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Municipal Corporations-Proper Street Use

MUNICIPAL CORPORATIONS—PROPER STREET USE—Appellee, owner of an industrial plant, entered into an agreement with the board of public works of Indianapolis by which appellee obtained permission to lay a switch across Koehne Street connecting its plant with a nearby railroad. This agreement was ratified by the city council of Indianapolis, and appellee laid the switch. One of the provisions of the agreement was that appellee would remove the tracks upon notice by the city; such notice was given and upon appellee's failure to remove the track, it was removed by the city. Appellee then obtained an injunction restraining the city from interfering with the switch, which appellee proposed to re-lay. *Held*, the injunction was erroneously issued.[1]

A municipal corporation has authority to permit the construction of a street railroad in a public street without compensation, if the railroad is to be used for a public purpose. But a municipal corporation, in the absence of constitutional or legislative authority, has no power to license a railroad to use permanently a public street for purely private purposes.[2] "The rule is clearly the legitimate sequence of the fundamental principles, that private property can never be seized under the power of eminent domain for merely private purposes, and that roads and streets are held for the public use, and not for permanent private purposes."[3]

The courts in determining what are public uses have arrived at widely divergent conclusions. The cases seem to have divided themselves into two groups. 1. The eastern or narrow view, that in order to have a public use the public generally must actually participate, directly or indirectly, in utilizing the thing. Illustrative of this view is the decision that a statute authorizing the public acquisition of the right to fish in fresh water streams did not provide for a public use, as only a few people, particularly interested in fishing, would enjoy it,[4] and by the case holding that a spur track to a manufacturing plant, which was also to be used in storing the excess cars of the railroad, is devoted to a public use,[5] and by the case holding that a private landowner might condemn an easement to provide a means of ingress and egress to his land, providing the public had the right to use the road;[6] 2. The western or liberal view is that the thing must be for a public purpose, as distinguished from public use, or for public benefit. The leading case in this division holds that a private landowner may condemn land to be used for irrigating his premises.[7] Applying the theory of this case it would seem that a large manufacturing plant, essential to the financial stability of the community, might exercise the right of eminent domain in acquiring additional land.

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[1] *Indianapolis v. Link Realty Co.* (1932), 179 N. E. 574.

[2] *Adams v. Ohio Falls Car Co.* (1892), 131 Ind. 375;, 31 N. E. 57; *City of Tell City v. Bielefeld* (1896), 20 Ind. App. 1, 49 N. E. 1090; *State v. Stoner* (1906), 39 Ind. App. 104, 79 N. E. 399; *Mikesell v. Durkee* (1886), 34 Kans. 509, 9 Pac. 278.

[3] Elliott, Streets and Railroads (4th), V. 2, Sec. 941.

[4] *Albright v. Sussex County* (1904), 71 N. J. L. 303, 57 Atl. 398; *Brown v. Gerald* (1905), 100 Me. 351, 61 Atl. 785.

[5] *Hairston v. Danville and Western Ry.* (1908), 28 Sup. St. Rep. 331, 208 U. S. 598. Note in 22 L. R. A. (n. s.) 1.

[6] *Towns v. Klamath County* (1898), 33 Ore. 225, 53 Pac. 604.

[7] *Clark v. Nash* (1905), 25 Sup. Ct. Rep. 576, 198 U. S. 361.

Despite some loose language in a few of the Indiana cases, it is clear that Indiana should be classified with the states adhering to the eastern or narrow view. The leading Indiana case holds that a railroad right of way condemned by a stone company, the use of which will be available to the public as a common carrier, as well as to the stone company as a private carrier, is devoted to a public use.[8] Quotations from other Indiana cases will shed more light upon the proposition. "There must be in the general public (to have a public use) a right to the definite use of the property; a right which the law compels the owner to give to the general public and which is guarded and controlled by law. It is not enough that the general prosperity of the community is promoted."[9] "To make a use public it is not necessary that the whole community or any large portion thereof actually participate in it, but only that a right to its enjoyment exists in the general public."[10] "It has been held by this court that the test as to whether a use is a public one or private one is not simply how many persons actually use the way condemned for the purpose for which it was condemned, but whether the public has a right to use it without discrimination."[11]

The holding of the Indiana court in the principal case is in conformity with the decisions of the states following the eastern or narrow view. The grant to a subway contractor of the right to lay a track in the street for the transportation of dump cars was held invalid, as not for a public use, the court reasoning that public use necessarily implies the right of use by the public.[12] The grant by a municipality to a department store of the right to construct a spur in the street connecting the department store with the main line of the railroad is not for a public use.[13] And a spur track from a railroad to a private coal yard is not a public use, and a grant to maintain such a track in a public street is invalid.[14] But if the switch spur to the private enterprise is or may be utilized by others, it is a public use.[15]

If, in the present case, the land desired to be taken was to be devoted to a public use, the question would arise as to whether compensation would have to be paid. But since the public had no right to use the track in the principal case, it was for a private purpose—one which the municipality had no power to authorize, and the decision of the court is correct.

R. O. E.

TAXATION—DUE PROCESS—GIFTS IN CONTEMPLATION OF DEATH—On March 1, 1927, John Donnan, by complete and irrevocable gift *inter vivos*, transferred, without consideration, certain securities to trustees for his

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[8] *Westport Stone Co. v. Thomas* (1910), 175 Ind. 342, 94 N. E. 406.

[9] *Great Western Natural Gas and Oil Co. v. Hawkins* (1903), 30 Ind. App. 557, 66 N. E. 765.

[10] *Sexauer v. Star Milling Co.* (1909), 173 Ind. 342, 90 N. E. 474.

[11] *Westport Stone Co. v. Thomas* (1910), 175 Ind. 342, 84 N. E. 406.

[12] *Bradley v. Degnon* (1918), 224 N. Y. 60, 120 N. E. 89.

[13] *Hatfield v. Straus* (1907), 189 N. Y. 208, 82 N. E. 172.

[14] *Mester v. Morman* (1924), 227 Mich. 364, 198 N. W. 927; *Butler v. F. R. Penn Co.* (1910), 152 N. C. 416, 68 S. E. 12.

[15] *Bedford Quarries Co. v. Chicago, etc., Ry.* (1910), 175 Ind. 303, 94 N. E. 326.