1952

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Recommended Citation
Charles J. Fain, Use of the Power of Eminent Domain by Missouri Electric Cooperatives, The, 17 Mo. L. Rev. (1952)
Available at: https://scholarship.law.missouri.edu/mlr/vol17/iss2/3
THE USE OF THE POWER OF EMINENT DOMAIN BY MISSOURI ELECTRIC COOPERATIVES

CHARLES J. FAIN*

The use of the consumer cooperative as a device for bringing electricity to the farms of America originated in the executive order of the late President, Franklin D. Roosevelt, in that troublous economic period of the thirties. The expressed purpose of the order was:

"To promote the generation, transmission, and distribution of electricity in rural areas."²

At that time, of the 6,000,000 farms in the United States only 800,000 had electric facilities, and many of this number were supplied from private plants on the farms rather than by central station service. By 1948 over 3,500,000 farms in the United States had been electrified with central station service, largely through the cooperative device.³

The executive order was followed by Congressional action in the form of the Rural Electrification Act.⁴ Briefly, the Act provides a Rural Electrification Authority to administer a lending program to individuals, municipalities, corporations, and cooperatives, the loans to be available only for the furnishing of electricity to those consumers in rural areas, who at the present time are not furnished central station service. Congress appropriated the necessary funds and has continued to make funds available for such loans up to the present time. The cooperative device was encouraged by the Administrator as the method of distribution and since that time the electric consumer cooperative has become the principal recipient of the Federal loans.

The Federal act was soon followed by state enabling acts for electric cooperatives. The Missouri General Assembly passed the Missouri Rural Electric Cooperative Act in 1939.⁵ The Act provided for the organization of a cooperative for the purpose of distributing and selling electric energy in

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2. Ibid.

Published by University of Missouri School of Law Scholarship Repository, 1952
rural areas⁸ to its members, to governmental agencies and political subdivisions, and to other persons not in excess of ten per cent of the number of its members.⁷

Thus any cooperative established under the Missouri act could not serve the public at large but only those persons who came within the Act. This was necessary in order to conform to the federal act which restricted its loans to aiding only those persons in rural areas who did not have central station electric service.

The R.E.A. cooperative organized under the Missouri act differs in many respects from the ordinary electric utility. The latter must, by state law, serve the general public whereas the cooperative is expressly forbidden to do so, and for all practical purposes it can serve only its members. It is the purpose of this study to examine the power of the cooperative to use the power of eminent domain in the light of the restrictive nature of the cooperative’s services in Missouri.

Can an R.E.A. cooperative organized under Missouri Statutes exercise the power of eminent domain? The answer to this question cannot be found in precedent in Missouri for to the present time no eminent domain proceedings, to which an R.E.A. cooperative was a party, have been taken to our appellate courts. But with the expansion of R.E.A. facilities in Missouri the question is being asked increasingly by Missouri attorneys. If the answer is found in the negative the Missouri R.E.A. cooperative will be placed at a serious disadvantage in expanding its present facilities, as the cooperative would have to go into the market place, figuratively speaking, and bargain for the land needed for its facilities and would, in many instances, find that the land was unobtainable.

The Rural Electric Cooperative Act⁸ provides that:

“A cooperative shall have power to exercise the power of eminent domain in the manner provided by the laws of this state for the exercise of that power by corporations constructing or operating electric transmission and distribution lines or systems.”

6. Mo. Rev. Stat. § 394.020 (1949). “Definitions: (a) ‘Rural area’ shall be deemed to mean any area of the United States not included within the boundaries of any city, town, or village having a population in excess of fifteen hundred inhabitants, and such term shall be deemed to include both the farm and non-farm population thereof.”
7. Id. § 394.030.
In short, the law of eminent domain is to be applied to such a cooperative as it is to all other kindred corporations.

The Missouri Constitution of 1945 puts a restriction upon the use of eminent domain by corporations or cooperatives which have been given that power by the Missouri General Assembly. It provides in Article I, section 28:

"That private property shall not be taken for private use with or without compensation; . . . and that when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public."

Thus, at the present time the principles of law governing the use of eminent domain in Missouri may be summarized as follows:

(1) The legislature in its discretion may invest a corporation or cooperative with the power of eminent domain and it is entirely within the discretion of the legislature as to who shall exercise that power. But the legislature cannot determine whether the property is being taken for a private use or a public use—and it must be the latter else it violates the constitutional prohibition.

(2) The determination of the question whether it be a taking for a public or private use is given entirely to the courts.

(3) True, the legislature may declare that a certain exercise of the power of eminent domain is for a public use. Evidence of such are the legislative declarations as to enlargement of certain cemeteries, the construction of drainage ditches, the establishment of public parks, the erection and maintenance of bridges. And when the legislature has acted upon facts which point to the land being taken for a public use the courts will take cognizance of this declaration by the legislature, but, nevertheless,
will not be bound by such a pronouncement. For it is the courts which must ultimately pass upon the question of “public use.” When the legislature has authorized the taking of private property for what it deems a public use, the courts have jurisdiction to investigate that question; to inquire into the facts, and unless the court finds the purpose for which the property is proposed to be taken is in fact a public use, the property will not be taken, even though directed by the legislature.

The probable basis for the above principles is that the power of eminent domain stems from the inherent power of the sovereign state and that state, acting through its legislature, can delegate the power to those whom it sees fit. Yet, because of the fear of people that their legislatures will exploit them, they have imposed the constitutional restrictions set out above as a buffer against indiscriminate use of power by their legislature.

From the foregoing principles it becomes apparent that the determining factor is the construction which the courts will put upon the words “public use.” As R.E.A. cooperative service is restricted to its membership and its membership is restricted by the Missouri Rural Electric Cooperative Act, it cannot be said that an R.E.A. cooperative serves the public at large in the sense that any member of the public desiring electric service could get it from the cooperative lines even though those lines might traverse that would-be consumer’s land. In this respect the cooperative differs radically from the usual private utility which, in principle at least, maintains it will serve the public at large, i.e., any person within reach of its facilities may obtain service without restriction.

Generally speaking, there have been two interpretations of the constitutional restriction embodied in the phrase “for public use.” What may

15. Savannah v. Hancock, 91 Mo. 54, 56, 3 S.W. 215 (1886). “Notwithstanding [it being a judicial question] this, it is undeniably true, that the courts were disposed somewhat to a legislative declaration on the subject. Hence, it is said, if the Legislature has declared the use, or purpose, to be a public one, its judgment will be respected by the courts, unless the use be palpably private.”

16. Southern Illinois and Missouri Bridge Co. v. Stone, 174 Mo. 1, 73 S.W. 453, 456 (1903). “The right of eminent domain appertains to every independent government. It requires no constitutional recognition. It is an attribute of sovereignty. The provision found in our Constitution providing for just compensation for private property taken or damaged for public use is a limitation only on the exercise of that right.”

17. Supra. p. 159.

be called the orthodox conservative meaning of the phrase is a right to use by the public in general. Lewis states:

"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."

A more liberal interpretation of the meaning "for public use" is that it means the same as "public advantage"; the same as "public benefit." Nichols generalizes the more liberal interpretation of the term thus:

"Anything which tends to enlarge the resources, increase the industrial energies, and promote the productive powers of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new resources for the employment of capital and labor, manifestly contributes to the general welfare and the prosperity of the whole community, and ... constitutes a public use."

It is difficult to understand why various courts have arrived at entirely different constructions of the term "for public use" unless one is familiar with the historical development of the law of eminent domain in our state courts. A brief look at that development may suffice to clarify the picture.

In the first half of the nineteenth century land was plentiful; there were the ever beckoning vast regions to the west where land was to be had for the asking. A general feeling of development, largely agricultural and trading, was in the air. Consequently, the restriction or "just compensation" was an adequate protection to the landowner that he would not be exploited; for the normal landowner was usually willing to give up his land for an adequate price.

Then too, the industrial development had not yet arrived so that the power of eminent domain was not delegated to large and powerful companies but was rather thought of as to be used by the state itself in such

19. Note, 21 N.Y.U.L.Q. Rev. 285, 287-288 (1946); Mills, Eminent Domain 15 (1879). In 11 Cooley's Constitutional Limitations 1129 (8th ed. 1927), 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 § 39 (2d ed. 1917); 20 C.J. 552.


developments as post roads. 28 Many of the early state constitutions had no such restriction as to “public use” for in those times such was not needed. 24

In this early period the power of eminent domain was used by private individuals for the establishment of mills on streams necessitating flowage easements. These were certainly not for the use of the public generally, yet they were not questioned because it was obvious that their establishment was for the advancement of the country as a whole, for the benefit of the public, so to speak. The public benefit resulting from these developments of the water power was thus regarded as sufficient to establish public use. 25

But as land became scarce and the industrial development of the nation began in earnest there was a gradual change of the judicial view of eminent domain and that change became more apparent toward the end of the century. To accelerate their industrial development many states delegated eminent domain to favored enterprises, especially railroads. The courts sought ways of limiting the power of eminent domain in order to protect private property from this new threat of powerful financial interests. 26 This was also reflected in the wave of constitutional prohibitions

23. See historical discussions in 1 Nichols, Eminent Domain §§ 41, 83, 84, 85 (2d ed. 1917); 1 Lewis, Eminent Domain § 275 (2d ed. 1909).
24. The first constitutions of most of the original states lacked any provisions pertaining to eminent domain. Massachusetts and Vermont were alone in requiring compensation. Pennsylvania was alone in requiring the consent of the landowner or that of his legal representative. In 1868, five of the original states were still without the guarantee of “just compensation.” Most of the states later admitted to the Union provided for compensation in their constitutions. Grant, The “Higher Law” Background of the Law of Eminent Domain, 6 Wis. L. Rev. 67, 70 (1931).
25. Aldridge v. Tuscumbia C. & D. R.R., 2 Stew. & P. 199 (Ala. 1832); Osmstead v. Camp, 33 Conn. 532 (1866); Boston & Roxbury Mill Dam Corp. v. Newman, 12 Pick. 467 (Mass. 1852); Great Falls Mfg. Co. v. Fernald, 47 N.H. 444 (1857); Scudder v. Trenton Delaware Falls Co., 1 N.J. Eq. 694 (1832); Beekman v. Saratoga & Schenectady R.R., 3 Paige Ch. 45, 73 (N.Y. 1831); Harvey v. Thomas, 10 Watts 63, 66 (Pa. 1840).
26. Railroad Co. v. Iron Works, 31 W. Va. 710, 735, 5 S.E. 453, 467 (1888): “It seems to us, if railroad corporations were permitted ad libitum to do what this defendant in error asks to be done, ‘no deadlier blow could be dealt the private rights of the citizens.’ If the doctrine claimed by defendant in error should prevail, then corporations might go to any private place they chose, to rolling-mills, ice-houses, tanneries, sugar-refineries, brickyards, grocery-stores, etc., and in the country to stone-quarries, coal-mines, stock-farms, etc., and if any private citizen dared to stand in the way, violently wrest his property from him for their mere private gain. In such a state of affairs the so-called protection by the constitution of the rights of private property would by the arbitrary ruling of the courts be rendered nugatory and void. The mere declaration in a petition, that the property is to be appropriated to public use does not make it so; and evidence, that the public will have a right to use it, amounts to nothing in the face of the fact that the only incentive to ask for the condemnation was a private gain, and it was apparent, that the general public had no interest in it.

28 We would do nothing to hinder the development of the State nor to cripple
ushered into the state constitutions during this period. For example, in Missouri there was no constitutional prohibition concerning "public use" until the Constitution of 1875. Case law was relied on entirely to prevent a taking for a private use. But in the Constitution of 1875 there was the new provision:

"That, whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such, judicially determined, without regard to any legislative assertion that the use is public."

This is the same provision which is found in the Missouri Constitution of 1945. The answer to this need for protection as found by the courts, was the so-called "use by the public" test, expanded in some circumstances to mean "the right to use by the public generally."

The test left much to be desired, however. If carried to its logical conclusion then eminent domain could be used to acquire property for the erection of hotels and theaters for it was traditional that the public, generally, had the right to use those facilities. Thus it had to be acknowledged that use and occupation by the general public had its limitations. In such cases the benefit to the public theory, prevalent in the earlier period, was still used.27

Then too, there were the "Mill Acts" of the earlier days of the century

railroad companies in assisting such development, but at the same time we must protect the property-rights of the citizens. Whatever corporations may be entitled to under a proper construction of the law they will receive; but they must not be permitted to take private property for private use."

See, also, the concurring opinion of Senator Tracy, one of the earliest advocates of this restriction of eminent domain, in Bloodgood v. Mohawk and H. R.R., 18 Wend. 9, 60 (N. Y. 1837): "When the 'public interest' is the only limitation on the power of eminent domain, is there any limitation which can be set to the exertion of the legislative will in the appropriation of private property? It seems to me that such a construction of legislative powers is inconsistent with secure possession and enjoyment of private property."

27. See Dayton G. & S. Mining Co. v. Seawell, 11 Nev. 394, 410-411 (1876). The court in adopting the public utility, benefit and advantage construction of public use pointed out that "if public occupation and enjoyment of the object for which the land is to be condemned furnished the only and true test for the right of eminent domain, then the Legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theatres . . . ." and that "it is certain that this view, if literally carried out to the utmost extent, would lead to very absurd results, if it did not entirely destroy the security of the private right of individuals." It is to be noted that this is mere dictum so far as the hotels and theaters are concerned, however, as the land to be taken in this instance was for mining purposes, the principal industry of Nevada at the time and a development which inured to the benefit of the public as a whole.
which had clearly authorized the taking of private property without a use by the public. To fit these "public benefit" instances into the legal straight-jacket of "use by the public," "possession and occupancy of the public," "a right to use by the general public," called for legal sleight-of-hand tactics. Chief Justice Shaw, of the Supreme Court of Massachusetts, tackled the task notwithstanding the fact that he had held at an earlier day\(^8\) that taking land under the mill acts was for a public use. Thus in *Murdock v. Stickney*\(^9\) he ruled that the taking in the mill acts cases was not a taking of property under the law of eminent domain but rather the exercise of the police power to enforce the recalcitrant landowner to *share* his land by giving the mill owner a flowage easement. He said:

"The principle on which this law is founded is not, as has sometimes been supposed, the right of eminent domain, the sovereign right of taking private property for public use. It is not in any proper sense a taking of the property of an owner of the land flowed."

Chief Justice Shaw was thus able to meet the needs of the industrial expansion of the Massachusetts Commonwealth by allowing the flowage easements for the development of water power and at the same time hold to the "use by the public" test for property generally. His evasion was quickly pounced on by sister states caught in the same quandary of industrial expansion and a preservation of private property. The case of *Head v. Amoskeag Manufacturing Co.*\(^10\) went from New Hampshire to the United States Supreme Court using Shaw's argument. Under the New Hampshire mill act the Amoskeag Manufacturing Company desired to overflow Head's land in order to establish the proper water supply to run the company's mills for general manufacturing purposes. Justice Grey, commenting on the extent of the mill acts in the various states, observing that they were found in practically every state in the union, and also observing the need for industrial development made possible by water power, proceeded to dispose of Head's argument that this was a taking not for a public use by quoting extensively the arguments of Chief Justice Shaw of Massachusetts:\(^{11}\)

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28. See Chase v. Sutton Mfg. Co., 4 Cush. 152, 169 (Mass. 1849), where Chief Justice Shaw said: "But these acts (the mill acts) justifying the flowing of another's land without his consent can rest only on the right of eminent domain to take private property for public use on making a compensation."

29. 8 Cush. 113, 116 (Mass. 1851).

30. 113 U. S. 9 (1884).

31. 113 U. S. 9, 21 (1884).
"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. . . . water rights held in common, incapable of partition at law, may be the subject of partition in equity, . . . by a sale of the right and a division of the proceeds."

It is of interest to note that Justice Grey at the very same October term held in *Cole v. City of Grange*,32 that the city of La Grange, Missouri, could not issue bonds to aid in the establishment of a general manufacturing business in La Grange. The citizens had attempted to purchase certain land and give assistance to a company to start manufacturing in their midst because of the general benefit anticipated by the community. The attempted bond issue was to cover these expenditures. Grey remarked that this would be taking of private property (by the taxing power) for a private use as the general benefit derived by the city of La Grange from such an establishment is not a public use within the meaning of that term. He distinguished *Burlington v. Beasley*,33 a case arising in Kansas, where such bonds were upheld by saying:

"The grist mill (to be established by the use of the bonds) is held to be a work of internal improvement, to aid in constructing which a town might issue bonds under the statutes of Kansas, as it was a public mill which ground for toll for all customers."

This was another explanation given by the courts for allowing eminent domain under the mill acts—that these grist mills had to grind for the public. *Burlington v. Beasley* was decided on that basis. This was sufficient to bring them within the "use by the public" test. Such reasoning was justified where the mill statute was confined to a taking under eminent domain only for grist mills which by statute or custom had to serve the general public, one and all, but it could not justify those instances of condemnation under a mill statute where the purpose was not to establish a grist mill but rather for manufacturing purposes in general.

The Missouri Mill Acts restricted eminent domain to those mills which ground for the general public. The statutes also regulated the amount of grain which the mill was to take as its share for the grinding. The statutes

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32. 113 U. S. 1 (1884).
33. 94 U. S. 310 (1876).
were so regulatory in nature as to even require the mill owner to help unload the grain. Thus, Missouri was consistent in its doctrine of use by the public as far as the mill act cases were concerned. The general public did have a right to the use of the mill; it was a type of necessary public service as most of the people raised their own grain and took it to these public mills to be ground into flour, corn meal, and feed. These mills were, in a sense, Missouri’s first public utilities. The Revised Laws of 1825, Volume 2, page 591, provided:

“All mills now in operation or which may hereafter be put in operation, within this state, for grinding wheat, rye, corn, or other grain and which shall grind for toll shall be deemed public mills.”

The Revised Statutes of 1889, Section 7024 defined public mills as:

“All grist mills which grind for toll, and all water grist mills.”

As the nineteenth century drew to a close, the “use by the public” doctrine had become firmly established in Missouri’s law of eminent domain; indeed, as the Mill acts cases in Missouri affirm, it had been consistently followed whereas in other jurisdictions it had been used only when so desired. Nowhere did it find stronger support than in the Missouri cases dealing with condemnation of land by political subdivisions of the state. In 1874 the Supreme Court of Missouri applied the “for the use of the public” test in sustaining the taking of land for the establishment of Forest Park in Saint Louis County. A legislative act authorized the taking of property by Saint Louis County for this park. Griswold, the owner of the land, contended that this was not a taking for a public use because there would be more benefit to the people of the city of Saint Louis than the people of the County of Saint Louis. The court replied:

“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, and is under the control of the public authorities; it may well be paid for by the public, as it is intended for public use.”

34. Mo. Stat. Ch. 98 (Wagner, 1872).
36. County Court of St. Louis County v. Griswold, 58 Mo. 175 (1874).
The court thus held that "public use" did not mean equal use by the public but a right for the public in general to use the facility if the members of that public so desired. This explanation was sufficient to uphold all takings for common carriers and public improvements of diverse nature.

The Forest Park case was accepted as the expression of the law on the subject up to that time and was consistently followed in such cases as the taking of land for an alley;\textsuperscript{37} for a street;\textsuperscript{38} for a sewer line;\textsuperscript{39} and for railroads, their right-of-ways, yards and workshops.\textsuperscript{40} These takings were explained as a use for the general public and in the railroad cases it was said the railroads must carry the freight for the public, and the public generally could ride on their trains, thus the public had a right to the use of the land.

But the "use by the public" test did not meet with the same success in many states as it had in Missouri. Especially was this true of the western states where irrigation and mining were highly important to the economic well-being of the state. The Nevada Constitution\textsuperscript{41} provided that no person shall be:

"Deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation having been first made or secured."

The Dayton Mining Company desired a strip of land so that it could "transport the wood, lumber, timbers and other materials to enable it to conduct and carry on its business of mining." Condemnation proceedings were held up on the grounds that this taking was not for a public use within the meaning of the Nevada Constitution. The Nevada Supreme Court in \textit{Dayton Mining Co. v. Seawell}\textsuperscript{42} replied:

"This brings us to the direct question: What is the meaning of the words 'public use' as contained in the provision of our state constitution? It is contended by respondent that these words should be construed with the utmost rigor against those who try to seize property, and in favor of those whose property is to be seized . . . that the words mean possession, occupation, or direct enjoyment by the public. On the other hand, it is claimed by petitioner that courts should give to the words a broader and more extended meaning, viz., that of utility, advantage or benefit; that any appropriation of

\textsuperscript{37} Savannah v. Hancock, 91 Mo. 54, 3 S.W. 215 (1887).
\textsuperscript{38} City of Caruthersville v. Ferguson, 226 S.W. 912 (Mo. 1920).
\textsuperscript{39} Hart v. Bothe, 247 S.W. 256 (Mo. 1923).
\textsuperscript{40} Chicago, B. & Q. R.R. v. McCooey, 273 Mo. 29, 200 S.W. 59 (1917).
\textsuperscript{41} Nev. Const. Art. I, Sec. 29 (1864).
\textsuperscript{42} 11 Nev. 394, 400, 401 (1876).
private property under the right of eminent domain for any purpose of great public benefit, interest or advantage to the community is a taking for a public use. . . .

"It has frequently been decided that the public have an interest in the use of a railroad because it increases the facility for travel from one part of the country to another, and every citizen may use it by paying the usual rates of fare; a turnpike is said to be for a public use because every man can . . . travel upon it for a fixed compensation (regulated by the Legislature). The same principle has been applied to many of the other enumerated cases. It is, however, evident that the act in question cannot be sustained upon any such reasoning. It can only be sustained, if at all, by adopting the theory advanced by petitioner's counsel. The issue is clearly presented and it ought to be fairly met . . . That mining is of paramount interest of the state is not questioned; that anything which tends directly to encourage mineral developments and increase the mineral resources of the state is for the benefit of the public and is calculated to advance the general welfare and prosperity of the people of this state, is a self-evident proposition."

This idea of public advantage adopted by the Nevada Supreme Court was followed in such western states as Utah\(^43\) in the development of mining and irrigation and Idaho\(^44\) in the development of that state's lumber industry. But Missouri failed to recognize the need for such a liberal interpretation as used by her sister states to the west.

Thus the matter stood until the case of *Kansas City v. Lieb*\(^45\) came before the Supreme Court of Missouri in 1923. The residents along Gladstone boulevard in Kansas City petitioned Kansas City to pass an ordinance which would, in effect, zone the street for residential purposes by restricting the industrial use to gasoline stations of less than 100 gallons capacity. It would also forbid the use of billboards along the street. The city also was to condemn the land for a distance of thirty-five feet on each side of the street, thus establishing a building line set back from the street. This land was to be paid for by assessments upon those residents within one hundred and fifty feet of either side of the boulevard. This would benefit those property owners within the district thus established by keeping the property.

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44. Potlatch Lumber Co. v. Peterson, 12 Idaho 769, 88 Pac. 426 (1906).

45. 298 Mo. 569, 252 S.W. 404 (1923).
free from unsightly businesses and because of the parkway established by the thirty-five foot space on either side would tend to increase the realty values of their holdings.46

In the subsequent condemnation proceedings it was argued that the power of eminent domain could not be exercised as it would be a taking of private property for the benefit of those property owners within the proposed district; that this was not a "public use" according to the Missouri cases as the number to be benefited was restricted to those within the district and not available to the public in general.47

Judge White wrote the majority opinion in which he adopted the view of public use being synonymous with public benefit, public advantage. He quoted Nichol's interpretation, supra, as to the meaning of public advantage.48 Judge White continued:

"As might be expected, the more limited application of the principle appears in the earlier cases, and the more liberal application has been rendered necessary by complex conditions due to recent developments of civilization and the increasing density of population."

The majority opinion, in effect, said that in order to constitute a public use it is no longer necessary that the entire community should actually use the land. Neither is the public use lessened by the fact that the benefit inures largely to a group of individuals. The dissent, expressed by Judge Walker and concurred in by Judge Blair, argued that this was an extension of

46. In many respects the case closely resembled the later zoning cases whereby land is taken by the police power rather than eminent domain. But, it is to be remembered, at the time the aesthetic value to the general public driving upon the boulevard was not recognized as a proper exercise of the police power. Thus the zoning features of the Liebi case are omitted from the discussion but it is suggested that they are related to the decision arrived at by the supreme court. It is of interest to note, in this respect, that zoning restrictions may now be imposed under the police power of the state. See Euclid v. Ambler Realty Co., 272 U. S. 365 (1926); State ex rel. Oliver Cadillac Co. v. Christopher, 317 Mo. 1179, 289 S.W. 720 (1927).

47. Kansas City v. Hyde, 196 Mo. 498, 96 S.W. 201 (1906): "A use is not a public one if an individual or a number of individuals is given the right to use the property in such a manner as to exclude the general public."

48. Judge White: "No satisfactory definition of the term 'public use' has ever been achieved by the courts. Two different theories are presented by the judicial attempts to describe the subjects to which the expression would apply. One theory of 'public use' limits the application to 'employment,' 'occupation.' A more liberal and more flexible meaning makes it synonymous with 'public advantage,' 'public benefit.'" 298 Mo. 569, 592, 252 S.W. 404, 407 (1923).
public use beyond the concept of the previous cases and adopted the narrow view found in the previous Missouri cases.\textsuperscript{49}

The most recent controversy over the meaning of public use has arisen in the field of public housing. The narrow doctrine of use by the public or a right to use by the public was first used to strike down state governmental attempts at supplying low-cost housing to selected, restrictive groups. This early view was evidenced in Massachusetts in 1912 in \textit{Opinion of Justices}\textsuperscript{50} where the housing project was restricted to only certain members of the public, \textit{i.e.}, those within a certain artisan class. The Massachusetts Supreme Court ruled:

"The dominating design of a statute requiring the use of public funds must be the promotion of public interests and not the furtherance of the advantage of individuals . . . the incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises, or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. . . . This would mean that the home of one wage-earner might be taken by the power of the Commonwealth for the purpose of handing it over to another wage-earner."

The court, in overcoming the argument that public funds were spent for schools and hospitals which were not used by all the public, went on to state that the main difference between a government condemning land to use in the business of supplying its people with such facilities—schools, hospitals, transportation—and condemnation for the purpose of supplying a low-income group of the people with living quarters, is that in the former the people can use the facility as of right, while in the latter only those whose income is below a specified amount can qualify for the privilege of using this governmental enterprise.

Thus, when the federal government first attempted public housing under Title II of the National Industrial Recovery Act\textsuperscript{51} this "use by the public" doctrine was used against it in a case holding that condemnation

\textsuperscript{49} Judge Walker: "Public, as the term is used in the Constitution, means everybody; if the use is not for everybody, it is a private use. If to an individual or any number of individuals the right is given to use property in such a manner as will practically exclude the general public therefrom, it is the giving of the property to a private use and a destruction of its public service character." \textit{Id.} at 611, 252 S.W. at 414.

\textsuperscript{50} 211 Mass. 624, 625, 98 N.E. 611, 612 (1921).

\textsuperscript{51} 48 \textit{Stat.} 200, 40 U.S.C.A. §§ 401-411 (1940)
could not be had as the intended use was private. This case was appealed by the government from the federal district court to the circuit court of appeals where the trial court’s decision was affirmed, but the appellate court relied upon the limitation of federal power rather than the trial court’s interpretation of the public use doctrine.

Meanwhile, Congress had enacted the United States Housing Act in 1937 which granted the necessary funds to the various states to carry out their own housing programs, thus putting the issue up to the states as to whether there could be condemnation. Of course, a requisite to obtain the Federal funds was that the state acts restrict the tenants of such public housing projects to those in certain of the low income groups as specified in the federal act. In this respect the legislation was very similar to the grant of loans under the Federal Rural Electrification Act as in the latter funds could not be borrowed unless a restrictive group, i.e., those without central station service, in a rural area, was to be supplied with the electricity made available by the loans.

It was inevitable that the argument of “use by the public” would be used in the state courts to prevent the condemnation of the land necessary for the public housing projects—the same argument which had been effectively used in Massachusetts in 1912 in the Opinion of the Justices case. Public housing was opposed by influential groups in most communities and the narrow doctrine seemed a convenient legal weapon to use in the state courts to block the program. But the state courts refused to accept the argument as it was applied to housing, the leading decision being New York City Housing Authority v. Muller, decided in 1936, one year before the Federal Housing Authority was established. The New York Court of Appeals said:

“The fundamental purpose of government is to protect the health, safety and general welfare of the public ... its power plant for the purpose consists of the power of taxation, the police power, and the power of eminent domain ... it seems to be constitutionally im-

56. 270 N. Y. 333, 1 N.E. 2d 153 (1936).
material whether one or another of the sovereign powers is employed. . . . Use of a proposed structure, facility, or service by everybody and anybody is one of the abandoned universal tests of a public use. . . . That is a public benefit and, therefore, at least as this case is concerned, a public use.”

In the twenty-two state courts where the question came up for decision the public housing projects were held to be a public use; most of the courts talking in terms of benefit to the public and general welfare. It is significant, however, that these condemnations were sustained on the basis of the police power as well as the power of eminent domain; thus, it is difficult to say that they are a clearcut repudiation of the “use by the public” test when the power of eminent domain alone is considered.

The Missouri Supreme Court considered the public housing question in *Laret Investment Co. v. Dickmann, Mayor.* An act of the Missouri General Assembly provided for the expenditure of public funds for low-income housing and declared:

“That the clearing, replanning and reconstruction of such unsanitary, etc., areas are public uses and purposes for which public money may be spent and private property acquired and are governmental functions of state concern.”

Taken as a whole, the statute spoke in terms of the police power of the state and recognized the social and economic need for such housing.

The Laret Investment Co. contended that the Public Housing Agency established by Mayor Dickmann of the City of Saint Louis, was not for such “public purposes” as to give the agency exemption from taxation accorded municipal corporations under the Missouri Constitution. The Investment Company said that:

“In determining whether the declared purposes of the Housing Authority are public functions we must be guided by a consideration . . . whether the public generally, or only a limited group, benefitted thereby.”

57. 134 S.W. 2d 65 (Mo. 1939).
59. Mo. CONST. Art. X. §§ 6-7: “The property, real and personal, of the State, counties and other municipal corporations . . . shall be exempt from taxation.” “All laws exempting property from taxation, other than the property above enumerated, shall be void.”
Judge Clark, speaking for the court, replied:

"Nor can we be governed alone by the fact that only a portion of the public will be directly benefited, or benefited in a greater degree than the public generally."

He then distinguished the case of *United States v. Certain Lands in Louisville* by saying:

"That case recognizes the distinction between the powers of the Federal and State governments and does not purport to decide what is a "public use" under a state constitution."

Judge Clark commented on the *Opinion of Justices* case by saying that the police power of Massachusetts was not involved while in the Missouri Act the General Assembly took special cognizance of the dire necessity for clearing the slum areas. Thus, Judge Clark implied that here the police power of the state was involved. Such an implication is justified as far as the abatement of the slum conditions is concerned but *quær e* as to whether any power but that of eminent domain is involved in the building of the new housing units. He further cited *Matter of New York Housing Authority v. Muller* as the proper law on the subject of public use.

**CONCLUSION**

From a consideration of the foregoing cases it is evident that the rural electric cooperatives as established in Missouri would be able to exercise the power of eminent domain as delegated to them by the Missouri General Assembly if the courts adopted the liberal view of public use; if they held "public use" to mean public advantage, public benefit. There is precedent in the *Liebi* case and those cases which have followed it; precedent sufficient to allow the courts to abandon the earlier doctrine of "use by the public" and "right to use by the public." Then, too, all the states which have considered the meaning of public use in reference to public housing

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61. *Supra*, n. 53.
63. *Supra*, n. 50.
64. *Supra*, n. 56.
65. *Supra*, n. 45.
66. See *City of Kirkwood v. Venable*, 351 Mo. 460, 173 S.W. 2d 8, 12 (1943); *City of Lebanon v. Schneider*, 349 Mo. 712, 163 S.W. 2d 588, 592 (1942); *State ex rel. Oliver Cadillac Co. v. Christopher*, 317 Mo. 1179, 298 S.W. 720, 724 (1927); *Empire Trust Co. v. Stepp*, 275 S.W. 982, 984 (Mo. 1925); *State ex rel. McDonnell v. Brown*, 274 S.W. 965, 967 (Mo. 1925).
have now come to the conclusion that "public benefit" is the controlling factor rather than "a right to use by the public." Here is a direct analogy to the Missouri R.E.A. cooperative as far as "public use" is concerned.

It could certainly not be argued that the electrification of Missouri's farms has not been, and will not continue to be, of general benefit to the people of Missouri as a whole. The rural electrification program in Missouri has been of general benefit from the standpoint of economics: It has enabled the Missouri farmer to produce more products and do it more efficiently, with the consequent saving to the state as a whole; the electrification of Missouri farms has opened up a virgin market for exploitation by manufacturers, wholesalers, and retailers of electrical appliances of every description; the rural electric cooperatives have added much to the economic well-being of the state by the consequent employment made possible by the program.

But if the courts chose not to abandon the narrow doctrine found in the Missouri cases previous to 1923, there is certainly ample justification for holding that the electric cooperatives' use of the power of eminent domain is to be distinguished from those cases where the narrow doctrine has been followed. For example, here is no use of the taxing power as was evident in Cole v. City of La Grange. The mill act cases, which, in Missouri, held so strenuously to the narrow doctrine in the latter part of the last century, were never allowed to stand in the way of industrial development in the New England states. They should not now, in Missouri's rural development, stand in the way of bringing electricity to the farms of Missouri.

67. Supra, n. 32.