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## I.—COMPENSATION AS AN INCIDENT OF THE RIGHT OF EMINENT DOMAIN.

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“Eminent domain is the public power of making a compulsory purchase of private property for public use; and payment (either made, or, by agreement of the parties, to be made) is an essential part of the legal idea of a purchase, voluntary or compulsory. Voluntary, and without payment, it is a donation; compulsory, and without payment, it is *robbery*.”—Doe, J., 54 N. H. 590, 611.

“The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. If ‘Thou shalt not covet’ and ‘Thou shalt not steal’ were not commandments of Heaven, they should be made inviolable precepts, in every society, before it can be civilized, or made free.”—6 Works of John Adams, 9.

The right of eminent domain, whereby the State is justified in taking private property for public use, against the owner’s consent, has been recognized from early times as a necessary incident of sovereignty. It is an attribute inherent in all governments, one of the *jura majestatis*, sometimes said to be “the law of the existence of every sovereignty.” At this late day, when this right has been so long acquiesced in,

there can be no reason for questioning its justice or for extolling its efficacy. The right exists, and the necessity is conceded. Half a century ago, it was said to be too late to set up any barrier to the power. "It has been," says the court, "in constant exercise since the existence of society, and must continue unrestricted so long as society shall last."<sup>1</sup>

The statements occasionally met with, to the effect that the right of eminent domain is absolute over the property of the citizen, and that it has no limit but the necessities of the State, must be understood as true only in a limited sense. Were such expressions literally true, we should be to-day living under an absolute despotism, and never be called upon to witness the controversies so frequently occurring in the courts, wherein the learning of the profession is challenged by disputes growing out of the exercise of this conceded right.

There being, then, certain limitations which condition the lawful exercise of the right, and beyond which legislative power cannot go, we shall consider the subject of compensation as a check upon the right of eminent domain.

*I. Compensation a Right not dependent upon Constitutional Provisions.* — Political philosophers long amused themselves in striving to invent plausible theories which should account for the organization of society and the creation of States, seeking to deduce therefrom the respective rights and duties of the governing and the governed. However interesting to speculative minds may be the results they reached, they are of little practical importance, as intelligent thought is agreed that the ultimate end and object of government is to protect those rights which, as Blackstone denominates them, are "the absolute rights of all mankind," — the right to personal security, to liberty, and to *property*. An absolute power over any one of these rights would be a power to destroy that which the State is primarily bound to protect. It follows that the power of the State, as conditioned by the law of

<sup>1</sup> Tuckahoe Canal Co. v. Tuckahoe R. Co., 11 Leigh, 75.

its own existence, must be a power with limitations. And, in its application to the property of the citizen, it is a power of interference confined to three classes of cases.

1. It may regulate the use and possession of property, so far as may be necessary to guard against abuse, and protect the rights of all. And this is generally called *the police power* of the state.

2. It may take a portion of the property of the citizen by way of taxation, which goes to support the government, and is the price which the remainder of his property must pay for protection.

3. It may take private property for public use, under the right of eminent domain.

And to these three classes is it agreed that the authority of the State over the property of the citizen is confined.<sup>1</sup>

In the first of these cases, the property of the individual is ordinarily not taken from his possession, but is only subjected to those regulations as to use which are deemed necessary for the good of all, it being an old maxim of the law, *Sic utere tuo ut alienum non lædas*.

In the last two cases private property is taken, and for public use, but with a distinction characterizing the respective powers which is fundamental, and of great importance. Under the power of taxation, government takes the property of the individual as his share of a justly imposed and apportioned public burden, an equivalent being received in the protection which government is thereby enabled to furnish him. On the other hand, under the power of eminent domain his property is taken as something distinct from, and more than his share of, a justly apportioned public burden.<sup>2</sup> And it is because more than his apportioned share is taken from him that it always has been regarded that the rendering the owner a just compensation in return was an obligation

<sup>1</sup> Burlamaqui's *Politick Law*, pt. iii., ch. 5, sec. 6; *Munn v. Illinois*, 94 U. S. 145.

<sup>2</sup> *The People v. The Mayor, etc., of Brooklyn*, 4 N. Y. 19; *Matter of Dorrance Street*, 4 R. I. 237; *McComb v. Bell*, 2 Minn. 295; *McBean v. Chandler*, 9 Heisk. 349, 360; *Cash v. Whitworth*, 13 La. An. 403; *Newby v. Platte County*, 25 Mo. 258, 269; *Washington Avenue*, 69 Pa. St. 355, 361, per Agnew, J.

which justice imposed upon the State,—a limitation conditioning any lawful exercise of the right of eminent domain. So that the right of eminent domain, sometimes said to “override every other right,” rides by no means “roughshod,” but is restrained by the necessity of making the owner a compensation which shall be an equivalent for the injury done his private rights.

The necessity of compensation as a conditioning principle of the right of eminent domain has not been confined to those States alone that are the most justly celebrated for the reverence they pay to the sanctity of private rights; but it has been a recognized principle even in governments that are the most odious by reason of the absolute power exercised over life and property. A remarkable instance of this, mentioned by De Tott in his “Memoirs of the Turkish Government,” and quoted by Mr. Justice Waties in the Supreme Court of South Carolina, in 1796, may not be uninteresting in this connection. “The Sultan Mustapha,” says De Tott, “being desirous of building and endowing a new mosque, fixed upon a spot, in the city of Constantinople, which belonged to a number of individuals. He treated with all of them for the purchase of their parts, and they all willingly complied with his wishes except a Jew, who owned a small house on the place, and who refused to give it up. A considerable price was offered him, but he resisted the most tempting offers. His partiality for the spot, or his obstinacy, was stronger than his avarice. All the city was astonished at his rashness, and expected every hour to see his house demolished and his head upon a pole. But what was the conduct of the sultan,—of one who was the absolute master of the lives of millions? He consulted his mufti, who answered that private property was sacred, that the laws of the Prophet forbade his taking it absolutely, but he might compel the Jew to lease it to him as long as he pleased, at a full rent. The sultan submitted to the law.”<sup>1</sup>

In ancient Rome, at a time when it seemed a little uncertain whether the State existed for the individual or the indi-

<sup>1</sup> *Lindsay v. The Commissioners*, 2 Bay, 60.

vidual for the State, a scheme of the censors to supply the city with water by means of an aqueduct was defeated, B. C. 179, as Tacitus tells us in his Annals, by the refusal of a proprietor to permit it to be carried through his lands. So, when a private house was damaged by the laying-out of a public highway, the same writer tells us that the damages were paid by the Emperor Tiberius, upon the petition of the party to the Senate.

And in early English history it is recorded that in 1544, when the English Parliament empowered the city of London to appropriate private property for a public use, it attached to the grant the condition that the property taken should be paid for, upon the assessment of its value by commissioners to be appointed by the lord chancellor.<sup>1</sup>

"No principle in English jurisprudence," it has been said, "is better settled than that an individual cannot be deprived of his property except for the public use, and for a just compensation; and the British Parliament accordingly *never* authorized one individual's property to be taken for the private benefit of another, nor for public use, without first providing a just equivalent for the owner."<sup>2</sup> In yet another case, it has been said that "English history does not furnish an instance of the kind; the Parliament, with all their boasted omnipotence, never committed such an outrage on private property. \* \* \* Such an act would be a monster in legislation, and shock all mankind."<sup>3</sup>

This principle, that compensation is a necessary incident to the exercise of the right of eminent domain, has been regarded by all writers upon natural jurisprudence as an acknowledged principle of universal law, and one founded in natural equity.<sup>4</sup>

<sup>1</sup> 1 Kent's Com. 340.

<sup>2</sup> *Newby v. Platte County*, 25 Mo. 258, 261.

<sup>3</sup> *Van Horne's Lessee v. Dorrance*, 2 Dall. 304, 310. And see 1 Bla. Com. 139.

<sup>4</sup> Gro. de J. B., b. viii., ch. 14, sec. 7; Puffendorf De Jur. Nat. et Gen., b. viii. ch. 5, sec. 7; Bynkershoek Quæst. Jur. Pub., b. ii., ch. 15; Burlamaqui's Politic Law, pt. iii., ch. 5, sec. 29.

In our own country, it has been generally admitted that, independent of all constitutional and statutory enactments, the right to compensation is an inseparable incident to the exercise of this power of eminent domain, and that, where the law fails to provide compensation, an attempt to take private property for public use is illegal and void. This point passed under the attention of Chancellor Kent in 1816, the Constitution of New York at that time containing no provision on the subject. The chancellor, however, held that provision for compensation was "an indispensable attendant" on the exercise of the power, and that, until such a provision was made, "it would be unjust, and contrary to the first principles of government," to allow the individual to be deprived of his property.<sup>1</sup> In New Jersey the same conclusion was reached, and the court declared it to be "a settled principle of universal law that the right to compensation is an incident to the exercise of the power; that the one is inseparably connected with the other;" and they are said to exist "not as separate and distinct principles, but as parts of one and the same principle."<sup>2</sup> While it has been elsewhere said that "the obligation to make just compensation is concomitant with the right,"<sup>3</sup> and the same conclusion has been reached by other courts.<sup>4</sup>

It should not pass without mention that in South Carolina and Virginia a different view has been taken of this subject. In the former State, the question seems to have arisen for the first time in 1796, the Legislature having empowered the city

<sup>1</sup> *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Bradshaw v. Rogers*, 20 Johns. 106.

<sup>2</sup> *Sinnickson v. Johnson*, 2 Harr. 145.

<sup>3</sup> *Bonaparte v. Camden, etc.*, R. Co., 1 Baldw. 220.

<sup>4</sup> *Young v. McKenzie*, 3 Kelly (Ga.), 31; *Parham v. The Justices*, 9 Ga. 341; *Woodfolk v. Nashville, etc.*, R. Co., 2 Swan, 422, 432; *The State v. Glen*, 7 Jones L. 321; *Johnston v. Rankin*, 70 N. C. 550; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 66; *Petition of Mount Washington R. Co.*, 35 N. H. 134, 141, 142; *East Kingston v. Towle*, 48 N. H. 57, 59, 60; *Eaton v. B. C. & M. R. Co.*, 51 N. H. 504, 510; *Orr v. Quimby*, 54 N. H. 590, 599, 603, per Doe, J.; *Hooker v. The New Haven R. Co.*, 14 Conn. 146, 151; *The San Francisco R. Co. v. Caldwell*, 31 Cal. 372.

of Charleston to take land for highway purposes, but having made no provision for compensation to the owners of the land to be taken. For this reason it was sought to restrain the commissioners, by an injunction, from proceeding to lay out the highway. The Constitution of the State was silent upon the subject; and the court being evenly divided in opinion, the constitutionality of the act was sustained, and no injunction issued, half of the court declaring that neither Magna Charta nor the law of the land required compensation to be made where land was taken for highway purposes, as every freeholder held subject to the public necessities.<sup>1</sup> The conclusion thus reached was afterwards adhered to.<sup>2</sup>

So, too, in Virginia, up to the time when the law expressly required compensation to be made, the doctrine was uniformly asserted, in its broadest terms, that a right of way might be taken for highway purposes and no compensation need be provided.<sup>3</sup>

It is true that in Pennsylvania land was also taken for highway purposes without compensation, but it was in consequence of express reservations in the original grants, in the earliest periods of the Commonwealth. The proprietor took his land charged with the general public servitude of highways. He received his compensation in advance, for in every grant the State threw in, without charge, six acres in the hundred, reserving to itself the right of making as many roads through the land as the public interests might require, without compensation.<sup>4</sup> The very nature of the reservation shows that otherwise it was expected that compensation would be required. It is one of the many cases where the exception proves the rule.

We have already noticed the fact that in New Jersey the courts held compensation to be a necessary incident of the

<sup>1</sup> *Lindsay v. The Commissioners*, 2 Bay, 38.

<sup>2</sup> *Patrick v. The Commissioners*, 4 McCord, 541; *McLauchlin v. The Railroad Co.*, 5 Rich. 583, 599; *The State v. Dawson*, 3 Hill, 100.

<sup>3</sup> See *Stokes v. Upper Appomattox Co.*, 3 Leigh, 337.

<sup>4</sup> *McClenachan v. Curwen*, 6 Binn. 509. And see *Beeson's Case*, 3 Leigh, 821, 828.

right of eminent domain, and yet even in this State, as in Pennsylvania, it was customary to take land for highway purposes without compensation. Nay, more; the Constitution of 1844, which expressly provided that compensation must be made in taking private property for a public use, declared that lands might be taken for highway purposes without compensation, until the Legislature should see fit to require otherwise. But the reason and explanation of this is the same as in the case of Pennsylvania. The proprietors of East and West Jersey, in their original grants, had reserved the right to take land for highways, and had made compensation in advance by allotting an extra allowance to their grantees in consideration of the reservation.<sup>1</sup>

It is true that in the Constitution of the Federal as well as in those of the several State governments, with but two exceptions, it has been deemed prudent to incorporate, among the fundamental articles of right, provisions requiring compensation to be made whenever private property is taken for public use. But these provisions are to be regarded not as establishing a new principle of law, but only as placing an old one beyond legislative control. As expressed by Mr. Justice Miller in the Supreme Court of the United States, these provisions have received "the commendation of jurists, statesmen, and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them."<sup>2</sup>

Similar constitutional provisions were embodied in the *Constitution de la République Française* of 1795, in the *Code Napoleon*, and in the constitutional charter of Louis XVIII., as well as in the Constitution of the Confederate States of America. But, notwithstanding it has been deemed prudent to incorporate these provisions into written constitutions, it appears to be a principle, not only of the common law, but of universal law, that the necessity of making just compensation is a limitation upon the right to exercise the power of eminent domain.

<sup>1</sup> The State *v.* Seymour, 35 N. J. L. 47, 53.

<sup>2</sup> Pumpelly *v.* Green Bay Co., 13 Wall. 177.



This fact, important in more lights than one, is especially so in view of the farther fact that in the Constitutions of two of the States there is no constitutional provision which expressly requires compensation to be made where private property is taken for public use.<sup>1</sup> The provision in the Constitution of the United States<sup>2</sup> is held to be a limitation upon that government only, and in no manner applies to the States.<sup>3</sup>

*II. Mode of ascertaining Compensation.*—A just compensation, then, follows the right as “the shadow follows the substance,” and the two cannot be separated. It must be apparent, therefore, that some definite mode must be prescribed, in pursuance of which it may be determined, in each particular case, what constitutes a just compensation to the owner for the property of which he has been summarily deprived.

As a rule, the constitutional provisions upon this subject are silent as to the manner in which this shall be done. In their silence, it must be presumed that it was intended to leave the matter to legislative discretion; otherwise, the right of eminent domain would be reduced to a nullity, and the hands of government so fettered that the property of the citizen could never be taken against his consent, there being no method provided whereby he could be recompensed. We say that his property could not be taken *against his consent*. The owner, if he was so disposed, might, of course, suffer his property to be taken, and seek his redress for the

<sup>1</sup> New Hampshire and North Carolina.

<sup>2</sup> Amendments to the Constitution, art. v.

<sup>3</sup> *Barron v. The City of Baltimore*, 7 Pet. 243; *Withers v. Buckley*, 20 How. 84; *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 176; *Murphy v. The People*, 2 Cow. 815, 818; *Jackson v. Wood*, 2 Cow. 819; *Livingston v. The Mayor, etc., of New York*, 8 Wend. 85; *Concord R. Co. v. Greely*, 17 N. H. 47; *Orr v. Quimby*, 54 N. H. 590, 599, 606; *Woodfolk v. The Nashville, etc., R. Co.*, 2 Swan, 422, 431; *The Railroad Co. v. Davis*, 2 Dev. & B. 459; *Johnston v. Rankin*, 70 N. C. 550; *Martin v. Dix*, 52 Miss. 53; *Cairo, etc., R. Co. v. Turner*, 31 Ark. 494; *North Missouri R. Co. v. Maguire*, 49 Mo. 490; *Weimer v. Bunbury*, 30 Mich. 201.

injury in an action at law, in which case the value of the property would be recovered as from a wrong-doer. But if, instead of consenting, he should be disposed to resist, there would be no lawful power to overcome that resistance, as it is held that the owner can never be compelled to resort to an action at law to recover the value of property taken under the right of eminent domain. Under the constitutional provision that "private property shall not be taken for public use without just compensation," it was never intended, say the courts, to drive the owner into a lawsuit. "No such obligation," it has been said, "can be imposed upon him; he is entitled to the damages he has sustained, without resorting to a legal tribunal to enforce the payment."<sup>1</sup> This has been so well expressed by one of the most learned and painstaking judges that to-day adorn the American bench, that we cannot refrain from here quoting his language: "There can be no necessity for casting upon him the burden of any legal proceedings. Legal proceedings may be necessary, and he may be entitled to notice if he can be found; but, so far as such proceedings are necessary for his enjoyment of his constitutional right, they are to be instituted and carried on by the public, because the public power is limited by his reserved right. His property is taken without payment, if it is taken with the payment of a sum procurable only by his unremunerated outlay of an equal or greater amount. And whether he must lose a sum equal to, or greater, or less than his compensation, the principle is the same."<sup>2</sup>

The legislature, then, must in its discretion prescribe the mode of assessing the owner's compensation. It must not itself, however, undertake arbitrarily to fix the value of the property, and by calling it a just compensation compel the owner to receive it as such. What amounts to just com-

<sup>1</sup> *San Francisco v. Scott*, 4 Cal. 114.

<sup>2</sup> *Orr v. Quimby*, 54 N. H. 590, 642, per Doe, J. See also *Piscataqua Bridge Co. v. The New Hampshire Bridge Co.*, 7 N. H. 35, 70; *Hall v. The People*, 57 Ill. 307, 316; *Shepardson v. Milwaukee, etc., R. Co.*, 6 Wis. 613; *Lee v. North-Western, etc., R. Co.*, 33 Wis. 222.

pensation is a judicial question; and, moreover, the legislature cannot be a judge in its own cause.<sup>1</sup> The discretion with which the legislature is thus intrusted is not unlimited. The owner has a right to insist that the legislature shall provide him with an impartial tribunal that shall hear evidence, and where both parties may meet and discuss their claims on equal terms,<sup>2</sup> and nothing can be prescribed which shall in any manner impair or destroy the rights of the owner to his just compensation.<sup>3</sup>

For a long time it was eagerly contended before the courts that any method of assessing damages without a jury, and against the owner's refusal to waive a jury-trial, would be unconstitutional and void; it having been supposed by some that, under the general constitutional provisions securing the right of trial by jury, the owner was entitled to insist that the case should be submitted to a jury, to pass upon the amount of compensation which would be just to him in that particular case.

The courts, however, have held from the beginning, with perfect unanimity, that condemnation proceedings were not embraced within the meaning of these constitutional provisions, and that the owner could not, as a matter of right, demand a jury-trial.<sup>4</sup> The constitutional provisions relative to the trial by jury relate to the trial of issues of fact in civil and criminal proceedings, and have no reference to special proceedings of condemnation under the right of eminent

<sup>1</sup> *Charles River Bridge v. Warren Bridge*, 7 Pick. 344; *s. c.*, 11 Pet. 571; *United States v. Illinois Central R. Co.*, 2 Biss. 174; *County Court v. Griswold*, 58 Mo. 175, 199; *Rich v. The Chicago R. Co.*, 59 Ill. 286; *Isom v. Mississippi, etc., R. Co.*, 36 Miss. 300.

<sup>2</sup> *Langford v. The Commissioners*, 16 Minn. 375, 380.

<sup>3</sup> *Potter v. Ames*, 43 Cal. 75.

<sup>4</sup> *Livingston v. The Mayor, etc., of New York*, 8 Wend. 85; *Raleigh, etc., R. Co. v. Davis*, 2 Dev. & B. 451; *McIntire v. Western, etc., R. Co.*, 67 N. C. 278; *Pennsylvania R. Co. v. Lutheran Congregation of Pittsburgh*, 53 Pa. St. 445; *Mount Washington Road*, 35 N. H. 134; *Ames v. The Lake Superior R. Co.*, 21 Minn. 241; *Buffalo, etc., R. Co.*, 26 Texas, 588; *Houston, etc., R. Co. v. Milburn*, 34 Texas, 224; *Dronberger v. Reed*, 11 Ind. 420; *Haverhill Bridge Co. v. County Commissioners*, 103 Mass. 120; *Willyard v. Hamilton*, 7 Ohio (pt. 2), 111.

domain. "The trial by jury," it has been said, "is preserved inviolate, in the sense of the Constitution, when in all criminal cases, and in civil cases when a right is in controversy in a court of law, it is secured to each party." In cases of this description, the right to take and the right to compensation are admitted; the only question is the amount, which may be submitted to any impartial tribunal the legislature may designate.<sup>1</sup>

The right to a jury-trial, however, to ascertain the amount of compensation due the owner when his private property is taken for a public use, has been provided and secured by special provision in the Constitutions of Alabama,<sup>2</sup> Colorado,<sup>3</sup> Iowa,<sup>4</sup> Maryland,<sup>5</sup> Pennsylvania,<sup>6</sup> and West Virginia;<sup>7</sup> while in Arkansas<sup>8</sup> and Missouri,<sup>9</sup> a jury-trial is secured when a corporation is interested on either side. In Illinois,<sup>10</sup> it is secured in all cases except those in which the taking is by the State; and in New York,<sup>11</sup> the amount is to be determined by a jury *or* commissioners, except when the taking is by the State. In Michigan,<sup>12</sup> too, private property cannot be taken for public improvements in cities or villages, against the consent of the owner, until compensation has been first determined by a jury of freeholders. The tendency of the times seems to have been in the direction of securing, in almost all of the recent constitutions, the right of jury-trial in cases where private property is taken under the right of eminent domain.

It only remains, in this connection, to notice the principle

<sup>1</sup> *Bonaparte v. Camden, etc., R. Co.*, 1 *Baldw.* 205, 221.

<sup>2</sup> *Const.* 1875, art. xiii., sec. 7.

<sup>3</sup> *Const.* 1876, art. ii., sec. 15.

<sup>4</sup> *Const.* 1857, art. i., sec. 18.

<sup>5</sup> *Const.* 1867, art. iii., sec. 40.

<sup>6</sup> *Const.* 1873, art. xvi., sec. 8.

<sup>7</sup> *Const.* 1872, art. iii., sec. 9.

<sup>8</sup> *Const.* 1874, art. xii., sec. 9.

<sup>9</sup> *Const.* 1875, art. xii., sec. 4.

<sup>10</sup> *Const.* 1870, art. ii., sec. 13.

<sup>11</sup> *Const.* 1846, art. I., sec. 7.

<sup>12</sup> *Const.* 1850, art. xv., sec. 15.

that where the legislature provides the owner with a remedy under a statute, that remedy is exclusive, and not cumulative;<sup>1</sup> the rule being a general one, that where a statute authorizes the doing of certain acts, the necessary consequence of which is to damage the property of another, and at the same time provides a remedy for the recovery of damages resulting therefrom, the injured party is restricted to the remedy thus provided. So it has been held, under an act which contained no provision authorizing the owner to institute an action for compensation in case the public failed to do so, that such an action could not be maintained, but only an action of ejectment, or trespass, or damages for use and occupation, or injunction.<sup>2</sup>

*III. Time of Compensation.*—While the statement that private property cannot be taken for public use without just compensation is in itself unobjectionable as a principle of law, it falls far short of expressing the true legal idea or requirement upon this subject. “It sometimes appears,” it has been said, “to convey the idea that the owner’s right is not infringed if, in fact, at some time he be paid. But this falls far short of the true doctrine. The constitutional requirement is not satisfied by payment without regard to time.”<sup>3</sup>

Now, an examination of the provisions upon this subject, as found in the Constitutions at present in force in the several States, will disclose certain important discriminations in relation to the time of making compensation. And these constitutional provisions may be classified as follows:

1. The provision is silent as to time. “Private property

<sup>1</sup> *Colcough v. Nashville, etc., R. Co.*, 2 Head, 171; *Lafayette, etc., R. Co. v. Smith*, 6 Ind. 249; *Teick v. Board of Commissioners*, 11 Minn. 292, 295; *Aldrich v. Cheshire R. Co.*, 21 N. H. 359; *Mason v. Kennebec, etc., R. Co.*, 31 Me. 215; *Lindell v. Hannibal, etc., R. Co.*, 36 Mo. 543; *Brown v. Beatty*, 34 Miss. 227; *McIntire v. Western, etc. R. Co.*, 67 N. C. 278; *Henniker v. Contoocook Valley R. Co.*, 29 N. H. 152.

<sup>2</sup> *Kansas Pacific R. Co. v. Streeter*, 8 Kan. 133.

<sup>3</sup> *Orr v. Quimby*, 54 N. H. 590, 643.

shall not be taken for public use without just compensation.”<sup>1</sup>

In three of the Constitutions, however, there is, in addition to this general provision, a special provision somewhat qualifying the general one, and requiring compensation to be first made, where the taking is by a corporation.<sup>2</sup>

2. The provision is specific as to time, and requires compensation to be first made. “Private property shall not be taken for public use without just compensation first made therefor.”<sup>3</sup>

3. The provision, while in general requiring compensation to be first made, expressly excepts those cases where the taking is by the State itself, giving the State its election to make compensation prior or subsequent to the taking.<sup>4</sup>

4. The provision is, that “private property shall not be taken for public use without just compensation first made or secured.”<sup>5</sup>

So, in the Constitutions of Oregon and Texas, already cited, it is sufficient in the ordinary cases if the amount of compensation is secured.

<sup>1</sup> Arkansas, Const. 1874, art. ii., sec. 22; California, Const. 1849, art. i., sec. 8; Connecticut, Const. 1818, art. i., sec. 11; Delaware, Const. 1831, art. i., sec. 8; Florida, Const. 1868, art. i., sec. 9; Illinois, Const. 1870, art. ii., sec. 13; Louisiana, Const. 1868, tit. vi., art. 110; Maine, Const. 1820, art. i., sec. 21; Massachusetts, Const. 1780, pt. i., art. 10; Michigan, Const. 1850, art. xviii., sec. 14; Nebraska, Const. 1875, art. i., sec. 21; New Jersey, Const. 1844, art. i., sec. 16; New York, Const. 1846, art. i., sec. 6; Rhode Island, Const. 1842, art. i., sec. 16; Tennessee, Const. 1870, art. i., sec. 21; Vermont, Const. 1793, ch. i., art. 2; Virginia, Const. 1870, art. v., sec. 14; West Virginia, Const. 1872, art. iii., sec. 9; Wisconsin, Const. 1848, art. i., sec. 13; United States, Const. 1787, amendment v.

<sup>2</sup> Arkansas, art. xii., sec. 9; Michigan, art. xv., sec. 9; West Virginia, art. iii., sec. 9.

<sup>3</sup> Alabama, Const. 1875, art. i., sec. 24; Colorado, Const. 1876, art. ii., sec. 15; Georgia, Const. 1877, sec. iii., pt. 1; Kentucky, Const. 1850, art. xiii., sec. 14; Maryland, Const. 1867, art. iii., sec. 40; Mississippi, Const. 1868, art. i., sec. 10; Missouri, Const. 1875, art. ii., sec. 21.

<sup>4</sup> Indiana, Const. 1851, art. i., sec. 21; Oregon, Const. 1857, art. i., sec. 19; Texas, Const. 1876, art. i., sec. 17.

<sup>5</sup> Iowa, Const. 1857, art. i., sec. 18; Minnesota, Const. 1857, art. i., sec. 13; Pennsylvania, Const. 1873, art. i., sec. 10.

5. The provision is, that "private property shall not be taken for public use without just compensation first paid or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be made afterwards."<sup>1</sup>

6. The provision is, that "private property shall not be taken for public use without just compensation first made or secured in money, except in time of war, or other public exigency imperatively requiring its immediate seizure, or for the purpose of making or repairing roads which shall be open to the public without a charge, when compensation may be made afterwards."<sup>2</sup>

The Constitution of Kansas seems only to provide for cases where a right of way is taken by a corporation, when compensation is required to be first made in money, or secured.<sup>3</sup> And the provision contained in the Constitution of South Carolina is so peculiar and unique that we give it entire.<sup>4</sup> Under this provision it would seem to be implied that property might be taken for a private use, provided compensation was made. It seems to recognize no distinction between a taking for a private and for a public use, and in that respect to be different from the provisions in other constitutions. But whether property can be taken or not for a private use is a subject to be considered farther on.

To recur, then, to the element of time, and to those provisions which we have classified under the first of these six heads, as specifying no particular time when compensation is to be made, it is to be remarked,—

1. That it was never intended by these provisions to prohibit the law-making power from authorizing a temporary entry upon private property as a proceeding incipient to

<sup>1</sup> Nevada, Const. 1864, art. i., sec. 8.

<sup>2</sup> Ohio, Const. 1851, art. i., sec. 19.

<sup>3</sup> Kansas, Const. 1859, art. xii., sec. 4.

<sup>4</sup> Const. 1868, art. i., sec. 23: "Private property shall not be taken or applied for public use, or for the use of a corporation, or for private use, without the consent of the owner, or a just compensation being made therefor; *provided, however,* that laws may be made securing to persons or corporations the right of way over the lands of either persons or corporations, and for works of internal improvement, the right to establish depots, stations, turnouts, etc., but a just compensation shall, in all cases, be first made to the owner."

condemnation, in order that the exact property which is to be taken may be located and determined. They were not designed, neither have they ever been held, to so operate. As a matter of necessity, it must be permitted to go upon the land for the purpose of making the preliminary surveys, for it would be impossible to make compensation for land until it should be first ascertained exactly what land was to be taken.<sup>1</sup>

2. That it was intended to prohibit the law-making power from ever authorizing any permanent occupation or appropriation of private property to public use, or the acquiring of any title to or interest in it, until just compensation has been first made or tendered the owner. Whatever view may at first have been taken of this subject in some quarters, the above may now be fairly stated as the recognized rule.<sup>2</sup>

3. It was intended by these provisions, and the courts so hold, that this right of temporary entry and occupation, for the purpose of surveying and determining the exact property to be taken, should be lost and become extinct by unreasonable delay in instituting and perfecting condemnation.<sup>3</sup>

4. It was intended that private property should not be

<sup>1</sup> *Bonaparte v. Camden, etc.*, R. Co., 1 *Baldw.* 226; *Young v. McKenzie*, 3 *Kelly (Ga.)*, 31; *Bloodgood v. Mohawk, etc.*, R. Co., 18 *Wend.* 9, 17, 34; *Polly v. Saratoga, etc.*, R. Co., 9 *Barb.* 449; *Walther v. Warner*, 25 *Mo.* 277; *Fox v. Western Pacific R. Co.*, 31 *Cal.* 538; *Cushman v. Smith*, 34 *Me.* 247; *Nichols v. Sorn, etc.*, R. Co., 43 *Me.* 358; *The State v. Seymour*, 35 *N. J. L.* 47, 53; *Lyon v. Green Bay, etc.*, R. Co., 42 *Wis.* 544.

<sup>2</sup> *Doe v. Georgia R. Co.*, 1 *Ga.* 524; *Young v. McKenzie*, 3 *Kelly (Ga.)*, 524; *Bonaparte v. Camden, etc.*, R. Co., 1 *Baldw.* 205, 226; *Bloodgood v. Mohawk, etc.*, R. Co., 18 *Wend.* 9; *Blodgett v. Utica, etc.*, R. Co., 64 *Barb.* 580; *Cushman v. Smith*, 34 *Me.* 247; *Powers v. Bears*, 12 *Wis.* 213, 222; *Brock v. Hishen*, 40 *Wis.* 681; *Davis v. San Lorenzo R. Co.*, 47 *Cal.* 517; *Brady v. Bronson*, 45 *Cal.* 640; *San Mateo Water-Works v. Sharpstein*, 50 *Cal.* 284; *McAulay v. Western Vermont, etc.*, R. Co., 33 *Vt.* 311; *Gray v. First Division of St. Paul, etc.*, R. Co., 13 *Minn.* 315, 322 (arising under the Constitution of the United States, under a territorial charter); *Hursh v. First Division, etc.*, 17 *Minn.* 439; *Warren v. First Division, etc.*, 18 *Minn.* 384, 396; *Hall v. The People*, 57 *Ill.* 307, 316; *The People v. Williams*, 51 *Ill.* 63; *Shute v. Chicago, etc.*, R. Co., 26 *Ill.* 436; *The People v. McRoberts*, 62 *Ill.* 38.

<sup>3</sup> *Cushman v. Smith*, 34 *Me.* 247; *Bensley v. Mountain Lake Water Co.*, 13 *Cal.* 306.



taken until after compensation had been made, and, therefore, that the execution of any authority which the law might profess to give, to take and appropriate the property, would be enjoined by injunction until this should be done;<sup>1</sup> or, if the wrong had been already done, possession of the property having been actually taken, that the owner should be entitled to recover possession by an action of ejectment,<sup>2</sup> or, maintaining an action of trespass, recover damages for all injuries occasioned by the unlawful occupation.<sup>3</sup>

Where authorized agents have once entered as trespassers, having taken possession before making compensation, a subsequent tender of compensation for the land taken will not bar an action by the owner to recover damages in trespass for the previous wrongful occupation.<sup>4</sup>

The principle that where compensation is not made to the owner previous to the entry he is entitled to bring ejectment or maintain trespass, may at first blush seem to contravene that other principle of law before noticed, that holds the statutory remedy to be exclusive. There is, however, a well-defined and a reasonable distinction between an action which denies that property has been lawfully taken and demands damages therefor, and one which admits the right to take and asks for a compensation, which, when received,

<sup>1</sup> *Bonaparte v. Camden, etc.*, R. Co., 1 Baldw. 205, 226; *The People v. Law*, 34 Barb. 494; *Parham v. The Justices*, 9 Ga. 341; *Strohecker v. Alabama, etc.*, R. Co., 42 Ga. 509; *Davis v. La Crosse, etc.*, R. Co., 12 Wis. 16; *Shute v. Chicago, etc.*, R. Co., 26 Ill. 436; *Ford v. Chicago, etc.*, R. Co., 14 Wis. 609; *Jersey City, etc.*, R. Co. *v. Jersey City, etc.*, R. Co., 20 N. J. Eq. 60; *Stacey v. Vermont, etc.*, R. Co., 27 Vt. 14.

<sup>2</sup> *Doe v. Georgia R. Co.*, 1 Ga. 524; *Gardner v. Tisdale*, 2 Wis. 153; *Weisbrod v. Chicago, etc.*, R. Co., 21 Wis. 602; *Wager v. Troy Union R. Co.*, 25 N. Y. 526; *Lazier v. New York Central R. Co.*, 42 Barb. 466; *Nichols v. Lewis*, 15 Conn. 136; *McClinton v. Pittsburgh, etc.*, R. Co., 66 Pa. St. 404; *Chicago, Burlington, etc.*, R. Co. *v. Knox College*, 34 Ill. 195.

<sup>3</sup> *Bloodgood v. Mohawk, etc.*, R. Co., 18 Wend. 9, 20, 77; *Loop v. Chamberlain*, 20 Wis. 135; *Gray v. First Division, etc.*, 13 Minn. 315 (construing a territorial charter); *Cushman v. Smith*, 34 Me. 247; *Hall v. Pickering*, 40 Me. 548; *Buffalo, etc.*, R. Co. *v. Ferris*, 26 Texas, 588; *Harrisburg v. Crangle*, 3 Watts & S. 464.

<sup>4</sup> *Missouri, etc.*, R. Co. *v. Ward*, 10 Kan. 352.

will establish in the other party the right to continue in possession. And this distinction the law recognizes and acts upon.<sup>1</sup>

While the payment of compensation is a condition precedent to any right of entry, the owner may waive his right to insist upon prepayment, in which case the public is not a tort-feasor, although it takes permanent possession. In such case the owner is held to have consented to let the damages be and remain a mere debt against the public. It is said that if the owner, "for the shortest period," clearly gives the public, either by his express consent or by his silence, to understand that he does not intend to object to the entry, but waives his claim to present payment, that he is thus concluded by his own act from afterwards asserting his claim by injunction or ejectionment, so as to hinder or prevent the improvement undertaken.<sup>2</sup> For example, in the case of railroads, the court would not issue an injunction and thus stop the running of the road, but would enter a decree directing compensation to be paid out of the revenues of the road;<sup>3</sup> or, if the circumstances of the case seemed to demand it, would undoubtedly put the road into the hands of a receiver until the damages were paid.<sup>4</sup> It is even held constitutional to limit the time within which the owner can recover compensation, and to provide that if proceedings are not instituted within the period, then his right shall be barred. But in such cases the statute must permit the owner to institute proceedings, and provide him with an adequate remedy to that end.<sup>5</sup>

<sup>1</sup> *Atchison, etc., R. Co. v. Weaver*, 10 Kan. 344; *Daniels v. Chicago, etc., R. Co.*, 35 Iowa, 129; *Ford v. Chicago, etc., R. Co.*, 14 Wis. 609; *Smith v. Chicago, etc., R. Co.*, 67 Ill. 191.

<sup>2</sup> *McAuley v. The Western Vermont Ry.*, 33 Vt. 311; *Knapp v. McAuley*, 39 Vt. 275; *Provolt v. The Chicago, etc., R. Co.*, 57 Mo. 256; *Baker v. The Chicago, etc., R. Co.*, 57 Mo. 265; *New Orleans, etc., R. Co. v. Moye*, 39 Miss. 374; *South Carolina R. Co. v. Columbia, etc., R. Co.*, 13 Rich. Eq. 339; *Hentz v. Long Island R. Co.*, 13 Barb. 646.

<sup>3</sup> *Hamilton v. Annapolis, etc., R. Co.*, 1 Johns. Ch. (Md.) 107.

<sup>4</sup> 2 Redf. Am. Railw. Cas. (2d ed.) 253.

<sup>5</sup> *The People v. Green*, 3 Mich. 496; *Rexford v. Knight*, 11 N. Y. 308.

While the decisions seem to have established the rule of law as imperatively requiring compensation to be made previous to entry, unless the owner waives his right thereto, they are not to be understood as requiring the amount to be actually paid and handed over to him before such entry. The principle of the cases is, that the owner should not be left dependent upon the solvency of individuals or corporations. It is therefore held to be sufficient if an adequate fund is provided, which shall be a security to the owner.<sup>1</sup>

As to what constitutes a sufficient security, it has been said that "any irrevocable deposit, appropriation, or disposition of money, any indemnifying obligation incurred or provision made, that affords the proprietor legal security (for payment, and for the necessary expense of obtaining it), convertible into compensation at his option, as good as is legally practicable under the circumstances, is reasonable legal security. It is legally sufficient in amount if, upon such evidence as is available, it appears to be sufficient for his indemnity, and is subject to subsequent increase or diminution upon its being made to appear that it is unreasonably small or large. A sum of money so deposited that he can legally avail himself of it is security of a legal character."<sup>2</sup>

And here it becomes necessary to advert to a distinction which has been recognized by the courts in numerous decisions. It is a distinction existing between a taking of property by the State, or a county, or a town, and a taking by an individual or a private corporation. While in the latter case, as we have seen, it is indispensable that the owner should be first paid, or provided with a certain and definite fund from which payment can be obtained, in the former

<sup>1</sup> *Bloodgood v. Mohawk, etc.*, R. Co., 18 Wend. 9, 39, 76 (1837); *Pittsburgh v. Scott*, 1 Pa. St. 309; *The Commonwealth v. Wood*, 10 Pa. St. 97; *Doe v. Georgia R. Co.*, 1 Ga. 524; *White v. Nashville, etc.*, R. Co., 7 Heisk. 518; *Anderson v. Turbeville*, 6 Coldw. 150; *Buffalo, etc., R. Co. v. Ferris*, 26 Texas, 588, 602; *Bohlman v. Green Bay, etc., Co.*, 30 Wis. 105; *Ash v. Cummings*, 50 N. H. 591; *Kramer v. Cleveland, etc., R. Co.*, 5 Ohio St. 140, 147 (under old Constitution).

<sup>2</sup> *Orr v. Quimby*, 54 N. H. 590, 644.

case, on the other hand, it is not regarded as essential that compensation should be secured in advance, upon a definite fund, provided the law contains a provision for compensation. It is said that the presumption is that municipalities are always responsible, and their property a fund to which the owner can resort without risk of loss.<sup>1</sup> And while it is held that the municipal power of taxation is in such cases, ordinarily, adequate security to the owner, yet, if it should be clearly shown that this power was, for any reason, inadequate to furnish payment within a reasonable time, the court would interpose until adequate security should be provided.<sup>2</sup> An examination of the cases already cited recognizing a distinction between a taking by the State and a taking by individuals shows that it is essential, however, that the law should contain a provision authorizing compensation to be made, it otherwise being void.<sup>3</sup> This is subject to the qualification that the act shall be held valid, provided a subsequent act is passed curing the defect.<sup>4</sup>

It was, however, held, in a recent New Hampshire case, that the government could take the property of the citizen for a public use although the law contained no provision for payment out of a definite fund.<sup>5</sup> But from this conclusion Justice Doe dissented, in a remarkably able and exhaustive opinion, in which he repudiates the whole doctrine which distinguishes between a taking by the State and by a private individual. "It maintains a distinction," he says, "that does not exist in law or fact, between the purse of a nation, state, county, city, town, school-district, or any municipal part of the public, and the purse of other corporations and individuals. It holds the former to be an adequate and the

<sup>1</sup> *Bloodgood v. Mohawk, etc., R. Co.*, 18 Wend. 9, 18, 37, 39, 76; *Chapman v. Gates*, 54 N. Y. 132; *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 114; *McClinton v. Pittsburgh, etc., R. Co.*, 66 Pa. St. 404; *Loweree v. Newark*, 38 N. J. L. 151; *Ash v. Cummings*, 50 N. H. 591, 621.

<sup>2</sup> *Keene v. Bristol*, 26 Pa. St. 46; *Long v. Fuller*, 68 Pa. St. 170.

<sup>3</sup> See also *McCauley v. Weller*, 12 Cal. 500.

<sup>4</sup> *McCauley v. Weller*, 12 Cal. 500; *Bonaparte v. Camden, etc., R. Co.*, 1 Baldw. 205.

<sup>5</sup> *Orr v. Quimby*, 54 N. H. 590.

latter an inadequate fund, without any inquiry into the fact. In assuming that municipalities are always responsible and always honest, and that nobody else can be safely trusted, it avers what everybody knows is not true. It asserts a moral certainty of voluntary payment in the municipal class of cases, and denies it in every other class, in entire disregard of all grounds of moral assurance. Professing to reject the technical view, and the legal certainty of constitutional rights, and to introduce the high moral authority of reason and justice, it starts with the municipal distinction, a technicality and fiction that shuts out reason and justice, and excludes the merits and equities of the case from consideration. Claiming to found the distinction upon historical fact, it ignores the painful circumstances of the disbandment of the American army in 1783, the deplorable condition of the finances at that time and afterwards, and the numerous Federal, State, and municipal bankruptcies and repudiations (some of them not recorded in judicial decisions, because the debtors were not suable) that are conspicuous in our annals."<sup>1</sup>

Attention has been called to the fact that in one or two instances it has been thought best to provide expressly, in the constitutional provisions on this subject, that in time of war, or impending public danger, property might be appropriated first and compensation provided afterwards. Unquestionably there are extraordinary and unforeseen occasions when it becomes imperatively necessary that property should be thus appropriated, there being no opportunity to make compensation at the time. And this may be lawfully done as well under the provision which is most general as under those that are the more specific.<sup>2</sup>

This general provision that private property cannot be taken for public use without just compensation, found in the large majority of the American constitutions, is construed to mean, (1) that there is no right of entry until compensation is first made or secured; (2) that in case of the State, com-

<sup>1</sup> *Orr v. Quimby*, 54 N. H. 651.

<sup>2</sup> *Mitchell v. Harmony*, 13 How. 115, 134; *United States v. Russell*, 13 Wall. 623.

pensation need not be first made, nor secured upon a specific fund, if the law provides for compensation; (3) that in time of war, or great danger, property may be taken without compensation being first made, secured, or provided for, but an obligation is imposed upon the public to compensate the owner thereafter. And so it appears that, notwithstanding the constitutional provision be general, the rights of the owner are as sacredly guarded on the one hand, and the necessities of the State as surely provided for on the other, as though the provision were specific in its nature.

We do not deem it necessary to here go into examination of the other and specific constitutional provisions as regards the question of time. What has already preceded, together with the fact that these remaining provisions are specific in themselves, seem to render it unnecessary. It may be stated, however, that though the provision may expressly require compensation to be first made, it has been held sufficient if it be secured,<sup>1</sup> and that there may be an entry for the purposes of a preliminary survey without having paid, or secured payment.<sup>2</sup>

*IV. Amount of Compensation.*—The amount of compensation which the owner is entitled to receive, and the public under obligation to give, for the property taken is a question which is simple in so far as it requires an *equivalent* to be given for that which is taken. "Just compensation" means an equivalent,—a *quid pro quo*.<sup>3</sup> The question, simple enough so far, becomes complex from a multiplicity of elements the moment it becomes necessary to analyze and determine just what constitutes the elements of loss and injury for which this *quid pro quo* is to be furnished. In such a

<sup>1</sup> *Cashweller's Heirs v. McIlroy*, 1 Marsh. 84; *Jackson v. Winn's Heirs*, 4 Litt. 322, 328.

<sup>2</sup> *Stewart v. The Mayor, etc.*, 7 Md. 500.

<sup>3</sup> *Bloodgood v. Mohawk, etc.*, R. Co., 18 Wend. 9, 35; *Keasy v. Louisville*, 4 Dana, 154, 155; *Winona, etc.*, R. Co., 10 Minn. 267, 280; *Cunningham v. Campbell*, 33 Ga. 625, 635; *Bonaparte v. Camden, etc.*, R. Co., 1 Baldw. 205, 227; *Henry v. Dubuque, etc.*, R. Co., 2 Iowa, 288; *Virginia, etc.*, R. Co. v. *Henry*, 8 Nev. 165.

case, the rules which govern are not always easy of application, and the difficulty is sometimes increased by the marked conflict of opinion which the decisions of the courts so lamentably betray.

As a taking of private property for public use may give rise to three distinct classes of cases, we shall prefer to consider separately each of these classes. They are,—

1. Where the public improvement requires *all* the land of the owner to be taken.
2. Where the public use is satisfied by a taking of a part only of the owner's property.
3. Where no portion of the owner's property is taken absolutely, but suffers depreciation in value, or consequential damages.

In the first of these cases, where the whole of the owner's property is taken, the question of compensation is comparatively easy of solution, the governing principles being of ready apprehension.

*First*, Compensation must be made in lawful money of the United States.<sup>1</sup> The State has no right to demand, and cannot compel, the owner to take in payment other land, which it might consider a fair exchange for that which it has appropriated.<sup>2</sup> So, in constructing a canal, and taking lands for that purpose, it cannot force the owner to receive canal-scrip as compensation, but he must be furnished with a pecuniary or money equivalent.<sup>3</sup> So, too, it has been held that an award of "one hundred and fifty dollars, *with a wagon-way and a stop for cattle*," is void.<sup>4</sup> Not only is it beyond the power of the legislature to provide for the payment of compensation in any thing but money, but that money must be paid at once, and the owner cannot be compelled to take time-certificates, and thus postpone his right to receive the same after the award becomes a finality.<sup>5</sup> At

<sup>1</sup> *Jones v. The Wills Valley R. Co.*, 30 Ga. 43.

<sup>2</sup> *Van Horne's Lessee v. Dorrance*, 2 Dall. 315.

<sup>3</sup> *McCormick v. The President, etc.*, 1 Cart. (Ind.) 48.

<sup>4</sup> *Central Ohio R. Co. v. Holler*, 7 Ohio St. 225.

<sup>5</sup> *Butler v. Sewer Commissioners*, to be reported in 10 Vroom.

this time, when long-ago exploded notions of finance are being popularized to satisfy the demands of the ignorant, or worse than ignorant, the following bit of irony may at least furnish a crumb of satisfaction to those who see no good in "fiat" money: "Compensation is not rendered unnecessary," so it has been recently said, "by the fact that it may be made in government notes. The less they are worth, the more of them is the plaintiff entitled to. Whether the nominal market value of property does or does not keep itself precisely adjusted to a depreciated currency, and whether such a currency is better or worse than any other, the right of property is not violated, in contemplation of law, by payment in such things as are held to be constitutional cash by the highest constitutional authority."<sup>1</sup>

*Second*, The owner is entitled to the full and fair market value of the property.<sup>2</sup>

Under the rule as thus stated, there is excluded all consideration of the necessity of the public to purchase, or of the owner to sell, as well as endearments of association, or the reluctance of the owner to part with the property to be taken; as he might not be willing to sell, even at any price, however unreasonable.<sup>3</sup> In valuing lands taken for public use, there must, of course, be something adopted as a measure of value, and it seems to be conceded that market prices are the only measures of value which courts and juries can employ; that any other standard of value would be necessarily fanciful and arbitrary, useless to the extent it was fanciful, unjust to the degree it was arbitrary.<sup>4</sup> "The value of land or any thing else," it has been said, "is its price in the market."<sup>5</sup> Market prices were expressly de-

<sup>1</sup> *Orr v. Quimby*, 54 N. H. 590, 619.

<sup>2</sup> *Somerville, etc., R. Co. v. Doughty*, 2 Zab. 495; *Giesey v. Cincinnati, etc., R. Co.*, 4 Ohio St. 308; *Matter of Furman Street*, 17 Wend. 649, 670; *Matter of William, etc., Streets*, 19 Wend. 678, 690; *Central Pacific R. Co. v. Pearson*, 35 Cal. 247, 261; *Brown v. Beatty*, 34 Miss. 227, 242; *East Pennsylvania R. Co. v. Hollenstine*, 47 Pa. St. 28.

<sup>3</sup> *Henderson, etc., R. Co. v. Dickerson*, 17 B. Mon. 173, 178.

<sup>4</sup> *Searle v. Lackawanna, etc., R. Co.*, 33 Pa. St. 57.

*Harrison v. Young*, 9 Ga. 359.



clared to be the standard of value in the French law upon this subject, in their carefully prepared and famous system *sur les expropriations pour cause d'utilité publique*.<sup>1</sup>

In determining what the market value is in such cases, the question is not what the property would bring for cash at a forced sale. It is surely enough that the owner is forced by compulsory process to part with his property against his will, and the public necessity cannot require the property to be ruthlessly sacrificed, as property unhappily too often is under such sales. On the contrary, the owner is entitled to the value the property would bring to a prudent seller, at liberty to fix the time and conditions of sale. "The standard of value," it has been said, "is not the price it would bring at a forced sale, but what, in the opinion of practical and judicious men, it is reasonably worth, taking in view its fitness for the purposes for which it was intended, and the time when, according to the reasonable and natural progress of improvement and growth in that particular locality, it would be required for those purposes."<sup>2</sup> "The fair cash value of the property taken for public use," is the language employed in another case, "if the owner were willing to sell and the government desired to buy at that time and place, and in that form, would be the measure of just compensation."<sup>3</sup>

In determining what is the market value, it is well settled that the opinions of witnesses acquainted with the value of the property in controversy are admissible in evidence.<sup>4</sup> But these opinions are admissible, it is said, not because they are the opinions of experts, strictly so called, as they "are not founded on special study or training, or professional experience, but rather from necessity, upon the ground that

<sup>1</sup> Law 1810, arts. 16, 17.

<sup>2</sup> Somerville, etc., R. Co. v. Doughty, 2 Zab. 495.

<sup>3</sup> Cox v. Cummings, 33 Ga. 549, 559.

<sup>4</sup> Kellogg v. Krauser, 14 Serg. & R. 137; Clark v. Baird, 5 Seld. 183; Dwight v. County Commissioners, 11 Cush. 203; Shattuck v. Stoneham, etc., R. Co., 6 Allen, 116, 117; Warren v. Wheeler, 21 Me. 484; Lafayette, etc., R. Co. v. Winslow, 66 Ill. 219; Keithsburg, etc., R. Co. v. Henry, 79 Ill. 290; Logansport v. McMillen, 49 Ind. 493.

they depend upon knowledge which any one may acquire, but which the jury may not have, and that they are the most satisfactory, and often the only attainable, evidence of the fact to be proved."<sup>1</sup>

It is, however, held inadmissible to introduce evidence showing what prices parties had offered to purchase at,<sup>2</sup> and equally improper to show what the owners have offered to sell at.<sup>3</sup> So, too, it has been held inadmissible to show the valuation which the owner put on his property before the assessors.<sup>4</sup> In California and Pennsylvania, it was held improper to show particular instances of sales;<sup>5</sup> while in Massachusetts, on the other hand, it was held admissible to show the price for which adjacent lots had been actually sold, open, of course, to any evidence explanatory of the circumstances attending the sale, and tending to show why the purchasers gave a price greater than the true value.<sup>6</sup> And in Iowa, it was held improper to show the price paid for a right of way through adjoining tracts, unless it was first shown that there was a uniformity in the character of the lands.<sup>7</sup> In the Massachusetts case already cited,<sup>6</sup> it is said that, if the price paid had not been voluntary, but had been fixed by a jury, or in some other compulsory way, evidence of the sale would have been excluded. And in another case, it was expressly decided that evidence was inadmissible as to what the public was compelled to pay for land adjoining.<sup>8</sup> In a Rhode Island case, it was held that evidence could not be introduced to show what the public had paid other parties, in compromise of suits pending on appeal for land

<sup>1</sup> *Swan v. Middlesex*, 101 Mass. 173, 177.

<sup>2</sup> *Davis v. Charles River, etc., R. Co.*, 11 Cush. 506; *St. Joseph, etc., R. Co. v. Orr*, 8 Kan. 419.

<sup>3</sup> *Lehmicke v. St. Paul, etc., R. Co.*, 19 Minn. 464; *Montclair R. Co. v. Benson*, 36 N. J. L. 557.

<sup>4</sup> *Virginia, etc., R. Co. v. Henry*, 8 Nev. 165.

<sup>5</sup> *Central Pacific R. Co. v. Pearson*, 35 Cal. 247, 261; *East Pennsylvania R. Co. v. Heister*, 40 Pa. St. 53.

<sup>6</sup> *Wyman v. Lexington, etc., R. Co.*, 13 Metc. 316, 326.

<sup>7</sup> *King v. Iowa Midland R. Co.*, 34 Iowa, 458.

<sup>8</sup> *White v. Fitchburg R. Co.*, 4 Cush. 400.

damages, although the lands were similarly situated with the property in dispute; offers made in compromise of litigation were said to be no evidence of market value, and though if they were, should be excluded upon grounds of public policy.<sup>1</sup> It has been decided, however, that it is proper to show the consideration expressed in the deeds by which the owner obtained title, especially if it appear that the purchases have been recently made, as it might tend to elucidate the question of value. The jury had a right, so it was said, to all evidence which in any degree, however slight, tended to enlighten that issue.<sup>2</sup> So, too, evidence has been held admissible as to the price obtained at an administrator's sale of an undivided part of the property in question.<sup>3</sup>

Under the rule that the measure of value is the market price, it was held, in Pennsylvania, in a case where a railroad sought to obtain an easement in coal lands for a right of way, that evidence was properly excluded the tendency of which was to show that there was over an acre of coal under the road, worth \$4,000, which would be lost to the owner, as it was necessary to leave it untouched for the support of the road. As the point is one of much importance, we quote the language of the court<sup>4</sup> upon that occasion: "Now, if such a fact," it was said, "were necessary to the ascertainment of the value of the land taken, it would be wise to accept the testimony of experts, for we ought always to seek the best sources of information. The objection is not to the experts, but to the facts themselves. We do not measure the value of land by such facts. Land may have \$4,000 worth of coal per acre in it, and yet sell at \$40 per acre.

"When a man has to sell his property, of course he must take the market value for it. That is measured by the custom or common dealing of the country. If it is land, the market value is measured by the price usually given for such land in that neighborhood, making due allowance for differences

<sup>1</sup> Howard *v.* City of Providence, 6 R. I. 514.

<sup>2</sup> Jones *v.* The Chicago, etc., R. Co., 68 Ill. 380.

<sup>3</sup> March *v.* Portsmouth, etc., R. Co., 19 N. H. 372.

of position, soil, and improvement. Value may be very approximately estimated in that way, for it is not then founded upon the mere opinion of witnesses, but on the fact of a general market value. \* \* \* In the present case, the jury were permitted to find in favor of the plaintiff the full value of the land as coal land, though the defendant gets no title to the coal further than it is needed to support the surface. Then the plaintiff has been allowed the full value of the land as estimated by the common standard, and we do not see how we can take any other. The one here proposed has never been publicly sanctioned, and that is something against it. It would require us to ascertain the possible value of the products of the land, in order to get at the value of the land itself. But the products do not exist, and therefore have no value; for value here means value in money in the market, and this cannot apply to products not yet in existence. And, then, to use the products as a standard of value is to apply an uncertain measure in order to obtain a certain result. It is easier to value the land directly, than thus.

“Moreover, the offer impliedly requires a degree of refinement in the measure of values which seems to us totally incompatible with the gross estimates of common life. Though we might have the most accurate calculation of the quantity of coal in the land, yet, without knowing exactly the expense of bringing it to the surface and carrying it to market, and the amount likely to be lost in mining and conveying, and the times in which it would be brought out, and the market prices at those times, the quantity would not help us to value the land.”<sup>1</sup>

*Third*, The value of the property is to be estimated as of the time when condemnation proceedings are instituted, in distinction from the time when the public may have unlawfully entered and taken possession.<sup>2</sup>

<sup>1</sup> Searle v. Lackawana, etc., R. Co., 33 Pa. St. 57, 63, 64.

<sup>2</sup> Sherwood v. St. Paul, etc., R. Co., 21 Minn. 122; San Francisco, etc., R. Co. v. Mahoney, 29 Cal. 112; Driver v. Western Union R. Co., 32 Wis. 569; Cook v. The Commissioners, 66 Ill. 115.

In accordance with this rule, it is held that where the public finds itself under the necessity of purchasing additional property, to enlarge or complete a public improvement previously undertaken, it must pay the owner the then value of his property, although the increase in value may be the direct and immediate result of the improvement which it has already made. As where the water-commissioners of Providence, having determined to build a reservoir, took certain land for that purpose, the improvement adding considerably to the value of the adjacent property. Afterwards it was found necessary to take an additional piece of property, and proceedings were soon instituted to condemn it; and it was held that the owner was entitled to its value at the time of condemnation, and not at the time of the location of the reservoir. The public had to pay for the enhanced value it had itself caused.<sup>1</sup>

As a farther exemplification of this same principle are those cases where the State, or its agents, before instituting condemnation proceedings, has gone on and placed improvements upon the property without the owner's consent. The question has then been raised, whether the public must pay for the land, with the improvements so annexed, or whether it would be entitled to have them disregarded in estimating the value of the property of which the owner was to be deprived. Of course, in all ordinary cases, it is a cardinal rule of the law, that whatever is wrongfully annexed to the realty becomes a part of it, and goes to the owner. The principle is an ancient one in the law.<sup>2</sup> It has, however, been raised as an interesting question, whether or not an exception should not be made in favor of annexations made by the public under such circumstances; it being urged that all the owner was entitled to was a "just compensation," and that there was no justice in compelling the public to pay him for that which cost him absolutely nothing. It has been ruled, in Wisconsin, that it is proper

<sup>1</sup> *Stafford v. Providence*, 10 R. I. 567. See also *Virginia, etc., R. Co. v. Lovejoy*, 8 Nev. 100.

<sup>2</sup> *Britton's Pleas of the Crown*, ch. 33.

to make an exception in such cases in favor of the public, and the same thing was at first held in California.<sup>1</sup> A similar doctrine has been recently announced by the Supreme Court of Pennsylvania, two of the judges dissenting.<sup>2</sup> In the last case, stress seems to have been laid on the fact that the railroad had been clothed by the State with the right of eminent domain, and that therefore it could not properly be regarded as an ordinary tort-feasor. The court say: "This is not the case of a mere trespass by one having no authority to enter, but of one representing the State herself, clothed with the power of eminent domain, having a right to enter, and to place these materials on the land taken for a public use," etc. We cannot agree with this view of the case. We do not believe that the company was clothed with the right of entry. It was merely endowed with a capacity to acquire that right, and, until the right was thus acquired, we are at a loss to perceive wherein such an entry differs from any ordinary trespass.

The entry being unauthorized, and therefore wholly unlawful, we fail to see any reason for making an exception to the general rule which holds that wrongful annexations to realty pass to the owner of the land. Such an exception it seems difficult to sustain. The improvements have become, by the wrongful annexation, as much the owner's property as the realty; and as for paying him for the increased value, which has cost him nothing, that is no more than the public is compelled to do in other instances,—as where the value has been increased by improvements upon contiguous property, upon which he never expended a penny. The exception is repudiated in a later California case, and denied in Indiana and New York.<sup>3</sup> We are not aware that the question has been raised, as yet, elsewhere. It is, of course, an entirely

<sup>1</sup> *Lyon v. The Green Bay, etc., R. Co.*, 42 Wis. 538; *California R. Co. v. Armstrong*, 46 Cal. 85.

<sup>2</sup> *Justice v. Nesquehoning Valley R. Co.*, Alb. L. J., Aug. 31, 1878.

<sup>3</sup> *United States v. A Tract of Land in Monterey Co.*, 47 Cal. 515; *Graham v. Connersville, etc., R. Co.*, 36 Ind. 463; *Matter of Long Island R. Co.*, 6 N. Y. Sup. Ct. 298.

different question where the improvement has been made with the permission of the owner, in which case he would not be entitled to recover its value.<sup>1</sup>

We come now to the second class of cases, in which a part only of the owner's property is taken.

*First*, The "just compensation" which, under the constitutional provision, must be made where private property is taken for public use, consists in paying to the owner not the mere value of the portion taken. That, in very many instances, would be to compensate him for the smaller part of the damage done him. Just compensation includes both the value of that which is absolutely taken and the diminution of the value of that from which the portion taken was severed.<sup>2</sup> In other words, compensation means the ordinary value of the strip taken, together with such additional value as attaches to it by reason of its connection with the adjacent land of the same owner. The inquiry should be, so it is sometimes said, as to what would be its value to him, situated as it is, if he were not the owner of it, but owned the adjacent property on both sides of it, under the same circumstances precisely that exist at the time of taking.

*Second*, Under the rule as stated above, it naturally results that, in estimating the injury done the remainder of the tract, all the direct physical injuries, and even inconveniences, to be produced by the contemplated change must be taken into account,<sup>3</sup> excluding, however, all those injuries

<sup>1</sup> *Emerson v. The Western Union R. Co.*, 75 Ill. 176.

<sup>2</sup> *New Orleans, etc., R. Co. v. Lagrade*, 10 La. An. 150; *Winona, etc., R. Co. v. Denman*, 10 Minn. 267; *Scott v. St. Paul, etc., R. Co.*, 21 Minn. 322; *Petition of Mount Washington R. Co.*, 35 N. H. 146; *Rochester, etc., R. Co., v. Budlong*, 6 How. Pr. 467; *Matter of Poughkeepsie, etc., R. Co.*, 63 Barb. 151; *Virginia, etc., R. Co. v. Henry*, 8 Nev. 165; *Bigelow v. West Wisconsin R. Co.*, 27 Wis. 478; *Parks v. Wisconsin, etc., R. Co.*, 33 Wis. 413; *Page v. Chicago, etc., R. Co.*, 70 Ill. 324; *Bangor, etc., R. Co. v. McComb*, 60 Me. 290.

<sup>3</sup> *Vanshoick v. Delaware, etc., Canal Co.*, Spen. 249; *White v. The Railroad Co.*, 6 Rich. 47; *Bangor, etc., R. Co. v. McComb*, 60 Me. 290; *Missouri, etc., R. Co. v. Haines*, 10 Kan. 439; *Jones v. Chicago, etc., R. Co.*, 68 Ill. 380, 383; *Parks v. Wisconsin, etc., R. Co.*, 33 Wis. 413; *Watson v. Pittsburgh, etc., R. Co.*, 37 Pa. St. 469.

and inconveniences which are not special to the land, but are borne by it in common with the public at large.<sup>1</sup> To pay the owner for damages which he suffers only in the same degree with the whole community, to whom no compensation is made, would be to indulge an unjust discrimination, having no foundation in reason.

The law, too, excludes from consideration all contingent damages. This means, that the award must proceed upon the theory that the public improvement will be made in a proper manner, with due care and skill. Any other theory would be manifestly against public policy, and would tend to introduce all manner of confusion. So that the courts hold that, if the work was unskilfully performed, a recovery may be had in a subsequent action, the original award being no bar, because based upon the above theory.<sup>2</sup> But no subsequent action can be maintained for damages which should have been included in the original award, but which, through ignorance or mistake, were omitted.<sup>3</sup> And it is immaterial whether the damages were compulsorily awarded, or whether they were voluntarily agreed upon, and a deed was formally given by the owner. For it will be conclusively presumed that, in fixing the consideration of the deed, all the legitimate and necessary results of the construction of the improvement were had in mind.<sup>4</sup>

In illustration of the principle holding that contingencies must be disregarded in estimating compensation, the following Wisconsin case may be considered with profit. It was a proceeding to condemn property for railroad purposes; and it appeared in evidence that a protecting wall would be necessary to protect the owner's property, in consequence

<sup>1</sup> *Meacham v. Fitchburg R. Co.*, 4 Cush. 291; *Upton v. South Reading, etc., R. Co.*, 8 Cush. 600; *Freede v. North Carolina R. Co.*, 4 Jones L. 89; *Winona, etc., R. Co. v. Waldron*, 11 Minn. 515; *Lee v. Tebo R. Co.*, 53 Mo. 178.

<sup>2</sup> *Delaware, etc., Canal Co. v. Lee*, 2 Zab. 243; *Winchester & Potomac R. Co. v. Washington*, 1 Rob. (Va.) 67; *Spencer v. Hartford, etc., R. Co.*, 10 R. I. 14; *King v. Iowa, etc., R. Co.*, 34 Iowa, 458.

<sup>3</sup> *Vanshoick v. Delaware, etc., Canal Co.*, Spen. 249, 253.

<sup>4</sup> *Brearsley v. Delaware, etc., Canal Co.*, Spen. 236.



of certain excavations made by the company. Upon the part of the company, it was proposed to show that the wall was as necessary to it for the protection of its road-bed as it was to the owner for the protection of his property; that it had already instructed its engineer to construct the wall, and had procured and then had upon the ground the necessary stone and materials. The company also accompanied the offer with an agreement to stipulate that, if it failed to build the wall, the award should be no bar to a subsequent action. The proposal was ruled out, the court holding that the owner must be so protected that he need not in any contingency be compelled to resort to a second action to recover what he was justly entitled to receive in the first.<sup>1</sup>

The point has been made, in one or two instances, that where the owner has gone on and made improvements upon his property, knowing that a portion of it was about to be taken for public purposes, he should not be entitled to recover for the depreciation in value of the improvements so put upon the land. But the point has not been sustained by the courts, it being held that, where the improvements have been made without malice, the owner is entitled to compensation for the injury done the remainder of the tract, including the improvements thus placed upon it.<sup>2</sup> The Wisconsin case cited below<sup>1</sup> will illustrate the principle. In this case, the plaintiff had purchased several city lots adjoining each other. At the time of purchase, and for several years preceding it, one of the lots had been used and occupied by a railroad company, under a license from its then owner, the plaintiff's grantor. After the purchase by plaintiff, he was informed by the company that the lot already used by the road was needed by it, and that, unless it could be purchased for an agreed price, condemnation proceedings would be necessary. The negotiations fell through, and the proceedings were instituted. In the meanwhile, the plaintiff had erected a planing-mill and manufactory upon the other

<sup>1</sup> *Thompson v. Milwaukee, etc., R. Co.*, 27 Wis. 93.

<sup>2</sup> *Driver v. Western Union R. Co.*, 32 Wis. 569; *Sherwood v. St. Paul, etc., R. Co.*, 21 Minn. 122, 125.

lots adjacent. The court held that plaintiff had the legal and moral right to improve his property, and that the railroad was bound to pay the enhanced damage.

On several occasions it has been urged upon the courts that, in determining the injury done the remainder of the tract, justice required the loss of profits and custom to be taken into the reckoning. The principle has failed of being sustained in a single instance.<sup>1</sup> Anticipated profits are not "property." They are not *in esse*, and only issue out of that which is the subject of property. It has, however, been held admissible to introduce evidence showing the effect of the taking upon the business, not for the purpose of recovering for any loss of business, but only to show the effect upon the market value of the property; it being evident that the use to which property is devoted, the kind and amount of business done upon it, and the facilities for transacting it inevitably enter into any estimate of the market value of the property.<sup>2</sup>

*Third*, The value of the property taken and the diminution in the value of the residue is a debt due from the public to the owner, and whether it must be paid in money exclusively, or whether it may not be paid in special benefits, exclusively or partially, is a question upon which the courts are not agreed. In Mississippi, it is held that there can be no payment in special benefits, but that compensation must be made in money, both for the land actually appropriated and for the damage done to the remainder of the tract;<sup>3</sup> while in Arkansas,<sup>4</sup> Iowa,<sup>5</sup> Kansas,<sup>6</sup> and Ohio,<sup>7</sup> it is expressly provided by constitutional enactment that there shall be no deduction on account of benefits.

<sup>1</sup> *Eddings v. Seabrook*, 12 Rich. 504; *Fuller v. Eddings*, 11 Rich. 239; *Stockton, etc., R. Co. v. Galgiani*, 49 Cal. 139.

<sup>2</sup> *Driver v. Western Union R. Co.*, 32 Wis. 569, 584.

<sup>3</sup> *Brown v. Beatty*, 34 Miss. 227, 242; *Isom v. Mississippi, etc., R. Co.*, 36 Miss. 300; *Penrice v. Wallis*, 37 Miss. 172.

<sup>4</sup> Const. 1874, art. xii., sec. 9.

<sup>5</sup> Const. 1857, art. i., sec. 18.

<sup>6</sup> Const. 1859, art. xii., sec. 4.

<sup>7</sup> Const. 1851, art. i., sec. 19.

And under the provision in the Constitution of Illinois, that "private property shall not be taken or *damaged* without just compensation," it is also held that there can be no deduction for benefits.<sup>1</sup>

In other cases, it is held that while there can be no offset of benefits as to the land actually taken, there may be such offset as to the injury done to the remainder of the tract.<sup>2</sup> In Tennessee, it is said that, if the Legislature so provides, it will be proper to offset benefits as to the injury done to the remainder, but not otherwise; and that the Legislature could not authorize any deduction as to the value of the tract actually taken.<sup>3</sup>

Another class of cases goes still farther, holding that benefits may be offset against the value of the property actually taken, so that if the benefits were great enough, the owner would not be entitled to receive any money consideration. So, it is said that the true inquiry should be to ascertain the value of the whole tract just previous to the improvement, and the value of the remainder after the appropriation and the improvement is completed.<sup>4</sup> To arrive at this result in

<sup>1</sup> *Carpenter v. Jennings*, 77 Ill. 250.

<sup>2</sup> *Elizabethtown, etc., R. Co. v. Helm's Heirs*, 8 Bush, 681; *Sutton's Heirs v. Louisville*, 5 Dana, 28; *Rice v. Danville, etc., Turnpike Co.*, 7 Dana, 81; *Jacob v. Louisville*, 9 Dana, 114; *Henderson, etc., R. Co. v. Dickerson*, 17 B. Mon. 173; *Shipley v. Baltimore, etc., R. Co.*, 34 Md. 336; *New Orleans, etc., R. Co. v. Lagrade*, 10 La. An. 150; *Buffalo, etc., R. Co. v. Ferris*, 26 Texas, 588; *Jones v. Wills Valley R. Co.*, 30 Ga. 43; *Selma, etc., R. Co. v. Redwine*, 51 Ga. 470; *The Mayor, etc., v. Central R. Co.*, 53 Ga. 120; *Oregon, etc., R. Co. v. Barlow*, 3 Or. 311.

<sup>3</sup> *Woodfolk v. Nashville, etc., R. Co.*, 2 Swan, 422, 431; *East Tennessee, etc., R. Co. v. Love*, 3 Head, 63; *White v. Nashville, etc., R. Co.*, 7 Heisk. 518; *Memphis v. Bolton*, 9 Heisk. 508.

<sup>4</sup> *Matter of Furman Street*, 17 Wend. 650, 670; *Matter of William, etc., Streets*, 19 Wend. 678, 690; *Canandaigua R. Co. v. Paine*, 16 Barb. 273; *McMasters v. The Commonwealth*, 3 Watts, 294; *Pennsylvania R. Co. v. Heister*, 8 Pa. St. 445; *Hornstein v. Atlantic, etc., R. Co.*, 51 Pa. St. 87; *The Commonwealth v. Coombs*, 2 Mass. 491; *The Commonwealth v. Middlesex*, 9 Mass. 388; *Nichols v. Bridgeport*, 23 Conn. 189; *McIntire v. The State*, 5 Blackf. 384; *The State v. Beackmo*, 8 Blackf. 246; *McCormick v. The President, etc.*, 1 Cart. 48; *Indiana Central R. Co. v. Hunter*, 8 Ind. 74; *The State v. Evans*, 2 Scam. 208; *The People v. Williams*, 51 Ill. 63; *Symonds v.*

cases where condemnation proceedings are instituted prior to the making of the improvement, it has been held improper to inquire of the witness as to what would be the value of the property upon the completion of the improvement. Had the improvement been already completed, there could be no objection to the inquiry; but, being *in futuro*, the court held that the inquiry should have been as to the difference in value between what the whole property would have sold for, unaffected by the contemplated improvement, and what it would sell for as affected by it.\* To ask what would be the market value of property in the future, or after an improvement should be completed (in this case the construction of a railroad), was to introduce as testimony, so it was said, that which did not "even rise to the standard of an opinion. It is a mere guess, with no substantial foundation on which to rest."

In a recent case in Missouri, it is held that the rule as to market value before and after the appropriation is not without its qualification. In this case, which was a condemnation of land for bridge purposes, the property consisted of an east and west lot, the two being divided by an alley. On the east lot (the one to be appropriated) stood a malt-house, horse-power, pump, and pipe; while on the west lot was situated a brewery, which the appropriation of the east lot, with the fixtures thereon, would render valueless. So that the amount of damages would be nearly equivalent to the whole value of the brewery. The company had no need of these appliances in connection with its bridge, and if they could be transferred to the lot on the western side of the alley, and so placed that the brewery could be as effectively operated as before, the actual loss to the owner would be only the trouble and expense of removal. It was held that the removal should be made, and that compensation would

Cincinnati, 14 Ohio, 147; *Holton v. Milwaukee*, 31 Wis. 27; *Winona, etc., R. Co. v. Waldron*, 11 Minn. 515; *Simmons v. St. Paul, etc., R. Co.*, 18 Minn. 184; *Newby v. Platte County*, 25 Mo. 258; *Mayor, etc., of Lexington v. Long*, 31 Mo. 369; *San Francisco, etc., R. Co. v. Caldwell*, 31 Cal. 367.

\* *Watson v. Pittsburgh, etc., R. Co.*, 37 Pa. St. 469.

include the cost of removal, and damages for the use of the brewery for the time it was necessarily idle during the transfer.<sup>1</sup> And the same principle is enunciated in a Kansas case, where land was taken for highway purposes, there being a valuable hedge upon the property. As the hedge might be removed with advantage to the owner, it was held that the removal should be made, and that the owner should receive compensation for the cost of removal to the place where it was needed, and for any depreciation in its value caused thereby.<sup>2</sup>

While benefits may be set off, the principle must not be lost sight of that they must be benefits to the particular tract from which the piece taken is severed. Benefits to other lands of the owner, situated in the vicinity, cannot be considered.<sup>3</sup> But where a tract has been cut into city lots, each lot is not to be considered as a distinct tract within the meaning of the principle referred to. A division into lots by imaginary lines is immaterial; if taken together, they constitute a compact body of land, capable of being treated as an entirety.<sup>4</sup>

In deducting benefits as against the part taken, the courts are not agreed in the theory of its justification; for while some of the cases hold that the owner has no reason to complain, as he has *lost* nothing by the appropriation, in others it is justified as an exercise of the taxing power, the owner being taxed to the extent of his benefits. In Missouri, for instance, it is expressly declared that the deduction could not be sustained upon any other theory than that of the

<sup>1</sup> Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582.

<sup>2</sup> Shawnee County v. Beckwith, 10 Kan. 603. See Ford v. County Commissioners, 64 Me. 408, allowing damages for removal under certain circumstances.

<sup>3</sup> Meacham v. Fitchburg R. Co., 4 Cush. 291; Milwaukee, etc., R. Co. v. Eble, 3 Pinney, 72; Winona, etc., R. Co. v. Waldron, 11 Minn. 515; Todd v. Kankakee, etc., R. Co., 78 Ill. 530 (under former constitution).

<sup>4</sup> Welch v. Milwaukee, etc., R. Co., 27 Wis. 108; Driver v. Western Union R. Co., 32 Wis. 569, 586; Sherwood v. St. Paul, etc., R. Co., 21 Minn. 122, 124.

taxing power.<sup>1</sup> This latter theory is very well, if the doctrine promulgated by the Supreme Court of Kansas is to be recognized as a true exposition of the law. "The power of taxation" was there declared to be "the most universal power possessed by governments. It is coextensive with every other power; it is an incident, a concomitant, an auxiliary of every other power."<sup>2</sup> Such a theory of the extent of the taxing power is not accepted with unanimity.<sup>3</sup> And in such quarters it would not do to justify a deduction of benefits as an exercise of the taxing power.

In conclusion of the whole subject of benefits, it may be remarked that their classification is into (I.) General Benefits and (II.) Special Benefits; the former being those which the owner enjoys in common with the community at large, while the latter are local in their character, and enjoyed by him in particular. And it is in this latter class only that, in the process of deduction, benefits may be considered in off-set.<sup>4</sup>

We come at length to the third and last class of cases, being those in which no portion of the owner's property has been actually appropriated, there being simply a depreciation in the value of the property by reason of its proximity to the improvement. Attention has been directed to the fact that where a strip of land is taken, for public use, the owner's right to compensation is not limited to the value of the strip thus absolutely appropriated, but that his demand

<sup>1</sup> *Newby v. Platte County*, 25 Mo. 258, 263. See *Nichols v. Bridgeport*, 23 Conn. 189; *Holton v. Milwaukee*, 31 Wis. 27; *Washington Avenue*, 69 Pa. St. 358, 361.

<sup>2</sup> *Leavenworth County v. Miller*, 7 Kan. 479.

<sup>3</sup> *The People v. Salem*, 20 Mich. 452; *The People v. The State*, 23 Mich. 499.

<sup>4</sup> *Whitman v. Boston, etc., R. Co.*, 3 Allen, 133; *Davis v. Charles River, etc., R. Co.*, 11 Cush. 506; *Hornstein v. Atlantic, etc., R. Co.*, 51 Pa. St. 87; *Whitcher v. Benton*, 50 N. H. 25; *The State v. Evans*, 2 Scam. 208; *Freedle v. North Carolina, etc., R. Co.*, 4 Jones L. 89; *Little Miami, etc., R. Co. v. Collett*, 6 Ohio St. 182 (under former constitution); *Pacific R. Co. v. Crystal*, 25 Mo. 544; *Hosher v. Kansas City R. Co.*, 60 Mo. 303; *Winona, etc., R. Co. v. Waldron*, 11 Minn. 515; *Carli v. Stillwater, etc., R. Co.*, 16 Minn. 260.

also includes any diminution in value experienced by the remainder of the tract. It may seem only reasonable, at first thought, that if *he* is entitled to recover for the diminished value of his remaining property, then the owner of the adjoining tract upon the opposite side should surely be entitled to recover for the decreased value of *his* property, although no part of it may have been actually "taken." The law, however, and with good reason, holds that, unless some portion of the property has really been appropriated, the owner is not entitled to any compensation. His property has not been "taken;" there is as much of it as there ever was. He is as free to use, enjoy, and dispose of it now as before. It may not be worth as much, to be sure, as previously it was; but the owner must take his chances as to whether his property will be appreciated or depreciated in value by improvements made in the vicinity, as much so when those improvements happen to be made by the public as when they are effected by individual enterprise. The owner, then, has no right to demand that compensation be made to him under such circumstances. And if he cannot demand it as matter of right, there certainly are weighty reasons of public policy against his receiving it as matter of favor. Public improvements would be expensive luxuries, if they did not become rare ones, were it necessary to make compensation for consequential injuries. It is, therefore, a well-settled legal principle, that no compensation can be demanded unless some portion of the owner's property has been "taken" from his possession.<sup>†</sup>

*V. Who is entitled to Compensation.*— "Property," says Bentham, "is a creation of law." In a state of nature, there was no such thing as property; and in the first stages of society, all property was held in common. At a later period,

<sup>†</sup> *Arnold v. Hudson River R. Co.*, 49 Barb. 108; *Radcliff's Executors v. The Mayor, etc.*, 4 N. Y. 195; *The People v. Kerr*, 27 N. Y. 188, 193; *Rogers v. Kennebec, etc.*, R. Co., 35 Me. 319; *Hooker v. New Haven, etc.*, Co., 14 Conn. 146; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21; *Davidson v. Boston, etc.*, R. Co., 3 Cush. 91; *Murray v. Menifee*, 20 Ark. 561.

the right to individual property came to be recognized; and now, by constitutional enactments, the sanctity of property rights is as securely guarded against all arbitrary interference as are the rights to life and to liberty, for "no man can be deprived of life, liberty, or property, without due process of law," and "private property cannot be taken for public use without just compensation."

In determining who is entitled to receive this compensation, regard must always be had to the nature and definition of "property." As property is a mere creation of law, it is not to be sought after in philosophic or scientific speculations. That only is property which the law of the land recognizes as such.<sup>1</sup> Then, too, the term "property" is, more often than otherwise, erroneously applied to that which is only the subject of property. "In a strict legal sense," so we are told, "land is not property, but the subject of property. The term "property," although in common parlance frequently applied to a tract of land or a chattel, in its legal signification means only the rights of the owner in relation to it. It denotes a right over a determinate thing. Property is the right of any person to possess, use, enjoy, and dispose of a thing."<sup>2</sup>

If we bear in mind that property is made up of certain essential rights, and that any interference which substantially abridges or subverts any one of these essential rights is *pro tanto* a taking of the owner's property, we have found a rule by which it may be determined whether or not a person has been deprived of his "property," within the legal signification of the term. But any exercise of the powers of government which does not encroach upon the owner's right to possess, use, enjoy, or dispose of his property cannot be a taking of "property," entitling him to compensation. So that, although the value of adjacent lots may be seriously impaired by a change made in the grade of a city street, the owner will not be entitled to compensation, nor have a cause

<sup>1</sup> *Wynehamer v. The People*, 13 N. Y. 378, 385.

<sup>2</sup> *Eaton v. Boston, etc., R. Co.*, 51 N. H. 504.



of action for the damage, as none of his property rights have been impaired.<sup>1</sup> So, where the State undertakes any public improvement, the necessary effect of which may be to diminish the value of adjoining property, there is no claim for compensation, as there has been no taking of property rights.<sup>2</sup>

But *use* is said to be the real side of property; and it is held that, although the title still remains in the owner, if any physical interference annuls the right of user, it is a taking of property, and compensation must be made. The flooding of property with water, for instance, is such an interference with the owner's rights of possession and of enjoyment that he is entitled to compensation as for a taking of his property.<sup>3</sup>

In all ordinary cases where a railroad is authorized to lay its track in a public highway, the fee of which is not in the abutting owners, they are not entitled to receive any compensation for the consequential injury;<sup>4</sup> and yet they have such a peculiar right to the *use* of the highway which is appurtenant to their lots that it is said to be as much property as the lots themselves. So that any appropriation of the highway, which deprives the adjoining owners of the reasonable use of the street, or of access to and from their lots, is as much a taking of property rights, entitling the owners to compensation, as though there had been an appropriation of the lots themselves; it not being material, in this view of

<sup>1</sup> Radcliff's Executors *v.* The Mayor, etc., 4 N. Y. 195; Murphy *v.* Chicago, 29 Ill. 279; Macy *v.* Indianapolis, 17 Ind. 267; O'Conner *v.* Pittsburgh, 18 Pa. St. 187; Skinner *v.* Hartford Bridge Co., 29 Conn. 523; Lee *v.* Minneapolis, 22 Minn. 13; Taylor *v.* St. Louis, 14 Mo. 20.

<sup>2</sup> Davidson *v.* Boston, etc., R. Co., 3 Cush. 91; Shrunck *v.* Schuylkill Nav. Co., 14 Serg. & R. 71; The Commonwealth *v.* Richter, 1 Pa. St. 467.

<sup>3</sup> Ashley *v.* Port Huron, 35 Mich. 296; Eaton *v.* Boston, etc., R. Co., 51 N. H. 504; Pumpelly *v.* Green Bay Co., 13 Wall. 177; Hooker *v.* New Haven, etc., Co., 14 Conn. 146; *s. c.*, 15 Conn. 312.

<sup>4</sup> In the Matter of the Philadelphia, etc., R. Co., 6 Whart. 25; Millburn *v.* Cedar Rapids, 12 Iowa, 246, 261; Davenport *v.* Stevenson, 34 Iowa, 225; Moses *v.* The Railroad Co., 21 Ill. 522; Atchison, etc., R. Co. *v.* Garside, 10 Kan. 552.

the subject, whether the fee of the highway is in the public or not.<sup>1</sup>

In those cases where the fee is in the owner of the abutting lots, the public have only a right of passage in the highway, for such purposes as a street is ordinarily devoted to; and the construction therein of a railroad propelled by steam is the imposition of an additional easement, entitling the owner of the fee to additional compensation.<sup>2</sup> Some few cases have held a contrary doctrine, but it is believed that the weight of authority sustains the proposition as we have stated it above.<sup>3</sup>

A distinction seems to be recognized between steam and horse railways, it being held that the latter, when laid in a public highway, do not impose an additional burden upon the land of the adjoining proprietor, although he is possessed of the fee of the land, the public having a mere easement therein.<sup>4</sup> This distinction is repudiated in New York, where the adjoining owner is held to be entitled to additional compensation.<sup>5</sup> Judge Dillon, in his work on Municipal Corporations, however, coincides with the principle as we have stated it, believing such an appropriation to fall within the

<sup>1</sup> *Lexington, etc., R. Co. v. Applegate*, 8 Dana, 289; *Elizabethtown, etc., R. Co. v. Combs*, 10 Bush, 382; *Crawford v. Delaware*, 7 Ohio St. 459; *Cincinnati Street Ry. v. Cummins*, 14 Ohio St. 523; *Haynes v. Thomas*, 7 Ind. 38; *Protzman v. Indianapolis, etc., R. Co.*, 9 Ind. 469; *New Albany, etc., R. Co. v. O'Daily*, 13 Ind. 463; *Cadle v. Muscatine, etc., R. Co.*, 44 Iowa, 11; *Anderson v. Turbeville*, 6 Coldw. 150, 158. See *Kellinger v. The Forty-second Street, etc., R. Co.*, 50 N. Y. 206.

<sup>2</sup> *Williams v. New York, etc., R. Co.*, 16 N. Y. 97; *Carpenter v. Oswego, etc., R. Co.*, 24 N. Y. 655; *Ford v. Railroad Co.*, 14 Wis. 616; *Pomeroy v. Milwaukee, etc., R. Co.*, 16 Wis. 640; *Star v. Camden, etc., R. Co.*, 4 Zab. 592; *Imlay v. Union Branch R. Co.*, 26 Conn. 255; *Gray v. St. Paul, etc., R. Co.*, 13 Minn. 315; *Harrington v. St. Paul, etc., R. Co.*, 17 Minn. 215; *Cox v. Louisville, etc., R. Co.*, 48 Ind. 178.

<sup>3</sup> *Cooley's Const. Lim.* 549; *Redf. on Rys.* (3d ed.), sec. 76, and note.

<sup>4</sup> *Elliott v. Fair Haven, etc., R. Co.*, 32 Conn. 586; *Cincinnati Street Ry. v. Cummins*, 14 Ohio St. 523; *Jersey City & B. R. Co. v. Jersey City & H. R. Co.*, 20 N. J. Eq. 61; *Hinchman v. Railroad Co.*, 17 N. J. Eq. 75; *Peddicord v. Baltimore, etc., Passenger R. Co.*, 34 Md. 464.

<sup>5</sup> *Craig v. Rochester City, etc., R. Co.*, 39 N. Y. 404.

use for which the highway was originally dedicated or acquired, and that the owner is not entitled to any further compensation.<sup>1</sup> And where the highway is used for gas or water pipes, and for telegraph poles, such use does not seem to be regarded as a new servitude, entitling the owner to compensation, but only a necessary and proper use incident to the street as such.<sup>2</sup> So, where a common highway is converted into a turnpike, upon which tolls are collected, the owner of adjoining lots is not entitled to receive additional compensation, as there is no new servitude imposed thereby.<sup>3</sup> Had there been an additional burden, there would also have been the necessity of making additional compensation, as in those cases where a railroad undertakes to lay a second track in a public highway, having previously obtained a right of way for only one track.<sup>4</sup>

The title of riparian proprietors on the banks of a navigable stream extends only to ordinary high-water mark, and the shore between high and low water-mark, as well as the bed of the river, belongs to the State, and may be appropriated, therefore, to a public use without making compensation.<sup>5</sup> But, although the fee may be in the public, the riparian owner may have certain riparian rights, such as a right of access to the navigable part of the stream, or a right to erect a landing, a wharf, or a pier, for use in connection with his property, which are valuable property rights, of which he cannot be deprived without compensation.<sup>6</sup> In this connection, it is to be understood that, in consequence of the great differences existing between the topography and extent of the American continent and the British Islands, the term "navigable"

<sup>1</sup> Dill. on Mun. Corp. (1st ed.), sec. 573.

<sup>2</sup> *Id.*, secs. 546, 552.

<sup>3</sup> *Douglass v. Turnpike Co.*, 22 Md. 219; *The Commonwealth v. Wilkinson*, 16 Pick. 175; *The State v. Laverack*, 34 N. J. 207; *Plank-Road Co. v. Cane*, 2 Ohio St. 419.

<sup>4</sup> *Southern Pacific R. Co. v. Reed*, 41 Cal. 256.

<sup>5</sup> *Gould v. Hudson River R. Co.*, 6 N. Y. 522; *Stevens v. Paterson, etc.*, R. Co., 34 N. J. 532; *Barney v. Keokuk*, 94 U. S. 324.

<sup>6</sup> *Yates v. Milwaukee*, 10 Wall. 497; *Clark v. Peckham*, 10 R. I. 35; *Brisbane v. St. Paul, etc.*, R. Co., 23 Minn. 114, 130.

has in this country a more liberal signification than it has at the common law. At the common law, no waters were deemed navigable in which the tide did not ebb and flow. In this country, all waters are navigable which are so in reality, without reference to any ebbing and flowing of the tide.<sup>1</sup> It is sufficient that the stream is capable, in its natural state, of transporting the products of the forests or mines, or of the tillage of the soil, in a condition fit for market. It is not essential that the transportation should be by vessels. Neither is it essential that its navigable capacity be continuous; the volume and height of water may be subject to periodical fluctuations, rendering it unnavigable at certain seasons of the year, and navigable at others. But the question of capacity must, in all cases, be decided without reference to the effect which artificial improvements may have caused in respect to the navigability of the stream.<sup>2</sup>

Compensation is only necessary where *private* property is taken for public use. It is simply discretionary with the legislature whether or not it will require compensation to be made when public property is taken for another public use.<sup>3</sup> This principle must be received, however, subject to qualification; for while municipalities may be possessed of property which is public in the sense that the municipalities are public, yet such property may be private as having all the attributes of the private property of an individual. This grows out of the peculiar character of such corporations. "They have their public or political character," says Judge Cooley, "in which they exercise a part of the sovereign power

<sup>1</sup> *Carson v. Blazee*, 2 Binn. 475; *Shrunk v. Schuylkill Nav. Co.*, 14 Serg. & R. 71; *Kates v. Wadlington*, 1 McCord, 580; *Wilson v. Forbes*, 2 Dev. 30; *Collins v. Benbury*, 3 Ired. 277; *Elder v. Bucrus*, 6 Humph. 366; *McManus v. Carmichael*, 3 Iowa, 1; *Tomlin v. Dubuque, etc., R. Co.*, 32 Iowa, 106; *Castner v. Steamboat*, 1 Minn. 73; *Bowman's Devises v. Wathen*, 2 McLean, 376; *The People v. Canal Appraisers*, 33 N. Y. 461; *Diedrich v. The Railroad Co.*, 42 Wis. 248, 263; *Barney v. Keokuk*, 94 U. S. 324.

<sup>2</sup> *Morgan v. King*, 35 N. Y. 454, 460.

<sup>3</sup> *Indiana Central R. Co. v. The State*, 3 Ind. 421; *Pennsylvania R. Co. v. New York, etc., R. Co.*, 23 N. J. Eq. 157; *Clinton v. Cedar Rapids R. Co.*, 24 Iowa, 455; *The People v. Kerr*, 27 N. Y. 188.

of the State for governmental purposes, and they have their private character, in which, for the benefit or convenience of their own citizens, they exercise powers not of a governmental nature, and in which the State at large has only an incidental concern, as it may have with the action of private corporations."<sup>1</sup> And the property which such corporations hold in their *quasi*-private capacity is denominated private, to distinguish it from that which they hold in their political capacity. It is believed that this private property of municipal corporations comes within the protection of the constitutional provisions we have been considering. In New York, however, it has been decided that there is no distinction between the public and private property of a municipal corporation so as to bring it within the meaning of these constitutional provisions.<sup>2</sup> But in this case the use for which the property was taken was one which concerned the city itself, and the court expressly disclaimed deciding "whether the legislative jurisdiction would extend to diverting the city property to other public use than such as concerned the city, or its inhabitants." We cannot believe that such a diversion would be sustained, confident that the rule was correctly stated when it was said, by an eminent authority, that, "when corporate powers are conferred, there is an implied contract between the State and the corporators that the property which they are given the capacity to acquire for corporate purposes, under their charter, shall not be taken from them and appropriated to other uses."<sup>3</sup> To the same effect is the language of Judge Dillon, in the Supreme Court of Iowa.<sup>4</sup>

In connection with this subject, that where public property is taken no compensation need be made, reference should be made to a somewhat remarkable case lately decided in the Supreme Court of Michigan. The case is noteworthy, not so much for what was decided, perhaps, as for what the court

<sup>1</sup> Cooley on Tax. 482.

<sup>2</sup> *Darlington v. Mayor, etc.*, 31 N. Y. 164, 193. See also *The People v. Rochester*, 50 N. Y. 525, 530.

<sup>3</sup> Cooley's Const. Lim. 238.

<sup>4</sup> *Clinton v. Cedar Rapids R. Co.*, 24 Iowa, 476.

was urged to decide. The case was argued upon the theory that property public for one purpose was public for all, and that where property had been taken for a particular public use, it thereby became public for any and all purposes, and might be taken without compensation; so that one railroad company had a right to appropriate, without compensation, the franchises or property of another railroad, to aid in the construction of its own road. The court, however, took a different view of the case. "It will not do to say," so said the court, "that property taken for a particular public use thereby becomes public for all purposes. The public may have the right to use it for certain purposes, and yet individuals or private corporations have rights therein at the same time. These rights may be considered as private rights, separate and distinct from the rights of the public. Wherever such private rights exist, they are entitled to protection, and can only be divested in the same manner and under the same laws that individual rights may be."<sup>1</sup>

But it is to be borne in mind that it is not every taking of private property for public use that entitles the owner to compensation. The property of the citizen might be taken under the police power of the State, and no obligation to render compensation be imposed in consequence.<sup>2</sup> So, under police regulations, a person's property may be taken from him in the sense that it is rendered perfectly useless and valueless, although it has not been taken from him so far as any question of title is concerned. A man may purchase a building upon condition that it shall only be used for the storing of gunpowder, and the legislature may thereafter prohibit its use for that purpose, and thus render the property worthless, and yet the owner would not be entitled to compensation as for property taken for public use. Or, the holder of a burial lot, in which no interments have been made, who has purchased it under the restriction that it shall

<sup>1</sup> Grand Rapids, etc., R. Co. v. Grand Rapids, etc., R. Co., 35 Mich. 265, 273.

<sup>2</sup> The People v. Hawley, 3 Mich. 330; The People v. Gallagher, 4 Mich. 244; Philadelphia v. Scott, 81 Penn. 80.

not be used for any other purpose, may have its value reduced to naught by the passage of an act making interments in the lot unlawful. Such laws would be a constitutional exercise of the police power; and that, too, without making any compensation to the owners thus deprived of the use of their property.<sup>1</sup>

It has been urged upon the courts, that where private property was taken in great emergencies, to prevent some public calamity, like the spreading of a fire or the ravages of a pestilence, it was such a taking for public use as required compensation to be made, afterwards, to the owners. At the common law, no compensation was required in such cases.<sup>2</sup> But it was argued, the constitutional provisions requiring compensation to be made where property was taken for a public use were designed to include just such cases as these. And Chief Justice Nelson of New York, while doubting, in 1837, whether they actually came within the provision, was certain that they came within "the spirit and reason of the principle."<sup>3</sup> It appears to be conclusively settled, however, that they do not come within the meaning of the provision we are considering.<sup>4</sup> A taking of property under such circumstances is not a taking under the right of eminent domain, and not necessarily under the police power of the State, for it is a right which any individual may exercise, without any legislative authority whatever. *Salus populi suprema est lex*, and *Necessitas facit licitum quoad alias non est licitum*.

But to return to those cases where there has been a taking of private property for public use, and compensation is to be made to the owner. The term "owner" is used, in this connection, to denote any person having any kind of *legal estate*

<sup>1</sup> Kincaid's Appeal, 66 Pa. St. 411.

<sup>2</sup> *Respublica v. Sparhawk*, 1 Dall. 357; *Russell v. Mayor, etc.*, 2 Denio, 474; *Mayor, etc., v. Lord*, 17 Wend. 297; *Taylor v. Plymouth*, 8 Metc. 465; *Ruggles v. Nantucket*, 11 Cush. 435; *Hale v. Lawrence*, 3 Zab. 590.

<sup>3</sup> *Mayor, etc., v. Lord*, 17 Wend. 285, 292.

<sup>4</sup> *Russell v. The Mayor, etc.*, 2 Denio, 461; *Beach v. Trudgain*, 2 Gratt. 219; *American Print-Works v. Lawrence*, 1 Zab. 248; *Hale v. Lawrence*, 3 Zab. 390; *Sarocco v. Geary*, 3 Cal. 69; *McDonald v. Red Wing*, 13 Minn. 38.

or interest in the property which it is proposed to acquire by condemnation.<sup>1</sup> It may be an estate in possession, reversion, or remainder.<sup>2</sup> All persons having proprietary interests in the property are entitled to compensation, as the fee or ownership is only an aggregation of these several interests. Where the interests are distinct, no one should receive the compensation belonging to another, but it should be apportioned among them according to the magnitude of their respective interests; the proper mode in such cases being to estimate the damage to the fee as if owned entire and unencumbered by one person, and then apportion the amount among all the interests which such persons have in the property.<sup>3</sup> Lessees and lessors, tenants for life, and remainder-men are each entitled to receive their respective shares of the compensation awarded.<sup>4</sup> As between mortgageors and mortgagees, the rule of law is, that the fund arising from the sale of the estate is to be considered as a substitute for the estate itself, and the mortgage attaches to it as such. The courts, therefore, will direct the application of the money according to the rights of the respective parties as they existed previous to the alteration of the estate.<sup>5</sup>

It has been decided, however, that a judgment-creditor of the owner has no such estate or interest in the land as entitles him to compensation at the hands of the public. His lien is regarded as a mere statutory remedy, in no way dependent upon contract, and is, therefore, within the power of the legislature to modify or take away. So that where the law provided that title should vest in the public as soon

<sup>1</sup> *The State v. Easton, etc., R. Co.*, 36 N. J. L. 181, 184.

<sup>2</sup> *Watson v. New York Central R. Co.*, 47 N. Y. 157, 162; *Parks v. Boston*, 15 Pick. 198.

<sup>3</sup> *Coutant v. Catlin*, 2 Sandf. 485; *Wiggin v. The Mayor, etc., of New York*, 9 Paige, 16.

<sup>4</sup> *Parks v. Boston*, 15 Pick. 198; *Foote v. Cincinnati*, 11 Ohio, 408; *Baltimore, etc., R. Co. v. Thompson*, 10 Md. 76; *Wiggin v. The Mayor, etc., of New York*, 9 Paige, 16; *Colcough v. Nashville, etc., R. Co.*, 2 Head, 171; *Turnpike Road Co. v. Brosi*, 22 Pa. St. 29; *Brown v. Powell*, 25 Pa. St. 229; *Dyer v. Wightman*, 66 Pa. St. 425; *Biddle v. Hussman*, 23 Mo. 597, 602.

<sup>5</sup> *Astor v. Miller*, 2 Paige, 68; *s. c.*, 5 Wend. 603.



as compensation was made to the owner, it was held a divestiture of all liens upon the land which had not ripened into title by sale.<sup>1</sup>

Where the land of a deceased person is taken for public use, the heir, and not the administrator, is entitled to receive the compensation; and this, notwithstanding the administrator may have previously represented the estate as insolvent, and afterwards obtained a license to sell the intestate's real estate for the payment of debts.<sup>2</sup> Mr. Scribner, in his learned work on the subject of Dower, expresses the opinion that the wife is entitled to compensation where her inchoate dower is taken under an exercise of the right of eminent domain. "It may be," he adds, "that after the value of the entire estate is ascertained, and the amount paid over to the proper legal authority, particularly if she is a party to the proceeding, her right is transferred from the land to the money representing it; \* \* \* and that if she fail to assert her right to a portion of the fund, or if the authority through whose agency the appropriation to public uses is made neglect or refuse to protect her interest, she cannot afterwards set it up against the land."<sup>3</sup> It seems impossible to reconcile any theory which requires compensation to be made for inchoate dower, with the great weight of authority which holds that the wife has no estate or interest in the land until dower has become consummated.<sup>4</sup>

A proceeding for condemnation is strictly between the public and such persons as the public has made parties thereto. If the public fails to make a party to the proceeding any person whose estate or interest in the property is essential to a perfect title, the condemnation is to that extent void, though valid as to the rest.<sup>5</sup> The person holding

<sup>1</sup> *Watson v. New York Central R. Co.*, 47 N. Y. 157.

<sup>2</sup> *Boynton v. Peterborough, etc., R. Co.*, 4 Cush. 467.

<sup>3</sup> 2 *Scrib. on Dower*, 20.

<sup>4</sup> *Moore v. The City of New York*, 8 N. Y. 110; *Weaver v. Gregg*, 6 Ohio St. 547; *Lucas v. Sawyer*, 17 Iowa, 517; *Barbour v. Barbour*, 46 Me. 9; *Magee v. Young*, 40 Miss. 164; *Melizet's Appeal*, 17 Pa. St. 449; *Noel v. Ewing*, 9 Ind. 37; *Taylor v. Sample*, 51 Ind. 423.

<sup>5</sup> *The State v. Easton, etc., R. Co.*, 36 N. J. L. 181, 184.

the legal, as distinguished from the equitable, title is the only necessary party to such proceedings.<sup>1</sup> And where property is appropriated first, and compensation made afterwards, the owner at the time of appropriation, as distinguished from his subsequent grantee, is, in general, entitled to the compensation, unless there is in the deed of conveyance an express reservation to the contrary.<sup>2</sup>

*VI. Compensation will not justify a Taking for a Private Use.*—The constitutional provisions we have been considering have had reference to private property taken for a *public* use. In only three instances is there to be found, in any of the State Constitutions, an express limitation upon the power to take for a *private* use. Such provisions are to be found in the Constitutions of Alabama, Colorado, and Missouri.<sup>3</sup> We have seen that the right to compensation where private property is taken for public use is a fundamental principle of law, and is not dependent upon any constitutional provision to that effect. It is equally a fundamental principle of law, and equally independent of constitutional provisions, that the making of a just compensation to the owner will not justify a taking of his property for a private use. "As between individuals," it has been ruled that "no necessity, however great; no exigency, however imminent; no improvement, however valuable; no refusal, however unneighborly; no obstinacy, however unreasonable; no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate," but he will be protected therein, "even to the extent of churlish obstinacy."<sup>4</sup>

<sup>1</sup> *Hidden v. Davison*, 51 Cal. 138; *McIntyre v. Easton, etc.*, R. Co., 26 N. J. Eq. 425.

<sup>2</sup> *Lewis v. The Railroad Co.*, 11 Rich. 91; *Rand v. Townshend*, 26 Vt. 670; *Central R. Co. v. Hetfield*, 29 N. J. L. 206; *McLendon v. West Point, etc.*, R. Co., 54 Ga. 295; *McFadden v. Johnson*, 72 Pa. St. 335. But see *Harrington v. St. Paul, etc.*, R. Co., 17 Minn. 215.

<sup>3</sup> Alabama, Const. 1875, art. i., sec. 24; Colorado, Const. 1876, art. ii., sec. 14; Missouri, Const. 1875, art. ii., sec. 20.

<sup>4</sup> *Bangor, etc.*, R. Co. *v. McComb*, 60 Me. 290, 295. And see *Hardin v. Goodlett*, 3 Yerg. 41; *Memphis Freight Co. v. Memphis*, 4 Coldw. 419; *Taylor v. Porter*, 4 Hill (N. Y.) 140; *Embury v. Conner*, 3 N. Y. 511; *Matter of*

In some of the States, it has been expressly provided, by constitutional enactments, that private property may be taken, in cases of necessity, for private ways.<sup>1</sup> And in Missouri, property may be taken not only for private ways, but for "drains and ditches across the lands of others, for agricultural and sanitary purposes." So, in Colorado, the provision includes "reservoirs, drains, flumes, or ditches, on or across the lands of others, for agricultural, mining, milling, domestic, or sanitary purposes."<sup>2</sup> In Kentucky, where there is no constitutional provision on the subject, it is held that land may be taken for a private pass-way when it is necessary to enable any inhabitant of the State to attend courts, elections, churches, or mills, or to reach an established public highway; but not for the purpose of passing from one tract of land to another owned by him, or to a railroad depot which may be the most convenient to his residence.<sup>3</sup>

So far as the general principle is concerned, it is immaterial whether the attempt to take for a private use be made under the guise of exercising the right of eminent domain, or under that of the taxing power. There can be no taking for a private use under either power. If the purpose for which it is undertaken to levy the tax be private in its nature, or, being public, does not pertain to the particular district taxed, the attempt to tax will fail, because it would be a taking of property for private use.<sup>4</sup>

We have thus reviewed, as we have been able, the subject of compensation as an incident to the exercise of the right

Deansville Cemetery, 66 N. Y. 569; *Wilkinson v. Leland*, 2 Pet. 658; *Norman v. Heist*, 5 Watts & S. 171; *Sadler v. Longman*, 34 Ala. 311; *Osborne v. Hart*, 24 Wis. 89; *Consolidated Channel Co. v. Central Pacific R. Co.*, 51 Cal. 577; *Ryerson v. Brown*, 35 Mich. 333; *Dayton Mining Co. v. Seawell*, 11 Nev. 394; *Potosi v. Casey*, 27 Mo. 373.

<sup>1</sup> Alabama, Const. 1875, art. i., sec. 24; Colorado, Const. 1876, art. ii., sec. 14; Georgia, Const. 1877, art. i., sec. 3, pt. i.; Michigan, Const. 1850, art. xviii., sec. 14; Missouri, Const. 1875, art. ii., sec. 20; New York, Const. 1846, art. i., sec. 7; South Carolina, Const. 1868, art. i., sec. 23.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Robinson v. Swope*, 12 Bush, 21.

<sup>4</sup> *Weismer v. Village of Douglass*, 64 N. Y. 91, 99; *Opinions of the Judges*, 58 Me. 590; *Scuffletown Fence Co. v. McAllister*, 12 Bush, 312.

of eminent domain. In conclusion, we are reminded of the words of an eminent English statesman, spoken in reference to the security enjoyed by every English subject under the protecting *ægis* of English law: "There stands the poor man's cottage; the rains of summer and the snows of winter may enter its crevices, but the king of England, with all his forces, dare not enter that poor man's cottage." It was a proud eulogy of English law and English civilization. The legal principles which we have attempted to set forth in this article must clearly show, not only how sacredly secure as against sovereignty itself is "the poor man's cottage," but that the very soil which lies around and underneath it is so securely his, that not an inch of land can be subjected to a servitude until he has first received, at the hands of the public, a compensation which shall be to him an equivalent for that which he surrenders for the public good.

HENRY WADE ROGERS.

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