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## Condemnation Procedure - An Argument for Reform

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## CONDEMNATION PROCEDURE—AN ARGUMENT FOR REFORM†

"A learned study in 1931 reported that [within the United States] there were 269 different methods of judicial condemnation in different classes of cases, and 56 methods of nonjudicial or administrative procedure. Certainly the number has not decreased since that time."<sup>1</sup> This plethora of procedure has understandable origins. Such was the influence of early corporation law that, in response to the land acquisition needs of private and municipal corporations, the state devised methods geared to the demands of the particular condemner.<sup>2</sup> The continued existence of these methods, without needed change,<sup>3</sup> may be ascribed to several factors—the public remains largely unaffected;<sup>4</sup> the intricacies of condemnation practice combine with sheer volume to confound bar and civic organizations;<sup>5</sup> inertia exists among those groups particularly qualified to cope with the problem.<sup>6</sup> The result is that procedure, no less important than the substantive law, has not in fact kept pace with substantive law developments.<sup>7</sup> Indeed one author characterized the situation as "an attempted production of artificial earth satellites with horse-and-buggy technology."<sup>8</sup> At the same time, municipal improvement activities have assumed and will continue to assume stunning proportions.<sup>9</sup> Such activities can only be implemented through condemnation. This comment will explore the procedure within the State of New York, indicate weaknesses, and make suggestions for improvement.

### RIGHT TO CONDEMN

The right to acquire land for public use, an attribute inhering in the sovereign,<sup>10</sup> is restricted only by the constitutional mandates of just compensa-

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† *Editors Note:* Although the present comment is reflective of the views of its authors, it should be noted that the *Fordham Law Review* has been assisting the Committee on Real Property of the Association of the Bar of the City of New York in an investigation of the condemnation laws of New York State.

1. Clark, *The Proposed Condemnation Rule*, 10 *Ohio St. L.J.* 1, 4 (1949).
2. Wasserman, *Procedure in Eminent Domain*, 11 *Mercer L. Rev.* 245, 257 (1960).
3. See, e.g., Panuch, *Building a Better New York 102-03 (1960)* (Final Report to Mayor Robert F. Wagner by the Special Adviser on Housing and Urban Renewal).
4. Goldstein, *Condemnation Procedure in the State of New York*, 17 *N.Y.S.B.A. Bull.* 230 (1945).
5. Wallstein, *Report on Law and Procedure in Condemnation 5 (1932)* (applicable to proceedings brought by the City of New York).
6. *Ibid.*
7. Kratoreil & Harrison, *Eminent Domain—Policy and Concepts*, 42 *Calif. L. Rev.* 596, 604 (1954).
8. Wasserman, *supra* note 2, at 247.
9. In the area of public housing alone, completion of programs now under study will vest in the New York City Housing Authority properties valued at two billion dollars. Panuch, *op. cit. supra* note 3, at 49. See also Searles & Raphael, *Current Trends in the Law of Condemnation*, 27 *Fordham L. Rev.* 529-30 (1959).
10. 11 McQuillan, *Municipal Corporations* § 32.11 (3d ed. 1950). This right can be exercised only if conferred by the legislature expressly or by necessary implication. 1 Lewis, *Eminent Domain* § 371 (3d ed. 1909). Authority by implication, however, is more readily drawn in favor of public than private corporations organized for profit. *Ibid.* See Note, 29 *Fordham L. Rev.* 390 (1960).

tion.<sup>11</sup> The New York Legislature has delegated the authority to condemn to cities,<sup>12</sup> towns,<sup>13</sup> villages,<sup>14</sup> state<sup>15</sup> and municipal agencies,<sup>16</sup> public<sup>17</sup> and certain private corporations<sup>18</sup> which serve a public purpose. Indeed, under limited circumstances, even private citizens may initiate condemnation proceedings,<sup>19</sup> and municipalities are authorized to condemn and sell at public auction.<sup>20</sup> Cities are free to draft their own procedure provided it is consistent with the state constitution and state policy as reflected by statute and judicial interpretation.<sup>21</sup> Not only are the grants of power voluminous, but in many instances the procedure is redundant.<sup>22</sup> Moreover, where procedural steps could be uniform, they differ.<sup>23</sup> This volume of procedure, its prolixity and unnecessary variation, have caused the uninitiated to regard the practice of condemnation law as a science.<sup>24</sup> The field remains the realm of the "specialist."

#### STATUTORY PROCEDURES

The pertinent language of the New York Constitution<sup>25</sup> gives rise to two distinct land acquisition procedures. Condemnation pursuant to administrative proceeding uses the courts only for the purpose of determining compensation, while in the judicial proceeding all questions are determined within the courts.<sup>26</sup>

##### *A. Administrative Proceedings*

Commonly referred to as acquisition by appropriation, the administrative proceeding is in most respects typified by Section 30 of the Highway Law.<sup>27</sup> As therein provided, the superintendent of public works causes a map and descrip-

11. N.Y. Const. art. 1, § 7(a), provides: "Private property shall not be taken for public use without just compensation." North Carolina appears to be the only state without such a provision. 11 McQuillan, *op. cit. supra* note 10, § 32.10. In that state, however, compensation is a mandate of case law. *Phillips v. Postal Tel. Cable Co.*, 130 N.C. 513, 41 S.E. 1022 (1902).

12. N.Y. Gen. City Law § 20(2).

13. N.Y. Town Law § 64(2).

14. N.Y. Village Law § 290.

15. N.Y. Correc. Law § 21; N.Y. H'way Law § 30.

16. N.Y. Rapid Transit Law § 50(a).

17. See, e.g., N.Y. Pub. Auth. Law § 533(4).

18. N.Y. R.R. Law § 17.

19. N.Y. H'way Law § 199.

20. N.Y. Munic. Law § 72-k. See art. 15, N.Y. Munic. Law, added by Sess. Laws 1961, ch. 402, which has recodified the urban renewal sections.

21. N.Y. Const. art. 9, § 12.

22. See, e.g., N.Y. H'way Law §§ 29, 30, 347.

23. See, e.g., N.Y. Correc. Law § 21; N.Y. H'way Law § 30.

24. Wallstein, *op. cit. supra* note 5, at x.

25. N.Y. Const. art. 1, § 7.

26. N.Y. Const. art. 1, § 7(b), provides: "When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the state, shall be ascertained by a jury, or by the supreme court without a jury, but not with a referee other than an official referee, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law."

27. N.Y. H'way Law § 30.

tion to be prepared indicating the property deemed necessary for state highway purposes.<sup>28</sup> After the map and a description of the property is first filed in the office of the department of public works and a certified copy of each is filed with the department of state,<sup>29</sup> the appropriate state agency may enter upon and take possession of the property.<sup>30</sup> Upon the superintendent of public works filing a copy of the map and description with the county clerk or register of the county in which the property is located, title vests in the people of New York.<sup>31</sup> A copy of the description and map is sent to the attorney general, who, in turn, certifies to the superintendent of public works the names of those having an interest in the property. After filing and recording a notice of appropriation in the clerk's office of the county wherein the property is situated, the superintendent serves upon those named a copy of the map and description and notice of appropriation.<sup>32</sup> At or after the vesting of title, the owner may be ejected upon forty days notice.<sup>33</sup> At this point it is well to note that the state may enter upon the property before the owner is given legal notice.<sup>34</sup> The right to notice applies only when the owner has actual, rather than constructive occupancy of the premises.<sup>35</sup> Claims for the value of property appropriated and damages caused thereby may be adjusted by the superintendent. If adjustment fails, the superintendent may agree with the owner to pay sixty per cent of the amount he considers the value of the claim.<sup>36</sup> In the absence of agreement, the owner may, of course, file a claim with the court of claims,<sup>37</sup> each claim being separately tried before a single judge.<sup>38</sup>

The United States Supreme Court has held such procedure not violative of either the fifth<sup>39</sup> or fourteenth<sup>40</sup> amendments, provided adequate compensation is assured. The public faith of the sovereign is deemed such assurance.<sup>41</sup> Unless required by the state constitution, payment is not a condition precedent to the taking of the property.<sup>42</sup> The New York State Constitution imposes no restrictions

28. N.Y. H'way Law § 30(3).

29. N.Y. H'way Law § 30(4).

30. N.Y. H'way Law § 30(5).

31. N.Y. H'way Law § 30(6).

32. N.Y. H'way Law § 30(9).

33. N.Y. H'way Law § 30(12).

34. Goldstein, *supra* note 4, at 233.

35. *Weitzner v. Stichman*, 64 N.Y.S.2d 40 (Sup. Ct.), *rev'd on other grounds*, 271 App. Div. 255, 64 N.Y.S.2d 50, *reargument denied*, 271 App. Div. 774, 64 N.Y.S.2d 926 (1st Dep't 1946), *aff'd mem.*, 296 N.Y. 907, 72 N.E.2d 625 (1947).

36. N.Y. H'way Law § 30(13).

37. N.Y. H'way Law § 30(14).

38. Goldstein, *supra* note 4, at 233.

39. *Crozier v. Krupp*, 244 U.S. 290 (1912).

40. *Bailey v. Anderson*, 326 U.S. 203 (1945); *Sweet v. Rechel*, 159 U.S. 360 (1895).

41. "[T]he duty to provide for payment of compensation may be adequately fulfilled by an assumption on the part of government of the duty to make prompt payment of the ascertained compensation—that is, by the pledge, either expressly or by necessary implication, of the public good faith to that end." *Crozier v. Krupp*, 244 U.S. 290, 305 (1912).

42. *People v. Adirondack Ry.*, 160 N.Y. 225, 54 N.E. 689 (1889), *aff'd*, 176 U.S. 335 (1900). Alabama typifies those jurisdictions in which payment must precede taking. *Ala.*

upon payment and the taking may therefore precede compensation. Nor need the owner be given notice of the acquisition before entry<sup>43</sup> by the state agency. However, if the condemner exceeds his authority, the statute authorizing condemnation affords no protection to the state agent so acting and an injunction will lie.<sup>44</sup>

#### Analysis of Procedure

Legislation providing for acquisition through administrative proceedings is in many instances redundant. Moreover, the variance in procedure has something less than a reasonable basis. The New York Highway Law contains three sections setting forth the entire procedure pursuant to which the superintendent of public works may acquire land by appropriation. When condemning for thruway<sup>45</sup> or national defense purposes,<sup>46</sup> the appropriation procedure is mandatory. Yet, when land is taken for state highways,<sup>47</sup> appropriation is an alternative procedure. In each instance, however, the procedure is the same. The superintendent is also empowered to acquire land for canal<sup>48</sup> and flood control<sup>49</sup> purposes. In both cases the procedure is spelled out and each duplicates the procedure set forth in the Highway Law.

When, however, this officer acquires land for public works,<sup>50</sup> the procedure differs in three aspects, though remaining basically similar. Under the Highway Law, the superintendent serves upon the landowner, in addition to a copy of the map and description, a notice of appropriation. This notice sets forth the dates of the filing of the map and description in the office of the department of state and county clerk. It also informs the owner that title to the interest being acquired vested in the state upon filing in the last mentioned office.<sup>51</sup> The Public Works procedure, on the other hand, requires only that notice of filing of papers be given.<sup>52</sup> That the owner is aware of the full impact of this notice is doubtful at best.

A second variation is contained in the provisions allowing ejection. Statutes corresponding to the Highway Law permit the owner's removal at or after the vesting of title but upon forty days notice.<sup>53</sup> Upon ten days notice to quit, the Public Works procedure permits ejection at or after thirty days from service of

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Const. art. 1, § 23, provides in pertinent part: "[B]ut just compensation shall, in all cases, be first made to the owner." See also *Ex parte Lance*, 267 Ala. 639, 103 So. 2d 753 (1958).

43. Cf. *People v. Adirondack Ry.*, supra note 42, at 237-39, 54 N.E. at 692-93.

44. Although the state is not subject to litigation at the insistence of an individual, sovereign immunity will not cloak the illegality of an official act. The complaint, however, must state a cause of action against the defendants individually. *Pauchogue Land Corp v. Long Island State Park Comm'n*, 243 N.Y. 15, 152 N.E. 451 (1926).

45. N.Y. H'way Law § 347.

46. N.Y. H'way Law § 29.

47. N.Y. H'way Law § 30.

48. N.Y. Canal Law § 40.

49. N.Y. Unconsol. Laws § 1307 (McKinney 1949).

50. N.Y. Unconsol. Laws § 7272(1)-(22) (McKinney 1953) [hereinafter referred to in text as Public Works].

51. N.Y. H'way Law § 30(9).

52. N.Y. Unconsol. Laws § 7272(10) (McKinney 1953).

53. See, e.g., N.Y. Canal Law § 40(11).

map, description and notice of filing.<sup>54</sup> The difference is seemingly insignificant; but because the landowner might be unaware of the vesting of title, the variation might well prove a harsh one.

The last, but most significant difference is in the procedure for settlement of claims. Pursuant to Section 30(13) of the Highway Law, the superintendent is empowered, if the claim cannot be adjusted, to agree with the owner to pay up to sixty per cent of the amount the superintendent considers to be the value of the claim. There is no such provision in the Public Works procedure.<sup>55</sup> From the landowner's point of view, the purpose of the appropriation can make little difference. Fear of being without compensation pending the prosecution of his claim with the court of claims might well induce the owner to accept any but the most arbitrary offer.<sup>56</sup> Clearly, the owner whose property is taken deserves better treatment.<sup>57</sup> At this point, it should be noted that the following correspond in detail to all relevant provisions of the Public Works procedure: the Correction Law,<sup>58</sup> the Agriculture and Markets Law,<sup>59</sup> and the Military Law.<sup>60</sup>

In one instance the legislature has made what appears to be an unusual effort to make its intention clear. Section 6485 of the Unconsolidated Laws allows the Port of New York Authority to acquire land pursuant to Chapter 802, Section 15, of the Laws of New York, 1947.<sup>61</sup> This procedure appears in the Unconsolidated Laws and applies to condemnation for air terminal purposes.<sup>62</sup> At the time section 6485 was enacted, the authority had access to an alternative procedure for any land acquisition need.<sup>63</sup> The air terminal and alternative procedures are precisely the same. The redundancy would seem to be without reason.

The use of the administrative procedure in its present form, at least, appears to be unwarranted. Appraisal is a prerequisite to the condemner's efforts to take property. There seems, therefore, to be no valid reason why the owner should not be paid the appraised value pending final determination of compensation. It would further appear that satisfactory methods could be established in respect to notice and ejection without unduly sacrificing the efficiency of this proceeding.

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54. N.Y. Unconsol. Laws § 7272(13) (McKinney 1953).

55. N.Y. Unconsol. Laws § 7272(14) (McKinney 1953).

56. It has been stated that twenty years experience with the federal administrative proceeding, Declaration of Taking Act, 46 Stat. 1421 (1931), 40 U.S.C. §§ 258(a)-58(e) (1958), shows that less than 5% of the owners affected filed claims. 48 Nw. U.L. Rev. 424, 425 n.6 (1953). It must be realized, however, that the federal procedure allows the landowner immediately to withdraw the appraised value.

57. This is particularly true as respects the owner whose land is taken for a state fair. N.Y. Agric. & Mkts. Law § 27(1).

58. N.Y. Correc. Law § 21.

59. N.Y. Agric. & Mkts. Law § 27.

60. N.Y. Mil. Law § 177.

61. N.Y. Unconsol. Laws § 6485 (McKinney 1960).

62. N.Y. Unconsol. Laws § 6615 (McKinney 1953).

63. N.Y. Unconsol. Laws § 6561 (McKinney 1953).

B. *Judicial Proceedings*

The General Condemnation Law,<sup>64</sup> which controls unless there is a provision to the contrary<sup>65</sup> and which supplements where applicable,<sup>66</sup> best illustrates the judicial procedure. The proceeding is initiated by the presentation of a petition to the supreme court or county court.<sup>67</sup> A copy of the petition and notice of time and place of presentation must be served upon the owner prior to such presentation.<sup>68</sup> The owner may interpose an answer putting in issue the petition's allegations.<sup>69</sup> If the petitioner prevails, judgment is entered declaring the property to be necessary for the public use.<sup>70</sup> This judgment entitles the condemner to possession upon payment of compensation. The court thereupon appoints three commissioners of appraisal<sup>71</sup> who, after viewing the premises and taking proof, make an award.<sup>72</sup> The court may confirm or set aside the award. If set aside, a rehearing is had before the same or new commissioners. Upon confirmation, the court enters a final order stating that the condemner may take possession, payment being a condition precedent.<sup>73</sup> Either party may appeal to the appellate division.<sup>74</sup> The appellate division may then direct a new appraisal before the same or new commissioners. This report of the commissioners is final and conclusive upon all parties concerned.<sup>75</sup> There is no right of appeal to the court of appeals.<sup>76</sup> In the event necessity dictates that

64. N.Y. Condem. Law §§ 1-29.

65. In the Matter of Pub. Serv. Comm'n, 217 N.Y. 61, 111 N.E. 658 (1916), cert. denied, 251 U.S. 537 (1919).

66. County of Orange v. Ellsworth, 98 App. Div. 275, 90 N.Y. Supp. 576 (2d Dep't 1904).

67. N.Y. Condem. Law § 4.

68. N.Y. Condem. Law § 5.

69. N.Y. Condem. Law § 9.

70. If judgment is entered against the petitioner, he may appeal to the appellate division. N.Y. Condem. Law § 20. The landowner, however, has no right of appeal at this time. New York State Elec. & Gas Corp. v. Smith, 269 App. Div. 725, 54 N.Y.S.2d 287 (4th Dep't 1954) (memorandum decision). This is so even though the owner contends that the order extends petitioner's authority beyond statutory limits. Gilson v. Lambert, 282 App. Div. 1046, 126 N.Y.S.2d 341 (2d Dep't 1953) (memorandum decision).

71. N.Y. Condem. Law § 13.

72. N.Y. Condem. Law § 14.

73. N.Y. Condem. Law § 15.

74. N.Y. Condem. Law § 19.

75. N.Y. Condem. Law § 21. New York Cent. R.R. v. Harrison, 279 App. Div. 341, 109 N.Y.S.2d 572 (4th Dep't 1952), in dictum, stated that an appeal will lie from this report if it can be shown that the commissioners were biased or arbitrarily refused to follow a proper rule in determining damages. This is at odds with authority. Prior cases state the proper procedure is by motion to set aside the award. In the Matter of City of New York, 267 N.Y. 64, 78, 195 N.E. 685, 690 (1935); In the Matter of So. Blvd. R.R., 141 N.Y. 532, 536-38, 36 N.E. 600, 601 (1894). It should be noted that there are procedures in the State of New York whereby an appeal can be taken to the court of appeals. See, e.g., New York, N.Y., Administrative Code § B15 - 26.0 (1957).

76. The Condemnation Law does not provide for such appeal. The courts, therefore, are bound. In the Matter of Bd. of Transp., 272 N.Y. 52, 55, 4 N.E.2d 214, 215 (1936).

the public interest is best served by immediate possession, the condemner may enter at any stage of the proceedings upon depositing a sum fixed by the court.<sup>77</sup> The owner, though dispossessed, is without access to the deposit. It should also be noted that the appeal does not stay the condemner's proceedings unless the court so directs.<sup>78</sup>

#### Analysis of Procedure

The procedure set forth above would appear effective. It is, however, not without defect. The petition creates too many justiciable issues. Among other items to be included is an allegation that the property is necessary for public use.<sup>79</sup> Quite obviously, most owners will not be enthusiastic with the prospect of condemnation. This allegation affords the owner a convenient method of venting his spleen, thereby unnecessarily delaying the proceedings. That the owner be protected from an arbitrary taking is an obvious necessity. It is also clear that remedies are available should such a contingency occur.<sup>80</sup> But a procedure arming an owner with the means unnecessarily to delay condemnation, does a disservice to the public, on the one hand; and on the other, furnishes a strong argument for the condemner seeking a "quick taking" statute.

A second defect is that the provision permits the owner to be ejected without having access to the deposit. This possibility does not create an atmosphere conducive to meaningful negotiation. It is a club with which the condemner should not be armed.

Perhaps the most difficult problem is the determination of compensation. In this respect, the procedure relating to the appointment of commissioners is not desirable. It is specified that they be competent.<sup>81</sup> "Competent" has been construed as meaning honest, unbiased and impartial.<sup>82</sup> These qualifications are not sufficient. The practicability of having a jury constituted as the tribunal to determine compensation has been much criticized.<sup>83</sup> Basically, the jury is without experience and therefore entirely dependent upon the conflicting views of the expert witnesses, in short, easily confused. The present system is, in effect, a jury of three. Because they are but three, will they be any less confused?

#### PROCEDURAL VARIATIONS

Other statutes setting forth judicial procedure within the State of New York differ in many respects from the General Condemnation Law. The Highway

77. N.Y. Condem. Law § 24.

78. N.Y. Condem. Law § 19.

79. N.Y. Condem. Law § 4(3).

80. See note 44 supra. See also N.Y. Munic. Law § 51, which allows a landowner to enjoin the proceedings of any agent or officer acting for or on behalf of a political subdivision of the state.

81. N.Y. Condem. Law § 13.

82. *City of Plattsburg v. Kellogg*, 254 App. Div. 455, 459, 5. N.Y.S.2d 1015, 1018 (3d Dep't 1938).

83. Advisory Committee on Rules for Civil Procedure, Proposed Rule To Govern Condemnation Cases in the District Courts of the United States, 7 F.R.D. 503, 511 (1947); Graubart, *Theory Versus Practice in the Trial of Condemnation Cases*, 26 Pa. B. A. Q. 36, 49 (1954); Wasserman, *Procedure in Eminent Domain*, 11 Mercer L. Rev. 245, 279-80 (1960).



Law requires that the petition, in addition to the prayer for relief, contain only a property description.<sup>84</sup> Other sections allow the condemner, as a matter of course, to take possession after judgment.<sup>85</sup> The Village Law compels the commissioners of appraisal to consider and to offset the value of any benefits or advantages to the property resulting from an alteration or improvement.<sup>86</sup> Under an alternative proceeding, the same law permits the village board of trustees to determine whether compensation should be ascertained by the supreme court without a jury or by commissioners of estimate appointed by that court or the county court as the board shall determine.<sup>87</sup> The Conservation Law presents an interesting departure. It states that if acquisition is not completed within eighteen months after the first publication of notice of application, any interested person may apply to the court for a discontinuance of the proceedings.<sup>88</sup>

The variations noted illustrate legislative indecision. The needs of landowner, condemner and the public remain constant, *i.e.*, a swift but equitable determination. The existing procedures, diverse as they are, can not possibly be equally efficient.

#### NEW YORK CITY

The City of New York, expressly excluded from the provisions of the Condemnation Law,<sup>89</sup> condemns pursuant to the Administrative Code.<sup>90</sup> The code procedure requires publication of a notice of intention to make application to condemn,<sup>91</sup> after which the corporation counsel presents a petition to the supreme court.<sup>92</sup> Upon filing the petition and proof of publication, the court enters an order granting the application.<sup>93</sup> The city at this time may take possession of the property.<sup>94</sup> The corporation counsel then causes to be pub-

84. N.Y. H'way Law § 120.

85. N.Y. H'way Law § 250(5); N.Y. Town Law § 64(2).

86. N.Y. Village Law §§ 149, 159(1).

87. N.Y. Village Law § 312.

88. N.Y. Conserv. Law § 760. See also N.Y. H'way Law § 250(5). It is therein provided that if compensation is not paid within one year after its determination title is re-vested in the owner, who may sue in the court of claims for damages resulting from the condemner's possession.

89. N.Y. Condem. Law § 27. Although the language of the General Condemnation Law appears all encompassing, it is difficult to find a condemner who must proceed according to its provisions.

90. New York, N.Y., Administrative Code §§ B15-1.0 to -41.0 (1957) [hereinafter cited as Administrative Code]. This comment will not touch upon excess lands condemnation procedure, Administrative Code §§ C15-1.0 to -10.0; acquisition of property outside the city for street closings, Administrative Code §§ D15-1.0 to -27.0; or street closing procedure, Administrative Code §§ E15-1.0 to -28.0.

91. Administrative Code § B15-7.0.

92. Administrative Code § B15-8.0.

93. Administrative Code § B15-9.0.

94. This is true in a capital project proceeding. Administrative Code § B15-36.0. In an assessable improvement proceeding, the corporation counsel is thereafter required to file a damage map. Administrative Code § B15-10.0 Title vests upon such filing. Administrative Code § B15-36.0.

lished notice to file claims.<sup>95</sup> After receipt of the claims he serves on the claimants notice of the time and place at which proof of title will be received.<sup>96</sup> After a hearing limited to the proof, the corporation counsel serves on all parties appearing a note of issue.<sup>97</sup> The proceeding then moves to trial where the court, without a jury,<sup>98</sup> determines compensation and, if necessary, title disputes. After viewing<sup>99</sup> the property and hearing testimony, the court enters a tentative decree estimating compensation.<sup>100</sup> The corporation counsel publishes a notice permitting interested parties to file objections to the decree.<sup>101</sup> After hearing objections and amending the tentative decree, the court enters the final decree.<sup>102</sup> Appeals from the final decree may be taken to the appellate division<sup>103</sup> and the court of appeals,<sup>104</sup> the appeals staying the proceedings only as to the property affected. Provision has been made for payment in advance of the determination of compensation. The Board of Estimate may authorize payment of up to seventy-five per cent of assessed valuation less liens and encumbrances of record.<sup>105</sup>

#### Analysis of Procedure

The order granting the application to condemn is not appealable. Thus owners who appear to challenge the proceedings are placed in an unenviable position. By the time appeal is taken from the final decree it is possible that the premises will have been demolished.<sup>106</sup> A practical solution<sup>107</sup> to this problem would appear to be via a taxpayer's suit to obtain an injunction restraining the proceedings of the condemner.<sup>108</sup> By giving a *res judicata* effect to the decision on the injunction, there would be no reason why the final decree in the main action should stay the condemner's proceedings.

The provision for advance payment is unsatisfactory and in need of immediate attention. Even assuming payment is authorized, the amount received cannot exceed seventy-five per cent of the assessed valuation, though it could be anything less.

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95. Administrative Code § B15-11.0.

96. Administrative Code § B15-12.0(a). Title disputes are determined by the court upon trial of the proceedings. Administrative Code § B15-12.0(b).

97. Administrative Code § B15-14.0.

98. Administrative Code § B15-1.0(2).

99. Administrative Code § B15-15.0.

100. Administrative Code § B15-19.0.

101. Administrative Code § B15-22.0. Upon the written consent of the corporation counsel and owner, the tentative decree, and filing of objections thereto, may be waived. Administrative Code § B15-23.1 (Supp. 1960).

102. Administrative Code § B15-23.0.

103. Administrative Code § B15-25.0.

104. Administrative Code § B15-26.0.

105. Administrative Code § B15-29.0.

106. Abberman, *Condemnation and the Courts*, 12 *New York County Lawyers A.B. Bull.* 102, 104-05 (1954).

107. *Id.* at 105.

108. *N.Y. Munic. Law* § 51. See, e.g., *Kaskel v. Impellitteri*, 305 *N.Y.* 73, 115 *N.E.2d* 689 (1953); *Denihan Enterprises, Inc. v. O'Dwyer*, 302 *N.Y.* 451, 99 *N.E.2d* 235 (1951).

New York City dispensed with commissioners of appraisal after finding this system replete with waste, incompetence and extravagance.<sup>109</sup> That the court, without jury, is any more efficient is doubtful. "Perhaps in no other field of law is the trial judge so completely helpless to learn the truth."<sup>110</sup> Because appraisal is largely a matter of opinion, it is felt that an interchange of views should be made possible.<sup>111</sup> Indeed, disenchantment with the commission system seems to lie in the fact that the commissioners were unqualified. A panel of experts would not be easily misled by the insinuations of counsel and the expert witness.<sup>112</sup>

It has been held that published notice of the hearing on compensation is violative of due process if personal service is possible.<sup>113</sup> The Administrative Code provides for service upon those filing claims and proof of title. Notice to file claims, however, is published in the City Record only.<sup>114</sup> A clear mandate requiring personal service would allay all doubt concerning this procedure.

#### PROCEDURE IN OTHER JURISDICTIONS

Both the federal government and the State of Wisconsin have condemnation provisions which New York might profitably emulate. The Federal Declaration of Taking Act<sup>115</sup> is roughly similar to, though far more equitable than, the New York administrative procedure. The federal act requires a deposit of the estimated compensation as a prerequisite to the vesting of title. Not only does the owner have access thereto, but the court, upon filing of the declaration of taking, fixes the time and place for the owner to surrender possession. If compensation, as finally determined, exceeds the amount withdrawn, judgment is entered against the United States.<sup>116</sup>

The State of Wisconsin has recently amended its procedure and has incorporated several features worthy of note. The condemner must make an appraisal and in so doing confer with the owner.<sup>117</sup> Thereafter, the parties negotiate for purchase.<sup>118</sup> If the resulting offer is not accepted, the owner has, after com-

109. Wallstein, Report on Law and Procedure in Condemnation 11 (1932) (applicable to proceedings brought by the City of New York).

110. *Id.* at v.

111. Wasserman, *supra* note 83, at 281.

112. Abberman, *supra* note 106, at 107. The interplay between these two is best illustrated by the following: "The choice of the right kind of expert involves a plain consideration of money in the attorney's pocket, and a claimant's expert would have to be more than human if his approach to his task of valuation were not colored by the knowledge that his immediate and future employment depended upon his being able to produce the desired result." Wallstein, *op. cit.* *supra* note 109, at ix.

113. *Walker v. City of Hutchinson*, 352 U.S. 112 (1956).

114. Administrative Code § B15-11.0.

115. 46 Stat. 1421 (1931), 40 U.S.C. §§ 258(a)-58(e) (1958).

116. It is interesting to note that there is no provision for the converse. In an analogous situation, Wisconsin provides for both contingencies. Wis. Stat. Ann. § 32.05(9)(b) (Supp. 1961).

117. Wis. Stat. Ann. § 32.05(2) (Supp. 1961).

118. Wis. Stat. Ann. § 32.05(2a) (Supp. 1961).

pletion of service, forty days within which to contest the taking.<sup>119</sup> An award, at least equal to the offer, is made available to the owner,<sup>120</sup> and the retention of this award is not a bar to an appeal for greater compensation.<sup>121</sup> County condemnation commissioners, who are appointed by the county court for three year terms, staggered to insure experience,<sup>122</sup> may decide the issue of compensation on appeal.<sup>123</sup> Provision has been made for judgment over if such determination differs from the basic award.<sup>124</sup> Appeal from the commissioners' award may be taken to the circuit court with a jury trial, unless the jury be waived by both parties,<sup>125</sup> and thence to the state supreme court.<sup>126</sup>

This procedure would be more efficient if the commissioners could not be bypassed, and appeal to the circuit court without a jury be allowed. A basically sound idea, that of county commissioners, is relegated to relative insignificance by allowing a jury to pass on their determination, on the one hand, or permitting such determination to be circumvented on the other. Surely an award resulting from the deliberation of experienced appraisers is entitled to more weight than that of a jury. Apparently Wisconsin, like the City of New York, feels that just compensation cannot be determined without review *ad infinitum*. This approach is unsound. Much of the state's procedure, however, is desirable. Negotiation prior to appraisal and offer allows the owner to point out features and considerations that otherwise might escape the attention of the condemner. Such negotiations, when coupled with an available deposit, create an atmosphere making an equitable offer less remote. A revised system of determining compensation and appeal would give Wisconsin a procedure that could profitably be emulated by any jurisdiction.

#### CONCLUSION

A satisfactory condemnation procedure must equitably and efficiently accomplish the vesting of title and ascertainment of compensation. Title cannot effectively vest if the petition encourages contest and consequent delay. Delay is a formidable weapon. The owner should not be so armed. To this end it is submitted that the petition be simple and concise. From the order granting the petition no appeal should lie, but the condemner should be allowed to enter and take possession. If an owner be aggrieved, let him pursue his remedy without the condemnation proceedings.<sup>127</sup> A necessary corollary is that an award be immediately available to the owner. In this regard a procedure similar to Wisconsin's, including negotiation prior to appraisal and offer, is recommended.

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119. Wis. Stat. Ann. § 32.05(3)(h) (Supp. 1961).

120. Wis. Stat. Ann. § 32.05(7)(a) (Supp. 1961).

121. Wis. Stat. Ann. § 32.05(3)(i) (Supp. 1961). The acceptance and retention of any part of such award does bar an action to contest the taking.

122. Wis. Stat. Ann. § 32.08 (Supp. 1961).

123. Wis. Stat. Ann. § 32.05(9)(a) (Supp. 1961). If the owner elects, he may appeal directly to the county court. Wis. Stat. Ann. § 32.05(11) (Supp. 1961).

124. Wis. Stat. Ann. § 32.05(9)(b) (Supp. 1961).

125. Wis. Stat. Ann. § 32.05(10)(a) (Supp. 1961).

126. Wis. Stat. Ann. § 32.05(13) (Supp. 1961).

127. The remedy pursuant to N.Y. Munic. Law § 51 remains available.