Legal Aspects of Limiting Highway Access

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● THE automobile has proved to be a mixed blessing. It has expanded markets and living areas with immeasurable effects on the society and economy.[1] But this gain has been bought at an enormous cost in lives, injuries, and property damage[2] and with an extravagant waste of human and physical productive capacities.[3] We are faced by the paradox of the obvious convenience and utility of the automobile leading to a continued increase in the number of motor vehicles using our highways[4] with this increase, in turn, resulting in traffic congestion that threatens to destroy the automobiles convenience and utility.

Traffic engineers have suggested that one solution to this dilemma lies in the limitation of vehicular access to major highways, that is, in the elimination or restriction of private driveways and other vehicular entrances to the public road from adjoining lands and the limitation of highway and street intersections at grade.[5] Because of the necessities of toll collection, turnpikes are consistently constructed in accordance with limited-access principles.[6] The principles, however, are equally useful for free highways.

The effectiveness of restrictions upon highway access in ameliorating traffic congestion appears to be established. Limiting access eliminates such accident sources as vehicles entering and leaving the traffic stream, cross traffic, parking, and pedestrian traffic.[7] If access restriction is combined with other features of modern highway design, such as multiple lanes, medial strips dividing opposing traffic, gentle curves, and adequate sight distances, the accident rate may be decreased by as much as 85 percent.[8] The mere elimination of street intersections at grade can triple highway capacity[9] and reduce fuel costs by from 50 to 75 percent.[10] Time savings of course follow accordingly. Moreover, control of highway access inhibits the development of the roadside businesses which have clogged the roadways and, by so doing, eliminates a principal cause of highway obsolescence.[11]

This evidence of the usefulness of the limitation of highway access finds support

[1] See Noble, Highways Influence Civic Growth and Industrial Development, 2 TRAFFIC Q 13 (1948), Willier, Traffic and Trade, 1 TRAFFIC Q 211 (1947)

[2] The National Safety Council reports that an estimated 38,000 deaths resulted from traffic accidents in 1952 Approximately 1,350,000 persons were injured, and property damage amounted to about one and one-half billion dollars N Y Times, Feb 2, 1953, p 36, col 3

[3] See LEVIN, PUBLIC CONTROL OF HIGHWAY ACCESS AND ROADSIDE DEVELOPMENT 3-5, Public Roads Administration, Federal Works Agency, (1947), Fratar, Economic Aspects of Highway Planning, 3 TRAFFIC Q 321 (1949)

[4] The number of registered motor vehicles in the United States has increased by 50 percent in the last twelve years Newsweek, Dec. 15, 1952, p 82, col 1 The estimated total of vehicle-miles traveled per year has increased 56 percent in the same period N Y Times, Feb 2, 1953, p 36, col 3.

[5] Other techniques for meeting the problems of indiscriminate access are available The use of land adjacent to highways may be controlled under traditional zoning powers to prevent the proliferation of those roadside businesses designed to exploit free access See Levin, Highway Zoning and Roadside Protection in Wisconsin, 1951 WIS L REV. 197, BOWIE, ROADSIDE CONTROL 44 (Maryland Legis Council, Research Div Report No. 5, 1940) In England, broad administrative control of access and of the use of abutting land is employed under the Restriction of Ribbon Development Act, 1935, 25 and 26 Geo V c 47 Parkways and ornamental roadside strips may also afford protection See Abrey v Livingstone, 95 Mich 181, 54 N W 714 (1893), Monroe County v Wilkin, 260 App Div. 366, 22 N Y S 2d 465 (1940), app denied 260 App Div 995, 25 N Y.S 2d 788

[6] See OWEN AND DEARING, TOLL ROADS 75 (1951).

[7] Approximately one-fourth of all fatal traffic accidents occur at intersections TRAFFIC ACCIDENT FACTS 24 (Ohio Dept of Highways, 1948), Cunnyngham, The Limited-Access Highway from a Lawyer's Viewpoint, 13 MO L REV 19, 23-24 (1948)

[8] HALSEY, TRAFFIC ACCIDENTS AND CONGESTION 11 (1941), LEVIN, PUBLIC CONTROL OF HIGHWAY ACCESS AND ROADSIDE DEVELOPMENT 32, Public Roads Administration, Federal Works Agency (1947), Cunnyngham, The Limited-Access Highway from a Lawyer's Viewpoint, 13 MO L REV 19, 23-24 (1948)

[9] HIGHWAY CAPACITY MANUAL 46, 91-92 (1950), HIGHWAY ECONOMICS AND DESIGN PRINCIPLES, American Road Builders' Association Bull. No 67 (1940)

[10] Fratar, Some of the Economic Aspects of Highway Planning, 3 TRAFFIC Q. 321, 323-24 (1949) See MOYER AND TESDALL, TIRE WEAR AND COST ON SELECTED ROADWAY SURFACES, Iowa Engineering Experiment Station Bull No 161 (1945)

[11] See Bowie, Limiting Highway Access, 4 MD L REV. 219, 219-21 (1940), BUGGE, THE HIGHWAY PROBLEM IN 1950 18 (1951).

in the fact that some 35 states[12] have, since 1937, enacted legislation authorizing in varying circumstances the establishment of limited-access highways.[13] Highway authorities are making increasing use of the principle, both in curtailing access on existing roads and in constructing new freeways and expressways.

Like most cures, limiting access involves certain costs. The benefits of the easy mobility which the automobile affords may be lost if access to highways is unduly restricted. A road which assures safe and rapid travel is no help to the motorist who cannot enter it where he is and leave it at his destination. The controlled-access principle must therefore be employed only upon highways which carry primarily through traffic, and adequate land-service roads must be available for local traffic.[14]

As a corollary to this concern for the motorist, consideration must also be given to the interests of the owner of the land adjoining the highway. The value of land abutting a road and well situated for the location of a gasoline station, tourist court, or roadside stand will be severely reduced if entrance to and from the highway is forbidden. On the other hand, if every landowner who is inconvenienced by an interference with access must be paid by the public for his loss, the costs of using controlled-access design may become prohibitive. The balance to be struck between these conflicting interests of the landowner and the traveling public is a legal question which has caused some difficulty.

It is a fundamental principle of Anglo-American jurisprudence that private property cannot constitutionally be appropriated for a public use unless the owner is paid an adequate compensation.[15] The problem of when this principle requires payment to a landowner whose access[16] is curtailed has proved to be a perplexing one, and solutions have varied. The United States Supreme Court has held that nothing in the federal constitution obliges the states to recognize any particular interests of an abutting landowner in access to the highway.[17] The matter of defining the landowner's interests has therefore been left to the courts of each state and the courts of different states often reach different conclusions.[18] Of necessity, any observations concerning the abutter's interests must be generalizations, subject to qualification for many states, and to contradiction for some. Additional variations result from the fact that the constitutions of almost half of the states require that compensation be paid only if private property is taken or appropriated by the government; the constitutions of the other states require compensation for damage to property caused by a public improvement, whether any land is, in fact, taken or not. The distinction is not so clear as it seems, however, for the courts of all states have not interpreted these

[12]These states are Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming Statutes of some 24 of these states are set out in LEVIN, PUBLIC CONTROL OF HIGHWAY ACCESS AND ROADSIDE DEVELOPMENT 104-47, Public Roads Administration, Federal Works Agency (1947). In Missouri, limited-access highways are authorized by the constitution. MO. CONST. Art. IV, Sec 29 (1945)

[13]In some states the power to establish limited-access highways is conferred only upon the state highway director, department, or commission, in others the power is also granted to municipalities, and counties Some of the statutes limit the application of restricted-access principles to newly constructed highways, while others also permit the conversion of existing free highways As to what amounts to "new construction," see State ex rel Troy v Superior Court, 37 Wash 2d 66, 225 P. 2d 890 (1950) In Maryland an expressway can be constructed only if the highway carries or will carry an average traffic load of 5,000 vehicles per day See MD LAWS ANN Art 89B, Sec 20(e) (1951), State Roads Comm'n v Franklin, 95 A. 2d 99 (Md 1953) In Oregon, adequate access must be provided to certain lands in the establishment of a limited-access highway ORE COMP LAWS secs. 100-1a14, 100-1a15 (1947). In some statutes, "easements" of light, air and view may also be curtailed, under others, only access can be extinguished.

[14]With apparent concern for private access rights, the Idaho legislature recently adopted a concurrent resolution requesting the state board of highway directors not to adopt policies of more populous states which would interfere with private rights and industry. Senate Concurrent Res No. 2, Jan. 16, 1952 First Extraordinary Session, Thirty-first Session, Idaho State Legislature

[15]This principle is included in some form or other in the federal constitution and the constitutions of all states but North Carolina, where it has been established by judicial construction. See Yancey v. North Carolina State Highway Comm'n, 222 N. Car. 106, 22 S E 2d 256 (1942).

[16]Other rights which are often said to appertain to land abutting a highway are easements of light, air and view See 2 NICHOLS, EMINENT DOMAIN 265-66 (3d ed 1950) Since these easements are usually less significant than the right of access and are generally governed by the same rules, light, air and view are not separately considered herein

[17]Sauer v New York, 206 U S 536 (1906)

[18]"The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States, and the decisions have been conflicting, and often in the same State irreconcilable in principle The courts have modified or overruled their own decisions, and each State has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy " Sauer v New York, 206 U.S 536, 548 (1906)

constitutional provisions literally. For example, South Carolina's courts have interpreted that state's constitution as requiring compensation for damage to property without a taking although the South Carolina constitution refers only to property "taken."[19] Conversely, in Pennsylvania, where the constitution contains a provision for compensation for property taken or injured under certain circumstances, it was held in several cases that damage without a taking entitled the landowner to no compensation.[20] Moreover, the distinction between taking and damage is beclouded by the usual rule that the destruction of property constitutes its taking,[21] since the difference between damage and destruction is only a matter of degree. Finally, by its nature the privilege or right of access to a highway is not subject to physical seizure and use, a fact which tends to obscure the distinction between taking and damage in this context.[22] Nevertheless, the differences in the judicial approaches to the problem and in the results reached seem to justify separate consideration of the questions presented under these two types of constitutional provisions.

IN STATES COMPENSATING ONLY FOR "TAKING"

In those states[23] with constitutional provisions requiring compensation only for property taken or appropriated for a public use, whether the power of eminent domain must be exercised in limiting access turns upon whether the property owner is regarded as having a property right to unrestricted access to an abutting highway.[24] If there is such a right, it constitutes an easement in the highway, making the abutter a part owner of the land occupied by the road. Extinguishment of this easement by the prohibition of vehicular access would destroy the supposed ownership and amount to a taking of that property right.[25]

Courts and writers have often stated broadly, and occasionally without qualification, that an owner of land abutting a public highway has a right of access to the highway, and that a denial of this right entitles him to compensation.[26] If such statements are interpreted in the light of the facts presented and of the actual rulings of the courts, however, the right appears to be more limited than is generally supposed. The existence of an abutter's right of access against certain kinds of obstructions does not establish such a right for all purposes.

Thus, it appears to be generally agreed that an abutter has a right against any private person who interferes with the abutter's means of access by maintaining some structure in the highway.[27] Such an obstruction constitutes a purpresture, or public nuisance, and is subject to abatement in an action by the state. It also constitutes a

[19] Moss v South Carolina State Hwy. Dept., 75 S E 2d 462 (S Car 1953), interpreting Article 1, Sec 17, of the Constitution of South Carolina

[20] The Constitution of Pennsylvania, Article 16, Sec 8, requires private corporations with powers of eminent domain to compensate owners for property taken, injured, or destroyed by their works or improvements The court held a railroad which took no property not obliged by this provision to make compensation for injuries caused by its works. See Pennsylvania R R v. Lippincott, 116 Pa. 472, 9 Atl 871 (1887), Pennsylvania R R v Marchant, 119 Pa 541, 13 Atl 690 (1888) For similar interpretation of a statutory provision, see Cantrell v Pike County, 255 S W 2d 988 (Ky 1953)

[21] See 2 NICHOLS, EMINENT DOMAIN 253, 259, 285 (1950)

[22] See RESTATEMENT, PROPERTY Sec 507, Comment b (1944)

[23] Alabama, Connecticut, Delaware, Florida, Idaho, Iowa, Indiana, Kansas, Maine, Massachusetts, Maryland, Michigan, Nevada, New Hampshire, New Jersey, New York, North Carolina (by judicial decision), Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, and Wisconsin In some states, as in Alabama and Pennsylvania, the general constitutional provision protects only against a taking, but special clauses provide for the payment of compensation for property "damaged" or "injured" by particular government or private agencies exercising powers of eminent domain See ALA CONST Art, 1, Sec. 23, Art XII, Sec 235, PA CONST. Art 1, Sec. 10, Art 16, Sec. 8. In Massachusetts, statutes permit recovery of damages caused by highway improvement, and in South Carolina, such recovery is permitted by judicial interpretation of the "taking" clause See n 19, supra

[24] A landowner need not always be an abutter upon a highway in order to claim a right to compensation for loss of access. If he enjoys a private easement of way over intervening land to the highway, extinguishment of the easement may require payment of compensation See United States v Welch, 217 U.S 333 (1910) But the destruction of the possibility of obtaining such a private easement is ordinarily non-compensable See Los Angeles v. Geiger, 94 Cal App 2d 180, 210 P 2d 717 (1949).

[25] See Aigler, Measure of Compensation for Extinguishment of Easement by Condemnation, 1945 WIS L REV 5 (1945), RESTATEMENT, PROPERTY sec 507, Comments b and c (1944). But compare Horn v Chicago, 403 Ill 549, 87 N E. 2d 642 (1949), where the court seems to say that extinguishment of access cannot amount to a "taking" of property because no land is physically occupied

[26] See 10 McQUILLIN, MUNICIPAL CORPORATIONS 669-71 (3d ed 1950), 1 LEWIS, EMINENT DOMAIN 178-79 (3d ed 1909)

[27] E g , Bernard v Willamette Box & Lumber Co , 64 Ore 223, 129 Pac 1039 (1913), Barham v Grant, 185 Ga 601, 196 S E 43 (1937) See also 3 NICHOLS, EMINENT DOMAIN 242-43 (3d ed 1950)

private nuisance to any landowner to whom it causes special injury, different from that suffered by the public generally. Since loss of access is usually regarded as a special injury, the abutter may sue to abate the nuisance or to recover damages, and to this extent it may truly be said he has a "right of access." But recognition of such a right against a private person for unauthorized obstruction of the highway falls far short of proving the existence of a right of access good against the interests of the highway user.

It is also agreed, although less generally, that an owner of land adjacent to a highway must be compensated for impairment of access caused by uses of the highway which, although authorized by the appropriate government, are not within the purposes of public passage for which the highway was established. Thus, it has been held that an owner is entitled to damages if the construction of a steam railroad or of telegraph or telephone lines in the highway impairs access to his abutting land.[28] Such structures, erected by quasi-public corporations with proper legal authorization, are not subject to abatement as nuisances, and recovery must be predicated upon the constitutional guarantee of just compensation.[29] Many of these cases present no problem of access rights, however. If the abutter owns the fee in the land occupied by the roadway and the public holds only an easement or right-of-way for highway purposes, the construction of the steam railroad or telegraph lines in the street may be regarded as beyond the scope of the highway easement and the imposition of this additional servitude upon the abutter's fee as a taking of his property rights.[30] Although injury to access will often be a major element in the amount recovered, the right to compensation depends not upon that injury, but upon the fact that the owner had previously relinquished a highway right-of-way and not a railroad or telegraph right-of-way. Since the right to compensation exists, whether access is obstructed or not, these cases cannot be regarded as establishing any rights of access.

In a number of states, however, the courts have held the landowner constitutionally entitled to recompense in cases where this explanation is unavailable, for example, where the nonhighway structure is constructed in a street owned in fee by the city or state or in a part of the street of which the fee is owned by some other person.[31] Deprivation of access is usually said to be the basis for such compensation, but the origin of this right is difficult to discern. In some cases, this right of access has been founded in the notion that the city or state holds the fee to a highway in trust for highway purposes; a use of the highway for other purposes is a breach of trust which an abutter specially injured by the denial of access may redress.[32] In others, the right has been based upon a provision in the original instrument of highway dedication requiring that the highway be kept free; the abutting landowner, regarded as a beneficiary of this promise, may sue to enforce it.[33] The fact that the landowner may have donated the land or may have been assessed for highway improvement has also been emphasized as adding weight to his claim for compensation.[34] Some courts have noted that access to adjacent land was the original purpose of the highway and that access is necessary to land use.[35] More often, the source of this right of access has been left unstated. Whatever its origin, however, this property right or easement of access is a right good only against nonhighway uses, a limitation of which some courts have overlooked.[36]

The problem encountered in curtailing the access of abutters in the conversion of

[28] See Muhlker v New York & Harlem R R , 197 U S 544 (1905), Kurtz v Southern Pacific Co., 80 Ore 213, 155 Pac 367 (1916), Adams v Chicago, B & N Ry , 39 Minn 286, 39 N.W. 629 (1888). Accord City of Cannelton v Lewis, 11 N E 2d 899 (Ind App 1953) (floodwall erected in street), Sweet v Irrigation Canal Co , 254 P 2d 700, (Ore. 1953), reh denied 256 P. 2d 252 (open ditch in highway)

[29] Sweet v. Irrigation Canal Co , ibid

[30] See Knapp & Cowles Mfg Co v New York, N H & H R R , 76 Conn 311, 56 Atl. 512 (1903), 3 NICHOLS, EMINENT DOMAIN 176-78, 242 (3d ed 1950).

[31] See 2 NICHOLS, EMINENT DOMAIN 404-05 (3d ed 1950), 3 id. 246-53

[32] E g , Lahr v Metropolitan Elevated R R , 104 N.Y 268, 10 N E 528 (1887), Theobold v Louisville R R , 66 Miss 279, 6 So 230 (1889).

[33] E g , Story v. New York Elevated R.R , 90 N.Y. 122 (1882)

[34] E g , Adams v Chicago, B. & N Ry , 39 Minn 286, 39 N W 629 (1888)

[35] See Bacich v Board of Control, 23 Cal. 2d 343, 350, 144 P. 2d 818, 823 (1943), State ex rel Copland v Toledo, 75 Ohio App 378, 62 N E 2d 256 (1944).

[36] E g , Brownlow v O'Donoghue Bros., 276 Fed 636 (App D C 1921), where the court considered a case involving restriction of access for private purposes conclusive of the question of the validity of access restrictions intended to facilitate highway travel

an existing highway to a freeway or limited-access highway is whether the landowner has a property right, good against the claims of proper highway uses, which requires exercise of the power of eminent domain and the payment of compensation. Cases involving the right of access against highway obstructions for private or nonhighway purposes are inapposite, for it is generally agreed that this right of access is subordinate to the fullest exercise of the highway easement, that is, to all uses of the highway by the public for purposes of travel.[37] Under this view, there is no right of access good against improvements designed to facilitate public travel. If there is no property right, there is, of course, no taking of property for which compensation must be paid when access is curtailed. The principle that there is no right of access superior to proper highway uses is demonstrated by well-established authority in a number of situations analogous to the limitation of access incident to the establishment of a freeway. Thus, in a number of states with constitutions guaranteeing compensation only for a "taking," it has been held that the construction of a viaduct or of an approach to a bridge in the highway so as to destroy access to the front of an abutting lot does not amount to a taking.[38] Similar holdings deny compensation when access is foreclosed by a change of the grade of a highway[39] on the ground of the superiority of the highway easement.

A related rule governs the rights of an owner of land abutting upon a navigable river or lake to access to the water. It is well settled that such an owner has a right of access superior to all but the state's right to facilitate public use of the waterway for navigation and commerce. If access is curtailed by a rule or a structure which is designed to promote public travel upon the river or lake, the landowner has no cause for complaint.[40]

This subordination of the abutting landowner's interest in access to any appropriate exercise of the highway easement has been explained by the assumption that obstructions to access must have been contemplated when the highway right-of-way was originally acquired and that the possibility of such obstructions must have entered into the compensation paid.[41] To allow recovery when access is obstructed would amount to paying the landowner twice. A more realistic view is that the interest acquired by the government in condemnation for highway purposes is sufficient to allow for all changes in the character or amount of traffic and for all improvements which such changes may require, regardless of whether such developments were, in fact, considered in fixing the price for the right-of-way.[42]

In some few cases, however, the rule that the abutter's right of access is subject to the public's right of travel has been somewhat limited. A recent opinion of the Iowa Supreme Court held a landowner constitutionally entitled to compensation for a so-called taking of property when access to his land was impeded by the elevation of the center of the abutting highway for an approach to a bridge over an intersecting highway.[43] The decision may not amount to the recognition of an absolute right of access superior to all highway improvements, however, since the court pointed out that the location of this particular land made the anticipation of such an improvement extremely unlikely in fact.[44] Thus, the case could be interpreted as meaning the landowner is subject only to such limitations in his access as result from changes

[37] See Clarke, The Limited-Access Highway, 27 WASH. L. REV 111, 117-19 (1952), 2 ELLIOTT, ROADS AND STREETS, 1141 (4th ed 1926), 1 LEWIS, EMINENT DOMAIN 179-81 (3d ed 1909), 11 McQUILLIN, MUNICIPAL CORPORATIONS 4 (3d ed 1950), 2 NICHOLS, EMINENT DOMAIN 362 (3d ed. 1950).

[38] E g., Sauer v New York, 206 U S 536 (1906), Delaware Bridge Comm'n v Colburn, 310 U S 419 (1940), Northern Transp Co v Chicago, 99 U S 635 (1879), Chicago v Rumsey, 87 Ill 348 (1877) (approach for tunnel in street), New York Dock Co v New York, 300 N Y 265, 90 N E 2d 183 (1949), Barrett v Union Bridge Co , 117 Ore 220, 243 Pac 93 (1926) See also 1 NICHOLS, EMINENT DOMAIN 370 (3d ed 1950), and cases cited in Notes, 45 A L R 534 (1926), and 11 A L R 2d 206 (1950) An opposite conclusion is of course reached in states where "damage" entitles the abutter, either under the constitution or by statute, to compensation See McCandless v Los Angeles, 10 Cal App 2d 407, 52 P 2d 545 (1935) (constitutional provision), Liddick v. Council Bluffs, 232 Ia. 197, 5 N.W 2d 361 (1942) (statute)

[39] E g , Cantrell v. Pike County, 255 S W 2d 988 (Ky 1953), Horn v Chicago 403 Ill. 549, 87 N E 2d 642 (1949), Roman Catholic Church v. New York, 278 App. Div. 1010, 105 N Y S. 2d 820 (2d Dept 1951), Dobler v Baltimore, 151 Md 154, 134 Atl 201 (1926). See also 2 NICHOLS, EMINENT DOMAIN 370 (3d ed. 1950), Bowie, Limiting Highway Access, 4 MD L REV 219, 228-34 (1940).

[40] See Sage v. New York, 145 N.Y 61, 47 N E. 1096 (1897), State ex rel Squire v Cleveland, 150 Ohio St 303, 82 N.E 2d 709 (1948). See 2 NICHOLS, EMINENT DOMAIN 163 (3d ed. 1950).

[41] See Callender v Marsh, 1 Pick, (Mass.) 418 (1823), 2 NICHOLS, EMINENT DOMAIN 369 (3d ed 1950)

[42] See Smith v Baltimore & Ohio R R , 168 Md 89, 92-93, 176 Atl 642, 643-44 (1935).

[43] Anderlik v. Iowa State Hwy Comm'n , 240 Ia. 919, 38 N W. 2d 605 (1949).

[44] The court observed, "There is no indication here that any such improvement as defendant has made was remotely contemplated at the time the original easement for the highway was acquired " 240 Ia., at 924, 38 N W. 2d, at 608

in the highway which might have been foreseen when the highway was originally established. A somewhat similar rule applies in Ohio, where an abutting owner must be compensated for damages occasioned by a change of the highway grade only if he has improved his property to conform to an established grade;[45] the requirement that the grade be an established one seems to reflect a judgment that no compensation should be paid if the change reasonably could have been contemplated.[46]

Even under the usual view that the abutter has no right of access superior to the public right to use the highway in any manner consistent with highway purposes, there are situations in which the extinguishment of access may entitle him to damages. If the means of access curtailed is the only available way of ingress and egress to and from land, the land is useless for all practical purposes.[47] The destruction of property or of its utility may constitute a taking in the constitutional sense. Elimination of all access to land is thus generally held to effect a taking of that land, for which the owner must be paid.[48] But the allowance of such compensation does not amount to a recognition of an easement of access as a property right.

Similarly, if some part of an owner's land is actually and physically taken for the right-of-way of a widened or relocated highway, he is entitled, as compensation for this taking, to all damages caused by the taking, including injury to the remainder of his tract. The measure of recovery usually applied is the market value of the whole tract of land before the taking less the market value of the parcel remaining after the taking.[49] Since ease of access affects market value, an impairment of ingress and egress may be paid for in this situation, although no compensation would be required if no land were physically taken.[50] Whether such a measure of damages is sound, the cases applying it cannot be regarded as establishing a right of access superior to the highway easement.

Subject to these qualifications, the generally accepted view that physical obstruction of an abutter's access in furtherance of highway purposes does not constitute a taking of property seems strong authority for the proposition that an existing free-access highway can be converted to a limited-access highway without the payment of compensation to abutters for loss of access.[51] Under this view, the owner's right of access is subject to restriction in favor of any exercise of the highway easement, and the legal limitation of ingress and egress to speed the flow of traffic and to eliminate accidents seems to further proper highway uses as much as the construction of a via-

[45] State ex rel. McKay v. Kauer, 156 Ohio St 347, 102 N.E. 2d 703 (1951), Cincinnati v. Shuller, 160 Ohio St. 95 (1953)

[46] Cf Adams v Chicago, B. & N. Ry , 39 Minn 286, 39 N.W 629 (1888), where the court argues that a city may be estopped by the abutting landowner's erection of buildings to use in connection with the street from closing the street or interfering with access by a non-highway use

[47] Of course the denial of all vehicular access does not totally destroy the land, or prevent some use to be made of it If a tract is completely isolated on the surface, it still might be reached by helicopter In many cases, the owner of such a tract might be able to purchase private easements of way from adjacent landowners as a means of reaching the public highway system If this should prove impossible, the owner of the isolated land could still sell the tract to the owner of adjacent property for use in conjunction with accessible land The decimated value which remains, because of these possibilities, after the curtailment of all vehicular access is not usually regarded as preventing the curtailment from amounting to the substantial destruction, and so the "taking," of the isolated land

When a tract has been so isolated by the denial of all vehicular access, the fact that it is owned by the owner of an adjacent and readily accessible tract poses a nice problem On the one hand, the curtailment of access would usually amount to a compensable "taking" if the two tracts were owned by separate persons, and it might seem that the owner of the isolated tract should not be denied this payment because he happens to own contiguous land On the other hand, since the tract which has no direct highway access can still be reached by crossing the intervening tract of the same owner, it might seem that there is no real isolation Whether the owner in such a situation must be compensated should probably depend upon whether the tract which is denied access can be reasonably used, in view of its physical and economic situation, in conjunction with the accessible tract If such a combined use is feasible, the value of the land has not been substantially destroyed, and the tract is not "taken " If the combined use of the tracts is physically or economically impracticable, however, the isolated tract is so reduced in value as to be "taken." The problem is illustrative of the gradual coalescence of concepts of "taking" and "damage "

[48] E.g., Breinig v Allegheny County, 332 Pa. 474, 2 A 2d 842 (1938) (sole means of access can only be curtailed by eminent domain, not by regulatory power), Schiefelbein v United States, 124 F 2d 945 (8 Cir 1942) (rechanneling of river flooded road which was sole means of access), Sanderson v Baltimore, 135 Md 509, 109 Atl 425 (1920) (change of grade cut off vehicular access on all sides) See the excellent discussion of this exception in Bowie, Limiting Highway Access, 4 MD L REV 219 (1940)

[49] E g , Case v State Hwy. Comm'n., 156 Kan. 163, 131 P 2d 696 (1942), Wheeler v. State Hwy. Comm'n , 212 Miss. 606, 55 So. 2d 225 (1951). See also 2 NICHOLS, EMINENT DOMAIN 414-16 (3d ed. 1950).

[50] Several cases employing broad language concerning the existence of an absolute "right of access" might be reconciled with the foregoing cases upon the basis of this rule, since some land was physically taken. Examples of such cases are Stock v Cox, 125 Conn 405, 6 A 2d 346 (1939) (all access also cut off), In re Appropriation of Easement, 93 Ohio App 179, 112 N.E. 2d 411 (1952).

[51] See Bowie, Limiting Highway Access, 4 MD L REV 219 (1940) Other writers indicate that such a rule would be desirable, but seem to conclude that the authority is to the contrary. See Cunnyngham, The Limited-Access Highway from a Lawyer's Viewpoint, 13 MO L REV 19 (1948), Clarke, The Limited-Access Highway, 27 WASH. L REV. 111 (1952)

duct or a change of grade for the same purposes. It might be argued that cases involving such physical impairment of access are distinguishable on the ground that the right of access still exists, even though its exercise has been rendered more difficult, when some physical obstruction is involved, while the extinguishment of access incident to the establishment of a limited-access highway is complete. Thus an abutter would ordinarily be free to construct a ramp to reach the highway level if only the grade has been changed,[52] but no such physical adaptation would ordinarily be possible if ingress and egress is legally prohibited. The suggested distinction appears to be inconsistent, however, with the general view that a right is as effectively taken by the destruction of the physical means for its exercise as by a legal prohibition. The landowner thus should have no greater claim to compensation when a right of access is legally extinguished than when it continues to exist in theory but is, in practice, destroyed by physical barriers.[53]

The governmental right to curtail highway access without payment of compensation does not rest upon the superiority of the highway easement alone. The regulatory, or police, power to control the use of private property in the interests of public health, welfare, and safety has long been employed as the foundation for restrictions upon the abutter's freedom of ingress and egress. Traffic regulations limiting the use of a highway to vehicles of a specified type or weight have often impaired access severely without being considered as a taking of property rights.[54] One-way streets,[55] prohibitions against left turns,[56] and medial dividing strips[57] often render access less convenient without giving rise to a constitutional right to payment. The zoning power has also been invoked as justifying limitations upon the construction of driveways into the street.[58] Municipal regulation of driveways, under "curb-cutting" ordinances, has long been sanctioned, and indicates that the restriction of access requires no compensation.[59] The legal question involved in cases testing such ordinances has usually been whether the administrative authority has been delegated the power to prohibit access or only to regulate the number of driveways and the manner of their construction.[60] Decisions that the power to prohibit has not been delegated should not be taken as establishing that prohibition without compensation would be unconstitutional.

On the basis of the cases establishing that an abutter's right of access is subordinate to the public right to improve the highway in the exercise of the highway easement and to regulate traffic, it would appear that no property is taken in the constitutional sense by the curtailment of access in the conversion of an existing highway to a limited-access facility. Although some 17 states with constitutional provisions compensating only for property taken also have statutes authorizing the establishment of limited-access highways, no reported decision of this precise question by a court of these states has been found.[61] In some four of these states the authorizing statutes have been involved in reported litigation, but in all four the highway authorities apparently conceded that the landowners were entitled to compensation for loss of access to existing roads.[62] The failure of counsel to assert

[52] Cf Interstate Bridge Authority v. Ham's Estate, 92 N H 277, 30 A 2d 7 (1943), Breinig v Allegheny County, 332 Pa 474, 2 A 2d 842 (1938)

[53] Except in states like Ohio which give effect to an abutter's improvements erected in reliance upon continued access, see n 45, supra, it apparently does not matter whether or not the owner has constructed a driveway or made other improvements on his land to facilitate ingress and egress

[54] E g , Illinois Malleable Iron Co v Lincoln Park, 263 Ill 446, 105 N E 336 (1914), Blumenthal v. Cheyenne, 64 Wyo 75, 186 P 2d 556 (1947) Interference with access caused by the erection of parking meters has also been held not to constitute a compensable "taking" Hickey v Riley, 177 Ore 321, 162 P 2d 371 (1945), Foster's, Inc v Boise City, 63 Idaho 201, 118 P 2d 721 (1941)

[55] E g , Chissell v Baltimore, 193 Md 535, 69 A 2d 53 (1949)

[56] E g , Jones Beach Boulevard Estate, Inc. v Moses, 268 N.Y 362, 197 N E 313 (1935)

[57] E g , Jones Beach Boulevard Estate, Inc. v Moses, 268 N.Y 362, 197 N E. 313 (1935) (medial divider compelled owner to travel five miles to turn around)

[58] See Standard Oil Co v Minneapolis, 163 Minn 418, 204 N W 165 (1925)

[59] E g , Alexander Co v Owatonna, 222 Minn 312, 24 N.W. 2d 244 (1946), Farmers-Kissinger Market House Co v Reading, 310 Pa 493, 165 Atl. 398 (1933), Tilton v Sharpe, 85 N H 138, 155 Atl. 44 (1931).

[60] E.g , Anzalone v. Metropolitan District Comm'n, 257 Mass. 32, 153 N E 325 (1926), Metropolitan District Comm'n v Cataldo, 257 Mass 38, 153 N E 328 (1926), Goodfellow Tire Co v. Comm'r, 163 Mich 249, 128 N W 410 (1910), Re Singer-Kaufman Realty Co , 196 N Y Supp. 480 (1922), Greeley Sightseeing Co v. Riegelmann, 119 Misc. 84, 195 N Y Supp 846 (1922), Northern Boiler Co v David, 157 Ohio St 564, 106 N E 2d 620 (1952), Newman v Mayor of Newport, 73 R I 435, 57 A. 2d 173 (1948).

[61] The states are Alabama, Connecticut, Delaware, Florida, Idaho, Indiana, Maine, Maryland, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island and Wisconsin.

[62] Morgan v Hill, 139 Conn 159, 90 A 2d 641 (1952), State Roads Comm'n v Franklin, 95 A 2d 99 (Md 1953), Jacox v. Zeigler, 334 Mich 482, 54 N W 2d 631 (1952), In re Appropriation of Easement, 93 Ohio App. 179, 112 N E 2d 411

the apparent power to curtail access without affording compensation may be attributable to the necessity for finding some statutory basis for extinguishing access at all. The statutes authorizing the establishment of limited-access highways in most of the states having such legislation provide in substance that in the conversion of existing roads to limited-access highways, existing easements or rights of access may be acquired by condemnation.[63] No specific authorization is given the highway authority to restrict access by a regulatory order or other means. As a result, in several of the cases the landowner apparently argued that the highway authorities lacked power to restrict access, and the government was forced to argue that there was a "property right" of access in order to empower it to impose a restriction upon access under this power to condemn property.[64] It would be unfortunate if the court's acceptance of this concession by the highway authorities for purposes of establishing statutory power to restrict access were to be considered as conclusive of the question of whether the abutter's access may be curtailed under adequate legislative authority without compensation.[65] The position taken by the highway authorities may also reflect their belief that, even if power to restrict access could be found elsewhere, the quoted statutory language constitutes a legislative direction that access be limited only upon payment of damages.[66] It is, of course, competent for the legislature to provide for the payment ofcompensation for injuries caused by public improvements in cases where no payment would be required by the constitution. The question remains, however, whether this is what the legislature meant to do. The quoted statutory language, particularly in the use of "may" rather than "shall," appears to be more appropriate for the delegation of power than for the limitation of administrative action. Moreover, the legislature should be assumed to have used words in their established legal signification; since the change-of-grade and viaduct cases establish that there is no easement or right of access superior to proper highway uses unless all access is extinguished, the statutory reference to "easements" and "rights of access" might properly be regarded as meaning only those means of access which can be curtailed only with compensation, that is, those means of access which are the sole means of ingress and egress.[67] Finally, if the legislature is assumed to have used this language in the belief that abutting owners have a constitutionally protected right of access in this situation, it seems that any resulting implication of an intention to provide compensation might well be overridden by a general purpose to afford payment only

(1952), Neuweiler v. Kauer, 62 Ohio L Abs 536, 107 N E 2d 779 (Ohio Com Pleas 1951) In all but the last of these cases, the highway authorities had commenced condemnation proceedings, thereby conceding that compensation was proper In the cases of Jacox v Zeigler and In re Appropriation of Easement, supra, some land was to be taken physically for the highway bed, so an exercise of the power of eminent domain was necessary, since loss of access usually constitutes an element of compensation for the taking, the concessions that loss of access should be considered were proper State Roads Comm'n v Franklin, supra, involved a new highway, not only was some of the owner's land to be taken physically for the highway right-of-way, but also the owner alleged the construction of the expressway would deprive him of all vehicular access to public highways On either ground, compensation for the taking would be required, In Morgan v Hill, supra, however, no land was to be taken physically, and some reasonable means of access remained. Nevertheless, the Connecticut highway authorities commenced a condemnation suit In most states it would seem this is unnecessary if there is statutory authority to restrict access apart from the power of eminent domain In Neuweiler v Kauer, supra, the discussion of access "rights" was unnecessary to the decision

[63] E.g , CONN. GEN STATS Title XI, Sec 351 h (Supp 1939), MICH STATS ANN Sec 8 251 (Supp. 1945), OHIO GEN CODE Secs. 1178-21, 7464-2 (Supp 1945)

[64] States Roads Comm'n v Franklin, 95 A 2d 99 (Md 1953), In re Appropriation of Easement, 93 Ohio App 179, 112 N. E. 2d 411 (1952) See also State ex rel Veys v Superior Court 33 Wash 2d 638, 206 P 2d 1028 (1948), and Burnquist v C(220 Minn 48, 19 N.W 2d 394 (1945), where the complete absence of specific statutory authority to extinguish access forced the highway officials to argue that there were "rights of access" which amounted to "lands" and "property", and could therefore be condemned under the general statutory power to condemn for highway rights-of-way Highway authorities also presented this argument, to avoid a landowner's claim that a constitutional provision for limiting access was not self-executing, in State ex rel State Hwy Comm'n v James, 356 Mo. 1161, 205 S W. 2d 534 (1947) In all three cases the argument prevailed Since the Minnesota, Missouri and Washington constitutions require compensation for "damage" and well as a "taking," the decisions will probably have no untoward consequences curtailment of access would require payment whether there is a "property right" or not See the discussion of "damage" states, infra In "taking" states, however, such an argument might prove expensive.

[65] In a carefully drawn opinion, Judge Schaefer of the Illinois Supreme Court avoided this pitfall by meeting the landowner's contention that there was no right of access which could be reached in a condemnation suit with the ruling that whether or not there is a "right of access," extinguishment of which would amount to a "taking," the specific statutory power to "condemn rights of access" authorized a suit to extinguish access Department of Public Works v Lanter, 413 Ill 581, 110 N E 2d 179 (1953)

[66] This belief finds support in the observation of the court in Department of Public Works v Wolf, 111 N E 2d 322 (Ill 1953), that a similarly-worded statute "specifically recognizes an abutting property owner's rights of access, ingress or egress as property rights which may be extinguished only by purchase or condemnation." 111 N E 2d, at 324

[67] Under statutes which refer to "means" of access rather than to "rights", this interpretation would of course be unavailable E g , MD GEN LAWS, Art 89B, Sec 166(b)(2)(1951) "The Commissioner may close any existing means of ingress or egress to, from or across abutting land to or from the freeway by agreement or condemnation "

when the constitution requires it.[68] If the courts should, nevertheless, conclude that payment was intended by the legislature, it should be made explicit that the payment is required only by the statute and not by the constitution, for once a property right has been created by judicial pronouncement, it is protected against encroachment not only by the state constitution but by the Fourteenth Amendment to the federal constitution as well.[69]

If the power to curtail access to an existing highway without payment of damages is established, it should be clear that the construction, under the limited-access principle, of a new highway immediately adjacent to, but not over, a complainant's land does not, because of the failure to supply a new means of access, constitute a taking of property rights.[70] If a tract of land is divided by the construction of a new limited-access highway, severance damages, because of the difficulty of using the separated parts of the tract as an economic unit, will be greater than those occasioned by the crossing of a conventional highway. However, this increase in damages does not result from the taking of any supposed right of access in the highway but from the measure used to determine the value of the land actually taken.[71]

The application of principles of limited-access design often requires that access from intersecting public streets or roads, as well as from private driveways, be limited.[72] Since it is not feasible to construct highway crossings at separate grades for all such streets or roads, it is the usual practice to close a number of intersecting streets at the intersections and to provide crossings or access only at convenient intervals along the freeway. The owner of land fronting upon such a street retains access to all highways abutting his land, but may lose access along the street in one direction and be put in a cul de sac as a result of the elimination of the intersection of his abutting street and the freeway. Again it seems clear that the resulting inconvenience of access does not amount to a taking of property for which compensation must be paid, since an adequate means of access remains.[73]

IN STATES COMPENSATING FOR "DAMAGE" OR "INJURY"

In some circumstances, compensating the property owner only when property is taken works real hardships. In recognition of this harshness, state constitutions began to be amended some 80 yr. ago to guarantee just compensation for damage or injury to private property resulting from a public improvement, regardless of whether any property is taken or not.[74] Statutes in other states were enacted to allow recovery for such losses. At present, some 26 states have constitutional or statutory provisions requiring compensation for "damage" without a "taking."[75] In these states, whether the landowner whose access to the abutting road is curtailed must be compensated is a different question from that presented in states with constitutions protecting property only against a taking. The inquiry is not whether there is a property right of access, but

[68] Cf Delaware Bridge Comm'n v. Colburn, 310 U S. 419 (1940), Cantrell v. Pike County, 255 S.W 2d 988 (Ky. 1953)

[69] Muhlker v New York & Harlem R. R , 197 U.S. 544 (1905).

[70] Apparently the question has not yet been decided in a "taking" state, but writers agree that this result should be reached See Cunnyngham, The Limited-Access Highway from a Lawyer's Viewpoint, 13 MO L REV 19, 32 (1948), Clarke, The Limited-Access Highway, 27 WASH. L REV 111, 122-23 (1952), Comment, 3 STAN L REV 298, 307-08 (1951). And compensation is denied in this situation in "damage" states. See infra, n. 95

[71] Cf. United States v. Welch, 217 U S. 333 (1910)

[72] In the absence of specific statutory authorization, highway commissions and municipalities have been held without power to deny access to major highways from city streets by the closing of the intersection Cabell v Cottage Grove, 170 Ore 256, 130 P. 2d 1013 (1942) But see, Application of Oklahoma Turnpike Authority, 203 Okla 335, 221 P 2d 795 (1950)

[73] See, e g., Meyer v Richmond, 172 U.S 82 (1899), New York, C & St L R R v Bucsi, 128 Ohio St 134, 190 N.E 562 (1934), Krebs v State Roads Comm'n, 160 Md 584, 154 Atl 131 (1931), Dantzer v. Indianapolis Union R R , 141 Ind 604, 39 N.E 233 (1894), Wagoner v Hutchinson, 169 Kan 44 216 P. 2d 808 (1950) An opposite conclusion has been reached in some "taking" states E g., Illinois Central R R. v Moriarity, 135 Tenn 446, 186 S W 1053 (1916), Re Melon Street, 192 Pa 397, 38 Atl. 482 (1897) (under stature allowing "damage").

[74] The first such amendment was adopted in Illinois in 1870. See Rigney v Chicago, 102 Ill. 64 (1882) Occasionally these provisions have been interpreted as merely allowing the recovery of consequential damage when some property is actually taken, and as not permitting recovery when no land is "taken." E g , Pennsylvania R R v. Lippincott, 116 Pa. 472, 9 Atl 871 (1887), Pennsylvania R R v Marchant, 119 Pa 541, 13 Atl. 690 (1888).

[75] These states are Alabama (as to municipalities and individuals or private corporations with powers of eminent domain), Arizona, Arkansas, California, Colorado, Georgia, Illinois, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania (as to municipalities and individuals or private corporations with powers of eminent domain), South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming. In Massachusetts, recovery of damage caused by highway improvement is provided for by statute, MASS REV LAWS c. 51, Sec. 15, and in South Carolina by judicial decision. Moss v. South Carolina State Hwy. Dept., 75 S E 2d 462 (S. Car 1953).

whether the impairment of access has damaged the abutting land.[76]

Naturally enough, questions arose as to what constitutes damage within the meaning of these constitutional and statutory provisions. It now seems to be settled generally that not all depreciation in property values caused by public improvements is compensable. The damage protected against is said to be an injury special or peculiar to the land involved and not merely damage common to the public at large.[77] As it is often put by the courts, the damage to be recoverable must be different in kind, not merely in degree, from that sustained by the community generally.

As one might expect, attempts to distinguish between differences in kind and differences in degree have led to varying results. Nor have these variations been avoided in the application of the principles to the limitation of highway access. Since the superiority of the highway easement to any property rights of access held by the abutter does not prevent the exercise of that easement from causing constitutional damage, the only basis for a governmental privilege to restrict access in a damage state is the police power. Striking a balance between the state's claim to untrammeled exercise of this regulatory power and the landowner's claim to be free of restrictions upon access which damage his land involves judgments as to matters of degree. Despite these uncertainties, it is probably safe to conclude that a landowner who is deprived of all vehicular access to one side of his tract has been damaged in the constitutional sense, even though he retains free access to his land from a highway on another side,[78] a situation in which he would not be entitled to compensation, at least on the authority of the older cases, in a taking state. When access to a highway is impaired but not completely curtailed, the questions become more involved. If the portion of the highway to which the abutter has free access is narrowed by the construction of a viaduct[79] or the depression of the center of the road,[80] the landowner must be compensated only if the remaining roadway is insufficiently wide or inadequately paved to allow reasonable convenience of access. Similarly, a limitation on the number of openings or driveways to the highway from a tract constitutes damage in the constitutional sense only if the number of openings allowed is less than that "reasonably required giving consideration to the purposes to which the property is adapted."[81] If the landowner is permitted to retain as many driveways as he maintained when the highway was free, he ordinarily would not be entitled to compensation.[82] Because the answer depends upon the location and character of the land involved, the question whether the landowner will have that access which is "reasonably required" is often left, along with the monetary assessment of the amount of damage suffered, to the jury.

Problems may also arise when free access to all immediately abutting highways is retained but is rendered less convenient by the establishment of a limited-access highway somewhere in the vicinity. For example, it is often the practice in the construction or establishment of a freeway to construct an auxiliary road paralleling the major highway. The purpose of these auxiliary roads, or outerways as they are sometimes called, is land service; abutting landowners have free access to and from them and, by way of these outerways, to the freeway at a point of entry. The property owner who has enjoyed direct access to a major highway may feel himself aggrieved when he is relegated to access upon an outerway by the establishment of the highway as a freeway, since the distance to his land may be increased and diminution in the flow of traffic past the land may decrease its business value. A similar injury may be sustained by the landowner whose property abuts not upon the major highway but upon an intersecting street or road. If the street upon which the land abuts is closed at the point where it intersects

[76] See Chicago v. Taylor, 125 U.S. 161 (1888), Reardon v San Francisco, 166 Cal 492, 6 Pac 317 (1885), 2 NICHOLS, EMINENT DOMAIN 362 (1950)

[77] See Rigney v. Chicago, 102 Ill 64 (1882), 2 NICHOLS, EMINENT 331 (1950).

[78] E g , Burnquist v Cook, 220 Minn. 48, 19 N W 2d 394 (1945), Dept of Public Works v Wolf, 111 N E. 2d 322 (Ill 1953), Licht v State, 277 N Y 216, 14 N E 2d 44 (1938) (under "damage" statute). Cf. Eachus v Los Angeles, 103 Cal 614, 37 Pac. 750 (1894).

[79] E g , Liddick v Council Bluffs, 232 Ia. 197, 5 N W. 2d 361 (1942) (under statutory provision for "damage")

[80] E g , Rose v. State, 19 Cal. 2d 713, 123 P. 2d 505 (1942), McCandless v. Los Angeles, 10 Cal. App 2d 407, 52 P 2d 545 (1935)

[81] See People v LaMacchia, 253 P. 2d 709, 721 (Cal App 1953) (one opening for 1580 feet of frontage inadequate) See also Boxberger v State Hwy Comm'n, 251 Pl 2d 920 (Colo. 1953).

[82] E. g , People v. Al. G. Smith Co., 86 Cal. App. 2d 308, 194 P. 2d 750 (1948), Department of Public Works v. Filkins, 411 Ill 304, 104 N. E 2d 214 (1952) Cf State ex rel. Geblin v. Dept of Hwys., 200 La. 409, 8 So. 2d 71 (1942).

the main highway in furtherance of limited-access principles, the landowner will find himself upon a dead-end street, or in a cul de sac; again the distance to the land will be increased, and the market value for business purposes reduced.

In the decision of whether landowners in such situations are entitled to compensation for damage in its technical sense, two limiting principles are called into play. The first, often referred to as the "principle of circuity of travel," holds that a landowner who retains free access to the general system of public streets and highways makes no case for compensation by showing that street improvements or traffic regulations compel him and his customers to travel further to reach or to leave the land.[83] The rule has its foundation in the conclusion that such injury as the landowner suffers is of the same kind as that suffered by the public generally and is not special or peculiar to him. The principle has been applied to deny payment to a landowner who is required to travel further by a prohibition against left turns,[84] by the establishment of a one-way street,[85] or by the erection of a medial divider separating opposing lanes of traffic.[86]

The second limiting rule is that an owner of land abutting upon a highway has no vested interest in the flow of traffic passing his land and that the diversion of traffic to another route does not result in compensable damage.[87] The value of land occupied by a gasoline station may, of course, be substantially depreciated by the relocation of a main route, but the injury is not regarded as damage in the constitutional sense.[88]

Application of these limiting principles to the case of the landowner whose abutting road is converted into an outerway usually should result in the denial of the existence of compensable damage. If the only injuries suffered are circuity of travel and diversion of traffic and if the outerway is adequate to allow otherwise unimpeded ingress and egress, the abutter ordinarily has no constitutional right to an award.[89] If, however, some part of the abutting tract is physically taken for the highway right-of-way, the measure of damages usually applied, that is, the amount by which the market value of the whole tract before taking exceeds the market value of the remainder,[90] would ordinarily permit recovery for the inconvenience of access caused by the outerway insofar as that inconvenience affects the market value. A recent California decision which seems to require compensation to an owner of land which was cut off from a main highway and relegated to an outerway might be explained upon this ground, since some land had been taken physically in widening the highway.[91]

The case of the owner who is put in a cul de sac or dead-end by the closing of one end of his abutting street again presents ordinarily only the inconveniences of circuity of travel and diversion of traffic. Accordingly, the courts of a number of states have held that he is entitled to no compensation under constitutional provisions requiring payment for damage.[92] In a few of the states with constitutions containing such a clause, however, the landowner has been held to have a right of access in both directions along his abutting street to the next intersecting street; he is thus damaged if his land is situated within the first block from the point where the street is closed.[93] Why a landowner should be

[83] See LEVIN, LEGAL ASPECTS OF CONTROLLING HIGHWAY ACCESS 28, Public Roads Administration, Federal Works Agency (1943).

[84] See Beckham v State, 64 Cal. App 2d 487, 502, 149 P 2d 296, 303 (1944)

[85] See Commonwealth v Nolan, 189 Ky. 34, 224 S W 506 (1920), Cavanaugh v. Gerk, 313 Mo 375, 280 S W 51 (1926)

[86] E g , People v Sayig, 101 Cal App 2d 890, 226 P. 2d 702 (1951), Holman v State, 97 Cal App 2d 237, 217 P 2d 448 (1950), Fort Smith v Van Zandt, 197 Ark 91, 122 S W 2d 187 (1938).

[87] See 2 NICHOLS, EMINENT DOMAIN 409 (3d ed 1950)

[88] E g , State ex rel Sullivan v Carrow, 57 Ariz. 434, 114 P. 2d 896 (1941), Holloway v Purcell, 35 Cal 2d 220, 217 P 2d 665 (1950), Application of Oklahoma Turnpike Authority, 203 Okla. 335, 221 P 2d 795 (1950)

[89] Cf Constantine v. Sunnyvale, 91 Cal. App 2d 278, 204 P 2d 922 (1949), Beckham v State, 64 Cal App 2d 487, 149 P. 2d 296 (1944) (grade crossing elimination in effect made outerway of road intersecting abutter's street) See Cunnyngham, The Limited-Access Highway from a Lawyer's Viewpoint, 13 MO L REV. 19, 34 (1948) See also State v. Ward, 252 P 2d 279 (1953) (proposed outerway decreases severance damage)

[90] See State v. Snyder, 131 W Va 650, 49 S E 2d 853 (1948), 2 NICHOLS, EMINENT DOMAIN 415-16 (3d ed 1950)

[91] People v Ricciardi, 23 Cal 2d 390, 144 P 2d 799 (1943). Although this opinion is ambiguous on the point, it seems that California follows the usual rule that elements of damage such as circuity of travel and diversion of traffic may properly be considered when some land is physically taken, but that they do not alone amount to constitutional "damage " See Colusa & Hamilton R R v Leonard, 176 Cal 109, 167 Pac 878 (1917), Rose v. State, 19 Cal. 2d 713, 123 P. 2d 505 (1942)

[92] E g., Richmond v Hinton, 117 W. Va 223, 185 S E 411 (1936), Lynchburg v Peters, 145 Va. 1, 133 S E 674 (1926) See 2 NICHOLS, EMINENT DOMAIN 400 (3d ed 1950)

[93] E g., Bacich v. Board of Control, 23 Cal 2d 343, 144 P. 2d 818 (1943), Rigney v. Chicago, 102 Ill 64 (1882), Vander-

held to suffer constitutional damage in this situation and why the somewhat arbitrary limitation of one block's distance should be imposed are not made clear.[94]

When a new limited-access highway is constructed where no highway existed before, the landowner who is made an abutter by the construction ordinarily sustains no injury to his land from the denial of a new means of ingress and egress and is not entitled to compensation for loss of access.[95] If the new freeway crosses the tract, dividing it in two, the severance damages attributable to the difficulty of utilizing the two parcels together will be enhanced by the limited-access feature, but such damages are awarded for loss of access between the divided portions of the tract and not for loss of access to the highway.[96]

If, however, a highway right-of-way is acquired and dedicated without a prohibition of access to the abutters, an interest in access has been held to arise immediately, even though the road has not been opened or even paved; conversion of such a proposed free-access highway to a limited-access highway then causes damage for which the abutter must be paid, at least when the right-of-way was originally acquired from him.[97]

Courts in a number of states having constitutions protecting private property against damage as well as against taking often fail to distinguish between these two grounds for compensation.[98] In cases involving questions of limiting highway access, this failure is particularly evident; such courts often speak of "property rights of access," and observe that they may be extinguished or taken only by the exercise of the power of eminent domain and upon the payment of just compensation, when they need only decide that the property served by a highway has been damaged by a denial of access and when, under ordinary standards, no taking would be found.[99] Although procedural rules may sometimes give significance to the distinction,[100] this indiscriminate use of language ordinarily has no untoward consequences, since the landowner must be paid either if he has a "right of access" which is taken or if the land served by a means of access is merely damaged by the curtailment. But courts in taking states, where the distinction is critical, should not inadvertently accept such statements as authority for the proposition that an abutter has a property right of access superior to the public highway easement.[101]

CONCLUSION

It seems to be established that limiting highway access can ameliorate many of the problems of modern traffic congestion. Whether this technique will prove too expensive for general use depends, in large part, upon whether and to what extent abutting landowners will be held entitled to compensation for loss of access. A decent respect for private property demands that established rights of property be preserved. But respect for the property rights of the taxpayer also requires that public funds should not be expended as compensation for nonexistent rights of access. It is the function of the trial and appellate judges to decide when a landowner is constitutionally entitled to recover for damages he may have suffered; it is the province of the jury to assess those damages in dollars and cents. Ver-

burgh v Minneapolis, 98 Minn. 329, 108 N.W. 480 (1906) Cf Boskovich v. Midvale City, 243 P 2d 435 (Utah 1952) (cul de sac caused by vacation of part of street), Grand River Dam Authority v Misenhimer, 195 Okla. 682, 161 P. 2d 757 (1945) (cul de sac caused by flooding)

[94] See Comment, 3 STAN L REV 298, 307 (1951), LEVIN, LEGAL ASPECTS OF CONTROLLING HIGHWAY ACCESS 22-23, Public Roads Administration, Federal Works Agency (1943).

[95] Schnider v State, 38 Cal. 2d 439, 241 P 2d 1 (1952) (highway widened to touch complainant's boundaries, no land "taken"), People v Thomas, 108 Cal App 2d 832, 239 P 2d 914 (1952) (new expressway partly over complainant's land)

[96] See, e g., State v. Ward, 252 P 2d 279 (Wash 1953)

[97] Department of Public Works v Wolf, 111 N E 2d 322 (Ill 1953).

[98] Thus in Department of Public Works v Wolf, ibid, the court observed that the "taking" of rights of access caused "damage" to the abutting land

[99] This confusion of "damage" with "taking" has been criticized See Note, 32 CALIF. LAW REV. 95, 96 (1944)

[100] In many states, if property is to be "taken," a condemnation suit must be commenced by the state, if property is only "damaged," no such suit is required, and the landowner must sue the state to recover The distinction between a "taking" and "damage" may thus be decisive if the statute of limitations bars the landowner's suit for damages, since in such a situation he can recover at all only if the governmental interference constitutes a "taking," so as to oblige the government to sue In such a case, it was held, in accordance with the usual rule in "taking" states, that curtailment of access by a viaduct was merely "damage," not a "taking " Horn v. Chicago, 403 Ill 549, 87 N E. 2d 642 (1949)

[101] One of the many examples of the disregard of this distinction is found in In re Appropriation of an Easement, 93 Ohio App 179, 12 N E. 2d 411 (1952), where a court of Ohio, a "taking" state, relied upon statements from an opinion of the Supreme Court of Minnesota, a "damage" state, to establish a "property right" of access And in State Roads Comm'n v Franklin, 95 A. 2d 99 (Md. 1953), the Maryland court cited a California decision for the same proposition although Maryland is a "taking" state and California allows recovery for "damage" as well

dicts of no damage often reflect the jury's recognition of the fact that the establishment of freeways may enhance the value of adjacent lands rather than decrease it.[102] Judges, lawyers, and highway officials must use similar caution in the development and application of the rules of law which govern the right to compensation. Unless money is to be awarded where it is not deserved, certain principles and distinctions must be kept in mind.

In states with constitutions guaranteeing compensation only when property is taken, the abutter's interest in access has, in the past, usually been held subject to limitations in furtherance of the purposes of the highway easement. Broad statements in several recent opinions may indicate that a property right of access, superior to all highway uses, will be recognized.[103] If such a property right is to be created, it should be established with full realization of the fact that existing authority does not seem in any state to require it. In the resolution of this problem, it should be recognized that: (1) pronouncements of courts in states where damage is compensable are directed toward a different problem, and may be inapplicable, (2) cases establishing a right of access against nonhighway uses are inapposite when facilitation of the exercise of the highway easement is involved; (3) payment of compensation when all access is curtailed, effectively isolating the land, does not mean that an award must be made when some reasonable means of access remains; and (4) decisions upon question of statutory interpretation do not amount to declarations of constitutional limitations.

In states with constitutions providing for compensation for damage to property, as well as for its taking, the problem presented by a limitation of access is not whether the highway easement is superior to the abutter's right of access but whether the claims of the police power outweigh the interests of the landowner. In such states, it should be emphasized that: (1) circuity of travel and diversion of traffic are not alone damage in the constitutional sense, even though they may be considered in the determination of the market value of the land remaining after the physical taking of a part; (2) clarity of thought will be promoted by a carefully drawn distinction between interferences with access which amount to a taking of property and those which constitute only damage; and (3) property does not suffer damage in the constitutional sense if the access required by those uses of the land for which it is naturally fitted remains unimpaired.

[102] See Young, Economic Effects of Expressways, 5 TRAFFIC Q. 353 (1951). Verdicts of no damage were sustained against attack in People v Al G Smith Co , 86 Cal App. 2d 308, 194 P 2d 750 (1948), Department of Public Works v Filkins, 411 Ill. 304, 104 N E 2d 214 (1952), New York Dock Co v City of New York, 300 N Y 265, 90 N E 2d 183 (1949) But such verdicts are sometimes overturned by appellate courts as unsupported See, e g., Boxberger v State Hwy Comm'n, 251 P. 2d 920 (Colo 1953), Burnquist v. Cook, 220 Minn 48, 19 N.W. 2d 394 (1945).

[103] See, e.g., Anderlik v Iowa State Hwy. Comm'n, 240 Ia 919, 38 N W. 2d 605 (1949), Stock v Cox, 125 Conn 405, 6 A. 2d 346 (1939), Fleming v State Road Dept., 157 Fla 170, 25 So 2d 373 (1946), State ex rel. McKay v Kauer, 156 Ohio St 347, 102 N E 2d 703 (1951)

DISCUSSION

MR. GORDON. I am a little curious if there isn't possibly an out in some cases. Is it possible that political pressure or something of that order might be used so that there can be some alleviation to a person who abuts on the highway which has limited access — Have you encountered anything of that sort?

MR. REESE. Not beyond general statutes which provide, although the constitution does not, that an owner's damage shall be compensated. Several States have general statutes of that type but I have not encountered any special acts where things of that sort were done although I haven't looked into the question. Of course there is a great deal of pressure from land owners on the legislature to allow compensation in these cases and I suppose it is certainly an allowable legislative judgment that they ought to be compensated if their access is impaired.

MR. KENNETH WOOTEN. Have you found any distinction made between acquisitions in fee and acquisitions of easements?

MR. REESE. There are some older cases, particularly some New York cases, which made such a distinction in the railroad cases, or actually in elevated railway cases. I don't think there is much of anything to it. Generally, it has not been followed, and most courts now seem to say that if there is any right of access the landowner must be paid whether the State or the city owns a fee or just an easement.

MR. BOOTH. Do you wish to comment on the situation where a freeway is con-

structed, where there is no highway previously existing? In a case of that kind will you say that the abutting landowner automatically acquired a common law right in a common law State of access in the event the purchase of that land contained no prohibition against it?

MR. REESE. That seems to be so, yes. Now, whether or not he acquires a right of access for which payment must be made when it is taken away from him is something else, but generally speaking, yes, he does acquire this right of access when a road is built adjoining his land or on his land. Question: Even though the road was constructed with an access denial feature to it? Answer: No, not in that situation if it was constructed as a freeway with denial of access. Question: In your opinion, would that type of construction in itself prevent the common law abutter's right of access springing into being? Answer: I should certainly think it should and that is in effect what this California supreme court has held. Question: It's the Snyder Case, isn't it? Answer: Yes.

MR. MARTIN. If the road is not built as a limited access highway he acquires the right under common law, doesn't he?

MR. REESE. If you would otherwise, yes. As you would on any public street in that situation and again I suggest that the answer depends on whether the constitution in that particular state contains a provision for damages, for compensation for damages or merely for a taking.

MR. LEVIN. That's a good question and in further pursuance of that: What, Professor Reese, would you think is the legal effect of the resolution of a State Highway Commission declaring a preexisting road to be a limited access highway? Is that just a statement of intention, and as you say, do they have to go back and acquire the rights or are there any police power implications that could be invoked?

MR. REESE. I am not, I must confess, familiar with the particular methods by which a highway authority, highway commissioner, highway department, or director must act or what his authority may be, but if elimination of access is within his authority as conferred by statute, then it would seem to me that in these States which compensate only a taking again, that that would be all that is necessary — a declaration, a prohibition of access.

MR. LEVIN. For example, I have in mind the State of Illinois where their Freeway Act of 1943, I believe it is, says that the State Department of Public Works, has the legal authority by resolution to designate pre-existing highways as freeways and they have taken 600 miles of pre-existing roads and declared them to be freeways. Pursuant to such declaration they have actually put up signs, the size of ordinary traffic signs — posted this entire mileage to put the public, perhaps, and subdividers and others who might be prospective owners or operators of these adjacent lands on notice. They put up these signs just indicating that this stretch of road has been declared to be a freeway under the laws of the State of Illinois and the highway authority should be consulted before proceeding on it. Supposing they haven't done anything more than that, they haven't gone out and acquired any rights of access or anything, now supposing a land owner, an abutter wants to subdivide. Can the State tell him, pursuant to this resolution that he can't provide ten new accesses where he only had one. This is all precedent to their contact with the property owner. Are there any police powers implications, in other words, would you say that the State has the authority to restrict further subdivision pursuant to this resolution?

MR. REESE. That's a nice question. I think that this much is clear, the State under its regulatory powers, police powers, does have the right to regulate access, that is, they can specify the kind of construction. For example, they can require — and this is, I suppose, abundantly clear — that an owner in constructing a driveway cannot build an apron out into the street over the gutter, that he must cut the curb. They can also limit the number of outlets that any particular owner may have within reason and then if you go one step further and limit all access, then of course you get into this problem again. Now Illinois happens to be one of those States whose constitution provides that a landowner is entitled to compensation for damage to his property, and I would suppose that in Illinois the courts are likely to hold that if all access is cut off on that street, even though access exists from some other direction, that the owner is entitled to compensation.

MR. SIMONSON. Just to clear the records, you said the State of Illinois had posted 600 miles of existing roads. Now I would assume there would be some accesses on there and if they did close those, then there would be damages, wouldn't there?

MR. LEVIN. I should think so. I don't mean to prejudice the highway department of Illinois, but I would be afraid so.