#36 10/28/65

Memorandum 65-74

Subject: Study No. 36(L) - Condemnation Law and Procedure (General Philosophy Concerning Method and Extent of Compensation)

At the October meeting, the staff was directed to prepare a memorandum presenting any recent publications which discuss the extent to which persons should be compensated for detriment or pay for benefit resulting from a public improvement, without regard to whether any property of such persons is actually taken for the public improvement. The Commission wished to consider this material before determining the general philosophy it will adopt when resolving problems of just compensation and measure of damages.

We have examined those articles that the Index to Legal Periodicals indicated might be relevant and attach the following materials:

Extract--Eminent Domain in Virginia--Compensation for damages and Nonphysical Takings, 43 Va. L. Rev. 597, 618-619 (1957) [to be cited as "Virginia (first pink)"]

Extract--Inverse Condemnation in Washington--Is the Lid Off Pandora's Box?, 39 Wash. L. Rev. 920 (1965)[to be cited as "Washington (yellow)"]

Excerpt--Spater, Noise and the Law, 63 Mich. L. Rev. 1373, 1404-1410 (1965)[to be cited as "Michigan (buff)"]

Extract--Report of the Eminent Domain Revision Commission of New Jersey (April 15, 1965)[to be cited as "New Jersey (green)"]

Vetoed Connecticut Bill and Governor's Veto Message (1963)[to be cited as "Conn. (goldenrod)"]

Extract--Report of the British Columbia Royal Commission on Expropriation (1961-63)(pages 72-77, 81-84, 113-119)[to be cited as "British Columbia (white)"]

Extract--Outline of the panel discussion on "Expropriation Procedure and Compensation" at the 1961 Annual Meeting of the Law Society of Alberta, 2 Alberta L. Rev. 76, 81-85 (1962)[to be cited as "Alberta (blue)"]

Article--Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964) [to be cited as "Sax (second green)"]

Extract--Krotovil and Harrison, Eminent Domain--Policy and Concept, 42 Cal. L. Rev. 596 (1954)[to be cited as "Krotovil (second goldenrod)"]

Extract--Haar and Hering, The Determination of Benefits in Land Acquisition, 51 Cal. L. Rev. 833 (1963)[to be cited as "Haar (second pink)"]

We are sending you this material now so that you will have an opportunity to read it and give this matter some thought prior to the meeting. We will present the staff's reactions to this material and our suggestions in a supplement to this memorandum.

Giving compensation where there is no actual physical damage or occupation of the property is generally considered as one aspect of the problem of inverse condemnation. Basically, the problem is one of determining the extent to which the state and federal Constitutions require compensation to be paid and the extent to which compensation should be paid for injuries resulting from what has traditionally been considered an exercise of the police power. Because Professor Van Alstyne has been retained as our consultant on the subject of inverse condemnation, we have asked him to be present at our November meeting when we discuss this memorandum and the supplement thereto which we are planning to prepare.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXTRACT

Report of the Eminent Domain Revision Commission of New Jersey
(April 15, 1965)

ARTICLE VI

Elements Which Should be Considered in Fixing Compensation

In the absence of any *constitutional* definition of "just compensation" (and there is none), the determination thereof is a judicial function which is said to be sufficiently elastic to adjust itself to the social needs of the times as they may change from generation to generation. *City of Trenton* v. *Lenzner* (17).

The mere fact that principles of law respecting such compensation have been recognized over a long space of time, is no reason for continued adherence thereto, if the reasons for their adoption no longer exist. This thought has been well expressed in the opinion of our Supreme Court, in *State* v. *Pennsylvania Railroad Co.* (18), as follows:

> "The principle espoused by these cases has stood for over 100 years. Mere antiquity, however, will not save it from the onslaughts being made if it is otherwise barren of reason or logic, equity or justice. Time alone will not suffice to cause its re-embracement. On the

> other hand, a firmly fixed and well settled rule should not be changed unless it is proved erroneous or, under present-day conditions, no longer sustains the basic principle of law and justice which originally evoked it."

The cases of *State* v. *Gorga* (21), *City of Trenton* v. *Lenzner* (17), *State* v. *Gallant* (22), and *State* v. *Burnett* (6), are indicative of the awareness of our courts that the basis of just compensation is subject to change and modification whenever the facts and circumstances warrant. Such modifications are not rapid however and are achieved only after long and expensive litigation. These results could and should be effected more promptly through legislative enactment.

In the case of *U. S.* v. *Miller* (23), it is stated:

> "The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money for the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."

This is a restatement of the rule enunciated in *Monongahela Navigation Co.* v. *U. S.* (24).

This principle is again stated in *State* v. *Burnett* (6) at 288, where our court points out that although such phraseology is "a term which speaks more of total indemnity",

> "* * * the constitutional requirement is satisfied by a sum of money which fairly represents the transferable value of the property in the market place. *Olson* v. *United States*, 292 U. S. 246, 255 * * * *Kimball Laundry Co.* v. *United States*, 338 U. S. 1 * * *. We deal, then, in most valuation problems, in an evidential construction of a hypothetical sale between a willing and uncoerced seller and a like-minded buyer."

As was pointed out in *City of Trenton* v. *Lenzner* (17) at 476:

> "While it has been pointed out that these concepts are somewhat indefinite, it may well be that their flexibility is the very thing which will best serve to attain the goal in eminent domain proceedings of 'justice and indemnity in each particular case.'"

Notwithstanding the foregoing equitable, fair and idealist principles, the cold hard facts are that the practical application thereof in many cases does *not* afford the full and perfect equivalent for the property taken and the owner is *not* placed in as good position pecuniarily as he would have occupied if his property had not been taken.

The items of non-compensable losses with respect to which most frequent complaints are made are discussed below:

Moving Expenses

The taking of property requires the vacation thereof by its occupants, both owners and tenants. This involves the cost of removal of furniture, fixtures, machinery and equipment, and the re-installation thereof in a new location. Incidental thereto is the damage done to such equipment as a result of dismantling and reconstruction.

Until recently, these items were held to be non-compensable items. However, Federal Aid Highway Act (Title 23, Sec. 133, U. S. C.) has now authorized relocation assistance when such payments were authorized and made by state agencies under state statutes. The maximum allowed is $200 for expenses of an individual and his family and $3,000 for a business. By P.L. 1962, Chap. 221, the State Highway Commissioner was authorized to pay such sums. Other agencies are not authorized to make any payments whatsoever for such costs, and hence do not do so. *Newark* v. *Cook* (8) and *City of Trenton* v. *Lenzner* (17).

The Federal Housing and Redevelopment Agencies are also authorized to make such payments in connection with their projects. (Title 42, U. S. C. A. 1450, *et seq.* as amended, and regulations issued thereunder). These statutes and regulations permit payment of money expenses of $200 to a family and up to $25,000 for businesses moving within an area of 100 miles.

There appears to be no logical reason why owners whose lands are taken by agencies subsidized by federal funds should receive compensation for relocation expenses while owners whose lands are taken by other agencies, financed by sale of securities to the public, are not similarly paid. In both instances, the owner suffers the same loss, and the Commission feels that uniform compensation should be paid therefor.

Our cases have held that such relocation items are not compensable as such. *Newark* v. *Cook, supra* (8), *City of Trenton* v. *Lenzner* (17) *supra, State* v. *Gallant* (22) *supra.* In *State* v. *Gallant* (22) decided July 7, 1964, the looms used in the owner's fabric weaving business could be moved only at great physical risk and at an expense of about 80% of its cost. Recognizing that such losses were not compensable as independent items, the court adopted a rule which may grant the owner relief in another manner. It permitted proof of the value of the real property, both with and without the equipment, and directed that the compensation paid should reflect any enhanced value of the property caused by the fact that the equipment was located and ready for use therein.

This, however, does not meet the problem of the merchant whose *land* is not affected by the installation therein of his store fixtures, but who nevertheless suffers a genuine loss caused by the necessity of removal. Nor does it satisfy the merchant or manufacturer who is a *tenant* in the property.

The Commission therefore, recommends that there be included in the amount of just compensation, the actual

cost of moving and the re-installing machinery equipment, furniture and fixtures within a radius of 25 miles, with a limit of $250 per family in cases of residential moving and $15000 in cases of displaced businesses or non-profit organizations (churches and the like). The attention of the legislature and public is called to the fact that in some instances, these limitations could be unfair. A manufacturer receiving $15000 to compensate him for a $75000 moving cost would be paid only 20% of its cost, but another concern incurring a cost of $15000 would be paid in full. The legislature might consider some other standard of compensation.

These payments (in addition to compensation for property taken) should be made to the occupants of the property who incur the expenditure, whose right to occupancy expire more than 3 years after the taking data. The fact that a lease may bar a tenant from participating in an award to his landlord, should not bar him from this compensation, payable by the condemnor directly to him.

Business Losses

Objection to the inclusion of this item has been made by some members.

The owner of a thriving business, developed after years of toil and effort, located on property taken for public use, may have his business totally destroyed, but will receive no independent compensation for his loss of good will, income, or profits, resulting from the taking; nor will he be compensated for the loss of and interference with his business while the public improvements are being made. The authorities on this subject are collected in the *Lenzner* case (17).

Various reasons are assigned for this omission:—his *land*, and not his *business* has been taken; he can move his business elsewhere; his profits and good will result from his personal acumen and skill rather than the location of his property; no statutory authority exists authorizing

compensation; damages are speculative and subject to exaggeration; improvement costs would increase substantially the cost of acquisition, and other reasons. *State* v. *Gallant* (22) supra.

What is generally overlooked, however, is that if the owner of the business dies, the state finds no difficulty in valuing and taxing his business good will, and many of the reasons for not compensating him for his loss in eminent domain proceedings, vanish into thin air.

This injustice in eminent domain cases, and the necessity for remedy thereof, has found expression in our courts and the legislatures of sister states. *City of Trenton* v. *Lenzner* (17) at 477, our Supreme Court has recognized:

> "* * * the foregoing principles [lack of compensability for business losses] may operate harshly in denying to landowners reasonable compensation for their actual loss resulting from the taking of their property; and although varying justifying theories may be found in the judicial opinions, they seem far from compelling. * * * More significant is the increasing tendency displayed in recent cases of giving fair and weighty consideration to the consequential loss of business as an element of the compensation rightly due to the owner."

Some measure of relief, though slight indeed, has been afforded by permitting proof of business profits to establish that the property being taken is being put to its highest and best use, (*Housing Authority of City of Bridgeport* v. *Lustig* (25); to support the market value of land occupied by a gasoline station (*State* v. *Hudson Circle Service Center, Inc.* (26); and *State* v. *Williams* (27); and to support value of land used for parking purposes, *City of Trenton* v. *Lenzner*, *supra* (17).

On this subject, see enlightening editorial in the 87 N. J. L. J. 68 (January 30, 1964), and an article in 67 Yale Law Journal, p. 61 (1957).

Some members of the Commission feel that the interference with and destruction of a business as a result of a condemnation taking is a loss which entitles the owner to compensation and that the enactment of a statute to that effect is necessary and proper. Others regard the matter debatable.

If this loss is to be compensable, the compensation should be limited to a loss of profits for one year (based upon mathematical average of profits for the three years preceding). Federal tax returns shall be evidential in support and defense of the claim, and failure to exhibit the return shall bar the claim. In Pennsylvania (under a broader constitutional requirement of just compensation) the compensation is arbitrarily measured by the equivalent of the rental value of the business premises for a period not to exceed 24 months (Pennsylvania Statute, P.L. 1964, Act 6, par. 609.)

However, the views of the respective Commissioners are highly divergent on this phase of the Report and therefore no specific recommendation is made.

Consequential Damages

Consequential damages is the term applied to damages sustained by an owner of property as a result of a taking, notwithstanding that no part of his land is actually taken. Such damages are for the most part not compensable in New Jersey, or elsewhere. A glaring example is, *H. F. Sommer* v. *State Highway Comm.* (28), in which light and air was shut off from a factory by a high embankment, no part of which was located on the owner's property. No compensation was awarded. Another example is the shutting off or interference with an existing access. *Mueller* v. *State Highway Authority* (29), recognizes that compensation for such interference should be made. Change of grades of existing roads, injury to surface support and the like, are other examples of consequential damages.

If these items are to be compensable, there it is our opinion that an owner should be paid compensation for damages resulting to his property within a limited area (200 feet) of an improvement, resulting from change of grade, permanent interference with access, injury to surface support, or vacation of streets whether or not any property of the owner is actually taken. The views of the Commissioners being divergent, no specific recommendation is made on the general subject.

Benefits Resulting from Taking

In cases of partial takings, the remaining land frequently benefits from the improvement. Our present Eminent Domain Act contains no provision for reflecting this benefit in the calulation of compensation, except in the limited situation where an assessment is to be levied, in which case, it may be set off against any award rendered (R.S. 20:1-33). Our cases have uniformly held that *general* benefits may not be considered to reduce damages which an individual owner will sustain from the taking of a portion of his property. *Ridgewood* v. *Sreel Investment Corp.* (30) and cases collected therein. The law is reviewed in an article by Walter Goldberg, Esq., 82 N. J. L. J. 273 (May 28, 1959).

It is our recommendation that in cases of partial taking, special benefits (the *immediate peculiar benefits* accruing to the remaining property as a result of the improvement), shall be considered in determining the value of or damage *to the remaining land*. Such special benefits shall not however affect the compensation for the land actually taken. *General* benefits accruing to the *general* area shall not be considered.

Imminence of Taking

The extent to which the value of property may be affected both favorably and adversely, by public announcements of a proposed taking thereof has been discussed under Article V and is therefore, not repeated in detail. It is mentioned here because it is an element which should be considered in fixing compensation.

VETOED CONNECTICUT BILL

PUBLIC ACT NO. 436

AN ACT CONCERNING ESTABLISHMENT OF PROJECT PLANNING DATES BY CONDEMNATION AUTHORITIES.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

SECTION 1. When, as a result of the construction of a highway or the taking of properties for the construction of a highway or proposed highway, the value of property contiguous to such highway has been substantially impaired in value and there has been no taking of any portion of such contiguous property, the owner of such contiguous property shall have a claim for damages for such impairment of value and may proceed for the recovery thereof as in all other civil actions, provided such action shall be brought within ninety days after receipt of notice in writing from the highway commissioner that the construction of such highway has been completed. The commissioner shall notify all owners of property contiguous to any highway the construction of which is completed after the effective date of this act of the completion of such construction.

SEC. 2. The cause of action provided for in section 1 shall be limited to the following cases:

(a) When a dwelling house located on one acre of land or less contiguous to a limited access highway is, as a result of taking of land for the construction of such highway, abutted on two sides by land taken for such highway and on the remaining sides by other streets or highways.

(b) When any highway is so constructed that any portion or superstructure thereof is of an elevation six feet or more above the elevation of any portion of contiguous land of one acre or less on which is located a dwelling house and such portion or superstructure is located within three hundred feet of such dwelling house.

(c) When the highway commissioner lays out a new route for a proposed highway and has filed a map of the same in the

office of the town clerk in the various towns wherein such highway is to be located and has not, within a period of one year from the date of such filing, taken the property needed for the construction of such highway.

SEC. 3. (a) When property is to be taken by the state by eminent domain, the authority which determines that the project is to be undertaken shall publish, in a newspaper having a general circulation in the location where property is to be taken, a notice stating the date on which such determination was made and therein describing the proposed location of the project. If such authority fails to establish such date, then an alternative date of two years prior to the date of taking shall be established. Compensation for property so taken shall be based upon its value as of the date so established or the date of taking, whichever is higher.

(b) For the purposes of this section with respect to any project undertaken by the state, the date on which such determination is made shall be that made by the agency charged with planning and carrying out the project rather than a basic decision made by the general assembly.

Certified as correct by

_____

Legislative Commissioner.

_____

Clerk of the Senate.

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Clerk of the House.

Approved _____, 1963.

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Governor.

JOHN DEMPSEY
GOVERNOR

STATE OF CONNECTICUT
EXECUTIVE CHAMBERS
HARTFORD

June 28, 1963

The Honorable Ella T. Grasso
Secretary of State
State Capitol
Hartford, Connecticut

Dear Madam Secretary:

I return without my approval Substitute For House Bill No. [illegible], Public Act No. 436, "An Act Concerning Establishment of Project Planning Dates By Condemnation Authorities."

This bill would seriously jeopardize the continuation of our State highway construction program. The State Highway Commissioner has supplied the following analysis:

This bill would require the Highway Department to multiply right-of-way acquisition personnel to an extent impossible to estimate without a detailed analysis of all construction projects presently under way or planned. It would require the Highway Commissioner to notify certain owners of property contiguous to highway construction, after construction is completed, that they might bring a civil action against the Highway Commissioner if their property was substantially impaired in value even though no property was taken from said contiguous owner. There would be no Federal Aid participation in such payments.

In the long run most property contiguous to a new highway is not impaired in value but rather its value increases. While it is conceivable that contiguous property might be substantially impaired in value during construction and for a short period of time after construction, to pay for such temporary impairment in value despite the long-range increase in value would unjustly enrich these contiguous property owners.

This bill does not provide any method to settle a dispute if the owner and the State cannot agree on the impairment of value. Neither is there any method provided for approval by a State Referee or court.

In urban areas, where many grade separations are constructed, the dwellings within 300 feet of such structures could be numbered in the hundreds.

Subsection (c) of Section 2 would require the Highway Commissioner to take all property needed for a highway within a year after a map was filed with the town in order not to be liable to contiguous property owners. This provision would be very expensive to administer and, as a practical matter, would be unworkable. It would require a great increase in right-of-way personnel and, procedurally, would not be economical. For all practical purposes, it would be ill-advised to hold a hearing until design was complete, which would make the hearing only a formality and serve no purpose.

Section 3 of this act concerns itself with any authority acting through its eminent domain procedures while Sections 1 and 2 are confined to actions of the Highway Commissioner. There is ambiguous language in subsections (a) and (b) of Section 3 in that subsection (b) refers to carrying out projects initiated by the General Assembly and subsection (a) refers to projects which some other authority decides to undertake.

The last sentence of subsection (a) of Section 3 would require any condemning authority to establish two sets of values for the price of any property taken, i.e., the determination date and the date of taking. It is obvious that this would, for all practical purposes, double appraisal costs which, in a highway construction program of the magnitude under way, would be considerable.

To insure the steady progress of Connecticut's vitally needed highway program, I must withhold my approval of this bill.

Sincerely,

Governor

Dit

EXTRACT

From pages 72-77, 81-84, and 113-119 of Report of the British Columbia Royal Commission on Expropriation (1961-63)

In order to determine the proper basis for compensation it is my view that consideration of the existing law of England, the United States and Canada will be helpful.

I. COMPENSATION IN ENGLAND

Awards of compensation in England now fall under The Land Compensation Act, 1961, a consolidation of the various compensation acts which have been passed since the first major revision of compensation law in 1919. I will outline briefly the evolution of this new English statute because it illustrates the complexity of the problem and the extreme difficulty of framing an effective and comprehensive code of compensation law.

The Lands Clauses Consolidation Act, 1845, as previously mentioned, served as the basis of compensation law and compulsory acquisition procedure for some seventy-five years in England. By the end of the First World War the inadequacy of the 1845 Act was so apparent that the Scott Committee was appointed to study the question of acquisition of land for public purposes and compensation therefor and to make recommendations. As a result of the Scott Committee reports Parliament passed the Acquisition of Land Act, 1919. The most important change affected by this Act was the introduction of statutory rules for assessing compensation. These rules substituted market value in place of value to the

owner concept of compensation evolved by the Courts from the wording of the 1845 Act. In addition, the 1919 Act:

(a) abolished the practice of adding an allowance on account of the acquisition being compulsory.

(b) eliminated any element of value which can be exploited only through statutory powers,

(c) attempted to eliminate the inflated price created by the needs of a particular purchaser,

(d) eliminated any element of value arising from illegal or unhealthful use of the premises,

(e) provided a reinstatement principle for assessing compensation for land "devoted to a purpose of such a nature that there is no general demand or market for land for that purpose", e.g. churches and schools, and,

(f) expressly preserved the right of an owner to compensation for "disturbance or any other matter not directly based on the value of land", i.e. severance and injurious affection.

It is important to remember that the 1845 Act was not repealed in 1919 and is still in force in England. Its scope was greatly limited in that the Acquisition of Land Act, 1919, was made applicable whenever any Government

Department or any local or public authority is authorized by statute to acquire land compulsorily and compensation is in dispute. The private taker to whom the 1845 Act applies appears today to be virtually extinct but the 1845 Act retains importance as the statutory foundation upon which is based the rules for determining compensation for disturbance, severance and injurious affection.[43]

The English rules for assessing compensation appear to have served their purpose fairly well since they were first formulated in 1919. The 1944 Report of the Uthwatt Committee[44] on Compensation and Betterment, indicates that the Committee considered the six rules in the 1919 Act generally satisfactory. Subject to variations in the statutory definition of the market value which have been made in Town and Country Planning legislation since 1919, the six rules have remained substantially unchanged. However, the Town and Country Planning Act, 1959, returned to the market value standard of the Acquisition of Land Act, 1919, and in addition made provision for the following

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43. Rule 6 - of Section 5 of the Land Compensation Act simply provides that "the provisions of (the market value rule for land taken) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land."

44. Cmd 6386, Expert Committee on Compensation and Betterment.

three difficult problems of valuation not previously covered by statute:

(a) whether any effect on land values either caused by or peculiar to the scheme of development should be ignored in determining compensation;

(b) whether any enhancement to the severed remainder where part of the owner's land is taken which is caused by or peculiar to the scheme of development should be set off against the compensation payable for the land taken;

(c) whether any depreciation in value resulting from the "threat of compulsory purchase" should not be taken into account in determining compensation.[45]

With the enactment of the Land Compensation Act, the provisions for determining compensation have once again been consolidated and its predecessors have been repealed (including the whole of the Acquisition of Land Act, 1919) except the Lands Clauses Act, 1845.

It is apparent that the English Parliament has found desirable a comprehensive codification of the law of expro-

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45. These provisions are set out in subsections 2, 3 and 6 respectively of Section 9 of the Town and Country Planning Act, 1959.

priation and has progressively codified that law as the complex problems of compensation policy and valuation practices have become better understood. For this reason I will attempt to analyze all ramifications of this problem and recommend ways of dealing with them by legislation.

Another significant development in England has been the creation of a special Lands Tribunal under the Lands Tribunal Act, 1949. The necessity of creating a special tribunal of experts to replace the official arbitrators (pursuant to Section 1 of the Acquisition of Land Act, 1919)[46] indicates the inherent difficulty involved in determining compensation questions.

Thus in England today questions of disputed compensation are determined by a special statutory tribunal composed of expert lawyers and valuators who apply the fairly

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46. Section 2 (2) of the Lands Tribunal Act, 1949, provides that: "The President shall be either a person who has held judicial office under the Crown (whether in the United Kingdom or not) or a barrister-at-law of at least seven years' standing, and of the other members of the Lands Tribunal such number as the Lord Chancellor may determine shall be barristers-at-law or solicitors of the like standing and the others shall be persons who have had experience in the valuation of land appointed after consultation with the president of the Royal Institution of Chartered Surveyors".

comprehensive statutory rules for assessing compensation. From their decision an appeal lies to the English Court of Appeal on a question of law only.[47]

II. COMPENSATION IN THE UNITED STATES

[Pages 77(portion), 78, 79, 80, and 81(portion) omitted.]

III. COMPENSATION IN CANADA

In British Columbia as I have stated, there is a statute virtually identical to the English Lands Clauses Act governing the compensation awards in expropriation cases. In other Provinces the Courts have evolved a law of compensation from the English Act, and in a majority of Canadian Provinces there are central expropriation statutes or such

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51. An especially excellent treatise on valuation questions is Orgel: Valuation under Eminent Domain, published by The Michie Company, Law Publishers, Charlottesville, Va.

statutes are in the process of being prepared.[52]

The Federal Expropriation Act governs expropriation by the Government of Canada.[53] The right to compensation is expressed in Section 23 of that Act which states:

> "The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; and any claim to or encumbrance upon such land or property shall, as respects Her Majesty, be converted into a claim to such compensation money or to a proportion of amount thereof, and shall be void as respects any land or property so acquired or taken, which shall, by the fact of the taking possession thereof, or the filing of the plan and description, as the cases may be, become and be absolutely vested in Her Majesty."

This Act does not specify the elements which are to be the subject of compensation or the criteria for compensation. Section 27 refers to "Land or property... acquired or taken for, or injuriously affected by, the construction of any public work", and the common law rules of compensation are thus brought into operation.

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52. A complete revised Expropriation Act, designated Bill C-50, was given first reading in Parliament on October 3, 1962. Alberta: Expropriation Procedure Act 1961 S.A. Ch. 30. Manitoba: Expropriation Act 1954 R.S.M. Ch.78. New Brunswick: Expropriation Act 1952 R.S.N.B. Ch.77. Nova Scotia: Expropriation Act 1954 R.S.N.S. Ch. 91. Ontario: Bill 120 (1961 Session) now under study by special legislative committee. Saskatchewan: Expropriation Act 1953 R.S.S. Ch. 52.

53. R.S.C. 1952, c. 106.

The Exchequer Court Act grants the Exchequer Court of Canada exclusive original jurisdiction to hear and determine:

(a) Every claim against the Crown for property taken for any public purpose;

(b) Every claim against the Crown for damage to property injuriously affected by the construction of any public work.

The Federal Expropriation Act permits the Crown to mitigate injury resulting from expropriation. Section 31 provides:

> "Where the injury to any land or property alleged to be injuriously affected by the construction of any public work may be removed wholly or in party by any alteration in, or addition to, any such public work, or by the construction of any additional work, or by the abandonment of any portion of the land taken from the claimant, or by the grant to him of any land or easement, and the Crown, by its pleadings, or on the trial, or before judgment, undertakes to make such alteration or addition, or to construct such additional work, or to abandon such portion of the land taken, or to grant such land or easement, the damage shall be assessed in view of such undertaking, and the Court shall declare that, in addition to any damages awarded, the claimant is entitled to have such alteration or addition made, or such additional work constructed, or portion of land abandoned, or such grant made to him."

This proviso, copied in substance in a number of provincial expropriation statutes, appears to me to offer a useful alternative or a supplementary method of alleviating injury. I, therefore, recommend that a similar provision be included in a new expropriation statute for British Columbia.

Rule 7.

The question of whether compensation should be paid for injury or loss suffered by owners from whom no land is taken raises a number of difficult problems. The law at present provides:

> " If any party is entitled to any compensation in respect of any land or of any interest therein which has been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking have not made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of $250.00, the party may have the same settled either by arbitration or by the verdict of a jury, as he thinks fit;.... and the same may be recovered by him with costs, by action in any court of competent jurisdiction." 71.

The English courts adopted the similar section in their Act as authority for granting compensation for injurious affection where no land is taken, and where the special statute did not give an express right to such compensation. 72.

It is stated in Challies' textbook "The Law of Expropriation" that:

> " The conditions that must be fulfilled to justify a claim for injurious affection, if no land is taken, are well set forth by Angers, J. in Autographic Register System v. C.N.R. 73. thus:
>
> Four conditions are required to give rise to a claim

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71. Section 69 of Land Clauses Act R.S.B.C.(1960)c. 209

72. Cripp's Compulsory Acquisition of Land, 11th ed.

73. (1933) Ex. C.R. 152.

for injurious affection to a property, when no land is taken:

(a) The damage must result from an act rendered lawful by statutory powers of the Company;

(b) The damage must be such as would have been actionable under the common law, but for the statutory powers;

(c) The damage must be an injury to the land itself and not a personal injury or an injury to business or trade;

(d) The damage must be occasioned by the construction of a public work, not by its user." 74.

The rationale of the first two conditions is that an owner whose land has been injured by acts, tortious if done without statutory authority, should be given a right to compensation in place of the right of action removed by the statute. The limitation imposed by these two conditions is, in my opinion, sound. These two conditions, incidentally, introduce the common law of private nuisance with its requirement that injury done must be peculiar to the claimant's land, over and above any general injury suffered by all land in the area. 75.

The third condition comes from the use of the word "land or any interest therein" appearing in section 69 of the British Columbia Lands Clauses Act. The principle

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74. Challies, The Law of Expropriation, 2nd, ed. p. 133.

75. Metropolitan Board of Works v. McCarthy supra @p.263.

underlying this condition was stated in a leading English compensation case:[76.]

> " The damage complained of must be one which is sustained in respect of the ownership of the property - in respect of the property itself, and not in respect of any particular use to which it may from time to time be put; in other words, it must, as I read that Judgment, be a damage which would be sustained by any person who was the owner, to whatever use he might think proper to put the property. Now that, of course, if to be taken with the limitation that a person who owns a house is not to be expected to pull it down in order to use the land for agricultural purposes. That would be pushing the Judgment in Ricket v. Metropolitan Rail Co. to an absurd extend. The property is to be taken in status quo and to be considered with reference to the use to which any owner might put it in its then condition that is, as a house."

In my view, this principle is generally sound since to allow claims for personal and business injury might render the cost of essential public development prohibitive. However, in cases where an owner suffers a loss of profit of a permanent nature which is not fully reflected in a diminished market value of the property, there can be severe hardship inflicted without redress. This occurred in an early Canadian case which I have already cited.[77.] I therefore propose to broaden the scope of the third condition by

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76. Beckett v. Midland Railway Co. (1867) L. R. 3 C.P. 82 @ 92.

77. McPherson v. The Queen (1882) 1 Ex. C.R. 53.

permitting the recovery of compensation for loss of business profits of a permanent nature, subject to a proviso against duplication of compensation awarded for diminished market value of the property.

Subject to this exception, it is my opinion that personal and business injuries must be borne where they fall. They are the unavoidable price of the use of land by the state for essential public purposes.

I am of opinion that the fourth condition does not apply in British Columbia where the authority to award compensation is drawn from section 69 of the Lands Clauses Act. In the Autographic Register case,[78] compensation for injurious affection was being considered under section 23 of the 1927 Expropriation Act of Canada[79] which provided:

> " The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property."

The Exchequer Court also referred to section 17 (2) (c) of the Canadian National Railway Act[80] which provided:

> " The compensation payable in respect of the taking of any lands so vested in the Company, or of interests

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78. (1933) Ex. C.R. 152.

79. R.S.C. 1927 c. 64

80. R.S.C. 1927 c. 172.

> therein, or injuriously affected by the construction of the undertaking or works shall be ascertained in accordance with the provisions of the Railway Act, beginning with Notice of Expropriation to the opposite party."

When the Autographic Register case was decided, the C. N. R. Act had been amended in 1927 by the deletion of a number of provisions dealing with expropriation including section 17 (2) (c) which were replaced by a provision incorporating the provisions of the Expropriation Act into it. However, the court referred back to section 17 (2) (c) in order to satisfy itself that there was a right to compensation for injurious affection at all.

It should be noticed that the fourth condition stated by Challies as a part of the general law is based on those statutes which unlike the Lands Clauses Act contain the word "construction" rather than the word "execution". This distinction, to the best of my knowledge, has been judicially noticed only in Simeon v. Isle of Wight Rural District Council[81] a decision of the English Court of Chancery:

> " The words of section 68 of the Lands Clauses Consolidation Act (section 69 in the B. C. Lands Clauses Act) are not, as in the case of section 6 of the Railways Clauses Act, 'construction of the works', but 'execution of the works'. In my judgment, the latter words are wider than the former and include the exercise, that is the carrying out and the execution of the appropriate statutory powers."

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81. (1937) Ch. 525.

In that case the local authority was authorized by the Health Act to construct and maintain waterworks. In the maintenance of these works the authority drew off water from private lands causing damage and the court ruled that damage resulting from such acts was compensable under section 69 of the Lands Clauses Act since the word "execution" included the carrying out of all the acts for which the authority is authorized by statute.

It is my opinion that the fourth condition does not apply under the existing British Columbia law, and should not be made applicable now in any new statute. I consider there is no rational basis for limiting compensation to injurious affection resulting from the construction of works and not from their maintenance and continued operation. I therefore do not recommend the enactment of this fourth condition in the proposed statute.

I have considered whether the liberalization of the third condition to cover loss of business profits of a permanent nature and the exclusion of the fourth condition may lead to excessive and unreasonable claims for compensation on the part of owners from whom no land has been taken. I am convinced that these changes will not result in such claims being successfully made since the second condition will serve to limit compensation claims to those which are

proper and reasonable. In effect, a claimant will have to prove common law nuisance, and in such regard the House of Lords pronounced in a nuisance action as follows:

> " An occupier may make in many ways a use of his land which causes damage to the neighbouring land-owners and yet be free from liability. This may be illustrated by Bradford Corporation v. Pickles (1895) A.C. 587. Even where he is liable for nuisance, the redress may fall short of the damage, as, for instance, in Colls v. Home & Colonial Stores (1904) A.C. 178, where the interference was with enjoyment of light. A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or, more correctly, in a particular society". 82.

I therefore recommend that the following rule be enacted to provide for compensation in cases where no land is taken:

PROPOSED BRITISH COLUMBIA RULE 7

> " An owner of land which is injuriously affected although no part of the land is acquired by the expropriating body, shall be paid just compensation for all such injurious affection and for loss of business profits of a permanent nature, (after setting off the value of all betterment accruing to that land as a result of acts done by the expropriating authority) which
> (a) are the direct consequence of the lawful exercise of the statutory authority,
> (b) would give rise to a cause of action but for that statutory authority, and
> (c) in the case of injurious affection, result in a decline in the market value of the land.
>
> In applying this rule no separate allowance shall be made for loss of business profits where such loss is also reflected in a decline of the market value of the land."

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82. Sedleigh - Denfield v. O'Callaghan (1940) A.C. 880 at 902.