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EXCESS CONDEMNATION

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Excess condemnation is the taking of land bordering on a condemnation project that is not needed for the purposes of that project. A recent writer on eminent domain says: "Under this theory the condemnor itself goes into the real estate business in an attempt to salvage the enhanced values created by the improvement."[1] If a street is widened and the city takes land in excess of what is needed and holds that area until a profitable sale can be realized, then the city would recoup in part the acquisition cost of the street widening or project. Some advocates of excess condemnation have suggested for it that public projects might be financed by such proceedings. Much would depend upon the increase in market value of the excess appropriation.

This theory, and it has not advanced far in actual practice, is fraught with difficulties, economic, as well as legal. The state would have to acquire the land at a fair and reasonable price and, certainly, it would not be fair to the property owner for the condemnor to "drive a bargain." Assuming that the state secured the land at a reasonable price, it would have to sell at a profit, and at a good one, to realize the purpose of the transaction. Again the selling at a profit is based upon another assumption that the condemnor could sell as advantageously as an individual could.

There are other purposes of excess condemnation. For example, the condemnor may acquire a greater area than what was considered necessary at the time for a light plant or waterworks, or for any other purpose; if so, it should be able to resell the surplus land. Very often in the widening of streets it would be well to take the whole of certain parcels rather than to leave remainders. In such cases the consequential damages to the re-

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1. ORGEL, VALUATION UNDER EMINENT DOMAIN (1936) § 241.

mainders very often approach the value of the whole parcel. Small remainders alone are of little value to the owner. If a city acquired several adjacent remainder parcels as an incident to a street opening, for instance, the use of such parcels would be greatly increased, either for purposes of resale, with or without restrictions, or as land adjacent to the main improvement for the purpose of beautification.

The advocates of excess condemnation claim that a city should have the right to acquire excess areas surrounding parks and plazas, and along boulevards for the purpose of imposing certain restrictions as to use, and then resell said areas so acquired. Such restrictions would be as to the character of buildings, certain kinds of business, and unsightly billboards fronting on said improvements. On the other hand, it is claimed by others that such accomplishments can be obtained by zoning, or by the establishment of building restriction lines through the exercise of the power of eminent domain. These and all other questions of policy the writer will leave to the city planner and the legislator to solve. The purpose of this article is to deal with excess condemnation from a legal standpoint.

If excess condemnation is to be legally perfected constitutions and statutes will have to clearly provide for such ends, and those requirements will have to be strictly complied with in the condemnation proceedings. If private property is taken, it must be for a public and not a private use. If land is to be taken through what is called excess condemnation, it must be for a public use. If such land is to be resold, the condemnor must take a fee simple title in order to pass such a title to a purchaser. If the fee, or other absolute title, does not pass, the land will not be resold. If constitutions and statutes do not authorize the acquisition of the fee and the sale thereof, excess condemnation cannot exist, for the purchaser will not invest unless he can secure the same title he would get from a private party.

The Constitution of Missouri provides:

> "That no private property can be taken for private use, with or without compensation. . . . except for private ways of necessity. . . ."[2]
>
> "That private property shall not be taken . . . for public use without just compensation."[3]

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2. Mo. CONST. art. II, § 20.
3. Mo. CONST. art. II, § 21.

Other state constitutional provisions are similar, except where, as in many instances, special uses and purposes are named. Such broader constitutional provisions are hereinafter discussed.

The Constitution[4] of the United States provides:

> ". . . nor shall private property be taken for public use without just compensation."

That provision is in the nature of a limitation upon the use of the power of eminent domain. "The power to take private property for public uses," the Supreme Court of the United States said, ". . . belongs to every independent government. It is an incident of sovereignty, and, as said in *Boom Co. v. Patterson,* requires no constitutional recognition."[5]

It is within the province of the courts to determine what is a public use.[6] The Constitution of Missouri so provides.[7] But what property is to be taken for public use, the necessity, expediency and propriety of resorting to eminent domain to acquire property are matters for the legislative department of the government to determine.[8]

The Taking Must Be for Public Use

The term "public use" is not defined by constitution or statute and it probably does not admit of concise definition for the reason that too much depends upon the peculiar facts and circumstances of the proposed project.

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4. U. S. Const. Fifth Amendment.

5. 98 U. S. 403 (1878); also see United States v. Jones, 109 U. S. 513 (1883); Georgia v. Chattanooga, 264 U. S. 472 (1924).

6. Shoemaker v. United States, 147 U. S. 282 (1893); Bassett v. Swenson, 51 Idaho 256, 5 P. (2d) 722 (1931); Root v. State, 207 Ind. 312, 192 N. E. 447 (1934); Howard Realty Co. v. Paducah & I. R. R., 182 Ky. 494, 206 S. W. 774 (1918); Savannah v. Hancock, 91 Mo. 54, 3 S. W. 215 (1886); Cape Girardeau v. Houck, 129 Mo. 607, 31 S. W. 933 (1895); City of Caruthersville v. Ferguson, 226 S. W. 912 (Mo. 1920); Hart v. Bothe, 247 S. W. 256 (Mo. App. 1923); Kansas City v. Liebi, 298 Mo. 569, 252 S. W. 404 (1923); Cobb v. Atlantic Coast Line R. R., 172 N. C. 58, 89 S. E. 807 (1916); State *ex rel.* Red River Valley Co. v. District Court, 39 N. M. 523, 51 P. (2d) 239 (1935); Town of Perry v. Thomas, 82 Utah 159, 22 P. (2d) 343 (1933); City of Richmond v. Carneal, 129 Va. 388, 106 S. E. 403 (1921); Shelton v. State Road Comm., 113 W. Va. 191, 167 S. E. 444 (1932).

7. Mo. Const. art II, § 20.

8. United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53 (1913); Western Union Telegraph Co. v. Louisville & Nashville R. R., 258 U. S. 13 (1922); Boston v. Talbot, 206 Mass. 82, 91 N. E. 1014 (1910), and cases therein cited; County Court of St. Louis County v. Griswold, 58 Mo. 175, 193 (1874); Kansas City v. Liebi, 298 Mo. 569, 252 S. W. 404 (1923), and cases therein cited; State *ex rel.* Red River Valley Co. v. District Court, 39 N. M. 523, 51 P. (2d) 239 (1935), and cases therein cited; State *ex rel.* Olcott v. Hawk, 105 Ore. 319, 208 Pac. 709 (1922), and cases therein cited; Philadelphia, M. & S. Street Ry's Petition, 203 Pa. 354, 362, 53 Atl. 191, 193 (1902); Ruddock v. City of Richmond, 165 Va. 552, 178 S. E. 44 (1935); Nichols, Eminent Domain (2d ed. 1917) §§ 19, 329, 488.

Lewis[9] has defined public use as follows:

> "The public use of anything is the employment or application of the thing by the public. Public use means the same as use by the public, and this, it seems, is the construction the words should receive in the constitutional provision in question."

Judge Cooley[10] gives the more liberal definition in the following language:

> "It may be for the public benefit that all the wild lands of the State be improved and cultivated, all the low lands drained, all the unsightly places beautified, all dilapidated buildings replaced by new; because all these things tend to give an aspect of beauty, . . . gratify the public taste; but the common law has never sanctified an appropriation of property based upon these considerations alone. . . ."

This, the more liberal definition, has as its basis, at least in part, the police power of the state, as well as the application of the power of eminent domain. Projects of this character include, among others, proceedings to condemn lands for the purposes of irrigation, drainage of swamp lands, acquisition of sewer rights-of-way and reclamation of flats and similar lowlands.

With respect to state constitutions and statutes, they have been, and can be, amended to avoid many difficulties in defining public uses and purposes. The constitutional provisions of nineteen states, extending the uses for which property may be taken, are found in Nichols.[11]

In *Bloodgood v. Mohawk & Hudson R. R.*,[12] the question was asked whether or not the constitutional expression "public use" could be made synonymous with public improvement, or general convenience and advantage, without involving consequences inconsistent with the reasonable security of private property. The answer given by the court was in the following language:

> "If an incidental benefit, resulting to the public from the mode in which individuals in pursuit of their own interest use their property, will constitute a public use of it, within the intention of

9. LEWIS, EMINENT DOMAIN (3d ed. 1909) § 258.
10. 2 COOLEY'S CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 1131. On page 1129, the author points out that public use implies a possession, occupation and enjoyment by the public at large, or by public agencies. For other definitions of public use, see NICHOLS, EMINENT DOMAIN (2d ed. 1917) § 39; 20 C. J. 552.
11. NICHOLS, EMINENT DOMAIN (2d ed. 1917) § 38.
12. 18 Wend. 9, 65 (N. Y. 1837).

> the constitution, it will be found very difficult to set limits to the power of appropriating private property."

Due protection under the law has been given to the rights of private property to prevent its seizure by the state. Court decisions make clear that private property cannot be taken for a private use. In *Arnsperger v. Crawford,*[13] the court held the appellant could not condemn a private road through the properties of the appellees; that, if condemnation were permitted, the private road could be fenced and the public would have no right therein. It is to be noted, however, that the court adopted the conservative definition of public use and the opinion has been cited frequently by other courts.

If private property is to be condemned for an alley, or a street, the public use or purpose of the project is assumed or taken for granted. However, there was a time when the question of the public use of a street or drive was passed on by the courts. In *Higginson v. Inhabitants of Nahant,*[14] the question was whether or not a pleasure drive encircling the shore of a peninsula, and the taking of private property from one Higginson, who enjoyed his estate with unmolested view, was a public use. The court held that "passing from place to place" was a rightful object, and that "pleasure travel may be accommodated, as well as business travel." The test was whether or not the drive was for public travel.

The irrigation and mining decisions are pertinent here because they show the liberal construction the courts have given to the term "public use." In these cases the state constitutions and statutes have declared the public policy with the view of bringing about "the greatest good to the greatest number." The results obtained are found in the following language:

> ". . . when the common-law doctrine of riparian rights was modified for the purposes of irrigation and mining, and a system for appropriating and acquiring title to water adopted that made it possible for populous and flourishing commonwealths to grow up where the country otherwise would have remained a desert, uninhabited, with the possible exception perhaps of an occasional cattle or sheep ranch."[15]

In *Clark v. Nash,*[16] the question was whether or not a Utah statute which permitted the condemnation of land of one individual by another for

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13. 101 Md. 247, 61 Atl. 413 (1905).
14. 11 Allen 530 (Mass. 1866).
15. Nash v. Clark, 27 Utah 158, 75 Pac. 371 (1904).
16. 198 U. S. 361 (1905). The defendant's land was north of and adjacent to plaintiff's. The ditch traversed the defendant's land and came to about 100 feet

the purpose of flowing water for irrigation was constitutionally in harmony with the Fourteenth Amendment. The court recognized that the general public could not use the property for which it was being taken—a test almost universally used. In affirming the decision of the state court the Supreme Court of the United States said:

> "This court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject, . . ."

Clark v. Nash was followed in *Strickley v. Highland Boy Gold Mining Company*[17] where the Utah statute[18] provided that the right of eminent domain may be exercised in behalf of the following uses:

> ". . . roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines."

The mining company, pursuant to said statute, instituted proceedings to condemn a right of way for an aerial bucket line across a placer mining claim of Strickley, from the company's mine in Bingham Canyon down to the railway station two miles distant and 1200 feet below, over which line ore was to be carried in suspended buckets. Strickley contended that the aerial line was for a private use and therefore contrary to the 14th Amendment. Among other things the court said:

> "In the opinion of the legislature and the Supreme Court of Utah the public welfare of that State demands that aerial lines . . . should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong."

The Constitution of the United States was not violated because eminent domain was omitted from the Fourteenth Amendment, and prohibition against the state is limited to depriving any person of life, liberty and property without due process of law. If property is paid for the due process

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of plaintiff's and was the only means by which plaintiff could get water, without which his land was arid and valueless. The ditch was 18 inches wide and 12 inches deep. Plaintiff sought a right of way to widen the ditch 12 inches making a total width of 2½ feet. For this right of way over the defendant's land the damages in the trial court were fixed at $40.00.

17. 200 U. S. 527 (1906), *aff'd*, 28 Utah 215, 78 Pac. 296 (1904).

18. UTAH REV. STAT. (1898) § 3588. In Dayton Mining Co. v. Seawell, 11 Nev. 394 (1876), a private concern acquired from an individual a right of way for transporting mining materials to and from a mine.

clause is satisfied. In these cases property rights were paid for under state laws. The condemnation laws of those western states fostered agricultural and mining industries. The courts held the proceedings to establish such projects were for a public use and purpose because the welfare of the people depended upon such industries; hence flourishing and prosperous commonwealths grew and developed. These are instances that stand out alone in their peculiar facts and circumstances where property was taken for a public use.

Idaho has adopted the same broad view of public use,[19] but Arizona has not.[20] The mining and irrigation decisions were not followed by the Supreme Court of New Mexico in *Gallup American Coal Co. v. Gallup Southwestern Coal Co.*,[21] where the statutes[22] authorized coal mine owners to acquire by condemnation proceedings rights-of-way over the property of another coal company. There the constitutional provision[23] on public use was like that of Arizona. It will be observed that the policy of the law in New Mexico seems to differ very materially from states like Utah, Nevada and Idaho. These are matters which are not always easily explained.

Perhaps the most interesting decisions for a study of public use arose under the grist mill statutes. Those statutes take us back to a very early day in the history of this country. In North Carolina the Mills Act was passed in 1777; in Pennsylvania, 1803; in Massachusetts the Provincial Statute of 1714 was amended in 1796; in New Hampshire the Legislature of the Province passed the Mills Act in 1718, which was largely copied from Massachusetts.

Under the Mills Act of New Hampshire of 1868 any person, or corporation authorized by its charter, could erect and maintain a mill and mill dam upon any non-navigable stream, and was authorized to condemn land therefor. In *Head v. Amoskeag Mfg. Company*,[24] the courts held that upon

19. Potlatch Lumber Co. v. Peterson, 12 Idaho 769, 88 Pac. 426 (1906). In IDAHO CONST. art I, § 14, "Public use" has been defined "as any . . . use necessary to the complete development of the natural resources of the state."

20. In the Arizona Constitution, public use is not as broadly defined as in Idaho and Utah. See Inspiration Consolidated Copper Co. v. New Keystone Copper Co., 16 Ariz. 257, 144 Pac. 277 (1914). For further discussion of the mining and irrigation decisions, see Hairston v. Danville & Western Ry., 208 U. S. 598 (1908).

21. 39 N. M. 344, 47 P. (2d) 414 (1935).

22. N. M. COMP. STAT. (1929) §§ 88- 401.

23. N. M. CONST. art. II, § 20.

24. 56 N. H. 386 (1876), *aff'd*, 113 U. S. 9 (1885). The principal statutes of the several states authorizing mills are found in this case on the margin of the page at 113 U. S. 17. The present Missouri Statute is Mo. REV. STAT. (1929) §§ 9157 *et seq.*; for public mills, see §§ 9185 *et seq.*

payment of the damages the condemnor could take possession of Head's land for the purpose of flowing it, and that the due process of law clause under the Fourteenth Amendment was not violated. The Supreme Court of the United States said:

> "When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified."

This common interest which the court speaks of can be welded together into one ownership by condemnation proceedings if for proper purposes, but there was, however, no difficulty in condemning land for a grist mill in so far as the public use was concerned. The public, that is the entire public, had the right to service at the mill. In those days the people, virtually all the people, raised their grain and took it to the neighborhood mill to be ground. The amount of toll paid was fixed by custom or by statute. Those mills were, of course, our first public utilities, and were just as important as electricity is with us today, but that public business did not extend to industries purely private. In Wisconsin it was held that a statute authorizing a municipality to build a dam for the purpose of furnishing water power to factories was void.[25] In Illinois it was held that the contemplated improvement of the waters of the Illinois and Fox rivers to run factories in Ottawa at public expense was not a public use.[26]

The case of *Green v. Frazier*,[27] which involves public use under the power of taxation, in our opinion, deserves attention here, because it shows the extent a state may go without violation of the Fourteenth Amendment. Taxation must be for a public use the same as condemnation must be for a public use. In that case the Legislature of North Dakota authorized the

25. Attorney General v. Eau Claire, 37 Wis. 400, 436 (1875).

26. Mather v. Ottawa, 114 Ill. 659, 666, 3 N. E. 216 (1885). La Grange, Missouri was authorized by the legislature to issue bonds to donate to a private manufacturing plant. The statute was held unconstitutional as providing for a tax for private use. Cole v. City of LaGrange, 113 U. S. 1 (1885). The court cited in support of its holding the case of Loan Association v. Topeka, 87 U. S. 655 (1874), in which case a statute that authorized a tax to aid a private concern in the manufacture of railroad iron was held void. A statute authorizing the county court to pay bounties for planting trees on privately owned farms was held void by the Supreme Court of Missouri. Deal v. Mississippi County, 107 Mo. 464, 18 S. W. 24 (1891); Mo. CONST. art IV, § 47; art. X, § 3.

27. 253 U. S. 233 (1920).

state to organize a bank and operate it, to establish elevators, warehouses, a system of flour mills, and to provide homes for residents through a Home Building Association. An Industrial Commission, which was composed of certain state officers with powers necessary to carry out the provisions of such laws,[28] was created. This commission had power to issue bonds, buy and sell, fix prices, rates, etc. Taxes were provided to pay all bonds. The commission was also given the right of eminent domain. These laws, passed pursuant to 10 constitutional amendments, were held valid by the Supreme Court of North Dakota.[29] The Supreme Court of the United States in affirming the opinion of the state court pointed out that the due process clause contained no specific limitation upon taxation within the states, but that taxation by the states could not be levied for merely private purposes.[30] In affirming the decision of the North Dakota Court, the Supreme Court of the United States said:

> "The precise question herein involved so far as we have been able to discover has never been presented to this court. The nearest approach to it is found in *Jones v. City of Portland,* 245 U. S. 217, in which we held that an act of the State of Maine authorizing cities or towns to establish and maintain wood, coal and fuel yards for the purpose of selling these necessaries to the inhabitants of cities and towns, did not deprive taxpayers of due process of law within the meaning of the Fourteenth Amendment."

The meaning of public use, as defined by the North Dakota Supreme Court, was not disturbed under the due process clause. In that respect, the decision is a complete analogy of the mining and irrigation cases, except that the use in the latter cases was a public necessity upon which the welfare of the whole population of those states depended for their existence, but in North Dakota the constitution and statutes authorized the entry of the state into private business as its public welfare.

When property is taken for a railroad, including its construction and operation, the public use is not questioned.[31] Railroads are public highways, and toll bridges and ferry landings are also parts of public highways and they are so used.[32]

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28. N. D. Laws 1919, c. 147, 148, 150-154.
29. 44 N. D. 395, 176 N. W. 11 (1920).
30 Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 155 (1896).
31. C. B. & Q. R. R. v. McCooey, 273 Mo. 29, 200 S. W. 59 (1917).
32. So. Ill. & Mo. Bridge Co. v Stone, 174 Mo 1, 22, 73 S W. 453, 458 (1903).

In *Chicago & N. W. Ry. v. Town of Cicero*,[33] an attempt was made to draw a distinction between right of way land, 53 feet of which was used for tracks and 47 feet of which it was assumed might be used for other than railroad purposes, and therefore might be put on the market and sold for business purposes, the court said:

> "Whether obtained by voluntary conveyance or condemnation, it is held for railroad purposes. . . . 'It does not hold land, as does the ordinary owner, with the right of using it for any purpose to which it may be adapted, or with the right to sell it at the highest price which it may bring in the market.' . . . To permit it to do so would be to allow private property to be indirectly taken for private use."

Under this holding a railroad could not engage in the real estate business, or change the use for which the land was taken. *Lance's Appeal*,[34] another railroad case, which dealt with fundamental phases of eminent domain, is pertinent here:

> "The power arises out of that natural principle which teaches that private convenience must yield to the public wants. . . . It requires no argument to prove that after the right has been exercised the use of the property must be held in accordance with and for the purposes which justified its taking."

As the court pointed out, among other things, that it would be a fraud upon the owner to take his property for railroad purposes and build private homes or mills, or erect machinery not connected with the use of the company's franchise, or build and conduct stores, taverns, shops and the like along the right of way, and other uses not thought of under the prescribed terms of acquisition. Such uses, the conclusion was, would not be a public use. Under decisions of this character a railroad could not take advantage of excess condemnation.

In 1874 the Missouri legislature passed an act[35] to establish Forest Park for the benefit of the inhabitants of St. Louis County, in the eastern part thereof, near to and outside the corporate limits of St. Louis. It was contended in *County Court of St. Louis County v. Griswold*[36] that a park

33. 157 Ill. 48, 53, 41 N. E. 640, 641 (1895).
34. 55 Pa. 16, 25 (1867).
35. Mo. Laws 1874, p. 371.
36. 58 Mo. 175, 196 (1874). The Supreme Court of California held in County of San Benito v. Copper Mountain Mining Co., 7 Cal. App. (2d) 82, 45 P. (2d) 428 (1935), that a public park condemned for the purpose of granting and conveying it, without consideration, to the United States was a public use; that a park was

was not a public use; that the park was not demanded by St. Louis County, but by the City of St. Louis. The Supreme Court of Missouri said:

> "Private property is taken for public use when it is appropriated for the common use of the public at large. A stronger instance cannot be given than that of property converted into a public park. A public park becomes the property of the public at large. . . . There is sufficient, then, on the face of this act to warrant us in holding that the park in question is for public use."

In *State* ex rel. *Smith v. Kemp*,[37] the supreme court held valid a statute which authorized condemnation proceedings for the acquisition of "any tract or parcel of land in the State of Kansas, which possessed unusual historical interest."[38] This use which was in the nature of a park, was held a public use by the Supreme Court of the United States in the same case.[39]

In *Kansas City v. Liebi*,[40] the city undertook by condemnation proceedings, pursuant to ordinance, to restrict the use of property along Gladstone Boulevard, a residential street, more specifically, the establishment of a building line thirty-five feet from either side of the boulevard. The ordinance fixed the benefit or taxing district within 150 feet from either side of the boulevard, and provided that the damages should be paid by special assessments within said district. The ordinance also prohibited billboards, gasoline stations and gasoline tanks of more than 100 gallons within said benefit district.

In passing on the question of public use the Supreme Court of Missouri adopted the liberal view of "public use," as given by Nichols[41] and other authorities, to the effect that "public use" was synonymous with "public benefit" or "public advantage." If these words are read in connection with the facts, the circumstances and conditions to which they are kindred, their meaning is obvious.

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a public use where it was to be used by the people of a town, city, county, state or nation. Note the cases therein cited which show that many of the national parks have been acquired in part by gifts from the states. In this connection see the recent cases of State v. Oliver, 162 Tenn. 100, 35 S. W. (2d) 396 (1931); Yarborough v. North Carolina Park Comm., 196 N. C. 284, 145 S. E. 563 (1928).

37. 124 Kan. 716, 261 Pac. 556 (1927).
38. KAN. REV. STAT. ANN. (1923) c. 26, art. III; see Kan. Laws 1927, c. 205.
39. Roe v. Kansas, 278 U. S. 191 (1929).
40. 298 Mo. 569, 252 S. W. 404 (1923).
41. NICHOLS, EMINENT DOMAIN (2d ed. 1917) 130, 131; LEWIS, EMINENT DOMAIN (3d ed. 1909) § 257; COOLEY, CONSTITUTIONAL LIMITATIONS (7th ed. 1903) § 766; 20 C. J. 552; County Court of St. Louis County v. Griswold, 58 Mo. 175 (1874).

In order to constitute a public use it is no longer necessary that the entire community should actually use the improvement. Its public character is not lessened by the fact that the benefit inures largely to a group of individuals.[42] Public enjoyment is always created by the establishment of a boulevard driver or a public park. No one questions the legality of a parkway along a street although it is not traveled, not taken in possession by the public. It is merely an ornament.

In *Salisbury Land & Improvement Co. v. Commonwealth*,[43] the state of Massachusetts attempted to acquire a beach for a public reservation or park by eminent domain with power to sell or lease said property, or part of it, in the discretion of the Salisbury Beach Reservation Commission. The statute[44] made it clear that it was intended that real and personal property was to be sold as the commission "may deem advisable," for the right to sell was in no way limited by the statute. In holding the statute unconstitutional, the court said:

> "Private property cannot be taken directly or indirectly for a private end. It cannot be seized ostensibly for a public use and then diverted to a private use."

The court distinguished the case from *Boston v. Talbot*,[45] where the statute[46] authorized the taking of the fee and easements, including the right to go under the surface, or through or under buildings, or parts of building, and that the taking may be confined to a section of a parcel, fixed by horizontal planes of division, below, above, or on the surface, and the authority was given to sell, or remove any buildings from the land, and to sell or

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42. Kansas City v. Liebi, 298 Mo. 569, 252 S. W. 404 (1923), 28 A. L. R. 295 (1924), and cases therein cited. We omit the zoning features of the Liebi case although they are closely involved in the decision. It is worthy of note, however, that zoning restrictions may now be imposed under the police power of the state. Euclid v. Ambler Realty Co., 272 U. S. 365 (1926); State *ex rel.* Oliver Cadillac Co. v. Christopher, 317 Mo. 1179, 298 S. W. 720 (1927).

43. 215 Mass. 371, 102 N. E. 619 (1913). In Opinion of Justices, 204 Mass. 607, 91 N. E. 405 (1910) the court held that the legislature could not authorize a municipal corporation to condemn land in excess of what was needed for public streets, to be leased to merchants for the encouragement of commercial interests of the municipality. In Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U. S. 254 (1891), the court held, although the state could not appropriate property of individuals for the purpose of creating water power to be leased for manufacturing purposes, that, if there was a surplus of water, the state could dispose of such surplus water as an incident to the right to make the public improvement.

44. MASS. STAT. (1912) c. 715.

45. 206 Mass. 82, 91 N. E. 1014 (1910).

46. MASS. STAT. (1902) c. 534.

lease any interest taken, whenever such interest or property ceased to be needed for such purposes. The construction of the tunnel and its underground stations with the approaches thereto called for the use of land not necessary for the tunnel as completed. There were risks and possible damage to buildings and foundations not within the limits of the tunnel. In the construction work the contractor would have no right to use the adjoining land without permission from the owner thereof, and, in many instances, such permission could not be obtained on account of the possible damage to the property. In that case the court held that the legislature might, in the interest of economy, provide for the taking of excess land, including buildings, and to provide for the sale of land, not needed for the tunnel easement, when the Transit Commission should decide such remainders were not needed; that said excess taking and said sale or sales were merely incidental to the main project, that of making a right of way for a tunnel, a thing of permanency.

The court also distinguished its ruling from the case of *Moore v. Sanford*,[47] where the statute[48] authorized the taking of certain lands, known as flats[49] adjacent to the Boston harbor by eminent domain, which, when filled by solid earth, would be sold, and would yield a possible pecuniary benefit to the commonwealth. Without this filling, reclamation in other words, the land was worthless. This project contemplated the improvement of Boston harbor, an instrument of commerce, railroad and commercial activities. The court considered the improvement of the harbor, alone, was a public use of greater importance than a local advantage.

The statute in the *Salisbury* case would have permitted the condemnor to engage in the real estate business, but in *Boston v. Talbot* the sale of

47. 151 Mass. 285, 24 N. E. 323 (1890).

48. Mass. Acts 1884, c. 290.

49. The Boston flats were areas of lowlands, portions of which were constantly under water. These lowlands were along Charles River, and adjacent to the waterfront, and were affected in varying degrees by high and low tides. Back Bay, an area of about 200 acres, at one time was a sheet of water, "nothing less than a great cesspool." Back Bay well covered by water in high tide, was in low tide a useless and unsightly place. The use of Charles River for sewerage purposes caused Back Bay at low tide to become a menace to public health. Back Bay has been filled, properly drained and rebuilt; it is now a fine residential section of Boston. A park, known as Back Bay Fens, not part of the Charles River Basin, is also reclaimed land. The original peninsula of Boston which had an area of 783 acres, has been enlarged to 1829 acres—a reclamation from water to "made land." This reclamation accomplished for the purpose of sanitation and of expanding the city's usable area, has been a development covering many years. ENCYCLOPEDIA AMERICANA (1839-1847); AMERICAN MAGAZINE OF ART, 13: 75-80, March 1922, "Redeeming a Waterfront."

parts or parcels of land taken in condemnation was merely incidental to the main purpose of establishing the tunnel. These parcels were only to be sold when the Tunnel Commission decided they were not needed for public use. In *Moore v. Sanford,* worthless land was reclaimed, made usable, as an adjunct to the harbor, a distinct public use, although there was an incidental private benefit. The making of the Boston flats usable is comparable to the public use, benefit and utility derived from irrigation and mining cases.

In Pennsylvania excess condemnation was held invalid in 1913. In *Pennsylvania Mutual Life Insurance Company v. Philadelphia,*[50] the statutes[51] authorized cities to appropriate private property within 200 feet of land appropriated for parkways in order to protect the same by resale of neighboring property with restrictions. Section 3 conferred upon the proper authorities the right "to resell such neighboring property with such restrictions in the deeds of resale" of said property. Section 4 declared the appropriation of property for such purposes "to be taking . . . for public use." The Philadelphia ordinance provided for the acquisition of private property outside of and within 200 feet of the parkway, a projected street extending from the City Hall to Fairmount Park for the purpose of imposing restrictions on and for the resale of said excess area.

The court reasoned that the only "public use" was the protection of the parkway; that the only "use" the city could make of the property was to impose restrictions on the property in the hands of the purchaser from the city, and the fee was to be sold to private parties for private use. The court said:

> "Holding, as we do, that the use to be made of property located outside a public highway is not a public use, for which private property may be taken by the city against the consent of the owner, the effect of the act of 1907, . . . is to permit, by the exercise of eminent domain, the taking of the property of one citizen without his consent and vesting the title thereto in another."

It is hardly necessary to state that excess condemnation was not legal in Pennsylvania.[52] Those same purposes may be accomplished in Missouri by building line restrictions as in *Kansas City v. Liebi.*[53]

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50. 242 Pa. 47, 88 Atl. 904 (1913).
51. Pa. Laws 1907, p. 466, §§ 1-4.
52. In Valmont Development Company v. Rosser, 297 Pa. 140, 146 Atl. 557 (1929), it was contended that the area taken for a bridge approach was greater than that allowed by law. The court held that cities building for the future were bound

The constitution[53a] of Ohio in 1912 provided for excess condemnation in the following language:

> "A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made."

In Cincinnati the city undertook to widen Fifth street from Pike to Main streets by taking twenty-five feet on the south side thereof, and to acquire certain excess parcels on or along the widened street. There were three excess parcels involved in the case of *Cincinnati v. Vester*,[54] two of which fronted on the south side of the proposed Fifth street, the northern twenty-five feet of each was to be taken in said street widening, and the remainders were to be taken in the excess areas along with a third parcel which was 19 feet south of the proposed street widening.

The city council was required by the Ohio statutes to pass a resolution "defining the purpose of the appropriation." The purpose of the excess appropriation, as stated in the resolution, was in the most general terms, namely, "in furtherance of the said widening of Fifth street," and was "necessary for the complete enjoyment and preservation of said public use." The Supreme Court of the United States said:

> "In what way the excess condemnation of these properties was in furtherance of the widening of the street, and why it was necessary for the complete enjoyment and preservation of the public use of the widened street are not stated and are thus left to surmise."

The contentions of counsel indicate that one of the purposes for the excess appropriation was the recoupment of expenses from the increased values, but it was not so defined and set forth in the resolution. The court

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only by factors of reasonableness and projects may reasonably include useful, ornamental and artistic designs. In New York in 1893 excess condemnation, that is, for the purpose of disposing of surplus land acquired by eminent domain was held valid. The land in that case had been acquired for a park and in the course of time had become useless for that purpose. *In re* City of Rochester, 137 N. Y. 243, 247, 33 N. E. 320, 321 (1893).

53. 298 Mo. 569, 252 S. W. 404 (1923).

53a. OHIO CONST. art. XVIII, § 10.

54. 281 U. S. 439 (1930). The Vester case was cited in East Cleveland v. Nau, 124 Ohio St. 433, 179 N. E. 187 (1931), where the Supreme Court of Ohio said that the purposes of excess condemnation must be specified and that such purposes must be proven by evidence in order to establish the public use.

adverted to the well established rule in condemnation proceedings that the constitutional and statutory requirements must be strictly complied with, hence the proceedings for the excess appropriation failed.

The Supreme Court of Michigan in 1931-33 recognized excess condemnation as valid in *Emmons v. Detroit.*[55] The constitution[56] provided:

> "In exercising the powers of eminent domain and in taking the fee of land and property that is needed for the acquiring, opening and widening of boulevards, streets and alleys, municipalities shall not be limited to the acquisition of the land to be covered by the proposed improvement, but may take such other land and property adjacent to the proposed improvement as may be appropriate to secure the greatest degree of public advantage from such improvement. After so much of the land and property has been appropriated for any such needed public purpose, the remainder may be sold or leased with or without such restrictions as may be appropriate to the improvement made."

In the widening of Plymouth street in Detroit it appears that all of lot 105 was taken, but that the northern 15 feet of the lot extended beyond the street line. This fifteen foot strip was not paved and was not used for street purposes. The street laid between the improved street and the plaintiff's property. She was assessed a tax bill for paving the street as a property owner fronting on the street. The court held that plaintiff's property was not abutting on the street and, therefore, her property was not liable for the assessment; that the city had paid for and acquired the fifteen foot strip in fee and that under the constitutional amendment of 1928 the area in question could be sold by the city. Under these decisions cities may take remainders of parcels where consequential damages would, together with the actual damages, amount to the value of the whole parcel. The court made it clear that excess condemnation in that state was legal.

Condemnor Must Take a Fee Simple Title

As to whether or not a fee may be taken by condemnation, Lewis, in his work on eminent domain, has spoken very clearly on the subject in the following language:

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55. 255 Mich. 558, 238 N. W. 188 (1931); same case after reargument, 261 Mich. 455, 246 N. W. 179 (1933).

56. Mich. Const. art XIII, § 5; Mich. Comp. Laws (1929) §§ 3912-14, and Mich. Laws 1929, Act 190, authorize municipalities to purchase or condemn the fee to real estate. In City of Chicago v. McCluer, 339 Ill. 610, 171 N. E. 737 (1930), the city took a strip of land two feet by 125 feet, lying along the widened street. The court held the matter was "too trifling an error to defeat a major improvement."

"In absence of any constitutional restraint, it rests with the legislature to say what interest or estate in the lands shall be taken for public use. The whole matter thus being in the discretion of the legislature, it may authorize a fee to be taken, and necessarily may authorize any lesser estate or interest to be taken, according to its views of the requirements of the grantee and the demands of the public.[57]

"If the statute provides that a fee shall vest, it is usually held to mean a fee simple absolute."[58]

"If absolute, then no individual has any interest in the land or its use, and it may be devoted to any purpose in the discretion of the legislature, or even sold to private parties."[59]

In *Corpus Juris*[60] we find substantially the same text as that given above by Lewis, but the courts are not uniform in their holdings with respect to the condemnation of the fee.

In *Sweet v. Buffalo, N. Y. & Philadelphia Ry.*,[61] the purpose of the condemnation suit was to lay out a public ground for a sea-wall. The statute declared, upon payment of the award, that "the fee shall vest in the city of Buffalo, . . . and thenceforth shall be and remain a public ground for maintaining . . . a sea-wall." The court held the language was sufficient to pass the fee, but that the public use declared was in the nature of a trust engrafted on the fee. In Missouri[62] where the statute[63] provided that a fee simple title should vest in the railroad company for its right-of-way, it was held by the court to vest a qualified or terminable fee, and that upon abandonment of the use the title would revert, although the language used authorized the company to take a fee simple title and to sell and dispose of the same. This case arose under a statute in Missouri before there was a limitation on the title a railroad company might take by condemnation.

Two of the judges, holding that excess condemnation was not authorized, dissented. The charter of the City of St. Louis provides for excess condemnation when authorized by the Missouri legislature. City Charter, 1914, art. XXI, § 16.

57. LEWIS, EMINENT DOMAIN (3d ed. 1909) § 448.

58. *Id.* at § 450.

59. *Id.* at § 219.

60. 20 C. J. 1221, 1223; see also NICHOLS, EMINENT DOMAIN (2d ed. 1917) §§ 150, 157, 334.

61. 79 N. Y. 293 (1879).

62. Kellogg v. Malin, 50 Mo. 496 (1872).

63. Mo. R. R. LAWS (1859) 51, 52; Mo. LAWS 1853, p. 355; other railroad statutes of Missouri, providing for taking the fee are: Mo. Laws 1836, p. 247; Mo. Laws 1846, p. 156; Mo. Laws 1847, p. 145; Mo. Laws 1871, p. 59; Mo. Laws 1849, p. 219; Mo. Laws 1851, p. 272.

The constitution[64] of Missouri provides that the fee simple title cannot be taken for railroad right-of-way without the consent of the owner. In other words, a railroad cannot condemn the fee. In *Allen v. Beasley*,[65] the court pointed out that, since the decision of *Kellogg v. Malin*,[66] where railroad corporations were authorized by statute to condemn the fee for right-of-way purposes, similar statutes had been construed to mean no more than an easement. Such is the rule in Missouri, but there are states where the appellate courts hold that railroad corporations may condemn the fee.[67]

But with respect to the purchase by a railroad for a valuable consideration the railroad acquires the fee. The Supreme Court of Missouri so held in *Coates & Hopkins Realty Company v. K. C. Terminal Ry.*[68] On principle, if a railroad pays for the fee, that is the full market value either by bargain and sale, or by condemnation, we see no reason why it should not acquire the fee simple title.

In *City of Moberly v. Lotter*,[69] the court held the Missouri statute was sufficient to authorize the city to acquire the fee and said statute did not violate any constitutional provision. In *County Court of St. Louis County v. Griswold*,[70] the court held that Forest Park vested in St. Louis County in fee.[71] Later the question of the title to Forest Park came before the Supreme Court of Missouri in *State* ex rel. *Wood v. Schweickhardt*[72] and the court, referring to the *Griswold* case, said:

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64. Mo. CONST. art II, § 21.
65. 297 Mo. 544, 553, 249 S. W. 387, 389 (1923).
66. 50 Mo. 496 (1872).
67. See authorities cited in Coates & Hopkins Realty Co. v. K. C. Terminal Ry., 328 Mo. 1118, 1134, 43 S. W. (2d) 817, 822 (1931); 2 LEWIS, EMINENT DOMAIN (3d ed. 1909) 1496.
68. 328 Mo. 1118, 1134, 43 S. W. (2d) 817, 822 (1931), where the court said: "Neither our constitution nor our statutes . . . discloses any limitation upon the power of a railroad corporation to hold, purchase, or convey the fee in land when acquired by bargain and sale upon a valuable consideration."
69. 266 Mo. 457, 181 S. W. 991 (1915). There the statute provided that upon payment of compensation the "circuit court . . . shall . . . order, adjudge and decree that the title, in fee, . . . be . . . vested forever in the city. . . ." See Mo. REV. STAT. (1919) § 8344. This section was amended in 1929 by changing the fee to an easement. See Mo. REV. STAT. (1929) § 6862. Section 7089 authorizes cities of the fourth class to take the fee.
70. 58 Mo. 175 (1874).
71. Here again the statute provided that upon payment of the award "the circuit court shall immediately order and decree that the title in fee . . . be . . . vested forever in the people of St. Louis County."
72. 109 Mo. 496, 508, 19 S. W. 47, 50 (1892). It may be noted that by the Constitution of 1875 the St. Louis city limits were extended to include Forest Park, but the park was acquired by condemnation prior to the adoption of the Constitution of 1875.

> "It cannot be doubted . . . that the absolute property in the park has been vested in the city. . . ."

In *Neil v. Independent Realty Company*,[73] it was urged that the dedication of a street passed the fee to the city. The statute provided that:

> "Such maps or plats . . . shall be a sufficient conveyance to vest the fee of such parcels of land . . . intended for public uses . . . in trust and for the uses therein . . . intended. . . ."

The court held that the fee was limited to the trust named, and the dedication was not a conveyance of a fee simple title, but only an easement, and upon vacation the dedicator was seized, freed of the easement. In other words, under the statute a trust was engrafted on the fee. Certainly the legislature did not provide for an absolute fee, but, on the contrary, the dedication was limited to street purposes. Other limited fees referred to in condemnation proceedings are qualified or terminable fees.[74] The general rule is that an easement or less than a fee is created unless it is clear that a fee was intended, or necessarily implied from the language used.[75]

In *Wyoming Coal & Transportation Company v. Price*,[76] the court in construing the statute[77] providing that "upon payment (of the damages) . . . the state shall be seized of such lands as of an absolute estate in perpetuity," was held to mean a fee simple title and that the commonwealth, having acquired certain land for canal purposes upon abandonment of that use, by change of route, could pass the fee title by conveyance thereof. The same court in *Lazarus v. Morris*,[78] where the land was taken for a school, that is for use and occupation and the erection of a school building thereon, very properly held that only an easement was acquired, and when the use ceased the land reverted to the original owners. However, the court pointed out that if the statute gave an absolute fee and full compensation

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73. 317 Mo. 1235, 298 S. W. 363, 70 A. L. R. 550 (1927).
74. Fairchild v. St. Paul, 46 Minn. 540, 49 N. W. 325 (1891); Smith v. Minneapolis, 112 Minn. 446, 128 N. W. 819 (1910); See Sweet v. Buffalo, N. Y. & Philadelphia Ry., 79 N. Y. 293 (1879). We can see no practical difference between a terminable fee and an easement. In either case when the use is abandoned the property reverts to the original owner or his grantees. Where there is no abandonment, an easement to all intents and purposes, is just as usable as the fee. If, however, the condemnor desires the reversion in order to have a salable estate at the end of the use, the fee simple title should be acquired.
75. 20 C. J. § 583.
76. 81 Pa. 156 (1876).
77. Act Feb. 26, 1826, Pamph. L. 55, § 8.
78. 212 Pa. 128, 61 Atl. 815 (1905).

was paid, the whole title was acquired. It is elementary that the property owner should be paid for all interest taken.[79]

The old case of *Dingley v. Boston*[80] is very interesting in that it is a precedent followed by many courts. There the legislature in 1867 passed an act,[81] the purpose of which was to enable the city of Boston to preserve the public health and to abate a nuisance then existing in a certain area, about sixteen acres, known as the Church Street District. The plan adopted was to raise the grade by filling in the district, including the streets, to the height of eighteen feet, and to provide for a system of drainage which would carry the sewage into deep water. The city was authorized to lay railroad tracks through any streets of the city in order to transport earth and other material to fill up the area and abate the nuisance. All these changes were to be made without injuriously affecting the lands of the commonwealth or its grantees in Back Bay. The city was authorized to purchase or otherwise take the lands with buildings and fixtures thereon. After taking such lands the city was to file with the registry of deeds of Suffolk County the description of the lands so taken and "the title to all land so taken shall vest in the city of Boston." Provision was made for the assessment and the payment of damages. The court held the statute was constitutional and that the fee simple title vested in the city as the absolute owner, and without consent of the property owners, and that it could dispose of the fee simple title. The court pointed out that the constitution conferred authority upon the legislature to pass "all manner of wholesome and reasonable laws . . . not repugnant or contrary to this Constitution." While the general policy of the law was expressed in the constitution, yet property rights were protected by the payment of just compensation. The case, being one of reclamation, the situation was quite similar to that of the establishment of drainage districts to reclaim swamp lands,[82] or to flow arid lands.[83]

Under public use we cited the case of *Boston v. Talbot.*[83a] With respect to the taking of a fee the court said:

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79. 20 C. J. § 583; Carroll v. City of Newark, 108 N. J. L. 323, 158 Atl. 458 (1932); Thompson v. Orange & Rockland Electric Co., 254 N. Y. 366, 173 N. E. 224 (1930); Ramsey v. Leeper, 168 Okla. 43, 31 P. (2d) 852 (1934).

80. 100 Mass. 544 (1868).

81. MASS. STAT. (1867) c. 308, § 1.

82. Houck v. Little River Drainage District, 248 Mo. 373, 154 S. W. 739 (1913).

83. See irrigation cases, *supra.*

83a. 206 Mass. 82, 91 N. E. 1014 (1910).

". . . that the legislature may determine what kind of an estate it is necessary to take to accomplish the public purpose for which the taking is made, and may take a fee, even though the use of the fee may not be permanent. Sweet v. Buffalo Ry., 79 N. Y. 293; Waterworks v. Burkhart, 41 Ind. 364; Dingley v. Boston, ubi supra; Burnett v. Boston, ubi supra. The Legislature well might determine that a taking in fee might be necessary in certain cases, in reference to a reasonably economical management of the business in the public interest, even though the use of the fee would not be needed permanently, and might authorize a subsequent sale or leasing of any rights in the property that were no longer devoted to the public use. We see no reason for doubting the constitutionality of the act."

Here the taking of the fee for the purpose of resale or leasing as an economical management in the public interest was held valid.

The general rule is that the fee is used by its owner for all legitimate purposes, and a municipality holding the fee should be no exception to the rule, but in *Higginson v. Slattery*[84] the court restrained the erection of a school building upon a public park, known as Back Bay Fens, which the city of Boston had acquired in fee (by condemnation) in 1879. By legislative act the state in 1911 authorized the erection of a high school of commerce in the park without the exercise of the right of eminent domain, presumably unnecessary, since the park was held in fee. The court made it clear that the absolute title was vested in the city and that the use could be changed without reversion to the former owners. The record showed that only 79 per cent of the building was to be used for the school, and the remainder, as planned, was to be used for administrative offices, which use was not authorized by the statute. The 1911 act was held invalid.

In 1893 New York held that the resale of the fee, acquired by condemnation, was valid.[85] Again in 1930 New York approved the acquisition of the fee by condemnation proceedings. In *Thompson v. Orange & Rockland Electric Company*,[86] where the statute[87] provided that "the title to the lands described in the petition . . . shall vest in the county for the purpose

84. 212 Mass. 583, 99 N. E. 523 (1912).

85. *In re* City of Rochester, 137 N. Y. 243, 247, 33 N. E. 320, 321 (1893). The court made it clear that the city could not enter into the real estate business; that the acquisition and resale of the fee was incidental to certain public uses, which in the course of time changed or were abandoned.

86. 254 N. Y. 366, 173 N. E. 224 (1930). The court cited with approval Sweet v. Buffalo, N. Y. & Philadelphia Ry., 79 N. Y. 293 (1879).

87. N. Y. CONS. LAWS (1930) c. 25, §§ 148, 150, 155.

of a highway forever," the court held that the language was sufficient to pass the fee to the county. However, the legislative intent to pass the fee was further indicated by the language of Section 155 which authorized the state and county officials to "sell, convey, grant or lease to the owner or owners of property adjoining the same, so much thereof as may be unnecessary for highway purposes."

In *Carroll v. City of Newark*,[88] the court held the fee was not determined by the fact that the city had abandoned the specific use for which the lands were condemned and devoted to another public use, that of a street. The court did not pass upon the question whether or not the fee was terminable if the lands were sold, since the question of resale was not before the court.

In *Skelly Oil Co. v. Kelly*,[89] the city of Atchison condemned certain lands for a public park, which were never used for park purposes. The statute[90] under which the lands were condemned provided, "the title . . . shall vest in such city." The land in question was sold to the defendant who erected a filling station thereon. The former owner from whom the land was condemned sought to recover on the theory that the city had acquired only an easement. The Supreme Court of Kansas in passing on the question held the statute was controlling with the result that the city, and its grantee, acquired the fee simple title. The decision, it is interesting to note, was based entirely upon the statute and no other court opinions were discussed.

The Kansas case was followed by the Supreme Court of Oklahoma in *Ramsey v. Leeper*,[91] with probably greater emphasis, on the right to acquire the fee simple title by the exercise of the right of eminent domain. In that case numerous statutes[92] were discussed, but the statute which the court held to govern the case is as follows:

> "Every municipality . . . shall have the right and power to acquire, own and maintain, within or without the corporate limits

88. 108 N. J. L. 323, 158 Atl. 458 (1932); N. J. COMP. STAT. (1910) §§ 1006, 1008, 1010-14. Under the New Jersey Statutes, the state takes an easement for highway purposes. N. J. Laws 1927, p. 725. Holcombe v. Western Union Telegraph Co., 109 N. J. L. 551, 162 Atl. 760 (1932). See also Bentley v. City of Newark, 108 N. J. L. 317, 158 Atl. 463 (1932).

89. 134 Kan. 176, 5 P. (2d) 823 (1931).

90. KAN. REV. STAT. (1923) § 26-204; KAN. REV. STAT. (1935) § 26-204.

91. 168 Okla. 43, 31 P. (2d) 852 (1934).

92. OKLA. COMP. STAT. (1921) § 4507. Incidentally, the statute also provided: "Every municipal corporation within this state shall have the right to engage in any business or enterprise which may be engaged in by a person, firm or corporation by virtue of a franchise from such corporation."

> of such city, real estate for sites and rights of way for public utility and public park purposes and for the location thereon of waterworks . . . and for all such purposes shall have the power of eminent domain."

In 1917, Oklahoma City acquired without the city limits, in Canadian county, 82.79 acres for the purpose of a system of waterworks to supply water for the city. The final judgment gave the city a fee simple title for full value paid. The land in question, thirty acres, was not used or needed for the purposes for which it was condemned and was deeded to one W. R. Ramsey with certain restrictions imposed. No question was raised as to the form of the deed and of the right to impose restrictions. The question before the court was whether or not the city could acquire a fee simple title by condemnation. The whole case hinged on the use of the word "own," that is, whether or not the language as used in the statute was sufficient to vest a fee. After discussing many decisions construing the language necessary to pass a fee, the court held the word "own," as used in the statute, meant an unqualified vesting of the title, and the fact that the city did not use all of the land condemned, did not "limit the character of the estate acquired in the land." The judgment vested a fee simple title in the city and the conclusion is that it passed, in the resale of the land, all the incidents of such a title. There was no constitutional restriction which prevented the taking or passing of a fee simple title.

We do not overlook the important case of *Emmons v. Detroit*,[92a] where the constitution and statutes authorize the acquisition of the fee simple title in street widening. The language of the court is clear and distinct without equivocation to the effect that when the city paid for the property the fee vested in the city and that the surplus area could be sold, with or without restrictions, appropriate to the improvement made.

The tendency of the states, and their duly authorized agents, is to take the fee in the exercise of the power of eminent domain.[93]

92a. 255 Mich. 558, 238 N. W. 188 (1931).

93. City of San Gabriel v. Pacific Electric Ry., 129 Cal. App. 460, 18 P. (2d) 996 (1933); Driscoll v. City of New Haven, 75 Conn. 92, 52 Atl. 618 (1902) (holding that the state had the power to authorize the taking of a fee as well as an easement, citing Dingley v. Boston, 100 Mass. 544 (1868)); Bookville & Metamora Hydraulic Co. v. Butler, 91 Ind. 134 (1883); Roanoke City v. Berkowitz, 80 Va. 616 (1885). In Iowa the cities and towns take the fee simple title for their streets. Inc. Town of Lamoni v. Smith, 217 Iowa 264, 251 N. W. 706 (1933). For street purposes it was held in Miller-Carey Drilling Co. v. Shaffer, 144 Kan. 508, 61 P. (2d) 1320 (1936), that the fee to the streets vested in the county. In O'Connor v. City

The question might be asked, what is the effect of the vacation of a street or an alley where the city owns the fee simple title? The answer is substantially the same as if an easement were vacated. The question is a matter of statutory regulation.[94]

CONCLUSIONS

It follows from the decisions reviewed that the condemnor may acquire the fee simple title to lands upon payment of the full market value, in the language of the constitution, "just compensation." It is necessary that legislative acts clearly authorize the condemnation of the fee. In the absence of constitutional restraint such legislative acts are generally held valid. The fact that many states have not until recently authorized the condemnation of the fee, or that the policy of the law in many states has been opposed to the acquisition of the fee, does not in any way affect the legal right to acquire a fee simple title under proper procedure. On principle there does not appear to be any reason why a condemnor may not be authorized to acquire the fee simple title. As to whether or not certain condemnors should not be allowed under the law to acquire the fee is a matter of legislative policy.

It would appear from the decisions to date that if the fee is sought primarily for purposes of excess condemnation the statute should very

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of Saratoga Springs, 146 Misc. 892, 262 N. Y. Supp. 809 (Sup. Ct. 1933), the court held that the title to the streets was fee simple absolute. In State v. Griftner, 61 Ohio 201, 55 N. E. 612 (1899), the state acquired fee simple title to lands under statutes of 1825 for canal purposes and the court held it could sell the fee. The court, in Houston Independent School District v. Reader, 38 S. W. (2d) 610 (Tex. Civ. App. 1931), held there was nothing in the constitution of the state that prevented the legislature from authorizing the taking of a fee.

94. In People *ex rel.* Huempfner v. Benson, 294 Ill. 236, 128 N. E. 387 (1920), the court held upon vacation of a street or alley, which was held in fee by the city, the land reverted to the original dedicators, citing People *ex rel.* Friend v. Wieboldt, 233 Ill. 572, 84 N. E. 646 (1908). In Krueger v. Ramsey, 188 Iowa 861, 175 N. W. 1 (1919), the Supreme Court of Iowa held where the city held the fee, the city upon vacation could deed the street area so vacated, although upon deeding streets, the public right to use them was destroyed. The court quoting from Harrington v. Iowa Central Ry., 126 Iowa 388, 102 N. W. 139 (1905), said "But the city had the right to vacate the portions of the street referred to (see Code, § 751), and on such vacation the title of the portions of land formerly occupied by the streets did not revest in the abutting owners, but remained in the city, and such portions could be disposed of for other purposes."

In Miller-Carey Drilling Co. v. Shaffer, 144 Kan. 508, 61 P. (2d) 1320 (1936), the Supreme Court of Kansas held upon vacation of a street held in fee, following the Kansas Statutes [REV. STAT. ANN. (1923) and (1935), § 12-506], the land reverted to the original owners, that is, from whom the improvement was originally platted.

clearly authorize such purposes, and the procedure so provided, must be strictly followed in carrying out such proceedings.[95]

The salability of the fee as a matter of law cannot be considered, separate and apart from the public use, for which it was condemned. In the cases reviewed the fee was authorized to be sold under certain conditions imposed by statute. For example, in the Boston flats cases, when the land was reclaimed, as provided by statute, it was to be sold; or, as in other cases, when the lands were no longer needed or used for public use, they were to be sold. Even in *Emmons v. Detroit,* where excess condemnation was held valid, it was contemplated that the remainder was to be sold when it was not needed. The authorities do not hold that land can be condemned merely for purposes of resale, a mere speculation in real estate.

If excess condemnation is to become valid as a part of our law, it must be for a public use. Excess condemnation, in the *Pennsylvania Mutual* case, where the plan was to impose restrictions upon excess areas and then resell the same, was held unconstitutional in that it was for a private use. In *Emmons v. Detroit,* the constitution and statutes provided for the acquisition in fee "to secure the greatest degree of public advantage from such improvement." There the excess area condemned in a street opening was for a "public purpose." In the Boston flats cases, where the fee was condemned, and its resale was authorized, after the land had been elevated above the water, the use was held to be public in that the resale was incidental to the main public use of sanitation, improving the harbor, and of expanding the city's usable area.[96] Those cases are distinguished from *Salisbury Land & Improvement Co. v. Commonwealth,* where the resale of the condemned areas was authorized at the discretion of the Salisbury Commission. Here there were no great uses involved, like the reclamation of lands for purposes of public health or improving the harbor. In *Boston v. Talbot,* the legislature deemed it of economical advantage to acquire the excess land rather than risk the outcome of damage claims growing out of the construction of the tunnel. There the excess appropriation was held incidental to the public improvement.

If excess condemnation is desired for the purpose of imposing restrictions, assuming such proceedings to be legal, serious problems would be

95. Cincinnati v. Vester, 281 U. S. 439 (1930); East Cleveland v. Nau, 124 Ohio St. 433, 179 N. E. 187 (1931).

96. Dingley v. Boston, 100 Mass. 544 (1868); Moore v. Sanford, 151 Mass. 285, 24 N. E. 323 (1890); Higginson v. Slattery, 212 Mass. 583, 99 N. E. 523 (1912).

involved in the ends sought to be attained. It must be remembered that after the city parts with title it has no power to enforce the restrictions, and which enforcement must be left to the purchasers. It may be suggested that restrictions may be imposed by zoning laws, and by the establishment of building restriction lines through the exercise of the right of eminent domain.

Certain phases of excess condemnation have been held valid, as is seen in cases reviewed in this article, and, no doubt, others will be. If excess condemnation is to be established, statutes must provide for, and constitutions must not prohibit such taking. The statutes must clearly authorize the acquisition of the fee simple title and provide for the resale thereof. Even then excess condemnation depends upon the facts and circumstances in each project in order to determine whether or not the purposes sought to be accomplished are for a public use.