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# Claims Against the State of Kentucky— Reverse Eminent Domain

By PAUL OBERST\* and THOMAS LEWIS\*\*

## *Introduction*

Immunity of the Commonwealth from suit for torts of its agents is one of the well settled attributes of sovereignty.<sup>1</sup> At first blush, it could be expected to follow that when the state or one of its agencies unlawfully enters upon land to build a road, the landowner would be without remedy in the ordinary course. Since no statute is on the books consenting in advance to a suit, it might be supposed that he would be forced to obtain a resolution from the legislature permitting him to sue the state or agency to recover the value of his land.<sup>2</sup>

Because of a rather unique interpretation of the fairly typical eminent domain provisions of Kentucky's Constitution, however, under these particular facts a resolution is unnecessary. The Kentucky Court has held that where the power of eminent domain has been improperly exercised, *i. e.*, where prior just compensation has not been given, governmental immunity is waived without legislative action. This article will consider the origin and development of this legal principle, the situations coming within it, and some of the legal consequences of the theory.

Section 13 of the Kentucky Constitution provides:

No person shall, for the same offense, be twice put in jeopardy of his life or limb, nor shall any man's property be taken or applied to public use without the consent of his representative, and without just compensation being *previously* made to him.

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<sup>1</sup> See the first article of this series: *Claims Against the State of Kentucky*, 42 Ky. L. J. 65, 78 (1953).

<sup>2</sup> Legislative consent by general act and special resolution will be discussed in the March, 1954, issue of the KENTUCKY LAW JOURNAL in the final article of this series.

Section 242 makes the further provision:

Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property *taken, injured or destroyed* by them; which compensation shall be paid *before* such taking, or paid or secured, at the election of such corporation or individual, *before* such injury occurs. . . .

Under the first section quoted, the action of the state in building a road across a citizen's private property without first providing for just compensation is plainly unconstitutional.<sup>3</sup> In allowing the landowner to sue for compensation, the Kentucky Court says, in effect, that if the Constitution prohibits the taking of private property without compensation and the state does so anyway, the state by so acting must have consented to a suit by the landowner. This allowance of a lawsuit is theoretically not an exception to the rule of sovereign immunity; sections 13 and 242 of the Constitution taken with the official acts simply waive the immunity.<sup>4</sup>

The sections are considered self-executing and allow the property owner to force the sovereign to do that which the Constitution demands despite the lack of statutory implementation. In accordance with this theory, the suit by a citizen has been termed a "retroactive condemnation of land,"<sup>5</sup> and a "condemnation suit in reverse."<sup>6</sup> To think of the theory in these terms will clarify many of the issues involved.

### *Development*

Constitutional waiver of the sovereign immunity of the Commonwealth and the county<sup>7</sup> developed generally along two dis-

<sup>3</sup> Because of this an order against the individual officers might be obtained enjoining them from continuing the road-building, but this is a suit against officers and sovereign immunity is not an issue. See *Claims Against the State of Kentucky*, *supra* note 1.

<sup>4</sup> *Kentucky Bell Corp. v. Commonwealth*, 295 Ky. 21, 172 S.W. 2d 661 (1943); *Layman v. Beeler*, 113 Ky. 221, 67 S.W. 2d 995 (1902).

<sup>5</sup> *Department of Highways of Kentucky v. Parker*, 306 Ky. 14, 206 S.W. 2d 73 (1947).

<sup>6</sup> *Keck v. Haffey*, 237 S.W. 2d 527 (Ky. 1951).

<sup>7</sup> Municipal liability is not discussed since municipal corporations are generally suable except where engaged in a "governmental function." It has long been settled that suit can be brought to recover damages for the taking of land by a municipality. See *Kemper and Wife v. City of Louisville*, 77 Ky. 87 (1878) where the court allowed a suit for damages for flooding of property by a city street improvement, relying on CONST. 1850 (Art. XIII, sec. 14).

tinct lines. The theory had its origin in cases against counties. Counties, as political subdivisions created by the state to carry out state functions, had been held immune from actions for tort as early as 1873.<sup>8</sup> In 1888 it was held that this immunity extended to a situation where the county flooded a citizen's property by negligently changing the course of a stream,<sup>9</sup> but fourteen years later the court rather abruptly departed from this holding. In a case which appears to be the first to hold a county liable for interference with private property without compensation, *Layman v. Beeler*, the county was held liable under the provisions of Constitution section 242. In so holding, the court said:

[Section 242] of the Constitution which requires that the municipality taking private property for public use "shall make just compensation for the property taken, injured or destroyed by them," necessarily implies that, if the corporation should fail to make the compensation . . . it is liable therefor after such taking or injury, and that, if it will not pay the damages, an action is necessarily authorized to be instituted against it; for it would be idle to give to a party a right without a remedy to enforce it.<sup>10</sup>

Two major principles were established by the *Layman* case: (1) A county's immunity to action is waived by the state Constitution when private property has been "taken, injured or destroyed" for a public use; (2) Section 242 of the Constitution, which begins "Municipal and other corporations and individuals . . . shall make just compensation . . ." also applies to a county, although it is not otherwise considered a corporation, individual or municipality. This latter principle was of independent importance at that time because it brought counties within the scope of section 242 which expanded the substantive liability of the corporations within its provisions.<sup>11</sup>

<sup>8</sup> *Wheatly v. Mercer*, 72 Ky. 704 (1873) is the first case found. It was a suit against the fiscal court of Breckinridge County for injuries caused by the collapse of a bridge.

<sup>9</sup> *Downing v. Mason County*, 87 Ky. 208, 8 S.W. 264, 12 Am. St. Rep. 473 (1888). This same act has since been held redressable under Const. sec. 242 in *Moore v. Lawrence County*, 143 Ky. 448, 136 S.W. 1031 (1911).

<sup>10</sup> 113 Ky. 221, 226, 67 S.W. 995, 996 (1902).

<sup>11</sup> *E.g.*, in the 1897 case of *City of Henderson v. McClain*, 102 Ky. 402, 43 S.W. 995 (1902), the court said that the general rule had been that a city could raise or lower the grade of a street (exactly what happened in the *Layman* case) without liability to abutting property owners unless the city actually invaded or trespassed upon the property, because to constitute a "taking" some *direct* injury was necessary. But it then held that section 242 changed this rule so that con-

Section 242 was not included in the 1850 Kentucky Constitution; the only provision for compensation for property taken under the power of eminent domain was Article 13, section 14, which became section 13 of the Constitution of 1891. Adopted for the first time in the present Constitution, section 242 is typical of a change which found its way into the law in one form or another in several states to meet changing social conditions. Until the early part of the last century serious property damage as a result of public works seldom occurred, but with the rapid growth of cities and the consequent increase in public improvement property damage was more frequently inflicted. Constitutional protection had been generally limited to a requirement that compensation be made for property "taken" for a public use. With the strict definition of "taken" in use in many of the states, which often allowed no recovery for "damage" alone, hardship resulting to the landowner brought demands for greater protection. Some states authorized recovery for damage by statute; a few states liberalized the meaning of the word "taken" by judicial interpretation. Others, of which Kentucky is an example, inserted sections like 242 in their constitutions.<sup>12</sup>

The doctrine of constitutional waiver of the Commonwealth's sovereign immunity did not develop so precisely as it did in the case of counties. The wedge was possibly driven at an earlier date than the *Layman* decision, but it is certain that the principle was not clearly established until a much later date. Suits against the Commonwealth for a taking may be classified into two broad groups, depending on the type of agency which is defendant. One class of agency is that which is corporate in form with the power to sue and be sued and to take property. As to this type, immunity has been regarded as no more of a problem than the immunity of the counties. In *Hauns v. Central Kentucky Lunatic Asylum*,<sup>13</sup> the issue was whether or not levy on a judgment obtained by Hauns against the Asylum, a state institution, should be quashed. The judgment had resulted from an earlier suit in

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sequential damage could also be recovered since any impairment of land value which is peculiar to the plaintiff, *i.e.*, which he has sustained in excess of that sustained by the public generally, is an "injury" within the contemplation of section 242 whether there has been a direct injury or trespass or not. Thus, in the *Layman* case, in the absence of section 242, plaintiff would probably have been without a remedy under the *law* as it existed at that time.

<sup>12</sup> See generally, 18 AM. JUR. 753 (1938).

<sup>13</sup> 103 Ky. 562, 45 S.W. 890 (1898).

which the plaintiff complained of a dam erected by the Asylum which caused a stream to stagnate, reducing the value of the plaintiff's property. The judgment for the plaintiff was affirmed by the Court of Appeals on the theory that an agency of the state, given the power to sue and be sued and to take property, is analogous to a municipal corporation. Since it was well established at this time that a municipality was liable for damaging land for a public use, it followed that such an agency was equally liable.<sup>14</sup> In a later case involving the same class of agency, the court said of the defendant:

Now, the Kentucky State Park Commission is a special corporation with very broad express authority, including the power to take property and to sue and be sued in its corporate name. (Citation omitted.) It is more nearly a private corporation than the eleemosynary institutions held liable to suit under the same circumstances, and is far from a county organization and its governmental nature, all of which have been held . . . to be liable for the value therefor.<sup>15</sup>

It is no more difficult, then, to sue such a state agency than it is to sue a municipal corporation or a county. It should be noted, too, that section 242 is applicable in a suit against this type of agency,<sup>16</sup> apparently on the basis of what the court said in the above quotation—that such an agency “is more nearly a private corporation than the eleemosynary institutions held liable to suit under the same circumstances, and is far from a county organization and its governmental nature. . . .”

The second class of agency . . . consists of (1) bodies corporate which have not expressly been given the power to sue and be sued or to hold property and (2) unincorporated departments of the state. An example of the former was the Kentucky Confederate Home, a state institution. On facts almost identical to those in the *Hauns* case (in which the court found liability) plaintiff sued the Confederate Home, predicating liability on section 242,

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<sup>14</sup> The *Hauns* case was later replied upon by counsel as precedent for the liability of a state agency for an ordinary tort, but the distinction that in the *Hauns* case there was a “taking” of private property was made by the court. *Zoeller v. State Board of Agriculture*, 163 Ky. 446, 173 S.W. 1143 (1915).

<sup>15</sup> *Kentucky State Park Commission v. Wilder*, 260 Ky. 190, 196, 197, 84 S.W. 2d 38, 41, 42 (1935) (second appeal).

<sup>16</sup> See *Kentucky Game and Fish Commission v. Burnette*, 290 Ky. 786, 163 S.W. 2d 501 (1942); *Kentucky State Park Commission v. Wilder*, *supra* note 15.

evidently relying on the Hauns case as precedent.<sup>17</sup> Although the Home was a corporation of the state, the court pointed out that it was not given the power to acquire and hold property as such, nor the power to sue and be sued. There being an absence of such powers, property of the Home was actually held by the Commonwealth itself; therefore, a suit against this type of agency is in reality a suit against the state. To allow the suit would be to "hold that the State itself may be sued without its consent and its property subjected to a claim for damages. . . ."<sup>18</sup>

It would seem to follow from the *Confederate Home* case that a suit for taking would not lie against the unincorporated agencies, such as the various administrative departments of the state, which are today much more numerous and important than the incorporated agencies. Suit against these agencies has always been considered to be in effect a suit against the state itself.<sup>19</sup> Although there was an occasional dictum suggesting that the state itself could be sued under the theory of constitutional waiver for a taking,<sup>20</sup> at least as late as 1935 the court expressly reserved any opinion as to the immunity of the state under section 13.<sup>21</sup> The first case which expressly *holds* that the state's immunity is waived, *Lehman v. Williams*,<sup>22</sup> did not appear until 1946. In that case the plaintiff sued the Commissioner of the Department of Highways and various other departmental officials to recover damages resulting from the flooding of his property. The lower court sustained defendant's special demurrer to its jurisdiction and the plaintiff appealed. The court pointed out that such a suit was "essentially against the Commonwealth" but held that it was maintainable under the Constitution, citing the dicta in several earlier cases.

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<sup>17</sup> *Norwood v. Kentucky Confederate Home*, 172 Ky. 300, 189 S.W. 225 (1916).

<sup>18</sup> *Id.* at 303, 189 S.W. at 226. In 1946, in *Lehman v. Williams*, *infra* note 22, the court held the Commonwealth itself subject to the reverse eminent domain suit. *Quaere*, with this obstruction removed, will section 13 alone be applicable against an agency corporate in form but without power to sue and be sued, or will the court say that since the agency is corporate in form section 242 will be applicable?

<sup>19</sup> *Board of Councilmen, City of Frankfort v. State Highway Commission*, 236 Ky. 253, 25 S.W. 2d 1008 (1930).

<sup>20</sup> See for example *Kentucky State Park Commission v. Wilder*, 256 Ky. 313, 76 S.W. 2d 4 (1934) (first appeal).

<sup>21</sup> *Kentucky State Park Commission v. Wilder*, 260 Ky. 190, 84 S.W. 2d 38 (1935) (second appeal).

<sup>22</sup> 301 Ky. 729, 193 S.W. 2d 161 (1946). Although the *Confederate Home* case would seem to be overruled, it was not mentioned.

By 1946, then, it was finally settled that under sections 13 and 242 of the Kentucky Constitution the state or any subdivision thereof, vested with the power of eminent domain, is liable for any interference with property rights in violation of those sections. To say there is liability assumes, however, that the plaintiff has brought his case within the appropriate section—the most important aspect of the whole problem. Whether the plaintiff can do so often depends on the scope which the court is willing to attribute to sections 13 and 242. Other factors also are of importance: for example, certain procedures and rules to which the plaintiff subjects himself as a result of reliance on the theory. Finally, there remains the question, whom should the plaintiff sue, a question which has an unexpected answer where land is affected by road-building, which is the cause of most suits under sections 13 and 242.

### *Coming Within the Theory*

It is a consequence of the terms of sections 13 and 242 of the Constitution that before immunity will be waived, the taking of or damage to property must be related to work being done for the public use. Damage as a result of the negligent or intentional acts of government officials in the course of their duties, unrelated to a project for the public use, remains an ordinary tort and sovereign immunity is not waived.<sup>23</sup> However, it will be seen that the line between ordinary tort and a violation of sections 13 and 242 is sometimes rather obscure. Likewise, injury to the person, though the result of a project undertaken for the public benefit, is not an injury of property within section 242 or a taking of property within section 13 because a human being is not "property" in the contemplation of the law of eminent domain.<sup>24</sup> And though no cases have been found specifically dealing with the problem, presumably sections 13 and 242 do not change the substantive law in respect to the distinction between regulations of one's property rights under the state's police power and a taking or injury under the power of eminent domain, the former of which is noncompensable.

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<sup>23</sup> See *Zoeller v. State Board of Agriculture*, 163 Ky. 446, 173 S.W. 1143 (1915).

<sup>24</sup> *City of Louisville v. Hehemann*, 161 Ky. 523, 171 S.W. 165 (1914).



Since the provisions of sections 13 and 242 differ from each other and have had a different history, it is important first to determine *which* section is applicable in a given case. Section 13, which makes provision for a "taking" only, is by its terms applicable in any case where a citizen's property is taken through the power of eminent domain. But section 242 with its more liberal provision of a "taking, injuring or destroying" is by its terms applicable only to "municipal or other corporations or individuals." If it was intended that section 242 be a blanket provision, like section 13, covering all who take property, it seems unlikely that the framers would have gone to the trouble of enumerating those to whom the section should apply. It is questionable whether the section was intended to be applicable to any governmental unit except municipalities, but the court has held that it is also applicable to counties and to those state agencies which are styled bodies corporate with the power to sue and be sued and to take property.<sup>25</sup>

If section 242 is also applicable to the remaining agencies, *i. e.*, those which are considered to be the state itself, the trouble of distinguishing between an injury and a taking (for what it is worth) could be forgotten. That would be the case if the Court of Appeals meant exactly what it said in this regard in *Lehman v. Williams*,<sup>26</sup> where it quoted with approval the dictum in *Kentucky State Park Comm. v. Wilder*:<sup>27</sup>

"Section 13 of our Constitution, which is included in the Bill of Rights, forbids such a taking and section 242 of the Constitution likewise provides that just compensation shall be made for private property taken, injured, or destroyed for public use. Under these express provisions, an appropriate action will lie against the Commonwealth as well as against corporations or individuals for damages growing out of the taking, *injuring*, or *destroying* of private property for public purposes."<sup>28</sup>

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<sup>25</sup> *Supra* page 165.

<sup>26</sup> *Supra*, note 22.

<sup>27</sup> *Kentucky State Park Commission v. Wilder*, 256 Ky. 313, 76 S.W. 2d 4 (1934), second appeal reported in 260 Ky. 190, 84 S.W. 2d 38 (1935).

<sup>28</sup> 301 Ky. 729, 731, 193 S.W. 2d 161, 163 (1946). It is perhaps significant that the court was quoting dictum from a case involving a corporate agency. On the second appeal of the *Wilder* case the court reserved the question of whether the state itself was suable.

The 1951 case of *Commonwealth v. Kelley*<sup>29</sup> suggests that the language in the *Lehman* case was inadvertent, however. After pointing out that the suit was against the Commonwealth (the plaintiff was suing the Highway Department for inundating his land), the court said: "It may be seen then that the owner of property may sue the State without its consent *only when his property has been 'taken.'*" (Italics writers'.)<sup>30</sup> Though never saying it in so many words, the court must have meant that as against the state itself, section 13 alone is applicable. This holding is the only one which could be justified, since it would be distorting section 242 to include the state within its scope.<sup>31</sup>

No problem of distinguishing between agencies covered by section 242 and agencies covered by section 13 only arises when there has been an actual taking in the dictionary sense: *e. g.*, where a strip of land is used for a roadbed without being condemned.<sup>32</sup> The question arises when interference with land is less direct, as where the grade of a road is changed. This is not a taking in the literal sense, but the construction given section 242 leaves no doubt as to recovery for a reduction in land value as a result of such a change. In fact the first case extending the theory to counties, *Layman v. Beeler*,<sup>33</sup> held such an act within section 242, defining that section's scope in the following terms:

If . . . the improvement of the highway in question did so impair the plaintiff's adjacent lands and their value as to damage him—that was a taking and injury within the contemplation and meaning of the Constitution.<sup>34</sup>

Thus under section 242, an action will lie where there is no actual taking, and not even a trespass or direct injury is necessary.

The principle that an "injury" occurs any time there has been a reduction in the value of the plaintiff's property cannot be carried to its logical extreme. In the absence of a direct invasion on plaintiff's property, not only must some reduction in value be

<sup>29</sup> 314 Ky. 581, 236 S.W. 2d 695 (1951).

<sup>30</sup> *Id.* at 584, 236 S.W. 2d at 696.

<sup>31</sup> The meaning of the opinions continues to be obscured by talk of both sections 13 and 242, but it is clear from the cases that in Highway Department suits section 13 only is being applied.

<sup>32</sup> See *Metcalf v. Lyttle*, County Judge, 219 Ky. 488, 293 S.W. 979 (1927); *Muhlenberg County v. Ray*, 215 Ky. 295, 284 S.W. 2d 727 (1926); *McDonald v. Powell County*, 199 Ky. 300, 250 S.W. 1007 (1923).

<sup>33</sup> 113 Ky. 221, 67 S.W. 995 (1902).

<sup>34</sup> *Id.* at 226, 67 S.W. at 996.

shown to establish the plaintiff's damage, but the added element of a substantial interference with some existing property right must also be shown. This element is not mentioned as such very often in the opinions because in the majority of cases the property right which has been injured or taken is too obvious to need discussion. The ingress-egress cases serve to illustrate the principle. If a road is closed a block away from the landowner's property, and as a result many of his customers find it inconvenient to continue their trade, his property will be reduced in value. If he leases to business tenants, they may leave him for a better location. The property owner, however, has no action against the county for changing or closing the road, because none of his property rights has been taken or injured. On the other hand, if a road directly contiguous to plaintiff's property is closed so that his property is reduced in value, a cause of action exists for a taking or injuring. The theory is that a landowner holds the vested right to an easement in a road directly contiguous to his land, for the purpose of getting to and from his property. When the road is closed a valuable property right is taken.<sup>35</sup> The easement of the abutting property owner is not one which gives him the right to *convenient* ingress and egress; therefore a substantial interference at least is necessary to recovery.<sup>36</sup> On the same theory recovery is allowed when the grade of a road is changed, unreasonably obstructing an abutting owner's ingress and egress.<sup>37</sup>

A more unique case where recovery was allowed for a reduction in property value as a result of interference with a property right is *City of Ashland v. Queen*.<sup>38</sup> Through the joint efforts of the city, county, a railroad company and a steel company, a viaduct was constructed which passed the plaintiff's house at the second-story level. The old road had passed by plaintiff's property, so he had a valid claim for the taking of his easement. Beyond this, however, it was alleged and proved that cars passing close to and at the second-story level of his house threw dirt and cinders on the house, gave forth obnoxious odors, caused the house to vibrate, and generally increased the outside noise. In addition to all this, the

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<sup>35</sup> For cases illustrating the distinction, compare *De Rossette v. Jefferson County*, 288 Ky. 407, 156 S.W. 2d 165 (1941), with *Cranley v. Boyd County*, 266 Ky. 569, 99 S.W. 2d 737 (1936).

<sup>36</sup> *Ibid.*

<sup>37</sup> See *Bader v. Jefferson County*, 274 Ky. 486, 119 S.W. 2d 870 (1938).

<sup>38</sup> 254 Ky. 329, 71 S.W. 2d 650 (1934).

viaduct itself shut out the light and air from the plaintiff's residence. No doubt the value of the premises was reduced; and the reduction was a consequence of the above objections, which constituted an interference with the plaintiff's right of privacy and quiet enjoyment—a valuable property right. Recovery was allowed practically without discussion of a taking, the main problem of the case being upon whom to place liability.<sup>39</sup>

None of the cases discussed thus far has involved a direct injury to private property such as a trespass. The most usual direct injury is a simple entering on and using of unpaid-for property for a roadbed, the stock situation for the operation of section 13 or 242. Often, however, the defendant has had a right to be on the right-of-way, but for some reason has trespassed on private property abutting thereto. Little difficulty has been encountered in suing the sovereign under such circumstances. Suits have been allowed where debris was blasted onto private property,<sup>40</sup> where private property was flooded,<sup>41</sup> and where sewage from toilets seeped onto private property.<sup>42</sup> Some of these trespasses are permanent and continuing in nature, some are temporary only. From the results of the cases, the distinction seems to be of little importance. The terms of section 242 do not require any permanency of damage since an "injuring" might well result from a temporary flooding of property.<sup>43</sup> However, as will be seen later, the theory for the measure of damage in suits under section 13 or 242 may be inconsistent with allowing recovery for damage of a temporary nature.

It has been said that a suit under section 13 or 242 in effect simply forces the sovereign to do that which it should have done of its own initiative. The converse of this proposition—that immunity is waived only when the damage, from its nature, is the

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<sup>39</sup> That the facts as alleged and proved by the plaintiff might have constituted a nuisance was not discussed. Nuisance principles have been used as a guide and for purposes of stating a rule for construing section 242. For example, it has been said, "When the tortious act of the county results in the creation of a nuisance which has the effect of reducing the value of the use of property, it is the taking of property within the meaning of that constitutional provision [section 242] and for that reason only may the county be held liable in damages." *Webster County v. Lutz*, 234 Ky. 618, 625, 28 S.W. 2d 966, 969 (1930).

<sup>40</sup> *Jefferson County v. Bischoff*, 238 Ky. 176, 37 S.W. 2d 24 (1931).

<sup>41</sup> *Department of Highways v. Corey*, 247 S.W. 2d 389 (Ky. 1952); *Keck v. Hafley*, 237 S.W. 2d 527 (Ky. 1951); *Commonwealth v. Kelley*, 314 Ky. 581, 236 S.W. 2d 695 (1951); *Black Mountain Corporation v. Houston*, 211 Ky. 621, 277 S.W. 993 (1925).

<sup>42</sup> *Webster County v. Lutz*, 234 Ky. 618, 28 S.W. 2d 966 (1930).

<sup>43</sup> *Mercer County v. Ballinger*, 238 Ky. 120, 36 S.W. 2d 856 (1931).

kind for which compensation could have been made prior to its infliction—is not true. The scope of sections 13 and 242 has not been so narrowly construed. In *Jefferson County v. Bischoff*,<sup>44</sup> recovery was sought for damage inflicted when the county, operating a quarry near plaintiff's land, blasted debris thereon. The county contended it could not have made prior compensation because it did not know or expect any damage would be done, and therefore section 242 was not applicable. The court answered that the county in blasting so close to the plaintiff's property could have anticipated some damage and therefore could have condemned the plaintiff's property. This reasoning seems dubious when one considers the resulting fiscal condition of a county should it be required to condemn all property as to which some possible damage could be anticipated. It can well be doubted that the positive commands of section 13 or 242 are so broad; it would seem logically that the sections cannot waive the sovereign's immunity except insofar as the sovereign has contravened their commands. But logic aside, it certainly cannot be doubted from a legal viewpoint based on precedent, because the rule stated in the *Jefferson County* case is broad enough to include all such negligent invasions of property:

The injury to the property as an incident to construction and operation of public enterprises has always been considered as a taking of property within the purview of the section of the Constitution referred to [section 242], and counties . . . have been held liable for such damages.<sup>45</sup>

The two necessary elements which are prerequisites to recovery are (1) an injury to property which is (2) an incident to construction or operation of public enterprises. But the rule is lacking in one element which consciously or subconsciously is usually linked with recovery for property taken under the power of eminent domain, *viz.*, that the taking or injuring of the property be a *necessary* step in the project being undertaken for the public benefit. From the standpoint of justice it is well, perhaps, to be as liberal as possible in allowing plaintiffs recovery when they have suffered a wrong and may be in keeping with the intention of the framers, implied from the insertion of section 242 in the Constitution, that recovery in the future be more liberally allowed. But

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<sup>44</sup> 238 Ky. 176, 37 S.W. 2d 24 (1931).

<sup>45</sup> *Id.* at 178, 37 S.W. 2d at 24-25.

the rule allowing recovery for incidental damage unintentionally inflicted as followed by the court becomes almost indistinguishable from allowing suit for an ordinary tort. Consider the case of *Letcher County v. Hogg*,<sup>46</sup> where the plaintiff's land was washed away when the flow of the Kentucky River was slightly changed as a result of drift which accumulated against a bridge. On the theory of constitutional waiver under section 242, the county was held liable for the "taking" of private property. The wrong committed was the negligent maintenance of the public project—the bridge. It is a dubious feat of logic which distinguishes this case from those where injury occurs to a traveller as a result of a defect in the bridge, in which case immunity is not waived.<sup>47</sup> If the strict theory of eminent domain is to be departed from in this respect it should be abandoned as to other aspects of the case in order to obtain any sort of consistency. When damages are considered later it will be seen that the court adheres strictly to eminent domain principles in determining the measure of damages, creating practical difficulties when applied to recovery for negligent acts under this broad construction of section 242.<sup>48</sup>

There is no difficulty in finding an interference with a property right in these cases involving a direct trespass on private property—the trespass alone is an interference with a recognized property right. Yet, in two cases, the court has unwittingly carried over to trespass cases a principle applicable to another situation to reach the impossible result that sometimes an actual trespass does not constitute an interference with a property right. It is a recognized principle that where one's property is taken, any diminution in the value of that person's remaining adjacent land, caused as a result of the taking and using of a part of the land, can be recovered as consequential damages. To be distinguished from this is the case where one citizen's property is reduced in value as a result of the government's taking and using the property of that citizen's neighbor. An illustrative case is *Campbell v. United*

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<sup>46</sup> 209 Ky. 182, 272 S.W. 423 (1925).

<sup>47</sup> *Taylor v. Westerfield*, 233 Ky. 619, 26 S.W. 2d 557 (1930).

<sup>48</sup> Louisiana, under very similar constitutional provisions, applies the same general theory as Kentucky. See LA. CONST. Art. I, sec. II. Injury to property, however, is a taking or damaging within the constitution only when it results from an *intentional* act related to a public project, or occurs as the "necessary consequence" of a public undertaking. (*Italics writers'.*) Purely negligent acts remain torts for which the state is immune. *Arthurs Angelle, Jr. v. State of Louisiana*, 212 La. 1069, 34 So. 2d 321, 2 A. L. R. 2d 666 (1948).

*States*,<sup>49</sup> decided in the Supreme Court. There part of the plaintiff's land was taken along with the land of other neighboring individuals by a United States official exercising the power of eminent domain. The land was to be used as the site of a nitrate plant. The plaintiff sued to recover the value of his land which was taken plus the diminution in value of his remaining tract that resulted from the taking of and the use to which the government intended to put the adjoining lands *taken from the plaintiff's neighbors*. It was held that the plaintiff could recover only the value of his land which was taken and the diminution in value of the remainder of his tract resulting from the taking and use of part of the plaintiff's land. The reasoning behind the result is that taking the plaintiff's property is an interference with one of his property rights, and any reduction in value of his property as a result of this interference can be recovered. But a reduction in the value of the plaintiff's property as the result of a taking of other person's land is the consequence of an interference with that other person's property rights; hence the reduction in value is not recoverable.

In the Kentucky case of *Hopkins County v. Rodgers*,<sup>50</sup> the county purchased a right-of-way from one Thomas, and in building a road thereon failed to construct properly certain culverts so that water failed to drain from the plaintiff's land which was adjacent to Thomas' property. Suit was brought under section 242 to recover the resultant damage. In refusing recovery, the court said that it was incumbent upon one seeking recovery under section 242 to show that the damage complained of resulted from construction of a road over land *he* conveyed to the county. In a later case, *Perry County v. Tyree*,<sup>51</sup> a road was constructed over land acquired from someone other than the plaintiff, and in the process of construction debris was blasted onto the plaintiff's nearby property. Again section 242 was held inapplicable, because "no part of appellee's boundary, or any easement or right in property adjacent to or abutting thereon was appropriated or affected. . . ." Why there must be some interference with an easement or other property right in addition to the trespass is not set forth in either case, but it evidently springs from a reading of other cases where

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<sup>49</sup> 266 U. S. 368, 45 S. Ct. 115 (1924).

<sup>50</sup> 275 Ky. 778, 122 S.W. 2d 743 (1938).

<sup>51</sup> 282 Ky. 708, 139 S.W. 2d 721 (1940).

such an interference is held to be necessary without looking to the reasons for the holding. In the absence of a trespass, some interference with a property right must be found or there can be no taking; but once a trespass is shown by plaintiff, the court need look no further. It is therefore submitted that the two above decisions are erroneous to the extent reliance is placed on the absence of some taking or interference in addition to the trespass itself.<sup>52</sup>

*Effect of a Conveyance as Estoppel.* Even though damage results to the owner of the remaining land from the use of the land conveyed he may be estopped because of his previous conveyance. Quite often, land is conveyed for a right-of-way, and in the course of building the road it is found necessary to use more land than was contemplated, or through negligence more land is taken or injured than was included in the conveyance. When this happens, whether or not the plaintiff can recover the value of the additional land depends upon the manner in which it was taken or injured. The controlling principle is the rule that a conveyance of land naturally carries with it the right to put the land to its intended use; therefore, the grantor is entitled to no further consideration if that right is exercised in a prudent and proper manner. Liability in these cases, then, depends upon the answers given to two questions: (1) Was additional land taken or destroyed as a result of the state's putting the land conveyed to its intended use? (2) Was the right to put the land to its intended use exercised in a prudent and proper manner? If the answer to either of these questions is no, compensation must be given for the additional land.

Suppose plaintiff-grantor conveys a strip of land to the Highway Department, and upon completion of the highway by the Department, the plaintiff finds the grade of the road is above or below his property so as to interfere with his right of ingress or egress. The land was put to its intended use, and, in the absence of negligence or bad faith of the Department, the plaintiff cannot

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<sup>52</sup> For a few cases allowing recovery when trespass was the only interference which appeared from the facts, see *Commonwealth v. Kelley*, 314 Ky. 581, 236 S.W. 2d 695 (1951); *Lehman v. Williams*, 301 Ky. 729, 193 S.W. 2d 161 (1946); *Jefferson County v. Bischoff*, 238 Ky. 176, 37 S.W. 2d 24 (1931); *Webster County v. Lutz*, 234 Ky. 618, 28 S.W. 2d 966 (1930); *Moore v. Lawrence County*, 143 Ky. 448, 136 S.W. 1031 (1911).



recover damages.<sup>53</sup> If the strip conveyed by the plaintiff had not been previously paid for by the proper party, a suit could have been brought and, as it will be seen later, plaintiff could recover actual and *consequential* damages. In effect, the compensation previously given for a conveyance by the plaintiff is considered as being compensation for the land itself plus any consequential damage to the remaining land.<sup>54</sup>

A more extreme case occurs when the Highway Department builds a road on land conveyed to it by the plaintiff, and in excavating for the roadbed, removes the lateral support of the plaintiff's adjacent property, causing it to slip, slide and break. Again, the Department is merely putting the conveyed land to its intended use and, in the absence of negligence or bad faith, incurs no liability for the damage to the remaining land. The removal of the lateral support is consequential to the use of the strip of land owned by the Department.<sup>55</sup>

A conveyance of a strip of land does not, of course, preclude an action by the grantor to recover the value of additional land when it is taken outright by the Department.<sup>56</sup> If more property is needed than was thought to be necessary, it must be purchased. Nor does a conveyance carry with it the right to trespass directly on any of the remaining adjacent property even though the trespass is necessary to the proper exercise of the right to put the strip conveyed to its intended use. This is not an exception to the rules set out above, but is merely a recognition of the fact that both the grantor and the grantee assumed that the latter would stay within the strip conveyed in putting land to its intended use. There is no real distinction between a trespass by the Department upon adjacent property as a result of work carried on within the right-of-way and the case where the Department finds it needs more land than was originally thought necessary and takes it. The purchase of a right-of-way through a man's land does not give the purchaser the right to destroy the remainder by careful blasting.<sup>57</sup>

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<sup>53</sup> *Fallis v. Mercer County*, 236 Ky. 315, 33 S.W. 2d 12 (1930).

<sup>54</sup> *Ibid.*

<sup>55</sup> *Snyder v. Whitley County*, 255 Ky. 741, 75 S.W. 2d 373 (1934). In *Bar-rass v. Ohio County*, 240 Ky. 149, 41 S.W. 2d 928 (1931), the Department *negligently* constructed culverts causing the plaintiff's land to be flooded. The fact that the land upon which the road and the culverts were constructed had been conveyed to the Department did not preclude an action by plaintiff for compensation. But suit was dismissed because brought against the wrong party.

<sup>56</sup> *Trimble v. Powell County*, 237 Ky. 501, 35 S.W. 2d 882 (1931).

<sup>57</sup> *Hall v. Ellis and Brantley*, 238 Ky. 114, 36 S.W. 2d 850 (1931).

*Section 13.* Are the rules which have developed under section 242 applicable when only section 13 is available? This question cannot be answered with any certainty. Where section 242 is applied, the opinions usually use the terms "taking and injuring" and "taking" interchangeably. Therefore in a given case it is often impossible to know whether the facts are considered to constitute a "taking" or only an "injury," so that cases against counties or certain state agencies may be inconclusive when only section 13 is under consideration. It is doubtful, nevertheless, whether any great distinction is made between an injuring and a taking. Through the continual use of the word "taking" when applying the more liberal terms of section 242, some of the meaning of that section seems to have rubbed off on the word. Whether this is the reason or not, it takes much less to constitute a taking now than it has in the past. Little can be said on the basis of actual holdings because suits have only recently been allowed against such agencies as necessitate the application of section 13 only; consequently few decisions have thus far been handed down. There have been no cases in which recovery was denied on the ground that a mere "injury" short of a taking was involved, however, and enough has been written to indicate that a direct invasion or injury to property such as a trespass is no longer necessary to constitute a taking. An unreasonable interference with the ingress and egress of an abutting landowner is sufficient without any actual trespass.<sup>58</sup> A fortiori a total ouster of possession is unnecessary.<sup>59</sup>

Practically all the suits in point have been against the Highway Department and in a very large percentage of them there has been a trespass, mostly in the form of flooding. Recovery has consistently been allowed with little regard for the amount of extra water on the plaintiff's land or the amount of time the water was there. Reiterated in substance in these cases is the following rule:

The appellants argue that to show a "taking" of property, the petition must state facts from which the court may infer a total ouster of possession, or at least a substantial deprivation of all beneficial use of the land affected. It seems to us, however, that an interference with the legally protected use to which land has been dedicated, which destroys that use or places a substantial and additional

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<sup>58</sup> See *Commonwealth v. Tate*, 297 Ky. 826, 181 S.W. 2d 418 (1944).

<sup>59</sup> *Commonwealth v. Kelley*, 314 Ky. 581, 236 S.W. 2d 695 (1951).

burden on the landowner to maintain that use, is a "taking" of his property.<sup>60</sup>

Put in different words, it has been said:

We cannot say as a matter of law that there has not been a "taking" when residential property has been damaged to such an extent that to maintain its use would require considerable expense on the part of the landowner.<sup>61</sup>

Few fact situations where the plaintiff could show "substantial" damage could not be brought within this phraseology, assuming the damage resulted from a public project. It is unsafe perhaps to generalize on the basis of so few cases, but it seems that any case fitting the county rule—reduction in value of property as a result of interference with some property right and incident to the construction or maintenance of a public project—would also be within section 13.

#### *Some Consequences of Relying on Constitutional Waiver of Immunity*

*Pleading.* The same liberality with which the court has allowed recovery under section 13 or 242 has been exercised in interpreting the pleading of a damaged property owner. It would not be surprising to find that since recovery against the governmental unit depends on a rather technical waiver the court would insist on the plaintiff's casting his pleadings in such terms as would make it plain that reliance is placed on the constitutional waiver. This has not been the case. In *McDonald v. Powell County*<sup>62</sup> the petition sounded in ejectment and trespass. The lower court struck that part which sought an ejectment, then sustained a demurrer to the remainder on the ground that a county is immune from suit for trespass. On appeal, this holding was reversed; the court held that although a trespass was pleaded, the gravamen of the plaintiff's action was the appropriation of his land for a public use.<sup>63</sup>

Neither is it necessary to plead a "taking" when the suit is against the Commonwealth. It is sufficient if facts are pleaded from which the court can conclude that the plaintiff's land has

<sup>60</sup> *Id.* at 585, 236 S.W. 2d at 697.

<sup>61</sup> *Id.* at 586, 236 S.W. 2d at 697.

<sup>62</sup> 199 Ky. 300, 250 S.W. 1007 (1923).

<sup>63</sup> Followed by *Terhune v. Gorham*, 225 Ky. 249, 8 S.W. 2d 431 (1928); *Harlan County v. Cole*, 218 Ky. 819, 292 S.W. 501 (1927).

been "taken."<sup>64</sup> Care must be exercised that the essential facts are pleaded, however. For example, in a suit for obstruction of ingress and egress, it should be set out that the road in question is contiguous to the plaintiff's land, and that the obstruction is complete or unreasonable.<sup>65</sup>

By interpreting the pleadings for the plaintiff as it does, the court at the same time is telling him that eminent domain not tort law will apply, and that the measure of damages will be quite different than the measure in an action for trespass. This latter difference can have far-reaching consequences.

*Measure of Damages.* In accordance with the theory of recovery, *i. e.*, that plaintiff is forcing the sovereign to comply retroactively with the constitutional commands of sections 13 and 242, the measure of damages is governed by the rules applicable to condemnation proceedings. *Harlan County v. Cole*<sup>66</sup> is often cited as containing the correct statement of the measure of damages. In propounding an instruction to be given the jury upon remand of the case, the court said:

If the jury find for the plaintiff they will find for him the reasonable market value of the strip of land taken, considered in relation to his entire two tracts, also the diminution, if any, in the reasonable market value of the remainder of the tract directly resulting by reason of the situation and shape in which it is placed by the taking of said strip; but the whole finding under this instruction shall not exceed in all the difference between the reasonable market value of the whole two-acre tract immediately before and the reasonable market value of the remainder immediately after the taking of the strip.<sup>67</sup>

*Enhancement and Diminution.* Often when a road is built property abutting thereto is enhanced in value. Nothing is contained in the above instruction which would warrant setting off any enhancement in the value of land against the value of that part which was taken, or against the reduction in value, if any, in the remaining tract directly resulting from a taking of the part. That such enhancement in value is not to be set off against any loss was made plain in the *Harlan County* case when an earlier

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<sup>64</sup> *Commonwealth v. Kelley*, 314 Ky. 581, 236 S.W. 2d 695 (1951).

<sup>65</sup> *De Rossette v. Jefferson County*, 288 Ky. 407, 156 S.W. 2d 165 (1941).

<sup>66</sup> 218 Ky. 819, 292 S.W. 501 (1927).

<sup>67</sup> *Id.* at 824, 292 S.W. at 504.

case<sup>68</sup> allowing set-off was expressly overruled to the extent it differed from the *Harlan County* case. The result is reasonable. Enhancement of the value of property accrues to any person whose land is near a new highway though none of his land was taken or destroyed in building the road. No payment is made for this increase in value, and the fact that the plaintiff is suing the road-builder is no reason to charge the plaintiff.

Since section 242 was applied in the *Harlan County* case, the damage instruction is not necessarily binding in a case where section 13 only is applicable. There are only two parts of the instruction, however, which might differ under section 13. It could be argued that the diminution in value of the land that the plaintiff retains, which results from a taking of part of the land, should not be recovered as a "taking." The few cases arising where section 13 alone is applicable have not dealt with the question. But a very early case, decided before section 242 was adopted and when the counterpart of section 13 was the only constitutional guaranty in existence, held that the diminution in value of plaintiff's remaining land was recoverable as an incident to the taking of part.<sup>69</sup> This rule probably remains unchanged. But if the diminution in value is recoverable in addition to the value of the land actually taken, can the enhancement in value of the plaintiff's remaining land, resulting from the existence of a road, be set off against this diminution when section 13 only is applicable? Before the adoption of section 242, enhancement could not be set off against the value of the land *actually taken*, but it could be set off against any loss resulting from a diminution in value of the land retained by the plaintiff. The reasoning of the court was that the diminution in value was consequential or incidental damage and thus could be balanced against a consequential or incidental increase in value. With the adoption of section 242 this rule was changed. The broader terms of that section made the diminution in value of retained land direct damage. Such diminution was said to be an "injuring" within the contemplation of section 242 and therefore a consequential increase in value could no longer be set off against this loss.<sup>70</sup>

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<sup>68</sup> *Logan County v. Davenport*, 214 Ky. 845, 284 S.W. 98 (1926).

<sup>69</sup> *Asher v. L. & N. R.R. Co.*, 87 Ky. 391, 8 S.W. 854 (1888).

<sup>70</sup> On this historical development, see the analysis in *Broadway Coal Mining Co. v. Smith*, 136 Ky. 725, 125 S.W. 157, 26 L.R.A. (NS) 565 (1910).

Where this leaves the plaintiff who can sue under section 13 only is not clear. Since the diminution in value of remaining land is not a "taking," recovery of that loss must still be considered an incidental or consequential loss, which makes applicable the old argument that consequential enhancement can be set off against consequential damage. The problem is not as apt to arise when the Commonwealth is the defendant, and so far as can be determined from the cases decided since the Commonwealth has been held liable under section 13 the question has not been answered.

*Injunction.* The recovery of damages is not the only possible remedy where section 13 or 242 has been violated. Irrespective of whether a county, corporate agency or state agency (the Commonwealth) is building the road, the plaintiff can seek an injunction against its officials to enjoin acts which are violative of the Constitution. The reasons for allowing the remedy of injunction were stated in an early case, *Herr v. Central Kentucky Lunatic Asylum*:

[E]xemption of the State from suit without its consent was intended for its own protection; not at all to enable agents or officers to do with impunity injury to private rights.

To say a court of chancery could not enjoin them entering upon and appropriating, without compensation, land of a private person, though done under color of statutory power, and in interest of the State, would be, indeed, a startling proposition. . . . It cannot be that in such case a person injured would be wholly without remedy merely because the wrongdoers are agents or officers holding and controlling property of the State.<sup>71</sup>

When the state or county officials step beyond their authority, as they do when acting in contravention of the express commands of the Constitution, the mantle of protection ordinarily extended them as officers of the sovereign is lost. They can therefore be restrained as individuals and no waiver of immunity is necessary.<sup>72</sup>

*Injunction and Damages.* Can a plaintiff seek damages for injury to his property up to the time suit is commenced, and obtain

<sup>71</sup> 97 Ky. 458, 462, 463, 30 S.W. 971, 972 (1895).

<sup>72</sup> See *Anderson v. State Highway Commission*, 252 Ky. 696, 68 S.W. 2d 5 (1934); *Wharton, County Road Supervisor v. Barber*, 188 Ky. 57, 221 S.W. 499 (1920).

an injunction to restrain future damage? This course of action is not unusual in an ordinary civil suit but in suits under sections 13 and 242 the court emphatically answers no. For the court to allow such relief, the theory under which recovery of damages is allowed would have to be ignored or modified. Under the present measure of damages in theory the plaintiff receives full compensation for his property; in effect the defendant "buys" the land. Having purchased it, the defendant can dispose of the property as it pleases.<sup>73</sup> Thus, plaintiff must choose between an injunction and compensation.<sup>74</sup> The theoretical soundness of refusing an injunction to supplement compensation recovered by plaintiff cannot be challenged so long as the law of eminent domain is applied. This problem points up the whole question of the measure of damages where the taking is less than a permanent occupation of the land to the exclusion of the owner. With the adoption of section 242 and the expansion of the meaning of the term "taken" under section 13, the necessity of applying the theory that the defendant "buys" the property in question might well be re-examined. Consider the facts of a recent case, *Commonwealth v. Kelley*.<sup>75</sup> The plaintiff's property was flooded and the foundation of his home was damaged as a result of a negligently maintained highway and culvert. It was held by the court that such damage could amount to a taking.<sup>76</sup> What is the measure of damages under these facts? The court did not expressly consider that problem, but from what has been said in other cases, the measure should be the value of the property taken. Therefore one item of the measure would be the value of the flooded land, another the damage to the foundation of the house and, perhaps, even the value of the house, which was allegedly rendered unfit for occupancy.<sup>77</sup> But must the Department buy the entire property and pay for total ouster as suggested by other cases<sup>78</sup> or may it merely buy the right to maintain the conditions complained of for the future?

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<sup>73</sup> *Keck v. Hafley*, 237 S.W. 2d 527 (Ky. 1951).

<sup>74</sup> *Lehman v. Williams*, 301 Ky. 729, 193 S.W. 2d 161 (1946).

<sup>75</sup> 314 Ky. 581, 236 S.W. 2d 695 (1951).

<sup>76</sup> The case is discussed on this point, *supra* p. 179.

<sup>77</sup> In *Mercer County v. Ballinger*, 238 Ky. 120, 36 S.W. 2d 856 (1931), some of the plaintiff's land was used for a roadbed, some more was flooded. As to the flooded portion, the jury was instructed to find the damage sustained by the plaintiff. On appeal it was held that the sole instruction authorized in such a suit is that damages will be the reasonable market value of the property taken.

<sup>78</sup> See, for example, *Keck v. Hafley*, 237 S.W. 2d 527 (Ky. 1951); *Kentucky Game and Fish Commission v. Burnette*, 290 Ky. 786, 163 S.W. 2d 501 (1942).

Although, in *Commonwealth v. Kelley*, the declaration alleged that the property had been rendered permanently and totally unfit and the court spoke of an "appropriation of the property," it is doubtful that the court intended to allow recovery of the value of the house. For instance, the court speaks of an "interference with the legally protected use . . . which places a substantial and additional burden on the landowner to maintain that use . . ." and says that there may be a taking "when residential property has been damaged to the extent that to maintain its use would require considerable expense."<sup>79</sup> Yet in the *Kelley* case the court repeatedly spoke of a taking of "property." If it meant a taking of "the cost of continuing the use," it was giving a new meaning to the word property.

Another aspect of the problem—damages where the taking was only temporary—was raised by a later case, *Keck v. Hafley*.<sup>80</sup> There again plaintiff's land was inundated, this time because of the negligence of the Highway Department in changing a creek channel and constructing a wall. The lower court awarded damages and issued an injunction to restrain future maintenance of the conditions. The Court of Appeals remanded the case with instructions that the plaintiff elect his remedy since, if damages were assessed, they must be for the *permanent* injury, giving to the Highway Department the right to maintain the conditions. To accord with this theory the damages must be the value of the flooded property or the difference between the value of the property not subject to flood and the value of the land permanently subject to flood. The result may be unreasonable both as to the plaintiff and the defendant. From a common-sense point of view, a better result would seem to be reached by allowing the plaintiff to recover the actual damage incurred, as for a trespass, and to obtain a mandatory injunction ordering the defendants to correct the situation in any case where under ordinary equitable principles this is the proper remedy. If on the other hand it would be nearly impossible to remedy the condition from a physical standpoint or impractical to do so from a financial standpoint there would be a "permanent" nuisance and injunction would be denied. In such a case the defendant would *need* the property and the theory of

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<sup>79</sup> 314 Ky. 581, 584, 586, 236 S.W. 2d 695, 697 (1951).

<sup>80</sup> 237 S.W. 2d 527 (Ky. 1951).



eminent domain properly would apply; consequently, the value of the land could be paid and the right to maintain the condition obtained.

*Injury and Injunction.* Where section 242 applies, adherence to the strict eminent domain theory of purchasing the property may be even more impractical. If less damage is necessary to constitute an "injury" than a "taking," a county or state agency to which section 242 is applicable may be forced to buy property when the damage is slight. In the ordinary case when a county is the defendant, a forced purchase simply causes the county to do exactly what it should have done on its own initiative, but there are a few cases where the result is anomalous. In *Breathitt County v. Hudson*,<sup>81</sup> plaintiff complained of debris which had been blasted onto his property in the course of the construction of a road. The lower court instructed the jury to find the damage, if any, done to the plaintiff's adjacent land. For the reason that this instruction, among others, was erroneous, the Court of Appeals reversed judgment for the plaintiff and set out several principles for the guidance of the lower court. Two principles put forth were: (1) that the county is liable for a taking or appropriation of property and this embraces substantial trespass or direct injury such as covering property with debris; (2) the measure of damages in such a case as this is the same as in a condemnation proceeding. This measure would be the value of the property taken or injured.<sup>82</sup> Under this standard of recovery, must the county buy property simply because debris was cast thereon? Ownership of the land for the sake of the right to leave the debris there or even to dump more there in the future would be a right of questionable value to the county.

That the court has recognized the unreasonableness of such a result in this type of case is apparent from at least one decision, *Jefferson County v. Bischoff*.<sup>83</sup> There the county in operating a quarry near the plaintiffs' property blasted debris onto the roof and chimney of his house and caused loss of water from his cistern. The county contended that the facts did not create a proper case

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<sup>81</sup> 265 Ky. 21, 95 S.W. 2d 1132 (1936).

<sup>82</sup> When section 242 is applied, an injunction still cannot be obtained along with damages. *Kentucky Game and Fish Commission v. Burnette*, 290 Ky. 786, 163 S.W. 2d 501 (1942).

<sup>83</sup> 238 Ky. 176, 37 S.W. 2d 24 (1931).

for the application of section 242, since by the nature of things the county could not have complied with that section by making prior compensation. The court felt that the county *might* have anticipated such damage; therefore, it was a proper case for the application of section 242. The court said: "If, for the necessary operation of the quarry, it becomes necessary to use or disturb appellees' property, why could not that have been condemned?"<sup>84</sup>

Not enough facts appear in the opinion to determine whether the debris was the result of negligence or accident, or was the regular and necessary result of operations. If it were the latter the continued operation of the quarry would necessitate condemnation of the land. But it seems a bit unreasonable to require a county to buy a house and lot because of the possibility that sometime some debris might *negligently* or accidentally be cast upon the premises. The court in this case departed from the general instruction on damages and said, "All agree that the proper criterion in such instances is a sum sufficient to restore the property to the condition it was in before the injury."<sup>85</sup> Except for this quotation, the language of the opinion implies that the measure of damages would be the value of the property injured, whether only that actually damaged, *i. e.*, the roof, chimney, and cistern, or the whole premises. If the injury was not of a continuing nature, was due to negligence or accident, and there was no necessity that it occur again in the future, a requirement that the county pay for total ouster would be unrealistic. To allow damages measured by the above standard, the cost of restoring, certainly seems to be the most reasonable result.

If the court construes sections 13 and 242 as including damage to property which is temporary in nature, or damage which is easily remedied—for example, flooding as a result of negligently constructed culverts—the measure of recovery should no longer be the "value of the property taken."<sup>86</sup> The problem results from adherence to the traditional measure of damages while allowing recovery for acts not traditionally considered to be the exercise of the power of eminent domain. Since it is unlikely that the court will restrict the meaning of the terms "taken" and "injured"

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<sup>84</sup> *Id.* at 178, 37 S.W. 2d at 24.

<sup>85</sup> *Id.* at 179, 37 S.W. 2d at 25. A similar instruction was approved in an earlier case under section 242 involving a contractor for a municipal corporation, *Adams and Sullivan v. Sengel*, 177 Ky. 535, 197 S.W. 974 (1917).

<sup>86</sup> *Cf.* the more limited interpretation of the Louisiana court, *supra* note 48.

to acts which oust the owner from possession, it should make it clear that the measure of damages is modified in cases where the injury can be corrected or is of a temporary nature. In such cases the actual damage done should be allowed under the theory that if there had been an injury or taking within the contemplation of section 13 or 242, it is such only to the extent the plaintiff has suffered a pecuniary loss. For example, if plaintiff's land is flooded, his "property" can be said to have been taken ("property" includes personal and real) in the sense that money will have to be expended to restore the premises to their original condition. If precedent is needed to apply this measure of damages instead of the "value of the land" standard, the *Jefferson County* case serves as the wedge. It will be noted that under this measure of damages no future rights would be purchased by the defendant, so an injunction as to the future could properly be ordered. Because the defendant in most of the cases under discussion has no *need* of the right to continue the condition, he cannot complain.

In view of the opinion expressed by the court that the framers of the Constitution intended a relaxation of the strict construction put upon previous eminent domain provisions in former constitutions, this seems to be a practical solution of the measure-of-damages problem, despite the analytical inconsistencies involved.

#### *Selecting the Defendants*

Obviously, if a county or state agency takes land without first making just compensation, a suit to remedy the wrong should be brought against that agency or county. This statement is generally true as to every agency but the one which figures most prominently in the exercise of the power of eminent domain and thus, by the law of averages, gives rise to more suits under sections 13 and 242 than any other agency—the Highway Department. The reason for a difference is a statute which provides in part:

- (1) Except as otherwise provided in this section and in KRS 177.070, all cost of acquiring any necessary land or right of way for primary road purposes and all damages incurred shall be paid by the county.<sup>87</sup>

Under this statute, the Highway Department may be the agency which enters upon private property to construct a road, but the

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<sup>87</sup> KY. REV. STAT. 177.060.

county in which the land lies is the proper party defendant.<sup>88</sup> If the county purchases a right-of-way and the Highway Department in the course of building the road finds it necessary to use more land, the county is still liable.<sup>89</sup>

It will be noted, however, that the county's duty under the statute is limited to paying the cost of "necessary land or right of way." It is evidently this phrase that is construed so as not to hold the county liable for the cost of land negligently taken or destroyed by the Highway Department. Land so taken is not "necessary" to the building of the road. In *Perry County v. Riley*<sup>90</sup> the plaintiff conveyed a strip of land to the state, receiving payment therefor from the county. After the Highway Department entered the land to build the road, the plaintiff sued Perry County, alleging negligent construction by the Highway Department as a result of which part of his land was washed away. The plaintiff pleaded himself out of court. Holding that the lower court should have sustained the county's request for a peremptory instruction, the Court of Appeals, quoting an earlier case, said:

"True it is that, under the statute, it was the duty of the county to procure a right of way for the state highway commission, and if, in constructing the highway, it had been necessary or perhaps even proper so to construct the culvert as to throw water upon appellant's lot, McLean County might . . . be liable because of its duty to furnish a right of way. Yet, where the right of way was furnished, and the damage caused the appellant was due to the careless way in which the highway was built, McLean County could not be liable. It did not construct the highway. The negligence was not its negligence. The duty to furnish the right of way did not include insurance against the negligence of the highway department."<sup>91</sup>

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<sup>88</sup> *Perry County v. Townes*, 228 Ky. 608, 15 S.W. 2d 521 (1929); *Muhlenberg County v. Ray*, 215 Ky. 295, 284 S.W. 727 (1926); *Metcalf v. Lyttle*, County Judge, 219 Ky. 488, 293 S.W. 979 (1927).

<sup>89</sup> *Trimble v. Powell County*, 237 Ky. 501, 35 S.W. 2d 882 (1931).

<sup>90</sup> 268 Ky. 325, 104 S.W. 2d 1090 (1937).

<sup>91</sup> *Id.* at 329, 104 S.W. 2d at 1092. Since the Highway Department is liable where land is taken through its negligence, the bulk of the suits against the Department would no longer be allowed if the Louisiana theory, *i.e.*, limiting recovery to situations where the land taken resulted from necessary or intentional acts, were adopted. The plaintiff would still have an available remedy, however. Under KY. REV. STAT. 44.070 a Board of Claims is authorized to try and compensate claims against the state arising from the negligence of its agencies and employees (within the scope of employment). Special acts of the Legislature and claims before the Board of Claims will be discussed in the March, 1954, issue of the KENTUCKY LAW JOURNAL.

Therefore, if the county is being sued for acts of the Highway Department, a taking or injuring of land as a result of careful work in accordance with prudent plans of the Highway Department must be shown.<sup>92</sup> If the Highway Department is the defendant a taking as the result of negligence of the Department must be shown<sup>93</sup> except in a few instances.<sup>94</sup>

*Joinder of Contractors.* Counsel for plaintiff in suits under sections 13 and 242 often think it advisable to join contractors for the county or state agency as defendants. In a clear-cut case of necessary taking such joinder is unnecessary, but if counsel is not sure whether the contractor was negligent<sup>95</sup> or took the land in carrying out the plans of his employer, joinder can save trouble and expense.<sup>96</sup> There is no question that a contractor for a county or state agency can be joined as a party defendant in a taking case. Indeed, in the first case which recognized constitutional waiver of immunity,<sup>97</sup> the court said that if the county "could not, without liability to the owner for damages, do the work in question so as

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<sup>92</sup> *Adkins v. Harlan County*, 259 Ky. 400, 82 S.W. 2d 425 (1935).

<sup>93</sup> *Department of Highways v. Corey*, 247 S.W. 2d 389 (Ky. 1952).

<sup>94</sup> The few instances where the Highway Department is itself liable without negligence are set out in KY. REV. STAT. 177.060 and 177.070. These exceptions are narrow in scope and not of the type which gives rise to interpretative litigation. The only one which will be discussed is found in KY. REV. STAT. 177.060, which provides in part:

When a highway has been located by the department [of highways] and a right of way procured by the county and accepted by the department, any additional right of way required by the department as a result of a change in the highway may be acquired by the department and shall be paid for by the state unless it is a road owned by the county.

Under this provision, if the Highway Department goes upon an established road not belonging to the county and changes the grade of the road, interfering with the ingress and egress of an adjacent landowner to such an extent as to constitute a taking of the land, the Department and not the county will be liable irrespective of negligence. *Bader v. Jefferson County*, 274 Ky. 486, 119 S.W. 2d 870 (1938). The same result follows if the Highway Department changes the route of an existing road, taking in additional private property. *Commonwealth v. Tate*, 297 Ky. 826, 181 S.W. 2d 418 (1944).

<sup>95</sup> If the contractor is negligent a right of action accrues against him in his individual capacity and the measure of damage will be the usual instruction for negligence.

<sup>96</sup> Without discussing the possibilities under the old Code, joinder of defendants against whom liability in the alternative is sought when plaintiff knows that one defendant or the other must be liable is permitted under the new Rules of Civil Procedure if the facts come within Rule 20.01 which provides in part: "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

<sup>97</sup> *Layman v. Beeler*, 113 Ky. 221, 67 S.W. 995 (1902).

to injure the plaintiff's premises, it must follow that it could not authorize another to do it with immunity."<sup>98</sup>

The contractor can even be sued individually in a taking case. If he is sued separately he can, as an agent of the county, force the plaintiff to predicate his action upon section 242 of the Constitution, thus making the measure of damages the market value of the land taken or injured.<sup>99</sup> The county is then liable over to the contractor.<sup>100</sup>

A special problem arises when injury to property is caused by blasting carried on by the contractor for the sovereign. In Kentucky, as in many other jurisdictions, liability is imposed for blasting debris on another's property irrespective of intent or negligence.<sup>101</sup> Suppose the contractor for the county, in building a county road, finds it *necessary* to blast, and though doing so with the utmost care, casts debris on adjacent property. Is the county liable for the damages as a taking, or is the contractor alone liable for a tort? The few cases on the subject are not clear enough to support a conclusive statement. In *Ben Gorham and Co. v. Carter*<sup>102</sup> the contractor was sued for casting debris on the roof of the plaintiff's house, apparently upon the theory of absolute liability. The damages awarded were the cost of repairing the roof. This measure of damages seemed to be for tort rather than for a taking.<sup>103</sup> The better rule would seem to be to treat damages caused by careful blasting the same as damage caused by a trespass upon uncondemned property by the contractor for the purpose of building a road, where there seems to be no doubt that the county is responsible for compensation.<sup>104</sup>

Some light is shed on the problem by cases involving contractors for the Highway Department. In the case of *Hall v. Ellis*

<sup>98</sup> *Id.* at 227, 67 S.W. at 996. However, if the contractor performed the work for the county or agency according to its specifications, he is not liable if he no longer has control or custody of the instrumentality (the structure) when the damage is done. *Black Mountain Corporation v. Houston*, 211 Ky. 621, 277 S.W. 993 (1925).

<sup>99</sup> *Terhune v. Ben W. Gorham and Co.* 229 Ky. 229, 16 S.W. 2d 1060 (1929) (second appeal).

<sup>100</sup> *Ibid.*; *Reed v. Ben W. Gorham and Co.*, 233 Ky. 215, 255 S.W. 2d 377 (1930). Because of this, the county can intervene as a real party in interest. See *Breathitt County v. Hudson*, 265 Ky. 21, 25, 95 S.W. 2d 1132 (1936).

<sup>101</sup> *Adams v. Sengel*, 177 Ky. 535, 197 S.W. 974, 7 A.L.R. 268 (1917).

<sup>102</sup> 228 Ky. 214, 14 S.W. 2d 303 (1929).

<sup>103</sup> But see *Jefferson County v. Bischoff*, 238 Ky. 176, 37 S.W. 2d 24 (1931), where the court applied the same measure of damages under sec. 242, discussed *supra* page 187.

<sup>104</sup> *Terhune v. Ben W. Gorham and Co.*, 229 Ky. 229, 16 S.W. 2d 1060 (1929).

and *Brantley*<sup>105</sup> a contractor for the state was sued for blasting debris onto the plaintiff's property. He was held liable but again nothing appeared in the case to indicate that he could recover over from the county for a taking. In an earlier case, *Hunt-Forbes Construction Co. v. Robinson*,<sup>106</sup> instead of blasting, the contractor removed the lateral support of the plaintiff's land, causing the land to subside and break. The contractor stayed within the right of way and no negligence was found on the part of the contractor or in the planning of the Highway Department. After noting that the state could not be sued in such a case (hinting strongly that the county was the proper defendant),<sup>107</sup> the court said:

It follows, therefore, that the appellant [contractor] cannot be held responsible for the injury to appellee, because the state cannot be made to respond in damages. This, of course, would not prevent the appellant's being held responsible to appellee if the injury to him was caused by negligence.<sup>108</sup>

Whether the contractor physically went beyond the right-of-way seemed to be the determining factor in the absence of negligence. This is borne out in the *Hall* case when the court distinguished the *Hunt-Forbes* case on this ground, saying:

[B]ut in that case [*Hunt-Forbes*] the contractors had stayed within the right of way and had done nothing beyond the right of way. There was no negligence shown on the part of the contractors, and it is insisted the same rule should apply here, as there was no evidence of negligence on the part of the contractors; but the contractors had only a right to enter upon the right of way, and when they went beyond the right of way they committed a trespass upon Mrs. Hall's property.<sup>109</sup>

If the distinction drawn between those two cases has any substance, a third case will point up its lack of logic. In *Combs v. Codell Construction Co.*,<sup>110</sup> a contractor for the Highway Department blasted debris into a creek *within the right-of-way*. The flow

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<sup>105</sup> 238 Ky. 114, 36 S.W. 2d 850 (1931).

<sup>106</sup> 227 Ky. 138, 12 S.W. 2d 303 (1928).

<sup>107</sup> Under similar facts the county was held liable in *Perry County v. Townes*, 228 Ky. 608, 15 S.W. 2d 521 (1929).

<sup>108</sup> *Hunt-Forbes Construction Co. v. Robinson*, 227 Ky. 138, 141, 12 S.W. 2d 303, 304 (1928).

<sup>109</sup> *Hall v. Ellis and Brantley*, 238 Ky. 114, 115, 36 S.W. 2d 850 (1931).

<sup>110</sup> 244 Ky. 772, 52 S.W. 2d 719 (1932).

of the creek was diverted as a result and flooded the plaintiff's property. In an action against the contractor, the jury found that the defendant was not negligent. Plaintiff claimed, however, that irrespective of negligence, the contractor was liable, because he had caused an invasion of the plaintiff's land. In answer to this argument the court said:

That [absolute] liability attaches to one engaged in road construction under contract with the highway commission where there is such a direct invasion beyond the right of way, since that was not contemplated by the contract. [Citation omitted.] But where the material does not go beyond the right of way the contractor is not liable for consequential damages to private property by reason of the road construction, since he is but the agent of a department of the Commonwealth.<sup>111</sup>

The court then suggested that the county would probably be the proper party to sue. The only difference, then, between the *Hall* case and the *Combs* case is that in the latter the invasion of the plaintiff's property was less direct; in neither case was the contractor found negligent.

Whether debris is blasted directly onto the plaintiff's property or blasted into a creek causing water to flow onto the plaintiff's property, there has been a trespass. In the *Hall* case the court says the contractor went beyond the right-of-way. What is meant is that the contractor caused debris to go beyond the right-of-way. In the *Combs* case the contractor caused water to go beyond the right-of-way, the only difference being that he did not directly throw the water there. It is difficult to see why the contractor should be any more liable for having cast debris onto the plaintiff's property by blasting than he should be for having diverted water onto the plaintiff's property by blasting.

The anomalous rule of contractor liability raises another problem. Theoretically it should be impossible to join a county and a Highway Department contractor, unless the liability sought to be imposed against the joint defendants is in the alternative.<sup>112</sup> If the contractor is negligent, liability will be his, not the county's. If the contractor is careful and operates in accordance with prudent plans of the Highway Department, the county will be liable

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<sup>111</sup> *Id.* at 774, 52 S.W. 2d at 720.

<sup>112</sup> See note 96 *supra*.



since the damage done was necessary to the construction of the road.<sup>113</sup> The contractor will not be liable because the Department for which he works is not liable. On the other hand, if the contractor is careful but performs the work in accordance with imprudent and negligent plans of the Highway Department, the Department is primarily liable; the contractor is secondarily liable and can be joined as a defendant.<sup>114</sup> Since the county is not an insurer against the Highway Department's negligence, it cannot be sued. The blasting cases, however, seem to break down the above analysis. They create a situation where a careful contractor is liable although his employer, the Highway Department, is not liable. The damage done may be necessary to the construction of the road yet apparently the county is not liable over. If the county is held responsible, the county and the state contractor can be joined.

There seems to be no escape from the conclusion that where the contractor inflicts injury to adjacent property while carefully blasting for the Highway Department, the county should be the proper party to pay under Ky. Rev. Stat. 177.060. The contractor who neither negligently nor intentionally commits any wrong should not be liable, any more than the Department is. Only this solution will bring the blasting cases into harmony with those where the Highway Department contractor enters upon private property to begin building a road before the land has been condemned—a clear case of trespass, more direct than blasting—in which cases the court has consistently held that the county is the proper party to sue for the value of the land.<sup>115</sup>

### *Conclusion*

The theory of reverse eminent domain has had a place in Kentucky law since 1898 when, in the *Hauns* case, it was utilized to allow suit against a corporate state agency. The theory had its early development through frequent application from 1902 onward to counties which as arms of the state otherwise enjoyed its

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<sup>113</sup> See *Adkins v. Harlan County*, 259 Ky. 400, 82 S.W. 2d 425 (1935).

<sup>114</sup> See *Breathitt County v. Hudson*, 265 Ky. 21, 25, 95 S.W. 2d 1132 (1936).

<sup>115</sup> *Trimble v. Powell County*, 237 Ky. 501, 35 S.W. 2d 882 (1931); *Metcalf v. Lyttle, County Judge*, 219 Ky. 488, 293 S.W. 979 (1927); *Muhlenberg County v. Ray*, 215 Ky. 295, 284 S.W. 727 (1926). This last case held also that the plaintiff need not seek an injunction, but can stand by while the Highway Department takes the land, then bring action for taking against the county.

sovereign immunity. The theory has been expressly held applicable to the state only since 1946.

Section 242 of the Constitution, with its broad provision of "taken, injured or destroyed" is applied to counties and corporate state agencies with power to sue and be sued and to hold property. As against state departments which are not bodies corporate only section 13 applies. Suits against corporate state agencies without power to sue and be sued and to hold property have been held to be suits against the Commonwealth, but the agencies are corporate in form and may fall within the contemplation of section 242.

Which section applies in a given case may be immaterial because it is possible that any case which satisfies section 242 would also satisfy section 13. At any rate, it is only in the exceptional case, if any time, that the question will become important. The usual case involves complete ouster of possession which would meet even the narrowest construction of section 13's sole guiding term, "taken." In the exceptional case, however, the further problem of distinguishing between facts which will fall within section 242 and facts which constitute an ordinary tort only is presented.

Other problems have not been satisfactorily settled: for example, the measure of damages which is applied in a case where the taking, injuring or destroying is negligently inflicted, or is only partial or temporary in nature. The root of all these problems is the fact that negligent, partial or temporary injuries to property traditionally have not been the type for which prior compensation has been made, and, in some cases, for which prior compensation could have been made. The court in attempting to maintain the symmetry of the law of eminent domain has produced inconsistencies in other respects. Either "property" in its ordinary sense is being purchased by governmental units when all that is needed may be a temporary use, or the term "property" has been given the new meaning of partial or temporary use. In the latter case injunction is being denied when in reality the defendant governmental unit may not be paying for any future rights at all. Symmetry on one side or the other will have to be sacrificed, and it would seem that where reason and common sense demand the application of ordinary tort and equitable principles, the abstract logic of eminent domain doctrine should be forsaken, if the court continues to allow recovery for negligent or unintentional takings

under section 13. Perhaps a better solution in the long run would be for the court to restrict recovery under section 13 to intentional takings of the sort for which prior condemnation proceedings could be had. This would require reconsideration of the holdings and dicta in several recent cases. Justification for this step might be found both in the difficulties created by extension of section 13 and in the newly created remedy of a claim up to \$5000.00 before the Board of Claims for negligent injuries to land by the Highway Department. It could well be argued that the remedy for negligent acts before the Board of Claims does away with the constitutional necessity for the reverse eminent domain suit based on negligence of the state, at least where the amount of injury is less than \$5000.00.

A special problem in this area under the Kentucky statutes is the question of liability as between the county and the contractor for the state for the latter's *careful* blasting. Application to the contractor of the theory of absolute liability in such a case has injected some confusion into the law. By statute the responsibility for procuring *necessary* land for rights-of-way is placed upon the county. Since the Department is not liable for the value of necessary land, it would seem its contractor should not be liable either.

Many ideas and principles concerning the theory of reverse eminent domain are still at least hazy. But despite the lack of a well rounded, well settled body of law in this area, the availability of the doctrine constitutes one more considerable breach in the eroding wall of sovereign immunity and represents further the ingenuity of the Court of Appeals for seeing that as much justice as possible obtains between the state and its citizens.