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William E. Britton

Indiana University School of Law

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CONSTITUTIONAL CHANGES IN EMINENT DOMAIN IN ILLINOIS

WILLIAM E. BRITTON¹

The purpose of this article is (1) to review the constitutional changes that have taken place in the law of eminent domain in Illinois; (2) to discuss the proposals which have been introduced in the present Constitutional Convention; and (3) to indicate some of the more important constitutional changes which, in recent years, have occurred in other states.

I.

Text of constitutional provisions.—The text of the eminent domain clause under the constitution of 1818 was as follows: "Nor shall any man's property be taken or applied to public use without the consent of his representatives in the General Assembly, nor without just compensation being made to him."

This language was continued without change in the constitution of 1848. The clause underwent important changes in the constitution of 1870. The general clause now provides: "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken."¹

Separate sections were inserted which deal with the right to condemn land for roads for private and public use, for drainage purposes and with the condemnation of property and franchises of corporations: "The General Assembly may provide for establishing and opening roads and cartways, connected with a public road, for private

1. Assistant Professor of Law, University of Illinois.
1½. Art. II, Sec. 13.

and public use.”² “The General Assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others.”³ As amended in 1878 the section last quoted reads: “The General Assembly may pass laws permitting the owners of lands to construct drains, ditches, and levees for agricultural, sanitary or mining purposes, across the lands of others, and provide for the organization of drainage districts, and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state, by special assessments upon the property benefited thereby.”⁴

The provision relating to the condemnation of corporate franchises reads: “The exercise of power and the right of eminent domain shall never be so construed or abridged as to prevent the taking, by the General Assembly, of the property and franchises of incorporated companies already organized, and subjecting them to the public necessity the same as of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when in the exercise of the said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right.”⁵

Changes introduced by Constitution of 1870—It thus appears that the constitutional convention of 1869-70 introduced several important changes in the law of eminent domain, as it existed under the constitutions of 1818 and 1848. A short statement herefollows concerning the effect, in general, of these new provisions.

(1) A constitutional right to compensation was given in cases where property has been damaged. Before 1870 the right to compensation was confined to cases of

2. Art. IV, Sec. 30.

3. Art. IV, Sec. 31.

4. Art. IV, Sec. 31.

5. Art. IX, Sec. 14.

actual takings. A taking was held to mean a taking of the fee, or the taking of an easement or the imposition of an additional servitude upon land an easement in which previously had been acquired, and in addition included all direct physical injuries to property such as the overflowing of land.⁶ Compensation was not required to be paid for non-physical injuries, such as resulted from a change in the grade of streets or from the construction of a railroad upon a street, the fee of which was in the public. The introduction of the damage clause gave a right to compensation in these cases. Stated generally, an owner whose property has been damaged under legislative authority and under color of eminent domain has, under the constitution of 1870, a right to compensation to the same extent as he has against private persons.⁷ Illinois was the first state to introduce this change. This example has been followed in about half of the states, most of which are western states. This change in the law appears to have given satisfaction, for there is to be found but little evidence of a desire to return to the earlier rule, which is still in force in most of the eastern states, under which property may be damaged without compensation.

(2) The guaranty of the right to compensation for damage to property has had an additional effect in this state which was not a necessary consequence of the introduction of the damage clause. Under the constitutions of 1818 and 1848, in determining the amount of compensation for land actually taken, it was held that elements of special benefit to that part of the claimant's land which had not been taken could be set off against the value of the part taken.⁸ Without pointing out any specific reason, the court has held that the effect of the constitution of 1870 was to prevent the set-off of benefits against the value of land taken, although the court has never had the opportunity of passing upon a

6. *Nevins v. Peoria*, 41 Ill., 502 (1866).

7. *Rigney v. Chicago*, 102 Ill., 64 (1881).

8. *State v. Evans*, 3 Ill., 208 (1840).

statute which undertook to restore the rule as it was under the earlier constitutions.⁹ In takings by private corporations this rule is followed in the great majority of the states, but in about half the states, either as the result of judicial construction of clauses similar to the Illinois provision, or because of express constitutional provision, set-off of benefits to remaining land against the value of the part taken is allowed in takings by the state and by its agencies. If all agencies of the state possessed the power of levying special assessments, the rule forbidding set-off would be of little consequence. But in Illinois where cities, towns, villages, park districts and drainage districts are the only agencies which may levy special assessments, there is strong argument in favor of allowing all governmental agencies, such as counties, school and road districts and the Department of Public Works and Buildings, the right to set off benefits against the value of the land taken.

(3) The guaranty of jury trial to determine the amount of compensation came into the constitution of 1870. Under the first two constitutions, the General Assembly had power to and did provide other means for the ascertainment of compensation, for the general constitutional guaranty of jury trial was never construed to apply to eminent domain proceedings.¹⁰ The provision relating to jury trial as to compensation is found only in about one-third of the states, and in some of these only in cases of appeal from a finding of some other body. In about half of these states the provision does not apply to takings by municipal corporations. The provision has been the subject of some criticism in other states.

The state is expressly exempted from this provision in Illinois. This exemption applies to all takings by the state in its corporate capacity, such as takings by the Department of Public Works and Buildings, but does not exempt local governmental agencies.

9. *Carpenter v. Jennings*, 77 Ill., 250 (1875).

10. *Johnson v. J. & C. R. R. Co.*, 23 Ill., 202 (1859).

(4) Under the constitutions of 1818 and 1848 there was no constitutional limitation upon the power of the General Assembly to authorize the condemnation of the fee simple title to land. The constitution of 1870 provided that the fee of land taken for railroad tracks should remain in the owner. Such a limitation as this is found in the constitutions of but three other states, Missouri, Oklahoma, and South Dakota. Since the abandonment of the user causes a reversion of the right of possession to the owner of the fee,¹¹ this provision works a hardship on railroad companies in the event of a necessary removal of their tracks. In cases where the removal of tracks is sought by a city in furtherance of its improvement plan, the provision becomes an obstacle. The elimination of this restriction has been urged by civic bodies in Chicago, interested in the Chicago Plan. If the provision is taken out it would seem that the roads should also be given the right to condemn the fee of lands now occupied by them in which they had previously acquired easements under the existing constitution. Proposal 121 accomplishes these purposes.

(5) The constitution of 1870 also contains a provision not found in the preceding constitutions, expressly declaring that the franchises and properties of corporations shall be subject to condemnation for public use. The provision also reasserts the guaranty of jury trial in eminent domain proceedings by or against corporations. This provision is found in about one-third of the states. Inasmuch as it has been held that the power of eminent domain cannot irrevocably be granted away and that a breach of an agreement not to do so is not an impairment of the obligation of any contract, this provision adds no power to that possessed under the general eminent domain clause.¹²

11. *Bell v. Mattoon Water Works Co.*, 245 Ill., 544 (1910)
C. & E. I. R. R. Co. v. Clapps, 201 Ill., 418 (1903).

12. *Hyde Park v. Cemetery Association*, 119 Ill., 142 (1886).

(6) The convention of 1870 also extended the meaning of the term "public use" to include two purposes primarily private, by inserting provisions authorizing the condemnation of land for roads for private and public use, and for drainage purposes. Under the prior constitution, it had been held that the General Assembly could not authorize the taking of land for private rights of way,¹³ and probably would have held, had the question been directly presented, that the taking of land for drainage purposes was not a public use. Provisions of a similar character relating to roads are found in about one-third of the states. The drainage provision is also found in about the same number of states. The drainage section was amended in 1878 so as to permit the construction of levees, the construction of drains for sanitary and mining purposes, the organization of drainage districts and the levying of special assessments to meet the cost of such works.

II.

Four proposals relating to the power of eminent domain have been introduced in the present Constitutional Convention.¹⁴ Proposals 118 and 119 provide for

13. *Nesbit v. Trumbo*, 39 Ill., 110 (1866).

14. Proposal 118. When private property is taken for public use by the state or any county, municipal corporation, subdivision or agency of the state, additional, adjoining or neighboring property may be taken in fee and thereafter held or disposed of under conditions fixed by general law.

Proposal 119. The General Assembly may provide that the state, or any county, municipal corporation, subdivision or agency of the state, having the power of eminent domain, may in furtherance of any public improvement involving the condemnation of land, take in fee more land and property than are needed for such improvement. Such additional land or property shall not be more in extent than sufficient for suitable building lots abutting on such public improvement or upon any street adjoining the same. The General Assembly may provide that any part of land or property so taken and not needed for the improvement may be held, improved or leased for value with or without restrictions.

Proposal 120. The power of eminent domain shall extend to every species of interest in real property including all rights and easements of any nature whatever, on, under, upon, or over adjacent property, whether public or private, and irrespective of the origin of the same, whether in dedication or otherwise.

Proposal 121. Amends section 13 of article 2 of the present constitution by omitting the provision: "The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken;" and, by providing that, "any corporation having the power to take land by

excess condemnation. Proposals 120 and 121 are designed to meet minor situations that have been disclosed by judicial decisions or by changes of policy. No proposals, other than those providing for excess condemnation, have been introduced which extend the power of eminent domain to include new public uses.^{14½}

The most important of these proposals are those which authorize the use of excess condemnation. Excess condemnation is the employment of the power of eminent domain for purposes which are collateral or incidental to some other object which is primary. The problem which is sought to be solved by excess condemnation is primarily a problem of the large city. The city desires a greater control over the character of the neighborhood surrounding public improvements, such as newly opened or widened streets, public parks or buildings, for the

eminent domain, may take a fee or an easement in such land, as it may elect. And any such corporation having heretofore acquired an interest in land less than a fee, may condemn such remainder or reversionary interest so that it may become vested with a complete fee simple title therein."

14½. In recent years in various states a number of constitutional provisions have been adopted which extend the power of eminent domain. Uses which heretofore were not generally regarded as public have by this means become public uses. These constitutional provisions fall into three groups: (1) There is a class which adds new functions of government to the state or to its subdivisions but which does not expressly confer the power of eminent domain as one of the means of their accomplishment. The ultimate effect, however, may be to draw the power of eminent domain to the added functions. This class is the most numerous. (2) In the second group, the sphere of government is extended and the power of eminent domain is expressly mentioned as one of the means of effectuating the new purpose. Amendments falling in these two classes comprise a wide range of subjects: conservation of natural resources, forests, reclamation work, internal improvements, municipal ownership of public utilities, state insurance, mining, manufacture of cement, operation of grain elevators and flour mills, sale of necessities, and building of homes. (3) In the third class of amendments, the power of eminent domain is authorized to be employed in a new direction, but for a purpose distinctly incidental to the accomplishment of other functions, as for example when a city, in the location or widening of streets or in the construction of public works, seeks to condemn land lying outside the proposed improvement for the purpose of further insuring the success of the improvement, or for other collateral objects. The properties taken are not directly and continuously used in the project but are sold after the incidental benefit arising from their temporary possession has been realized.

The first and second classes of constitutional amendments simply expand the power of eminent domain. Constitutional provisions of the third class likewise extend the power of eminent domain but the difference in the objects sought to be accomplished thereby has caused the introduction of the term "excess condemnation" as descriptive of this additional authority

primary purpose of protecting such improvements from undesirable structures and for the more general objects of stabilizing real estate value and insuring the proper development of the district.

First, it is urged that the city be given power to condemn the small remnants of lots which are left as a result of the location or widening of streets, and in addition, the power to condemn a sufficient amount of land which, when added to the remnant, will make suitable building sites and that the city be authorized to sell the lot. Second, it is proposed that the city be given power to condemn considerable areas adjoining a public improvement for the purpose of reselling them under proper restrictions designed to protect the improvement and to control the character of the buildings in the section. Third, it is proposed that the city be authorized to condemn the area surrounding an improvement and to sell the same for the purpose of recouping the cost of the improvement.

Constitutionality of statutes authorizing excess condemnation.—The courts of the United States, with practical unanimity, have held unconstitutional under general eminent domain clauses, statutes which authorize the condemnation of more land than is necessary for a proposed improvement, such excess to be later sold or leased. Such a taking is held not to be for a public purpose. As early as 1824 the Supreme Court of South Carolina took this position with reference to a statute which authorized the taking and resale of lot remnants.¹⁵ A few years later a similar statute of New York was held unconstitutional.¹⁶ These two cases had the effect of settling the constitutional question, at least for a time. No statutes of like character are found until 1870, at which time New Jersey passed an act authorizing the replotting of land affected by an improvement so as to

15. *Dunn v. City of Charleston*, Harpers Law Reports, 189.

16. *In re Albany street* 11 Wend. 149, (1834); *Emery v. Conner*, 3 N. Y. 511, (1850).

absorb the remnants.¹⁷ The act was never tested. In 1904, a remnant act was passed in Massachusetts.¹⁸ A similar one, but with broader powers was enacted in Ohio in the same year, followed by like legislation in Virginia in 1906, Connecticut and Pennsylvania in 1907, Maryland in 1908, Wisconsin in 1909, New York in 1911, and Oregon in 1913.

The Maryland act came before the court in 1911, and, while the decision is not a square holding against its constitutionality, for the point was not definitely in issue, the language of the opinion points strongly in that direction.¹⁹ Two years later, the Pennsylvania statute was declared unconstitutional.²⁰ This statute authorized the condemnation and resale under building restrictions of land within 200 feet of a proposed parkway. The object of the taking was to preserve the improvement. There was a slight intimation by the court that the taking of an easement for such a purpose might not be objectionable, but the taking of land to be resold possibly to others was held to promote a private purpose and was therefore void. Proposed legislation of the same nature was for like reasons said to be unconstitutional, in opinions of the justices of Massachusetts, rendered to the legislature in 1910.²¹ In its first opinion the court took occasion to remark that the lot remnant act might be sustained, but they stated that this legislation went "to the very verge of constitutionality" and that it could apply only when the particular remnant was too small to be of any practical value and even then only upon an adjudication that the public convenience and necessity required the taking. With the exception of this opinion, no authority has been found which is favorable to the constitutionality of a statute authorizing excess condemnation under a general eminent domain

17. New Jersey Laws, Chap. 117 (1870).

18. Mass. Laws (1904).

19. *Bond v. Baltimore*, 116 Md. 683, (1911). See, also, *Philadelphia etc. R. Co. v. Baltimore*, 121 Md. 504.

20. *Mutual Life Insurance Co. v. Philadelphia*, 242 Pa. St. 47 (1913).

21. *Opinions of the Justices*, 204 Mass. 604, 204 Mass. 616.

clause. Such judicial authority as there is, is in accord in indicating that if municipalities are to be given the power to condemn land which is not to be used for the purposes of the improvement, but is to be resold for any collateral object whatsoever, such power must be conferred by express constitutional provision. The statutes in other states have not been before the courts, those interested in their use apparently acquiescing in the prevailing judicial opinion.

The question here discussed has never been raised in the courts of Illinois, but in a case²² decided in 1866 the Supreme Court of Illinois, in holding that a statute which authorized the condemnation of land for private rights of way was unconstitutional, took occasion to quote with approval from the Albany Street case²³ which held the New York lot remnant act void. There is no reason to suppose that the courts of this state would hold such an act valid. Under the existing eminent domain clause it is definitely outside the scope of legislative power to authorize municipalities to condemn and resell lot remnants, to take and resell lands for the purpose of protesting an improvement or for improving the character of the neighborhood, or for purposes of recouping the cost of the improvement.

It has sometimes been said that a statute which would authorize the condemnation of easements for the purpose of protecting an improvement or for improving the character of the neighborhood would be constitutional, because this does not involve excess condemnation but only an extension of the power of eminent domain, the authority to resell after the taking being eliminated. But little authority can be adduced in support of this position. The case usually referred in this connection is that of *Attorney General v. Williams*.²⁴ In this case

22. *Nesbitt v. Trumbo*, 39 Ill. 110.

23. 11 Wend. 149 (1834).

24. 174 Mass. 476, 178 Mass. 330, 188 U. S. 491 (1899). Walter L. Fisher, *Plan of Chicago*, p. 148.

an act of the General Court of Massachusetts which authorized the condemnation of easements of light and air above the height of ninety feet surrounding Copely Square in the city of Boston was held constitutional. The limitation of the height of buildings is, however, recognized everywhere as a legitimate exercise of the police power, and the Massachusetts court intimated in this case that payment of compensation would not have been necessary. A recent Minnesota decision is, however, an authority for the proposition that apartment houses may be excluded from certain specified districts under the power of eminent domain.²⁵ The General Assembly of Illinois has acted upon the assumption that such an act is constitutional.²⁶

List of Constitutional Provisions Authorizing Excess Condemnation.—Constitutional amendments providing for excess condemnation have been adopted in Massachusetts (1911), Ohio (1912), Wisconsin (1912), New York (1913) and Rhode Island (1916). Amendments of a broader character than those adopted in New York and in Wisconsin were defeated in New York in 1911 and in Wisconsin in 1914. An amendment similar to those adopted in Ohio and in Wisconsin failed in California in 1914, 1915 and in 1918. An amendment similar to those adopted in Massachusetts, New York and Rhode Island failed of adoption in New Jersey in 1915.

Lot Remnants.—The problem of the lot remnant left by the opening of widening of streets did not present itself acutely in Illinois until the city of Chicago undertook to carry out its extensive program of municipal improvements. Upon the formulation of the city plan several years ago this problem was anticipated, and it

25. State ex rel. Twin City Building Co., 175 N. W. 159. (1920).

26. Sec. 3 of Art. IV, Act of 1915, providing for the consolidation of the local governments of Chicago authorizes the condemnation of easements to control the surroundings of parks. This act has never gone into effect, because dependent upon a favorable popular vote in Chicago.

was urged that the city should be granted power to condemn lot remnants for the purposes of facilitating their union with adjoining property.²⁷

The recent widening of Twelfth Street and Michigan Avenue, and the survey of the proposed Ogden Avenue Avenue extension in the city of Chicago present the problem of lot remnants in striking form. The Price property located on Twelfth Street and Wabash Avenue is said to be the most flagrant example.²⁸ The situation with respect to this property is as follows: The Price property had a frontage of 166 feet on Twelfth Street and 71 feet on Wabash Avenue. The city took 68 feet of the 71 feet on a frontage of 166 feet. This taking left a lot remnant of 166 feet fronting on the widened street with a depth of 3 feet. The loss to the city appears from the following figures. The city paid \$204,000 for the 68 feet taken, that is, at the rate of \$3,000 per front foot on Wabash Avenue. The Supreme Court held the remnant was damaged and not benefited and for this damage the city paid \$9,000, that is \$3,000 per front foot. The city, therefore, paid the owner as much for the property which was not taken as it paid for the land taken. Had it been allowed to take this remnant, which it paid for in full, it could have recouped at least a portion of this cost by sale to the owner of the adjoining property.

The city also loses in the amount of the special assessment which can be levied against the property in the rear. In the case the 50-foot lot behind the remnant was assessed \$14,200. For the 25 feet nearest Twelfth Street it was assessed \$440 per front foot, or \$11,000; for the next 25 feet, \$128 per front foot or \$3,200. Had the remnant been united with the adjoining property, at this

27. *Legal Aspects of the City Plan*, by Walter L. Fisher, in the report on "Plan of Chicago" by the Commercial Club of Chicago.

28. *Chicago Bureau of Public Efficiency, Report on Excess Condemnation*, Sept. 1918. This report discusses this problem in Chicago in detail and presents several diagrams showing the size and shape of the remnants which have been left. The Report of the Committee on Taxation of New York on Excess Condemnation contains a number of photographs and diagrams of lot remnants in New York City.

rate, such remnant as a part of the other property, would have borne an assessment for benefits of \$1,320, instead of a damage of \$9,000. As a matter of fact, however, this three-foot strip and the rear property would have been assessed at a rate higher than \$440 per front foot, for they could then have been assessed as corner property. The probable increase in the assessment rate over \$440 per front foot if it had been corner property appears roughly from a comparison of the assessment on corner property lying to the east and fronting on Michigan Avenue. Here, the whole of the original corner property was taken and a small part of the lot in the rear was taken but there was left to this lot a frontage of 32 feet on Michigan Avenue and a new frontage on Twelfth Street of about the same length, so that it now became corner property. This lot was assessed \$1,220 per front foot, or a total of \$60,000 as compared with the assessment of \$440 per front foot on the lot on Wabash Avenue which was blocked off from the new street by the remnant. Michigan Avenue property is about twice as valuable as Wabash Avenue property at this point. After making this deduction, it appears that the first 32 feet of frontage on Wabash Avenue should have been assessed \$30,000. Actually this 32 feet was assessed but \$11,500—nothing for the first 3 feet, \$11,000 for the next 25 feet and \$500 for the remaining 4 feet. The city lost the difference between \$30,000 and \$11,500, or \$18,500, plus the \$9,000 paid as damages for the 3-foot strip, making a total loss of \$27,500.

The report of the Chicago Bureau of Public Efficiency from which the above facts are taken, states that 617 feet of frontage of the Michigan Avenue widening, out of a total of 3,000 feet affected, will have depths of from 5 to 14 feet. Approximately one-fifth of the frontage on one side of the Michigan Avenue improvement is thus made up of remnants. The proposed Ogden Avenue extension will leave 93 remnants, with a frontage of approximately 3,300 feet on the proposed new street, too small for building purposes.

From these facts the primary reasons for allowing the condemnation of lot remnants are apparent. There is an unquestionable direct loss to the city. There is also a loss to the property owners in the neighborhood. The history of lot remnants in several cities shows that they are apt to remain in separate ownership for years. They cannot be used for building purposes. The street is thus left in an ugly and irregular appearance. Frequently this condition is accentuated by the use of the small area for billboards or other structures of temporary nature out of keeping with the general character of the neighborhood. The development of the street is greatly retarded and the normal increase in real estate value is checked. The improvement is thus robbed of much of its effectiveness and the general utility of the district is greatly impaired.

It has sometimes been urged that the taking of the remnant is unnecessary because its union with the adjoining property can be brought about through private sale or at most by authorizing the city to buy the strip if the owner is willing. The experience of New York does not justify this hope. The union of the two properties is dependent largely on the price asked for the remnant. The history of such parcels shows that the main obstacle is the wide difference of opinion as to price between the owner of the remnant and the proposed purchaser. The city, not primarily desiring pecuniary gain from this strip, would be in a much better position to cause the two properties to be united. Where the remnant is owned by several persons having different interests and some of them under disability the obstacles to a private sale are great.

Investigations into the lot remnant problem have led to the conclusion that the city should be given the power to condemn these ill-shaped strips of land.

The Massachusetts Committee on Eminent Domain, which made an exhaustive study of excess condemnation here and in Europe, says in its report, "It often happens that the owners of these remnants, desirous of deriving

some income, erect temporary structures, unsuited for proper habitation or occupancy. Such structures are frequently made intentionally objectionable, both in appearance and in the character of their occupancy for the purpose of compelling the purchase of the remnant at exorbitant prices. The result is that a new thoroughfare, which should be an ornament to the city, is frequently for a long period after its construction disfigured by unsightly and unwholesome structures to the positive detriment of the public interests.'²⁹

The Committee on Taxation of the City of New York, in its report on excess condemnation, reaches a similar conclusion. "New York furnishes several 'horrible examples' in cutting new streets through sections already built up without excess condemnation. Excess condemnation would leave the city free to re-arrange and subdivide the land fronting the improvement into plots of the size and shape best suited to the proposed development.'³⁰

The Chicago Bureau of Public Efficiency, in its recent study of this problem, concludes that, "If in future projects the difficulties are to be avoided which the city has met in the building of the Michigan Avenue boulevard link and the widening of Twelfth Street, the city must be given a free hand so that it can deal with this problem, re-arranging the lots in a block to conform to the new street, thus making them available for building purposes. When remnants are left it is essential if the street is to be developed speedily that such remnants be united with adjoining property under a single ownership so that the combined plots can be made suitable for building sites.'³¹

29. Massachusetts House Document, 228, (1904), p. 5.

30. Report, 1915.

31. Report on Excess Condemnation, Sept. 1918, p. 36.

Writers on the question have reached similar conclusions.³² Where proposed amendments have limited the power of excess condemnation to the taking of land sufficient to make suitable building sites, they been adopted with one exception³³—New Jersey.

Protection of public improvements.—In recent years there has been considerable discussion as to the advisability of conferring upon municipalities the power to condemn land bordering on an improvement, for the purpose of facilitating the city's control over the character of the neighborhood. A new use of the power of eminent domain is sought for purposes which are outside the police power. While the city may, under its police power, reasonably control building heights, and exclude such business concerns from residential districts as livery stables, public garages, brick yards and the like and may exercise a fairly adequate control over billboards, it cannot establish an exclusively residential neighborhood, nor a business district, except in so far as these objects will prove to be attainable under a zoning law such as was enacted in Illinois in 1919. The city, under the police power, cannot impose restrictions upon the general architectural style or value of buildings. The various sections of metropolitan areas are undergoing continual change, with a destructive effect upon the stability of land values and upon the harmony of architectural construction and arrangement. Slum areas develop. Public improvements constructed at great expense may fail to accomplish the objects for which they were designed because their usefulness becomes impaired by changed conditions. Building restrictions inserted in deeds to newly sub-divided property operate as partial

32. Flavel Shurtleff and Frederick Law Olmsted, *Carrying out the City Plan*; Lawson Purdy, *Report of the Conference on City Planning, 1911*, p. 121; Herbert W. Swan, *Report on Excess Condemnation*, prepared for the Municipal League, published by the Committee on Taxation of New York; Robert E. Cushman, *Excess Condemnation*, p. 72; Ernst Freund, *Conference on City Planning, 1911*, p. 242.

33. Massachusetts, New York and Rhode Island.

correctives where they exist, but the policy behind them is not formulated with respect to the city's needs as a whole.

It has been proposed, therefore, that the city be given power to condemn land which borders upon public improvements such as streets, parks, and public buildings and to sell the excess land with restrictions as to the use of the property; the power to be used with respect to developed property as well as undeveloped property. There has been virtually no experience in this country in employing the power of eminent domain for this purpose, but it has been used in England with considerable effectiveness during recent years. Constitutional amendments authorizing excess condemnation for this purpose have been adopted in Ohio and Wisconsin, both in 1912; but have failed of adoption in New York and California.

It is argued that the city should have the power to control, within reasonable limits, the character of a district bordering on its own improvements, if it is willing to pay for that privilege. It is urged that the exclusion of inappropriate structures and business establishments in residence districts, or of residences in business districts, the securing of reasonable harmony in architecture, building lines and uses of property, steady land values and benefit property owners and the city economically and from a standpoint of aesthetics. It is also urged that the realization of the full benefit of the improvement would thereby be insured; that the power would be an effective instrument for the rehabilitation of insanitary areas; that public health, morals and welfare would be promoted. Legislative investigative committees and civic bodies have reported in favor of this extension of the power of eminent domain.³⁴

34. Report of Committee on Taxation of the City of New York on Excess Condemnation; Chicago Bureau of Public Efficiency, Report on Excess Condemnation; Plan of Chicago, Commercial Club.

Several writers have likewise put themselves on record as favoring this extension of the power of eminent domain.³⁷

The fundamental objection to excess condemnation for the purpose of controlling the character of areas bordering on public improvements is, of course, that the taking amounts to an unjustifiable interference with the rights of private property. It is said that the public welfare does not demand it; that the police power is adequate³⁸ and that it is preferable to seek any desired extension of control over the use and location of buildings through the gradual expansion of the police power by judicial decision rather than by abrupt changes in constitutional principles, upon the theory that gradual changes are more calculated to represent the real desires of the people. It is further urged that the exercise of the police power entails little expense to the public as compared with that which accompanies the taking of property under the power of eminent domain and that it is better to sacrifice the added control which cities would derive from this extension of the power of eminent domain than to adopt a policy which might lead to an era of unfortunate land speculation for cities. Doubtless for these reasons proposed constitutional amendments providing for excess condemnation for these purposes have in some instances failed of adoption, as has been the case in California three times and in New York, although such a constitutional provision has been adopted in Ohio and Wisconsin.

In this connection a brief reference to municipal zoning regulations may be made for the purpose of showing the extent to which such regulations have been upheld under the police power or denied, as being a deprivation of property without due process of law.

37. Flavel Shurtleff, *Carrying out the City Plan*, p. 137; Robert E. Cushman, *Excess Condemnation*, p. 116; Herbert S. Swan, *Report on Excess Condemnation*, p. 19; William Bennett Munro, *Principles and Methods of Municipal Administration*, p. 91.

38. Ernst Freund, *Conferences on City Planning*, 1911, p. 242.

City plans, rather generally, seek an adequate control over the location and regulation of all offensive industries, of advertising signs, and of ordinary business establishments. Buildings are to be safely constructed, limited to certain heights, to certain proportions of the lot and to the uses to which they may be put. The display of advertising signs is to be restricted. In planning for undeveloped areas it is sought to prohibit the building within the lines of officially mapped streets. A thorough-going zoning system is sought. To what extent are these objects attainable under the police power without express constitutional authority?

The police power is adequate to compel the safe construction of buildings,³⁹ and to exclude from certain districts any business which is a nuisance and many which are not nuisances *per se*, such as public wash-houses, public garages and the like.⁴⁰ In the matter of excluding business establishments from specified areas, the courts probably have not gone farther than in the case of *ex parte Hadacheck*.⁴¹ In this case an ordinance was sustained which excluded brick yards from residential districts. Retail stores and similar business establishments, it has been held, cannot be excluded from residence districts.⁴²

Nor may the police power be used to control the general character and architecture of a building. The issuance of building permits, conditioned upon the proposed building conforming in size and general character and appearance to the general character of buildings in the neighborhood, has been held not justified.⁴³ "A citizen has the common law right to improve his property as his taste, convenience or interest may suggest without

39. *Commonwealth v. Roberts*, 155 Mass. 281; *Health Dept. v. Rector*, 145 N. Y. 32.

40. *Ex parte Quong Wo*, 161 Calif. 220; *Chicago v. Stratton*, 162 Ill. 494 (1896); *Shea v. Maucie*, 148 Ill. 14; *People v. Ericsson*, 263 Ill. 368 (1914).

41. 165 Calif. 416, 239 U. S. 394.

42. *People v. Chicago*, 261 Ill. 16 (1913); *Stubbs v. Scott*, 127 Md. 86, and *State v. Houghton*, 134 Minn. 226, though the Minnesota decision was by a bare majority.

43. *Bostock v. Sams*, 95 Md. 400.

considering whether his building will conform to the general character of buildings previously erected." says the court. The compulsory establishment of building lines is not generally within the police power⁴⁴ though the recent case of *Eubank v. Richmond*⁴⁵ sustained such an ordinance which allowed the establishment of a building line on request of two-thirds of the property owners in the district affected. This case was reversed by the Supreme Court of the United States⁴⁶ but apparently not upon the ground that no building line could be established. The requirement that dwellings be constructed as separate and detached buildings likewise has been held unreasonable.⁴⁷

The history of billboard regulation is a long one. When the statute merely prescribes the manner of construction the regulation is valid.⁴⁸ If the statute prohibits the construction and display of billboards the regulation is held invalid.⁴⁹ The most advanced position on billboard regulation yet taken by any court is the recent decision in *Cusack v. Chicago*,⁵⁰ where an ordinance prohibiting the erection of billboards in residential districts, except upon the written consent of the owners of a majority of the frontage in the block, was sustained. The ordinance was not sustained upon aesthetic grounds. The court finds a relation to public morals and health. Massachusetts has deemed this power inadequate and has attempted to expand the police power by a constitutional amendment of 1918, as follows: "Advertising on public ways, in public places, and on private property within public view may be regulated and restricted by law." A similar provision was rejected in Ohio in 1912.

44. *Fruth v. Charleston*, 75 W. Va. 456; *Curran v. Guilfoyle*, 38 App. Div. N. Y. 82.

44. *In re Charleston*, 57 App. Div. N. Y. 167; *St. Louis v. Hill*, 116 Mo. 527.

45. 110 Va. 749.

46. 226 U. S. 137.

47. *Byrne v. Maryland Realty Co.*, 129 Md. 202 (1916).

48. *Gunning v. St. Louis* 235 Mo. 99; *Chicago v. Gunning*, 214 Ill. 628.

49. *Haller v. Training School*, 249 Ill. 436 (1911).

50. 267 Ill. 344 (1914); 242 U. S. 526.

A statute which imposes reasonable restrictions upon the height of buildings is a proper exercise of the police power.⁵¹

Cities frequently desire to project new streets into undeveloped territory in anticipation of future needs and to prohibit the erection of buildings within the lines of the proposed street, pending the taking of title. Except in Pennsylvania this has not been allowed under the police power.⁵²

There has as yet been no thorough testing of the constitutionality of zoning ordinances such as the one which went into effect in New York City in 1916. Several states have passed statutes enabling the adoption of such ordinances including Illinois in 1919. The Illinois zoning law authorizes cities (1) to limit the height of buildings, (2) to limit the bulk of buildings, (3) to limit the intensity of the use of lot areas, (4) to determine the area of yards and open spaces, (5) to restrict the location of trades and industries, (6) to exclude trades and industries from fixed districts, and (7) to establish residential districts from which buildings designed for business may be excluded. The act provides that no ordinance shall deprive owners of existing property of the right to continue the use of the property for the purpose for which it was employed at the time such ordinance goes into effect. The owners of a majority of the frontage in any district, by written objection, may prevent the enforcement of the ordinance. The *Cusack* case, sustaining an ordinance prohibiting the erection of billboards in residence districts except upon the written consent of the owners of the majority of the frontage in the block, is a fairly strong authority for the constitutionality of the Illinois act, but it remains yet to be

51. *Welch v. Swasey*, 193 Mass. 364, 214 U. S. 91; *Cockran v. Preston*, 107 Md. 220.

52. *Forrester v. Scott*, 136 N. Y. Suppl., 557; *Edwards v. Bruorton*, 184 Mass. 529; *Bush v. McKeesport*, 166 Pa. St. 57. See the analysis of the cases bearing on the constitutional limitations on city planning powers in the report of the Conference on City Planning, 1917, p. 199, by Edward M. Bassett, Special Counsel to the Zoning Committee, New York City.

seen whether the courts will extend the rule of that case to justify such regulations as are sought to be authorized by this statute. In Massachusetts it has been assumed, apparently, that the decisions which concern the constitutionality of zoning statutes do not go far enough to make certain the constitutionality of such acts, and accordingly by constitutional amendment of 1918, it was provided that:

“The General Court shall have power to limit buildings according to their use or construction, to specified districts of cities and towns.” Proposal 122, now pending before the Illinois Constitutional Convention makes a similar provision.

It is obvious that the problem of the lot remnant is distinctly one of eminent domain and not of the police power. As regards the protection of public improvements, assuming that ordinances enacted under the Illinois zoning act will be upheld, still in many instances, such regulations which were designed to meet the needs of a relatively larger area will not afford the kind and degree of protection desired. Such ordinances do not and probably could not authorize compulsory changes in existing properties, nor impose restrictions upon the architectural style and value of buildings to be later erected. Such changes probably can be effectively accomplished only by the exercise of the power of eminent domain.

To meet the objections that have been raised to the use of excess condemnation for the purpose of protecting improvements, two proposals have been made. One consists in requiring the city to sell the land condemned in excess, to its former owner if he wishes to buy it. Only upon his rejection of the offer would the land be offered to the general public. The Illinois proposals do not contain any such guaranty, though the General Assembly, under them would have power to impose such a restriction. There would seem to be no public

advantage in selling land to another when the former owner is willing and able to retake title with the restrictions.

A second proposal, designed to meet some of the objections and at the same time calculated to secure many of the advantages of excess condemnation for the purpose of protecting improvements, seeks to confer upon municipalities the power to condemn easements only in the adjoining land. Under this plan the property owner is protected in his ownership but is restricted in the use of his property. It is further urged that this plan would involve less financial risk to the city. Within certain limits, not well defined, the condemnation of easements could be authorized by statute but any thorough-going plan of control would probably meet with constitutional objection. The recent act in this state providing for the consolidation of the local governments of Chicago, but which has never gone into effect, authorizes the city to acquire easements in lands in the vicinity of parks for the purpose of controlling the surroundings. As to the policy of condemning assessments, those who advocate broader power admit its effectiveness but deny that it goes far enough. As far as undeveloped territory is concerned, the condemnation of easements probably would be adequate but it is contended that this power would not be adequate to protect improvements or to change the character of a district which is already improved.

Recoupment.—The proposal has been made to employ the principle of excess condemnation for the purpose of recouping the cost of a public improvement and for intercepting a part of the increment of value added to land as a result of the improvement. The adoption of such a policy is advocated as a substitute for or as supplementary to the common practice in this country of levying special assessments, or the practice in some European countries of imposing increment taxes. It is urged that the city having created this increment of

value is entitled to receive it. The economic justification for recoupment is much the same as that which supports a tax on the unearned increment such as is levied in England under the provisions of the Lloyd George budget of 1909.

The principle of recoupment has never been adopted in this country though it has been employed extensively in European countries. In England the practice dates back to the Land Clauses Consolidation Act of 1845, but as a financial measure it has not been a success. Out of fourteen miles of streets widened by the Metropolitan Board of Public Works of London at a cost of \$58,859,000 the sale of the surplus land totaled but \$26,608,000. A few street improvements have shown a margin of profit. Later improvements put through by the London County Council were, with but few exceptions, not financially successful. The extensive improvements in the city of Paris, during the days of the second empire, showed a like loss. Land to the amount of \$259,400,000 was condemned but in 1869 the city had recouped but \$51,800,000 from the sale of surplus lands and still had on hand land valued at \$14,400,000. Later projects have likewise failed to produce a profit or meet the cost. The experience of Belgium, while in many cases productive of heavy losses, in more recent years has been more successful, particularly in projects which were designed to change the character of slum areas. The levying of special assessments is not common in Europe though it is coming to be looked upon with greater favor.

In this country there is but little enthusiasm shown for the adoption of the principle of condemning land for purposes of recouping the cost of an improvement.⁵³ The financial risks, apparent from European experience, are deemed too great. The practice of levying special assessments is regarded as preferable. When recoup-

53. Committee on Taxation of New York, Report on Excess Condemnation; Chicago Bureau of Public Efficiency, Report on Excess Condemnation; Herbert S. Swan Report on Excess Condemnation; W. L. Fisher, Legal Aspects of the City Plan; R. E. Cushman, Excess Condemnation, Flavel Shurtleff, Carrying out the City Plan.

ment is favored at all, it is regarded not as the primary object but as an incident to some other project such as taking of lot remnants or the protection of improvements. In every case in this country where a proposed constitutional amendment has been worded broadly enough to permit the taking of excess land for purposes of recoupment, it has been defeated. This has been the case in New York, Wisconsin, and California, although in the first two states amendments of more limited scope have been adopted.

Illinois proposals authorizing excess condemnation.— Proposal 118 provides that when private property is taken for public use by the state or any county, municipal corporation, subdivision or agency of the state, additional, adjoining or neighboring property may be taken in fee and thereafter held or disposed of under conditions fixed by general law. This provision is broad enough to authorize the condemnation of property for purposes of recoupment as well as for the purpose of protecting improvements and of eliminating lot remnants. To the extent that it justifies the use of excess condemnation for purposes of recouping cost the section is broader than similar provisions which have been adopted in other states. The amendments adopted in Massachusetts, New York and Rhode Island merely make provision for the lot remnant problem. The amendments adopted in Ohio and Wisconsin authorize the use of eminent domain for the purpose of providing suitable building lots and also for the purpose of preserving the improvement. The Illinois proposal is substantially the same as the proposed amendments which were defeated in New York in 1911 and in Wisconsin in 1914, except that the Illinois proposal is an enabling act and confers the power on all agencies of the state, while the New York and Wisconsin proposals were probably self executing and confined the exercise of the power to municipal corporations. As regards the interest in land which may be taken it is to be noted that the Illinois proposal

expressly authorizes the condemnation of the fee. It has not always been thought necessary in other states to expressly authorize the taking of a fee but it is expedient in Illinois for the Supreme Court has never directly held that the General Assembly possesses the power to authorize the condemnation of the fee. On the contrary it has been intimated slightly that such power could be denied. Since the section does not specify that lesser interests may be taken it is conceivable, however, that the power to condemn in excess might, under the phraseology, be confined exclusively to the taking of the fee and would not permit the condemnation of easements or other interests. This construction is made more possible because proposal 121, an amendment to the general eminent domain clause, expressly authorizes the condemnation of the fee or of an easement, and proposal 120, likewise an amendment to the general eminent domain clause, expressly authorizes the taking of any interest in real property. This result would be unfortunate for the condemning authority might find it expedient in some cases to take easements only.

Proposal 119 restricts the power of excess condemnation to the taking of an amount of land sufficient for suitable building sites as was done in Massachusetts, New York and Rhode Island. The power is conferred upon all agencies of the state and can be employed in connection with any public improvement, while in the states mentioned the power is restricted to specified agencies, such as the state and its cities and is restricted to specified public improvements such as laying out or widening of streets or locating parks and public places. If proposal 118 were adopted there would be no necessity for the adoption of proposal 119.

Illinois proposals amending the general eminent domain clause.—Proposal 120, provides that “the power of eminent domain shall extend to every species of interest in real property including all rights and easements of any nature whatever, in, under, upon or over adjacent

property, whether public or private, and irrespective of the origin of the same, whether in dedication or otherwise." The purpose of this clause is to avoid the possible effect of the decision in the case of *South Park Commissioners v. Ward*.⁵⁴ This case presented a special problem arising out of the condemnation of property already devoted to public use. It is well established of course that property already devoted to public use is still subject to condemnation for other public uses where a status so provides. In the *Ward* case it appeared that a portion of what now comprises Grant Park in the City of Chicago was dedicated by the Canal Commissioners to the public. The plat designated the lake front as "open ground, no buildings." Another portion was dedicated by the United States and the plot similarly stated, "public grounds forever to remain vacant of buildings." These dedications were duly accepted by the city of Chicago.

The General Assembly of Illinois subsequently authorized the South Park Commissioners to condemn the easements thus created and possessed by the owners of the property abutting on the park, and authorized the erection therein of a museum. The court held that the General Assembly had no power to authorize the condemnation of these easements because the land had been accepted under these restrictions. The decision was not expressly based upon the ground that the proposed new use was not public but was based upon the broad proposition that the state, having accepted the land with the restrictions, could not rid itself of them for any purpose. Three of the members of the court dissented. The precise point has apparently not arisen elsewhere. In view of the probability that needs of the state may often demand a change in the use of property dedicated under restrictions, this decision might prove of difficulty. The adoption of proposal 120 would therefore seem desirable.

54. 248 Ill. 299 (1910).

Proposal 121 amends the general eminent domain clause by omitting the provision which forbids the General Assembly from authorizing the condemnation of the fee in land taken for railroad tracks, and also provides that "any corporation having the power to take land by eminent domain, may take a fee or an easement in such land, as it may elect. And any such corporation having heretofore acquired an interest in land less than a fee may condemn such remainder or reversionary interest so that it may become vested with a complete fee simple title therein." This proposal accomplishes three objects: (1) it removes the restriction upon the taking of the fee in land for railroad tracks, (2) it authorizes without further legislation any corporation which heretofore has acquired an easement to condemn the reversionary interest in the fee, and (3) makes it certain that in all takings by corporations a fee may be condemned.

(1) The restriction relating to railroads is the only express constitutional limitation in Illinois upon the power of the General Assembly to authorize the taking of the fee in lands. This restriction upon railroads is found only in the constitutions of Illinois, Missouri, Oklahoma and South Dakota. It has been urged that this restriction is unjust because the easement cannot be sold, an abandonment causing a reverter.⁵⁵ The Chicago Bureau of Public Efficiency recently stated: "There is public interest in this matter in connection with city planning. One of the aims of Chicago City planners is to secure a rearrangement of railroad terminals in Chicago which would permit of the abandonment for railroad use of considerable railroad property. It would seem that the constitution should provide that the railroads after having made use of property in good faith for railroad purposes should retain title and have the power to sell it and retain the proceeds in case the city authorities agree, and it is no longer needed for railroad purposes."

55. *C. & E. I. R. R. Co. v. Clapp*, 201 Ill. 418, (1903)

(2) The last sentence of proposal 121 was inserted primarily for the purpose of enabling railroad companies which have heretofore condemned easements in land for railroad tracks to take the outstanding interest and thus to avoid any loss that would otherwise be occasioned by abandonment.

(3) As regards the power to condemn the fee in general, the Supreme Court had held that statutes which delegate the power of eminent domain, confer the right to condemn easements only.⁵⁶ It has also been held that it is a question for the courts to determine whether there is a necessity for a particular taking and, whether the amount of land sought to be condemned is actually needed.⁵⁷ It is possible, therefore, for the court to say that it is not a public use to take the fee, if in any case the court thinks a right of user sufficient. To allay the doubt as to the power of the General Assembly to authorize the condemnation of the fee this proposal was introduced.

One feature of this proposal may prove somewhat objectionable. The section provides that "any *corporation* having the power of eminent domain may take a fee or an easement in such land, as it may elect." This clause could be construed as forbidding the taking of a fee by any authority which was not a corporation. As far as railroads, telegraph companies and the like are concerned it may be wise to compel them to incorporate before conferring upon them the power to condemn private property provided it can be said that the corporate form of doing business will be as common fifty or a hundred years from now as it is today. On the other hand governmental agencies other than bodies corporate are frequently given the power to condemn property. The result could be obviated, of course, by creating such

56. Tacoma Safety Deposit Co. v. Chicago, 247 Ill. 192 (1910); Miller v. Commissioners of Lincoln Park, 278 Ill. 400 (1917).

57. Chicago v. Lehman, 262 Ill. 468 (1914).

governmental agencies corporations in the first instance but it is possible that for other reasons this might not be advisable.

Proposals 118 and 119 restrict the power of eminent domain to the taking of a fee. Proposal 121 restricts the power to the taking of the fee or an easement; while proposal 120 extends the power "to every species of interest in real property." There would seem to be no substantial reason for the adoption of different phraseology in the four sections. If a strict construction of proposal 121 were adopted the General Assembly, for example, could not authorize the condemnation of a profit which under proposal 120 such an interest could be taken. The taking of a profit, while not common is sometimes authorized as was done by the act passed by the General Assembly of Illinois in 1919, which authorizes the Department of Public Works and Buildings "to acquire by condemnation mines, quarries, gravel beds, clay beds, mineral deposits or other property for procuring materials necessary in the construction and maintenance of public improvements by the State of Illinois." There may be occasion for the condemnation of interest in land other than fees or easements and the right to do so should not remain in doubt.

III.

Constitutional provisions extending State functions.—

Constitutional provisions recently adopted in other states, which extend state functions but which do not expressly confer the power of eminent domain with respect to such new functions, relate either to the conservation of natural resources or to the conduct of some business enterprise.

Constitutional provisions authorizing the creation of forest preserves have been in force for some time.⁵⁸ In the absence of a constitutional provision authorizing

58. Constitutional provisions relation to forest preserves will be found in Ohio, New York, Wisconsin, Washington, Montana, Idaho and Arizona.

the condemnation of land for the purpose of creating a forest preserve, a statute which confers this power probably would be constitutional. No case has been found which directly presents this question but the purpose might be regarded as analagous to that of public parks. It has been held in Illinois that it is proper to employ the taxing power to maintain forest preserves.⁵⁹

The broader policy of conservation of all natural resources has been adopted in some states. The constitution of Idaho declares that the use of lands for the development of the natural resources of the state or the preservation of the health of the inhabitants shall constitute a public use. By an amendment adopted in 1918, Massachusetts authorizes the condemnation of land for the conservation of natural resources. In 1919 Texas provided for the conservation of natural resources and the creation of conservation districts. The preservation and distribution of water, irrigation, reclamation, drainage, forests, water and hydro-electric power were expressly referred to as being within the objects of the Texas amendment. The power of eminent domain was not expressly mentioned in the Texas amendment. South Dakota has recently authorized the state to invest its funds in, and to lend its credit to, corporations organized for the development of natural resources.

The reclamation of privately owned swamp and arid land is not usually undertaken by the state directly, but express constitutional provisions are common which authorize quasi-public corporations to condemn land for such purposes. There is but slight evidence of a desire to change this policy. Within certain limits, not clearly marked out, the state, under general constitutional provisions, may condemn, reclaim and sell land. The condemnation and reclamation of the Back Bay flats district in Boston harbor by the state was one of the most extensive of such reclamation projects. The statute which authorized this work was held constitutional under

59. *Perkins v. Commissioners of Cook Co.* 271 Ill. 449 (1916).

the general domain clause,⁶⁰ but its validity was made more certain because of its close relation to the promotion of commerce.⁶¹ Condemnation of land on a broad scale in furtherance of a definite policy of state reclamation work could scarcely be attempted in the absence of express constitutional provision.⁶² The legislature of the state of Washington at its last session proposed an amendment to be voted on in 1920, which declares that the taking of private property by the state for land reclamation and settlement purposes shall be a public use. An amendment which would have authorized the state to contract indebtedness for the reclamation of wild lands failed of adoption in Arizona in 1914; and a similar proposal increasing the state debt limit for building roads, constructing irrigation and power projects and developing untilled lands, was rejected in Oregon in the same year.

A few constitutional provisions empower the state to enter generally into the construction of works of internal improvement. In some states the power to construct such works is prohibited. But the construction of public roads and the improvement of lands donated to the state are commonly excepted from the prohibition. In this connection mention should be made of the act passed at the 1919 session of the General Assembly of Illinois which grants power to the Department of Public Works and Buildings: "To acquire by condemnation under the eminent domain laws of this state, lands, mines, quarries, gravel beds, clay beds, mineral deposits, or other property for procuring materials or producing manufactured products necessary in the construction and maintenance of public improvements by the state of Illinois; to lease, purchase, construct, maintain and operate lands, mines, plants and factories for the production of any raw materials or manufactured products

60. *Moore v. Sanford*, 151 Mass. 285 (1890).

61. *Opinion of the Justices*, 204 Mass. 607.

62. *Cooley, Constitutional Limitations* (7th Ed.) Sec. 766.

necessary in the construction and maintenance of public improvements by the state of Illinois.⁶³ Constitutional amendments have been adopted in North Dakota and in South Dakota which authorize the state to engage in works of internal improvement.⁶⁴ Wyoming permits the state to engage in works of internal improvement when authorized by two-thirds vote of the people.

The power of eminent domain has been employed in European countries for the purpose of abating insanitary areas, and while it has been discussed to some extent in this country, this policy has not been acted upon. It is unlikely that the courts would sustain, under the general eminent domain clause, a statute which authorized the condemnation of properties for the purpose of changing the character of the neighborhood.⁶⁵ The nearest approach to a policy of this character is that contained in the Massachusetts amendment of 1915 which authorizes the state to take land for the purpose of relieving congestion and for providing homes for citizens. A city may, of course, cut wide thoroughfares through an insanitary area; and in states which, by recent amendment, permit the condemnation of land bordering upon an improvement for the purpose of protecting it, a much greater portion of the district could be changed. The employment of the power of eminent domain to abate slum districts has been discussed and proposed,⁶⁶ but the great expense and the likelihood that the abatement of one area would merely cause its re-appearance elsewhere has led others to oppose its use.⁶⁷

Constitutional provisions in several states expressly authorize the condemnation and operation of public utilities by municipalities. With respect to the power of

63. Illinois Laws, 1919, p. 712.

64. South Dakota, 1918, authorizes the State to engage in works of internal improvements and to lend its credit to corporations for this purpose. North Dakota, 1918, authorizes the state or any of its subdivisions to make internal improvements or to engage in any industry not prohibited.

65. *Salisbury Land Co. v. Commonwealth*, 215 Mass. 371.

66. See Proceedings of Conference on City Planning, 1912, p. 100.

67. Dewsnup, *Housing Problems*, p. 233; Swan, *Excess Condemnation*, p. 481.

a city to condemn existing public utilities, it has been held in New York that a statute enacted under the general eminent domain clause justifies such a taking.⁶⁸ The power to condemn public utilities has been conferred upon Illinois cities by an act of 1913.⁶⁹ The power to acquire harbors, canals, wharves, levees, and all appropriate harbor structures, elevators and warehouses was delegated to municipalities in the same year.⁷⁰ Little doubt could be raised as to the constitutionality of the main features of these acts, but objections might be raised with respect to the provision found in each which authorizes the city to lease to private corporations for a limited number of years the utilities taken over by the city by condemnation proceedings. While the courts elsewhere allow the condemnation of properties in fee and their ultimate sale upon the abandonment of the undertaking, they have refused in other types of cases to permit the taking of land from a private person to be immediately sold or leased to another private person. A constitutional provision in Ohio expressly authorizes the condemnation and leasing of public utilities by municipalities. Other provisions relating to the acquisition and operation of public utilities are to be found in Arizona, California, Colorado, Louisiana, Michigan, Missouri, Oregon and South Carolina.

The power of eminent domain under general eminent domain clauses cannot be employed to aid an enterprise which is not invested with a public interest, nor to aid the state or its subdivisions, when such enterprises are conducted by them.⁷¹ In a number of states there exist constitutional prohibitions upon the granting of aid to private enterprises by the state or municipalities or both. The extension of the functions of government in some states to include the conduct of business enterprises may

68. *In re City of Brooklyn*, 143 N. Y. 596, affirmed 166 U. S. 685.

69. *Hurd's R. S.* 1917, Chap. 111A, Secs. 87-101.

70. *Hurd's R. S.* 1917, Chap. 24, Sec. 70 et. seq.

71. *School v. Coal Co.*, 118 Ill. 427 (1887) (mining). *Banker v. Grand Rapids*, 142 Mich. 687, (state cannot condemn land for coal yard or for a plumbing establishment). *Keen v. Waycross*, 10 Ga. 588; *Mather v. Ottawa*, 114 Ill. 659 (1885).

have the effect of expanding the power of eminent domain. In North Dakota the state has been given the power by constitutional amendment of 1918 to engage in any private enterprise which is not expressly prohibited by the constitution. The state of Oklahoma may engage in any occupation or business except agriculture. In Arizona the state and municipal corporations have the right to engage in any industrial pursuit. In other instances the power is conferred upon the state to engage in certain specified enterprises, such as providing for state insurance against loss by hail in North Dakota and in South Dakota, engaging in mining and the manufacture of cement in South Dakota, in the establishment and operation of grain elevators and flour mills,⁷² and in supplying necessities of life in time of war or other emergency.⁷³ An amendment was adopted in Massachusetts in 1915, which authorized the condemnation of land to relieve congestion and to provide homes.⁷⁴ At its 1919 session the legislature of Kansas proposed an amendment to be voted on in 1920 which authorizes the creation of a fund to encourage the purchase of farm homes.⁷⁵ A proposal to levy a land tax to establish a home-maker's fund was defeated in Oregon in 1916.

Constitutional provisions expressly extending power of eminent domain.—Recently adopted constitutional provisions which extend the use of eminent domain in addition to those authorizing excess condemnation, relate to the conservation of natural resources, to the acquisition of public utilities by municipalities and to housing projects. The constitutions of Ohio and Wisconsin authorize the taking of land for forest preserves. The conservation of natural resources is declared to be

72. South Dakota; North Dakota.

73. Massachusetts 1917.

74. This action followed an opinion of the Justices of the Supreme Court, 211 Mass. 624, that such a project was not a public purpose. See also, *Salisbury Land Co. v. Commonwealth*, 215 Mass. 371, (1913).

75. Kansas Session Laws, 1919.

a public use in the constitution of Idaho, and an amendment in Massachusetts in 1918 authorizes the condemnation of land for reclamation and settlement purposes. The constitutions of several states authorize the condemnation and operation of public utilities by cities. An amendment adopted in Massachusetts in 1915 authorizes the condemnation of land to relieve congestion of population and to provide homes for citizens.