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Constitutional Law--Eminent Domain-Public Use

Constitutional Law—Eminent Domain—Public Use.—Action for appointment of appraisers of land for railroad connection. Both parties are corporations engaged in the business of operating stone quarries. Defendant contends that the statute which gives stone quarries the power of eminent domain for the purpose of constructing a lateral railroad for not more than ten miles in length to any other railroad or canal is unconstitutional because the property was to be taken for a private and not a public use. Held, the development and operation of mines and quarries is of such public interest and benefit to the state and to the communities in which they are situated that mining and quarrying may properly be regarded as a public use for which the power of eminent domain may be delegated for the purpose of securing a way of necessity. Judgment for plaintiff reversed because the act in question did not enable the plaintiff to acquire defendant's completed lateral railroad, which was included in the proposed appropriation.[1]

No principle of law is better settled than that the legislature can not grant to a private corporation or individual the power to take private property for a private use, but it is equally well settled that the legislature may grant

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fiduciary that may be appointed, shall have preference and priority in all assets of such bank or trust company over its general creditors, for all uninvested money held by such bank or trust company in its capacity as a fiduciary, to the extent that such money is commingled with its general assets, or is not duly accounted for."

[9] Wooley Coal Co. v. Trevault (1918), 187 Ind. 171, 118 N. E. 921; State v. Shanks (1912), 178 Ind. 330, 99 N. E. 481; State v. Jennings (1872), 27 Ark. 419.

[10] State v. Bruce (1909), 17 Idaho 1, 102 Pac. 831; Meyer v. Board of Education (1893), 51 Kan. 87, 32 Pac. 658.

[1] Indianapolis Oolitic Stone Co. v. Alexander King Stone Co. (1934), 190 N. E. 57 (Ind.).

the power of eminent domain to a private individual or corporation when the property taken under the grant of that power is for a public use.[2] Although a presumption exists in favor of the public character of the use declared by the legislature to be public, this presumption is not conclusive, and whether a particular use is public or private is a judicial question and must be ultimately decided by the courts.[3]

The decisions of the courts in the United States in determining what constitutes a public use, however, show a distinct split of authority.[4] Many jurisdictions have adopted the rule that to make a use public in the sense in which it is used in this connection, the general public have the right to a definite and fixed use of the property appropriated.[5] Courts adopting this view do not insist, however, that all the public have the right to use the appropriated property, but state that the requirements of a public use are satisfied if a portion of the public has that right.[6] Other jurisdictions have applied the test of public benefit or public advantage to determine whether or not the use in question is a public use.[7] This view is manifestly more liberal, as public benefit or advantage may be found in many instances where the public would most certainly not have the right to use the property appropriated. Statutes which have granted the power of eminent domain to an individual or a corporation for the purpose of obtaining water for land,[8] or for mining,[9] to a mining company for the purpose of constructing a tramway,[10] to a lumber company for the purpose of building a railway,[11] have been upheld as constituting a grant of power for a public use on the

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[2] Waterworks Co. of Indianapolis v. Burkhart (1872), 41 Ind. 364; Wild v. Deig (1873), 43 Ind. 455; Stewart v. Hartman (1874), 46 Ind. 331; Blackman v. Halves (1880), 72 Ind. 515; Gaylord v. Sanitary District of Chicago (1903), 204 Ill. 574, 68 N. E. 522; Minneapolis General Electric Co. v. Minneapolis (1911), 194 F. 215; Gillette v. Aurora Ry. Co. (1907), 228 Ill. 261, 81 N. E. 1005; Salisbury Land and Improvement Co. v. Commonwealth (1913), 215 Mass. 603, 102 N. E. 619; Opinion of Justices (1911), 208 Mass. 603, 94 N. E. 848; Gilman v. Tucker (1891), 128 N. Y. 190, 28 N. E. 1040; Long Sault Development Co. v. Kennedy (1914), 212 N. Y. 1, 105 N. E. 849.

[3] Waterworks Co. of Indianapolis v. Burkhart (1872), 41 Ind. 364; Sexauer v. Star Milling Co. (1909), 173 Ind. 342, 90 N. E. 474; Mull v. Indianapolis, etc. Traction Co. (1907), 169 Ind. 214, 81 N. E. 657; Westport Stone Co. v. Thomas (1910), 175 Ind. 319, 94 N. E. 406; Walker v. Shasta Power Co. (1908), 160 F. 856; Talbot v. Hudson (1860), 16 Gray 417; Long Sault Development Company v. Kennedy (1914), 212 N. Y. 1, 105 N. E. 849.

[4] Cooley, Constitutional Limitations (8th ed.), p. 766.

[5] Ross v. Davis (1884), 97 Ind. 79; Sexauer v. Star Milling Co. (1909), 173 Ind. 342, 90 N. E. 474; Mull v. Indianapolis, etc., Traction Co. (1907), 169 Ind. 214, 81 N. E. 657; Ozark Coal Co. v. Pennsylvania Anthracite Railroad Co. (1911), 97 Ark. 495, 134 S. W. 634; Chesapeake Stone Co. v. Moreland (1907), 126 Ky. 656, 104 S. W. 762; Cozad v. Kanawha Hardwood Co. (1905), 139 N. C. 283, 51 S. E. 932; Sholl v. German Coal Co. (1887), 118 Ill. 427, 10 N. E. 199, 54 A. L. R. 7.

[6] Sexauer v. Star Milling Co. (1909), 173 Ind. 342, 90 N. E. 474; Mull v. Indianapolis, etc., Traction Co. (1907), 169 Ind. 214, 81 N. E. 657; Bedford Quarries Co. v. Chicago and Louisville Ry. (1910), 175 Ind. 304, 94 N. E. 326; Chesapeake Stone Co. v. Moreland (1907), 126 Ky. 656, 104 S. W. 762; Talbot v. Hudson (1860), 16 Gray 417.

[7] Clark v. Nash (1904), 27 Utah 158, 75 P. 371, affirmed (1905), 198 U. S. 361, 49 L. Ed. 1085; Blackwell Lumber Co. v. Empire Mill Co. (1916), 28 Idaho 556, 155 P. 680; Hand Gold Mining Co. v. Parker (1877), 59 Ga. 419; New Central Coal Co. v. George's Creek Coal and Iron Co. (1872), 37 Md. 537; Oury v. Goodwin (1891), 3 Ariz. 255, 26 P. 376; Long Sault Development Co. v. Kennedy (1914), 143 N. Y. S. 454, 105 N. E. 849; Hazen v. Essex Co. (1853), 12 Cush. 475; Talbott v. Hudson (1860), 16 Gray 417; Douglas v. Byrnes (1893), 59 F. 29, 54 A. L. R. 7.

[8] Clark v. Nash (1904), 27 Utah 158, 75 P. 371, affirmed (1905), 198 U. S. 361, 49 L. ed. 1085.

[9] Hand Gold Mining Co. v. Parker (1887), 59 Ga. 419.

[10] Strickley v. Highland Boy Mining Co. (1905), 200 U. S. 527, 50 L. ed. 581.

ground that there was a sufficient public benefit in the development of natural resources. Under either test it seems that the mere fact that the individual or corporation to whom the power is granted will receive personal gain or benefit will not prevent the use from being public, if the other requirements are met.[12]

Until the decision in the principal case, it seems to have been the settled rule in Indiana that the test to be applied to determine whether or not a use was public was whether the public had the right to use the property appropriated.[13] In Westport Stone Company v. Thomas,[14] the Indiana Supreme Court applied this test in upholding the constitutionality of the statute, the validity of which is in question in the principal case.[15] This reason was disapproved, however, by the court in this case, the court saying: "We are convinced, however, that the act does not invest the owner of a quarry or mine with the character of a common carrier or with the duties and privileges of a common carrier. We think that the validity of the grant of power of eminent domain must rest upon the ground that the state has such an interest in the development of its natural resources that the General Assembly can treat the business of mining or quarrying as a 'public use.'"

Although the Indiana court does not expressly repudiate the test formerly applied in this state, it would seem that it has in fact followed Clark v. Nash[16] in adopting public benefit as the criterion of public use. If the statute in question is to be upheld at all, it must be on this ground for it is obvious that the criticism directed at Westport Stone Company v. Thomas was just. The correctness of the result in the principal case, then, depends upon whether the court was right in finding that the business of quarrying was vested with a public interest. This is a question of policy to be determined by the state court, because, as set out by the United States Supreme Court in Clark v. Nash, "The local courts understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the state, which in all probability would flow from the denial of its validity."[17] It is here submitted that the Supreme Court of Indiana, while doubtlessly adopting a more liberal view than formerly expressed judicially in this state, followed in the principal case a view which has been shown to be preferable by eminent authority.

C. L. C.

Courts—Number of Jurors Required.—Appellee filed its claim in the City Court of East Chicago asking for damages in the sum of $600. The only errors presented involved the jurisdiction of the court and the overruling of appellant's motion for a new trial. Appellant asserts that the City Court of East Chicago had no jurisdiction over the subject-matter of the action, and that, therefore, the Lake Circuit Court, upon appeal, did

[11] Blackwell Lumber Co. v. Empire Mill Co. (1916), 28 Idaho 556, 155 P. 680.

[12] Mull v. Indianapolis, etc., Traction Co. (1907), 169 Ind. 214, 81 N. E. 657; Burley v. United States (1910), 179 F. 1; Hairston v. Danville and Western Ry. Co. (1908), 208 U. S. 598, 52 L. ed. 637; City of Santa Ana v. Harlin (1893), 99 Cal. 538, 34 P. 224; Chicago, B. and Q. Railroad Co. v. City of Naperville (1897), 169 Ill. 25, 48 N. E. 335.

[13] Sexauer v. Star Milling Co. (1909), 173 Ind. 342, 90 N. E. 474; Mull v. Indianapolis, etc., Traction Co. (1907), 169 Ind. 214, 81 N. E. 657; Bedford Quarries Company v. Chicago, Indianapolis and Louisville Ry. Co. (1910), 175 Ind. 353, 94 N. E. 326; Westport Stone Co. v. Thomas (1910), 175 Ind. 319, 94 N. E. 406.

[14] (1910), 175 Ind. 319, 94 N. E. 406.

[15] Burns' Ann. St. 1926, Sec. 13218.

[16] (1904), 27 Utah 158, 75 P. 371, affirmed (1905), 198 U. S. 361, 49 L. ed. 1085.

[17] (1905), 198 U. S. 361, 49 L. ed. 1085.