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## LEGAL CONCEPTS IN CASES OF EMINENT DOMAIN

JOSEPH M. CORMACK \*

THERE is nothing original in a suggestion that in legal thinking mental concepts should be used instead of physical. Possibly the best-known exposition of the thought is that of the late Wesley N. Hohfeld.<sup>1</sup> He expresses it as a matter of "differentiating purely legal relations from the physical and mental facts that call such relations into being." He gives as reasons for the tendency to confuse and blend the two types of concepts, association of ideas and defective terminology. Professor Hohfeld's suggested system of terminology<sup>2</sup> is designed to differentiate legal relations from all others.

Possibly there is something original in a laboratory study of certain of the materials of legal science in order to observe the workings of the two types of concepts in the actual solution of problems. It is with this thought in mind that the field of eminent domain is selected for investigation.

The principle underlying the law of eminent domain has become crystallized in the form of expression set forth in the Fifth Amendment to the United States Constitution: ". . . nor shall private property be taken for public use, without just compensation." The words "property" and "take", to which detailed consideration will be given, have thus been encysted in the heart of this branch of the law.

The principle of the juristic necessity of compensation to an individual whose property is taken for public use, has been one of the most universally recognized principles of justice.<sup>3</sup> It is

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<sup>1</sup> HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (1923) 27; reprinted from (1913) 23 YALE L. J. 16, at 20. Cf. Bingham, *The Nature and Importance of Legal Possession* (1915) 13 MICH. L. REV. 535.

<sup>2</sup> HOHFELD, *op. cit. supra* note 1, at 65; reprinted from (1917) 26 YALE L. J. 710. His suggestions as to terminology are not followed at all points in this article.

<sup>3</sup> Grant, *The "Higher Law" Background of the Law of Eminent Domain* (1931) 6 WIS. L. REV. 67.

found in the Roman law,<sup>4</sup> the Code Napoleon,<sup>5</sup> and in the legal systems of the American colonies.<sup>6</sup> The expression *eminens dominium*, with which the principle is now associated, seems first to have been used by Grotius, in 1625.<sup>7</sup> Provisions such as the quoted portion of the Fifth Amendment have now been adopted in the constitutions of all the states, save one.<sup>8</sup> In that state, North Carolina, the principle of *Magna Charta* that no person ought to be deprived of his life, liberty, or property but by the law of the land,<sup>9</sup> has been included in the constitution,<sup>10</sup> and the same result has been reached through judicial interpretation of that provision.<sup>11</sup> In instances where, in the past, applicable constitutional provisions have been lacking, courts have nevertheless held invalid legislative acts not recognizing the principle.<sup>12</sup> In addition, the requirement has been imposed upon the states by the "due process of law" clause of the Fourteenth Amendment.<sup>13</sup>

The word "property" is used by Hohfeld as an example of defective terminology. He says:

"Both with lawyers and with laymen this term has no definite or stable connotation. Sometimes it is employed to indicate the physical object to which various legal rights, privileges, etc., relate; then again—with far greater discrimination and accuracy

<sup>4</sup> Matthews, *The Valuation of Property in The Roman Law* (1921), 34 HARV. L. R. 227, 252.

<sup>5</sup> Bk. II, tit. 2, art. 545.

<sup>6</sup> 1 NICHOLS, *EMINENT DOMAIN* (2nd ed. 1917) 13, 22. As to the development of the principle in England, consult *ibid.* 6.

<sup>7</sup> DE JURE BELLI AC PACIS, lib. iii, c. 20.

<sup>8</sup> The history of the adoption of the constitutional provisions is outlined in 1 LEWIS, *EMINENT DOMAIN* (3d ed. 1909) 20.

<sup>9</sup> MAGNA CHARTA, cap. 39, is rendered in STUBBS, *SELECT CHARTERS* (9th ed. 1921) 297, following one of the Cottonian manuscripts (Cotton MS., Aug. ii 36): "Nullus liber homo capiatur, vel imprisonetur, aut dissalsiatur, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terrae." The passage is translated in POUND, *READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW* (2nd ed. 1913) 147: "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed, nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land."

<sup>10</sup> N. C. CONST., art. 1, § 17: "No person ought to be taken, imprisoned, or disseised 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."

<sup>11</sup> *Staton v. Norfolk & Carolina R.R.*, 111 N. C. 278, 16 S. E. 181, (1892); cf. *Johnston v. Rankin*, 70 N. C. 550 (1874); *Phillips v. Postal Tel. Cable Co.*, 130 N. C. 513, 41 S. E. 1022 (1902).

<sup>12</sup> Grant, *op. cit. supra* note 3, at 71.

<sup>13</sup> *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581 (1897). See Grant, *The Natural Law Background of Due Process* (1931) 31 COL. L. REV. 56, 71, 79.

—the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object. Frequently there is a rapid and fallacious shift from the one meaning to the other. At times, also, the term is used in such a 'blended' sense as to convey no definite meaning whatever."<sup>14</sup>

The usage first referred to may be described as the use of a physical concept, the latter of a mental. The one may be described as a concept of property as consisting of tangible physical objects, with which certain human beings are more or less intimately connected; the other as a concept of property as consisting of legal relations between human beings, some of which relations to a greater or less degree involve control over certain physical objects. In the use of the former concept the lawyer's mind is directed primarily toward things, in the latter toward human beings. The one deals with material substances, the other with abstract conceptions. The one is objective, the other subjective.

A difficulty in connection with the use of the physical concept has been thus expressed by Mr. Justice Holmes: "The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed."<sup>15</sup> It is worthy of note that the viewpoint of the Roman (and, therefore, of the civil) law seems to favor the use of the mental concept of property. Thus in the Digest we find the title *De Adquirendo Rerum Dominio*.<sup>16</sup> The reference is to the acquiring of ownership of things, and not to the acquiring of things as such.<sup>17</sup> The word *proprietas* in Roman law never means a material thing, but a legal position in regard to it; the thing itself is *materia*.<sup>18</sup>

"Take" is a term much like "transfer," which is used by Hohfeld as an illustration of the difficulty, as regards legal ter-

<sup>14</sup> HOHFELD, *op. cit. supra* note 1, at 28. Compare Bowen, *The Concept of Private Property* (1925) 11 CORN. L. Q. 41. But see Costigan, *A Plea for a Modern Definition and Classification of Real Property* (1903) 12 YALE L. J. 425.

<sup>15</sup> Block v. Hirsh, 256 U. S. 135, 155, 41 Sup. Ct. 458, 459 (1921). He has beautifully described the variable quality of a word, as follows: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U. S. 418, 425, 38 Sup. Ct. 158, 159 (1918).

<sup>16</sup> DIG. 41.1.9.6.

<sup>17</sup> While Buckland provisionally calls *dominium* ownership, he feels that this is a little misleading, and prefers to consider *dominium* "the ultimate right to the thing." BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW (1925) 110, 112. *Res*, like our "property", is sometimes used in a physical, and sometimes in a mental, sense. *Ibid.* 107.

<sup>18</sup> MACLEOD, ELEMENTS OF ECONOMICS (1881) 143.

minology, that many of the words used were originally applicable only to physical things.<sup>19</sup> He points out that the use of such terms in connection with legal relations is, strictly speaking, figurative or fictional, and essentially metaphorical. Confusion and blurring of ideas are easy results of such a condition.

To take, from the standpoint of the physical meaning of the word, means to acquire custody. The gist of the other, or mental, usage possible in regard to the meaning of taking is placed by Shakespeare in the mouth of Shylock. After the judgment of the court the merchant of Venice says:

"You take my house when you do take the prop  
"That doth sustain my house; you take my life  
"When you do take the means whereby I live." <sup>20</sup>

The prominent position of the word "take" in the American law of eminent domain is fortuitous, but its influence has not been thereby lessened. While the words "take" and "property" cannot be dissociated in the present connection, the problem in regard to choice of concepts is the same in regard to both.

A choice, in eminent domain cases, between the concepts which have been discussed involves important consequences. Under the physical concept it is necessary, in order that compensation to the condemnee be required, that he be deprived of the possession of land or some other tangible physical object. Under the mental concept, it is only necessary that there be interference with some of the legal relations which, from the standpoint of this concept, constitute his property.<sup>21</sup>

The two leading writers in the field of eminent domain disagree as to which of the concepts should be used. Nichols<sup>22</sup> approves the former, and Lewis<sup>23</sup> the latter. Nichols supports the physical concept largely upon the ground of adherence to precedent, and the use of the word "taken" in constitutional provisions. Lewis supports the legal relations concept by quoting the language of decisions which will be discussed in this article.

It is the purpose of eminent domain proceedings to distribute throughout the community the loss inflicted upon the individual by the making of public improvements. In the light of this public policy, the ideal to be aimed at is that the compensation awarded shall put the injured party in as good condition as he would have been in if the condemnation proceedings had not

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<sup>19</sup> HOHFELD, *op. cit. supra* note 1, at 30.

<sup>20</sup> THE MERCHANT OF VENICE, act. 4, sc. 1, l. 375.

<sup>21</sup> Notice will be taken later of the practical difficulties which render impossible compensation because of every such interference.

<sup>22</sup> 1 NICHOLS, *op. cit. supra* note 6, at 299.

<sup>23</sup> 1 LEWIS, *op. cit. supra* note 8, at 62.

occurred.<sup>24</sup> Nothing short of this is adequate compensation.<sup>25</sup> The law of eminent domain is merely one method of approach to the problems of the law of damages. As Mr. Justice Holmes has well expressed it, a constitution deals "with persons, not with tracts of land."<sup>26</sup> Either a physical or a legal relations conception of the process is simply a tool for the use of the legal profession in adjusting the relations of human beings. A choice between the conceptions must be made upon considerations of comparative usefulness for purposes of legal thinking in making such adjustments.

Any concept is adequate if it produces proper results for the purpose at hand,<sup>27</sup> and during the early development of the law of this country a purely physical conception of the process of condemnation was amply sufficient. In Colonial times there was little necessity for the use of eminent domain procedure. There were no roads, nearly all land was unsettled and unimproved, and much had not been even allotted to private ownership. While the "marginal" land of the economists surrounded all land which was used, land in small strips had no appreciable value. When a road was constructed, it simply traversed the surface of the land, without cuts or fills, and there were no locomotives to belch forth sparks and fumes, or pipes to be laid for public utilities.<sup>28</sup> Whenever there was any occasion for the institution of eminent domain proceedings, the land was "taken" in every sense of the word.<sup>29</sup> Under these conditions, the physical concept of the taking of property for public use developed. Its use was later encouraged by the adoption of constitutional provisions containing the words "take" and "property," with their physical connotations. The concept thus obtained a strong hold upon the courts, so that Sedgwick, writing in 1857, stated the law as follows:

"It seems to be settled that, to entitle the owner to protection . . . the property must be actually taken in the physical sense

<sup>24</sup> See *Seaboard Air Line Ry. v. United States*, 261 U. S. 299, 304, 43 Sup. Ct. 354, 356 (1923).

<sup>25</sup> This method of expression is borrowed from Mr. Justice Campbell, in *Grand Rapids & Ind. R.R. v. Heisel*, 47 Mich. 393, 398, 11 N. W. 212, 215 (1882). It is obvious that practical difficulties of administration make impossible anything more than approach to attainment of the ideal suggested.

<sup>26</sup> *Boston Chamber of Commerce v. City of Boston*, 217 U. S. 189, 195, 30 Sup. Ct. 459, 460 (1910).

<sup>27</sup> The writer is indebted to oral statements of Professor Walter Wheeler Cook for this thought.

<sup>28</sup> 1 NICHOLS, *op. cit. supra* note 6, at 14.

<sup>29</sup> Statutes providing for the necessities of mills "were treated merely as a regulation of the conflicting rights of the different riparian owners in the stream." *Ibid.* 20.

of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential damage, no matter how serious or how clearly and unquestionably resulting from the exercise of the power of eminent domain. This rule has been repeatedly declared in many of the States of the Union."<sup>30</sup>

After discussing the decisions, Sedgwick criticized this attitude on the part of the courts:

"To differ from the voice of so many learned and sagacious magistrates, may almost wear the aspect of presumption; but I cannot refrain from the expression of the opinion, that this limitation of the term *taking* to the actual physical appropriation of property or a divesting of the title is, it seems to me, far too narrow a construction to answer the purposes of justice, or to meet the demands of an equal administration of the great powers of government."<sup>31</sup>

In 1823 it was said, in the Supreme Judicial Court of Massachusetts, in discussing the applicable provision of the constitution of that state, that it had "ever been confined, in judicial application, to the case of property actually taken and appropriated by the government."<sup>32</sup>

Mr. Chief Justice John B. Gibson, the great builder of the law of Pennsylvania,<sup>33</sup> advanced the novel contention that it was necessary to leave some elements of compensation outside the protection of the Constitution, in order to prevent excessive awards.<sup>34</sup> In connection with early eminent domain proceedings, the courts were so impressed with the drastic nature of the expedient, in its effect upon the individual, that they were inclined to favor him in the matter of compensation. As the importance of public improvements in the development of the country became more manifest, this feeling disappeared. The sympathies of the courts then tended to be with those initiating such enterprises.

Perhaps the strongest argument in favor of the use of a physical conception in this connection was made by Mr. Chief Justice Gibson in 1843, in *Monongahela Navigation Company v. Coons*.<sup>35</sup> It was held that the plaintiff was not entitled to compensation because of the flooding of his mill as a result of obstruction of the stream. The learned justice said:

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<sup>30</sup> SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW (1857) 519.

<sup>31</sup> *Ibid.* 524.

<sup>32</sup> Mr. Chief Justice Parker, in *Callender v. Marsh*, 1 Pick. (18 Mass.) 418, 430 (1823).

<sup>33</sup> See excellent biographical sketch in MATLACK, 3 GREAT AMERICAN LAWYERS (1908) 353.

<sup>34</sup> *Philadelphia and Trenton R.R.*, 6 Whart. 25, 46 (Pa. 1840).

<sup>35</sup> 6 Watts & S. 101 (Pa. 1843).

"Now, it cannot be said that the plaintiff's mill was taken or applied, in any legitimate sense, by the State, or by the company invested with its power; nor can it be said he was deprived of it. . . . It is true, that a nuisance by flooding a man's land was originally considered so far a species of ouster, that he might have had remedy for it by assize of novel disseisin, or assize of nuisance, at his election; but we are not to suppose that the framers of the Constitution meant to entangle their meaning in the mazes of the *jus antiquum*. It was aptly said by Chief Justice Tilghman, in *The Farmers' and Mechanics' Bank v. Smith*, (3 Serg. & Rawle 69), that conventions to regulate the conduct of nations are not to be interpreted like articles of agreement at the common law; and that where multitudes are to be affected by the construction of an instrument, great regard should be paid to the spirit and intention. And the reason for it is an obvious one. A constitution is made, not particularly for the inspection of lawyers, but for the inspection of the million, that they may read and discern in it their rights and their duties; and it is consequently expressed in the terms that are most familiar to them. Words, therefore, which do not of themselves denote that they are used in a technical sense, are to have their plain, popular, obvious, and natural meaning; and, applying this rule to the context of the Constitution, we have no difficulty in saying that the State is not bound beyond her will to pay for property which she has not taken to herself for the public use." <sup>36</sup>

The learned justice's assumption as to the understanding of laymen seems correct, as applied to the word "take", which the layman has occasion to use only in a physical sense. As to the word "property", however, it seems proper to ask whether laymen, as well as lawyers, do not use it when they desire to have a general term covering every element of an individual's financial well-being. Is not the layman's thought represented by the following statement: "These terms, 'life,' 'liberty,' and 'property,' are representative terms and cover every right to which a member of the body politic is entitled under the law." <sup>37</sup>

It is a remarkable coincidence that in the same opinion, in the *Monongahela* case, Mr. Chief Justice Gibson should give what is probably the most vivid judicial recognition of the practical injustice resulting from the use of a physical concept in eminent domain cases:

"It is not, therefore, enough to set before us a case of moral wrong, without showing us that we have legal power to redress it. Beyond constitutional restraint or legislative power, there is none but the legislative will, tempered by its sense of justice,

<sup>36</sup> *Ibid.* 113.

<sup>37</sup> Sherwood, J., in *State v. Julow*, 129 Mo. 163, 172, 31 S. W. 781, 782 (1895). Identical language, except as to the first word, is to be found in another criminal case, *Gillespie v. People*, 188 Ill. 176, 182, 58 N. E. 1007, 1009 (1900).



which has happily been sufficient, in most cases, to protect the citizen. Compensation has been provided for every injury which could be foreseen, whether within the constitutional injunction or not, in all laws for public works by the State or a corporation; though cases of damage have occurred which could neither be anticipated or brought within the benefit of the provision by the most strained construction. In one instance, a profitable ferry on the Susquehanna, at its confluence with the Juniata, was destroyed by the Pennsylvania Canal; and, in another, an invaluable spring of water, at the margin of the river, near Selinsgrove, was drowned. These losses, like casualties in the prosecution of every public work, are accidental, but unavoidable; and they are but samples of a multitude of others; so that the plaintiffs have at least the miserable good luck to know that they have companions in misfortune: would that it were in our power to afford them more solid consolation!"<sup>38</sup>

He also wrote the opinion denying compensation in a situation where, as he stated the facts, lowering the grade of a street had left the plaintiff's church building worthless, and had left the ground on which it stood worth no more than the expense of sinking the surface to the common level.<sup>39</sup> He said that the legislature had "never dreamt that it was laying the foundation of such injustice," but held that it was unavoidable.<sup>40</sup>

In an early decision denying compensation in a situation where the plaintiff had sustained loss through the erection of a railroad in the street by his land, it was said:

"The prohibition of the constitution is against taking private property without compensation, and not against injuries to such property, where it is not taken. In this case, the private property of the plaintiffs is not taken by the defendants; but the whole allegation is, that it is injured by erections in its vicinity; and the plaintiffs have not, therefore, any claim to have their damages ascertained and paid for before such erections shall be constructed or used."<sup>41</sup>

It was stated, in an early Maine decision,<sup>42</sup> that the records of judicial proceedings showed that private property in railroads, turnpike roads, toll bridges, and ferry ways had been often greatly injured, and sometimes quite destroyed, by acts authorized by legislation, which, according to judicial decisions, did

<sup>38</sup> *Supra* note 35, at 115.

<sup>39</sup> *O'Connor v. Pittsburgh*, 6 Harris (18 Pa. St.) 187 (1851).

<sup>40</sup> *Ibid.* 190. See also *Sharpless v. Philadelphia*, 9 Harris (21 Pa. St.) 147, 166 (1853).

<sup>41</sup> Mr. Justice Edmonds, in *Drake v. Hudson River R. Co.*, 7 Barb. 508, 559 (N. Y. Sup. Ct. 1849).

<sup>42</sup> *Cushman v. Smith*, 34 Me. 247, 257 (1852).

not violate any constitutional provision.<sup>43</sup> To take a man's land for public use was defined as "to deprive him of his title to it, or of some part of his title, so that the entire dominion over it no longer remains with him."<sup>44</sup>

The fact that the public only acquires a revertible easement in a highway was used, in an early case,<sup>45</sup> to justify a refusal of compensation<sup>46</sup> when land was condemned for such a purpose. It was said that in order to come within the constitution there "should be such a taking as divests the owner of all title to or control over the property taken, and is an unqualified appropriation of it to the public."<sup>47</sup>

The physical conception of the eminent domain process made use of the word "property", as well as "take". Thus, in denying compensation when a riparian owner complained of loss of the benefits of navigation, it was said:

"What must be understood by the term private property in the contemplation of the constitution?

"It appears to us that it applies to such property as belongs absolutely to an individual, and of which he has the exclusive right of disposition; property of a specific, fixed, and tangible nature, capable of being had in possession and transmitted to another, as houses, lands, and chattels."<sup>48</sup>

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<sup>43</sup> *Ibid.* 257.

<sup>44</sup> *Ibid.* 260. Mr. Chief Justice Shepley also said, as *dicta*: "The (constitutional) provision was not designed, and it cannot operate to prevent legislation, which should authorize acts, operating directly and injuriously, as well as indirectly upon private property, when no attempt is made to appropriate it to public use. . . .

"The design appears to have been simply to declare, that private property shall not be changed to public property, or transferred from the owner to others, for public use, without compensation; to prevent the personal property of individuals from being consumed or destroyed for public use without compensation, not to protect such property from all injury by the construction of public improvements; not to prevent its temporary possession or use, without a destruction of it, or a change of its character." *Ibid.* 258.

The following year the same court denied compensation in a case where the plaintiff's mill had been damaged through diminution of the flow of water because of the erection of a railroad embankment higher up the stream. Mr. Chief Justice Shepley said: "No land, estate, or materials owned by the plaintiff was taken; and he cannot be entitled to the remedy provided by the statute in such cases." *Rogers v. Kennebec & P. R.R.*, 35 Me. 319, 323 (1853).

<sup>45</sup> *Livermore v. Town of Jamaica*, 23 Vt. 361 (1851).

<sup>46</sup> This is contrary to the settled position developed by the courts in regard to easements. See note 110, *infra*.

<sup>47</sup> Mr. Justice Kellogg, in *Livermore v. Town of Jamaica*, *supra* note 45, at 365.

<sup>48</sup> Mr. Justice Handy, in *Commissioners of Homochitto River v. Withers*, 29 Miss. 21, 32 (1855). In this case the complainant owned a plantation bordering upon a former bed of the Mississippi River, through which

In another case it was held that it was not a taking of the plaintiff's dwelling house for a railroad company to render it unfit for habitation by permitting cars loaded with offensive freight to stand upon the tracks within ten feet of the house.<sup>40</sup>

In an interesting Wisconsin case,<sup>50</sup> later criticized in the same court,<sup>51</sup> it was held that the city of Milwaukee was not required to make compensation, although it had caused a considerable portion of the plaintiff's land to be washed away, with every indication that the remainder would be destroyed. This result had come about through the excavation by the city of a canal through a strip of land which acted as a barrier between the plaintiff's land and Lake Michigan, permitting the waves to rush through with disastrous effect. It was reasoned that the case was not within the constitutional provision, as the city "did not take the property," but only "made a great public improvement in the vicinity, which incidentally produced the injury complained of."<sup>52</sup>

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enough water still flowed to keep it navigable. He alleged that a canal was being dug which would prevent the water from flowing through the old bed of the river, thus depriving him of the use of it as a navigable body of water. A general demurrer was sustained, upon the ground of freedom of the government from responsibility for the consequences of acts done to improve navigation. Following the quotation in the text, it was reasoned that the complainant's property in the water which flowed through the old bed of the river was subject to this limitation. See also *In the Matter of Dorrance-Street*, 4 R. I. 230, 245 (1856).

<sup>40</sup> *Beseman v. Pennsylvania R.R.*, 50 N. J. L. 235, 13 Atl. 164 (1888).

<sup>50</sup> *Alexander v. City of Milwaukee*, 16 Wis. 247 (1862).

<sup>51</sup> In *Pettigrew v. Evansville*, 25 Wis. 223, 227 (1870), it was held that the defendant village could not, without paying compensation, drain the waters of a natural reservoir so as to cause them to go upon the plaintiff's land. The *Alexander* case was distinguished upon the ground that there the injury to the property of the plaintiff was remote and consequential, as it came about only through the blowing of the wind in a particular direction. The distinction is so weak as to imply a criticism.

In *Arimond v. Green Bay and Mississippi Canal Co.*, 31 Wis. 316, 335 (1872), it was held that compensation must be made where a lake was raised by a dam so as to submerge the plaintiff's land. Mr. Chief Justice Dixon admitted doubt as to the correctness of the decision in the *Alexander* case. He stated that "it was an extreme application of the doctrine of *damnum absque injuria*, and that the principle of it is not to be extended to other and dissimilar cases, or to a case like the present." The *Arimond* case involved the same dam as the leading case of *Pumpelly v. Green Bay Company*, *infra* note 62.

<sup>52</sup> *Alexander v. City of Milwaukee*, *supra* note 50, at 253. It was also reasoned that even though the injuries could not be classed as remote and speculative, nevertheless the city was not liable, upon the ground of governmental freedom from responsibility in doing work for the public benefit. Mr. Justice Paine concurred, at 257, upon the ground of adherence to precedent. He pointed out, however, that even though the case was not within the letter of the constitutional provision, with which he agreed, in

It was held that there was no taking of land for any purpose under an ordinance which permitted an adjoining proprietor to erect a party wall across the line of his neighbor's land without consent, and which compelled the latter to pay half the cost of any portion of the wall which he later used. It was reasoned that the land was not taken from the owner in any sense, as it remained his, together with the wall constructed upon it. He was simply required to pay part of the cost of the wall in case he used it.<sup>53</sup>

The obvious failure of such cases to award compensation for serious losses, and the consequent failure to accomplish the social purpose of eminent domain proceedings, were bound to produce a revolt against the use of a physical conception of the process. A change in methods of thought was first evidenced by judicial recognition that, in cases of so-called destruction, *i.e.*, cases where continued use of land had been made impossible, there had been, for legal purposes, a taking of property. The practical futility of the distinction between taking and damaging was there most apparent. Any holding that a destruction of property constitutes a taking of it is a departure from a strictly physical conception of taking. In the physical acceptance of the term, there must be an appropriation by the taker from another. Mr. Justice Brewer thus distinguished an earlier case, upon the ground that it "was a case not of the taking, but of the destruction, of property."<sup>54</sup>

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his opinion it was entirely out of harmony with the spirit of the constitutional provision to deny compensation.

<sup>53</sup> *Hunt v. Armbruster*, 17 N. J. Eq. 208, 214 (1865). It was correctly held that there was no public purpose involved.

<sup>54</sup> *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 338, 13 Sup. Ct. 622, 631 (1893). He was discussing, in the later case, the taking of a franchise, for which it was held compensation must be made. In the earlier case which was distinguished, *Bridge Co. v. United States*, 105 U. S. 470 (1881), Congress had exercised a reserved power to withdraw its consent to the construction of a bridge across a navigable river, after construction had partially progressed. This was held to be a risk which the company had voluntarily assumed when it chose to proceed under the limited license which Congress had given, so that no compensation was required. The results in both cases were correct, but the distinction should have been put upon the different character of the legal relations involved.

In *Omnia Commercial Co. v. United States*, 261 U. S. 502, 510, 43 Sup. Ct. 437, 438 (1923), Mr. Justice Sutherland said: "If, under any power, a contract or other property is *taken* for public use, the Government is liable; but if injured or destroyed by lawful action, without a taking, the Government is not liable." The refusal of compensation in this case was proper, as the damage complained of was a legally remote consequence of exercise of the war powers. The government had requisitioned the entire production of steel plate of a certain plant for a year. This had made impossible performance of a contract to deliver plate to the claimant. It

The earliest cases treating a destruction as a taking were decided prior to a number of the cases already discussed, and before Sedgwick wrote. Perhaps the first case of the kind was *Crenshaw v. Slate River Company*,<sup>55</sup> decided in Virginia in 1828. A law had been passed compelling a mill owner to erect locks, under the penalty of having his mill abated as a nuisance. Without citing any cases, and without referring to any authorities other than Blackstone, it was held that eminent domain proceedings were necessary, Mr. Judge Carr saying:

"Here then, is a Law imposing upon the citizen a burthen, which would render his property worthless, or destroying the property in case he refuses to comply. The question forces itself upon us: Can such a Law bind? That the eminent domain of the Sovereign Power, extends to the taking private property for public purposes, I am free to admit. But then, to render the exercise of this power lawful, a fair compensation must always be made to the individual, under some equitable assessment established by Law. This is laid down by the writers on Natural Law, Civil, Common Law, and the Law of every civilized country. . . . I must declare it as my solemn conviction, that whether we judge this Law by the principles of all Civilized Governments, by the Federal Constitution, or that of our own State, it is unconstitutional and void."<sup>56</sup>

In a Massachusetts case<sup>57</sup> decided four years later, tide water had been permanently excluded from the plaintiff's land. It was held that by this deprivation of the beneficial use of the land, there had been, in a legal sense, a taking of it. In another case the removal of the owner's dam which had protected a meadow by keeping out salt water was held to constitute a taking of the meadow.<sup>58</sup>

In a Massachusetts case<sup>59</sup> of the period of Rufus Choate, a statute was involved which chartered a railroad and provided that no other railroad should be authorized over its route within a certain period. This was held to constitute a grant of an ex-

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was also said, in regard to contracts: "Frustration and appropriation are essentially different things." *Ibid.* 513, 43 Sup. Ct. at 439. Compensation was awarded where the government through war-time requisition prevented the petitioner from using water which it was entitled by conveyance and lease to divert from a canal owned by another. *International Paper Co. v. United States*, 282 U. S. 399, 51 Sup. Ct. 176 (1931); see (1931) 4 So. CALIF. REV. 320.

<sup>55</sup> 6 Rand. 245 (Va. 1828).

<sup>56</sup> *Ibid.* 264. The other judges concurred in separate opinions.

<sup>57</sup> *Boston and Roxbury Mill Corporation v. Newman*, 12 Pick. (29 Mass.) 467 (1832).

<sup>58</sup> *Glover v. Powell*, 2 Stockt. (10 N. J. Eq.) 211 (1854).

<sup>59</sup> *Boston and Lowell R.R. v. Salem and Lowell R.R.*, 2 Gray (68 Mass.) 1 (1854).

clusive franchise which could not be violated without compensation. During the argument Choate and other counsel endeavored to induce the court to think of all forms of property in strictly physical terms.<sup>60</sup> In the opinion Mr. Chief Justice Shaw refused to do this, attaching significance to the use in the Massachusetts Declaration of Rights of the term "appropriate", which, he said, "is of the largest import and embraces every mode by which property may be applied to the public use."<sup>61</sup>

One of the leading cases in the field of eminent domain is *Pumpelly v. Green Bay Company*,<sup>62</sup> decided by the United States Supreme Court in 1871. In this case compensation was awarded because of the overflowing of land through the erection of a dam for hydraulic purposes which raised the level of a lake. In the opinion Mr. Justice Miller said, in a passage which has been widely quoted in later cases:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."<sup>63</sup>

This reasoning would seem to abandon the physical conception of property entirely in eminent domain cases, but the opinion limits the holding to cases "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness."<sup>64</sup> Thus the physical concept is preserved to the extent of requiring a physical invasion of the land, and the case is distinguished by the same

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<sup>60</sup> *Ibid.* 25.

<sup>61</sup> *Ibid.* 35.

<sup>62</sup> 13 Wall. (80 U. S.) 166 (1871).

<sup>63</sup> *Ibid.* 177.

<sup>64</sup> *Ibid.* 181.

court in a later case upon the ground that in it there was "a physical invasion of the real estate of the private owner, and a practical ouster of his possession."<sup>65</sup>

The course of the later decisions of the United States Supreme Court dealing with the overflow of land, is as follows: In *United States v. Lynah*, in 1903,<sup>66</sup> it was held that there had been a taking of the petitioners' rice plantation when an overflow, resulting from works in the improvement of navigation on the Savannah River, had turned it into an irreclaimable bog. It was pointed out that even in the improvement of navigation or the performance of other public duties the government could not appropriate property without being under the obligation imposed by the Fifth Amendment to make compensation.<sup>67</sup> As to the facts of the particular case it was said: "While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested."<sup>68</sup> As instances of cases where there had been no taking, Mr. Justice Brewer distinguished a case in which access to land abutting on a navigable river had been destroyed by the construction of a pier on the submerged land in front of the upland,<sup>69</sup> and another in which a riparian proprietor had been deprived of the use of her landing for the shipment of products from her farm for the greater part of the gardening season.<sup>70</sup> A District Court case involving overflow from the same improvements, but in which the injury could be remedied at an alleged expense of \$10,000, was distinguished upon the ground that damage to such a limited extent constituted only consequential injury.<sup>71</sup> It was admitted that theoretically there is no limit to what engineering skill might accomplish, but it was made a "practical matter" of degree how far the damage would have to go to constitute a taking.<sup>72</sup>

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<sup>65</sup> *Transportation Co. v. Chicago*, 99 U. S. 635, 642 (1878). In this case the plaintiff complained of obstruction of access to its lot during the construction of a tunnel under the Chicago River. It was held that there had been no taking of the plaintiff's property, that any work authorized by law could not constitute a nuisance, and that the city was exempt from liability in the proper performance of the work as the agent of the state in the performance of a public function. It was pointed out that, unlike the *Pumpelly* case, there had been no invasion of the plaintiff's lot, that all that had been done was "to render for a time its use more inconvenient." *Ibid.*

<sup>66</sup> 188 U. S. 445, 23 Sup. Ct. 349 (1903).

<sup>67</sup> *Ibid.* 471, 23 Sup. Ct. at 357.

<sup>68</sup> *Ibid.* 470, 23 Sup. Ct. at 357. It was held that when the compensation was paid the fee and the riparian rights passed to the government.

<sup>69</sup> *Ibid.* 472, 23 Sup. Ct. at 357, discussing *Scranton v. Wheeler*, 179 U. S. 141, 21 Sup. Ct. 48 (1900).

<sup>70</sup> *Ibid.* 473, 23 Sup. Ct. at 358, discussing *Gibson v. United States*, 166 U. S. 269, 17 Sup. Ct. 578 (1897).

<sup>71</sup> *Ibid.* 473, 23 Sup. Ct. at 358, discussing *Mills v. United States*, 46 Fed. 738 (S. D. Ga. 1891).

<sup>72</sup> *Ibid.* 474, 23 Sup. Ct. at 358. Three members of the court dissented

A year later, *Bedford v. United States*<sup>73</sup> was decided. The effect of revetments erected by the government for the improvement of navigation had been to prevent the Mississippi River from gradually lessening, through natural causes, the force of the current directed against the claimants' land. A tract of 2300 acres was being eroded, and had been overflowed for a number of years. The *Pumpelly* and *Lynah* cases were distinguished upon the ground that in them there had been "an actual invasion and appropriation of the land as distinguished from consequential damage."<sup>74</sup> The claimants were denied compensation, Mr. Justice McKenna saying:

"In the case at bar the damage was strictly consequential. It was the result of the action of the river through a course of years. The case at bar, therefore, is distinguishable from the *Lynah* case in the cause and manner of the injury. In the *Lynah* case the works were constructed in the bed of the river, obstructed the natural flow of its water, and were held to have caused, as a direct consequence, the overflow of Lynah's plantation. In the case at bar the works were constructed along the banks of the river and their effect was to resist erosion of the banks by the waters of the river. There was no other interference with natural conditions. Therefore, the damage to appellants' land, if it can be assigned to the works at all, was but an incidental consequence of them."<sup>75</sup>

The following year, in *Manigault v. Springs*,<sup>76</sup> where an overflow to a "minor extent" was involved, it was again held that there is no taking where the plaintiff is "merely put to some extra expense."<sup>77</sup>

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upon the ground that there had been no overflowing, but only an interference with drainage, which constituted only consequential damage. It was said in the dissenting opinion that if it were to be held that there had been an overflowing, there still had been no taking of the property, as the overflowing could have been stopped by raising the embankment surrounding the plantation. *Ibid.* 484, 23 Sup. Ct. at 362. Mr. Justice McKenna did not participate in the decision.

<sup>73</sup> 192 U. S. 217, 24 Sup. Ct. 238 (1904).

<sup>74</sup> *Ibid.* 225, 24 Sup. Ct. at 240.

<sup>75</sup> *Ibid.* 224, 24 Sup. Ct. at 240.

<sup>76</sup> 199 U. S. 473, 26 Sup. Ct. 127 (1905).

<sup>77</sup> *Ibid.* 484, 26 Sup. Ct. at 132. In *Jackson v. United States*, 230 U. S. 1, 33 Sup. Ct. 1011 (1913), it was held that it was not open to the petitioners, who had built a levee to protect their own land, to claim that the same land had been partially taken because the effect of the general system of construction of levees along the Mississippi River was to keep water from escaping from the river during high water periods, and thus to increase the pressure against the petitioners' levee. It seems clear that this decision represented sound social policy. Everyone along the river should be required to engage in "team work" to curb the annual flood menace, and there should be no complaint in regard to what others reasonably may



In *United States v. Cress*, decided in 1917,<sup>78</sup> it appeared that land had been subjected to "a permanent liability to intermittent but inevitably recurring overflows" through the construction of locks and dams to improve navigation. It was argued that there had been no taking of the land because it had been depreciated in value only fifty per cent. Mr. Justice Pitney said, in reply to this, that "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."<sup>79</sup> It was held that there had been a partial taking, for which compensation must be made. The amount involved was comparatively small,<sup>80</sup> and the question whether the plaintiff could have prevented the loss through protective engineering works was not discussed.

In another case it was held that where land was flooded by a government irrigation reservoir there could be no recovery because of destruction of the business conducted upon the land, or because of the enforced sale of cattle.<sup>81</sup> Mr. Justice McReynolds assigned as the reason for this, that "there was no actual taking of these things by the United States, and consequently no basis for an implied promise to make compensation."<sup>82</sup>

The latest pronouncement of the court upon the question is that of Mr. Justice Sutherland, in 1924, that in order to constitute a taking "it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."<sup>83</sup>

If an attempt be made to reconcile these cases, it may be said that the position of the United States Supreme Court is that in order that a flooding of land may constitute a taking, it is necessary that the following requirements be satisfied: that the physical facts involved be not too complicated;<sup>84</sup> that there be a

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do in that regard. If it were desirable, it would not be feasible to distribute such losses.

<sup>78</sup> 243 U. S. 316, 37 Sup. Ct. 380 (1917).

<sup>79</sup> *Ibid.* 328, 37 Sup. Ct. at 385.

<sup>80</sup> Fifty per cent of the value of the overflowed land was \$495. In addition the plaintiff was held entitled to recover \$500 because of the destruction of a ford, and the parties in a companion case covered by the opinion were awarded \$1500 because of the cutting off of the water power of a mill.

<sup>81</sup> *Bothwell v. United States*, 254 U. S. 231, 41 Sup. Ct. 74 (1920).

<sup>82</sup> *Ibid.* 233, 41 Sup. Ct. at 75. To the same effect, *Mitchell v. United States*, 267 U. S. 341, 45 Sup. Ct. 293 (1925) (not an overflow case).

<sup>83</sup> *Sanguinetti v. United States*, 264 U. S. 146, 149, 44 Sup. Ct. 264, 265 (1924). In this case the court felt that upon the facts the most that could be said in favor of the claimant was that land which previously had been subject to periodical overflows had probably been subjected to some increased flooding.

<sup>84</sup> Witness the quoted distinction between the *Lynah* and *Bedford* cases, in the latter decision, *supra* note 75.

permanent or intermittent physical invasion of the land; that the loss sustained be substantial, and not relate to a business conducted upon the land; and that the situation be such that the landowner cannot obviate the loss through protective engineering works with a reasonable expenditure of funds.<sup>85</sup>

It was held, by the same court, that compensation is necessary when a franchise is taken.<sup>86</sup> This is a recognition of intangibles, but Mr. Justice Brewer, in a *dictum*, argues for the retention of a strictly objective point of view in dealing with questions relating to property under the Fifth Amendment. He bases his contention upon the language used in the Constitutional provision:

"And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. 'No person shall be held to answer for a capital, or otherwise infamous crime,' etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the 'just compensation' is to be a full equivalent for the property taken."<sup>87</sup>

The cases which have been considered, recognizing a so-called destruction as a taking, have gotten away from the most narrow physical viewpoint, that, in order to constitute a taking, the possession of land or other tangible objects must be removed from the owner and appropriated by the taking authority. But unless a further advance is made, many cases of serious loss to the individual will still remain uncompensated. The courts are left in the position thus stated oracularly in a Maryland case: "Every taking involves an injury of some kind, though every injury does not include a taking."<sup>88</sup> And, while physical limitations are retained in the methods of thought, a determination as to which injuries are to be considered takings, and thus receive compensation, will not be reached, as it should be, upon consider-

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<sup>85</sup> Mr. District Judge Grubb, after discussing the United States Supreme Court flooding cases, reaches the following conclusion: "A fair construction of these decisions leads to the conclusion that, in order that a flooding of lands may constitute a 'taking,' it must be not only a direct physical invasion of private property, but must also act as an actual ouster and cause a practical destruction of the value of the land." *Coleman v. United States*, 181 Fed. 599, 603 (C. C. N. D. Ala. 1910). The cases are reviewed in *Walls v. United States*, 44 Ct. Cl. 482 (1909), and *Tompkins v. United States*, 45 Ct. Cl. 66 (1910).

<sup>86</sup> *Monongahela Navigation Co. v. United States*, *supra* note 54.

<sup>87</sup> *Ibid.* 326, 13 Sup. Ct. at 626. In addition to the franchise, tangible property was taken.

<sup>88</sup> Mr. Justice McSherry, in *Garrett v. Lake Roland E. Ry.*, 79 Md. 277,

ations having to do with the social policy of eminent domain proceedings, or relating to practical expediency. The decision will turn upon the accidental presence or absence, along the lines already pointed out, of certain physical facts.

The leading case taking another step, and treating the eminent domain process as one of interference with valuable legal relations, is *Eaton v. B. C. & M. R. R.*,<sup>80</sup> decided by the Supreme Court of New Hampshire in 1872, the year following the *Pumpelly* decision. The facts involved were again those of overflow.<sup>80</sup> The opinion was written by the learned Mr. Justice Jeremiah Smith, later the distinguished professor of law at Harvard. The opinion is as able as it is long, and is perhaps the best known and most influential of those written by him.<sup>81</sup> He said:

"The vital issue then is, whether the injuries complained of amount to a taking of the plaintiff's property, within the constitutional meaning of those terms. It might seem that to state such a question is to answer it; but an examination of the authorities reveals a decided conflict of opinion. The constitutional prohibition (which exists in most, or all, of the States) has received, in some quarters, a construction which renders it of comparatively little worth, being interpreted much as if it read,—'No person shall be divested of the formal title to property without compensation, but he may, without compensation, be deprived of all that makes the title valuable.' To constitute a 'taking of property', it seems to have sometimes been held necessary that there should be 'an exclusive appropriation', a 'total assumption of possession', 'a complete ouster', an absolute or total conversion of the entire property, a 'taking the property altogether'. These views seem to us to be founded on a misconception of the meaning of the term 'property', as used in the various State constitutions."<sup>82</sup>

He proceeds to point out that "in a strict legal sense, land is not 'property,' but the subject of property;" that while the term "property" is, in common parlance, frequently applied to a tract of land or a chattel, in its legal signification it refers to legal relations. Interference with those relations, he continues, takes the owner's property.<sup>83</sup> If the defendants were correct in their

282, 29 Atl. 830, 832 (1894).

<sup>80</sup> 51 N. H. 504 (1872).

<sup>80</sup> It was stated that at times the water carried sand, gravel, and stones upon the plaintiff's land.

<sup>81</sup> "In this masterly essay on the nature of property, the force of an unconstitutional statute, and the meaning of a 'taking' by eminent domain, Judge Smith established the law as it is generally held today upon an impregnable basis." Beale, *Jeremiah Smith* (1921) 35 HARV. L. REV. 1, 2.

<sup>82</sup> *Eaton v. B. C. & M. R.R.*, *supra* note 89, at 511.

<sup>83</sup> He also reasoned that if the land itself were to be considered the property, the practical result would be the same, as it would have to be inferred

contention that they had a right to flood the plaintiff's land, they would have an easement in it. But an easement is property, and could have been acquired by the defendants only through subtraction from the legal relations constituting the plaintiff's property. This the constitution does not permit without compensation. The plaintiff having received no compensation for the easement,<sup>94</sup> it does not exist, and the plaintiff is entitled to his damages.<sup>95</sup>

The doctrine of the *Eaton* case was applied in another overflow case, in the same court, in an opinion written by Mr. Justice Charles Doe, "one of the greatest of our American judges."<sup>96</sup> He said:

"Property in land must be considered, for many purposes, not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges, the limits of which are prescribed by the equality of rights, and the correlation of rights and obligations necessary for the highest enjoyment of land by the entire community of proprietors. . . . Property is taken, when any one of those proprietary rights is taken, of which property consists."<sup>97</sup>

Lewis quotes Mr. Justice Doe at length with approval.<sup>98</sup> Nichols takes the opposite view.<sup>99</sup> He feels that it is "only by an extremely technical argument" that the New Hampshire court is able to interpret the word "take" as it does, and that this is not a proper method of interpretation of the language of constitution

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that the framers of the constitution intended to protect the essential elements of ownership which give the property value, and not to protect "mere empty titles, or barren insignia of ownership." *Ibid.* 512. The damage was said to be "consequential," in the sense of having occurred following the lapse of a period of time after the defendants' acts, but was said to be what Sir William Erle had called "consequential damage to the actionable degree." *Ibid.* 513, citing *Brand v. H. & C. Ry.*, L. R. 2 Q. B. 223, 249 (1867).

<sup>94</sup> It was held that eminent domain proceedings previously directed against the plaintiff had related only to acts done by the defendants on the plaintiff's land, whereas the overflowing now complained of resulted from acts on the land of another. *Ibid.* 515.

<sup>95</sup> The suit was an action on the case to recover damages for a taking not covered by eminent domain proceedings. The New Hampshire constitution contained no provision that private property should not be taken for public use without compensation, but the learned justice thought of the problem in those terms, and held that such a provision was to be implied from the spirit and tenor of the whole instrument. *Ibid.* 510. There was a provision that no part of a man's property should be taken from him, or applied to public uses, without his consent. N. H. CONST. pt. 1, art. 12.

<sup>96</sup> Beale, *op. cit. supra* note 91, at 2.

<sup>97</sup> *Thompson v. Androscoggin Co.*, 54 N. H. 545, 551 (1874).

<sup>98</sup> 1 LEWIS, *op. cit. supra* note 8, at 62.

<sup>99</sup> 1 NICHOLS, *op. cit. supra* note 6, at 293 ff.

makers who used "an expression which, to the lay mind at least, meant something wholly different."<sup>100</sup> He states that the fallacy of the argument of the New Hampshire court "lies in its assumption that the property rights of an individual against other individuals are the same as they are against the public."<sup>101</sup> He contends that the constitutional provisions should be interpreted in the light of the law as it existed prior to their adoption, and therefore concludes that whatever one might think of the abstract logic of the *Eaton* case, it came "too late to stand on its merits as an interpretation of the constitution."<sup>102</sup>

Such a method of approach is to be criticized in that it is purely legalistic. It gives no consideration to the requirements of the social policy to be effected through eminent domain proceedings. It affords no opportunity for an advancing civilization, confronted with changing and more complicated conditions, to give effect to the social policy set forth in certain words, by using a more abstract conception in their interpretation than was required in early times. Processes of growth and development in constitutional interpretation are utterly denied. The assumption of the New Hampshire justices, that the property rights of an individual against the public are the same as his rights against other individuals, seems to be entirely justified, as applied to the awarding of compensation in eminent domain proceedings.<sup>103</sup> It is implicit in the nature of such proceedings that society desires to purchase from an individual the property rights recognized in him under a legal system designed to adjust his relations with other individuals. The only difference that should exist between a sale to society and one to an individual is that the former may acquire property that the latter could not buy.

Before the *Eaton* case, Mr. Chief Justice Shaw of Massachusetts handed down the first decision holding that a railroad is entitled to compensation when its line is crossed by a highway. He said that if the public use of land or chattels deprived the owner of possession or "some beneficial enjoyment," his property had been "appropriated" to public use, and he was entitled to compensation.<sup>104</sup> In the leading case of *City of St. Louis v. Hill*,

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<sup>100</sup> *Ibid.* 299.

<sup>101</sup> *Ibid.* 297.

<sup>102</sup> *Ibid.* 301. Although disagreeing with the *Eaton* case, he states that the decision, "remarkable for its strength of logic and clearness of reasoning, attracted and retained the attention of the legal profession throughout the country." *Ibid.* 296.

<sup>103</sup> See note 189, *infra*.

<sup>104</sup> *Old Colony and Fall River R.R. v. County of Plymouth*, 14 Gray (80 Mass.) 155, 161 (1859).

In 1874 the leading case of *Grand Rapids Booming Company v. Jarvis* was decided by the Supreme Court of Michigan. This case involved facts of overflow. In a famous passage Mr. Justice Christiancy asked: "Of

a city ordinance imposing a building line restriction was held invalid, because it constituted a taking of private property, even though "title to the property and the right to use the same are still in the defendant."<sup>105</sup>

In a New Jersey case, *Pennsylvania R. R. v. Angel*, a similar holding was made in dealing with a nuisance from the operation of a railroad. Mr. Justice Dixon said, in a widely quoted passage: "Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property."<sup>106</sup>

In a similar case in the United States Supreme Court, Mr. Justice Pitney said that while the legislature might legalize what otherwise would be a public nuisance, it could not "confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use."<sup>107</sup> The same court held on demurrer that it would constitute a taking of land for the government to install a battery in a fort for the purpose of firing projectiles at will across the area in time of peace.<sup>108</sup>

Title consists of an aggregate of valuable legal relations vested in the person called the owner.<sup>109</sup> Throughout legal history it has been the practice to treat as separate entities for legal and commercial purposes certain sub-groups of legal relations included within the aggregate known as title. Due to the methods of thought thus historically developed, the courts have had no difficulty in recognizing as a taking of property any interference with such a sub-group of legal relations. Here property has always been looked at from a legal relations standpoint. This applies to situations where easements<sup>110</sup> or profits *a prendre*<sup>111</sup>

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what does property practically consist, but of the incidents which the law has recognized as attached to the title, or right of property? Is not the idea of property in, or title to lands, apart from, and stripped of all its incidents, a purely metaphysical abstraction, as immaterial and useless to the owner as 'the stuff that dreams are made of'? Is it not a much less injury to him, if it can injure him at all, to deprive him of this abstraction, than of the incidents of property, which alone render it practicably valuable to him?" 30 Mich. 308, 320 (1874).

<sup>105</sup> 116 Mo. 527, 22 S. W. 861 (1893).

<sup>106</sup> 14 Stewart (14 N. J. Eq.) 316, 329 (1886).

<sup>107</sup> *Richards v. Washington Terminal Co.*, 233 U. S. 546, 553, 34 Sup. Ct. 654, 657 (1914).

<sup>108</sup> *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327, 43 Sup. Ct. 135 (1922).

<sup>109</sup> *HOHFELD*, *op. cit. supra* note 1, at 162.

<sup>110</sup> 1 LEWIS, *op. cit. supra* note 8, at 428; 1 NICHOLS, *op. cit. supra* note 6, at 346. As to violation of restrictions in deeds, see Note (1930) 19 CALIF. L. REV. 58.

have been obstructed, or where in effect easements have been imposed on land in favor of the public, as through building line<sup>112</sup> or zoning restrictions<sup>113</sup> (not justified under the police power), or where there has been interference with riparian rights.<sup>114</sup> In an oft-cited passage Mr. Justice Pitney stated that the right to have water flow away from a mill dam unobstructed, except as in the course of nature, "is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land."<sup>115</sup> Franchises, also, have been a historically recognized species of property, and it has never been doubted that compensation is required whenever they are taken.<sup>116</sup> There should be no doubt in regard to other forms of contracts.<sup>117</sup>

Licenses are not protected against obstruction by third parties, either in eminent domain or other connections. 2 LEWIS, *op. cit. supra* note 8, at 958; 1 NICHOLS, *op. cit. supra* note 6, at 340, 353; 2 TIFFANY, *REAL PROPERTY* (2nd ed. 1920) 1202, 1391. For a criticism of the failure to afford protection, see Note (1924) 33 YALE L. J. 642, discussing *Taft v. Bridgeton Worsted Co.*, 246 Mass. 444, 141 N. E. 119 (1923). Eminent domain cases are: *Clapp v. City of Boston*, 133 Mass. 367 (1882); *Elliott v. Mason*, 76 N. H. 229, 81 Atl. 701 (1911); *Gorgas v. Philadelphia, H. & P. Ry.*, 144 Pa. St. 1, 22 Atl. 715 (1891); *Strickland v. Pennsylvania R.R.*, 154 Pa. St. 348, 26 Atl. 431 (1893); *Municipal Freehold Land Co. v. Metropolitan and District Railways Joint Committee*, 1 Cab. & E. 184 (Q. B. 1883); *Bird v. Great Eastern Ry.*, 19 C. B. (N. S.) 268 (C. P. 1865) (not "interest in land", under statute); *Frank Warr & Co., Ltd. v. London County Council*, L. R. 1 K. B. 713 (1904) (not "interest in land", under statute). *Contra*: *Miller v. Greenwich*, 33 Vr. (62 N. J. L.) 771, 42 Atl. 735 (1899). In *Holt v. Gas Light and Coke Co.*, L. R. 7 Q. B. 728 (1872), two tracts of land, not adjoining, had been used as a shooting range, by reason of a license for hire to shoot over the intervening land. One of the tracts was taken. It was held that the possibility of continuance of the license should be taken into consideration in assessing the damages in regard to the tract not taken, the statute permitting compensation when land not taken was injuriously affected. The court did not feel that it was awarding compensation for the enforced discontinuance of the license as such.

<sup>111</sup> 2 LEWIS, *op. cit. supra* note 8, at 957; 1 NICHOLS, *op. cit. supra* note 6, at 352.

<sup>112</sup> 1 LEWIS, 433; 1 NICHOLS, 280. As to height of buildings, see 1 LEWIS, 468; 1 NICHOLS, 277.

<sup>113</sup> 1 LEWIS, at 469; 1 NICHOLS, 278. As to other regulations, see 1 LEWIS, 467 ff.; 1 NICHOLS, 271 ff.

<sup>114</sup> 1 LEWIS, 69 ff.; 1 NICHOLS, 404 ff. The police power as applied to riparian rights is generally denominated the power to improve navigation. The same thought has been expressed by saying that land held by individual owners "is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution". Mr. Chief Justice Fuller, in *Gibson v. United States*, *supra* note 70, at 272, 17 Sup. Ct. at 579.

<sup>115</sup> *United States v. Cress*, *supra* note 78, at 330, 37 Sup. Ct. at 386.

<sup>116</sup> *Monongahela Navigation Co. v. United States*, *supra* note 54; 1 LEWIS, 407 ff.; 1 NICHOLS, 68, 361 ff.

<sup>117</sup> *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106, 44 Sup. Ct.

It has sometimes been provided by statute, that if a city files a plat indicating the location of future streets, no compensation can be secured for buildings thereafter erected upon the land thus claimed for street purposes. Under a physical conception of property, the filing of such a plat does not constitute a taking of the land. There has been no semblance of a physical invasion or interference. From the standpoint of legal relations, however, there has been a very serious change in the owner's position. It was held in Pennsylvania that under such circumstances there was no taking.<sup>118</sup> The position of the doctrine has been greatly weakened in that state,<sup>119</sup> and in other jurisdictions there has been agreement that such action constitutes a taking of

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471 (1924); *Russian Volunteer Fleet v. United States*, 282 U. S. 481, 51 Sup. Ct. 229 (1931); (1931) 4 So. CALIF. REV. 320; 2 LEWIS, 745; 1 NICHOLS, 68. In *McGrath v. Boston*, 103 Mass. 369 (1869), the plaintiff occupied certain land under a written instrument which the court interpreted to be an executory contract with the owner of the fee, and not a lease. The defendant city gave notice of intention to take a part of the premises. Six months later, during the period covered by the contract, a new owner of the fee, to whom it had been conveyed by the one with whom the plaintiff had his contract, gave the plaintiff notice to quit, and removed the plaintiff's furniture. The court states that the plaintiff then moved out. The city did not enter until over nine months after the plaintiff's removal. The plaintiff paid rent up to the date of the notice to quit. The plaintiff was refused compensation upon the ground that he did not have any interest in the land. The result reached seems to be correct, as it seems that under the circumstances the breach of the plaintiff's contract was too remote a consequence of the city's action to be properly attributable to it, and that, as stated by the court, the plaintiff's remedy was to seek his damages upon the contract. In *Omnia Commercial Co. v. United States*, *supra* note 54, impossibility of performance of a contract was a legally remote consequence of exercise of the war powers, and compensation was therefore properly denied. In *Cornell-Andrews Smelting Co. v. Boston and Providence Ry. Corp.*, 209 Mass. 298, 306, 95 N. E. 887, 890 (1911), it was held that in awarding compensation to a lessee the value of an option to purchase could not be taken into consideration. It was held that the option did not constitute an estate in the land, but was only a contract right, which in equity shifted to the fund produced by the condemnation award to the lessor. A statute provided for payment of the fund to a trustee in this contingency. The decision seems correct.

Whatever the nature of the property interests in a corpse may be, it has been held that they cannot be made the subject of eminent domain proceedings. *University of Louisville v. Metcalfe*, 216 Ky. 339, 387 S. W. 945 (1926).

<sup>118</sup> In the matter of the District of the City of Pittsburgh, 2 W. & S. 320 (Pa. 1841); *Forbes Street*, 70 Pa. St. 125 (1871); *Bush v. McKeesport City*, 166 Pa. St. 57, 30 Atl. 1023 (1895).

<sup>119</sup> In *Philadelphia Parkway*, 250 Pa. St. 257, 95 Atl. 429 (1915), the court indicates an intention to limit the earlier cases to situations where the filing of the plat is a net benefit to the owner of the land, through enabling him to know where the future channels of travel and transportation will be located.



property.<sup>120</sup> The almost complete unanimity of the courts in this connection no doubt has been due to the obviously serious character of the effect of such a situation upon the usability or salability of the owner's title.

When the Illinois constitution of 1870 was framed, an attempt was made to insure protection to condemnees, in spite of the physical conception of property so largely used by the courts, by inserting the words "or damaged" after the word "taken" in the usual constitutional provision, so as to read, that private property shall not be taken "or damaged" for public use without just compensation.<sup>121</sup> Similar provisions have now been adopted in the constitutions of a majority of the states.<sup>122</sup> In opening the debate upon this provision in the constitutional convention, Mr. William H. Underwood, advocating its adoption, said:

"The courts have decided that cities in their grading, may cut down lots so as to almost ruin men and subject them to enormous expense, or they may raise the grade of streets so as to cause water to run upon lots, and make property comparatively worthless, but that that is a damage for which lot-owners are entitled to no compensation. That seems the settled law of the land; so decided in several states, and by the Supreme Court of the United States. They say it is not taking property, but is an incidental damage which lot-owners must sustain, by reason of these public improvements, and for which they are entitled to no compensation. As I understand this article, it will require compensation to be made for those damages which necessarily and naturally rise to a party in consequence of these public improvements." <sup>123</sup>

The debates indicate that the framers of the Illinois Constitution were greatly influenced by the use of the word "damage" in the Lands Clauses Consolidation Act,<sup>124</sup> and its judicial interpretation in England.<sup>125</sup>

The leading decision interpreting such a provision as that of the Illinois Constitution is *Rigney v. City of Chicago*,<sup>126</sup> decided

<sup>120</sup> 1 LEWIS, 431; 1 NICHOLS, 282.

<sup>121</sup> ILL. CONST. (1870), art. 2, sec. 13.

<sup>122</sup> 2 NICHOLS, 844.

<sup>123</sup> 2 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS (1870) 1577.

<sup>124</sup> *Ibid.* 1578. See Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, §§ 18, 49 (1845). This act requires that compensation be paid for the lands purchased, and also "for the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands. . . ."

<sup>125</sup> The English law as to compensation for injurious affection of lands, as developed under this and other acts, is set forth in 6 HALSBURY, LAWS OF ENGLAND (1909) 43 ff.

<sup>126</sup> 102 Ill. 64 (1882).

by the Supreme Court of Illinois in 1882. The plaintiff was awarded compensation because of obstruction of access to a street through the erection of a viaduct. Mr. Justice Mulkey, in the opinion of the court, three of the seven justices dissenting, points out that under the previously existing constitutional provision in Illinois, of the usual type, an "actual physical invasion" of property was required.<sup>127</sup> His reasoning proceeds: While an actual appropriation or taking was not required, it being enough that the injury was direct and physical, nevertheless many cases of great hardship were excluded, such as the case at bar. Under the old provision, it was the view of the Illinois courts that "any direct physical injury to the property" of an individual, by means of which he was substantially deprived of its ordinary use and enjoyment, was a taking. Under the amended provision the requirement of physical injury is not abandoned. There has been, however, ambiguity in the judicial statements of the Illinois courts as to the facts necessary to constitute physical injury, because of the use by the courts of the term "property" in this connection. This ambiguity can be obviated, and the change in the constitution given proper effect, by adopting the conception of property as consisting of legal relations. Therefore, he concludes, "under the present constitution it is sufficient if there is a direct physical obstruction or injury to the right of user or enjoyment, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally."<sup>128</sup>

It seems unfortunate that the court should retain a physical requirement in the test for an obstruction or injury to what it so carefully points out are intangibles, and the opinion indicates the difficulty in abandoning physical concepts in habits of thought. Just what the court has in mind in requiring a "direct physical obstruction or injury" to legal relations is not clear. It is not discussed in the opinion, and is not made clear in other cases.<sup>129</sup> Other parts of the opinion would seem to eliminate the

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<sup>127</sup> *Ibid.* 74.

<sup>128</sup> *Ibid.* 72, 78. At another place in the opinion the requirement is stated in somewhat different form. It is said that "to warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally." *Ibid.* 80.

<sup>129</sup> Halsbury states that "physical interference" is required. 6 HALSBURY, *op. cit. supra* note 125, at 32, 46. In *Lambert v. Norfolk*, 108 Va. 259, 265, 61 S. E. 776, 778 (1908), it is stated that there must be physical damage to the corpus or to some appurtenant right, and that the damage must be physical, not to the "feelings, tastes, or sentiments." Other cases stating the requirement that the interference with legal relations must be physical are: *Austin v. Augusta Terminal Ry.*, 108 Ga. 671, 674, 34 S. E. 852, 857 (1899); *Illinois Power & Light Corporation v. Peterson*, 322 Ill.

requirement. Possibly it is reasonable to conclude that the statement of the requirement, while unfortunate from the standpoint of lucidity of the concepts used in legal thinking, has produced no practical ill effects. It is pointed out in the opinion that the amended constitutional provision is not intended to reach every possible injury that may be occasioned by a public improvement.<sup>130</sup> This is obviously correct, as every injury sustained by an individual in an organized society is not legally remediable. Toward the end of the opinion the view of the English courts in construing the term "injuriously affected" is adopted, particularly as set forth in *McCarthy v. Metropolitan Board of Works*.<sup>131</sup> It is therefore felt that "it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law."<sup>132</sup> This statement of principle, unlike the earlier portion of the opinion which has been referred to, does not include any physical requirement. It treats the problem simply as one of working out principles of the law of damages in accordance with the social policy of eminent domain proceedings.<sup>133</sup> While the principles developed in other connections will not always afford a sufficient guide,<sup>134</sup> certainly all possible bene-

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342, 347, 153 N. E. 577, 579 (1926); *East St. Louis Light & Power Co. v. Cohen*, 333 Ill. 218, 222, 164 N. E. 182, 184 (1928); *Stuhl v. Great Northern Ry.*, 136 Minn. 158, 161, 161 N. W. 501, 502 (1917); *Gottschalk v. Chicago, B. & Q. R.R.*, 14 Neb. 550, 560, 16 N. W. 475, 479, 14 Neb. 561, 17 N. W. 120 (1883); *Haney v. G. C. & S. F. Ry.*, 3 Will. § 278, § 279 (Tex. Civ. App. 1887). On the facts none of the cases cited throw any light upon the content of the requirement.

<sup>130</sup> *Rigney v. City of Chicago*, *supra* note 126, at 80.

<sup>131</sup> L. R. 7 C. P. 508 (1872).

<sup>132</sup> *Rigney v. City of Chicago*, *supra* note 126, at 81.

<sup>133</sup> A similar conclusion has been reached in interpreting such a provision in the constitution of another state. *City of Tulsa v. Horwitz*, 131 Okla. 63, 65, 267 Pac. 852, 854 (1928). The opinion quotes with approval 20 C. J. 674, to the effect that such a constitutional provision includes "all damages or injuries arising from the exercise of the right of eminent domain which cause a diminution in the value of private property, whether this results directly to the property, or is but an interference with the right which the owner has to the legal and proper use of the same." See *City of Amarillo v. Tutor*, 267 S. W. 697, 699 (Tex. Comm. of App. 1924). The encyclopedia immediately follows the quotation with an incorporation in its text of the requirement, "generally held," of a "physical interference."

Dillon suggests that under such a constitutional provision recovery "must . . . be limited to cases where the *corpus* of the owner's property itself, or some appurtenant right or easement connected therewith or by the law annexed thereto, is directly (that is, in general, if not always, physically) affected, and is also specially affected (that is, in a manner not common to the property owner and to the public at large); and such direct and special injury must be such as to depreciate the value of the owner's property". 3 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) 1610.

<sup>134</sup> For example, at common law, with few exceptions, a man may build

fit should be derived from the general law of damages wherever the situations presented are essentially analogous.<sup>135</sup>

Nichols argues that the states which have failed to adopt constitutional provisions in regard to "damaging" as well as "taking" property have indicated by such failure their deliberate choice of a physical conception of property in this connection.<sup>136</sup> He therefore concludes that it is no longer open to question in those states that a "damaging" does not constitute a "taking". This would mean that in such a state no court could with propriety adopt for eminent domain purposes a conception of property as consisting of legal relations. It is submitted that this view is entirely erroneous, as it overlooks the difficulties to be encountered and the popular inertia to be overcome in securing any constitutional amendment.<sup>137</sup>

It has been pointed out that under a legal relations conception of property a constitutional amendment adding "damaging" to "taking" is unnecessary.<sup>138</sup> In this connection it has been suggested, not only that the cases adopting a physical conception have been too narrow in giving a meaning to the term "property", but also that they have erred "in holding that the right of recovery rested upon the constitution, rather than upon the common law or upon an inherent right superior to any legislative enactment."<sup>139</sup> That portion of the argument which relates to "inherent right" would be rejected by many modern thinkers, but the contention can well stand without that support. If the view that there is a principle of justice, apart from constitutions, requiring compensation is adopted, the only effect of a constitutional provision in regard to compensation is to prevent the legislature from destroying the citizen's right to receive it.

It has been suggested that when a "damaged" provision is

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any sort of an erection upon his own land. A different problem is presented when an erection is built in a street.

<sup>135</sup> See note 175, *infra*.

<sup>136</sup> 1 NICHOLS, 306.

<sup>137</sup> In this connection the writer recalls an interesting round table discussion at one of the meetings of the Association of American Law Schools. Professor Edwin R. Keedy, of the University of Pennsylvania, outlined a number of needed reforms in the field of criminal procedure. Professor Edson R. Sunderland, of the University of Michigan, the great leader of the American bar in matters of procedural reform, opened the discussion with remarks commencing about as follows: "Why is it that Mr. Keedy can present in fifteen minutes reforms which we all agree are good, and which it would take about one hundred years to put into effect? The reasons can all be summed up in one word—constitutions."

<sup>138</sup> Mr. Justice Whiting, in *Hyde v. Minnesota, Dakota & Pacific Ry.*, 29 S. D. 220, 230, 136 N. W. 92, 95 (1912); Davis, *Constitutional Provisions Against Damaging Private Property* (1902) 8 VA. L. REG. 525.

<sup>139</sup> See *Hyde v. Minnesota, Dakota & Pacific Ry.*, *supra* note 138, at 230, 136 N. W. at 95. Consult Grant, *op. cit. supra* note 3.

added, "taking" should be restricted to cases where the owner is deprived of title.<sup>140</sup> Frequently constitutions require payment of compensation in advance in case of a taking, but not in connection with a damaging.<sup>141</sup> For this purpose there are practical considerations in support of a distinction based upon the importance of the legal relations affected. There is also more liberality in granting injunctive relief in connection with acts considered takings than with those thought of as only amounting to the infliction of damage.<sup>142</sup> A distinction here based upon the extent of the consequences of the contemplated action is in harmony with fundamental principles of the law of injunctions.

The problem of the nature of the conception to be used in administering eminent domain proceedings has sometimes been presented in situations where there unquestionably has occurred a taking of property, under either of the concepts discussed. A question has arisen as to what parties are to be recognized as having property interests entitling them to compensation, or it has been necessary to determine how far the property interests of those receiving compensation extend.<sup>143</sup> In the solution of any problem, the selection of the persons to receive compensation, and of the elements of loss or injury to be taken into consideration in assessing damages, is a measure of the extent of property.

It is settled that life tenants and tenants for years or from year to year are entitled to compensation.<sup>144</sup> On the other hand, it seems clear that tenants by sufferance and trespassers have no legal relations entitling them to compensation.<sup>145</sup> It generally has been so held in regard to tenants at will.<sup>146</sup> This result has

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<sup>140</sup> Mr. Justice Crow, in *Milwaukee Terminal Ry. v. City of Seattle*, 86 Wash. 102, 107, 149 Pac. 644, 646 (1915). See *Fenton v. City of Seattle*, 132 Wash. 194, 198, 231 Pac. 795, 796 (1925). The distinction is jurisdictional in the Court of Claims. In connection with a taking there is an implied contract to pay, and jurisdiction. A damaging constitutes only a tort, when there is no jurisdiction. *Sanguinetti v. United States*, 55 Ct. Cl. 107 (1920), *aff'd, cit. supra* note 83; *cf. State of Alabama v. United States*, 282 U. S. 502, 51 Sup. Ct. 225 (1931).

<sup>141</sup> 1 NICHOLS, 307.

<sup>142</sup> 2 LEWIS, 1611.

<sup>143</sup> See *Matter of City of N. Y. (Manhattan Ry.)* 126 Misc. 879, 216 N. Y. Supp. 2 (Sup. Ct. 1926); modified, 229 App. Div. 617, 243 N. Y. Supp. 665 (1st Dep't 1930); Note (1931) 40 YALE L. J. 779; Nelles, *A Constructive "Property Right" and Its "Value"* (1931) 40 YALE L. J. 1074; Corbin, *The Elevated Railway Condemnation Case—Another Analysis of the Property Interests Involved* (1931) 40 YALE L. J. 1039. This case presents the interesting and novel question whether, upon condemnation of an elevated railroad in a city street, the railway company is entitled to compensation for the right to impair light, air, and access.

<sup>144</sup> 2 LEWIS, 952; 1 NICHOLS, 338.

<sup>145</sup> 1 NICHOLS, 340, 343.

<sup>146</sup> *United States v. Inlots*, Fed. Cas. No. 15,441a (S. D. Ohio, 1873); *Emerson v. City of Somerville*, 166 Mass. 115, 44 N. E. 110 (1896); *Hanna*

been reached, apparently, either upon the theory that a tenancy at will has no market value, or upon the technical theory that the nature of the estate is such as to render impossible its consideration in eminent domain proceedings.

The facts of one of the cases denying compensation to tenants at will<sup>147</sup> present the question whether such a holding accomplishes, as far as is practicable, the social purpose of eminent domain proceedings to prevent loss to condemnees. The tenants at will were liquor dealers, renting from a brewer. They purchased their beer from the landlord, and as rent paid him twenty-five cents per barrel more than the usual price. The tenants had relied upon the arrangement sufficiently, and had considered it of enough value, to erect a number of buildings upon the land. It was a reasonable inference that the lessor was profiting by the arrangement, and that, as a practical matter, he would have permitted it to continue indefinitely if condemnation had not intervened. It was held that termination of the lessor's estate by condemnation proceedings determined the lease of the tenants at will, and made them tenants at sufferance of the condemning authority, and they were refused compensation. It was said, by way of *dictum*, that the change in the nature of the tenancy was not of any practical importance, as all that they were entitled to in any event was notice, and a reasonable time to remove their goods and fixtures.

Looking at the situation from the standpoint of the legal relations of the human beings involved, the lessees had a conditional privilege to continue to use the premises, subject to a power of revocation in the landlord. They had a right that they should not be interfered with before such revocation. The question presented is whether, assuming that a financial value to the lessees is involved, it is not practicable, in eminent domain proceedings, to recognize such legal relations as constituting property, for which compensation should be made. Such action does not call for reduction of the compensation to be paid the land-

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v. County of Hampden, 250 Mass. 107, 145 N. E. 258 (1924); *Lyons v. Philadelphia & R. Ry.*, 209 Pa. St. 550, 58 Atl. 924 (1904); *Canadian Pacific R. W. Co. v. Brown Milling Co.*, 18 Ont. L. Rep. 85 (1909) (not "person interested," under Canadian act). *Contra*: *Sheehan v. City of Fall River*, 187 Mass. 356, 73 N. E. 544 (1905); *Cole v. Ellwood Power Co.*, 216 Pa. 283, 65 Atl. 678 (1907). *Sheehan v. City of Fall River* is unlike the other cases cited in this note in that the tenancy at will continued to exist. The grade of a street was changed, under a statute providing for the payment of "all damages sustained by any person in his property." The lessee was awarded damages because of injury to a building which, as between her and the owner of the fee, was a tenant's fixture, subject to removal. She also received compensation because of temporary interference with access. A settlement by the condemning authority with the landowner had not included her damages.

<sup>147</sup> *Lyons v. Philadelphia & R. Ry. Co.*, *supra* note 146.

lord, as the presence of satisfied tenants does not lessen the market value of the premises or their value to him.

If the condemning authority secures a conveyance from the owner of the fee, the problem is still in substance the same. Such a conveyance is voluntary only in the sense that the owner is willing to submit gracefully, rather than to await condemnation proceedings. The question remains, whether, as matter of sound social policy, compensation should not be paid to the tenant at will because of the proximate effect of such action upon his legal relations. It may seem that an affirmative answer will mean that a condemning authority will be required to pay more to secure land than a private individual. It may be said that while the latter can purchase from the owner of the fee and let the owner terminate the tenancy, the condemning authority will have to make payment to both parties. But while the private purchaser will have only one payment to make, in the bargaining process he will not have the assistance of a threat of eminent domain proceedings. It is therefore doubtful whether, in the long run, the condemning authority will be out more than the private buyer. Even though an additional payment is required, there is still reason for holding that the legal relations of the parties should be adjusted in this way. Forced transactions and voluntary ones are not the same. A valuable economic situation is created when land is occupied by satisfied tenants, regardless of the character of the legal tenure. Both landlords and tenants pay brokers substantial sums to create such situations, and no sufficient reason is seen why courts should be blind to them. If both landlord and tenant sustain losses, both should be awarded compensation.

The practical situation is essentially the same where, as the result of condemnation proceedings against the landlord (or purchase by the condemning authority from him), a tenant from year to year is given the required notice to quit. Lord Tenterden's reasoning in awarding compensation to such a tenant<sup>148</sup> under the Hungerford Market Act<sup>149</sup> is capable of wide applica-

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<sup>148</sup> *Ex Parte Farlow*, 2 B. & Ad. 341 (K. B. 1831). *King v. Hungerford Market Co. (Ex Parte Still)*, 4 B. & Ad. 592 (K. B. 1833). *Accord*, as to tenant ousted at expiration of fixed term, *King v. Hungerford Market Co. (Ex Parte Gosling)*, 4 B. & Ad. 596 (K. B. 1833).

<sup>149</sup> *Loc. & Pers. Pub. Acts* 11 GEO. IV c. 70 (1830). The language of this statute differs from the American constitutional provisions. In § 19 it specifically includes tenants at will and occupiers among those entitled to compensation, and provides, *inter alia*, for the payment of compensation to any person who "shall or may sustain or be put unto any loss, damage, or injury, in respect of any interest whatsoever, for good-will, improvements, tenant's fixtures, or otherwise, which they may now enjoy by reason of the passing of this Act." From a legal relations standpoint it is believed that these differences, except as to the reference to occupiers (who, as such, probably would not have any legal relations which otherwise

tion. He said:

"Now it seems perfectly clear that if this act had not passed, the tenants and occupiers would not have been all dispossessed, as they will be under the act. It is said 'the interest which they now enjoy' must be taken to mean a legal interest, and that all legal interest was determined by the notice to quit. But I think this is not the fair meaning of the words, and that they must be understood as signifying that sort of right which an occupier ordinarily has, of parting with his tenancy to another person for such sum as he may be induced to give for goodwill, fixtures, and improvements, and which is often very considerable though the tenancy be only from year to year, where there is a confidence that it will not be put an end to. This interest, feeble as it may be (since it is always determinable at a short notice), may justly be considered as matter of value to the owner, and to any other party who becomes the purchaser.<sup>150</sup>

In a Maryland case a tenant who had had a number of successive leases, each for a term of one year, was awarded compensation for loss of the possibility of renewal. Mr. Justice Bryan said:

"The evidence tended to show that Rice's brickyard, though held by a precarious tenure, had a large market value. A thing is worth what it can be sold for. If Rice's interest would sell

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properly could be recognized in such proceedings), are immaterial. The learned justices stressed the inclusion of the term "good-will." See *Ex Parte Farlow*, *supra* note 148, at 347. The reporters, at 349, have attached a note in regard to another case where the tenant held "on an agreement for one year certain from Michaelmas 1822, with liberty to the landlord afterwards to determine the tenancy in any year at three months' notice, and with a stipulation also that the tenant should not underlet or give up possession of the premises without leave in writing. The Court was of opinion that these conditions of holding, especially the last, essentially distinguished this case from the preceding . . ." In a note to *King v. Hungerford Market Co. (Ex Parte Still)*, *supra* note 148, at 595, the reporters state, as to the interest of the tenants in the three cases cited *supra* note 148: "Such an interest, it may be presumed, would be too slight and precarious to be noticed at law or in equity, if it were not upheld . . . by conclusive words in an Act of Parliament." In a case under another statute, the Liverpool and Manchester Railway Act, Loc. & Pers. Pub. Acts 7 GEO. IV c. 49 § 47 (1826), where the term "good-will" was omitted, a distinction was made upon that ground, and compensation denied to a tenant for a fixed term ousted at the expiration of his term, the condemning authority having taken a deed from the reversioner. The tenant was said to have "merely a hope of renewal on the old terms, which, if there has been an improvement, were not likely to be granted, where there would have been a competition." Lord Denman, in *King v. Liverpool and Manchester Ry.*, 4 Ad. & E. 650, 656 (K. B. 1836). This result was reached, although the act included occupiers, and provided for compensation for "detriment, injury, damage, loss, inconvenience, or prejudice."

<sup>150</sup> *Ex Parte Farlow*, *supra* note 148, at 345.



for \$4,000, it is worth \$4,000, and the destruction of it would injure him to that extent. It would be confiscation, pure and simple, to take it from him without paying him its value. It is not a question of the permanency of his title to real estate, but of the salable value of such interest as he had. . . . The jury had a right to consider the probability of a renewal of Rice's term, because the evidence tended to show that this circumstance increased its market value."<sup>151</sup>

The Supreme Judicial Court of Massachusetts expressly refused to follow this case. Mr. Chief Justice Holmes said, referring to the facts of the case he was then deciding:

"It appeared that the owners had been in the habit of renewing the petitioners' lease from time to time, and an attempt was made to give this fact the aspect of an English customary right. The evidence merely showed that the landlords and the tenants were mutually satisfied and were likely to keep on together. It added nothing except by way of corroboration to the testimony that they both intended to keep on. Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. For as under the statutes the land was to be valued as a whole, and then the amount subdivided (St. 1896, c. 516, sec. 23; Pub. St. c. 112, secs. 95, 100, 107; Id., c. 49, secs. 18, 22, 25), the view opposite to ours would allow the tenants to diminish the share of the landowners on the strength of the latter having entertained an intention which they were free to change if they chose."<sup>152</sup>

<sup>151</sup> *Mayor of Baltimore v. Rice*, 73 Md. 307, 311, 21 Atl. 181, 182 (1891). The landlords' agent testified that the land in question was part of a larger tract which had been leased to numerous tenants in this way for half a century. The owners derived large revenues from such leases, and never removed a tenant who paid his rent promptly. A number of the tenants had erected expensive improvements, and the agent testified that he had no doubt that the expectation of a renewal added largely to the market value of their interests.

Under a Canadian statute the possibility of securing renewal of a lease has been taken into consideration in assessing damages. *McGoldrick v. King*, 8 Can. Exch. 169 (1902). Likewise, under a statute, in condemnation proceedings against a hotel, possibility of securing renewal of the liquor license has been taken into consideration. *In re Cavanagh and Canada Atlantic Ry.*, 14 Ont. L. R. 523, 529 (1907).

<sup>152</sup> *Emery v. Boston Terminal Co.*, 178 Mass. 172, 185, 59 N. E. 763, 765 (1901). The case involved the taking of a wharf. At the time possession was taken, the tenants were in under a lease for a fixed term. It was held that evidence was correctly excluded which would, at most, have proved an arrangement for the tenants to hold at will beyond the expiration of the term.

Under the terminology suggested by Hohfeld, the tenants in this case had beneficial liabilities<sup>153</sup> to have created in each of them, at the expiration of the existing term, the group of legal relations constituting the position of tenant for a future term. The landlords had correlative powers<sup>154</sup> to bring these legal relations into existence. These powers and liabilities were destroyed by the condemnation proceedings. This was done without regard to the volition of the individuals concerned, and if they thereby sustained substantial loss, the social policy of eminent domain proceedings required that they receive compensation. In making practical adjustments of such matters, in the absence of relevant evidence it could well be assumed that neither landlord nor tenant would enter into a lease upon an improvident basis, in accordance with what the court or jury might conceive to be their respective standpoints. But the best evidence as to what they would do is what they have done in the past, and in a case involving a tenant who is in possession, this evidence will ordinarily be present. Assuming similar conditions, this should govern the determination of the amount of their respective losses, and any opinion of court or jury as to the improvidence of either would be irrelevant. It seems that a court would have no hesitation in thus adjusting a situation involving interruption of a lease during its term. In such a situation the extent of the losses of the landlord and tenant will depend upon the nature of the contract between them, and it is clear that their respective shares of the compensation should be apportioned accordingly.

Using a different method of approach, when a possibility of renewal of a lease is destroyed, a court should not feel compelled by juristic necessity to refuse compensation to the tenant. It will not be questioned that a landlord and tenant have a right that third parties shall not interfere, by duress or other wrongful acts, with the future course of their mutual dealings. While there is no element of wrongdoing in instituting eminent domain proceedings, nevertheless it is a question of policy whether society should not recognize in the tenant a right not to be interfered with by such proceedings, so that, in case of invasion of the right, he will be entitled to compensation. It is simply a question whether an attempt should be made to compensate him for an actual loss sustained in that way.

It is stated, in the opinion quoted, that the Massachusetts statutes require that the land be valued as a whole, and the amount divided among the various claimants. Interpreting the statutes from a legal relations standpoint, in referring to land<sup>155</sup>

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<sup>153</sup> HOHFELD, *op. cit. supra* note 1, at 36, 58.

<sup>154</sup> *Ibid.* 50.

<sup>155</sup> While the distinction is not material in the present connection, from

they do not refer to the physical earth, but to the legal relations which sufficiently involve the enjoyment of certain physical earth so as to be cognizable in the statutory proceedings. A determination as to where to draw the line, as to what legal relations should be so recognized, should be made upon considerations of social policy, tempered by the requirements of expediency. The suggestion that an award to the tenant will necessarily diminish that to the landlord, has already been considered. It may be granted that the general attitude of the courts, both English and American, is such as to justify the conclusion that on legalistic grounds they will refuse to grant the tenant relief in this connection.

The value of land, and of most other objects of value, is based almost entirely upon unenforceable expectations in regard to the conduct of other persons.<sup>156</sup> When the courts, in any connection, arbitrarily refuse to consider such expectations, they are closing their eyes to the most important facts of economic existence. The question has often been asked, how much good a million dollars would do a person upon a desert island. The problem of the effect of expectations upon value was presented in concrete form in a case in which the damages caused by the abolition of a grade crossing were being assessed. It was urged that in determining the value of the petitioners' land its proximity to railroad facilities could not be taken into consideration, as the petitioners had no right to compel their continuance. Mr. Justice Loring, of the Supreme Judicial Court of Massachusetts, anticipating in 1901 the work of the behaviourists, said:

"If the respondent were right in its contention that this fact could not be considered because the petitioners had no legal right to have the spur tracks continue, the fact that a lot of land is in the business portion of a city or town in place of in the residential or other less valuable portion of it, could not be taken into consideration in determining its market value; the owner of a lot of land in the business centre of a city has no legal right to have the business of the city done in that neighborhood; but the fact that it is done there, and is likely to continue to be done there, is a fact which affects the market value of the land."<sup>157</sup>

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a legal relations standpoint a statute referring to "land" presents a different problem from that arising under a constitutional provision that "property" shall not be taken. Such a statute requires that the legal relations involved have a reasonably close connection with the enjoyment of physical earth. The constitutional provision is not so limited.

<sup>156</sup> "Market value" represents a "series of annual incomes capitalized into a fund of value." ELY AND MOREHOUSE, *ELEMENTS OF LAND ECONOMICS* (1924) 241.

<sup>157</sup> *New York, N. H. & H. R. R. v. Blacker*, 178 Mass. 386, 390, 59 N. E. 1020, 1021 (1901).

Under a physical conception of the process involved in eminent domain proceedings, when part of a tract of land is physically appropriated the owner may recover the amount of the damage to the remainder of the tract, even though there could have been no recovery for such damage, standing by itself.<sup>158</sup> The distinction thus based upon the taking of a part of the tract is made because of the necessity that is felt that some sort of a physical appropriation be found to constitute a taking. This requirement having been satisfied, all the damages sustained are awarded, and no difficulty is felt because of the source of any portion of the loss. The entire amount of the damages is thought of as being damage because of the taking. There seems to be no justification for the distinction, other than legalistic, unless as a protection against the assertion of fictitious claims. The slight effect in that regard does not seem to be sufficient to justify the discrimination between two classes of citizens. If the problems of eminent domain proceedings are approached from a legal relations standpoint, there is no necessity for the distinction, and, in fact, it is entirely meaningless.<sup>159</sup> From this standpoint, as has been suggested, any assessment of damages is a measurement of the extent of property.

Under a physical conception of the eminent domain process, the total amount of the compensation paid the owners of various estates in a single *res* must necessarily equal the total value of the *res*, standing as a unit in a single fee simple estate. From a physical standpoint the law has no concern with the existence of various estates. If the value of the *res* is assessed and paid, the damages have equalled the extent of the taking, and that amount must be divided among the owners of the various interests. From a legal relations viewpoint, the situation of each individual involved must be separately examined, and the total compensation paid may or may not be more than the value of the land, held as a single fee simple estate. It was said, in a Massachusetts case, that the relations among themselves of those having various estates in the same tract of land could not be taken into consideration, upon the ground that contracts between the owners of the various interests could not be permitted to "affect the right of the government to take the land for the public use, or oblige it to pay by way of compensation more than the entire value of the

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<sup>158</sup> 2 LEWIS, 1176; 2 NICHOLS, 721, 852, 896. Various tracts owned by the same owner are treated as separate tracts for purposes of the distinction. 2 LEWIS, 1207; 2 NICHOLS, 737.

<sup>159</sup> The distinction is criticized in *County Court of Marion Co., W. Va. v. United States*, 53 Ct. Cl. 120, 139 (1918), and *Queen v. Essex*, 17 Q. B. D. 447, 452 (1886), *rev'd, sub. nom. Cowper Essex v. Local Board for Action*, 14 App. Cas. 153 (1889), and questioned by Mr. Justice Holmes in *Lincoln v. Commonwealth*, 164 Mass. 368, 375, 41 N. E. 489, 490 (1895).

land as a whole."<sup>160</sup> The physical viewpoint is apparent. In another case, in the same court, it was admitted that the sum of the market worth of the various interests, valued separately, might exceed the market value of the entire interest in the land, considered as one estate.<sup>161</sup> It was said that it did not follow that it was unjust to the owners of the various interests to use the latter method of computation. No reason for this conclusion was given, but it follows naturally from the use of a physical concept.

In a third case,<sup>162</sup> in the same court, the facts were reversed, and the value of the land as a whole was greater than the actual damage to the owners of the various interests. Land was being condemned for street purposes which was already subject to a private easement of way, light, and air in favor of one of the parties to the proceeding. It was agreed that if the land was to be regarded as though held in a fee simple estate by a single owner it was worth \$60,000, but that the damages actually caused the parties were only \$5,000. The court seized upon the fact that the statute under which the later proceedings were had provided for compensation for the "damages sustained by the owners," and awarded the smaller sum. From the standpoint of adjustment of the legal relations involved, this result is correct, but consistency would have required a holding that what had been taken was an entire single estate in the land, and that, regardless of the provisions of the statute, the constitutional provision in regard to the taking of property required compensation for that estate. The decision was affirmed by the Supreme Court of the United States. Mr. Justice Holmes said:

"The only question to be considered is whether when a man's land is taken he is entitled, by the Fourteenth Amendment to recover more than the value of it as it stood at the time. . . . It is true that the mere mode of occupation does not necessarily limit the right of an owner's recovery. [citing cases] But the Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is

<sup>160</sup> Mr. Chief Justice Gray, in *Burt v. Merchants' Insurance Co.*, 115 Mass. 1, 15 (1874). In the view which the court took of the case, the statement quoted was *dictum*. The case was a condemnation proceeding instituted by the United States in the name of an agent. The same statement was quoted as *dictum* in *Cornell-Andrews Smelting Co. v. Boston & P. R. Corp.*, 209 Mass. 298, 305, 95 N. E. 887, 890 (1911).

<sup>161</sup> *Edmands v. Boston*, 108 Mass. 535, 549 (1871).

<sup>162</sup> *Boston Chamber of Commerce v. City of Boston*, 195 Mass. 338, 81 N. E. 244 (1907), *aff'd, cit. supra* note 26.

what has the owner lost, not what has the taker gained.<sup>163</sup> We regard it as entirely plain that the petitioners were not entitled as matter of law to have the damages estimated as if the land was the sole property of one owner. . . ." <sup>164</sup>

This reasoning, applied consistently, would seem upon constitutional grounds to prevent use of the value of the land as a single estate to limit the compensation paid the owners of the various interests.<sup>165</sup>

In a case involving a ground rent, Mr. Justice Boyd, of the Court of Appeals of Maryland, recognized that in order to do justice to all the parties concerned, it would sometimes be necessary to make exceptions to the general rule of valuing the land as a single estate and then dividing the proceeds. He said:

" . . . We are . . . of the opinion that owing to the peculiar character of this class of property, if it be proven that the reversioner's interest was worth \$10,000 and the leaseholder's \$52,500, the latter sum could be allowed, although the whole property, if no ground rent had been on it, would only have been worth \$60,000. We say that because each is entitled under the Constitution to be compensated in damages for the amount of his interest taken, and, if it be true that the values of the two interests are more than what the lots would be worth, if owned by one person, the necessities of the case require an apparent exception to the general rule announced above as to what the condemning party must pay. . . . Indeed when a piece of property which is subject to an ordinary lease for a short term is taken, it may happen that although the owner of the fee is allowed full value for the property, the tenant must also be paid a large and substantial amount in addition, by reason of the value of his lease." <sup>166</sup>

When condemnation of land necessitates removal or discontinuance of a business which has been conducted upon it, elements of damage such as loss of profits, destruction of good will or going concern values, or expenses of removal, are frequently present. The speculative character of the losses often is such as to justify, upon practical grounds, a refusal to attempt to assess the damages. The decision as to whether compensation should be made generally has been reached, however, upon purely legal-

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<sup>163</sup> This is the usual method of approach. Hale, *Value to the Taker in Condemnation Cases* (1931) 31 COL. L. REV. 1. This article discusses the interesting question whether special value of the premises to the taker can be permitted to affect the market value, as determined for purposes of compensation. *Ibid.* 10.

<sup>164</sup> *Boston Chamber of Commerce v. City of Boston*, *supra* note 26, at 194, 30 Sup. Ct. at 460.

<sup>165</sup> Cf. cases discussed in 2 LEWIS, 1253, and 1 NICHOLS, 707, 709.

<sup>166</sup> *Mayor of City of Baltimore v. Latrobe*, 101 Md. 621, 631, 61 Atl. 203, 206 (1905); see *State v. Hall*, 28 S. W. (2d) 80, 82 (Mo. 1930).

istic grounds, with a physical conception of the eminent domain process in mind.<sup>167</sup> Thus, Mr. Justice Brandeis has said:

"There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of lands."<sup>168</sup>

In another case compensation for business losses was refused, although a statute provided for compensation for "all damages that may be sustained," as it was reasoned that the petitioners were claiming only as landholders suffering from the taking of a portion of their land.<sup>169</sup> From the standpoint of the legal relations involved, in all cases of business losses there has been violation of the right of the one owning or leasing the land, and conducting the business thereon, not to be disturbed in his occupancy of the premises, and to the extent that such right has been violated his property has been taken. Mr. Justice John B. Gibson, before he became Chief Justice, based a refusal of compensation in such a case upon the ground that such losses are "only collateral to the assuming of the rights of the citizen."<sup>170</sup> In reply to the cases denying compensation for loss of profits, it has been well said:

"By changing the words of Lord Coke from 'What is property but the use thereof' into 'What is business but the profits therefrom,' the contention that the business is not taken or damaged appears to be answered. Nothing could be more absurd than to say that a retail grocery business forced through eminent domain proceedings to leave the community wherein each and every one of its customers resided, is not taken or damaged."<sup>171</sup>

In a case refusing compensation for expenses of removal, the interesting suggestion is made that: "As the title to all property is held subject to the implied condition that it must be surren-

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<sup>167</sup> Compensation generally has been denied. As to profits: 2 LEWIS, 1271; 1 NICHOLS, 698; 2 *ibid.* 1170, 1173. As to good will: 2 LEWIS, 1276; 1 NICHOLS, 366, 685, 698. As to expenses of removal: 2 LEWIS, 1274, 1277; 1 NICHOLS, 697. *Contra*, as to going concern values: 1 NICHOLS, 685; *semble, ibid.* 665; 2 LEWIS, 1176, 1228.

The English view is more liberal, and allows compensation for all the items mentioned. 6 HALSBURY, 36.

<sup>168</sup> *Mitchell v. United States*, *supra* note 82, at 345, 45 Sup. Ct. at 204. In this case the flooding of land for reservoir purposes necessitated the sale of cattle.

<sup>169</sup> *Mr. Chief Justice Shaw, in Boston and Worcester R.R. v. Old Colony R. R.*, 12 Cush. (66 Mass.) 605, 611 (1853).

<sup>170</sup> *Schuylkill Navigation Co. v. Thoburn*, 7 Serg. & R. 411, 422 (Pa. 1821). This is the great leading case in this connection.

<sup>171</sup> (1916) 4 CALIF. L. REV. 248, 249.

dered whenever the public interest requires it, the inconvenience and expense incident to the surrender of possession are not elements to be considered in determining the damages to which the owner is entitled."<sup>172</sup> The implication of such a condition, without any consideration of the practical aspects of the situation, is a highly legalistic method of solution of the problem. If such a condition is to be implied, presumably as a part of the social compact, it would seem that the court might well imply a like condition that the fee simple title is held subject to the existence of necessity for its surrender when required for the public welfare, and thus avoid the payment of compensation altogether.<sup>173</sup>

It is neither necessary nor desirable that legalistic considerations have any place in connection with the awarding of compensation in eminent domain proceedings. Considerations of policy should control. If from the standpoint of policy it is desirable that a citizen have compensation, there should be no hesitation, under constitutional provisions, in awarding it to him. The legal relations of an individual cover every aspect of his existence, and when there is violation of these relations his property is taken.<sup>174</sup> Manifestly, it is not practicable for society to compensate the individual for every such consequence of condemnation proceedings, any more than it is feasible for the courts to take into consideration the remote consequences of torts or other occurrences. The problem is one of practical expediency. The judicial experiences in the administration of eminent domain proceedings indicate that it is important that the problem be recognized, in this field as elsewhere, as one of drawing the line

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<sup>172</sup> Mr. Justice Clark, in *Ranlet v. Concord R.R.*, 62 N. H. 561, 564 (1883).

<sup>173</sup> In *State v. Dawson*, 3 Hill (21 S. C.) 100, 102, 104-105 (1836), it was suggested that in every grant of land by the state there was an implied reservation that land and timber and other materials might be taken for road purposes. The authority to take land is discussed at length in *Lindsay v. East Bay Street Com'rs*, 2 Bay (2 S. C.) 38 (1796). In *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 52, 29 Sup. Ct. 192, 200 (1909), where a public utility was itself condemned, Mr. Justice Peckham put the refusal of compensation for loss of "good will" values upon the ground that in the case of monopolistic public utilities any question of "good will" is irrelevant. This reasoning would undoubtedly strike a responsive chord in the minds of many consumers, and does not seem to be open to criticism.

<sup>174</sup> "If the railway encroaches in any degree upon the plaintiff's proprietary rights, then it is clear that the constitutional inhibition, which forbids the taking of private property for public use 'without just compensation,' applies to the case." Mr. Justice Selden, in *Williams v. New York Central R.R.*, 16 N. Y. 97, 100 (1857). The case involved an added burden on a highway.

For an interesting comparative study of extensive interference with legal relations without compensation, see Barker, *New Laws and Nationalism in Mexico* (1927) 5 FOREIGN AFFAIRS 589.



between proximate and remote consequences.<sup>175</sup>

It may be suggested that in all fields of thought the early, simple concepts are of a physical character, and that advance is made to concepts of a more abstract nature. Such a change may be regarded as inevitable as more complicated problems are solved or old problems are given more delicately adjusted solutions. It may be suggested that the history of both the physical and the social sciences evidences such development.<sup>176</sup> Whether the general suggestion be justified or not, it is believed that the thought is pertinent as applied to the field of eminent domain and the accomplishment of the social purpose therein involved.

<sup>175</sup> It is sometimes stated that the principles of the general law of damages apply to acts done under the power of eminent domain. *Peel v. City of Atlanta*, 85 Ga. 138, 140, 11 S. E. 582, 583 (1890); *Austin v. Augusta Terminal Ry.*, *supra* note 129, at 674, 34 S. E. at 853; *Rigney v. City of Chicago*, *supra* note 126, at 81; *O'Brien v. City of St. Paul*, 25 Minn. 331, 334 (1878); *Stuhl v. Great Northern Ry.*, *supra* note 129, at 161, 161 N. W., at 502; *In re Hull*, 163 Minn. 439, 453, 204 N. W. 534, 539 (1925); *Indian Creek Drainage Dist. No. 1 v. Garrott*, 123 Miss. 301, 321, 85 So. 312, 319 (1920); *Thompson v. Androscoggin Co.*, *supra* note 97, at 554; *Columbia Delaware Bridge Co. v. Geisse*, 55 N. J. L. 558, 563 (1871); *Staton v. Norfolk & Carolina R.R.*, *supra* note 11, at 288, 16 S. E. at 184; *Hyde v. Minnesota, Dakota & Pacific Ry.*, *supra* note 138, at 235, 136 N. W. at 98; *G. C. & S. F. Ry. v. Fuller*, 63 Tex. 467, 471 (1885); *Lambert v. Norfolk*, *supra* note 129, at 259, 61 S. E. at 778; *Smith v. St. Paul, Minneapolis & M. Ry.*, 39 Wash. 355, 360, 81 Pac. 840, 842 (1905); 6 HALSBURY, 44, 49; 1 LEWIS, 57, 444.

At other times it is stated that in eminent domain proceedings compensation will be granted for elements of loss for which no damages would be awarded in actions between private parties. *Lake Erie & Western R.R. v. Scott*, 132 Ill. 429, 436, 24 N. E. 78, 80 (1890); *Des Moines Wet Wash Laundry v. Des Moines*, 197 Ia. 1082, 1090, 198 N. W. 486, 490 (1924); *Woodbury v. Inhabitants of Beverly*, 153 Mass. 245, 247, 26 N. E. 851, 852 (1891); *Harmon v. Omaha*, 17 Neb. 548, 550 (1885); *Tidewater Ry. v. Shartzer*, 107 Va. 562, 567, 59 S. E. 407, 409 (1907); 2 NICHOLS, 853, 855.

<sup>176</sup> COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* (1924) 3-60 *passim*, 165, 181, 184-191, 199, 211, 238, 247, 264, 274, 282, 314-320 *passim*, 374; Cook, *Scientific Method and the Law* (1927) 13 A. B. A. J. 303.

#### APPENDIX A.

Cases, not elsewhere cited, indicating the use of a physical conception of the eminent domain process. *Green v. Swift*, 47 Cal. 536, 541 (1874); *Bradley v. New York & N. H. R.R.*, 21 Conn. 294, 309 (1851); *Woodruff v. Catlin*, 54 Conn. 277, 295, 6 Atl. 849, 854 (1886); *Opinion of Westcott, J.*, in *Public Works*, 13 Fla. 700, 701 (1871); *Hurt v. City of Atlanta*, 100 Ga. 274, 280, 28 S. E. 65, 68 (1896); *Less v. City of Butte*, 28 Mont. 27, 32, 72 Pac. 140, 141, 61 L. R. A. 601, 602 (1903); *Matter of Hamilton Avenue, Brooklyn*, 14 Barb. 405, 411 (N. Y. Sup. 1852); *Atwater v. Trustees of Village of Canandaigua*, 124 N. Y. 602, 609, 27 N. E. 385, 387 (1891); *Godley v. The City*, 7 Phila. 637, 641 (Pa. 1869); *Salt Lake City v. East Jordan Irr. Co.*, 40 Utah 126, 137, 121 Pac. 592, 596 (1911); *Lund v. Salt Lake County*, 58 Utah 546, 553, 200 Pac. 510, 513 (1921).

## APPENDIX B.

Cases, not elsewhere cited, indicating the use of a legal relations conception of the eminent domain process. *Duckett & Co. v. United States*, 266 U. S. 149, 151, 45 Sup. Ct. 38 (1924); *Associated Pipe Line Co. v. Railroad Commission*, 176 Cal. 518, 528, 169 Pac. 62, 66 (1917); *Tripp v. Overocker*, 7 Colo. 72, 74, 1 Pac. 695, 697 (1883); *Chicago, B. & Q. R.R. v. Public Utilities Commission*, 69 Colo. 275, 279, 193 Pac. 726, 728 (1920); *C. & W. I. R.R. v. E. C. Ry.*, 115 Ill. 375, 385, 4 N. E. 246, 249 (1886); *Evansville and C. R.R. v. Dick*, 9 Ind. 433, 436 (1857); *Kemper v. City of Louisville*, 14 Bush (77 Ky.) 87, 90, 93 (1878); *Lee v. Pembroke Iron Co.*, 57 Me. 481, 484 (1867); *Ashley v. Port Huron*, 35 Mich. 296, 301 (1877); *Pearsall v. Supervisors*, 74 Mich. 558, 561, 42 N. W. 77, 4 L. R. A. 193, 194 (1889); *Adams v. Chicago, B. & N. R.R.*, 39 Minn. 286, 290, 39 N. W. 629, 631 (1888); *Broadwell v. City of Kansas*, 75 Mo. 213, 218 (1881); *Prairie Pipe Line Co. v. Shipp*, 305 Mo. 663, 672, 267 S. W. 647, 649 (1924); *City of Omaha v. Kramer*, 25 Neb. 489, 493, 41 N. W. 295, 296 (1889); *Forster v. Scott*, 136 N. Y. 577, 584, 32 N. E. 976, 977, 18 L. R. A. 543, 547 (1893); *Garvey v. Long Island R.R.*, 159 N. Y. 323, 329, 54 N. E. 57, 58 (1899); *Syracuse Solar Salt Co. v. Rome, W. & O. R. R.*, 43 App. Div. 203, 209, 60 N. Y. Supp. 40, 44 (3rd Dep't. 1899), *aff'd*, 163 N. Y. 650, 61 N. E. 1135 (1901); *Rome, Watertown & O. R.R. v. Gleason*, 42 App. Div. 530, 533, 59 N. Y. Supp. 647, 649 (4th Dep't. 1889); *Gordon v. Village of Silver Creek*, 127 App. Div. 888, 891, 112 N. Y. Supp. 54, 56 (4th Dep't. 1908); *Crawford v. Village of Delaware*, 7 Ohio St. 459, 471 (1857); *Reeves v. Treasurer of Wood Co.*, 8 Ohio St. 333, 346 (1858); *City of Mansfield v. Balliett*, 65 Ohio St. 451, 471, 63 N. E. 86, 92, 58 L. R. A. 628, 635 (1902); *Callen v. Columbus Edison Electric Light Co.*, 66 Ohio St. 166, 175, 64 N. E. 141, 143 (1902); *G. C. & S. F. Ry. Co. v. Fuller*, 63 Tex. 467, 469 (1885); *Stockdale v. Rio Grande Western Ry.*, 28 Utah 201, 211, 77 Pac. 849, 852 (1904); *Foster v. Stafford Nat. Bank*, 57 Vt. 128, 133 (1884); *State v. Superior Court*, 26 Wash. 278, 286, 66 Pac. 385, 388 (1901); *Great Northern Ry. v. State*, 102 Wash. 348, 351, 173 Pac. 40, 42 (1918); *Fruth v. Board of Affairs*, 75 W. Va. 456, 460, 84 S. E. 105, 106, L. R. A. 1915C 981, 983 (1915); *Goodall v. City of Milwaukee*, 5 Wis. 32, 39, 46 (1856); *Janesville v. Carpenter*, 77 Wis. 288, 301, 46 N. W. 128, 132 (1890); *Piper v. Ekern*, 180 Wis. 586, 596, 194 N. W. 159, 162, 34 A. L. R. 32, 38 (1923).