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Real Property - Eminent Domain - Time for Fixing Damages - Super-Highway Construction

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REAL PROPERTY—EMINENT DOMAIN —TIME FOR FIXING DAMAGES— SUPER-HIGHWAY CONSTRUCTION.

As a result of the extensive super-highway construction throughout our nation, many eminent domain problems have recently arisen. The resulting condemnation proceedings have activated many almost dormant problems in this area of the law. This Comment will suggest a course of procedure in condemnation proceedings for super-highway construction. The present state of the law and its inadequacies when applied to this relatively new mode of construction will be examined in detail.

Many of the issues and problems which confront the courts at the present time were raised originally in the pre-Revolutionary War era of *private* turnpike construction. However, it has become apparent that the legal principles and procedural rules that were used to settle disputes in that period were not designed to cope with the problems raised by our modern urban and rural development. Furthermore, the law governing eminent domain proceedings at a municipal level is unsatisfactory since condemnation at that level is carried on with an eye toward the local scene, whereas modern turnpikes are integral parts of tremendous interstate systems. Another source of law which might be thought applicable to the problem at hand is that which grew up with the construction of the railroads. Again, however, the rules are unsatisfactory, since most of the railroads were built through barren, undeveloped lands. Furthermore, most of this land was owned by the federal government. Modern turnpikes, on the other hand, usually cut through privately owned land which is intensively developed. Condemnation by the federal government is probably the nearest thing to proceedings resulting from turnpike construction. But even here there is a basic difference. Condemnation by the Attorney General or a government agency usually involves the acquiring of blocks of land in one particular area, whereas thruway construction involves the dissection of entire states. Hence, some new procedures are to be desired.

One of the chief problems raised by this road building is the question of compensation to the landowner whose property is taken by the state. While compensation is guaranteed by the Constitution, it is the computation of the amount of damages that creates the major problems. There are two principal facets to this issue: (1) the point in time at which the valuation of the land is to be determined; (2) the problem of determining just what factors are to be included in the total compensation figure. This Comment will deal primarily with the former.

It is well established that a taking of private property by the state for public use on payment of just compensation is within constitutional limitations. The power of eminent domain was a well-recognized function of government when the Constitution was adopted.[1] However, the ques-

1. Aldridge v. Tuscumbia, C. & D. R. R., 2 Stew. & P. 199 (Ala. 1832); Lewis & Clark County v. Nett, 81 Mont. 261, 263 Pac. 418 (1928); Smith v. Cameron, 106 Ore. 1, 210 Pac. 716 (1922); 10 R. C. L. 16 (1916).

tion of just what is a *taking,* and what is *just* compensation is not so well settled. The traditional rule of damages set down by the courts is that damages accrue to the landowner when his property is taken; but by itself, this statement is, at best, a hollow principle. For, while the courts continually echo this principle,[2] and further agree that a taking occurs when there is an interruption or restraint of the common and necessary use and enjoyment of the property by the owner,[3] it is the application of these principles that causes uncertainty and speculation in this area of the law. This Comment is aimed primarily at those cases where the courts found that interests in property had been taken, and it is designed to present the subject in a positive light.

I.

TYPES OF PROPERTY INTERESTS GIVING RISE TO A RIGHT OF COMPENSATION.

The law does not require that land in the tangible sense be taken in order to give rise to a right of compensation in the owner.[4] Consequently, the landowner may recover damages in many cases where his rights have been merely restricted as well as where his property rights have been directly affected by ordinances. The former situation often arises when building lines are established [5] or when zoning ordinances have an adverse effect on existing uses.[6] A typical situation in which property rights are

2. United States v. Miller, 317 U.S. 369 (1943); Danforth v. United States, 308 U.S. 271 (1939); United States v. Johns, 146 F.2d 92 (9th Cir. 1945); Love v. United States, 141 F.2d 981 (8th Cir. 1944); United States *ex rel.* TVA v. 7.2 Acres of Land in Sullivan County, Tenn., 117 F. Supp. 499 (E.D. Tenn. 1953); Dore v. United States, 119 Ct. Cl. 560, 97 F. Supp. 239 (1951); Tigar v. Mystic River Bridge Authority, 329 Mass. 514, 109 N.E.2d 148 (1952); May v. Boston, 158 Mass. 21, 32 N.E. 902 (1892); Application of Westchester County, 204 Misc. 1031, 127 N.Y.S.2d 24 (Sup. Ct. 1953); *In re* Certain Lands on the North Shore of the Hudson River, 127 Misc. 710, 217 N.Y. Supp. 544 (Sup. Ct. 1926); *In re* Hamilton Place, 67 Misc. 191, 122 N.Y. Supp. 660 (Sup. Ct. 1910).

3. Keith v. Drainage Dist. No. 7 of Poinsett County, 183 Ark. 384, 36 S.W.2d 59 (1931); Inhabitants of Lynnfield v. Inhabitants of Peabody, 219 Mass. 322, 106 N.E. 977 (1914); Cushman v. Smith, 34 Me. 247 (1852); Big Rapids v. Big Rapids Mfg. Co., 210 Mich. 158, 177 N.W. 284 (1920); Morrison v. Clackamas County, 141 Ore. 564, 18 P.2d 814 (1933); *In re* Sansom Street in the City of Philadelphia, 293 Pa. 483, 143 Atl. 134 (1928); Gasque v. Town of Conway, 194 S.C. 15, 8 S.E.2d 871 (1940).

4. Keith v. Drainage Dist. No. 7 of Poinsett County, 183 Ark. 384, 36 S.W.2d 59 (1931); Liddick v. Council Bluffs, 232 Iowa 197, 5 N.W.2d 361 (1942); Ashland v. Queen, 254 Ky. 329, 71 S.W.2d 650 (1934); Big Rapids v. Big Rapids Mfg. Co., 210 Mich. 158, 177 N.W. 284 (1920); Morrison v. Clackamas County, 141 Ore. 564, 18 P.2d 814 (1933); *In re* Sansom Street in the City of Philadelphia, 293 Pa. 483, 143 Atl. 134 (1928); Gasque v. Town of Conway, 194 S.C. 15, 8 S.E.2d 871 (1940).

5. *In re* Sansom Street in the City of Philadelphia, 293 Pa. 483, 143 Atl. 134 (1928).

6. Gasque v. Town of Conway, 194 S.C. 15, 8 S.E.2d 871 (1940).

directly affected is that which arises when natural water courses are diverted for use in various public projects,[7] or where a viaduct is built over an existing street resulting in a decrease in market value of the property adjoining the street.[8] Again this problem arises when the closing of a street obstructs the abutting owners' right of egress and ingress.[9] With reference to the latter situation the Supreme Court of Georgia has held that a "damaging" rather than a "taking" was present when a bridge was constructed in such a manner that entrance to the adjoining property was made less convenient.[10] The distinction appears to be of little utility since compensation was awarded for the rights infringed. It is worth noting that when an already established easement, as a street, is further burdened by the exercise of eminent domain powers, such as the laying of street railway tracks, additional compensation is granted to the owner of the servient estate.[11] In accord with these decisions are those holding that where the actual taking of a portion of land causes damage to the part retained by the owner, such injury must be compensated for in arriving at the total damage figure.[12]

II.

WHAT CONSTITUTES A TAKING?

A.

Condemnation by Counties and Municipalities.

There is a great deal of disagreement among the courts over the question of just what action on the part of a governmental unit will constitute a taking so as to give the property owner a cause of action for damages. Basically, there are two approaches to the problem. The New York courts have usually held that the filing of a location chart, of itself, is insufficient to constitute a taking of the property in question.[13] In substantial agreement with this view are those courts which have stated that the passage of an ordinance closing a street,[14] or the laying out of a right of way in the planning of a highway [15] is also insufficient to establish

7. Keith v. Drainage Dist. No. 7 of Poinsett County, 183 Ark. 384, 36 S.W.2d 59 (1931); Morrison v. Clackamas County, 141 Ore. 564, 18 P.2d 814 (1933).

8. Ashland v. Queen, 254 Ky. 329, 71 S.W.2d 650 (1934).

9. Liddick v. Council Bluffs, 232 Iowa 197, 5 N.W.2d 361 (1942).

10. Hurt v. Atlanta, 100 Ga. 274, 28 S.E. 65 (1892).

11. McCammon & Lang Lumber Co. v. Trinity & B. V. Ry., 104 Tex. 8, 133 S.W. 247 (1911).

12. Town of Ayden v. Lancaster, 197 N.C. 556, 150 S.E. 40 (1929); Western Carolina Power Co. v. Hayes, 193 N.C. 104, 136 S.E. 353 (1927); Blankenship v. State, 160 Wash. 514, 295 Pac. 480 (1931); Strouds Creek & M.R.R. v. Herold, 131 W. Va. 45, 45 S.E.2d 513 (1947).

13. Benedict v. New York, 98 Fed. 789 (2d Cir. 1899); New York Central & H.R.R. v. State, 37 App. Div. 57, 55 N.Y. Supp. 685 (3d Dep't 1899); *In re* New York Dep't of Public Parks, 60 N.Y. 319 (1875).

14. Whitaker v. Phoenixville Borough, 141 Pa. 327, 21 Atl. 604 (1891).

15. North Carolina State Highway Comm'n v. Young, 200 N.C. 603, 158 S.E. 91 (1931).

the right of compensation in the landowner. These decisions were reasoned from the principle that there is no taking, justifying compensation, until an entry is made on the land and it is occupied with the intent to start the proposed project.[16] Damages are then computed from that date. The same rule was followed where an ordinance set out a future plan for the construction of streets,[17] where property owners received a notice to remove buildings by a stated date,[18] where statutes authorized the construction of a project,[19] and where funds were authorized for such a project.[20] These courts further refused to hold that a taking had occurred where the filed location for a public project was too vague in its specifications,[21] and where a statute was passed establishing the location of a harbor line.[22] The same result was achieved where resolutions were passed stating that certain land would be required for public purposes,[23] and where a map which recommended future eminent domain proceedings was approved by the legislature.[24] However, in all of these cases the courts recognized that a taking, with its usual right to compensation, would occur when the proposed plans went into construction and the land was actually occupied. On the other hand, courts adhering to the second view have held that the passage of an ordinance relating to restrictions on the use of property, or an appropriation of such property, is sufficient to constitute a taking, and, consequently, give the landowner a right to compensation. Illustrative of this view is the situation where the passage of an ordinance closing a street was held to give those whose property rights were affected an immediate right to damages.[25] The court reasoned that the ordinance terminated all rights of the abutting landowners as of the date of passage of the ordinance, though the street might not be physically

16. Benedict v. New York, 98 Fed. 789 (2d Cir. 1899); Spaulding v. Arlington, 126 Mass. 492 (1879); Eaton v. Boston, C. & M.R.R., 51 N.H. 504, 12 Am. Rep. 147 (1872); New York Central & H.R.R. v. State, 37 App. Div. 57, 55 N.Y. Supp. 685 (3d Dep't 1899); North Carolina State Highway Comm'n v. Young, 200 N.C. 603, 158 S.E. 91 (1931); *In re* Appropriation of Easement for Highway Purposes, 90 Ohio App. 471, 107 N.E.2d 387 (1951); Whitaker v. Phoenixville Borough, 141 Pa. 327, 21 Atl. 604 (1891); Bate v. Philadelphia, N. & P.R.R., 1 Mont. L.R. 47 (C.P., Pa. 1885).

17. Scheibel v. Burr, 192 App. Div. 438, 183 N.Y. Supp. 49 (2d Dep't 1920); Philadelphia Parkway, 250 Pa. 257, 95 Atl. 429 (1915); *In re* Opening of the Avenue on the Parkway, 24 Pa. Dist. 184 (1915); Widening of Venango Street, 9 Pa. Dist. 651 (1871); *In re* Dist. of the City of Pittsburgh, 2 W. & S. 320 (Pa. 1841).

18. Franklin Street, 14 Pa. Super. 403 (1900).

19. Lancaster v. Kennebec Log Driving Co., 62 Me. 272 (1874).

20. Cuyahoga River Power Co. v. Akron, 210 Fed. 524 (N.D. Ohio 1913), *rev'd on other grounds,* 240 U.S. 462 (1915).

21. Warren v. Spencer Water Co., 143 Mass. 9, 8 N.E. 606 (1886).

22. Willink v. United States, 240 U.S. 572 (1915).

23. Dep't of Public Works and Buildings v. Wolf, 414 Ill. 386, 111 N.E.2d 322 (1953).

24. May v. Boston, 158 Mass. 21, 32 N.E. 902 (1892).

25. Application of Corp. Counsel of the City of New York (Garden Place), 258 App. Div. 490, 17 N.Y.S.2d 111 (1st Dep't 1940); *In re* Walton Avenue, 131 App. Div. 696, 116 N.Y. Supp. 471 (1st Dep't 1909).

closed for some time. The same argument has been used to support an immediate right to damages from the mere passage of an ordinance setting forth the decision of the city authorities to appropriate certain properties for municipal operations.[26] Courts adhering to this view are consistent in holding that the filing of a map plotting streets,[27] the passage of an ordinance which ordered the proper authorities to condemn certain lands for the construction of a park,[28] and the drafting of a resolution stating that lands are to be appropriated for the construction of a freeway,[29] were sufficient to give the affected property owners an immediate right to compensation. The Supreme Court of Tennessee further extended this line of reasoning by holding that the affected property owners had a right to compensation where a pipe line had been located and the pipe lay alongside the proposed site of the digging, though no actual breaking of ground had occurred.[30]

Although, in general, the decisions in this area of the law are inconsistent, all courts meet the constitutional objections by identifying the *point* of taking (whatever it might be) as well as the *time* in which the right to compensation vests in the landowner. Hence, no constitutional issue arises concerning the taking of land for public use without compensation. In those cases in which a bond is posted to cover the compensation assessment which is to be determined at a later date, payment is not made when the land is taken and title passes, since provisions have already been made for compensation through the filing of the requisite bond with the proper court.[31] Some courts, on the other hand, refuse to recognize a passage of title or a taking of private property until the damages have been both measured and paid.[32] In these cases the damages are measured from the date that the court's judgment is entered. The Illinois courts have held that the title of the new owner will relate back to the date of filing of the petition concerning the appropriation.[33] However, the Minnesota courts have held that damages are frozen as of the time that the action commences, though they do not recognize that a taking is present

26. *In re* Delafield, 109 Fed. 577 (3d Cir. 1901); Raymond v. Commonwealth, 192 Mass. 486, 78 N.E. 514 (1906); Mowry v. Boston, 173 Mass. 425, 53 N.E. 885 (1899); McMicken v. Cincinnati, 4 Ohio St. 394 (1854).

27. Matter of Corp. Counsel of the City of New York, 186 App. Div. 669, 174 N.Y. Supp. 816 (1st Dep't 1919).

28. People *ex rel.* Canavan v. Collis, 20 App. Div. 341, 46 N.Y. Supp. 727 (1st Dep't 1897).

29. People v. Shultz Co., 268 P.2d 117 (Cal. 1954).

30. Lea v. Louisville & N.R.R., 135 Tenn. 560, 188 S.W. 215 (1916).

31. Fox v. Western Pac. Ry., 31 Cal. 538 (1867); Fort Wayne & S. W. Traction Co. v. Fort Wayne & W. Ry., 170 Ind. 49, 83 N.E. 665 (1908); Underwood v. Pennsylvania, M. & S.R.R., 255 Pa. 553, 99 Atl. 64 (1916); *In re* Southern New England R.R., 39 R.I. 468, 98 Atl. 99 (1916).

32. San Francisco & San Jose R.R. v. Mahoney, 29 Cal. 112 (1865); Chicago Park Dist. v. Downey Coal Co., 1 Ill.2d 54, 115 N.E.2d 223 (1953); Kansas City So. Ry. v. Second Street Improvement Co., 256 Mo. 386, 166 S.W. 296 (1914).

33. Chicago Park Dist. v. Downey Coal Co., 1 Ill.2d 54, 115 N.E.2d 223 (1953).

until the damages are ascertained and paid.[34] Other courts have held that an entry on private property to survey the area or to ascertain its applicability to the proposed project or improvement is not considered a taking, provided that such entry is reasonably necessary, not continued for too long a time, and accompanied by no serious damage to the property.[35] This approach is consistent with the reasoning of the majority of decisions. Yet, an 1851 Missouri case reached a contrary result in a fact situation similar to that in which the property was surveyed.[36] Where damage is caused by the examiner or surveyor, or where the statutory restrictions on such entry are not complied with, the property owner has a cause of action for such violations.[37] In these cases the courts will look behind the technical application of the law to determine in an equitable manner if a taking of property has occurred. This result is clearly illustrated in a New Jersey decision in which the court ruled that a taking had occurred when a shaft was sunk and then abandoned in accordance with an examination proceeding to test ground for the location of one terminus of a tunnel.[38]

B.

Exercise of Eminent Domain Power by Railroads.

The question of when a taking occurs and the corresponding right of compensation vests, when railroads are exercising their sovereign-granted condemnation powers, seems to be founded on different considerations than those governing the exercise of this power by the sovereign itself. Since the statutes granting this power to the railroads require the filing of a proposed road plan, courts rely rather heavily on this factor in deciding the time at which a taking is effected. This is of particular importance when property values are fluctuating since the point at which the taking is held to occur is the point at which the value of the land is determined. Some courts, particularly those of Pennsylvania, hold that the filing of a location by the railroad and the presentment of the statutorily-required bond to the court constitute a taking, thus demanding compensation.[39] The Pennsylvania courts have further held that the railroad ob-

34. Duluth Transfer R.R. v. Northern Pac. R.R., 51 Minn. 218, 53 N.W. 366 (1892).

35. Robinson v. Southern Cal. Ry., 129 Cal. 8, 61 Pac. 947 (1900); Marshall v. Niagara Springs Orchard Co., 22 Idaho 144, 125 Pac. 208 (1912); Winslow v. Gifford, 60 Mass. 327 (1850); Orr v. Quimby, 54 N.H. 590 (1874); Edwards v. Law, 63 App. Div. 451, 71 N.Y. Supp. 1097 (2d Dep't 1901).

36. Walther v. Warner, 25 Mo. 277 (1851).

37. Robinson v. Southern Cal. Ry., 129 Cal. 8, 61 Pac. 947 (1900); Marshall v. Niagara Springs Orchard Co., 22 Idaho 144, 125 Pac. 208 (1912); Winslow v. Gifford, 60 Mass. 327 (1850); Orr v. Quimby, 54 N.H. 590 (1874); Edwards v. Law, 63 App. Div. 451, 71 N.Y. Supp. 1097 (2d Dep't 1901).

38. Morris and Essex R.R. v. Hudson Tunnel R.R., 25 N.J. Eq. 384 (Ch. 1874).

39. Fox v. Western Pac. Ry., 31 Cal. 538 (1867); Fort Wayne & S.W. Traction Co. v. Fort Wayne & W. Ry., 170 Ind. 49, 83 N.E. 665 (1908); Underwood v. Pennsylvania, M. & S.R.R., 255 Pa. 553, 99 Atl. 64 (1916); Schonhardt v. Pennsylvania R.R., 216 Pa. 224, 65 Atl. 543 (1907); Graham v. Pittsburgh &

tains a conditional title, good against all but the real owner, upon filing the location. This conditional title ripens into a complete title upon the filing of the bond to cover the damages to the injured landowner.[40] The Pennsylvania doctrine freezes compensation valuation at the time of the filing of the location,[41] though the landowner would have no cause of action for damages until the bond is filed. At that time the railroad would perfect its title. The Massachusetts courts have stated that the filing of the location by the railroad is an assertion of the latter's rights against the land and such action is prima facie evidence of a taking of the property in question and damages may be assessed as of that date;[42] but in Illinois and Indiana, where condemnation and appropriation proceedings are regulated by statute, the courts rule that a taking occurs when a petition for the commencement of such proceedings is filed,[43] and compensation is reckoned as of that date. Maine, which allows occupation before compensation is paid, has held that where the railroad fails to perfect its title within a reasonable time, its occupation will be considered tortious from the date of such entry.[44]

Legislation creating the power of eminent domain necessary to the construction of canals is similar to the railroad provisions and usually requires the filing of a location. Under such a provision the date of filing has been held to constitute a taking in the eyes of the courts, and compensation is measured from that time.[45] However, Ohio has not considered these statutes in the same light and holds that the actual construction of the waterway must be commenced before a taking is accomplished and the property owner has a right to compensation.[46]

C.
Condemnation by the Federal Government.

The statutory provisions providing for the appropriation of private property by the federal government require the filing of a petition of appropriation including a complete description of the land affected.[47] When this is accomplished and the estimated compensation is deposited

L.E. R.R., 145 Pa. 504, 22 Atl. 983 (1891); Crider v. Pittsburgh, H. B. & New Castle Ry., 54 Pa. Super. 587 (1913); Speer v. Monongahela R.R., 22 Pa. Dist. 292 (1912); *In re* Southern New England R.R., 39 R.I. 468, 98 Atl. 99 (1916).

40. Underwood v. Pennsylvania, M. & S.R.R., 255 Pa. 553, 99 Atl. 64 (1916); Speer v. Monongahela R.R., 22 Pa. Dist. 292 (1912).

41. Underwood v. Pennsylvania, M. & S.R.R., 255 Pa. 553, 99 Atl. 64 (1916).

42. Hampton Paint and Chemical Co. v. Springfield, Athal & N.E. R.R., 124 Mass. 118 (1877); Davidson v. Boston & Me. R.R., 57 Mass. 91 (1840).

43. Chicago v. McCausland, 379 Ill. 602, 41 N.E.2d 745 (1942); Harshberger v. Midland R.R., 131 Ind. 177, 30 N.E. 1083 (1892).

44. Nichols v. Somerset & Kennebec R.R., 43 Me. 356 (1857).

45. Briggs v. Cape Cod Ship Canal Co., 137 Mass. 71 (1884); Van Alstine v. Belden, 41 App. Div. 123, 58 N.Y. Supp. 521 (4th Dep't 1899).

46. Haynes v. Jones, 91 Ohio St. 197, 110 N.E. 469 (1915).

47. 46 STAT. 1421 (1831), 40 U.S.C. § 258 (1952).

with the authorities prescribed, the title to the land vests immediately in the United States; nor can anything delay this vesting of title in the government once these steps are taken.[48] The federal government is permitted to occupy the land prior to the final judgment setting forth the amount of compensation to be allowed.[49] However, by pursuing this course of conduct, the government becomes irrevocably bound to pay the amount of compensation that is determined by the court at a later date.[50] Where one disagrees with the valuation that is put on the land by the sovereign, there are various procedures for review. Typical is that prescribed for parties dealing with the Atomic Energy Commission. When a property owner disagrees with the amount of compensation allowed for lands appropriated for the use of the Commission, the latter group must deposit seventy-five per cent of the figure they have offered the land owner with the proper authorities. The Commission then has the right to take possession of the land subject to any further assessment of compensatory damages that may be declared by the court.[51]

The federal provisions are unique in that the Attorney General may stipulate that certain property which has either been taken, or may be taken, be excluded from the condemnation proceedings.[52] Thus, where farm land had been taken, the crops thereon, or part of the acreage, may be given back to the owner and their worth will not be considered in determining the value of the property taken.[53] To the contrary, state courts uniformly hold that once land has been taken either by the commencement of construction, or occupation, of the land in question, the right to compensation vests in the former owner, even though the work is never completed by the activity or group exercising the condemnation power.[54]

III.

ADDITIONAL FACTORS DETERMINING THE RIGHT TO COMPENSATION.

A.

Conduct on the Part of the Landowner.

With respect to eminent domain proceedings by state and municipal authorities, there are several minor topics that deserve mention. Before compensatory damages are awarded to a landowner claiming infringement of his property rights, the landowner must show that the defendant has authorized or inflicted the damage for which he now seeks recovery.[55]

48. 46 STAT. 1422 (1931), 40 U.S.C. § 258b (1952).
49. 46 STAT. 1422 (1931), 40 U.S.C. § 258d (1952).
50. 46 STAT. 1422 (1931), 40 U.S.C. § 258e (1952).
51. 68 STAT. 952, 42 U.S.C.A. § 2221 (Supp. 1954).
52. 56 STAT. 797 (1942), 40 U.S.C. § 258f (1952).
53. 88 CONG. REC. 3350 (1942).
54. People *ex rel.* Utley v. Hayden, 6 Hill. 359 (N.Y. 1844).
55. Red v. Little Rock Ry. & Electric Co., 121 Ark. 71, 180 S.W. 220 (1915); Ketchum v. City of Monett, 193 Mo. App. 529, 181 S.W. 1064 (1916).

Moreover, where one is not content with the assessment award, an appeal by the property owner will not change the date of taking, nor the date from which his damages will be measured.[56] Damages may not be recovered by a property owner who has built on his land subsequent to the enactment of the ordinance or statute providing for a change in street level, though prior to the changing of such street level.[57] However, where the courts do not apply the rule that a taking occurs immediately upon the passage of an ordinance concerning the appropriation of private property, and the land is subsequently improved, the courts have held that such improvements must be compensated for by the condemning group.[58] However, where the property owner acted in bad faith, and has been guilty of "house planting," the additional compensation will not be allowed.[59]

B.

Divided Property Interests.

Divided interests in property present another consideration in determining the proper amount of compensation. Where the unit of government exercising the right of eminent domain obtains a deed from the life tenant, the damages which result from the filing of the petition must be assessed for the interest of each minor remainderman as he comes of age.[60] A Louisiana court has held that when a minor's guardian together with the party appropriating the land waived certain proceedings, such action being fatal to the appropriator's claim of title, the minor was not bound thereby and was allowed to recover compensation from the date of entry.[61]

C.

Condemnation Agreements.

An interesting situation arose in Kansas when the former owner of land taken by a railroad under an agreement, claimed that the latter had breached the contract and brought condemnation proceedings. The court stated that, if in fact the promised consideration had not been given by the railroad, the compensation under the condemnation proceedings would be measured as of the date of entry by the railroad.[62] In a similar situation a municipality occupied certain property under an agreement providing for arbitration by a court if the parties could not arrive at a satisfactory

56. Shannahan v. City of Waterbury, 63 Conn. 420, 28 Atl. 611 (1893); Board of Commissioners of Fairfield County v. Richardson, 122 S.C. 58, 114 S.E. 632 (1922).

57. Bourland v. City of Jackson, 196 S.W. 1045 (Mo. App. 1917).

58. Maher v. Commonwealth, 291 Mass. 343, 197 N.E. 78 (1934); New York Central & H.R.R. v. State, 37 App. Div. 57, 55 N.Y. Supp. 685 (3d Dep't 1899); Keane v. Portland, 115 Ore. 1, 235 Pac. 677 (1925).

59. Matter of the City of New York, 196 N.Y. 255 (1909).

60. Stahl v. Buffalo, Rochester & Pgh. Ry., 262 Pa. 493, 106 Atl. 65 (1919).

61. Jacobs v. Kansas City, S. & G. Ry., 134 La. 389, 64 So. 150 (1914).

62. Wier v. St. Louis, Ft. S. & W. R.R., 40 Kan. 130, 19 Pac. 316 (1888).

figure for the measure of compensation. In that case damages were awarded from the date of the trial,[63] the court reasoning that the municipality was not a tortfeasor and that the claim had been unliquidated until that date.

IV.

CONCLUSION.

As a result of the growing number of problems faced by the various states in constructing modern super-highways, legislation in this area of the law is very likely. The problems arising under such large-scale condemnation programs are similar to those faced by the railroads and the federal government, and totally foreign to the problems and considerations encountered when eminent domain powers are exercised on the county or municipal level. There is no thought of simply revising or modifying existing building lines when a turnpike is planned. Large expanses of land in different counties are appropriated for the construction of these highways. Thus, the theories and the reasoning of the courts where eminent domain powers were exercised on the municipal or county level are of little value. Consequently, it is apparent that neither of the approaches used by the courts to determine the point at which the taking has occurred are satisfactory for such large-scale activities. It is submitted that the better rule might be an admixture of the various approaches. First, the date of taking and the date on which the compensation award is measured must be identified to satisfy constitutional requirements. Secondly, the landowner and the speculator must not be given the opportunity to profit at public expense; but at the same time the landowner must be certain of the date of taking and fixing of compensation so that he will not improve his property at the risk of having it valued at a point prior to the improvement. Thirdly, the award itself must be just. It is therefore suggested that the date of taking and the valuation date should be the date on which the provision for the exercise of the sovereign power is filed, or in the alternative, the date of passage of the statute relating to the appropriation of the land in question. There should be an additional requirement that a bond be posted immediately. As a further safeguard, the statute should include a clause providing for the situation when the land is not actively appropriated or occupied within a stated period or when the required bond is not posted within a reasonable time; in such a case, the date of the taking and measurement of damages would be fixed at the time when the land was actively appropriated or occupied, and the required bond was posted with the proper authorities. It is submitted that the adoption of this legislation, including the shifting clause, would prevent many of the injustices occurring under the traditional standards in use today.

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63. Union Exploration Co. v. Moffat Tunnel Improvement Dist., 104 Colo. 109, 89 P.2d 257 (1939).