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Eminent Domain -- Just Compensation -- Cost of Removal of Personal Property

or incorrect sizes are of the heart of the sales contract, they need not be warranted, and there is simply a breach of contract.[26]

In the instant case, there was an express warranty covering excess loss in quantity, which is rare, but exists as a custom in the alcoholic beverage trade. If the warranty were treated as any other contract, it could be assigned, since there was no personal consideration. The whiskey stored in a warehouse was untouched and unseen by the purchaser, and would have been warranted to any vendee. Yet, because of the treatment of the assignment of warranties as different from other contracts, the court could not examine this contract and call it assignable. Instead, it allowed assignment on the basis of a distinction of this warranty of quantity from the usual one of quality and title. If the court were faced with a situation in which a warranty was clearly of quality and was equally as impersonal as this one, it is uncertain whether assignment would be permitted. But the decision does show a dissatisfaction with the practice of grouping warranties and classifying them as unassignable. It also shows an inclination to examine the individual warranty for its own terms and to consider it on its own merits. This attitude is much more in keeping with the needs of a complex modern business structure than is a rigid rule of lack of privity based in antiquity and illogically perpetuated.

EMINENT DOMAIN — JUST COMPENSATION — COST OF REMOVAL OF PERSONAL PROPERTY

The United States expropriated, for a term of years with an option to renew, a warehouse leased by the defendants. The period originally condemned by the government would have expired before the termination of the leasehold, but the government, by exercising its option, exhausted the leasehold. The cost of removal of personal property was included in the just compensation award of the lower federal courts. *Held*, that the market rental value would not include the cost of removal of personal property, when the exercise of the renewal option exhausted a leasehold which originally was not entirely condemned. *United States v. Westinghouse Electric & Manufacturing Co.*, 70 Sup. Ct. 644 (1950).

The Government may condemn property[1] for a term of years, or for an indefinite number of years,[2] by condemning with an option to lengthen or shorten the initial expropriation. When an option is, or is not, exercised

26. But see Abounader v. Strohmyer & Orpe Co., 243 N.Y. 458, 154 N.E. 309 (1926).

1. U.S. CONST. AMEND. V; 56 STAT. 177 (1942), 50 U.S.C. APP. 632 (1946); *see* United States v. Gettysburg Elec. Co., 160 U.S. 668, 681 (1896).

2. United States v. Petty Motors Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945); see United States v. Certain Parcels of Land, 55 F. Supp. 257 (D.C. Md. 1944).

the controversial issue is whether the expropriation is considered as the taking for the initial period, or whether the taking is for the indefinite period created by the option. When the entire leasehold interest is expropriated, just compensation is the fair market value of the unexpired term, less the rent provided in the lease.[3] If the interest is taken with an option to *shorten*, which is not exercised, the leasehold is considered as completely exhausted for the purpose of determining the extent of the taking, and the cost of removing personal property is not allowed.[4] When only part of a leasehold interest is condemned, the compensation for the unexpired interest remaining to the condemnee is the market rental value of the property on a temporary sublease from a long term tenant.[5] An option to *renew*, which is not exercised, is considered as the taking for the shorter period, so that removal costs of personal property are awarded, not as an element of damage, but as bearing upon the market value of the leasehold.[6]

When the entire leasehold is exhausted, the cost of removing personal property is usually considered a consequential damage, and is not allowed. A consequential damage, is a damage to, or destruction of, property not actually taken,[7] but which results indirectly from a lawful act of taking.[8] In the absence of a statute or constitutional provision[9] expressly granting compensation, these costs are not allowed,[10] for the tenant has a duty to move at the end of his term,[11] and the mere shortening of the term does not give any right to compensation. Similarly, removal costs are not deemed a taking of property within the meaning of the Constitution.[12] Allowance of these costs in computation would be based on conjecture, because removal distances would vary and no established rule would be applicable.[13] As an exception, a few decisions allow the cost of removing personal property, not as a separate element of damage, but as part of the market value of the

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3. United States v. 26,699 Acres of Land, 174 F.2d 367 (5th Cir. 1949); *In re* Cross-Bronx Expressway, 195 Misc. 842, 82 N.Y.S.2d 55 (Sup. Ct. 1948); Riebs v. Milwaukee County Park Comm'n, 252 Wis. 144, 31 N.W.2d 190 (1948).

4. United States v. Petty Motors Co., *supra* note 2.

5. United States v. General Motors Corp., *supra* note 2.

6. *Ibid.*; *cf.* Gershon Bros. Co. v. United States, 284 Fed. 849 (5th Cir. 1922).

7. Sanguinetti v. United States, 264 U.S. 146 (1924); Missouri-Kansas-Texas R.R. v. Rockwall County Levee Improvement Dist., 117 Tex. 39, 297 S.W. 206 (1927); *see* John Horstmann Co. v. United States, 257 U.S. 138, 146 (1921).

8. Omnia Commercial Co. v. United States, 261 U.S. 502 (1923); *see In re* Soldiers & Sailors Memorial Bridge, 308 Pa. 487, 490, 162 Atl. 309, 310 (1932).

9. Joslin Mfg. Co. v. Providence, 262 U.S. 699 (1923); Richmond v. Williams, 114 Va. 698, 77 S.E. 492 (1913).

10. United States v. General Motors Corp., *supra* note 2; see Stephenson Brick Co. v. United States, 110 F.2d 360 (5th Cir. 1940) (loss of future profits); Mitchell v. United States, 267 U.S. 341 (1925) (loss of a business); Omnia Commercial Co. v. United States, *supra* note 8 (losses from breach of a contract). *But cf.* Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).

11. United States v. Petty Motors Co., *supra* note 2; Springfield Southwestern Ry. v. Schweitzer, 173 Mo. App. 650, 158 S.W. 1058 (1913).

12. United States v. General Motors Corp., *supra* note 2; Springfield Southwestern Ry. v. Schweitzer, *supra* note 11.

13. Springfield Southwestern Ry. v. Schweitzer, *supra* note 11.

leasehold.[14] These cases do not overrule the established doctrine, but sidestep it to allow the condemnee the amount he would receive in a voluntary sale.[15]

In the instant case the expropriation for a term originally less than the entire leasehold period, with an option to renew, which was exercised exhausting the lessee's interest, is considered as if it were a taking of the entire leasehold interest rather than an expropriation for a shorter period. This case extends the definition of a "taking of an entire leasehold" to include one which does not entirely exhaust the lessee's interest originally, but which does so by the exercise of an option to renew, thus disallowing the cost of removal under both sets of facts.

EMINENT DOMAIN—JUST COMPENSATION—WARTIME IMPOSED CEILING PRICES

The United States expropriated a commodity from a long term speculator whose purpose was to hold and sell at future high prices. At the time of the taking, the maximum market price, specified by regulation under the Emergency Price Control Act,[1] was lower than the purchase price and storage costs of the commodity to the owner. The Court of Claims took cognizance of these facts and allowed compensation greater than this ceiling price.[2] *Held*, that just compensation as measured by fair market value was correctly determined by the ceiling price established by the OPA, because this was the only legal maximum selling price. *United States v. Commodities Trading Corp.*, 70 Sup. Ct. 547 (1950).

The exercise of the power[3] of eminent domain for necessary public use is subject to the constitutional requirement that just compensation be made for the property taken.[4] The amount of remuneration paid as compensation follows no strict formula,[5] but is normally determined as a judicial function,[6] by the fair market price at the time of the taking.[7] In a free

14. James McMillan Printing Co. v. Pittsburgh, C. & W. R.R., 216 Pa. 504, 65 Atl. 1091 (1902); Metropolitan West Side El. R.R. v. Siegel, 161 Ill. 638, 44 N.E. 276 (1896).

15. Metropolitan West Side El. R.R. v. Siegel, *supra* note 12.

1. 56 STAT. 23 (1942), 50 U.S.C. APP. § 901 (1946).

2. United States v. Commodities Trading Corp., 83 F. Supp. 356 (Ct. Cl. 1949).

3. *See* United States v. Gettysburg Ry., 160 U.S. 668, 681 (1896) (implied power); THOMPSON, REAL PROPERTY § 2575 (Perm. ed. 1939) (inherent power).

4. U.S. CONST. AMEND. V; *cf.* Monongahela Navigation Co. v. United States, 149 U.S. 312, 341 (1892).

5. United States v. Cors, 337 U.S. 325 (1949); United States v. Petty Motor Co., 327 U.S. 372, 377 (1946); Wilson Mfg. Co. v. United States, 161 F.2d 915, 918 (7th Cir. 1947).

6. *See* National City Bank of N.Y. v. United States, 275 Fed. 855, 859 (S.D. N.Y. 1921).

7. Louisville Flying Service, Inc. v. United States, 64 F. Supp. 938 (W. D. Ky. 1945); C. G. Blacke Co. v. United States, 275 Fed. 861 (S.D. Ohio 1921).