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(As of December 31, 1963)

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Foreword

The papers presented in this issue of the Highway Research Record constitute a symposium of comments on current problems in what are recognized as major fields of the law and legal procedures by which highway programs are carried on.

The first four papers (presented at the 43rd Annual Meeting) are addressed to the broad and basic fields of law which lawyers tend naturally to use in classifying problems that arise in connection with planning, construction and operation of highway systems—eminent domain, the police power, contracts, and intergovernmental relationships.

With respect to each of these fields of the law, the past decade of highway building has generated significant pressures to change historic concepts of public powers and private rights. Also, advances in the technology of engineers and planners have given lawmakers and lawyers new means of obtaining and presenting insight into the economic and social consequences of public highway programs. These forces present an urgent challenge to the lawmaking agencies—courts, legislatures, and administrative agencies—to revise the concepts, doctrines and procedures of the law so that it provides the best possible framework for carrying on highway programs and facilitating the development of highway transportation systems.

The second set of four papers (presented at the 44th Annual Meeting) are addressed to more specific matters: use of air space in connection with highway transportation, defining the function of the legal doctrine of sovereign immunity, correlating our laws relating to highways and laws relating to drainage, and bringing into better focus the working relationship between the use of the police power through zoning laws and the function of valuation in eminant domain proceedings.

These latter matters are relatively new and emerging concerns for lawyers and highway engineers. And, significantly, they all are matters which lawyers cannot fit neatly into the classification of fields which they learned in law school. The solutions to the legal problems that are raised in these new fields will cut across traditional lines separating the several great legal powers of government. They will call for using combinations of various powers. Thus, they challenge the ingenuity of lawmakers and administrators to work out new methods of government.

Research will be needed to explore and devise sound approaches to both the theoretical and practical aspects of the law. As a first step toward marking out these approaches, researchable areas must be identified and evaluated. The papers presented in this Record constitute a step forward in the performance of this essential task.

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Condemnation Awards and Appraisal Theory

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• AS a confirmed optimist, it is contrary to my nature to view with alarm. Yet it has come as a shock to realize how pervasive is appraisal error in valuations which are relied on in condemnation awards. The nature and implications of these errors in appraisal theory and practice will command our attention later; for the moment, accepting the hypothesis of widespread appraisal error, consider the vicious circle of circumstance which enthrones and perpetuates these errors. To present a somewhat oversimplified sequence of events, an appraisal practitioner develops a plausible method of analysis which presents the appearance of scientific accuracy and which he employs in a condemnation case. His lawyer, finding that this method convincingly supports the client's case, gladly accepts it as sound. In court, because of his long experience in real estate, the appraiser is qualified as an expert. The judge, who is no appraisal expert himself, is not competent to assess the soundness of the method and is inclined to accept it as presented by a qualified expert. The opposing lawyer, also unlearned in appraisal methodology, is in poor position to challenge the process. It sounds impressive to the farmers and housewives on the jury, who rely on its findings in their award. Other appraisers, observing that this method seems to be accepted and effective, employ it in other cases. Other lawyers, finding it unchallenged and accepted by the judges, accept it themselves and dare not question it in court when employed by the other side. It appears as accepted doctrine in judicial pronouncements. It is written into appraisal literature and taught as gospel. Finally, public officials in condemning agencies, demand that their appraisers employ this tried and true method and prepare appraisal forms which call for its use and which all appraisers hired by the agency must complete. Now comes a small voice from somewhere which questions the validity of the method, points to faulty theory on which it is based, and demonstrates its error. Who is there to listen? Who is there to break the vicious circle? The appraiser for the public agency is required to use the method if he wants to be hired. The lawyer for the condemnor and the lawyer for the condemnee will insist that his appraiser use this tested and accepted method, assuming it contributes to the client's case, or he will find another expert witness. If neither side challenges the method, the judge may never become aware of its dubious logic; or if the question is raised, there is the comfortable precedent of past acceptance on which to fall back.

It is a demonstrable fact that not one such error, but many have become built into appraisal theory and practice, accepted by most appraisers, lawyers, judges and public agencies. All parties to the condemnation process have contributed in one way or another—the appraiser, the lawyer, the public agency, the judge and the legislature. Because of the growing importance and frequency of compulsory acquisition of land and the large number of court cases, the appraisal theory and practice which has gained acceptance in this area of activity has acquired a status which makes it controlling in other fields of appraisal.

It is difficult to assess the social importance of appraisal error but as a generalization it is safe to say that any method which results in a condemnation award which fails to reflect the intent of the law represents a social cost and is not to be condoned.

THE NATURE OF APPRAISAL ERROR

Before proposing ways and means for breaking the vicious circle which appears to bar the rationalization of condemnation appraisal practice, it will be well to make the case for the existence of damaging error. Be it said that our view is that of a minority

Paper sponsored by Special Committee on Highway Laws and presented at the 43rd Annual Meeting.

within the appraisal fraternity; it is contrary to much of the accepted appraisal literature and not consonant at many points with the teachings of some of the professional appraisal organizations. Thus our case will have to stand on feet of crystal-clear logic, unsupported by precedent and bolstered by but a few sympathetic authorities.

We start with recognition of the fact that no appraisal is ever done in the abstract, that each appraisal assignment is occasioned by the need to make a decision—in condemnation, to determine an award; in mortgage lending, to judge the wisdom of making a loan of a given amount; in real estate investment, to decide how much to sink in the property or project.

A second principle of basic importance is that any value figure must be compounded of past human behavior; there is no other possible basis. There is no such thing as intrinsic value; there is no necessary relationship between value and cost. Take an iron nose ring which might cost 12 cents to produce. It might be worth one goat to a Hottentot for adornment; a farmer with an ill-tempered bull would pay many times its cost; it would have no value whatsoever in New York cafe society. The appraiser of real estate cannot assign a value except by reference to his observations of the value reactions of real people in the past with respect to similar properties under similar circumstances. Even an estimate of cost must be a reflection of what it has cost other people to acquire a new property of similar characteristics.

Finally, there is only one act of value judgment which the appraiser can possibly perform—he can only predict what the property will probably sell for under stated conditions. Appraisal is prediction, a forecast based on the observed value behavior of people in the past. In most appraisal assignments, the client's needs are satisfied by an expert prediction of what would be the most probable selling price of the subject property under existing market conditions. But the client may change the conditions for whatever may be his personal reason; he may ask what the property will probably sell for in next year's market. Or he may want to know what it would sell for if interest rates should be lower by one percent. Or he may recognize that today's market is unbalanced, with an excess of supply and depressed prices. Thus he may ask what the property would sell for in a balanced market. The appraiser may be faced with an infinite variety of hypothetical conditions under which he is to predict the most probable selling price. The particular conditions which have been set for him when appraising for condemnation purposes will be discussed later. But whatever are the conditions which may be set by the appraisal assignment, the only thing which the appraiser can possibly do is to refer to his observations of past transactions and judge as best he can how buyers and sellers are most likely to act under the given conditions of his assignment. It follows that if the appraiser has not observed past transactions of a relevant nature or has no way for discovering records of such behavior, he is not equipped to appraise the property.

To summarize the basic valuation principles which must be understood and accepted if prevalent appraisal errors are to be identified:

1. The appraiser's findings must be directed to the client's problem and the value figures derived must be relevant to this problem.
2. Past human behavior is the only possible basis for appraisal judgment.
3. The only possible appraisal conclusion is the probable selling price of the property under the stated conditions.

THE CONCEPT OF VALUE IN CONDEMNATION

The variety of concepts and definitions of value which are bruited about in appraisal literature is almost as great as the number of appraisers. But in recent times, appraisers have taken over the legal definition of value, labeled "market value" or "fair market value." This judicial definition, which seems to be generally accepted in condemnation cases, derives from a number of legal concepts expressed by the courts which all seem to add up to about the same thing. In effect, the appraiser is told to estimate what the subject property would sell for if both buyer and seller were willing, if not necessitous, if fully informed of market conditions and the potential utility of the property, if the property had been on the market a reasonable length of time and if the

balance of demand and supply were normal. There is no doubt but that this definition of value has an ethical content which is consistent with the intent of the constitution to provide "just compensation." Strangely, its literal application can defeat its purpose. Assume that an appraiser is seeking the "fair market value" under unbalanced conditions—a depression, a surplus of supply and depressed prices resulting from distressed sales. He must start with an estimate of what the subject property would sell for in the present market, which he determines to be $10,000. Then, under the constraints imposed by the value definition, he must adjust this figure to represent a level which could be expected in a balanced market. This he judges to be $15,000. An award made on this basis would permit the condemnee to profit substantially by replacing the property lost with another of like quality for $10,000 and pocketing the excess $5,000. Or assume the reverse situation—a housing shortage with inflated prices. Here the award would be reduced below the current level of selling prices and the condemnee might have to wait several years before the restoration of a balanced market would permit him to replace his property with the proceeds of the award. In neither of these two situations could the award be said to be a "just" measure of the property taken. It would seem that justice would be served if the condemnation award were established by the "most probable selling price under current market conditions." Theoretically, at least, the condemnee could replace the property taken at current prices. As a matter of practice, it is observable that most awards conform more closely to this latter definition of value than to the technical terms of the legal definition.

COST LESS DEPRECIATION

The most shocking violation of appraisal logic is the widespread misuse of the cost less depreciation calculus. Ignoring a number of respected appraisal authorities who have long pointed out the error in the cost approach, appraisers persist in its use and many courts continue to accept it as a valid basis for adducing evidence of value. Much of its popularity, no doubt, derives from a specious appearance of reasonableness, from the widely understood parallel approach in accounting procedure, albeit for entirely different purposes, and from the fact that juries will readily believe that a property is worth what it would cost new less accrued depreciation. As a horrible example of the misuse of the cost approach, take the case of an actual appraisal made recently by a staff member in the organization of an outstanding and nationally known appraiser. This appraisal was submitted to a public agency in connection with land acquisition and prepared in the standard form required by this agency. The property was an old combination store and apartment building, built in 1898 and located in a slum area. The appraiser, at great expense in time, carefully measured up the building and calculated its cost of reproduction. He meticulously examined both exterior and interior and using the recognized classification of the sources of depreciation, he estimated a 30 percent loss in value by reason of physical deterioration, 35 percent because of functional obsolescence, and 20 percent from economic obsolescence. This added up to 85 percent depreciation. When pressed, the appraiser privately admitted that he had no real basis for such massive adjustments and that, in fact, he had already arrived at a tentative value figure based on market information and simply fudged the depreciation estimates so that the net figure was close to his already established value. This case is not unique; in fact, it is typical. The appraiser was required to use this approach by his client, the public agency. He had to fudge the figures because there is, in fact, no basis on which such large adjustments can be made unless the value of the property is already known. The unpleasant fact is that, at considerable cost to his client and the taxpayer, the appraiser was forced to engage in a futile exercise which contributed nothing whatsoever to his conclusion.

Why was the cost approach wrong in the foregoing example, as well as in most cases in which it is currently being freely used?

1. It starts with the false assumption that the cost of the property, new, is equivalent to its value new. But no one would build this structure in this location so that such a figure, cost new, is hypothetical and unrealistic and, in fact, meaningless. Design standards and structural techniques have changed vastly since 1898. The nature of the

location has changed so that no intelligent investor would consider building this kind of a building in an area which has long been on the downgrade.

2. The summation method of cost estimating is unrealistic. The formula calls for adding the value of the land separately determined by comparison as if vacant to the cost-new of the building. Land value is to be based on highest and best use, which would not be a similar structure. Thus land value assumes a different use than the building whose cost of construction is added. The value of vacant land, which in fact is not vacant, is added to the cost of a building which no one would build.

3. If the adjustments for depreciation are to be made to a figure which is meaningless in the first place, the end product is bound to be meaningless.

4. The whole concept of depreciation should be thrown out of court in the appraisal context. The term "accrued depreciation" is wrong because it implies the passage of time, yet the appraiser admits that a poorly designed structure is subject to "depreciation" the minute it is completed. Depreciation is usually defined as "loss in value," which also implies the passage of time.

5. Remembering that the only possible basis for value-determination is human behavior and that in most cases the appraiser seeks to predict "the most probable selling price," it follows that the only use for a cost estimate is when it represents the probable cost of acquisition of an alternative new property which a buyer actually might consider as a substitute for the subject property and which, therefore, will condition his bid for the subject property. It must be an actual potential, to be built on land now vacant and available, and to provide substantially the same utilities and amenities. If there are small qualitative differences, the appraiser may make adjustments (not for depreciation) on the basis of his observations of past market reactions to such differences. Thus, the hypothetical new structure is treated by the appraiser as he treats any "comparable" which represents a real alternative or substitute for the subject property in the market. If it is not a real alternative, it has no relevancy to the problem.

A common rejoinder to the argument that cost data have only limited usefulness in the appraisal process is to point out the problem of the single purpose property or the monument. Now there is little appraising of monuments since there are few business decisions to which they give rise. However, special purpose properties such as churches abound and they constitute fine examples of situations in which neither sales comparison data nor income histories are available. Consider the problem of a non-income property like a church where sales of such properties are rare. What basis other than cost is there for the appraiser to employ? If, in actuality, there is no market whatsoever for churches in the community, then the answer is easy—the property has no value as a church; its probable selling price is zero. This does not mean that it may have no value if convertible to some other use, or that the land may not be appraised as if vacant, less costs of demolition of the structure. But suppose that there is some chance of selling the church to another congregation though no other churches of this size have recently been sold and no comparative sales information is available. Under these circumstances, a cost-new figure can be of use—but not cost new of the subject property; rather, the probable cost of acquiring an available site and building a new structure according to the specifications of the prospective purchaser congregation. The hypothetical new church would not be identical; in fact, it might be quite different in location, plan and architectural treatment. But it would represent an actual and effective alternative for the prospective purchaser. Assume that the purchaser congregation could secure what it wanted, new, at a cost for land and building of $500,000. The problem which would confront it would be to decide, in comparison, how much the subject property would be worth. The appraiser, simulating the purchaser's approach, would adjust the cost new for the age of the subject property, the inefficiency of its floor plan, the outdated architecture and the shortage of parking space, and would conclude that a purchasing congregation would be willing to pay $250,000 for the older building. This is the point of indifference—$500,000 for the new or $250,000 for the old. Thus $250,000 is the most probable selling price provided that the selling congregation should decide that it would rather have the $250,000 than the old church.

INCOME ANALYSIS

It is surprising to an appraiser that some courts frown on the so-called income approach to value. This type of analysis is very useful to the appraiser in at least two circumstances. In the first place, the capacity to produce income is a most significant quality of a property where productivity can be measured in dollars as in the case of an apartment building or office building. Thus the relevance of comparable sales depends upon the similarity of the prospective level, pattern and duration and certainty of the incomes of the subject and comparable properties. Like the architectural design of a dwelling house, the expected income of an income property is an important qualitative characteristic which conditions its selling price.

A second use of income analysis arises when past transactions of purchase and sale of similar properties to that under appraisal have been so infrequent or so remote in time that the appraiser can adduce very little sales evidence on which to base his value prediction. Under these circumstances, the appraiser must simulate the analysis and reasoning of prospective buyers and sellers. He must put himself in the shoes of the typical investor in this type of property and reason like such an investor. This act requires that he be familiar with the calculus which the investor is most likely to employ in arriving at his bid or offer. The greatest failure of appraisers in this connection is their failure to identify realistically with the typical investor.

This failure to simulate realistically the investment reasoning of a prospective buyer sometimes simply reflects the unfamiliarity of the appraiser with market behavior relating to this type of property. Thus the appraiser, unable to act like an investor, simply acts like himself, which may be quite different. Again, the appraiser may employ esoteric calculations—like the building residual method with the Hoskold formula—which impress the undiscerning but which are a far cry from the way real-life investors go about making investment decisions. In the arithmetic of many appraisers, the role of borrowed capital is ignored or glossed over in broad generalizations. Yet in no form of investment is the leverage game more generally played to the hilt. Investors seek the maximum use of borrowed capital; thus the availability of credit and the interest rate and terms under which it can be borrowed are highly significant in the investment decision. Short-term cash flow may be more important to the investor than net income before depreciation which the appraiser painfully estimates for the next forty years. In these days of accelerated depreciation and capital gains advantages, tax advantage may be a primary motivation among investors in this type of property. The main point is that unless the appraiser reasons like an investor, his prediction of the most probable selling price will be off the mark. It is not required that the appraiser employ textbook methods which are used in the market, be they theoretically right or wrong.

Perhaps the most vulnerable part of the usual income appraisal is the capitalization rate. The geometric leverage of this component is such that a small difference in the rate makes a large difference in the value answer. In the majority of communities and for many types of income property, there simply are not sufficient recorded market transactions to provide the appraiser with what he must know—the capitalization rate actually employed by real-life investors in their investment calculations. The appraiser falls back on simulation procedure or he siezes upon a given rate for a certain type of property which has become accepted into local appraisal practice with its doubtful paternity lost in antiquity and its accuracy as a reflection of actual investor behavior subject to serious question.

COMPARATIVE SALES

Comparative sales are clearly the best evidence on the basis of which to predict the most probable selling price of a property. The logic is unassailable but often strained in practice. Any facts on market behavior may have relevance in the problem of predicting the probable selling price of the subject property, and the degree of relevance depends not so much on the degree of identity of the properties but rather on the degree to which the comparable property is competitive, i. e., an acceptable alternative or substitute for the subject property. Thus the real-life buyer may have a hard time

choosing between a two-story colonial on the west side and a ranch-type home on the east side of town but in spite of their qualitative differences, the actual selling price of one would be useful evidence in predicting the probable selling price of the other.

Adjustments for qualitative differences between comparable and subject properties must be founded on actual market reactions to such differences if the adjustments are to be meaningful. The cost required to make the two properties the same is not a dependable basis for adjustment. Thus it might cost $1,000 to modernize the bathroom but no buyer would increase his price offer by more than $500 in response to this improvement. Or $350 spent on exterior painting might bring $750 in a higher selling price. Bona fide bids and offers are useful evidences of market behavior and should not be barred if they represent firm commitments. It is hard to understand why, in some courts, the previous selling price of the subject property is not admissible evidence. It is well-known that the real estate market has a propensity for accepting a transaction price as convincing evidence of the value of a property and uses this figure as a basis for future transactions. Thus the price at which the property recently sold is an important indicator for the future.

THE THREE APPROACHES

The three approaches to value—cost, income and market—have become so imbedded in contemporary appraisal literature and practice that appraisers are stuck with them. Convention requires that they produce three separate value figures and by a mysterious process termed "correlation," derive a final single value. A much simpler and more realistic concept of the appraisal process derives from our earlier hypothesis that the only possible thing which an appraiser can do is to predict probable future market behavior on the basis of past evidence. All relevant evidence is assembled, processed and a final estimate is made. This is but one process though it may be convenient to classify types of evidence under various headings. The customary trichotomy breaks down under this line of reasoning. We view the estimation of cost-new as appropriate only when a new property is a real alternative or substitute for the subject property and when the cost is viewed as a market-determined price of acquisition of a hypothetical comparable property which is to be treated in the same fashion as an existing comparable which represents a real alternative. Income analysis to estimate the characteristics of the income stream is necessary in order to adapt the selling price of a comparable property for use as evidence of the probable selling price of the subject property. When no past sales transactions are to be found, then income analysis is employed to simulate the reasoning of the most probable investors as a basis for prediction of the most probable selling price. This line of attack does not break down neatly into the three approaches and challenges the convention of approaching every appraisal from three directions at once.

PROBABILITY

We have insisted that the appraiser can only predict the most probable selling price under stated conditions. Most clients, including public agencies and courts, mistakenly insist on a single value figure. Many appraisers round off their estimate in recognition of the fact that it is not an exact amount and a few prefer to report their findings in the form of a range. This device of a range is in the right direction; in fact, it would be both logical and useful to the client if the appraiser took a final step and indicated his opinion of the probability that the actual selling price would fall within this range. Consider the fact that, in statistical terms, the appraiser's prediction is in the form of a central tendency, the most probable occurrence in a frequency distribution of possible occurrences. The quality of the appraiser's prediction of an exact value will vary widely from case to case. In appraising a tract house, he usually has available a substantial number of recent sales of nearly identical houses, and his prediction of the most probable selling price of the subject property will be realized in actuality within a narrow range of error. But should he be appraising a large luxury home in a small town where no past sales of similar properties can be found, the actual selling price of the property will probably deviate widely from his value estimate. In both cases he

may have used all available information with the highest level of skill. Thus in any given case, the reliability of the value estimate is a function of both the availability of dependable information and the skill of the appraiser. But who knows better than the appraiser what are the odds that the property will really sell for something close to his appraised value. And since all business decisions call for judgment on the odds for and against success, would it not be helpful to the appraiser's client to know the degree of dependability of the appraiser's estimate. In the tract house valuation, the appraiser might report that the most probable selling price of the property will be $17,500 with only a one out of ten chance that it will be lower than $17,000 or higher than $18,000. For the luxury house, he would indicate that the most probable price would be $75,000 but that it might fall anywhere from $60,000 to $90,000 with only a one out of ten chance that it would be higher or lower. This kind of odds-making is realistic and can be useful in the decision-making of the client. It adds an important qualification to the value figure and avoids the misleading implication that in every appraisal, the appraised value has the same practical significance.

REMEDIES

This discussion began by viewing with alarm the self-perpetuating circle which has frozen certain serious and pervasive appraisal errors into the condemnation process. The existing situation was highlighted by a number of examples of error, and it is to be hoped that a more or less convincing logic has served to support my position, dominant appraisal beliefs and practices not to the contrary. It is not quite true that everyone is out of step but me. A few of the errors discussed have been recognized by the courts in a number of states. Among thoughtful appraisers, there is growing evidence of an acceptance of certain of the viewpoints outlined here. In fact, the misuse of the cost approach was pointed out some thirty years ago and since 1934, the Federal Housing Administration has avoided using it in its millions of appraisals for the very reasons stated in this paper. But the fact remains that most of the protest against traditional but unsound appraisal methods is tacit and not expressed in changed techniques. The major reason for the laggard pace of rationalization in appraisal practice may perhaps be found in the fact that so many courts and public agencies accept unquestioningly or even insist upon wrong practices. In such a precedent-minded environment, what gain is there for the appraiser in fighting upstream against the strong current of tradition and accepted theory.

But it is also true that the great majority of practicing appraisers are not conscious of error. They are following the theory and methods which have long been taught by the trade associations and professional societies and which are supported by most of the books and periodical literature which is recognized as authoritative. Perhaps the lagging state of the appraisal art can be illuminated by viewing it in the perspective of its slow evolution toward professional status.

The history of any professional group will reveal that at the beginning, the development of a theoretical foundation and the refinement of techniques depended almost entirely upon the more able and thoughtful practitioners. Apprentices were trained by those experienced in the art, and accumulated wisdom was passed on to each new generation through observation and personal instruction. Until very recently in the field of appraisal, most of the textbooks were written by practitioners, the articles in the professional magazines were submitted by practicing appraisers, and the organized societies passed on the accumulated knowledge through educational programs prepared and taught by practitioners. Very little was contributed by university professors and scholars. Whatever the reasons, there have been very few significant advances in appraisal theory and practice in more than forty years. But as it became more difficult for the appraiser to retreat behind experience alone to defend his findings, he did develop theoretical gimmicks, such as the three approaches, to serve as rationalizations for his methods. He devised impressive arithmetical treatments for processing appraisal data which gave the specious appearance of scientific analysis and exactitude.

If the experience of other professional fields can be accepted as relevant, the maturing of appraising into a profession will continue to lag until there has been a substantial

increase in the complementary facilities for appraisal education and research in our institutions of higher learning. Without the contributions of a much more extensive academic collaboration than now exists, there will be little progress in raising the standards of this deductive art. On this front, the University of Wisconsin has made a modest addition in the form of a new graduate program of professional education leading to the degree of Master of Science in appraisal. Public agencies could speed the process by insisting on adequate training for staff and fee appraisers and by refusing to accept appraisal findings based on erroneous theory and faulty practice. They could provide retraining facilities for their present staffs. And the judges are in a most strategic position to speed the rationalization of appraisal practice for if, with sufficient frequency, the judges refuse to consider appraisal findings which are unsoundly based, the appraisers will quickly mend their ways. And who is to educate the judges? The lawyers.

The Exercise of Police Power in Highway Cases

HAROLD R. FATZER, Justice, Kansas Supreme Court

• IT is believed by some that when a lawyer becomes a judge he knows all the answers; rather, it must be said, he finds the problems. The truth is that in numerous cases the problems have never been judicially determined. Circumstances in particular cases differ. Procedural rules, presentation of facts by counsel, and deliberations by juries, all are factors that must be accepted as variables. The answers depend upon established rights correlated through such variables. Mr. Justice Cardozo, in his book "The Growth of the Law" said: "We tend sometimes, in determining the growth of a principle or a precedent, to treat it as if it represented the outcome of a quest for certainty. That is to mistake its origin. Only in the rarest instances, if ever, was certainty either possible or expectant. The principle or the precedent was the outcome of a quest for probabilities. Principles and precedents, thus generated, carry throughout their lives the birthmarks of their origin."[1]

Mr. Justice Sutherland wrote "that liberty and order are the most precious possessions of man, and the essence of the problem of government is reconciliation of the two." Many basic legal questions arising out of the National System of Interstate and Defense Highways require application of this principle. Generally speaking, the backbone of this Federal-state system is premised primarily upon the policy of access control. This presents the pressing problem, pinpointed by Mr. Justice Sutherland, of reconciling conflicting interests—that of private land use versus public highway use.

The two great powers of government involved—eminent domain and the police power—are antithetical; the line of demarcation between their valid exercise is not always well defined[2] and must be determined by "established rights" correlated through the always present "accepted variables." Hence, we turn to the subject of this paper, "The Exercise of Police Power in Highway Cases."

Application of controlled-access statutes to fact situations produces legal questions of great magnitude relating to the restriction of access of abutting owners, frontage roads, new highways where none previously existed, roadside zoning and control of land use in interchange areas, relocating utilities, and utilization of air space over highways. In all these areas, the traditional police power doctrine is currently under tension.

In discussing the extent the police power may be exercised to solve some of these problems, let us begin by asking the following questions and attempting to answer them, keeping in mind Mr. Justice Cardozo's statement that certainty is neither possible nor expectant, and that principles or precedents are generated by a quest for probabilities.

What is the police power? How is it exercised, and what are its limitations? What is an abutter's right of access, and may it be restricted by the police power? Can the two rights, the private right of the abutter and the right of the state to promote public safety, be harmonized? What are the rights of utilities? What about roadside zoning?

The term "police power" is not susceptible to definition with circumstantial precision and is subordinate to constitutional limitations. It is a governmental power of self protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury. It rests upon the fundamental principle that every owner holds his property under the implied limitation that

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[1] Cardozo, "The Growth of the Law," pp. 69,70.
[2] Pumpelly v. Green Bay Company, 80 U.S. 166, 20 L.Ed. 557.

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its use may be so regulated as to not be injurious to the safety, health, morals and general welfare of the community in which he lives.[3] The power extends to the entire property and business within a state's jurisdiction. Both are subject to it in proper cases.[4] The police power belonged to the states when the Federal Constitution was adopted. They did not surrender it and they have all of it now. Nor did the states, by ratification of the Fourteenth Amendment, impose restrictions upon the exercise of their power for the protection of the safety, health or morals of the community, where the regulation invoked is reasonable and bears a fair relationship to the object sought to be attained.[5]

The landmark case of Mugler v. Kansas clearly outlines the distinction between eminent domain and the police power. A taking in eminent domain contemplates just compensation; a restriction or prohibition upon the use of property under the police power leaves the owner uncompensated. While every regulation necessarily speaks as a prohibition[6] and deprives the owner of some rights theretofore enjoyed and is in that sense an abridgment by the state of rights in property without compensation, such a restriction or prohibition imposed to protect public safety from danger threatened is not a "taking" in the constitutional sense.[7] The rule is stated: "Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking or damaging without just compensation of private property, or of private property affected with a public interest."[8]

The property so restricted remains in the possession of the owner. The state does not appropriate it or make any use of it. It merely prevents the owner from making a use which interferes with the paramount right of the public safety previously ascertained by state action. Whenever the use prohibited ceases to be noxious—as it may because of future changes in economic or social conditions—the restriction can be removed and the owner will be free to enjoy his property as theretofore.[9] If a regulation is otherwise a valid exercise of the state's police power, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.[10] Nor is it of controlling significance that the use prohibited is a "use" upon the soil as opposed to a "use" of the soil itself.[11] Nor that the use prohibited is arguably not a common-law nuisance.[12]

Except for the familiar standard of "reasonableness," courts have generally refrained from declaring any specific area in which the police power may be invoked, but the classical statement of the rule in Lawton v. Steele[13] (1894) is still valid today, and I quote: "to justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."[14]

This is not to say, however, that state action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation.[15] Hence, we come to the elusive question: Where does police power end and eminent domain begin? There is no precise answer to the question. Each case must be con-

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[3] Panhandle Co. v. Highway Comm'n, 294 U.S. 613, 79 L.Ed. 1091.
[4] Transportation Co. v. Chicago, 99 U.S. 635, 642, 25 L.Ed. 336.
[5] Mugler v. Kansas, 123 U S. 623, 31 L.Ed. 205; Martin v. Davis, 187 Kan. 473, 484, app. dis. 368 U.S. 25, 7 L.Ed.2d 5.
[6] Goldblatt v. Hempstead, 369 U.S. 590, 8 L.Ed. 2d 130.
[7] Mugler v. Kansas, supra.
[8] Chicago Burlington &c R'D v. Chicago, 166 U.S. 226, 254, 255, 41 L.Ed. 979, 991; Mugler v. Kansas, supra.
[9] Goldblatt v. Hempstead, supra; Penna. Coal Co. v. Mahon, 260 U.S. 393, 67 L.Ed. 322; Transportation Co. v. Chicago, supra.
[10] Walls v. Midland Carbon Co., 254 U.S. 300, 65 L.Ed. 276; Reinman v. Little Rock, 237 U.S. 171, 59 L.Ed. 900; Mugler v. Kansas, supra; Goldblatt v. Hempstead, supra.
[11] U.S. v. Central Eureka Mining Co., 357 U.S. 155, 2 L.Ed.2d 1228.
[12] Reinman v. Little Rock, supra.
[13] Lawton v. Steele, 152 U.S. 133, 38 L.Ed. 385.
[14] Goldblatt v. Hempstead, supra.
[15] Penna. Coal Co. v. Mahon, supra.

sidered on its own merits. If a line can be drawn between the exercise of these two powers, Mr. Justice Holmes, in Penna. Coal Co. v. Mahon,[16] had this to say:

> Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clause are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases, there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power. (p. 325.) (Emphasis supplied.)
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> The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . . As we already have said, this is a question of degree and therefore cannot be disposed of by general propositions. (p. 326.) (Emphasis supplied.)

In the recent Goldblatt case,[17] Mugler v. Kansas was quoted and approved, and it was said: "There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, see Pennsylvania Coal Co. v. Mahon, supra, it is by no means conclusive, see Hadacheck v. Sabastian, supra, where a diminution in value from $800,000 to $60,000 was upheld." See, also Erie R. R. Co. v. Public Util. Commrs,[18] where an expenditure of over $2,000,000 was required to insure public safety.

One of the most obvious purposes for the exercise of the police power by the states is that they have a constitutional duty to insist that the streets and highways shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger.[19] From this duty stems the right of legislative control over public highways and the right to invoke the police power which is not "inaptly termed the law of overruling necessity."[20]

Controlled-access statutes, in the best sense, are mere police regulations deemed essential to the protection of the lives and property of our citizens against the unrestrained exercise by any citizen of his own right. They were enacted to meet the needs of social and economic conditions brought about by twentieth century urbanization and the perfection and increased use of the motor vehicle. They contain broad grants of power and were intended to embrace all details for the safe, convenient and efficient movement of traffic. Their purpose was to have highways constructed in such a manner that their use would not be dangerous to traveling America. Old highways were to be relocated and reconstructed, and new highways were to be located and constructed. There would necessarily be contacts with railroads, telegraph, telephone and electrical transmission lines, and with pipe lines for transportation of oil, gas and water. These highways were to be free from abutter's access except at designated interchange areas or cross-overs, and were designed to serve the traveling public and not the land over which they pass. The general grant of power to deal effectively with an enterprise of this magnitude in the interests of public safety is paramount, and the statutes are not to be interpreted in any narrow, technical or illiberal manner.

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[16] Penna. Coal Co. v. Mahon, supra.
[17] Goldblatt v. Hempstead, supra.
[18] Erie R. R. Co. v. Public Util. Comm'rs, 254 U.S. 394, 410, 65 L.Ed. 322, 333.
[19] Erie R. R. Co. v. Public Util. Comm'rs, supra.
[20] Chicago Burlington &c R'D v. Chicago, supra.

The right of access can be said to be a common-law right in property which declares that an abutter to an existing street or highway possesses a right as an incident of ownership, of access to and from the street or highway. The right has been given the status of property, which may not be taken from the owner without just compensation. It is a judicially declared right, created and adopted by common law to conditions existing at the time of the judicial decisions. But conditions change, and the common law follows apace.

On this point, the Supreme Court of Kansas said:

> One of the basic characteristics of the common law is that it is not static, but is endowed with vitality and a capacity to grow. It never becomes permanently crystalized but changes and adjusts from time to time to new developments in social and economic life to meet the changing needs of a complex society . . .. In his book entitled The Growth of the Law, page 20, Mr. Justice Cardozo, with poetic imagery, gave the following expression on that thought: ". . .. The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow. It must have a principle of growth."[21]

But accepting the nature of the right as it is now recognized by most courts, its enjoyment, like all property rights, is subject to regulation by the state, where facts demonstrate its free and unrestricted exercise would be detrimental to public safety. The right of the abutter must bend to the right of the public to safe and efficient travel upon the public way. It is universally held that acts done in the proper exercise of governmental powers and not directly encroaching upon private property, though these consequences may impair its use, do not constitute a taking within the meaning of the constitutional provision, or entitle the owner to compensation from the state, or give him any cause of action.[22]

How far the abutter's right of access must accommodate itself to the public need is the decisive question. As lawyers who face the task of advising your agencies so that highways may be constructed with some knowledge of the legal and financial consequences, I need not remind you of the difficulty of stating a definitive answer. Courts have placed the fulcrum at various points along the balance between the public need and the private right, but time does not permit a discussion of the numerous cases which are no doubt familiar to you.

No hard and fast rule can be stated, but courts must weigh the relative interests of the public and the individual and strike a just balance so that government will not be unduly restricted in its function for the public good, while at the same time, give due effect to the policy of eminent domain to insure the individual against an unreasonable loss occasioned by the exercise of police power.[23] The question depends upon the particular facts of the case. Obviously, if there is a total blocking of access, the restriction would appear to be unreasonable and the abutter entitled to compensation. Where, however, the restriction does not substantially interfere with the abutter's ingress and egress,[24] or where frontage or connecting roads are provided,[25] the abutter is not entitled to compensation. While an abutter may have the right of access to the public highway system, it does not follow that he has a direct-access right to the main traveled portion thereof; circuity of travel, so long as it is not unreasonable, is non-compensable.[26] Likewise, loss of access due to change in grade in an existing right-of-way is not compensable.[27]

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[21] Hoffman v. Dautel, 189 Kan. 165, 168, 368 P.2d 57.
[22] Transportation Co. v. Chicago, supra; 29 C.J.S., Eminent Domain, § 111, pp. 919, 920.
[23] Iowa State Highway Comm. v. Smith, 248 Iowa 869, 877, 82 N.W.2d 755 (1957).
[24] Moore v. State Highway Commission, 191 Kan. 624; Nick v. State Highway Comm., 13 Wis.2d 511.
[25] Blaylock v. State Highway Commission, 191 Kan. 183; State ex rel. v. Silva (N.M., 1962), 378 P.2d 595.
[26] State v. Lavasek (N.M., 1963), 385 P.2d 361.
[27] Smith v. State Highway Commission (N.C. 1962), 126 S.E.2d 87.

In determining the reasonableness of a state regulation, courts would want to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic steps, and the loss which the owner will suffer from the imposition of the regulation.[28] The presumption is in favor of the validity of the regulation and the burden is upon the abutting owner to show that it was not necessary for the protection of the public safety and welfare.[29] Cases dealing with eminent domain proceedings must be put to one side.[30]

I have the notion that when the public authorities design and establish a controlled-access highway, or establish a controlled-access facility where none previously existed, their resolutions and findings of traffic conditions and the nature and extent of each abutter's access should be fully determined and reduced to writing in the records of the commission, and notice should be given to the public and to each abutter, of the findings and action of the commission. The recent case of State, ex rel. v. State Road Comm., 128 S. E. 2d 471, decided by the Court of Appeals of West Virginia, seems ample authority to support this statement. I recommend your careful study of that case.

I further suggest that controlled-access statutes be amended to aid the courts in balancing private rights and public rights. It seems to me that the Wisconsin statute contains provisions most helpful in this respect.

Time does not permit the discussion of other questions, and in conclusion I briefly summarize: the supervision of public safety is a governmental power, continuing in its nature, to be exercised through the police power as the special exigencies of the moment may require, and the largest legislative discretion is allowed.

Controlled-access statutes form the basis for a different approach to the solution of questions concerning access rights than courts have had in some of their opinions. Heretofore they have approached the questions largely on the basis of individual interest alone. Under these statutes properly applied, courts must now approach them on the basis of the convenience and safety of the people of the states without losing sight of the limited or restricted use the individual may make or has the right to make of access to such highways. Broad statements found in some opinions that the abutter has the absolute right of unrestricted ingress and egress to and from streets and highways must be modified to harmonize with the declaration of these statutes. The change is an appropriate one for legislatures to make. Individuals do not live alone in isolated areas where they, at their will, can assert all of their individual rights without regard to the effect upon others.

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[28] Goldblatt v. Hempstead, supra.
[29] Penna Coal Co. v. Mahon, supra; Goldblatt v. Hempstead, supra.
[30] State Highway Comm. v. Panhandle Eastern P.L. Co., 139 Kan. 185, 189, 29 P.2d 1104.

Highway Contract Administration– Its Problems and Treatment

SAUL C. CORWIN, Counsel, Department of Public Works, State of New York

• CONTRARY to views of most contractors, lawyers working at the various levels of government learn from almost their first experience with public contracts, that the sovereign has no special advantage in the formulation of the written document. Only those of the uninformed public exclaim that they would rather represent the government in any contract question. In fact, the courts in New York State have held that the State has a definite duty and responsibility in making contracts with its citizens. The courts unanimously declare that in performing that duty, the State must set a standard for "fairness, justice, equity, honesty and plain frank statement of its purpose, without subterfuge or circumlocution, and shall be beyond all criticism as being in any way possible of deception." Courts in other states have expressed themselves similarly. In face of this admonishment by the courts, the duty of the government lawyer becomes clear. He should and must approach the preparation and administration of such contracts within the strict standards that are imposed upon him.

Highway construction contract administration poses many problems, both engineering and legal. In meeting these problems, the care used in forming the language of the instrument is of the utmost importance. The usual case finds the contractor presented with a contract that is written by representatives of the government and for that reason, when the language is in doubt, the courts construe the words most strongly against the party who writes them, the sovereign.

CHANGED CONDITIONS

The complexities of contract legal construction are most apparent in the area of highway contract administration that generally is termed as "changed conditions." These changed conditions may result in performance of either "extra work" or "additional work" by the contractor. The terms are not synonymous. Extra work usually arises outside of, and entirely independent of, the contract and is not required in its performance; whereas, additional work usually results from a change or alteration in work that has to be performed pursuant to the contract and might arise from conditions that could not have been discovered until the specific work of the contract was actually undertaken. Whether changed conditions result in extra work or additional work performed by the contractor has been the subject of argument between the contracting parties and too often becomes the subject of litigation in the courts, a result that is very expensive for both the contractor and the state.

I will review very briefly, within the limits of the time allotted, the Federal treatment of this problem and contrast it with the New York State method, a method which many other states also employ. These views seem to represent the two general schools of thought for treatment of this problem.

The Federal government has endeavored to treat and reduce the risk of changed conditions as they affect the contractor by the inclusion in all Federal construction contracts of a requirement that the contractor immediately notify the contracting officer of (a) subsurface or latent physical conditions at the site which differ materially from those indicated on the contract or (b) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work of the character provided for in the contract.

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The contracting officer must then promptly investigate the conditions, and in a proper case, he may make an equitable adjustment and modify the contract accordingly.

However, New York State highway construction contracts do not contain a provision similar to the Federal government's "Changed Conditions" article. With respect to subsurface conditions, the New York State Public Works Specifications of January 2, 1962, provide:

> Whenever subsurface borings or other subsurface information obtained by the Department is available for a bidder's inspection, it is understood that it has been obtained with reasonable care and recorded in good faith with reasonable interpretations placed on the results and character of materials and conditions to be expected. The bidder must interpret this information according to his own judgment and not rely upon it as accurately descriptive of subsurface conditions which may be found to exist. The information is made available to the bidder only in order that the bidder may have access to the identical information available to the Department.

This provision means in effect that the contractor is expected to accept full responsibility for subsurface conditions encountered on the site except those resulting from faulty design or misrepresentation. The New York State Department of Public Works cooperates fully with the contractor and makes available to him, as well as other bidders, all information on subsurface conditions that it has available. If subsurface conditions are encountered which depreciate the construction design features, the Department of Public Works will initiate and authorize procedures to adapt the design. Such adaptations usually take the form of increases in quantities of excavation, foundation piles, sheeting, concrete or gravel. The unit bid prices for the items are not modified. The Department of Public Works endeavors to have a complete engineering design and to have the subsurface structures and conditions fully tested and supported by borings and laboratory tests. What we are saying, in effect, to the contractor is "We put reliance on our boring data but we acknowledge that variations in texture, slope, earth strata and ground water are prevalent and that uniformity should not be surmised—therefore, you should make your own borings and subsurface investigations in order that you will be apprised so far as possible of conditions at the site. However, we honestly believe that our borings will factually show the actual subsurface conditions at the site and we offer to make them available to you together with any other information that we have on the subject." Of course, this procedure is a gamble of sorts to the contractor but it appears from our experience that seasoned contractors would not have it otherwise.

In New York State the contractor is not without a remedy. The State has a "disputed work" procedure which affords the contractor an opportunity to be heard when claiming extra work. If the work is determined to be extra work, a supplemental agreement is negotiated with the contractor. If additional work is involved, the unit price for the item is paid for this work. If the Superintendent determines that the disputed work is contract work, the contractor may still disagree with him and pursue his remedy in the State Court of Claims.

We have never been entirely satisfied with either the equity or effectiveness of our State procedures. We have always held to the basic view that a contractor who feels "short-changed" as a result of the conditions outlined will utilize every means to secure compensation in some form through either "curricular or extra-curricular" activities. After all, one of the basic concepts of sound contract procedure is to effectuate the exchange of "honest" dollars measured in terms of "honest" work. No more—no less! Any procedure or practice which defeats this principle must only lead to either litigation or an attempt by the contractor to remedy the imbalance in his own way.

STRICT COMPLIANCE VS PRACTICAL APPLICATION

Following the problem of the contract's legal construction is the problem of contract application. This is the area of strict compliance to the legal letter of contract law

under common law rules vs the practical engineering approach used to obtain a final result. In highway contract administration, care must be used to balance both of these views in order to obtain the desired result most expediently and at the minimum cost. I know of no genie who can balance these views and come up with the best results everytime, but experience in this area is an excellent guide. Therefore, good contract administration requires that a large amount of discretion and flexibility be delegated to the experienced contract engineer-administrator so he can use this experience to perform this important balancing function.

PRELIMINARY ACTIVITY

Critical attention should be given to three areas of pre-activity in order to determine what aid they may offer in minimizing delay in progressing construction contracts. First, consider the use of a system of pre-bidding qualification. In New York, we lean to the position that such a system is not especially effective and our experience has not revealed that there is a compelling need for such procedure. In fact, in our view, it adds to the time factor needed to process administratively the contract after the "low bidder" has been ascertained when the bid box is opened at the letting because our interest is primarily in the qualifications of the low bidder rather than a group of several bidders. The low bidder's qualifications are adequately determined before an award is made to him. The State at that point has no interest in the qualifications of the unsuccessful bidders.

The system of pre-bidding qualification is tied in, to a large degree, to the contractor's past performances in similar work and, in particular, those projects he has performed for the State. Mere possession of adequate financing and equipment is not the governing criterion. New or little known contractors, who, incidentally, may well be equipped with management, manpower and equipment sufficient to handle the project, would be faced with the difficult and costly task of establishing their qualifications. The results could well be that on many projects the number of bidders would be diminished. This would work to the detriment of the State and the cost of projects could increase because of limited bidding by the same few contractors. We think it does not give as free play to the competitive process.

The second suggestion for examination is the use of a system of pre-award qualification. Although this system is closely akin to the first suggestion, it is more practical because a determination is being made as to the responsibility of the low bidder and his capability to complete the contract satisfactorily. Of course, time can be saved if the bidder has had prior experience with the State because the "book" on the bidder can be up-dated with little additional work.

The third area which we feel offers great opportunities for reducing the time required to initiate and complete projects is pre-construction conference. A typical conference would include an invitation to the contractor and "other concerned parties" in interest to meet with the State's representatives in the District Office where the project is to be performed. The contractor is required to present his schedule of operation so that all possible points of conflict can be determined, discussed and then resolved. The District Engineer conducts the conference and uses a check list, which he has drawn up from experience at many other similar conferences, to ascertain that all areas are completely covered in an orderly fashion.

The other concerned parties are very important. A major problem in almost all projects is the coordination of the utility company's activities so that the project is not seriously delayed once under construction. Knowledge of the work schedule can save money because it allows the affected parties, both utilities and contractors, to preorder any specialized equipment or material that is necessary. Lower costs may result because of the ability to time the purchase and secure a precise delivery date. Further, public relations play a major role in the conferences. The local officials must be alerted to traffic problems such as traffic delays, congestion on other routes and detours that become necessary as a result of the planned improvement. The police and fire departments must know what effect the construction will have on their responsibilities.

From this sketchy outline, you can readily appreciate the importance of the coordination needs which such a conference can bring about. If the conference is not used, then the contractor and the State would have to do their own arranging after the fact which would, of necessity, entail a greater length of time and possibly not cover the requirements of all the interested parties. This would lead to improvisation and delay—two of the arch enemies of effective project progress.

LUMP SUM BIDDING

There is a school of thought which holds the view that lump sum bidding would reduce materially the problems in contract administration.

The unit price system is most useful and virtually imperative when conditions make it difficult precisely to establish the quantity of work to be performed or when unknown conditions may be encountered. Such conditions occur primarily in excavation work because of the lack of knowledge of the precise surface and subsurface conditions. The unit price system allows for the use of estimates and calculated estimates for the bidding process with the accurate determination, upon which the installments and final payments are based, to be made as the work progressed. Almost every contract that calls for use of this system will end up with changes in the total contract price reflecting the increase or decrease in the items due to actual measurements.

Lump sum bidding, on the other hand, is practical only when the work is of a definable and exact nature and quantity. In highway construction, such items might include clearing and grubbing of the right-of-way, staking-out of the project, traffic control, bridge superstructure above the footings and surface pavement construction. However, lump sum bidding is not practical where the items tend to vary in quantity.

With the use of lump sum bidding, either the contractor or the State would have to determine with a high degree of accuracy the nature and quantity of work that is entailed in the project. This design accuracy would require substantial engineering expenditures. If a system was adopted which placed the risk of variance and the duty of calculation of work requirements on the contractor, the results would, of necessity, mean higher bid prices to cover this risk and the cost of the work involved in making the accurate determinations. If the State makes the determination of the quantity of work required and indicates this determination on the contract, then the contractor could recover additional sums when unknown factors are encountered because he is performing work which the contract does not enumerate. The paper and admininstrative work involved when there are numerous variances would be quite burdensome in addition to substantially increasing the State's cost for preparation of plans as well as supervision.

No matter which system is used, the project must still be performed according to the established specifications and would require inspection so that the problem of quality supervision would not be lessened by the adoption of one system over the other.

Any radical change from one system to the other would require a great deal of adjustment by and "education" of the contractors. For instance, many contractors are equipped to bid under a unit price system where estimates of the work requirements are used because they know that adjustments will be made later at the unit prices to reflect the actual measurements, but they would be unable to cope with the task of estimating the total job for a lump sum bid. In a big project, this risk could well encompass a substantial amount of money.

The determination of the best system for highway contracts is not a simple one. Possibly, it lies in a hybrid form incorporating some of both systems. Lump sum bidding could be used for such items as clearing and grubbing, staking out of the project and traffic control, with unit price bidding used for the remaining items, many of which are apt to vary in quantity.

No discussion of unit price bidding should ever conclude without touching on its one principal vulnerability—unbalanced bidding. Extreme caution must be exercised in reviewing unit price bids to contrast them with the engineer's or Department's estimate as well as the competitive bids on the same project which, although higher, may nevertheless furnish interesting and helpful comparisons. An "unbalanced" bid item is one which greatly exceeds the engineer's estimate for the same item. When discovered,

a careful recheck is undertaken to ascertain whether the quantity or number of units are correct and reasonable and do, in fact, reflect the actual quantity necessary for project completion. Steps are also initiated to insure as much as possible that there will not be an appreciable overrun in the item. Such checking will often uncover errors as to quantities enumerated in the bid proposal so that correction can be made while still possible.

The entire area of bidding is one that we would strongly recommend be the subject of review and analysis by the newly-created Department of Legal Studies.

SUPERVISION AND INSPECTION

A group of State engineers, headed by an engineer-in-charge, are assigned to each highway construction project to supervise its construction and to maintain an equitable balance in contractual obligations. The inspection of the contract work consumes the bulk of the engineers' physical energies. The continual striving and planning to achieve the best possible job, with the least possible disaccommodation to the general public, the utilities and the local industry, will demand close supervisory control over the construction project and flexibility by the State engineers assigned to the project. The engineer-in-charge and his men must exercise what is known as construction control. Construction control is a method—as well as a process; it is a blend of experience, training, judgment and just plain horse sense. These factors, in order to be effective, must be applied continuously from the very inception of the job down to the finish. Its purpose is the translation of the contract plans into a completed, effective highway facility.

The contractor, depending upon his ability, working force and equipment, will establish a program schedule which will indicate how and when he plans to take the necessary steps and advance the various stages to complete the project. The methods and means of construction he elects to use, providing they do not violate the contract, terms, the State specifications, and the various State industrial codes and safety statutes are the contractor's prerogative. In the final analysis, the responsibility for successfully completing the highway facility according to the plans and specifications is a joint one, resting equally on the shoulders of both the engineer-in-charge and the contractor. To get the best possible job, the engineer and the contractor must work together and aim for the single common goal. The engineer must appraise and consider in advance of the actual work being performed at the moment. The work planned and the methods to be used next week must already have been discussed and agreements reached between the contractor and the engineer so that both know what work is to be done and the methods to be used to accomplish it. The engineer who waits to see what the contractor is going to do next and how he is going to do it, and then tells the contractor that it is wrong or unacceptable, is not properly carrying out his responsibilities to the State, nor is he advancing the project in a sound manner.

The engineer-in-charge must be careful to exercise a very delicate degree of supervision particularly with respect to the manner in which the work is to be performed. There is a very definite area of contractor prime responsibility and so long as the contract specifications are being followed, he should not reject the contractor's suggested method or means unless, of course, it is clearly unsound or unsafe. Otherwise, he will be assuming a greater responsibility than the contract intends and possible legal liability will result from his actions. The courts in New York recently extended liability to cover consultant engineers employed by the State in a supervisory capacity on the theory that they exceeded their authority and demanded that the contractor apply a particular method of operation which resulted in personal injury to the contractor's employees. In New York, we can expect an increasing number of such suits since in this way the injured employee can avoid being confined to the workmen's compensation injury scale and hope for a trial jury's much more generous award.

It is, therefore, vitally important that the terms "supervision" and "inspection" be clearly itemized and defined in the contract documents so as to preserve the contractor in his proper role as "independent contractor" and his responsibility for the method of operation and limit the supervision and inspection performed by the State as being

solely for the purpose or making certain that the contractor is performing the work within the scope of the contract and contract plans and specifications.

CONCLUSION

Highway contract administration is replete with manifold problems. Obviously all of them cannot be discussed or even touched on in a paper as brief as this. However, I have attempted to present some of the obvious ones. I am heartened by the designation of the newly-created Department of Legal Studies for I believe that this group can undertake a detailed study and review of this very important area and furnish us with a creative, affirmative approach toward effectively meeting a difficult phase of our work.

Organization of Intergovernmental Relations

DENNIS O'HARROW, Executive Director,
American Society of Planning Officials, and
JACK NOBLE, Editor, Zoning Digest

• HIGHWAY programs give rise to a bewildering variety of intergovernmental relations problems, but by far the most urgent of these are the problems that arise out of the planning and construction of highways in urban areas. It has been estimated that in the United States during the next 30 years there will be an increase of 100 million persons living in urban areas. This is more people than now live in our 25 largest cities. During the next 30 years, then, our nation will have to build cities and supply urban facilities equal in quantity to (and, hopefully, better in quality than) the urban facilities now existing in our 25 largest cities. There is no need to stress the singular importance of highways in shaping these urban areas.

Charged with the job of solving these urban problems are a variety of governmental agencies on all levels: federal, state, and local. Their interrelationships and their shared powers result in a structure that has been compared to a marble cake—and has also, less charitably, been called chaotic. If the efforts of all these agencies are really to produce livable cities, this chaos must be replaced by some kind of order. What the nation needs, as Professor Doebele of Harvard has pointed out, is "a quite new type of three-tiered federalism: institutional arrangements in which local, state, and federal jurisdictions each have a clear but limited role to play. The federal government," Professor Doebele notes, "has the financial and technical resources, the state has the necessary political jurisdiction over the total urban area and its hinterlands (laying aside for the moment the special problems of interstate cities), and the local government has the machinery for creating public policies which in this day of bigness are still mindful of the human scale."

It seems clear that the legal profession must play a leading role in devising the institutional arrangements needed for the best functioning of the tri-level government. And in view of the preeminent importance of highways in shaping our urban destiny, I think that the studies needed to devise these institutions should be considered a major frontier of research in highway law.

This paper concentrates on a particularly familiar and important type of intergovernmental problem: the potential, and too often realized, conflict between a state highway department—the "action agency" in most highway programs—and a community affected by a highway department proposal. You are all familiar with disagreements of the type over route location, over whether a freeway should be depressed or elevated, or just where an interchange is needed. How should our institutions seek to resolve these conflicts? The primary objective, of course, should be cooperation among the affected governments.

In recent years, particularly since the Sagamore Conference in 1958, there have been general recognition and widespread discussion of the need for all units of government to cooperate in meeting urban transportation needs. Some progress has been made. By formal devices, such as public hearings, and informal ones, such as continuing staff contacts and very early consultations on project proposals, many differences between state and local viewpoints have been compromised before conflict ever came to a head. Perhaps more important in the long run, a great deal of education has taken place, with the result that planners and engineers are now doing at least a slightly better job of understanding each others' viewpoints.

Paper sponsored by Special Committee on Highway Laws and presented at the 43rd Annual Meeting.

There is still, of course, a long way to go before we have truly effective cooperative planning—a longer way than we have come so far—but we seem to be on the right road; all we must do is move along it faster. A significant push in the right direction is provided by section 134 of the 1962 Federal-Aid Highway Act. This is the section that requires federally aided highway projects initiated in urban areas after July 1, 1965, to be "based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities." There is some question how effectively the act can force cooperation or truly adequate planning. The "workable program" requirement of the urban renewal legislation has not been a notable success in those communities whose only interest is to meet minimum federal requirements. Too often the form of planning is present but the substance is missing. The highway act provision should nevertheless be of great benefit, if only because it calls attention to the need for cooperative planning and causes states and local governments to set up additional channels within which cooperation can take place. Cooperative planning, then, is the first objective. By its use, most potential disputes can be settled before they arise. Those disputes that do arise will ordinarily be settled by one party educating the other or by compromise at some midpoint.

What is to happen, though, if state and local officials do not reach agreement? At present, if we look only at the state statutes, it appears that the state highway department will prevail in one group of states, the local government in others. Statutes in a number of states give state highway departments authority to build certain types of highways within cities despite objections or disagreement by city authorities. The statutes may require various types of cooperation with city officials—perhaps notice or various kinds of hearings—but the final decision is left to the highway department.

Other statutes go to the opposite extreme. They require municipal approval of state highway projects within cities. A substantive municipal veto power may result even in the absence of such a statute if certain local action, such as the vacation of a local street, is required before the new highway may be built, and the locality has complete discretion to take or refuse the needed action.

In practice, of course, the statutes do not tell the whole story. The highway department facing a local veto may exert pressure by threatening to abandon the project or to place it low on the priority list. On the other hand, the objecting local officials may invoke political pressure by running to legislators or congressmen. The important point, though, is that there is no formal mechanism available to resolve these disputes, nobody to act as judge or arbitrator. We believe there should be.

Is it really so unsatisfactory to have state law give final decision-making power to one unit of government or another? To have no formal arbitration machinery?

In cases of this kind, we believe it clearly is unsatisfactory. In the first place, any given stretch of major highway in an urban area is likely to be an integral part of an overall statewide or regional transportation net and also part of the transportation net within the urban area. Under these circumstances—and the division of metropolitan areas into many small localities intensifies the problem—it seems an oversimplification to let either the state or local view prevail automatically in the event of disagreement. It seems equally unsatisfactory to permit the decisions to be made through shadowy, informal or political channels.

In the second place, there is more at stake in these disagreements than state and local transportation plans. Many of the disputes resemble the most common kind of land-use disputes. That is, they represent a conflict between the need for a particular facility and the objections to that facility because of its effects on the adjacent community. There are, of course, elaborate legal procedures to deal with an impasse in a land-use dispute. The proposed facility is a private project. The owner seeks governmental approval, permission to build the project.

Take a regional shopping center, for example. Such a project has the same enormous impact on its surroundings that a freeway has. The center will be subject to local zoning. In practice, some form of legislative zoning decision by the local government—an amendment of the ordinance, a review and acceptance of the design—will ordinarily be needed before the center can be built. This will subject the proprietor to an "ordeal by public hearing," during which his views, those of his neighbors, and

those of local officials will all be aired. Thereafter, the local governing body will make its decision. Although serious doubts have been expressed about the adequacy and fairness of zoning procedures, and numerous suggestions have been made to improve them, the existence of the process is worthy of note, as is the fact that the decision is subject to judicial review—a very searching judicial review in some states.

There is a difference, of course, between public and private projects. But it is easy to exaggerate the difference. Controls of private development are justified on the theory that private developers are usually selfish and without concern for the community at large. But public projects, this argument would run, are designed to benefit the public and are proposed by boards or individuals ultimately subject to the electorate.

We believe this approach must be rejected. It should be recognized that a public agency responsible for a particular project can generally be expected to weigh the importance of building that project more heavily than any detrimental effects its construction may have on the surrounding area. Local governments have been known to build garages for their garbage trucks in the midst of their own best residential areas just because the site was convenient and the land was cheap. And when a government agency, such as a road-building agency, spends most of its time on a particular type of public facility, it is understandable that the agency develops a certain momentum, or bias, that is extremely difficult to overcome.

Some state road-building agencies have done a creditable job of integrating planners into their organizations—a better job, probably, than many local planning agencies have done in using engineering in the preparation of their local traffic plans. Hopefully, the addition of planners has increased the concern of highway agencies with community effects of proposed facilities. The fact remains, though, that the primary responsibility of highway departments (and this includes the planners as well as the engineers) is to build highways. And it is not clear that the decision between getting the most road for the public dollar and considering the welfare of the adjacent community is always best reached by an interested highway department official. The problem is made no easier when it is realized that money for highway building normally comes from earmarked funds, which results in a definite reduction in the legislative control compared with that which exists in some other areas of governmental activity.

We are not arguing that state highway programs should be subject to local land-use controls. Anyone who has dealt with many local officials will recognize that they (and sometimes their planner employees) too often fail to see the big picture—too often want to protect the status quo even if it means excluding a vitally needed public project. As the interests of individual suburban communities increasingly diverge from those of metropolitan areas as a whole, this problem becomes increasingly serious. In fact, in such areas we must recognize three parties of interest in a state highway program: the metropolitan community as well as the state and the particular city.

The impracticality of complete local control has been recognized by the one group of statutes that has established machinery designed to reconcile the need for particular public facilities with the adverse effects of those facilities. These statutes, based on the Standard City Planning Enabling Act issued by the Department of Commerce in 1928, require that plans for any type of public facility (often including state highways) be submitted for approval by the plan commission of each affected locality. If the plan commission disapproves, however, the proposed facility may nevertheless be built if two-thirds of the membership of the governmental body proposing the facility votes to overrule the commission. Thus, it appears that the drafter of the standard act recognized, quite properly, that a local veto is not practical.

These considerations, then, lead to the conclusion that neither the action agency nor the objecting municipality should be given the power of final decision in those cases reaching a true impasse.

What is needed is a new institution, not specifically identified with either contending agency, one with a breadth of view enabling it to see all sides of the picture. We believe this new institution should be a board at the state level, modeled on the federal regulatory commissions such as the Interstate Commerce Commission or the Federal Power Commission. Like these agencies, the board's power should be subject only to broad policy standards established by the legislature. The board would be required to

consider presentations by the action agency, municipal objectors, and others. The board would then have power to make a final and binding decision.

Although no exact precedent for such a board is known, there are some useful analogies. In some states, although public utilities are subject to local zoning regulations, state public utility commissions are authorized by statute to grant exemptions from local regulations. In New Jersey, for example, such an exemption may be granted if the board of public utility commissioners find that "the present or proposed situation of the building or structure in question is reasonably necessary for the service, convenience or welfare of the public." New Jersey court decisions have spelled out fairly precisely the nature of the matters that the board must consider in applying this standard. We can infer that the legislators wanted neither the utility nor the locality to make the final decisions. Statutes such as this are particularly interesting because of the great similarity of the land-use questions presented by, say, an electric power transmission line and a highway.

The Ontario Municipal Board offers another analogy worth studying. That board considers a variety of municipal questions: annexation, assessments, bond authorizations, various planning decisions, and zoning. The procedure is simple enough. Certain municipal decisions must by law be submitted to the board for approval. The board gives notice to all concerned, hears evidence and arguments, and hands down its decision. There is no doubt that the board and its work are highly regarded. It is usually possible to obtain a hearing before the board within a month or two. In minor cases, board decisions are frequently handed down right at the hearing. And in important cases, decisions are usually forthcoming within a few weeks.

Still another analogy may be the boards established in a few states to pass on annexation questions. These boards, like the Ontario Municipal Board, are primarily concerned with review of actions contemplated or taken by a single municipality, although intermunicipal conflict is often involved.

If established to deal with highway disputes, we believe an institution of the proposed type would rapidly come to be used for a number of other state-local and intermunicipal disputes as well. Richard Babcock, an eminent zoning lawyer, has written forcefully of the need for a statewide administrative agency to review local zoning decisions. At present, although there is an increasing realization among planners of the need for some land-use control authority other than local governments, particularly in metropolitan areas, no agency is now available to perform the needed review functions. For the resolution of controversy, the courts are the only recourse, and their experience in intergovernmental disputes is not extensive, nor particularly sophisticated. In addition to land-use control questions, annexation matters could also very easily be assigned to such a board.

We do not insist that a board of this type will be an unmixed blessing. There will be a danger of the board being biased (as regulatory commissions are often accused of being) or of abusing its broad powers. The method of appointment of board members can become a seriously debated point, although this problem has been faced and apparently resolved in the case of the federal and state regulatory agencies. As the boards became more experienced, it would presumably become possible for state legislatures to lay down more detailed policy standards to guide board decisions.

There would also be a problem of delay. This could easily be the most serious problem of all. It is not necessary to remind lawyers how long administrative processes can take. Existing procedures sometimes delay private developments for years, and such delays of vital links in urban highway networks would not be acceptable. The magnitude of administrative delays would have to be continually examined as the boards operated. Certainly, highway disputes should be assigned higher priority than most of the other types of disputes. And an adequate staff to handle the disputes would have to be provided by state legislatures. In view of the vast amounts of money being spent on urban highways and in view of the incalculable effects these highways can have on our cities for decades or even centuries to come, there is a strong argument for instituting such a formal process even if some delays do result. With expeditious handling, the delays should not be so long that the processing would do more harm than good.

We are also realistic about our own field, public planning. We are well aware of the inadequacies that exist—inadequacies in staff, in preparation, in real knowledge of the

variables. We recognize that there is often a complete lack of local consensus on a particular problem and its solution. The intuition of local politicians is no match for the precision of an engineering presentation. Yet this should not discourage us. The doctrine of "put up or shut up" will be invoked. As we see it, the end cannot but help both our houses. Planners as well as highway engineers will be forced into a deeper and more accurate understanding of the urban development process.

In sum, our hope is that, in conjunction with the state-local cooperation now developing in the highway field, it may be possible to devise a new institution to settle disputes when cooperation fails. Once established, this institution could also turn part of its attention to the increasingly serious intermunicipal disputes for which there is now no machinery to resolve. We have long had tribunals to regulate conflicts among private interests and conflicts between private interests and public ones. We should at least try a similar approach in reconciling disputes between public agencies that have differing views of the public interest. Lawyers in the highway field could play a leading role in getting the needed boards established.

General Discussion of 43rd Annual Meeting Papers

J. H. BEUSCHER, School of Law, University of Wisconsin

• THIS is an occasion when we can appropriately say, "The King is dying, long live the King." With this meeting the Special Committee on Highway Laws will terminate its activities which now go back more than a decade. At the same time, however, there is being born in the Highway Research Board a new department which promises to give long-term continuity to our research in the general field of highway law. Therefore, it seems to me that this session is especially significant. Here we are launching a new venture, or at least taking a new grip on an old venture, and at the same time our meeting this afternoon is devoted to a discussion of some of the frontiers of research in four major fields of highway law.

We have had four excellent papers on, in one sense, quite diverse subjects. But there is a common thread that runs through them all. It seems to me that as we look back over them we can justify grouping these particular people and their ideas together on a single program in terms of research ideas that have been presented here this afternoon—research ideas that are going to become clearer in their detail and helpful as we look at these papers in their entirety and read them with care.

For example, Professor Ratcliff's paper very ably presented the urgent need for getting some researching lawyers and researching economists who know something about the appraisal process together in a joint effort to make better sense out of our court rules with respect to admissibility of evidence in this field.

In the paper presented by Justice Fatzer, one point that stood out clearly was the need to begin to pay much more attention than we have been to the vital job of getting together the facts that justify particular police power action in the highway field, such as the elimination of access, and then preserving those facts in a record that is readily available to those who are interested or when there is subsequent litigation. Research into the various processes by which this is being done in the various states might teach us much. Also, research into the way this problem is handled in the general field of land-use control in American cities and local units generally would be significant. In addition, we might want to be concerned in our research activities with what I believe as an American is an extremely important problem that emerges when we consider this vague, indefinite boundary that cannot be drawn with preciseness between the police power and the eminent domain. Granting that this will forever be true, nevertheless it seems we should investigate to see whether in practice a given state agency is sometimes taking private property and paying compensation, and at other times taking the very same interest through the police power and not paying compensation. Where this happens I think we are in danger of weakening respect for government and the law in our country, and if I had time I could cite you some chapter and verse from my own state.

Turning to our third paper—Saul Corwin's excellent analysis of some of the major problems of contract administration—I found a number of challenges for the researcher. For example, what do we know about the courts of claims that have been set up in a number of states, and what they are doing in the important field of highway contract claims? What are the diverse practices, and what can be learned from this reservoir of experience? This, in addition to the specific things that he identified as challenges, for example, that problem of perfecting the techniques of delegating responsibility for contract supervision to the engineer in charge of a highway project.

Turning finally to Dennis O'Harrow's stimulating presentation, we obviously have a man-size job trying to find out and keep abreast of what is going on all over the country in connection with implementation of the planning requirements of Sec. 134 of the Federal-Aid Highway Act of 1962, trying to report the more successful of these efforts,

and perhaps also the least successful—trying to demonstrate what works and what does not work. There is some accumulating experience, and I think it is vital that we bring it out and make it available to those who are going to have to live with this law for the generation ahead. As to Mr. O'Harrow's formal arbitration idea, I believe that some research into other analogous state-level arbitration procedures may help shape procedures and some arrangements that will make this device more successful in the field of highway transportation planning. For instance, in my state we have had a subdivision plat approval control procedure, and this is now accepted as a successful program. We should try to find out what happened here to make it successful, and how local units of government were persuaded to put up with this kind of state-level control. Also, we have a procedure used in connection with construction of major dams on navigable rivers which requires that the proposed builder of the dam, be he a private individual or be it a local unit of government, must apply to a state agency for a permit. This agency normally holds a formal hearing, and frequently another state agency, the Conservation Commission, appears and offers a very carefully prepared and energetically presented case—usually opposed to the dam. And the state agency which is to make the adjudication is not satisfied to rely on the record made by the partisan groups, but makes its own investigation in connection with applications presented to it. It is quite possible that experiences such as these suggest better ways of solving the problems of devising procedure for intergovernmental harmony and efficiency in carrying on the various phases of the highway program.

Suffice to say that I, at least, am going away from this meeting with a headful of ideas, raw as they may be, for the Board's new Department of Legal Studies. We are indebted to our speakers of this afternoon for their interesting and significant contributions. Within the areas they have highlighted for us are immensely important jobs for the highway lawyer in his role as a professional craftsman and a social engineer, working with other disciplines that participate in the process of public policy making.

Sovereign Immunity and the Settlement Of Contract Claims Against the State

JOHN T. AMEY, Chief Counsel, Arizona Highway Department

•THE writer has not conceived the purpose of this paper to be for the examination and cataloging of the various kinds of contract disputes which have arisen within the respective states. Rather, the existence of a dispute (without defining its character) is assumed. Nor is this paper concerned with administrative procedures established pursuant to administrative rule-making powers conferred by statute upon state agencies. Instead, it is concerned with those administrative and judicial procedures which have been specifically provided for by the respective state legislatures.

It is hoped that this paper may serve (in military parlance) as a kind of "staging area" from which deeper assaults of inquiry might be made. For example, most state agencies charged with the duty of constructing public works are delegated a corollary power to establish rules for the administration of the work for which they are responsible. It may be assumed that in some jurisdictions, public works agencies have established purely administrative procedures for the resolution of contract disputes. This would seem to follow especially in those jurisdictions where the legislature has enacted an administrative procedure act. A state-by-state survey would probably reveal valuable administrative formulas lying beneath the strata of statutory procedure. Such information would only be disclosed through personal inquiries of the various administrative officers of state agencies involved in the construction of public works, but the effort would certainly be worthwhile.

Initial research into the subject matter of this paper posed some particularly vexing problems. First, there was a dearth of written authority concerning the settlement of contract claims against the states. Second, by contrast, there was a superabundance of material discussing sovereign immunity and the settlement of tort claims. Any cherished bit of contract claims discussion was usually lumped together with a discussion of tort claims and treated in an almost off-hand or incidental manner. Typical of such discussion is the following:

> Immunity of the sovereign from suability is an ancient principle of the law, both in contract and tort cases. The sovereign may waive, and at times has waived, this immunity in part, by express statutory provisions. The United States as a sovereign has long abandoned the principle of nonsuability in contract cases, at first by private acts allowing recovery against the government for private claims, and then by the establishment in 1855 of the Court of Claims with jurisdiction over claims against the United States founded upon any law of Congress or upon any contract, express or implied, and by the enactment in 1887 of the Tucker Act granting concurrent jurisdiction to the Federal District Courts in cases involving claims not exceeding $10,000.00 1 A.L.R.2d 222 at p. 224.[1]

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[1] See also 49 Am.Jur., States, Territories, and Dependencies, § 62 p. 274 and 81 C.J.S., States, § 194 et seq., p. 1260.

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Although the merging of such material makes the task more difficult, when analyzed, it becomes apparent that by utilizing the entire body of law relating to sovereign immunity and the settlement of all kinds of claims against the states, some worthwhile conclusions may be drawn. Therefore, although the emphasis of this paper is upon the settlement of contract claims, frequent excursion is, of necessity, made into the other areas of claims settlement.

Rather than overburden the following discussion with footnotes, an appendix containing a state-by-state summary of the statutory claims procedures is provided.

THE DOCTRINE OF SOVEREIGN IMMUNITY

The doctrine of sovereign immunity had its genesis in the English common law and was transported to this country notwithstanding the non-existence of a sovereign ruler as that term was understood in English jurisprudence. Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P. 2d 107 (1963); Spanel v. Mounds View School District, 264 Minn. 279, 118 N.W. 2d 795 (1962); City of Fairbanks v. Schaible, 375 P. 2d 201 (1962); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962); Williams v. City of Detroit, 364 Mich. 231, 111 N.W. 2d 1 (1961); Muskopf v. Corning Hospital District, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P. 2d 457 (1961); McAndrew v. Mularchuk, 33 N.J. 172, 162 A. 2d 820 (1960); Molitor v. Kaneland Community Unit District, 18 Ill. 2d 11, 163 N.E. 2d 89 (1959). Those courts which have recently abrogated the doctrine of sovereign immunity have felt little restraint in brushing aside the doctrine of stare decisis since, they reason, sovereign immunity was essentially a court made rule.

To understand the doctrine of sovereign immunity it is important to note that it is composed of two facets. The courts speak on the one hand in terms of the "substantive defense of sovereign immunity" and on the other hand of the "procedural defense of sovereign immunity." Legislation may provide a procedure for the adjudication of claims against the state, but before the courts will hold that the legislature has waived sovereign immunity it must also be clearly manifest that the legislature intended the state to be substantively liable for claims against it. McDowell v. State Highway Commissioner, 365 Mich. 268, 112 N.W. 2d 491 (1962); Holytz v. City of Milwaukee, supra; State v. Miser, 50 Ariz. 244, 72 P. 2d 408; State v. Sharp, 21 Ariz. 424, 189 Pac. 631 (1920). This would be particularly true in at least ten states where the constitutions provide that "suits may be brought against the state in the manner and in such courts as the legislature may prescribe."[2] Moreover, in those jurisdictions in which the supreme courts have recently abrogated the substantive defense of sovereign immunity, a claim against the state might still be subject to the procedural defense of sovereign immunity unless the legislature prescribes the procedural means for collection. Holytz v. City of Milwaukee, supra.

Probably due to the inherent differences between contract claims and tort claims the courts have found little difficulty holding that the state has waived its sovereign immunity on contract claims. Thus, in Watkins v. Department of Highways, 290 S.W. 2d 28 (Ky. 1956), the court states the following typical reasoning:

> Surely when the Department of Highways was authorized to enter into this contract, the legislature contemplated a binding agreement legally enforceable by both parties. A mutuality of obligation was created. To deny appellant's right of action would be to destroy the sanctity of all contracts made by state agencies and would seriously impair the operation of our government. It may be said that the legislature, in authorizing the department to enter into a contract, by necessary implication authorized it to sue or be sued thereon.[3]

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[2] Arizona, California, Nebraska, Nevada, North Dakota, Pennsylvania, South Carolina, Washington, Wisconsin and Wyoming.

[3] See also 49 Am.Jur., States, Territories, and Dependencies, § 74, p. 285.

Notwithstanding the ease with which the courts have held the states to have waived their sovereign immunity with respect to contract claims, there are certain attributes of sovereignty which may still defeat or impair the collection of contract claims against states. Probably the most notable, are those in which state constitutions require that the legislature first prescribe the "manner and in what courts" suits may be brought against the state. As pointed out by the Wisconsin Supreme Court in Holytz v. City of Milwaukee, supra, unless the legislature prescribes the procedure for bringing an action against the state, the fact that substantive sovereign immunity has been abrogated may be of no comfort to an aggrieved claimant. It is a general rule that the contract upon which claimant relies must ordinarily rest upon some legislative authorization and absent such enactment, a contract claim may be uncollectable. 49 Am. Jur. States, Territories, and Dependencies, § 62, p. 275. In addition, there must be a valid appropriation from which payment can be made for "Unless there is an appropriation, courts have no power to enforce a contract of a state, even though they do not doubt its validity." 49 Am. Jur., supra.

STATE CLAIMS PROCEDURES

Although the procedures adopted by the states to redress private claims are varied and each bears certain intricacies peculiar to the jurisdiction involved, some general patterns emerge. Thus, there are five basic methods by which private claims are adjusted:

1. Statutes which consent to suits against the state in the state courts of general jurisdiction;
2. Statutes creating an administrative board or commission, which in some jurisdictions is empowered to render final decisions and in other jurisdictions, renders merely recommendatory findings;
3. Statutes creating administrative court of claims empowered to render quasi-judicial judgments;
4. A constitutional provision authorizing the establishment of a court of claims arising to the dignity of other constitutionally established courts; and
5. Adjudication by state legislatures culminating in the passage of special or general relief bills for the benefit of aggrieved claimants.

Consent to Suit Jurisdictions

Suits against the state in those jurisdictions in which a consent statute has been enacted are not without restriction. In most such jurisdictions some specific limitations or conditions are embodied in the enactment itself. For example, consent may be limited to suits on contracts (North Dakota) or for "contract or for negligence" (Arizona). Other consent statutes impose conditions such as serving notice upon an administrative officer of the public agency involved, within prescribed time limits. In some jurisdictions the courts have by judicial interpretation imposed other limitations. Some courts, for example, have held that the consent did not extend to tort actions where the language embodied in such legislation used the words "all claims." Murdock Parlor Grate Co. v. Comm., 152 Mass. 28, 24 N. E. 854, Houston v. State, 98 Wis. 481, 74 N. W. 111.

As late as 1962, the Wisconsin Supreme Court in Holytz v. City of Milwaukee, supra, notwithstanding the abrogation in that case of the doctrine of sovereign immunity, indicated that the statutory language consenting to suits against the state on "all claims," had been construed as applying only to claims against the state in debt. While declining to pass upon the question specifically (since the subject had not been submitted to it in briefs) the Wisconsin court suggested that before a tort suit could be maintained against the state, the legislature must prescribe the procedure.

Administrative Boards or Commissions

In Alabama, Arkansas, California, Idaho, Iowa, Nebraska and South Carolina, ex officio claims boards have been established by statute with jurisdiction over claims filed against the state. While typically such boards are staffed by three constitutional

state officers acting in ex officio capacities, the board's jurisdictions are quite different both with respect to power and subject matter.

In some states, the board has jurisdiction over all claims filed against the state. In some states the board's jurisdiction is limited to the consideration of liquidated contract claims. Where there is an existing appropriation which may be identified, the board may, in some jurisdictions, upon approving the claim, order payment by the state officer charged with the responsibility of disbursing state funds. Where such board is not empowered to order disbursement from an existing appropriation, or where the board is authorized to order disbursements but no appropriation is available, a report of claims upon which there has been a favorable ruling is made to the legislature for action.

Administrative Courts of Claims

Following the example of the Federal Government, Illinois and West Virginia created a court of claims. Although they were denominated "courts" they were, strictly speaking, special instrumentalities of their respective legislatures.

In 1953, the legislature of West Virginia abrogated the court of claims and transferred its powers and duties to the attorney general.

The courts of claims in Illinois and West Virginia were established to avoid constitutional restrictions providing that these states shall not be made defendants in any court of law or equity. Since such courts were established as special legislative instrumentalities, their adjudication of claims against these states do not offend the prohibition.

The Michigan court of claims, unlike that of Illinois, is established more within the framework of the judiciary. Its judges are circuit court judges who are directed by the administrator of the supreme court to conduct court of claims sessions. While trials are to the court and not to juries, generally the same procedural rules as followed by the circuit courts govern, except where the supreme court has formulated special procedural rules for the court of claims to follow. However, while the court of claims may direct the payment of its awards from a particular appropriation, where such appropriation is insufficient, the award must be reported to the legislature for payment.

Constitutional Court of Claims

In 1949, a constitutional amendment in New York established the New York court of claims as the first such court to be constitutionally established by any state.[4]

The New York court of claims is even more firmly a part of the judiciary than the Michigan court of claims. It is comprised of twelve judges, each of whom must have had ten years' experience in the practice of law prior to appointment. While its record must be reported to the legislature it must also be reported to the judicial council. Evidence which would establish the liability of the state must be of the same kind and character as would establish liability against an individual or corporation and appeals may be taken to the appellate division of the supreme court.

In waiving its sovereign immunity and providing a means of redress for claimants against the state, New York has perhaps assumed the most comprehensive liability for the acts of its officers and agents that has yet been assumed by any state. The statutory language waiving sovereign immunity provides that:

> The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as apply to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article.

[4] Constitution of New York, Article VI, Section 9, formerly Article VI, Section 23.

Legislative Determination

In jurisdictions where the legislature is not constitutionally precluded from auditing or allowing the claim or account of a party,[5] state legislatures take some part in resolving claims against the state. The typical legislative process has been very ably outlined by a Harvard Law Review article as follows:

> The traditional first step toward recognizing so-called moral claims has been for the legislature to entertain petitions by private individuals for relief. At every session most state legislatures today entertain scores of claims for damages and grant a considerable number of awards. Generally a bill must be introduced by a legislator and is then sent to a standing committee for hearing and recommend disposition. For successful applicants the product is an act in one of two forms--depending upon the state involved rather than the nature of the claim. Petitioner is either given permission to sue the state or awarded a direct appropriation.
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> A major weakness found in the legislative system is the inability of legislators to give adequate consideration to the claims presented. . . .The claims may never be sent to a committee for hearing; and in any event legislative committees in most state's do not have the investigative facilities or the notions of evidence and procedure that would make justice more certain. To protect against fraudulent or unfounded claims it is necessary to either appropriate for only the obvious cases of governmental wrongs or to authorize suit against the state. If the legislative practice is to appropriate, the legitimate claims in which the fault of the state is not obvious may be rejected. . . .68 Harvard L.Rev. 506, 507.

Miscellaneous Procedure

One hybrid procedure which has not yet been discussed is followed in Idaho and North Carolina. The supreme courts of these states have original jurisdiction to hear claims against the state. Decisions, however, are merely recommendatory to the legislature.

ADMINISTRATIVE PROCEDURES FOR RESOLVING CONTRACT DISPUTES WITH FEDERAL AGENCIES

Where a contractor's claim against the Federal Government is based upon a breach of an express or implied condition of a contract, or the claim is for unliquidated damages, the administrative procedures which have been established within Federal agencies and departments cannot be employed by the contractor in seeking redress. Cramp v. United States, 216 U.S. 494; Continental Illinois Nat'l. Bank and Trust Co. of Chicago v. United States, 126 Ct. Cl. 631, 115 F. Supp. 892 (1953). Only the Comptroller General or the courts can reform contracts or grant equitable relief. Braucher, "Arbitration Under Government Contracts," 17 Law and Contemp. Prob., 473, 493-94 (1952). The following discussion is limited to contractual disputes which may properly be determined by the Federal administrative process.

A standard provision is contained in nearly all Federal Government construction contracts, which to some extent limit and govern the procedures which must be

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[5] The constitutions of Michigan and New York contain such a provision. New York Constitution, Art. III, Sec. 19; Mich. Constitution, Art. V, Sec. 34. However, as has previously been noted, other means have been provided in these states for private claimants to seek redress.

followed in reconciling contract disputes. This is characterized as the "standard disputes clause."[6] It generally provides that where a dispute cannot be resolved at the local engineering level the contractor may, within 30 days, appeal to the head of the department or agency or his duly authorized representative. In all such appeals the department head's decisions with respect to questions of fact are final and conclusive unless fraudulent, capricious, arbitrary, or so grossly erroneous as to imply bad faith. In appeals to the head of the agency the contractor is afforded a hearing at which he may present evidence in support of his position.

There are at least fourteen Federal administrative boards or commissions which have been designated the authorized representatives of the department or agency head to hear and resolve contract appeals.[7] In those departments or agencies where no board of administrative contract appeals has been established arrangements are sometimes made with another Federal agency to receive cases which may be referred to it for disposition. In such instances the findings are generally merely recommendatory and are subject to final decision by the head of the agency under which the contract was entered.

Since the procedures before the Department of Defense's Armed Services Board of Contract Appeals (ASBCA) are said to typify those of the other Federal agencies, it is worthwhile to discuss the method by which its contract appeals are resolved.

When a contractor is unable to resolve a dispute at the local engineering level with the "contracting officer" he receives a written notice that such officer's decision is final, and that he must file his notice of appeal with such officer within the time specified in the contract. The contracting officer is required to transmit the notice of appeal to the ASBCA within ten days of its receipt together with any "complaint" which the contractor might have served upon him.

The complaint is an instrument in the nature of a pleading which sets forth the contractor's claims, with appropriate references to the provisons of the contract upon which he relies and the dollar amount demanded. If it has not already been served upon the contracting officer, the contractor must file his complaint with the ASBCA within thirty days after his notice of appeal has been docketed.

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[6] "(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

"(b) This 'Disputes' clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law."

(1) The Department of Defense, the Armed Services Board of Contract Appeals (2) Army Corps of Engineers Board of Contract Appeals (3) Department of Interior Board of Contracts Appeals (4) Post Office Department Board of Contract Appeals (5) General Services Administration Board of Contract Appeals (6) Atomic Energy Commission (7) Department of Agriculture Contract Disputes Board (8) Department of Agriculture Procurement Board (9) National Aeronautics and Space Administration Board of Contract Appeals (10) Veteran's Administration Contract Appeals Board (11) Agency for International Development Board of Contract Appeals (12) Federal Aviation Agency Contract Appeals Panel (13) Department of Commerce Appeals Board (14) Coast Guard Board of Contract Appeals.

Within thirty days after service of the complaint, counsel for the Government must file an "answer" setting forth the Government's defense to each claim. In addition, within this thirty days, the "contracting officer" must file his findings of fact, the written decision from which the appeal was taken, the contract, plans, specifications, change orders, and pertinent correspondence between the parties.

A prehearing procedure, similar in many respects to pretrial procedure under the Federal Rules of Civil Procedure, is provided. Either party may be heard upon motion to dismiss for lack of jurisdiction. Written interrogatories, depositions, orders to produce, and requests for admission are available. However, leave of the board to take depositions will not ordinarily be granted unless the deponent cannot appear at the hearing or unless the hearing is waived. Prehearing conferences may be held by the board for reasons similar to those for holding pretrial conferences in the Federal district courts.

If the contractor desires, he may waive his right to a hearing and have his case submitted upon the record augmented by oral argument and legal briefs submitted by counsel for both parties.

Hearings are usually conducted by one member of the board with the proceedings being stenographically recorded. Witnesses are sworn before they testify and the admissibility of evidence is governed by the rules of admissibility which are applied in nonjury trials in the Federal district courts. While the hearing may be conducted by one member of the board, a three member division must render the board's decision in which a majority of the division must concur. The decision is reduced to writing and served upon the parties.

Where the contractor has pursued his remedies under the standard disputes clause before the appropriate board, he may submit his claim to the general accounting office for review. However, the review of the comptroller general is limited to the record of the proceedings of the board of contract appeals, and the decision of such board will not be disturbed unless "fraudulent, capricious, arbitrary, so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

The general accounting office does not conduct formal hearings, but its claims division may conduct informal interviews and receive evidence in writing. Settlements made by the claims division bind the executive agencies unless reversed by the comptroller general.

JUDICIAL PROCEDURE FOR RESOLVING CONTRACT DISPUTES WITH FEDERAL AGENCIES

Where a contractor has not received a satisfactory administrative decision, he is entitled to a judicial review either in the court of claims or in a Federal district court. The jurisdiction of the Federal district court is expressly limited to contract claims of $10,000 or less.[8] In either court a judgment may be rendered against the United States upon any contract claim founded upon the "constitution, any Act of Congress, any regulation of an executive department, [and] upon any express or implied contract."

The scope of judicial review of administrative decisions in contract appeals now appears to be somewhat clearer than in the immediate past. The Supreme Court in United States v. Carlo Bianchi and Company, 323 U.S. 709, 83 S.Ct. 1409 (1963), discussed the issue of whether in a contractor's suit, the court is limited to a review of the administrative record on issues of fact submitted for administrative determination or may receive new evidence. It was decided that unless the board's decision is fraudulent, capricious, arbitrary, or so grossly erroneous as necessarily to imply bad faith, the court is limited solely to a consideration of the record before the administrative board. Moreover, before a court may receive new evidence which was not before an administrative board on the basis that the board's decision was "not

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[8] 28 U.S.C. § 1346(a)(2).

supported by substantial evidence" the "substantial evidence" standard must be met.

> . . .The statement goes to the reasonableness of what the agency did on the basis of the evidence before it, for a decision may be supported by substantial evidence even though it could be refuted by other evidence that was not presented to the decision-making body.

In discussing the value of the procedures for contract disputes before the United States Court of Claims it was said that:

> Before the Court of Claims was created, a citizen could obtain satisfaction of his contractual claims against the United States only by petitioning Congress for relief. He appeared in the legislative halls in the role of a supplicant petitioning for the bounty of the sovereign, and no matter how meritorious his claim, he had no "right" to demand compensation for the Government's breach of contract. Since the founding of the Court of Claims in 1855, the formal status of the citizen asserting a claim against the Government has improved steadily. It reached its apex in the highly symbolic 1953 act giving the Court of Claims the status of a court established under article III of the Constitution. Claims against the Government, therefore, are now regarded as matters of right just as claims against private parties are; no longer is the claimant considered, even formally, a petitioner for a gift from the legislature. 49 Va. L.Rev. 773.

CONCLUSION

Sovereign immunity, for centuries a fundamental legal concept, is undergoing spectacular change. This change was underscored by Professor Davis when he wrote:

> Sovereign immunity in state courts is on the run. State courts are taking the offensive against it. The development during the five years 1958-1963 is deep and dramatic. The movement is gaining momentum. The states that have abolished large chunks of immunity are, chronologically, Florida, Colorado, Illinois, New Jersey, California, Michigan, Wisconsin, Alaska, Minnesota and Arizona. The action of these ten states makes it easier for other states to do the job. One may confidently expect that other states will follow. 3 Davis, Administrative Law Treatise, § 25.01, p. 76 (Supp. 1964).

More subtle, are the changes which are being wrought through the legislative process. In its 1964 session, the Michigan legislature passed Senate Bill No. 1132 waiving the state's sovereign immunity for bodily injuries and property damage resulting from defective highways and dangerous and defective conditions in public buildings. In Washington a statute of recent origin provides that "The State of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." Revised Code of Washington, § 4.92.090.

In every instance where sovereign immunity has been recently changed, the motivating force has been the modern attitude of repugnance which judges and legislators feel where a state is allowed to escape its moral responsibilities in the aftermath of death and personal injuries. Although there is a similar feeling of repugnance when

the state escapes a moral contractual obligation, it is lesser in degree. Consequently, what is happening is that the legal reformation which is converting the state's "sovereign immunity" into "sovereign responsibility" has virtually ignored the public works contractor.

The procedures embraced in New York, Michigan and Illinois for redressing private claims against the state commend themselves to the other states. In these states, claims, whether in contract or in tort, are heard and adjudicated before courts of claims. Contract claimants were probably given more adequate consideration in the enabling legislation in these states because, at the time, legal opinion was not concerned with the single-minded purpose of redressing death or personal injury losses.

It must be emphasized, however, that merely providing a judicial forum for the resolution of disputes with the states is not enough. With our society embarked upon vast new public works projects, contract claims alone would soon hopelessly congest the courts to the end that only samplings of justice would emerge. Administrative means of settling claims must be utilized to supplement judicial processes. In states where there are existing administrative procedures, they must be refined and where none exist they should be established. Many of the procedures of Federal administrative agencies could be modified and adopted for state practice. And broader use might be made of administrative procedure acts in states where such legislation has been adopted.[9]

Those who are concerned with the efficient administration and operation of state government must assume the responsibility of working out efficient and equitable procedures for the settlement of all kinds of claims against the states as the doctrine of sovereign immunity wanes. Proper limits of liability must be established, however, if state government is to function without placing its officers and employees in peril for performing their public responsibilities.

The California Law Revision Commission study published in early 1963 is probably the most elaborate work yet made concerning sovereign immunity. It proved to be a priceless legislative tool in revising the claims procedures in California. Its application, however, is largely limited to problems peculiar to that state. What is needed now is a comprehensive study of the claims procedures of all the states to the end that specific, concrete recommendations could be made for states falling within certain categories.

In Arizona, in the less than two years since the Arizona supreme court abrogated sovereign immunity, tort suits demanding in the aggregate in excess of four million dollars have been filed against the state highway department. This is nearly four times the total sum of damages claimed in tort suits against all other state departments and agencies. An Indianapolis-type automobile race at the state fairgrounds recently resulted in injuries to scores of spectators when a driver lost control of his car and plummeted into a crowded grandstand. Were it not for this extraordinary event Arizona's experience would show the highway department defending tort suits demanding total damages of eight to ten times those of all other state agencies. If the experience in other states is similar to Arizona's, state highway departments may expect to have four to ten times the exposure to tort suits as all other state departments and agencies combined. It would therefore, be most appropriate for the Highway Research Board to underwrite a definitive study into the field of sovereign immunity and the settlement of all kinds of claims against the state. If properly conceived, such a work would be an invaluable legislative tool.

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Appendix

STATE BY STATE SUMMARY OF THE STATUTORY CLAIMS PROCEDURE OF THE VARIOUS STATES[1]

ALABAMA

The Code of Alabama, 1940, as amended, Title 55, Chapter 10, Article 2, §§ 333-344, provides that all personal injury, property damage and contract claims against the State may be presented to the State Board of Adjustment. The public officers composing this board are the Director of Finance, the Treasurer, the Secretary of State and the State Auditor.

The Board of Adjustment is characterized as a fact-finding quasi-judicial body. State v. Brandon, 244 Ala. 62, 12 So. 2d 319, 325. It has the power to subpoena the attendance of witnesses, issue subpoenas duces tecum to obtain documents, and to punish for contempt through the state courts of general jurisdiction.

Following a hearing by the Board of Adjustment, a ruling is made. If a claim is resolved against the State, payment is made from the current appropriation of the agency involved if it has a sufficient balance available. Each year the Alabama

[1] A number of states are not discussed. This results from one of two reasons. Either the state had no statutory procedure or the library facilities used by the writer were limited to that extent.

Legislature appropriates $200,000 for the payment of those claims for which the State's agencies may not have adequate appropriations.

When there is neither an agency appropriation available, nor a balance contained in the legislature's annual claims appropriation, the claim is temporarily uncollectable. However, claims previously denied for this reason may be subsequently allowed. State v. State Board of Adjustment, 249 Ala. 542, 32 So. 2d 216.

ALASKA

The Alaska Statutes, Title 44, State Government, Part 8, Chapter 77, §§ 44.77.010 et seq., provide for the settlement of contract claims against the State.

It is required that claims be presented to the appropriate administrative or executive officer of the State agency involved. If disallowed by such officer, the claimant has 60 days within which to apply for a review by the Department of Administration.

Peculiarly, the appeal from a disallowance by the Department of Administration is to the Department of Administration. However, on such appeal a hearing is provided. If a claim is allowed following the hearing it becomes a binding judgment and the State's warrant is issued against the correct appropriation.

ARKANSAS

The Arkansas Statutes, 1947, Sections 13-1401 et seq., create the Arkansas State Claims Commission, which is comprised of three members, two of whom are attorneys. It has jurisdiction over all claims against the State except for those based upon personal injuries and the death of State employees.

Proceedings are commenced before the Commission by filing a verified complaint with the State Comptroller. The claimant is provided a hearing at which he is entitled to fully examine and cross-examine witnesses. The Commission's findings are binding upon all parties, and judicial review is expressly precluded. Final determination upon claims which the Commission has approved resides in the legislature.

ARIZONA

The Arizona Revised Statutes, Sections 12-821 through 12-826, establish a procedure for bringing an action against the State "on contract or for negligence."

Such claims must have been presented to the appropriate State agency and disallowed and where the pleadings fail to so allege, the complaint is subject to dismissal since these are conditions which must be met before the court has jurisdiction of the subject matter. State of Arizona v. Miser, (1937) 50 Ariz. 244, 72 P. 2d 408.

A two-year statute of limitations applies and the plaintiff must file a bond of not less than $500 to secure the payment of all costs incurred by the State if he fails to recover judgment.

If plaintiff recovers a judgment he is entitled to interest from the time the obligation accrued. It is the duty of the Governor to report such judgments to the legislature. But the State Auditor is not authorized to draw his warrant for the payment of such judgment, until the legislature has made its appropriation.

In Stone v. Arizona Highway Commission, (1963) 93 Ariz. 384, 381 P. 2d 108, the Arizona Supreme Court abrogated the doctrine of sovereign immunity. In so doing, it specifically overruled a line of cases including the Miser case, cited above, upholding the State's sovereign immunity with respect to its torts. In the Miser case the claimant contended that A.R.S. § 12-821, et seq., constituted a waiver by the legislature of the State's sovereign immunity for "negligence." It was held that while this legislation had provided a procedure for bringing actions against the State for negligence, it had not waived the State's substantive defense of sovereign immunity. The Stone decision made no mention of these sections, in abrogating the substantive defense of sovereign immunity, but it must be presumed that they are still operative.

CALIFORNIA

The California Government Code, Sections 900 through 960.5, prescribes one of the most comprehensive of all state claims procedures. It resulted largely from the

California Law Revision Commission's studies following the California Supreme Court's abrogation of the Doctrine of Sovereign Immunity. Muskopf v. Corning Hospital District, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P. 2d 457 (196_).

The State Board of Control is vested with jurisdiction over claims against the State (1) where no appropriation was made for payment, (2) where the appropriation has been exhausted, (3) upon the State's express contracts, (4) upon injuries for which the State is liable, (5) for the State's eminent domain taking and (6) any other claim for which settlement is not otherwise provided.

A minimum requirement is established for the data that claims must contain. The board is authorized to provide forms upon which claims are to be presented and if any claim is insufficient in detail, the board can require additional submissions.

If a person has a claim based upon death, personal injury or personal property damage, he must present it to the board within 100 days after his cause of action accrues. However, the board can authorize a claim to be filed within a reasonable time thereafter but not after the expiration of one year. Where more than 100 days has elapsed since one's claim accrued, application must be made to the board showing good reason or excusable neglect for the delay. If the board denies a claimant's application to file a late claim, he may petition the superior court for review.

Any other claim (including contract claims) must be submitted to the board within one year after the cause of action accrues. There is no provision for filing such claims after the expiration of one year.

The Board of Control is required to act upon claims within 45 days after they are filed or they will be taken as having been denied. When a claim is allowed, the board is authorized to designate the fund from which it is to be paid, and the agency involved makes payment unless the funds are administered by the controller, in which case, he makes payment from the correct appropriation. In the event the appropriation is insufficient, the board, with the approval of the Governor, reports the facts together with its recommendations to the legislature. Where the agency's appropriation is insufficient, it is conceived that payment will be from a subsequent "omnibus claim appropriation" made to the board for that purpose.

In addition to the statutory administrative procedure provided for the settlement of claims, the Board of Control is authorized to allow a State agency to include provisions in its written contracts concerning the presentation of claims to that agency for the consideration and payment of such claims. An interesting note by the California Law Revision Commission to this provision states that it would have no effect on contract provisions such as those contained in contracts entered into by the Department of Public Works, which require the contractor to give prompt notice of claims for extra services, since such provisions do not relate to "claims which are required to be presented to the board."

In the event the Board of Control rejects a person's claim he is afforded an opportunity to bring an action against the State in the courts. However, before the action is commenced it is required that claims must first have been presented and acted upon by the Board of Control. Suit must be brought within 6 months after the Board has acted upon the claim. The court in which the action is brought may require a surety bond of at least $100 upon the application of the public entity affected.

If a judgment is rendered in favor of a claimant against the State, the controller pays it from the appropriation of the agency concerned. However, if such appropriation is insufficient, the Governor reports the same to the legislature for action.

COLORADO

The Colorado Revised Statutes, 1953, Sections 3-2-1 and 3-3-1, establish a Division of Accounts and Control which is headed by the State Controller. It is granted rule-making powers and is charged with the power and duty among others, "to receive, hear, and settle all claims against the State and issue warrants for the payment thereof from the treasury."

CONNECTICUT

The General Statutes of Connecticut, Section 4-61, provide that a person having a claim against the State sounding in contract may bring an action in the superior court of Hartford County for a trial without a jury.

The plaintiff must have notified the State agency involved within 2 years after his acceptance of the contract, of his intention to assert his claim, and he must commence the action within 3 years from the date he accepted the contract.

IDAHO

The Idaho Code, Sections 67-1008 and 67-1009, provides that claims against the State may be presented to the Board of Examiners for review. Claimant must show that he has presented his claim to the Auditor for the board within 2 years after its accrual. The Board of Examiners is delegated rule making powers to facilitate the handling of matters over which it has jurisdiction.

The Idaho Constitution, Art. V, § 10, provides that the state Supreme Court shall have original jurisdiction to hear claims against the state and to render recommendatory decisions for the advice of the legislature. It is also provided that no process in the nature of execution may issue against the state.

IOWA

The Iowa Code Annotated, Sections 25.1, et seq., establishes the State Appeals Board. When a claim is submitted to the board it is referred to a Special Assistant Attorney General. He drafts a report and proposed findings and delivers them to the board which makes the determination. If the board makes an award for the claimant, payment is made from the appropriation or fund of original certification unless it has lapsed, in which case payment is made out of "any money in the State treasury not otherwise appropriated."

Sections 22.2, et seq., establish the Board of Appeal (note that this board does not bear the identical name as the one discussed above). The Board of Appeal has jurisdiction over claims relating to contracts for the construction of public buildings or other public improvements in an amount greater than $25,000.

The Board of Appeal has three members. Two are appointed by the Governor. The third member is the Comptroller. Its members have four-year terms of office.

Hearings before the Board of Appeal are de novo and the claimant may present any relevant evidence he may have. The Board's decision is final.

ILLINOIS

The Illinois Annotated Statutes, Title 37, Section 439.01 through 439.23, constitute the Illinois Court of Claims Act.

The Court of Claims is comprised of three judges appointed by the Governor with the advice and consent of the senate to terms of six years with annual salaries of $6,500. Each may sit separately or they may appoint a commissioner to hear evidence. Court of Claims hearings do not provide for juries, but before a decision is binding the concurrence of at least two judges is required.

The Court of Claims has jurisdiction to hear and determine: (1) all claims against the State founded upon any law of the State of Illinois or upon any regulation thereunder except claims relating to workmen's compensation; (2) all claims against the State founded upon any contract; (3) claims relating to unjustly served prison terms; (4) cases sounding in tort, provided that an award for damages may not exceed the sum of $25,000; (5) counterclaims or set-offs for recoupment by the State against any claimant; (6) all claims in connection with the overpayment of taxes or fees.

The Court of Claims is granted general authority to establish rules of practice, to appoint commissioners, and to exercise such powers as are necessary to effectuate compliance with its lawful orders. It may issue subpoenas for the attendance of witnesses, the production of evidence and can compel obedience to its orders by proceedings for contempt.

A claimant may commence an action in the Court of Claims by filing a petition stating the persons interested therein, together with the reasons why they are so interested and the occurrence, transaction or event, giving rise to his alleged claim. Such petition must be verified by the affidavit of the claimant, his agent or attorney.

Upon reasonable notice, any one of the judges or a commissioner appointed for such purposes may conduct a hearing and may require the attendance of the claimant or other witnesses for examination. A transcript of such proceedings must be filed with the clerk of the court. The court is required to file its determination with the clerk in written opinion form for publication.

New trials may be granted for any reason which would be a sufficient ground for granting a new trial in the courts of general jurisdiction. A final determination against a claimant shall forever bar a further claim.

The clerk of the Court of Claims transmits to the General Assembly (at every regular session) a statement of all decisions in favor of claimants which have been rendered in the preceding two years, together with a synopsis of the nature of such claims. It is the expressed policy of the General Assembly (as embodied in the Court of Claims Act) to make no appropriation for the payment of any claim against the State unless it has been awarded by the Court of Claims.

A general two-year statute of limitations applies with respect to most claims cognizable in the Court of Claims. Those arising from a contract are the most notable exceptions. Contract claims may be filed until five years after they have accrued.

When an individual has a claim as a result of personal injuries, he is required to file a notice with the attorney general and with the clerk of the Court of Claims, giving the name of the person to whom the cause of action has accrued, the date and the time of the accident, its place and location and the identity of the attending physician, if any. If such notice is not given the action may be dismissed and forever barred.

MASSACHUSETTS

The Massachusetts General Laws, Chap. 258 §§ 1 through 4A, prescribe the procedure by which a claimant may prosecute his claim against the Commonwealth in the Superior Court.

The Superior Court has jurisdiction over all claims whether at law or in equity against the Commonwealth. Such actions are commenced in a petition to the court, stating clearly and concisely the nature of the claim and the damages sought.[2]

It is provided that trial shall be without a jury; that it shall be conducted in open court and that questions of law may be appealed to the Supreme Judicial Court as in other cases. When a final judgment is rendered against the Commonwealth, the clerk of the Superior Court is obliged to transmit a certified copy to the Comptroller who notifies the Governor and draws his warrant against the State treasurer for payment.

MICHIGAN

The Michigan Statutes Annotated, Sections 27A. 6401 through 27A. 6475, constitute the Court of Claims Act.

The Administrator of the Supreme Court designates one or more circuit judges to sit as judge of the Court of Claims, and to hold four sessions each year in the city of Lansing, unless otherwise directed.

The Attorney General is responsible for representing the interests of the State in all matters before the court.

The State Administrative Board is granted discretionary authority (upon the advice of the Attorney General) to hear and allow claims against the state of less than $100. When such small claims are allowed, they are paid in the same manner as are judgments rendered by the Court of Claims.

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[2]Numerous claims upon contract both expressed and implied have been brought against the Commonwealth under these provisions. Lewis v. Commonwealth, 122 N.E.2d 888; New England Foundation Co. v. Commonwealth, 100 N.E.2d 6; Arthur A. Johnson Corp. v. Commonwealth, 60 N.E.2d 364; Pioneer Steel Erector's Inc. v. Commonwealth, 181 N.E.2d 670.

The Court of Claims has exclusive jurisdiction to hear and determine "ex contractu" and "ex delicto" claims against the State whether such claims are liquidated or unliquidated. The State may counterclaim and, if it prevails, recover an enforceable judgment against the claimant. The judgments of the court are res adjudicata and become final unless they are appealed.[3]

The procedural rules followed in the Court of Claims are the same as those of the circuit courts, except that the Supreme Court may make special rules. The Court of Claims has the power to issue subpoenas for the attendance of witnesses and production of evidence, and to punish for contempt.

As a condition precedent to maintaining an action in the Court of Claims, a claimant must file a written claim (or written notice of his intention to do so) with the clerk of the court within one year after his claim has accrued. Such claim or notice must set forth in some detail the nature of the claim and be signed and verified by the claimant.

Where a claim has arisen as the result of a defective roadway or a dangerous or defective public building, the claimant must serve a verified notice upon the appropriate agency specifying his injury and stating the nature of the alleged defect within 60 days of the time the injury occurred. This notice is "a condition to any recovery." Enrolled Senate Bill No. 1132, 1964.

Trial before the Court of Claims is without a jury. New trials may be granted for cause and appeals may be taken to the State Supreme Court in the same manner and under the same rules of practice as appeals from the circuit courts.

If the claimant recovers a judgment against the State in the Court of Claims, the court may specify in the judgment the appropriation from which payment must be made. However, if the Auditor General determines that the appropriation specified is insufficient, payment will be made from an appropriation which has been made for this purpose. And, in the event that appropriation is insufficient, the judgment will be reported to the next session of the legislature and paid as soon as money becomes available.

MINNESOTA

The Minnesota Statutes Annotated, Sections 3.66 through 3.75 and 3.76, create the State Claims Commission and define its authority and jurisdiction.

The commission is composed of six members, three of whom are senators appointed by the committee of committees and three are members of the house of representatives appointed by the speaker of the house. It is empowered to direct its clerk (the Director of Research) to administer oaths and affirmations and to issue summons, orders, statements and awards.

The commission is directed to adopt rules of procedure "to assure a simple, expeditious and inexpensive consideration of claims," and to permit a claimant to appear and be heard in his own behalf or through "a qualified representative." The commission is not bound by common law or statutory rules of evidence, but may accept "any information that will assist it in determining the factual basis of the claim."

Claims are instituted by the filing of a written notice (identifying the claimant, stating the circumstances giving rise to the claim, and designating the State agency concerned) with the commission clerk. The clerk then transmits a copy of the notice to the State agency involved. Four members must consider each claim before the commission can make its determination. When a decision is rendered, the commission

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[3] As late as 1962 the Michigan Supreme Court upheld the doctrine of sovereign immunity in a suit against the State for injuries allegedly sustained as a result of the failure of the highway department to remove water from the highway. This ruling followed a long line of cases holding that the statutory language, to-wit "ex delicto," did not clearly and sufficiently manifest the legislature's intention that the state be liable for its torts. McDowell v. State Highway Comm'r, 365 Mich. 268, 112 N.W.2d 491. However, on May 19th of this year the Governor of Michigan signed into law, Senate Bill No. 1132. This act would appear to clearly and sufficiently manifest the legislature's intent to waive tort sovereign immunity for bodily injuries and property damage resulting from defective highways and dangerous and defective conditions in public buildings.

must file a statement of its reasons with the clerk, together with the reasons of any dissenting member. In the event the commission finds for a claimant it must also file an itemized statement of the amount of the award.

The commission is authorized to consider claims which "but for some statutory restrictions, inhibitions, or limitations could be maintained in the courts of the State." In the event the commission approves a claim and recommends an award, it is expressly provided that no liability is imposed upon the State unless the legislature has previously made an appropriation for its payment, or unless the amount of the award is less than $2,500 and the legislature has previously made a general appropriation for the payment of such awards.

The commission is expressly granted jurisdiction over the following matters: (1) claims which the State "should in equity and good conscience discharge and pay;" (2) claims in the nature of set-off or counterclaim on behalf of the State; (3) any claim referred to the commission by the head of a State agency for an advisory determination; (4) for injury or death of an inmate of a State penal institution; (5) claims arising out of the care or treatment of a person in a State institution; (6) for personal injury, death or property damage sustained by a member of the militia or national guard while in the service of the State.

Claims over which the commission is expressly precluded jurisdiction are those: (1) for personal injury, death or property damage incurred because of wild animals; (2) arising out of contract claims to which another code section applies; (3) for disability or death benefits otherwise provided for by the workmen's compensation statutes; (4) for unemployment compensation; (5) for relief or public welfare; (6) claims for which a proceeding may be maintained against the State in the courts.

In addition, the commission's jurisdiction is further expressly limited. It cannot consider claims which have previously been rejected by the legislature or those which have been barred by a statute of limitations, unless such barred claims are referred to the commission by the legislature.

The Governor or any head of a State agency may refer claims to the commission for advisory determinations. Such claims are considered informally and when a determination is made a brief opinion is prepared for the information and guidance of the officer who has made the submission. Notwithstanding an advisory consideration by the commission, a claimant may subsequently present his claim.

In its hearings the commission may stipulate the questions it wishes to have argued. Any member may examine or cross-examine witnesses, and the commission may call witnesses or require the production of evidence not elicited or submitted by the parties. Compliance with the commission's subpoenas for the attendance of witnesses and the production of documents may be compelled by application to the district court with its contempt sanctions.

When a claim is not in excess of $1,000 and does not arise under an appropriation for the current fiscal year and it is approved by the attorney general as one within the jurisdiction of the commission which should be paid, it may be considered by the commission informally upon the record submitted.

At the time the legislature convenes a list of all awards recommended by the commission for appropriation is certified to the commissioner of administration. He includes all awards so certified in the budget estimates which are submitted to the Governor.

Sections 161.34 and 3.751 delegate a certain measure of power to its courts to redress contract claims against the state.

In at least two instances the Minnesota legislature has provided a general waiver of the State's immunity. It is provided that (1) "when a controversy arises out of any contract for the construction or repair of State trunk highways entered into by the commissioner or by his authority, in respect to which controversy a party to the contract would be entitled to redress against the State . . ., the State hereby waives immunity from suit in connection with such controversy and confers jurisdiction on the district courts of the State to hear and try the controversy in the manner provided for trial of causes in the district courts. . ." M.S.A. § 161.34; (2) "when a controversy arises out of any contract for work, services, or the delivery of goods entered into by

any State agency . . . and when no claim against the State has been filed in the State claims commission, or made in a bill pending in the legislature for the same redress against it, the State hereby waives immunity from suit in connection with such controversy and confers jurisdiction in the district court to hear and determine any such controversy in the manner provided for the trial of causes in the district court. . ." M.S.A. § 3.751.

When an action is brought under either of the above sections, the plaintiff must either commence his action (1) within 90 days after the State has furnished him a final estimate under the contract, or at his election; (2) within 6 months after the work has been completed. Each section also provides that a copy of the summons and complaint be served upon the Attorney General and that he has 40 days within which to file the State's answer. Thereafter, the case proceeds as other civil actions, and appeals may be taken to the supreme court "in the same manner as appeals in ordinary civil actions."

MONTANA

The Montana Constitution, Article VII, Section 20, creates an ex officio Board of Examiners composed of designated constitutional officers to examine and recommend adjustment of all claims filed against the State.

NEBRASKA

The Revised Statutes of Nebraska, 1943, as amended, Sections 81-857 through 81-861, establish the Sundry Claims Board and prescribe its powers and duties.

The Attorney General, Auditor of Public Accounts and the Tax Commissioner constitute the Sundry Claims Board. The board is empowered to receive and investigate "all claims against the State of Nebraska for the payment of which no moneys have been appropriated."

The board, in its discretion, may afford claimant a hearing after giving him 5 days written notice. The clerk of the legislature, who serves as secretary to the board, is empowered to administer oaths, compel the attendance of witnesses and the production of documents through the issuance of subpoenas, and enforce such powers by punishment for contempt.

Following its investigation the board may give its unqualified approval to a claim, approve it with limitations or conditions or may disapprove the claim entirely. Whether approved or rejected, the board must file every claim it has passed upon together with a concise statement of the facts brought out in its investigation, with the Secretary of the Board. Each such claim and factual statement is delivered to the chairman of the appropriate committee of the next legislature.

However, claims for negligence or other torts of $250 or less may be paid when approved by the board and the department head concerned, where such department has sufficient funds for payment. Such small claims need not be reported to the legislature for action.

Although tort claims of $250 or less may be authorized by the Sundry Claims Board, the statutory language of R.S.N. § 81-861 disavows that a general waiver of tort sovereign immunity is intended.

Pursuant to Revised Statutes of Nebraska, 1943, as amended, Section 24-319 through Section 24-336 and Section 25-218, the district courts are granted jurisdiction over claims against the State of Nebraska.

The district courts' claims jurisdiction extends to (1) those which have been presented to the Auditor of Public Accounts and have been rejected or disallowed, (2) claims for relief that may be presented to the legislature and those which are referred to the court by the legislature, (3) set-offs and counterclaims which may be available to the State as defenses, (4) those in which the State of Nebraska has a lien upon any real estate located within the State, and (5) certain others.

In his petition against the State the claimant must: (1) set forth the facts upon which his claim arose and the action of the legislature or the department of government upon which he relies; (2) identify persons who may be interested therein; (3) state

that he has made no assignment of his property or an award which might be obtained, and that he, as the claimant, is justly entitled to an allowance. The petition must be verified as are pleadings in other civil actions in the district court.

The court may enter a judgment either for the claimant or for the State. Judgments rendered against the State are transmitted by the clerk of the court to the legislature together with a statement of all claims adjudicated showing the amounts claimed and the judgment rendered by the court.

Civil actions to which the State is a party are entitled to priority in trial over other civil actions, and appeals are provided to the Nebraska Supreme Court.

Certified judgments rendered by the court are paid by the Auditor of Public Accounts from any special fund or appropriation applicable thereto; and if none has been provided, then from any available appropriation made to the department out of whose activity the cause of action arose. Where these appropriations are insufficient the judgment is stayed until the adjournment of the next regular session of the legislature, in which case the claimant is entitled to interest at the rate of ten percent per annum.

If a judgment is rendered against the claimant it may be collected (upon application of the Attorney General) in the same manner as judgments in the courts of general jurisdiction by execution thereon.

A two-year statute of limitations applies with respect to all claims against the State.

NEW YORK

The Constitution of the State of New York, Article VI, Section 9, establishes the Court of Claims to be comprised of at least eight judges to hear claims by or against the state. The judges are appointed by the Governor with advice and consent of the senate for a term of nine years.

The Court of Claims had its genesis as a separate entity in 1883 when the office of Canal Appraiser and the State Board of Audit were abolished and the claims then pending before those bodies were transferred to the Board of Claims. The new Board was composed of three commissioners who were appointed by the Governor. It was given jurisdiction to audit and determine all private claims against the State and counterclaims by the State.

In 1897 the Board of Claims became the Court of Claims with the power to prescribe its own rules of practice. Its members became judges. In 1911 the Court of Claims was again renominated the Board of Claims but its membership was increased to five. In 1922 the legislature repealed the 1911 Act and enacted the Court of Claims Act. However, it was not until 1949 when the people of the State of New York adopted a constitutional amendment that the Court of Claims became a constitutional court.

Pursuant to the New York Court of Claims Act the present court is comprised of twelve judges appointed by the Governor to nine-year terms, one of whom is designated by the Governor as the presiding judge. To be appointed judge, one must be an attorney, admitted to practice in the State of New York and be possessed of ten years' experience in the practice of law. An annual salary of $20,000 is provided.

The court is required to keep a record of the proceedings before it and to report to each legislative session the claims it has acted upon, together with a statement of the judgments rendered. It is also obliged to report to the judicial council.

Judgments against the State are paid out of an annual appropriation provided in the court's budget bill. On the first of each calendar year the clerk of the Court of Claims reports the court's disbursements to the Comptroller.

The waiver of sovereign immunity as embodied in the Court of Claims Act is expressed in the following language: "The State hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as apply to actions in the supreme court against individuals or corporations provided the claimant complies with the limitations of this article."

The Court of Claims has express jurisdiction over the following subject matter: (1) claims for the appropriation of property, breach of contract, for torts " . . . providing the claimant complies with the limitations of this article;" (2) torts committed

by members of the organized militia; (3) counterclaims and set-offs which the State may have available as defenses; (4) a claim by one who was wrongfully imprisoned for a crime which he did not commit providing he has received a pardon from the Governor

The court has the power to consolidate claims that have arisen out of the same facts or circumstances, to interplead parties, to perpetuate testimony, to correct or modify its prior rulings or orders, to establish rules of practice before itself, to prescribe procedural forms, and to exercise all powers necessary to effectuate the spirit of the Court of Claims Act.

It is an express statutory condition precedent to the right of any claimant to recover a judgment against the State in the Court of Claims to have complied with the following conditions: (1) in land appropriation cases the claim must have been filed within two years of its accrual; (2) wrongful death claims must have been filed within ninety days after the appointment of the executor or administrator of the estate unless within such ninety days notice of intent to file a claim has been filed, in which case the claimant may have two years within which to file his action; (3) personal injury or personal property damage claims must be filed within ninety days of the accrual of such claim or notice of intention to file a claim must be filed within such ninety days, in which case the claimant has two years within which to commence his action; (4) a contract claim or a notice of intention to file a contract claim must be filed within six months. Where a notice of intention to file a contract claim is served, the claimant has two years within which to file his claim. Notwithstanding the above requirements, the Court of Claims has discretion to permit a claimant to file within two years after his claim has accrued upon motion and affidavit showing a reasonable excuse for his failure, together with a statement to the effect that the State had knowledge of all the essential facts constituting the claim.

An action is commenced by the filing of a verified claim with the clerk of the Court of Claims and serving copies upon the Attorney General. It must state the time, the place and the circumstances under which the claim arose, the nature of the claim and the items of alleged damages or injuries and the total sum demanded. Where one elects to file his notice of intention to file a subsequent claim, his notice must contain the same information as a claim except that he need not itemize his damages nor state the total sum which he will demand.

It is expressly provided that judgments may be granted against the State only upon the same kind of evidence which would establish liability against an individual or corporation. Moreover, any statute of limitations which would bar an action against an individual or a corporation will also bar an action against the State. However, before any judgment in eminent domain in excess of $5,000 may be rendered, the judge must personally take a view of the premises.

Generally one judge may render a decision which will be binding upon the parties unless the presiding judge exercises his discretion, in which case he may order that as many as three judges shall make a determination. Where three judges are assigned to any case the concurrence is required.

The Attorney General is authorized, upon five days' notice, to take the sworn testimony of any claimant. As a corollary, any claimant is entitled to examine any state officer or employee upon making proof to the court of the materiality and necessity of such testimony.

Appeal from the judgments of the Court of Claims is provided to the appellate division of the Supreme Court. There the action of the Court of Claims may be affirmed, reversed or modified. The appeal may be dismissed, a new trial granted or remitted for further proceedings in the Court of Claims.

NORTH CAROLINA[4]

The North Carolina Constitution, Art. IV § 13, and the General Statutes of North Carolina, §§ 7-8, 7-9, vest the Supreme Court with original jurisdiction to hear claims against the State. That court describes its decisions as "merely recommendatory."

[4] The latest material available to the writer relating to North Carolina was published in 1957.

Claims filed with the Supreme Court must state the nature of the claim and the grounds upon which they are based and served upon the Governor. The Supreme Court may direct the manner in which the trial shall be conducted. Issues of fact may be transferred to the superior court for determination.

When the Supreme Court has made its finding it is obliged to report the facts found, together with its recommendations and reasons therefor to the General Assembly for action.

NORTH DAKOTA

The North Dakota Century Code, Sections 32-12-02 through 32-12-04 and Section 32-1201, provides a procedure by which certain claims against the State may be prosecuted in the district court.

An action may be brought against the State "respecting title to real property" or "arising upon contract." The claimant is required to file a surety bond to secure the payment of costs incurred by the State in the event he fails to recover judgment. The amount of such bond is fixed by the clerk of the district court.

An action upon a contract is precluded unless the Department of Accounts and Procedures has disallowed the claim or has failed to act upon it for a period of ten days after it has been property presented to it for action.

Judgments against the State may be collected, but execution upon the property of the State is expressly prohibited. The clerk of the court furnishes a certified copy of such a judgment to the Department of Claims and Procedures, and when it has been approved by the Audit Board, payment is made if funds have been appropriated.

PENNSYLVANIA

Purdon's Pennsylvania Statutes, Title 72, §§ 4651-1 through 4651-10, establish a procedure for filing claims against the Commonwealth arising from contracts.

The Board of Arbitrations of Claims (as a part of the Department of the Auditor General) is the legislative instrumentality designated to hear contract claims. It is comprised of three members appointed by the Governor to terms of six years, two of whom receive an annual salary of $11,000 and one, the chairman, a salary of $13,500. The chairman must be an attorney. A second member must be a registered civil engineer, and the third member, a citizen who is neither an attorney nor an engineer.

All claims must be filed with the secretary of the board, the secretary of the department involved and the Attorney General. Unless a claim is filed within six months after it has accrued the board has no jurisdiction to hear it. The instrument filed with the board must be "a concise and specific written statement" setting forth the circumstances under which the claim arose and be signed and verified by the claimant. The department involved may file a verified answer within thirty days. When the answer is filed the issues are joined. Thereafter, the secretary of the board notifies the claimant thirty days in advance of a time and place where he may be heard.

The board is authorized to establish rules of practice governing its proceedings. At the request of a claimant or the Commonwealth, the secretary of the board may issue subpoenas for the attendance of witnesses or the production of papers and documents, and may enforce such powers by applying to the Court of Common Pleas for contempt citations.

Hearings before the Board of Arbitrations and Claims are public proceedings. The board may dismiss the claim or make an award for the claimant. Its awards are entered in the record and written opinions are filed. Costs may be awarded to either party or the order may state that each party shall bear its own costs.

Within thirty days the claimant or the Commonwealth, if either be aggrieved, may appeal to the Court of Common Pleas for a review of the Board's determination. It is provided that the Court of Common Pleas shall hear the appeal without a jury and upon the record which has been certified to it by the board. The findings made by the board with respect to questions of fact, if supported by substantial evidence, are conclusive. The Court of Common Pleas may affirm the award, set aside the board's determination, modify or remand the claim to the board for further disposition.

Payments upon awards made by the board are processed within thirty days of the final action taken. The secretary of the board certified to the secretary of the department involved, a statement of the action which has been taken and the identity of the person entitled to payment. The department involved then pays the award out of any funds which have been appropriated to it for the contract giving rise to the claim.

SOUTH CAROLINA

The Code of Laws of South Carolina, Sections 30-251 through 30-255, authorizes the State Budget and Control Board to settle claims against the state.

All claims for services rendered or for supplies furnished are presented to the board in the form of a petition. The petition must state the facts upon which the claim is based, together with any evidence which may be required by the board. It must be filed with the chairman at least twenty days before the General Assembly convenes. The board is obligated to examine the claims and report its findings to the House of Representatives', Ways and Means Committee, within ten days after the House convenes.

The House Ways and Means Committee may make provision for the payment of all approved claims in the appropriation bill introduced by the committee. Claims not submitted to the Board within three years "after the right to demand payment thereof accrues" are thereafter barred.

UTAH

The Utah Constitution, Article VII § 13, and the Utah Code, Sections 63-6-1, et seq., establish the Board of Examiners for the purpose of reviewing claims against the State.

The Board of Examiners is composed of three members: the Governor who acts as president, the Secretary of State who acts as secretary, and the Attorney General. It has jurisdiction "to examine all claims against the State for which funds have not been provided . . . except salaries or compensations of officers. . . ." It is the expressed legislative policy not to consider claims which have not been considered by the board. Meetings of the board may be called by the president or the two other members thereof, but must be called at least sixty days before each legislative session. Notice of meetings must be published in a newspaper of general circulation.

A record of the proceedings of the board is required to be kept. Any member may record his dissent. Abstracts of all claims are entered in the minutes of the board.

The board is authorized to establish its own procedural rules. Each member may take depositions but only the president may issue subpoenas for the attendance of witnesses and the production of records and documents.

If the board makes an award and no appropriation has been made or if an appropriation has been made and it has been exhausted, a transmittal is made to the legislature together with a statement of reasons for the board's action.

The board is required to report its facts and recommendations to the legislature thirty days before it convenes and to compile an abstract report showing the claims it has allowed and those it has rejected.

Any party who has been aggrieved by the board's disallowance may appeal to the legislature in which case a notice is filed with the board and its record is transmitted to the legislature.

VERMONT

The Vermont Statutes, Title 32, Sections 901, et seq., establish a Claims Commission to hear claims against the State.

The State Treasurer, Auditor of Accounts and Attorney General are the commission's three members. It has rule-making powers with respect to the procedures and hearings held before it and may issue summons to examine witnesses.

Claims against the State for which payment is "not otherwise specifically provided by law" may be filed with the commission in the form of a petition. The petitions must state the facts giving rise to the claim and be signed by the petitioner under oath. At

the hearing provided, the commission may examine the claimant or other witnesses under oath and may make awards up to $1,000.

When an award has been made by the Commission, the Auditor of Accounts is authorized to issue his warrant. When accepted by the claimant, the State is completely discharged. Such payments were charged against the State agency responsible for the claim or against a contingent fund.

In 1961 the Vermont General Assembly waived the State's sovereign immunity by the enactment of Title 12, Section 5601, et seq. While prohibiting execution upon State property for the satisfaction judgments, the General Assembly made the State liable for injuries to persons or property and loss of life caused by the State's employees while acting within the scope of their employment, under the same circumstances, manner and "extent as a private person would be liable." The State's liability, however, is limited to $75,000 for one person and $300,000 for each activity, condition or event. Exclusive jurisdiction in such matters is vested in the county courts.

The General Assembly expressly provided that the State assumed no liability with respect to (1) claims based upon the performance of discretionary functions by State officials exercising due care in the execution of a statute or regulation; (2) claims arising from the assessment or collection of a tax or from levying upon goods or merchandise; (3) claims arising from the imposition of a quarantine; (4) claims arising by reason of the fiscal operations of the State; (5) claims arising out of the combatant activities of the National Guard; (6) claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, liable, slander, misrepresentation, deceit, fraud, interference with contractual right or invasion of the right of privacy; (7) any claim for which another remedy is specifically provided.

Claims of $500 or less may be settled by the Attorney General on his own motion. Where the amount of settlement would be greater than $500 the Attorney General may settle only with the approval of the court.

Judgments are paid by the State Treasurer from the appropriation of the department involved. Where a State employee has had a causal connection with the claim but he is not connected with any department, payment is made from the State treasury which is subsequently reimbursed by the Emergency Board. In the event an insurance policy is in effect, its provisions with respect to payment govern. Acceptance of payment by the claimant is final and conclusive and will bar any subsequent action by him against the State or any of the State's employees who may have been involved.

VIRGINIA

The Code of Virginia, Sections 2-193 through 2-199 and Sections 8-752 through 8-757, provides a procedure by which claims against the Commonwealth may be resolved.[5]

The Comptroller has been designated as the Commonwealth's administrative instrumentality to receive any person's "pecuniary claim" against the Commonwealth based upon "any legal ground." The Comptroller may allow claims within ten years from the time they accrued, but must call claims that are more than ten years old to the attention of the Governor and may allow them only if the Governor so directs.

If the Comptroller disallows a claim the party aggrieved may have redress to the circuit court of the city of Richmond by filing a petition or a bill in chancery. However, these proceedings must be commenced within three years after the claim accrued. The court is authorized to empanel a jury to determine the facts and to fix the amount of unliquidated claims. When the claimant prevails he may present his claim to the Comptroller for payment within two years of the court's decision. However, no judgment can be paid until a special appropriation has been passed.

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[5] Under the above cited statutory authority it has been held that court proceedings based upon contract will lie against the Commonwealth, Davis v. Marr, 200 Va. 479, 106 S.E.2d 722, but it has been held that actions based upon torts are not authorized. Elizabeth River Tunnel District v. Beecher, 202 Va. 452, 117 S.E.2d 685.

WASHINGTON

The Revised Code of Washington, Sections 4.92, 4.92.010, 4.92.140, and 4.92.090, provides a comprehensive judicial procedure for the redress and payment of claims against the State of Washington.

It is provided that "any person or corporation having any claim against the State" shall have a right of action in the superior court of Thurston County (except those cases involving real property which may be brought in the county where the land is situated or in tort cases which may be brought in Thurston County or the county where the claim arose). In any action brought against the State under these provisions, the claimant may be required to file a surety bond for costs to indemnify the State in the event he fails to recover judgment.

Section 4.92.090 provides that "The State of Washington, whether acting in its govmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." Such claims must be presented to the State Auditor within one hundred and twenty days from when the claim arose. The statement to the auditor must be verified and describe the conduct and circumstances of the injury or damage, the nature of the injury or damage and the names of persons involved, together with an itemization of the injury and the total amount claimed. An action cannot be maintained in the courts until a claim has first been filed with the State Auditor.

The execution of judgments against the State upon publicly owned property is prohibited. However, the Budget Director upon receiving a certified copy of the judgment is authorized to make payment from the State treasury. A tort claim account has been established in the State general fund for the payment of claims against the State. However, payments may be made from such fund only upon a final court judgment or upon settlement or adjustment by a department head with the approval of the Attorney General for claims of $500 or less.

The Attorney General is authorized to settle tort actions against the state but he must first secure the approval of the court, in which case a stipulation or judgment is entered. In such instances, the judge before whom any such action is pending may require the Attorney General or the plaintiff to produce and satisfy him with respect to any relevant or material evidence.

The Budget Director is authorized to pay tort claims and judgments against the State only upon the following conditions: (1) where the department head involved certifies that the claim was settled for $500 or less and has secured the approval of the Attorney General, or (2) the clerk of the court has transferred a certified copy of the judgment to him and the Attorney General has certified that it arose out of a tort action.

When payments are made by the Budget Director out of the tort claims account it is conceived that the department involved will, unless to do so would disrupt its operation, reimburse the tort claims account. Thus this account will in the ordinary operation of the system have a tendency to replenish itself. However, it is provided that the Budget Director may relieve a department involved from reimbursing the tort claims account where to do so would disrupt a department's operation. Therefore it may become necessary from time to time for the legislature to replenish this account.

In those instances where the tort claims account is reimbursed, the department involved is required to apportion such charges within its department to the various activities which contributed to liability. And where more than one department is involved, the Budget Director may make the apportionment between the departments whose activities contributed to the state's liability.

WEST VIRGINIA

The West Virginia Code of 1961, Sections 1143 through 1147(7), designates the Attorney General as the "special instrumentality of the legislature" to consider claims against the State and to recommend a course of disposition to the legislature.[6]

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[6] Until 1953 when these code sections were amended, a Court of Claims was the legally constituted legislative instrumentality. The Attorney General succeeded to many of the same powers and responsibilities formerly delegated to the Court of Claims.

It is expressly provided that the determinations of the Attorney General are not subject to judicial review, and further that no liability may be created by an Attorney General's determination unless an appropriation has previously been made.

The Attorney General's jurisdiction extends to those claims which "but for the constitutional immunity of the State from suit" or for some statutory limitation, could be brought in the courts. He is authorized to examine both liquidated and unliquidated claims, "ex contractu and ex delicto," which have equitable overtones, and to consider defensive set-offs and counterclaims which may be presented by the State. However, he is expressly precluded from considering claims arising as a result of particular kinds of State activity. They are those resulting from the militia or National Guard, injury or death to State prisoners, treatment of patients or inmates in state institutions, workmen's compensation, unemployment compensation, public assistance in the nature of relief and welfare and in any other instance where the claimant may have had recourse to the courts.

A person institutes his claim by filing it with the Attorney General. He is entitled to a hearing in accordance with the rules of procedure adopted by the Attorney General for such purposes. The Attorney General is empowered to issue subpoenas for the attendance of witnesses and in receiving evidence he is neither bound by the common law nor statutory rules of evidence. In the event a finding is made for the claimant, the Attorney General is required to make a written determination containing the reasons for his decision together with an itemized statement of the amounts recommended for payment. Interest upon any such awards is prohibited unless they are based upon a contract which provides for interest, in which case the interest specified in the particular contract governs.

Where a claim has arisen out of an activity of a State agency for which there is an existing appropriation, the claim may be submitted to the Attorney General by (1) the claimant whose claim has been rejected either by the State agency involved or the State auditor, (2) the head of the State agency involved, or (3) by the State Auditor. If the Attorney General finds for the claimant he certifies his findings to the head of the State agency concerned, the State Auditor and to the Governor. The Governor then is authorized to instruct the State Auditor to issue his warrant from the existing appropriation.

Where a claim arises out of an activity which is financed under a special appropriation the Attorney General has the authority upon finding for a claimant to requisition the State Auditor to issue his warrant for payment.

Where there is neither an existing appropriation nor a special appropriation out of which an Attorney General's award may be paid, he is required to transmit to the Director of the Budget an itemized statement of the awards he has made for inclusion in his appropriation recommendations. All documents, papers, briefs and transcripts of the testimony must be preserved and made available to the legislature upon request.

WISCONSIN

The Wisconsin Statutes, Sections 15.94 and 16.53(8), provide a procedure for the redress of "all claims requiring legislative action."

A claim against the State is submitted to the Director of the Department of Administration whose responsibility it is to examine them, note the funds to which they are chargeable and generally, to determine that all claims are in proper order. When this has been done the director refers these claims to the Claims Commission.

The Claims Commission was created to receive, investigate and make recommendations requiring legislative action and it is the express policy of the legislature to consider only those claims upon which the Claims Commission had made its recommendation.

The Claims Commission is comprised of five members who receive no additional compensation but are entitled to reimbursement for their actual and necessary out-of-pocket expenses. A representative of the Governor's office, the Department of Administration and the Attorney General's office, together with the chairman of the Senate Finance Committee and the chairman of the Assembly Finance Committee, constitute the Commission's membership.

Ten days' written notice is required to be given by the Commission to a claimant before his hearing is held, stating the time and the place thereof. The proceedings are required to be taken by a recording device although they do not have to be transcribed. The Commission may subpoena the attendance of witnesses and the production of records and documents. In receiving evidence the Commission is not bound by the common law or statutory rules of evidence and may take official notice of certain facts.

The Commission is required to report its findings and recommendations on all claims submitted to it for action to the legislature. If the Commission concludes in its findings that the State is legally liable or that the claim arose out of the causal negligence of a State employee or that there are equitable reasons why the State should pay, it is required to draft a bill reporting its findings and conclusions and submit it to a joint legislative committee on finance.

It is provided that with respect to claims of $500 or less, the Claims Commission may on its own cognizance without submission to the legislature order payment.

Sections 285.01 et seq. provide a means by which a person having a claim against the State may have redress to the courts where the legislature has refused to make an allowance. Such actions are commenced by filing service of process and pleadings upon the Attorney General. It is also required that a bond of not to exceed $1,000 may be filed by any such plaintiff to secure the State's costs.

No execution may be had against State property for satisfaction of one's judgment. However, after the clerk of the court has furnished a certified transcript of the judgment to the Department of Administration and that department has audited and examined the amount of damages so awarded, payment may be made from the State treasury.

It should be noted that in the case of Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962) the Wisconsin Supreme Court in abrogating prospectively the doctrine of sovereign immunity with respect to torts made some very significant comments concerning the above cited sections. It stated that since the Wisconsin constitution provided that "the legislature shall direct by law in what manner and in what courts suits may be brought against the State" it is questionable whether the statutory language authorizing suits against the State is broad enough to include suits sounding in tort. The court further noted that these sections have been construed as limited to claims against the State for debt but declined to pass upon the particular issue since it had not been briefed and submitted to the court for its determination. However, the court stated that before a suit may be commenced against the State under such a constitutional provision the legislature must specifically so provide.

WYOMING

In Wyoming claims against the State are presented to the State Auditor, pursuant to Wyoming Statutes 1957, Sections 9-71 through 9-77.

The State Auditor is authorized to receive evidence and examine witnesses under oath. If a decision in favor of a claimant is rendered and there is an existing appropriation from which payment can be made, the Auditor may draw his warrant for the amount he has allowed.

If there is no existing appropriation from which payment can be made, the claim may be certified to the legislature for payment. The legislature, as a matter of policy, will not act upon a claim until it has been considered by the State Auditor.

If a claimant is dissatisfied with the decision of the Auditor, he may appeal to the legislature.

Legal Aspects of the Utilization And Development of Airspace Over and Under Freeways

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•IT has been often said that "history repeats itself." The use and development of air rights has turned full circle in the last 50 years. It was not so long ago that the attorneys for the Public Service Commission of the State of New York were engulfed with a myriad of legal problems attendant upon the utilization of street airspace by the elevated train system. Most of the elevated train structures in New York have since been torn down. Today we have similar legal problems concerning the use of airspace above our highways in a new setting.

Some states—and even some foreign countries, for example Japan, in the last five years have moved far ahead in the actual use of airspace. One of the most prominent recent examples of the use of airspace over a highway is the development of four 32-story apartment buildings over the approach to the George Washington Bridge in New York, and in addition a $14 million bus station straddling the same Interstate expressway.[1]

In Chicago the U.S. Post Office Building not only bridges the Congress Street superhighway, but surrounds it. In Hartford, Conn., a public library has been built over an expressway. In many places in the nation, there are Fred Harvey restaurants and stores located on structures over the highway. The new Pan American Building in New York was constructed over two levels of railroad tracks just next to Grand Central Terminal.

The potential for the use and development of airspace on the nation's highways looms as high as our cities' tallest skyscrapers. The legal problem will undoubtedly equal them in stature.

RIGHTS IN AIRSPACE

At common law, the private owner's rights in his land extended downward to the core of the earth and upward to the periphery of the universe ("Cujus est solum, ejus est usque ad coelum et ad inferos")[2]. This historic concept was hardly suited to the present needs of air navigation, so the law of ownership of air rights has been modified accordingly.[3] Rights in airspace are not materially different when the landowner is a governmental body. No authority has been found on the extent of the state's rights in airspace when it has the legal authority to acquire the right of way in fee simple. Presumably the state has at least the same rights to use and dispose of its airspace as does a private owner, subject of course to statutory limits on its authority to dispose of public property.

Where the state's title to the right-of-way consists of an easement or where the statutory authority is limited to the acquisition of easements, there is no ownership by

[1] Abrahams "Vertical Easements and the Use of Airspace," Third Workshop on Highway Law, L.S.U. 1964.
[2] Black, Law Dictionary, 3d Ed., page 487.
[3] U.S. v. Causby, 328 U.S. 256 (1946), 66 S.Ct. 1062; 49 U.S.C.A., Sec. 1508.

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the state of airspace as such. However, the state may be able to control the use of airspace above the right-of-way by its power to limit or control encroachments in the highway. The owner of the underlying fee, subject to the limited control in the state to regulate encroachments, is the owner of the airspace, to the extent that it does not interfere with the highway itself or the traffic thereon.

HRB Special Report 32 lists ten states where only an easement may be acquired by the state highway department and nine states where the law is silent on the subject. The Special Report 32 stated:

> Various and important consequences are contingent upon whether a fee simple or an easement is acquired. ...[If] the property is held in fee simple the department would be in a position to sell the land or lease it and regain its acquisition costs.
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> * * *
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> To insure the highest degree of control possible over the right-of-way and approaches, it is advisable to permit the acquisition of a fee title. ...[It] is safe to predict that an absolute title may aid in the furtherance of the desired control. The acquisition of a fee title may prevent difficulties in the future.[4]

Thus statutory authority to acquire fee title and actual fee title is essential to the full utilization and development of air rights on our highways.

It has been stated many times that the payment for an easement is about the same as the payment for fee titles.[5] This may not be true in metropolitan areas where air rights can be utilized and are valuable. The state highway department may be confronted with the problem of whether to acquire a fee simple title or a limited horizontal and vertical dimension easement or so-called "tunnel easement." Since the state highway department would have no interest in the airspace above the uppermost boundary of a "tunnel easement," the owner will have the right to develop and utilize the airspace.

Section 109 of Title 23 U.S.C. manifests a congressional intent that the states acquire fee title and control of rights-of-way. Section 1.23 of the Federal-Aid Regulations requires that the states acquire rights-of-way of such nature and extent as are adequate for the construction, maintenance and operation of a project.

Paragraph 5u of PPM 21-4.1 provides:

> Right-of-way for all Federal-aid highways shall be unlimited in vertical dimension, subject to the enjoyment by others of rights beneath the surface of the earth that will not impair the highway or interfere with the free and safe flow of traffic thereon, and except as shown in the approved construction plans or as may otherwise be approved by the Commission in particular instances. In cases where a considerable savings in right-of-way costs can be made a right-of-way of limited vertical dimension with private or public facilities occupying the space above or below such right-of-way may be acquired under conditions determined by a State subject to approval of Public Roads in each case.

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[4] HRB Special Report 32, p. 9-10.

[5] 4 Nichols, Eminent Domain, p. 277 and 279; Schmuntz, Condemnation Appraisers Handbook, p. 207; Jahr, Eminent Domain Valuation and Procedure, p. 252.

In other words, the right-of-way for Federal-aid highways may be limited to the space reasonably necessary for construction and maintenance, subject of course to certain conditions and controls. The Assistant General Counsel for the U.S. Bureau of Public Roads has stated that:

> Such special circumstances might include cases where the cost of acquiring urban property is extremely high, or where the normal type of acquisition might have an adverse effect on or conflict with current land use, local zoning, development trends, or overall urban planning. In such cases, if it is in the public interest, consistent with the highway purposes, and feasible to do so, improvements may be left in place, or provision may be made to permit the continued use or development of surfaces areas or airspace for nonhighway purposes, by an acquisition in limited vertical dimension.[6]

Some flexibility is thus allowed by the U.S. Bureau of Public Roads in the nature of the title acquired for the right-of-way, either to let the owner develop his air rights or for the state to lease and develop the airspace. This flexibility in type of title obtained can be achieved by a statute that authorizes a state to acquire a fee title or such lesser estate or interest considered necessary for state highway purposes.[7]

ABUTTER'S RIGHTS IN AIRSPACE

While on the subject of property rights in airspace, consideration must include the rights of abutting owners in the airspace above the highway. All property owners are subject to the maxim "sic utere tuo ut non alienum laedas"—one person must not so use his property as to deprive others of the equal right to the use and enjoyment of their property.[8] More specifically, owners of property abutting on streets or highways have the right to light, air, view and access. In Williams v. Los Angeles Railway Co., 150 Cal. 592, 89 Pac. 330 (1907), the defendant railway company erected a tower and platform in front of plaintiff's store for the purpose of giving signals to its trains and operating the switches at the intersection. The court said, at page 594:

> Every lot fronting upon a street has, as appurtenances thereto, certain private easements in the street, in front of and adjacent to the lot, which easements are a part of the lot, and are private property as fully as the lot itself, though exercised in the street and extending into and over the street. Any obstruction to the use of the street which impairs or destroys these easements is a private injury, special and peculiar to the owner of the lot, and different and distinct from the injury to the general public and from that which such owner suffers as a part of the general public. As one of the public he has the right to travel from place to place on the street, in front of his lot or elsewhere. Any injury to this public right gives him no right to maintain an action for damages, or for an injunction. As an abutting owner, he has the right to the private easements in question, and for an injury thereto he may sue for damages or to enjoin the continuance of the injury, regardless of the fact that the same obstruction also constitutes an injury to his public right of travel, and regardless of the number of persons who may suffer a similar injury to similar private easements appurtenant to other lots fronting on the street.

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[6] Morton, "Air Rights", AASHO 1962.
[7] See California Streets and Highways Code, Section 104.
[8] 42 Am. Jur., Property, Sec. 49, p. 224.

> These private easements are,--1. The right of ingress and egress to and from the lot over and by means of the adjacent portion of the street....; 2. The right to receive light from the space occupied by the street, and to the circulation of air therefrom....; and 3. The right to have the street space kept open so that signs or goods displayed in and upon the lot may be seen by the passersby, in order that they may be attracted as customers to patronize the business carried on thereon....

A commercial building located in the airspace on our highways can very well be placed in the same category as the tower and platform in the Williams case, if there is a legal interference with abutter's rights.

The New York elevated railroad cases shed some legal light on this problem. The New York appellate courts held that if the elevated structures were consistent with the proper use of public streets, the resulting inconvenience of access and interference with light and air was not compensable; if, however, the elevated railroad is not a legitimate use of public streets, compensation might be claimed.[9] These cases held the abutting owner was entitled to recovery for interference with light, air and impairment of access. Thus the New York elevated railroad cases decided during the last century may set precedent control on abutter's rights in airspace law as it did the law on abutter's rights in freeway access law. The Williams case and the New York elevated railroad cases will certainly be applicable to situations where airspace is developed on conventional highways.

Where airspace is developed on freeways a more complex legal question comes into focus. In Schnider v. State of California (38 Cal. 2d 439, 443, 241 P. 2d 1) it was held that where an ordinary or conventional road is built there may be an intent to serve abutting owners, but when a freeway is established the intent is just the opposite, and a resolution of the highway commission creating a freeway gives adequate notice that no new abutter's rights of access will arise unless they are specifically granted. The question remains as to whether the creation of a freeway gives adequate notice that no new abutter's rights of light, air and view will arise. One means of giving this notice is by a specification in the freeway resolution that no abutter's rights at all will arise. Therefore, in metropolitan areas where it is anticipated that airspace over freeways will be developed the resolution should not limit the specification of abutter's rights merely to access but should specifically refer to abutter's rights.

Freeways on new alignment or freeways that occupy full city blocks and are separated from abutting private property by city streets should not pose a problem of liability for damage for the development of air rights where the freeway resolution specifies that all abutter's rights are being acquired.[10]

The difficult factual situations occur when a freeway or conventional highway is constructed and there is a partial taking of the abutting property. Here there can be a claim of taking or damage to the adjoining owners' rights of light, view and air as well as access if the proposed construction contemplates the development of air rights. Where the development of air rights occurs after the freeway construction there is the possibility of an inverse condemnation action for any diminution in value of the adjoining property in those states where there is liability for such damage.[11]

AIRSPACE AS A PUBLIC USE

Is the acquisition of fee title for a highway right-of-way with the intent to lease the airspace to private parties the taking of property for a private use? This particular question has not been satisfactorily answered for the highway lawyer.

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[9] Netherton, Control of Highway Access, p. 41.

[10] McDonald v. State, 130 Cal.App.2d 793; 279 P.2d 777; People v. Lipari, 213 Cal.App.2d 485; 28 Cal.Rptr. 808.

[11] Goycoolea v. City of Los Angeles, 207 Cal.App.2d 729, 24 Cal.Rptr. 719.

It is the universally established rule that private property cannot constitutionally be taken by eminent domain except for public use.[12]

There are two schools of thought on the legal definition of the term "public use"—the so-called narrow view and the broad view. In 2 Nichols on Eminent Domain, page 629, it is said of the narrow view:

> The supporters of one school insist that "public use" means "use by the public," that is, public service or employment, and that consequently to make a use public a duty must devolve upon the person or corporation seeking to take property by right of eminent domain to furnish the public with the use intended, and the public must be entitled, as of right, to use or enjoy the property taken. The term implies the "use of many" or "by the public."

On pages 632 and 633 of the same volume the broad view is stated as follows:

> On the other hand the courts that are inclined to go furthest in sustaining public rights at the expense of property rights contend that "public use" means "public advantage," and that anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new resources for the employment of capital and labor, manifestly contributes to the general welfare and the prosperity of the whole community, and, giving the constitution a broad and comprehensive interpretation, constitutes a public use.

The generally accepted requirements for public use are set forth in 2 Nichols on Eminent Domain, 639, as follows:

> (1) That it effect a community as distinguished from an individual;
> (2) That the law control the use to be made of the property;
> (3) That the title so taken be not invested in a person or corporation as a private property to be used and controlled as private property; and
> (4) That the public reap the benefit of public possession and use, and that no one exercise control except the public.

If the use for which land is taken by eminent domain is public, the taking is not invalid merely because an incidental benefit will inure to private individuals. There is authority that the "by-product" of a public use may be sold or leased to a private developer. It is stated in 2 Nichols on Eminent Domain, 658:

> When a taking is made for a public use, it is no objection that a by-product of the property taken is to be sold for private profit, even, it has been held, if the public improvement would not have been made had it not been for the expected profit from the by-product.

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[12] 2 Nichols, Eminent Domain, 614.

Figure 1. Cobo Hall and Lodge Expressway, Detroit Michigan—air rights.

Figure 2. U.S. Post Office and Congress Expressway (I-98), Chicago, Illinois—use of air space.

Figure 3. University of Alabama Medical Center, Birmingham—air rights.

Figure 4. Allen Bradley, Co., Milwaukee, Wisconsin—air rights.

Figure 5. Santa Monica Freeway, California—parking.

Figure 6. Expressway, Tokyo, Japan.

It can be argued that the private use of airspace is merely a "by-product" of the highway public use.

When there is commingling of public and private uses the general law is set forth in 2 Nichols on Eminent Domain, 659, which states on pages 659 and 660:

> When, however, a statute authorizes a single taking for uses both public and private and does not limit the extent of the taking to the necessities of the public use, and the uses are so commingled that they cannot be separated and the taking for private use disregarded, the whole statute is unconstitutional.
>
> The use for which the property is acquired by eminent domain must be the use of the condemnor. An acquisition which is primarily for private benefit is not for a public use. However, an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. Where, despite the commingling of private and public uses, the taking will aid in the establishment of a public project, the courts are disposed to ignore the private element as purely incidental; ...

There is another argument that the leasing of highway airspace can be considered as the utilization of public property not presently needed for highway purposes. In 2 Nichols on Eminent Domain, page 663, it is stated:

> It is not, however, objectionable that a statute which authorizes a taking provides that the municipal authorities may sell lands taken whenever they determine that such property is no longer needed for public use. Such a power is latent in every taking, and is very different from a taking of land with a contemporaneous knowledge and purpose that a definite and separable part is not necessary for the public use.

In California the question of whether the condemnation of property to construct a viaduct section of freeway with the intent to lease the area beneath the structure for parking purposes was a public or private use has been before the appellate court in the recent case of People v. Nahabedian (171 Cal. App. 2d 302, 340 P. 2d 1063). In that case it was claimed that the area under a freeway was going to be leased to "Walt's Auto Park" and to be used for a private purpose without any relation to the freeway project. The court in the foregoing case, at page 307, stated the following:

> To us, it is manifest that the trial court confused "necessity" with "public use." Respondent concedes that"...the mere declaration by the legislature of a purpose for which property may be taken for a public use is not conclusive and does not preclude a person whose land is being condemned from showing upon the trial that, as a matter of fact, the use sought to be subserved is a private one, or from assailing the complaint on the ground that it so appears therefrom. The character of the use and not its extent, determines the question of public use." [Emphasis added.] (Stratford Irr. Dist. v. Empire Water Co., 44 Cal.App.2d 61, 67, 111 P.2d 957). Yet, in the case at bar, the court announced, "...so we will know where we stand, I will sustain any objection to the introduction of evidence tending to show ... the true purpose of the condemnation proceedings." This was error. There can be no doubt that both the court and counsel for respondent clearly understood that appellant's contention was that the "real purpose" of the condemnor was to take part of appellant's property not for freeway purposes, but to lease it to Walt's Auto Park for private purposes, without any relation to the freeway project.

> Certainly, if such contentions could be proved, respondent could not acquire the portion of the property in question, because the latter is without authority in law to acquire the property of a citizen for private use (U.S. Const., Fifth and Fourteenth Amendments; Cal. Const., art I, Sec. 14; People v. Chevalier, Cal. App., 331 P.2d 237; City & County of San Francisco v. Ross, 44 Cal.2d 52, 59, 279 P.2d 529).
>
> Respondent argues that the instant action is a taking for the Santa Monica Freeway, which is being built on "stilts" or piers so that it is an elevated freeway. That therefore, the need for a clearance of the surface of the land under the bridge and the approaches to it will serve the public interest. As respondent puts it, "Not only will it be of "public utility" to have complete control of the property during construction but it is also obvious that the State must have access to the understructure of the bridge at all times for necessary repairs, maintenance and possible remodeling." [Emphasis added.] (Crockett L. & C. Co. v. American T. B. Co., 211 Cal. 361, 365, 295 Pac. 328.) Respondent also contends that appellant's argument of the lack of public use due to a future lease for private parking lacks substantiality because of the need for the property during construction, even though the property is later leased or sold to private parties (Redevelopment Agency v. Hayes, 122 Cal.App.2d 777, 803, 266 P.2d 105). However, the holding in the case just cited was contingent upon the determination that the taking initially is for a public purpose. In the case at bar, all efforts of appellant to establish that the taking was not for a public purpose were excluded by the trial court. Here, the court seemingly concluded that the question whether the proposed taking is for a public purpose, was committed to the conclusive determination of an administrative agency of the condemning body. Such is not the law (People v. Lagiss, 160 Cal.App.2d 28, 35, 324 P.2d 926).

Later when the case was again appealed by the property owner in People v. Mascotti, 206 Cal. App. 2d 772, 23 Cal. Rptr. 846, the court affirmed the finding of the trial court that the private parking use underneath the freeway was a necessary public use.

In conclusion it would appear that as far as the airspace below a highway is concerned, at least in California, it can be condemned if it is necessary for highway purposes, and the original intention of the condemning party controls.[13]

Since Bureau of Public Roads Instructional Memorandum 21-3-62 provides in paragraph 17 that the authorized uses will be limited to "a term basis; or revocable at will or revocable on a specified period of notice," it can be argued that the private use of the airspace is temporary. This argument is bolstered by the decisions which uphold the right of a public agency to condemn for future needs and lease in the interim period before actual construction, and the authority to lease any public property not presently needed for highway purposes.[14]

The launching of an extensive program of leasing of air rights is actually a new and different kind of activity for most state highway departments. If the past is any criterion, it would seem to be wise to have the legislature specifically authorize this activity.[15] Although it may be desirable to have legislation specifically authorizing the leasing of highway airspace, it should not be inferred that without such legislation the state is powerless to make use of airspace on its highways.

REVENUE FROM USE OF AIRSPACE

A legislative answer to the question—"What to do with the income to the state from the leasing of highway airspace to private interests?"—will be before the 89th Congress.

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[13] People v. Lagiss, 223 A.C.A. 24; 35 Cal.Rptr. 34.
[14] HRB Special Report 27, "Acquisition of Land for Future Highway Use."
[15] See California Streets and Highways Code, Sections 104.6 and 104.12.

In order to understand the present conflict in viewpoint on what to do with the revenue derived from airspace, a knowledge of the history of the Federal-Aid Highway Act of 1956, and in particular Section 111, is essential.

The Federal-Aid Highway Act of 1956, which established the National System of Interstate and Defense Highways, provided in Section 111 that the only allowable non-highway use of airspace above and below the interstate highway was for the public parking of motor vehicles. This statute was interpreted by the Bureau of Public Roads in Cherry Memorandum No. 31 to be restricted to parking leases to other public entities. Several states considered this interpretation to be too restrictive. Sensing that a potentially large amount of income would be denied the states, the American Association of State Highway Officials, through its Legal Affairs Committee successfully urged Congress to broaden the permissable uses of highway airspace. Section 111 of Title 23 of the United States Code was amended and now authorizes the state to use or permit the use of airspace whenever it will not impair the full use and safety of the highway. Immediately after enactment of the 1961 amendment, the Bureau published its guide for leasing airspace above and below the Interstate System in Instructional Memorandum 21-3-62.

In the interim the Bureau, through the Assistant Secretary of Commerce, requested the U.S. Comptroller General for his opinion on the authority of the Bureau of Public Roads to require all states to apply a pro rata share of the net proceeds from the use of airspace to highway projects on the interstate system without matching Federal-aid funds. The Department of Commerce wished to make such a requirement a condition precedent to allowing the state to use or permit the use of airspace on Interstate Highways.

The Comptroller General, in an opinion dated April 6, 1962, rejected this argument.[16] The Comptroller General found that Congress did not consider the question of income in enacting or amending Section 111 and concluded that there was considerable doubt that the Secretary of Commerce has authority to require a state to share with the Federal Government the net proceeds from Interstate airspace. As a result of this decision the Bureau of Public Roads in its Instructional Memorandum 21-3-62, provided as follows: "Disposition of income received from the authorized use of airspace will be the responsibility of the State." This instructional memorandum did not end the matter. The General Accounting Office filed a report to the Congress concerning their audit of the California Interstate program. One of the recommendations of the GAO was that legislation should be introduced in Congress to allow the Federal Government to participate in revenue from the lease of airspace on Interstate highways. In March of last year the Bureau of Public Roads, in their comment on the General Accounting Office report, indicated that recommended legislation was drafted by Public Roads and submitted to the Bureau of the Budget. On June 30, the draft bill was forwarded by the Department of Commerce to both the Speaker of the House of Representatives and the President Pro Tempore of the Senate as part of the department's legislative program.

On July 30, the bill was introduced in the House of Representatives as H.R. 12143. The bill (H.R. 12143) provides as follows:

> When a State leases, permits the use of or otherwise disposes of the airspace on any of the Federal-aid highway systems, including the airspace on the Interstate System pursuant to section 111 of this title, in the cost of which the United States has participated under this title, the Federal Government shall be entitled to share in the net proceeds from such leasing, use, or disposition, after deduction of the costs to the State thereof, in the same ratio in which it participated in the cost of the right-of-way. An amount equivalent to the Federal share of such net proceeds shall be deducted from sums due the State covering the Federal pro rata share of the cost of construction of any projects on any of the Federal-aid highway systems.

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[16] 41 Compt. Gen. 652.

This bill would have entitled the Federal Government to share in the net proceeds from leases of airspace in the same ratio in which it participated in the cost of the right-of-way. The Federal share of such net proceeds is to be deducted from the cost of construction of projects on any Federal-aid highway system. H.R. 12143 died when the 88th Congress adjourned. Since it constitutes part of the Department of Commerce's legislative program it will undoubtedly be reintroduced at the first session of the 89th Congress. For this reason the House bill deserves comment from a policy and legal standpoint.

Another alternative on the disposition of revenue was mentioned in the Comptroller General's report to the Congress on the legislative policy requirements governing federal participation in the Federal-aid highway program in California. According to this plan, the benefit to the Federal Government would "take the form of a credit to participating project costs in the amount of the estimated value of the airspace for nonhighway purposes." Although this was not the plan which the Department of Commerce chose to send to Congress, it did receive some attention from Clifton W. Enfield, Minority Counsel of the House Committee on Public Works. In an address to the Workshop on Highway Law at Louisiana State University, April 17, 1964, Mr. Enfield raised several interesting questions:

> A number of unanswered questions exist, such as, should the Federal Government share in the net rentals as they are collected over future years, without end, or should projects be closed out by crediting the Federal Government with the present worth of its share of estimated future net rentals? If the latter procedure is followed, over what period of time should future rentals be estimated? Should it be in perpetuity, or for some arbitrary number of years, or for the estimated economic or functional life of some portion of, or the entire, highway facility as constructed, or would some other measure of time be more equitable? Also, how should the amounts of future rentals be estimated, and how should their present worth be computed?

What are the arguments and policies against the Federal Government sharing the revenue from airspace?

H.R. 12143 is more than a mere revenue measure. It goes to the very heart of the philosophy behind the Federal-aid highway program. The basic question involved here is whether or not the Interstate Highway program takes the form of the traditional Federal-aid to a state or whether by the contribution of Federal funds the Federal Government maintains title in the right-of-way by participation in its income. In more basic legal terms, the question is whether the fee owner of the highway and its airspace has the inherent right to own, possess and dispose of the income from the property.

The present wording of the Federal-aid highway statutes, the legislative history and the Congressional debate, indicate a legislative intent that the Interstate and other Federal road programs is one of Federal assistance, by which the states retain all the normal property rights in the highways, rather than one of Federal investment. An examination of the debates which have covered a half century of legislation in the field of Federal aid to highways shows that the underlying principle upon which the system is built is one of aiding and assisting the states in building their highways.

If the states are left free to spend highway-airspace revenue on the highway projects of their choosing without being forced to forfeit Federal contributions to their Federal-aid highways, they will be able to pursue a vigorous program of updating and maintaining other streets and highways in their states.

If the Federal Government cuts off its statutory-promised contribution in the amount of 90 percent of the net airspace revenue, the states will be required to provide additional tax money for the completion of the Interstate Highway System on schedule.

In Section 116 of Title 23, U.S.C., it is stated that it is the duty of the states to maintain or cause to be maintained the Federal-aid highways and Section 110 requires

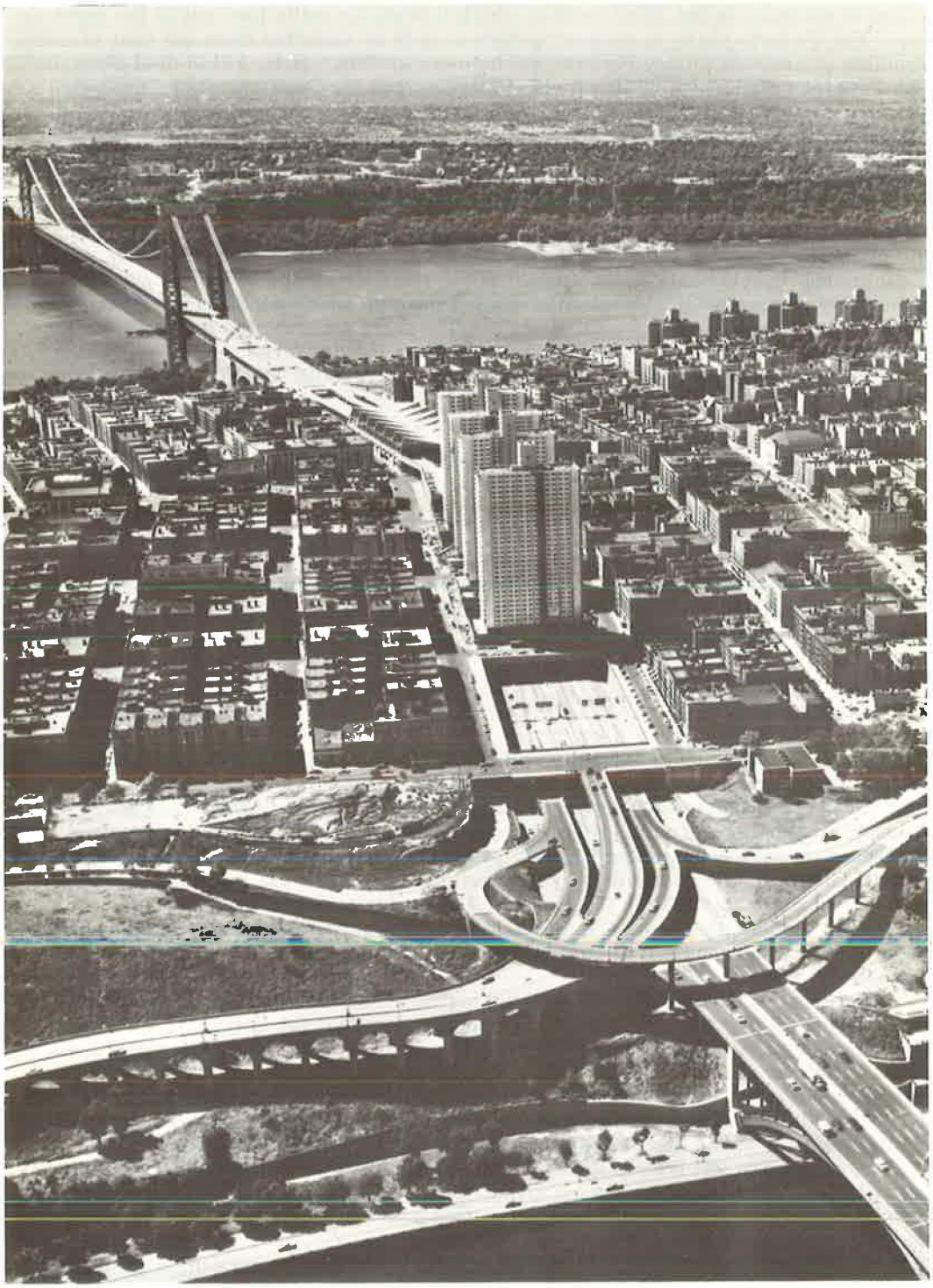

Figure 7. Approaches to George Washington Bridge, New York, N.Y.—use of airspace.

that project agreements include a provision for maintenance by the state after completion of construction. The project agreement states:

> 12. Maintenance. The State highway department will maintain, or by formal agreement with appropriate officials of a county or municipal government cause to be maintained, the project covered by this agreement, in accordance with 23 U.S.C. 116.

Since part of the consideration of the project agreement is the state's duty to maintain the highway, it should be entitled to this revenue to offset the maintenance expenditures.

No one would deny that the use of airspace over or under freeways is very often desirable to gain the most beneficial use possible of the highway right-of-way in urban areas, to relieve the land shortage in densely populated areas and to place on the tax rolls additional valuable property. Under the proposed legislation, however, the incentive for a state to utilize airspace on its highways and to shoulder the burden of the many planning, construction, right-of-way and legal and maintenance problems incident thereto would be hampered, if not completely deterred, if the state received only 10 percent or less of the net revenue.

In addition, under Bureau of Public Roads Instructional Memorandum 21-3-62, "Federal funds will not participate in any added costs whatsoever of construction of the highway project required by [nonhighway] use; i.e., for additional right-of-way, increased clearance for depressed highways, structural columns, ventilation, lighting, signing, etc.; or other changes in design, construction methods, or materials." And as pointed out earlier the bureau requires the states to obtain fee title.

If any provision is to be made in the Federal-aid highway law for the disposition of revenue from the lease of highway airspace, it is suggested that it be confined to a requirement that the funds so received must be used for highway purposes. A nondiversion requirement would conform to the original idea back of the Hayden-Cartright provision that has been in the Federal law for so many years.

LEGAL PLANNING FOR DEVELOPMENT OF AIRSPACE

From this review of selected legal problems in the development and utilization of highway airspace, it can be seen that the field is complex and sometimes frustrating to the highway lawyer. The lawyer must reconcile as best he can a mass of judicial precedents, beginning with the New York elevated railroad cases, his state law, the Federal laws and regulations, to be able to advise his state of the ramifications of merging the present right-of-way methods into a successful program for the utilization and development of air rights. Careful legal review is essential from the beginning. Legal planning will avoid subsequent complications and protect the integrity of highway airspace.

One phase of the legal planning involves an evaluation of state laws to determine their effectiveness to meet the need to utilize highway airspace in metropolitan areas. Several questions on state laws should be asked:

1. Does the state have statutory authority to acquire a fee simple interest for highway right-of-way?
2. Does the state freeway law allow the acquisition of abutters' rights or is it limited to access rights?
3. Does the state law authorize the highway department to lease areas above or below highways or authorize the state highway department to lease areas of right-of-way not presently needed for highway purposes?

These basic questions illustrate the need for legislative planning. They also suggest to the author the need for a special study and report by the Highway Research Board on this subject. Such a report could provide each state with a basis for evaluating the effectiveness of its law on air rights and airspace in relation to the laws of other states.

A comprehensive model statute on highway airspace could be drafted and included in the report.

There are many other legal problems inherent in the development of airspace which could not be covered in this paper. These problems range from those involved in the contract specifications, bidding and construction phases in the development of highway airspace uses to the complex legal problems concerned with the leasing, maintenance, safety and taxation of possessory interests in the management of buildings occupying the highway airspace.

It is hoped that the trail blazed by this short review of selected legal problems will aid those who will research further and deeper into the many unanswered questions created by the growing need for space in metropolitan areas.

An Outline of Highway Drainage Law

HARRISON LEWIS, Assistant Attorney General, North Carolina Department of Justice, State Highway Division

•A FEW hours research into the law of the various states concerning interferences with waters occasioned by highway construction and maintenance will convince anyone that a complete analysis is beyond the scope of a paper of this length. Three general classifications of waters are encountered: surface waters, watercourses and subterranean waters. The law relating to each is a field in itself. In addition to the basic case law doctrines relating to waters, there is considerable statutory law and various rules of liability applicable to state highway departments. The application of the law to various factual situations encountered in highway construction often presents a problem. Considerable litigation has arison out of claims for damages by reason of interference with waters by highway construction, and this author believes that a major research project on the subject would be worthwhile. Such a project would result in a volume of considerable size and should be the product of a number of attorneys working over a period of several months.

The purpose of this paper will be merely to outline the legal principles governing drainage and waters as they may be affected by highway construction and maintenance and to point out the various rules applicable in different jurisdictions with the hope that such an outline and citations may serve as something of a springboard for a more complete study of the subject matter.

LIABILITY OF STATE HIGHWAY AUTHORITIES AND REMEDIES OF INJURED PARTIES

Generally speaking, when one private individual unlawfully interferes with water, whether it be surface waters, watercourse or subterranean waters, it is held to be a tort.[1] The doctrines of negligence, trespass and nuisance have all been applied and in some instances recovery has been had on the theory of implied contract.[2] Generally, the injured party is entitled to an abatement of the interference through injunctive relief and for damages to the time of abatement.[3] However, where the interference is by a governmental agency having the power of eminent domain, such as a state highway department, different rules and remedies generally apply. In some instances, it has been held that the state acting in its governmental capacity, even though the interference would be actionable between private parties, is immune from liability.[4] There have also been instances of the state being held liable in tort in the same manner as private owners. This liability, however, is generally limited to states in which sovereign immunity has been waived, either by legislation or court decision.[5]

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[1] Hunter v. Mobile, 244 Ala. 318, 137 So.2d 656 (1943).

[2] Mayer v. Studer and M. Co., 66 N.D. 190, 262 N.W. 925 (1935), and Hunter v. Mobile, supra.

[3] Partial Injunction: Jones v. Kelly Trust Co., 179 Ark. 857, 18 S.W.2d 356 (1929); People v. Hauley, 207 Cal. 395, 279 Pac. 136 (1929); Rogers v. Gibson, 267 Ky. 32, 101 S.W.2d 200 (1937); Stevens v. Rockport Granite Co., 216 Mass. 486, 104 N.E. 371 (1914). Total Injunction: Adams v. Snouffer, 88 Ohio App. 79, 87 N.E.2d 484 (1949); Alonso v. Hills, 95 Cal.App.2d 778, 214 P.2d 50 (1950); See also 93 CUS, Waters, Sec. 146.

[4] Hawks v. Walsh, 177 Okla. 564, 61 P.2d 1109 (1936).

[5] SHC v. Horn, 187 Okla. 605, 105 P.2d 234 (1940); Tracewell v. Wood County Court, 58 W.Va. 283, 52 S.E. 185 (1905); Milhous v. S.H. Dept., 194 S.C. 33, 8 S.E.2d 852 (1940).

Paper sponsored by Committee on State Highway Laws and presented at the 44th Annual Meeting.

In the majority of states, liability for interference with waters arises from the action being classified as a taking or damaging under eminent domain.[6] In many of these cases, language such as "nuisance", "negligence", and "trespass" are used; however, the action is held ultimately to be a taking or damaging and the remedy just compensation. Generally, where the interference would be actionable between private parties, it constitutes a taking or damaging, however, it has been held that a public agency may be liable even though there would be no liability between private parties.[7] The owner is not entitled to injunctive relief or abatement but is entitled to just compensation for the permanent taking of the right to continue the interference and the state agency acquires the right to continue the flooding, diversion, ponding, or other interference with the waters.[8] In addition, where there is an actual physical taking, water damage is generally to be considered as an element of damage to the remainder.[9] In order to determine a highway department's liability with respect to interference with waters, it is necessary to examine the basic law of that state concerning liability for interference with the various categories of waters. It is realized that in many instances states may have statutes which have a particular bearing on highway drainage, however, these instances will be dealt with only as reflected by the cases.

SURFACE WATERS

In order to deal with the problems raised by the disposition of surface water drainage, American courts have adopted two positions which, in their extreme forms, are completely opposed. One group holds what has come to be known as the "common enemy" or "common law" doctrine. This doctrine briefly holds that each landowner is entitled to take any desired action on his own land to dispose of surface water without liability for damage to his neighbors.[10] The other group follows the rule of the civil law which holds that adjoining landowners are entitled to have the normal course

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[6] Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317 (1885); Logan Co. v. Adler, 69 Colo. 290, 296, 194 Pac. 621 (1920); Gwinnett Co. v. Allen, 56 Ga.App. 756, 194 S.E. 38 (1937); Covington v. Parsons, 258 Ky. 22, 79 S.W.2d 353 (1935); Gledhill v. State, 123 Neb. 726, 243 N.W. 909 (1932); Okla. SHC v. Horn, 187 Okla. 605, 105 P.2d 234 (1940); Milhous v. S.H. Dept., supra; State v. Hale, 136 Tex. 29, 146 S.W.2d 731 (1941); Nichols on Eminent Domain, Sec. 6.23 (3); 18 Am.Jur., Eminent Domain, Sec. 134; Braswell v. SHC, 108 S.E.2d 912.

[7] Milhous v. S.H. Dept., 194 S.C. 33, 8 S.E.2d 852 (1940); Colusa & H.R. Co. v. Leonard, 176 Cal. 109, 167 Pac. 878 (1917).

[8] U.S. v. Crest, 243 U.S. 316, 61 Led. 76, 37 Sup.Ct. 380 at 385 (1916): stating that "Where the damage is so affected by highway purposes to amount to a taking, and the owner is not entirely deprived of the enjoyment of his land, the fee will stay in the landowner, but upon the payment of the judgment by the state, a flowage easement to the land will pass to the public authority." Braswell v. SHC, supra.

[9] Braswell v. S.H. and Public Works Comm., 108 S.E.2d 912 (N.C., 1959); Bennett v. County of Eaton, 65 N.W.2d 798 (Mich., 1954); Swank v. Plat County, 40 S.W.2d 863 (Neb., 1950).

[10] Tuscon v. Dunseath, 15 Ariz. 355, 139 Pac. 177 (1914); Turner v. Smith, 217 Ark. 441, 231 S.W.2d 110 (1950); Tide-Water Oil Sales Corp. v. Shimelman, 114 Conn. 182, 158 Atl. 229 (1932); U.S. v. Shapiro, Inc., 92 App.D.C. 91, 202 F.2d 459 (1953); Hamilton v. County of Hawaii, 40 Hawaii 193 (1953); Gwinn v. Myers, 234 Ind. 560, 129 N.E.2d 225 (1955); Goering v. Schrag, 167 Kan. 499, 207 P.2d 391 (1949) as to urban land; Greeley v. Maine Cent. R. Co., 53 Me. 200 (1865); Miller v. Darby, 143 N.E.2d 816 (Mass., 1957); Palmer v. Massengill, 214 Miss. 379, 58 So.2d 918 (1952); Happy v. Kenton, 362 Mo. 1156, 247 S.W.2d 698 (1952); O'Hare v. Johnson, 116 Mont., 410, 153 P.2d 888 (1944); Snyder v. Platte Valley Public Power & Irrig. Dist., 144 Neb. 308, 13 N.W.2d 160 (1944); Bennett v. Cupina, 253 N.Y. 436 171 N.E. 698 (1930); Henderson v. Hines, 48 N.D. 152, 183 N.W. 531 (1921); Lundsford v. Stewart, 95 Ohio App. 383, 120 N.E.2d 136 (1953) as to urban areas; King v. Cade, 205 Okla. 666, 240 P.2d 88 (1951); Chamberlain v. Ciaffoni, 373 Pa. 430, 96 A.2d 140 (1953) as to urban property; Deason v. Southern Railroad Co., 142 S.C. 328, 140 S.E. 575 (1957); Mason v. Lamb, 189 Va. 348, 53 S.E.2d 7 (1949); DeRuwe v. Morrison, 28 Wash.2d 797, 184 P.2d 273 (1947); Lamm v. Milwaukee 85 N.W.2d 349 (Wis., 1957).

of natural drainage maintained with the lower owner bound to accept and dispose of the water which naturally comes to his land from above.[11]

Each doctrine has both advantages and disadvantages and has generally been modified to some extent to minimize the disadvantages. In addition, a few jurisdictions have abandoned both of the traditional rules and have adopted a rule of "reasonable use" under which the landowner in dealing with surface waters is entitled to take such steps as are reasonable in the light of all the circumstances.

The common enemy doctrine has the advantage of permitting the free improvement of property with the disadvantage that it is likely to promote drainage contests. The civil law doctrine, on the other hand, although it avoids such contests, has a tendency to preclude proper improvement of property.

Common Law Rule or Common Enemy Doctrine

In its extreme form, the common enemy doctrine or common law rule holds that as an incident to his right to use his own property as he pleases, each landowner has an unqualified right by operations on his own land to fend off surface waters as he sees fit without concern for the consequences to other landowners who have the duty and right to protect themselves in the same manner. The doctrine appears to have had its inception in Massachusetts. One of the leading cases was Gannon v. Hargadon[12] which held that the defendant had a right to alter ruts on his property in such a manner that surface water was diverted to plaintiff's property. The court held that the right of a landowner to occupy and improve his property by changing the surface or putting structures thereon was not restricted or modified by the fact that the land was so situated that the improvement would cause surface water either to stand in unusual quantities on adjacent land or pass onto and over the other lands in greater quantities or in other directions than the water was accustomed to flow, and that it was immaterial whether the result of defendant's act was to prevent the water from coming on his land at all or to turn it off in a new course after it had entered.

The original common enemy doctrine has been considerably qualified in more recent decisions and it is unlikely that any court today would apply it in its original form. However, it appears to be the basis of decisions in many jurisdictions.[13]

Probably the most common modification of the common enemy doctrine is that the action taken by the property owner must be without malice or negligence.[14] Other jurisdictions have stated that the action must not unreasonably or unnecessarily injure the neighbor's land.[15] At least one jurisdiction has modified the rule so that the owner

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[11] Kay-Noojin Dev. Co. v. Hackett, 253 Ala. 588, 45 So.2d 792 (1950); So. Pac. Co. v. Proebstel, 61 Ariz. 412, 150 P.2d 81 (1944); Kallens v. Orange Co., 129 Cal.App.2d 255, 276 P.2d 886 (1954); Rinzler v. Folsom, 209 Ga. 549, 74 S.E.2d 661 (1953); Loosli v. Heseman, 66 Idaho 469, 162 P.2d 393 (1945); Turkey v. Arnold, 384 Ill. 158, 51 N.E.2d 176 (1943); Cundiff v. Kopseiker, 245 Iowa 179, 61 N.W.2d 443 (1953); Goering v. Schrag, supra; Gott v. Franklin, 307 Ky. 466, 211 S.W.2d 680 (1948); Elam v. Cortinas, 219 La. 406, 53 So.2d 146 (1951); Kennedy-Chamberlain Dev. Co. v. Shure, 212 Md. 369, 129 A.2d 142 (1957); Bennett v. Eaton Co., 340 Mich. 330, 65 N.W.2d 794 (1954); Palmer v. Massengill, supra.; Martinez v. Cook, 56 N.Mex. 343, 244 P.2d 134 (1952); Johnson v. Winston-Salem, 239 N.C. 697, 81 S.E.2d 153 (1954); Lunsford v. Stewart, supra.; Garrett v. Haworth, 183 Okla. 569, 83 P.2d 822 (1938); Wellman v. Kelly & Harrison, 197 Ore. 553, 252 P.2d 816 (1953); Lucas v. Ford, 363 Pa. 153, 69 A.2d 114 (1949) as to rural areas; Kougi v. Curry, 73 S.D. 427, 44 N.W.2d 114 (1950); Slatten v. Mitchell, 22 Tenn.App. 547, 124 S.W.2d 310 (1932); Blocher v. McArthur 303 S.W.2d 529 (Tex. Civ. App., 1957); Beard v. Murphy, 37 Vt. 99, 86 Am.Dec. 693 (1864).

[12] 92 Mass. (10 Allen) 106, 87 Am.Dec. 625 (1865).

[13] Note footnote 11, supra.

[14] O'Hare v. Johnson, supra.

[15] Synder v. Platte Valley Public Power & Irrig. Dist., supra; Turner v. Smith, supra.

interfering with the drainage may not cause a nuisance.[16] The language "wantonly, unnecessarily, or carelessly and in bad faith" has also been used.[17]

Damming Back Water.—A situation which can arise in highway construction, but which is generally avoided by the installation of adequate culverts, is the construction of a fill so as to dam back and cast on the upper owner surface water which would normally drain down and across his land. The common enemy doctrine in its unmodified form authorizes this action without liability.[18] Under various modifications of the common enemy doctrine, the right to dam against surface waters has been substantially limited. It has been held that if the damming is unnecessary (i.e., a different method may be employed at no greater expense), liability may be incurred by the damming and casting waters on the upper owner.[19] It has also been held that the casting back or damming of waters must be reasonable and with due regard for the rights of others.[20] It has also been limited in that a landowner has no right to obstruct a natural watercourse.[21] However, watercourses will subsequently be treated separately. In some cases with regard to surface water, watercourse has been broadly defined to mean any ditch, swale or gully carrying surface water.

Augmenting Natural Drainage.—Under the common enemy or common law doctrine, even as modified, there seems to be little doubt that an owner of upper land acting in the reasonable use of his property and without negligence may augment the flow of surface waters to the land below, either by increasing the volume or by changing the mode of flow.[22] Apparently under the common law or common enemy rule, property owners may both accelerate and divert the flow of surface waters.

Collecting and Discharging Water.—It has usually been held that the traditional common enemy rule states that an upper landowner ordinarily has no right to artificially collect surface waters and discharge them in a mass on the lower proprietor to the latter's damage.[23] This is certainly so where there is any negligence involved in the concentration and discharge of surface waters.[24] It appears that in this area the common enemy and civil law rules are most alike. A number of common enemy doctrine jurisdictions or modifications thereof have held that the collection, concentration and discharge of surface waters on a lower owner is unlawful.[25]

Civil Law Rule

Completely opposed to the common enemy or common law rule is the extreme civil law rule which recognizes a natural servitude of natural drainage as between adjoining lands so that the lower owner must accept the surface water which naturally drains onto his land, but on the other hand, the upper owner can do nothing to change the natural system of drainage so as to increase the natural burden.[26] The reason this rule is called the civil law rule is that it apparently had its inception in the Roman law. The basis for the rule is that those purchasing or otherwise acquiring land should accept it subject to the burdens of natural drainage and is founded on the fact that water runs downhill.

The rule has the advantage that a property owner's rights are predictable. Its tendency to inhibit the development and improvement of land is its greatest drawback. As with the common enemy or common law rule, the basic rule has been greatly modified;

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[16] Deeson v. Southern Railroad Co., supra; Garmoney v. Southern Railroad Co., 152 S.C. 205, 149 S.E. 765 (1929).
[17] Mason v. Land, 189 Va. 348, 53 S.E.2d 7, 12 A.L.R.2d 1332 (1949).
[18] Watts v. Evansville NT. C. and N.R. Co., 191 Ind. 27, 129 N.E. 315 (1920).
[19] Holeman v. Richardson, 115 Miss. 169, 76 So. 136 (1917).
[20] Haskins v. Felder, 270 P.2d 960 (Okla., 1954).
[21] Capes v. Barger, 1123 Ind.App. 212, 109 N.E.2d 725 (1953).
[22] Callins v. Orange Co., 129 Cal.App.2d 255, 276 P.2d 886 (1954).
[23] Routka v. Rzegocki, 132 Conn. 319, 43 A.2d 658 (1945).
[24] Bussell v. McClellan, 155 Neb. 875, 54 N.W.2d 81 (1952).
[25] Ricenbaw v. Kraus, 157 Neb. 723, 61 N.W.2d 350 (1953).
[26] Annot., Surface waters, drainage, etc., 59 A.L.R.2d 429.

however, it appears to serve as a foundation for surface drainage law in a number of jurisdictions.[27]

Because under a strict interpretation of the civil law rule, almost any use of property is likely to cause a change in the natural drainage which may cause damage to an adjoining owner, the courts have shown considerable tendency to modify the rule in some respects so as to permit a reasonable use of land. A number of jurisdictions have accepted the modification of reasonable use and have avoided liability where the use was reasonable and where there was no negligence involved.[28]

Even the states adhering more strictly to the rule have modified it to the extent that water may be accelerated but not diverted.[29]

Acceleration and diversion are probably the two most common problems arising out of highway construction. The paving of a road naturally accelerates the flow of water, and it is difficult to construct highways so that all water continues to flow in the same direction without the introduction of new drainage areas. Some jurisdictions have modified the civil law rule even to the extent of adopting the common law rule as to urban property.[30]

Damming Back Water.—The civil law rule, at least before modification, appears to forbid the lower owner from damming back the natural flow of surface water.[31] This seems to follow, of course, from the theory that the lower owner must accept the surface water naturally flowing on him. However, it appears that a lower owner has the right to dam back water or artificial drainage which has been unlawfully thrown upon him.[32] In addition, it has been held that a governmental agency in constructing public improvements might validly exercise police power to obstruct such flow without making compensation and that the construction of improvements along a stream for the purpose of flood control was within the police power.[33]

An exception to the rule that the damming back of water may not be tolerated under the civil law rule has been applied where the damming back is occasioned by the change or establishment of a grade of a street by a municipality.[34] This is particularly so where there is no negligence in the construction of the street. However, it is not the universal rule and a number of cases hold a municipality liable for interfering with the flow of surface water by grading a street.[35]

Augmenting Natural Drainage.—The rule appears to be generally that under the civil law natural drainage may be augmented as the rule is now modified. In other words, surface waters may be accelerated and increased in volume so long as no additional areas are tapped from which surface waters otherwise would not have flowed.[36] This tapping of additional watershed areas is generally referred to as a diversion and is generally prohibited in civil law jurisdictions. It has also been held that an upper proprietor may drain his land into a natural watercourse without liability to a lower proprietor for resulting damages, although the effect is to throw the surface water in somewhat increased volumes on the lower owner.[37] Several jurisdictions have held that an upper proprietor must act with reasonable consideration for the rights of the lower landowner and not cause unusual or unreasonable amounts of water to be emptied

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[27] Note the cases in footnote 11.

[28] Monarten v. Jet, 12 La. 501, 32 Am.Dec. 120 (1838); Ratcliff v. Indian Hills Acres, Inc., 93 Ohio App. 231, 113 N.E.2d 30 (1952).

[29] Braswell v. SHC, 250 N.C. 508, 108 S.E.2d 912.

[30] Timmons v. Clayton, 222 Ark. 327, 259 S.W.2d 501 (1953).

[31] Turner v. Hopper, 83 Cal.App.2d 215, 188 P.2d 257 (1948).

[32] Hancock v. Stull, 206 Md. 117, 110 A.2d 522)1955).

[33] O'Hara v. L. A. County Flood Control District, 19 Cal.2d 61, 119 P.2d 23 (1941).

[34] Hume v. Des Moines, 146 Iowa 624, 28 A.L.R. (NS) 126, 125 N.W. 846 (1910); Globe v. Marino, 23 Ariz. 124, 202 Pac. 230 (1921).

[35] McNinch v. Columbia, 128 S.C. 54, 122 S.E. 403 (1924); Jeffersonville v. Myers, 2 Ind.App. 532, 28 N.E. 999 (1891); Milhous v. S.H. Dept., supra; Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317 (1885).

[36] Callins v. Orange Co., 129 Cal.App.2d 255, 276 P.2d 886 (1954).

[37] Holeman v. Richardson, 115 Miss. 169, 76 So. 136 (1917).

on the lower land.[38] Generally, surface waters may be accelerated but not diverted. By diverted, it is generally meant additional watersheds tapped or drained on the lower owner or surface water discharged on the owner at a different point from that which it was previously discharged.

Collecting and Discharging Water.—The civil law rule here appears to be generally consistent with the common law or common enemy rule in that a property owner may not artifically collect surface waters and discharge them in mass on the lower proprietor to the latter's damage.[39] In other words, an upper landowner in the proper improvement of his land may, to some extent, augment or concentrate the natural drainage but he may not gather the surface waters artifically and dump them on the property below to its injury. It has been held that not only the amount of water caused to flow on the lower land, but the manner of collection and release and the intermittent increase in volume or destructive force or its direction to a more vulnerable point of invasion are important.[40]

Rule of Reasonable Use

A few jurisdictions, recognizing the undesirability of applying either the common enemy doctrine or the civil law rule in its rigid or extreme form, have evolved a rule of reasonable use which attempts to determine the rights of the parties with respect to the disposition of surface waters by an assessment of all the relevant factors.[41] Such an approach has flexibility and avoids the harsh results which may be reached under extreme application of the other rules. The rights of the parties are ordinarily regarded as involving issues of fact for the jury, and the predictability of liability is generally poor.

The reasonable use rule may be stated as follows: "Where the interference with surface waters results in an invasion of a neighbor's interest in the use and enjoyment of his land, an action may lie where the invasion, if unintentional, was negligent, reckless or ultrahazardous, or, if intentional, where the invasion was unreasonable on weighing the gravity of the harm caused against the utility of the conduct complained of."[42] Other jurisdictions have reached the rule of reasonable use by progressive modification of the common enemy doctrine. In some cases, the civil law or common enemy doctrine have been so substantially modified, although not expressly rejected, as to approach the rule of reasonable use.[43]

WATERCOURSES

A body of law has evolved concerning watercourse which is of concern to highway engineers and lawyers because it is often necessary to bridge streams, change channels and in some way either interfere with or alter such watercourses. Watercourses are divided into two types—natural and artificial.

Natural Watercourses

"The term watercourse is frequently defined as a stream of water flowing in a definite direction or course in a bed with banks." This definition is for most purposes sufficient but a too strict adherence to it has caused confusion in some cases. A some-

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[38] Levine v. Salem, 191 Ore. 182, 229 P.2d 255 (1951); Lucas v. Ford, 263 Pa. 153, 69 A.2d 114 (1949); Turner v. Hopper, supra; Studer v. Dashner, 242 Iowa 1340, 49 N.W.2d 859 (1951); Wallace v. Snyder, 310 Ky. 17, 219 S.W.2d 977 (1949).

[39] Rudker v. Rzegocki, supra; Tide Water Oil Sales Corp. v. Shimelman, 114 Conn. 182, 158 Atl. 229 (1932); Ricenbaw v. Cross, supra.

[40] Ricenbaw v. Cross, supra; Phillips v. Chesson, 231 N.C. 566, 58 S.E.2d 343 (1950); Martin v. Jett, supra.

[41] Restatement of Torts, Sec. 833.

[42] Restatement of Torts, Sec. 833; Bassett v. Salisbury Manfg. Co., 43 N.H. 569, 82 Am.Dec. 179, (1862).

[43] Bush v. Rochester, 191 Minn. 591, 255 N.W. 256 (1934); Henderson v. Tulahan, 226 Minn. 163, 32 N.W.2d 286 (1948); Johnson v. Agrabeck, 247 Minn. 432, 77 N.W.2d 539 (1956); Hopler v. Morris Hills Regional Dist., 45 N.J.Super. 409, 133 A.2d 336 (1957); Whitman v. Farney, 181 Md. 652, 31 A.2d 630 (1943); Lunsford v. Stewart, supra.

what similar definition of a watercourse is a channel with banks and bed and running water. According to another definition, the distinguishing characteristic of a watercourse is the existence of a stream of water flowing for such a length of time that its existence will furnish the advantages usually attendant on streams of water. It is a condition created by a stream having a well-defined and substantial existence.[44] The term watercourse is applied only to inland streams. Watercourses as herein considered should be distinguished from natural channels or drainways for the drainage of surface waters. Various rights are attached to watercourses, and interference therewith by highway departments may give rise to complaint. As we have seen, certain immunity may attach to governmental agencies in the change of grade and construction of highways with regard to surface waters. However, it appears with regard to watercourses that a highway department stands on the same footing as a private property owner.[45]

In addition to interference with the flow of water so as to throw it on another property, the general principle of the law of water (subject to certain exceptions and modifications) that a riparian proprietor has the right to have the water of the stream flow by or through his premises in its natural mode, course and volume, should be considered.[46]

Channel Change.—A landowner (and a state highway department would stand on the same footing as a landowner) has the right to divert or change the course of a stream flowing through his land provided he returns it to its original or natural channel before it reaches the land of the lower owner.[47] The right to change the course of superabundant water is no less certain than the right to change to course of an ordinary stream.[48] One who changes the course of a stream must do so in such manner as not to injure or interfere unduly with the rights of the adjoining property owners, either above or below or on the opposite side of the stream. Thus, he must not by changing the direction of the flow of the stream so increase or diminish its velocity as to cause damage to the land of the adjoining property owners or impair their rightful use of the stream, nor can he make any change or division of the stream although on his own land which would cause the washing of mud and debris on the land of his neighbor.[49] Without regard to negligence, the riparian owner, who diverts the waters of a natural stream from its accustomed channel and causes them to flow on the lands of another owner, is liable for resulting damages.[50] Also, one may not alter the channel of the stream so as to accelerate the flow and injure an adjoining property.[51] One who, for his own purposes, changes the course of a stream must use due care to provide the stream with a new channel of sufficient capacity to carry off, not only the ordinary flow of water, but also such high waters as may be reasonably anticipated.[52]

Deflection of Current.—One cannot interfere with the flow of a stream so as to deflect the current and cast it directly against the banks of a lower owner resulting in the

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[44] Chicago, R.I. and P.R. Co. v. Groves, 20 Okla. 101, 93 Pac. 755; Simmons v. Winters, 21 Ore. 35, 27 Pac. 7.

[45] 25 Am.Jur. Highways, Section 91.

[46] United States v. Crest, 243 U.S. 316, 61 L.Ed. 746, 37 Sup. Ct. 380; Cole v. Bradford, 52 Ga.App. 854, 184 S.E. 901; Straton v. Mt. Hermon Boys School, 216 Mass. 83, 103 N.E. 87; Townsend v. McDonald, 12 N.Y. 381, 64 Am.Dec. 508.

[47] Cook v. Seaboard Air Line R. Co., 107 Va. 32, 57 S.E.564; Mentone Irrig. Co. v. Redlands Electric Light & P. Co., 155 Cal. 323, 100 Pac. 1082; Dillings v. Murray, 6 Ind. 324, 63 Am.Dec. 385; Missouri P.R. Co. v. Keys, 55 Kan. 205, 40 Pac. 275.

[48] Cook v. Seaboard Air Line R. Co., supra.

[49] Kay v. Kirk, 76 Md. 41, 24 Atl. 326; Atchinson, T. & S.F.R. Co. v. Hadley, 168 Okla. 588, 35 P.2d 463.

[50] McKee v. Nebraska Gas & E. Co., 110 Neb. 137, 193 N.W. 106; Hartshorn v. Chaddock, 135 N.Y. 116, 31 N.E. 997.

[51] Mullen v. Lake Drummond Canal & Water Co., 130 N.C. 496, 41 S.E. 1027; Mentone Irrig. Co. v. Redlands Electric Light & P. Co., 155 Cal. 323, 100 Pac. 1082; Gilson v. Delaware & H. Canal Co., 65 Vt. 213, 26 Atl. 70.

[52] Willson v. Boise City, 20 Idaho 133, 117 Pac. 115; Garrett v. Beers, 97 Kan. 255, 155 Pac. 2.

washing away or destruction of a portion of his land.[53] Liability for deflecting a current to the injury of a lower proprietor may be incurred by the construction of a bridge or pier in the river. The injury, however, must be one that could reasonably have been foreseen.[54]

Acceleration.—Generally an upper owner has no right to accelerate the flow or current of a natural watercourse or to increase the volume to the injury of a lower owner.[55] The rule has been applied where the acceleration is caused by deepening the channel or removing natural obstructions therefrom. There are cases to the contrary, however, that hold that a stream may be accelerated or the volume increased if improvements are reasonably necessary for the utilization and enjoyment of riparian rights in the stream or for the protection of the owner's property.[56] The right to construct and maintain embankments and structures in and along watercourses to facilitate their use is generally subject to the paramount right of riparian owners to have the stream flow in its natural mode and manner without undue acceleration or increase in volume.

Obstruction and Detention.—As already seen, a riparian owner has the right annexed to his land to have the water of a stream flow to and from his land as it usually flows so far as is consistent with the right of other owners to make a reasonable use of such water. It follows that the obstruction of the natural flow of a stream is always done at the risk of being answerable in damages to an owner who sustains a loss thereby. An upper owner has no right unreasonably to interrupt or to retard the natural flow of water to the injury of lower owners,[57] nor has a lower owner the right to throw the water back on the upper owners unless he has acquired the right to do so by grant, license, prescription, prior appropriation or an exercise of the power of eminent domain.[58] The obstruction of a natural stream in such manner or to such extent as to infringe on the rights of others or to injure their property has frequently been held to constitute a nuisance.[59]

Liability for the obstruction of a stream by debris or drift may arise from the placing or leaving of such debris in or along the stream or from the erection and maintenance of structures causing an accumulation of such debris or otherwise interfering with the flow of the stream.[60] One who erects in the stream such a structure which will likely result in damage to another is chargeable with negligence and if the current of the stream becomes so obstructed by reason of such structure being washed down that the water therein is diverted from its ordinary channel and destroys the property of another, the person erecting the structure will be liable in damages.

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[53] Fowler v. Wood, 73 Kan. 511, 85 Pac. 763; Morton v. Oregon Short Line R. Co., 48 Ore. 444, 87 Pac. 151.

[54] De Baker v. Southern California R. Co., 106 Cal. 257, 39 Pac. 610; Lehigh Bridge Co. v. Lehigh Coal & Nav. Co., 4 Rawle (Pa.) 8, Am.Dec. 111.

[55] Stein v. Burden, 29 Ala. 127, 65 Am.Dec. 394; Grant v. Kuglar, 81 Ga. 637, 8 S.E. 878; Kamm v. Normand, 50 Ore. 9, 91 Pac. 448; Jones v. Conn., 39 Ore. 30, 64 Pac. 855, 65 Pac. 1068.

[56] San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 Pac. 554, holding that the right to hasten the drainage along a watercourse is not limited to the natural capacity of the stream so as to entitled a lower riparian owner to damages in case his land is flooded by the increased flow of the water.

[57] Parker v. Griswold, 17 Conn. 288, 42 Am.Dec. 739; O'Connell v. East Tennessee, V. & G. R. Co., 87 Ga. 246, 13 S.E. 489; Evans v. Merriweather, 4 Ill. 492, 38 Am.Dec. 106; Whitney v. Wheeler Cotton Mills, 151 Mass. 396, 24 N.E. 774; Clinton v. Myers, 46 N.Y. 511, 7 Am.Rep. 373; Rhodes v. Whitehead, 27 Tex. 304, 84 Am.Dec. 631.

[58] Kroeger v. Twin Buttes R. Co., 13 Ariz. 348, 114 Pac. 553; Parker v. Griswold, supra; Grant v. Kiglar, 81 Ga. 637, 8 S.E. 878; Heith v. Williams, 25 Me. 209, 43 Am.Dec. 265; Mullen v. Lake Drummond Canal & Water Co., supra; Davis v. Fuller, 12 Vt. 178, 36 Am.Dec. 334; Rhodes v. Whitehead, supra.

[59] Farris v. Dudley, 78 Ala. 124, 56 Am.Rep. 24; Ogletree v. McQuaggs, 67 Ala. 580, 42 Am.Rep. 112; Baltzeger v. Carolina Midland R. Co., 54 S.C. 243, 32 S.E. 358; Mohr v. Gault, 10 Wis. 513, 78 Am.Dec. 687.

[60] Goble v. Louisville & N.R. Co., 187 Ga. 243, 200 S.E. 259; Williams v. Columbus Producing Co., 80 W.Va. 683, 93 S.E. 809.

Artificial Waterways

Artificial watercourses are just what the name implies—watercourses which are man-made and not natural. They cover such a wide variety of conduits (canals, drains, sewers, irrigation ditches, waterworks, flumes, etc.) that it is difficult to make any general statement concerning them. However, it might be said that they are generally constructed under some particular property right (easement, for example), and each will require examination on its own merits. Under certain circumstances, an artificial watercourse may take on the aspects of a natural watercourse, and where this occurs, the same principles apply.[61]

SUBTERRANEAN WATERS

Subterranean waters are generally divided into two classes—percolating waters and flowing streams. Generally unknown and undiscoverable streams are governed by the same rules as those applied in the case of percolating waters.[62] Underground bodies or accumulations of water other than flowing streams, such as reservoirs or artesian basins, are generally classified and treated as percolating waters.[63]

Percolating Waters

Percolating waters in the strict sense of the word are generally defined as those which ooze, seep, filter or percolate through the ground under the surface without a definite channel.[64] The term has also been used in a more comprehensive sense as including veins, riverlets or other streams which flow in a course that is uncertain or unknown and not discoverable from the surface without excavation for that purpose, as well as other underground accumulations such as lakes and artesian basins. As with surface water, two rules have developed with regard to the diversion or interference with percolating waters. These are the so-called "English" or "common law" rule and the "American" or "correlative rights" rule.

English Rule.—In England where the question first arose, the view was taken that the ownership and control of land applied to and included the percolating waters therein and consequently that any obstruction or diversion thereof by the owner or occupant of land incident to the use thereof to the injury of an adjoining or neighbor owner or occupant was at least in the absence of negligence or malice not actionable at law. This rule was followed in many of the earlier cases in this country and probably still prevails in a majority of jurisdictions.[65] The rule, in its extreme, is stated in Pixley v. Clark,[66] as follows:

> An owner of the soil may divert percolating water, consume or cut it off, with impunity. It is the same as land, and cannot be distinguished in law from land. So the owner of the land is the absolute owner of the soil and of percolating water, which is a part, and not different from, the soil. No action lies against the owner for interfering with or destroying percolating or circulating water under the earth's surface.

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[61] 66 Am. Jur., Waters, Sec. 151.

[62] Subterranean Waters, 29 A.L.R. 1357.

[63] Ibid.

[64] Subterranean Waters, 29 A.L.R.2d 1357 and 1358, Sec. 3.

[65] Roath v. Driscoll, 20 Conn. 533, 52 Am.Dec. 352 (1850); Saddler v. Lee, 66 Ga. 45, 42 Am.Rep. 62 (1880); Edwards v. Haeger, 180 Ill. 99, 54 N.E. 176 (1889); New Albany & S.R. Co. v. Peterson, 14 Ind. 112, 77 Am.Dec. 60 (1860); Chesley v. King, 74 Me. 164, 43 Am.Rep. 569 (1882); Western Maryland R. Co. v. Martin, 110 Md. 554, 73 Atl. 267 (1909); Greenleaf v. Francis, 18 Pick 117 (Mass., 1836); Schenk v. Ann Arbor, 196 Mich. 75, 163 N.W. 109 (1917); Mosier v. Caldwell, 7 Nev. 363 (1872); Pixley v. Clark, 35 N.Y. 520, 91 Am.Dec. 72 (1866). But note: Forbell v. New York, 164 N.Y. 522, 58 N.E. 644 (1900); Frazier v. Brown, 12 Ohio St. 294 (1861); Zimmerman v. Union Paving Co., 335 Pa. 319, 6 A.2d 901 (1939); Tennessee Electric Power Co. v. Van Dodson, 14 Tenn. App. 54 (1931); Houston & T.C.R. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904); Herriman Irrig. Co. v. Keel, 25 Utah 96, 69 Pac. 719 (1902); White River Chair Co. v. Connecticut River Power Co., 105 Vt. 24, 162 Atl. 859 (1932); Huber v. Merkel, 117 Wis. 355, 94 N.W. 354 (1903).

[66] 35 N.Y. 520, 91 Am.Dec. 72 (1866).

American Rule.—In other jurisdictions in this country, a different view has been taken.[67] This rule is known as the doctrine of correlative rights or the American rule and imposes on the English rule the limitation or qualification that in order to be immune from liability for the obstruction or diversion, the activity or conduct must be a reasonable exercise of a proprietary right. The rule has been well stated in Cason v. Florida Power Company, [68] as follows: "The property rights relative to the passage of waters that naturally percolate through the land of one owner to and through the land of another owner are correlative; and each landowner is restricted to a reasonable use of his property as it affects subsurface waters passing to or from the land of another." Under this rule what is a reasonable use, as with the reasonable use surface water rule, is ordinarily a mixed question of law and fact to be submitted to the jury under instructions of the court.[69]

Under the doctrine of correlative rights or the American rule, the owner or occupant of land is not precluded from utilizing it for any lawful and proper purpose for which it is adapted without liability for incidental interference with the water, but he is required to exercise his rights in such a way that he does not unreasonably or unnecessarily obstruct or divert water to the injury of neighboring owners.

In California, however, the doctrine has been caried to the extent of imposing liability for any interference which deprives another of his equitable share of the water even in the reasonable use of one's own land.[70]

The question of injuries to springs and wells by the use of explosives in highway construction often arises. In some jurisdictions, liability must be predicated on the negligent use of explosives;[71] however, in a number of instances, liability is predicated on the use of explosives in the absence of negligence on the theory that it is an ultrahazardous activity.[72]

Underground Streams

Subterranean waters which flow in a fixed or definite channel are for many purposes classified and characterized as streams as distinguished from percolating waters, although, as previously pointed out, percolating water is sometimes used in a comprehensive sense as including streams, the course or existence of which is unascertainable from surface indications.

The question of liability for obstruction and diversion of a subterranean stream by the use of one's own property depends primarily upon whether the existence or course of the streams are known or ascertainable from surface indications. If they are ascertainable, liability is determined ordinarily by the rules applicable in the case of

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[67] O'Leary v. Herbert, 5 Cal.2d 416, 55 P.2d 834 (1936); Sloss-Sheffield Steel & Iron Co. v. Wilkes, 231 Ala. 511, 165 So. 764 (1936); Labruzzo v. Atlantic Dredging & Constr. Co., 54 So.2d 673 (Fla., 1951); Barclay v. Abraham, 121 Iowa 619, 96 N.W. 1080 (1903); Sycamore Coal Company v. Stanley, 292 Ky. 168, 166 S.W.2d 293 (1942); Stillwater Co. v. Farmer, 89 Minn. 58, 93 N.W. 907 (1903); Ryan v. Quinlan, 45 Mont. 521, 124 Pac. 512 (1912); Swett v. Cutts, 50 N.H. 439, 9 Am.Rep. 276 (1870); Meeker v. East Orange, 77 N.J.L.J. 623, 74 Atl. 379 (1909); Forbell v. New York, supra; Rouse v. Kinston, 188 N.C. 1, 123 S.E. 482 (1924); Canada v. Shawnee, 179 Okla. 53, 64 P.2d 674 (1936); Couch v. Clinchfield Coal Corp., 148 Va. 455, 139 S.E. 314 (1927); Evans v. Seattle, 182 Wash. 450, 47 P.2d 984 (1935); Drummond v. White Oak Fuel Co., 104 W.Va. 368, 140 S.E. 57 (1927).

[68] 74 Fla. 1, 76 So. 535 (1917).

[69] Bassett v. Salisbury Mfg. Co., 43 N.H. 569, 82 Am.Dec. 179 (1862).

[70] Evans v. Seattle, 182 Wash. 450, 47 P.2d 984 (1935); O'Leary v. Herbert, 5 Cal.2d 416, 55 P.2d 834 (1936); Eckle v. Springfield Tunnel & Development Co., 87 Cal.App. 617, 262 Pac. 425 (1927).

[71] McGeorge v. Henry, 193 Ark. 443, 101 S.W.2d 440 (1937); Ingram v. Great Lakes Pipe Line Co., 153 S.W.2d 547 (Mo.App., 1941); Dellinger v. Skelley Oil Co., (1951 Tex.Civ.App.) 236 S.W.2d 675.

[72] Richard v. Kaufman, 47 F.Supp. 337 (D.C. Pa., 1942); Patrick v. Smith, 75 Wash. 407, 134 Pac. 1076 (1913).

surface streams;[73] but if unknown or unascertainable, by the rules applicable in the case of percolating waters.[74] As a general rule, when one discovers the existence or location of an underground stream while making an excavation, liability for any injurious obstruction or diversion of the stream by acts done thereafter depends upon whether or not such acts were reasonable under the peculiar and particular circumstances.[75]

OCEAN AND TIDEWATERS

One final category of waters which we have not dealt with is that of ocean and tidewaters. There seems to be very little law on interferences, obstruction, or diversion of ocean waters, probably because the constructions of man have little effect upon the tides. There is, however, at least one North Carolina case[76] dealing with this subject in which it was alleged that the Highway Commission constructed a highway on a fill near the coast and that during a hurricane waters from the ocean overflowed the land and the highway acted as a dam causing flooding of certain properties. Upon a demurrer, the court held that the property owner had stated a cause of action and, applying the civil law rule, equated ocean waters, which had escaped, to surface waters. This is a somewhat peculiar holding in that the civil law rule grew partially out of the fact that surface waters naturally flow downhill. This, of course, is not the case with hurricane wind driven ocean waters.

In conclusion, the author recognizes that this is a very generalized summary of the law relating to waters and considerable work needs to be done, particularly in relation to statutory laws of the various jurisdictions, the remedies of injured owners, and the peculiar immunities and liabilities of highway departments; however, it is hoped that it will serve some useful purpose.

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[73] Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. 780 (1896); Sadler v. Lee. 66 Ga. 45, 42 Am.Rep. 62 (1880); Wyandot Club v. Sells, 6 Ohio N.P. 64, 9 Ohio Dec.N.P. 106 (1898); Hayes v. Adams, 109 Ore. 51, 218 Pac. 933 (1923); Clinchfield Coal Corp v. Compton, 148 Va. 437, 139 S.E. 308 (1927).

[74] Labruzzo v. Atlantic Dredging & Constr. Co., supra; Sycamore Coal Co. v. Stanley, 292 Ky. 168, 166 S.W.2d 293 (1942); Vanderbilt v. State, 159 Misc. 586, 288 N.Y.S. 554 (1936); Halderman v. Bruckhart, 45 Pa. 514, 84 Am.Dec. 511 (1863).

[75] Labruzzo v. Atlantic Dredging & Constr. Co., supra.

[76] Midgett v. North Carolina State Highway Comm'n., 260 N.C. 241, 132 S.E.2d. 599 (1963).

The Effect of Zoning on Valuation in Eminent Domain

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•APPRAISERS, right-of-way personnel and attorneys must understand the legal effect of zoning in eminent domain in order properly to evaluate, investigate, negotiate or litigate condemnation-zoning cases. It is particularly important that they discover and evaluate the kind of evidence which will be accepted by the courts if the case is tried.

The Illinois decisions are reviewed because they are typical of the decisions of the many jurisdictions which have not yet passed upon the major condemnation-zoning questions, such as reasonable probability of rezoning, zoning for the benefit of the condemnor, and collateral attack upon zoning ordinances. They are indicative of a general trend to permit the court or jury to consider evidence which has an influence upon market value. The decisions in all United States jurisdictions which have contributed in a significant manner in deciding these questions are also reviewed.

HIGHEST AND BEST USE

In an eminent domain proceeding the owner of land is entitled to its market value for its highest and best use. The accepted definition of highest and best use in Illinois is as follows:

> The owner of property appropriated for public use is entitled to its market value for the most profitable use for which it is available and any capacity for future use which may be anticipated with reasonable certainty though dependent upon circumstances which may possibly never occur, is competent to be considered by the jury if it in fact enhanced the market value of the land in its present condition and state of improvement. The future prospective use affecting value must be a present capacity for a use which may be anticipated with reasonable certainty and made the basis of an intelligent estimate of value.[1]

Under this definition, can a trial court permit a property owner to introduce evidence that there is a reasonable probability that his land will be rezoned to a higher use? Although the Supreme Court of Illinois has not specifically ruled on this question, there are decisions which indicate that such evidence can be admitted. Illinois holds that market value is the proper measure of compensation,[2] and that matters which affect market value can be considered by the jury.[3]

POSSIBILITY OF OBTAINING SPECIAL RIGHTS

Evidence as to the probability of obtaining legislative or administrative action which will enhance market value has been admitted in Illinois condemnation actions. In South

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[1] Crystal Lake Park Dist. v. Consumers Company, 313 Ill. 395 (1924). Accord, City of Chicago v. Jackson, 333 Ill. 345 (1929); Super-Power Co. v. Sommers, 352 Ill. 610 (1933).
[2] City of Chicago v. Farwell, 286 Ill. 415 (1919).
[3] See City of Chicago v. Sexton, 408 Ill. 351 (1951).

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Park Commissioners v. Ayer,[4] the land being condemned was separated from railroad tracks by a public alley but was not being served by switching facilities. In order to obtain switching facilities it would be necessary for the defendant to make a contract with one of the railroad companies and also obtain permission from the city council to build over or upon the alley. The court stated: "In determining the value of the ground, the owners thereof are entitled to have the jury take into consideration the possibility of effecting the needed arrangements. If that possibility adds to the value of the ground the owners are entitled to the addition."[5]

In Chicago and Western Indiana R. R. v. Heidenreich,[6] the jury was instructed that they had no right to assume that the city council would grant permission for a switch track to cross a street or alley so as to connect the defendant's property. Holding that the instruction was erroneous, the court stated: "There was evidence that a switch track could be run to the property if consented to by the city council, and the jury had a right to judge, from all the evidence, whether that fact added anything to the value of the property."[7]

In City of Chicago v. Sexton,[8] the trial court would not permit the defendant railroad to prove that a portion of its property could be sold or leased to outside interests. The condemnor claimed that such proof was improper unless the railroad had obtained approval of such disposition from the Illinois Commerce Commission in accordance with the statute.[9] The court reversed and remanded for a new trial on the ground that "the jury should be entitled to consider evidence as to the other uses to which this property could be put and to also consider the possibility of the Commerce Commission authorizing such use."[10]

Illinois does recognize that land restricted as to use cannot be valued for a use beyond the restriction.[11] However, it would appear that evidence of the probability of legislative or administrative relaxation of such restrictions may be considered by the jury in determining market value.

ADMISSIBILITY OF ZONING ORDINANCE

The zoning ordinance as a restriction on land use has been held admissible in condemnation cases in other states.[12] Without specifically ruling on admissibility, Illinois has accepted zoning ordinances as a factor in land value. The Illinois Supreme Court has (1) held that where the defendant claimed the highest and best use was for a filling station, the ordinance of the City of Chicago requiring "frontage consents" in establishing filling stations was admissible;[13] (2) held that where the condemnor proceeded under a misapprehension as to the correct zoning it was proper to allow the condemnor to reopen its case to present the true facts;[14] (3) held that the defendant could present evidence of use of a portion of the land for parking facilities as a nonconforming

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[4] 237 Ill. 211 (1908).
[5] Id. at 220.
[6] 254 Ill. 231 (1912).
[7] Id. at 243.
[8] 408 Ill. 351 (1951).
[9] Ill. Rev. Stat., ch. 114, § 174a.
[10] City of Chicago v. Sexton, 408 Ill. 351, 357 (1951).
[11] In Illinois Central R.R. v. City of Chicago, 141 Ill. 509 (1892), the City of Chicago levied a special assessment on railroad land which was restricted by statute for railroad use. The court stated at page 515: "In a proceeding to condemn lands for public purposes, where the lands are restricted by statute or the instrument under which the owner holds title, to a particular use, the measure of compensation to the owner for the lands taken will be their value to him for the special use to which the lands are restricted."
[12] Los Angeles City High School Dist. v. Hyatt, 249 Pac. 221 (Cal., 1926); City of Beverly Hills v. Anger, 15 P.2d 867 (Cal., 1932); State ex rel. McKelvey v. Styner, 72 P.2d 699 (Id. 1937); City of Tyler v. Ginn, 225 S.W.2d 997 (Tex., 1949).
[13] Forest Preserve Dist. v. Wike, 3 Ill.2d 49 (1954).
[14] Dept. of Public Works v. Drobnick, 14 Ill.2d 28 (1958).

use under the zoning ordinance;[15] (4) held that evidence of the sale of other property made prior to the adoption of the zoning ordinance was proper;[16] (5) held that evidence of the sale of other property zoned differently from the property being condemned was proper.[17]

REASONABLE PROBABILITY OF REZONING

Doctrine of Reasonable Probability

The doctrine of reasonable probability of rezoning in condemnation cases apparently began with the Ontario case of In re Gibson,[18] and was first applied in this country in City of Beverly Hills v. Anger.[19] It is well stated in People v. Dunn[20] as follows: "Where land is not presently available for a particular use by reason of a zoning ordinance or other restriction imposed by law, but the evidence tends to show a 'reasonable probability' of a change in the near future, the effect of such probability upon the minds of purchasers generally may be taken into consideration in fixing present market value." Although held inapplicable where the evidence is not adequate, this doctrine has been recognized in all states where the issue has been presented.[21] It has even been extended to evidence of the reasonable probability that a variance will be granted,[22] and that a special exception will be granted.[23]

It is clear that the doctrine involves some speculation. In his dissenting opinion in People v. Dunn, Justice Carter made the following observation: "In my opinion nothing could be more speculative than prospective action of a zoning authority. It is as changeable as the political fortunes of its members."[24] However, it is a form of speculation which is not generally condemned by the courts.[25] It can only be justified on the ground that it is the same speculation used by a prospective purchaser in determining the amount he should pay. The fact that rezoning "may not actually happen is not to say this possibility does not influence the market."[26]

In United States v. 50.8 Acres of Land,[27] the court stated: "To what extent the possibility or probability of a change would affect the value as of the date of taking is dependent upon the degree of probability, the imminence of the change, the effectiveness of the opposition, and other factors which are largely speculative and conjectural."

BURDEN OF PROOF

The burden of proof of the reasonable probability of a change in zoning has been held to be on the landowner.[28] Although many decisions on the question of reasonable

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[15] Forest Preserve Dist. v. Kercher, 394 Ill. 11, 22 (1946).
[16] Id. at 17.
[17] City of Evanston v. Piotrowicz, 20 Ill.2d 512, 170 N.E.2d 569 (1960). See § 12, infra.
[18] 28 Ont.L.R. 20, 11 D.L.R. 529 (1913).
[19] 294 Pac. 476 (Cal., 1930).
[20] 297 P.2d 964, 966 (Cal., 1956).
[21] The case of City of Euclid v. Lakeshore Co., 133 N.E.2d 372 (Ohio, 1956), where the court was faced with a statute excluding evidence of a use which would violate an ordinance, appeared to be an exception, but a subsequent Ohio case, In re Appropriation of Easement for Highway Purposes, 194 N.E.2d 582 (Ohio, 1963), held that the doctrine was applicable. See § 8(g) infra.
[22] School Dist. No. 13 of the Town of Huntington v. Wicks, 227 N.Y.S.2d 768 (1962).
[23] School Dist. No. 13 of the Town of Huntington v. Wicks, 227 N.Y.S.2d 768 (1962). The zoning ordinance gave the Board of Appeals the power to extend business uses back from an existing business district an additional distance not in excess of 50 feet. The court held that this was in the nature of a special exception and that the reasonable probability that it might be granted could be included as an element of value.
[24] 297 P.2d 964, 966 (Cal., 1956).
[25] In O'Neill v. State of Nebraska, Dept. of Roads, 118 N.W.2d 616 (1962), the court after approving the doctrine, pointed out on page 619: "It is of course true that involved was an entry into the realm of speculation, but it is one which is not condemned."
[26] Valley Stream Lawns, Inc. v. State of New York, 192 N.Y.S.2d 805, 808 (1959).
[27] 149 F.Supp. 749, 752 (E. Dist., N.Y., 1957).
[28] United States v. Certain Land in Baltimore County, Maryland, 209 F.Supp. 50 (D.C., Md., 1962).

probability of rezoning have not specifically mentioned the burden of proof, it is apparent that the burden has, in fact, been on the landowner.

PRELIMINARY DETERMINATION BY THE COURT

In Board of Commissioners of State Inst. v. Tallahassee Bank and Trust Co.[29] the court held that where the evidence conclusively showed that the zoning ordinance imposed unreasonable and discriminatory restrictions on the property, there is no factual question to be determined by the jury and the matter should be determined by the judge as a matter of law.[30] However, in most cases the evidence is not so conclusive that rezoning can be determined to be an accomplished fact by the court, but must be submitted to a jury for a determination of its effect on value, if any.

Ordinarily a preliminary determination should be made by the court as to whether there is sufficient evidence to submit the question to the jury. In State of New Jersey v. Gorga,[31] the court stated: "Whether there is evidence of such probability to warrant submitting the issue to the jury, is in the first instance a question for the court as in the case of any other issue of fact." This procedure has been generally followed.[32] In State Roads Comm. v. Warriner,[33] the court stated:

> If the evidence offered proved to be insufficient to establish a reasonable probability of rezoning within a reasonable time after the date of taking, it would, we think, have been entirely in order for the trial court to have instructed the jury as to the insufficiency of such evidence and to have stated that no element or enhancement of market value could be based upon the mere possibility that at some time in the future a re-classification might occur.

If the court is satisfied from the evidence that there is no reasonable probability that existing zoning restrictions may be changed within a reasonable time, it should exclude evidence based on use for any purpose other than those to which it is restricted.[34]

PRESUMPTION AS TO VALIDITY OF PRESENT ZONING

In Illinois it would appear that the condemnor enjoys at least one presumption on zoning questions. The Supreme Court of Illinois has consistently held that there is a presumption as to the validity of a zoning ordinance, and that the municipality exercised its zoning power with discretion.[35] It is a presumption which is overcome "where the evidence shows a destruction of property value in the application of the ordinance and an absence of any reasonable basis in public welfare requiring the restriction and the resulting loss."[36] However, the uniform decisions in other jurisdictions make it clear that it is unnecessary to overcome this presumption if sufficient evidence is presented that the probability of rezoning has increased its market value.

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[29] 108 So.2d 74 (Fla., 1959).

[30] It should be noted that this case involved the question of zoning for the benefit of the condemnor which is discussed infra, § 14.

[31] 138 A.2d 833, 835 (1958).

[32] Long Beach City High School Dist. v. Stewart, 185 P.2d 585 (Cal., 1947); City of Austin v. Cannizzo, 267 S.W.2d 808 (Tex., 1954); In re Armory Site in Kansas City, 282 S.W.2d 464 (Mo., 1955); State of Missouri ex rel. State Highway Comm. v. Williams, 289 S.W.2d 64 (1956); Swift & Company v. Housing Authority of Plant City, 106 So.2d 616 (Fla., 1958).

[33] 128 A.2d 248, 251 (Md., 1957).

[34] Henslee v. State of Texas, 375 S.W.2d 474 (1963).

[35] This presumption extends in favor of both zoning and rezoning ordinances. Kinney v. City of Joliet, 411 Ill. 289, 103 N.E.2d 473 (1952); Bohan v. Village of Riverside, 9 Ill.2d 561, 138 N.E.2d 487 (1956).

[36] Illinois National Bank & Trust Co. v. The County of Winnebago, 19 Ill.2d 487, 492, 167 N.E.2d 401 (1960).

EVIDENCE AS TO PROBABILITY OF REZONING

Since the courts have adopted the rule that evidence may be admitted where there is a reasonable probability of rezoning, the outcome will turn upon the kind of evidence presented. Consequently, it is important to consider the rulings of the courts on various types of evidence.

Sales Indicating Rezoning Value

The best evidence of probability of rezoning is the sale of properties in the area at prices which indicate that the market is influenced by that probability. On the other hand, failure to present evidence of such influence has been considered one of the factors indicating that there is no probability of rezoning.[37] Evidence that a number of properties situated similarly to defendant's property had sold recently for inflated prices for uses other than residential, has been considered one of the factors indicating that there is a probability of rezoning.[38] However, the low purchase price of the condemned property in a recent sale has been considered evidence of the improbability of a change.[39]

In State of New Jersey v. Gorga,[40] the court made the following observation:

> The specific question is whether market value as of the date of taking may be affected by the prospect of an amendment of the zoning ordinance. Analytically, the question is one of fact. Abstractly considered, it would not matter whether the zoning change is probable or remotely possible if the parties to the sale would in fact be influenced thereby in fixing the price. And if there were sales close to the critical date of other property within the area which it is claimed should be rezoned, presumably the prices paid would reflect the actual effect of the likelihood of a change. But that theoretical situation rarely exists, and since the opportunity for unbridled speculation is apparent, rules must be formulated consonant with the principle that the owner shall receive the fair market value of the land for any use for which it has a commercial value in the immediate present or in reasonable anticipation in the near future.

Change in Character of Neighborhood

The reasonable probability of a zoning change may be shown by proof that there have been general changes in the neighborhood;[41] that the property is adaptable for similar industrial uses of the type in the neighborhood and is isolated from established residential districts, schools and churches;[42] that there has been a marked expansion of the commercial area toward the property;[43] that the area has become an industrial development to some extent;[44] that the property is actually located in a commercial area;[45] that there is a commercial trend in the vicinity of the property.[46] However, merely presenting evidence that nearby there exist buildings other than those permitted by the zoning regulations is not sufficient to remove from the realm of speculation the possibility of a change;[47] the same is true where the character of the community

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[37] State of Arizona ex rel. Morrison v. McMinn, 355 P.2d 900 (1960).
[38] People ex rel. Department of Public Works v. Donovan, 369 P.2d 1 (Cal., 1962).
[39] City of Euclid v. Lakeshore Company, 133 N.E.2d 372 (Ohio, 1956).
[40] 138 A.2d 833, 834 (1958).
[41] People ex rel. Department of Public Works v. Donovan, 369 P.2d 1 (Cal., 1962).
[42] State of Washington v. Motor Freight Terminals, Inc., 357 P.2d 861 (1960).
[43] State Roads Commission of Maryland v. Warriner, 128 A.2d 248 (1957); see Snyder v. Commonwealth of Pennsylvania, 192 A.2d 650 (Pa., 1963).
[44] Hall v. City of West Des Moines, 62 N.W.2d 734 (Iowa, 1954).
[45] State of Missouri ex rel. State Highway Comm. v. Williams, 289 S.W.2d 64 (1956).
[46] Papovitch v. State of New York, 235 N.Y.S.2d 97 (1962).
[47] In re Armory Site in Kansas City, 282 S.W.2d 464 (Mo., 1955).

was generally rural, there had been considerable residential construction and there had been no changes to industrial zoning for over 20 years.[48] Probability of rezoning is not shown where neither industry nor business has been invading the residential area involved.[49] A New York court considered as sufficient the economic and industrial growth of the area, the fact that the land was adjacent to two aluminum plants and the fact that a portion of one side was bounded by property of a power company.[50]

Rezoning Activity

In Long Beach City High School Dist. v. Stewart,[51] the court stated:

> The zoning ordinance classifying the property as residential was enacted only three years before the condemnation proceedings were started, and it clearly appears that the ordinance is in line with the natural development in such area. Nor is there the slightest suggestion that the ordinance was enacted for the purpose of defeating appellant in his just claims for compensation or that it was not enacted in the utmost good faith.

Where zoning of nearby property for commercial purposes had been recently denied for the third time and surrounding property was zoned residential, the court stated that the jury was entitled to assume that there would be no change in the zoning.[52] However, where there was evidence that the city authorities had considered rezoning the area, but had rejected any changes, at least temporarily, it was held that the defendant was not required to show that such authorities were contemplating zoning changes.[53]

Shortly before condemnation proceedings were filed, the property owner was denied rezoning which would allow him to use the property for recreational purposes. The condemnor contended that its value for recreational purposes could not be considered since it was zoned residential. Overruling the condemnor's objection, the court held that it would seem hardly reasonable for the petitioner to condemn it for recreational purposes and at the same moment maintain that had the petitioner not deemed it wise to take it for recreational purposes, the city would refuse to rezone it so that its owner could use it for the same purposes.[54]

In upholding a jury verdict indicating no probability of rezoning, an Arizona court pointed out that no attempt whatever had been made to rezone the property.[55] Where an application to rezone had been made six months before the taking, had neither been approved nor rejected but had been deferred for further study, and such zoning would not be inconsistent with the use of surrounding areas, it was held that there was reasonable probability of rezoning.[56]

Testimony of a witness that "all petitions for rezoning that have been made in this area had been allowed by the planning board," has been held proper.[57]

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[48] Heintz v. State of New York, 226 N.Y.S.2d 540 (1962).

[49] Long Beach City High School Dist. v. Stewart, 185 P.2d 585 (Cal., 1947).

[50] Brubaker v. State of New York, 236 N.Y.S.2d 395 (1963).

[51] 185 P.2d 585, 589 (Cal., 1947).

[52] County of Los Angeles v. Faus, 304 P.2d 257 (Cal., 1956), reversed on other grounds, 312 P.2d 680 (Cal., 1957). Where the property owner's application for rezoning had been denied and there was no other adequate basis in the record, there was no reasonable probability of change. Skodnek Industries v. State of New York, 250 N.Y.S.2d 246 (1964).

[53] People ex rel. Department of Public Works v. Donovan, 369 P.2d 1 (Cal., 1962).

[54] Board of Park Comm'rs, of City of Wichita v. Fitch, 337 P.2d 1034 (Kan., 1959).

[55] State of Arizona ex rel. Morrison v. McMinn, 355 P.2d 900 (1960). The dissenting opinion in Snyder v. Commonwealth of Pennsylvania, 192 A.2d 650 (1963), noted that the property owner had not made application for a zoning change.

[56] In re Mackie's Petition, Mackie v. Eilender, 108 N.W.2d 755 (Mich., 1961). See also subsequent appeal of this case in 127 N.W.2d 890 (Mich., 1964).

[57] Barnes v. North Carolina State Highway Comm'n., 109 S.E.2d 219 (1959).

In 0.040 Acres of Land v. State of Delaware,[58] the defendants had the city clerk testify as to the history of all changes in the zoning ordinance in the general area of the property being condemned, indicating a general trend from residential to commercial use. Upon appeal the court held that the appraisers should have been permitted to consider the action of the city council with reference to past zoning applications.[59]

In Masten v. State of New York,[60] the court stated:

> The proof was that a number of business and commercial establishments existed in the neighborhood before the appropriation; that the highway traffic became increasingly heavy; that a large number of variances from the residential restrictions were granted before and after the appropriation and that, apparently, no applications therefor were denied. The State objected to the evidence as to variances and it is true that an occasional, isolated variance granted in the exercise of discretion would have little or no probative force; but here the effect is to evidence a condition and continuing trend that rendered early rezoning very nearly inevitable.

In Snyder v. Commonwealth of Pennsylvania,[61] the property owners' appraiser testified that property along both sides of the highway in adjacent municipalities had been zoned commercial and rapid commercial and institutional development was taking place; that in Churchill Borough, where the land being condemned was located, the only zoning change made prior to filing the condemnation suit was a rezoning for construction of a research and development plant; that there was a scarcity of land for commercial use in the area. With three justices dissenting, the Supreme Court of Pennsylvania held that this testimony was sufficient proof of a reasonable probability of rezoning.[62]

In Papovitch v. State of New York,[63] the land was zoned residential although adjacent areas were zoned for office building use and one abutting property had been granted a variance for the erection of a motel. Three months prior to the time the State acquired title to the property, the property owner made application to change the zoning to office building use and the planning board recommended the change. No further action was taken on the application because of the condemnation action. In addition, the land fronted on a main artery of travel in the county which lent itself and was, in fact, used for office buildings. The court held that there existed a strong probability that the zoning would have been changed in the immediate future to office building use.

In Heintz v. State of New York,[64] several members of the local planning boards in the area testified that at one time the planning board where the land was located considered changing the area to industrial, but such change depended upon the amount of acreage which would be devoted to a reservoir which was being planned for a power project in the area. No change was ever made by the planning board. Also, the authorities had recently refused to extend the industrial zoning of a chemical factory three miles away which had long been zoned industrial. There had been no changes to industrial zoning for over 20 years. Based upon this and other evidence the court concluded that there was only a remote possibility of a zoning change.[65]

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[58] 198 A.2d 7 (1964).
[59] Id. at 11.
[60] 206 N.Y.S.2d 672, 673 (1960).
[61] 192 A.2d 650 (1963)
[62] The court pointed out that "While there was no direct testimony that a zoning change was reasonably likely in the near future, there was sufficient evidence, including a view of the property and the surrounding area, from which the jury could so find." Id. at 652.
[63] 235 N.Y.S.2d 97 (1962).
[64] 226 N.Y.S.2d 540 (1962).
[65] Id. at 544.

In Rapid Transit Company v. United States,[66] an attempt to rezone from residential to commercial had failed[67] and no other efforts to obtain reclassification had been made. The court stated on page 466:

> However the landowner called several witnesses who were familiar with the policy and attitude of the Lawrence zoning commission each of whom expressed the opinion that an application to rezone to "C" (multiple dwellings) would be favorably considered and that the land had a higher potential for successful development as a site for two and four unit housing. This opinion evidence indicating a reasonable probability that a favorable rezoning classification could be obtained was not directly contradicted and was a proper and indeed necessary factor for the trier of the facts to consider in determining the value of the condemned land. McCandless v. United States, 298 U.S. 342, 56 S.Ct. 764, 80 L.Ed. 1205.

Must Be Proof That Rezoning Will Enhance Value

It has been pointed out that "zoning does not create value; it permits the realization of potential value."[68] Consequently, the rezoning of land will add nothing to its value if there is no demand for the higher use in the area, or if there is a large amount of available land in the area which is already zoned for the higher use.

Where the plaintiff failed to offer proof that a commercial use would be the highest and best use of the property or that the change would enhance its value, it was held that the question of reasonable probability of rezoning was properly withheld from the jury.[69] The court stated that the defendant must prove that his "property was adaptable for a use other than that for which it was zoned at the time of the 'taking', and which use it was or in all reasonable probability would have become available within the reasonable future."[70] Even though the property was zoned for heavy and light industrial use, it has been held that there was no substantial testimony that the property was suitable or in demand for heavy or light industry.[71] Where there was no proof of a demand for industrial property, industrial sites were available in neighboring towns and there was no industrial or commercial activity in the general vicinity of the land involved, it was held that there was no reasonable probability of rezoning.[72]

Zoning After the Date of Taking

In Illinois market value is determined as of the date of filing the petition to condemn,[73] and ordinarily evidence of matters which occur after such date is not admissible.[74] However, zoning after the date of taking has been considered in determining reasonable probability of rezoning. In State of New Jersey v. Gorga[75] the court stated:

> We agree with the Appellate Division that an amendment of the ordinance which came into being after the date of taking should not be excluded solely because of the time sequence. But such evidence should be carefully confined to its proper role. It may serve only to support the reasonableness of the

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[66] 295 F.2d 465 (C.A. 10th, 1961).

[67] Apparently commercial zoning was refused because of an informal but pre-existing agreement between officials of the City of Lawrence, Kan., and officials of the University of Kansas which was located near the subject property. Id. at 466.

[68] United States v. Certain Land in Baltimore County, Maryland, 209 F.Supp. 50, 54 (D.C., Md., 1962).

[69] Continental Development Corp. v. State of Texas, 337 S.W.2d 371 (1960).

[70] Id. at 374.

[71] Union Electric Co. of Missouri v. McNulty, 344 S.W.2d 37 (1961). Accord, United States v. 1,108 Acres of Land, 204 F.Supp. 737 (E. Dist., N.Y., 1962).

[72] Heintz v. State of New York, 226 N.Y.S.2d 540 (1962).

[73] City of Chicago v. Riley, 16 Ill.2d 257 (1959); Dept. of Public Works v. Bohne, 415 Ill. 253 (1953); Eckhoff v. Forest Preserve Dist., 377 Ill. 208 (1941).

[74] Edlin v. Security Insurance Co., 269 F.2d 159 (7th Cir., 1959).

[75] 138 A.2d 833, 835 (1958).

> factual claim that on the date of taking the parties to a voluntary sale would have recognized and been influenced by the probability of an amendment in the near future in fixing the selling price. The fact would still remain that on the date of taking the property was otherwise zoned, and the value as of that date must still be reached on the basis of facts as they then would have appeared to and been evaluated by the mythical buyer and seller.

The Gorga case has been generally followed in Masten v. State of New York[76] and United States v. 50.8 Acres of Land.[77]

A somewhat reverse situation exists where there was no zoning at the time of the taking and a restrictive zoning ordinance is passed after the time of taking. Under such conditions it has been held that the trial judge's charge that "You may take into consideration the fact that the Howard County Zoning Laws had not become operative at the time the property was taken, so that at that time it could have been utilized or sold for any purpose the owner decided to utilize or sell it," was correct.[78] However, in a similar situation the court indicated that it was erroneous for an expert witness to take into consideration zoning regulations adopted after the date of taking where there was no evidence that the land was suitable or in demand for industrial use.[79]

Consideration of a change in zoning after the date of taking has also been condemned.[80] In Williams v. City and County of Denver,[81] the court refused to consider a zoning change after the date of taking, pointing out that if the rezoning happened to devalue the property instead of raising it, then it obviously would be unjust to assess such diminution against the property owner; that fair compensation in condemnation cases does not include speculative values either lowering or raising the compensation to be paid. Apparently there was some evidence in the Williams case that the subsequent rezoning was brought about by the acquisition or improvement to be made by the condemnor. The decision was qualified somewhat by the following statement:[82]

> It may be that under some circumstances evidence of a probable change in zoning may be admitted where such change is unrelated to the acquisition of the subject property. However, where the change in zoning results from the taking of the subject property, as is the case here, it is not admissible under the authority we have previously cited herein.

The mere fact that the land is being taken for a power plant, does not establish reasonable probability of rezoning for an industrial use generally.[83]

Suppose land zoned for residential use is condemned for urban renewal purposes and is later rezoned to commercial and sold to private individuals for commercial development. Would this be a change in zoning which is not admissible because it resulted from the taking of the property? Would the result be any different if prior to the taking the urban renewal authority had adopted a re-use plan which designated it for commercial use?

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[76] 206 N.Y.S.2d 672 (1960).
[77] 149 F.Supp. 749 (E.D., N.Y., 1957), affirmed United States v. Meadow Brook Club, 259 F.2d 41 (C.A.2d, 1958), certiorari denied 358 U.S. 921, 79 S.Ct. 290, 3 L.Ed.2d 239 (1958).
[78] Reindollar v. Kaiser, 73 A.2d 493 (Md., 1950).
[79] Union Electric Co. of Missouri v. McNulty, 344 S.W.2d 37 (1961).
[80] Travis v. United States, 287 F.2d 916 (U.S. Ct. Cl., 1961); Williams v. City and County of Denver, 363 P.2d 171 (Colo., 1961).
[81] 363 P.2d 171 (Colo., 1961).
[82] Id. at 175.
[83] Union Electric Co. v. Saale, 377 S.W.2d 427 (Mo., 1964).

Desirability for Use Under Present Zoning

Evidence that the property is not desirable for the purpose for which it is zoned has been admitted as an important factor on the question of probability of rezoning.[84] The Supreme Court of Illinois has consistently held this to be one of the factors in determining whether the zoning classification is unconstitutional as to the property involved.[85]

Need for Change in Zoning Standards

In City of Euclid v. Lakeshore Co.,[86] the property owners claimed that the zoning ordinance was antiquated, that the neighborhood was experiencing rapid growth and that there was need for further retail development and multifamily units in the area. Rejecting this claim the court pointed out:[87]

> In all events a city is not required to lessen its zoning standards because of increased demands for home sites in the community and such demands cannot be the foundation for a claim that reasonable administration of the zoning laws would require a reduction of zoning classifications to make way for a greater concentration of population. Only where zoning restrictions fall into disuse can such claims be made.

Since there was no evidence that there was a reasonable probability of rezoning, the court refused to speculate as to the legislative policy of the municipal council. The court pointed out that the legislative policy of the State of Ohio was clearly fixed by Section 719.09 of the Revised Code of Ohio which contained the following provision: "In arriving at such assessment of compensation for such lot or parcel, any use or occupancy which is in violation of any statute or ordinance, be excluded from consideration in determining fair market value."[88] However, a subsequent Ohio opinion[89] distinguished the City of Euclid case on the ground that there was no evidence of reasonable probability of rezoning and held that the doctrine was applicable in Ohio.

Official Plan for Future Development

Zoning ordinances commonly provide that territory which is annexed to the municipality shall be automatically classified as residential.[90] This is to provide restrictions on the use of the annexed area until the zoning authority can consider its proper zoning classification. It is not necessarily intended to be a permanent zoning classification.

In State of Missouri ex rel. State Highway Comm. v. Williams,[91] the property was zoned residential at the time it was annexed to the city. Evidence was introduced that

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[84] State of Washington v. Motor Freight Terminals, Inc., 357 P.2d 861 (1960).

[85] Atkins v. County of Cook, 18 Ill.2d 287, 163 N.E.2d 826 (1960).

[86] 133 N.E.2d 372 (Ohio, 1956).

[87] Id. at 380.

[88] This statute goes much further than Section 9.5 of The Eminent Domain Act (Ill. Rev. Stat. ch. 47, § 9.5) which provides: "Evidence is admissible as to (1) any unsafe, unsanitary, substandard or other illegal condition, use or occupancy of the property; (2) the effect of such condition on income from the property; and (3) the reasonable cost of causing the property to be placed in a legal condition, use or occupancy. Such evidence is admissible notwithstanding the absence of any official action taken to require the correction or abatement of any such illegal condition, use or occupancy." It is clear that the Illinois statute applies only to existing illegal uses.

[89] In re Appropriation of Easement for Highway Purposes, 194 N.E.2d 582 (1963).

[90] Section III D of the Zoning Ordinance of the City of Decatur, Illinois (Ord. No. 3512) provides: "All territory which may hereafter be annexed to the City of Decatur shall be automatically classified in the R-1 Single-family District until otherwise changed by ordinance, after public hearing."

[91] 289 S.W.2d 64 (1956). See Sayers v. City of Mobile, 165 So.2d 371 (Ala., 1964).

the city plan commission had prepared a master plan for rezoning all annexed areas which designated the property as commercial, and that it was in a commercial area. The court held that there was substantial evidence that the zoning would soon be changed to commercial.

In Board of Park Comm'rs of City of Wichita v. Fitch,[92] the court stated: "It seems to have been established beyond dispute that when the land is taken into the city, it is automatically zoned for residential property use, and then is later subject to be rezoned in accordance with its best use, if that accords with the city's master plan." Holding that there was no reasonable probability of rezoning to industrial use, it was pointed out that a development plan had been submitted to the town authorities by consultants employed for that purpose; that most of the subject property was located in an area designated as residential in the development plan.[93]

Minutes of Zoning Body

In People v. Dunn,[94] the court admitted in evidence a certified copy of the minutes of the city council which summarized the discussion of the council prior to the rezoning of one parcel owned by the defendant. The defendant claimed that there was a reasonable probability of rezoning the remainder of his property. The court held that the minutes were admissible on this question since the reasons assigned by the council for rezoning the one parcel would be much more persuasive for rezoning the remainder of the defendant's property.

Buffer Zone

In State of Louisana v. McDuffie,[95] the condemnor claimed that a strip of land immediately to the rear of the filling station on the defendant's property, even though it was zoned commercial, should not be regarded as commercial for purposes of valuation, but rather that it should be regarded as a "buffer zone" between the developed commercial property and the residential property on the south. The Supreme Court agreed with the trial judge that the highest and best use of the property was for commercial purposes and as such it was worth considerably more than it would be as a "buffer zone."

In State of Arizona ex rel. Morrison v. McMinn,[96] the court stated:

> Although there was evidence that this property was not very desirable for residential purposes, this is not at all uncommon for properties on the fringe of a residential zone forming the buffer between industrial and residential zones. Such fringe devaluation has little weight in showing a possible zoning change, unless it is accompanied by a general invasion of the residential zone by nonconforming industrial uses.

Speculative and Hearsay Evidence

Although all evidence of the probability of rezoning is speculative in nature, the courts do require some kind of proof. A witness cannot be asked "would there be any difficulty," based upon his examination, in changing the zoning.[97] Where a witness testified that he assumed zoning changes would be made to accommodate a higher use of the land, the court held that such assumption is not enough and must be rejected as being speculative.[98] A California court accepted the testimony of an appraiser who

[92] 337 P.2d 1034, 1037 (Kan., 1959).
[93] Heintz v. State of New York, 226 N.Y.S.2d 540 (1962).
[94] 287 P.2d 161 (Cal., 1955).
[95] 123 So.2d 93 (1960).
[96] 355 P.2d 900 (1960).
[97] Redondo Beach School Dist. v. Flodine, 314 P.2d 581 (Cal., 1957).
[98] Hietpas v. State of Wisconsin, 130 N.W.2d 248, 252 (1964).

testified that "He had talked on two different occasions 'to the men' in the zoning department of the city, and from the conversation he had with them he formed the opinion that it was reasonable to assume that there would 'be rezoning'."[99] Where the proposed use would require obtaining a right of access it was held too uncertain.[100] It would seem that the jury is allowed to speculate, but it must be provided with some kind of evidence.

In People v. Gangi Corp.,[101] the defendant claimed that error was committed in permitting the condemnor's appraiser to testify that he considered only R-1 zoning because he had heard the city council state that they would not change the zoning. Holding that this was not error, the court stated:[102]

> An integral part of an expert's work is to obtain all possible information, data, detail and material which will aid him in arriving at an opinion. Much of the source material will be in and of itself inadmissible evidence but this fact does not preclude him from using it in arriving at an opinion. All of the factors he has gained are weighed and given the sanction of his experience in his expressing an opinion. It is proper for the expert when called as a witness to detail the facts upon which his conclusion or opinion is based and this is true even though his opinion is based entirely on knowledge gained from inadmissible sources.

Qualification of Witnesses

A witness who is an expert on real estate valuation generally, but not on zoning, is qualified to testify as to the reasonable probability of rezoning.[103] In 0.040 Acres of Land v. State of Delaware,[104] the court stated:

> The trial judge rejected in toto the testimony of defendant's appraisers on the basis that they were not endowed with the special qualifications which enable them to render an opinion on the reasonable probability of a change in a zoning ordinance. Consequently, the trial judge was of the opinion that a member of a zoning body was essential or at least a letter from the zoning body indicating the likelihood of a change in zoning ordinance in this area was required before any instruction to the commission would be justified.
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> The mere fact that neither appraiser ever sat on a zoning board did not tend to disqualify either of them to testify as to the trends in the area, the best use of the land, and the bases on which each arrived at a decision on valuation.

IMPROPER TO VALUE AS IF REZONING IS ACCOMPLISHED

In State of New Jersey v. Gorga,[105] the court stated:

> The important caveat is that the true issue is not the value of the property for the use which would be permitted if the amendment were adopted. Zoning amendments are routinely made or granted. A purchaser in a voluntary transaction would rarely

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[99] People v. Hurd, 23 Cal.Rptr. 67, 70 (1962).
[100] Altman v. Hill, 129 A.2d 358 (Conn., 1957).
[101] 15 Cal.Rptr. 19 (1961).
[102] Id. at 25.
[103] Snyder v. Commonwealth of Pennsylvania, 192 A.2d 650 (1963).
[104] 198 A.2d 7, 11 (1964).
[105] 138 A.2d 833, 835 (1958).

> pay the price the property would be worth if the amendment were an accomplished fact. No matter how probable an amendment may seem, an element of uncertainty remains and has its impact upon the selling price. At most a buyer would pay a premium for that probability in addition to what the property is worth under the restrictions of the existing ordinance. In permitting proof of a probable amendment, the law merely seeks to recognize a fact, if it does exist. In short if the parties to a voluntary transaction would as of the date of taking give recognition to the probability of a zoning amendment in agreeing upon the value, the law will recognize the truth.
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> Here defendants' testimony was confined to the value the property would have if it were rezoned. No testimony was directed to the target, what a willing buyer would pay a willing seller as of the date of taking for the property as then zoned, taking into account the probability, as it then appeared, of an amendment in the near future. In support of his opinion of the then market value, an expert may advert to the value the property would have if rezoned, but only by way of explaining his opinion of the existing market value.

This rule has been generally followed,[106] except in those cases where the zoning authorities have used zoning restrictions to hold down the cost of subsequent acquisition.[107]

In United States v. 50.8 Acres of Land,[108] the court stated: "To what extent the possibility or probability of a change would affect the value as of the date of taking is dependent upon the degree of probability, the imminence of the change, the effectiveness of the opposition, and other factors which are largely speculative and conjectural."

In Papovitch v. State of New York,[109] the court stated: "The correct measure of damage is to give to the residential value a premium based on the fact that a purchaser would pay more having the likelihood of a zoning change in mind." Even when the condemnor and the condemnee agreed that the probability of a zoning change to commercial was excellent, the court held that an element of uncertainty remained which had an impact upon the selling price.[110]

USE PERMITTED BY ZONING TOO REMOTE

It is generally understood that property which is not subject to zoning regulation cannot be valued for a use for which it is not suited. Likewise, there is no reason that property zoned for commercial use must be valued as commercial property if it is not suitable for commercial use. In other words, the zoning of the property is not a legal determination of its highest and best use. This has been recognized in a recent Iowa case.[111] The fact that the owner had not seen fit to use his property for some business development permissible under its zoning has been held to be evidence which can be considered on the issue of the most advantageous use, but it is not conclusive.[112]

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[106] State of Arizona ex rel. Morrison v. McMinn, 355 P.2d 900 (1960); United States v. 50.8 Acres of Land, 149 F.Supp. 749 (E. Dist., N.Y., 1957); Snyder v. Commonwealth of Pennsylvania, 192 A.2d 650 (1963).

[107] See § 14.

[108] 149 F.Supp. 749, 752 (E. Dist., N.Y., 1957).

[109] 235 N.Y.S.2d 97, 99 (1962).

[110] Albany Country Club v. State of New York, 235 N.Y.S.2d 684 (1962), affirmed in Albany Country Club v. State of New York, 241 N.Y.S.2d 604 (1963) although the court increased the front foot value.

[111] Kaperonis v. Iowa State Highway Comm., 99 N.W.2d 284 (1959).

[112] Utech v. City of Milwaukee, 101 N.W.2d 57 (Wis., 1960).

BENEFITS WHICH OFFSET DAMAGES

It has long been established in Illinois that where property not taken is damaged, the amount of damage can be offset by the amount of benefits which the property receives as a result of the improvement. [113] California has held that evidence of the reasonable probability of rezoning the property not taken, including the effect of the construction of the improvement upon rezoning, is proper in determining the amount of such benefits. [114]

NONCONFORMING USES

It appears that ordinance provisions as to elimination of and restrictions on nonconforming uses are admissible to the same extent as zoning restrictions.

Elimination Provisions

In City of La Mesa v. Tweed and Gambrell Planning Mill, [115] the defendants' predecessors in interest purchased the land in 1936, located along a railroad track in the city and built a planning mill on the easterly half thereof, which was zoned for industrial use. The westerly half was zoned R-2 (two-family residence). Four years later, after obtaining a variance permit, additional structures were erected on the westerly half, so that the planning mill covered the entire property.

In 1945, the city adopted Ordinance No. 265 which zoned the property R-1 (one-family residence) and permitted the continuance of nonconforming uses existing at the time of its passage, provided that any nonconforming building should not be "enlarged, extended, reconstructed or structurally altered" excepting alterations or replacements within any twelve month period not exceeding 25 percent of the building's assessed valuation; directing that if any nonconforming building should be damaged to the extent of more than 75 percent of the assessed value, the nonconforming use should terminate.

In 1955, the city adopted Ordinance No. 618 which zoned the property R-3 (multiple-family residence) and permitted the continuance of a nonconforming use; provided for an amortization plan for the termination of nonconforming uses; prohibited structural alterations to nonconforming buildings, except those provided by law, and excepting those destroyed to the extent of not more than 50 percent of their replacement value; expressly repealed Ordinance No. 265. Under the amortization plan nonconforming uses such as the defendants would terminate upon the expiration of twenty years from the date of construction, but, in no case, less than five years after notification by the City Council.

The master plan study which prompted the adoption of Ordinance No. 618 also resulted in a decision to extend a street, requiring the acquisition of a 40-ft strip of the defendants' land.

Approximately a year prior to the adoption of Ordinance No. 618 the city acquired all of the property in the block where defendants' property was located, and then started negotiations to acquire the 40-ft right-of-way from the defendants. Included in these negotiations was a proposal to reconstruct a part of defendants' planing mill on property which the city theretofore has acquired. Under this proposal it would have been necessary to zone the premises for an industrial use. Since an agreement was not reached, the city terminated negotiations on February 23, 1955, and on April 26, 1955, enacted Ordinance No. 618; and on June 30, 1955, filed the condemnation action; and on September 21, 1955, notified the defendants to terminate their nonconforming use within five years.

The buildings upon the property had an estimated remaining economic life of twenty-one years from the time of the adoption of Ordinance No. 618. Yet the city council ordered their termination within five years. The planning consultants employed by the city believed that the block in which the defendants' property was

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[113] Capital Building Co. v. City of Chicago, 399 Ill. 113 (1948).
[114] People v. Hurd, 23 Cal.Rptr. 67 (1962).
[115] 304 P.2d 803 (Cal., 1956).

situated eventually should be used as part of a civic center, but recommended that, for the time being, it should be zoned for professional business purposes, which would act as a buffer between the adjoining commercial and residential zones.

The trial court held that the amortization provisions of Ordinance No. 618 were unconstitutional. Upholding this ruling the District Court of Appeal stated on page 808:

> In order to effect its change of plans, which would permit only a residential use of defendants' land during the interim period awaiting the creation of a civic center, the city, by its ordinance, requires the defendants, within five years, to liquidate their investment which has an estimated remaining twenty-one years of economic life, although shortly before the adoption of that ordinance, the land in question was considered a proper subject for classification as an industrial site; was recommended by the planning consultants for inclusion within a professional zone; is bordered on the east by a railroad track; and surrounded on three sides by industrial and commerical businesses. This is unreasonable and arbitrary.

It should be noted that the court sustained a collateral attack on the zoning ordinance.[116] A portion of the ordinance was declared invalid in the condemnation proceeding, to the extent that it affected the value or damage to the defendants' property.

Restrictions on Nonconforming Buildings

In State of Minnesota v. Pahl,[117] the building on the property was 133 feet wide, 200 feet deep and was set back 37 feet from the existing right-of-way line of the highway—Figure 1. The petitioner condemned the front 72 feet of the property, which took 35 feet off of the front of the building. The portion of the building taken included its more important components such as the heating system, plumbing and water, lavatory, display room, offices and lunchroom. The balance of the building was used as a warehouse.

After the building was built the city adopted a zoning ordinance which placed it in an industrial zone and required a minimum setback of 60 feet from the street line. This ordinance made the building nonconforming as to the setback requirement, but it was conforming in that it was used for industrial purposes as required by the ordinance.

With respect to nonconforming uses the ordinance provided that the lawful use of any land or building existing at the time of its adoption may be continued although such use does not conform with the regulations for such district, provided that no such nonconforming use be altered or extended to occupy a greater area of land than that occupied by such use at the time of its adoption; that if such nonconforming use ceases for a period of one year, any subsequent use shall be in conformity to the regulations of the ordinance; that no such nonconforming use, if once changed to a use permitted in the district, shall be changed back to a nonconforming use; that if a nonconforming structure is substantially destroyed, then the land on which it is located shall thereafter be subject to all regulations of the ordinance. The ordinance further provided for procedure by which application may be made for special-use permits and exceptions to the ordinance if they involve minor variations and in certain cases involving unnecessary hardship.[118]

The condemnor based its valuation on the theory that the defendants would only be required to reestablish their building 37 feet back from the new right-of-way line, which would result in the destruction of the front 72 feet. The trial court held that the taking resulted in a "substantial destruction" of the building and that, according to

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[116] See § 13.

[117] 95 N.W.2d 85 (1959).

[118] Such provisions as to nonconforming uses are typical of most zoning ordinances. See Section XXII of the Zoning Ordinance of the City of Decatur, Illinois (Ord. No. 3512).

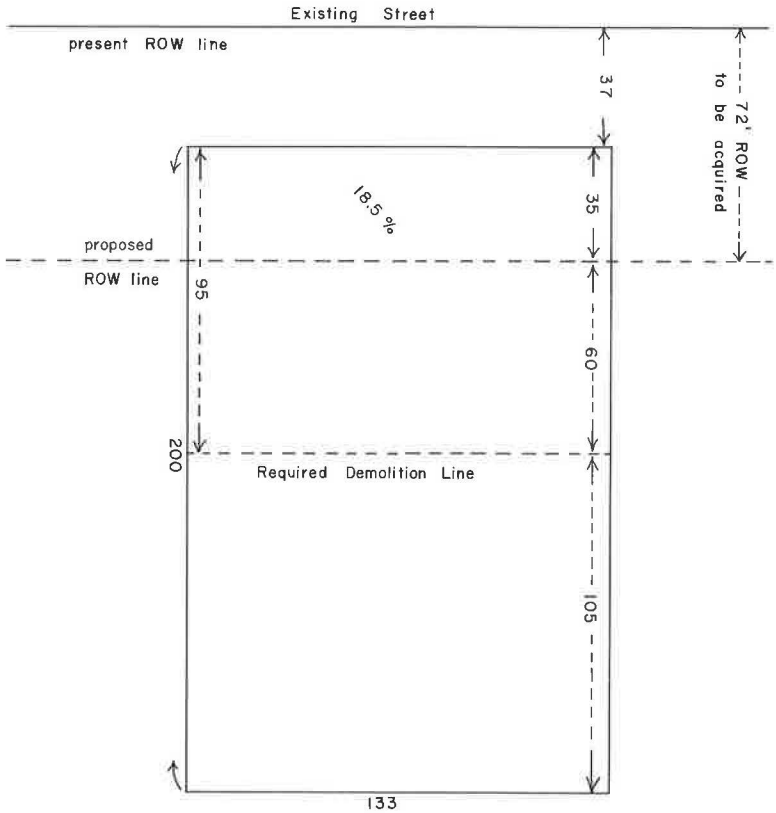

Figure 1. State of Minnesota v. Pahl, 95 N.W.2d 85 (1959)—front yard requirement 60 ft.

the terms of the ordinance, the building, if it were to remain, had to comply with the 60-ft setback provision. In other words, the taking would ultimately result in the destruction of the front 95 feet of the building.

Affirming the order denying a new trial, the court resolved the four basic issues of the case as follows:

1. Even though only 18.5 percent of the total area of the building was actually taken and even though the portion of the building remaining was worth more than the part taken, the court held that there was substantial destruction within the meaning of the ordinance. The nature and character of the portion taken was considered more important than percentage of area or value.

2. The court denied the condemnor's claim that the defendants would be entitled to build the same distance from the new right-of-way line as their building was from the old right-of-way line and that condemnation, even though it caused a substantial destruction of the building, could not deprive the defendants of that right. The condemnor claimed that Connor v. Township of Chanhassen,[119] was controlling on this question. The court distinguished that case in the following manner:

> In that proceeding the owner of a certain property, part of which had been condemned by the state to widen a highway, sought a declaratory judgment declaring a zoning ordinance for the township

[119] 81 N.W.2d 789 (Minn., 1957).

of Chanhassen unconstitutional. The owners of the property maintained a general repair shop on the premises. A zoning ordinance was passed in March 1952, and according to its terms the owners' shop constituted a nonconforming use of the land. However, any lawful use of the land at the time the ordinance was adopted could be continued, even though it was a nonconforming use, as long as it was not extended to occupy a greater area of land, was not moved to another part of the land, or was not rebuilt after being 50 percent or more destroyed. The tract of land involved amounted to one acre. The condemnation proceeding covered the front one-fourth of the tract on which was situated the building where the owners operated their business. After the taking, the building in which the nonconforming use was conducted was rebuilt on a portion of the balance of the tract. This was contrary to the provisions of the ordinance which prohibited any nonconforming use to "be moved to any other part of the parcel of land upon which the same was conducted at the time of the adoption of this plan." Under the record in that proceeding there was nothing to warrant the assumption that the price paid for condemnation also included the compensation to the plaintiffs (owners) for the loss of the right to continue their business. In fact the state is not required to pay the owner for damages from interruption of business and good will. Connor v. Township of Chanhassen, supra, and cases cited therein.

We held, under those circumstances, where the owner could not be compensated for the loss of his business, that if the condemnation by the state gave effect to the prohibition of the ordinance so as to deprive the owners of the right to continue the operation of such business on the remaining portion of the tract, such an interpretation would constitute an unreasonable police regulation restricting the right of use of plaintiffs' property for business purposes contrary to the provisions of the constitution.

We do not consider that case controlling here because that case involved an element of damages in the loss of a right to continue a business for which the owner could not be compensated, whereas in the instant case compensation can be given under eminent domain. We accordingly hold that under the circumstances here a partial taking under condemnation by the state does give effect to the provisions of a zoning ordinance requiring compliance with the setback provisions when there is a "substantial destruction" of the building which is subject to the ordinance.

3. The court held that where the defendants are required to remove 60 feet of their building, in addition to 35 feet which is actually acquired, in order to comply with the set back requirements, the damage for removal of this 60 feet is compensable. The court cited the Illinois case of West Chicago Masonic Ass'n v. City of Chicago,[120] as authority that evidence of ordinance restrictions on rebuilding may be considered.

4. The court held that the defendants did not have a duty to apply for a variance permit to allow them to maintain the remainder of their building less than 60 feet from the new right-of-way line. While recognizing that the doctrine of "avoidable consequences" is applicable to the owner in a condemnation proceeding,[121] the court held

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[120] 215 Ill. 278 (1905). The condemnor took 35 feet from the front of the building. Evidence was introduced that the walls were not as heavy as required by the city building ordinance and that in case of reconstruction the walls would have to be heavily reinforced to comply with the ordinance. In computing the value of the remaining structure and the cost of reconstruction it was held error not to instruct the jury that if the remainder of the building was susceptible of reconstruction it would have to be re-constructed subject to the ordinance of the City of Chicago regarding the erection of buildings.

[121] The court cited Kelly v. Chicago Park Dist., 409 Ill. 91, 98 (1951) where the court stated that the principle of "avoidable consequences": ". . . finds its application in virtually every type of case in which the recovery of a money judgment or award is authorized."

that it was reasonable for the defendants to conclude that a permit would not be granted because the variance of some 23 feet could not reasonably be considered minor; there was no undue hardship indicated because compliance with the setback provision only required the destruction of a portion of the building used for warehouse purposes which only involved bare walls and floor; and further, the village council had indicated by resolution that the setback provision would be enforced.

Relocation of Nonconforming Uses

Where the condemnor took the portion of a tract on which nonconforming advertising signs were located, it was held that the signs could not be relocated in a similar manner on another part of the tract which was not taken.[122] However, it has been held that where nonconforming commercial buildings are located on the part taken, there is no abandonment of the nonconforming use so as to prohibit the owner from rebuilding and continuing the nonconforming use on the portion of the tract not taken.[123]

Permit to Extend Period of Nonconforming Use

Where a nonconforming building was being used under a city permit which expired after a twenty-one year period, the court held that in determining value it was proper to consider testimony that the city might grant a ten year extension.[124]

COMPARABLE SALES WHERE ZONING IS DIFFERENT

The Supreme Court of Illinois has held that the trial court did not abuse its discretion in permitting evidence of the sale of properties zoned differently than the property being condemned where the property and the conditions of the sale met the usual qualifications.[125] However, the same court held that it was error to permit cross-examination of a witness as to the value of other property where there was no foundation proof of its similarity and where the zoning was not the same.[126]

In Maryland it was held that the sale of two properties were comparable even though they were zoned residential while the condemned property was zoned commercial. The court pointed out that after their sale, but a year before the trial, they were rezoned to commercial and that the probability of rezoning may be taken into consideration.[127]

COLLATERAL ATTACK ON ZONING ORDINANCE

In Robinson v. Commonwealth,[128] the owner contended that the zoning ordinance was invalid as applied to the land being taken and attempted to prove that if freed from

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[122] City of New York v. Seel, 190 N.Y.S.2d 865 (1959), reversing 177 N.Y.S.2d 56 (1958). Two of the five justices dissented on the ground that the relocation on the same property for which the permits were originally issued was not an erection or structural alteration in violation of the zoning resolution. The signs were originally located prior to the passage of a zoning resolution which prohibited advertising signs within 200 feet of an arterial highway.

[123] 440 East 102nd Street Corp. v. Murdock, 34 N.E.2d 329 (N.Y., 1941); Connor v. Township of Chanhassen, 81 N.W.2d 789 (Minn., 1957).

[124] Gottfried v. State of New York, 218 N.Y.S.2d 286 (1961).

[125] City of Evanston v. Piotrowicz, 20 Ill.2d 512 (1960) (Other sales were for cash, were within two blocks of the subject property, were reasonably similar in size, and were sold within one to three years of the proceeding); Forest Preserve Dist. v. Kercher, 394 Ill. 11 (1946) (Other land was similar in locality and in the lay of the land. The court held that while dissimilarities did exist there was a reasonable basis for comparison.); City of Chicago v. Vaccarro, 408 Ill. 587 (1951) (Reasonable basis for comparison did exist.).

[126] Forest Preserve Dist. v. Chilvers, 344 Ill. 573 (1931) (The other property was zoned for apartments and was improved with an apartment building, while the property being condemned was zoned for single family residences and was improved with a structure used by the owners as a dwelling and boat house.).

[127] Bergeman v. State Roads Comm. of Maryland, 146 A.2d 48 (1958).

[128] 141 N.E.2d 727 (Mass., 1957).

its residential classification, it would have substantial value and that otherwise it was worthless. The trial court excluded such evidence and upon appeal the ruling was affirmed. The court held that the owner had ample opportunity to attack directly the ordinance if he had desired to do so; that he could not attack it at the condemnation trial. Earlier New York cases held to the same effect.[129] In other words, there can be no collateral attack upon a zoning ordinance in a condemnation proceeding. However, it has been held that permitting evidence of probability of rezoning does not constitute a collateral attack.[130]

Further inroads upon the prohibition against collateral attack have been made in Florida. In Board of Comm'rs of State Institutions v. Tallahassee Bank and Trust Co.[131] the defendants in a condemnation proceeding attempted by their answers to attack the validity of the zoning ordinance of the city of Tallahassee. The trial court held that it constituted an improper collateral attack and on appeal that ruling was approved. However, in a pretrial conference the trial court held that since the city was a party to the action, and since the other interested parties were before the court, the validity of the ordinance and its proper application should be determined as an incident to the condemnation proceedings. The defendants were than allowed to file cross-claims for declaratory relief in law adjudicating the validity and application of the ordinance, and the condemnor and the city were ordered to answer the cross-claims. The condemnor sought certiorari to review the order of the trial court denying its motions to strike and dismiss the cross-claims. The court denied certiorari on the ground that it was a procedure which would indirectly permit a collateral attack and pointed out that if evidence of reasonable probability of rezoning is presented to the jury there will be no necessity of determining the validity of the ordinance.

The case was subsequently tried before a jury and the condemnor appealed from the final judgment.[132] The opinion on the second appeal clearly indicated that the prohibition of collateral attack had some exceptions. The condemnor claimed "That the filing of a condemnation suit ipso facto exclusively precludes any attack by a landowner upon the validity of zoning regulations."[133] The court observed on page 81 of the opinion: "It appears to us that it would be totally unjustifiable to hold that the condemning authority could rely on the restrictive provisions of a zoning ordinance to depress land values and in the same litigation deny to the property owner an opportunity to defend himself and his property against the asserted ordinance on the ground of its alleged invalidity." The condemnor's argument that municipal ordinances cannot be subjected to collateral attack was more directly answered on page 82 of the opinion:

> In the first place in the instant case any assault on the validity of the ordinance as such was a direct assault so far as the City of Tallahassee was concerned. This is so for the simple reason that the City of Tallahassee was already a party to this cause and was named a co-defendant and was accorded a full opportunity to defend its ordinance against the assault. Moreover the position of the appellee property owners simply is that they were not leveling a general attack on the validity of the ordinance. They merely questioned, as they had a right to do, the application of the restrictions of the ordinance to the particular property here involved as a limitation on evidence as to value. Incidentally the City of Tallahassee as such is not a party to this appeal.

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[129] MacEwen v. City of New Rochelle, 267 N.Y.S. 36 (1933); Westchester County v. MacEwen, 260 N.Y.S. 875 (1932).

[130] State of Washington v. Motor Freight Terminals, Inc., 357 P.2d 861 (1960).

[131] 100 So.2d 67 (Fla., 1958).

[132] Board of Commr's. of State Institutions v. Tallahassee Bank & Trust Co., 108 So.2d 74 (Fla., 1959).

[133] Id. at 81.

Another form of collateral attack upon a zoning ordinance occurs where the court refuses to enforce the ordinance provisions for elimination of nonconforming uses.[134]

Where the zoning ordinance was not enacted in accordance with the provisions of the enabling statute, it was held that it could be collaterally attacked by the defendant in a condemnation suit on the ground that it is void.[135]

ZONING FOR THE BENEFIT OF THE CONDEMNOR

A more extreme situation exists where a zoning regulation is adopted or rezoning denied by the condemnor (or another cooperating public body) for the purpose of decreasing land value or preventing its utilization in order to lower acquisition costs in eminent domain proceedings. Such action has been condemned in numerous cases.[136] The courts have considered this situation extreme because it contains positive elements of confiscation and denial of basic constitutional rights.

In Board of Comm'rs of State Institutions v. Tallahassee Bank and Trust Co.,[137] the condemnor appealed on the ground that the trial court ignored the zoning restrictions on the property. The State of Florida had employed a city planner to advise it on the development of a Capitol Center. Simultaneously, the same city planner was employed by the City of Tallahassee to advise it on a comprehensive zoning plan. He made his report to both the city and the state and they shared in paying the expense. The report stated that unless measures were taken to prevent it, private property would be utilized for business purposes within the Capitol Center area; that unless restrained it would seriously increase the cost of acquisition when, and if, the state used its power of eminent domain; that zoning regulations should prohibit the construction of business and commercial buildings in order to avoid this increased cost of acquisition. Zoning regulations were adopted by the city which prohibited commercial buildings and the public records of both the state and the city clearly indicated that zoning was employed to restrict private development of the Capitol Center area. The condemnor claimed that the courts may not determine the motives of the legislative body which passed the ordinance. The court answered this claim in the following manner:[138]

> There is abounding evidence of excessively exuberant civic enthusiasm. However, we are not inclined to commend an arbitrary exercise of the police power by one branch of government in order to pave the way for a less expensive exercise of the power of eminent domain by another branch to the detriment of the private property owner. Even when adorned with a mantle of civic improvement we cannot conceive of a policy of government afflicted with greater potentials for abuse of the private citizen. The only difficulty with the desires of all of the officials as well as the effort which they put forth to effectuate their wishes, simply was that out of their ambition to construct an attractive Captiol Center that would be a

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[134] City of La Mesa v. Tweed & Gambrell Planning Mill, 304 P.2d 803 (Cal., 1956), discussed in § 11 (a).

[135] Bowling Green-Warren County Airport Bd. v. Long, 364 S.W.2d 167 (Ky., 1962). In order to minimize the damages to the defendant's land, the condemnor offered in evidence a zoning ordinance to show that the land in the immediate vicinity of the proposed runway was already subject to restrictions. The Court heard evidence in chambers that notice of the public hearing on the proposed adoption of the zoning ordinance was not published as required by statute.

[136] Robertson v. City of Salem, 191 F.Supp. 604 (Dist. Ct. Oreg., 1961); Grand Trunk Western R. R. Co. v. City of Detroit, 40 N.W.2d 195 (Mich., 1949); Long v. City of Highland Park, 45 N.W.2d 10 (Mich., 1950); Robyns v. City of Dearborn, 67 N.W.2d 718 (Mich., 1954); State ex rel. Tingley v. Gurda, 243 N.W. 317 (Wis., 1932); Kissinger v. City of Los Angeles, 327 P.2d 10 (Cal., 1958); Henle v. City of Euclid, 125 N.E.2d 355 (Ohio, 1954); In re Gibson, 28 Ont.L.R., 11 D.L.R. 529 (1913); Board of Comm'rs. of State Institutions v. Tallahassee Bank and Trust Co., 108 So.2d 74 (Fla., 1959).

[137] 108 So.2d 74 (Fla., 1959).

[138] Id. at 85.

> credit to all of Florida they imposed upon certain private property owners in the involved area the burden of suffering what amounted to an arbitrary and unreasonable restraint on the use of their property.

In Robertson v. City of Salem,[139] the city zoned an area of land so as to prohibit commercial development although it was located within a predominately commercial area. The evidence indicated that it was zoned at the request of the State of Oregon so as to hold down the cost of acquiring land for state office buildings. The property owner filed a declaratory judgment action against the city to determine the validity of the ordinance. Holding the zoning ordinance void as to the property owner, the court stated:[140]

> Paraphrasing the language of Kissinger, this Court is of the opinion that Ordinance No. 4578 is arbitrary and discriminatory and that it is, in effect, an attempt on the part of Salem to use its police power to take Robertson's property without due process of law and without payment of just compensation for the taking, and therefore violative of the guarantees of the Constitutions of the United States and the State of Oregon, and, hence, void as to Robertson.

In Kissinger v. City of Los Angeles,[141] the property owner had started building apartment buildings on his property when he was advised that a portion of the property would be condemned for airport purposes. At the same time the city rezoned his property from R-3 to R-1 by an ordinance which specifically stated that it was to avoid undue density of population in the airport area. Pointing out that other properties in the area were not rezoned from R-3 to R-1, the court held that the obvious purpose of the ordinance was to prevent the improvement of the property so that it could be acquired for a lesser price; that such action was a taking of property without compensation and without due process of law.[142]

NECESSITY OF DETERMINATION BY JURY

Ordinarily, the question of reasonable probability of rezoning should be submitted to a jury. However, there are factual situations where it has been held that as a matter of law the court can hold that the existing zoning is void as to the property involved. It is virtually the same question as whether a collateral attack on a zoning ordinance will be permitted in a condemnation proceeding.[143]

In Board of Comm'rs of State Institutions v. Tallahassee Bank and Trust Co.,[144] the condemnor claimed that the question of whether the zoning ordinance was unreasonably restrictive should be submitted to the jury, and cited cases involving reasonable probability of rezoning. Holding that the facts of the case[145] took it out of the reasonable probability category, the court stated on page 83:

> The record in the instant case reflected almost conclusively and certainly beyond dispute that the existing zoning ordinance imposed unreasonable and discriminatory restrictions on the use of the particular property involved. Indulging the established presumption that public officials will do their duty, we

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[139] 191 F.Supp. 604 (Dist. Ct. Ore., 1961).
[140] Id. at 612.
[141] 327 P.2d 10 (Cal., 1958).
[142] Cf. State ex rel. Tingley v. Gurda, 243 N.W. 317 (Wis., 1932).
[143] See § 13.
[144] 108 So.2d 74 (Fla., 1959).
[145] See § 14.

> think that this record beyond all doubt would have sustained a judicial conclusion as a matter of law that the municipal officials would within the foreseeable future adjust the requirements of the ordinance so as to liberalize the uses to which the property might be put. We think under such circumstances the so-called reasonable probability of a change in the ordinance ceases to be a factual conclusion alone for jury determination. Like any other conclusion it becomes one of law for determination by the judge if the factual aspects of the matter are so clear and indisputable that only one legal conclusion can be reached.

The validity of a zoning ordinance provision eliminating nonconforming uses has been determined by the court as a matter of law in a condemnation case.[146] If the validity of a zoning regulation can be determined in a condemnation action, it seems clear that it should be determined by the court as a matter of law. Although this question has not been raised in an Illinois condemnation case, the validity of a zoning regulation as applied to a particular property has always been determined by the court as a matter of law.[147]

JURY INSTRUCTIONS ON ZONING

The following jury instructions on zoning in eminent domain cases have been approved:

> You are instructed that the term "market value" is the price which the property would bring when it is offered for sale by one who desires, but is not obliged to sell, and is bought by one who is under no necessity of buying it, taking into consideration all of the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future.[148] Compensation awarded when land is taken by eminent domain is the market value of the land for any use to which it is adapted and for which it is available. If, therefore, the land is not presently available for a particular use by reason of a zoning ordinance or other restrictions imposed by law, but if you find from the evidence that there was a reasonable probability of a change in the near future in the zoning ordinance, or other restrictions, then the effect of such probability on the minds of purchasers generally should be taken into consideration in fixing the present market value of it.[149]
>
> The jury was advised if it found that the best adaptable use to which the land could have been put at the time of the condemnation was a use other than that for which it was zoned at the time and that there was a reasonable probability on September 4, 1959,

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[146] City of La Mesa v. Tweed & Gambrell Planning Mill, 304 P.2d 803 (Cal., 1956), discussed in § 11 (a).

[147] Usually through a declaratory judgment action (See American National Bank & Trust Co. v. County of Cook, 27 Ill.2d 468 (1963)), a suit in equity to set it aside as a cloud on the title and to enjoin its enforcement (See LaSalle National Bank v. City of Chicago, 27 Ill.2d 278 (1963)), or a mandamus to compel the issuance of a building permit coupled with an injunction to enjoin interference (See People ex rel. Chicago Title & Trust Co. v. Village of Elmwood Park, 27 Ill.2d 177 (1963)).

[148] City of Austin v. Cannizzo, 267 S.W.2d 808 (Tex., 1954). This instruction was also approved in a case where there was no evidence of a probable change in zoning but a city permit was required. State of Texas v. Albright, 337 S.W.2d 509 (1960).

[149] State of Arizona ex rel. Morrison v. McMinn, 355 P.2d 900 (1960). A similar charge was given, without appellate determination of its correctness in Board of Education of Claymont Special School Dist. v. 13 Acres of Land, 131 A.2d 180 (Dela., 1957).

of its being later rezoned to permit such use, then it might consider such fact in determining fair market value of the property insofar as that use tended to affect the immediate value of the property.[150]

In arriving at your verdict as to the fair market value of the property you may take into consideration the reasonable probability of a change of the zoning ordinance in the near future and the influence that that circumstance might have on the value of the land.[151] If you should find from the evidence introduced that there is a reasonable probability of a change in the existing zoning restrictions which now restricts the use of any of the property here being condemned, you may consider the effect of such probability of a change in the zoning restrictions on the minds of purchasers generally in fixing the market value of the property.[152]

The enactment of a zoning ordinance which is adopted by a city in good faith and which actually does affect the market value of real property is competent evidence in behalf of the city in a subsequent suit for condemnation of the property for public use. The city is not estopped from proving the actual market value of the property merely because its enforcement of police regulations may have affected the value of the property.[153]

You may take into consideration the fact that the Howard County Zoning Laws had not become operative at the time the property was taken, so that at that time it could have been utilized or sold for any purpose the owner decided to utilize or sell it.[154]

At the same time, Gentlemen, I charge you that while you may, in determining the value of the property condemned, consider all uses to which it might reasonably be put, the mere possibility, if you should find from the evidence that such existed, that it might in the future have been put to some use not permitted under the applicable zoning ordinance affecting the property at the time of the taking, that is on June 8, 1961, is not enough to authorize you to consider the effect of such a possibility in determining the value of the land.

If, however, there is a possibility or a probability that the zoning restrictions may in the future be repealed or amended so as to permit the use in question, such likelihood may be considered if the prospect of such repeal or amendment is sufficiently likely as to have an appreciable influence on the present market value. Such possible change in zoning regulations must not be remote or speculative.

I charge you further that in such an event the property must not be evaluated as though the rezoning were already an accomplished fact, but it must be evaluated by the existing zoning regulations and consideration given to the impact upon the market value in the event of a change in the zoning regulations. The question of the existence of a reasonable possibility or probability of a change in zoning regulations is a question of fact and it is for your sole determination.[155]

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[150] Vic Regnier Builders, Inc. v. Linwood School Dist. No. 1, 369 P.2d 316 (Kan., 1962).

[151] Barnes v. North Carolina State Highway Comm., 109 S.E.2d 219 (1959), (although this instruction was not specifically discussed, the court approved the admission of evidence as to reasonable probability of rezoning and held that there was no error.).

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

[153] City of Menlo Park v. Artino, 311 P.2d 135 (Cal., 1957), (The court also gave an instruction as to reasonable probability of rezoning, see note 118.).

[154] Reindollar v. Kaiser, 73 A.2d 493 (Md., 1950), See § 8 (e).

[155] Civils v. Fulton County, 134 S.E.2d 453 (Ga., 1963).

The following instructions were not approved:

> You are instructed that in determining the highest and best use of defendants' property that you are not limited by the use presently being made of the property, nor by the particular zoning presently on the property, but you should consider the uses for which the land is adapted and for which it is available and the reasonable probability that the zoning will be changed for the use to which said land is adapted and available.[156] You are instructed that in determining the highest and best use of defendants' property that you are not limited by the use presently being made of the property, nor by the particular zoning presently on the property, but you should consider the uses for which the land is adapted and for which it is available and the reasonable probability that the zoning will be changed for the use to which said land is adapted and available.[157]
>
> In determining the market value of the property taken, you are not limited to a consideration of the use to which the owner was putting the land, but you should take into consideration all the uses to which the property was adapted and for which it was available, including the highest possible use to which it could reasonably be put. . . . Only R-1 is involved here. . . as a matter of law, in this case the Court instructs the jury that at all times referred to in the evidence in this case the only lawful use that could be made of this property was for single family residence.[158]

It was held that the trial court properly refused an instruction which stated that, in determining the reasonable market value of the property, the jury should consider the zoning ordinances of the city and "You shall not take into consideration the future possibility of a change in said zoning ordinance."[159]

As to benefits which offset damages,[160] it was held that the following instruction was properly refused by the trial court:[161] "Prospective enhancement in value of the remaining property or any part thereof, if any there be, which can occur, if at all, only after a change of zone or a zone variance is not a proper basis for a finding of special benefits and should therefore be entirely disregarded by you."

In the same case, the following instructions were given at the request of the property owners and were quoted by the court without specific approval or disapproval:[162]

> No change of zone or zone variance will result only from the mere construction of the improvement herein.
>
> The property involved herein is zoned R1 pursuant to the zoning ordinances of the City of Los Angeles. No part of the remaining property can be legally used for multiple residential or commercial purposes except after a zone change or a zone variance.

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[156] People v. Gangi Corp., 15 Cal.Rptr. 19 (1961), (failed to define how far distant in the future, failed to name the hypothetical new zone, duplicated other given instructions, and there was insufficient evidence that the governing body would change the zoning).

[157] People ex rel. Dept. of Public Works v. Donovan, 369 P.2d 1 (Cal., 1962), (failed to set an express time limit on the probability of a zoning change and contained the possible implication that the court had concluded as a matter of law that there was a reasonable probability of a zoning change).

[158] People ex rel. Dept. of Public Works v. Donovan, 369 P.2d 1 (Cal., 1962), (did not recognize reasonable probability of rezoning).

[159] State of Missouri ex rel. State Highway Comm., 289 S.W.2d 64 (1956).

[160] See § 10.1.

[161] People v. Hurd, 23 Cal.Rptr. 67, 72 (1962).

[162] Id at 72.

CONDITIONS ATTACHED TO REZONING OR A VARIANCE

In Rand v. City of New York, [163] the property owner sought a declaratory judgment to have a city law declared unconstitutional in its application to her property. [164] The Board of Estimate adopted a map laying out the confines of a proposed street which encompassed more than 80 percent of the plaintiff's property. The plaintiff applied for a building permit to erect a garage and her application was denied on the ground that the erection of a garage in the bed of a mapped street is forbidden by city law. Thereafter, plaintiff requested a variance and after a hearing it was granted on condition "that in the event of condemnation the cost shall be amortized over a term of ten years at the rate of ten percent per year starting from the completion of the building." The uncontroverted evidence was that the building would have a minimum useful life of 50 years. Granting the plaintiff's motion for a summary judgment, the court stated on pages 755-756: "If the defendants have so restricted plaintiff's use of her property that it cannot be used for any reasonable purpose for an indefinite period of time, then they have acted beyond the bounds of permissive regulation and their action constitutes a taking of the property. Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 117 A.L.R. 1110."

However, in In re Rosedale Avenue, City of New York, [165] the property owners asked that their property be rezoned from residential and restricted retail use to a retail use and signed an agreement waiving any enhancement of damages by reason of the use change should the property be taken within ten years for a proposed street widening. They further agreed that in event of such taking their claim would be limited to the value of the property as residentially zoned and that the agreement would constitute a covenant running with the land. Noting that the rezoning was granted without imposing a condition for making the change, it was held that the agreement was binding.

CONCLUSION

The doctrine of reasonable probability of rezoning has been adopted in all United States jurisdictions where it has been asserted and will probably be adopted in the remaining United States jurisdictions. Since probability of rezoning is a factor in determining market value, the condemnor should accept it and concentrate its efforts upon the discovery and evaluation of the evidence which is admissible in event of trial. The condemnor must also recognize that the courts are beginning to take a liberal approach upon such condemnation-zoning questions as the effect of condemnation upon restrictions on nonconforming uses, collateral attack upon a zoning ordinance, and zoning for the benefit of the condemnor.

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[163] 155 N.Y.S.2d 753 (1956).
[164] See also Vangellow v. City of Rochester, 71 N.Y.S.2d 672 (1947).
[165] 243 N.Y.S.2d 814 (1963).