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

Milton Colvin

Dedicated Property

The trust which has been held by all the courts to be impressed upon government-owned property used in governmental activity by the states and the nation, and the trust which the federal courts have declared to be impressed upon idle land owned by the federal government, have been held to protect the property thus impressed from the encroachment of eminent domain power.\(^1\) The basis for this protection has been found to be in solemn constitutional obligations. If this trust character be considered as arising out of contract, such a contract could be nothing less than the great "social compact" which Rousseau says underlies all good government by the consent of the governed. Trusts have been created, which are administered by governmental agencies, which can with much more definiteness be considered to have arisen out of contract relations created by direct offer and acceptance. Of such a nature is a trust which arises out of the accept-

\(^1\) This phase of the subject was discussed by the author in Colvin, *Property Which Cannot Be Reached by the Power of Eminent Domain for a Public Use or Purpose* (1929) 78 U. of Pa. Law Rev. 1. That article also considered property which had the capacity to repel the invasion of the power of eminent domain, by reason of (1) its physical characteristics, (2) the character of certain legal interests involved, and (3) the depth of those interests.
ance by governmental agents, in behalf of the people, of a proffered dedication of land, or other property, with all its terms of reservations, conditions, and restrictions.  

As ordinary contracts are property, they may be taken by the power of eminent domain, and paid for like other kinds of property, with no greater injury done than is necessary for the larger public good. If the exercise of eminent domain results in the failure of performance of a contract, even on the part of the condemnor, the condemnee is in no worse position than when an ordinary individual chooses to exercise his legal power (howsoever immorally) to breach the contract and pay damages. These are the usual situations, and courts of justice have reacted accordingly in their decisions. In referring to the status of contracts under the law of eminent domain, the late Mr. Justice Brewer, of the Supreme Court of the United States, in a notable opinion, said:

"A contract is property, and, like any other property, may be taken under condemnation proceedings for public use."  

In regard to the application of the "contract clause" of the Federal Constitution to eminent domain proceedings, he said, in his decision in the same case:

"The true view is that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property . . . ."

In the case of *Cincinnati v. L. & N. R. R.*, Mr. Justice Lurton of the same court, in reference to the same subject, said:

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2 See cases cited *infra* note 4.


4 *Supra* note 4, at 400, 32 Sup. Ct. at 268.
"If compensation be made, no constitutional right is violated."

It has so frequently been held that neither contracts themselves nor the “contract clause” of the Constitution can bar eminent domain power from reaching the property which it desires or needs for its legitimate ends, that textbooks and encyclopedias have overlooked cases which have excepted from this general rule peculiar situations presented in certain dedication cases, where the invasion of eminent domain power would unconscionably frustrate the fulfillment of the double trust imposed by the terms of the dedication, in behalf of the dedicator and his beneficiaries. It has been held that the granting of the power of eminent domain by the legislature, in general terms, cannot be construed to empower the holder of the power to appropriate trust property arising out of dedication, and that express legislative

8 Cincinnati v. L. & N. R. R., supra note 4; Enfield Toll Bridge Co. v. Hartford, etc., R. R., 17 Conn. 40 (1845); Hyde Park v. Oakwoods Cemetery Ass'n, 119 Ill. 141, 7 N. E. 627 (1886); Terre Haute v. Evansville, etc., R. R., 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189 (1897); Cox v. Revelle, 125 Md. 579, 94 Atl. 203 (1915), L. R. A. [1915] 443; Central Bridge Corp. v. Lowell, 70 Mass. 474 (1885); Backus v. Lebanon, 11 N. H. 19 (1840); Wood v. Millville, 89 N. J. L. 646, 38 Atl. 267 (1916); In re Kerr, 42 Barb. 119 (N. Y. 1854); Pennsylvania Hospital v. Philadelphia, 254 Pa. 392, 98 Atl. 1077 (1916); West River Bridge Co. v. Dix, 16 Vt. 446 (1844); Norfolk, etc., Ry. v. Virginian Ry., 110 Va. 631, 66 S. E. 863 (1910); State v. King County Super. Ct., 77 Wash. 593, 138 Pac. 277 (1914).


10 12 C. J. 993 (1917); 10 AM. AND ENG. ENCY. OF LAW (2d ed. 1899) 1089.

11 In reference to dedication cases, Thompson, J., of the United States Supreme Court, once said: "The law applies to them rules adapted to the nature and circumstances of the case, and to carry into execution intention and object of the grantor; and secure to the public the benefit held out, and expected to be derived from, and enjoyed by the dedication." Cincinnati v. Lessee of White, 31 U. S. 431 (1832).

12 This class of cases should be distinguished from cases where dedication has been without restriction. Cases in this classification should also be distinguished from those cases wherein eminent domain power has been allowed to reach the dedicated property, where the result has not been to deprive the public of a substantial continuation of the same or similar benefits, nor to deprive the dedicator of anything consistent with the trust and his real interest in it. Such a situation is presented in the case of Cincinnati v. L. & N. R. R., supra note 4; cf. Cornwall v. L. & N. R. R., supra note 4.

13 South Western State Normal School's Case, 213 Pa. 244, 62 Atl. 908 (1906); President and Fellows of Middlebury College v. Central Power Corp. of Vermont, 143 Atl. 384 (Vt. 1928); In the Matter of the Petition of the Boston & Albany R. R., 53 N. Y. 574 (1873).
authority to acquire "any real estate required for the purpose of the incorporation" or to proceed against land when "the title is invested in a trustee, not authorized to sell", is not strong enough to warrant the use of eminent domain to appropriate property dedicated to the public use, when it would result in a violation of the obligation of the trust.\textsuperscript{14} Although some of these decisions\textsuperscript{15} have indulged in \emph{obiter dicta}\textsuperscript{16} to the effect that it would take a special act of the legislature, definitely naming the specific property desired, to legalize an appropriation, yet, in cases of the same character, where legislatures have gone to great pains to empower the specific appropriation attempted, courts have disallowed the appropriation, held the law unconstitutional, and declared the legislature without the power thus to authorize the invasion of a dedication trust and a violation of its material or essential obligations.

In a case before the District Court of Appeals of California,\textsuperscript{17} on rehearing by direction of the supreme court of that state, the court emphasized the binding effect of the acceptance of an offer of dedication, as to observing its terms thereafter, and held that the trustees themselves could not violate the trust obligations, nor could the legislature empower anyone to do so. In that case the city of San Diego, under authority from the state legislature, attempted to lay out a highway across land dedicated to park purposes, known as Washington Square. The highway would take a strip of land from each side of the square and a strip, ninety feet in width, off one end of it; comprising, in all, sixty per cent of the square itself. The case came up on the question of the validity of certain lot assessments to help sustain the expense of laying the highway. As to the dedication agreement, the court said:

\textsuperscript{14}In the Matter of the Petition of the Boston & Albany R. R., \textit{supra} note 13.


\textsuperscript{16}For an example of this contrast between \emph{obiter dictum} and decision by the same court and the same judge, \textit{cf.} Codman v. Crocker, \textit{supra} note 15, with Cary Library v. Bliss, \textit{infra} note 31.

\textsuperscript{17}Hall v. Fairchild-Gilmore-Wilton Co., 66 Cal. App. 615, 227 Pac. 649 (1924).
"... it is well settled that if an owner of land has it surveyed and platted with the intended public use clearly indicated, allowing the public to so treat it, the offer to dedicate is sufficient (citing cases). And that no formal acceptance is necessary to complete the dedication of the property represented (citing cases); but use of the land by the public for the purpose to which it was so dedicated is sufficient to show an acceptance (citing cases).

"Under these and many other authorities which it is unnecessary to accumulate, the uses to which Washington Square has so long been devoted would seem to establish its character as a pleasure ground, beyond question, as the purpose for which it was dedicated...

As to the legal effect of the trustees’ attempt to relinquish that portion of the dedicated property needed for the highway, the court said:

"It may be said that the board of park commissioners is entrusted by the city charter with the ‘management and control’ of the park property, and that it appears from the findings that this board requested the city council to adopt the ordinance. However, this charter provision confers no authority upon the board of park commissioners to destroy the subject of its trust, or to devote it to uses other than that of enjoyment and recreation. Its authority is merely that of a trustee, invested with limited jurisdiction, having imposed upon it the duty to protect parks within its management and control, which should at the same time compel such board to protest, rather than instigate, usurpation of authority over parks of the city by another body, or pass its trust property into the street department."

As to the legal effect of the act of the legislature and the ordinance of the city, under the authority of which the taking was attempted, the court said:

"We think it clear that the city council of San Diego was utterly without jurisdiction to take over 60 per cent of Washington Square, a public park, and make of it a highway, thus entirely withdrawing that portion of it from the

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purposes of its original dedication. Numerous authorities sustain the proposition that when land is once dedicated for park purposes it is beyond the authority of a city, or even the Legislature, to withdraw it therefrom.”

In the case of City of Jacksonville v. Jacksonville Ry., decided by the Supreme Court of Illinois, the court had to pass upon the validity of a special act of the legislature empowering the railway company to construct and operate its “railway in, over, across and along any and all the avenues, streets, public grounds, squares and alleys” of Jacksonville, as applied to the appropriation by the company of land of a recreation square dedicated to the public by the original proprietors of the land. The city resisted the appropriation and filed a bill for injunction. The injunction was denied in the trial court, and the case was appealed to the Illinois Supreme Court. After stating that the company claimed the right thus to “frustrate the original purpose for which the ground was dedicated”, Justice Thornton, for the court, denied the existence of the power in the legislature to make such an authorization. Said he:

“A dedication must always be construed with reference to the object with which it was made. The donors never could have intended that this ground should be used as a street.

The power of the legislature to repeal the charters of municipal corporations can not be extended to the right to divert property given to the public for one use, to a wholly different and inconsistent use. The power can not exist to divert property from the purpose for which it was donated. This plat was a solemn dedication of the ground to the corporation, to be held in trust for the use of the public. The donation was made for a certain specific and defined purpose. That purpose is unmistakable. As soon as the plat is recorded the statute declares the trust, that the property shall be held for the uses intended, and for no other. The city has accepted the trust. It must be preserved, or the land must revert to the original proprietors. The city has acted in good faith. It has inclosed, planted with trees and

20 Ibid. 620, 227 Pac. at 651.
21 67 Ill. 540 (1873).
improved and embellished the ground dedicated, and thus maintained the purpose of the donor. Lots abutting upon the square have been purchased and built upon with reference to it. They have also been made more valuable by this open ground in front of them." 22

In holding the attempted appropriation invalid, the court said:

"In this case the attempted use of the public square by the railway company for the track of its road, is a manifest perversion of the trust created and declared; would operate injuriously to the public and the abutting lot owners; would mar the beauty of the ground, destroy it as a place of public recreation, and cannot be justified.

"We are, therefore, of opinion that the railway company should be perpetually enjoined from all attempts to lay down the track of its road through or across the inclosed public square." 23

It has been contended that the general rule that the legislature has no power to divert the use of dedicated property 24 should not be applied in those cases where the diversion is sought to be accomplished by the employment of eminent domain power, because those whose interests are injured are recompensed in money for what is taken. This argument was presented to the Supreme Court of Illinois in the case of South Park Commissioners v. Montgomery Ward. 25 The South Park Commissioners of Chicago had lost in suits involving the question of their power, under authorization of the legislature, to erect buildings in Grant Park, contrary to the terms of the dedication of the land for park purposes. It was held in these suits that the legislature could not authorize the breach of the accepted terms of the dedication. No attempt had been made to use the power of eminent domain. The legislature passed an act authorizing the South Park Commissioners to erect a museum and a public library in the park, and provided for condemnation, by the power of eminent domain, of "any private right, easement, interest or property

22 Ibid. 543.
23 Ibid. 545.
24 See cases cited infra note 100; 18 C. J. 127 (1919).
25 248 Ill. 209, 93 N. E. 910 (1910).
right to have the park remain open or vacant”. Acting under the added authority of the eminent domain act of the legislature, the Park Commissioners again started proceedings toward erecting the museum, to be known as the Field Museum of Natural History, and the library, to be known as the John Crear Library. This time they filed petitions to condemn and pay for the rights and easements, held by private individuals, to have the park kept free from such structures under the terms of the dedication. Condemnation proceedings were resisted by owners of lots opposite the park, protected by the terms of the dedication, and the case reached the Illinois Supreme Court. The majority opinion was adverse to the petitioners. The minority opinion was that the dedication contract could not stand in the way of the exercise of the power of eminent domain. After stating that eminent domain might attempt to reach property for a recognized public use and yet fail because, among other reasons, the public use might be a “subversion of natural or constitutional right”, Cartwright, J., referred to the previous decisions and said:

“If the legislature had no power to change the uses of Grant Park and to disregard the terms of the dedications by authorizing the erection and maintenance of buildings in the park, there could be no condemnation of the rights of the defendants that the park should be kept free from buildings, whatever the nature of such rights might be. It is not thought that the state can divest itself of the right of eminent domain to take private property for public use, but the settled law of this state is that if the owner of private property offers to donate it to the public for a specified public use, and the offer is accepted and the property devoted to such use, the State cannot change the use and apply the property to some other use inconsistent with the dedication.”

Referring to the argument that condemnation and compensation gave a stronger power to interfere with the trust obligation

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In Le Clercq v. Gallipolis, 7 Ohio 218 (1835), the fact that ample payment was to be received was not allowed to neutralize the illegality of a special legislative enactment empowering the leasing of the dedicated lands for uses which would violate the trust imposed by the terms of the dedication. Decisions have held the same as to sale and payment. See cases digested in Note (1910) 25 L. R. A. (n. s.) 980.

Supra note 25, at 306, 93 N. E. at 913.
arising out of the terms of the dedication agreement, Justice Cartwright said:

"It is urged against the application of the doctrine of *res judicata* that the question of the right to erect buildings in the park upon ascertaining the compensation to be paid to Ward was not considered or decided in that case or the subsequent cases. That is true, but the basic question whether the legislature could authorize the construction of buildings in the park, which lies at the foundation of the right to condemn, was determined. If the legislature had no right to erect the buildings, which are now alleged to be a public use, they could not provide for taking the right of any person or appropriating his property for such use. To say that having acquired the right to ascertain and pay the damage to the property of Ward gives the right to change the use and violate the restriction which did not before exist would be reasoning backward. A superstructure does not support the foundation, and a lawful public use lies at the very foundation of the right to appropriate property or property rights." 28

As previously stated, dedications for public use involve a double trust—a trust in behalf of the dedicator, and a trust in behalf of the portion of the public for whose use or benefit the dedication is made. The state, or its subdivision, has not been allowed by the courts to occupy the inconsistent position of preserving the trust and at the same time violating it. This is a fundamental reason why, in such cases, courts have held that neither a state nor a municipal legislature has the police power, under the Constitution, to violate the obligations of what amounts to the dedication contract, even for a recognized public use or purpose. 29 The *South Park Commissioners v. Montgomery*

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28 Supra note 25, at 309, 93 N. E. at 914.
29 Trustees of Watertown v. Cowen, 4 Paige 510 (N. Y. 1834); Commonwealth v. Alburger, 1 Whart. 469 (Pa. 1836); Pomeroy v. Mills, 3 Vt. 379 (1830); Abbott v. Mills, 3 Vt. 521 (1831); Adams v. S. & W. R. R., 11 Barb. 414 (N. Y. 1851); Fletcher v. Peck, 6 Cranch 87 (U. S. 1810); Godfrey v. City of Alton, 12 Ill. 29 (1859); Haight v. City of Keokuk, 4 Iowa 190 (1856); Grant v. City of Davenport, 18 Iowa 179 (1865); Le Clerq v. Trustees of Gallipolis, supra note 26; Common Council of Indianapolis v. Croas, 7 Ind. 9 (1855); Rowan's Ex'r v. Portland, 8 B. Mon. 232 (Ky. 1847); Augusta v. Perkins, 3 B. Mon. 437 (Ky. 1843); Sedgwick, Constitutional and Statute Law (2d ed. 1874) 343.
Ward case held that this fundamental reason, which prevents police powers from frustrating the trust, is equally applicable and effective in preventing eminent domain power from violating the trust and reaching the dedicated property, even for a recognized public use or purpose. If the reasoning of Justice Cartwright be sound, it would seem that a still further step could be taken in legal reasoning, leading to the conclusion that the decision of the Dartmouth College Case should apply as well to this class of eminent domain power cases as it has been held to apply to police power cases where attempts have been made to frustrate trust obligations incurred by government, its subdivisions, or agencies. The transition was made by the Massachusetts Supreme Court in the Cary Library Case.

In the Cary Library Case, the legislature of Massachusetts created a close corporation and authorized it to acquire by eminent domain all the books, pamphlets, funds, and property of the Cary Library, situated in the town of Lexington, by the exercise of the power of eminent domain. The trustees of the Cary Library refused to obey a vote of the people of the town to release the property when it was moved against by the corporation under the legislative authorization, on the ground that the property was trust property, coming into their hands as designated trustees as a result of a dedication which restricted the management to them. The newly-formed corporation petitioned the Middlesex County Court for a writ of mandamus to compel delivery, and the court reported the case to the Massachusetts Supreme Court, "for the opinion of the full court". The evidence revealed that Maria Cary had written a letter to the selectmen of the town, proposing a gift of money for the foundation of a library for the benefit of the people of the town, upon condition that the selectmen and the school committee of the town, together with the help of the local settled minister, should invest the funds received from her and expend the accruing interest, in their best discretion.

\[53\] Ibid. That portion of the decision which referred to the impotency of eminent domain to reach money and promissory notes, and to the lack of necessity of change of administration, is treated elsewhere in this article.
for such books as they should deem suitable, and should supervise the library and pass such rules and regulations for its management as they should consider conducive to the public interest. At a town meeting the people of the town voted to accept her proposition and comply with all the conditions annexed to the gift. The funds were accordingly furnished and the library established, and, under the same arrangement, she added from time to time to the original amount. The court was of the opinion that Maria Cary placed special confidence in those occupying the official positions of selectmen and school committee and the settled minister; and that their administration of the library was a very important condition of the trust, which would be frustrated by allowing eminent domain power to throw the property and management into the hands of the newly-established corporation, whose board of directors had the power to withdraw from the original trustees all their original power and activities. The opinion of the court was delivered by Knowlton, J. In regard to the application to the case of the provision of the Federal Constitution prohibiting the impairment of the obligation of contracts by state laws, he said:

"The acceptance by the town of Maria Cary's proposition contained in her letter created a contract, which was executed on her part by the payment of the money, and which continued binding on the town and the trustees as to their conduct in reference to the charity. Prior to the decision in Dartmouth College v. Woodward, 4 Wheat. 518, it was uncertain what construction would be given by the Supreme Court of the United States to the word 'contracts' in Section 10 of Article 1 of the Constitution of the United States, which provides that no State shall pass any 'law impairing the obligation of contracts.' It was settled by that case that the word is to be interpreted broadly and liberally, so as to include all obligations which should be enforced and held sacred growing out of agreements, express or implied, for which there is a valuable consideration. There can be no doubt that the money of Maria Cary was paid under a contract, within the meaning of that word in this clause of the Constitution. The principles by which the courts of England and of this country have been controlled, in the decisions to which we have referred, are those rules of common right which protect men in their transactions with one another. Among them is that fundamental one which is em-
bodied in this provision of the Constitution. If it applies to a change in the administration of a charitable trust such as has been attempted in the present case, it controls the action of the Legislature as effectually as that of the courts.”

In holding that the contract clause of the Constitution was applicable to the situation and prevented the acquisition by the corporation of the property in question by the power of eminent domain, Justice Knowlton said:

“We are of opinion that the statute which we are considering impairs the obligation of the contract under which this charity is administered. The principles which lie at the foundation of the Dartmouth College case, and of other similar decisions, are decisive of the question before us. Louisville v. University of Louisville, 15 B. Mon. (Ky.) 642. Dartmouth College v. Woodward, 4 Wheat. 518. Allen v. McKeen, 1 Sumner, 276. New Gloucester School Fund v. Bradbury, 2 Fairf. 118. Regents of University of Maryland v. Williams, 9 Gill & J. 365, 408. Norris v. Abington Academy, 7 Gill & J. 7. Brown v. Hummel, 6 Penn-St. 86, 96. The law laid down in these cases, that a charter establishing an eleemosynary corporation is a contract which cannot be changed by the Legislature without the consent of the parties to it, is a mere extension of the doctrine which gives a similar effect to the written statement of a scheme that is made the foundation of donations to unincorporated trustees of a public charity.”

\[33\] Ibid. 375, 25 N. E. at 94.

\[34\] Ibid. 378, 25 N. E. at 95. Mr. Justice Knowlton expressed some anxiety, in his decision of the Cary case, as to the reversion of the park property to the dedicators, if its use were allowed to be diverted from the terms of dedication. In the case of Porter v. International Bridge Co., 200 N. Y. 234, 93 N. E. 716 (1910), the Court of Appeals of New York found a way to avoid holding that the taking of dedicated property by eminent domain for another purpose was an invasion of the obligation of the trust under the situation presented, by holding that the voluntary acquiescence on the part of trustees, administrators, and the public as \textit{cestui que trust} to the taking of the dedicated property by a corporation with power of eminent domain, was an abandonment of the dedicated property and the trust, and that it could then be said to be taken by the power of eminent domain, without violating any trust. Some of the cases which we have discussed, where either the trustees or the beneficiaries have gone into equity to restrain eminent domain condemnation, could have been decided against the condemnor on the ground that the prayer for injunction was an appeal to the courts to prevent a forced abandonment of the dedicated property, resulting in its falling back into the hands of the dedicator as the true and full owner.
Whether one agrees in all particulars with the reasoning of this decision, or with South Park Commissioners v. Montgomery Ward and other decisions to which we have referred, it is evident that more decisions arriving at the same result would go a long way toward reducing the present suspicion and lack of confidence which prevents many well-disposed persons from donating valuable property to states and municipalities, for the benefit of the people.

Substituted Ownership and Identical Public Use

It has been decided repeatedly that the power of eminent domain is such a constituent attribute of sovereignty that the government cannot grant it away beyond its power of recapture, and that devotion of property to a public use does not save it.

There is no reason why this ground should not be a part of any petition to enjoin eminent domain condemnation against dedicated property. It appears to be a valid basis for a prayer for relief through a restraining order.

When its sense of right is shocked, a court will sometimes go to great lengths to find legal justification for a decision which is just to the party wronged. An example of a decision in the opposite direction to that of Porter v. International Bridge Co., is that of Jersey City v. National Docks Ry., 55 N. J. L. 194, 26 Atl. 145 (1893), where a contract prohibiting the exercise of eminent domain was indirectly sustained by the aid of a statute, which in other states has been interpreted as having been passed for another purpose altogether. Many of the states in the Union have statutes requiring an unsuccessful attempt to purchase as a condition precedent to the institution of eminent domain proceedings. This has been uniformly construed by the courts as a precautionary measure, to prevent unnecessary expense and litigation.

2 Lewis, op. cit. supra note 9, § 497, n. 1. In these states the condemnor has been allowed to take, by eminent domain, property which he agreed not to take, in a previous purchase or other agreement. Ibid. § 416. However, the Supreme Court of New Jersey has given to this statute what must be considered a novel slant, as compared with judicial interpretation of the same type of statute in other jurisdictions. In the case of Jersey City v. National Docks Ry. the decision of the court, and the pertinent facts, were summarized in the syllabus, as follows: "Where a railroad company acquires a right of way for the construction of a bridge over city property by contract with the city, conditioned that the right of way must be used so as not to interfere with the city's right to open a street under such right of way, the company cannot thereafter repudiate its agreement, and acquire a right of way by condemnation, as inability to agree with the owner is a jurisdictional fact necessary to legalize condemnation proceedings; Revision, p. 928, § 100, authorizing condemnation proceedings only where the company cannot agree with the owner for the use or purchase of lands."

* Richmond, etc., R. R. v. Louisiana R. R., 13 How. 71 (U. S. 1851); West River Bridge Co. v. Dix, 6 How. 597 (U. S. 1848); Charles River Bridge v. Warren Bridge, 11 Pet. 420 (U. S. 1837); New York, etc., R. R. v. Boston, etc., R. R., 36 Conn. 156 (1869); Little Miami, etc., R. R. v. Dayton, 23 Ohio St. 510 (1872); Giesy v. Cincinnati, etc., R. R., 4 Ohio St. 308 (1854); Southwest Pennsylvania Pipe Lines v. Directors of the Poor, 1 Pa. Co. Ct. 460 (1886).
from being taken away from its owners by the force of its invasion. This being the case, property acquired by the exercise of eminent domain power and strictly devoted to the authorized purpose for which it was condemned can be taken away from the first taker by another who has been adequately armed by the legislature with eminent domain power to do so, and, likewise, it is possible to take property received through grant or franchise from the government and used in fulfillment of its public purpose obligations, and property voluntarily devoted to public use or purpose. All must submit to acquisition through the exercise of the power of eminent domain, upon the principle of the prerogative power of sovereignty. If this were not so, it has been said by a learned judge, "great public improvements rendered necessary by the increasing wants of society in the development of civilization and the progress of the arts might be prevented".

However, the "due process" clause of the federal and state constitutions enunciates another principle in behalf of the individual property owner, and, when it has come in conflict with the principle of the prerogative of sovereign eminent domain, the latter sometimes has had to give way. It has been held that eminent domain power cannot be employed to take property by the kind of undue process of law whose description has found expression in the classical example of "taking the property from A to convey it to B". The fact that the taking has behind it the prestige and power of eminent domain, and that the property is to be paid for by ample compensation, has not been allowed to impair the integrity and applicability of this ancient example. In an early case before the Supreme Court of the United States, Mr. Justice Story said:

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56 See the list of cases in 20 C. J. 599, n. 77 (1920).
58 COOLEY, CONSTITUTIONAL LIMITATIONS (6th ed. 1890) 337.
59 Starr Burying Ground Ass'n v. North Lane Cem. Ass'n, 77 Conn. 83, 58 Atl. 467 (1904). This does not include certain dedicated property devoted to public use under trust conditions previously referred to in this article.
60 Bigelow, J., in Central Bridge Corporation v. Lowell, supra note 8, at 482.
61 West River Bridge Co. v. Dix, supra note 35, at 537.
“Although the sovereign power in free government may appropriate all the property, public as well as private, for public use, making compensation therefor, yet it has never been understood, at least never in our Republic, that the sovereign power can take the private property of A and give it to B by the right of eminent domain.”

Mr. Justice Story’s statement, made in 1837, very well expresses what should be the correct rule today. The word “private” refers to ownership and not to use, so that if A, as an individual or corporation, is devoting his or its property to a public use, it would still be “private property” under the relations which we are discussing. Under the above rule it could not be taken away from A merely in order to give it to B, and it has been held that this could not be done even though B was attempting to acquire it by eminent domain power for a recognized public use or purpose, which was the same use or purpose to which A had been devoting the property. This would amount to nothing more than the compulsory change of hands in the property and would result in eminent domain power’s taking it from A merely in order to give it to B. Property in public use cannot be taken to be used for the same purpose and in the same manner. This being a constitutional prohibition, under the due process clause, it is not only a prohibition on the one to whom the power of eminent domain has been delegated by the legislature, but it is a restriction upon the legislature itself, and any law authorizing generally or specifically such a taking is unconstitutional and should so be held.

Charles River Bridge v. Warren Bridge, supra note 35, at 642.
Lewis, op. cit. supra note 9, § 440.
Lake Shore and Mich. So. Ry. v. Chicago & Western Ind. R. R., 97 Ill. 506 (1881); West River Bridge Co. v. Dix, supra note 35.
See cases cited infra note 48.
West River Bridge Co. v. Dix, supra note 35; Starr Burying Ground Ass’n v. North Lane Cem. Ass’n, supra note 39; Marsh Min. Co. v. Inland Empire Min., etc., Co., 30 Idaho 1, 106 Pac. 1128 (1910); Suburban R. R. v. Metropolitan West Side El. R. R., supra note 46; St. Louis, etc., R. R. v. Belleville City Ry., 158 Ill. 390, 41 N. E. 916 (1895); Chicago West Div. Ry. v. Metropolitan West Side El. R. R., 152 Ill. 519, 38 N. E. 735 (1894); Chicago & N.
“Where there is no change in use there cannot be a change in ownership under the law of eminent domain.” 49

This rule against substituted ownership and identical use found expression eighty-three years ago in a decision of the Supreme Court of the United States, to the effect that the legislature cannot take the property of A, such as a toll bridge, and transfer it to B, to be used as a toll bridge by B in the same manner as it had previously been used; 50 and state courts have since followed the same rule in similar situations. It was accordingly held in the Cary Library Case, 51 that, independently of the trust invasion, which we have discussed, the special legislative act authorizing a corporation to take over the library property from the old trustees, by exercise of the power of eminent domain, was unconstitutional, because the very legislative act itself provided that the property in the hands of the new trustees “was to be held and applied by the corporation in the same manner as if held by said trustees”. 52 In the case of the Oregon Cascade R. R. v. Baily, 53 the legislature did not provide that the railroad property to be condemned should be used for the same purpose and in the same manner as it was in the hands of the condemnee, but the court held that, if as a matter of fact such was the case, that was sufficient to overcome the force of eminent domain and protect the property from being taken by its power, under the rule of decision in such situations, that courts may look to what happens or is attempted under a legislative act, as well as to the legislative act itself.

In the city of Chicago a street railway secured, partly by purchase and partly by eminent domain, a right of way to connect

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50 West River Bridge Co. v. Dix, supra note 35.
52 Ibid. 379, 25 N. E. at 95.
53 Supra note 48.
its track with the tracks of a second company. Under authority of a city ordinance the second company brought proceedings to condemn the same right of way, which would also afford it better connections with a third company. The condemnation was resisted and the case reached the Supreme Court of Illinois,\textsuperscript{54} where Cartwright, J., in the course of the opinion for the court, said:

"The purpose to which the petitioner proposes to devote the property is in law precisely the same as the purpose for which it is already held by the defendant. To vest title in the petitioner would be nothing more or less than a mere change of ownership for the same public use, so that the incline and tracks would be owned by the petitioner, rather than the defendant." \textsuperscript{55}

He then stated the law, in the short phrase which has found a permanent place in legal literature:

"Where there is no change in the use there cannot be a change in ownership under the law of eminent domain." \textsuperscript{56}

Most cases, of the character which we are discussing, are cases where the land moved against by eminent domain is already devoted to the same public use to which the condemnor wishes to put it. It has been held, however, that land not yet put to such use, but held as part of a plan which contemplates its being put to such use, is equally immune from condemnation, upon a "showing of a reasonable necessity for use in a reasonable time".\textsuperscript{57}

In referring to such a situation, a decision of the Supreme Court of Washington says:

"We have also held that property owned by a corporation, 'and not actually devoted to a public use' may be acquired by condemnation . . . The right to condemn in a particular case depends upon all the attendant facts and circumstances . . .

\textsuperscript{54} Suburban R. R. v. Metropolitan West Side El. R. R., \textit{supra} note 46.
\textsuperscript{55} \textit{Ibid.} 222, 61 N. E. at 1091.
\textsuperscript{56} \textit{Ibid.} 223, 61 N. E. at 1092; 20 C. J. 600 (1920).
\textsuperscript{57} State v. Spokane County Super. Ct., \textit{supra} note 48, at 27, 145 Pac. at 1001.
"It has become the settled law of the state that a public service corporation may acquire property by condemnation or otherwise in reasonable anticipation of its future needs. When property has been so acquired, it is deemed devoted to a public use, although not actually devoted to such use, until there has been an abandonment of the intention so to use." 58

The syllabus of the case summarizes the holding of the court as follows:

"A corporation constructing a hydroelectric power plant for a public purpose cannot condemn a power site owned by another public utilities corporation which intends to construct thereon a similar power plant, since property owned by a corporation and devoted to a public use cannot be condemned by another corporation for use in the same manner and for the same purpose." 59

As neither party in such cases has yet actually engaged in the contemplated activity, and as the party whose property is being moved against has already gone far enough to acquire it for the contemplated use, this decision seems to represent the nearest approach to justice possible in such situations. A harder case would be presented if the condemnor was already engaged in the public purpose activity in question and needed more land.

A subsequent case before the same court presented a stronger case for the plaintiff, but the holding of the land for future use was decided to be sufficient to block eminent domain from reaching it. 60 The statutes of Washington gave the Board of Land Commissioners the power to grant the right of flooding state lands for electric power purposes, for public use, to any person or corporation; and one Tilden and his wife secured such a grant with respect to certain state lands. Unlike the defendants in the previous case, they were not in the public utility business, with a going concern. They did not put the right, or easement, to any use, and a power company brought proceedings to condemn it for im-
mediate use. The power company showed itself to be a corporation with power of eminent domain, stock fully subscribed, annual license fee paid, possessing lands for the dam site, and works already laid out and surveyed; and it was ready to go ahead with the business of generating and furnishing power to the public, upon acquiring the needed right to overflow state lands, which was sought by the proceedings. It contended that defendants' unused "naked right should be allowed to be condemned by the eminent domain proceedings". After stating the rule against allowing condemnation for the same use or purpose, the court held that, upon a showing to the Board of Commissioners that the defendants had failed to use the right granted them, it might be revoked, but, until revoked, it was immune from being taken by the power of eminent domain, although not put to use.

In Idaho, under its constitution, the necessary use of lands for mining is a public use, and land may be acquired for such use by eminent domain. One mining company, which was a going concern, successfully engaged in mining commercial ore, was allowed by the local district court to take land, which it needed for the continuation of its industry, from another mining company. It needed the land for tramways, storage, dumps, etc. On appeal, the Idaho Supreme Court reversed the judgment allowing the condemnation, because in its opinion the evidence showed the taking was in order that the land might be "used in the same manner and for the same purpose" for which it was "in good faith being held". The court so held, although the land was not in use and its future use was not certain, but rested upon the contingency of the defendant's discovering ore in paying quantities, which it had not done on the property of which this was a part. The court said:

"It appears that appellant and its predecessors have expended about $20,000 in the development of the Never Sweat claim; that while ore in paying quantities has never been discovered some ore has been found, and that appellant is still prospecting, in good faith, and expending its money in an effort to develop a mine, and also that if commercial ore in

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paying quantities is discovered in the Never Sweat claim, all
the level ground sought to be condemned will be necessary
\( * \)
to its owner in its development and operation for the same use
to which respondent seeks to appropriate it.” 62

Chief Justice Sullivan dissented from the majority opinion, on
the ground that the land in question only had a “possibility” of
future public use and should therefore submit to acquisition by
eminent domain. The case probably illustrates the extreme limit
to which any court would be likely to go in protecting property
from a change of hands where there is no change of use. The
dissenting opinion may find greater favor in the minds of some
judges and lawyers. 63 However, when the gambling nature of
the whole mining enterprise is taken into consideration, especially
that part which involves the discovery of ore in a paying quantity,
a liberal view of what constitutes “held for use” can be approved
on the ground of justice to the adventurer who takes such large
risks of failure.

In the case against Tilden and his wife, 64 which we have
discussed, counsel for the defendants successfully presented an
argument for the preservation of the grant, which would be
equally applicable in any case where the condemnor was operating
under a general power of eminent domain, rather than under
a special power covering the specific property moved against. That
argument was that, where property is acquired through a grant
or power from the state, for a specifically authorized use or pur-
pose, it could not have been intended that the state’s power should
be used by an individual or corporation to take that same property
away again and bestow it on another for the identical use or pur-
pose, for this would be an inconsistent exercise of sovereign
power. The trial court adopted this theory as applied to the
grant, and was confirmed in so doing by the Washington Supreme
Court, in the following language:

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62 Ibid. 7, 165 Pac. at 1129. (Italics are the author’s.)
1890), where the court said with regard to a defense of “future use”, “this is
but a prospective dedication which may or may not ever be made”, and allowed
the condemnation.
64 State v. Mason County Super. Ct., supra note 48.
"We cannot believe that the state in the exercise of its sovereignty in dealing with this matter would contemplate the grant of the right through one agency and the taking away of the same right through another agency giving it to someone else." 65

It appeared in that case that the petitioner and defendant were rivals, and that both had applied to the Board of Land Commissioners for the grant of the same right, and that the grant had been denied the petitioner and given to the defendant. In the field of business, cases before the courts often present the situation of one business rival attempting to condemn by eminent domain the property of the other, in order to devote it to the same purpose, with the object in view of destroying or crippling the competitor or taking a certain amount of business away from him. It has never been the policy of our government to allow its agencies to be used by one business competitor to injure another.66 When this is shown to be the motive, the question of public policy, as well as of service to the public, enters and gives an added support to the rule of disallowing a change of ownership when there is no change of use. Justice Valliant of the Supreme Court of Missouri, in dissenting from a majority opinion which allowed a taking by eminent domain power, expressed the desirability of courts looking into the motive of rival concerns in such cases, as follows:

"The evidence in the record showed to the satisfaction of the trial court, and it shows to my satisfaction, that this is a controversy between two rival coal companies, wherein one, having assumed for the purpose the legal garb of a railroad corporation, is endeavoring to shut its rival from the market and reduce it to a dependency." 67

After reviewing the evidence supporting this conclusion, he said further:

65 Ibid. 500, 169 Pac. at 995.

66 "No man, nor corporation, or association of men, have any other title to obtain advantages or particular and exclusive privileges distinct from those of the community, than what arises from consideration of services rendered to the public." MASS. BILL OF RIGHTS, art. 6, as quoted by Story, J., in Charles River Bridge v. Warren Bridge, supra note 35, at 606.

67 Kansas & Texas Coal Ry. v. North Western Coal, etc., Co., supra note 48, at 327, 67 S. W. at 693.
"But the answer to all this is that the charter is conclusive, and the courts are not only powerless to grant any relief, but must even suffer themselves to be used to effect the gross wrong and abuse. If that is the law we are in a bad way. If courts are so encrusted in form that they are not only powerless to do right, but must even yield themselves as instruments to effect a wrong, we are far from perfection. I do not believe that that is the law." 68

In the first Washington power case, previously discussed, 69 one power company was trying by eminent domain to oust another power company from a desired location. In the street railway case, 70 the purpose of the attempted condemnation was to connect the condemnor with a rival of the condemnee. The syllabus of the latter case, on this point, summarized the decision of the court as follows:

"Where a street railway company has procured a right of way to connect its track with the track of another company, the latter cannot condemn and take such right of way to connect its track with a rival company." 71

In the Marsh Mining Company Case, to which we have referred, 72 the defendant mining company contended that if the plaintiff mining company were allowed to take the land moved against "then the development of the remaining portion of its property might as well cease". The part of the decision of the court, in response to the evidence supporting the defendant's contention in this respect, reads as follows:

"It was not the intention of the framers of the Constitution nor of the Legislature, that the power of eminent domain be so invoked that one mine will be developed and thereby another mine be destroyed, or that one mine owner would be enriched and another impoverished. The aid of eminent domain is extended to the industry, not to the individual." 73

68 Ibid. 528, 61 S. W. at 694.
69 State v. Spokane County Super. Ct., supra note 48.
71 Ibid.
72 Supra note 48.
73 Supra note 48, at 10, 165 Pac. at 1130.
In the state of Washington, boom companies are public service companies and have authority to condemn property for their use by eminent domain. In a condemnation proceeding by one boom company against another, to gain the latter's tide lands, the order of condemnation was denied and the case came before the supreme court of the state for review on a writ of certiorari. In affirming the decision below, the court, through Mount, J., said:

"In this case, it appears that the relator seeks the land of the Nicomen Boom Company to be used by the relator for the same purpose, and in the same locality, and in the same manner, that it is already being used by the Nicomen Boom Company, and necessarily in competition with that company. It is plain that one public service corporation may not condemn the property of another public service corporation to be used for the same purpose, at the same place, and in the same manner it is already being used, when its use is necessary for the other corporation." 74

The property was not held in the name of the boom company, but in the name of the third party, and it was contended that this fact made it subject to condemnation. As to this contention, Mount, J., said:

"The fact that the record title to the land stands in the name of Mr. McGowan is of no importance when it is shown that he is merely a trustee, and that actual possession is in the Nicomen Boom Company, and that company is using the property for a public service, and the property is necessary to serve the purpose of its business which is the same as that of parties seeking to condemn." 75

Since rivalry in business is seldom confined to two parties, the effect of allowing one, by this use of eminent domain power, to take property away from the other, upon which the latter's business is based, would be to encourage the continuation of the practice by other rivals, to the great injury of the stability of business investments. The language of Justice Upton, in the

74 State v. Pacific County Super. Ct., supra note 48, at 133, 117 Pac. at 756. Italics are the author's.
75 Ibid.
condemnation case of *Oregon Cascade R. R. v. Baily*, covers the situation of rival companies, as follows:

"If a railway company could condemn and appropriate the ground and track of another similar corporation, so as to deprive the first of its use, a third company could immediately proceed in the same manner against a second. The proposition needs but to be stated to show its impropriety." 

In that case the plaintiff railroad company was trying to appropriate lands from the defendant railroad company for the same use and purpose, and contended that the defendant company was withholding it to shut off competition. On this point Justice Upton said:

"The defendant cannot hold lands it does not need merely to prevent competition from a rival company. Nor can the plaintiff take from the defendant what the defendant does need in its business on any claim that the defendant creates a monopoly." 

In a similar case, in Minnesota, where one railway tried to take the property of the other for the same use, under the general power of eminent domain, the supreme court of that state, in deciding against the power, said:

"If one railroad could, at its option, condemn the property of another railroad company, we do not see why such proceedings could not be continued as often as each different company desired. The law of eminent domain does not sanction any such absurdity, especially where the public use sought is identical with the one already enjoyed." 

There is another reason, probably more fundamental, for the rule that "where there is no change in the use there can be no change in ownership under the law of eminent domain". This reason is to be found in the fact that the power of eminent do-

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*Supra* note 53, at 175.


*Minneapolis and Western Ry. v. Minneapolis and St. L. Ry.,* 61 Minn. 502, 509, 63 N. W. 1035, 1038 (1895).
main "has its foundation in the imperative law of necessity which alone justifies and limits its existence",\textsuperscript{7} and it is difficult to find a necessity for a change of ownership without a change in the application of the property to a public use or purpose. In each of the cases we have taken up, the condemnor alleged the necessity of appropriation in order to carry on its public activities. In each of them, except the Suburban R. R. Case, the court accepted the evidence of the condemnor's necessity as proof, and based its decision on that assumption. In the second power company case, the court said of the corporation seeking to acquire the land by condemnation, "It cannot develop its plant without acquiring the relator's land",\textsuperscript{8} and in the Marsh Mining Company Case, Morgan, J., in the course of the majority opinion, said:

"We are convinced from a careful examination of the evidence that for the convenient and economical development and operation of its mine the use of the land is needed, and that a reasonable necessity exists for the taking. If a reasonable, although not an absolute, necessity exists to take property for a public use, it is sufficient."\textsuperscript{9}

In the Suburban R. R. Case, Cartwright, J., who gave the opinion of the court, doubted the real necessity of the railroad company's using the route chosen, but said:

"Even in a case where there was no other way to build a railroad, it was held that one corporation could not take any part of the right of way of another company, except for the purpose of a connection or intersection. Illinois Cent. R. Co. v. Chicago, B. & N. R. Co., 122 Ill. 473, 13 N. E. 140. In that case there was an attempt to condemn for railroad purposes a part of a right of way between the rocky buffs and the eastern bank of the Mississippi river, where there was a physical impossibility of building a road elsewhere."\textsuperscript{10}

\textsuperscript{8} State v. Spokane County Super. Ct., \textit{supra} note 48, at 22, 145 Pac. at 1000.
\textsuperscript{9} \textit{Supra} note 48, at 7, 165 Pac. at 1128.
\textsuperscript{10} \textit{Supra} note 46, at 224, 61 N. E. at 1092.
In each of these cases it was pointed out that necessity to the condemnor is not sufficient. As stated in the Marsh Mining Company Case, "The aid of eminent domain is extended to the industry, not to the individual"; and, as brought out in the other cases, it is the "public necessity", and not the necessity of the condemnor, which is the paramount test. Looking at the class of cases where the proposed use is the same as the existing use, the decisions against the exercise of eminent domain power will be justified on the ground that there can be no public necessity for a change of ownership without a change of use. When the legislature specifically designates the exact property which it authorizes to be taken, this carries the implication that the taking is necessary. However, the legislature itself is limited by the constitutional requirement of due process, and in such cases the question whether there be in fact a public necessity is subject to judicial review. It will be recalled that in the Cary Library Case the legislature authorized a corporation to take the library property from the board of trustees, and administer it "in the same manner as if held by the said trustees". In addition to the reasons which we have discussed, the court in that case based its decision upon a consideration of "public necessity". Said Knowlton, J., in concluding the opinion of the whole court:

"The question arises whether taking property from one party who holds it for a public use by another to hold it in the same manner for precisely the same public use can be authorized under the Constitution. Can such a taking be founded on a public necessity? It is unlike taking property for a public use which is already devoted to a different public use. There may be a necessity for that. In the first case the property is already appropriated to a public use as completely in every particular as it is to be. Can the taking be found to be for the purpose which must exist to give it validity? In every case it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity. If it is of that nature, it is for the Legislature to say whether in a particular case the necessity exists. We are of opinion that the proceeding authorized by the Statute was, in its nature, merely a transfer of property from

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\[\text{Supra note 48, at 10, 165 Pac. at 1130.}\]
one party to another, and not an appropriation of property
to public use nor a taking which was, or which could be
found by the Legislature, to be a matter of public necessity
(citing cases)."  84

Justice Mount stated the public necessity rule in a few words in
the Boom Company case, by quoting from a previous decision of
the court regarding property in public use. Said he:

"... 'it can not be taken to be used for the same purpose
in the same manner, as that would amount simply to a taking
of property from one and giving it to another, without any
benefit or advantage whatsoever to the public—an act which
the legislature is powerless to authorize.'"  85

Probably, in the light of the typical cases which we have
discussed, we could summarize the law of the decisions to be
that property devoted to a public use or purpose cannot be taken
by the power of eminent domain, to be devoted to substantially
the same use or purpose in other hands, for the reason that:
(1) to permit the compulsory process of eminent domain to be
thus employed would result in wresting property, by forced sale,
from its owner, against his will, merely to turn the property over
to another, thus depriving the owner of that protection which
organized governments are established to secure, and which fur-
nish one of the principal justifications for their existence; (2) it
would be an inconsistent and mutually contradictory exercise of
sovereign power; (3) it would be lending government power
and machinery to unfair competition and trade practices in the
field of business and industry; and (4) it could not be supported
by any justification of public necessity.

It is evident that the "same" use or purpose does not mean
in detail, but refers to the general aspects or larger outlines of the
use or purpose. For example, in the Marsh Mining Company
Case, the condemnor needed the land of the condemnee for tram-
way, storage, dumping, etc., purposes. There was no showing
that the condemnee was using the same land, or ever would use

85 State v. Pacific County Super. Ct., supra note 48, at 133, 117 Pac. at 756.
it, for these distinct purposes. Nevertheless, they were both engaged in the same kind of "mining business," and the condemnor wanted to take land necessarily used in the mining business, to devote it to the same business, and it was held that this constituted the "same" use or purpose. On the other hand, the mere fact that the condemnor is engaged in the same business does not prevent the condemnor from taking property from a condemnor who is also engaged in the same business, else one railroad company could never cross another railroad company's tracks with its tracks; nor does the fact that the condemnor wants the property for the same identical use and purpose prevent his taking it from the condemnor, when a judicial body can be convinced that the condemnor is not making good in fulfilling what constitutes the requisites of public use or purpose. Public use has, in effect, been distinguished from public purpose, and, contrary to the earlier dictum of the United States Supreme Court, a state or municipality may use the eminent domain power to take the property of a public utility company and devote it to the same use, when the purpose (at least in theory) is not to run it for private profit but solely for the benefit of the public. The fact that the purpose does not actually work out for the charging of lower rates to the public would probably make no difference. The rule of prohibition runs against property's being taken for the "same"

64 "It is manifest that if this could not be done then a general authority to locate and construct new railroads would be nugatory." 2 Lewis, op. cit. supra note 9, § 424.


66 "There would be no change in the use, except the application of the profits, and this would not bring the act within the power." McLean, J., in West River Bridge Co. v. Dix, supra note 35, at 537.

67 Tacoma v. Nisqually Power Co., 57 Wash. 420, 107 Pac. 199 (1910); Little Nestucca Road Co. v. Tillamook County, 31 Ore. 1, 48 Pac. 465 (1897). See State v. King County Super. Ct., supra note 8, where such condemnation was upheld, although the part of the electric railway taken materially damaged the portion not taken. See Vermont Hydro-Electric Corp. v. Dunn, 95 Vt. 144, 112 Atl. 223 (1921), to the effect that the United States, and the several states, by their extraordinary powers incident to sovereignty, may take for themselves property in public use, without special enactment; but municipal corporations stand on the same footing as private corporations.

68 The reason for this is that the purpose included a change of control, which would be an end in itself in governmental experimentation.
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public use or purpose, or to be used in the "same" manner. An examination of the decisions where the rule is recognized and applied, a comparison of these with the decisions where the rule is recognized but held inapplicable, and a consideration of some of the dissenting opinions which mark a few of the cases, will show, it is believed, that the meaning and application of the term "same" depends, not only on the circumstances and facts of each case, but upon an adequate and accurate presentation and analysis of those facts, at the hearings and reviews before condemnation tribunals and the courts. Once it be established, however, that the public purpose or use is the "same", then the decisions are in accord in holding that the property cannot be taken by the power of eminent domain.

Balancing Different and Conflicting Uses

There is not the same reason for an absolute prohibition of taking property, which is in public use, when it is to be devoted to a different public use, as there is when it is to continue in the same use under different management. In the latter instance the public could gain no benefit that it had not already been enjoying, while in the former situation a new public benefit would accrue. The reason for favoring a taking for a different public use is especially supported when the encroachment on the old use is slight, and the public benefit from the new use is manifest. Accordingly, in such cases the decisions seem to be uniform that a general power of eminent domain is sufficient to authorize a taking of this nature. The public need of such a taking, and the justice

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93 See the dissenting opinion in Marsh Min. Co. v. Inland Empire Min., etc., Co., referred to on page 158, and Kansas & Texas Coal Ry. v. Northwestern Coal, etc., Co., referred to on page 152.

94 For cases so holding in the federal courts and in the courts of the different states, see 20 C. J. 605 (1920); also supra note 15.
of the rule of eminent domain law permitting it, find particular
application in the crossing and recrossing of public ways, in the
form of railroads, highways and streets, and instrumentalities of
communication, such as the telephone and the telegraph, all of
which interlace our nation in all its parts and in every direction.
Although two corporations may each be in the railroad business,
the condemnation by one of the other’s property, merely for the
purpose of crossing, has never been considered to be a condemna-
tion of property in public use for the same use or purpose. “The
use is not the same as that of the prior road, but is rather a joint
or coöperative use, to be exercised and enjoyed by both railroad
companies, so as to furnish the public an additional line of travel
and transportation . . .”

The law which subjects railroads and other transportation
and travel ways to general eminent domain power for crossing
purposes is based upon the public policy to “preserve, multiply and
maintain highways for the benefit of the country and the general
public benefit”. Naturally, this policy would be defeated if one
highway or railroad were allowed to cross another in such a way
as to hamper it in fulfilling its travel and transportation functions.
Therefore, the law does not require any and every property of the
condemnee to submit to the crossing company’s general power
of eminent domain, even though it is needed; but only so much
as it can spare without too much interference with its legitimate
activity. Property whose loss would materially impair or destroy
ability to fulfill recognized public purpose obligations cannot be
taken by a grant of a general power of eminent domain, and, when
such a taking is attempted, a court of equity, upon timely appli-
cation, will intervene to prevent the threatened injury.

66 Cooley, Constitutional Limitations (8th ed. 1927) 1190, n. 1; 2
Leigh, op. cit. supra note 9, § 424.
67 Quoted from the syllabus of Lake Shore & Mich. So. Ry. v. Chicago &
Western Ind. R. R., supra note 44.
953 (1895); Humeston, etc., Ry. v. Chicago, etc., Ry., 74 Iowa 554, 38 N. W.
413 (1888); Chicago, etc., Ry. v. Chicago, etc., Ry., 91 Iowa 16, 58 N. W. 918
(1894); Atchinson St. Ry. v. Missouri Pac. Ry., 37 Kan. 669, 3 Pac. 284 (1884);
Accordingly, it has been held that one railroad company, under its power of eminent domain to cross another railroad company’s property, cannot build through the yards of another railroad company and condemn and take property needed and used by the latter company for yard, yard-tracks, and switches; nor take valuable property by laying its way through depot buildings or grounds used for shops and other appurtenances necessary to the transaction of railroad business. Neither can it condemn railroad property for a greater number of crossings than are necessary, nor take the tracks used by another company, nor even a joint use of such tracks, nor its right of way, even though the right of way is badly needed. The same kind of property is immune from appropriation on the part of public highways, roads, streets, and alleys. 

290 (1894); In re St. Paul, etc., Ry., 37 Minn. 164, 33 N. W. 701 (1887); In re Minneapolis, etc., Ry., 39 Minn. 162, 39 N. W. 65 (1888); National Docks, etc., Ry. v. United N. J. R. R. & C. Co., supra note 97; Jersey City, etc. Ry. v. Central R. R. of N. J., 48 N. J. Eq. 379, 22 Atl. 728 (1891).


See supra note 100; 2 Lewis, op. cit. supra note 9, § 419.

Illinois Cent. R. R. v. Chicago, etc., R. R., 122 Ill. 473, 13 N. E. 140 (1887); In the Matter of City of Buffalo, 68 N. Y. 167 (1877).

Ibid.
companies, in condemning easements over railroad property, through the exercise of their power of eminent domain, for the construction and maintenance of the poles and lines, are subject to the same rule. They cannot appropriate for their use property which the railroad company must have in order to assure adequate service to the public.\textsuperscript{106}

This rule works both ways, and other transportation ways have the same protection against encroachment by the power of eminent domain on the part of railroads. They also have the protection of the same rule against each other. Thus, it has been held that a railway, under its general power of eminent domain, cannot, in crossing, take public highway property so as to close and vacate the street as a way of travel and transportation, and that any such closing constitutes a public nuisance and is punishable as such.\textsuperscript{107} It was held, in the state of Washington, that a railroad company could not acquire, by its power of eminent domain, the exclusive right to use half of the street in the city of Spokane, against the rights of the public;\textsuperscript{108} and a New Jersey court held that a railroad company could not obstruct the public highway with its freight station, for the convenience of its transportation business.\textsuperscript{109} The Supreme Court of Missouri expressed the opinion that a public highway could not be laid so as to take by eminent domain power a passageway for school chil-


\textsuperscript{107} New Orleans, etc., R. R. v. Southern, etc., Tel. Co., 53 Ala. 211 (1875); Mobile, etc., R. R. v. Postal Tel. Cable Co., 120 Ala. 21, 24 So. 408 (1898); Union Pacific R. R. v. Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564 (1902); Savannah, etc., Ry. v. Postal Tel. Cable Co., 112 Ga. 941, 38 S. E. 353 (1901); St. Louis, etc., R. R. v. Postal Tel. Cable Co., 173 Ill. 508, 51 N. E. 382 (1898); South Carolina, etc., R. R. v. Am. Tel. & Tel. Co., 65 S. C. 459, 43 S. E. 970 (1903); St. Louis, etc., R. R. v. Southwestern Tel. & Tel. Co., 121 Fed. 276 (C. C. A. 8th, 1903).


\textsuperscript{109} State v. Spokane County Super. Ct., 62 Wash. 96, 113 Pac. 576 (1911).

dren, adjoining a public high school building, and owned by the board of education. It has been decided in Pennsylvania that a turnpike company, organized under a general law, cannot locate on an existing highway, and that a plank road cannot take part of a public highway already in existence and in use. As stated by Chancellor McGill, in the case of National Docks, etc., Ry. v. United N. J. R. R. & C. Co., "It is not the policy of the law to cripple or destroy one highway for the purpose of erecting another."

In some states the right to cross is expressly given by statute, but this adds nothing to the general power of eminent domain, and it has the same limitations. In other states, statutes make provision for a tribunal to determine what property can be taken by the condemnor. These bodies are governed by the same rule against impairment, and their determinations are reviewable in the courts.

The evils of too much liberality in applying the general rule have sometimes caused legislatures to reassert the rule against impairment, with special emphasis on the evil desired to be reached. This is illustrated by a statute passed in Pennsylvania, which makes it the duty of courts of equity "to ascertain and define by their decree the mode of such crossing which will inflict the least practical injury upon the rights of the company owning the road to be crossed and to avoid grade crossings if it is reasonably practicable to do so". A decision of the Supreme Court of Pennsylvania contains language which describes how a form of condemnation once tolerated, such as a grade crossing, can become increasingly objectionable with the economic development of the country. The language of the court is as follows:

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110 Cochran v. Wilson, 287 Mo. 210, 229 S. W. 1050 (1921).
113 Supra note 97.
114 See supra note 24.
115 See supra note 8.
116 Biglow, J., in Central Bridge Corporation v. Lowell, supra note 8, at 482.
"The time for grade crossings in this state has passed. They ought not to be permitted, except in case of imperious necessity. They admittedly involve great danger to life and property. In the earlier period of railroads, this danger was overlooked, or at least disregarded. The desire of the people for this species of improvements tended to close their eyes to the dangers involved. The traffic then upon railroads was comparatively light, and trains ran at long intervals. The rapid development of the country, the enormous growth in wealth, population, and business, has materially changed the relations of railroads to the public and to each other. The result is that we now see railroad companies and municipalities spending enormous sums in correcting the defects of earlier railroad construction, and especially in avoiding grade crossings. We must therefore construe the act of 1871 in accordance with our present surroundings." ¹¹⁸

The very nature and purpose of ways of travel and transportation make it necessary that they extend themselves in all directions. Therefore, when one of them wishes to take rights and property from the other, sufficient to enable it to cross and continue its path of extension, the presumption of public necessity is very strong. This presumption does not exist in favor of other public utilities or property devoted to public use or purpose, which permanently occupy more restricted areas. It cannot be supposed in such cases that eminent domain authority is ever granted with the intention of interfering with any prior public use, and the circumstances would have to be very peculiar to justify it;¹¹⁹ but, since both public uses purport to be for the public benefit, where the interference is slight and the benefit great, condemnation taking has been allowed. One public utility or public purpose enterprise, however, cannot, under a general power of eminent domain, take property from another when it would mean a material impairment of the latter’s ability to carry on its activity.¹²⁰

It is difficult to lay down a hard and fast rule as to how far

¹²³ Perry County R. R. Extension Co. v. Newport, etc., R. R., supra note 101, at 199, 24 Atl. at 710.
¹²⁰ The cases supporting this rule are too numerous to list. See 20 C. J. 602 (1920), n. 93, tabulating cases from the different jurisdictions in the United States.
the encroachment can go without interfering with the activity of the condemnee so as to violate the rule against impairment. The necessity of the condemnor, in relation to the necessity of the public, is on one side; while the necessity of the condemnee, in relation to the necessity of the public, is on the other side. In considering the situation of the condemnee, the Court of Appeals of New York laid down a rule of guidance, which is often quoted, as follows:

"In determining whether a power generally given, is meant to have operation upon lands already devoted by the legislature to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent public use." 121

With regard to considering them both together, the court said, in the same opinion:

"If both uses may not stand together, with some tolerable interference which may be compensated for with damages paid; if the latter use, when exercised, must supersede the former; it is not to be implied from a general power given, without having in view a then existing and particular need therefor, that the legislature meant to subject lands devoted to a public use already in exercise to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift of power made in general terms." 122

In applying the rule of necessity and consistency and in balancing the importance of the contesting uses in cases involving the exercise of the general power of eminent domain, it has been held that: a school house site cannot be taken from a county poor farm,123 nor can land for a street;124 the public square of a

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121 In the Matter of City of Buffalo, supra note 103, at 175.
122 Ibid.
124 City of Edwardsville v. Madison County, 251 Ill. 265, 96 N. E. 238 (1911).
village cannot be taken for a school house; \textsuperscript{125} state school lands cannot be taken for the uses of a water works public utility company; \textsuperscript{126} lands of the state, for the aid of destitute seamen, cannot be taken for streets of a city; \textsuperscript{127} land for a public library cannot be taken for widening a street, even though the library will not be taken nor destroyed; \textsuperscript{128} land of gas company, for many years in public use, cannot be taken for additional railway tracks; \textsuperscript{129} the right of way of a railroad cannot be taken to relocate a highway necessary for the construction of a public storage reservoir; \textsuperscript{130} a public street cannot be taken, nor any part thereof, for a reservoir to supply the city with water; \textsuperscript{131} land of a park cannot be taken by an electric power-carrying line,\textsuperscript{132} nor by a railway, although the railway only wishes a quarter of an acre; \textsuperscript{133} railroad land cannot be taken for a park; \textsuperscript{134} part of a public cemetery cannot be taken for street purposes; \textsuperscript{135} land for a shore road cannot be taken for a railroad; \textsuperscript{136} a railroad right of way cannot be taken for a public reservoir; \textsuperscript{137} streets and alleys cannot be taken for a college campus; \textsuperscript{138} a highway cannot be overflowed by eminent domain power granted a public mill owner, authorizing him to overflow lands; \textsuperscript{139} an upper mill privilege can-

\textsuperscript{125} Davis v. Nichols, 39 Ill. App. 610 (1890); McCullough v. Board of Education, 51 Cal. 418 (1876).
\textsuperscript{126} State v. Superior Court of Chelan County, 36 Wash. 381, 78 Pac. 1011 (1904).
\textsuperscript{127} In re Rosebank Ave. in City of N. Y., 162 App. Div. 332, 147 N. Y. Supp. 638 (1914).
\textsuperscript{128} City of Moline v. Green, 252 Ill. 475, 96 N. E. 911 (1911).
\textsuperscript{129} Scranton Gas & Water Co. v. Northern Coal & Iron Co., 192 Pa. 80, 43 Atl. 470 (1897).
\textsuperscript{131} Ex parte Manhattan Co., 22 Wend. 653 (N. Y. 1840).
\textsuperscript{132} Minnesota Power & Light Co. v. State, 225 N. W. 164 (Minn. 1929).
\textsuperscript{133} State v. Superior Court of Washington for Mason County, 136 Wash. 87, 238 Pac. 985 (1925).
\textsuperscript{134} Boston G. & R. Co. v. City Council of Cambridge, 166 Mass. 224, 44 N. E. 140 (1896).
\textsuperscript{135} Evergreen Cemetery Ass’n v. City of New Haven, 43 Conn. 234 (1875).
\textsuperscript{136} In re N. Y. & B. B. Ry., 20 Hun 201 (N. Y. 1880).
\textsuperscript{138} South Western State Normal School’s Case, supra note 13.
not be destroyed by the raising of a dam by a lower riparian mill owner, under his power of eminent domain; \(^{140}\) and lands and water rights of a canal cannot be taken for city water purposes. \(^{141}\) It was held, in the United States District Court of Massachusetts, that a municipal corporation may contest the taking of park property by the United States government, on the ground that the public use as a post office is not superior to its use as a park. \(^{142}\) The United States Circuit Court of Appeals, sitting in South Carolina, restrained the federal government from condemning and taking by eminent domain the right of way of a public service company, to use for government forestry purposes. \(^{143}\) In each of these cases the power of eminent domain was prevented from taking property, although the property was desired and needed for a recognized public use or purpose.

Property not in use and not necessary, which is owned by a public service enterprise, may be taken under the general power of eminent domain, to the same extent as the private property of a private party; but here, as elsewhere, consideration must be given to expanding service, and property not presently devoted to public use, but held in reasonable anticipation of future use, is deemed "devoted to a public use". \(^{144}\) Land "about to be" devoted to public use cannot be taken for a different public use, \(^{145}\) nor can land held for a "prospective use". \(^{146}\) It has been held that land "laid out" for waterways cannot be taken for a railway. \(^{147}\) The Vermont Supreme Court held that a public service company is not bound to show that it cannot conduct its business without retaining the property sought, in order to defeat its being taken by eminent domain; and the court restrained a city from taking certain water


\(^{141}\) Van Reipen v. City of Jersey City, 58 N. J. L. 262, 23 Atl. 740 (1896).

\(^{142}\) In re Certain Land in Lawrence, 119 Fed. 453 (D. Mass. 1902).


\(^{144}\) State v. Pacific County Super. Ct., 94 Wash. 691, 163 Pac. 15 (1917).


\(^{146}\) In re Seneca Ave. in City of N. Y., 98 Misc. Rep. 712, 163 N. Y. Supp. 503 (1917).

rights, not in use, from a hydroelectric power company. The Supreme Court of Washington has held that land purchased for a terminal will be protected from eminent domain appropriation, although the railroad company is not yet in operation, if it is being constructed in good faith. The Supreme Court of Arkansas, under a similar situation, where the road was not quite finished, restrained the taking of its station site for the right of way by another railroad. The station site had been purchased but not yet actually appropriated to the use, and the court called it an inchoate appropriation, and held it to be as good as an actual appropriation against the encroachment of eminent domain power.

Navigable streams, unlike railways, highways, roads, and streets, are not so susceptible of being crossed with slight damage. Accordingly it has been held that their navigability cannot be interfered with, and that they cannot be crossed or occupied under a general power of eminent domain; neither can this be done where the tide ebbs and flows. Special legislative authority may be given to cross or to occupy these waters, where public benefit demands it, but such authority does not empower the condemnor to destroy navigation or to impair it seriously.

It is evident that exceptional cases may, and do, arise, where the great public benefit to ensue would appear to justify subjecting public property, or the property of an established public purpose enterprise to a taking on the part of those who are launching a new and different public purpose activity, even though the taking should violate the rule against impairment. The condemnors, as well as the commissions and courts, are bound, however, by the

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148 Vermont Hydro-Electric Corp. v. Dunn, supra note 89.
149 State v. Super. Ct., supra note 100.
150 Italics are the author's.
153 State v. Anthoine, 40 Me. 435 (1855); Chase v. Cochran, 102 Me. 431, 67 Atl. 230 (1907); Marblehead v. County Comm. of Essex, 71 Mass. 451 (1855).
155 Hicock v. Hine, 23 Ohio St. 523 (1872).
rule against impairment, and it is not for them to say when the exigency of such a public necessity has arisen; but the legislature is not thus bound. Unlike the situation presented by a proposed taking for the same use, there is no constitutional inhibition on the legislature, preventing that body from authorizing an impairment taking when the property taken is to be devoted to a new, different, but paramount, use. This is particularly true where the new use is construed as more necessary than the old use, in the light of increased public benefit. Since such statutes enlarge the field of property subject to eminent domain taking, and are in derogation of the rule against impairment, they are strictly construed against the condemnor. Under a “more necessary use” statute, it has been held that the fact that a company’s proposed canal will irrigate 20,000 acres of land, as against 2,500 acres which can be irrigated by the present company, does not make it either a different use or a more necessary use, and that the latter’s property can not be taken by the former for the new use. It was held in Georgia that statutory authority to connect a mill tramway with a railroad line did not subject a second tract to easement condemnation for a crossing by a tramway, in order to enable the mill owner to get to his timber. The Supreme Court of Minnesota held that legislative authority to subject “water courses, bays, lakes, dams” to condemnation did not authorize the lowering of a lake to the injury of navigation. Authority given by the legislature to take waters of any stream, lake, or pond, “in whole or in part”, was held not to subject to a condemnation taking any water already appropriated to public use. Legislative authority to take by condemnation “needed real

157 Ibid.
158 Marin County Water Co. v. Marin County, 145 Cal. 586, 79 Pac. 282 (1904).
159 Portneuf Irrigation Co. v. Budge, 16 Idaho 116, 100 Pac. 1045 (1909).
162 Water Co. v. Wallingford, 72 Conn. 293, 44 Atl. 235 (1899).
estate”, for college purposes, was held not to include alleys, and streets. An act providing for condemnation by a municipal corporation of land, water, water rights, or property, “when the governing authorities deem it proper”, was held not to be broad enough to require the submission to condemnation of lands and water rights owned by a canal company. Authority granted by the legislature to construct its lines “over any public roads, streets, or highways” was held not to mean over railroads or roadways of railroads. Legislative authority given to a public canal company to alter, by eminent domain, any part of a public road or highway which might “interfere” with its construction was held not to permit of such an alteration-taking from a turnpike company which only in “some degree” thus interfered. It was held in Virginia that legislative authority to construct “along and parallel” to a railroad did not permit a telegraph company, by easement condemnation, to construct along and “upon” the right of way of a railroad. Where a statute seems to authorize an impairment taking when necessity demands it, there is an obligation on the part of the condemnor to use every means to avoid such a necessity. This obligation is sometimes expressed in the language of the statute, but, whether so expressed or not, it is implied as a part of that which goes to make up the requisite of actual necessity. An illustration of the strictness with which these “necessity” statutes are construed is afforded by the language of the Supreme Court of Pennsylvania in the case of *Baltimore, etc., R. R. v. Butler Pass. Ry.* A statute in Pennsylvania permits a taking by eminent domain of a right of easement over railroad property for grade crossings, where it is not reasonably practicable to avoid it. The

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[166] See *infra* note 170.
syllabus summarizing the opinion of the court in that case reads as follows:

"In determining whether it is practicable to avoid a grade crossing, the court will not consider the expense of an overhead structure, not its unsightliness, nor the fact that damages may have to be paid to the owners of private property by reason of the erection of such structure; nor that an overhead structure will interfere with travel on a street, will frighten horses, and will obstruct the view of coming trains; nor that local sentiment is in favor of such grade crossings."

Under the statute in question, the location of the condemnor's grade crossings so as to cross the condemnee's tracks twice, when it was practicable not to cross them at all, was restrained. Under the same statute, where it was shown that a dangerous grade crossing could be avoided by the expenditure of $7,000 on the part of the condemnor, a grade crossing was restrained. In a case where it was contended that the statute, by necessary implication, authorized an impairment-taking of railroad property, the taking was restrained upon a showing by the condemnor's engineer that the necessity of cutting up the condemnee's railroad yards could be avoided by an expenditure of $18,000 by the condemnor railroad company.

Whether two different and conflicting uses are consistent and can stand together, or inconsistent and cannot stand together, presents a problem of mixed fact, public policy, and law, all looking to the greatest public good with the least sacrifice practicable on the part of those whose properties are already serving the public. It can be concluded from the typical cases herein referred to and the rulings of the courts in deciding them, and from other similar cases, that the presumption is against a taking for the new use; that even when allowed it cannot be done at the

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210 Eische v. Superior Court of Whitman County, 45 Wash. 270, 88 Pac. 201 (1907).
cost of destroying, or even materially impairing, the old use, under a general power of eminent domain; that special statutes with special powers will be strictly construed against the condemnor; and that they will not be construed to carry by implication an enlargement of the field of property subject to impairment-taking, beyond that which is unavoidably necessary to carry such statutes into effect.

In introducing the subject of which this is the second article, it was said that eminent domain power has not always been able to reach desired property, even for a recognized public use or purpose, and that this must be due to something about the property which gives it the capacity to resist the power, or something about the power or its exercise which incapacitates it from reaching the property. This article brings to a close the consideration of decisions dealing with the resistent capacity of property to repel eminent domain power because of the physical nature of the property moved against, or the nature of the owner's legal interest in the property, or the relation of those intangible interests to the tangible property and to each other, and finally because of certain trusts or public uses which have impressed themselves upon the property moved against.

(Author's Note: A shorter treatment, but one which deals with no less an important phase of the subject, will appear in a subsequent article. It will take up Part II of this series of articles, or "The Power", and will discuss factors of time, distance, and place, and certain other factors which condition the force of the power of eminent domain, and prevent it from reaching the property it moves against for a public use or purpose.)