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Inverse Condemnation in Washington—Is the Lid Off Pandora's Box?

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INVERSE CONDEMNATION IN WASHINGTON— IS THE LID OFF PANDORA'S BOX?

Improvements and innovations designed to meet modern-day requirements of mass public transportation have spawned a number of legal problems, many of which the courts have attempted to resolve under an expanding concept of eminent domain.[1] This ancient power, by which a sovereign may appropriate private property to public use, has not been a static doctrine. Rather it has served as an umbrella under which a multitude of varied and intricate theories, rules, and limitations have been developed by the judiciary to keep up with the increasing complexities of governmental functions and responsibilities.

In Washington it may well be that modern transportation, by virtue of a single recent case, has generated a considerable extension of eminent domain under the title of inverse condemnation.[2]

The 1964 decision in *Martin v. Port of Seattle*,[3] appears to have abrogated a sizable segment of the established law of eminent domain in this state; though rendered in a jet aircraft setting, the force and tenor of this opinion suggests a great potential impact on the entire field of public works. While awaiting future pronouncements in this area by the Washington court, the undertaking of this comment will be threefold: (1) to explore briefly the law of eminent domain as it appeared to be in Washington prior to *Martin;* (2) to ascertain the meaning of that decision and its impact on prior law; and (3) to suggest the possible effect on future decisions involving the exercise of

[1] The title "eminent domain" is credited to the early publicist Grotius who set out the concept as one of the powers of the State in his 1625 work, *De Jure Belli et Pacis,* Lib., 3, C. 20. The Washington court discusses taking in a sovereign capacity in Kincaid v. Seattle, 74 Wash. 617, 621, 134 Pac. 504, 506 (1913), wherein the court notes that a sovereign could formerly take freely for himself, the kingdom, or to give to another, but that when vassalage gave way to citizenship the principle arose that payment should be made for what is taken. "The constitution does not give the right to take; that is inherent in the state. Its only office is to define the limitations to be put upon its exercise; that is, that no property shall ever be taken without compensation."

[2] "Inverse condemnation" should be identified at the outset as an eminent domain proceeding in which the property owner brings suit to compel condemnation of his property. In light of the then existing governmental immunity to tort actions, there was ample justification for treating these damage or taking actions as an extension of eminent domain rather than under the traditional grounds of nuisance, negligence, or trespass. Whether this still holds true in Washington following legislative abrogation of the doctrine of sovereign immunity under RCW 4.92.090 and Kelso v. City of Tacoma, 63 Wn.2d 913, 390 P.2d 2 (1964) (judicial extension to municipalities), is, of course, open to question.

[3] 64 Wn.2d 324, 391 P.2d 540 (1964), 39 WASH. L. REV. 398 (1964).

governmental functions and activities in the area of public transportation.

INVERSE CONDEMNATION IN WASHINGTON, PRE-1964

The term "inverse condemnation" characterizes an action by which the property owner who asserts an injury to his property right takes the initiative in compelling the offending government body to exercise its power of condemnation and thus make just compensation to him. While the label is new to the Washington court, it is unlikely that it describes an action any different from those which Washington property owners have been asserting for many years.[4]

Cause of Action. A common misconception is that the basis of the power of eminent domain is the state or federal constitution. In fact, the power is an inherent attribute of sovereignty upon which constitutions place a limitation.[5] A consideration of the history and operation of article I, section 16 (amendment 9) of the Washington Constitution[6] and its nearly seventy-five years of judicial interpretation is a necessary preface to the *Martin* case, though an exhaustive survey of the area is beyond the scope of this comment.

The fifth amendment to the federal constitution provides that private property shall not be *taken* without just compensation, and prior to 1870 nearly every state constitution[7] incorporated that provision. While some early courts recognized that a constitutional "taking" might exist without a formal divesting of the property owner's title,[8] other courts insisted on an actual taking. In an effort to remedy the resulting inconsistencies and inequities, Illinois, in 1870, amended its constitution to include the words "or damaged" after the prohibition against taking; either by amendment or original adoption the Illinois

[4] Where courts have felt it necessary to apply a label to these actions there has been no standardization. See Peckwith v. Lavezzola, 50 Cal.App.2d 211, 122 P.2d 678, 682 (1942) ("reverse condemnation"); V.T.C. Lines v. City of Harlan, 313 S.W.2d 573, 579 (Ky. 1958) ("reverse eminent domain").

[5] Kincaid v. Seattle, 74 Wash. 617, 134 Pac. 504 (1913).

[6] "No private property shall be taken or damaged for public or private use without just compensation having been first made...." Amendment 9, adopted in 1920, added a proviso declaring a taking by the state for land reclamation and settlement to be a public use.

[7] Only North Carolina and New Hampshire have not, to this date, expressly provided for compensation in their constitutions.

[8] *E.g.*, Hooker v. New Haven & Northhampton Co., 14 Conn. 146 (1846); Nevins v. City of Peoria, 41 Ill. 502 (1866). See also State *ex rel.* Smith v. Superior Court, 26 Wash. 278, 66 Pac. 385 (1901), which suggests that any substantial interference with private property that destroys or lessens its value, or which impairs the owner's right to use or enjoy his property, is a "taking" in the constitutional sense to the extent of damages suffered, even though title and possession are unimpaired.

amendment has been incorporated into the constitutions of twenty-four other states, including Washington. In the 1892 case of *Brown v. Seattle,*[9] the Washington court noted that the addition of "or damaged" was clearly intended to extend the meaning of "taken." Thereafter the court began to evolve a "taking-damaging" dichotomy with individual rules and limitations.

In the years following 1892 the court created numerous distinctions in an attempt to narrow the broad language of the *Brown* case, particularly with regard to the damaging concept.[10] One such effort was to distinguish the constitutional requirement of taking for "public use" from the effects of regulation for the "welfare of the public," the latter being an exercise of police power.[11] Another method was to classify the governmental activity as tortious and thereby outside the eminent domain protection;[12] this normally resulted in no recovery of damages because of sovereign immunity,[13] or through failure to comply with municipal charter provisions requiring prompt filing of tort claims.[14] It should be noted, however, that this particular distinction was often advantageous to the property owner since the Washington court frequently converted seemingly noncompensable negligence and nuisance actions into compensable eminent domain or inverse condemnation actions.[15]

Still another limiting factor was the court's unwillingness to create a cause of action where none existed under the doctrine of *damnum absque injuria,*[16] which lead to a usual requirement of some physical

[9] 5 Wash. 35, 31 Pac. 313 (1892).

[10] *E.g.,* Fletcher v. Seattle, 43 Wash. 627, 86 Pac. 1046 (1906).

[11] Conger v. Pierce County, 116 Wash. 27, 36, 198 Pac. 377, 380 (1921) (dictum). See also, *e.g.,* Kahin v. City of Seattle, 64 Wn.2d 886, 395 P.2d 79 (1964); Bowes v. City of Aberdeen, 58 Wash. 535, 109 Pac. 369 (1910). The Supreme Court has observed that "there is no set formula to determine where regulation ends and taking begins." Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). See generally, Comment, *Distinguishing Eminent Domain from Police Power and Tort,* 38 WASH. L. REV. 607 (1963).

[12] *E.g.,* Dempsey v. Seattle, 187 Wash. 38, 59 P.2d 923 (1936); Willit v. Seattle, 96 Wash. 632, 165 Pac. 876 (1917); Casassa v. Seattle, 75 Wash. 367, 134 Pac. 1080 (1913).

[13] *But see* Comment, *Abolition of Sovereign Immunity in Washington,* 36 WASH. L. REV. 312 (1961); Peck, *Claims Against the State,* 38 WASH. L. REV. 498 (1963); Note, 39 WASH L. REV. 275 (1964).

[14] RCW 35.31.020 (first class cities); RCW 35.23.340 (second class cities).

[15] In Wong Kee Jun v. Seattle, 143 Wash. 479, 255 Pac. 645 (1927), 2 WASH. L. REV. 247 (1927), the court reviewed a number of its prior decisions and clarified some existing confusion by holding that where there is an injury to private property which *could* have been treated as a condemnation proceeding, the city could not claim that the damage was done tortiously in order to bar recovery under the charter limitation of thirty days for filing tort claims. To do this, according to the court, would elevate the city charter over the state constitution.

[16] Loss or damage occasioned without wrong for which there is no legal remedy

invasion or technical trespass as a condition precedent to recovery.[17] Various other specialized limitations on governmental liability were developed, such as the difference between grading and regrading a street or alley in an action claiming deprivation of light, air, or access;[18] the holding that a non-abutting property owner could not show any special or peculiar injury differing from that of the public generally, and therefore could not recover;[19] and the application of the common law concept of surface waters as a "common enemy" in actions alleging inundation or damage to land as a consequence of nearby public works.[20] In addition, the Washington court imported a "substantial-

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or recovery. Washington courts have tended to use this conclusion as if it were a reason. *E.g.*, Wilkening v. State, 54 Wn.2d 692, 344 P.2d 204 (1959); Taylor v. Chicago, M., St. P. & P. R.R., 85 Wash. 592, 148 Pac. 887 (1915); Hieber v. Spokane, 73 Wash. 122, 131 Pac. 478 (1913); Smith v. St. Paul, M. & Man. Ry., 39 Wash. 355, 81 Pac. 840 (1905).

[17] Absent a showing of negligence, it was held in Clark v. Seattle, 156 Wash. 319, 325, 287 Pac. 29, 31 (1930), that recovery must be predicated on (1) a direct invasion of private property; (2) a deliberate taking; or (3) damage directly and proximately caused by one or the other. *Accord*, Farnandis v. Great No. Ry., 41 Wash. 486, 84 Pac. 18 (1906). *But see* Keesling v. Seattle, 52 Wn.2d 247, 324 P.2d 806 (1958).

[18] A city may establish the initial grade of a street or alley at any point reasonably necessary for public travel without liability to abutting property owners. While the grade may be maintained and improved, a material change of grade constitutes regrading and the abutting property owner may invoke his constitutional protection. This distinction was first made in Fletcher v. Seattle, 43 Wash. 627, 86 Pac. 1046 (1906); it was most recently applied in Hagen v. City of Seattle, 54 Wn.2d 218, 339 P.2d 79 (1959). It is clear that an abutting property owner has a right of access to an established street that is protected against interference without just compensation; see McMoran v. State, 55 Wn.2d 37, 345 P.2d 598 (1959) (installing a divider curb between the property and highway); Docksteader v. Centralia, 3 Wn.2d 325, 100 P.2d 377 (1940) (building a viaduct in the street); Keil v. Grays Harbor & P. S. Ry., 71 Wash. 163, 127 Pac. 1113 (1912) (running a train down the street); Hatch v. Tacoma, O. & G. H. R.R., 6 Wash. 1, 32 Pac. 1063 (1893) (elevating the street level to accommodate train).

[19] Clute v. North Yakima & V. Ry., 62 Wash. 531, 114 Pac. 513 (1911); Ponischil v. Hoquiam Sash & Door Co., 41 Wash. 303, 83 Pac. 316 (1906). Furthermore, in O'Connel v. Seattle, 62 Wash. 218, 113 Pac. 762 (1911), it was made clear that the terms "abutting," "adjacent" and "bordering" are all synonymous in this respect. Recent aircraft taking and damaging cases have retained this general requirement through use of the term "superadjacent."

[20] As already noted, governmental units are not liable for consequential damages to private property occasioned by the original grading of streets or alleys, though drainage problems frequently result. This governmental protection is further broadened by the common law doctrine that surface water is a common enemy against which any landowner may take steps for the protection and continued use of his land. Wilkening v. State, 54 Wn.2d 692, 344 P.2d 204 (1959); Thorpe v. Spokane, 78 Wash. 488, 139 Pac. 221 (1914); Wood v. Tacoma, 66 Wash. 266, 119 Pac. 859 (1911). Certain limits have been placed on this doctrine for the property owner's protection. For example, where street or highway construction involves collecting water by artificial means and depositing it on private property, there is a constitutional damaging. Ulery v. Kitsap County, 188 Wash. 519, 63 P.2d 352 (1936); *cf.* Sigurdson v. Seattle, 48 Wn.2d 155, 292 P.2d 214 (1956) (tort recovery). A public use which inundates adjoining property with water, sewage, or dirt, thereby destroying its usefulness, is a constitutional taking. Conger v. Pierce County, 116 Wash. 27, 198 Pac. 377 (1921); Wendel v. Spokane County, 27 Wash. 121, 67 Pac. 576 (1902). But if injury could be averted by drains or dikes, it is merely a damaging. Buxel v. King

incidental" distinction from tort law which required a plaintiff to show substantial damage resulting from the governmental activity.[21]

The property owner who was able to avoid these judicial limitations and conditions might still encounter difficulties due to the statute of limitations.

Statute of Limitations. While Washington has a number of different statutes of limitations for a wide variety of actions, none expressly places a limitation on the time for bringing a constitutional taking or damaging action under article I, section 16. Property owners in the early "damaging" actions advanced a number of arguments in an attempt to invoke a more favorable statutory period, but the court applied the short two-year statute governing actions not otherwise provided for in the code.[22] This was altered in 1918 when the court handed down companion decisions which changed the statute applicable to actions for a damaging and established a separate limitation on actions for a taking.

In *Jacobs v. Seattle,*[23] the plaintiff sought compensation for loss of value to his property occasioned by construction and operation of a city garbage incinerator on abutting property. The city asserted that the action was barred by the two-year statute while the plaintiff claimed the city's power of eminent domain raised an implied promise that just compensation would be made. The court adopted the latter view and applied the three-year statute which governs implied contracts not in writing.[24]

At the same time, in *Aylmore v. Seattle,*[25] the question was first presented as to which statute governs recovery for an actual taking. The city pleaded both the two and three-year statutes since either would have barred recovery. The court, however, reasoned: (1) that holding and using property is an incident of ownership or title; (2) that title cannot be vested where none has been divested; and (3) that no title could be divested from the plaintiff short of the statutory ten year period for adverse possession.[26] Although the plaintiff could

County, 60 Wn.2d 404, 374 P.2d 250 (1962); Wiley v. Aberdeen, 123 Wash. 539, 212 Pac. 1049 (1923).

[21] Buxel v. King County, 60 Wn.2d 404, 374 P.2d 250 (1962); Cheskov v. Port of Seattle, 55 Wn.2d 416, 348 P.2d 673 (1960); Jacobs v. Seattle, 93 Wash. 171, 160 Pac. 299 (1916).

[22] RCW 4.16.130. Denney v. Everett, 46 Wash. 342, 89 Pac. 934 (1907).

[23] 100 Wash. 524, 171 Pac. 662 (1918).

[24] RCW 4.16.080(3).

[25] 100 Wash. 515, 171 Pac. 659 (1918).

[26] RCW 4.16.020.

not require removal of the city street from his property, he nevertheless had ten years under the constitution for bringing his action to force condemnation.[27]

Frequently litigated along with the statute of limitations question was the issue of when the statute began to run. Here the substantiality of the claimed injury was critical; so long as the property owner had suffered only inconsequential damage he had no cause of action and the period did not commence. Any subsequent change or increase of use which rendered the previously inconsequential damage substantial, however, immediately started the three-year statute running.[28]

Measure of Damages. Under both the constitution and the earliest eminent domain decisions in Washington, it was clear that the proper compensation for "taking" was the jury-determined value of the property taken.[29] Closely related and equally clear was the rule that a property owner might recover for the taking before work proceeded on his property.[30] The courts were unable to extract this same clarity from the constitution, with regard to the measure of compensation or the time of payment for a consequential damaging.[31]

As to time, it was resolved quite early that the constitution did not require the property owner to submit his damage claim in advance.[32]

[27] Recent expressions of the period of limitation are that the three-year statute [RCW 4.16.080(3)] is applicable to constitutional damaging of private real property. Cheskov v. Port of Seattle, 55 Wn.2d 416, 348 P.2d 673 (1960); Ackerman v. Port of Seattle, 55 Wn.2d 400, 348 P.2d 664 (1960); Papac v. Montesano, 49 Wn.2d 484, 303 P.2d 654 (1956). But an action for a constitutional taking is not barred by any statute of limitations and may be brought any time before title to the property taken is acquired by prescription which in Washington is ten years. Ackerman v. Port of Seattle, *supra.*

[28] Buxel v. King County, 60 Wn.2d 404, 374 P.2d 250 (1960); Papac v. Montesano, 49 Wn.2d 484, 303 P.2d 654 (1956).

[29] "[W]hich compensation shall be ascertained by a jury, unless a jury be waived...." WASH. CONST. art. I, § 16. Seattle Transfer Co. v. Seattle, 27 Wash. 520, 68 Pac. 90 (1902); Brown v. Seattle, 5 Wash. 35, 31 Pac. 313 (1892).

[30] "[W]ithout just compensation having been *first* made, or paid into court..." WASH. CONST. art. I, § 16 (emphasis added). Where there was a taking without condemnation, the fair market value at the time of the trial was allowed rather than the value when the property was taken, or at some intervening time, on the reasoning that the land would not be considered taken until the value had been paid. Distler v. Grays Harbor & P. S. Ry., 76 Wash. 391, 136 Pac. 364 (1913).

[31] In Brown v. Seattle, 5 Wash. 35, 31 Pac. 313 (1892), the court noted the wording of the constitution and recognized the mechanical difficulties involved in requiring prior payment for damaging, but suggested that these difficulties would have to be met when they arose. They arose the following year in Lewis v. Seattle, 5 Wash. 741, 32 Pac. 794 (1893), where the court said it was up to the legislature to decide when payment for damages must be made in advance. The legislature immediately enacted a comprehensive statute that resulted in at least fifteen years of confused litigation before its repeal. See particularly, Ettor v. Tacoma, 57 Wash. 50, 106 Pac. 478 (1910), *affirmance upheld on rehearing,* 57 Wash. 56, 107 Pac. 1061 (1910), *rev'd,* 228 U.S. 148 (1912).

[32] Peterson v. Smith, 6 Wash. 163, 32 Pac. 1050 (1893).

The claim could be withheld until actual condemnation was begun, or until the owner himself compelled condemnation.[33] These decisions enabled the property owner to postpone the determination of his claim until the full extent of the damage became certain.

The court had little difficulty in extending the measure of damages for a "taking" to those claims involving a partial taking and a resulting injury to the untaken remainder. It was established that the measure should be the market value of the land taken, together with any reduction in value to the remaining contiguous property,[34] and that this reduction or depreciation was the difference between the fair market value before and after the taking.[35]

Recovery was far more difficult for the property owner who sought only damages for a reduction in value of his physically untouched land. Here the court was able to limit recovery on the basis of the injury. Damage was required to be material,[36] and of such a permanent character as to impair the value of the fee;[37] further, the decrease in property value had to be directly attributable to the adjoining public use.[38] Recovery was denied for claims based on mere depreciation of property value from noise, smoke, fumes, and odors coming from, and necessarily incident to, some lawful activity being carried out on the adjacent property.[39] Mere inconvenience, whether permanent[40] or temporary,[41] or fear of anticipated results of the governmental activity were insufficient even though sale of the property was made difficult or

[33] Failure of the property owner to take prior steps to compel condemnation was also considered in Thorberg v. Hoquiam, 77 Wash. 679, 138 Pac. 304 (1914), where it was held that if the owner stood by and watched the taking in the form of some public improvement, he waived his right to enjoin the work pending compensation but retained an action at law for damages.

[34] Seattle & Mont. Ry. v. Roeder, 30 Wash. 244, 70 Pac. 498 (1902).

[35] Puget Sound Power & Light Co. v. P.U.D. No. 1, 123 F.2d 286 (9th Cir. 1941), *cert. denied,* 315 U.S. 814 (1942).

[36] Lund v. Idaho & Wash. No. R.R., 50 Wash. 574, 97 Pac. 665 (1908).

[37] Great No. Ry. v. Quigg, 213 Fed. 873 (W.D. Wash. 1914).

[38] Kincaid v. Seattle, 74 Wash. 617, 134 Pac. 504 (1913).

[39] Taylor v. Chicago, M. & St. P. R.R., 85 Wash. 592, 148 Pac. 887 (1915); DeKay v. North Yakima & V. R.R., 71 Wash. 648, 129 Pac. 574 (1913); Smith v. St. Paul, M. & Man. Ry., 39 Wash. 355, 81 Pac. 840 (1905). In Brady v. Tacoma, 145 Wash. 351, 259 Pac. 1089 (1927), the court attempted to update these "railroad" cases but reached the same conclusion and reversed a lower court finding of damage from a "loud" nearby city power station. The court reasoned that the station was not improperly or unreasonably located and that the city had acquired as much land for the plant as was reasonable. The court then prophesied: "To hold otherwise would be to stop all progress and invite a flood of litigation which would, we fear, destroy commerce and industry." *Id.* at 362, 259 Pac. at 1093.

[40] Ponischil v. Hoquiam Sash & Door Co., 41 Wash. 303, 83 Pac. 316 (1906).

[41] *In re* West Marginal Way, 109 Wash. 116, 186 Pac. 644 (1919); Hieber v. Spokane, 73 Wash. 122, 131 Pac. 478 (1913).

impossible.[42] Though these complainants might show an actual resulting damage, it was considered incidental and non-compensable in the absence of some physical invasion or taking. The court's position persisted despite the constitutional prohibition that property not be taken "or damaged."

The effect of these limiting decisions and rules was to align Washington with the majority of states in rejecting an interpretation of "damaged" which would include every ascertainable depreciation in the market value of property adjacent to a public use.[43] The role of the supreme court has been largely to determine whether a stated claim is compensable; the trial court has been left to struggle with the practical application of the broad "before and after" formula. The appellate record is therefore of little aid in resolving, or even understanding, the various mechanical difficulties that might be encountered.[44]

This was the rather restrictive situation that faced a complaining property owner in his suit against a governmental unit for a taking or damaging prior to the decision in *Martin v. Port of Seattle*. The question now is how *Martin* may have changed this, and what might reasonably be expected for the future?

The Present and Future: Aircraft and Airports

The advent of widespread commercial air travel following World War II has produced a wealth of litigation by property owners in the vicinity of airports. On several previous occasions the Washington court had considered inverse condemnation actions involving the Seattle-Tacoma Airport,[45] but only as to alleged taking or damaging by flights directly over private property. The most significant aspect of the *Martin* decision, and one that should come in for vigorous discussion and consideration, is the recovery allowed nearby property owners who were *not* subjected to direct overflights.

Martin v. Port of Seattle was originally instituted as two separate suits by 196 individual owners of property located south of the main runway at the Seattle-Tacoma International Airport. The two actions, subsequently joined for convenience before trial, were distinguishable

[42] Aubol v. Tacoma, 167 Wash. 442, 9 P.2d 780 (1932).
[43] See 2 Nichols, Eminent Domain § 6.441(1) (3d ed. rev. 1963).
[44] See generally Comment, *Measure of Damages in Eminent Domain Proceedings in Washington*, 2 Wash. L. Rev. 192 (1927).
[45] See Cheskov v. Port of Seattle, 55 Wn.2d 416, 348 P.2d 673 (1960); Ackerman v. Port of Seattle, 55 Wn.2d 400, 348 P.2d 664 (1960); Anderson v. Port of Seattle, 49 Wn.2d 528, 304 P.2d 705 (1956).

largely by the location of the properties involved and the corresponding existence or absence of actual jet overflights. Plaintiffs generally alleged that use of the airport by jets had unreasonably interfered with the use and enjoyment of their properties, causing a substantial depreciation in values for which the defendant municipal corporation, as owner-operator of the airport, was liable. The trial court agreed, and a unanimous Washington Supreme Court affirmed, reasoning that "when the land of an individual is diminished in value for the public benefit, then justice, and the constitution, require that the public pay."[46] This broad statement, in light of prior litigation in the area, may seem somewhat startling. It is, however, nothing more than a return to the philosophy of *Brown v. Seattle,* where, in 1892, the court declared that "if private property is damaged for the public benefit, the public should make good the loss to the individual. Such always was the equity of the case, and the constitution makes the hitherto disregarded equity now the law of it."[47]

It has already been noted that the *Brown* case fell rapidly from favor and was, for all practical purposes, distinguished to death.[48] In reaching the same conclusion as *Brown,* the court in *Martin* apparently chose to disregard or reject some seventy years of judicially evolved distinctions and limitations on eminent domain actions in Washington although no prior decision is expressly overruled or distinguished and, for that matter, only a single Washington case is cited. It may be argued that the decision is strictly limited to actions involving jet aircraft; but the reasoning of the opinion and the very breadth of its pronouncements suggest a more sweeping edict—one that may effect a variety of property owners.

Cause of Action. One class of complainants represented in *Martin* claimed that direct flights over their property constituted the "taking" of an air easement of the type first recognized in *United States v. Causby.*[49] The other group, while not claiming overflights, alleged that their property had been "damaged" by the jet noise for which they too, within the meaning of the Washington Constitution, were entitled to just compensation. The trial court found a "taking" as to the first

[46] 64 Wn.2d at 333, 391 P.2d at 547.
[47] 5 Wash. 35, 41, 31 Pac. 313, 315 (1892).
[48] See text accompanying note 10 *supra.*
[49] 328 U.S. 256 (1946). Causby recovered for the taking of an air easement over his chicken farm by flights of military aircraft from a nearby field. Planes coming in as low as eighty-three feet so alarmed his chickens that they would kill themselves, rendering the farm valueless for raising chickens.

group, and a "damaging" as to the second. The supreme court, noting that in essence the complaint was one of excessive noise and vibration rather than of physical invasion, chose not to stress the taking-damaging distinction. In the words of the court, the distinction was apt to be "more difficult and treacherous than convincing or utilitarian."[50] When coupled with a later statement that this distinction belongs to a "bygone era,"[51] the implication is clearly a permanent departure. Most troublesome is an attempt to determine *why* the supreme court felt it necessary to take this approach in affirming a trial court decision based on two distinct classes of complainants.

It has already been indicated that the Washington Constitution affords a broader base for protecting property rights than does the federal constitution or the constitutions of twenty-five states with the "taking" prohibition only.[52] One would expect little aid from decisions in these jurisdictions, particularly in light of the conceptual difficulties encountered by the federal courts. A number of recent cases demonstrate that there are but two circumstances under which a property owner in the vicinity of an airport may expect to recover from the United States for a "taking," regardless of the diminution of property value: (1) when his property is subject to actual overflights and (2) absent such overflights, when resulting interference is such that the owner is forced to abandon his property.[53] The federal position, clearly stated in *United States v. Willow River Power Co.*,[54] is that "damage alone gives courts no power to require compensation." With the additional remedial category of "or damaged," the Washington courts have been able to view "property" in its broadest sense,[55] and damage alone could logically justify compensation; but federal decisions with their technical trespass requirement would not support recovery for those

[50] 64 Wn.2d at 327, 391 P.2d at 543 (1964).

[51] "The specific purpose of the addition of language beyond that of the United States Constitution is to avoid the distinctions attached to the word 'taking' appropriate to a bygone era. It is unnecessary to become embroiled in the technical difference between a taking and a damaging in order to accord the broader conceptual scope intended by the additional language.... We hold that no overflight or direct physical invasion of the airspace over the land is necessary in order to maintain an action under the 'taking or damaging' provisions of the state constitution." *Id.* at 332, 391 P.2d at 546.

[52] See text accompanying note 9 *supra*.

[53] Batten v. United States, 306 F.2d 580, 585 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

[54] 324 U.S. 499, 510 (1945).

[55] Under the Washington Constitution "property" includes the unrestricted right to use, enjoy and dispose of land. Ackerman v. Port of Seattle, 55 Wn.2d 400, 348 P.2d 664 (1960).

parties in the *Martin* case who were not subject to trespassory overflights.

Some analytical difficulty is prompted by the use of federal authority in *Martin* and the statement that "it also appears that the right of a property owner to proceed against the federal government on a theory that the noise of jet aircraft have 'taken' his right to use and enjoyment of land is well established, recognized and accepted."[56] The implication is that not only may the property owner bring an action but that he has some likelihood of recovering against the government for a "taking" based on jet noise without a physical invasion of the superadjacent airspace.[57] None of the five federal decisions cited support this proposition. Four of the cases involved direct overhead flights,[58] and the fifth, *Batten v. United States*,[59] denied any recovery in the absence of overflights, despite a showing that jet noise from nearby flights had reduced the value of the several complainants' properties by up to fifty-five percent.[60] Chief Judge Murrah, dissenting in *Batten*, urged that a constitutional taking need not necessarily depend on a physical invasion of the damaged property; rather, governmental interference, which adversely affects private economic interests, could amount to a taking.[61] The fact remains, however, that no federal case has allowed a property owner to recover for property damage absent some trespassory overflight, and this makes it extremely difficult to agree with the Washington court's statement in the *Martin* opinion that the view of Judge Murrah "more likely ... represents the position of the United States Supreme Court."[62]

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[56] 64 Wn.2d at 328, 391 P.2d at 544.

[57] The Washington court was aware of the overflight requirement in the federal decisions, though apparently not in agreement. This is evidenced by a reference to "the perhaps unwarranted assumption commonly found in the federal cases that sound and vibration waves cannot be considered a 'physical invasion'...." 64 Wn.2d at 326, n. 4, 391 P.2d at 543, n. 4.

[58] Aaron v. United States, 311 F.2d 798 (Ct. Cl. 1963); Jensen v. United States, 305 F.2d 444 (Ct. Cl. 1962); Davis v. United States, 295 F.2d 931 (Ct. Cl. 1961); Bacon v. United States, 295 F.2d 936 (Ct. Cl. 1961).

[59] 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

[60] *Ibid.* Findings of the district court were that jet noise and vibration had reduced the land value of the complaining parties by 40.8% to 55.3%. 306 F.2d at 583, n. 3.

[61] Judge Murrah asked "at what point the interference rises to the dignity of a 'taking'? Is it when the window glass rattles, or when it falls out; when the smoke suffocates the inhabitants, or merely makes them cough; when the noise makes family conversation difficult, or when it stifles it entirely? In other words, does the 'taking' occur when the property interest is totally destroyed, or when it is substantially diminished?" 306 F.2d at 587.

[62] 64 Wn.2d at 331, 391 P.2d at 546. If the Supreme Court had abandoned the physical invasion requirement in favor of Judge Murrah's position, the *Batten* case would have been an appropriate place to so hold. The Court's denial of certiorari (371 U.S. 955 (1963)), while not conclusive, suggests that the requirement persists.

Although the Washington court elected not to stress the "difficult and treacherous" distinction between property that is taken and that merely damaged, a more clearly reasoned result could have been reached by leaving the parties in the categories found by the trial court. No difficulty is then encountered in justifying recovery by the property owners subjected to direct overflights and resulting loss of property value. Nor did the other group pose any issue that could not have been resolved under the Washington Constitution and prior law; the court need only have held that recovery is not limited to the effect of unreasonable noise coming from overflights—that such interference can be equally "damaging" when it travels horizontally to reach non-superadjacent property owners. In this manner the *Martin* decision, while reaching an identical result, could be more easily placed in perspective with the established Washington law.

While the reasoning behind this departure from the taking-damaging distinction in *Martin* is vague, such is not the case with the court's clear and forthright rejection of the necessity of distinguishing between "substantial" interference with the use and enjoyment of property and mere "incidental" damaging in an inverse condemnation action.[63] The court reasoned that it should be even easier for the public to pay small claims than large ones for benefits taken from property owners. From a monetary standpoint this may be true, but the idea is not likely to be met with any enthusiasm by various governmental agencies, particularly the State Highway Department. There was a certain utility in the limited construction placed on the constitutional concept of "damaged" that allowed the courts to balance a community or public interest in the activity against the asserted injury to the individual. The *Martin* decision rejects this balancing process as being of "dubious relevance or utility."[64] The court's new approach clearly offers an element of predictability to such actionable injuries; this could be more than offset, however, by a burgeoning of claims each time there is public construction. Even though the damage alleged might be inconsequential, or perhaps purely imaginary, these claims would have to be met, with the likely result of increasing the cost of construction of public works and perhaps even materially retarding development in a number of areas.

This approach has the further result of placing public activities at a

[63] 64 Wn.2d at 332, 391 P.2d at 546.
[64] *Ibid.*

disadvantage when compared to similar private endeavors—in effect, a discrimination against governmental works. The balancing process is an integral part of a private remedial action sounding in tort, and traditionally a private owner has been allowed to use his land in many way which adversely affect the value of neighboring land without resulting liability.[65] The *Martin* opinion indicates that by showing an offending use to have been made for the public benefit, and proving a correlative diminution in property value, the public will be made to pay. This is consistent with the constitution, but it is contrary to prior holdings of the court that an action which could not be maintained against a private party could not be maintained against the state or its agent.[66] With substantial injury no longer a requisite of recovery, it is clear that the court has adopted a view even more liberal than the long rejected philosophy of *Brown v. Seattle*.[67]

The requirements of an actionable claim for inverse condemnation in Washington would now appear to be (1) a claim of personal discomfort from a nearby (though no longer necessarily adjacent or abutting) public activity, (2) grounded in the constitutional requirement of compensation for private property "taken or damaged" (without necessarily distinguishing which), (3) for which some resulting reduction (though not necessarily "substantial") in property value can be proved.

Statute of Limitations. Abrogation of the necessity of establishing either a "taking" or a "damaging" is likely to introduce difficulty into the area of selecting an appropriate statute of limitations.[68] As already noted, the rule in Washington had developed that the three-year stat-

[65] Erection of a garage, a factory, an apartment or even a dwelling of inferior quality in a desirable residential section may distinctly depreciate the values in the area; yet, if properly zoned, the affected property owners would have no remedy. It would seem a strange perversion of legal principles if the right of an owner to recover damages depended on his ability to show that the offending structure was erected for public good rather than private profit, or if one man could claim compensation for a public hospital next to his house while another would be denied recovery for his identical damage from a private hospital. See generally PROSSER, TORTS § 99, at 620-23 (3d ed. 1964).

[66] See text accompanying notes 16, 17 *supra*.

[67] See text accompanying notes 9, 10, 47 *supra*.

[68] Such difficulty will not be a new experience for the court. In Ackerman v. Port of Seattle, in an opinion withdrawn by the court and now appearing only in 329 P.2d 210 (1958), the court overruled all prior decisions applying the three-year statute of limitations to constitutional damagings. Sixteen months later when the opinion reappeared in 55 Wn.2d 400, 348 P.2d 664 (1960), that part had been replaced with a reaffirmance of those cases applying the three-year statute.

[69] See text accompanying notes 23-27 *supra*.

ute was applicable to a "damaging" but for a "taking" the ten-year statute applied.[69]

The court has several alternatives at this juncture. Most obvious would be continued adherence to the established rule, necessarily reviving the departed distinction. Another possibility would be elimination of any limitation as to inverse condemnation actions.[70] Somewhere between these two extremes lies the alternative of applying a single statute to all claims, regardless of whether a distinction might be made on the basis of taking or damaging; but here the court could find itself bound to a limitation that would not be equitable under all circumstances. Although a longer period for all actions would be fair to genuinely injured property owners, there remains a serious question of fairness to the public in imposing additional years of potential liability on the governmental entity engaged in the offending activities, particularly since the most insubstantial injury may now be actionable.[71] On the other hand, a short uniform period would be adverse to property owners and would necessitate a change in the requirements for acquisition of prescriptive rights.[72] It is suggested that when this issue is raised, the Washington court will find it advantageous to return to the taking-damaging distinction.

Measure of Damages. By rejecting the necessity of a property owner showing "substantial" damages, the court in *Martin* caught everyone, including both parties to the action, by surprise. Plaintiffs had set out to prove that jet traffic had substantially reduced their

[70] It was suggested in Note, 34 WASH. L. REV. 239, 245 (1959), that no statute of limitations should apply in eminent domain actions inasmuch as the state constitution makes no such provision, and the legislature has not provided for the action under any of the existing statutes. However, a complete removal of any time limitation would likewise remove the incentive for injured parties to promptly bring their actions.

[71] Departure from "substantial" injury as a condition of recovery will have the further side-effect of confusing *when* the statute of limitations starts running. In the past no cause of action for a constitutional damaging accrued until such time as the offending acts *substantially interfered* with the use and enjoyment of property. *E.g.*, Buxel v. King County, 60 Wn.2d 404, 374 P.2d 250 (1962); Jacobs v. Seattle, 100 Wash. 524, 171 Pac. 662 (1918). If, as the *Martin* decision suggests, a cause of action accrues immediately upon the ability to show some measurable damage from a nearby public use, then some interesting questions could arise as to whether the statute might start running from the announcement of a proposed project, or a number of other prior times when any injury might be reflected solely in the market value of the property.

[72] No Washington statute expressly governs the acquisition of prescriptive rights. Wasmund v. Harm, 36 Wash. 170, 78 Pac. 777 (1904), held that in the absence of a statute of limitations applicable to incorporeal heriditaments the court would apply, *by analogy*, the local limitations for quieting title to lands. The judiciary could change the prescriptive period, but in view of the precedent grown up around this application this does not seem likely.

property values,[73] defendants attempted to show that they had suffered noncompensable annoyance and discomfort.[74] The court, however, ruled that "substantial interference" and "substantial injury" are not a requisite of recovery in inverse condemnation; rather the sole measure of recovery is the proveable injury to the market value of the property.[75]

The court further rejected the idea that a balancing of public and private interests is necessary under this type of action. The court, in the past, has tended to import certain traditional tort factors into its eminent domain considerations. When one considers the underlying basis for nuisance as opposed to inverse condemnation it can readily be seen that there is a valid issue as to whether such a balancing process is appropriate to the latter action.[76] Balancing is a product of the common law tort of nuisance[77] while inverse condemnation rests on a constitutional requirement of just compensation for private property taken or damaged pursuant to some public use. There is no *express* leeway in the constitution for a balancing of interests; it seems rather to have become an element of the judicial process gradually through a combination of common law and common sense. But with the constitution making unqualified provision for paying for whatever is taken or damaged, a strong argument can be made that it is not equitable to shift to the private property owner the burden of damage to his property as a contribution to the public interest.[78] The court in *Martin v. Port of Seattle* was so persuaded, ruling that the full extent of appropriate balancing is attained, independent of a separate and distinct process, when the property owner shows injury to the market value of his property.[79] Rejection of the idea that the individual must bear some inconvenience and loss of peace and quiet as the cost of living in a modern, progressing society[80] marks a departure from a considerable segment of prior Washington law.[81]

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[73] Brief of Respondents, p. 4.
[74] Brief of Appellant, p. 177.
[75] 64 Wn.2d at 333, 391 P.2d at 546, citing Ackerman v. Port of Seattle, 55 Wn.2d 400, 348 P.2d 664 (1960).
[76] Some earlier Washington opinions have also attempted to depart from the tort balancing concept in these constitutional actions. *E.g.*, Jacobs v. Seattle, 100 Wash. 524, 527, 171 Pac. 662, 663 (1918); Kincaid v. Seattle, 74 Wash. 617, 134 Pac. 504 (1913) (dissent).
[77] See PROSSER, TORTS § 90, pp. 619-23 (3d ed. 1964).
[78] See Comment, 47 MINN. L. REV. 889, 896-97 (1963).
[79] 64 Wn.2d at 333, 391 P.2d at 546.
[80] *Ibid.* Perhaps indicative of a certain lack of clarity in *Martin* is the fact that an opposite interpretation has been made, *i.e.*, that the individual *must* bear a certain amount of inconvenience, and that each case *will* involve a balancing of private versus

The formula for determining the amount of damage suffered is frequently, and broadly, stated to be the fair market value [82] of what was taken; or the difference between the fair market value of the property before and after the damaging. Problems inherent in this seemingly simple rule are well illustrated by the *Martin* case.

Clear enough is the finding that jet flights resulted in compensable damage to the plaintiffs' property. Arriving at the amount of compensation is possible under the before and after rule by working with two figures: (1) the fair market value of each parcel at a point in time immediately preceding the first injury caused by jet flights ("before"); and (2) the corresponding value of each parcel at the time when damages are being determined ("after"). A reduction of the latter below the former would result in compensable damage. The apparent simplicity of the process in this case, however, is obfuscated by two lower court findings which were necessarily affirmed through a process of being neither discussed nor modified by the supreme court. First, that prior to the advent of jet traffic, "flights of piston driven aircraft over or in the close proximity to plaintiffs' properties from and after September, 1947, substantially diminished the fair market value of said properties."[83] Second, that monetary damages to the properties should be the "fair cash market value after allowing for diminution in value occasioned by operation of piston driven aircraft only. . . ."[84] On remand it would not appear that the jury will be working with only the before and after valuations suggested above. Because the defendant acquired a prescriptive avigation easement over some of these properties for piston driven aircraft—a right no doubt being exercised today to some extent—a value must also be established for this ease-

public interests. Note, 39 WASH. L. REV. 398, 402 (1964). It is submitted that this is not correct. The Washington court suggests, rather, that the ability of the individual to prove some loss takes in the full extent of balancing allowed under the constitution. Clearly such items as noise and inconvenience of jet flights are a major factor in reducing the market value of nearby properties, and there would be no way to compute and subtract a corresponding amount for the reasonable and expectable inconvenience even should the individual be required to bear it. Such was the pre-*Martin* result obtained under the "substantial damage" requirement. An interesting comparison is found in Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100, 103 (1962), where it was said: "It is equally clear that a reasonable volume of noise... must be endured as the price of living in a modern industrial society." The Oregon Constitution, however, is one of those without the "or damaged" protection.

[81] See cases cited in notes 40-43 *supra*.

[82] "Fair market value is the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied." 4 NICHOLS, EMINENT DOMAIN § 12.2(1) (3d ed. rev. 1963). See also Symposium, *Damage to Property Not Taken*, 1957 U. ILL. L.F. 296.

[83] Transcript, p. 37.

ment in order that the loss of property value may be proportionately reduced.[85] The actual mechanics of this process should tax the facilities of even a very superior jury; and since compensation must be determined on a plot by plot basis, the difficulties will be multiplied by the number of recovering property owners.

Another problem, apparently overlooked, is our generally spiralling economy which has resulted in a gradual but continuous appreciation in real estate values. Neither the trial court nor the supreme court provided for this inflationary factor. The trial court no doubt reasoned that since the complaint was of a continuing damage, the plaintiffs should be allowed to show their loss at the latest possible point in time —upon remand for establishing the amount of recovery. However, the greater the period of time between the "before" and "after" valuations, the more inflation will reduce the ultimate recovery; sufficient delay could cause the latter value to exceed the former with the result that despite a finding of damage there would be no proveable loss and hence no recovery. To avoid such a hollow victory for the injured property owner in inverse condemnations, the courts should provide for removing normal property appreciation from the "after" valuation.

Mention should also be made of the apparent demise of another long standing rule in this area. The supreme court departed, sub silentio, from the concept that one who purchases his property after the damage, has no cause of action since the reduced value is presumed to be taken into consideration in the purchase price.[86] The trial court refused to dismiss this action as to twenty property owners who purchased after the commencement of jet traffic.[87] The supreme court did not mention

[84] *Id.*, p. 41.

[85] This raises an interesting question as to whether property owners nearby, but not directly beneath, flights should have any reduction made in their damages. Ackerman v. Port of Seattle, 55 Wn.2d 400, 348 P.2d 664 (1960), found that there could be no prescriptive acquisition of a right to damage, as distinguished from a taking. Further, the rule for acquiring a prescriptive easement, as set out in Schulenbarger v. Johnstone, 64 Wash. 202, 204, 116 Pac. 843, 844 (1911), is that "one asserting a right of way must show continuous, uninterrupted and adverse use over a uniform route, with knowledge of the owner, and *during a time when he was able in law to assert and enforce his rights.*" (Emphasis added.) Since *Martin v. Port of Seattle* is the first decision to depart from the requirement of a physical invasion into the complainant's airspace, the parties not subject to overflights were *not* previously able to assert and enforce any right that might ripen into a prescriptive easement or a prescriptive right to damage. This suggests a necessary return to the distinction between taking and damaging for purposes of determining compensation; and it presents the rather anomalous possibility that property owner *A* would have his damages reduced by the value of a prescriptive avigation easement through his air, while property owner *B*, only fifty feet away but not subject to overflights, could show the same resulting loss of market value which would not be subject to any reduction.

[86] Kakeldy v. Columbia & P. S. Ry., 37 Wash. 675, 80 Pac. 205 (1905).

[87] Appellant's Petition for Rehearing, p. 5.

the issue on appeal, and it can only be assumed that both courts felt that the continuing nature of the damage and the increasing frequency of flights warranted some recovery. Nevertheless, a genuine question of bona fides and equity remains as to recovery by these recent purchasers. It has been suggested that if a real estate purchaser has notice of an impending expansion of a nearby governmental use at the time of purchase he should be presumed to have assumed that risk rather than being given a "windfall" upon subsequent materialization of the expansion.[88] It might also be said that a person who buys property at the end of an established airport runway, in fact, assumes the necessary inconveniences, including noise, of its normal operation.[89] There seems to be little justification for this result in the *Martin* case which permits property owners a double recovery, contrary to the recent decision in *Anderson v. Port of Seattle.*[90]

When the various damage issues are finally resolved, there may remain the question of what the condemnor has acquired. The trial court found that between 1947 and 1959 the Port of Seattle acquired a prescriptive air easement over one group of property owners, but that in retrospect the easement was limited to use by piston-type aircraft only; flights by jets were found to be a change of use so substantially different in character and degree as to give rise to a new cause of action. Although a private servitude is limited to a use of the nature prescriptively acquired,[91] it does not necessarily follow that the same rule should govern a public servitude. In this respect the case of *In re West Marginal Way*[92] would appear analogous. The effect of that decision was to permit King County to acquire a full sixty-foot roadway by prescription through use of only the middle ten to fifteen feet. The court reasoned that this should follow from a law requiring roads to have a sixty-foot right of way. In the *Martin* case the glide path acquired by

[88] Comment, 47 MINN. L. REV. 889, 898 (1963).

[89] Only ten of the 196 complainants acquired their property before the area was zoned for an airport in 1943. Brief of Appellant, p. 19. Consider PROSSER, TORTS § 92, p. 632 (3d ed. 1964), with regard to the plaintiff who has "come to the nuisance."

[90] 49 Wn.2d 528, 304 P.2d 705 (1956). A property owner brought suit for damages from low overflights; during pendency of the suit the defendant purchased plaintiff's property at its fair market value with no reduction for the alleged damages. Plaintiff still sought recovery for temporary damages during his ownership. This was denied on the grounds that any recovery would constitute a double recovery.

[91] The Restatement rule is that the extent of a prescriptive easement is fixed by the use through which it was acquired. 5 RESTATEMENT, PROPERTY § 477 (1944). But in § 479 is the suggestion that an increased use resulting from a normal and foreseeable evolution of the use of a dominant tenement, balanced against the increased burden in the servient tenement, could be upheld.

[92] 109 Wash. 116, 186 Pac. 644 (1919).

prescription for conventional aircraft was in fact no more than a highway in the air,[93] and it is clear, even without the Municipal Airports Act of 1945,[94] or the Federal Aviation Act of 1958,[95] that airplanes require sufficient air space to make a safe descent and landing. It does not seem logical, or consistent with the rest of the country,[96] that because the Port of Seattle was not fully utilizing its prescriptive avigation right it should be limited to something less than the full necessary use including use by jets.

The Port of Seattle may receive a rather limited right indeed. If the prescriptive easement already acquired was limited to use by piston-driven aircraft, it follows that this purchased easement will be limited to use by jets, perhaps even to jets with a maximum of four engines. This, together with the implication that each change of use or increase in noise creates a new cause of action, makes it apparent that an advance in aircraft design involving more engines and noise per jet could lead to a whole new round of actions. A conversion from jets to rockets would be even more analogous to the present action, and in either instance it would seem that the property owner's recovery would turn on his ability to prove a resulting reduction in property value.[97] This view, while admittedly generous to individual property owners, would be onerous to governmental entities that could be subjected to successive actions due to reasonable changes in use dictated by progress. Particularly serious results could attend an extension of this concept

[93] Cheskov v. Port of Seattle, 55 Wn.2d 416, 421, 348 P.2d 673, 677 (1960) ("The air is a public highway...."); Mills v. Orcas Power & Light Co., 56 Wn.2d 807, 821-22, 355 P.2d 781, 789 (1960) ("An airplane... is privileged to travel this modern highway.").

[94] RCW 14.08 provides in part: "Where necessary, in order to provide unobstructed air space for the landing and taking off of aircraft... every municipality is authorized to acquire... easements through or other interests in air spaces over land or water... and such other airport protection privileges as are necessary to insure safe approaches to the landing areas of said airports...." RCW 14.08.030(3).

[95] 49 U.S.C.A. § 1301(24) (Supp. 1961). It should be noted that on appeal the Port of Seattle made a two-pronged attack on the lower court judgment, asserting on the one hand that it was in error based on prior Washington eminent domain decisions, and on the other that the trial court erred in its interpretation of the Federal Aviation Act of 1958. This rather substantial and controversial federal question has been ignored for the purposes of this comment.

[96] 2 NICHOLS, EMINENT DOMAIN § 6.445 (3d ed. rev. 1963).

[97] Several methods are used to convey the easement to the condemnor upon payment of damages. RCW 8.20.090 provides for transfer by judgment or decree and recordation thereof. Other examples are found in three federal cases cited at note 58 *supra*. The court in *Davis* merely declared a permanent air easement for the damages paid. The *Aaron* decision specified a permanent easement above 400 feet. The court in the *Jensen* case, perhaps recognizing the difficulties that could arise later, required the property owners to execute deeds granting the government a perpetual easement for flight of airplanes *of any kind*. Greater specificity in this area would clearly preclude future problems.

to highways and other ground activities. These successive actions, when coupled with a rejection of the substantial damages requirement, suggest that the state and cities could spend more time defending inverse condemnation suits than building highways, streets or airports.

Summary. Before attempting to predict what *Martin* could mean if carried over to other governmental activities, it is almost essential to summarize several key points. Although there is a certain amount of vagueness, not only in what the court said, but in what it left unsaid, it seems clear that several distinctions and practices in the Washington law of eminent domain have been eliminated. A strict following of the *Martin* decision should mean that in bringing a future inverse condemnation action there is (1) no clear necessity of distinguishing between the taking or damaging of a property right respecting the use and enjoyment of land; (2) no clear requirement of a physical invasion, technical trespass, or adjacent public activity as to that property right; (3) no distinction between substantial interference and incidental damaging of property; (4) an opportunity to purchase damaged land at a depreciated price and recover again from the damager; (5) accrual of a new cause of action with each subsequent injury to property resulting from a change or increase of use; (6) possible periodic acquistion of perscriptive rights against property which must be analyzed and considered in determining the actual extent of damage for each separate injury; and (7) no clearly applicable statute of limitations as to these causes of action.

The Future: Streets and Highways

A logical extension of the *Martin* decision could well invite a flood of previously noncompensable claims, especially in conjunction with the building of modern freeways or limited-access highways through metropolitan areas, and with new types of municipal transportation. A number of urban property owners, both residential and commercial, may now have valid inverse condemnation actions against the state or its agents[98] for damages that can be proved under the holding of *Martin v. Port of Seattle*. Consider these brief hypothetical situations.

When apartment owner *X* purchased his building it was in a quiet residential neighborhood. Today he faces an access road and a Cyclone fence separating him from a two-story wall of concrete topped by

[98] Political subdivisions of the state acquire powers of eminent domain by express delegation from the legislature. Seattle v. State, 54 Wn.2d 139, 338 P.2d 126 (1959); Tepley v. Summerlin, 46 Wn.2d 504, 282 P.2d 827 (1955).

a ten-lane highway. Nothing was "taken" from X in the traditional sense, nor is he technically abutting on the freeway.[99] The highway department, when acquiring right of way, undoubtedly reasoned that the damage would be the usual noncompensable "inconvenience and loss of peace and quiet" referred to in *Martin*,[100] and long supposed to be the lot of those who live alongside highways. But X has lost many tenents because of the constant flow of noisy traffic, the bright mercury-vapor lights, and the loss of view. The highway side of his apartment is largely vacant now, and X would sell and move except for the sizeable loss his realtor estimates he must take. This is exactly the measure of his claim under the *Martin* decision where it is suggested that he may sell the property at its present fair market value and recover his loss from the state.[101]

Homeowner Y has a similar problem. The quiet neighborhood street that ran in front of his house is now a busy access road that causes his wife great concern with regard to the children.[102] Here too is the loss of view,[103] the constant noise of passing cars and trucks, the bright lights, and the inconvenience of having to drive three miles to the shopping center formerly only a two block trip.[104] All these factors weigh heavily in determining the price Y may expect to get for his home,

[99] RCW 47.52.080 protects, in theory, an abutter's right of access to a limited access facility by requiring compensation when such access is taken. The question really is, who is an "abutting owner" under the code? Current practice in acquiring freeway rights of way would seem to entail a purchase up to the far side of an existing street. The property owner continues to abut on the old street rather than the freeway, and the fact that he cannot conveniently get on or across the freeway is not compensable since he technically is not abutting.

[100] 64 Wn.2d at 333, 391 P.2d at 546.

[101] See text accompanying note 111 *infra*.

[102] Aubol v. City of Tacoma, 167 Wash. 442, 9 P.2d 780 (1932), considered the question of anxiety and fear causing loss of property value. It was held there that a showing of "reasonable apprehension of danger" was necessary, and recovery was denied. Similarly, one of the many allegations by plaintiffs in the *Martin* case was directed toward an element of the taking or damaging by jet flights through the "anxiety" engendered by the loud noise. Brief of Respondents, pp. 15-16. However, the individual consideration of these factors would now seem unimportant following the *Martin* decision. The fear or anxiety of a mother for her children next to a busy access road will be directly reflected in what a purchaser (with children) will pay for the property, and this is the sole measure of damages.

[103] The right to such intangibles as light, air and view, was a compensable element of damage in earlier cases. See Fry v. O'Leary, 141 Wash. 465, 252 Pac. 111 (1925); Keesling v. Seattle, 52 Wn.2d 247, 234 P.2d 806 (1958). In an inverse condemnation it is now the bearing of such loss on the fair market value that is important.

[104] One is not deprived of access if the highway is new since no access existed before construction. State v. Calkins, 50 Wn.2d 716, 314 P.2d 449 (1957). There is a parallel in the case of Caldwell v. Seattle, 75 Wash. 565, 135 Pac. 470 (1913), which held that the complaining adjacent property owner had no protected right to enter the city park at a particular spot, and could not complain that the entrance across from his house had been made inaccessible. While such inconvenience would not have been compensable before the *Martin* case, to the extent it is reflected in the reduced market value of the property it will now be an element of recovery.

and indeed, may even render finding a buyer difficult. It would appear that *Y's* injury could now support an inverse condemnation under the *Martin* case.

Representative of a third type of indirect property injury is the businessman who is dependent on passing motorists for his livelihood. Motel owners are a common example of this group,[105] although restaurants and other highway-oriented business activities are similarly affected. As a rule their initial locations were selected on the basis of traffic flow; today they find that either the motorists do not pass, or if they do, they cannot get off the highway. From their loss of business would follow a corresponding loss in value of the business and its situs, and "in inverse condemnation the measure of recovery is injury to market value, and that alone."[106]

One example which is not hypothetical may be representative of the municipal transportation liability of the future. As of June 19, 1964, some twenty property owners and businesses abutting the Seattle monorail route had filed actions totalling 1.6 million dollars against the City of Seattle and the franchised monorail operators.[107] These property owners have, in general, alleged only a constitutional "taking or damaging" which, in line with the *Martin* opinion, should be sufficient. Though not attempting to prejudge the case, it would appear that the plaintiffs' success of recovering must turn on an ability to show that their properties today have less value than before the monorail was constructed in the street.

There are many similar examples of property owners up and down our streets, highways and freeways, who can conclusively show that some nearby or adjacent governmental project has caused a reduction in their property values. Former limitations on a constitutional taking or damaging action such as the abutting requirement, the need to show something more than mere depreciation of property value or annoyance and inconvenience, dissuaded most property owners from

[105] In Walker v. State, 48 Wn.2d 587, 295 P.2d 328 (1956), a motel owner brought an inverse condemnation action claiming a right to compensation for "diminution of the right of ingress and egress" resulting from installation of a concrete divider in the center of an abutting four-lane highway. The court found this to be the non-compensable result of a valid exercise of police power, noting that a property owner has a right of free and unhampered access to his property—but no property right in the continued flow of traffic past that property. Here the court emphasized that while traffic coming down the far side of the highway could no longer turn across to complainant's motel the motorists could eventually return on the right side of the road. Compare the recent handling of a similar complaint by a Minnesota motel owner in Hendrickson v. State, 127 N.W.2d 165 (Minn. 1964).

[106] 64 Wn.2d at 333, 391 P.2d at 546.

[107] Argus, June 19, 1964, p. 4, col. 3.

even bringing forth their claims. Legislation rendering acts done under statutory authority immune from being a nuisance,[108] the probability that an asserted "public use" would be turned into an exercise of police power for "public welfare,"[109] and a number of other limiting concepts all contributed to keeping the courts clear of these claims. Yet these people have had their property rights interfered with, albeit for the greater public good. The state constitution offers a remedy, and the *Martin* decision expressly states that "when the land of an individual is diminished in value for the public benefit, then justice, and the constitution, require that the public pay."[110] The court even offers the property owner a means by which he can establish the injury and the amount of damage; he may simply sell his property at a loss and move away, with a result no different than if the property had been directly condemned. "Whichever way the state exacts such a 'sale' it must pay the individual the amount he suffers in the diminishment of the value of his land, as reflected by the decrease in the amount he can receive in a sale to a willing buyer."[111]

CONCLUSION

The equitable result in *Martin* as to private property owners cannot be doubted. The court has cut away some overly technical distinctions and limiting judicial verbiage that has, in the past, blocked fulfillment of the express promise of article I, section 16 of the Washington Constitution. In so doing, however, the court may subsequently find that it has opened the way to actions and recoveries not envisioned by the framers of the constitution, or perhaps even by the court itself. Washington courts may now have some difficulty in drawing new lines, if any lines are to be drawn, between recovery for necessary and legitimate governmental activities and those projects categorized by the constitution as "public uses."

It will be recalled that there are two versions of the ancient myth

[108] "Nothing which is done or maintained under express authority of a statute can be deemed a nuisance." RCW 7.48.160. *But see* Shields v. Spokane School District, 31 Wn.2d 247, 196 P.2d 352 (1948), interpreting the statute to mean only that it cannot be a nuisance *per se*, and that the court may still find it a nuisance in fact.

[109] See text accompanying note 11 *supra*. *Compare* Walker v. State, 48 Wn.2d 587, 295 P.2d 328 (1956), *with* McMoran v. State, 55 Wn.2d 37, 345 P.2d 598 (1959). That the valid exercise of "police power" will continue as an important escape route from governmental liability has been borne out in two decisions coming after *Martin:* Kahin v. City of Seattle, 64 Wn.2d 886, 395 P.2d 79 (1964); State v. Williams, 64 Wn.2d 855, 394 P.2d 693 (1964).

[110] 64 Wn.2d at 333, 391 P.2d at 547.

[111] *Ibid.*

of Pandora and her magic box. In one the box contained all human ills which escaped when the box was opened. In the other the box was filled with all the blessings of the gods which likewise (except for Hope) escaped.[112]

It seems clear that the decision and opinion in *Martin v. Port of Seattle* has, for the time being at least, opened a similar box filled with all the various actionable claims of inverse condemnation. It may well be that these too are blessings rather than ills, and perhaps the court has intentionally released seventy-five years of express constitutional claims, imprisoned one by one by an overly solicitous Washington court.

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[112] BULFINCH, MYTHOLOGY: THE AGE OF FABLE 16-17 (comp. Modern Library).