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administrative regulation than criminal prosecutions, right to counsel appears inappropriate. In the principal case, facing no controlling authority, the court should have balanced these conflicting interests before extending right to counsel to misdemeanants.

COMPENSATION FOR CONDEMNATION OF LAND ENHANCED IN VALUE BY AGRICULTURAL ALLOTMENT

Defendant's farm, including 550 acres devoted to production of cotton under an acreage allotment from the Department of Agriculture, was condemned by the federal government for an irrigation project. Defendant retained the right under section 1378(a) of the Agricultural Adjustment Act[1] to transfer its cotton quota to other property under its ownership, and did so. Trial before a jury resulted in an award to defendant based on the value of its property as a cotton farm, less the value of the section 1378 right retained.[2] The government objected on the ground that the enhanced value to the land resulting from the cotton allotment was not compensable when the owner utilized his right to reestablish the allotment on other land. On appeal, the Ninth Circuit Court of Appeals affirmed. *Held:* Enhancement in land value resulting from a cotton allotment, reduced by the value of the section 1378 right retained, must be included in determining compensation for

[1] The Agricultural Adjustment Act of 1938 § 378(a), added by 72 Stat. 995 (1958), as amended, 7 U. S. C. § 1378(a) (1965), provides in part:

> Notwithstanding any other provision of this chapter, the allotment determined for any commodity for any land from which the owner is displaced because of acquistion of the land for any purpose, other than for the continued production of alloted crops, by any Federal, State, or other agency having the right of eminent domain shall be placed in an allotment pool and shall be available only for use in providing allotments for other farms owned by the owner so displaced. Upon application to the county committee, within three years after the date of such displacement . . . any owner so displaced shall be entitled to have established for other farms owned by him allotments which are comparable with allotments determined for other farms in the same area which are similar except for the past acreage of the commodity. . . .

Commodities, the allotments for which are subject to the section 1378 right, are corn, wheat, rice, peanuts, tobacco, and cotton.

[2] Defendant's witnesses set a valuation of $1,050,000 for the land with the allotment attached. The government's experts assigned a value of $865,000, of which $413,000 was enhancement by virtue of the allotment and $452,000 was the value of the land alone. 350 F.2d at 685.

The portion of the trial court's instruction relating to the proper method for the jury to arrive at a valuation was, 350 F.2d at 685 n.2:

> It is my advice that the most reasonable approach to a solution of this problem is for you first to agree upon the fair market value of Citrus Valley Farm on July 1,

property condemned. *United States v. Citrus Valley Farms, Inc.*, 350 F.2d 683 (9th Cir. 1965).

Broadly speaking, compensation awarded to a condemnee is measured by the fair market value of the property, as it exists at the time the property is taken.[3] The most advantageous use to which the property may be devoted is considered in arriving at the valuation.[4] However, when the most advantageous use is the result of governmental policy, there is disagreement whether this increment of value may be awarded to the property owner. Recent decisions have held that enhancement resulting from a general governmental policy should be included in a condemnation award,[5] but no previous case has dealt with the precise question of the proper valuation of enhancement in property value when a section 1378 right was involved.

The court in the principal case rejected the government's contention that an allotment is a revocable "government-bestowed right" which enhances in a constant amount any lands to which it is attached, and pointed out that each allotment affords the basis for a history of cotton production on its associated tract of land. This productive history represents, in turn, a proven record of worth for the production of cotton. After condemnation, the court reasoned, what is left in the farmer's hands by virtue of section 1378 is only a license-to-produce, which proves nothing about the value of new land as a cotton-producing unit. The court concluded that the difference in value between the allotment as an element in the original farm's worth, and as a section 1378 right separate from the land, was taken by the government and therefore compensable.

1959, as if it were then being sold by a willing seller to a willing buyer, both of whom had all the information affecting the value of the property which you now have. Having determined such fair market value, you then should consider and agree upon the monetary value, if any, established by a preponderance of the evidence, of the Section 1378 right retained by the defendant, and subtract such value from the fair market value of defendant's property. The difference should be the amount of your award as just compensation to the defendant.

The jury found that the land and allotment were worth $1,024,000 together, that the section 1378 right was valueless, and that the owner was entitled to the full $1,024,000 as compensation.

[3] See 3 NICHOLS, EMINENT DOMAIN § 8.5 (rev. 3d ed. 1965).

[4] Olsen v. United States, 292 U.S. 246, 255 (1934); 4 NICHOLS, *op. cit. supra* note 3, § 12.314; 1 ORGEL, VALUATION UNDER EMINENT DOMAIN § 30 (2d ed. 1953).

[5] United States v. Douglas, 207 F.2d 381 (9th Cir. 1953) (enhancement from a regional irrigation development included, even though water was not yet available when the land was condemned); United States v. Jaramillo, 190 F.2d 300 (10th Cir. 1951); Iriarte v. United States, 157 F.2d 105 (1st Cir. 1946). Enhancement from general governmental policy should be distinguished from enhancement which is the result of the special project for which the land is to be taken. Increase in value of the latter sort is not properly part of an award. See United States v. Miller, 317 U.S. 369 (1943).

Underlying the court's reasoning is the implicit assumption that impact of a general governmental policy is a proper part of an award.[6] If the enhanced value is such that a *private* buyer would be willing to pay for it, the government should also pay. For example, a revocable cattle-grazing permit on United States Forest Service lands is but a government-bestowed privilege; its value is non-compensable if the land upon which the permit has been granted is taken by another department of the government for other purposes.[7] Nevertheless, it has been held that the increment in value resulting from such a permit on Forest Service land adjacent to a condemned ranch should be considered in determining an award for the ranch, so long as the permit continued to exist at the time the ranch was condemned.[8] By analogy, the land owner in the principal case would have received full compensation for the land, valued as a cotton farm, were no section 1378 right involved, since the allotment was not cancelled prior to condemnation.

The key issue in the principal case was whether the allotment attached to the original land, and the right to reestablish it elsewhere, are one and the same. The government assumed, and the district court in a pre-trial memorandum agreed, that they were the same.[9] According to this reasoning, an allotment has a certain constant value, which, when the allotment is moved, would enhance new land by precisely the same amount as it had the old.[10] Thus, argued the government, to pay anything for the allotment would unjustly enrich the defendant by placing him in a better position than he was before the taking. The court in the principal case correctly distinguished the right from the allotment. In characterizing an allotment as a "measure of the proven

[6] The court did not cite any authority upholding the proposition. See note 5 *supra*.

[7] Osborne v. United States, 145 F.2d 892, 896 (9th Cir. 1944).

[8] United States v. Jaramillo, 190 F.2d 300 (10th Cir. 1951). See also United States v. Cox, 190 F.2d 293 (10th Cir. 1951).

[9] A pretrial conference was held before the district court to determine how the cotton allotment should be treated. The court was of the opinion that:

> [T]he cotton allotment on Citrus Valley Farms was not condemned by the Government, and just compensation for the land taken should not include any enhancement by reason of the allotment. The condemned land should be valued as agricultural land, suitable for the production of cotton, but without a cotton allotment. United States v. 3,296.82 Acres of Land, 222 F. Supp. 173, 175 (D. Ariz. 1963).

At subsequent pretrial conferences before a different judge, who subsequently presided over the trial, the court reversed its earlier position in favor of that taken at the trial. Brief for Appellant, p. 4.

[10] One commentator has concluded that the enhancement resulting from a cotton allotment is not a constant figure. Its value may range from zero in central Georgia to $1000 in California. Westfall, *Agricultural Allotments As Property*, 79 HARV. L. REV. 1180, 1196 (1966). The value of an allotment may further depend upon the individual characteristics of the land. See note 11 *infra*.

productive value" of the land to which it has been attached, and as more than a government-granted license, the court indicated that the history of production under an allotment shows the land's cotton-producing quality. If land with an allotment were sold to a private buyer, the production record would itself be an important consideration in setting the purchase price.[11] Even if the license aspect of an allotment were withdrawn by congressional repeal of the allotment program, the record of production gained under an allotment would still constitute irrefutable proof of a tract's special value for cotton production.

The transfer of an allotment to other acreage is an economic gamble because there is normally no prior record of such land's cotton-producing quality. The allotment attached to new land becomes only a license to plant cotton, without any assurance of financial success, and, until the new land's capacity is known, there is no assurance that its cotton production will be equal to that of the land from which the allotment was moved. The "right" is, therefore, potentially less valuable than the allotment,[12] and any difference in value represents a capital asset taken by the government when it condemned the former land.

Unfortunately, the court in the principal case failed to set forth a workable standard for valuation of the section 1378 right. The factors relied upon by the court to establish a fair market value of the right as of the time the original farm was condemned did not accurately reflect its actual value.[13] Because the right is an anomalous species of

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[11] It seems obvious that a production record of two bales of cotton per acre would increase the value of one piece of land over that of another with a production record of 1.5 bales.

[12] Examination of the statute reveals a number of other limitations on the right. It is personal, limited in duration, and not subject to transfer. See Morrow v. Clayton, 326 F.2d 36 (10th Cir. 1963) (right subject to forfeiture for making secret arrangements to allow another to use it). The individual can exercise it only to the extent that the ratio of cotton acreage to total irrigated acreage on his new farm does not exceed the average ratio for the entire county in which the new farm is located. This is implicit in 7 C.F.R. § 719.11(f)(5) (1965). This provision eliminates use of the right by a farmer who buys a farm with an existing ratio equal to, or in excess of, the county average.

There is also the possibility that the right may prove to be *more* valuable than the allotment. There is nothing in the statute, for example, which would prevent the condemnee of a farm in Georgia from reestablishing his allotment on a new farm in California. The new tract might prove to have greater productive capacity than the old, so that the enhancement to the former would be greater than to the latter.

[13] The factors which the court enumerated included testimony as to the cost and availability, within a large surrounding area, both of farm land suitable for cotton production, but currently without an allotment, and of raw desert land. Testimony as to the general cost of developing the land tended to obscure the major issue of the worth of the particular 1378 right to the defendant.

"property," and, moreover, because the right is not salable,[14] it is incorrect even to speak of its "fair market value."[15]

Since the value of the right depends ultimately upon the productive quality of the individual replacement tract which is chosen by the condemnee, a method of valuation more appropriate than that approved by the court might be to consider, in retrospect, how much the right actually benefitted its owner.[16] Two situations are distinguishable when dealing with this formula. First, when a condemnee does not wish to exercise his right, either because of having purchased land with a pre-existing allotment or because of retiring from the business of cotton growing, nothing should be deducted from the value of his land and allotment. Neither the language of the statute nor its legislative history suggests that the right was intended as more than an option, available when suitable replacement lands with allotments already attached could not be reasonably had.[17] To deduct the value of the right as of the date of taking, without regard to whether the landowner planned to use it, would place those who did not exercise the option in poorer financial postion than before their land was taken. A court should allow the owner to renounce his right and recover the full compensation. Second, when the right to transfer the allotment to other land has been utilized before trial, it would seem proper to inquire to what extent the allotment on the new land has actually enhanced the new land's value. The amount of enhancement resulting from the transfer affords a definitive method of valuing what the owner did, in fact, realize from the right to transfer his allotment. This method offers the additional advantage that the enhancement may be objectively valued by means of whatever productive history is estab-

[14] Congress has recently amended the Agricultural Adjustment Act to provide for the sale or lease of cotton allotments, subject to quite restrictive conditions, separately from any land. 79 Stat. 1197, 7 U.S.C.A. § 1344(b) (Supp. 1965). Section 1344(b) will apparently have little effect on section 1378, since the section 1378 right, itself, remains personal and non-salable.

[15] Asked about the value of the section 1378 right, one expert witness admitted: "I don't know how you would value 1378 as such." Brief for Appellee, p.6.

[16] There would appear to be no rule of evidence which would prohibit a court from taking such a retrospective view. "In order to obtain substantial justice in eminent domain proceedings it is necessary for courts to adopt working rules to fit the particulars of the case." United States v. Silver Queen Mining Co., 285 F.2d 506, 509-10 (10th Cir. 1960).

[17] The forerunner of section 1378 was passed to eliminate the shortage of tobacco allotments created by widespread condemnation of rural areas in the South for military bases at the start of World War II. In one county alone, over 40,000 acres of tobacco land and allotments were taken. Remaining lands with allotments were not sufficient to accomodate all the displaced farmers. "The farmers who know how to grow tobacco must have other tobacco land. It will not be helpful that the lands can be secured unless tobacco acreage allotments are provided for...." 88 CONG. REC. 731 (1942) (remarks of Rep. Folger).

lished between the times of condemnation and trial, and whatever projections may be reliably made with regard to that specific piece of land.

Since the section 1378 right expires three years after the date of condemnation,[18] and condemnation suits frequently must wait some time before trial,[19] a farmer who intended to exercise his right to transfer the allotment would probably have already done so before the trial began, as was true in the principal case. In the interest of achieving a fair valuation of the right under these circumstances, perhaps trial should be postponed until the owner has exercised his right, renounced it, or allowed it to lapse. No special hardship to either government or landowner will result; the government is required by statute to pay into court its estimate of fair compensation at the time it files the declaration of taking.[20] This payment is available to the owner as immediate cash to undertake the purchase of new land on which to exercise his 1378 right, and the final award can be postponed and adjusted pursuant to facts in existence at the time of trial.[21]

The best solution to the problem raised by the section 1378 right is, in the opinion of one authority, its revocation by Congress and cancellation of the attached allotment whenever a tract is condemned.[22] All problems of proof of value of the right would be eliminated, and the owner would receive the enhanced value of his farm in money as full compensation. While this approach may offer the soundest long-term solution, in view of abuses in the exercise of the right,[23] it is

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[18] See note 1 *supra*.

[19] Of the land condemnation cases pending in the district courts in 1961, 33.8% (994 out of 2939) were three or more years old. 1961 ADMIN. OFFICE UNITED STATES COURTS ANN. REP. 168. The corresponding figure in 1963 was 27.5% (810 out of 2942). 1963 ADMIN. OFFICE UNITED STATES COURTS ANN. REP. 217.

The preliminary memorandum in the principal case, 222 F. Supp. 173, was not filed until October 9, 1963, over three years after the date of condemnation (July 1, 1959).

[20] 46 Stat. 1421 (1931), 40 U.S.C. § 258(a) (1965).

[21] If the judgment ultimately awarded is greater than the amount deposited, the owner recovers the excess. 46 Stat. 1421 (1931), 40 U.S.C. § 258(a) (1965). If the award is less than the amount deposited, the government may be granted judgment for the difference, even though there is no provision for this eventuality in the statute. United States v. Miller, 317 U.S. 369, 381 (1943).

Since there is a possibility that the right may, as exercised, have been more valuable than the enhancement to the original tract by virtue of the allotment attached to it (see note 12 *supra*), there is a question whether the deduction from the award for the value of the section 1378 right should be limited to the enhancement on the original tract.

[22] Westfall, *supra* note 10, at 1197.

[23] Billie Sol Estes' empire rested in part upon the fraudulent manipulations of allotments through arrangements with farmers who had section 1378 rights. See DUSCHA, TAXPAYERS' HAYRIDE 145-81 (1964). See also Morrow v. Clayton, 326 F.2d 36 (10th Cir. 1963); Kephart v. Wilson, 219 F. Supp. 801 (W.D. Tex. 1963).

submitted that the theory adopted by the court in the principal case, supplemented by the retrospective valuation formula suggested herein, will be adequate as long as the section 1378 right remains an element in condemnation proceedings.

UNCONSCIONABILITY IN CONSUMER SALES CONTRACTS—A DEFENSE TO ACTIONS AT LAW, AND UNDER THE UCC

Plaintiff, operator of a retail furniture store, sold a five hundred dollar stereo set on installment contract to defendant Williams, knowing that defendant supported herself and seven children on a two hundred eighteen dollar monthly welfare payment.[1] At the time defendant bought the set, she owed plaintiff one hundred sixty four dollars on thirteen prior purchases.[2] The form contract provided that plaintiff would retain title to all items purchased until the purchaser had paid all amounts due in full, and that the debt on each item was secured by the right to repossess all items purchased.[3] When defendant defaulted shortly after purchasing the stereo, plaintiff sued to replevy all items purchased by her since 1957. The trial court granted judgment for plaintiff, rejecting defendant's contention that the contract was not enforceable because unconscionable. The District of Columbia Court of Appeals affirmed. The United States Court of Appeals for the District of Columbia reversed, and remanded for the taking of evidence

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[1] The name of defendant's social worker and the amount of her monthly stipend were written on the back of the contract.

[2] Since December 1957, defendant had purchased thirteen items for a total of $1800.

[3] The contract set out the value of the item and purported to lease it to the purchaser for a monthly rental payment. However, title was to pass to the purchaser when the total of the payments made equalled the stated value. The contract further provided that:

> the amount of each periodical installment payment to be made by [purchaser] to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by [purchaser] under such prior leases, bills or accounts; and all payments now and hereafter made by [purchaser] shall be credited pro rata of all outstanding leases, bills and accounts due the Company by [purchaser] at the time each such payment is made.

The court analyzed the provision as follows, 350 F.2d at 447:

> The effect of this rather obscure provision was to keep a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated. As a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings.