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THE LIMITED-ACCESS HIGHWAY FROM A LAWYER'S VIEWPOINT

WILKIE CUNNYNGHAM*

For thousands of years before roughly 1910, civilizations traveled leisurely by animal-drawn vehicles. Since an ox-cart or wagon could go almost anywhere across field or countryside (provided farming operations were not unduly interfered with), the problem of locating trails or roads was simple, and usually solved by the respective owners through whose lands they went.¹ Construction, if any, was inexpensive and more often considered a private neighborhood project than a public or governmental function.

But as motor vehicles came into common use, the transportation picture in the United States began changing. Within a decade trips of 50 or 100 miles became as common as 5 or 10 miles had been before. Average speeds of 3 to 5 miles an hour jumped to 10 and even 20 miles per hour.²

Next, the public began demanding a much better road for the new vehicle. This pressure produced in 1916 a legal revolution in highway matters—the Federal Aid Act, 39 Stat. 355, approved July 11, 1916. One-half of the cost of constructing roads would be contributed from federal funds, provided certain conditions were complied with.³ In the next few

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1. Mo. REV. STAT. § 8481 (1939) still provides that: "Any person wishing to cultivate or enclose land through which any road may run may petition the county court . . . for permission to turn such road on his own land or on the land of any other person consenting thereto. . . ." But in common practice, road locations were shifted by some traveler's simply opening "gaps" in the right-of-way fence and driving out across the adjoining field "in order to avoid a mudhole" in the old road, or by the landowner's "straightening his fence" or changing drainage, as in *California Special Road District v. Bueker*, 221 Mo. App. 435, 439, 441, 282 S. W. 2d 71 (1926).

2. *State v. Swagerty*, 203 Mo. 517, 524, 102 S. W. 483 (1907), upheld a conviction for violating the maximum speed limit of 9 miles per hour for all highways in Missouri—the automobile "is of unusual shape and form, is capable of high rate of speed, and produces a puffing noise when in motion. All this makes such a horseless vehicle a source of danger to persons traveling upon the highway in vehicles drawn by horses."

3. Some important pioneering was done here on a device, now very common, whereby the federal government can leave to the independent states all jurisdiction and control over any field of government into which the central government does not wish to, or may not legally enter, but nevertheless, allows it to control all

years most of the states created state highway departments to receive "Federal aid" and voted large bond issues to raise state funds to match the promised federal funds.⁴

But always the imagination, initiative, ingenuity, and model improvements of the private motor vehicle manufacturer, as well as the ever increasing demands of the public, have kept well ahead of the public highway official. By 1942 our American civilization had become so geared to, and dependent upon, the motor vehicle that it was almost paralyzed by only a limited rationing of gasoline and tires. The total number of vehicles, their average size, speed, and daily mileage, as well as the congestion of roadside business (so-called "ribbon development"), have already exceeded the wildest dreams of the decade when our most important highways were conceived and built. And they continue to increase. No one can now prophesy when and what the ultimate will be. But already the full safe-capacity of many of our key highways during certain hours and periods has been reached or exceeded, and the point of diminishing returns from these expensive service facilities is being passed.

However, improvements in vehicles and increase public demand always result, sooner or later, in better highways. The most important recent advance is the limited-access highway. Though the *autobahn* was well known

the actions of the states. It simply collects enough federal taxes from the citizens of all the states so that it can offer to return certain amounts to those states which enact or enforce a particular state law as desired by the federal Government, its officers, or employees. The effectiveness of such government through go-between states is illustrated in Section 16 of the Centennial Road Law, MO. REV. STAT. § 8754 (1939), by which: "The (State Highway) Commission is hereby directed to comply with the provisions of any act of Congress providing for the distribution and expenditure of funds of the United States appropriated by Congress for highway construction, and to comply with any of the rules or conditions made by the bureau of public roads in the department of agriculture, or other branch of the United States Government . . . in order to secure to the State of Missouri funds allotted to this State by the United States Government for highway construction." This section, under the majority opinion in *Logan v. State Highway Commission*, 330 Mo. 1213, 52 S. W. 2d 989 (1932), directs the commission to violate a later section (MO. REV. STAT. § 8768 (1939)) in the same law, provided such violation is made a condition for getting some additional federal money; e.g., the location of a secondary highway by statute in 1921 (and by the Constitutional Amendment, Art. IV, § 44a, which in 1928 adopted that location of "secondary highways as designated and laid out under existing law") might, according to the minority opinion, be made "wholly subject to the will or caprice of the Federal (or State) authorities" by merely producing a letter signed by some federal employee. See MO. CONST. Art. IV, § 30 3d; Art. III, § 38; Art. VI, § 16 (1945); Ind. Acts. 1947, Ch. 377, p. 1509.

4. For the succession of more important legal milestones which mark in Missouri the development of the motor vehicle, see Appendix, p. 42, following.

in Germany before the recent war, the limited-access highway has begun to really develop in America only in the last 10 years, and has been greatly retarded during this period by the almost complete stoppage of highway construction by World War II. In all the United States there are only a few hundred miles of it as yet.⁵ There are none in the State of Missouri.⁶

1. WHAT IS A LIMITED-ACCESS HIGHWAY?

Many of those in control of our highways and streets have little, if any, conception of what a limited-access highway is, what it is intended to accomplish, and what engineering, legal, economic, and social problems may be connected with it. Yet, in the next few years thousands of miles of this new highway will appear all through the states.

The goal toward which the limited-access highway aims is an unobstructed, safer, faster, less congested, and more efficient highway, with the driver's roadway freed from:

- (1) Danger of headlight glare and other vehicles coming at him head-on in his traffic lane.
- (2) Slowing, stopping, and congestion from traffic on intersecting highways blocking his roadway.
- (3) Other vehicles suddenly cutting in front of him, coming out of and going into abutting property, or turning into or out of other highways.

These various results are accomplished by a multi-lane highway with:

5. Frank C. Balfour, in an address on "*Effect of Freeway Development on Adjoining Land Values in California*," delivered in New York City before the 1947 Meeting of the American Association of State Highway Officials, said: "Long before our State Highway Department embarked on the program of planning and constructing limited freeways, planners and subdividers with outstanding foresight were thinking along the same lines and transformed their thoughts into action and accomplishment." He cited as examples the Park-Presidio and Junipero Serra Boulevards in San Francisco, the Santa Anita Oaks subdivision along Foothills Boulevard, and other private developments along Crenshaw, Long Beach, Sepulveda, and Ventura Boulevards in or near Los Angeles.

6. Unless abutting landowners have had their legal right to construct and use their own entrances for access to the 3.286-mile Oakland Express in St. Louis extinguished by the statute of limitations or some other rule of law, it probably should not be referred to as a limited-access highway. See: *State ex rel. State Highway Commission v. Hoffman*, 132 S. W. 2d 27, 32 (Mo. App. 1939); *Brownslow v. O'Donoghue*, 276 Fed. 636, 22 A. L. R. 939 (1921); 25 AM. JUR. *Highways* § 154; *Kent v. Trenton*, 48 S. W. 2d 571 (Mo. App. 1932); *Riggs v. Springfield*, 344 Mo. 420, 126 S. W. 2d 1144 (1939) *State ex rel. State Highway Commission v. Bailey*, 234 Mo. 168, 178-180, 115 S. W. 2d 17 (1938).

- (a) Central traffic lanes or "thruway"⁷ for through traffic, separated from "outer-roadways" in front of the abutting property on either side for two-way local traffic and parking.
- (b) No direct access to the thruway except at certain well spaced entrances and exits connecting outer-roadways and intersecting highways. The thruway lanes are often elevated, depressed, or fenced from the rest of the highway and abutting property. The usual direct access is allowed between outer-roadways and abutting property.
- (c) Grade separations for intersecting highways.
- (d) Thruway lanes for traffic going in opposite directions, separated and screened by a wide division strip and plantings.

Of course, every limited-access highway will not have all the above characteristics. Local and varying conditions must always determine the degree of approximation to this model which will be practical in each particular case. However, an analysis of Missouri's state highway accidents, set out hereafter, suggests that the minimum requirements for a limited-access highway should be:

- (1) All direct access *from outside the highway* (whether from other highways or from abutting property) must be subject to *legal* limitation—either entire or partial.
- (2) All access *between lanes intended for traffic going in opposite directions inside the thruway* must be subject to legal control.

II. WHY HAVE LIMITED-ACCESS HIGHWAYS?

Is this new type highway worthy of the lawyer's (or, for that matter anyone's) attention and study? What may we expect to get from such a highway? It is, or will shortly command such public attention that every well informed lawyer who expects to be a leader in public affairs should be interested in just a few facts about it.

A. *It can make millions of additional productive man-hours available to our economy and society each year.*

We are all familiar with the rush-hour jam in our big cities. Cars creep along block after block in low gear at a snail's-pace, bumper to bumper, fender to fender, stopping and starting at each intersecting street and in-

7. The use and spelling of "thruway" was originated in New York. Other terms are also used to designate the general type of road from right-of-way line to right-of-way line, such as "freeway," "limited freeway," "expressway," "superhighway," "controlled-access highway," and "parkway."

numerable times in between. Honking horns and glaring faces only add to the driver's nervous tension (and perhaps high blood pressure and early death). Tempers are lost; paint and fenders are lost; and countless hours of precious time are lost.

Would limiting access help? Well, it takes only 3 or 4 minutes now to make a 1½-mile trip on the Davidson Limited Highway in Detroit's metropolitan area, where formerly, with unlimited access, 20 to 30 minutes were required. The 5.8-mile Arroyo Seco limited-access highway has cut 25 minutes' driving time between Pasadena and Los Angeles. Milwaukee compared a 5/8-mile limited-access section of 35th Street with 4 other adjoining or near sections of the same length, on the same street, and which carried about the same traffic, but allowed unlimited access. Limitation of access raised the average speed of 13.4 miles per hour during rush hours to 31.8.

If the time saving for each vehicle each day were totaled at the end of the year, we would get some startling figures. It has been estimated that the Willow Run Expressway System alone will save motorists in Detroit approximately 5,000,000 man-hours each year. The total productive man-hours which a few limited-access highways could make available to the United States each year for economic and social gains would be astronomical. And one of the factors most determinative of any nation's strength, wealth, and well-being is its available man-hours.

B. It can carry up to 3 times the amount of traffic with no increase or widening of existing traffic-lanes.

All agree that something must be done to relieve traffic congestion on many of our highways. It is estimated that a 6-lane limited-access highway will carry 50,000 vehicles per day, but that it takes up to 18 lanes of unlimited-access highway to carry the same traffic. Another estimate is that only 400 vehicles can be accommodated per hour on a single unlimited-access traffic-lane, whereas, 1,500 can be better accommodated on a controlled-access lane.

C. It should reduce motor vehicle accidents between 50% and 75%

If we look only at those highways in Missouri which are under the jurisdiction of the State Highway Commission (and these are only a small part of the total mileage of the state), there were 7,256 reported accidents during the 12 months ending June 30, 1947. Of these, 1,854 were caused by vehicles attempting to gain access to a state highway, while 1,724 were

caused by head-on collisions between vehicles going in opposite directions, but on the same traffic-lane—or, in the year, a total of 3,578 accidents which were occasioned, in every instance, by access being allowed either (1) *from outside the highway* to a traffic-lane occupied by another vehicle, or (2) *between lanes* intended for traffic in opposite directions.

That indicates $\frac{1}{2}$ —to be exact, 49.2+%—of all accidents on Missouri's state highways this year could have been prevented by limited-access highways—231 lives, out of the 464 persons killed in those accidents, could have been saved; 3,191 mangled bodies, and \$1,348,037 of property loss prevented.

After the exclusion of promiscuous entering and crossing traffic on the $\frac{1}{8}$ -mile section in Milwaukee, it had only 5% as many accidents as the average of the other 4 comparable unlimited-access sections, and the personal injury ratio was 1 to 27. U. S. Highway No. 1 in New Jersey parallels the Merrit Parkway and has a reasonably comparable amount of traffic. From 1940 to 1944 there were 103 deaths on No. 1, which allows unlimited access, and only 23 on the limited-access Parkway—or 4.5 times as many. California reduced accidents 75% by limiting access on the Arroyo Seco.

Experience throughout the United States indicates limited-access highways should eliminate between 50% and 75% of our staggering annual toll of approximately 40,000 highway deaths, 1,450,000 non-fatal injuries, and \$2,000,000,000 of property loss.

Certainly all engineering, financing, and legal problems connected with limited access are worthy of study. Indeed, it is tragic that they were not solved long ago.

III. WHAT LEGAL RIGHTS ARE THERE WHICH MAY BE AFFECTED BY THE LIMITED-ACCESS HIGHWAY?

As lawyers, we are particularly interested in (1) *who* has (2) *what* (3) *legal rights* (and *duties*) which may be affected by the limited-access highway so as to give rise to (4) *legal remedies or proceedings*.

A. "Damage" not same as injury to legal rights—*damnum asque injuria*.

We should be careful not to confuse in our minds economic matters with legal. Financial damage is not necessarily the result of legal injury. This all too common confusion causes almost everyone who suffers damage in a traffic accident to ask immediately whom his claim is against—not whether there has been a breach of some legal duty.

We all are lucky enough to enjoy a great many privileges and advantages which we have no *legal right* to demand, and which no one else owes the *legal duty* to give us. The mere announcement that a particular location has been chosen for some beneficial public improvement may cause great financial profit to fortunate owners of adjacent property. A later announcement that the location will be changed to another community may cause very real damage to those same owners because of depreciation in the market value of their property, but they will not have lost any *legal right*.

This distinction is indicated by the phrase: *Damnum absque injuria*. "‘Damnum’ means only harm, hurt, loss, damage; while ‘injuria’ comes from ‘in,’ against, and ‘jus,’ right, and means something done against the right of the party, producing damage, and has no reference to the fact or amount of damage. Unless a right is violated, though there be damage, it is ‘damnum absque injuria.’"⁸

The lawyer's first inquiry should be: Is the right or privilege claimed by one (and the necessary accompanying duty owed by another) recognized in law—or is it merely fortuitous?

B. *As against the public's right to improve for highway use with elevated roadways and overpass structures, there is generally no private property right to light, air, view, or a particular grade.*

Generally, no one has any property right or easement of light, air, or view across his neighbor's land. Each adjoining landowner may build just as high and as close to the division line as he pleases. Since each has acted within his legal rights (has violated no legal duty), any depreciation cause in the value of the neighbor's property is *damnum absque injuria*.⁹ How-

8. *West Virginia Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 615, 40 S. E. 591, 592-3 (1901), where defendant had obtained pipeline business which plaintiff previously enjoyed, and still coveted. The addition of "or damaged" to many state constitution, so that they now provide that private property shall not be (1) taken or (2) *damaged* without payment of just compensation, created *remedial rights* against the state which could not have been sued without its consent—but created no *new* property rights in *substantive law* which would thereafter be subject to injury, and did not create corollary *substantive duties* upon the public where, under similar circumstances, none would exist upon a private individual. See *Austin v. Augusta T. Ry.*, 108 Ga. 671, 674-676, 34 S. E. 852, 854 (1899); *Hill-Behan Lumber Co. v. State Highway Commission*, 347 Mo. 671, 681, 148 S. W. 2d 499 (1941), *cert. denied*, 314 U. S. 636 (1941), and respondent's points and authorities, 347 Mo. at 674; *Thompson v. Chicago, M. & St. P. Ry.*, 137 Mo. App. 62, 68, 119 S. W. 509 (1909); *Max v. Barnard-Bolckou Drainage Dist.*, 326 Mo. 723, 730-733, 32 S. W. 2d 583 (1930); *Smith v. St. Paul M. & M. Ry.*, 39 Wash. 355, 81 P. 840 (1905).

9. *Austin v. Augusta T. Ry.*, Note 8, *supra*; *Straup v. Rauschelbach*, 217 Mo. App. 236, 239, 261 S. W. 346 (1924); *Thompson v. Chicago, M. and St. P. Ry.*, 137 Mo. App. 62, 68, 119 S. W. 509 (1909).

ever, many assume that a landowner has such easements *in an abutting highway*, and that he is entitled, under the Constitution, to compensation from the public if an overpass or elevated roadway is constructed in front of his property, or the grade of the highway is changed. As the origin of this idea, the early New York elevated railroad cases are usually cited.

But the obiter dictum in the *Story* and *Lahr*¹⁰ cases actually pointed out that the abutter would not have recovered if the elevated structure had been placed in the street as an improvement *for street purposes*. In the *Story* case the city originally owned all the land and, as a part of the transaction selling the abutting lot to plaintiff's predecessor in title, had subjected the street to a covenant that the street would always be protected from non-street use—and the erection of the railroad company's structure diverting it from street use, violated plaintiff's legal right under the covenant. Likewise, in the *Lahr* case the right-of-way was held in trust (imposed by the law under which it was condemned) for the use of the public for highway purposes. The exclusion of the public, and diversion of the street to the private use of a corporation, violated the rights of the abutter from whom the right-of-way was condemned, authorizing him to recover all property-value loss he could trace to the breach of trust.

The Supreme Court of the United States in the *Sauer*¹¹ case pointed out the distinction between (1) elevated structures intended to promote the highway use and enjoyment, for which the right-of-way is held in trust, and (2) those which divert it from that purpose, saying:

"The New York elevated railway cases . . . hold that the construction and maintenance on the street of an elevated railroad operated by steam, and which was not open to the public for purposes of travel and traffic was a perversion of the street from street uses, and imposed upon it an additional servitude, which entitled abutting owners to damages. . ."

". . . It is clear that, under the law of New York, an owner of land abutting on the street has easements of access, light and air *as against the erection of an elevated roadway by or for a private corporation for its own exclusive purpose, but that he has no such easements as against the public use of the streets, or any structures which may be erected upon the street to subserve and promote that public use.*" (Emphasis mine.)

10. *Story v. New York Elevated R. R.*, 90 N. Y. 122, 144, 145, 177 (1882), and *Lahr v. Metropolitan Elevated Ry.*, 104 N. Y. 268, 292 (1887).

11. *Sauer v. City of New York*, 206 U. S. 536, 545, 547 (1906).

settled that regulation or limitation of traffic on a highway comes under the police power.¹⁵ It makes no difference how or where any part of the traffic gained access to the road—whether from a nearby or a distant point, whether from abutting land or from another highway.¹⁶

The sovereign's right to regulate traffic *without liability for payment of compensation* allows, among other things, (1) diversion of traffic away from a business location,¹⁷ prohibiting access or cross-overs between separated traffic lanes,¹⁸ designating one highway or lane to have right-of-way, and its traffic to have precedence over intersecting highways, lanes, and traffic,¹⁹ prohibiting left turns,²⁰ prohibiting or regulating parking,²¹ restricting speed, weight, weight, size, and character of vehicle allowed on certain highways,²² prescribing one-way traffic,²³ creating a cul-de-sac by closing a highway just beyond a tract of land, if access is left in one direction to the general network of highways.²⁴ However, the courts of some states have denied that one-way traffic may be enforced under the police power if,

15. 5 AM. JUR. *Automobiles* § 16; 25 AM. JUR. *Highways* § 253; 40 C. J. S. *Highways* § 232; *City of Clayton v. Nemours*, note 13, *supra*; *Town of Oyster Bay v. Moses*, 287 N. Y. Supp. 826, 827 (2nd Dept. 1936), *aff'd* 273 N. Y. 631, 7 N. E. 2d 729 (1937); *State v. Cox*, 91 N. H. 137, 141, 16 A. 2d 508 (1940), *affirmed*, 312 U. S. 569 (1941); *Ex Parte Kneedler*, 243 Mo. 632, 641, 147 S. W. 983 (1912); *Duval Lumber Co. v. Slade*, 147 Fla. 137, 2 So. 2d 371 (1941).

16. *Jones Beach Boulevard Estate v. Moses*, 268 N. Y. 362, 369, 197 N. E. 313, 316, 100 A.L.R. 487, 491 (1935); 39 C.J.S. *Highways* § 141.

17. *Wolff v. City of Los Angeles*, 49 Cal. App. 400, 193 Pac. 862, 863 (1920); *City of Stockton v. Marengo*, 137 Cal. App. 760, 764, 31 P. 2d 467 (1934); *Nelson v. State Highway Board*, 110 Vt. 44, 1 A. 2d 689, 118 A.L.R. 915 (1938); *Elks v. Board of Commissioners*, 179 N. C. 241, 102 S. E. 414 (1920); *Board of Supervisors of Chenango County*, 257 App. Div. 1058, 13 N. Y. Supp. 2d 730 (1939); *People v. Gianni*, 130 Cal. App. 584, 20 P. 2d 87 (1933); *Quin v. Mississippi State Highway Commission*, 194 Miss. 411, 11 So. 2d 810 (1943); *In re Appointment of Viewers, Johnson*, 344 Pa. 5, 23 A. (2d) 880 (1942).

18. *Jones Beach Boulevard Estate v. Moses*, note 16, *supra*.

19. 42 C. J. *Motor Vehicles* § 48.

20. *Cavanaugh v. Gerk*, 313 Mo. 375, 280 S. W. 51 (1926).

21. *Grimes, The Legality of Parking Meter Ordinances and Permissible Use of Parking Meter Funds*, 35 CALIF. L. REV. 235-251 (1947); *City of Clayton v. Nemours*, note 13, *supra*; *Wilhoit v. Springfield*, 237 Mo. App. 775, 171 S. W. 2d 95 (1943); *State ex rel. Audrain County v. Mexico*, 197 S. W. 2d 301 (1946); *Kimmel v. Spokane*, 7 Wash. 2d 372, 109 P. 2d 1069 (1941); *Rhodes v. Raleigh*, 217 N. C. 627, 9 S. E. 2d 389, 130 A.L.R. 311 (1940).

22. 25 AM. JUR. *Highways* § 267, 5 AM. JUR. *Automobiles* § 48; 40 C.J.S. *Highways* § 233; *Wilbur v. Newton*, 301 Mass. 97, 16 N. E. 2d 86, 121 A.L.R. 570 (1938); *State v. Swagerty* (1907), note 2 *supra*; *People v. Linde*, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997 (1930).

23. 5 AM. JUR. *Automobiles* § 49; *Jones Beach Boulevard Estate v. Moses*, note 16, *supra*; *Cavanaugh v. Gerk*, note 20, *supra*; 42 C. J. *Motor Vehicles* § 46.

24. *Wilson v. Kansas City*, 162 S. W. 2d 802 (1942).

Compensation for change of grade is *volunteered* by the statutes or charters controlling many cities. But constitutions should not be held to have created a new property right or easement—the legal right to have all highways maintained at any particular grade and so as not to obstruct light, air, and view.¹²

C. *Compensation under eminent domain,
but not under police power.*

The converse of the individual's legal right is the public's legal *duty*. The Federal Government is under the injunction of the Fifth Amendment to the United States Constitution which says:

“. . . nor shall private property be taken for public use without just compensation.”

Similarly, each of the states, because both (1) of the Fourteenth Amendment and (2) of its own state constitution, is under the requirement that private property shall not be (1) *taken* or (under many state constitutions) (2) legally damaged for public use without payment of just compensation.

These constitutional provisions have reference to taking or damaging (1) *property* (2) *for public use* under the sovereign's power of *eminent domain*. They do not apply if property which is, or is apt to become an *instrumentality of harm*, is taken or damaged *for public protection* under the sovereign's *police power*.¹³ Constitutions do not require payment of any compensation when only police power is exercised.¹⁴ Of course, those entrusted with legislative power over the matter may (and often do) voluntarily pay what no constitution compels them to pay.

1. Traffic regulation or limitation comes under police power.

It is often difficult to determine whether it is the eminent domain or the police power which is being exercised in a particular case. However, it is well

12. See note 8, *supra*, and Gaus & Sons Mfg. Co., v. St. Louis, K. & N. W. Ry., 113 Mo. 308, 315, 318-319, 20 S. W. 658 (1892); S. B. Penick & Co., v. New York Central R. R., 111 F. 2d 1006 (C.C.A. 3d 1940); Perlmutter v. Greene, 259 N. Y. 327, 182 N. E. 5, 81 A.L.R. 1543, 1547 (1932)—screening off view of a valuable billboard.

13. In a sense, the first serves a positive purpose, the second a negative one. For rationale of “*The Police Power and the Right to Compensation*,” see 3 HARV. L. REV., 189-205 (1889). See also, 16 C. J. S. *Constitutional Law* §§ 175, 184; 29 C. J. S. *Eminent Domain* § 6; State *ex rel.* Penrose Investment Co. v. McKelvey, 301 Mo. 1, 256 S. W. 474 (1923); Bellerive Investment Co. v. Kansas City, 321 Mo. 969, 980-983, 13 S. W. 2d 628 (1929); City of Clayton v. Nemours, 353 Mo. 61, 65-66, 182 S. W. 2d 57 (1944), *appeal dismissed*, 323 U. S. 684 (1945).

14. Max v. Barnard-Bolckou Drainage District, note 8, *supra*; Bellerive Investment Co. v. Kansas City and *Eminent Domain*, note 13, *supra*; 11 AM. JUR. *Constitutional Law* § 266.

coincidentally, a cul-de-sac exists for some arbitrarily selected distance from the abutter's land.²⁵

We note in passing that, under Section 12 of the Federal Aid Highway Act of 1944, Pub. L. 521, approved December 20, 1944, the Federal Government is preparing to take over some police power on all state highways and streets which receive federal aid in the future. This section provides that "the Commissioner of Public Roads is hereby directed to concur only in such installations (of traffic signs) as will promote safe and efficient utilization of the highways"; and that "the location, form, and character of informational, regulatory, and warning signs, curb and pavement or other markings, and traffic signals installed or placed by any public authority, or other agency" must become "subject to the approval of the State highway department with the concurrence of the Public Roads Administration" if that particular highway or street is to be constructed thereafter with federal aid.

2. Regulation of place and manner of access under police power.

Generally an abutting owner may construct as many entrances to the highway and at such places as he desires.²⁶ But where reasonably necessary for the maintenance of the highway or for the safety of the public, regulations and restrictions may be imposed, under the police power, upon the right of access (at least, provided they neither *entirely* nor *unreasonably* restrict it). For example, no one would question a prohibition, under the police power, of an abutter's gaining his access to a busy street, across a crowded sidewalk, at 60 miles per hour. Places of entrance may be restricted by culvert headwalls, drainage ditches, cuts, fills, sidewalk and curb regulations, fire hydrants, telephone poles, and even commercialized parking meters.²⁷ The type of

25. *Bacich v. Board of Control of Calif.*, 23 Cal. 2d 343, 366, 144 P. 2d 818, 832 (1943); *People v. Ricciardi*, 23 Cal. 2d 390, 399, 144 P. 2d 799, 802, 807 (1943). But see the better reasoning in the dissenting opinions. Perhaps the statutory definition of property in California (CIVIL CODE, §§ 658-662, as set out in the *Ricciardi* opinion) creates new property rights which would not exist at common law.

26. *State ex rel. State Highway Commission v. Hoffman*, *State ex rel. State Highway Commission v. Bailey*, *Brownslow v. O'Donoghue*, and *Highways*, note 6, *supra*.

27. See note 21, above and *State ex rel. State Highway Commission v. James*, 205 S. W. 2d 534 (Mo. 1947); *Alexander v. City of Owatonna*, 222 Minn. 312, 321, 24 N. W. 2d 244, 250 (1946); *Anzalone v. Metropolitan District Commission*, 257 Mass. 32, 153 N. E. 325, 47 A.L.R. 897 (1926).

construction of the entrance facility may also be regulated in the interest of public safety.²⁸

3. All claims, evidence and argument concerning damages from exercise of police power and other non-compensable damages should be excluded.

It is well settled that, while particular statutes and city charters may, constitutions do not require compensation for damages which are (1) common or which differ only in degree, and not in kind, from those suffered by the community generally,²⁹ (2) for personal inconvenience, expense, or loss, rather than for value of *property* taken or depreciation of *property* injured directly for public use,³⁰ (3) from loss of gratuitous privileges which have been enjoyed on sufferance, not because of legal right,³¹ or (4) caused by an exercise of the public power.³² Of course, all claims, evidence, and argument concerning any such damages should be excluded by objection or instruction.

28. *Shawnee v. Robbins Bros. Tire Co.*, 134 Okla. 142, 272 Pac. 457, 66 A.L.R. 1047 (1928); *Browslow v. O'Donoghue*, note 6 above.

29. *Gilbert v. Greeley, S. L. & P. Ry.*, 13 Colo. 501, 22 Pac. 814 (1889); *Smith v. St. Paul, M. & M. Ry.*, note 8, *supra*; *State Highway Commission v. Chatham*, 173 Miss. 427, 161 So. 674 (1935); *Feltz v. Central Nebraska P. P. & I. Dist.*, 124 F. 2d 578, 583 (C.C.A. 8th 1942); *City of Colorado Springs v. Weiher*, 110 Colo. 55, 129 P. 2d 988 (1942); *Mandell v. Board of Commissioners*, 44 N. Mex. 109, 99 P. 2d 108 (1940); *Jarnagin v. Louisiana Highway Commission*, 5 So. 2d 660 (La. 1942); *Nagel v. Lindell Ry.*, 167 Mo. 89, 98, 66 S. W. 1090 (1902); *Rude v. St. Louis*, 93 Mo. 408, 415, 6 S. W. 257 (1887); *Chicago Great Western R. R. v. Kemper*, 256 Mo. 279, 295, 166 S. W. 291 (1914); *Gates v. Kansas City Bridge & T. Ry.*, 111 Mo. 28, 34-45, 19 S. W. 957 (1892).

30. *St. Louis K. and N. W. R. R. v. Knapp-Stout & Co.*, 160 Mo. 396, 406, 411-415, 61 S. W. 300 (1901); *Springfield S. W. Ry. v. Schweitzer*, 173 Mo. App. 650, 655, 158 S. W. 1058 (1913); *United States v. General Motors Corporation*, 323 U. S. 373, 156 A.L.R. 390 (1945); *Beckham v. State*, 64 Cal. App. 2d 487, 149 P. 2d 296, 303 (1944); *Louisiana Highway Commission v. Boudeaux*, 19 La. App. 98, 139 So. 521 (1932); *State Highway Board v. Willcox*, 168 Ga. 883, 149 S. E. 182, 184, 185 (1929); *In re Appointment of Viewers*, note 17, *supra*; *Lenhart v. Commonwealth*, 345 Pa. 528, 29 A. 2d 22 (1942); *Wilkerson v. Grand River Dam Authority*, 195 Okla. 678, 161 P. 2d 745, 747 (1945); *Pemberton v. City of Greensboro*, 208 N. C. 466, 181 S. E. 258 (1935); *Banner Milling Co. v. State*, 117 Misc. 33, 191 N. Y. Supp. 143, 148, 149 (1921); *State ex rel. State Highway Commission v. Sharp*, 62 S. W. 2d 928, 930 (Mo. App. 1933); *State ex rel. State Highway Commission v. Stoddard Gin Co.*, 62 S. W. 2d 940, 942 (Mo. App. 1933); *State ex rel. State Highway Commission v. Watkins*, 51 S. W. 2d 543 (Mo. App. 1932); *Deepe v. United States*, 103 Colo. 294, 86 P. 2d 242 (1938); *State ex rel. State Highway Commission v. Blobeck Investment Co.*, 233 Mo. App. 858, 863, 110 S. W. 2d 860 (1937).

31. *Union Elevator Co. v. K. C. Suburban Belt R. R.*, 135 Mo. 353, 367-370, 36 S. W. 1071 (1896); *Tate v. State Highway Commission*, 226 Mo. App. 1216, 49 S. W. 2d 282 (1932); *Gorgas v. Philadelphia, H. & P. R. R.*, 144 Pa. 1, 11, 22 Atl. 715 (1891); *Ranlet v. Concord R. R.*, 62 N. H. 561, 563-564 (1883); *Gillespie v. Board of Commissioners*, 47 Wyo. 1, 30 P. 2d 797, 801-802 (1934); *Banner Milling Co. v. State*, and *State Highway Board v. Willcox*, note 30, *supra*; *In re Appointment of Viewers*, note 17, *supra*.

32. See notes, 13 and 14, *supra*.

And, since they are not compensable, it should make no difference whether any or all possible damages of the above character are foreseen at the time the right-of-way is originally acquired.³³

D. *The abutting property owner's right of access.*

If the owner of one tract of land has the *legal* right to go upon and travel over a second tract in the possession of another, he has what is known in law as an "easement appurtenant," which is property or a property right. The *Restatement of Servitudes*,³⁴ says:

"§ 450. An easement is an interest in land in the possession of another which

"(a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists; . . .

"*Comment: a* . . . the land in which an easement exists constitutes a servient tenement."

"§ 453. An easement is appurtenant to land when the easement is created to benefit and does benefit the possessor of the land in his use of the land."

"§ 507 . . . *Comment: a* . . . Easements are property rights and when the ownership of them is in private hands they are subject to extinguishment as other property rights are through the exercise of this power (of eminent domain).

"*b* . . . The rights themselves are not appropriated; they are merely extinguished . . .

"*c* . . . For there to be an extinguishment it is only necessary that the use permitted under the condemnation shall be inconsistent with the continuance of the use authorized by the easement existing prior to the condemnation."

1. How does the abutter acquire his right-of-access property?

It would be both interesting and profitable to examine into how the abutting landowner acquires his right-of-access property.

Back in the horse and cart days of early English or Colonial history, neighboring landowners cleared or opened passage-ways through their woods and fields so they could haul their produce to the nearest village, or perhaps ride, instead of walk, to the village church or inn. I can remember the early

33. *Hill-Behan Lumber Co. v. State Highway Commission*, note 8, *supra*, and *The Julia Bldg. Assn. v. Bell Telephone Co.*, 88 Mo. 258, 268-273 (1885).

34. See: *Petition of Burnquist*, 220 Minn. 48, 55, 19 N. W. 2d 394, 398 (1945); *State ex rel. State Highway Commission v. James*, note 27, *supra*; 28 C.J.S. *Easements* § § 1-4; 25 AM. JUR. *Highways* § 154; 39 C.J.S. *Highways* § 141.

years of this century in the Ozark hills of Missouri when a farmer located, constructed, and maintained a country road as if it were wholly his private road or property, to which, however, the public was always welcome—just as any stranger was always welcome to drop in for a free meal or night's lodging. Under such conditions it was naturally taken for granted that the landowner who had contributed all construction and maintenance labor, as well as right-of-way, should have the right of access to "his" road at any place he pleased. Common understanding and common custom eventually become common law.

But suppose all the costs of locating, designing, acquiring right-of-way, constructing, and maintaining a highway are paid by the Pennsylvania Turnpike Company, a private corporation engaged in selling transportation service for a toll charge. Should Farmer Jones, who has contributed nothing, have some right-of-access property in the tollroad, and the legal right of toll-free access to, and use of that highway just because his farm happens to abut on it?

Again, suppose all the costs of providing the highway were contributed exclusively by another limited group—motor-vehicle-users. And suppose Mr. Jones does all his farming and traveling with teams or road-tax-free tractors and fuel. Did the motor-vehicle-users, turned Santa Claus, give Mr. Jones a property right in the abutting road as a Christmas present, and insist that he sue them for damages if he should fail to realize the fullest possible enjoyment and use from his present?

Or, suppose two adjoining farms with a division fence between, one owned by our old friend, Mr. Jones, and the other by Mr. Smith. A new highway is located all upon Smith's land, but with its right-of-way line coming just to Jones' land. Jones, of course, had no right to access across the division fence to Smith's land before the highway was opened up. But the day after the highway is opened, Smith finds he has suddenly become the owner of a new property right. If he is thereafter denied access to the highway on Jones' land, he can go to court, and may recover several thousand dollars—from Highway Users, of course, not from Mr. Smith—because *his property* has been taken or damaged for public use, the exact amount of his recovery depending upon plaintiff's service demands upon the highway—what use he might be making of his land at the time.³⁵

35. Somewhat parallel to this, when we finally become fully aware of the almost universal assumption which has evolved during recent years concerning employee rights and employer obligations, must we not recognize that another

What a far cry one of our modern "superhighways" is from the old horse and cart road. And often there is just as great a difference between the abutter's contributions to, and equities in, the two kinds of highways. Except as an abutter has contributed something *because he is an abutting landowner*—as distinguished from contributions to motor-vehicle-tax trust funds for construction and maintenance of highways—how does he get, and why should he have this legal *right* which attaches automatically *because his land abuts on a highway*? Likewise, how does the legal *duty* become saddled upon motor-vehicle users (1) to give him this property right and (2) to pay "just compensation" if it is later withdrawn or limited?³⁶

It may not be too late for some enterprising lawyer with a pioneering urge to convince a state court that no constitution-given right really belongs to abutters to demand this gift of property; and that there is no corresponding duty upon motor-vehicle-users to either give, or pay for, any such property right on all highways.³⁷

property right has grown up from common understanding—that, when his name goes on the payroll a laborer acquires a property right in the machine with which he works? If, without any fault of his, another is given his place at his machine, he may collect full compensation—*National Labor Relations Board v. Giannasca*, 119 F. 2d 756, 135 A.L.R. 560 (C.C.A. 2d, 1941). In fact, one who has never been employed may force his name onto the payroll of a company which does not want him, and can collect "back pay" for time before he went to work—*Phelps Dodge Corp. v. N.L.R.B.*, 313 U. S. 177, 133 A.L.R. 1217 (1941). In order that he may have his machine with which to work, his employer may be compelled to reopen a business which the employer does not wish to operate—*N.L.R.B. v. Cape County Milling Mo.*, 140 F. 2d 543, 152 A.L.R. 144 (C.C.A. 8th 1944); *Williams Motor Co. v. N.L.R.B.*, 128 F. 2d 960 (C.C.A. 8th 1942); *Atlas Underwear Co. v. N.L.R.B.* 116 F. 2d 1020, 1023 (C.C.A. 6th 1941); *New York State Labor Relations Board v. National Beauty Parlors*, 180 Misc. 997, 45 N.Y.S. 2d 36 (1943) ("words of art," which laymen may consider legal "double-talk," may make a practice "which is not unfair" become "an unfair labor practice"). And there is a rapidly growing public feeling (not yet fully crystallized and defined in legislation, but reflected in decisions and orders of administrative agencies set up by legislation) that prices and profits should be kept down by law, and that whatever additional income (over a "reasonable" interest return on the capital invested) is realized from the use of any labor-saving device should go to raise the living standards of the machine's operator—not to enable the employer to "profiteer." Like the hen or the egg controversy, do rights and privileges enjoyed from property create interests and ownership, or does ownership create rights?

36. Few people appreciate how much earmarked motor vehicle revenue is being diverted from *motor-vehicle-use roads* (and from being spent strictly for the benefits of, and according to the needs of those who contribute), to *land-use-roads* (and spent almost wholly to benefit and increase the market value of lands, the owners of which may contribute little or nothing to the trust fund). See: HIGHWAY RESEARCH BOARD BULLETIN No. 6, pp. 12-13.

37 See Justice Holmes' dissent in *Muhlker v. New York and Harlem R. R.*, 197 U. S. 544, 572-577 (1904). Also, *Stanwood v. City of Malden*, 157 Mass. 17, 18 (1892)—"It would have been intelligible for the Legislature to say that, when a benefit conferred upon a landowner, the value of which he does not pay for, he

2. When does abutter acquire his access-right property?

An easier question is: When does the abutter's right-of-access property come into legal existence? The answer is: When the highway is legally opened to general public travel. Up to that time the locating power—the legislature, the state highway commission, or the city fathers—may make minor changes in, or even abandon, the particular location of the highway past his land.³⁸

3. No injury to abutter's right of access where there is an outer-roadway in front of his property.

As stated under I, above, the usual direct access is allowed between abutting property and outer-roadways which are maintained for two-way local traffic between the central thruway and the right-of-way line.

We should always keep in mind that, as pointed out under III, C, above, the abutting property owner has no more legal right than has anyone else to be free from police regulations of traffic after he has gained access to some part of a highway. The abutter suffers no special damage (different in kind, rather than degree) from regulation of traffic inside the highway in front of his property. And he is entitled to no compensation for limiting his access, since he has the usual right to access to the outer-roadway.

4. What value does access-right property have?

Constitutions require just compensation for private property taken or damaged for public use. Such compensation must equal the loss in value of the property to the owner—not its value to the public.³⁹ "Value," as used

takes it upon the implied condition that he shall not be paid for it when it is taken away"; *Reichelderfer v. Quinn*, 287 U. S. 315, 319, 83 A.L.R. 1429 (1932). But, even if it were admitted that a particular abutter owns right-of-access property, will not any limitation or control of that right of access be only because, and to the extent, this property becomes *dangerous to public safety and welfare*, and, therefore, be *under the police power*? Certainly it is not taken or damaged because the public desires to itself enjoy the right of access between the highway and abutting property—it is not for *public use*. See note 13, *supra*.

38. See: *Nairn v. Bean* ("Individuals constituting State Highway Commission, its engineers and employees"), 48 S. W. 2d 584, 586, 587 (Tex. 1932); *Board of Commissioners of Canadian County v. State Highway Commissioners*, 176 Okla. 207, 55 P. 2d 106 (1936).

39. *U. S. v. Honolulu Plantation Co.*, 122 Fed. 581, 584 (C.C.A. 9th 1903); *Thompson v. State*, 204 App. Div. 684, 198 N. Y. Supp. 590 (1923); *Black River R. v. Barnard*, 9 Hun. 104 (N. Y. 1876); *In re Union Depot Street R. and R. Co.*, 31 Minn. 297, 17 N. W. 626 (1883); *U. S. v. Miller*, 317 U. S. 369, 147 A.L.R. 55 (1943); *U. S. v. Powelson*, 319 U. S. 266, 281 (1943); *St. Louis, K. & N. W. R. R. v. Knapp-Stout & Co.*, note 30, *supra*; *St. Louis v. Rossi*, 333 Mo. 1092, 1102, 64 S. W. 2d 600 (1933); *Louisiana Highway Commission v. Bordeaux*, note 30, *supra*.

here, does not include any intangible, speculative, sentimental, or social values.⁴⁰ Where ascertainable, the law recognizes only "market value"—the cash price which the property would bring if it were sold.⁴¹

In an inquiry into the market value of right-of-access property, the time element is one of the most important factors—"is of the essence." Until the highway is opened to public travel the abutter does not have legal title to any access-right property. The city slicker may have sold the Brooklyn Bridge (which he didn't own) to the gullible stranger; but surely no highway authority would be so gullible as to pay an abutter for access-rights to a new highway which that same highway authority has not yet given to the abutter.

Of course, after the public has once opened the road to traffic, and has given this access-right property to the abutter, it then becomes a question of fact and legal proof as to what price the new property would bring on the market. To determine this amount we usually use the Archimedes method.⁴² We find the difference in market value of the abutting land,

40. *Cane Belt Ry. v. Hughes*, 31 Tex. Civ. App. 565, 72 S. W. 1020 (1903); *In re Edwards J. Jeffries Homes Housing Project*, 306 Mich. 638, 11 N. W. 2d 272, 276 (1943); *Potts v. Philadelphia*, 28 Pa. Dist. 498, 500 (1915); *Louisiana Highway Commission v. Bordeaux*, note 30, *supra*; *State Highway Board v. Bridges*, 60 Ga. App. 240, 3 S. E. 2d 907, 910 (1939).

41. See cases in notes 39 and 40, *supra*. *Anderson v. Cheasapeake Ferry Co.*, 43 S. E. 2d 10 (Va. 1947), suggests that a state may pay only nominal, if any, compensation for property from which an annual profit of nearly a half million dollars can be realized (actually was realized by the state), provided the business is strike-bound and cannot operate at the time of condemnation. *Query*: If a country, subject to a constitution requiring payment of just compensation for all property taken, should decide to socialize industry and transfer it from private to public ownership, may those individuals who are in control of government at the time legally deflate "market values" either (1) directly, by setting low rent and price ceilings, or (2) indirectly, by conniving with, or allowing, organized bands of private individuals to throw a wall around the property and exclude its owners, employees, and customers? Must "market value" be set under (1) a free market, and (2) police protection of person and property in good faith by the state? See *U. S. v. New Rivers Collieries Co.*, 262 U. S. 341 (1923).

42. A favorite with physics teachers (and ex-teachers or problem-solving addicts) is the story of how the King demanded that Archimedes determine whether a new crown was of pure gold, or whether it was adulterated with silver alloy. Archimede could weigh a cubic centimeter of gold and find its density (or specific gravity in the metric system) to be 19.3 grams, while the density of silver would only be 10.53 grams per cubic centimeter. He also knew that if he divided the mass (or, generally speaking, the weight) of the crown by its volume, and did not get 19.3 grams (if using the metric system), it was not pure gold. But how measure the volume of the intricately shaped crown? One day while in his bath he suddenly thought of the answer and, without stopping to dress, he treated the market place loafers of Syracuse to the spectacle of a grotesque little fat paunchy man running panting through the street with no covering save his beard flapping in the breeze, shouting, "Eureka, Eureka!" (I have found it!) It had just occurred to him that he

first, sold *with* the right of access, and second, sold *without* it, just as Archimedes measured the volume of water with, and without, the crown.⁴³

The value to the abutter of his right of access, once it has come into existence, depends principally upon the use to which he can put his abutting land—the highest use for which he can prove it is suitable at the time of valuation. Thus, the value of the road does not depend upon the type of road, but upon the type of property which abuts it—the demands which the property makes upon the road for service. Often almost the entire value of the abutting land was created by the road. Extinguishing all right of access on one side might decrease very little the market value of a section of cattle grazing land, if access is left to roads on the other three sides. But the figure for loss of access to one side of property at the intersection of Broadway and 42nd Street in New York City might be faintly reminiscent of the national debt of a few decades ago.

It is always difficult for the untrained and inexperienced to set a fair and just value on anything. Few of us have yet had any opportunity to see what effect limiting access will have on property values. But within the next 25 years millions of dollars will be paid out for extinguishing access rights. Shall a scientific and factual basis be worked out for accurately and fairly determining those values? Or, because it would require too much time, effort, and money to make a scientific investigation beforehand of access values and methods of evaluation, shall we depend upon rolling dice or some other game of chance before juries? Shall we be penny wise, but pound foolish?

It will take imagination, initiative, and perseverance to plan and carry

could measure the volume of the crown indirectly by measuring the volume of the water which it would displace. This he could do either by (1) using a linear measuring stick to get the cubic contents of water in a vessel of regular or easily measurable shape (either one large vessel or a smaller vessel in which the quantity of overflow from the larger vessel could be measured), first, without the crown, and second, with the crown submerged in it, the apparent increase in the volume of water being equal to the volume of the crown which displaced and caused the water to rise, or (2) weighing the crown, first, in the air, and second, submerged in water, the difference in weight of the crown equalling the weight of an equal volume of water which it had displaced—each gram lost indicating 1 cc. of water displaced.

43. 18 AM. JUR. *Eminent Domain* § 250; *Re West Tenth St. v. Realty Corp.*, 196 N. E. 30, 98 A.L.R. 634 (1935); *Rose v. State*, 19 Cal. 2d 713, 740, 123 P. 2d 505 (1942); *Andrews v. Cox*, Highway Commissioner, 129 Conn. 475, 29 A. 2d 587 (1942); *Pumphrey v. Tabler*, State Road Commission, 175 Md. 498, 2 A. 2d 668, 671-672 (1938); *Realty Improvement Co. v. Consolidated Gas E. L. & P. Co.*, 156 Md. 581, 144 Atl. 710, 713 (1929); *State Highway Board v. Bridges*, note 40, *supra*; *Mississippi State Highway Commission v. Prewitt*, 186 Miss. 778, 192 So. 11 (1939).

through a worth while study of such values. Some of the states may not have that kind of personnel. Such states might be able to save themselves hundreds of thousands of dollars of excessive verdicts in their larger metropolitan centers by bringing in, from the states which do make such studies, expert witnesses or advisers who know, rather than speculate, about such values.⁴⁴

(a) *Do not confuse severance damages with access damages.*

We should not confuse *severance damages*, damages which result from limiting access from one part to another part of a man's land, with *damages from limiting access to an abutting public highway*. A severance damage does not come from the loss of any rights associated with highway; it would have occurred just the same if the intervening strip had been taken for any other use.

(b) *May decrease special-benefits compensation.*

In many states compensation for property taken (and in slightly fewer states for consequential damages to property not taken) may be paid either (1) in money or (2) in special benefits. Of course, in proportion as payment with new right-of-access property is decreased or eliminated, payment in money will have to increase.⁴⁵ However, as the years go by, it is becoming more difficult to sell special benefits to the average jury. It may be that the lack of special benefits to offer abutters and juries will become increasingly less important in the future.

5. How may abutter's right of access be extinguished or kept from ever coming into existence?

Of course, an abutter can always extinguish his right of access by his own voluntary act. Since the right of access is an easement appurtenant to

Of course, all gratuitous privileges enjoyed by the property should be carefully excluded, and the value before the taking should be decreased accordingly so it will reflect only the value to which the owner is entitled by law. Likewise, the value after the taking should reflect, on the one hand, (1) no increase by *general* benefits from the public improvement (in those states which allow only special benefits in payment for damages), and, on the other hand, (2) no *general* or other non-compensable damages. *Queeno v. State*, 255 Misc. 941, 8 N. Y. Supp. 2d 855 (1938); *Mississippi State Highway Commission v. Prewitt*, *supra*; *State Highway Board v. Bridges*, note 40, *supra*; *State ex rel. State Highway Commission v. Lindley*, 232 Mo. App. 831, 838, 113 S. W. 2d 132 (1938); *State ex rel. State Highway Commission v. Bailey*, 234 Mo. App. 168, 175, 115 S. W. 2d 17 (1938); *State ex rel. State Highway Commission v. Baumhoff*, 230 Mo. App. 1030, 1037, 1043, 93 S. W. 2d 104 (1936).

44. See "Effect of Freeway Development on Adjoining Land Values in California," note 5, *supra*.

45. See exhaustive annotation on special benefits in 145 A.L.R. 7-299 (1943) and Missouri cases under note 43, *supra*.

land, not one in gross or a personal right which may be separated from the land, it should be extinguished by a written instrument capable of being recorded and clearly evidencing the abutter's intention—as against himself, his heirs, successors, and assigns—to thereby either (1) renounce or extinguish it, or (2) convey the right to the public.⁴⁶

If a highway authority has power to design a highway so the safety of the traveling public will require that certain *land* shall be taken;⁴⁷ and if that authority then has power to condemn “all right, title, and interest” in that land; it is difficult to understand why there should be any question as to such authority's power to design for, and condemn only so much of the right, title, and interest as is necessary for public use. If it can condemn the whole, it can condemn one of its parts. Why should the right of access be singled out as the only right in land which is not subject to condemnation?

Surely the sovereign has not lost its power to condemn this particular kind of property simply because the need for it was only discovered within the last decade. However, from the frequency with which we hear: “It has been done this way before,” or “it has never been done this way before,” one wonders if all lawyers and engineers are not direct descendants of those early pork eaters which Charles and Mary Lamb tell about in their delightful *Dissertation on Roast Pig*.⁴⁸

46. See: RESTATEMENT OF PROPERTY, §§ 497-506 (1944); *Dyer v. Sanford*, 50 Mass. 395, 402 (1845); *Westlake v. Silva*, 49 Cal. App. 2d 476, 121 P. 2d 872 (1942).

47. In 1945 Missouri adopted a new Constitution. The Constitutional Convention considered a proposal for Article IV, Section 29, which would spell out specifically that the State Highway Commission has authority “to limit access to, from and across state highways where the public interest and safety may require.” But certain-outside interests were ignorant of the meaning of (1) “legal right of access,” and of (2) the distinction between (a) limiting access under eminent domain and (b) regulating traffic under the police power. One group feared that authority to limit access meant authority to limit the size and weight of their busses and trucks before they would be admitted to state highways. Another group feared they might lose, without any right to compensation, their roadside commercial ventures with large values built by, and dependent upon, the business of passing motorists. These two groups got an amendment added which makes the Highway Commission's authority “subject to such limitations and conditions as may be imposed by law.”

48. Almost all state highway officials seem to assume that new condemnation statutes specifically mentioning “right of access” must be enacted. But see *Burnquist v. Cook*, note 34, above; *Houston North Shore Ry. v. Tyrrell*, 128 Tex. 248, 258, 98 S. W. 2d 786, 793, 108 A.L.R. 1508, 1517 (1936); *State ex rel. Burrows v. Superior Court*, 48 Wash. 277, 93 Pac. 423 (1908); *Northern Light & Power Co. v. Stacher*, 13 Cal. App. 404, 109 Pac. 896 (1910); *St. Louis, K. & N. W. Ry. v. Clark*, 121 Mo. 169, 180-184, 190-194, 196-199, 25 S. W. 192 (1893); *State ex rel. State Highway Commission v. James*, note 27, *supra*.

But, you ask: If right-of-access property does not come into existence until the highway is opened for use, how can it be condemned when the right-of-way is secured—before this right exists and before it is owned by anyone?

The Supreme Court of Missouri has said that: "The exercise of the power of eminent domain has been delegated by the Legislature to the State Highway Commission . . . , but not to the courts. The condemnor in every case, in the exercise of a discretion not subject to judicial review, makes its own appropriation of private property for public use."⁴⁹ It has also been pointed out that the condemnor may determine, if in good faith, what is reasonably necessary for public use, and, on the other hand, what rights may be reserved or granted the property owner without unduly interfering with the public use.⁵⁰ The condemnor may stipulate, in accordance with the needs of the public in a particular case, that a stockpass will be built under the road for the benefit of the abutter without unduly interfering with the public use(or will not be built); or that room partitions in a hotel will (or will not) be restored for the owner's benefit at the end of the public's temporary use, *i.e.*, the condemnor may stipulate what rights will (or will not) be given the owner, and, in the words of the *Clark* opinion, "pays for what it needs and takes, and the landowner is allowed all the damages which he in fact sustains." If the law, in the absence of contrary allegations in a condemnation pleading, gave an abutter an easement of light, air and view

When the public needs to extinguish a property right in land, but the possession and use of the land is not desired—*e.g.*, to extinguish the right to maintain an overhead electric power line near an airport runway—condemnation of that single property right in the land (if necessary) would seem to be the logical procedure (just as we condemn the limited right to borrow road material during construction. *Causby v. United States*, 328 U. S. 256 (1945)). But, instead of proceeding in such a direct and obvious way to the desired end, Mo. CONST. Art. I, § 27 (1945) provides for (1) condemnation of the fee simple title to the land; (2) placing the desired restriction upon the land; and (3) then selling the land, subject to the restriction, back to the original owner (or others). If this provision is intended to authorize so-called "excess condemnation" (of property not needed), see, *City of Cincinnati v. Vester*, 33 F. 2d 242 (C.C.A. 6th 1929), 68 A.L.R., 831 (1930), *aff'd* 281 U. S. 439 (1930), holding such a state constitution violates the Federal Constitution. And neither the Fifth nor the Fourteenth Amendment may be nullified by an administrative agency's arrogant, contemptuous, and dishonest certification of its official finding that the taking of certain property is necessary to carry out the legislative mandate to it, when it is obvious to everyone that this is not true—*United States ex rel. TVA v. Welch*, 150 F. 2d 613 (C.C.A. 4th 1945).

49. *State ex rel. State Highway Commission v. Day*, 327 Mo. 122, 125, 35 S. W. 2d 37 (1931).

50. See *St. Louis, K. & N. W. Ry. v. Clark*, note 48, above, and *U. S. v. 60,000 Square Feet of Land & Oakland Hotel*, 53 F. Supp. 767, 770 (Cal. 1943).

over a highway the instant it was opened, there is no doubt but the condemnor could stipulate in its pleadings its plans to construct a viaduct or fill 100 feet high in front of the abutting property. In such a case it would be more accurate to say that the condemnor would thereby keep these easements from ever coming into existence, rather than to say the easements, not yet in existence, were being condemned.

6. When should legal rights of access be extinguished or kept from coming into existence?

Certainly the most access-right property can be extinguished or kept from coming into existence for the least money before a highway is opened on a new location—before the new property right is created and given to the abutter. Once the gift of property is completed, new and more valuable uses of the abutting land will usually grow with the increase in volume of traffic past the land, and the value of access-rights will grow accordingly.

It would, therefore, seem that the best time to extinguish, or cause any legal right of access to abort, is the earliest possible time—preferably, before the road is opened.⁵¹

The emphasis in the last sentence is upon "*legal right*." The statute of limitations ordinarily does not run against the public. A right may exist without being exercise to the fullest at all times. If there is any probability whatever that it will ever be desirable to limit access to a new highway location, why not extinguish the right of access while it will cost nothing, or the least possible—before the highway is opened, and the right created? If there is no reason for enforcing limitation during the first few years, don't. Just file the legal right away until such time as it is needed, then bring it out and exercise it only when and as it becomes reasonably necessary for the public welfare.⁵²

51. 29 C.J.S. *Eminent Domain* § 153; *United States v. Miller*, 317 U. S. 369, 147 A.L.R. 55 (1942); *Vey v. City of Fort Worth*, 81 S. W. 2d 228, 230-231 (1935). As to the power to condemn for prospective, rather than immediate needs, see RESTATEMENT OF PROPERTY, § 507 *comment d*; 29 C.J.S. *Eminent Domain* § 92; *St. Louis R. Co. v. Foltz*, 52 Fed. 627, 633 (1892); *Heger v. City of St. Louis*, 323 Mo. 1031, 20 S. W. 2d 665 (1929); *Cochran v. Cavanaugh*, 252 S. W. 284, 286 (Tex. Civ. App. 1923); 18 AM. JUR. *Eminent Domain* § 111. "No constitutional right of the abutting landowners is invaded by the exercise of the right acquired by the public but suffered to lie dormant for a time."—*Peabody v. Boston*, 220 Mass. 376, 378, 107 N. E. 952, 953 (1915).

52. 34 AM. JUR. *Limitation of Actions* § 388; MO. REV. STATS. § 1011 (1939); *Bowzer v. State Highway Commission*, 170 S. W. 2d 399, 403 (Mo. 1943); *Columbia v. Bright*, 179 Mo. 441, 454, 79 S. W. 151 (1904); *St. Louis v. Mo. Pac. Ry.*, 114 Mo. 13, 24 (1893).

7. How enforce right to limit access when proper time comes?

Of course, it is possible to create *physical* barriers to access. This may be done at the time of original construction by elevating or depressing the grade above or below abutting property or intersecting highways. Fences or walls can be constructed at any time. However, we should not allow such physical obstructions to lull us into a mistaken assumption that an abutter may not build his own entrance or sue for damages provided his access rights have not been extinguished by law.⁵³

But physical barriers are not the only way to limit access. In 1943 I drew a proposed bill to set up in Missouri a legal procedure for enforcing limitation of access. It would have provided (1) for the State Highway Commission to prepare, approve, and file for public information with the county clerks in several counties, maps showing the locations and details of all limitations of access and control of traffic on state highways in the respective counties; (2) also for the commission to cause signs, conforming to the information shown on the map, to be erected and maintained so as to indicate the permissible places, manner, and extent of access to and from the highway, and movements on and between its traffic lanes; and (3) making it a misdemeanor for any person to proceed to, from, or over the highway contrary to such signs.⁵⁴

Since Missouri does not yet have any limited access highways, nothing was lost because that proposal was not enacted into law. And, with more study and understanding, both by the State Highway Department and by the public, a better bill can be drawn when the need for enforcement becomes acute.

CONCLUSION

Highway officials are just becoming aware of one of the most important and revolutionary of modern highway developments—limitation of access. Much education is necessary before more officials (and most of the public) become either interested or informed.

Naturally there are still unanswered engineering, legal, and right-of-way questions. I have sought to suggest an approach for breaking down what

53. See note 6, *supra*.

54. See STATE TRAFFIC COMMISSION OF NEW YORK, VEHICLE & TRAFFIC LAW, Art. 7, § 95-95k; State v. Dixon, 335 Mo. 478, 73 S. W. 2d 385 (1934); Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. 2d 691, 87 A.L.R. 534 (1932); 25 AM. JUR. *Highways* § 256; 11 AM. JUR. *Constitutional Law* §§ 238-244; 40 C.J.S. *Highways* § 232; MO. REV. STATS. § 8758 (1939).

is now a new legal problem into several more simple and familiar questions—to perhaps provoke some controversy, thought, and better final development.

But the need for solutions is more urgent than we may think. Every year we postpone the extinguishment of access rights—especially on new locations—the greater the eventual cost of such extinguishment becomes, and the more public trust funds must be needlessly dissipated. And who knows when your number or mine may be up to become one of the 50% to 75% of highway fatalities which could have been prevented by limited-access highways, or for our life savings to be wiped out as part of the 2-billion dollar annual highway-accident property-loss?

Imagination and vision are needed. How appropriate here is the Biblical quotation inscribed on the walls of Missouri's Capitol:

“Where there is no vision the people perish.”

APPENDIX

EVOLUTION OF MISSOURI'S MAJOR HIGHWAY LAWS DUE TO DEVELOPMENT OF MOTOR VEHICLES

In 1903, with a total of 640 motor vehicles owned in the state, Missouri adopted the Act set out in *State v. Swagerty*, 203 Mo. 517 (1907), note 2, *supra*, Mo. Laws 1903, p. 162. It set up a state speed limit of 9 miles per hour; prescribed certain conduct when approaching carriages, wagons, women, children, etc.; and required the buying of a local annual license for \$2.00.

In 1907, with 3,940 motor vehicles, Mo. Laws 1907, pp. 74-79, Mo. Rev. STATS. c. 83 (1909), required all motor vehicles and “auto drivers” to be registered, paying fees of \$5 and \$2, respectively, the vehicle's permanent number to be fixed on it, while the driver had to wear his number “upon his clothing in a conspicuous place at all times” while driving, as well as “keep a vigilant watch for all vehicles, carriages, or wagons drawn by animal or animals, and especially vehicles, carriages, or wagons driven by women or children, and shall . . . stop and remain stationary, and shall, if requested, stop the engine of such motor vehicle . . . and shall not in any event, while upon any public highway, run at a greater rate of speed than 15 miles an hour, . . . and within the limits of all cities, towns, and villages the rate of speed shall not be greater than 8 miles per hour in the business portion. . . .”

Mo. Laws 1907, pp. 407-408, authorized a State Highway Engineer “to be appointed by and to be under the general supervision of the State Board of Agriculture.” He was to hold public meetings, gather and disseminate information, and “superintendent the construction of demonstration roads in any county whenever requested to do so by those having authority in road construction.” His \$2,400-salary and all expenses of operating were paid from an appropriation of \$6,000 per year.

Under the “Inter-County Seat Road Law,” Mo. Laws 1913, pp. 8, 697-699, when there were 33,310 motor vehicles in the state a State Highway Department was created with a \$3,000 a year State Highway Commissioner, a \$2,000 Deputy Highway Commissioner, and a total appropriation

of \$8,000 per year. With the consent and assistance of the road construction officials of the several counties the commissioner could establish "standard gauge roads by prescribing the width of the roadbed, also the grade, also the rise in elevation per rod." But his chief duties were "to visit the counties of the state when requested and address public meetings on the subject of construction and improvement of public roads" and generally act as a good-roads publicity and propaganda agent.

In 1917, the number of motor vehicles in the state had increased to 147,528. By the "Haws Law," Mo. Laws 1917, p. 485-492, "assent" was given to the Federal Aid Act passed by Congress the previous year; a 4-member, bipartisan State Highway Board and a State Highway Engineer were authorized; a 3,500-mile system of "state roads" was to be selected by the engineer and the board; right-of-way should not be less than 40 feet; counties and civil subdivisions could submit surveys and project statements to the United States Secretary of Agriculture through the State Highway Engineer; counties could construct their "state road" by day labor; a "State Road Fund" was set up to receive proceeds from (1) state motor vehicle registration fees, (2) option stamp sales, and (3) corporation registration fees.

Under the "Morgan-McCullough Amendment," Mo. Laws 1919, pp. 650-660, MO. REV. STATS. § 10,889-10,910 (1919) when there were 244,363 motor vehicles, it was intended "that there shall be expended by the State Highway Board on such (6,000 miles of) state roads in each county (during the years 1919, 1920, and 1921) the sum of \$1,200 per mile without cost to the county and out of the funds derived from the Federal government and the state road funds." It provided for a State Highway Superintendent (and ex-officio Secretary) to be under the State Highway Board, a State Highway Engineer under the Superintendent, and First and Second Assistant Engineers under the State Highway Engineer. The cost of all surveys and plans could not exceed \$100 per mile on the average and should be taken from the \$1,200 per mile. Construction was to be under contracts awarded by the several counties.

Under the campaign slogan: "Get Missouri Out of the Mud," and with 346,838 motor vehicles, a Constitutional Amendment, Mo. Laws 1921, p. 707, was adopted November 2, 1920, (1) authorizing \$60,000,000 of bonds for road construction and (2) earmarking motor vehicle registration fees to "stand appropriated without legislative action for and to the payment of the principal" (but not interest). At a special election on August 2, 1921, the Constitution was again amended to allow motor vehicle registration fees to be used for payment of road bond *interest*, as well as principal. Mo. Laws 1921, 1st Extra Session, p. 196, MO. CONST., Art. IV, Sec. 44a.

Two days later the Centennial Road Law, Mo. Laws 1921, 1st Extra Session, pp. 131-167, MO. REV. STAT. § 8740-8783 (1939), was approved. It provided for a State Highway Commission, a Secretary, a Chief Engineer, a Legal Advisor, and such assistants and employees as may be necessary; gave the commission very large and comprehensive discretionary powers to locate, construct, and maintain a "state highway system" consisting of (1) approximately 6,000 miles of secondary roads to pass through certain designated points in each county, and (2) approximately 1,500 miles of primary roads. The apportionment of state and federal funds for construction was raised from \$1,200 for "earth roads of substantial character," as under former law, to \$6,000 for a "properly bound gravel road . . . of at least 12 feet in

surface width" on secondary roads, and over \$20,000 on "higher type" primary. See Mo. Rev. Stat. § 8426 (1939).

When it was discovered that money was needed for *maintenance* and also desirable to supplement bond proceeds for *construction*, while income from registration fees exceeded many times the requirement for road bond interest and principal, new § 44a, Article IV of the Constitution was relaxed by an amendment of Section 4, Article X, on November 7, 1922 (Mo. Laws 1923, p. 392), to allow such excess of registration fees to be used for maintenance and construction.

The present 2-cent rate for motor vehicle fuel tax, together with an increase in registration fees, was adopted by initiative on November 4, 1924, Mo. Laws 1925, pp. 282-290, Mo. Rev. Stat. § 8411-8442 (1939).

On November 6, 1928, with 712,965 motor vehicles registered, an additional bond issue of \$75,000,000 was voted in Constitutional Amendment of Art IV, § 44a. It also provided that "all state motor vehicle registration fees, license taxes or taxes authorized by law on motor vehicles (except the property tax on motor vehicles and state license fees or taxes on motor vehicle common carriers) and also all state taxes on the sale or use of motor vehicle fuels authorized by law, less the expense of collection . . . shall . . . be and stand appropriated without legislative action" to the state highway purposes, set out therein in great detail for administration by the State Highway Commission under very large constitutional discretionary powers. This is continued, with some changes, in the present 1945 Constitution, Art. IV, § 29-34.

The highest registration of motor vehicles in Missouri was 984,626 (1941). With manufacture of motor vehicles restricted during the war, this figure had dropped to 854,291 in 1945.

A statute for state aid to county roads (sometimes called the County Aid Road Law, Milk Route Law, or King Bill), Mo. Laws 1945, pp. 1472-1475, approved July 23, 1946, as amended, p. 1503, provides for the state to apportion from its General Revenue Fund to the several counties certain money to be used in matching, up to \$750 per mile, equal amounts raised locally for improvement of certain county roads. Approximately one half million dollars of state money has been spent under this, and an additional one million obligated in all but 9 counties of the state. It is now estimated that the cost of loose gravel surfacing alone (cost of grading and draining having been previously paid from other sources) in some one-fourth of the projects is equalling or exceeding \$1500 per mile.