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Memorandum 69-31

Subject: Study 65 - Inverse Condemnation

The attached note was prepared by Mr. Gideon Kanner, Los Angeles attorney. The note is a critical comment on the Commission's inverse condemnation study and presents a point of view that should be considered in resolving policy questions in this study and in the eminent domain study.

We do not plan to go through this material at the meeting. It may be, however, that the Commission will wish to discuss the note at the meeting. This note by Kanner is generally along the same lines as the letter from Roy Gustafson, former Chairman of the Commission, that was considered at the last meeting. See also the First Supplement to Memorandum 69-17 (reprint of articles from Readers Digest and New York Times sent to us by a professional appraiser)(sent to you for background in connection with the January meeting).

Respectfully submitted,

John H. DeMoully
Executive Secretary

"JUST HOW JUST IS JUST COMPENSATION?"

(A Critical Comment On The California Law Revision Commission's Inverse Condemnation Study)

by

GIDEON KANNER

FOREWORD

This note has been written in response to a three-part study of inverse condemnation made for the California Law Revision Commission by Prof. Arvo Van Alstyne,[1/] as well as to certain Commission staff memoranda on this subject. The scope of this note is limited to examining certain ground rules of the study, and to reviewing certain aspects of [inverse] condemnation law particularly as applied to freeways, from the point of view of the damaged property owner seeking compensation. I find myself in fundamental disagreement with certain of Prof. Van Alstyne's views expressed in his inverse condemnation study. This note can properly be characterized as an open letter to the California Law Revision Commission on this subject.

The Limits of Power: Yes, Virginia, There is a Constitution

The Commission, judging from its materials, has undertaken its study of inverse condemnation because of an admitted need for improvement in this field. I agree that the need for change exists. But I am somewhat startled at the direction of the proposed change seemingly suggested in the study. At the very outset of Prof. Van Alstyne's study for the Commission,[2/] the reader is greeted with the reminder that the legislature's power to act in this field is limited by the inhibitions of the constitutional just compensation and due process clauses. Therefore, we are reminded, the legislative approach must be limited, lest it fall below the minimal constitutional guarantees of just compensation and due process of law. Sadly, there is implicit in this caveat a suggestion that the legislature must watch these constitutional shoals in its assumed journey toward the implicit goal of minimizing just compensation.

My uneasiness is further reinforced by Prof. Van Alstyne's serious discussion of the deletion of the "damaged" clause of California Constitution, Art. 1, §14 at p.63 of Part One of his study. I find little comfort in his observation[3/] that the deletion of the "damaged" clause is no guarantee that the courts would not reinterpret

the concept of "taking" so as to "expand inverse condemnation liability well beyond federal standards". And to one who, like myself, believes that the "damaged" clause was put into the Constitution as an expression of principle, and a limitation on future legislation,[4] it is even more disturbing to note Prof. Van Alstyne's apparent indifference to any a priori impact of the "damaged" clause on contemplated legislation.[5]

Such thoughtful ruminations are the prerogative of a scholar, and I readily acknowledge Prof. Van Alstyne's credentials as such. It might be profitable to suggest, however, that even an ambitious effort by the Commission should fall short of any serious consideration of deletion of the "damaged" clause. The short shrift given by this state's electorate to the last attempt at relaxing the constitutional restraints on eminent domain[6] should be kept in mind as suggesting a pragmatic boundary of the projected efforts of the Commission. The tremendous and increasing number of condemnations in recent years[7] has undoubtedly hardened the public attitude against the process of eminent domain. An insight into this attitude is provided by the increasing phenomenon of veniremen who refuse to serve on condemnation juries, either on principle or because of the harsh experience of a friend or relative. And, to add a personal judgment, I submit that some avenues of approach, such as tinkering with this state's organic declaration of rights, should be rejected out of hand, not because they are abstractly invalid, but because they

are fundamentally, morally wrong.

As it is, the compensation now available to damaged property owners is too often a meager and chancy thing. Putting aside the procedural traps and hurdles thrown in their way by the Claims Act, the substantive case law is unrealistic: substantial and economically devastating damages are pooh-poohed by the courts as "mere personal annoyance". It is contradictory: after stern pronouncements that the liability of the government is the same as that of private citizens, damages are denied for the very same governmental acts for which private parties are routinely held liable. Rules of exquisite technicality are laid down: the government may escape liability altogether, in spite of admitted damage proximately caused by its acts, when these acts take place a few feet beyond an imaginary line which once marked the boundary of the owner's land.

These matters are more fully dealt with below, but they are touched on here because they highlight the need for legislative reform liberalizing the right to compensation for damages actually suffered. All the talk about financial burdens on government, and the inability to get liability insurance misses the mark. For it presupposes damage inflicted by governmental acts, and merely quibbles with the mechanics of providing compensation or propagandizes for denying compensation altogether. Implicit in the inquiry into sources of compensatory funds is the admission that something compensable has happened.

In this connection I note a city attorney's handwringing, at p.3 of Commission Memorandum 67-73, over the "proliferation" of actions "under the guise" of inverse condemnation, which - we are told - "presents the taxpayer with a burden far greater than any other theory of liability since most insurance companies will not underwrite this risk". Could it be that the "proliferation" of inverse condemnation lawsuits and their economic "burden" are causally connected to an even greater proliferation of damage inflicted by burgeoning public works constructions? And are we seriously being told that the concept of just compensation, a basic constitutional guarantee, is to be subordinated to insurance companies' profit expectations?

Therefore, at the risk of uttering a banality, I submit that one must bear in mind that the Constitution's command is that <u>just</u> compensation be paid. I have yet to hear of a concept of justice acceptable to right-thinking men, which is reconcilable with the notion that an actor can inflict damage for his own benefit, and then escape liability because he finds it economically inconvenient to make amends. I submit that if one accepts the validity of the preceding statement, then it is not undermined by pinning the label of "government" on the actor. I submit that the Commission's speculation about a statutory limit on constitutionally decreed inverse condemnation liability, except as, if and when the legislature specifically enacts liability,[8/] is not likely to lead to a workable solution of the problems before the Commission. Similar legislative

wisnful thinking with regard to nuisance non-liability[9] has been properly criticized as ineffective.[10] Because of the [inverse] condemnation roots of governmental nuisance liability, the legislature lacks the power to abrogate such liability.[11] This federal constitutional limitation on the legislature's power is not removed by amending the state constitution. As the U.S. Supreme Court put it:

> "The legislative authorization [of nuisance] exempts only from liability to suits, civil or criminal, at the instance of the state; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."[12]

In a later case the Supreme Court explained the constitutional basis for that rule:

> "...the legislation we are dealing with must be construed in the light of the provision of the Fifth Amendment - 'nor shall private property be taken for public use without just compensation' - and is not to be given an effect inconsistent with its letter or spirit. The doctrine of the English cases has been generally accepted by the courts of this country, sometimes with scant regard for distinctions growing out of the constitutional restrictions upon legislative action under our system. Thus, it has been said that 'a

railroad authorized by law and lawfully operated cannot be deemed as a private nuisance'; that 'what the legislature has authorized to be done cannot be deemed unlawful', etc. These and similar expressions have at times been indiscriminately employed with respect to public and private nuisances. We deem the true rule, under the Fifth Amendment, as under state constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such character as to amount in effect to a taking of private property for public use."[13/]

So, like Prof. Van Alstyne, I too posit at the outset the principle that the legislature's power to create substantive [inverse] condemnation law is limited by the California Constitution (Art.I, §14) and the U.S. Constitution (5th and 14th Amendments).[14/] But these limitations are faced only if the legislature chooses to move in the direction of denial of compensation to damaged owners.[15/] No such restrictions exist if the legislature sets out to correct the inequities which now plague damaged owners. There is nothing in the constitutions which prevents a state from enacting into its laws a more enlightened standard of justice.[16/]

The words of Mr. Justice Bell of the Pennsylvania Supreme Court express a helpful observation which should be kept in mind by the Commission in its present study:

> "We shall start with the Constitution - strange to say, the legislature, attorneys and courts in most of the cases in this field have been so engrossed with the interpretation of the pertinent statutes that they have completely overlooked or ignored the Constitution, which of course is paramount."[17/]

The Responsibility of Power: Where Does The Buck Stop?

Next, I wish to offer a word of disagreement with the suggestion of Prof. Van Alstyne in Part 2 of his study[18/] and adopted verbatim in the Commission's Memorandum 67-73, p.7, as Item 8,[19/] that the changes in inverse condemnation law to be made by the Commission should "avoid disturbing existing rules of settled law except where clearly justified by policy considerations of substantial importance."

It seems to me that the Commission can perform a valuable service to the people of this state, and to its administration of justice by clearing a few cobwebs with which this field is replete. If the result of the Commission's effort in the field of inverse condemnation

is to be a transfer of "existing rules of settled law" from court report books into code books, then I submit that little purpose will have been served. Indeed, the Commission would then be acting as a codification body, not as the Law Revision Commission.

I feel that this point is of pivotal importance. It goes to the rationale of the Commission's work. I urge as strongly as I can, that the Commission pursue its study to the end that rational new laws are formulated; laws which balance the competing interests and achieve substantial justice. Whether or not the decisional status quo is preserved in the process should not be a controlling criterion. As Mr. Justice Brandeis put it:

> "... the doctrine of stare decisis does not command that we err again when we have occasion to pass upon a different statute. In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken."[20/]

The above words, uttered in the context of decisional law, are even more compelling when applied to the legislative process since the legislature is not even theoretically bound by precedent (other, of course, than precedent expounding constitutional limitations).

There is much more at stake here than just an abstract question of how the Commission's objectives should be delineated. A highly pragmatic problem is involved. When the legislature fails to act in a field of the law in which the courts have spoken, the courts in turn equate legislative inactivity with legislative approval.[21/] This is especially so when the legislature acts in a particular field, but fails to enact legislation changing the decisional law in that field.[22/] Thus, if the Commission fails to recommend any significant departures from decisional inverse condemnation law, this will be interpreted as approval of the decisional status quo.

Yet, "the status quo suggestion" embraces current decisional law not because it is consciously approved by the study. On the contrary, Prof. Van Alstyne states that "... most authorities readily acknowledge that the case law of inverse condemnation is disorderly, inconsistent and diffuse."[23/] The reason offered for the apparent willingness to largely codify such unsatisfactory case law is the professed objective of avoiding "uncertainty" and "litigation".[24/] Is this objective worth the price of perpetuating the "disorderly, inconsistent and diffuse" case law? I submit that on principle the answer is: no. Moreover, few things are as conducive to uncertainty and litigation as inconsistent law - whether statutory or decisional.

Thus a foundation is being laid here for a situation where the courts look to the legislature, the

legislature looks to the courts, and the law continues in its present, admittedly undesirable state.

I submit also that "the status quo suggestion" gains no added force from its professed abhorrence of the "creation of broad and nebulous new areas of possible liability through the use of unduly general statutory language." Indeed, the above-quoted language hints of a straw man. Nowhere does the study material indicate that anyone has suggested the creation of "unduly general" statutory language or has come out in favor of "nebulous" areas of "possible" liability. The Commission's proposed statutes can both embody new approaches which are desirable, and can also achieve precision. Statutory improvement and vagueness of expression are hardly synonymous.

I am not oblivious to the final sentence of "the status quo suggestion".[25/] It seems to me, however, that the relegation of correction of injustices to a kind of an "on the other hand" afterthought, hardly formulates a proper goal for the Commission. At the risk of sounding naive, I submit that correction of injustices should head - not trail - the Commission's agenda.

In short, the Commission should seek just solutions to real and admittedly troublesome problems, rather than limit its thinking by a priori positing of conformance whenever possible, to admittedly "disorderly, inconsistent and diffuse" decisional law as a goal of its efforts.

The Impact of Power: When is an Invasion of Property Mere Inconvenience? or, Symons Says ...

Moving from the general to the particular, I strongly urge the Commission to give its attention to a serious [inverse] condemnation problem which is daily growing more aggravated. I refer to the impact of the urban freeway on its neighbors.[26/]

Urban freeways impinge directly and severely upon their neighbors. Their greater traffic density constitutes a direct and serious interference with adjacent homeowners' use and enjoyment of their property. Moreover, the number and mileage of urban freeways is rapidly increasing. In Los Angeles County alone there are several freeways currently in the process of construction and right of way acquisition. Additional freeway routes have been adopted through densely populated areas. For example, the Whitnall Freeway is now slated to cut through the heart of the heavily populated "bedroom" of Los Angeles, the San Fernando Valley. In this connection, see the discussion of certain broader aspects of this problem by Gunzburg, "Transportation Problems of the Megalopolitan", 12 UCLA Law Rev. 809-810.[27/]

Beyond the general problems touched on by Mr. Gunzburg, there is the reality which faces those unfortunates whose homes wind up in the immediate proximity

to an urban freeway. The judicial decisions which have come close to this problem (none have really considered it), have taken refuge in semantic devices by referring to the problem in terms of "inconvenience" to the owners, usually preceded by the belittling adjective "mere". This choice of language conceals a massive failure on the part of this State's judiciary to address itself to a pressing issue.

The reality is that private residences located immediately next to a freeway are generally transformed into a kind of personal hell.[28/] The stench, dust, vibrations, interference with radio and television reception, and incessant roaring noise of the freeway traffic constitute a severe burden. Add to that the inevitable falling of some debris from the freeway onto adjoining back yards, plus the ever-present danger of trucks dumping their loads,[29/] or of a car coming down the embankment, and one gets a more realistic appreciation of what is inflicted upon the persons who are thus forced to live in the excretions of a freeway.[30/] These factors directly and severely diminish the market value of such residences. The opinions which have chosen to overlook these realities of life under the rubric that noise, dust, etc., are "mere" personal inconveniences to the owners for which there is to be no compensation, turn their back on an urgent social problem.

The principal judicial offender in this regard is People v. Symons (1960) 54 C 2d 855. I submit that it deserves careful attention from the Commission. I urge

the Commission that the Symons "rule" be legislatively consigned to oblivion.

I have used quotation marks when referring to the Symons rule, because the opinion contains within its four corners a basic contradiction which undermines its reasoning and creates a serious doubt as to whether there is a clear-cut Symons rule. Moreover, the contradiction suggests that the Supreme Court had not considered the implications of its opinion when it wrote Symons.

The proposition for which Symons is frequently cited by condemnors, is that there is no compensation for noise, dust, fumes, etc.[31/] This result is arrived at supposedly because such elements of damage are said to be a "mere infringement of the owner's personal pleasure or enjoyment", whereas to get compensation "the property itself must ... be rendered intrinsically less valuable by reason of the public use".[32/] The opinion, however, chooses to overlook uncontroverted evidence that Mr. Symons' property was indeed "rendered intrinsically less valuable" to the tune of over 30% of its value in the "before" condition.[33/] Moreover, the above-quoted reasoning is fallacious; is it not ovious that where residential property is subjected to conditions which infringe upon the inhabitants' "personal pleasure and enjoyment", the market value of that property will plummet? To obvert Polly Adler's notorious dictum, a home is not a house. There is more to a home than mere shelter from the elements, and the market reflects it.

But even overlooking the above faulty premise of the opinion, the reader of Symons is also presented with a rule that the state is liable for its injurious activities where an adjoining private owner would be liable for like activites.[34/] Thus Symons contradicts itself: surely, it is not open to question in California that if a private owner were to undertake on his own land an activity giving rise to dust, noise, fumes, vibrations, etc., unreasonably interfering with his neighbors' use and enjoyment of their land, he would be liable in damages for nuisance[35/] which is an invasion of rights in land - property rights, to use the "right" label.[36/]

Just take a look at Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 C 2d 265, where the Supreme Court finds no difficulty at all in holding that "fumes, vapors, dust, dirt", etc., generated by plaintiff's neighbor are a compensable interference with property rights.

> "It appears to us that the discomfort and annoyance suffered by plaintiffs is an injury directly and proximately caused by defendant's invasion of their property and that such damages would naturally result from such invasion."[37/]

Note well that when the fumes, vapors, dust, dirt, etc., come from a private owner's land, the Court sees nothing "mere" about them or about the "discomfort and annoyance"

caused by them. They are an "invasion of ... property", no ands, ifs or buts; damages "naturally result". How then are fumes, dust, dirt, etc., coming from a freeway different? What makes their impact "mere"? If Mr. Kornoff became the neighbor of a freeway instead of a cotton gin, why would his "discomfort and annoyance" cease to be compensable?

Thus, we wind up with the peculiar "rule" that when the State does the very same things as did the private defendant in Kornoff (plus vibrations, noise, danger, etc.), Symons tells us that there is no liability, supposedly because the State's liability is no greater than a private party's!

The difficulty in understanding Symons is further compounded by the Supreme Court's more recent decision. In Albers v. County of Los Angeles (1965) 62 C 2d 250, the Court embraces the rule that where damage to private property results from a governmental public works activity, the government is liable regardless of whether or not a private owner would be liable under like circumstances. Thus, Albers rejects as superfluous the criteria which Symons supposedly made controlling.[38/]

The Supreme Court's disclaimer in Albers[39/] where the Court unobtrusively brushes aside the Symons standard of governmental liability, exemplifies what Prof. Van Alstyne must have meant when he termed case law in this field "disorderly, inconsistent and diffuse". One cannot avoid the conclusion that Symons was buried in the Potter's

Field of Albers, with only a footnote marking its passing. Regrettably the Supreme Court failed to drive a stake through the heart of its interred progeny by an express overruling. Thus, we find Symons' ghost haunting the law-books.[40/]

The confusion in decisional law described above, comes from a basic shortcoming of the cases. Although there is in this State a well developed body of law of nuisance, both with regard to nuisance committed by private persons and nuisance committed by governmental entities, the courts have simply failed to take cognizance of this body of law when dealing with freeway condemnation (direct or inverse) for an express recognition of the concept of nuisance.[41/]

Compounding the problem is the arbitrary rule (honored in Symons and disregarded in Albers) that a condemnor is liable for activities occurring on land taken from the complaining owner, but the same condemnor may conduct the same activities and inflict the same damage with impunity, if such activities are conducted on land taken from others. This rule is simple and totally irrational. If a home adjoining a right-of-way is subjected to a nuisance originating from the freeway, what conceivable difference does it make whether the source of the nuisance is twenty feet away (land taken from the owner) or twenty-five feet away (land taken from others)? It is a rule without a reason. Would it not be more rational to use the impact on the neighbors as the criterion of compensability?

Shouldn't one leave some room for balancing the competing interests of the damaged owner against those of the motoring public, instead of ignoring damages to innocent persons by a line arbitrarily drawn on a map?

By the time the objectionable activities take place on the right-of-way, the State is the owner thereof, and by what chain of title it acquired that ownership is manifestly irrelevant to the question of whether its activities as owner of the right-of-way interfere with the use and enjoyment of the land of others.

A rational solution to the above peoblems is to recognize that when the State by building and operating a freeway generates noise, vibrations, fumes, hazards and the like, which unreasonably interfere with the use and enjoyment of adjacent properties, [42/] the acts of the State constitute a nuisance which is amenable to legal analysis and redress by the settled and familiar rules of nuisance law. For a forthright and effective approach to the problem see U.S. v. Certain Properties, etc. (1966) 252 Fed Supp 319.

Pragmatically, the problem is amenable to solution by legislation to the effect that the perpetrator of activities constituting a nuisance is not relieved from liability by virtue of its governmental status or by virtue of the fact that the nuisance originates from public works.[43/] Such legislation would bridge the gap between the case law of nuisance for which the government has always been liable

in California,[44] and the law of [inverse] condemnation as applied to freeways.

Such nuisance-oriented legislation would not create any "broad and nebulous new areas of possible liability". On the contrary, it would return to the historical path of legal development. Whenever in the past new modes of transportation impinged unreasonably upon the rights of their neighbors, just compensation had to be paid to those damaged.[45] This was the case with railroads and electric street cars.[46] Compensation was held to be payable to the neighbors of New York's "El" in the celebrated New York Elevated Railway cases.[47]

When still newer modes of transportation came upon the scene, and men in noisy machines started flying over the heads of their neighbors, just compensation had to be paid for the resulting damage.[48] It is reassuring to observe that since Causby at least some courts have junked the medieval notion of trespass under the usque ad coelum concept and have addressed themselves to physical realities.[49] Significantly, California courts experience no difficulty in weighing the impact of noise on condemnation damages when it comes to airports.[50] Paying just compensation did not inhibit the railroads, streetcars or air transportation.

What is it then that makes a freeway so special? I submit that the answer is: nothing.

I respectfully urge the Commission to make the question of compensation to immediate neighbors of freeways,

an item of the highest priority on its agenda. Such priority is deserved.

The Ethics of Power: You Pays Your Money and You Gets Your Public Improvement

There is one more major point which I feel must be discussed before concluding. I am, of course, not unaware of the fact that the construction of public improvements costs money, and that a significant portion of this money must be spent compensating owners for the takings and damagings inflicted upon them in order to acquire the land necessary for public improvements. I am likewise very much aware of the line of argument which calls upon the courts to construe the just compensation command of the constitutions strictly and narrowly against the owner. It is said that unless the courts do that, "an embargo upon the creation of new and desirable roads" will descend upon us.[51/]

While that assertion has found its way into some opinions, it has most recently been expressly rejected by the Supreme Court after explicit consideration.[52/] And rightly so. For that argument does not withstand either economic, or constitutional, or moral scrutiny.

First, the economic standard. It is basic economics that by reducing compensation to the damaged

owners, not one penny is deducted from the ultimate, total cost of the public project. All that happens is that the burden of the cost is redistributed, and a greater portion of the cost is forced upon the shoulders of the landowners who have been damaged.

It is this economic principle which brings into focus the constitutional objection. The theoretical socio-political concept inherent in the just compensation clauses is that the cost of public works should be evenly distributed among the members of the public which benefit from the improvement.[53/] Therefore, the constitutional commands of just compensation have been construed as prohibiting the forcing of some people to bear a disproportionate share of the cost of public improvements. This view has been expressly embraced both by the United States Supreme Court[54/] and the California Supreme Court.[55/]

> "... the cost of such damage can better be absorbed, and with infinitely less hardship, by the taxpayers as a whole than by the owners of the individual parcels damaged."[56/]

Finally, there is the question of justice and of the morality implicit in that word. It must never be forgotten that the constitutions command that <u>just</u> compensation be paid. The framers were not satisfied with merely requiring "compensation" which strictly speaking would have been sufficient, as "compensation" presupposes a full <u>quid pro quo</u> for what is taken.[57/] The word "just" was added

for emphasis.

"The word 'just' in the Fifth Amendment[58] evokes ideas of 'fairness' and 'equity'..."[59]

It seems to me that one cannot, therefore, escape the task of asking: are the results of the application of any rule of condemnation law (whether direct or inverse) just?[60]

The granting or withholding of justice tests the morality to which our society subscribes. I would like to believe that ours is a moral society which abhors confiscation.[61] And I submit that confiscation does not become morally palatable when called by a different name, or when "justified" on the ground that it is expensive to be moral.[62]

Yet we find the courts invoking the incantation that not all of the damages suffered by an owner are compensable, as a foundation for ignoring damages. Notwithstanding the literal correctness of that observation, this is not a helpful way to deal with the problem, because it tells us what the law isn't, rather than what it is. Nevertheless, this phrase can become a kind of a condemnor's deus ex machina which can be plucked out of the blue by a court which decides to deny compensation for damages admittedly suffered. With its aid an owner can be economically destroyed, in the name of just compensation. Our courts turn their eyes skyward and deplore the harshness of the law which they, as the law's mere servants, must apply even

though they regret the unfortunate consequences.[63] They forget in the process that the harsh rules they explicitly or implicitly deplore were judicially created in the first place.[64]

This is a phenomenon which forcefully brings to mind the words of Mr. Justice Cardozo:

> "Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it nonetheless, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the Gods of Jurisprudence on the altar of regularity ... I suspect that many of these sacrifices would have been discovered to be needless if a sounder analysis of the growth of law, a deeper and truer comprehension of its methods, had opened the priestly ears to the call of other voices."[65]

All the talk about logic, law, morality, and policy must not obscure the fact that ultimately human beings are made to suffer in the name of the freeways, Let me illustrate.

I have recently become aware of the case of a couple with six children. They live in a very modest two-bedroom home. They have been unable to sell this obviously

inadequate dwelling, because it was known for years that the freeway was coming. As a result no real estate broker would list the property, and rightly so: for if he concealed the imminence of the freeway he would be courting a lawsuit for fraud, and if he made a disclosure to prospects, who would buy?

Unable to sell, the owners decided to add a room to provide some relief for their overcrowded family. But the local municipality refused to issue a building permit. The reason? The freeway was coming, and the house was to be taken. Therefore, the local officials, apparently acting on a theory that any improvements would have to be paid for by the State when it took the house for the freeway, denied the permit.

For over three years the family was thus forced to live in the overcrowded quarters. Finally, the great day arrived: the highwaymen came! The end of the overcrowding was in sight, whatever the price. But alas, the hossannahs were premature. After traipsing through the house and yard countless times, the right-of-way agent delivered the blow: the house was not be taken. Was the home to be spared? Could the owners finally add on that badly needed room? Not exactly. The freeway builders, in their infinite and unreviewable wisdom decided to wrap a freeway off-ramp around the home. To accomplish this feat, at least half of the none-too-big back yard is being taken. The take line cuts diagonally across the backyard, coming

within one inch of the corner of the house. In addition, the house is to be deprived of street access along its street frontage in front of the garage.

Nor is this all. The lady of the house is a severe asthmatic. She is unable to live in a dusty environment. What is she to do when the air darkens with dust inevitably rising from the construction of the freeway? And, if she lasts that long in that house, how is she to go on living after the freeway goes into operation?

"Mere" inconvenience? "Mere infringement of the owner's personal pleasure or enjoyment"? "Mere" anything?

What does one tell these people? Can any right-thinking person face them and utter the condemnors' disingenuous prattle about inconveniences which in our modern society must be suffered by members of the general public as "the price of progress"?[66/] Or do we tell them "Symons says ..." and hide behind the Supreme Court's skirts?

There is more at stake here than the witnessing of an outrage, which is bad enough. When all is said and done, when tempers cool, and the passage of time blurs the memory of these events, what will be the legacy of it all? Respect for government? Respect for law? Hardly. And can you blame them?

If we can somehow close our eyes to such needlessly inflicted human suffering and speak in abstractions, then in the final analysis, the economic-constitutional issue

boils down to the question of whether or not our society can afford all the public works that we may wish for. Unquestionably, we can afford a great deal; our surroundings are irrefutable evidence of our affluence. But, as with private individuals, the desire for still more affluent surroundings does not imply that the means for fulfilling the desire are readily at hand. If a governmental entity cannot afford to pay for what it desires, then it is no answer to confiscate the economic substance of innocent neighbors. And it is also no answer to repeal or undermine the constitutional guarantee of just compensation for damaging.

I note Prof. Van Alstyne's statement that "even the most affluent society cannot feasibly assume the cost of socializing all of the private losses which flow from the activities of organized government."[67/] But is that not merely another way of saying that society is not affluent enough to translate all of its collective aspirations into immediate reality, if it has to pay for what it gets? I experience difficulty in accepting the proposition that our society aspires to get "something for nothing". Moreover, if legitimate economic interests of individuals are to be sacrificed in the name of "activities of organized government", to prevent the reaching of the bottom of the public purse, then why must they be <u>solely</u> the interests of the injured, neighboring property owners? If such sacrifices are truly indispensable to the functioning of

government, they should also be borne by those who benefit from the construction of public works.

Conceptually, I posit a scale of values flowing from the creation of public works, constructed like a thermometer, i.e., with a "zero" point corresponding to a set of economic values enjoyed by a local societal group unaffected by any public works. The introduction of a public project into such a group causes the values enjoyed by some of its members to rise above the postulated "zero" point, and simultaneously to depress the values enjoyed by others into the "below zero" region.

The arguments for denial of compensation to injured adjacent neighbors (the "below zero" group) in the name of solvency of the public treasury, are based on the theory that the currently fashionable types of revenues are the only source of compensatory funds. A discussion of alternative sources of compensatory funds is beyond the scope of this note, but it should be observed that such a theory is myopic. User taxes are another alternative. Also, it has been noted that land in the general vicinity of public works (as opposed to residential property immediately next to public works) often increases in value. For example, the owner of commercially exploitable land served by a new freeway may find himself the beneficiary of rapid appreciation of his property.[68/] It has been suggested that such unearned increments of value should be taxed, as another source of revenues.[69/]

Therefore, I urge that the Commission turn a deaf ear to the governmental lamentations about the threadbare public purse. If that purse is indeed as threadbare as suggested in condemnors' more graphic lamentations, one should question whether the construction of public works should continue at the present furious pace. And if such construction is mandatory in the face of inadequate public funds (a highly doubtful premise), then the Commission should consider new, alternative ways of providing compensatory funds. It seems fundamentally wrong to perpetuate a situation where it is said that there are no funds to compensate the "below zero" group, while the "above zero" group enjoys its favorable position, and the general public enjoys its new public works. It is bad public policy for the many to abuse the few.

I have couched the above discussion in terms favorable to the public works builders. I have personified society and government as rational and benign entities. Generally, in our system in the long run they tend to be. But it is a fact that when it comes to specific public improvements, it cannot be said that they are always rationally planned and designed. It is a bitter fact that the statutory incantation of "greatest public good and least public injury" has been reduced to just that: an incantation.[70] With the courts precluded from inquiry into these criteria[71] the freeway builders can do exactly as they please, no matter what the consequences. And that includes adverse economic consequences to the public purse.[72] In the hands

of the highway engineers rest not only technical considerations, but also enormous powers with far-reaching ethical, social and economic consequences. Their efforts are - as a matter of fact - not subject to meaningful administrative supervision.[73] And the impact of their work is not reviewable by the courts, even where there is fraud, bad faith, and abuse of discretion.[74] Since the freeways are often designed without a thought to the economic impact on their immediate neighbors, the freeway builders should not be heard to say that they should be able to escape the economic consequences of their own acts. They are possibly the only government officials in this country with absolute, unreviewable power to act.[75] As an absolute moral minimum our society should require payment to those damaged by the exercise of such unbridled power.

The California Law Revision Commission can arrive at a just and rational legislative scheme of inverse condemnation if it gives recognition to the principle of constitutionally founded morality, that the compensation to those damaged by the construction of public works must be just. And justice cannot be achieved by forcing the homeowners adjacent to the freeways to subsidize the motoring public.

Any introduction into the criteria of just compensation of a suggestion that justice is to be molded to the shape of the public purse, undermines the socio-political ethics of the Constitution. The logical end of

the reasoning implicit in such a suggestion, would tell us that where a governmental entity is poor it should be able to take land for nothing. The logical converse of that suggestion is equally absurd. Are we to accept the proposition that where a governmental entity has a lot of money, it should pay for damages not suffered by the owner? The criterion is what has the owner lost, and not what has the taker gained. A fortiori it is not how much does the taker have to pay for what it gains, or how fat the taker's purse.[76]

Perhaps the best, and certainty the most succinct way in which the foregoing considerations were expressed, is found in the phrase of Mr. Justice Holmes:

> "We are in danger of forgetting that a strong desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[77]

1. An article by Prof. Van Alstyne, based on the first part of his study has been published as "Statutory Modification of Inverse Condemnation: The Scope of Legislative Power", 19 Stanford Law Rev. 727.

2. Van Alstyne, "A Study Relating to Inverse Condemnation", (hereafter cited as "Inverse Condemnation") Part 1, p.1.

3. Id., p.63.

4. See Reardon v. San Francisco (1885) 66 C 482.

5. Van Alstyne, "Inverse Condemnation", Part 1, pp. 64-65.

6. See Statement of Vote, General Election of November 4, 1958, Proposition 10, wherein the voters rejected by over 2 to 1 a constitutional amendment which would have expanded condemnors' rights to immediate possession.

7. The Annual Report of Administrative Office of the California Courts, Judicial Council of California, 1967, Table 15 (Superior Courts), indicates that during the fiscal year 1965-1966, 8496 condemnation cases were filed in California,

of which 4226 were in Los Angeles County. A condemnation case typically names several parcels with several owners having different interests in each parcel. Some condemnors usually name as many as 50 or more defendants in a single case. Thus, it is safe to say that tens of thousands of persons annually feel the impact of condemnation lawsuits in Los Angeles County alone. And it must be borne in mind that a vast majority of governmental land acquisitions are made under threat of condemnation, but without actually filing suit.

8. See pp. 4-5 of Commission Memorandum 67-73.

9. See Comment following West's Government Code §815, pp. 119-120.

10. Van Alstyne, "Government Tort Liability", C.E.B., 1964, §5.10, p.126.

11. See Note 15, infra.

12. Baltimore & P.R. Co. v. Fifth Baptist Church (1883) 108 US 317; 27 L Ed 739, 745.

13. Richards v. Washington Terminal Co. (1913) 233 US 546, 552-553; 58 L Ed 1088, 1091.

14. See People v. Lynbar, Inc. (1967) 253 CA 2d ____, 253 ACA 969.

15. "Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute." Seaboard Airline R. Co. v. U.S. (1923) 261 US 299, 304; 67 L Ed 664, 669. "... 'what cannot be done directly because of constitutional restriction, cannot be accomplished indirectly by legislation which accomplishes the same result'...". Mecallen Co. v. Massachusetts (1925) 279 US 620, 629; 73 L Ed 874, 880.

16. See Joslin Mfg. Co. v. Providence (1923) 262 US 668, 676-677; 67 L Ed 1167, 1175.

17. Rosenblatt v. Pennsylvania Turnpike Commission (1959) 157 Atl 2d 182, 194.

18. Van Alstyne, "Inverse Condemnation", part 2, p.10, item Sixth.

19. That suggestion is hereafter referred to as the "status quo suggestion".

20. DiSanto v. Pennsylvania (1927) 273 US 34, 42; 71 L Ed 524, 529 (dissent).

21. People v. Hallner (1954) 43 C 2d 715, 719 [3].

22. Cole v. Rush (1955) 45 C 2d 345, 355 [9].

23. Van Alstyne, "Inverse Condemnation", Part 1, pp. 7-8. And see Id., Part 2, p.3, where current case law is referred to as a "muddled and disorderly array".

24. Id., Part 2, p.10.

25. "On the other hand, when existing law tends to work injustice or to frustrate sound considerations of policy, departures therefrom should be readily undertaken." Commission Memorandum 67-73, p.7.

26. There are, of course, other specific problems, worthy of the Commission's attention. However, the freeways in addition to giving rise to frequent and severe problems, also exemplify much of what is wrong with [inverse] condemnation law in its present state. I submit that there is little to be gained by attempting to pigeonhole problems by type of public works or governmental activity. Legislation which is sound in principle will cut

across many factual situations and largely obviate the need for narrowly drawn "freeway statutes", "airport statutes", "drainage statutes" and the like.

27. Also see Bigart, "U.S. Road Plans Periled by Rising Urban Hostility", New York Times, November 13, 1967.

28. I am told that the inhabitants of such dwellings are subjected to rubber dust as a product of tire wear, along with the usual variety. One attribute of the rubber dust is that it cannot be wiped off like ordinary household dust. Instead it adheres, leaving black smudges.

29. Newspapers have recently reported flaming gasoline, cattle and ammonia. And for variety, as this is being written, the media have just reported 38,000 pounds of hot, molten chocolate which turned into solid fudge under the fire department's hoses.

30. What the subtle or long-term effects of living next to a freeway may be, one can only guess at. See Getze, "Freeway Fumes May Reduce Driver Ability, Official Says", Los Angeles Times, February 11, 1968, p.3, reporting that in neighborhoods bordering on urban freeways atmospheric carbon monoxide contamination sometimes reaches levels whose biological effects impair judgment.

31. 54 C 2d at 858.

32. Id.

33. See superceded Court of Appeal Opinion: People v. Symons (1960) 5 Cal Rptr 808, 811-812.

34. 54 C 2d at 861-862 [7].

35. NOISE AND VIBRATIONS: Gelfand v. O'Haver (1948) 33 C 2d 218; Wilms v. Hand (1951) 101 CA 2d 811; McNeil v. Reddington (1944) 67 CA 2d 315; Fendley v. City of Anaheim (1930) 110 CA 731.

DUST, SOOT, AND FUMES: Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 C 2d 265; Dauberman v. Grant (1926) 198 C 586; Wade v. Campell (1962) 200 CA 2d 54; Centoni v. Ingalls (1931) 113 CA 192; Williams v. Bluebird Laundry Co. (1927) 85 CA 388; McIntosh v. Brimmer (1924) 68 CA 770.

SMELL: Johnson v. V.D. Reduction Co. (1917) 175 C 63; Carter v. Johnson (1962) 209 CA 2d 589; Cook v. Hatcher (1932) 121 CA 398.

36. See Prosser, "Private Action for Public Nuisance", 52 Virginia Law Rev. 997, at 997-998 (1966).

37. 45 C 2d at 272 [4]. Also see 45 C 2d at 273-275 [7].

38. Compare Symons, 54 C 2d at 861-862, with Albers 62 C 2d at 259, and 262, footnote 3.

39. 62 C 2d at 262, footnote 3.

40. See People v. Presley (1966) 239 CA 2d 309, and People v. Elsmore (1964) 229 CA 2d 810. Of even greater concern is Symons' extreme and wholly unwarranted impact on the question of what constitutes compensable impairment of access - a question beyond the scope of this note, but one worthy of the Commission's attention.

41. This gap in judicial application of the nuisance doctrine apparently obtains only with respect to freeways. Other damaging government activities have been dealt with by applying nuisance law. See Van Alstyne, "Inverse Condemnation", Part I, p.18, and cases cited therein. Also see notes 12 and 13, supra, and note 44 infra, and the associated discussion.

42. While private homes are emotionally most appealing, other devastating situations should not be overlooked. For example, our office represents a manufacturer of precision space-age components which must be assembled in totally dust-free "clean rooms". The product is so vulnerable to airborne contaminants that in spite of elaborate air filtration,

the numbers of rejects increase measurably when a nearby farmer plows his field. A freeway is now coming - right next door.

43. See Mandelker, "Inverse Condemnation: The Constitutional Limits of Public Responsibility", 1966 Wisc. Law Rev. 3, 29.

44. As early as 1884, this principle was so well established that in Bloom v. City and County of San Francisco, 64 C 503, the Supreme Court disposed of a claim of governmental nonliability for nuisance in a brief per curiam opinion. In 1885, the Supreme Court declared that legislation purporting to authorize the creation of a nuisance by the government was null under the state constitution. Coniff v. City and County of San Francisco, 67 C 45, 49. The principle of governmental liability for nuisance has been upheld in many other cases: Lind v. San Luis Obispo (1859) 109 C 340, 343; Peterson v. Santa Rose (1897) 119 C 387; Adams v. Modesto (1901) 131 C 501, 502-503; Richardson v. Eureka (1892) 96 C 443; Phillips v. Pasadena (1945) 27 C 2d 104, 106; Mulloy V. Sharp Park Sanitary District (1957) 154 CA 2d 720, 726; Hassell v. San Francisco (1938) 11 C 2d 168, 171; People v. Glenn-Colusa Irrigation Dist. (1932) 127 CA 30, 36; Bright v. East Side Mosquito

Abatement Dist. (1959) 168 CA 2d 7, 11-12; Behn v. Santa Cruz County (1959) 172 CA 2d 697, 711. As the Supreme Court put it in surveying the area of governmental liability of pre-Muskopf days: "Finally, there is governmental liability for nuisances even where they involve governmental activity". Muskopf v. Corning Hospital Dist. (1961) 55 C 2d 211, 219.

A fortiori, that liability is no less after the death of sovereign immunity. See Van Alstyne, "California Government Tort Liability", CEB (1964) §1.20, pp. 21-22.

45. Baltimore & P.R. Co. v. Fifth Baptist Church, 108 U S 317; 27 L Ed 739.

46. Fairchild v. Oakland etc. Ry. (1917) 176 C 692.

47. Story v. New York Elev. R. Co. (1882) 90 NY 122; Lahr v. Metropolitan Elev. R. Co. (1887) 104 NY 268. In this connection it is useful to bear in mind that the various electric urban railways served the same function in their day as freeways serve today. See Faus v. Los Angeles (1967) 67 C 2d ___, 67 AC 350, 359 [3a].

48. U.S. v. Causby (1946) 328 US 256; 90 L Ed 1206.

49. See Martin v. Port of Seattle (1964) 391 P 2d 540.

50. Fresno v. Hedstrom (1951) 103 CA 2d 453; Sneed v. County of Riverside (1963) 218 CA 2d 205. Also note that when that judicially-created everyman - the private owner conducting a nuisance on his own land, by whose liability we supposedly measure the state's liability - runs an objectionable airport, the courts find no difficulty in giving him short shrift at the behest of aggrieved neighbors. Anderson v. Souza (1952) 38 C 2d 825, 839-841 [15]. And even where a non-enjoinable, public service type of operation is involved, the right to recover damages is expressly preserved to adjacent owners subjected to the nuisance. Loma Portal Civic Club v. American Airlines (1964) 61 C 2d 582, 591.

51. People v. Symons, supra, 54 C 2d at 862. This colorful judicial expression pales when placed next to the jeremiads of condemnors. I am currently involved in an inverse condemnation case in which the State has solemnly informed the court that if the court allows compensation to admittedly damaged neighbors of a freeway, the State will be forced to close "many existing roads" rather than "pay tribute". "Urban self-strangulation" was darkly predicted, and the end of "urban civilization" foreshadowed. I submit that the fact that an agency of this enlightened state feels free to peddle such utter fatuity to the courts should of itself be cause for concern to the Commission when it examines inverse condemnation law.

52. See Albers v. County of Los Angeles, supra, 62 C 2d at 262.

53. A member of the public assumes his proper share of the cost of public improvements when he pays his taxes. See Louisville etc. Bank v. Radford (1935) 295 US 555, 602; 79 L Ed 1593, 1611.

54. Armstrong v. U.S. (1960) 364 US 40, 49; 4 L Ed 2d 1554, 1561.

55. Clement v. State Reclamation Board (1950) 35 C 2d 628, 641..

56. Albers v. County of Los Angeles, supra, 62 C 2d at 263. Note that this is the same policy principle found in litigation among private parties: where an instrumentality which is the cause of damage, generally constitutes a benefit to someone, the economic burden is spread among those who benefit from the cause of the injury. This is the case in defective product liability (Greenman v. Yuba Power Products (1963) 59 C 2d 57), medical malpractice (Clark v. Gibbons (1967) 66 C 2d____, 66 AC 409, 429), the exercise of constitutionally protected freedom of the press (Curtis Publ. Co. v. Butts (1967) ___US___, 18 L Ed 2d 1094,1106), and in the field of equitable liens (Pacific Ready Cut Homes v. Title Insurance & Trust Co. (1932) 216 C 447, 452).

57. "com·pen·sā'tion, ... that which is given as an equivalent for...loss"
"com'pen·sāte, ... to give equal value to..."
Webster's New 20th Century Dictionary (Unabridged), 2nd Ed., p.370.

58. The "just compensation" command of the Fifth Amendment is, of course, binding on the states through the due process clause of the 14th, as a constitutional guarantee of a "fundamental nature". (See Gideon v. Wainwright (1963) 372 US 335, 341-342; 9 L Ed 2d 799, 803-804). Indeed, the case so holding was the first instance of the incorporation doctrine (Chicago B. & Q. R. Co. v. Chicago (1897) 166 US 226, 238-239; 41 L Ed 979; 985); it was explicitly embraced by California decisions (See Marin Municipal Water District v. Marin etc. Water Co. (1918) 178 C 208, 314).

59. U.S. v. Virginia P & E Co. (1961) 365 US 624, 631; 5 L Ed 2d 838, 846.

60. See People v. Lynbar, Inc. (1967) 253 CA 2d___, 253 ACA 969, 978 and 981; U.S. v. Citrus Valley Farms, Inc. (1965, 9th Cir.) 350 F 2d 683, 688.

61. See U.S. v. Cors (1949) 337 US 325, 332; 93 L Ed 1392, 1398.

62. "...it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." Watson v. Memphis (1963) 373 US 526, 537; 10 L Ed 2d 529, 539.

63. I once had a judge say to me: "I know, it's very unjust to your client, but that's all she can get as just compensation".

64. For example: "... but it is not for us to change the established law". Los Gatos v. Sund (1965) 234 CA 2d 24, 28.

65. Cardozo, "The Growth of the Law", p. 66, Yale University Press, 1924.

66. Having heard this trite platitude ad nauseam, I must record here my observation that those who habitually intone it, get to enjoy the progress without having to pay the price.

67. Van Alstyne, "Inverse Condemnation" Part 2, p.3.

68. Typically, this occurs where undeveloped land winds up near an interchange, or where a whole suburban area is connected to the city and thus becomes suitable for commercial subdivision. For an illuminating example of such phenomena, see Jordan, "Our Growing Interstate Highway System", 133 National Geographic, 195, 210-214, (Feb. 1968)

69. Similar schemes have been experimented with in Britain. See Mandelker, "Controlling Land Values in Areas of Rapid Urban Expansion", 12 UCLA Law Rev. 734 (1965).

70. People v. Chevalier (1959) 52 C 2d 299. It is worthy of note that other jurisdictions have made the statutory criterion of greatest public good and least public injury meaningful, with direct and favorable economic consequences to the state, albeit achieved over the state's objections. See State Highway Commission v. Danielson (1965) 146 Mont 539, 409 P 2d 443. I cannot resist observing that Montana's big sky did not fall following Danielson's holding that the highway builders are required to obey the law rather than merely being required to say that they obeyed the law.

71. People v. Chevalier, supra, 52 C 2d at 307.

72. See People v. Nyrin (1967) 256 CA 2d ___, 256 ACA 308, 318-319.

73. See Houghteling, "Confessions of a Highway Commissioner", Cry California, Spring 1966, p.29.

74. People v. Chevalier, supra 52 C 2d at 307 [7]. In this connection I also experience difficulty in perceiving how a carte blanche for governmental "fraud, bad faith and abuse of discretion" can be made compatible with the fundamental notion of fairness embodied in the Constitution, or serve any legitimate governmental purpose.

75. The enormity of the power vested in the California Highway Commission is brought into sharp focus when one bears in mind that the acts of the President of the United States to avert a national catastrophe in a wartime emergency are judicially reviewable. See Youngstown Sheet & Tube Co. v. Sawyer (1952) 343 US 579; 96 L Ed 1153. (To say nothing of our own Governor purporting to act in defense of the fisc. See Morris v. Williams (1967) 67 AC 755). Incredibly, the vast, unchecked power bestowed on the Highway Commission is largely unexercised by those to whom it has been entrusted. Instead, it appears to have been usurped by those whom the Highway Commission is supposed to supervise. This harsh judgment has been candidly expressed by a Highway Commissioner: "What actually exists is a condition wherein the inmates run the asylum,..." Houghteling,

op. cit., p.29. (italics, the author's). I urgently commend Mr. Houghteling's article in its entirety to the reader - it provides an insight into the ways in which the Highway Commission operates, which can only be described as frightening.

76. See Boston Chamber of Commerce v. Boston (1910) 217 US 189, 195; 54 L Ed 725, 727.

77. Pennsylvania Coal Co. v. Mahon (1922) 260 US 393, 416; 67 L Ed 322, 326.