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Eminent Domain—Excess Condemnation

EMINENT DOMAIN—EXCESS CONDEMNATION.—The City of Cincinnati filed condemnation proceedings under the excess condemnation provision in the Ohio Constitution, reading as follows: "A municipality may appropriate property for public use or acquire an excess over that actually to be occupied and may sell such excess with such restrictions as shall be appropriate to preserve the improvement." Const. Ohio art. 8 sec. 10. The recital of purpose in the city's petition was very vague. In the Circuit Court of Appeals the condemnation proceedings were enjoined at the suit of the condemnees. *City of Cincinnati v. Vester* (C. C. A. 6, 1929) 33 F. (2d) 242. The result reached was passed upon an interpretation of the city's act as an attempt at recoupment of the cost of the improvement from the sale of the excess property. The state constitutional provision was held violative of the Fourteenth Amendment to the Federal Constitution. Upon writ of certiorari the Supreme Court refused to declare the state provision unconstitutional upon conjectures as to what the city might be attempting to accomplish. The decree below was affirmed upon the ground that the public purpose in each condemnation proceeding must be stated in exact terms in the petition of the city. Failure to conform to this requirement is a denial of due process. *City of Cincinnati v. Vester* (1930) 281 U. S. 439.

That there must be an exact public use stated in a condemnation petition is firmly established. *Forest Preserve Dist. v. Jirsa* (Ill. 1929) 168 N. E. 690; *Young v. City of Gurdon* (1925) 169 Ark. 399, 275 S. W. 890; *Wilson v. St. Johns* (Fla. 1929) 123 So. 527.

The Circuit Court of Appeals classified the purposes of excess condemnation into three categories, namely: (1) recoupment of the increase in value due to the improvement; (2) avoidance of remnant lots; (3) preservation and amplification of the public improvement. As regards the constitutionality of excess condemnation the Supreme Court, in common with the majority of tribunals dealing with the subject, appears to be suspicious of recoupment, for it says, " . . . the importance of the definition of purpose would be even greater in the case of taking property not directly to be occupied by a proposed public improvement. . ." *City of Cincinnati v. Vester* (1930) 281 U. S. 439, 447. See also *In re Monroe Avenue* (1929) 227 App. Div. 123, 237 N. Y. S. 147; *Bond v. Mayor and City Council of Baltimore* (1911) 116 Md. 683, 82 Atl. 978; *Pennsylvania Mutual Life Insurance Co. v. Philadelphia* (1911) 242 Pa. 47, 88 Atl. 904; *Carpenter v. City of Buffalo* (1930) 244 N. Y. S. 242; *Opinion of the Justices* (1912) 204 Mass. 609, 91 N. E. 405. The court further affirmed the accepted view that the determination of the adequacy of the public purpose in each case is a judicial question. *Rindge v. County of Las Angelos* (1923) 262 U. S. 700; *In re City of Rochester* (1917) 100 Misc. 241, 165 N. Y. S. 1026; *Board of Education of School Dist. v. Harper* (1922) 191 N. Y. S. 273.

The trend of judicial opinion in regard to avoidance of remnant lots

and preservation of the improvement by means of excess condemnation is much more liberal. *Pennsylvania Mutual Life Insurance Co. v. Philadelphia,* above; *Hunt Drainage Dist. v. Harness* (1925) 317 Ill. 292, 148 N. E. 44; *Rogers v. Breisacher* (1925) 231 Mich. 317, 204 N. W. 112.

Excess condemnation is used extensively in Europe. REPORT, COMMITTEE ON TAXATION (1915) 53. Today California, Massachusetts, Michigan, New York, Rhode Island, Ohio, and Wisconsin have constitutional provisions for excess condemnation; and Maryland, Illinois, New Jersey, and Virginia have statutory provisions. HUBBARD AND HUBBARD, OUR CITIES TODAY AND TOMORROW (1929). J. G. G., '32.

EMINENT DOMAIN—PUBLIC PURPOSE—GOLF COURSE FOR STATE UNIVERSITY.—The University of Michigan instituted condemnation proceedings against certain lands for a golf course. The course was to be owned by a non-profit corporation whose purpose was the furtherance of the physical well-being of the students at the University but which was controlled by the Board of Regents. *Held,* the University could condemn the land since the purpose is an integral part of the board program of education. *People v. Pommerening* (Mich. 1930) 220 N. W. 194.

The appropriation of lands for public educational purposes is a just exercise of the right of eminent domain. *Board of Education v. Hackman* (1871) 48 Mo. 243. The taking of land adjacent to a school building for a place of recreation and exercise is a taking for a public use. *State ex rel. School District v. Superior Court* (1912) 69 Wash. 189, 124 Pa. 484. Also is the condemning of land for a gymnasium or athletic field. *Kern County Union High School District v. McDonald* (1919) 180 Cal. 7, 179 Pac. 180. In granting the school board the right to condemn land for a high school athletic field as part of an educational institution the court stated, "More properly defined a modern educational institution embraces those things which experience has taught us are essential to the mental, moral and physical development of the child." *Commissioners of Dist. of Col. v. Shannon & Lucks Construction Co.* (D. C. Col. 1922) 17 F. (2d) 219.

The power of a university to condemn lands for a dormitory has been upheld as constituting a public use within the meaning of the constitution. *Russell v. Trustees of Purdue University* (Ind. 1929) 168 N. E. 529. Also has the power to appropriate lands to be used as a lawyers' club and dormitory. *People v. Brooks* (1923) 224 Mich. 45, 194 N. W. 602. In *Knapp v. State* (1914) 125 Minn. 194, 145 N. W. 966, the action of the University of Minnesota condemning land for a railway to connect the University campus and farm to the line of a common carrier was upheld.

In view of the wide approval given by the courts to the condemnation of land for state universities' recreational facilities, the decision in the instant case does not seem to stretch unduly the category of "public uses." T. L., '32.