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Julius R. Bell

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THE CONSTITUTIONAL BASIS OF THE RIGHT TO TAX AND THE TAKING BY EMINENT DOMAIN IN INDIANA

It is an established principle of constitutional law that private property cannot be taken by virtue of the power of eminent domain or by the exercise of the power of taxation for other than public purposes. This rule of law is usually based upon provisions found in the American constitutions. However, the constitutions do not designate the particular objects for which these powers should be exercised. On the contrary it is a question for the court to determine in each particular case, whether the powers are exercised for public use or benefit. To ascertain just what objects the courts of Indiana have had an occasion to hold to be for public purposes under the constitution is the aim of this study.

I.

The constitution of 1816 provided "That no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without a just compensation . . ." ¹ The constitution of 1851 contains in substance the provisions of the former constitution. The present constitution provides ". . . No man's property shall be taken by law without just compensation; nor, except in the case of the state, without such compensation first assessed and tendered." ² The provision of the former constitution of 1816 having been considered and construed by the courts, the present constitution is impressed with that construction. ³

In accordance with the Indiana constitution, it has always been held that private property can only be taken under the

¹ CONST. OF 1816, ART. I, § 7.

² CONST. OF 1851, ART. I, § 21.

³ *Stay v. Indiana, etc., Power Co.*, 166 Ind. 316 (1906); *Gellispie v. State*, 168 Ind. 298 (1907); *Sexauer v. Star Milling Co.*, 175 Ind. 342 (1910).

power of eminent domain when such appropriation is for a public use.⁴ Furthermore, the constitutional limitations against taking private property for public purpose without compensation by necessary implication prohibits taking private property for a private purpose,⁵ and the taking of private property for a private purpose is also a deprivation of private property without due process of law⁶ in violation of the federal constitution.⁷

That part of the Indiana constitution which provides that no man's property shall be taken by law without compensation does not extend to the power of taxation.⁸ However, the power of taxation is essential to the existence of the government and it is therefore inherent in the state. It is a legislative power and is limited only by the provisions of the constitution.⁹ The constitution of Indiana provides that "The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious or charitable purposes, as may be especially exempted by law."¹⁰ Local laws authorizing taxation are prohibited by provisions in the constitution dealing with local and special laws.¹¹ But it has been decided that these constitutional provisions do not prohibit local taxation for objects in themselves local.¹² They require a general uni-

⁴ *Great Western Co. v. Hawkins*, 30 Ind. App. 557, 66 N. E. 765 (1903); *Wild v. Deig*, 43 Ind. 455, 13 Am. Rep. 399 (1873); *Stewart v. Hartman*, 46 Ind. 331 (1874).

⁵ 20 C. J. 548 and cases cited.

⁶ 10 R. C. L. 17 and cases cited.

⁷ ". . . nor shall any state deprive any person . . . of property without due process of law . . ." CONST. OF THE U. S., 14 AMEND., § 1. The state constitution of Indiana also limits the exercise of these powers. ART. I, § 21.

⁸ *Wright v. House*, 121 N. E. 433 (1919); *State v. Richcreek*, 167 Ind. 217, 119 Am. St. Rep. 49 (1906); *Hanley v. Sims*, 175 Ind. 345 (1910).

⁹ *State v. Halter*, 149 Ind. 292, 47 N. E. 665 (1897).

¹⁰ CONST. OF IND. (1851) ART. 10, § 1.

¹¹ CONST. OF IND. (1851) ART. 4, §§ 22 and 23.

¹² *City of Lafayette v. Jenners*, 10 Ind. 70 (1857).

form levy for state purposes, but they do not prohibit local taxation under general laws.¹³

By virtue of the provisions in the constitution in regard to the taxing power, the legislature provided that "All taxes levied and collected under this act, less any expense of collection shall be paid in to the state treasury of the state for the use of the state, and shall be applicable to the expenses of the state government, and to other purposes such as the legislature may by law direct."¹⁴

In accordance with the above constitutional and statutory provisions the court has decided that property may be taken, through the taxing power for public use.¹⁵ But the court recognizes a distinction between the general powers of taxation for purposes which, as citizens or inhabitants of either the state or the smaller territorial divisions, all are generally interested, and the assessments for improvements resulting in a special benefit to property, and therefore reasonably and justly chargeable with the expenses of them. The foundation of each power rests in the inherent power of a government to tax the people for its support.¹⁶ Accordingly it is not unusual for the legislature in the exercise of the general powers of taxation, to create a special taxing district and to levy a tax on all property within such district by a uniform rule, according to its value for the purpose of aiding in the construction of public local improvements.

Under the old constitution internal improvements could be carried on by means of loans creating a state debt.¹⁷ The provisions in the constitution of 1851 admit the power of the state to construct works of internal improvements, but for-

¹³ Bank v. City of Albany, 11 Ind. 139 (1858).

¹⁴ BURN'S ANN. IND. STAT., REV. OF 1914, § 10143al.

¹⁵ City of Aurora v. West, 9 Ind. 74 (1857); Board of Com'rs., etc., v. State, *ex. rel.* Brown, 147 Ind. 492 (1896); State v. Richcreek, *op. cit. supra* note 8; Staine v. Fritts, 169 Ind. 361 (1907); Hanley v. Sims, *op. cit. supra* note 8.

¹⁶ Law v. Turnpike Co., 30 Ind. 77 (1868).

¹⁷ City of Aurora v. West, *op. cit. supra* note 15.

bids the state, in its state capacity, to create a debt for this purpose. Internal improvements must be paid for by taxes raised as the work progresses. This is an express limitation on the exercise of the power of the state inserted in the constitution.¹⁸ The prohibition in the constitution upon the legislature to create a state debt does not prohibit that body from authorizing cities to create debts, but they prohibit the state from assuming any debts cities may contract.¹⁹ And the constitution concedes the power to counties to subscribe for stock in companies incorporated to construct works of internal improvements providing payment is made in cash at the time.²⁰

The construction and maintenance of internal improvements of the state have always been legitimate subjects to call into exercise the powers of taxation and eminent domain.²¹ In the course of the opinion in *Rubottom v. M'Clure*²² the court said:

"It is presumed that at the present day, no one will question the right of the legislature to apply the property of individuals to public use, when 'urgent necessity' or 'the general interest' may require it."

The court was considering in this case a question of securing materials necessary for the maintenance of internal improvements.

II.

"The public necessity and convenience have always indicated highways as one of the objects for which the state might take private property."²³ There seems to be no

¹⁸ See CONST. OF IND., ART. 10, § 5.

¹⁹ *City of Aurora v. West*, *op. cit. supra* note 15.

²⁰ CONST. OF IND., ART. 10, § 6.

²¹ See for example, *State v. Marion County*, 82 N. E. 482 (Ind. 1907); *Wright v. House*, *op. cit. supra* note 8; *Droneberger v. Reed*, 11 Ind. 420 (1858); *Rudisell v. State*, 40 Ind. 485 (1872); *Rubottom v. M'Clure*, 4 Blackf. 505 (1838); *City of Aurora v. West*, *op. cit. supra* note 15; *Cook Investment Co. v. Evansville*, 175 Ind. 3, 93 N. E. 279 (1910).

²² *Op. cit. supra* note 21, p. 506.

²³ *Droneberger v. Reed*, *op. cit. supra* note 21 (A supervisor of a road district entered upon adjoining land to obtain materials for the repair of a highway. The

question about the constitutionality of taking private property for public roads. However, the courts distinguish between public and private roads. One for the use of the public which is usually constructed and maintained at public expense. The other is for the use of the particular persons for whose benefit it is located and must be maintained at their expense. A private road is not for and its use cannot be demanded by the public. While it is true that the construction of public roads sustains the exercise of the power of eminent domain, no person²⁴ or group of persons²⁵ have the right to have a private road opened and maintained over the land owned by another person, even at their own expense. But the fact that a road is of special benefit or advantage to certain individuals is not sufficient to declare it a private road. In the *Glendenning v. Stahley* case²⁶ it was insisted that the convenience necessary to the taking of private property for a public road must be public convenience and not a convenience to certain individuals. It appeared from the evidence that the proposed road would facilitate the convenience of one or more persons over that of others. In view of this fact it was contended that the road would not be a public utility. The court did not attempt to give a complete definition of the terms "public utility" or "convenience" as used in connection with the exercise of the power of eminent domain. But the dominant idea advanced appears to be that the special advantage or convenience of the road to certain individuals cannot destroy its public character. This proposition is sound for the reason that

exercise of the power of eminent domain for this purpose was sustained). See also *Rubottom v. M'Clure*, *op. cit. supra* note 21, wherein it was said: ". . . our own statutes regulating the location and opening of highways, both under the territorial governments and ever since we became a state, have embraced the same principle. They contemplate that individual property—even cultivated fields—may be entered upon by the proper agents for the purpose of viewing, locating, and marking routes for public roads . . ."

²⁴ *Wild v. Deig*, *op. cit. supra* note 4; *Logan v. Stogsdale*, 123 Ind. 372, 24 N. E. 190 (1890); *Stewart v. Hartman*, *op. cit. supra* note 4.

²⁵ *Blackman v. Halves*, 72 Ind. 515 (1880).

²⁶ 173 Ind. 674, 91 N. E. 234 (1910).

some roads provide special means and facilities of access to and from certain property, making the benefit in a special sense different from that resulting to the general public. Therefore it is not essential that every citizen have a particular interest in a road before it can be said that it is required for public use. On the contrary however, if the public use or benefit to be derived from an outlet from property is incidental to the private use the power of eminent domain cannot be exercised.²⁷ Obviously it is impossible to determine the exact number of persons required to derive benefits from a road before it can be said to be invested with a public interest.²⁸ However, the legislature has no authority to provide for the construction of roads which are for the private use of an individual alone or constructed by private expense and not open to the public.²⁹ This kind of a road is not a public highway for which private property may be taken. In *Blackman v. Halves*³⁰ a number of persons petitioned the board of county commissioners for a change in a public highway. The reviewers appointed to report on the petition advised against the proposed change because

²⁷ *Kessler v. Indianapolis*, 157 N. E. 547 (1927). In this case it was held that a city cannot condemn private property adjoining a boulevard notwithstanding contingent prospective benefit to the city.

²⁸ In *Kissinger v. Hanselman*, 33 Ind. 80 (1870), the court decided that a neighborhood road for the purpose of having access to a burial ground is not a private road. The petition to the commissioners to have the road opened was signed and presented by twenty-three citizens of the township. In upholding the condemnation proceeding and answering the objection that a neighborhood road is only a private road the court said: "If that be so, then half the highways in Indiana are of that class—void in their inception, if, as the appellant contends, the right of eminent domain cannot be exercised to take land for them . . ." This case holds that such roads are public highways and the question whether the right of eminent domain may be exercised to take private property for a private road is not applicable to them. This rule was not followed in later cases. For example see *Wild v. Deig*, *op. cit. supra* note 4; *Stewart v. Hartman*, *op. cit. supra* note 4; *Logan v. Stogsdale*, *op. cit. supra* note 24.

²⁹ See for example *Wild v. Deig*, *op. cit. supra* note 4; *Stewart v. Hartman*, *op. cit. supra* note 4; *Blackman v. Halves*, *op. cit. supra* note 25; *Logan v. Stogsdale*, *op. cit. supra* note 24.

³⁰ *Op. cit. supra* note 25. (The petitioner and eighteen other persons of the neighborhood petitioned for the change in the location of the highway.)

the petitioner (the one most interested in the road) proposed to open and maintain the new road which the change petitioned for would make necessary, at his own expense. For this reason the reviewers maintained that the road would not be of public utility. The court said in this case:

"The principles governing the private rights of land-owners . . . lead to what appears to us to be the inevitable conclusion, that no person has the right to open and maintain a highway over the land of another without his consent, where such highway has been found not to be of public utility. The right of eminent domain can only be invoked for the compulsory taking or the enforced appropriation of private property when some public exigency requires the exercise of that sovereign right. When a highway, petitioned for, has been found not to be needed for public use, it can not be said that any public exigency requires that it shall be opened and maintained."

In an earlier case in which the main question was the constitutionality of a law authorizing the location of private roads the court said:

"Concede that the public exigency requires that a way should be opened to every man's farm, and that the State may and should provide for the establishment of a public road or highway, to enable every citizen to discharge his duties, and travel to and from his farm; it does not follow that such ways should be private and owned by the party applying for them. If it would be of public utility to establish the road, then it should be a highway. If not, the right of eminent domain cannot be exercised to establish it. It is not the amount of travel, the extent of the use of a highway, by the public, that distinguishes it from a private way or road. It is the *right* to so use or travel upon it, not its exercise."³¹

In *Logan v. Stogsdale*³² an act which provided for the establishment of branch highways and gave to any freeholder who had no outlet to a highway, the right to petition for one was declared to be unconstitutional on the ground that it assumed to authorize the seizure of the property of one citizen for the benefit of another. The petitioner's land in

³¹ Wild v. Deig, *op. cit. supra* note 4, at p. 461. (Condemnation proceeding to obtain land to establish this road was not sustained). See also Stewart v. Hartman, *op. cit. supra* note 4.

³² *Op. cit. supra* note 24. (The petitioner was successful in securing a way of necessity.)

this case was surrounded on all sides by the land of other persons and was completely shut off from any highway. It was impossible to go to or from it without passing over adjoining land. But the court said:

" . . . the Legislature intended to grant a freeholder who is shut off from a highway a right to secure a way across the land of another upon the payment of damages. It is not made essential that the way shall be one required by the public, for the whole scope and tenor of the act was intended to secure a right of way to private property owners.

* * *

"As the act assumes to authorize the seizure of the property of one citizen for the benefit of another, it can not be upheld."

However, the petitioner in this case was successful in securing an out-let to a highway, as a "way of necessity."

There can be no doubt that public highways are of such general benefit as to warrant their construction at governmental expense by the exercise of the power of taxation.³³ In fact the Supreme Court of Indiana has said ³⁴ that "The power to construct and maintain public highways is a governmental function, the same as the power to build school-houses and support schools or to build courthouses and jails, or to construct and maintain asylums for the insane or for the dependent poor The Legislature may likewise empower any of the governmental subdivisions of the state to levy and collect taxes for similar purposes in the exercise of their delegated governmental powers." The repair of highways is also for a governmental purpose which supports the exercise of the power of taxation, the same as a tax to support and maintain the different departments of government of the state.³⁵ It appears that no question has ever been made relative to the use of the taxing power to construct and maintain private roads. But in *Gilson v. Board*

³³ See *State v. Marion County, op. cit. supra* note 21; *Wright v. House, op. cit. supra* note 8.

³⁴ *Wright v. House op. cit. supra* note 8 at p. 436.

³⁵ *State v. Marion County, op. cit. supra* note 21.

of *Commissioners*³⁶ an act which provides for the purchase of a privately owned toll road was upheld. For the purpose of raising money to purchase the road the board of commissioners was required to levy an annual tax upon the property of the township voting to make the purchase. The court said in this case:

"In the passage of the statute under examination the legislature took into consideration that those living in the immediate vicinity of a toll road had a special interest in having it made free, and that they would reap an advantage therefrom not enjoyed by those residing in a remote part of the county, and hence it imposed upon those who thus received a special benefit the burden of paying for the same in the event they desired to purchase such road, and make it free. There can be no difference in principle between taxation to construct a free gravel road and taxation to purchase a toll road already constructed, and make it free to all."

III.

The construction of railroads to provide means of transportation and inter-communication, to facilitate the social and business relations of the people and to develop natural resources of the state always has been one of the objects of special interest to the government. The constitutional power of the Legislature in Indiana to impose a tax upon the people to aid in the construction of railroads and other internal improvements has undergone a thorough and elaborate discussion.³⁷ The provisions in the constitution in this connection admit the power of the state to construct work of internal improvement but forbid it to create a debt for the purpose.³⁸ In *John v. the Cincinnati, etc., R. R. Co.*³⁹ it was said:

"The state being authorized to build railroads, it follows that it may levy a tax, in accordance with the provisions of the constitution for that purpose."

³⁶ 128 Ind. 65 (1890).

³⁷ See for example, *City of Lafayette v. Cox*, 5 Ind. 38 (1854); *City of Aurora v. West*, *op. cit. supra* note 15. (A very able discussion of the history of Internal Improvement in Indiana.) See *The Lafayette, Muncie, and Bloomington R. R. Co. and Another v. Geiger*, 34 Ind. 185 (1870).

³⁸ *City of Aurora v. West*, *op. cit. supra* note 15.

³⁹ 35 Ind. 539 (1871).

There is no case on record which challenges the constitutionality of a state tax levied for this purpose. But the constitutionality of the question has been fully considered in cases relative to the powers of municipalities to exercise the power of taxation to aid in the construction of railroads.

In *City of Aurora v. West*,⁴⁰ a case which involved a suit brought to recover the interest on bonds issued by a city for this purpose, it was held that a city could subscribe for stock in a railroad corporation when the act of incorporation conferred such power. It was said in this case:

"It has been suggested, that taxation to pay the indebtedness sued upon, is the taking of private property for public use; and the suggestion is true. And it is the important fact in the case which renders the taking legal. . . .

* * *

"That charter (of the City of Aurora) specifies the roads in which the city may take stock, viz., those running to the city. And independently of the fact that the charter itself is confirmed by the constitution, we cannot say, in opposition to the judgment of the legislature of the state and people of city, that such road may not be of such local interest to the whole city as to justify the exercise of the taxing power of the corporation, over the persons and property of the citizens of the city, to aid in their constructions.

* * *

"We think, also, that a company chartered to build a railroad is chartered to build a road. We think a railroad is a road as properly as a turnpike road . . . is a road. . . ."

In considering the taking of private property by condemnation proceedings for the construction of railroads, the test appears to be, is the proposed use a public one?⁴¹ If the use for which the property is taken is for the convenience and benefit of the public private corporations constructing and operating railroads have the right to exercise the power of eminent domain.⁴² "It is not a question of how many

⁴⁰ *Op. cit. supra* note 15, affirmed in *Thompson v. City of Peru*, 29 Ind. 305 (1868).

⁴¹ *F. W. Cook Investment Co. v. Evansville*, 175 Ind. 3 (1910).

⁴² *Reitz v. Evansville Terminal R. R. Co.*, 175 Ind. 707, 93 N. E. 283 (1910).

persons use the facilities and upon the same analogy it is immaterial that other facilities exist a few miles away. It is not a question of degree of public utility that determines the character of the use, but of choice by the carrier in furnishing greater and better facilities for the public use, and is determined by the right of the public to use it without discrimination and not by the extent to which it may be used or by the fact that other equal facilities exist at more remote distance. Equal facilities are as much required at one place as at another."⁴³ This statement was made in a case which upheld the taking of property, outside of the right of way previously taken, for the location and maintenance of stock pens. A railroad company as a common carrier is required to carry live stock. Consequently the construction and maintenance of stock pens is an indispensable necessity to furnish facilities for loading and unloading and to enable the companies to perform their public duties. For the same reason property may be taken for depots as well as for roads of which they are a necessary part.⁴⁴ When a station is established, the duty to provide facilities and accept and transport freight is imperative.

In a case which involved proceedings to prevent the appropriation of land for the construction of a side track from the main line to privately owned land containing building stone, the court held such an appropriation was for a public use.⁴⁵ The purpose of the side track was to connect the main line of the railroad with a market for building stone. In answer to the contention that this was a private use for which property cannot be condemned, the court said:

⁴³ *Chicago, etc., R. Co. v. Baugh*, 175 Ind. 419, 94 N. E. 571 (1911).

⁴⁴ *Protzman v. The Indianapolis, etc., R. Co.*, 9 Ind. 467, 68 Am. Dec. 650 (1857).

⁴⁵ *Bedford Quarries Co. v. Chicago, etc., Co.*, 175 Ind. 303 (1911). See also *Westport Stone Co. v. Thomas*, 175 Ind. 319 (1911); *Cottrell v. Chicago, etc., R. Co.*, 192 Ind. 692, 138 N. E. 504 (1923); *Sisters of Providence v. Lower Vein Coal Co.*, 198 Ind. 645, 154 N. E. 659 (1926).

“. . . the proposed side track when constructed will be open to the public use, and subject to public control in all respects, as its other tracks are open to public use. Said side track will be open to all who are so situated as to be able to use it, upon equal terms and must therefore be regarded as a public, and not a private, use. The proposed side track is not to be constructed for the sole purpose of furnishing an outlet for the business of one quarry. It is the extension of a track now reaching a quarry. . . . It is to be constructed over land which is underlaid with a good quality of stone, which can only be marketed by having a railroad track built upon and across the same.

* * *

“The public generally is interested in these quarries being opened, and this stone land being developed; the country at large in the price of stone; and the particular locality in the development of the resources of the County. Appellee has a main line of railroad built through that territory which is naturally expected to serve that locality, and it is a part of its business to provide such facilities as must be had, in order for this business to be accommodated.”

IV.

The Supreme Court of Indiana has uniformly held that the construction and maintenance of ditches and other facilities for drainage purposes authorized by the drainage laws of the state are for a public and not for private use.⁴⁶ The essential elements required to give a public character to drainage prospects are that the work will either promote the public health or improve a public highway or be of public utility.⁴⁷ However, it is not necessary for a drainage system to promote all three of these elements before the court will sustain it. If it is found that either of the propositions will be promoted, the construction of the drain is to be regarded an improvement of such a public character as to warrant its construction.⁴⁸ In *Anderson v. Kerns Draining Co.*,⁴⁹ one of the earliest cases in which the con-

⁴⁶ *Poundstone v. Baldwin*, 145 Ind. 139, 44 N. E. 191 (1896).

⁴⁷ *Heick v. Voight*, 110 Ind. 279, 11 N. E. 306 (1887); *Anderson v. Baker*, 98 Ind. 587 (1884); *Ross v. Davis*, 97 Ind. 79 (1884); *Chambers v. Kyle*, 67 Ind. 206 (1879); *Wishmier v. State*, 97 Ind. 160 (1884).

⁴⁸ *Heick v. Voight*, *op. cit. supra* note 47.

⁴⁹ 14 Ind. 199 (1860).

struction of drains was involved, the court held that the reclamation of wet lands, and the draining of the marshes and ponds is of public utility and is conducive to the public health and convenience, for the promotion of which taxes may be levied. But the court also pointed out that "the draining of a man's farm, simply to render it more valuable to the owner, would not be a work of public utility in the constitutional sense of the term . . . though the public and adjoining proprietors might be, in a substantial degree, benefited by the operation, and forceable taxation to pay for the benefit would hardly be tolerated."

A petition for the construction of a drainage ditch was sustained in *Ross v. Davis*⁵⁰ over the objection that the provisions for the constructions of drains made in the statute were intended for private benefit only. This objection was based on the fact that proceedings for the construction of drains could be commenced only by an owner of land which would be benefited by drainage. The objection was answered in another provision of the statute which required the petitioner to state that the proposed drains would be of public utility or improve public highways. The court, however, said:

"It is not necessary in order that the use may be regarded as public, that the whole community or any large portion of it may participate in it. If the drain be of public benefit, the fact that some individuals may be specially benefited above others affected by it will not deprive it of its public character."

If a particular ditch will drain a considerable amount of wet land, it is of public utility and benefit.⁵¹ This of course is an application of the more liberal doctrine of "public use" interpreted to mean "public advantage." That is a community is benefited by any drainage project which makes land suitable for habitation and agricultural purposes, and

⁵⁰ 97 Ind. 79 (1884).

⁵¹ Zigler v. Menges, 121 Ind. 99, 22 N. E. 782 (1889).

adds to their taxable value. The same is true of drainage projects which tend to prevent disease.

An interesting case in connection with drainage is that of *Valparaiso v. Hagen*.⁵² This case involved the following set of facts. A city constructed a complete sewer system, adapting for its outlet a low-lying marsh which drained into a stream which in turn was the only natural and practicable drainage outlet for all the surrounding territory. The city arranged to extend the outlet for its sewage through the marsh to the stream. The owner and occupants of the land abutting on the stream below the city brought an action for an injunction to prevent the city from discharging sewage into the stream. They contended that the stream which at one time was a natural running stream of pure water, used by them for domestic and dairy purposes had already become polluted, filthy and unwholesome; and that the extension of the sewer through the marsh to the stream would greatly increase the pollution of the water and make it unfit for any purpose, "and that this is a consequential damage, not to the natural rights in the stream, but to the acquired property rights; and that it is a taking of his private property for a public use without compensation first being rendered." In answer to this argument, the court held that when the construction of public improvements sanctioned by law are "skillfully executed and free from negligence," cities are not liable for the resulting consequential damages to private property. Such damages as lowering the value of property by the destruction of pastures and the "creation of personal discomforts is not a taking of private property as must be preceded by just compensation." The city of course had the right to exercise the power of eminent domain to obtain an outlet for its sewage, but it had no authority to use the power to condemn the stream and margins to relieve consequential damages. "The construction of sewers

⁵² 153 Ind. 337, 54 N. E. 1062 (1899).

and outlet is sanctioned by law, and what the law grants will not constitute a nuisance *per se* public or private. And, if the law is obeyed, no objectionable wrong will result . . . But it must be presumed that all ministerial officers will perform their official duty, and cause no offense in their execution of the law." The facts did not show that there was the lack of skill or that some other outlet was more practicable or that the disposal of the sewage could be accomplished by some other available method. Hence the requested relief was denied.

V.

The operation of mills for various purposes by water power has brought the question of public use before the Supreme Court. Early territorial laws authorized the construction of dams to obtain power from overflowing water to operate mills. Similar statutes were enacted after the constitution of 1816 was adopted. The constitutional validity of these statutes was considered in *Hankins v. Lawrence*,⁵³ which involved the right of a canal company to exercise the power of eminent domain to secure land for a site for erecting and operating a grist mill, carding machine and woolen factory. In answering the argument that this was taking private property for private use, the court said:

"Since the commencement of our state government, we have always had statutes authorizing writs of *ad quod damnum*. By virtue of such writs, persons are enabled to procure the land of others necessary for the abutment of dams for grist mills, without the owners' consent, by making compensation. These statutes are supported on the ground of the benefit of such mills to the public. This Court has repeatedly and, we have no doubt, correctly, recognized these statutes as valid. . . . We think, therefore, that the company owning the canal might be authorized by statute, to take the land mentioned in the plea as a site for said works, on account of their being of public use . . ."

The taking of land to be overflowed by a dam to be used among other purposes to grind and manufacture all kinds

⁵³ 8 Blackf. 266 (1846).

of flour, meal and feed from grain was sustained in *Sexauer v. Star Milling Co.*⁵⁴ The court said in this case:

"The public character of such use has been declared by legislative enactment, adjudged by this court, and tacitly acknowledged in the Constitution, and at no time authoritatively denied or questioned. It is within the common knowledge of the members of this court, as well as of other men, that the public is not now so vitally dependent upon the operation of water grist mills as it was in earlier times: but such of these mills as continue in existence are *quasi*-public institutions, are in the enjoyment and exercise of a public franchise, and remain subject to the regulating police power of the State. . . . We cannot, in view of the well-settled policy of this State, declare that such use is not of a public character within the meaning of our Constitution."

While the changing requirements of necessity and public policy have apparently lessened and eliminated the public character of some uses, they have caused other uses to become public. This is particularly true in regard to the question of water power. In *Zehner v. Milner*⁵⁵ the right to construct and maintain a dam to obtain water power to operate a grist mill was secured in 1852 by condemnation proceedings. When the mill was first put into operation it was declared to be for a public use or benefit. Later when the mill was operated almost entirely for private use due to the fact that it did very little grinding for toll, the dam was permitted to be taken by drainage commissioner for another public use to prevent overflows of the river which injured roads and created pools of water which became a menace to health.

Utilizing water power to manufacture electricity to be sold to the public generally now constitutes a public use for which land may be taken by eminent domain.⁵⁶ The

⁵⁴ 173 Ind. 342, 90 N. E. 474 (1910).

⁵⁵ 172 Ind. 493, 87 N. E. 209 (1909).

⁵⁶ *Miller v. Southern Indiana Power Co.*, 184 Ind. 370, 111 N. E. 308 (1916); *Stoy v. Indiana Hydraulic Co.*, 166 Ind. 316, 76 N. E. 1067 (1906); *Lowe v. Indiana Hydroelectric Power Co.*, 197 Ind. 430, 151 N. E. 220 (1926); *Illyes v. White River Light & Power Co.*, 175 Ind. 118, 93 N. E. 670 (1911).

court, in *Miller v. Southern Indiana Power Co.*,⁵⁷ upheld a condemnation proceeding which had for its purpose the taking of land to be used for a power site by a corporation to manufacture and sell to certain cities, private persons and the general public, electric current for light, heat and power. The taking of the property was objected to on the ground that the corporation was not charged in any manner with the performance of any public duty; that no part of the public had a right to its services on any terms or conditions. It was contended that taking the property sought would be in violation of the constitution which forbids the taking of private property for a private use. It was held that the statute under which the corporation was incorporated did not fix rates or prescribe regulations of service, but the corporation was bound by common law to impartially serve the public. Consequently the use of the land for a power site was held a public one.

The taking of land by a street railway company has been upheld for a proposed electrical transmission line, consisting of poles and wires, for the transmission of electric current with the purpose of using it for light and power in operating its street cars. The objection to the condemnation proceeding was that the contemplated use was not public but intended only to furnish the company with cheaper power and light in the operation of its own cars. The use in this case, *Mull v. Indianapolis & C. Traction Co.*, was held a public one.⁵⁸

Electric current is so admirably adapted for light, power and heat that its use has had a phenomenal growth. It is the law that the expense of lighting the streets is essential to the maintenance of corporate existence, and constitutes current expenses, payable out of the current revenues which

⁵⁷ *Op. cit. supra* note 56. See also a fairly recent case, which holds this same view: *Lowe v. Indiana Hydroelectric Power Co.*, *op. cit. supra* note 56.

⁵⁸ 169 Ind. 214, 81 N. E. 657 (1907).

may be applied to such purposes.⁵⁹ "The power to light the streets and public places of a city is one of its implied and inherent powers, as being necessary to properly protect the lives and property of its inhabitants and as a check on immorality." "Wherever men herd together in villages, towns, or cities will be found more or less of the lawless and vicious; and crime and vice are plants which flourish best in the darkness. So far as lighting the streets, alleys and public places . . . are concerned . . . independently of any statutory power, the municipal authorities have inherent power to provide for lighting them."⁶⁰

In the case of *Rushville Gas Co. v. City of Rushville*⁶¹ a statute was considered in so far as it related to the right of a city to buy and operate a plant and machinery to light its streets and public places, and it was held that the statute under which the city was incorporated was sufficient to confer that power.

The purchase of the necessary land, and material and the erection and maintenance of a lighting plant involves the exercise of the taxing power. Because the necessary funds must be raised by taxing the tax-payers of the municipality concerned. A city possessing the power to generate and distribute electricity within its limits for the lighting of streets and public places may also furnish it to its inhabitants to light their residences and places of business. This is a legitimate exercise of the police power for the preservation of property and health.⁶²

⁵⁹ *Foland v. Town of Frankton*, 41 N. E. 1031 (1895). See also *Town of Gosport v. Pritchard*, 156 Ind. 400, 59 N. E. 1058 (1901), in which it was said: "The power of municipal corporations to contract for the lighting of streets is purely a business power and is discretionary." The authority to contract for the lighting of the streets and other public places with electric power was upheld.

⁶⁰ *The City of Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849 (1891).

⁶¹ 121 Ind. 206, 23 N. E. 72 (1889).

⁶² *The City of Crawfordsville v. Braden*, *op. cit. supra* note 60.

“The authority to do these things carries with it incidentally the further power to procure or furnish whatever is necessary for the production and dissemination of the light.”⁶³ The court recognizes the difference between electricity and other commodities which can be bought and transported from place to place. The properties of electricity are such that the facilities required for transportation are different from that of oil, fuel and food. Electricity cannot be generated and transported from place to place in the same manner as these commodities. Transportation lines, consisting of poles, wires and many other accessories are required to convey electrical energy from the place where it is generated to the place where it is used. And the city has the power to provide for these transportation facilities.

VI.

There are some other important cases involving miscellaneous questions in regard to exercising the powers of taxation and eminent domain. “It seems to be settled law that lands may be condemned for the purpose of a public cemetery, where the public in general have a right to obtain interment, and that lands taken for the purpose of enlarging a public cemetery is devoting it to a public use.”⁶⁴ In *Forneman v. The Mount Pleasant Cemetery Association*⁶⁵ the land in question was condemned by a corporation owning and controlling a public cemetery. In the opinion of its trustees, it had become necessary to enlarge the cemetery and to secure land for this purpose. The court decided that this was sufficient to show that the land was condemned for the purpose of using it for a public cemetery.

In another case the court held invalid a statute giving chautauqua associations the right to exercise the power of

⁶³ *The City of Crawfordsville v. Braden*, *op. cit. supra* note 60.

⁶⁴ *Forneman v. The Mount Pleasant Cemetery Association*, 135 Ind. 344, 347 (1893).

⁶⁵ *Op. cit. supra* note 64.

eminent domain as attempting to confer the power on a private corporation for a purpose not constituting a public use.⁶⁶ The statute provided "That any voluntary association organized and incorporated for the purpose of establishing, conducting and maintaining a religious chautauqua or assembly, which has had a continuous legal existence for a period of not less than fifteen years, during all of which period of time such voluntary association has held . . . an annual program covering a period of not less than sixteen days during each year, and has held a lease on a tract of timber land for a period of not less than fifteen years, is hereby endowed with the right of eminent domain insofar as the same may be necessary for the purpose of acquiring possession . . . of the tract of land on which such association holds a lease . . ." The statute was held invalid against the contention of the chautauqua company that it was "one of the most prominent and useful societies devoted to the public service in teaching morality and justice and civil government, and widening the intellectual horizon of many thousand men, women, and children . . ." To this argument the court answered that "it cannot be insisted that every organization wielding a public benefit can be endowed with the power of eminent domain." The chautauqua association further emphasized "the character, use, and purpose of chautauqua assemblies as an aid to the dissemination of knowledge." But the court said:

"Granting that chautauqua assemblies as have a great and good influence on the educational as well as the religious life of the country by reason of their summer entertainment, lectures, and schools, yet by reason of the private character of the appellant chautauqua company and in the absence of any showing that its meetings are for the whole public or that the general public has the right and the power to compel appellant to serve it, we cannot see that it is in any different situation from a private school. Private schools, though admittedly of value and use to the public, cannot be granted the power of eminent domain."

⁶⁶ Fountain Park Co. v. Hensler, 155 N. E. 465 (Ind. 1927).

The court held that chautauqua assemblies are not of such great public concern as to require their operation as a matter of public policy and that their operation does not constitute such a public use as will sanction the exercise of the power of eminent domain in their favor.

In *Russell v. Trustees of Purdue University*⁶⁷ the supreme court upheld the right to exercise the power of eminent domain to acquire property upon which to erect and maintain dormitories for Purdue University. The court reviewed a number of cases to support the view that universities founded and supported by the state are public rather than private corporations, consequently, dormitories used in connection with a university to enable it to perform its duties to the public serves a public use which will sustain the taking of private property by eminent domain.

More than half a century ago the court upheld that a tax assessed in a county to pay a debt contracted in securing the location of Purdue University in the county.⁶⁸ The court's decision was based on the fact that "the location of it in a given county will doubtless confer upon that county many local benefits of pecuniary value. The parents residing in the county can send their sons and perhaps their daughters to the college to be educated at a less expenditure of time and money than would be incurred if it were situated at a more remote point in the state. The college, with its professors, tutors, attendants and students, will probably diffuse much more money throughout the community than would otherwise circulate. It may also add to the educated and intelligent population of the place, and be the means of stimulating the industry and increasing the worth and moral worth of the community, thereby enhancing the attractions of society and the value of society."

⁶⁷ 168 N. E. 529 (Ind. 1929).

⁶⁸ Marks, Treasurer of Tippecanoe Co., v. The Trustees of Purdue University, 37 Ind. 155 (1871).

In a similar case, in which the authority of a municipality to exercise the taxing power to pay the entire cost of procuring the location of a county seat within its limits and the erection of the necessary county buildings was questioned, the court said:⁶⁹

"The power of taxation must be exercised for a public purpose and unless restricted, however, by some provision of fundamental law it may be exercised or conferred by the legislature to an unlimited extent. It is certainly a fact and one well recognized that the location of a county capital seat of justice at a particular town or city and the erection therein of the necessary county buildings and the administration thereof of all the offices or public business of the county, are matters of public concern, and much to be desired by the inhabitants of such town or city immediately and especially benefited thereby in many respects. The location of a county seat therein in view of all the incidental benefit and advantages derived therefrom by the citizens of the place in general may certainly be considered of such benefit to and enhancement of all property therein as under the circumstances would justify the legislature in its discretion in authorizing the entire burden of the expense incident to such location to be laid upon the property of the particular district composed of the territory within the limits of such municipal corporation by providing for the discharge of payment thereof by taxes levied upon all the property in such district subject to taxation."

A very interesting case involving the power of taxation is that of Trustee *McClelland v. The State, ex rel. Speer*.⁷⁰ A township trustee deposited to his personal credit funds belonging to the township, for use in maintaining the public schools. The bank failed and the trustee lost the deposit. He repaid all of the money lost, belonging to the school fund out of "his private means." The legislature passed an act for the relief of the trustee. Immediately he demanded payment of the sum which he had made to replace the amount lost and that a tax be levied sufficient to raise the amount. The court held that "a public statute cannot be valid, which is intended to, and does in effect, so tax

⁶⁹ *Schenck v. City of Jeffersonville*, 152 Ind. 217, 52 N. E. 212 (1896). See also *Board of Commissioners v. State*, 147 Ind. 476, 46 N. E. 908 (1897).

⁷⁰ 138 Ind. 321, 37 N. E. 1089 (1854).

an individual as to take private property for private use. It seems, from the record, that the appellee's relator . . . voluntarily made up the money he had lost . . . and this being so, he occupied to his township, as to that money, the position neither of debtor or creditor. He had no right in law or in equity to a return of the money, and a return of it to him would amount to nothing short of a gift. Raising the funds for that purpose from the various taxpayers of Wayne township, by tax, would be, in effect, taking the property of one man to bestow it upon another. It would be a taking of the property of the citizens of that township for a private, and not a public use."

VII.

There are comparatively few Indiana cases in which the doctrine of public purpose is invoked. By far the greatest number of objects for which the powers of taxation and eminent domain are exercised have not been disputed. Therefore an enumeration of the objects for which these powers can be used is not possible or practicable. However they are sovereign powers which the people retain over private property to take as much as may be necessary for the government to accomplish the many public services and other purposes for which it is maintained. Consequently they are alike in their source and rest upon the same foundation, the necessities of the public and the objects to be attained by which the exercise of either can be sanctioned by the court for some public purpose or public use.

Public purpose in taxation and public use in eminent domain are much the same in importance. When a tax is imposed or private property taken a public policy is to be promoted. Public purpose and public use are, to a considerable extent, dependent upon public policies which are determined by the legislature changing from time to time to adopt the best means of promoting the interest of the state.

These powers are also clearly distinguishable in respect to the occasion and method of use, compensation secured to the individual and the manner which they operate upon a community or a class of persons or an individual. Therefore a more liberal construction of public purpose is allowed in eminent domain than in taxation. The reason is obvious. Eminent domain proceedings affect individuals or only a few persons at most, and too great liberality in the interpretation of public purpose in eminent domain would be less harmful and result in less injustice than in taxation. Consequently proceedings under the power of eminent domain were upheld when land was required for a right of way to connect a railroad with a stone quarry. The extension of the side track for this purpose subserved a public use in bringing valuable building stone to a market. To exercise the power of taxation for such a purpose would be inadmissible as appropriating public revenues to a private purpose.

The flexible nature of public purpose as dependent upon social and economic conditions has often been recognized. The economic situations, especially, are of considerable importance in regard to the use of eminent domain by private organizations. A case which decided that Chautauqua activities are a non-public use lends support to this conclusion, there being no significant economic consideration involved. However, the tendency has been to expand the meaning of public purpose in eminent domain and taxation. It is difficult, of course, to determine in some cases what constitutes a public purpose. But it is an error to assume that the court should not consider the progress and improvements of the time in drawing the line of distinction between private and public purposes.

Julius R. Bell.

Johns Hopkins University.