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NOTES

CONDEMNATION OF SLUM LAND—ILLEGAL USE AS A FACTOR REDUCING VALUATION

The number of dwelling units in Chicago in need of major repairs or unfit for use[1] is almost equal to the minimum number of new dwelling units required in that area.[2] The need for extensive slum clearance and redevelopment is thus as great as the need for new housing. Public agencies charged with the task of slum clearance face at the outset many land-acquisition problems. One of these difficulties—expensive, drawn-out, and cumbersome condemnation procedures—

[1] The Chicago Plan Commission estimates this number to be about 75,000. Chicago Plan Commission, Housing Goals for Chicago 62 (1946).

[2] A minimum of 85,000 and a maximum of 118,000 new dwelling units are needed. Chicago Plan Commission, op. cit. supra note 1, at 81.

has recently been discussed.[3] This note will be concerned with another of the "outstanding problems in connection with the redevelopment of blighted areas . . . . the high cost of land acquisition."[4]

A significant factor tending to sustain land values in slum areas is the common disregard for building, health, and sanitation laws, which disregard is manifested in overcrowding within structures in need of substantial improvements and modifications.[5] Capitalization of the profits which result from this combination of increased income through congestion and low maintenance costs gives to the land in such areas a market value far above what such value would be were there effective enforcement of existing sanctions.[6]

It would seem obvious that a public authority should not be required to pay in condemnation proceedings a market price which would be paid by a private purchaser only on the assumption that the building, health, and sanitation regulations would henceforth be no more rigorously enforced than before. The purpose of this note will be to examine the English statutory development in this phase of slum clearance and the American statutory and common law authority which might be available to local courts as guides and precedents, should they desire to remove this bar to effective slum clearance and low cost housing development.[7]

[3] Modernizing Illinois Eminent Domain Procedures, 41 Ill. L. Rev. 82 (1946).

[4] Chicago Plan Commission, op. cit. supra note 1, at 135.

[5] A survey by the Chicago Housing Authority of three blighted areas reports that 83 per cent of the structures surveyed had at least one substandard characteristic, and that the average number of substandard characteristics per structure was 2.36. The substandard characteristics for which each structure was surveyed were: unsafe foundations, walls unsafe or not weather-tight, roof unsafe or not weather-tight, stairs dangerous to life and limb, fire escapes not provided as required by municipal ordinance, stair-well light and ventilation not provided as required by municipal ordinance. Chicago Housing Authority, Final Report and Tabulations on Occupancy Survey of Three Blighted Areas (1946). In 1944, it was reported that in the Negro area 300,000 persons were living in quarters built to house 110,000. Metropolitan Housing Council, The Threat to Public Welfare Entailed by Inadequacy of Present Housing Inspection in Chicago (Dec. 15, 1944).

Relevant sections of the Municipal Code of Chicago are:

§ 39-7. Every building or structure constructed or maintained in violation of any of the building provisions of this code, or which is in an unsanitary condition, or in an unsafe or dangerous condition, or which in any manner endangers the health or safety of any person or persons, is hereby declared to be a public nuisance.

§ 96-13. No owner, lessee, or keeper of any tenement house, lodging house, or boarding house shall cause or allow the same to be overcrowded, or cause or allow so great a number of persons to dwell, be or sleep in any such house, or any portion thereof, as thereby to cause any danger or detriment to health.

[6] "The land costs in blighted areas often amount to five or ten times those in the outlying vacant areas. While it is to be expected that central land costs will be greater in most instances, owing to location and improvements, the aforementioned differential is definitely out of line." Chicago Plan Commission, op. cit. supra note 1, at 135. Another factor tending to sustain such costs is over-zoning, which gives to the land a speculative value unsupported by any reasonably foreseeable use. Public Housing in Illinois, 8 Univ. Chi. L. Rev. 296, 313 (1941).

[7] The discussion is intended to have general application and will not be limited to Illinois. The Chicago statistics are cited to point up the problem and are not meant to indicate that the problem is peculiar to that area.

I

In England, as early as 1879, Parliament modified existing slum clearance legislation by providing that an arbitrator assessing the compensation to be paid for slum land might receive evidence showing that the premises were, by reason of their "unhealthy state, or by reason of overcrowding or otherwise, in such a condition as to have been a nuisance," and to decrease the amount of the award proportionately.[8] This received fuller expression in the Housing of the Working Classes Act of 1890,[9] and ultimately appeared in more abridged form in the Acquisition of Land (Assessment of Compensation) Act of 1919.[10]

The next step was taken in 1919, when Parliament provided, in the Housing, Town Planning, &c. Act, that where land included in a clearance area was acquired compulsorily the compensation to be paid for such land was its value "as a site cleared of buildings and available for development in accordance with the requirements of the building byelaws for the time being in force in the district."[11] The purpose underlying this provision is seen in a comment made at the time:

> It would appear that no compensation is to be paid for the buildings. In that case it will be to the advantage of all interested in the buildings to preserve them from being condemned.[12]

Subsequently it was said: "It is generally agreed that we cannot possibly go back to the old state of affairs, when the compensation allowed was so excessive that it was impossible to carry out schemes for slum clearance except at an exorbitant cost."[13]

The British approach has been adopted relatively recently in New York, where the legislature directed in 1935 that in any proceedings for awarding compensation for the taking of property by eminent domain, evidence should be admissible "bearing upon the unsanitary, unsafe or substandard condition of the premises, or the illegal use thereof," and should be considered in making the award "notwithstanding that no steps to remedy or abate such conditions have been taken by the department or officers having jurisdiction."[14]

[8] An Act to Amend the Artizans and Labourers Dwellings Improvement Act, 42 & 43 Vict., c. 63 (1879).

[9] 53 & 54 Vict., c. 70 (1890).

[10] 9 & 10 Geo. 5, c. 57 (1919).

"2. In assessing compensation, an official arbitrator shall act in accordance with the following rules:

. . . .

(4) Where the value of the land is increased by reason of the use thereof or any of the premises thereon in a manner which could be restrained by any Court, or is contrary to law, or is detrimental to the health of the inmates of the premises or to the public health, the amount of that increase shall not be taken into account."

[11] 9 & 10 Geo. 5, c. 35, § 9 (1) (1919).

[12] Wood, The Law and Practice with Regard to Housing in England and Wales 388 (1921).

[13] Townroe, The Slum Problem 120 (1928).

[14] N.Y. Public Housing Law (McKinney, 1939) § 125 (4e).

II

A study of judicial decisions reveals that a body of common law precedent has developed which supports the principles of valuation codified by the New York and English legislatures. Hence, although legislative action by other jurisdictions might be desirable, it is not essential. The cases supporting these principles fall into three categories: 1) those cases in which the property, the value of which was the subject of litigation, had been put to such use or was in such condition as to violate a law; 2) cases in which compensation was sought for structures illegally maintained or erected, not upon the land of the owner, but upon the public domain; and 3) cases involving the payment of compensation for property part of whose value was attributable to the possibility of its being used in a manner which would be a violation of rights of others.

Illegal use or condition.—An early instance of judicial refusal to recognize that portion of market value attributable to illegal use of the property condemned is *McKinney v. Nashville.*[15] There condemnation proceedings had been instituted by the municipal authorities of Nashville to acquire land on which was situated a saloon. The trial judge had permitted the introduction of evidence tending to show that gambling had been frequently, if not habitually, carried on in one or more of the rooms of the saloon, and that this had inflated the rental value of the property. In regard to this evidence, the judge had said to the jury that if they found that gambling had been carried on in the saloon, and that it did inflate the rental value of the premises, then to the extent of such inflation they might not consider the rent received as indicating either rental or market value. In affirming this judgment on appeal, the court stated:

> We think there is no error in this. Gambling is an offense against the law, and the use of any portion of this property for gambling purposes was in violation of the law. And, if it was true that such illegitimate use did inflate the rental value of this property, then the jury were properly told that a rent, inflated by this use, to the extent of the inflation, could not be taken into consideration as constituting a part of the rental value. It is true that it might be a matter of difficulty to determine where the rental value from a legitimate use ended and that from the illegitimate use began, yet that is the misfortune of the owner, for which the city is not responsible.
>
> In this case, however, we think that there is sufficient evidence to guide the jury, at least approximately, in determining the value of this inflation. It is true it is found largely in the opinion of witnesses, which is necessarily somewhat speculative, but not more so than is ordinarily found as to questions of value.[16]

This principle operated to benefit the property owner in *Lawrence v. Metropolitan Elevated R. Co.*[17] In an action for damages caused by the construction and operation of an elevated railway in the street adjoining his premises, the plaintiff was awarded compensation for the diminution of rents up to the time of

[15] 102 Tenn. 131, 52 S.W. 781 (1899).

[16] McKinney v. Nashville, 102 Tenn. 131, 139, 52 S.W. 781, 783 (1899).

[17] 126 N.Y. 483, 27 N.E. 765 (1891).

trial, and was granted an injunction against the further maintenance and operation of the railway unless the defendant would pay an amount representing the permanent depreciation in the value of the plaintiff's property. The railway company was not allowed to introduce evidence to establish that the plaintiff's tenants used the premises as a house of prostitution and that the elevated railway caused no diminution of the rental value of the property for this purpose. In viewing this aspect of the decision, the court stated:

> The fact that the house had been used as a house of prostitution did not enter as an element into the award of damages, nor could that fact be properly considered. If the plaintiff had sought to enhance the damages on the ground that the rental value of the house as a house of prostitution had been depreciated by the construction of the railway, and the award had been based upon that consideration, the defendants would have had a just ground of complaint.[18]

In re Daly[19] is an early New York decision which refused compensation for value arising from illegal condition. The court did not allow admission of evidence of value given property by a dam thereon because a pond formed by it had previously been declared a nuisance. The owner was allowed for his mill and machinery only their value without water power.

A similar situation is seen in *Joly v. City of Salem*,[20] involving the taking by the city of Salem of certain filled and unfilled tidewater flats. The issue presented was whether the petitioner might increase the amount of his award by showing that a large area of his flats had been filled in without a license, the petitioner merely having permitted the general public to dump filling on his flats. The court pointed out that "such filling was a public nuisance which was subject to abatement unless the flats were filled under a license of the department of public works of this Commonwealth and under a permit from the war department of the United States," and declared: "it is settled, with some possible exceptions, that nothing can be allowed by way of compensation for privileges which the owner of land taken enjoys contrary to law or to public right."[21]

In a case decided in 1906, the Illinois court took a position contrary to that advanced in the cases already discussed. Although the current significance of this case, *Freiberg v. South Side Elevated R. Co.*,[22] is extremely doubtful because of a later decision by that court, it nevertheless merits consideration because of its effective presentation of its position.

In this case the railroad had filed a petition to take a fifteen-foot strip of Freiberg's land by eminent domain. On this land was a building leased as a saloon and dance hall. The railroad had been permitted to introduce evidence

[18] Lawrence v. Metropolitan R. Co., 126 N.Y. 483, 489, 27 N.E. 765, 766 (1891).

[19] 45 App. Div. 622, 61 N.Y. Supp. 480 (1899).

[20] 276 Mass. 297, 177 N.E. 121 (1931).

[21] Joly v. City of Salem, 276 Mass. 297, 302–3, 177 N.E. 121, 123 (1931).

[22] 221 Ill. 508, 77 N.E. 920 (1906).

which tended to show that the saloon and dance hall were conducted without proper license. At the railroad's request the following instruction was given:

> The court instructs the jury to disregard all values given, if any have been given, for the highest and best use of the respondents' property in this case, where such highest and best use may have been unlawful or in violation of the ordinances of the city of Chicago, in evidence in this case.[23]

On appeal, the judgment was reversed. The court declared the expression "highest and best" meant properly "highest and best in a financial sense," whereas counsel for the railroad and the court below had "proceeded on the theory that it meant highest and best from the standpoint of the moralist."[24] The court continued:

> The fact that the value of the property had been increased, in the eyes of possible purchasers, by a business conducted in an unlawful manner in a part of the building by a tenant, either with or without the connivance of the owners, and that the purchaser on that account would regard the property as of greater value, is wholly immaterial. That does not concern the railroad company. . . . . If appellants have been guilty of a violation of the statutes and ordinances, it is not in this suit that the penalties may be inflicted. If these persons offend, they should be prosecuted and punished, but the law governing persons, natural or artificial, who desire to possess themselves of the property of the Freibergs, will not on that account be suspended. This corporation, exercising the power of eminent domain, will not be permitted to take appellants' property from them without making just compensation, even if they have violated the laws both of city and state.[25]

The proposition implicit in this opinion—that value in condemnation proceedings equals the price obtainable from a purchaser willing to take the risk that the non-enforcement of existing law will continue—has been commonly stated in cases in which there appeared no element of illegal use or condition. But even some of these cases have stated that the landowner should be paid "all that the property is reasonably worth for any legitimate purpose for which it could fairly be used,"[26] and that a tract's market value should be estimated upon consideration of "the rental value of the property or of any part thereof for any lawful purpose."[27] Perhaps the decision in the Illinois case can be attributed, in part at least, to lack of diligence on the part of the appellee's counsel, for there was an apparent failure to bring to the court's attention the *McKinney*, *Lawrence*, and *Daly* cases already discussed; the court stating, "We find no authority cited in appellee's brief to sustain the superior court in the position taken by it in this regard."[28]

[23] Freiberg v. South Side Elevated R. Co., 221 Ill. 508, 519, 77 N.E. 920, 924 (1906).

[24] Freiberg v. South Side Elevated R. Co., 221 Ill. 508, 513–14, 77 N.E. 920, 922 (1906).

[25] Freiberg v. South Side Elevated R. Co., 221 Ill. 508, 515–16, 77 N.E. 920, 922–3 (1906).

[26] Adirondack Power & Light Corp. v. Evans, 226 App. Div. 490, 492, 235 N.Y. Supp. 569, 573–74 (1929).

[27] Pumphrey v. State Roads Comm'n, 175 Md. 498, 509, 2 A. 2d 668, 673 (1938).

[28] Freiberg v. South Side Elevated R. Co., 221 Ill. 508, 515–16, 77 N.E. 920, 923 (1906).

A recent Illinois decision, *Department of Public Works and Buildings v. Hubbard*,[29] implicitly overrules the *Freiberg* case. This was a proceeding to assess compensation to be given for land taken for a proposed state highway, and damages to be awarded for injury to land not taken. For part of the proposed highway the land taken consisted of strips only a few feet in width along a highway then existing. On these strips were hedge fences from twenty-five to thirty feet in height, although by statute hedges along a highway were not to be more than five feet high. Of the testimony presented as to the value of these hedges, the court said:

> While it may be said that there was actual value in said hedge as fence posts, in so far as they contained such, it surely cannot be said that the loss of shade, windbreaks, or as nesting places for birds may entitle the owner to damages where such hedge constitutes an unlawful fence.[30]

It has been suggested[31] that cases in which evidence of illegal use or condition is admissible as an element in valuation are departures from the usual rules of valuation under which the property owner is entitled to whatever he might have received by a sale; that they therefore "are to be justified on grounds of policy rather than as findings of fact"; that the courts were faced with a choice "between consistency in the standard of valuation and consistency in adherence to those policies which are expressed in the legal prohibition of particular uses of property," and, having in mind the fact that they used market value only as a measure of "just compensation," chose to prefer "consistency in their concepts of justice and morality to consistency in their standards of valuation."[32] It might better be stated that the courts' notions of the requirements of justice have resulted not in their departing in these cases from their normal requirement that full market value be given, but rather in their modifying and refining their concept of market value as being value to a law-abiding purchaser. At any rate, it is clear that the notion of the Illinois court in the *Freiberg* case as to the meaning of the common constitutional requirements of "just compensation" does not coincide with that of most courts which have considered the matter. Furthermore, one might well question whether the increment of value given a piece of property by the failure of law enforcement authorities to prevent an illegal use of it, abate a nuisance on it, or require that structures on it conform to law, should be regarded as representing "property" at all. Just as a right to break the law is a conceptual impossibility, so one's property in a piece of land, as a bundle of rights, cannot be affected by poor administration of the law; and whatever value may thereby have been added should not be viewed by the

[29] 363 Ill. 99, 1 N.E. 2d 383 (1936).

[30] Dept. of Public Works and Buildings v. Hubbard, 363 Ill. 99, 104, 1 N.E. 2d 383, 385 (1936).

[31] Orgel, Valuation under Eminent Domain (1936).

[32] Ibid., at 107–8.

courts as representing property, within the meaning of constitutional provisions relating to eminent domain.

Encroachment on the public domain.—Although the cases to be found in this category can be explained "rather on grounds of property law than on any theory directly dealing with the standard of value,"[33] it will be seen that courts have emphasized the illegality of the use—just as in the cases in the first category—as well as strict property notions. However, no matter on what theory compensation is denied for value attributable to the encroachment, these cases support the thesis advanced by this note.

A case which points up the similarity of the encroachment and illegal use cases is *Kingsland v. New York.*[34] This was an action for damages instituted against the city of New York's dock department for its having constructed a new bulkhead in front of the plaintiff's wharf, cutting it off from the water and destroying access thereto by solid filling. The plaintiff had built a platform on piles extending out over the water seventy feet from his wharf, and erected a shed on the platform. Permission so to build had been granted by the city; nevertheless, by an earlier statute all structures outside the established bulkhead line were forbidden except piers and bridges connecting such piers with the street. Furthermore, the permission given by the city was by its terms revocable, and the city ultimately directed the removal of the platform and shed before it began to construct its new bulkhead. In this action the referee made an element of his award the value given the plaintiff's wharf by the platform and shed. This was held erroneous on appeal, the court saying that "taking into account an unlawful platform and shed, and the chance of maintaining it unmolested, is giving to the property, as an element of increased value, its convenient situation for violating the law, and capitalizing the existing and expected profits of that violation."[35] The court treated this encroachment case precisely as it would have dealt with an illegal use case of the first group; for it continued:

> The same reasoning might lead to an increase of value in cases much more harmful and reprehensible. Suppose the city, under competent authority, should take a house and lot for the purpose of a part, and destroy the dwelling, and the owner seeking its value shows that, owing to its peculiar location, it can be rented as a house of ill fame, or as a gambling den, for twice the rent obtainable for any lawful purpose, and, when reminded that such uses are illegal, should answer that he had obtained such rental for years, and the city had winked at it, and never once raided his house or enforced the law; that he could have sold for the amount he claimed, the purchaser taking the chance of the blindness of the police or the endurance of the citizens; and that what he could sell for to another in the same business was market value, and market value he should have. We can all see the absurdity of that claim, but not so readily when the illegal use for which value is claimed, is merely illegal, and not also immoral and criminal.[36]

[33] Ibid., at 106.

[34] 110 N.Y. 569, 18 N.E. 435 (1888).

[35] Kingsland v. New York, 110 N.Y. 569, 582, 18 N.E. 435, 439 (1888).

[36] Ibid.

In re Union Depot Street Ry. & Transfer Co. of Stillwater[37] also illustrates an analysis of an alleged pourpresture in terms of illegality rather than property rights. The question before the court was whether a proper valuation had been given land taken for a railway. The court explained that in Minnesota the owner of land bordering on a navigable stream has the fee to low-water mark, and, incident to his ownership, certain riparian rights, including the right to build landings, piers, and wharves extending into the river to the point of navigability. It found no evidence tending to show that land had been reclaimed by the respondents beyond the point of navigability, and therefore decided that compensation in full was due them for their property. But continuing, the court said:

> Suppose however, a riparian owner has unlawfully intruded into the water beyond the point of navigability, as above defined, and filled up the bed of the stream beyond that point for the sole purpose of extending his possessions, and so as to obstruct and interfere with the public right of navigation. This would constitute a pourpresture. . . . . When it is proposed to take his property for public use by the exercise of eminent domain, he can claim no additional compensation by reason of it. When condemned or taken, the corporation who acquired it would presumably have to remove it,—at least, there is no presumption that it would be allowed to remain,—and therefore there is no reason why the party condemning the property should pay more for it on account of his unlawful encroachment upon public rights. The mere chance that it might be allowed to remain, cannot be made the basis of compensation to the person who made it.[38]

Compensation was denied on property theory without reference to illegal use in *Diedrich v. The Northwestern Ry. Co.*,[39] where the issue was whether value need be paid for an embankment built into the lake eighty-five feet from the shore in front of the respondent's land. The court simply declared that this constituted an intrusion upon the public fee in the land beneath the water, that the respondent had failed to establish his title to the "locus in quo," and that he therefore was entitled to no compensation for the taking of his embankment. Similarly, in *United States v. Chandler-Dunbar Water Co.*,[40] the Supreme Court held that as the company had "no vested property right in the water power inherent in the falls and rapids of the river," the government could not be required to pay "any hypothetical additional value"[41] to the company as riparian owner in condemnation proceedings pursuant to a determination of Congress that the entire river be devoted to navigation, which revoked earlier permits to put dams in the river to generate power for commercial purposes.

The decisions are not confined to cases involving encroachments upon the public domain in harbors, lakes, and streams. *In re Pearsall Street in City of New*

[37] 31 Minn. 297, 17 N.W. 626 (1883).

[38] In re Union Depot Street Ry. & Transfer Co. of Stillwater, 31 Minn. 297, 302, 17 N.W. 626, 629 (1883).

[39] 42 Wis. 248 (1877). [40] 229 U.S. 53 (1913).

[41] United States v. Chandler-Dunbar Water Co., 229 U.S. 53, 76 (1913).

York[42] presented the issue of whether compensation need be given for the removal of encroachments upon the public fee in a street. The court here refused any such compensation upon a showing that the deeds to the abutting property carried only to the edge of the street. The same court reached the same conclusion upon substantially identical facts in *In re Hallett and Howland Streets in City of New York*,[43] but added here that the facts indicated an "unlawful encroachment." A case similar to these two is *Harvey v. Lackawanna & Bloomsburg R. Co.*[44] The plaintiff owned a valuable tract of coal land through which a state road ran. Across this road he had extended five tramways leading to his wharves on an adjacent canal. The railroad company, occupying this public highway with its railway, took up the five tramways and provided two crossings in their place. The court said:

> For this alleged injury is his real claim for damages. His being the owner of the soil does not give him any more right over the highway, or the passage along or over it, than any other individual. . . . .
>
> It is clear, therefore, that the placing of these five diagonal tramways across the state road was an unlawful act, and amounted to a nuisance, which the defendants were entirely justified in abating, and that therefore no damages can be claimed by the plaintiff.[45]

Whether the theory of denial of compensation in the encroachment cases is illegal use—a wrong in Hohfeldian language—or lack of property right in that for which compensation is sought—a no-right—the cases in this category are all authority for the proposition that compensation should not be allowed in slum-clearance condemnation proceedings for exploitation value. Compensation for that part of slum-property value which can be attributable to capitalization of high profits realized through violation of health, sanitation, and building laws can be denied on either of these theories. The illegal use theory would follow the reasoning illustrated by the cases in the first category; the property theory would hold that the owner of the exploited property would have no property right in that part of value attributable to illegal use, and hence would be entitled to no compensation since there would be no taking of property for which there is a constitutional requirement for compensation. Although the two approaches are in reality but one, it must be recognized that the distinction has been made in the decisions. It is only indicated here that a desirable result should not fail for want of the proper conceptual gimmick.

Violation of civil rights of others.—In these cases compensation has been asked for value which property has by virtue of a possible use, where such use would directly or indirectly violate the civil rights of third parties. A case of this type is *Burke v. Sanitary District of Chicago.*[46] Here the appellants had sought to show

[42] 135 N.Y. Supp. 763 (Sup. Ct., 1912).

[43] 135 N.Y. Supp. 828 (Sup. Ct., 1912).

[44] 47 Pa. 428 (1864).

[45] Harvey v. Lackawanna & Bloomsburg R. Co., 47 Pa. 428, 436, 437 (1864).

[46] 152 Ill. 125, 38 N.E. 670 (1894).

that the value of their land would be increased, were dikes erected to prevent its being inundated periodically by the overflow of the adjacent Des Plaines river. But as other evidence tended to show that this would cause the water to flood the land of others, the court below had instructed the jury that if they believed such a result would follow, they were to exclude from their consideration everything pertaining to the question of diking. This ruling was upheld on appeal, the court declaring:

> As the respondents, then, had no legal right to improve their land by erecting dikes thereon in such manner as to flood the lands of others, it would seem to follow, necessarily and logically, that the value of their land, as affected by its capability of improvement in that manner, was not a proper matter for the consideration of the jury, in assessing their compensation. This is only an application of the familiar legal maxim that no person will be allowed to take advantage or profit by his own wrong.[47]

Another case within this group is *Castle Heights Water Co. v. Price*.[48] The appellants contended that the commissioners who had valued the land taken by the water company had ignored its true water capacity, for although the supply the tract by itself might provide was not very great, yet a substantially larger amount might be drawn from surrounding land by machinery installed on that tract. On appeal it was held that the conclusion of the commissioners would not be disturbed as they had not erred in their theory of the award. The court stated:

> The water company, perforce of its ownership of these 8 acres of wet bog land, could not apply its machinery so as to tap the water stored in that land, "and in all the region thereabout, and lead it to its own land, and by merchandising it prevent its return." . . . . And the fact that the water company, or any other person, might actually do this thing, in disregard of the rights of third persons, should not be taken into consideration.[49]

Portland & Seattle Ry. Co. v. Ladd[50] was a condemnation suit in which the railroad sought to obtain a strip of the appellants' land lying at the base of a large rock and between that rock and a river. This rock had considerable value as a stone quarry, but to use it for that purpose would involve blasting down portions of that rock which would fall upon the land below, some of which was already owned by the railroad. If this would occur, the lower court told the jury, all the evidence of the rock's value as a quarry had to be disregarded, as it was the appellants' duty to avoid committing such a trespass upon land the railroad then owned, and they could not claim that it was the railroad's taking additional land which prevented their quarrying stone. On appeal the judgment was affirmed, the court saying:

[47] Burke v. Sanitary District of Chicago, 152 Ill. 125, 133, 38 N.E. 670, 672 (1894).

[48] 178 App. Div. 687, 165 N.Y. Supp. 816 (1917).

[49] Castle Heights Water Co. v. Price, 178 App. Div. 687, 689, 165 N.Y. Supp. 816, 818 (1917).

[50] 47 Wash. 88, 91 Pac. 573 (1907).

It requires no argument to show that, if appellants' property was so situated that it could not be utilized without injury to others, its use would not be permitted at all; and if the value of appellants' property was dependent upon other property which they did not own and could not acquire, then, as shown by the appellants themselves, the property had no value, and, of course, was not damaged. We think the instruction was proper in this case.[51]

The analogy of these cases to the central theme of this note is the similarity between the position of the tenants whose rights would be affected if building, health, and sanitation violations would continue in the future and the third parties whose rights were given implicit protection in the cases in this category. For a purchaser would pay the value attributable to illegal use only on the premise that such illegal use could continue unabated. Certainly, a tenant has the same right to have the condition of the premises which he occupies bear a reasonable relation to the rent he pays as the unknown third parties in the *Ladd* case had not to have rocks thrown on them.

If an effective slum clearance and redevelopment program is to be carried on, one of the outstanding problems to be met is the high cost of land acquisition. A significant factor tending to maintain such costs is the disregard for building, health, and sanitation laws; the combination of over-crowding and low maintenance costs increases profits whose capitalized value gives to the property a value far above what such value would be were there effective law enforcement. The significance of this factor is indicated by the action of the English and New York legislatures in prohibiting compensation in condemnation proceedings for value attributable to illegal use. There is sufficient common law authority to justify courts in arriving at the same result without specific statutory help.

LANDLORD AND TENANT AFTER OPA

Federal control of the landlord-tenant relationship under the Emergency Price Control Act of 1942[1] is at best a stop-gap. Its purpose is to supplement state statutes and common-law rules clearly inadequate for dealing with a housing shortage greatly aggravated by mobilization for war.[2] In view of the rapid termination of other emergency measures and the continuing attack on OPA, it is timely and important to anticipate what effect the end of rent and eviction controls will have on the landlord-tenant relationship. Inevitably, the nature of that relationship is itself somewhat obscure, for the more common types of

[51] Portland & Seattle Ry. Co. v. Ladd, 47 Wash. 88, 95, 91 Pac. 573, 576 (1907).

[1] 56 Stat. 25 (1942), as amended 57 Stat. 566 (1943), 58 Stat. 633 (1944), 59 Stat. 306 (1945), 50 U.S.C.A. § 902(b) (1944).

[2] See Borders, Emergency Rent Control, 9 Law & Contemp. Prob. 107 (1942) for a discussion of the relocation of population, the motivations therefor, and the effect of such relocation in creating inflationary rent increases of considerable magnitude.