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# Compensation in Florida Condemnation Proceedings

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# COMPENSATION IN FLORIDA CONDEMNATION PROCEEDINGS

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In the past twenty-five years this country has experienced tremendous economic growth, achieving an economic output unparalleled in history. With expansion of the economy and increase in population there has been a concomitant growth in the functions and services provided by government at all levels and a noticeable trend away from recognition of the individual in favor of the community at large. There have been spiraling demands for more schools, more highways, more parks, urban redevelopment programs, and numerous other public functions.

This article explores but one facet of the impact of expanding government on the individual — eminent domain proceedings. Attention will be focused on problems of compensation and the protections provided to the individual property owner upon the taking of his property for the common good. It is thought that a relatively concise survey of the broad subject of compensation may be more useful to the practitioner than a narrow concentration in any one area of this vast field.

Most of the cases discussed deal with highway condemnation, since the great bulk of Florida law, built up through court decisions, has arisen from such proceedings. However, most of the principles governing the individual's rights in highway condemnation proceedings are applicable to other areas of eminent domain.

## THE FUNDAMENTALS OF EMINENT DOMAIN

### *The Necessity of Taking*

Before condemnation may be authorized, there must be a necessity of taking for a public purpose.[1] The necessity of the taking is a matter of law for determination by the court rather than a question of fact for the jury; the question must be timely raised, before the trial, by appropriate petition of the party attacking the necessity.[2] There is a strong presumption in favor of the necessity of taking, and this pre-

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1. Central Hanover Bank & Trust Co. v. Pan American Airways, Inc., 137 Fla. 808, 188 So. 820 (1939); Wilton v. County of St. Johns, 98 Fla. 26, 123 So. 527 (1929).

2. Wilton v. County of St. Johns, *supra* note 1; Spafford v. Brevard County, 92 Fla. 617, 110 So. 451 (1926).

sumption may be overcome only by evidence of oppression, actual fraud, or bad faith.[3]

*Full or Just Compensation*

The theory behind granting compensation for property is that an owner should be recompensed for what has been taken from him.[4] Otherwise, the taking would be a confiscation rather than a condemnation. Most of the litigation in this area has arisen from two central problems: (1) For what property is the owner to be compensated, and (2) how much compensation is the property owner to receive?

Both the United States Constitution[5] and the Constitution of Florida[6] require that the property owner be awarded "just compensation" if his property is taken for public use. However, the Florida Constitution, in another provision,[7] calls for "full compensation" to the owner when the property is appropriated for the use of a corporation or an individual. Although writers and courts have from time to time used the terms interchangeably,[8] it appears from the statutes and case law of Florida that the full compensation awarded under appropriate circumstances is something more than the just compensation guaranteed under the federal constitution. This distinction was expressed in *Central Hanover Bank & Trust Co. v. Pan American Airways,* in which Justice Whitfield stated:[9]

> " 'Full Compensation' as used in Section 29, Article XVI, is broader and more exact in scope than the words 'just compensation' as used in Section 12 of the Declaration of Rights, Florida Constitution. . . . An ascertained compensation ranging between two *reasonable* maximum and minimum amounts might be 'just compensation,' yet it might not in every case be 'full compensation' . . . under Section 29, Article XVI."

There has been a divergence of opinion, however, as to which condemning authorities are covered by the full compensation provision.[10]

Whatever may be the nice distinctions between full compensation and just compensation, the law recognizes that freedom to own prop-

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3. Rott v. City of Miami Beach, 94 So. 2d 168 (Fla. 1957); Peavy-Wilson Lumber Co. v. County of Brevard, 159 Fla. 311, 31 So. 2d 483 (1947); State Rd. Dep't v. Southland, Inc., 117 So. 2d 512 (1st D.C.A. Fla. 1960).

4. Meyers v. City of Daytona Beach, 158 Fla. 859, 30 So. 2d 354 (1947).

5. U.S. CONST. amend. V.

6. FLA. CONST. Decl. of Rights §12.

7. FLA. CONST. art. XVI, §29.

8. *E.g.,* Pocock v. Town of Medley, 89 So. 2d 162 (Fla. 1956); Meyers v. City of Daytona Beach, *supra* note 4; 3 NICHOLS, EMINENT DOMAIN §8.6 (3d ed. 1950).

9. 137 Fla. 808, 824, 188 So. 820, 826 (1939) (dissenting opinion).

10. See notes 107, 108 *infra* and accompanying text.

erty is a valued and guarded right in this country,[11] and that the purpose of compensating the owner for property taken is that he be made whole in so far as is practicable under the circumstances.[12] The issue has been stated to be not what the taker has gained, but what the owner has lost.[13] Full compensation, then, is nothing less than payment by the condemning authority for the property of which the owner is being deprived.[14] Unfortunately, it is easier to state a compensation theory than to apply it to particular circumstances.

### Compensation Only upon a Taking

Before compensation to a property owner may be allowed, the law is settled that unless a constitutional provision permits compensation for mere damage to property, there must, in fact, be a physical taking of the property,[15] even though there may be damage to the property[16] or depreciation in its value.[17] Such incidental damage is called consequential damage[18] and is not compensable. The theory behind this principle is that unless there has been a physical taking, any damage that occurs is damage without a loss.[19]

Apparently, once there has been a taking of property, the owner may recover full compensation for all injury that results from the taking. This important right to the property owner[20] will be discussed in detail later.

### Determination of Proper Compensation

Once it has been established that there is a public necessity for taking and that there has, in fact, been a taking for which the law will permit recovery, the next consideration is determination of what compensation is to be allowed in order to award the owner "full" or "just" compensation. The criterion has been stated to be the value of the property taken plus the damage to the property remaining.[21] The

11. Dade County v. Brigham, 47 So. 2d 602, 604 (Fla. 1950).
12. *Ibid.*
13. 3 Nichols, Eminent Domain §8.61 (3d ed. 1950).
14. Meyers v. City of Daytona Beach, 158 Fla. 859, 30 So. 2d 354 (1947).
15. See 2 Nichols, Eminent Domain §6-1 (3d ed. 1950).
16. Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457 (1891).
17. *E.g.*, Board of Pub. Instr. v. Town of Bay Harbor Islands, 81 So. 2d 637 (Fla. 1955); Jacksonville Expressway Auth. v. Milford, 115 So. 2d 778 (1st D.C.A. Fla. 1959); City of Tampa v. The Texas Co., 107 So. 2d 216 (2d D.C.A. Fla. 1958), *cert. denied*, 109 So. 2d 169 (Fla. 1959).
18. City of Tampa v. The Texas Co., *supra* note 17.
19. *Ibid.*
20. *E.g.*, Jacksonville Expressway Auth. v. Milford, *supra* note 17 (change in grade of highway); City of Tampa v. The Texas Co., *supra* note 17.
21. Worth v. City of West Palm Beach, 101 Fla. 868, 132 So. 689 (1931).

value is determined as of the time of trial of the cause or as of the date at which title to the property taken vests in the taker, whichever occurs first.[22]

It must be remembered that value, or market value, is not the end sought but merely the means to the end of ascertaining the compensation to which the owner is entitled.[23] Numerous theories of compensation have been propounded by courts and writers,[24] but only three basic theories will be discussed.

### *Value to the Taker*

As its name implies, the value-to-the-taker theory contemplates a determination of compensation on the basis of the particular parcel's value to the condemning authority.[25] It is generally rejected, however, because the crux of compensation is the determination of loss to the owner.[26]

### *Value to the Owner*

The value-to-the-owner theory is the corollary of the value-to-the-taker theory.[27] Of the two, the value-to-the-owner theory comes closer to compensating the owner for what has been taken from him. This method takes two factors into consideration: (1) the loss to the owner, and (2) any special value to the owner.[28] Each of these aspects has caused confusion. In taking into consideration all loss to the owner, factors such as non-compensable consequential damages[29] are encountered in some instances.

Determination of special value to the owner also poses problems, because valuation frequently becomes speculative.[30] Often property

22. FLA. STAT. §73.10 (2) (1959).

23. See 4 NICHOLS, EMINENT DOMAIN §12.2 (3d ed. 1951).

24. See 4 NICHOLS, EMINENT DOMAIN §§12.1-.22 (3d ed. 1951).

25. *Id.* §12.21; 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN §81 (2d ed. 1953).

26. Meyers v. City of Daytona Beach, 158 Fla. 859, 30 So. 2d 354 (1947); 3 NICHOLS, EMINENT DOMAIN §8.61 (3d ed. 1950).

27. See, *e.g.*, Jacksonville Expressway Auth. v. Henry G. DuPree Co., 108 So. 2d 289 (Fla. 1958); Meyers v. City of Daytona Beach, *supra* note 26; State Rd. Dep't v. Bender, 147 Fla. 15, 2 So. 2d 298 (1941) (allowance of replacement value of materials taken); 4 NICHOLS, EMINENT DOMAIN §12.22 (3d ed. 1951); 1 ORGEL, *op. cit. supra* note 25, ch. III.

28. See 4 NICHOLS, EMINENT DOMAIN §12.22 (3d ed. 1951).

29. *E.g.*, City of Tampa v. The Texas Co., 107 So. 2d 216 (2d D.C.A. Fla. 1958), *cert. denied*, 109 So. 2d 169 (Fla. 1959). *But cf.* FLA. STAT. §73.10 (4) (1959); Jacksonville Expressway Auth. v. Henry G. DuPree Co., *supra* note 27 (allowance of moving expense).

30. See 4 NICHOLS, EMINENT DOMAIN §12.22 (2) (3d ed. 1951).

has sentimental or personal value to the owner. Such matters cannot be considered, since compensation is determined on the basis of the rights taken, without regard to the personal relationship of the owner to his property.[31] However, when the character of the property is such that it does not have an ascertainable market value, the peculiar value to the owner may be considered as an element in the determination of compensation.[32] Likewise, if there is a special value to the owner that can be measured by money, he may be entitled to have this value considered.[33] The value-to-the-owner theory is seldom used, because of its propensity toward compensating for factors generally not recognized in eminent domain proceedings.[34] However, Florida courts, on occasion, have used this theory.[35]

*Market Value*

The most widely used and accepted method of determining the value of property taken is the fair market value formula.[36] The market value of property is the fair value as between a seller who is willing to sell and a purchaser who is willing to buy, neither acting under compulsion or necessity.[37] Under normal conditions, when land is so situated as to be available for sale in the ordinary course of dealing, market value is the best test for determining compensation.[38] In this state, however, the fair market value test is not the sole standard used.[39] In certain instances the property owner may recover for loss of business.[40] Fair market value is more easily computed on unimproved lands than on property on which there are buildings or other fixtures. When improved land is taken, factors such as replacement cost of improvements,[41] income from existing use of property by capitalization of income,[42] cost of moving structures,[43] and loss of business[44] may, in some cases, be taken into consideration. In these

31. *Ibid.*
32. *Ibid.*
33. See 20 C.J., *Eminent Domain* §128 (1920).
34. 4 NICHOLS, EMINENT DOMAIN §12.22 (3d ed. 1951).
35. *E.g.*, Jacksonville Expressway Auth. v. Henry G. DuPree Co., 108 So. 2d 289 (Fla. 1958); Orange State Oil Co. v. Jacksonville Expressway Auth., 110 So. 2d 687 (1st D.C.A. Fla. 1959).
36. See 1 ORGEL, *op. cit. supra* note 25, §17.
37. See 4 NICHOLS §12.2 (1); 1 ORGEL §20.
38. See 4 NICHOLS §31; 1 ORGEL §36.
39. See, *e.g.*, cases cited note 35 *supra.*
40. FLA. STAT. §73.10 (2) (1959).
41. State Rd. Dep't v. Bender, 147 Fla. 15, 2 So. 2d 298 (1941).
42. See 4 NICHOLS §12.312.
43. Jacksonville Expressway Auth. v. Henry G. DuPree Co., 108 So. 2d 289 (Fla. 1958).
44. FLA. STAT. §73.10 (2) (1959).

instances strict application of the willing buyer and willing seller theory is not always adequate. The only hard and fast rule as to the determination of compensation to the owner is that there is no one theory or test. The courts, in applying the various theories, are generally seeking to compensate the owner fully; and circumstances do arise under which the application of fair market value does not make the owner whole.[45]

Regardless of the theory used in determining value, a jury may take into consideration the uses to which the property might reasonably be applied rather than the use to which it has been applied.[46] This is frequently referred to as the "highest and best use" rule. It is not to be implied, however, that mere speculation as to what could be done with the land after making improvements will be permitted.[47] In spite of this, consideration of prospective zoning has been permitted in determining the most valuable use.[48] Moreover, in establishing value, the property taken is considered as a portion of an entire tract and not as if it stands alone.[49]

### Compensation to Owners Other than Fee Owners

The Florida Constitution guarantees that no private property shall be taken without just compensation,[50] and the owner may recover for loss of both real and personal property.[51] Likewise, there is deemed to be a taking whether the owner has title to the fee, has a leasehold interest, is a life tenant, or has only an equitable interest in the property. All of these interests are compensable. Although there is considerable authority to the contrary, the Florida Supreme Court has allowed recovery of the cost incurred in moving property as a result of the taking.[52]

A more difficult question arises in relation to the full compensation provision, section 29 of article XVI, which purports to apply only to an owner; the term *owner* apparently includes interests such as those of a lessee[53] but not those of a mortgage holder.[54] The Court

45. Jacksonville Expressway Auth. v. Henry G. DuPree Co., *supra* note 43.

46. Yoder v. Sarasota County, 81 So. 2d 219 (Fla. 1955); Doty v. City of Jacksonville, 106 Fla. 1, 142 So. 599 (1932).

47. Doty v. City of Jacksonville, *supra* note 46; Board of Comm'rs v. Tallahassee Bank & Trust Co., 100 So. 2d 67 (1st D.C.A. Fla. 1958).

48. Board of Comm'rs v. Tallahassee Bank and Trust Co., *supra* note 47.

49. See 4 Nichols, Eminent Domain §14.231 (3d ed. 1951).

50. Decl. of Rights §12.

51. 1 Nichols, Eminent Domain §2.1 (3d ed. 1950).

52. Jacksonville Expressway Auth. v. Henry G. DuPree Co., 108 So. 2d 289 (Fla. 1958).

53. Baker v. Clifford-Mathew Inv. Co., 99 Fla. 1229, 128 So. 827 (1930); Orange State Oil Co. v. Jacksonville Expressway Auth., 110 So. 2d 687 (1st D.C.A. Fla. 1959).

54. Shavers v. Duval County, 73 So. 2d 684 (Fla. 1954).

has not yet determined whether owners of various other interests are "owners" as contemplated by section 29. Based on the Court's determination as to mortgagees and lessees, a life tenant undoubtedly would be considered an owner under this provision, whereas parties such as remaindermen and holders of lien interests might not be.

The determination of compensation to interests less than fee simple is not easy, since varying factors must be considered. The general rule is that each owner of an interest in the property is entitled to compensation in proportion to his interest.[55]

*Life Estates and Remainder Interests*

Owners of successive interests, such as life estates and remainder interests, are entitled to compensation,[56] provided their successive estates are taken or damaged.[57] The common method of establishing the value of the life tenant's compensation is by determining his life expectancy, converting the value of the property into an expected annual sum for the life term, and reducing the sum to present value.[58] Although the Florida appellate courts have not ruled upon the question, it is reasonable to assume that this would be the method of determining the life tenant's compensation, since the courts have used similar methods for determining permanent damages in personal injury actions.[59] Generally speaking, the compensation due the remainderman is the difference between the value of the life estate and the fair market value of the property taken.[60]

*Leasehold Interests*

A lessee under a written lease is an owner of land and is entitled to full compensation for the taking of all or part of the leased premises.[61] The lessee's compensation has been stated to be the value of the lease to the lessee rather than the value to the lessor,[62] since the greatest value of the property to the lessee is his privilege of re-

55. See 4 NICHOLS §12.42 (2). *But cf.* 1 ORGEL §113.

56. See 4 NICHOLS, EMINENT DOMAIN §12.46 (3d ed. 1951).

57. *Ibid.*

58. 4 NICHOLS §12.46 (1).

59. *E.g.*, Renuart Lumber Yards, Inc. v. Levine, 49 So. 2d 97 (Fla. 1950); Seaboard Air Line Ry. v. Watson, 94 Fla. 571, 113 So. 716 (1927); City of Key West v. Baldwin, 69 Fla. 136, 67 So. 805 (1915).

60. See 4 NICHOLS, EMINENT DOMAIN §12.46 (2) (3d ed. 1951).

61. *E.g.*, Natural Gas & Appliance Co. v. Marion County, 58 So. 2d 701 (Fla. 1952); Orange State Oil Co. v. Jacksonville Expressway Auth., 110 So. 2d 687 (1st D.C.A. Fla. 1959).

62. Jacksonville Expressway Auth. v. Henry G. DuPree Co., 108 So. 2d 289 (Fla. 1958); Orange State Oil Co. v. Jacksonville Expressway Auth., *supra* note 61.

maining in undisturbed possession of the premises during the term of the lease.[63]

Determination of the value of a lease is a difficult matter,[64] since its value is dependent on the use made of the premises by the lessee, the extent to which he has capitalized upon the use of the premises, the marketability of the lease itself, and numerous other factors.[65]

When the lessee is required by law or by the lease to pay rent upon the whole premises even though the property be condemned, he is entitled to substantial damages.[66] Likewise, when the law requires the tenant to make repairs to the premises in the absence of an agreement to the contrary, the lessee may recover all the costs of repairs if there has been damage to a building and repair is feasible.[67] Moreover, if the taking completely destroys a building or renders it untenantable, the tenant may recover the market value of the lease.[68] Even a party who is holding over after the expiration of the lease may recover for damage to buildings that he was entitled to remove at any time or after termination of the lease.[69]

Frequently, determination of market value is not feasible when the leasehold is one of a kind that is seldom transferred.[70] In such instances the court may revert to other methods of determining value, such as the "before and after" test or the "summation" method.[71] The summation theory entails a separate determination of the value of the buildings, fixtures, and the land free of the leasehold, together with the reversionary value of the fee, and a summation of the value of the various items.[72] The before and after test equates the compensation to the owner to the difference between the value of the whole parcel before the taking and the value of the parcel that remains after the taking.[73] As applied to the lessee, this method determines the value of the lease before and after the taking. These methods seem of questionable help when determination of market value is not feasible, since in using either the summation theory or the before and after theory some concept of value must first be established.

Again, the various tests and theories used are not the end in

63. Orange State Oil Co. v. Jacksonville Expressway Auth., *supra* note 61.

64. *Id.* at 690; see 4 NICHOLS §12.42 (3).

65. See note 64 *supra.*

66. See 4 NICHOLS, EMINENT DOMAIN §12.42 (3) (3d ed. 1951).

67. *Ibid.*

68. *Ibid.*

69. Wingert v. Prince, 123 So. 2d 277 (2d D.C.A. Fla. 1960).

70. Orange State Oil Co. v. Jacksonville Expressway Auth., 110 So. 2d 687 (1st D.C.A. Fla. 1959).

71. *Ibid.*

72. See Orange State Oil Co. v. Jacksonville Expressway Auth., *supra* note 70; 2 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN §196 (2d ed. 1953).

73. See 4 NICHOLS, EMINENT DOMAIN §14.232 (3d ed. 1951).

themselves but merely a means to the end of making whole, in so far as is possible, the person who is deprived of his property.

*Mortgage and Other Lien Interests*

The general rule pertaining to mortgage and other lien interests allows the mortgagee to recover a portion of the compensation granted to the extent that the lien is impaired.[74] Moreover, when a mortgagee is omitted from the proceedings because of failure of the condemning authority to give him notice, he may recover damages from the condemning authority to the extent to which the taking impairs his security interest.[75]

When there has been a complete taking of the property, the mortgagee may recover from the award the full amount of the debt secured by the mortgage lien.[76] When the lien attaches to an entire tract and only a portion of the land is taken, the lien does not shift to the remaining land. Instead, it attaches to the award to satisfy the mortgage to the extent that the lien is impaired.[77]

The rules applicable to judgment liens and other liens follow the same principles that govern mortgage liens.[78] Although the lienor may attach the award only to the extent that his lien is impaired,[79] any doubt as to impairment is resolved in favor of the lienor.

*Dower*

Although there is authority to the contrary,[80] the general rule is that no award will be made for a wife's inchoate right of dower, since its present value cannot be determined intelligently, as it is based on the speculation that the owner will leave his wife a widow.[81] Florida would almost certainly follow the majority rule, since it recognizes the inchoate right of dower as an expectancy, vesting only upon the death of the husband.[82] In the event that property is taken following the husband's death, the widow should be entitled to compensation if she

74. Investors Syndicate v. Dade County, 98 So. 2d 889 (3d D.C.A. Fla. 1957); see 4 NICHOLS §12.43.

75. Seaboard All-Florida Ry. v. Levitt, 105 Fla. 600, 141 So. 886 (1932).

76. *Ibid.*; see 4 NICHOLS §12.43.

77. Matter of City of New York, 266 N.Y. 26, 193 N.E. 539 (1935); see 4 NICHOLS §12.43.

78. See 4 NICHOLS §12.44.

79. Investors Syndicate v. Dade County, 98 So. 2d 889 (1st D.C.A. Fla. 1957); see 4 NICHOLS §12.43.

80. See 1 ORGEL, *op. cit. supra* note 72, at 508.

81. See 4 NICHOLS §12.45; 1 ORGEL §117.

82. FLA. STAT. §731.34 (1959); Gore v. General Properties Corp., 149 Fla. 690, 6 So. 2d 837 (1942).

elects to take dower, since the dower right gives a one-third interest in all real property owned by the husband during his lifetime and not released by her.[83]

*Rights of User*

A party who has a right of user not held in common with the public is entitled to compensation for its taking, including the condemnation of exclusive easements[84] and riparian rights.[85]

Therefore, if the dedicators reserve to themselves an exclusive easement for public utilities in a subdivision, they are entitled to compensation from the condemning authority for the value of the non-exclusive easement taken, and also for damage to the remainder of the easement for any loss of its exclusive character.[86] This does not apply, however, in the case of a negative easement;[87] consequently, building restrictions that are reserved do not vest in the owner a property right for which compensation will be granted.[88]

The riparian rights for which the law will grant compensation include an unobstructed view of the water, the right of ingress and egress,[89] and the property right to land filled in when title has vested in the upland owner.[90] Since the right of navigation on the waters is not an exclusive right, the riparian owner has no compensable property right therein.[91] Likewise, the riparian owner's common law rights of bathing and fishing[92] are not exclusive rights, so the owner probably has no property right for which compensation will be granted.

DAMAGE TO REMAINING LAND

Probably the most prolific source of litigation in the condemnation area stems from the compensation to be granted to the condemnee for damage to his remaining adjoining property.

In addition to full compensation for the property taken, the property owner may also recover for damages to his remaining ad-

83. FLA. STAT. §731.34 (1959).
84. City of Jacksonville v. Shaffer, 107 Fla. 367, 144 So. 888 (1932).
85. Holland v. Ft. Pierce Fin. and Constr. Co., 157 Fla. 649, 27 So. 2d 76 (1946); Thiesen v. Gulf, F. & A. Ry., 75 Fla. 28, 78 So. 491 (1918); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909).
86. City of Jacksonville v. Shaffer, 107 Fla. 367, 144 So. 888 (1932).
87. Board of Instr. v. Bay Harbor Islands, 81 So. 2d 637 (Fla. 1955).
88. *Ibid.*
89. Thiesen v. Gulf, F. & A. Ry., 75 Fla. 28, 78 So. 491 (1918).
90. Holland v. Ft. Pierce Fin. and Constr. Co., 157 Fla. 649, 27 So. 2d 76 (1946).
91. Carmazi v. Board of County Comm'rs, 108 So. 2d 318 (3d D.C.A. Fla. 1959).
92. Thiesen v. Gulf, F. & A. Ry., 75 Fla. 28, 78 So. 491 (1918).

joining lands; these are commonly called "severance damages."[93] The full measure of damages, then, includes both the value of the property taken and the damage to the adjacent remaining property.[94] The primary consideration in computing the value of property taken and the damages to the remainder is the depreciation in value of the entire tract by reason of the taking.[95]

Although fair market value is a usual criterion and an important element in the compensation formula, it is not an exclusive standard for determining full or just compensation;[96] and it is not a complete formula when a determination of damage to the remainder of the property is sought. In assessing the damage to remainder property, the court may consider as the compensation the difference in its market value before and after the taking.[97]

The two theories most used in computing compensation for property taken and damage to the remainder are the market value theory and the before and after theory.[98] Under the market value theory, the compensation is computed by determining the value of the land taken and adding to this amount the difference between the value of the remainder area before and after the taking.[99] Under the before and after theory, the tract is considered as a whole; that is, compensation is fixed by determining the difference between the value of the owner's entire tract, including the parcel taken, before the taking by the condemning authority, and the value of his remaining property.[100] It appears that these rules merely state the same principle in a different way, but the application of the two theories frequently can bring materially different results.[101]

Numerous other variations of these methods have been used, but all of them are merely tools to be used by the court or by the jury in determining the ever elusive question of what constitutes full or just compensation.[102]

Damage to the remaining property may be caused by taking a

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93. See 4 NICHOLS, EMINENT DOMAIN §14.1 (3).

94. Worth v. City of West Palm Beach, 101 Fla. 868, 132 So. 689 (1931).

95. See 4 NICHOLS §14.231.

96. Jacksonville Expressway Auth. v. Henry G. DuPree Co., 108 So. 2d 289 (Fla. 1958); Orange State Oil Co. v. Jacksonville Expressway Auth., 110 So. 2d 687 (1st D.C.A. Fla. 1959).

97. Jahoda v. State Rd. Dep't, 106 So. 2d 870 (2d D.C.A. Fla. 1958).

98. See 4 NICHOLS §14.23.

99. *Ibid.*

100. *Ibid.*

101. When enhancement to the remainder exceeds the damage to it, the market value formula produces a larger award, since such enhancement ordinarily may not diminish the compensation for the property taken.

102. See, *e.g.*, Orange State Oil Co. v. Jacksonville Expressway Auth., 110 So. 2d 687 (1st D.C.A. Fla. 1959).

portion of a building, by taking such a portion of the land that the property is rendered unusable or less valuable for the purposes for which it is adapted, by separating a parcel of land so that there are two remaining parcels, by the use to which the property owner's land is put by the condemning authority,[103] or in any number of other ways. The primary consideration in computing both the compensation for the property taken and the severance damage is the depreciation in value to the owner by reason of the taking.

*Offsetting Enhancement Against Damage*

A question arises as to whether compensation for severance damages should be reduced by any enhancement of the value of adjoining property because of improvements made by the condemning authority. In this connection, the legislature has provided:[104]

> "When the suit is by the state road department, county, municipality, board, district or other public body for the condemnation of a road right-of-way, the enhancement, if any, in value of the remaining adjoining property of the defendant property owner by reason of the construction or improvement made or contemplated . . . shall be offset against the damage, if any, resulting to such remaining adjoining property . . . ."

This provision apparently is in conflict with the Constitution of Florida, which provides that "no private property, nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner . . . *irrespective of any benefit from any improvement* proposed by such corporation or individual . . . ."[105] With the passage of this statute, the words *corporation or individual* under article XVI, section 29, of the constitution loom of great importance. An early case[106] that construed the "irrespective of any benefit" provision stated that the constitution contemplated that the issue of full compensation should be determined without regard to any benefits that might accrue to the owner of the property from the improvement proposed by the petitioner, and that the law did not deny the owner any real and reasonable enhancement in the market value of the appropriated property by reason of the proposed improvement. In another case[107] the Court indicated that the provision applied both to a county and

103. City of Tampa v. The Texas Co., 107 So. 2d 216 (2d D.C.A. Fla. 1958), *cert. denied,* 109 So. 2d 169 (Fla. 1959).

104. FLA. STAT. §73.10 (3) (1959). See also *id.* §73.12.

105. FLA. CONST. art. XVI, §29. (Emphasis added.)

106. Sunday v. Louisville & N.R.R., 62 Fla. 395, 57 So. 351 (1912).

107. Rosenbaum & Little v. State Rd. Dep't, 129 Fla. 723, 177 So. 220 (1937).

the State Road Department. However, the question whether these provisions apply to such condemning authorities has apparently not been laid to rest by the courts.[108]

*Damage to Established Business*

The general rule in other jurisdictions has been that evidence of profits is too speculative to be admitted in determining the value of or damage to business located on the condemned land.[109] The Florida legislature, however, has enacted a statute permitting recovery when property is taken for the condemnation of a right-of-way and the effect of the taking of the property may damage or destroy a business established for more than five years that is owned by the party whose lands are taken and located on his adjoining property.[110] This statute supports Justice Whitfield's position that "full compensation" is something more than "just compensation,"[111] but it is limited in scope to cases of condemnation for right-of-way purposes and to damage to a business on the landowner's adjoining property. It requires, however, only that the affected business must have existed for five years prior to the taking, and does not require the party from whom the property is taken to have owned or operated the business for that length of time.[112]

Under this statute an owner of land cannot recover for damage to a business when the premises have been leased and the lessee owns the business.[113] Nor can the owner recover for loss of rental value of the remaining land, since loss of rents is not allowable as a separate element of damages.[114] Permanent loss of rental value is a relevant factor, however, in so far as it affects the market value of the remaining lands.[115]

The statute permits recovery for damage to a business on adjoining property caused by denial of the use of the property taken rather than by the use made of the property by the condemning authority.[116]

See also Spafford v. Brevard County, 92 Fla. 617, 110 So. 451 (1926).

108. *E.g.*, Jacksonville Expressway Auth. v. Henry G. DuPree Co., 108 So. 2d 289, 293 (Fla. 1958) (dissenting opinion); DeSoto County v. Highsmith, 60 So. 2d 915 (Fla. 1952). *But cf.* Parker v. Armstrong, 125 So. 2d 138 (2d D.C.A. Fla. 1960).

109. See Meyers v. City of Daytona Beach, 158 Fla. 859, 30 So. 2d 354 (1947).

110. FLA. STAT. §73.10(4) (1959).

111. Central Hanover Bank & Trust Co. v. Pan American Airways, Inc., 137 Fla. 808, 823, 188 So. 820, 826 (1939) (dissenting opinion).

112. Hooper v. State Rd. Dep't, 105 So. 2d 515 (2d D.C.A. Fla. 1958).

113. City of Tampa v. The Texas Co., 107 So. 2d 216 (2d D.C.A. Fla. 1958), *cert. denied,* 109 So. 2d 169 (Fla. 1959).

114. Florida State Turnpike Auth. v. Anhoco Corp., 107 So. 2d 51 (3d D.C.A. Fla. 1958).

115. See 4 NICHOLS, EMINENT DOMAIN §14.242 (3d ed. 1951).

116. FLA. STAT. §73.10(4) (1959).

This does not mean that the owner can never recover for damages to his remaining land caused by the use for which the land is taken.[117] Some authorities hold that the owner can recover for damages resulting from the construction and operation of the part of the public works that has been erected on the land taken from the owner.[118]

Florida apparently has aligned itself with these authorities. In *City of Tampa v. The Texas Co.*[119] the Second District Court of Appeal quoted from a Minnesota case[120] with approval:[121]

> " '[I]n cases where there is a partial taking, the injured owner is not required to show that the injury is peculiar to his remaining property. . . . Recovery is generally limited solely to the damage caused by the taker's use of the land acquired from the owner of the remainder area. Stated in another way, the owner of the remainder area is not ordinarily entitled to recover for damage caused his remaining land by the taker's use of property acquired from adjoining landowners even though his and all property taken from others is used to further the same project.' "

The law of Florida appears to be, then, that the owner can recover for damages to his remaining adjoining land caused by the use made of the land taken from him, but not for the use made by the taker of adjoining lands or those already owned by the taker.[122] This principle emphasizes the importance of the landowner's day in court and his receipt of full compensation or an adequate award at that time. The use to which the condemning authority may put the property immediately following the taking may not injure the owner's adjoining land. However, the condemning authority may later use the property in such a way as to damage severely the owner's remaining land. There can be no recovery by the owner for the later injurious use, since there is no taking of property at that time.[123]

### By Whom Compensation Is Determined

Florida's Constitution provides that the right to trial by jury shall

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117. City of Tampa v. The Texas Co., *supra* note 113 at 220 (dictum).

118. See 1 Orgel §56.

119. 107 So. 2d 216 (2d D.C.A. Fla. 1958), *cert. denied,* 109 So. 2d 169 (Fla. 1959).

120. City of Crookston v. Erickson, 244 Minn. 321, 69 N.W.2d 909 (1955).

121. 107 So. 2d at 223-24.

122. See City of Tampa v. The Texas Co., *supra* note 119.

123. *Ibid.*; Jacksonville Expressway Auth. v. Milford, 115 So. 2d 778 (1st D.C.A. Fla. 1959); Florida Turnpike Auth. v. Anhoco Corp., 107 So. 2d 51 (3d D.C.A. Fla. 1958).

be secured to all persons.[124] It further provides that no property may be appropriated for the use of a corporation or an individual until full compensation has been determined by a jury of twelve men.[125] Consequently, in such proceedings a woman may not sit on the jury.[126] As in all civil cases, the jury is allowed wide discretion in the determination of compensation and will not be reversed unless the compensation awarded is wholly inadequate.[127] The jury may not, however, award as compensation an amount lower than the lowest value testified to.[128] Likewise, the jury may not arrive at the award by means of a quotient verdict.[129]

It has been the practice of some Florida courts to have the jury determine compensation as a whole, and to have the rights of interests such as those of lessees and mortgagees, life tenants, and the like determined in supplemental proceedings by the court. This procedure was generally sustained in one Florida case;[130] however, the primary issue on appeal was that of title rather than apportionment of the award. In many instances this is probably the wise procedure, since the intricacies of determining the value of the various property interests are frequently confusing even to the court.[131] Prior to 1959, the legislature had provided that the rights of security interests such as those of mortgagees, judgment creditors, and lien holders should be determined by the court upon appropriate petition.[132] The 1959 Legislature amended this statute to provide that the jury should determine the compensation to be awarded as a whole, irrespective of the interests of the various parties; and that the court, on petition, should determine the rights of any owners, lessees, mortgagees, judgment creditors, and lienholders in respect to the compensation awarded to each owner by the verdict, and should also determine the method of apportionment among the interested parties.[133] The present statute goes further, then, by providing that not only the rights of the owners of security interests are to be determined by the court but also the rights of "owners" and "lessees." In *Rich v. Harper Neon Co.*[134] the Second District Court of Appeal considered the question whether the

124. Decl. of Rights §3.
125. FLA. CONST. art. XVI, §29.
126. *Ibid.*; FLA. STAT. §40.01 (5) (1959).
127. Worth v. City of West Palm Beach, 101 Fla. 868, 132 So. 689 (1931).
128. Meyers v. City of Daytona Beach, 158 Fla. 859, 30 So. 2d 354 (1947).
129. Yoder v. Sarasota County, 81 So. 2d 219 (Fla. 1955); Orange Belt Ry. v. Craver, 32 Fla. 28, 13 So. 444 (1893).
130. Porter v. Columbia County, 75 So. 2d 699 (Fla. 1954).
131. *E.g.*, Orange State Oil Co. v. Jacksonville Expressway Auth., 110 So. 2d 687 (1st D.C.A. Fla. 1959).
132. FLA. STAT. §73.12 (1957).
133. FLA. STAT. §73.12 (1959).
134. 124 So.2d 750 (2d D.C.A. Fla. 1960).

jury should apportion compensation among the owner, the tenant, and other parties in interest or whether the verdict should include only damage to the owner, leaving to the court the determination of the various interests in a subsequent proceeding. The court ruled that under the 1959 statute[135] the court rather than the jury should make the determination of interests; however, the constitutionality of the statute was not raised in this case.

Another statute provides that the verdict of the jury shall state the compensation to which each owner is entitled.[136] Again, the meaning of this statute depends on the meaning the legislature intended for the word *owner*.

The latter statute provides that the jury in its verdict shall determine compensation to various owners, while the former leaves this matter to the court in a supplemental proceeding. It appears, at least as to the parties in interest who are "owners" under article XVI, section 29, that the supplemental proceeding statute is invalid, since this constitutional provision requires that the owner's compensation shall be determined by a jury of twelve men. The apportionment among the interested parties under the statute[137] is for all practical purposes an "ascertainment" by the court rather than by the jury of the compensation to be awarded the various owners. In an early case[138] the Florida Supreme Court had before it a statute that permitted a determination of compensation by a majority of the jurors. The Court, in striking down the statute as conflicting with the constitution, cautioned:[139]

> "If the Legislature can authorize a majority of the jury to ascertain the compensation or determine the matters before them, they can give the same power to less than a majority. A concession to the Legislature of power to make the judgment of less than the entire twelve competent to answer the requirement of the Constitution is a surrender of all protection from the prescription of the stated number, and renders this feature of our organic law a useless declaration. The words 'as shall be prescribed by law,' at the end of the section relate to the procedure in such cases, but do not authorize any change or impairment of the agency by which the compensation is to be fixed."

In light of the constitutional provision and the apparent conflict in

135. FLA. STAT. §73.12 (1959).
136. FLA. STAT. §73.11 (1959).
137. FLA. STAT. §73.12 (1959).
138. Jacksonville, T. & K.W. Ry. v. Adams, 33 Fla. 608, 15 So. 257 (1894); *cf.* Spafford v. Brevard County, 92 Fla. 617, 110 So. 451 (1926).
139. 33 Fla. at 613, 15 So. at 258.

statutory provisions in this area,[140] the statutes should be reconciled with each other and with the constitution.

Aside from the constitutional question as to the use of supplemental proceedings in determining various interests, this statute raises some very practical problems. In the first instance, the statute places an additional burden on an already overburdened judiciary. In instances in which there are separate interests of owners and lessees, as opposed to security interests, difficult questions frequently arise as to the portion of the award to which each claimant is entitled. Since the statute is couched in the mandatory "shall," the trial judge may well be subjected to unwarranted criticism from the parties because of his apportionment, each party feeling that the jury might have intended or found a different apportionment from that reached by the trial judge. Furthermore, the supplemental proceedings in a difficult case might well develop into an extended procedure, taxing the time and efforts of court and counsel.

A more workable procedure might be to permit the supplemental procedure on an optional basis, upon stipulation of all parties in interest. In this manner, if a complicated case arose that might be difficult for a jury of laymen to untangle, the parties could agree to submit the apportionment to the trial judge. If the parties themselves elected this procedure, there would be no denial of trial by jury, and the parties should not complain of the apportionment made.

## Costs Incident to the Defense of a Condemnation Suit

### *Attorney's Fees*

Award of attorney's fees is a matter of more than slight concern both to the owner and his attorney. Unless it is specifically provided by statute, a landowner is generally not entitled to recover attorney's fees in defense of a condemnation suit.[141] In Florida, however, allowance of reasonable attorney's fees to the owner has been said to be a part of the full compensation guaranteed by the constitution.[142] Moreover, the common law rule has also been changed by statute[143] to require that the jury assess to the petitioner a reasonable attorney's fee for the defendant's counsel. This statute, as construed by the Florida Court,[144] also entitles the defendant to a reasonable attorney's fee upon a condemnation appeal, except in those cases in which an

140. See Fla. Stat. §§73.11-.12 (1959).

141. See 3 Nichols, Eminent Domain §8.6 (3d ed. 1950).

142. Jacksonville Expressway Auth. v. Henry G. DuPree Co., 108 So. 2d 289, 293 (Fla. 1959).

143. Fla. Stat. §§73.16, 74.10 (1959).

144. Jacksonville Expressway Auth. v. Henry G. DuPree Co., *supra* note 142.

appeal is taken by the condemnee and the judgment of the lower court is affirmed. Apparently the trial judge has no authority to order payment of appellate attorney's fees,[145] but the appellate court in its discretion may do so.[146]

Determination of attorney's fees is within the province of the jury, but if the fees allowed by the jury are grossly inadequate, a new trial may be granted as to such fees.[147] The jury may consider, among other things, the service performed, the responsibility incurred, the skill and time required, and the result of the litigation.[148]

It has been the practice in some circuits for counsel in a condemnation proceeding to stipulate the amount of attorney's fees, and in such a case the jury is instructed to award the stipulated fee. However, when the petitioner does not stipulate the amount, the court is without authority to instruct the jury to include in its verdict a specified sum as the defendant's counsel's fees.[149]

Unless the petitioner has stipulated the amount of attorney's fees, the defendant's counsel will be well advised not to take this matter lightly. He should approach the proof of his fees with the same diligence and meticulousness that he does the proof of all elements of damage or compensation. Unless the record contains substantial evidence as to the value of his services, the appellate court is without authority to grant counsel redress if the jury awards a fee that he considers woefully inadequate.[150] The attorney may be wise to make a specific agreement with the client that the client must bear any amount that is not awarded by the jury. If the owner-client is permitted to testify as to the agreement, the jury may be more inclined to award a reasonable fee in its effort to make the owner whole.

### *Miscellaneous Costs*

Florida law requires that all costs of condemnation proceedings shall be borne by the petitioner.[151] There can be no hard and fast rule laid down as to what costs incurred by the defendant may be allowed; this is a matter within the sound discretion of the trial judge.[152] In a proper case the costs allowed may include the cost of

145. See Seban v. Dade County, 102 So. 2d 706 (Fla. 1958).
146. Jacksonville Expressway Auth. v. Henry G. DuPree Co., *supra* note 142.
147. Dratch v. Dade County, 105 So. 2d 171 (3d D.C.A. Fla. 1958).
148. Folmar v. Davis, 108 So. 2d 772 (3d D.C.A. Fla. 1959).
149. Romy v. Dade County, 114 So. 2d 8 (3d D.C.A. Fla. 1959).
150. Fekany v. State Rd. Dep't, 115 So. 2d 418 (2d D.C.A. Fla. 1959).
151. FLA. STAT. §73.16 (1959).
152. Dade County v. Brigham, 47 So. 2d 602 (Fla. 1950); compare Inland Waterway Devel. Co. v. Jacksonville, 160 Fla. 913, 38 So. 2d. 676 (1948).

photographs, certified copies of records, and expert witness fees.[153] In *Dade County v. Brigham*[154] the Court, in an opinion by Justice Hobson, quoted with approval the lower court order recognizing the plight of the landowner:[155]

> " 'The courts should not be blind to the realities of the condemnation process. . . . The Court sees that the County is armed with engineering testimony, engineering data, charts and drawings prepared by expert draftsmen.
>
> " 'The court sees that the County produces appraisers, expert witnesses relating to value, usually more than one in number, whose elaborate statement of their qualifications, training, experience and clientele indicate a painstaking and elaborate appraisal by them calling for an expenditure by the County of fees to such experts and appraisers which are commensurate therewith, and customary for like services of such persons. A lay defendant whose property is to be taken is called upon to defend against such preparation and expert testimony of the County. It is unreasonable to say that such a defendant must suffer a disadvantage of being unable to meet this array of able, expert evidence, unless he shall pay for the same out of his own pocket.' "

The Court continued:[156]

> "Since the owner of private property sought to be condemned is forced into court by one to whom he owes no obligation, it cannot be said that he has received 'just compensation' for this property if he is compelled to pay out of his own pocket the expenses of establishing the fair value of the property, which expenses in some cases could conceivably exceed such value."

It should be emphasized that the allowance of these miscellaneous items as costs in the proceedings is within the discretion of the trial judge, and that the allowance of such costs should not be unlimited.[157] The court should allow only those costs reasonably necessary to enable the landowner to protect himself and to present his case adequately.[158] The property owner is in these circumstances an unwilling seller, since the property is taken for the public good. The spirit of the constitution requires that before parting with his prop-

153. Inland Waterway Devel. Co. v. City of Jacksonville, *supra* note 152.
154. 47 So. 2d 602 (Fla. 1950).
155. *Id.* at 604.
156. *Ibid.*
157. Dade County v. Brigham, 47 So. 2d 602 (Fla. 1950).
158. *Ibid.*

erty the owner should be compensated not only for the value of the property taken but also for the necessary expenses incurred in fixing the value.[159] The discretion of the trial judge is a leveling influence that prevents the public authority from being overtaxed or the public from being mulcted by unnecessary costs.

## Conclusion

This article has not been intended to be an exhaustive work on compensation and valuation; many volumes have been written on these subjects. An effort has been made to touch on some of the problems that face the Florida practitioner in this area.

In summary, it may be well to consider again the query that was posed in the early part of this article — whether there is a difference between "full compensation" and "just compensation." Through the various processes of the law, the constitution, statutes, and court decisions, the Florida owner is granted many protections not guaranteed under the federal constitution and by many other states. These benefits include the right to trial by jury, allowance of damages for loss of business in some circumstances, allowance of attorney's fees, discretionary allowance of such costs as expert witness fees, maps and plats necessarily incident to preparation for trial, and numerous other rights that have grown up through the case law of the state. It is indeed refreshing to recognize that in the area of condemnation the legislature and the judiciary of Florida have zealously protected the rights of the individual against the power of public authority and necessity. Apt recognition of these principles is found in the words of Justice Drew:[160]

> "The fact that the sovereign is now engaged in great public enterprises necessitating the acquisition of large amounts of private property at greatly increasing costs is no reason to depart from the firmly established principle that under our system the rights of the individual are matters of the greatest concern to the courts. The powerful government can usually take care of itself; when the courts cease to protect the individual — within, of course, constitutional and statutory limitations — such individual rights will be rapidly swallowed up and disappear in the maw of the sovereign. If these immense acquisitions of lands point to anything, it is to the continuing necessity in the courts of seeing to it that, in the process of improving the general welfare, individual rights are not completely destroyed."

159. *Ibid.*

160. Jacksonville Expressway Auth. v. Henry G. DuPree Co., 108 So. 2d 289, 293 (Fla. 1959) (concurring opinion).