JUDICIAL DECISIONS ON THE EXERCISE OF THE RIGHT OF EMINENT DOMAIN BY SCHOOLS AND COLLEGES

by

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CHAPTER I

INTRODUCTION

The power of a state to control the uses of property has come to be regarded as a basic characteristic of a sovereign state. The fact that the state could condemn private property for public use was recognized as an inherent power of government long before the formation of the United States. When the Federal Constitution was drawn up, no express grant of this power was included. The Fifth Amendment, added to the Constitution as one of the guarantees against federal infringement on individual rights, provided that private property should not be taken for public use, without just compensation.

The idea of "private" property and the rights associated with it has acquired a particular significance under a constitutional republic. According to the concept inherited from European backgrounds, property is held or used at the pleasure of the ruling sovereign, and vestiges of the sovereignty concept remain in American law. The conditions under which the state may assert its rights of eminent domain are carefully circumscribed, however, and the interpretation of eminent domain has been the subject of extensive litigation in United States courts.

Exercise of the power to condemn private property for public use places the interests of the individual at odds with the interests of the state and calls for a critical evaluation of the conditions and values associated with the action. With a limited amount of new land available for private uses, an expanding population, new uses for land as a result of technological developments,[1] and new concepts of the role of government,[2] the variety, complexity, and importance of the issues concerning eminent domain can be expected to increase.

Concern for individual rights in the appropriation of property has been expressed recently in the following terms:

> ...when the state impinges upon substantial individual interests, whether of liberty or property, courts must go beyond the limited review of expenditures to consider whether the state's interest outweighs the individual's....The lack of effective political safeguards also jusitifies increased judicial intervention....forcing the state to justify its action seems required to prevent the use of eminent domain to deprive condemnees of fundamental rights.[3]

In the United States, the responsibility for formal education has been developed by both public and private institutions, but in either case, the objectives and consequences of education have social significance. It is not surprising, then, that schools and colleges have been granted the power to take private property under various conditions in order to carry

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[1]For a case involving a "taking" of air space near an airport see Griggs v. County of Allegheny, 369 U.S. 84, 82 S.Ct. 531 (1962).

[2]Two recent cases on the condemnation of private property by a public agency to be turned over to another private party for urban renewal purposes are Rabinoff v. District Court, 145 Colo. 225, 360 P.2d 114 (1961), and Cannata v. City of New York, 11 N.Y. 2d 210, 182 N.E. 2d 395 (1962).

[3]"State Constitutional Limitations on the Power of Eminent Domain," Harvard Law Review, 77 : 717, Feb., 1964, pp. 718, 720.

out their purposes. A number of factors seem to indicate that the resources devoted to education, and potentially the amount of private property that may have to be condemned by schools and colleges, may be expected to increase. Larger numbers of students are to be educated as a result of population growth and the cultural requirements which result in a longer period of formal education for the individual and a greater percent of the population who need education. The multiplying amount of knowledge available and the development of new methods in education also lend weight to the prediction that the resources involved in formal education will be expanded.

At least three factors, then,--concern for private or individual interests, societal pressures of expanding population in a limited environment, and the increasing importance of education--indicated that a study of the situations in which the exercise of the right of eminent domain by schools and colleges has been challenged would be appropriate and useful.

STATEMENT OF THE PROBLEM

A major purpose of the study was to identify issues litigated in United States federal and state appellate courts concerning the exercise of the right of eminent domain by schools and colleges.

A second purpose of the study was to describe the situations which have given rise to controversy over the condemnation proceedings instituted by schools and colleges--the facts of the cases. Because only appellate court decisions have been examined, this description could not include all the controversies litigated by schools and colleges on these issues, but only point out the situations which gave rise to the decision of important points of law.

Third, the reasoning of the courts in arriving at their decisions was examined for the purpose of determining what principles and rules of law have been developed by the courts in eminent domain cases to which a school or college was a party.

Among the questions to be answered by the study were the following: What limitations have been placed upon the exercise of the right of eminent domain by schools and colleges? Are there particular features of the educational enterprise that have affected the judicial decisions in eminent domain cases? Is there a difference in the condemnation rights of public schools and the rights of private institutions? What rights to the property, or what nature of title, do schools and colleges secure as a result of condemnation proceedings? Are there any uses for which a school or college may not exercise the right of eminent domain? In what ways do the various States differ, and what reasons have been noted for varying rulings according to jurisdiction in the school and college condemnation cases? Are different standards applied in cases involving institutions of higher learning than in cases involving elementary and secondary schools? What standards have been adopted by the courts in reviewing the amount of property that may be taken or the amount of compensation that must be paid in cases involving schools and colleges? May a school or college condemn property already devoted to a public use? What considerations apply when other agencies seek to condemn property of educational institutions?

NEED FOR THE STUDY

Cases in which schools and colleges have been involved in eminent domain proceedings have been mentioned by a number of writers, but there has been

no comprehensive treatment of the problem.

Hamilton and Mort, commenting on the operation of the law as it affects schools, state:

> The greater part of the law as we know it today is still basically common law....Thus the basic principles of contracts between a board of education and its teachers, the right of eminent domain, are not, normally, the result of any statutory or constitutional provision, but rather exist by virtue of what is known as the common law.[4]

Edwards, on the other hand, makes the statement that

> The right to take private property for public use is an attribute of sovereignty. Such right lies dormant in the state, however, until legislative action points out the occasions, the modes, and the agencies for its exercise. A board of education cannot, therefore, exercise the right of eminent domain unless expressly authorized to do so by statute.[5]

Edwards also cites authority for statements that where land is taken for school purposes the fee remains in the owner and when no longer used for school purposes the land reverts, that a school cannot appropriate land already being used for other public purposes, and that the necessity of taking a particular piece of land is not a matter to be reviewed by a commission or jury. These are all matters that could vary from one jurisdiction to another. A number of important decisions since the time of this study may require modification of these statements.

Remmlein makes a number of general statements about the issues involved when a school district attempts to condemn property, such as "Eminent domain

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[4]Robert R. Hamilton and Paul R. Mort, The Law and Public Education (Brooklyn, 1959) p. 4.

[5]Newton Edwards, The Courts and the Public Schools (Chicago, 1933). p. 282. (Both text and reference material on eminent domain are identical in the 1955 and 1933 editions.)

cannot be used except when the property is needed for a public use."[6] A number of interesting questions could be raised such as, "Are all school uses of property considered public uses?" or "What standards have been used to determine if the use is public?"

Recent issues of the Yearbook of School Law contain comments on school cases involving eminent domain.[7] These relate to effects of statutory restrictions, determination of "necessity" by a school board, and the appropriation of school land by a state highway department. This publication, being a periodical, is designed primarily to report on cases as they are decided, and only in occasional articles are specific subjects treated historically or comprehensively.

A recent study by McCann was concerned with eminent domain as an example of a problem area in the administration of education by non-educational agencies.[8] He pointed out that in Delaware eminent domain proceedings are initiated for schools by the State even though the town council there is the agency authorized to procure school sites by purchase. In three states, New Hampshire, Vermont, and New York, municipal authorities prosecute condemnation proceedings for the schools. A relatively new concept, that of "superior public use," or "more necessary public use" is mentioned by McCann in the cases involving two governmental agencies seeking the use of the same property. He also discusses the problem of the measure of damages when one

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[6]Madeline K. Remmlein, The Law of Local Public School Administration (New York, 1953) p. 117.

[7]Lee O. Garber, ed., The Yearbook of School Law (Danville, 1960, 1961 1962, 1963, and 1964).

[8]Lloyd E. McCann, The Legal Problems in the Administration of Education by Educational and Non-Educational Government Agencies (Tucson, 1964).

government agency takes property from another.

Blackwell states that there is no question as to the legitimacy of the use of eminent domain for the acquisition of property to be used by a tax-supported college, but that the current issue is the extent to which the power may be exercised by privately controlled institutions.[9] He points out a case in which the fiction of the separate entity of an auxiliary corporation was disregarded in allowing the university to condemn private property for the use of the corporation.

Elliott and Chambers, in their first volume of The Colleges and the Courts, included a chapter on The Exercise of Eminent Domain by Universities and Colleges.[10] Later volumes by Chambers either omit the topic or deal with it as part of a general chapter on property.[11] In the most recent volume covering the period 1950-1964, cases are cited dealing with the taking of a fraternity by the university for use as a campus center, condemnation of property by a university for lease to a hospital, and securing of property by colleges for parking lots and veterans' housing.[12]

The time spread of these publications and their topical or selective treatment of the problems indicated a need for a comprehensive, analytical, historical study of the cases involving schools and colleges in eminent domain proceedings.

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[9]Thomas E. Blackwell, College Law (Washington, 1961) p. 38.

[10]Edward C. Elliott and M.M. Chambers, The Colleges and the Courts (New York, 1936) Chapter 24.

[11]M. M. Chambers, The Colleges and the Courts (New York, 1941, 1946, and 1952).

[12]M. M. Chambers, The Colleges and the Courts Since 1950 (Danville, 1964).

The study should be useful in at least the following ways:

1. as a guide to schools and colleges contemplating condemnation by delineating the rights secured in other cases and the rationale or principles according to which the institutions may operate,

2. as a convenient reference to case materials on the subject, and

3. as a stimulus for discussion of desirable changes.

SCOPE OF THE STUDY

This study involves description and analysis of appellate court decisions identified in the National Reporter System, including both State and federal court reports. The scope was restricted to the use of cases decided at the appellate level both because they were more accessible than trial court reports, and because they are more authoritative concerning the issues of law involved. The decisions selected for study were those in which a school or college was one of the parties to a controversy over eminent domain issues prior to 1965. A few cases not involving a school or college as a party were included in the study because the issues litigated pertained to the condemnation rights of a school or college. Because of their importance to the exercise of the right of eminent domain, issues that might be classified as procedural, as compared to substantive issues, were included in the study. The terms "school" or "college" were used to include educational institutions, both public and private, whose primary function can generally be classed as educational as distinguished from religious, social, military, or governmental.

LIMITATIONS OF THE STUDY

The study was not designed to be a legislative history, and there may be statutes in some states relating to eminent domain proceedings by schools or colleges that have not yet been interpreted by the courts. This limitation of the study is justified on the basis that until the meaning of a statute has been adjudicated, its status is indefinite. Statutes are evaluated through judicial construction, and unless a contest is joined at the trial level and the issues of law appealed, the meaning of a statute may remain in doubt even though it is used by many as a guide to action or restraint.

Due to the relatively small number of cases that have been located involving colleges or universities, the application of the findings to other situations in higher education should be done with caution.

The study is not a treatise on the law of eminent domain in general. It has been limited to those cases in which a school or college was a party because of the researcher's primary interest in how the law has been applied to educational institutions.

The study should not be regarded as a substitute for the legal research that may be essential in a given situation, although it may furnish valuable information. This limitation is due to the nature of the judicial process in the United States:

> For all our cases are decided, all our opinions written, all our arguments made on certain four assumptions. 1.) The court must decide the dispute before it, 2.) The court can decide only the particular dispute which is before it, 3.) The court can decide the particular dispute only according to a general rule which covers a whole class of like disputes, 4.) Everything, everything, everything, big or small, a judge may say in an opinion, is to be read with primary

> reference to the particular dispute, the particular question before him.[13]

No two cases are exactly alike, and the applicability of one principle or another may depend on the extent to which the facts of a case can be shown to provide a basis for distinction. Caution should be exercised in evaluating how the law of one jurisdiction may apply in another.

Because of the fact that a total of more than 30,000 decisions on all subjects are being reported by appellate courts each year, no guarantee can be made that all the cases on the single issue of eminent domain in which a school or college was a party have been located. Within the limitations of the researcher's ability and the accuracy of the digests, citators, and annotations, the study is comprehensive.

PROCEDURES OF THE STUDY

Steps taken to complete the study were as follows:

1. Location of the cases in point by use of the Century, Decennial, and General Digests, Annotated Statutes, and other sources such as legal encyclopedias and treatises. When the study was planned, it was anticipated that Shepherd's Citations would be used to locate additional cases, but because the headnotes seldom indicated whether a school or college was a party, the citator was found not to be a productive source of information. Considerable difficulty was encountered in use of the digests because the method of analysis did not indicate which cases involved schools or colleges, except on the topic of the use for which the property may be taken. Because

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[13]Karl N. Llewellyn, "The Bramble Bush," in The Legal Process by Carl Auerbach, Lloyd K. Garrison, Willard Hurst, and Samuel Mermin (San Francisco, 1961) p. 13.

the statutes under which a school or college may proceed could be found in the school sections, general eminent domain sections, or, especially in the case of colleges and universities, in sections establishing each institution, a considerable amount of cross reference checking of annotated statutes was necessary, and it would be entirely possible that some cases have not been located. Annotated statutes were consulted for each State and the District of Columbia, but in a few States no cases on the subject were found.

2. Analysis of the cases for facts, issues, decisions, dicta, and rationale. An attempt was made in the use of these terms to follow the suggestions of Price and Bitner[14] as acceptable legal practice.

3. Organization of the findings under appropriate sub-topics. A certain amount of arbitrary decision was required for this step, and there may have been a number of other organizational plans that would have been appropriate.

4. Reporting the findings. The method of citation suggested by Price and Bitner[15] was followed with the exception that a single source was cited for quotations from the opinions, usually the National Reporter series volume and page number.

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[14]Miles O. Price and Harry Bitner, Effective Legal Research (Boston, 1953) Chapter 11.

[15]Ibid., Chapter 32.

CHAPTER II

THE AUTHORITY FOR THE EXERCISE OF THE RIGHT OF EMINENT DOMAIN BY SCHOOLS AND COLLEGES

One of the most basic issues litigated in the cases involving schools and colleges in eminent domain proceedings has been the question of the power or authority of the institution to take private property for its purposes. This issue is not peculiar to the cases involving schools and colleges, and it is necessary to consider the historical background of the right of eminent domain in order to clarify the issue. It is also the purpose of this chapter to distinguish eminent domain proceedings from other closely related legal problems involving schools and colleges. Other sections are devoted to problems of delegation of authority to exercise the right of eminent domain.

THE COMMON LAW BASIS OF EMINENT DOMAIN PROCEEDINGS

One of the cases frequently cited as authority for the power of a school or college to exercise the right of eminent domain is Valentine v. Lamont.[1] Actually, the issue decided in the case concerned the nature of the estate acquired by the Board of Education of Jersey City by condemnation proceedings in 1922. The case was an ejectment action by the successors in

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[1] 20 N.J. Super. 454, 90 A. 2d 143, affd. 25 N.J. Super. 342, 96 A. 2d 417, affd. 13 N.J. 569, 100 A. 2d 668, cert. den. 347 U.S. 966, 74 S. Ct. 776 (1953).

interest of those whose property had been condemned against those to whom the Board had sold the property after it was no longer needed for school purposes. The Board was made a third-party defendant, and while it is not discussed in any of the opinions, there could be some question about whether the Board was a necessary party. The case is mentioned here because the Justices of both the Appellate Division and the New Jersey Supreme Court discussed more extensively than in any other school or college condemnation case the historical development of the right of eminent domain. Most of the discussion on this topic would be regarded as obiter dicta, but the other cases are not in conflict with the statements made, and the authority for the statements were treatises by Kent, Cooley, Nichols and Lewis, as well as prior eminent domain cases, most of which did not involve schools and colleges.

Historical Backgrounds.

Justice Goldmann of the Appellate Division cited the Annals of Tacitus as one of the early references to the power to take private property for public use.

> The term "eminent domain" ("dominium eminens") seems to have originated with Grotius, who declared that the state or he who acts for it may use and even alienate and destroy the property of its subjects for the ends of public utility, but added that "when this is done the state is bound to make good the loss to those who lose their property."[2]

Justice Oliphant of the Supreme Court discussed the basic nature of eminent domain in similar terms.

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[2] 96 A. 2d at 420.

> The right of eminent domain is of very ancient origin, is inherent in all governments and requires no constitutional provision to give it force. It is an inherent and necessary right of the sovereignty of the state.
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> It is generally spoken of in reference to those cases in which the government seeks to appropriate property against the will of the owner and is said to be that superior right of property pertaining to the sovereignty by which private property acquired by its citizens under its protection may be taken and its use controlled for the public benefit without regard to the wishes of its owners. More accurately, it is the rightful authority which exists in every sovereignty to control rights of a public nature which pertain to its citizens in common and to appropriate and control property for the public benefit as the public safety, necessity, convenience, or welfare may demand. It is the highest and most exact form of property, notwithstanding the grants to individuals, which remains in the government or in the aggregate body of the people in their sovereign capacity; and they have the right to assume possession of the property in the manner directed by the Constitution and the laws of the State, whenever the public interest requires. In theory it exists in absolute form in the ultimate source of authority in every organized society.[3]

Both of the opinions quoted referred to the absolute, unlimited, inherent, and sovereign nature of the right of eminent domain, but both of the opinions also discussed limitations on the right. The Supreme Court opinion emphasized the common law origin of the limitation, referring to "the equitable principle that property cannot be taken for public use without just compensation," and stating that the taking "should not be greater than necessary to effectuate the public use," implying, at least, that the historic determination of the bounds of the right is judicial.

The opinion of the Appellate Division, however, stressed the limitations imposed by constitutional provisions.

> ...[S]uch provisions neither directly nor indirectly grant the power of eminent domain, but are simple limitations on

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[3] 100 A. 2d at 670-671.

> the power already in existence which would otherwise be unlimited.
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> The history of eminent domain in the American Colonies seems to sustain the doctrine that "the power of eminent domain, as it exists untrammeled by constitutional limitations, extends to the taking of any property within the jurisdiction of the state for the public good, subject only to the moral obligation of making compensation." When the Colonies broke away from the Crown, each became a sovereign state in its own right, with absolute control over persons and property within its jurisdiction. Each became vested with the general power of eminent domain. The power could be exercised directly by the legislature, or could be delegated to municipalities or other governmental subdivisions. The legislature could also grant the power of eminent domain to public corporations, such as school districts or boards of education.
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> Under the terms of the typical constitutional provision private property cannot be taken for public use without making just compensation. Such provision is contained in the Fifth Amendment to the United States Constitution as a limitation on the powers of the Federal Government. The same provision, variously worded, appears in the constitutions of all but one of the states.[4]

If on the basis of this authority it may be concluded that eminent domain actions involve litigation of issues concerning the taking of private property for public use, the questions of which acts of a school or college may be classified as "taking" property, and how eminent domain cases are distinguishable from other types of cases involving schools and colleges are raised.

Eminent Domain Actions and Issues Distinguished.

Classifying as eminent domain cases those actions in which the pleadings of the party bringing the complaint--the plaintiff or petitioner--are stated as condemnation or appropriation is a relatively precise and effective way to limit the scope of cases to be considered. Most of the cases

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[4] 96 A. 2d at 420.

involving schools and colleges in which issues of the right of eminent domain have been litigated are of this type, and this criteria is the basic one employed for this study. There are a number of cases, however, which concern eminent domain issues, that do not fall within this classification, such as those in which injunctive relief is sought, or an action to quiet title. In order to distinguish the types of cases and issues which are considered, some of those which are not included in the study will be mentioned.

Cases Involving Purchase. "Taking" of private property for public use could possibly be accomplished by a school or college in a number of ways, such as by purchase, gift, or devise, but "taking" as construed in the eminent domain cases usually involves the element of an act adverse to the interest or without the consent of the party whose property is sought.

There is some dicta in Gogarty v. Coachella Valley Junior College District[5] about eminent domain, but the land sought by the District was purchased, and the case is distinguishable from eminent domain cases on that basis.

Gremillion v. Rapides Parish School Board[6] was an action for specific performance of a contract to compel the Board to take title to property. The Board did not want the property after it had contracted for it because of restrictive covenants found in the title. The Court of Appeals discussed eminent domain as illustrative of sovereign rights, but the Supreme Court

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[5]57 Cal. 2d 727, 21 Cal. Rptr. 806, 371 P. 2d 582 (1962).

[6]134 So. 2d 700, rev. 242 La. 967, 140 So. 2d 377 (1962).

distinguished the case from eminent domain actions and pointed out that the only issue was whether there was a substantial defect in the title.

The only issue decided in Board of Public Instruction of Dade County v. Town of Bay Harbor Islands[7] was that the trial court had not abused its discretion in allowing an amendment to the pleadings and denying a motion to dismiss. The parties conceded that a contract or agreement existed between the school and the town regarding sites, and the statement by the court that "the condemnation of lands for school purposes, standing alone, is one vested in the discretion of school authorities," was not germane to the decision.

In St. Paul Foundry Co. v. Burnstad School District[8] the Company sought to recover for steel furnished for construction of a gymnasium. The court found that the contract was illegal and distinguished the case from those involving taking without just compensation.

An injunction was sought by the School District to prevent mining of coal under a public school building in Commonwealth ex rel. Keator v. Clearview Coal Co.[9] The site had been purchased in 1896 by contract and deed reserving minerals and waiving support of the surface. The building was abandoned by the District in 1914 after coal had been mined without adequate supports causing injury to the building. The dismissal in the trial court was affirmed on appeal because the District was found to have waived its rights at purchase. The court suggested that to prohibit mining would

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[7] 74 So. 2d 786 (Fla. Sup. Ct. 1954).

[8] 70 N. D. 403, 295 N. W. 659 (1941).

[9] 256 Pa. 328, 100 Atl. 820, L.R.A. 1917E 672. (1917).

be taking private property without compensation and that the District could take the coal under the right of eminent domain, but since these points were not at issue, the statements must be regarded as dicta.

A number of statements regarding the power of a school district to exercise the right of eminent domain were made in Kingsville Independent School District v. Crenshaw[10] but the court made it clear that the necessity for condemnation of a park by the School District had been averted by a conveyance by the town and a waiver of rights to reversion by the town's grantor. There was no occasion, the court said, to litigate the question as to paramount public use. The action was brought by residents of the town of Kingsville who owned property adjoining the park in an attempt to enjoin condemnation by the School District. There was no resolution by the Board that the property be taken by condemnation.

A result that would seem in some ways to be in conflict with the Crenshaw case was reached in Jury v. Wiest,[11] a taxpayers' action to enjoin purchase of property by a School District, but the facts of the Jury case are quite different. The School Directors passed resolutions on February 2, 1925, and January 27, 1927, for condemnation of land to increase school and playground facilities. On August 13, 1927, the Directors entered into an agreement with the owner fixing the value of the property at $87,000 and providing that the grantors could retain possession prior to payment by the Directors which could not be demanded prior to August 1, 1930, and then

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[10]164 S.W.2d 49 (Tex. App. 1942). A suit to enjoin erection of the building was brought later but the court said there were no new facts or law involved. 252 S.W.2d 1022 (Tex. App. 1943).

[11]326 Pa. 554, 193 Atl. 5 (1937).

only with six months notice. The Directors agreed to pay taxes and insurance and the deeds were to be put in escrow on payment of the sum fixed. On August 20, 1930, the grantor gave notice that he would expect payment on February 2, 1931, and the School Directors procured taxpayers to restrain them from paying on the ground that the constitutional debt limit would be exceeded if this payment were made. At trial, the Chancellor found that there had been no effective condemnation since the Board had never physically entered and marked off the boundaries, and that a contract to purchase had been executed at a time when the debt limit would have been exceeded. The court en banc, reversing the Chancellor, dismissed the bill for injunction on the basis that the debt limit would not be exceeded by enforcement of the contract. On appeal, the dismissal was affirmed, but for a different reason. The Supreme Court held that the lower court had erred in finding no effective condemnation. The important point to be noted here is the holding that by its resolutions to condemn, which, the court said, presuppose an inability to agree with the owner, the Directors had effectively condemned the property. The court said it was not necessary for the Directors to take physical possession, and where the entire tract was taken it was not necessary for the Directors to mark it. Condemnation, the court held, was not ineffective because the owners cooperated in fixing the price or arranging for payments and delivery of the deed.

> When a corporation, municipality, or other governmental body having the power of eminent domain passes resolutions condemning land and effects a taking of it, the validity of this condemnation procedure is not impaired by a subsequent settlement and acceptance of a

> deed to the property from its owners, but such deed is rather in furtherance of the condemnation proceedings.[12]

This case, then, is one of those in which the pleadings are not an adequate criterion for determination of whether it should be included in the study, and it will be discussed further in Chapter VIII.

The question of what acts constitute an appropriation was discussed in Borough of Braddock v. Bartoletta.[13] While a school district was a party in the case, it was not involved in the condemnation proceeding. The Borough and the District were attempting to collect a tax they had levied on transfer of real estate within their boundaries. In 1959, the Redevelopment Authority of Allegheny County had passed a resolution to condemn real estate within these boundaries and subsequently entered into an "Agreement in Confirmation of Condemnation Proceedings" with the owners. The court held that the property had been legally taken by condemnation prior to the Agreement and that the tax was not collectible on these transactions. The tax ordinance of the Borough and the tax resolution of the District provided that there were to be no exemptions, but the court ruled that in this case there was no transfer as the condemnation had divested the owners of all interest. Had the owners appealed instead of negotiating the Agreement, the court reasoned, there would have been no instrument to tax.

Cases Involving Boundaries and Taxation. The constitutionality of an

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[12] 193 Atl. at 7, citing Boalsburg Water Co. v. State College Water Co., 240 Pa. 198, 87 Atl. 609 (1913). From the title of this case, it was thought that perhaps the case would be pertinent to this study, but on examination of the case, it was found to deal with no school or college eminent domain issues but condemnation of water rights, and no educational institution was a party.

[13] 186 A. 2d 243 (Pa. Sup. Ct. 1962).

act of the Tennessee Legislature changing the boundary of a school district was challenged in a plea for mandamus to require the board to show cause why the plaintiff's children should not be permitted to attend Memphis city schools.[14] A demurrer to the complaint was overruled and on appeal the action of the trial court was affirmed, but in rejecting the argument that the act was unconstitutional because it deprived the plaintiff of property without just compensation, the court stated that in no sense was property "taken."

Washington Heights School District v. Fort Worth[15] was a suit by the District to prevent annexation in which the District argued that provisions of the constitution would be violated. The court held that since the legislature had authorized the parties to reach settlements concerning their property, and neither party was deprived of judicial proceedings, that annexation in no manner resulted in taking of property without compensation.

The plaintiff in Thie v. Consolidated Independent School District of Mediapolis[16] sought to enjoin the levy and collection of taxes against his property in the consolidated district, but the court pointed out that a consolidation does not present a situation in which the property is taken.

An act of the Oklahoma Territorial Legislature providing for separate schools for colored children, and that an injunction may issue to prevent disposal of separate schools by districts already maintaining them[17] was

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[14]Edmonson v. Board of Education, 108 Tenn. 557, 69 S.W. 274, 58 L.R.A. 170 (1902).

[15]251 S.W. 341 (Tex. App., 1923).

[16]197 Iowa 344, 197 N.W. 75 (1924).

[17]Act of May 8, 1901, p. 205, ch. 28, art. 9.

contested in Board of Education of City of Kingfisher v. Board of Commissioners.[18] The Commissioners sought an injunction to prevent the sale of existing facilities, and the Board maintained that the Act was unconstitutional because it interfered with property rights without just compensation. The court referred to school districts as quasi-public corporations, "simply agencies of the higher power," in distinguishing its property rights from those of private corporations. Construction of school houses was regarded as part of the general exercise of sovereignty over its entire domain by the Territory, and it was held that the law did not restrict or divert the property to a use other than its original purpose.

An injunction to restrain the collector of taxes was affirmed in Waldrop v. Kansas City Southern Ry. Co.[19] on the basis that the proceedings under which the Town of Ogden was attempted to be organized were void. The Town had been incorporated to include an area seven miles long and five miles wide along the railway, and the court found that the land was not of such character as could form an incorporated town. Evidence in the record indicated that the purpose of incorporation was so that a Special School District could be formed under the Arkansas statutes, coterminus with the Town. The court also noted that it was "to get rid of the negroes." After finding the incorporation of the Town invalid, the court also found the formation of the School District void, and added "we think this is a case of taking private property for public use under the form of taxation without giving any protection or other compensation therefor."[20] It is not clear from the opinion whether the

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[18] 14 Okl. 322, 78 Pac. 455 (1904).

[19] 131 Ark. 453, 199 S.W. 369, L.R.A. 1918B 1081 (1917).

[20] 199 S.W. at 372.

injunction depended on this conclusion, and no other cases involving schools or colleges have been located in point.

Glendale Development Inc. v. Board of Regents[21] was a taxpayers action to set aside a sale of lands by the Board to a Foundation for development of a shopping center as an investment with returns to be used for the benefit of the University of Wisconsin. It was held that the sale did not involve a taking of public property for private use.

Charter Cases. Board of Regents of the University of Maryland v. Trustees of the Endowment Fund[22] is characteristic of a number of cases since the Dartmouth College Case[23] concerning the power of the state to alter the charter or articles of incorporation of an organization, and these should be distinguished from eminent domain proceedings on the basis of the intent of the party seeking the change. A 1952 Act of the Maryland Legislature, passed over the Governor's veto, provided for an amendment of the Endowment Fund charter to provide that the Regents be the Trustees. There was no intention of the Legislature to make compensation in the event that the Act was regarded as a "taking" of property. The decree which was affirmed held the Act unconstitutional and restrained the Regents from control of the Fund. In this case the Board argued that there was no impairment of the obligation of the charter as constitutional amendments in 1851 and 1867 provided that Maryland charters be subject to repeal or modification. The court, however, found in the Act a fundamental change, a legislative

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[21] 12 Wis. 3d 120, 106 N.W. 2d 430 (1960).

[22] 206 Md. 559, 112 A. 2d 678, cert.den. 350 U.S. 836, 76 S.Ct. 72 (1955).

[23] 4 Wheat. 518, 4 L. Ed. 629, (U.S.Sup.Ct. 1819).

attempt to remove a private self-perpetuating board and replace it with a public one appointed by the Governor. The court said that "Since we hold that the Act of 1952 exceeds the permissible limits of the reserved power to amend the corporation charter it is unnecessary to discuss the other points argued in the briefs." But in response to the Trustees contention that the change in the charter violated Article III, Sec. 40 of the Maryland Constitution prohibiting taking of private property for public use without just compensation, the court made the following statement:

> The rule that an alteration that defeats or fundamentally changes the corporate purpose is beyond the constitutional power of the Legislature is conceded on both sides. Whether this is true because it is a violation of the contract clause of the Federal Constitution we need not decide. The Supreme Court and our Court of Appeals have both adopted the rule as a constitutional principle which has the status of a vested right, whether it stems from the law of implied contract, the law of property or the corporation law. If the right is violated, we are constrained to hold that it violates the due process clause of the Fourteenth Amendment as well as the provisions of Article 23 of our Declaration of Rights and Section 40 of Article III of the Maryland Constitution.[24]

Other Cases Distinguished. In two New Hampshire cases, True v. Melvin,[25] and Board of Education of Nashua v. Vagge,[26] the form of the plea was mandamus. The authority of the True case concerning any eminent domain issue would be doubtful as the court found laches between the decision to build a schoolhouse in 1857 and bringing of the action in 1861. The District alleged it was not bound by law to lay out a schoolhouse lot as it had decided on another

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[24] 112 A. 2d at 684.

[25] 43 N.H. 503 (1862).

[26] 102 N.H. 457, 159 A. 2d 159 (1960).

location which had been purchased. In the Vagge case the Board sought to compel the mayor and aldermen to convey unused city real estate to it for a junior high school. The court found no statutory provisions or provisions in the city charter which would compel the city to transfer the land to the Board. It is apparent that eminent domain issues were not involved here, either by allegation of the board or construction of the court.

Two cases in which the complaint alleged that acts of the school authorities caused injury to property have been noted, and in both cases the principles of eminent domain were used to avoid the rule that the school is immune from liability for tort. In Griswold v. Town School District,[27] dynamiting to explore for water to supply the school had diverted an underground channel supplying water to the plaintiff's spring. The trial court sustained a demurrer to his complaint in tort on the basis that the District was immune. In reversing, the Vermont Supreme Court indirectly criticized the doctrine of immunity as follows:

> ...[I]t is difficult to find any good reason why there should be liability for a taking through no negligence, but non-liability if the same taking is the result of negligence. Such a doctrine it seems to us would be most unjust and indeed a monstrous doctrine permitting a way for avoiding liability under the constitutional provision.[28]

The court felt that if property has to be so taken it must be under the right of eminent domain and speculated that the District had not chosen to exercise the right. It would seem doubtful if the necessity for exercise of the right ever occurred to the District, however, under the facts of this case.

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[27] 117 Vt. 224, 88 A. 2d 829 (1952).

[28] 88 A. 2d at 831. The constitutional provision was that "whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money."

Johnson v. Independent School District No. 1[29] was cited, but in this case immunity was not discussed, and relief was denied even though the plaintiff had alleged that he had no adequate remedy at law, because of inability of the court to assess compensation for damages resulting when the school sewer flowed onto the plaintiff's land. In the Johnson case the court suggested that the district should condemn the land, but issued no order for it to do so. Similar facts were involved in Eller v. Board of Education of Buncombe County.[30] The plaintiff alleged that his dwelling and natural spring water supply had been damaged by a sewer built by the Board. In this case, however, the Board's demurrer was overruled, and in affirming the action the court attempted to distinguish between liability for tort and liability for payment of compensation for private property appropriated:

> The creation and maintenance of a governmental project so as to constitute a nuisance substantially impairing the value of private property, is, in a constitutional sense, a taking within the principle of eminent domain.[31]

The court thought that a sufficient taking to require compensation had occurred if the value of the property had been "substantially impaired," and the amount of compensation would be based on the impairment of value caused by the injury inflicted. The Board maintained that the sole remedy, then, was to petition as provided by the eminent domain statute, but the court rejected the argument because it was not a case in which the Board was undertaking to condemn or take possession for school purposes and the Board

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[29]239 Mo. App. 749, 199 S.W. 2d 421 (1947).

[30]242 N.C. 584, 89 S.E. 2d 144 (1955).

[31]89 S.W. 2d at 146.

apparently had no intention to "take" the land and pay for the rights to it.

Another case in which the "taking" of property was put at issue was Casey County Board of Education v. Luster.[32] The principal of the school had ruled that no students were allowed to enter a restaurant nearby nor any other business establishment in the town between 8:15 a.m. and 3:00 p.m. An injunction granted by the trial court was reversed on appeal on the basis of the authority of the school officials to make reasonable rules, and these were not considered arbitrary or malicious. But the plaintiffs also alleged that the regulation violated the constitutional provisions forbidding the taking of private property without just compensation, and to meet this argument the court held that no property was taken from the children or their parents.

Stone v. Fritts[33] was an action to enjoin the County Superintendent from revoking a license to teach, and here, too, the court found that there was no taking of private property.

Legal Classification of Eminent Domain Cases. Assuming that the nature of the pleadings is a valid criterion for distinguishing eminent domain cases from others to which a school or college is a party, the legal classification or form of the action may be helpful in further distinction. However, due to the joining of equity and law in most jurisdictions of the United States and to the acceptance by the courts of more liberal rules of pleading, the importance of this classification is probably minimized.

There seems to be general agreement that eminent domain proceedings

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[32]282 S.W. 2d 333 (Ky. App. 1955).

[33]169 Ind. 361, 82 N.E. 792, 15 L.R.A. (NS) 1147, 14 Ann.Cas. 295 (1907).

are special in nature, as compared with the historical division of actions into equity and law, but this question has been adjudicated in very few cases involving schools and colleges. In Kraemer v. Board of Education of Cincinnati[34] the court noted that appropriation is a special proceeding "not necessarily adversary" and held that the trial court had erred in assigning the burden of proof regarding the value of his property to the owner.

The court deciding Torrance Unified School District v. Alwag[35] recognized that an "action to condemn property is not of the same nature as ordinary civil litigation," and pointed out that the owner was required to defend even though there was no allegation that he had wronged the plaintiff. In this case the District dismissed its own action and the judgment of the trial court denying attorney fees to the defendant was reversed.

In Arkansas, where the equitable and legal functions are carried out by separate courts, an eminent domain action has been recognized as a special proceeding. The issue in Burton v. Ward[36] was whether the defendant had stated sufficient equitable defenses to deprive the circuit court of its usual jurisdiction in eminent domain proceedings. On July 8, 1950, the District, which already held two acres for its school, proceeded to condemn an additional tract of 10.35 acres of Burton's property. His answer alleged the taking was excessive, arbitrary, capricious, in bad faith, unnecessary, and unauthorized, and that these defenses were exclusively cognizable in equity. His motion to transfer to Chancery was granted. The Chancellor

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[34] 8 App. 428 (Ohio App. 1917).

[35] 145 Cal. App. 596, 302 P. 2d 881 (1956).

[36] 218 Ark. 253, 236 S.W. 2d 65 (1951).

transferred the cause back to the Circuit Court and on November 13, Burton prayed for a writ of mandamus to require the Chancellor to try the case. The District's application to the Circuit Court of November 15 for determination of the amount of deposit and right to enter was refused pending the mandamus action, so the District also sought mandamus, but to compel the Circuit Court to assume jurisdiction. The Supreme Court found Burton's allegations on excessiveness sufficient on the basis that the proposed taking was over five times the amount already held by the District. Two justices dissented from the holding that the case should be tried in Chancery, distinguishing the cases relied upon by the majority, and questioning the adequacy of Burton's answer which they regarded as a "mere statement of conclusion not sufficient to invoke equitable relief." The case illustrates the special nature of eminent domain proceedings, the statute providing that the action begin in the Circuit Court, but defenses being considered of an equitable nature.[37] In these three cases the recognition that eminent domain is a special proceeding has had the result of affording greater protection for the defendant, although in the Burton case there was no actual settlement of property rights.

In Burlington City Board of Education v. Allen,[38] because the North Carolina statute[39] provided that the Clerk of the Superior Court appoint the appraisers, eminent domain proceedings were declared not to be judicial, but a political and administrative measure, at least until the question of compensation is raised. Therefore the defendant was not entitled to notice,

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[37]Ark. Stat. 80-403

[38]243 N.C. 520, 91 S.E. 2d 180 (1956).

[39]G.S. 115-125.

and his appeal on the denial by the Clerk of his motion to dismiss was considered premature.

Three cases have been found in which the question of whether an eminent domain proceeding is against the person of the title holder or against the property was discussed. Herren v. Board of Education[40] was denominated in the report an "action in rem to condemn," but there was no discussion on this point.

In re Oronoco School District[41] is slight authority to the effect that a condemnation proceeding is in rem and not in personam. The discussion on this point in the case was not for the usual purpose of settling the problem of adequacy of notice. The court stated that the proceeding was in rem in holding that damages awarded to two parties may be assessed by the jury in gross and divided between the parties. The award of the jury was considered a fund standing in place of the land. It is not clear that the court decided this issue on that basis, however, as the objection of the defendant was held to be too late as it was made after the verdict had been rendered.

The more acceptable view would seem to be that held in Board of Education of City of Stillwater v. Aldredge.[42] In this case the major issue was sufficiency of notice. The case was before the court three times, and in the second action, the court held that where the statute of the territorial legislature did not provide for notice, the requirement would not be inferred. Notice by publication was held to be insufficient, and the court observed that cases which say eminent domain is a proceeding in rem are mistaken. Other

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[40] 219 Ga. 431, 134 S.E. 2d 6 (1963).

[41] 170 Minn. 49, 212 N.W. 8 (1927).

[42] 13 Okl. 205, 73 Pac. 1104 (1903).

problems involved in the case will be considered in Chapter VIII.

DELEGATION OF THE AUTHORITY TO EXERCISE THE RIGHT OF EMINENT DOMAIN TO SCHOOLS AND COLLEGES

Judicial opinions have consistently stated that the authority for exercise of the right of eminent domain is inherent in government, and that the legislature may determine when, how, and by whom the power may be exercised. Statements typical of those found in many of the school and college cases are as follows:

> The right to appropriate private property to public uses lies dormant in the state until legislative action is had, pointing out the occasions, the modes, conditions, and agencies for its appropriation.[43]
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> . . . /T/he right to exercise the power must be conferred by statute, either in express words or by necessary implication and is not to be gathered from doubtful inferences.[44]
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> . . . /T/he power to take is found in the broad scope of eminent domain inherent in the ultimate source of authority in every organized society, which is exercised through proper legislative enactment, subject to the constitutional limitations set forth.[45]
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> It is the exclusive prerogative of the Legislature--limited only by our organic law which requires that just

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[43] Richland School Township v. Overmyer, 164 Ind. 382, 73 N.E. 811 (1905).

[44] Dean v. County Board of Education, 210 Ala. 256, 97 So. 741 (1923).

[45] Valentine v. Lamont, 13 N.J. 569, 100 A. 2d 668, 673 (1953).

> compensation shall be paid for the land so appropriated--to prescribe the method of taking land for the public use.[46]

Two cases are of special interest concerning the delegation of authority by the legislature for exercise of the right of eminent domain.

The Code of the District of Columbia providing for condemnation by Commissioners of the District for schoolhouses "or for any other municipal use authorized by Congress"[47] was construed in Commissioners of the District of Columbia v. Shannon and Luchs Construction Co.[48] An Act of Congress making appropriations for the District of Columbia for the fiscal year ending June 30, 1925, provided "For athletic field for the Western High School, $125,000."[49] In the decision, the court stated:

> We are of the opinion that the mere act of appropriating the money by Congress, for the purpose specified in the act, is sufficient to authorize the exercise of the power of eminent domain by the commissioners to carry the purpose into effect.[50]

The situation concerning the District of Columbia can be distinguished from a similar situation in one of the States, and it would seem doubtful if this case could be relied upon as authority for a rule that a legislative appropriation without an express grant of authority to exercise the right of eminent domain is sufficient delegation of that right.

The authority cited by the appellant in Denson v. Alabama Polytechnical

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[46]Burlington City Board of Education v. Allen, 243 N.C. 520, 91 S.E. 2d 180 (1956).

[47]D.C. Code 483.

[48]57 App. D.C. 67, 17 F. 2d 219 (1927).

[49]43 Stats. 558.

[50]17 F. 2d at 221.

Institute[51] to the effect that statutes on eminent domain must be strictly construed and that the power must not be granted by implication was mentioned in the opinion. No express grant of power to the Institute in the school code or in the general eminent domain statute, was found however. The court thought that, according to the language of the general statute, the legislature had assumed that the power existed for the Institute, but under the strict rule urged by the appellant, the statute could not be construed as a grant of the right of eminent domain. In holding that the Institute could condemn the property, the court said:

> But this institute is a state institution, owned, controlled, and supported by the state, receiving also federal aid. ... Such state institutions are a part of the state, and their property is in fact the property of the state. They are held to be immune from suits under the terms of our Constitution prohibiting suits against the state, though the charter may expressly provide otherwise. ... If therefore such institutions are so far an integral part of the state as to enjoy immunity from suits because of a constitutional prohibition against a suit against the state, we are of the opinion, by logical sequence, it must follow they also enjoy that other incident of sovereignty, the right of eminent domain, for the property to be acquired is in fact the property of the state and used for state purposes, the educational advancement of its citizens. ... We think section 7476 of the Code of 1923 discloses a legislative recognition of this power of eminent domain as existing in petitioner and makes provision for its enforcement. The power comes from its inseparable connection with the state of which it forms a part. The power is therefore derived from the sovereign state, and needs no express statutory declaration to that end.[52]

A later Alabama decision[53] insists that the basis for this case was the constitutional independence of the Institute from the legislature, but, if so,

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[51] 220 Ala. 433, 126 So. 133 (1930).

[52] 126 So. at 134.

[53] Gerson v. Howard, 246 Ala. 567, 21 So. 2d 693 (1945).

that basis was not stated in explicit terms by the court. Whatever the basis for the decision, it would be doubtful if it could be relied on by schools with a less direct relationship to the State as authority to the effect that legislative delegation of the right of eminent domain is not essential to its exercise.

The question of whether property outside the boundary of a school district may be condemned has been considered in two cases. The tract sought by the Board in Bertagnoli v. Baker[54] was situated partly within the Salt Lake City School District and partly within the Granite School District. The owner's demurrer and motion for pleadings to be made more definite and certain were overruled and denied, so he petitioned for a writ of prohibition which was granted. The statute provided that the right of eminent domain may be exercised in behalf of public buildings and grounds for the use of any county, city or incorporated town, or board of education. Boards of education were classified as municipal corporations with purely statutory powers, and authority was cited to the effect that municipal corporations could not condemn land outside their corporate limits unless the power was expressly delegated by the legislature. The Board cited cases in which authority of a city to take property for water, sewer, and power plants without express statutory provisions was upheld, but the court reasoned that in these cases the authority could be clearly inferred, since the grant of power to construct the plants would be worthless otherwise. But the court found no persuasive reason why the legislature would contemplate that efficient school systems could not be maintained without the power to condemn land outside

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[54]117 Utah 348, 215 P. 2d 626 (1950).

the boundaries of the district. The court thought that the only natural conclusion to be drawn from the silence of the statute was that the legislature did not intend to confer extra-territorial powers of condemnation on school districts. The Board argued that if the legislature had intended to limit school district condemnation to within the boundaries it would have done so, and pointed out that the legislature had so limited counties. This suggestion was met by the Court with the observation that the legislature had expressly given the power to cities to take land outside their corporate limits. A less convincing position of the court was its observation that if boards had possessed the authority to construct schools outside their districts, a 1947 enactment authorizing them to participate in joint construction and operation of schools attended by resident or adjoining district students, either within or without the state, would have been unnecessary. A concurring opinion suggested that if the right to condemn were exercised jointly, an inference of the grant of power might be found, but pointed out that this question was not before the court.

The decision in Sterkel v. Mansfield Board of Education[55] was in agreement with the Bertagnoli case. The case began as a petition for injunction which was denied. The first appeal was dismissed, but the Supreme Court reversed the decision and granted the injunction. While the case was on appeal, the Board sought a writ of mandamus to compel determination of the proceeding, and after the injunction was granted, this action was determined moot.[56] The Board relied on a provision in statutes authorizing purchase of property

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[55]172 Ohio St. 231, 175 N.E. 2d 64 (1961).

[56]State v. Common Pleas Court, 172 Ohio St. 259, 175 N.E. 2d 67 (1961).

"either within or without the district," but the court construed the meaning of "purchase" in the restricted sense of acquisition after voluntary agreement. A case involving the attempt by a city to take a cemetery was cited as authority for the rule that power to take land exempted from appropriation must be expressly granted.

Legislative Provision by Statute for Condemnation.

The purpose of this section is to illustrate the types of statutory provisions by which schools and colleges have been granted authority to exercise the right of eminent domain. It is not an attempt to present a complete historical account of eminent domain legislation, nor will all of the types of statutory provisions be mentioned. Other types of statutory provisions will be considered in subsequent chapters.

A common form of providing the authority for schools or colleges to condemn property is for the express grant of the authority to appear in the school code of the State, or in the statutes creating the college or university. Often this provision will specify that the procedure to be followed by the school or college is that provided in a general eminent domain statute. In many cases the express authorization for schools and colleges to condemn property is repeated in the general statute. Some of the litigation has resulted from confusion over which of these sources provides the authority for condemnation. One of the cases,[57] while critical of the fact that alternative methods were available, upheld the method pursued by the

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[57]Union School District of City of Jackson v. Starr Commonwealth for Boys, 322 Mich. 165, 33 N.W. 2d 807 (1948).

school district. A Michigan Judicial Council study was mentioned in the opinion, in which it had been found that there were 17 methods in that State by which property could be condemned.

General Eminent Domain Statutes. Authority for the Board to condemn land on which it had constructed a gymnasium through a misunderstanding regarding the boundaries of its property was found in a general statute in Ouachita Parish School Board v. Clark.[58] The code contained the rationale in a somewhat unusual fashion. It provided that every individual who possesses property is tacitly subjected to the obligation of yielding it to the community whenever it becomes necessary for the general use, and that if the owner refuses to yield or demands an exhorbitant price, he may be divested of his property by authority of law.[59]

A general statute containing provision for the right of eminent domain to be exercised in behalf of a number of public uses, including public buildings and grounds for the use of any school district, was authority for the condemnation in Board of Education of City of Minot v. Park District.[60] There was no grant of the power of eminent domain in the statutes relating to special school districts, although the grant of authority had been made for common school districts. The court held that the absence of the provision in the special district law did not indicate a lack of the power, and upheld the condemnation on the basis that special districts were granted all the powers and duties usual to public corporations.

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[58]197 La. 131, 1 So. 2d 54 (1941).

[59]La. Code 2626, 2627.

[60]70 N.W. 2d 899 (N.D. Sup. Ct. 1955).

In a number of states, schools or colleges authorized to exercise the right of eminent domain are required to follow the procedure established for other agencies, such as municipal corporations, railroad corporations or counties. In Cousens v. Lyman School District,[61] one of the objections of the owner was that there was no record of the proceeding in the town clerk's office as provided by the statute on laying out of ways. The court held that while the District was following the procedure of the statute, the proper place for the record was in the School District, and to that extent the details of the statute should not be followed.

Interpretation of two sections of the Texas statutes was required in County School Trustees of Upshur County v. Free.[62] By a section which related only to schools, the County School Trustees were given power to acquire the fee simple title to real property by exercise of the right of eminent domain for all common school districts and the Independent School Districts of their county having less than 150 students. The action was brought to acquire title to the surface estate of two strips of land adjoining the site of East Mountain Common School District. The defendant argued that the statute provided only for school districts having less than 150 students, and since East Mountain School had more than 150 students, there was no statutory authority for exercise of the right of eminent domain. Another section of the statutes provided that all cities and towns in Texas and all Independent School Districts having 150 or more students may exercise the right of eminent domain. The court interpreted the school section to provide

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[61] 67 Me. 280 (1877).

[62] 154 S.W. 2d 935 (Tex. App. 1941).

authority for the Trustees to contemn property for all common school districts and like authority to condemn for Independent Districts of less than 150 students.

Provisions of the School Code. Many of the school and college condemnation cases present the problem of which of the school statutes apply to a particular type of district. This question is raised most frequently in regard to specific provisions of the statute by which the board is required to meet certain conditions, and these statutes will generally be discussed in Chapter VIII.

The defendant in Consolidated School District No. 2 v. O'Malley[63] insisted that the statutes under which the proceedings were brought directed the Board to the statute for consolidated districts which he maintained did not contain authority for condemnation. The statute under which the proceedings were begun by the District provided:

> Whenever any district shall select, at the annual or any special meeting, one or more sites for one or more schoolhouses, or the Board of Education in a city, town, or consolidated school district, under the provisions of the statute applicable thereto, shall locate, direct and authorize the purchase of sites for schoolhouses, libraries, offices and public parks and playgrounds, or additional grounds adjacent to schoolhouse site or sites, and cannot agree with the owner thereof as to the price to be paid for the same, or for any other cause cannot secure a title thereto, the Board of Directors or Board of Education aforesaid may proceed to condemn the same in the same manner as provided for condemnation of right of way. ... / emphasis by court /[64]

The court agreed that the italicized portion required the District to find authority to condemn in the statute relating to town, city or consolidated

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[63] 343 Mo. 1187, 125 S.W. 2d 818, 232 Mo. App. 1116, 115 S.W. 2d 171 (1938).

[64] Sec. 9215 R.S. 1929, Mo. St. Ann., Sec. 9215, p. 7087.

districts. That statute did not contain an express authorization for exercise of the right of eminent domain but it did authorize consolidated districts to perform the same duties as Boards of other school districts under general school law "except as provided." The court held that "except as provided" referred to the provisions of the statute quoted above. The result was that by a bit of circular reasoning, authority was found for the District to condemn. It would seem that the italicized portion of the statute quoted could be construed to refer only to the method of selecting the site by city, town or consolidated districts. If this construction were adopted, the act could be held to grant authority to "any district" without reference to other sections of the statutes. It is not clear why the court did not adopt this construction.

Statutory Limitations on the Amount and Kind of Property That May Be Taken. Virginia statutes illustrate the situation in which eminent domain proceedings are authorized by both the school sections and a general eminent domain act. The court considered these sections together in School Board of City of Harrisonburg v. Alexander[65] in ruling that a city board is subject to the same limitations as those imposed on county boards of education. Prior to 1903, the court explained, there was no general statute and the power was exercised under separate statutes relating to each agency. The 1904 Code contained general provisions, and a section was added conferring the right of eminent domain on school districts. The same legislature amended the school sections, but left in the chapter relating to county boards the provision that no dwelling, yard, garden, or orchard could be invaded. The chapter relating

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[65]126 Va. 407, 101 S.E. 349 (1919).

to city boards did not contain this provision, but did state that the provisions of the chapter applying to counties should apply in like manner to cities, and that city boards could have the same powers in relation to condemnation as county boards. In the case cited, the Board attempted to avoid the limitations on condemning a dwelling by considering this provision a grant of power. The court found the grant of power in the general act, which it said applied to cities, towns and counties alike, and the limitations stated applied to all as well. An earlier case, Burger v. State Female Normal School[66] was noted which reached an opposite result, but the court thought that a general statute should be restrained by special enactment. The Burger case may be distinguishable, as there the court held that the words, "any company chartered by this State," in reference to the limitation on condemnation of dwellings did not include state institutions. The court also held that the provision in the general act that "the proceedings in all such cases shall be according to the provisions of this act so far as they can be applied to same," did not refer to the limitation against taking dwellings, but to the procedure to be followed.

Dennis v. Independent School District of Walker[67] was an application for certiorari to have the action of the Board to condemn declared null and void. The dismissal of the writ was affirmed as the question of the authority of the District to condemn had not been raised in the trial court. The District began condemnation proceedings in July, 1911, to acquire a 1.3 acre tract owned by two parties which adjoined the established site. One

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[66]14 Va. 491, 77 S.E. 489 (1913).

[67]166 Iowa 556, 148 N.W. 1007 (1914).

of the parties accepted the award of the referees without objection. The other party contended that the Board had no authority to take or hold more than one acre. An earlier law had provided that the Board could take and hold so much as necessary; provided "real estate so taken, otherwise than by consent of the owner or owners, shall not exceed one acre."[68] A re-enactment of this section resulted in the wording:

> Any school corporation may take and hold so much real estate as may be required for schoolhouse sites, for the location or construction thereon of schoolhouses, and the convenient use thereof, but not to exceed one acre, exclusive of public highway except in a city, town, or village it may include one block exclusive of the street or highway as the case may be: or in districts consolidated ..., or in school townships holding not more than two school sites, may consist of not to exceed four acres for any one site, unless by the owners consent, ...[69]

It was the plaintiff's position that this statute had two distinct parts and that the District was under the first part and therefore could not hold over one acre or one block. The court noted that in rewriting the statute, the provision for consolidated districts had been inserted, and that by reading the entire statute, the consent of the owner referred to in the last part could also refer to the one acre or one block limitations. Since the amount of land to be taken from this plaintiff was less than one acre, and the other party was not complaining, the District was authorized to condemn the property.

The court in Nelson v. Ottawa County School District No. 3[70] held that the District may proceed either under the act applicable to second class

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[68] Acts, 13th Gen. Assembly, ch. 124.

[69] 1907 Code Supp. 2814, cited at 148 N.W. 1009.

[70] 100 Kan. 612, 164 Pac. 1075 (1917).

cities, which limited the amount that could be taken to 1½ acres, or under the act which applied to Districts wherein third class cities were located, which did not contain a limitation on the amount that could be condemned.

The legislative history of enactments by which various types of districts in Kentucky could condemn property was discussed in Bell's Committee v. Board of Education of Harrodsburg.[71] Of a 300 acre tract owned by Bell, who was "of unsound mind," the Board sought 12.9 acres within the corporate limits for a public high school. A motion to dismiss was sustained, but overruled on appeal. After a verdict for a total of $20,400, the denial of a motion for a new trial was affirmed. The defendant thought that if the Board had authority to condemn, it could not take over one acre, nor any land on which there was a residence. The earliest act mentioned, passed in 1893, authorized District Trustees to condemn not over one acre, but no residence, garden, orchard, or burying ground. In 1908, County Boards of Education were given authority to condemn in the manner provided for railroad purposes. A re-enactment of the 1893 statute in 1916 included the County Board of Education as one of those authorized to exercise the right of eminent domain. The result was one grant of the power without the limitations, and one limiting the amount that could be taken to one acre not to include any residence, garden, orchard or burying ground. In 1920, fourth class cities were authorized to institute condemnation proceedings in accordance with railroad company statute provisions. Under the 1920 act, the defendant insisted, the legislature intended to limit the city board to provisions of the 1916 act. The court reasoned that the Board had been granted

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[71] 192 Ky. 700, 234 S.W. 311 (1921).

power to purchase the amount it deemed necessary, so it should not be limited in the amount it could take by condemnation.

The situation that resulted from one act applying to County Boards limiting the amount and kind of property that could be taken and another without a limitation was considered in Cunningham v. Shelby County Board of Education.[72] In this case, the court concluded that the purpose of the legislature was evidently that each of the sections of the act should be effective and neither destructive of the other. This result could be accomplished only by ascribing to the act the meaning it had when first enacted for county boards of education--no limitation.

The legislative history of provisions in North Carolina statutes limiting the amount of property that could be taken was considered in Board of Education of Wake County v. Pegram[73] for the purpose of settling the issue of whether the power of eminent domain was exhausted after one instance of its exercise. In 1901, the statute provided that a school could not take more than one acre; in 1903, the amount was changed to two acres; in 1913, three acres; and in 1923, not more than ten acres. The court concluded that it was evidently contemplated by the legislature that a school site was "an elastic quantity" varying as the expansion and needs of school systems might require. The court found no reason why the power should be exhausted by one exercise of the right unless the maximum quantity of land had been reached.

The fact that the Board already owned an adjoining tract of six acres

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[72]202 Ky. 763, 261 S.W. 266 (1924).

[73]197 N.C. 33, 147 S.E. 622 (1929).

on which a high school was situated did not prevent condemnation of 7.5 acres more for a grammar school according to Wayne County Board of Education v. Lewis.[74] The statute[75] provided that a site may not contain over ten acres if any part must be obtained by condemnation. The fact that the sites involved were adjoining was considered incidental, as they were regarded as separate sites. The granting of a writ of assistance to obtain possession was affirmed.

A district owning three acres, all secured other than by condemnation, sought adjacent land for an athletic field and playground in Schaefer v. School District No. 18.[76] The statute provided that as much real estate as necessary for the location, construction, and convenient use of the school could be taken by eminent domain provided that the real estate taken otherwise than by consent of the owner did not exceed three acres "in any one place or location," or if within a platted town, not over one block. The court suggested that "in any one place or location" had been added in 1941 in contemplation of efforts to secure multiple school sites, and held that the District could not hold for school purposes more than three acres in one location. The District contention that unless and until the right of eminent domain had been exercised this statute could be invoked at its pleasure was answered in the opinion by the statement that the whole purpose of the statute was here anticipated and accomplished. A Pennsylvania railroad case was cited to the effect that rights acquired under eminent domain are

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[74]231 N.C. 661, 58 S.E. 2d 725 (1950).

[75]G.S. 115-85.

[76]111 Colo. 340, 141 P. 2d 903 (1943).

the same as those acquired by purchase. The judgment for the District was reversed. It would seem that in this case, the confusion between a legislative limitation on the amount to be taken by eminent domain and a legislative determination of the amount of land necessary for a school site, was not well clarified by the court.

The opinion in Ferree v. Allegheny Sixth Ward School District[77] stated there was no reason to exclude from the power of a school district the authority to enter upon and occupy improved lots. There was no reference to statutory provisions but the court added that ownership of an adjoining lot would not prevent the District from taking as much as necessary where the quantity allowed by the act had not been exceeded.

The court permitted condemnation of a piece of property in Board of Education of School District No. 1 v. Harper[78] even though it contained a homestead. The reason given was that the section of the education law which prevented taking a homestead applied to a building lot of ordinary terminology and not to an estate of the character involved in this case.

Proceedings to condemn part of the property of the defendant in Center School District No. 1 v. Sen Previvo[79] were dismissed and affirmed even though the land had been found reasonably necessary for public use. Condemnation was precluded by the statute which prohibited acquisition without the consent of the owner of a yard necessary to the use of buildings. Evidence had established that the property sought by the District was

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[77] 76 Pa. 376 (1872).

[78] 191 N.Y.S. 273 (1918).

[79] 257 App. Div. 1029, 13 N.Y.S. 2d 593 affd. 282 N.Y. 631, 25 N.E. 2d 979 (1939).

reasonably necessary to the owner as a range for poultry in connection with poultry houses constructed at large expense on the part of the property that was not taken.

Dicta in the case of Union Free School District No. 10 v. Baumgartner[80] indicated that a school district would not be prevented from condemning a golf course on the basis that it was a yard or enclosure within the statutory exclusion of this property from being taken by eminent domain.

Remedial Provisions. Statutes cited in Buchwalter v. School District No. 42[81] were of a remedial nature, providing that a school district which constructed a building on land without holding the equitable title could apply to the probate judge for appraisers and on payment by the District to the County Treasurer, title would vest in the District. The issue litigated was whether the owner was entitled to notice, and the court held that none was required either by the statute or the constitution.

In Long v. Monongahela City School District[82] a statute providing that a district which held a previous lesser interest may acquire the fee by resolution and publication was mentioned, but was not at issue in the case. The statute was important to schools in Pennsylvania where a previous decision had held that when abandoned for school purposes, the interest that had been condemned would revert to the original owner.[83]

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[80]277 App. Div. 998, 100 N.Y.S. 2d 151 (1950).

[81]65 Kan. 603, 70 Pac. 605 (1902).

[82]395 Pa. 618, 151 A. 2d 461 (1959).

[83]Lazarus v. Morris, 212 Pa. St. 128, 61 Atl. 815 (1905) discussed in Chapter VI.

In re Application of New York University[84] involved the statute of limitations on a condemnation award, and the University had been involved in condemnation as the defendant. The proceeding was brought by the University to review a determination of the State Comptroller rejecting its claim for payment of a condemnation award. The award had been made by decree for damages against New York City on January 5, 1916. The award was not paid until May 19, 1944. The Comptroller's position was that the statute of limitations prevented payment, but the University made its claim under an Abandoned Property Law in which the court found no limitations. The dismissal of the University's petition was reversed on policy grounds.

Theories of Statutory Construction.

Some of the opinions in school and college condemnation cases contain statements similar to that made in School Board of City of Harrisonburg v. Alexander[85] that:

> ... The taking of private property, however, is a matter of serious import, and is not to be permitted except where the right is plainly conferred and the manner of its exercise has been strictly followed. ...[86]

While the opinions of some of the cases indicate that the strict construction of eminent domain statutes is a generally accepted rule, there are enough instances of exceptions to doubt whether it is meaningful to attempt

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[84] 271 App. Div. 131, 63 N.Y.S. 2d 556, rev'g 185 Misc. 40, 57 N.Y.S. 2d 158 (1946).

[85] 126 Va. 407, 101 S.E. 349 (1919).

[86] 101 S.E. at 351.

to state a rule. How a statute is construed may depend on the facts of the case involved. A good illustration is the case of Davis v. Board of Education of Anne Arundel County.[87] The statute in question provided that when land was required for school purposes and the Board was unable to purchase it, proceedings to condemn it according to the general eminent domain statutes may be initiated, "but no lot so taken or enlarged shall exceed, in the whole, 10 acres, including the land occupied by the school building."[88] On November 3, 1931, the Board acquired title to a tract of more than 10 acres subject to the right of Davis to use an alleyway 20 feet wide which crossed the property. The building constructed completely covered the alleyway for 162.4 feet of its length, depriving the owner of the easement of its use. On April 1, 1933, the Board petitioned to condemn the easement. The defendant, Davis, entered a plea in bar of condemnation proceedings on the basis that the Board owned a tract exceeding 10 acres in area. The Board's demurrer to the plea in bar was sustained, and on appeal affirmed. The court based its holding on the fact that acquiring the easement would not enlarge the lot, but only increase the rights of the owner. If taking the easement were said to enlarge the owner's rights in the lot, the court reasoned that the action would not be within the scope of the grant of power by the legislature, as the power granted to condemn land would not apply. On the other hand, if the building were removed to permit the right in the easement to be exercised, the area of the lot would not be diminished. The 10 acre limitation was held to be a limit on the amount that could be condemned, not on

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[87] 166 Md. 118, 170 Atl. 590 (1934).

[88] 1931 Acts, Ch. 157.

the amount the Board could acquire and hold. The court regarded the purpose of the statute as empowering the Board to exercise the state's power of eminent domain to acquire land needed to establish new sites or enlarge sites already established, provided the lot so taken or enlarged did not exceed, in the whole, 10 acres. In the words of the court:

> It may be conceded that the general rule is that statutes of eminent domain are to be strictly construed, but, while such statutes are in derogation of common right, they are not in derogation of the common law, and not subject to the same rigid construction applicable to such statutes. But while they should be strictly construed, the purpose and intention of the Legislature when clearly manifested in the statute should not be defeated by any narrow, strained, forced, or artificial construction of its language.[89]

The admonition to read statutes according to their most natural and obvious import and to construe them strictly in order to effect the intention of the framers, as suggested in Board of Education of Village School District v. O'Rourke,[90] could hardly be said to have been given much consideration in this case.

The O'Rourke case was an attempt to condemn two village lots each 100 feet wide fronting on opposite sides of a block. Both lots contained gardens. The judgment of the referee who had held that the provision preventing taking against the owner's consent of a garden was not applicable when part of a whole piece of property, was reversed. The court was of the opinion that this was contrary to the plain reading of the statute, and that the legislature intended to protect such property (gardens) without qualification.

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[89] 170 Atl. at 59.

[90] 191 App. Div. 317, 181 N.Y.S. 21 (1920).

The explanation given in Bertagnoli v. Baker[91] for the fact that a school district could not take territory outside its district, was that the right of eminent domain being in derogation of rights of individual ownership has been strictly construed so that no person would be wrongly deprived of the use and enjoyment of his property.

The suggestion in some of the cases that statutes in pari materia should be read together is not very dependable as a rule. The question can always be raised as to when statutes are, in fact, in pari materia. In the Alexander[92] case, the court followed this "rule" concerning a general eminent domain statute and a statute relating specifically to schools. In the Sterkel[93] case, the Board suggested that statutes in pari materia should be read together and that the statute authorizing purchase of property outside the district should also authorize condemnation of property outside the district, but the court was not willing to follow this suggestion.

Delegation of Authority by Provisions of Charter or Constitution.

While many charters are granted by legislative enactment, the rights granted by charter are usually thought of as subject to little change. The effect of a grant of authority to exercise the right of eminent domain by charter provisions has been considered in a few school cases.

The issue in the case did not directly involve the authority to condemn,

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[91]117 Utah 348, 215 P. 2d 626 (1950).

[92]126 Va. 407, 101 S.E. 349 (1919).

[93]172 Ohio St. 231, 175 N.E. 2d 64 (1961).

but in Board of Education of City of Holland v. VanDerVeen[94] the authority of the Board to select a site by resolution was challenged. Provisions of the city charter were cited by the court as authority for the resolution instead of election:

> The board of education shall have authority and it shall be their duty to designate and establish such number of sites for schoolhouses as may be necessary and to purchase and procure the lands therefor. ...[95]

An earlier Michigan case[96] was distinguished on the basis that there was no such provision in the Detroit charter.

The issue of whether charter or statutory provisions apply in a given case was litigated in Waukegan v. Stanczak.[97] In 1859, the City had been incorporated by a special charter with a co-extensive School District. According to the general school law, a referendum for selection of a school site would have been necessary, but the Board proceeded by resolution to determine the site and requested the City to condemn the land under the authority of the eminent domain powers of the special charter School District. The defendant contended that the City's adoption of the Cities and Villages Act of 1890 brought it under the general law and that, therefore, the School District was under general school law. The general law, however, was held to abrogate only inconsistent charter powers, and the general school law contained exceptions regarding special charter districts. The defendant

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[94] 169 Mich. 470, 135 N.W. 241 (1912).

[95] 135 N.W. at 242, citing 1899 Local Acts No. 427, p. 257.

[96] Board of Education of City of Detroit v. Moross, 151 Mich. 625, 114 N.W. 75 (1907).

[97] 6 Ill. 2d 594, 129 N.E. 2d 751 (1955).

also objected to the taking on the ground that there was no authorization in the charter for the Special District to condemn, but the court found that the charter granted the authority, if not expressly, then by necessary implication.

An act of the General Assembly to amend the charter provisions relative to condemnation for school purposes was upheld in Sheppard v. Edison[98] on the basis that it did not violate constitutional prohibitions against special legislation.

Authority for condemnation was found in constitutional provisions in Gerson v. Howard.[99] The court regarded the Board of Trustees as the governing body for the purpose of carrying out the constitutional functions of Alabama Polytechnical Institute, also known as Auburn:

> This body is, pro hac vice, its legislature and can do those things which pertain to the purposes for which the Alabama Polytechnical Institute was created.[100]

There was no need in this case, the court felt, for an express statutory declaration of the authority to exercise the right of eminent domain.

The interesting situation of the condemnee insisting that the University was constitutionally independent of the legislature and therefore could not rely on a statute authorizing the State to condemn was presented in People v. Brooks.[101] The court recognized the University as a separate entity but a department of the State government created by the Constitution, and the opinion of the court pointed out

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[98]161 Ga. 907, 132 S.E. 218 (1926).

[99]246 Ala. 567, 21 So. 2d 693 (1945).

[100]21 So. 2d at 695.

[101]224 Mich. 45, 194 N.W. 602 (1923).

that the real estate it holds is public property belonging to the State.

Constitutional Limitations Upon Delegation of the Authority to Exercise the Right of Eminent Domain.

The constitutions of all but one of the States have been found to contain clauses limiting the power of eminent domain by providing that just compensation shall be made when private property is taken for public use.[102] Another source indicates that two States are without this type of provision, but that in New Hampshire the common law has been held to require just compensation, and in North Carolina just compensation is a part of the requirement of due process of law.[103] In Eller v. Board of Education of Buncombe County[104] the court noted that the principle that just compensation must be made for property taken

> ...is deeply imbedded in our constitutional law. It was incorporated in the Bill of Rights of the Federal Constitution. While the principle is not stated in express terms in the North Carolina Constitution, it is regarded as an integral part of the "law of the land" within the meaning of Article I, Section 17.[105]

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[102] Valentine v. Lamont, 20 N.J. Super 454, 90 A. 2d 143, affd. 25 N.J. Super. 342, 96 A. 2d 417, affd. 13 N.J. 569, 100 A. 2d 668, cert. den.347 U.S. 966, 74 S. Ct. 776 (1953).

[103] 49 Iowa L.R. 193. See footnote p. 194. Part I, Article 12 of the New Hampshire Constitution provides in part that "...no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people."

[104] 242 N.C. 584, 89 S.E. 2d 144 (1955).

[105] 89 S.E. 2d at page 146. Article I, Section 17 provides that "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property but by the law of the land."

The authority of the Missouri Board of Regents to condemn property for a dormitory was challenged in Board of Regents v. Palmer[106] on the basis that a recent revision of the Constitution contained an article which specified only that the state, county, or city may acquire property by eminent domain.[107] In spite of the fact that this provision was more in the nature of a grant or extension of power than would be found in most of the State constitutions, the court held that the power to exercise the right of eminent domain did not depend on a grant in the constitution, but is inherent in a sovereign state. Constitutional provisions are limitations on the power, the court said, and in this article the provision that the state, county, or city may acquire property in excess of that actually to be occupied was in no manner a limitation on who may exercise the right of eminent domain.

Compensation. An Act of the Tennessee Legislature was held to be unconstitutional because it did not provide an adequate remedy for the enforcement of the constitutional provision for payment of just compensation in Bragg v. Yeargin.[108] The Act[109] was entitled "An act to extend to County

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[106]356 Mo. 946, 204 S.W. 2d 291 (1947).

[107]Article I, Section 27 of the Constitution adopted in 1945 provided "That in such manner and under such limitations as provided by law, the state, or any county or city may acquire by eminent domain such property, or rights in property, in excess of that actually to be occupied by the public improvement or used in connection therewith, as may be reasonably necessary to effectuate the purposes intended and may be vested with the fee simple title thereto, or the control of the use thereof, and may sell such excess property with such restrictions as shall be appropriate to preserve the improvements made."

[108]145 Tenn. 643, 238 S.W. 78 (1922).

[109]Chapter 149, Acts 1915.

Boards of Education and County High School Boards the right of eminent domain and to provide for a board of appraisers." It provided that the County Judge or Chairman of the County Court, the County Court Clerk, and the County Superintendent should constitute a board of appraisers, and in case of a failure of the school authorities and the owner to agree on a price for property sought, the appraisers were to fix a "fair and equitable value." On this point the court held the statute too indefinite as "fair cash value" was the proper measure of damages. The Act also provided that either party could appeal from the report of the appraisers, and that the school authorities may, by depositing with the County Trustee a fund equal to that set by the appraisers, enter and construct school buildings. The owner was not required to convey the deed until final adjudication. The reasoning of the court was that the owner, if awarded a larger sum on appeal, had no remedy to collect it, but his land was already taken. The constitutionality of the Act was raised by the owner's demurrer to the High School Board's bill for a mandatory injunction to prevent the owner from entering or interfering with the Board's possession. The Board had taken possession after the appraisers reported the value of the property at $400 and the amount was tendered and refused. From the facts stated it would seem that the Board had not complied fully with the requirements of the statute that the fund be deposited with the County Trustee. It would seem, also, that to say the owner was without remedy, disregarded the facts that the court had not finally disposed of the case, that the deed had not been delivered, and that the owner could seek equitable relief.

The fact that the statute did not provide for compensation did not make

it unconstitutional according to the opinion in Dean v. County Board of Education.[110] The court thought the legislature had enacted the statute with full knowledge of the constitutional requirement.

The statute construed in Huber v. Steel[111] provided that the freeholders appointed to assess damages should allow "at least cash value," and this was held by the court to impose on the freeholders the duty to allow "compensation" as required by the constitution.

The constitutionality of an act providing that the jury determine "... the amount of compensation in money that shall be paid to the owner ... which shall be the amount found by the jury to be the fair and full value of such premises ..." was considered in State ex rel. School District No. 56 of Chelan Co. v. Superior Court.[112] The owner claimed this section limited recovery to the naked value of the land taken, whereas by the constitution he would be entitled to damages for depreciation of land not taken. The court agreed that the owner was entitled to damages and held that the statute was directory rather than mandatory. Protection of rights of the owner were to be left to the court since the court was to instruct the jury. "The power to condemn is the principal thing," said the court, "and, when this is granted, the provisions relating to its exercise need not be prescribed to the utmost detail."[113]

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[110] 210 Ala. 256, 97 So. 741 (1923).

[111] 14 Del. Ch. 302, 125 Atl. 673 (1924).

[112] 69 Wash. 189, 124 Pac. 484 (1912).

[113] 124 Pac. at 486.

Equal Protection. Many State constitutions provide that the State shall guarantee to its citizens the equal protection of the laws, and this provision has been the basis for rulings that the legislature may not enact statutes which apply only to a special class. Eminent domain statutes followed by schools and colleges have been questioned on this basis and held to be reasonable classifications applying to all similarly situated, or for some similar reason, with very little comment in Wendel v. Board of Education,[114] Knapp v. State,[115] Sheppard v. Edison,[116] Russell v. Trustees of Purdue University,[117] University of Southern California v. Robbins,[118] Cochran v. Cavanaugh,[119] and Waukegan v. Stanczak.[120]

The plaintiff seeking to enjoin condemnation proceedings in Munn v. Independent School District of Jefferson[121] challenged the constitutionality of the Iowa statute on the basis that it was lacking in some of the elements contained in the eminent domain statute relating to internal improvements and therefore made an unreasonable and arbitrary discrimination. The court rejected the argument on the basis that there was a distinction in the purposes for which the acts were passed, but did not illustrate the distinction:

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[114] 75 N.J.L. 70, 66 Atl. 1075, rev. 76 N.J.L. 499, 70 Atl. 152 (1908).

[115] 125 Minn. 194, 145 N.W. 967 (1914).

[116] 161 Ga. 907, 132 S.E. 218 (1926).

[117] 201 Ind. 367, 168 N.E. 529 (1929).

[118] 1 Cal. App. 2d 523, 37 P. 2d 163, cert. den. 295 U.S. 738, 55 S. Ct. 650 (1934).

[119] 252 S.W. 284 (Tex. App. 1923).

[120] 6 Ill. 2d 594, 129 N.E. 2d 751 (1955).

[121] 188 Iowa 757, 176 N.W. 811 (1920).

> There is a manifest distinction between the exercise of the right of eminent domain by a school district for school purposes, solely in the public interest, and the exercise of the same power by a railway company for its right of way, or by a mill owner to acquire the right to flood adjacent land by the erection of a mill dam to promote an interest which is only quasi-public; and if the Legislature, recognizing such distinctions, provides distinctive methods of condemnation, there is no infraction of the property owner's constitutional rights.[122]

The unreasonable character of any discrimination, the court said, must be clear and admit of no reasonable doubt.

An unreasonable classification by the legislature was found in Fountain Park Co. v. Hensler,[123] a case that involved a Chautauqua Society instead of a school or college, but because of its educational purpose and the issues discussed it is included in the study. The Act of the General Assembly of March 2, 1923, provided that any voluntary association organized for the purpose of establishing a chautauqua, which had existed 15 years giving a program of not less than 16 days each year and leasing a tract of timber land for 15 years was endowed with the right of eminent domain insofar as necessary to acquire the leased land, not exceeding 40 acres. Provisions of the Indiana Constitution relied on by the defendant were that the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which shall not equally belong to all citizens,[124] nor pass local or special laws, but those that shall be general and of uniform operation throughout the state.[125] The court was of the opinion that there was no

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[122]176 N.W. at 816, 817.

[123]199 Ind. 95, 155 N.E. 465, 50 A.L.R. 1518 (1927).

[124]Indiana Constitution, Article I, Section 23.

[125]Indiana Constitution, Article IV, Sections 22 and 23.

reason for different legislation for a society which operated 16 days a year for 15 years from that for one which operated 14 days a year for five years, and held that these were not reasonable or natural differences, but enacted to single out a small sub-class as a recipient of the benefits of the legislation. An old line of cases was noted which contained dicta that it was for the legislature alone to judge whether a law can be made applicable to the whole State, but these could not change the law that the power to construe the constitution is a judicial power. "The present legislative tendency toward special and local legislation under the guise and verbiage of general laws should be checked,"[126] the court said, if not by the legislature itself, then by the courts.

Issues Regarding the Title of the Statute. Another ground for raising constitutional objections to school or college eminent domain legislation is that the statute contains material not germane to its title in violation of provisions that laws should not contain more than one subject nor contain subjects different from that expressed in the title. In State ex rel. School District No. 56 of Chelan County v. Superior Court[127] the validity of the entire section of the Code of Public Instruction was questioned on the basis that the section granting the power of eminent domain to schools was not germane to the title of the Act authorizing the Code. The title recited that the act was to establish, provide for the maintenance of, and relate to a general and uniform public school system for the State. The court held that the purpose was to enact a complete code, pointing out that if eminent domain

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[126] 155 N.E. at 468.

[127] 69 Wash. 189, 124 Pac. 484 (1912).

was not within the general scope of the title, much else would have to be excluded and that it would be difficult to find one provision more germane than others.

The Michigan Constitution[128] provided that "No law shall embrace more than one object, which shall be expressed in its title," and the defendant in People v. Brooks[129] maintained that "An act to authorize proceedings by the state to condemn private property for public use" did not include authority for the Board of Regents to exercise the right of eminent domain. The court found every section of the act germane to the object expressed in the title and held that it was not necessary for the various institutions for which property was to be taken to be designated in the title of the act.

A similar issue was raised in the recent case of Sheppard v. DeKalb County Board of Education.[130] In this case, the title of the act read, "An Act to authorize County Boards of Education and certain Independent and public school systems to condemn private property for public school purposes or any public educational program which is now or may be hereafter authorized by law." In answer to the defendant's contention that the act involved more than one subject in providing for county, independent, existing, and indefinite programs, the court found condemnation as the single subject of the act, and added that in the taking of property there was no denial of due process of law as the taking had been authorized by the legislature.

An emergency clause was added to the statute authorizing the Board of

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[128] 1908, Article V, Section 21.

[129] 224 Mich. 45, 194 N.W. 602 (1923).

[130] 138 S.E. 2d 271, 220 Ga. 219 (1964).

Regents to condemn land for a dormitory and contested on the basis that the preamble or bill did not express that an emergency existed in Board of Regents v. Palmer.[131] The court found that section 10 of the act, referring to a great increase in the number of students enrolled in state educational institutions as a result of conditions existing after World War II, was a sufficient statement of emergency.

SUMMARY

For the purpose of this study, eminent domain actions of a school or college have been classified as those by which the educational institution seeks to take property against the wish of the owner or without his consent with the intention of making compensation. This classification, in general, excludes those cases adjudicating the rights of parties who enter into voluntary purchase agreements. The constitutional prohibition against taking private property for public use without just compensation has been the basis for litigation of a number of issues that may be distinguished from eminent domain actions because the intent of the parties did not involve an attempt to take property against the will of the owner while making just compensation. Examples of this distinction are cases involving boundaries, taxation, torts, rules and regulations, and charter revisions. A few cases which involve important considerations of eminent domain principles are included, such as those in which the property of a school or college has been sought by another agency or those litigating the rights of parties who claim to be successors in interest to land condemned by a school or college.

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[131] 356 Mo. 946, 204 S.W. 2d 291 (1947).

Condemnation has been regarded as a special proceeding, and does not fit the classifications of "legal-equitable," or "in rem-in personam." The consequences of this recognition have generally been to afford greater protection to the rights of the party whose property is sought in the school and college cases.

The power to exercise the right of eminent domain has been regarded as a fundamental characteristic of government. Theoretically, the power may be regarded as unlimited, but, at least in the United States, a number of limitations have been imposed as a result of both constitutional provision and common law.

There is general agreement that the authority for a school or college to exercise the right of eminent domain must be delegated by legislative act. Most of the opinions add the requirement that the delegation must be explicit, but in a few cases the delegation of authority has been implied to a limited extent. In states where constitutional provisions establish colleges or universities as relatively independent from the legislature, there is authority to indicate that the institution need not rely on a delegation of authority from the legislature. This conclusion should be hedged with the suggestion that other considerations particular to the case and the jurisdiction involved may apply, however. The two cases located on the issue of whether a school district may condemn property outside its boundaries have held that unless the legislative authorization expressly provides otherwise, such property may not be taken.

Authority for schools and colleges to exercise the right of eminent domain is found in general eminent domain statutes, sections of school codes or school statutes, charters, statutes for special purposes, or statutes

creating and organizing educational institutions. The question of which statute should apply to a given case has been the basis for considerable litigation, and there is no general conclusion that can be drawn from the school and college cases. It would seem that the judiciary has on occasion been called upon to remedy unsatisfactory legislative practices. A number of problems have resulted from the historical factor of specifying that schools and colleges follow procedures previously enacted for condemnation of right of way by railroad companies.

Statutes limiting the amount of property that may be taken by a school or college or preventing the taking of dwellings and their surroundings or other kinds of property have also been adjudicated. There has been no consistent pattern of interpreting the meaning or application of these statutes, and the results of the cases seem to depend as much on the facts involved as on any legal principle.

Constitutional limitations on delegation of the authority to exercise the right of eminent domain are applicable in all the States. Those most generally urged in opposition to the attempt to condemn property deal with just compensation, special legislation, and material in the statute not germane to the title. A liberal construction has usually applied to the latter plea and a wide variety of subjects have been found properly within the title of acts providing either for schools or for condemnation. Most of the statutes have been upheld when challenged on the basis of class or special legislation. The requirement of just compensation has been strictly applied in some cases, but in other cases the wording of the statute has not been considered crucial as the "just-ness" of compensation is regarded as a matter for judicial determination.

CHAPTER III

PRINCIPLES OF PUBLIC USE AND NECESSITY APPLIED TO SCHOOLS AND COLLEGES

A basic principle involved in the right of eminent domain noted in Chapter II is that when private property is taken against the will of the owner it must be taken for a public use. This chapter is concerned, first, with questions of how educational institutions have been found to fulfill public purposes sufficiently to qualify them to exercise the right of eminent domain, and second, with cases in which particular types of uses have been questioned. The third section of the chapter involves the principle that property must be necessary for the use of a school or college in order for it to be taken by eminent domain.

THE PUBLIC NATURE OF EDUCATION

In a number of eminent domain cases, the courts have discussed in general terms the function of education in society. Some of these comments, while they usually do not constitute a legal rule or establish precedent, are important as recognition of basic principles upon which the law depends.

Features of the Educational Enterprise Noted By the Courts.

One of the oldest eminent domain cases involving a school was Williams

v. School District No. 6.[1] The issue of whether the taking of the defendant's property by the school district was for a public use was discussed. The court referred to the activity of the legislature in providing for school districts, their support, requirements, corporate existence, annual meetings, the duty to erect buildings, authority to tax, the use of federal funds, and the creation of the office of state superintendent to show that the legislature had regarded education as a public responsibility. The court said:

> ... Enough has already been stated to show that the whole subject of the maintenance and support of common schools has ever been regarded in this state as one not only of public usefulness, but of public necessity, and one which the state in its sovereign character was bound to sustain....
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> Every public use is to some extent local and benefits a particular section more than others.... It is a benefit and advantage to the whole country that all the children should be educated, and thus any means of educating the children in a single district benefit the whole.[2]

The Williams case was cited in Board of Education v. Hackmann,[3] a case in which the facts were not reported.

In Long v. Fuller[4] the constitutionality of the Pennsylvania statute authorizing the district to condemn was challenged and the court said:

> The common school system pervades the whole Commonwealth, and is its creature, acting in the several school districts by its boards of directors or controllers, who are simply the agents of the state in carrying out the wise, benevolent

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[1]33 Vt. 271 (1860).

[2]33 Vt. at 279.

[3]48 Mo. 243 (1871).

[4]68 Pa. St. 170 (1871).

> and far-sighted policy of the government.... Every man, woman and child in a republic should be able to read and write, and this is the object aimed at by the Common School Law. Schoolhouses are an essential part of the system and the compulsory power is as necessary to it, as the taking of land for a public highway.[5]

Appeal of Rees[6] was brought as a bill for injunction by lessees of lots along the Allegheny River to prevent the Pittsburgh Exhibition Society and the City of Pittsburgh from occupying buildings along the wharf which would interfere with the plaintiff's uses. While the Society, strictly speaking, was not a school or college, the issues in the case involved educational purposes. The plaintiff claimed that the act of the Pennsylvania Legislature authorizing the Society to condemn the property was unconstitutional because the purpose of the Society did not warrant the conclusion that the taking was for a public use. In answering this objection, the court said:

> The question of public use is one difficult to determine, but it may be assumed as sound that wherever the taking is a public necessity, as in the case of highways, or is for the welfare of the people, it is taking for public use; ... the purpose for which such corporations can be created ... is for the educating of the public by exhibiting artistic, mechanical, agricultural, and horticultural products and providing public instruction in the arts and sciences.... It need not now in this day be argued that the education of the citizens of the commonwealth is a necessity, or that education conduces to the welfare of the public.[7]

The question of whether Purdue University was an institution belonging to the state was raised in Russell v. Trustees of Purdue University.[8] In order to show the public nature of the University, the court cited cases

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[5]68 Pa. St. at 173.

[6]12 Atl. 427 (Pa. Sup. Ct. 1888).

[7]12 Atl. at 430.

[8]201 Ind. 367, 168 N.E. 529 (1929).

from a number of jurisdictions to show that a university incorporated by the State had been treated as a public institution. The court also pointed out that Indiana accepted public federal lands and donations of John Purdue by legislative act in 1869 and that other acts of the legislature dealing with the duties of the State and its control of the University had also been passed. The legislative appropriations for the 1929 University budget were listed by the court and the court commented that the University by accepting the funds acceded to the claim of the legislature that it held title to all receipts as well.

In upholding the right of the School District to dismiss condemnation proceedings without being liable for the property owner's attorney fees, the court in Meadow Park Land Co. v. School District of Kansas City[9] noted that the School District did not exist for private gain but wholly for public and beneficent purposes. The court pointed out that the School District was created a quasi-corporation for specific purposes and that it was the local agent of the State for promotion of the education of children of the District. The District's power to levy taxes was limited, and the funds derived from taxation were to be devoted to specific uses, the court said, and it was the policy of the State that these funds be jealously guarded.

The issue litigated in Town of Atherton v. Superior Court[10] was whether the zoning ordinance of the town could prevent the School District from locating a school in an area that had been zoned residential. In holding that the State has occupied the field in the matter of location of school sites

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[9]257 S.W. 441 (Mo. Sup. Ct. 1923).

[10]159 Cal. App. 2d 417, 324 P. 2d 328 (1958).

and that the Town zoning ordinances could not exclude the school, the court said:

> The public school system is of statewide supervision and concern and legislative enactments thereon control over attempted regulation by local government units....
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> . . . . .
>
> The comprehensive system of school control and operation by the school districts as shown in the statutes herein discussed is completely inconsistent with any power of a municipality to control the location of school sites.... If ... the construction and maintenance of a school building is a sovereign activity of the state, it is obvious that the location and acquisition of a school site is necessarily and equally such an activity. Obviously, too, neither the Constitution nor the Legislature has consented to a municipal regulation of school sites.[11]

Another case which involved a zoning ordinance was State ex rel. St. Louis Union Trust Company v. Ferriss.[12] In this case, the court regarded schools as a governmental function and stated that control of public institutions could be accomplished through zoning ordinances only where they involved proprietary functions of the State.

These quotations all related to institutions or organizations that could readily be classified as public on the basis of their organization and administration or use of funds secured by public taxation. These opinions may apply only in certain respects to institutions and activities generally regarded as private because they are not operated by a political unit of government.

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[11] 324 P. 2d at 331, 335-336.

[12] 304 S.W. 2d 896 (Mo. Sup. Ct. 1957).

Private Education and the Public Use Principle.

No case has been discovered in which a private school below the college level has sought to exercise the right of eminent domain, but the two cases involving colleges that would be considered private, as compared with state or municipal institutions, resulted in conflicting decisions.

In Connecticut College for Women v. Calvert[13] a demurrer to the petition of the Trustees for appointment of appraisers was sustained and affirmed on appeal. The College was organized by a special legislative act of 1911 under the name of Thames College. By its charter its sole purpose was stated to be the higher education of women, and control and disposition of property and the management of affairs of the College were vested in a Board of Trustees elected by members of a corporation. Its property was exempt from taxation, and later in the session the name was changed to Connecticut College for Women. A special act amending the charter was passed still later in the 1911 session of the legislature giving the College the power to take such real estate in New London and Waterford as was necessary upon the payment of just compensation according to the procedure outlined in the statutes for condemnation of land for the site of county buildings. The demurrer of the property owners challenged the constitutionality of the act granting the power of eminent domain to the College on the basis that it was a private corporation. The question of whether a private corporation administering a public charity may exercise the right of eminent domain was recognized by the court as one of first impression, and the court stated that:

> However elastic and indefinite the term "public use"

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[13]87 Conn. 421, 88 Atl. 633, 48 L.R.A. (NS) 485 (1913).

> may be, it is certain that no additional or novel application of the power of eminent domain can justify the taking of property for a private use.[14]

Three classes of public uses were outlined by the court:

1. Uses exclusively governmental, such as forts, post offices, jails, and court houses,

2. Uses governmental in nature but administered by private organizations, such as cemeteries, markets, turnpikes, bridges, wharves and other public services,

3. Property taken and administered by private corporations for purposes governmental in their nature when the community has a common right upon equal terms to the use, or to benefit from the property taken.

The first two uses, the court said, were properly within the discretion of the legislature but when the right of eminent domain is delegated to a private corporation, the justification for taking depends on the character of the use and the manner in which the use is to be administered. In the third class of uses would be cases which have been called "flowage cases," but the court distinguished these from the case at bar on the basis that the water powers of Connecticut were a public asset of great value and "directly for the benefit of the state as the owner in sovereignty of its own territory."[15] The court recognized that the higher education of women was governmental in nature but paraphrased a cemetery case to the effect that there are many colleges for the higher education of women in which the public have not and cannot acquire the right to be educated.

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[14] 88 Atl. at 635.

[15] 88 Atl. at 635.

> The vital question is whether it appears that the public will have a common right upon equal terms, independently of the will or caprice of the corporation, to the use and enjoyment of the property sought to be taken.[16]

Counsel for the College argued that higher education should be regarded as a public utility in the same manner as water resources and not necessarily as a public right. The court, in answer to this contention, cited cases in which the right to use public funds for educational institutions had been denied because the institutions were not under public control and stated that if the authority to exercise the right of eminent domain were granted:

> ... we should be logically unable to restrain the exercise of the same authority in favor of private corporations operated for profit and administering purposes governmental in their nature for the exclusive use of their own members and selected beneficiaries.[17]

The court felt that in order to grant the power, a public benefit should result from the taking which could not otherwise be realized, and concluded that:

> The fact that these public universities exist and flourish in so many states is conclusive proof that the necessity which justifies the grant of eminent domain to private persons in order to develop the material resources of a state does not exist in the case of institutions for the higher education of women.[18]

In the dissenting opinion, it was pointed out that the charter did not specify that all must have the right to attend the College, nor did it prohibit some from attending. The dissenter also thought the change of name indicated an intent of the legislature that the College should serve all

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[16] 88 Atl. at 637.

[17] 88 Atl. at 639.

[18] Ibid.

women of the State. The facts that it was a charitable trust engaged in service and not for profit, and that it was exempt from taxation, were cited by the dissenter as evidence of a quasi-public purpose carried out by the College. It was noted that the right of eminent domain had been supported when granted to individuals and corporations in private business in such enterprises as public utilities, mining, grain elevators, cemeteries, grain mills, petroleum transportation, drainage and irrigation, and mills for manufacture of ax handles and tinware, none of which, the dissenter said, were uses which might properly be administered by the state. He felt that every valid exercise of the right of eminent domain could be supported on the principle of public utility. The dissenting justice pointed out that the public right or common right on equal terms doctrine had been repudiated in another case of the Connecticut court and that:

> No good reason can be suggested why purposes which benefit the body and mind of citizens or which educate, uplift, and enoble a community, should not be esteemed of as great public good as the things which add directly to its wealth or give employment to its citizens.[19]

According to the dissenting opinion, a college is open to the public on equal terms although admission to it is surrounded by reasonable regulations which do not prohibit the public in a partial way from the right to enjoy the benefits of the institution.

A result opposite to that reached in the Calvert case was the decision in University of Southern California v. Robbins.[20] This case began as an action by the University to acquire a tract of land for use as a portion of

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[19] 88 Atl. at 646.

[20] 1 Cal. App. 2d 523, 37 P. 2d 163, cert. den. 295 U.S. 738, 55 S.Ct. 650 (1934).

the grounds surrounding a newly constructed library. No structures were to be erected on the parcel sought, but it was for the purpose of suitable landscaping and making the entrance to the library more readily accessible. Located on the tract were a drugstore, a residence, two cottages, and two garages. The owner conceded that the University was a benevolent, non-profit institution offering cultural facilities valuable to the community, but he contended that the taking of the property was for a private use. In answer to this contention, the court noted California statutory provisions that the right of eminent domain might be exercised by any institution within the State of California which was exempt from taxation under the provisions of the Constitution, which included any educational institution of collegiate grade whose resources were used exclusively for the purpose of education. The court also noted that the Articles of Incorporation of the University provided that the University should be open and equal privileges accorded to each and every resident of the State whether male or female, and regardless of nationality, race, or religious belief, who possessed the required qualifications for entrance. The Articles also provided that these qualifications should be of the same general character as those required by State colleges and universities of California. The case was distinguished from the Calvert case on the basis that there the College lacked in its organic structure the elements upon which the University in this case relied. Noting that private property had been taken by a private cemetery for a public use in California, the court said:

> It could not reasonably be urged that the development of public utilities and natural resources or the burial of

> the dead are more truly public uses than the intellectual development of our citizens.[21]

A decision of the United States Supreme Court in a case involving irrigation water rights was noted, and the court concluded from that case that it was not essential that the entire community directly enjoy or participate in the benefits from the use acquired. The appellant owner said that if the current use was regarded as public, the University might later amend its articles or make arbitrary rulings to infringe the rights the public enjoyed at the time. In response to this suggestion, the court said:

> The illustrious record of respondent university for half a century is a matter of common knowledge, and the creative altruism of its graduates who have become integrated into the life of our state bears impressive testimony to its ideals and purposes.[22]

Therefore, it would be unreasonable to suppose that the institution would, by trickery or evasion, act to deprive the public of benefits in the property in question. However, the bulletin of the School of Pharmacy stated that the University reserved the right to reject any applicant for admission even though he may meet the requirements listed. The court found testimony in the record to show that the purpose of this regulation was to permit the exclusion of those whose purposes were inimical to the University and to society on moral and ethical gounds. Such a reservation was not regarded as a denial of full rights to one who was otherwise qualified. The statement by the court that the land was devoted to a high public use and that "its dedication to that objective is made further apparent by the fact that the respondent seeks to acquire such property by these proceedings rather

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[21] 37 P. 2d at 166

[22] Ibid.

than by purchase" may be open to question. It would seem that this was the precise issue to be litigated. This case is an important precedent for the fact that a private educational institution may follow proceedings outlined by constitutional and statutory provisions for the condemnation of private property when the right of the public to benefit from the institution is clear. It could not be said that this case overruled the Calvert case, but it is, instead, distinguishable on the facts.

Fountain Park Company v. Hensler[23] did not involve a school or college, as such, but the attempt by a Chautauqua Company to condemn private property. The defendant maintained that an act of the legislature, granting any voluntary association organized for the purpose of establishing a Chautauqua the right of eminent domain, was void as an attempt to confer the power on a private corporation for purposes which did not constitute a public use. The court agreed on the basis that the constitutional inhibition against taking private property for public use without compensation "by necessary implication prohibits taking private property for private use." The holding was also based on the finding that Indiana had not recognized the "benefit, advantage, or utility rule" for determination if a use is public. In other words, it was essential that the public have a right to a definite and fixed use of the property in question. The cases based on the utility rule were distinguished as being decided according to a different public policy at the time or place of decision. The court admitted that the Chautauqua Company might render public service, but said it would not follow that every organization wielding public benefit could be endowed with a power of eminent

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[23]199 Ind. 95, 155 N.E. 465, 50 A.L.R. 1518 (1927).

domain or there would be a list including churches, lodges, clubs, civic organizations, temperance organizations, theatres, circuses, public halls, hospitals, homes for the aged, and an endless chain that would know no bounds. There was an absence of showing, the court felt, that the meetings of the Society were for the whole public or that the general public had a right and power to compel the Society to serve it. The Calvert case was cited as authority for the decision.

A private educational organization was the defendant in Union School District of City of Jackson v. Starr Commonwealth for Boys.[24] The defendant said its property was owned by a non-profit corporation and used for a public purpose. The court held that the Commonwealth was not a government agency or supported by the government, that there was nothing in the statutes or constitution to immunize it, and that its property was private and subject to condemnation.

SOME SPECIFIC USES FOR PROPERTY CONDEMNED BY SCHOOLS AND COLLEGES

Even though the agency seeking to exercise the right of eminent domain is clearly public, the use to be made of the property condemned may be questioned. In many of the cases, the use to be made of the property is assumed to be public, but in a few, the issue has been litigated.

Schoolhouse Sites.

The use most frequently assumed to be of a public character is that the condemnor wants land on which to erect a schoolhouse of classrooms. The

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[24] 322 Mich. 165, 33 N.W. 2d 807 (1948).

opinion of In re Application to Condemn Land in Rock County[25] was to the effect that there was no question that the taking for a schoolhouse site was authorized and a public use. In the Ouachita Parish School Board v. Clark[26] case, the answer of the property owner was that the petitioner had no cause of action. The court dealt with the allegation in a summary statement that the petitioner had alleged that his site was inadequate, that this was the only property suitable, and it was needed for public use.

Playgrounds, Athletic Fields, and Gymnasiums.

The taking of property for use as playgrounds or athletic fields has been contested in a number of cases.

The owner attempted to defeat condemnation proceedings in State ex rel. School District No. 56 of Chelan County v. Superior Court[27] by asserting that the land taken for a playground was for the use of the pupils, and to that extent, not a school purpose. Physical development was recognized in the opinion as just as important as mental growth, and it was held that the school could not be without suitable places for physical activity.

The Board in Kern County Union High School District v. McDonald[28] passed a resolution to condemn land for a gymnasium in anticipation of a bill not yet passed by the legislature which would require the school to provide two hours per week of physical training for each student. One of the issues of

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[25]121 Minn. 376, 141 N.W. 801 (1913).

[26]197 La. 131, 1 So. 2d 54 (1941).

[27]69 Wash. 189, 124 Pac. 484 (1912).

[28]180 Cal. 7, 179 Pac. 180 (1919).

the case was whether condemnation of land for a gymnasium was within the authority of the district. The court held that the district was clearly empowered to condemn land for the purpose alleged, if not expressly, then by necessary implication. Other sections of the California Code were cited which provided that attention should be given to the physical exercise, health, vigor, and physical development of pupils, and that the high school course may include training in athletics for which credit may be given.

The petition for condemnation filed by the commissioners of the District of Columbia for land for an athletic field for Western High School was dismissed by the trial judge because he found this use would violate the zoning law. The zoning law provided that educational, philanthropic, or eleemosynary institutions could be located within the residential district. In Commissioners of District of Columbia v. Shannon and Luchs Construction Company[29] the Federal District Court reversed the trial court and held that the athletic field was accessory to and part of the high school and properly located within the residential district without conflict with the zoning law. In the opinion of the court:

> An educational institution consists, not only of the buildings, but of the grounds necessary for the accomplishment of the full scope of educational instruction.
>
> More properly defined, a modern educational institution embraces those things which experience has taught us are essential to the mental, moral, and physical development of the pupils. It is not the modern conception of a public school that it be erected on a lot merely large enough in area to contain the school building. In addition to the buildings there should be playground space, basketball stops, chinning bars, room for calisthentics, all in the open air. It is also for the general welfare

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[29] 57 App. D. C. 67, 17 F. 2d 219 (1927).

> and safety that the school children be furnished a place in which to play, removed from the dangers of street traffic.[30]

A similar factual situation was presented in Herren v. Board of Education.[31] The objection to the condemnation in this case was made by abutting property owners who intervened, seeking an injunction against construction of a football field or stadium. The case was decided on other grounds, but the court did comment that " ... the challenge of the authority of the condemnor to condemn for the purposes as stated is utterly without merit."

The court in People v. Pommerening[32] found evidence in the record to support the verdict that taking 10½ acres for a golf course was for a necessary educational purpose. The relationship of athletics and physical education became a critical issue as the property taken was to be paid for from funds of the Board of Control of Athletics. It was probably most essential to the decision that the court found the Board of Control an operating agency of the Regents rather than a private corporate entity, but the opinion also noted that the resolution of the Regents declared the property essential to the development of physical education as an integral part of a broad program of education. There was no error found in the instructions to the jury, which had not specified that the property was sought for a golf course, because this fact was understood.

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[30] 17 F. 2d at 220.

[31] 219 Ga. 431, 134 S.E. 2d 6 (1963).

[32] 250 Mich. 391, 230 N.W. 194 (1930).

The importance of physical education in the school curriculum was discussed in Town of West Hartford v. Talcott[33] as a basis for the finding that it was reasonably necessary to provide a playing field. The opinion included information about the dimensions of baseball fields and how they might be located on an 8.62 acre tract in order to show that the entire tract was needed. The Town also maintained Beachland Park, but the court indicated that it was not part of the educational program, and access to the park would be difficult for school children.

The Board sought to acquire a site for a gymnasium in Seba v. Independent School District No. 3,[34] and the court was of the opinion that part of a block in the town of Leedey was not too much for such a building when modern conditions and the popularity of athletics among high school students were considered.

Dicta in Board of Education of City of Minot v. Park District[35] indicated that the use of an area for an athletic field was quite different from use of an area for a park. The court recognized that the time had long since passed when schools were devoted exclusively to mental training, and that the physical development of a child was as essential as his mental development. Many proper activities of the school, the court added, took place outside the classroom.

Three other cases in which the authority of the school district to take property for athletic fields or playgrounds was upheld with very little

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[33]138 Conn. 82, 82 A. 2d 351 (1951).

[34]208 Okl. 83, 253 P. 2d 559 (1953).

[35]70 N.W. 2d 899 (N.D. Sup. Ct. 1955).

comment were Lipscomb v. Bessemer Board of Education,[36] Board of Education of Kanawha County v. Campbell's Creek Ry. Co.[37] and Vierling v. Independent School District No. 720.[38]

Dormitories.

People v. Brooks[39] resulted when an alumnus offered the University of Michigan $1,500,000 to build a Lawyer's Club, which was accepted by the Regents. With State money, the Regents sought to purchase two blocks immediately south of the campus as a site for the club, but eleven of the owners refused to sell, so the Regents sought to condemn the property. A jury verdict finding necessity for the taking and awarding damages totalling $230,870 was accepted by six of the owners, but five sought a review on certiorari. One of the bases for their appeal was that the use for which the property was sought was not a public use. The court thought that this argument was so plainly without merit that it needed no extended discussion. Citing from the letter of the donor, the opinion pointed out that the building was to furnish sleeping and study rooms for 150 law students and dining accomodations for 300 students and that dues and profits from the building would be used to further legal research. "It will be for the lawyers to hold this great republic together, without sacrifice of its democratic institutions," the court added.

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[36]258 Ala. 47, 61 So. 2d 112 (1952).

[37]138 W. Va. 473, 76 S.E. 2d 271 (1953).

[38]129 N.W. 2d 338 (Minn. Sup. Ct. 1964).

[39]224 Mich. 45, 194 N.W. 602 (1923).

Two other cases in which the public nature of an exercise of the right of eminent domain for dormitory purposes was upheld were Russell v. Trustees of Purdue University[40] and Board of Regents v. Palmer.[41] In the Russell case the court defined a dormitory as a building containing sleeping rooms especially connected with a college and noted that the early usage of "college" meant a place of residence for students, a "group of buildings in which scholars are housed, fed, instructed, and governed under college discipline...." The taking of title to a tract across the street from a student dormitory for parking purposes was upheld in Wampler v. Trustees of Indiana University.[42]

General Community Uses.

While it may not have been entirely pertinent to the eminent domain proceeding, the issue of whether the school district could provide recreational facilities for surrounding communities was raised in State ex rel. Tacoma School District v. Stojack.[43] The court noted that the petition of the condemnor referred only to school use, but that evidence in the record indicated that the school intended to permit use of the playgrounds and athletic fields when school was not in session. While it may have been regarded as a limited right, statutory authority for use of school facilities

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[40]201 Ind. 367, 168 N.E. 529 (1929).

[41]356 Mo. 946, 204 S.W. 2d 291 (1947).

[42]241 Ind. 499, 172 N.E. 2d 67, 90 A.L.R. 2d 204 (1961).

[43]53 Wash. 2d 55, 330 P. 2d 567, 71 A.L.R. 2d 1064 (1958).

by non-school groups was relied upon in order to support the condemnation proceeding.[44]

The Board sought to condemn over 97 acres of land in addition to the 32 acres it had already purchased in Independent School District of Boise City v. Lauch Construction Co.[45] The land was to be used for a campus type high school and the remainder of the entire tract developed as a community educational-recreation area. The judgment favoring the school district was affirmed on appeal. The dissenting opinion, which took the position that there was no reasonable necessity shown for taking so much land, recited that, besides land for the buildings, the District wanted a gymnasium to seat 5,000 people, three or four football fields, 10-15 acres for a band drill area, four baseball fields, possibly a golf course, two soccer fields, eight basketball courts, 20 tennis courts, four volley ball courts, croquet and horseshoe areas, game and picnic grounds, 15-20 acres for parking, and space for nature study. The dissenter concluded that the statutes had never contemplated that school districts should be permitted to go into the real estate or parking business.

Phi Delta Theta v. Sachtjen[46] was an application for writ of prohibition against the judge to command him to desist from proceeding further in a condemnation action by the University of Wisconsin Board of Regents. The Board sought the property of the Fraternity for development of a continuing education center. The Fraternity insisted that the Regents were without

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[44] R.C.W. 28.58.050.

[45] 274 Idaho 502, 264 P. 2d 687 (1953).

[46] 260 Wis. 206, 50 N.W. 2d 469 (1951).

authority to condemn in this case when the funds and contract for the building would be provided by a private non-profit Foundation and there was no contract between the Regents and the Foundation. The court held that the public purpose was clear and that the statutes clearly authorized the Regents to acquire land for the purposes of adult education, short courses, institutes, and conferences. It was noted that the Foundation had no interest other than accomplishing the purposes of the Board of Regents.

Other Uses Held Public.

The University of Louisville, a municipal institution, proceeded to condemn property in the area of the Louisville Medical Center for a site for Methodist Evangelical Hospital, which would be used as a teaching hospital in connection with the University's School of Medicine. Both University and Hospital funds would be involved in the construction of the building, but title to the land, it was proposed, would be held by the University and the building leased to the Hospital. In Craddock v. University of Louisville[47] the owners objected on the basis that the agreement between the Hospital and the University was a subterfuge for allowing the Hospital to invoke the University's power of eminent domain to avoid a free-market deal. The court thought this objection imputed bad faith where there was none. Unquestionably, the court said, the University would own the fee in the property and for practical purposes would own the physical improvements since they could not be removed but would be attached to the land. While the Hospital could establish policy for the use of the buildings,

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[47]303 S.W. 2d 548 (Ky. App. 1957).

it would be required to allow the University to carry out its program. The defendants also objected on the basis that clergymen of the Methodist Church and other classes had preferred status and access to the facilities of the Hospital, but the court replied "these little twills of creedal purpose are merely human approaches to the divine design of service to all mankind, and hence not unconstitutional."[48]

The condemnation of property for use as an agricultural experiment field was upheld in Gerson v. Howard.[49] Alabama Polytechnical Institute sought to condemn 664 acres in a county other than the one in which the Institute was located. A demurrer to its application to condemn was overruled and the owner petitioned for mandamus to set aside the order overruling the demurrer. The owner's petition was dismissed and the dismissal affirmed on appeal. While the authority of the Institute to take property by eminent domain had earlier been affirmed,[50] the owner's position was that building expansion on the campus was quite a different matter from taking land for an agricultural experiment field in another county. Experimentation and research, reasoned the court, are most important methods of education, and the climatic conditions, soil, disease, and insects involved vary in the different parts of the State. Since Alabama Polytechnical Institute was the land grant college and had as one of its primary purposes the teaching of agriculture, and since an experimental farm had been established there too, the power of condemnation was not limited to the campus at Auburn. The

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[48]303 S.W. 2d at 552.

[49]246 Ala. 567, 21 So. 2d 693 (1945).

[50]Denson v. Alabama Polytechnical Institute, 220 Ala. 433, 126 So. 133 (1930).

court said there was no need to discuss the contention that there was no power of eminent domain given in the Agricultural Experiment Station System Act as the legislature probably considered that the power was already extant.

Knapp v. State[51] involved the attempt of the University of Minnesota to acquire land on which to construct a railway connecting the University farm with the street car system of the City of Minneapolis. The action was brought by the Attorney General in the name of the State under a Minnesota statute which specifically provided authority for the Board of Regents to provide a means of transportation from the farm to the campus and to acquire the necessary land by gift, purchase or condemnation. According to the court, the fact that the land was taken in order to provide transportation did not change the character of the use unless it could be shown that the facilities could not legitimately serve public purposes. In emphasizing the public nature of the University, the court said:

> The state in its governmental capacity maintains and conducts the University ... and may condemn for its use any property needed for the purpose of providing the institution with proper and convenient facilities for performing its work. The taking of property for such purposes is a taking for public use.[52]

Smith v. City Board of Education of Birmingham[53] was a taxpayers class action to enjoin condemnation. The Board's demurrer was sustained and the action of the trial court affirmed on appeal. The issue raised by the action was whether the Board had statutory authority to condemn property for the purpose of construction of a building to house the superintendent and his

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[51]125 Minn. 194, 145 N.W. 967 (1914).

[52]145 N.W. at 969.

[53]272 Ala. 227, 130 So. 2d 29 (1961).

assistants. By construing together three sections of the code relating to the general grant of powers for administration and management of the schools, the provision of quarters and equipment for administration, and the authority to condemn, the court found that this was a purpose within the intent of the legislature.

Whether a county junior college was a public education program authorized by law so that the county board was authorized to condemn property for the college was an issue in Sheppard v. DeKalb County Board of Education.[54] A very small portion of the opinion was devoted to discussion of the issue but the court cited a constitutional provision for county districts, the Junior College Act of 1958, and the county election to establish a junior college, as bases for the public purpose of the program.

THE NECESSITY OF TAKING PROPERTY FOR USE BY SCHOOLS AND COLLEGES

Not only must property taken by a school or college against the will of the owner be for a public use, but also the use to be made of the property must be one that is necessary. The question of whether a particular use of property is necessary has been raised frequently in school and college condemnation cases. The purpose of this section is to document this litigation.

Necessity Defined.

An immediate question that may be asked when the principle of necessity

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[54]220 Ga. 219, 138 S.E. 2d 271 (1964).

is applied to the facts of any case is "How much of a need must there be for the use of the property for it to be considered necessary?"

The terms "needful and advantageous" were suggested as synonymous with necessity in Graded School Trustees v. Hinton.[55] In Board of Education v. Forrest[56] the issue was whether the statute conferred authority only to acquire property by condemnation for school buildings. The Board selected a site for Efland High School on June 9, 1924, and purchased one of the two parcels on which the high school was built. The Board attempted to purchase the other parcel, but was unable to do so, and condemnation proceedings were ordered in December, 1924. The proceedings were begun in April and after that, the defendant, Forrest, conveyed his interest to the defendant Webb. Webb entered the property and the Board secured a restraining order against him. He appealed the case, and the restraining order was dissolved, but on the Board's appeal the dissolution of the restraining order was reversed. The trial court had held for the defendant on the basis that the high school had five acres and condemnation proceedings were not begun at the time the building was erected. The court stated its opinion that the term "suitable sites" in the statute was:

> ... broad enough to embrace such land, not exceeding the statutory limit, as may reasonably be required for the suitable and convenient use of the particular building; and land taken for a playground in conjunction with a school may be as essential as land for the schoolhouse itself.

This opinion suggests the use of the term "reasonable necessity" as well as

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[55]165 N.C. 12, 80 S.E. 890 (1914).

[56]190 N.C. 753, 130 S.E. 621 (1925).

the terms "suitable," "convenient," and "essential" to explain the meaning of necessity.

A reasonable necessity for the taking of land was conceded in Town of West Hartford v. Talcott[57] but the defendants objected to the finding by the court that all the land asked for by the Town was necessary. Two petitions were brought by the Town, one for 1.36 acres and one for 7.26 acres. The tracts adjoined each other and the cases were tried together. A 50 foot frontage on the tracts was zoned for business. The Town owned 3.2 acres east of these tracts on which was located Talcott Junior High School. The land was sought for a playground. The order of the trial court appointing commissioners to assess damages was based on the finding that a reasonable, rather than an absolute, necessity was required, and that, in this case, all the land was reasonably necessary. The order was affirmed even though the defendants objected that there was no formal, detailed, specific plan designating what part was needed for what purpose and that the taking of the 50 foot strip zoned for business was not necessary. The court said there was no requirement in the statute that a plan showing the need be presented. Whether the necessity for taking the 50 foot strip could be upset depended on the construction given to "necessary." The court said it had been found "highly desirable" for the school to have full-sized baseball and softball fields and on this basis held that a reasonable necessity existed.

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[57]138 Conn. 82, 82 A. 2d 351 (1951).

The term "necessary" was construed in County Board of School Trustees v. Batchelder[58] to mean " ... expedient, reasonably convenient, or useful to the public," and not "indispensable" or "an absolute necessity."[59]

The Issue of Immediacy.

The problems of providing for future needs by condemnation have been set against the wish of the owner to protect his property from being taken unnecessarily in a few cases. Determination of how closely related in time a taking of property must be to its actual occupation and use for the purposes stated in order for the taking to be classified as necessary depends largely upon the facts of each case. Kern County Union High School District v. McDonald[60] presented a situation in which the Board was seeking to anticipate its needs by constructing a gymnasium in order to be able to offer physical education as required by a bill under consideration in the legislature. In answer to the defendant's objections the court stated that it was not essential that the District should already have a prescribed program of instruction in athletics, and that the District could exercise its discretion in anticipation of the mandatory requirements of the new law.

> Immediate future needs are ordinarily an essential factor in the determination of the question of whether or not there is a present necessity. The mere fact that land proposed to be taken for a public use is not needed for the present and immediate purpose of the petitioning party is not necessarily a defense to a proceeding to condemn it.[61]

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[58] 7 Ill. 2d 178, 130 N.E. 2d 175 (1955).

[59] 130 N.E. 2d at 178.

[60] 180 Cal. 7, 179 Pac. 180 (1919).

[61] 179 Pac. at 184, citing a New York case.

The question of public use can also be raised in consideration of the issue of immediacy as illustrated by the case of Cochran v. Cavanaugh.[62] In reversing an injunction against the taking by the Board of Regents for land adjacent to the State University, the court said:

> ... It is true that the act shows that the Legislature realized that all of this property could not at once be used for the purpose for which it was taken. The Legislature is not required to act only for the present; it has the power to determine the future needs of the University with reference to land, and to provide in the present for that which it believes to be a future necessity.[63]

The court added that the act in authorizing the Board of Regents by short rental contracts to realize some revenue from the excess of what could be immediately used did not constitute a taking for a private use.

An interesting and somewhat unusual piece of evidence for "future necessity" was cited in Independent School District of Boise City v. Lauch Construction Co:[64]

> In Reader's Digest for the month of December, 1953, there appears a thought-provoking article condensed from Time Magazine entitled "The Great Baby Boom." The article considers the impact upon our economy of the large and unanticipated increase in the rate of growth of our population. It forcibly points out the great expansion which will have to be made in the next few years in our private industrial plants and in our public facilities such as public schools.[65]

A dissent to the holding of the majority was based on the opinion that no reasonable necessity had been shown for taking over 97 acres in addition

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[62] 252 N.W. 284 (Tex. App. 1923).

[63] 252 S.W. at 286.

[64] 74 Idaho 502, 264 P. 2d 687 (1953).

[65] 263 P. 2d at 690.

to the 32 acres the District had purchased. The Superintendent of Schools had testified concerning the reasonable necessity for 130 acres for a campus type high school, community recreation area, and future needs. Testimony also showed that the Board had employed J.F. Weltzen of the University of Idaho, who had reported on needs of the District in 1944 and 1949. On the basis of these studies the projection of enrollment was 2,300 high school students.

Testimony by the Superintendent was apparently not as effective in the case of Board of Education of the City of Grand Rapids v. Baczewski.[66] The Board sought to take a tract of vacant land in an area surrounded by homes which was located about 3/4 of a mile from the Union High School of 1500 students. The court found nothing in the record to justify condemnation for playground uses, and concluded that economy was the dominant motivation of the Board. The report of the case included the testimony of the Superintendent and Business Manager as follows:

> We think it is wise for public boards to procure sites in advance in order that the taxpayers today may spend a small sum of money in order to save future taxpayers a vast sum of money.
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> . . . . .
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> What we are trying to do is save the taxpayers of this city some money by acquiring property which is not now developed so we don't have to do it after it is developed.[67]

The court thought this reasoning would be highly commended in purchase of property, but held it did not meet the test of necessity required for condemnation of property. Necessity, said the court, did not mean an

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[66] 340 Mich. 265, 65 N.W. 2d 810 (1954).

[67] 65 N.W. 2d at 811.

indefinite, remote, or speculative future, but now existing or to exist in the near future. Noting that instructions which told the jury they could not award speculative future damages were correct, the court observed that if necessity could be extended into the future so should damages be extended. The Board thought that the denial of the right to condemn would have far reaching consequences of importance to government units seeking future condemnation, and the court answered with the suggestion that granting the condemnation would have far reaching effects on the right of property ownership.

The holding in the Baczewski case was approved in a law review comment by Andrew Foster, Jr.:

> The principal case is one of first impression. ... In no modern case has the test of necessity to condemn property, for future use so speculative, been challenged, and it is submitted that this court has not placed an unwise restriction upon condemning agencies by adding the additional requirement that property sought to be condemned will be used within a reasonable time in the future.[68]

One of the grounds of the defendant's appeal in Waukegan v. Stanczak[69] was that the property taken was excessive in area and estate. The City sought a 15.2 acre tract in fee simple. The discretion of the condemning authority to take land sufficient not only for present but also for future requirements that could and should be anticipated was recognized. In this case, the Superintendent had testified that 15 acres was a minimum and 20 acres would be better. At the time the action was brought, there were 810 pupils in the grades 7-12, and prospects reported of 1400 to 1700 in five

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[68] 18 Detroit L.J. 233,235.

or six years. A formula of 10 acres plus one acre for every 100 students was mentioned with approval by the court.

SUMMARY

The function of education in society has been discussed in judicial opinions as a basis for determination of whether the taking of property by schools and colleges in eminent domain proceedings meets the test of public use. In one of the early cases on the subject, the court referred to the fact that the public usefulness and public necessity of education had been recognized by the legislature in establishment of schools. The fact that a particular locality of a State may benefit from a taking more than others will not prevent exercise of the right of eminent domain. Some relationship of the condemning agency to a government unit has been found in cases upholding the right of schools and colleges to take the property by condemnation.

Two cases adjudicating the right of a privately operated institution of higher education to exercise the right of eminent domain resulted in opposite holdings, but the cases are distinguishable on the basis of the facts involved. It would seem to be essential that for a privately organized and operated college or university to condemn property, the public must have a right on equal terms to benefit from the use of the property to be taken. This right is not denied by reasonable entrance requirements.

The attempt to classify uses as (1.) Exclusively governmental, (2.) Governmental in nature but administered by private organizations, or, (3.) Governmental uses administrated by private organizations which benefit the public, would not seem to establish dependable rules or principles. The important conclusion from this attempt at classification is that some

jurisdictions have less stringent tests than others for finding that property taken will be used for public purposes.

There is authority for condemnation of private property by a privately organized and operated university, but no case has been found in which a private school of less than college grade has attempted to exercise the right of eminent domain. It would be reasonable to assume that similar principles would apply, however, and that in a jurisdiction following a liberal test of public use, an institution not directly related to a governmental unit may be authorized by the legislature to exercise the right of eminent domain if the public has access to the benefits of the institution.

A wide variety of uses have been upheld when the condemnor is clearly a public agency, including schoolhouse sites, playgrounds, athletic fields, gymnasiums, golf courses, dormitories, parking lots, community centers, agricultural experiment stations, hospital construction, transportation, office buildings, and a junior college campus.

The "rule of reason" has been applied by the courts to the determination of the extent of need a school or college must show in order for property to be taken by condemnation. The opinions have generally interpreted the requirement of necessity liberally rather than making the necessity absolute. The amount of land that may be taken and the urgency or immediacy of its use have also been considered. Necessity has been held to require that the use for which the property is sought not be remote, indefinite or speculative, but no case has been located in which the school or college was prevented from taking a certain amount of property as long as statutory requirements were met.

CHAPTER IV

COMPETING PUBLIC USES

The issues discussed in Chapters II and III concern the taking of private property for public use. Closely related but somewhat different questions are raised when a public body seeks to condemn property already devoted to public use by another organization. Schools and colleges have been in the position of both petitioner and respondent on these issues, and the purpose of this chapter is to summarize the case reports. The cases in which schools and colleges have attempted to condemn property devoted to public uses will be considered first, followed by a discussion of cases in which the property held by schools or colleges is sought by other agencies.

ATTEMPTS BY SCHOOLS AND COLLEGES TO CONDEMN PROPERTY ALREADY DEVOTED TO A PUBLIC USE

In the absence of any apparent logical order of consideration, the cases in this section are presented in chronological order, with the exception of three cases which have been located that deal with zoning ordinances.

Streets, Parks, Public Utilities, Cemeteries, and a Poor Farm.

The defendant in Jordan v. Haskell[1] proposed that the location of a schoolhouse lot sought in condemnation proceedings was void because it included part of a public way. The action was brought as a bill in equity for an injunction to prevent erection of the schoolhouse. The trial court sustained the demurrer of the school district, and on appeal the action was dismissed. The holding was based on the fact that the plaintiff whose property was sought was in no position to complain and on the fact that the school did not plan to block the public way. Therefore, the case does not really settle any issue regarding the right of a school to take property devoted to a public way.

McCullough v. Board of Education[2] was an action for damages on a contract which had been awarded by the Board for building a schoolhouse on Hamilton Square. In this sense, it was not an eminent domain action, but the decision of the court was based on principles of eminent domain. The court found the contract ultra vires, and held that the plaintiff was bound to take notice that the Board could not "under any circumstances" acquire a right to occupy a public square for school purposes. A resolution of the Board of Supervisors authorizing the Board of Education to use a portion of the Square, which had been ratified by the legislature, was declared inoperative. Erection of a schoolhouse was not considered as one of the purposes for which public squares may be used.

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[1] 63 Me. 189 (1874).

[2] 51 Cal. 418 (1876).

Tyrone Township School District Appeal[3] was dismissed on the basis that land devoted to public use as a poor farm could not be taken as a site for a schoolhouse. The action was brought as a bill for injunction to restrain the School District from appropriating three-fourths of an acre of a 172 acre tract belonging to the County. The opinion of the trial court appeared along with the appeal. According to the trial court there was no question that the legislature may authorize taking of public property for another public use either by express words or necessary implication, which the court was unable to find. In order to imply the authority, the court thought it should appear that some special object could not be reached in any other place or manner. The legislature would not be presumed to abandon the former use without a clear expression of that intention. The opinion of the Supreme Court noted that the claim of the County that the tract was scarcely large enough and that no part could be taken without great prejudice to the poor had not been denied so must therefore be accepted as a complete answer to the claim of the School District. The court here stated that the legislature did not intend that land already appropriated and actually acquired for such an important use as care and support of the poor could be taken in whole or part for school purposes.

Another case involving the attempt of a school district to take a public square was Davis v. Nichols.[4] By an election in the District the northwest quarter of the public square in Tremont had been selected as a site for the school. The Village Trustees and School Directors had failed to agree on

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[3] 1 Monag. 20, 15 Atl. 667 (Pa. Sup. Ct. 1888).

[4] 39 Ill. App. 610 (1891).

transfer of the property. A petition for mandamus to require the School Directors to condemn the property was brought by residents of the District. The sustaining of a demurrer to the petition was affirmed on appeal, the court holding that public square and schoolhouse uses were entirely inconsistent. The court recognized a general rule that land held for a public use could be condemned for another public use when the latter was different from the former and not inconsistent with or destructive of the rights of the public. The rule was illustrated with the hypothetical argument as follows:

> Suppose the voters were to select as a site for a new schoolhouse, the middle of a public street, or the court house of the county; would it seriously be contended that such site could be enforced?[5]

In re South Western State Normal School[6] concerned the attempt of the school to close a street. In 1873, an addition to the town of California, Pennsylvania, was laid out containing 36 lots with streets and alleys. Prior to 1901 the school purchased 12 lots. Under the authority of a legislative act of 1901 authorizing condemnation of real estate for use of State Normal Schools, the school sought to close the street between Lots 10-15 on one side of the street and Lots 28-33 on the other side of the street. Its petition for approval of a bond required by the statute was dismissed and the dismissal was affirmed on appeal. The condemnation was prevented by the holding that the school was already the owner, seeking to condemn a public right of way over its own land. The court referred to the proceedings as an attempt to appropriate property without the apparent necessity to do so. The act by which the proceedings were brought was construed as referring to ground or

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[5] 39 Ill. App. at 612.

[6] 26 Pa. Super. Ct. 99 (1904).

land other than that of the petitioner. Dedication of streets and alleys was considered a contract with the public, a franchise which could not be violated except by express legislative authority. This franchise could not be terminated in the absence of an absolute necessity for the street to be closed.

Higginson v. Slattery[7] has been cited as a case on the subject of eminent domain, but the opinion clearly reveals that eminent domain issues were not involved. The case began as a petition in equity to restrain erection of a school building in a park, Back Bay Fens, as authorized by a statute. The City had acquired the fee by eminent domain in 1879. The court held that the State had the power to appropriate the property to another public use without the consent of the City, but found that the plans of the School Committee to devote 21% of the building to administrative offices was not within the purpose of the statute. In the opinion, the court stated that "Land appropriated to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that end."[8] The court intimated that without the administrative offices, the construction of a high school might have been permissible.

The question of whether a board of education could appropriate property already devoted to public use as a cemetery was raised in Board of Education of City of Akron v. Proprietors of Akron Rural Cemetery.[9] The suit was for injunction by the Cemetery Proprietors to prevent the Board from taking a

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[7]212 Mass. 583, 99 N.E. 523, 42 L.R.A. (NS) 215 (1912).

[8]99 N.E. at 527, 528.

[9]110 Ohio St. 430, 144 N.E. 113 (1924).

1.94 acre tract acquired by the Cemetery in 1885. The tract had not been improved by the Proprietors nor had any lots been platted or sold. In 1914, the Cemetery had leased the tract to the Board for use as a playground, and the Board had fenced and filled the lot which was located in the northwest corner of the Cemetery property. One of the findings of fact by the trial court was that the Cemetery was the principal burying grounds for the City of Akron and the entire tract would be needed in a few years. Another fact found was that the Board did not have special authorization to appropriate property devoted to a public use. The court held:

> Before property appropriated to a public use can be appropriated to another public use, which will later materially interfere with the original use, or be partly destructive thereof, it should be made to appear clearly that the same is necessary and not destructive of the public use to which the land is already devoted. ... Land exempt from appropriation cannot be taken under a mere general power of appropriation.[10]

In the case, the Board also challenged the right of the Cemetery to hold over 50 acres as provided in the special act by which the Cemetery had been incorporated. The Cemetery, however, was found to come under a general law authorizing cemeteries to acquire and hold not over 100 acres. The granting of an injunction was affirmed.

In re Oronoco School District[11] involved condemnation by the District of a public square which had been platted as a park. The statute[12] specifically authorized any school district to acquire any tract designated as a public square if not in an incorporated village, borough, or city. The

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[10] 144 N.E. at 116.

[11] 170 Minn. 49, 212 N.W. 8 (1927).

[12] 1925 Laws, Ch. 286.

issue of the authority of the District was not discussed in the appeal, which the court said was limited to the same issue heard by the commissioners, that of damages. The court did say, however, that if the District lacked the power to take the property, the power of the commissioners to award damages would also be lacking.

An action to take property owned by the City of Chicago and used as a nursery to supply parks and grounds with shrubs, Board of Education of Cicero-Stickney Township High School v. Chicago,[13] was not successful, but for reasons other than that the property was already devoted to a public use. A remark was made in the dissenting opinion that ownership by the City would not prevent the condemnation as the City was not using the property for a necessary public purpose.

The proceeding in eminent domain to condemn railroad land for a playground and athletic field was successful in Board of Education of Kanawha County v. Campbell's Creek Ry. Co.[14] In this case, there was no express statutory authority for condemnation of lands already devoted to a public use. The Board conceded that land actually devoted to exercise of a franchise could not be taken but maintained that if it was not essential to a franchise, it could be condemned. The Railway Company attempted to rely on the fact that a 1931 revision of the statutes left out an 1881 provision that lands not used by one internal improvement company could be taken by another. The court cited cases both before and after the 1881 act holding that one agency may take the land of another provided that lands were not necessary to the franchise. According to the court, it was not inconceivable that the

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[13]402 Ill. 291, 83 N.E. 2d 714 (1949).

[14]138 W. Va. 473, 76 S.E. 2d 271 (1953).

legislature intended to confer on internal improvement companies the authority to acquire and hold land in quantities wholly unnecessary for exercise of their franchise. Others with like authority might require the use of such land for a public use.

The question of whether a board of education could condemn an easement of a public utility corporation was raised in Pike County Board of Education v. Ford.[15] The issue was not settled by the appeal, however. In April, 1954, the Board began proceedings to condemn an 11.2 acre tract for a 12 grade school. On one end of the tract, 1.3 acres were under lease to the Columbian Fuel Corporation for use as a pumping station and gas line. Conclusions of law by the circuit court were that the corporation was a necessary party to the proceedings, that land leased by the corporation could not be put to any public use by the Board, that the Board had no authority to condemn it, and that the court was without power to separate the tract. On appeal, the trial court was found to have exceeded its authority, and the Corporation was held not to be a necessary party as the easements were not incompatible with the use of the land for school purposes. The court said

> The fact that a portion of the land taken will continue to be put to private use by a public utility, holding a lease thereon until the needs of the Board require its use does not destroy the right of eminent domain.[16]

The Board was held to have the right to take whatever interest the owners had, and the question of the Corporation interest was not part of the case. For this reason, the authority of this case regarding the right of a school to condemn the easement of a public utility must be regarded as doubtful.

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[15] 279 S.W. 2d 245 (Ky. App. 1955).

[16] 279 S.W. 2d at 248.

A fee simple title to Lincoln Park of 12.91 acres which had been dedicated to the use of the City with reversion to the parties who were defendants in the case was sought by the Board in Board of Education of City of Minot v. Park District.[17] After a demurrer was overruled, a jury trial resulted in damages of $25,820 in favor of the Park District and this judgment was affirmed. The North Dakota general eminent domain statutes provided that a fee simple could be condemned when for public buildings. The Board here was found to be a special district and under the general law. The reversioners of the Park District challenged the finding of the trial court that the proposed Junior High School constituted a greater necessity than the Park under the statute which provided for condemnation in such case. Findings of the trial court were based on the fact that the site was not well developed for park purposes in that no permanent improvements of substantial value had been made. The findings were also based on the importance to the Board of a central location, available utilities, suitable contour, and absence of hazards. The need of the Board for additional facilities was also mentioned. In answer to the defendant's contention that the test of necessity is convenience, the court replied that either use was based on convenience, and that convenience to the public becomes a necessity to the Board of Education in establishing a junior high school.

The attempt of the School Township to take property of a cemetery was unsuccessful in Cemetery Company v. Warren School Township.[18] The school authorities proposed that the terminology in the statute, "any real estate,"

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[17] 70 N.W. 2d 899 (N.D. Sup. Ct. 1955).

[18] 236 Ind. 171, 139 N.E. 2d 538 (1957).

meant that the legislature did not intend to impose restrictions on exercise of the right of eminent domain by school townships. It was the opinion of the court that statutes in derogation of the common law should be construed strictly, and the logical consequence of the school's interpretation would place their interests over streets, highways, railways, and public buildings. In addition, cemeteries had been given authority to condemn as broad as the school authorities, and the court found no reason to imply that one had an overriding priority where the legislature had not so specified.

A demurrer to the petition of the District to take cemetery property was sustained in Woodland School District v. Woodland Cemetery Association,[19] but reversed on appeal. The trial court was held to have abused its discretion in refusing to allow the District to amend its petition. The provision in the Code of Civil Procedure[20] that the right of eminent domain may be exercised as to property appropriated to public use if a more necessary public use than that to which the property was already appropriated was held to imply that cemetery property may be taken when the facts warrant it. The court held that the District should have been allowed to amend its pleadings to allege that the school use was more necessary, stating that:

> It is conceivable that under such circumstances use for school purposes could be held to be a more necessary use. While burial is a necessity essential to the preservation of the health of the living it may not reasonably be urged that burial is a more truly public use than intellectual development of our citizens.[21]

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[19] 174 Cal. App. 2d 243, 344 P. 2d 326 (1959).

[20] Sec. 1240, subdiv. 3.

[21] 344 P. 2d at 327.

Zoning Ordinances and School Condemnation.

The cases involving the attempts to prevent condemnation of property for school purposes by application of zoning ordinances are presented here for want of a more logical order. They should be differentiated from the cases in which specific property is already devoted to a public use, and their inclusion here is not intended to indicate that similar principles apply.

The petition for condemnation by commissioners of the District of Columbia was dismissed by the trial judge because he found an athletic field for Western High School within the prohibition of the zoning law. The decision was reversed in Commissioners of District of Columbia v. Shannon and Luchs Construction Company.[22] The zoning ordinance permitted institutions of an educational character to be located in the residential district and the court found that the athletic field was a public use, condemned without encountering the legal limits of the zoning law and regulations.

The school district of the City of Ladue brought a condemnation suit to acquire 32.26 acres of an 86 acre tract known as Lone Tree Farm owned by Joseph Pulitzer at the time of his death and devised to trustees to be held and maintained as a residential estate for his widow. A city zoning ordinance enacted in 1948 under statutory authority prohibited erection of a schoolhouse on the land involved. State ex rel. St. Louis Union Trust Company v. Ferriss[23] was an original proceeding to prohibit the judge from hearing the action to condemn. Citing the constitution and statutes, the court said

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[22]57 App. D.C. 67, 17 F. 2d 219 (1927).

[23]304 S.W. 2d 896 (Mo. Sup. Ct. 1957).

it was too clear to argue that the school district had an express grant of authority from the legislature

> ... with the absolute and exclusive power to select, locate and procure by condemnation the site here in question unless the legislature by the enactment of Chapter 89 has invested the City with the police power of the State to restrict the selection and location of school sites to the extent herein asserted.
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> To suppose that zoning ordinances may limit or prevent the public use for which land is taken is to invest municipalities with power to restrict the exercise of the power of eminent domain. Zoning ordinances are upheld on the theory that they bear a real and substantial relation to the public welfare. ... Through the medium of zoning ordinances municipalities may insist that private rights in real property yield to the general good of the community, but the presumption is that the use of public property is designed to promote the general welfare also...[24]

Cases which upheld the City's right to regulate facilities, sanitary conditions, and building standards were distinguished from the selection and location of school sites. Zoning ordinances were found to contain no express grant of power to regulate the location of schools, and the court noted that no authority had been cited that such power was implicit. The only reference to schools found in the zoning ordinance was that regulations authorized should be made in accordance with a comprehensive plan and designed to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. If this were regarded as a grant of power, as the plaintiff contended, the court thought the authority to exercise the right of eminent domain would be nullified. A New York case holding that a village could not prevent the location of a school within its

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[24]304 S.W. 2d at 899, 900.

borders was cited, but that case involved purchase of the property rather than condemnation.

Town of Atherton v. Superior Court[25] was brought as a writ of prohibition to restrain the Superior Court in an eminent domain proceeding by the School District. The Court of Appeals held that zoning ordinances would not control the location of schools and the petition for a peremptory writ was denied. On June 24, 1957, the City Council of Atherton passed an ordinance entitled "An Interim Zoning Ordinance Relating to Public Buildings and the Location Thereof Declaring Its Urgency and Providing That It Shall Take Effect Immediately." By the ordinance any property zoned residential was prevented from other uses, with a specific provision that property so zoned could not be used for public buildings, including, but not limited to, schools. On the same day, a resolution was passed proposing hearings to determine if a zoning district should be established in which public buildings, including schools, may be located. On July 3, 1957, the School District began its eminent domain action for nine acres within the city limits in an area which was zoned residential only. The court cited a California case to the effect that the State had preempted the field of regulating public school building construction so that the school was not subject to municipal regulation and a requirement of a $300 permit. School districts were recognized as agencies of the State for the local operation of the State school system, and in the matter of location of school sites, the State was found to have occupied the field. The plaintiff contended that the delegation of the authority to exercise the right of eminent domain was limited by the

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[25] 159 Cal. App. 2d 417, 324 P. 2d 328 (1958).

police powers given to the municipality by the constitution and by the authority to enact zoning provisions given to municipalities by the legislature. It would seem, therefore, that the court put State control of the school system over State control of municipalities. The Education Code provided that Boards should give Planning Commissions notice of their proposed acquisitions, but the ultimate determination of sites was left to the Board. A disapproval by the Planning Commission could be overruled by the Board. The Town maintained that its power to zone came from the constitution, and was therefore superior to the right of the legislature to provide for school sites. The Town also insisted that the legislature had designated municipalities as the agency to enforce the police power and that education was listed as one of the use areas specified in the zoning law. In the opinion of the court, the legislature did not intend to repeal the power given to school districts expressly as state agencies to locate schools, but had used general language in the zoning law to cover all situations. The interest of the State in school buildings was also supported by the fact that funds for capital outlay were provided by the legislature and a recent appropriation of $30,000,000 was mentioned. The fact that the Town's ordinance was an interim ordinance would not prevent the District from exercising the right of eminent domain. The question of whether the District had acted arbitrarily or abused its discretion could not be determined in a prohibition action, but the court suggested it was possibly a matter of defense to be determined in the condemnation action. Another case, in which facts similar to the Atherton case were alleged, was reported, but the court said all the

issues raised were similar to those of the Atherton case and further discussion was unnecessary.[26]

ATTEMPTS OF PUBLIC AGENCIES TO CONDEMN PROPERTY OF SCHOOLS AND COLLEGES

Only one case has been located in which the attempt of a public agency to condemn the property of a school or college was unsuccessful. President and Fellows of Middlebury College v. Central Power Corporation of Vermont[27] was a suit brought by the College to enjoin the Corporation from taking part of its property for development of a water storage and electric power project. The property sought was devised to the College by Joseph Battell in trust forever as a park for the benefit of the students with the provision that the citizens of Vermont be allowed access to the park. The injunction was sought on the basis that it was a public park dedicated to the public uses under the terms of the Battell will. The court held that lands dedicated and employed to a public use could not be taken for another public use without legislative authority either expressed or implied. It was not considered essential that the State hold the legal title to park lands which are devoted to a public use. The court was of the opinion that:

> In each case the distinction between public and private uses lies in the character of the use, and determination of the character of a given enterprise cannot be made upon consideration of legal principles alone; economic conditions and the needs of the people must have attention.[28]

The corporation maintained that the Battell will created only limited rights

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[26] Landi v. Superior Court, 159 Cal.App. 2d 839, 324 P.2d 326 (1953).

[27] 101 Vt. 325, 143 A. 384 (1928).

[28] 143 Atl. at 388.

for the public as a condition subsequent, but the court was of the opinion that the intention of the testator was clearly to preserve wild lands and found that the land was dedicated to a public use. The fact that the Trustees had the power to fix reasonable regulations regarding public access to the park was not considered the power to deny access. The primary use of the property was found to be public and not subordinant to the private use by the College.

The other cases in which the property of schools and colleges has been taken by public agencies are presented in chronological order.

The earliest case located was Trustees of Belfast Academy v. Salmond.[29] In 1825, the selectmen of Belfast laid out a town way diagonally across a lot belonging to the Academy within a few feet of its building. In 1833, the Trustees put up a fence across the way. The selectmen removed the fence and this resulted in the action of trespass being brought by the Academy, which resulted in a non-suit. According to the court, it was clear the land was private property subject to claims on the part of the public.

Similar facts were involved in the case of Trinity College v. Hartford[30] except that it was a petition for an injunction to prevent opening a street. The right of the public to take the college property was not discussed in the case, but assumed.

Rominger v. Simmons[31] began as a petition for location of a highway in Haw Creek Township of Bartholomew County. A remonstrance was filed by some

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[29] 11 Me. 109 (1833).

[30] 32 Conn. 452 (1865).

[31] 88 Ind. 453 (1882).

of the owners alleging that there was no public need for the highway and the damages awarded were inadequate. The Haw Creek School Township filed a separate remonstrance but did not press the appeal. The instructions of the trial court had told the jury that no part of the proposed highway could be located on premises owned, used and occupied by the School Township for common school purposes, because such property, being the property of the State, could not be entered upon for the purpose of locating a highway thereon. The jury was told however, that they could locate the proposed highway if they found it to be of public utility regardless of the fact that part of the proposed line would be occupied by a schoolhouse. It had been conceded that if the highway were established, a portion of the school building would be in line of the highway, but this fact alone, the jury was told, would not defeat the petition for location of the highway. The rights of the School District would not be in any way affected, and location of the highway would not authorize destruction of the schoolhouse. The jury was told that the effect of finding the road to be of public utility would be to locate the highway as proposed, with the schoolhouse intact occupying a part of the highway. On appeal the court found error in these instructions on the basis that it was not for the jury to fix the location of the road. It was not regarded an issuable question whether the road would occupy land owned by the School Township. Taking the instructions as a whole the jury could not have understood that they were not to determine the line of the road but only the question of public utility and damages. The court then discussed whether a public highway may be located on school property, and concluded that the appropriation would not extinguish the franchises of the School Township. The cost of the highway to the public would be a proper

question for the jury in determination of public utility, and this cost would include the expense caused by removal of the brick schoolhouse. The court found error in instructions saying the schoolhouse might occupy a portion of the highway, but added it was not erroneous to say that the schoolhouse in line with the highway should not alone defeat the petition.

In re St. Paul and Northern Pacific Ry. Co.[32] was appealed from denial of a motion by the State to dismiss the petition. The motion was made on the ground that the Company could not appropriate the land of the University. The court found the lots in the Regents Addition of Minneapolis were not used or held for public purposes by the State and not contiguous to the University grounds, so therefore liable to appropriation in the same manner as private property. No cause was shown by the University why such lands might not be taken.

Dicta in University of Minnesota v. Northern Pacific Ry. Co.[33] suggested that if the University had been found to have acquired title in the lots in question they would not have been subject to condemnation by the Company. The case was decided for the Company because the action of members of the executive committee of the Board of Regents had not been recognized by the Regents, nor had the property been put to any use by the University.

Another case involving the laying out of a town way over a schoolhouse lot was Easthampton v. County Commissioners of Hampshire.[34] The action was brought as a petition for certiorari to quash the proceedings and the petition

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[32]34 Minn. 227, 25 N.W. 345 (1885).

[33]36 Minn. 447, 31 N.W. 936 (1887).

[34]154 Mass. 424, 28 N.E. 298 (1891).

was dismissed. Justice Holmes noted that ordinarily a highway or railroad could not be laid out longitudinally over a previously established highway or railroad according to general statutes or without special legislation, but he was of the opinion:

> ... When we come to more difficult cases, we derive little aid from the varying statements of general principles under which authority will be implied to take land for a second public use.
>
> We must consider the relative importance and the necessities of the two uses generally, the extent of the harm to be done, accept any light that history may throw, and make up our minds under all the circumstances of the particular case as best we can.[35]

Considering that large tracts are appropriated to school purposes, it was thought impossible to accept an unqualified rule that no part of school property could be taken for a way under any circumstances without express enactment. The Rominger case was cited as authority for the taking. The opinion reasoned that the converse case of an attempt to put a schoolhouse within the limits of a highway would not be so strong, as there would be no necessity for taking the property since the school had a much greater freedom of choice. The record of the Governor and Council of 1702 was cited to show that such a case had been permitted, and the conclusion was that, according to this reasoning, the present case should also be permitted. Other examples cited of public property taken for other public uses involved a highway through a reservoir, a railroad already located through a cemetery, and a crossing of a large tract by a highway at the edge.

An action for damages was brought in Board of Education v. Kanawha and Michigan Ry. Co.[36] In 1892, the Railway Company erected an embankment across

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[35] 28 N.E. at 298.

[36] 44 W. Va. 71, 295 S.E. 503 (1897).

the schoolhouse lot for the bed of its road without legal permission. The Board alleged that the playground had been destroyed, the railroad created a nuisance, its access to a river and spring had been cut off, and that the lot was therefore worth nothing as school property. It had been used each year, however, since the embankment was built. The issues presented in the case related to the measure of damages and these will be discussed in Chapter VII. The court did point out that the school could build a fence, dig a well, or get adjoining land for its playground.

The issue of damages was also of paramount importance in San Pedro, L.A. and S.L. Ry. Co. v. Board of Education of Salt Lake City.[37] The railroad condemned a strip 43½ feet wide off the south end of a 292 x 150 foot lot. The trial court found that the property was entirely destroyed for school purposes and awarded damages for the entire property, including the four room, 63 x 90 foot building. The track was located 127 feet south of the building, and access to the building was unimpaired. The Company's motion for a new trial was overruled, and this ruling was reversed on appeal. The finding of the trial court that the property had been wholly destroyed was not supported by direct evidence, and error was found in the instructions that let the jury believe the Board might abandon the property under any conditions other than total destruction for school purposes.

A judgment awarding damages to the School District for property taken by the State for use as a highway was affirmed in School District of Borough of Speers v. Commonwealth of Pennsylvania.[38] In this case the highway

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[37] 32 Utah 305, 90 Pac. 565 (1907).

[38] 383 Pa. 206, 117 A. 2d 702 (1955).

department was contesting the requirement that damages be paid to the District because the District was already an agent of the State.

The United States acquired title in condemnation proceedings to 3.42 acres of Ridgely West Virginia High School property for a flood control project, and the case of United States v. Board of Education[39] adjudicated the issue of the measure of damages.

The measure of damages was also the only major issue in State v. Salt Lake City Public Board of Education.[40] The State Road Commission in construction of an interstate highway condemned Franklin School and possession was granted by a stipulation of counsel. The dissent in the case commented that the highway was conceded a more necessary public use although this was really not contested.

Another highway condemnation action in which damages were at issue was Union Free School District v. State.[41] In this case the state appropriated a strip along the frontage of the school property and two parcels in the northeast portion of the elementary school site. The court noted that the school did not use the entire site for school purposes and that the two parcels in the northeast corner were undeveloped.

The state acted to condemn 7.4 acres for highway purposes through the campus of University High School in Waco in the case of State v. Waco Independent School District.[42] In this case, also, the issue before the

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[39]253 F. 2d 760 (4th Cir. 1958).

[40]13 Utah 2d 56, 368 P. 2d 468 (1962).

[41]35 Misc. 2d 373, 230 N.Y.S. 2d 416 (N.Y.Ct. Claims 1962).

[42]364 S.W. 2d 263 (Tex. Sup. Ct. 1963).

court was whether the school had a market value, and it, too, will be discussed further in Chapter VII.

SUMMARY

Condemnation of property already devoted to a public use as a public park by a school district has been permitted in a recent case, but the power of a school or college to take other public property has, in general, been limited. The other cases of competing public uses in which a school or college has been successful in condemning property involved factual situations in which the public use by the other agency was marginal or the use of the property by the school did not interfere with the pre-existing public use. The courts have held consistently that in the absence of express legislative provisions, a school or college may not condemn property already devoted to another public use, and only two cases, both of which were decided in favor of the school district, have been located in which such provisions were construed.

The efforts of other public agencies to take property of schools and colleges have apparently met with greater success, as only one case has been located in which the taking was denied, and in that case the use of the property was found to be public not so much for educational purposes as for general access to the property for park purposes as dedicated by the terms of a will. In two older cases the property of private colleges yielded to public use for streets. The property of public schools and colleges has generally been found to be subservient to public highways and railroads on the theory that the location of a school or college is less critical than that of a public transportaion artery. In many of these cases the paramount

issue has been the measure of damages, the more necessary use having been conceded or uncontested.

Cases in which the condemnation of property by schools has been challenged because in violation of zoning ordinances do not involve the same issues as those in which the property sought is actually put to a public use, but the rights of two public agencies are put at issue. All the cases located hold that zoning ordinances of a municipality, even though they are enacted under statutory authority, will not prevent condemnation of property by public schools also operating according to legislative provisions. The references to location of schools in the zoning statutes have not been construed as grants of power to the municipalities. The power of eminent domain granted by the legislature to schools in these cases has been found to be greater than the police power granted to municipalities.

CHAPTER V

DETERMINATION OF QUESTIONS OF PUBLIC USE AND NECESSITY

In Chapters III and IV, the issues involved in the commonly recognized principles that property condemned by schools and colleges must be for necessary public uses were investigated. The purpose of this chapter is to document the judicial opinions in school and college eminent domain cases concerning the methods of determining questions of public use and necessity.

It should be recognized at the outset that, as a result of the function of review, the judiciary could be considered the final arbiter of almost any question. There are questions, however, which the courts have been reluctant to consider, and to a relative extent, the determination of these questions can be said to be left primarily to legislative or administrative bodies. In the cases where the courts disqualify themselves from consideration of an issue a phrase such as "except in case of fraud, abuse of discretion, or bad faith," is usually added. It should be noted also that in some jurisdictions the statutes have been more explicit than in others about the roles of the various agencies involved in condemnation proceedings. Sometimes it is not clear from the report of a case whether the comments regarding who should determine if a taking of property meets the requirement of the law are necessary to the decision or dicta. It may be assumed, however, that the issue is raised by the parties when mentioned in the report, and the issue is often one that is critical to the outcome of the case.

LEGISLATIVE DETERMINATION OF THE ISSUES

The early case of Williams v. School District No. 6[1] indicated that it was for the legislature to determine when and in what manner public necessity requires the exercise of eminent domain, and that courts would not interfere with reasonable exercise of that discretion. The use of the term "reasonable" implies that the court reserves the right to review the "wisdom of the legislature." In this case, the amount of property that could be taken was regarded as a matter resting with the commissioners and the county court.

The opinion in Appeal of Rees[2] cited authorities to the effect that the control of the right of eminent domain rests with the legislature and that the degree of the public necessity for exercise of that right is exclusively for the legislature's ascertainment. The court also said, however, that the question of what is a public use is finally a judicial question.

In Knapp v. State[3] the court indicated that the legislative determination to take private property is conclusive, but the questions of whether the taking is for a public use and whether just compensation has been paid are judicial questions.

A statute of the Texas Legislature authorizing the Governor to appoint a committee to purchase land adjacent to the state university and appropriating $1,350,000 was contested in Cochran v. Cavanaugh.[4] By the terms of the Act,

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[1] 33 Vt. 271 (1860).

[2] 12 Atl. 427 (Pa. Sup. Ct. 1888).

[3] 125 Minn. 194, 145 N.W. 967 (1914).

[4] 252 S.W. 284 (Tex. App. 1923).

the acquisition board was authorized to institute condemnation proceedings in the name of the State of Texas for the use of the University. The court noted that the University Board of Regents had the power of eminent domain as well. In its decision favoring the taking of property, the court spoke concerning the legislative function:

> The State University is a public institution authorized by the Constitution of the State of Texas and supported by legislative appropriations from year to year. It is necessary for its future growth and prosperity that it have ample grounds on which there can be erected buildings for its various activities. Whether or not there was sufficient land before this enactment for this purpose was a matter resting solely with the Legislature. By this act the Legislature declared that a necessity existed for the acquisition of this additional land, and the courts cannot review a legislative act in this respect.[5]

In a case involving a school as one of two public uses, Cemetery Company v. Warren School Township,[6] the court reasoned that it could not, under the guise of interpreting the law, grant a priority to one public use over another where the legislature had not seen fit to expressly grant such power. A United States Supreme Court decision involving an eminent domain proceeding by a railroad was distinguished and criticized by the court in the following terms:

> ... /E/ven though the Supreme Court has not feared to venture into this field of apparent legislative policy with heavy-handed deftness it has reached anomalous and confusing results.[7]

In this case, also, determination of the legal authority and right under

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[5]252 S.W. at 286.

[6]236 Ind. 171, 139 N.E. 2d 538 (1957).

[7]139 N.E. 2d at 545.

which the power of eminent domain is exercised was recognized as a judicial function, but the court added, probably in deference to other Indiana cases /see the following section/ in which the discretion of administrative boards has been protected:

> This does not mean, however, that the courts may assume the administrative act of determining the necessity or reasonableness of the decision to appropriate and take the land. ... We do not think the court has the power to inquire into the wisdom or propriety of such judgment unless a question of fraud or bad faith is raised as where an attempt is made to show that the property taken will not be used for a public purpose, or the proceeding is a subterfuge to convey the property to a private use.[8]

These five cases decided in five different states would seem to indicate that there is a tendency for the questions of public use and necessity basic to exercising of the right of eminent domain to be determined by the legislature, at least in these jurisdictions. The issue is not always clearly stated in the reports, however, and it is probably safer to conclude that no clear line has been drawn regarding the determination of the issue of necessity by the legislature or by the court.

THE FUNCTION OF ADMINISTRATIVE BOARDS

The general principle that an agency of the state must depend upon legislative authorization in order to exercise the right of eminent domain has been discussed. This statement does not account for many of the details involved in an eminent domain action, and a number of cases have dealt with the problem of the proper function of the administrative board or agency seeking to condemn the property.

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[8] 139 N. E. 2d at 546.

One of the errors assigned by the defendant in Kirkwood v. School District No. 7[9] was that the court should not have approved the report of the commissioners appointed to appraise the property sought by the District since one of the three commissioners found no necessity for the taking. The court said that the statute empowered the School District to take and hold as much property as necessary for the location, construction, and convenient use of a schoolhouse, but not in excess of one acre. The court found that there was no error committed by the trial court because the matters of determining the location for a school and the necessity of taking property had been vested entirely in the school authorities and were not for the commissioners to determine. The court added that these were not matters for the jury to determine, but this statement would have to be regarded as dicta.

One of the grounds on which the taxpayers requested an injunction in Smith v. City Board of Education of Birmingham[10] was that the conduct of the Board in seeking to condemn property to construct an administrative office building was a gross abuse of discretion, arbitrary, and capricious. The demurrer was sustained partly on the ground that it was not a function of the courts to locate, construct, and maintain school buildings and that, when free from fraud, administrative and quasi-legislative functions of the Board could not be reviewed.

In three school or college cases, the Indiana Supreme Court has consistently recognized that a legislature could confer broad discretion

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[9]45 Colo. 368, 101 Pac. 343 (1909).

[10]272 Ala. 227, 130 So. 2d 29 (1961).

concerning exercise of the right of eminent domain. In Braden v. McNutt[11] the Trustee of Washington Township in Clinton County filed a petition to acquire land for a schoolhouse. A motion by the defendant to reject the petition was overruled and the Supreme Court affirmed this ruling, stating that the filing of the petition was sufficient evidence of the Trustee's decision that it was necessary to locate the school on the land he sought to acquire under the statute. An abuse of discretion might be prevented by the court, but the defendant had not offered any evidence to that effect. The statement by the court that " ... great injury might result if the questions respecting the locating of schoolhouses and of providing school facilities should be made matters for trial by jury. ..."[12] must be regarded as dicta.

The Braden case was cited in Richland School Township v. Overmyer,[13] a case in which a judgment for the defendant was reversed. The Township Trustee began proceedings to condemn one acre and the appraisers appointed reported its value as $325. The defendant filed exceptions on the basis that damages were too small. The District's demurrer to the exceptions was overruled. On application by the defendant the venue of the case was changed and a verdict and judgment rendered for the defendant. On appeal the petitioner assigned as error the overruling of his demurrer to exceptions and overruling a motion for new trial. The Supreme Court found that the allegation of the defendant that the damages were too small was sufficient

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[11] 114 Ind. 214, 16 N.E. 170 (1888).

[12] 16 N.E. at 171.

[13] 164 Ind. 382, 73 N.E. 811 (1905).

to justify overruling the demurrer, but granted a new trial on the basis that the only legitimate question for the jury was the amount of damages. The court accepted the argument of counsel for the Trustee that the verdict could not be sustained because in condemnation proceedings the Trustee acts on his discretion and his action is not reviewable except by the County Superintendent. This ruling was made in spite of an allegation by the defendant that the appropriation was not intended for school purposes but that the Trustee under the color of his office was acting from prejudice and personal interest, if not corruptly. The court said that the State had delegated to the Township Trustee the right to exercise the power of eminent domain for the special purpose of construction of schoolhouses. There was no question that could be raised about public use as the taking was by a public official and the benefit shared to a greater or lesser degree by the whole public. No hearing on the propriety of taking was required, the court said, and the legislature could delegate the authority to decide the necessity for taking the property without review by a court or jury. The discretion conferred on the Trustee was broad, comprehensive, and absolute. The question of whether the Trustee would personally benefit, or whether he was biased or prejudiced against the defendant was not regarded as a proper matter to go before the jury or in any sense pertinent to the real issue for trial. The court indicated that it was not deciding whether property could be taken by private or quasi-public agencies.

The court stated in Wampler v. Trustees of Indiana University[14] that necessity or expediency is a legislative question but that the statute had

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[14]241 Ind. 499, 172 N.E. 2d 67, 90 A.L.R. 2d 204 (1961).

vested discretion in the University and its judgment could not be questioned or superceded by the courts, except for fraud, capriciousness, or illegality. The court did not seem to go as far in this case as it did in the Overmyer case, as it recognized that reasonable standards must be imposed where the legislature had delegated discretionary duties. The purpose of the condemnation could be considered in order to determine if the standards provided in the act were reasonable. The defendant maintained that the condemnation was not necessary as the University was seeking more land than it needed and that parking space for the dormitory could be provided on land already owned by the University. In answer to this contention, the court held that the question of necessity or expediency was within the discretion of the legislature, not a proper subject for judicial review, and that the defendant was prevented from showing that a smaller amount of land would suffice.

There is dicta in the case of Burlington City Board of Education v. Allen[15] to the effect that the advisability of taking property is committed to the discretion of the petitioner with the exercise of which neither the defendant nor the court could interfere. The major issue in the case was whether the defendant had received adequate notice, and the court said that condemnation was a political and administrative measure of which the defendant was not entitled to notice or even to be heard. This result was reached in part because of the statutory provision designating the Clerk of the Superior Court as the officer to conduct all proceedings until the question of compensation was raised. The Clerk was not considered a judicial officer.

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[15] 243 N.C. 520, 91 S.E. 2d 180 (1956).

Brown v. Doby[16] was before the North Carolina Supreme Court twice, the first decision having been handed down on June 30, 1955, which was before the Allen case of February 3, 1956. In the first decision the problem of notice was adjudicated. In the second case, decided on November 7, 1956, after the Allen case, the court simply stated that discretionary powers existed in the petitioner to select and take land not exceeding 30 acres for school purposes and that the respondent had no right to stay the taking. His rights were limited to the recovery of damages.

The discretion of the Board was questioned in Board of Education of City of Minot v. Park District,[17] an action involving the issue of two public uses. The judgment for the Board was affirmed, the court noting that the evidence as to the amount of property needed was in conflict. According to one of the statutes, the legislature had fixed the maximum for common schools at five acres, but the condemnor in this case was designated a special district. Since no maximum was specified in the statutes for this type of district, the court said that the amount that could be taken was left to the discretion of the Board and not reviewable except in case of gross abuse or manifest fraud. In discussing the issue of which use involved the greater necessity, the court cited a federal decision which did not involve schools which held that if there is no express legislative provision, the relative importance of the two uses is to be determined by the court.

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[16]242 N.C. 462, 87 S.E. 2d 921 (1955), 244 N.C. 746, 945 S.E. 2d 895 (1956).

[17]70 N.W. 2d 899 (N.D. Sup. Ct. 1955).

A statute which provided that "if the application be by ... a board ... the petitioner shall determine the necessity"[18] was cited in Phi Delta Theta v. Sachtjen.[19] In response to the plaintiff's contention that a State agency could not be a board within the meaning of the act, the court found that the Board of Regents met the requirement of the statute.

The plaintiff in Spann v. Joint Boards of School Directors[20] objected to the fact that the Board appropriated 15 acres through the heart of his farm cutting it into two parcels. He called the action of the Board "a grandiose scheme" that could have been served on acreage to the north and challenged the action of the board as arbitrary and capricious. The court held that the location and amount of property to be taken had been placed in the discretion of the Board by the statute--that it was an administrative matter, binding on the courts. Where the land had been cut in two, the court suggested, the element of damages may be involved.

The amount of land necessary for a senior high school of 600 to 1500 students was questioned in State ex rel. Tacoma School District v. Stojack.[21] The statute said that it was for the court to find that the real estate sought was necessary for the purposes of a schoolhouse site. In spite of this provision, the court said that the rule applicable to other public agencies should apply, which was that the action of a public agency having the right of eminent domain in selecting land for public use will generally

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[18]Wis. Stats. 32.07 (2).

[19]260 Wis. 206, 50 N.W. 2d 469 (1951).

[20]16 Beaver 18, exc.dis. 16 Beaver 122, affd. 381 Pa. 338, 113 A. 2d 281 (1955).

[21]53 Wash. 2d 55, 330 P. 2d 567, 71 A.L.R. 2d 1064 (1958).

not be controlled by the courts, except for abuse of discretion, violation of law, fraud, improper motives, or collusion.

The question of the necessity for the college taking property on which to construct a dormitory was raised in Board of Regents v. Palmer.[22] According to the court, the grant of power by the legislature carried with it the right to decide the essentially political questions of the necessity for its exercise as well as the expediency and propriety of doing so. The only question for the court was whether the contemplated use was a public use.

JUDICIAL FUNCTIONS

It has just been noted that in Missouri the question of necessity was regarded as a matter for the determination of the condemnor, but that the determination of whether the use was public was for the court. Comments in cases from a number of other jurisdictions also indicate that the question of public use is a judicial question.

Determination if the Use is Public.

A New York case, Board of Education of School District No. 1 v. Harper[23] held, similarly to the Palmer case in Missouri, that the question of public use was to be determined by the court but that the legislature or the instrumentality it employed to exercise the right of eminent domain was the sole judge of necessity.

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[22] 356 Mo. 946, 204 S.W. 2d 291 (1947).

[23] 191 N.Y.S. 273 (N.Y. Sup. Ct. 1918).

A case involving the tax exemption of Yale University[24] was noted by the court in Connecticut College for Women v. Calvert.[25] The College in attempting to support the legislative determination of public use, maintained that the Yale case established that principle. The Calvert case held, however, that it was a judicial function to determine if the use would be administered as a public or private use in accordance with the facts of the case, and that it was for the court to determine whether the public had or could acquire a right to use the property taken. The dissent was based on the opinion that the court should resolve every reasonable intendment in favor of the legislative declaration that the purpose of the act was public. The dissenting judge thought that since the charter of the College had been made a part of the application to condemn, no further allegation as to the public right was necessary on the part of the college. The dissenting opinion recognized that "public use" was an elastic term varying with different ages and circumstances, and that, in the end, the courts should decide if the public benefit was great enough to warrant the exercise of the power in a given case.

The dicta in Kern County Union High School District v. McDonald[26] that the power to determine what uses are public is vested in the legislature was discussed in University of Southern California v. Robbins.[27] In the Robbins case the court agreed that the legislative declaration that uses are public

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[24] Yale University v. New Haven, 71 Conn. 316, 42 Atl. 87, 43 L.R.A. 490 (1899).

[25] 87 Conn. 421, 88 Atl. 633, 48 L.R.A. (NS) 485 (1913).

[26] 180 Cal. 7, 179 Pac. 180 (1919).

[27] 1 Cal. App. 2d 523, 37 P. 2d 163, cert. den. 295 U.S. 738, 55 S.Ct. 650 (1934).

would be recognized, but expressed the opinion that the final determination of whether an individual case involved a public use must be determined by the judiciary. A United States Supreme Court case involving eminent domain for irrigation purposes was cited as authority for the statement that what is a public use depends upon the facts and circumstances of the case.

The Question of Necessity.

The question of whether a necessity for taking property existed was a matter dependent upon the evidence and to be determined by the court according to Sheppard v. Edison.[28] An Act of the General Assembly to amend the charter of the City of Edison included a section relating to condemnation of land for school purposes and the act included the phrase "when in their judgment it may be necessary." The court said that this phrase in the Act did not have the effect of making the power dependent merely on the judgment of the city council instead of upon the facts of the case. The injunction sought was granted on appeal for other reasons.

The court in Seba v. Independent School District No. 3[29] stated that the condemnor's decision regarding the necessity for taking property would not be disturbed in absence of fraud, bad faith or abuse of discretion, but also noted that this had been held to be a judicial question. On the question of whether the taking was arbitrary and for spiteful reasons, the court found that the defendant had not introduced sufficient evidence to make a showing that the Board did not need the property, or that the Board

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[28]161 Ga. 907, 132 S.E. 218 (1926).

[29]208 Okl. 83, 253 P. 2d 559 (1953).

did not have the right to take it by eminent domain.

In the jurisdictions where the court has the function of determining whether the property taken is necessary or for a public use or both, the issue has been raised as to whether these are legal questions for the judge to decide, or of a factual nature for submission to a jury.

Questions for the Court. The opinion in Dean v. County Board of Education[30] is somewhat contradictory on the question of whether the board or the court determines the necessity for taking the property. At one place the court says the necessity for acquiring by condemnation is a matter for determination of the Board of Education rather than by trial of fact. This statement was in answer to the defendant's argument that the Board had never introduced sufficient evidence to show that taking the property was necessary. The court said that the Board's statement of facts in its petition and the fact that it had prosecuted the case were sufficient indications that the Board thought the land was necessary. The court also stated that the question of necessity was determined by the court as a legal question on the right of condemnation presented by the pleadings, and held that there was no error in the oral instructions that:

> The court has determined from the petition and the evidence in the case that the petitioner in this case has a legal right to condemn the property and has a right to have the value of the property assessed.[31]

Ouachita Parish School Board v. Clark[32] is authority for the determination

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[30]210 Ala. 256, 97 So. 741 (1923).

[31]97 So. at 744.

[32]197 La. 131, 1 So. 2d 54 (1941).

of the question of necessity by the court. It was noted in the opinion that the defendant had not asked the court to try the issue of necessity before submission to the jury. The court thought that the fact that the judge rendered and signed a judgment showed he found necessity for the Board to acquire the property.

A line of Illinois cases have held that determination of the question of necessity is not to be submitted to the jury, but to be decided by the court. These cases also illustrate a tendency to shift from judicial to administrative determination that the property sought is necessary. The earliest of these cases, Chicago v. Lehman[33] held that the question of whether the particular property sought to be appropriated was necessary for the public use was for the courts. The owner could challenge the right by denying that the property was necessary and that issue was regarded as preliminary to be decided by the court. The burden of the evidence was on the petitioner to show facts supporting his allegation of necessity. While the court recognized that the question would be left largely to the condemnor, it noted that it was subject to review, and if the quantity sought was grossly in excess of the amount necessary, the right to take would be denied. The trial court was held to have erred in issuing judgment for the City because no evidence of necessity was shown by the record.

The validity of an election to select a site was contested in Bierbaum v. Smith.[34] Selection of the site was held to be a condition precedent to the right to condemn. The court felt that while the question of the conditions

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[33] 202 Ill. 468, 104 N.E. 829 (1914).

[34] 317 Ill. 147, 147 N.E. 796 (1925).

under which the right of eminent domain could be exercised was purely legislative, it was for the judiciary to decide whether the statutory conditions existed in any case, and if not, to dismiss the petition.

Dicta in the case of Chicago v. Jewish Comsumptives Relief Society[35] was to the effect that the court must determine prior to submission of the case to the jury if the right of condemnation existed.

Citing the Lehman case, the court in County Board of School Trustees v. Batchelder[36] stated that the question of necessity for public use was for the courts and if none were found the land could not be taken. Otherwise, according to the court:

> ... the property owner would be without the protection to which he is entitled if the determination of a corporation, private or municipal, to take his property conclusively settled the necessity of the taking ...
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> . . . . .
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> A determination of the question of necessity is left largely to the corporation or municipality, and its determination will be rejected only for an abuse of the power.[37] / emphasis added. /

Here the Board was seeking to condemn 1.45 acres for a playground and other school purposes. The motion to dismiss by the defendant was based in part on his allegation that the taking was not necessary for a public use. Evidence submitted by the Trustees on necessity included the fact that the school had been leasing the tract since 1942 and that it had been continuously used as a playground and athletic field by the school since then. The school enrollment was larger by 80 students in 1953 than it had been in 1942. The

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[35] 323 Ill. 389, 154 N.E. 117 (1926).

[36] 7 Ill. 2d 178, 130 N.E. 2d 175 (1955).

[37] 130 N.E. 2d at 178.

court held that upon the consideration of this evidence, the burden of showing necessity for taking the property was satisfied.

The court held that issues raised by traverse or denial concerning the right of the petitioner to condemn were preliminary questions to be determined by the court without a jury in Chicago v. Riley.[38] This determination, the court said, would not be disturbed on appeal unless against the weight of the evidence, and in this case there was a direct conflict in the evidence of petitioner and defendant. The case presented a complicated fact situation. On January 8, 1957, the Board made an offer to purchase the defendant's lot, on which stood a two-story frame building, for $6,500, and stipulated that unless the offer was accepted in 10 days it would be assumed rejected. The defendant testified that she received this offer and went to the Board office to tell an employee that she accepted, but that he informed her she should wait until hearing from the Board. The employee said he did not recall the interview, and there was no tangible evidence of acceptance. The defendant did continue to collect the rentals on the property. On August 3, 1957, the building on the property was washed or blown from its foundation by a violent storm and the City demolished it due to the hazard it created. On October 21, 1957, the Board petitioned to condemn the property. Appraisers were appointed who reported the value of the property at $750. This was the only evidence on the question of value that had been submitted, so the court directed a verdict for that amount. On February 3, 1958, the defendant filed a petition for dismissal on the grounds that her offer had been accepted, or in the alternative, that $6,500 be entered as the amount of compensation due.

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[38] 16 Ill. 2d 257, 157 N.E. 2d 46 (1959).

The defendant had instituted suit to recover insurance for the damage caused by the storm, and the court was of the opinion that this fact, along with the collection of rentals, furnished sufficient reason to doubt the credibility of the defendant's evidence on acceptance of the Board's offer. The only issue to be tried, concluded the court, was that of just compensation, and the value of the property was to be determined as of the time of filing the petition to condemn.

In Trustees v. Sherman Heights Corporation[39] the Board of Education of the township passed a resolution stating that "it is necessary and desirable" to acquire the eleven acre tract of vacant land in question. The resolution stated that the use would be for playgrounds, recreation grounds, athletic fields, and enlargement of the Lemont Township high school site and other educational purposes. According to the Illinois procedure, the Township Trustees intitiated the petition to condemn. It was dismissed on the defendant's motion, the trial court overruling all the denials of fact by the defendant except that on the question of necessity, ruling that the Trustees would have to introduce further evidence to establish their case. On appeal the Supreme Court reversed and remanded the case, holding that the resolution of the Board stated a prima facie case of necessity. The question of necessity, added the court, is legislative and its determination is within the discretion of the corporate body authorized to exercise the right of eminent domain. This discretion would be disturbed by the courts only when there was evidence of a violation of constitutional rights. The evidence presented by the Superintendent on the question of necessity was part of the

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[39]20 Ill. 2d 357, 169 N.E. 2d 800 (1960).

record. It included the following facts:

1. The recommendation of the North Central Association that a high school the size of Lemont should have a minimum site of 20 acres.

2. The original building was constructed in 1925 with additions in 1952 and 1957 and one then in progress.

3. The 8½ acres occupied by the school were 99% covered by buildings and the terrain of the site was irregular. Additions were crowding the baseball diamond and football field, neither of which had spectator seats.

4. Land to the north, south, and west was improved.

5. Enrollments in 1954 totalled 248; in 1959, 418; and the projection to 1964 was 603.

6. Classes were then being held in the gymnasium.

This evidence is repeated here as a point of interest to school boards or administrators who may be contemplating condemnation. It illustrates that the court may regard factual information which may have a bearing on the question of a necessity as of considerable importance to the taking of property for school use.

It is interesting to note that in the three Illinois cases that indicate the court should decide the question of necessity, the school was not successful in its effort to condemn property, but that in the three cases emphasizing the role of the administrative board, these boards' right to condemn was upheld.

Necessity Determined By the Jury. The constitution and statutes in Michigan require that in eminent domain cases the question of necessity for

taking the property should be determined by a jury. The constitutional provision reads:

> When private property is taken for the use or benefit of the public, the necessity for using such property ... shall be ascertained by a jury. ...[40]

The statute quoted in Board of Education of City of Detroit v. Moross[41] stated that whenever a site is designated and the district is unable to obtain the title for any purpose, the Board is authorized to apply to the circuit judge or circuit court commissioner or justice of the peace for a jury to determine the questions of just compensation and necessity, provided that when the school district has selected or established a site, that action is prima facie evidence for the necessity thereof.[42] The case was not decided on the basis of this issue.

In re Board of Education of City of Grand Rapids[43] held that the trial court's dismissal of the Board's petition should be vacated. On December 3, 1928, the Board had passed a resolution stating that it was necessary to enlarge the site of Vocational and Technical High School by acquiring three parcels, that it had been unable to agree with the owners on the price, that it was a necessary improvement, and that it was necessary to take the property for the use and benefit of the public. The resolution instructed the city attorney to take proceedings to condemn the property. After the Board had submitted its evidence, the order dismissing the petition was issued for

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[40]Article 13, Section 2.

[41]151 Mich. 625, 114 N.W. 75 (1907).

[42]Comp. Laws, 4729, Sec. 2.

[43]249 Mich. 550, 229 N.W. 470 (1930).

want of proper proof of necessity. The evidence submitted by the Board included its preliminary plans, approval of the plans by the State Superintendent of Public Instruction, a cost estimate of $565,490 for the first section of the project, the fact that the first parcel had been purchased and that two were yet to be acquired, and that money was on hand for the first section of the building and the land needed for the second section. The trial court's action had been based on an absence of proof that the Board had adopted a resolution providing that the second addition would be built when funds were available. In vacating the order dismissing the petition, the Supreme Court held that a jury would have been justified in finding that the Board intended to raise additional money to complete the project and that under the provisions of the constitution, the jury was judge of law and fact on the issue of necessity which should have been submitted to them.

The defendant in Union School District of City of Jackson v. Starr Commonwealth for Boys[44] objected to the taking of his property on the basis that it was also used for a public purpose, and the court here held that the question of necessity was for the jury.

The decision in Board of Education of City of Grand Rapids v. Baczewski[45] is authority for a limitation being placed on the function of the jury. In this case, a decision for the Board of Education was reversed because the court found that there was nothing in the record to justify the condemnation of the defendant's property for a playground and that the Board

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[44]322 Mich. 165, 33 N.W. 2d 807 (1948).

[45]340 Mich. 265, 65 N.W. 2d 810 (1954).

had shown there was no present necessity to use the property. The court took note of the fact that the provision in the constitution regarding jury determination of necessity for taking and using property was not generally found. Before it was inserted in the 1850 constitution, the court observed, the jury and commissioners only assessed damages, and the prerogative of taking was exercised by the legislature or those authorized by the legislature. The Board argued that the jury's determination was conclusive and that the constitution denied the court of any function of review, but the Supreme Court held that where the jury had proceeded on a wrong theory, and error had been a controlling influence in the result, the court had a right and a duty to reverse their decision.

Abuse of Discretion.

In at least two cases, the discretion of the legislature or the administrative board has been considered unreasonable by the court.

In Fountain Park Company v. Hensler[46] the act of the legislature delegating the right of eminent domain to a Chautauqua Company was considered unreasonable on two grounds. The first ground was that the classification involved in the act was manifestly unjust, and the second ground was that the legislature could not reasonably have considered the use to be public. The court recognized that usually questions regarding the expediency of taking private property for public use were exclusively for the legislature and that the question for the court was not whether the use was public, but whether the legislature might reasonably consider the use to be public.

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[46]199 Ind. 95, 155 N.E. 465, 50 A.L.R. 1518 (1927).

Ultimately therefore, the question was considered one of judicial determination. In this case, the court determined that the use was not public.

Winger v. Aires,[47] a suit to enjoin the school district from condemnation, was dismissed by the trial court but reversed on appeal. In 1947, the School Board of the Borough of Euphrata conducted a census and calculated that by the beginning of the 1952-53 term another building of three rooms for 60 to 65 students would be needed and that by the next term, three more rooms would be required. On July 10, 1950, the Board tried to purchase the Winger farm of 55 acres but was unable to do so. In December of that year, a resolution authorizing condemnation was passed under the statute which provided that the Board was vested with the necessary power and authority to acquire in the name of the District by condemnation any and all real estate, vacant or occupied, as the Board may deem necessary. The court found the zeal of the Board excessive and its knowledge of the law lacking. It said the record showed the Board moved precipitately and without adequate preparation. The reasons given by the court for this finding were that no plans had been drawn up for use of the 55 acres; no building specifications had been indicated; no architect had been retained; there had been no surveys of the property nor location on the tract of the structure; no estimate had been made of construction costs and there was no money in the treasury or no planning for a junior high school, football field, or additional rooms. A bond issue of $150,000 had been approved, and one of the directors had testified that he would vote to take 71 acres if he had known the owner held title to the additional tract which had not yet been recorded. The opinion also took note

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[47]371 Pa. 242, 89 A. 2d 521 (1952).

that an adjoining city had built on 12 acres a plant costing $850,000. The approval of the State Council of Education was not considered evidence for necessity of this property, as an official of the Council had testified they never denied approval because a tract was too large and that they would have approved a ten acre tract. A presumption that the school directors performed discretionary acts in the interest of the public welfare was mentioned, but evidence in this case was held to overcome the presumption and lead to the conclusion that the Board had abused its discretion. The court added that the decision was not intended to restrict the Board in meeting the needs of the district. In a general vein the court said:

> There is no authority under our form of government that is unlimited. The genius of our democracy springs from the bedrock foundation on which rests the proposition that office is held by no one whose orders, commands or directives are not subject to review. The power of eminent domain, next to that of conscription of manpower for war, is the most awesome grant of power under the law of the land.[48]

In a concurring opinion, one of the judges thought that the evidence showed serious study and no abuse of discretion on the part of the Board, and he would have reversed the case only on the weakness of the petition.

SUMMARY

The cases cited in this Chapter lead to the general conclusion that the determination in eminent domain proceedings involving schools and colleges of what is a public use is finally a judicial question to be decided by the court.

The determination of the question of necessity for exercise of the

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[48] 89 A. 2d at 522.

right of eminent domain is often left to the discretion of the legislature or the administrative board to which the legislature has delegated the right. This conclusion is subject to a number of important exceptions, however. In the jurisdictions of Alabama, Georgia, Louisiana, Michigan and Oklahoma, there is authority for the judicial determination of the question of necessity. Decisions in Minnesota and Texas which emphasize the legislative determination of necessity involved State Universities. In these institutions the relationship of the legislature might be considered more direct than the relationship to the public schools. The opinions in which the administrative determination of necessity has received approval have consistently reserved to the court the right to review the discretion of the condemnor. In only one case was the discretion of an administrative agency regarded as absolute, and the decision on this point could be considered eroded by a later decision in the same State.

It should be noted that in all of the cases decided contrary to the right of an educational organization to take property by eminent domain, the opinions held that determination of questions of public use and necessity were judicial functions. Conflicting opinions in Alabama, Illinois, Indiana, and Pennsylvania may be explainable partly on this basis.

The problem of determination of questions of public use and necessity may not have been adjudicated in a school or college eminent domain case in a number of States. A jurisdictional rule may have been established, however, in eminent domain actions brought by other parties.

CHAPTER VI

RIGHTS ACQUIRED BY SCHOOLS AND COLLEGES AS A RESULT OF CONDEMNATION

Assuming that a school or college may successfully complete condemnation proceedings, a number of questions have been raised about the effect of the proceedings upon the rights of the parties. The purpose of this chapter is to present the case material on the issues of when the school or college secures rights and the nature of the rights secured as a result of condemnation proceedings.

THE STAGE IN THE PROCEEDINGS WHEN RIGHTS ARE SECURED

In a general sense it could be said that rights are acquired by a school or college when legislation authorizing condemnation is passed. The issue of when the condemnor acquires property rights in the specific property sought has been raised in a few cases. It should be noted that statutes in many of the states specify that the title to property shall vest in the condemnor upon payment of the compensation award. Other statutes require an official act of the judiciary before rights are affected. These provisions have not been frequently adjudicated. They have been put at issue in cases in which the condemnor wishes to discontinue the proceedings, and the cases on discontinuance are considered in Chapter VIII.

A new trial was granted in Storer v. Hobbs[1] because the court found that the plaintiffs in the trespass action had not established their joint possession. The action was based on the complaint that the District had no right to enter or take possession except upon payment of compensation. Apparently the building construction was begun before payment, and the court stated in its opinion that for the District to tender payment after entry would not establish a right to possession.

The question of when the School District obtained title to the property condemned was raised in School District of Ogden v. Smith.[2] In July, 1913, the School District petitioned to condemn 8.14 acres and a jury trial resulted in a verdict of $2,500 as compensation. On July 26, the District paid the award to the Sheriff and notified Smith. On September 3, the Sheriff paid the award to the Clerk of the Court and the Clerk paid Smith on October 13. Presumably, the reason for this delay was that the court adjourned after its July term until October 13 when a judgment was rendered vesting the title in the District. Subsequent to the payment by the District, Smith removed potatoes, apples, peaches, and corn from the property and collected rents from four dwellings. Smith refused to give possession when it was demanded by the District. On December 9, 1913, the District brought the action for damages of $300. The statute provided that the District may request the Court or the Judge to fix a proper sum to be deposited as security, and after making the deposit the District had authority to take immediate possession. It was also provided that after the compensation was fixed by the

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[1] 52 Me. 144 (1862).

[2] 113 Ark. 430, 168 S.W. 1089 (1914).

jury, the District should have 60 days to pay to the owner or the Clerk of the Court the amount and the Court would then enter an order vesting the title in the District.[3] The judgment of the trial court for the defendant was reversed and remanded, the court holding that the purpose of the statute was to give the School District immediate possession on payment of the amount of compensation whether the order of the court vesting the title had been immediately made or not. In the opinion of the court, if the District paid, it was entitled to possession the same as if it had made an outright purchase with a contract for immediate delivery. The owner was entitled to have compensation from the time of the petition, and the jury had estimated the value at the time of filing the petition. Their award was held to include the value of the land, appurtenances, and growing crops. While the title was not divested until the court order, the District was entitled to possession from the time it paid the award to the owner or the Clerk. The court added that if the owner continued in possession after the compensation was paid he would be regarded as a tenant by sufferance.

The court in Topping v. North Carolina State Board of Education[4] held that the title was not divested unless and until the condemnor obtained a final judgment in his favor and paid the condemnation award. The issue of when the title to the property vested in the District was raised as a result of a complicated factual situation. In 1957, the Superior Court of Hyde County issued a judgment authorizing and requiring the Board of Education to build a consolidated high school at a designated place. The State Board of

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[3] 193 Acts 238, secs. 4,5,6.

[4] 249 N.C. 291, 106 S.E. 2d 502 (1959).

education allocated $164,484 after approving plans including a 15 acre site. The Board acquired the fee simple title to three acres, but began condemnation proceedings on February 17, 1958, for the remainder. The Board planned to build on the three acres previously acquired, and entered into a contract for construction of the building. The plaintiff in this case, sought to restrain the Board from entering into the contract, but it was signed while the case was on appeal,and the appeal was dismissed as academic. The action cited above was brought on April 10, 1958, to restrain the State Board from paying the amount allocated, and a restraining order was granted by Judge Moore on April 23. The basis for the restraining order was that the Board of Education had acted unlawfully in entering into a contract without first obtaining the site and the State Board could not allot funds for an inadequate site. There was no appeal from the restraining order which also provided that if the Board acquired legal rights to the entire site it may move to dissolve the injunction. The Chairman of the Board of Education and the County Superintendent signed a requisition for $19,184 of the State allotment. This amount was honored by the State Board of Education on May 19, 1958, and a contempt judgment was issued on June 27, 1958. On September 17, 1958, the Commissioners reported their appraisal of the property sought by the Board at $5,218.50 to the two defendants, and the following day the Clerk of the Court signed an order that the Board be let into the possession after the award had been paid. The owners filed exceptions, and on October 22, 1958, had a hearing before the Clerk and took an appeal from that hearing. On November 15, 1958, the Board moved to dissolve the restraining order, and the order was dissolved by Judge Paul on November 21 on the basis that the conditions prescribed by Judge Moore

had been met. The owners filed exceptions to this dissolution. The question taken to the Supreme Court, therefore, was whether the Board had complied with the conditions of Judge Moore's order of April 23, or what was the status of the title on November 21. The order of Judge Moore had restrained the State Board from making any payment "until final hearing of this cause or until title to the full site of 15 acres shall have been acquired in fee simple." The court found the condemnation proceeding was still pending on the exceptions directed at the right to condemn and the adequacy of damages. The court recognized that the statute[5] explicitly entitled the Board to possession "notwithstanding the pendency of the appeal, and until final judgment rendered on said appeal ... " The court did note that the condemnor may not take a voluntary non-suit over the landowner's objection after obtaining temporary possession, but reasoned that the non-suit was prevented because the owner may still assert a claim for damages. Judge Paul's order granting the motion to dissolve the restraining order was vacated as the court found that the Board had not yet secured the title in a way that met the requirement of Judge Moore's earlier order, even though it had gained possession.

In three cases in which school buildings were constructed by mistake, the schools were found to have obtained an interest in the land before condemnation proceedings were begun. The major issue raised by the defendant in Buchwalter v. School District No. 42[6] was the adequacy of notice, but the case could be regarded as authority for the proposition that a school

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[5] G.S. 40, Sec. 19.

[6] 65 Kan. 603, 70 Pac. 605 (1902).

district may secure interest in property by construction of a building even without title to the land. In this case, the building was constructed on government land prior to the plaintiff's settlement of the property. On November 14, 1855, the plaintiff made full payment and obtained a receiver's receipt. On July 28, 1886, the District proceeded to condemn the property, and on December 28, 1886, the plaintiff obtained a U.S. patent to the land. The plaintiff objected to the proceedings partly on the basis that the District was seeking to condemn government land, but the court dismissed the contention with the statement that the plaintiff held the equitable title. The court commented that the title passed to the District upon taking of the property but this could be regarded as dicta. Even though the proceedings were begun in 1886, the court cited a 1901 statute which provided that a District which built on land without the equitable title may apply for appraisal, and when the sum was paid, the title should vest in the District.[7]

In Davis v. Board of Education of Anne Arundel County[8] it was held that the power granted to the School District included the right to condemn every interest incident to having a perfect and complete title to the land taken. The District was found to have power to condemn an easement where the destruction of the easement was essential to utilization of the land for school purposes. This condemnation proceeding was begun to condemn the right of the defendant to use an alley 20 feet wide on which the Board had constructed a building.

Due to a mistake regarding boundary lines, the Board constructed a

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[7]1901 G.S. Sec. 6131.

[8]166 Md. 118, 170 Atl. 590 (1934).

gymnasium extending onto an adjoining owner's land and later brought proceedings to condemn it. The court held in Ouachita Parish School Board v. Clark[9] that the proceedings were begun after appropriation. In answer to the defendant's plea that he be reimbursed for improvements made before the proceedings were begun, it was held that he had already been divested of his property "by the authority of law" as provided in the statute.

The Effect of Pre-Existing Rights.

The plaintiff in Russell v. Trustees of Purdue University[10] attempted to quiet his title against the condemnation proceeding by the University by relying on the common law rule that a tenant's action may not be hostile to the title acknowledged in a lease. In this case, the University had leased the real estate in question for agricultural purposes on April 15, 1927, for five years to commence March 1, 1928. On September 22, 1927, the University began an action to condemn the fee simple estate for dormitory purposes. The condemnation proceeding was appealed and resulted in affirmance of the judgment for the University on November 1, 1929.[11] On March 1, 1928, however, the University had taken possession of the property under the terms of the lease, and while in such occupation of the premises and without the knowledge of the plaintiff, on September 18, 1929, paid the appraiser's award in the condemnation action to the Clerk of the Court. The University's demurrer was sustained, and a judgment in its favor affirmed, the court

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[9] 197 La. 131, 1 So. 2d 54 (1941).

[10] 93 Ind. App. 242, 178 N.E. 180 (1931).

[11] Russell v. Trustees of Purdue University, 201 Ind. 367, 168 N.E. 529 (1929).

holding that the University had not waived its rights to condemn by paying the lease money and entering on March 1, 1928. A waiver was defined as an intentional relinquishment of a known right, and the court found no allegation that the University intended to waive its rights to condemn or that the plaintiff was misled. A tenant while in possession would be estopped to deny the landlord's title as it existed at the time of the lease, but the court was of the opinion that the tenant may show that the right of the landlord had expired or that the tenant had acquired the landlord's title. The University's claim was asserted under a judicial decree passing title by operation of law, the court said. According to this view, payment of the appraiser's award was not denial of the title accepted in the lease, but affirmance of it. Payment of the award, it was held, extinguished the landlord's title and vested it in the University, and the relationship of landlord-tenant ceased, no possessory right remaining in the landlord. The question of how the appraiser's award accounted for these interests was not presented in the case.

THE NATURE OF RIGHTS ACQUIRED

The nature of the estate or interest a school or college acquires as a result of exercise of the right of eminent domain has been litigated for a number of reasons. Several of the cases which deal with this issue have not involved schools or colleges as parties, but they are included in the study because the issues are pertinent. For the purposes of this study, the cases will be classified as those in which the school or college acquired the fee simple absolute title to the property in question and as those in which a limited estate was secured. In either situation, it

should be noted, the nature of the estate acquired may be determined by express provisions of a statute or by judicial interpretation.

Jurisdictions in Which a Fee Simple Estate Has Been Secured.

One of the early comments on the nature of the title acquired by a school district can be found in Norton Eighth School District v. Copeland.[12] The School District brought the action in tort for breaking and entering and removing a stone wall. The action resulted in a directed verdict for the defendant and the District's exceptions were overruled. The court held that the owner should have had the opportunity to appear before the selectmen in a condemnation proceeding. One of the grounds of defense urged by the defendant was that if the action could be maintained by the District it had taken only an easement and therefore he had committed no trespass. The court observed that the tenure of the District was peculiar but that it was immaterial how it was denominated in law, as the District would have gained a right to exclusive possession if the condemnation proceedings had been found regular. Due to the fact that the proceedings were not upheld, this statement must be regarded as dicta.

Ritter v. County Board of Education of Edmonson County[13] involved the question of whether the Board had abandoned an old site to which the former trustees of a common school district had a title which contained a reverter clause. The court found that there was no abandonment in the Board's action of temporarily choosing a new site and beginning construction, then going

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[12] 2 Gray 414 (Mass. Sup. Ct. 1854).

[13] 150 Ky. 849, 151 S.W. 5, rehearing 151 Ky. 578, 152 S.W. 564 (1912).

back to the old site on a majority petition of the District. The schoolhouse on the old site was still in use. In the modified opinion, the court directed the Board to secure the fee simple title to the site by condemnation proceedings if it was unable to agree with the owners on the price.

The nature of an estate acquired by condemnation in 1889 was put at issue by an action of the Board for specific performance of a contract made on March 5, 1927, to sell the property. In Binder v. County Board of Education for Jefferson County[14] the demurrer on the basis that the Board had obtained only an easement or that the clause in the deed "for school purposes" created a reversion was overruled and a judgment for the Board affirmed. As a result of the action in 1889, the court appointed commissioners to execute a deed to the Trustees of Common School District No. 36 in the County. The deed recited that the parties of the first and second part through the commissioners did "hereby grant, bargain, sell, and convey to the parties of the third part their successors in office forever for school purposes" the described one-half acre. The defendant conceded that the title of the County Board was the same as that formerly held by the Trustees. The statute[15] under which the Trustees had condemned the property provided that the Trustees may condemn property, if they could not purchase it, as in the case of railroad and turnpike companies, that the court should issue a writ causing the deed by the Commissioners to be made to the Trustees and their successors, and that thereupon the title should vest in the Trustees and their successors in office. The court held that this statute did not require

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[14] 224 Ky. 143, 5 S.W. 2d 903 (1928).

[15] 1888 G.S., Sec. 6, p. 1166 (Bullitt and Freeland).

that the title taken by the District be the same as the title taken by railroad companies. It was noted that the statute provided that the Trustees might dispose of a site as well as acquire one. The deed to be executed by the Commissioners was to have the same language as that employed to create in a corporation a fee simple title, and the court observed that the Commissioners had no authority to limit the fee even if it had been their intention to do so. The commissioners had no authority to convey any less title than the condemnation proceedings provided for. The language in the statute "for school purposes" did not create a reverter in the absence of express statutory provision to that effect.

A similar result was reached in Hopewell School District v. Bush.[16] A judgment for the defendant was reversed, the court holding that the interest in the property to be taken in this proceeding was expressly stated to be the fee, and no lesser estate would satisfy the purpose of a site for a school building. The court noted that the price paid was the full market value for all purposes. The wording in the statute "for school purposes" was considered a limitation on the right to exercise the power of eminent domain, but not a limitation on the interest or estate to be taken. The reversal was based on the error of the trial court in not ordering the entire interest in the property condemned.

In 1942, the District of Columbia began a proceeding to condemn property and deposited the amount of the condemnation award with the court. Because of the war emergency the District was prevented from constructing a school building. The defendant refused to deliver possession to the District and

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[16] 179 Ark. 316, 15 S.W. 2d 985 (1929).

the action in ejectment resulted. The defendant's answer set up the defense that the title had reverted due to non-use by the District for school purposes. The decision in O'Hara v. District of Columbia[17] was a summary judgment for the District which was affirmed. The court held that there was no reversion as the statutes provided "for the condemnation of said land or said right of way and the ascertainment of its value" and that the District may acquire "title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in the declaration shall vest in the District of Columbia."[18] The court recognized that it was construing the allegation liberally in order to find that the District was seeking to condemn a fee simple and that it would have been better for the District to declare that it was seeking an estate in fee simple and state why such estate was necessary. The court also noted that the jury had been instructed to appraise the property at its full market value, and this fact supported the condemnation of the entire estate.

The Jersey City Board of Education was made a third party defendant in Valentine v. Lamont,[19] an ejectment action by the successor in interest of the condemnee against the grantee of the condemnor. The action was dismissed by the trial court and the dismissal was affirmed on appeal by the Law Division, the Appellate Division and the New Jersey Supreme Court. The Board had condemned the property on July 19, 1922, and paid an award

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[17]79 U.S. app. D.C. 302, 147 F. 2d 146 (1944), cert. den. 325 U.S. 855, 65 S. Ct. 1183, 89 L. Ed. 1975 (1945).

[18]1940 D.C. Code 16-601, 605.

[19]20 N.J. 454, 90 A. 2d 143, Affd. 25 N.J. 342, 96 A. 2d, 417, affd. 13 N.J. 569, 100 A. 2d 668, cert. den. 347 U.S. 966, 74 S. Ct. 776 (1953).

of $13,600 for it. On May 27, 1928, Emma Maslin, who had owned the property, died intestate, and her only heir was Mary Stinard, who died intestate on January 22, 1934. The heirs of Mary Stinard were a son, Percy, whose whereabouts were unknown, a granddaughter, Anna Valentine, and a grandson, Rutherford Stinard. On September 6, 1945, the Board of Education passed a resolution that the property was no longer needed and offered it for public sale at a minimum price of $5,900. On March 21, 1946, the Board ratified a sale on March 14, 1946, to Lester and Marian Lamont. On April 9, 1946, a deed conveying the property to the Lamonts was executed. On January 14, 1952, the suit by the plaintiff, Anna Valentine, was filed. The opinion of the court pointed out that the title and right of possession of the Board had not been disputed for 24 years in spite of the fact that the property had not been used for school purposes. It had been occupied by tenants who paid monthly rental. The court recognized that the taking of the right, title, and interest of the owners should not be greater than necessary to effectuate the public use, and noted that, according to New Jersey precedents, the land of an abutting owner, both at common law and under the statute, was merely charged with an easement for right of way and the fee to land in the middle of a road remained with the owner. Another New Jersey case involving operation of a public market in a public street was noted in which a servitude over and above an easement had been found. In that case, the court had thought it was "an exaggeration of the essence of private ownership and a mulcting of the public purse"[20] to pay an individual for lands and then when the character of the use of the property changed to pay him or his heirs anew.

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[20] 100 A. 2d at 672.

The court concluded that the precedents did not establish a lack of power to take a fee simple absolute title where necessary to accomplish the underlying public purpose and cited authority for taking a fee simple estate for railroad, military reservation, public market and housing authority purposes. The question then became one of whether the legislature had authorized taking of the fee simple. The court was of the opinion that if the statute authorized taking a fee it could not be held invalid because a lesser interest would accomplish the legislative purpose. The court was of the opinion that the legislature intended for schools to take a fee simple title.

> Where, as here, the land is being acquired for the purpose of schools it is extraordinarily difficult to see how anything less than a fee simple absolute title was intended by the statute.[21]

The reasons given for this position were that the use of the Board involved exclusive possession, and the right of possession might have lasted forever. The requirement by the statute for payment of full market value carried with it a presumption of full payment for an estate in fee. The court felt it would also be inequitable to compensate the condemnee on the basis of a determinable title and deprive him of the use, right of possession, and interest in the property subject only to a theoretical contingency that the public use might be abandoned. This, the court suggested, would make a fraud of the constitutional provision for payment of just compensation. The court also held that the Board was a body corporate with power to sell or dispose of land or buildings no longer needed without regard to whether they had been purchased or condemned. The money received from the sale, however, could be devoted only to school purposes. The court noted a statement in a street

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[21]Ibid.

railway case that "it appears to be the settled law that a fee simple absolute cannot be acquired by condemnation"[22] was contrary to its holding and held that the statement which was obiter dicta in the earlier case was expressly overruled. The opinion of the Law Division had pointed out that there were no sacramental words to create a fee simple estate, but that the job of the court was to ascertain the intent of the legislature. In the statute which provided that the Board could "purchase, lease, receive, hold, and sell property...and take and condemn land and other property for school purposes,"[23] the Law Division found authority for a fee simple absolute on the basis that "for school purposes" was not to limit the estate but to show the public use. The Binder and Hopewell cases mentioned earlier were cited as authority. Lazarus v. Morris[24] which held that the property reverted when no longer used for school purposes was distinguished on the basis of the statutory provisions which were different in Pennsylvania. The opinion of the Appellate Division emphasized the fact that the Constitution or statute did not require a limited estate, and that it was not necessary that authority to take a fee simple be stated in express terms in the statute. It was also noted that the owner had not claimed that less than full value had been received at the time of condemnation, and the court was of the opinion that compensation was made, paid, and received on the basis of a full estate.

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[22] Summerill v. Hunt, 25 N.J.Misc. 498, 55A.2d 833 (1947), cited at 100 A.2d 673.

[23] R.S. 18:6-24 N.J.S.A.

[24] 212 Pa. St. 128, 61 Atl. 815 (1905).

North Dakota statutes on which the Board relied in Board of Education of City of Minot v. Park District[25] provided that when taken for public buildings or grounds or for permanent buildings, a fee simple estate was condemned but that the estate taken was an easement when for any other use. The court noted that the statute did not make any provision for reversion, but it is not clear if the issue of the nature of the estate was contested in this case.

Jurisdictions in Which Schools and Colleges Take Only A Limited Estate By Condemnation.

Contrary to the cases cited in the preceding section, the courts in some jurisdictions have held that a school or college acquires only the right to use property for school purposes by condemnation, and when abandoned for those purposes, the rights condemned revert to the condemnee or his successors in interest. In these cases, also, the decision may depend on either an explicit statutory provision or upon judicial interpretation.

Dicta in the case of Williams v. School District No. 6[26] pointed out that the proceedings did not profess to take a fee but speculated that if they did, they would probably be ineffectual to accomplish that result.

A statute which provided that when a schoolhouse ceased to be on a lot for two years, the lot may revert to the original owner was the basis for the action in Jordan v. Haskell.[27] After proceedings concerning the location of a schoolhouse lot there was a delay of at least two years between

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[25] 70 N.W. 2d 899 (N.D. Sup. Ct. 1955).

[26] 33 Vt. 271 (1860).

[27] 63 Me. 189 (1874).

the selection of the lot and construction of a schoolhouse. The court pointed out that in this case, the schoolhouse had not ceased to be used, in fact, it had not begun to be used as it had never been constructed. The owner had a year to apply for a jury and the appeal might involve more than two years. A district would take an element of risk if it proceeded without clear title to the lot. It was therefore held that the lot did not revert because of non-use for school purposes, and the sustaining of the demurrer to the bill for injunction to prevent erection of the school on the lot was affirmed.

Banks v. School Directors of District No. 1[28] is not exactly in point regarding the nature of the estate condemned, but it was held in the case that the District in condemning a tract in the center of an enclosed pasture did not acquire a right of way of access to the tract only by condemning the tract. The petition for condemnation sought a tract 12.7 rods square in the center of a pasture which was part of the defendant's 374 acre farm. The School District did not ask for a right of way to the tract but claimed the law would give it. The verdict by the jury resulted in a grant of $75 for the land, $100 damage to the remainder and 50 cents to the tenant. The defendant's cross petition had asked damages for the whole tract. In reversing a verdict for the plaintiff, the court held that the rules under which a way by necessity arises and is presumed to have been granted could not be applied to this case. The judgment of the trial court was found erroneous in the attempt to give the District a right not acquired.

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[28]194 Ill. 247, 62 N.E. 604 (1901).

The question of what title the Trustees took in Illinois was raised in Kelly v. Bowman,[29] a suit to determine the ownership of land and buildings. In August of 1906, the Trustees of the Township had filed a condemnation suit, and a jury fixed the value of the property at $355.25, which the Trustees paid to Henry L. Timmons. A schoolhouse was constructed on the property. On January 19, 1952, the Trustees sold all interest in the two acres and the buildings to Bowman, and Bowman contracted to sell his interest to Hise. There was no question but what the premises had been abandoned for school purposes. The plaintiff in the case was successor in interest of Timmons and the Trustees were joined as a party defendant. According to the statutes then in force[30] the court found that there was no legislative intention that the Trustees acquire a fee simple title. The court thought that it was clear that the legislature intended that the Trustees in the exercise of eminent domain obtain the school site for school purposes only. The court did hold that the reversionary interest did not include the improvements and that the title to the improvements was separate from the title to the site. The opinion of the trial court which had granted the plaintiff the land and the defendant the buildings was affirmed. Neither of the cases cited as authority for this holding was an eminent domain action, and the court distinguished the Trustees argument that drainage districts acquired a fee simple title on the basis that statutory provisions had not granted such authority to school districts. The ownership of the buildings was decided on the basis of two Illinois cases, one involving a conveyance

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[29]104 F. Supp. 973 (E. Dist. Ill. 1952).

[30]Ill. R.S. 1905, Ch. 122, Sec. 151, 152, Ch. 47, sec. 10.

with option to repurchase when abandoned and the other a grant with express provision for reversion.

The authority of the Kelly case would seem to have been eroded to some extent by Waukegan v. Stanczak.[31] In this case, however, the condemnation proceedings were brought by a special charter city which had a co-extensive school district. Here the court stated that the State may take any interest if for a public purpose and just compensation is made. It could be a fee simple absolute if the legislature so determined and lacking the express definition by the legislature, the court suggested that the absolute needs of the public purpose should control the decision on the nature of the estate. The court found authority for a fee simple absolute in this case in the charter provisions.

The School District was not a party to the proceedings in Lazarus v. Morris,[32] but the issues in that case were raised again in Mulligan v. School District of Hanover Township.[33] The factual situation involved in the two cases was the same. In 1871 the School District, by exercise of the right of eminent domain, gained title and took possession of real estate belonging to George Deal. The Deal heirs conveyed all their right, title and interest in the property taken by the School District to Thomas Lazarus. In 1896, the School District abandoned the premises and offered them for sale. They were purchased by Morris for $1,000, and the District officials executed a deed purporting to convey the fee containing a covenant of general warranty.

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[31] 6 Ill. 2d 594, 129 N.E. 751 (1955).

[32] 212 Pa. St. 128, 61 Atl. 815 (1905).

[33] 241 Pa. 204, 88 Atl. 362 (1913).

Morris was in possession of the property until 1905 when the heirs of Lazarus brought an action in ejectment. In that case, the defendants' exceptions to the referee's report were dismissed and the dismissal affirmed. The court held that appropriation did not give a fee simple in the absence of express statutory language. The title had been acquired by the District under a statute which had provided that when unable to procure a site by agreement, it would be lawful for the District to enter upon and occupy sufficient ground for the purpose. This statute, the court held, covered only the use and occupancy of the property. It was noted that in some cases the right acquired by the school was called an easement, but the court was of the opinion that whatever the kind of right, it terminated when the School District ceased to use the property for the purposes for which it had been appropriated and the title reverted. The Mulligan case was an action by the heirs of Morris against the District to recover on breach of general warranty. Here the court stated that the School District was a creature of statute, a mere agent of the State, a corporation of lower grade and less power than a city and had only such powers as given by statute. It found no act which expressly granted or impliedly granted or attempted to grant the right to convey in fee property which had been acquired by eminent domain or to enter into a covenant of general warranty. The court was of the opinion that the plaintiff's decedent must have been aware of this fact. The plaintiff was found unable to produce Board minutes showing any authority to enter into the covenant of general warranty. The court thought that while this conclusion was hard on the estate of the plaintiff, it was clear beyond any doubt.

The Lazarus case was cited in the concurring opinion of a more recent Pennsylvania case, Winger v. Ayres,[34] as authority for the dicta that the Board was without power to sell a portion of the condemned property that it did not need, as it would revert should the Board attempt to do so.

In School District of Donegal Township v. Crosby[35] the court held that where a School District had been in possession of property for 55 years, and there was no evidence of how the property had been obtained, it would be proper to imply that it had been granted to the District and that the District held a fee simple title. This case is no authority for the nature of estate taken by condemnation, but in the opinion, an act of the Pennsylvania legislature of 1911 was mentioned which provided that a School District may condemn a fee simple estate.[36]

The question of whether the District had abandoned the property was raised in Long v. Monongahela City School District.[37] In 1880 and 1883, the School District had condemned the land of John Kennedy, Jr., to whom the plaintiff claimed succession of title. The plaintiff in his action for ejectment claimed that the District had abandoned the property for school purposes prior to 1955. In 1955, the District took action under a statute granting the power to acquire the fee where a previous lesser interest had been secured. The court pointed out that the original taking was a base or conditional fee or easement, citing the Lazarus case, but added that no

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[34] 371 Pa. 242, 89 A. 2d 521 (1952).

[35] 178 Pa. Super. 30, 112 A. 2d 645 (1955).

[36] P.L. 309, Sec. 606, 607.

[37] 395 Pa. 618, 151 A. 2d 461 (1959).

property could be considered abandoned in the absence of a resolution of the Board to do so. The issue had been raised by a motion for judgment on the pleadings, and the court found that the plaintiff had not sufficiently averred a cause of action in that he had not cited a resolution of the Board to vacate and abandon the premises. The court found that the case was moot because by admitting the fact that the District had acted to condemn the fee, even though he maintained that the action had no legal effect, the plaintiff was found to have admitted by his pleadings that the District had acquired a fee.

Carter v. Davis[38] was an action to quiet title under a warrant deed executed by the School District. The judgment for the plaintiff was reversed on appeal. In 1921, the lots in question were condemned for agricultural and farming purposes in connection with the agriculture department of the school. The only use made of the property was as a garden in 1922, and a few flowers had been planted in 1924. Otherwise the lot was idle and weedy. On September 16, 1924, the District conveyed the property to the plaintiff in order to acquire other property. The check for $350 in payment by the plaintiff was held by the District as there was some doubt regarding the title. The general rule mentioned by the court was that unless the statute authorized the condemnor to take a fee, only an easement or qualified or terminable fee would be taken and upon cessation of the use for which the property had been condemned, the title would revert. The Lazarus case was cited to support the statement that authority to take a fee must be expressly given or necessarily implied and an absolute or unconditional price must be

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[38] 141 Okl. 172, 284 Pac. 3 (1929).

paid. The statute on which the plaintiff attempted to rely had been repealed, and the court held it was not in force in 1921. The controlling statute[39] provided that a School Board or Board of Education had power to condemn in the manner as provided for railroad companies for building sites and other public purposes. It was recognized that cases may arise in the absence of a statutory provision where it clearly would appear from the proceedings that a fee was condemned, but under the facts cited here, it was not found necessary for the School District to acquire a fee simple to accomplish the purpose for which the lots were taken. The plaintiff could not rely on statutes authorizing an independent school district to sell and convey real estate, as the District could not sell or convey any interest it did not have.

From the report of the case, it is not clear that Thomison v. Hillcrest Athletic Association[40] was an appellate decision, but it would be regarded as authority for the proposition that a school district condemns only a limited estate in Delaware. In 1903, the Hillcrest School District acquired title to the property in question from the Brandywine Realty Company by condemnation proceedings. The property was abandoned for school purposes in 1933. On March 15, 1938, Thomison bought a tract including the Hillcrest School property from the realty company. On March 17, 1938, the defendant purchased the school property from Weatherlow who traced his title to the Hillcrest School District by a deed from the State Board of Education, dated November 17, 1933. The defendant argued that the provisions of the statute that required freeholders to allow at least cash value in condemnation proceedings

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[39] 1921 C.O.S. Sec. 6321.

[40] 39 Del. 590, 5A. 2d 236 (1939).

and that upon payment of damages, the land taken "shall become and be the property of the said school district for the purpose aforesaid"[41] authorized the taking of a fee, both expressly and by implication. The court held, however, that the provision for cash value was not determinative of the quantum of interest taken, pointing out that the constitution and statute both required just compensation. The defendant cited the Hopewell case[42] as authority for interpretation of the statute as showing a public use rather than describing the estate. The court thought that "for school purposes" was entirely different than "for the purpose aforesaid." It was not necessary to require that the property be taken for public use the court said, as the statute was concerned solely with the condemnation of private property for school purposes. There was no indication that the legislature intended that land for school purposes required a fee simple estate, and the unlimited estate would not be implied. In explaining its position, the court stated that:

> ... A reversioner in an eminent domain proceeding has no general power to accelerate his right of reversion and it is a mere dormant right dependent upon the action of that party for whose benefit the property was condemned[43]

Ohio cases are in conflict on the issue of the nature of the estate secured by a school board as a result of condemnation. Pifer v. Board of Education of Rochester Tp.,[44] a court of appeals decision, held that the

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[41] 21 Del. Laws, Ch. 67, Sec. 17.

[42] 179 Ark. 316, 15 S.W. 2d 985.

[43] 5 A. 2d at 239.

[44] 25 Ohio App. 469, 159 N.E. 99 (1927).

estate taken for a school was an absolute fee simple estate, but a later decision of the Ohio Supreme Court, McMechan v. Board of Education of Richland Tp.[45] held that under the statute in force at the time of condemnation only a limited estate was taken. The Pifer case was not mentioned in the Supreme Court opinion. The condemnation in the Pifer case occurred in 1919 and three or four years later, the school at the location was abandoned. The Board proceeded to sell the property. An action was brought to quiet the title against the Board, and the decree for the plaintiff was dismissed on appeal. The question before the court was whether the Board had obtained a fee simple absolute title with a right to dispose of the property. The opinion noted that eminent domain was a sovereign right granted by constitutional provision and legislative enactment to be strictly construed, being in derogation of common law rights. The Board was found to have proceeded under a statute which provided that it follow the same proceedings as for appropriation of property by a municipal corporation. The proviso that on payment of the amount assessed an absolute estate in fee simple should be vested unless a lesser estate was asked was held to apply to the Board. The fact that the Board asked for the property "for school purposes" would not limit the estate, as the Board could not acquire property for any other purpose by condemnation. Its pleadings would have been defective had the purpose not been stated. When the fee simple had been taken, no right of reversion existed, and the property could be disposed of for either public or private uses.

The property involved in the McMechan case had been obtained by

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[45] 157 Ohio St. 241, 105 N.E. 2d 270 (1952).

appropriation proceedings in the Probate Court on February 7, 1861. The record of the court did not disclose any reversionary interest. The decree to quiet the title for the Board was reversed by the Supreme Court. The question stated in the opinion was whether the Board obtained a fee simple title by appropriation. The statutes had provided that the Board may "appropriate for schoolhouse purposes"[46] according to the procedure outlined in the act entitled An Act To Provide For Compensation To the Owners of Private Property Appropriated to The Use of Corporations[47] which said that the corporation must state the rights it sought and that the court would render judgment that the corporation should hold the property for the purposes for which it was appropriated. The opinion noted that the record of appropriation had used terminology "to the use of" and found that the statutes in no place provided for the appropriation of an estate in fee simple and that if authorized it would have to be by implication. Cases involving canal and railroad condemnation which said that no greater estate or interest may be taken than necessary for the public use were cited, as well as a case involving a dedication of school lands in a town plat, which held that on abandonment of the schools, the interest reverted. In a concurring opinion, Justice Taft stated that he thought the party seeking equitable relief should, as a condition of the relief sought, refund to the Board the money paid to the predecessors in title. He noted that when the property had been taken, the School Board was required to pay full compensation for perpetual use, but that it would no longer have either the use of the property

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[46] 51 Ohio Laws 429, 433, Sec. 11, 57 Ohio Laws 9.

[47] 50 Ohio Laws 201, 204, Sec. 11.

or the money as a result of the decision. Chief Justice Weygandt dissented, being of the opinion that the lower court had been correct in construing the allegation of the Board in its condemnation action that the property was needed "for schoolhouse purposes" as a necessary jurisdictional fact the Board had to allege, and not as a limitation on the authority of the Board of Education to take an unlimited estate.

Texas cases are also in conflict on the nature of the estate taken by condemnation proceedings of a school. In Dickey's Estate v. Houston Independent School District[48] the highest court held that a judgment passing fee simple title was in error. A special act creating the school district conferred the power to appropriate property for the purpose of securing grounds for public school buildings in the manner provided for appropriation by railroad corporations or by any other manner or any other proceedings authorized by the general laws of the State for condemnation.[49] In the statute setting out the procedure for railroad companies,[50] the court held that, except where otherwise expressly provided by law, the right acquired by eminent domain was not to be construed to include a fee simple estate in lands. The court stated that the District could rely on other statutes on eminent domain only for the manner or proceeding to be followed as the other statutes were for special classes of districts. The court also found errors in the instructions of the trial court regarding the market value of the property. The judgment awarding the property to the District and a

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[48]300 S.W. 250 (Tex. Sup. Ct. 1927).

[49]Spl. Acts, 38th Leg., p. 323.

[50]1925 R.S., Art. 3270.

compensation award of $35,250 to the defendant was reversed and remanded.

In a later case involving the same school district, Houston Independent School District v. Reader,[51] the appellate court held that there was no inhibition in the Constitution against condemnation of a fee simple and that the clear implication of Section 17, Article 1 of the Constitution was that a fee simple may be taken. The court said the legislature had the right to grant authority to condemn a fee simple and cited the same statute as was cited in the Dickey case regarding creation of the special district. The court found that the legislature had authorized the District to take a fee as asked in its petition. The Dickey case was not mentioned in the opinion here. The court stated that if authority were not to be found in the act creating the District, then it could be expressly found in another statute.[52] The issue was raised in this case on a cross assignment of error after an appeal by the District from a jury verdict. The decision of the trial court was affirmed, but it should be noted that this case was not decided by the Texas Supreme Court.

In County School Trustees of Upshur County v. Free[53] the Trustees sought a fee simple title to the surface estate only, subject to the oil and gas mineral estate. The court reversed the judgment dismissing the condemnation action, holding that the Trustees were not required to condemn both surface and mineral estates. The defendant claimed that the fee simple title meant the absolute and indefeasible ownership of everything from the top of

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[51] 38 S.W. 2d 610 (Tex. App. 1931).

[52] Acts 41st Leg., Ch. 168, p. 370.

[53] 154 S.W. 2d 935 (Tex. App. 1941).

the ground to the center of the earth. The court replied that the statute did not use the word "land" but "fee simple title to real property," and that the minerals may be severed and when done so, involved separate and distinct estates. As a result of this decision, the owners of the mineral estate were found not to be necessary and indispensable parties.

SUMMARY

Payment of the compensation award was a critical factor in determination of the stage of the condemnation proceedings at which the school or college secures rights which was mentioned in three cases. Where school buildings had been constructed before formal steps to acquire property were taken, the right of the school authorities to subsequently condemn the property without making compensation for the improvements has consistently been upheld. Acquisition of a leasehold interest has been held not to prevent condemnation by the tenant in a university case.

The case authority is in conflict not only between jurisdictions, but also within some of the States, regarding the nature of the estate secured by public schools as a result of condemnation proceedings. Statutes provide for condemnation of a fee simple absolute interest in some States. In the absence of an express statutory provision, the courts of some jurisdictions have been reluctant to grant more than a conditional estate, probably because of the influence of the litigation concerning condemnation for railroad purposes. The rationale advanced for finding that an unlimited estate is taken has been that the payment of just compensation requires assessment as if the property will be held for school purposes for an indeterminate length of time, but even considering this argument, some courts have not been

convinced that a school should require an unlimited interest in the property. Statutory provision for condemnation of property "for school purposes" has been interpreted to limit the estate and, on the contrary, to provide only that the property taken must be used for a public purpose.

Some of the cases have simply litigated the issue of whether the property had been abandoned by the school authorities, and in each case the continuing interest of the school district was upheld.

CHAPTER VII

COMPENSATION AND DAMAGES IN SCHOOL OR COLLEGE EMINENT DOMAIN CASES

In Chapter II, the constitutional requirement that when private property is taken for public use just compensation must be paid was discussed, and a number of cases in which the provision was construed were presented. The purpose of this Chapter is to consider the issues raised concerning the determination and assessment of compensation and damages in school or college eminent domain cases. Standards adopted by the courts for determination of what constitutes fair or just compensation are examined first. In the second section of the Chapter, questions raised regarding the evidence on the value of property are considered.

RULES FOR THE MEASURE OF COMPENSATION AND DAMAGES

A distinction between compensation and damages is not always clear in the case reports. Here the term "compensation" will be used to refer to payment for the property taken, and "damages" will refer to injury to the defendant or to adjoining property as a result of the condemnation.

Compensation On the Basis of Market Value.

The defendant in Burger v. State Female Normal School[1] objected to the refusal of the court to offer instructions he had submitted which would have stated that the commissioners in determining the value of the land were not to confine themselves to the present uses but to consider as an element of compensation the special adaptability of the land to the use for which it was to be taken. The opinion did not mention the instruction actually given by the trial judge, but the court held that the attention of the jury was unduly directed to the necessities of the condemnor in the instructions offered by the defendant. The object was not to ascertain the value to the school for its purposes, but fair market value. The court said that the extent, variety, and importance of uses to which the property may be put and the number of persons who may want it is what gives property its value. It would have been proper to consider the uses of the land for all purposes, which would have included the use for which it was sought by the school.

In Mohler v. Board of Regents of University of Nebraska[2] the defendant charged that error had been committed in limiting his recovery to the cash value of the property at the time of the taking. He thought that he should be entitled to prove damages of $250 for expenses of moving and loss of work time. The court pointed out that the instructions had stated that market value was what the defendant could get in money under a voluntary sale and purchase of his property. The fact that it was his home or that he would suffer inconvenience in moving would make no difference. The court suggested

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[1]14 Va. 491, 77 S.E. 489 (1913).

[2]102 Neb. 12, 165 N.W. 954 (1917).

that the measure of damages for condemnation of a railroad right of way was the value of the land taken and the damages to the remainder, and that this rule was in the mind of the legislature in providing that a school should follow the procedure as outlined in the statute regarding railroads.

The defendant argued in Wood v. Syracuse School District[3] that the instructions had been confusing to the jury in the use of "market," "fair," or "reasonable" as terms by which the amount of compensation should be measured. The court held that market value was only one of several elements the jury could consider and noted that the constitutional requirement of full compensation made no mention of market value. The statute under which the school condemned the land provided only that the owner was to be paid the "value" of his property.

The instructions given in Dickey's Estate v. Houston Independent School District[4] were found to be in error because the court suggested that among the uses to be made of the property any development that might be expected in the immediate future, but not speculative or possible contingencies, could be taken into account in the determination of the amount of compensation. The court pointed out that by the terms of the statute, the trial judge was required to submit explanations and definitions in legal terms as necessary to enable the jury to properly pass upon and render a verdict, but if explanations were not necessary, none should be given. The measure of compensation on the basis of market value would comply with the statute, and the remainder of the instruction in which the jury was told not to consider

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[3]108 Kan. 1, 193 Pac. 1049 (1920).

[4]300 S.W. 250 (Tex. Sup. Ct. 1927).

evidence as to speculative values was considered confusing and misleading.

Instructions in School District of Kansas City v. Phoenix Land and Improvement Co.[5] that the jury was to fix damages and the actual cash market value of the land actually taken were held by the court to be correct.

In another Missouri case, Consolidated School District No. 2 v. O'Malley,[6] the defendant objected to instructions which included the terms "clear market value," "actual cash market value," and "actual cash value" on the basis that these were prejudicial to his interests. The court held that one of the instructions had defined "market value" as the measure of damages, and words used in other instructions could not have been prejudicial.

The instructions in North Kansas City School District of Clay County v. Peterson-Renner Inc.[7] stated that private property could not be taken for public use without just compensation and the School District on appeal argued that it was error to include this statement in the instructions. The court noted an earlier Missouri case which had said that language abstract, immaterial, and unnecessary to the precise issue, should not be included in the instructions, but thought that it was not reversible error unless it resulted in prejudice to the interest of the party or was misleading to the jury. The case was remanded, and the court advised the parties to consider this caveat at the new trial. The point here was that the jury was only to assess damages and not to consider the issue of whether the District could take the property.

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[5]297 Mo. 332, 249 S.W. 51 (1923).

[6]343 Mo. 1187, 125 S.W. 2d 818 (1938).

[7]369 S.W. 2d 159 (Mo. Sup. Ct. 1963).

The Effect of Benefits to the Condemnee. The District appealed from an award in Haggard v. Independent School District of Algona.[8] One of the issues raised on the appeal was that the advantages of locating a school on the property ought also to be considered in the assessment of damages. The court simply stated that benefits were not to be taken into account.

In a later Iowa case, Gregory v. Kirkman Consolidated Independent School District[9] the court approved instructions which said the amount of damages was the difference between the reasonable market value of the 130 acres before the condemnation and the reasonable market value of the remainder immediately after the condemnation without any consideration of the benefits that might accrue to the owner. The court noted that the evidence did not support any other theory as to damage. The owner had invited the instruction, therefore, by his evidence, and was in no position to complain on appeal as he had not requested any instructions on this point at the trial.

In People v. Pommerening[10] the opinion of the court stated that it had been error to admit testimony that a golf course would benefit the land of the owner that was not taken, but the error was cured by an instruction which stated that the claimed benefit was not to be considered in fixing the amount of compensation. The court found the award of the jury within the range of the evidence and affirmed the judgment of the trial court for the Board of Regents.

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[8]113 Iowa 486, 85 N.W. 777 (1901).

[9]193 Iowa 579, 187 N.W. 553 (1922).

[10]250 Mich. 391, 230 N.W. 194 (1930).

The Time at which Value of the Property is Determined and Interest on the Award. Instructions to the jury in Rinke v. Union Special School District No. 19[11] stated that the measure of compensation was to be the fair cash market value of the land at the time of taking. The market value was to be determined by the amount the land would reasonably be worth on the market for a cash price allowing a reasonable time within which to effect a sale. The court pointed out that a long line of decisions had held that just compensation was the actual market value at the time of institution of the proceedings. Since compensation was to be paid in money, there was no error in telling the jury that the value could be determined allowing a reasonable time for sale, but the court did not give any reason as to why payment in money would remedy the instructions.

The question of interest as a part of the compensation that is required of the condemnor is closely related to the problem of the time of determination of the value of the property to be taken. The District claimed that the judgment allowing interest in Houston Independent School District v. Reader[12] was in error because the owner had made no prayer for interest in his pleadings. The court held that in a condemnation proceeding, the owner was not required to plead that interest be granted and his prayer for general relief would entitle him to it from the date of actual appropriation. While the District had deposited the award into the Court, the owner could not withdraw it without waiving further rights and the deposit was not a tender but a prerequisite to possession. Therefore, the interest would run

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[11] 174 Ark. 59, 294 S.W. 410 (1927).

[12] 38 S.W. 2d 610 (Tex. App. 1931).

from the time of appropriation until the owner received the award according to this opinion.

In School District of Clayton v. Kelsey[13] the owner objected to the refusal to give an instruction which would permit the jury to consider the value of what the owner said amounted to a 10 day option given to the District under the statute. The statute provided that the District might "within 10 days from the return of such assessment, elect to abandon ..."[14] In the opinion of the court, there had been no evidence presented on the value of a 10 day option, and the court also was of the opinion that the value was to be fixed as of the day the property was appropriated, which would not occur until the damages had been fixed by the jury and paid into court.

Condemnation proceedings were begun on June 10, 1957, in the case of Red Springs City Board of Education v. McMillan[15] and the judgment on the $1,450 awarded by the jury said that it should bear interest at six percent from June 10, 1957. The court held that the judgment must conform to the verdict and that the trial judge was without authority to add the interest. Interest should run only from the time of rendition of the judgment. In a concurring opinion, one of the justices pointed out the conflict in authority on the right to recover interest on a judgment in condemnation proceedings, some of the cases holding that interest ran on a judgment from a date of its rendition, others from the date of taking the property by the condemnor. In

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[13]355 Mo. 478, 196 S.W. 2d 860 (1946).

[14]1939 R.S. Sec. 1506.

[15]250 N.C. 485, 108 S.E. 2d 895 (1959).

this opinion, the North Carolina Constitution required interest on the judgment in order for the owner to receive just compensation.

The Question of Damages to Property Not Taken.

Where the school or college has not taken the entire amount of property owned by the defendant in condemnation proceedings, the question of whether the District is obligated to pay for damage that may occur to the remainder has been raised.

The District sought to condemn 2 1/2 lots separated from the defendant's residence by an alley in Haggard v. Independent School District of Algona.[16] The District appealed from an award of $350, basing its appeal on an exception to the testimony of witnesses regarding annoyance or inconvenience resulting from establishment of a schoolhouse which would have the effect of depreciating property. The appeal was also based on an objection to instructions which said the jury could consider the condition in which the premises were left after the appropriation and every inconvenience naturally resulting by which the market value of the property would be unfavorably affected. The jury was also told it could take into consideration the natural and probable effect of the use for which the property was condemned, as well as how the taking would inconvenience the owner in the use of the remainder of his property or how it would lessen its value. The trial court's holding that damage was not limited to the value of the land taken but might include damage to the entire premises was approved. There was no conflict found in the evidence as to whether the premises were owned and used together and

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[16] 113 Iowa 486, 85 N.W. 777 (1901).

while this question would ordinarily be for the jury, it was not reversible error to assume the fact that they were used together and to instruct the jury accordingly. Three possible views regarding consequential injury were mentioned:

1. That the owner should receive the value of the land and damage to the remainder only, with no compensation for the same kind of inconvenience suffered by adjoining property owners whose land was not taken.
2. That the owner should receive compensation not only for the land but also for any injury caused by the use of it for public purposes.
3. That the landowner, while not generally entitled to compensation for inconvenience, is entitled to recover for depreciation of the value of the entire tract arising from the proximity of a public improvement, and which would not have resulted but for the taking.

The first view would satisfy the constitutional requirement, the court said, but the statutes had been construed to entitle the owner in the railroad cases to damages beyond the mere compensation for being deprived of his land. The court thought it would not be practical to adopt the third view as it was impossible to tell how much inconvenience the owner suffered due to the proximity of a public improvement. It was not entirely clear how the second view differed from the third, but the court seemed to favor the second view and modified the judgment, finding error in rendering the judgment against the District for the amount of the owner's damages as assessed by the jury. The opinion was not clear about exactly where the trial court had erred.

The Board sought to take 12.9 of the 300 acres owned by the defendant in Bell's Committee v. Board of Education of Harrodsburg.[17] The defendant, on appeal, argued that there had been an error in the instructions. The statute provided that the Board should follow the proceedings in accordance with provisions governing condemnation by railroads, and the court found that the instructions given had been upheld in railroad cases. The measure of the damage to the remainder was the difference between the market value of the entire tract immediately before the taking and the market value of the remainder after the taking, excluding from both estimates any enhancement of the remainder by reason of the purpose for which the condemned quantity had been taken. The court also observed that when testimony was contradictory, the jury was to reconcile the difference, and the court would not set aside the verdict unless the jury had been influenced by passion or prejudice.

The owner argued in People v. Brooks[18] that he should have been awarded damages for impairment of the value of the portion of the lot that was not taken by the University. The question was not settled on appeal, however, as the court said the question had been left to the jury under proper instructions, and there was no evidence in the record about how the lump sum awarded by the jury had been determined.

One of the grounds for reversal in Dean v. County Board of Education[19] was that the trial court had erred in refusing the charge requested by the

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[17] 192 Ky. 700, 234 S.W. 311 (1921).

[18] 224 Mich. 45, 194 N.W. 602 (1923).

[19] 210 Ala. 256, 97 So. 741 (1923).

owner that he was entitled to the value of the land as situated and not merely as a separate piece. According to the facts of this case, the remainder of the property obtained water from a well located on the lot the Board sought to condemn. The court was of the opinion that the two lots were legally related, each enhancing the value of the other.

Mayfield v. Board of Education of City of Salina[20] was a suit by owners of property adjoining that sought by the Board to enjoin condemnation on the basis that they would be annoyed by noise and trespassers and their property depreciated in value. They sought injunctive relief on the basis that they had no remedy at law since the statute did not provide for damages and the Board was immune from suit. The adjoining owners also alleged that their property was taken and that they were denied equal protection of the laws. The sustaining of a demurrer was affirmed because there was no right to compensation in the absence of constitutional or statutory provisions requiring payment of damages for consequential injury. These owners, the court noted, differed only in degree from the next removed neighbors covering an indefinite area. The court commented that even in States where consequential damages were allowed by constitutional provision there was no damage except for physical interference.

A cross petition by the wife of the owner of the property in the case of Schuler v. Wilson[21] was based on an allegation that the land owned by the wife which adjoined the property condemned was also damaged. The jury did not allow damages for the wife's adjoining property and the court found

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[20] 118 Kan. 138, 233 Pac. 1024 (1925).

[21] 322 Ill. 503, 153 N.E. 737, 48 A.L.R. 1027 (1926).

there was no error in this procedure. There was no physical interference with her property or no disturbance of any right. None of her property had been taken and the mere use of the adjoining property for a playground even though it caused depreciation of her property would not justify an action at law for damages or assessment for compensation in an eminent domain proceeding.

Compensation When Property of a School or College is Condemned for a Public Use.

It was pointed out in Chapter IV that very few appellate cases have been located in which a school or college has condemned public property. Only one case, In re Oronoco School District,[22] has been located in which the issue of damages when a school attempts to condemn property already devoted to a public use was raised. In this case, the issues on damages were treated no differently than in the situation where private property is taken. The court held that damages may be assessed in gross by the jury and divided between the town and the heirs of those who originally laid out the park in the town plat. No error in the evidence on the value of the property, which varied from $650 to $6,000, was found and the verdict was supported by the evidence. Two justices who dissented thought that instructions which told the jury they may consider the fact that residents of the school district were also citizens of the township and that whatever the district residents had to pay, they would also have to pay as citizens, were erroneous. In their opinion, it was clearly prejudicial to tell the jury that consideration could

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[22] 170 Minn. 49, 212 N.W. 8 (1927).

be given to who would benefit most by use of the land for park purposes, the people who lived in the village or those who lived outside it.

There have been a number of cases in which the measure of damages when property of a school or college is taken has been put at issue.

A benefit set-off was allowed in the case of Trinity College v. Hartford.[23] The case began as a petition for injunction by the College to prevent opening of a highway through the College property. Gross damages of $3,500 had been set, and it was estimated the College would benefit to the extent of $3,000, so the judgment was for $500. The comment of the court that where the landowner has a claim for damage and has received local and special benefits equal to the damage, the value of the benefits shall be set off against the damage and he shall be allowed nothing,must be regarded as dicta.

The court in Board of Education v. Kanawha and Michigan R. Co.[24] was of the opinion that the same rule regarding damages should be applied as in the case of condemnation of private property. The fact that the property was already put to a public use did not enhance the damage because the Board could condemn a replacement. Just compensation would allow for what was taken and damages to the residue beyond the benefits from the work to be constructed. The school should receive the difference between the value of the property for school purposes before the damage and the market value for any purpose after the damage. In this case, the railroad had erected an embankment across a school lot for the bed of a railroad without legal

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[23] 32 Conn. 452 (1865).

[24] 44 W. Va. 71, 29 S.E. 503 (1897).

permission. The school said the land was worth nothing as school property, but had used it annually for school purposes since the taking. The court ruled that if the property was still to be used for school purposes, the damage would be the difference in value of the property after the taking of a part by the railroad. The court intimated that the cost of building a fence, digging a well, or getting adjoining land might be considered as elements of damage.

The instructions on the measure of damages given by the trial court in San Pedro, L.A. & S.L.R. Co. v. Board of Education of Salt Lake City[25] were not printed in the record of the appeal, but the opinion stated that they were correct. The action of the trial court in allowing the Board to prove the value of the schoolhouse apart from the land was also approved on the basis that no other method of arriving at the value of the property was practical in a case where the property had no market value. The evidence presented was not considered sufficient, however, to justify the finding of the jury that the property of the District had been wholly destroyed for school purposes by construction of railroad tracks on one end of the property. The overruling of a motion for new trial was reversed.

The School District brought the action for damages under the State highway law in School District of Borough of Speers v. Commonwealth of Pennsylvania.[26] The judgment confirming the award of the viewers to the School District was affirmed. The appeal by the State was based on the position that the State had a duty to compensate only for private property

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[25]32 Utah 305, 90 Pac. 565 (1907).

[26]383 Pa. 206, 117 Atl. 2d 702 (1955).

condemned. As the School District was an agent of the State, the State argued, it may receive compensation only by grace and not by right. The State also attempted to rely on the argument that the constitutional prohibition against taking property without just compensation applied only to privately owned property. The court noted that the school code provided that lands may be acquired by the School District in fee simple in holding that the District was the owner of the property and that the highway act did not specify that compensation would be made only to private owners. The court stated:

> We cannot believe, for example, that school buildings costing many thousands of dollars can be destroyed for highway purposes and yet the legislature not have intended that the loss be paid to the District.[27]

A judgment against the United States for $97,500 for condemnation of 3.42 acres of high school property and a temporary easement over .57 acres taken for a flood control project was affirmed in United States v. Board of Education of the County of Mineral.[28] Prior to the taking by the United States, the high school site included eight acres, and the court found that abundant evidence had been submitted that the program could not be carried on satisfactorily with less than this amount. The case was submitted to the jury on instructions that the award be the value of the property taken, plus damages to the residue, less any benefits to the residue from the project. If the jury were to find that the property taken had no market value, they were to consider the cost of acquiring adjacent property in substitution. The issue raised by the United States on appeal was that only

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[27] 117 Atl. at 704.

[28] 253 F. 2d 760 (4th Cir. 1958).

the market value of the property taken should be considered. The court thought that where the highest and best use of the property was for municipal or government purposes for which no market value existed, some other method of arriving at just compensation must be adopted.

> It would be absurd to hold that the Board's recovery should be limited to the value as vacant lots of the land so taken and that no severance damages should be allowed for damages to the residue merely because the residue had no market value for school purposes and its market value for other purposes was not affected.[29]

Another federal case holding that the United States had the constitutional power to condemn lands to substitute for those inundated by a reservoir was cited as authority that the best means of making compensation in such cases was by substitution. The instructions approved by the court were to the effect that if the jury should find the property taken had no market value at the time of the taking, a replacement cost or substitution cost would be appropriate for them to consider. The Board would be entitled to have the lands taken substituted by replacement with lands with the same proximity if reasonably possible, if the Board was required to continue to provide the same facilities for the program as at the time of the taking. If the jury should decide that the Board was not required to continue the program,they should consider how much loss would be suffered by the Board by reason of the taking. Any benefits to the Board as a result of the construction of a flood wall should be considered. If the Board were not obligated or required to continue the program as at the time of taking the property but only deemed it advisable, it would be incumbent upon the Board to use the remaining existing facilities even though re-scheduling might be inconvenient.

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[29]253 F. 2d at 763.

The jury could consider the uses to which the Board was putting all its lands and award just compensation for damages the Board would sustain in restoring itself to a full utilitarian and equivalent use before the time of the taking. The government was required to pay just compensation but no more than necessary to indemnify the Board of Education for its loss.

In State v. Salt Lake City Public Board of Education[30] the State's motion for summary judgment on the basis that Franklin School which was condemned for construction of Interstate Highway 15 had no market value and therefore the State was not obligated to compensate for the taking was denied. On a petition for interlocutory appeal, the denial of the motion was affirmed. Possession of the property had been granted by stipulation of counsel and the question of compensation reserved for trial. In its answer the Board asked $550,000 as the market value but was later allowed to amend its answer to ask $709,000 on a replacement cost theory rather than market value. The court found no distinction in the method for taking public or private property and stated that the condemnor was required to take all essential steps in either case. The State's argument that the legislature would not require taking public money from one pocket and putting it into another, would be considered valid only if the resources of the State were in a unified fund. Tax funds collected in the School District were not put into the General State Fund, the court noted, but were for a particular purpose of operating the public schools. Taking the property without compensation would disrupt the balanced plan for financing schools, and as a practical matter would create an obstacle for the Board in the management of its program. The fact that the highway

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[30] 13 Utah 2d 56, 368 P. 2d 468 (1962).

was part of the federal project had some bearing on the case. The court referred to the fact that 90% of the cost of the highway would be borne by the federal government, and said that while this fact had no bearing on legal issues and would not be admissable as evidence, it pointed up the inequity of imposing the cost of the right of way on the School Board. Two justices dissented, basing their views on statutory construction that the statute did not specifically provide for payment in the case of taking of public property. An Illinois school annexation case was cited as authority for the proposition that the Board of Education owns nothing save by the grace of the State. The dissenters thought that the practical argument substituted a philosophical point of view for binding legal authority, calling it an "objectivity complex, divorced from juridical justification." In their view, the federal participation had no place in the decision.

The substitution theory as a basis for assessing the compensation due to the District was not allowed in Union Free School District v. State.[31] In this case, the State appropriated for highway purposes a strip along the frontage and two parcels in the northeast portion of the elementary school site. The District cited the federal West Virginia case as authority that its damages should be a sum equivalent to the market value of another suitable tract, but the court observed that the school did not use the entire site for school purposes here. Contemplation of future use could not offset the fact of non-use. In this case, it was found that the school could continue the same activities after the taking as before the taking. For the substitution theory to be applicable, the District use before the

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[31] 35 Misc. 2d 373, 230 N.Y.S. 2d 416 (N.Y. Ct. Claims 1962).

taking would have to be so complete that partial taking would render the whole useless and the court would have to find that there was no other method to determine the plaintiff's pecuniary loss. The court thought that the District, by admitting an alternative to the substitution method in computing $368,300 as the direct and consequential damage to the land and building and another figure, $190,000, as the amount necessary to purchase an adjoining tract, conceded the validity of the usual before-and-after method of assessing damages.

State v. Waco Independent School District[32] was an action by the State to condemn 7.4 acres of a high school site in Waco for highway purposes. The acreage included two buildings, and the remainder of the high school campus included a $250,000 gymnasium and three shop buildings. At the trial, the District amended its pleadings to allege that the measure of damages should be the cost to the School District of providing substitute replacement facilities. The State's exception to this amendment was overruled. The State contended that the proper measure for damages was the difference between the value of the entire campus of 25 acres before the condemnation and the value of the remainder after the taking. According to the State, the value of the condemned property should be market value with damages to the remainder. In the opinion of the court, it made no difference if the property had a market value or not, as the value of what the school had or lost was not the inquiry. Instead, the costs of restoring the facility to a utility for school purposes equal to what it was prior to the taking was to be considered. The trial court had said that

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[32]364 S.W. 2d 263 (Tex. Sup. Ct. 1963).

the property remaining after the taking had value only to the extent it was a starting point from which to re-build the high school campus that was absolutely necessary to the Waco School District. This value would be dependent upon the cost of acquiring or constructing reasonable substitute facilities. In explaining that the measure of damages was the amount reasonably necessary to restore the remaining 18.35 acres of land and facilities to the same or reasonably equal utility, the court commented as follows:

> There is a fundamental distinction between the obligation resting on the agency condemning public property, and that of condemning private property. This distinction lies in the obligation thereby imposed on the condemnee. For example, a private party owes no duty to the public to continue its operation either at its original location or elsewhere. It can move, it can stay, or it can liquidate as it alone sees fit. Not so with a school system charged with a legal obligation to the public. A school system suffering the loss of one of its schools by condemnation must replace that school when the facility is necessary to the education of its children as shown by the undisputed evidence in this case. This is the legally imposed duty of the School District, and it has no other choice.[33]

The State objected to the instructions that had been submitted on the basis that they were multifarious. The court found the instructions to the advantage of the State because in this case there were no separate elements of damages, and it was proper for the land and improvements to be submitted together. The State was protected against double assessment by the instructions regarding the restoration of the 18.35 acres remaining. The instructions as submitted by the trial court were as follows:

> What do you find from a preponderance of the evidence was the reasonable cost, on November 7, 1961, of land, if any, and facilities, if any, reasonably necessary to replace

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[33] 364 S.W. 2d at 268.

> the 7.40 acres of land and facilities taken by the State with land, if any is required, and facilities of the same or reasonably equal utility for high school purposes as that to which the 7.40 acres and facilities were reasonably utilized immediately prior to the taking in question, and reasonably necessary, if any are reasonably necessary, to restore the remaining 18.35 acres of land and facilities to the same or reasonably equal utility for high school purposes as that to which the 18.35 acres of land and facilities were reasonably utilized immediately prior to the taking in question.[34]

Comments on the Waco case in Law Reviews were generally favorable. The advantages to the public of the substitution theory were pointed out by one of the comments in that the facility destroyed had no doubt deteriorated to some extent, but if it was considered unnecessary to replace the facility, only nominal damages would be awarded. The writer seemed to recognize that the probability of the jury finding replacement unnecessary in any school case was slight:

> It seems reasonable to conclude that in almost no other situation does the necessity of immediate reconstruction exist as strongly as when school facilities have been taken from use.[35]

Three conditions were noted by Conant[36] which require the application of the substitution theory as in the Waco case. These conditions were, first, that the property have no market value, second, that replacement of the facility be found necessary, and third, that there be a legal duty to replace the facility. In this comment another advantage of the substitution theory was noted:

> The principal case appears to follow the weight of authority in applying the reasonable substitute measure of damages, as between two public bodies. Likewise in

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[34] 364 S.W. 2d at 264.

[35] 49 Iowa L. Rev. 193, 197.

[36] 15 Baylor L. Rev. 84.

> view of the importance of school facilities and the close legal question which would be presented should a school district assert the doctrine of paramount purpose in bar of a condemnation for highway use, the substitution method would seem most equitable of remedies in such a situation.[37]

EVIDENCE IN ASSESSMENT OF COMPENSATION AND DAMAGES

In addition to the necessity for some measure of value for determination of what constitutes just compensation, it is necessary to determine what evidence is valid in the attempt to arrive at the amount of compensation or damages that must be paid. Obviously, not all of the rules of evidence would have been mentioned in the school and college cases, but issues on what types of evidence should be admitted and for what purposes have been raised in a number of cases.

The Nature of Evidence of Value.

Recognizing that appropriation proceedings are special in nature, not necessarily adversary, the court in Kraemer v. Board of Education of Cincinnati[38] stated that there was no set rule as to the burden of proof, but found error in the trial court's assigning of the burden of proof to the owner regarding the value of the property to be taken. The owner was not required to prove the value of the property by the preponderance of the evidence. The jury were warned that they should not average the testimony of witnesses nor divide the values placed on the property by the number of witnesses. The opinion was also critical of the trial court's confinement of

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[37] 15 Baylor L. Rev. at 89.

[38] 8 App. 428 (Ohio App. 1917).

the testimony to per acre value, ruling that the owner should be permitted to suggest value on any plan most desirable. The court found error in sustaining an objection to testimony regarding the front foot value of the land in favor of a per acre value. Error was also found in instructions which limited the view of the jury to the premises only. The view of the premises was for the purpose of seeing the real estate to be condemned, not for the purpose of fixing its value, but to enable the jury to better consider the evidence because the value of the property depended on its location. The court thought the owner would be deprived of his statutory rights if he were not permitted to call the attention of the jury to the abutting property.

According to the statute involved in Dean v. County Board of Education[39] evidence of value is opinion evidence that is not conclusive on the court or the jury trying the fact even when the evidence is without conflict. In this case, estimates of the value of the property sought by the Board varied from $800 to $2,000. While the court found no error in the examination and cross-examination of the owner on the value of the property, the court did find that the owner, having been invoked on re-direct examination to reveal that he had told the commissioners the land was worth $1,500, should have been allowed to give the jury the basis of that opinion. This evidence was not confined to the question of the credibility of the owner's testimony, but was allowed to apply to the value of the land.

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[39]210 Ala. 256, 97 So. 741 (1923).

Conflicting or Irrelevant Evidence. Mohler v. Board of Regents of University of Nebraska[40] was a proceeding to condemn a portion of a 50 foot square lot in Lincoln on which a seven room cottage was located. The appraisers valued the property at $2,200, and the jury found its value to be $2,250. The question of the adequacy of the damages was raised on appeal. The court noted that the evidence had been conflicting and that the estimates had varied from $1,800 to $3,500. For some reason, the court commented that the witnesses best qualified to know made the lower estimates. The opinion mentioned the fact that the property was in an area where the streets were unpaved, that a railroad yard was located several blocks north of the property, and that property in the area had declined in value. The owner also sought to overturn the verdict on the basis that incompetent and irrelevant evidence had been admitted, but the court found that he had not made any objection or motion to strike at trial and while some of his objections should have been sustained, they were not considered prejudicial. The verdict was affirmed.

The verdict in Ouachita Parish School Board v. Clark[41] was amended because the court found that testimony did not support the jury finding of a value of $200 per acre for the property taken by the Board as a result of construction of a gym on the owner's land due to a misunderstanding regarding the boundary. While a jury was authorized to rely on its own valuation and its verdict was entitled to respect, the court felt that it had disregarded the testimony. The owner had placed a value of $200 per acre on the property,

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[40] 102 Neb. 12, 165 N.W. 954 (1917).

[41] 197 La. 131, 1 So. 2d 54 (1941).

but the court found this was an arbitrary figure as no reasons for the figure had been given. The experts who testified for the Board said the land was worth $20 per acre since located near the school, but otherwise would be worth $10 per acre. The deeds submitted by the Board as evidence had shown that property in the vicinity had sold for from $5 to $12.50 per acre. The owner was to be awarded the market value of the property without regard to the improvements that had been made by the Board, and the court fixed the award at $50 per acre, and assigned costs of $300 to the owner. On re-hearing the owner pointed out that the costs exceeded the amount he was awarded. The matter was settled by the Board's motion to pay the costs in both the District Court and the appeal.

The refusal of a new trial on the ground that damages awarded were inadequate was affirmed in School District of Clayton v. Kelsey[42] even though there was a wide margin in the testimony on value. The court would not disturb the verdict when the award was supported by substantial evidence.

In Waukegan v. Stanczak[43] the verdict of the jury of $35,000 was affirmed. The City's evidence had shown a value of $22,800 to $30,400 and the owner's evidence had shown a value of $60,000 to $75,000. Since the jury had viewed the premises, and the verdict was within the range of the evidence, it was affirmed.

A judgment on the verdict of $15,000 was affirmed in County Board of School Trustees of DuPage County v. Boram,[44] one of the issues being that

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[42] 355 Mo. 478, 196 S.W. 2d 860 (1946).

[43] 6 Ill. 2d 594, 129 N.E. 2d 751 (1955).

[44] 26 Ill. 2d 167, 168 N.E. 2d 275 (1962).

the verdict was not within the range of the testimony. The Board was seeking to acquire 5.16 acres to which Boram had title on and before April 10, 1960. Luehring, a real estate broker, claimed to have purchased the property from Boram on April 10 for $30,000 with one dollar down and a note for the remainder due within two years without interest. Witnesses for the Board placed a value on the property of $3,000 per acre or $15,000, and witnesses for the owners said the property was worth $34,000 and $6,250 per acre. The owners maintained that since the acreage was 5.16 and the low valuation was $3,000 per acre, the verdict of $15,000 was not within the range of the evidence. The court explained that while the evidence had established the actual acreage as 5.16, the property had been referred to in the trial as a five acre tract, even by the defendants' own counsel. The total amount specified by the jury was held to have precedence over a per acre valuation. Because the jury was supposedly in the best position to appraise the capabilities of expert opinion witnesses, the verdict was not contrary to the evidence. The owners also insisted that the verdict was a result of passion and prejudice caused by improper remarks of counsel for the Board. The court pointed out that the objection to remarks regarding the opinion of members of the Board that the value of the property was no more than $3,000 per acre had been sustained, and that at no time did counsel for the Board state his own opinion or put his reputation upon the supposed opinion of Board members.

Testimony. The appraisers modified their valuation of the property and Peckham v. North Providence School District[45] was an action for debt by the owner in an attempt to recover on the basis of the first award. On

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[45] 7 R.I. 545 (1863).

March 26, 1863, the appraisers, the owner, and the District clerk went to the site sought for a school. The owner informed the clerk that he would not allow him on his ground and according to the report of the case, the owner used "opprobrious language" in reference to the men from the clerk's section of the town. As a result, the owner was heard alone by the appraisers, and they reported the value of the property at $500. When the District complained to the appraisers that it had not been heard, the papers were recalled and an appraisal meeting held at the schoolhouse where the award was reduced to $333. The court denied the owner the right to recover on the first award, calling his conduct inexcusable. The Board had a right to be heard, but was prevented by the owner's conduct, so he was found to have no right to complain.

A judgment awarding the owner $17,000 was reversed in Chicago v. Lehman[46] partially because the trial court had refused to allow the owner to cross-examine the City's value witnesses on the cost of developing the lots for their best use. The court discussed the use of the term "expert" and in this case, thought the use of the term was a misnomer. The witnesses had not acquired the ability to deduce correct inferences from hypothetically stated facts, or from facts proved involving scientific or technical knowledge. Instead, they had acquired practical experience in real estate business, but even then, had no special knowledge of the locality in question. It was significant to the court that the four witnesses all went to the property, knew of no sale in the neighborhood, but each arrived at a total value of $15,000. The City maintained that it was not admissible to examine witnesses

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[46]262 Ill. 468, 104 N.E. 829 (1914).

regarding a purely imaginary scheme, but the court found that these witnesses had fixed their estimate of value on the basis of the possible uses of the property and that to test the value of their opinion, it would be admissible to question them about the possible income that might be derived from the property.

The question of whether one of the appraisers should be allowed to testify at the trial was raised in Gregory v. Kirkman Consolidated Independent School District.[47] The court agreed that the jury was not entitled to consider the award made by the appraisers as it was not an issue in the case. Two of the appraisers had testified at the trial, but the court guarded any reference to the amount of the award made by the appraisers and promptly sustained any objections that were offered. The evidence of the value of the property ranged from $10 to $20 per acre, and two of the District's witnesses had testified that the taking would cause no damage to the remaining property. The verdict for $1,260 for four acres of the owner's 130 acre improved farm was affirmed. The District submitted with its motions to set aside the verdict and grant a new trial, affidavits of the jurors that they had erred. The court recognized from reading the affidavits that the jury misunderstood or ignored the instructions or considered a measure of damage on which there had been no evidence, but it was held that the jury could not impeach its own verdict by showing a mistake in calculation or error in judgment, and the verdict stood.

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[47]193 Iowa 579, 187 N.W. 553 (1922).

Testimony by a commissioner in School District of Kansas City v. Phoenix Land and Improvement Co.[48] was a basis for reversing the case. The court said that the fact McElroy was a commissioner should not have been permitted to go to the jury as the cause stood at the time it was submitted to the jury as though no commissioners were appointed. At the same time, the court indicated that if the commissioners were not examined, the trial court would have no way of knowing the theory on which they had proceeded. At the trial the commissioners were named and the fact was stated that their valuation of the property was $41,950. Because this evidence was prejudicial and in disregard of the law in prior cases, a new trial was granted.

No error was found in refusal of the trial court to instruct the jury that they should be guided by their own judgment as well as all the evidence in State v. Moriarity.[49] A previous case was cited in which a similar instruction was held improper because the jurors were not limited to evaluation of the testimony, but invited to draw without limitation on whatever information, knowledge, or experience they had. The court found that the jury had been fully instructed on the subject in another instruction, and cautionary instructions were regarded as resting in the discretion of the court. Refusal of the trial judge to permit the jury to view the site was also discretionary, and he had been of the opinion that testimony of witnesses and photographs were sufficient.

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[48]297 Mo. 332, 249 S.W. 51 (1923).

[49]361 S.W. 2d 133 (Mo. App. 1962).

Elements That May Be Considered.

The following cases illustrate some of the elements or conditions that have been considered as evidence of the value of property schools and colleges have sought to condemn.

The Most Advantageous Use. Four lots for a high school building were appropriated in Soisson v. School District of City of Connellsville.[50] The judgment on the verdict awarding $6,784.11 was affirmed by the court without discussion. No error was found in the instructions which told the jury that if they believed the land was available for subdivision and the market value would be increased thereby, they had a right to consider such as an element of the value of the property. The District's motion to strike testimony of a witness that he valued the property at $10,000 and that if he wanted it for a residence he would give that amount was overruled by the court. The owner was also refused permission to show a price that had been bid for the property in 1912. The condemnation proceedings began May 9, 1916.

The District suggested that error had been committed in admitting evidence of valuable gravel deposits on the property it sought in Wood v. Syracuse School District.[51] The court held, however, that in order to determine the market value of the property, it would be appropriate to consider any legitimate use that could be made of the land, including that most advantageous to the owner.

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[50]262 Pa. 80, 104 Atl. 892 (1918).

[51]108 Kan. 1, 193 Pac. 1049 (1920).

State v. Moriarity[52] was an action by the Board of Regents to acquire 8 1/2 acres for Central Missouri State College. Commissioners assessed the damages at $14,000 which was paid by the State and both parties filed exceptions. The jury arrived at a figure of $20,000 for the property. On appeal by the State, the instruction telling the jury to consider only the highest and best use for the property as shown by the owner was challenged. The position of the State was that fair market value should not be defined as what could have been obtained from parties who wanted to buy the property on December 21, 1960,who would give the full value for its highest and best use. The State was also of opinion that evidence of suitability for subdivision was speculative. The judgment was affirmed, however, on the basis that the highest and best use instruction as used within an otherwise correct definition of fair market value was not reversibly erroneous. The court pointed out that the highest and best use was not the only measure of value but one element. Unless other elements of value had been excluded, the instructions would not be considered erroneous. The jury had not been limited to only evidence presented by the owner.

The District sought to condemn a strip of about ten acres on the north end of a 160 acre farm owned by the defendant in Vierling v. Independent School District No. 720.[53] On an appeal from the appraisers report of $15,000 a jury awarded the owner $16,500 for his property, and this judgment was affirmed. The owner objected to the fact that his cross examination of the Superintendent regarding the District's contemplated use of the property

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[52]361 S.W. 2d 133 (Mo. App. 1962).

[53]129 N.W. 2d 338 (Minn. Sup. Ct. 1964).

had been restricted. The owner's case was presented on the theory that the highest and best use for the property would be residential development, and he made no claim that the remaining 150 acres would be adversely affected. The court found that the rule permitting evidence of the contemplated use where the effect would be to depreciate the value of the remainder did not apply in this case. The right of the District to condemn the property for an athletic field was not relevant to the question of damages. The owner also maintained that error had been committed in rejection or disparagment of the testimony of his value witnesses. Since the highest and best use was the basis for recovery on which the owner had proceeded, the court felt that the rule permitting testimony of persons living near the tract as to its value was not applicable and would prejudice the owner.

Offers and Problems of Collusion. Two types of offers should be distinguished; those by the school or college seeking the property, and those submitted as evidence of the value of the property by the owner. As discussed further in Chapter VIII, it is necessary in most states for the condemnor to make an effort to purchase the property before he begins condemnation proceedings, and the offer made in this effort has, on occasion, been questioned regarding its validity as evidence of value.

The offer made by the Board was considered in Dean v. County Board of Education[54] and in Waukegan v. Stanczak.[55] The Board in the Dean case offered $300 to the owner for the land it later condemned. The evidence presented in the case valued the land at between $800 and $2,000. The court

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[54]210 Ala. 256, 97 So. 741 (1923).

[55]6 Ill. 2d 594, 129 N.E. 751 (1955).

found that it had been error to use the offer of the Board as evidence of the value of the land. In the Waukegan case the Board had offered more than the jury eventually awarded. In holding that there was no error in exclusion as evidence of the Board's offer to purchase the property for $40,000, the court pointed out that the condemnor's offer was a requisite to showing that a price could not be agreed upon, and that often the offer was a premium price in order to secure quick action.

One of the grounds on which Chicago v. Lehman[56] was reversed was that the trial court had erred in refusing to permit the owner's witnesses, two of whom lived in the neighborhood and two of whom had offices on the same street, to show offers that had been made for their property. From the record the court ascertained that these witnesses would have valued the property at from $23,000 to $25,000 compared to the $17,000 offered by the jury. The court observed that actual sales of property were the best evidence, but in the absence of such evidence, bona fide offers to purchase for cash were some evidence. When there were no sales in the vicinity, this evidence would be of some value. It was noted that courts differed in the admissibility of such evidence and in some courts, the sales of similar property at about the time of condemnation could not be proved. This court was of the opinion that there ought to be great liberality in admitting evidence and preferred the rule that bona fide offers by persons able to buy were admissible. The court also held that the refusal to admit as proof of the value of the property the amount awarded in a previous condemnation of 14 adjoining lots was not error. Evidence would be competent to show value only when it

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[56]262 Ill. 468, 104 N.E. 829 (1914).

involved an open market negotiation.

The question of whether an executory contract was admissible as evidence of value was raised in School District of Clayton v. Kelsey.[57] At a meeting of the School Board on April 19, 1944, the Superintendent was authorized to offer $15,000 for the property sought by the Board. The contract the owner offered as evidence of value was dated March 7, 1945,between the owner and Adelyn Freund for the sale of a lot across the street from the property involved in the condemnation action at $200 per front foot. The contract had been signed for the owner by her agent, and $500 was deposited provided the deal was closed by June 7, 1945,or the deposit would be forfeited or would go to the agent as a commission. The contract also contained a notation that the seller would receive half of the earnest money. Evidence submitted by the District valued the property at $85 per front foot and the verdict on which the judgment was based was for $114.23 per front foot. While nothing had been offered to show that this contract was made in bad faith, the court held that to admit it as evidence would open the door to fraud.

The court in Denson v. Alabama Polytechnical Institute[58] found no indication of fraud in the fact that the grandmother of the appellant, who held a life estate, and two uncles, who also had an interest in the property had agreed with the Institute on a valuation of the property. The granddaughter suggested that this agreement involved collusion that worked to her disadvantage. The opinion of the court was based on the fact that the life tenant's interest was not adverse to that of the contingent remaindermen.

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[57]355 Mo. 478, 196 S.W. 2d 860 (1946).

[58]220 Ala. 433, 126 So. 133 (1930).

The sum that had been agreed upon was the same as the amount of the jury verdict, and by some means, the court concluded that it was "in fact in excess of the actual value" of the property.

The owner in Pike County Board of Education v. Ford[59] objected to the commissioners who had been appointed to appraise his property, but without success. The statute provided that the court appoint three impartial housekeepers of the county who were owners of land.[60] The owner showed that one of the commissioners was a brother-in-law of a clerk in the County Superintendent's office, one was the father-in-law of the attorney representing the Board, and one was the father-in-law of the son of the Assistant Superintendent of Schools. While the court was of the opinion that it would be better practice not to use persons with such marital relationships, there was no showing of bias or prejudice that would cause them to place an unfair value on the land or not be classified as "impartial housekeepers."

The Value of Other Property. It was suggested in School District of Kansas City v. Phoenix Land and Improvement Co.[61] that testimony regarding the value of land three miles distant from the property sought by the District should on re-trial be excluded. The court did not say that it was error to have permitted this testimony, but pointed out that in its exercise of discretion, the trial court should confine the investigation to property sold in the near vicinity and at a recent date.

The fact that two tracts were separated by 2½ miles of distance would

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[59]279 S.W. 2d 245 (Ky. App. 1955).

[60]K.R.S. 416.020

[61]297 Mo. 332, 249 S.W. 51 (1923).

not render them dissimilar in the opinion of the court in Waukegan v. Stanczak.[62] The tracts compared were both in the city, one in the northern part and one in the southern part. Both tracts were zoned residential; both were vacant and both usable for business, but best suited for subdivision. Both the tracts fronted on Lewis Avenue and were of comparable size, one being 20 acres and the other 15.2 acres. Both tracts were bounded by buildings on one side and vacant on the other side. The owner complained that the tract to which his property was compared was subject to flooding, below grade, and contained a ravine. The court re-named the ravine, calling it a ditch, and pointed out that the defendant's property had a watercourse in one corner which contained 2 1/2 feet of water. On the other hand, the court held that there was no error in exclusion of evidence of the value of another tract which was 44/100 of an acre and had been sold for a clubhouse. This tract, the court thought, was not similar in size or potential use.

Crawford v. Murphy[63] was an original proceeding to prohibit the circuit judge from trying a condemnation action with a jury other than one composed of freeholders of the City of Newport. The School District sought to condemn property within the City under a statute which provided that "Trial of such actions shall be by a jury summoned under order of court and consisting of twelve freeholders of such city or county."[64] The owner maintained that this provision called for a special jury of city freeholders. His rationale was that city jurors were more cognizant of property values in the city. In

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[62] 6 Ill. 2d 594, 129 N.E. 2d 751 (1955).

[63] 296 S.W. 2d 738 (Ky. App. 1956).

[64] K.R.S. 416.120.

denying the order of prohibition, the court mentioned the fact that the statute referred to either city or county freeholders as proper, and did not refer to the location of the property. There would be no reason why the owner would not receive a fair trial, as the verdict must be based on evidence and not on pre-existing concepts of city or county valuations.

The court in Vierling v. Independent School District No. 720[65] approved the sustaining of an objection to a question of the owner's counsel directed to the District's witnesses which was designed to test their knowledge of the value of improved lots in the City. Since the land involved in the condemnation proceeding was neither platted nor improved, there was no prejudice to the interest of the owner in the sustaining of the objection. Another question which was barred related to the effect of terms on the selling price, and here, again, the court found no prejudice in barring the question.

Improvements. The cases in which the improvements to the property have been considered elements in determination of the amount to be paid to the condemnee may be put into two categories. In the first are those in which the improvements had been made by the owner, and in the second, are those in which the improvements were made by the condemnor.

On the appeal in Board of Education v. Hackman[66] the owner claimed that the Commissioners had overlooked the value of the crops growing in the land. The court held that since the report did not show the fact that there were growing crops, this objection would fail.

After the proceedings to condemn had been started by the District, the

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[65]129 N.W. 2d 338 (Minn. Sup. Ct. 1964).

[66]48 Mo. 243 (1871).

owner in Petersburg School District v. Peterson[67] had the tract platted. On appeal he objected that the instructions to the jury had told them to fix the value of the property as of the date the proceedings began, but to disregard anything that had been done thereafter. According to the statute, no improvements subsequent to the date of service of process were to be included in the damages. The owner claimed that this prevented the jury from considering the value of the property because of its location, but the court mentioned that specific instructions on that point prevented any error.

Linesch v. Board of Education of St. Bernard[68] was reversed because the court found it was error to exclude the testimony of contractors and builders who had examined the improvements independently of the land. Their testimony was stricken on motion of the Board. The court referred to an Ohio rule that the owner had the right to show the value of the land separate from the value of the buildings, adding that this was the method used for assessment of property. A case in which the original construction cost of a building no longer adapted to purposes for which it was built would mislead the jury was distinguished.

The judgment condemning three acres and awarding the owner $1,600 was affirmed in Cunningham v. Shelby County Board of Education.[69] In the instruction on the measure of damages, the court had directed the jury to include the probable cost of fencing, if any. The owner insisted that it had been shown without contradiction that some fencing would be necessary

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[67] 14 N.E. 344, 103 N.W. 756 (1905).

[68] 13 App. 161 (Ohio App. 1920).

[69] 202 Ky. 763, 261 S.W. 266 (1924).

and that it was error to submit the issue of the necessity of fencing to the jury. The court was of the opinion that the judgment was amply sufficient to compensate the owner for every item of damage and though the instruction may have been in error, it was not considered prejudicial or sufficient to authorize a reversal.

Instructions to the jury that they should assess the value of property taken for a schoolhouse exclusive of the land devoted to the highway were held proper in Hilton v. Cramer.[70] The statute in this case required that land taken as a schoolhouse site be situated upon a section line or upon a regularly laid out highway. The court found that the land taken did not include the 33 feet which was half of the highway and that "upon" as used in the statute meant "near to" or "along the side of."

Evidence admitted in State v. Moriarity[71] that a house situated on the original tract of the owner, but not taken by the Board of Regents, was connected to a sewer was approved. The court said that a factor in determination of what constituted fair market value was whether the property was served by a sewer or one was located close by.

In North Kansas City School District of Clay County v. Peterson-Renner, Inc.[72] the School District sought title to 34 acres in the southeast corner of a 140 acre tract. Commissioners awarded damages of $94,966 and all parties filed exceptions. A jury trial resulted in a verdict of $131,200, plus interest, to total $133,615.51. The District appealed,assigning as error

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[70] 50 S.D. 274, 209 N.W. 543 (1926).

[71] 361 S.W. 2d 133 (Mo. App. 1962).

[72] 369 S.W. 2d 159 (Mo. Sup. Ct. 1963).

the instructions which had said that the owner had a right to use the sewer plant and that such right may be considered in determination of fair market value because just compensation is based on what the owner loses and not what the condemnor gains. The court held that it was proper to tell the jury the availability of sewers should be considered in determination of the value of the land as the highest and best use for the property, in this case, was for housing. The fact that the owner had paid $93,200 for sewer rights gave the jury the impression that they should add that figure to the value they found the property to have otherwise. This objection had not been pleaded by the District, however. The District's objection was based on the fact that the contract purporting to give the owner the right to use the sewer was void as contrary to public policy. The court agreed with the District's contention and found the contract void on the basis that the city may not contract away its governmental functions. On this basis, the case was reversed and remanded.

Five cases have been located, all of them prior to 1908, in which the issue of improvements made by the condemnor was raised. In the earliest of these, Harris v. Marblehead,[73] a claim for betterments made during pendency of the controversy was disallowed. Otherwise, the court suggested, the owner could be compelled to buy the schoolhouse which had been constructed. The judgment was for the devisee on a writ of entry.

Williams v. School District No. 6[74] was an appeal on certiorari from a decision of the commissioners that the owner receive $75.00 and the District

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[73] 10 Gray 40 (Mass. Sup. Ct. 1857).

[74] 33 Vt. 271 (1860).

build a fence. The owner complained that the compensation did not include the value of the fencing the District was required to make, but the court dismissed the objection with the observation that if the owner had been required to do the fencing, it would be an additional loss to him.

The only opinion by the United States Supreme Court which has been located dealing with school and college eminent domain issues involved the problem of improvements made by the District. According to the facts stated in Searl v. School District No. 2,[75] on April 16, 1881, a receiver's receipt was issued by the United States Land Office to Cooper. On May 18, 1881, Cooper received a United States patent to the tract in Colorado which included the land in question. On November 20, 1882, Cooper conveyed the patent title to Searl, a resident of Kansas. Ownership of the property was also claimed by Watson and Schlessinger who occupied, possessed and improved the premises under a squatter's title with knowledge of the U.S. Patent. On July 1, 1881, the School Board purchased the lots from Watson and Schlessinger for $3,500. On January 30, 1882, the Board completed a building worth $40,000 on the lots. The School District employed counsel who reported in favor of the squatter's title, and the Board subscribed to funds of an organization whose purpose was to defeat the patent title. Searl began an action of ejectment on March 24, 1884, but on June 7, 1884, the District obtained an injunction restraining trial of the ejectment action. On June 9, 1884, the District began condemnation proceedings in the Lake County Court. On application of Searl, the case was removed to the United States Circuit Court for a jury trial. There the court instructed the jury that the value of the property had been stipulated at $3,000 and the instructions of Searl which would have awarded him the

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[75] 133 U.S. 553, 10 S. Ct. 374, 33 L. Ed. 740 (1890).

stipulated value of the buildings at $40,000 were refused. The case went to the Supreme Court on error from the Circuit Court. The owner's appeal was based on a common law rule that structures erected by a trespasser with full knowledge of the condition of title were given to the legal owner. Pointing out that this was not an action of ejectment or trespass, but a proceeding in exercise of the right of eminent domain, the court said that:

> ... It is the duty of the State, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it.
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> ... courts of equity, in accord with the principles of the civil law, when their aid is sought by the real owner, compel him to make allowance for permanent improvements made bona fide by a party lawfully in possession under a defective title.[76]

The court observed that Searl knew when he acquired the title that the land was in public use. While color of title was a matter of law, good faith in the party claiming thereunder was regarded as a matter of fact. The only legitimate inference that could be drawn from the facts was that the District acted in good faith. Although the District had been mistaken, "the intention guided the entry and fixed its character," the court said, and the District could not be held to have trespassed so that the building erected in good faith became part of the land as to entitle the owner to recover its value.

The third time that Aldridge v. Board of Education of City of Stillwater[77] was before the Oklahoma court, the issue was whether the value of the improvements should have been considered by the jury and their value awarded

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[76] 133 U.S. at 561, 562.

[77] 15 Okl. 354, 82 Pac. 827 (1905).

unlawful, and that the law was simply a rule of conduct that should keep pace with changing conditions of the times, the court held that the owner could not recover for the building which cost the District thousands of dollars and was not erected for the betterment of the real estate, but for a public use. The Searl case was cited as authority for the holding. Claims of the public should not be overlooked, the court thought, in guarding the rights of citizens. All the citizen could ask for was fair and reasonable payment for damages sustained. The court suggested that the owner should be awarded the value of the property at the time it was condemned, but if the land had increased in value from the time of unlawful entry, the owner should recover the advanced price and the value of the use of the land during the wrongful occupancy. The common law rule that buildings erected on land by a trespasser became part of the real estate had been modified, and this case was considered within the exception to the rule. Since there was no law under which the condemnation could be had at the time the building was erected, the owner said this was not the same situation as wrongful appropriation. While the law had been declared invalid, the court pointed out that the legislature had declared that school authorities had the power to condemn. Even if there were no law, there was a subsequent law which gave the right and the owner would receive just compensation when paid for all his damages. The ejectment action did not adjudicate the ownership of the buildings, but only settled the right to possession. The action to condemn was a new condition and the right to condemn was not questioned, so the issue before the court was considered the same as if the ejectment suit had never commenced. In this case, the court scolded the counsel for the School Board for filing no brief and putting the entire burden of the research on the court. The court suggested that, where the court had

every reason to believe he was able to brief the case, and, without good cause failed to do so, counsel may find his case dismissed.

McClarren v. Jefferson School Township[81] was an action to condemn the interest of the wife of a party whose property had earlier been taken by eminent domain. In the first action, begun in September, 1904, the wife was not a party as the township did not know she claimed any interest. After the proceedings, the Township built a school worth $600 with the full notice and knowledge of the wife. When the Township learned of her interest, it brought an action on March 20, 1905. The wife alleged that the improvements had become her property and that she should have damages for them on the basis of the common law rule that structures erected by tortfeasors become part of the land. The court held that this rule did not apply and distinguished a railroad case in which it had been held that the owner was entitled to the value of a depot constructed without any right to enter the property. The rule suggested was that failure to bring action until public interests have intervened would prevent successful prosecution.

Tax Assessment. In Haggard v. Independent School District of Algona[82] it was held that there was no prejudice to the owner's cause from exclusion of his valuation given to the assessor. The court recognized that while the assessor's valuation may not be shown as evidence of value of the property, the owner may admit what he had told the assessor.

The court in Dean v. County Board of Education[83] held that it was error

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[81] 169 Ind. 140, 82 N.E. 73 (1907).

[82] 113 Iowa 486, 85 N.W. 777 (1901).

[83] 210 Ala. 256, 97 So. 741 (1923).

to refuse an instruction requested by the owner that tax assessment sheets introduced as evidence had no legal tendency to prove the value of the property. There was no error, however, in the examination and cross-examination of the owner about his evaluation of the property for tax purposes.

The Value of a Life Estate. Because there was no evidence in the record as to the age of a life tenant, the judgment for the District in School District of Columbia v. Jones[84] was reversed and remanded with directions that the case be re-opened on this single point. The life tenant had conveyed her estate to one of the defendants and the estate was commuted at a value of $1,687.95. There was nothing in the record to indicate that consent had been given to this valuation of the estate and no admission of the age of the life tenant.

SUMMARY

The constitutional requirement that private property may not be taken for public use without just compensation requires the development of standards for the measure of compensation. Market value has been traditionally accepted as a basic measure in school and college cases, and these cases are probably not unique in this respect. The facts of each case present problems of determining what may be taken into account by the jury in particular situations in its attempt to arrive at market value.

It seems clear that any benefit that might accrue to the owner from having a school located near his property has not been taken into account. There is some uncertainty in the school and college cases about the time at

[84] 229 Mo. 510, 129 S.W. 705 (1910).

which the value of the property is determined, but it will usually be at the time proceedings are begun by the condemnor or the time of the jury verdict. Interest may be included in a condemnation award, and the school and college cases are not clear on the question of when it begins to run.

Where only a part of an owner's property has been taken, the measure of damages has been held to be the difference between the market value of the entire tract before the taking and the market value of the remainder after the taking. A school or college would not ordinarily be liable to damages for consequential injury because of taking property by condemnation, either to the owner or to adjoining owners.

In some of the cases where property of a school or college has been taken for another public use, the measure of damages has been regarded as the same as when private property is taken. Especially has this been true when the school or college is private or when the property taken has not been in use for school purposes.

Recent cases have developed the substitution cost theory as a means of compensating an agency whose property has no market value. The right of the school to compensation as a public agency has consistently been upheld. The necessity of the school holding and using the property for school purposes has been an important element in consideration of the amount of compensation it should receive.

Evidence of the value of the property condemned by schools and colleges has been conflicting in most of the cases where it has been at issue, and the rulings on evidence have seemed to depend to some extent on the facts of each case. The verdict of the jury has been allowed to stand unless it is clearly contrary to the weight of the evidence.

The most advantageous use of the property has been regarded as an element that may be considered in arriving at the value of property sought by condemnation, but, in general, the courts have attempted to prevent speculative values from entering into the verdicts. Offers made in good faith by parties who were able to purchase have been considered evidence of value, but where there has been the slightest suggestion of collusion, the courts have been careful to prevent admission of an offer as evidence of value. The offer made by the Board as a prerequisite to condemnation has not been considered good evidence of the value of the property. The value of other property similar to or in the area of that sought by the school or college may be considered valid evidence, but this determination usually depends on the facts of the case. Improvements made by the owner may be evidence of the value of the property depending on the conditions under which they were made. Improvements made by the condemnor before securing full title have been consistently held not to enhance the amount of the condemnation award, even when made by mistake or under a defective title. This situation has been clearly distinguished from the common law rule that improvements by a trespasser become the property of the owner. The valuation of property for taxation purposes has not been considered evidence of the market value of property sought by schools and colleges.

CHAPTER VIII

PROCEDURAL PROBLEMS INVOLVED IN SCHOOL AND COLLEGE CONDEMNATION CASES

This chapter is designed to present a wide variety of issues that have been raised in the school and college condemnation cases. The use of the term "procedural" in the title of the chapter is not intended to mean that the issues discussed here can be neatly separated from those presented in previous chapters. In a sense, this chapter reports the issues that have been considered by the writer to be sufficiently unrelated to the issues in the preceding chapters. While many of the issues discussed here could have been considered in connection with issues previously discussed, it has seemed that dealing with them in a separate chapter would be less confusing. The order in which the issues are presented here is somewhat similar to the order in which the issues would be raised in a condemnation proceeding, beginning with issues regarding parties and pleadings, then considering a number of conditions precedent to exercise of the right of eminent domain, and concluding with other issues such as discontinuance or costs and fees.

The court in Willan v. Hensley School Township stated that:

> We may suggest in passing that we have considered some questions presented by appellants which appear to us to be quite frivolous and in reality merited no consideration.[1]

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[1]175 Ind. 486, 93 N.E. 657 at 660 (1911).

This expression may seem in many respects applicable to other cases reported in this section. On the other hand, if, as suggested in earlier chapters, rights in property are among those considered most important, both condemnor and condemnee are entitled to extensive judicial protection of those rights.

ISSUES REGARDING PARTIES SUING AND BEING SUED

One of the limitations of this study was that the cases involve a school or college as a party to condemnation proceedings. Even within this limitation there are questions regarding the right to sue or be sued.

A Line of Illinois Cases.

The issue of what agency is authorized to prosecute an eminent domain action was raised in a series of Illinois cases dating from 1901 to 1949.

Banks v. School Directors of District 1[2] has been cited as authority that in Illinois the Township Trustees are proper and necessary petitioners in a condemnation proceeding, but from the case report it is not clear that the reversal was due to the fact that the School Directors brought the petition. The court apparently would have reversed the verdict for the Directors on the basis that they had no right of way to gain access to the tract condemned in the middle of the owner's pasture. It was not clear if the discussion in the report was a result of the issue having been raised by the owner or of the court taking judicial notice. In either case, the opinion mentioned that by statute, the Trustees were invested with the title, care and custody of school property and that the School Directors

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[2]194 Ill. 247, 62 N.E. 604 (1901).

had responsibility for control and support of the school. The Directors could decide when property was unsuitable, inconvenient, or unnecessary and decide upon a price to be paid for property or when unable to agree upon a price for it, to proceed to have compensation determined in the manner provided by law for exercise of the right of eminent domain.

The authority of the Trustees to condemn property for school purposes was challenged in Trustees v. McMahon.[3] The Banks case was cited to the effect that the Trustees were proper parties. The Board of Education having requested the Trustees to institute condemnation proceedings, the action was properly prosecuted. Interests of the owner were protected as his property could not be taken until compensation was made, and it was immaterial to him whether the funds came directly from the Board or through the Trustees.

The issue of whether the Trustees or the Board of Education were authorized to petition for condemnation was raised again in Schuler v. Wilson[4] because the statute had been revised since the Banks case. The court explained again that by statute in 1857, the Trustees were invested with title, custody and care of the schoolhouses and sites, that supervision and control of the school was vested in Directors of each District, and that this plan had been preserved through revisions made in 1872, 1879, and 1909. The court found no substantial change even though the owner pointed out that the 1909 statute expressly provided that a Board of Education should have the right to take land for a schoolhouse site "with or without the owner's consent, by condemnation or otherwise."[5] It was mentioned that the McMahon case had

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[3]265 Ill. 83, 106 N.E. 486 (1914).

[4]322 Ill. 503, 153 N.E. 737, 48 A.L.R. 1027 (1926).

[5]1909 Laws, Sec. 127, cited at 153 N.E. 739.

already construed the 1909 act and that the Banks case and Thompson v. Trustees[6] had construed the act of 1889. The Thompson case, however, did not concern the precise issue of whether the Board of School Directors or the Trustees were the proper parties, but only that the Trustees had power to take property without an election to select a site.

In a decision rendered the same day as the Schuler decision, Chicago v. Jewish Consumptives Relief Society[7] held that the City was a proper party to bring a condemnation action for land needed for school purposes. The petition in the case was filed by the Board of Education of the City, naming the City as petitioner in trust for the use of the schools. The owner challenged the right of the Board of Education to bring the suit on the basis that it had no legal existence. If the City were held to be the petitioner, he maintained, the action was void because it was instituted without action of the City Council. The court noted that when the statute was amended, the concurrence of the City Council was left out and from this fact concluded that it was the intent of the legislature to give the Board of Education authority to act without action of the City Council. Since the title was in the City as Trustee, the action must be brought in the name of the City.

In Board of Education of Cicero-Stickney Township High School v. Chicago[8] the proceedings brought by the Board of Education were dismissed and the dismissal affirmed. On March 30, 1944, the Board of Education petitioned for condemnation of a tract of 36.75 acres in Berwyn which was owned by the

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[6]218 Ill. 540, 75 N.E. 1048 (1905).

[7]323 Ill. 389, 154 N.E. 117 (1926).

[8]402 Ill. 291, 83 N.E. 2d 714 (1949).

City of Chicago and used as a nursery to supply its parks and grounds with shrubs. On April 8, 1948, the Board filed an amended petition seeking the same relief, but naming the Trustees of the Schools of the Township as additional defendants on the basis that they had declined to institute proceedings as requested by the Board. The Trustees answered the petition, alleging that they had declined to be the sole petitioners but had agreed to join with the Board as co-plaintiff, and that in 1944 the Board had instituted proceedings without the knowledge of the Trustees and had made no request to have the property condemned. A motion to compel the Trustees to answer interrogatories and admit facts showed the Trustees had deemed it inadvisable to be the sole petitioner where they were asked to adopt and ratify all the acts of the Board of Education, but they had no objection to acquisition of the land. On July 13, 1948, a motion to dismiss was granted and final judgment entered because the Board was considered an improper party plaintiff, and because they could not condemn property already put to a public use. The record of the case on appeal does not discuss the public use issue. Citing the Banks, McMahon, and Schuler cases, the court was of the opinion that these decisions had been strengthened by legislation in 1945. The 1945 revision of the statutes, which no longer contained the term "Board of Education," but, instead, referred to the "corporate authority" of the educational institution or school district, was held to govern the amended petition. The court explained that an amended petition was not an amendment to the petition. An entire new cause of action was begun when the original petition was abandoned, and the amended petition was then considered as an original petition. Since the circumstances and conditions under which the Trustee had declined to act had not been discussed at the trial, this

point was given no consideration on appeal. Nor was the answer of the Trustees considered a part of the record for consideration of the motion to dismiss, as the Board had elected to stand on its petition. The refusal of the Trustees to bring the action did not automatically give the Board the power to maintain the action as there was no provision to that effect in the statute. The dismissal did not raise the issue of the Trustees discretion. The court observed that even if it had been mandatory that the Trustees bring the action on request of the Board, their refusal would not itself empower others to perform their duties. The Board had named the Trustees as a party defendant on the basis of a statutory provision that any necessary plaintiff declining to join may be made a defendant. The court held that this was applicable only where joint plaintiffs were necessary parties. This provision was regarded as procedural only and not authority to allow an improper party to start a suit by making a sole necessary plaintiff a party defendant. The dissent in the case was based on the opinion that the only function of the Trustees was to receive and disburse tax funds, and that the Board was the "corporate authority" referred to in the 1945 act. Otherwise, the dissenter said, the efficient operation of the schools would be prevented due to a contrary stand by the Trustees "who merely held the bare, naked legal title."

The Condemning Agency For a State College Or University.

One of the defenses in University of Minnesota v. Northern Pacific Railway Co.[9] was that the railroad could not take the property as it had already been put to a public use by the University. In June, 1882, a

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[9]36 Minn. 447, 31 N.W. 936 (1887).

professor of agriculture had recommended that authority be granted to the executive committee of the Board of Regents to purchase lots adjoining the horticulture grounds for a farm house and outbuildings. His recommendation was referred to the Executive Committee and two members of the Committee negotiated for and purchased seven lots in the City of St. Anthony for $4,900 and obtained a deed running to one of them. The title remained in him when the condemnation proceedings were begun by the railroad on January 21, 1884. No record of action in the minutes of the Board of Regents to acquire the property was shown, nor had there been any occupation of the property by the University for any purpose. In affirming the judgment for the Railroad, the court held that the action of the two members of the Executive Committee did not constitute a purchase by the University. Even assuming that the Regents, by their silence, had ratified the action of the Committee members, the ratification could extend no further than the parties had proceeded, and some action of the Regents to acquire the title would have been necessary. The fact that the State was made a party would not, in itself, be grounds for an injunction to stay the condemnation proceedings.

A motion to dismiss was granted in Territory of New Mexico v. Crary[10] on the basis that the petition to condemn property should have been brought in the name of the Regents of the University and not in the name of the Territory. On appeal, however, the judgment dismissing the action was reversed. The basis for the holding was that the Territory sought the legal title to hold for the use and benefit of the University. The statute[11]

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[10] 15 N.M. 213, 103 Pac. 986 (1909).

[11] 1897 Comp. Laws, Sec. 3693.

provided that when the Board of Regents found it necessary that title to real estate for the use of the University be acquired, the Board may acquire title in the name of the Territory. According to the court, an express trust was created, and under this statute the Territory could maintain a suit as Trustee without joining the University or the Regents.

The defendant in People v. Brooks[12] contended that the act authorizing the State to condemn private property for public use did not include the Board of Regents because the title to the property would vest in the State. Because the constitution gave corporations the right of eminent domain in their own name, he said, only the Regents could hold title in their corporate capacity. This argument was denied because it was immaterial whether the title was held by the Regents or by the State. The mere holding of the title by the State could not interfere with the constitutional powers of the Board of Regents to exclusively control and manage the property. The court found no constitutional objection to requiring that the University prosecute an eminent domain action in the name of the State, pointing out that money was furnished by the State and title was taken and held by the State by consent of the Regents for the use and benefit of the University.

In another Michigan case, People v. Pommerening,[13] the defendant insisted that the Board of Control of Athletics was a corporate entity existing wholly apart from the Regents. The Board of Control was set up by statute[14] as a non-profit corporation and a creature of the Board of Regents for the declared

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[12] 224 Mich. 45, 194 N.W. 602 (1923).

[13] 250 Mich. 391, 230 N.W. 194 (1930).

[14] 1921 Pub. Acts No. 84.

purpose of physical betterment of University students, particularly through the conduct of athletics. The court found the Board of Control an operating agency of the Regents in the management of designated activities, at all times under full control of the Regents. In this case, as in the Brooks case, the proceeding was instituted by the State for the use of the Board of Regents.

In Board of Regents v. Palmer[15] it was argued that the act vested the right to prosecute an eminent domain action in the particular institution but not in the Board of Regents. According to the statute,[16] the court found that the legislative branch had the right to authorize condemnation, and in this instance,had conferred the power on any State educational institution acting through its governing body. The institutions mentioned in the act were controlled by the Board of Regents, who were authorized to sue and be sued.

Interests of Other Parties.

The facts in Norton Eighth School District v. Copeland[17] led to a consideration of the relationship between the District, the owner,and a third party to whom the appraiser's award was paid. In November, 1852, the District appointed a committee to purchase a lot and build a new school. The committee selected the Copeland lot, but the owner refused to sell. In April, 1853, the committee and five other legal voters appraised the damages for the Copeland lot, and a town meeting subsequently approved their action. The appraiser's award was tendered to Copeland, but he refused it. Copeland

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[15] 356 Mo. 946, 204 S.W. 2d 291 (1947).

[16] 1945 Mo. Laws, p. 1717, Mo. R.S.A. 10839.2.

[17] 2 Gray 414 (Mass. Sup. Ct. 1854).

entered the property and removed a stone wall, and the District brought an action of tort against him. After the action was begun, another person named Copeland accepted the award of the appraisers. The major issue discussed in the case was the failure of the District to give notice to Copeland that his property had been condemned. The District attempted to justify its right to bring an action in tort by the fact that the appraiser's award had been accepted and, therefore, rights in the property had been waived and the defendant was estopped to deny the District's title. The court found, however, that there was no privity between the Copeland who took the money and the Copeland who owned the property, so there was no authority to waive any rights.

Facts somewhat similar to those in the Copeland case were involved in Board of Education of City of Holland v. VanDerVeen.[18] On May 13, 1911, the Board passed a resolution selecting the property owned by Engbertus VanDerVeen as a site for a school and authorizing a Committee to negotiate with him. On May 18, the Committee reported to the Board that they had been unable to arrive at any agreement, and the Committee was authorized to condemn the property. On May 20, the petition to condemn was filed and summons executed. On May 23, a deed was filed conveying part of the interest of Engbertus VanDerVeen to his son, John VanDerVeen. The deed was dated May 15, and acknowledged by VanDerVeen's attorney. Testimony revealed, however, that the actual execution of the deed had been on May 23. The court held that it was not necessary for the Board to treat with John VanDerVeen or make him a party as his interest was acquired after proceedings were begun. The proceedings as to Engbertus VanDerVeen were regular, as he was the sole owner at the time proceedings were filed.

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[18] 169 Mich. 470, 135 N.W. 241 (1912).

The City was improperly joined as a party defendant in Byfield v. City of Newton[19] but the court did not specify the reason why the City was not a proper party. The petition was for a writ of certiorari to quash eminent domain proceedings by the Board of Aldermen. The taking was for a schoolhouse, a municipal purpose for which, under Massachusetts statutes, the power of eminent domain could be exercised by the Board of Aldermen.

One of the defendants in Denson v. Alabama Polytechnical Institute[20] objected to the condemnation proceedings on the basis that all the parties in interest were not and could not be represented due to the terms of the will creating remaindermen in fee who were not yet born. The real estate sought by the Institute was owned by a Dr. Thach at the time of his death, and devised to his widow for a life estate and at her death, to two married daughters. According to the terms of the will, at either daughter's death the property was to go in equal shares to the female children of the daughters and to the three named sons of Dr. Thach if they should marry with their parents' consent. The appeal was prosecuted by one of the granddaughters of the testator through her guardian. The contention that all parties in interest were not represented was rejected by the court. The life tenant, a contingent remainderman, and one of the class of indefinite remaindermen were all represented, according to the court.

In a condemnation action to acquire the fee simple title to the surface estate only, County School Trustees of Upshur County v. Free,[21] the owner

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[19] 247 Mass. 46, 141 N.E. 658.

[20] 220 Ala. 433, 126 So. 133 (1930).

[21] 154 S.W. 2d 935 (Tex. App. 1941).

tried to defeat the proceedings by contending that the owners of the mineral estate were necessary and indispensable parties. The court held that their rights were in no way affected and that the owners of the mineral estate had no need of the surface strips for development of oil rights.

The dismissal of a condemnation action was affirmed in Trustees of Schools v. Clippinger.[22] Title to the lot the Trustees sought as a playground adjacent to a junior high school in Glen Ellyn had been acquired by Myers as sole devisee in 1939. Myers sold the property to the Board in 1945, granting immediate possession and agreeing to convey title within six months. A year later the Board removed buildings on the lot and had it graded and filled. The deed was not delivered, as the will by which Myers had obtained an interest had not been probated. On January 20, 1948, the Trustees began the action to condemn the property, and the will was probated four months later. The court held that Myers was the only party in interest, and that the Trustees had not acquired a right to condemn the property due to an owner being incapable of consent, unknown or non-resident. Other parties had no rights except to contest the will, and Myers could contract his interest on the death of the devisee. While others may have been proper parties, they were not necessary or indispensable parties.

In Pike County Board of Education v. Ford,[23] it was held that the Columbian Fuel Corporation which held a lease on part of the property sought by the Board was not a necessary party, as its easements were not incompatible with the use of the land for school purposes.

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[22] 404 Ill. 202, 88 N.E. 2d 451 (1949).

[23] 279 S.W. 2d 245 (Ky. App. 1955).

The issues litigated in Butler Fair and Agricultural Association v. School District of the City of Butler[24] concerned the relationship of several parties. The facts of the case were relatively complex. The statute[25] provided that if, on account of liens against the premises, because the owners could not be found, the owners refused to accept, or "if for any other reason," the District could not pay the sum awarded, it could be paid into court and the owners look to said fund for all damages. In August, 1955, nine districts, comprising a juncture, purchased from the owners a 67 acre tract on which was located 40 buildings. The Districts proceeded to condemn the leasehold interest of the Association. A Board of Viewers appraised the leasehold interest at $160,000. A final judgment for that amount was rendered with the stipulation that the Association have the right to remove the buildings. On April 30, the Districts certified to the Association that provision had been made in the 1956-57 budget for funds to make payment of the award, and on that same date one named Chambers loaned $60,000 to the Association. The Association assigned all right, title, and interest in the judgment to Chambers as collateral. On May 14, 1956, Chambers entered judgment against the Association, and the District was notified of the assignment on May 17. On June 13, stockholders of the Association's predecessor began an equity action alleging fraudulent sale of its assets 11 years earlier. The equity action was against the Association and the School District. On June 29, 1956, the District requested permission to pay the judgment into court ,which was refused on September 28, and the District filed exceptions. On December 5, the District

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[24] 389 Pa. 304, 132 A. 2d 214 (1957).

[25] P.L. 30 Art. VIII, Sec. 726, 24 P.S. 7-726.

petitioned for interpleader of Chambers and the equity suit plaintiffs. On January 11, 1957, Chambers petitioned for a writ "in the nature of a mandamus" directing the District to pay the Association judgment. On January 21, the petition for interpleader was refused and the District appealed. On January 22, the Association's preliminary objection to the equity suit was sustained and the plaintiffs appealed. On January 23, the denial of the District's request to pay into court was reversed and the Association appealed. On February 13, Chamber's petition for mandamus was dismissed and he appealed. The trial court was held to have erred in its order that the District be allowed to pay the award into court. The court reasoned that the whereabouts of all claimants was known and they did not refuse to accept payment. The equity suit was not a lien against the property, and the District's reason that multiple liability may result was unfounded. Any other construction, the court thought, would allow payment into court under all circumstances. Chambers was the real party in interest as the Association had made a complete assignment to him. If he had to present his claim against the fund in court, he would have no remedy, as the exclusive remedy provided by the statute was against the District, and Chambers could not have enforced judgment while the equity proceeding was pending. On the appeal by the District from denial of its petition to interplead, the court held that interpleader must be by a defendant and a result of a demand by which the defendant was exposed to multiple liability. While the District was a defendant in the equity suit, there was no danger of multiple liability as the claim was against the fund when paid, and the claim of Chambers against the District was not adverse to that of the Association.

Three owners of property adjoining that sought by the Board in Herren v. Board of Education of City of Marietta[26] intervened seeking an injunction to prevent the condemnation. They alleged that irreparable harm to their property would be caused by construction of a football field or stadium. The court found that there were no grounds for relief as none of the property of the intervenors was taken and the nuisance of which they complained was mere speculation. The court made it clear that it was not deciding if the adjoining owners could properly intervene.

THE SUFFICIENCY OF THE PLEADINGS

In the adversary system of jurisprudence, issues are raised by the pleadings of the parties. Because an eminent domain action is recognized as a special proceeding, some consideration of the propriety of the pleadings of both condemnor and condemnee is in order.

Essential Allegations.

The sufficiency of the petition of the condemnor has been challenged for several reasons. In some states, the statute specifies in detail what the condemnor must allege.

The Purpose For the Taking. One of the grounds of the appeal from a judgment of condemnation in Willan v. Hensley School Township[27] was that the petition did not allege that the Township intended in good faith to construct a schoolhouse on the land or that it had taken steps to build a schoolhouse

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[26] 219 Ga. 431, 134 S.E. 2d 6 (1963).

[27] 175 Ind. 486, 93 N.E. 657 (1911).

or that it had authority to incur the indebtedness required. The court held, with very little comment, that it was not necessary for the Township to allege these facts in its petition.

The Board in School Board of City of Harrisonburg v. Alexander[28] applied to the court for condemnation "for its purposes" of a lot containing 1.74 acres. The owner's demurrer to the petition was sustained and on appeal the action of the trial court was affirmed. The court on appeal did hold, however, that the petition was not required to be more specific regarding the purpose of the condemnation than it had been in this case.

The order of taking passed by the Board of Aldermen and upheld in Byfield v. City of Newton[29] stated that the property was needed "for municipal purposes." The court held that the order, although not meeting the precise requirement of the statute[30] that the purpose for which the property was to be taken must be stated, was not a nullity as it was lacking only in specification of the particular municipal use. The necessity for strict compliance with eminent domain statutes was mentioned, and authority cited that the order must show on its face the specific purpose. The court recognized that the natural meaning of the requirement that the order of taking should state the purpose was that some definite use must be declared as the intent and design of the body exercising the power of eminent domain. A general, undefined, or comprehensive statement would not satisfy the terms of the statute. The court cited a case in which an order of assessment which

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[28] 126 Va. 407, 101 S.E. 349 (1919).

[29] 247 Mass. 46, 141 N.E. 658 (1923).

[30] Mass. G.L. Ch. 79, Sec. 1.

was defective for not showing the amount to be expended for a public improvement was held not void, but amendable. The right to amend was not even suggested in the Byfield case, and in spite of the dicta mentioned above, the order was held valid. The court explained that the petitioner knew all the facts and that it was clear the property was to be used for school purposes. Since certiorari was addressed to the discretion of the court, it must appear that manifest injustice had been done and that there was no delay in bringing the action. The opinion explained that a party could not, having knowledge of salient facts, see great expenditures made and then attempt to quash proceedings as lacking in legal formality. According to the facts stated in the case, the order for taking was passed by the Aldermen on November 6, 1922, and recorded on November 16. On November 24, the petitioner received notice of the proceedings, and on March 1, 1923, construction began. The writ of certiorari was sought on April 24, 1923.

The defendant did not contest the issue of the sufficiency of the petition in Board of Education of Kanawha County v. Campbell's Creek Ry. Co.,[31] but the court discussed the question nevertheless. There seemed to be some confusion about whether a petition to condemn must describe the amount of funds to be used and show steps taken to issue revenue bonds as provided by statute. The court held that authority was conferred on the Board to condemn property for playgrounds and athletic fields in statutes other than by those setting up a system of financing athletic facilities through self-liquidating revenue bonds. On the question of whether the Board must allege a public use superior to that of the railroad, the court found that the Board had closely followed the statute.

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[31] 138 W. Va. 473, 76 W.E. 2d 271 (1953).

The allegations were sufficient to give the court jurisdiction, and the defendant must show facts relied on to defeat the proceeding.

An Allegation That The Property Is Necessary. In Territory of New Mexico v. Crary[32] the court called attention to the fact that the petition would be subject to demurrer for failing to allege that the acquisition of the land was deemed necessary by the Board of Regents. Apparently, sufficiency of the petition had not been challenged by the owner. The judgment dismissing the proceedings was reversed by the appeal.

The owner based his appeal partly on the contention that the trial court had erred in denial of his motion to dismiss the proceedings because the petition was insufficient in lacking the jurisdictional allegation regarding the necessity for taking the property in Waukegan v. Stanczak.[33] The court recognized that the power to take private property was limited to cases of necessity and that the petition must contain allegation to that effect. When allegations were denied, it was the petitioner's burden to establish the fact. In this case, the word "necessity" was not used, but the petition did contain an allegation that the School District "requires" the property and the court regarded this as synonymous with "necessity." The court added that the petitioner did not need to allege facts showing the need for the property.

A demurrer to the petition in Sheppard v. DeKalb County Board of Education[34] was made on the basis that the Board had not alleged its determination of necessity to condemn the property for a specific use. From the

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[32]15 N.M. 213, 103 Pac. 986 (1909).

[33]6 Ill. 2d 594, 129 N.E. 2d 751 (1955).

[34]220 Ga. 219, 138 S.E. 2d 271 (1964).

opinion of the court, it is not clear if the Board was required to raise the issue of necessity by pleading, but the court held that the Board's resolution was not so vague as to provide insufficient notice to the owner. The resolution said that the Board must secure the property for the purpose of constructing school buildings and providing necessary educational facilities, and that the Board had determined that a necessity existed for acquisition of the property for educational purposes.

Amendment of the Pleadings. In McClarren v. Jefferson School Township[35] the court held that it was not error to permit amendment of the complaint after the report of the appraisers had been made. The purpose of the amendment was only to make the description of the real estate in the petition conform to the description in the appraisal report.

The question of whether the amendment to the complaint could be amended on the day of the trial was raised in Kern County Union High School District v. McDonald.[36] The amendment was sought by the District because one of the defendants had filed a separate answer which asked damages for a remaining 20 foot strip of the tract. If these damages were awarded, the District would be required to pay for 100 feet of frontage and get 80 feet. The amendment was to ask for the entire 100 foot frontage of the property, instead of the 80 feet originally sought. The defendants argued that this amendment involved a new cause of action, but the court supported the amendment on the basis that there was no surprise or detriment to the owner.

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[35]169 Ind. 140, 82 N.E. 73 (1907).

[36]180 Cal. 7, 179 Pac. 180 (1919).

The original application filed in the Probate Court in Lipscomb v. Bessemer Board of Education[37] averred that the petitioner had adopted a resolution declaring that the acquisition of lots in the City of Bessemer was in the public interest and necessary for a public use for the site of a new school building or for a school playground or other public purpose or a public school purpose. A motion by the owner to dismiss the proceeding was overruled, but his demurrer to the application was sustained. The Board appealed to the Circuit Court where it received a judgment in favor of the condemnation. Before the trial in the Circuit Court, the application was amended to delete reference to the resolution of the Board and to the "other public purpose." On appeal from the judgment, the owner maintained that the Board was attempting to condemn his property for public purposes other than public school purposes and that if, by amendment,the proceedings were changed to condemnation only for school purposes, then a departure had occurred. In answer to this contention, the court found that the trial in the Circuit Court was de novo (as if it originated there). An application for condemnation filed in the Probate Court was subject to proper amendment on appeal and would not be a new action so long as it referred to the same transaction, property, and parties as the original application. Under a liberal system of amendment favored by the court, the only limitations were that there could be no change of parties nor any new cause of action. The court did not discuss the meaning of "cause of action," but it was clear that it did not consider the cause of action changed in this case. The application, both before and after the amendment, sought the property for

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[37] 258 Ala. 47, 61 So. 2d 112 (1952).

a use authorized by the statute, and the amendment only cured a defect of the application to delete the part calling for a use not within the statute.

Sustaining of a demurrer was reversed in Woodland School District v. Woodland Cemetery Association[38] because the trial court had abused its discretion in refusing leave to amend. The District had not alleged that a school use was more necessary than use of the property as a cemetery. Its petition was subject to demurrer, but the court held that the District should have been afforded the right to amend its petition in order to present the issue of which was the more necessary use.

Amendment of the original petition was approved by the court in County Board of School Trustees of DuPage County v. Boram.[39] The petition had failed to allege the authority of the Board to take the property and the purpose for which the property was to be taken. The court pointed out that the statute provided for amendments when necessary to a fair trial and final determination of questions involved.

The Answer to a Petition for Condemnation.

The owner in Richland School Township v. Overmyer[40] filed exceptions to the appraiser's report granting him an award of $325. The Township demurred to the exceptions, but the court held that the allegation by the owner that the damages were too small was sufficient to justify overruling the demurrer.

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[38] 174 Cal. App. 2d 243, 344 P. 2d 326 (1959).

[39] 26 Ill. 2d 167, 186 N.E. 2d 275 (1962).

[40] 164 Ind. 382, 73 N.E. 811 (1905).

The proper procedure for the Board of Aldermen in Byfield v. City of Newton[41] would have been to file a return instead of an answer, according to the opinion of the court. The return or formal report, or official statement of the action performed, the court said, should have been signed by the Board of Aldermen and not by their attorney. In the answer of the Board, the court found information which it called a return and found this information conclusive as to all matters of fact, not open to contradiction by the owner as the owner had gone to trial on the merits of the case.

It was held in Houston Independent School District v. Reader[42] that the owner's prayer for general relief would entitle him to interest, the court noting that in condemnation proceedings the defendant was not required to file a pleading.

Dicta in Caruthersville School District v. Latshaw[43] stated that pleadings were not required by a defendant in condemnation proceedings, but were necessary to raise issues other than the question of damages.

The defendant filed objections to the condemnation proceedings in Cemetery Company v. Warren School Township.[44] The court found that the statute under which the Township proceeded was deficient in procedure in that it did not provide for filing objections to the proceedings. The objections were authorized by the general eminent domain act for the reason that the landowner was entitled to contest the proceedings at some stage.

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[41]247 Mass. 46, 141 N.E. 658 (1923).

[42]38 S.W. 2d 610 (Tex. App. 1931).

[43]360 Mo. 1211, 233 S.W. 2d 6 (1950).

[44]236 Ind. 171, 139 N.E. 2d 538 (1957).

The Township argued that the owner should use a suit in equity, but the court said the weight of authority was that injunctive relief was available against wrongful exercise of eminent domain only where there were no provisions for an answer or objections in the act.

CONDITIONS PRECEDENT TO THE RIGHT TO CONDEMN

Statutes in most of the states specify that certain conditions must exist before the right of eminent domain can be exercised, and some issues have been raised as a result of common law procedures.

Selection of Site.

Discussion of the cases in which the issue of site selection has been raised may be divided into three sections. The adequacy of the notice calling the meeting for an election by the residents of the District is considered, followed by a section on the requirement of an election. In some States, the board is authorized to select the site, but a number of cases have been located in which this authority has been challenged.

Notice of the Election. Reed v. Acton[45] began as a writ of entry, and a trial without jury resulted in a judgment for the owner. The Town filed exceptions which were sustained on appeal. The warrant for the Town meeting held on March 4, 1872, had stated that one of the purposes of the meeting was to see if the Town would vote to build a schoolhouse and would instruct the selectmen to take or purchase land. At the meeting, the vote was to build the schoolhouse, and a sum was appropriated for the buildings not

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[45] 117 Mass. 384 (1875).

including the cost of the land. The March meeting was adjourned to April, and on April 1, 1872, the town meeting voted that the selectmen purchase or take the Heywood lot which was part of the plaintiff's property. The owner challenged these proceedings on the basis that the selectmen had been authorized to act under the April 1 vote, but that the warrant for that meeting did not mention the subject of taking property for school purposes. The court held that because the March meeting was adjourned to April, matters begun in March may be acted upon at the later meeting if there were no intervening rights of other parties. The court recognized that a condition precedent to taking the lot was that the Town vote on the location and that the subject matter for the meeting be stated in the warrant even though it must often be in general terms. The court held that the adjournment was not to an indefinite meeting as it was the uniform custom to meet on the first Monday of the month.

The notice for the election in Thompson v. Trustees[46] proposed two sites to be voted upon. At the meeting, no votes were cast for the two sites proposed, but the site sought by the Board had a majority of the votes. In consideration of the appeal by the owner, the court held that the notices were not required to specify the site and that this was surplusage in the notice.

The site sought by the Board was selected at a special meeting called by five freeholders in the case of In re Application to Condemn Land in Rock County.[47] The owner complained that one of the freeholders was not a citizen. The evidence, which showed he came to the United States from Norway when 16

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[46]218 Ill. 540, 75 N.E. 1048 (1905).

[47]121 Minn. 376, 141 N.W. 801 (1913).

years old, he voted since 1896 in the District, and naturalization of his father before the freeholder came of age, was considered sufficient to justify the trial court's conclusion that he was a citizen. The court also held that the site could be changed at a special meeting as well as at the annual meeting of the District.

A judgment of condemnation was reversed with directions to dismiss in Trustees v. Hoyt.[48] The statute[49] provided that the Board could not locate a school site unless authorized to do so by a majority of votes cast at an election called in pursuance of a petition signed by not less than 500 voters or one-fifth of the voters of the District. The court thought the record should show the filing of this petition as it was a condition precedent to the power of the Board to call an election. The evidence presented at trial was a petition with less than 500 signatures which recited that the signers were legal voters constituting one-fifth of the voters of the District. An affidavit regarding the signatures and the minutes of the Board were also introduced as evidence. The court held that these items were not valid evidence that the signers constituted one-fifth of the legal voters of the District. The affidavit was rejected because it did not state that the affiant had any knowledge on the subject. The court was unwilling to assume or infer that the affidavit was correct. The minutes of the Board were rejected because there was no statement that the Board had found the fact that one-fifth of the legal voters had signed the petition to call the meeting. The court called the recital of due notice in the resolution a

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[48] 311 Ill. 532, 143 N.E. 59 (1923).

[49] 1919 Laws, p. 926, School Law, Sec. 127.

mere conclusion of the law and held that facts must be stated from which the court was able to say the conclusion was true.

An order dismissing a petition to condemn property was affirmed in Bierbaum v. Smith[50] because the records of the Board did not show that notices of the special election called on May 18, 1923, had been posted. No site received a majority of the votes at the meeting, so the Board selected the site in question. The secretary of the Board filed a certificate of posting notices on May 10, 1923, which stated that on May 3 at least ten notices had been posted, and a copy of the notices was attached. The court stated that giving notice was a jurisdictional requirement. Without giving notice the Board had no power to act, whatever the result of the election. The acts of a board must be manifested by its record, and unless the record showed that notice had been given as required by the statute, the election was void. A valid election to select the site was considered a condition precedent to the maintenance of condemnation proceedings to secure such site.

Selection of the Site by the Electorate. Harris v. Marblehead[51] began as a writ of entry by an owner who had received the property through devise. The case was reserved for the decision of the full court and resulted in a judgment for the owner, partly because of a failure by the condemnor to show any vote by the Town designating the site condemned. The court held that designation of the site could not be delegated to officers of the Town.

At a meeting of voters to decide on the site, a majority of votes were cast "for locating a new schoolhouse on the hill at the south end of Sixth

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[50]317 Ill. 147, 147 N.E. 796 (1925)

[51]10 Gray 40 (Mass. Sup. Ct. 1857).

Street in Peterson's field." The owner in Petersburg School District v. Peterson[52] challenged the condemnation of his property on the basis that this designation by the voters was too indefinite. The statute[53] provided that the Board should call a meeting of voters to decide on selection, purchase, exchange or sale of school sites. Should an owner refuse to sell his property, the site could be obtained by eminent domain, and, if at the meeting of the voters no site were selected, the Board may act on its own. According to this statute, the court held that a general designation of the site by the voters was sufficient. The owner argued that as the statute pertained to eminent domain, it should be construed strictly. The court was of the opinion that when the question was whether the statute conferred power to condemn, then it should be strictly construed, but that a strict construction could not be invoked in carrying out the provision of the statute where the power was plainly conferred.

The Board was prevented from condemning property in Board of Education of City of Detroit v. Moross[54] because the court found it had been the policy of the State since 1846 to require voters to designate school sites. The Board maintained that the wording of the statute that "whenever a site for a schoolhouse shall be designated, determined, established or enlarged, in any manner provided by law"[55]indicated legislative recognition that meetings were not required in all Districts. The general eminent domain act, under which

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[52]14 N.D. 344, 103 N.W. 756 (1905).

[53]1899 Rev. Codes, Secs. 701-703.

[54]151 Mich. 625, 114 N.W. 75 (1907).

[55]Comp. Laws 4728, Sec. 2.

the Board brought the action, stated that its provisions were to be in force in every school district, township, city, and village in the State except as inconsistent with direct provisions of special acts. The court found that the school statute requiring qualified voters to designate a site applied in this case.

On a motion to require the District to make its petition more certain, judgment for the owner was affirmed in School District No. 3 v. Oellien.[56] The petition had averred that a "majority of qualified voters and taxpayers of said school district, at said annual meeting, voting by ballot, voted in favor of said proposition." The motion was designed to determine if the District was averring that a majority at the meeting or a majority all qualified voters had favored the proposition. The statute provided that "whenever a majority of the qualified voters and taxpayers of any School District, at any annual or special meeting, called for that purpose,"[57] determined it was necessary to have additional grounds, the Board could take property by condemnation. The court interpreted this statute to mean that a majority of all qualified voters in the District must favor the proposition, and unless a majority of those present at the meeting was also a majority of the voters in the District, the vote would be insufficient. The rationale for this interpretation was legislative intent to require the assent of voters and taxpayers before the District was subjected to the expense and damages resulting from condemnation proceedings. The court thought the District had practically conceded the correctness of the trial

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[56]209 Mo. 464, 108 S.W. 529 (1908).

[57]1899 R.S. Sec 9772, 1906 Ann. Stat. 4483.

court action by its brief which presented the case for a majority of those present at the meeting being sufficient. The petition was found to be indefinite and uncertain enough that the owner did not know what to plead. While the court emphasized the commas setting off the phrase, "at any annual or special meeting," in the statute, it did not put the same construction on the petition of the District, where the phrase was also set off by commas. The court speculated that if the District meant that a majority of those in attendance had favored the proposition, the owner could have successfully interposed a demurrer. If the District were alleging that a majority of all qualified voters had supported the plan, the owner would be forced to answer, and he was entitled to know what to plead.

In re Hemenway[58] reversed a judgment for the Trustee on the basis that the conditions prescribed to authorize condemnation had not been met. According to the statute[59] a new site must be chosen at a special meeting called for such purpose and by written resolution in which the site was described. The notice of the meeting contained a description of three sites to be considered but no written resolution for adoption. The minutes of the meeting, however, did show evidence that a resolution had been adopted. Probably the major ground for reversal of the judgment for the Trustee was that the statutory requirement that the School Commissioner give consent in writing to a new site was not met. There was evidence of letters showing the opinion of the School Commissioner that a change was desirable. The school authorities suggested that because this was a new District, the consent of the School

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[58]134 App. Div. 86, 118 N.Y.S. 931 (1909).

[59]1894 Laws, Ch. 556, p. 1214.

Commissioner was not required. The court observed that the District was altered nine years earlier, that two School Commissioners had held office since then, and that this case did not involve a site for a new district. The objection by the landowner was considered appropriate.

The answer of the defendant in Willan v. Hensley School Township[60] challenged the signatures of the petition to change the site, but the trial court action of denying the answer was upheld on the basis that this answer was irrelevant and impertinent. It was not considered a cause of defense to an action in eminent domain. The court observed that the answer of the defendant was possibly appropriate to secure a review of the proceedings before the County Superintendent.

At the special meeting called to vote on addition of 2.27 acres to the existing site in the town of Cashmere, a standing vote was taken instead of by ballot as directed in the law. The court in State ex rel. School District No. 56 of Chelan County v. Superior Court[61] held that the statute[62] was directory instead of mandatory. There was no requirement in the statute that polls be opened, that judges be appointed, or that the ballot be in secret and none of the requirements of a formal election were made essential. The court found no direct provisions that would make the election void nor any provisions from which it could be implied that the election was void. Unless it appeared that the election did not fairly represent the will of the voters, the court was willing to let the election stand and held that it was valid.

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[60] 175 Ind. 486, 93 N.E. 657 (1911).

[61] 69 Wash. 189, 124 Pac. 484 (1912).

[62] 1909 Laws, p. 349.

The question of whether the vote of the people was required for acquisition of property to add to an already existing site was raised in Trustees v. McMahon.[63] The court held that the Board was not required to submit the question of how much ground would be necessary for the school site. The Thompson case[64] was cited as authority that the only limitation on the power of the Board to purchase or condemn a site was that the location must be submitted to the voters. Where the location was already determined, no election was required.

The statute construed in Trustees v. Berryman[65] provided that a petition signed by at least 300 voters or one-fifth of the voters of the District must call for an election to authorize the Board of Education to acquire a site, and that no site should be on the ballot unless petitioned for by ten voters and the location, size and price to be paid for the site be stated on the ballot.[66] If the property was to be condemned, the ballot was to state a maximum estimated price and in no case could the Board of Education purchase property for a greater sum. The petition presented to the Board by the ten voters asking that the property in question be selected fixed the maximum estimated cost at $600. At the jury trial on the condemnation proceedings, the testimony as to the value of the property sought by the Board ranged from $1,000 to $2,000. The jury verdict awarded the owner $500 for his land and $400 damages. A motion in arrest of the judgment on the basis that the award

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[63] 265 Ill. 83, 106 N.E. 486 (1914).

[64] 218 Ill. 540, 75 N.E. 1048 (1905).

[65] 325 Ill. 72, 155 N.E. 850 (1927).

[66] 1925 R.S. Ch. 122, sec. 136, p. 2325.

was greater than had been authorized was overruled, but on appeal the decision of the trial court was reversed. The Trustees argued that the price authorized by the ten petitioners did not include damages or that the provision in the statute did not apply in case of condemnation but only in case of purchase. The court, pointing out that language used in the statute was to be given "its ordinary meaning," said that purchase covered both voluntary and involuntary purchase and that the purpose of the election was to get the view of the people on the amount of expenditure. The maximum estimated price referred to in the statute included damages, in the opinion of the court. A point was raised by the Trustees that an owner might be able to prevent condemnation of his property by petitioning with the help of nine friends to have his land considered at a price less than what a jury would award. The court said this argument should be addressed to the legislature as the intent of the legislature that the people say what the cost of the site should be seemed clear, and it was the duty of the court to administer the law as it was found. A dissenting opinion recognized that the Board was limited to payment of $600 by the statute and the election held in pursuance of the statute, and that the Board may not be able to make payment of a jury award which was a condition precedent to taking possession. In the opinion of the dissenter, the Board had a right to judgment that the property could be taken upon paying the compensation as there was no prohibition on acceptance of contributions or donations and no statute or public policy would prevent donations. The dissent pointed out that it was no defense to condemnation proceedings that the condemnor had no funds with which to pay for the land or authority to incur indebtedness. Neither the owner nor the court had authority to inquire into the ability of the owner to pay, according to

the dissenter. In his opinion, the trial court had properly overruled the owner's objections regarding the right to condemn and this right must be presented to the court before the jury had been empaneled. Eminent domain was a special statutory summary proceeding in which the sole object was to ascertain the amount to be paid, according to the dissenter.

Golowich v. Union Free School District[67] involved two cases tried together. The District, claiming that Second Street was a public way, wanted to use it as a means of ingress and egress to the school property. If not a public way, the District maintained, it was entitled to condemn the property. Owners of the residential lots on either side of the street held title to the fee to the center of the street, subject to the rights of other lot owners to use the street also. The first case was an injunction by these owners to enjoin the District from using the private street, and the injunction was granted. The second case was an action by the District to condemn the street, which was dismissed. These moves by the trial court were affirmed on appeal. The injunction was granted because there had been no complete dedication of the street as a public way without acceptance by the municipality, and the court found no reason to imply that the municipality had accepted Second Street as a public way. The action to condemn was dismissed because the District had not taken the preliminary steps outlined by the statute[68] for voting on an addition to a school site. The District conceded it had not proceeded in accordance with the statute. Its contention that under another provision it had power to designate the site without submitting the question to the

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[67] 25 Misc. 2d 867, 206 N.Y.S. 2d 439 (1960).

[68] Ed. Law Sec. 416, subd. 3, Sec. 1709, Subd. 6.

electorate was rejected by the court. The fact that the street had appeared on plans approved by the electorate at the time the school site was established did not give the District the authority to purchase or condemn the street. At the time the District acquired the site as a gift, the impression was that the street was a public way.

Selection of the Site by the School Authorities. Exceptions of the owner in Jordan v. School District No. 8[69] were based on evidence that the location of the lot should be changed by the jury to land owned by another. The District contended that the jury had no power to change the location of the lot and that this evidence should be excluded. The court held that, according to the statute,[70] municipal officers were to decide where on the lot the schoolhouse should be placed, but not the boundaries of the lot. Conditions precedent to laying out a lot and appraising damages were that the location be legally designated and the owner refuse to sell. In this case, the designation having been legally made by the District, the jury could not change it. The statute also provided that if the owner should be aggrieved at the location of the lot or the damages awarded, he may apply to the County Commissioners and have the matter tried by a jury. The court said "location" here referred only to adjusting the boundaries to render them less inconvenient to the owner, but not to authority to place the lot anywhere in the District as that would settle the rights of a third party without notice.

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[69]60 Me. 540 (1872).

[70]R.S. Ch. 11, Sec. 32, 33, 34.

The owner's action of trespass and ejectment was successful in Howland v. School District No. 3[71] because the record showed no vote of the District to erect a schoolhouse. On April 14, 1875, a meeting of the District was held to consider repair of the schoolhouse. On May 22, 1875, at a special meeting, the District voted to locate the schoolhouse on the grounds of the old building, and the Trustee was empowered to petition the School Committee to lay out a lot of land of a suitable size. The court held that a vote to locate a site was not a vote to erect a building. The vote by the District to locate the site was a nullity because the power was in the School Committee. The court thought that it was clear the School Committee did not have authority to appoint appraisers until after the District had voted to erect a schoolhouse. The case was before the court at a later date[72] and this time, the proceedings were quashed at the trial court level because the vote to build the schoolhouse preceded the selection of the site by the School Committee. On appeal, the court held that the statute did not expressly provide that the vote to construct a building should precede selection of the site, but only that both measures should precede next steps. The statement in the preceding case that "the statute contemplates that the selection of the site shall precede the vote to build" was regarded as only an inference from the order which was mentioned in the statute, and the Board was not commanded to follow that order. The court was of the opinion that if the legislature had intended to prescribe the order, it could have done so. There was nothing to warrant adding the requirement that the steps proceed in a certain order by judicial construction.

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[71]15 R.I. 184, 2 Atl. 549 (1885).

[72]15 R.I. 184, 8 Atl. 337 (1887).

Commenting on notice of the meeting of the District, the court added that while the notice may not have been sufficient at common law, it was satisfactory under the statute, and the record of the District Clerk that the meeting was duly and legally notified was prima facie evidence of the validity of the notice.

The question of which of the school statutes, if any, authorized the District to condemn property was raised in School District of Columbia v. Jones.[73] In the statute relating to country school districts which elected three directors, express authority to condemn after selection of the site by a majority of the qualified voters of the district was granted. The statute for city districts provided that they should enjoy the same corporate powers as other districts, except as provided. It appeared that the District had been operating as a city district since 1872, electing six directors. There may have been some doubt about formal incorporation as a city district, but the defendant was prevented from attacking the corporate capacity of the District. The court held that the phrase in the statute "except as herein provided" was authority for the board of a city district to select the site.

Munn v. Independent School District of Jefferson[74] was an action brought to enjoin the District from condemning the property. The opinion related that the statement of facts had required 366 paragraphs, that there were 27 assignments of error, a 28 page motion to dismiss the appeal, and a 450 page abstract. The result of the case, however, turned on the validity of the act of the Board of Directors in locating a new schoolhouse. The court did not consider

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[73]229 Mo. 510, 129 S.W. 705 (1910).

[74]188 Iowa 757, 176 N.W. 811 (1920).

it appropriate to inquire into the wisdom of the Board's choice, but only into the power and authority of the Board to take the property which was found in express terms of the statute. At the time bonds were voted for the new schoolhouse, the Board contemplated construction of the building on an old site. An increase in the amount of bonds that could be issued was authorized by a majority of the voters after a new site was selected. The court held that there was no implied promise of the Board to use the old site and commented that the Board had made an effort to carry out its pledge. The dismissal of the petition for injunction was affirmed, and the court added that since the building was actually constructed, the injunction would have been an idle ceremony.

The owner in Cunningham v. Shelby County Board of Education[75] raised the issue that there had been proof at the trial that the site was not conveniently located. The court cited authority that it was not its duty to select the site, and concluded that while the proof showed the site was not in the exact center of the District, it failed to prove an abuse of discretion on the part of the Board.

The trial court was held to have exceeded its authority and usurped the function of the School Board by taking judicial notice of the danger of a gas line on the property sought by the Board in Pike County Board of Education v. Ford.[76] The appellate court found no evidence of fraud, collusion or abuse of authority in the action of the Board in selecting the site.

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[75]202 Ky. 763, 261 S.W. 266 (1924).

[76]279 S.W. 2d 245 (Ky. App. 1955).

The controversy over the site in Hyde County Board of Education v. Mann[77] resulted from a consent judgment in an earlier case which incorporated a resolution of the Board that the site be within a half mile of a certain junction. The State Board of Education allocated $164,484 for a new consolidated school and approved a 15.32 acre site selected by the County Board on recommendation of the State Board. The Board purchased 3.04 acres and advertised for bids for a building on this tract. The rest of the property was sought in condemnation proceedings, but one of the owners resisted the taking because he claimed his property was not all within the half mile radius specified in the consent judgment. The uncertainty developed because the highway junction was formed by a "Y" type intersection. The trial court's conclusion that either junction could serve as the point from which the half mile radius could be measured was approved. Considering the objective to be accomplished, the court found no purpose to be served in specifying one site over another within 1,000 feet, as most of the students would ride on the bus to school.

A brief comment of the court in County Board of School Trustees of DuPage County v. Boram[78] was that the Board may select and purchase sites without referendum according to the 1959 Code.

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[77]250 N.C. 493, 109 S.E. 2d 175 (1959). Other issues involving the same factual situation were litigated in Topping v. North Carolina State Board of Education, 249 N.C. 291, 106 S.E. 2d 502 (1959), discussed in Chapter VI.

[78]26 Ill. 2d 167, 186 N.E. 2d 275 (1962).

The Resolution of the Board.

Nelson v. Ottawa County School District No. 3[79] held that the statute did not require the School Board to make a record stating that the Board deemed it necessary to appropriate land. The court affirmed a judgment for the District denying an injunction to prevent the condemnation.

A resolution of the Board to condemn property for construction of a gymnasium, passed two days before the act requiring the high school to offer two hours of physical training per week, was considered in Kern County Union High School District v. McDonald.[80] In support of the action of the District, the court held that it was not necessary to allege that a resolution had been adopted. The requirement of the statute that the complaint contain a statement of the right of the District to take the property had reference only to the legal right and authority to exercise the power of eminent domain. This power was not restricted by the verbiage of the resolution.

The owner in Board of Regents v. Palmer[81] challenged the timing of the resolution of the Regents, but the court held that having joined issue on the merits, he could not object to proceedings which were not required by the statute. The court held that it was not necessary that the Board pass a resolution to condemn the property as a condition precedent to institution of the suit.

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[79]100 Kan. 612, 164 Pac. 1075 (1917).

[80]180 Cal. 7, 179 Pac. 180 (1919).

[81]356 Mo. 946, 204 S.W. 2d 291 (1947).

The steps outlined by the court for condemnation in Spann v. Joint Boards of School Directors[82] were (1) selection, (2) disagreement on price, (3) decision on amount and location, (4) entry, possession and occupancy by going upon the land, and (5) designation and marking of boundary lines. On March 31, 1952, the Joint Board informed the owner that they desired 20 acres of his 118 acre farm for a site for a joint secondary school. After negotiations for the site failed, the attorney met with the Board to outline the steps that needed to be taken to exercise the right of eminent domain. The minutes of the meeting showed that a motion and appointment of a committee to take possession of the property were unanimously approved. A carbon copy of what was captioned "Resolution Appropriating Certain Lands Adjoining the Darlington Township-Darlington Borough Joint Consolidated Elementary School" was appended to the minutes but was unsigned. The owner on appeal insisted that no resolution of condemnation had been adopted by the Joint Boards. The trial court had found as a fact that the resolution condemning the property had been unanimously adopted and concluded that the Board's action complied with requirements of the statute. The evidence that the resolution had been adopted was reviewed by the appellate court, and the dismissal of the bill in equity to restrain the condemnation was affirmed. The owner also argued that the act of the joint board was void as it was not indicated in the record how each member had voted, but in answer to this argument, the court said it was not necessary to record each member's vote when the decision was unanimous.

The sufficiency of a resolution adopted by the Board in Pike County Board of Education v. Ford[83] was challenged by the owner. The Board resolved to

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[82]381 Pa. 338, 113 A. 2d 281 (1955).

[83]279 S.W. 2d 245 (1955).

employ attorneys to prosecute the action for condemnation of approximately 11 acres of land on John's Creek. While the resolution did not specifically direct condemnation, the court held that it had the necessary effect and stated that in dealing with proceedings of governing bodies on such questions, technical strictness was not required.

The Sufficiency of Notice to the Owner.

The sufficiency of the notice given by the Town to the Trustees was at issue in Trustees of Belfast Academy v. Salmond.[84] It was thought that the reasonableness of the notice depended upon the circumstances of the case, and here, where a majority of the Trustees were in residence, seven days was adequate notice of the intention of the Town to lay out a way diagonally across the Academy lot.

The District's action of tort against the owner was unsuccessful in Norton Eighth School District v. Copeland[85] because the court held the District had not acquired sufficient title to maintain the action. According to the facts stated, Copeland had no notice of the selection of his lot, its appraisal, or approval of the selection by a town meeting. It was held that the owner should have had the opportunity to appear before the selectmen to offer evidence especially on the question of compensation.

The facts in Cochran v. Independent School District of Council Bluffs[86] led to a holding that adequate notice had not been given to the owner. On

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[84]11 Me. 109 (1833).

[85]2 Gray 414 (Mass. Sup. Ct. 1854).

[86]50 Iowa 663 (1879).

November 7, 1871, the plaintiff, who brought an action to quiet title, purchased the property in question at a tax sale and held only a certificate of tax purchase. Proper entry of the tax sale had been made. On January 18, 1872, the property was condemned by the District with notice to specific parties but not to the plaintiff. Compensation of $316.66 was paid to one named Graham. The plaintiff's complaint alleged that he had no personal or actual service, no notice of the condemnation or evidence of possession by another party, nor had he received any portion of the condemnation money. The District alleged that it had no knowledge of the plaintiff's claim. The District said the code provided for notice only to the owner and that the plaintiff was not the owner when the condemnation proceedings were begun. The court found that the plaintiff had made a valid purchase and could not constitutionally be deprived of his property without compensation or notice. He could not get notice by publication because he was a resident of another county.

A Pyrrhic victory was won by the mortgagee in Leavitt v. Eastman,[87] a case which was heard on report from the Superior Court and resulted in a judgment for the mortgagee and an award of one dollar in damages. The District had voted to locate a schoolhouse on the property by a two-thirds majority. Municipal officers staked out the lot and appraised damages. The school authorities entered the premises, removed a fence, and built the schoolhouse. The court explained that the statute should be fully and strictly construed and that notice of the proceedings was of chief importance. The landowner may have felt no interest in the hearing on the location, for which he

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[87] 77 Me. 117 (1885).

received notice, as he may have been willing for the school to be on his land, but he may have wished to be heard on the extent of the property taken or the amount of damages. The court thought he should be allowed to assume that a new hearing would be held for these purposes. It was suggested that the plaintiff had actual notice, but the court said that since legal transfer of land was involved, all of the formalities of the statute should be fully observed.

The District appealed from a decision increasing the damages in Haggard v. Independent School District of Algona.[88] Its appeal was based partly on the contention that the District had not received sufficient notice that the owner was taking the case to the District Court. The court held that the notice which had been directed to the District and served upon the President of the District was sufficient. Recital of the name of the President of the Board in the notice was surplusage, and the court pointed out that it was not a personal summons.

The testimony that the owner had no notice was uncontradicted in Aldredge v. School District No. 16.[89] Aldredge brought the action to recover use and possession of his property, and the trial court entered judgment for the District. The judgment was reversed on appeal, the court being of the opinion that if the statute were construed to deny the owner notice that proceedings were pending, it would be unconstitutional as a denial of due process of law. If the statute were interpreted to imply the requirement of notice, the requirement had not been met in this case. Due process, explained the court,

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[88] 113 Iowa 486, 85 N.W. 777 (1901).

[89] 10 Okl. 694, 65 Pac. 96 (1901).

meant in due course of legal proceedings according to rules and forms established for the protection of private rights. The court observed that any proceeding under the common law or statutory law for the appropriation of private property required notice to the owner. Within the next two years, Stillwater became a City of the First Class and the Board of Education again attempted to condemn the property in question[90] and gave notice to the owners by publication for four weeks and by registered mail. The Sheriff proceeded to oust the Board on the basis of the former case, and an action was begun by the Board to enjoin the Sheriff from executing the writ of ouster. The owner demurred to the complaint, and judgment was entered for him. The judgment was affirmed because the court found that the statute did not provide for notice and that language in the former opinion was not intended to decide the question of whether there might be an implied duty to give notice. Three classes of cases were suggested by the court. First, those in which no notice was necessary, citing the Buchwalter[91] case; second, those in which it was presumed that notice was intended and any reasonable notice had been held sufficient; and third, those in which a statute without provision for notice had been declared void as a violation of due process of law. The condemnation proceedings were held void because the statute failed to provide notice and it could not be inferred. In a subsequent action, the Board was successful in condemning the property in question.[92]

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[90]Board of Education of City of Stillwater v. Aldredge, 13 Okl. 205, 73 Pac. 1104 (1903).

[91]Buchwalter v. School District No. 42, 65 Kan. 603, 70 Pac. 605 (1902).

[92]Aldridge v. Board of Education of City of Stillwater, 15 Okl. 354, 82 Pac. 827 (1905).

The Buchwalter case referred to in the preceding paragraph was an ejectment action to recover possession of one acre on which a schoolhouse had been erected. A judgment for the District was affirmed, the court holding that it was not necessary that the owner receive notice. The land was taken by eminent domain and for a public purpose, and the only limitation on the District was that it pay full compensation. Neither the statute nor the constitution was found to require notice, and notice was of no concern to the citizen as the right to take the property existed independent of notice.

According to the court in Byfield v. City of Newton[93] the statute provided that failure to give notice would not affect the validity of proceedings, and, therefore, a mistake in the date of recording of the order of taking was of slight consequence to the owner. A defective notice would have no different effect from no notice at all.

The adequacy of service of process by publication was considered in Brown v. Doby.[94] The Board sought to condemn a site in Stanly County and the landowners were resident in Davidson County. Notice was first served on October 1, 1954, by the Sheriff of Davidson County. The owners brought an action in the Superior Court of Stanly County for a temporary injunction, which was later dismissed. The Board petitioned for the appointment of appraisers, and then the Sheriffs were unable to find the owners to serve summons, so the Board filed for service by publication, allowing until January 25, 1955. On January 22, the owners made a special appearance through counsel and moved to dismiss the proceedings for want of jurisdiction over the persons by service of process.

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[93] 247 Mass. 46, 141 N.E. 658 (1923).

[94] 242 N.C. 462, 87 S.E. 2d 921 (1955).

The motion was overruled by the Clerk and an appeal taken to the Judge, who affirmed the Clerk's decision and decreed that the owner had been suitably served. On the appeal, the owner insisted that the statutory provision for service of process on non-resident owners implied that residents were amenable only to personal service, but this argument was rejected by the court. The owners also challenged the Clerk's finding that the owners could not be found in the state. The court referred to a four page narrative of unavailing efforts by the Board and the officers of Davidson County to locate the owners. To decide the matter, the court stated that the statutory requirement as to proof of diligence was simply a pleading or affidavit which would state that after due diligence, personal service could not be had within the state. This case also had a sequel which was decided in favor of the Board.[95]

In another North Carolina case, Burlington City Board of Education v. Allen,[96] the court, in discussing the issue of its jurisdiction over the person of the owner, explained that an eminent domain action was a political and administrative measure of which the owner was not entitled to notice.

Notice was sent by certified mail to the parties in the case of In re Armagh Township School District,[97] but the appeal of the owners from a dismissal of their exceptions to the appraiser's report was based on the fact that they had not received a copy of the report or notice of the time and place the report had been filed. The court held that the statute providing that parties interested have at least five days notice of the filing of the

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[95]Brown v. Doby, 244 N.C. 746, 94 S.E. 2d 895 (1956).

[96]243 N.C. 520, 91 S.E. 2d 180 (1956).

[97]411 Pa. 395, 192 A. 2d 338 (1963).

report did not require that they receive a copy of the report or that the place of its filing be specified. There was no evidence that the owners had made any effort to examine the report. After the report was filed, the owners had 30 days to file exceptions, and the court was of the opinion that the legislature could also have imposed the requirement the owners sought if it had intended to do so.

An Effort to Purchase the Property.

Where the statutes or precedents require the agency seeking private property for public use to make an effort to purchase it before condemnation, questions of what facts show that the condemnor and the owner have been unable to agree on a price for the property are raised.

Evidence of an Attempt to Purchase. The opinion in Trinity College v. Hartford[98] referred to the fact that the President and the Treasurer of the College had refused to take any action on the proposal that had been made to open a street through College property. The court found that the highway committee had made an attempt to agree on a price and dismissed the petition of the College for an injunction.

The petition for condemnation alleged, and the court found, that the District had made a bona fide effort to negotiate for purchase of the property in School District of Clayton v. Kelsey.[99] The owner complained that the finding of the court was not based on substantial evidence. At a meeting of the Board on April 19, 1944, the Superintendent was authorized to offer the

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[98] 32 Conn. 452, (1865).

[99] 355 Mo. 478, 196 S.W. 2d 860 (1946).

owner $15,000 for the property. This offer was made by letter, and the owner replied by letter, declining the offer. Other parties had appeared before the Board, and the owner who complained here was advised that she could also appear. Testimony was noted that the owner had said she would turn down three times the amount offered. Minutes of the Board stated that an attempt to agree on a price with this owner had not been successful. The judgment on the verdict for the District was affirmed.

The fact that the President of the Board called on the owner, was unable to negotiate for purchase of the property, and informed the owner that the Board would institute proceedings to take the property by eminent domain was considered sufficient in Payne v. Deercreek Board of Education[100] to meet the requirement of the statute that the Board make an effort to purchase the property before condemning it.

The Kelsey case was cited as authority for the statement that an inability to agree on a price for the property was a jurisdictional prerequisite to condemnation which must be pleaded and proved in Caruthersville School District v. Latshaw.[101] The petition for condemnation was filed July 22, 1948, and an answer to the petition on July 26. The next day, the Board amended its petition to allege an inability to agree on the damages and to include in the petition a resolution that the Board had made an offer to the owner. On July 29 an amended answer was filed admitting an inability to agree. After commissioners had been appointed, the owner on September 7, filed another amended answer and, on October 19, a third amended answer, both of which denied

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[100]76 N.E. 2d 734 (Ohio App. 1947).

[101]360 Mo. 1211, 233 S.W. 2d 6 (1950).

the allegation that the condemnor and the owner had been unable to agree on a price. The answer of October 19 was subsequently withdrawn. After a change of venue and a commissioner's report of compensation at $28,000, which was paid to the court, a final judgment in condemnation was entered on February 7, 1949. On appeal, the court held that the essential allegation that the parties had been unable to agree was sufficiently stated in the petition and that there was no specific requirement that the court enter in the record a finding of that fact. Nor did the order appointing the commissioners require the court to find that the parties had been unable to agree, because express provision for such finding was not found in the statute. The court was of the opinion that the facts as stated showed the answer of the owner admitted an inability to agree at the time the commissioners were appointed. While jurisdiction could not be conferred by consent by the parties, the court found no reason why the owner may not admit existence of a fact essential to the court's jurisdiction.

The amount of the purchase price was not the major factor in the breakdown of negotiations in Town of West Hartford v. Talcott.[102] In this case, the Town refused to guarantee that its zoning authority would extend a business zone to the north to include a portion of the property owned by the defendant which was not taken in the condemnation proceedings. Because the Town had refused to make this guarantee, the owner maintained on appeal that there had been no effort to purchase the property. The court held that it was sufficiently established that the condemnor had exhausted all reasonable efforts. While the authority to condemn was to be strictly construed

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[102] 138 Conn. 82, 82 A. 2d 351 (1951).

in favor of the owner, the court thought the statute should be enforced to effectuate the purpose for which it had been enacted. A letter of the owner's counsel, dated February 7, 1949, had stated; "My clients are not willing to make the substantial sacrifice which an acceptance of either of your offers would entail ... any further discussions would be fruitless." The order appointing commissioners to assess damages was affirmed.

Evidence that the parties were unable to agree on a price was found in three visits to the owner in Spann v. Joint Boards of School Directors.[103] Each time the committee of the Board called, the owner informed them the property was not for sale. On appeal, the owner complained that he had never been tendered a specific sum and that the Board did not offer an ultimatum of a final price. The court held that tender was excused where it would be a useless ceremony, and the Chancellor's finding that the parties had been unable to agree on the price was affirmed.

The court in Pike County Board of Education v. Ford[104] thought it would be unable to conclude as a matter of law that there was no good faith effort to negotiate. The Board had offered $5,000 for the property, which the court thought was inadequate and, if on a take it or leave it basis, would not be a good faith offer. The letter also stated, however, that the Board would be happy to receive a reasonable offer from the owner. The verdict of the jury awarding $15,350 damages was set aside by the trial court, but this action was reversed on appeal.

A letter from the Board's attorney offering $500, which was not answered,

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[103] 381 Pa. 338, 113 A. 2d 281 (1955).

[104] 279 S.W. 2d 245 (Ky. App. 1955).

and an informal meeting with the owner were considered sufficient attempts to negotiate for purchase of the property in County Board of School Trustees v. Batchelder.[105] At the informal meeting, the owner stated he was negotiating with an oil company for a service station on the north end of the tract. The representative of the Board promised to meet with him again, but no meeting was ever held. Because the owner did not submit proof that the offer was not a bona fide offer, the court held that the Board had made a sufficient effort even though the amount might have been inadequate. The verdict of $4,750 and judgment of condemnation were affirmed.

In Golowich v. Union Free School District[106] the Board was seeking to condemn a street to which title was held by residential owners on either side. Part of the basis on which the condemnation was denied was that the Board had not introduced sufficient evidence at the trial that it had negotiated for purchase of the rights. The owners of the street conceded that the Board had made an offer of $100 to each owner, and minutes of the Board showed a recommendation that the Board authorize the President to offer $100 to each owner and, if refused, to proceed with condemnation. A resolution in accord with the recommendation was passed. Recognizing that the title to the street bed may have substantial value, and that the burden was on the Board to establish a bona fide but unsuccessful attempt to acquire the property, the court stated that "A merely formal or perfunctory attempt to purchase is not sufficient to comply with the requirement of the statute."[107] Because the

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[105] 7 Ill. 2d 178, 130 N.E. 2d 175 (1955).

[106] 25 Misc. 2d 867, 206 N.Y.S. 2d 439 (1960).

[107] 206 N.Y.S. 2d at 445.

burden of the evidence was not sustained, the condemnation petition was denied without prejudice.

The judgment for condemnation was affirmed in Wampler v. Trustees of Indiana University[108] contrary to the owner's contention that the Trustees had made no good faith effort to purchase the property as required by the statute. An effort to purchase was regarded as a condition precedent to the right to maintain an eminent domain action, and the burden was on the petitioner to show a good faith effort. The owner complained that he had not been offered what he considered the market price of the property. Other adjoining lots had been purchased for $18,000, $21,000 and $25,000, so the court thought an offer of $30,000 for the owner's property in question was evidence that the University had made a reasonable effort. The court stated that prior Indiana decisions had not followed a market value theory suggested by a highway case cited by the owner. The court thought that if a reasonable offer had been made honestly and in good faith, with a reasonable effort to induce the owner to accept it, the requirements of the statute were met. Each case would have to be determined in the light of its own circumstances. On the first contact by the University in this case, the owner had stated he did not want to sell. Subsequent contacts led to offers of $25,000 and $30,000. On July 14, 1955, the owner said he did not want to sell, but would take $50,000 for his property. On July 17, 1957, the Trustees offered $30,000 by registered mail along with a notice of their intention to condemn the property if not accepted. Supporting the University's claim that it made no further attempts to purchase the property because of the $50,000 offer, the

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[108]241 Ind. 499, 172 N.E. 2d 67, 90 A.L.R. 2d 204 (1961).

court said:

> In our judgment the statute ... does not contemplate an impossibility to purchase at any price, however large, but merely an unwillingness on the part of the owner to sell only at a price which in the petitioner's judgment is excessive. In such an event the attempt to agree need not be pursued further than to develop the fact that an agreement to purchase is not possible at any price which the condemnor is willing to pay.[109]

Problems of Agency in the Attempt to Negotiate. A Trustee who had been appointed to ask the School Committee to select a lot reported he was unable to get any price on it in Howland v. School District No. 3.[110] In this third time the case was before the Rhode Island Court, it was held that refusal to give the Trustee a price was not a refusal to give the District a price. The Trustee had no authority to represent the District, and acceptance of his report could not amount to adoption of his agency. There was nothing to show that the owner had received the Trustee as a representative of the District or intended to have his refusal regarded as an indication he did not want to negotiate. A motion to quash the proceedings was granted.

At the trial of Connecticut College for Women v. Alexander[111] the owner denied that the College had made any effort to agree with him regarding the price for the property, but the judge found that the effort was proved. On appeal, the owner said the judge's finding was not supported by the evidence and the court agreed. A Trustee of the College, with the College's attorney, went to the owner's house where a daughter-in-law said to see the owner's son.

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[109] 172 N.E. 2d at 71.

[110] 16 R.I. 257, 15 Atl. 74 (1888).

[111] 85 Conn. 602, 84 Atl. 365 (1912).

The son refused to fix a price on the property and declined the offer made by the Trustee and the attorney. The court found nothing in the evidence to show that the owner's son was an agent of the owner to agree on price or that the owner or his son had been informed that the Trustee was an agent of the College. The rationale for the holding was that the owner was entitled to know by whom the land was sought and for what purposes. It was speculated that he might react differently to a party who had the power to take the property by condemnation. While the evidence was recognized as meager, the court thought it failed to show a sufficient attempt and a resulting failure to agree on price.

Some complex relationships were reviewed in Chicago v. Jewish Consumptives Relief Society.[112] The evidence showed the Business Manager of the Board of Education had corresponded with the attorney of the Society, after being referred to him, advising him that the Board was considering purchase of the Society property and enclosing a proposal of sale form. The attorney replied with an offer to sell the property at $125,000. The Board's inspector of school property replied the Board would consider an offer of $82,500. At the trial, the attorney testified that the President of the Society was his sister and that he had not consulted the members or officers of the Society regarding the negotiations. When summons were served on the President to condemn the property in July, 1925, it was the first time the President or officers knew that the Board was considering this site. The court held that the Board must prove that the agent with whom it dealt was acting within the scope of his authority and that such proof could not be by acts or declarations

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[112]323 Ill. 389, 154 N.E. 117 (1926).

of the agent. Since there was no evidence that the attorney had an agency authorizing him to agree on a price with the Board, the evidence was considered undisputed that he was not such agent. The judgment for the City was reversed because the Board had not shown sufficient attempt to purchase the property from the owner.

Inability to Secure Title Except By Condemnation. In School District of Columbia v. Jones,[113] the owner maintained that no attempt had been made to negotiate for purchase of his property. The court pointed out that the statute provided the District may condemn the property if it "for any other cause cannot secure a title thereto."[114] Under this clause, the petition of the District had stated the facts of an earlier case in which the interests of the parties were detailed. Since the interest of a minor was involved, the Board could gain title in no way other than by condemnation. Therefore, it was unnecessary to negotiate for the purchase of the property.

In Trustees v. Clippinger[115] the Board attempted to avoid the requirement of negotiation for purchase by claiming that the diverse and uncertain interests of the owners made it impossible to acquire the property by any means other than condemnation. On August 29, 1945, Myers, the sole devisee, contracted to sell the property to the Board for $6,800, and the Board was given immediate possession. Myers agreed to convey title within six months but was unable to do so because the will was not probated until May 24, 1948. In the meantime, the Board removed buildings, graded and filled the lot, began

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[113] 229 Mo. 510, 129 S.W. 705 (1910).

[114] 1906 Ann. Stat. 9772.

[115] 404 Ill. 202, 88 N.E. 2d 451 (1949).

condemnation proceedings, and wrote to the owner cancelling the contract due to failure to deliver title. The court affirmed the dismissal of the petition for condemnation on motion of the owner, explaining that the Board could not repudiate a contract, gamble on a smaller award of compensation, and otherwise elect to abandon the proceedings. The Board must have known delivery of the title could not be made until the will had been probated, the court thought. Possession under the terms of the contract after the time limit had expired was considered evidence that the time limit was waived. There was no provision in the contract that time was of the essence.

Evidence That Negotiations Would Be Futile. The evidence in Nelson v. Ottawa County School District No. 3[116] showed that the owner had said he would not sell unless he were forced to do so. The court said the District did not have to try to purchase the property, because when it was useless to make a tender, none was required.

Dismissal of a suit to condemn was reversed in Ft. Worth Independent School District v. Hodge[117] because of evidence that the owner would reject any offer less than $2,000. The undisputed facts in the record were that the agent of the District had asked the owner for a price several times but never received one. The agent attempted to contract for purchase of the property at a price of $1,500. The owner testified that he thought $2,000 was about right, but the agent was not authorized to enter into an agreement. The attorney for the Board wrote to the owner that the Board had authorized condemnation and that if the owner desired, he may agree to the terms that

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[116] 100 Kan. 612, 164 Pac. 1075 (1917).

[117] 96 S.W. 2d 1113 (Tex. App. 1936).

had been offered. The owner testified that he did not remember receiving the letter. The court approved the doctrine that where it appeared from the record that the parties could not have agreed upon an amount, it was not necessary to make a formal effort to agree. Suggesting that common sense should be read into the statute, the court was not willing to permit the owner to evade condemnation by refusing to name a price.

The Board's allegation that it was unable to acquire the property it needed by purchase was denied by the owner in Red Springs City Board of Education v. McMillan.[118] The preliminary negotiations were approved by the trial judge, and on appeal the court found the record replete with testimony that the owner would not sell to the school at any price. "An offer made under such presence would be a vain thing which is not required by law."[119]

Because the District had difficulty in ascertaining the true owner and was faced with a single demand over what it was willing to pay, the court held in County Board of School Trustees of DuPage County v. Boram[120] that the statute did not require an offer and it was not necessary where it was clear an offer would be futile. Boram had refused to negotiate because he said he had signed an option contract with Luehring, a real estate broker. Luehring offered to sell the property at $6,500 per acre. The President of the Board wrote to him to ask for a letter stating his demand, and Luehring treated it as an offer and replied that he would accept. Other than this, there was no evidence of an offer to negotiate by either party.

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[118] 250 N.C. 485, 108 S.E. 2d 895 (1959).

[119] 108 S.E. at 898.

[120] 26 Ill. 2d 167, 186 N.E. 2d 275 (1962).

Jurisdictions in Which it Has Been Held That No Attempt To Purchase Is Required. While there may be a number of States in which the statute does not require an attempt by the school or college to purchase the property it needs before condemning it, three cases have been located in which the court has stated explicitly that the statute did not require an attempt to agree on a purchase price. These cases are In re Application To Condemn Land in Rock County,[121] People v. Pommerening,[122] and Union School District of City of Jackson v. Starr Commonwealth for Boys.[123]

Corporate Existence of the Condemnor.

In three Missouri cases, the owner attempted to defeat condemnation proceedings by a School District by showing that the District was not legally organized. In the first of these cases, Orrick School District v. Dorton[124] a judgment for the District was reversed due to failure of the District to show that it had been organized as required by the statute. The court noted that in some other states, notably Illinois, Kansas, Michigan, and Arkansas, it had been held that corporate existence could not be put at issue in a condemnation action. In fact, Missouri cases had held that corporate existence could not be attacked collaterally, but in this case, the court apparently thought a collateral attack was not involved, though it did not explain why. The fact that the owner had been a resident of the District for 10 years,

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[121] 121 Minn. 376, 141 N.E. 801 (1913).

[122] 250 Mich. 391, 230 N.W. 194 (1930).

[123] 322 Mich. 165, 33 N.W. 2d 807 (1948).

[124] 125 Mo. 439, 28 S.W. 765 (1894).

paying school taxes and attending meetings, did not estop him from denying the corporate existence.

A result that would seem the opposite of the Dorton case was reached in School District No. 35 v. Hodgins,[125] where a judgment for the District was affirmed. The petition to condemn the property was filed on June 20, 1899, and on July 5, 1899, the owner appeared to file an affidavit denying the corporate existence of the District. After a hearing which resulted in a finding for the District and appointment of commissioners who reported the value of the property at $250, the owner filed exceptions on the basis that the District was not a corporation under the Missouri law. A general denial was entered by the District, and at the trial counsel for the District showed the steps that had been taken to form the District. The trial court found that it was legally formed with authority to condemn the property. On appeal, the issue was raised again, and the court held that the regularity of the proceedings that led to formation of the District were not properly involved in condemnation proceedings. In the opinion of the court, an affidavit denying corporate existence called only for a showing of a certificate and not that it was obtained rightfully. The right to assail the validity of the District did not belong to a citizen, but only to the State in quo warranto proceedings. Any other policy, the court thought, would be ruinous, because a corporation would find itself either with or without existence according to the whim of a jury. The Dorton case was not mentioned in the Hodgins opinion. The opposite results may have been due to the possibility that the District in the Dorton case did not introduce evidence or contest the issue, but elected to stand on its pleadings, but this is not clear from the case.

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[125] 180 Mo. 70, 79 S.W. 148 (1904).

The contention that the District was not legally organized was not seriously urged by the owner in Columbia School District v. Jones[126] as his brief did not deal with the matter as a separate point. The court did hold, however, that the corporate capacity of the District could not be assailed in a collateral proceeding, but only be considered at the call of the State in quo warranto proceedings.

Funds for Payment of Compensation. The opinion in Long v. Fuller[127] noted that no evidence had been introduced regarding the ability of the condemnor to pay for the property, but that the power of the School Directors to levy taxes afforded adequate security to the owner.

The power of the Board to condemn property for school purposes and the constitutionality of the statute under which it proceeded were upheld by the Supreme Court of New Jersey in Wendel v. Board of Education,[128] but on a writ of error to the Court of Errors and Appeals of New Jersey, the decision was reversed because the District had not averred that the amount to be paid for the property had been fixed by the Board of School Estimate. The higher court noted that the Supreme Court had overlooked this second ground of appeal even though it had been mooted before that court. The New Jersey statutes provided that when a board of education decided it was necessary to raise money to purchase land or erect schoolhouses, it should prepare a statement for the Board of School Estimate which would certify the amount to the financial board of the city for appropriation or bond issue.[129]

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[126] 229 Mo. 510, 129 S.W. 705.

[127] 68 Pa. St. 170 (1871).

[128] 75 N.J.L. 70, 66 Atl. 1075 rev. 76 N.J.L. 499, 70 Atl. 152 (1908).

[129] 1903 Gen. School Law, Secs. 73-76

The Board of Education was powerless to contract for purchase of property until after action of the Board of School Estimate. The court thought that the power to condemn could not exist where there was no power to purchase. A fundamental requisite of either the power to condemn or to purchase, the court said, was the ability to pay the agreed price or the amount fixed by the award of the commissioners. The petition in a proceeding to condemn property must state all jurisdictional facts, and unless the petition showed the existence of the right of condemnation, the order appointing commissioners could not properly be made.

In Territory of New Mexico v. Crary[130] the court held that the absence of an allegation that the Board of Regents had funds to pay the condemnation award was not fatal on a motion to dismiss or demurrer. In this case, a judgment dismissing the action was reversed.

In re Application to Condemn Land in Rock County[131] involved a statute which provided that the Board could not expend funds or incur liability beyond the amount that had been appropriated. The court stated that at the trial there had been no showing that the Board had the money on hand or that it had been appropriated, but that if a failure to have a sufficient sum defeated the proceedings, it would have to be a defense to be proved by the owner.

The owner in Cochran v. Cavanaugh[132] attempted to enjoin condemnation by the University Board of Regents partly on the ground that there was a deficiency in the State Treasury. The court dismissed this argument with the observation

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[130] 15 N.M. 213, 103 Pac. 986 (1909).

[131] 121 Minn. 376, 141 N.W. 801 (1913).

[132] 252 S.W. 284 (Tex. App. 1923).

that the statute provided that the University could not take the property until damages and costs had been paid.

Jury v. Wiest[133] was a case in which the District had procured taxpayers to restrain the District from continuing condemnation proceedings which had begun several years earlier on the basis that the constitutional debt limit of the District would be passed. The finding of the Chancellor that there was a contract to purchase was reversed. Considering the second ground of the appeal, the court found the District could raise sufficient revenue without extending its debt beyond the constitutional limit. The unused portion of available millage was to be considered an asset in calculating the extent to which the indebtedness of the District may be increased, and the court said it was imperative for the School District to levy its unused millage to pay the amount fixed as damages. Neglect of the District to levy taxes would not render the owner's claim void, and the court referred to a duty of the District to increase taxes. The statute[134] provided that funds which may be raised by taxation should be pledged and made security where a school district condemned.

The argument by the owner that the District could not begin condemnation before electors had voted taxes or bonds was considered in Union School District of City of Jackson v. Starr Commonwealth for Boys.[135] The opinion stated that the trial court had properly held that the showing of $50,000 in the building fund, which had been authorized by electors, obviated the need for the District to show that further taxes or bonds had been voted.

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[133] 326 Pa. 554, 193 Atl. 5 (1937).

[134] 24 P.S. Sec. 692, School Code Sec. 606.

[135] 322 Mich. 165, 33 N.W. 2d 807 (1948).

The owner's objection in Seba v. Independent School District No. 3[136] was based on his statement that the Board members had to borrow money on their own personal notes to make the condemnation award. In answer to the objection, the court held that the landowner could not inquire into the source of the money to pay the award and all that was required by the statute was that he receive just compensation.

One of the grounds for appeal in Spann v. Joint Boards of School Directors[137] was that the joint boards had no assured plan of financing. The court pointed out that the Boards were acting on the approval of the State Department of Education and that financing of the project would be partly by the State Public School Building Authority. On this point, the owners had amended their complaint to show themselves as taxpayers seeking relief. The court held that there was no requirement that the Boards have funds on hand and that it was conjecture that the debt limit would be exceeded.

Mercer Island School District v. Victor Scalzo, Inc.[138] was an original proceeding for certiorari to review a district court order denying the School District's petition for condemnation. At the hearing, the owner claimed that the School District budget was expended and that if the property were acquired, the District would be unable to pay for it. The trial court was reversed because it was error to admit evidence of the budget status at that stage of the proceeding. The three stages suggested by the court were, (1) adjudication of public use and necessity, (2) assessment of damages, and (3) payment, entry and dominion. The court did not suggest at what stage the owner could

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[136]208 Okl. 83, 253 P. 2d 559 (1953).

[137]381 Pa. 338, 113 A. 2d 281 (1955).

[138]54 Wash. 2d 539, 342 P. 2d 225 (1959).

raise the question of the ability of the condemnor to pay, if at any stage.

QUESTIONS OF JURISDICTION AND VENUE

This section is designed to mention only the cases in which the specific questions of jurisdiction and venue have been raised. It should be noted that the jurisdiction of the court is questioned by many of the other procedural or substantive issues that are raised. The cases dealing with venue will be considered first in chronological order, followed by those in which the jurisdiction of the court was mentioned.

The owner in Kirkwood v. School District No. 7[139] contended that it was error to deny his application for a change of venue on the ground that the judge was prejudiced, but on appeal, the court held that venue was left to the discretion of the judge and that there was no apparent abuse of that discretion in this case.

The owner complained in Cochran v. Cavanaugh[140] that because the guaranty bond had been signed by 1,600 Austin residents, the act authorizing the government to appoint a committee to purchase land adjacent to the State University was invalid. It was not clear from the opinion, but apparently his argument was based on the possibility of a biased jury, as the court met the argument with the suggestion that the owner could get a change of venue.

A change of venue from Adair County to Schuyler County was approved in Board of Regents v. Palmer.[141] The court explained that the owner was entitled

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[139] 45 Colo. 368, 101 Pac. 343 (1909).

[140] 252 S.W. 284 (Tex. App. 1923).

[141] 356 Mo. 946, 204 S.W. 2d 291 (1947).

to but one change of venue, and that by that change, the Circuit Court gained jurisdiction of the subject matter.

In a short opinion, the Kansas City Court of Appeals denied its own jurisdiction in Consolidated School District No. 2 v. O'Malley.[142] It was noted that the Supreme Court had ruled that the Court of Appeals had jurisdiction in a condemnation proceeding involving less than $7,500, but here, the cause was transferred because the title to real estate was involved. This holding was later approved by the Supreme Court.[143]

Another Missouri case, State v. Moriarity,[144] mentioned that the Kansas City Court of Appeals had jurisdiction as the amount exceeded $10,000 in controversy. The O'Malley case was not mentioned in the opinion.

ISSUES REGARDING EVIDENCE

The issues regarding evidence in school and college eminent domain cases may be divided into two categories: those dealing with the admissibility of evidence at the trial, and those in which the sufficiency of the evidence to support the verdict has been questioned.

Admissibility.

The oral testimony of the Trustee that he acted within his authority as agent for the District to condemn the property was considered inadmissible in

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[142] 232 Mo. App. 1116, 115 S.W. 2d 171 (1938).

[143] 343 Mo. 1187, 125 S.W. 2d 818 (1938).

[144] 361 S.W. 2d 133 (Mo. App. 1962).

Howland v. School District No. 3.[145] The court said that

> The District and the School Committee, in condemning land for school purposes, perform a public function, judicial in its nature and their records are the proper proof of their acts.[146]

In Wood v. Syracuse School District[147] the Board objected to testimony by the owner until he had given evidence to show that he was the owner. The Board's objection was overruled and on appeal by the District, the action of the trial court was affirmed. The Board had paid the commissioners award to the County Treasurer, and the court was of the opinion that as the proceedings had been instituted by the Board, the question of ownership could not be raised.

A brief comment in Board of Education of City of Minot v. Park District[148] indicated that evidence of the minutes of the Board of Education was admissible in determination of the amount of land necessary as the question was for the court, the jury hearing only the issues on the amount of damages.

Sufficiency.

On appeal, the verdict finding the value of the property taken at $250 and damages to the part not taken at $7,750 was reversed in San Pedro, L.A. and S.L.R. Co. v. Board of Education of Salt Lake City.[149] This was a proceeding by a railroad to condemn school property in which a strip off the south end of the

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[145] 16 R.I. 257, 15 Atl. 74 (1888).

[146] 15 Atl. at 76.

[147] 108 Kan. 1, 193 Pac. 1049 (1920).

[148] 70 N.W. 899 (N.D. Sup. Ct. 1955).

[149] 32 Utah 305, 90 Pac. 565 (1907).

school lot was taken. At the trial, the Board contended that the taking had necessitated abandonment of the property for school purposes. Evidence was presented that passenger trains passed over the tracks, but not during school hours, and that there were no freight trains on the line, although both might use the line during school hours in the future. All the teachers and the principal testified that the railroad interfered with successful operation of the school, but none had said it was impossible to continue. There was also evidence that other schools in the City were located about the same distance from railroad tracks. The jury answered "Yes" to the question "Do you find from the evidence that the property of the defendant not taken has been wholly destroyed for school purposes?" The court found that the finding the property was wholly destroyed was not supported by direct evidence but, in fact, just the contrary. Suggesting that no enterprise was unaffected by others in city life, the court reviewed the evidence that the efficiency of the school had been destroyed and pointed out that even if that fact were established, it was not tantamount to total destruction. The Board had introduced the evidence that 32½% of the students failed to be promoted in the City, while in the school near the railroad, only 25% had failed. The court thought this evidence showed that there were many factors to consider regarding efficiency of a school, and that estimates of the teachers were unreliable and did not amount to the degree of proof necessary to support the finding that the property was wholly destroyed for school purposes. The court thought the Board must show that it was impractical after a reasonable effort to continue holding school in this building. There was no showing that the efficiency of the school was impaired or that the physical threat involved could not be overcome by reasonable effort and diligence.

The hazard of attributing all the results of the school to the railroad was pointed out with the suggestion that allowance should also be made for the natural ability and diligence of both students and teachers. The instruction which told the jury that the Board might abandon the property under any conditions other than total destruction was considered prejudicial error. While the conditions which were necessary to destroy the property for school purposes must be left to the jury to some extent, the court pointed out that there must be substantial evidence to support the verdict.

The owner complained in School District of Borough of Lewisburgh v. Harrison[150] that the District had not introduced evidence it had actually taken possession, occupied, and used the property for school purposes. The minutes of the Board were in the record, and the court found that the minutes were admissible as evidence of the action of the District. The minutes showed that the Board had discussed the necessity of acquiring additional land five years earlier and that a tentative selection of the land in question had been made two years prior to the time litigation was begun. The minutes showed a final selection of the property of this owner was made on June 11, 1923. On November 10, 1924, the Board made an offer which was rejected. On June 8, 1925, the Board stated its maximum amount and set a deadline for acceptance. On July 6, 1925, the Board appointed a committee to enter the premises with its solicitor and surveyor and passed a resolution to condemn the property. The entry of the committee was recorded in the minutes of July 17, 1925. The court held that there was no requirement in the statute that the District do anything further in order to obtain title to the property.

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[150]290 Pa. 258, 138 Atl. 760 (1927).

The owner suggested in Payne v. Deercreek Board of Education[151] that the Board had acted in bad faith in attempting to take his property. The court pointed out that the evidence showed the school had 135 children enrolled on a school site of 1/4 acre including the playground. With the permission of prior owners, the school had used the property in question as a playground until it was acquired by the owner in 1945. When the owner, who was the plaintiff in the action to enjoin appropriation, secured the property, he enclosed the lots and put 80 hogs in the enclosure. The court thought this evidence did not show bad faith on the part of the Board.

Without explaining the objection of the owner, the court in Town of West Hartford v. Talcott[152] stated that while there may have been technical errors concerning the introduction of evidence, they were not of such nature that the case should be reversed.

The reluctance of the appellate court to disturb the findings of the trial court was mentioned in Independent School District of Boise City v. Lauch Construction Co.[153] The court found no evidence of fraud, oppression or abuse of discretion by the District. Even though the evidence at the trial was conflicting, the findings of the trial court could be substantiated and the judgment was affirmed.

THE RIGHT OF THE CONDEMNOR TO DISCONTINUE PROCEEDINGS

Most of the case reports use the term "abandonment" to describe the

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[151] 76 N.E. 2d 734 (Ohio App. 1947).

[152] 138 Conn. 82, 82 A. 2d 351 (1951).

[153] 74 Idaho 502, 264 P. 2d 687 (1953).

condemnor's act of withdrawing from the proceedings. A few refer to "discontinuance" as the term indicating that the condemnor no longer wishes to secure the property by eminent domain. In this study, the latter term is used in order to avoid confusion with abandonment of premises for school purposes.

The earliest case located on this topic, Moravian Seminary v. Borough of Bethlehem,[154] dealt with the right of a borough council to discontinue proceedings to condemn property of a private school for an extension of a street. On October, 1889, the Borough passed an ordinance to extend Main Street through the Seminary grounds. Viewers were appointed, and then proceedings were quashed for irregularities and the ordinance repealed. In July, 1890, a new ordinance was passed, and the Seminary appealed from the report of the Viewers that the property was worth $15,000. On November 28, 1891, a jury verdict was handed down for $35,000, and on the same day, judgment on the verdict was rendered. In January, 1892, the Borough secured a rule to show cause why the proceedings should not be discontinued. The Seminary answered that the Borough was powerless to discontinue proceedings at that stage, and made a claim for its expenses in defending against the action of the Borough. The Master appointed by the court found the costs of the Seminary amounted to $745 and attorney fees amounted to $2,242.75. He recommended discontinuance on payment of costs only, as he did not consider attorney fees a legal liability. An earlier case was cited construing the law to be that where the owner has a judgment, all questions are concluded for him, and subsequent abandonment cannot affect his rights at law.

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[154]153 Pa. St. 583, 26 Atl. 237 (1893).

The court found, however, that the application to discontinue the proceedings was not after judgment because the judgment was null, having been entered on the same day the verdict was rendered, and it could not have stood in the way of a motion for new trial. While there was no record of a motion for a new trial, the brief of the Seminary apparently referred to one, and the court thought it was warranted in assuming that a motion for new trial was pending when the discontinuance was authorized. While the power of the trial court to discontinue the proceedings was upheld, the appellate court thought the terms imposed were not proper or adequate, as the Borough should be required to repeal the ordinance as a condition precedent to discontinuance and to pay the costs and expenses of the Seminary.

> Anything less than that would be visiting upon the plaintiff the consequences of the ill-advised or reckless proceedings inaugurated and prosecuted by at least a majority of the borough council. In justice and equity all the costs and expenses of the proceeding should be borne by themselves, but inasmuch as we have no means of reaching them, we must impose said costs and expenses on the municipality which they represent, or, perhaps, misrepresent.[155]

The action by the Seminary for a mandamus execution was not granted because the judgment had been held invalid. The court set a limit of 60 days within which if the ordinance had not been repealed and costs and expenses paid, the Seminary could apply for a mandamus execution.

After a jury trial resulting in a verdict for the defendant of $18,000, the School Trustees filed a resolution to abandon the proceedings, but judgment

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[155] 26 Atl. at 239.

was rendered over their objection in Evans v. Plymouth Congregational Church of Whiting.[156] In reversing the trial court, a statute[157] providing that after payment of the appraiser's award the title should vest at once was construed. A proviso that if the Trustees filed an exception to the appraisal, the title would vest, and subsequent proceedings would affect only the amount of the appraisal did not prevent the Trustees from discontinuing the proceedings. The general rule that the condemnor may discontinue proceedings any time before rights had vested was mentioned, and the court was of the opinion that the time of vesting of rights should not be hastened by judicial construction. Until the legislative act was made plain, the court suggested that doubts should be resolved in favor of the condemnor.

An action for damages of $9,107.66 was brought against the District as a result of dismissal of condemnation proceedings, and the judgment for the District was affirmed in Meadow Park Land Co. v. School District of Kansas City.[158] The statute under which the District had proceeded provided that schools should follow the procedure outlined for railroad, telegraph and other corporations. The court referred to railroad cases in which it had been held that costs up to and including the filing of the report by the appraisers were to be paid by the condemnor, but there was no provision for payment of expenses of the defending party. In one case in which the condemnor had been liable for damages, the action had been prolonged for nine years, and

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[156] 189 Ind. 381, 127 N.E. 406 (1920).

[157] 1914 Burns Ann. Stat. 6635.

[158] 257 S.W. 441 (Mo. Sup. Ct. 1923).

this case was distinguished. The provision in the statute for abandonment after 10 days from the appraisers report, the court thought, implied the right to discontinue the proceedings at an earlier stage. A controversy had developed as to whether restrictive covenants in the title of the property sought by the District should be considered in assessing damages. Apparently the commissioners had reached agreement, but before their report was filed, the School District protested, and the court discharged the commissioners. The School District then moved for dismissal of the proceedings. The court cited cases to show that where there had been no unnecessary vexatious prolonging of the proceedings, expenses had not been allowed. In this case, the action was begun on December 11, 1920,and dismissed December 21, 1921. The land company alleged that the Board had procured a protest against the report of the commissioners which would have set a value on the property of $100,000. The court pointed out that the land company had no vested interest in the unreported sum and that the right of the School District to dismiss the action must be available to the Board as public officials charged with the public interest.

In re Board of Education of City of Detroit[159] also mentioned the importance of the right to discontinue proceedings to enable a public agency to safeguard the public interest. The trial court, in this case, denied a motion to discontinue the proceedings before the verdict. The statute provided that the Board was without power to discontinue the proceedings after confirmation of the verdict, and the court thought this was a clear recognition of the right to discontinue before the verdict was confirmed. Therefore, on appeal,

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[159]242 Mich. 658, 219 N.W. 614 (1928).

the verdict was vacated and the case remanded with directions. The motion to discontinue was made because the Board believed the expense of acquiring ten of the lots in question was not justified.

In Whittier Union High School District v. Beck[160] the request for dismissal with prejudice filed by the District was due to the fact the property had been acquired by purchase. The court observed that the issues between the parties had been settled out of court so there was no necessity for a judgment of condemnation. Having acquired the property, the District could hardly be said to have abandoned efforts to secure it, the court said, and the District's good faith was shown by its purchase. The issue raised by the defendant was that the dismissal was in effect an abandonment, which was prevented by the Code of Civil Procedure in order to prevent an owner being harrassed by a series of suits to condemn his property.

The comments in Hooper v. Board of Education of Detroit[161] concerning discontinuance must be regarded as dicta. A resident of a hotel sought by the Board for the use of Wayne University brought the action to restrain the Board from purchasing of the hotel. The condemnation proceedings brought by the Board earlier had been discontinued. The court commented that because the Board was a State agency it had the right to discontinue condemnation proceedings any time before confirmation of the jury verdict.

The Beck case was distinguished from Torrance Unified School District v. Alwag[162] on the basis that in the former case the owner forfeited any

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[160] 45 Cal. App. 2d 736, 114 P. 2d 731 (1941).

[161] 315 Mich. 202, 23 N.W. 2d 692 (1946).

[162] 145 Cal. App. 2d 596, 302 P. 2d 881 (1956).

rights by selling the property to the condemnor. In the Alwag case, the District dismissed the action because it had been advised by the highway division that the State planned to condemn a strip through the middle of the property. The judgment of the trial court awarding costs but denying attorney fees was reversed on the issue of the attorney fees. The owner insisted that dismissal of the action by the District constituted an abandonment within the meaning of the Code provision which would entitle him to costs and expenses. The District argued that this provision was not applicable where there was no bad faith, and the District had terminated its action only on discovery that the land was no longer suitable. The court explained that while the provision of the Code was designed to defeat the practice of expensing the owner into submission by successive actions, the legislature could have specified that bad faith or just cause was to be the test. The State decided on the freeway route one month before the action was filed and if the Board was aware of this decision, the court thought, the action was in bad faith. If the Board was unaware of the State's action, then the court thought the Board should be in a better position to know of the action than the owner.

The problem of the finality of the appraiser's report was raised in Ragland v. Davidson County Board of Education.[163] The condemnation petition was filed by the Board in the County Court on August 3, 1956. On November 12, 1956, the court ordered the report of the appraisers that the property was valued at $97,725 to be filed. With the consent of the owner, the Board entered the property to make percolation tests and concluded that the land

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[163] 203 Tenn. 317, 312 S.W. 2d 855 (1958).

was not suitable for its use. On December 14, 1956, the Board appeared before the County Court to ask for a voluntary non-suit which was granted. On December 18, the owner moved to set aside the non-suit. The order denying his motion was affirmed. The owner contended that the authority of the County Judge had ended with the November term, but the Board pointed out a statute which provided that when any case was undetermined at the time the term expired, the term should be extended and continued. Because there was provision for appeal from the County Court to the Circuit Court, where the proceedings could be heard as if a new trial, the court found that the proceedings were not final at the end of the November term of the County Court. The court suggested, citing a number of railroad cases, that the order for the filing of the appraiser's report should not be considered a final order, even though the Board was in possession, where the enterprise was found impractical and the owner had not suffered damage. The court noted that the District had no idea of discontinuing the proceedings in order to secure a lower compensation award. Referring to the Ragland case, Roady commented in a law review article that:

> The result reached in this case appears to extend somewhat the tendency to liberalize condemnation proceedings for the benefit of the condemning authority. The court recognizes that it is moving away from the strict common law view favoring the property owner, but apparently feels that this is in accord with the spirit of the legislation simplifying procedure and that no injustice can be done the property owner so long as he can recover such damages as the good faith action of the condemning authority in abandoning may have caused him.[164]

The owner moved to strike the condemnor's motion to dismiss proceedings,

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[164]Thomas G. Roady, Jr. "Real Property - 1959 Tennessee Survey," 12 Vanderbilt L. Rev. 1318 at 1326.

and trial on this issue resulted in a judgment for the District in Center School District v. Kenton.[165] Commissioners had reported the value of the property at $17,500, and both parties filed exceptions asking for a jury trial. The jury assessed compensation at $33,000 plus $1,155 interest. Within 10 days of the verdict, the District moved to dismiss the action without prejudice at its own cost. On appeal, the owner did not contest the right of the condemnor to discontinue, as the statute provided clearly for this right. The owner was also seeking attorney fees and interest, both of which were denied. The court distinguished the cases involving condemnation by private corporations, holding that public agencies were exempt from liability for expense of litigation or losses incurred by the landowner when the condemnation action had been begun in good faith. The court refused to apply in retrospect an act which had been passed after the proceedings were instituted. This act provided for payment of interest in the case of abandonment of condemnation proceedings. The owner also maintained that the dismissal should not be without prejudice. The court noted that the District would be prevented from beginning a new action within two years and,therefore, the owner was protected from vexatious litigation. If the District acted in good faith, the court thought it should not lose the right to institute a new proceeding for condemnation of the same property where action had been discontinued before compensation was made or before rights had been vested. This opinion was citicized in one of the law review comments.[166] The writer thought the condemnor's ability to abandon might coerce the landowner into

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[165] 345 S.W. 2d 120 (Mo. Sup. Ct. 1961).

[166] 746 Minnesota L. Rev. 655.

giving up his right to just compensation. It was suggested that the party better able to bear the burden of the litigation cost should pay it, and that the cost of the litigation could better be distributed by the condemning authority. The distinction in public and private agencies was also criticized by the reviewer. It was suggested that the requirement that private agencies pay attorney fees was based on the fact that these costs could be passed on and distributed widely. The reviewer also suggested that requiring the condemnor to pay attorney fees would lessen the chance of harrassment of the owner.

An Illinois statute[167] provided that if the petitioner dismissed proceedings before the order fixing the time within which compensation was to be paid or failed to make full compensation within the time set, the court may order payment of costs and fees. In County Board of School Trustees of DuPage County v. Boram[168] the court recognized that while the statute did not provide that failure to pay constituted an abandonment, it was obviously the intent of the legislature to protect the owner from possible harrassment. The case was decided on the point that the award of compensation had not finally been determined, so there was no abandonment in the Board's failure to pay. The facts recited in the opinion showed that both parties and the trial court were confused about when the time period for payment of the award would begin to run. The complicated series of events involved will not be described here, but it can be noted that the court found that the compensation had not been determined with finality due to an appeal by the owner. The time

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[167] 1961 R.S. Ch. 47, sec. 10.

[168] 26 Ill. 2d 167, 186 N.E. 2d 275 (1962).

for payment of the award did not begin to run until the court had finally disposed of the case.

ASSIGNMENT OF COSTS AND FEES

The issues regarding payment of costs and fees by a condemnor who moves to dismiss the proceedings have been mentioned in the previous section. A few cases have raised questions of who should be responsible for costs and fees.

The judgment was modified to allow costs of the trial to the owner in Petersburg School District v. Peterson.[169] While the owner had not moved at trial to secure payment of his costs, and they were not provided for in the statute, the court was of the opinion that to hold that he must pay his own costs would nullify the constitutional guarantee of just compensation. The District claimed that it was too late to raise the question on appeal, but as the owner had not waived his right to costs at the trial, and the matter pertained to the judgment, the court allowed the owner his costs as part of the compensation.

Costs were taxed to the Board in Jones v. School Board of Liberty Township[170] and the owner moved for payment of $150 in attorney fees also. In this case, the court held that reference to the statute on taking of property for internal improvements in the statute under which the Board proceeded was only to point out the method for appeal. As attorney fees were not taxable as costs except by express statutory provision, and the School Code did not provide for attorney fees, they were not granted to the owner.

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[169] 14 N.D. 344, 103 N.W. 756 (1905).

[170] 140 Iowa 179, 118 N.W. 265 (1908).

In Kirkwood v. School District No. 7[171] the District filed a cross error plea on the basis that the cost of the proceeding had been taxed to the District. The court did not decide the issue because it found no exception taken by the District at the trial to the award of $25 damages.

APPEAL FROM A JUDGMENT OF CONDEMNATION

Because the right of appeal was granted by the statute the court in Krcmar v. Independent School District of Cedar Rapids[172] held that notice of the appeal must be in substantial compliance with the method prescribed in the statute, and that service of notice of the appeal on the Secretary of the Board and the Sheriff of the County was not sufficient. The notice should have been served on the County Superintendent, but it had been served on the Sheriff because of provisions in the statute on condemnation for internal improvements. The court thought it was idle ceremony to serve an unnecessary party, that the functions of the Sheriff were essentially different from those of the County Superintendent, and that it would be unreasonable to hold that notice of appeal served on the Sheriff was sufficient when he was in no way connected with the action.

Dicta in Huber v. Steel[173] explained that the landowner had no absolute right to appeal and that the legislature was under no constitutional duty to grant a right of appeal. The point was made in response to the owner's argument that he was deprived of his property without compensation because the

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[171] 45 Colo. 368, 101 Pac. 343 (1909).

[172] 192 Iowa 734, 185 N.W. 485 (1921).

[173] 14 Del. Ch. 302, 125 Atl. 673 (1924).

judge had discretion to appoint new freeholders until a fair and equitable award was made. The court was of the opinion that the legislature "being bound to grant no right of appeal whatever, ... acted entirely within its province when it chose to grant the right to this limited extent."[174]

The appeal in Davis v. Board of Education of Anne Arundel County[175] was considered premature. The court commented that there was no right to appeal in a case involving special limited statutory jurisdiction unless provided by the statute. The only right to appeal was from a final judgment on questions of necessity and compensation. In this case, the owner had filed a plea in bar of the petition to condemn and appealed from the sustaining of a demurrer to his plea in bar.

Two appeals were taken from the application of the Board of Trustees of the University of Alabama to condemn property. The first appeal, Denson v. Board of Trustees of University of Alabama[176] was to the Supreme Court from the Probate Court decree that the property be taken by the University. The Trustees filed a motion to dismiss the appeal on the basis that there was no statutory provision for an appeal direct from the Probate Court to the Supreme Court. The owner also sought a writ of mandamus to review the order of the Probate Court. The appeal was dismissed and the writ denied because the court found that the proper avenue of appeal was to the Circuit Court and that the Supreme Court would not issue supervisory writs if any inferior court had the authority to afford ample relief. Seven months after the Board's

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[174] 125 Atl. at 675.

[175] 166 Md. 118, 170 Atl. 590 (1934).

[176] 247 Ala. 257, 23 So. 2d 714 (1945).

application to condemn was granted by the Probate Court, the owner appealed to the Circuit Court where the appeal was dismissed as unauthorized and premature. The case then went to the Supreme Court on original petition of the State for mandamus to require the Circuit Court judge to rule on a petition for mandamus to be directed to the Probate Court judge. The writ was denied in Ex parte State ex rel. Denson.[177] The action of the Circuit Court judge was supported because the record did not substantiate the owner's claims, and the discretion of the judge would not be overturned unless the relator could show an overriding reason why the writ should be granted. As dicta, the court added the statement that the appeal could have been dismissed because of laches, as the statute allowed 30 days for appeal.

The judgment and order appointing commissioners to ascertain the amount of compensation was held not appealable in Union Free School District No. 10 v. Baumgartner.[178]

The right of the owner to appeal from an order authorizing the District to take possession of the property was upheld in San Francisco Unified School District v. Hong Mow.[179] The compensation to the owner had been assessed at $17,500 plus $47.09 costs, and judgment was entered for that amount. The award was paid into the court and an order issued authorizing the District to use the property for purposes for which it had been condemned until final conclusion of the case. The court held that the owner's appeal from this order was not barred by other sections of the Code.

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[177] 248 Ala. 161, 26 So. 2d 563 (1946).

[178] 277 App. Div. 998, 100 N.Y.S. 2d 151 (1950).

[179] 123 Cal. App. 2d 668, 267 Pa. 2d 349 (1954).

The owner moved to dismiss the appeal of the School District which assigned error to the instructions on the basis that the District had not paid the award and therefore had "constructively abandoned" the proceedings in North Kansas City School District of Clay County v. Peterson-Renner, Inc.[180] The court held that the District was not bound to pay prior to its appeal in order for the court to have jurisdiction over the appeal.

The Relationship of the Trial to the Appeal.

The question of whether the railroad should be enjoined from taking University property because of possible injury to the University was not considered in University of Minnesota v. Northern Pacific Ry. Co.[181] because the appellate court was of the opinion it could not come to a conclusion different from the trial court. There was no evidence in the record, so the court was unwilling to assume that different findings of fact should have been made. By some source, the appellate opinion did mention that the trial court had found that the railroad would not disturb the University any more than loaded wagons traveling over nearby streets. It was also mentioned that another railroad was already located closer to the University and that the Company which sought the property intended to lay its road in a cut 30 feet deep, separated by a street from the campus, and six to eight hundred feet from any present building. Possible interference with astronomical instruments was suggested, but there was no clear measure of how far away the railroad had to be to avoid interference.

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[180] 369 S.W. 2d 159 (Mo. Sup. Ct. 1963).

[181] 36 Minn. 447, 31 N.W. 936 (1887).

Independent School District of Oakland v. Hewitt[182] was an action to quiet title, and on appeal the defendant tried to put the sufficiency of the condemnation proceedings by which the District claimed title at issue. The court said that no evidence on the Board's attempt to purchase or the vote on funds to authorize condemnation had been introduced at the trial, so these questions were not appropriate on appeal. The District sought to quiet its title, secured by condemnation begun in 1889, because the defendant claimed to have purchased the property for taxes on December 1, 1890, and he held a tax deed executed December 21, 1893. A statute had provided that all lands exempt from taxes, which included school district land, should not be affected by any sale made for taxes. The trial court required the District to pay the amount the defendant had bid for the property at the sale with interest.

Because the pleadings had not been attacked at the trial, the court in Kirkwood v. School District No. 7[183] did not allow the owner to raise the question of site selection on appeal.

An explanation of new procedure was included in the opinion of Wood v. Syracuse School District.[184] The court noted that it was no longer necessary for a party to save an exception, but that by the revised code, the only requirement was that the record should show that a party had objected to a ruling of the trial court.

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[182]105 Iowa 663, 75 N.W. 497 (1898).

[183]45 Colo. 368, 101 Pac. 343 (1909).

[184]108 Kan. 1, 193 Pac. 1049 (1920).

A claim by the owner that the evidence was insufficient to support the judgment was unsuccessful in Hilton v. Cramer[185] because the owner's brief did not contain all the evidence presented at the trial.

The owner challenged the propriety of a nunc pro tunc (now for then) amendment of the final judgment in Lipscomb v. Bessemer Board of Education.[186] The opinion did not state what the amendment was, and the court found the record incomplete, so that the trial court must be presumed to have made the amendment on the basis of some information not before the court on appeal.

The motion for new trial had not mentioned error in rulings on evidence or in refusing to allow the owner to show land values as grounds for appeal, so he was prevented from raising these issues in County Board of School Trustees v. Batchelder.[187] The court also supported the Board's argument that the owner by failing to object to testimony of his own witnesses on cross examination had waived the right to object and noted that the owner had offered no citation of authority that the Board's motion to strike the testimony had been incorrectly overruled. The owner did not make any objection at the time the testimony was made.

The court in Hyde County Board of Education v. Mann[188] held that the instructions given by the trial court would be presumed correct because the instructions were not repeated in the record on appeal. The record did not contain information about what answer could have been given to questions to

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[185] 50 S.D. 274, 209 N.W. 543 (1926).

[186] 258 Ala. 47, 61 So. 2d 112 (1952).

[187] 7 Ill. 2d 178, 130 N.E. 2d 175 (1955).

[188] 250 N.C. 493, 109 S.E. 2d 175 (1959).

which the Board's objection had been sustained.

SUMMARY

The issues discussed in this chapter have been somewhat arbitrarily classified as procedural, but this classification has not been intended to suggest that the issues are less important than those that might be considered substantive. The general topics of the chapter involved parties, pleadings, conditions precedent, jurisdiction and venue, evidence, discontinuance, costs and fees, and appeals.

A group of Illinois cases illustrate the influence of the statutes on the question of the proper parties to prosecute condemnation actions for schools. In that State, property is held in trust for schools by trustees or municipal corporations. The decisions have consistently held that the party holding title, rather than school authorities, should initiate the proceedings. The authority of the party prosecuting condemnation proceedings for a state college or university has been upheld where the State or a State Board of Regents has been involved. Other cases lead to the conclusion that interests of third parties must be substantial before they can affect proceedings to condemn property for a school or college.

A liberal view has been taken by the courts regarding the pleadings in most school and college condemnation cases. It has been held uniformly that where the condemnor is required to allege the purpose for which the property is sought or that the property is necessary, a general statement is sufficient. Amendment of the pleadings has been approved in each case located where it has been an issue. Generally, a defendant is not required to answer the petition for condemnation, but in most of the cases where he has done so, his right to

raise issues by pleading has been supported.

Several issues classified as conditions precedent to the right of a school or college to acquire property by condemnation have been identified. These deal with site selection, the resolution of condemnation, notice, preliminary negotiations, corporate existence, and availability of funds.

Two Illinois cases were decided for the condemnee because the notice of the meeting of electors to select a site was inadequate, but otherwise, the issue has been decided in favor of the schools. Where an election to select a site is required by statute, its terms must be followed, and the cases seem to have been decided according to the facts presented rather than by consistent legal principles. In jurisdictions where the site is selected by school authorities, their discretion has generally been respected.

In some States a resolution of the school board to condemn property is not necessary. Where it is a condition precedent to the right to condemn, the courts have been permissive regarding the board's expression of its will.

One of the opinions on the issue of notice suggested that the cases fall into three classes; those in which no notice is required, those in which intent to give reasonable notice was sufficient, and those following a strict view that the statute must provide for notice and its provisions be carefully observed. The validity of notice given has been upheld in all the recent cases located.

An attempt to purchase is required as a condition precedent to the right of condemnation by statutes in a number of States. In only one case was the evidence of an attempt to purchase considered insufficient. An offer of $500 where the compensation verdict was $4,750 was upheld, as well as an offer of $5,000 in a case resulting in a verdict of $15,350. Some of the cases refer

to good faith as the criterion for evaluation of the board's offer. At least three cases have been lost, two by schools and one by a college, because of lack of agency to negotiate for the owner. Some of the statutes provide that if the school cannot secure title for a reason other than inability to purchase, it may do so by condemnation, but this provision will not substitute for an attempt to negotiate where the owner is capable. If it is clear that the owner would refuse to sell at any price, the courts have said that no offer is required.

Three Missouri cases have involved a challenge to the corporate existence of the school district, the oldest holding that the condemnation proceedings were invalid, and the two more recent cases holding that corporate existence may not be questioned except by the State.

The question of whether the school or college had funds to pay the compensation award was considered an inappropriate issue for the owner to raise in all but one of the cases located on the subject. A specific statutory requirement that the Board of School Estimate certify the amount required was involved in that case.

Venue and jurisdiction have not been significant issues in the attempts of schools and colleges to take property by eminent domain, apart from the issue of jurisdiction being raised in connection with other questions.

Evidence has been challenged on grounds of both admissibility and sufficiency to sustain the verdict in school and college condemnation cases. Minutes of board action have generally been held to be admissible. Some of the opinions refer to a reluctance of the appellate court to disturb a finding or verdict of the trial court. In one of the cases involving taking of school property by a railroad, the verdict was upset because contrary to

the evidence on the amount of damage.

The attempts of a school or college to discontinue condemnation proceedings have generally been successful. There is a conflict of authority on the question of whether a school or college is liable for costs and expenses upon discontinuance of proceedings. In the school and college cases not involving discontinuance, the problems of costs and fees have apparently been litigated infrequently, and the authority located could not be considered conclusive on this question.

It has been held that there is no absolute right to appeal from a condemnation award, and this right is frequently governed by statute. The right to appeal may arise only at appropriate stages of the proceedings and then perhaps only to a particular tribunal. On appeal, the courts have consistently held, issues may not be raised which were not raised at trial. When the record has been insufficient to give the appellate court the information necessary to a decision, the finding of the trial court has usually been upheld.

CHAPTER IX

CONCLUSIONS AND RECOMMENDATIONS

The purpose of this study was to identify and describe the legal issues and factual situtations involved in appellate decisions in which a school or college has sought to exercise the right of eminent domain. A total of 144 school or college condemnation cases were located. An additional 64 cases in which significant eminent domain issues were discussed were included in the study. Of these 64 cases, 24 were actions for injunctive relief, twelve were actions to determine ownership when property was abandoned for school use, and the remainder were actions for ejectment, entry, damages, trespass, prohibition, mandamus, or other relief. Twenty-three cases illustrative of those distinguishable from school and college eminent domain actions were discussed. The search for cases in point resulted in location of only 21 in which a college or university was a party and the pleadings were for condemnation. Another seven college cases involving eminent domain issues were included in the study, and five college cases were cited to distinguish those on eminent domain. The judicial opinions were analyzed, and a narrative was developed which summarized the facts, decisions, and rationale of the case law. Findings were presented according to a topical plan within which chronological order was observed.

This chapter is designed to provide a statement of general conclusions that may be drawn from the cases. Generalization from the findings of the

study involves the hazard of inaccuracy due to a number of variables. Among these are constitutional and statutory provisions, the facts of the cases or of new situations, jurisdictional rules, and the influence of legal precedents and principles relating either to eminent domain in general or to application to schools or colleges of the law of property, contracts, agency, or any number of other topics.

While the right of eminent domain has been referred to as a sovereign right, a number of limitations have been imposed upon exercise of the right by schools and colleges. Some of the limitations stem from constitutional provisions, such as the requirement that when private property is taken for public use, just compensation must be paid. Other limitations are a result of legislative enactment, such as provisions that an attempt must first be made to purchase the property, or that not more than a certain amount of land may be condemned. Limitations have also been imposed as a result of the legal traditions or precedents--the common law; for example, a requirement that the owner receive due notice of proceedings to take his property. One requirement that seems to be uniformly recognized is that there must be some form of legislative delegation of the right of eminent domain to a school or college, with a possible exception in the case of the constitutional state universities.

Some of the eminent domain decisions affecting schools and colleges have emphasized the protection of private rights, and others have stressed the importance of the educational enterprise to society. No cases were located concerning the right of a privately organized school of less than collegiate grade to exercise the right of eminent domain, and the cases dealing with condemnation by private colleges or universities are in conflict

to some extent. A general conclusion from the study must be that with legislative delegation of authority and a clear showing of necessary public use, the right of a school or college to take private property has been upheld. Where the public nature of the institution can be established, the taking may be for a wide variety of specific purposes. The determination of what is a public use has generally been considered a judicial function.

The requirement that the property be necessary for the uses of the school or college has been interpreted liberally, the most important restriction appearing to be that the property will be put to use within a reasonable time. The discretion of the legislature or of an administrative board regarding the necessity for condemnation has usually been respected, but the judiciary is not without authority to review this determination.

In general, similar principles regarding condemnation have been applied to educational institutions regardless of their grade level. Because of the fact that so few college or university cases were located, this conclusion must be regarded as tentative. The eminent domain cases seem to illustrate a possible effect of a closer relationship of colleges and universities to the state legislature than the public schools have as the latter are usually governed in part by a local unit of some type. One of the cases, in order to support the condemnation proceedings of a university, referred to the legislative authorization granted to the public schools.

There is conflict of authority regarding the nature of estate taken by a school or college as a result of condemnation proceedings, but there seems to be a trend, as a result of both judicial interpretation and legislation, toward finding that condemnation results in taking of a fee simple absolute estate.

In only one recent case could it be said that a school or college has been successful in condemning property already devoted to another public use. A few other cases have indicated that it may be done. Zoning ordinances will not prevent condemnation of property for school purposes. Public projects, such as railroads, highways, and flood control, have been considered "more necessary" than schools for purposes of land use as litigated in condemnation actions.

Market value is the generally accepted standard for the compensation a school or college has been required to pay for the property taken by eminent domain. Damages may be allowed for injury to property of the condemnee not taken, and any benefit to him from having a school located near the remaining portion has usually not been considered. Evidence of the value of the property has been contested in a number of cases, and the decisions have usually depended on the facts of each case. Where the property of a public school or college has been taken, recent cases have developed the substitute cost theory of damages on the basis that the property has no market value.

Issues raised in the school and college eminent domain cases concerning parties, pleadings, site selection, notice, the resolution of condemnation, negotiation for purchase, corporate existence, availability of funds, jurisdiction, venue, evidence, discontinuance or abandonment of proceedings, costs, fees, and appeals were arbitrarily classified as procedural issues and discussed in Chapter VIII. Because of the diverse nature of these issues, the reader is referred to the chapter summary for a brief review of the findings.

A general conclusion to be drawn from the study is that there is considerable variation among the States regarding the exercise of the right of eminent

domain by schools and colleges. These variations are due in part to differences in wording of the statutes, and there seem to have been few other logical explanations for the variations offered in the cases. Some of the variations in statutes, both within a State and between States, are due to differences in school district organization. While it may be beyond the scope of this study, the impression is inescapable that there could be greater uniformity between States and greater clarity within the States without sacrifice of important private or public rights. A study which would concentrate on legislative history of school and college eminent domain statutes would provide additional important background information for revision of statutes. Because of the variations that now exist, institutions contemplating proceedings to take property by condemnation would be well advised to seek legal counsel in the early stages of their planning processes.

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