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CITY PLANNING AND RESTRICTIONS ON THE USE  
OF PROPERTY

By J. S. YOUNG\*

**M**ORE than half the people of the United States live under urban conditions. An eminent authority has said, "as go the cities so goes the country" and has designated the city as the hope of democracy.<sup>1</sup>

The industrial revolution has made the modern city and because the municipality is chiefly the result of economic forces, insufficient thought has been given to the city as a comfortable place in which to live. Little attention has been given to the adequate development of streets, parks, rapid transit, general transportation, public buildings, restricting the height, bulk and different purposes of varying kinds of structures to make them adaptable to the specific uses to which these structures must be put. The result is that Topsy-like they were not "made" but just "grewed," and in a very hit-and-miss or haphazard way.

## 1. THE DEVELOPMENT OF CITY PLANNING

The confusion and consequent inconvenience and discomfort just described have called for a thorough investigation with a view to correcting past mistakes and to formulating plans for the prevention, or at least the reduction of, similar mistakes in the future. The result is the development of a new profession—city planning, which, in its comprehensive sense, aims to make the city safe, convenient, healthful and attractive.

Ancient cities, such as Rome, were partially planned. In the Fifteenth Century the commercial cities of Italy and Hanseatic regions benefited by some definite plans, but it was not until the great London fire in 1666, that a plan for the rebuilding of the city along correct lines was formulated by Christopher Wren, a leading architect of the day. His plan was only partially followed owing to the objections of land-owners who did not favor the generous amounts of land recommended for streets. In 1682 Wil-

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<sup>1</sup>Howe, *The City the Hope of Democracy*.

liam Penn planned early Philadelphia wisely. The new capital at Washington was planned by Pierre Charles L'Enfant, a French military engineer, who served the colonial cause during the Revolutionary War. Until 1807 New York City was simply an irregular expansion of an old Dutch town. Modern city planning both in Europe and the United States received a great impetus from the work of Baron Haussmann, and M. Deschamps in France<sup>2</sup> and Adicks, chief *bürgermeister* of Frankfort-on-the-Main, in Germany.<sup>3</sup> Since 1870, the city planning movement has steadily gained in power, especially in Europe and South America, but its progress has been much more backward in the cities of the United States, chiefly due to narrow and divided municipal powers, public tolerance of defective municipal living conditions, especially ugliness, a mistaken notion that city planning is a matter of civic beautification only, and finally, that it involves great outlays of money covering long periods of time, and that such expenditures cannot safely be entrusted to the average municipal politician. In spite of this tardiness, public planning,<sup>4</sup> especially city planning, is receiving careful attention in the United States and every state has benefited by its adoption.

The division of buildings and housing in the Department of Commerce at Washington reports that a total of 320 municipalities with a population of more than 24 million have adopted systematic planning, including zoning. These municipalities range from the city of New York with its millions, down to the smallest village.<sup>5</sup>

What is city planning? City planning has two well-defined phases: (1) the securing of, and government control over, public property; (2) the government control of the use of private property. The present article will treat the first phase of the subject and a second article, the law of zoning or restricting the use of private property.

## 2. A COMPREHENSIVE PLAN FOR PUBLIC PROPERTY

There are certain public and semi-public property and interests in a city that must receive attention in a comprehensive plan: (1) An adequate street system which will care for the growth.

<sup>2</sup>Munro, *Municipal Government and Administration* 76.

<sup>3</sup>Williams, *Law of City Planning and Zoning* 87.

<sup>4</sup>Public planning, other than city, includes town, village, neighborhood, county, state, interstate, national, international, metropolitan, regional, and rural. See Williams, *The Law of City Planning and Zoning*, ch. 1.

<sup>5</sup>Circular of Department of Commerce released March 12, 1925.

traffic and future needs of the city; (2) a street transit system projected and progressively adapted to the needs of a growing city; (3) development and coordination of railroad and water transportation sufficient to care for the commerce, industry and passenger needs; (4) the placing of public buildings, (a) those which should be centrally located for ease of access from every part of the city, such as a civic center, postoffice, city hall, auditorium, courthouse and public library, (b) those which should be scattered, such as fire and police stations, elementary schools and branch libraries, (c) the buildings and places that by their use require special location, such as public baths, railroad stations, hospitals, prisons, poorhouse, garbage-disposal plants and landing fields for flying machines; (5) a complete recreational system including neighborhood settlements, parks, playgrounds and boulevards; (6) the location and facilities for an adequate system of public utilities for an expanding city.

What legal powers are necessary to carry out a comprehensive plan? It must be kept in mind that the city uses very different legal powers in accomplishing the objects just stated from what it does in zoning. Also that the successful accomplishment of these objects presupposes a comprehensive system of zoning. That is, the two kinds of control, as will be seen later, must be coordinated and put into operation together. Each is impotent without the other. The two taken together directly promote the general welfare of the city.

### 3. METHODS OF SECURING PUBLIC PROPERTY

In the United States the city exercises delegated and not reserved powers, receiving its powers from state constitutions and statutes. Its chief powers are taxation, proprietary, eminent domain and police. The city secures property for public purposes by various methods, such as dedication, prescription, purchase or agreement, and eminent domain.

(1) *Dedication.* Acquisition of lands by dedication is employed mostly when promoters of land sales in a new subdivision give lands for public purposes, especially for streets, sometimes even constructing the streets. It may be used not only for public streets but also for public buildings, markets, sewers, parks, squares and commons. The essential feature of dedication is that it shall

be for the use of the public at large.<sup>6</sup> Dedications are of two kinds, namely, statutory and common law. The first must be express, but a common law dedication may be either express or implied. Dedication of land for a public purpose is restricted to the owner only; a tenant for life or a term of years and an administrator cannot dedicate.<sup>7</sup> In making a dedication the intent of the owner is the essential element and must be manifested by his acts and declarations.<sup>8</sup> Generally speaking, acceptance on the part of the public is necessary to complete dedication.<sup>9</sup>

(2) *Prescription*. Rights in land for a public use may be acquired by prescription the same as for private use.<sup>10</sup> Washburn says:

"The requisites of prescription are, the use and enjoyment of what is claimed must have been adverse, under a claim of right, exclusive, continuous, uninterrupted and with the knowledge and acquiescence of the owner of the estate in, over or out of which the easement prescribed for is claimed, and while such owner was able in law to assert and enforce his rights, and to resist such adverse claim if not well founded," and "must, moreover, be of something which one party could have granted to the other."<sup>11</sup>

(3) *Agreement or Purchase*.—Dedication is frequently used for suburban additions but in the older sections of a city the chief method of acquiring property is by agreement or purchase. This is frequently done in the open market. By this method the regular rules of contract are followed. Frequently private owners demand exorbitant prices. In this event the city offers prices fixed by its own experts and if the offer is declined, resort is had to condemnation under eminent domain.

(4) *Eminent Domain*.—Eminent domain is one of the most drastic exercises of sovereignty. All cities in the United States have delegated power to take private property for public purposes provided fair compensation is made. In England and France there is no constitutional requirement of compensation. In Germany there is such a requirement. There are two constitutional limitations in the constitution of the United States and different states, namely, public purpose and fair compensation. There are definite proceedings for condemning and taking property under

<sup>6</sup>Lewis, *Eminent Domain*, 3rd ed. sec. 489.

<sup>7</sup>*Ibid.*, sec. 493. See *Johnson v. Dadeville*. (1899) 127 Ala. 244, 28 So. 700.

<sup>8</sup>*Ibid.*, sec. 494.

<sup>9</sup>*Ibid.*, sec. 495.

<sup>10</sup>*Ibid.*, sec. 486.

<sup>11</sup>Washburn, *Easements*, ch. 1, sec. 4, par. 26.

the right of eminent domain in the United States. These include: (1) Notice of city's intention to take private property; (2) a public hearing must be held to give opportunity for protesting; (3) plan and notice of takings must be filed in a place provided by law; (4) former owner must have opportunity to enter suit for damages if he so desires; (5) experts give testimony, and amounts allowed depend upon the judgment of the court.

There are no constitutional obstacles to a city taking land for streets, parks, public buildings, sites, etc., as these purposes are conceded to be public.<sup>12</sup>

#### 4. CONTROL OVER, AND PROTECTION OF, PUBLIC PROPERTY

The control over, and protection of, public property are subjects of great importance.

(1) *Private Restrictions that Aid in Protecting Public Property.*—Real estate salesmen who are putting an addition on the market sometimes interpose obstacles to city planning, but considerable coöperation is being secured from them at the present time because they realize the pecuniary advantages that come from comprehensive planning. The real estate operator, usually acting in his own interest for profits, frequently places restrictions upon the purchaser in the deed of conveyance. These operate as protections to public as well as private property. They include such kinds of business as are classified as nuisances, regulations as to barns and garages, fences, walls, set-backs, etc. Sometimes they extend to approval of plans and specifications of buildings, and locations and grading plans. They usually run for twenty-five years. are haphazard, spasmodic, difficult to enforce, and often-times not intelligent. In a word, they cannot be depended upon to carry out a comprehensive city plan.

(2) *Advertising on Public Property.*—If the streets, parks and public buildings are located and constructed, the city has power to protect them against disfigurement, improper use, and can regulate as well as prevent all forms of advertising. Since a park is "a piece of ground enclosed for purposes of pleasure, exercise, amusement or ornament,"<sup>13</sup> a park commissioner whose statutory duty it is "to maintain the beauty and utility of all such

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<sup>12</sup>A different phase of taking for public purposes will be treated later. See p. 526.

<sup>13</sup>Perrin v. New York Cent. R. Co., (1867) 36 N. Y. 120.

parks, squares, and public places as are situated within his jurisdiction," has no authority to allow advertisements on a park fence, since this amounts to perversion of the property of the park.<sup>14</sup> In the case of *MacNamara v. Willcox*<sup>15</sup> it was held that a city has no power to grant a right to exhibit advertisements upon a fence enclosing a public building. City authorities will not be restrained from tearing down billboards or signs on sheds erected over sidewalks.<sup>16</sup>

Outdoor advertising may be on public property or on private property so located as to be visible from the public property. The first is usually found on the stations and vehicles of transportation companies. If the city owns the fee of the streets used by these companies, public control is complete for two reasons: (1) the franchise to engage in the business of public transportation does not include the right to sell advertising space; (2) no corporation or other person may advertise on public property without public permission. Advertising on private property that impairs public property is more difficult to control. It is not feasible to use either the police power or eminent domain; but a system of graduated taxation might be used both for raising revenue and for regulation.

(3) *Regulating Parks and Street Uses*.—The city may designate the kinds of traffic allowed on certain streets and boulevards and in public parks. It can exclude heavy traffic from parks and certain streets reserving them for pleasure driving and light vehicles. In *Brodhine v. Inhabitants of Revere*,<sup>17</sup> Knowlton, C. J. said:

"A regulation made by the metropolitan park commissioner forbidding the driving of a wagon or other vehicle from carrying heavy merchandise or other articles along parkways is not void as unreasonable and oppressive."

Again, the supreme court of Illinois has said:<sup>18</sup>

"There is nothing unreasonable in excluding traffic teams from a street designated and intended to be a pleasure drive. Such a driveway must be constructed and paved in a particular manner; and if heavy teaming is allowed injury would result and frequent repairing would be necessary."

<sup>14</sup>*Thompkins v. Pallas*, (1905) 47 Misc. 309, 95 N. Y. S. 875.

<sup>15</sup>(1902) 73 App. Div. 451, 77 N. Y. S. 294.

<sup>16</sup>*Sullivan Advertising Co. v. New York*, (1908) 61 Misc. 425, 113 N. Y. S. 893.

<sup>17</sup>(1903) 182 Mass. 598, 66 N. E. 607.

<sup>18</sup>*Cicero Lumber Co. v. The Town of Cicero*, (1898) 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 A. S. R. 55.

Continuing, the court said:

"Neither can it be said that pleasure and recreation are not as much for the good of the people as business and traffic." Also "that an act which limits the use of streets to the purpose of pleasure driving, is in no sense class legislation."

The holding of this case is that converting a street from heavy traffic use to pleasure only, does not deprive former users of their property without due process of law. In the case of the *Fifth Avenue Coach Company v. City of New York*<sup>19</sup> the court of appeals said that a city which owns the fee of a street holds the same in trust for public purposes. It may grant rights therein which do not impair the public easement or may refrain from granting them as it sees fit for the public convenience. Continuing, the court said that the city could prevent the coach company from carrying gaudy tobacco advertisements on the exterior of its coaches when its franchise was for carrying passengers, only. This decision rests on the ground that the city owns the fee and therefore has the power to prevent heavy traffic especially with vans or vehicles that carry exaggerated advertising, because such advertising would attract crowds and cause congestion.

(4) *Franchises of Public Utility Corporations.*—One of the best ways of protecting public property in carrying out a comprehensive city plan is the power of the government in the granting of franchises to public utility corporations.<sup>20</sup> Public utility is a term used to designate a service such as the furnishing of gas, water, electricity, heat, power, transportation, etc. The service required cannot safely be left to private individuals but is usually granted to public utility corporations whose business is said to be affected with a public interest and therefore subject to public control.<sup>21</sup> The chief methods of controlling public utility corporations in harmony with city planning are: (a) the conditions that may be incorporated for securing the charter; (b) requirements for amending the charter; (c) regulating rates and services; (d) granting a charter to a competing corporation; (e) by the city

<sup>19</sup>(1909) 194 N. Y. 19, 86 N. E. 824. For other cases on various phases of this subject see *Commonwealth v. McCafferty*, (1888) 145 Mass. 384, 14 N. E. 451; *State v. Wightman*, (1905) 78 Conn. 86, 61 Atl. 56; *Salisbury v. Herchenroder*, (1871) 106 Mass. 458, 8 Am. Rep. 354; *Ivins v. Trenton*, (1902) 68 N. J. L. 501, 53 Atl. 202; *State v. Higgs*, (1900) 126 N. C. 1014, 35 S. E. 473, 48 L. R. A. 446.

<sup>20</sup>See *Williams*, op. cit., chap. IV; John Nolen, *City Planning*, pp. 66-69; 3 *Dillon, Municipal Corporations*, 5th ed., ch. XXV and sec. 1304, et seq.; 4 *McQuillan, Municipal Corporations*, chs. 34-35.

<sup>21</sup>See *Munn v. Illinois*, (1876) 94 U. S. 113, 24 L. Ed. 77.



itself competing; (f) by taking over the rights and property of the corporation and itself furnishing the utility, that is, the city superseding the public utility corporation. These public utility corporations bear such an intimate relation to the development of a city that if so minded they can wreck the best city plan if not publicly controlled. This is especially true of the transportation corporation, because the city is more dependent upon it than upon any other utility corporation.

The methods of control just outlined apply particularly to the transportation corporation. Those furnishing transportation must do it under the corporate form. The power to grant and amend charters comes from the state. This carries with it public requirements as to the conditions in accordance with which the business must be conducted, such as location of route, kind of tracks and crossings, kind of cars, frequency of service, fair rates, etc. No additional privileges may be granted the corporation except by public authorities. These additions may be based upon compliance with public plans and demands. It was early decided by the Supreme Court of the United States that a charter is a contract<sup>22</sup> and cannot be impaired. In accordance with a suggestion made by Justice Story at the time the *Dartmouth College Case* was decided, there is now frequently inserted in the charter, a reservation of the right to alter or amend the charter or to purchase and recover the business. When these reservations are inserted they become a part of the contract. An additional continuing control is exercised under the police power which cannot be granted away in a charter.<sup>23</sup>

The city control over rates and facilities bears an important relation to the city plan, especially the prevention of congestion and the building up of localities such as suburbs. Stockholders in public utility corporations are not entitled to unreasonably high dividends. On the other hand, the city cannot fix rates that are confiscatory as these would conflict with the state constitutions and the fourteenth amendment of the federal constitution. A flat rate for the whole city, and service at cost are now much favored. Rates might fluctuate but dividends would remain fixed. A flat

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<sup>22</sup>*Dartmouth College v. Woodward*, (1819) 4 Wheat. (U.S.) 518, 4 L. Ed. 629; 3 Dillon, *Municipal Corporations*, sec. 1306 and cases cited.

<sup>23</sup>For modifications of the doctrine of the *Dartmouth College Case* see *Boston Beer Co. v. Massachusetts*, (1877) 97 U. S. 25, 24 L. Ed. 989; *Stone v. Mississippi*, (1879) 101 U. S. 814, 25 L. Ed. 1079. See 4 McQuillan, *op. cit.*, secs. 1677-1685.

rate is supposed to prevent congestion<sup>24</sup> and materially assist in developing a comprehensive plan. A transportation charter is usually supposed to be monopolistic, but if the city becomes dissatisfied with the service and rates of an existing corporation, it may usually grant a franchise to a competing company or may enter into competition by itself furnishing the utility under a reservation to purchase or, under eminent domain, take the franchise and property and furnish the utility itself or lease it under stringent operating conditions. There are decided objections to these plans. If a competing corporation be allowed to enter the field each company has the right to earn a fair return on its investment and the public pays for the duplication. If the city competes or takes over the service and loss results through inefficiency, then general taxation must bear the burden. The single system under a private corporation with the public interest safeguarded in a franchise is favored by most authorities on the subject.<sup>25</sup> Other public utility corporations that use the city streets may be controlled and made to conform to a city plan if the city will use the legal powers it now possesses. Its power is complete.

(5) *Eminent Domain*.—The most generally used, and the most effective method of protecting public property is eminent domain. The various phases of eminent domain employed are condemnation of easements on the height of structures bordering on streets, boulevards and parks; also building lines or setbacks; and finally, zone and excess condemnation.

(A) *Height*.—In 1898 Massachusetts passed a statute limiting, with compensation, the height of private buildings around Copley Square in Boston. In upholding the constitutionality of this exercise of eminent domain the supreme court of Massachusetts in the case of *Attorney-General v. Williams*<sup>26</sup> said:

“Looking to all its provisions in connection with the place to which they apply, it seems to have been intended as a taking of

<sup>24</sup>For an opposing view, see Walter Jackson on Zone Fares for Street Railways, in *National Municipal Review*, Nov. 1920, p. 705.

<sup>25</sup>See Delos F. Wilcox, *Municipal Franchises*, McGraw-Hill Book Co., New York City, 1910.

<sup>26</sup>(1899) 174 Mass. 476, 55 N. E. 77. For other cases see *Shoemaker v. United States*, (1893) 147 U. S. 282, 37 L. Ed. 170, 13 S. C. R. 361; *United States v. Gettysburg Electric Railway Co.*, (1896) 160 U. S. 668, 40 L. Ed. 576, 16 S. C. R. 427; *Bunyan v. Commissioners of Palisades Interstate Park*, (1915) 167 App. Div. 457, 153 N. Y. S. 622; *Cascade Town Co. v. Empire Water and Power Co.*, (1910) 181 Fed. 1011.

Protection of public property from the standpoint of beautification is treated in 1 Nichols, *Eminent Domain* 2nd ed., p. 162; 4 McQuillan, *Municipal Corporations*, sec. 1485; Notes in 34 L. R. A. 998.

rights in property for the benefit of the public who use Copley Square. It adds to the public rights in light and air and in the view over adjacent land above the line to which buildings may be erected. These rights are in the nature of an easement created by the statute and annexed to the park. Ample provision is made for compensation to the owners of the servient estates. In all respects the statute is in accordance with the laws regulating the taking the property by right of eminent domain, if the legislature properly could determine that the preservation or improvement of the park in this particular was for a public use. The uses which should be deemed public in reference to the right of the legislature to compel an individual to part with his property for a compensation, and to authorize or direct taxation to pay for it, are being enlarged and extended with the progress of the people in education and refinement. Many things which a century ago were luxuries or were altogether unknown, have now become necessities. . . The grounds on which public parks are desired are various. They are to be enjoyed by the people who use them. They are expected to minister, not only to the grosser senses, but also to the love of the beautiful in nature in the varied forms which the changing seasons bring. Their value is enhanced by such touches of art as help to produce pleasing and satisfactory effects on the emotional and spiritual side of our nature. Their influence should be uplifting and, in the highest sense, educational. If wisely planned and properly cared for they promote the mental as well as the physical health of the people. For this reason it has always been deemed proper to expend money in the care and adornment of them to make them beautiful and enjoyable. Their aesthetic effect never has been thought unworthy of careful consideration by those best qualified to appreciate it. It hardly would be contended that the same reasons which justify the taking of land for a public park do not also justify the expenditure of money to make the park attractive and educational to those whose tastes are being formed and whose love of beauty is being cultivated."

"If the legislature, for the benefit of the public, was seeking to promote the beauty and attractiveness of a public park in the capital of the Commonwealth and to prevent unreasonable encroachments upon the light and air which it had previously received, we cannot say that the law-making power might not determine that this was a matter of such public interest as to call for the expenditure of public money and to justify the taking of private property."

There are statutes limiting, with compensation, the height of buildings in the neighborhood of the statehouse in Boston, the state capitol at Hartford, Connecticut, and the courthouse in New York City. The city of St. Louis has provided for a condemnation of structures fronting on public parks.<sup>27</sup>

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<sup>27</sup>Williams, *op. cit.* p. 387.

(B) *Building Lines or Set-backs.*—What is a setback? It is a front building line behind the street line beyond which an abutter cannot erect buildings, but may use his land for all other purposes.<sup>28</sup> By the establishment of such a line the city condemns, under the right of eminent domain, and pays the abutter the value of the building line easement. Under some ordinances nothing can be built beyond this line. Frequently, to save expense, buildings in advance of the establishment of the building line are allowed to remain but not to be renewed or substantially repaired and are finally condemned when they are few or of small value.

The building line has for its main purposes (1) the securing of privacy; (2) improving the general appearance of the street as a whole; (3) imparting a general air of spaciousness; (4) increasing the amount of greenery; (5) economizing when the street must be widened or its use changed.<sup>29</sup> The building line may be employed to advantage in three classes of streets, namely, suburban and minor residential streets, suburban business and traffic streets, and central business and traffic streets.<sup>30</sup>

The setback is a distinct advantage to the suburban and minor residential street as it allows lawns in front of buildings, decreases or prevents congestion and increases light and air for the community as a whole, raises and stabilizes land values and makes the district more quiet, pleasant and healthful for residences. Sometimes these setbacks result from private covenants in deeds or tacit agreement on the part of individual builders or owners of homes, but private covenants expire and tacit agreements are often ignored or violated by private owners. The safe way is to establish and enforce the setback by public authority.<sup>31</sup>

This is an age characterized by the rapid growth of cities and this carries with it an intensive employment of land, due in any locality either to an increase in the same use, or a shift to a more intensive use. This throws an increased burden upon streets in the suburbs and partially settled sections and wise flexible forms of street construction can be adopted. In laying out a new street a city may at the beginning take land wide enough for future needs and allow the abutter on each side to use strips for narrow lawns, or it may lay out the street broad enough for present uses and impose a setback on abutters so that it will not be necessary to pay

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<sup>28</sup>Ibid. p. 177.

<sup>29</sup>John Nolen, *op. cit.*, p. 101.

<sup>30</sup>Williams, *op. cit.*, p. 178.

<sup>31</sup>Supra 522.

for buildings when the street is widened. . Either course reduces city waste, avoids useless expenses for the destruction of buildings and allows the abutters the use of additional strips for some time.<sup>32</sup> As the residence street changes to one of stores and apartment houses, the setbacks, especially at corners, tend to reduce collisions in this age of automobiles. The widening of traffic streets in the central business section, after the street is intensively improved with buildings, is sometimes imperative and usually enormously expensive. The buildings frequently cost more than the land. Great saving can be made by establishing a building line back of the street line and of the fronts of buildings, under the provisions of which the buildings that are in advance of the building line may not be renewed or substantially repaired. The city can then take these old buildings when their value becomes small. This is a slow but economical method of street widening.

The constitutionality of a setback is questioned under the police power,<sup>33</sup> but is unquestioned under the power of eminent domain. Under the latter the interest in the extra land is condemned for a street use. The legislature has decided to take an easement in land instead of the title and the legislature is the judge of which to take.

*C. Zoning and Excess Condemnation.*—These two forms of condemnation are enlarged and liberal exercises of the power of eminent domain. They are new as applied to eminent domain and are being urged as proper methods of broadening the law to meet the needs of city planning. Their emergence is due to an early, narrow, visionless conception of the complete purposes of eminent domain.

Zoning condemnation is the taking, with compensation, of an entire district. It is complete and independent for a special purpose and is sometimes used in the built-up parts of a city, especially to eliminate slums. When a district is selected for condemnation, all the land, including buildings, is condemned, the buildings destroyed and the land thrown in to a common mass. The land for public uses is withdrawn and the remainder is replanned and re-subdivided and the part intended for private uses resold.

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<sup>32</sup>See pamphlet, *Establishment of Setbacks or Courtyards in City of New York*, issued in 1917.

<sup>33</sup>See *St. Louis v. Hill*, (1893) 116 Mo. 527, 22 S. W. 861; *Fruth v. Board of Affairs*, (1915) 75 W. Va. 456, 84 S. E. 105. For an opposing view see *Eubank v. Richmond*, (1916) 110 Va. 749, 63 S. E. 376; (1912) 226 U. S. 137, 57 L. Ed. 156, 33 S. C. R. 76.

This must be done under the power of eminent domain and not under the police power, because the cost is too great to be borne by private owners.<sup>34</sup>

A few states have passed statutes authorizing cities, for the purpose of raising the level of low land and securing proper drainage, to condemn, reconstruct and resell an entire district. Massachusetts in 1867<sup>35</sup> authorized the city of Boston to condemn, re-plan and resell the Back Bay district, which was done very successfully. This district is the best residential section of Boston at present. The statute was upheld as constitutional by both the supreme court of Massachusetts and the Supreme Court of the United States.<sup>36</sup> In sustaining the constitutionality of the statute, the Supreme Court of the United States said:

"In determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is a well-settled rule of constitutional exposition, that if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed.<sup>37</sup>

"In *Dengley v. Boston* . . . it was objected, that as the act (of 1867) authorized the city to first take the land and thereby transfer to itself the fee without the consent of the owners, and as the only object of the legislature was to abate a nuisance, the act should only have granted power to occupy the land until its object was effected by raising the grade, which being done, the land should have been restored to the owners, applying the benefit received therefrom in offset to the damages. That objection was fully met. Conceding it to be true that the raising of the grade did not require the occupation of the land for a great length of time, and that when the work was completed the nuisance was abated, and the land in a condition to be occupied by private persons, the court said: 'But its condition will be greatly changed; almost as much as raising flats into upland. The former surface will be deeply buried under the earth that will have to be brought upon it, and the changed condition is to be perpetual. If the old property is restored, the new property which has been annexed to it must go with it. This

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<sup>34</sup>See Williams *op. cit.* p. 61.

<sup>35</sup>Mass., Laws 1867, Chap. 308; supplementary laws are 1908, ch. 117 and 1910, ch. 606.

<sup>36</sup>*Dengley v. Boston*, (1868) 100 Mass. 594; *Sweet v. Rechel*, (1895) 159 U. S. 380, 40 L. Ed. 188, 16 S. C. R. 43.

<sup>37</sup>Citing *Talbot v. Hudson*, (1860) 16 Gray (Mass.) 417; *Fletcher v. Peck*, (1810) 6 Cranch (U.S.) 87, 3 L. Ed. 162; *Sinking Fund Cases*, (1878) 99 U. S. 700, 25 L. Ed. 496.

would be very unjust to the city, which has been compelled to incur the great expense of destroying the nuisance, unless the owner were required to make a reasonable compensation, which might be far beyond the amount of the damages to which he would be entitled. It would be difficult to adjust the matter; and in many cases it might operate harshly upon the owner to compel him to take and pay for the improvements. On the whole, therefore, the plan of compelling the city to take the land in fee simple, and the owner to part with his whole title for a just compensation, would seem to be the most simple and equitable that could be adopted; unless there is some objection on the ground that a fee simple is more sacred than an estate for life or years, or than an easement of greater or less duration. We can see no ground for regarding one of these titles as more sacred than another, or for regarding land as more sacred than personal property. . . . It must. . . . be left to the legislature to decide what quantity of estate ought to be taken in order to accomplish its purpose, and do the most complete justice to all parties. . . . The Constitution provides for the protection of all private property, and it provides that when the public exigencies require that the property of any individual shall be appropriated to public uses, he shall receive a reasonable compensation therefor. But it leaves the legislature, without any restriction, express or implied, to decide in each case as it arises, what constitutes such exigency; and, if the land is to be taken, what estate in it shall pass."

Excess condemnation,<sup>38</sup> in essence, is taking more property than is necessary for the precise, narrow purpose of the public improvement, using the excess property so taken in any way that is conducive to the public interest, or selling it for private use, usually subject to restrictions calculated to promote the larger purpose of the main improvement; in brief, it is incidental to another and main condemnation.<sup>39</sup>

This method of condemnation had its first trial in the United States. It was used in New York in 1812; Charleston, South Carolina, in 1817; Pennsylvania in 1868; New Jersey in 1870.<sup>40</sup> These early laws were little used for the reason that they were promptly declared unconstitutional on the ground that the taking was not for a public purpose. The recent interest in city planning

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<sup>38</sup>For good treatments of this subject see Cushman, *Excess Condemnation* (Appleton, 1917); Fisher, *Plan of Chicago*, (1909); Report of Chicago Bureau of Efficiency, *Excess Condemnation*, (1918); Swan, *Excess Condemnation*, Report for Committee on Taxation, City of New York; H. W. Crawford, *Constitutionality of Excess Condemnation*; Senate Document No. 422, 61st Cong., 2nd Session; Williams, *op. cit.* chaps. II and III.

<sup>39</sup>If this form of condemnation were regarded as incidental, one of the main objections to its constitutionality would disappear. See discussion of constitutionality, *infra*, p. 539.

<sup>40</sup>See Williams, *op. cit.* p. 128.

has shown a decided need for the revival of the practice. This method of taking private property has had extended and successful use in other countries. The city of London was granted the power in 1845; Brussels in 1867; and it was used by the city of Paris from 1852 to 1869, when many of the beautiful thoroughfares were built. It has been used with signal success by such Canadian cities as Montreal, Halifax and Toronto. Because of early unfriendly decisions of the courts in the United States, little was done with it until Massachusetts passed the Remnants Act in 1904, which permitted municipalities in making public improvements to take title to any remnants left which in themselves were unsuitable for building sites. Other states quickly followed the example of Massachusetts. Among these states were Ohio, Virginia, Connecticut, Pennsylvania, Maryland, Wisconsin, and New York. Statutory regulation under the constitutions as they then stood was found to be inadequate because of the narrow construction placed upon them by the courts. The next step was to broaden the power by amendments to the state constitutions. Massachusetts adopted the first constitutional amendment in 1911 and it was followed by amendments in Wisconsin and Ohio, in 1912; New York in 1913 and Rhode Island in 1916.<sup>41</sup>

Excess condemnation is most frequently used for cutting a new street or widening an old one, but it may be used to carry out almost any public improvement such as a municipal building, playgrounds and public parks. But regardless of the kind of improvement to be added, some of the following results may be expected. First, the adjoining land is almost sure to increase in value. This increased value is produced by the city's improvement and not by the local land-owner. The construction of the street and the taking of the extra land to resell should be regarded as one business enterprise. If the city does not get the increment of the value and apply it to the making of the improvement the cost will be increased. None of the statutes or constitutional amendments mentioned above expressly authorizes the condemnation for the making of profit, but all of them provide for re-sale. Therefore, profit may, and usually does, result. This is not the chief object. It is merely incidental, or as a manufacturer would say, it is the utilization of waste or a by-product.<sup>42</sup> Secondly, the

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<sup>41</sup>See Report of Chicago Bureau of Public Efficiency, *op. cit.* p. 51.

<sup>42</sup>In addition to excess condemnation, there are other methods of appropriating the increment of value resulting from the improvement. The



cutting of a street, especially if it be diagonal, always leaves remnants on each side of it not large enough for independent improvement. These remnants shut off the land back of them from the street and prevent development. The result is that values shrink and the city loses revenue from local assessments and general taxes. A third effect may be that the use to which the adjacent land is put, may defeat the objects of the public improvement, or at least impair these objects because the street may be bordered by a row of cheap unsightly houses, a solid row of tall buildings, or buildings at wrong points.

The public improvement may be protected if the city condemns the land and resells with covenants against improper uses of the land. The chief object of excess condemnation should be the protection of the main improvement. In the statutes and amendments mentioned above, some provide that the resale may be "with," others, "with or without restrictions" to secure the accomplishment of the improvement. The writer is strongly of the opinion that the law should read, "with restrictions" in the covenants of resale to protect the main public improvement.<sup>43</sup> Such a provision strengthens the condemnation if it is contested in the courts.

The bad effects of allowing a city to condemn for a street widening purpose, precisely so much land as is needed for the specific improvement and no more may now be shown. In the proposed diagonal Ogden Avenue extension<sup>44</sup> in the city of Chicago, if carried out as planned, there will be a hang-over of 93 remnants with a frontage of 3,300 feet on the proposed new street that will be too small or too irregular in shape to be available for building purposes. Further, in widening Twelfth street in Chicago the city left a strip of land three feet wide and 166 feet long in the hands of the private owners, and when Chicago improved Michigan Avenue, there were lot areas with a frontage of 617 feet having varying depths of from five to fourteen feet. Unless these are united to adjoining property which may take years, the land will remain vacant or be used for billboards, small one-story shops or other make-shift structures—each one an eye-sore. Many of the lot remnants along street improvements in New York city have re-

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common method in this country is to levy local assessments up to the cost of the improvement. It may be accomplished by an increment tax, in general use in several foreign countries.

<sup>43</sup>For a different view see Williams, *op. cit.* p. 130.

<sup>44</sup>See Report of Chicago Bureau of Public Efficiency, *passim*.

mained vacant for from twenty to fifty years because they were unfit for building sites and no union of the remnants with the adjoining property was accomplished.

When remnants are left it becomes essential, if the improvement is to be protected, that they be united with adjoining property under a single ownership so that the combined lots can be made suitable for building sites. If this is not done the results that may follow are strikingly set forth by H. S. Swan in a report on excess condemnation for the Committee on Taxation of the city of New York as follows:

"Since each parcel, by the mere fact of its adjacency, commands the values of the neighboring plots, every owner becomes, as it were, a monopolist. Knowing the strategic position of his own remnant and that its union with any other would immediately, without any effort on his own part, result in a greater value than the sum of the two separately, each proprietor overestimates the true importance of his own plot and shrewdly bargains to get not only the proportion that his own parcel contributes to this increased value, but also as much more as he is able to wring from the purchaser. Not succeeding in his designs by legitimate means, the owner, if he be unscrupulous, sometimes erects so objectionable a building on his land or puts the land to such a use as practically coerces the adjoining owner into either purchasing it at an exorbitant price or selling his own at a great sacrifice. The limited power of eminent domain, heretofore existing, has often served to make the ultimate development of the city dependent upon petty jugglery."

Excess condemnation would empower the city to acquire the remnant and unite it with adjoining property, thus forming lots suitable for building sites; prevent black-mailing and speculative profits; exclude the building of objectionable structures, or leaving remnants as unsightly vacant areas; reduce litigation expenses; improve sanitary conditions; and permit the city a recoupment from re-sales of the property condemned.

What should the city condemn? The condemnation should extend not only to the remnant but also to a sufficient amount of the adjacent land to permit the making of suitable building sites out of the re-arranged tracts. Only in this way can the remnant be eliminated and the united tracts of land be given a frontage on the widened street. This will accomplish the main object of the improvement.

The writer is fully convinced that the condemnation should not stop with taking a mere easement for a public use, but should

give the city the absolute fee to the property condemned. There are two reasons for this opinion: (1) If the city wishes to change the use for which the easement is taken, the property reverts to the original owner or his heirs, if they can be found. The city should control the property in fee as an asset so it can change the use or sell the property; (2) while an easement would be less expensive than full title and for some purposes would be effective, nevertheless it is open to the same objections as is the exercise of the police power. In the main it would provide only a negative means of control, that is, it could prevent the property from being put to an offensive or injurious use, but it could not furnish a positive or constructive means for developing street surroundings, and the street together; therefore the city should acquire the fee to be in a position to carry out a comprehensive city plan.

The final topic for consideration in this article is the constitutionality of excess condemnation. This will involve the examination of several decisions of the courts.

The constitutionality of excess condemnation has been raised in state cases only; however, some decisions of the Supreme Court of the United States have a bearing on the subject. The attitude of the Supreme Court of the United States is significant because the constitutionality of excess condemnation may be attacked as a violation of the fourteenth amendment despite the fact that the state supreme courts may hold it in harmony with the state constitutions. That is, a federal question is involved.

The state decisions are not numerous and far from harmonious. Since they deal with the subject of eminent domain it may be permissible to take a cursory view of this subject. Eminent domain finds a place in every state constitution, also the fifth amendment of the constitution of the United States and the "due process" clause of the fourteenth amendment. The constitutional limitations are that private property may be taken for a public purpose when just compensation is made to the owner. The Supreme Court of the United States in the case of the *Chicago, Burlington and Quincy Railroad Company v. Chicago*,<sup>45</sup> decided that taking private property for a private purpose is not due process of law since private property can be taken for a public use only. The question arises, what is a public use? The answer must be found in the adjudicated cases.<sup>46</sup> There is no general agreement

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<sup>45</sup>(1896) 166 U. S. 226, 51 L. Ed. 979, 17 S. C. R. 581.

<sup>46</sup>Lewis, Eminent Domain, 3d ed., sec. 251 and cases cited.

found in the decisions. In the case of the *Dayton Mining Company v. Sewell*<sup>47</sup> the court said:

"No question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words 'public use,' as found in the different state constitutions regulating the right of eminent domain."

The term "public use" is one of those general constitutional phrases like "the law of the land" and "due process" that has no clear-cut meaning either by definition or context in the constitutions. These phrases have been the footballs of judicial inclusion and exclusion as a necessity for applying them to concrete issues has arisen from time to time. Lewis, an eminent authority, says:<sup>48</sup>

"The different views which have been taken of the words, 'public use' resolve themselves into two classes: one holding that there must be a use, or a right of use, on the part of the public or some limited portion of it; the other holding that they are equivalent to public benefit, utility or advantage."

He favors the first meaning for the following reasons:<sup>49</sup>

"First, That it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; third, it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application."

The second view has the support of several state supreme courts and also the Supreme Court of the United States as will be seen later.<sup>50</sup>

With these two standards of meaning in mind, the few cases that have a bearing on excess condemnation will now be examined. A statute passed by the state of South Carolina conferred power upon the city of Charleston to condemn remnants in connection with the widening of a street. The constitutionality of the act was challenged in the case of *Dunn v. The City of Charleston*.<sup>51</sup> The court said:

"The question involved is whether the legislature has the constitutional right of taking the property of one individual and transferring it to another or to a body corporate for their own individual benefit and emolument."

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<sup>47</sup>(1876) 11 Nev. 394.

<sup>48</sup>Lewis, *op. cit.* sec. 257.

<sup>49</sup>*Ibid.*, sec. 258.

<sup>50</sup>*Infra*, p. 539.

<sup>51</sup>(1824) Harper's Law (S.C.) 189.

Continuing, the court said:

"Any act of partial legislation, which operates oppressively upon one individual, in which the community has no interest, is not the *law of the land*. . . . To take the property of one man, and give it to another, would be contrary to all those immutable principles of justice and common law, which have been consecrated by universal consent from time immemorial, and which are secured to us by the plain and unequivocal language of the constitution. Such would be the effect of the act in question."

This decision was handed down in 1824. If it were decided today the act would be declared unconstitutional on the ground that it is not due process of law.

In 1834 a "remnants" case came before the highest court of New York. This was the case of *The Matter of Albany Street*.<sup>52</sup> In denying the power of excess condemnation the court adopted the narrow view of public use and said:

"The constitution, by authorizing the appropriation of private property to public use, impliedly declares, that for any other use, private property shall not be taken from one and applied to the use of another. It is in violation of natural right, and if it is not in violation of the letter of the constitution, it is of its spirit, and cannot be supported. This power has been supposed to be convenient, when the greater part of a lot is taken, and only a small part is left, not required for public use, and that small part of but little value in the hands of the owner. . . . The quantity of the residue of any lot cannot vary the principle. The owner may be very unwilling to part with only a few feet; and I hold it equally incompetent for the legislature thus to dispose of private property, whether feet or acres are the subject of this assumed power. I am clearly of opinion that the commissioners have no right to take the strip of land in question against the consent of the corporation of Trinity Church."

The subject was given a broader turn. In 1910 the legislature of Massachusetts asked the supreme court of that state if it would be constitutional to authorize the city of Boston to lay out a broad thoroughfare and take not only the land needed for the street but also additional land with a view to selling it to private individuals. The court<sup>53</sup> answered the question in the negative. In considering the question whether the land outside the thoroughfare would be taken for a public use the court said:

"It is plain that a use of the property to obtain the possible income or profit that might accrue to the city from the ownership and control of it would not be a public use. . . . It is equally true

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<sup>52</sup>(1834) 11 Wend. (N.Y.) 149.

<sup>53</sup>Opinions of the Justices, (1910) 204 Mass. 405. 91 N. E. 405.

and indubitable that a management and use of such property to promote the interests of merchants or traders who might occupy it, and to furnish better facilities for doing business and making profits, would not be a public but a private use of the real estate."

The court then concluded its opinion with the following statement:

"An affirmative answer to this question would make it possible for the city to take the home of a resident near the line of the thoroughfare, or the shop of a humble tradesman, and compel him to give up his property and go elsewhere, for no other reason than that, in the opinion of the authorities of the city, some other use of the land would be more profitable, and therefore would better promote the prosperity of the citizens generally. We know of no case in which the exercise of the right of eminent domain or the expenditure of public money has been justified on such grounds."<sup>54</sup>

In 1907 the state of Pennsylvania passed an act providing that cities might condemn land within 200 feet of a park or street and sell the surplus land to private parties. Philadelphia condemned land adjacent to the new Fairmont Park. The constitutionality of the ordinance was upheld by the district court,<sup>55</sup> and on appeal denied by the state supreme court.<sup>56</sup> In arriving at the narrow view of eminent domain the court said:

"We think this interpretation of the words 'public use' is in accord with their plain and natural signification and the weight of the best considered authorities. It furnishes a certain guide to the legislature as well as to the courts in appropriating private property for public use. It enables the state and the owner to determine directly their respective rights in the latter's property. If, however, public benefit, utility or advantage is to be the test of a public use then, as suggested by the authorities, the right to condemn the property will not depend on a fixed standard by which the legislative and judicial departments of the government are to be guided, but upon the views of those who at the time are to determine the question. There will be no limit to the power of either the legislature or the courts to appropriate private property to public use, except their individual opinions as to what is and what is not for the public advantage and utility. If such considerations are to pre-

<sup>54</sup>The supreme court of Massachusetts has rendered opinions on somewhat analogous cases touching the limitations of eminent domain. *Salisbury Land Improvement Company v. Commonwealth*, (1913) 215 Mass. 371, 103 N. E. 619; denying the power to condemn land for workmen's cottages, see *Opinions of Justices*; (1912) 211 Mass. 624, 98 N. E. 611; see *Duke Bond v. The Mayor and City Council of Baltimore et al.*, (1911) 116 Md. 683, 82 Atl. 978.

<sup>55</sup>See *Pennsylvania Life Insurance Co. v. Philadelphia*, (1913) 22 Pa. Dist. Rep. 195.

<sup>56</sup>*Pennsylvania Mutual Life Insurance Co. v. Philadelphia*, (1913) 242 Pa. St. 47, 88 Atl. 904.

vail, the constitutional guarantees as to private property will be of small moment."

The proponents of excess condemnation will find some comfort in a few decisions. In 1904 Massachusetts passed a Remnants Act which provided for condemnation when the remnants were unsuited for the erection of suitable and appropriate buildings. The supreme court<sup>57</sup> of Massachusetts upheld the constitutionality of the act but intimated that it went to the verge of constitutionality. The reasoning of the court is as follows: The principle herein approved is that a remnant may be taken and resold if it is fairly incidental and reasonably necessary in connection with the taking of the main improvement. This is an opinion and not a decision of a case but it evidently expresses the matured judgment of the court.

The supporters of excess condemnation may derive considerable encouragement from the decisions of several Western states and their affirmation by the Supreme Court of the United States. These decisions adopt the second or recent meaning of "public use," namely, public utility, advantage, or what is productive of public benefit.

The supreme court of Idaho used language in the case of *Potlach Lumber Company v. Peterson*<sup>58</sup> which supports the broad view of public use as follows:

"It is enough if the taking tends to enlarge the resources, increase the industrial energies and promote the productive power of any considerable part of the inhabitants of a section of the state, or leads to the growth of towns and the creation of new channels for the employment of private capital and labor, as such results indirectly contribute to the general prosperity of the whole community."

A statute of Utah providing for an aerial tramway two miles long from a mine to a railroad for the transportation of ore, was sustained as a public use by the supreme court of that state<sup>59</sup> and in affirming this decision the Supreme Court of the United States in the case of *Strickley v. The Highland Boy Gold Mining Company* said:<sup>60</sup>

"In the opinion of the legislature and the supreme court of Utah the public welfare of that state demands that aerial lines be-

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<sup>57</sup>Opinions of the Justices, (1910) 204 Mass. 616, 91 N. E. 578.

<sup>58</sup>(1906) 12 Idaho 769, 88 Pac. 426, 18 A. S. R. 233.

<sup>59</sup>Highland Boy Gold Mining Co. v. Strickley, (1904) 28 Utah 215, 78 Pac. 296, 107 A. S. R. 711.

<sup>60</sup>(1905) 200 U. S. 527, 50 L. Ed. 581, 26 S. C. R. 301.

tween the mines upon its mountain sides and the railways in the valleys below 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."

Another statute of Utah which permitted a single proprietor to condemn a right of way for an irrigation ditch across the lands of others was upheld as a public use by the Supreme Court of the United States in the case of *Clark v. Nash*.<sup>61</sup> In the course of the opinion the court said:

"Whether a statute of a state permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and, therefore, a valid enactment, may depend upon a number of considerations relating to the situation of the state and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. Where the use is asserted to be public, and the right of the individual to condemn for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the state, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious and acknowledged in the state, and the state courts may be assumed to be exceptionally familiar with them."

Finally, the Supreme Court of the United States in the case of *Fallbrook Irrigation District v. Bradley*<sup>62</sup> said:

"It is obvious, however, that what is public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned. . . . On the other hand, in a state like California which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore a valid exercise of legislative power. . . . The use must be regarded as a public use or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect."

In these recent state and federal cases the courts adopt liberal views of public use and frankly recognize the inadequacy of use by the public, only, as a universal test. If the other state courts

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<sup>61</sup>(1904) 198 U. S. 361, 49 L. Ed. 1085, 25 S. C. R. 676.

<sup>62</sup>(1896) 164 U. S. 112, 41 L. Ed. 369, 17 S. C. R. 56.



will adopt the opinion of the supreme court of Massachusetts sustaining the taking of remnants as incidental to the main improvement and the decisions of the supreme courts of the Western states and the United States upholding a public advantage or benefit as being a public use, then excess condemnation will have a chance to be held constitutional, and city planning will have gained a new ally.

The next article will treat city planning and restrictions on the use of private property.

(To be concluded.)