169 U.S. 557 (1898)

BACKUS
v.
FORT STREET UNION DEPOT COMPANY.

No. 55.

Supreme Court of United States.

Argued January 17, 18, 1898.
Decided March 7, 1898.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

565 *565 *Mr. Don M. Dickinson* for plaintiffs in error.

Mr. Fred. A. Baker for defendant in error.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

Inasmuch as the respondents, both on the trial in the circuit court and in the subsequent proceedings on the certiorari in the Supreme Court, specifically set up and claimed rights under the Federal Constitution which were denied, the jurisdiction of this court is not open to doubt. They again and again insisted that certain provisions of the Federal Constitution, which they named, stood in the way of any further proceedings against them.

It is also not open to further debate, since the decision in *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U.S. 226, that this court may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just compensation. But in this respect we quote the restriction placed in the opinion then filed (p. 246):

"We say, `in absolute disregard of the company's right to just compensation,' because we do not wish to be understood as holding that every order or ruling of the state court in a case like this may be reviewed here, notwithstanding our jurisdiction, for some purposes, is beyond question. Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied; and in respect of such matters, that which is done or omitted to be done by the state court may constitute only error in the administration of the law under which the proceedings were instituted."

While in cases of this kind coming from the Supreme Court of a State, questions of fact passed upon in the
566 state courts are not here open to review, *Egan* v. *Hart,* 165 U.S. 188, and *566 cases cited in the opinion, it may not be inappropriate to notice that the award of compensation as finally sustained gave to the

respondents the sum of $63,000. As the valuation they placed upon the plant, outside of the realty, was only $150,000, and of the realty the like sum of $150,000, though the realty cost in 1871 less than $30,000, and as none of the ground, upon which the plant stood and the business was carried on, was taken by the Depot Company, but only the use of the street in front thereof, and that not so as to exclude them from its use, it is obvious that the award, whether adequate or not, was not one in reckless disregard of their rights.

It is not questioned by counsel that the settled rule of this court in cases of this kind is to accept the construction placed by the Supreme Court of the State upon its own constitution and statutes as correct. *Long Island Water Supply Company* v. *Brooklyn,* 166 U.S. 685; *Merchants' & Manufacturers' Bank* v. *Pennsylvania,* 167 U.S. 461, and cases cited in those opinions. His contention, however, is that the true construction of the constitution and laws of the State, as settled by repeated decisions of its Supreme Court, was wholly disregarded in this case, and that by reason thereof the respondents were denied that equal protection of the laws which is guaranteed by the Fourteenth Amendment to the Federal Constitution. His contentions are grouped under the following heads:

"I. They were denied the fundamental right to have an ascertainment and determination of the amount of compensation and its final payment before being deprived of their property.

"II. They were denied the protection of that guaranty of the state constitution providing that the questions of compensation and necessity should be passed upon by one and the same jury, and of the settled, uniform and unreversed construction of the constitution to that effect by the state judiciary in respect of all other citizens.

"III. They were denied the protection of a trial on the questions of necessity and compensation by the tribunal
567 *567 guaranteed by the constitution of the State, in accordance with the settled, uniform and unreversed construction of that constitution in respect of all other citizens.

"IV. They were denied that measure of just compensation for their property taken, guaranteed by the constitutions, Federal and state, as the same was and is accorded to all other persons than themselves.

"V. They were denied a hearing and deprived of a hearing guaranteed by the Constitutions, Federal and state, as `due process of law,' when summoned into court as appellees to defend their property, rights and themselves from imputations upon them.

"VI. Finally, having been deprived of their property sought by the railroad company for its purposes, their personal assets of the value of one hundred and ten thousand ($110,000) dollars were taken from them under the color of a judgment and process unknown to the constitution and statutes of Michigan, and unknown to jurisprudence, whereby they were deprived of their property without `due process of law.'"

Attention is called to the fact that while upon the return of the first verdict the respondents moved to confirm it, which motion was denied by the circuit court and the verdict set aside, yet after the decision of the Supreme Court awarding the writ of mandamus, they did not renew that motion; that the petitioner alone asked for confirmation, though, as expressly stated, for the purpose of taking an appeal to the Supreme Court; that,

after the order of confirmation had been entered, it paid the amount of the award to the respondents, which sum was accepted by them, and that thereupon it took possession of the property and has since continued in undisturbed possession and use. It is insisted that such payment and taking possession created under the constitution and statutes of Michigan a finality so far as the Depot Company was concerned, and that to this effect had been the repeated adjudications of the Supreme Court of the State. The argument is that the
568 property owner has a constitutional right to have the amount of his compensation finally determined and *568 paid before yielding possession; that the party seeking condemnation (in this case the Depot Company) cannot be let into possession until after all question as to the compensation has been finally settled, and the amount thereof paid; that it cannot take advantage of one report or verdict, pay the sum fixed by it, obtain possession, and still litigate the question of amount; that if it does then pay and take possession its right to further litigate is ended. But the Supreme Court of the State held against this contention, and we must assume therefrom that it is not warranted by the constitution and statutes of the State. Indeed, the language of that constitution is "made or secured." Does this amount to a denial of the right to that protection to property which is guaranteed by the Fourteenth Amendment to the Federal Constitution? In other words, is it beyond the power of a State to authorize in condemnation cases the taking of possession prior to the final determination of the amount of compensation and payment thereof? This question is fully answered by the opinions of this court in *Cherokee Nation* v. *Southern Kansas Railway,* 135 U.S. 641, and *Sweet* v. *Rechel,* 159 U.S. 380. There can be no doubt that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid and before any final determination thereof.

Neither can it be said that there is any fundamental right secured by the Constitution of the United States to have the questions of compensation and necessity both passed upon by one and the same jury. In many States the question of necessity is never submitted to the jury which passes upon the question of compensation. It is either settled affirmatively by the legislature, or left to the judgment of the corporation invested with the right to take property by condemnation. The question of necessity is not one of a judicial character, but rather one for determination by the lawmaking branch of the government. *Boom Company* v. *Patterson,* 98 U.S. 403, 406; *United States* v. *Jones,* 109 U.S. 513; *Cherokee Nation* v. *Kansas Railway Company, supra.*

569 Neither was there anything in the proceedings actually had *569 before the last jury and in the Circuit Court which conflicts with any mandate of the Federal Constitution. Counsel say that the respondents were entitled to a trial by a jury of inquest, but were forced to trial before a common law jury, presided over and controlled by the circuit judge. But the Constitution of the United States does not forbid a trial of the question of the amount of compensation before an ordinary common law jury, or require, on the other hand, that it must be before such a jury. It is within the power of the State to provide that the amount shall be determined in the first instance by commissioners, subject to an appeal to the courts for trial in the ordinary way; or it may provide that the question shall be settled by a sheriff's jury, as it was constituted at common law, without the presence of a trial judge. These are questions of procedure which do not enter into or form the basis of fundamental right. All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process

of law which is required by the Federal Constitution. *Bauman* v. *Ross,* 167 U.S. 548, 593. These considerations dispose of all the objections embraced in the first three contentions of counsel so far as those objections run to the validity of the proceedings actually had, providing those proceedings were warranted by the constitution and statutes of the State.

But it is insisted that those proceedings were not so warranted; that the settled, uniform and unreversed construction thereof by the Supreme Court of the State theretofore forbade them, and hence there was a discrimination against the respondents, and they were denied that equal protection of the laws which the Federal Constitution guarantees. Thus, for instance, it is insisted that the previous rulings of the courts, both trial and Supreme, had been to the effect that a jury called under these condemnation statutes was a jury of inquest and not a trial jury, whereas in this case the ruling was practically to the contrary, and the
570 respondents were compelled to submit their rights to a trial jury, subject to the control of *570 the presiding judge, as in ordinary common law cases. We deem it unnecessary to review the many authorities from the Supreme Court of Michigan cited by counsel, or determine whether the ruling in this case as to methods of procedure and the true construction of the statute is or is not in harmony with prior decisions of that court. Accepting the contention of counsel, that in this case the Supreme Court of the State has put a different construction on the state statutes from that theretofore given, and has sustained modes of procedure different from those which had previously obtained, still it does not follow that this court has a right to interfere and say that the present ruling is erroneous and the prior construction correct, or that the change of construction works a denial of any fundamental rights. There is no vested right in a mode of procedure. Each succeeding legislature may establish a different one, providing only that in each are preserved the essential elements of protection. The fact that one construction has been placed upon a statute by the highest court of the State does not make that construction beyond change. Suppose it were true, in the fullest sense of counsel's contention, that for a series of years the courts had ruled that the jury in condemnation cases was a jury of inquest, or in the nature of a sheriff's jury — one determining for itself all matters of law and fact, and that in this case, for the first time, they held otherwise, and that such jury was a common law jury, subject to be controlled by the presiding judge, whose duty it was to determine all questions of law, and still, whatever might be thought of the propriety of such a change of construction, there is in it nothing to justify this court in reversing the judgment of the state court and denying the correctness or validity of this last ruling. We fail to see why the presence of the judge with this jury, his assumption of power to control its proceedings, his instructions to it on questions of law, necessarily vitiated the proceedings. Grant that such a course had never been taken before; grant that it had never been held to be a proper proceeding; grant that it was unexpected
571 by counsel, and yet if the judge's rulings and instructions were in themselves correct, and the propriety of *571 his presence and control be held by the Supreme Court of the State warranted by the statutes, we do not perceive that any right possessed under the Constitution of the United States has been violated.

The question is not presented of a distinct ruling by a state court that one party is entitled to certain rights and the benefits of certain modes of procedure, and that another party similarly situated is not entitled to them. An act of the legislature which in terms gave to one individual certain rights and denied to another similarly situated the same rights might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws. But that does not prevent a legislature, which has established a certain rule of

procedure, and continued it in force for years, from subsequently repealing the act and establishing an entirely different mode of procedure. In other words, there is no absolute right vested in the individual as against the power of the legislature to change modes of procedure. And a similar thought controls where the courts of the State have construed a statute as prescribing one form of procedure, and parties have acted under that construction, and then subsequently the same court has held that the statute was theretofore misconstrued, and really provided a different mode of procedure. This last adjudication cannot be set aside in the Federal courts on the ground of an unjust discrimination or a denial of the equal protection of the laws.

We, of course, do not mean to affirm that there has been by the Supreme Court of the State such a change of adjudication. We simply in this respect accept the contention of counsel for the respondents, and hold that, even if the facts be as claimed by him, they furnish no ground for interference by this court. It should be noticed in passing, however, that nearly all, if not absolutely all, of the cases which he cites from the Supreme Court of Michigan arose under the provisions respecting condemnation in the General Railroad Act, while these proceedings were had under the Union Depot Act, and, although the two acts may be substantially
572 similar, yet this adjudication is under a different statute from that *572 under which most, if not all, of the prior decisions were made.

Passing now to the fourth point. Under this it is claimed that the trial judge gave to the jury an improper measure of damages. During the argument of counsel for the respondents this colloquy took place, as appears from the record:

"COURT: A question which arises in my mind is this: There is no question but what the Backuses are entitled to full compensation for such damages as they may suffer, but does not the other rule also attach, and that is, that the jury are not in any way to consider any speculative damages or any probable damages?

"MR. DICKINSON: They can only consider the damages which are actually shown, but the other rule follows, may it please your honor, that they are not to estimate those damages for a year, or estimate the present injury done by the railroad, but they must assume that the railroad is running to its maximum capacity, that it has other railroads, that it may double, treble or quadruple its trains, so far as that is concerned, and they must estimate the damage for the future time, not for a year or three years or five years or ten years.

"COURT: That is undoubtedly true to a certain extent, but the question that I have thought about considerably within the last few days is in regard to the testimony which was admitted in the case in regard to their profits, the profits of their business. Do they not come within the rule which applies in regard to speculative damages?

Afterwards, when the counsel for petitioner was making his argument, he said:

"In other words, if the court please, the question as to what business is carried on there, and as to how profitable an institution it might be is merely an element to be considered in establishing the market value of the property."

Upon which the judge made this comment:

"In other words, if a profitable business is carried on in connection with a certain site, the profitableness of the business itself must be taken into consideration by the jury in estimating the value?"

573 *573 After the arguments were over the judge charged the jury as follows:

"Upon this question, viz., compensation or damages, what I have to say must necessarily be in a broad and the most general way. This is a question for you, and from the very nature of a proceeding of this character, you are vested with large powers and great discretion. These powers and this discretion should not be exercised arbitrarily, nor without proper regard for substantial justice. You should bear in mind that the greater the power, the more jealous is the law of its careful exercise, and the greater is the responsibility of the persons vested therewith. You should exercise a cool, careful, intelligent and unbiased judgment. The compensation or damages must be neither inadequate or excessive, and your award must not furnish a just inference of the existence of undue influence, partiality, bias and prejudice, or unfaithfulness in the discharge of the duties imposed upon you. You must, however, remember that the respondents' property is taken, or its enjoyment interfered with, under the so-called power of eminent domain, a power somewhat and necessarily arbitrary in its character, and that where this is done the party whose property is taken, or whose enjoyment or use of the property is interfered with, is entitled to full compensation for the injury inflicted. While the allowance to be made should be liberal, still it must not be unreasonably exorbitant or grossly excessive. It should be a fair and liberal allowance and full and adequate compensation for the damages inflicted. You should not allow too little nor should you allow too much. Your award should be based upon that which is real and what is substantial, and not upon what is either fictitious or speculative. You should look at the condition of things as they exist. Under the constitution and laws the right to take another's property for public uses, the power to exercise the right of eminent domain, is a part of the law of the land, but when this power is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation.

574 *574 "I shall not call attention to any particular part of the testimony in the case: the responsibility of its application and the weight to be given it rests with you, always regarding that which is real and substantial and disregarding that which is fictitious and speculative; treating conditions as they have been shown and as they are, without speculating as to what might possibly happen or occur, taking conditions as you find them, and the natural and probable consequences following such conditions."

And this was all which was said in reference to the measure of compensation. Now, it is insisted by counsel that the profits which the manufacturing plant was making were to be taken into consideration by the jury in awarding compensation, inasmuch as the business of that plant was seriously interrupted, if not practically destroyed, by this condemnation; that inasmuch as the query was suggested by the judge during the argument whether profits did not come within the rule as to speculative damages, the failure to charge distinctly that they were proper subjects of consideration was equivalent to an instruction that they were not to be considered, and that, therefore, the true rule of compensation was not given to the jury.

It is evident that the judge did not attempt to define the several elements which enter into the general fact of

compensation, or the various matters to be considered by the jury. He simply charged generally that as this was an arbitrary taking of the property of the respondents they were entitled to full compensation, and left to the jury the duty of determining what should be such compensation, telling them plainly that they were vested with large powers and great discretion. If it be said that the judge had intimated by his query that the matter of profits came within the rule applicable to speculative damages, it must also be noticed that further on he suggested that the profitableness of a business was to be taken into consideration in estimating the value. It is true he nowhere instructed the jury to make the profits of the business the criterion of value, nor indeed would he have been justified in so doing. The profitableness of the business was undoubtedly a matter to be
575 considered, and so the judge fairly intimated in *575 these prior colloquies. But the profits of a business are not destroyed unless the business is not only there stopped, but also one which in its nature cannot be carried on elsewhere. If it can be transferred to a new place and there prosecuted successfully, then the total profits are not appropriated, and the injury is that which flows from the change of location.

But beyond this no special instructions were asked by the respondents at the time of the giving of the charge. The statute (§ 3466) provides that the judge "may attend said jury, to decide questions of law." So far as he gave instructions it is obvious that he stated that which was the law, and the real objection is that he did not go further and enter into a more minute description of the elements which were to be taken into consideration by the jury in fixing the amount of compensation; that they may from the colloquies which had taken place during the arguments have drawn improper inferences as to the limit to which they were warranted in going, and that those inferences he failed to correct by specifically stating what matters they should consider. A sufficient answer is that the respondents did not ask any further instructions. All they did was to except to what had been stated. By well-settled rules no appellate court would under such circumstances be required to set aside the judgment of the trial court. *Shutte* v. *Thompson,* 15 Wall. 151, 164; *Mutual Life Ins. Co.* v. *Snyder,* 93 U.S. 393; *Texas & Pacific Railway* v. *Volk,* 151 U.S. 73; *Isaacs* v. *United States,* 159 U.S. 487.

But a more complete and satisfactory answer is that whatever error there may have been affords no ground for the interference of this court. The respondents were not thereby deprived of any rights secured by the Federal Constitution. They were not denied "due process of law." The proceedings were had before a duly constituted tribunal, in accordance with the declared law of the State, with full opportunity to be heard. Nor were they denied "the equal protection of the laws." The rule as to the necessity of asking special instructions was administered in this case no differently than in others. *Marchant* v. *Pennsylvania Railroad,* 153 U.S. 380.
576 *576 The error, if any there be, was not one "in absolute disregard of their right to just compensation," but was only error in the administration of the law under which those proceedings were instituted. As clearly pointed out in *Chicago, Burlington & Quincy Railroad* v. *Chicago, supra,* it is not every error occurring in a state court in the administration of its law concerning condemnation of private property for public purposes that opens the door to review by this court. We are not called upon to search the record simply to inquire whether there may or may not have been errors in the proceedings. Our limit of interference is reached when it appears that no fundamental rights have been disregarded by the state tribunals.

Under the fifth head counsel presents two matters:

"(1) The denial by the Supreme Court of the State of a hearing on the substantial and essential question, of

whether counsel for plaintiffs in error abused their privilege as counsel by arguing to the jury on the question of necessity that the margin of the depot grounds that belonged to the Michigan Central road could be taken for the elevated structure; and (2) the reversal of the unanimous judgment of the Supreme Court of the State in 89 Michigan, 209, without a rehearing, by the judgment in 92 Michigan, 33."

With reference to the first, it is enough to say that the respondents did not appeal to the Supreme Court, and that under section 3468 it would seem that that court was called upon to consider only such objections as had been particularly specified. "Either party may appeal, by notice in writing;" "such notice shall specify the objections;" "the Supreme Court shall pass on such objections only, and all other objections, if any, shall be deemed to have been waived." No objection to the finding of the jury as to the question of necessity had been made by the appellant, and therefore was to be treated as waived. Under those circumstances it cannot be said that the Supreme Court deprived the respondents of any rights by refusing to hear counsel in respect to the question of necessity, or connected with its determination.

With regard to the second, technically the decision on the mandamus proceeding and that on the appeal did
577 not conflict. *577 The writ of mandamus directed the circuit judge to set aside the order which he had entered vacating the award. It thus in effect declared that that judge ought not to have made such an order. On the appeal the Supreme Court itself ordered that the award be set aside, and a new jury empanelled, and remanded it to the Circuit Court for such new appraisal. This is within the letter of the statute, (§ 3468,) "on the hearing of such appeal, the court may direct a new appraisal before the same or new commissioners or jury, in its discretion." The decision by the Supreme Court that it had power to set aside the verdict and order a new appraisal was not a reversal of a ruling that the Circuit Court had no such power, although it may suggest consequences somewhat singular. Appreciating that fact, in the last opinion the court declared that in the former decision its language restricting the power of the Circuit Court had been too strong.

Coming now to the last point, the Supreme Court held that as upon the second appraisal the damages were less than those awarded on the first, and the amount of the first had been paid to the respondents, the petitioner was entitled to a judgment for the difference. The language of the statute (§ 3468) is "but if the amount is diminished, the difference shall be refunded to the company by the party to whom the same may have been paid, and judgments therefor and for all costs of the appeal shall be rendered against the party so appealing." It may be that this language is not entirely apt, for in this case the party appealing was not the landowner but the Depot Company, and so it cannot be said that judgments were rendered against "the party appealing." But the true intent of the statute is obvious, and at any rate we are bound to accept the construction placed upon it by the Supreme Court, and hold that it means that if the last appraisal was less than the first and the amount of the first had been paid, the company was entitled to recover the difference from the party to whom it had been paid. Nothing is said, it is true, in the statute about execution, but the Supreme Court ruled that under the general statutes the recovery of the judgment carried with it a right to an execution.

578 *578 These are all the questions in this case. We find nothing in them which justifies an interference by this court with the proceedings of the state courts; nothing in which it can be said that any ruling of those courts was in absolute disregard of the respondents' right to compensation. The judgment must, therefore, be

Affirmed.

MR. JUSTICE HARLAN dissenting.

Did the trial court prescribe any rule of law for the guidance of the jury that was in absolute disregard of the right of the plaintiffs in error to such compensation?

In *Chicago, Burlington & Quincy Railroad* v. *Chicago,* 166 U.S. 226, 241, it was held that "a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."

Before proceeding with his argument to the jury, Mr. Dickinson, the attorney for the plaintiffs in error, called the attention of the trial court to some of the principles which, in his judgment, should control the ascertainment of the just compensation to which they were entitled. Addressing the court in the presence of the jury, he said: "Now, as to what is compensation, I refer your honor to the case of *The Grand Rapids & Indiana Railroad* v. *Heisel,* in 47 Michigan, 398: `It need hardly be said that nothing can be fairly termed compensation which does not put the party injured in as good a condition as he would have been if the injury had not occurred. Nothing short of this is adequate compensation. In the case of land actually taken, it includes its value, or the amount to which the value of the property from which it is taken is depreciated, and
579 in *Jubb* v. *Hull Dock Co.,* 9 Q.B. 443, it was held, where the property taken was a brewery in *579 operation, the damages included the necessary loss in finding another place of business. In cases where damage is by injury aside from the actual taking of property, the rule has been to make the party whole as nearly as practicable, and where it affected the rental value or enjoyment the same principle has been applied as in other cases. There is no reason, and so far as we can discover, no law which allows the wrongdoer to cast any portion of an actual and appreciable loss on the party whom he injures.' (In this case the same rule of damages would apply as in the Grand Rapids and Indiana case, and the suit was brought for damages, and the question was what was compensation.) `In such a case as this, it is in the power of the company and always has been to have the compensation settled once for all, and to get any benefit which the law attaches to such a method of ascertainment. Until this is done the possession is a continual wrong.'"

At this point the court interrupted the argument of counsel with this observation: "A question which arises in my mind is this: There is no question but what the Backuses are entitled to full compensation for such damages as they may suffer, but does not the other rule also attach, and that is, that the jury are not in any way to consider any speculative damages or any probable damages?" To this counsel made the following response: "They can only consider the damages which are actually shown, but the other rule follows, may it please your honor, that they are not to estimate those damages for a year, or estimate the present injury done by the railroad, but they must assume that the railroad is running to its maximum capacity, that it has other railroads, that it may double, treble or quadruple its trains, so far as that is concerned, and they must estimate the damage for the future time, not for a year or three years or five years or ten years." The court then said:

"That is undoubtedly true to a certain extent, but the question that I have thought about considerably within the last few days is in regard to the testimony which was admitted in the case in regard to their profits, the profits of their business. Do they not come within the rule which applies in regard to speculative damages?"

580 *580 Counsel then observed: "Not at all, your honor. If the profits are shown and the business is destroyed, you can only show it by the effect upon the business, and upon that point I call your honor's attention to the unanimous opinion of the Supreme Court delivered by Mr. Justice Campbell in the case of *Grand Rapids & Indiana Railroad* v. *Weiden,* 70 Michigan, 390, 393: `Under our present constitution there is never any presumption that a railroad is necessary, or that any particular land ought to be given up to its uses. Every landowner therefore has a perfect right to object to giving up his land, and is not confined to objections depending upon price or value... . And a road already established has no better claim than any other to extend or change its lines. Although railroads are allowed by public policy to condemn lands, because they cannot exist otherwise, nevertheless the enterprise is, under our laws, which prohibit public ownership of railways, one of private interest and emolument, and must show its claims to legal assistance.' Now upon the question of profits: `We are bound to see that parties are not deprived of their property without necessity, or without full compensation for being compelled to relinquish it. And, while respect is due to the honest action of juries, it is not conclusive, and is subject to comparison with the facts in the record. Both of the appellants were using their property in lucrative business, in which the locality and its surroundings had some bearing on its value. Apart from the money value of the property itself, they were entitled to be compensated so as to lose nothing by the interruption of their business and its damage by the change. A business stand is of some value to the owner of the business, whether he owns the fee of the land or not, and a diminution of business facilities may lead to serious results. There may be cases when the loss of a particular location may destroy business altogether for want of access to any other that is suitable for it. Whatever damage is suffered must be compensated. Appellants are not legally bound to suffer for petitioner's benefit. Petitioner can only be authorized to oust them from their possessions by making up to them the whole of their losses.' That goes
581 directly upon the question which *581 your honor suggests. Now I shall not take time to refer to the other cases."

I cannot doubt, from what passed between the court and counsel in the presence of the jury, that the court meant to characterize profits from the business of the parties owning the real estate as speculative damages.

After the counsel for the parties concluded their argument to the jury upon the whole case, the trial judge delivered a carefully prepared charge, in which he said: "The question, and the only question before you for your determination, is that of compensation, and of compensation only. Your duty, and your only duty, is to ascertain and determine what compensation or damages ought justly to be paid by the Fort Street Union Depot Company to the respondents for the real estate, property, franchises, easements and privileges described in the petition, viz.: 1. The amount to be allowed to Absalom Backus, Jr., as the owner of the fee of the land described. 2. The amount to be allowed to A. Backus, Jr., & Sons, a corporation, as tenants in possession of such lands. Upon this question, viz., compensation or damages, what I have to say must necessarily be in a broad and the most general way. This is a question for you, and from the very nature of a proceeding of this character you are vested with large powers and great discretion. These powers and this

discretion should not be exercised arbitrarily, nor without proper regard for substantial justice. You should bear in mind that the greater the power the more jealous is the law of its careful exercise, and the greater is the responsibility of the persons vested therewith. You should exercise a cool, careful, intelligent and unbiassed judgment. The compensation or damages must be neither inadequate or excessive, and your award must not furnish a just inference of the existence of undue influence, partiality, bias and prejudice, or unfaithfulness in the discharge of the duties imposed upon you. You must, however, remember that the respondents' property is taken, or its enjoyment interfered with under the so called power of eminent domain, a power somewhat and necessarily arbitrary in its character, and that where this is done the party whose
582 property is taken, *582 or whose enjoyment or use of the property is interfered with, is entitled to full compensation for the injury inflicted. While the allowance to be made should be liberal, still it must not be unreasonably exorbitant or grossly excessive. It should be a fair and liberal allowance and full and adequate compensation for the damages inflicted. You should not allow too little nor should you allow too much. Your award should be based upon that which is real and what is substantial, and not upon what is either fictitious or speculative. You should look at the conditions of things as they exist. Under the constitution and laws the right to take another's property for public uses, the power to exercise the right of eminent domain, is a part of the law of the land, but when this power is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation."

Is it not clear that the trial judge, while indulging in very general language as to the duty of the jury not to allow too much or too little compensation, gave the jury to understand that compensation was to be ascertained upon the basis only of the ownership by Absalom Backus, Jr., of the fee in the land described, and of the rights of A. Backus, Jr., & Sons as tenants in possession, excluding damages to the business of the plaintiffs in error, which would arise from the condemnation of their property rights? The jury were, in effect, instructed that the profits derived by them from their business were to be excluded from consideration as being "fictitious or speculative."

That he was so understood by counsel for the plaintiffs in error is manifest from the circumstance that, immediately upon the charge being concluded, he made the following exceptions to it: "We except to that part of the charge of the court wherein he says that the damages are to be confined to the damage to the real estate described and the improvements upon it; whereas, in our view, the damages are to the entire plant, including the injury to the business from the impairment of the mill as affecting its adjuncts, the lumber yard
583 and *583 the storehouse... . To what is said by the court as to avoiding the giving of speculative damages, in view of what has been said before by the court in regard to taking into consideration the profits, I refer to what has been said upon the records in the course of the testimony and upon the argument, expressing the views of the court against taking into consideration the profits. We except to the refusal of the court to charge as I requested in the language or in the substance, according to the decisions of the Supreme Court, which I read in full upon the opening of my argument and called attention of the court to it, especially to the expression of Campbell, J., in delivering the opinion of the court in *Grand Rapids & Indiana Railroad* v. *Weiden,* 70 Michigan, 395, 398."

If the trial judge did not intend to say to the jury that injury to the business of the plaintiffs in error was to be deemed speculative, and therefore to be excluded from consideration, he would instantly have said that no such impression was intended to be made as that indicated by the exceptions taken to his charge.

The views expressed by counsel for the plaintiffs in error as to the principles which should guide the jury in the matter of compensation were sustained by the authorities. In addition to the cases in 47th and 70th Michigan above referred to, reference may be made to many others decided by the Supreme Court of Michigan.

In *Commissioners* v. *Chicago &c. Railroad,* 91 Michigan, 291, which was a case of the condemnation of the lands of a railroad company, that court said: "If, therefore, their adjoining land is rendered less valuable by the location of a public highway, or another railroad across its property, there is no reason why they should not recover compensation therefor. Situated near this crossing is a small tract of land used for warehouse purposes. It is insisted by the respondents that, by reason of this crossing, this land, with the warehouse thereon, is rendered less available and less valuable for the purposes for which it was constructed and used. This was a proper element of damage, and should have been submitted to the jury."

584 At the same term the court, in *Commissioners* v. *Moesta,* *584 91 Michigan, 149, 154, quoted with approval what had been said in *Grand Rapids Railroad Co.* v. *Weiden,* 70 Michigan, 295, saying: "The constitutional provision entitling the owner of private property, taken for public use, to just compensation, has uniformly been construed to require full and adequate compensation. The rules to be applied in fixing the compensation are not necessarily the same as obtain in fixing damages in actions upon contracts. The correct rule of compensation in such cases is more nearly analogous to the remedy afforded in an action in tort in which property rights have been interfered with without the owner's assent. In such cases damages for the interruption of the owner's business are allowed. *Allison* v. *Chandler,* 11 Mich. 549." In *City of Detroit* v. *Brennan,* 93 Michigan, 338, the court reaffirmed the doctrine of the former cases, that the full measure of compensation and the injury done to the business should be allowed, and said: "The law considers the rights of the property and business carried on by the respondent as of equal consideration and entitled to as much protection as the right of the city to take the property and interfere with the business; and will not permit the property to be taken and the business to be interfered with, unless an actual public necessity exists for the making of the improvement... . The element of damages are: (1) The value of the property taken for the opening of the street; the injury to the works and property not taken, and left in the parcel of land from which the property is taken; (2) the injury to the business of the owner; (3) compensation for all prospective loss or injury resulting from the opening of the street, and the taking of the property for that purpose."

See also *Grand Rapids &c. Railroad* v. *Chesebro,* 74 Michigan, 466, where the court said: "An owner has a right to be indemnified for anything that he may have lost. The farming test, which is the one petitioner sought to apply, would be of no particular use in a great many cases of suburban lands... . The mere taking of four acres for a right of way could not be regarded, in any sensible point of view, as compensated by one tenth of
585 the value of the forty acres, taking acre for acre. *585 The damages in such a case must be such as to fully make good all that results, directly or indirectly, to the injury of the owners in the whole premises and interests affected, and not merely the strip taken." Further: "The jury here, as in all cases where no certain measure

exists, must trust somewhat to their own judgment. That is one of the purposes for which juries of inquest are provided. They are expected to view the premises and use their own senses... . But the purpose throughout is to give all the damages which they reasonably discover, past or present, and to result, but no more. No one can read this record without seeing that the jury did not deal fully with the case. It is manifest that they gave no damages beyond what they assumed to be the price of four acres by the acre... . It cannot be said there is any real conflict as to the damages arising from the cutting off one part from the other of the forty acres, and this was left out altogether, unless they regarded the proofs of value wantonly, which we cannot believe." See also *Pearsall* v. *Supervisors,* 74 Michigan, 558; *Barnes* v. *Michigan Air Line,* 65 Michigan, 251; *Grand Rapids &c. Railroad* v. *Railroad,* 58 Michigan, 641, 648; *Toledo &c. Railway* v. *Detroit &c. Railroad,* 62 Michigan, 564; *Commissioners* v. *Chicago Railroad,* 91 Michigan, 291; *Commissioners* v. *Chicago &c. Railroad,* 90 Michigan, 385; *City of Grand Rapids* v. *Bennett,* 106 Michigan, 528.

Without referring to other matters discussed at the bar and in the elaborate brief of counsel, I place my dissent from the opinion and judgment of the court upon the ground that the trial court committed error in its charge to the jury as to the principles which should guide them in determining the just compensation to which the plaintiffs in error were entitled. The rules laid down by the Supreme Court of Michigan, in the cases above cited, as to what was just compensation, were, I think, in accord with the principles that obtain in the courts of the Union when determining the just compensation to be made for private property taken for public use.

MR. JUSTICE BROWN took no part in the decision of this case.