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EMINENT DOMAIN - PUBLIC HOUSING AND SLUM CLEARANCE AS A "PUBLIC USE"

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EMINENT DOMAIN — PUBLIC HOUSING AND SLUM CLEARANCE AS A "PUBLIC USE" — The recent legislation[1] providing for housing and slum clearance raises the interesting and practical problem of

[1] Federal Housing Act of 1937, S. 1685, Sept. 1, 1937 (Public No. 412).

whether a taking of land for such housing and slum clearance purposes by means of an eminent domain proceeding is condemnation for a "public use," within the meaning of that term in eminent domain proceedings. Such a taking was held to be for a public use in the recent case of *Spahn v. Stewart.*[2]

A sovereign has the power to take private property for the use of the public if due compensation is made.[3] By the Fifth and Fourteenth Amendments to the Federal Constitution and by similar provisions in many state constitutions, a person cannot be deprived of his property without due process of law. Where proper compensation is made, an eminent domain proceeding is due process, providing the taking is for a public use. Conversely, a taking of private property in a condemnation proceeding for a private use is a deprivation of property without due process of law, and is thus a violation of the Fifth and Fourteenth Amendments.[4] Hence the question whether the land is to be devoted to a public use.

There is no one definition of a "public use" which is satisfactorily comprehensive and exclusive. Three views have been taken as to what is meant thereby. The majority of the state courts maintain that the only "public use" which will support eminent domain is an actual user by the public; an employment by the public; a use by the public as of right; or a use by the government administrative machinery.[5] Some courts are committed to the doctrine that "public use" may in certain cases mean public advantage or public benefit.[6] *Spahn v. Stewart* was

[2] 268 Ky. 97, 103 S. W. (2d) 651 (1937).

[3] 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 1108-1109 (1927); Foltz v. St. Louis & S. F. R. R., (C. C. A. 8th, 1894) 60 F. 316. Cf. the statement that "in view of the fact that condemnation statutes are in derogation of the common law and must be strictly complied with. . . ." City of New Lisbon v. Harebo, (Wis. 1937) 271 N. W. 659 at 664.

[4] 1 NICHOLS, EMINENT DOMAIN, 2d ed., §§ 37-39 (1917); 1 LEWIS, EMINENT DOMAIN, 3d ed., § 250 (1909). The provision in the Fifth Amendment: "nor shall private property be taken for public use without just compensation," has been construed to impliedly prohibit a governmental taking of land for a private use. Cole v. La Grange, 113 U. S. 1, 5 S. Ct. 416 (1884) (state constitution). This limitation has also been placed upon principles of natural justice. See 2 KENT, COMMENTARIES, 14th ed., 339 [525], note (f) (1896). "The definition given of the right of eminent domain implies that the purpose for which it may be exercised must not be a mere private purpose; and it is conceded on all hands that the legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit." 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 1124 (1927).

[5] 1 LEWIS, EMINENT DOMAIN, 3d ed., § 258 (1909). Light v. City of Danville, (Va. 1937) 190 S. E. 276. Cases are collected in 54 A. L. R. 7 (1928).

[6] Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 S. Ct. 56 (1896); Clark v. Nash, 198 U. S. 361, 25 S. Ct. 676 (1904); Dayton Gold & Silver Mining

decided in accordance with the latter doctrine. The third view, adopted by some writers, refuses to recognize that there are two rules, each exclusive, and maintains that the general rule requires an actual public user, and that the cases allowing eminent domain when the public use was merely a public advantage or a public benefit are exceptions to the general rule.[7] Other than this few or no definitions of the term can be found. Even the dictionary definition of "use" gives both the meaning of employment and that of advantage. There have been comparisons with the interpretation of the term "public use" in the taxation and expenditure of public funds cases, but little help can thus be derived, since there, too, no precise definition has been given.[8] It is the purpose of this comment to consider the housing and slum clearance situation as affected by these three views.[9]

The usual procedure in direct slum clearance is for the government, both federal and state, to build modern tenements and to lease them either directly to the inhabitants, or to limited-dividend corporations to sublet to the tenants. The authorizing statutes contain provisions limiting the letting to a low-income group. This may be a general classification such as "mechanics, laborers, or other wage-earners,"[10] or a more specific one, setting up a maximum income.[11]

Co. v. Seawell, 11 Nev. 394 (1876); Olmstead v. Camp, 33 Conn. 532, 89 Am. Dec. 221 (1866); Holmes Electric Protective Co. v. Williams, 228 N. Y. 407, 127 N. E. 315 (1920).

[7] Strickley v. Highland Boy Gold Mining Co., 200 U. S. 527, 26 S. Ct. 301 (1905); 1 NICHOLS, EMINENT DOMAIN, 2d ed., § 40 (1917). See 54 A. L. R. 7 at 44 (1928).

[8] People ex rel. Detroit & Howell R. R. v. Salem, 20 Mich. 452 (1870); Eyers Woolen Co. v. Town of Gilsum, 84 N. H. 1, 146 A. 511 (1929). "It is difficult and probably impossible to frame such a definition of the term 'public use' employed in Constitutions as will include all the adjudications where controverted uses have been held public, and at the same time exclude all those uses where it has been ruled that the disputed uses were private. It has been frequently stated that it is easier to define public use by negation rather than by affirmation." Smith v. Cameron, 106 Ore. 1 at 12, 210 P. 716 (1922).

[9] On the subject of the financing of these projects by a city already up to its constitutional limit upon indebtedness, see Foley, "Low-Rent Housing & State Financing," 85 UNIV. PA. L. REV. 239 (1937). [On this problem see also, Reconstruction Finance Corp. v. Richmond, 249 Ky. 787, 61 S. W. (2d) 631 (1933).] Another article by the same author, Foley, "Legal Aspect of Low Rent Housing in New York," 6 FORDHAM L. REV. 1 (1937), contains a history of the various attempts to remove the menace of slums in that state. Two other articles on this general subject are: Corwin, "Constitutional Aspects of Federal Housing," 84 UNIV. PA. L. REV. 131 (1935), and a comment in 12 WIS. L. REV. 512 (1937).

[10] Opinion of Justices, 211 Mass. 624, 98 N. E. 611 (1912).

[11] New York City Housing Authority v. Muller, 270 N. Y. 333, 1 N. E. (2d) 153 (1936). Federal Housing Act of 1937, S. 1685, Sept. 1, 1937 (Public No. 412).

The plan usually contemplates ultimate sale, with restrictions, by the government of the entire building. However, the slum problem is not solved by a mere building of modern tenements. The old tenements must be destroyed or completely modernized. The present federal legislation requires a destruction or modernization of the old tenements, save for an exceptional situation, as a prerequisite to any grant (as distinguished from a loan) of money from the Federal Government.[12] Both the obtaining of the land for the new building and the destruction of the old slum areas require eminent domain proceedings.

I.

The few cases have scarcely considered the possibility that the slum clearance project may be a taking for a "public use" within the narrow "employment" definition of that term. Instead there is an assumption that so considered the project does not involve a public use. Thus in an advisory opinion of the Supreme Court of Massachusetts, in which the contemplated taxation and taking of land for a housing and slum clearance project were held to be unconstitutional, the whole consideration of the court is summed up in the following:

> "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 over by the power of the Commonwealth for the purpose of handing it over to another wage-earner."[13]

The primary basis of this assumption is the income restriction on who may actually live in the completed buildings. There is also the factor that ultimate sale to private persons is contemplated with no assurance that other than rent regulations will be imposed, i.e., the purchasers will probably be able to use their discretion in choosing one tenant over another tenant.[14] The main difference between a government condemning land to use in the business of supplying its people with utilities, tuition schools and transportation, and condemnation

[12] Federal Housing Act of 1937, S. 1685, Sept. 1, 1937 (Public No. 412), §§ 10, 11.

[13] 211 Mass. 624 at 625, 626, 629, 98 N. E. 611 (1912).

[14] On this point, as affected by the Kentucky Constitution, under which Spahn v. Stewart was decided, see Barker v. Crum, 177 Ky. 637, 198 S. W. 211 (1917).

for the purpose of supplying a low-income group of the people with living quarters, is that in the one the people can use the commodity as of right, while in the other only those whose income is below a specified amount can qualify for the privilege of using this governmental enterprise. Such makes the use a private use, rather than a public use, within the "employment" definition of the term.[15]

2.

The question of when there is a public use within the "advantage" definition of that term is wide open. It is this relative lack of limitation which has caused many courts to reject the definition.[16] It is usually said that the determination of when there is the requisite public benefit is dependent upon each particular situation, and that no general statements defining the term can be made.[17] Many questions of degree, to which there are few definite answers, are involved. How great a public advantage must there be? The benefit to a community of a thriving manufacturing industry may not be sufficient.[18] What effect should be given to the legislature's statement that the taking is for a public use? Of what importance, if any, is the necessity of eminent domain for the accomplishment of the project? [19] If there is both a private use and a public use, as there may be here, which is primary and which is incidental? [20] If the doctrine of necessity of public use is a limitation, is the present case likely to lead to the abuses to pre-

[15] Connecticut College for Women v. Calvert, 87 Conn. 421, 88 A. 633 (1913). Like the term "public use," "private use" also lacks adequate definition. The statement is often made, that if the members of the public do not have the right to use as of right, the use is private. The whole public need not share but they must have the right to share for a use to be public. Rindge Co. v. Los Angeles County, 262 U. S. 700, 43 S. Ct. 689 (1923).

[16] Healy Lumber Co. v. Morris, 33 Wash. 490, 74 P. 681 (1903); Pennsylvania Mutual Life Ins. Co. v. Philadelphia, 242 Pa. 47, 88 A. 904 (1913). For an answer to such a contention see Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394 at 410 (1876).

[17] Talbot v. Hudson, 16 Gray (82 Mass.) 417 at 423 (1860).

[18] Brown v. Gerald, 100 Me. 351, 61 A. 785 (1905). Cf. Tyler v. Beacher, 44 Vt. 648, 8 Am. Rep. 398 (1871).

[19] It is usually said to be "of some weight," or it is said to create a presumption. Spahn v. Stewart, 268 Ky. 97, 103 S. W. (2d) 651 (1937); 10 R. C. L. 29 (1915).

[20] It is generally held that if there is clearly a public use, an incidental private use will not negative the public use. But which is primary and which is incidental? Clearly in the slum clearance situation, if the public benefit will be accepted as a public use, such would be primary, and the private use of the occupants would be incidental. See Kessler v. City of Indianapolis, 199 Ind. 420, 157 N. E. 547, 53 A. L. R. 1 at 9 (1927); Plecker v. Rhodes, 30 Gratt. (71 Va.) 795 (1878).

vent which the limitation has been imposed? [21] What weight should the judiciary give to its own opinions as to the effect of the economic soundness of the project on the ultimate benefit or advantage derived by the public? Such questions of public welfare are usually for the legislature. Yet, by merely saying that the taking of land and the building thereon of a modern tenement will realize the great public benefit of slum eradication when there may be serious doubts as to any such result, should the legislature decide the judicial question of whether the taking is for a public use? [22]

The answer in each particular situation is a balanced composite or synthesis of all of these, and possibly more, elements. There are however a few guide-posts. Nichols has pointed out that although it is recognized that where the use is clearly public the feasibility of acquiring by purchase is immaterial, yet, in doubtful cases, in ascertaining whether the use is public such feasibility is a strong determinant.[23] There is also authority for the proposition that the courts will be less stringent when the condemnation is by the government, itself, than when it is by a private person or corporation to whom there has been a delegation of the power to condemn.[24]

There are no categorical rules as to the degree of public benefit necessary for there to be a public use. "The term 'public use' is synonymous with public benefit or advantage," is said in *Olmstead v. Camp.*[25] This is clearly too broad a statement for the holdings of the cases today. The advantage must be some "great advantage." It has mostly been

[21] It is said to be merely a limitation in 1 LEWIS, EMINENT DOMAIN, 3d ed., § 256 (1909).

[22] See Arnsperger v. Crawford, 101 Md. 247, 61 A. 413 (1905). Here, the only justification for the taking of the land is the great advantage to the public. Slum clearance may be a recognized benefit, but it, in itself, has no necessary connection with the taking of private land by condemnation. The connecting link is the reasonably questionable fact that the taking of the land will accomplish this great benefit, viz. elimination of slums.

"Whether it be expedient or wise for the legislature to exercise, this authority, to take property for public use, is purely a political question, and one solely for the legislature. But whether the use to which it is sought to appropriate the property authorized to be taken, is a public use, is a judicial question for the determination of the courts." Philadelphia, M. & S. Street Ry.'s Petition, 203 Pa. 354 at 362, 53 A. 191 (1902). This and similar statements do not solve the problem. One test might be that of whether the legislature is acting in good faith or not. See Kessler v. City of Indianapolis, 199 Ind. 421, 157 N. E. 547 (1927). "We are not to judge of the wisdom or expediency of exercising the power to accomplish the object." Talbot v. Hudson, 16 Gray (82 Mass.) 417 at 424 (1860). See Varner v. Martin, 21 W. Va. 534 at 550 (1883).

[23] 1 NICHOLS, EMINENT DOMAIN, 2d ed., § 42 (1917).

[24] 1 NICHOLS, EMINENT DOMAIN, 2d ed., § 47 (1917).

[25] 33 Conn. 532 at 550, 89 Am. Dec. 221 (1866).

found to exist in the development of the natural or economic resources of the state. There is usually the limitation expressed in *Connecticut College for Women v. Calvert*:[26]

> "The principle of the cases arising under legislation in aid of material resources of the state is limited, as already pointed out, to the case of lands so situated that their economic value cannot be realized without subjecting adjoining or neighboring land to some easement amounting to a taking, and does not include the ordinary human activities, which collectively, or in an abstract sense, are advantageous to the community. . . ."

Furthermore, there is usually the justification that the peculiar conditions of the particular locality is the reason for the finding. This is brought out in the negative in the case of *Gallup American Coal Co. v. Gallup Southwestern Coal Co.*[27] Here the New Mexico court recognized that, as to Nevada, metal mining was so fundamental to the state's economic existence that there was a sufficient public benefit in allowing eminent domain for mining purposes, but held that in New Mexico coal mining did not occupy a position of similar magnitude. In *Dayton Gold & Silver Mining Co. v. Seawell* an epitome of the reasoning is expressed in the following:

> "The present prosperity of the state is entirely due to the mining developments already made, and the entire people of the state are directly interested in having the future developments unobstructed by the obstinate action of any individual or individuals."[28]

The variance in subject matter makes it difficult to apply these statements to slum clearance. Consequently, a consideration of what has been said by the few courts passing upon slum clearance legislation should be helpful.

In *Spahn v. Stewart* statistics are given as to the deleterious effects of slums on the whole community, as evidenced by much higher than normal percentage of diseases, major crimes, and juvenile delinquencies within the spotted areas. After a discussion of the history of slums, there is a conclusion that the solution of the problem calls for action in some way that may prove more efficacious than regulation under the police power. It is pointed out that although the declarations of the general assembly that the plan involves "objects essential to public interest," are not binding upon the court, they may be looked upon as per-

[26] 87 Conn. 421 at 434, 88 A. 633 (1913).
[27] 39 N. M. 344 at 348, 47 P. (2d) 414 (1935).
[28] 11 Nev. 394 at 409 (1876).

suasive. To the contention that this legislation is only for the private interest of the favored few who may live there, the court answers:

> "Who can say that in the long run those who live in sumptous residences environed by the élite may not account themselves still more blessed, if by improved conditions of housing in another section they are relieved from the probabilities or possibilities of an epidemic of smallpox, typhoid fever, or other diseases, or that they may sleep more serenely because of a lessened fear of the commission of crime against their persons or property."[29]

The only approach to a definite rule is found in the court's quotation from an earlier case:[30]

> "Nor is it necessary that the entire state should directly enjoy or participate in an improvement of this nature in order to constitute it a 'public use.' . . . In the broad and comprehensive view that has been taken of the rights growing out of the constitutional provisions, everything which tends to enlarge the resources and promote the productive power of any considerable number of the inhabitants of a section of the state contributes, either directly or indirectly, to the general welfare and the prosperity of the whole community, and, therefore to the public."

In the case of *New York City Housing Authority v. Muller*,[31] the court, in sustaining the right to take land for this purpose by condemnation, goes even farther in stressing the necessity of eminent domain for slum clearance, by showing how the regulatory measures under the police power have failed.

> "The fundamental purpose of the 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. . . . Whenever there arises, in the state, a condition of affairs holding a substantial menace to the public health, safety or general welfare, it becomes the duty of the government to apply whatever power is necessary and appropriate to check it. . . . But if the menace is serious enough to the public to warrant public action and the power applied is reasonably and fairly calculated to check it, and bears a reasonable relation to the evil, it seems to be constitutionally immaterial whether one or another of the sovereign powers

[29] 268 Ky. 97, 103 S. W. (2d) 651 at 657 (1937).

[30] Ibid. quoting Wilson & Co. v. Compton Bond & Mtg. Co., 103 Ark. 452 at 459, 146 S. W. 110 (1912), involving condemnation for drainage district.

[31] 270 N. Y. 333, 1 N. E. (2d) 153 (1936).

> are employed. . . .A sufficient answer should be the page of legislative history in this state and the results referred to above. . . . Use of a proposed structure, facility or service by everybody and anybody is one of the abandoned universal tests of a public use. . . . In a matter of far-reaching public concern, the public is seeking to take the defendants' property and to administer it as a part of a project conceived and to be carried out in its own interest and for its own protection. That is a public benefit, and therefore, at least as far as this case is concerned, a public use."[32]

These two cases are the only cases directly in point.[33] In *Green v. Frazier*,[34] the United States Supreme Court held constitutional a North Dakota statute, pursuant to an amendment to the state constitution, providing for state participation in, among other businesses, that of providing homes for its inhabitants. The Court stated:

> "what was or was not a public use was a question concerning which local authority, legislative and judicial, had especial means of securing information to enable them to form a judgment; and particularly . . . the judgment of the highest court of the State declaring a given use to be public in its nature, would be accepted by this court unless clearly unfounded."[35]

Thus the Supreme Court did not clearly decide the question. In the state opinion, holding such taxation to be for a public use and not violative of the Fourteenth Amendment, the strength of the state is said to be in direct proportion to the morality and integrity of the home: the general welfare will be greatly served by increasing the number of permanent homes in a state with an unusually high percentage of tenant farmers.

[32] 270 N. Y. at 340-343.

[33] In Willmon v. Powell, 91 Cal. App. 1, 266 P. 1029 (1928), it was held that the city of Los Angeles had the power to engage in the business of providing modern housing in order to effect slum clearance. In Simon v. O'Toole, 108 N. J. L. 32, 155 A. 449 (1931), it was held that an ordinance providing for a contract between the city of Newark and The Prudential Life Insurance Company, whereby the latter promised to buy land in a specified slum area and build thereon modern houses, and whereby the city was to purchase all unused land for park purposes and to condemn, if necessary, some land for park purposes, contemplated an expenditure for a public purpose.

In People for use of Regents v. Brooks, 224 Mich. 45, 194 N. W. 602 (1923), it was held that the Regents of the University of Michigan could condemn land for the purpose of erecting a dormitory to be known as the Lawyer's Club, membership in such club being limited to lawyers and law students, governors to be selected from the faculty of the Law School, and the dues and profits to go for legal research.

[34] 44 N. D. 395, 176 N. W. 11, affd. 253 U. S. 233, 40 S. Ct. 499 (1920).

[35] 253 U. S. at 242.

These three cases illustrate what has been said in many cases and texts, viz. that "public use" in the broad sense has no definite meaning and that what is a public use must be decided in each situation upon broad sociological and economic principles.

As opposed to these three cases upholding the constitutionality of the taking, there are three cases which have held condemnation for slum clearance to be unconstitutional. In *Opinion of the Justices*,[36] there is little consideration of the slum problem. The whole discussion is whether one person's home can be taken so as to furnish a home to another. However, in the legislation there involved the purpose was said to be either to provide homes "for mechanics, laborers, or other wage-earners" or to provide homes for "those who might otherwise live in the most congested areas." The possibility that the legislation was aimed at mitigating the evils of slums was passed off with the suggestion that such should be remedied by the exercise of the police power.

In *United States v. Certain Lands in the City of Louisville*,[37] it was held that the Federal Government, as a government of delegated powers, did not have the power to condemn land for the purpose *of relieving unemployment* and of slum clearance, since what is a public use for a state is not necessarily a public use for the Federal Government. However, many of the reasons given for this not being a public use for the latter are equally applicable to a state condemnation.

In *United States v. Certain Lands in the City of Detroit*,[38] the above case was cited, in holding that the Federal Government did not have the power to condemn land for relief of unemployment and slum clearance, and that a general Michigan statute giving the Federal Government the power to condemn Michigan land "required for customhouses, arsenals, lighthouses, national cemeteries, or for other purposes of the government of the United States" did not supply this lacking power.

Spahn v. Stewart and *New York Housing Authority v. Muller* distinguish these last two cases on this variance between state and federal condemnation. There is also the distinction that the eminent domain was pursuant to a statute the primary purpose of which was to relieve unemployment. If these two federal condemnation cases can be distinguished, there is only one case holding a taking of land for slum clearance to be unconstitutional, *Opinion of Justices*. That case (1) was decided at a comparatively early date, (2) did not necessarily

[36] 211 Mass. 624, 98 N. E. 611 (1912). Cf. Franklin Square House v. Boston, 188 Mass. 409, 74 N. E. 675 (1905).

[37] (C. C. A. 6th, 1935) 78 F. (2d) 684.

[38] (D. C. Mich. 1935) 12 F. Supp. 345.

involve slum clearance, (3) did not involve an actual controversy, and (4) decided the slum clearance question on a premise, viz. eminent domain is not necessary since regulation under police power is adequate, which experience has since shown is not true. Thus there is good authority for the constitutionality of a taking of private land for housing and slum clearance, if there is no restriction to a public use in the narrow "employment" sense only.

However, the simple conclusion that housing commissions will have an easy time in the future in getting the necessary land cannot be made. The majority of the states have already committed themselves to the narrow actual user view. In as late a case as *Light v. City of Danville*[39] there is a reaffirmance of this narrow definition. Thus, if this taking is to be allowed many courts will be forced to one of the following courses or a combination of them: (1) overruling previous cases, (2) distinguishing the factual situation; (3) making an exception.

Instead of overruling former decisions some courts have explained them away as being confined to the particular facts. Wisconsin has done this. The few situations in which public benefit was the only justification are followed on principles of stare decisis. There are statements that the earlier cases took the narrow view but that with the development of our complicated life of today there is a trend toward the broader view.[40] There are antithetical statements that in the earlier cases the courts of an undeveloped country in accordance with the spirit of the day took the "loose" view in allowing the governmental taking of private lands for the benefit of industries and enterprises, and that today the trend is toward the actual user view, because of its soundness and definiteness.[41] The governing factors of a court's admission of previous error are too numerous, broad, and uncertain to warrant further discussion.

There is a possibility of a factual distinction in regard to classification. It is the limitation to a low-income class which is the major objection to the actual use of these tenements being designated a public use. In the majority of situations in which there is clearly a public use, by the narrow view not all members of the public can use the project without qualification. Some of these are so well known as to not need any citations. Only those who pay the fare can ride on a railroad. Only that class of persons who are not intoxicated can freely use the streets.

[39] (Va. 1937) 190 S. E. 276.

[40] Helena Power Transmission Co. v. Spratt, 35 Mont. 108, 88 P. 773 (1907). The principal case, Spahn v. Stewart, supra note 2, should be compared with Chesapeake Stone Co. v. Moreland, 126 Ky. 656, 104 S. W. 762 (1907).

[41] Eyers Woolen Co. v. Town of Gilsum, 84 N. H. 1, 146 A. 511 (1929). Cf. Boston & Robary Mill Corp. v. Newman, 12 Pick. (29 Mass.) 467 (1832), with Opinion of the Justices, 211 Mass. 624, 98 N. E. 611 (1912).

Only those persons who have completed a high school course, or equivalent secondary education, can attend a state university. It is a matter of drawing a line. In *New York City Housing Authority v. Muller*, only those persons whose income was below twenty-five hundred dollars per annum could reside in the contemplated tenements, and it was therein stated that this class would comprise over two-thirds of the people of the city.[42] One might inquire whether the class of persons whose educational attainments are sufficient to qualify them to attend a state university is as large. However, it is unlikely that any court will hold this classification in housing legislation to be so broad and so reasonable as to constitute a public use within the "employment" view. There are three factors present which singly might not necessitate such a refusal, but which together will probably cause the courts to so hold. They are: (1) the fact that such a small percentage of the people who would like to reside in a modern apartment will actually be accommodated;[43] (2) the fact that a tenant has certain property rights, as lessee, which a member of the public using most public buildings does not have; (3) and the fact that only those whose income is below a specified amount may qualify as tenants.

3.

It is when one considers the possibility of a court making the slum clearance case an exception to its general rule as to a public use, that one needs consider the previously mentioned third view as to public use. That view maintains that the general rule is that there must be a public use in the employment sense, but that in certain unusual or exceptional situations there may be a public use predicated merely upon great public benefit or advantage. Nichols in giving "the true meaning of public use" states,

> "It is a public use for which property may be taken by eminent domain . . . (3) in certain special and peculiar cases, sanctioned by ancient custom, or justified by the requirements of unusual local conditions, to enable individuals to cultivate their land or carry on business in a manner in which it could not otherwise be done, if their success will indirectly enhance the public welfare, even if the taking is made by a private individual and the public has no right to service from him or enjoyment of the property taken."[44]

[42] 270 N. Y. 333 at 342, 1 N. E. (2d) 153 (1936).

[43] Brown v. Gerald, 100 Me. 351 at 375-376, 61 A. 785 (1905).

[44] 1 NICHOLS, EMINENT DOMAIN, 2d ed., § 45 (1917). Also see ibid., § 40.

Adherents to this theory cite most of the public benefit-public use cases as their exceptions.[45] In the much quoted case of *Strickley v. Highland Boy Gold Mining Co.*,[46] Justice Holmes supports this exception possibility:

> "In discussing what constitutes a public use it recognized the inadequacy of use by the general public as a universal test. While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent."

The exceptions are the mill cases, flowage cases, irrigation, mining, and drainage. None of these cover the slum clearance case, and there is some support for the belief that the number of exceptions is closed.[47] In the early cases of eminent domain there was little attention given to the restriction that a taking of private land must be for a public use. There was plenty of land. Industries were desired. Because of the obvious possibility of rank injustice by a government taking one person's property merely to give it to a more favored one, it is not surprising that the English requirement of public use was adopted. However, in a government which has a propensity for aiding its unfortunate and for aiding its own development and expansion, it is likewise not surprising that this limit of public use has received various interpretations. These two forces have either struck a balance of one rule with exceptions, or have each formed a different rule, or approach, limited obliquely by the other force. Some courts maintain these early cases were exceptions or resulted in decisions which were later made exceptions by the creation of a discordant general rule, and that any new exceptions must be by constitutional amendment.[48] If the reason the exception came into being is that it preceded the general rule, there is a basis for saying new exceptions are impossible. Other cases flatly say there has been a reversal of opinion on the general subject; that the former rule of public

[45] See 54 A. L. R. 7 (1928).

[46] 200 U. S. 527 at 531, 26 S. Ct. 301 (1905).

[47] See cases cited in note 41, supra; 54 A. L. R. 7 at 13 (1928); Ferguson v. Illinois Central R. R., 202 Iowa 508, 210 N. W. 604 (1926); and 1 NICHOLS, EMINENT DOMAIN, 2d ed., § 44 (1917).

[48] There have been constitutional declarations of public use in several states. Idaho Constitution, art. 1, § 14, construed in Blackwell Lumber Co. v. Empire Mill Co., 28 Idaho 556, 155 P. 680 (1916). Cf. Turner v. Nye, 154 Mass. 579, 28 N. E. 1048 (1891).

benefit being nearly synonymous with public use has been rejected; and that the only reason for allowing eminent domain in the special mill or flowage cases and in the mining cases is stare decisis.[49] Such reasoning may also exclude any new exceptions. However, the reasoning of Justice Holmes in *Strickley v. Highland Boy Gold Mining Co.*, quoted above, leaves the possibility of a new exception still open. So does that of *Connecticut College for Women v. Calvert*:[50]

> "These cases proceed upon what appears to us to be the right of a state, as a measure of self-preservation, to prevent the stubbornness or avarice of a private proprietor from obstructing the development of its own physical resources.
>
> "The developed and undeveloped water-powers of Connecticut constitute, in their aggregate, a public asset which is and will be of great value in the international struggle for economic advantage; and it seems to us to be the right of the state to promote the development of such a natural resource, by delegating the power of eminent domain for that purpose as far as may be necessary."

If there may be exceptions in order to promote development of physical resources, might not there also be an exception in order to promote social resources?

The difficulty comes in applying these statements to our particular situation. Nichols' epitome of the cases, quoted above, is based only on cases involving the development of industry and natural resources. It is difficult to see why the principle should be so limited. There is one difference which does not seem to be of extraordinary weight. Slums are not confined to a few localities. They are prevalent to some degree in all metropolitan areas. Such merely increases the magnitude of the problem and the greatness of the benefit to be realized.

The *Gallup Coal Company* case, cited in the discussion of the broad view, is even more applicable to a consideration of possible exceptions. In that case the court decided that it did not have to give up the "orthodox [narrow] view," by holding that coal mining in New Mexico was not of sufficient general benefit to justify an exception, such as had been made for irrigation. The court required an outstanding public benefit. Considering the volumes that have been written on the slum evil and the statistics that have been gathered, it would seem that slum clearance should be a benefit easily great enough and sufficiently outstanding to justify an exception.

In considering the making of an exception it is often helpful to give attention to the reasons for the general rule, and then to decide

[49] Fisher v. Horicon Iron & Mfg. Co., 10 Wis. 351 (1860).

[50] 87 Conn. 421 at 433-434, 88 A. 633 (1913). Cf. Great Falls Mfg. Co. v. Fernald, 47 N. H. 44 (1867).

if the pending exception is covered by the reasons. Nichols gives the reason for this limit of public use to be that a contrary rule, that is an allowance of a taking of land by a government for a private use, is contrary to natural justice.[51] Is it contrary to natural justice to take land and let it to slum inhabitants for the purpose of slum clearance? The answer to that depends on one's perspective. It would seem that it would be no more contrary to natural justice than a taking to develop mining or agriculture. Cooley gives the reason that the limit is inherent in the definition. Thus eminent domain is defined as "the superior right of property pertaining to the sovereignty by which . . . private property . . . may be taken or its use controlled for the public benefit without regard to the wishes of its owner."[52] But such a definition includes public use in the "advantage" as well as "employment" sense. Probably the main reason for the adherence to the actual user view is a desire to make the law more certain and to set up definite limits.[53] This may be desirable, but it should not stand in the way of proper progress and it has not when the necessity was great enough. Allowing a taking for slum clearance is not opening the door to usurpation. It does, however, make one more precedent for a liberalizing of the public use requirement, which liberalizing must eventually cease if we are to continue to have our present form of government. If the need is great enough, and there is plenty of non-legal authority[54] that it is, the limitation should not obstruct the government from acting for the public good. Such was the conclusion of the court in *New York Housing Authority v. Muller*:[55]

> "Whenever there arises, in the State, a condition of affairs, holding a substantial menace, to the public health, safety or general welfare, it becomes the duty of the government to apply whatever power is necessary and appropriate to check it."

Wayne E. Babler

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[51] 1 NICHOLS, EMINENT DOMAIN, 2d ed., § 37 (1917).

[52] COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 1110 (1927).

[53] 1 LEWIS, EMINENT DOMAIN, 3d ed., § 258 (1907).

[54] A few of the more recent publications (some of which contain extensive bibliographies) are: 1 LAW AND CONTEMPORARY PROBLEMS 135 (1934); HOUSING AMERICA, by the editors of FORTUNE (1932); BAUER, MODERN HOUSING (1934); BRITTON, THE RELATION BETWEEN HOUSING AND HEALTH (1935); WOOD, SLUMS AND BLIGHTED AREAS IN THE UNITED STATES (1935). Tenement House Dept. v. Moeschen, 179 N. Y. 325, 72 N. E. 231 (1904), also recites some of the abominable conditions.

[55] 270 N. Y. 333 at 341, 1 N. E. (2d) 153 (1936).