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PROPERTY WHICH CANNOT BE REACHED BY THE POWER OF EMINENT DOMAIN FOR A PUBLIC USE OR PURPOSE

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When it becomes necessary for the attainment of its objects of public purpose, the appropriating power of a government and its agents reaches quite far into the field of property. It reaches much farther now than it did in the seventeenth century when Grotius tried to give it greater favor and respectability with the people by christening it "Eminens Dominum".

If property cannot be reached when the power of eminent domain has been granted and the property is desired for a legally-recognized public use or purpose, it seems evident that there must be something about the property itself which repels or eludes the power and gives the property immunity, or something about the power which impedes the force of its progress and prevents it from getting at the property. In affording some instances where courts have not allowed property to be reached by the power of eminent domain for public use or purposes, and considering some of the reasons advanced by the courts in support of their decisions, the subject will be approached from the standpoint of "The Property" in Part I, and from the standpoint of "The Power" in Part II.

PART I. THE PROPERTY

Eminent domain acts directly on property rather than on the individual. In considering the nature of property, it has been described as "an aggregate of rights which are guaranteed and protected by the government", and, "in the ordinary sense it is used to indicate the thing itself rather than the rights attached to it".¹

Hohfeld has very clearly named and described, for the convenience of the legal profession, certain legal concepts. His choice of terminology is very helpful in considering what we mean by the word *property*. He recognizes that it is frequently used to designate the physical thing itself, but he decides that certain "interests"² in the physical thing, receiving legal protection and recognition, constitute property in law. So far as these interests run to the benefit of the owner, he denominates them as *rights* (or claims), *privileges*, *powers*, and *immunities*. It is in the sense of the corpus, or thing itself, and these "interests"³ that the word *property* is used in this article.

From the nature of the power of eminent domain as an "attribute of sovereignty",⁴ the conclusion has followed logically that all property is subject to its appropriation, upon payment of just compensation, provided only that the requisite of public use or purpose be satisfied, and many expressions of this conclusion have found their way into cases and legal literature.⁵ This power has little regard for size. It has taken broad acres for irriga-

¹ *Fulton Light, Heat and Power Co. v. State*, 65 Misc. 263, 288, 121 N. Y. Supp. 536, 553 (1909).

² HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923) 28.

³ These "interests" have been analyzed by Hohfeld as included in "more or less limited aggregates of abstract legal relations" of jural opposites and correlatives, illustrated by the following scheme of arrangement taken from page 65 of his work on Fundamental Legal Conceptions:

Jural Opposites	{	right	privilege	power	immunity
		no-right	duty	disability	liability
Jural Correlatives	{	right	privilege	power	immunity
		duty	no-right	liability	disability

⁴ 2 LEWIS, EMINENT DOMAIN (3rd ed. 1909) § 262.

⁵ "The right of eminent domain is an attribute of sovereignty, and whatever exists in any form, whether tangible or intangible, may be subjected to the exercise of its power, and may be seized and appropriated to public use when necessity demands it." *Metropolitan City Ry. v. Chicago West Div. Ry.*, 87 Ill. 317 (1877). "All property is held subject to the inherent right in the government to appropriate it . . ." *Alabama and Florida R. R. v. Kenney*, 39 Ala. 307

tion purposes,⁶ and many miles of territory for highway purposes,⁷ and has used its whole power to take a single painting from the wall,⁸ or to interfere with an easement of cool air.⁹ Neither sentiment, education nor religion has been allowed to stand in its way, for it has entered the cemetery,¹⁰ invaded the college campus,¹¹ and taken the property of houses of worship.¹² It has also made property, inalienably settled by the state on beneficiaries for charitable purposes, subject to its compulsory power.¹³

However, the power of eminent domain has not always been irresistible, even when the legitimacy of its public purpose has been recognized. From time to time certain forms of property have been able to repel the force of its progress.

Property as the Thing Itself

It was recently held by the Supreme Court of Kentucky that the unburied body of a deceased husband could not be injured nor taken from the widow by the right of eminent domain held by a public hospital.¹⁴ In the course of his opinion Justice Clay stated:

" . . . whatever may be the nature and extent of one's property right in a corpse, it is not the kind of property that may be condemned and is not therefore protected by section 242 of the Constitution." ¹⁵

(1864). Cf. *Opinion of the Justices*, 261 Mass. 523, 159 N. E. 55 (1927); *People v. Mayor, etc., of New York*, 32 Barb. 102 (N. Y. 1860); *Bailey v. Miltenberger*, 31 Pa. 37 (1856); *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287 (1913); *Hollister v. State*, 9 Idaho 8, 71 Pac. 541 (1903); *Eddleman v. Union County Traction, etc., Co.*, 217 Ill. 409, 75 N. E. 510 (1905); *Kennebec Water District v. Waterville*, 96 Me. 234, 52 Atl. 774 (1902); *Woodcliff Land Impr. Co. v. New Jersey, etc., R. R.*, 72 N. J. L. 137, 60 Atl. 44 (1905).

⁶ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56 (1896).

⁷ *State v. Superior Court*, 29 Wash. 1, 69 Pac. 366 (1902).

⁸ House Bill No. 1698, Mass. Leg. Assembly (1922).

⁹ *South Buffalo Ry. v. Kirkover*, 176 N. Y. 301, 68 N. E. 366 (1903); *Dona-hue v. Keystone Gas Co.*, 181 N. Y. 313, 73 N. E. 1108 (1905).

¹⁰ *Wood v. Macon and Brunswick R. R.*, 68 Ga. 539 (1882).

¹¹ *Girard College Grounds Case*, 10 Phila. 145 (1874); *Cincinnati I. R. R. v. Murray*, 10 Ohio N. P. (N. S.) 301 (1903).

¹² *Macon, etc., Ry. v. Riggs*, 87 Ga. 158, 13 S. E. 312 (1891).

¹³ *In re Cuckfield Burial Board*, 24 L. J. Ch. 585 (1854).

¹⁴ *University of Louisville v. Metcalfe*, 216 Ky. 339, 287 S. E. 945 (1926); (1927) 15 Ky. L. J. 359.

¹⁵ *Ibid.* 343, 287 S. E. at 947. Sec. 242, referred to, is an eminent domain provision.

If eminent domain cannot reach a corpse, it would seem reasonable that it cannot reach and appropriate a live human being. This was held to be so, even in the case where the live human being was a slave and as truly property "as land or any other property movable or immovable".¹⁶ Congress provided for the enlistment or drafting of slaves of loyal owners, authorized a compensation of \$300 to the loyal owners for each slave drafted, and provided that such slaves should be free.¹⁷ This law was declared unconstitutional by the Supreme Court of Kentucky on the double ground that \$300 was not "just compensation", and that the government had no right to appropriate the title to a slave by eminent domain, but was limited in its power to the appropriation of the use or services of the slave.¹⁸

There is judicial opinion that money cannot be taken by the power of eminent domain,¹⁹ and, according to Justice Field, of the California Supreme Court and later of the Supreme Court of the United States, this is due to its nature as property corresponding to the nature of the medium of compensation. On this point he said:

"Money is not that species of property which the sovereign authority can authorize to be taken in the exercise of its right of eminent domain. That right can be exercised only with reference to other property than money, for the property taken is to be the subject of compensation in money itself" ²⁰

¹⁶ See cases referred to in note 18 *infra*.

¹⁷ Act of Feb. 24, 1864, 13 STAT. 11 (1864).

¹⁸ *Hughes v. Todd*, 2 Duval 188 (Ky. 1865); *Corbin v. Marsh*, 2 Duval 193 (Ky. 1865). Drafting or conscripting, as covering only the use or services (however perilous) of able-bodied men, has been carried over into the proposals now in Congress for amendments to the Constitution empowering the national government to conscript property in time of war. As thus employed, "conscription" does not mean, as popularly supposed, the appropriation of the property itself by taking the title away from the owner, but means appropriating merely the use or services of what is taken over, on payment of just compensation. See "Hearings before the Committee on Military Affairs," reported in *Government Bulletin* entitled "Universal Mobilization for War Purposes". I have been correctly quoted, on page 25 of the bulletin, as stating that, since these proposals involve nothing more than the exercise of the government's present power of eminent domain, no amendments to the Constitution giving this power are necessary.

¹⁹ See *Burnett v. Sacramento*, 12 Cal. 76, 83 (1859).

²⁰ *Ibid.* Justice Field probably had in mind an attempt to appropriate money in ordinary times of peace, for it would seem that in time of war or in an emergency which required it for self-preservation, the government could use its emi-

The resistant quality of money, which successfully repels the power of eminent domain, has also been put upon the ground that money is subject to exaction by the power of taxation and this makes it unnecessary and not permissible to consider it as also subject to the power of eminent domain. In passing upon this question, in the course of a decision in a case where it was contended that disguised eminent domain proceedings were being employed to deprive the plaintiff of money, *Ruggles, J.*, of the Court of Appeals of New York, said:

"The framers of the constitution could not have intended to delegate to municipal corporations the right of taking money under this power, because it is entirely unnecessary. Money can always be had by taxation; lands can not; and therefore lands may be taken by the right of eminent domain, but money may not." ²¹

If that which cannot be done directly ought not to be allowed to be accomplished indirectly the conclusion would seem to follow that since eminent domain power cannot take money it cannot take property in order to sell it for money. The public purpose which justifies taxation sustains the power to take property and sell it for government support, but this high public purpose will not sustain the exercise of eminent domain power to do the same thing, even by the State itself. Thus it has been held in Ohio that in appropriating the water of private streams by eminent domain power more water could not be taken than was needed for a public canal with a view of raising revenue by selling or leasing it. In the decision so holding in the Supreme Court of that State, Mr. Justice Wood commented on the legitimate exercise of eminent domain power to take private property and then said:

nent domain power to effect a forced loan. In the case of *Hammett v. Philadelphia*, 65 Pa. 146, 152 (1870), *Sharswood, J.*, in speaking of this question, says: "I am not able, and do not feel disposed to enter the lists upon such a question, but it does seem to me that there may be occasions in which money may be taken by the state in the exercise of its transcendental right of eminent domain. Such would be the case of a pressing and immediate necessity, as in the event of an invasion by a public enemy, or some great calamity, as famine or pestilence, contributions could be levied on banks, corporations or individuals." Police power cannot always be relied upon in time of war or emergency for the impressing of property into the service of the state. For cases requiring eminent domain and compensation, see 2 *LEWIS, EMINENT DOMAIN* (3d ed. 1909) § 8.

²¹ *People v. Mayor of Brooklyn*, 4 N. Y. 419, 424 (1851).

"We know of no instances in which it has, or can be taken, even by the State authority, for the mere purpose of raising a revenue by resale, or otherwise; and the exercise of such a power would be utterly destructive of individual right, and break down all the distinctions between *meum et tuum*, and annihilate them forever, at the pleasure of the State." ^{21a}

Property as Interests

While it has been said on good authority that "in regard to choses in action and all other kind of personal property, there can be no doubt as to the power of appropriation",²² and this is the general rule, yet an exception has been made of "rights in action, which can only be available when made to produce money".²³ Accordingly, it has been held that promissory notes representing such *rights* are not subject to the eminent domain power.²⁴ In a case before the Massachusetts Supreme Court, it became necessary to pass upon the power of the legislature, under a special act authorizing the taking by eminent domain of all the rights and property of a library, to reach \$1,500 in money and also promissory notes for the payment of \$11,000. It was held that such an authorization was beyond the power of the legislature and that neither money nor promissory notes for the payment of money can be the subject of eminent domain appropriation. In so holding, the opinion of Justice Field, above referred to, was quoted with approval and was held to be as applicable to promissory notes as to money itself.²⁵

There are *privileges* which can hardly be said to be property, such as the privileges of members of Congress to refuse submission to arrest during their attendance at the sessions of their respective houses, or the constitutionally-protected privilege, which

^{21a} *Buckingham v. Smith*, 10 Ohio 288, 297 (1840).

²² 2 LEWIS, EMINENT DOMAIN (3d ed. 1909) § 413.

²³ 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 1118.

²⁴ Neither the taxation reason nor the money substitution reason entirely fits a promissory note, for it is often worth much less than the amount of money it calls for, depending on the financial responsibility of parties liable on it. It sometimes can be sold for more than the amount of money it calls for when it bears high enough interest. Query: Corporate shares of stock may be taken by eminent domain. *Offield v. New York, etc., R. R.*, 203 U. S. 372, 27 Sup. Ct. 72 (1906). May corporate bonds be taken by eminent domain?

²⁵ *Cary Library v Bliss*, 151 Mass. 364, 25 N. E. 92 (1890).

every American has, of freedom of choice in all matters of religious worship. There are other privileges, however, ranging all the way from large corporate franchises to humble patent-right privileges on small articles of commerce, which are bought and sold and are recognized in law as property.²⁶ As such they have frequently been held subject to the power of eminent domain,²⁷ regardless of difficulties in appraising their values.²⁸

The privilege of fishing in private waters belongs to the class of privileges which has been held to be property.²⁹ It is more than an easement and is classed as an interest in land.³⁰ Some of the counties in New Jersey are dotted with natural lakes, many of which are on private estates and farms. Members of the public were not privileged to fish in these lakes without getting the permission of the owners. The legislature of New Jersey authorized counties to acquire by eminent domain condemnation the privilege of fishing on such of these lakes as covered over one hundred acres. The purpose of the condemnation (which includes access to the lakes) was to take the exclusive privilege away from the owner and throw the privilege of fishing open to the general public. The putting of this law into effect was resisted, and one of the grounds of resistance was that it was beyond the legislative power to appropriate the privilege of fishing, by eminent domain. The case went to the Supreme Court of New Jersey, where the law was sustained as being for a legitimate public purpose, and it was held that the privilege of fishing was such a property interest as could be reached by the power of eminent domain.³¹ On appeal to the Court of Errors and Appeals, however, the case was reversed.³² On the point whether the privilege of fishing in private waters was property of such a character that it could be taken by eminent domain, the decision of Dixon, J., who delivered the opinion of the court, was as follows:

²⁶ *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 13 Sup. Ct. 622 (1893); *Brady v. Atlantic Works*, 4 Cliff. 408 (C. C. Mass. 1876).

²⁷ See cases cited in note 26 and 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 1113.

²⁸ *New Haven Water Co. v. Russell*, 86 Conn. 361, 85 Atl. 636 (1912).

²⁹ *Waters v. Lilley*, 4 Pick. 145 (Mass. 1826).

³⁰ *Ibid.*; 2 WASHBURN, REAL PROPERTY (6th ed. 1902) 275.

³¹ *Albright v. Sussex County Lake, etc.*, Comm., 68 N. J. L. 523, 53 Atl. 612 (1902).

³² *Albright v. Sussex County Lake, etc.*, Comm., 71 N. J. L. 303, 57 Atl. 398 (1904).

"The constitution requires that on taking private property for public use just compensation should be made to the owner, and this implies that the property taken shall be reasonably capable of just estimation. The lake itself could no doubt be fairly appraised, as could, probably, the right of any individual or of any specified number of individuals to fish therein. But I know of no criterion by which the right of an unlimited number of persons to spend their time upon the lake for the purpose of catching fish could be valued. It might be that the appraisers would evade the difficulty by awarding to the owner the full value of the lake, but in that case justice would require that the lake itself and not a mere incidental right in it, should become public property.

"We think, therefore, that neither in the reason of the case nor in the settled practice of free governments is there legal support for the proposed condemnation."³³

A lien is property,³⁴ and this is true of a so-called mortgage lien with its *power* of foreclosure and sale in certain situations (in a lien theory state); as such it can be bought and sold like any other property.³⁵ Although the condemnor of land under eminent domain authority may wish to safeguard his recognized public purpose activity from any embarrassment by condemning a mortgage lien, with its power of foreclosure and sale, on land which includes his land, it has been held that this cannot be done, for the mortgage lien is not subject to eminent domain processes. In a case before the Court of Appeals of Kansas,³⁶ the facts showed that a railroad company had condemned a right of way and secured the legal title in fee simple to a strip of land running through a larger tract. The entire tract of land was cov-

³³ *Ibid.* 307, 57 Atl. at 400. In stating that the commissioners might have avoided the difficulty "by awarding the owner the full value of the lake", Dixon, J., appeared to think this to be the alternative when the true value could not be ascertained by condemnation. However, "just compensation" in the law of eminent domain does not seem to require such exactness of computation. "It may be more or it may be less than the mere money value of the property actually taken." 2 LEWIS, EMINENT DOMAIN (3d ed. 1909) § 684. In the case of *New Haven Water Co. v. Russell*, *supra* note 28, it was held that the fact that damages from a contemplated condemnation of water rights "are such that they cannot be fully compensated will not prevent the condemnation, all property being subject to condemnation for public use and the damages awarded being such as will compensate as nearly as the nature of the property will permit."

³⁴ 2 BOUVIER (Rawle's 3d Revision 1914) 2750.

³⁵ *Pool v. Gates*, 116 Kan. 195, 225 Pac. 1069 (1924).

³⁶ *Chicago K. & W. R. R. v. Need*, 2 Kan. App. 492, 43 Pac. 997 (1896).

ered by a mortgage lien. In an action brought to foreclose the mortgage on the entire tract, the court ordered that the railroad right of way be sold under the mortgage power of sale, in case the remaining land was not sufficient to satisfy the judgment. The railway sought to put its right of way in a position of immunity from the threatened use of the power of sale, and from further acts under the mortgage powers, by starting condemnation proceedings against the mortgage lien under its power of eminent domain. In passing upon the legality of the eminent domain proceedings, the court held that a mortgage lien (in a lien theory state) is not an interest in the land itself, and that the law does not recognize it as the subject of appropriation by eminent domain. A portion of the decision seems to put the situation on an analogous basis with that of money. Says the court:

"The ultimate object of the proceeding is to enable it [the railroad] to deposit with the county treasurer the amount of damages so ascertained, in order that it may receive the same for its own indemnity. After such superfluity of action, it is somewhat difficult to comprehend just what has been accomplished." ³⁷

The case also went against the railway company on the ground that the mortgage lien was extraneous and not a part of that which could be taken by the railway company for its needs in fulfilling its recognized public purpose. The court so held, although it recognized that the railway company might "suffer immeasurable loss by reason thereof", and it concluded by expressing the opinion that the company could probably get adequate protection in a

³⁷ *Ibid.* 495, 43 Pac. at 998. In the case of Phila. R. & N. E. R. R. v. Bowman, 23 App. Div. 170, 48 N. Y. Supp. 901 (1897), under similar conditions the mortgage was foreclosed on the entire tract and the defendant bought the railroad tract and received the referee's deed for it. At this stage of the situation the railway company was allowed to institute eminent domain proceedings to acquire title to the portion of its right of way so sold. This case shows what might have been saved to the railway company in the Kansas case herein referred to had the Court of Appeals of Kansas decided otherwise, for the New York Supreme Court conceded that, had the railway been able to move against the mortgagee by eminent domain, it would only have had to pay damages to his interest, but held that, having waited and moved against the purchaser at the mortgage sale, it would have to pay not only for the land but for the improvements it had put on the land itself. Eminent domain, if allowed against the mortgage lien in this case, would not have been a "superfluity of action".

court of equity in proper proceedings, but not through the medium of eminent domain, which it held had no power to reach the mortgage lien.

Not only do the ordinary *immunities* which the law throws about everyone's person and property have value, but often those granted by the government are highly prized as property in themselves. In seeking protection of such immunities, litigants have from time to time had to appeal to the constitutional provision against depriving a person of property without due process of law. This has been especially true of immunities from taxation³⁸ and immunities from execution.³⁹ Some of these immunities may be released by consent of the owners, as the immunity of certain property from attachment, and, where not contrary to public policy, they may be sold. It has been held in a few states that it is against public policy to permit an abutting owner to sell immunity from assessment and from the effects on his property which result from improving the streets,⁴⁰ or to sell immunity from having to submit to the laying of street car tracks in front of his premises.⁴¹ However, in Ohio the courts have held otherwise and consent to the release of such immunities may be bought and sold. In injunction proceedings in that state an abutting owner prayed that the construction and operation of a street railway should be enjoined because the legal consent of more than one-half of the abutting land holders of the lots and lands abutting the street had not been secured as required by statute.⁴² The pleadings and the evidence made it necessary on appeal for the court to pass upon the question whether the consent of abutting owners as a condition precedent to the municipal authorities empowering the street railway company to lay its tracks in front of their premises could be sold to the street railway. The court also had to pass upon the question whether the consent to the release of this immunity could be condemned by eminent domain. It held that such consent could be sold and that its purchase was not con-

³⁸ See *Choate v. Trapp*, 224 U. S. 665, 32 Sup. Ct. 565 (1912).

³⁹ *Brearley School v. Ward*, 201 N. Y. 358, 94 N. E. 1001 (1911). See cases collected in ANN. CAS. [1912 B.] 259.

⁴⁰ *Maguire v. Smock*, 42 Ind. 1 (1873).

⁴¹ *Doane v. Chicago City Ry.*, 160 Ill. 22, 45 N. E. 507 (1896).

⁴² *Hamilton, etc., Tract. Co. v. Parish*, 67 Ohio St. 181, 65 N. E. 1011 (1902).

trary to public policy. The brief syllabus by the court on this point reads as follows:

"The owners of abutting lots are free to give or withhold such consent, upon such terms as to them severally may seem proper, and there is no public policy in this state against giving such consent for valuable consideration moving from the street railroad company to such lot owner." ⁴³

As to the nature of the otherwise legal power which the legislature wished to place under a disability, the court said:

"The general assembly at an early day foresaw that the public authorities, in the exercise of the power to grant franchises for street railroads with a liability to make compensation only in cases of interference with the property rights of ingress and egress, might act oppressively, or against the wishes of the abutting lot owners, and therefore imposed a further check upon that power, and required that the consent in writing of the owners of a majority of the feet front on the street should be obtained and produced to the proper officer. This was done, as held by this court in *Roberts v. Easton*, 19 Ohio St. 86, 'To protect owners of property on the streets of cities . . . from the exercise of arbitrary power on the part of the city authorities in permitting the streets to be used for street railroads'." ⁴⁴

Although the court held that the immunity of the abutting owner had an exchange value and was very effective as a legal instrument against the exercise of official power, yet it did not hold that it was property. The court concluded that since it was not property it could not be appropriated by eminent domain. The language of the decision on this point reads as follows:

"But this additional check did not have the effect to vest the fee of the street in the abutting lot owner, nor to give him a right to compensation unless his easement of ingress and egress should be injured. It therefore gave him no more property rights than he had before the statute as to such consents was enacted.

"Such consent is therefore not a property right adhering to the lot, but is a personal right in the owner of the

⁴³ *Ibid.*

⁴⁴ *Ibid.* 192, 65 N. E. at 1014.

lot, a power or sword in his hands with which to protect his lot against the arbitrary powers of the city authorities. A majority of the consents by the feet front is a condition precedent to jurisdiction to pass a street railway ordinance, and each abutting lot owner is free to aid in conferring such jurisdiction, and free to withhold such aid. His actions cannot be controlled in that regard by others on the street, nor by courts of justice in their behalf. Such a condition, such consent, in the nature of things cannot be appropriated under the power of eminent domain."⁴⁵

The language of this part of the decision might be construed as recognizing the abutting owner's immunity as property, but not as property in the lot, and hence not subject to appropriation by eminent domain power.^{45a} However, in a subsequent decision,⁴⁶ the same interest was again construed by the same court, and was held not to be property at all and therefore not entitled to the protection of the "due process" clause of the Constitution. Some years after the first decision the constitution of Ohio was amended so as to permit the city of Cleveland to change its charter. One of the changes in the charter did away with the necessity of securing the abutting owners' consent in a situation such as that presented by the *Hamilton Traction Co.*⁴⁷ case. The property owners contended that deprivation of their immunity was undue process of law—first, because the immunity vested before the charter was changed; secondly, because the general statute of Ohio granting the immunity had never been repealed. The injunction suit of the abutting owners reached the supreme court of the state. After referring to the fact that it had previously

⁴⁵ *Ibid.* 192, 65 N. E. at 1014.

^{45a} It is recognized that some interests are considered property by the courts for some purposes and not for others. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality* (1926) 39 HARV. L. REV. 307. For example, in some jurisdictions "good will" has not been recognized as property for purposes of considering compensation under the so-called eminent domain clause of state constitutions. (Cal., Kan., Mass., N. Y., Penn., Tenn.) See 41 A. L. R. 1026 (1926). Yet, it is bought and sold, has exchange value, and, independent of eminent domain consideration, it has been held to have the property protection guarantee of the due process clause of the Federal Constitution. See note 48 *infra*; *Abbot v. Tacoma Bank*, 175 U. S. 409, 20 Sup. Ct. 153 (1899).

⁴⁶ *Billings v. Cleveland Ry.* 92 Ohio St. 478, 111 N. E. 155 (1915).

⁴⁷ *Supra* note 42.

held that the consent of release of such immunity was not property under eminent domain consideration, the court said:

"Such consents are not property rights, but rights in their nature personal to each owner of an abutting lot.

"Such personal rights were bestowed by the general assembly on owners of abutting lots as a check upon the power of the municipality. The right referred to not being a property right (the taking of which would violate the guaranties of the constitution, unless done by due process of law and after full compensation), it follows that the statute conferring it, being a matter of local concern, when inconsistent with the provisions of the charter passed under favor of the constitution, would fall simply because it was inconsistent . . . " 48

Relation of the Intangible Interests to the Tangible Property

In the last two cases discussed the character of interest represented was held to be such as to resist the encroachment of eminent domain power. In the mortgage lien case it was held that mortgage liens were property but not the character of property which could be reached by the process of eminent domain, because the "superfluity of action" resulting would violate the same merry-go-round principle which protects money and bills and notes from seizure by eminent domain process.⁴⁹ In the abutting owner's immunity case it was held that such immunity was not an interest of such character as could be judicially defined as property, and, as eminent domain power could only reach property, it could not

⁴⁸ *Billings v. Cleveland Ry.*, *supra* note 46, at 491, 111 N. E. at 158. The court in this case apparently was not in agreement with the views of Justice Swayne of the Supreme Court of the United States that "Property is everything which has an exchangeable value and the right of property includes the power to dispose of it according to the will of the owner". This was in his dissenting opinion in the *Slaughter House Cases*, 16 Wall. 36 (U. S. 1872), but it received the approval of the majority of the court in *Chicago M. & St. P. Ry. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 702 (1889). For legal foundations of the exchange-value definition of property, see *COMMONS, LEGAL FOUNDATIONS OF CAPITALISM* (1924) c. 2.

One who follows the Hohfeldian analysis could probably see a good many legal relations affected by allowing the power of the city council to break into the immunity granted by statute to the abutting street owners. In the situation he would very likely be able to see eminent domain exercising its usual process in appropriating property either against the due process clause of the Constitution or in accordance with it.

⁴⁹ *Supra* note 37.

be condemned and taken. In each of these cases a further reason was advanced for not allowing the interests to be paid for and taken by eminent domain. This additional reason was based upon the quantity of interest moved against, rather than the quality. The court held in each case that the quantity of interest moved against was not of sufficient depth to reach the corporeal or physical thing affected or taken. It was therefore decided that there was nothing on which eminent domain power could get a foothold. Speaking of the immunity gained by withholding consent, the court said in the abutting owner's immunity case:

"Such consent is therefore *not a property right adhering to the lot.*"⁵⁰

In the mortgage lien case the court quoted with approval from one of its preceding holdings:

"The mortgagee, however, had only a lien upon the land out of which the right of way was taken. *He was not the owner of the same or of an interest therein.*"⁵¹

In each instance it was decided that eminent domain could not reach an interest which was held not to be deep enough to be an interest in the physical property taken or affected. It has been held that a legal interest may be deep enough to reach and enter the physical property and therefore be an interest *in* the physical property itself and at the same time not be of sufficient depth to afford a foothold for the attachment of eminent domain. A decision so holding is found in the case of *Western and Atlantic Railroad Co.*

⁵⁰ *Supra* note 48. Italics are the author's.

⁵¹ Italics are the author's. It is difficult to consider the statement frequently made, that a mortgage lien is not an interest in the thing mortgaged because it is a lien, as anything more than an historical legal assumption. This is especially true after default in payment, since a mortgage lien carries with it the privilege of entry and power of foreclosure and sale of the land itself with all the consequent changes of legal relations which attend the exercise of such transactions. See HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1919) c. 2. However, the view of the court in the above case is the orthodox view. 1 JONES, *MORTGAGES* (8th ed. 1928) § 67. But see *Ormsby v. Ottman*, 85 Fed. 497 (1898). Independently of the depth of the mortgagee's interest, it has been allowed to be reached in a separate eminent domain proceeding, by statute in Wisconsin. *Aspinwall v. Chicago & N. W. Ry.*, 41 Wis. 474 (1877). Some states, as a matter of policy, have passed laws making the mortgagee a necessary party along with the mortgagor in eminent domain proceedings. 2 LEWIS, *EMINENT DOMAIN* (3d ed. 1909) § 523.

v. Western Union Telegraph Co.,⁵² decided by the Supreme Court of Georgia, in regard to what was designated by the court as a "usufructuary interest in the land". In this case a railroad company had leased a railroad from the state for twenty-nine years, with a franchise to operate it. A telegraph company started condemnation proceedings against the railroad company to condemn a right of way for its telegraph lines. The injunction suit instituted by the railroad company against the prosecution of the condemnation proceedings reached the supreme court of the state, and, among other questions, it became necessary for the court to decide whether the interest of the lessee railroad company was such as to be subject to the power of eminent domain. The court referred to a previous decision in which it had held that the same railroad company's interest was a "usufructuary interest in the land", because of certain "rights of forfeiture on broken conditions subsequent", and other terms of the lease regarding the state's reversionary interest.⁵³

The court did not seem to adhere to the strict meaning of the civil law, from which the term was borrowed, and recognized that, as used in regard to the interest of the railroad company as lessee, its "usufructuary interest" represented an "interest in land". However, the court attempted to distinguish between an "estate in land" and an "interest in land",⁵⁴ and held that such a "usufructuary interest in the land" was not subject to the power of eminent domain, and, as this represented the railroad company's interest, the telegraph company should move against the railroad company's lessor, which was the state of Georgia. In answer to the contention that the statute made this unnecessary, the court, by Evans, J., said:

⁵² 138 Ga. 420, 75 S. E. 471 (1912).

⁵³ State of Georgia v. W. & A. R. R., 136 Ga. 619, 71 S. E. 1055 (1911).

⁵⁴ *Supra* note 52, at 429, 75 S. E. at 475. The terms "estate in land" and "interest in land" are usually synonymous. 1 BURR, LAW DICTIONARY 434; *Freidman v. Macy*, 17 Cal. 230 (1861). They are often used interchangeably. *Hurst v. Hurst*, 7 W. Va. 289 (1874). "Estate when used in reference to land signifies simply interest therein." *City of N. Y. v. Stone*, 20 Wend. 139, 142 (N. Y. 1838). See also *Commonwealth's Appeal*, 127 Pa. 435, 17 Atl. 1094 (1889); *Mulford v. Le Franc*, 26 Cal. 88 (1864); *Clift v. White*, 12 N. Y. 527 (1855); *James v. Morey*, 2 Cow. 246 (N. Y. 1823); *Minnesota Debenture Co. v. Dean*, 85 Minn. 473, 89 N. W. 898 (1902); *New Orleans J. and G. N. R. R. v. Hemphill*, 35 Miss. 22 (1858).

"Our attention is called to the provisions of the eminent-domain law respecting the right of a telegraph company to condemn the right of way of a railroad company, and especially to the provision that in such cases only the railroad company is to be notified . . . For reasons already stated, it is manifest that the statute does not contemplate proceedings solely to condemn the right of way of a railroad company which has no ownership or easement of the right of way or of the fee; one which is merely a tenant, possessing no estate, but only a usufructuary interest in the land." ⁵⁵

The telegraph company was permitted to amend its condemnation petition to make the state of Georgia a party, and, upon condemnation proceedings being again resisted, the case reached the supreme court of the state for the second time.⁵⁶ Evans, P. J., again referred to the usufructuary interest in the land of the railroad company and said:

"When the case was formerly before this court, one of the points to be decided was whether the lessee had such an interest in the railroad as would authorize, by condemnation proceedings, the telegraph company to construct a line of telegraph on the property of the State. This point was decided adversely to the telegraph company. The decision of the court went to the point that as the lessee's interest was only to enter upon and enjoy the use of the property leased, it had no estate or interest which was subject to the exercise of the right of eminent domain." ⁵⁷

The outcome of the second case was a holding by the court that since the usufructuary interest of the lessee was not a sufficient interest in the physical property to be subject to the power of eminent domain, and since the state of Georgia had not consented that its interest in the property should be subject to eminent domain power, the proceedings failed and the telegraph company could not thus acquire the right to run its lines on the railroad right of way.⁵⁸

⁵⁵ *Western and Atlantic R. R. vs. Western Union Tel. Co.*, *supra* note 52, at 430, 75 S. E. at 476.

⁵⁶ 142 Ga. 532, 83 S. E. 135 (1914).

⁵⁷ *Ibid.* 533, 83 S. E. at 135.

⁵⁸ This case seems to have put the usufructuary interest in the same classification as a mortgage lien in the sense that it is not subject at all to the power of eminent domain. Property which is not subject at all to the power of eminent

The property interests which may be reached in a suit to quiet title or in an action for specific performance are not susceptible of being subjected to the power of eminent domain for those purposes, according to the decision of the Supreme Court of Kansas in *Florence, etc., R. R. v. Lilley*.⁵⁹ A railroad company had acquired land along its right of way for station grounds, depot, and side track purposes, by purchase in fee. It occupied the land either by itself or by tenant for eight years, when doubt arose as to its documentary evidence of title being perfect. For this reason, the railroad company instituted condemnation proceedings under its power of eminent domain. The commissioners appointed by the district court allowed the condemnation and awarded one dollar in damages to the one to be compensated. This party being unknown, the money was deposited with the county treasurer. Sometime after the award was made, it was attacked by parties who claimed to be owners in fee of the land and actually in pos-

domain should not be confused with property which cannot be reached standing alone. In the sense that eminent domain proceedings cannot always condemn an interest standing alone, even though it has power to take it, there are still deeper interests than those which have been mentioned which it has been held cannot be taken. This is due to the fact that the relationship between the interest moved against and other interest or interests are so interdependent that the policy of the law will not allow the condemnor to proceed against one of the property interests standing alone in disregard of the other interests or relationships. In the first hearing of *Western and Atlantic Railroad Company v. Western Union Telegraph Co.*, *supra* note 52, Evans, P. J., in the course of his decision gave it as his opinion that if the railroad company were in the position of an ordinary lessee and its possession were disturbed by eminent domain condemnation, it would have to be separately compensated. But, said the court: "In this state a tenant can neither assign his lease nor sublet the premises without the landlord's permission. Nor can a tenant who leases premises for a particular use devote them to other uses without the landlord's consent. *Dodd v. Ozburn*, 128 Ga. 380, 57 S. E. 701 (1907). Acquisition of the right of occupancy of land by means of condemnation is the equivalent of a conveyance. The difference consists in the means of acquiring the right; the former is involuntary and the latter is voluntary. If a tenant cannot convey the right to devote the premises to a use not authorized by the lease, it must follow that the right cannot be acquired by condemnation."

Many leases contain provisions against assignment, subleasing or changed uses without consent by the landlord. In Georgia, Kansas, Kentucky, Missouri and Texas, assignment or subleasing by the lessee without the landlord's consent is prohibited or restricted. *JONES, LANDLORD AND TENANT* (1906) c. 6. In Colorado a "married woman can do what she will with her own property, as any other person sui juris, without reference to any restraint or disability of coverture". However, the statute requires that condemnation proceedings must consider the husband's relations and join him as a party defendant along with the wife and that her individual property interest standing alone is not subject to the power of eminent domain, even though she owns the absolute fee therein. *Colorado Central R. R. v. Allen*, 13 Col. 229, 22 Pac. 605 (1889).

⁵⁹ 3 Kans. App. 588, 43 Pac. 857 (1896).

session of the land at the time of the condemnation proceedings and at the time of the appeal from the award. In their pleadings they asserted that they had been occupying the land as lessees of the railroad company under the mistaken belief that the railroad company was the true owner. The railroad company, in answer, contended that it owned the land by purchase, and that the condemnation proceedings and award confirmed its complete ownership and title to the land, and that the status of the complainants had been since their occupancy, and still was, that of lessees by reason of a valid contract of lease entered into between them and the railroad company. Upon the case reaching the Supreme Court of Kansas, Dennison, J., in affirming that portion of the judgment below, which held the railroad company's position not to be tenable, said:

"To hold that a railroad company may ask the district court to use this power to condemn land for its use, and to have the value thereof and the damages awarded to the owner, and then be permitted to show that it is already the owner of said land, and entitled to the award, would be to turn this proceeding into a farce, and subject the district courts to ridicule. A condemnation proceeding under the right of eminent domain can be legally maintained only to subject the private property of one owner to the public use of another, and to award the compensation therefor. It cannot be instituted by a corporation to quiet its title to land it claims to already own, nor can it be instituted for the purpose of compelling a specific performance of a contract already entered into between a corporation and others."⁶⁰

Property as Affected by Certain Trusts and Public Uses

The property considered thus far in this article has been held to have had a repelling capacity to resist the encroachment of the power of eminent domain, though the exercise of the power was attempted for a public use or purpose. This was found to be on account of its physical nature, or by reason of the character or depth of the legal interest represented in the property moved against. The use to which property has been put, or for which it is held, especially if it be of a trust character, has found high

⁶⁰ *Ibid.* 590, 43 Pac. at 858.

protection in other fields of the law. Though the protection is not so high in the realm of eminent domain,⁶¹ it is not altogether wanting. It is true that in certain situations property devoted to one public use may be taken by the exercise of the power of eminent domain and put to another public use.⁶² It is also true that eminent domain has been allowed to reach and take government-owned property.⁶³ Yet it has been held that, when government-owned property is devoted to the important use of aiding the government in its necessary functions of fulfilling the high trust imposed upon it of carrying out the purposes of its existence, such property is protected from the thrust of eminent domain power.⁶⁴ The Federal Constitution authorizes Congress to acquire and hold land for the erection of "forts, magazines, arsenals, dock yards and other needful buildings".⁶⁵ The term "needful buildings" has been held to include armories, lighthouses, custom houses and other property used to carry on the necessary activities of governmental administration.⁶⁶ As instruments for carrying on the functions of general government, such property is not subject to the power of eminent domain, or any other interference which would prevent the carrying out of the purposes of government "for the protection and interest of the states, their people and property, as well as for the protection of the people generally of the United States".⁶⁷

The rule is the same as to property held by the states of the Union in a governmental capacity, and this rule protects such property against condemnation by one who is acting under a general or special power of eminent domain, and this has been held to be so, even though the statute granting the power expressly provides for condemnation of state-owned property and includes in

⁶¹ Trustees of Belfast Academy v. Salmond, 11 Me. 109 (1833).

⁶² 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 1113, n. 2; *ibid.* 1190.

⁶³ 20 C. J. 619 (1920).

⁶⁴ See cases cited *infra* note 67.

⁶⁵ ARTICLE I, § 8, CL. 17.

⁶⁶ See cases cited *infra* note 67.

⁶⁷ U. S. v. Chicago, 7 How. 185 (U. S. 1849); U. S. v. Ames, Fed. Cas. No. 14,441 (C. C. Mass. 1845); U. S. v. Railroad Bridge Co., Fed. Cas. No. 16,114 (C. C. N. D. Ill. 1855); Barrett v. Palmer, 135 N. Y. 336, 31 N. E. 1017 (1892); Rockport, etc., Ry. v. State, 135 S. W. 263 (Tex. Civ. App. 1911); Fort Leavenworth R. R. v. Lowe, 114 U. S. 525, 5 Sup. Ct. 995 (1884).

its description the character of property which happens to be set aside for such a use. Thus, in the state of Washington, in construing an act which gave authority to condemn tide lands by eminent domain power and provided that state-owned lands could be taken, it was held by the supreme court that tide lands, which the state had set aside for certain governmental purposes, could not be reached by parties acting under authority of the act.⁶⁸

In construing the strength of the statute the court distinguished between land held by the state in its proprietary capacity and land held by the state in its governmental capacity. In handing down the opinion of the Supreme Court, Fullerton, J., said:

"If, however, we have mistaken counsel's meaning, and it be that they mean to assert that the statute is broad enough to permit the condemnation for railway purposes of any property of the state, other than the specifically exempted part, we cannot agree with the contention. As is well known, the state holds title to property in two entirely distinct capacities, the one a proprietary capacity as individuals generally hold property, and the other a governmental capacity; that is, in trust for the public use. The rule therefore is that a statute conferring upon the state or other municipal corporation the general authority to sell, or a statute conferring the right to condemn state or other municipal property generally, will, in the absence of express words to the contrary, be confined to such property as it holds in its proprietary character."⁶⁹

As to what the consequences would be if the rule were otherwise, Justice Fullerton observed:

"Indeed, if this be not the rule, the Legislature has by the act in question granted to railway companies power to condemn any of the state lands for railway purposes (save that, of course, which is specially exempted), which would include the lands on which its capital buildings are situated."⁷⁰

What is a government activity is sometimes hard to determine in other fields of law, but in the field of eminent domain, in the sense of resisting condemnation, it seems to refer to what-

⁶⁸ *State v. Jefferson County Super. Ct.*, 91 Wash. 454, 157 Pac. 1097 (1916).

⁶⁹ *Ibid.*, 157 Pac. at 1098.

⁷⁰ *Ibid.*, 157 Pac. at 1099.

ever undertaking the state or municipal subdivision conducts as such and has been held to include property used for varied activities,⁷¹ varying from a railroad for profit⁷² to an asylum for charity.⁷³

In most of these cases the court has taken pains to point out, as did Fullerton, J., in the tide land case, the sharp distinction between property held in trust by a government for the fulfillment of governmental purposes and property merely owned by a government in its proprietary capacity and not subject to such a trust. That land held in a proprietary capacity by the federal government for settlement or sale was not affected by such a trust has long been the opinion of the legal fraternity. It has also been thought that such land located within the boundaries of a state was like that of any individual proprietor and could be taken by eminent domain power granted by the state, without the need of any permission or act of Congress. These conclusions have found support in the actual practice of thus appropriating such lands.⁷⁴ They have found their way into legal text books⁷⁵ and have appeared in judicial opinions.⁷⁶ The first case in which the subject was given special attention and was definitely discussed by a federal court was the case of *U. S. v. Railroad Bridge Company*,⁷⁷ decided in 1845, when railroad building in the west began to attract settlers. The decision was against the granting of an injunction to prevent a railroad company, with power of eminent domain from North Dakota, from locating its road over a por-

⁷¹ *Op. cit. supra* note 63, at 619.

⁷² *Atlanta v. Central R. R.*, 53 Ga. 120 (1873).

⁷³ *Matter of Rosenbank Ave.*, 162 App. Div. 638, 147 N. Y. Supp. 638 (1914); *St. Louis, etc., R. R. v. Ill. Trust for Education of Blind*, 43 Ill. 303 (1867); *Rockport R. R. v. State*, *supra* note 67.

⁷⁴ *U. S. v. Railroad Bridge Co.*, *supra* note 67.

⁷⁵ 2 LEWIS, EMINENT DOMAIN (3d ed. 1909) § 414.

⁷⁶ *Texas, etc., Ry. v. Kirk*, 115 U. S. 1, 5 Sup. Ct. 1113 (1885); *Fort Leavenworth R. R. v. Lowe*, *supra* note 67; *U. S. v. Chicago*, 7 How. 185 (U. S. 1848); *Union Pac. Ry. v. Leavenworth, etc., R. R.*, 29 Fed. 728 (C. C. Kan. 1887); *Illinois Central R. R. v. Chicago, etc., R. R.*, 26 Fed. 477 (C. C. N. D. Ill. 1886); *Northern Pac. R. R. v. St. Paul, etc., R. R.*, 3 Fed. 702 (C. C. Minn. 1880); *Union Pac. Ry. v. Burlington, etc., R. R.*, 3 Fed. 106 (C. C. D. Neb. 1880); *U. S. v. Ames*, *supra* note 67; *U. S. v. Railroad Bridge Co.*, *supra* note 67; *People v. District Court*, 11 Colo. 147, 17 Pac. 298 (1887); *Flint, etc., R. R. v. Gordon*, 41 Mich. 420, 2 N. W. 648 (1879); *Rockport, etc., R. R. v. State*, *supra* note 67.

⁷⁷ *Supra* note 67.

tion of a federal military reservation in North Dakota, no longer used for military purposes. After stating that the immunity of such lands had not been previously raised and judicially decided, the court went into a lengthy discussion concerning land held in proprietary ownership by the federal government, and, in its closing paragraph on the subject, said:

"No one can question the right of the Federal government to select the sites for its forts, arsenals and other public buildings. The right claimed for the state has no reference to lands specially appropriated, but to those held as general proprietor by the government, whether surveyed or not. The right of eminent domain appertains to a state sovereignty, and is exercised free from the restraints of the federal constitution. The property of individuals is subject to this right, and no reason is perceived why the aggregate property, in a state, of the individuals of the Union, should not also be subject to it. The principle is the same, and the beneficial result to the proprietors is the same, in proportion to their interests." ⁷⁸

The case was reported by the Honorable John McLean, Circuit Justice, and syllabus 4 and syllabus 5 of his report of the case speak of the practice as follows:

"In all the Western states, within which there have been public lands, it has been the uniform practice to make public roads through the lands of the United States. This every state may do, under its power of eminent domain . . .

"And this power is exercised by a state, subject to no power vested in the federal government. The proprietary right of the United States can in no respect restrict or modify this exercise of the sovereign power by a state." ⁷⁹

Four years afterwards, it became necessary for the Supreme Court of the United States to pass upon the power of Chicago to authorize the opening of streets through the lands and property of the United States known as "Fort Dearborn" which the Secretary of War had authorized to be plotted for sale but which had not yet been sold.⁸⁰ Mr. Justice Woodbury delivered the

⁷⁸ *Ibid.* 693.

⁷⁹ *Ibid.* 686.

⁸⁰ *U. S. v. Chicago*, 7 How. 185 (U. S. 1849).

opinion of the court in a decision which went against the city of Chicago, apparently because the authority of the Secretary of War had not been exercised to the point of sale or release for sale and because there was no provision made by Chicago for compensation. In the course of his opinion, Mr. Justice Woodbury contrasted land of the federal government devoted to important governmental functions and land held by it in an ordinary proprietary capacity, and said:

"It is not questioned that the land within a state purchased by the United States as a mere proprietor and not reserved or appropriated to any special purpose may be liable to condemnation for street or highways, like the land of other proprietors."⁸¹

Similar judicial expressions continue in the decisions of cases, both federal and state, of later date.⁸²

The validity of the proposition that so-called proprietary lands of the federal government, located within the borders of states, were not protected by any trust, policy or laws against the exercise of state-granted power of eminent domain was challenged in the federal courts for the first time in 1915, in the *Utah Power and Light Company* cases,⁸³ seventy years after the *U. S. v. Railroad Bridge* case was decided. The *Utah Power and Light Company* had located its reservoir, flume, conduit and other equipment on vacant, unoccupied land open for settlement and sale and not appropriated or used by the federal government in the carrying on of any governmental activities. The United States government, through the office of its Attorney General, filed suits in the Federal District Court of Utah to enjoin the continued occupancy of the land. In addition to contending that its occupancy be permitted under certain acts of Congress, the company contended that its power of eminent domain, granted it by the state of Utah, enabled it to appropriate the unoccupied and unused land of the federal government. Upon the *Utah Power and Light Company* cases reaching the Circuit Court of Appeals, District Judge Van

⁸¹ *Ibid.* 194.

⁸² *Supra* note 76.

⁸³ *Utah Power & Light Co. v. U. S.*, 230 Fed. 328 (C. C. A. 8th 1915).

Valkenburg, who rendered the decision for the court, took up the cases we have referred to in the text and notes of this article, and, after adverting to the peculiar facts with which they dealt, the application of the expressions to the cases in hand, and the modifications implied in cases as they approached the present epoch, held against the company, both on jurisdictional grounds⁸⁴ and on grounds which he based upon the trust nature of the property itself. On this latter ground he was able to find a sufficient trust imposed upon the property to enable it to resist the power of eminent domain, though the property was not being used in any governmental activities. On this point he said:

"The public lands of the United States are held by it, not as an ordinary individual proprietor, but in trust for all the people of all the states to pay debts and provide for the common defense and general welfare under the express terms of the Constitution itself. It matters not whether the title is acquired by cession from other states, or by treaty with a foreign country, whether the lands are located within states or in territories, they are held for these supreme public uses *when and as they arise*." ⁸⁵

The Utah Power and Light Company cases were carried to the United States Supreme Court where they were combined with other cases of the same nature and decided in one opinion.⁸⁶ Briefs were filed, in support of the power of eminent domain granted by a state of the Union to reach idle lands of the federal government, by the attorney generals of the states of Utah, Colorado, Idaho, Nevada and Nebraska, through special counsel as *amici curiæ*. However, the decision of District Judge Van Valkenburg remained unshaken and was affirmed by the United States Supreme Court, except that part which did not require payment for what was held to be unauthorized occupancy of the lands in question.

⁸⁴ The jurisdictional grounds will be discussed in Part II of this article. The jurisdictional prohibition does not work both ways. For the reasoning which supports the validity of appropriation of state-owned proprietary lands by the exercise of eminent domain under authority of the federal government, on grounds of constitutional power, see *Stockton v. Baltimore, etc., R. R.*, 32 Fed. 9 (C. C. N. J. 1887).

⁸⁵ *Supra* note 83, at 336. Italics are the author's.

⁸⁶ 243 U. S. 389, 37 Sup. Ct. 387 (1916).

The trust theory of the states, which allow their proprietary land to be reached, and that of the federal government, which at the present time does not, present a difference of construction on what constitutes a public trust which is complete enough to exclude the power of eminent domain. An examination of the line of cases to which reference has been made shows that the state courts hold that such a trust covers only *present uses* of land in governmental activities, and that up to 1915 the decisions of the federal courts revealed the same opinion. However, the present federal holding is that such a trust covers *future uses, when and as they arise*. The state courts hold that the use must be present, definite, actual and active, or a part of a definite plan which is shortly to be put into execution. The federal holding refers to the long run or indefinite future and to undefined purposes not yet planned. These broad future purposes are "to pay debts and provide for the common defense and general welfare".⁸⁷

The position of the federal courts in the Utah Power and Light Company cases is that the state courts' *present use* interpretation of what constitutes a public trust which will exclude the invasion of eminent domain power cannot be applied to land owned by the federal government, lying within the boundaries of states, because the federal courts, regardless of what they appear to have done in the past, will not accept that interpretation, and also because of the jurisdictional reasons not here discussed.⁸⁸ Consistent with this view, the decisions in the Utah Power and Light Company cases held, on the same ground of a trust for the future, that the same kind of unused or idle land owned by the federal government, not located within the borders of states, is likewise not subject to the power of eminent domain. The total effect of the Utah Power and Light Company cases has been to withdraw from the appropriating power of eminent domain all

⁸⁷ Idle lands of the state held, like the unoccupied lands of the federal government, for "settlement and sale", could with equal reason be said to be held in trust "to pay debts and provide for the common defense and general welfare" of the people. The fact that states have granted general authority for state lands to be taken by the power of eminent domain and courts have allowed the power to reach all such idle lands, shows the view of the public policy of these states to be that the exercise of the power of eminent domain over lands not in actual use in governmental activities is a fulfillment of such a trust and not a violation of it.

⁸⁸ *Supra* note 84.

idle land of the United States held for settlement or sale or otherwise not in use for governmental activities, except that land specifically designated by Congress for release.⁸⁹

The portion of Judge Van Valkenburg's decision in the Utah Power and Light Company cases, dealing with a trust for *future use*, seems recently to have found reflection and reassertion in President Hoover's inaugural address. This decision, along with later decisions sustaining withdrawals by the federal government of unused lands "from settlement, entry or other form of appropriation"⁹⁰ is, no doubt, but a part of the record of a public policy of conservation which is a change from the policy which prevailed in the earlier days when the west was being first settled and industrial adventure was allowed freer play on the public domain. It is evident that the decision does not mean that idle, unoccupied or unused lands of the federal government are permanently withdrawn from appropriation by eminent domain, but that such lands will be released from time to time for such appropriation, as the merits and needs of the situation recommend themselves to Congress and its recognized agencies. Exercise of the power of eminent domain on these lands will depend on the will of the federal government and not on the will of the appropriator.

(*Author's Note:* Other trusts and uses and the resistant capacity which they have been held, under certain conditions, to give property against the encroachment of eminent domain power will be taken up in a subsequent article and will close the discussion so far as it relates to Part I, or "The Property." Part II, which deals with "The Power", will follow.)

⁸⁹ The enactment of legislation by Congress, opening up such land to appropriation by the exercise of eminent domain power, is a political declaration that the exercise of eminent domain power over such land is not an interference with the trust imposed on such land "to pay debts and provide for the common defense and general welfare", and the courts cannot go behind such congressional decision, U. S. CONSTITUTION, Art. IV, § 3, cl. 2; *Luther v. Borden*, 7 How. 1 (U. S. 1849). The remedy for those who are opposed to the effects of the Utah Power and Light Company cases would seem to be in the hands of Congress rather than of the courts.

⁹⁰ *Mason, et al. v. U. S.*, 260 U. S. 545, 43 Sup. Ct. 200 (1928); *U. S. v. Midwest Oil Co.*, 236 U. S. 459, 35 Sup. Ct. 309 (1914).