RECENT TRENDS IN HIGHWAY CONDEMNATION LAW†

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I. INTRODUCTION

Extensive post-war road building programs have led to a great deal of judicial and legislative activity in the field of condemnation law, but the attorney or highway administrator confronted with day to day problems probably seldom has the opportunity to look beyond the law of his own state or in any event beyond the law pertaining to the specific problem with which he is confronted. It is the objective of this paper to provide a broader view of recent happenings in the field of highway condemnation law and to sketch such major trends as seem to be apparent on a nationwide basis.

The subject I have chosen to discuss is a broad one, particularly since it purports to cover the law of all the states. In order to keep the length of the paper within reasonable bounds, it will be necessary to relegate much of the illustrative and supporting material to footnotes. I hope, however, that the paper will provide an overview of happenings in the field of highway condemnation law which is not readily available to the attorney or administrator who is confronted with the day-to-day problems in this field.

This paper is based primarily upon information gathered in a study being conducted under a contract between the Bureau of Public Roads and the University of Wisconsin. The Study focuses on highway condemnation law during the period of 1946 through 1961 and includes, among other things, a review of legislation and litigation pertaining to highway condemnation during that period. Because 16 years is a relatively brief period on which to base conclusions as to major trends in decisional law, the principal focus of this paper necessarily will be on legislative law. Some attention also will be given to the interrelationship of the legislative and judicial processes in the development of condemnation law.

The discussion of trends will be divided among three major areas of condemnation law: (a) the right of the condemnor to condemn; (b) the right of the owner to receive just compensation; and (c) condemnation proce-

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dure. Before proceeding to a discussion of trends, however, it might be well to take a brief look at the sample of legislation and litigation on which this discussion is based. The survey of litigation is limited to the reported cases of 25 states.[1] Nevertheless, this involves almost 800 cases. The survey of legislation covers the laws of all states enacted during the 1946-1961 period, and occasional references also will be made to laws enacted subsequent to 1961. About 60 per cent of the cases were decided from 1957 through 1961. The volume of litigation appears to correspond roughly with the increase in land acquisition brought about by the interstate highway program. Legislative activity in the condemnation field appears to show a more even distribution, but it is quite evident that this activity also has increased in recent years.

II. The Right of the Condemnor to Condemn

It is often said that the only real problem in most condemnation cases is to determine the compensation to which the landowner is entitled. This may be true, but the fact remains that in almost 14 percent of the reported highway condemnation cases which were reviewed, the landowner, in addition to other contentions which he may have been making, was challenging the right of the condemnor to proceed with the condemnation. Moreover, about a hundred different enactments on the part of state legislatures dealt with this aspect of highway condemnation law during the period of 1946 to 1963. We are not, therefore, dealing with an entirely moot problem.

What have been the significant trends in this area of the law in the last 15 years or so? In general, it can be stated quite categorically that the trend has been toward expanding the powers of the condemnor. All but a very few of the legislative enactments have tended to expand or clarify rather than to restrict the condemnation powers of highway agencies. And only in about one out of six of the cases in which the landowner challenged the proceedings (slightly more than two percent of all the cases) did the challenge meet with any success. Nevertheless, it may be helpful to examine briefly some of the specific aspects of the problem.

The right of the condemnor to condemn may be challenged on the ground that the taking is not for a public use or is not necessary to the contemplated public use or is not authorized by statute, as well as on certain other grounds. We will now examine briefly some of these specific aspects of the problem.

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1. These states are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Hampshire, North Carolina, North Dakota, Rhode Island, Vermont, Virginia, Wisconsin, and Wyoming.

A. *The Public Use Requirement*

The constitutional requirement that the condemned property must be taken for a public use has not proved to be an important issue in connection with condemnation for highway purposes, but it does arise occasionally in unusual or peripheral situations. Statutes authorizing condemnation for "private ways of necessity" occasionally are challenged (usually without success) on the ground that the taking is not for a public use.[2] Originally, these statutes were designed to provide access to agricultural lands which could be reached from a public highway only by crossing the lands of others. The modern counterpart of this situation is the parcel which becomes landlocked because of the construction of a controlled-access highway which cuts it off from the public highway system. At least one court, without much discussion, has concluded that a roadway to provide access to land isolated from any public road would be solely for the benefit of the owner of such land and those having business with him and that to permit such a road to be laid out therefore would constitute the taking of property for private use in violation of the constitution.[3] The more usual attitude, however, is exemplified by an opinion of the Supreme Judicial Court of Massachusetts in which it said that the condemnation of right of way for an access road for the benefit of parcels of land incidentally deprived of all or of some means of access by reason of a major freeway project is but a by-product of the major project which unquestionably is for a public purpose.[4] A similar view has been taken in cases involving the acquisition of land for toll-road service facilities, such as restaurants and filling stations.[5]

B. *The Necessity of the Taking*

The question whether the taking is necessary has been raised somewhat more often than the question whether the proposed use is public, but certainly without any more success. In the absence of a controlling statute, the general rule which seems to be followed is that a finding of necessity by the condemnor will not be disturbed in the absence of fraud, bad faith or gross abuse of discretion on the part of the condemnor. Contentions by landowners that the highway might better be constructed in a different location than that proposed by the highway authorities almost invariably are un-

2. *E.g.*, Stein v. Darby, 126 So.2d 313 (Dist. Ct. App. Fla. 1961); State *ex rel.* Happel v. Schmidt, 252 Wis. 82, 30 N.W.2d 220 (1947).

3. Libbee v. Imhoff, 11 Ill. App. 2d 344, 137 N.E.2d 85 (1956).

4. Luke v. Massachusetts Turnpike Authority, 337 Mass. 304, 149 N.E.2d 225 (1958).

5. Opinion of the Justices, 330 Mass. 713, 113 N.E.2d 452 (1953); Illinois State Toll Highway Comm'n v. Eden Cemetery Ass'n, 16 Ill.2d 539, 158 N.E.2d 766 (1959).

successful.[6] A question of considerable current importance is the extent to which the rule that the condemnor's determination of the necessity of the taking will not be reviewed by the courts (in the absence of fraud, bad faith, or abuse of discretion) permits the taking of land for future highway needs. Here again, the courts appear to have been generally sympathetic to the condemnor's cause, provided the highway agency in question at least had some reasonably definite plans for future construction.[7]

There does not appear to have been much legislative activity in recent years with regard to determinations of necessity. However, there are at least a couple of disturbing clouds on the horizon from the standpoint of highway officials. Vermont, in a general revision of its highway condemnation law in 1957, set up a rather elaborate, and apparently time-consuming, quasi-judicial procedure for determining the necessity of particular highway takings.[8] And in 1963 New Mexico enacted a law which pertains at least indirectly to determinations of necessity in that it gives the governing bodies of counties and municipalities a veto power over state highway relocations.[9] One of the major concerns here apparently was the serious non-compensable damages which roadside businesses sometimes suffer when a major highway is relocated, but this seems like a rather drastic way of meeting the compensation problem.

C. *Statutory Authority to Condemn*

Statutory delegation of condemnation power is perhaps the area which we are inclined to think of first when we speak of the condemnor's right to proceed with the condemnation. A review of appellate court decisions in this area leads to the general conclusion that lack of statutory authority certainly has not been any serious impediment to condemnation for highway purposes. Nevertheless, the fact that the issue was raised in a substantial number of cases indicates that there are potential trouble spots in the statutory law pertaining to delegation of condemnation powers. The taking of lands already devoted to public use, the taking of access rights, the taking of lands within municipal boundaries, the taking of lands for peripheral high-

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6. *E.g.*, City of Carrollton v. Walker, 215 Ga. 505, 111 S.E.2d 79 (1959); Department of Pub. Works & Bldgs. v. Lewis, 411 Ill. 242, 103 N.E.2d 595 (1952); Porter v. Iowa State Highway Comm'n, 241 Iowa 1208, 44 N.W.2d 682 (1950).

7. Takings for future use were approved in State Road Dep't v. Southland, Inc., 117 So.2d 512 (Dist. Ct. App. Fla. 1960); State Roads Comm'n v. Franklin, 201 Md. 549, 95 A.2d 99 (1953); Woollard v. Arkansas State Highway Comm'n, 220 Ark. 731, 249 S.W.2d 564 (1952). The taking for future use was disapproved in State *ex rel.* Sharp v. 0.62033 Acres of Land, 49 Del. 174, 112 A.2d 857 (1955).

8. Vt. Laws 1957, No. 242.

9. N.M. Laws 1963, ch. 114.

way uses such as drainage or storage sheds, and the taking of lands by local units of government as agents of state highway departments are examples of areas which the cases tend to show are in need of attention.[10]

A review of state legislation since 1946 indicates that these are some of the areas which also have received attention. A substantial number of states have patched up their laws in various respects, including clearer specifications as to the type of property interest which may be condemned as well as to the purposes for which property may be condemned.[11] Almost invariably, these amendments have tended to broaden the condemnation powers of the state or local highway authorities involved. In addition, there has been significant expansion in such areas as condemnation for limited-access facilities,[12] condemnation for future highway use,[13] condemnation of remnants

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10. Taking of lands devoted to a public use: Muscolino v. Superior Court, 172 Cal. App. 2d 525, 341 P.2d 773 (1959); Welch v. City and County of Denver, 141 Colo. 587, 349 P.2d 352 (1960); Canzonetti v. City of New Britain, 147 Conn. 478, 162 A.2d 695 (1960); Elberton So. Ry. v. State Highway Dep't, 211 Ga. 838, 89 S.E.2d 645 (1955); Burnes v. Metropolitan Dist. Comm'n, 325 Mass. 731, 92 N.E.2d 381 (1950); City of Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957); Dove v. May, 201 Va. 761, 113 S.E.2d 840 (1960).

Taking of access rights: Department of Pub. Works & Bldgs. v. Finks, 10 Ill.2d 20, 139 N.E.2d 242 (1956); Luke v. Massachusetts Turnpike Authority, 337 Mass. 304, 149 N.E.2d 225 (1958); Hedrich v. Graham, 245 N.C. 249, 96 S.E.2d 129 (1957).

Taking by other agency for highway department: Blanton v. Fagerstrom, 249 Ala. 485, 31 So.2d 330 (1947); Martin v. Fulton County, 213 Ga. 761, 101 S.E.2d 716 (1958); Tiller v. Norfolk & W. Ry., 201 Va. 222, 110 S.E.2d 209 (1959).

Taking for peripheral uses: Heppe v. State, 162 Neb. 403, 76 N.W.2d 255 (1956); Webster v. Frawley, 262 Wis. 392, 55 N.W.2d 523 (1952).

Taking in municipality: Town of Greenwood Village v. District Court, 138 Colo. 283, 332 P.2d 210 (1958).

11. Among laws which clarified the type of interest which may be condemned are: Ariz. Laws 1953, ch. 126; Idaho Laws 1953, ch. 100; Kan. Laws 1951, chs. 381-82; N.J. Laws 1951, ch. 112; N.C. Laws, 1951, ch. 59; N.D. Laws 1953, ch. 177, § 90; N.D. Laws 1959, ch. 267; Mich. Acts 1962, No. 22; Pa. Laws 1949, No. 71; S.C. Laws 1963, No. 149.

Among laws which clarified the relationship between condemnation powers of state and local authorities were: Ala. Laws 1955, No. 566; Colo. Laws 1955, ch. 240; Kan. Laws 1953; ch. 301; Ky. Acts 1952, ch. 180; N.D. Laws 1959, ch. 228.

Among laws involving expansion of powers to condemn for various peripheral highway uses were: N.D. Laws 1959, ch. 222; Ga. Laws 1953, No. 395; Md. Laws 1951, ch. 608; Ohio Laws 1951, at 124; N.C. Laws 1947, ch. 806; Pa. Laws 1961, No. 325; S.D. Laws 1957, ch. 25; Ill. Laws 1949, at 1023.

12. Versions of the Model Access Facility Law were enacted in Iowa (Ia. Laws 1955, ch. 148), Kansas (Kan. Laws 1953, ch. 307), Kentucky (Ky. Acts 1946, ch. 225), Minnesota (Minn. Laws 1957, ch. 864), Mississippi (Miss. Laws 1956, ch. 314), New Mexico (N.M. Laws 1957, ch. 234), North Carolina (N.C. Laws 1957, ch. 993), North Dakota (N.D. Laws 1953, ch. 177, §§ 102-07), Oregon (Ore. Laws 1947, ch. 226), and Wyoming (Wyo. Laws 1949, ch. 85). In addition a great many laws creating freeway or tollway commissions and conferring condemnation powers upon them were enacted.

or landlocked parcels,[14] and condemnation of land to be exchanged for land needed for highway purposes.[15] Most legislation has been on a piecemeal basis. However, a few states, usually in connection with a general revision of their highway laws, have enacted comprehensive statutes delegating power to condemn for highway purposes and listing a dozen or more purposes as constituting highway purposes. A good example of a recent enactment of such a statute is found in the new Utah highway code.[16]

III. The Right of the Owner to Receive Just Compensation

It is a safe bet that the underlying issue in most condemnation litigation is the amount of compensation to which the landowner is entitled. Even in the appellate courts, almost two-thirds of the cases which were analyzed contained compensation issues in the broad sense of the term. There consequently has been no lack of opportunity for the courts to make new law in this area. When the decisions are viewed in the aggregate, however, it is difficult to discern an over-all trend toward either broadening or restricting the scope of the landowner's right to compensation. It is possible to discern apparent trends with regard to certain specific aspects of the law of compensation, and a few of these will be commented upon later.

When we take into account what the state legislatures have done during the last 15 or 16 years, the trend is clear—the scope of the landowner's right to compensation gradually has been expanding. This is true even though, for the most part, legislative activity has been confined to a half dozen or so narrow segments of the law of compensation and even though the legislatures of about a third of the states have done nothing to either expand or restrict the scope of compensation.

For the purposes of this discussion, the law of compensation for taking of property by eminent domain is considered to include three separate but related topics: (a) rules governing compensability of specific items of loss or damage; (b) rules for measuring value or damages; and (c) rules pertaining to valuation evidence and its use. We turn now to an examination of some of the apparent trends in these three specific areas of the law of compensation.

13. Examples of such laws are: Ky. Acts 1960, ch. 220; Kan. Laws 1963, ch. 333; Mich. Acts 1957, No. 262, § 13a; Wash. Laws 1961, ch. 281, § 2.

14. Examples are: Alaska Laws 1960, ch. 122; Hawaii Laws 1951, No. 12, § 301; Neb. Laws 1961, ch. 181, § 6; N.J. Laws 1952, ch. 21; Ill. Laws 1957, at 2042. The Access Facility Law enacted in many states also embodies such powers.

15. Examples are: N.H. Laws 1959, ch. 294; Wash. Laws 1953, ch. 55.

16. Utah Laws 1963, ch. 39. Other examples are: Neb. Laws 1955, ch. 148; Ark. Acts 1953, No. 419.

A. *Compensability of Specific Items of Loss or Damage*

In considering first what the courts have done with the rules of law limiting the scope of compensability, it seems desirable to focus on a few areas in which the law has been in a state of uncertainty and in which there consequently has been opportunity for judicial development of the law. Compensability of damage due to impairment of access obviously is one of these areas. The dozens of cases dealing with this subject in recent years afford a reasonably good opportunity to observe the process of judicial development of the law. Perhaps the basic proposition which underlies all the decisions is that damage caused by interference with access is compensable if the interference is unreasonable in view of the particular circumstances involved, for it is clear that not all injury due to interference with access is compensable. As certain types of fact situations keep recurring, however, the courts are likely to develop specific rules to govern specific situations. Thus, a particular state is likely to have developed one rule to govern the situation wherein traffic is diverted from the old highway to a new one, another to govern the situation wherein access by means of a service road is substituted for direct access, another to govern the situation wherein a traffic divider or median strip is constructed in an existing highway, and so on.[17] Partly because there is a lack of unanimity of opinion among the courts of the several states as to what rule to apply in each situation, there is no readily apparent nationwide trend toward either expanding or restricting compensability in the area of impairment of access rights. As previously noted, there is a trend toward development of specific rules for specific situations so that the vague standard of reasonableness tends to fade more and more into the background. Perhaps judicial development of the law in this area now has proceeded to a point where careful study could lead to rules suitable for legislative enactment.

The question of whether the landowner is entitled to be reimbursed for

17. The case by case development of these rules can be illustrated by quoting from the opinion in People v. Sayig, 101 Cal. App. 2d 890, 905, 226 P.2d 702, 712 (Dist. Ct. App. Cal. 1951):

> It is obvious that no general rule can be laid down to cover all situations. We know that property placed in a cul-de-sac by reason of an improvement is entitled to compensation for the depreciation of the property. Bacich case. We know that if property is divided from the highway by an underpass and the only access to the highway is a service road, the property located on the service road has been legally damaged. Ricciardi case. We also know that mere relocation of a highway thus diverting traffic from the property does not legally damage the property. Holloway v. Purcell, supra. We also know that the construction of a divided highway in front of the property does not legally damage it. Holman case. The distinctions between these various situations and their impact on the actual value of the property is simply one of degree. Our case falls within the rule of the Holman case.

his reasonable moving costs is another aspect of the law of compensability which has been presented to the courts a number of times. Most of the courts which have faced the issue appear to have been unwilling to expand the traditional concept of just compensation to encompass such expenses.[18] However, some have hedged on the subject, at least to the extent of allowing the matter to go to the jury,[19] and one court has stated quite positively that the landowner is entitled to be reimbursed for such expenses under the constitutional guarantee of "full compensation."[20] This is an area in which state legislatures have been relatively active. Moving-cost statutes were enacted in at least half a dozen states during the period of 1951 to 1959, and of course the pace has quickened since the enactment in 1962 of the federal statute providing for federal participation in the payment of relocation expenses.[21]

Another area in which considerable pressure apparently has been exerted toward expansion of the traditional concept of just compensation is that pertaining to loss of customers, loss of good will, and consequent loss of anticipated future profits of an existing business enterprise. Such losses can be very real and very extensive, and there is a certain reliance interest here which tends to evoke additional sympathy for the business entrepreneur whose business will be adversely affected by the relocation of a highway or by access limitations. We noted previously that a recent New Mexico law prohibiting state highway relocation without the consent of the county or municipal governing body apparently was concerned mainly with protecting the interests of businesses established along the old highway, and it is possible that some of the decisions in the field of access control may have been influenced at least to some degree by the belief that substitution of indirect access for direct access would adversely affect some of the businesses located along the highway. When courts have been faced squarely with the question of the compensability of loss of good will or business profits, however, the answer usually has been that such damages are too speculative to be

18. See, e.g., Arkansas State Highway Comm'n v. Fox, 230 Ark. 287, 322 S.W.2d 81 (1959); People v. Auman, 100 Cal. App. 2d 262, 223 P.2d 260 (Dist. Ct. App. Cal. 1950); City of La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App. 2d 762, 304 P.2d 803 (Dist. Ct. App. Cal. 1956); Williams v. State Highway Comm'n, 252 N.C. 141, 113 S.E.2d 263 (1960).

19. Harvey Textile Co. v. Hill, 135 Conn. 686, 67 A.2d 851 (1949); State Highway Dep't v. Robinson, 103 Ga. App. 12, 118 S.E.2d 289 (1961).

20. Jacksonville Expressway Authority v. Henry G. Du Pree Co., 108 So.2d 289 (Fla. 1958).

21. 76 Stat. 1146; 23 U.S.C. §133. State moving-cost statutes enacted prior to 1962 include: Tenn. Acts 1951, ch. 176; Conn. Laws 1957, No. 601; Md. Laws 1959, ch. 688; Minn. Laws 1959, ch. 656; R.I. Laws 1959, at 586; Wis. Laws 1959, at 838.

compensable in eminent domain proceedings.[22] Perhaps an answer closer to the real truth is that the courts are fearful of the drain on the public treasury which could result if business losses were to be made compensable without careful restrictions. This is indicated by the attitude of the courts of states in which the legislature has taken the lead to make business losses compensable. For example, Vermont in 1957 enacted a statute expressly making compensable the damages resulting from the taking or use of property "and of the business thereon."[23] The Vermont court has shown reluctance to construe this statute broadly. The court was concerned in one case that there may be many situations in which it is difficult to separate business losses from damage to the land on which the business was conducted and in which compensation both for damage to the land and for damage to the business might lead to double compensation.[24] The court held in another case that the statute was not intended to provide compensation for damages due to the relocation of a highway. Whole communities might be seeking damages under such circumstances, said the court.[25]

Many more examples of the attitude of the courts toward compensability of the various items of damage in eminent domain proceedings could be given, but in the interest of brevity the above examples will have to suffice. When we turn to what the state legislatures have done, the trend toward expansion of the scope of compensability becomes more pronounced. There have been at least 60 different enactments during the past 16 or 17 years which were designed to expand the scope of compensability and very few which were designed to restrict the scope of compensability. Prior to 1959, however, these laws dealt only with narrow segments of the problem of compensability. For example, most of these laws can be placed in one of the following categories: (1) laws designed to compensate the owner or occupant of condemned premises for part of the cost of removal and relocation;[26] (2) laws designed to provide compensation for crops or fixtures located on the condemned premises or for damage caused to personal

22. *E.g.*, Hot Spring County v. Crawford, 229 Ark. 518, 316 S.W.2d 834 (1958); Williams v. State Highway Comm'n, 252 N.C. 141, 113 S.E.2d 263 (1960); Ryan v. Davis, 201 Va. 79, 109 S.E.2d 409 (1959).

23. Vt. Laws 1957, ch. 242.

24. Penna v. State Highway Bd., 122 Vt. 290, 170 A.2d 630 (1961).

25. Spear v. State Highway Bd., 122 Vt. 406, 175 A.2d 511 (1961). It can also be demonstrated that the Florida court has not shown any inclination to expand the scope of the "business loss" statute of that state beyond its literal terms. See Hooper v. State Road Dep't, 105 So.2d 515 (Dist. Ct. App. Fla. 1958); City of Tampa v. Texas Co., 107 So.2d 216 (Dist. Ct. App. Fla. 1958); Florida State Turnpike Authority v. Anhoco Corp., 107 So.2d 51 (Dist. Ct. App. Fla. 1958), *modified*, 116 So.2d 8 (1959); Guarria v. State Road Dep't, 117 So.2d 5 (Dist. Ct. App. Fla. 1960).

26. See note 21, *supra*.

property;[27] (3) laws dealing with prorating of real estate taxes on the condemned premises for the year of condemnation;[28] (4) laws designed to compensate the landowner for expenses incurred in defending a condemnation action which subsequently is abandoned by the condemnor;[29] (5) laws designed to provide the landowner with compensation in the form of interest on the award during periods when he neither had possession nor a right to receive payment of the award;[30] and (6) occasional enactments designed to expand the scope of litigation expenses which the landowner is entitled to recover.[31]

Since 1959 there appears to have been some tendency for state legislatures to take a broader look at rules of compensability in eminent domain proceedings. This usually occurs in connection with general revision bills. Thus, the 1959 Wisconsin revision incorporated several rules designed to expand compensability.[32] The same is true of a 1963 Kansas revision bill, but the bill was amended prior to adoption to delete most of these rules.[33] A 1963 Maryland revision provided for some expansion of the scope of compensability.[34] And, although it failed of enactment, a 1963 Pennsylvania revision bill[35] dramatically illustrated what appears to be a growing trend toward legislative clarification, codification and expansion of the rules for

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27. Cal. Laws 1957, ch. 1098; Conn. Laws 1957, No. 659; Iowa Laws 1959, ch. 318.

28. Tex. Laws 1951, ch. 484; Mass. Laws 1953, ch. 634; Cal. Laws 1953, ch. 1792; Cal. Laws 1961, ch. 1612.

29. Ore. Laws 1947, chs. 283, 533; (D.C.) 61 Stat. 312 (1947); P.R. Laws 1949, No. 286; Nev. Laws 1955, ch. 188; N.C. Laws 1957, ch. 400.

30. Conn. Laws 1957, No. 632; Idaho Laws 1957, ch. 127; Mass. Laws 1960, ch. 298; Neb. Laws 1951, ch. 101; Neb. Laws 1959, ch. 351; Nev. Laws 1960, ch. 239.

31. Iowa Laws 1955, ch. 226; Conn. Laws 1957, No. 632; N.D. Laws 1957, ch. 226; Minn. Laws 1959, ch. 656.

32. Wis. Laws 1959, ch. 639. Among items of damages made compensable were: (a) damages due to change of grade; (b) cost of realigning personal property on the same site when necessitated by a partial taking or a restriction of access; (c) the cost of removing personal property to another site, subject to limitations; (d) refinancing costs, subject to limitations; (e) net rental losses resulting from vacancies during the year preceding the taking; and (f) expenses of plans and specifications rendered useless because of the taking.

33. Senate Bill No. 184 (1963 Session) which, in amended form, became Kan. Laws 1963, ch. 234. Among provisions deleted from the bill prior to enactment were provisions which would have (a) reimbursed the owner for cost of removal of his personal property to another location, (b) reimbursed him for increased cost of new financing, (c) compensated him for damage due to loss of business directly resulting from the taking, and (d) reimbursed the owner for the cost of plans rendered useless.

34. Md. Laws 1963, ch. 52.

35. House Bill No. 683 (1963 Session).

determining compensation in condemnation proceedings. The bill blazed new trails in the direction of legislatively-defined compensability rules, valuation rules, and evidential rules for condemnation proceedings.

B. *Rules for Measuring Value or Damages*

The rules for measuring value or damages of course also affect scope of compensability, but we are dealing here with rules such as the fair market value rule for measuring the value of property taken, the "before and after" or "value of the part taken plus damages" rules for determining compensation in severance situations, and the like, rather than with rules stating whether specific items of damage are or are not compensable. Also included in this category are rules pertaining to set-off of benefits, date of valuation, and the valuation of interest less than a fee simple. Although there has been a fair amount of litigation with regard to rules of valuation, it is difficult to discern any general trends in this area. It appears to be an area which merits further study. For example, a considerable amount of confusion appears to arise from the fact that there are two generally used rules for determining compensation in severance situations;[36] there do not appear to be any clear-cut rules for differentiating between general and special benefits;[37] there appears to be a considerable amount of confusion as to what rules apply to the valuation of leasehold interests under various circumstances.[38]

36. Examples of this confusion can be found in the following cases: Morgan County v. Hill, 257 Ala. 658, 60 So.2d 838 (1952); Shelby County v. Hatfield, 264 Ala. 488, 88 So.2d 842 (1956); State *ex rel.* Morrison v. Jay Six Cattle Co., 88 Ariz. 97, 353 P.2d 185 (1960); Sorenson v. Cox, 132 Conn. 583, 46 A.2d 125 (1946); Barry v. State, 103 N.H. 141, 167 A.2d 437 (1961); Lineberg v. Sandven, 74 N.D. 364, 21 N.W.2d 808 (1946); Stringer v. Board of County Comm'rs, 347 P.2d 197 (Wyo. 1959).

37. Among cases which have considered this problem are: Ball v. Independence County, 214 Ark. 694, 217 S.W.2d 913 (1949); Koelsch v. Arkansas State Highway Comm'n, 223 Ark. 529, 267 S.W.2d 4 (1954); People v. Thomas, 108 Cal. App. 2d 832, 239 P.2d 914 (1952); Boxberger v. State Highway Comm'n, 126 Colo. 526, 251 P.2d 920 (1952); Cuneo v. City of Chicago, 400 Ill. 545, 81 N.E.2d 451 (1948); State v. Smith, 237 Ind. 72, 143 N.E.2d 666 (1957); Phillips v. State, 167 Neb. 541, 93 N.W.2d 635 (1958); D'Angelo v. Director of Pub. Works, 89 R.I. 267, 152 A.2d 211 (1959); Townsend v. State, 257 Wis. 329, 43 N.W.2d 458 (1950).

38. Among cases which have considered this problem are: City of Dothan v. Wilkes, 269 Ala. 444, 114 So.2d 237 (1959); State *ex rel.* Morrison v. Carlson, 83 Ariz. 363, 321 P.2d 1025 (1958); Orange State Oil Co. v. Jacksonville Expressway Authority, 110 So.2d 687 (Dist. Ct. App. Fla. 1959); Department of Pub. Works & Bldgs. v. Bohne, 415 Ill. 253, 113 N.E.2d 319 (1953); Batcheller v. Iowa State Highway Comm'n, 251 Iowa 364, 101 N.W.2d 30 (1960); Veirs v. State Roads Comm'n, 217 Md. 545, 143 A.2d 613 (1958).

For the most part, state legislatures have made few attempts in recent years to clarify or codify rules of valuation. There appears, however, to be a trend toward codification of the more important valuation rules in connection with the general revision of condemnation procedures.[39] A few states also have enacted rules to cover unusual or especially difficult valuation problems.[40]

C. *Rules of Evidence*

Issues pertaining to evidence were involved in almost one out of three of the cases studied. Some of these issues do not have any special significance from the standpoint of eminent domain law as such, but many of them do. Insofar as a trend is discernible, there appears to be a trend toward liberalization of the rules pertaining to qualifications of witnesses and admissibility of evidence. For example, there is some indication that the rules pertaining to qualifications of expert valuation witnesses are being liberalized.[41] The courts of some states which previously excluded evidence of sales of comparable properties now admit such evidence.[42] Evidence of income and of cost of reproduction is admitted with more reluctance than evidence of sales, yet there appears to be growing judicial sentiment that business income should not be completely ignored in the fixing of the value of the property taken.[43] A substantial number of the cases have dealt with the question of the admissibility of evidence of the owner's intended use of the land and of

39. For example, the "before and after" rule, as well as certain other valuation rules, were codified in connection with revisions in North Carolina (N.C. Laws 1959, ch. 1025), Wisconsin (Wis. Laws 1959, ch. 639) and Kansas (Kan. Laws 1963, ch. 234). Valuation rules also were codified in the recent Maine and Maryland revisions (Me. Laws 1961, ch. 295; Md. Laws 1963, ch. 52).

40. *E.g.*, Cal. Laws 1963, ch. 1204 (valuation of park property); Wash. Laws 1956, ch. 156 (building located partly on land taken).

41. For example, in two Massachusetts cases in which the trial court had refused to permit expert witnesses to testify because the witnesses did not have local experience in buying and selling property, the cases were reversed on appeal. The Supreme Judicial Court noted that local conditions do not have the controlling significance in many cases that they had in the pre-automobile era and that there is often more occasion for employing a qualified appraiser of wide experience than to rely only on persons who have had local experience. Muzi v. Commonwealth, 335 Mass. 101, 138 N.E.2d 578 (1956); Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority, 335 Mass. 189, 138 N.E.2d 769 (1956).

42. See County of Los Angeles v. Faus, 48 Cal.2d 672, 312 P.2d 680 (1957); Redfield v. Iowa State Highway Comm'n, 251 Iowa 332, 99 N.W.2d 413 (1959).

43. See, *e.g.*, State Roads Comm'n v. Novosel, 203 Md. 619, 102 A.2d 563 (1954) (capitalization of business profits should be avoided, but it was not error for landowner's expert witness to have taken into account in valuing the land the profitable nature of the business conducted thereon); State by Lord v. LaBarre, 255 Minn. 309, 96 N.W.2d 642 (1959) (evidence that the gross sales of a supermarket were increasing was admissible for the purpose of showing that the lease was becoming more valuable).

the suitability of the land for subdivision purposes.[44] The courts do not appear to have been able or willing to develop precise rules in this area. The answer in any particular case appears to depend on the court's judgment as to the utility of the evidence in establishing market value, weighed against the number of misleading and time-consuming collateral issues which the evidence might introduce in the case.

There has been very little legislative activity with regard to rules of evidence pertaining to condemnation cases. An exception to the general rule was the Pennsylvania revision bill introduced in 1963. It attempted to set forth in some detail the rules of evidence which frequently are in issue in condemnation proceedings. The bill contained rules with regard to jury view, with regard to qualifications of expert valuation witnesses, and with regard to the permissible testimony of such witnesses. It is anyone's guess whether this portends a trend toward codification of rules dealing with the more common evidential issues in condemnation cases.

IV. Condemnation Procedure

Condemnation procedure is of course an important part of condemnation law. Issues pertaining to condemnation procedure were involved in almost half of the cases studied, and at least 200 different legislative enactments pertaining to condemnation procedure may be counted during the period of 1946 to 1963. We customarily think of condemnation procedure as being statutory. Nevertheless, the courts have played an important role in the development of condemnation procedures. At times, statutory procedures have been so sketchy that the courts necessarily have had to supply the missing rules. At other times, the courts in deciding cases have pointed out defects or ambiguities which subsequently were corrected by legislative action. Finally, the legislatures of a few states recently have taken the position that it is the function of the supreme courts of those states to promulgate procedural rules for condemnation proceedings.[45]

Notwithstanding this role of the courts, it is true that the principal devel-

44. *E.g.*, Etowah County v. Clubview Heights Co., 267 Ala. 355, 102 So.2d 9 (1958); State v. Goodwyn, 272 Ala. 618, 133 So.2d 375 (1961); State *ex rel.* Morrison v. Jay Six Cattle Co., 88 Ariz. 97, 353 P.2d 185 (1960); Arkansas State Highway Comm'n v. O. & B., Inc., 227 Ark. 739, 301 S.W.2d 5 (1957); Arkansas State Highway Comm'n v. Watkins, 229 Ark. 27, 313 S.W.2d 86 (1958); Tift v. State Highway Dep't, 99 Ga. App. 387, 108 S.E.2d 724 (1959); Department of Pub. Works & Bldgs. v. Lambert, 411 Ill. 183, 103 N.E.2d 356 (1952); Aselbekian v. Massachusetts Turnpike Authority, 341 Mass. 398, 169 N.E.2d 863 (1960); State by Lord v. LaBarre, 255 Minn. 309, 96 N.W.2d 642 (1959); Wishek Inv. Co. v. McIntosh County, 77 N.D. 685, 45 N.W.2d 417 (1950); L'Etolle v. Director of Pub. Works, 89 R.I. 394, 153 A.2d 173 (1959).

45. Alaska Laws 1962, ch. 101; Md. Laws 1963, ch. 52.

opments in condemnation procedure during recent years have resulted from statutory enactments. Many of these developments have come about through piecemeal amendments, but there also appears to be a trend toward legislative revision of state condemnation laws in the form of major revision bills. Several states have undertaken such revisions, with the result that statutory condemnation procedures have been improved and clarified.[46] There does not seem to be sufficient evidence at this time, however, to conclude that there is a definite trend toward consolidation of condemnation procedures. Some states, instead of revising or patching up existing procedures, simply have piled one new procedure on top of another.[47]

When we discussed the two other major areas of condemnation law—that pertaining to the right of the condemnor to condemn and that pertaining to the right of the landowner to receive just compensation—we were able to say that the over-all trend in the first area has favored the condemnor and in the second area the landowner. In the area of condemnation procedure, on the other hand, there have been two major trends running side by side—one tending to favor the condemnor and the other the landowner. These trends, however, are consistent with the two major trends previously noted in that procedural changes pertaining to the condemnor's right to condemn and to obtain quick possession of the desired property generally have favored the condemnor while procedural changes pertaining to the landowner's right to receive just compensation generally have favored the landowner. We now will look at these two trends in somewhat more detail.

A. *Procedures Designed to give the Condemnor Possession*

Almost every state has enacted procedures designed to give the condemnor possession of the property at an early stage of the proceedings. Many of these laws were in existence prior to 1946, but many of them also have been enacted since that time.[48] In general the courts have been sym-

46. Some of the more recent revisions were in North Carolina (N.C. Laws 1959, ch. 1025), Wisconsin (Wis. Laws 1959, ch. 639), Virginia (Va. Acts 1960, ch. 491; Va. Acts, 1962, ch. 426), Maine (Me. Laws 1961, ch. 295), Alaska (Alaska Laws 1962, ch. 101), Kansas (Kan. Laws 1963, ch. 234), Maryland (Md. Laws, 1963, ch. 52) and West Virginia (W. Va. Acts 1963, ch. 65).

47. Consolidations took place in Delaware (48 Del. Laws 1951, ch. 271), Nebraska (Neb. Laws 1951, ch. 101), and Kansas (Kan. Laws 1963, ch. 234). On the other hand, supplemental procedures were enacted in Georgia (Ga. Laws 1957, at 387; Ga. Laws 1961, at 517), Louisiana (La. Acts 1954, No. 107), New Mexico (N.M. Laws 1959, ch. 324), and Tennessee (Tenn. Acts 1959, ch. 216). Most of the other states which had revisions either had a uniform procedure to begin with or retained separate procedures for different types of takings.

48. Some of the post-1946 enactments were: Ill. Laws 1947, at 905; La. Acts 1948, No. 326; Alaska Laws, 1953, ch. 90; Idaho Laws 1953, ch. 252; La. Acts 1954, No. 107;

pathetic to such statutes, although a few states have had difficulty enacting constitutional quick-taking statutes.[49] Another trend which appears when one views recent legislative enactments in this area is a trend toward refinement of existing immediate-possession procedures. In this refinement process, it appears that both the condemnor and the landowner have benefited. The revised procedures often provide for better notice to interested parties, for clearer procedures for testing the validity of the taking and the adequacy of the deposit which usually is a prerequisite to possession by the condemnor, and for other adjustments which experience has shown to be necessary or desirable.[50] Another aspect of this refinement process is to permit the owner to withdraw the deposit under appropriate safeguards.[51] Many of the earlier immediate-possession statutes did not permit such withdrawal. Because the condemnor usually is not required to pay interest on deposits which the landowner is entitled to withdraw, these withdrawal procedures may work to the advantage of the condemnor as well as the landowner.

B. *Procedures for Determining Just Compensation*

Many amendments designed to improve procedures for determining compensation in condemnation proceedings have been enacted in recent years. On the whole the revised procedures afford greater protection to the landowner's rights than did the old procedures. There has been some tendency, for example, to get away from the old "laying out" procedures in connection

Ill. Laws 1957, at 2603; N.M. Laws 1959, ch. 324; Tenn. Acts 1959, ch. 216; N.D. Laws 1961, ch. 274; S.D. Laws 1963, ch. 195.

49. Among states which have had some difficulty are Georgia and Illinois. Immediate possession statutes were held invalid in Pilgreen v. City of Atlanta, 204 Ga. 710, 51 S.E.2d 655 (1949) and in Department of Pub. Works & Bldgs. v. Gorbe, 409 Ill. 211, 98 N.E.2d 730 (1951). However, both states subsequently enacted valid immediate possession procedures without amending their constitutions. See, O.K. Inc. v. State Highway Dep't, 213 Ga. 666, 100 S.E.2d 906 (1957); Department of Pub. Works & Bldgs. v. Butler Co., 13 Ill.2d 537, 150 N.E. 2d 124 (1958). North Dakota also experienced difficulty until its constitution was amended in 1956. See Kessler v. Thompson, 75 N.W.2d 172 (N.D. 1956). Although Idaho and Washington are among those states whose case law generally is not treated in this paper (see note 1, *supra*), it might be pointed out that those states also have had immediate possession statutes invalidated. See Yellowstone Pipeline Co. v. Drummond, 77 Idaho 36, 287 P.2d 288 (1955); State *ex rel.* Eastvold v. Yelle, 46 Wash.2d 166, 279 P. 645 (1955).

50. Some examples are: Ark. Acts 1963, No. 99 (certain restrictions on withdrawal of deposit by landowner added); Cal. Laws 1961, ch. 1613 (better notice to landowner and other changes); Conn. Laws 1957, No. 384 (better notice to landowner; increased deposit); Fla. Laws 1959, ch. 59-297 (reduction in required deposit); Mont. Laws 1961, ch. 234 (date of possession advanced).

51. Among laws providing for such withdrawal were: Md. Laws 1950, ch. 54; Va. Acts 1956, ch. 565; Cal. Laws 1957, ch. 2022; Va. Acts 1958, ch. 581; Neb. Laws 1959, ch. 351; Ind. Laws 1961, ch. 317; R.I. Laws 1961, ch. 166.

with land acquisitions for highway purposes.[52] These procedures typically provided for the making of an award by a local administrative body, generally with very little opportunity for a hearing on the issues involved. If the landowner was dissatisfied, he had the burden of going to court to attempt to obtain some redress. This is not to say that there has been a trend away from administrative condemnation procedures. For example, both Maine and Wisconsin in the recent revisions of their condemnation laws retained the administrative award procedure for highway condemnation purposes.[53] However, the laws were substantially revised so as to give perhaps as good protection to the landowner's rights as he would be likely to have in any judicial condemnation proceeding.

Turning to the more specific changes which have been made in condemnation proceedings, we find that amendments designed to improve notice procedures have been quite common.[54] Amendments designed to improve procedures for payment of compensation and for settling conflicting claims also were enacted in many states.[55] In addition, there has been a great deal of patchwork which is more difficult to classify.

There is one area of compensation procedure which has hardly been touched by legislative activity but which has been a fruitful source of litigation. This is the procedure for determining the landowner's right to compensation when his property allegedly has been taken or damaged by a highway agency without any formal action on the part of that agency. The proceedings sometimes are referred to as "inverse condemnation," but they make take many different forms. The courts usually manage to find that the landowner has a remedy, but it would seem that a well-conceived statutory procedure might be useful here.

CONCLUSION

If we were to attempt to summarize in a few words the post-war trends in highway condemnation law, we would have to say that two general trends appear to emerge from the mass of court decisions and legislative enactments: (a) there has been a tendency for both courts and legislatures to

52. *E.g.*, N.J. Laws 1953, ch. 27; R.I. Laws 1962, ch. 216. A summary "sheriff's jury" procedure in Maryland was repealed in 1962. Md. Laws 1962, ch. 36.

53. Wis. Laws 1959, ch. 639; Me. Laws 1961, ch. 295.

54. Among these were: Cal. Laws 1959, ch. 1573; Fla. Laws 1953, ch. 28282; Ill. Laws 1951, at 1850; Kan. Laws 1955, ch. 213; Minn. Laws 1957, ch. 728; N.H. Laws 1955, ch. 56; Tenn. Acts 1959, ch. 194; Tex. Laws 1961, ch. 105; W. Va. Acts 1957, chs. 82, 83, 84; Wis. Laws 1953, ch. 308.

55. Among these were: Ill. Laws 1959, at 157; Kan. Laws 1961, chs. 208, 209; La. Acts 1954, Nos. 47, 48; R.I. Laws 1962, ch. 76; Wis. Laws 1953, ch. 308.

look with favor upon the right of the highway authorities to condemn the property needed for highway construction and to acquire quick possession so that the improvement projects could proceed without delay; and (b) there has been a gradual trend toward expanding the scope of the landowner's right to receive compensation for some of the consequential damages which previously were considered to be noncompensable and toward improving the procedures whereby such right may be exercised.

Most of the changes which have taken place in highway condemnation law in recent years have been brought about by legislative action. However, there are areas of the law which have been left largely to the courts to develop and which now perhaps have been developed to a point where legislative statement of the rules might be warranted in the interest of clarity and of forestalling litigation. In fact, the time would seem to be ripe for the development of a model condemnation law which would synthesize the best features of the condemnation laws which already have been fashioned by the courts and legislatures of the several states and which could be drawn upon by the states in further improving their condemnation laws. One of the products of the study on which this paper is based hopefully will be at least a first draft of such a law.

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