

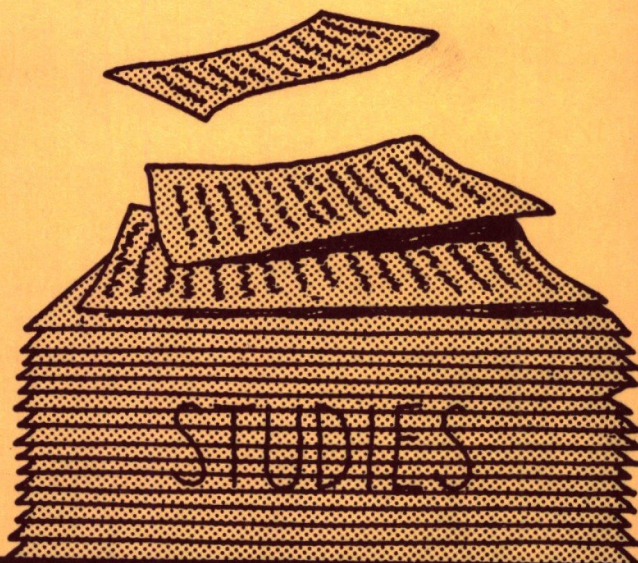
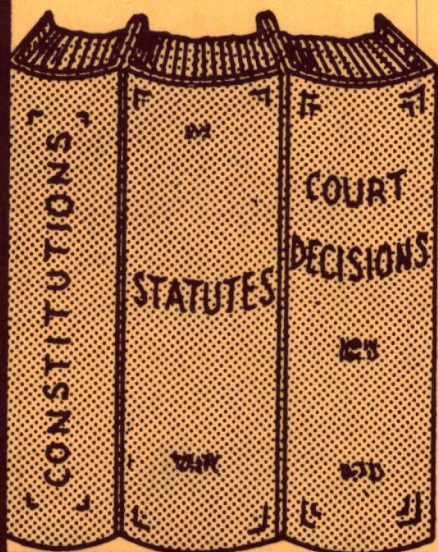
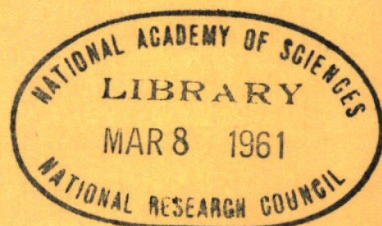
HIGHWAY RESEARCH BOARD

Special Report 59

CONDEMNATION OF PROPERTY FOR HIGHWAY PURPOSES

A LEGAL ANALYSIS

Part III



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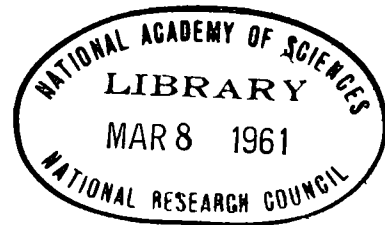
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**CONDEMNATION OF PROPERTY
FOR HIGHWAY PURPOSES**

A LEGAL ANALYSIS

Part III

A Report of the
Highway Laws Project



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Washington, D. C.

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PREFACE

The Highway Laws Committee of the Highway Research Board is engaged in a research program designed to provide highway officials and other interested persons with comprehensive reports on the legal aspects of every major highway function. To date the Committee staff has completed reports on several main segments of its program, including "Relocation of Public Utilities Due to Highway Improvement, An Analysis of Legal Aspects" (Special Report 21); "Expressway Law, An Analysis" (Special Report 26); "Acquisition of Land for Future Highway Use, A Legal Analysis" (Special Report 27); "Condemnation of Property for Highway Purposes, A Legal Analysis" (Part I, Special Report 32 and Part II, Special Report 33); "Legislative Purpose in Highway Law, An Analysis" (Special Report 39); "Outdoor Advertising Along Highways, A Legal Analysis" (Special Report 41), "Highway System Classification, A Legal Analysis" (Part I, Special Report 42), "Federal-Aid Provisions in State Highway Laws, An Analysis" (Special Report 48); "Intergovernmental Relations in State Highway Legislation, An Analysis" (Special Report 49); "State Constitutional Provisions Concerning Highways, A Legal Analysis" (Special Report 50), and "Highway Contracts, A Legal Analysis" (Special Report 57).

This is the third in a series of reports on "Condemnation of Property for Highway Purposes". This report covers various aspects of the condemnation of property for highway purposes; namely, board of viewers, jury trial, miscellaneous tribunals for determining compensation, time at which value is determined, constitutional provisions concerning the taking and damaging of property, set-off of benefits, interest and court costs, determination of necessity, right of entry, property already devoted to a public use, dismissal or abandonment of proceedings, and scope of appeal

This report was researched and written by Howard G. Feldman, a former member of the Highway Laws staff and now special research assistant. Photographs are furnished through the courtesy of the Bureau of Public Roads

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SUMMARY OF FINDINGS

In assessing the worth of a particular condemnation statute, one of the most important factors is the procedure established to determine the amount of the award to the landowner. Methods of condemnation are divided into two broad categories: the administrative method and the judicial method.

In the eight States which use the administrative method, the condemnor can take land by taking certain steps which do not include instituting court proceedings. The condemnor makes the initial determination of the amount of compensation. It is then up to the landowner to start proceedings if he wishes to contest the amount of the award.

Under the judicial method, which is used in the other 44 jurisdictions, the condemnor institutes the proceedings and the amount of compensation is initially determined by a board of viewers, by a jury, or by other means independent of the condemnor. (Both methods of condemnation are explained in HRB Special Report 33, "Condemnation of Property for Highway Purposes, A Legal Analysis, Part II.")

This analysis is limited to those jurisdictions which use the judicial method, plus Pennsylvania, which uses a board of viewers as the first step in its procedure after the landowner has contested the highway department's determination. Generally speaking the following three procedures are used under the judicial method:

1. A hearing by a board of viewers and determination of compensation by that body with an appeal to a trial de novo, with or without a jury, which redetermines the amount without considering the viewers' decision.

2. A trial before a judge or jury, without the use of a board of viewers.

3. A hearing by a board of viewers or commissioners, without appeal to a jury trial.

Board of Viewers

Twenty-one of the jurisdictions which employ the judicial method do not use viewers at the State level. Compensation is determined, at the State level, by a board of viewers with an eventual trial, with or without a jury in 25 States. With the exception of Georgia, Iowa, Mississippi, New Hampshire, South Carolina and Tennessee the court appoints the persons who constitute the board of viewers. If a board of viewers is used in Georgia, the condemnor and property owner each designate one viewer, and the two choose the third member of the board. Whenever the damages are payable out of the State treasury, the Chief Justice of the Iowa Supreme Court is required to appoint the members of the commission whose responsibility it is to assess damages. In Mississippi, the special court of eminent domain which assesses compensation, consists of a justice of the peace, chosen by the clerk of the circuit court, and a jury of 12 chosen in the same manner as an ordinary jury. The governor in New Hampshire appoints the viewers, while in South Carolina, although he designates the persons eligible to serve as viewers, the actual appointment is made by the State highway department. The general condemnation law of Tennessee places the responsibility of appointing the viewers on the sheriff of the county in which the property is located.

In 17 of these States, the board of viewers consists of three persons. Five viewers are required in South Carolina, Tennessee and West Virginia while six persons constitute the board in Iowa. The special court of eminent domain in Mississippi consists of a justice of the peace and 12 jurors. The Pennsylvania statute does not specify the number of viewers to be appointed.

Various requirements are found in the statutes of these 25 States concerning the qualifications of prospective viewers. The

most common requirement is that a viewer be a freeholder or citizen of the county in which the property being condemned is located. In Iowa, the venue is the entire State with the requirement that no two of the viewers be residents of the same county. A viewer in Alaska must be a competent resident of the precinct which is the situs of the condemned property. The statutes of 12 States specifically provide that the viewers must be disinterested persons. Prospective viewers in Alabama, Montana and Tennessee must possess the same qualifications as required of a juror, and in Oklahoma the viewers are chosen from the regular jury list. Georgia, New Hampshire and Pennsylvania are silent in regards to qualifications a viewer must possess.

The power of issuing subpoenas is expressly granted to the board of viewers in five States. In a majority of the 25 States, it appears from a reading of the statutes that the judge has little or no power over the viewers' report. That is to say, if either party should be dissatisfied with the decision of the board it may demand a trial, without any court action being taken with respect to the board's report. However, in seven States the powers vested in the court more closely approximate those which a judge may exercise with respect to a jury verdict. With the exception of North Carolina, the court is limited to accepting or rejecting, *in toto*, the viewers' conclusions and returning the case to the same or a new board to make another assessment. The North Carolina statute provides that in addition to the aforementioned powers, the court may modify the viewers' award of compensation. Language found in the statutes of five States provides, in substance, that the judge may make such order as right and justice require.

At the county level some jurisdictions follow the general condemnation statute and, in addition, there are two classes of laws which are relevant to this study. In 14 States, the procedure for laying out and establishing public roads (usually county roads) contains provisions for the fixing of compensation. In six States, condemnation procedures which make use of viewers have

been enacted for counties. Only those statutes which provide for a board of viewers or a similar body are included within the report.

In 11 States the county governing body appoints the board of viewers; while the county court, or its equivalent, in six States designates the persons to serve as members of the board. Iowa and Nevada procedure requires that the condemnor and property owner each choose an equal number of viewers and the viewers designate an additional person to serve on the board. In Tennessee the road district commissioner chooses two freeholders of the district to act with him as jury of viewers to assess damages.

With the exception of the statutes found in four States, the various laws concerning the determination of compensation at the county level specify that the board shall consist of three viewers. Four provisions in three States require the appointment of five viewers, in Louisiana six persons are to be appointed.

Pursuant to the statutes of 12 States, a potential viewer must be a disinterested freeholder of the county in which the property is located. In Arkansas and New York a viewer must be a disinterested citizen of the county. Another provision in New York and the statutes of Michigan and Nevada provide that a viewer be a disinterested person of the county wherein the condemned property is located. A viewer in Wyoming must be a suitable and disinterested elector of the county.

In 18 States, procedures applicable to all or certain classes of cities are found which make use of a board of viewers. With the exception of Oregon and South Carolina, the members of the board are chosen by the court. The city council in Oregon and the parties in South Carolina designate the members of the board of viewers. With the exception of Michigan and South Carolina, the boards of viewers consist of three persons. South Carolina law specifies five persons, and 12 persons constitute the board in Michigan.

A majority of these statutes require that prospective viewers be freeholders of the

city. Connecticut and Maryland law provides that the viewers must be electors of the city. A prospective viewer in Texas must be both a freeholder and a qualified voter; any competent, disinterested person has the capacity to serve as a viewer in Illinois and Oregon.

Jury Trial

The constitutions of ten States provide for a jury trial in all cases. The most common constitutional provision, found in 26 States, provides that the right to a jury trial shall remain inviolate or continue as heretofore. In eight States, the constitution provides that there shall be a trial by jury in all cases except when the State is the condemnor. Four State constitutions require a jury trial when the condemnation is for a corporation other than a municipal corporation. The Arkansas jury provision is applicable only when the condemnor is a private corporation. The Louisiana clause, by its very terms, limits jury trials to criminal cases. The Utah constitution provides that the right to a jury trial shall remain inviolate in capital cases.

The statutes of 42 States clearly, and probably in Nebraska, provide for a jury trial in condemnation proceedings instituted by the State highway department. In 31 States and probably Nebraska, the jury provision is found in the general condemnation statute. In 15 States special condemnation procedures for the State highway department provide for a trial by jury. Aside from the general condemnation statutes which are applicable to all condemnors, in 8 States provisions limited to counties and in 21 States, provisions applicable to some or all cities, provide for a jury trial.

Miscellaneous Tribunals

The general condemnation laws of several States provide that if the parties waive a trial by jury, an official referee or referees may be employed to make the preliminary determination of damages. The procedures applicable to the State highway department

in Connecticut and New York substitute a court-appointed referee for a jury. In several jurisdictions a board, much like a board of viewers, is used except that there is no resort to trial from the board's decision.

These boards range in size from three members in Arizona, Delaware, Michigan and New York to six members in Missouri. Five persons constitute the board in Virginia, Wisconsin and the District of Columbia. Generally speaking, a prospective viewer or commissioner must be a competent, disinterested person and, in most cases, a freeholder. In the District of Columbia a special list is kept from which the "jurors" are chosen. A commissioner in Michigan cannot be a resident of the same township wherein the condemned property is located.

Time at Which Value Is Determined

The time at which property is evaluated may materially affect the size of the award. An inspection of the statute and case law of the several jurisdictions reveals that the question has been answered differently in the various States and possessions. In ten jurisdictions, the general condemnation law provides that the key date is the issuance or service of the summons. With the exception of Indiana, these provisions stipulate that improvements placed upon the condemned property subsequent to the date of valuation are noncompensable. In California, if the case is not tried within one year from the date of the commencement of the action (filing complaint and issuing summons), unless the delay is caused by the property owner, the compensation and damages are determined as of the date of the trial. Other dates used by various jurisdictions are: the date the highway commission, by resolution establishes the necessity of the property, the date of the trial, the award of the viewers, time of possession or the date of the trial, whichever is the earliest, and filing of the petition to condemn, or entry into possession, whichever comes first.

Constitutional Provisions

The starting point for any discussion of the rules governing compensation is the constitutions of the several States. In 21 States compensation must be made for a "taking" of property, while in 24 States compensation must be made for a "taking or damaging" of property.

The constitutions of Alabama, Kentucky and Pennsylvania each contain two provisions: a "taking" provision applicable to all types of condemnation, and a "taking or damaging" provision applicable to condemnation proceedings brought by municipal and other corporations. The North Carolina constitution does not contain a condemnation provision as such, but does provide, in substance, that no person's property "ought to be taken but by the law of the land."

It is difficult to generalize as to the differences between a "taking" and a "taking or damages" State. A "taking" jurisdiction is not required to compensate for every depreciation in value of property not physically taken. But this is also true for a "taking or damaging" jurisdiction, because the constitutional concept of damage applied by the courts does not require compensation for all decreases in value.

Probably the most important difference between the two constitutional provisions manifests itself in the area of consequential damages. Generally speaking, consequential damages, which do not involve taking of land, are not compensable in a "taking" jurisdiction while they are compensable in some "taking or damaging" States.

Remaining Property

The concepts of benefits and severance damages both presuppose that there is a partial taking of property and that the remaining property receives certain advantages due to the proposed improvement for which the taking is made. The courts have developed two tests to govern the question of what constitutes the remaining property—unity of title and unity of use. Unity of title requires that the property taken and the remaining land must have been held by

the property owner in the same quality of ownership. The unity of use test requires that both parcels of land were used in conjunction with each other. It would seem that the unity of use test is satisfied if the two parcels of land are adaptable to the same use rather than requiring that they be actually devoted to the same use. Also, it appears that this test does not require that the two tracts be contiguous. However, some jurisdictions require, as a separate test, that the tracts be contiguous.

Set-off of Benefits

Types of benefits are classified differently in different States, and the effect of the benefit on the determination of compensation depends upon this classification. There is a good deal of confusion as to just what is the difference between a special benefit and a general benefit. Some of the different rules which are applied are that special benefits must be local or neighborhood benefits; that they must differ in kind from those enjoyed by the general public, or that they must be physical in nature.

Twelve States and the Federal government either by statute, judicial decision or both, permit the set-off of benefits against the value of the land taken and damages to the remainder. Of these 13 jurisdictions, eight permit only the deduction of special benefits, five States authorize the deduction of both special and general benefits.

In 27 jurisdictions benefits may be deducted only from the damages to the property not taken. Eighteen of these jurisdictions limit the set-off to special benefits, New York, Virginia and West Virginia permit the deduction of general, as well as special benefits. The laws of Alaska, Arizona and Nevada do not specify the type of benefit which may be deducted, and no case was found interpreting the particular statute. No case was found interpreting "real benefits" as used in the Wyoming statute. Although the Illinois cases hold that only special benefits may be deducted, the interpretation given to special is broad enough to encompass general benefits. The Florida statute is written in terms of "enhancement

in value" of the remaining property without specifying the nature of the enhancement.

By provisions in their respective constitutions, Iowa and Oklahoma prohibit the set-off of benefits. The status of the set-off rule or the type of benefit which may be deducted is not clear in eleven jurisdictions.

Interest

As a means of compensating the property owner for damages attributable to a delay in payment of compensation, interest is normally made part of the final award. The condemnation statutes of 18 jurisdictions provide for a fixed rate, ranging from 4 percent in Massachusetts to 6 percent in nine States the District of Columbia and Puerto Rico. Interest at the rate of 5 percent is paid in Louisiana, Virginia and Hawaii, while the legal or lawful rate is paid in California, Georgia and New Mexico. In the absence of a statutory rate using the legal or ordinary commercial rate has received judicial approval.

As a general rule interest must begin to run not later than the date of the entry into possession. Other dates which received legislative recognition as the time from which interest should be paid are possession or award, whichever occurs first, order of special master; report of commissioners; date of deposit if award increased on appeal; and date of deposit.

The immediate possession statutes usually provide that interest shall accrue either from the date of possession or the date of the order permitting possession. In the eight States using the administrative method title normally vests prior to possession and interest probably is computed from the date title changes hands.

Costs and Expenses

Since costs and expenses were not awarded at common law, the property owner does not have a constitutional right to receive court costs and expenses incurred in defending the taking of his property. If these items are awarded it must be pursuant to statute and unless the general statute on

costs is specifically made applicable to condemnation proceedings, it does not apply to such proceedings.

In eight States the general condemnation law contains a provision placing the taxing and allocating of costs within the court's discretion. It would seem that in seven States the condemnor is taxed with costs in all cases. The procedures found in nine States require that the condemnor pay costs up to a certain point in the proceedings and from that point the awarding of costs is determined by which party initiates further action and who is successful in the subsequent phases of the proceedings.

A comparison is made in several States between the amount of the original offer made by the condemnor and that awarded by the commissioners or viewers. Depending upon which amount is greater, the condemnor or property owner is required to pay costs. Another group of States compare the amount awarded by the commissioners or viewers with that awarded by the court or jury. The taxing of costs in these jurisdictions is dependent upon which party institutes further proceedings and who the successful party is, in the new phases of the proceedings. Four States, Minnesota, New Hampshire, Ohio and Wisconsin, have provisions which direct that costs shall be awarded to the prevailing party. Several jurisdictions require that costs and expenses shall be taxed against the condemnor in the event he abandons the proceedings.

Unless the statute provides otherwise, taxable costs are generally held to be the ordinary and usual costs allowed in civil actions. Fourteen jurisdictions require the condemnor to reimburse the property owner for attorney's fees. Of these, seven States and the District of Columbia pay counsel fees only when the condemnor abandons the proceedings. Counsel fees are paid in North Carolina only when the court appoints an attorney to represent unknown parties. Delaware and Iowa laws specifically prohibit the payment of attorney's fees.

Determination of Necessity

In the absence of a constitutional provision or statute providing otherwise, the overwhelming majority of the cases hold that the question of the necessity of a particular tract of land is for the condemnor to decide, and is not to be reviewed in court unless the property owner alleges fraud, bad faith or an abuse of discretion by the condemnor. However, in a significant number of States, it appears that statutes have been enacted which make the question of necessity one cognizable by the courts. The general condemnation statutes of eight States require the court or judge to pass upon the question of necessity. In three States, Arizona, Montana and Nevada, the condemnor is required to allege in his petition, that the property is necessary.

In a majority of jurisdictions, no reference to the question of necessity is found in the statutes, thus making the condemnor ultimately responsible for the decision. In seven States, Arizona, California, Kentucky (State), Minnesota, Oregon (State), South Dakota and Washington (toll facilities), the condemnor is required to pass a resolution which becomes a conclusive presumption as to the necessity of the taking. The Idaho and Kentucky (county) statutes also require the condemnor to pass a resolution, but it is only a prima facie presumption of the necessity. In Missouri, the pertinent statute provides that the question of necessity is not one for the courts.

Right of Entry

As a means of permitting the condemnor to decide intelligently which property is required, a number of jurisdictions have enacted provisions which permit the condemnor to enter upon the property to make surveys and inspections. These statutes may be divided into two categories. The first group simply provide that the agents of the condemnor may enter upon the property, the statutes in the second group provide that the condemnor may enter upon the property but that he is liable for actual damages or for damages due to wantonness, negligence, malice or carelessness.

Property Already Devoted to a Public Use

In determining whether property already devoted to a public use may be taken for another public use the character of the condemnor is of primary importance. Generally, the doctrine of prior public use does not apply when the State condemns property for one of its sovereign purposes. However if the condemnor is a municipality the doctrine is applicable and may act as a restriction upon the municipality's exercise of the power of eminent domain.

In essence, the doctrine of prior public use is that where a proposed use will either destroy or substantially interfere with an existing use, the exercise of the power of eminent domain will be denied unless the legislature has authorized the acquisition, either expressly or by necessary implication. If the exercise of a power granted by the legislature would be prevented if the land could not be condemned, the courts infer that the taking is authorized. Also, from the difficulties which would be incurred if the property were not taken, it may be assumed that the legislature intended to permit the condemnor to exercise the power of eminent domain.

An exception to the general rule now embodied in the general condemnation statutes of nine jurisdictions, is that if the proposed use will serve a more necessary use than the existing use, the condemnor may take the property. The California provision stipulates that when property is appropriated by any individual firm or private corporation the use thereof for a State highway or public street is a more necessary use. Legislation dealing with the Port of New York Authority and several special authorities in New Jersey provides that use of property for highways is a more necessary use than for other purposes.

In seven States, special legislation dealing with turnpike or bridge authorities contains broad and all-inclusive descriptions of the type of property which may be condemned. These are probably broad enough to permit the taking of property devoted to a public use. Four States have statutes which permit the taking if the proposed use will not interfere with the existing use.

**FIGURE 1**

Increase in value of remaining land may amount to a benefit which will affect the amount of compensation paid to the condemnee.

Dismissal or Abandonment of Proceedings

Legislation exists in 25 jurisdictions which governs the time within which abandonment is permitted and prescribes certain conditions which must be satisfied by the condemnor before it may exercise the privilege. In 19 jurisdictions the general condemnation law contains a provision concerning abandonment; in Illinois, Ohio and Oregon, the procedure applicable to the State highway department includes a section on abandonment. The procedure followed by counties in five States and by cities in seven States also contains a provision relative to abandonment.

Twelve statutes specify a period, subsequent to the final judgment or verdict of the trial court within which the condemnor may abandon the proceedings. The period varies from ten days in Florida to one year in Indiana. In the remaining jurisdictions a variety of dates are found which seem to

serve as the cut-off date for the condemnor to abandon the proceedings.

Without a statute making the right of abandonment absolute and unconditional it is within the discretion of the court, and for that matter the legislature, to permit the discontinuance of the proceeding on condition that the condemnor pay the court costs, attorneys' fees or other expenses. Therefore, it is not surprising to find that: in twelve jurisdictions the condemnor is required to pay costs, disbursements and reasonable attorneys' fees; in five States the condemnor is required to pay costs; in Hawaii he must pay costs, attorneys' fees and damages suffered by the landowner; in Massachusetts (alternate method) and Puerto Rico the condemnor must compensate the property owner for any damages he suffered; and in Pennsylvania the condemnor must pay costs and actual damages suffered by the property owner. The Wisconsin statute vests in the court the power to impose

whatever conditions it deems advisable before permitting the condemnor to abandon the proceedings. In seven States the statutes are silent concerning the payment of any such items.

Scope of Appeal

The statutes providing for an appeal from the trial court's decision normally specify

that an appeal may be taken, the time for taking an appeal, and the procedural steps necessary to perfect an appeal. However, these statutes are of no assistance in determining the scope of review vested in the appellate court. A synthesis of the case law reveals that appeals involving the taking of property are treated as appeals in other civil actions.

INTRODUCTION

In the vast majority of condemnation proceedings, the issue in dispute is the amount of compensation due the property owner for the taking and/or damaging of his property. The subject matter of this study consists of the procedural and substantive laws of the several States and territories which govern the handling of this problem.

The importance of the procedural method employed to arrive at the amount of money due the landowner should not be minimized. The applicable procedural law is as important in arriving at a just decision as the substantive rules of law which control a particular first-situation. Disregarding for a moment the substantive law concerning compensation in an eminent domain case, a jurisdiction which utilizes an archaic, inadequate procedure is increasing the chances of results adverse to both itself and the property owner.

With this thought in mind, the discussion of "Procedural Law" is devoted to an analysis of those bodies whose responsibility it is to determine the amount of compensation due the property owner. It includes a discussion of such entities as a board of viewers, commissioners, jury, and a judge without a jury. Such important topics as the qualifications of the members of the board of viewers, the effect of its report and the power of the court to amend, accept or reject the report are discussed.

The material presented and the discussion thereof has a two-fold objective. First, to compile and describe the existing law in the various jurisdictions, second, to analyze the elements of the different procedures and indicate, as far as possible, which are the most desirable.

Following the discussion of the existing procedural structure, some aspects of the substantive law pertaining to the compensation due the property owners are reviewed.

Although not a question of substantive law, the important problem of the date to be used as the time to value the property

taken or damaged is discussed in this part of the monograph. This analysis consists of a study of existing statutes and case law fixing the date at which condemned property is evaluated.

The goal of condemnation statutes and cases is determination of the constitutionally required "just compensation." The pertinent constitutional clauses are phrased in terms of "taking" or "taking and damaging" of property. This report discusses these two types of provisions and traces the consequences of each.

In the process of arriving at the amount of compensation due the landowner, the valuing body will necessarily be required to determine which items of loss to the owner are compensable and those which are non-compensable. The problem of "consequential damages" and the theory behind denying payment for certain classes of loss are discussed.

The concept of "just compensation" encompasses the proposition that if the property owner derives a benefit from the facility for which his land is taken, the amount of benefit should be taken into account in arriving at the compensation to be paid. An analysis of the law of benefits as it exists in the several States and territories is therefore included.

Those elements of the final award such as interest, court costs and attorney fees, which are ancillary to the value of the affected property and for which the property owner is compensated in some or all of the jurisdictions, are analyzed and discussed.

There are also discussed six miscellaneous subjects, not related to the determination of compensation, but all important to the exercise of the power of eminent domain. These topics are determination of necessity, court having jurisdiction, right of entry, taking property already devoted to a public use, scope of appellate review, and abandonment.

PROCEDURAL LAW

BOARD OF VIEWERS

General Comments

This section is concerned with the type of procedure whereby a board of viewers,¹ after viewing the property and hearing testimony, determines the amount of compensation due the property owner. If this amount is accepted by both parties the proceeding is terminated. However, if the award is unacceptable to either party an appeal may be taken to the trial court and the questions in dispute are tried *de novo*, with or without jury.

This segment of the study is not concerned with any procedures the condemnor uses to fix an amount to be offered in negotiating for the purchase of the property. It is assumed that negotiations have been unsuccessful or that the property owner is unknown or incapable of conveying the land or that judicial action is necessary to clear the title and that condemnation proceedings have been instituted.

The procedure followed in seven of the eight States² using the administrative method of condemnation is not within the purview of this analysis. In these jurisdictions compensation is initially determined by the condemnor, with eventual recourse to a judicial determination. The use of a board of viewers is not part of the procedure in these seven States. Also excluded from this study is the use of appraisers or commissioners in connection with the "immediate possession" statutes of the several jurisdictions. The estimate of compensation by these appraisers is used solely for the purposes of fixing the amount to be deposited in court for the use of the owner before possession may be taken. In most jurisdictions the amount deposited is inadmissible in evidence in the main proceed-

ings and therefore has no effect upon the sum eventually awarded as compensation.

Of the remaining 43 jurisdictions which use the judicial method of condemnation, 19 States,³ the District of Columbia and Puerto Rico do not make use of viewers, at least at the State level. In Delaware,⁴ Michigan,⁵ Virginia⁶ and the District of Columbia⁷ the procedures resemble those which use viewers, but actually are more like those which do not. A discussion of the statutes of these four jurisdictions is included in the section on "Miscellaneous Tribunals."

A two-fold analysis of the various procedures is used. First, the various statutes are grouped and discussed from the viewpoint of the governmental units which are active in the highway field, second, according to the substantive elements found to exist in the statutes.

STATE

Appointment of Viewers

In 25 States a board of viewers or its equivalent is an integral part of the condemnation procedure.⁸

With the exception of Georgia, Iowa, Mississippi, New Hampshire, South Carolina and Tennessee, the court appoints the persons who constitute the board of viewers. If a board of viewers is used in Georgia, the condemnor and property owner each designate one viewer and the two choose the

¹ Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Louisiana, Michigan, Nevada, North Dakota, Oregon, South Dakota, Utah, Vermont, Virginia, and Washington.

² Tit. 10, §6108.

³ Tit. 8, §184.

⁴ Ch. 25 *et seq.*, ch. 33, §§57-75.

⁵ Tit. 7-201 *et seq.*, tit. 16-601 *et seq.*

⁶ Alabama tit. 19, §11, Alaska ch. 57-7-12(4), Georgia ch. 36, §401, Indiana ch. 3, §1704, Iowa ch. 472.6, Kansas ch. 26-401, Kentucky ch. 177.083, Maryland art. 89B, §17, Minnesota ch. 117.07, Mississippi §2750, Missouri ch. 523.040, Montana tit. 93, §9911(4), Nebraska ch. 76-706, New Hampshire ch. 233.2, New Jersey tit. 20.1-6, New Mexico ch. 22-9-3, North Carolina ch. 4D, §16, Oklahoma tit. 69, §46, Pennsylvania tit. 36, §670-303, South Carolina tit. 33, §§128, 129, Tennessee ch. 23, §1407, Texas art. 3264, West Virginia §5376, Wisconsin ch. 32.08 (In Wisconsin, much of the land for State highway purposes is condemned by the counties. The county procedure uses a board of viewers, the State condemnation does not), Wyoming ch. 3, §6114.

¹ For the purposes of this study the term "viewers" includes such bodies as boards of appraisers and commissioners.

² Connecticut, Maine, Massachusetts, New York, Ohio, Rhode Island and Wisconsin, viewers are used in the Pennsylvania administrative procedure.

third member of the board.⁹ Whenever the damages are payable out of the State treasury, the Chief Justice of the Iowa Supreme Court is required to appoint the members of the commission whose responsibility it is to assess damages.¹⁰ In Mississippi, a special court of eminent domain is established to assess damages.¹¹ This court consists of a justice of the peace, chosen by the clerk of the circuit court, and a jury of 12 chosen in the same manner as an ordinary jury is picked.¹² In New Hampshire,¹³ the governor is required to appoint the viewers. Although the governor in South Carolina designates the persons eligible to serve as viewers the actual appointment of members to condemnation boards is made by the State highway department.¹⁴ The general condemnation law of Tennessee places the responsibility of appointing the viewers on the sheriff of the county in which the property is located.¹⁵

In Wisconsin, State and county authorities have three alternative condemnation procedures. Two are basically administrative methods, with recourse to a jury, which do not involve a board of viewers.¹⁶ However, if the general condemnation statute is followed, viewers (commissioners) are appointed by the court.

Legislation in South Carolina authorizes the Governor to appoint a list of "responsible" citizens who shall be eligible to serve on condemnation boards.¹⁷ Members of the State Highway Commission, but not members of the Highway Department, are eligible for appointment to the boards. The State Highway Department, which is governed by the State Highway Commission, is empowered to appoint three or more individuals from the Governor's list to act as a board of condemnation. It is therefore possible that the determination of compensation will be made by a board closely affiliated with the condemnor rather than by a tribunal independent of both parties. If this is the case, the South Carolina pro-

cedure is quite similar to the "administrative method" where the condemnor makes the original determination of compensation with recourse to judicial proceedings by a dissatisfied party.

Number

In a majority of jurisdictions the board of viewers consists of three persons. Three or more persons may be appointed to a condemnation board in South Carolina while the Tennessee and West Virginia statutes stipulate that the board of viewers shall consist of five persons. The Chief Justice of Iowa is required to appoint six freeholders. In Mississippi the special court of eminent domain consists of a justice of the peace and 12 jurors. The Pennsylvania statute does not specify the number of viewers to be appointed.¹⁸

It is significant to note that in nine States the statutes provide that a majority of the members of the board may act for the full board.¹⁹ In seven of the nine States which permit a majority to act, the statute prescribes a board of three viewers,²⁰ therefore in these States the decision of two viewers is all that is required.

Qualifications

In general, in order for a person to serve as a member of a board of viewers he must meet the same or similar tests as would a prospective common law juror. The various statutes contain three, not mutually exclusive, requirements. The most common requirement is that a viewer be a freeholder or citizen of the county in which the property being condemned is located.²¹ In Iowa, the venue is the entire State, with the requirement that no two of the viewers be

⁹ Tit 36, §670-303

¹⁰ Alabama tit 19, §13, Georgia ch 36-501, Missouri ch 523 050, New Jersey tit 20 1-10, North Carolina ch 40, §17, Tennessee ch 23, §1415, West Virginia §5379, Wisconsin ch 3210(2), Wyoming tit 3, §6116. Although not provided for in the general condemnation law, the Attorney General of Minnesota has informed the Committee that other statutes so provide.

¹¹ Alabama, Georgia, Missouri, New Jersey, North Carolina, Wisconsin and Wyoming.

¹² Alabama tit 19, §11, Kansas ch 26-101, Kentucky, ch 177 083, Minnesota ch 117 07, Missouri ch 523 040, Montana tit 93, §9911(4), Nebraska ch 76-706, New Jersey tit 20 1-6, New Mexico ch 22-9-3, North Carolina ch 40, §16, Oklahoma tit 69, §46, Texas art 3264, West Virginia §5376, Wisconsin ch 32 08, Wyoming tit 3-6114

⁹ Ch 36, §§401, 402

¹⁰ Ch 472 6

¹¹ §2750

¹² §§2751, 2757

¹³ Ch 233 2

¹⁴ Tit 33, §129

¹⁵ Ch 23, §1407

¹⁶ Ch 84 09, ch 83 07

¹⁷ §33-128

Mo	X	court	3	X	X															X
Mont	X	court	3	X	X															
Neb	X	court	3	X	X															
Nev																				
N H	X	governor	3	silent		silent														
N J	X	court	3	X	X	X					county gov body	3	X							
N Mex	X	court	3	X	X	X					county gov body	3	X							
N Y						X				X	court	3		X						X
N C	X	court	3	X																X
Okl	X	court	3	X	X					chosen fr jury list										X
Ore											county gov body	3	X							
Pa	X	court		silent		silent					court	3		silent						X
S C	X	st highway dept	3 or more																	X
Tenn	X	sheriff of county	5					X			rd dist comm & 2 persons	3	X							
Tex	X	court	3	X	X	X					county gov body	5	X							X
Vt																				
Va											county gov body	5	X							
W Va	X	court	5	X	X															
Wis	X	court	3	X	X															X
Wyo	X	court	3	X	X						county gov body	3								suitable and disinterested elector

residents of the same county.²² A viewer in Alaska must be a competent resident of the precinct in which the condemned property is located.²⁴

Legislation enacted in 1956 in Maryland²⁴ directs that the circuit court judges in each judicial circuit and the supreme bench in Baltimore City shall appoint a board of property review. Each county and Baltimore City is to have at least one board. These boards are to consist of three members, one lawyer, one engineer or a person having an engineering background, and a third person, neither a lawyer nor an engineer.

What is the reason for requiring that a viewer be from the county in which the property is located? Is it simply a matter of convenience, or is it assumed that he would be more familiar with the land values than a non-resident? If this is the explanation, it indicates a marked difference between a juror and a viewer. A juror is required to base his decision solely upon the evidence introduced at the trial and if it is proved that a juror predicated his decision on information not offered in court an appellate court probably would reverse the decision and require a new trial. (In some States a jury view is considered evidence which the jury may weigh in addition to the testimony.) Furthermore, if a prospective juror is familiar with the matter to be litigated or parties involved, he is subject to disqualification. This discussion raises an important problem—what should be the proper function of the board of viewers? More will be said about this question once the review of the existing statutes is completed.

Although expressly required by the statutes of only twelve States,²⁵ it goes without saying that in all cases viewers must be disinterested persons. This requirement would bar any person who is personally interested in the property or related to the owner or owners of said property.

Prospective viewers in Alabama, Montana and Tennessee must possess the same qualifications as required of a juror;²⁶ in Oklahoma, the viewers are chosen from the regular jury list. The statutes of Georgia, New Hampshire and Pennsylvania are silent in regards to qualifications a viewer must possess.

Function

In evaluating the usefulness of a board of viewers it is of prime importance to explore fully the role assigned to the boards by the several State laws. A board of viewers can be assigned either one or both of two functions. The board can be required to serve as a "fact gatherer" or "fact determiner." In the interests of clarity these terms require definition.

An example of a fact gathering body is a congressional investigating subcommittee. The task of such a subcommittee, generally speaking, is to search out the facts, to determine whether legislation is required, and to recommend the type of needed legislation. In the area of the judicial process an example of a fact gathering institution is the use of a special master or referee to take testimony in long and complicated cases. Generally speaking, the report of the master or referee is subject to a court hearing and approval of a judge before it becomes the judgment of the court.

The traditional role of a jury as the trier of questions of fact is the most obvious example of a fact determining body. This distinction between the possible uses of a board of viewers, although not clear cut in all jurisdictions, may be of assistance in evaluating the present usefulness of the institution. Before turning to this phase of the study the survey of the existing law on this point must be completed.

To get a complete picture of the board's functions in the several jurisdictions it will be helpful to discuss the problem from two aspects. Initially the duties to perform and powers granted to fulfill the responsibilities will be discussed and then the court's power

²² Ch 472 G
²³ Ch 57-7-12(4)
²⁴ Art 89B, §§9-20
²⁵ Alabama tit 19, §11, Kansas ch 26-101, Kentucky ch 177 083, Minnesota ch 117 07, Missouri ch 523 040, Nebraska ch 76-706, New Jersey tit 20 1-6, New Mexico ch 22-9-3, Oklahoma tit 69, §46, Texas art 3264, West Virginia §5376, Wyoming tit 3-6114

²⁶ Alabama tit 19, §11, Montana tit 93-9911(4), Tennessee ch 23-1409

to accept, reject and modify the board's decision.

In each of the 25 jurisdictions which use a board of viewers the task of the board is the same: to determine the amount of compensation due the property owner.²⁷ However, there exists a difference in the scope of the powers given the various boards to assist them in determining compensation. The boards are directed to view the property, hear testimony and submit a report to the trial court concerning the amount of compensation, if any, due the property owner.

In five States the power of issuing subpoenas is expressly granted to the board.²⁸ This power seems to indicate a mixture of the fact gathering and fact determining roles of the boards. Another interesting feature of the position of a board of viewers in the judicial structure is the power over the viewers' report vested in the court. In a majority of the 25 jurisdictions, it appears from a reading of the pertinent statutes that the judge has little or no power over the viewers' report.²⁹ If either party should be dissatisfied with the decision of the board it may demand a trial without any court action being taken with respect to the board's report.

However, in seven States the powers vested in the court more closely approximate those which a judge may exercise with respect to a jury verdict.³⁰ With the exception of North Carolina, the court is limited to accepting or rejecting, as a whole, the viewers' conclusions and returning the case to the same or a new board to make another assessment. The North Carolina statute provides that in addition to these powers, the court may modify the viewers' award

of compensation. Language found in the statutes of five States,³¹ provides, in substance, that the judge may make such order as right and justice require. It is possible, but not likely, that this language enhances the court's power. Even so, the court's power over the report is severely limited.³²

Trial

Provision is made in the statutes of each jurisdiction discussed in this chapter for a trial subsequent to the proceedings before the board of viewers. This trial is with or without a jury depending upon the law of the jurisdiction and the desires of the parties. Although the terminology used in describing the resort to trial court proceedings is that of an "appeal from the board's decisions" the trial is actually a *de novo* proceeding in which the question of the amount of compensation due the property owner is litigated as if there had been no prior proceedings.

Only one State, Georgia³³ expressly treats the admissibility of the viewer's report at the trial. In Minnesota, a commissioner may be called by any party as a witness to testify as to the amount of the commissioners' award.³⁴

COUNTY

The following discussion includes only those provisions which are applicable to counties. In numerous jurisdictions the condemnation procedure used by the county is either the general condemnation statute or a method established for highways, be they State or county.³⁵ These statutes have been analyzed in the preceding section which concerned the State highway department.

Two classes of statutes form the subject matter of this section. In 15 States³⁶ the procedure for laying out and establishing of public roads (usually county roads) con-

²⁷ Alabama tit 19, §13, Alaska ch 57-7-13, Georgia chs 36-502-508, 611A, 612A, Indiana chs 3-1704, 1706, Iowa ch 472 4, 14, Kansas ch 26-101, Kentucky ch 177 083, Maryland art 89B, §17, Minnesota ch 117 08, Missouri ch 523 040, Montana tit 93-9912, Nebraska chs 76-709, 710, New Hampshire ch 233 10, New Jersey tit 20 1-6, 9, New Mexico ch 22-9-3, North Carolina ch 40-17, Oklahoma tit 69-46, Pennsylvania tit 36-670-303, South Carolina tit 33, §138, Tennessee ch 23-1413, Texas art 3264, West Virginia §5379, Wisconsin ch 32 10, Wyoming tit 3-6114-6116

²⁸ Alabama ch 36-502, Minnesota ch 117 08, North Carolina ch 40-17, Texas art 3264, West Virginia §5379

²⁹ Alabama, Georgia, Indiana, Iowa, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, Pennsylvania, South Carolina and Texas

³⁰ Missouri ch 523 050, New Mexico ch 22-9-6, North Carolina ch 40-19, Oklahoma tit 69-46, Tennessee ch 23-1417, West Virginia §5382, Wyoming tit 3-6117, 6118

³¹ Missouri, New Mexico, Oklahoma, West Virginia and Wyoming

³² See *State v Taylor*, 42 N M 405, 79 P 2d 937

³³ Ch 36-612A

³⁴ Laws of 1959, ch. 656, extra session of 1959, ch 41

³⁵ See "Condemnation of Property for Highway Purposes", Part I, HRR Special Report 32 (1958) for a discussion of the various procedures established for counties

³⁶ Arkansas, Indiana, Iowa, Kansas, Louisiana, Maryland, Minnesota, Missouri, Nevada, New Mexico, Oregon, Tennessee, Texas, Virginia and Wyoming

tains provisions for the fixing of compensation for property taken or damaged. These statutes: 1. serve as a means of determining the need for the particular road; 2. provide the steps to be taken in the actual laying out and establishing of the route; and 3. establish a procedure for determining compensation. It is this last phase of the procedure which is relevant to this report. Only those statutes wherein a board of viewers or a similar body is provided for are included within the discussion.

Six States³⁷ have enacted condemnation statutes, specifically for counties, which make use of an ad hoc body to make the preliminary determination of compensation. Excluded from the scope of this study are the procedures found in Mississippi, Ohio and South Dakota, for example, in which the Board of County Commissioners or its equivalent, makes the preliminary determination of compensation. North Dakota statutes appear to require that compensation be determined by either a special board or Board of County Commissioners.³⁸ However, the North Dakota Supreme Court in *Kuecks v. Cowell*, — N. D. —, 97 N.W.2d 849, interpreted art. 1, § 14 of the State constitution as superseding all inconsistent statutory provisions. Minnesota law affords the county the choice of one of two methods in condemning property for county roads. The county may proceed under ch. 117, the general condemnation statute, or else use a procedure whereby the county board first determines compensation.³⁹

Appointment of Viewers

A variety of methods are found in the statutes for the appointment of viewers. In eleven jurisdictions the county governing body (the Board of County Commissioners, the Fiscal or Commissioners Court or the Board of Chosen Freeholders) has the responsibility of appointing the board of viewers.⁴⁰ Next in order of frequency are the statutes found in six States which re-

quire the county court, or its equivalent, to appoint the viewers.⁴¹ In two States the condemnor and property owner each choose an equal number of viewers and the viewers designate an additional person to serve on the board.⁴²

Reference has been made to the practice found in several States of the county governing board fixing the compensation for the affected property. Tennessee⁴³ has established procedure which is somewhat in between those employing a board of viewers and those procedures wherein the board of county commissioners determines compensation. The Tennessee statute requires the road district commissioner to choose two freeholders of the district to form with him a jury of viewers to assess damages, but the parties have recourse to the court for a trial of the issue of compensation.

Number

With the exception of the statutes found in four jurisdictions the various laws specify three as the number of viewers to be appointed. Of the four exceptions, three provisions⁴⁴ require the appointment of five viewers, in Louisiana,⁴⁵ six viewers are to be appointed.

Qualifications

A variety of requirements are found in the several States concerning the qualifications of prospective viewers. The most frequent description, found in twelve jurisdictions, is that a viewer must be a disinterested freeholder of the county in which the property is located.⁴⁶ The Arkansas statute and one of the procedures used in New York provide that the viewer must be a disinterested citizen of the county.⁴⁷ Another statute in New York and the laws of Michi-

³⁷ Arkansas §76-905, Kentucky §416 100, 240, Michigan §9 113, Missouri §§228 180, 228 210 (St. Louis County), New York Highway Law, §121, Unconsolidated Law ch 79, §7, Pennsylvania tit 36, §1781

³⁸ Iowa §306 22, Nevada §403 440

³⁹ §54-908

⁴⁰ Nevada §403 440, Texas art 6106, Virginia §§33-142, 33-149

⁴¹ Tit 48-492

³⁷ Kentucky, Michigan, Missouri, New Jersey, New York, North Dakota and Pennsylvania

³⁸ §§24-0510, 0716

³⁹ Laws of 1959, ch. 500, art. IV, §611, 12

⁴⁰ Indiana §36-205, Kansas §68-104, Kentucky §416 110, Louisiana tit 48-492, Maryland art 25-127, New Jersey §27 16-55, New Mexico §55-4-8, Oregon §368 135, Texas art. 6706, Virginia §33 149 and Wyoming §48-319

⁴¹ Iowa §306 22, Kansas §68-104, Kentucky §416 100, 110, 240, Louisiana tit 48-492, Maryland art 25-127, Missouri §228 210, New Jersey tit 27 16-55, New Mexico §55-4-8, Oregon §368 135, Tennessee §54-908, Texas art 6706, Virginia §33-149

⁴⁷ Arkansas §76-905, New York Unconsolidated Law, §79 7

gan and Nevada require that a viewer be a disinterested person of the county wherein the condemned property is located⁴⁸ The Wyoming procedure applicable to counties specifies that a viewer must be a suitable and disinterested elector of the county⁴⁹

The Indiana and Pennsylvania statutes are silent concerning the qualifications of a prospective viewer However, in Pennsylvania the procedure applicable to public roads in general, tit 36-1761 *et seq.*, contains a provision, § 1783, which requires a viewer to be a "discreet and reputable citizen qualified to vote for members of the legislature"

A comparison of these statutes reveals that, with one exception, the various laws are quite similar All are aimed at picking a person who is not interested, either personally or through family association, in the condemned property It is conceivable that in those jurisdictions which require that a viewer be a freeholder, a person somewhat more conversant with property values will be chosen than in States which do not require a viewer to be a freeholder With this exception very little difference exists between the various statutes in reference to the qualifications of a prospective viewer

Function

The function of the board of viewers as provided for in the various general condemnation laws and statutes applicable to the State highway department is exclusively to determine compensation In a sense, the viewers are officers or agents of the court and they perform a judicial function However, on the county level the board of viewers, in most cases, acts both in a legislative and judicial capacity In determining the need for and establishing a proposed road, a board is performing a function that has been uniformly labeled as a legislative act However, it is clear that when the board fixes damages and this determination becomes the final award, in the absence of objection on the part of

either party, the board is performing a judicial function

On the State level a relatively simple procedural structure is found In brief, the condemnor petitions a court which appoints viewers The viewers view the property, hold hearings and file a report in court If the amount awarded by the viewers is accepted by the parties the proceedings are terminated However, the parties may appeal to the trial court and have a trial *de novo*, with or without a jury

Probably because of the joint legislative and judicial role of the viewers on the county level, the governing body of the county, in some States, plays an important role in the procedure In these States the viewers are agents of the governing authority and it is from the decision of said authority that recourse is had to the courts

In one group of States the viewers are directed to view the property, hear the affected landowner, determine the amount of compensation due the landowner and file a report, which includes its determination of compensation, in court⁵⁰ The parties are afforded the opportunity to appeal the decision and have the issue of compensation determined *de novo* by the trial court In this group of States the court or governing body appears to act as a conduit through which the parties pass from the viewer stage to the trial court In effect, appeals are taken from the action of the viewers rather than from the decision of the court or governing body

The procedure established in a second group of States and the Federal Government would seem to vest a greater degree of control over the award in the court or county governing body⁵¹ In these jurisdictions a dissatisfied party is actually appealing from the determination of the court or governing body The viewers perform a fact finding and advisory rather than a decisional function For example in Iowa, Maryland, Minnesota, Nevada, Oregon,

⁴⁸ Arkansas §76-912, Kansas §68-106 Louisiana tit 48-492, Missouri §5228 210, 220, 240, New Jersey tit 27 16-58 59, 62, Tennessee §54-908

⁴⁹ Indiana §§36-206, 207, 208, Iowa §306 25, Maryland art 25, §134, Nevada §403 440, New Mexico §§55-4-11 13, 14, Oregon §§368 460, 480, 510, 515, Pennsylvania tit 16-2408, 2413, 2416, 2423, Texas art 6710, Virginia §§33-149, 151, Wyoming §§48-321, 327, U S A Rule 71 A, Federal Rules of Civil Procedure

⁴⁸ Michigan §9 113, Nevada §403 440, New York Highway Law, §121

⁴⁹ §48-319

Pennsylvania, Texas and Wyoming a hearing is held by the court or county governing body upon receiving the viewers' report. Evidence may be introduced and the court or governing body is authorized to confirm, reject or modify the viewers' determination of compensation. The Oregon statute permits the return of separate reports by the viewers and the court is permitted to adopt one of the reports. After hearing objections to the report, the appropriate body in Indiana, Pennsylvania and Virginia is permitted to appoint a new board of viewers or return the case to the same board.

The relative inconclusiveness of the viewers' report in some States is illustrated by two of the Kentucky statutes.⁵² If there are objections to the viewers' findings the county or fiscal court, as the case may be, is directed to hold a jury trial on the exceptions to the report. A dissatisfied party may appeal the jury's determination to the circuit court and have a jury trial.

With one exception, the Michigan and New York⁵³ laws are similar to the statutes found in the second group of States. No provision is made for an appeal of the court's decision via a jury trial in a court of general jurisdiction. In both States the court is given wide latitude to confirm, reject, or appoint another board of viewers for a rehearing of the disputed questions.

CITY

In 18 States, procedures applicable to all or certain classes of cities are found which make use of a board of viewers.⁵⁴ Very little can be written about these laws which has not already been said concerning State and county procedures. With slight variation they follow the pattern which has been found to exist on the State and county level.

⁵² §§416 040, 416 100

⁵³ Michigan §§9 115, 116, New York Highway Law, §122

⁵⁴ Alabama tit. 19, §509, Colorado §§50-3-1 *et seq.*, Connecticut §13-30, Illinois tit. 24-84-14, 23, Kansas ch. 26-201 *et seq.*, Kentucky, §§94 690, 710 (second class city), Michigan §§5 1435, 1436, 1443 (village), §§5 1861, 1862, 1869 (fourth class city), Minnesota §440 25 (third class city), §440 30 (first class city), Missouri §§74 505, 507, 510, 513 (first class), §§88 023, 027, 033, 037 (public works, all cities), New York Highway Law, §§174, 176, 177, 179 (town roads), North Carolina, §§160-210, 211, 212, 214, Oklahoma tit. 66, §§53, 55, Oregon §§223 025, 120, 125, Pennsylvania tit. 53, §§1081, 1082, 1089, 1091 (general municipal law), tit. 53, §§56908, 56914, 56920, 56923, 56929, 56935, 56938, 56945 (first class township), South Carolina §§25-162, 165, 166, 168, Texas art. 1206 (city of more than 1000 in population), Vermont Tit. 19-385, 387, 388, 421, 422, 423, Wisconsin §§80 19, 24 (towns)

With the exception of Oregon and South Carolina, the members of the board of viewers are chosen by the appropriate court. The city council in Oregon and the parties to the condemnation proceedings in South Carolina are given the responsibility of picking the board of viewers. The statutes of all States except Michigan and South Carolina limit the size of the board to three members. South Carolina law requires the board to consist of five members; Michigan in effect, affords the landowner two jury trials by requiring twelve persons to serve as a board of viewers.

The majority of the statutes require that prospective viewers be freeholders of the city in which the property is located. Connecticut and Minnesota law provides that the viewers must be electors of the city. A viewer in Texas must be both a freeholder and a qualified voter; any "competent, disinterested" person has the capacity to serve as a viewer in Illinois and Oregon.

In all 18 States the prime function of the board is to assess compensation due the affected property owner. A report, containing the board's conclusions must be filed with the appropriate body, with recourse to a jury trial if there are dissatisfied parties.

The same variations are found in the case of cities, with respect to the power of the court over the board's determination of compensation, as are found in the statutes applicable to the State and county. In some States the board's report becomes final if there are no objections, other statutes provide that the court may confirm, modify, alter, or reject a report and appoint a new board or send the case back to the old board. The report serves in some States as a means of presenting the court with the facts of the case while the determination of damages is, in reality, made by the court. On the other hand, the board actually fixes compensation and any appeal to the trial court is from the board's report, not that of the court.

The Illinois procedure is a good example of the board serving as a fact finding body. In comparison, Texas practice typifies the function of the board as a decision-making body.



FIGURE 2
Taking land for highway construction in a heavily built-up area gives rise to many complex condemnation problems.

JURY

Federal Constitution

The concept of "due process of law" as embodied in the fifth and fourteenth amendments to the Federal Constitution and in the several State constitutions does not require a jury trial⁵⁵ Except when a State constitution provides otherwise, no particular procedure is required: "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry should be made as to the amount of compensation, and when this has been provided this is the due process of law which is required by the Federal Constitution"⁵⁶

The seventh amendment to the Constitution provides in part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . ." This provision has been repeatedly interpreted as not creating a new right but only protecting a right which existed at common law, at the date of the adoption of the Constitution⁵⁷ It was previously pointed out that the use of a common law jury was rarely if ever the practice in either England or the Colonies For this reason the Federal courts have uniformly held that a jury trial is not required in condemnation proceedings brought by the United States⁵⁸ In a leading case the Supreme Court decided that the seventh amendment does not apply to proceedings brought in State courts⁵⁹

In light of the construction by the court of the due process and jury provisions it is interesting to note that a jury trial is not afforded the parties in all cases, by the

⁵⁵ *Kohl v. United States*, 91 U.S. 367, 21 L. Ed. 449, *Shoemaker v. United States*, 147 U.S. 282, 13 S. Ct. 361, 37 L. Ed. 170, *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685, 17 S. Ct. 966, 41 L. Ed. 1165, *Bauman v. Ross*, 167 U.S. 548, 17 S. Ct. 966, 42 L. Ed. 270, *Dohany v. Rogers*, 281 U.S. 362, 50 S. Ct. 299, 74 L. Ed. 904, *Marrin M.W. Dist. v. Marrin W. Co.*, 178 Cal. 308, 173 Pac. 469, *Department of Public Works and Buildings v. Kirkendall*, 415 Ill. 214, 112 N.E.2d 611, *City of Dearborn v. Michigan Turnpike Authority*, 344 Mich. 37, 73 N.W.2d 544

⁵⁶ *Backus v. Ford Street Union Depot Co.*, 169 U.S. 557, 18 S. Ct. 445, 42 L. Ed. 853

⁵⁷ *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 33 S. Ct. 523, 57 L. Ed. 879, *Dmuck v. Schredt*, 293 U.S. 474, 55 S. Ct. 296, 79 L. Ed. 603, *Baltimore and C. Lane, Inc. v. Redman*, 295 U.S. 654, 55 S. Ct. 890, 79 L. Ed. 1636

⁵⁸ See notes 55-57

⁵⁹ *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288, and cases cited therein

Federal Rules of Civil Procedure⁶⁰ Rule 71A(h) provides:

If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue, but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, *unless the court in its discretion order that because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it* (Emphasis added)

This provision represents a compromise between those advocates of a jury trial in all cases and the proponents of the commission form of tribunal⁶¹

State Constitutions

With rare exceptions a common law jury of twelve is employed to determine the amount of compensation due the property owner. This is the case whether a board of viewers makes the preliminary determination of compensation, with recourse to a jury trial, or where the issue of compensation is initially tried before a jury. From an historical point of view this is a somewhat anomalous situation since a common law jury was not used either in England or the Colonies. To quote from Nichols:⁶²

The jury which was required in the ancient proceeding of inquest of office by which highways were laid out in England at the time of the settlement of the American Colonies, and which determined what damages would be suffered by the king or any other person, was not the common law jury of twelve presided over by a judge, but was a jury of indeterminate number, being either twelve, or less, or more, and was presided over by a sheriff or a coroner

In accordance with this practice it was the custom in most of the Colonies in which the writ of *ad quod damnum* was adopted for the

⁶⁰ Fed. R. Civ. P. 71A(h)

⁶¹ For an informative comparison between the advantages of a commission over a jury trial see PAUL, *Condemnation Procedure Under Federal Rule 71A*, 43 Iowa Law Review, 231

⁶² NICHOLS, *EMINENT DOMAIN*, 3rd Ed., Vol. I, p. 352

purpose of assessing damages in eminent domain cases, to have the tribunal which assessed the damages composed of less than twelve, and in other respects to lack the characteristics of a common law jury. It had become the practice in almost all of the original thirteen States at the time when their constitutions were adopted to refer the question of damages from the construction of ways or drains or mill dams to a commission of viewers or appraisers, generally three or five in number.

The importance of this historical fact will become apparent when the several State constitutional provisions concerning trial by jury are discussed. Suffice it to say, the right to a jury trial in condemnation proceedings stems from either the State constitution or statute. The Federal Constitution does not provide for the right of jury trial in condemnation proceedings.

A majority of the State constitutions contain provisions which concern the right to a jury trial. These provisions may be divided into four groups. The constitutions of ten States provide for a jury trial in all cases.⁶³ A second group of constitutional provisions requires a trial by jury in all cases except when the State is the condemnor.⁶⁴ The most common provision found in the State constitutions concerning jury trials is that which exists in 26 jurisdictions,⁶⁵ and provides, in substance, that the right to a jury trial shall remain inviolate or continue as heretofore. In four States a jury trial is required when the condemnation is for a corporation other than a municipal corporation.⁶⁶ The Arkansas

jury provision is applicable only when the condemnor is a private corporation,⁶⁷ while the Hawaii and Louisiana clauses,⁶⁸ by their very terms, limit jury trials to criminal cases. The Utah constitution provides that the right to a jury trial shall remain inviolate in capital cases and is waived unless demanded in civil cases.⁶⁹

In the 26 jurisdictions whose constitutions provide that the right of trial by jury shall remain inviolate or continue as heretofore practiced, the courts have interpreted the provision in conformity with the United States Supreme Court's construction of the seventh amendment of the Federal Constitution. That is, a new right to a jury trial is not created in proceedings where at common law a jury trial was not the practice.⁷⁰ In most jurisdictions it was never the custom to use a common law jury to determine the question of compensation in condemnation proceedings. It follows that a jury trial is not a constitutional requirement in those States having this type of provision.⁷¹

Because of either the specific language of the provisions or the construction placed upon them, there are only ten States where the property owner has a constitutional right to a jury trial in all condemnation proceedings (California, Colorado, Florida, Iowa, Missouri, North Dakota, Ohio, Oklahoma, South Dakota and West Virginia).

Statutes

In only ten jurisdictions is a jury trial required in all cases by the State constitution. In Colorado, a trial by a jury of three freeholders may be had at the option of the landowner; in Missouri, three commissioners may be substituted for a jury, if the statute so provides. An additional eight

⁶³ California art I, §14, Colorado art II, §15 (damages are to be assessed by three freeholders or by a jury at the option of the owner), Florida art XVI, §29, Iowa art I, §18, Missouri art II, §21 (in all cases by a jury or three commissioners as may be prescribed by law), North Dakota art I, §14, Ohio art I, §19, art XIII, §5, Oklahoma art II, §24, South Dakota art VI, §13, West Virginia art III, §9.

⁶⁴ Alabama art XII, §235, Alaska art I, §16, Illinois art II, §13, Kentucky §242, Maryland art III, §§40, 40A, 40B, Michigan art XIII, §2, New York art I, §7, Pennsylvania art XVI, §8.

⁶⁵ Arkansas art II, §7 (inviolate), Connecticut art I, §21 (inviolate), Delaware art I, §4, Georgia §2-5101 (inviolate), Idaho art I, §7 (inviolate), Indiana art I, §20 (inviolate), Kansas Bill of Rights, §7 (inviolate), Maine art I, §20, Massachusetts Part the First, art XV, Minnesota art I, §4 (inviolate), Mississippi art III, §31 (inviolate), Montana art III, §20 (inviolate), Nebraska art I, §6 (inviolate), Nevada art I, §3 (inviolate), New Hampshire Part I, art XX, New Jersey art I, §7 (inviolate), New Mexico art II, §12 (inviolate), North Carolina art I, §19 (inviolate), Oregon art I, §17 (inviolate), Rhode Island art I, §15 (inviolate), Tennessee art I, §6 (inviolate), Texas art I, §15 (inviolate), Vermont ch I, art XII, Virginia art I, §11, Wisconsin art I, §5 (inviolate), Wyoming art I, §9 (inviolate).

⁶⁶ Arizona art II, §17 (But see *McCune v City of Phoenix*, 83 Ariz 98, 317 P 2d 537, which seems to imply that a jury trial must be provided in every case unless waived by the con-

demnee), Illinois art XI, §14, South Carolina art IX, §20, see *Smith v. City of Greenville*, 229 S C 252, 92 S E 2d 639, Washington art I, §16.

⁶⁷ *Young v Red Ford Levee District*, 124 Ark 61, 186 S W 604.

⁶⁸ Hawaii Organic Act, §83, Louisiana art. VII, §41, see *State v Burriss*, 169 La 520, 125 So 580.

⁶⁹ Art I, §10.

⁷⁰ *Bowman v Virginia State Entomologist*, 128 Va 351, 105 S E 141, *Seward v Denver and R G R Co.*, 17 N M 557, 131 Pac 980, *Kennebec Water District v Waterville*, 96 Me 234, 52 Atl 774, *Aldridge v Bogue Phala Drainage Dist.*, 106 Miss 626, 64 So 377, *Moore v Capitol Gas Corp.*, 117 Mont 148, 158 P 2d 302, *Portneuf Ir Co v Budge*, 16 Idaho 116, 100 Pac 1046, *Petition of the Mt Washington Road Company*, 35 N H 134.

⁷¹ NICHOLS, EMINENT DOMAIN, 3rd Ed., Vol I, p 357, N 27.

Table 2 States Providing for Jury Trial

Jury Trial in All Cases	Constitutions				Statutes			
	Jury Trial Except when State Is Condemnor	Right to Jury Trial Remains Inviolat or Continues as Heretofore	Jury Trial when Appropriation Is for a Corporation Other Than a Municipal Corporation	Applicable Only to Criminal Matters	General Condemnation Law	Procedure Applicable to State Highway Department	Procedure Applicable to Counties	Procedure Applicable to Cities
Calif Colo Fla Iowa Mo N D. Ohio Okla S D W. Va	Ala Alaska Ill Ky Md Mich N Y Pa	Ark Conn Del Ga Idaho Ind Kans. Me Mass Minn Miss Mont Neb Nev N H N J N Mex. N C Ore R I Tenn Texas Vt Va Wis Wyo	Ariz Ill S C Wash	Hawai La Utah	Ala Alaska Ariz Calif Colo Fla Ga Idaho Ill Ind Iowa Kans Ky Md Mass Minn Miss Mo Mont Neb Nev N J N Mex N C N D S D Tenn Texas Utah W Va Wis Wyo	Ark Ky Me Md N H N D Ohio Okla Ore Pa R I S C S D Vt Wash	Mich Minn Mo Ohio Ore Pa S C Wash	Ala Ariz Ark Colo Conn Ill Ind Kans Ky Mich Minn Mo N C Ohio Okla Ore Pa S C Texas Vt Wash

State constitutions provide that a jury trial shall be held except when the State is the condemnor. Although the right to a jury trial is a constitutional right only in a small group of States, it is given by statute in a majority of jurisdictions. For the purposes of this discussion the term "jury trial" refers to the use of a common law jury of twelve jurors. In the next section several statutes will be discussed which make reference to a trial by jury, the jury not being a common law jury.

The statutes of 42 jurisdictions clearly (and an additional State probably) provide for a trial by jury in condemnation proceedings brought by the State highway

department. Of these 42 jurisdictions, the jury provision is found in the general condemnation law of 31 States.⁷² In 15 States, special condemnation procedures for the State highway department provide for a trial by jury.⁷³

It is difficult to determine from a reading of the Nebraska general condemnation law

⁷² Alabama tit 19, §17, Alaska §57-7-16, Arizona §12-1122, California Code of Civil Procedure, §1248, Colorado §50-1-7, Florida §73 10, Georgia §36-601, §36-614a, Idaho §7-711, Illinois §47-1, Indiana §3-1707, Iowa §472 21, Kansas §26-102, Kentucky §§416 020, 120, 280, Maryland art 33A, §6, Massachusetts ch 79, §22, Minnesota §117 133, Mississippi §2766(C), Missouri §523 060, Montana §93 9915, Nevada §37 110, New Jersey tit 20-1-20, New Mexico §22-9-8, North Carolina ch 40 20, North Dakota §32-1513, South Dakota §37 4001, Tennessee §23-1418, Texas §3266(6), Utah §78-34-10, West Virginia §5381, Wisconsin §32 11, Wyoming §3-6119.
⁷³ Arkansas §76-533, Kentucky §177 087, Maine ch 23, §23, Maryland art 89B, §52, New Hampshire §6233 17,

whether a jury trial is required. The operative provision of the statute is §76-717 wherein it is provided that:

After docketing of the appeal, the issues shall be made up and tried in the district court in the same manner as an appeal from the county court to the district court in a civil action

An inspection of the county court code discloses that appeals from the county court are to be handled in the same manner as provided by law in cases tried and determined by justices of the peace⁷⁴ Neither the sections pertinent to appeals from the justice of the peace⁷⁵ or the power of the district court to reverse or modify judgments and orders⁷⁶ make any reference to a jury trial In all likelihood the answer is found in §25-1104 which provides that "issues of fact arising in actions for the recovery of money or of specific real or personal property shall be tried by a jury unless a jury is waived or a reference be ordered as hereinafter "

Aside from the general condemnation statutes which are applicable to all condemnors, the provisions found in eight States pertaining to counties⁷⁷ and in 21 States, applicable to some or all cities⁷⁸ provide for a jury trial

MISCELLANEOUS TRIBUNALS

In a majority of cases a trial by jury is held to determine the amount of compensation due the property owner However, in addition to the use of a jury there are other means of deciding this question To begin with, in most, if not in all States the parties may waive a jury trial In the

234 51, North Dakota §24-0726, Ohio §5519 02, Oklahoma tit 69, §46(5), Oregon §366 380, Pennsylvania tit 36, §670-303, Rhode Island §37-6-24, South Carolina §§33-134, 139, South Dakota §28 13A02, Vermont Tit 19-232, §11, Washington §8 04 080

⁷⁴ §24-544
⁷⁵ §27-1301, 1315
⁷⁶ §25-1901, 1910
⁷⁷ Michigan §8 48, Minnesota Laws of 1959, Ch 500, Art IV, §12-8, §162 21(6), Missouri §228 250 (St Louis County), Ohio §5563 05, Oregon §281 330, Pennsylvania tit 16, §2424, South Carolina §33-838, Washington §8 08 010
⁷⁸ Alabama §37-509, Arizona §9-608, Arkansas §§35-204, 903, Colorado §50-6-13, Connecticut §13-30, Illinois §24-84-23, Indiana §48-2112, Kansas §26-205, Kentucky §94 710, Michigan §§5 1446, 1872, Minnesota §§440 27, 39, Missouri §§74 513, 88 037, North Carolina §160 214, Ohio §719 06, Oklahoma tit 66, §55, Oregon §223 125, Pennsylvania tit 53, §1091, tit 53, §§56915, 56945 (First Class Townships), South Carolina §25-168, Texas art 1206(D), Vermont Tit 19-421, Washington §§8 12 090, 8 12 100

event this should occur, several approaches are found in the statutes providing for a trier of the facts

The most obvious substitute for a jury is the judge. It may be assumed that unless the statute provides otherwise the judge will decide questions of fact in lieu of a jury. The Louisiana expropriation (condemnation) statute specifically provides that expropriation cases shall be tried before the court without a jury⁷⁹

In place of the jury many jurisdictions provide that an official referee shall be appointed to take testimony and make a report to the court. Embodied in this report are the referee's findings of fact and conclusions Generally speaking, the court is authorized to accept, reject or modify the report or to require a new hearing before the same or another referee Although not spelled out in the statutes, it may be inferred that in practice the hearings are somewhat less formal than before the court and jury. This is not to say that evidence inadmissible before a court or jury would be admissible in a hearing conducted by a court appointed referee

Most, if not all, the rules of civil practice in the several States provide for the appointment and use of referees These laws are not included within the scope of this study However, the general condemnation statutes of several States make specific reference to the use of referees in lieu of a jury.⁸⁰ The procedures established in Connecticut⁸¹ and New York⁸² for the State highway department dispense with a jury and substitute a court appointed referee.

To improve and simplify condemnation by government agencies Georgia, in 1957, provided an optional method which provides that the determination of compensation will be made by a special master⁸³ The master is appointed by the court, and his decision may be appealed to a trial by jury

In several States an ad hoc board much like a board of viewers is used instead of

⁷⁹ Tit 19, §4

⁸⁰ For example, California Code of Civil Procedure, §1248, Idaho §7-711, Nevada §37-110, Utah §78-34-10

⁸¹ §2264

⁸² Highway Law, §30

⁸³ Ch 36, §606A

a jury to determine compensation.⁸⁴ The major difference between this board and a board of viewers is that there is no appeal to a jury trial from the decisions of the boards. In reality their determination has the same conclusiveness as a jury verdict, except for the possibility that the court has more power over the board's report than over a jury verdict. Generally speaking, once the report of the board is filed with the court, unless good cause is shown, the court is directed to confirm the board's report. If good cause is shown, such as the application of an erroneous rule of law, bias or in some cases an excessive or insufficient award, the court is permitted to modify the report or direct that a new hearing be held before the same or a new board.

These boards range from three members in Arizona, Delaware, Michigan and New York to six members in Missouri. The statutes of Virginia, Wisconsin and the District of Columbia specify that the board shall consist of five persons. With the exception of Missouri, all the statutes specify that a majority of the members may act. At least five out of the six members of the "jury" must sign the report in Missouri. The Virginia procedure is somewhat unique in that if the report is challenged the commissioners are allowed to testify in court as to the basis of their report.⁸⁵ In Michigan the commissioners' report is prima facie proof of the compensation due the property owner.⁸⁶

With the exception of the District of Columbia, the several statutes establish the same qualification as that required of members of board of viewers. That is to say, a prospective viewer or commissioner must be a disinterested, competent person and, in most cases, a freeholder. In the District a special list of persons is kept from which "jurors" are chosen. The Michigan statute provides that the commissioners shall not

be residents of the township wherein the property is located.⁸⁷

The various boards are directed to view the property in question, hear testimony and file a report with the court. However, in Delaware a view will be permitted only in the discretion of the court.

General Comments

One objective of this part of the study is to describe the various procedures used for determining the amount of compensation due the condemnee. The previous discussion has shown that there are three basic procedures followed by the several States in determining compensation:

1. A preliminary hearing before a board of viewers and determination of compensation by that body, with an appeal to the trial court for a trial de novo, that is, a redetermination of the amount of compensation, with or without a jury;

2. A jury trial without the use of a board of viewers;

3. A hearing before board of viewers or commissioners, somewhat similar to that body used in No. 1, but without a trial de novo.

In those jurisdictions which provide for a jury trial, either after a determination by a board of viewers or initially, the parties have the right to waive a jury trial. In the event a jury is waived, the statutes of the several States provide that the question of compensation shall be decided by the judge. Several State statutes provide that the judge, on his own initiative or at the request of the parties, may appoint referees to hear the evidence and make a report to the court. This report when confirmed by the court becomes the judgment of the court.

The second objective of this part of the study is to compare and analyze the various procedures for determining compensation. The ultimate purpose of such an analysis should be to draw upon the best features of the different procedures to develop better ones.

This study was concerned only with the characteristics of condemnation procedures

⁸⁴ Arizona §9-608 (if waive jury trial), California Streets & Highways Code, §4200 (Street Opening Act of 1903), Delaware tit. 10, §6108(b), Michigan §58 184, 9 113, Missouri §228 180 (county), New York Highway Law, §174 (town highways), Village Law, §3212 (village roads), General Condemnation Law, §13, Unconsolidated Law, ch. 79, §7, Virginia, §25-12, Wisconsin §80 27 (laying out of highways), District of Columbia, §§7-205, 16-604

⁸⁵ §25-18 1.
⁸⁶ §8 193.

⁸⁷ §8 184

as prescribed by law, that is, the form of the procedures. Form is not an end in itself but rather a means of attaining desired results from the condemnation process. Revisions in form are not to be made for their own sake but to bring about improved results. Since the study did not investigate results of the different methods for determining compensation, definite proposals for procedural changes cannot be drawn from it. However, a comparison of the results desired and the elements of the different procedures points up some of the factors which should be investigated to determine whether a given change in procedural form would have beneficial consequences.

It would seem that an effective procedure for determining compensation due a condemnee would have the following attributes:

1 *Fairness* The landowner should get the full amount to which he is entitled—and the State should pay no more than required—under the law.

2 *Economy*. The determination should be made at as little cost, whoever pays the cost, as is practical.

3 *Speed* In the interests of both parties, the dispute should be settled as soon as possible.

4 *Simplicity* The procedure should be only as complicated as is necessary to protect the right of the parties.

Fairness is of paramount importance. The whole purpose of the procedure is to come up with the correct amount of money due the landowner. Economy, speed, and simplicity should be effected only to the extent that they do not unduly interfere with this over-riding consideration. The problem, then, is one of striking a balance between expediency and accuracy.

Whether the correct amount, as prescribed by law, is arrived at depends to a great extent on the decision-making body itself. Should the question be decided by a jury of laymen or by people with more familiarity with real estate values? A board of lawyers, engineers and real estate experts would undoubtedly be better able to understand the rather complicated rules for determining values and damages than would

the average juror. On the other hand, this question involves the rights of individual citizens and, without getting into a detailed discussion of American jurisprudence, there is serious question as to whether the decision should be taken from the traditional jury and turned over to experts. Perhaps the facts can be presented so that, with proper guidance and control from the judge, a jury can reach as reasonable a decision as could persons versed in the technical rules involved. Professional experts, who do a considerable amount of such evaluation, may unconsciously develop bias one way or another. Individuals may give more weight to one particular element of damage than is justified, or may gradually tend to favor either the condemnor or the property owner. The jury's verdict, which requires agreement among most, if not all of several people, may average out these individual differences. On the other hand, the jury may get so bogged down by discussion that the verdict will be arrived at in a confused manner and be fair to no one.

The expert versus the layman question is obviously not one that can be solved by theoretical discussion.

The factors which contribute to the cost, speed, and simplicity of a proceeding are a good deal less abstract than those involved in its fairness. Experts are paid a lot more for their services than jurors. This may be offset, however, by higher administrative costs for the jury system. The length of time that the different tribunals take to settle a case would also affect the cost.

A jury, since it is larger than a commission of a few experts, is often said to be unwieldy and slower than the commission. This may or may not be so. Both bodies would presumably consider the same testimony and estimates of value so the time for presentation of the case would not necessarily be affected. The commission would probably work under relaxed rules of evidence, but this could have the effect of either prolonging or shortening the time required for determination. It is questionable whether the full jury would take longer in its deliberations than would a panel of experts who disagreed with each other.

One of the widely-used procedures mentioned previously consists of a hearing by a board of viewers or commissioners, and then, if the results of the hearing are not acceptable to the parties, a jury trial de novo. In a trial de novo the question of compensation is redetermined without considering the previous findings by the viewers or commissioners.

This repetition of the fact-finding process would seem to be wasteful duplication of effort, but this is not necessarily so. If a great percentage of condemnation cases handled in this way were settled at the initial hearing without ever getting to trial this procedure could be considerably quicker and more economical in total effect than would be indicated by the few cases which do go through both a hearing and a trial.

The economy, speed, and simplicity of condemnation procedures lend themselves quite readily to objective analysis. For instance, the costs of two procedures can be totaled, the factors which contribute to the cost can be evaluated, and there is no doubt which one is more expensive. This does not apply to the fairness of a procedure, how-

ever. When the final awards or judgments from different types of procedures are tabulated, it is only known which ones result in higher awards and which ones in lower. No progress has been made in deciding whether the high or low award is fair. Without trying to define strictly what a fair procedure is, it may sometimes be decided as a matter of policy that awards made by a certain procedure seem unduly to favor or prejudice certain classes of parties. Once this finding has been made, the problem can be analyzed in terms of the factors which influence the fairness of a procedure, and procedural modifications which will bring about the desired change in result can be devised.

To reiterate, the reason for changing procedural forms is to effect changes in the end result. Since this study is limited to the prescribed form of procedure, no conclusions can be drawn as to which procedures best serve the intended function. However, this study of form does suggest some factors which, when studied, would indicate whether certain reforms were desirable. This comment is concerned with those factors.

RULES FOR DETERMINING COMPENSATION

TIME AT WHICH VALUE IS DETERMINED

Before the various rules for determination of compensation can be applied, the date at which the property is to be valued must be designated. The cases speak in terms of "market value as of the date of taking." This statement may be of little assistance since the problem still remains of what act or acts are required for the "taking" to occur. A review of the jurisprudence reveals that a variety of dates are used as the time at which the value should be determined.

Real estate values are subject to many influences and are by no means constant. The amount of the final award may reflect whether the date chosen is that of the filing of the summons, the viewers' award, the trial, the vesting of title or some other date. Although a particular date is chosen and is the critical point for valuation purposes the courts have not consistently applied the date designated, be it by statute or case law.

Before setting forth the existing law, it would be well to examine the consequences of choosing a particular date. Condemnation proceedings can, and many do, require a protracted period of time before they are terminated. If the condemnation occurs in a rising real estate market and the date of valuation is fixed at an early stage of the proceedings (for example, the service of the summons) it is obvious that the final award will be less than if the date of trial or vesting of title is chosen.

Property has value to the extent that it may be used. If, for practical purposes, the freedom of use is denied the owner, although title and possession still remains in the owner he has been denied something of value. Looking at the problem from this aspect the rights of the property owner might be better protected by designating as the key date the earliest practical point.

Experience demonstrates that a substantial period of time often elapses be-

tween the institution of condemnation proceedings and actual trial. Logically, if the date of trial is the time at which property is valued any improvements made between the commencement of the proceedings and trial date should be compensable. Such a result may, in certain cases, materially increase the cost of right-of-way acquisition. The earlier the date of valuation the less the opportunity for this added cost to arise. This is another example of the importance of the valuation date.

As a practical matter, the theoretically correct date, that of transfer of title and possession, cannot be used in most cases. Convincing arguments can be made in support of whatever date is chosen. The difficulty is not in formulating a rule but in applying it. Whether realizing it or not the courts in certain areas have consistently failed to value property as of the "date of taking," whatever such date may be.

The confusing problem of the allowance of the enhancement in value of the condemned property created by the proposed improvement is a case in point. For the purposes of discussion it is assumed that the rule in a particular jurisdiction is that market value is to be determined as of the date the property owner is served with a summons. At the trial the property owner attempts to introduce evidence that his property has appreciated in value because of the proposed improvement. Should such evidence be admissible?⁸⁸ Conversely, instead of increasing, the market value of the property has dropped due to the proposed improvement. Is evidence of such decrease admissible?⁸⁹

The problem of enhancement in value and its relation to the equally perplexing problem of the set-off of benefits will be discussed subsequently. It is sufficient to note that to the extent that enhancement is dis-

⁸⁸ *Gate City Terminal Co v Thrower*, 136 Ga 456, 71 S E 903.

⁸⁹ *Atchison Etc. R Co v. Southern Pacific Co.*, 13 Cal App 2d 505, 57 P 2d 575. *A Gettlemen Brewing Co v Milwaukee*, 245 Wis 9, 13 N W 2d 541.

allowed the court is actually substituting another "time of taking" for that prescribed by law. Nothing is intrinsically wrong with this result and there may be compelling policy reasons requiring such action. However, a court creates confusion if it states that a particular date is the critical point for valuation purposes and then disregards such date.

Once it is recognized that the date chosen is of some consequence the next step is to determine how the several jurisdictions have handled the problem. A variety of dates are used in the several States and territories and more than one within a particular jurisdiction.

A small number of jurisdictions treat the problem in their general condemnation statutes. The key date is the issuance or service of the summons in ten jurisdictions.⁹⁰ With the exception of the Indiana provision, all the statutes previously cited expressly state that improvements placed upon the condemned property subsequent to the date of valuation are non-compensable. The California provision contains a clause which protects the landowner. If the case is not tried within one year from the date of the commencement of the action, that is, the filing of a complaint and issuance of a summons, unless the delay is caused by the property owner, the com-

ensation and damages shall be determined as of the date of the trial.⁹¹ In addition to the general condemnation provisions, the Arizona statutes contain a section applicable only to the State highway commission.⁹² Pursuant to this section property is valued immediately preceding the date the highway commission, by resolution, establishes the necessity of the property. In the event the action to condemn is not brought within two years of the date of the resolution, the compensation is measured as of the date of the summons.

The most common date as of which compensation is assessed is either the time of trial or the award of the commissioners.⁹³ A distinction appears to exist in Louisiana between compensation for the land taken and damage to the remainder. In the former situation the critical date is the institution of proceedings,⁹⁴ in the latter case

⁹¹ See *City of San Rafael v. Wood*, 144 Cal App 2d 604, 301 P 2d 421, for discussion of this proviso and the problem created by the condemnor taking possession prior to the date of trial. The holding is that the property owner must be compensated for the use of his property during the period between possession and trial and that the awarding of interest from the date of possession is sufficient compensation.

⁹² §18-155(D)
⁹³ Colorado §50-1-17, *Union Exploration Co v. Moffat Tunnel Imp. Dist.*, 104 Colo 109, 89 P 2d 257, *Mulford v. Farmers Reservoir and Irrigation Co.*, 62 Colo 167, 161 Pac 301, *Delaware Board of Education v. 13 Acres of Land*, 50 Del 387, 131 A 2d 180, *Georgia Gate City Terminal Co v. Throver*, 136 Ga 456, 71 S E 903, *Illinois Chicago Park Dist. v. Downey Coal Co.*, 1 Ill 2d 54, 115 N E 2d 223, 45 A.L.R 2d 518, *Kansas Collingwood v. Kansas Turnpike Authority*, 181 Kan 43, 310 P 2d 211, modified 181 Kan 838, 317 P 2d 400, *Minnesota Minneapolis Traction Co v. Harkins*, 108 Minn 478, 122 N W 450, *Missouri State v. Galloway*, —Mo—, 292 S W 2d 904, *State v. Deutschman*, 346 Mo 755, 142 S W 2d 1025, *New York Matter of County of Westchester*, 204 Misc 1031, 127 N Y S 2d 24, *Texas Gillam v. State*, —Tex—, 95 S W 2d 1019, *Tarrant County Water Control and Improvement Dist v. Fowler*, 142 Tex 375, 179 S W 2d 694, *West Virginia Buckingham v. Great Scott Coal Co.*, 75 W Va 423, 83 S W 1031, *Wisconsin Wisconsin Power Co v. Public Service Comm.*, 231 Wis 390, 284 N W 586, rehearing denied, 286 N W 392, *Wyoming* §3-6122

⁹⁴ *State v. Landry*, 219 La 721, 53 S 2d 908

⁹⁰ Alaska §57-7-14, Arizona §12-1123(A), California Code of Civil Procedure, §1249, *County of Los Angeles v. Hoe*, 138 Cal App 2d 74, 291 P 2d 98, *Hawaii*, §315, *Idaho* §7-712, *Independent School District v. Lauch*, 78 Idaho 485, 305 P 2d 1077, *Indiana* §3-1706 (fifth), *Montana* §93-9913, *State v. Lee*, 103 Mont 482, 63 P 2d 135, *Nevada* §37 120, *New Mexico* §22-9-9, *Utah* §78-34-11, *Hyde Park Town v. Chambers*, 99 Utah 118, 104 P 2d 220

Table 3 States Stipulating Time at Which Property Is Valued

Issuance or Service of Summons	Trial or Award of Commissioners	Date of Trial	Filing of Petition to Condemn	Date Highway Commission by Resolution Establishes Necessity
Alaska Arizona California Hawaii Idaho Indiana Montana Nevada New Mexico Utah	Colorado North Dakota Wyoming	Louisiana (damage to remainder)	New Jersey North Carolina	Arizona



FIGURE 3

Where land values are changing, as in this rapidly developing area, the date at which condemned land is valued is especially important.

the date of trial is the valuation date.⁹⁵ Ohio decisions show that the date of valuation is either the time of possession or the date of trial, whichever comes first.⁹⁶

Several States have adopted the filing of the petition to condemn as the date damages are assessed.⁹⁷ In those jurisdictions which take property by the administrative method damages are assessed as of the date of tak-

ing, which is commensurate with the vesting of title and/or possession.⁹⁸ The date of taking in these jurisdictions would occur when the necessary papers are filed with the appropriate officials. In the event possession is taken prior to the filing of the petition or administrative order cases have held the valuation must be made as of the date of possession.⁹⁹

The preceding discussion has shown that there are various alternative dates from which a State may choose the valuation date. It is important to keep in mind the

⁹⁵ Tit. 48-453.

⁹⁶ Appeal of Stickels, —Ohio App.—, 104 N.E.2d 186; In re Appropriation of Easement for Highway Purposes, 90 Ohio App. 471, 107 N.E.2d 387; Board of Education of Cleveland v. Hecht, 102 Ohio App. 521, 130 N.E.2d 707.

⁹⁷ Alabama: Smith v. Jeffcoat, 196 Ala. 96, 71 S. 717; Arkansas: Keith v. Drainage Dist., 183 Ark. 384, 36 S.W.2d 59; Illinois: Chicago v. McCausland, 379 Ill. 602, 41 N.E.2d 745; Louisiana: Louisiana Power and Light Co. v. Simmons, 229 La. 165, 85 S.2d 251; Nebraska: Platte Valley Public Power and Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N.W.2d 200, Application of Burt County Public Power Dist., 163 Neb. 1, 77 N.W.2d 773; New Jersey: \$20:1:9, New Jersey Highway Authority v. Wood, 39 N. J. Super. 575, 121 A.2d 742; North Carolina: General Condemnation Law, §40-17, Western Carolina Power Co. v. Hayes, 193 N.C. 104, 136 S.E. 353; District of Columbia: Ralph v. Hazen, 68 App. D.C. 55, 93 F.2d 68, but see Carlock v. United States, 60 App. D.C. 314, 53 F.2d 926.

⁹⁸ NICHOLS, EMINENT DOMAIN, 3rd Ed., Vol. 3, p. 18 and see cases cited in note 52 therein.

⁹⁹ Missouri: Newman v. City of El Dorado Springs, —Mo.—, 292 S.W.2d 314; New York: Matter of County of Westchester, 204 Misc. 1031, 127 N.Y.S.2d 24; North Carolina: North Carolina State Highway Commission v. Young, 200 N.C. 603, 158 S.E. 91; North Dakota: Constitution, art. I, §14, Kuecks v. Cowell, —N.D.—, 97 N.W.2d 849; South Carolina: Board of Commissioners v. Richardson, 122 S.C. 58, 114 S.E. 632; Tennessee: Snowden v. Shelby County, 118 Tenn. 725, 102 S.W. 90; State v. Roscoe, 181 Tenn. 43, 178 S.W.2d 392; Virginia: Chairman of Highway Commission v. Fletcher, 153 Va. 43, 149 S.E. 456.

consequences which follow from the designation of a particular date. There are advantages and disadvantages inherent in each date and a logical argument may be made in support of any date chosen. However, the interests of both the property owner and condemnor are protected if either the act which initiates the condemnation proceedings or the taking of physical possession of the property, whichever occurs first, is adopted. The property owner loses the beneficial aspects of owning property when he is denied possession while the condemnor is allowed to begin construction of the improvement. From a practical point of view, the commencement of proceedings to condemn property limits the usefulness of the property. A combination of these two dates would seem to be an equitable resolution of a problem which admits of only an arbitrary solution.

CONSTITUTIONAL AND STATUTORY RULES

The preceding discussion concerned itself with the several bodies which decide the question of compensation and the time at which said compensation is to be determined. Now the various statutory rules which govern the determination of compensation will be analyzed. This analysis has been limited, for the most part, to constitutional and statutory rules, and does not attempt an exhaustive investigation of the tremendous amount of pertinent case law.¹⁰⁰

One reason for the seemingly inconsistent decisions concerning certain elements of damages may stem from the constitutions of the various States. The States are almost equally divided between the 22 jurisdictions which must compensate for a "taking" of property¹⁰¹ and the 23 States which must pay for a "taking or damaging" of prop-

erty.¹⁰² The Connecticut constitution contains two provisions: one provides for the payment of compensation for the taking of property;¹⁰³ the other section provides in part, "and every person, for any injury done him in his person, property or reputation shall have remedy by due course of law."¹⁰⁴ Thus, Connecticut is both a "taking" and "damaging" State. The constitutions of Alabama, Kentucky and Pennsylvania each contain two provisions, one applicable to all types of condemnations¹⁰⁵ and the other governing proceedings brought by municipal and other corporations or individuals granted the power to condemn property.¹⁰⁶ The former refers to property being "taken"; the latter speaks in terms of property "taken, injured or destroyed." North Carolina's constitution does not contain a condemnation provision as such, but does provide, in substance, that no person's property ". . . ought to be taken . . . but by the law of the land."¹⁰⁷

What are the consequences, if any, of a "taking" as compared to a "taking or damaging" provision? The distinction in the "partial taking cases" seems to be non-existent because irrespective of the type of provision, severance damages to property not taken are recoverable. For present purposes the various rules applicable to a "partial taking case" may be disregarded but it is sufficient to point out that even under a "taking or damaging" clause not all damages are recoverable. The courts have limited the breadth of the damaging provision by developing the concept of "damage in the constitutional sense." Such incidental damages as loss of business, good will and expense of moving are not compensable as separate elements of damages.

¹⁰⁰ Alaska art I, §18, Arizona art II, §17, Arkansas art II, §22, California art I, §14, Colorado art II, §15, Georgia art I, §3, ¶1, Illinois art II, §13, Louisiana art I, §2, Minnesota art I, §13, Mississippi art III, §17, Missouri art I, §26, Montana art III, §14, Nebraska art I, §21, New Mexico art II, §20, North Dakota art I, §14, Oklahoma art II, §24, South Dakota art VI, §13, Texas art I, §17, Utah art I, §22, Virginia art. IV, §58, Washington art I, §16, West Virginia art III, §9, Wyoming art I, §33.

¹⁰¹ Art I, §11.

¹⁰² Art I, §12.

¹⁰³ Alabama art I, §23, Kentucky §13, Pennsylvania art I, §10.

¹⁰⁴ Alabama art XII, §235, Kentucky, §242, Pennsylvania art XVI, §8.

¹⁰⁵ Art I, §17, see *Yancey v North Carolina State Highway Comm*, 222 N C 106, 22 S E.2d 256.

¹⁰⁰ Excellent references on the subject of just compensation are NICHOLS, *EMINENT DOMAIN*, 3rd Ed., especially volumes 3-6, ORGEL, *VALUATION UNDER EMINENT DOMAIN*, Second Edition, and KALTENBACH, *JUST COMPENSATION*, which contains all the most recent cases.

¹⁰¹ Delaware art I, §8, Florida Declaration of Rights, §12, Idaho art I, §14, Indiana art I, §21, Iowa art I, §18, Kansas art XII, §4 (applies to any corporation), Maine art I, §21, Maryland art III, §§40, 40a, 40b, Massachusetts Part I, art X, Michigan art XIII, §1, Nevada art I, §8, New Hampshire Part I, 12th, New Jersey art I, §20, New York art I, sec 7(a), Ohio art I, §19, Oregon art I, §18, Rhode Island art I, §16, South Carolina art I, §17, Tennessee art I, §21, Vermont ch I, art. 2nd, Wisconsin art I, §13.

The significance of these clauses arises in cases where no property is taken "Taken" as used here means the actual physical appropriation of a tract of land. However, the courts have expanded the meaning of "taken" to include certain aspects of the "taken or damage" provisions and do not limit the concept of "taking" to mean a physical appropriation of property.¹⁰⁸ Nichols states:

The modern and prevailing view is that any substantial interference with private property which destroys or lessens its value, or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed, is, in fact and in law, a "taking" in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed.¹⁰⁹

Thus courts have held that pollution of the air,¹¹⁰ and extreme noise¹¹¹ may be a "taking" in the constitutional sense. However, a recent Kentucky case held that dust caused by the construction of a highway did not amount to a "taking" of land adjacent to the highway.¹¹²

An owner of property abutting a conventional highway is in possession of easements of light and air¹¹³ over such street as well as easement of view¹¹⁴ and of access.¹¹⁵ These easements are considered property rights for which the owner is entitled to receive compensation in the event they are interfered with.¹¹⁶ It is beyond the scope of this monograph to discuss the problem of controlling access, but if such control goes beyond a certain point, which depends upon the particular facts, a court will con-

strue such control as a "taking" of property and require the payment of compensation.¹¹⁷

Generally, a "taking" State is not constitutionally required to compensate for every depreciation in value of property not physically taken.¹¹⁸ Nichols summarized the present status of the law as it pertains to "damages" as a "taking" as follows.¹¹⁹

Accordingly, although it has found some following among the courts and text writers, the Supreme Court of the United States and the great majority of the state courts have adhered to the old doctrine and hold that when the owner of property continues in use and possession as before, it is not taken in the constitutional sense, however much it may be depreciated in value. In other words, when a municipal or a public service corporation, or other party to whom the power of eminent domain can be constitutionally delegated, inflicts injury upon private land under authority of and in compliance with an act of the legislature, and there has been no want of reasonable care or skill in the execution of the power, such party is not liable in an action at law for such injury, even though the same act if done without legislative sanction would be actionable, unless the injury is of such a character as to deprive the owner of the use and possession of his land, or compensation is required by special statutory or constitutional provision whenever property is damaged by the construction of a public improvement.

As an example of the hazards involved in making generalizations in this field, the court in a recent South Carolina case¹²⁰ stated that although the State constitution contains only a "taking" clause the court does not recognize a distinction between a "taking" as compared to a "damaging." By holding that a deprivation of the ordinary beneficial use and enjoyment of property is commensurate to its being taken it is doubtful whether there remains in South Carolina any significant difference between a "taking" as compared to a "damaging" of property.

Despite the progressively more liberal construction of the concept of "taking",

¹⁰⁸ *Nelson v. Wilson*, 239 Minn 164, 58 N W 2d 330, *Eller v. Board of Education of Buncombe County*, 242 N C 584, 89 S E 2d 144.

¹⁰⁹ NICHOLS, *EMINENT DOMAIN*, 3rd Ed., Vol. 2, p. 259, fn. 6.
¹¹⁰ *Richards v. Washington Terminal Co.*, 233 U S 546, 34 S Ct 654, 58 L Ed 1088, *Cogswell v. New York R R Co.*, 103 N Y 10, 8 N E 537, *Louisville v. Hekemann*, 161 Ky 523, 171 S W 165, *Dayton v. Asheville*, 185 N C 12, 115 S E 827, 30 A L R 1186.

¹¹¹ *Dicta, Baltimore R R Co v. Fifth Baptist Church*, 108 U S 317, 2 S Ct. 719, 27 L. Ed 739, see also *Peabody v. United States*, 231, U S 530, 34 S Ct 159, 58 L Ed 351.

¹¹² *Commonwealth v. Moore*, —Ky—, 267 S W.2d 531.
¹¹³ *Sweet v. Irrigation Canal Co.*, 198 Ore 166, 254 P 2d 700, *Wolf v. Providence*, 77 R I 192, 74 A 2d 843.

¹¹⁴ *Keinz v. State*, 2 App Div 2d 415, 156 N Y S 2d 505, *Northio-Theatres Corp v. 223 Main Street Hotel Corp.*, 313 Ky 329, 231 S W 2d 65.

¹¹⁵ *People v. Russell*, 48 Cal 2d 189, 309 P 2d 10, *Department of Public Works and Buildings v. Wolf*, 414 Ill 386, 111 N E 2d 322, *Iowa State Highway Commission v. Smith*, 248 Iowa 869, 82 N W 2d 755.

¹¹⁶ *Department of Public Works and Buildings v. Finks*, 10 Ill 2d 20, 139 N E 2d 242, *City of Cannelton v. Lewis*, 123 Ind App 473, 111 N E 2d 889, *Hillrege v. City of Scottsbluff*, 164 Neb. 560, 83 N W 2d 76, *State v. Kaner*, 156 Ohio St 347, 102 N E 2d 703.

¹¹⁷ *Expressway Law, An Analysis*, HRB Special Report 26, 1957, pp. 11-19.

¹¹⁸ *Richert v. Board of Education of the City of Newton*, 177 Kan 502, 280 P 2d 596.

¹¹⁹ NICHOLS, *EMINENT DOMAIN*, 3rd Ed., Vol. 3, pps. 292-293, sec. 6 38[1], see fn. 92 and 93 for citations.

¹²⁰ *Webb v. Greenwood County*, 229 S C 267, 92 S E 2d 688.

cases continued to arise in which the property was damaged but the injury was not compensable. To remedy this situation a substantial number of the constitutions were amended to make compensable the "damaging" as well as "taking" of property. In these jurisdictions the courts were and still are confronted with the question of which type of "damaging" is compensable.

The Supreme Court of Illinois was the first court required to give meaning to the new constitutional provision¹²¹. It evolved a definition of damages in the constitutional sense which has been adopted by most of the "taking or damaging" States.¹²² A condemnor is required to pay compensation not only for an injury that would be actionable at common law, but also when there has been some physical disturbance of a public or private right, which the property owner possesses and which enhances its value, and that by reason of the condemnor's action he has suffered a special damage to his property in excess of that sustained by the public.

It is in the area of consequential damages that the difference between the two clauses is most significant. The difference between consequential damages and severance damages must be kept in mind. The former refers to damages where there was no physical taking of property. Severance damages are damages to the remaining property caused by the taking of a portion of the property.

Generally speaking in a "taking" State consequential damages are not compensable,¹²³ while in some "taking or damaging" States such damages are recoverable.¹²⁴ One limitation placed on the recovering of consequential damages is that the damage must be peculiar to the landowner and not suffered by the public.¹²⁵ In

a sense this requirement is similar to that found in those States which allow only the set-off of special benefits. The interpretation of "special" is analogous to that given "peculiar." Other opportunities for the consequences of the clauses to be reflected in court opinions are in the change of grade and interference with access cases.¹²⁶

A detailed discussion of the problems raised by the clauses is beyond the scope of this study. It is sufficient to note that it is imperative to check the constitution of a particular jurisdiction before discussing any out-of-state cases. Even among States with the same provision there exists a divergence of interpretations given to "taking" as compared to "taking or damaging." A list of cases from the several States which illustrate the varying interpretations given to the two clauses is appended¹²⁷

¹²⁵ See NICHOLS, EMINENT DOMAIN, 3rd Ed., Vol. 2, secs. 6 4441, 6 4442
¹²⁷ Appendix A.

Table 4 States Having Taking and Damaging Provisions in Constitution

Taking	Taking and Damaging
Alabama ¹	Alabama ¹
Connecticut	Alaska
Delaware	Arizona
Florida	Arkansas
Idaho	California
Indiana	Connecticut
Iowa	Colorado
Kansas	Georgia
Kentucky ¹	Illinois
Maine	Kentucky ²
Maryland	Louisiana
Massachusetts	Minnesota
Michigan	Mississippi
Nevada	Missouri
New Hampshire	Montana
New Jersey	Nebraska
New York	New Mexico
Ohio	North Dakota
Oregon	Oklahoma
Pennsylvania ¹	Pennsylvania ²
Rhode Island	South Dakota
South Carolina	Texas
Tennessee	Utah
Vermont	Virginia
Wisconsin	Washington
	West Virginia
	Wyoming

¹ Applicable to all types of condemnation

² Proceedings brought by municipal and other corporations

¹²¹ *Rigney v. Chicago*, 102 Ill. 64

¹²² NICHOLS, EMINENT DOMAIN, 3rd Ed., Vol. 2, p. 331, notes 31 and 34

¹²³ *Harris v. United States*, 205 F.2d 765, *Nunnally v. United States*, 239 F.2d 521, for additional citation see NICHOLS, EMINENT DOMAIN, 3rd Ed., Vol. 2, p. 339, notes 51, 52, 53

¹²⁴ *Heldt v. Elizabeth River Tunnel Dist.*, 196 Va. 477, 34 S.E.2d 511, *Texas Power and Light Co. v. Hering*, 148 Tex. 350, 224 S.W.2d 191, and NICHOLS, EMINENT DOMAIN, 3rd Ed., Vol. 2, p. 343, fns. 56, 57, 58

¹²⁵ *Hanson v. City of Omaha*, 157 Neb. 403, 599 N.W.2d 622 and NICHOLS, EMINENT DOMAIN, 3rd Ed., Vol. 2, p. 350, fn. 69

SET-OFF OF BENEFITS

One consequence of the construction or improvement of a highway is that property in close proximity may become more valuable. Land which was once suitable for agricultural purposes may become adaptable to residential or commercial use because of the new or improved highway. The same result often occurs in partial taking cases. That is to say, although a segment of a tract of land may be taken and the remaining property damaged by such taking, certain benefits may accrue to the remaining property.

Stripped of the many complex rules which have been developed by the judiciary the constitutional mandate of "just compensation" requires that the property owner be indemnified for his loss due to the taking of his property. If, in reality, his remaining property has been enhanced in value due to the taking, logically the amount of this enhancement should be deducted from the compensation awarded. To the extent that benefits are not subtracted from the award, the property owner receives more in compensation than he lost by the taking or damaging of his property.

The concept of benefits and the rules for their set-off have probably created more difficulties for the legislatures and courts than any other aspect of "just compensation." Examples of some of the problems related to benefits are

1. What is a benefit?
2. Should every increase in value to property stemming from the improvement be deducted?
3. If not, what benefits should be deducted and how are the various types of benefits distinguished from each other?
4. Should the benefit be deducted from the entire award or only from that part which represents the damage to the remainder?

It would be of very little use and next to impossible to discuss every type of benefit which may result from a public improvement. Up to a point there is general agreement among the several States concerning certain facets of the benefit problem. It is

in the realm of the rules governing the set-off of benefits that the several States take divergent roads.

The procedure for assessment for benefits prevalent in most municipalities is not covered in the following analysis of benefits. Although both condemnation and the practice of making assessment for benefits are intertwined an assessment is essentially a taxing device.

Remaining Property

Irrespective of the set-off rules applicable in a particular jurisdiction there are several requirements which must be satisfied before the rules will be applied. The concepts of benefits and severance damages both presupposes that there is a partial taking and that the remaining property receives certain advantages or disadvantages due to the proposed improvement for which the taking is made.¹²⁸ In some situations the determination of what constitutes the remaining property presents a problem. Two tests have been developed by the courts which govern this question; unity of title and unity of use.¹²⁹ A third test, contiguity, is required in some jurisdictions.¹³⁰

Unity of title requires that the property taken and the remaining land must have been held by the condemnee in the same quality of ownership.¹³¹ Once it is decided that the property is owned by the condemnee in the same quality of ownership it must be shown that the remaining property was used in conjunction with the part taken.¹³²

A good example of the "use" rule in operation is *City of Stockton v Marengo*.¹³³ The defendant, Marengo, owned a large

¹²⁸ *Housing Authority v Iron Works*, 91 Ga App 881, 87 S E 2d 671, *Tyson Creek R. Co v Empire Mill Co*, 31 Idaho 580, 174 Pac 1004, *People v McReynolds*, 31 Cal App 2d 219, 87 P 2d 734, *Denver Joint Stock Land Bank v Board of Commissioners*, 105 Colo 366, 98 P 2d 283, *State v Bailey*, 234 Mo. App 168, 115 S W 2d 17, *Strouds Creek & M R Co v Herold*, 131 W Va 45, 45 S E 2d 513

¹²⁹ *Enfield and Mansfield, Special Benefits & Right of Way Acquisition*, paper presented at Convention of American Association of State Highway Officials, Right of Way Committee, Nov 29, 1956, p 3

¹³⁰ *Monongahela Navigation Co v United States*, 148 U S 312, 13 S Ct 622, 37 L Ed 463, *People v Ocean Shore R R*, 32 Cal 2d 406, 196 P 2d 570

¹³¹ *Tillman v Lewisburg R. Co*, 133 Tenn 554, 182 S W 597, *Glendenning v Stahley*, 173 Ind 674, 91 N E 234, *State v Superior Court*, 10 Wash 2d 362, 116 P 2d 752, *McIntyre v Board of County Commissioners*, 168 Kan 115, 211 P 2d 59

¹³² *People v R R Co*, 32 Cal 2d 406, 196 P 2d 570, *State Highway Commission v Dodson*, 207 Miss 229, 42 So 2d 179

¹³³ 137 Cal App 760, 31 P 2d 467

tract of land devoted to agricultural purposes, with the exception of a segment leased out and used for a service station. A strip of the property used for farming was condemned without including any of the leased land. In deciding the question of what constitutes the remaining property, the court excluded the land used for the service station since the "unity of use" test was not satisfied.¹³⁴

The unity of use test raises two interesting problems; must the two tracts of property be presently applied to the same use and must the property be contiguous? Although there is some conflict concerning the first question the better view would appear to be that if the two tracts are adaptable to the same use, the use requirement is met.¹³⁵ In the *Marengo* case, although the part devoted to agricultural purposes was plotted into lots, the "use" test was satisfied since the property was presently used for the same purpose. In regard to the question of contiguity (some States hold that contiguity is a separate test) two old cases hold that land physically separated by a highway or street, even though used in conjunction with each other for the same purpose, must be considered as two separate parcels of property.¹³⁶ On the other hand a recent Federal case held that parcels of property on separate islands may be considered as one if used as a unit.¹³⁷ The court pointed out that the real test is unity of use and although the fact of physical separation may be material as to the "use" it is not determinative of the question.

Permanency of Benefit

It has been contended and accepted in some cases that the set-off of benefits should be disallowed since the property owner has no legal right to require that the improvement from which the benefits stem must

be permanent.¹³⁸ If it became settled law in any jurisdiction that the landowner has the right to require the continuance of a benefit once it is deducted, it would be well to forego the savings to be derived from the application of the benefit concept.¹³⁹ Otherwise highway program flexibility, required to meet changing needs, would be lost.

However, there is authority which holds that in order to deduct a benefit there is no requirement that the property owner must have the legal right to compel the continuance of the benefit.¹⁴⁰ The permanency of the benefit will be reflected in the market value of the property and the more permanent the benefit the less will be the market value.¹⁴¹ This disposition of the question of permanency is compatible with the principle that speculative benefits cannot be deducted.¹⁴² To be deductible a benefit must be caused by the improvement for which the property is being taken¹⁴³ and must affect the market value of the remaining property.¹⁴⁴

Types of Benefits

A distinction is made in the various statutory set-off rules between general and special benefits. Some States permit the set-off of special benefits while prohibiting the deduction of general benefits. It is therefore necessary to attempt to differentiate between the types of benefits and to understand the basis for the difference of treatment which is found to exist between the several States.

¹³⁴ *In Re Water Front*, 190 N Y 350, 83 N E 299, *Moran v State Highway Commission*, 223 Iowa 936, 274 N W 59, *Zook v State Highway Commission*, 156 Kan 79, 131 P 2d 652.

¹³⁵ It is settled law that the abutting property has no vested right in the continuance of traffic on the adjacent highway or in the location of a highway. *People v Ricciardi*, 23 Cal 2d 396, 144 P 2d 799, *Holloway v Purcell*, 35 Cal 2d 220, 217 P 2d 665.

¹³⁶ *Reichelderfer v Quinn*, 287 U S 315, 53 S. Ct 177, 77 L Ed 331, 83 A L R 1429, *United States v. River Rouge Improvement Co.*, 269 U S 411, 46 S Ct 144, 70 L Ed 339, *People v Thomas*, 108 Cal App 2d 832, 239 P 2d 914, *Whitney v. New York*, 96 N Y 240.

¹³⁷ *Ibid*.

¹³⁸ *Bauman v Ross*, 167 U S 548, 17 S Ct 966, 42 L Ed 270, *Los Angeles v Marblehead Land Co.*, 95 Cal App 602, 273 P 131, *St. Clair v State Highway Board*, 45 Ga App 488, 165 S E 297, *Amory v Commonwealth*, 321 Mass 240, 72 N E 2d 549, 174 A L R 370, *State v Bailey*, 234 Mo. App 168, 115 S W 2d 17.

¹³⁹ *Dickson v Brown Crummer Irr Co.*, 137 F 2d 615, *Denver Joint Stock Land Bank v Board of Commissioners*, 105 Colo 366, 98 P 2d 293, *State v Bailey*, 234 Mo App 168, 115 S W 2d 17.

¹⁴⁰ *People v. McReynolds*, 31 Cal App 2d 219, 87 P 2d 734 and cases cited in note 142.

¹³⁴ *U S v Miller*, 317 U S 369, 63 S Ct 276, 87 L Ed 336, 147 A L R 55, *Pryor v Limestone County*, 222 Ala 621, 134 So 17, *Schneider v Louisiana Highway Commission*, 206 La 754, 20 So 2d 14, *Gary v Averill*, 321 Mo. 840, 12 S W 2d 747, *Talbot v. Norfolk*, 158 Va. 387, 163 S E 100.

¹³⁵ Compare *Wilcox v St. Paul R. Co.*, 35 Minn 439, 29 N W. 148 and *Re Queen Anne Blvd.*, 77 Wash 91, 137 Pac 435 with *Oregon Railway and Navigation Co v Taffe*, 67 Ore 102, 134 Pac. 1024.

¹³⁶ *White v Metropolitan R Co.*, 154 Ill 620, 39 N E 270, *L & N R Co v Chenault*, 214 Ky 748, 284 S W 397.

¹³⁷ *Baetjer v United States*, 143 F 2d 391, *United States v Powelson*, 118 F 2d 79.



FIGURE 4

Increased land value resulting from the construction of an interchange often benefits nearby landowners and may affect the compensation paid for land taken.

One way of attacking the problem of deciding whether a benefit is general or special is from the viewpoint of geography. According to Nichols benefits are divided naturally into three classes:¹⁴⁵

1. Benefits peculiar to a particular estate by reason of its direct relation to the improvement,
2. Local or neighborhood benefits, or those accruing to a well-defined and limited part of a city or town by reason of its proximity to the improvement,
3. General benefits, or those which affect the community as a whole and perhaps raise the value of land in an entire city or town

Benefits in group 3 are classified as general benefits.¹⁴⁶ There is a split of opinion regarding benefits in group 2; some courts consider these benefits as special¹⁴⁷, others term them general¹⁴⁸

In addition to the geographical test the cases refer to other yardsticks in determining whether a benefit is general or special. Innumerable cases define general benefits as those which result from the enjoyment of the facilities provided by the new public works, while special benefits arise from the peculiar relationship of particular land to the public improvement.¹⁴⁹ This distinction was made in a recent California case, wherein the court stated:¹⁵⁰

Whether benefits are special or general in a given case is often a perplexing question. General benefits consist in an increase in the value of land, common to the community generally, and resulting from advantages which will accrue to the community from the improvement. Special benefits on the other hand, are such as result from the mere construction of the improvement, and are peculiar to the land in question.

A corollary of this distinction is that for a benefit to be special it must differ in kind, rather than in degree, from the benefits

which are enjoyed by the general public.¹⁵¹

Some courts distinguish between physical and non-physical benefits.¹⁵² A benefit which physically affects the land of the condemnee is uniformly classified as a special benefit.¹⁵³ Non-physical benefits may be illustrated by a street widening case. The new frontage on an improved thoroughfare may enhance the value of the property and in some jurisdictions be set-off as a special benefit. On the other hand, the advantage of traveling on the improved street is denominated a general benefit.¹⁵⁴

It is difficult to generalize and to state with any exactness what is a benefit and what is not or to distinguish between a general and special benefit. No one test or criterion will encompass all cases. Enfield and Mansfield¹⁵⁵ point out that the cause for so much confusion is that in many cases a court first decides whether there exists any real and substantial benefit, as distinguished from speculative or uncertain matters, and, if not, finds a general benefit. Compounding the difficulties in this area is that, in practice, the same benefit may, with equal justification, be classified as a general or specific benefit.

Set-off Rules

Before analyzing the various rationales which have been expounded to justify the difference in treatment given general as compared to special benefits, the practice of the several States will be discussed. The various possibilities for set-off of benefits were summarized in a recent New Mexico case as follows:¹⁵⁶

1. Benefits cannot be considered at all.
2. Special benefits may be set-off only against damages to the remainder.
3. Special and general benefits may be set-off against damages to the remainder.
4. Special benefits may be set-off against the value of the part taken and the damages to the remainder.

¹⁴⁵ NICHOLS, EMINENT DOMAIN, 3rd Ed., Vol. 3, p. 44

¹⁴⁶ State v. Pope, 228 Mo. App. 888, 74 S.W.2d 265, Wilson v. Greenville County, 110 S.C. 321, 96 S.E. 301, State v. Dunclick, Inc., 77 Idaho 45, 286 P.2d 1112, Board of County Commissioners v. Gardner, 57 N.M. 478, 260 P.2d 682

¹⁴⁷ Washington County v. Day, 196 Ark. 147, 116 S.W.2d 1051, Ball v. Independence County, 214 Ark. 694, 217 S.W.2d 913, Koelach v. State Highway Commission, 223 Ark. 529, 287 S.W.2d 4, San Luis Valley Irr. Dist. v. Noffsinger, 85 Colo. 202, 274 Pac. 827

¹⁴⁸ Louisiana Highway Commission v. Grey, 197 La. 942, 2 So.2d 654, State v. McConnell, —Mo.—, 248 S.W.2d 17

¹⁴⁹ East Baton Rouge Parish Council v. Koller, —La.—, 94 S.2d 505, State v. Williams, —Mo.—, 263 S.W.2d 444, Crawford v. Central Nebraska Public Power and Irr. Dist., 154 Neb. 832, 49 N.W.2d 682

¹⁵⁰ Podesta v. Lunden Irr. Dist., 141 Cal. App.2d 38, 296 P.2d 401

¹⁵¹ State v. Pope, 228 Mo. App. 888, 74 S.W.2d 265, State v. McMurtry, —Mo.—, 292 S.W.2d 947

¹⁵² NICHOLS, EMINENT DOMAIN, 3rd Ed. Vol. 3, pp. 50-53

¹⁵³ People v. Thomas, 108 Cal. App.2d 832, 239 P.2d 914

¹⁵⁴ Op. cit. note 157

¹⁵⁵ Supra, note 129

¹⁵⁶ Board of County Commissioners v. Gardner, 57 N.M. 478, 260 P.2d 682

Table 5 Set-Off and Type of Benefits, by States

Set-off Benefits Against Value of Land and Remainder	Set-off Benefits Against Remainder Only	No Allowance for Set-off Benefits	Law Not Clear on Set-off Rule	Allowance of Special Benefits	Allowance of Both General and Special Benefits	Law Not Clear as to Type of Benefit
Ala	Alaska	Iowa	Del	Ark	Ala	Alaska
Ark	Ariz	Okla	Ky	Calif	N Mex.	Ariz.
Conn	Calif		Me	Colo	N Y	Del
Kans	Colo		Md	Conn	N C	Fla
Mass	Fla		Mich	Ga	S C	Ky
Mo	Ga		Miss	Hawau	Va	Me
N Mex	Hawau		N H	Idaho	W Va	Md
N C	Idaho		N J	Ill	Wis	Mich
Penn	Ill		R I	Ind		Miss
S C	Ind		S D	Kans		Nev
Wash	La		D C	La		N H
Wis	Minn			Mass		N J
U S	Mont			Minn		R. I
	Neb			Mo		S D
	Nev			Mont		Wyo
	N Y			Neb		D. C
	N D			N D		
	Ohio			Ohio		
	Ore			Ore		
	Tenn			Penn		
	Texas			Tenn		
	Utah			Texas		
	Vt			Utah		
	Va			Vt		
	W Va.			Wash.		
	Wyo			U S		
	P R			P R		

5. Special and general benefits may be set-off against the value of the part taken and the damages to the remainder.

Twelve States and the Federal Government either by statute, judicial decision or a combination of both, permit the set-off of benefits against the value of the land taken and damages to the remainder.¹⁵⁷ Of these 13 jurisdictions, eight permit only the

deduction of special benefits,¹⁵⁸ and five States authorize the set-off of both special and general benefits.¹⁵⁹

In 27 jurisdictions distinction is made between the value of the property taken and the damage to the remainder. These States permit the set-off of benefits against the damages to the property not taken but prohibit the deduction of benefits from the

¹⁵⁷ United States *Bauman v Ross*, 167 US 548, 17 S Ct 966, 42 L.Ed 470, *Alabama* tit 19, §14, *McRea v Marion City*, 222 Ala 511, 133 So 278, *Pryor v Limestone County*, 222 Ala 621, 134 So 17, *Pike County v Whittington*, 263 Ala 47, 81 So 2d 288, *Arkansas* §76-521, *Cullum v Van Buren County*, 223 Ark 525, 267 S W 2d 14, *Koelach v State Highway Commission*, 223 Ark 529, 267 S W 2d 4, *Connecticut* §§13-145, 146, 150, *Brto v Waterbury*, 130 Conn 115, 32 A 2d 162, *Hoyt v City of Stanford*, 116 Conn. 402, 165 A 357, *Kansas Collins v State Highway Commission*, 145 Kan 598, 66 P 2d 409, *Zook v State Highway Commission*, 156 Kan. 79, 131 P 2d 652, *Massachusetts* Ch 79, §12, *Amory v Commonwealth*, 321 Mass 240, 72 N L 2d 549, 174 A L R 370, *Hall v Commonwealth*, 235 Mass 1, 136 N E 49, *Missouri* §227 120(3), *State Highway Commission v Clevenger*, 365 No App 970, 291 S W 2d 57, *State Highway Commission v Mink*, —Mo—, 292 S W 2d 940, *State v McMurtry*, —Mo—, 292 S W 2d 947, *State Highway Commission v Mattox*, —Mo.—, 307 S W 2d 382, *New Mexico* §55-4-11, *Board of Commissioners v Gardner*, 57 N M 478, 260 P 2d 682, *City of Tucuman v Magnolia Petroleum Co*, 57 N M 392, 259 P 2d 351, *North Carolina* §§136-19, 40-21, *Dalton v State Highway and Public Works Commission*, 273 N C 406, 27 S E 2d 1,

Gallmore v State Highway and Public Works Commission, 241 N C. 350, 85 S E 2d 292, *City of Stateville v Anderson*, —N C—, 95 S E 2d 591, *North Carolina Highway Commission v Prvett*, 246 N C 501, 99 S E 2d 61, *Pennsylvania* tit 36, §§670-303, 304, *Petition of Johnson*, 344 Pa 5, 23 A 2d 880, *Perry v Pittsburgh and B Street Railroad Co*, 64 Pa Super Ct 583, *Long v Harrisburg, etc R Co*, 126 Pa 143, 19 A 39, *South Carolina* §§25-165, 33-136, 840, *Smith v City of Greenville*, 229 S C 252, 92 S E 2d 639, *Wilson v Greenville County*, 110 S C 321, 96 S E 301, *Washington* §§8 04 080, 8 08 040, 8 12 190, *State v Ward*, 41 Wash 2d 794, 252 P 2d 279, *Wisconsin* §32 10, *Nowaczyk v Marathon County*, 205 Wis 536, 238 N W 383, *Townsend v State*, 257 Wis 329, 43 N W 2d 458, *Carazella v State*, 269 Wis 593, 70 N W 2d 208, reversed on other grounds 269 Wis 593, 71 N W 2d 276

¹⁵⁸ United States, *Arkansas*, *Connecticut*, *Kansas*, *Massachusetts*, *Missouri*, *Pennsylvania* and *Washington*. See cases cited in note 157 and *Brand v Union Electric Railway Co*, 238 U S 586, 35 S Ct 846, 77 L Ed 331, *St Louis v Senter Commn Co*, 3 F Supp 308, aff'd 64 F 2d 921, cert den 290 U S 668, 54 S Ct 88, 78 L Ed 577

¹⁵⁹ *Alabama*, *New Mexico*, *North Carolina*, *South Carolina* and *Wisconsin*

value of the land taken.¹⁶⁰ Of these 27 jurisdictions 18 limit the set-off to special benefits¹⁶¹ and three permit the subtraction of general as well as special benefits.¹⁶² The Alaska, Arizona and Nevada statutes do not specify the type of benefit which may be deducted and no case was found interpreting the particular statute; however, these statutes are similar to those found in California, Idaho, Indiana, Montana and North Dakota. These laws have been construed by the courts as permitting the set-off of only special benefits. It therefore seems probable that the courts of Alaska, Arizona and Nevada would give like mean-

ing to their statutes. No case was found interpreting the words "real benefits" used in the Wyoming statute. Although the Illinois cases hold that only special benefits may be subtracted, the meaning given to "special" has become increasingly broader, until today the set-off as special benefits is permitted which would in another jurisdiction be classified as general benefits.¹⁶³ The Florida statute is written in terms of "enhancement in value" of the remaining property without specifying the nature of the enhancement.

The set-off of either general or special benefits is prohibited in Iowa¹⁶⁴ and Oklahoma.¹⁶⁵

In the remaining 11 jurisdictions the status of the set-off rules or the type of benefit which may be deducted is not clear. For this reason rather than attempt to discuss these jurisdictions as a unit a synopsis of the posture of the law in each State follows:

Delaware—There appears to be no relevant statute. In 1839 the Court of Errors and Appeals, in a case dealing with a railroad held that it was permissible to set-off benefits from both the value of the land taken and damages to the remainder.¹⁶⁶ In a recent Superior Court case,¹⁶⁷ involving a condemnation for highway improvement, the judge instructed the jury that benefits resulting from the improvement may be set-off against whatever loss, detriment or disadvantage the jury found the property owners sustained or will sustain, by reason of the taking and consequent highway improvement. Such an instruction would require the set-off to be made against the entire award. The court did not differentiate between general and special benefits.

Kentucky.—In 1952 a new condemnation procedure was established for the State highway department.¹⁶⁸ Section 177.083 in part provides that the court-appointed com-

¹⁶⁰ Alaska §57-7-13(3), Arizona §12-1122(3), California Code of Civil Procedure, §1248(3), Herzog v. Grosso, 41 Cal 2d 219, 259 P 2d 429, People v. Schultz Co., 123 Cal App 2d 925, 268 P 2d 117, People v. Thompson, 43 Cal 2d 13, 271 P 2d 507, Colorado §50-1-17, Boxberger v. State Highway Commission, 126 Colo 526, 251 P 2d 920, Denver Joint Stock Land Bank v. Board or Commissioners of Elbert City, 105 Colo 366, 98 P 2d 283, Florida §73 10(3), Georgia §§36, 504, 506, 612A, 1109, State Highway Board v. Bridges, 60 Ga App 240, 3 S E 2d 907, State Highway Board v. Coleman, 78 Ga App 54, 50 S E 2d 262, Hawaii §§8-21, Idaho §7-711(3), State v. Luncchick, 77 Idaho 45, 286 P 2d 1112, Tyson Creek R Co v. Empire Mill Co., 31 Idaho 580, 174 Pac 1004, Illinois tit 47, §9, Dept of Public Works and Buildings v. Griffin, 305 Ill 585, 137 N E 523, Dept of Public Works and Buildings v. McBride, 338 Ill 347, 170 N E 295, Dept of Public Works and Buildings v. Barton, 371 Ill 11, 19 N E 2d 935, Kane v. Chicago, 392 Ill 172, 64 N E 2d 506, Capitol Bldg Co v. Chicago, 399 Ill 113, 77 N E 2d 28, Cuneo v. City of Chicago, 400 Ill 545, 81 N E 2d 451, Indiana §3-1706(5), State v. Ahaus, 223 Ind 629, 63 N E 2d 199, State v. Smith, Ind.—, 143 N E 2d 666, Louisiana East Baton Rouge Parish Council v. Koller, —La —, 94 So 2d 505, State v. Cooper, 213 La 1016, 36 So 2d 22, Louisiana Highway Commission v. Grey, 197 La 942, 2 So 2d 654, Minnesota State v. Anderson, 176 Minn 525, 223 N W 923, Appeal of Burg, 143 Minn 429, 174 N W 309, see sec 440 26, 39 pertaining to street widening cases where benefits can be set-off against entire award, McKee v. City of Minneapolis, 170 Minn 124, 212 N W 202, Montana §93-9912(3) State v. Bradshaw Land & Livestock Co., 99 Mont. 95, 43 P 2d 674, Gallatin Valley Electric Ry v. Neible, 97 Mont 27, 186 P 689, Nebraska Crawford v. Central Nebraska Public Power and Irr Dist., 154 Neb 832, 49 N W 2d 682, Langdon v. Loup River Public Power Dist., 142 Neb 859, 8 N W 2d 201, rehearing, 144 Neb 325, 13 N W 2d 188, Prudential Ins Co v. Central Nebraska Public Power and Irr Dist., 139 Neb 144, 296 N W 752, Nevada §37 110(4), New York Condemnation Law, §14, In Re Exterior Street, 285 N Y 455, 35 N E 2d 39, Bakerman v. City of New York, 230 N Y 544, 130 N E 887, Becker v. Metropolitan El Ry Co., 131 N Y 509, 30 N E 499, Achino v. State, 2 Misc 2d 1001, Hartman v. State, 5 Misc 2d 636, 161 N Y S 2d 748, Reese v. State, 190 Misc 316, 72 N Y S 2d 209, North Dakota §32-1522(4), City of Bismarck v. Casey, 77 N D 295, 43 N W 2d 372, Laneburg v. Sandven, 74 N D 364, 21 N W 2d 808, Ohio In Re Adjudication of Claims, —Ohio C C P 1—, 121 N E 2d 695, In Re Appropriation of Easement for Highway Purposes, 93 Ohio App 179, 112 N E 2d 411, Oregon State v. Bailey, 212 Ore 261, 319 P 2d 906, Tennessee §23-1414, Davidson County Board of Education v. First American National Bank, —Tenn —, 301 S W 2d 905, Newberry v. Hamblen County, 157 Tenn 491, 9 S W 2d 700, Faulkner v. City of Nashville, 154 Tenn 145, 285 S W 39, Texas tit 52, §3265(1, 3), Hughes v. State of Texas, —Tex —, 302 S W 2d 747, State v. Meyers, —Tex —, 292 S W 2d 933, Strickland v. City of Friona, —Tex —, 294 S W 2d 254, Utah §78-34-10, Salt Lake and U R Co v. Butterfield, 46 Utah 431, 150 Pac 931, Vermont L 1957, Act 242, sec 1(1), Virginia §33-73, Long v. Shirley, 117 Va 401, 14 S E 2d 375, West Virginia §5380, State Roads Commission v. Evans, 131 W Va 744, 50 S E 2d 485, State Roads Commission v. Snider, 131 W Va 650, 49 S E 2d 853, State v. Sanders, 128 W Va 321, 36 S E 2d 397, Wyoming §§3-6122, 6123, Puerto Rico People v. Soc Agric Mario Mercado e Hyos, 72 P R R 704

¹⁶¹ California, Colorado, Georgia, Hawaii, Idaho, Indiana, Louisiana, Minnesota, Montana, Nebraska, North Dakota, Ohio, Oregon, Tennessee, Texas, Utah, Vermont and Puerto Rico

¹⁶² New York, Virginia and West Virginia

¹⁶³ NICHOLS, EMINENT DOMAIN, 3rd Ed., Vol 3, p 85

¹⁶⁴ Constitution, art I, §18, Stoner v. Iowa State Highway Commission, 227 Iowa 115, 287 N W 269, Welton v. Iowa State Highway Commission, 211 Iowa 625, 233 N W 876

¹⁶⁵ Constitution, art II, §24, tit 69, §46(3), Finley v. Board of County Commissioners of Oklahoma County, —Okla —, 291 P 2d 333, City of Tulsa v. Horwitz, 151 Okla 201, 3 P 2d 841

¹⁶⁶ Whiteman v. Wilmington & S R Co., 2 Harr 514, 33 Am Dec 411

¹⁶⁷ State Highway Department v. Morris, 47 Del 477, 93 A 2d 523

¹⁶⁸ §§177 081, 177 089

missioner shall "award any damages resulting to the adjacent lands of the owner or owners considering the purpose for which it is taken, *but shall deduct from such damages the value of the advantages and profits that will accrue to the adjacent lands from the construction and prudent maintenance of the proposed project*"¹⁶⁹

Nichols classified Kentucky as a jurisdiction wherein benefits cannot be offset against the value of the land taken or direct damages to the remainder¹⁷⁰ He further states that both general and special benefits may be used to reduce damages for consequential injury and inconvenience.¹⁷¹ What is meant by consequential injury and inconvenience is problematical. As authority for the statement that benefits are not set-off *Enfield and Mansfield*¹⁷² cites three cases, two highway cases decided before the enactment of the new statute¹⁷³ and one dealing with an electric corporation¹⁷⁴

The effect of the new statute cannot be determined at this time It is conceivable that pursuant to the new law, at least special benefits may be set-off against damages to the remainder

Maine—There appears to be no statute in reference to the question of benefits Two old cases hold that special benefits may be set-off from the entire award¹⁷⁵ Language is found in two more recent decisions to the effect that special benefits may be set-off against damages¹⁷⁶ Neither of the latter cases is a square holding on the point

Maryland—Article 33A, § 24 of the Annotated Code of Maryland provides in substance, that in condemnation cases the jury is at liberty to consider and assess any special benefits provided said benefits shall not exceed the *damages* the defendant is entitled to because of the taking. The statute does not make clear whether damages refer to the entire award or only to the damages to the land not taken Two

cases,¹⁷⁷ not decided under this statute and the most recent highway case¹⁷⁸ point in the direction of limiting the set-off to the damages to the land not taken

Michigan—Section 8 189, Michigan statutes Annotated, which is part of the condemnation procedure to be used by the State and county in condemning property for highway purposes provides:

and in like manner the benefits accruing to owners of land by reason of laying-out, altering, widening or otherwise improving any highway or of changing the line thereof, shall be taken into consideration in determining the damages to be paid to any such owner as compensation for the taking of any of his property for any such highway purpose

Benefits cannot be deducted in absence of a statute so authorizing or in the special assessments levied¹⁷⁹ No recent case was found pertaining to the type of benefits or the extent of the set-off. However, there is authority for the proposition that benefits may be deducted.¹⁸⁰

Mississippi.—Section 2760 which sets forth the instruction to be given to the condemnation jury provides that nothing is to be deducted from the award "on account of supposed benefits incident to the public use for which the application is made" Nichols states that no benefits may be deducted from any part of the award and cites several old cases in support of this conclusion¹⁸¹ However, there are more recent cases from which it may be argued that special benefits can be set-off.¹⁸² None of these cases are clear holdings to that effect and nowhere is a discussion of the set-off rule found

New Hampshire—No modern case was found pertaining to the type of benefit which may be set-off and rules governing said

¹⁷⁷ *Johnson v Consolidated Gas, Electric & Power Co of Baltimore*, 187 Md 454, 50 A 2d 918, Realty Improvement Company v Consolidated Gas, Electric & Power Co of Baltimore, 156 Md 581, 144 Atl 710

¹⁷⁸ *Pumphrey v State Roads Commission*, 175 Md 498, 2 A 2d 668

¹⁷⁹ *Rogers v Bressacher*, 231 Mich 317, 204 N W 112, In Re Petition of Board of Road Commissioners of Macomb County, 242 Mich 239, 219 N W 74

¹⁸⁰ RAY, CONDEMNATION PROCEDURE, First Report of the Judicial Council of Michigan, 1931, p 87, *Custer v Dawson*, 178 Mich 367, 144 N W 862, In Re *Rogers*, 243 Mich 517, 220 N W 808 but see In Re *Bagley Ave*, 248 Mich 1, 226 N W 688

¹⁸¹ NICHOLS, EMINENT DOMAIN, 3rd Ed., Vol 3, p 92, fn 31.
¹⁸² *State Highway Commission v Buchanan*, 175 Miss 157, 166 So 537, *State Highway Commission v Hillman*, 189 Miss 550, 198 So 565, *State Highway Commission v Prewitt*, 186 Miss 778, 192 So 11

¹⁶⁹ See also §§416 020, 120, 240

¹⁷⁰ NICHOLS, EMINENT DOMAIN, 3rd Ed., Vol 3, p 88

¹⁷¹ *Ibid*

¹⁷² *Infra*, note 190

¹⁷³ *Commonwealth v Powell*, 258 Ky 131, 79 S W 2d 411, *Commonwealth v Combs*, 244 Ky 204, 50 S W 2d 497

¹⁷⁴ *Electric Cooperative Corp v Thurman*, —Ky—, 275 S W 2d 780

¹⁷⁵ In re *Penley*, 89 Me 313, 36 Atl 397, *Chase v Portland*, 86 Me 367, 29 Atl 1104

¹⁷⁶ *Simoneau v Inhabitants of Livermore Falls*, 131 Me 165, 159 Atl 853

deduction. However, several old cases hold that special benefits may be deducted.¹⁸³

New Jersey—No statute or recent case was found concerning the problem under discussion. However, several old cases hold that special benefits may be set off against the entire award.¹⁸⁴

Rhode Island—No relevant statute was found in Rhode Island. In the *Greene* case¹⁸⁵ there is an indication that benefits may be set-off against damages, but the discussion of the problem is fragmentary. There are two early cases which hold that benefits, without distinguishing between general or special benefits, may be deducted from the entire award.¹⁸⁶ Subsequent to these cases, the Rhode Island Supreme Court held in a case involving a railroad that special benefits may be set-off only against the damages to the residue.¹⁸⁷ The early cases were distinguished on the ground that the condemnor in those cases had the power to tax. It may be inferred that when the State condemns, benefits may be set-off against the entire award.

South Dakota.—Several statutes indicate that benefits shall be considered without defining the type of benefits or the set-off rules.¹⁸⁸ No cases were found interpreting these provisions.

District of Columbia—The general condemnation statute provides that the jury shall consider any benefits to the land not taken in arriving at their award.¹⁸⁹

Reasons for Distinguishing

The previous review has shown that of the 51 jurisdictions which permit the set-off of benefits, 27 authorize only the deductions of special benefits; 8 make no distinction between types of benefits; and in 16 States the law is not clear. Of these 51 jurisdictions permitting some type of benefit to be set-off, 27 States allow the deductions of

be made only from the damages to the remainder; 12 States and the United States permit the deduction from the entire award; and in 11 States the law is not free from doubt. Two States prohibit any type of set-off.

What is the rationale behind the classification of benefits and the different set-off rules? The basis for allowing set-off of only special benefits is the idea that all landowners in the benefited area should be treated equally. The value of the general, or community-wide, benefit is not charged against those whose land is not taken for the highway. To require the man whose land is taken to give up or pay for his full share of the common or general benefit, while others are allowed to retain it, is not fair to him. Coupled with this is the fact that general benefits are somewhat nebulous and are difficult to evaluate accurately. Normally they are the result of projected increased business prosperity. These advantages may or may not accrue depending upon factors other than the new public improvement.

An argument against this concept of equal treatment is that, to be theoretically consistent, it would require an adjustment between the condemnor and all noncondemnees who are specially benefited by the project.¹⁹⁰

Compensation is measured by the value of the land taken plus the damage to the residue. Many States allow set-off of benefits against the damage to the residue, but not against the value of the land taken. The reasoning used to support this distinction is that the constitutional requirement of compensation for property taken means compensation in money, not benefits. It would seem, however, that the only right the property owner has is to receive payment for his damages. If benefits actually counter-balance losses there is no damage. To the extent that he is compensated for nonexistent damage, the landowner is unjustly enriched at the expense of the public.¹⁹¹

¹⁸³ *Whiteaker v. Benton*, 50 N H 25, *Carpenter v. Sandoff*, 42 N H 218.

¹⁸⁴ *State, Mangles et al. Prosecutors v. Hudson County Board of Chosen Freeholders*, 55 N J L 88, 25 Atl 322, *State, Vanderbeck, Prosecutor v. Blauvelt*, 34 N J L 261.

¹⁸⁵ *Greene v. State Board of Public Roads*, 50 R I 489, 149 Atl 596.

¹⁸⁶ *Howard v. Providence*, 6 R I 514, *Central Land Co v. Providence*, 15 R I 246, 2 Atl 553.

¹⁸⁷ *Tabor v. New York P & B R Co.*, 28 R I 269, 67 Atl 9.

¹⁸⁸ Sec 28 13A09 (State highways), sec 28 0616 (county highways), sec 28 1301 (county acquire for State highways), sec 37.4010 (municipal corporations).

¹⁸⁹ Sec. 16-606.

¹⁹⁰ *Enfield and Mansfield, "Special Benefits and Right of Way Acquisition," American Association of State Highway Officials, Right of Way Committee*, p 11, note 28.

¹⁹¹ NICHOLS, *EMINENT DOMAIN*, 3rd Ed., Vol 3, p 67.

Although it has received little or no attention in the reported cases,¹⁹² the fact that much of the law of benefits developed in a period in which most condemnation actions were brought by privately owned corporations¹⁹³ may have influenced the restriction on the type of benefit which may be set off.

The courts which apply this restriction have not carried it to its logical conclusion by prohibiting the deduction of benefits from any part of the final award. Apparently, the legislatures and courts of these States decided that at least some of the landowner's compensation should be in money and set up the value of the land taken as a workable minimum figure.

INTEREST AND COURT COSTS

The final award which the property owner receives as the result of condemnation proceedings is composed of three elements: an amount which, according to the law of the particular jurisdiction, is the monetary equivalent of the taken or damaged property; interest on this money, and certain court costs. In a sense the awarding of interest and court costs can be explained on the basis that to give the property owner "just compensation" these items must be made part of the final award. However, the term "just compensation" is generally used to connote the value of the property taken or damaged, whereas the amount paid in interest and court expenses bears little or no relation to the value of the property being taken or damaged.

Whenever there is a delay between the date of taking (whenever that may be) and the time of payment the courts are unanimous in holding that interest must be included in the final award, even when no statutory provision exists.¹⁹⁴ On the other

hand there is no constitutional directive requiring the payment of court costs, and such costs were not allowed at common law. Therefore the awarding of costs must be pursuant to statute.¹⁹⁵ The subsequent discussion will show that the rationale underlying the payment of these two items is different.

Interest

Generally when property is acquired by eminent domain there is an interval between the date of taking and the date of compensation. The date of taking may vary from jurisdiction to jurisdiction but at some point in the proceedings, be it the date of the summons, possession, vesting of title or some other stage of the action, the landowner is divested, either legally or practically, of the beneficial attributes of the ownership of property. The ideal method would be to pay compensation simultaneously with the vesting of title or the entry into possession. However, this ideal cannot be achieved due to the time required for the judicial determination of compensation.

A classic statement of the problem is found in the old Massachusetts case of *Parks v Boston*,¹⁹⁶ wherein the court stated:

The true rule would be as in the case of other purchases that the price is due and ought to be paid at the moment the purchase is made when credit is not specially agreed upon. And if a pie-powder court could be called on the instant and on the spot, the rule of justice for the public would be to pay the compensation with one hand whilst they apply the ax with the other, and this rule is departed from only because some time is necessary, by the forms of law to conduct the inquiry, and this delay must be compensated by interest.

Rather than attempting to determine in each case the damages to the property owner caused by the interval between the loss of his property and the receipt of its cash equivalent, the courts have awarded

¹⁹² See *Elks v Board of Commissioners*, 179 N C 241, 102 S E 414.

¹⁹³ ORGEL, VALUATION UNDER EMINENT DOMAIN, 2d Ed., Vol 1, p 45. Indications of this factor are several State constitutions which prohibit the consideration of benefits when the condemnor is a private corporation.

¹⁹⁴ *United States v Tillamooks*, 341 U S 48, 71 S Ct 552, 95 L Ed 738, *United States v Klamath, etc. Tribes of Indians*, 304 U S 719, 58 S Ct 799, 82 L Ed 1219, *Arkansas State Highway Commission v Stupenti*, 222 Ark 9, 257 S W 2d 37, *Sacramento and San Joaquin Drainage Dist v Truslaw*, 125 Cal App 2d 478, 271 P 2d 930, *State v Smith*, —Ind—, 143 N E 2d 668, *State v Galloway*, —Mo—, 292 S W 2d 904, *Harris v Green Bay Levee and Drainage Dist No 2*, 246 Iowa 402, 68 N W 2d 69, *LaPorte v State*, 5 Misc 2d 419, 159 N Y S 2d 596, *State v Deal*, 191 Ore 661, 233 P 2d 242.

Nashville Housing Authority v Doyle, 197 Tenn 549, 276 S W 2d 722. See also cases collected in ORGEL, VALUATION UNDER EMINENT DOMAIN, 2d Ed., Vol 1, p 19, note 26 and NICHOLS, EMINENT DOMAIN, 3rd Ed., Vol 3, p 106, note 19.

¹⁹⁵ *State v Efen Warehouse Co.*, 207 Ore 237, 295 P 2d 1101. NICHOLS, EMINENT DOMAIN, 3rd Ed., Vol 1, p 369, but see *Petersburg School District v Peterson*, 14 N D 344, 103 N W 756.

¹⁹⁶ 15 Pick 198.

interest¹⁹⁷ Such an approach emphasizes the money equivalent of the property rather than the income which might have been earned during the interval or injury suffered due to the delay in payment

In line with this approach, a 1956 California decision¹⁹⁸ held that interest on the value of the property taken, but not on the severance damages, was payable for the time between the date of taking and the award of compensation. The rationale was that severance damages included the full loss of use from the date of possession, and interest on this sum would be double compensation for this loss of use of the property not taken. This rule was changed by the enactment of §1255(b) of the Code of Civil Procedure, which provides that where the condemnor gets an order of immediate possession, both the compensation and severance damages shall draw interest.

Although there is unanimity of opinion that, at least under certain conditions the final award must bear interest there exists a divergence of views concerning two aspects of the interest problem, the date at which interest begins to run and the rate of interest. The condemnation laws of 18 jurisdictions provide for a fixed rate of interest, ranging from 4 percent in Massachusetts¹⁹⁹ to 6 percent in 8 States, the District of Columbia and Puerto Rico²⁰⁰ The statutes of three jurisdictions prescribe 5 percent as the rate of interest²⁰¹ By statute the legal or lawful rate of interest must be awarded in three States²⁰²

In the absence of a rate fixed by the legislature, the use of the legal or ordinary commercial rate of interest has received judicial approval²⁰³ If the purpose of awarding interest is to compensate for damages caused by a delay in payment it becomes important to determine whether in fact the

use of a statutory, legal or commercial rate achieves this objective. To the extent that the rate used falls short or exceeds the damages incurred by the property owner "just compensation" has not been awarded.

Although the statute prescribes a rate, it has been held that the courts are not bound by that rate if "just compensation" will be awarded by the employment of a different rate²⁰⁴ According to Orgel:²⁰⁵

The courts have not, however, made a carefully discriminating choice as to the rate of interest that should compensate the owner for the loss of the use of his property between the time when he is deprived of that use and the date when he receives its judicially admeasured equivalent in cash

The most that can be said about whichever rate of interest is used is that it must adequately compensate the property owner. Although attempts to show that the applicable rate of interest does not yield an amount equal to the value of the use of the property are rare,²⁰⁶ in the vast majority of cases the legal rate of interest is held to adequately compensate the landowner.²⁰⁷ However, just compensation is a judicial question,²⁰⁸ and therefore it would seem that irrespective of the statutory commercial or legal rate the question of the proper rate is always open to argument by either party.

At first glance the rules concerning the time at which interest begins to run appear to be inconsistent and contradictory; however, it is submitted that there is a common rationale at the base of these rules. The key to their understanding is the function served by an award of interest; to compensate the owner for damages caused by a delay in payment.

A delay in payment implies that there is a date at which payment should have been made. The variance among the States is based upon differing interpretations as to when compensation should be paid. To say

¹⁹⁷ Clark v Cox, 134 Conn. 226, 56 A 2d 512, Feldman v Chicago, 363 Ill. 247, 2 N E 2d 102, Bruma v State Highway Commission, 146 Kan. 375, 69 P 2d 743, Arkansas-Missouri Power Co. v Hamlin, —Mo—, 288 S W 2d 14, Gitlin v Pennsylvania Turnpike Commission, 384 Pa. 326, 121 A 2d 79

¹⁹⁸ City of San Rafael v Wood, 144 Cal. App 2d 804, 301 P 2d 421

¹⁹⁹ §79-37

²⁰⁰ Alaska §57-7-26, Arkansas §76-536, Florida §74 06, Illinois §47-2 6, Kansas §26-102, Kentucky §177 087(5), Washington §8 28 040, West Virginia §5385, District of Columbia §16-608, Puerto Rico §§32-2907, 2908

²⁰¹ Louisiana §48-455, Virginia §33 70 10, Hawaii §8-23

²⁰² California Code of Civil Procedure, §1249, Georgia §36-615A, New Mexico §22-9-9

²⁰³ State v Deal, 191 Ore 661, 233 P 2d 242, Adams v City of New Kensington, 374 Pa. 104, 97 A 2d 354

²⁰⁴ United States v 412 715 Acres of Land, 60 F Supp 576, In re Bronx River Parkway, 259 App Div 552, 20 N Y S 2d 53, aff'd 284 N Y 48, 29 N E 2d 465, aff'd 313 U S 540, 61 S Ct 839, 85 L Ed 1508

²⁰⁵ ORGEL, VALUATION UNDER EMINENT DOMAIN, 2d Ed. Vol 1, p 24

²⁰⁶ See Metropolitan Water District v Adams, 16 Cal 2d 676, 107 P 2d 618

²⁰⁷ Pennsylvania Co v Philadelphia, 268 Pa. 559, 112 Atl 76, Seaboard Air Line R Co v United States, 261 U S 299, 43 S Ct 354, 67 L Ed 664

²⁰⁸ Monongahela Navigation Co v United States, 148 U S 312, 13 S Ct 622, 37 L Ed 463

that the date of taking is the crucial point is to beg the question because of the different definitions of the date of taking.

In no case does the legal right to have interest or delay damage considered as an element of just compensation commence later than the time of entry into possession under the applicable statute²⁰⁰ With the divesture of possession, whether it occurs before or after the vesting of title in the condemnor the property owner is deprived of one of the most fundamental elements of ownership He neither has the use of the property or its money equivalent

Much of the existing statutory law concerning the payment of interest is found in the "immediate possession" statutes of the several jurisdictions. These laws provide that interest shall accrue either from the date of possession²¹⁰ or the date of the order permitting possession.²¹¹

A date other than the taking of possession is the critical date in a substantial number of jurisdictions. In the eight States²¹² which

condemn property by the administrative method, title normally vests prior to possession Logically the divesture of title could serve as the date from which interest is to be computed.²¹³

The following provision was added, as of March 1, 1957, to §7-712 of the Idaho general condemnation law: "The compensation and damages awarded shall draw lawful interest from the date of the summons." Before the addition of this sentence the section was silent concerning the date interest accrued but provided that compensation and damages accrued at the date of the summons Section 7-712 had been interpreted by the Federal courts and the Idaho Supreme Court as requiring the computation of interest from the date of the summons.²¹⁴

On January 10, 1957 the Idaho Supreme Court expressly overruled the Villages of Lapwai case and stated that:

The correct rule and the one which is supported by the overwhelming weight of authority, is that the condemnee should be allowed interest upon the compensation and damages awarded from the time the condemnor either takes possession, or becomes entitled to possession

The legislative action would appear to be the direct consequence of this decision.

²⁰⁰ Harris v Green Bay Levee and Drainage District, No 2, 246 Iowa 402, 68 N W 2d 69, State v Galloway, —Mo—, 292 S W 2d904, State v Sauers, 199 Ore 417, 262 P 2d 676, Petition of Lakewood Memorial Gardens, 381 Pa 46, 112 A 2d 135, Application of Great Lakes Pipeline Co, 168 Kan 100, 211 P 2d 70, Beal v Iowa State Highway Commission, 209 Iowa 1308, 230 N W 302, Metropolitan Water Dist v Adams, 16 Cal 2d 676, 107 P 2d 618, Clark v Cox, 134 Conn 226, 58 A 2d 512.

²¹⁰ Connecticut §13-147, Florida §74 06, Illinois §47-2 6, Montana §93-9913, Tennessee §23-1526, Utah §78-34-9, West Virginia §5385, District of Columbia §16-608, Puerto Rico §32-29-8.

²¹¹ Alaska §57-7-26, Arizona §12-1123(B), Arkansas §76-536, California Code of Civil Procedure, §1249, cf §1254 7, Hawaii §8-30, New Mexico §22-9-9

²¹² Connecticut, Maine, Massachusetts, New York, Ohio, Pennsylvania, Rhode Island and Wisconsin According to a letter from the Director of the Ohio Department of Highways, interest is computed from the date of possession, and not necessarily from the divesture of title unless the latter coincides with the former

²¹³ See ORGEL, VALUATION UNDER EMINENT DOMAIN, 2d Ed , Vol 1, p 28, note 38 and Vescera v State, 3 App Div 2d 644, 157 N Y S 2d 1022

²¹⁴ Brown v United States, 263 US 78, 44 S Ct 92, 68 L Ed 171, Weiser Valley Land Co v Ryan, 190 F 417, Villages of Lapwai v Alligier, 69 Idaho 397, 207 P 2d 1025, but see State v Peck, 1 Utah2d 263, 265 P 2d 630

Table 6 States Having Statutes Pertaining to Interest

Provision	State
Rate	
4%	Mass
5%	La , Va , Hawaii.
6%	Alaska, Ark , Fla , Ill , Kan , Ky , Wash , W Va , D C , P.R
Lawful rate of interest	Calif , Ga , N Mex
When interest begins to run	
Date of possession	Ariz , Conn , Fla , Ill , Mont , Tenn , Utah, W Va , D C , P R
Date of order of possession	Alaska, Ark , Calif , Idaho, Hawaii, N Mex
Possession or award whichever occurs first	Del
Order of special master	Ga
Possession if award increased on appeal	Ky
Vesting of title	La
Report of commissioner	Minn , W Va
Date of deposit if appeal and receive more on appeal	Neb
Deposit	Va

Other dates which have received legislative recognition as the time from which interest should be paid are possession or award, whichever occurs first,²¹⁵ order of special master,²¹⁶ possession, if award increased on appeal;²¹⁷ vesting of title;²¹⁸ report of commissioners,²¹⁹ date of deposit if appeal and receive more on appeal;²²⁰ date of deposit.²²¹

No useful purpose would be served by a more extensive discussion of the problem than the foregoing. Suffice it to say that the allowance of interest is a short-hand method employed by the courts to compensate for a delay in payment.²²² It would seem that rather than award interest as a matter of course, the property owner should be required to demonstrate that he actually was damaged by a delay in payment.

Costs and Expenses

The codes and rules of civil practice of the several States and territories contain provisions which authorize the award of certain costs and expenses of the law suit to the victorious party. Any attempt to apply the general cost statute²²³ to condemnation proceedings glosses over a fundamental difference between an ordinary civil action as compared to a condemnation proceedings. The genesis of the ordinary law suit is an act of omission or commission by the defendant, not so with a condemnation proceedings. At the inception of the proceedings the only act, if it can be termed an act, the landowner has committed is that of owning property. It is submitted that, although not expressly stated in the pertinent statutes or cases, the rationale of the existing jurisprudence concerning costs and expenses reflects the differences in status of

the defendant in a condemnation proceeding, as compared to other civil actions.

Before discussing the various statutes pertaining to the subject under discussion there are several generalizations which should be made. To begin with, although there are cases holding to the contrary,²²⁴ the better view is that the property owner has no constitutional right to the payment of his costs and expenses in defending the taking of his property. It is logical to assume that since costs were not allowed at common law the framers of the Federal and early State constitutions did not intend to include the awarding of costs and expenses within the term "just compensation."²²⁵ A concise statement of the majority view is found in *In re Hastings Lock & Dam*.²²⁶

When one reflects that costs in all law action are solely creatures of statute, and that the common law did not recognize the right of any litigant to recover costs, and that under no circumstances can costs be taxed against the United States without its consent, it becomes quite apparent that, in condemnation proceedings, the constitutional framers did not have in mind the allowance of any costs when they used the term just compensation but merely inculcated into the bill of rights a check on the sovereign in the exercise of right of eminent domain, so that all citizens would be guaranteed the reasonable and fair market value of the property taken.

Since there is no constitutional right to costs and expenses, any payment thereof must be predicated upon statutory authority.²²⁷ Unless the general statute on costs is specifically made applicable to condemnation proceedings, it has no application to such proceedings.²²⁸

The subsequent discussion consists of two parts. Initially the various statutes allocating costs will be analyzed; next a discussion

²¹⁵ Delaware §10-6113
²¹⁶ Georgia §36-615A
²¹⁷ Kentucky §177 087(5)
²¹⁸ Louisiana §48-455
²¹⁹ Minnesota §117 16, West Virginia §5384
²²⁰ Nebraska §76-711
²²¹ Virginia §33-70 10

²²² *Arkansas-Missouri Power Co v Hamlin*, —Mo—, 288 S W 2d 14, State v Stabb, 226 Ind 319, 79 N E 2d 392, *DeBruhl v State Highway and Public Works Commission*, 247 N C 671, 102 S E 2d 229, *Van Wagoner v Morrison*, 279 Mich 285, 271 N W 760, *Housing Authority of City of Dallas v Shambry*, —Tex—, 252 S W 2d 963, *Hayes v Chicago, R I and P Ry Co*, 239 Iowa 149, 30 N W 2d 743, *State v Danielson*, 122 Utah 220, 247 P 2d 900, See also 96 A L R 150, 111 A L R 1304, and 36 A L R 2d 413 for additional cases

²²³ Reference is made to provisions allocating costs and expenses, not the items to be awarded

²²⁴ *Albaugh v Mt Shasta Power Corporation*, 124 Cal App 779, 12 P 2d 137, *Department of Public Works and Buildings v McBride*, 338 Ill 347, 170 N E 295, *State v Barneau*, 225 Ia 341, 72 S 2d 869, *State Highway Commission v Mason*, 192 Miss 576, 6 S 2d 468, *Petersburg School District v Peterson*, 14 N D 344, 103 N W 756

²²⁵ *NICHOLS, EMINENT DOMAIN*, 3rd Ed., Vol 1, p 369. *In re Hastings Lock & Dam*, 2 F Supp 324, *Dohany v Rogers*, 281 U S 362, 50 S Ct 299, 74 L Ed 904, 68 A L R 434, *Simms v Dillon*, 119 W Va 284, 193 S E 331, 113 A L R 787, *State v Miller Home Development*, 243 Minn 1, 65 N W 2d 900, 50 A L R 2d 1377

²²⁶ 2 F Supp 324, p 329
²²⁷ *City of Waterbury v Macken*, 100 Conn 407, 124 Atl 5, cert denied 273 U S 646, 477 S Ct 244, 71 L Ed 820, *Morris v Nesbitt*, —La—, 9 S 2d 75, *State v Lesslie*, 195 Minn 408, 263 N W 295, *Banner Milling Co v State*, 117 Misc 33, 191 N Y S 143, *State v Elem Warehouse Co*, 207 Ore 237, 295 P 2d 1101, *State v Sanders*, 128 W Va 321, 36 S E 2d 397
²²⁸ 30 C J S 80.

of the items which are included within the term "costs and expenses." For the most part the several States have taken a chronological approach to the allocating of costs. This is to say, the proceedings have been treated as divisible parts and the awarding of costs is contingent upon the relative status of the parties at a particular stage of the litigation.

In eight States the general condemnation law contains a provision placing the taxing and allocation of costs within discretion of the court.²²⁹ Statutes found in seven jurisdictions would appear to require that the condemnor be taxed with the costs of the proceedings.²³⁰

The statutes of nine States²³¹ include provisions, which are a combination of those laws which specifically allocate costs and those which make the taxing of costs dependent upon other factors. Eight out of nine of the statutes require the condemnor to pay all costs up to a certain point in the proceedings: the completion of proceedings in the circuit court in Florida; and the filing of the commissioner's report in Iowa, Mississippi, Missouri, Nebraska, New Mexico, Oklahoma (final assessment by Commissioner) and apparently in Indiana. The same result is reached in Maryland by application of §§16 and 19 of Art. 33A of the Maryland Code. That is, the condemnor pays the costs up to a certain stage of the proceedings and thereafter the allocation of costs is contingent upon other factors.

The factors which determine who pays the costs of the proceedings subsequent to the time designated in the statutes are: (a) the moving party and (b) the success or failure of the moving party. If the defendant appeals in Florida to the Supreme Court and the judgment of the circuit court is affirmed the condemnor is not charged

with the costs of said appeal. Maryland law provides that if the court of appeals determines that the petitioner is not entitled to condemn the property, the landowner shall receive costs and a reasonable counsel fee. Both the Indiana and Missouri provisions vest the power to award costs in the discretion of the court.²³² A condemnor in Iowa is required to pay the trial costs unless the same or a lesser amount is awarded after trial than was allowed by the viewers. If the landowner in Mississippi appeals and the circuit court's award is not greater than that of the special court of condemnation, he must pay the costs of the appeal. In Nebraska, New Mexico and Oklahoma, if the appealing party does not secure a more favorable valuation of the property than was fixed by the commissioners he pays the cost of the appeal.

A comparison is made in several States between the amount of the original offer made by the condemnor and that awarded by the commissioners or viewers.²³³ If the condemnor's offer is less than the amount awarded by the commissioners, the property owner in Connecticut, New York, Oregon, South Dakota and Texas would receive costs. If the offer of the condemnor proves to be equal to or more than the commissioner's award, the property owner is required to pay costs in Alabama, Louisiana, Oregon, Texas and West Virginia.

These statutes do not allocate costs to the respective parties in all cases. For example, in Louisiana the statute does not specify whether the property owner recovers costs if the tender proves to be less than the amount finally awarded. If the basic premise mentioned is correct, that is, costs may be awarded only as directed by statute, then in situations not covered by the statute neither party would be taxed costs.

The statutes of nine States compare the amount awarded by the commissioners or viewers with that awarded by the court or

²²⁹ Alaska §55-7-22, Arizona §12-1128(A), but see §12-345 which provides that no court costs shall be charged to the State, county or political subdivision of the county, California Code of Civil Procedure, §1255, Idaho §7-718, Montana §93-9921, Nevada §37-190, North Dakota §32-1532, Wyoming §33-3137.

²³⁰ Delaware §10-6111, Maryland Art 33A-19, Michigan §8 191, New Jersey §20 1-13, see *Morris May Realty Corp v Board of Chosen Freeholders of Monmouth County*, 18 N J 269, 113 A 2d 649, North Carolina §40-19, Virginia §33-65, Washington §8 04 130.

²³¹ Florida §73 16, 74 10, Indiana §3-1709, Iowa §472 33, Maryland Art 33A-16, Mississippi §2767, Missouri §523 070, Nebraska §76-720, 723, New Mexico §522-9-7, 8, Oklahoma tit 69, §46(5, 6), see *Kelly v Oklahoma Turnpike Authority*, —Okla—, 269 F 2d 359.

²³² An old Indiana case, *Douglas v Indianapolis and N W Trac Co*, 37 Ind App 332, 76 NE 892 holds that if the damages assessed are reduced at the trial, the condemnor recovers the cost of the trial.

²³³ Alabama tit 19-30, Connecticut §§13-150, 151, Louisiana tit 19-12, New York General Condemnation Law, §16, Oregon §366 380(9), South Dakota §37-4002, Texas §3267, West Virginia §5387 (if applicant states in petition amount of offer). See also Arizona Rules of Civil Procedure, Rule 68.

jury²³⁴ These laws also emphasize the factor of which party appealed that commissioners award. If the property owner is the appellant and the trial court's award is greater than the commissioners', in Kentucky, Maine, Massachusetts, and Texas the property owner is awarded costs. If the same situation prevails in Tennessee, costs are awarded as in chancery cases, and in Vermont costs may be awarded to property owner or either party as the court determines is just. If the trial court's award is less than the commissioners', the property owner is required to pay costs in Alaska, Kentucky, Maine, Massachusetts, Tennessee, Texas and West Virginia. South Carolina law provides that unless the appellant recovers at least 20 percent more than the amount awarded by the board he must pay costs and disbursements. If a new trial is granted to the defendant in North Dakota and he does not recover more than on the first trial, he must pay the costs of the new trial.²³⁵

There is a premise basic to the various rules discussed above. Nichols succinctly explains this common denominator as follows:²³⁶

It is often held that when the landowner unsuccessfully contests the validity of the taking he may be compelled to pay costs, as he has raised an issue different from a mere assertion of his constitutional right to compensation. So, also, in many states an appeal is allowed from the tribunal which first assessed the damages. If the condemnor appeals, and succeeds in having the amount reduced, the owner should not be mulcted in costs because he has remained passive. But if the owner fails to have the award increased, he may be compelled to pay costs, because, as the event showed, he had already been tendered just compensation.

There remain two types of provisions found in several States, awarding costs to the prevailing party²³⁷ and taxing costs for the property owner in the event the condemnor abandons the proceedings.²³⁸ In a

sense the condemnor, whenever his petition for condemnation is granted, is the "prevailing party." This would be true since he has achieved the objective for which the proceeding was brought. However, such a statement ignores the fact that the property owner's contention as to the amount of compensation due him may have been accepted by the jury or court. For this reason the "prevailing party" standard must have reference to aspects of the final judgment other than the granting of the petition to condemn. Such facts as whether the condemnor's estimate of compensation or that of the property owner is accepted by the jury or court is probably the standard used by those States which use the "prevailing party" test.²³⁹

Items Allowable

Unless the statute provides otherwise, taxable costs are generally held to be the ordinary and usual costs allowed in civil actions.²⁴⁰ With rare exception attorneys' fees are not considered as part of court costs.²⁴¹ The payment of attorney fees is not required by a constitutional provision providing for the payment of just compensation²⁴² and therefore in the absence of express statutory language the condemnor is not required to pay said fees.²⁴³

Only 14 jurisdictions require the condemnor to reimburse the property owner for reasonable attorneys' fees by statute.²⁴⁴

²³⁹ See *State v. Miller Home Development*, 243 Minn. 1, 65 N.W.2d 900, 50 A.L.R.2d 1377, *State v. Bently*, 231 Minn. 531, 45 N.W.2d 185.

²⁴⁰ *Inland Waterway Development Co. v. City of Jacksonville*, 160 Fla. 913, 37 S.2d 333, *City of Euclid v. Vogelstein*, 152 Ohio St. 538, 90 N.E.2d 593, *Los Angeles County v. Marblehead Land Co.*, 95 Cal. App. 799, 273 Pac. 138.

²⁴¹ NICHOLS, *EMINENT DOMAIN*, 3rd Ed., Vol. 1, §4 109, note 77. *Dohany v. Rogers*, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904, 68 A.L.R. 434, *In re Clark's Estate*, 187 F.2d 1003, *City of Waterbury v. MacKen*, 100 Conn. 407, 124 Atl. 5, cert. denied 273 U.S. 646, 47 S.Ct. 244, 71 L.Ed. 820, *Welton v. Iowa State Highway Comm.*, 211 Iowa 625, 233 N.W. 876, *Petition of Reeder*, 100 Ore. 484, 222 Pac. 724, *North American Realty Co. v. City of Milwaukee*, 189 Wis. 585, 208 N.W. 489.

²⁴² *Oregon Mesabi Corp. v. C. D. Johnson Lumber Corp.*, 166 R.2d 1003, cert. denied 334 U.S. 837, 68 S.Ct. 1494, 92 L.Ed. 1762, *Conner v. State Roads Dept.*, —Fla.—, 66 S.2d 257, *Wilson v. Fleming*, 239 Iowa 918, 32 N.W.2d 798, *Petition of Consumers Power Co.*, 335 Mich. 360, 56 N.W.2d 217, *Tomten v. Thomas*, 125 Mont. 159, 232 P.2d 723, *American Salvage Co. v. Housing Authority of Newark*, 14 N.J. 271, 102 A.2d 465.

²⁴³ Arizona §18-155(D), California Code of Civil Procedure, §1255A, Florida §§73 11, 74 10, Hawaii §§8-25, Illinois ch. 49, §§2-9, 10, Maryland art. 33A, §18, Michigan §8 191, Minnesota §117 16, New Jersey §20 1-30, North Carolina §§40-19, 40-24 (only for court appointed attorneys for unknown parties), North Dakota §32-1528 (public corporations), 1532 (within discretion of court), Oregon §366 380(9), Washington Code §§4 84 080, 8 04 092, District of Columbia §16-610.

²³⁴ Alaska §57-7-10, Kentucky §416 110(2F), Maine ch. 23-23, Massachusetts tit. 79-38, South Carolina §33-139, Tennessee §23-1419, see *Erin v. Brooks*, 190 Tenn. 407, 230 S.W.2d 397, Texas art. 3287, Vermont Tit. 19-232, West Virginia §5387.

²³⁵ §32-1532.

²³⁶ NICHOLS, *EMINENT DOMAIN*, 3rd Ed., Vol. 1, pp. 369-370.

²³⁷ Minnesota §117 20(4), New Hampshire §233 17, Ohio §5519 02, Wisconsin §32 11.

²³⁸ *County of Los Angeles v. Lorber*, 158 Cal. App.2d 804, 323 P.2d 542, *State v. Miller Home Development*, 243 Minn. 1, 65 N.W.2d 900, 50 A.L.R.2d 1377.

In Delaware and Iowa the allowance of attorney's fees is forbidden by express statutory language²⁴⁵ Of these 14 jurisdictions, seven States²⁴⁶ and the District of Columbia pay counsel fees only in the event the condemnor abandons the proceedings. The Maryland statute applies only if the Court of Appeals decides that the condemnor has no right to condemn the property in question In Florida, Michigan, Oregon and Washington the statute authorizing the payment of attorney's fees has general application However, the Michigan and Washington statutes limit the amount of payment to a nominal sum

In Florida, the jury determines the amount to be paid as attorney's fees. In Minnesota and Hawaii, the statute does not specify who determines the fee In the remaining 10 States, it is the responsibility of the court to fix the attorney's fees. From a reading of the pertinent statutes it would appear that, with the exception of Florida, attorneys' fees are considered as part of the costs and disbursements incurred in trying the case On the other hand in Florida attorneys' fees appear to be part of "just compensation"²⁴⁷

²⁴⁵ Delaware tit 10 §6111, Iowa §472 33
²⁴⁶ California, Hawaii, Illinois, Minnesota, New Jersey
 North Dakota (public corporations)
²⁴⁷ De Soto County v Highsmith, —Fla—, 60 S 2d 915,
 Dade County v Brigham, —Fla—, 47 S 2d 602

The expense incurred by a landowner in procuring ordinary witnesses is generally included within a provision for the taxing of costs²⁴⁸ However, such is not the case with the fees of expert witness²⁴⁹ Unless expressly authorized by statute, these fees cannot be allowed²⁵⁰ When allowed the amount will be limited by the standards and practice of the community.²⁵¹ In 1959, Minnesota amended its general condemnation law (ch 117) to provide that the court, in its discretion, may allow the property owner, as taxable costs, appraisers' fees not to exceed \$150 each for two appraisers²⁵² The court may also in its discretion allow moving costs not to exceed \$200 for residential property and \$500 for business property In Connecticut, if the highway commissioner's award is increased on appeal reasonable appraisal fees are allowed²⁵³

²⁴⁸ Conner v Brake, 333 Mich 219, 52 N W 2d 672, Childs v New Haven, etc Co, 135 Mass 570
²⁴⁹ Metropolitan Water Dist of Southern California v Adams, 23 Cal 2d 770, 147 P 2d 6, In re South Schenectady-Mariaville State Highway, 174 Misc 1089, 23 N Y S 2d 819
 St Louis v Meintz, 107 Mo 611, 18 S W 30, Pittsburgh's Pet, 243 Pa 392, 90 Atl 329, Freeman v Boston, 178 Mass 403, 59 N E 1018
²⁵⁰ U S v 254 35 Acres of Land, 46 F Supp 913, Dade County v Brigham, —Fla—, 47 S 2d 602, State v Corner, 321 Mich 648, 32 N W 2d 907, Matter of Palisades Interstate Park Comm, 83 Misc 186, 144 N Y S 782, aff'd 164 App Div 957, 149 N Y S 1076, City of Los Angeles v Vickers, 81 Cal App 737, 254 Pac 687
²⁵¹ Application of Gillespie, 173 Misc 591, 17 N Y S 2d 560, aff'd 22 N Y S 2d 464, Rec & Parks Comm of East Baton Rouge Parish v Perkins, 231 La 869, 93 S 2d 198
²⁵² L. of 1959, ch 656, Extra Session I. of 1959, ch 41
²⁵³ §13-150

Table 7 States Having Statutes Concerning Imposition of Costs

Within Discretion of Court	Condemnor Pays Costs	Condemnor Pays Up to Designated Point ¹	Determined by Comparing Original Offer with Award of Viewers	Determined by Comparing Award of Viewers with Award of Court or Jury	Prevailing Party Pays Costs	Attorneys' Fees ²
Alaska	Delaware	Florida	Alabama	Alaska	Minnesota	Arizona ³
Arizona	Maryland	Indiana	Connecticut	Kentucky	N Hampshire	California ³
California	(limited)	Iowa	Louisiana	Maine	Ohio	Florida
Idaho	Michigan	Maryland	New York	Massachusetts	Wisconsin	Hawaii ³
Montana	(nominal)	Mississippi	Oregon	S Carolina		Illinois ³
Nevada	New Jersey	Missouri	S Dakota	Tennessee		Maryland
N Dakota	N Carolina	Nebraska	Texas	Texas		Michigan
Wyoming	Virginia	New Mexico	W Virginia	Vermont		Minnesota ³
	Washington	Oklahoma		W Virginia		N Carolina
	(nominal)					N Dakota ⁴
						N Jersey ³
						Oregon
						D C ³

¹ Thereafter taxing of costs depends upon which party appeals and who is successful
² Attorneys' fees are not allowable in Delaware and Iowa
³ Only if condemnor abandons
⁴ If condemnor abandons, otherwise within courts discretion

Aside from the allowance of attorney's fees and expert witnesses the other items of costs and disbursements are similar to those incurred in any ordinary civil action. Those which are included within the costs provision are usually enumerated in the stat-

ute In conclusion it is emphasized that, unlike the payment of interest, costs are a creature of statute and, if not provided thereby, will not be made part of the final award.

DETERMINATION OF NECESSITY

It is obvious that since there is no pre-ordained plan of public improvements some agency of government must, at some point in time, determine that a particular improvement is needed by the public. Along with this determination, a decision must be reached as to the location of the improvement and the property to be acquired by the governmental body constructing the facility. This section is devoted to a discussion of the various methods used by the several jurisdictions to determine the question of the necessity of the acquisition of property for a public use. Any discussion of this subject to be at all complete requires an analysis of the judiciary's treatment of the question of public necessity.

To place the subsequent discussion properly in focus, an important distinction must be made between the terms "public use" and "public necessity." "Public use" or "public purpose" refers to the constitutional requirement that private property can be acquired only for a public use or purpose.

Two separate and distinct requirements are included within the term "public necessity." One is that the admittedly public use, such as a highway, be needed by the community. The other is that the specific parcel of property sought be necessary for the establishment of that highway. The question of "public use" is always open to judicial determination. The same is not true in regard to the question of "public necessity."

In the absence of a constitutional provision or a statute to the contrary, determining the necessity of condemning property is a legislative function and is not subject to review by the courts.²⁵⁴ Thus,

a court does not have authority to substitute its discretion for that of the legislature in the question of public necessity. This also holds true where the legislature has delegated to a government agency the responsibility of selecting the property to be condemned.²⁵⁵ However, if the determination of the condemnor, in its exercise of the power delegated to it by the legislature, is the result of fraud, bad faith, or a gross abuse of discretion, a court can overrule the condemnor on the necessity question.²⁵⁶ As one court stated it:²⁵⁷

We are of opinion that condemnation of the Puckett tract fell within the discretion of the Public Works Administrator and that the exercise of his discretion was not reviewable by the United States Court, unless palpably arbitrary, capricious, or otherwise unlawful, and we think it was not.

In most States the right to decide what property is necessary is vested in the condemnor, because the statutes omit any reference to the necessity of the taking.²⁵⁸

Minn 72, 192 N.W. 188, *In the Matter of the Proceedings to Grade*, —Mo—, 270 S.W.2d 863, *Scheer v. Kansas-Nebraska Gas Co.*, 158 Neb. 668, 64 N.W.2d 333, *New Jersey Highway Authority v. Currie*, 35 N.J. Super 527, 114 A.2d 587, *Cuglar v. Power Authority*, 4 Misc.2d 879, 163 N.Y.S.2d 902, *Kuecks v. Cowell*, 97 N.W.2d 849, (N.D. 1959), *Solesher v. Ohio Turnpike Commission*, 99 Ohio App. 228, 133 N.E.2d 148, *Owens v. Oklahoma Turnpike Authority*, —Okla—, 283 P.2d 827, *Luzrow v. Philadelphia Housing Authority*, 375 Pa. 586, 101 A.2d 664, *Balsamo v. Providence Redevelopment Agency*, —R.I.—, 124 A.2d 238, *City of Bristol v. Horter*, 73 S.D. 398, 43 N.W.2d 543, *Virginia Electric Power Co. v. Webb*, 196 Va. 555, 84 S.E.2d 735, *State v. Superior Ct.*, 46 Wash.2d 219, 279 P.2d 918, *Swenson v. County of Milwaukee*, 266 Wis. 179, 63 N.W.2d 103, *Aeroville Corp. v. Lincoln County Power District No. 1*, 71 Nev. 320, 290 P.2d 970, *United States v. Certain Parcels of Land*, 215 F.2d 140.

²⁵⁴ *United States v. Certain Parcels of Land*, 141 F. Supp. 300, *Chicago v. Vaccaro*, 408 Ill. 587, 97 N.E.2d 766, *Elberton Southern R. Co. v. State Highway Dept.*, 211 Ga. 838, 89 S.E.2d 645, *City of Newark v. New Jersey Turnpike Authority*, 7 N.J. 377, 81 A.2d 705, *Bradford v. Magnolia Pipe Line*, —Tex—, 262 S.W.2d 242, *Adams v. Greenwich Water Co.*, 138 Conn. 205, 83 A.2d 177, *State v. Curtis*, 350 Mo. 402, 222 S.W.2d 64.

²⁵⁵ *United States v. 209 25 Acres of Land*, 108 F. Supp. 454, *United States v. Certain Real Estate*, 217 F.2d 920, *Woollard v. State Highway Commission*, 220 Ark. 731, 249 S.W.2d 564, *St. Joe Paper Co. v. Choctawhatchee Electric Coop.*, —Fla—, 79 S.2d 761, *Guerretas v. Public Service Company of Indiana*, 227 Ind. 556, 87 N.E.2d 721, *Flower v. Bilerica*, 324 Mass. 519, 87 N.E.2d 189, *Erwin v. Mississippi State Highway Commission*, 213 Miss. 885, 58 S.2d 52, *In re Housing Authority of City of Salisbury*, 235 N.C. 463, 70 S.E.2d 500, *Bookhart v. Central Electric Power Cooperative*, 222 S.C. 289, 72 S.E.2d 576.

²⁵⁷ *United States v. Certain Real Estate*, 217 F.2d 920.

²⁵⁸ Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, West Virginia and District of Columbia.

²⁵¹ *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27, *Rundge Co. v. County of Los Angeles*, 262 U.S. 700, 43 S.Ct. 689, 87 L.Ed. 1186, *Mosker v. City of Phoenix*, 39 Ariz. 470, 7 P.2d 622, *Greene County v. Hayden*, 175 Ark. 1067, 1 S.W.2d 803, *Gould Realty Co. v. City of Hartford*, 141 Conn. 135, 104 A.2d 365, *State v. 0.62033 Acres of Land*, —Del—, 112 A.2d 857, *Rott v. City of Miami Beach*, —Fla—, 94 S.2d 168, *City of Atlanta v. Fulton*, 210 Ga. 784, 82 S.E.2d 850, *Department of Public Works & Buildings v. Lewis*, 411 Ill. 242, 103 N.E.2d 595, *Cemetery Co. v. Warren School Township*, 236 Ind. 264, 139 N.E.2d 538, *Crommott v. City of Portland*, —Me—, 107 A.2d 841, *Hayeck v. Metropolitan District Comm.*, 335 Mass. 372, 140 N.E.2d 210, *State v. Voll*, 155

Table 8 States Having Statutes Concerning Determination of Necessity and Right of Entry

Court or Judge Pass on Question	Determination of Necessity		Right of Entry	
	Condemnor in Petition Must Allege Property Is Necessary	Condemnor Pass Resolution That Property Is Necessary	Can Enter	Enter, but Liable ¹
Alaska Kan Mich Utah Vt Va Wis (municipality) Wyo	Ariz Mont Nev	Ariz (county) ² Calif ² Colo (inc town) Idaho ³ Ind Ky (State) ² Kj (county) ⁴ Minn Mo ⁴ N D Ohio Ore (State) ² (county & municipality) R I S D ² Wash (toll facilities) ³ Wis (State & county) P R	Ala Ariz Hawaii Idaho Ill Ind La Md Minn Miss Neb N H N J N Y N C Ore S C Tex Vt Wash Wis Wyo D C	Alaska Calif Conn Idaho Mont Neb Nev N Mex N D Ohio Okla Pa Tenn Utah Va

¹ For actual damages or damages due to wantonness, malice, negligence or carelessness

² Conclusive presumption

³ Prima facie presumption

⁴ Question is not for court to decide

Other jurisdictions accomplish the same result by specific legislation vesting the responsibility of decision in the condemnor²⁵⁹ In seven States, Arizona, California, Kentucky (State), Minnesota, Oregon (State), South Dakota and Washington (toll facilities), the condemnor is required to pass a resolution which becomes a conclusive presumption as to the necessity of the taking. The Idaho and Kentucky (county) statutes also require the condemnor to pass a resolution, but it is only a prima facie presumption of the necessity of the property. In Missouri, the pertinent statute provides that the question of necessity is one not

for the courts, therefore, the condemnor must make the ultimate decision

Some States, however, have seen fit to make the determination of necessity a question for the judiciary to decide. In one State²⁶⁰ the constitution, and in eight States²⁶¹ the statutes require that necessity be determined either by a judge or jury. In addition, the statutes of three States require that the condemnor allege in its petition that the property is necessary.²⁶²

In summary, the question of "public necessity" is not one for the courts unless it is given to them by a constitutional provision or statute, or unless the condemnor has committed a clear abuse of its discretion.

²⁵⁹ Arizona §9-607 (municipality) §18-155(A), California Streets & Highways Code, §§102,103, Colorado §139-83-3 (incorporated town), Idaho §40-120(9), Indiana §36-118, Kentucky §177 081(1) (State), §416 110(2) (county), Minnesota §161 03, State v Voll, 155 Minn 72, 192 N W 188, Missouri §228 180(2,6), Ohio §5519 01 (State), §719 04 (municipality), Oregon §366 370 (State), §§281 320, 350 (county), §281 520 (municipality), Rhode Island, §37-6-13, South Dakota §28 13A02, 13A03, Washington §§47 12 010 (State highways), 47 56 110 (toll facilities), Wisconsin §32 07(2) (State, county), Puerto Rico tit 32-2902

²⁶⁰ Art XI, §2 of the Wisconsin Constitution provides "No municipal corporation shall take private property for public use, against the consent of the owner, without the necessity thereof being first established by the verdict of a jury"

²⁶¹ Alaska §57-7-12(4), Kansas §26-101, Michigan §8 174, Utah §78-34-8(1), Vermont Tit 19-225, Virginia §25-27, Wisconsin §32 07 (municipality), Wyoming §3-6114

²⁶² Arizona §12-1112(2), Montana §93-9905(2), Nevada §37 040(2)

RIGHT OF ENTRY

As a means of facilitating the construction of a public improvement, it would appear that the condemnor should be permitted to enter upon property for survey purposes without being subject to a law suit for trespass. In a sense, this right may be said to be a necessity, for without it the condemnor may not be in a position to intelligently decide the amount of property required for the improvement. Additionally, prior knowledge of the nature of the property may require an alteration in the layout of the proposed improvement. The type of entry which is being discussed is that involving, for example, a survey of the property or the making of test borings.

A review of the statutes of the several jurisdictions discloses that there are two types of statutes authorizing entry without being subject to the payment of compensation. The first simply provides that agents of the governmental body condemning the property may enter upon the land to make surveys or for other purposes.²⁶³ The second type provides that the condemnor will

be liable for actual damages while upon the land or for damages due to wantonness, negligence, malice or carelessness.²⁶⁴ It is submitted that the condemnor would be responsible for any damages due to the negligence or wilfulness of its employees whether or not such liability is set forth in the statute.

Although there is substantial authority for the proposition that a temporary occupation, for the limited purposes mentioned, does not constitute a claim for compensation in eminent domain,²⁶⁵ and that an entry for the purpose of a survey is not a taking,²⁶⁶ statutory authority may serve a useful purpose. Such a provision would give the condemnor the right to enter on the property for the purpose of gathering information as to the relative advantages and disadvantages of the land in question. It would also permit the entry free from the risk of an action for trespass. On the other hand, the property owner would be adequately protected by requiring the condemnor to pay for damages caused by its agents

²⁶³ Alabama §23-40, Arizona §12-1115, Hawaii §305, Idaho §40-134, Illinois ch 121, §23, Indiana §36-118, §3-1701, Louisiana tit 48-217, Maryland art 89B, §110, art 33A, §28, Minnesota §117 04, Mississippi §8023, Nebraska §76-702, New Hampshire §229-112, New Jersey §40 178-7 (municipality), New York Highway Law, §30(17), 118(5), Town Law, §170, North Carolina §40-3, Oregon §5366 385, 281 010, 340(2), South Carolina §533-134, 33-134 1, Texas art 6795(b) §3 (causeways, bridges, tunnels authorized in gulf coast counties of 50,000 or more), Vermont Tit 19-223, 4971, Washington §43 27 030, Wisconsin §583 01(e), 84 01(12), Wyoming §3-6101, District of Columbia §7-111

²⁶⁴ Alaska §57-7-7, California Code of Civil Procedure, §1242, Connecticut §13-79, Idaho §7-705, Montana §93-9906, Nebraska §39-1324, Nevada §37-050, New Mexico §22-9-18, North Dakota §24-0127, 24-0509, 32-1506, Ohio §5517 01, Oklahoma tit 69, §46 1, 2, Pennsylvania tit 36, §670-205, tit 16, §2403, Tennessee §23-1421, Utah §78-34-5, Virginia §25-3

²⁶⁵ NICHOLS, EMINENT DOMAIN, 3rd Ed., Vol 1, §6 11

²⁶⁶ *Ibid*

PROPERTY ALREADY DEVOTED TO A PUBLIC USE

With the increased tempo of highway construction and improvement it is inevitable that property will be required for highway improvement which is already devoted to some public use. The pre-existing use may take countless forms, such as a public park, municipal golf course, railroad or public utility property or a score of other uses. This clash, in a sense of competing uses, raises the problem of whether property may be condemned which is already devoted to a public use.²⁶⁷

Much of the law which has evolved concerning this problem is not relevant to this study. If the State is the condemnor and is condemning property for one of its sovereign purposes, the fact that the desired property is already devoted to a public use is no impediment to its being condemned.²⁶⁸ Since the State highway department is an instrumentality of the State, the doctrine of prior public use is inapplicable to condemnations by it.²⁶⁹

On the other hand, if the condemnor is a municipality²⁷⁰ the doctrine is applicable and may act as a restriction upon the exercise of the power of eminent domain. As stated by Nichols²⁷¹ "the general rule is that where the proposed use will either destroy such existing use or interfere with it to such an extent as is tantamount to destruction, the exercise of the power will be denied unless the legislature has authorized the acquisition either expressly or by necessary implication." In a recent New

Jersey case the rationale of the doctrine was stated as follows:²⁷²

The rule stems from the recognition that municipal and many private corporations possess general powers of condemnation delegated by the Legislature. If one such body may acquire land used or held for a public purpose by another corporation under a general power of condemnation, the latter would logically be free to re-acquire the same property. By like token it is recognized that if there were no exception to the rule the Legislature would be required in every instance of conflict between an existing public use and a proposed public use to enact special legislation.

Unless it can be inferred, from the nature of the proposed improvement and the difficulties of constructing it without taking land which is devoted to a public use, that the legislature intended to authorize the taking of the property in question, the property cannot be condemned under a general grant of the power of eminent domain.²⁷³ If the nature of the proposed use is of such a character as to make it inevitable that land devoted to a public use will be required for the new use, courts have held that the legislature must have intended to authorize the taking of land already in public use.²⁷⁴ Courts have held that if, as a result of the condemnor being prohibited from taking land in public use, he is prevented from exercising a power expressly granted to him by the legislature, he may take the property.²⁷⁵ Something more than mere convenience is required before the courts will infer that the legislature intended to authorize the condemnation of property already in public use.²⁷⁶ Taking all factors into consideration, a court would

²⁶⁷ For the purposes of discussion it is assumed that the desired property is, at the time of the condemnation, being devoted to a public use which the owner is under a legal obligation to maintain. If either of the aforesaid is not the case the property is not considered to be devoted to a public use.

²⁶⁸ *United States v. Cormack*, 329 U.S. 230, 67 S. Ct. 252, 91 L. Ed. 209, *United States v. Southern Power Co.*, 31 F.2d 852, *Barnegat Light v. Ocean County Freeholders Board*, 44 N.J.S. 332, 130 A.2d 409, *Weehawken v. Erie R.R. Co.*, 20 N.J. 572, 120 A.2d 593, *In re Elimination of Highway-Railway Crossings*, 234 App. Div. 129, 254 N.Y.S. 578, *State v. Mohler*, 115 Ore. 562, 237 Pac. 690.

²⁶⁹ *Elberton Southern R. Co. v. State Highway Dept.*, 211 Ga. 838, 89 S.E.2d 645, but see *Cemetery Company v. Warren School Township*, 236 Ind. 264, 139 N.E.2d 305.

²⁷⁰ The doctrine is also applicable to private or quasi-public condemnors, but no reference will be made to said persons since they perform no function in the highway field.

²⁷¹ NICHOLS, EMINENT DOMAIN, 3rd Ed., Vol. 1, § 2, p. 132.

²⁷² *Weehawken v. Erie Railroad Company*, 20 N.J. 572, 120 A.2d 593, 596.

²⁷³ *Hagadol v. City of Aurora*, 126 Colo. 267, 248 P.2d 732, *Connolly v. Des Moines & Central Iowa Ry. Co.*, 246 Iowa 874, 68 N.W.2d 320, *City of Louisville v. Milton*, —Ky—, [247 S.W.2d 975, *City of Goldboro v. Atlantic Coast Line R.R. Co.*, 246 N.C. 101, 97 S.E.2d 486, *City of Tyler v. Smith County*, 151 Tex. 80, 246 S.W.2d 601.

²⁷⁴ NICHOLS, EMINENT DOMAIN, 3rd Ed., Vol. 1, § 2(1).
²⁷⁵ *Minnesota Power & Light Co. v. State*, 177 Minn. 343, 225 N.W. 164, *Board of Commissioner v. Holladay*, 182 S.C. 510, 189 S.E. 885, 109 A.L.R. 1496, *Vermont Hydro-Electric Corp. v. Dunn*, 95 Vt. 144, 112 Atl. 223, 12 A.L.R. 1495.

²⁷⁶ *Vermont Hydro-Electric Corp. v. Dunn*, op cit note 275.

require that a condemnor show a reasonable rather than absolute necessity for the desired property.

Another exception to the general rule is that if the proposed use will serve a more necessary public use or interest than the existing use the land may be condemned.²⁷⁷ This concept of weighing competing public uses is embodied in the general condemnation statutes of nine States.²⁷⁸ Property already devoted to a public use in these jurisdictions can be condemned if it will be devoted to a more necessary public use. It would appear that in these States the condemnor is required to plead and prove that the proposed use is more necessary to the public than the existing use. The rule in California is that, when property is appropriated by any individual firm or private corporation, the use of the property for State highways and public streets is a more necessary public use.

It follows that since the objective of the general rule is to prevent the impairment or destruction of a public use,²⁷⁹ if the proposed taking will not substantially impair or destroy the existing use, the rule is not applicable.²⁸⁰

The State or one of its agencies, for example, the State highway department,

may condemn property owned by a municipality whether the property is held in a governmental or proprietary capacity.²⁸¹ However, the State may not condemn property owned by the Federal government, no matter what the Federal use is, unless the Federal government consents to the condemnation.²⁸² If municipally owned property is held in a governmental capacity, the State may take the property without compensating the municipality because the municipality is an agency of the State.²⁸³ On the other hand, municipal property held in a proprietary capacity must be paid for if taken.²⁸⁴

In the absence of a constitutional prohibition, the legislature may authorize the taking of property already devoted to a public use for another public use.²⁸⁵ Mention has already been made of provisions appearing in the general condemnation statutes in 9 States permitting the condemnation of property already devoted to a public use if for a more necessary public use.²⁸⁶ In addition, there are various other provisions which bear upon the problem under dis-

²⁷⁷ Snellen v Brazoria County, —Tex—, 224 S W 2d 305
²⁷⁸ Alaska §§57-7-5, 6, Arizona §12-1112(3), California Code of Civil Procedure, §1240(3), Hawaii §304, Idaho §7-703, Portneuf Irr. Co v Budge, 16 Idaho 116, 100 Pac 1046, Montana §93-9905(3), Nevada §37 030(3), North Dakota §32-1504(3), Utah §78-34-3(3)
²⁷⁹ Mississippi State Highway Commission v Yellow Creek Drainage District, 181 Miss. 661, 180 So. 749
²⁸⁰ City of Norton v Lownden, 84 F 2d 663, City of San Diego v Cuyamaca Water Co, 209 Cal 152, 287 Pac 496, cert denied, 282 US 863, 51 S Ct 36, 75 L. Ed 763, City of White Bear Lake v Lenthold, 172 Minn 255, 214 N W 930, Snellen v. Brazoria County, —Tex—, 224 S W 2d 305, City of Tacoma v State, 121 Wash 448, 209 Pac 700

²⁸¹ City of Newark v New Jersey Turnpike Authority, 7 N J 377, 81 A 2d 705, State v Superior Court, 44 Wash 2d 607, 289 P 2d 560, City of Philadelphia v Commonwealth, 284 Pa 225, 130 Atl 491
²⁸² NICHOLS, EMINENT DOMAIN, 3rd Ed., Vol 1, §222
²⁸³ Burns v Metropolitan District Commission, 325 Mass 731, 92 N E 2d 381, State v Cooper, 24 N J 261, 131 A 2d 756, and cases cited in NICHOLS, EMINENT DOMAIN, Vol 1, p 178, note 79
²⁸⁴ New Orleans v New Orleans Waterworks, 142 US 79, 12 S Ct 142, 35 L Ed 943.
²⁸⁵ State ex rel Camden County v Union Light and Power Co., 42 F 2d 692, Jefferson County v City of Birmingham, 217 Ala 268, 115 So 422, Board of Supervisors v State Highway Commission, 188 Miss 274, 194 So 743, State Highway Commission v City of Elizabeth, 103 N J Eq 376, 143 Atl 916, Bronx Chamber of Commerce v Fullen, 174 Misc 524, 21 N Y S 2d 474, Zanesville v Zanesville Canal & Mfg Co., —Ohio App—, 100 N E 2d 739, reversed on other grounds, 159 Ohio St 203, 111 N E 2d 922, State v Jones, 182 Wash 301, 47 P 2d 14
²⁸⁶ Supra note 278

Table 9 Statutes Concerning Condemning of Property Devoted to Public Use

Can Be Taken for a More Necessary Use	Special Legislation Dealing with Toll Facilities Broad Enough to Permit Taking	Highway Use the Most Necessary Use	Proposed Use Will Not Interfere with Existing Use
Alaska Arizona California Hawaii Idaho Montana Nevada North Dakota Utah	Illinois Kentucky Maryland Ohio Oklahoma Rhode Island Washington	New York (Port of N Y Authority) New Jersey (Port of N Y. Authority & several special authorities)	Alabama Missouri Oregon West Virginia

cussion. In seven States special legislation dealing with turnpike or bridge authorities contains broad and all inclusive descriptions of the type of property which may be condemned.²⁸⁷ Rhode Island has a typical provision which states: "to acquire . . . such public or private lands, including public or private lands, including public parks, playgrounds, or reservations, or parts thereof . . . as it may deem necessary. . . "

In addition to the California provision which makes highway use more necessary than public use by a private corporation, legislation of similar import exists in relation to the Port of New York Authority,²⁸⁸ and several special authorities in New Jer-

sey.²⁸⁹ Four States have, in effect, codified the common law by enacting provisions authorizing the condemnation of property devoted to a public use, on condition that the proposed use shall not interfere with the existing use.²⁹⁰ In several States, under certain circumstances, the consent of the municipality or some other government agency is required before the property may be condemned.²⁹¹ In conclusion, it should be noted that in the legislation delegating the power of eminent domain there is normally found a description of the type of property which may be acquired. Some of these provisions are broad enough to include property already devoted to a public use.²⁹²

²⁸⁷ Illinois tit 121, §314a32 (toll road), Kentucky §177 420(2) (turnpike), Maryland art 89B, §123(e) (toll facilities), Ohio §5537 04 (Ohio Turnpike), Oklahoma tit 69, §654 (Oklahoma Turnpike), Rhode Island §24-12-9(K) (R I Turnpike & Bridge Authority), Washington §47 56 110 (Washington State Toll Bridge Authority)

²⁸⁸ New Jersey §§32 1-40, New York Unconsolidated Laws, tit. 17, §§6485, 6496g

²⁸⁹ §§32 3-6 (Delaware River Joint Commission) and 32 8-4 (Delaware River Joint Toll Bridge Commission).

²⁹⁰ Alabama tit 19, §9, Missouri §523 100, Oregon §366 335, West Virginia §5363.

²⁹¹ Massachusetts ch 79, §10, New Jersey §32 13A-6, New York Unconsolidated Laws, tit 17, §6496H, Rhode Island §37-6-13

²⁹² See HRB Special Report 32, *Condemnation of Property For Highway Purposes*, Part 1, for a discussion of these provisions

COURT HAVING JURISDICTION

In the majority of jurisdictions the court of general jurisdiction, whether it be called the superior court as in Massachusetts, the district court as in Kansas, or the circuit court as in Arkansas has jurisdiction in condemnation proceedings. In Michigan, the applicable statute provides that the proceedings may be brought in either the circuit or probate courts.²⁹³ In Ohio the pro-

ceedings may be instituted in either the court of common pleas or probate court.²⁹⁴ In Pennsylvania the court of common pleas has jurisdiction over condemnation proceedings brought by a county²⁹⁵ or municipality²⁹⁶ but the court of quarter session has jurisdiction when the State highway department condemns property.²⁹⁷

²⁹³ § 8 178

²⁹⁴ § 5519 01

²⁹⁵ Tit. 16, § 2408.

²⁹⁶ Tit. 53, § 1081

²⁹⁷ Tit. 36, § 670-303

DISMISSAL OR ABANDONMENT OF PROCEEDINGS

Regardless of the competency and care which may characterize a land acquisition program and the engineering planning that precedes it, imponderable factors are always present which may require a realignment or abandonment of a proposed highway route. Shifts in population and in land uses and other considerations can thwart the best laid highway plans. Circumstances may arise once a condemnation proceeding has been instituted which may dictate that the wisest course for the condemnor to follow would be the abandonment of the proceeding. A prime example of such a condition is where it can be determined, either from the viewers' report or the verdict itself, that it would be less expensive to alter the alignment of the proposed facility than to condemn the property in question.

These and other reasons make it clear that it is important to the condemnor, property owner and the general public, that the condemnor have the right to abandon the proceedings, at least during some stages of the proceeding. In the absence of a statute prohibiting the discontinuance of a proceeding once it is commenced or other factors, such as an agreement between the parties, courts have upheld the abandonment of the proceeding if the application or request to abandon is timely made.²⁹⁸ The diffi-

culties in this area are not with the proposition that in certain instances the condemnor should be permitted to discontinue. It is upon other questions which arise once the right to abandon is recognized that a difference of opinion is found, both in the statutes and case law. These questions are: When should abandonment be permitted? What conditions, if any, should be imposed upon the condemnor before permitting him to abandon the proceedings? What steps are necessary to effect abandonment? The subsequent analysis of the statutes and case law will attempt to supply the answers to these questions.

At some point in a condemnation proceeding the property owner's right to compensation becomes a vested right. In different States this right vests at the time of the institution of the proceeding, the entry into possession, the final judgment or some other point in the proceeding. Once the right to compensation becomes vested the condemnor can no longer abandon the proceeding. It is also the general rule that the taking of actual, physical possession of the

²⁹⁸ State v Helm, —Ariz—, 345 P 2d 202 Piz v Housing Authority, 132 Colo 457, 289 P 2d 905, Conner v State Road Dept., —Fla—, '66 So 2d 257, Department of Public Works &

Buildings v O'Brien, 402 Ill 89, 83 NE 2d 280, State v Superior Court of Maran County, 235 Ind 151, 131 NE 2d 645, Friendship Cemetery v Baltimore, 200 Md 430, 90 A 2d 695, State v Lynch, —Mo—, 297 S W 2d 400, Matter of Municipal Housing Authority, 284 App Div 162, 130 N Y S 2d 460, City of Columbus v Rugg, —Ohio St—, 123 NE 2d 613, Oklahoma Turnpike Authority v Dye, 208 Okla 396, 256 P 2d 438, South Carolina State Highway Department v Bobotes, 180 S C 183, 185 S E 165

Table 10 States Having Statutes Concerning Abandonment of Proceedings.

Provision	State
Can abandon within designated period subsequent to final judgment	Ariz, Calif, Fla, Ill (mun corp), Ind, Ky, Minn (mun. corp), Nev, N J, N Y, Ohio (State), Ore (St), Wis
Before final award with permission of property owner	Del
Appointment of court commissioners no abandonment except on satisfying certain requirements	Mich
Any stage of proceedings	Colo (mun corp), D C (within discretion of court)
Any time after final judgment	Ga (county)
Any time before final judgment	Mass (alternate procedure), Mich (city), N D (public corporation)
While case in district court	Iowa.
Designated time after viewers' report	Kan (state, city), Mo (county, city), Pa (city)
No date specified terminating right to abandon	Hawan, Ill (State), Mass, Mo (S Ct), Pa (county)

property precludes the subsequent abandonment of the proceedings²⁹⁹

Rather than attempt to analyze the somewhat confusing body of case law which has developed interpreting the time of taking, a review of the pertinent statutes will be made. From the existing statutes a pattern emerges which will be of material assistance to a State interested in the problem

In 25 jurisdictions legislation exists which governs the time within which abandonment is permitted and prescribes certain conditions which must be satisfied by the condemnor before it may exercise the privilege³⁰⁰ The general condemnation statutes of 17 jurisdictions contain a provision concerning abandonment,³⁰¹ in four States the procedure applicable to the State highway department includes a section on abandonment.³⁰² In five States the procedures to be followed by counties contain such a provision³⁰³ Additionally, the laws governing condemnation proceedings brought by municipal corporations in seven States include a section on abandonment³⁰⁴

Thirteen statutes specify a period subsequent to the final judgment or verdict of the trial court within which the condemnor may abandon the proceeding³⁰⁵ The period varies from one year in Indiana to ten days in Florida, in Arizona the condemnor can abandon up to the payment of compensa-

tion The statute applicable to proceedings brought by municipal corporations in Illinois permits abandonment within 90 days after the verdict; in Kentucky and Wisconsin 60 days is the prescribed time Five statutes³⁰⁶ limit abandonment to 30 days after judgment and two laws permit up to 20 days after the judgment.³⁰⁷ If, prior to the expiration of the time within which the proceeding may be abandoned, the condemnor takes possession of the property, it would seem that the condemnor is then precluded from abandoning the proceedings.³⁰⁸

In the remaining jurisdictions a variety of actions by the condemnor or the completion of a certain phase of the proceedings terminate the right of the condemnor to abandon the proceeding In Delaware the proceeding is divided into two parts In the event that the proceeding has not progressed to the hearing stage, the condemnor can abandon the action without a court order If the hearing phase of the proceeding has been reached, and there has been no entry of an award, the proceeding can be abandoned only if the property owner will enter into a stipulation with the condemnor. In any event, if possession is taken or title has vested in the condemnor, there can be no abandonment.

A municipal corporation, in Colorado, can abandon an eminent domain proceeding at any stage of the proceeding. In Georgia a county can terminate the action "any time after final judgment" An alternate method of condemnation in Massachusetts permits the proceeding to be abandoned any time before final judgment The Iowa general condemnation law permits the abandonment of the action while the case is in the district court In Kansas the condemnor has 30 days from the filing of the viewers' report to either pay the amount awarded by the viewers or take an appeal. If the condemnor does neither he, in effect, has abandoned the proceeding Once court commissioners are appointed in Michigan there can be no discontinuance of the proceeding except on the payment of the landowner's expenses and reasonable attorney's fees

²⁹⁹ State v. 0 62033 Acres of Land, 40 Del. 90, 110 A 2d 1, Petition of State Highway Commissioner, 252 Mich. 116, 233 N.W. 172, Lafontaine's Heirs v. Lafontaine's Heirs, 205 Md. 311, 107 A 2d 653, Oklahoma Turnpike Authority v. Dye, 208 Okla. 396, 256 P 2d 438, South Carolina State Highway Department v. Bobotes, 180 S.C. 183, 185 S.E. 165, Department of Highways & Public Works v. Gamble, 18 Tenn. App. 95, 73 S.W.2d 175, Thompson v. Jones, —Tex.—, 245 S.W.2d 718, Keys v. Shirley, 153 Va. 461, 150 S.E. 401, see also Wyoming v. \$48-322(D) (county)

³⁰⁰ The reason for the apparent inconsistency between the number of jurisdictions which have statutes pertaining to abandonment as compared to the number of statutes found is attributable to the fact that in several States two or more provisions exist

³⁰¹ California Code of Civil Procedure, §1255a, Delaware §10-6109, Florida §73 13, Hawaii §318, Indiana §3-1710, Iowa §472 34, Kansas §26-101, Kentucky §416 120, Massachusetts ch. 79, §36, ch. 80, §11, Michigan sec. 8 184, Missouri §523 040, Nevada §37 180, New Jersey §20 1-30, New York, Condemnation Law, §18, North Dakota §32-1528 (public corporation), Wisconsin §32 19, District of Columbia §16-610, Puerto Rico tit. 32-2910

³⁰² Arizona §18-155(D), Illinois ch. 121, §23, Ohio §5519 02, Oregon §366 385

³⁰³ Georgia §36-1004, Michigan §8 184, Missouri §228 290 (St. Louis County), Ohio §5563 15, Pennsylvania tit. 16-2433

³⁰⁴ Colorado §50-6-17, Illinois ch. 24, §84-32, Kansas §26-206, Michigan §8 63, Minnesota §440 30, Missouri §74 523, §88 050, Pennsylvania tit. 53, §1092

³⁰⁵ California, Florida, Illinois (municipal corporation), Indiana, Kentucky, Minnesota (municipal corporation), Nevada, New Jersey, New York, Ohio (State), Oregon (State) and Wisconsin

³⁰⁶ California, Nevada, New York, Ohio and Oregon

³⁰⁷ Minnesota and New Jersey

³⁰⁸ NICHOLS, EMINENT DOMAIN, 3rd Ed., Vol. 6, p. 193, see also cases cited in note 43 therein

Table 11 States Providing for Payment by Condemnor on Abandonment of Proceedings

Costs, Disbursements and Attorney's Fees	Costs, Attorney's Fees and Damages	Costs	Damages	Costs and Damages	Within Discretion of Court Impose Conditions
Ariz Calif Iowa Mich Minn Nev N J N Y Ohio Ore D C	Hawaii N D	Colo Ga Ill (State) Kans (G C L.) Ky	Mass (alternate procedure) P R	Pa	Wis

The procedure to be followed by municipal corporations in Kansas and Pennsylvania permits abandonment within 10 and 30 days, respectively, after the filing of the viewers' report. In Missouri the procedures followed by St. Louis County and by municipal corporations provide that failure to take action on the report filed by the viewers constitutes the abandonment of the proceeding. After the jury reaches a verdict, a municipal corporation in Michigan is precluded from discontinuing the proceedings. The general condemnation law of the District of Columbia vests in the discretion of the court the authority to permit the discontinuance of the proceedings, within a reasonable time.

In a number of jurisdictions the statute does not specify a cut-off date, either in terms of time or the completion of a phase of the proceeding, beyond which the condemnor is prohibited from abandoning the proceeding.³⁰⁹ In addition to making a timely application to discontinue the proceedings, in most jurisdictions the condemnor is required to pay certain expenses incurred by the landowner. Even in those cases where the abandonment has occurred at a relatively early stage of the proceedings, the landowner may incur certain losses and expenses. For example, the marketability of the property is temporarily diminished, and the property owner is required to hire an attorney and otherwise prepare for

trial. However, in the absence of a statute so providing, the property owner is not entitled to be compensated for such items.³¹⁰

In eleven jurisdictions, in case of abandonment, the condemnor must pay the costs of proceedings, the landowner's disbursements and reasonable attorney's fees incurred by the property owner.³¹¹ The applicable statute in Hawaii stipulates that the condemnor shall pay the costs, reasonable attorney's fees and the damages suffered by the property owner because of the institution of the proceedings. In five States the condemnor is required to pay costs in the event he abandons the proceedings.³¹² The alternate procedure in Massachusetts and the statute in Puerto Rico require the condemnor to compensate the property owner for any damages attributable to the proceedings. Both statutes in Pennsylvania specify that the condemnor shall pay costs, and actual damages suffered by the property owner. The Wisconsin statute vests in the court the power to impose whatever conditions it deems advisable before permitting the condemnor to abandon the proceeding. This may or may not require the condemnor to pay costs or other expenses incurred by the property owner. In seven States³¹³ the statutes are silent concerning the payment of any of these items

³⁰⁹ *Blue River Power Co v Hronik*, 116 Neb 405, 217 N W 604, *State v Beck*, 333 Mo 1118, 63 S W 2d 814, 92 A L R 373, *J F Schneider & Son v Watt*, —Ky—, 252 S W 2d 898

³¹⁰ Arizona, California, Iowa, Michigan, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, and District of Columbia

³¹¹ Colorado, Georgia, Illinois (State), Kansas (general condemnation law), and Kentucky

³⁰⁹ Hawaii, Illinois (State), Massachusetts, Missouri (general condemnation law), Pennsylvania (county)

³¹² Delaware, Florida, Illinois (municipal corporation), Indiana, Kansas, Massachusetts, and Missouri

With the exception of four States ³¹⁴ each of the statutes under discussion would appear to require some affirmative action of the condemnor to signify that he intends to

abandon the proceedings. In the four States which are exceptions, failure to pay the award or other types of inaction indicate that the condemnor desires to abandon the proceedings.

³¹⁴ Florida, Indiana, Kentucky, and Missouri

SCOPE OF APPEAL

The subsequent discussion is focused exclusively on an appeal from a decision of the trial court to an appellate tribunal. That is to say, the preliminary determination by a board of viewers, where such a board is utilized, has occurred, the case has been tried by a court, with or without a jury and one or both parties is dissatisfied with the verdict of the trial court. Of no concern is the method by which the appeal is taken, whether by a writ of certiorari or by some other procedural device. What is of prime importance is the scope of review of a trial court's decision by an appellate court.

Unfortunately the statutes granting an appeal are of no assistance in arriving at a conclusion as to scope of appellate review in condemnation cases. The statutes normally provide that an appeal may be taken, the time for taking an appeal, and the procedural steps necessary to take an appeal. For this reason there will be no discussion of these statutes. In passing, it should be noted that a statute vesting in the court of last resort general appellate jurisdiction over courts of record is probably broad enough to encompass condemnation proceedings.³¹⁵

Generally speaking, the scope of review of condemnation proceedings by an appellate court is the same as appeals in other civil matters.³¹⁶ Unless there is a showing of an abuse of discretion, matters vested in the discretion of the court are not reviewable.³¹⁷ Non-prejudicial errors which cannot affect the outcome of the case are not subject to appellate review.³¹⁸ As in the case of other civil cases questions of fact

can be reviewed,³¹⁹ and this includes questions of value or damages.³²⁰ However, an appellate court will not substitute its judgment for that of the trial court's decision as to what the award should be unless the award is clearly erroneous or is based on the wrong principle of law, or is the result of passion or prejudice.³²¹

Although an appellate court will determine whether the award is supported by evidence in the record,³²² it will ordinarily not weigh the evidence if there is conflicting evidence.³²³ An award based on conflicting evidence, but which is within the range of the testimony will ordinarily not be disturbed on appeal³²⁴ unless based on mistake,³²⁵ bias,³²⁶ passion³²⁷ or on erroneous principle of law.³²⁸

³¹⁵ *In re Newton Creek Waterway*, 284 N Y 493, 31 N E 2d 916.

³¹⁶ *Federal Land Bank of Wichita v State Highway Commission*, 150 Kan 187, 92 P 2d 72, *New Orleans v Moeglich*, 169 La 1111, 126 So 675, *Hoesly v Department of Roads & Irrigation*, 143 Neb 387, 9 N W 2d 523, *Louisiana Highway Commission v Grey*, 197 La 942, 2 So 2d 654.

³¹⁷ *Department of Public Works & Buildings v Pellme*, 7 Ill 2d 367, 131 N E 2d 55, *East Kentucky Rural Elec Coop Corp v Asbury*, —Ky—, 302 S W 2d 370, *Mississippi State Highway Commission v Luter*, 227 Miss 279, 86 So 2d 5, *Messina v State*, 2 App Div 2d 802, 153 N Y S 2d 737, *Montana-Dakota Utilities Co v Hoerner*, —N D—, 81 N W 2d 648, *Claim of Kincaid*, 95 Ohio App 239, 119 N E 2d 314, *United Fuel Gas Co v Allen*, —W Va—, 75 S E 2d 88.

³¹⁸ *Baetjer v United States*, 143 F 2d 391, cert denied, 323 U S 772, 65 S Ct 131, 89 L Ed 618, *Sorensen v Cox*, 132 Conn 583, 46 A 2d 125, *State v Metropolitan Life Ins Co*, —Mo—, 157 S W 2d 217, *Little v Lorya River, P P Dist*, 150 Neb 864, 36 N W 2d 261, 7 A L R 2d 355.

³¹⁹ *State Highway Commission v Sandbrink*, 215 Ind 71, 18 N E 2d 382, *Waisman v City of Manchester*, 96 N II 50, 69 A 2d 871, *Pettition of Reeder*, 110 Ore 484, 222 Pac 724.

³²⁰ *Dorroh v Jefferson County*, 264 Ala 335, 87 So 2d 619, *Department of Public Works & Buildings v Lambert*, 411 Ill 183, 103 N E 2d 356, *In re Condemnation of Lands in City of Battle Creek*, 341 Mich 412, 67 N W 2d 49, *In re Hue*, 2 N Y 2d 168, 139 N E 2d 140, *In the Matter of the Adjudication of Claims*, —Ohio C C Pl—, 121 N E 2d 695, *State Highway Commission v Reid*, 52 Ga App 206, 182 S E 801, *Kemmerer v Iowa State Highway Commission*, 214 Iowa 136, 241 N W 693, *Ziegler v Sypher*, 310 Mich 93, 16 N W 2d 676, *Kennedy v Dept of Roads & Irr*, 150 Neb 727, 35 N W 2d 781.

³²¹ *Department of Public Works & Buildings v Filkins*, 411 Ill 304, 104 N E 2d 214, *In re Appropriation of Easement for Highway Purposes*, 90 Ohio App 471, 107 N E 2d 387.

³²² *Appeal of Stuckels*, —Ohio App—, 104 N E 2d 186, *Shoemaker v United States*, 147 U S 282, 13 S Ct 361, 37 L Ed 170, *Commonwealth v Anderson*, 228 Ky 104, 14 S W 2d 392, *Northern States Power Co v Efiertz*, —N D—, 94 N W 2d 288.

³²³ *NICHOLS, EMINENT DOMAIN*, 3rd Ed, Vol 6, p 282 and cases in note 2 therein.

³¹⁵ *Crawford v Iowa State Highway Commission*, 247 Iowa 736, 76 N W 2d 187.

³¹⁶ *United States v 111,000 Acres of Land*, 155 F 2d 683, *Commonwealth v Adams*, 220 Ky 151, 294 S W 1066, *St Louis v Senter Commission Co*, 336 Mo 820, 82 S W 2d 87, *In re Public Service Commission*, 224 N Y 211, 120 N E 147, *Department of Highways v Stepp*, 150 Tenn 682, 266 S W 776.

³¹⁷ *NICHOLS, EMINENT DOMAIN*, 3rd Ed, Vol 6, p 268.

³¹⁸ *Ibid*, p 270.

APPENDIX A

JUDICIAL INTERPRETATIONS OF TAKING AS COMPARED TO TAKING OR DAMAGING

Alabama

Brock v City of Anniston, 244 Ala 544, 14 So 2d 519.

Fricke v. City of Guntersville, 254 Ala 370, 48 So 2d 420.

Finnell v. Pitts, 222 Ala. 390, 132 So 2

Alaska

Nothing

Arizona

County of Mohave v Chamberlin, 78 Ariz 422, 281 P 2d 128.

In Re Forsstrom, 44 Ariz 472, 38 P 2d 878

Grande v. Casson, 50 Ariz 397, 72 P 2d 676

Maricopa County Municipal Water Conservation Dist. No 1 v Warford, 69 Ariz. 1, 206 P.2d 1168

Arkansas

Arkansas State Highway Commission v. Bush, 195 Ark. 920, 114 S.W 2d 1061

City of Van Buren v Smith, 175 Ark 697, 300 S.W. 397.

Arkansas State Highway Commission v. Kencannon, 193 Ark. 450, 100 S.W 2d 969.

California

House v L A County Flood Control Dist , 25 Cal 2d 384, 153 P 2d 950.

Rose v State, 19 Cal 2d 713, 123 P.2d 505

Blumenstein v. City of Long Beach, 143 Cal App 2d 123, 299 P 2d 347

Ambrosini v Alisal Sanitary Dist , 154 Cal App 2d 720, 317 P 2d 33

Colorado

City of Colorado Springs v Weiher, 110 Colo. 55, 129 P 2d 988.

Denver Union Terminal Ry. Co v Gladt, 67 Colo. 115, 186 Pac 904.

Connecticut

Anselmo v. Cox, 135 Conn. 78, 60 A 2d 767

Gaylord v. City of Bridgeport, 90 Conn 235, 96 Atl. 936.

Kachele v. Bridgeport Hydraulic Co , 109 Conn. 151, 145 Atl. 756

Lefebvre v. Cox, 129 Conn 262, 28 A 2d 5

Delaware

Nothing

Florida

Arundel Corporation v Griffen, 89 Fla. 128, 103 So 422

Natural Gas and Appliance Co. v. Marion County, — Fla. —, 58 So 2d 701

Weir v Palm Beach County, — Fla —, 85 So.2d 865

Georgia

City of Atlanta v Due, 42 Ga App 797, 157 S.E. 256

Felton Farm Co. v Macon County, 49 Ga App 239, 175 S.E 29

Hawaii

Nothing.

Idaho

Crane v City of Harrison, 40 Idaho 229, 232 Pac. 578.

Renninger v. State, 70 Idaho 170, 213 P 2d 911

Illinois

Horn v. City of Chicago, 403 Ill 549, 87 N.E.2d 642.

Kane v. City of Chicago, 392 Ill 172, 64 N.E 2d 506.

Indiana

Freigy v Cargaro Co Inc , 223 Ind 342, 60 N.E 2d 288

State v Patten, 209 Ind. 482, 199 N.E. 577
N Y , Chicago & St Louis R.R Co v Lincoln National Life Ins Co , 127 Ind. App 608, 142 N.E 2d 437.

Iowa

Anderlik v Iowa State Highway Commission, 240 Iowa 919, 38 N.W.2d 605.

Lage v. Pottawattamie County, 232 Iowa 944, 5 N W 2d 161

Pillings v Pottawattamie County, 188 Iowa 567, 176 N.W. 314

Kansas

- Richert v. Board of Education of City of Newton, 177 Kan 502, 280 P 2d 596
 Sample v Board of Commissioners of Jefferson County, 108 Kan 498, 196 Pac 440

Kentucky

- City of Covington v Greenburg, 242 Ky 797, 47 S W 2d 723
 Commonwealth v Moore, — Ky —, 267 S.W 2d 531
 Commonwealth v Tate, 297 Ky 826, 181 S W 2d 418
 Cranley v Boyd County, 266 Ky 569, 99 S W 2d 737
 O'Gara v City of Dayton, 175 Ky 395, 194 S W 380

Louisiana

- Cucurullo v City of New Orleans, 229 La 463, 86 So 2d 103
 Harrison v Louisiana Highway Commission, 202 La 345, 11 So 2d 612

Maine

- Boober v Towne, 127 Me 332, 143 Atl 176
 Simoneau v Inhabitants of Livermore Falls, 131 Me 165, 159 Atl 853

Maryland

- Brehm v Tabler, 176 Md 411, 5 A 2d 820
 Friendship Cemetery v City of Baltimore, 197 Md 610, 81 A 2d 57
 Krebs v State Road Commission, 160 Md 584, 154 Atl 131

Massachusetts

- F. F. Woodward Co v City of Fitchburg, 236 Mass 364, 128 N E 419
 Wyman v City of Boston, 282 Mass 204, 184 N E 462.
 Deyo v Athol Housing Authority, 335 Mass. 459, 140 N E 2d 393
 Sullivan v Commonwealth, 335 Mass 619, 142 N E 2d 347

Michigan

- Johnstone v Detroit, G H & M Ry Co, 24 Mich 65, 222 N W 325
 Tomaszewski v Palmer Co, 223 Mich 565, 194 N W 571

Minnesota

- Wolfram v Burnquist, 246 Minn 264, 74 N W 2d 510

Mississippi

- Parker v Mississippi State Highway Commission, 173 Miss 213, 162 So 162
 Puyper v Pure Oil Co, 215 Miss 121, 60 So 2d 569

Missouri

- Guaranty Savings & Loan Ass'n v City of Springfield, 346 Mo 79, 113 S W 2d 147
 Holecamp Lumber Co v State Highway Commission, — Mo —, 173 S W 2d 938.
 Wilson v Kansas City, — Mo —, 162 S W 2d 803
 Laeclde Gas Co v Abrahamson, — Mo —, 296 S W 2d 100
 Hamer v State Highway Commission, — Mo —, 304 S.W 2d 869

Montana

- Less v City of Butte, 28 Mont 27, 72 Pac 140
 Eby v City of Lewistown, 55 Mont 113, 173 Pac 1163

Nebraska

- Psota v. Sherman City, 124 Neb 154, 245 N.W 405
 Schumette v State, 147 Neb 193, 22 N W 2d 691
 Armbruster v Stanton-Pilger Drainage Dist, 165 Neb 459, 86 N W 2d 56

Nevada

Nothing

New Hampshire

- Langdon v Maine-New Hampshire Interstate Bridge Authority, 92 N H 432, 33 A 2d 739

New Jersey

- Sorbino v City of New Brunswick, 43 N J Super 554, 129 A 2d 473
 Mansfield & Swett v Town of West Orange, 120 N J L 145, 198 Atl 225
 Rangelli v. Township of Wayne, — N J Super —, 127 A 2d 916

New Mexico

- Board of Commissioners of Santa Fe City v Slaughter, 49 N M 141, 158 P 2d 859

New York

- Lawrence Construction Co v State, 293 N Y. 634, 59 N E 2d 630

- In re Brooklyn Queens Connecting Highway and Parks, 300 N Y 265, 90 N E 2d 183
- Coffey v State, 291 N Y 494, 53 N E 2d 362
- Smith v Gagliardi, 2 Misc 2d 1005, 148 N Y S 2d 758
- Geiger v City of New York, — Misc 2d —, 141 N Y S 2d 667
- 59 Front St Realty Corp v Klaess, 6 Misc 2d 774, 160 N.Y.S.2d 265
- North Carolina*
- Eller v Board of Education, 242 N C 584, 89 S E 2d 144
- North Dakota*
- King v Stark County, 67 N D 260, 271 N W 771
- Ohio*
- State v Linzell, 163 Ohio St 97, 126 N E 2d 53
- State ex rel McKay v Kauer, 156 Ohio St 347, 102 N E 2d 703
- Oklahoma*
- Chicago, R I & P Ry Co v Pregmore, 180 Okla 124, 68 P 2d 90
- Grand River Dam Authority v Misenhimer, 195 Okla 682, 161 P 2d 757
- Lindley v. Oklahoma Turnpike Authority, — Okla —, 262 P 2d 159
- City of McAlester v King, — Okla —, 317 P 2d 265
- Oklahoma Turnpike Authority v Chandler, — Okla —, 316 P 2d 828
- Oregon*
- Ail v City of Portland, 136 Ore 654, 299 Pac 306.
- Cooke v City of Portland, 136 Ore 233, 298 Pac. 900
- Wilson v City of Portland, 132 Ore 509, 285 Pac. 1030.
- Pennsylvania*
- Ewalt v Pennsylvania Turnpike Comm, 382 Pa. 529, 115 A 2d 729
- Koontz v. Commonwealth, 364 Pa 145, 70 A 2d 308
- In re Mill Creek Seven in City of Philadelphia, 374 Pa 120, 97 A 2d 11
- Mayer v. Commonwealth, 185 Pa Super 333, 132 A 2d 902
- Rhode Island*
- Newman v Mayor of City of Newport, 73 R I 385, 57 A 2d 173
- South Carolina*
- City of Rock Hill v Cothran, 209 S C. 357, 40 S E 2d 239
- Moss v South Carolina State Highway Department, 223 S C 282, 75 S E 2d 462
- Webb v. Greenwood County, 229 S C 267, 92 S E.2d 688
- South Dakota*
- Olson v City of Watertown, 46 S D 582, 195 N W 446.
- Remartz v Town of Ethan, 50 S D 42, 208 N W 174.
- Tennessee*
- Hollers v Campbell County, 192 Tenn 442, 241 S W 2d 523
- Wood v. Foster & Creighton Co, 191 Tenn 478, 235 S W 2d 1
- Texas*
- L-M-S Inc v Blackwell, — Tex —, 277 S.W.2d 593
- Long v City of Austin, — Tex —, 265 S W 2d 632.
- State v. Sparks, — Tex —, 296 S.W.2d 609
- City of Amarillo v Gray, — Tex —, 304 S W 2d 742, modified, — Tex —, 310 S W 2d 737
- Utah*
- State v. District Court, 94 Utah 384, 78 P.2d 502
- Robnett v Price, 74 Utah 512, 280 Pac 736
- Vermont*
- Hoyt v Village of North Troy, 93 Vt 8, 105 Atl 33
- Virginia*
- Heldt v Elizabeth River Tunnel Dist, 196 Va 477, 34 S E 2d 511
- Hicks v Anderson, 182 Va 195, 28 S E.2d 629
- City of Lynchburg v Peters, 156 Va 40, 157 S E 769
- Washington*
- Kuhr v City of Seattle, 15 Wash 2d 501, 131 P 2d 168
- Milwaukee Terminal Ry Co v. City of Seattle, 86 Wash. 102, 149 Pac 644

- Peterson v King County, 41 Wash 2d 907, 252 P 2d 797
- Walker v State, 48 Wash.2d 587, 295 P.2d 328
- West Virginia*
- Curry v Buckhannon & N R Co , 87 W Va 548, 105 S.E 180
- Peddicard v County Ct of Marshall County, 121 W. Va 270, 3 S.E 2d 222
- Richmond v City of Hinton, 117 W. Va. 223, 185 S E. 411
- State v City of Dunbar, — W. Va —, 95 S.E.2d 457.
- Wisconsin*
- State v. Milwaukee Light, Heat and Traction Co , 173 Wis 225, 180 N.W. 938
- Wyoming*
- Hirt v. City of Casper, 56 Wyo 57, 103 P 2d 394

APPENDIX B

SUMMARY OF LAWS, BY STATES

Alabama.—A board of viewers consisting of three persons is appointed by the court. The viewers are required to be freeholders or citizens of the county wherein the property to be condemned or part of it is located. Additionally, the viewers must be disinterested and possess the same qualifications as a juror. A majority of the board may act for the whole board and the board has the power of issuing subpoenas.

The condemnation procedure applicable to cities specifies that the court shall appoint three freeholders to serve as a board of viewers.

The constitution provides that there shall be a jury trial except when the condemnor is the State. A jury trial is provided for by the general condemnation law and the procedure applicable to cities. The constitution also requires that compensation be paid whenever property is taken. However, if the condemnor is a municipal or other corporation compensation must be paid whenever property is taken, injured or destroyed.

Benefits, both general and special, may be deducted from the value of the land taken and for the damages to the remainder. The property owner is required to pay the costs of the proceedings if the offer made by the condemnor is greater than the award of the board of viewers. The condemnor has the right to enter upon the property to make preliminary surveys and investigations. Property already devoted to a public use may be condemned for another public use so long as the existing public use is not injured or destroyed by the proposed use.

Alaska.—A board of commissioners consisting of three competent residents of the precinct where the property is located is appointed by the court. The constitution requires that the right to a jury trial is preserved to the same extent as at common law, while the general condemnation law

provides for a jury trial. According to the constitution compensation must be paid whenever property is taken or damaged.

The general condemnation law provides, *inter alia*, that the value of the property is determined as of the time of the issuance or service of the summons, that benefits may be deducted from the damages to the land not taken; that improvements made subsequent to the summons are not compensable, that interest at the rate of 6 percent is awarded from the date possession is taken, that the taxing of costs is within the discretion of the court, but that the property owner pays the costs if the award made by the trial court is less than that made by the board of commissioners, that the court or judge passes on the question of the need for the property to be condemned; that the condemnor may enter upon the property to make surveys, etc., but that he is liable for actual damages or damages caused by his wantonness, negligence, maliciousness or carelessness, and that property devoted to a public use may be condemned for a more necessary public use.

Arizona.—The constitution provides that there shall be a jury trial when the appropriation is by a corporation other than a municipal corporation. However, a recent case implies that a jury trial must be provided in all cases unless waived by the condemnee. The general condemnation statute and the procedure applicable to municipalities provides for a jury trial. However, if a jury trial is waived a board of three competent, disinterested persons may be appointed by the court, a majority of whom may act for the whole board.

The general condemnation statute provides that the property is to be valued at the time of the issuance or service of the summons and that improvements made subsequent to the summons are not compensa-

ble A provision applicable only to the State highway department provides that property is valued as of the time the department declares by resolution the necessity of the property. If proceedings are not commenced within two years of the resolution the property is valued as of the date of the summons. The constitution provides that compensation must be paid for property that is either taken or damaged. Benefits may be set off against damages to the remainder, but it is not clear whether both general and special or only special benefits may be deducted. Pursuant to the immediate possession provisions of the general condemnation procedure, interest is to be awarded from the date of the order of possession. It is within the discretion of the court to tax costs. A condemnor is required by the general condemnation law to allege in his petition that the property is necessary. On the other hand, the procedure applicable to municipalities provides that the condemnor must adopt a resolution stating that the property is needed and that this resolution is a conclusive presumption of the necessity of the property. The general condemnation law permits the condemnor to enter upon the property for preliminary surveys and inspections. Pursuant to the general condemnation law land devoted to a public use may be condemned for a more necessary public use. The condemnor may abandon the proceedings any time before the payment of compensation but he must pay court costs, attorneys' fees and expert witness fees. The concurrence of nine or more jurors is required for a verdict.

Arkansas—The procedure applicable to the laying out of county roads provides that the county court shall appoint three disinterested citizens of the county to serve as a board of viewers. The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore. The special condemnation procedure applicable to the State highway department and the procedure to be followed by municipalities provide for a jury trial. According to the constitution, compensation must be paid for property which is either taken or damaged. Special benefits may be deducted from both

the value of the land taken and the damages to the remainder. The immediate possession statute provides that interest at the rate of 6 percent shall be paid from the date of the order of possession.

California—The constitution requires that there be a jury trial in all cases and the general condemnation law so provides. However, the Street Opening Act of 1903 utilizes an ad hoc body. The general condemnation statute provides that property is to be valued as of the time of the issuance or service of the summons and that improvements made after the service of the summons are not compensable. However, if the case is not tried within one year from the date of the summons, the property is valued as of the date of the trial.

The constitution requires that compensation be paid for the taking or damaging of property. Special benefits may be set-off against the damages to the property not taken. The immediate possession statute requires that interest at the lawful rate, be paid from the date of the order of possession. Costs may be taxed, within the discretion of the court. The Streets and Highways Code provides that the highway department shall pass a resolution which is a conclusive presumption in regards to the necessity of the property to be condemned.

The general condemnation statute provides, *inter alia*, that the condemnor may enter upon the property to make investigation, but he is liable for actual damages, or damages caused by his wantonness, negligence, maliciousness or carelessness, that property devoted to a public use may be taken for a more necessary public use, that when property is appropriated by any individual firm or private corporation the use thereof for a State highway or public street is a more necessary use, and that the proceedings may be abandoned within 30 days after final judgment, but that if the condemnor abandons the proceedings he must pay the costs, disbursements and reasonable attorneys' fees to be fixed by the court.

Colorado—The procedure applicable to cities provides that the court shall appoint three freeholders of the city to serve as a board of viewers. The constitution requires

that a jury trial be held in all cases and the general condemnation procedure and the statute applicable to cities so provide. Compensation must be paid for property which is either taken or damaged. Special benefits may be deducted from the damages to the property not taken. Incorporated towns are required to pass a resolution stating that the property sought to be condemned is necessary. Condemnation proceedings instituted by a municipal corporation may be abandoned at any stage of the proceedings on the payment of costs.

Connecticut—The procedure applicable to cities provides that the court shall appoint three electors of the city to serve as a board of viewers. The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore. A referee is employed by the procedure applicable to the State highway department, while a jury trial is provided for by the procedure followed by cities. Compensation must be paid when property is taken or damaged.

Special benefits can be deducted from the value of the land taken plus the damages to the remainder. Interest must be paid from the date possession is taken of the property to be condemned. The property owner is entitled to court costs and reasonable appraisal and attorneys' fees if the award of the commissioners is more than the original offer by the State. The condemnor may enter upon the property to make surveys and investigations but is liable for any damages.

Delaware—The general condemnation statute provides that the court shall appoint three disinterested, competent persons to serve as a board, a majority of whom may act for the whole board. The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore and that compensation must be paid for the taking of property. The law is not clear concerning the set-off of benefits. A lower court has allowed both general and special benefits to be set-off against the entire award. Interest must be paid from the date of possession or the award, whichever occurs first. The condemnor is required to pay the

costs and it is specifically provided that attorneys' fees shall not be paid.

In the event the proceeding has not progressed to a hearing, the condemnor can abandon the action without a court order. However, if the hearing phase of the proceeding has been reached, but there has been no entry of an award, the proceeding can be abandoned, but only if the property owner will enter into a stipulation with the condemnor. In any event, if possession is taken or title has vested in the condemnor, there can be no abandonment.

Florida.—The constitution and the general condemnation statute require a jury trial in all cases. Compensation must be paid for the taking of property. Benefits may be set-off against the damages to the remaining property, but the statute is not clear whether both general and special or only special benefits may be deducted. The immediate possession statute provides that interest at the rate of 6 percent is to be paid from the date possession is taken of the property.

The condemnor pays the costs of the trial in the circuit court, however if the condemnor appeals and the judgment is affirmed, the condemnor does not pay the costs of the appeal. The proceedings may be abandoned within 10 days after the final judgment and the failure to pay the award manifests an intent to abandon the proceedings.

Georgia—The general condemnation statute provides that the parties shall each pick one person and the two so chosen shall pick a third person to serve as a board of assessors. A majority of the board may act for the whole board. An optional method of condemnation adopted in 1957, dispenses with the board and substitutes a special master who must be an attorney with three years experience. The special master is appointed by the superior court.

The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore, while the general condemnation statute provides that there shall be a jury trial. The constitution requires that compensation must be paid whenever property is taken. Special benefits may be

deducted from the damages to the land not taken. The optional method of condemnation provides that interest, at the lawful rate, shall be paid from the date of the order of the special master. A county may abandon the proceedings any time after final judgment, on the payment of costs.

Hawai—The Hawaiian Organic Act contains a provision requiring a jury trial in criminal matters. Property is to be valued at the time of the issuing or service of the summons, and improvements made subsequent to the summons are not compensable. The immediate possession statute provides that interest at the rate of 5 percent shall be paid from the date of the order of possession. The general condemnation statute provides, *inter alia*, that the condemnor may enter upon the property to make surveys and investigations, that property devoted to a public use may be condemned for a greater public use; and that the proceedings may be abandoned upon the payment of the defendant's costs and that special benefits may be deducted from the damages to the property not taken.

Idaho—The constitution provides that the right to a jury trial remains inviolate or continues as heretofore. A jury trial is required by the general condemnation law. Property is valued as of the time of the issuance or service of the summons and improvements made after the summons are not compensable. Compensation must be paid when property is taken. Special benefits may be deducted from the damages to the land not taken. The condemnor is required to pay the costs of the proceedings. The State highway department is required to pass a resolution stating that the property sought to be condemned is necessary and this resolution becomes a *prima facie* presumption as to the necessity of the taking. Both the highway code and the general condemnation statute provide that the condemnor may enter upon the property to make surveys, etc. The general condemnation law provides that the condemnor shall pay for actual damages and for damages due to his wantonness, maliciousness, negligence or carelessness. Property de-

voted to a public use may be condemned for a greater public use.

Illinois—The procedure to be followed by a municipal corporation provides that the court shall appoint three disinterested persons to serve as a board of viewers. The constitution requires that a jury trial be held in all cases, except when the State is the condemnor and also a jury trial is required when the appropriation is by a corporation other than a municipal corporation. Both the general condemnation statute and the procedure set forth for municipalities provide for a jury trial. Compensation must be paid whenever property is taken or damaged. Special benefits may be deducted from the damages to the land not taken. The immediate possession statute provides that interest at the rate of 6 percent shall be paid from the date of possession. The condemnor may enter upon the property to make preliminary investigations. Legislation applicable to toll roads is broad enough probably to authorize the taking of property devoted to a public use. The highway code permits the abandonment of the proceedings on the payment of costs and reasonable attorneys' fees, fixed by the court. Municipal corporations may abandon the proceedings within 90 days after final judgment.

Indiana—The general condemnation law provides that the court shall appoint three persons to serve as a board of viewers. The procedure for laying out county roads provides that the county governing body shall appoint three persons to serve as a board of viewers. The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore, while both the general condemnation law and the procedure applicable to cities require a jury trial. Property is to be valued as of the time of the issuance or service of the summons. Compensation must be paid whenever property is taken. Special benefits may be set-off against the damages to the land not taken. The condemnor pays all costs up to the filing of the board of viewers' report and thereafter the taxing of costs is within the discretion of the court. The State highway department is required to pass a resolution stating that the property is necessary

Both the general condemnation statute and the highway code provide for the entry upon the property to make surveys. Pursuant to the general condemnation law the proceedings may be abandoned within one year after final judgment. The failure to pay the award manifests an intent to abandon.

Iowa.—The general condemnation statute requires the Chief Justice of the State Supreme Court to appoint six persons to serve as a board of viewers. These persons may be from any part of the State. The procedure for laying out county roads provides that the property owner and the condemnor shall each pick a viewer and the two so chosen shall pick a third. The viewers must be disinterested freeholders of the county wherein the property is situated. The constitution requires that there be a jury trial in all cases. Compensation must be paid whenever property is taken. Benefits cannot be deducted from the award. The condemnor pays the costs up to the filing of the viewers' report and also the costs in the trial court, unless the trial court's award is greater than the award of the viewers. Attorneys' fees cannot be paid. The general condemnation law permits the abandonment of the case while it is in the District Court on the payment of costs, disbursements, and attorneys' fees.

Kansas.—The general condemnation law provides that the court shall appoint three disinterested freeholders and citizens of the county to serve as a board of viewers. In accordance with the procedure for laying out county roads, the governing body of the county appoints three disinterested freeholders of the county to act as a board of viewers. Also, the procedure applicable to cities requires the court to appoint three freeholders of the city to serve as a board of viewers.

The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore. Both the general condemnation law and the procedure employed by cities specify that a jury trial shall be held. Compensation must be paid for property which is taken. Special benefits can be deducted from the value of the land taken plus the damages to the remainder. Interest

at the rate of 6 percent is paid on the award. The general condemnation statute requires the court or judge to pass upon the question of the necessity of the property. The condemnor has 30 days from the filing of the viewers' report to either pay the award or appeal. If he does neither, in effect, he has abandoned the proceedings and must pay costs. The procedure applicable to municipalities permits the abandonment of the proceedings within 10 days after filing the report of the viewers.

Kentucky.—The procedure applicable to the State provides that the court shall appoint three disinterested freeholders or citizens of the county wherein the property is located, to serve as a board of viewers. One procedure applicable to counties provides that the governing body of the county shall appoint three persons, while another procedure states that the county court shall appoint three disinterested freeholders of the county to act as a board of viewers. The procedure to be followed by cities states that the court shall appoint three freeholders to constitute a board of viewers. The constitution provides that there shall be a jury trial except when the State is the condemnor. The condemnation applicable to the State highway department, the general condemnation statute, and the procedure applicable to cities all require a jury trial. The constitution requires that compensation be paid when property is taken, or taken and damaged when the condemnor is a municipal or other corporation.

It is not clear whether benefits may be deducted and if permitted from what element of the award they may be set-off. Interest is at the rate of 6 percent from the date of possession, if the award is increased on appeal. The property owner is awarded costs if the trial court's award is more than that of the viewers. However, he pays the costs if the trial court's award is less than the viewers' award. The State highway department is required to pass a resolution stating that the property is necessary; the resolution becomes a conclusive presumption in support of the necessity of the property. The county is also required to pass a resolution, but its resolution is only a prima

facie presumption. Legislation pertaining to toll roads is probably broad enough to permit the taking of property devoted to a public use. The general condemnation statute permits the abandonment of the proceedings within 60 days after final judgment on the payment of costs. Failure to pay the award manifests an intent to abandon.

Louisiana—The procedure for laying out parish roads provides that the parish governing body shall appoint six disinterested, freeholders of the parish to serve as a board of viewers. The constitutional provision pertaining to a right to a jury trial applies only to criminal matters, while the general condemnation statute provides that the trial shall be by a court without a jury. Compensation must be paid for the taking or damaging of property. Special benefits may be deducted from the damages to the property not taken. Interest at the rate of 5 percent is awarded from the date of the vesting of the title. If the preliminary offer is equal to or more than the award the property owner is required to pay the costs. The condemnor has the right of entry for surveys.

Maine—The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore, while the condemnation procedure applicable to the State highway department requires a jury trial. Compensation must be paid when property is taken. The law pertaining to benefits is not clear concerning whether benefits may be deducted.

The property owner must pay costs if either party appeals from the award of the joint board and the trial court's award is less than that of the joint board. Otherwise, the prevailing party recovers costs to be taxed by the court.

Maryland—A board of property review in each county and Baltimore City consists of three persons, a lawyer, an engineer and a third person who is neither a lawyer nor an engineer. These people are appointed by the circuit court judge and the supreme bench in Baltimore City. The procedure for laying out county roads provides that the county governing body shall appoint three disinterested, freeholders of the county to

serve as a board of viewers. The constitution provides that there shall be a jury trial except when the condemnor is the State. Both the general condemnation law and the procedure applicable to the State highway department provide for a jury trial. Compensation must be paid when property is taken. It is not clear whether benefits may be deducted. The condemnor pays costs up to a point and thereafter the awarding of costs is contingent upon many factors. If the court of appeals finds that the condemnor is not entitled to take the property, the landowner is awarded costs and attorneys' fees to be fixed by the court. The condemnor may enter upon the property to make investigations. Legislation pertaining to toll facilities is broad enough to include the taking of property devoted to a public use.

Massachusetts—The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore. A jury trial is required by the general condemnation law. Compensation must be paid for the taking of property. Special benefits may be set-off against the value of the land taken plus the damages to the remainder. Interest at the rate of 4 percent is awarded. If the property owner appeals and the trial court's award is more than the original offer, he is awarded costs, but if the award is less than the offer the property owner pays the costs. The general condemnation law permits the abandonment of the proceeding. The alternate method of condemnation permits the abandonment of the proceedings any time before final judgment, on the payment of damages attributable to the proceedings.

Michigan—Pursuant to the procedure applicable to the State highway department the court appoints three disinterested persons, who cannot be residents of the township wherein the property is located, to act as commissioners. A majority of the commissioners may act for all the commissioners and their report is admissible in court and is prima facie proof of the value of the property being taken. The procedure followed by counties provides that the county court shall appoint three disinter-

ested persons of the county to make the preliminary determination of damages. The procedure applicable to cities specifies that the court shall appoint 12 freeholders to constitute a board. The constitution provides that there shall be a jury trial except when the State is the condemnor. The procedures applicable to counties and cities provide for a jury trial.

The constitution requires that compensation be paid when property is taken. The law pertaining to the set-off of benefits is not clear. The condemnor pays the costs of the proceedings and the landowner is entitled to \$25.00 toward his attorney's fees. The court or judge is required to pass upon the question of the necessity of the property sought to be condemned. The procedures applicable to the State and counties permit the abandonment of the proceedings, after the court has appointed commissioners, only on the payments of the landowner's expenses, disbursements, and reasonable attorneys' fees. The procedure applicable to municipalities prevents abandonment after the jury has rendered its verdict.

Minnesota—The procedure applicable to the State highway department provides that the court shall appoint three disinterested freeholders or citizens of the county wherein the property is located to act as a board of viewers. A majority of the board may act and the viewers may testify in court with respect to their award. The board has the power of subpoena. With respect to counties, two methods are provided for. Either the county follows the general condemnation law, or as an alternative the county board first determines compensation. The procedure to be followed by municipalities states that the court shall appoint three electors of the city to act as a board of viewers. The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore. The procedures applicable to the State, counties, and municipalities all provide for a jury trial. Although the general condemnation law does not provide for it other statutes permit a quotient verdict.

The constitution requires that compensation be paid if property is taken or dam-

aged. Special benefits may be deducted from the damages to the property not taken. Interest is allowed from the date of the report of the viewers. Costs are taxed for the prevailing party. A recent law provides for the payment of \$50.00 to not more than two appraisers, within the discretion of the court, and also, within the discretion of the court, moving expenses. If the condemnor abandons the proceedings, the landowner is allowed reasonable attorneys' fees. A supreme court case holds that the condemnor determines the need for the property. The condemnor has the right to enter upon the property to make investigations. The procedure followed by municipalities permits the abandonment of the proceedings within 20 days after final judgment.

Mississippi—The general condemnation law provides for the creation of a special board consisting of a justice of the peace and a jury of 12 chosen like an ordinary common law jury. The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore. The general condemnation statute requires that a jury trial be held. The constitution requires that compensation be paid when property is taken or damaged. The law pertaining to the deduction of benefits is not clear. The condemnor pays the costs up to the filing of the report of the special court and if the landowner appeals and the award of the circuit court is not greater than that of the special court, the landowner pays the costs. The condemnor has the right of entry to conduct investigations.

Missouri—The general condemnation statute provides that the court shall appoint three disinterested freeholders or citizens of the county to serve as viewers. A majority of the board may act for the whole board. The procedure followed in the laying out of county roads provides that the court shall appoint three persons as a board of viewers. Another procedure applicable to counties makes use of an ad hoc body to make the preliminary determination of damages. A third method applicable to counties in general and also St. Louis County, specifies that the county court shall appoint three disinterested freeholders of

the county to act as a board of viewers. The procedure applicable to municipalities requires the court to appoint a board of viewers consisting of three freeholders of the city. The constitution requires that a jury trial be held in all cases. The general condemnation procedure, several of the methods used by counties, and the procedure followed by cities provide for a jury trial. One of the procedures used by counties employs a board of six disinterested persons, five of whom must sign the report. The constitution requires that compensation be paid when property is taken or damaged. Special benefits may be deducted from value of the land taken plus damages to the remainder. The condemnor is required to pay costs up to the filing of the viewers' report and thereafter the awarding of costs is in the discretion of the court. Property devoted to a public use can be taken if the new public use will not interfere with the existing public use. The general condemnation law permits the abandonment of the proceedings. A failure to pay the award is treated as an abandonment of the proceedings. The procedures applicable to St. Louis County and municipalities provide that failure to take action on the viewers' report is an abandonment of the action.

Montana—The general condemnation statute requires the court to appoint three freeholders or citizens of the county, who possess the same qualifications as common law jurors, to act as a board of viewers. The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore. The general condemnation law provides, *inter alia*, that there shall be jury trial; that the property shall be valued as of the date of the issuance or service of the summons; that improvements made subsequent to the summons are not compensable, and that special benefits may be deducted from the damages to the property not taken. The constitution requires that compensation be paid for property which is taken or damaged.

The immediate possession statute provides that interest shall be paid from the date possession is taken. The awarding of costs is within the discretion of the court.

The general condemnation law provides, *inter alia*, that the petitioner allege in his petitions that the property is necessary; that the condemnor may enter upon the property, but is liable for actual damages and damages due to wantonness, negligence, maliciousness or carelessness, and that property devoted to a public use may be taken for a greater public use.

Nebraska.—The general condemnation law provides that the court shall appoint three disinterested freeholders or citizens of the county to serve as a board of viewers. The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore. Although not specifically provided, the general condemnation statute probably provides for a jury trial. The constitution requires that compensation be paid for the taking or damaging of property. Special benefits may be deducted from the damages to the property not taken. Interest is awarded from the date of the deposit of the award if there is an appeal and more is awarded on the appeal than before. The condemnor pays the costs up to the filing of the viewers' report. If there is an appeal and the party appealing does not receive a more favorable award than before, he pays the costs of the appeal. Both the State highway code and the general condemnation statute permit the entry upon the property to make surveys. The general condemnation law provides that the condemnor shall pay for actual damages or for damages due to his negligence, wantonness, maliciousness or carelessness.

Nevada.—The procedure applicable to the laying out of county roads provides that the condemnor and property owner each appoint two disinterested persons and the four shall appoint a fifth. The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore.

The general condemnation statute provides, *inter alia*, that there shall be a jury trial, that the property shall be valued as of the date of the issuance or service of the summons; that improvements made subsequent to the summons are not compensable; that the taxing of costs is within the discretion of the court; that the condemnor must

allege in his petition that property is necessary; that the condemnor may enter upon the property but is liable for actual damages or for damages due to his negligence, wantonness, maliciousness or carelessness; that property devoted to a public use may be taken for a greater public use, and that the proceedings may be abandoned within 30 days after the final judgment on the payment of costs, disbursements and attorneys' fees

The constitution requires that compensation be made for property which is taken. Benefits may be deducted from the damages to the property not taken, but it is not clear whether general or special benefits or both may be set-off.

New Hampshire—The Governor is required to appoint a board of viewers. The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore. The procedure applicable to the highway department provides for a jury trial. The constitution requires that compensation be paid when property is taken. The law pertaining to benefits is not clear as to whether benefits may be set-off and the type of benefits which may be deducted. The prevailing party is awarded costs and the condemnor may enter upon the property to make surveys.

New Jersey—The general condemnation law provides that the court shall appoint three disinterested freeholders or citizens of the county to act as viewers. A majority of the viewers may act for all the viewers. The procedure applicable to counties provides that the county governing body shall appoint three disinterested freeholders to act as a board of viewers. The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore. A jury trial is provided by the general condemnation statute. Property is to be valued as of the date of the filing of the petition to condemn.

The constitution provides that compensation shall be paid for property which is taken. The law, as it relates to benefits, is not clear. The condemnor pays the costs. The procedure applicable to municipality provides for the right of entry. Legislation

pertaining to the Port of New York Authority, Delaware River Joint Commission and Delaware River Joint Toll Bridge Commission are broad enough to probably include land devoted to a public use. The general condemnation law permits the abandonment of the proceedings within 20 days after final judgment on the payment of costs, disbursements and attorneys' fees, as fixed by the court.

New Mexico.—The general condemnation law provides that the court shall appoint three disinterested freeholders or citizens of the county to act as a board of viewers. The procedure for laying out county roads authorizes the county governing body to appoint three disinterested freeholders of the county to serve as a board of viewers. The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore.

The general condemnation statute provides, *inter alia*, that there shall be a jury trial; that property is to be valued as of the date of the issuance or service of the summons; that improvements made subsequent to the summons are not compensable, that special and general benefits may be set-off from the value of the land taken plus damages to the remainder; that interest, at the lawful rate, shall be paid from the date of possession, that the condemnor shall pay the costs up to the filing of the viewers' report and if a party taken an appeal to the trial court and does not receive a more favorable award than the viewers' award, he shall pay the costs of the trial; and that the condemnor may enter upon the property to make surveys; but that he shall be liable for actual damages or for damages caused by his negligence, wantonness, maliciousness or carelessness. The constitution requires that compensation be paid for the taking or damaging of property.

New York—The county court is required to appoint three disinterested citizens of the county to serve as a board of viewers. The procedure for cities provides that the court shall appoint three freeholders of the city to act as a board of viewers. The constitution provides that there shall be a jury trial except when the State is the condemnor.

The special procedure followed by the State highway department employs a referee, while the general condemnation law, the town and village procedures, and the procedures set forth in the unconsolidated laws all use a board of three competent, disinterested persons, a majority of whom may act for the whole board.

The constitution requires that compensation be paid when property is taken. Special and general benefits may be deducted from the damages to the land not taken. If the award is greater than the preliminary offer the landowner is awarded costs. The highway code and town law permit the entry upon the property to make investigations. Legislation applicable to the Port of New York Authority is probably broad enough to permit the taking of property already devoted to a public use. The general condemnation statute permits the abandonment of the proceedings within 30 days after final judgment on the payment of costs, disbursements and attorneys' fees.

North Carolina—The general condemnation law provides that the court shall appoint three freeholders or citizens of the county, a majority of whom may act as a board of viewers. The board has the power of subpoena. The procedure applicable to cities authorizes the court to appoint three freeholders of the city to serve as a board of viewers. The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore. The general condemnation law and the city procedure provide that there shall be a jury trial. Property is to be valued as of the date of taking or seizure in the event that the petition is not filed prior to that date. Although there is no "condemnation provision" in the constitution the section providing that property cannot be taken except by the due law of the land has been interpreted as requiring the payment of compensation. Special and general benefits may be deducted from the value of the property taken plus damages to the remainder. The condemnor pays the costs and attorneys' fees, as fixed by the court, are paid when the court appoints an attorney to represent unknown parties. The

general condemnation law permits the right of entry.

North Dakota—A recent supreme court case has interpreted Art. 1, §14 of the constitution as overruling all inconsistent provisions. Therefore it appears as if viewers are not used in any proceedings. The constitution requires a jury trial on all cases and the general condemnation law includes a provision requiring a jury trial. Compensation must be paid whenever property is taken or damaged. Special benefits may be deducted from the damages to the land not taken. Costs, which include attorneys' fees, are awarded within the discretion of the court. If a public corporation abandons the proceedings it must pay costs, damages, and attorneys' fees. A recent constitutional amendment removed the requirement that the question of necessity be determined by the court. The State highway code, the county code and the general condemnation law provide for the right of entry. However, the condemnor is required to pay for actual damages or damages caused by his negligence, wantonness, maliciousness or carelessness. Land devoted to a public use can be taken for a more necessary public use. Pursuant to Art 1, §14 of the constitution property is valued as of the time possession is taken.

Ohio—The constitution requires a jury trial and the condemnation procedure applicable to the State, counties and municipalities, provide for a trial by jury. A verdict may be returned by 9 of 12 jurors and fewer if the parties so agree. Compensation must be paid for property which is taken. Special benefits may be set-off from the damages to the land not taken. The State highway department and the county are required to pass a resolution stating that the property is necessary. The condemnor is afforded the right of entry but is responsible for any damages. Legislation pertaining to toll facilities is broad enough to probably permit the taking of property devoted to a public use. The highway code and the statutes pertaining to appeals from county road cases permit the abandonment of the proceedings within 30 days after final judgment on the

payment of costs, disbursements and attorneys' fees. Costs are awarded to the prevailing party.

Oklahoma.—The procedure applicable to the State highway department authorizes the court to appoint, from the regular jury list, three disinterested freeholders or citizens of the county to act as a board of viewers. The procedure followed by a city requires the court to appoint three freeholders to serve as a board of viewers. The constitution requires a jury trial to be held in all cases. Both condemnation procedures provide for a jury trial. Compensation must be paid for the taking of damaging of property. Benefits are prohibited from being deducted. The condemnor pays the costs up to the filing of the viewers' report. If a party appeals and the trial court decision is not more favorable to him than the commissioners' report, he must pay the costs of the trial. The highway code authorizes the condemnor to enter upon the property but he is liable for actual damages or for damages due to his negligence, wantonness, maliciousness or carelessness. Legislation pertaining to the Oklahoma Turnpike is probably broad enough to permit the taking of land already devoted to a public use.

Oregon.—The procedure for the laying out of county roads provides that the county governing body shall appoint three disinterested freeholders of the county to act as a board of viewers. The city council is directed to appoint three competent, disinterested persons to serve as a board of viewers. The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore. A jury trial is provided by the condemnation procedures applicable to the State, county and city. The constitution requires that compensation be paid for property which is taken. Special benefits may be deducted from the damages to the land not taken. If the award is greater than the original offer the landowner receives costs.

The State highway department and county are both required to pass a resolution stating that the property is needed.

The State's resolution creates a conclusive presumption in favor of the necessity of the property. The general condemnation statute and the highway code permit the entry upon the property to make surveys. Property devoted to a public use may be taken if the new public use does not interfere with the existing use. The highway code permits the abandonment of the proceedings within 30 days after final judgment, on the payment of costs, disbursements and attorneys' fees, as fixed by the court.

Pennsylvania.—The procedure applicable to the State provides for the appointment of viewers by the court. The procedure applicable to public roads in general provides for the appointment of discreet and reputable citizens, qualified to vote for members of the Legislature, as viewers. The procedure to be followed by counties empowers the court to appoint viewers. The method followed by cities specifies that the court is to appoint three freeholders to act as a board of viewers.

The constitution requires that a jury trial be held in all cases, except when the State is the condemnor. The statutes applicable to the State, county, and cities require a jury trial. The constitution requires the payment of compensation when property is taken, or taken or damaged when the condemnor is a municipal or other corporation. Special benefits may be deducted from the value of the land taken and the damages to the remainder. Both the State highway code and the county code permit the condemnor to enter upon the property, but he is liable for actual damages. The county code permits the abandonment of the proceedings, while the municipal code permits the abandonment within 30 days after the filing of the viewers' report. Both procedures require the payment of actual damages suffered by the landowner due to the proceedings.

Rhode Island.—The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore. A jury trial is required by the condemnation procedure followed by the State highway department. The constitution requires that

compensation be paid when property is taken. The law is not clear concerning the set-off of benefits. Before the property may be condemned the highway department must pass a resolution stating that the property is necessary. Legislation dealing with the Rhode Island Turnpike and Bridge Authority is sufficiently broad to permit the taking of property devoted to a public use.

South Carolina—The Governor appoints a list of responsible citizens and the State highway department appoints three or more persons from the list to sit on a condemnation board. Members of the State highway commission are eligible to be appointed to the list. The procedure followed by cities provides that the condemnor and property owner appoint two freeholders each and the four appoint a fifth to constitute a board of viewers. The constitution requires a jury trial whenever the appropriation is for a corporation other than municipal corporation. The procedures followed by the State, county and city make provisions for a jury trial.

The constitution requires the payment of compensation whenever property is taken. Special and general benefits may be deducted from the value of the land taken and the damages to the remainder. If the landowner appeals and he does not receive at least 20 percent more than awarded him, he pays the costs. The highway code permits the condemnor to enter upon the property to make surveys.

South Dakota—The constitution requires a jury trial in all cases, and the general and special condemnation statute provide for a jury trial. Compensation is required to be paid whenever property is taken or damaged. The law is not clear concerning the set-off of benefits. If the award is greater than the offer the property owner receives costs. The State highway department is required to pass a resolution stating that the property is necessary and this resolution becomes a conclusive presumption supporting the necessity of the taking.

Tennessee—The sheriff of the county in which the property is located is required to appoint five persons, who shall possess the

same qualifications as a juror, to be a board of viewers. A majority of the five may act for the entire board. The procedure for the laying out of county roads directs the road district commissioner to appoint two disinterested freeholders to view the property with him. The constitution provides that the right to a trial by a jury shall remain inviolate or continue as heretofore and that compensation must be paid for property which is taken. The general condemnation law provides for a jury trial.

Special benefits may be deducted from the damages to the land not taken. Interest is to be awarded from the date of possession. If the property owner requests a trial and the award is less than that made by the viewers, he is required to pay the costs. However, if the award is greater costs are awarded as in chancery case. The general condemnation law permits the entry for investigation, but the condemnor is liable for actual damages or those caused by negligence, wantonness, maliciousness or carelessness.

Texas—The general condemnation law provides that the court shall appoint three disinterested freeholders or citizens of the county to act as a board of viewers. The board can subpoena. The procedure for laying out county roads provides that the county governing body appoints five disinterested freeholders to act as a board of viewers. The procedure followed by cities requires the court to appoint three freeholders and qualified voters as a board of viewers.

The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore. The general condemnation law and the procedure followed by cities provide for a jury trial. Compensation must be paid for the taking or damaging of property. Special benefits may be deducted from the damages to the land not taken. If the original offer is less than the award of the viewers the property owner is entitled to costs, if more, he is required to pay costs. If the property owner appeals and receives more from the trial court he receives costs; but if the award is less than that of the viewers, he must pay costs. Gulf

Coast counties of more than 50,000 population permit the right of entry

Utah—The constitution provides that the right to a jury trial shall remain inviolate in capital cases and is waived, unless demanded in civil cases. The general condemnation statute provides for a jury trial. Property is to be valued as of the date of the issuance or service of the summons and improvements made subsequent to the summons are not compensable. Compensation must be paid for property which is taken or damaged. Special benefits are to be set-off from the damages to the property not taken. The immediate possession statute provides that interest shall be paid from the date possession is taken. The court or judge is required to pass upon the question of necessity. The general condemnation law provides, *inter alia*, that the condemnor may enter upon the property to make preliminary surveys, but is liable for actual damages or for damages due to his wantonness, negligence, maliciousness or carelessness, and that property devoted to a public use may be taken for a higher public use.

Vermont.—The procedure applicable to cities provides that the court shall appoint three freeholders to serve as a board of viewers. The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore, while the special condemnation procedure applicable to the State highway department and the procedure followed by cities provide for a jury trial. Compensation must be paid for property which is taken. Special benefits may be deducted from the damages to the property not taken. If the property owner appeals the viewers' award to the trial court and its award is greater than that of the viewers', the court may award costs to either party, as is just. The State highway department has the right of entry.

Virginia—The procedure for laying out county roads provides that the county governing body shall appoint five disinterested freeholders of the county to serve as a board of viewers. The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore. A jury trial

is dispensed with by the general condemnation law and in its place a board of five competent, disinterested persons, a majority of whom may act, is substituted. These persons are permitted to testify in court. Compensation must be paid for property which is taken or damaged. Both general and special benefits may be deducted from the damages to the property not taken. Interest, at the rate of 5 percent, must be paid from the date of the deposit of the award in court. The condemnor pays the costs of the proceedings. The general condemnation law requires the court or judge to pass upon the question of necessity. The condemnor may enter upon the property but he is liable for actual damages or damages due to his negligence, wantonness, maliciousness, or carelessness.

Washington—The constitution provides that there shall be a jury trial when the appropriation is by a corporation other than a municipal corporation. The condemnation procedures applicable to the State, counties and cities provide for a jury trial. Compensation must be paid for property which is taken or damaged. Special benefits may be deducted from the value of the land taken plus the damages to the remainder. Interest at the rate of 6 percent is paid. The condemnor pays court costs. The State highway department when it acquires property for toll facilities is required to enact a resolution stating that the property is necessary, and this resolution becomes a conclusive presumption in favor of said determination. The State highway department has the right of entry. Legislation pertaining to the Washington State Toll Bridge Authority is probably broad enough to permit the condemnation of land already devoted to a public use.

West Virginia—The general condemnation law provides that the court shall appoint five disinterested freeholders or citizens of the county to act as a board of viewers. A majority of the board may act for the whole board and the board has the power to subpoena. The constitution requires that there be a jury trial in all cases and provision is made for a jury in the gen-

eral condemnation statute. Compensation must be paid for property which is taken or damaged. General and special benefits may be deducted from the damages to the property not taken.

Interest at the rate of 6 percent must be paid from the date possession is taken in accordance with the immediate possession statute and generally from the date of the viewers' report. If the viewers' award is less than the condemnor's offer the property owner pays the costs. In the event a trial is held and the court awards less than the amount of the viewers' award the property owner pays court costs. Property devoted to a public use may be taken if the proposed use does not interfere with the existing use.

Wisconsin—The general condemnation law provides that the court shall appoint three disinterested freeholders or citizens of the county to act as a board of viewers. The procedure followed by municipalities provides that the court shall appoint three freeholders to serve as a board of viewers. The constitution states that the right to a jury trial shall remain inviolate or continue as heretofore. The general condemnation law provides for a jury trial while the procedure used to lay out roads makes use of a board of five competent, disinterested persons, a majority of whom may act. Compensation must be paid for property which is taken.

General and specific benefits may be deducted from the value of the property taken plus damages to the remainder. Costs are awarded to the prevailing party. The constitution and the general condemnation statute require that when the condemnor is a municipality the jury shall pass upon the question of necessity. The State highway department and the county road commissioner are required to pass resolutions stating that the property is necessary. Both the State and county are empowered to enter upon the property to make surveys. The general condemnation statute permits the abandonment of the proceedings within 60 days after final judgment, but the court, in its discretion, may impose conditions on the condemnor's exercise of the privilege.

Wyoming—The general condemnation statute provides that the court shall appoint three disinterested freeholders or citizens of the county to act as a board of viewers. A majority of the board may act for the whole board. The procedure for laying out county roads provides that the governing body of the county shall appoint three suitable and disinterested electors of the county to serve as a board of viewers. The constitution provides that the right to a jury trial shall remain inviolate or continue as heretofore and the general condemnation law provides for a jury trial. Compensation must be paid for property which is taken or damaged. Real benefits may be deducted from the damages to the land not taken. The general condemnation law provides, *inter alia*, that costs may be awarded in the discretion of the court, that the court or judge shall pass upon the question of necessity, and that the condemnor may enter upon the property to make surveys.

District of Columbia—A board of five persons is chosen from the list of jurors and a majority of the board may act for the whole board. The immediate possession statute requires that interest at the rate of 6 percent be paid from the date of possession. The highway department possesses the power to enter upon the property to make surveys. The general condemnation law vests in the court's discretion the power to permit the abandonment of the proceedings upon the payment of costs, disbursements, and attorneys' fees, as fixed by the court. The general condemnation statute provides that the jury shall consider benefits, if any, to the land not taken in arriving at their award.

Puerto Rico—The immediate possession statute requires the payment of interest at the rate of 6 percent from the date of possession. The condemnor is required to pass a resolution stating that the property is necessary. The general condemnation law provides that the proceedings may be abandoned, on the payment of any damages attributable to the proceedings. Special benefits may be deducted from the damages to the property not taken.

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