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Eminent Domain

EMINENT DOMAIN

Chapter 39 provides that: (1) Municipalities or other political subdivisions of adjoining states may acquire land in Indiana for the purpose of operating airports or other aerial navigation facilities; (2) Indiana municipalities and political subdivisions are empowered to acquire land in adjoining states for such uses; (3) The municipalities and political subdivisions of adjoining states may cooperate with those of Indiana in establishing and maintaining joint facilities. Section 2 of the act, granting a municipality or political subdivision of an adjoining state the power of eminent domain in acquiring lands in Indiana, raises a serious constitutional question.[1] Whether the operation of Section 2 of the instant act in fact affords a benefit to the people of Indiana determines the validity of the taking as a "public use" within the meaning of accepted constitutional construction.

The exercise of eminent domain is an essential power of sovereignty, and is limited, not conferred, by the constitution.[2]

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33. Ind. Stat. Ann. (Burns, Repl. 1942) § 9-604.

34. There seems to be a commendable policy for the change. Punishing public officers for failing to perform their duties efficiently should help improve local administration.

1. Ind. Acts 1947, c. 39, §2. "Such municipality or other political subdivision of an adjoining state shall have all the rights, privileges, and duties of like municipalities and political subdivisions of this state, including the right to exercise the right of eminent domain in accordance with the laws of this state as to property not devoted to public use. . ." It is clear that the last phrase must be read to mean "property not already devoted to public use," as public use is a definite limitation in Indiana. See note 4, infra.

2. Great Western Nat. Gas etc. Co. v. Hawkins, 30 Ind. App. 557, 565, 66 N. E. 765, 768 (1903).

It has been characterized as a "very high and dangerous right," the exercise of which will be carefully scrutinized by the courts.[3] Strictly eminent domain seems to be a power rather than a right; however, since owners of land are subjected to no duties by exercise of eminent domain; they simply have no right to interfere with the process. Among the chief limitations upon the exercise of this sovereign power is the requirement that property be taken only for a public use. This limitation is in force in Indiana, though the words "public use" do not appear in the present constitution.[4] The legislative declaration that a use is a public one is subject to review by the courts.[5]

The difficulty in the present act is not that the power is exercised by a foreign municipality. "It is not the instrumentality employed for operating the public use, but the use itself, that satisfies the constitution."[6]

No valid analogies can be drawn from the cases in which the power was exercised for the benefit of the federal government. There, a completely disparate question is involved: First, the individual states exercise their sovereignty over entirely separate lands, while the United States has concurrent sovereignty with each state over the lands within the state borders; secondly, the theory that a taking for the benefit of the people of the United States would necessarily include a benefit to the people of the state wherein the land lies. Two early but vigorous decisions held that a state has no power to condemn land for use by the federal government, unless a direct and substantial benefit accrues to the people of the state.[7] The more recent cases have limited those deci-

3. Kinney v. Citizens Water & Light Co., 173 Ind. 252, 255, 90 N. E. 129, 130 (1909).

4. Great Western Nat. Gas etc. Co. v. Hawkins, 30 Ind. App. 557, 566, 11 66 N.E. 765, 768 (1903).

5. Great Western Nat. Gas etc. Co. v. Hawkins, 30 Ind. App. 557, 566, 66 N.E. 765, 768 (1903); Logan v. Stogsdale, 123 Ind. 372, 24 N.E. 135 (1889).

6. Columbia Waterworks Co. v. Long, 121 Ala. 245, 25 So. 702 (1899). The case concerns the exercise of eminent domain by a foreign municipal corporation.

7. People ex rel. Trombley v. Humphrey, 23 Mich. 471, 9 Am. Rep. 94 (1871). In holding that the State of Michigan was without power to condemn land for the use of the United States in erecting a lighthouse, Judge Cooley voiced the now classic doctrine, which was reiterated and approved in Kohl v. United States, 91 U.S. 367 (1876): "The eminent domain in any sovereignty exists only for its own purposes; and to furnish machinery to the general govern-

sions so severely, however, that they are little more than a slight embarrassment to courts today. The rule now seems to be that exercise of eminent domain by a state, if otherwise valid, is not defeated because the power is exercised for the benefit of the federal government.[8] It is interesting to note, however, that the courts still speak of a proper "local and municipal character."[9]

No case has been found which held that the power of condemnation could be exercised solely for the benefit of people of adjoining or foreign states. The converse has been accepted as a self-evident proposition.[10] In addition strong secondary authority supports the impossibility of exercising the power of eminent domain where no benefits accrue to the people of the state wherein the lands are situate.[11]

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ment under and by means of which it is to appropriate land for national objects is not among the ends contemplated in the creation of the state governments." And in Darlington v. United States, 82 Pa. 382 (1876), the court, after citing this passage, adds: "The foundation of the right of eminent domain is necessity. The reason utterly fails when one sovereignty proceeds to take land for the use of another sovereignty."

8. Delfeld v. Tulsa, 191 Okla. 541, 131 P. 2d 754 (1942); Fishel v. Denver, 106 Colo. 576, 108 P. 2d 236 (1940). And see Note, 143 A.L.R. 1040, and numerous cases there collected.

9. Fishel v. Denver, 106 Colo. 576, 108 P. 2d 236 (1940). "Where a state, or a municipality under its authorization, seeks to take land under the right of eminent domain for a lawful, local, state or municipal purpose, the circumstance that such land is later to be turned over to the United States to better effectuate the public object of the taking, is no valid objection to the condemnation." A case growing out of the same facts, McNichols v. Denver, 101 Colo. 316, 74 P. 2d 99 (1937), went off on the fact that the proposed project ". . .possessed the necessary local and municipal character to empower the city to participate to the extent contemplated." Though the latter case did not involve the condemnation question, it clearly establishes the local public use, and was cited for that purpose in the Fishel case. Both cases distinguished People ex rel. Trombley v. Humphrey, 23 Mich. 471, 9 Am. Rep. 94 (1871), supra, note 7, as being a question of an exclusive federal use. Via v. State Commission on Conservation, etc. of Virginia, 9 F. Supp. 556 (1935), infra, note 15, was cited as authority for this construction of the Trombley rule.

10. Grover Irr. & Land Co. v. Lovella Ditch, Reservoir, & Irr. Co., 21 Wyo. 204, 131 Pac. 43, Ann. Cas. 1915D 1206 (1913); Salisbury Mills v. Forsaith, 57 N.H. 124 (1876). In the following cases, the court treated the proposition that there must be some benefit to the people of the state in which the land lay as evident, but found such a benefit in fact: Shedd v. Northern Ind. Pub. Serv. Co., 206 Ind. 35, 188 N.E. 322 (1934); Washington Water Power Co. v. Waters, 19 Idaho 595, 115 Pac. 682 (1911). And see Note, 90 A.L.R. 1035 (1934). But cf. Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N.E. 1062 (1891).

11. 1 Nichols, "Eminent Domain" §29 (2d ed. 1917). "One state cannot take or authorize the taking of property situated within its limits

Generally, it appears that the relative quantity of benefit to the inhabitants of the state in which the lands are located is not material. But it seems to be established that some *direct* advantage must accrue to the state or at least to a few of its inhabitants.[12] Although cases exist which have allowed one state to exercise eminent domain in another state,[13] it has been uniformly founded upon some theory of direct benefit to the persons living in the state in which the lands are located.[14] Collateral and incidental economic bene-

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for the use of another state. Any employment of the power of eminent domain for other purposes than to enable the government of the state to exercise and give effect to its proper authority, effectuate the purposes of its creation and carry out the policy of its laws could not be rested upon the justification and basis which underlie the power, and has never received the sanction of the courts. Accordingly, it would seem that if a municipality was located close to the boundary of another state, and the only available property for satisfying the necessity and convenience of its people for such purposes as a water supply, a sewer outlet, or a park was situated across the boundary line, it would be impossible to take the necessary land by eminent domain even with the consent of the state in which it was situated, for the legislature of neither state would have the power to grant the requisite authority—in one case because the property sought to be taken was not within its jurisdiction, and in the other because the use for which it was sought to take the property was not one for which it lay within its powers to invoke the exercise of eminent domain."

1 Lewis, "Eminent Domain" §310 (3d ed. 1909). "The public use for which property may be taken is a public use within the state from which the power is derived."

12. 18 Am. Jur. "Eminent Domain" § 20 (p. 646), and cases there cited. "Generally speaking, it appears from the cases that the relative amount of direct benefits accruing respectively inside and outside the state is not material. But it is apparently settled that property cannot be condemned by virtue of the state's power of eminent domain if no direct benefit from its proposed use is to accrue to the state in which it is located or to at least a few inhabitants thereof. An indirect benefit to the people of a state, such as results from the industrial activities, population, and wealth of a neighboring state, is not sufficient to justify the taking of private property within the borders of one state for the benefit of the people of another." Cases cited notes 13 and 14, infra.

13. Washington Water Power Co. v. Waters, 19 Idaho 595, 115 Pac. 682 (1911); Columbia Waterworks v. Long, 121 Ala. 245, 25 So. 702 (1899).

14. See e.g., Grover Irr. & Land Co. v. Lovella Ditch, Reservoir, & Irr. Co., 21 Wyo. 204, 131 Pac. 43, (1913) Ann. Cas. 1915D 1206; a square holding that the Wyoming Legislature could not authorize the taking of land in Wyoming for the sole purpose of irrigating lands located in the State of Colorado. The court said: "It will be noticed that in the cases cited it was deemed necessary to sustain the exercise of the power that the particular use have some substantial relation to a public purpose and the public interest and welfare in the state wherein the land to be taken is located. And this thought runs through all the cases discussing the question of

fits do not seem to be sufficient.[15]

But an act will not be invalidated simply because a direct benefit will accrue to the people of a foreign state, where the exercise of the power is primarily for the people of the state in which the land is located. The most recent Indiana case touching upon the point is *Shedd v. Northern Indiana Public Service Company*.[16] In that case, a power company sought to condemn lands for a right-of-way for their lines. Although some of the power was to be sold in an adjoining state, it was held that such incidental benefits to the people of the adjoining state would not defeat the right where the major purpose of the condemnation was for the benefit of the people of the State of Indiana. The question was there stated to be: "Is the use of a public use within this state, and does it serve the interests of the people of this state?"[17] Though the question was answered affirmatively on the facts, the court quoted with approval from the opinion in *Washington Water Power Co. v. Waters*,[18] including the statement

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public use, or a use permitting or justifying the taking of private property by eminent domain."

15. Grover Irr. & Land Co. v. Lovella Ditch, Reservoir, & Irr. Co., 21 Wyo. 204, 131 Pac. 43, Ann. Cas. 1915D 1206 (1913); Salisbury Mills v. Forsaith, 57 N.H. 124 (1876); People ex rel. Trombley v. Humphrey, 23 Mich. 471, 9 Am. Rep. 94 (1871); Wooster v. Great Falls Mfg. Co., 39 Me. 246 (1855). In the Salisbury case, the learned judge indulged in some very biting satire as to the value of having such a thriving commonwealth as Massachusetts to the south of New Hampshire, but refused to allow New Hampshire land to be taken to further the prosperity of her southerly sister.

Indeed, it would not seem necessary that the problem of incidental benefits be considered in the instant case, since the act does not proceed on any theory of benefit to the people of Indiana. At least this is so if the doctrine of Judge Cooley in the Trombley case, supra, may be considered authoritative. In answer to the contention that the interest of the state in coastwise shipping would be furthered by aiding the United States in establishing lighthouses, he replied, "But the act does not proceed on any theory of state interest. It assumes that the taking is to be for the United States exclusively. It is not necessary for us to consider, therefore, what might be the result were the theory of the act different." This "theory of the act" concept has been the basis for most subsequent distinguishing of the Trombley case, and is well illustrated by Via v. State Commission on Conservation, etc. of Virginia, 9 F. Supp. 556 (1935). The Virginia act in question authorized a taking for the establishment of a national park, and proceeded on the theory of a direct benefit to the people of Virginia. Fishel v. Denver, 106 Colo. 576, 108 P. 2d 236 (1940) used much the same device, and relied on the Via case. See note 9, supra.

16. 206 Ind. 35, 188 N.E. 322 (1934).

17. Id. at 46, 188 N.E. at 326.

18. 19 Idaho 595, 115 Pac. 682 (1911).

that "Condemnation could evidently not be had in this state for the purpose of serving alone a public use in another state . . . ". This would seem to indicate that unless some benefit to the people of Indiana can be established, the section in controversy is of dubious constitutionality.

It is difficult to predict with any accuracy just what is needed to constitute a so-called "direct" benefit, and what is merely indirect or collateral.[19] The cases furnish only imperfect analogies, since they have been generally concerned with the furnishing of a *commodity*, such as water,[20] electrical power,[21] or natural gas,[22] both within and without the state.[23] Where a commodity is furnished, whatever benefit is received is clearly of a direct nature. Where a *service or facility* is concerned, as is the case with airports, the direct nature of benefits conferred is not so apparent. The use of the airport by an occasional Indiana pilot might be considered di-

19. The following cases found only collateral benefits: Grover Irr. & Land Co. v. Lovella Ditch, Reservoir, & Irr. Co., 21 Wyo. 204, 131 Pac. 43, (1913 Ann. Cas. 1915D 1206 (hiring of workers, purchase of supplies, probability of the establishment of a town in the home state at the site of the proposed headgate); Salisbury Mills v. Forsaith, 57 N.H. 124 (1876) (promotion of manufacturing in neighboring state); People ex rel. Trombley v. Humphrey, 23 Mich. 471, 9 Am. Rep. 94 (1871) (furtherance of coastwise navigation); Wooster v. Great Falls Mfg. Co., 39 Me. 246 (1855) (development of commerce and manufacturing in neighboring state).

20. Columbia Waterworks v. Long, 121 Ala. 245, 25 So. 702, (1899) (furnishing of water supply to two municipalities in home state and one without).

21. Shedd v. Northern Ind. Pub. Serv. Co., 206 Ind. 35, 188 N.E. 322 (1934); Rogers v. Toccoa Elec. Power Co., 163 Ga. 919, 137 S.E. 272 (1927); Washington Water Power Co. v. Waters, 19 Idaho 595, 115 Pac. 682 (1911).

22. Carnegie Nat. Gas Co. v. Swiger, 72 W. Va. 557, 79 S.E. 3 (1913) (right of condemnation not defeated by fact that most of the gas was to be sold outside the state, where condemnor averred willingness to serve all within state who applied and were within reach of its lives.

23. Perhaps the decision most nearly in point as involving a service is In re Townsend, 39 N.Y. 171 (1868). The New York court found a direct benefit to the citizens of New York in a canal which ran along the border of, but did not enter, the state.

Latinette v. St. Louis, 120 C.C.A. 638, 201 Fed. 676 (C.C.A. 7th, 1912), infra, note 24, involves a taking of lands in Illinois by the Missouri municipality, for use as a bridgehead for a highway across the Mississippi. Though this is clearly the same sort of occasional direct benefit to the citizens of the home state as is involved in an airport question, the case is simply not in point, since the power of condemnation was not derived from any state authorization, but from the broad commerce power of Congress. Thus the question of whether a state itself may authorize a taking of lands of its citizens for such a purpose is left open.

rect. The mere promotion of commerce is more conjectural, and has, at least in some aspects, been held only collateral.[24]

Section 4 provides that the entire act is inapplicable unless an adjoining state wishing to take advantage of the act grants reciprocal rights to Indiana municipalities. This would seem to add little to constitutionality; it begs the question. In the leading case involving such reciprocal state laws, their purpose was effectuated.[25] But the decision was in the foreign court, which admitted that the effectiveness of the agreement depended upon the constitution of the state wherein the lands were located. Though they then construed that constitution as authorizing the taking under the reciprocal state laws, the case is certainly open to attack as lacking both in sound rationale and authority.[26] In any case, the problem is still one of constitutionality of the reciprocal laws.

As an attempt to guarantee a benefit to the people of Indiana, Section 4 may be of some aid. But upon analysis, no benefit is clearly established by the section. It is no answer to a man in one part of Indiana, complaining of an unconstitutional taking of his lands, to tell him that persons in another part of the state might someday wish to build an airport in, say, Illinois. It would not appear to be within the province of the legislature to determine that it might authorize unconstitutional takings of land in this state, so long as the people of this state were free likewise to invade the rights of the people of the adjoining state.

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24. Cases cited note 19, supra.

25. Langdon v. Walla Walla, 112 Wash. 446, 193 Pac. 1 (1920). Washington and Oregon passed reciprocal laws, each permitting municipalities of the other to condemn lands within the borders of the state foreign to it, for the purpose of establishing and operating waterworks. The City of Walla Walla, Washington, sought to condemn lands in Oregon under authority of these laws. Held: The condemnation is valid. Though the validity depends upon the constitution of Oregon, the Washington court found nothing in the Oregon Constitution to invalidate the statutes.

26. The majority opinion cites Grover Irr. & Land Co. v. Lovella Ditch, Reservoir, & Irr. Co., 21 Wyom. 204, 131 Pac. 43, (1913) Ann. Cas. 1915D 1206 with approval, but found that it was decided upon the ground that no Wyoming law authorized a taking in Wyoming by a political subdivision of an adjoining state, i.e., that there had been no special legislative action. This is simply a misstatement of the holding in the Grover case, as was pointed out by Main, J., in his dissenting opinion. Judge Main further pointed out that the majority relied on only two cases, neither of which was strictly in point. In re Townsend, 39 N.Y. 171 (1868), has always been treated as a "direct benefit" case; and Reddal v. Bryan, 14 Md. 444, 74 Am. Dec. 550 (1859) went off on the historical unity of Maryland and the District of Columbia.

Though, as has been shown, the eminent domain clause of Section 2 may well be invalid through failure to guarantee a benefit sufficient to support the public use necessary to a valid exercise of eminent domain, the invalidation of the entire act by no means necessarily results.[27] By limiting the act to its valid applications, a great many of its objects could be consummated. In addition to this, at least three other possibilities for achieving the objects of the act are available:

1. The foreign municipalities could join in the operation of air navigation facilities with municipalities of this state. Though this method is provided by the act, and might be authorized thereby if the act were limited to its valid applications, the provision occurs in the doubtful Section 2.[28] Should the entire section be invalidated because of its inseparable character, this provision would also fall. But it is not certain that a statute would be necessary for such joint action. Incidental benefits to the people of adjoining states are not fatal to the exercise of the power of condemnation in this state, where there is a clear intent to confer a benefit upon the people of this state and where execution of the proposal would evidently result in such benefit.[29]

2. Secondly, it seems clear that Congress can authorize a municipality as its agent, to take and operate facilities in

27. 2 Sutherland, "Statutes and Statutory Construction" §§2401-2419 (3d ed., Horack, 1943), especially §2417, on separability where part of the act is invalid as to part of the possible applications. Though there is some conflict, Indiana will in general allow limitation of the act to its valid applications; this is a logical corollary of the presumption of validity. The rule is well stated in Keane v. Remy, 201 Ind. 286, 168 N.E. 10 (1929), citing State v. Barrett, 172 Ind. 169, 87 N.E. 7 (1909): "Where only a part of a legislative act violates the constitution and is judicially declared void, and the remainder of the act is complete in itself and capable of execution according to the legislative intent and wholly independent of that which is judicially determined to be unconstitutional, the remaining part of the act will be sustained." The converse is also true. Kelso v. Cook, 184 Ind. 173, 181, 110 N.E. 987, 990 (1915) Ann. Cas. 1918E 68. No reason is apparent why the foreign municipalities should not be permitted to acquire lands in this state by purchase, though they be denied the power of condemnation. The statute here would thus appear to be separable.

28. Ind. Acts 1947, c. 39, §2. "Such municipality or other political subdivision of an adjoining state shall have. . .the power jointly with municipalities in this state to acquire, establish, construct, own, control, lease, equip, improve, maintain, and operate airports or landing fields, or other air navigation facilities." The portion of the section indicated by ellipses is quoted supra, note 1, and contains the controverted eminent domain clause.

29. Shedd v. Northern Ind. Pub. Serv. Co., 206 Ind. 35, 188 N.E. 322 (1934).

adjoining states, for any purpose for which Congress can authorize the exercise of eminent domain.[30] It would appear that airports clearly come under the commerce power of Congress.[31]

3. It is possible that the states might by compact authorize a joint commission or authority to exercise eminent domain, for the joint benefit of the peoples of both states.[32] In such case, of course, the operation would be theoretically aimed at a benefit for the people of the state wherein the land lies, and the precise question would not arise. Even so, it is possible that such compact would require the approval of Congress.[33]

ESTATES, FIDUCIARIES AND GUARDIANSHIP

ESTATES UNDER $500—Chapter 124 provides an alternate method of settlement for estates under $500.[1] The Act permits a bank or person,[2] indebted to or having funds not exceeding $500 which are the property of the estate of a deceased person, to pay these funds to the clerk of the circuit court of the county in which the deceased resided at death.[3]

30. Latinette v. St. Louis, 120 C.C.A. 638, 201 Fed. 676 (C.C.A. 7th, 1912). The court upheld an act of Congress which authorized the city of St. Louis, Missouri, to take lands in Illinois for use as a terminus of a bridge across the Mississippi River.

31. Air Commerce Act of 1926, 44 Stat. 568 (1926), 49 U.S.C. §§171-184 (1940).

32. The statute creating the Port of New York Authority (N.Y. Laws 1921, c. 154) seems to present a clear picture of the operation of compacts between states and the methods by which they are reached. It will be noted, however, that the act of the New York Legislature provides for the cooperation of the two states concerned, with New York retaining a substantial measure of control, and receiving a clear and direct benefit from the operation of the Authority.

In City of New York v. Wilcox, et al., 189 N.Y.S. 724, 115 Misc. Rep. 351 (1921), the act was held valid because it purported to operate only within constitutional limitations. The court said, "It is obvious . . . that the State of New York has parted with none of sovereign rights, nor relinquished the control over any property belonging to the people of New York."

33. The New York Act of 1921, supra, note 26, was made with the sanction of Congress. Further discussion of compacts between states is beyond the scope of this note.

1. Ind. Acts 1947, c. 124, §8, so provides. For previous procedure see Ind. Acts 1881, c. 45, §193, et seq., as amended, Ind. Stat. Ann. (Burns, 1933) §6-1701 et seq.

2. Id. §1, ". . .including without limitation thereon, the state or a municipal corporation. . ."

3. Ibid.