THEORY AND PRACTICE IN INVERSE CONDEMNATION FOR FIVE REPRESENTATIVE STATES

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Systematic, well-designed research provides the most effective approach to the solution of many problems facing highway administrators and engineers. Often, highway problems are of local interest and can best be studied by highway departments individually or in cooperation with their state universities and others. However, the accelerating growth of highway transportation develops increasingly complex problems of wide interest to highway authorities. These problems are best studied through a coordinated program of cooperative research.

In recognition of these needs, the highway administrators of the American Association of State Highway Officials initiated in 1962 an objective national highway research program employing modern scientific techniques. This program is supported on a continuing basis by Highway Planning and Research funds from participating member states of the Association and it receives the full cooperation and support of the Bureau of Public Roads, United States Department of Transportation.

The Highway Research Board of the National Academy of Sciences-National Research Council was requested by the Association to administer the research program because of the Board's recognized objectivity and understanding of modern research practices. The Board is uniquely suited for this purpose as: it maintains an extensive committee structure from which authorities on any highway transportation subject may be drawn; it possesses avenues of communication and cooperation with federal, state, and local governmental agencies, universities, and industry; its relationship to its parent organization, the National Academy of Sciences, a private, non-profit institution, is an insurance of objectivity; it maintains a full-time research correlation staff of specialists in highway transportation matters to bring the findings of research directly to those who are in a position to use them.

The program is developed on the basis of research needs identified by chief administrators of the highway departments and by committees of AASHO. Each year, specific areas of research needs to be included in the program are proposed to the Academy and the Board by the American Association of State Highway Officials. Research projects to fulfill these needs are defined by the Board, and qualified research agencies are selected from those that have submitted proposals. Administration and surveillance of research contracts are responsibilities of the Academy and its Highway Research Board.

The needs for highway research are many, and the National Cooperative Highway Research Program can make significant contributions to the solution of highway transportation problems of mutual concern to many responsible groups. The program, however, is intended to complement rather than to substitute for or duplicate other highway research programs.
Highway attorneys who may be associated with legal cases involving inverse condemnation will find much of interest in this research report. The theory of the law is reviewed as it applies to damages occurring during or after highway construction, and not compensated at the time of taking. In addition to describing laws of five representative states, the report cites numerous cases on inverse condemnation from these states to relate the basis and extent of liability awarded by the courts. Various substantive defenses are noted for use by the state attorney in meeting inverse condemnation claims.

Inverse condemnation suits are those wherein the state is sued for property damage occasioned by highway construction. Generally, these suits are brought by private landowners adjacent to or near a highway and assert that property has been taken or damaged due to construction or improvement of the highway. Generally, also, such claims arise after or in the absence of any regular condemnation proceeding undertaken by the state for land acquisition under its eminent domain power.

Inverse condemnation cases are increasing, but the theory and limits of the state's liability for inverse condemnation are neither clearly understood nor agreed upon. Legal procedures for determining questions of liability are also unsettled. The handling of inverse condemnation claims is becoming increasingly diverse, the results are costly, and judicial use of both eminent domain and tort theories in dealing with these claims makes for confusion and hampers the evolution of clear legal rules of compensation.

Because of the limited time and funds allotted for this project, all forms or causes of property damage could not be studied. This report concentrates on inverse condemnation claims of injury to drainage, withdrawal of lateral support, and injury to land caused by highway construction operations.

Five states—California, Florida, New York, Pennsylvania, and Texas—were selected for study in this research project. They were selected to illustrate the handling of inverse condemnation cases in states which have had substantial experience with property damage claims, and which also have varying types of constitutional provisions relating to the taking or damaging of property. Other variables are the statutory procedures for handling such claims and the impact of the doctrine of sovereign immunity. The study thus permits comparison between states which acquire land by condemnation through judicial proceedings (California, Florida, and Texas) and states which utilize administrative or quasi-judicial proceedings for land acquisition (Pennsylvania and New York). It allows comparison of states like New York, where the legislature has enacted a general waiver of sovereign immunity and a comprehensive Court of Claims procedure, with states like Pennsylvania, where sovereign immunity is still applied by the courts, and states like California, where sovereign immunity has been largely destroyed by the courts.

For each of the selected states, the following is presented: the status of the doctrine of sovereign immunity, the legal basis on which landowners alleging
injuries may bring actions against the state for compensation, the procedural
defenses to such claims, and the state's defenses under substantive law.

This body of law is far from being stable and mature and therefore deserves
continued study. It is believed that this report dealing with five states, together with
other research such as was conducted by Professor Daniel Mandelker in 1964 in
cooperation with the Bureau of Public Roads, will furnish a beginning in providing
the influences which will shape the law of the future.
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SUMMARY

Pennsylvania law of inverse condemnation is a possibly unique combination of the old and the new, of conservative adherence to old doctrine and innovations incorporating current concepts of fair play and just compensation.

The constitutional scope of eminent domain liability was early broadened, with respect to municipalities, to include damages for injury and destruction, as well as taking of property. However, the enlargement did not apply to the state, whose power of eminent domain was consequently limited only by the requirement of payment for property taken or applied. In other states, taken or applied has expanded under judicial refinement of the definition of the constitutional terms. In Pennsylvania, at least as to cases within the scope of this study, the judiciary by and large has deferred to the judgment of the framers of the current constitution that the line should be held as to state liability even though that of municipalities (and private condemnors) was enlarged.

Similarly, the ancient doctrine of sovereign immunity, in Pennsylvania evolved from the constitution, has been retained without perceptible diminution of force. As applied in Pennsylvania, the result has been to bar all actions which would broaden the scope of constitutional eminent domain liability by seeking such damages under other theories, principally negligence and willful tort.

The scope of state liability, until recently determined by the confluence of these two streams of law originating in the Constitution, is now beginning to exceed those bounds. The enlargement is due to new elements injected into the law by legislative action in the form of a comprehensive Code of Eminent Domain, adopted in 1964. It marks the first major break in the long-established rule, applied as well as endorsed by case law, that consequential damages (as an independent right, rather than an incident of the measure of damages employed in partial taking) can not be recovered against the state. It also breaches the liability barrier as to good will and other items not specifically relevant to this study.

To the extent that Pennsylvania law recognized liability, it has been in the forefront in providing the procedural means of enforcing it. Individuals have had a statutory right to initiate condemnation proceedings to have their damages assessed since 1891. The new Code continues this right, although prescribing some changes of detail in its exercise. This proceeding, popularly referred to as “inverse,” and sometimes “reverse” condemnation, theoretically is governed by the identical substantive law that governs a proceeding begun by the condemnor. In practice, however, inverse claims for physical damage tend to have certain characteristics, and to raise certain considerations, not present when the parties are in their more normal posture.

Conflicts as to the scope of property rights tend to be fought out in the inverse
arena—merely a public manifestation of the same attitude as is colloquially summed up by the phrase “sue me.” Partly for the same reason, inverse proceedings tend to be associated with injuries which are felt (or seen) only at some remove in time from the causal acts, and particularly those injuries which, at the time of the acts, the condemnor believes, possibly wrongly, will never materialize or will be insignificant. The fact that a right which is not mature at one time subsequently ripens into an actionable claim is not under Pennsylvania law a significant distinction per se between the two. In fact, however, because of the interaction of the rules that govern state liability, the inverse proceedings tend to raise issues which are rarely if ever relevant to proceedings begun by the condemnor. These relate both to the procedural or technical defenses and to the substantive issues relating to recovery.

New York

Inverse condemnation, understood to mean a reversal of normal posture of parties, does not exist in New York.

New York does not follow its usual condemnation procedures in appropriating real property for public use as a highway. Section 27 of the New York Condemnation Law exempts the condemnation of real property for public use as a highway from compliance with what has been characterized as the “judicial” procedure for condemnation.

Under the New York Highway Law, land is acquired by the State for the construction and reconstruction of highways via an “administrative” procedure which involves the filing of a description and map of the property sought, followed by the automatic vesting of title. The Superintendent of Public Works is authorized, by Section 30(13) of the Highway Law, to settle claims for the value of the property so appropriated, but the only “condemnation proceeding” available is that brought under Section 30(14), authorizing any owner of property so appropriated to present his claim for its value to the Court of Claims.

The same appropriation procedure, under which any judicial proceeding must be initiated by the claimant and is limited to adjudication of value, applies to condemnations for thruways under Section 347 of the Highway Law, and for public works, including highways, constructed with the aid of funds from the Federal Government under McKinney’s Unconsolidated Laws, Section 7702. All of these highway land appropriation statutes were enacted in 1942 as part of a general revision and reorganization of the system for administering and constructing highways with the purpose of centralizing control in the State. Such procedures are applicable by their terms to formal appropriations accomplished by filing and automatic vesting. Each contains a provision also authorizing suit against the state for damage to property not thus appropriated. The regular way of exercising a claimant’s rights is at his own initiative. Hence, the fact that the claimant necessarily brings suit where the state does not concede incurring some eminent domain liability does not effect a reversal of the posture of the parties.

Inverse condemnation with respect to New York cases is used to mean claims for compensation based on physical damage allegedly caused by state highways to neighboring property interests which were not formally appropriated for the purpose and involving damage which had not occurred, and was not in fact foreseen as a source of liability when the highway was planned. Such claims almost invariably arise from flooding.

The defense of sovereign immunity is inapplicable, the statutes of limitations
play a minimal role; and even the legal theory of the action is relatively insignificant to the results reached. The determination of rights and liabilities tends to have a decidedly factual cast.

**Texas**

The procedural basis for inverse condemnation suits in Texas is statutory. Vernon's Annotated Civil Statutes, Article 3269, provides as follows:

> When the State of Texas, or any county, incorporated city, or other political subdivision, having the right of eminent domain, or any person, corporation or association of persons having such right, is a party, as plaintiff, defendant or intervenor, to any suit in a District Court, in this State, for property or for damages to property occupied by them or it for the purposes of which they or it have the right to exercise such power of eminent domain, or when a suit is brought for an injunction to prevent them or it from going upon such property or making use thereof for such purposes, the Court in which such suit is pending may determine the matters in dispute between the parties, including the condemnation of the property and assessment of damages therefor, upon petition of the plaintiff, cross-bill of the defendant or plea of intervention by the intervenor asking such remedy or relief; and such petition, cross-bill or plea of intervention asking such relief shall not be an admission of an adverse party's title to such property; and in such event the adverse party may assert his or its claim to such property and ask in the alternative to condemn the same if he or it fails to establish such claim; provided that, if injunctive relief be sought, the Court may grant relief under the Statutes and Rules of Equity or may as a prerequisite to denying such relief, require the party seeking condemnation to give such security as the Court may deem proper for the payment of any damages that may be assessed on such party's pleading for condemnation.

Conceivably, this statute may be read as waiving statutory immunity, but this interpretation does not yet appear to have been urged or considered.

**Florida**

The law of Florida concerning the state's liability for damage attributable to state highways presents a further example of the interaction of the doctrines of sovereign immunity and inverse condemnation. The defense of sovereign immunity, although pierced, is still a potent tool within the area of its applicability. Its greatest efficacy in factual contexts of interest to this study is as a bar to action for tort. As to such claims in respect of highway damage, the state legislature has superimposed its imprimatur on the doctrine evolved from the constitution. At the other extreme, it confers no immunity whatever to claims for just compensation based on the constitutional limitation on the eminent domain power. Some highway damage claims may be maintained on this basis through the medium of a condemnation suit initiated by the injured property owner. The facts that are sufficient to sustain such a suit may be substantially indistinguishable from those which would state an action for trespass barred by sovereign immunity. Thus, the effect on the scope of liability, as opposed to the formula for its measurement, may be nil.

**California**

There is a dynamic atmosphere about the law of California in the sphere of interest of this report for which four developments since 1960 are responsible: (1) the
Muskopf case abolishing governmental immunity from tort liability; (2) a legisla-
tive moratorium, which has since expired, during which the government's tort
liability was temporarily restored to its pre-Muskopf immunity; (3) a state tort
liability act and a revised statutory administrative procedure for both tort and
inverse condemnation claims; and (4) the Albers case, expressly sanctioning an
inverse condemnation claim for physical damage to property although no claim
would lie against a private party on the same facts.

CHAPTER ONE

INTRODUCTION

Inverse condemnation, in just a few decades, has mush-
roomed from a virtually unknown species of action to a
fairly numerous classification.1 The purpose of this report
is to examine and analyze claims of alleged takings or
damage to private property for public purposes without
payment of just compensation and without formal ap-
propriation. Such cases are included without regard to
whether they are labeled inverse, reverse, de facto, or
common law condemnation.2 For practical reasons, how­
ever, the study is by and large limited to physical damage
cases adjudicated in five legally variegated states.

The increase in the number of inverse condemnation
claims has paralleled and, at least in part, has been pro-
duced by other growth of population and of the public
and private sectors of the economy. The basic facts pertain­
ing to this growth, particularly the population explosion, have
probably achieved cliche status. Although overshadowed
by its other effects, the fact that our population has more
than doubled between 1900 and 19603 has had a portent
for the eminent domain power, nonetheless significant for
being indirect.

Industry, commerce, and people need land and costly
improvements for business and family use. These require­
ments have been and are being met by tremendous private
investment, albeit with no little (and increasing) public
assistance. Efficient modern transportation is needed and
demanded by all people, whatever their group or category.
But transportation also requires land, 4 much of it in the
urban areas where population growth has been greatest.5

Comparative statistics in this area are illuminating.

1 One of the earliest judicial uses of the "inverse" label appears in
Ferguson v. Village of Hamburg, 272 N.Y. 234, 5 N.E.2d 801 (1936)
(Defendant raised existing dam and appropriated water from creek. Held,
acts constituted a taking of the private property of petitioner, a lower
riparian, for which equity should assess and award damages.)

2 A similar disregard of labels can be seen in many cases. In Ferguson
v. Village of Hamburg, id., for example, the court, as precedent for its
decree awarding damages "sometimes termed inverse condemnation" cited
cases which, although factually apposite, make no mention of the term.

3 The total population of the United States in 1900 was 76,094,000; in
1960 this figure had risen to 178,153,000. U.S. Census Bureau, HISTORICAL
STATISTICS OF THE U.S., COLONIAL TIMES TO 1957 (Supp. 1962) (herein-
after HISTORICAL STATISTICS), Series A 1-3.

4 In 1954, 35 million acres were used for transportation purposes of all
kinds. BARLOWE, LAND RESOURCE ECONOMICS 100 (1958). In the same year,
highways and roads consumed slightly more of the total land area than
did urban areas, 19.8 million acres as against 18.6 million acres. Id. at
45, Table 2-4.

5 In 1900, only 30,160,000 people lived in urban areas. The larger num­
ber, 45,835,000 lived in rural areas. By 1960, this situation was more than
reversed: 125,269,000 people were urbanites as against 40,567,000 people
living in rural areas, and only 13,476,000 still home on the farm. HISTORI­
CAL STATISTICS, Series A 34-50.

6 Legault, HIGHWAY & AIRPORT ENGINEERING, Ch. I (1960).

7 Bello, The City & the Car, THE EXPLODING METROPOLIS 33 (Ed. FOR­
TUNE 1958).

8 HISTORICAL STATISTICS, Series Q 246-259. Not everyone agrees that the
rate of past increase in automobile travel served the cause of modern
transportation or that the increase protected for the future would be a
good thing. Compare Welles, BITTEREST FIGHT: NEW MASS TRANSIT VS. MORE
HIGHWAYS, LIFE 38 (May 12, 1967), with Bello, The City & the Car, supra
note 7. There is, however, less disagreement with the view that the strong
preference that exists today for the automobile for relatively short dis-
tances will continue unabated in the foreseeable future.

9 HISTORICAL STATISTICS, Series Q 376-383.

In 1900, there were about 8,000 automobiles registered
in all of the United States.6 Air travel was still a thing of
the future. Sixty years later, the number of cars had
swelled to more than 54,300,000.7 Air travel was very
much a thing of the present. Automobile travel requires
land for parking as well as for highways, which by 1960
spanned 3,546,000 miles, as compared with 154,000 miles
in 1904.8 Air travel requires land for approaches as well
as for airports, which by 1960 numbered 6,881, as
compared with no commercial airports in 1904.9

The concurrence of increased private development of
land and public acquisition of land has had a twofold
result. It has made the exercise of the eminent domain
power at one and the same time more costly to the public
developer and more painful to the private owner. The
farm-to-market road conferred obvious financial benefits
on both farmer and consumer, with little if any infringe­
ment on the amenities of either. The needs served by the
modern highway, although as great, are often less direct
and the benefits, therefore, less obvious. Whether the
highway diverts traffic to or from abutting property, it is
likely to raise cries of protest, particularly if access is
affected.10 In light of this background, the tremendous
growth of eminent domain and inverse claims is hardly
surprising.
CONDEMNATION AND INVERSE CONDEMNATION: A COMPARISON

The de jure exercise of the eminent domain power may be broken down into four phases, not always discrete and not always in the order stated. The first phase is the doing of some act by the public developer, such as a declaration of taking, the filing of a map or plan, etc. This act is prescribed by statute and ordinarily pinpoints the time of taking. The second phase is the doing of physical acts preliminary to or part of the construction of the public improvement. The third stage is negotiation between the condemnor and condemnee prior to the initiation of any formal proceeding to assess damages. Whether a state's statutes prescribe or have been interpreted as prescribing negotiation of the issue of just compensation, it is in fact the universal practice. If negotiations are successful, as they are in the majority of efforts, the matter ends there, and just compensation is paid in accordance with the agreement reached by property owner and public developer. Only if negotiations fail, does the fourth stage, adjudication of the amount of just compensation, commence. Here again, state statutes are applicable. These prescribe, in more or less detail, the form and forum, procedure and substance of condemnation proceedings. This last stage is part of the eminent domain cycle, even as to claims settled by agreement. The settled right to an adjudication and the possibility of its commencement is the invariable background of such negotiation and is certainly a factor in the minds of the negotiators.

Inverse condemnation claims fall outside the ordinary condemnation pattern in at least one respect. As defined in one recent case, inverse condemnation is "... a situation where one having the power of eminent domain has taken property without the exercise of such power and has not made payment for the property so taken." By "exercise of such power" the court presumably is referring to the filing of a declaration of taking or other stage one action. Other courts have defined inverse actions even more broadly, as "... an eminent domain proceeding initiated by the property owner rather than the condemnor. The principles which affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action." Both definitions were adequate for the purposes of the respective courts and perhaps even adequate to differentiate inverse from other condemnation proceedings in the respective jurisdictions. Neither, however, stands up as a generally applicable description of the line of demarcation. In some states, the property owner rather than the condemnor is always the moving party, initiating "eminent domain proceeding(s)." And, although it is always true that the developer "has not, prior to an inverse action, made payment for the property taken" in some jurisdictions, fewer today than formerly, it is equally true of ordinary condemnations which go to the stage of adjudication. Moreover, some takings which become the subject of inverse claims are preceded by an exercise of the eminent domain power (that is, a map or plan has been filed). Substantively, demarcation between inverse and eminent domain claims is, if anything, even more difficult. Whether there is in fact any real distinction is an open question. Despite the elusiveness of a golden thread, inverse claims do have a common characteristic which, although not legally significant, may put them in truer perspective. Characteristically, such claims originate out of uncertainty as to title, compensability or causal relationship.

ORIGINS OF INVERSE CLAIMS

Title Questions

When inversion is a function of uncertainty as to title, the exercise of the eminent domain power and resulting liability are not in controversy. At issue is whether the inverse claimant is the person entitled to be compensated therefor. The sum total of cases of this kind is small, the amounts involved relatively trivial, and the legal issues governed by private property law.

Property Questions

Cases involving uncertainty as to compensability fall into two categories. The basic issue is whether the property owner has not already been compensated (or waived compensation) for the right in question. Here the original interest of the property owner, the taking—which is always less than a fee simple interest—and the owner's right to compensation for such taking are all uncontroversial. As in Heyert v. Orange & Rockland Utilities, Inc., the issue,

10 E.g., State Highway Dep't. v. Augusta District of North Georgia Conference of the Methodist Church, 154 S.E.2d 29 (Ga. 1967) (Injury alleged in noise and other elements resulting from proximity to highway); Painter v. State of Nebraska, Dep't. of Roads, 131 N.W.2d 587 (Neb. 1964) (Injury alleged in reduction of traffic resulting from construction of island in middle of street.) The impact of highways on people is vigorously criticized editorially (THE NEW YORK TIMES 12E (Nov. 20, 1966)); in articles (Green, Full Speed Ahead on a Dead-End Road, VI HORIZON 66 (Summer, 1964); Redforsky, Roads & In History, IV HORIZON 94 (Jan. 1962); Mumford, The City in History, III HORIZON 33, 63 (July 1961)), and in books (Bianfield & Grodzins, GOVERNMENT & HOUSING, 16-17 (1958); W. Whyte Jr., Urban Sprawl, THE EXPLODING METROPOLIS 115 126-27 (1958)). That the automobile and modern highways are also making a line of demarcation. In some states, the property owner rather than the condemnor is always the moving party, initiating "eminent domain proceeding(s)." And, although it is always true that the developer "has not, prior to an inverse action, made payment for the property taken" in some jurisdictions, fewer today than formerly, it is equally true of ordinary condemnations which go to the stage of adjudication. Moreover, some takings which become the subject of inverse claims are preceded by an exercise of the eminent domain power (that is, a map or plan has been filed).

11 This almost always is the case where the inverse claim for damage was preceded by compensation for taking, other damage, or both, in connection with the same improvement.


13 For cases of this kind, see, e.g., Commonwealth of Kentucky v. Rice, 411 S.W.2d 471 (Ky. 1966); Wilson v. State Road Dep't. 201 So.2d 619 (Fla. App. 1st 1967). In the first case, Rice's right to compensation turned on whether he had forfeited the subject easement before it was re-conveyed to the defendant. Their common grantor had been brought into the proceeding by a third party complaint which the trial court dismissed. On appeal, held, reversed. Title had not been forfeited and the third party complaint should not have been dismissed. The title question in the Wilson case turned on the correct location of the center line of an existing highway, which was being widened, according to the State, within the existing right-of-way, but according to petitioner encroaching on his property.

broadly stated, is whether the rights acquired by the condemner are adequate for the challenged use to which he proposes putting them. There the original acquisition was a public easement for highway purposes. The petitioner, owner of the underlying fee, challenged defendant's right to install gas mains under the surface of the roadway. The court held that defendant did not have the controverted owner of the underlying fee, challenged defendant's right to a public easement for highway purposes. The petitioner, the same basis as in any case of partial taking through the exercise of the power of eminent domain...” 21

The second category is today by far the most important, whether gauged financially or numerically. The controversy in these cases centers on whether the alleged facts constitute an infringement of a legally protected right, as opposed to an annoyance or inconvenience that the petitioner must suffer as one of the costs of present day civilization. Even in old, fairly settled areas of law, such questions are always lurking unanswered in the interstices. For example, property owners in California have a long-established right, protected by their state constitution, to the reasonable use of waters to which their lands are riparian. 18 But until very recently, it was unclear whether extraction of gravel and rock deposited by the normal flow of a stream was a reasonable and, therefore, protected use. If it was, then the construction of a dam slowing the stream and thereby preventing the replenishment of rock and gravel beds constituted a taking. This issue was decided against the inverse claimant in Joslin v. Marin Municipal Water District 20 by the Supreme Court of California in 1967. Although that issue is now at rest, it and like issues may prove light sleepers in view of the court's pronouncement that: “As much as we have said, what is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved in vacuo isolated from state-wide considerations of transcendent importance. Paramount among these we see the ever increasing need for the conservation of water in this state....” 20

Legal uncertainty as to rights and liabilities is, however, greatest where large-scale, far-reaching innovation is occurring. The automobile and the airplane, in changing the means of transportation, have affected the quality of life generally. Legal relations are being created and modified as an inevitable consequence. Conceivably, these changes could be wrought in advance of controversies raising the question of rights and co-relative duties by anticipatory legislation. Typically, however, law is remedial, after rather than before the fact, whether by legislative or judicial action.

Controversies resulting from the factual impact of limited-access highways and of aviation, particularly jet-propelled airplanes, thus fell into a legal vacuum which is only gradually being dissipated. 22 As long as the developer, whether a state highway department or a municipal airport authority, has no clear legal liability for the consequences of his actions, he will not (indeed he may not have power to) offer to negotiate compensation therefor. The burden of action thus devolves on the property owner; the avenue of such action is a suit alleging a taking or damaging of private property for public purposes without compensation having been made as required by constitution, statute, or both—herein denominated inverse condemnation. However, these cases are not analyzed in this report because they are generally regarded as not involving a physical invasion.

Probability Questions

The last of the categories, the foreseeability cases, always involve damage to property, sometimes contemporaneous with a partial taking. Cases involving a single claim for damage only do not present any peculiar problems. Other claims join a partial physical taking with damage to the remaining property. Proceedings in which both damage and taking are litigated open up an interesting conceptual question, sometimes seeding the ground for future difficulties. Kamo Electric Cooperative, Inc. v. Cushard 22 is illustrative. It was an ordinary proceeding to condemn an easement across farm property for a power line. Two witnesses testified that on damp days the arcing of current from the line would injure anyone who came within a few feet of it, as might someone riding on top of a wagon loaded high with hay. On appeal, the court held that this evidence should have been excluded because it did not establish a reasonable probability of danger, but only a mere possibility of it. If and when the possibilities of yesterday, such as that adverted to in Cushard, become actualities of today, the conceptual questions begin to take on problem status. 23

The genesis of a large part of the difficulty may be traced to an assumption of condemnation law as to the normal degree of human prescience. This assumption is implicit in the generally accepted rule of condemnation law that all questions of value and damage are to be laid to rest at one and the same time and, often, before the fact.

The burden of the rule falls on both parties, and the dollar impact may well be greater on the condemner 24 than on the condemnee. But it is the latter who is the protagonist of the most dramatic application of the rule—in claims for a second award. Claimants have sought, sometimes successfully, to avoid the rule by predicing damages on negligence, rather than the exercise of the eminent domain power. 25 This path

17 Id. at 35, 271 N.Y. S.2d at 203.
18 Art. XIV, 3.
20 Id. at 896, 60 Cal. Rptr. at 382.
21 E.g., City of Jacksonville v. Schumann, 199 So.2d 777 (Fla. App. 1st 1967); 167 So.2d 95 (Fla. App. 1st 1964); Hillsborough County Aviation Auth. v. Benitez, 200 So.2d 194 (Fla. App. 2d 1967); Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964). In October, 1968, 2,400 persons filed claims totaling 56 million dollars against the City of Los Angeles alleging injuries due to jet noise. HOUSE & HOME 8 (Feb. 1968).
22 416 S.W.2d 664 (Mo. 1967).
23 Had the evidence in question been held admissible, it is interesting to speculate what would have been its effect in a subsequent suit for negligence against the condemnor by the condemnee or by his employee or invitee. See White v. Mississippi Power & Light Co., 196 So.2d 343 (Miss. 1967).
24 E.g., Fulton County v. Woodside, 155 S.W.2d 404 (Ga. 1967) and section on Individual States, infra.
avoids the conceptual problem also, since negligence, by
definition, is not reasonably foreseeable.26

The alternative path, a second recovery under eminent
domain law, requires more direct confrontation with the
rule that all damages are to be assessed in a single proceed-
ing and would seem to require, by the same token, some
attempt at solving the conceptual problem inherent in it.
The battle may be waged at the outset by a demurrer to
the complaint, as in Curtis v. Mississippi State Highway
Commissioner.27 The claimant, Curtis, had some years
earlier been awarded compensation for a partial taking for
highway purposes. In the instant suit he first alleged that
dirt, etc., from a 34-ft highway fill had polluted his water
sources and injured his pasture lands. He also alleged
injury in that as “constructed and maintained” culverts
underneath the highway could not be used to cross over
the highway. The trial court had given judgment for the
defendant. The appellate court agreed that both injuries
had been compensated in the original award. It is “...logical to assume that the jury in awarding damages
considered the separation of the unit, inconvenience oc-
casioned to the owners by the construction, change and altera-
tion in the access routes to a public road, damage to timber
and pasture, and damage of every kind and nature which
the landowners might sustain because of such taking.”28

As reflected in the court’s opinion the record in the
eminent domain proceeding cannot be said of a certainty
to bear directly on either injury. Of the two, pollution was
more probably foreseeable from the specification as to fill
on the plans, regardless of whether in fact foreseen by either
party or the forum. Injuries from the manner, as opposed
to the plan, of construction and maintenance would not
seem to be foreseeable by any degree of merely human
foresight. If so, then the assumption of the court, an
assumption common to most if not all jurisdictions, is in
effect a rule of law that, as the court elsewhere phrases it “... the ‘before and after’ rule swallows and absorbs
all of the damages of every kind and character. ...”.29

The same court, however, quotes language which antici-
pates the possibility of the existence of damages “... which could not have been estimated or compensated in
advance, although some damage might naturally have
been apprehended. ...”. If such damage should in fact
occur, how is compensation for it to be squared with the
rule? And, if it is not compensated because of the applica-
tion of the rule, how is the fact of non-compensation to
be squared with the constitutional/statutory requirement
for just compensation?

It may be that courts give due consideration to these
questions in their deliberations. There are, however, seldom
any visible signs of the struggle, or even of awareness that
they are implicit in the fact situation. One of the few
exceptions occurs in In re Holmes, discussed in detail in
the section dealing with Pennsylvania law. Even there, a
majority of the court, although obviously aware of the
problem, was able to avoid having to attempt a solution,
notwithstanding a minority view to the contrary.

FUTURE OF INVERSE CLAIMS

The perspective of the classification invites the conclusion,
arguable though by no means definitively demonstrated,
that inverse condemnation does not carry with it any unique
substantive connotation. Rather the discussion suggests
that the cases are the result of tangential or transient fact
situations, which made inverse condemnation the practical
mode of proceeding.

The accidental nature of the posture of the parties is
perhaps most readily apparent with respect to cases in
the title category, which may just as easily be eminent
domain actions. If, for example, the dispute as to the
ownership of the condemned property is known at the
time of the condemnation, the condemnor might well avail
himself of interpleader procedure or might assure the
presence of both contending claimants by impleader.

Similarly, cases in the compensability category are not
intrinsically inverse. They arise because of gaps which
exist in the law in its unending pursuit of life. The gaps
are unusually large now because of the number and radical
nature of recent innovations in our technology and econ-
omy affecting public improvements. But as the law be-
comes settled with respect to any particular claim it will
cease to be made inversely, becoming either an ordinary
condemnation or accepted with more or less good grace as
another of the costs of living in a highly developed society.

To some extent, foreseeability cases can be expected to
follow a parallel path to extinction. As the sciences fill in
existing gaps in human knowledge, more of the possible
permutations in cause and effect with respect to public
improvements and their impact on private property become
known. Injurious consequences will to the same extent be
actually foreseeable and either avoided or compensated by
the condemnor.30

That the gaps—between law and human experiences,
between knowledge and action—will ever be completely
eliminated is not to be supposed. As existing ones close,
new ones will doubtless emerge in the future as they always
have in the past.31 Inverse condemnation may thus be
viewed as a safety valve, providing a degree of flexibility to
eminent domain law, much as the chancery did in drafting
new writs for cases falling outside the rigidly established
forms of action at common law centuries ago.

26 A somewhat unusual attempt at such avoidance is the sponsorship by
International Airport (Los Angeles, Calif.) of experimentation with “jet”
housing: heavy roof tiles and other insulation which attempts to convert
noise energy into friction and then into heat. HOUSE & HOME 8 (Feb.
1968).
27 The airplane cases provide an interesting illustration. Whether effects
such as noise and vibration from jet flights constituted an infringement of
a legally protected right of property disturbed thereby was an open ques-
tion in litigation brought in the early ’60’s. At least in Florida and Wash-
ington, that question has been answered. In those states, it is established
that a flight pattern, whether it is directly over the subject property, if it
interferes with the use and enjoyment thereof, will support an inverse
claim for damages. One answer by prospective defendants in such suits is
to acquire aviatonal easements. The result may be not to forestall dam-
age claims, but to shift the battle ground to the scope of the rights acquired
by the easement. Hillsborough County Aviation Auth. v. Benitez 200
So.2d 194 (Fla. App. 1967).
In any event, inverse condemnation cases will continue to be brought. And they will doubtless also continue to involve issues not presented in eminent domain cases, but of practical significance to the parties. The seamlessness of the law is never more evident than in the interaction of these issues. And certain substantive issues, although possible in eminent domain proceedings also, because of the nature of the right are often examined more closely in inverse claims. For these reasons, inverse, regardless of whether it also has a substantive connotation, may be culled out from the body of condemnation cases for separate study.

The choice of states for intensive study was based on diversity of laws and conditions, so as to provide a representative group. Thus Pennsylvania affords an instructive example of judicial attachment to sovereign immunity coupled with apparent legislative unconcern for the considerations of public policy which in relatively recent years have led the Congress and the New York Legislature, among others, to enact quite general consents to suit. On the other hand, Pennsylvania has a comprehensive Code of Eminent Domain, adopted in 1964, which reflects the legislature's judgment on the rules evolved by the judicial process, whereas New York's statutory law is the result of piecemeal enactments and amendments and must be sought in different parts of the law.

In other respects, New York and Pennsylvania are similar. Both, for example, are noteworthy for their many adjudicated cases, decided over a long period by many judges wrestling with numerous congeries of facts. The other states surveyed are scarcely less noteworthy for the absence of such substantial bodies of case law. Florida perhaps comes closest to this sort of mature jurisprudence. The disinclination of the legislature to grant a general waiver of immunity has been accepted by the courts for the most part as the policy decision that it is. Yet a general waiver in inverse condemnation suits has been worked out (with an assist from local civil practice) and in other areas the suggestion of waiver has been enthusiastically received. At the end, it is the facts and the application of the substantive law that will constitute the field of combat for the future.

Texas, like Pennsylvania, clings to its sovereign immunity, but has not reviewed and codified its eminent domain policies. Although also without thoroughgoing review or recodification, California experience is quite different. As befits its reputation for dynamism, its law has undergone considerable evolution in a small space of time and an even smaller number of cases and enactments. The court has totally rejected sovereignty, forcing the legislature to its own view, and then enacting its own concept of good public policy, leaving for the legislature and the executive the problem of resolving the situation.

CHAPTER TWO

THE LAW OF FIVE REPRESENTATIVE STATES

Pennsylvania

Pennsylvania law of inverse condemnation is a possibly unique combination of the old and the new, of conservative adherence to old doctrine and innovations incorporating current concepts of fair play and just compensation.

The constitutional scope of eminent domain liability was early broadened, with respect to municipalities, to include damages for injury and destruction, as well as taking of property. The enlargement did not, however, apply to the state, whose power of eminent domain was consequently limited only by the requirement of payment for property taken or applied. In other states, taken or applied has expanded under judicial refinement of the definition of the constitutional terms. In Pennsylvania, at least as to cases within the scope of this study, the judiciary by and large has deferred to the judgment of the framers of the current constitution that the line should be held as to state liability even though that of municipalities (and private condemnors) was enlarged.

Similarly, the ancient doctrine of sovereign immunity, in Pennsylvania evolved from the constitution, has been retained without perceptible diminution of force and vigor. As applied in Pennsylvania, the result has been to bar all actions which would broaden the scope of constitutional eminent domain liability by seeking such damages under other theories, principally negligence and willful tort.

The scope of state liability, until recently determined by the confluence of these two streams of law originating in the Constitution, is now beginning to exceed those bounds. The enlargement is due to new elements injected into the law by legislative action in the form of a comprehensive Code of Eminent Domain, adopted in 1964. It marks the first major break in the long-established rule, applied as well as endorsed by case law, that consequential damages (as an independent right, rather than an incident of the measure of damages employed in partial taking) can not be recovered against the state. It also breaches the liability barrier as to good will and other items not specifically relevant to this study.

To the extent that Pennsylvania law recognized liability,
serious issue. Such an issue of identity arises only when departments. Consequently, the assertion of the defense its highway department. The suit is brought against a party other than the state or liability and measure of damages will never be reached. he is out of court. Unless the claimant can show statutory authority for his by the state highway department itself does not raise a complete bar to the action, and questions of substantive issues relating to recovery. 

Sovereign Immunity

Sovereign immunity is an ancient and, in America, gradually disintegrating doctrine which has still a capricious but devastating power when it can be invoked. The Pennsylvania Constitution declares that the Commonwealth may be sued in such courts and in such cases as the legislature may by law direct. Consistently with ancient lore, the rule has evolved from that provision that the state's consent is a precondition to suits against it. Lack of consent may be asserted by the Commonwealth, its instrumentalities and agents. If established in its purest form, the defense is a complete bar to the action, and questions of substantive liability and measure of damages will never be reached. Unless the claimant can show statutory authority for his suit against the Commonwealth or any member of that indeterminate class who might squeeze under its umbrella, he is out of court.

Standing to Assert Immunity

The immunity of the state unquestionably extends to its departments. Consequently, the assertion of the defense by the state highway department itself does not raise a serious issue. Such an issue of identity arises only when the suit is brought against a party other than the state or its highway department.

It goes without saying that the state may be, and often is, more or less directly interested in the outcome of a claim notwithstanding the fact that it purports to seek relief only against an independent contractor. The realization that it is a public improvement that is to be delayed or curtailed or prevented is an express ground for decision in some cases. Downs v. Lewis, for example, holds that sovereign immunity is available even in a suit against an independent contractor if the relief sought "would operate to control action of the state or subject it to liability." On this ground, the Downs case, and more recently Swarmer v. Lawler, deny applications for injunctive relief which, in form, would be directed against independent contractors.

Where money damages rather than an injunction are sought, the applicable rule, at least in formulation, is different. Here the rule states simply that an independent contractor is not sheltered by sovereign immunity. But it can hardly be said that the public interest is less involved. If damages are awarded against the contractor, the state may not have to pay the piper in the very case where the rule is just laid down. But it would be ingenuous indeed to assume that it would not have to do so one way or another, in every case thereafter. A factor of cost for incurring such liability would either creep into any future bids arrived at on a rational basis, or the state would have to assume it directly. If this has not been the case, it is because the practical impact that this rule would otherwise have is substantially blunted by the scope of liability to which such defendants are subject.

As described in Valley Forge Gardens v. James D. Morrissey, Inc., it excludes (presumably for public policy reasons) any damages resulting from work performed "without negligence and in accord with plans and specifications." While conceivably the state's interest as a road builder may not always be identical with public policy based on a broader perspective, the rule as applied in Valley Forge Gardens advances both. The result reached, on the facts of the case, makes it clear that negligence inherent in the plan is not to be imputed to the contractor who executes it. There, both the trial court and the appellate court found that the negligence, if any, consisted in leaving an embankment bare and thus susceptible to the erosion which, ultimately, caused injury to the plaintiff's property. On appeal, judgment for the plaintiff was reversed on the ground that "the foreseeable effects of erosion . . . was a matter for the Authority to contemplate and guard against." Thus, the contractor is not required to second-guess the explicit results called for by the plans. The logic of the rule applies as well to provisions as to materials and methods, and to matters that are implicit as well as to those that are explicit. The interest of the state also points to those applications of the rule. The reported cases, however, as yet suggest rather than raise the issues.

17 D.C. 427 (1931). Cf. Bannard v. N.Y.S. Natural Gas, 404 Pa. 269, 172 A.2d 306 (1961) (grants relief against lessee of Commonwealth on ground that the action there was "possessor").

74 Dauph. 363 (1960).

of scope, and they are, therefore, still open questions of law.\textsuperscript{36}

In Pennsylvania, as in many other states, the current legislative practice is to utilize public authorities, rather than the highway department, for some specific highway projects. The assertion of sovereign immunity by such authorities has been challenged with varying results. Thus \textit{Lichtenstein v. Pennsylvania Turnpike Commission} \textsuperscript{57} rejects the defense: \textit{In re Delaware River Bridge} \textsuperscript{38} sustains it. The cases arise under different Acts containing different provisions. The difference in results, however, appears not so much predicated on statutory language as on the judicial focus brought to bear on it.

In \textit{Lichtenstein} the court stresses the fact that the Turnpike Act which created the Commission confers financial autonomy on it. The reasoning, not unlike \textit{Downs v. Lewis}, is that the incidence of liability determines the availability of the immunity defense. Under the statutory scheme, the Commission’s adverse judgments, as well as other expenditures, were payable from its own funds, which were separate and distinct from those of the state. Hence the Commission’s liabilities were not liabilities of the state, and, the court reasoned, the state’s immunity could not, therefore, be asserted by the Commission.

This narrow view of immunity is rejected in the \textit{Delaware River Bridge} case, which limits the earlier \textit{Lichtenstein} case to its facts. The Bridge Authority’s case suggests several factors relevant where the defense of sovereign immunity is challenged. One is the function performed by the authority: is it one which traditionally is carried on by the executive branch of government. A second factor of significance is the locus of responsibility and control. And a third is legislative intent, which \textit{Delaware River Bridge} deduces from the legislature’s declaration that the Bridge Authority is to “be deemed to be exercising an essential governmental function.” The rule fairly to be inferred from the facts and holding of the \textit{Delaware River Bridge} case is that a legislative declaration, coupled with some continuing ties to government in the form of reports, supervision or the like, and perhaps even without it, is a sufficient basis for immunity. And since each of the Acts relating to the Turnpike contains a declaration of intent identical with the provision construed in \textit{Delaware River Bridge}, it is highly likely that a claim of immunity by an entity in the position of the Commission would now be sustained.

\textbf{Waiver of Immunity}

The state may unquestionably, in Pennsylvania, as elsewhere, enact legislation effecting a general waiver of its immunity. Although this step has been urged as a needed reform of the laws, legislation expressly directed to that objective has not been adopted. A partial relaxation of the doctrine was, however, effected by judicial decision. Some lower state courts, and the federal court in cases governed by state law, read a waiver into the statutory authorization to sue and be sued.\textsuperscript{39} The consequences might have been very far reaching, since such provision is invariably included in legislation creating authorities such as the Pennsylvania Turnpike Commission.

In \textit{Rader v. Pennsylvania Turnpike Commission},\textsuperscript{40} albeit over a vehement dissent, this trend was abruptly halted and reversed by the Pennsylvania Supreme Court’s disavowal of the federal interpretation.

\textbf{Conclusion}

The ruling by the state’s highest court in \textit{Rader v. Pennsylvania Turnpike Commission} bespeaks the present vigor of the doctrine of sovereign immunity in Pennsylvania.

Perhaps the weakest link in this protective mail, is that the courts utilizing it assert no ground except precedent for so doing. Dissenting voices within the judiciary rest their position on the higher ground that the doctrine is contrary to a proper standard of public morality. For the present, these are voices in the wilderness. However, the portent of the trend elsewhere is that they may not remain there forever. There appears to be a growing consensus that sovereign immunity serves no important public policy. Yet there is also a certain implication in other Pennsylvania cases that the doctrine may receive a new lease on life for its utility in protecting the pocket, rather than the personality of the sovereign.\textsuperscript{41} Thus it appears to be invoked, not so much to avoid the conceptual anomaly of the sovereign being dragged by the heels into his own court, but to limit the substantive liability of the state once it is properly there.

\textbf{Basis of Inverse Actions}

The right of property owners to initiate inverse condemnation proceedings is conferred in Section 1-502(e) of the Code:\textsuperscript{42}

If there has been a compensable injury suffered and no declaration of taking therefor has been filed, a condemnee may file a petition for the appointment of viewers substantially in the form provided for in subsection (a) of this section [governing inverse petitions for injuries which are included in a declaration of taking] setting forth such injury.

\textbf{Procedural Defenses—Timeliness}

\textit{Accrual and limitation on right}

Pennsylvania law of eminent domain, in common with general law, accords condemnees the power to defeat recovery on the ground that the proceeding is not timely. Thus, if a condemnation proceeding seeks damages for a right not yet

\textsuperscript{36}Hayes Creek Country Club v. Central Penn Quarry S&C., Co., 407 Pa. 464, 181 A.2d 301 (1962) holds the defendant contractor liable for damage caused by inadequacy of drains under a temporary roadway, but this matter appears to have been left entirely to the judgment of the contractor.

\textsuperscript{37}398 Pa. 415, 158 A.2d 461 (1960).


\textsuperscript{40}407 Pa. 609, 182 A.2d 199 (1962), followed in Delaware River Bridge, supra note 38.

\textsuperscript{41}See Ewalt v. Pennsylvania Turnpike Comm., 382 Pa. 529, 115 A.2d 729 (1955) where the Commission argued its instrumentality status conferred “immunity” to liability for consequential damages.

\textsuperscript{42}Eminent Domain Code, 1964, 26 Purdon’s Ann. Pa. Stats. Ch. 1, §§ 1-101—1-903 referred to variously in this chapter as the Eminent Domain Code, the Code of 1964, the 1964 Code, or simply, the Code.
accrued, it may be dismissed. So, too, a proceeding may be dismissed which is begun after the period limited on the right has expired. This is a manifestation of the judgment, apparent also at other points of eminent domain law, that municipalities and other condemners should not be subjected to unlimited vexation even as the consequence of their own acts—that the law should afford them the same protection as private individuals and corporations similarly situated. This aspect of eminent domain law rests on the same general policy as its counterparts in other areas of law. There are also significant differences, arising out of statutory provisions and special policy considerations.

The statutory basis for a time limitation on the right conferred in § 1-502(c) is contained in § 1-524:

A petition for the appointment of viewers for assessment of damages for a condemnation or compensable injury, may not be filed after the expiration of six years from the date on which the condemnor made payment in accordance with section 407(a) or (b) of this act when the property or any part thereof has been taken, or from the date of injury when the property has been injured but no part thereof has been taken. If such petition is not filed before the expiration of such period such payment shall be considered to be in full satisfaction of the damages.

"Injury," not defined in the Code, is doubly significant to its scheme. The date of injury determines the beginning of the period of enforceability of the property owner's right to compensation. It is the starting point for calculating the end of the period of enforceability and likely to prove the major issue raised by the defense of limitation to an inverse suit. It is, therefore, doubly unfortunate that the legislature does not expressly and unambiguously indicate its intent. The statutory context in which the term is used adds little if any light as to the legislative choice among possible meanings. At most there is a nuance created by the qualification "suffered" in § 1-502(c) which weights the balance slightly in favor of interpreting injury to mean the effect on the property for which the owner claims damages.

The draftsmen's comment on § 1-524, while addressed to the problem, like the caterpillar at the crossroads of Wonderland points in opposite directions. It points out, first, the necessity for special treatment for damage or injury where there is no taking: "... the condemnor may not be aware of the injury and therefore not in a position to petition itself." Here the referent of injury would appear to be effect, for it is only as to this that the property owner's information is likely to be greater than the condemnor's. The comment goes on to state:

Also it is necessary that the final costs of the improvement be established within a reasonable period.

This purpose is furthered most by starting the period running at the earliest possible time—when the cause comes into existence, rather than the subsequent effect.

Similarly, both existing law and general usage interpret in ways that do not necessarily always point to the same conclusions. One possible interpretation is that the compensable injury occurs when the condemnor takes the action on which his liability, if any, is predicated. "Injury" here is read as causation. Thus, under a statute defining the duty of support owed by mine owners to the owners of the earth's surface, it has been held that the injury occurred, and the statutory cause of action arose, when the coal necessary to support the superjacent surface was removed. Under this rule, the fact that the subsidence might not, and in the case at bar did not, occur for many years thereafter, is immaterial.

St. John's Church v. Equitable Gas Co. expressly rejects the unique rule of the coal cases only in part, on the ground that its avowed purpose, to encourage mining, made it inapposite. The opinion also points out that while the rule was even there likely to operate harshly it had at least a theoretical basis (the surface owner's legal right of access to enforce his statutory rights) which was lacking in the case at bar. The injury to St. John's Church was caused by water seepage through the matter under the street, which defendant had backfilled so as to be porous. In this situation, In re O'Gontz Ave. suggests a third solution which defendant had performed a negligent act in laying the gas line until the injury was done." As is clear from this last statement, the court in the Equitable Gas Co. case used "injury" to denote, not the facts constituting defendant's negligence, but rather the consequences thereof.

While these two views would seem to defy reconciliation, In re O'Gontz Ave. suggests a third solution which achieves that feat. The issue on which recovery turned was whether a non-abutter on a newly opened street was entitled to condemnation damages "before there has been any physical change of grade of the ground or actual injury to the property for which damages are claimed." The court concludes, on the basis of its review of the law, that "there is a valid distinction between abutting and non-abutting owners." While the distinction is not readily apparent from the opinion, the consequences deduced as to accrual are. On the authority of Sedgley Ave., the court finds the law to be that an abutter may recover damages on the basis of the established grade before it is actually graded. The non-abutting owner, however, must abide the event, and suffer injury therefrom in the sense of present hurt or loss, before seeking recovery. The court points out that since non-abutting property cannot be actually taken, any damages must be for a consequential injury. From this it reasons thus:

If there be no injury, no compensation can be demanded. That is why all our cases have held that all such consequential injuries must be proximate, immediate, and substantial. An injury cannot be said to be immediate and substantial if there be none at all.

This statement of the law conflicts with Leard v. Pennsylvania RR., a claim for anticipated flooding injury, proved by expert testimony which predicted it as a certainty. Moreover, a literal and thoroughgoing application of the view quoted from O'Gontz if possible at all is surely impracticable, and in fact there is no clear holding for so extreme a view, not even the instant case. For although

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48 229 Pa. 475, 78 Atl. 1034 (1911).
the court states that "... injuries that may or will result ... when [the street] is filled to the established grade ... is too remote a possibility to sustain a present claim for consequential damages to a property not actually taken nor disturbed in any way by the opening of the street," its holding is narrower; the injuries were "too remote a possibility" at that time, when it was not certain that the grading would be carried out.

Still another possibility suggested by existing case law falls somewhere between the extreme of the Gas case and the coal cases. 13th St. 48 decided the same year as O'Gontz, raises the issue of accrual because successive owners all claimed to be entitled to the damages resulting from a change in grade. The court rejects the contention of one claimant that the "injury" occurs when "the part of the work which will do the injury is begun." Instead, it endorses a rule which would not vest any right of compensation "until the municipality enters the property, or begins work, or the report of the viewers has been filed. ..." This, however is not to say that all rights which may arise therefrom will then vest.

Conclusion

The requirement of accrual is simply to say that suit cannot be brought on a right until the right exists. Existence in this case, however, is not a fact in the lay sense, but a legal fact, one which comes into being when the law says it shall. Several considerations are relevant to that decision. If the date of injury selected is permitted to anticipate the future by too great an interval, awards may rest on pure speculation which future events will prove unfounded. If the date is pushed too far in the other direction, it may have equally undesirable effects. For example, if a claim for compensation for flooding must abide the event, the condemnee either loses the value of the use of that part of his land which is endangered or, if he uses it, the result may be an additional item of injury or damage. The problem is to find the point in time which is not "too remote" to enable reasonably accurate prediction nor so immediate as to entail additional and unnecessary damage.

The defense of limitations rests on the different, but not less important, consideration that the possibility of litigation on any given set of facts should not be permitted to continue in perpetuity. And as the draftsman's comment points out, it is not possible to compute total costs until all damages have been assessed. Reading "injury" to mean "cause" tends to permit the books to be closed much more contemporaneously with the work of construction. This objective could have been simply and clearly accomplished by measuring the period of enforceability from the opening of the road, from giving of notice or from the occurrence of any other fact more subject to control and ascertainment.69 To deduce it from the language actually used in the statute requires an effort which, probably, will not be forthcoming. The courts are not likely to go out of their way to interpret the statute so as possibly to terminate a right before the individual possessing it should reasonably be aware of its existence.

Procedural Defenses—Res Judicata

The defense of prior award (essentially another name for res judicata) is the product of the common law balance struck between the rights of injured parties and the duties of the parties chargeable. The injured property owner is to be afforded an opportunity to recover all legal damages constituting his claim resulting from a condemnation. The condemnor is liable for damages assessed for injuries resulting from a statutory or common law exercise of the eminent domain power. Once utilized, however, the right is exhausted; and conversely, the corollary duty, once fulfilled by payment of the award, is terminated for all time.50 The boundaries of the right in question are described as the totality of "all the direct, immediate, and unavoidable consequences of the act of eminent domain itself,"51 transmuted into money damages.

Injuries Not Resulting from Eminent Domain, Negligence, etc.

The logical converse—that a legal injury not within this right of recovery is a basis for a second award—is the law of Kehoe v. City of Philadelphia,52 which allows a second recovery for negligence, the clearest case outside the definition. The plaintiff there having been awarded damages in connection with a change of grade, sued for damages caused by water which had percolated into his cellar from the holes in the street where it had accumulated. The defense contended, and the court agreed, that the earlier award covered all foreseeable damage. The court, nevertheless, granted judgment for the plaintiff, on the ground that the claim was not based on the change of grade, but on the subsequent neglect of duty to maintain. And since "neglect" is by definition not "unavoidable," proof of contemporaneous neglect should have the same legal consequences as proof of subsequent neglect.

In either situation, therefore, the best means of establishing the defense of prior award where plaintiff alleges negligence lies in an attack on the characterization of the acts as neglect (or negligence). Often, as in Beach v. Scranton,53 this will be more vulnerable than appears to have been the case in Kehoe.

Another focal point of controversy in regard to this issue is the act of eminent domain referred to in the definition. The problem for the court is whether the facts giving rise to the injury should be deemed a new act of eminent domain for the purpose of a second proceeding. The probabilities are that if the facts arise under the second of successive legal authorizations, as for example the not uncommon procedure of authorizing a highway and the acquisition of land for it and in a subsequent authorization establishing the grade and other details of the improvement, the court will sustain the right of the property

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70 199 Pa. 90, 48 Atl. 679 (1901).
71 Beach v. Scranton, 25 Pa. Super. 430 (1904) (Damage award for injuries resulting from regrading "presumed" to include water damage caused by alleged negligence in the construction and maintenance of gutters and drains.)
owner to petition for a second award. But the fact of execution of the project, in stages, over a period of time is not conclusive one way or the other as to whether one or more "act[s] of eminent domain" are involved.

Foreseeability

The concept of foreseeability recurs frequently in prior award cases, but usually it is in a passing reference, without any extended discussion of content or significance. In Petition of Holmes, it is precipitated into the very center of attention by the argument of plaintiff in avoidance of the bar of a prior award.

In the background of the instant petition was an award for damages, described in constitutional language. The taking line divided plaintiff's lot, the county acquiring the front part and the house on it, the plaintiff retaining the rear part of the lot and a cottage located 60 feet from the top of the line of the slope. Seven months after the view on which the original award was based, the earth surface of the cut of the slope began to slide, removing in the process some of the lateral support of plaintiff's cottage. The resulting damage to the cottage was the basis of plaintiff's second claim. The trial court gave judgment for the plaintiff, which was reversed, 5-2, on appeal. The majority opinion rejects the factual finding in the opinion that the injury arose "... out of a condition not ascertainable at the time the award was made ..." quoting in disproof the testimony of petitioner's expert witness that the "hillside in question had been a 'sliding proposition' for over fifty years." While the amount of the award—$8,000—suggests that the viewers dismissed the testimony rather lightly, it nevertheless takes factual foreseeability out of the case. The opinion on appeal also expressly rejects the legal theory of the trial court that the unstable condition of the slope "... could not possibly have been considered as an item of damage even if alleged, since the condition giving rise to the claim of damage was non-existent at the time of the claim and could not be recognized because of its speculative, remote, and unforeseeable aspects. ..." The appellate court can hardly have intended to be understood as holding that the law does permit recovery for injuries that are "speculative" or "remote," contrary to numerous precedents, some by the Pennsylvania Supreme Court and therefore binding on it. The meaning to be deduced from this and other language in the opinion is that any injury which, if proved, should have been included in the original award is conclusively presumed to have been included. That the plaintiff failed to prove it to the satisfaction of the viewers, whether because of difficulties of proof or error on the part of the jury of view is not grounds either to reopen the original proceeding or to commence a new proceeding.

Applied to the Holmes case, the jury either awarded damages for anticipated injury to lateral support or it erred in not doing so and, in either event, the petitioner had exhausted his right: "no individual or municipality should be vexed twice for the same cause." The dissenting opinion, on the other hand, goes farther than the plaintiff or trial court. It urges that damages should be assessed only for present injuries. If the question were one of first impression, the dissenters' solution has the merits they ascribe to it of not imposing damages for injuries that may never occur or denying them for injuries that do. While there are also disadvantages to both sides that are not mentioned in the dissent, the strongest objection is that the question, far from being open, has been decided to the contrary in a line of decisions spanning many years and broken only by a dictum in the O'Gontz case.

Conclusion

The defense of prior award is appealing because of its underlying policy of laying contention to rest, endorsed in the Holmes case and generally accepted. As applied in Holmes it does theoretically permit anomalous results, always a potential breeding ground of resentment and pressure for change. For example, an improvement to an existing highway may involve the taking of a very small area from an abutting owner. The award of damages for the taking, even though a nominal sum, would, under Holmes, bar recovery for subsequent injuries, however great and however clearly attributable to the improvement. The inequity would be aggravated as well as dramatized if an adjoining abutter is awarded substantial damages for identical consequential injuries to his property, because, unlike his neighbor no part of his property had been taken.

In this case, however, different results in practice are not likely to generate the pressure necessary to produce a change in the law. For although analogous in some respects to the consequential damage cases which led to the introduction of Article 16 § 8 into the state's constitution, there are also significant differences. Before Article 16 § 8 was adopted, the requirement of a taking as a basis for any award and the computation of damages where there was an award permitted those property owners, part of whose property was taken, to recover for damages to the remainder as well as the value of the property taken. Without the taking, consequential damages were damnum absque injuria; such owners had no legal right or remedy.

The problem of Holmes and those similarly situated is not lack of right or remedy, but that they must exercise foresight to avail themselves of the remedy provided by law. For the most part, the burden should not be insupportable. The fact of a taking forewarns of the possibility of other damages. No extraordinary degree of caution or wisdom is required to suggest the employment of experts to assist the owner in ascertaining and stating his full claim. The cases indeed suggest that the error, if any, is far more likely to be on the side of overstatement than understatement. Perhaps for this reason, the rule of

59 See Wallace v. Jefferson Gas Co., supra note 58 (Plaintiff sought damages for anticipated injury should gas pipe 3 feet below surface break and gas somehow enter mine 140 feet below).
Holmes does not appear to have produced an excess of harsh results or bad law. In any event, the Holmes majority and dissenting opinions, which state the alternatives with clarity and vigor, were on the books when the Joint State Commission was making its study which resulted in the enactment of a comprehensive Eminent Domain Code in 1964. The inference of legislative approval of Holmes that the chronology suggests is reinforced by the comment of the improvement be established within a reasonable period.  

Substantive Law

The constitutional liability of the Commonwealth is fixed in Article I, § 10:

... nor shall private property be taken or applied to public use without authority of law and with just compensation first being made or secured.

Unlike other jurisdictions which have construed similar language broadly to include damage or injury to property, Pennsylvania courts have construed “taken or applied” to preclude liability in the absence of a physical occupation or appropriation. Under the 1964 Code, however, state liability may also be based upon certain consequential injuries. Consequential injuries have been defined as “the necessary and unavoidable consequences of the nonnegligent performance of the work.”

Tortious Injuries

The definition of consequential injuries draws a line between lawful acts of eminent domain and wrongful acts. Hence, the advent of the Code and the liability it implies for some consequential injuries changes the focus in claims based on physical injuries. The crucial question becomes whether the causal acts are negligent (or otherwise tortious), in which case the claim is barred by sovereign immunity, or within the scope of the eminent domain power, in which case the Code now establishes a right of recovery.

The Pennsylvania courts have not yet reported any opinions considering the distinction between the tortious and consequential injuries in the context of claims arising under the Code. Such cases as there are not only antedate the Code and the liability it implies, but involve municipal (or corporate) liability, which embraces tortious as well as consequential injuries and is thus broader than state liability even as enlarged by the Code. Moreover, judicial discussion and application of the distinction is addressed to a somewhat different issue from that raised by the Code. The focal issue in these cases is primarily procedural: Has the injured party mistaken his remedy under the rule that an action for trespass and a statutory proceeding before viewers are mutually exclusive? Nevertheless, the cases, if not precedent, are likely to be cited as analogy pointing the way for uncharted decisions, and the opinions provide insight into some of the difficulties. Line v. Philadelphia H. & R. Co., one of the few pre-Code opinions interesting for this reason, affirms an award of viewers for injuries resulting from a mill race as reconstructed by defendant to change its course in connection with the widening of its road. The defendant objected that the trial court had not adequately excluded negligent injuries from the consideration of the jury. The opinion of the reviewing court rejects the objection as baseless:

... there was no complaint of negligent construction. The plaintiff's claim was for deprivation in the value of his land as a consequence of the plan of construction which the defendant had adopted as best suited to its purpose. The distinction between injuries that might result from faulty construction and those which naturally result from a change in the stream were carefully observed by the learned trial judge. . . .

Stork v. City of Philadelphia, decided contemporaneously with the claim against Philadelphia H. & R. Co., is similar in approach. This claim, also submitted to viewers, alleged that the plaintiff's land was deprived of lateral support, resulting ultimately in the destruction of her house, by an excavation for a subway retaining wall. The judgment of the trial court awarding damages to plaintiff was reversed on appeal on the ground that the injury would not have occurred if the City had provided temporary shoring. The court's own generalization is that “the injury was not because of the work but the manner in which it was done.” The distinction thus drawn is between the type and design of improvement selected, and the means used to give effect to the determination. The determination to construct a subway necessarily implies excavation. Some damage to property may in the circumstances be unavoidable. If, however, excavation of the width and depth desired in the place selected can be accomplished without injury, then the occurrence of such avoidable injury constitutes negligence, and cannot support an award by viewers.

64 Lizza v. City of Uniontown, 345 Pa.363, 28 A.2d 916 (1942); Curran v. East Pittsburgh Borough, 20 Pa. Super 590 (1902). The basis of the rule is the different procedures employed; the common law actions are begun by complaint and are tried to a judge and jury; claims for condemnation damages under the new Code, as under the scattered statutes it replaces, are begun by a petition for appointment of viewers and the jury of view decides issues of law as well as fact. The measure of damages and permissive parties may be different. The initial choice of a wrong forum in most cases theoretically does not bar the plaintiff from prevailing in a second action in the proper forum. Because that forum is reached by commencing a law action, rather than transfer, in practice the first action may prove a permanent defeat, as where the statute of limitations has run.

In some cases, however, a claimant may be held to have waived his common law action by proceeding before viewers. If the facts are such that the property owner may elect to treat the acts either as a trespass or eminent domain, e.g., where an attempted condemnation is technically defective, an adjudication may be final. Bethlehem Southern Gas v. Yoder, 112 Pa. 136, 4 Atl. 42 (1886). 218 Pa. 604, 67 Atl. 890 (1907). 195 Pa. 101, 45 Atl. 678 (1900). Accord, Smith v. County Allegheny, 397 Pa. 404, 155 A.2d 615 (1959) seepage of water from pool formed by break in drainage pipe during construction. But, cf. erosion cases, infra, and related notes. In re Cavanaugh, 121 Pa. Super 332, 183 Atl. 360 (1936); Lizza v. City of Uniontown, 345 Pa. 363, 28 A.2d 916 (1942).
Stork suggests, and Curren v. East Pittsburgh Borough holds, that the reverse is true as to injuries which, although the necessary result of the work, could have been avoided by a modification of the project. In the latter case, the modification would have entailed merely continuing a private drain for 50 feet more than specified in the plan for grading, paving and curbing an existing highway. On the theory that the injury to his property, therefore, was legally, as well as factually avoidable, plaintiff sued in tort. As in Stork, judgment for claimant was reversed on appeal. And again, as in Stork, the reason was that he had mistaken his remedy: “the Borough [was] not liable as a wrongdoer.” He should have proceeded before viewers notwithstanding that “a different and in other respects equally good plan might have been adopted by the city which would have worked no injury to the adjoining property.”

Despite the comfortable familiarity of the means-end test, In re Holmes suggests that it may not always prove an easy fit. The Holmes case, like Stork’s claim against the City of Philadelphia, alleged deprivation of lateral support as the basis of recovery. But whereas Stork v. City of Philadelphia concludes that the gravamen of the complaint was negligence, Holmes concludes that it was eminent domain. Doubtless the injury to the Holmes’ property was unavoidable given the conjunction of facts (for example, the construction plan, the weather, etc.) that in fact occurred.

This is not an adequate basis for distinguishing the injury to Stork, for it too would doubtless be unavoidable given the same assumption. Conversely, while the injury in Stork doubtless could have been avoided by the expedient suggested by the court, there is no reason to suppose that terracing, surfacing, or some other available technique would not have eliminated the injury to the Holmes’ property. The judgment of avoidable or unavoidable thus begs the question, which is the extent, if any, of the condemnor’s duty to avoid injury to private property. East Pittsburgh Borough holds that the condemnor need not weigh injury to private property in determining the details of its plan. It is perhaps arguable that the legal distinction is between the latitude permitted condemnors in deciding what best serves the public benefit in view and the latitude permitted them in deciding what precautionary measures must be taken to minimize private injury. A counter argument is that the formalistic cast of the distinction tends to overlook the common denominator of cost.

Another possible argument proceeds from the identity of the defendants. The claims of both Curran and Stork were against municipalities, which are generally liable for all injuries, whether negligent or consequent, caused by them in connection with an eminent domain undertaking. Thus, while the Curran decision may have achieved its apparent objective of protecting the good character of the Borough, its effect, like that in the Stork case, in legal theory promised only temporary relief for the public fisc.

On the same analysis of the same facts where the Commonwealth is the defendant a significantly different result would be achieved because of the sovereign immunity doctrine which bars actions for trespass against the state. The prospect of absolute unavailability of a remedy could conceivably inspire a greater emphasis on effect in the decisional process. The Pennsylvania courts, however, have tended to be decidedly conservative in their approach to the law, deferring to the legislative branch as to the desirability of changes which other courts might put into effect via the judicial process.

Condemnation Damage

State liability for consequential damage is purely statutory. Apart from a few statutory provisions applicable only to specific highways, such liability rests entirely on the 1964 Code. The relevant provision, § 1-612, does not create a general liability after the fashion of its constitutional counterpart governing minimum municipal liability for acts of eminent domain. Instead, Code liability is specifically limited to:

... damages to property abutting the area of an improvement from change of grade of a road or highway, permanent interference with access thereto, or injury to surface support, whether or not any property is taken.

The courts have not yet glossed the provision, either as to the proper construction of the statutory language or its application to the facts. The language of the provision and of related provisions in the Code and the comments of the draftsmen furnish some basis for estimating the probabilities as to issues to come before the court in the future.

There is also a considerable body of case law as to the much older liability of municipalities for consequential injuries. While state liability continues to be narrower, many of the issues likely to arise under § 1-612 are substantially indistinguishable from those considered in the context of municipal liability, and the courts will doubtless look to those cases for relevant precedents.

Damage to Property Generally.—Compensable damage is limited by the language of the statute in terms of cause—“resulting from . . .”—and in terms of the class to be benefitted—abutters. The big question, left open by the statute, is the effects which constitute claims for compensation thereunder. The broad treatment of effect is susceptible of various interpretations. One possibility is that the legislature did not intend to provide an a priori, statutory answer, preferring to leave the task of defining the content to the case-by-case method of the courts.

A second possibility is that the legislature believed the statutory limitations as to cause and class would provide adequate safeguards against excessive liability. In this view, the generality of “damage to property” is not an invitation to judicial legislation, but an attempt to bring all effects detrimental to property within its coverage. This construction would impose liability, permitting compensa-

67 20 Pa. Super. 590 (1902). Contra: King v. Borough St. Mary’s, 152 Pa. 30, 25 Atl. 161 (1892) (Construction of bridge in two spans with center pier, resulting in flooding, held to constitute negligence on ground that one span would have been adequate for bridge and avoided injury).
68 Supra note 57.
tion for some claims that are now clearly damnum absque injuria. For example, improving the surface of a road and lessening the pitch of a particularly steep rise might subject the condemning to liability on the theory that truck traffic attracted by the improved condition of travel diminished the beneficial enjoyment of abutting residences.

The maximum coverage interpretation is probably the closest possible approximation (that is, within the limits imposed by class and cause requirements) to supermorality, which, it has been urged, is the proper standard for responsible government. In this view, public morality should lead, not pace, private morality. As part of the burden of leadership, government should compensate for all loss or hurt it occasions, even if the same facts would not be actionable under private law.

A third interpretation, one which could consistently stand together with the first possibility, is that the legislature intended to adopt the content of municipal liability for consequential damage, subject to the statutory limitations incorporated into § 1-612. The statutory phrasing does not, it is true, borrow the language of the constitutional counterpart, which speaks of "... property taken injured or destroyed. . . ." The difference, however, may be dismissed as merely stylistic in view of In re City of Pittsburgh, which declares that:

The words, 'damage,' 'loss,' and 'injury' are used interchangeably, and within legislative meaning and judicial interpretation, import the same thing.

This view is most in accord with the intent that seems to be implied by the draftsmen's comment, and, was presumably endorsed by the legislature. The comment in question states that:

Under existing law the Commonwealth is not liable for consequential damages unless liability therefor is expressly provided by statute. . . . Municipal and other corporations having power of eminent domain are liable for consequential damages.

... This section makes the Commonwealth liable for consequential damages to the extent set forth.

Assuming the third interpretation is the one adopted, the question which next arises is what effects are properly cognizable under the borrowed definition of damage to property.

Ritchie v. Pittsburgh and Lake Erie R.R. construes the constitutional phrase "property . . . injured or destroyed" to "include only such injuries as were remedial at common law." Decided contemporaneously with the adoption of the constitutional provision it was construing, the opinion, although by a lower court, speaks with the authority of firsthand knowledge of events and attitudes leading to and surrounding the constitutional enlargement of municipal liability. The intent ascribed by the court to the framers of the constitution was merely to eliminate special powers, and not to impose any "special burthens" greater than those of the "ordinary individual without special powers." The discussion following attempts to evaluate the force of the generalization as a rule of case law, as well as to distill from that law a case-by-case definition, to the extent that one has been involved.

Claims of consequential injuries in Pennsylvania highway cases are by and large classifiable as water damage or land damage cases. Litigated claims for other damage, as for example, interference with ancient rights of light, air and view are rare almost to the point of nonexistence.

Water Damage Claims.—Highway construction and other highway improvements invariably affect surface waters and sometimes subsurface waters. This, combined with the mobility of water and its potential both for use and destruction, tends to produce perceptible effects on private property, causally related to the highway undertaking. While, hopefully, many of the effects are beneficial, many apparently are not and give rise to a relatively large number of water claims in Pennsylvania, as elsewhere throughout the country.

As a general rule, a municipality is not legally chargeable with damage by surface water run-off resulting from normal and non-negligent growth and expansion. This rule was first laid down in Strauss v. Allentown. The plaintiff operated a water mill at the low point of the watershed. The city, by grading and paving streets, installing gutters and drains, etc., had, the complaint alleged, caused a vastly increased volume of surface water and debris to be carried into his tailrace, interfering with the operation of his mill. The court analogizes the city's activities to an individual's "natural proper and profitable use" of his land which results in similar consequences to the lower owner. Private law, as read by the court, would not impose liability in this situation. Finding "no sound reason why the same rule should not apply to municipalities as to individuals," the court sustains the non-suit entered below. The opinion suggests two bases for the result, in addition to the natural rights inherent in ownership. One is the uncertain character of diffused water. As the court points out, run-off may be accelerated by such fundamental activities as clearing land for agriculture or construction of houses. Although these activities increase the volume of water draining onto the lower owner, the rule posits that the water remained diffused. In this case, the upper owner is likely to be unaware that any drainage problem is developing. Thus the need for preventive measures would not be evident and even the need for remedial measures may not become apparent until many years later. Perhaps the more important reason, not unrelated to the physical considerations, is the belief which permeates the courts' discussion of this problem, that the rule favors development.

The right to develop accorded by Allentown is subject to two limiting criteria. One concerns the area from which the surface water is drained. If, by its activity, the municipality or individual enlarges the drainage area, an individual whose property is injured has a right to damages.

The more important limit, in terms of litigation and probably practical significance, is the much used "artificial channel" test. As described in an early private law case,
“the line of distinction . . .” between liability and non-liability “is reached when (the owner) cuts an artificial channel by which what would otherwise be surface water is concentrated and discharged, with greater force on a particular point in the servient land.” 76

While the channel and the injury must be causally related, the standard of proof required to establish the necessary relationship does not seem to have been exacting. In Hereda v. Lower Burrell 77 and Morton v. Borough of Dormont 78 improvements were made in existing drainage systems. Although no more water was discharged than formerly on the plaintiff’s land, the proof of damage to his property and a change in the drainage system was enough to get Morton to a jury and Hereda to a judgment. 79

Moreover, while negligence is an essential element to recover damages based on simple grading, paving, etc., it is irrelevant to liability under the artificial channel test.

The more recent Petition of Rapetta 80 holds that the condemnor is not liable for damages following the installation of a new drainage facility in connection with an existing road. To the extent that this case is explicable as involving a claim against the state, it is distinguishable from the Morton and Hereda cases involving municipal liability, and it is overruled by the Code. The court, however, does not characterize the claim as one for consequential damage nor does it purpose to rest on the proposition that the state’s liability is narrower in scope than that of municipalities. The court’s reasoning is rather that the additional facility did not “impose upon the property a new and additional servitude.” This language, arguably, at least, suggests a holding that the facts did not give rise to legal injury, and that the Morton and Hereda cases might be differently decided by a contemporary court.

A highway improvement may have the opposite impact on the drainage of neighboring lands, slowing or even stopping their run-off of surface water. In re Chatham Street, 81 one of the few cases in which such a reversal of facts was present, also reached a reverse result. There, the claimant, a non-abutter, had improved his property below grade and provided drainage by a private drain from his property through the intermediary of two alleys onto Chatham Street. The municipality raised the grade, thereby blocking the plaintiff’s drain. It is perhaps arguable that the plaintiff has a stronger case here, where the injury is in kind, than in Strauss, where it was only in degree. This may explain the court’s readiness to find that “property is injured where its drainage is materially affected.” Unlike the cases on increased flowage, Chatham does not invoke private law and, moreover, even in 1899, the broad rule stated by the court was probably not in accord with private law. It is highly doubtful whether Pennsylvania surface water law ever imposed so absolute and unqualified a burden with respect to drainage of surface water. 82 The authority of In re Chatham nevertheless remained unimpeached until Kunkle v. Borough of Ford City, 83 in 1934. Here, too, the municipality raised the grade of its property, interfering with plaintiff’s drainage, but only, the court found, in rainy periods. The court held that the rule of Strauss v. Alten­town governed, and accordingly reversed the court below, where plaintiff had prevailed. As to Chatham, the court states that “in view of the well established rule . . . that a municipality is not liable, any more than a private owner, for refusing to receive surface water, unless a natural channel is interfered with . . . (In re Chatham) must be understood in that sense, and the report shows nothing to the contrary.” This seems more ingenuous than candid. The channel stopped by the raising of Chatham Street clearly began its existence as an “artificial” channel; while conceivably it might have been transformed to “natural” in the eyes of the law by the passage of time or because the plaintiff took it and used it as he found it, the opinion does not state any dates or other facts to lend support to such a hypothesis. Kunkle nevertheless, seems to be reliable authority because it does in fact accord with private law on this point. 84

Highway improvements may also affect a watercourse, as by increasing or decreasing the flow, and by changing its direction. In this situation, assuming the parties were riparians, private law would look to the doctrine of reasonable use to determine respective rights with regard to the stream. That doctrine holds, generally, that each riparian is entitled to the continuation of the accustomed flow subject only to the right of reasonable use by his riparian neighbors, who are subject to his own like right. 85

The decisions in the companion cases of Leard and White against the Pennsylvania R.R., 86 are in accord with that doctrine. The claims alleged that the defendant, exercising its power of eminent domain, had constructed a railroad bridge, the piers of which were located on the bed of a stream and had the effect of damming its flow. The result, as found by the court, was that the waters would in times of ordinary freshets overflow the banks of the stream and flood the lands of the plaintiff which were riparian to it. The court found this constituted legal injury for which the defendant was liable under Article 16 § 8 of the Constitution. Similarly, riparian law, as expounded by the Ritchie court, on these facts would find that the Railroad had violated the rights of Leard and White to the accustomed flow of the stream.

The facts of Hawkins v. Dept. of Highways, 87 although not entirely clear from the opinion, also raise an issue, which as between private parties, is cognizable under riparian law. The department, in connection with the

78 334 Pa. 263, 2 A.2d 803 (1939).
79 Where the artificially collected water is discharged not on the plaintiff’s land, but into a natural watercourse, the plaintiff’s burden of proof appears to be greater. See Goulden v. Scranton, 121 Pa. 97, 15 Atl. 483 (1888).
81 191 Pa. 604, 43 Atl. 365 (1899).
82 While Pennsylvania has been classified as a civil law state, except perhaps for one very early case, there is little basis for supposing that Pennsylvania law ever imposed liability for every change in drainage flow. Whether this is because the civil law rule has been modified or whether, as the cases would seem to indicate, Pennsylvania has the common enemy rule modified, makes little difference to the result.
83 316 Pa. 571 (1934).
85 See e.g. Ritchie v. Pitts & Lake Erie R.T., 31 Pitts. Leg. J. 424 (1884).
86 229 Pa. 475, 78 Atl. 1034 (1911); 229 Pa. 480, 78 Atl. 1035 (1911).
87 21 D.&C. 471 (1934); see also 17 Wash. 154 (1935).
relocation of a highway and a change of its grade, had changed the direction of a stream, diverting it into a new channel cut for the purpose across the plaintiff's land. Here again, the judgment for plaintiff accords with the result indicated by riparian law. The opinions do not, however, indicate how the concurrence came about, whether the deliberate result reached through the application of that law as part of the law of eminent domain or by simple coincidence. The omission of an explicit statement of applicability necessarily qualifies prediction of eminent domain results based on riparian law rules.

A particularly troublesome group of three cases involve injury to water rights resulting from erosion. The opinions, reaching different conclusions, are difficult to reconcile with each other and with any body of legal doctrines.

The first in time of the trio, Ewalt v. Pennsylvania Turnpike Comm., began as a bill in equity. Ewalt owned a lake located 600 feet from the edge of the slope constructed by the Commission to support the right-of-way. The petition for injunctive relief alleged that matter eroding from the slope was filling the petitioner's lake and killing the fish with which it had been stocked. The trial court dismissed the bill, on the grounds, urged by the Commission, that the injuries alleged were consequential; that the commission was an instrumentality of the Commonwealth, and that by virtue of that status, it was immune to liability for consequential damages. The result on appeal, reversing the dismissal below, is readily explicable as resting on the statutory duty of the Commission "to repair replace or compensate for property damaged or destroyed in carrying out the powers of the act." While the opinion advances the statutory ground it also rests at least as much on a quite different line of reasoning. Immunity if conceded, as apparently it is, is not decisive in the court's view because the case was not one "arising out of the power of eminent domain, but a continuing trespass arising out of construction, maintenance and operation of the Turnpike." The distinction it seems to make is between the acquisition of property for public use (eminent domain) and the public use of property thus acquired (construction and maintenance). Whatever validity this distinction may once have had, it has certainly been obliterated by legal developments leading to the present. More paradoxical, however, are the legal consequences deduced from the distinction. For, far from eliminating immunity as an issue, a characterization of the facts as a trespass would seem to make it crucial.

This analysis seems strengthened by Valley Forge Gardens v. James D. Morrisey, Inc., next in time of the erosion cases. The plaintiff relied on Ewalt, very naturally since the facts of the two cases were strikingly similar. Here, too, plaintiff was a non-abutter and the injury complained of was the silting of his pond and destruction of its fish stock by erosion of the slope of a fill created in connection with a highway. The trial court, following Ewalt, gave judgment for the plaintiff. Although the defendant in the lake case was not the condemnor (originally joined, but dismissed from the action as an instrumentality of the state), but a contractor employed by it, this fact would not take the case out of the rule stated in the Ewalt case. As the plaintiff argued on appeal, the fact of agency if proved would not avoid liability for trespass. The appellate court, nevertheless, reversed, rejecting the trespass theory as inapplicable because of the absence of the element of intent essential to the tort.

In re Bear Creek Realty, the last and perhaps most perplexing of the line, sought recovery against the Turnpike Commission via the inverse condemnation route. Again, the claimant is a non-abutter, and the gravamen of the action is damages caused by the pollution and sifting of a stream and the lake into which it flowed, and the destruction of the fish that had inhabited the waters. A factual difference is that in the instant case the court found that the Commission, acting without right or authority had diverted the natural flow of the water (in what manner and for what purpose is unclear). Again statutory grounds, which appear from the opinion to be more adequate, are cited, but in conjunction with other, more questionable grounds:

The damages in this case are not "consequential damages," because by definition such damages are "the natural result of an act lawfully done . . . " The damages here are not consequential because they are not the result of an act unlawfully done by another. They are the direct result of an act unlawfully done by an agent of the Turnpike Commission. The damages here might better be termed "resultant damages."

The opinion does not state the factual basis for holding the commission liable for the unlawful acts of its agent. But if the unlawful acts are properly imputed to the Commission it would be reason to question the correctness of the result, which permits recovery in a proceeding before viewers. Statutory authorizations of condemnation damages have never been construed to include tortious damages; and the well-established rule is that recovery of damages for tort cannot be had in a view but only in an action at law for trespass.

The criticism of the Ewalt and Bear Creek opinions is inapplicable to Valley Forge Gardens v. James Morrisey, Inc., certainly the most soundly reasoned of the three, although its ruling on intent is perhaps questionable. The question of state liability, however, was not before it and the closest it comes to expressing any view on the subject is the possible inference that may be drawn from its statement absolving the contractor of any fault in executing the specifications of the plan which resulted in the damage to plaintiff:

The foreseeable effects of erosion . . . was a matter for the Authority to contemplate and guard against.

While this places the responsibility with the Commission, it does not shed any light on the nature of liability—tort or eminent domain—if any. If the failure to take adequate precautionary measures is a tort, sovereign immunity should bar recovery. If it is not a tort, but a consequential injury, the issue of liability arguably should be referred to the appropriate body of private law, the reasonable use doctrine. It is not at all clear that riparians would
have a claim for damages in a similar case against another individual (for example, erosion from the bare slope supporting a private road). Moreover, the Pennsylvania concept of reasonable use has been noticeably colored in the early 1900’s by a judicial policy of facilitating continued growth of the mining industry, even then vital to the economy of the state. The argument that prevailed with the courts to limit the potential liability of mine operators was that imposing responsibility to keep stream water sufficiently pure to permit such uses as fish and ice ponds would be to subject mining to the consent of riparians. The apparent fear was that growth of the mining industry would suffer too greatly under the financial burden of obtaining consent. Whether an analogous argument can be made for highways depends on the facts—physical and financial—which would enter into a determination of the reasonableness of the burden imposed on some individuals to secure the public good.

Land Damage Claims.—Claims of damage in which land, rather than water, is the injurious element are more likely to arise in connection with highway work in mountainous areas. Such topography tends to increase the need for blasting, which may cause injury directly by vibration, debris, etc., or indirectly as where it precipitates a slide, possibly of a part of the mountain remote from the site of operations. It tends also to increase the probability of erosion in substantial enough quantity to inflict injury. Another species of damage in this category is the removal of the lateral support.

Liability for injuries resulting from the physical invasion of the plaintiff’s property, whether caused by blasting or otherwise, is of great antiquity, going back to very early common law where the remedy was a writ of trespass quaere clausum frigt. The necessity of an invasion made that action unavailable where the agent of blasting injury was not an invasion of matter as defined in an earlier less scientific era, but vibration. This impediment to recovery was overcome by the adoption of a rule of absolute liability for damage caused by blasting. These same rules appear to circumscribe rights and liabilities arising out of blasting where municipalities, rather than individuals, are the actors. The only issue in such cases is proximate cause, which, as in any other type of injury, is generally a question of fact for the jury.

Where the slide is not the result of blasting, recovery under private law would be by action for trespass. The fault in such case is established merely by proof of invasion of plaintiff’s property and gives rise to a right of damages. The wrongful character of the act is wiped out when committed in the exercise of eminent domain power. Hence, such injuries are in theory, and in case law, a permissible basis for recovery of an award in a proceeding before viewers.

Intent and fault are also used in a formalistic rather than opprobrious sense in connection with rights and duties under private law rules as to lateral support. The power of eminent domain removes even that faint taint of wrong, so that here too the proper forum for recovery may be the statutory proceeding. An argument against such recovery may be made if the possibility of injury was reasonably foreseeable and could have been prevented without changing the design or specifications of the public improvement. Stork v. City of Philadelphia holds that such an injury is negligent and cannot be the basis of an award of condemnation damages. In the case of the state, of course, this is tantamount to holding that such an injury cannot be the basis of recovery of damages.

Abutters.—The application of the case law discussed is, of course, subject to the condition to recovery imposed by the Code that the claimant be an abutter. Thus, the erosion triad, apart from special statutory provisions, would not be entitled to damages since all were, or may have been, abutters. If the instant claimant is an abutter he will certainly be accorded rights that the cases recognize in non-abutters.

“Resulting From”.—The statutory requirement is, when read against the case law background, an incorporation of the rule that negligent or willfully tortious injuries are not compensable under eminent domain law. The rules for distinguishing negligent from consequential injuries are as yet neither so precise nor well established as to preclude argument on both sides of the issue in many not unusual fact situations. And for the state and its instrumentalities, the issue may be decisive as to ultimate liability, in the broadest sense. This, of course, is not the same as saying it is decisive as to the plaintiff’s right of recovery, except as against the state. It does not foreclose the possibility of recovery against the active wrongdoer; for example, a contractor or a state employee. Where possible, this aspect should be stressed, to avoid the stigma of seeking to profit from one’s own wrongdoing.

The requirement also connotes proximate cause as a condition of recovery. Generally speaking, this does not conjure up difficulties peculiar to condemnation, inverse or otherwise. Hawkins v. Dept. of Highways is, in this regard, unusual. That case dealt with a claim arising out of the Department’s diversion of a stream into a new channel in connection with a highway relocation and regrading. Among the grounds urged on the court by the defendant was that the claim was made too late. The defendant argued that the damages should have been claimed and disposed of in an earlier proceeding which assessed county liability in accordance with a state-county agreement relating to the project. The argument failed. The county’s undertaking, as the court construed the agreement, extended only to “damages from the taking of land for relocating the highway and for necessary slopes,” which it defined as excluding relocation of the stream. The opinion makes no mention of whether the highway plan under which the takings were made called for the change in the course of the stream. This, however, would seem to be highly relevant to the question of what the parties contemplated in using the term “taking” in connection with the allocation of their respective liabilities. Moreover, the case may have broader implications, for if the same restric-
Inverse condemnation, understood to mean a reversal of normal posture of parties, does not exist in New York. New York does not follow its usual condemnation procedures in appropriating real property for public use as a highway. Section 27 of the New York Condemnation Law exempts the condemnation of real property for public use as a highway from compliance with what has been characterized as the judicial procedure for condemnation.

Under the New York Highway Law, land is acquired by the State for the construction and reconstruction of highways via an administrative procedure which involves the filing of a description and map of the property sought, followed by the automatic vesting of title. The Superintendent of Public Works is authorized, by Section 30 (13) of the Highway Law, to settle claims for the value of the property so appropriated, but the only condemnation proceeding available is that brought under Section 30(14), authorizing any owner of property so appropriated to present his claim for its value to the Court of Claims.

The same appropriation procedure, under which any judicial proceeding must be initiated by the claimant and is limited to adjudication of value, applies to condemnations for throughways under Section 347 of the Highway Law, and for public works, including highways, constructed with the aid of funds from the Federal Government under McKinney’s Unconsolidated Laws, Section 7702. All of these highway land appropriation statutes were enacted in 1942 as part of a general revision and reorganization of the system for administering and constructing highways with the purpose of centralizing control in the state. Such procedures are applicable by their terms to formal appropriations accomplished by filing and automatic vesting. Each contains a provision authorizing as well suit against the state for damage to property not thus appropriated.

The regular way of exercising a claimant’s rights is at his own initiative. Hence, the fact that the claimant necessarily brings suit where the state does not concede incurring some eminent domain liability does not effect a reversal of the posture of the parties. “Inverse” condemnation with respect to New York cases is used to mean claims for compensation based on physical damage allegedly caused by state highways to neighboring property interests which were not formally appropriated for the purpose and involving damage which had not occurred, and was not in fact foreseen as a source of liability when the highway was planned. Such claims almost invariably arise from flooding.

The defense of sovereign immunity is inapplicable, the statutes of limitations play a minimal role; and even the legal theory of the action is relatively insignificant to the results reached. The determination of rights and liabilities tends to have a decidedly factual cast.

**Sovereign Immunity**

So far as the doctrine of sovereign immunity is concerned, New York stands near the opposite end of the spectrum from Pennsylvania. This is not to say that there has been any explicit rejection of the doctrine or its validity within its classical limits. On the contrary, a recent Court of Appeals opinion states that unless waived, sovereign immunity is a bar even to suits based upon the constitutional prohibition of the taking of property without compensation—a classic case of a right without a judicial remedy.

Thus, inverse claims based on physical damage resulting from condemnation are barred unless within the scope of statutory consent. The necessary authorization must be found either in the highway-damage statutes or the general waiver statute that has been part of New York Law since 1929.

**General Waiver**

The current general provision, Section 8 of the Court of Claims Act (1965) reads as follows:

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 applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article.

The language of this waiver of immunity is not without potential construction problems. Does it impose liability on the state in every instance where an injury would be actionable if it were committed by an individual or a corporation without legislative sanction; and does it ever impose liability if the individual or corporation would not be vulnerable?

**Terrace Hotel Co. v. State** construed this waiver as consenting to liability only where the identical cause of action would lie against a private party. So construed, the waiver did not extend to a claim against the state for damages to property in connection with its abortive appropriation, voided because based on a misconception of a statute. Such a governmental act, the court explained, could only be performed by a sovereign.

This result invites comparison with the host of federal cases decided under the Tucker Act and the Federal Tort Claims Act to the general effect that the actions of the Government in its sovereign capacity will not support liability against it in its capacity as a contracting party or potential tortfeasor; for example, an embargo frustrating...

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46 The provisions of Section 29 of the Highway Law (which seems to relate to war-time planning) are virtually the same as those in Section 30.
47 New York Highway Law §§ 30(15), 347(4); McKinney’s Unconsolidated Laws § 7702(15).
49 46 Misc.2d 174, 259 N.Y.S.2d 553 (Ct. Claims, 1965). This is not to say that there are not strong considerations reinforcing the application of sovereign immunity. The state has acted under color of right, relying on a presumptively valid enactment. While, to be sure, the appropriation must fail, the imposition of additional liability would have an undesirable inhibiting effect on the proper conduct of the state’s business.
Thus, to the extent that the activity giving rise to the claim is one peculiar to the Federal Government, neither the Tucker Act nor the Tort Claims Act constitutes a waiver. The reason is that both Acts, like the New York statute, authorize suit only where an action would lie against a private person based on the same facts.

Another possible explanation of *Terrace* and the authorities it cites is that the statute waives the procedural bar to suits against the sovereign, but does not place the state on a parity with a private party as to all possible defenses.\(^\text{101}\) That the state is engaged in a “governmental activity” rather than one common to its citizens as well, may perhaps serve to confer immunity from liability as a substantive defense, rather than as a technical bar to suit.\(^\text{102}\)

**Specific Waiver**

The specific waiver provision in the highway-damage statutes presents a somewhat similar problem. It provides for recovery by the claimant (and liability on the part of the state) for damage caused by the work of constructing the highway, limited by the condition that they create no liability not already existing by statute, and subject to a statute of limitations which bars claims not filed within six months after an administrative procedure ordinarily occurring about the time of the completion of the highway.

Section 30(15) provides:

> If the work of constructing, reconstructing or improving such state highways and bridges causes damage to property not acquired as above provided, the state shall be liable therefor, but this provision shall not be deemed to create any liability not already existing by statute. Claims for such damage may be adjusted by the superintendent of public works, if the amounts thereof can be agreed upon with the persons making such claims, and any amount so agreed upon shall be paid as a part of the cost of such construction, reconstruction or improvement as prescribed by this section. If the amount of any such claim is not agreed upon, such claim may be presented to the court of claims which is hereby authorized to hear such claim and determine if the amount of such claim or any part thereof is a legal claim against the state and, if it so determines, to make an award and enter judgment thereon against the state, provided, however, that such claim is filed with the court of claims within six months after the acceptance by the superintendent of public works of the final estimate of the completed contract.

Taken at face value, these statutes seem to cover only the situation in which the very process of highway construction occasions damage to nearby landowners. Under this interpretation, the language limiting the state’s liability, so that it is no greater than that “already existing by statute,” refers to and would have the effect of coordinating decisions under this provision with the substantive law developed under the statutory waiver of sovereign immunity contained in Section 8 of the Court of Claims Act.

These provisions have thus far rarely been invoked by claimants as authority in connection with injuries of interest for the purposes of this study. For example, not one of the flooding damage cases discussed as follows bases its claim on these statutes. The decisions which do involve construction of the statutory language do not support a restrictive plain meaning interpretation. Claims based upon Section 347(14) of the Highway Law have not been limited to damage attributable to the construction process: In *Selig v. State*,\(^\text{103}\) the landowner claimed damages due to a change of grade resulting from the New York Thruway. The Court of Appeals held that Section 347(14) of the Highway Law would have entitled her to recover if the damage had been caused by the change of grade (rather than by the impairment of access). The requirement of pre-existing statutory liability was satisfied by a statute which would have imposed liability on the city had it undertaken the construction and caused the damage.\(^\text{104}\)

The background of these provisions is described in a case which involved damage attributable to the actual process of construction, although this does not seem material to the decision:

Section 30 of the Highway Law established a new procedure for the acquisition of property required for public improvement work whereby the State undertook highway construction and reconstruction in place of towns, villages and municipalities, and assumed liability thereunder, provided such liability already existed by statute, by which it was meant that if a prior statute made the town, village, or municipality liable to a property owner for damages sustained in the construction or reconstruction of a highway that such liability now became the liability of the State.\(^\text{105}\)

A possible explanation of this statutory interpretation, apparently at odds with its plain meaning, is the fact that similar language was interpreted this way in older cases involving the statutes eliminating railroad grade crossings. These statutes antedated New York’s principal waiver of sovereign immunity in 1929. They imposed liability on the state for damage caused to the property which had not been appropriated by “the work of such elimination,” on condition that “this provision shall not be deemed to create any cause of action not already existing.” These provisions were construed to mean that the state assumed any liability under any cause of action, against any party, that had existed theretofore, permitting the conclusion that the state was liable for damages by virtue of the liability of the municipalities which had previously been responsible for grade crossing operations.\(^\text{106}\)

By contrast with the situation in the case of the grade crossing elimination statutes, however, the damage provisions were not essential to permit any recovery from the state, because the bar of sovereign immunity had already

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\(^\text{100}\) Derecktor v. U.S., 128 F. Supp. 136 (Ct. Cl., 1954), cert. dis. 350 U.S. 802 (1956); Bartho\'tomae Corp. v. U.S., 253 F2d 716 (9th Cir., 1945), to the effect that the defense of sovereign immunity, like the


\(^\text{102}\) See also Williams v. City of New York, 57 N.Y.S.2d 39 (Sup. Ct., 1945), to the effect that the defense of sovereign immunity, like the statutory waiver, applies to suits against a city.

\(^\text{103}\) 10 N.Y.2d 34, 176 N.E.2d 59 (1961).


been removed by a separate statute in 1929. This fact could explain the legislature's use of different language to describe the pre-existing liability invoked by the highway-damage provisions. They require liability "already existing by statute" as distinguished from a "cause of action" "already existing." In Coughan v. State, the Court of Claims held that the language of the highway statute does not provide for the continuation of all remedies, as did the grade crossing statutes, but only for prior remedial remedies.

The operative construction of these provisions, then, limits the state's liability to any damages which, by 1942, were recoverable by statute, from the state, or city or any other party. The requisite statute is held to mean a statute providing a specific cause of action. Nevertheless, it is clear that, for the present, claims for physical damage caused by highway improvements are not tested for reliance on a pre-1942 statutory cause of action.

Conclusion

Whatever the potential ramifications of the line of distinction regarding the scope of general waiver in other areas, it has not in fact created a substantial problem in cases of present interest. Similarly, construction of the specific waiver is in practice an obstacle to recovery on claims that were not actionable by statute before 1942. For inverse condemnation claims, the waiver appears relatively clear and complete; the issue of substantive liability has engaged the attention of the parties and the courts.

Procedural Defenses—Timeliness

Accrual and Limitation on Right

The liability imposed on the State by Section 30(15) of the Highway Law is limited in the same section by a provision that:

... such claim is filed with the court of claims within six months after the acceptance by the superintendent of public works of the final estimate of the completed contract.

Since these provisions have not been restricted to actual work-of-construction damages, it might be argued that, being generally applicable, they pre-empt the field with regard to such damage claims, and thus bar claims which cannot satisfy either the pre-existing statutory liability test or the six months statute of limitations. As a practical matter, the answer is clear for our damage cases. These statutes are not the only path to recovery for the claimant or the only source of liability for the state. The theoretical justification has not yet been provided by the courts. The various limitations periods provided for claims of "appropriation" by the state, and for claims based on tort by agents of the state, in Section 10 of the Court of Claims Act are also invoked and permit claims much longer than six months after the highway's completion.

Thus, in Cook v. State, the Court considered a claim for damages incurred in 1955, which were allegedly caused in connection with highway reconstruction or maintenance in 1927; in Rockwell v. State, a claim for damage in 1953 on a 1910 road, which was resurfaced in 1933; in Chisum v. State, a claim is based on a 1945 flood, with damages attributable to the construction of the highway in 1910 and its reconstruction in 1934; in Scamp v. State, the damages attributed to the 1926 highway occurred in 1945; and in Walfords Roost, Inc. v. State, a 1956 damage was attributed to a 1928 highway culvert which was connected to a pipe in 1947.

The existence of alternative remedies has rendered these provisions of limited practical importance so far as they authorize a judicial determination of the value of the damage suffered, reinforcing the view that it is the judge-made substantive law that dominates the body of New York law.

Under some circumstances, the period in the Highway Law (for claims based on "damage") is more liberal since it is not measured from the accrual of the claim. West v. State, holds that the Highway Law's statute of limitations applies to a claim for a "consummated invasion" while the measuring period of the Court of Claims Act's Section 10(3) applies to a claim founded on "intermittent and recurrent injuries"—acts in the nature of a continuing trespass.

There is authority for the interpretation that the Highway Law's statute pre-empts the Court of Claims' provisions, where the claim in question alleged property damage caused by the negligent conduct of the highway's construction.

The result of this interpretation, however, was to permit the filing of the claim.

Procedural Defenses—Res Judicata

The New York plaintiff who seeks an additional remedy after a condemnation proceeding in which he or his predecessors in interest were involved meets only the normal rules with regard to the res judicata effect of a prior proceeding. Parties thereto are concluded with respect to all matters which were at issue, including the legality of the public improvement which was the object of the condemnation proceeding. Matters which although not litigated might have been put in issue are equally foreclosed. Such matters,
however, raise the most difficult res judicata problem in condemnation proceedings. That problem is to determine what "might have been at issue." New Street 119 posed this question with regard to a partial taking purportedly for street purposes. The general rule is that an award of damages for such purposes includes all damages that may result from any future use normally included within street purposes. The issue was raised by New Street where plaintiff sought to prove damages for injuries to his remaining property from the construction and operation of a subway which, there was reason to believe, would be forthcoming shortly. The court held that the construction and operation of a subway was not such a clear street or public use as to be deemed to have been included in the consequential damages paid to abutters in the street opening proceeding. The alternative to the court's ruling would have been to open up the street condemnation proceeding to proof of damages for any conceivable use the city might make of the property required, an onerous result the court explicitly rejected on policy grounds.

Res judicata issues have not frequently been raised in the modern New York cases. In Sherover Const. Corporation v. City of New York, plaintiff sought additional compensation for the cost of constructing his hotel above a city subway. Portions of the parcel on which the hotel was built had been taken in a subway condemnation proceeding some ten years before. The instant case held that the plaintiff's claim was foreclosed because "the damages sought were adjudicated in the subway condemnation proceeding." The court found that the previous adjudication "included the item of the loss of lateral support" notwithstanding that the damage in question does not appear to have been inadvertently considered by the parties when the right of lateral support was specifically before the court.

The line suggested by the two cited cases is this: the claimant will not be denied a remedy in the future for uses outside the purported scope of the taking. But an element once considered has been bought and sold forever, although the claimant had not the prescience to place on it then the value he would place on it today. But the whole sphere of possible liability for injuries sustained as a result of the purported use remains to be explored. As to that, one famous case in New York jurisprudence is significant as a benchmark of a latitudinarian philosophy implemented by subtle judicial ingenuity. There an elevated railway company had acquired the physical properties necessary to build the structure and tracks for its unconcealed and indeed unconceivable transit purposes. The actual operations, so the court found, were, however, so thoroughgoing an invasion of the peace, quiet and privacy of the neighboring buildings as to diminish significantly their value. The diminution, foreseeable in a sense from the beginning if the railway were built, proved so drastic in practice that it could be held to justify the conclusion that some further right had been taken for which compensation must be paid.121 This case and and its judicial progeny will continue to afford a constant source of encouragement and consolation for the claimant and the reverse for the earnest estimator of the cost of public improvement. On the other hand, it is good to know that when the elevated railway was torn down, that which had been taken from the former owners circa 1888 was restored to their successors in interest, who are now being called upon to pay for having it back.122

**Substantive Law**

Defining the state's substantive liability for such damage by way of inverse condemnation rests most importantly on analysis of cases involving the relevant facts. Whether or not the opinions purport to rest on condemnation principles is less significant where, as distinguished from the Pennsylvania situation, a claimant need not color his case one way or another to avoid the technical bar of sovereign immunity.

There are perhaps six distinguishable factual patterns in flooding damage cases: (1) a highway drainage ditch or culvert discharges water directly onto, or close to, claimant's property; (2) flooding is due to the lack of a highway drainage ditch or culvert; (3) a highway drainage ditch or culvert proves inadequate to receive the flow of water which is blocked and floods; (4) drainage from nearby land is impounded or otherwise impaired by the highway; (5) construction processes cause flooding; and (6) flooding is the result of the highway's interference with a stream or spring.

**Flooding-Damage Cases**

It goes without saying that actual causation is essential. It is not, however, conclusive on the issue of liability. The fact that property has been damaged by flooding which would not have occurred but for a highway does not, without more, render the state liable for such damage.

*Highway Ditch or Culvert Discharges Water Directly onto Private Property.*—When such damage is attributed to the water which a highway drainage ditch or culvert discharges directly on, or close to, the affected property, the state is quite likely to be held liable despite the absence of any negligence. This liability results from the application of rules of private law to the highway situation. New York law of surface water permits a property owner to improve his land or deflect surface water without liability to his neighbor for any resultant flooding damage, subject to an exception that he may not collect and cast surface water on another's land by artificial means, such as drains, pipes or ditches.123

Kerhonkson Lodge v. State 124 involved a state highway built in 1931. The instant claim arose from drainage improvements undertaken as a maintenance measure in the spring of 1952. During the 20 preceding years, a culvert under the highway had discharges water onto claimant's

119 Id.
120 162 Misc. 893, 295 N.Y.S. 925 (Sup. Ct., Kings County, 1937).
124 Id.
property. According to claimant's expert, the deepening and extension of the drainage ditch on the north side of the highway, which discharged into the culvert, increased the flow of surface water onto the claimant's land, which in turn caused the injuries on which the claim was based. The damage was incurred during a heavy rainstorm in November 1952, which washed out a private road and damaged the piers and underpinning of a new cottage.

The judgment of the Court of Claims dismissing this claim was reversed and the case remanded for a new trial. The reviewing court tested liability by

... whether the state so changed, channelled or increased the flow of surface water unto (sic) claimant's land by artificial means so as to cause damage to its property. If it did so, the state cannot escape liability on the theory that the changes were made in conformity with good engineering practice. In that respect the state had no greater rights than an individual under the same circumstances (Niosan v. City of Albany, 79 N.Y. 470; Foster v. Webster, 8 Misc. 2d 61, 44 N.Y.S. 2d 152; Zidel v. State, 198 Misc. 91, 96 N.Y.S. 2d 330).

The appellate court's opinion clearly implies that the requisite "artificial means" were present in the highway's ditch and culvert, leaving open only the question of whether the drainage changes had caused the damage, and the extent thereof. Within the area of this "artificial means" test the courts can be stern in imposing liability. Thus, the Kerhonkson opinion, in the language quoted above, rejects the trial court's view that the state's employment of good engineering practice in making the changes protected it from liability. This Court also rejects the state's suggestion that the legal cause of the damage was claimant's neglect in not clearing the dry brook on its land of the obstructions which had impounded the waters discharged by the culvert:

... no duty rested on claimant to keep the dry brook free from any debris accumulated there from surface water discharged from drainage ditches constructed by the state.

Wolferts Roost, Inc. v. State, one of the rare artificial means cases to reach the Court of Appeals, spotlights the celerity with which liability is imposed once the test is satisfied. Since 1928 there had been a culvert under the state highway, draining surface water from its sides and the adjacent upland, and discharging this water on claimant's bordering golf course. In 1931 wetness was observed on the fairway of the hole closest to the culvert. The club itself remedied this by running an underground drain pipe from a point in the nearby rough downgrade to a point beyond the fairway. Still later all the water collected in the culvert, including some which had until then dispersed itself gradually, was received by the club's drain through a connecting drain installed on a small parcel sold by the club. The club's drain, because it had become plugged, was unable to accommodate the runoff of a heavy rainstorm. The resulting break caused almost $3,000 damage to the golf course.

The Appellate Division, by a divided court, held the state liable. The entire court agreed that the break would not have occurred except for the additional water and debris carried into the club's drain through the intermediary of the drain linking it to the culvert. The issue on which the court divided was whether, as the state contended, it should not be held liable since it had not laid the connecting drain. The majority opinion surmounts the problem of causation by, in effect, treating the connecting pipe as part of the state's culvert, because installed with the state's knowledge, and the whole as an "artificial means" within the test:

For many years the state had actual knowledge that the connection had been installed and that thereby it was collecting surface water from the highway and discharging it by way of an artificial channel on claimant's land.

Lack of Drainage Ditch or Culvert.—Predictability of the outcome as to claims based on flooding damage drops substantially when there is no highway drainage ditch, pipe or culvert discharging water on private property.

Is any other disturbance of the flow of surface water, which causes damage, a basis for liability, under the exception for collecting and casting by artificial means or under any other theory? Clearly not a city's raising of the grade of a street above the sidewalk without installing drains (so that water drained onto adjoining property).

Moreover, in the absence of the established precedent which governs the city-street drainage cases it is sometimes difficult to predict whether particular facts are a "ditch" so as to satisfy the test. In Rockwell v. State, a ditch parallel to the highway carried its runoff until encountering the claimant's drive, which sloped down from the highway. The water followed the drive to the claimant's barn, causing the injuries alleged in the claim. The plaintiff himself testified that the declivity forming the ditch was created by runoff from the highway, which was improved above grade. The state, however, was aware of its existence, kept it clear of debris, and did not install a pipe to carry the water under the claimant's drive to the other side, where a ditch had also formed.

Although this could be regarded as an instance of collecting and casting this water without straining the meaning of these words, the Court held that the artificial water means test—using the Kerhonkson language—was not met. The state was not liable for not draining off the flow of surface water from the highway.

Drainage Ditch or Culvert Inadequate to Receive All the Water.—Inadequacy of the highway's drainage system to receive all the surface water flowing toward it, so that the water is blocked, backs up and floods the claimant's property, is not inherently beyond the reach of liability imposed under the artificial means test. But for the blocked up drain, pipe or ditch, there would not have been flooding or damage. Yet the artificial means test is not applied in such situations.
Instead, the state's liability is determined by the law of negligence, as illustrated in Fuller v. State.\textsuperscript{131} There the highway drainage system, a 1930 reconstruction, was inadequate to cope with the runoff caused by a storm in 1941, which was the heaviest in 23 years. The backed-up waters overflowed and washed out a wall of claimant's building. The court held that the state was not liable for this damage, on the ground that the highway and drainage system had been constructed in accordance with accepted highway standards and no more was required. The failure to anticipate and provide for an unprecedented rainfall was not actionable negligence.

The Appellate Division, on the same theory of liability, reversed a Court of Claims' decision that the state was negligent. The flooding damage resulted from the inability of the Turnpike's 1954 drainage system to absorb the effects of 1955's "Hurricane Connie." Incorporated Village of Flower Hill v. State,\textsuperscript{132} found reversible error in the absence of any evidence adduced to show prior notice of any defect nor was it shown that such circumstance was or should have been foreseeable on the part of the state.

The claimants in these cases based their suits on negligence. The inapplicability of the artificial means test, not explained in the opinion, probably lies in the historical development of private law rules as to the extent of the lower owner's duty to afford drainage for upper lands. An alternative or additional explanation may be inferred from the court's references to the heavy rain as the cause of the damage. This suggests that in these cases the rainfall, rather than the artificial means, caused the damage. This distinction is difficult to sustain. A more plausible approach is that the state's negligence was not the proximate cause of the claimant's injuries. The injury was not foreseeable, in the sense that it would not be sound policy to transfer the incidence of loss on so tenuous a thread. The rain falls on the just and the unjust, and each must make good his own damage.\textsuperscript{133} Yet the rain fell in unusual quantities as well in cases where the artificial means test was applied without inquiry into the question of proximate cause.\textsuperscript{134} There may nevertheless be policy grounds for applying a different rule on the basis of a distinction other than between upper and lower lands.

The cases may be divided on a factual basis: whether the drainage system was discharging water onto private property because this was how it was intended to function, or only by virtue of the extraordinary degree of runoff attributable to a heavy storm. Conceivably the stricter rule of liability without fault is appropriate in the former instance where the use of, if not the damage to, claimant's land was intended, while negligence is required before the state is liable when there was no planned discharge on his land. Furthermore, even in these cases, artificial means may be said to be a contributing factor. For although liability is determined by standards of the law of negligence, those standards are only applied where flood damage is due to inadequate culverts, drains, etc., themselves hardly natural phenomena. In the absence of such artificial means, as in the Rockwell case, discussed supra, liability is denied for damage resulting from the lack of a culvert, regardless of the foreseeability of the flooding. Thus the state is not under a duty to act in regard to providing drainage facilities, but if it does act it is under a duty to use reasonable care in so doing.

Highway Structure Interferes with Drainage from Nearby Lands.—These cases exhibit the process of mutation—a rule of law governing state liability for water damage attributable to the highway evolves from, or along with, gradual changes in the private law principles which have been invoked as the test.\textsuperscript{135}

Holmes v. State,\textsuperscript{136} which illustrates the process, grew out of the following facts. In connection with the approach of a new bridge, the state closed a street exit, and in effect dammed the surface waters which had previously flowed out of it. The state had also eliminated the drainage effect of two of the four city storm sewer inlets on the same street by changing its grade slightly in order to direct the runoff away from the bridge approach.

In consequence of the changes, rainwater at times ran down the street and accumulated adjacent to the bridge approach, covering a portion of the street between the approach and the sewer inlets. The claim alleged that the foundation and cellar of claimant's house, located near a point of accumulation (and as a result of it), became damp and, following heavy rainfall was weakened and in part washed away. Held, the state was liable.

Although the claim alleged that the state had been negligent in constructing a bridge approach without providing adequate drainage, and although foreseeability of flood damage in the circumstances might have been inferred from testimony of the deputy City Engineer, the opinion bypasses the issue of negligence. The court asserts that even the absence of negligence ("the fact that the design was in accord with good engineering practice" as testified to by the state's designer) does not preclude liability "if the acts of the state were in derogation of the claimant's rights." The Holmes judgment imposing liability is a foregone conclusion from the court's factual finding that:

Under these circumstances the combination of building a dam in the form of a bridge approach across New Street and eliminating two inlets, with no substitution for the drainage effect represented by those inlets, amounted to an artificial gathering of surface water and throwing it upon the property. . . .

The effect of the judgment is to extend the artificial means test to encompass some flooding damage caused without ditches, pipes or drains. The underlying policy judgment may be implicit in the court's reference, closely juxtaposed to its key statement, to the deputy City Engineer's testimony that one pair of sewer inlets would not suffice in heavy rain on such a street. The inference this suggests is that the state action which results in predictable flooding serves the

\textsuperscript{127} A.D.2d 940, 182 N.Y.S.2d 230 (3d Dep't., 1959).
\textsuperscript{129} See Wolters Road, Inc. v. State; Kerhonkson Lodge, Inc. v. State; supra notes 127 and 123.
same purpose as a highway culvert built to discharge water onto private property. Predictability alone cannot fully explain Holmes, since damage was also predictable in cases of negligence and lack of a culvert where the artificial means test was not applicable.

The Holmes case clearly tends, however, toward greater state responsibility, and in this respect is in the tradition of Keller v. State. The Keller case first approves a description of the scope of the state's liability which, in effect, invokes the rules which apply to flooding damage caused by the activities of a private landowner:

It is true, as the state contends, that damages resulting from a public improvement, effected under legislative authority, are not recoverable in the absence of trespass or negligence.

Although the court predicates the state's liability upon a finding of negligence, it strained somewhat to provide that basis. The opinion also virtually rejects the artificial means test as a ceiling on the state's liability. The claim alleged that the 14-ft highway embankment had blocked the normal drainage path of surface water, causing it to back up and flood a portion of claimant's land. Upon discovering this, the owners had complained to the Department of Public Works, which replied that plans were going forward to remedy the drainage situation. The state did subsequently build a culvert under the highway, but the water continued backed up. Suit was then brought on the theory acquiesced in by the court that the flooded condition of the land was permanent and constituted a de facto appropriation. The court found that the culvert was inadequate to remedy the condition because of defective design, and constituted negligence by the state.

Keller's significance lies in the court's treatment of the artificial means test. The state had argued vigorously that it had unquestioned authority to build the Parkway and the embankment merely represented reasonable use of its own land, which the artificial means test permitted it to do without liability for damage to nearby owners. The court characterizes this argument as untenable.

The State may not just construct a dam under the guise of a necessarily elevated highway and be unconcerned as to what may consequentially happen to 1, 2 or 10 nearby owners. This exceeds the doctrine of the respective rights of two landowners.

The Keller opinion clearly disapproves the artificial means test on the ground that the state is not merely "a lower landowner," notwithstanding that the opinion also invited its support by noting that some drainage was "piped" (italics are the court's) from the Parkway onto the flooded land and by characterizing the embankment as artificially created.

It is possible to conclude that, as in the Holmes case, the decisive reason for the Keller holding was a policy judgment—here that the state should not have been permitted to cause damage which could be avoided by a proper culvert. The rationale offered in the opinion is not too convincing. The defense based on artificial means is rejected on a species of estoppel theory: that the state had conceded the inapplicability of the test, by the Public Works Department's reply to claimants and by building the culvert. The opinion puts great stress on the fact that the state was negligent in erecting the defective culvert, which is found to be the proximate cause of the damage. But it seems clear that the flooding damage was no greater as a result of the defective culvert than it would have been if no culvert had been constructed, so that the reliance on negligence appears strained.

This feeling that the opinion is straining to achieve its result, perhaps for the indicated policy considerations, gives rise to the hypothesis that the Keller holding might have been the same if there had been no letter from the state and no defective culvert. The court's concluding language, however, suggests that it was not contemplating such an extension:

When the state tries to avoid liability for the negligent erection of the culvert under the doctrine affecting property owners (i.e., the artificial means test) it is calling upon the court to overlook the state's primary obligation of setting an example of fair play to its very taxpayers and citizens.

Moreover, other cases of damage by water impounded by a highway have not perceptibly extended the private surface water law so as to impose liability on the state. Thus, in Scamp v. State liability was not imposed for damage by water draining off a 1926 highway, elevated about ten inches above claimant's lot. This highway, unlike the road it replaced, had no culvert. Drainage did not become a problem for many years, apparently because the adjacent lot absorbed the water flowing off the highway. In 1943, the adjacent lot was graded, causing a 2-ft rise in its elevation and a gradual slope toward claimant's land, which was flooded during the heavy rain in July 1945.

The fact that the drainage problem was caused by changes made after the highway was constructed does not preclude liability, as is apparent from the Wolfert case (where the connecting pipe under the golf course was a later installation). The Scamp case dismissed the claim without explaining its conclusion that claimant did not prove any cause of action against the state, beyond indicating that it would be "guessing" to find that negligence caused the damage complained of. The artificial means test is described, but not applied, for reasons which are not apparent from the opinion.

Damage Resulting from the Construction Process.—In the "inadequate culvert" cases discussed, the law of negligence was invoked to impose liability. Curiously, in the case of a highway under construction, the law of negligence has been invoked to reduce the area of potential liability under the artificial means test. In Morris v. State the damage complained of occurred when certain streets were flooded after a heavy rainfall because a culvert entrance was blocked by trash and debris from a spur of the State Thruway then under construction. Although this case rests on the question of delegation to the independent 1930 189 Misc. 802, 70 N.Y.S.2d 752 (Ct. Claims, 1947).
contractor, the court goes on to discuss the merits of the claim and concludes that the state would not be liable. The state's liability for damages where the project is still under construction is distinguished as requiring "a clear showing of defect," whereas such negligence need not be present in the case of a "completed and accepted contract and therefore the discovery of inadequate drainage."

There is support for challenging the assumptions underlying the conclusion. The court evidently assumed that the artificial means test would otherwise impose liability on the state here. But as the inadequate culvert cases have demonstrated, that test would probably not be deemed satisfied. Indeed the very authority cited for the distinction, the Flower Hill case, is simply an inadequate culvert situation and not a case of damage during construction. However that may be, the Morris case appears to demonstrate judicial policy making, modifying the presumed state of the law of surface water to create a new distinction in order to limit the state's liability.

The law of negligence consistently overshadows the artificial means test in cases involving the liability of the state for flooding damage attributable to highway construction. Thus, Bantelman v. State 140 rules against the state without ado, although liability would certainly not be sustained under the ditches, drains and pipes interpretation of the artificial means test. The state's negligence was in not providing a protective ditch at the toe of the highway embankment while it was in its raw state, to avoid flooding and the spilling of loose clay, silt and rocks therefrom on the adjoining land. But in other cases, although the requisite pipe for the artificial means test seems to have been present, the absence of negligence either in design or construction was held to preclude a finding of liability since the reconstruction of the highway was a public improvement. 141

Flooding Damage by Overflowing Streams Instead of Surface Water.—It has been suggested that the nature of the water resource disturbed by the highway is an important factor in determining the state's liability—that a finding of liability is less likely if it is surface water than if it is a stream. 142

If we exclude for this purpose the cases dealing with a highway culvert or ditch which is intended to discharge surface water onto private property, the "stream" cases certainly have a higher incidence of holdings that the state is liable for flooding damage. The state was adjudged liable for these flooding damages in 85.7% of the stream cases discussed herein and in only 25.4% of the surface water cases.

The decision that the state is liable in these stream cases is uniformly based on the law of negligence. As applied here, however, that law seems tolerant of fewer wrong judgments than was true in the surface water cases. 144

Thus, where the construction of a highway which crossed a stream by way of a bridge had included the straightening or other alteration of the channel of the stream, or the dredging of the stream bed, causing the stream to over-flow, the inference of negligence seems to follow almost automatically from the fact that the stream had been disturbed. 145

The conventional factors comprising negligence were weighed where the stream was carried under the highway by means of a culvert which proved inadequate for unusual reasons. In one case 146 a large amount of branches and debris from rough terrain clogged the culvert; in another 147 substitution of pavement for gravel prevented reformation of the flood channel whereby water had formerly returned to the stream. These cases hold the state negligent for failing to construct an adequate culvert. Their conclusions concerning the state's duty to foresee and avoid such damage seem to impose a higher standard, for example, of expert professional engineering judgment, and the duty to cope with extraordinary rainfall, than was required by the Fuller and Flower Hill cases applying the law of negligence to the construction of culverts which were inadequate to drain off surface water. And yet these opinions place no express reliance on the fact that the water carried by the culvert is a stream.

Christman v. State 148 is a very interesting decision from the standpoint of distinguishing the state's liability in the stream and surface water cases. Here property adjacent to the highway was damaged by floodwater after a heavy rain in 1945 because of the inadequacy of the highway's drainage system, consisting of culverts and stormwater sewers. The water funneled off this system included a stream susceptible to flash flooding as well as the surface water. Unable to pass through the mouth of the culvert, these waters became impounded and overflowed. This drainage system dated back to 1910, with some 1934 modifications. The opinion presents a detailed and vehement description of the state's negligence in failing to perform its duty to construct a culvert which would be adequate and proper to carry off the water reasonably to be expected—in the light of the hilly nature of the topography which produced an increasingly rapid runoff of surface water, and of the danger of flash flooding. The state is described as having been negligent in this regard in 1910 when the highway was built. Its subsequent conduct was also negligent since there had been repeated floods and increased runoff by 1928, when the state reconstructed the highway without change in the stormwater system; and then the state did nothing to avert floods thereafter while the increased runoff doubled the mass of water.

140 Mandelker, Inverse Condemnation: Constitutional Limits of Public Responsibility, 11-12.
141 In these cases there is a very high proportion of state liability decisions since they are clear instances of the ditch, pipe or drain interpretation of the artificial means rule. Excluded also is the case of the culvert carrying a stream. See Rutklin Bros. Inc. v. State, infra at note 149.
The court's ruling in *Christman*, that the state's failure to construct adequate culverts and a drainage system with greater capacity constituted negligence for which it should be held responsible in damages, does not purport to rely on the presence of a stream. The rapid run-off of surface waters was an important source of the excess water. Yet all of the authorities cited by the court in support of its decision are stream cases.

The spirit of the opinion suggests the existence of a public duty to drain highways and to regulate their drainings so that the water does not damage adjoining land. The surface water cases, with their artificial means test, are relatively permissive, treating instances of state liability for flooding damage as an exception to the rule that the state, like the individual owner, is not required to avoid such damage.

This is in sharp contrast with the results produced by a comparison of the cases dealing with flooding damage by a highway culvert constructed to discharge its water onto private property. Whereas the surface water cases exhibit a strong trend toward holding the state liable, the stream case finds none. In *Roskin Bros. Inc. v. State*, a culvert carried the stream under the state highway and discharged its water into a catch basin and pipes on claimant's land, built to receive, lower and dispose of this stream which had previously flowed through an open channel across his land. Upstream debris in the stream blocked the catch basin which filled up with water, increasing the pressure in basin and culvert. The claimant sought compensation for flooding damage to his cellar, 20 ft from the catchbasin.

The court's refusal to impose liability is based solely on the riparian nature of the water in the culvert:

The stream was a natural watercourse and an upper riparian owner is not chargeable with negligence in allowing debris to flow through his land from above which may cause damage below, providing he does not affirmatively increase the material flowing in the stream. The only act of negligence attributed to the state is removing a screen which had prevented debris from passing through the state's premises. The removal merely allowed the stream to flow unimpeded. The accumulation of water was not caused by an instrument on the state's land, but by the catchbasin on a third-party's land. The state's liability has not been demonstrated.

Except for the nature of the water discharged from their culverts, the *Roskin* facts closely resemble those in the later *Wolferts* case (involving a culvert discharging water into a connecting pipe under a golf course), where the state was held liable. Their contrasting holdings emphasize the importance of the surface water/stream distinction. In this instance the test for liability is harsher where surface water is involved.

It has been suggested that the law of riparian rights is also subject to modification by considerations of policy when it is invoked to test the state's liability. In *Quayle v. State* the Court of Claims refused to find that the state's duties are only those of an ordinary riparian owner. Having assumed maintenance of a town bridge as part of the state highway system, the state had the duty to clear the ice jams in the stream below the bridge and was liable for the damage caused when the stream overflowed because it had not been cleared. These policy factors are acknowledged in the opinion—any other result would confine the state's responsibility too narrowly, the role of the local officials was confused by the fact that the state took over the bridge, and the public is entitled to this protection. But these carefully considered policies to the contrary notwithstanding, the Appellate Division reversed, finding the forces of nature and not the state to be the culprit.

**Role of Inverse Condemnation.**—Only one of the flooding-damage decisions is based on the theory of inverse condemnation. *Reese v. State*, where the dredging of the creek bed caused the creek to flood, eroding 4.4 acres of topsoil, found three separate grounds for holding the state liable. One of these was inverse condemnation, albeit described as "appropriation," the taking of property within the meaning of the Constitution for which compensation must be paid. As to the scope of the right to recover for an appropriation under the *Reese* case, it holds that the destruction of the topsoil on 4.4 acres was, to that extent, a taking or appropriation of property because its owner was, to that extent, excluded from its possession and deprived of his right to its benefits. Although no other facts are mentioned as material to this holding, the dredging was also found to be negligent and, even if not negligent, a continuing trespass, in the two alternative holdings.

The *Keller* case finds that claimants' flooded lands were made useless to them and had therefore been appropriated by the state. Here the reference to appropriation does not describe a separate ground of liability. The claimants' right to recover was determined by the private law of surface waters and negligence as modified in this and other cases of damage attributable to the state highway.

The *Keller* case is unusual in that the claims filed alleged de facto appropriation, but the opinion commingles this cause of action inextricably with the non-constitution-based right to recover from the state for flooding damages. Under *Keller* there is no right to recover for appropriation apart from these precedents. The state is held liable for appropriation but only after the court strains to find liability due to negligence and estoppel to invoke the artificial means test.

Recovery by way of inverse condemnation then, under the *Reese* and *Keller* cases, apparently turns on whether the state would otherwise have been held liable. But there is very little discussion of the constitutional issue since the claims rarely allege this ground for recovery.

What accounts for the unpopularity of the inverse condemnation claim in New York? Not the eminent domain provision in the state constitution:

> Private property shall not be taken for public use without just compensation.

Although it does not mention damaged property, the

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186 *8 A.D.2d 895, 187 N.Y.S.2d 51 (3d Dep't, 1959).*

187 *41 Misc.2d 137, 245 N.Y.S.2d 31 (Ct. Claims, 1963).*
absence of a specific constitutional provision does not interfere with the allowance of property damage claims.

The New York courts have a very broad definition of the “taking” or “appropriation” of property which entitled the owner to just compensation under the constitution:

Any limitation to the free use and enjoyment of one's property constitutes such an appropriation as entitled the owner to compensation for that which has been taken from him.155

More accurately, what is 'taken,' i.e. what is completely or partially destroyed or lessened, is a private right in the land, either the right to the fee, the entire title, or something less, e.g., riparian rights or easements, or any of the rights referred to... as 'real property.' But in each case, to the extent that such rights are invaded, lessened or completely destroyed, there is in contemplation of law a 'taking,' and that taking is in fact by its operation and effect a direct injury to the owner in his property rights and a diminution of his rights of use.156

Nor do the New York courts impose technical barriers to inverse condemnation claims. The fact that the statutory procedure for appropriation was not followed by the state does not preclude a claim of appropriation, since the question of whether there has been appropriation of land is entirely apart from the procedure for taking it.157

In the main, the flooding-damage cases claim damages by reason of the state's negligence or trespass. New York's statutory waiver of sovereign immunity authorizes such suits against the state. No need arises, therefore, to allege a constitution-based inverse condemnation claim in an effort to avoid the bar of sovereign immunity. While the Trippe case, supra, indicates that this approach would not succeed in avoiding the bar in New York, that opinion also indicates that it would in other states.

Presumably some of the flooding-damage claims did not allege appropriation because compensation was equally available on the basis of a claim for negligence, nuisance or trespass, or even via a simple claim for damages. The theory of the claimant's cause of action may become crucial, however, in connection with the measure of damages to be applied, or with the choice of the controlling statute of limitations.

The diminution of the property's fair market value (e.g., as a result of the flooding) is the measure of damage in a cause of action for appropriation or a permanent taking, as in the Reese and Keller cases. But the measure of damage in trespass is the cost of repair unless it can be established that the damage is irreparable.

Moreover, as noted earlier, the statutes of limitation under the Highway Law and the Court of Claims differ as to the length of time for filing the claim and as to the moment in time when this measuring period begins to run. The Court of Claims Act itself provides a different measure for claims based on appropriation, under Section 10(1), and those based on tort, under Section 10(3).

Furthermore, with regard to the significance of identity of the ground for liability, in conversations with agents of the Bureau of Public Roads it was indicated that the absence of a specific reference in an opinion to an inverse condemnation ground for the damages awarded creates a significant problem for the Bureau in determining the state's right to reimbursement, which extends to damages based on the law of eminent domain, not on tort law.

While the nomenclature of inverse condemnation was neglected in the New York cases, the primary purpose of this cause of action was carried out. Flooding damage caused by the highway was compensated. The law of surface waters, riparian rights and negligence, which would control such disputes between private landowners was applied with some modifications reflecting policy considerations. No greater or lesser liberality with regard to the state's liability for damages inheres in the constitutional right to just compensation (i.e., the inverse condemnation cause of action), under which the courts are still required to determine which facts give rise to the right to recover.

**FLORIDA**

The law of Florida concerning the state's liability for damage attributable to state highways presents a further example of the interaction of the doctrines of sovereign immunity and inverse condemnation. The defense of sovereign immunity, although pierced, is still a potent tool within the area of its applicability. Perhaps its greatest efficacy in factual contexts of interest to this study is as a bar to action for tort. As to such claims in respect of highway damage, the state legislature has superimposed its imprimatur on the doctrine evolved from the constitution. At the other extreme, it confers no immunity whatever to claims for just compensation based on the constitutional limitation on the eminent domain power. Some highway damage claims may be maintained on this basis through the medium of a condemnation suit initiated by the injured property owner. The facts that are sufficient to sustain such a suit may be substantially indistinguishable from those which would state an action for trespass barred by sovereign immunity. Thus, the effect on the scope of liability, as opposed to the formula for its measurement, may be nil.

**Sovereign Immunity**

The state's immunity from suit receives constitutional recognition in Florida—at least by implication—in the provisions of the constitution authorizing the waiver of sovereign immunity. Article 3, Section 22 of the Florida Constitution provides for "suits against state:"

Provision may be made by general law for bringing suit against the State as to all liabilities now existing or hereafter originating.

From the standpoint of the highway-damage cases, very little of this immunity has been expressly waived by statute. Section 337.19 of the Florida Highway Code of 1955, relating to suits against the State Road Department, authorizes certain contract claims, but also forbids tort claims:

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337.19 Suits by and against department; limitation of actions; forum

(1) Suits at law and in equity may be brought and maintained by and against the department on any claim under contract for work done; provided that no suit sounding in tort shall be maintained against the department.

A precursor of this statute containing virtually identical language was first enacted in 1923. The Florida Supreme Court in State v. Love, held it invalid on the ground that it did not comply with the constitutional requirements of a "general law" for a waiver of sovereign immunity. The 1923 Act was titled "An Act Relating to the State Department and Conferring Certain Powers upon the Same." This did not give due notice of the waiver it purported to authorize; the court held, therefore, that the section was not a "general law" dealing with the subject, but:

... a mere provision incidentally embraced in an act dealing with another subject, the title of which act, however broad and comprehensive, makes no mention whatever of removing the state's immunity from suit and fails to fairly apprise the members of the Legislature and the people that such an important matter is one of the matters to be dealt with in such act.

The concurring opinion in the Love case refers to the fact that the 1923 statutory waiver before the court had thereafter been incorporated into the 1927 compilation of the law. This did not cure the defect in the notice given by the statute's original title, since the 1927 act was a compilation and not a revision enacted under an appropriate general title. The 1955 Florida Highway Code, which contains this same statutory waiver, clearly constitutes a statutory revision under a general title, which would seem to augur the validity of the present waiver under the rationale of this concurring opinion. Indeed, its validity in a proper case was apparently conceded in State Road Department v. Taylor. Although couched narrowly, the waiver may in practice open the courts to a great many claims against the State Road Department, certainly more than would be required by its terms. If so, the opening wedge will have been the alternative holding in State Road Department of Florida v. Tharp. The opinion finds "an implied contract to pay," bringing the case within the statutory consent to suit, from the "damage" to plaintiff's property resulting from a bridge and fill constructed by the state which impounded the water exiting from his millrace.

The way for this construction may be thought to have been cleared by decisions stating that a "taking" of property without compensation having been made gives rise to an implied contract to pay. They, however, rest on an inference to that effect supplied by the common law. This would seem to render them inapposite to the Tharp case, which, to come within the scope of statutory consent, had to establish not merely a contract to pay implied or other-

wise, but a contract to pay "for work done." These words are read out of the statute by the Tharp construction, which, nevertheless, may be the established rule of the future. The Tharp construction, if generally accepted, would also bring legal developments as to state immunity into line with the trend in Florida as to municipal immunity, as well as that increasingly apparent in other jurisdictions.

On the other hand, there are also signs of the continuing viability of the defense. One such is Seasides Properties, Inc. v. State Road Department, a suit to quiet title to the fee in the bed of an abandoned road on which plaintiff had erected certain display signs that the state threatened to remove and destroy. Although this claim is not tainted with any aura of tort, it was dismissed for lack of statutory consent. Similarly, a recent supreme court decision indicates that counties, as administrative units of the state, may enjoy, indeed must enjoy, the right to invoke the defense.

And to the same effect, the Florida rule, contrary to other jurisdictions, is that the usual authority "to sue and be sued," contained in the various statutes creating separate Expressway Authorities, does not constitute a waiver of sovereign immunity.

Whichever direction the trend takes, actions for inverse condemnation will not be affected. The defense of sovereign immunity does not bar claims by property owners based on the constitutional right to just compensation for damages resulting from acts of eminent domain. Such constitutional inverse condemnation claims, if not the only source, are the clearest source of state liability for highway damage at the instance of injured property owners.

Property owners must, however, take the proper route or forego its benefits—at least temporarily. Thus Pereira v. State Road Department denies relief to plaintiffs, riparian owners, on a thre- amended complaint sounding "in tort" for damages caused by the State Road Department's operation of its ferryboat. The case rests on the ground that sovereign immunity bars an action to impose tort liability. The opinion indicates that the complaint would have avoided the immunity bar if it had been:

... filed in chancery seeking injunctive relief with incidental damages or, in the alternative, for an order of inverse condemnation. The trial court might have so considered the complaint upon the stipulation of the parties, but that is a function which an appellate court is precluded from performing. Our sole function is to decide whether the trial court committed reversible error. For this reason we specifically decline to express any view as to the sufficiency of the allegations contained in the complaint to justify either injunctive relief accompanied by a judgment for incidental damages, or for an order of inverse condemnation. We wish to make it clear, however, that this
Basis of Inverse Action

The right of individuals to initiate proceedings to assess damages for de facto condemnations, is the product of judicial ingenuity. This right, like the immunity barring them from maintaining other actions, is legitimated and doubtless even inspired by the constitutional provisions it "enforces."

The course which has been charted for perfecting the right begins on the equity side of the court. Typically, although not necessarily, the plaintiff prays for an injunction requiring the restoration of what he alleges to have been taken and, in the alternative, for an order of inverse condemnation.

If the alternative relief ordering inverse condemnation is granted, the plaintiff is, of course, entitled to have his damages determined. With the possible exception of class suits, Florida procedure requires that the equity side relinquish jurisdiction completely; damages are determined in an action on the law side tried to a jury.

The function served by the equity "action for inverse condemnation"—as such suits are called in recent Florida jurisprudence—is essentially that of a declaratory judgment. Similar relief may be obtained from equity in a workaday suit for a declaratory judgment (or what may perhaps be called an inverse, "inverse" condemnation) brought by the potential condemnor.

Procedural Defense—Timeliness

A suit for an order of inverse condemnation may be untimely on two grounds, either of which would bar relief. One possible objection invokes the equitable doctrine of laches. A somewhat distinctive feature in the application of the doctrine to such suits is that there is no formal statute of limitations in the analogous action at law to provide a yardstick.

There is, however, a "statute of repose," which is the basis for the second objection to the suit addressed to its timeliness. Section 337.31(1) of the Florida Statutes provides:

Roads presumed to be dedicated

1. Whenever any road constructed by any of the several counties or incorporated municipalities or by the department shall have been maintained, kept in repair or worked continuously and uninterruptedly for a period of four years by any county, municipality, or by the department, either separately or jointly, such road shall be deemed to be dedicated to the public to the extent in width which has been actually worked for the period aforesaid, whether the same has ever been formally established as a public highway or not. Such dedication shall be conclusively presumed in the particular county in which

138 State Road Dept. v. Bender, 147 Fla. 15, 2 So. 2d 298 (1941).
139 Florida Power Corp. v. McNewley, 125 So.2d 311 (Fla. App. 2d, 1960); cert. den., 138 So.2d 341 (Fla., 1961); Anhoco Corp. v. Dade Co., 144 So.2d 793 (Fla. Sup. Ct., 1962).
140 Padgett v. Central & Southern Fla. Flood Control Dist., 178 So.2d 900 (Fla., 1965).
141 See Hillsborough Co. v. Kensett, 107 Fla. 237, 138 So. 400; aff'd., 107 Fla. 237, 144 So. 393 (1932).
142 State Road Dept. v. Lewis, 156 So.2d 862 (Fla. App. 1st, 1963) aff'd in part, 170 So.2d 817 (Sup. Ct., 1964), adhered to on rehearing.

the road is located, if it be a county road, or in the particular municipality, if it be a municipal street or road, or in the state, if it be a road in the state highway system or state park road system, all right, title, easement and appurtenances therein and thereto, whether there be any record of conveyance, dedication or appropriation to the public use or not.

In State Road Department v. Lewis, where this section was invoked, the plaintiff attempted to have the statute amended by judicial action as to change "conclusively presumed" to "presumed, subject to rebuttal." The plaintiff prevailed in the intermediate appellate court, but on appeal the Supreme Court reversed this part of the decree.

The history of the case, one of a series of litigations involving the same parties, had been a material fact in the result reached on the intermediate appeal. The land in question had been taken by the Department in connection with the widening of the road and construction of an overpass, in front of plaintiff's property. The District Court found from the history of plaintiff's opposition to the taking in court and out "That Lewis did not intend to give the Road Department a single grain of sand." Since the defendant's acts were hostile to the plaintiff's interest they would, if continued for the necessary period of time, ripen into a claim of acquisition by prescription. In the court's view, however, their character was inconsistent with a claim of dedication, which generally requires affirmative act indicative of the owner's intent to dedicate, or at least his passive consent. Accordingly, the court held that "The evidence in this case falls short of the statutory requirement necessary for the conclusive presumption of dedication to the state." The Supreme Court opinion rejects this interpretation of the statute: "The conduct or intention of the Respondents is not controlling rather it is the action of the road authorities. . . ."
tionally conveyed by easement, and drainage easements are perhaps as traditional as any, would seem to fit comfortably within the scope of the statute.

Procedural Defenses—Res Judicata

In Florida, as in many other jurisdictions, the rules of res judicata are easier to state than to apply to condemnation claims. The Florida formulation for invoking that doctrine is that there must be successive actions with an identity of persons and parties, of the thing sued for, and of the cause of the action. All matters that were or might have been put in issue in the first action may not be the subject of a second controversy —but there is always room for a good rousing fight as to what was put in issue and even more as to what might have been.

The principal difficulties may be summed up in the word foreseeability. Should the plaintiff have foreseen the damage subsequently claimed at the time of his earlier claim? If the damage results from “a new and distinct act of the condemnor or by negligent or wrongful acts, or by unlawful use of the condemned property, or by the construction of the work in question in a manner different from that originally contemplated,” then he need not have done so.

Whether the res judicata issue involves damage or a taking, the legal position of the parties is the same. Practice probably accords with theory, notwithstanding a possible contrary inference that may be drawn from a comparative analysis of State Road Dep't. v. Lewis, a taking case, and Poe v. State Road Dep't., a damage case.

In the Poe case, plaintiff sought an inverse condemnation order for a drainage easement relating to some 10 acres alleged to have been appropriated without compensation. The Department asserted prior adjudication in a condemnation proceeding in which plaintiff claimed damages for the value of a partial taking and consequential damages, based on the same drainage injury to the same 10 acres more or less. On the basis of the review of the evidence for the landowner in the earlier action, the court found that the two cases raised the same issues of fact and sustained the res judicata defense. That the issues might have been erroneously decided would, as the court points out, be entirely immaterial. Recourse, in such event, must be by appeal, not collateral attack.

State Road Dep’t. v. Lewis also alleged an appropriation without compensation, but based on a taking rather than damage. In the earlier action plaintiff had sought to adduce by interrogatories information relevant to this taking. The Department refused to give the information as irrelevant and immaterial. The instant court states that “the Road Department having pleaded that the location of the Lewis triangle was not material to the issues in the injunction case, is now bound by that pleading and is estopped to plead that they were within the scope of the issues in the previous case.” It is this injection of estoppel that seems inconsistent with Poe. The facts pleaded and proved are germane, but the defendant’s denial would not seem to be controlling, and if the denial asserted an untruth, plaintiff was not entitled to rely on it any more than he could on defendant’s evidence in disproof of claimed future damage. The remedy in both instances would seem to be appeal. The cases can also be reconciled, however, since in fact the issue of a taking was not raised by the plaintiff’s allegations in the first suit. The more likely interpretation of Lewis, therefore, is that, consistent with Poe, its result rested on the ground that the plaintiff having failed in his attempt to broaden the issues, the crucial issue was not raised by either the pleadings or proof.

Substantive Law

The Florida constitution contains two provisions relating to the rights of owners of property injuriously affected by acts of eminent domain. Section 12 of the Declaration of Rights declares that “private property (shall not) be taken without just compensation.” Section 29 of Article 16 provides that:

No private property, nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law.

In 1964, the Florida Supreme Court, contrary to prior dicta which it disapproved, held that Article 16, Section 29 applied only to private corporations and, therefore, did not control condemnation by the State Road Department. Thus any constitutional basis for inverse claims against the State must be found in Section 12 of the Declaration of Rights.

When is physical damage to private property caused by a state highway a deprivation of property for which the state is constitutionally obliged to make compensation? Clearly, property which constitutes an actual use for highway purposes is “taken” in the constitutional sense. For example, a taking is effected by the use of private property for a highway shoulder and ditches to the extent of the trespass. Similarly, appropriating a strip of land in an abandoned subdivision, digging a large hole in a lot therein, and removing a large quantity of shelling, curbing, sidewalk and builders’ sand constitutes such a taking.

If there is no such actual use of the land for highway purposes, the question is more difficult to answer. Other jurisdictions have construed “taken” in the context of substantially identical constitutional provisions to include most kinds of damage. Florida appears to lean toward this broad construction. It has been held that:

a continuing trespass or nuisance may ripen into a constitutional taking of property within the ken of constitutional provisions prohibiting the taking of property without the payment of just compensation.

Broward County v. Bouldin, 114 So.2d 737 (Fla. App. 2d, 1959).
State Road Dep’t. v. Bender, 147 Fla. 15, 2 So.2d 298 (1941).
The broadest definition of "taking," and thus of state liability in connection with physical damages resulting from a highway project, appears in State Road Department v. Darby, decided in 1941, and in State Road Department v. Darby, decided 1959. Both are water-damage cases.

The claim in Darby was based on the construction of a bridge and fill by the State Road Department which blocked four of the five channels which had served as the exit for water from plaintiff's millrace. The court states that the "millrace with the water from the millpond . . . is the power that drives the water mill and it is property protected by the Bill of Rights." The impounding of the millrace water and the resultant impairment of the mill's efficiency effected by the state's bridge and fill was characterized as a trespass on, and a destruction of the property. This, Darby holds, constitutes a deprivation of property which invokes the constitutional right to just compensation.

Darby claimed damages for injury to his property by a large amount of red clay, sand and silt which had washed onto it from an adjacent fill in connection with the reconstruction of a state road. The state's project engineer, informed of the condition and the damage that it was causing, reported it to the contractor employed on the project, who was chargeable with negligence in failing to build proper drainage facilities. The Road Department did not take any other steps to prevent aggravation of the damage, nor did it attempt any repairs.

The case holds that a claim for just compensation as a "taking" under the constitution is made out:

... where, as in this case, the public authority prepares the plans and specifications for the work, exercises supervision over it, becomes acquainted with a faulty performance under the contract that results in damage amounting to the taking without just compensation of the property of another, and fails to promptly take such steps as may be necessary to repair the injury and avert a recurrence or aggravation thereof. Under such circumstances the taking is implied on the theory that the damage was a necessary incident to the prosecution of the work.

The conclusion in Darby is difficult to reach, not because of the nature of the injury, but because of the necessary relationship between cause and effect. The test, imported from a Louisiana case, is whether the state's conduct amounts to a deliberate taking or a necessary damaging of property for a public purpose. It seems quite a jump from the finding of the state's knowledge of damage and subsequent neglect to act to the conclusion that the damage is a necessary incident to the highway construction.

After Darby, the court seems to have retreated to a more limited definition of the constitutionally protected "taking" in Poe v. State Road Department. Periodic flooding from the highway prevented the owner from using the property for truck farming, but was not a constitutional "taking" since the owner was not permanently deprived of the use of his property. In this case, the court found that the flooding was merely temporary.

The intensity and duration of the impact on the highway-damaged property, trespass, the intentional quality of the state's conduct, with regard to the highway, which contributes to the impact—these have been the decisive factors, in the cases discussed above, in determining whether the state would be liable.

In Weir v. Palm Beach Co., the court relied principally on an analysis of the legal theory of recovery, in denying relief for injuries resulting from construction work which deprived plaintiff's land of lateral support and thereby caused serious damage to the building situated on it. The court adverts to this impact only to distinguish the Tharp case, on which plaintiff relied. In Tharp, the court points out, there was a physical invasion in the form of the water backed up against plaintiff's millrace, contrary to the instant case, where "the state had neither directly nor indirectly entered upon" plaintiff's property.

The conclusion that the destruction of lateral support in itself was not a "taking" for constitutional purposes is predicated on the private law regarding lateral support. The Weir opinion discusses the special consideration growing out of the defendant's governmental status, and concludes that liability should be governed by the same principles that would apply if both parties were individuals.

The most difficult kind of case from the standpoint of the articulation of a general definition of liability, involves unintended injury to property inflicted by state employees in the course of highway maintenance. In White v. Pinellas Co., the county's agents trespassed on plaintiff's lands and cut down and removed "vegetation" therefrom.

Clearly the nature of the impact on the property is a "taking." The district court held, however, that it did not give rise to a constitutional right to compensation because not a taking for a public purpose, it being unrelated to the exercise of governmental authority over private property. Summary judgment for defendant was reversed on appeal. The petition had alleged that the actions complained of were pursuant to a planned program of highway improvement. If this were true, as must be assumed on a motion for summary judgment, plaintiff had stated a claim for relief. The appellate court, therefore, remanded for trial of this decisive issue of fact, in a sense turning on the state's intent. The opinion also states, however, that given the premise of the district court, its opinion is "an excellent treatise upon the subject at hand."

Another approach to this type of case is to say that such property was not "taken by the state agency, . . . it was destroyed and the destruction if negligent, constituted a tort" (for which the government is not subject to suit).

TEXAS

Sovereign Immunity

The doctrine of sovereign immunity has substantial vitality in Texas. A long series of unsuccessful attempts in personal injury actions to raise the bar by private bills attests the
fact. Thus, claims alleging negligent damage to private property, even though causally related to the construction of a public improvement, may be abated and liability thereon avoided by the state and its agents.

Arguably, the State's immunity extends even further, to liability based upon constitutional eminent domain provisions. State v. Hale, among others, asserts that even as to such claims, the consent of the state is a prerequisite to a suit. These cases do not deny that the constitution gives rise to a right to compensation for property taken or damaged. But, according to the Hale court, payment of such compensation must await an appropriation and, therefore, the pleasure of the legislature. True, this view is in direct conflict with the view earlier approved in City of Amarillo v. Tutor. There the court states that the legislature lacks power to authorize an appropriation of private property without at the same time appropriating funds to pay for it. True also, the statements as to the necessity of consent may be downgraded as dicta, consent having been given in all the cases so stating. For what it is worth, however, it may be noted that at least one, the Hale claim, languished for more than 15 years after the injury occurred before suit was commenced.

Basis of Inverse Actions

The procedural basis for inverse condemnation suits in Texas is statutory. Vernon's Annotated Civil Statutes, Article 3269, provides as follows:

When the State of Texas, or any county, incorporated city, or other political subdivision, having the right of eminent domain, or any person, corporation, or association of persons having such right, is a party, as plaintiff, defendant, or intervenor, to any suit in a District Court, in this State, for property or for damages to property occupied by them or it for the purposes of which they or it have the right to exercise such power of eminent domain, or when a suit is brought for an injunction to prevent them or it from going upon such property or making use thereof for such purposes, the Court in which such suit is pending may determine the matters in dispute between the parties, including the condemnation of the property and assessment of damages therefor, upon petition of the plaintiff, cross-bill of the defendant or plea of intervention asking such remedy or relief; and such petition, cross-bill or plea of intervention asking such relief shall not be an admission of an adverse party's title to such property; and in such event the adverse party may assert his or its claim to such property and ask in the alternative to condemn the same if injunctive relief be sought, the Court may grant relief under

Procudural Defenses—Timeliness

The traditional defense of limitations may, generally, be asserted in the state's behalf. Whether a claim is or is not timely may thus be dispositive. But the applicable law is less than crystal clear.

Texas statutes of limitation do not in terms apply to inverse condemnation actions. One limitations problem is whether the two-year statute on damage to real property, even though causally related to the construction of a public improvement, may be abated and liability thereon avoided by the state and its agents. Article 3269 reads in pertinent part:

There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions of trespass for injury done to the estate or the property of another.

2. Actions for debt where the indebtedness is not evidenced by a contract in writing.

Where, as in Renault, Inc. v. City of Houston, the damage is to personality, the applicability of the two-year period has been assumed without discussion. The answer is somewhat less clear where the damage is to real property, as is more commonly the case in inverse claims.

In Brazos River Authority v. City of Graham three dissenting justices strongly urged the applicability of the two-year statute, citing Tarrant County Water Control & Improvement District #1 v. Reid. In the latter case, the defendant had constructed a dam and lake which had slowed the rate of the stream to which plaintiff's lands were riparian. This resulted in increased siltation, which led to greatly reduced productivity of the claimant's land, the basis of the plaintiff's suit for damages. The crucial issue, as formulated by the court, was whether the injury amounted to a "taking." The physical events which gave rise to the claim had occurred more than two years before suit was commenced. The case holds that the injury in question was not a taking. Hence, even if damage in the constitutional sense, as the court clearly thought it was, the claim was barred by the two-year limitation.

The Brazos River case facts are similar in that the de-
fendant's dam and lake slowed the flow of the stream causing an increase in siltation and eventually damage to the plaintiff. In this case, plaintiff was given judgment, notwithstanding more than two years had elapsed since the accrual of its cause of action. The court's analysis of the issues enabled it to skirt the question of "taking" versus damage. But the majority opinion, though it bypassed the issue, was clearly of the view that the facts constituted a claim subject to the ten-year limitation, rather than the two-year limitation. *Payne v. City of Tyler*\(^{197}\) provides a slightly different perspective. On the issue of whether the two- or ten-year statute governed, that decision rejects as inapposite the inverse cases cited by plaintiff as authority for the longer period. The basis for the distinction was that "by virtue of Article 3269, . . . suits for property, for damages, for Injunctions, etc., against a concern having the right of eminent domain may be converted into an inverse condemnation action. . . ."

"Occupation," which may prove a crucial word in the scope of Article 3269, has not yet been construed. A not unreasonable construction, however, would be to equate it with damage resulting from a physical invasion of the subject property which under private law might ripen into a prescriptive right. Should this view prevail, the two-year statute would apply at most to damage other than that. The tendency has been toward enlarging the area of compensability, however. It may well be, therefore, that in the prevailing climate of opinion, a physical invasion would not be deemed necessary. If so, the scope of the two-year statute of limitations would be correspondingly restricted.

Whatever the length of the period, it commences with the accrual of the cause of action. On this issue, *State v. Malone*\(^{198}\) indicates that the cause of action accrues when the injury occurs and not upon completion of the construction which ultimately caused the damage. The "taking" occurred when the damage occurred, rather than when the state did the acts complained of. The very statement of the conclusion reveals the close kinship to tort with which the court struggled, with indifferent success, in its opinion.

One exception has been carved out of the general rule that the running of time may be pleaded as a defense against an inverse claim. Article 5517, provides in part as follows:

> The right of the State, all counties, incorporated cities and all school districts shall not be barred by any of the provisions of this Title [Title 91, "Limitations"]

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**Brazos River Authority v. City of Graham**\(^{199}\) holds that this section renders limitations unavailable as a defense against a claim by a municipality.

### Procedural Defenses—Res Judicata

The concept of res judicata is also available as a defense. The general rule in Texas, as elsewhere, is that an award for a partial taking is a bar to any recovery "in a sub-

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\(^{197}\) 379 S.W.2d 373 (Tex. Civ. App. 1964). *The Payne case was an ordinary condemnation proceeding. Payne filed objections to the award of the Commissioners, but took no further action until the City moved to dismiss for want of prosecution. That motion was granted, and Payne appealed.*


\(^{199}\) Supra, note 195.

\(^{200}\) From the vantage point of the original proceeding, the possibility of damage is either foreseeable, and compensable, or speculative and non-compensable. *State v. Parchman*\(^{202}\) illustrates the solution of one Texas court to the vexing problem of the deficiencies of human foresight.

The *Parchman* controversy had begun as an ordinary condemnation. In the proceedings before the jury of view called to assess damages, Parchman opposed the proposed drainage channel across his property. While he testified that it would injure him, he did so in general terms only. The state highway engineer, apparently in the course of explaining the proposed construction, specifically negated the likelihood of overflows from the channel. This prediction proved incorrect, the property owner started the instant suit, an inverse claim for damages to his remaining property by reason of flooding. *State v. Parchman* permits a second recovery on these facts on the ground that the damage was not such that the plaintiff "ought reasonably to have foreseen" in the earlier proceeding. The court points out that the plaintiff is not an engineer, and that the state's expert witness, its highway engineer, did not anticipate the damage which occurred. In light of the court's emphasis on this aspect of the record in the first proceeding, the instant decision is not a modification of claimants' burden of proving damages in a single proceeding, but rather a species of equitable estoppel.

The more radical step of departing from the traditional insistence on a single assessment of all damages may, however, be in the offing. The City of Graham's claim against the Brazos River Authority had alleged the taking of or damage to a water treatment plant and a channel reservoir, as well as to its sewage disposal plant. The Supreme Court of Texas reversed the judgment insofar as it allowed damages for the first two items. These facilities were so located as to be damaged by the discharge of raw sewage into the creek, which occurred whenever the disposal plant was flooded. With the "taking" of the sewage plant, however, this source of contamination would be eliminated. And without it, the court holds that there is no basis for allowing damages. It goes on to say that:

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\(^{202}\) *City of LaGrange v. Pieratt, 142 Tex. 23, 175 S.W.2d 243,* rev'd, 171 S.W.2d 377 (1943). The background of this case was the partial condemnation of plaintiff's commercial property for highway purposes, and his acceptance of an award in the amount of damages assessed by the condemnation jury. Later he instituted the instant suit for damages in the amount of profit allegedly lost because of interference with access during the period of construction. Held, for defendant: "... we think, plaintiff had a perfect right to present his expected loss of profits, as an element of consequential damages to his property in the condemnation proceedings. . . . Since he had such right, we think it follows, as a matter of course, that it was his duty to do so." *Id.,* 175 S.W.2d at 246.

\(^{203}\) *E.g.*, Texas Pipe Line Co. v. Hilldrath, 225 S.W. 563 (Tex. Civ. App., 1920) (Excludes evidence that cattle would be frightened by inspectors patrolling right-of-way being condemned); *Texas Elec. Co. v. Campbell, 161 Tex. 77, 336 S.W.2d 742,* rev'd, 328 S.W.2d 208 (1950) (Excludes testimony as to possibility that nearby town would grow toward subject property rendering it feasible for industrial and residential development but for defendant's high power lines as "based on possibilities rather than reasonable probabilities . . . and on speculation.") If, however, some damage is reasonably probable, it may be submitted to the jury notwithstanding that the amount of such damage is necessarily speculative and uncertain. *City of LaGrange v. Pieratt, Id.*

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\(^{204}\) 216 S.W.2d 655 (Tex. Civ. App., 1948).

\(^{205}\) *Brazos River Auth. v. City of Graham, supra, note 195.*
It is conceivable that the factual situation in this case points to a time in the future when the water of Salt Creek would repeatedly inundate the city's water treatment plant with its critical elevation of 1,019.09 feet, but the situation has not as yet become "stabilized," that is, it has not become sufficiently definite and certain to support the trial court's theory of recovery.

... Until a plaintiff is in a position so to establish the repetitious nature of the injury, he should be confined in his demand for damages to those flowing directly from the single injury or flooding.204

If the implication is that successive suits will no longer be barred, the consequences may be far-reaching indeed.

**Substantive Law**

Under Article 1, Section 17 of the state constitution the impact upon property which gives rise to the constitutional right to compensation is broadly stated:

No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money;

**Water Damage Cases**

Cases involving damage caused by diversion or impounding of surface water afford a useful example of the judicial attempt to give specific content to the right of compensation created.

Texas imposes liability by statute for property damage so caused:

Art. 7589a. Diversion or impounding surface waters

It shall hereafter be unlawful for any person, firm or private corporation to divert the natural flow of surface waters in this State or to permit a diversion thereof caused by him to continue after the passage of this Act or to impound such waters, or to permit the impounding thereof caused by him to continue after the passage of this Act in such manner as to damage the property of another, by the overflow of such water so diverted or impounded, and that in all such cases the injured party shall have remedies, both at law and in equity, including damages occasioned therefrom, and that the passage of this Act shall be so construed as to authorize or give authority to persons or private corporations owning or constructing canals for conveying water for irrigation or other purposes; and provided that nothing in this Act shall be so construed as to authorize or give authority to persons or private corporations owning or constructing canals for irrigation or other purposes, to construct or maintain any canal, lateral canal, or ditch or in such manner as to obstruct any river, creek, bayou, gully, slough, ditch or other well defined natural drainage; and provided further where gullies or sloughs have cut away or intersect the banks of rivers or creeks so as to permit the escape of flood waters from such rivers or creeks, through such gullies or sloughs or on to land adjacent to such streams, the owner of such land may fill the mouth of such gullies or sloughs to the height of the adjoining banks of such rivers or creeks without liability in damages to other property owners. Acts 1927, 40th Leg., p. 80, ch. 56, § 1; Acts 1935, 44th Leg., p. 766, ch. 334, § 1.

Although applicable by its terms only to "any person, firm, or private corporation," the statute has been read to apply to municipal corporations as well.205 In Falls County v. Kluck,206 it was successfully invoked by the plaintiff in his inverse claim against the defendant county. The claim alleged that the county had improved a road, at the same time discontinuing use of an existing culvert, with the result that plaintiff's abutting property no longer had adequate drainage. Upon proof that the road in fact did cause water to be impounded on plaintiff's property whenever there was a heavy rainfall, the trial court granted damages for the period since the discontinuance of the use of the culvert and an injunction in effect requiring the construction of a proper culvert.

On appeal, the judgment of the trial court was affirmed. Renault, Inc. v. City of Houston,207 a more recent decision, attempts to distinguish both the Kluck case and the authority it cites as not requiring a ruling as to the applicability of Article 7589a. There is little doubt, however, that under Falls County v. Kluck municipalities would be within the scope of the statute. Thus the court states that the statutory standard of conduct "was the well established common-law rule in this state prior to the enactment of the statute, the provisions thereof being applicable to municipalities as well as to private corporations and individuals." Again, in rejecting appellant's suggestion that it balance equities (and reverse the granting of the injunction), the court rests on the ground that "the trespass complained of involves the violation of a statute... ."

Renault, Inc. concludes, to the contrary, that the statute is inapplicable to public bodies: the statute "not only fails to expressly include municipal corporations; it specifically designates and confines those included to 'private' corporations."

In the matter of statutory interpretation, the Renault decision would appear to be correct. Whether the decision has a practical impact, in addition to its academic significance, is far more doubtful. For Renault also holds the municipal defendant liable for damages resulting from water impounded by the defendant's road. And, although Renault bases liability on Article 1, Section 17 of the Texas constitution whereas Kluck bases liability on Article 7589a of the Texas civil statutes, both virtually take for granted the applicability of a standard of absolute liability upon proof that drainage was delayed or obstructed.

Thus, whatever the basis of liability, the effect of the cases has been to hold public bodies to the standards of private law.208 The converse is also generally accepted as true. There must be a finding that the cause of action involved would lie against a private party on the same facts, else the public body "would be held to a higher liability than a private person engaging in the same acts."209

204 Stoner v. City of Dallas, 392 S.W.2d 910 (Tex. Civ. App., 1965) (refused, Supreme Court not satisfied that opinion in all respects correctly states law, but no reversible error presented); Falls County v. Kluck, 199 S.W.2d 704 (Tex. Civ. App., 1947).

205 Supra, note 205.


withstanding the general agreement as to this proposition, it is not always clearly the law of the case. In *Brazos River Authority v. City of Graham,* the appellant and three judges of the Supreme Court of Texas urged that the plaintiff was not entitled to recover damages because, *inter alia,* on the same facts he would not have had a right of recovery against a private person. Long before the instant case, plaintiff had constructed a sewage disposal plant on a bank of Salt Creek, a tributary of the Brazos River. The plant could only operate when its clarifier outlet was above the water level of the creek. Some time after the City's plant was in operation, the defendant constructed a dam, for flood control purposes, downstream on the Brazos. As part of the same project, the defendant also condemned land for Possum Kingdom Lake, which was formed by the dam. Climatic conditions in the area, operating in conjunction with the dam, resulted in the gradual raising of the river bed and the formation of sand bars, which in turn caused the water level in Salt Creek to rise, subjecting plaintiff's sewage plant to repeated flooding. Plaintiff thereupon brought suit, alleging that the Authority had taken or damaged its property within the meaning of Article 1, Section 17. The immediate cause of the flooding was conceded by all to have been the increased siltation that resulted from the slowing of the flow of the River by the defendant's dam and lake. The Authority argued, however, that the City, as an upper riparian, did not have a legal right in the customary rate of flow of water by or through its property.

In this case a majority of the court was of the view that plaintiff was entitled to judgment. The court's reasoning proceeds from the fact that the Authority condemned for overflow purposes more land than would be flooded at the outset of the operation of the dam. Answering its own question as to the reason for the excess condemnation, the court states it was because the Authority knew that the high-water contour lines of the lake would gradually rise. And, the court concluded, if the Authority had to acquire overflow rights as to land flooded a few days or months after completion of the dam (the assumption of necessity is equated with a self-evident truth), it had also to acquire such rights even as to land flooded years after the dam was put into operation. Thus, although the court certainly pays scant heed to the private law urged by the defendant and the dissenting minority, it does not join issue on the general proposition that the rules of private law are applicable, but only on the applicability to the facts before it of the particular private law rule asserted as controlling.

But the fact that the plaintiff would have a cause of action against a private party does not necessarily satisfy the test for a constitutional claim. As to a private person, it is a matter of indifference that the claimant's action sounds in tort. Not so where the State itself is involved. Compensatory damages must be based on the constitutional language. It cannot be expanded by vouching in other elements of the law of torts. However wrongful an act may be under the substantive standard imposed, a flavor of "taking" is essential to compensation. The leading case on this issue is *State v. Hale.* The claim arose from a temporary roadbed raised over a creek. The openings provided for the passage of water were inadequate, with the result that the creek over­flowed. The overflow deposited large quantities of sand and other substances on plaintiff's land, resulting in a permanent impairment of its productivity. This suit was sustained as falling on the right side of the line between the state's non-liability for torts and the constitutional right to compensation:

The true test is, did the State intentionally perform certain acts in the exercise of its lawful authority to construct such highway for public use which resulted in the taking or damaging of plaintiffs' property, and which acts were the proximate cause of the taking or damaging of such property. (p. 736)

The liability of the State under Section 17 of Article 1, supra, for taking, damaging or destroying private property for public use, where the authority is properly exercised, should not be confused with the claim for damages caused by the neglect or wrongs committed by its agents or officers. In the first class of cases the taking or damaging of such property is done for the State in the exercise of lawful authority. The right to exercise this authority, and the command to adequately compensate the owner for such property, are expressly provided in the section of the Constitution above quoted. In other words, where the State has exercised its lawful authority to take or damage private property for the construction of a public highway, it has the power to carry out its plans relating to such highway and compensate the owner of such property for damages which proximately resulted from the construction of such highway. (p. 737)

The difficulties which arise in applying this distinction appear in *State v. Malone,* involving the construction of a highway without sufficient drainage facilities, which caused water to be impounded on the claimant's land damaging his cotton crop. The state argued in essence that the damage was the result of negligence in the design and construction or maintenance of the highway and that the gravamen of the action sounded in tort. The court holds that the claim does not fall on the "tort" side of the line. While the opinion of the court is hardly less muddy than the water on poor Malone's land, it concludes ultimately that the damage inflicted was for a public use and was caused by the proper exercise of the discretion of the state's agents and employees in designing and constructing the road, rather than their negligent failure to do so with due care.

Again, in *State v. Sparks,* the state was held liable under the Hale test for having impounded floodwaters on plaintiff's farm by means of the construction of a highway ditch, but might have been immune had the damage been caused by negligent maintenance.

On the other side of the line, in the immunity zone, are the cases involving highway maintenance which results in accidental injury to property of adjoining landowners. In *Texas Highway Department v. Weber,* Highway Department maintenance workers were clearing grass along the shoulders of the highway by burning it off; the fire they set...
spread to plaintiff’s nearby land and destroyed his hay crop. It was held that the state was not liable:

Under the facts of this case, the cause of action is simply one sounding in tort. The Highway Department employees were engaged in the maintenance of the highway at the time they set the fire that caused the damage to respondent's hay crop. They were engaged in the discharge of a mandatory, governmental duty. There was not authorization or necessity for them to cause damage to adjoining property by reason of burning the grass on the shoulders of the highway. The damage occasioned by the fire was not necessarily an incident to, or necessarily a consequential result of, the act of the employees in clearing the grass from the highway. The spreading of the fire onto the premises of Weber was purely and solely the result of negligence; in no conceivable way can it be said that the hay crop was taken or damaged for public use. To hold otherwise would be, in effect, to establish a principle of law that the State is responsible for all injuries or damages occasioned by its agents in the negligent performance of their official duties. It is true, and unfortunately so, that respondent has suffered damage to his property. One's normal reaction is that he should be compensated therefor. On the other hand, the doctrine of the nonsuitability of the state is grounded upon sound public policy. If the state were liable or liable for every tortious act of its agents, servants, and employees committed in the performance of their official duties, there would result a serious impairment of the public service and the necessary administrative functions of government would be hampered.

And in Dallas Co., Flood Control District v. Benson, the same ruling was applied. There the employees of the flood control district sprayed the floodway with weed killer to clear it of weeds and willows. The spray drifted three miles away and killed plaintiffs' cotton crop, for which they sought damages on the theory that this constituted a taking or damaging of their property for public use. The court concluded that the drifting of the spray was not a taking or damaging under the constitutional provision. It was due to negligence or accident and not a necessary or inherent part of the governmental function—trying to clear the floodway.

If the highway damage claim meets the requirements that it contain the necessary elements for a cause of action between the two private landowners; and if it falls into the constitutionally protected zone of claims based on acts which were duly authorized and intentionally performed and which constitute a public use in the course of highway construction and maintenance, it is tried as a conventional damage claim.

**Sovereign Immunity**

The issue on appeal in the *Muskopf* case was whether a hospital district was immune from tort liability as a state agency exercising a governmental function. Plaintiff alleged that because of the negligence of the hospital staff she had further injured the broken hip for which she was being treated. Re-evaluating the rule of governmental immunity from tort liability, the court found that the doctrine was replete with legislative and judicial exceptions:

The state has also enacted various statutes waiving substantive immunity in certain areas. (Gov. Code, § 53051 [dangerous or defective condition of public property]; Gov. Code, § 50140 [damage by mobs or riots]; Ed. Code, § 903 [liability of school district]; Veh. Code, § 17001 [public agency liability for negligent operation of motor vehicle].)

Municipal corporations were first held subject to the court's equitable jurisdiction (Spring Valley Water-Works v. City and County of San Francisco, 82 Cal. 286, 307-311, 22 P.910, 1046, 6 L.R.A. 756). They were then held liable for their proprietary acts (Chafar v. City of Long Beach, 174 Cal. 478, 481-483, 163 P.670, L.R.A. 1917E, 865), which have been constantly expanded. Thus, a community theater in a public park (Rhodes v. City of Palo Alto, 100 Cal. App.2d 336, 341-342, 223 P.2d 639), a public golf course (Plaza v. City of San Mateo, 123 Cal. App.2d 103, 106-112, 266 P.2d 523), an electric lighting plant (Davoust v. City of Alameda, 149 Cal. 69, 72-74, 84 P.2d, 5 L.R.A., NS., 536), and the furnishing of impure water (Ritterbusch v. City of Pittsburgh, 205 Cal. 84, 86-88, 266 P.930), have all furnished the basis for municipal liability. Moreover, the concept of proprietary acts has been extended to the state and its agencies (People v. Superior Court, 29 Cal. 2d 754, 761-762, 178 P.2d 1, 40 A.L.R. 2d 919), and the liability of the state under that concept is increasing. Guidi v. State, 41 Cal.2d 623, 626-628, 262 P.2d 3; Pianka v. State, 46 Cal.2d 208, 210, 293 P.2d 458. Finally, there is governmental liability for nuisances even when they involve governmental activity. Phillips v. City of Pasadena, 27 Cal.2d 104, 106, 162 P.2d 625.

Finding that "none of the reasons for its continuance can withstand analysis" the court abolished the doctrine of governmental immunity from tort liability, as a "mistaken and unjust rule." The hospital employees would, in the court's view, have been personally liable for any negligence in caring for and treating plaintiff, under the accepted rules whereby government agents are liable for negligent performance of their ministerial duties, but not for discretionary acts within the scope of their authority. The holding therefore expressly discarded only governmental immunity for torts for which its agents are liable. The existence of governmental immunity where the employer would not be liable—that is, in the case of discretionary acts—remained for decision.

Moreover, as the opinion notes, the mere abolition of immunity did not impose liability on the state for "all harms that result from its activities." In each case of such harm, the question would be whether "the state through its agents has committed a tort." The legislative reaction to the

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Muskopf decision was a moratorium,\textsuperscript{218} to remain in effect until the 91st day after final adjournment of the 1963 Regular Session of the Legislature. For this period, the doctrine of governmental immunity from tort liability was reenacted as a rule of decision, temporarily restoring the state of the law on January 1, 1961. The effect of the moratorium was to postpone the trial of the negligence action in the Muskopf case, suspending but not destroying it.\textsuperscript{219}

The 1963 legislation which was conceived during the moratorium includes Division 3.6 of the Government Code, "Claims and Actions against Public Entities and Public Employees." It authorizes suits against the state among other "public entities:"

\textsection{945. Power to sue and be sued}
A public entity may sue and be sued. (Added Stats. 1963, c.1715, p.3383, \textsection{2}.)
\textsection{811.2 Public entity}
"Public entity" includes the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State. (Added Stats. 1963, c.1681, p.3267, \textsection{1}.)

The legislation then proceeds to deal with the problem of prescribing the state's newly created substantive tort liability.\textsuperscript{220}

Sections 814 and 815 purport to confine the state's liability (in other than contract cases) "for money or damages" to the liability provided by statute. In effect, the state's liability in cases such as highway-damage claims must be based either on inverse condemnation pursuant to the provisions of the state constitution, or on tort liability established by these statutes. The case law grounds for tort liability which were not incorporated into these statutes have been eliminated: for example, there is no specific state liability for nuisance, or for negligence in the conduct of proprietary activities.\textsuperscript{221}

The liability treated in these statutes is liability for "injury," which is defined to include "damage to or loss of property," but only such as "would be actionable if inflicted by a private person."\textsuperscript{222} Underlying all of these statutes establishing the state's tort liability and that of its employees then, is the condition precedent that there would be a valid claim against a private party in such circumstances.

The state's tort liability under this legislation is vicarious. The keystone is the personal liability of the state employee. On this score, the statute preserves the prior law, which was summarized in the Muskopf opinion, that the employee is not liable for the results of the exercise of his discretion.

\textsection{815.2 Injuries by employee within scope of employment; immunity of employee}
(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

\textsection{820.2 Discretionary acts}
Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability. (Added Stats. 1963, c.1681, p.3268, \textsection{1}.)

As a consequence of the new statute, certain claims, particularly those involving the negligence of state employees in connection with highway maintenance, may be more successfully asserted than could have been done via inverse condemnation. In addition, the change of legislative policy reflected in the tort liability statute may encourage judicial expansion of the inverse condemnation remedy. For, to the extent that the state may be held liable in actions in tort it is not significant whether an inverse condemnation claim is based on tortious acts or acts of eminent domain.

\textbf{Basis of Inverse Actions}

The inverse condemnation action is a familiar one in California. The provisions of the Government Code accord statutory recognition to these actions against the State seeking constitutional "just compensation" for the "taking or damaging of private property for public use." Section 955 treats the venue of such actions. And Section 955.6 provides for the service of summons and the conduct of the defense in such actions on claims arising "out of work done by the Department of Public Works."

The court in Bredert v. Southern Pacific Co.,\textsuperscript{223} a loss of access case, made the following observation in connection with its reference to "a cause of action in inverse condemnation:"

An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemnor. The principles which affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action. (See Rose v. State of California, supra, 19 Cal.2d 713, 123 P.2d 505; Bacich v. Board of Control, supra, 23 Cal.2d 343, 144 P.2d 818.)\textsuperscript{224}

California allowed these actions against the state for just compensation even during the period of its formal adherence to the doctrine of sovereign immunity in tort cases. E.g., Bacich v. Board of Control,\textsuperscript{225} a loss of access case:

The instant action is predicated upon the constitutional provision that private property may not be taken or damaged for a public purpose without the payment of just compensation. Cal. Const. art. I, sec. 14. That clause of the Constitution is self-executing and hence neither consent to sue the State nor the creation of a remedy by legislative enactment is necessary to obtain relief thereunder. Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505.

\textsuperscript{218} Calif. Civil Code, \textsection{22.3.}
\textsuperscript{219} See 57 Cal.2d 488, 370 P.2d 325 (1962).
\textsuperscript{220} See Government Code, Sections 810-895.8, Liability of Public Entities and Public Employees.
\textsuperscript{221} See Legislative Committee Comment—Senate at Section 815 of Government Code.
\textsuperscript{222} Section 810.8.
\textsuperscript{223} 61 Cal.2d 659, 394 P.2d 719 (1964).
\textsuperscript{224} 394 P.2d at 721.
\textsuperscript{225} 23 Cal.2d 343, 144 P.2d 817, 821 (1944).
Procedural Defenses—Timeliness

Want of timely institution of proceedings is a bar to state or municipal liability in California as in the other states surveyed. A recent California case raised the issue of the constitutionality of the application of the bar of a statute of limitations to the constitutional right to compensation for the taking or damaging of property. The city had built a public street on an unused roadbed of a railroad at some time between 1922 and 1925. In 1933 the railroad asserted its ownership by letter, followed by some communications with the city dealing with its inability to pay for this property.

Many years later (the opinion is dated 1961, with no indication of a delay between commencement and termination of the proceeding) the railroad brought suit for compensation. Both the bar of the statutes of limitations for trespass (3 years), and for adverse possession (5 years) were invoked and found to preclude recovery. And the court held that inverse condemnation claims are subject to reasonable statutes of limitation.226

The significant measuring periods applicable to inverse condemnation claims are contained in the statutory claims procedure discussed. Under Section 911.2 of the Government Code, such claims must be presented to the Board “not later than one year after the accrual of the cause of action.” And under Section 945.6 any suit on such a claim must be begun “within six months after the date the claim is acted upon by the board, or is deemed to have been rejected by the board.”

Procedural Defenses—Res Judicata

It goes without saying that in California, as elsewhere, a prior award bars later compensation based on the same taking. The California courts have usually solved the vexing problem of what was in fact taken by reference to the original plans for the public improvement in question.227 If the result of a change not contemplated in these plans is to damage the retained parcel, an inverse condemnation action to recover this damage is not barred.228 Thus, in one case it was conceded that the judgment in the original proceeding did not bar recovery for water damage caused by the defendant’s installing a grating in a storm drain since the grating was not provided for in the original plans.

When there is post-condemnation damage which was just not expected at the time of the original condemnation, the test is whether such damage was reasonably to have been anticipated.229

California’s new enactment on “Claims against Public Entities” 230 contains provisions as to the res judicata impact of the allowance of a claim. Section 946 provides:

(a) If the claim is allowed in full and the claimant accepts the amount allowed, no suit may be maintained on any part of the cause of action to which the claim relates.
(b) If the claim is allowed in part and the claimant ac-
cepts the amount allowed, no suit may be maintained on that part of the cause of action which is represented by the allowed portion of the claim.
(c) If the claim is allowed in part, no suit may be maintained on any portion of the cause of action where, pursuant to a requirement of the board to such effect the claimant has accepted the amount allowed in settlement of the entire claim. (Added Stats. 1963, c.1715, p.3383, § 2.)

Substantive Law

Article 1, Section 14 of the California Constitution requires, inter alia, the payment of just compensation for the taking or damaging of private property for public use:

§ 14. Eminent domain; just compensation; rights of way; reservoirs; payment of or security for compensation; logging or lumbering railroads

Sec. 14. Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law; provided, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county or public corporation or district aforesaid may take immediate possession and use of any right of way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings. The taking of private property for a railroad run by steam or electric power for logging or lumbering purposes shall be deemed a taking for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier. (Amended Oct. 10, 1911; Nov. 5, 1918; Nov. 6, 1928; Nov. 6, 1934.)

At least until 1965, many of the California opinions on the elements of a valid inverse condemnation claim espoused the theory that the eminent domain provision in the constitution merely furnished the requisite consent for bringing suit against the state and that it was not without substantive content. In a leading case, Bauer v. County of
Ventura, plaintiffs sought damages on the theories of inverse condemnation and tort for the flooding of their land resulting from some changes in the county’s storm drainage ditch. The court said:

Section 14, however, is designed not to create new causes of action but only to give the private property owner a remedy he would not otherwise have against the state for the unlawful dispossession, destruction or damage of his property. The state is therefore not liable under this provision for property damage that is *damnum absque injuria*. If the property owner would have no cause of action against a private citizen on the same facts, he can have no claim for compensation against the state under section 14. Clement v. State Reclamation Board, 35 Cal.2d 628, 220 P.2d 897; House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 153 P.2d 950; Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1; San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392, 188 P.554, 9 A.L.R. 1200; Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 P.625. The effect of section 14 is to waive the immunity of the state where property is taken or damaged for public purposes. To bring his complaint within the provision, the plaintiff must show not only a taking or damaging for a public use but also that it is actionable under the general law.

This interpretation of the constitutional provision for just compensation is used, as in the Bauer opinion quoted above, to support the conclusion that an inverse condemnation claim will not lie unless it would otherwise be actionable against a private person. There have been a number of recent applications of this requirement, often citing and quoting Bauer.

In 1965 the Supreme Court of California handed down its opinion in *Albers v. County of Los Angeles*, a landmark case in many ways. Unlike the bulk of case law concerning the elements of an inverse condemnation claim, which involves damage caused by irrigation or drainage or flood control districts, *Albers* is a highway case. The damage was caused by an enormous landslide which began in 1956 and had not stopped by the date of the opinion. The aggregate of the inverse condemnation awards in the four consolidated cases in *Albers* was $5,600,000. And it virtually proclaimed the independence of the physical damage claim from the “private cause of action” list.

With the consent and approval of the various corporations interested in developing the Portuguese Bend area of the Palos Verdes Hills, the County of Los Angeles was working on a road from the metropolitan area southward to Palos Verdes Estates. With the consent and approval of the various corporations interested in developing the Portuguese Bend area of the Palos Verdes Hills, the County of Los Angeles was working on a road from the metropolitan area southward to Palos Verdes Estates. Although a portion of the Portuguese Bend area was known to have been a prehistoric slide area, the experts believed the area to be at rest and did not anticipate further slides. In 1956, however, a slide was triggered in a corner of that area by the weight of about 175,000 cubic yards of dirt which had been placed in the road easement by the County with the consent of abutting developers. The slide spread to include almost the entire Palos Verdes Hills, the County of Los Angeles being interested in developing the Portuguese Bend area of the Palos Verdes Peninsula; the County of Los Angeles was eventually proclaimed the independent of the physical damage to the area.

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The trial court found no negligence, nuisance or trespass, but held the County liable on the theory of inverse condemnation. On appeal, the issue presented was whether liability could be imposed on this theory where there would be no cause of action against a private person, in the light of the “prevailing authority” conditioning liability in inverse condemnation on the existence of a valid claim against a private person. The appellate court affirmed the judgments imposing liability:

- on the ground that with the exceptions stated in Gray, supra, and Archer, supra, any physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable under Article I, section 14, of our Constitution whether foreseeable or not.

*Albers* thus creates constitutional liability without fault for physical damages which formerly were *damnum absque injuria* under both private and public law. The “deliberate act” test (in *Albers* “as deliberately designed and constructed”) was retained although of course nothing in the *Albers* facts raises any issue thereunder. By the exception based on the *Gray* case, the court seems to be excluding from the class of compensable claims, physical damage claims attributable to a valid exercise of the police power. And the exception for *Archer* apparently intends to exclude liability for damage caused by governmental action which a private landowner has a “right” to cause. The “right” in *Archer* was the right of a landowner to collect

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232 289 P.2d at 5.
234 Bauer illustrates the operation of this test. A storm drain ditch had overflowed onto plaintiffs’ property. Plaintiffs alleged that the defendants had wrongfully and negligently raised the bank of the ditch lying on the far side of the ditch from plaintiffs’ land, thereby obstructing the previous direction of its overflow.
235 “Mere improvement within an existing watercourse which accelerates rather than diverts the flow does not give rise to a cause of action when damage results from an overflow. Straightening, widening or deepening the channel of a stream to improve the drainage or the collection of surface waters for discharge into their natural stream entails no diversion in the event of a resulting overflow. But to escape liability the improvements thus described must follow the natural drainage of the channel or its natural stream entails no diversion in the event of a resulting overflow. But to escape liability the improvements thus described must follow the natural drainage of the channel or its natural stream or the natural stream. Archer v. City of Los Angeles, supra; San Gabriel Valley Country Club v. County of Los Angeles, supra. In the present case, the plaintiffs’ allegations show that the waters of the bank were diverted from their natural course by the ditch running close to the plaintiffs’ land, and then permitted to overflow and back up in a direction exactly opposite from their natural flow. See *Bauer*, supra, note 233 at 6.) But the raising of a ditch bank appears on its face to be a deliberate act carrying with it the purpose of fulfilling one or another of the public objects of the project as a whole. Here the raising of the bank is not an accident or an act in itself resulting from carelessness. It is deliberate. The damage to property in this instance resulted not from immediate carelessness but from a failure to appreciate the probability that, functioning as deliberately conceived, the public improvement as altered and maintained would result in some damage to private property. Damage resulting from negligence in the routine operation having no relation to the function of the project as conceived is not within the scope of the rule applied in the present case. See *Miller v. City of Palo Alto*, 208 Cal. 74, 280 P.108; *McNeil v. City of Montague*, 124 Cal. App.2d 326, 268 P.2d 497; *Western Assurance Co. v. Sacramento & S.J. Drainage District*, 72 Cal. App. 68, 237 P.99; *Youngblood v. Los Angeles County Flood Control District*, 56 Cal.2d 603, 364 P.2d 840 (1961); *Granone v. County of Los Angeles*, 231 Cal.App.2d 629, 42 Cal. Rep. 34 (1945). *Albers* is a highway case. The dam­
248 If and the exception for *Archer* apparently intends to exclude liability for damage caused by governmental action which a private landowner has a “right” to cause. The “right” in *Archer* was the right of a landowner to collect
250 92 Cal.2d 125, 298 P.2d 129 (1957).
251 2 A.L.R.2d 677. (289 P.2d at 7).
and channel surface waters on his property into the stream or watercourse into which they would naturally have drained even though this resulted in the flooding of lower lands.

The Albers court summarizes the reasons for its holding, which lean heavily on its concept of a just social policy:

The following factors are important. First, the damage to this property, if reasonably foreseeable, would have entitled the property owners to compensation. Second, the likelihood of public works not being engaged in because of unseen and unforeseeable possible direct physical damage to real property is remote. Third, the property owners did suffer direct physical damage to their properties as the proximate result of the work as deliberately planned and carried out. Fourth, the cost of such damage can better be absorbed, and with infinitely less hardship, by the taxpayers as a whole than by the owners of the individual parcels damaged. Fifth, to requote Clement, supra, 35 Cal.2d page 642, 220 P.2d page 905. "The owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking."

This court said in Bacich, supra, 23 Cal.2d, page 351, 144 P.2d page 823, quoting from Sedgwick on Constitutional Law: "The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes." (p. 137)

It is, of course, too early to assess the general impact of the Albers case on the California law. Formerly, the state's liability for highway improvements had been limited by requirements such as negligence, which characterize the cause of action against a private person. The Archer case still appears to be good law on its facts. And it is not impossible that the concept of a "right" to inflict damage may be expanded to limit the state's liability in other situations where a private property owner is not liable for damages actually sustained by another. But the essential impact of the facts and, even more, of the rationale of Albers bespeaks an almost unlimited potential expansion of the state's liability. It is perhaps not too much to say that the catastrophic slide, so wide ranging in its effect, so far beyond the most apocalyptic vision of the actors, and so devastating to its luckless victims, has presented the occasion for the government to act as an insurer or indemnitor, rather than as one actor among and on a footing with many. Such a role is, to be sure, by no means unusual in the face of great natural or manmade disasters. The Federal Government's war risk insurance programs and its voluntary program for indemnification of victims of the Texas City explosion are only a few among many of that order. The more unique aspect of Albers, and the most disturbing one from many points of view other than the narrow interest of protecting the public fisc, is the forum in which the decision on this matter of grave social and financial import was made.237

APPENDIX A

TABLE OF CASES

Amarillo v. Tutor, 267 S.W. 697 (Comm. of App., 1924).
Anhoco Corp. v. Dade Co., 144 So.2d 793 (Fla. Sup. Ct., 1962).
Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1 (1941).
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Padgett v. Central & Southern Fla. Flood Control Dist., 178 So.2d 900 (Fla. 1965).