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Cover Page Footnote

Members of the New York Bar.

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CURRENT TRENDS IN THE LAW OF CONDEMNATION

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THE field of condemnation continues to expand and grow. In New York City alone, a rebuilding and redevelopment plan has been proposed which will result in the razing and condemnation of over 500 acres of land from river to river.[1] Government planners have estimated that at least 90 per cent of some 1,175 cities in the country with populations of more than 10,000 have blighted areas that must be replaced.[2]

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1. A billion dollar redevelopment plan for lower Manhattan was presented by the Down-Town Lower Manhattan Association backed by the Chase Manhattan Bank and Seamen's Bank for Savings. In essence, the plan would redevelop 564 acres of land in Manhattan, and would permit expansion of the financial district, assemble housing and industrial sites, widen streets, and make other improvements including a heliport. The Board of Estimate of the City of New York referred the plan to its departments. N.Y. Times, Aug. 31, 1958, § 1, p. 1, col. 2; id., Sept. 19, 1958, p. 29, col. 1; id., Oct. 15, 1958, § 1, p. 1, col. 1; id., Oct. 18, 1958, p. 23, col. 8; id., Oct. 22, 1958, p. 37, col. 8.

Among the new projects envisioned by the City of New York are Seward Park Extension, an 1800 unit cooperative to be constructed with a 23 million dollar private investment and a 12 million dollar city and federal subsidy; Division Street cooperative, requiring a 12½ million dollar investment; Mid-Harlem and Moot Haven Projects requiring expenditures of more than 56 million dollars; Williamsburg Houses (ten million); Battery Park Houses in Manhattan (twenty-one million); and Sound View in the Bronx, Seaside and Hammels in Queens. These involve expenditures of approximately 210 million dollars. In addition, it is estimated that there are 13 Title I redevelopment plans involving 585 million dollars either completed, in construction or in the site clearance planning stages. The Lincoln Square Title I Project is expected to cost over 200 million dollars. N.Y. Times, Oct. 18, 1958, p. 23, col. 8. See also articles by James L. Holton, Real Estate Editor, New York World Telegram & Sun, Jan. 2, 1959, Feb. 4, 1959, and Feb. 6, 1959, discussing the problems of expanding slums in cities, and the problem of providing adequate community facilities for mushrooming suburbs.

In Chicago, the City Council Housing & Planning Commission approved an urban renewal plan for rehabilitating 600 acres of dilapidated property. This plan calls for demolition of about 600 buildings at a cost of one million dollars and has been called one of the first in the nation for redoing a "worn out" neighborhood. N.Y. Times, Oct. 26, 1958, § 1, p. 130, col. 1.

In Title I Proceedings, the procedure of New York City has been that after final approval by the City Planning Commission, the Board of Estimate, and the Federal Housing and Financing Agency, the site is condemned, then resold at auction at a fraction of the condemning price. Title I of the Housing Act of 1949 permits cities to purchase or condemn properties in deteriorating areas and resell to developers, the federal government paying two-thirds of the price difference, with the city contributing one-third as its share of the cost.

2. 9 W. Res. L. Rev. 457 (1958). The Federal Highway Act, 70 Stat. 374, 23 U.S.C. 151 (Supp. V, 1958), made available for highway construction, in cooperation with state highway departments, 34 billion dollars to be expended in the next thirteen years.

The Urban Renewal Administration of the federal government has allocated more than a billion dollars in grants for urban renewal projects throughout the nation since that agency was created some nine years ago. The national highway program within a single generation envisions 41,000 miles of super highways costing 40,000,000,000 dollars. By 1960, the estimate of properties to be taken for highway rights of way and capital outlay is 8,000,000,000 dollars a year.[3] In addition, acquisition of property for school building, sewerage, water systems, and bridge approaches are proceeding at expenditures involving fantastic outlays of money.[4] The rate with which condemnation continues makes it necessary for the average lawyer to keep abreast of current developments in the field and practice of eminent domain, and particularly with the principles of law established by the most recent decisions.[5]

The Federal Highway Act, 72 Stat. 89, U.S. Code Cong. & Ad. News No. 6, p. 669 (1958), has authorized appropriation of $900,000,000 for the fiscal year ending June 30, 1960 and $925,000,000 for 1961. The 1958 act authorizes the use of additional monies to maintain the thirteen year construction schedule.

3. Fortune, The Highway Billions, Sept. 1958, p. 106.

4. A proposed amendment to the New York Constitution will authorize school building expenditures up to one-half billion dollars outside the debt limit. Newsletter, Dep't of City Planning (New York), Sept. 1958. The Narrows Bridge approaches are estimated to cost about 79 million dollars. Fortune, The Surge in School Building, Nov. 1958, p. 144. Citizens' Union Searchlight, The 1958 Legislature Made Progress, July 1958.

5. The magnitude of this field is indicated by the contracts of housing projects alone. In 1950, 213,578,000 dollars were committed or reserved for 124 projects throughout the country. In 1957, the cumulative total went over 1,019,294,000 dollars for a total of 494 projects. The master projects envisioned by a single urban renewal consultant indicated planned projects in 23 cities in New York, New Jersey and Pennsylvania, and 39 cities in eight other states and in Puerto Rico. In addition, huge projects such as the giant networks of state highways, relocation of airports, rearrangement of traffic routes, are presently either in the planning stages or are actually being acquired. From new housing developments, the range of eminent domain is encompassing commercial communities and the establishing of industrial sites. Newsletter, Dep't of City Planning (New York), March 1958; Limited Access Highways, 36 N.C.L. Rev. 87 (1957).

Emphasis in the future will be placed on housing programs for middle income families. N.Y. Times, Oct. 13, 1958, p. 22, col. 3. The Senate Banking Committee approved an omnibus housing bill of which 350,000,000 dollars a year is proposed to be spent for the next six years for slum clearance. A new program of liberalized mortgage insurance for housing for the elderly is a feature of this housing bill. N.Y. Times, Feb. 2, 1959, p. 6, col. 1. Communities near the Metropolitan area, such as White Plains, Hastings on Hudson, Peekskill, Nyack and Bridgeport, have also begun urban renewal programs. N.Y. Times, Aug. 31, 1958, § 1, p. 1, col. 2. New York State, however, continues to lead the country, with cooperatives for middle income groups. See, for example, the $70,000,000 Coney Island cooperative in Brooklyn, to be known as James Peter Warbusse Development, already approved by New York City officials.

I. Recent Decisions

A. *Condemnation By a Government Agency*

The power of a governmental agency to condemn property for public purposes continues to be extended. Thus, in a recent case[6] involving the St. Lawrence Power Project, an attack made by a plaintiff on the condemnation procedures instituted by a condemnation authority was rejected. Plaintiff had objected to the proposal to condemn as "useless" and "unnecessary."[7] It was argued that the taking would not result in the public's immediate use of the property and that the authority's plan was to give long term leases to private parties of substantial parts of the property for residential, recreational, business, commercial, and other uses. New York Supreme Court, Special Term reiterated the principle that the widest latitude must be given to a public authority in exercising its power of eminent domain. The appellate division refused to interfere with the authority's contention that the land acquisition was indeed necessary and the lower court's holding that the burden of proving the unreasonableness of the taking or any inherent bad faith lay with the person attacking the authority's sincerity. On further appeal to the New York Court of Appeals, the judgment was affirmed without opinion.[8]

In another case,[9] plaintiffs were taxpayers and owners of real property and business and residential tenants in the area embraced by the Lincoln Square urban renewal project in Manhattan. A permanent injunction and declaratory judgment were sought to prevent the carrying out of the project in accordance with the plan proposed by the Committee on Slum Clearance (which involved the condemnation of the property and subsequent resale), on the ground, among others, that the Lincoln Square urban renewal project violated provisions of the federal and state constitutions which forbid grants to religious institutions. Justice McGivern, sitting in Condemnation Part, New York Supreme Court, Special Term, granted the defendant's motion for summary judgment and dismissed the complaint,[10] holding that the proposed sponsorship by Fordham Uni-

6. Cuglar v. Power Authority, 4 Misc. 2d 879, 163 N.Y.S.2d 902 (Sup. Ct.), aff'd mem., 4 App. Div. 2d 801, 164 N.Y.S.2d 686 (3d Dep't), aff'd mem., 3 N.Y.2d 1006, 147 N.E.2d 733, 170 N.Y.S.2d 341 (1957).

7. 4 Misc. 2d at 896, 163 N.Y.S.2d at 921.

8. 3 N.Y.2d 1006, 147 N.E.2d 733, 170 N.Y.S.2d 341 (1957). In the absence of bad faith or gross abuse of discretion, courts will not disturb a condemnor's selection of a particular route or location; accord, Tennessee Gas Transmission Co. v. Geng, 11 Misc. 2d 739, 175 N.Y.S.2d 488 (Erie County Ct. 1958). See Symposium, Eminent Domain, 43 Iowa L. Rev. 165 (1958); Abberman, Condemnation and the Courts, 12 N.Y. County L.A.B. Bull. 102 (1954).

9. 64th St. Residences v. City of New York, 4 N.Y.2d 268, 150 N.E.2d 396, 174 N.Y.S.2d 1 (1958).

10. 10 Misc. 2d 841, 173 N.Y.S.2d 700 (Sup. Ct. 1957).

versity of a portion of the Lincoln Square project would not result in the granting of government aid to a denominational institution. The aim of the plan, said Justice McGivern, was "the resuscitation of a blighted area and its rededication to a better and a more abundant community life."[11] The appellate division affirmed without opinion.[12]

In the New York Court of Appeals, the plaintiffs again contended that New York City did not have the power to grant a subsidy to a sectarian school; that such a subsidy or benefit was prohibited by both state and federal constitutions. The city, however, maintained that no valid objections could be made to the inclusion of churches and schools in proposed development programs, and that if the public good were enhanced, the fact that private interests may be benefited was only secondary. It was shown that bidding for the parcels of property involved would take place at a public sale open to all institutions of learning. It was pointed out, also, that most of the property presently owned by the City of New York had been acquired through the exercise of the power of eminent domain, and that this fact had never been regarded as being a bar to the sale of city owned property to religious organizations.

The court of appeals affirmed the determinations of special term and of the appellate division,[13] stating that while Fordham University might be obtaining a benefit in the sense that it was being permitted to acquire property at a price probably lower than it would have had to pay if it had to negotiate with private owners, the city benefited by the "achievement of its valid municipal purpose of eliminating a slum."[14]

Plaintiff sought a further review in the United States Supreme Court, arguing that the question affected cities throughout the nation, and raised a serious constitutional problem involving the "establishing of religion" clause of the first amendment. Plaintiff attempted to distinguish *Berman v. Parker*[15] which had held that it was within the power of Congress to authorize a redevelopment agency to condemn a slum clearance area, and to redesign the area so that an integrated plan could be developed for the region including not only new houses, but also schools, churches, parks, streets, and shopping centers; and that eminent domain could validly be exercised under the redevelopment act even though the property so taken could later be sold or leased to private interests or a religious institution in a project and though it did not pay the full acquisition cost. The Supreme Court denied certiorari.[16] It appears,

11. Id. at 847, 173 N.Y.S.2d at 705.
12. 5 App. Div. 824, 170 N.Y.S.2d 993 (1st Dep't 1958).
13. 4 N.Y.2d 268, 150 N.E.2d 396, 174 N.Y.S.2d 1 (1958).
14. Id. at 276, 150 N.E.2d at 399, 174 N.Y.S.2d at 5.
15. 348 U.S. 26 (1954).
16. 357 U.S. 907 (1958). In Gart v. Cole, 27 U.S.L. Week 2373 (U.S. Feb. 3, 1959) objections to the constitutionality of using federal funds on urban renewal projects spon-

therefore, that the power of condemnation cannot be circumscribed where a valid public purpose is achieved, regardless of the character of the user or the use to which the property may be put after the power is exercised.

B. *Abridgement of Power By Past Legislatures*

In a decision involving a hospital which had entered into an agreement with the state under which no street could be opened on the hospital lands, and no lands could be taken from the hospital, a lower court held that the power of eminent domain could not be abridged by agreements made by a past legislature.[17] It held that the legislature could not grant away the state's right of eminent domain so as to bind future legislatures (this, despite the fact that in 1927, the legislature had passed a special act on behalf of the hospital) and that the State Superintendent of Public Works had the power necessary to appropriate the land. The appellate division agreed with special term's holding that the state cannot be deprived of its sovereign power of eminent domain by previous legislative acts, but said that the Superintendent was without power to appropriate the hospital's land where the 1927 special act had not been expressly repealed.[18]

C. *Compensation For Intangible Factors*

Keinz v. State[19] affirmed an owner's right to be compensated for the loss of a pleasant river view which, as a result of a taking, was obstructed by a thirty-foot highway embankment. In the proceeding, part of the claimant's lot which extended to the shore line of the bay was appropriated and the highway which was constructed resulted in loss of access to the water. The court said that the constitutional requirement of just compensation is not satisfied if any factor having a bearing on value is disregarded. If a view is spoiled, said the court, the market value is reduced.[20]

The court in both the *Keinz* case and in *Crance v. State*,[21] did not refer

sored by Fordham University were overruled. The Court of Appeals for the Second Circuit held that the state court decision in 64th St. Residences v. City of New York, supra note 9, was res judicata, and that property owners are not entitled to a hearing before the Federal Housing and Home Financing Administrator who must approve the project.

17. Society of New York Hospital v. Johnson, 9 Misc. 2d 73, 166 N.Y.S.2d 210 (Sup. Ct. 1957), aff'd, 5 N.Y.2d 102, 154 N.E.2d 559, 180 N.Y.S.2d 287 (1958).

18. 5 App. Div. 2d 552, 174 N.Y.S.2d 402 (2d Dep't 1958), aff'd, 5 N.Y.2d 102, 154 N.E.2d 550, 180 N.Y.S.2d 287 (1958), the court stating that there had to be clear legislative language repealing the exemption from condemnation.

19. 2 App. Div. 2d 415, 156 N.Y.S.2d 505 (4th Dep't 1956), appeal denied, 3 App. Div. 815, 161 N.Y.S.2d 604 (4th Dep't 1957).

20. 2 App. Div. 2d at 417, 156 N.Y.S.2d at 507.

21. 309 N.Y. 680, 128 N.E.2d 324 (1955). Elements of view and loss of scenery were considered in making an award.

to and probably overlooked *Matter of City of New York (East River Drive)*[22] where the owner of an exclusive apartment house, 10 Gracie Square, with a view of the East River, received consequential damages for the loss of a view.

The *Keinz* case goes a step forward in taking into account those intangible factors which help to determine the true value of property.

D. *Consequential Damages*

In *Diven v. State*[23] the New York Court of Claims recognized consequential damages resulting to a farmer whose property was cut in two as a result of an appropriation. The property consisted of a 170 acre farm with a home, sheds, and a greenhouse. The state appropriated approximately nineteen acres for a new highway which divided the farm with the claimant having a right to cross the highway for farm purposes. The fact that the farmer continued to enjoy the right to use the highway in going from one parcel to the other did not fail to diminish the value of his land and his right to compensation for such damages. The court considered the fair and reasonable market value before appropriation and subtracted the value of the farm remaining. The court took the "before and after" value of the farm as a unit. While the claimant's experts testified in this case that the best possible use of the land was for residential subdivision, and facilities were shown, proof of the cost of development was not taken, and as a result the court based its award upon the value of the land for farm purposes.

In *Robinson v. State*[24] the New York Appellate Division found that where an appropriation removed the claimant's land from the public highway on which it had previously abutted, the fact that claimant may have been given a continued easement, inadequately defined, to that highway will not maintain the previously high value of his land, for as a result of the taking, it lacked that desirable quality of most lands that actually abut on public highways. Consequential damages were therefore awarded to the claimant.

E. *Status of Tenants*

Tenants are faring better in recent condemnation proceedings than in the past. Usually, the lease contains a waiver by the tenant of any rights

22. 264 App. Div. 555, 35 N.Y.S.2d 990 (1st Dep't 1942).

23. 5 Misc. 2d 282, 160 N.Y.S.2d 484 (Ct. Cl. 1957). See also Power v. State, 160 N.Y.S.2d 486 (Ct. Cl. 1957), where claimants were owners of a dairy farm. The court, for its awards, gave claimants the difference between the fair and reasonable market value of the land before and after the taking; cf. Dormann v. State, 4 App. Div. 2d 979, 167 N.Y.S.2d 760 (3d Dep't 1957), appeal denied, 5 App. Div. 2d 904, 172 N.Y.S.2d 554 (3d Dep't 1958). See Dodge, Land Acquisition for State Highways, 1953 Wis. L. Rev. 458.

24. 3 App. Div. 326, 160 N.Y.S.2d 439 (3d Dep't 1957).

to share in condemnation awards. In addition, the requirements of the cases that fixtures must constitute a part of the realty and be affixed thereto before a tenant will be entitled to compensation for such fixtures has heretofore imposed a severe hardship on tenants. Though the value of movable fixtures may be greatly depreciated by the removal, the courts have held that no award should be made.[25] A more liberal view was taken in *Queensboro Farm Products v. State*.[26] The claimant owned a milk receiving plant located on lands leased from a fee owner, and enjoyed at the same time certain easements on nearby properties. His lease had a thirty-day cancellation clause, and a provision that the tenant had the right to remove the buildings and materials. The state contended that it could substitute different but similar easements for those which the claimant had. It further argued that the measure of damages for the taking or the consequential injury to his buildings and fixtures should be restricted to the market value of a thirty-day leasehold. The court viewed the operations of the company as a whole, and awarded damages accordingly. The fact that the fixtures were used in conjunction with a large and highly technical milk processing plant placed a special value on them, and the award took these special circumstances into account. The court stated that the thirty-day cancellation clause was not sufficient reason to limit the tenant's claim to the value of a thirty-day use on these fixtures. Instead the court held that the "claimant is entitled to compensation for such fixtures as would have become part of the realty if they had been installed permanently by the owner of the fee, or which would cause injury to the realty or the fixture by removal thereof. . . . Claimant is entitled to be paid for its improvements and fixtures. . . ."[27] The court further stated that the acquisition of an ease-

25. No allowance is made for depreciation of removable fixtures or for expenses of removal, dismantling, or storage. Keller v. State, 7 Misc. 2d 925, 166 N.Y.S.2d 825 (Ct. Cl. 1956).

26. 6 Misc. 2d 445, 161 N.Y.S.2d 989 (Ct. Cl. 1956), aff'd mem., 5 App. Div. 2d 967, 171 N.Y.S.2d 646 (4th Dep't 1958). See, as to construction of lease terms and leasehold interest, 27 U. Cinc. L. Rev. 119 (1958).

27. 6 Misc. 2d at 449, 161 N.Y.S.2d at 994; cf. Marfel Properties v. State, 9 Misc. 2d 878, 168 N.Y.S.2d 234 (Ct. Cl. 1957), the termination of a lease may not be a bar to tenant's claim for compensation for improvements to the extent that the improvements enhanced the value of the leasehold. But see Matter of City of New York (Bruckner Expressway), 138 N.Y.L.J. No. 88, p. 8, col. 7 (Nov. 1, 1957). See also Hoffman Wall Paper Co. v. City of Hartford, 114 Conn. 531, 159 Atl. 346 (1932). In Matter of City of New York (Public Parking Field—Port Richmond), 139 N.Y.L.J. No. 102, p. 15, col. 1 (Nov. 18, 1958), a decision which indicated liberalized treatment for tenants, Mr. Justice Keogh of Kings County Supreme Court, recognizing that a taking had impaired a leasehold, awarded substantial damages to a long term tenant. The proceeding involved the taking of vacant land by New York City for a public parking field in Staten Island. Adjoining the parking lot was a brick building containing stores and a warehouse and offices. Both

ment of access and the appropriation of certain pipelines were partial appropriations, and that the claimant was entitled to money damages therefor rather than substitute easements.

F. *Specialty Qualities*

In a case involving specialty qualities,[28] the New York Court of Appeals reversed the appellate division and affirmed special term in awarding damages to a parking lot owner for a non-conforming use. The special term finding of a 20 per cent premium for such use rather than the appellate division's reduced premium of 10 per cent was sustained. Special term, it was held, as the trier of the facts, is more adequately apprised of unusual and special circumstances. Moreover, the court of appeals said that the trial court was justified in taking into consideration an option for a five year renewal term in determining the amount of an award. In this case, the court of appeals held that, despite the fact that the rent reserved in the lease of the premises was "in excess" of the amount that would ordinarily be paid for the parcel, special term could consider the rental for the full twenty year term of the lease including a five year renewal term, in determining the amount of the award. The inclusion of the five year option in computing the total award was held not so unreasonable as to warrant the appellate division's reversal.[29]

G. *Full and Just Compensation*

The criteria employed in measuring damages when property is taken and the factors that must be considered to reach a final figure for full and "just" compensation, include not only capitalization of income,

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parcels had been leased for a period of 58 years to a tenant who had put in substantial improvements. The tenant had agreed in his lease that he was not to be entitled to receive a share of any part of any condemnation award except for improvements made to the premises. The owner sought to recover compensation for the appropriation of the land, consequential damages, and certain costs of reconstruction. The tenant sought an award representing the loss of parking facilities and increased costs of operating the said building.

In a well written opinion, the court held that in a partial taking, the true measure of damages was the difference between the market value of the property before the taking and the market value of the remainder after the taking, including consequential damages sustained.

The court followed equity principles and refused to deny the tenant compensation for the damages to the leasehold which would have resulted in the fee owner obtaining the entire award although the interest of the long term tenant was not only impaired but he would have been compelled to make additional improvements and undergo reconstruction costs. The court thereby followed the trend of liberalizing awards to tenants.

28. Matter of Port of N.Y. Authority, 2 N.Y.2d 296, 140 N.E.2d 740, 159 N.Y.S.2d 825 (1957).

29. Id. at 301, 140 N.E.2d at 741, 159 N.Y.S.2d at 827.

reproduction cost less depreciation, sales of similar property, rental income, and location but highest suitable use.

In *St. Agnes Cemetery v. State*,[30] the New York Court of Appeals, dividing four to three, affirmed the holding of the lower court which granted cemetery owners an award for both market value and consequential damages greatly in excess of what the state claimed was the replacement value of as yet unused burial plots. The property in question was unique only in the sense that at some future time, it would be usable as an extension to the cemetery that was contiguous to it. The improvement by the state precluded the use of the property for burial purposes.

The majority felt that since it was agreed that the probable use of this property would have been for cemetery purposes, it was the value of the parcel as cemetery lots that should attach. The measure of damages, the court stated, was what *the owner lost* and not what the state had gained. There was no doubt that the purchase price or the replacement cost was far below the amount awarded but it was not the cost or replacement value which governed, according to the court, but a much higher value attached to the property because of its special limited use. The majority also stated that evidence of potential future income could be used in proving the value of the property.[31]

Judge Van Voorhis, in a strongly worded dissent, pointed out what he discerned to be a fallacy in the majority's position. He argued that it was not the property per se in any sense that proved so valuable, but rather the license on the part of those who owned the property and could appropriate it to the restricted use that so greatly enhanced its value. To award the damages on that basis would be tantamount to equating the qualities of the owner with the qualities of the land. The minority

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30. 3 N.Y.2d 37, 143 N.E.2d 377, 163 N.Y.S.2d 655 (1957).

31. Id. at 41, 45, 143 N.E.2d at 380, 382, 163 N.Y.S.2d at 659, 662. But see Matter of the City of New York (Washington Square Southeast Slum Clearance Project), 5 App. Div. 2d 821, 170 N.Y.S.2d 839 (1st Dep't 1958), where the court reviewed an award based on a real estate expert's estimated rental, free of rent control. On cross examination by the city, the appraiser admitted his valuation would have been much lower if the appraisal had been predicated on controlled rentals. The appellate division, in modifying the award, held that the capitalization of income method used and accepted by the lower court was erroneously based upon what rentals should be in the absence of statutory rentals, rather than on controlled rentals.

In the opinion of the writers, although actual rental is obviously some evidence of fair rental value, the fair market value of a parcel of real estate is the capitalized amount of fair rental value and not of actual net income. An owner should not be limited to statutory and controlled rentals; cf. Ettlinger v. Weil, 184 N.Y. 179, 77 N.E. 31 (1906); People ex rel. Connelly v. Weise, 261 App. Div. 980, 25 N.Y.S.2d 883 (2d Dep't 1941); Matter of the City of New York (Major Deegan Boulevard), 1 App. Div. 2d 807, 149 N.Y.S.2d 270 (1st Dep't 1956). In the latter case, however, note that the statutory tenant was in business and that it did not deal with residential space.

further felt strongly that the replacement cost of the property itself ought to have been the measure of damages unless it was shown that there was in fact no other property available for cemetery purposes. However, it appears from the stand of the majority that when property is taken without an owner's consent, the court will take into account every factor that will insure that it is his loss that must be compensated though this may necessitate consideration of peripheral matters. This is a step forward toward a fuller recognition of the rights of an owner to emerge from condemnation proceedings as nearly unscathed as is possible. It appears, therefore, that under certain circumstances where land is restricted to purposes special in nature, it should be valued for that use.[32] A special purpose rule in condemnation has therefore emerged which applies to situations where land is shown to be adapted to a particular use. Thus, where land was taken from a summer camp, an appellate court held that the use of the property for the special purpose for which it had been constructed should have been considered.[33]

H. *Power of Review*

In a case involving an award of commissioners, the New York Supreme Court, Special Term, rejected the award as too high.[34] On appeal, the appellate division overruled special term, affirming the original award of the commissioners. In approving the decision of the appellate division, the New York Court of Appeals again made it clear that the power of the courts to review and modify an award must rest on proper evidence. Special term may of course, reject the commissioners' findings, as indeed, a higher court may reject special term findings, but in so doing a court must support its reasons with the evidence presented. It cannot arbitrarily reduce an award simply because it feels that the original figure is in excess. In order for an award of commissioners to be rejected, the court of appeals said it would have to be so far removed from a reasonable amount as to shock the conscience of the court. Otherwise, a reviewing court cannot substitute its own opinion of value for that of the commission or the trier of the facts.

II. Revision of Condemnation Procedures

During the past century, complaints have repeatedly been made in New York condemnation cases about the unsatisfactory way in which

32. Mattydale Shopping Center, Inc. v. State, 303 N.Y. 974, 106 N.E.2d 59 (1952); Syracuse Univ. v. State, 7 Misc. 2d 349, 166 N.Y.S.2d 402 (Ct. Cl. 1957).

33. Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 138 N.E.2d 769 (1958). See 37 B.U.L. Rev. 495 (1957); Housing Authority v. Lustig, 139 Conn. 73, 90 A.2d 169 (1952). See also, Harvey School v. State, — Misc. 2d —, 180 N.Y.S.2d 274 (Ct. Cl. 1958).

34. Matter of Huie, 2 N.Y.2d 168, 139 N.E.2d 140 (1956).

compensation has been awarded. Where new amendments have been proposed to the New York State Constitution, frequently the new procedure has not even been tried out.[35] The Commissioners' system was attacked because of the small awards granted by appraisers selected by the very people to whom were entrusted the sovereign power of condemnation.[36] The Commissioners' system under which commissioners were judges of "fair" compensation was criticized as being wasteful, particularly in New York State. As a result, a constitutional amendment was passed in 1913 which provided that the New York Supreme Court, with or without a jury, but not with a referee, could determine compensation in eminent domain proceedings. Subsequently, about twenty years later, a specialized three judge court of the supreme court was recommended for the trial of condemnation cases[37] and in 1933 the constitution of the state of New York was amended so as to provide that a term of the supreme court (one or more justices thereof) without jury, could try condemnation cases. Article 1-Section 7(b) of the New York Constitution now provides for four methods for determining compensation in other than state appropriations in condemnation; namely, a jury, the supreme court without a jury, an official referee, or no less than three commissioners appointed by a court of record.

A special committee was recently appointed by the Mayor to investigate condemnation practices and procedures.[38] It is recommended since the scope of condemnation has mushroomed to such a large extent in recent years that tribunals be created in the form of condemnation courts. This is not new, having been urged decades ago.[39] In many cases, owners have had to wait long periods of time before compensation was determined and paid, which condition has led to popular indignation. Competent and trained judges should be added to the courts trying eminent domain cases, with experienced personnel, so as to eliminate any delays with respect to the determination and payment of just compensation.

III. Federal Acquisition of Land and Condemnation Practice

The power of eminent domain, exercised by the federal government, is of course unquestioned, particularly since the decision of *Kohl v. United*

35. Inter-Law School Comm. Report on "The Problem of Simplification of the Constitution," Legislative Document No. 57, pp. 16-24 (1958).

36. Id. at 17.

37. Id. at 21.

38. N.Y. Herald Tribune, June 19, 1958, p. 1, col. 1.

39. Legislative Document No. 57, supra note 35, at 20 n.16.

States.[40] The necessity for a taking is not a judicial question, but is exclusively in the power of Congress and one which it may delegate through special acts.[41]

Condemnation actions by the federal government are being increasingly employed for the acquisition of air bases, Nike sites, guided missile installations and easement acquisitions. Aviation easements have also come into being during and after World War II with the expansion of innumerable airports.[42]

The Rules of Civil Procedure for the United States District Courts now govern the procedure for the condemnation of real and personal property. Following the adoption of Rule 71A,[43] the procedure in federal condemnation proceedings had been greatly simplified. Prior to the adoption of this rule, each department or agency had its own rules depending on congressional statute or its own regulations. Proceedings were governed by the procedure and law of state courts where the condemnation took place. Rule 71A, effective as of August 1, 1951, simplified this procedure by creating a uniform federal procedure which was heretofore lacking. Little comment need be made on the rule except to observe that its underlying philosophy is in consonance with emphasis upon practical considerations.

40. 91 U.S. 367 (1875). The right of eminent domain can, however, only be exercised when authorized by statute. Missouri v. Union Elec. Light & Power Co., 42 F.2d 692 (C.D. Mo. 1930). The government has the inherent right of eminent domain, but the power may not be exercised unless and until Congress passes appropriate legislation to that effect. Chappell v. United States, 160 U.S. 499 (1896). The right to authorize the exercise of eminent domain lies in Congress. United States v. 40 Acres of Land, 160 F. Supp. 30, 33, modified, 162 F. Supp. 939 (D. Alaska 1958).

41. Missouri v. Union Elec. Light & Power Co., supra note 40. The Supreme Court has never invalidated a taking for lack of a public use. United States ex rel. T.V.A. v. Welch, 327 U.S. 546, 552 (1946); Symposium, Eminent Domain, 43 Iowa L. Rev. 165 (1958); Comment, 1 Buffalo L. Rev. 147 (1951-52) for concept of public use in urban development.

42. A nationwide program of procuring sites for anti-aircraft guided missiles is in process. Bases in the New York, Washington, Baltimore, Chicago and Philadelphia areas have been selected. More than 30 areas in the north, northwest and northeast now have sites in operation. See N.Y. Herald Tribune, Jan. 29, 1958, p. 7, col. 1; Method of Appraising Value of Aviation Easement, Real Estate Appraisal Practice, Silver Anniversary Papers 571 (1958).

43. 28 U.S.C. (1951). For a good presentation of the rule, see the following: Dolan, New Federal Procedure in Condemnation Actions, 39 Va. L. Rev. 1071 (1953); Neusner, Federal Land Condemnations in Conn. & Rule 71A(h), 31 Conn. B.J. 217 (1957); Legal Institute Papers—Condemnation Law Procedures, Problems, 32 Wash. L. Rev. 314 (1957). For the latest comment on the practical operation of the rule, see Chief Judge John Paul's article, Condemnation Procedures Under Federal Rule 71A, 43 Iowa L. Rev. 231 (1958). See also Condemnation Procedure—A New Federal Rule, 4 Stan. L. Rev. 266 (1952); Comment, 10 Ohio St. L.J. 65 (1949); Dolan, Federal Condemnation Practice, General Aspects, Appraisal Journal, Jan. 1959, at 15.

The complaint in condemnation names as a defendant the property, designated by kind, quantity and location, and names at least one of the owners of some portion of or interest in the property. It contains a short statement of the authority for the taking, the use for which the property is to be taken, a description sufficient for its identification, the interests to be acquired and a designation of the defendants who have been joined as owners with the court, and in addition, the government furnishes the clerk with at least a copy for the use of the defendant. The defendant may serve upon the government an answer within twenty days after service of the notice.[44] The failure to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and fix the compensation. If a defendant has no objections to the taking of his property, he may serve a notice of appearance designating the property in which he claims to have an interest. Thereafter, the defendant receives notice of all proceedings affecting it. No other pleading or motion asserting any additional defenses or objections are allowed. Rule 71A provides for the trial of all issues, except that of just compensation by the court. One aspect of Rule 71A should be discussed since it differs from New York practice in condemnation proceedings. For the trial of the issue of just compensation, a number of possibilities exist. In certain instances, it is Congress which may constitute special tribunals to determine the award. The constitutionality of such tribunals without the use of juries has been well established. As long ago as 1897, the United States Supreme Court said:

> By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury; but may be entrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury.[45]

Where Congress fails to set up special tribunals, either party may file a demand for a jury trial, but the court may, in its discretion, because

44. Notice is served upon the claimant that a complaint in condemnation has been filed with the clerk of the district court for the taking of certain estates and easement interests which are more fully described in exhibits. The purpose for which the interests and estates are to be acquired and the authority for the taking of them, are set forth. Notice is also given that if any objection or defense to the taking is desired, an answer is required to be served upon government's attorney within twenty days after personal service of the notice exclusive of the date of service.

The answer must identify the property in which an interest is claimed; the nature and extent of the interest is to be stated as well as all objections and defenses to the taking. At the trial, evidence must be presented as to the amount of compensation to be paid whether or not an answer is filed or notice of appearance served.

45. Bauman v. Ross, 167 U.S. 548, 593 (1897). There is no constitutional right to a jury trial. United States v. Buhler, 254 F.2d 876 (5th Cir. 1958).

of the character and location of the property to be condemned, or for other reasons in the interest of justice, deny such demand and appoint a commission to determine the award.

It is the extent of the discretion of the court that is in issue in the cases. Although as yet the decisions have been few, they warrant at least a tentative conclusion that here, too, the interests of the property owner will be more zealously safeguarded by the court than those of the condemning authority.

In *United States v. Theimer*,[46] the court held that where the government sought to condemn a fee simple title in a tract of seventy-one acres, and obtain an easement for the flight of aircraft over two other adjacent tracts, the district court abused its discretion when it denied a demand for a jury and appointed a commission instead. The court here felt that since the desire "to remove all obstacles that caused delay, and bring this action to a conclusion" was the sole reason for the district court's appointment of a commission, it was tantamount to an abuse of its discretion to deny a jury. The Circuit Court of Appeals for the Tenth Circuit said that such "desire may well be present in all cases but it does not constitute such extraordinary circumstances as to warrant the trial court in invoking the extraordinary provisions of the Rule."[47]

However, in *United States v. Waymire*,[48] the same court of appeals refused to overrule the district court which appointed a commission at the request of property owners despite a demand for a jury trial by the United States Government. The circuit court held that the district court had not abused its discretion.

> This was not a proceeding for the condemnation of a single tract of land or a single unit of property uniform in kind, easy of description, and located reasonably adjacent to the place at which the court sits. In addition to other small tracts, it had for its purpose the taking of property and property rights from five ranches including various and varying improvements located more than one hundred and fifty miles from the nearest place at which the court sits. The land varied in kind, character, and adaptability. . . . Not all of the land was taken. In some instances, not all of the land of the same kind was taken. . . . The properties were no longer balanced ranches. . . . The situation presented multiple circumstances calling for the consideration of various elements in arriving at just compensation. . . . In view of all these facts and circumstances considered in their totality, it cannot be said that the court erred in appointing a commission to fix just compensation for the various properties and rights in properties to be condemned.[49]

Here it will be noted that it was the government that was demanding a jury trial. The refusal to consider a commission as beyond the discre-

46. 199 F.2d 501 (10th Cir. 1952).
47. Id. at 504.
48. 202 F.2d 550 (10th Cir. 1953).
49. Id. at 552.

tion of the court thereby favored the landowner. Even so the circuit court paid at least lip service to the right of an individual to a jury. "Under such provision in the rule, any party to a condemnation proceeding is ordinarily entitled as a matter of right to trial by jury of the issue of just compensation for the property taken if demand therefor is made within the time fixed in the rule."[50]

The dissent argued, not unjustifiably, that in Wyoming, a distance of 150 miles from the place where the court sat was not extraordinary. Therefore, according to the minority, the majority's reasoning would make the right to a trial by jury in condemnation proceedings an exception rather than the rule, and this would be contrary to the legislative intent. In *United States v. Wallace*[51] where the property was a distance of only 60 miles from the place where the court sat, Circuit Judge Pickett, in a sharp dissent to the majority's opinion that this distance was just grounds for the appointment of a commission rather than a trial by jury, voiced similar thoughts when he said:

These proceedings involved a single tract of land with no improvements. The witnesses gave their estimate of value as in any other case where it is sought to establish the value of land. It is difficult to conceive of a more simple condemnation case. If the trial judge has the discretion to appoint commissioners to determine the compensation for land merely upon the grounds that it is some distance from the seat of the trial court, he would have the discretion to appoint commissioners in almost any case. It appears to me that we are laying the foundation for the establishment of the right of reference as the rule, not the exception.[52]

In *United States v. Cunningham*[53] the property taken was some four miles long and undeveloped. The government demanded a jury. This was overruled, the court holding that it was in the interest of justice that the issue of just compensation be determined by commissioners. Chief Judge Parker of the Fourth Circuit Court of Appeals stated that the appointment of a commission was not an abuse of discretion, pointing out, among other factors, the impracticability of having a jury view property very far from the nearest federal court, and the difficult questions of valuation involved.[54]

In more recent cases, the federal court has been granting the right to trial by jury except in extraordinary cases where there are hundreds of parcels involved with scattered locations and diverse ownerships and where it is apparent that a jury would not be appropriate. In those situations, commissioners determine the issue of compensation. Thus,

50. Ibid.

51. 201 F.2d 65 (10th Cir. 1952).

52. Id. at 67-68.

53. 246 F.2d 330 (4th Cir. 1957); 66 Harv. L. Rev. 1314 (1953).

54. Id. at 333; cf. Brennan v. United States, 153 F. Supp. 377 (Ct. Cl. 1957), cert. denied, 355 U.S. 890 (1957).

where there were hundreds of condemnation parcels a court held that this was a case involving most extraordinary issues and disallowed a right to trial by jury.[55] It would appear that the federal rule presently is to permit jury trials except when the court finds proceedings to be of a most extraordinary character, but in this it has wide discretion.

In the action which the federal government institutes to acquire land or easement for the public use, the government may file with the complaint or at any time before judgement, a Declaration of Taking signed by the condemnation authority, declaring that the properties being acquired are taken for the use of the United States. An estimated compensation is deposited in the Registry of the United States District Court. This estimate is based upon appraisals made for the government by real estate people believed to be competent and qualified, who are employed by the government for this purpose. It has recently been held that when the government files a declaration of taking before it enters into possession, the filing constitutes the taking, but when it files the declaration after it has taken possession, then the date of the taking is the date on which the government entered and took possession.[56]

An order may also be procured from the court permitting the United States immediately to take possession of either fee or easement interests upon filing of the complaint in condemnation. This order for immediate possession is obtained *ex parte* and without notice, and grants to the petitioner-plaintiff, the United States of America, the right to immediate possession of the land involved. Notice of entry of the order together with notice of the time set forth for delivery of possession is served upon defendant-claimants at their last known addresses. No appeal, bond, or undertaking can operate to prevent vesting of title.

55. United States v. Certain Tracts of Land, 21 F.R.D. 389 (N.D. Cal. 1957) (500 condemnees, 710 parcels). But see United States v. Fairfield Gardens, 21 F.R.D. 370 (N.D. Cal. 1958) which held that there was to be no deviation from the rule granting parties a right to trial by jury in condemnation cases except in most extraordinary proceedings, "where the ends of justice require such course." Chief Judge John Paul of the United States District Court, Western District of Virginia has advocated the commissioner procedure. He charges the jury system with being cumbersome, inefficient and wasteful and states that where small properties are involved injustice results. He noted that the Land Division of the Dept. of Justice seeks jury trials and is opposed to trial by commission. Paul, Condemnation Procedure under Federal Rule 71A, 43 Iowa L.J. 231 (1958). But in the Eastern and Southern Districts of New York, the government has not asked for juries. Judge Paul argues that in the case of small tracts, they are too small or of such little value that an owner cannot afford to contest the evidence of the government. On the other hand, Dolan, Federal Condemnation Practice, General Aspects, supra note 43, at 17, opposes the commissioner method as costly and time consuming. Dolan further argues that the federal rule governing jury trials by placing wide discretion in the district court nullifies the right to a jury trial. See also Comment, 10 Ohio State L.J. 65 (1949).

56. United States v. Dow, 357 U.S. 17 (1958).

The deposit of the estimated amount is, of course, not binding upon the claimant or the government, and the exact amount to be paid for the taking of the fee or easements will be determined either by agreement or by actual trial. If the amount of just compensation finally awarded by the court on trial exceeds the amount of the deposit, the final judgement must include, as part of the just compensation, interest at the rate of six per cent per annum from the date of taking to the date of payment on the difference between these amounts.[57] This deposit under the rule, as already stated, is required by law as a condition to the exercise of the power of eminent domain and the vesting of title.[58]

The amount on deposit may be withdrawn by those entitled thereto, upon proper application and in accordance with the Rules of the District Court.[59]

Under the rule, costs in condemnation cases are not taxed against the property owner, since he is usually the prevailing party. Costs, however, incurred by a property owner in the presentation of his proof will not be taxed against the government.

A brief comment should be made upon the nature of the easements recently taken by the United States. Such easement interests presently sought by the government are to prevent structures, buildings or trees from intruding into the paths of planes, radar beams, or electronic impulses emanating from instruments located on fee parcels. They are in the nature of obstruction easements and have been identified principally with airports and guided missile installations.[60] Easements are taken

57. The court has no power to review the amount of the deposit of estimated compensation. In re United States, 257 F.2d 844 (5th Cir. 1958). See Dolan, Fair Condemnation Awards—A Government View, Real Estate News (Sept. 1958). A claimant is entitled to interest now from time of possession. United States v. Dow, supra note 56; United States v. 6.87 Acres of Land, 147 F.2d 351 (2d Cir. 1945). If there is no declaration of taking and no payment, interest is paid on total value from date of possession to date of actual payment. See Dolan, Federal Condemnation Practice, General Aspects, supra note 43, at 26-27.

Under earlier federal procedure, the decisions held that where possession of the condemned land is taken before payment, interest for the interval is a part of just compensation. Jacobs v. United States, 290 U.S. 13 (1933); Phelps v. United States, 274 U.S. 341 (1927); Seaboard Airline Ry. v. United States, 261 U.S. 299 (1923).

58. See United States v. 15.3 Acres of Land, 158 F. Supp. 122 (M.D. Pa. 1957); United States v. 164.25 Acres of Land, 159 F. Supp. 728 (D.N.H. 1957). Even a county is entitled to interest from the time of taking. United States v. Certain Lands, 246 F.2d 823 (3d Cir. 1957). It is date of possession which not only determines the date when the obligation to pay interest accrues but when valuation is to be estimated. Date of vesting of title does not govern. United States v. Dow, supra note 56.

59. Fed. R. Civ. P. 71A(j).

60. For a recent case involving an easement of air space by jet bombers, see Highland Park v. United States, 161 F. Supp. 597 (Ct. Cl. 1958). The case of United States v. Causby, 328 U.S. 256 (1946), was one of first impression to deal with the question of

for airfields and bases. These limit the height to which an owner may construct a building with the purpose of preserving inviolate the integrity of the air space used by the United States.[61] Because of the impairment of an owner's utility, compensation must be paid for the obstruction easements in terms of estimated depreciation and market value attributable to the taking of the easement. The difference in the value of the land upon which the easement was imposed and the value after, forms the basis for the evaluation of the easement.[62]

The federal courts do not reimburse an owner for consequential damages.[63] Moving costs, the loss of good will of the business, loss of

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whether property was taken within the meaning of the fifth amendment by frequent flights of aircraft at low altitudes. In this case, planes passed over the land and buildings of the owner at regular intervals, thereby ruining a chicken business and causing noise and disturbance to the owner. The court of claims had found that claimant's property had depreciated in value and held that the government had actually taken an easement de facto. The United States claimed that it had air sovereignty and could exercise its rights to travel through air space. It was argued that the residential damage as a result of authorized air navigation was not compensable. The court stated that it was "the owner's loss" which is the measure of the value of the property taken, and that "the use of the air space immediately above the land would limit the utility of the land and cause a diminution in its value. . . ." Id. at 262. The Supreme Court held that flights over private land could be so frequent and low as to be an immediate and direct interference with the owner's enjoyment of his land. For a recent flight easement, see Herring v. United States, 162 F. Supp. 769 (Ct. Cl. 1958); United States v. Jones Beach State Parkway Authority, 255 F.2d 329 (2d Cir. 1958); for a guided missile case, see United States v. Chase, 260 F.2d 405 (2d Cir. 1958). Easements have been described as primarily the right of the government not to use the land but to prohibit an owner from using it for buildings or structures or for the growth of trees or natural growth of any kind above a certain height. The height above the ground level involved in these easement cases is shown on maps which are offered in evidence by the government.

There are so-called safety easements, which consist of prohibitions or restrictions on the owner's rights to construct residences or buildings to be used for human habitation, and to prevent the gathering of more than twenty-five people in a group at any one time. The government usually reserves what has been termed a right of access to prohibit the owner from violating the easement and the right to enforce provisions of the easement. There are also line-of-sight easements, the purpose of these being to limit the height of structures and natural growth of a certain elevation above the land. See United States v. 29.28 Acres of Land, 162 F. Supp. 502 (D.N.J. 1958).

61. As to the nature of obstruction easements, see the following: United States v. 72.35 Acres of Land, 150 F. Supp. 271 (E.D.N.Y. 1957); United States v. 69.67 Acres of Land, 152 F. Supp. 441 (E.D.N.Y. 1957); United States v. 329.05 Acres of Land, 156 F. Supp. 67 (S.D.N.Y. 1957); United States v. 102.93 Acres of Land, 154 F. Supp. 258 (E.D.N.Y. 1957); United States v. 48.10 Acres of Land, 144 F. Supp. 258 (S.D.N.Y. 1956); United States v. 29.40 Acres of Land, 131 F. Supp. 84 (D.N.J. 1955).

62. See cases cited notes 59 and 60 supra.

63. Federal decisions are similar to state. See United States v. Westinghouse Elec. & Mfg. Co., 339 U.S. 261 (1950); United States v. General Motors Corp., 323 U.S. 373 (1945); Intertype Corp. v. Clark-Congress Corp., 240 F.2d 375 (7th Cir. 1957). Evidence

profits, damages to a business from an inability to relocate in an acceptable substitute location are non-compensable in the absence of statutory provision; and in this respect also, there is no legal distinction between federal or state cases. Where, however, the premises of a lessee are temporarily taken by the government the cost of removal has been considered in the determination of "just" compensation.[64] This is only with respect to the taking of a portion of a lease. Where the government occupies an entire lease, such consequential losses are seldom considered.[65] Thus, greater hardship has been created where property is taken without the consent of individuals and business concerns which, because of lease provisions, are not entitled to any part of any condemnation award.[66] To alleviate this hardship in housing cases, the federal law provides a maximum of compensation up to 100 dollars for families and up to 2,500 dollars for businesses displaced by urban removal developments.[67] This is a wholly unrealistic sum since it is known to the authors that some industrial businesses have resulted in the expenditures of 40,000 dollars to 50,000 dollars and more for removal costs.[68]

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of loss of profits of a business, damages to good will, the expenses of moving or relocation, the increased cost of new facilities and other such losses are rejected in federal condemnation proceedings, since such losses are considered personal to the owner.

64. Consideration is given to these damages where the taking is of a partial leasehold. United States v. Petty Motor Co., 327 U.S. 372, 377-78 (1946); Mullon Benevolent Corp. v. United States, 290 U.S. 89, 94, 95 (1933); United States v. 25.4 Acres of Land, 71 F. Supp. 248 (E.D.N.Y. 1947). Compare United States v. General Motors Corp., supra note 63 at 379; United States v. Fisk Bldg., 124 F. Supp. 259 (S.D.N.Y. 1954); United States v. 10,620 Sq. Ft., 62 F. Supp. 115 (S.D.N.Y. 1945). See Dolan, supra note 56.

65. Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. 21,815 Sq. Ft. of Land, 155 F.2d 898 (2d Cir. 1946).

66. See Comment, 33 N.Y.U.L. Rev. 882-89 (1958); Perl, Minimize Losses in Condemnation, The Appraisal Journal (Jan. 1958).

67. Housing Act of 1957 § 304, 71 Stat. 294, 42 U.S.C. § 1456(f)(2) (Supp. V, 1958). This amended paragraph 2 of § 106(f) of the Housing Act of 1949 by making payment not to "exceed $100.00 in the case of an individual, or family, or $2,500.00 in the case of a business concern." Payments are made subject to rules and regulations of the Public Housing Administrator. The regulations promulgated have required written evidence including appraisals and certified estimates which may be obtained only after great expense. Good will or profit is explicitly excluded from the act. Since 1951, military departments of the government have been authorized to make additional payments for expenses and losses incurred by owners and tenants as a result of moving because of the taking of land for military projects.

68. Cf. Searles and Raphael, Developments in the Law of Condemnation, N.Y.L.J. December 3, 1956; Perl, Minimize Losses in Condemnation, supra note 66.

Some measure of relief should be given to businessmen located in the heart of a business district who have suffered heavy financial losses because they were uprooted by Title 1 slum clearance projects or assessable improvement proceedings (acquisition for streets, parks, bridges, tunnels and sewers). See N.Y.C. Charter § 291 and N.Y.C. Admin. Code § B 15-1.0(8). For capital project proceedings (schools, libraries, playgrounds, hospitals,

Bills have been introduced to Congress authorizing reimbursement for business losses measured by an estimated average net income during certain calendar years or the average adjusted gross income derived from a trade, business, or profession, in accordance with the provisions of the Internal Revenue Code. Other proposals are being considered which authorize the Secretary of the Treasury and the Secretaries of the Military Departments of the government, to settle claims for damages caused to land resulting in a decrease in the fair market value thereof, by aircraft and guided missiles, or as a result of the acquisition of other land by governmental authorities.[69] Financial assistance for community relocation where an urban area is damaged or flooded by reason of a public works project and providing for relocation costs to a new site is being studied.[70]

In condemnation, the courts have not adhered to the strict rules of evidence, and the hearers of the fact have received matters which normally are excluded as irrelevant or hearsay.[71] As in state cases, sales are considered of importance in determining true market value in federal courts. Evidence of "similar sales in the vicinity made at or about the same time" is admissible as a basis for valuation.[72]

In the taking of property the government also has, like other public authorities, used its power of eminent domain without instituting actual condemnation proceedings. Where this was done, the government was compelled to pay just compensation. Thus, in *Campbell v. United States*[73] an army officer took possession of plaintiff's property without obtaining consent or without the government's instituting condemnation proceedings. It was held that the taking was under the sovereign power of eminent domain.

In a partial taking, severance damages may arise either from damages attributable to the physical characteristics of the remainder, limiting or

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courthouses, police stations, fire houses, parking lots, etc.) see N.Y.C. Charter § 211 and N.Y.C. Admin. Code § B 15-1.0(9).

69. S. 1066, 85th Cong., 2d Sess. (1957) would authorize settlement of claims for damages caused by aircraft and guided missiles.

70. S. 2865, 85th Cong., 2d Sess. (1957) would authorize financial assistance for community relocation. See Appraisal Journal, Jan. 1958, at 25.

71. United States v. 50.8 Acres of Land, 149 F. Supp. 749 (E.D.N.Y. 1957); United States v. 80.46 Acres in Erie County, 59 F. Supp. 876, 877 (W.D.N.Y. 1944), aff'd, sub nom. Phillips v. United States, 148 F.2d 714 (2d Cir. 1945).

72. United States v. Lowrie, 246 F.2d 472, 474 (4th Cir. 1957); United States v. 63.04 Acres of Land, 245 F.2d 140, 145 (2d Cir. 1957); United States v. 5139.5 Acres of Land, 200 F.2d 659, 662 (4th Cir. 1952); United States v. 329.05 Acres of Land, 156 F. Supp. 67 (S.D.N.Y. 1957). Sales occurring a substantial period after vesting of title are usually excluded, but the court has wide discretion. United States v. Meadow Brook Club, 259 F.2d 41 (2d Cir. 1958).

73. 266 U.S. 368 (1924).

impairing its future use, or from the nature and character of the use to which the government proposes and may put the part taken.[74] Claims of this sort frequently arise.[75] Recently, claimants have proposed what are termed proximity damages, which resulted from the location of land under obstruction easements, such as the noise of aircraft flying in close proximity to the land, which may, in fact, reduce the owner's enjoyment of his land and by the frequent and regular flights of army and navy aircraft over property at low altitudes impair the value of the real estate in the market place.[76]

In the opinion of the authors, the ambit of consequential damages will be broadened eventually and the theory of just compensation re-evaluated.[77] Analysis of the cases of the past year demonstrates a greater recognition of the property owner's rights in the light of economic, moral and practical considerations. This view accords with the necessities of modern economics and emphasizes less the purely technical and legal aspects which heretofore have been considered of importance.

Certain courts and authorities are adopting more adequate procedures. Negotiators and representatives of condemning authorities have been making serious efforts to have negotiations conducted through owners' and tenants' attorneys. Views of the properties taken are being held by various courts in the presence of not only the attorneys for the property authority but owners' lawyers as well, thereby providing an opportunity to the courts to receive observations from counsel for both sides. Recently, Justice McGivern of the Supreme Court, New York County, in a case involving the approaches to the George Washington Bridge, and Justice Keogh of the Supreme Court, Kings County in the condemnation proceeding involving Public School 288 now on trial, directed the exchange of experts' appraisals prior to their submission in evidence. Thus, the courts have been better able to understand, weigh, and appraise properties in a continuing effort to improve condemnation procedures. It is to be hoped that this procedure may be adopted in other jurisdictions since it will make possible an earlier investigation and arrival at the truth.

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74. Severance damage is loss in value to the remainder after any portion of a given property has been taken from it. See Bauman v. Ross, 167 U.S. 548, 574 (1897); United States v. 392.05 Acres, 156 F. Supp. 67, 71 (S.D.N.Y. 1957).

75. Olson v. United States, 292 U.S. 246, 257 (1934); Cole Inv. Co. v. United States, 258 F.2d 203 (9th Cir. 1958).

76. United States v. 26.07 Acres of Land, 126 F. Supp. 374 (E.D.N.Y. 1954); United States v. 11 Acres of Land, 61 F. Supp. 373 (E.D.N.Y. 1945). See in particular, United States v. Causby, supra note 59.

77. See Comment, 67 Yale L.J. 61 (1957).

IV. Tax Developments

Since December 31, 1957 several new developments have taken place in the tax treatment of property condemned. Section 1033 of the Internal Revenue Code has been amended by the Technical Amendments Act of 1958, in effect September 2, 1958.[78] The amendment adds a new subsection (g) to 1033 dealing with involuntary conversions. Prior to the amendment, taxpayers whose property was seized, requisitioned or condemned were not taxable on the excess of the awards over their costs if, within a certain period, the property was replaced with other property "similar or related in service or in use." What constituted property similar or related in service or in use had been given a narrow interpretation. Where, for example, the property was a poultry business and the owner replaced it with a gas station, it was held not to be similar in service or in use,[79] and the gain was recognized.

The new subsection provides a substitute test, which has a broader interpretation than the "similar or related" phrase. The new test is the "like kind" test. The amendment reads:

(g) Condemnation of Real Property Held for Productive Use in Trade or Business or for Investment.

(1) Special Rule. For purposes of sub-section (a), if real property (not including stock in trade or other property held primarily for sale) held for productive use in trade or business or for investment is (as a result of its seizure, requisition, or condemnation, or threat or imminence thereof) compulsorily or involuntarily converted, *property of a like kind* to be held either for productive use in trade or business or for investment shall be treated as property similar or related in service or use to the property so converted.[80]

The difference between "like kind" and "similar or related in service or in use", indiscernible as a matter of dictionary meaning, is sharp, however, under the tax provisions. The "like kind" test is new to section 1033, but is not new in the tax law. Like kind is a test called for in section 1031 of the 1954 Internal Revenue Code[81] and its antecedent, section 112(b)(1) of the 1939 Act, and has been in the tax law structure for years. Section 1031 deals with exchanges of property for other property held for productive use or investment.

Under the like kind test, an exchange of unimproved real estate for improved real estate has been held to be of like kind, and even exchanges

78. 72 Stat. 1606 (1958), 26 U.S.C.A. § 1033 (Supp. 1959).

79. Denny L. Collins, 29 T.C. No. 75 (Jan. 20, 1958). See also Flemming v. Commissioner, 241 F.2d 78 (5th Cir. 1957); Century Elec. Co. v. Commissioner, 192 F.2d 155 (8th Cir. 1951).

80. 72 Stat. 1606 (1958), 26 U.S.C.A. § 1033(g) (Supp. 1959) (emphasis added).

81. 68A Stat. 302 (1954), 26 U.S.C. § 1031 (Supp. V., 1959).

of oil, gas and mineral rights for improved realty were held to be of like kind.[82]

The Committee report in connection with section 1033(g) makes clear why the new test was added. "[M]oreover, it appears particularly unfortunate that present law requires a closer identity of the destroyed and converted property where the exchange is beyond the control of the taxpayer than that which is applied in the case of the voluntary exchange of business property."[83] Thus, reinvestment of proceeds of a condemned business building for a ranch comes within the like kind test and is a non-taxable replacement. It would seem, therefore, that any real property held for productive use in trade or business or for investment which is condemned and replaced within the proper period with real property held for the same purpose would meet the like kind test. The rule applies also where homes are involuntarily converted or replaced.

The second development, one not too favorable to taxpayers, is based on a Revenue Ruling.[84] There is no taxable capital gain to a property owner if he replaces the condemned property within a certain period. The regulation states that the replacement period commences:

> with the date of the disposition of the converted property, or the date of the beginning of the threat or imminence of requisition or condemnation of the converted property, whichever is earlier, and ending one year after the close of the first taxable year in which any part of the gain upon the conversion is realized, or at the close of such later date as may be designated pursuant to an application of the taxpayer.[85]

Any replacement or sale therefore, made before the start of the period or after the end of the period does not count, and will not avoid a tax on the profit on the condemned property. What constitutes "the threat or imminence of condemnation" so as to begin the period is important. The Treasury refuses to consider the mere publication of newspaper articles indicating that property is being considered for condemnation as a threat or imminence of condemnation even though confirmed by the mayor.[86] This ruling covered a taxpayer who owned property within the area of a slum clearance program. Newspaper articles indicated that the city intended to proceed to condemn the taxpayer's real estate. The property owner had personal conversations with the mayor confirming the prospective condemnation following which, he arranged to purchase replacement property. The Treasury stated that the threat or imminence did not begin until a public resolution was adopted or an act of an ap-

82. Commissioner v. Crichton, 122 F.2d 181 (5th Cir. 1941).
83. S. Rep. No. 1983, 85th Cong., 2d Sess. 70 (1958).
84. Rev. Rul. 58-557, 1958 Int. Rev. Bull. No. 46, at 12.
85. Treas. Reg. § 1.1033(a)-2 (1958).
86. Rev. Rul. 58-557, 1958 Int. Rev. Bull. No. 46, at 12.

propriate body was passed. It would appear, therefore, that if a taxpayer purchased replacement property or sold out before the final resolution a gain would be taxable.

It would appear to the writers that the position of the Treasury is unreasonable. Certainly, if threat is to be given its normal meaning, it is possible for a threat to occur long before a condemning authority vests title. It would seem, therefore, that the section should be liberally construed.

Whether the present interpretation of the Treasury as to what constitutes a threat or imminence of condemnation will be acceptable to the courts is open to question. Some courts have indicated that a more liberal view in favor of the taxpayer will be taken. In one case,[87] there was involved a sale of land to a city after the taxpayer had been informed that his land would be required for an airport. There was no official resolution adopted. It was held that this constituted a sale under threat of condemnation.

In accord is the case of *Wala Garage, Inc. v. United States*[88] where the court, in dealing with the predecessor of section 1033, quoted a past Tax Court opinion as follows: "Section 112(f) is a relief provision, which takes cognizance of the inequity of taxing a gain resulting from the involuntary conversion of property where the proceeds are used to replace the property, and should be liberally construed to effectuate its purpose."[89]

The benefits of the law are applicable where only part of the property is condemned. In *Harry G. Masser*,[90] the taxpayer operated a trucking business consisting of two pieces of property. One was a parking lot and the other contained offices and loading docks. Under threat of condemnation the lot was sold to a housing authority, and the building to another. The total proceeds were reinvested. The Treasury said that the gain on the building was taxable. The Tax Court rejected this Treasury Ruling, holding that where both parcels were used as a single economic unit, when one is involuntarily sold, and continuation of the other is impractical, replacement of both by similar property would qualify for tax benefits.

The recent developments point to a more lenient rule as to what property can serve as a replacement and still qualify for tax avoidance, and to an earlier starting point from which a taxpayer can either sell or replace.

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87. Louis J. Hexter, 11 CCH Tax. Ct. Mem. 337 (1952).

88. 163 F. Supp. 379 (Ct. Cl. 1958).

89. Id. at 382, quoting Massillon-Cleveland-Akron Sign Co., 15 T. C. 79, 83 (1950).

90. 30 T.C. No. 72 (June 27, 1958).

RECOMMENDATIONS

The authors recommend:

(a) Legislation should be enacted promptly authorizing payments for those items which are not compensable in the absence of statutory provisions, such as moving costs, loss of profits and good will, damages to business from an inability to locate an acceptable substitute location, attorneys and appraisal fees. Only then will property owners and business tenants be reimbursed for the actual and real damages sustained by them. This would be in keeping with a spirit of fairness, particularly where the rights of the individual must yield to public necessity. Until the innovation of such a reform, it cannot be fairly said that a citizen is adequately compensated for property damaged or destroyed.

(b) Article I, section 7 of the New York State Constitution dealing with eminent domain should be amended to provide a simple but firm guaranty that an individual be fairly compensated in condemnation proceedings. In all other respects, we recommend that the constitutional provisions concerning details and methods of payment should be deleted since they form no proper part of a constitution. These simply clutter the constitution, which can be amended only with great difficulty; the details can be left to legislative decision.

(c) Municipal and state authorities should adopt the federal practice providing for payment of an estimated amount of compensation as a condition to vesting title, the exact amount to await the actual trial. The average fee owner may suffer substantial losses unless paid promptly after the appropriation of his property for public use. Legal interest alone does not suffice where the property owner may have a business opportunity available or an investment which, for lack of funds, may be lost to him.

(d) Prompt and speedy trials of condemnation proceedings should be held, particularly where authorities are not required to deposit monies as a condition to vesting title. Otherwise, the condemnor's action constitutes taking of property without due process of law since claimants will be deprived of income and property without receiving full and just compensation. Not only does the landowner suffer but it has been estimated that municipal, county, and state authorities have lost millions of dollars in interest payments because of the failure to have speedy trials and payment of awards.

(e) The methods by which compensation to owners of condemned properties are being made should be the concern of a serious study in view of the far-reaching and immense proportions to which condemnation has grown. A re-evaluation of the entire concept of compensation in

terms of modern conditions should be made with the intention of providing a firm guaranty that the individual will be fully compensated in eminent domain proceedings. Unless this is done, property owners, who fear that their rights have been inadequately considered in the exercise of the power of eminent domain, will continue to voice their concern and distress; until this is done, the attitude which the courts have manifested during the past year in the cases reviewed, will undoubtedly prove of constructive value.

(f) In view of the wide scope of the field, means should be taken to establish land courts with competent and specially trained judges, appraisal panels and personnel familiar with condemnation procedure to deal speedily and promptly with the tremendous number of condemnation cases which will arise in the future.

(g) Because present takings encompass large areas[91] which involve thousands of business properties, fixture claims for millions of dollars have arisen. Competent fixture and machinery experts should be added to the personnel of the condemning authorities and efforts made to negotiate, settle and dispose, in a practical and reasonable way, fixture and machinery claims which usually follow condemnation of business and industrial property.

(h) A commission should be appointed to evaluate the condemnation law and this commission should practice with the purpose of providing reform and change in a field hamstrung by old rules of law, inapplicable to modern condemnation situations. Legislation to this effect would help to eliminate injustices and would be a major step in leading to a more equitable balance between the interest of the public at large and the individual property owner.

91. The decree in the Seward Park Proceeding where title vested in the City of New York on Nov. 29, 1958 provided for a final award of $8,184,112.70. The award of the court after trial was $7,673,490.40. Recently fourteen contracts with the New York City Housing Authority were consolidated into one. This contract covered contributions to fifty federally subsidized developments with a combined cost of $711,820,219.