Report of Committee on Land Acquisition and Control of Highway Access and Adjacent Areas

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● THE COMMITTEE on Land Acquisition and Control of Highway Access and Adjacent Areas continued to render assistance to state highway departments during the year, and to other governmental and non-governmental agencies in their efforts to improve the legal and administrative procedures under which right-of-way for highways is acquired. Passage of the Federal-Aid Highway Acts of 1956 and 1958, providing for an accelerated highway program, made improvement mandatory in many cases, since existing methods were not geared to take care of the increased work load.

Emphasis placed on the 41,000-mile interstate system by the 1956 Federal-Aid Highway Act resulted in increased activity by the committee, due to requests for assistance in formulating new legal machinery in states where enabling legislation did not exist, and improving existing legal and procedural mechanisms in others. In this connection, it is interesting to note that with the exception of Arizona, all of the states now have controlled-access laws or constitutional provisions relating to this subject.

Regulation of the roadside continued to be a lively concern of the committee, since the utility of many of the highway improvements contemplated by the 1956 act could be impaired by lack of such regulation. There was increased activity in the U. S. Congress for legislation to provide some sort of control of outdoor advertising in areas adjacent to the interstate system. Although such legislation failed of passage in 1957, the 1958 Federal-Aid Highway Act included a provision whereby state highway departments may receive additional federal funds if billboards are prohibited, with certain exceptions, within 660 ft of the interstate system.

The right-of-way salary survey, sponsored by the committee in cooperation with the Right-of-Way Committee of the American Association of State Highway Officials and the American Right of Way Association, was completed and published as Highway Research Board Special Report 34. The study reveals a wide range of salary schedules for right-of-way personnel throughout the United States. It is hoped that this report will provide the factual basis for seeking appropriate betterment in this important field of highway activity.

Studies of the economic impact of highway improvements on urban and rural communities gained new impetus as a result of a Special Conference on Economic Impact conducted under the auspices of the committee in March 1957. There are at the present time at least 41 economic impact studies underway in 26 states, as indicated in a later section of this report.

A number of interesting papers were presented at the open meeting sponsored by the committee during the Annual Meeting of the Highway Research Board in January 1958. Three of these papers, "Industrial Development Survey on Massachusetts Route 128," "Economic and Social Impact of the Connecticut Turnpike," and "Tenant Relocation for Public Improvements," are included in this report, and discussed under the appropriate headings herein. Because two of these papers pertained to economic impact studies, it was thought desirable to include another paper on the same subject, presented at a meeting of the Committee on Economic Analysis—"Methods Used to Study Effects of the Lexington, Virginia, Bypass on Business Volumes and Composition." A fourth paper presented at the committee's open session, "Visual Approach to Highway Planning and Design," by Louis B. Wetmore, will be included in the HRB Bulletin 190, entitled "Urban Research."

LAND ACQUISITION

The significance of land acquisition in connection with the over-all federal-aid highway program cannot be over emphasized. The new highway program will necessitate

the acquisition of fantastic amounts of real estate. Land is needed for 41,000 miles of modern highways having rights-of-way as wide as 300 ft. Complex interchanges, ramps and frontage roads will, of themselves, require great quantities of additional land. Some of these highways will be built so that they boldly traverse lands that former highway builders circumvented and avoided due to the expense and engineering difficulties. This in turn creates land acquisition problems that cannot be bypassed; they must be faced and solved.

When the system is ultimately established, the traveler will be able to ride in an automobile from coast to coast and border to border without passing an intersection at grade or a stop sign. Consequently, safety, economy and utility will be enhanced, driving will be a pleasure once more, and beauty of the landscape will be protected. Furthermore, these new highways are to be a vital and integral part of national defense plans.

New Legislation

More and more legislatures of the various states have been enacting into law proven practices which facilitate the tremendous land acquisition task. The following summary will illustrate what the states have done during 1957 legislative sessions:

Authority to Condemn. Texas has given its state highway commission the authority to condemn land for highway purposes. Formerly this function was vested in the counties.

Future Use. Florida and Indiana have enacted provisions permitting the acquisition of land for future highway use. The Florida act authorizes the Florida Development Commission to purchase land for the future improvement of existing highways. The Indiana act permits such land purchases, providing a highway is to be constructed within a reasonable length of time.

Immediate Possession. Last year Illinois also provided for a system (patterned after federal law) whereby the state could take immediate possession of certain lands needed for highway construction, after instituting condemnation proceedings and depositing 125 percent of the amount of compensation estimated by appraisers appointed by the court and work out later in the courts the compensation problems. A lower court decision declared this law unconstitutional, but the state supreme court subsequently reversed the holding. Georgia and Tennessee also passed legislation facilitating the taking of possession.

Nature of Interest Taken. Indiana, under its new highway law, permits the state to acquire a fee simple to land needed for highway purposes. New laws in Texas and Illinois give the state authority to condemn a fee simple or a lesser estate for highway purposes.

Relocation of Tenants. Connecticut passed an act designed to ease the inconvenience of tenant relocation. Sometimes the problems created when tenants are forced to move from their established residences can be extremely serious. This problem of tenant relocation has been of special import, naturally, in New York City. Robert S. Curtiss, President of the Real Estate Board of New York, Inc., has recorded how the New York Port Authority has handled the problem. A verbatim account is given in "Tenant Relocation for Public Improvements" which Curtiss presented at the Annual Meeting of the Highway Research Board, January 8, 1958, in Washington, D.C.

Reservation of Right-of-Way. Indiana can now reserve highway rights-of-way for a limited amount of time in order to prevent development within the proposed right-of-way.

Revolving Fund. For the purpose of overcoming some of the delay in right-of-way acquisition, several states passed laws which established revolving funds to be drawn on when highway right-of-way is desired to be purchased but construction is not to begin until later. The system thus permits the head of state highway departments to have a limited amount of funds constantly available when right-of-way is needed. The system also permits more rapid acquisition which, in turn keeps costs down. Specifically, three states—Indiana, Maryland, West Virginia—provided for establishment of revolving funds during legislative sessions during the year. Five states—Florida,

Kansas, Michigan, New Jersey, Ohio—had bills attempting to establish revolving funds presented to their legislatures, but they were defeated. It is expected that new attempts to enact such legislation will be made during the next legislative sessions.

Acquisition of Highway Right-of-Way for Future Use

As previously noted, the nation is experiencing its greatest highway construction boom, and more and more state legislatures are authorizing future acquisition of highway right-of-way. Only one case was noted, however in which a state supreme court was asked to rule on the authority of a state highway department to acquire land in advance of construction last year.

In the case of State v. Florida Development Commission,[1] the Board of County Commissioners of Orange County requested the Florida Development Commission to assist in financing improvements to existing state primary roads in Orange County. The plan called for the issuance of $3,500,000 of so-called "Florida Development Commission, Orange County Road Revenue Bonds." The proceeds of the bonds were to be used to redeem certain outstanding State Road Department-Orange County Fuel Tax Anticipation Certificates. The balance of the bond proceeds, amounting to about $3,000,000 was to be used primarily to purchase additional rights-of-way for future state primary road improvements. The principal and interest of the bonds were to be liquidated out of Orange County's share of the Eighty Percent Surplus Gasoline Tax accruing to that county under Section 16, Article IX of the State Constitution.

The state contended that the Eighty Percent Surplus Gasoline Tax accruing to the county could be used only for the construction of a completed road project; that the funds in question could not be employed merely for the acquisition of right-of-way without a commitment to the effect that the road would actually be constructed.

The state supreme court called attention to prior decisions in which it had held that the state road department had unlimited discretion in the use of the surplus gasoline tax so long as the funds were used for the improvement of state highways within the limits of the particular county entitled to the surplus. (State v. State Board of Administration, 157 Fla. 360, 25 So. (2d) 880, 1946); (City of Hollywood v. Broward County, 54 So. (2d) 205, 1951).

The state attempted an answer to that argument with the contention that the instant case was distinguishable from the prior decisions because the proceeds of the bond sale were to be used for the acquisition of rights-of-way for highways to be constructed in the future rather than to finance the actual completed construction of the road. The court found no justification for this contention.

The court reasoned that under paragraph (c), Section 16, Article IX of the constitution, the state road department was authorized to use the Eighty Percent Gasoline Tax Surplus "for the construction or reconstruction of state roads and bridges within the county." The court added that the acquisition of adequate right-of-way was an essential component of highway construction. In fact, the court cited the Florida Highway Code of 1955 (Chapter 29965, Laws of Florida 1955) which defined the term "road" as including "the roadbed" and "right-of-way."

As was indicated in the bond resolution, the county was undertaking to plan for the improvement of the state highway system within the county by the acquisition of adequate rights-of-way at a time when land values would not be influenced by the immediate announcement of actual highway construction. This was particularly significant, the court said, in view of the statutory restriction against showing benefits from a proposed improvement as against the value of property taken by eminent domain. It would appear to be an efficient exercise of governmental power and business judgment in providing an essential public service in an area of the state which, in a measure, was outgrowing the capacity of the government to provide these important needs out of current resources.

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[1] 95 So. (2d) 13, May 1, 1957, (See memorandum 95, September 1957, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 346).

The court again cited the Highway Code (Section 337.28, Florida Statutes, F.S.A.) to note that it specifically authorized counties to furnish rights-of-way for any road in the state primary system. The only condition attached to the expenditure was that the road was to be surveyed and located in the county by the state road department. According to the court it was self-evident that a right-of-way for a primary road could not be acquired until this preliminary survey, which would determine the width of the right-of-way, had been made by the proper authority.

The court observed that the state primary roads named in the resolution as those to be improved by the acquisition of additional rights-of-way were shown by the Report of the Select Committee on Roads of the Legislative Council of the Florida Legislature 1954, p. 160, to be roads in the state primary system which were badly in need of improvement as measured by sufficiency rating standards established by the state road department. The court, while admitting its lack of power to review the exercise of discretion by the board, said that the foregoing observation was made merely to demonstrate that in this instance, the road department as well as the county appeared to be exercising its discretion wisely in the expenditure of public funds.

The court said, therefore, that there was no constitutional or statutory inhibition against the use of the proceeds of the bonds proposed to be issued by the bond resolution reflected by the record. On the contrary, the court held that the contemplated use of the bond proceeds was well within the prescriptions of the state constitution and applicable statutes. The fund was allowed to be pledged in the fashion proposed in order to meet the requirements of the bond issue.

Immediate Possession of Highway Right-of-Way

In order to speed up their highway programs, many legislatures have been sanctioning the taking of land needed for highway right-of-way at some point prior to the completion of condemnation proceedings. The purpose of such legislation is to prevent unconscionable delays in highway construction programs by permitting state highway officials to enter on the land and commence construction without waiting for final determination of compensation by the court, which may, and has been known to take years. Immediate possession statutes provide that, if necessary, just compensation can be worked out later in the courts. Two states—Louisiana and Washington—handed down decisions involving ramifications which arose when this principle was practiced.

Louisiana. According to the Court of Appeal of Louisiana, a statute is unconstitutional which provides that a landowner may not take legal action to prevent or retard construction of a highway once it has been laid out and construction has commenced without his objection. [2]

Along with 77 other landowners, Williams had executed a deed conveying to the department a right-of-way "of a width not to exceed 80 feet, measuring 40 feet in width on each side of the centerline of the existing roadway." Subsequently the department of highways revised its plans, locating the right-of-way approximately 80 ft further east into Williams' land, in order to straighten out the old highway. The change was made without Williams' knowledge. He objected as soon as he learned of the state's action, and filed suit within 7 days after the construction started. An injunction was issued by the district court and the state appealed.

In affirming the judgment of the district court, the court of appeal held that any citizen was entitled to have the public need for his property judicially determined, and to receive payment for it before it was taken. This, said the court, was one of the fundamental liberties guaranteed by Article 1, Section 2, and Section 6, and by Article 4, Section 15, of the Louisiana Constitution. These provisions authorized the legislature to provide for the taking of property for highway purposes by exparte court order prior to final judgment in expropriation suits, "provided that provision be made for deposit before such taking" of the estimated value and damages.

The court cited a recent Supreme Court of Louisiana decision which affirmed the constitutional right of a landowner to receive compensation for private property before

[2] Williams v. Department of Highways, 92 So. (2d) 98, January 2, 1957.

the public taking, and held void for this reason a police jury taking of private property for road purposes when payment was not tendered until 16 days after the taking; and held further that "notice and an opportunity to be heard and to defend in an orderly proceeding" are constitutional requisites to afford due process before such taking. (Charles Tolmas, Inc. v. Police Jury, La., 90 So. (2d) 65 June 29, rehearing denied September 28, 1956).

The statute on which the department based its appeal provides:

> After the department has laid out a highway over a certain tract of land and the work thereon has commenced without objection on the part of the landowner, the landowner may not prevent or retard the construction thereof by any legal process, but is limited to an action for damages. (LSA-R. S. 48:219)

The court acknowledged that counsel for the highway department ably argued that the necessities of efficient highway construction and of avoiding undue expense by interruptions or relocations demanded the sustaining of the constitutionality of the department's interpretation of the statute to the effect that a landowner's claim is relegated to damages and he is barred from enjoining construction, once a contract has been let and work has been started upon a given highway project. However, the court decided that the sincerely claimed power of the state, through the highway department, to preclude a citizen's fundamental right to have the necessity for the public taking judicially determined and the court-ordered compensation paid or deposited before the taking, was repugnant to the cited provisions of the state constitution.

Washington. In State v. Laws[3] the Supreme Court of Washington was asked to determine whether or not the state by paying into court the amount of an award for condemnation, and by taking possession of the property, waived its right to appeal. The court decided that it had.

On November 1, 1956, the jury had returned a verdict of $19,500 and judgment in that amount was entered. Notice of appeal was filed on November 7, 1956. On February 6, 1957, the state paid into the Superior Court of Spokane County the sum of $19,556.90 (judgment plus costs). The letter of transmittal indicated that it was reserving the right of appeal. Thereafter the state took possession of the property involved. At the time of the appeal to the supreme court, the money still remained in the depository of the court.

Under the Washington State Constitution no private property may be taken for public use without just compensation having been first made, or paid into court for the owner. In this case the specific question, therefore, was whether just compensation was paid into court for the owner before the property was taken. The supreme court found that the state had paid the money into court, but not as just compensation for the owner. The court reasoned that this was so because the state had already appealed on the ground that the amount awarded was excessive compensation.

The statute gives either party the right to appeal. An appeal by the property owner does not operate to prevent the state from taking possession of the property pending such appeal, if the amount of the award has been paid into court. The state, on the other hand, according to the court, cannot take possession of the property and also wage an appeal from the judgment on the verdict. In order to take possession of the property, it must first accept the award of the jury and pay it into court for the benefit of the owner; as soon as it does so, it waives its right of appeal. According to the court, the state "cannot have its cake and eat it too."

The court held that by paying into court the amount of the award, plus costs, and taking possession of the property, the state had accepted the award of the jury. The issue of "the propriety and justness of the amount of damage" was no longer an issue. The question was moot, the court said in dismissing the appeal.

Necessity for Taking

The law protects owners of land in the sense that it will not permit indiscriminate

[3] 318 P. (2d) 321, 1957.

or arbitrary condemnation of their land by public authorities. There must be a necessity present before any land can be taken. Nevertheless, the law grants to public authorities broad powers of discretion in performing their functions. Vermont's highest court was called upon last year to give a workable definition of the statutory term "necessity."

In this case,[4] the state highway board sought to condemn 24.62 acres out of a 135 acre farm in Brattleboro, Vermont. The land was situated westerly of U.S. Route 5 (Canal Street) and southerly of Fairview Avenue. Of this total acreage only about 8 acres were flat land. The rest was hilly and wooded terrain which had been partially cleared for skiing purposes, although it had not been used in that connection for the past two years. The board had not included any portion of the flat land in its condemnation proceedings.

The landowner asserted that the order for the taking was unsupported by the evidence, both as to the necessity for the taking and as to compensation awarded therefor. The court restricted itself to consideration of only the question of necessity. The report showed that the proposed taking was for the purpose of a limited-access, divided, four-lane highway which would ultimately run from Hartford, Connecticut, to White River Junction, Vermont, from which point it would proceed in two forks, to the Canadian border, one by way of Burlington, and the other by way of northeastern Vermont.

The supreme court ruled that the "necessity" specified by statute for condemnation of land for highways did not mean an imperative or indispensable or absolute necessity, but only that the taking provided for be reasonably necessary for accomplishment of the end in view under the particular circumstances.[5] The court said that to require "imperative necessity" as a general test for necessity would be to adopt a test that had never been applied in condemnation for highways, and "there would be no practical way in which the crooked road could be made straight." To do so would be to adopt a strict and rigid necessity never intended by the statute.

The end in view was determined by the legislature itself by Act No. 270 of the Acts of 1955. This act stated that necessity was to be based upon grounds of health, safety and welfare. The court was strongly aware that this was a declaration of policy under the very act that highways like the one in question might be constructed. This court was not, therefore, confronted with the situation where the legislature's purpose was ambiguous.

Where the volume and nature of traffic is such that public safety requires under the circumstances that the road be constructed or reconstructed at a given location, a reasonable necessity exists, and a taking of land is justified, if reasonable in the light of all the concurring circumstances. The court declared that under the statutes the state highway board had been vested with a broad discretion for determining what land it deemed necessary for the particular location and route to be followed, and as a safeguard, appeal to the county court with a provision for a hearing before an independent board of commissioners was provided. A determination, said the court, made agreeably to the statute will not be interfered with by the courts if it is made in good faith and is not capricious or wantonly injurious.

The court overcame the landowner's arguments concerning an alternative route, and agreed with the findings of the commissioners that the proposed route through appellant's property was the most satisfactory from the standpoint of safety, grade, land acquisition and engineering costs.

The supreme court held that the evidence sustained a finding as to necessity for condemnation and as to the amount of compensation to be awarded therefor. The judgment of the lower court was affirmed.

The case in question was handled under Vermont's old land condemnation law. A new law was passed by the 1957 legislature and is now in effect.[6] The new law attempts to overcome any definition difficulty with term "necessity." The new statute on necessity reads as follows on the next page.

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[4] Latchis v. State Highway Board, 134 A. (2d) 191, July 7, 1957.
[5] V.S. Secs. 4971-4975.
[6] H. 245.

> "Necessity" shall mean a reasonable need which considers the greatest public good and the least inconvenience and expense to the condemning party and the property owner.

The wording would seem to cover both the court's "reasonable necessity" and the highway safety doctrines. The statute's necessity definition goes on to list a number of other factors to be considered such as the amount of farm land to be taken out of production, the adequacy of alternate locations, the effect on home and homestead rights, the convenience of the property owner, the effect of scenery and recreation values and the effect on town grand lists and revenues.

Compensation for Damages

Civilized man has moved a long way from the early times in history when the king, if he needed or wanted certain lands, simply appropriated the land to himself and little or nothing could be done about it by the unfortunate landowner. Today no one will deny the right still exists whereby the sovereign can take any land it needs, but a countervailing principle is now well established in law which provides no land can be taken without just compensation first being paid the landowner. When there is disagreement as to what constitutes just compensation, the courts attempt to reach a fair decision.

A cursory review of all reported 1957 court cases dealing primarily with land acquisition problems, leaves the impression that the vast majority of the cases can be generally placed in one of two categories: those in which the landowner claims he was not compensated enough, and those in which the state claims he was compensated too much. Admittedly, such a two-camp categorization is an oversimplification of land acquisition problems, which, in reality, present the courts with some of their knottiest cases. The cases outlined below are no exception.

Change in Grade. Four cases were reported during the year involving the question of whether compensation should be awarded for a change in grade. All four came from the New York courts. Each one of these cases involves a different situation. Thus, in one, the change in grade resulted from an improvement made by a town, and although no land was taken, compensation was awarded under state statutes permitting recovery in such instances when the taking is by a town. The second case involved a change in grade resulting from an improvement by the state but part of the owner's land was also taken, and compensation awarded reflected damage due to such change. But since New York law does not specifically provide for consequential damages resulting from an improvement made by the state, when no land is taken, landowner in the third case was denied compensation for a change in grade. Finally, in the fourth case discussed no land was taken, but the court awarded compensation for damages for the reason that the landowner's access was impaired as a result of the improvement by the state.

New York. The first case was based on Section 197 of the Highway Law, which expressly allows a landowner to recover damages from a town due to a change in grade of a highway. Pursuant to this section of the Highway Law, in a proceeding to recover damages resulting from a change in grade of a town highway in the town of Hempstead, the Supreme Court, Appellate Division, Second Department, held that the town had the duty to restore and replace grass and sidewalks on the damaged land after completion of a filling operation.[7]

This case arose as a result of differing opinions concerning a report of commissioners on the value of the land in question. The report was questioned because of what the commissioners had included in the allowance for the restoration of the landowners' property. The landowners asked on appeal that the report be confirmed, and the town asked that it be set aside.

Under the existing statute, the commissioners, in determining compensation, must consider the fair value of the work done, or necessary to be done, in order to place the land in question in the same relation to the changed grade as it was to the former grade. The court reasoned that the only practical way to do so in this case was to restore or replace the grass and sidewalks after completion of the filling operation. Thus the

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[7] Application of Kruger, 162 N.Y.S. (2d) 442, 1957.

court held that the commissioners properly allowed compensation therefor.

In the second case Lewis J. Spinner brought an action against the state to recover consequential damages resulting from the appropriation of a permanent easement for highway purposes.[8] In addition to this easement, a fee strip of land was also taken. These appropriations were made in connection with an improvement of the approach to a circle at a highway intersection in the village of Johnson City, Broome County. The grade of Spinner's land was raised 14 to 15 in. as part of the project.

The court of claims awarded Spinner $12,300, with interest, as payment for both appropriations. This amount represented a compromise sum for the permanent easement, and both parties appealed the judgment. The sole controversy on appeal related to the amount allowed for consequential damages as a result of the taking of the easement.

The easement ran across the front of the property, upon which a two-family residence stood. The appropriation map indicated the state had acquired the easement "for the purpose of constructing, reconstructing and maintaining thereon embankments and/or excavations."

One expert witness expressed the opinion that, in view of the fact that the state had the right to completely block access to Spinner's property by building an embankment of considerable height on the easement strip, the property was practically unsalable, except to a person who might be willing to gamble on the state's future action. On this basis, he found that the consequential damage resulting from the taking of the easement was about ⅔ of the value of the remaining property. The witness for the state, on the other hand, while recognizing the seriousness of the situation, took the view that an allowance of about ¼ of the value was adequate, because he did not believe that the state would exercise its right under the easement to the fullest possible extent but would only use it in connection with a possible grade crossing separation which might ultimately replace the circle.

The supreme court held that the damages allowed in the court of claims were inadequate according to the record. It reasoned that if the state wished to limit its rights under the easement to the continuance of the existing use or to the prospective use envisaged by its expert, it should have done so by formal action, by deed, release or otherwise. In the absence of such modification, the damage must be evaluated on the basis of what the state has the right to do under the terms of the easement as appropriated. On the other hand, said the court, if the easement were limited to the present use, the amount of the award might have been excessive.

The judgment of the court of claims was reversed, and a new trial was ordered.

In the third case[9] the Supreme Court, Appellate Division, Fourth Department denied recovery for damages allegedly sustained by changing the grade of a highway when the state had previously acquired a perpetual easement for constructing, reconstructing and maintaining highways. The denial reversed the holding of the court of claims which had awarded the claimant $15,000 as the result of the reconstruction by the state of Thompson Road near its intersection with James Street in the Town of De Witt in Onondaga County.

The facts indicated that in 1943 the state acquired from the claimant's predecessor in title the above mentioned perpetual easement. At that time Thompson Road was widened and reconstructed as an access road to a nearby airbase. The then owner was paid for the easement which for the stated purpose placed a burden upon some 900 ft of frontage on Thompson Road and consisted of a parcel containing approximately 0.951 acre of land.

In 1950 Thompson Road was again rebuilt. In altering the approach to a nearby viaduct crossing certain railroad tracks the elevation of the road in front of claimant's property was changed from a substantially level grade to an elevation of 9 ft on claimant's southerly boundary and gradually descending on a five percent grade to a 1.7-ft elevation at the northerly boundary.

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[8] Spinner v. State, 167 N.Y.S. (2d) 731, 1957.

[9] Raymond v. State, 162 N.Y.S. (2d) 838, 1957.

The findings of fact of the trial court were, among others, (1) all work subsequent to the taking of the 1943 perpetual easement was performed within the limits of that area, (2) a 1943 appropriation map showed a profile of the proposed road to be then constructed at substantially level grade in front of the property of claimant's predecessor in title. The trial court took recognition of the long established rule that damages sustained by an abutting owner on a highway by a change of grade are not recoverable in the absence of express statutory authority conferring the right to compensation, and then laid down the general rule that "where the state changes the grade of a highway and usurps more land, rights, privileges or interest therein than those it had previously acquired, then it is liable to the owner and must make compensation therefor." Elsewhere in its decision the trial court narrowed this finding by the statement that in 1950 the state took an additional easement "by increasing the elevation of the road."

The supreme court said that it found no proof in the record that in 1950 the state took any action except to change the grade of Thompson Road. The state had already acquired a perpetual easement over a portion of claimant's predecessor in title for the purpose of constructing, reconstructing and maintaining a highway. Having acquired this right, any damage sustained by the claimant as a result of the change of grade in 1950, the court held was damnum absque injuria. In the absence of an enabling statute the claimant was without remedy. The court conceded that the result was harsh and was discriminating as to property located in a town, but the remedy lay with the legislature.

On the other hand, in the fourth case recovery of damages actually due to a change in grade by the state were allowed by a decision of the Court of Claims of New York [10] on the ground that the landowner's easement of access had been substantially interfered with.

The foundry had sued for compensation for an alleged de facto appropriation of a strip of land off the easterly or front side of its property. It also sued for damages caused by the change of grade, and interference with its access resulting from a grade crossing elimination.

The land belonging to the foundry was located on the westerly side of Lemoyne Avenue, formerly called "the State Road." The grade crossing of Lemoyne Avenue over the New York Central Railroad tracks was eliminated by depressing the highway under the tracks.

Before the construction, the railroad extended along the foundry's northerly boundary, and the highway along the east side. Lemoyne Avenue was a two way road and was practically level and substantially at grade with the foundry's premises. The buildings and signs on the property were in full view. Advertising placed on or near the front thereof could readily be seen and read. The foundry corporation was engaged in a business which required trucks to deliver and take out approximately 100,000 pounds of raw materials and finished products each month. The trucks could be backed directly from the highway so that the rear door of the truck would be flush with the platform inside the front door of the plant, resulting in reduced cost in loading and unloading.

After the construction work, the foundry's driveway and easement of access was cut off by an embankment descending 22 to 24 ft, along the front of the foundry's property, with a curb constructed at the bottom, a heavy steel cable fence along the top, and a fence barricade along the railroad right-of-way on the foundry's north boundary. Trucks could no longer be backed into the plant or even get in over the foundry's own or public property. In lieu thereof, without the foundry's consent, the state constructed a sort of substitute for the easement of access along the top of the embankment commencing about 1,200 ft southerly of the foundry's lands and running northerly past the front of the Grandinetti Building, Consolidated Gas property, Laure Building Supply, and the driveway of one private residence, then a short distance onto the foundry's lands (see Fig. 1).

The state denied that it appropriated any of the foundry's lands, property or rights, and contended that the lands used were within the state's right-of-way.

The general rule is that the state is not liable for damages due to construction or

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[10] Meloon Bronze Foundry v. State, 166 N.Y.S. (2d) 586, 1957.

alteration, including change of grade, of its highway within its own right-of-way, unless provided for by statute. Payment for damages for change of grade had not been provided for by statute. Such damages were, therefore, according to the court, damnum absque injuria.

The parties in this case disagreed as to the location and width of the right-of-way involved. The burden of proving the location and width of the right-of-way, the court said, was with the landowner, and here the landowner's evidence fell short of overcoming the evidence presented by the state. The court concluded, therefore, that the state had taken no additional land from the foundry.

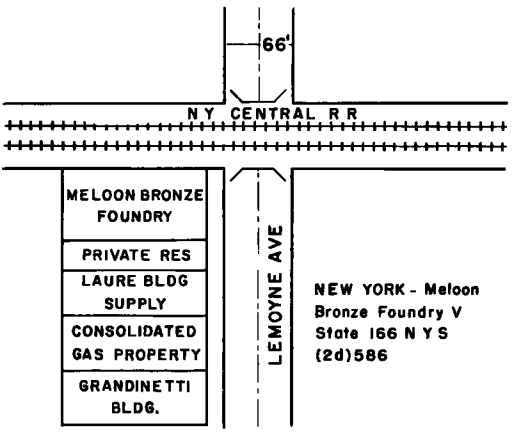

Figure 1.

However, the court did find that the state did not own the fee to this right-of-way. It only had an easement therein for highway purposes. The foundry was an abutting owner, and, according to its deed, it owned to the center of the highway. The court reasoned, therefore, that the foundry had a special easement in the highway for purposes of ingress and egress, known as an access easement. This easement was property and could not be taken away or materially impaired or interfered with even under legislative authority, without compensation.

The foundry's cost of operation was increased because of interference with its direct easement and the substitution of a new means of access. This necessitated the rental of a parcel of land on claimant's south side to enable trucks to turn and back in, so that the side of the truck stopped adjacent to a newly constructed platform instead of backing into the rear door. The foundry had to move its power lines at its own expense to accomodate the new loading platform addition leading out from the front door.

The court ruled that the interference with the foundry's easement of access was more than an inconvenience and the substitute access road was not suitable for the foundry's purposes. The court held that the foundry had suffered damages for which it must be compensated. This damage was the difference in value immediately before the taking of the easement, less the value immediately after the taking, because of the loss of suitable access without allowance for change of grade.

The court found that the value of the foundry's property immediately before and at the taking of such easement of access was $80,190 and the value thereof immediately after the taking of the access easement was $66,190. Therefore, the foundry was awarded $14,000 with interest for damages.

Other Consequential Damages. Other cases involving consequential damages where no land was taken were reported in Massachusetts, New York and Pennsylvania.

Massachusetts. The decision handed down by the Supreme Judicial Court of Massachusetts in May 1957, allowed the landowners to recover [11] damages for an injury which the court held to be special and peculiar within a state statute providing for recovery of damages to property not taken. The recorded facts of this case showed that under an order of taking dated July 10, 1951 the department of public works appropriated certain property located on State Street, between a building owned by the Webster Thomas Co. and a building of Theopold and Bigelow, for the purpose of constructing a portion of the Boston Central Artery. The taking of the property and the subsequent demolition of the buildings situated on the condemned land, exposed an interior brick boundary wall of both the Webster and Boyden buildings. One half of each wall stood on the lots of each building and one half on the lots taken by the commonwealth. There was expert testimony that while these boundary walls were safe and adequate as interior walls, they were not designed as exterior walls; that so long as the buildings on the land taken were standing, the boundary walls were safe, but upon the removal of the adjacent

[11] Webster Thomas Co. v. Commonwealth, 143 N. E. (2d) 216.

buildings the walls would have buckled outward unless tied in. By letters dated July 1, 1952, the building commissioner of Boston informed the commonwealth that certain things should be done in order to made the exposed walls safe. The commonwealth having "refused to take any action along the lines required in these letters," the petitioners at their own expense performed the work required.

Since the walls were made of soft, underburned bricks which were not suitable as outside walls, the owners of the buildings were obliged to incur additional expense to make it weatherproof.

In addition to the expenses incurred in connection with its wall, Webster suffered other damage. On November 23, 1953, before the boundary wall was reconditioned, there was a comparatively heavy, but not unusual, rain which resulted in flooding the basement of the Webster building and causing damage to property therein.

Webster and Boyden filed petitions to recover for the taking of its right to support and shelter and for special and peculiar damage to their buildings even though there was no actual taking. The trial court entered judgment in favor of the petitioners whereupon the commonwealth took exception and appealed.

The Supreme Judicial Court of Massachusetts held that the damage caused in laying out a limited access highway when the condemned buildings were torn down, leaving the interior walls of the Webster and Boyden buildings exposed and necessitating work to make the walls safe, was an injury which was special and peculiar within the statute providing for recovery of damages to property not taken, and the commonwealth was liable for the reasonable cost of tying in and weatherproofing the exposed walls and for the water damage to the Webster building. (G. L. (Ter. Ed.) c. 79, Sec. 12 as amended.) The court therefore overruled the commonwealth's exceptions.

New York. In this case [12] a landowner was not allowed to recover for alleged damages because of an appropriation of his right-of-way over adjacent lands which took place subsequent to a formal release of his claims negotiated between the landowner and the state at the time of the original taking.

The facts of the case disclosed that the Levinsons owned a large tract of land upon which was situated a main building which was used as a hotel or lodge. There were also a riding stable, a swimming pool, a baseball diamond, some tennis courts, and a number of other buildings and recreational facilities such as are generally found in an establishment of this kind which is ordinarily known as a summer hotel.

The landowners contended that the negotiated settlement and the "taking" of the right-of-way should have been regarded as separate transactions, for the settlement was not intended to release any rights in the right-of-way. The landowners argued that the highway had not been constructed on that part of the adjacent land where the right-of-way was located when the settlement was negotiated, and the "taking" of the right-of-way was an appropriation of the adjacent land, and not the original appropriation referred to in the settlement papers.

The state urged the court to hold that the landowners had not established that they had any rights in the right-of-way. Or, in the alternative, if they had any such rights, the release actually eliminated all claims for damages by reason of the interference with or the taking of the right-of-way. Furthermore, the state simply denied that the papers were signed under any mutual mistake of fact.

Assuming that the landowners had established an interest in the right-of-way, the court of claims agreed with the state that any claim for damages against the state was released by virtue of the provisions of the settlement papers, and particularly the "Agreement of Adjustment" and the "Release of Owner."

The "Agreement of Adjustment" dated June 21, 1950, set forth, among other things, that a sum of $5,000 was paid in consideration for the full adjustment of the claims the landowners had against the state.

The "Release of Owner" dated May 19, 1951, acknowledged the "Agreement of Ad-

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[12] Levinson v. State, 158 N.Y.S. (2d) 180, November 17, 1956 (See Memorandum 93, July 1957, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 343).

justment" and contained the following language which the court said was controlling:

> . . . and from any and all claims which claimant has or may have by reason of any estate or interest in the streams, lakes, streets, roads, highways or rights-of-way, if any, adjacent to or abutting on the above mentioned property required for the purposes of said project . . . . (Emphasis supplied by the court)

The court said that the above language, and particularly the underlined part, released any claims for damages arising because of any right, title or interest in the right-of-way, since the landowners' property, which was originally appropriated, was "adjacent to or abutting" thereon.

The court wanted to be sure, however, that it was clear that the release did not include any property interest itself. In other words, whatever right the landowners had in the right-of-way was still theirs, but there was now imposed upon those rights the newly constructed highway project. Only the damages resulting from such public use had been released.

The court also assumed for the sake of argument that at the time of the original appropriation, the landowners had acquired their right by prescription or otherwise, and that it constituted an easement over the neighboring land. The court repeated the rule that the value of such an easement could not be evaluated in gross and could not be ascertained without reference to the dominant estate which in this instance was the landowners' property. Upon such an assumption, the court said that if damage had resulted to the alleged right-of-way by reason of the original appropriation, it had been compensated for as consequential damages when the sum of $5,000 was paid to the landowners in accordance with the settlement.

In the light of the foregoing conclusions, the court felt that it was not necessary to determine any other issue, and the claim of the landowners was accordingly dismissed.

Pennsylvania. Pennsylvania statutes impose no liability upon the commonwealth for consequential damages when no property is taken. This fact was emphasized in a superior court decision decided in June 1957.

This case [13] involved relocation of a highway in Butler County.

Dean E. Moyer and Olivdene V. Moyer, his wife, were the owners of a house and lot in the Borough of Evansburg, Butler County, fronting 75 ft on old State Highway Route 78. In relocating the highway, it was moved away from the Moyers' lot some 30 ft, and a fill varying from 9 to 15 ft was made. No land was taken. Access to the Moyers' property was accomplished by filling in a portion of the old highway and making a steeply declining approach from an intersecting street, which approach ended in a cul-de-sac. The Moyers alleged that the value of their property had decreased. The borough council refused to assume liability for property damage resulting from the highway construction. Viewers appointed by the court reported that the commonwealth was not liable because no land had been taken, and appeal to the court of common pleas resulted in judgment adverse to the landowner. The judgment was affirmed by the superior court.

The Moyers alleged that a property right had been taken for which they were entitled to compensation under Section 10 of Article 1 of the Constitution of the Commonwealth. They argued that although no physical part of their property was taken, by depriving them of their ingress and egress to the state highway and by building a fill in front of their property, they lost a property right which was included in the above constitutional provision.

The Moyers' principal contention rested upon the premise that a borough, as a municipality under Section 8 of Article 16 of the Constitution of the Commonwealth, was liable for consequential damages. Therefore, had the work been done by the Borough of Evanburg the Moyers would have been entitled to damages. Upon that foundation the Moyers endeavored to base the proposition that the statutes amounted to an assumption

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[13] Moyer v. Commonwealth, 132 A. (2d) 902, June 11, 1957 (See Memorandum 96, November, 1957, Committee on Land Acquiaition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 351).

by the commonwealth of the borough's liability.

The superior court noted that the Constitution of the Commonwealth contained two provisions restricting the use of the power of eminent domain. Article 1, Section 10 required compensation only for property "taken or applied to public use," whereas Article 16, Section 8 required compensation "for property taken, injured or destroyed." It was important to note, according to the court, that Article 16, Section 8 applied to a municipal corporation, but not to the commonwealth, whereas Article 1, Section 10 was a limitation upon both.

The court declared that it was well settled that the constitution imposed liability upon a municipal corporation for consequential damages, but that no liability was imposed upon the commonwealth where no property had been taken. Therefore, contrary to the Moyers' allegation, damages which were merely consequential did not constitute a taking of property within the provisions of Article 1, Section 10 of the constitution. The court said the reason for the rule was obvious: In addition to many others, the commonwealth owns the highways of the state and constructs yearly thousands of miles of road. If it were to be liable for consequential damages the burden imposed on the commonwealth would be enormous.

The court ruled that the state highway law was not, either in its title or in its various provisions, the type of express legislative mandate, which was required to impose liability on the commonwealth for consequential damages resulting from the improvement of a highway within a borough without the taking of realty. The work "damages," appearing frequently in the statute, did not appear to the court to include consequential injury.

Judgment of the lower court in favor of the commonwealth was affirmed.

Another Pennsylvania case denied damages to a landowner whose house was damaged by a landslide resulting from a highway improvement. This case involved an actual taking.[14]

The facts of this case revealed that Lewis W. Holmes owned a lot with a 30-ft frontage abutting on West Fifth Avenue in McKeesport and a depth of 109 ft—a total area of 3,236 sq ft. In 1950, in the court of common pleas, Allegheny County petitioned for the appointment of viewers to determine and award damages to Holmes and other property owners whose property was taken, injured or destroyed by the widening of the avenue. Ten feet of the front of Holmes' lot was taken for the right-of-way. Additionally, 1,136 sq ft was occupied for slope easement, with the top of the slope running from a point on the westerly sideline of the lot 35.14 ft south from the right-of-way line to a point on the easterly sideline of the lot 40.57 ft south from the right-of-way line. The slope line ran through the middle of a two-story frame dwelling, resulting in its total demolition. There was a one-story cottage at the rear of the lot, 60 ft removed from the top of the slope line. Based on the report of the Board of Viewers, Holmes was awarded $8,000 on July 14, 1950, representing "the damages for all property taken, injured or destroyed." No appeal was taken.

On or about December 5, 1950, earth commenced to slide on the remaining portion of Holmes' lot, resulting in damage to the small cottage at the rear. On August 26, 1952, Holmes filed a petition asking for the appointment of viewers to ascertain and award compensation for damages suffered "by reason of the removal of the support necessary to the premises remaining." The petition alleged that the resultant "injury and damage to said premises was the necessary and unavoidable consequence of the non-negligent performance of said construction."

The court of common pleas rendered judgment for Holmes, and the county appealed, on the ground that the 1950 award was conclusively presumed to include all damages. The superior court held that where the Board of Viewers filed a report as to the damages to an owner's property caused by the widening of the street and the report was confirmed absolutely and no appeal had been taken, that award included consequential damages and the owner could not recover for any alleged subsequent damages.

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[14] In re Holmes' petition, 132 A. (2d) 918, June 11, 1957 (See Memorandum 96, November 1957, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 351).

The superior court said the lower court apparently reasoned that in a condemnation proceeding a municipality did not acquire "the right of the owner of the remainder of the tract to have the adjacent soil supported." In other words, where land was taken for public use, the right of support for the adjoining soil was not taken, but such rights should be retained by the owner, and improvements would have to be constructed so as not to interfere with that right, or further compensation would have to be made. In other words, the property owner should not be precluded from recovering damages for injury to his property arising out of a condition not ascertainable at the time the award was made, and which could not possibly have been considered as an item of damage even if alleged, since the condition giving rise to claim of damage was nonexistent at the time of claim and could not be recognized because of its speculative, remote and unforeseeable aspects. The superior court, however, held that such reasoning was contrary not only to law, but also to the facts [15] in the instant case.

Under established rule in Pennsylvania:

> Where a street or highway is laid out, the property owner must submit his whole claim for the damage caused by the opening and grading thereof, embracing consequential as well as direct injuries.

According to the court, it was beyond question, therefore, that the original award in the principal case must have included consequential damages.

Furthermore, not one of the many Pennsylvania appellate cases which the court examined upheld the decision of the court below. To the contrary, they all supported the contention of the county that the damages presently claimed were included in the first award. Having been adjudicated in the original proceeding, they could not have been made the subject of a second claim. No individual or municipality "should be vexed twice for the same cause."

The order of the court below was reversed and no subsequent award was allowed.

In dissent, Justice Ervin said that it seemed extremely unfair and contrary to the constitution to prohibit an owner from securing damages for an injury actually suffered. For a jury of view to fix damages for an injury which had not occurred and which might never occur could unduly penalize the municipality. To permit a jury of view to assess damages before the happening of the event would permit them to indulge in the rankest kind of speculation. How could a jury of view intelligently assess damages for something which had not occurred? Ervin believed it would be more reasonably for a second jury of view to assess the damages if and when such consequential damages occurred. Such a rule, according to the justice, would prevent the payment of consequential damages which had not and might not ever occur and, on the other hand, would allow to an owner damages intelligently assessed if and when they did occur. If the law of Pennsylvania needed changing so that justice may prevail, he was in favor of the changing.

Offset of Special Benefits. When part of a landowner's property is appropriated for highway improvements, and such improvements would be specially beneficial to the remaining property, courts generally permit such special benefits to be set off against damages to such remaining property. However, if the benefits are equally salutary to the public in general, then they are considered general in nature and cannot be set off against the severance damages. The Indiana case discussed below illustrates this principle. On the other hand, in a few states, benefits to the remaining land may be offset against the value of the land taken as well as that remaining. This doctrine was brought out in a Missouri case, also discussed below.

Indiana. This was an action by the state to acquire a strip of defendants' land for highway purposes. The circuit court, Jackson County awarded defendants the sum of $5,500 and the state appealed. [16]

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[15] Holmes' engineer, L. F. Savage, testified that the hillside in question had been "a sliding proposition" for over 50 years. It was certainly not "speculative, remote and unforeseeable" that further, and probably more severe slides would occur as a result of the new cut. (Footnote by the court)

[16] State v. Smith, 143 N. E. (2d) 666, 1957.

The state contended that it was error for the trial court to refuse evidence introduced by it to prove that part of the land in question actually had a value for something other than farming. According to the state, parts of the farm along the new highway had a higher value as small tracts than the property had as an entire farm.

Smith, the landowner, contended that the benefits which the state was attempting to show by the testimony of its witnesses were common to all the other owners whose lands were intersected by the relocation of the highway, and hence such benefits, if any, were general and not special.

The court held that, in line with its past decisions, any benefits which accrued to the property remaining after appropriation should be deducted from the amount of damages allowed; and the difference, if any, plus the damages allowed for the property actually appropriated, should be the amount of the award, but in no case should the total damages awarded be less than the damages allowed on account of the land and improvement actually appropriated. [17]

The court therefore concluded that if the value of residual land was enhanced because the location of the new highway had made it desirable for purposes other than farming, such enhanced value was a special benefit to the landowners, although other landowners along the highway might have been similarly benefited. The jury was entitled to consider such facts in determining the damages to be awarded, and the trial court erred in refusing to allow the question as to value of the remaining land as small tracts which would have presented this issue to the jury.

The judgment was reversed with instructions.

Missouri. The State Highway Commission of Missouri brought suit to condemn a right-of-way consisting of 5.09 acres across land belonging to Mr. and Mrs. Roy L. Mattox. [18] The jury returned a verdict of no damages. Mattox claimed this fact was a clear indication that the verdict was arbitrary and the result of prejudice. For this reason the case was appealed to the Kansas City Court of Appeals.

The facts brought before this court showed that the Mattox farm consisted of approximately 140 acres. It was located slightly south and west of the town of Bigelow in Holt County, and had been in Mrs. Mattox's family for over 50 years. An existing road running through the farm had a 40-ft right-of-way with a 20-ft gravel surface. The new road would be 24 ft from shoulder to shoulder with an 80-ft right-of-way.

Mattox claimed the existing road had always given adequate service. According to other witnesses, it had not. Mattox also claimed his farm was extremely fertile for corn, and that there was a grove of walnut trees many of which would have to be removed. These trees acording to Mattox, were worth $50 apiece. He placed the reasonable value of the farm at $350 per acre, and stated that its value would not be enhanced by the construction.

The defendants called Silas C. Combs, as a witness. He testified that the farm was reasonably worth $250 an acre and the fact that it would front on the farm to market road would not add to its value.

In presenting its case, the state highway commission called six witnesses, among whom were neighboring landowners, a real estate broker and the state highway commission's district engineer. The highest appraisal placed upon the land by these witnesses was $200 an acre, and the lowest figure was $185 an acre. Furthermore, these witnesses stated that after the road was improved the Mattox farm would be worth from $10 to $25 per acre more.

In reaching a decision, the court of appeals cited as authority the case of State ex rel. State Highway Commission of Missouri v. Baumhoff. [19] That case was another condemnation case in which the jury returned a verdict for the plaintiff and awarded the defendant no damages. The court in an exhaustive opinion held that if the amount of damages exceeded the amount of special benefits, the landowner was entitled to the difference, but if the special benefits exceeded the total damages, the landowner would recover nothing. In estimating damages, the value of the land taken and damages to

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[17] State v. Ahaus, 63 N.E. (2d) 199, 1945.

[18] State v. Mattox, 307 S.W. (2d) 382, 1957.

[19] 230 Mo. App. 1030, 93 S.W. (2d) 104, April 28, 1936.

the remaining tract might be computed and any special benefits to the remaining land subtracted therefrom, or the proper valuation might be taken as the difference between the reasonable market value of the entire tract before improvement and its reasonable market value thereafter.

In the instance case, the court held that the state had offered substantial evidence that the defendants would receive special benefits vastly in excess of the damages they would sustain. Thus it had no right to disturb the jury's finding. The judgment of the lower court was thus affirmed.

Admissibility of Evidence. Few segments of condemnation law are more unpredictable than the matter of what the courts will allow to be admitted as evidence for measuring damages. The cases summarized below clearly point this out, each case being decided on its own particular facts. Evidence admitted or denied ranges from that of comparable sales in the neighborhood to the inadequacy of rent reserved in a lease. Only two dealt with the same problem, that of evidence as to value of land taken where a reasonable possibility of a zoning change existed.

California. Heretofore, in determining the market value of property being condemned, the established rule in California was to allow prices paid for similar property in the vicinity to be admitted as evidence only through cross-examination of expert witnesses. In other words, after the expert offered his opinion of value, it was then the burden of the cross-examiner to bring out the sales upon which he relied so as to impeach his estimate. The rule was adopted to avoid unnecessary time-consuming procedures in the administration of justice. There is a long line of authorities in California supporting this view. The most recent Supreme Court of California case on the subject, however, overruled the principle and held instead that prices paid for similar property in the vicinity are admissible on direct examination.[20]

The facts of this case indicated that L. C. Faus and others owned strips of an abandoned right-of-way formerly used as a street car route, located in the middle of Huntington Drive. The strips were 60 ft wide and the county had condemned a 30-ft strip for the purpose of widening Huntington Drive.

The superior court entered judgment and the landowners appealed. The district court held, in part, that though experts who testified for the county on market value of property based valuation on sales where one of the parties possessed the power to condemn, where property owners, on cross-examination, failed to elicit the fact that latent power of eminent domain actually prevented sale from being true market transaction no grounds existed in evidence for striking any of the estimates of market value. The district court of appeal therefore, affirmed the judgment of the superior court. Justice Ashburn in a concurring opinion declared that all the difficulty in this case grew out of the established rule that sales of similar properties were not admissible upon direct examination, and that the real reason for the exclusion of evidence of other sales was to avoid attempts to use comparables as proof of market value. The rule in his opinion was designed to avoid collateral issues and their resultant delays, but was unrealistic in practice. He thought it should be re-examined and changed, but the district court of appeals was powerless to depart from the rule as laid down by the supreme court.[21]

The supreme court on appeal apparently adopted Justice Ashburn's theory, using this very case as the vehicle for effecting the change. In taking its position the court realized it was overruling a line of decisions, but believed the former rule was "contrary to logic, unrealistic, and followed in only a few other states."

The court held, therefore, that it was error for the lower court to refuse to give a requested instruction that the price paid for other property by a public corporation having the right of condemnation would not be a proper basis for determination of market value of the property condemned.

The court cited section 1872 of the Code of Civil Procedure which provided that evidence of prices paid for similar property in the vicinity, including prices paid by condemner, was admissible on direct examination and cross-examination of a witness who

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[20] County of Los Angeles v. Faus, 312 P. (2d) 680, 1957.
[21] Los Angeles County v. Faus, 304 P. (2d) 257, 1956.

was presenting testimony on the value of property being condemned.

Three judges dissented, on the theory that the old rule avoided prolongation of condemnation trials. Under the changed rule, the expert would not only be permitted, but would be practically required, to go into detailed facts upon direct examination concerning every sale which he had considered in forming his opinion. If he should fail to do so, the dissenters feared he might find that the court would sustain objections later upon the ground that the questions should have been asked on direct examination and, therefore, would not constitute proper redirect examination. This would tend to bring into the case on direct examination numerous collateral issues, and make direct examination of every expert unduly prolonged.

Connecticut. The Connecticut Superior Court upheld the appraisal of land by a state referee in a decision handed down on February 5, 1957.[22] In this case the landowner appealed to the superior court from the action of the state highway commissioner in appraising damages in the sum of $5,000. The matter was referred to a state referee for reassessing the damages. The referee heard witnesses, viewed the property and filed a report in which he found that the fair market value of the property at the time of the taking was $5,000, or a sum total of $9,500 damages.

In this case, the landowner challenged the referee's findings that there was no access from a public highway, that the highest and best use of the land was for residential purposes, that the land was of a wild character, and that the expense and the difficulty of making it available for residences were obvious. The landowner contended, also, that there was no evidence of the prices paid for similar land in the neighborhood with street frontages.

The landowner offered evidence as to its possible use for a gravel mine in support of his claim that it was available for light industry and sought to prove that its value for gravel mining was $100,000. The evidence proved, however, that no test pits had been dug. The exposed ground, as was shown by various cuts made in connection with the construction of the highway, did not appear to be gravel of even fair quality. It consisted mostly of boulders and pebbles. Furthermore, development of the 3-acre piece for light industrial use was obviously dependent on obtaining a right-of-way to the highway. The court was of the opinion that the obtaining of a right of access was surrounded by too many uncertainties to merit consideration.

The court noted that a witness for the highway commissioner had testified that the highest and best use of the land taken was for residential purposes, and also as to prices paid for similar land in the neighborhood with street frontages, including a parcel sold by the landowner. The referee's view of the land had furnished evidence of its character.

The court concluded that the landowner's claim that the challenged facts were found without evidence had no merit, and found no reversible error in the referee's report.

Massachusetts. This case was instituted after the corner of Brook Road and Adams Street in Milton was widened.[23] The landowners had petitioned the court for an assessment of damages for the taking of a part of their premises in December, 1953. When the jury returned its verdict for only $1,250 the landowners appealed, claiming that the trial judge erred in excluding certain evidence.

The property was attractively located with a 10-room structure designed for a doctor's office and a dwelling. A lawn ran from the house to within a foot or two of Brook Road and the corner where it sloped abruptly down about four feet to the level of the road. There was evidence that before the taking the premises were worth $26,500 and afterward $21,500.

The land taken comprised 290 sq ft and was triangular in form. The lawn adjacent to the taking had become eroded. The top layer of loam had washed down exposing the under layer of gravel upon which grass would not grow.

The landowners' expert witness was not allowed to give his opinion as to what would

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[22] Altman v. Hill, 129 A. (2d) 358 (See Memorandum 93, July 1957, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 343)

[23] Kennedy v. Commonwealth, 143 N. E. (2d) 203, 1957.

be reasonably necessary to restore the property to its approximate appearance before the taking. The trial judge observed that if the property was left in "a mess," the jury had taken that into consideration, for they had seen the property; that there was no embankment wall before the taking; that there was no place for a landscape architect in a land damage case; and that this was the usual case where the damages were the difference in value before and after the taking.

The landowners offered to prove that the area adjacent to the part taken would not now bear vegetation of any kind; would constantly erode and gradually work back toward the house; that to correct this condition it would be necessary to construct a retaining wall approximately 110 ft in length and 4 ft high which would prevent any further erosion; that in connection with this wall considerable landscaping in the area adjacent to the wall would be necessary; and that the fair cost of these items would be about $4,000.

The supreme judicial court held that it was error to exclude the evidence. The court said that had it been admitted, the jury could have disregarded it or they could have accepted the whole or any part of it in determining whether it was reasonably necessary and an economical method to make such a repair in adapting the premises to the new condition created by the taking. The evidence was competent as bearing upon the diminution in value caused by the taking and as corroborative of other testimony upon that issue.

The landowners' exceptions were sustained.

Maryland. January 3, 1957, the Court of Appeals of Maryland handed down an opinion which held that a reasonable possibility that land sought to be condemned would be rezoned could be considered in awarding damages.[24]

The state roads commission instituted eminent domain proceedings against Warriner and paid into the circuit court for Baltimore County the sum of $17,139.80 as its estimate of the fair value of the land and improvements taken and damages done to the property. A subsequent trial increased the award to $49,825.00 and the commission petitioned the court of appeals to lessen damages. This court, however, affirmed the lower court's decision.

At the time of the taking, the property was zoned for residential use, but testimony by Warriner was allowed to show that at that time the property should have been reclassified, and that possibly it would have been reclassified for light industrial use within a reasonable time if it had not been taken. In connection with this point the court said that it was for the jury to decide whether there was a reasonable probability that the land would be re-zoned.

In deciding the case the court said that evidence as to population growth of the area, expansion of its commercial area, demand for property for industrial use, proximity of land already zoned as light industrial, adaptability of land taken to such use, widening of a road and opening of an expressway in the vicinity, and opinions of expert witnesses that the highest and best use of land taken was for light industrial use, were sufficient to show at least a reasonable probability that, if land had not been taken by eminent domain, it would have been reclassified for light industrial use within a reasonable time. Therefore, to consider its influence upon the market value at the time of the taking, the evidence was properly admitted. The judgment of the lower court for higher damages was affirmed.

New Jersey. An award of $11,415.84 was made by the Law Division of the Superior Court of New Jersey in compensation for certain property taken by the state highway commissioner and the landowner appealed.

The property was substantially triangular in shape, having its apex at the intersections of State Highway No. 4, and Saddle River Road in Fair Lawn. At the time the proceedings to condemn were commenced, virtually all the property along the highway was zoned for business, except Gorga's property which was zoned for residential purposes. The reason given for this was that Fair Lawn had at a prior data intended to use Gorga's property as part of a county park (see Fig. 2).

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[24] State Roads Commission v. Warriner, 128 A. (2d) 248 (See Memorandum 92, April 1957, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 336).

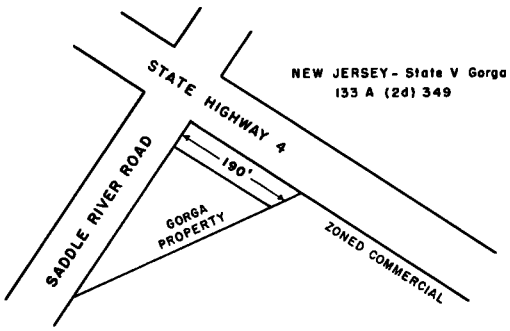

Figure 2.

Expert witnesses testified to the effect that the highest and best use of this property was for business, and it would not be worth very much for residential purposes. The state's witness testified he felt that the owner "would have a reasonable chance to have his property re-zoned . . . for business."

During the course of the trial, the landowner sought to introduce into evidence a certified copy of a zoning ordinance, adopted almost 10 months after the taking of the property, which changed the zone of the remainder of the property from residence to business. The trial court refused to admit this evidence. The principal question on appeal was the propriety of that ruling.

The state contended that the zoning change was merely speculative at the date of the taking, but the superior court pointed out that the assertion was not supported by the evidence. It noted that even the state's expert witness testified that there was a reasonable possibility of the property being re-zoned. The court, therefore, ruled that the zoning ordinance might well have been received into evidence.[25]

The superior court held that exclusion of the zoning ordinance warranted reversal, since it could not be said that such exclusion had no substantial effect on the jury's award. Although the award was based on the value of the property for business use, it was necessarily affected by the probability that such use might not be permitted. Proof of the zoning ordinance change might have minimized or eliminated any improbability of such a change.

This case was reversed and remanded for a new trial.

New Jersey. The Superior Court of New Jersey held recently that it was error to exclude evidence showing that rent reserved in a lease was inadequate, for it was a necessary element in determining the fair market value of business property.[26]

The Hudson Circle Service Center, Inc., was a New Jersey corporation which owned the property condemned by the state. The land acquired involved two parcels, one of 1.279 acres and the other of 0.701 acre out of a total area of approximately 20 acres owned by the corporation. The property was located in the town of Kearny, New Jersey. The first condemnation award was $223,500, but after appeal by both parties and a new trial in the superior court, law division, the amount was lowered to $168,200. It was this judgment which the corporation sought to have set aside in the appellate division.

Part of the premises acquired had been leased to Jersey Truck Center, a partnership owned by brothers of one Myron G. Auerbach, an officer and stockholder of the Hudson Circle corporation. The lease was for 21 years from April 30, 1948, at a rental of $7,200 per annum, payable in equal monthly installments of $600.

According to expert testimony, the amount of rent was determined primarily by estimating the gallonage of the site and then applying a "rule of thumb" factor to translate the estimate into a definite rental figure. The objective was to secure as low a rate as possible, but, the witness said, "we usually go up to two cents a gallon." The state objected to such testimony on the grounds: (1) that a specific annual rental of $7,200 was designated in the lease and an additional rental of two cents for each gallon of gasoline delivered to the demised premises became payable only in the event of default in the terms of the agreement incorporated in the lease; and (2) that a computation based on the number of gallons of motor fuel oil sold constituted evidence bearing on a claimed business loss, not to be the subject of computation in condemnation proceedings. The

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[25] State v. Gorga, 133 A. (2d) 349, 1957.

[26] State v. Hudson Circle Service Center, Inc., 134 A. (2d) 113, 1957 (See Memorandum 97, December 1957, Committee on Land Acquisition and Control of Access and Adjacent Areas, Highway Research Correlation Service Circular 354).

lower court apparently barred the testimony on the first ground.

The appellate division stated that, in order for an award to be considered just compensation, it was essential that it include all the separate interests in the property. To properly determine that amount, evidence was admissible here to support the contention of the corporation that the portion of the property leased to Jersey Truck Center had a rental value in excess of the rent reserved by the lease.

According to the court, this was not an attempt to prove business profits, although it had that collateral effect. The proffered evidence had as its objective the determination of what rental income would probably have accrued to a purchaser in the open market.

The court felt it should be noted that the lease in question incorporated within its terms the contract referable to the gallonage and the 2 cents per gallon additional rental payment. The court conceded that it was to become operative only in case of the breach of the lease terms, but it was, nevertheless, an important element of the terms of the entire property.

The state asserted that, on the theory that a tenant was entitled to recover the difference, if any, between the fair value of his leasehold and the actual rent reserved, the value of the lease computed by the gallonage method would greatly exceed the value of the property taken as estimated by one of the corporation's witnesses. The court held that this argument involved the value of the testimony and the weight to be accorded to it by the jury. It was not determinative of the basic issue, namely, whether the jury should have had an opportunity to consider the evidence.

The court noted that, in determining the fair market value of business property, the tendency now was to consider all of the elements which an owner or a prospective purchaser could reasonably urge as affecting its fair price.

Under these circumstances, the court determined that the rigid confinement of the evidence by the lower court to the rental fixed by the lease was substantial error, as it went to the heart of the question of valuation.

Judgment was set aside and a new trial was ordered.

New York. A difficult situation arises whenever cemetery land is condemned for highway improvement. The main difficulty lies in deciding what factors are proper to use in determining just compensation. Two extreme alternative views were presented in a recent case in the Court of Appeals of New York.[27]

In this case the action was brought by the St. Agnes Cemetery against the State of New York to recover damages for a portion of its land which was appropriated in 1952 for the construction of the highway. The trial court awarded $230,712.79 (including interest), for the 3.2 acres involved, and the appellate division of the supreme court affirmed the judgment "in all things." The issue appealed to the Court of Appeals of New York was whether the finding of value was the product of the application of an erroneous principle of law. The court of appeals, in a divided opinion, affirmed the judgment of the lower court.

The facts of the case showed that the cemetery was located two miles north of the city of Albany and had been in existence for almost a century, during which time there had been over 50,000 interments. Prior to appropriation, the cemetery contained about 150 acres. The condemned strip bisected the parcel of 13.939 acres located at the southern extremity of the cemetery.

The 13.939 acres of land in question were originally purchased for the cemetery in 1938 at a total cost of $22,500. By 1951 this parcel, as well as the adjoining cemetery property, had been improved by arranging it as a modern garden-type cemetery—that is, in place of headstones which are found in a monument cemetery, there were bronze markers set in concrete at ground level which gave the area a parklike appearance. Furthermore, as part of this improvement plans had been drawn for the construction of a memorial entrance with a central drive from the entrance to a memorial statue in the interior portion of the cemetery.

The testimony of the experts revealed enormous discrepancies as to the value of the property before and after appropriation. The state's witnesses estimated the market

[27] St. Agnes Cemetery v. State, 143 N.E. (2d) 377, 1957.

value of the tract at $42,000, the value of the remainder after the taking $16,000, leaving a difference of $26,000. The witnesses on the other side valued the 13.939 acres at $429,500 and the damage at $327,000.

The court of claims, following the general rule, found the reasonable market value of the affected area of the cemetery before appropriation and after appropriation. In determining the value before and after appropriation, the court referred to the sales prices which the cemetery had obtained for the sale of burial lots in the adjoining garden sections. Value of burial lots in the affected area of the cemetery was determined by applying the unit value based on the acreage sales price per lot, less sales costs, of the lots sold in the adjoining garden section to the number of lots affected.

The court ruled that where a property has a higher value because of a restricted use, the value resulting from such restrictive use is the highest and best use of that property.

The majority opinion said the weight of authority supported the rule that if the land taken is an integral though unused portion of a well-established cemetery, that is, a portion of the cemetery in which there have been no interments and no sales of graves, the property should, nevertheless, be appraised on the basis of its value for cemetery purposes.

The court stated that there was ample authority that testimony as to future income has been accepted by some courts as evidence. It conceded superficially that it appeared in these cases the trial courts reached a value derived from capitalization of profits, a theory of appraisal which had been condemned.[38] However, this court, conscious that business profits are not allowable, adopted the rule that present value of "clearly to-be-expected future earnings may be considered." The court found in this case the theory of damage and method of appraisal were based upon a proof of loss of the value of the land itself, and not a capitalization of profits. The court also noted that the circumstances of an established cemetery are less subject to change than business enterprises, and offer a safe guide to value. The method used by the court was not a capitalization of hope of expected profits. The actual sales of nearby burial plots were before the court with the prices received and the expenses incurred in connection with the sales. Besides, the court of appeals found that the judge of the court of claims disregarded any increment which would be the profit on the land.

The state argued that damages were to be measured by the value of the cost of replacement of the land. However, the principle of replacement cost, the court said, was not germane where the taking, as here, split apart property held in one parcel and used for a single purpose. Restoration of the use of such property as a unified whole was manifestly impossible. The land taken was irreplaceable by the substitution of other land in a different location. The court said evidence of replacement or reproduction cost had been accepted only in case of structures designed for special purposes, such as the stock exchange, but not as to vacant land.

The court of appeals ultimately found no error of law in the judgment of the court of claims. Consequently it was affirmed.

Van Voorhis, in a strong dissent, believed the judgment should have been reversed for the reasons, among others, given below.

It was conceded by the cemetery that there were no consequential damages. No part of the condemned portion had been developed, and no burials had taken place, and not a single plot had been sold. All that existed on the day of appropriation was a plan by a sales organization. The court's determination of value involved too many conjectural and speculative amounts. The uncertainty, said the dissenting judge, of the sale of lots even out of the developed areas was indicated by the high rate of commissions—30 percent—which the cemetery agreed to pay to the selling organization. While the trial court decided it would take 40 years to sell the lots of this area, there was no finding as to the date when the sales would begin. If these lots were not available for sale for a number of years, the trial court's calculation would be wide of the mark. Furthermore, no deductions were made for administrative expenses nor even for the permanent and current maintenance of the cemetery. According to one of the state's wit-

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[38] U.S. ex rel. T.V.A. v. Powelson, 319 U.S. 266, 1943.

nesses, these deductions would have amounted to 95 percent of the retail sales price of the individual lots. The dissenting judge said that the market value depended upon what a purchaser would pay for the 2,912 lots in this undeveloped portion of the cemetery at the appropriation date, not upon how much it was imagined could be realized from their individual sales during the unknown future. Finally, the judge indicated that the claimant introduced no evidence concerning what a willing buyer would pay for cemetery lots of this nature.

Utah. On January 10, 1957, the Supreme Court of Utah handed down a decision following a different line of reasoning in determining damages than did the New York court under somewhat similar circumstances in the case just discussed.[29]

The property in question, being condemned by the state for highway purposes, contained a residence, an antique business, a trailer court business and a sand and gravel business. The state road commission appealed from the award of the trial court. The supreme court noted that all the expert witnesses who testified for the owners, and for the state, fixed the value of the land by finding the product of the total tons of sand and gravel on the premises times the price per ton. The court held that this was not the proper method of fixing the fair market value of the property, calling attention to the fact that courts with great unanimity had rejected the proposition that just compensation is the equivalent of the total profits which would be realized from the future operation of the property. The measure of damages is, said the court, the market value of the property and not the output thereof. The landowners were not entitled to the value of the sand and gravel independently of the land of which it was a part. As a result of using the appraised value of the sand and gravel in arriving at the value of the land, the supreme court held that there was no competent evidence to support the verdict and remanded the case for a new trial.

Authority to Condemn

An especially difficult problem arises when one public authority, having the power of eminent domain, desires to condemn property belonging to another public authority. This problem is accentuated when property desired by a state belongs to the federal government, as presented in a New Mexico case in a very interesting setting.

New Mexico. A very important case concerning the Pueblo Indians, which doubtless will have very limited application outside the States of New Mexico and Arizona, was decided by the U. S. District Court for the District of New Mexico on February 8, 1957.[30]

This is a relatively unique case in which the State Highway Commission of New Mexico brought eminent domain proceedings against the United States and the Pueblo of Laguna (Pueblo Indians) for the purpose of acquiring a strip of land in Bernalillo County. The commission sought to take a total of 178 acres alleging the strip was necessary for the construction and improvement of a public highway as part of the National System of Interstate and Defense Highways. The commission also alleged that the action was brought pursuant to a congressional statute, and that the Pueblo of Laguna, as a corporate body, held title to the lands in question which were subject to the restraint on alienation by the United States of America through its Secretary of the Interior.

The defendants asked the court to dismiss the case and deny the plaintiff's motion for an order permitting immediate entry. The defendants based their answer on the grounds, among others, that only two days prior to the institution of this litigation, the commission applied to the Secretary of the Interior for the desired right-of-way so that the secretary had not had an opportunity to act on the application. Since the application was still being considered, they alleged that the plaintiff had not exhausted its administrative remedies.

The problem presented in this case was whether or not the Congress had enacted legislation sufficiently broad in scope and within constitutional limits, to permit a condemning authority to acquire Pueblo Indian lands by eminent domain.

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[29] State v. Noble, 305 P. (2d) 495.

[30] State of New Mexico, ex rel. State Highway Commission of New Mexico v. U. S. and the Pueblo of Laguna, 148 F. Supp. 508.

Congress by 44 Stat. 498, Chapter 282, Act of May 10, 1926, passed an Act to Provide for the Condemnation of the Lands of the Pueblo Indians in New Mexico for public purposes, and making the laws of the State of New Mexico applicable in such proceedings. The gravamen of the act is that lands of the Pueblo Indians of New Mexico, the Indian title to which had not been extinguished, could be condemned for any public purpose, and for any purpose for which lands might be condemned under the laws of New Mexico.

The court said it was of the opinion that there are three independent and separate methods of acquiring title to Pueblo Indian lands, namely, (1) by condemnation proceedings, as in the case at bar; (2) by negotiations with the Secretary of the Interior, as provided in Section 322 et seq., and (3) by cooperation between various heads of the Executive Department, as provided in Section 109(d) of the Highway Act of 1956. (23 U.S.C.A. Section 159(d))

The court ultimately decided, first, that under the Act of Congress of May 10, 1926, 44 Stat. 498, a remedy for condemnation of Pueblo Indian lands was created; second, that the Act of 1926 was still in effect, and was one of three separate and independent methods by which title to Indian lands for right-of-way could be acquired; third, that under the doctrine of State of Minnesota v. U.S., [31] the United States must be and has been joined as a defendant; and, lastly, that this court was the proper forum and had the jurisdiction to try and determine the respective rights of the parties.

The court, therefore, upheld the authority of the state highway commission to condemn land across property held by the U.S. in trust for the Pueblo Indians.

Abandonment of Condemnation Proceedings

Occasionally an abandonment of condemnation proceedings results in genuine injury to the property of a landowner. It has been difficult, however, to get recovery in the courts due to the generally accepted reasoning that a highway commission ought to have full use of its discretion in altering and abandoning a proposed highway construction without incurring liability. A case involving this problem was decided by the Supreme Court of Missouri based on the above reasoning.

Missouri. The plaintiff, in this case [32] brought a claim against the highway commission for an alleged taking and damaging of his property as a result of proposed construction of a highway over his land and the subsequent change of location of the proposed highway. The trial court dismissed the petition on the grounds that it failed to state a claim upon which relief could be granted. The plaintiff appealed to the Supreme Court of Missouri.

The facts disclosed that on May 1, 1954, the plaintiff purchased approximately 250 acres of land in Clay County, Missouri, and then started to develop it as a subdivision to be known as Hamilton Heights. Shortly thereafter he was told by agents of the Missouri State Highway Commission that a new limited access highway was to be constructed over a part of his land, and that he should not develop that part of his land, because if he did the improvement placed thereon would be lost to him. He was then allowed to examine the highway plans and surveys prepared by the highway commission for the proposed highway, and he redesigned his subdivision plans to correspond therewith. The highway commission attempted to negotiate with him for the purchase of the right-of-way over his land, but the plaintiff declined because he needed more time to determine the proper price. Two weeks later the commission informed him that the location of the proposed highway had been changed, and that no land of the plaintiff's was to be taken. Plaintiff then alleged that because of this abandonment he was damaged in the amount of $148,000.

The plaintiff stated that although none of his property was physically invaded or trespassed, he based the theory of his case upon the constitutional principle that his private property could not be taken or damaged, for public use without just compensation. The sole question before the supreme court was whether the above mentioned

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[31] 305 U.S. 382.

[32] Hamer v. State Highway Commission, 304 S.W. (2d) 869, 1957.

acts amounted to a taking or damaging of plaintiff's property within the meaning of Art. I, Sec. 26, Constitution of Missouri 1945.

The court said that while it is not always necessary that there be an actual physical taking of any part of property in order to have a taking or damaging thereof within the meaning of the Constitution of Missouri, it is necessary that there be an invasion or an appropriation of some valuable property right which the landowner has to the legal and proper use of his property, which invasion or appropriation must directly and specially affect the landowner to his injury.

The court said that a close analogy to the present situation was to be found where condemnation proceedings are abandoned after they have actually been instituted, and the landowner then seeks compensation for the damages alleged to have resulted from the pendency of the proceedings. However, the court said that such a situation obviously presented a stronger case for the landowner than did the facts of the present case. The court held that the changes plaintiff made for the future use of his property in expectation that the highway commission would purchase or take by condemnation the right-of-way for the proposed highway were entirely voluntary on his part, although possibly ill advised under resulting circumstances. It had expressly been held that there can be no recovery by reason of the constitutional provision against taking or damaging private property for public use, for loss or expense resulting from voluntary acts of a landowner in making changes on his premises in expectation that condemnation proceedings will be prosecuted to judgment.

The rationale the court adopted for this case is expressed in the following language:

> The highway commission must, for obvious reasons, have the right to alter or abandon a proposed location of a highway without incurring liability to landowners along the abandoned route. A property owner who voluntarily makes changes on his property in anticipation that a proposed public improvement will be constructed thereon or nearby does so at the risk of losing his investment if the public agency exercises its unquestioned right to abandon the project or move it to a different location.

The judgment was affirmed.

Procedures

For the sake of fairness and justice, condemnation procedures of every state are elaborate systems designed to fulfill the due process requirements of the Fourteenth Amendment. A Kansas case was decided recently by the U. S. Supreme Court in which the question of adequate notice was raised.

U. S. Supreme Court (Kansas). In this case[33] the U. S. Supreme Court held that a single newspaper publication used to notify landowner that his property was being condemned for highway purposes was not adequate notice as required by due process even though in accordance with state statutes.

The facts of the case revealed that Walker owned land in the City of Hutchinson, Kansas. In 1954 the city filed an action in the District Court of Reno County, Kansas, to condemn part of his property in order to open, widen, and extend one of the city's streets. The proceeding was instituted under the authority of Article 2, Chapter 26 of the General Statutes of Kansas, 1949. Pursuant to Sec 26-201 of that statute the court appointed three commissioners to determine compensation for the property taken and for any other damage suffered. These commissioners were required by Sec 26-202 to give landowners at least ten days notice of the time and place of their proceedings. Such notice could be given either "in writing . . . or by one publication in the official city paper . . . ." Walker was not given notice in writing but publication was made in the official city paper of Hutchinson.

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[33] Walker v. City of Hutchinson, 352 U.S. 112, 77 S. Ct. 200, 1956 (See Memorandum 92, April 1957, Committee on Land Acquisition and Control of Access and Adjacent Areas, Highway Research Correlation Service Circular 336).

The commissioners fixed his damages at $725, and pursuant to statute, this amount was deposited with the city treasurer for the benefit of Walker. After the time authorized by Sec 26-205 for an appeal from the compensation award had elapsed, Walker brought this action in the Kansas District Court. His petition alleged that he had never been notified of the condemnation proceedings and knew nothing about them until after the time for appeal had passed. He charged that the newspaper publication authorized by the statute was not sufficient notice to satisfy the Fourteenth Amendment's due process requirements. He asked the court to enjoin the City of Hutchinson and its agents from entering or trespassing on the property "and for such other and further relief as to this court seem just and equitable." After a hearing, the Kansas trial court denied relief, holding that the newspaper publication provided for by Sec 26-202 was sufficient notice of the commissioner's proceedings to meet the requirements of the due process clause, and on appeal the state supreme court affirmed. (178 Kan. 263, 284 P. (2d) 1073, June 11, 1955). From that decision the U. S. Supreme Court allowed an appeal on the constitutional due process question.

Measured by the principle that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests, as stated in the case of Mullane v. Central Hanover Bank and Trust Co. (339 U.S. 306, April 24, 1950), the supreme court held that the notice by publication here fell short of the requirements of due process. The court said that it is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In the Mullane case, the court pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case the court held that there seemed to be no persuasive reasons why such direct notice could not have been given. Walker's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appeal if he wanted to be heard as to its value.

The court stated that there is nothing peculiar about litigation between the government and its citizens that should deprive those citizens of a right to be heard. Nor is there any reason to suspect that it will interfere with the orderly condemnation of property to preserve effectively the citizen's rights to a hearing in connection with just compensation. Notice by publication in too many instances is no notice at all. The court warned that if such notice were permitted it would leave government authorities free to fix one-sidedly the amount that must be paid owners for their property taken for public use.

For the foregoing reasons the judgment of the Supreme Court of Kansas was reversed and the case was remanded for further proceedings not inconsistent with this opinion.

Justice Frankfurter dissented on the ground that the only constitutional question raised by Walker was whether failure to give adequate notice of the hearing on compensation of itself invalidated the taking of his land, apart from any claim of loss. Frankfurter suggested that Walker should have had to show that the provisions for payment as they operated in this case were inadequate before he could attack the Kansas statutory scheme for compensation in condemnation cases. The justice stated that since on the record the compensation was not alleged to be inadequate, the taking was valid and the judgment of the Kansas Supreme Court should have been affirmed.

Justice Burton's dissent was on the ground that the statutory provision under consideration was constitutional. This justice considered that the length and kind of notice of proceedings to determine just compensation was largely a matter of legislative discretion, and was not ready to hold that the Constitution of the United States prohibited the people of Kansas from choosing the standard here in controversy.

Relocation of Highways

The relocation of a highway by its very nature disturbs established uses of property located on the old route. In spite of the fact that courts generally have held that it is in the discretion of highway authorities to make the final decision as to whether a highway should be relocated or not, landowners continue to bring the matter before the

courts on one ground or another. A recent Iowa district court decision is in point.[34]

Iowa. Action was brought by two landowners, whose property would be adversely affected by the proposed relocation of the highway and its extension into the westerly part of Sioux City, and one John C. Kelly, a prominent business man and civic leader of the city, suing in a representative capacity. The plaintiffs did not object to the improvement, but they asked for an injunction to restrain the city council of Sioux City and the Iowa State Highway Commission from proceeding with the proposed improvement in the location selected. They suggested an alternative route a short distance north of the presently proposed location.

The plaintiffs alleged that the proceedings were illegal. They believed the city council should have had a public hearing on the proposed extension into Sioux City with prior notice to the public of such hearing, before adopting the resolution.

In compliance with federal regulations a public hearing on the proposed relocation had been held, at which time the members of the Iowa State Highway Commission were present, and the plaintiffs were heard and registered their objections. This hearing was duly certified to the Federal Bureau of Public Roads by the chief engineer of the Iowa State Highway Commission, and the certificate stated that the said Iowa State Highway Commission had considered the economic effects of the relocation of the road in question, and that due notice of the hearing was given.

Where the highway was within the limits of Sioux City, it was necessary that the state highway commission get the approval of the city. This was done, and the city by resolution, which was offered in evidence, approved the detailed plans of the Iowa State Highway Commission. Complaint was made that a public hearing should have been held by the council prior to the approval of these plans, and that a three-fourths vote of approval was required. The law provides that the state highway commission may, with the approval of the city council of the city or town, extend the primary road system into and through a city or town, and that the route and location shall be determined by said commission. The court could find no provision in the law that under these circumstances a hearing by the city council is necessary for such approval.

The court has no jurisdiction over the selection of routes, this being a matter for determination by the state highway commission. The decision of the highway commission is final. It might be true, said the court, that the highway commission encouraged the city council to act with speed, and that the commission, in effect, told the council that they must either approve the plans as set out or the whole project would be delayed past this year. However, according to the court, that was not material here. If the various agencies followed the law and substantially complied therewith, then it followed that their action must be approved and the petition of the plaintiffs for an injunction was refused.

Right-of-Way Costs and Land Values

As indicated in Figure 3, farm real estate values continued to increase during the period from March 1, 1957 to March 1, 1958. Although dollar values increased in every state, and increased by 5 percent or more in 41 states, the national average increase of 6 percent was one percent less than the period for March 1, 1956 to March 1, 1957 (7 percent).[35]

Biggest increases took place in two groups of states—8 percent or more—one group consisting of Atlantic Coast states extending from Maryland to Massachusetts, and the other including three Northern Plain states—North Dakota, Nebraska and Kansas.

According to the Department of Agriculture, the recession in non-farm business activity has so far had little effect on the farm real estate market, which the department attributes to the fact that the agricultural segment of the economy has not been as adversely affected recently as have other sectors; and also because the farm real estate market reacts slowly to moderate changes in non-farm business activity.

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[34] Kern v. Peck, Docket No. 80743 Equity, June 1957.

[35] Current Developments in the Farm Real Estate Market, Agricultural Research Service, U. S. Department of Agriculture (May 1958).

Farm real estate reports expect prices of farmland to decline slightly in the summer and early fall of 1958.

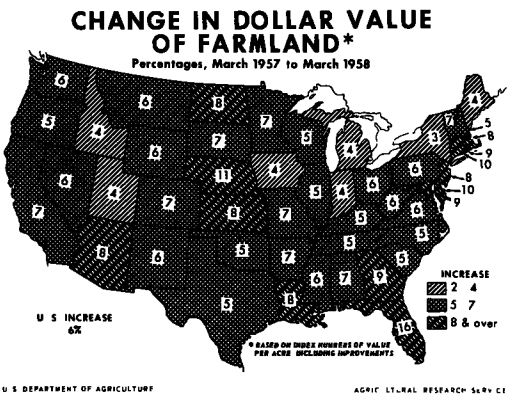

Figure 3.

CONTROL OF ACCESS

Now that Minnesota,[36] New Mexico[37] and North Carolina[38] during their 1957 legislative sessions have passed laws providing for the construction of controlled-access highways, all states except Arizona have specifically authorized the construction of such highways.

Wyoming extended the authority of its state highway department by permitting it to control the use of highway access. Both private and commercial access rights may be granted, but if private access is allowed, it cannot be used for roadside business or commercial enterprise.[39]

Authority to Control Access

The courts of three states, North Carolina, Illinois, and Maryland, were confronted with questions as to the extent of the highway department's authority to control access. It is interesting to note that even though the North Carolina case arose prior to the enactment of the state's control of access statute, the highest court of the state held that the state highway and public works commission had the authority to construct controlled-access highways.

North Carolina. In the recent case of Hedrick v. Graham[40] the Supreme Court of North Carolina held that under existing statutes the state highway and public works commission has authority to exercise the power of eminent domain to condemn or severely curtail an abutting landowner's right of access to a state highway adjacent to his property upon payment of just compensation.

This case arose when the state highway and public works commission attempted to condemn certain property owned by Hedrick and to use it as a part of a controlled-access highway. The landowner, Hedrick, asked the court for an injunction, alleging that the state was without legal authority to create controlled-access highways. The lower court refused the injunction and Hedrick appealed to the state supreme court.

The supreme court noted that the Federal-Aid Highway Act of 1956 in Sec 108(a), 23 U.S.C.A. 158(a) states:

> "It is hereby declared to be essential to the national interest to provide for the early completion of the 'National System of Interstate Highways'. . . . It is the intent of the Congress that the Interstate System be completed as nearly as practicable over a 13-year period and that the entire system in all the states be brought to simultaneous completion. . . . All agreements between the Secretary of Commerce and the State Highway Department for the construction of projects on the Interstate System shall contain a clause providing that the state will not add any points of access to, or exit from, the project in addition to those approved by the Secretary in the plans for such project without the prior approval of the Secretary."

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[36] H. 57.
[37] H. 211, Ch. 234.
[38] H. 123, Ch. 993.
[39] S. 86, Ch. 67.
[40] 96 S.E. (2d) 129, January 11, 1957 (See Memorandum 92, April 1957, Committee on Land Acquisition and Control of Access and Adjacent Areas, Highway Research Correlation Service, Circular 336).

The court also noted that this act provided for the apportionment of federal funds among the states for the purposes of the act, and that Sec 108(h) provided for construction by the states of such highways in advance of apportionment of federal funds.

Since the reconstruction of the highway in question was under the control and direction of the commission and according to statute (G. S. Sec 163-18 (1)), the commission would have such powers as would be necessary to fully comply with the provisions of present or future federal-aid acts, the court thought it a fair inference that the reconstruction of the highway was being done in compliance with the state statutory requirements, and that it was being reconstructed to meet the standards and requirements of the 1956 Federal-Aid Highway Act, so that it could be incorporated into the National System of Interstate and Defense Highways.

The court adopted the following observations as underlying practical reasons for its decision:

> "Motor car transportation is a basic need of modern society. It is of vital importance in the social and economic life of our people. The development of high speed motor car transportation has brought more and more traffic congestion and an ever mounting grisly toll of automobile accidents. Forty thousand deaths, a million and one-half injuries, and two billion dollars worth of property damage each year (Levin, 'Public Control of Highway Access and Roadside Development 3'—Public Roads Administration, 1943) demonstrate the gravity of the problem confronting public highway authorities."

The court recalled its holding in another case (Sanders v. Town of Smithfield, 221 N.C. 166, 19 S.E. (2d) 630, 633, April 8, 1942) in which it was pointed out that the owner of abutting property had a right in the street beyond that which was enjoyed by the general public, or by himself as a member of the public, and different in kind, since egress from and ingress to his own property was a necessity peculiar to himself. In citing other authorities, the court described the right as in the nature of an easement appurtenant to the property, and abridgement or destruction thereof by vacating or closing the street, resulting in depreciation of the value of the abutting property, may give rise to special damages compensable at law. Beyond acceptance of that fundamental principle the supreme court admitted authorities differed as to practically every other phase of the subject under discussion. However, following the line of authorities considered commendable and controlling, the supreme court decided that it was settled law in North Carolina "that under such circumstances the interference with the easement, which is itself property, is considered pro tanto a 'taking' of the property for which compensation must be allowed, rather than a tortious interference with the right."

The court acknowledged that the most important private right involved in controlled-access highway cases was the right of access to and from the highway by an abutting landowner. It stated the basic problem in every case involving destruction or impairment of the right of access was to reconcile the conflicting interests—i. e., private versus public rights. The court held that the time had come when an ever-increasing consideration must be given to the promotion of public safety on the highways and to the concept of roads whose purpose was not land service but traffic service.

The court explained that there are two methods available for curtailing the right of access—the right of eminent domain and the police power. The court made the distinction that eminent domain is the power of the sovereign to take or damage private property for a public purpose on payment of just compensation, while the police power is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguarding of the public interests. The construction of controlled-access highways is bound to cause a dislocation of rights. Justice demands that these dislocations be adjusted in a way that will be fair to both property owners and the public.

The court thought there seemed no doubt that the General Assembly of North Carolina could authorize the state, or a governmental agency or instrumentality of the state, to exercise the power of eminent domain to condemn or to severely curtail an abutting landowner's right of access to a public highway adjacent to his property for the con-

struction or reconstruction of a controlled-access highway upon the payment of just compensation for the destruction or impairment of his right, which is in the nature of an easement appurtenant to his property, and upon giving him a reasonable notice and a reasonable opportunity to be heard.

The court recalled the failure of the 1951 session of the general assembly to enact into law a bill introduced to provide for limited-access roads by the commission but stated that this fact did not change its opinion. The statutes conferring the power of eminent domain upon the commission, the court stated, were not ambiguous or of doubtful meaning, but were so clear and plain, so general and comprehensive in nature and the object so general and prospective in operation that there could be no reasonable doubt as to their meaning.

The court said that it was a well-known fact that some 170 miles of limited-access roads were constructed by the state in 1955, and the general assembly did nothing to stop such work. Such legislative acquiescence the court thought was entitled to some weight.

In concluding the case, the court held that the complaint did not state facts sufficient to constitute a cause of action for injunctive relief against the individuals comprising the membership of the state highway and public works commission.

Illinois. Questions concerning the extent of the state's authority to condition the use of access rights were presented to the Supreme Court of Illinois in Department of Public Works and Buildings v. Finks.[41]

A resume of the facts showed that in 1944 a large segment of Route 66 was designated by the Department of Public Works and Buildings as a freeway. Thereafter, eminent domain proceedings were instituted in the circuit court to acquire certain land and to extinguish or limit the rights of access, air, light and view of the owners of certain property abutting Route 66 in the vicinity of the City of Lincoln. Finks owned some land abutting the highway. None of his land was to be taken, but the department sought to limit his right of access and to extinguish rights of air, light and view. The jury returned a verdict awarding Finks $500 as compensation for the rights taken. The landowner appealed.

The theory of the landowner's case was that since the object of the proceeding was to assess the value of the rights of access, air, light and view being taken, the proper measure of damages should have been determined from the decline in value of the entire property affected by the taking. And inasmuch as access to 150 acres of landowner's property would be limited as a result of this action (unless Kickapoo Creek was bridged), the landowner reasoned that all 150 acres should have been mentioned in the case, and not just the 80 acres that abutted the highway.

The supreme court conceded that the argument had a logical appeal, but thought it impractical. The state was interested in acquiring the rights of direct access to the highway. The more remote the property was from the highway, the greater the probability that the damage, if any, would be consequential. Here, in the case of farm land, the state had pursued its title search back a quarter of a mile from the highway. The supreme court agreed with the trial court that the description of the area was sufficient to enable the jury to determine the nature of the property, and to ascertain its highest and best use. Beyond that point, the court held, the condemner could hardly be required to explore either the ownership of the land or its configuration. If the landowners felt that other land was injured, they should have filed a cross petition describing that land.

Another contention of the landowners was that the department had exceeded its statutory authority when it attempted to condition the use of the existing entrance at the east line of their property by the phrase "so long as the land served thereby was used for residential or farming purposes." The power to extinguish, the landowners argued, was not the power to condition.

The court said that in its opinion statutory power to "extinguish . . . any existing

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[41] 139 N. E. (2d) 242, 1956 (See Memorandum 93, July 1957, Committee on Land Acquisition and Control of Access and Adjacent Areas, Highway Research Correlation Service Circular 343).

rights . . . of access" must have meant the power to extinguish those rights of access that unduly impinged upon the flow of traffic on the freeway. The landowner suggested no purpose which might have prompted the legislature to require the acquisition of access rights beyond the extent necessary to protect through traffic; in other words, the state was not required to extinguish completely all rights of access of property abutting upon existing highways which were designed as freeways. What was involved in limiting rights of access, rather than extinguishing them, was not, as the landowner urged, an exercise of the zoning power. The power involved was that of eminent domain and the condemner was required to pay the difference in value caused by the limitation of access.

The court said that when rights of access were only partially extinguished, however, those taken must be clearly distinguished from those that remained. Responsibility for an accurate description of the rights to be taken rested on the condemner, not on the property owner or the court. In this case the department had not complied with this duty and the court remanded the case to the lower court.

Maryland. The court of appeals handed down a decision to the effect that landowners, who had deeded a part of their land and their right of highway access to the state highway commission for a controlled-access arterial highway, and who were asking for an order directing the commission to grant them a right of access, were not entitled to such access because the commission unlawfully granted access to the highway to others.[42]

The report of the case indicated that the State Roads Commission of Maryland on September 8, 1955, had brought suit against several members of the Jewell family for ignoring a limitation to their access rights to the Annapolis Bypass. The commission alleged that the Jewells on December 30, 1952, had conveyed land to the commission for the highway, a controlled-access arterial, and all rights of ingress and egress from the bypass to their remaining property, a filling station. The barriers put up by the commission to deny access had been removed by the Jewells. The commission asked the court to prevent the Jewells from breaking the denial of access clause contained in the deed. The Jewells, on the other hand, claimed that the deed was procured in an improper manner by the commission.

After a hearing, the chancellor passed an order in favor of the commission, from which the Jewells appealed to the court of appeals.

In this court, the Jewells contended that sometime prior to 1950 the commission had determined that it was necessary to construct the Annapolis Bypass. However, before the dissemination of general knowledge relative to the construction of the bypass and prior to the acquisition of land, the commission by one or more of its members, agents or employees "must have disclosed its plant" to Parr and Della. Thus provided with such advance information from the commission, Parr and Della, during the years 1950 up to and including 1954, procured various tracts of land along the proposed bypass. The commission, according to the Jewells' allegations, had conspired with Parr and Della to grant access to their properties at various points along the bypass, despite the action of the commission in designating and constructing the road as a controlled-access highway. When the commission purchased the property in question in December 1952, its representatives implanted in the minds of the Jewells the conviction that this highway was to be of a "non-access" type. It failed to disclose that only Parr and Della were to be accorded the "exclusive bounty of access roads." Subsequent developments had convinced the Jewells of the utter bad faith in such "capricious, arbitrary, collusive and discriminatory acts." They asked that the commission be ordered and directed to grant them the right to maintain a 30-ft entrance into their gasoline filling station, permitting vehicles to pass thereto from the northbound artery of the Annapolis Bypass.

The above argument for the Jewells was disposed of by the court stating that:

> By Code 1951, Article 89B, Section 3, all records of the state roads commission were public records. Before the adoption of

[42] Jewell v. State Roads Commission of Maryland, 131 A. (2d) 727, May 8, 1957 (See Memorandum 95, September 1957, Committee on Land Acquisition and Control of Access and Adjacent Areas, Highway Research Correlation Service, Circular 346).

> Chapter 59, Acts of 1956, we know of no requirement that plats containing the information, which the Jewells allege that Parr and Della "must have received" from the commission, be denied the public. By that act, 1956 Cumulative Supplement, Article 89B, Section 9D, such plats and maps showing such information "shall not be considered public record of the commission, and shall not be open to public inspection except by permission of the commission, ..." From this legislation it appears that the reason for withholding the plats and maps is to prevent their use by speculators.

The court held that even assuming, without deciding, that the commission was capricious, arbitrary, collusive and discriminatory, as alleged, in granting benefits to Parr and Della, and that access should not have been granted on this controlled-access highway, no authorities were either found by the court or cited to it which would justify the granting of such access to the Jewells. In addition to that reason the court seemed to feel that the Jewells were asking the court to judicially sanction their violation of the deed on the ground that others had acted unlawfully.

Assuming, again without deciding, that fraud had been practiced by the commission in obtaining the deed from the landowners, the court said the Jewells had neither sought to have that deed set aside and declared null and void, nor had they offered to return the purchase price. Only in their argument in this court had they made such an offer, and the court held, in effect, that it was too late here. The argument and offer should have been made before the chancellor, and, therefore, the order of the lower court was affirmed.

Access Rights on New Highways

The courts of seven states have now held that when a controlled-access highway is established in an area where no highway previously existed, there can be no taking of rights of access since none ever existed. Two of the pertinent decisions—in Connecticut and Washington—were handed down in 1957.

Connecticut. An interesting decision pertaining to access rights was handed down by the Connecticut Supreme Court of Errors on March 5, 1957. The South Meadows Realty Corporation, the owner of two tracts abutting the Hartford Bypass, asked for a declaratory judgment determining whether it had a right of direct access to the bypass. The Superior Court of Hartford County held that the corporation had no right of access thereto. On appeal, the Supreme Court of Errors affirmed the judgment of the lower court.[43]

The bypass was constructed some years ago as a part of the Wilbur Cross Parkway under the provisions of a special act. The term "parkway" is defined by Connecticut statutes as a "trunk line highway . . . to which access may be allowed only at highway intersections designated by the highway commissioner and designed by him so as to eliminate cross traffic of vehicles." The city deeded certain land, including the portion of the bypass abutting on the property now owned by the corporation, to the state in 1944, the deed containing no provision for direct access from any of the abutting land remaining in the ownership of the city. In 1947, after the parkway, including the bypass, had been constructed and in use for several years, the city quitclaimed to one Peter M. Anselmo the land now owned by the realty corporation.

Access to the land conveyed to Anselmo was, and still remained, by way of Airport Road. Buildings constructed by the realty corporation or its predecessor in title were so designed as to permit access thereto from Airport Road. No request was made at that time for direct access to the bypass.

In 1952, the realty corporation first sought permission from the highway commissioner for direct access from its land to the bypass. The requested permission was refused.

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[43] South Meadows Realty Corporation v. State, 130 A. (2d) 290 (See Memorandum 94, August 1957, Committee on Land Acquisition and Control of Access and Adjacent Areas, Highway Research Correlation Service, Circular 345).

The corporation now claimed that since its land abutted on the bypass, the right of direct access was an existing easement appurtenant to its land. It based this contention upon its assertion that the right of direct access came into being when the bypass was constructed, and that the state had neither paid damages for the deprivation of the claimed right not taken any steps to acquire it from the city or any subsequent owner.

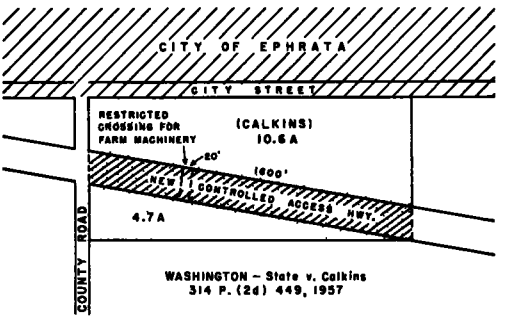

Figure 4.

The court answered that the bypass was not a conventional highway, but was part of a parkway which fact was stipulated by the parties at the trial. The land in question was not landlocked and the claimed right of direct access to the bypass was not based on any claim of a right-of-way by necessity. The court held, on the basis of its finding, that the bypass was a part of the parkway, and that the corporation did not have the right of direct access to the bypass.

Washington. State v. Calkins[44] involved a condemnation action to establish a new controlled-access highway, extending a distance of approximately five miles from Ephrata to secondary state highway No. 11-G, and connecting Soap Lake and Moses Lake in Grant County.

The land condemned was a part of the Calkins' 20-acre farm which was rectangular or oblong in shape. The farm was bordered on the westerly side by a county road and on the northerly side by a city street, which marks the city limits of Ephrata. The right-of-way involved was 1,600 ft long and 150 ft wide. It diagonally bisected the Calkins' property and embraced a total of 4.42 acres. The Calkins were left with a 10.6 acre tract of land on the north side of the highway, and a 4.7 acre tract of land on the south side of the highway. The north tract continued to be served by the city street. The tract to the south continued to be served by the county road which provided access to the new highway. A restricted crossing was provided the Calkins for the purpose of crossing the highway with farm machinery (see Fig. 4).

The principal question was whether there had been a constitutional taking of an alleged easement of access. During the trial testimony was taken relative to the nature of the highway project, the value of the land taken, and the severance damages to the land remaining in the north and south tracts. The estimates of total damages ranged, on behalf of the state, from $10,958 to $13,610; and on behalf of the Calkins, from $25,600 to $40,000. Much of this testimony was based upon the theory that the best and highest use of the farm acreage was for subdivision purposes. The jury returned a verdict of $19,000 and the state appealed.

The court held that where a new controlled-access highway was established by condemnation in an area where no highway previously existed, there was no taking of an easement of access, because such an easement had never in fact existed. And since the property owner had no easement, it followed that an allowance of damages for the loss of such a non-existent easement or right of access would be unrealistic, unjustified in fact, and improper.

One of the trial court's instructions emphasized the loss by the owner of access rights to the highway, and of the rights of air, view, and light. The supreme court said this constituted reversible error, because the claimed loss of the property rights of access, air, view and light, were not proper issues in this case, for the reason given in the preceding paragraph.

According to the court, the market value of the property remaining might have been affected by the nature and the extent of the taking for the controlled-access highway, the separation of an owner's land into different tracts and the added inconvenience, if

[44] 314 P. (2d) 449, August 15, 1957 (See Memorandum 96, November 1957, Committee on Land Acquisition and Control of Access and Adjacent Areas, Highway Research Correlation Service, Circular 351).

any, in managing the property and in going from one tract to the other. Additional circumstances to be considered included (1) the access provided, if any; (2) the presence of existing streets, roads and highway; and (3) the reasonably probable uses of the remaining property in determining the question of special benefits, if any, to the Calkins. But the severance damages must not be based upon any theory of a loss of access rights to the highway.

The supreme court noted that there was much confusion between (1) the supposed easement or right of access to the highway and (2) the inconvenience of access from one part of the farm to the other after construction of the new controlled-access highway. The court felt that the trial judge erred in ruling that the expert witnesses could testify as to loss of access in their estimates or opinions as to damages to the remaining property. Under the circumstances the line of questioning pursued tended to emphasize to the jury the non-existing easement or loss of access to the highway.

It was argued that the trial court improperly admitted expert testimony relative to the commercial value of highway frontage property located in Ephrata. The court said that this testimony would have been admissible if the case had involved an existing highway. Because it did not, and since there was no easement or right of access to the new controlled-access highway, the subject property did not have commercial frontage, and the admission of testimony as to this the court held was error.

The court took notice of the general rule that evidence of the price received at a free and voluntary public auction was competent and admissible as evidence of value where, presumably, a willing buyer meets a willing seller in open competition. However, forced sales are not admissible as evidence of value. Here, so far as the record revealed, the court was not concerned with a forced sale.

Whether or not, upon a new trial, the state could prove (1) that the public auction sales were free and voluntary, (2) that the property sold was not too far removed from the subject property and was comparable thereto and (3) that the sales were not too remote in time, were issues which the court did not pass upon. The court said that these were matters in which it is difficult to formulate specific rules, and they must rest largely in the discretion of the trial court to be reviewed only for manifest abuse.

The judgment was reversed and the cause remanded for a new trial.

Frontage Roads

Many states are including frontage roads in their plans for expressway projects, thus affording the abutting landowner a means of access to the controlled-access facility at designated intervals. Whether or not the affected landowner has suffered a compensable loss because he does not have direct access to the main highway apparently depends on the circumstances in the individual case, or the court's interpretation of the facts. Some of the court's rulings in this respect indicate a lack of understanding of the function of a frontage road. A recent Georgia case is in point.

Georgia. The Georgia State Highway Department brought eminent domain proceedings against one Catherine T. Porter to condemn 8.79 acres of her land for use in establishing a limited-access highway in Tiff County.[45]

The trial court awarded a total of $21,548 to the landowner, including $10,548 for the 8.79 acres taken and $10,500 as severance damages to the remaining 21.21 acres. The state highway department requested a new trial, which was denied. On appeal to the state court of appeals, the state argued that the trial judge's charge to the jury was in error, inasmuch as it did not go far enough. The charge was as follows:

> I charge you, gentlemen of the jury, that a limited-access highway is a highway, road or street for through traffic and over, from or to which owners or occupants of abutting land, or other persons have no right or easement or only a limited right or easement of access, light, air or view by reason of the fact that their property abuts upon such limited-access highway or for any other reason;

[45] State Highway Department v. Porter, 99 S.E. (2d) 519, June 27, 1957.

> I also charge you that a limited-access highway may be so designated as to regulate, restrict or prohibit access thereto so as to best serve the traffic for which such facility is intended. No person shall have any right of ingress or egress from or passage across any limited-access highway to or from abutting lands except at the designated points to which access may be permitted, and under such arrangements and conditions as may be specified from time to time.

The state contended that the following should have been included:

> A local service road is any road or street, whether or not existing at the time of the designation of a limited-access highway or thereafter established, which serves the owner or occupant of any land or improvements abutting a limited-access highway and which gives a means of ingress to and egress from such lands or improvements.

The court of appeals held that this was not a good assignment of error. The judge's charge stated a correct principle of law applicable to the case, and there was no error in failing to include some other correct and appropriate instruction.

The high court held that the verdict was within the range of the pleadings and evidence and was consequently authorized. The verdict had the approval of the trial judge, and, said the court, since every presumption would be indulged in favor of jury verdicts, the trial court did not abuse its discretion in denying the motion for a new trial.

Impairment of Access

Determination as to whether access rights have been impaired by construction of a highway to an extent recognized by the law as compensable is in many cases an extremely difficult question to resolve. Cases of this type came before the courts in two states—California and New York—during the year. Entirely different situations were involved and each case was decided on the basis of the particular situation found by the courts.

California. A question of whether there was a compensable impairment of access rights was decided by the Supreme Court of California in the case of People v. Russell.[46]

The facts of this case disclosed that the Russell property fronted on a county road known as Firestone Boulevard between Elmcroft and Ringwood Avenues. A state highway also known as Firestone Boulevard ran parallel with and contiguous to the county road. Reconstruction of this state highway to provide a railroad overpass resulted in raising the grade of that highway, the taking of a portion of the county road right-of-way for maintenance of an embankment to support the overpass, the closing of any access to the state highway at Ringwood Avenue and the provision of a new access to that highway at Elmcroft. The state sought an easement across the Russell property for the relocated county highway which was to be exactly the same as the old facility in all respects except that the 12-ft unimproved parkway on the opposite side of the road would be eliminated. The trial court awarded Russell the value found for the easement taken and $33,499.83 for impairment of his right of access to this county road. The state appealed.

The supreme court held that the landowner was not entitled to compensation for severence damages resulting from the construction of the improvement, because the evidence did not disclose any impairment of his right of access to the county road.

The court noted that the parkway adjoining Russell's property and the paved street area for vehicular traffic were of exactly the same width and grade, and bore the same relationship to his property as theretofore. Any inconvenience in the use of this property for commercial purposes because of these widths was no greater as a result of the improvement.

Use of the parkway as a traffic separation strip between the state highway and the county road was proper in the control of traffic, and as such presented no valid claim for damages.

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[46] 309 P. (2d) 10, 1957.

The supreme court affirmed the judgment of the trial court as to the land taken, striking therefrom the $33,499.83 awarded as severance damages.

New York. This case arose when the Taconic State Park Commission acquired and extinguished two easements owned by one Homer Robinson, consisting of right-of-way over state lands to the driveway of the Taconic Parkway. At the same time the commission appropriated a parcel of 2.38 acres from Robinson. The parcel taken extended some 465 ft along the easterly line of state lands used for parkway purposes and some 355 ft along the southerly line of Underhill Road, all of Robinson's frontage on this highway being taken. Following the appropriation, the grade of Underhill Road was elevated above that of the parkway to permit passage over the parkway by means of a highway bridge, and embankment slopes to support the easterly approach to the bridge were constructed within the area of the appropriation. The landowner based his case on the theory that the appropriation left him without any access to Underhill Road.

The state's only expert testified to damages of $3,000, assuming access to Underhill Road. On that basis, he said there was no consequential damage. On his cross-examination, it appeared that he had at one time furnished to the state a report in which he advanced the opinion that the total damages would amount to $29,000 if claimant's remaining property were "landlocked." He also testified, however, that he had not considered a particular width of a possible easement to Underhill Road in arriving at his opinion of damages.

During the trial the state tendered the landowner a deed purporting to grant him an easement, 50 ft in width and to be located by mutual agreement of the landowner and the commission, extending from the remaining land across the parcel taken, to Underhill Road.

The trial court held, in line with the commission's argument, that the lands taken by the state contiguous to the local highway became part of the highway, so that Robinson's remaining lands abutted the highway, and he enjoyed the status of an abutting owner. The court awarded Robinson $12,500 for property taken and for damages to his remaining property, and he appealed, claiming that the trial court erroneously considered that he continued to have access to the public highway.

The state supreme court held that the state's theory of an easement was advanced in too nebulous a form (being undefined, unlocated and far more restrictive than the unlimited access of an abutting owner) to permit a determination and award of damages. In short, the owner's rights were not defined by the express terms of the appropriation.[47]

The court thought it unrealistic in the extreme to hold that a landowner, whose property was distant from the traveled portion of the highway more than 90 ft at the nearest point and some 465 ft at the farthest, enjoy the privileges and convenience of an abutting owner.

Since the granting of an easement to Underhill Road would have an important effect on the right of consequential damages, the court ruled that until such easement was specifically defined and located by appropriate action, the landowner could not be properly awarded damages for the extinguishment of the easement.

For the above reasons the court reversed the judgment and award of the trial court and ordered a new trial.

Regulation of Access

There are a number of situations being brought before the courts by landowners who argue that their access rights have been curtailed or impaired as a result of highway improvements, and who demand that they be compensated for alleged damages to their property, or in some instances, seek to enjoin the highway authority's action. These cases, discussed in this and following sections, involve such matters as the construction of curbs, separation of traffic by means of a dividing, or median strip, the closing of a street or road causing circuity of travel, etc. Such actions by the highway authorities are generally conceded to be police power controls, imposed for the purpose of regulating traffic, and as such are not compensable. There are, however, certain ex-

[47] Robinson v. State, 160 N.Y.S. (2d) 439, 1957.

ceptions to this theory as will be noted in the case reports.

The following cases in which decisions were handed down by the courts of Nebraska and Texas involve, respectively, an action to enjoin the City of Scottsbluff from construction of a curb which curtailed parking in front of the property involved, and a suit to compel the City of San Antonio to issue a permit for a curb cut.

Nebraska. The Supreme Court of Nebraska, in the case of Hillerage v. City of Scottsbluff,[48] denied the landowner recovery for alleged damages to her business property due to a proposed improvement of U. S. Highway 26, called 27th Street in Scottsbluff.

The landowner in this case sought an injunction against the City of Scottsbluff to prevent the erection of curbs which allegedly would interfere with the use of parking areas in front of her buildings. She contended that the city's action was an infraction of Article I, Section 21, of the state constitution which provides that the property of no person shall be taken or damaged for public use without compensation.

The district court made the following findings of fact: There were two tracts of business property belonging to the landowner. Tract 1 was known as "Terry's Town and Country," used, among other purposes, as a supermarket. Tract 2 was used as a launderette. Both tracts abutted on U. S. Highway 26 with Tract 1 on the south of the street and Tract 2 on the north, two blocks west of Tract 1. U. S. 26 had a 66-ft right-of-way, but only a 20-ft strip was paved. There were no curbs. Customers transacting business on the premises parked motor vehicles partly on a paved portion of the parking area in front of the premises and partly on the highway right-of-way, but not on the paved portion of the highway.

The city adopted an ordinance August 4, 1953, creating an improvement district for widening and improving a portion of 27th Street beginning at Avenue A and continuing westward past the landowner's property. Plans and specifications provided for the construction of barrier curbs in front of the landowner's premises. No part of the street improvement was on private property, and the proposed construction would not interfere with the use by the public of the street for highway purposes. However, the method of entering the properties and of parking in front thereof would be changed. Parking in front of the premises would be curtailed and perhaps even eliminated. There was proof, said the court, that completion of the construction, as provided by the plans and specifications, would substantially diminish the value and the use of the property.

The trial court refused the injunction without prejudice to an action at law by the landowner for the recovery of damages which might result from construction proposed by the city or from the adoption of later regulations restricting parking and access of vehicles to the landowner's properties. The landowner appealed.

The state supreme court stated that the right of a property owner to ingress and egress by way of an abutting street is a property right in the nature of an easement in the street which the owner of an abutting property has, not in common with the public generally, and of which he cannot be deprived without due process of law and compensation for his loss.

The court noted that the police power of a city is not absolute and unlimited, and the exercise of such power could not be so arbitrary, unreasonable, confiscatory or discriminatory as to deprive an owner of property without due process of law. However, the court held that where a city entered into agreement with the state for a widening of a highway for the purposes of public safety and convenience it was a reasonable and proper use of its police power. The court found sufficient justification for the state's action in the fact that a hazardous condition existed due to the parking of vehicles partially in the roadway.

The court held that the landowner was not entitled to damages or the aid of equity to assure her against the loss of value of her property due to restrictive parking, in view of the fact that such parking could not be carried on without the use of a part of the street which the city held in trust for the use of the public.

The judgment was reversed and the cause remanded to the district court with directions to dismiss the case.

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[48] 83 N. W. (2d) 76, 1957.

Texas. The Court of Civil Appeals, San Antonio, in the case of City of San Antonio v. Pigeonhole Parking of Texas held that owners of property abutting on a street have a right of ingress and egress to their property from such street, and a city ordinance providing that no permit should be issued for construction of any curb cut or driveway leading to property abutting on a certain street denied abutting property owner of right of access without due process of law and without compensation, and was unconstitutional.[49]

This suit was brought by Pigeonhole Parking of Texas, Inc., against the city to require the city to issue a permit to make a curb cut and construct a driveway for egress and ingress of motor vehicles from its lot to the street. A writ ordering the city to issue the permit was granted by the trial court and the city appealed.

Before the writ was granted, the city passed an ordinance prohibiting the granting of any additional curb cuts on the street where the Pigeonhole Parking lot was located. The owner claimed a right of access as an abutter and that the right was a property right. He also claimed that the ordinance which flatly prohibited the issuance of permits which would make such access possible was an unconstitutional taking of said property right. The court sustained the owner's contentions.

The Pigeonhole Parking Corporation's lot abutted both Soledad and West Houston Streets in the City of San Antonio. It had been allowed to cut the curb and construct a driveway about 89 ft wide on the Soledad side, and subsequently applied for a permit to cut the curb on the Houston side of the property. Before the issuance of the writ by the lower court, the city passed an ordinance prohibiting the granting of any additional curb cuts on certain streets, including that part of West Houston Street on which the lot in question abutted. The ordinance was actually passed before the suit was filed, but the corporation had delayed filing its suit at the suggestion of the city attorney, so it was stipulated that the suit should be regarded as filed before the ordinance was passed.

The court declared that the city could pass ordinances for the purpose of regulating the cutting of sidewalks and building driveways across the same, but it could not arbitrarily deny to abutting property owners such right. If such right was prohibited entirely, it would amount to the taking of property and that could be done only by due process of law and the payment of just compensation. The court added the maxim that the right to regulate is not the right to prohibit.

In conclusion, the court quoted from a recent Oregon case, State, By and Through State Highway Commission v. Burk (200 Or. 211, 265 P. (2d) 783, 792). The Oregon court said:

> Reduced to its simplest terms, our problem is to determine at what point we should hold that the police power ends and the power of eminent domain begins. . . . (Citing authorities) Private rights relative to highways may be regulated in many ways under the police power, and that without compensation. If the action of the state amounts to a "taking," then the principles based upon the constitution control and the state must proceed by condemnation.

In the principal case, the court held that the trial court properly granted Pigeonhole's petition for the writ to have the permit issued and, accordingly, affirmed the trial court's judgment.

Dividing Strip

The Court of Appeals of Maryland and the highest courts of three states, Iowa, Maryland and Georgia, handed down decisions in cases which raised questions involving the construction of a dividing strip in a street or highway. Most courts have consistently held that inconvenience and damages caused by such construction of a highway does not entitle an abutting landowner to compensation. Three of the four cases re-

[49] 300 S. W. (2d) 328, April 3, 1957 (See Memorandum 93, July 1957, Committee on Land Acquisition and Control of Access and Adjacent Areas, Highway Research Correlation Service, Circular 343).

ported here reinforced this rule. The Georgia case is an exception, inasmuch as the court held that an abutting landowner must be compensated for any depreciation in the value of his property.

Iowa. On May 7, 1957, the Supreme Court of Iowa decided the case of Iowa State Highway Commission v. Smith[50] which involved the limitation of access points and the prohibition of crossings, left turns, and U turns except at designated points on a controlled-access highway (see Fig. 5).

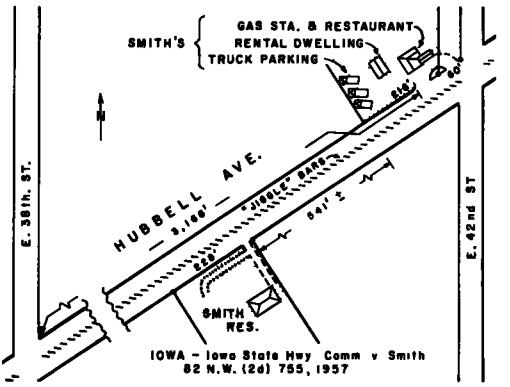

Figure 5.

This case was brought by the state highway commission against the city and the owners of certain property abutting on the controlled-access highway for a judgment declaring that the limitation established by the commission did not constitute a "taking" of property for which compensation had to be paid. The lower court entered a judgment that the limitations upon access constituted a "taking" but that the prohibition of crossings and turns did not, and the commission and property owners appealed. The supreme court held, among other things, that two 34-ft wide driveways connecting a filling station with the highway were all that were reasonably necessary, and, therefore, the filling station owners and operators were not deprived of reasonable or free and convenient access to the highway.

The two parcels of land in question abutted on Hubbell Avenue. One parcel had a frontage of 216 ft on the northerly side of Hubbell which ran northeast and southwest. On, roughly, the east half of this tract the owners had a filling station with connected garage and cafe which catered primarily to heavy cross-country trucks. There was a space with a frontage on Hubbell of about 150 ft west of the filling station where trucks parked and truckers slept. Just east of their 216 ft was a strip of ground 50 ft due east and west, with a frontage of about 60 ft on Hubbell on which the owners had easement rights. This 50-ft strip abutted the west side of East 42nd Street which ran due north and south and intersected Hubbell. The east part of the concrete approach to the gasoline pumps occupied the south part of this strip.

Before the attempted change by the commission, the trucks had entered the filling station at any point from either east or west and left at any point in either direction. Under the combined action of the commission and the city only two places of access to the filling station were permitted, each 34 ft wide and 45 ft apart.

Also, because of the median separating traffic in opposite directions, which was part of the highway improvement, traffic would only be allowed to enter the property from the east. Therefore, eastbound travelers could only enter by making a U turn at East 42nd Street and going back west a short distance to the east driveway. When leaving the station these travelers would be required to go west about 3,168 ft to East 38th Street and make a U turn there. No turns were permitted between 38th on the west and 42nd on the east.

The other parcel involved here was the one where the home of the owners was located. The parcel had a frontage of 228 ft along the southerly side of Hubbell Avenue. The east line of this property was approximately 541 ft west of the west line of the filling station property on the north side of the avenue.

The owners had enjoyed unlimited access to this 228-ft frontage from either direction. However, the commission and the city left only a single point of access, 18 ft wide. The east side of this driveway was about 7 ft west of the owners' east line. Thus there were approximately 203 ft between the drive and the west property line. The

[50] 82 N. W. (2d) 755 (See Memorandum 95, September 1957, Committee on Land Acquisition and Control of Access and Adjacent Areas, Highway Research Correlation Service, Circular 346).

landowner was a contractor as well and had construction equipment stored adjacent to the residential property.

Not only did the owners enjoy unlimited access, but heretofore they could cross Hubbell Avenue by motor vehicle between their home and business properties by driving from 500 to 600 ft. When the contemplated highway improvement was completed they would only be able to cross at East 38th or 42nd Street. The increased distance in traveling from their home to place of business and back again would approximate one mile.

The court acknowledged the fact that in Iowa the owners of property abutting a street or highway could not be deprived by public authorities of all access thereto without just compensation. There was no claim here that the owners were totally deprived of access to either tract. However, the court noted that it had held several times that the destruction of the right of access or the substantial or material impairment or interference therewith by the public authorities was a taking of the property. The landowners, consequently, in reliance upon those holdings, contended that there was such a substantial impairment or interference with their right of access as would constitute a taking of their properties for which compensation would have to be made. Apparently the trial court went along with this view. But the supreme court did not believe those precedents were controlling here, because none of them considered the extent of the right of access to property from and adjoining the street or highway. The court said, while admitting some authority to the contrary, it was well settled in Iowa that, while access could not be entirely cut off, an owner was not entitled, as against the public, to access to his land at all points between it and the highway. If he was allowed free and convenient access to his property and the improvements on it and his means of ingress and egress were not substantially interfered with by the public he had no cause for complaint.

The court said that the space between the two driveways might have been fixed at 45 ft because that was the maximum length permitted for trucks and semitrailers upon Iowa highways under section 321.457 (3), Code 1954, I.C.A. However, the court said that since the recent 57th General Assembly had increased this length to 50 ft the space between the driveways should likewise be increased to 50 ft. The court felt that the commission would be willing to do that.

The court held that the owners had not been deprived of reasonable access to their dwelling on the south side of Hubbell Avenue. However, there were about 140 ft west of their dwelling suitable for a residential site, and no access to this ground had been allowed except at the extreme northeast corner of the residence property. The only way in which this driveway could have been utilized as a means of ingress and egress for the residential site to the west was by constructing an outer roadway or private service road parallel to the south side of Hubbell Avenue between the residential site and the driveway the commission had provided.

The court decided that unless means of access were allowed this residential site its value would be greatly diminished, and it would be difficult to find a purchaser for it. The court felt, therefore, a driveway should be permitted for this site or, in the absence thereof, just compensation should be paid.

The supreme court easily disposed of the owners' appeal from the part of the judgment which held that the prohibition of crossing the highway, left turns, and U turns except at designated points where there were no raised "jiggle" bars did not constitute a taking of the owners' property within the law of eminent domain, on the basis of recent court decisions, and, therefore, affirmed the judgment of the lower court on this point.

Maryland. This case, decided on the same day as the case above, arose as a result of the state roads commission's action in reconstructing a highway into a divided, 4-lane dual facility with center median strip dividing north-bound and south-bound lanes of traffic so that left turns could not be made directly into a shopping center without taking a more circuitous route. The owners of the shopping center sought an injunction to halt construction, which was denied by the circuit court.

On appeal the state supreme court held that construction of the median did not constitute a taking of the abutting properties and the state roads commission was not

liable for damages.[51]

The owners of the shopping center did not deny the state roads commission's authority to construct median strips. They did complain, however, that the strip would prevent direct access to the far sides of the roads bordering on their properties, and this would amount to substantial denial of their rights to ingress and egress, and to a taking of their property without compensation.

The court was of the opinion that the state's action was more nearly akin to a diversion of traffic than to a blocking of the owner's means of access to the highway. It appears entirely reasonable, continued the court, that if the state could divert traffic entirely away from the owners' corners without being liable for damages for so doing, it might, in the interest of safety, and without incurring liability for damages, interpose an obstacle which might render access to the property more difficult, while not actually destroying access to the highway. Any other view, the court concluded, would require the state to pay through the nose for the privilege of further improving and adding to the safety of highways which it had built and which had evidently brought customers to the doors of owners of land abutting such highways.

The Langley decision was accepted by the Court of Appeals of Maryland as controlling in its ruling in the case of Turner v. State Roads Commission.[52] The point raised involved the question as to whether the lower court committed error by denying damages to appellants for the impairment of access caused by the median strip. The court of appeals answered in the negative.

This case was a combined appeal from two judgments of the Circuit Court of Prince George's County, in two condemnation cases tried together by stipulation. The owners of the two properties involved were father and son, Albert H. and Albert W. Turner, respectively. The portions of the two properties condemned were located on the opposite sides of Enterprise Road in Prince George's County.

The commission planned to improve Enterprise Road and provide for a future interchange to serve U. S. Route 50, the Washington-Annapolis Expressway. The father's property fronted 336 ft on the east side of Enterprise Road. The roadside strip to be taken from the father would consist of 3.48 acres. The commission's plans called for a dual highway on Enterprise Road with two lanes divided in the center by a 16-ft median strip at the area of the interchange. Such plans required the father, in order to go south from his property, to take a frontage road for about 200 ft before gaining access to Enterprise Road.

The commission proposed to condemn a total of 11.543 acres of the son's property on the west side of Enterprise Road. To go south the son would have to proceed north 400 to 500 ft to the nearest break in the median strip and then make a U turn to travel south. The son would be denied access to the new expressway and to Enterprise Road to a point some 75 ft north of his present driveway.

The court said it was true that construction of a median strip would result in inconvenience to the property owners and others entering or leaving the properties in question, but there certainly was no blocking of access shown, nor was it so contended.

The court said that the facts in this case should be given the same interpretation as were the facts in the Langley case. Since the Langley case was said to be controlling, the court held that the trial judge was correct in not allowing damages for the impairment of access to appellants' properties.

Georgia. Although inconvenience caused by construction of a dividing strip in a street or highway is generally not held compensable as noted in the three previous cases, there are exceptions to the general rule as illustrated in a decision handed down on March 13, 1957, by the Supreme Court of Georgia.[53] In this case the court

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[51] Langley Shopping Center v. State Roads Commission, 131 A. (2d) 690, May 7, 1957 (See Memorandum 94, August 1957, Committee on Land Acquisition and Control of Access and Adjacent Areas, Highway Research Correlation Service, Circular 345).

[52] 132 A. (2d) 455, June 3, 1957.

[53] Dougherty County v. Hornsby, 97 S. E. (2d) 300 (See Memorandum 94, August 1957, Committee on Land Acquisition and Control of Access and Adjacent Areas, Highway Research Correlation Service, Circular 345).

held that a county was liable to an abutting land owner for depreciation in value of his property caused by construction of such a dividing strip and concrete curb and gutter along the side of the highway adjacent to his property.

The protesting landowner operated a drive-in restaurant and trailer court which were both largely dependent upon traffic on the highway for trade, according to the owner. He further alleged that the three entrances allowed him were only 20 ft in width and that any traffic entering his premises was hampered and deterred because of the insufficient width and faulty construction thereof (see Fig. 6).

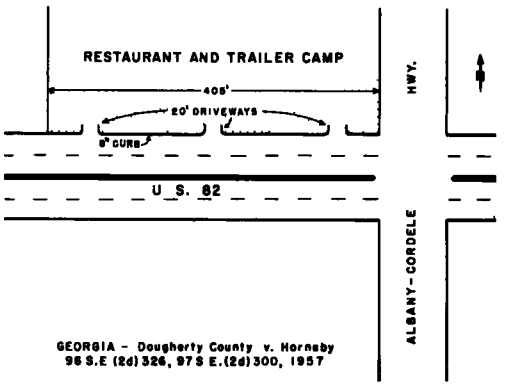

Figure 6.

The county's contention was that it was under no obligation to supply the landowner with customers. The court held, however, that although this was true, the county was liable for any interference with the rights of ingress and egress to the property which might cause any diminution in the market value of the property. The court cited previous decisions in which it had been held that damages which an individual might recover for injuries to his property need not necessarily be caused by acts amounting to a trespass, or by an actual physical invasion of his real estate. But if his property be depreciated in value by his being deprived of some right of user or enjoyment growing out of and appurtenant to his estate as the direct consequence of the construction and use of any public improvement, his right of action was complete, and he might recover to the extent of the injury sustained.

In line with these previous decisions, the court held that the present landowner was entitled to just compensation in an amount represented by the difference between the market value of the property before and after the taking for public purposes.

Circuity of Travel

Two court decisions—one in Kentucky and one in New York—involved the question of whether a landowner is entitled to compensation when the street or road on which his property abuts is closed at a certain point, making it necessary for the landowner to take a more circuitous route in reaching his destination. The answer of both courts was in the negative.

Kentucky. The issue before the Court of Appeals of Kentucky in the case, Department of Highways v. Jackson,[54] was whether the property owner could recover damages for depreciation in the value of his land as a result of the closing of the county road between his land and the nearby town, which required him to travel a greater distance to the town.

Jackson's property was located about one mile east of Lebanon Junction, on Samuels Road, a county highway. When the department of highways closed the county road at the Kentucky turnpike, west of Jackson's property, he had the choice of going east two-tenths of a mile to Maraman Road, thence south to State Route 61, thence west to Lebanon Junction, or going three-tenths of a mile east to Old Pine Tavern Road which ran north and then around to the west to Lebanon Junction. The distance from the Jackson farm to the junction by either route was about two miles.

The court of appeals held that closing the county road at one end did not deprive Jackson of reasonable access from his land to the public highway system, and he was not entitled to damages, even though closing the road required him to travel a slightly longer distance to the nearby town. The court said that a property owner in a situation like this would be entitled to damages only when the closing would deprive him of his

[54] 302 S. W. (2d) 373, 1957.

sole or principal means of ingress and egress.[55]

The court also held that insofar as this decision was in conflict with previous decisions, those decisions were overruled.[56]

New York. In this street closing case, the Court of Claims of New York granted the state's motion to dismiss the landowners' claim for alleged damages resulting from the closing.[57]

The landowners' land was located between two lots which were appropriated by the state. None of his property was taken. His property fronted on Lenox Street which ran in an east-westerly direction. Before its relocation, Ashmond Road intersected Lenox Street west of the landowners' frontage, and Lenox was a through street. After the relocation of Ashmond Road, it intersected Lenox Street on the east of his property, and old Ashmond Road was elevated so that it blocked Lenox Street making it a dead-end street so that the landowners no longer had access to and from their property in a westerly direction.

The court held that this case fell within the general rule controlling a street closing case, and claimants' damages were damnum absque injuria.

Economic Impact of Expressways

Interest in economic impact research developed remarkably during 1957. Pursuant to the 1956 resolution of the American Association of State Highway Officials, the Highway Research Board held a special two-day conference on economic impact research, under the aegis of the Land Acquisition Committee. Those associated with this type of research at the time of the meetings were asked to participate. The conference proceedings were published by the Board as Special Report 28, entitled "Economic Impact of Highway Improvements, Conference Proceedings." Those interested will find a wealth of ideas contained in the discussions of this conference.

At this time, there are 41 economic impact studies underway in 26 states, most of them programmed through the highway planning survey mechanism. The requirements of the Highway Cost Allocation Study have been largely responsible for this noteworthy development of economic impact research. Reports on how three of these studies are being carried on were presented at the Annual Meeting of the Board in January 1958. These studies concern a new turnpike in Connecticut, the Boston Circumferential Highway (Route 128) and a route bypassing Lexington, Virginia.

A comprehensive before-and-after inquiry into the economic and social impact of the Connecticut Turnpike is being carried on cooperatively by the University of Connecticut, the Connecticut State Highway Department and the Bureau of Public Roads. It has been underway since early in 1956, almost two years before the opening of the turnpike in January of 1958. According to present plans, the study will cover a period of at least five years. Changes involving property values, manufacturing activity, the recreation industry, retail sales, community services, and agriculture will be noted in the course of the study. A report on the objectives sought and the methods being used in conducting the study are included in another paper in this bulletin by Walter C. McKain, Jr.

The purpose of the Route 128 study, sponsored by the Massachusetts Department of Public Works and the Bureau of Public Roads, and carried on by the Massachusetts Institute of Technology, is to make an investigation of the basic factors underlying the changes that have taken place along the highways. Three types of surveys have been initiated: (1) survey of residential property values and sales before and after construction of the highway, both in the immediate vicinity and in areas removed from the location; (2) survey of industrial and commercial developments along the highway and in nearby areas, and an investigation of employee travel patterns; and (3) traffic survey of Route 128, including trends in volumes over a period of years, and an origin-and-destination count as of 1957. The present report, included in full in this volume, deals

[55] See Ex parte Commonwealth, 291 S.W. (2d) 814, 1956.
[56] See Standiford Civic Club v. Commonwealth, 289 S.W. (2d) 498, 1956.
[57] Spicer v. State, 169 N.Y.S. (2d) 128, December 12, 1957.

with the survey of industrial and commercial developments and with traffic characteristics and travel patterns of the employees at one industrial location group. A. J. Bone and Martin Wohl, both of M. I. T., prepared the paper, entitled "Industrial Development Survey on Massachusetts Route 128."

"Methods Used to Study Effects of the Lexington, Virginia, Bypass on Business Volumes and Composition," also included in this report, contains an account of the methods used to determine the effects of the bypass on business volumes and composition. It includes a comparative evaluation of commonly-used methods of assessing the economic effects and an analysis of data obtained. The report presented at the Board's Annual Meeting was prepared by Joseph W. Harrison, of the Virginia Council of Highway Investigation and Research, which organization carried on the study under the sponsorship of the Virginia Department of Highways and the University of Virginia. According to the author, the study was designed to permit employment of classifications and comparisons which have been used in previous economic impact studies with the aim of testing their congruity.

ROADSIDE REGULATION

Efficiency and safety of the highway can be greatly augmented by the use of certain regulations which may legally be imposed under the police power. The committee has long concerned itself with these regulations, stressing the importance of adequate driveway control, the use of setbacks, establishment of zoned districts for highway service facilities, subdivision regulations designed to insure compatibility with existing and proposed highways, appropriate control of outdoor advertising, and many others. The majority of these controls can be put into effect without additional legislative authorization. Consequently, there is a relatively small amount of new legislation in the field. During 1957, some of the state legislatures did, however, concern themselves with certain aspects of the roadside problem. Colorado, Michigan, New Mexico, North Carolina, and Tennessee enacted provisions prohibiting service facilities in the right-of-way of the interstate system, substantially the same as that contained in the Federal-Aid Highway Act of 1956. In a number of other states, including Connecticut, Maryland, New York, South Carolina, Vermont, and West Virginia, such legislation failed of passage.

An interesting enactment of the West Virginia Legislature in 1957 authorizes the state highway commission, after appropriate surveys, to promulgate and enforce reasonable rules and regulations relating to setback lines, traffic islands, curb separations, entrance approaches, etc. The law specifies that the commission may not "unduly" interfere with any abutting property owner's entrance or access rights or approaches without his consent or through appropriate proceedings in court "in the exercise of the right of eminent domain for determination of the lawful rights of the respective parties and the damages, if any, to be assessed."

Also of interest is a resolution passed by the California legislature which took notice of the amount of funds spent for controlled-access facilities in relation to those spent in landscaping and maintaining the beauty of these facilities. The legislature therefore resolved that henceforth its policy would be to urge that more attention be given to landscaping and beautification of such highways.

Of great importance at the federal level was the attempt to obtain passage of legislation pertaining to regulation of outdoor advertising in areas adjacent to the interstate highway system. A number of bills were introduced, hearings were held, and there was great activity on the part of both proponents and opponents of such legislation. No legislation was enacted, however, but in 1958, an amendment to the 1956 law including a provision providing for a minimum amount of control was passed. The amendment provides for payment of small amounts of additional federal funds to those states agreeing to prohibit outdoor advertising within 660 ft of the edge of the right-of-way of highways in the interstate system, with certain exceptions, as indicated in the act.[58] Regulation is to be consistent with standards promulgated by the Secretary of Commerce.

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[58] Public Law 85-381, 85th Congress, H. R. 9821, Sec 122, April 16, 1958.

At the state level, laws providing for control of billboards on the interstate system have been enacted by the legislatures of three states—Maryland, Vermont, and Virginia. The Vermont law, enacted in 1957, prohibits the erection or maintenance of advertising signs within 750 ft of the right-of-way of highways on the interstate system. Exceptions are directional and official signs, signs in towns and cities, signs advertising sale of business or products, and signs not visible from the traveled portion of the highway. The Maryland and Virginia laws were enacted in 1958, and prohibit signs within 600 and 500 ft of interstate highways, respectively, again subject to certain exceptions.

Various other state legislatures passed laws regulating certain types of billboards or prohibiting their erection in certain places or areas. Laws passed in Georgia, Minnesota and Nevada prohibited, or clarified existing provisions prohibiting billboards in the highway right-of-way. Florida, Indiana, Kansas, New Hampshire and Washington laws prohibited, or regulated, rotating or flashing signs under certain conditions.

The regulation or control of outdoor advertising has always been the subject of a great deal of litigation. The year 1957 was no exception. Some of the more significant decisions are discussed in the following section.

Outdoor Advertising

California. The City of Los Angeles sought a preliminary injunction in order to enjoin Richard Barrett and others from constructing an advertising sign upon their lot, which adjoined the Hollywood Freeway and was considerably below the level of the traffic artery. The preliminary injunction was granted by the superior court, and the defendants appealed to the district court of appeal.[59]

The defendants had obtained from the Department of Building and Safety, a permit to construct the sign in question. This department had authority to issue permits for the construction of what was termed "roof signs." No permit was obtained from the Board of Public Works which was authorized to issue permits for the construction of "ground signs."

The sign was to be 16 ft by 37½ ft and designed to display the name of the lot occupants' business, viz., "The Barra Co. Wine Vinegar." It was to be supported by two piers situated on opposite sides of, but not touching, a one story building located near the freeway. The sign was to pass over and well above the building. Amendatory plans indicated the building was to be modified so that the roof was to be extended to cover a patio, with the extension of the roof to be attached to one of the piers. The building department also issued a permit authorizing the alteration, but both permits were subsequently revoked "as they were issued in error." Nevertheless, the defendants continued to work without any permit until served with a restraining order.

The district court of appeals said this case involved two primary questions: (1) Whether the sign was a "roof sign" requiring a building permit from the Department of Building and Safety, or an "outdoor advertising structure" falling within the jurisdiction of the Board of Public Works and requiring its permit for construction; (2) whether the continued construction of the sign after revocation of a permit was properly enjoined as one designed to have its advertising viewed primarily from the freeway and creating a condition endangering the safety of persons thereon. The court noted that Section 67. 15. 01 of the statutes provided that no outdoor advertising structure, post sign or advertising statuary was to be erected, constructed, relocated or maintained, regardless of the district or zone in which it was located if designed to have the advertising thereon maintained primarily to be viewed from a main traveled roadway of a freeway, or if, because of its location, size, nature or type, it constituted or tended to constitute a hazard to the safe and efficient operation of vehicles upon a freeway.

The main contention of the defendants was that this was a roof sign within the jurisdiction of the Building and Safety Department because it stood over a roof. Defense counsel relied upon the literal reading of certain sections of the municipal code as grounds for this contention. The court said it could not accept such a literal construc-

[59] City of Los Angeles v. Barrett, 315 P. (2d) 505, 1957.

tion, for the claim that this was a roof sign simply because it was over the roof of the small building below it "sticks in the bark." It said to so hold would throw open the flood gates of evasion and enable any property owner to avoid the freeway ordinance provisions by placing a detached ground sign over his hen house or garage, though not in contact with it. Such a construction, the court said, was too far fetched to be accepted as reasonable. According to the court, ordinances, like other statutes, must be given a reasonable construction.

The court also held that the evidence was sufficient to support the city's allegation that the sign was designed to have its advertising matter viewed primarily from the Hollywood Freeway, and that this would afford adequate basis for a preliminary injunction.

The court said the order granting a preliminary injunction carried with it an implied finding that the sign in question was within the field covered by permits from the Board of Public Works, and the erection without its permit was a violation of the law and a public nuisance.

The courts have been given broad discretion in passing upon a motion for temporary injunctions. It is not necessary to determine at that time the ultimate rights of the parties. Unless an abuse of discretion appears, such an order will not be reversed. No abuse of discretion appeared here, so the court affirmed the lower court's order granting a temporary injunction.

Pennsylvania. Another decision pertaining to so-called roof signs was handed down by the Supreme Court of Pennsylvania on January 17, 1957.[60] The Landau Outdoor Advertising Company leased the roof area above a drug store located in an area zoned "A" Commercial in the City of Philadelphia. Their application for a permit to erect a large illuminated billboard 15 ft high and 42 ft wide for general advertising purposes was denied by the zoning division, and on appeal by the zoning board of adjustment. The board found that the area was partly residential and partly commercial, that the proposed use was not an accessory one, that proper and orderly development of the neighborhood could best be obtained by limiting the area to accessory signs advertising business conducted on the premises, that the sign would be a distraction to motorists and that the health, morals, safety and general welfare of the immediate neighborhood would be affected if permission were granted to erect the sign for general advertising, not accessory to any business at this location. On appeal, the court of common pleas reversed the action of the zoning board, without taking further testimony, holding that the proposed billboard was an accessory use. The court reasoned that use of the roof of a business building for the erection of a sign thereon was "customarily incidental" to its main use as a buisness building, in line with the definition of an accessory use included in the zoning ordinance.

The state supreme court, on appeal, agreed with the city that an accessory use sign must advertise activities conducted on the premises, and therefore the sign in controversy was a non-accessory sign, and that the contemplated use of the roof bore no relationship whatever to the occupancy of the building.

The advertising company argued that refusal to permit the sign for general advertising use, when erection of a similar sign by the owner to advertise the business conducted on the premises would be permitted, was a restriction which bore no substantial relation to public health, safety, morals or general welfare, and was unconstitutional. In refutation of this argument, the court cited several previous decisions including a New Jersey case in which the state supreme court held:

> The business sign is in actuality a part of the business itself, just as the structure housing the business is a part of it, and the authority to conduct the business in a district carries with it the right to maintain a business sign on the premises subject to reasonable regulations in that regard as in the case of this ordinance. Plaintiff's placements of its advertising signs, on the other hand, are made pursuant to the conduct of the business

[60] Landau Advertising Co. v. Zoning Board of Adjust., 128 A. (2d) 559.

> of outdoor advertising itself, and in effect what the ordinance provides is that this business shall not to that extent be allowed in the borough. It has long been settled that the unique nature of outdoor advertising and the nuisances fostered by billboards and similar outdoor structures located by persons in the business of outdoor advertising, justify the separate classification of such structures for the purposes of governmental regulation and restriction.[61]

The supreme court reversed the order of the court of common pleas, holding that the contemplated use of the roof in this case would not be an accessory use and therefore could not be permitted.

Maryland. The authority of City of Baltimore to enforce a 1950 zoning ordinance, requiring all outdoor advertising structures in residential districts to be removed within five years from passage of the ordinance, was recently upheld by the Maryland Court of Appeals.[62]

In its decision, the court noted that the fundamental problem facing zoning is the inability to eliminate non-conforming uses. Originally they were not regarded as serious handicaps to the effective operation of zoning ordinances, because it was felt they would be few and likely to be eliminated by the passage of time and restrictions of their expansion. After a while other ways to get rid of them were tried. Two tools which were resorted to mostly were eminent domain and the law of nuisances. The effectiveness of eminent domain, however, is restricted by the necessity that the purchase must be for a public use, by the complexities of administrative procedures, and by the high cost of reimbursing the property owners. The law of nuisances is limited as an effective tool in that some courts will restrain only common law nuisances and even where the lawmakers have expanded the nuisance category, judicial enforcement seems often to have been restricted to uses that cause a material and tangible interference with the property or personal well-being of others, uses that are equivalent to or are likely to become common law traditional nuisances.

The facts brought out in the present case showed among other things, that all the billboards in question were on leased land. Most of the leases were for terms of one year, with options to renew. None were in effect before April 5, 1950, when the city council passed Ordinance 1101, requiring all outdoor advertising structures in residential districts to be removed within five years. The leases all provided that the advertising company could terminate them if the law forbade the maintenance of the boards. The signs were so constructed that if they had some further useful life after five years they could be moved to locations in commercial and industrial zones and there earn revenue for their owner.

The billboard people and the owners of property on which the signs were located contended that their rights to non-conforming uses were vested rights of property which the enforcement of Paragraph 13(d) would take from them without compensation, contrary to Art. 3, Sec 40 of the Constitution of Maryland, and so would deprive them of property without due process of law, as well as be discriminatory and a denial of the equal protection of the laws.

The billboard interests argued that removal of the non-conforming structures would seriously injure their business.

Here the court said it found nothing in the record to rebut the presumptive validity of the ordinance under consideration. Only after extended hearings and full consideration of the views of both proponents and opponents was it enacted. Over 40 civic and improvement associations endorsed it. The council had the benefit of the views of especially well-qualified expert witnesses, C. William Brooks and Dr. Flavel Shurtleff. The court, therefore, ruled that the validity of the classification would seem to destroy the argument of the plaintiffs that the ordinances were discriminatory as to them.

Having determined the harm to the public welfare, the court said the city council

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[61] United Advertising Corporation v. Borough of Raritan, 93 A. (2d) 362, 1952.
[62] Grant v. Mayor and City Council of Baltimore, 129 A. (2d) 363, February 14, 1957.

undoubtedly concluded that the equitable means of reconciling the conflicting interests of the public on the one hand, and those of advertising companies and those leasing land to them on the other, and thus the satisfaction of the requirements of due process, would be a 5-year amortization period. The court found that the remedy chosen was not arbitrary, nor was the city council wrong in its conclusion that the effect for good on the community by the elimination of billboards within five years would far more than balance individual losses.

The court thus upheld the validity of the ordinance.

Encroachments

Many highway departments are plagued by persons maintaining or constructing various types of encroachments on the highway rights-of-way. It is not uncommon to find that some of these encroachments have been in existence for 15 or 20 years, and the problem of their removal has often been a difficult one.

Georgia. The state highway department at one time contemplated asking for special legislation to cope with its encroachment problem. This was averted, however, when the idea of removing these encroachments by means of an injunction was generated by the Georgia Department of Law. There was some doubt as to whether the courts would uphold such action on the theory that the injunction sought would be mandatory. The Supreme Court of Georgia held otherwise, however, in the case of Davidson v. State Highway Department.[63] This decision has greatly lessened the encroachment problem in Georgia.

In this case the state highway department asked the court for an injunction to restrain one Davidson from continuing trespass upon a state highway right-of-way. The facts in the case were as follows. In 1931 the State Highway Board of Georgia acquired land in McDuffie County for right-of-way purposes. Thereafter, Davidson constructed a building which encroached 9 ft upon the right-of-way. The state obtained a commitment from the federal government to share in the costs of improvement of the highway. The government, however, withheld a sum of money because of the encroachment, since the commitment specified that the department would keep the right-of-way free of encroachments. Davidson argued that he could not legally be required to perform the act of removing the building by injunction. The trial court held that the continuing trespass on the state's land could be enjoined.

The Supreme Court of Georgia affirmed the lower court's ruling, basing its decision on many authorities. While fully recognizing the rule that mandatory injunctions would not be issued, the court held that a continuing trespass such as this could be stopped by using an injunction, even though in so doing the wrongdoer would be required to take affirmative action.

The court reasoned that, properly construed, the petition did not seek primarily to require Davidson to perform an act. The main purpose of the relief sought was to restrain Davidson from maintaining a continuing injury upon the right-of-way, although in rendering obedience to a restraining order he might be incidentally required to perform some act.

Mississippi. Injunction was also the remedy used to obtain removal of obstructions in the right-of-way of a state highway in Mississippi. G. H. Guckert and T. V. Adams operated commercial enterprises on land abutting U. S. Highway 82 near the eastern corporate limits of Columbus. The state highway commission requested that they remove signs and other encroachments in the right-of-way, and upon their refusal to do so, asked the court for an injunction to require removal of the obstructions. The trial court refused the injunction, holding that the power and authority to regulate and prohibit obstructions upon or over the right-of-way but outside the traveled portion of the highway were vested in the city, and not the state highway commission. The commission appealed.

The state supreme court noted that the state highway commission had full statutory authority over all matters relating to construction or maintenance of state highways,

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[63] 100 S. E. (2d) 439, 1957.

and was further vested with the power to make reasonable rules and regulations pertaining to the placing of obstructions that might in its opinion be considered hazards upon such highways.

Guckert and Adams on the other hand relied on a provision subsequently inserted in the statutes to the effect that the municipality should have "full control and responsibility beyond the curb of any such streets." The supreme court held that this latter provision had reference to municipal streets or "parts of sections thereof" which had been taken over for maintenance by the commission, not to state highways constructed by the commission in or through municipalities upon rights-of-way owned by the commission. In the present case, the court found that the commission had a fee simple title to the entire right-of-way. In other words, it owned the right-of-way outside and beyond the street curbs. The legislature, the court said, did not intend to place the commission at the mercy of municipal authorities. The commission had title to the right-of-way, and it could not be used or obstructed by others against the wishes of the commission, whether such use or obstructions constituted safety hazards or not. The supreme court thus reversed the ruling of the trial court, remanding the case so that the time and other details of removal of the obstructions might be worked out.

Roadside Control Through Zoning

An interesting decision was handed down in Maryland during the past year, in which the court refused to sanction a zoning change which the court believed would result in congestion on the adjoining highway, thus creating a traffic hazard.[64]

A landowner, Thelma D. Price in August, 1955, asked the Zoning Commissioner of Baltimore County to reclassify her property on Liberty Road from a residential to a business use. She contemplated constructing a shopping center upon her land. After a hearing the request was denied on the ground that the proposed construction would increase the traffic hazard on this very heavily travelled highway. An added reason for the denial, said to be according to a recent court of appeals opinion, was that the area was being studied by the Baltimore County Planning Board. The commissioner believed an area as great as this should be so studied in order to make recommendations for a new use map.

The landowner appealed from the commissioner to the board of zoning appeals. The testimony at the hearing before the board showed that this tract was roughly triangular in shape and was bounded on the southwest by Liberty Road on which it had a frontage of approximately 1,750 ft, on the east by Gwynns Falls, and on the north in part by the flood plain from Gwynns Falls. Liberty Road was hilly in this section and had a right-of-way 66 ft in width. The road was 22 ft in width, with 5-ft stabilized shoulders. Across the street opposite the landowner's property there was a branch bank and the Woodmore Shopping Center. Within a radius of a mile and a half of this tract was a shopping center at Pikesville, another at Colonial Village, and a number of stores on Edmondson Avenue. The proposed center was to have from 18 to 20 stores and parking places for approximately 800 cars. Three entrances were planned. After this hearing, the board granted the requested rezoning.

The board stated, among other things, that in spite of the local residents' opposition to the change, the phenomenal increase in population in the area constituted a substantial change in conditions which justified additional commercial zoning. It acknowledged that the traffic situation presented a problem, but one which could be solved by proper engineering and possibly the erection of a traffic light.

Residents of the neighborhood on June 13, 1956, were granted a review of the board's decision by the Circuit Court for Baltimore County. The circuit court held that the contemplated shopping center for which the reclassification was sought would generate additional traffic upon Liberty Road causing congestion in the streets and create a traffic hazard. The reclassification was denied and the order of the board was reversed. The landowner appealed to the court of appeals.

The court of appeals was of the opinion that the rezoning here would have materially

[64] Price v. Cohen, 132 A. (2d) 125, 1957.

increased the traffic hazard on Liberty Road. This road handled capacity traffic, and it was indefinite whether it would be improved. In changing zoning regulations, traffic conditions should be given material consideration, and as this was not done by the board in this case, the rezoning was arbitrary and an abuse of discretion was found by the trial judge. The order of the circuit court was affirmed.

PARKING

The number of cases contesting the authority of governmental and quasi-governmental agencies to provide public parking facilities, and to regulate the parking of vehicles in certain areas has steadily declined during the past several years. The provision of off-street facilities to ease the traffic problem is rather generally considered to constitute a legitimate governmental enterprise. Regulation of on-street parking, for the same purpose, has consistently been held a legitimate exercise of the police power. There is an occasional exception, however, as will be noted in the Georgia decision reported in a following section, in which the court held that the provision of parking facilities is a service or function ordinarily performed by private enterprise and not a governmental function. With the further exception of a Texas decision in which the court held that the subsurface of a public park could not be used for a parking garage, under the particular circumstances involved, all of the cases discussed in the following pages upheld the governmental bodies' authority to provide for, or regulate, parking.

Authority to Establish Parking Facilities

The Supreme Courts of Massachusetts and Georgia decided cases involving the question of whether or not the establishment of public parking facilities was accomplished within the authorized powers of the state. The Massachusetts decision held that the city was authorized to take private parking lots, which were open to the public, in order to provide for the continued use of the land as parking lots. The Georgia case held unconstitutional the legislative act which attempted to set-up a parking authority and a certain system of financing the project.

Massachusetts. In this case[65] the owners of certain parking lots in the City of Boston asked the court to enjoin the city from taking their parking lots for the purpose of constructing public parking facilities. The owners also asked for a decree determining that the city was without authority to take the lots. The superior court held that the city did have such authority, and the owners appealed. The supreme judicial court held that the statute authorizing the city to establish public off-street parking facilities to "insure public interest in free circulation of traffic in and through the city," and a supplementing statute authorizing the city to lease property acquired for parking facilities was constitutional.

The facts in the case indicated that the owner or operator of each lot had under preparation plans to construct a structure thereon so that the capacity would be greatly increased. After taking the land, the city intended at an early date to lease the land to a private person or persons upon condition that the lessee construct a facility which would greatly increase the accommodations—in two instances from 45 and 90 to 700 cars and in the third instance from 90 to "greatly increased" capacity. The prospective lessee, subject to the statutes, would operate the facilities for his personal profit.

Pending the execution of a lease under which a building would be constructed, the city would lease the lots to private operators who would operate the same without substantial change from existing conditions as a public parking lot for their own personal profit. If for any reason the city did not conclude a lease conditioned on construction, it would continue to lease the land to private persons or to construct the structures with municipal funds and to lease the same to private persons for operation.

All leases entered into must contain schedules of maximum rates to be charged by

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[65] Court Street Parking Company v. City of Boston, 143 N. E. (2d) 683, 1957 (See Memorandum 97, December 1957, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 354).

the lessee for use by the public, and also regulations with respect to the use, operation and occupancy of the property.

The enabling act specifically prohibited the city from acquiring, except by gift or demise, any property privately held and operated as a garage.

One of the important questions raised here was whether there was a possibility that in some instances the only apparent change, so far as parking facilities were concerned, would be that the facilities presently operated by a private owner would instead be operated by a private individual who leased from the city. Did this make the statute invalid as involving a use of the power of eminent domain for a predominantly private purpose? But the court said that a public purpose would also be served. The land taken would be permanently devoted to the public purpose, and not subject to the decision of an owner who could, if he so desired, change the use. Furthermore, it would constitute a part of a statutory plan to provide enough such areas to relieve a pressing public need. Its ownership would have changed as a part of a plan designed to use public authority to marshal private capital to meet the public need. The possibility upon which the owners relied was not the primary purpose of the statutes. The existence of this possibility did not make the intent of the statutes or their effect in operation the use of public authority to serve a private end. There was reasonable provision for control in the public interest if such a possibility developed as a fact.

The statutes were to be judged as enactments designed to increase the amount of space available for the parking of automobiles in the City of Boston by facilitating the construction of buildings for this purpose in areas of parking congestion. It could not be known in advance when private capital for this purpose would surely be available. Therefore, the court held it was reasonable to provide for the continued use of the land for parking purposes pending construction, either by private operators or by the city. The possibility that some lot or lots would continue indefinitely without the construction of a building thereon could have been provided against either by requiring that the city itself build after a period of attempted leasing or, as the owners suggested, by authorizing a taking only after a lease to construct had been secured. But it was not necessary, according to the court, to so limit and hamper the city in its acquisition and development of property for a public purpose.

The court held that such aspects of private advantage as the statutory plan presented were reasonably incidental to carrying out a public purpose in a way which was within the discretion of the legislature to choose.

The court did not believe, and the parking lot owners had not contended, that an arbitrary and unreasonable distinction was made by the statutes in excluding existing garages from the category of property which could be taken or purchased. Existing garages presumably already provided substantially more space for parking automobiles than would be afforded by the use of the underlying land without a structure thereon, and hence already served the purpose of the statutes. The fact that owners of particular parking lots might have plans for building garages, which so far as appeared might have developed or matured after the board began the action for the taking of their lots, did not make the statutes arbitrary in their application. The validity of action under a general plan for serving a public need cannot depend on such uncertainties.

Bills of complaint dismissed.

Georgia. Recently the Supreme Court of Georgia decided that the act of its legislature (Ga. L. 1957, p. 2744) which attempted to establish the Cobb County Parking Authority and a system of financing off-street parking facilities, was unconstitutional.[66] Earlier the superior court had declared the act constitutional and valid, including the proposed issuance of revenue bonds by the parking authority.

The act was alleged to be unconstitutional because it violated several enumerated provisions of the constitution, among them, Article 7, Section 7, Paragraph 5 (Code Ann. Sec 2-6005), which provided in part:

> Revenue anticipation obligations may be issued by any county, municipal corporation or political subdivision of the state, to pro-

[66] Tippins v. Cobb County Parking Authority, 100 S. E. (2d) 893, 1957.

> vide funds for the purchase or construction, in whole or in part, of any revenue-producing facility which such county, municipal corporation or political subdivision is authorized by the Act of the General Assembly approved March 31st, 1937, known as the "Revenue Certificate Laws of 1937," as amended by the Act approved March 14, 1939, to construct and operate or to provide funds to extend, repair or improve any such existing facility. . . . This authority shall apply only to revenue anticipation obligations issued to provide funds for the purchase, construction, extension, repair or improvement of such facilities and undertakings as are specifically authorized and enumerated by said Act of 1937 as amended by said Act of 1939.

It was conceded by counsel for the parking authority that parking garages or facilities were not mentioned in either 1937 or 1939 acts of the general assembly providing for issuance of revenue certificates or bonds, but they insisted that this constitutional provision was applicable only to "any county, municipal corporation or political subdivision of this state, and that the revenue bonding powers of the Cobb County Parking Authority were not limited by this provision of the constitution, since it was a separate and distinct body corporate and politic. The court noted, however, that while strictly speaking the parking authority was neither a county, municipal corporation nor political subdivision of the state, the title of the act creating the parking authority, said that it was "An Act to Create the 'Cobb County Parking Authority' as a Public Body Corporate and an Instrumentality and Agency of the State."

The supreme court held that the furnishing of facilities and services necessary or convenient in constructing, erecting, maintaining and operating motor vehicle parking facilities and any area or space of any parking facility for lease or rental to commercial enterprises was a service or function ordinarily performed by private enterprise and was not a governmental function. Certainly, continued the court, under the unanimous decision of the court in Beazley v. DeKalb County,[67] the county itself would not be authorized to issue revenue certificates or bonds for the purpose of engaging in the business of acquiring, maintaining, and operating parking facilities and space for lease or rental to commercial enterprises, which could include mercantile and manufacturing establishments; and the parking authority, being an agency of the county, could not be clothed with greater power or authority than its principal. The court reasoned that the county could not do by delegation that which it could not do itself, for no greater power than that possessed by the principal could be conferred upon an agent thereof.

Parking as a Public Purpose

Although the courts have rather consistently held the provision of public parking facilities to be a public use, or public purpose, the question must still be adjudicated in certain instances, generally where interested parties believe the facilities to be provided to be for the benefit of individuals or groups of individuals rather than for the public at large. Such a case arose in California in 1957.

California. The City of Menlo Park brought eminent domain proceedings against certain landowners to condemn their land for off-street parking plazas.[68] The land in question was located in an area in the vicinity of a commercial district comprising a six block strip of Santa Cruz Avenue, the main business street of Menlo Park, and was zoned to permit multiple residence and parking uses. The zoning classification recognized that the area's uses were transitional and moving into commercial uses.

At least two areas in the transitional area had been rezoned to permit construction of supermarkets and customer parking areas. In 1955, the city council adopted a resolution to acquire and construct parking plazas, the cost of which was to be paid by assessment upon the lands benefited thereby, and to form an assessment district for that purpose. No part of the cost of acquisition of land and construction of the parking

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[67] 77 S. E. (2d) 740, 1953.

[68] City of Menlo Park v. Artino, 311 P. (2d) 135, 1957.

plazas was to be borne by the public generally. Condemnation awards were rendered for all lots taken, and the owners of several parcels appealed, on the ground that the purpose for which the city was taking their lands did not constitute a public use.

The district court of appeal held that the condemnation was for a public use within the meaning of the statute authorizing condemnation of realty for off-street parking, and the constitutional provision that private property shall not be taken or damages for "public use" without just compensation. In so doing, the court cited a previous decision upholding the validity of the Vehicle Parking District Act of 1943,[69] in which the court recognized that public parking places relieve congestion and reduce traffic hazards, in accord with the broader interpretation of public use recently followed in California.[70]

The property owners further contended that because two areas of the transitional zone, which had been commercial and had provided their own private parking, were excluded from the assessment district, and because no part of the costs of the plazas were to be paid out of general funds or bonds, the city had admitted that the proposed parking facilities were entirely for the benefit of the Santa Cruz Avenue frontage.

In answer to this contention, the court again cited the case of Whittier v. Dixon,[71] in which the court stated that the levy of a special assessment was justified if the improvement was a public one and the property to be assessed would receive a special benefit. Merchants, said the court, frequently acquire and operate private parking places to attract customers and vacate buildings when no parking space for customers is available. Parking places that tend to stabilize a business section, continued the court, by making it readily accessible to trade, benefit the property in the vicinity.

The present court noted that "public use" within the meaning of the California Constitution had been defined as a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government.[72] The court felt this test had been met in the instant case.

Use of Park Land for Public Parking Purposes

It is the general rule that where land has once been dedicated to public use, such as for park purposes, no use inconsistent with its use as a park can be made of the property so long as the public is still using the land as a park. So said the Texas Supreme Court in a recent case in which it held void a lease entered into by the City of San Antonio for the construction of an underground parking garage, which would partially destroy use of the surface as a park.[73]

The City of San Antonio, pursuant to an ordinance passed by the city council, proposed in 1953 to lease to one Zachry, for a period of 40 years, the right to construct and operate an underground parking garage beneath the city's Travis Park.

The facts indicated that shortly after the lease was entered into, an heir of the person who had dedicated the park some 100 years before filed suit, claiming that the park should revert to her because the lease constituted a use of the park contrary to the purpose for which it had been dedicated. In that suit the city joined with Zachry in upholding the lease contract. The court held that the city was the owner of the fee simple title to Travis Park.[74]

Subsequently the city filed suit to cancel and set aside the lease.

Testimony showed that the land in question had been used as a park for 100 years, and was being used for that purpose at the time of the trial. The court took notice of the general rule that property, having once been dedicated to public use as a public park, could not be subjected to a use inconsistent therewith. Zachry contended that under its home rule charter, the City of San Antonio might, among other things, dispose

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[69] City of Whittier v. Dixon, 151 P. (2d) 5, 1944.
[70] University of California v. Robbins, 37 P. (2d) 163, 1934.
[71] Ibid.
[72] Bauer v. County of Ventura, 289 P. (2d) 1, 1955
[73] Zachry v. City of San Antonio, 305 S.W. (2d) 558, 1957.
[74] Green v. City of San Antonio, 282, S.W. (2d) 769, 1955.

of any property whatever within the city, and might also abandon, discontinue, abolish, close, etc. park squares, public places, etc. The court however, ruled that under the provisions of a state statute, no public park or square could be sold until the sale had been authorized by a majority vote of the qualified electors voting at an appropriate election. Another statute made this applicable to all cities and towns, regardless of population or manner and method of incorporation. The court held that these provisions would apply to prevent sale or incumbrance of Travis Park by the City of San Antonio until authorized by a majority of the qualified electors of the city.

The court held that while it was intended to have an underground garage, approximately one-fourth of the park area would have been required for entrances and ramps. Public sidewalks bordering the park would be destroyed. In the center area of the park, now occupied by a statue, there would be escalators to permit patrons of the storage area to enter and leave the garage. All of the present surface of the park would be excavated and removed. The public would be unable to use the park during the period of construction. Trees could only be grown in boxes. Considering these and other details of the proposed plan, the court came to the conclusion that an unlawful diversion of Travis Park would take place in the construction of the underground parking facilities, and that the city council was without authority to make and enter into the lease. The court held the lease null and void and of no force and effect.

Necessity of Taking Property for Off-Street Parking

Florida. The question as to the necessity of taking property for public off-street parking facilities was brought before the Supreme Court of Florida, after the owners of certain property in Miami Beach applied for a permit to erect a multiple-level parking garage on their property.[75] Plans called for a number of mercantile stores to be located on the street level for the purpose of financing the project. It appeared from the record that a successful financial venture could not be undertaken without the revenue to be derived from rent for such establishments.

The property was located in an area zoned for multiple-family use, multiple-level parking garages without store fronts on the street were permitted. The city council denied the application for a permit as being a use not sanctioned by the ordinance, insofar as the plan called for construction of mercantile establishments not permitted by the zoning ordinance.

Subsequently, the city instituted condemnation proceedings to acquire the land in question for the purpose of establishing public parking facilities thereon. The property owners, David and Harry Rott, then asked the court to enjoin enforcement of the zoning ordinance which prohibited construction of parking garages with street-front stores. They also asked for a continuance of the condemnation action pending determination of the validity of the zoning ordinance. The injunction was denied and the landowners appealed.

The supreme court noted that the reasonableness and constitutionality of the ordinance in question had been upheld in a previous decision (Parking Facilities, Inc., v. City of Miami Beach, 88 So. (2d) 142, 1956). That decision the court held controlling here. The trial court was thus correct in refusing to grant the requested continuance.

The landowners contended that there was no necessity for taking this particular property. The court noted, however, that everyone agreed that this was an area of great traffic congestion. Furthermore, the finding of the city council on the question of necessity could not be easily or casually overthrown by the courts. Strong and convincing evidence of the most conclusive character was required to upset the findings of the elected officials charged with the responsibility of operating the city government in matters of this kind. Here there was no showing nor even allegation of fraud.

That the owners of the property were willing and had planned to provide better and even greater parking facilities than the city contemplated, the court held was not the

[75] Rott v. City of Miami Beach, 94 So. (2d) 168, March 13, 1957 (See Memorandum 94, August 1957, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 345).

answer. The owner, continued the court, could change his mind both as to whether he would build and what he would use the property for after he had built it. It might become a private enterprise subject to private control and used for private purposes. Evidence sustained the city council's finding that the taking was necessary, continued the court, and was sufficient to establish the city's good faith.

Prohibiting Parking by Ordinance

During 1957, the courts of Louisiana and New Mexico decided cases questioning the validity of city ordinances which attempted to prohibit parking on certain streets. In both cases the courts upheld the validity of the parking ordinances.

Louisiana. The object of this action[76] was to have decreed null and void Ordinance No. 1212 of the City of West Monroe which prohibited parking of all types of vehicles or things on Cypress Street between its intersections with North Seventh Street and with Bridge Street, and on Bridge Street between its intersection with Natchitoches and Bridge Streets.

The plaintiffs were eight owners of businesses located on property abutting and fronting on Cypress Street, within the zone in which parking had been prohibited by the ordinance. The ordinance was attacked as an unreasonable, arbitrary, and unfair regulation of traffic, the enforcement of which would be injurious to the landowners, and would impair their property rights. Additionally, it was contended that the ordinance violated Article 1, Section 2, of the Louisiana Constitution, which provides that no person shall be deprived of life, liberty or property, except by due process of law. The city denied these allegations on the grounds that due to the great and constantly increasing volume of traffic on this street, which, as a part of U. S. Highway 80, formed a main thoroughfare, the city's action being in the interest of public safety, convenience and welfare, was not only imperative but a proper and valid exercise of its police power. The trial court upheld the validity of the ordinance and the landowners appealed.

Evidence showed there had been an extensive survey made of traffic conditions before the ordinance was enacted. The first of these tabulations showed there had been a general and constant increase in volume of traffic in the street affected by the ordinance. Before undertaking the widening of this street, it was concluded by the Department of Highways that, in order to properly expedite traffic through this area, a four-lane highway or thoroughfare was required. To permit the parking of vehicles on each side of this highway would be to reduce a four-lane highway to a two-lane highway and return to the conditions existing prior to the widening of this highway.

According to the court of appeal, it is conceded that a municipality may, under its police power, regulate in a reasonable manner vehicular traffic on its streets. Furthermore, the city, through its governing authority, is vested with control over its streets and may make reasonable regulations for their use, and is only precluded from exercising that power in an arbitrary and discriminatory manner. It has likewise been held, the court said, that the legitimate exercise of the police power is not subject to restraint by constitutional provisions for the general protection of the rights of individual life, liberty and property.

Considering the reasons advanced to justify adoption of the ordinance, particularly as to the traffic load on the street during all hours of a normal business day, and applying the aforesaid principles, the court found nothing unreasonable or arbitrary in the ordinance or its enforcement and consequently no manifest error in the conclusion reached by the trial court that the ordinance afforded a reasonable regulation of traffic in the interest of safety.

The court ruled that the landowenrs had not been deprived of their right to the street, nor had their customers and/or their friends and neighbors.

Under the established facts, the court concluded that the ordinance was not unreasonable, arbitrary, unjust or oppressive, nor did it violate Art. 1, Sec 2, of the Louisiana Constitution. Therefore, the validity of the ordinance should be upheld.

The lower court's judgment for the city was affirmed.

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[76] Scott v. City of West Monroe, 95 So. (2d) 343, 1957.

New Mexico. Several property owners and tenants in the City of Roswell, New Mexico, sought an injunction to prevent enforcement of an ordinance which prohibited parking of vehicles on a certain street. The main question before the court was whether the city had, by reason of a contract, bartered away the exercise of its police power contrary to the general rule that the police power of a municipal corporation cannot be divested by contract or otherwise. The trial court held the ordinance valid and the property owners appealed. The state supreme court held that an ordinance adopted subsequent to execution of an agreement between the city and the state providing for widening of a portion of a state highway traversing the city, which prohibited the parking on a portion of the highway, was not invalid.[77]

The agreement between the city and the state provided that the state would participate in the cost of improvement of U. S. 380 within the city limits to the extent of 100 percent for resurfacing the existing paving, and one-third of the cost of the widening. A supplemental contract entered into by the parties specified that parking would be prohibited in the area in question except as permitted by written authorization from the state.

Among the important conclusions of law reached by the trial court were, that the action of the city council in prohibiting parking was not unreasonable, that the city had the power to prohibit or place a ban upon the parking of vehicles upon public streets within its corporate limits, and that the action of the city council was a reasonable exercise of the police power delegated to it and with which the court would not interfere.

The property owners did not question the city's power to enact a no parking ordinance as a reasonable exercise of the city's police power. They did not even question the reasonableness of the ordinance. They alleged, however, that the ordinance, however reasonable, was void because it was not enacted to meet an emergent traffic problem, but rather to secure for the city the greater part of the cost of the improvement.

The supreme court noted that there were facts which indicated the existence of a bona fide traffic problem, for example, the physical fact of two-way vehicular traffic flowing into and out of a bottleneck created by a sudden narrowing of the three-block stretch involved from a 52 to a 46-ft street, the council's declaration that it was acting in the interest of public safety and welfare, plus the presumption of good faith attending the council's exercise of discretion in the matter in the absence of a showing of fraud or conduct equivalent to fraud. The court thought these facts should be given more weight than those advanced by the property owners.

The property owners' reasoning in connection with the facts of this case did not appear to the court as sound. In the first place, according to the court, it laid a charge of bad faith against the action of the city in the premises. In the second place, in demanding the declaration that the city abdicated and waived its police power, it would deny the city the right to its day in court on whether it was not, at the same time, acting in good faith for the safety of all its inhabitants, in imposing the regulation.

The court said it found nothing either immoral or illegal in the agreement made. The court based its finding upon the principle that where two separate governmental agencies, or political subdivisions, are committed by the inherent nature of each to the attainment of a common purpose or end, there was no ethical consideration which proscribed, nor any sound business practice which condemned, an agreement between the two to cooperate in achieving the common aim of both.

The supreme court affirmed the judgment of the trial court upholding the validity of the ordinance.

INFORMATION INTERCHANGE

The committee issued seven monthly memoranda during the year 1957 through the Highway Research Correlation Service. These memoranda contain digests of new laws, court decisions, administrative practices, and other items of current interest. Memoranda numbers and the month of release are listed on the next page.

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[77] Farnsworth v. City of Roswell, 315 P. (2d) 839, 1957.

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