

Memorandum 70-38

Subject: Study 36.22 - Condemnation (The Right to Take--Public Necessity)

BACKGROUND

The right of eminent domain is an inherent attribute of sovereignty and the constitutional and statutory provisions merely define and limit its exercise. There are two constitutional limits on the exercise of the power:

- (1) "Just compensation" must be paid for the property taken or damaged.
- (2) The property must be taken for a "public"--as distinguished from a "private"--use.

In addition to the "public use" limitation on the right of eminent domain, there is the statutory requirement of "necessity." "Public use" and "necessity" are distinct concepts and the distinction is significant because "public use" is always a justiciable issue while "necessity" often is not.

Public Use

"Public use" as an issue in a condemnation proceeding refers to the actual or intended use of property for a public purpose and is a condition precedent to the exercise of the power of eminent domain. Thus, the possible "public use" defenses include:

- (1) Condemnor not authorized to condemn property for the designated use. This is a question whether there is statutory authority for this condemnor to condemn property for the particular use and, if so, whether the statute or the particular application of the statute is constitutional.
- (2) No intent to put the property to the designated use. This defense requires affirmative allegations of and proof indicating "fraud, bad faith,

or abuse of discretion in the sense that the condemnor does not actually intend to use the property as it resolved to use it." People v. Chevalier, 52 Cal.2d 299, 304, 340 P.2d 598, 601-602 (1959). The pertinent intent is the intent at the time of taking since "property acquired in fee simple by a public body for a particular public purpose may nevertheless be diverted to another use. . . . When the judgment in the condemnation case became final plaintiffs were divested of all interest in the property regardless of the purpose for which the property might later be used." Newport v. City of Los Angeles, 184 Cal. App.2d 229, 239, 7 Cal. Rptr. 497 (1960).

(3) Lack of intent to use property within reasonable time. The Commission will consider this aspect of the right to take--"future use"--as a separate matter.

(4) Property taken in excess of that required. This aspect of the right to take--"excess condemnation"-- will be considered as a separate matter.

(5) "Substitute" condemnation. This will be considered as a separate matter.

#### Necessity

The issue of "necessity" is concerned with such matters as when and where the improvement will be made and what property interests will be taken for it. A separate matter--to be considered at a subsequent meeting--is the "more necessary public use" problem.

California statutes limit the exercise of the right of condemnation to the taking of property that "is necessary to such ["authorized by law"] use" (Code Civ. Proc. § 1241(2)), and to the taking of land or rights of way when

the proposed public use is located in a manner which will be "most compatible with the greatest public good and least private injury" (Code Civ. Proc. § 1242 on land and Code Civ. Proc. § 1240(6) on rights of way). If the property to be taken is not land or rights of way, the statutes do not limit the right of condemnation by requiring a proper location of the proposed public use. The matter of whether an interest greater than an easement may be taken is covered by Code of Civil Procedure Section 1239, which, in effect, permits any public entity to take a fee if it adopts a resolution that the taking of a fee is necessary. Attached as Exhibit III are the pertinent provisions referred to above.

By statute, the resolutions of many condemnors are made conclusive evidence of necessity. See attached Table VI. You will note that, for all practical purposes, state takings are subject to a conclusive presumption of necessity. In addition, subdivision (2) of Section 1241 of the Code of Civil Procedure provides that a resolution of necessity adopted by two-thirds of the governing body of a county, city, school district, irrigation district, sanitary district, transit district, public utility district, rapid transit district, or "water district" is conclusive evidence:

- (1) of the public necessity of the proposed improvement,
- (2) that such property is necessary therefor, and
- (3) that such proposed improvement "is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury."

The resolution is not conclusive if the property is located outside the condemnor's territorial limits.

Other statutes make the resolution conclusive with respect to other types of local public entities. See Table VI attached.

Where the resolution is conclusive, the issue of necessity is not justiciable even when facts constituting fraud, bad faith, or abuse of discretion are affirmatively pleaded. See extract from People v. Chevalier, 52 Cal.2d 299, 240 P.2d 598 (1959) (Exhibit I attached).

There is little doubt but that the vast majority of takings are now covered by the conclusive resolution provisions. Reference to Table VI (attached) indicates, however, that there are a number of condemnors whose resolution is only "prima facie" evidence of necessity and a number of condemnors whose resolutions are not even prima facie evidence. (However, this latter class of resolution probably would be given the effect of a presumption affecting the burden of proof by Evidence Code Section 664-- presumption that official duty regularly performed.)

It is possible that some of the various types of districts that are involved with the use of control of water would be given the benefit of a conclusive presumption of necessity by giving a broad construction to the phrase "water district" in subdivision (2) of Section 1241. Table VI does not, however, attempt to indicate the extent to which the conclusive presumption might be extended to districts other than those specifically designated as "water districts."

Where the resolution is made prima facie evidence of necessity, a property owner challenging a condemnation on the ground of improper location must produce clear and convincing evidence to show that the location selected is inconsistent with the greatest public good and least private injury. Housing Authority v. Forbes, 51 Cal. App.2d 1, 124 P.2d 194 (1942). Where the issue is whether the particular property or particular interest is necessary to the proposed public improvement, the burden on the property owner to rebut the presumption arising from a prima facie resolution is

unclear. Such a presumption may shift the burden of proof to the property owner (most likely effect) or merely the burden of producing evidence. See Evidence Code Sections 602-606. But see People v. O'Connell Bros., 204 Cal. App.2d 34, 21 Cal. Rptr. 890 (1962) (discussed infra).

Condemnors--such as mutual water companies, public utilities, nonprofit hospitals, and the like--that are not public entities present special problems in determining the extent to which their determinations of "necessity" should be recognized in the condemnation action. These condemnors will be discussed separately in memoranda prepared for future meetings.

Necessity generally--not a judicial question in other states

Attached (green) is an extract from Nichols on Eminent Domain. This extract sets out the portion of Nichols discussing necessity. We have reproduced all of this portion of Nichols for you, and we suggest that you read it. (Because of the extensive footnotes, you will find that it will require less time to read than you would expect from its size.) You will note that the extract commences with the statement:

The overwhelming weight of authority makes clear beyond any possibility of doubt that the question of the necessity or expediency of a taking in eminent domain lies within the discretion of the legislature and is not a proper subject of judicial review.

Nevertheless, California and a few other states have made necessity a judicial issue by statute. But even in California, as Table VI demonstrates, the great majority of California takings are covered by a conclusive resolution of necessity so that even in California the issue of necessity is not a justiciable issue in the ordinary case.

It is important to recognize the distinction between a "necessity" issue and a "public use" issue. Although the extract from Nichols is not as clear

as it might be in its discussion of the circumstances where the condemnor's determination of "necessity" is not conclusive under the general rule, it appears that the so-called "bad faith" type of exceptions discussed by Nichols frequently are cases where the issue is a "public use" issue, such as excess condemnation, future use, no intent to devote property to use for which it is claimed it is being taken, and the like. In California, in a case where the resolution of necessity is conclusive, "the conclusive effect accorded by the Legislature to the condemning body's findings of necessity cannot be affected by allegations that such findings were made as a result of fraud, bad faith, or abuse of discretion." People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598. But California also recognizes that an issue such as excess condemnation is not a necessity issue; it is a public use issue and the conclusive resolution of necessity does not deprive the court of its responsibility to determine whether the excess taking is a public use. People v. Superior Court, 68 Adv. Cal. 206, 65 Cal. Rptr. 342, 436 P.2d 342 (1968).

#### California statutory scheme on necessity

The existing statutory scheme on necessity has been built up over the years since 1872 and shows no consistent legislative policy. The major condemnors all have a conclusive resolution of necessity. The resolutions of the various kinds of special districts are given different effects, but the system defies any logical explanation. Some condemnors that can take immediate possession do not have a conclusive or even prima facie effect given their resolutions. Other condemnors that cannot take immediate possession have a conclusive effect given their resolutions of necessity. Many special districts have the county board of supervisors as the governing body. When the county board of supervisors acts for the county in adopting

the resolution of necessity, the resolution is conclusive. But when the board of supervisors acts for a special district in adopting the resolution, the effect to be given the resolution varies without any relationship to the type of district. In some cases, the resolution is conclusive on only one or two of the elements of necessity; sometimes it is conclusive on all three. Sometimes the resolution must be adopted by a two-thirds vote; sometimes a simple majority appears to be sufficient. Insofar as the resolution relates to the property interest to be taken--whether the fee or a lesser interest--the resolution of any local public entity apparently is conclusive on the issue of necessity and there is no two-thirds vote requirement. See Section 1239 of the Code of Civil Procedure.

Even with respect to public entities of the same type, the effect to be given the resolution varies. For example, examination of page 4 of Table VI discloses that the Alpine County Water Agency (county board of supervisors is governing body) has a resolution that is given prima facie effect; the Antelope Valley-East Kern Water Agency (elected board of directors) has a resolution that is given conclusive effect; and the Bighorn Mountains Water Agency (elected board of directors) has a resolution the effect of which is not indicated. The same is true of the flood control districts: The American River Flood Control District (elected board) has a resolution that is given conclusive effect; a county flood control district (county board of supervisors) has a resolution the effect of which is not indicated; and the Del Norte County Flood Control District (county board of supervisors) has a resolution that is given prima facie effect. Also a comparison of the functions of the various types of districts will disclose a similar lack of consistent treatment of districts that carry on the same function. In summary, while the Legislature has provided for a conclusive resolution

to cover the great majority of takings, the statutory pattern that governs this area of condemnation law consists of a mass of statutes that reflect no consistent legislative policy and introduce complexity and uncertainty into the law.

One of the few examples of a case where the court found that there was no necessity for a taking is People v. O'Connell Bros., 204 Cal. App.2d 34, 21 Cal. Rptr. 890 (1962). This was an action by the Department of Natural Resources to condemn approximately 500 acres of ranch land for development as a part of the State Park System. The plaintiff had the benefit of a "prima facie" presumption of necessity. The property in question was being acquired for Santa Clara County as a part of a cooperative park and recreational venture with the State Division of Beaches and Parks. The plaintiff presented two witnesses on necessity: (1) a land agent for the State Division of Beaches and Parks who gave no testimony as to necessity; (2) the Deputy Chief of the Division of Beaches and Parks who testified that a report had been prepared under his general supervision and that he agreed with the report (the report, which was admitted in evidence, stated that the 500 acres was too little to develop as a park and that there was not sufficient money to acquire the needed remaining property). The court found no public necessity. About a month later, the plaintiff filed a motion to reopen the case for the purpose of providing additional evidence on necessity (park personnel from Santa Clara County and other persons familiar with the Santa Clara County situation) but this motion was denied by the trial court. The judgment of the trial court was affirmed by the Court of Appeal and the Supreme Court denied a petition for hearing.

The staff believes that the case represents one where the plaintiff did not take the defendant's denial of "public necessity" seriously, and the plaintiff made no real effort to submit much more proof on the issue than the resolution. The adverse decision probably came as a shock to the plaintiff, but a second shock was when the court refused to reopen the case to hear from the persons who really knew what the facts were. Interestingly enough, if Santa Clara County had itself sought to acquire the property, a resolution of the board of supervisors on the issue of necessity would be conclusive. The case is one of the few where the defendant won on necessity (although, for all we know, Santa Clara County may later have brought an action to condemn the property). The case represents an example of a situation where the judge determined that a joint state-local park project is not necessary or not properly planned. There is little doubt that the plaintiff could have proved necessity had it gone to the trouble of bringing some witnesses who knew something about the project to the trial. (The defendant never introduced any evidence on the issue.) The staff believes that the case is an example of the problem that can arise where the plaintiff's resolution is not conclusive on necessity; the defendant has no real chance of winning on the issue, but the plaintiff has to go to the trouble and expense of litigating the issue and, in a rare case, losing if he fails properly to prepare his case on the issue.

For a further discussion of the existing law, see the extract from California Condemnation Practice (pages 150-165), which is attached to Memorandum 70-33.

## POLICY CONSIDERATIONS AND RECOMMENDATIONS

Many persons initially react to the policy question whether the resolution of necessity should be conclusive by taking the view that there should be some method of preventing public entities from acquiring property by eminent domain when the taking is not really necessity. However, the question whether the resolution should be given a conclusive effect or some lesser effect in a condemnation action is one that requires careful analysis.

As a practical matter, it would appear that any attempt to lessen the effect now given to the resolution of necessity would be doomed to failure. Taking away the conclusive effect given to the resolutions that now apply to the great majority of takings by public entities would probably be sufficient in and of itself to defeat any attempt to secure enactment of a comprehensive eminent domain statute. On the other hand, support from public entities for a comprehensive statute would be more likely if improvements can be made in the procedural aspects of condemnation law to preclude unmeritorious attempts to defeat condemnations. The great need in condemnation law is to give the property owner a right to adequate compensation and, if possible, to provide him with a practical means of obtaining justice if the condemnor has not offered him adequate compensation. The possibility of defeating a taking as not "necessary" under existing law is exceedingly slim. It would be more to the property owner's interest to eliminate necessity as a judicial issue and to provide him with a clear right and a statutory procedure for raising the public use questions (excess, future, substitute, fraud in not intending

to devote to use for which taken, and the like) in a condemnation action.

#### State takings

Almost every state condemnation action has the benefit of a conclusive presumption of necessity. It is likely that we will be revising and clarifying state condemnation procedure. To the extent that state condemnation actions are conducted under the Property Acquisition Law (which now probably governs--or should govern--all takings other than those of the Department of Public Works and Department of Water Resources), a conclusive presumption now applies. It seems appropriate to give state condemnation actions the benefit of a conclusive presumption on necessity since the Legislature can and does supervise state property acquisitions as does the Department of Finance. Limited state funds severely limit state property acquisitions and funds are available only in the cases of the greatest necessity. It does not seem appropriate for a Superior Court judge to tell the Legislature and the head of the appropriate state department that property sought to be acquired for state purposes is not necessary for state purposes. Accordingly, the staff believes that state takings should have the benefit of a conclusive presumption. The only real policy question for decision is who will determine "necessity" in takings by local public entities and by nongovernmental condemners.

#### Local public entity takings

The time to determine whether a project should go forward is long before a condemnation proceeding is instituted to acquire property. A local public entity is almost always committed to a public improvement long before the condemnation proceeding is filed. The project has been

cussed and discussed at length. Often the voters have approved a bond issue to finance the improvement. A large number of citizens will generally protest any public improvement on the ground that it will disturb the environment or will require expenditure of public money. And public officials have become more and more willing to listen to those who protest public improvements. At the same time, funds available to local public entities are less adequate than in the past to cover current programs, much less to finance new public improvements. Accordingly, decisions involved in the determination of the need for and the location and timing of public improvements have become some of the most political ones that the governing bodies of public entities are required to make.

In reality, the courts have done little more than to rubber stamp the decisions made by public bodies on necessity (other than in extraterritorial condemnation cases) because those bodies unquestionably are more qualified than a court to make these decisions. The courts are not equipped to deal with the kind of fact finding and interpretation needed to determine the policy questions presented by the need for a particular parcel of property for a particular project. Often the data on which the governing bodies rely in determining necessity involves political considerations that responsible public officials, rather than the courts, are best fitted to decide. The court procedure is not the suitable means by which the elements that must go into a political decision making of the "necessity" nature may be presented to the individual who must make the ultimate decision. To permit the courts to rely on the kind of nonjudicial materials that should be considered in determining necessity questions--such as the views of all interested citizens--poses the danger that some

courts might reach conclusions based on questionable or inadequate information.

There are other reasons why the court should not be permitted to pass on the question of necessity. A city sewer project, for example, often involves more than just this taking for this particular segment of sewer. A denial of a part of one location has an effect on larger segments and, to some extent, on the whole system. If review is needed, the condemnation action is not the time for it, because the condemnation action is the end of a process begun long before. Also, one judge may find necessity for one parcel in the right of way and another may not find it for another needed parcel in the same right of way. Someone finally has to judge, and it seems better in many ways to have that one be the governing body in control of the entire project. Moreover, the judicial process can only consider specific cases. Before contested cases reach the court, it is likely that many parcels of the same project will have been acquired by purchase.

In view of these considerations, it is not surprising that the original 1872 California scheme of making "public necessity" an issue for the judge has changed over the years so that now this issue is not one for the judge in the great majority of takings.

Finally, anyone who reviews the existing statutory scheme for determining the effect of the resolution of necessity is struck by the lack of any rational basis for the scheme. In any comprehensive revision of eminent domain law, the Commission could make a substantial contribution by repealing all the diverse provisions dealing with the effect of the resolution of necessity adopted by local public entities and substituting one sensible series of provisions dealing with this subject.

Our consultant (on pages 12-13 of the background study attached to Memorandum 70-33), after reviewing the existing situation, concludes:

It is suggested that the legislative intent as the court expressed it in Chevalier is sufficiently valid as to all takings by public condemnors to allow a conclusive presumption in their favor. While this would not alter greatly the end result in present litigation, it would put it in a more logical posture without unduly infringing upon the right of the general public or of particular landowners.

The staff has reached the same conclusion. All state takings should have the benefit of a conclusive presumption of necessity. However, any taking for the benefit of a state agency (other than the Department of Public Works or the Department of Water Resources) should be approved by the Property Acquisition Board before the proceeding is commenced. (When the details of this recommendation are worked out in statutory form the nature of the required revisions will be specified in more detail.)

All takings by local public entities should have the benefit of a conclusive presumption of necessity (except for takings outside the entity's territorial limits). But, at the same time, property owners should be provided with some assurance that the decision to acquire property by eminent domain is an informed one. Hence, the staff recommends that no condemnation action be commenced by a local public entity unless the governing body of the entity, after a public hearing, has adopted a resolution of necessity by a two-thirds vote of all of the members of its governing body. (The advice of representatives of local entities should be sought to determine whether the public hearings and two-thirds vote requirements are practical.)

The staff recommendation is based on the belief that the "necessity" question is a political one and should be made by the governing body of the local public entity rather than by a judge who may not be responsive to public needs. At the same time, we believe that the democratic process requires that the governing body make a decision to condemn property only after considering the information presented at a public hearing, and further, that the extreme step of condemnation of property should be taken only if a two-third majority of all the members of the governing body are persuaded that the acquisition is necessary.

The staff believes that the statutory scheme suggested above would be a vast improvement on the existing scheme which makes no sense at all. Moreover, we believe that it would provide property owners with some real protection against unnecessary acquisitions--something that is not actually provided under the existing statutory scheme. Attached as Exhibit II (yellow) are proposed statutory provisions dealing with the necessity problem as it exists in takings by local public entities. (We will draft provisions applicable to state agencies later.)

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

George C. Hadley, William H. Peterson, Charles E. Spencer, Jr., Roger Arnebergh, City Attorney, and Peyton H. Moore, Jr., for Respondents.

SPENCE, J.—Defendants Richard C. Goodspeed and William A. Hyland, as trustee, appeal from a judgment entered in two consolidated eminent domain actions, one brought by the state and the other by the city, to extinguish certain street access rights and to acquire an easement over said defendants' land for street purposes. The takings were incidental to the construction of a freeway. The jury found that the market value of the property taken was \$7,500, and that severance damages were offset by special benefits to the portion of the land which was not taken. Defendants seek a reversal on the following grounds of alleged error: (1) the striking of portions of their answer, which purported to raise special defenses of fraud, bad faith, and abuse of discretion; (2) the consolidation of the two proceedings for trial; (3) the refusal of certain instructions bearing on the measure of damages; (4) the submitting to the jury of an alleged improper form of verdict; and (5) the exclusion from evidence of a proposed plan for improving defendants' land.

The litigation involved property in a block in the city of Los Angeles, which block was bounded on the north by 98th Street, on the east by Broadway, on the south by Century Boulevard, and on the west by Olive Street. Defendants owned a strip on the southeast corner, with a frontage of 87 feet on Century Boulevard and 441.63 feet on Broadway. 99th Street formerly cut into the block, crossing Olive Street from the west, but did not continue through to Broadway. It ended at the westerly boundary of defendants' land.

A section of the new Harbor Freeway was built, running generally along Olive Street. It does not cross defendants' land but its construction resulted in the closing of the intersection of 99th Street and Olive. Access to the west along 99th Street was thereby denied to defendants and to the owners of property located in said block on 99th Street to the east of its former intersection with Olive Street.

To provide access for the landlocked parcels located on 99th Street east of its former intersection with Olive Street, the state sought to obtain an easement measuring 60 feet by 87 feet over defendants' land, for the purpose of extending 99th Street to Broadway. Defendants successfully interposed demurrers on the theory that the condemnation to provide

for this extension was beyond the power of the state with respect to the freeway project. The state and the city then entered into an agreement whereby the city agreed to condemn the easement across defendants' land. The state therefore limited its action against defendants to condemning defendants' right of access over 99th Street to and across the former Olive Street; and the city then brought the action to condemn the easement over defendants' land to extend 99th Street to Broadway.

The two actions were thereafter consolidated for trial. At the outset of the trial plaintiffs moved to strike from the defendants' answers those portions which defendants characterized as establishing "special defenses" of fraud, bad faith and abuse of discretion. With respect to the state's action, the allegations were that it was feasible to construct the freeway over 99th Street instead of closing off defendants' westerly access, and that in failing to so construct the freeway, the State Highway Commission acted arbitrarily and abused its discretion.

The allegations of fraud, bad faith, and abuse of discretion with respect to the city's action were more detailed. They attacked the city council's action in finding that condemning an easement across defendants' land was necessary and in the public interest. In substance, the allegations were that (1) the council abused its discretion in that (a) it failed to investigate properly the advisability of providing access to the landlocked parcels by constructing a north-south service road along the east side of the freeway, from 99th Street to 98th Street, across land available for the purpose; (b) the council's finding was "pursuant to an agreement and conspiracy by and between said Council and the California State Highway Commission" merely to further the commission's desires rather than to further any of the city's own interests, since the state would otherwise have to construct the described service road; (c) the council refused to hear defendants' arguments that the described service road was more in the public interest; (2) the council acted in bad faith, fraudulently, arbitrarily, and negligently in that (a) it acted in concert with and under the domination, control, and influence of state agencies, without studying or investigating for itself the necessity or desirability of the described service road as an alternative; (b) rather than for a legitimate city interest, the condemnation was for the purpose of accomplish-

ing for the state what the state was unable to do, and saving the state from having to build the described service road; (c) it refused to hear defendants' arguments that the public interest would be better served by the described service road.

After receiving in evidence the city ordinance and the commission's resolution containing the findings attacked in the answer, the court ordered the "special defenses" stricken. The question is whether the stricken allegations presented a justiciable issue.

[1] Because eminent domain is an inherent attribute of sovereignty, constitutional provisions merely place limitations upon its exercise. (*County of San Mateo v. Coburn*, 130 Cal. 631, 634 [63 P. 78, 621]; *County of Los Angeles v. Rindge Co.*, 53 Cal.App. 166, 174 [200 P. 27].) [2a] The only limitations placed upon the exercise of the right of eminent domain by the California Constitution (art. I, § 14) and the United States Constitution (Fourteenth Amendment) are that the taking be for a "public use" and that "just compensation" be paid for such taking. Each of these limitations creates a justiciable issue in eminent domain proceedings. But "all other questions involved in the taking of private property are of a legislative nature." (*University of So. California v. Robbins*, 1 Cal.App.2d 523, 525 [37 P.2d 163].) [3] The taking of property for use as a public street or highway is clearly a taking for an established public use (*Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 706 [43 S.Ct. 689, 67 L.Ed. 1156]; 2 Nichols on Eminent Domain (3d ed.) § 7.512 [2], p. 489), even though the street or highway will bear relatively little traffic. (*Sherman v. Buick*, 32 Cal. 241, 255 [91 Am.Dec. 577].) There is no question, then, that the takings in the instant case are for a public use. Defendants did not allege fraud, bad faith, or abuse of discretion in the sense that the condemner does not actually intend to use the property as it resolved to use it. The stricken allegations in defendants' "special defenses" sought judicial review of the findings that the respective takings were necessary and commensurate with the greatest public good and the least private injury. These legislative determinations are frequently termed the question of necessity.

[4] The recitations in the city ordinance and Highway Commission's resolution of the "public necessity" of the proposed improvements, that "such property is necessary therefor," and that the improvements were "planned or located in the manner which will be most compatible with the greatest

public good, and the least private injury," are "conclusive evidence" of those matters. (Code Civ. Proc., § 1241, subd. 2; Sts. & Hy. Code, § 103.) [5a] In upholding the constitutionality of this conclusive presumption, the United States Supreme Court said: "That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. . . . The question is purely political, does not require a hearing, and is not the subject of judicial inquiry." (*Rindge Co. v. County of Los Angeles*, *supra*, 262 U.S. 700, 709.)

However, defendants maintain that there is an implied exception to the statutory conclusive presumption. They argue that the determination of necessity is justiciable when facts constituting fraud, bad faith, or abuse of discretion are affirmatively pleaded. Plaintiffs, on the other hand, assert that implying such an exception would allow public improvements to be unduly impeded by frequent and prolonged litigation by persons whose only real contention is that someone else's property should be taken, rather than their own. Plaintiffs point out that property owners do have considerable protection in any case, since just compensation must always be paid, and since the conclusive presumption attaches only to those city ordinances that have been passed by a two-thirds vote. (Code Civ. Proc., § 1241, subd. 2.)

There is no doubt that the language used in several decisions seems to imply that the condemning body's findings of necessity are reviewable in condemnation actions when facts establishing fraud, bad faith, or abuse of discretion are affirmatively pleaded. (*People v. Logiss*, 160 Cal.App.2d 28, 32-33 [324 P.2d 926]; *Orange County Water Dist. v. Bennett*, 156 Cal.App.2d 745, 750 [320 P.2d 536]; *Los Angeles County Flood Control Dist. v. Jan*, 154 Cal.App.2d 389, 394 [316 P.2d 25]; *City of La Mesa v. Tweed & Gambrell Planning Mill*, 146 Cal.App.2d 762, 777 [304 P.2d 803]; *People ex rel. Department of Public Works v. Schultz Co.*, 123 Cal.App.2d 925, 941 [268 P.2d 117]; *People v. Thomas*, 108 Cal.App.2d 832, 835 [230 P.2d 914]; *People v. Milton* 85 Cal.App.2d 549, 552 [96 P.2d 159].) But the cases upon which defendants rely appear to confuse the question of public use with the question of necessity for taking particular property. This is especially true in those instances in which the property owner's contention was that the condemning body was seeking to take more land than it intended to put to a public use.

(See *People v. Lagiss*, *supra*, 160 Cal.App.2d 28; *Los Angeles County Flood Control Dist. v. Jan*, *supra*, 154 Cal.App.2d 389; *People ex rel. Department of Public Works v. Schultz Co.*, *supra*, 123 Cal.App.2d 925; *People v. Thomas*, *supra*, 108 Cal.App.2d 832; *People v. Milton*, *supra*, 35 Cal.App.2d 549. See also 2 Nichols on Eminent Domain (3d ed.) § 7.5122, p. 492.) [6] However, the distinction between the question of public use and the question of necessity has been, and should be, recognized. (*County of Los Angeles v. Rindge Co.*, *supra*, 53 Cal.App. 166, 174; *People v. Olsen*, 109 Cal.App. 523, 531 [293 P. 645].)

The failure of some of the cases to recognize such distinction may have resulted from adherence to the language employed in certain earlier cases decided before section 1241 of the Code of Civil Procedure was amended in 1913 to provide that the condemning body's determination of "necessity" should be "conclusive evidence" thereof. (Stats. 1913, p. 549.) That amendment, however, definitely brought the law of this state into line with that of the vast majority of other jurisdictions. (See numerous cases cited in note L.R.A. (N.S.) vol. 22, p. 64, at p. 71.) [5b] The majority rule is summarized in the cited note as follows: "If a use is a public one, the necessity, propriety, or expediency of appropriating private property for that use is ordinarily not a subject of judicial cognizance. In general, courts have nothing to do with questions of necessity, propriety, or expediency in exercises of the power of eminent domain. They are not judicial questions." Continuing on page 72, it is further said: "Once it is judicially established that a use is public, it is within the exclusive province of the Legislature to pass upon the question of necessity for appropriating private property for that use, unless the question of necessity has been made a judicial one, either by the Constitution or by statute." Such a constitutional provision is found in the Constitution of Michigan (1850) (art. 13, § 2) but as stated at page 70 in the cited note: "This provision, according to the court in *Paul v. City of Detroit*, 32 Mich. 108, is not found in Constitutions generally, and was never known in Michigan until the adoption of the Constitution of 1851."

[2b] As above indicated, the only pertinent limitations placed by the California Constitution upon the exercise of the right of eminent domain (art. I, § 14) are that the taking be for a "public use" and that "just compensation" be paid for such taking. It is further clear that since 1913, our statutory

provisions (Code Civ. Proc., § 1241, subd. 2; see also Sts. & Hy. Code, § 103) have placed the determination of the question of "necessity" within the exclusive province of the condemning body by expressly declaring that the latter's determination of "necessity" shall be "conclusive evidence" thereof.

[7] We therefore hold, despite the implications to the contrary in some of the cases, that the conclusive effect accorded by the Legislature to the condemning body's findings of necessity cannot be affected by allegations that such findings were made as the result of fraud, bad faith, or abuse of discretion. In other words, the questions of the necessity for making a given public improvement, the necessity for adopting a particular plan therefor, or the necessity for taking particular property, rather than other property, for the purpose of accomplishing such public improvement, cannot be made justiciable issues even though fraud, bad faith, or abuse of discretion may be alleged in connection with the condemning body's determination of such necessity. To hold otherwise would not only thwart the legislative purpose in making such determinations conclusive but would open the door to endless litigation, and perhaps conflicting determinations on the question of "necessity" in separate condemnation actions brought to obtain the parcels sought to carry out a single public improvement. [8] We are therefore in accord with the view that where the owner of land sought to be condemned for an established public use is accorded his constitutional right to just compensation for the taking, the condemning body's "motives or reasons for declaring that it is necessary to take the land are no concern of his." (*County of Los Angeles v. Bindge Co.*, *supra*, 53 Cal.App. 166, 174, *aff'd* *Bindge Co. v. County of Los Angeles*, 262 U.S. 700 [43 S.Ct. 689, 67 L.Ed. 1186].) Any language in the prior cases implying a contrary rule is hereby disapproved. It follows that there was no error in the trial court's ruling striking the "special defenses" relating to the question of necessity. /

(balance of opinion, dealing with other matters, omitted.)

EXHIBIT II

COMPREHENSIVE STATUTE § 300

Staff recommendation

The Right to Take

DIVISION 4. THE RIGHT TO TAKE

Chapter 1. General Provisions

Article 1. Public Use and Necessity

§ 300. Condemnation permitted only for a public use

300. The power of eminent domain may be exercised only to acquire property for a public use. Any use, purpose, object, or function which is declared by statute to be one for which the power of eminent domain may be exercised is a public use.

Memorandum 70-38

COMPREHENSIVE STATUTE § 301

Tentatively approved April 1970

The Right to Take

§ 301. Condemnation permitted only where authorized by statute

301. The power of eminent domain may be exercised to acquire property for a public use only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use.

The Right to Take

§ 302. Condemnation permitted only when necessity established

302. Before property may be taken by eminent domain, all of the following must be established:

- (a) The proposed project is a necessary project.
- (b) The property sought to be acquired is necessary for the proposed project.
- (c) The proposed project is planned or located in the manner which will be most compatible with the greatest public good and the least private injury.

The Right to Take

Article 2. Local Public Entities

§ 310. Resolution of necessity required

310. An eminent domain proceeding may not be commenced by a local public entity until after its governing body has adopted a resolution of necessity that meets the requirements of this chapter.

The Right to Take

§ 310.1. Contents of resolution

310.1. The resolution of necessity shall describe the specific parcel or parcels of property to be acquired by eminent domain and the general nature of the proposed project for which the property is required and shall declare all of the following:

- (a) The public interest and necessity require the proposed project.
- (b) The property described in the resolution is necessary for the project.
- (c) The proposed project is planned or located in the manner which will be most compatible with the greatest public good and the least private injury.

Memorandum 70-38

COMPREHENSIVE STATUTE § 310.2

Staff recommendation

The Right to Take

§ 310.2. Adoption of resolution

310.2. The resolution of necessity must be adopted by a vote of not less than two-thirds of all of the members of the governing body of the local public entity.

The Right to Take

§ 310.3. Effect of resolution

310.3. (a) If the property described in the resolution is located entirely within the boundaries of the local public entity, the resolution of necessity conclusively establishes the matters referred to in Section 302.

(b) If the property described in the resolution is not located entirely within the boundaries of the local public entity, the resolution of necessity creates a presumption that the matters referred to in Section 302 are true. This presumption is a presumption affecting the burden of producing evidence.

The Right to Take

§ 310.4. Public hearing

310.4. A resolution of necessity may be adopted only after the governing body of the local public entity has held a public hearing at which interested persons are provided a reasonable opportunity to express their views on the matters to be determined by the resolution. The determination by the governing body of the local public entity as to what constitutes a reasonable opportunity to present views is conclusive.

The Right to Take

§ 310.5. Notice of hearing

310.5. (a) Notice of the public hearing shall be given as provided in this section.

(b) The notice of the hearing shall include all of the following information:

(1) A statement that the governing body of the local public entity is holding a public hearing to determine whether the right of eminent domain should be exercised to acquire property.

(2) The general nature of the project for which the property is to be acquired.

(3) The general location or situs of the parcel or parcels of property to be considered at the hearing.

(4) The time and place of the hearing.

(c) The notice of hearing shall be published as provided in Section 6061 of the Government Code at least 15 days before the date set for the hearing.

(d) A copy of the notice shall be mailed by first class mail to each person whose interest in property is to be acquired by eminent domain if the name and address of such person appears

Staff recommendation

on the last equalized county assessment roll (including the roll of state-assessed property) or is known to the clerk or secretary of the local public entity. The notice shall be mailed at least 15 days before the date set for the hearing.

(e) Certificates or affidavits shall be filed with the clerk or secretary setting forth the time and manner of compliance with the requirements of subdivisions (c) and (d).

(f) A defect, error, or omission in the notice, the certificate or affidavit of the clerk or secretary, the publication or mailing of notices, or failure of the person having an interest in the property to receive notice, does not invalidate any eminent domain proceeding or affect the right to commence or maintain any eminent domain proceeding.

## CALIFORNIA STATUTORY PROVISIONS

§1239. Estates in Land Subject to Condemnation.—The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, or for the protection of water bearing lands from drought therefrom of any character whatsoever from any adjacent lands. [1]

2. Except as provided in subsections 3 and 4, or specifically in any other statute, an easement, when taken for any other use; provided, however, that when the taking is by a municipal corporation, and is for the purpose of constructing, equipping, using, maintaining or operating any works, road, railroad, tramway, power plant, telephone line, or other necessary works or structures, for the preparation, manufacture, handling or transporting of any material or supplies required in the construction or completion by such municipal corporation of any public work, improvement, or utility, a fee simple may be taken if the legislative body of such municipal corporation shall, by resolution, determine the taking thereof to be necessary; and provided, further, that, when any land is taken for the use of a by-pass, or drainage way, or overflow channel, or a levee, or an embankment, or a cut required by the plans of the California Debris Commission referred to in that certain act of the Legislature, entitled "An act approving the report of the California Debris Commission transmitted to the speaker of the House of Representatives by the Secretary of War on June 27, 1911, directing the approval of plans of reclamation along the Sacramento River or its tributaries or upon the swamp lands adjacent to said river, directing the State Engineer to procure data and make surveys and examinations for the purpose of perfecting the plans contained in said report of the California Debris Commission, and to make reports thereof, making an appropriation to pay the expenses of such examinations and surveys, and creating a Reclamation Board and defining its power," approved December 24, 1911, or any modifications or amendments that may be adopted to the same, either a fee simple or easement may be taken as the Reclamation Board shall by resolution determine may be necessary. Such resolution shall be conclusive evidence that a taking of a fee simple or easement, as the case may be, is necessary

3. The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use.

4. When the property is taken by any mutual water system, county, city and county, or incorporated city or town, or a municipal water district, or other political subdivision, regardless of the use, a fee simple may be taken if the legislative or other governing body of such mutual water system, county, city and county, or incorporated city or town, or municipal water district, or other political subdivision, shall, by resolution, determine the taking thereof in fee to be necessary. Such resolution shall be conclusive evidence of the necessity for the taking of the fee simple. Where the fee is taken, the decree of condemnation shall specifically provide for the taking of a fee simple estate.

The provisions of this subsection shall not be applicable where the property is taken under the authority conferred by subsection 1 hereof. Leg.H. 1872, 1874 p. 355, 1911 p. 618, 1913 p. 582, 1949 ch. 978.

§1240. Private Property Subject to Condemnation.—The private property which may be taken under this title includes:

6. All rights-of-way for any and all the purposes mentioned in Section 1238, and any and all structures and improvements on, over, across or along such rights-of-way, and the lands held or used in connection therewith shall be subject to be connected with, crossed, or intersected by or embraced within any other right-of-way or improvements, or structures thereon. They shall also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections, and connections shall be made in manner most compatible with the greatest public benefit and least private injury.

§1241. Conditions Precedent—Public Use and Necessity.—Before property can be taken, it must appear:

1. [1] That the use to which it is to be applied is a use authorized by law;

2. That the taking is necessary to such use; provided, when the board of a sanitary district or the board of directors of an irrigation district, of a transit district, of a rapid transit district, of a public utility district, of a county sanitation district, or of a water district or the legislative body of a county, city and county, or an incorporated city or town, or the governing body of a school district, shall, by resolu-

tion or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, or school district, or sanitary, irrigation, transit, rapid transit, public utility, county sanitation, or water district, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury; provided, that said resolution or ordinance shall not be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city or town, or school district, or sanitary, irrigation, transit, rapid transit, public utility, county sanitation, or water district, of property located outside of the territorial limits thereof.

TABLE VI. EFFECT OF CONDEMNATION RESOLUTION AND GOVERNING BODY  
 (Only public entities having condemnation authority are included.)

<u>Public Entity</u>	<u>Effect of Resolution</u>	<u>Governing Body</u>
<u>STATE</u>		
California Toll Bridge Authority	Sts. & Hwys. Code § 30404 <u>Conclusive</u>	Gov., Lt. Gov., Admin. of Transportation, Dir. of Finance & 1 appointed member Sts. & Hwys. Code § 30050
Dept. of Conservation <sup>1</sup>	Pub. Res. Code § 3320.1 <u>Prima Facie</u>	State Oil & Gas Supervisor (appointed) Pub. Res. Code § 3320.1
Dept. of Parks & Recreation	Pub. Res. Code §§ 5006, 5006.1 <u>Prima Facie</u>	Dept. of Parks & recreation with consent of Dept. of Finance Pub. Res. Code §§ 5006, 5006.1
Dept. of Water Resources	Water Code § 251 <u>Conclusive</u>	Dir. of Water Resources appointed by Gov., confirmed by Senate Water Code § 120
Dept. of Water Resources (Central Valley Project)	Water Code § 11582 <u>Conclusive</u>	Dept. of Water Resources Water Code § 11451
San Francisco Port Authority	Harb. & Nav. Code § 1917 <u>Conclusive</u>	Appointed by San Francisco Port Authority Commissioners Harb. & Nav. Code § 1700
State Lands Commissioner	Pub. Res. Code § 6808 <u>Conclusive</u>	Controller, Lt. Gov., Dir. of Finance, Pub. Res. Code § 6101

1. This statute provides for acquisition by condemnation of property in an area where 75% of the owners have entered an agreement for management development operations or repressuring of an oil or gas pool. Condemnation may also be exercised by the city or county on behalf of the other owners under this provision.

Public Entity	Effect of Resolution	Governing Body
State Militia	Mil. & Vets. Code § 438 <u>Prima Facie</u>	Adjutant Gen., Mil. & Vets. Code § 438
State Public Works Bd.	Govt. Code § 15855 <u>Conclusive</u>	Dir. of Finance, Dir. of Pub. Works, Real Estate Comm., appointed by legislators, Govt. Code § 15770
State Reclamation Bd.	Water Code § 8595 <u>Conclusive</u>	Bd. appointed by Gov. Water Code § 8551
Univ. of California	Educ. Code § 23152 <u>Conclusive</u>	Bd. of Regents (appointed Cal. Const., Art. 14, § 9; Govt. Code § 20008)

COUNTY

Code Civ. Proc. § 1241(2) <u>Conclusive</u>	Leg. Body of County, Code Civ. Proc. § 1241(2)
Sts. & Hwys. Code § 4189 (Street Opening Act 1903) [ <u>Conclusive</u> only (a) necessity & (c) greatest public good with least private injury]	Leg. Body of County, Code Civ. Proc. § 4170
Sts. & Hwys. Code § 6121 (Improvement Act of 1911) <u>Conclusive</u>	Leg. Body of City or County, Sts. & Hwys. Code § 6121
Sts. & Hwys. Code § 11400 (Pedestrian Mall Law 1960) <u>Conclusive</u>	Leg. Body of County, Sts. & Hwys. Code § 11400
Sts. & Hwys. Code §§ 31590, 31592; Acquisitions for parking districts. <u>Conclusive</u> evidence as to (a) & (c) as per Sts. & Hwys. Code § 4189--Street Opening Act of 1903	Leg. Body of County, Sts. & Hwys. Code § 31590

Public Entity	Effect of Resolution	Governing Body
---------------	----------------------	----------------

CITY

	Code of Civ. Proc. § 1241(2) <u>Conclusive</u>	Leg. Body of City, Code Civ. Proc. § 1241(2)
	Govt. Code § 38081; Park & Playground Act of 1909 <u>Conclusive</u> as to (a)	Leg. Body of City, Govt. Code § 38010
	Govt. Code § 39140 (Sewer Right of Way Law of 1921) <u>Conclusive</u> as to (a) & (c)	Leg. Body of City, Govt. Code § 39110
	Sts. & Hwys. Code § 4189 (Street Opening Act of 1903) <u>Conclusive</u> only as to (a) & (c)	Leg. Body of City, Code Civ. Proc. § 4170
	Sts. & Hwys. Code § 6121 (Improvement Act of 1911) <u>Conclusive</u>	Leg. Body of City, Sts. & Hwys. Code § 6121
	Sts. & Hwys. Code § 11400 (Pedestrian Mall Law of 1960) <u>Conclusive</u>	Leg. Body of City, Sts. & Hwys. Code §§ 11400, 11002, 11003
	Sts. & Hwys. Code §§ 31590, 31592 (Acquisitions for parking districts) <u>Conclu-</u> <u>sive</u> as to (a) & (c) as per Street Opening Act of 1903 Sts. & Hwys. Code § 4189	Leg. Body of City, Sts. & Hwys. Code § 31590

SCHOOL DISTRICTS

	Code Civ. Proc. § 1241(2) <u>Conclusive</u>	Elected governing bd., Code Civ. Proc. §§ 1221-1229.5
--	--	---

Public Entity	Effect of Resolution	Governing Body
<u>DISTRICT</u>		
Alameda County Flood Control & Water Conservation Dist.--1949:1275, Water Code App. §§ 55-1 to 55-39	Water Code App. § 55-5(13) <u>Prima Facie</u>	Bd. of Supervisors of County ex officio, Water Code App. § 55-6
Alameda County Water Dist.--1961:1942 (additional powers granted to dist. organized as county water dist.)	1961:1942 §4(d) <u>Conclusive</u> (same as city)	Elected Bd. of Dir., Water Code §§ 30730-30803
Alpine County Water Agency --1961:1896, Water Code App. §§ 102-1 to 102-56	Water Code App. § 102-7 <u>Prima Facie</u>	Bd. of Supervisors of County ex officio, Water Code App. § 102-30
Amador County Water Agency --1959:2137, Water Code App. §§ 95-1 to 95-29	Water Code App. §§ 95-3.4 <u>Prima Facie</u>	Either Bd. of Supervisors or elected Bd. of Dir., Water Code App. § 95-7
American River Flood Control Dist.--1927:808, Water Code App. §§ 37-1 to 37-31	Water Code App. § 37-23 <u>Conclusive</u> (refers to gen. powers of irrigation dist., etc.)	Elected Bd. of Trustees, Water Code App. § 37-3
Antelope Valley-East Kern Water Agency--1959:2146, Water Code App. §§ 98-49 to 98-96	Water Code App. § 98-61(7) <u>Conclusive</u> (rights of city)	Elected Bd. of Dir., Water Code App. § 98-51
Avenal Community Services Dist.--1955:1702, Govt. Code § 61610	<u>No indicated effect</u>	Elected Bd. of Dir., 1955:1702 § 5
Bayside Reclamation Dist. --1927:792, repealed with savings clause 1953:1005	<u>No indicated effect</u>	Elected Trustees 1925:792 § 4
Bethel Island Municipal Improvement Dist.--1960 (1st Ex. Sess.):22	1960 (1st Ex. Sess.):22 § 80 (as amended Deerings Gen. Laws Act 5239e) <u>Conclusive</u> (powers of city)	Elected Bd. of Dir., 1960 (1st Ex. Sess.):22 § 26
Bighorn Mountains Water Agency--1969:1175, Water Code App. §§ 112-1 to 112-54	<u>No indicated effect</u>	Elected Bd. of Dir., 1969:1175 § 5

Public Entity	Effect of Resolution	Governing Body
Boulevard dist.--Sts. & Hwys. Code §§ 26000-26260	<u>No indicated effect</u>	1 elected commissioner, Chair. Bd. Supervisor, county surveyor or county engineer, Sts. & Hwys. Code § 26080
Brannan-Andrus Levee Maintenance Dist.--1967: 910, Water Code App. §§ 106-1 to 106-17	<u>No indicated effect</u> (refers to reclamation dists., Water Code §§ 50000-53901)	Elected Bd., 1967: 910 § 6
Bridge & highway dists.-- Sts. & Hwys. Code §§ 27000-27325	Sts. & Hwys. Code § 27166 refers to same powers of State of California <u>Conclusive</u>	Appointed Bd., Sts. & Hwys. Code § 27122
Brisbane County Water Dist.--1950 (1st Ex. Sess.):13, Water Code App. §§ 57-1 to 57-7	1950 (1st Ex. Sess.):13 <u>Conclusive</u> , Incorporated Water Code § 31044, which would incorporate CCP § 1241(2)	Elected Bd. of Dir., 1950 (1st Ex. Sess.):13 § 3
California airport dists.-- Pub. Util. Code §§ 22001-22908	<u>No indicated effect</u>	Elected Bd. of Dir., Pub. Util. Code § 22402
California water dists.-- Water Code §§ 34000-38501	Water Code § 35625, <u>Conclusive</u> , incorporating by reference, CCP § 1241(2)	Elected Bd. of Dir., Water Code § 34705
California water storage dists.--Water Code §§ 39000-48401	Water Code § 43532 <u>Conclusive</u>	Elected Bd. of Dir., Water Code § 40302
Citrus pest control dists.--Agri. Code §§ 8401-8759	<u>No indicated effect</u>	Appointed Bd. of Dir., Agri. Code § 8501
City of Marysville Levee Dist.--1875-76:134	<u>No indicated effect</u>	Elected Bd. of Commissioners, 1875-76:134 § 1
Community Redevelopment Agencies--Health & Saf. Code §§ 33390-33396	<u>No indicated effect</u>	Appointed members of agency, Health & Saf. Code §§ 33110-33112

Public Entity	Effect of Resolution	Governing Body
Community services dists. --Govt. Code §§ 61000-61802	<u>No indicated effect</u>	Elected Bd., Govt. Code §§ 61200-61202
Conservancy dists.--1919:332, repealed with savings clause 1953:1023	<u>No indicated effect</u>	Elected Bd. of Dir., 1919:332 § 6
Contra Costa County Flood Control & Water Conservation Dist.--1951:1617, Water Code App. §§ 63-1 to 63-36	Water Code App. § 63-5(13) <u>Prima Facie</u>	Bd. of Supervisors of County, Water Code App. § 63-6
Contra Costa County Storm Drainage Dist.--1953:1532, Water Code App. §§ 69-1 to 69-43	Water Code App. § 69-7 <u>Prima Facie</u>	Bd. of Supervisors of County, Water Code App. § 69-8
Contra Costa County Water Agency--1957:518, Water Code App. §§ 80-1 to 80-27	Water Code App. § 80-10, <u>Prima Facie</u>	Bd. of Supervisors of County, Water Code App. § 80-4
Costa Mesa County Water Dist. (merger)--Water Code §§ 33200-33250	Code Civ. Proc. § 1241(2) <u>Conclusive</u>	Elected Bd. of Dir., Water Code §§ 33240-33247
Cotton pest abatement dists. --Agri. Code §§ 6051-6084	<u>No indicated effect</u>	Appointed Bd. of Dir., Agri. Code § 6060
County drainage dists.-- Water Code §§ 56000-56130	<u>No indicated effect</u>	Bd. of Dir. (representatives of city & county, specified officers) Water Code § 56030
County flood control dists. --Water Code § 8110	<u>No indicated effect</u>	Bd. of Supervisors Water Code § 8110
County power pumping dists. --1915:745, repealed with savings clause 1953:1022	<u>No indicated effect</u>	Bd. of Supervisors 1915:745 § 12

Public Entity	Effect of Resolution	Governing Body
County recreation dists.-- former Pub. Res. Code § 5439	[former Pub. Res. Code § 5439, now under Pub. Res. Code §§ 5780-5788.13 Recreation & Park dists. (see below)]	
County sanitation dists.-- Health & Saf. Code §§ 4700-4858	Code Civ. Proc. § 1241(2) <u>Conclusive</u>	Appointed Bd. of Dir., Health & Saf. Code § 4730
County sewerage & water dists.--Health & Saf. Code §§ 5500-5656 (provisions repealed except for § 5617 without affecting existing dists.)	<u>No indicated effect</u>	Appointed Bd. of Dir., Health & Saf. Code § 5530
County water authorities-- 1943:545, Water Code App. §§ 45-1 to 45-16	Water Code App. § 45-5 <u>Conclusive</u> (same as muni. corp.)	Appointed Bd. of Dir., Water Code App. § 45-6
County water dists.--Water Code §§ 30000-33901	Water Code §§ 30000-33901 <u>Conclusive</u> § 31044 included in CCP § 1241(2)	Elected Bd. of Dir., Water Code §§ 30730-30803
County waterworks dists.-- Water Code §§ 55000-55991	<u>No indicated effect</u>	Bd. of Supervisors, Water Code § 55301 or appointed Bd. §§ 55302-55305
Crestline-Lake Arrowhead Water Agency--1962 (1st Ex. Sess.):40, Water Code App. §§ 104-1 to 104-46	Water Code App. § 104-11(9) <u>Conclusive</u>	Elected Bd. of Dir., Water Code App. § 104-2.7
Del Norte County Flood Control Dist.--1955:166, Water Code App. §§ 72-1 to 72-36	Water Code App. § 72-7 <u>Prima Facie</u>	Bd. of Supervisors, Water Code App. § 72-8
Delta Water Agency--1968: 419, Water Code App. §§ 108-1.1 to 108-10.2	<u>No indicated effect</u>	Bd. of Dir., appointed or elected, Water Code App. . . . . §§ 108-3.2, 108-3.3

Public Entity	Effect of Resolution	Governing Body
Desert Water Agency-- 1961:1069, Water Code App. §§ 100-1 to 100-54	Water Code App. § 100-15(9) <u>Conclusive</u> (same as city)	Elected Bd. of Dir., Water Code App. § 100-5
District agricultural associations--Agri. Code §§ 4002, 4051, 4054	<u>No indicated effect</u>	Appointed Bd. of Dir., Agri. Code § 3959
Donner Summit Public Utility Dist.--1959 (1st Ex. Sess.):15, Water Code App. §§ 58-1 to 58-6	Water Code App. §§ 58-1 to 58-6 <u>Conclusive</u> --as in Pub. Util. Code §§ 16404- 16405 (same as muni. corp.)	Elected Bd. of Dir., Pub. Util. Code § 15951
Drainage dists. (Act of 1880)--1880:227, repealed with savings clause 1953:1021	<u>No indicated effect</u>	Appointed Bd. of Dir., 1880:227 § 4
Drainage dists. (Act of 1897)--1897:228, repealed with savings clause 1953:1020	<u>No indicated effect</u>	Elected Bd. of Dir., 1897:228 § 3
Drainage dists. (Act of 1923)--1923:102, repealed with savings clause 1953:1019	<u>No indicated effect</u>	Appointed Bd. of Dir., 1923:102
Drainage dists. (Law of 1885)--1885:158, Water Code App. §§ 5-1 to 5-21	<u>No indicated effect</u>	Appointed Bd. of Trustees, Water Code App. § 5-5
Drainage dists. (Law of 1903)--1903:238, Water Code App. §§ 8-1 to 8-134 <sup>2</sup>	<u>No indicated effect</u>	Elected Bd. of Dir., Water Code App. § 8-6
Drainage dists. (Law of 1919)--1919:354, Water Code App. §§ 31-1 to 31-27	<u>No indicated effect</u>	Bd. of Supervisors of County with largest portion of land, Water Code App. § 31-2

2. This statute purportedly superseded and repealed by Act of 1919. However, Act of 1903 itself amended as recently as 1968.

Public Entity	Effect of Resolution	Governing Body
El Dorado County Toll Tunnel Authority--Sts. & Hwys. Code §§ 31100-31246	Sts. & Hwys. Code § 31203 <u>Conclusive</u>	Bd. of Supervisors, Sts. & Hwys. Code § 31110
El Dorado County Water Agency--1959:2139, Water Code App. §§ 96-1 to 96-104	Water Code App. § 96-8 <u>Prima Facie</u>	Bd. of Supervisors, Water Code App. § 96-32
Embarcadero Municipal Improvement Dist.--1960 (1st Ex. Sess.):81	1960 (1st Ex. Sess.):81 § 81 (as amended, see Deering's Gen. Laws Act 5239c) <u>Conclusive</u> (powers of city)	Elected Bd. of Dir., 1960 (1st Ex. Sess.):81 § 2
Estero Municipal Improvement Dist.--1960 (1st Ex. Sess.):82	1960 (1st Ex. Sess.): 82 § 81 (as amended see Deering's Gen. Laws Act 5239d) <u>Conclusive</u> (powers of city)	Appointed Bd. of Dir. (commencing 1964), 1960 (1st Ex. Sess.):82 §§ 26, 28-29
Fairfield-Suisun Sewer Dist.--1951:303	1951:303 § 44 <u>Conclusive</u> (same as city)	Bd. of Dir., 10 members from city councils of cities of Fairfield & Suisun, 1951:303 § 25
Fire protection dists. (Law of 1961)--Health & Saf. Code §§ 13801-13999	<u>No indicated effect</u>	Either Supervising Authority, <u>i.e.</u> , Bds. of Supervisors or City Council of largest city (Health & Saf. Code § 13806) or elected Bd. of Dir. (Health & Saf. Code §§ 13831, 13835)
Flood control & water conservation dists.--1931:641, Water Code App. §§ 38-1 to 38-13	<u>No indicated effect</u>	Appointed Bd. of Trustees, 1931:641 § 6
Folsom Lake Bridge Authority --Sts. & Hwys. Code §§ 30910-31041	Sts. & Hwys. Code § 31003 <u>Conclusive</u>	Appointed Bd., Sts. & Hwys. Code § 30920

Public Entity	Effect of Resolution	Governing Body
Fresno Metropolitan Flood Control Dist.--1955:503, Water Code App. §§ 73-1 to 73-46	Water Code App. § 73-26 <u>Prima Facie</u>	Appointed Bd., Water Code App. § 73-6
Fresno Metropolitan Transit Dist.--1961:1932, Pub. Util. Code App. 2, §§ 1.1 to 11.1	Pub. Util. Code App. 2, § 6.3, <u>Conclusive</u> (same as city)	Appointed Bd. of Dir., Pub. Util. Code App. 2, § 3.1
Garbage & refuse disposal dists.--Health & Saf. Code §§ 4170-4187	<u>No indicated effect</u>	Appointed Bd. of Dir., Health & Saf. Code § 4179
Garbage disposal dists.--Health & Saf. Code §§ 4100-4135	<u>No indicated effect</u>	Bd. of Supervisors, Health & Saf. Code § 4120
Guadalupe Valley Municipal Improvement Dist.--1959:2037	1959:2037 § 80 (as amended see Deering's Gen. Laws Act 5239b) <u>Conclusive</u> (same as city)	Elected Bd. of Dir., 1959:2037 §§ 26-29
Harbor dists.--Harb. & Nav. Code §§ 6000-6110	Harb. & Nav. Code § 6076 <u>Conclusive</u> (same as muni. corp.)	Elected Bd. of Commissioners, Harb. & Nav. Code §§ 6050, 6051
Harbor improvement dists.--Harb. & Nav. Code §§ 5800-5945	Harb. & Nav. Code § 5900.4 <u>Conclusive</u> (same as muni. corp.)	Bd. of Supervisors of largest county, Harb. & Nav. Code § 5703
Horticultural protection dists.--1935:756	<u>No indicated effect</u>	Appointed Bd., 1935:756 § 6
Housing authorities--Health & Saf. Code § 34325 <u>et seq.</u>	<u>No indicated effect</u>	Appointed Commis- sioners, Health & Saf. Code § 34270 or Governing body of city or county if authority transacts no business for 2 years, Health & Saf. Code § 34290

Public Entity	Effect of Resolution	Governing Body
Humboldt County Flood Control Dist.--1945:939, Water Code App. §§ 47-1 to 47-36	Water Code App. § 47-7 <u>Prima Facie</u>	Bd. of Supervisors of County, Water Code App. § 47-8
Hunters Point Reclamation Dist.--1955:1573, Water Code App. §§ 78-1 to 78-17	<u>No indicated effect</u>	Elected Bd. of Trustees, Water Code App. § 78-4; Water Code §§ 50600-50602
Irrigation dists.--Water Code §§ 20500-29978	Water Code § 22455; CCP § 1241(2) <u>Conclusive</u>	Elected Bd. of Dir., Water Code §§ 20890, 20913; or appointed in lieu thereof, Water Code § 21285
Joint highway dists.--Sts. & Hwys. Code §§ 25000-25521	Sts. & Hwys. Code § 25052 <u>Conclusive</u>	Appointed Bd. of Dir., Sts. & Hwys. Code §§ 25027, 25030, 25070, 25073
Joint municipal sewage disposal dists.--Health & Saf. Code §§ 5700-5830.08 (provisions repealed except for § 5745 without affecting existing dists.)	Former Health & Saf. Code § 5740.06 <u>Conclusive</u> (same as city) repealed with savings clause 1959:1309	Appointed Bd. of Dir., former Health & Saf. Code §§ 5730, 5731 repealed with savings clause 1959:1309
Joint powers contract agencies--Govt. Code §§ 6500-6514	<u>No indicated effect</u>	Agency as provided in joint powers agreement, Govt. Code §§ 6505.1, 6508
Kern County Water Agency --1961:1003, Water Code App. §§ 99-1 to 99-29	Water Code App. § 99-3.4 <u>Prima Facie</u>	Elected Bd. of Dir., Water Code App. § 99-7.1
Kings River Conservation Dist.--1951:931, Water Code App. §§ 59-1 to 59-51	<u>No indicated effect</u>	Elected Bd. of Dir., Water Code App. §§ 59-8, 59-22

Public Entity	Effect of Resolution	Governing Body
Knights Landing Ridge Drainage Dist.--1913:99, Water Code App. §§ 21-1 to 21-13	<u>No indicated effect</u>	Elected Bd. of Commissioners, Water Code App. §§ 21-2, 21-3
Lake County Flood Control & Water Conservation Dist.--1951:1544, Water Code App. §§ 62-1 to 62-41	Water Code App. § 62-5(12) <u>Prima Facie</u>	Bd. of Supervisors, Bd. of Dir. ex officio, Water Code App. § 62-6 but may appoint commission, Water Code App. § 62-7
Lake Cuyamaca Recreation & Park Dist.--1961:1654	<u>No indicated effect</u>	Appointed Dist. Bd., 1961:1654 § 20
Lassen-Modoc County Flood Control & Water Conserva- tion Dist.--1959:2127, Water Code App. §§ 92-1 to 92-38	Water Code App. § 92-3(6) <u>Conclusive</u> (same as city, county, etc.)	Bd. of Supervisors of Lassen County with appointed advisory committee, Water Code App. §§ 92-4, 92-7
Levee dists.--1905:310, Water Code App. §§ 9-1 to 9-25	<u>No indicated effect</u>	Elected Bd. of Trustees, Water Code App. § 9-7
Levee dists. (Law of 1959) --Water Code §§ 70000- 70272	<u>No indicated effect</u>	Elected Bd. of Dir., Water Code § 70070
Limited dividend housing corporations--Health & Saf. Code § 34874 <u>et</u> <u>seq.</u>	Health & Saf. Code § 34878 <u>Conclusive</u>	<sup>3</sup> Elected Bd. of Dir., Health & Saf. Code § 34831
Local health dists.-- Health & Saf. Code §§ 880-972 (provisions repealed without affecting existing dists.)	<u>No indicated effect</u>	Appointed Bd. of Trustees, Health & Saf. Code § 926

3. Certificate of authorization necessary from Commission of Housing & Community Development, appointed commission, Health & Saf. Code §§ 37031-37032.

Public Entity	Effect of Resolution	Governing Body
Local hospital dists.-- Health & Saf. Code §§ 32000-32492	<u>No indicated effect</u>	Appointed Bd. of Dir., Health & Saf. Code § 32100 or Elected § 32100.1
Los Angeles County Flood Control Dist.--1915:755 Water Code App. §§ 28-1 to 28-23	Water Code App. § 28-16 1/2 <u>Prima Facie</u>	Bd. of Supervisors, Water Code App. § 28-3
Lower San Joaquin Levee Dist.--1955:1075	<u>No indicated effect</u>	Elected Bd. of Dir., 1955:1075 § 6
Madera County Flood Control & Water Conser- vation Agency--1969:916, Water Code App. §§ 110-100 to 110-950	Water Code App. § 110-650 <u>Conclusive</u>	Bd. of Supervisors, Water Code App. § 110-200
Marin County Flood Control & Water Conservation Dist.--1953:666, Water Code App. §§ 68-1 to 68-36	Water Code App. § 68-5(13) <u>Conclusive</u>	Bd. of Supervisors with appointed advisory commis- sion, Water Code App. §§ 68-6, 68-6.1
Marin County Transit Dist. --Pub. Util. Code §§ 70000-80019	Pub. Util. Code § 70162 <u>Conclusive</u> (powers of city)	Bd. of Supervisors, Pub. Util. Code § 70060
Mariposa County Water Agency--1959:2036, Water Code App. §§ 85-1 to 85-25	Water Code App. § 85-3.4 <u>Prima Facie</u>	Bd. of Supervisors, Water Code App. § 85-7; may create advisory body
Memorial dists.--Mil. & Vets. Code §§ 1170-1259	<u>No indicated effect</u>	Elected Bd. of Dir., Mil. & Vets. Code § 1197; must be veteran
Mendocino County Flood Control & Water Conser- vation Dist.--1949:995, Water Code App. §§ 54-1 to 54-113	Water Code App. § 54-3(f) <u>Conclusive</u> (same as county, city, etc.)	Bd. of Supervisors, Water Code App. § 54-4

Public Entity	Effect of Resolution	Governing Body
Metropolitan water dists. --1969:209, Water Code App. §§ 109-1 to 109-551	Water Code App. § 109-141, <u>Conclusive</u> (same as muni. corp.)	Appointed Bd. of Dir., representa- tives from member public agencies, Water Code App. § 109-51
Mojave Water Agency-- 1959:2146, Water Code App. §§ 97-1 to 97-38	Water Code App. § 97-14 <u>Prima Facie</u>	Elected Bd. of Dir., Water Code App. § 97-4
Montalvo Municipal Improve- ment Dist.--1955:549	1955:549 § 45 (as amended see Deering's Gen. Law Act 5239a) <u>Conclusive</u> (powers of city)	Elected Bd. of Dir., 1955:549 § 26
Monterey County Flood Control & Water Conser- vation Dist.--1947:699, Water Code App. §§ 52-1 to 52-36	Water Code App. § 52-6 <u>Prima Facie</u>	Bd. of Supervisors, Water Code App. § 52-7
Monterey Peninsula Airport Dist.--1941:52	<u>No indicated effect</u>	Elected Bd. of Dir., 1941:52 § 5
Mormon Slough Reclamation Dist.--1871-72:481, repealed with savings clause 1953:1004	<u>No indicated effect</u>	Elected Water Trustees, 1871-72: 481 § 2
Mosquito abatement dists. --Health & Saf. Code §§ 2200-2360	<u>No indicated effect</u>	Appointed Bd. of Trustees, Health & Saf. Code §§ 2240, 2242-2244
Mt. San Jacinto Winter Park Authority-- 1945:1040	1945:1040 § 4.9 <u>Conclusive</u>	Appointed authority, 1945:1040 § 3.4
Mountain View Shoreline Regional Park Community --1969:1109	1969:1109 § 51 <u>Conclusive</u> (powers of city)	City Council of Mountain View, 1969:1109 § 20
Municipal corporation tunnel authorities-- 1951:1347	1951:1347 § 7(5) <u>Conclusive</u> (powers of muni. corp.)	Appointed Bd. of Dir., 1951:1347 § 8

Public Entity	Effect of Resolution	Governing Body
Municipal Sewer & Water Facilities (Law of 1911) --Health & Saf. Code §§ 4600-4648	<u>No indicated effect</u>	Governing Body of city, Health & Saf. Code § 4605
Municipal Utility dists.-- Pub. Util. Code §§ 11501-14401	Pub. Util. Code § 12703 <u>Conclusive</u> (powers of city)	Elected Bd. of Dir., Pub. Util. Code §§ 11641, 11821
Municipal water dists. (Act of 1909)--1909:724, repealed with savings clause 1953:1011	1909:724 § 7 <u>Conclusive</u> (same of muni. corp.) repealed with savings clause 1953:1011	Appointed Commissioners, 1909:724 § 15
Municipal water dists. (Act of 1911)--Water Code §§ 71000-73001	Water Code § 71694 <u>Conclusive</u> (same as city)	Elected Bd. of Dir., Water Code §§ 71161, 71461
Napa County Flood Control & Water Conservation Dist.--1951:1449, Water Code App. §§ 61-1 to 61-37	Water Code App. § 61-6 <u>Prima Facie</u>	Bd. of Supervisors, Water Code App. § 61-7
Nevada County Water Agency --1959:2122, Water Code App. §§ 90-1 to 90-56	Water Code App. § 90-7 <u>Prima Facie</u>	Bd. of Supervisors, Water Code App. § 90-30
North Lake Tahoe-Truckee River Sanitation Agency-- 1967:1503, Water Code App. §§ 107-1 to 107-600	Water Code App. § 107-146 <u>Conclusive</u> (same as gen. law city)	Appointed Bd. of Dir., Water Code App. § 107-60
Olivehurst Public Utility Dist.--1950 (1st Ex. Sess.):12, Water Code App. §§ 56-1 to 56-7	Water Code App. §§ 56-1 to 56-7; Pub. Util. Code § 16404 <u>Conclusive</u> (same as city)	Elected Bd. of Dir., Pub. Util. Code §§ 15951, 16001
Orange County Flood Control Dist.--1927:723, Water Code App. §§ 36-1 to 36-23	<u>No indicated effect</u>	Bd. of Supervisors, Water Code App. § 36-3

Public Entity	Effect of Resolution	Governing Body
Orange County Transit Dist.--Pub. Util. Code §§ 40000-40617	Pub. Util. Code § 40162 <u>Conclusive</u> (powers of county)	Appointed Bd. of Dir., Pub. Util. Code § 40060; may have citizens advisory committee, Pub. Util. Code § 40015
Orange County Water Dist. --1933:924, Water Code App. §§ 40-1 to 40-78	Water Code App. § 40-2(8) <u>Conclusive</u> (same as muni. corp.)	Elected & appointed Bd. of Dir. (depending upon particular division of dist.), Water Code App. § 40-12
Overflow dists.--1911:718, repealed with savings clause 1953:1010	<u>No indicated effect</u>	Elected Bd. of Trustees, 1911:718 § 11
Palo Verde Irrigation Dist.--1923:452, Water Code App. §§ 33-1 to 33-77	Water Code App. § 33-66, Water Code §§ 22455-22458, CCP § 1241(2) <u>Conclusive</u> (all powers of irrigation district)	Elected Bd. of Trustees, Water Code App. § 33-5
Parking authorities--Sts. & Hwys. Code §§ 32500- 33552	<u>No indicated effect</u>	Appointed Bd. of Dir., Sts. & Hwys. Code §§ 32656-32657
Parking dists.--Sts. & Hwys. Code §§ 35100- 35708	Sts. & Hwys. Code § 35401.5 <u>Conclusive</u>	<sup>4</sup> Appointed Bd. of Parking Place Commissioners, Sts. & Hwys. Code §§ 35550, 35551
Pest abatement dists.-- Health & Saf. Code §§ 2800-2910	<u>No indicated effect</u>	Appointed Bd. of Trustees, Health & Saf. Code §§ 2850-2851
Placer County Water Agency --1957:1234, Water Code App. §§ 81-1 to 81-25	Water Code App. § 81-3.4 <u>Prima Facie</u>	Bd. of Supervisors, Water Code App. § 81-7

4. Legislative body of the city does the actual condemnation for the district,  
Sts. & Hwys. Code § 35401.5.

Public Entity	Effect of Resolution	Governing Body
Placer Mining Dists.-- Pub. Res. Code §§ 2401- 2512 (provisions repealed without affecting existing dists.)	<u>No indicated effect</u>	Elected Bd. of Dir., Pub. Res. Code § 2444
Plumas County Flood Con- trol & Water Conserva- tion Dist.--1959:2114, Water Code App. §§ 88-1 to 88-38	Water Code App. § 88-3(f) <u>Conclusive</u> (all powers as county city, muni. water dist., etc.)	Bd. of Supervisors, Water Code App. § 88-9
Port dists.--Harb. & Nav. Code §§ 6200-6372	Harb. & Nav. Code § 6296 <u>Conclusive</u> (powers of muni. corp.)	Appointed Bd. of Port Commissioners, Harb. & Nav. Code § 6240
Protection dists. (Act of 1880)--1880:63, Water Code App. §§ 4-1 to 4-18	<u>No indicated effect</u>	Elected Bd. of Trustees, Water Code App. § 4-3
Protection dists. (Act of 1895)--1895:201, Water Code App. §§ 6-1 to 6-29	<u>No indicated effect</u>	Bd. of Supervisors, Water Code App. § 6-6
Protection dists. (Act of 1907)--1907:25, Water Code App. §§ 11-1 to 11-94	<u>No indicated effect</u>	Elected Bd. of Dir., Water Code App. § 11-5
Public utility dists.-- Pub. Util. Code §§ 15501- 17501	Pub. Util. Code § 16404 <u>Conclusive</u> (powers of muni. corp.)	Elected Bd. of Dir., Pub. Util. Code § 15951
Reclamation dists.--Water Code §§ 50000-53660	<u>No indicated effect</u>	Elected Bd. of Trustees, or owners, Water Code §§ 50600-50602, 50400-50403
Reclamation Dist. No. 10-- 1913:194, Water Code App. §§ 24-1 to 24-5	<u>No indicated effect</u>	Elected Bd. of Trustees, or owners, Water Code §§ 50600-50602, 50400-50403

Public Entity	Effect of Resolution	Governing Body
Reclamation Dist. No. 70 --1905:552, Water Code App. §§ 10-1 to 10-3	<u>No indicated effect</u>	Elected Bd. of Trustees, or owners, Water Code §§ 50600-50602; 50400-50403
Reclamation Dist. No. 252 --1877-78:348, repealed with savings clause 1953:1009	<u>No indicated effect</u>	Elected Bd. of Trustees, 1877-78: 348 § 4
Reclamation Dist. No. 254 --1877-78:567, repealed with savings clause 1953:1008	<u>No indicated effect</u>	Elected Bd. of Trustees, 1877-78: 567 § 2
Reclamation Dist. No. 317 --1877-78:379, Water Code App. §§ 3-1 to 3-6	<u>No indicated effect</u>	Elected Bd. of Trustees, Water Code App. § 3-3
Reclamation Dist. No. 800 --1907:213, Water Code App. §§ 12-1 to 12-3	<u>No indicated effect</u>	Elected Bd. of Trustees, or owners, Water Code §§ 50600-50602, 50400-50403
Reclamation Dist. No. 830 --1911:171, Water Code App. §§ 15-1 to 15-3	<u>No indicated effect</u>	Elected Bd. of Trustees, or owners, Water Code §§ 50600-50602, 50400-50403
Reclamation Dist. No. 832 --1911:402, Water Code App. §§ 16-1 to 16-3	<u>No indicated effect</u>	Elected Bd. of Trustees, or owners, Water Code §§ 50600-50602, 50400-50403
Reclamation Dist. No. 833 --1911:403, Water Code App. §§ 17-1 to 17-4	<u>No indicated effect</u>	Elected Bd. of Trustees, or owners, Water Code §§ 50600-50602, 50400-50403
Reclamation Dist. No. 900 --1911:100, Water Code App. §§ 14-1 to 14-3	<u>No indicated effect</u>	Elected Bd. of Trustees, or owners, Water Code §§ 50600-50602, 50400-50403

Public Entity	Effect of Resolution	Governing Body
Reclamation Dist. No. 999 --1913:161, Water Code App. §§ 23-1 to 23-3	<u>No indicated effect</u>	Elected Bd. of Trustees, or owners, Water Code §§ 50600-50602, 50400-50403.
Reclamation Dist. No. 1000 --1911:412, Water Code App. §§ 19-1 to 19-5	<u>No indicated effect</u>	Elected Bd. of Trustees, Water Code App. § 19-2
Reclamation Dist. No. 1001 --1911:411, Water Code App. §§ 18-1 to 18-5	<u>No indicated effect</u>	Elected Bd. of Trustees, Water Code App. § 18-2
Reclamation Dist. No. 1400 --1913:384, repealed with savings clause 1953:1007	<u>No indicated effect</u>	Elected Bd. of Trustees, 1913:384 § 2
Reclamation Dist. No. 1500 --1913:100, Water Code App. §§ 22-1 to 22-5	<u>No indicated effect</u>	Elected Bd. of Trustees, Water Code App. § 22-2
Reclamation Dist. No. 1600 --1913:195, Water Code App. §§ 25-1 to 25-2	<u>No indicated effect</u>	Elected Bd. of Trustees, Water Code App. § 25-2
Reclamation Dist. No. 1660 --1915:591, Water Code App. §§ 27-1 to 27-5	<u>No indicated effect</u>	Elected Bd. of Trustees, Water Code App. § 27-2
Reclamation Dist. No. 2020 --1917:613, Water Code App. §§ 29-1 to 29-3	<u>No indicated effect</u>	Elected Bd. of Trustees, or owners, Water Code §§ 50600-50602, 50400-50403
Reclamation Dist. No. 2031 --1919:338, Water Code App. §§ 30-1 to 30-4	<u>No indicated effect</u>	Elected Bd. of Trustees, or owners, Water Code §§ 50600-50602, 50400-50403

Public Entity	Effect of Resolution	Governing Body
Recreation & park dists.-- Pub. Res. Code §§ 5780- 5788.13	<u>No indicated effect</u>	Either Bd. of Super- visors, city council of largest city, appointed bd. of dir., or elected Bd. of Dir., Pub. Res. Code §§ 5781.4, 5781.6
Regional park dists.--Pub. Res. Code §§ 5500-5595	Pub. Res. Code § 5542 <u>Conclusive</u> (powers of muni. corp.)	Elected Bd. of Dir., Pub. Res. Code §§ 5527, 5533
Regional sewage disposal dists.--Health & Saf. Code §§ 5900-6110 (provisions repealed except for § 6096 without affecting existing dists.)	Health & Saf. Code § 5998 repealed with savings clause 1959:1309 <u>Conclusive</u> (powers of county)	Appointed Bd. of Dir., Health & Saf. Code §§ 5960, 5961
Resort improvement dists.-- Pub. Res. Code §§ 13000- 13233	<u>No indicated effect</u>	Bd. of Supervisors or elected Bd. of Dir., Pub. Res. Code §§ 13031-13037, 13060
River port dists.--Harb. & Nav. Code §§ 6800-6963	Harb. & Nav. Code § 6896 <u>Conclusive</u> (powers of city)	Appointed Commis- sioners, Harb. & Nav. Code § 6830
Riverside County Flood Control & Water Conser- vation Dist.--1945:1122, Water Code App. §§ 48-1 to 48-39	Water Code App. § 48-9(9) <u>Conclusive</u>	Bd. of Supervisors plus appointed commissioners, Water Code App. §§ 48-10, 48-16
Sacramento County Water Agency--1952 (1st Ex. Sess.):10, Water Code App. §§ 66-1 to 66-31	Water Code App. § 66-3.4 <u>Prima Facie</u>	Bd. of Supervisors, Water Code App. § 66-3
Sacramento River Drainage Dist.--1877-78:643, repealed with savings clause 1953:1018	<u>No indicated effect</u>	Appointed Commis- sioners, 1877-78: 643 § 2

Public Entity	Effect of Resolution	Governing Body
Sacramento River-West Side Levee Dist.--1915:361, Water Code App. §§ 26-1 to 26-11	<u>No indicated effect</u>	Appointed levee commissioners, Water Code App. §§ 26-2, 26-3
San Benito County Water Conservation & Flood Control Dist.--1953:1598, Water Code App. §§ 70-1 to 70-40	Water Code App. § 70-8 <u>Prima Facie</u>	Appointed Bd. of Dir., Water Code App. § 70-9
San Bernardino County Flood Control Dist.--1939:73, Water Code App. §§ 43-1 to 43-28	<u>No indicated effect</u>	Bd. of Supervisors, Water Code App. § 43-3
San Diego County Flood Con- trol Dist.--1966 (1st Ex. Sess.):55, Water Code App. §§ 105-1 to 105-48	Water Code App. § 105-6(12) <u>Conclusive</u>	Bd. of Supervisors, Water Code App. § 105-5
San Diego County Transit Dist.--Pub. Util. Code §§ 90000-93017	Pub. Util. Code § 90402 <u>Conclusive</u> (powers of incorp. city)	Elected Bd. of Dir., Pub. Util. Code § 90170
San Diego Unified Port Dist.--1962 (1st Ex. Sess.):67, Harb. & Nav. Code App. 1 §§ 1-88	Harb. & Nav. Code App. 1 § 27 <u>Conclusive</u> (powers of muni. corp.)	Appointed Port Commissioners, Harb. & Nav. Code App. 1 § 16
San Francisco Bay Area Rapid Transit Dist.--Pub. Util. Code §§ 28500-29757 (see also 1949:1239)	Pub. Util. Code §§ 28954, 28953 <u>Conclusive</u> (powers of incorp. city)	Appointed Bd. of Dir., Pub. Util. Code §§ 28735- 28738
San Geronio Pass Water Agency--1961:1435, Water Code App. §§ 101-1 to 101-52	Water Code App. § 101-15(9) <u>Conclusive</u> (powers of city)	Elected Bd. of Dir., Water Code App. §§ 101-3, 101-4
San Joaquin County Flood Control & Water Conser- vation Dist.--1956 (1st Ex. Sess.):46, Water Code App. §§ 79-1 to 79-43	Water Code App. § 79-5(13) <u>Prima Facie</u>	Bd. of Supervisors. assisted by appointed Commis- sion, Water Code App. §§ 79-6, 79-7

Public Entity	Effect of Resolution	Governing Body
Sanitary dists. (Act of 1923)--Health & Saf. Code §§ 6400-6830	Code Civ. Proc. § 1241(2) <u>Conclusive</u>	Elected Governing Bd. or Governing Body of City, Health & Saf. Code §§ 6464, 6500
Sanitary dists. (Law of 1891)--1891:161, repealed with savings clause 1939:60; now Health & Saf. Code § 6935	Code Civ. Proc. § 1241(2) <u>Conclusive</u>	Elected Sanitary Bd., 1891:161 § 2
San Luis Obispo County Flood Control & Water Conservation Dist.--1945:1294, Water Code App. §§ 49-1 to 49-36.17	Water Code App. § 49-6 <u>Prima Facie</u>	Bd. of Supervisors, Water Code App. § 49-7
San Mateo County Flood Control Dist.--1959:2108, Water Code App. §§ 87-1 to 87-35	Water Code App. § 87-3(8) <u>Prima Facie</u> , but <u>Conclusive</u> with 2/3 vote	Bd. of Supervisors with zone advisory committee, Water Code App. §§ 87-4, 87-14
Santa Barbara County Flood Control & Water Conservation Dist.--1955:1057, Water Code App. §§ 74-1 to 74-39	Water Code App. § 74-5(12) <u>Conclusive</u>	Bd. of Supervisors, Water Code App. § 74-6
Santa Barbara County Water Agency--1945:1501, Water Code App. §§ 51-1 to 51-19	Water Code App. § 51-3.4 <u>Conclusive</u>	Bd. of Supervisors, Water Code App. § 51-7
Santa Barbara Metropolitan Transit Dist.--Pub. Util. Code §§ 95000-97100	Pub. Util. Code § 96002 <u>Conclusive</u> (powers of incorp. city)	Appointed Bd. of Dir., Pub. Util. Code § 95400
Santa Clara County Flood Control & Water Dist.--1951:1405, Water Code App. §§ 60-1 to 60-35	Water Code App. § 60-6 <u>Prima Facie</u>	Bd. of Supervisors, Water Code App. § 60-7

Public Entity	Effect of Resolution	Governing Body
Santa Clara County Irrigation Dist.--1923:479, repealed with savings clause 1953:1002. 1921:822, repealed with savings clause 1953:1003	<u>No indicated effect</u>	Elected Bd. of Dir., 1923:479 § 5
Santa Clara County Rapid Transit Dist.--Pub. Util. Code §§ 100000-100500	Pub. Util. Code § 100131 <u>Conclusive</u> (powers of incorp. city)	Bd. of Supervisors, Pub. Util. Code § 100060
Santa Cruz County Flood Control & Water Conservation Dist.--1955:1489, Water Code App. §§ 77-1 to 77-597	Water Code App. § 77-24 <u>Conclusive</u> (powers of county, city & county, water dist., etc.)	Bd. of Supervisors, Water Code App. §§ 77-71, 77-73
Santa Cruz Metropolitan Transit Dist.--Pub. Util. Code §§ 98000-98407	Pub. Util. Code § 98212 <u>Conclusive</u> (powers of city)	Appointed Bd. of Dir., Pub. Util. Code § 98100
Separation of grade dists. --Sts. & Hwys. Code §§ 8100-8297	<u>No indicated effect</u>	Appointed Commissioners, Sts. & Hwys. Code §§ 8130, 8130.1
Sewer maintenance dists.-- Health & Saf. Code §§ 4860-4927	<u>No indicated effect</u>	Bd. of Supervisors, or governing body of contiguous city, Health & Saf. Code §§ 4885, 6500
Shasta County Water Agency --1957:1512, Water Code App. §§ 83-1 to 83-190	Water Code App. § 83-67 <u>Prima Facie</u>	Bd. of Supervisors, or appointed Zone Trustees, Water Code App. §§ 83-22, 83-23, 83-167, 83-169 to 83-176
Sierra County Flood Control & Water Conservation Dist.--1959:2123, Water Code App. §§ 91-1 to 91-38	Water Code App. § 91-3(f) <u>Conclusive</u> (powers of county, city, water dist., etc.)	Bd. of Supervisors with Zone Advisory Committee, Water Code App. §§ 91-7, 91-9

Public Entity	Effect of Resolution	Governing Body
Siskiyou County Flood Control & Water Conservation Dist.--1959:2121, Water Code App. §§ 89-1 to 89-38	Water Code App. § 89-3(f) <u>Conclusive</u> (powers of county, city, water dist., etc.)	Bd. of Supervisors, with Zone Advisory Committee, Water Code App. §§ 89-7, 89-9
Small craft harbors dists. --Harb. & Nav. Code §§ 7000-7340	Harb. & Nav. Code § 7147 <u>Conclusive</u> (powers of muni. corp.)	Elected dir., or Leg. body of city, Harb. & Nav. Code §§ 7040, 7046
Solano County Flood Control & Water Conservation Dist.--1951:1656, Water Code App. §§ 64-1 to 64-20.4	Water Code App. § 64-3.4 <u>Prima Facie</u>	Bd. of Supervisors, Water Code App. § 64-7
Solvang Municipal Improvement Dist.--1951:1635	1951:1635 § 45 <u>Conclusive</u> (same as city)	Elected Bd. of Dir., 1951:1635 §§ 25-26
Sonoma County Flood Control & Water Conservation Dist.--1949:994, Water Code App. §§ 53-1 to 53-35, renamed Sonoma County Water Agency (see 1969:656)	Water Code App. § 53-3(f) <u>Conclusive</u> (powers of county, city, etc.)	Bd. of Supervisors, Water Code App. § 53-7
Southern California Rapid Transit Dist.--Pub. Util. Code §§ 30000-31520	Pub. Util. Code § 30504 <u>Conclusive</u>	Appointed Bd. of Dir., Pub. Util. Code § 30201
Stockton Metropolitan Transit Dist.--Pub. Util. Code §§ 50000-50507	Pub. Util. Code § 50162 <u>Conclusive</u> (same as incorp. city)	Appointed Bd. of Dir., Pub. Util. Code § 50060
Storm drain maintenance dists.--1937:265, Water Code App. §§ 42-1 to 42-22	<u>No indicated effect</u>	Bd. of Supervisors, or Leg. Body of City, Water Code App. §§ 42-1.1, 42-5

Public Entity	Effect of Resolution	Governing Body
Storm drain maintenance dist. (Act of 1939)--1939:1100, repealed with savings clause 1953:1001	<u>No indicated effect</u>	Bd. of Supervisors, 1939:1100 § 10
Storm water dists.--1909: 222, Water Code App. §§ 13-1 to 13-30	<u>No indicated effect</u>	Elected trustees, Water Code App. § 13-5
Sutter County Levee Dist. No. 1--1873-74:349, Water Code App. §§ 1-1 to 1-12	<u>No indicated effect</u>	Elected Bd. of Dir., Water Code App. §§ 1-2, 1-3
Sutter County Water Agency --1959:2088, Water Code App. §§ 86-1 to 86-28	Water Code App. § 86-3.4 <u>Prima Facie</u>	Bd. of Supervisors, with appointed advisory council, Water Code App. § 86-7
Swamp Land Dist. No. 150--1873-74:629, Water Code App. §§ 2-1 to 2-7	<u>No indicated effect</u>	Elected Trustees, Water Code App. § 2-2
Swamp Land, Levee, or Reclamation Dists.--1909:346, repealed with savings clause 1953:1000	<u>No indicated effect</u>	Elected Trustees (same as reclamation dist. from which name or no. is taken)
Tehama County Flood Control & Water Conservation Dist.--1957:1280, Water Code App. §§ 82-1 to 82-39	Water Code App. § 82-3(f) <u>Conclusive</u> (powers of city, county, etc.)	Appoint Dist. Bd. which must appoint advisory committee, Water Code App. §§ 82-6, 82-8
Transit dists.--Pub. Util. Code §§ 24501-27302, 27501-27509	Pub. Util. Code § 25703 <u>Conclusive</u> (powers of city)	Elected Bd. of Dir., Pub. Util. Code §§ 24801, 24862
Tulare County Flood Control Dist.--1969:1149, Water Code App. §§ 111-1 to 111-41	Water Code App. § 111-5(12) <u>Prima Facie</u>	Bd. of Supervisors, with appointed commission, Water Code App. § 111-6

Public Entity	Effect of Resolution	Governing Body
Tuolumne County Water Agency --1969:1236, Water Code App. §§ 113-1 to 113-100	Water Code App. § 113-8 <u>Prima Facie</u>	Bd. of Supervisors, Water Code App. § 113-33
Union Island Reclamation Dists. Nos. 1 & 2-- 1903:36, Water Code App. §§ 7-1 to 7-10	<u>No indicated effect</u>	Elected Trustees, Water Code App. § 7-6
Upper Santa Clara Valley Water Agency--1962 (1st Ex. Sess.):28, Water Code App. §§ 103-1 to 103-49	Water Code App. § 103-15(7) <u>Conclusive</u> (powers of city)	Elected Bd. of Dir., Water Code App. §§ 103-3, 103-5
Vallejo Sanitation & Flood Control Dist.--1952 (1st Ex. Sess.):17, Water Code App. §§ 67-1 to 67-28	Water Code App. § 67-23 <u>Conclusive</u> (powers of county, city, etc.)	Appointed Trustees, Water Code App. § 67-3
Vehicle parking dists.--Sts. & Hwys. Code §§ 31500- 31933	Sts. & Hwys. Code § 31590 <u>Conclusive</u> (condemnation action brought by city in name of city, with ordinance passed by leg. body of city)	Appointed parking place commissioners, Sts. & Hwys. Code §§ 31770-31773
Ventura County Flood Con- trol Dist.--1944 (2nd Ex. Sess.):44, Water Code App. §§ 46-1 to 46-37	Water Code App. § 46-7(8) <u>Prima Facie</u>	Bd. of Supervisors, Water Code App. § 46-8
Ventura County Harbor Dist. --1927:861, repealed with savings clause 1953:999	<u>No indicated effect</u>	Appointed Harbor Commissioners, 1926:861 § 5
Water conservation dists.-- 1923:426, repealed with savings clause 1953:998	<u>No indicated effect</u>	Elected Bd. of Dir., 1923:426
Water conservation dists. (Act of 1927)--1927:91, Water Code App. §§ 34-1 to 34-45	<u>No indicated effect</u>	Elected Bd. of Dir., Water Code App. §§ 34-5, 34-11

Public Entity	Effect of Resolution	Governing Body
Water conservation dists. (Act of 1931)--Water Code §§ 74000-76501	<u>No indicated effect</u>	Elected Bd. of Dir., Water Code § 74091
Water replenishment dists. --Water Code §§ 60000- 60449	Water Code § 60230(8) <u>Conclusive</u> (powers of city)	Elected Bd. of Dir., Water Code §§ 60131, 60134
Water storage & conserva- tion dists.--1941:1253 (provisions repealed without affecting existing dists.), formerly Water Code App. §§ 44-1 to 44-191; Deerings Calif. Codes--Water (uncodified acts--part two) Act 9126a §§ 20(4), 20(6), 21, 28, 29	<u>No indicated effect</u>	Elected Bd. of Dir., 1941:1253 § 15
West Bay Rapid Transit Authority--1964(1st Ex. Sess.):104, Pub. Util. Code App. 3, §§ 1.1 to 14.3	Pub. Util. Code App.3 § 6.6 <u>Conclusive</u> (powers of incorp. city)	Appointed representa- tive bd., Pub. Util. Code App. 3 § 4.3
Yolo County Flood Control & Water Conservation Dist.--1951:1657, Water Code App. §§ 65-1 to 65-35	Water Code App. § 65-3(f) <u>Conclusive</u> (powers of county, city, muni. water dist., etc.)	Appointed Bd. of Dir., Water Code App. § 65-5
Yuba-Bear River Basin Authority--1959:2131, Water Code App. §§ 93-1 to 93-54	Water Code App. § 93-8 <u>Prima Facie</u>	Appointed Bd. of Dir., Water Code App. § 93-30
Yuba County Water Agency --1959:788, Water Code App. §§ 84-1 to 84-28	Water Code App. § 84-3.4 <u>Prima Facie</u>	Bd. of Supervisors, with appointed advisory council, Water Code App. § 84-7

## NECESSITY

Extract from Nichols on Eminent Domain (3d ed 1964, Vol 1, pp. 540-592)

### § 4.11 Question of necessity.

The overwhelming weight of authority makes clear beyond any possibility of doubt that the question of the necessity or expediency of a taking in eminent domain lies within the discretion of the legislature and is not a proper subject of judicial review.<sup>82</sup> As was said in one case:<sup>82.1</sup>

in a statute allowing an attorney's fee to the owner upon the dismissal of the proceedings by the condemnor.

Illinois—*Sanitary Dist. v. Ray*, 119 Ill 63, 64 NE 1042, 93 Am St Rep 102; *Deneen v. Unverzagt*, 225 Ill 378, 80 NE 321, 8 Ann Cas 390, or in addition to the award if the land is taken,

Iowa—*Gano v. Minneapolis, etc., Ry. Co.*, 114 Iowa 713, 87 NW 714, 55 LRA 263, 89 Am St Rep 393, aff'd 100 US 557, 47 L Ed 1183, 23 S Ct 854.

Michigan—*Boyne City, etc., R. R. Co. v. Anderson*, 146 Mich 328, 109 NW 429, 8 LRA (NS) 306, 117 Am St Rep 642, 10 Ann Cas 283.

Missouri—*Gibbons v. Missouri, etc., R. R. Co.*, 40 Mo App 146.

See, also, *Taylor v. Chicago, etc., R. R. Co.*, 83 Wis 615, 53 NW 855, holding that a reasonable attorney's fee should be taxed when the statute provides that the owner should be reimbursed for his "costs and expenses," and *Whitney v. Lynn*, 122 Mass 338, allowing an attorney's fee under a statute providing that an owner should be indemnified for his "trouble and expense" when the proceedings were abandoned. In *McCaskey v. Fort Dodge, etc., Ry. Co.*, 154 Iowa 652, 135 NW

6, it was held that when the award was increased on appeal the owner was entitled to counsel fees for both trials, and in *Boyne City, etc., R. R. Co. v. Anderson*, 146 Mich 328, 109 NW 429, 8 LRA (NS) 306, 117 Am St Rep 642, 10 Ann Cas 283, that the amount of attorney's fees lies in the discretion of the trial court and cannot be reviewed upon appeal.

<sup>81</sup> California—*Consumer Holding Co. v. County of Los Angeles*, 208 CA (2d) 419, 25 Cal Rptr 215. (See *infra*, § 14.249, footnote 16.)

Minnesota—*State v. District Court*, 87 Minn 263, 91 NW 1111.

<sup>82</sup> United States—*Backus v. Fort St. Union Depot Co.*, 169 US 557, 42 L Ed 853, 18 S Ct 445; *Adirondack R. Co. v. New York*, 176 US 335, 44 L Ed 492, 20 S Ct 460, aff'g 160 NY 225, 54 NE 689; *Cincinnati v. Louisville & N. R. Co.*, 223 US 390, 56 L Ed 481, 32 S Ct 267; *United States v. Chandler-Dunbar W. P. Co.*, 229 US 53, 57 L Ed 1063, 33 S Ct 667; *Sears v. Akron*, 246 US 242, 62 L Ed 688, 38 S Ct 245; *Bragg v. Weaver*, 251 US 57, 64 L Ed 135, 40 S Ct 62; *Joslin Mfg. Co. v. Providence*, 262 US 668, 67 L Ed 1167, 43 S Ct 684; *Rindge Co. v. County of Los Angeles*, 262 US 700, 67 L Ed 1186, 43 S Ct 659; *Georgia v. Chattanooga*, 264 US 472, 68 L Ed 796, 44 S Ct 369; *North Laramie*

Land Co. v. Hoffman, 268 US 276, 69 L Ed 953, 45 S Ct 491; United States v. 1096.84 Acres, 99 F Supp 544; United States v. 170.88 Acres of Land, 106 F Supp 623; United States v. 1298.15 Acres, 108 F Supp 549; United States v. 277.97 Acres of Land, 112 F Supp 159; United States v. State of South Dakota, 212 F(2d) 14; Combs v. Illinois State Toll Highway Comm., 128 F Supp 305; Bernan v. Parker, 348 US 26, 99 L Ed 27, 75 S Ct 98; Anderson v. Seeman, 252 F(2d) 321; Brooks v. Shepard, 157 F Supp 379; Hoffman v. Stevens, 177 F Supp 898; Government of Virgin Islands v. 50.05 Acres of Land, 185 F Supp 495; United States v. 113.81 Acres of Land, 24 FRD 368; United States v. 1,108 Acres of Land, 25 FRD 205; United States v. Mischke, 285 F(2d) 828; United States v. 23,912.9 Acres of Land, 192 F Supp 101; Maiatico v. United States, 302 F(2d) 880; United States v. 929.70 Acres of Land, 205 F Supp 456; Harwell v. United States, 316 F(2d) 791; United States v. Certain Property, 32 FRD 48.

In *United States v. 70.39 Acres of Land*, 164 F Supp 451, the court said:

"The court has no doubt that the government, having taken a term for years, may thereafter take the fee. What the government decides to take is a matter solely within the prerogative of the Executive Department rather than the Judiciary, *Old Dominion Land Co. v. United States*, 1925, 269 U.S. 55, 46 S.Ct. 39, 70 L.Ed. 162; *Mead v. City of Portland*, 1906, 200 U.S. 148, 26 S.Ct. 171, 50 L.Ed. 413. The United States can 'always acquire a greater interest in the property than it already possessed.' *United States v. 6.74 Acres of Land in Dade County, Florida*, 5 Cir., 1945, 148 F.2d 618, 620."

**Alabama**—*Smith v. City Board of Education of Birmingham*, 272 Ala 227, 130 So(2d) 20.

**Arkansas**—*Greene County v. Hayden*, 175 Ark 1067, 1 SW(2d) 803.

**California**—*Schnider v. State*, 229 P(2d) 847, reversed on other grounds 231 P(2d) 177, aff'd 38 Cal(2d) 439, 241 P(2d) 1; *People v. Lagiss*, 160 CA(2d) 28, 324 P(2d) 926; *People v. Chevalier*, 331 P(2d) 237; *People v. Chevalier*, 340 P(2d) 598; *People v. City of Los Angeles*, 179 CA(2d) 558, 4 Cal Rptr 531; *Reid v. State*, 193 CA(2d) 880, 14 Cal Rptr 597; *County of Los Angeles v. Bartlett*, 203 CA(2d) 523, 21 Cal Rptr 776. (See *infra*, footnote 4.)

Where, when or how a condemnation proceeding shall be had is within the sole competency of the condemnor. *People v. Oken*, 159 CA(2d) 456, 324 P(2d) 58. The court said:

"From the allegations of appellant's pleadings which we have above summarized in some detail, it would appear that the relief which he seeks thereby as against the respondents is a judgment declaring that the public interest and necessity require the construction by the respondent El Monte School District of a school building and 'the acquisition and appropriation by said school district of a site upon which said building may be erected within that certain tract of land' in the cross-complaint described. We know of no law, and none has been called to our attention, which authorizes a private citizen to maintain such an action. Where, when or how, if at all, a school district shall construct school buildings is a matter within the sole competency of its governing board to determine. *Montebello Unified School Dist. of Los Angeles County v. Keay*, 1942, 55 Cal.App.2d 839, 843-844, 131 P.2d 384."

**Colorado**—*Ambrosio v. Baker Metropolitan Water & San. Dist.*, 139 Colo 437, 340 P(2d) 872; *Welch v. City and County of Denver*, 141 Colo 587, 349 P(2d) 352; *Maek v. Board of County Comrs.*, 381 P(2d) 987.

**Connecticut**—*Northeastern Gas Transmission Co. v. Collins*, 138 Conn 582, 87 A(2d) 139; *Gohld Realty Co. v. City of Hartford*, 141 Conn 135, 104 A(2d) 365; *Greenwich Water Co. v. Adams*, 145 Conn 535, 144 A(2d) 323; *Graham v. Houlihan*, 147 Conn 321, 160 A(2d) 745.

**Delaware**—*State v. 0.62033 Acres of Land*, 49 Del 90, 110 A(2d) 1, citing *Treatise*; *State v. 0.62033 Acres of Land*, 49 Del 174, 112 A(2d) 857.

**Florida**—*Rott v. City of Miami Beach*, 94 So (2d) 168; *Miller v. Florida Inland Navigation District*, 130 So (2d) 615.

**Georgia**—*Tift v. Atlantic Coast Line R. Co.*, 161 Ga 432, 131 SE 46; *City of Atlanta v. Fulton County*, 210 Ga 784, 82 SE(2d) 850; *Du Pre v. City of Marietta*, 213 Ga 403, 99 SE(2d) 156; *City of Carrollton v. Walker*, 215 Ga 505, 111 SE(2d) 79; *Kellett v. Fulton County*, 215 Ga 551, 111 SE(2d) 364.

**Hawaii**—*State v. Chang*, 46 Hawaii 279, 378 P(2d) 882.

**Idaho**—*Independent School Dist. v. C. B. Laueh Const. Co.*, 74 Idaho 502, 264 P(2d) 687; *Big Lost River Irr. Dist. v. Zollinger*, 83 Idaho 401, 363 P(2d) 706.

**Illinois**—*Pool v. Kankakee*, 406 Ill 521, 94 NE(2d) 416; *Chicago v. Vaccaro*, 408 Ill 587, 97 NE(2d) 766; *Department of Public Works and Buildings v. Lewis*, 411 Ill 242, 103 NE(2d) 595; *Waukegan Park Dist. v. First Nat. Bank of Lake Forest*, 22 Ill (2d) 238, 174 NE(2d) 824;

*Deerfield Park Dist. v. Progress Dev. Corp.*, 22 Ill (2d) 132, 174 NE(2d) 850; *Deerfield Park Dist. v. Progress Dev. Corp.*, 26 Ill (2d) 296, 186 NE(2d) 360.

**Indiana**—*Slentz v. City of Fort Wayne*, 233 Ind 226, 118 NE(2d) 484; *Cemetery Company v. Warren School Township*, 236 Ind 171, 139 NE(2d) 538; *Dahl v. Northern Indiana Public Service Co.*, 239 Ind 405, 157 NE(2d) 194; *Wampler v. Trustees of Indiana University*, 241 Ind 449, 172 NE(2d) 67, citing *Treatise*.

**Kentucky**—*Craddock v. University of Louisville*, 303 SW(2d) 646.

**Louisiana**—*Parish of Iberia v. Cook*, 238 La 697, 116 So (2d) 491; *State v. Guidry*, 240 La 516, 124 So (2d) 531, citing *Treatise*; *State v. Waterbury*, 125 So (2d) 503; *Calhoun v. State*, 152 So (2d) 866. (As to acquisition for highway purposes).

**Maine**—*Crommatt v. City of Portland*, 150 Me 217, 107 A(2d) 841.

**Massachusetts**—*Hayeck v. Metropolitan District Comm.*, 335 Mass 372, 140 NE(2d) 210; *Luko v. Massachusetts Turnpike Authority*, 337 Mass 304, 149 NE(2d) 225.

**Minnesota**—*Holen v. Minneapolis-St. Paul Metropolitan Airports Comm.*, 250 Minn 130, 84 NW(2d) 282; *Volden v. Selke*, 251 Minn 349, 87 NW(2d) 696.

**Mississippi**—*Culley v. Pearl River Industrial Comm.*, 234 Miss 788, 108 So (2d) 390; *Mississippi Power & Light Co. v. Blake*, 236 Miss 207, 109 So (2d) 657; *Gale v. City of Jackson*, 238 Miss 826, 120 So (2d) 550.

**Missouri**—*State v. Pankey*, 359 Mo 118, 221 SW(2d) 195; *State v. Curtis*, 359 Mo 402, 222 SW(2d) 64; *Bowman v. Kansas City*, 361 Mo 14, 233 SW(2d) 26; *State v. Shultz*, 243

SW(2d) 808; Phillips Pipe Line Co. v. Brandstetter, 263 SW(2d) 880; In the Matter of Proceedings to Grade, etc., 270 SW(2d) 863; State v. Ferriss, 304 SW(2d) 896; State v. Crain, 308 SW(2d) 451; Slate v. Waggoner, 319 SW(2d) 930; State v. Weinstein, 329 SW(2d) 399.

**Nebraska**—Scheer v. Kansas-Nebraska Natural Gas Co., 158 Neb 668, 64 NW(2d) 333; Hammer v. Dept. of Roads, 175 Neb 178, 130 NW(2d) 969.

**New Jersey**—Ryan v. Housing Authority of Newark, 125 NJL 336, 15 A(2d) 647; Burnett v. Abbott, 14 NJ 291, 102 A(2d) 16, citing *Treatise*; City of Trenton v. Lanzner, 29 NJS 514, 103 A(2d) 13, 16 NJ 465, 109 A(2d) 409; New Jersey Highway Authority v. Currie, 35 NJS 535, 114 A(2d) 587; State v. Lanza, 48 NJ Super 362, 137 A(2d) 622, aff'd 27 NJ 516, 143 A(2d) 571; Bergen County v. S. Goldberg & Co. Inc., 76 NJ Super 524, 185 A(2d) 38.

**New York**—*In re* Townsend, 39 NY 171; Rensselaer, etc., R. Co. v. Davis, 43 NY 137; Brooklyn Park Comre. v. Armstrong, 45 NY 234, 6 Am Rep 70; *In re* Brooklyn Union Ferry Co., 98 NY 139; *In re* Niagara Falls, etc., R. Co., 108 NY 375, 15 NE 429; *In re* Brooklyn, 143 NY 596, 38 NE 983, 26 LRA 270, aff'd 166 US 685, 41 L Ed 1165, 17 S Ct 718; Matter of City of Rochester v. Holden, 224 NY 386, 121 NE 102; Matter of City of New York (Ely Ave.), 217 NY 45, 111 NE 266; Matter of Public Service Comm., 217 NY 61, 111 NE 658; Application of Residents of Summer Haven, 202 Misc 682, 110 NYS (2d) 186; Purdy v. City of Newburgh, 113 NYS(2d) 376; Burda v. Palisades Interstate Park Comm., 204 Misc 232, 120 NYS(2d) 801; Dutchess County v. Cary, 283 App Div 951, 130 NYS(2d) 415;

De Matteis v. Town of Hempstead, 286 App Div 1025, 145 NYS(2d) 256; City of Albany v. Yaras, 1 AD(2d) 989, 150 NYS(2d) 34, aff'd 2 NY(2d) 844, 140 NE(2d) 875; Cuglar v. Power Authority, 4 Misc (2d) 879, 163 NYS(2d) 902, aff'd 4 AD(2d) 801, 164 NYS(2d) 686, aff'd 3 NY(2d) 1006, 147 NE(2d) 733; City of Utica v. Damiano, 193 NYS(2d) 272; Saso v. State, 192 NYS(2d) 272; Saso v. State, 194 NYS(2d) 793; Schulman v. People, 11 AD(2d) 273, 203 NYS(2d) 708, rev'd 10 NY(2d) 249, 176 NE(2d) 817; Buell v. Genesee State Park Comm., 25 Misc (2d) 841, 206 NYS (2d) 65. However, see Brent v. Hoch, 25 Misc (2d) 1062, 205 NYS (2d) 66, aff'd 13 AD(2d) 505, 211 NYS(2d) 853, app. diss. 13 AD (2d) 774, 217 NYS(2d) 505; *In re* Incorporated Village of Garden City, 217 NYS(2d) 827; Bennett v. McMorrin, 38 Misc (2d) 928, 239 NYS (2d) 205; Brown v. McMorrin, 39 Misc (2d) 716, 241 NYS(2d) 483.

**North Carolina**—North Carolina State H'way Comm. v. Young, 290 NC 603, 158 SE 91; Redevelopment Comm. v. Security Nat. Bank, 252 NC 595, 114 SE(2d) 688.

**Ohio**—Shepard Paint Co. v. Board of Trustees, 88 Ohio App 319, 100 NE(2d) 248; Emanuel v. Twinsburg Tp., 94 Ohio App 63, 114 NE(2d) 620; Solesher v. Ohio Turnpike Commission, 99 Ohio App 228, 133 NE (2d) 148, citing *Treatise*; City of Lakewood v. Thornmyer, 80 Ohio Abs 65, 154 NE(2d) 777, citing *Treatise*; Simmons v. City of Cleveland Heights, 81 Ohio Abs 129, 160 NE (2d) 877; Grisanti v. City of Cleveland, 89 Ohio Abs 1, 181 NE(2d) 299 app. diss. 173 Ohio St 356, 182 NE (2d) 508, app. diss. 371 US 68, 9 L Ed (2d) 119, 83 S Ct 111.

**Oklahoma**—Pryor v. Western Paving Co., 74 Okl 308, 184 P 88; Owens

v. Oklahoma Turnpike Authority, 283 P(2d) 827.

**Oregon**—Port of Umatilla v. Richmond, 212 Or 596, 321 P(2d) 338, citing and quoting *Treatise*.

**Pennsylvania**—Luzrow v. Philadelphia Housing Authority, 375 Pa 586, 101 A(2d) 664.

**Rhode Island**—Joslin Mfg. Co. v. Clarke, 40 RI 350, 103 A 935, err. dism. 251 US 535, 64 L Ed 401, 40 S Ct 55; Balsamo v. Providence Redevelopment Agency, 84 RI 323, 124 A(2d) 238.

**South Carolina**—Sease v. City of Spartanburg, 242 SC 520, 131 SE (2d) 883.

**South Dakota**—City of Bristol v. Horter, 73 SD 398, 43 NW(2d) 543.

**Tennessee**—Justus v. McMahon, 189 Tenn 470, 226 SW(2d) 84.

**Texas**—Texas Electric Service Co. v. Campbell, 328 SW(2d) 208; Waggoner v. City of Arlington, 345 SW(2d) 759; Atkinson v. City of Dallas, 353 SW(2d) 275; Halbert v. Upper Neches River Municipal Water Authority, 387 SW(2d) 879.

**Virginia**—Richmond Fairfield Ry. Co. v. Llewellyn, 156 Va 258, 157 SE 809; City of Richmond v. Dervishian, 190 Va 398, 57 SE(2d) 120; Virginia Electric and Power Co. v. Webb, 196 Va 555, 84 SE(2d) 735.

**Washington**—State v. Superior Court, 46 Wash (2d) 219, 279 P(2d) 918.

**West Virginia**—State v. Professional Realty Co., 144 W Va 652, 110 SE(2d) 616; Board of Education of Kanawha County v. Shafer, 124 SE(2d) 334.

**Wisconsin**—Swenson v. County of Milwaukee, 266 Wis 129, 63 NW(2d) 103; Brausen v. Daley, 11 Wis (2d) 160, 105 NW(2d) 294; Lehmann v.

Waukesha County Hwy. Comm., 15 Wis (2d) 94, 112 NW(2d) 127.

**Wyoming**—Miller v. Hagie, 59 Wyo 383, 140 P(2d) 746.

*Contra:*

**Florida**—State Road Dept. of Florida v. Southland, Inc., 117 So (2d) 512, in which the court said

“The resolutions adopted by the Road Department, copies of which are attached to the petition, declare that the construction of State Road 9 as a limited access state highway is necessary, practical and to the best interest of the State, and that it is necessary that the right-of-way for the roadbed and ditches as described in the petition be acquired for use in the construction and maintenance of such highway under the authority granted by law. The foregoing resolutions constitute an administrative determination as to the necessity of acquiring defendant's land for highway purposes under the power of eminent domain. Such determination of necessity, although presumptively valid, is nevertheless a proper subject of judicial inquiry when timely raised by one who conceives himself to be injured as a consequence thereof.

“The abuse of power by misguided, though well intentioned, administrative bureaus, boards, departments or agencies of government poses an ever present threat to the very foundation of our democratic institutions. Though such abuses occur infrequently, their occurrence has a devastating effect upon the rights of individual citizens adversely affected thereby. Thus the courts must be ever zealous in protecting the basic rights of the governed against the improper exercise of governmental power perpetrated under the cloak of lawful sanction.

“It is settled in this jurisdiction that

"[T]he motives or reasons for declaring that it is necessary to take land are no concern of the owner of land sought to be condemned by the state for a use declared by law to be a public use \* \* \* At best it [i.e., the evidence] establishes that plaintiff was taking more land than it needed for a public purpose. Such necessity is not justiciable, even if the motive of plaintiff was to take more land than it needed in order to avoid severance damages."

There are various aspects of this principle which have crystallized into specific questions. In accordance with the general principle, it has been held that the courts may not inquire into the question

(1) Whether there is any necessity for the taking,<sup>§2</sup>

a determination of the necessity for acquiring private property under the power of eminent domain by an administrative agency of government, or by a quasi public corporation, will not be set aside by the courts in the absence of a showing that such a determination was motivated by bad faith, fraud, or constitutes a gross abuse of discretion. There is nothing in the record before us to indicate, nor does appellee contend, that the Road Department's resolutions determining the necessity for acquiring defendant's property were motivated by fraud or bad faith. The trial court found that no public necessity, purpose or use exists in this case at this time to properly authorize the Road Department to exercise the power of eminent domain against the lands of defendant. Having so found, it seems implicit in the order appealed from that the court concluded the resolution of necessity adopted by the Road Department constituted a gross abuse of discretion, or else no public purpose or use exists for the taking of defendant's land, and therefore the institution of this proceeding is an improper exercise of the power of eminent domain delegated to it by law."

<sup>§2.</sup> California—*People v. Lagiss*, 216 CA(2d) 374, 30 Cal Rptr 853.

<sup>§3</sup> United States—*Sears v. Akron*, 246 US 242, 63 L Ed 688, 38 S Ct 245; *Bragg v. Weaver*, 251 US 67, 64 L Ed 135, 40 S Ct 62; *Joslin Mfg. Co. v. Providence*, 262 US 668, 67 L Ed 1167, 43 S Ct 684; *Rindge Co. v. County of Los Angeles*, 262 US 700, 67 L Ed 1186, 43 S Ct 689; *United States v. 80 Acres of Land*, 28 F Supp 315.

Colorado—*Pine Martin Mining Co. v. Empire Zinc Co.*, 90 Colo 520, 11 P(2d) 221.

Mississippi—*Mississippi Power & Light Co. v. Blake*, 236 Miss 207, 109 So(2d) 657, in which the court said:

"Consequently, as a condition precedent to the exercise thereof, the Power Company was required to obtain from the Public Service Commission a certificate of public convenience and necessity.

\* \* \*

"It has been repeatedly held that the public necessity for taking private property is a legislative question. *Ham v. Board of Levee Commissioners*, 83 Miss. 534, 35 So. 943;

(2) Whether there is any need for resorting to eminent domain in effecting such acquisition,<sup>84</sup>

(3) Whether the time is a fitting one,<sup>85</sup>

*City of Greenwood v. Gwin*, 153 Miss. 517, 121 So. 160; *Miss. State Highway Commission v. Cockrell*, 205 Miss. 828, 39 So.2d 494; *Culley v. Pearl River Industrial Commission*, Miss., 108 So.2d 390.

"Since the Legislature had the right and power to determine the public necessity, it of course also had the power to delegate that function to the Public Service Commission. The action of the Commission, in granting a certificate, cannot be overturned if it is supported by substantial evidence, and is not arbitrary or capricious, or beyond its power to make, and does not violate some constitutional right."

*Nevada—Aeroville Corp. v. Lincoln County Power Dist. No. 1*, 71 Nev 320, 290 P(2d) 970.

*North Carolina—Burlington City Board of Education v. Allen*, 243 NC 520, 91 SE(2d) 180.

*Pennsylvania—*Where statute requires that as a prerequisite to condemnation by a public utility the condemnor must obtain the approval of the proposed condemnation by the public service commission, the court would not substitute its own judgment for that of the commission, unless the order was clearly unreasonable and not in conformity with law, or if there was a flagrant abuse of discretion. *Phillips v. Pennsylvania Public Utility Commission*, 181 Pa St 625, 124 A(2d) 625.

<sup>84</sup> *United States—In re Secretary of the Treasury*, 45 F 396; *In re Condemnation for Impvmt. of Rouge River*, 266 F 105; *United States v. Cray*, 1 F Supp 406; *United States*

*v. Gideon-Anderson Co.*, 16 F Supp 627.

*New York—In re Townsend*, 39 NY 171.

<sup>85</sup> *United States—In United States v. Certain Parcels of Land*, 215 F (2d) 140, the owners contended that the condemnation was itself improper inasmuch as a portion of the property taken was not to be devoted to "public use" within a reasonable period of time. The court upheld the taking, saying:

"As we have stated the Merchants Exchange tract was but one of a large number of tracts condemned or to be condemned by the government in establishing the Independence National Historical Park. The particular condemnation proceeding in which the Merchants Exchange property was involved covered many separate tracts. Other pieces of land remained to be condemned. One of these properties, condemned at the same time as was the Merchants Exchange, was taken subject to a provision allowing the owner to remain in possession for a period of five years. A provision allowing similar arrangements in respect to other lands then taken was included. The owners of the Merchants Exchange, a property still largely occupied by private tenants, argue that the National Historical Park 'as a completed whole' could not come into being until at least five years after their property was condemned and that this constituted an unreasonable delay after the time of taking.

"The court below ruled to the contrary for good reasons. The court concluded that since the authorizing

legislation anticipated a program of piecemeal acquisition [99 F.Supp. 717] of the necessary properties, the government reasonably deemed such a transitional program administratively desirable for such a large project and more feasible for the tenants who had to make arrangements to conduct their business in other localities. In addition, the obtaining of early control of the properties enabled the government to prevent unsatisfactory alteration, deterioration, or destruction of the site and also avoided speculation.

"We do not, however, consider it necessary to evaluate these reasons. Since the power of eminent domain is limited in its exercise to obtaining property for public use, the courts have reviewed eminent domain proceedings in order to insure that the property condemned was actually taken for public use. Admittedly, the proposed National Historical Park is a public use. Though there may be some delay in diverting the property from private uses the delay should not be great in the light of all the circumstances.

"Once it is administratively determined that a property is to be taken for a public use, a United States court ordinarily will not review the reasonableness of the government's decision as to the time of taking or the period which must elapse before the property is utilized solely for a public activity. In authorizing the use of eminent domain in such a case as that at bar 40 U.S.C.A., § 267 provides that the " \* \* \* officer of the Government \* \* \* authorized to procure real estate \* \* \* may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, \* \* \*" (Emphasis added.) The statute indicates that the judgment as to the proper time

of taking is to be that of the government official to whom the exercise of the power of eminent domain has been delegated by Congress. See *United States v. 6,576.27 Acres of Land*, D.C.N.D. 1948, 77 F.Supp. 244, 245. The administrative difficulties in having a court sit in judgment on such an exercise of official discretion and the disadvantages of such a course would seem to limit severely the role a court may play save where there has been a clear abuse of discretion."

The court further distinguished the situation in the case at bar from that in which the condemnor was a non-governmental entity. The court said: "The owners rely heavily on *Clendaniel v. Conrad*, 1912, 3 *Boyce*, Del., 549, 83 A. 1036, at page 1049, a Delaware condemnation proceeding, wherein the court said, that property taken by eminent domain must " \* \* \* be devoted to a public use within a reasonable time \* \* \*" after the taking. The court explained that this requirement was enforced as a means of compelling private groups, allowed the eminent domain power, without directions as to its exercise, to use the fruits of the power only for public purposes and that acceptance of the eminent domain power by a private corporation not only imposed a duty to devote private property taken with the power to public use, but to do so within a reasonable time. The court ruled that this duty would be judicially enforced when necessary. Because the eminent domain power delegated to private groups has always been more closely limited than that inherent in sovereignty, the precedent of the *Clendaniel* decision is not persuasive here. See *United States v. Jotham Bixby Co.*, D.C.S.D. Cal. 1932, 55 F.2d 317, 319."

Delaware — State v. 0.62033

(4) Whether there is a need for the property to the extent sought to be acquired,<sup>86</sup>

*Acres of Land*, 49 Del 90, 110 A(2d) 1, in which the court said:

"In the application of these concepts, however, the Courts enforce a well-established limitation upon the power of eminent domain. One of the fundamental principles of eminent domain is that it shall not be exercised unless the property taken is to be devoted to a public use within a reasonable time after the taking. *Clendaniel v. Conrad*, 3 Boyce 549, 590, 83 A. 1036, 1049. The doctrine of reasonable time prohibits the condemnor from speculating as to possible needs at some remote future time. The condemning authority, of course, may take lands sufficient to provide for future needs as well as present needs; but, in this area, the condemning authority may not exceed that which may in good faith be presumed to be necessary for future use within a reasonable time."

**New York**—*In re Townsend*, 39 NY 171.

See, however:

**Kentucky**—*Pike County Board of Education v. Ford*, 270 SW(2d) 245, in which the court said:

"An authority with the power to condemn is not limited to its immediate needs only, but it may, and indeed should, give consideration to future needs. *Baxter v. City of Louisville*, 224 Ky. 604, 6 S.W.2d 1074. In 18 Am.Jur., Eminent Domain, section 111, it is stated:

"In the determination of whether the taking of property is necessary for public use, not only present demands of the public, but those which may be fairly anticipated in the future, may be considered.

" \* \* \* When a taking of land or water rights or other property is made for a public use, there is no valid objection if a reasonable regard for probable future expansion is kept in mind, and a taking of considerably greater extent than is required by present necessities is made, even if the parties making the taking derive a revenue from selling the surplus water or leaving the surplus land for private purposes until it is needed for the public use. \* \* \*"

"The fact that a portion of the land taken will continue to be put to private use by a public utility, holding a lease thereon until the needs of the Board require its use, does not destroy the right of eminent domain."

<sup>86</sup> **United States**—*Shoemaker v. United States*, 147 US 282, 37 L Ed 170, 13 S Ct 361; *United States v. Gettysburg Elec. R. Co.*, 160 US 668, 40 L Ed 576, 16 S Ct 427; *United States v. Chandler-Dunbar W. P. Co.*, 220 US 53, 57 L Ed 1063, 33 S Ct 667; *Sears v. Akron*, 246 US 242, 62 L Ed 688, 38 S Ct 245; *United States v. Certain Parcels of Land*, 215 F(2d) 140; *United States v. Certain Real Estate, etc.*, 217 F(2d) 920; *United States v. 342.81 Acres of Land*, 134 F Supp 430; *United States v. 23.9129 Acres of Land*, 192 F Supp 101.

**Florida**—*Miller v. Florida Inland Navigation District*, 130 So (2d) 615.

**Illinois**—*City of Waukegan v. Stanczak*, 6 Ill (2d) 594, 129 NE(2d) 751, in which it was held that as to amount, the condemning authority had substantial discretion to take land sufficient not only for present needs, but for future requirements as well. Unless the discretion is abused

or an area grossly excessive is taken, the taking will not be disturbed.

**Indiana**—*Wanapler v. Trustees of Indiana University*, 241 Ind 449, 172 NE(2d) 67, citing *Treatise*.

**Kentucky**—*Kroger Co. v. Louisville & Jefferson County Air Bd.*, 308 SW(2d) 435.

**Louisiana**—*Greater Baton Rouge Port Comm v. Watson*, 224 La 136, 68 So (2d) 961.

**New Jersey**—*Tennessee Gas Transmission Co. v. Hirschfeld*, 38 NJS 132, 118 A(2d) 64.

**New York**—*Cuglar v. Power Authority*, 4 Misc (2d) 879, 163 NYS (2d) 992, aff'd 4 AD(2d) 891, 161 NYS(2d) 686, aff'd 3 NY(2d) 1006, 147 NE(2d) 733.

**Oregon**—*Port of Umatilla v. Richmond*, 212 Or 596, 321 P(2d) 338, citing and quoting *Treatise*.

**Pennsylvania**—*Lacy v. Montgomery*, 181 Pa St 640, 124 A(2d) 492.

The obverse of the textual statement was involved in *McAuliffe & Burke Co. v. Boston Housing Authority*, 334 Mass 28, 133 NE(2d) 493, wherein the court said:

"The first contention of the plaintiff is that the authority was empowered to take all the land within the peripheral boundaries of the area or nothing. Each of these seven parcels was especially described by metes and bounds together with its total area. All but one of them abutted upon one of the existing streets now forming one of the external boundaries of the project. The authority has in fact all the land located within the peripheral boundaries of the area except these parcels. The plaintiff contends that a taking of less than the entire plot declared to be substandard or decadent is invalid.

"The defendants contend that the plaintiff has no standing to raise this point. The extent and the necessity for a taking rest in the sound discretion of the board to which the subject has been entrusted, *Talbot v. Hudson*, 16 Gray 417; *Lynch v. Forbes*, 161 Mass 302, 37 NE 437; *Boston v. Talbot*, 206 Mass 82, 91 NE 1014, although the purpose for which the land was taken is a question of law and is open to judicial review. *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass 371, 102 NE 619, 46 LRA, NS, 1196; *Allydenn Realty Corp. v. Holyoke Housing Authority*, 304 Mass 288, 23 NE(2d) 665.

\* \* \*

"It may at times happen, as it did undoubtedly here, that within the entire substandard district there are a few parcels with the structures thereon that in the sound judgment and discretion of the members of the authority are in harmony with the contemplated use to which the locus is to be devoted. Structures suitable to and consistent with the new use to which the area is to be put need not be destroyed merely because they happen to be located within a substandard and decadent area. \* \* \*

Of a somewhat similar question it was said in *Berman v. Parker*, 348 US 26, 36, 75 S Ct 98, 99 L Ed 27, in answer to an objection of a department store owner whose place of business was located within a condemned area that his business should not be taken, that it was not 'the function of the courts to sort and choose among the various parcels selected for condemnation.' It has been held that all the land included in a substandard or decadent area need not be taken. Omission to take the seven particular lots did not invalidate the taking of the remainder of the area."

(5) Whether there is a need for the particular tract sought to be acquired (and, correlatively, whether another tract would not better serve the purposes of the condemnor),<sup>87</sup>

(6) Whether there is any need for the particular estate sought to be condemned,<sup>88</sup>

(7) Whether the mode of acquisition with respect to the

<sup>87</sup> **United States**—*Monongahela Nav. Co. v. United States*, 148 US 312, 37 L Ed 463, 13 S Ct 622; *United States v. Burley*, 172 F 615, aff'd 179 F 1; *Campbell v. Chase Nat. Bank*, 5 F Supp 156, aff'd on jurisdictional grounds, 71 F(2d) 669, cert. den. 293 US 592, 79 L Ed 686, 55 S Ct 108; *Fish v. Morgenthau*, 10 F Supp 613; *Atlantic Coast Line R. Co. v. Sebring*, 12 F(2d) 679; *Transcontinental G. P. L. Corp. v. Borough of Milltown*, 93 F Supp 287; *United States v. Certain Parcels of Land*, 215 F(2d) 140; *United States v. 342.81 Acres of Land*, 134 F Supp 430; *Kingsport Utilities v. Steadman*, 139 F Supp 622.

**California**—*Stafford v. People*, 144 CA(2d) 79, 300 P(2d) 231.

**Florida**—*Central Hanover Bk. & Tr. Co. v. Pan American Airways*, 137 Fla 808, 158 So 820.

**Missouri**—See, however, *St. Louis County v. Manchester*, 360 SW(2d) 638, as to the inhibiting character of a zoning ordinance. (See § 1.42 [10], footnote, 59.1, *supra*.)

**New York**—*In re Townsend*, 39 NY 171; *Tennessee Gas Transmission Co. v. Geng*, 11 Misc (2d) 739, 175 NYS(2d) 488.

<sup>88</sup> **United States**—*Sweet v. Rechel*, 159 US 380, 40 L Ed 188, 16 S Ct 43; *United States v. Certain Parcels of Land*, 215 F(2d) 140; *United States v. Certain Real Estate, etc.*, 217 F(2d) 920; *Richmond Investment Co. v. United States*, 249 F(2d) 811.

**Florida**—*Miller v. Florida Inland Navigation District*, 130 So (2d) 615.

**Illinois**—*City of Waukegan v. Stanczak*, 6 Ill (2d) 594, 129 NE(2d) 751, in which the court said:

"As to the estate taken, the State or its municipal delegatee, may take any property, if for a public purpose, so long as it provides just compensation. Subject to these constitutional requirements, the estate or quantum of interest taken may be the maximum interest in property, the fee simple absolute, if the legislature so determines. *Sanitary District of Chicago v. Manasse*, 380 Ill 27, 42 NE(2d) 543. In a given case, the grant of condemnation power in the statute, or lacking an express definition of the interest to be taken, the absolute needs of the public purpose, may control the quantum to be taken. *Miner v. Yantis*, 410 Ill 401, 102 NE(2d) 524, and where a condemnation statute does not expressly grant power to take a fee simple absolute, then a determinable fee, easement, or lesser interest may be all that may be taken. *Superior Oil Co. v. Harsh, DC*, 39 F Supp 467; *Miller v. Commissioners of Lincoln Park*, 278 Ill 400, 116 NE 178.

\* \* \*

"Where the power to take is a power to take 'real property,' the grant authorizes taking 'all interest held or claimed in lands in fee, for life or for years,' including a fee simple interest."

**Massachusetts**—*Boston v. Talbot*, 206 Mass 82, 91 NE 1014.

instrumentalities employed, such as a state officer, an individual, or a corporation, is proper insofar as the exercise of the legislative discretion is concerned.<sup>89</sup>

### [1] Legislative question.

It follows from the very nature of the power of eminent domain that property cannot be taken by the exercise of the power except when it is needed for the public use.<sup>90</sup> It is equally obvious that, as there is no fixed principle which decides that public improvements shall be undertaken and where they shall be located, these questions must be settled by some department of the government. It does not, however, follow merely because such questions are often open to doubt,

<sup>89</sup> **New Jersey**—*Morris May R. Corp. v. Board of Chosen Freeholders*, 18 NJ 269, 113 A(2d) 649.

**New York**—*In re Townsend*, 39 NY 171.

<sup>90</sup> **United States**—*West River Bridge Co. v. Dix*, 6 How 597, 12 L. Ed 535.

**California**—*Spring Valley Waterworks v. Drinkhouse*, 92 Cal 528, 28 P 681.

**Georgia**—*Parham v. Inferior Court Justices*, 9 Ga 341; *Atlantic, etc., R. Co. v. Penney*, 119 Ga 481, 46 SE 665.

**Illinois**—*Chaplin v. H'way Comrs.*, 129 Ill 651, 22 NE 484.

**Indiana**—*Prather v. Jeffersonville, etc., R. R. Co.*, 53 Ind 16; *Blackman v. Halves*, 72 Ind 515.

**Kentucky**—*Tracy v. Elizabethtown, etc., R. R. Co.*, 80 Ky 259.

**Louisiana**—*New Orleans, etc., R. Co. v. Gay*, 32 La Ann 471.

**Maine**—*Jordan v. Woodward*, 40 Me 317.

**Maryland**—*New Central Coal Co. v. George's Creek Coal, etc., Co.*, 37 Md 537.

**Massachusetts**—*Harback v. Boston*, 6 Cush 295.

**Michigan**—*People ex rel. Trombly v. Humphrey*, 23 Mich 471, 9 Am Rep 94.

**Missouri**—*St. Louis, etc., R. R. Co. v. Hannibal Union Depot Co.*, 125 Mo 82, 28 SW 483.

**Nevada**—*Dayton, etc., Mining Co. v. Seawell*, 11 Nev 394.

**New Jersey**—*Cheyney v. Atlantic City Waterworks Co.*, 55 NJL 235, 26 A 95.

**New Mexico**—*City of Carlsbad v. Ballard*, 71 NM 397, 378 P(2d) 814.

**New York**—*Bloodgood v. Mohawk, etc., R. R. Co.*, 18 Wend 9, 31 Am Dec 313.

**Ohio**—*Giesy v. Cincinnati, etc., R. Co.*, 4 Ohio St 308.

**Oregon**—*Dallas v. Hallock*, 44 Or 246, 75 P 204.

**Pennsylvania**—*Darlington v. United States*, 82 Pa 382, 22 Am Rep 766.

**Vermont**—*Foster v. Stafford National Bank*, 57 Vt 128.

and because evidence and argument might be of assistance in coming to a decision, that they are necessarily judicial and should be passed upon by the courts.

Just as it is exclusively within the power of the legislature, except so far as it is limited by the provisions of the constitution, to decide what police regulations shall be enacted, what taxes shall be levied and what the duties of the various public officers shall be, so it is within the exclusive jurisdiction of the same body to determine what public improvements shall be constructed, where they shall be located, and whether the power of eminent domain shall be employed to acquire the necessary site.

When the legislature has authorized the exercise of eminent domain in a particular case, it has necessarily adjudicated that the land to be taken is needed for the public use, and no other or further adjudication is necessary. When the legislature has made its decision and has authorized the taking of land by eminent domain, the owner has no constitutional right to have this decision reviewed in judicial proceedings or to be heard by a court on the question whether the public improvement for which it is taken is required by public necessity and convenience, or whether it is necessary or expedient that his land be taken for such improvement, unless the public use alleged for the taking is a mere pretense.

If the legislature should determine that it was unwise to establish a public improvement for which there was a considerable demand, no one would suppose that such a determination could be reviewed by the courts, and the principle is the same if the determination of the legislature is the other way.

This rule is sometimes stated in other forms, as that such questions are political, not judicial;<sup>\*1</sup> or that the judicial function is exhausted when the use is declared public, and the extent to which property shall be taken rests in the discretion of the legislature.<sup>\*2</sup> The logical basis of the rule

<sup>\*1</sup> California—*Barry v. Department of Public Works*, 199 CA(2d) 359, 18 Cal Rptr 637, quoting *Treatise* etc., R. R. Co., 108 NY 375, 16 NE 429.

Missouri—*State v. Crain*, 308 SW (2d) 451. <sup>\*2</sup> United States—*Shoemaker v. United States*, 147 US 282, 37 L Ed 170, 13 S Ct 361.

New York—*In re Niagara Falls*, Indiana—*Guerretaz v. Public Serv-*

does not appear in any of the above expositions of it, and the subject is sometimes confused by a statement of these synonymous conclusions as if one presented the reasoning from which the others resulted. The real reason of the rule is simple enough; the courts have no power to revise any enactment of the legislature unless it violates some clause of the constitution. The constitutions of the great majority of the states contain no provision prohibiting the taking of land for public use except for necessary or economically expedient undertakings, or unless the work can be done in no other way, nor was it the practice when the state constitutions were adopted to require a judicial hearing upon the question of necessity in eminent domain cases, so that it can be plausibly argued that such a hearing is essential to due process of law.

If there were such provisions in the state constitutions the questions whether a particular public work was expedient, or a particular piece of land needed, would be judicial, and the courts would consider such questions upon their merits, uninfluenced except by the respect which they accorded the previous expressions of legislative opinion. Such provisions being lacking there is nothing upon which the courts may base any opposition to the validity of the statutes, however much they may doubt the wisdom of constructing the work at all or disapprove of its magnitude or of the site that is chosen.

## [2] Limitation on legislative power.

There is, however, at least a theoretical limit beyond which the legislature cannot go. The expediency of constructing a particular public improvement and the extent of the public necessity therefor are clearly not judicial questions; but it is obvious that, if property is taken in ostensible behalf of a public improvement which it can never by any possibility serve, it is being taken for a use that is not public, and the owner's constitutional rights call for protection by the courts. So, also, the due process clause protects the individual from

ice Company of Indiana, 227 Ind 556, 87 NE(2d) 721.

Louisiana--State v. Guidry, 124 So (2d) 531, citing *Treatise*.

New Jersey--City of Newark v.

New Jersey Turnpike Authority, 12 NJS 523, 79 A(2d) 897, citing *Treatise*; Burnett v. Abbott, 14 NJ 291, 102 A(2d) 16, citing *Treatise*.

spoliation under the guise of legislative enactment, and while it gives the courts no authority to review the acts of the legislature and decide upon the necessity of particular takings, it would protect an individual who was deprived of his property under the pretense of eminent domain in ostensible behalf of a public enterprise for which it could not be used. While many courts have used sweeping expressions in the decisions in which they have disclaimed the power of supervising the selection of the site of public improvements, it may be safely said that the courts of the various states would feel bound to interfere to prevent an abuse of the discretion delegated to the legislature by an attempted appropriation of land in utter disregard of the possible necessity of its use, or when the alleged purpose was a cloak to some sinister scheme. In other words, the court would interpose in a case in which it did not merely disagree with the judgment of the legislature, but felt that that body had acted with total lack of judgment or in bad faith. In every case, therefore, it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity.<sup>93</sup> But while the

<sup>93</sup> *Lynch v. Forbes*, 161 Mass 302, 37 NE 437, 42 Am St Rep 402.

"Of course neither the state nor its delegates can take, under the guise of eminent domain, the property of A. for the purpose of conveying it to B., or for a purpose clearly in excess of, or at variance with, the powers granted. No question of good faith, however, arises here." *Cary Library v. Bliss*, 151 Mass 364, 25 NE 92, 7 LRA 765.

"There can be a taking for a public use under this power only when, in the nature of the case, there is or may be a public necessity for the taking. . . . 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 the opinion that the proceeding . . . was not a taking which was or which could

be found by the legislature to be a matter of public necessity. For these reasons a majority of the court are of opinion that the statute is not in conformity with the constitution of the United States."

See, also:

**United States**—*Chesapeake, etc., Canal v. Mason*, 4 Cranch CC 123; *Weidenfeld v. Sugar Run, etc., R. R. Co.*, 48 F 615; *United States v. 209.25 Acres of Land*, 198 F Supp 454; *United States v. 113.31 Acres of Land*, 24 FRD 368; *United States v. 1,108 Acres of Land*, 25 FRD 205.

**Arkansas**—*Woolard v. State H'way Comm.*, 220 Ark 731, 249 SW (2d) 564.

**California**—*People v. Lagiss*, 160 CA (2d) 28, 324 P (2d) 926.

**Colorado**—*Welch v. City and County of Denver*, 141 Colo 587, 349 P (2d) 352.

**Connecticut**—Norwich v. Johnson, 86 Conn 151, 84 A 727, 41 LRA (NS) 1024; State v. Fahey, 146 Conn 55, 147 A(2d) 476; Graham v. Houlihan, 147 Conn 321, 169 A(2d) 745.

**District of Columbia**—United States v. Baltimore, etc., R. R. Co., 27 App DC 105.

**Florida**—St. Joe Paper Co. v. Choctawatchee Electric Coop., 79 So(2d) 761, in which the court said:

“It is the rule of this jurisdiction that in order to make a justiciable issue as to the necessity for the exercise of the power of eminent domain, a contestant must allege ‘fraud, bad faith or gross abuse of discretion’ on the part of the condemning authority.”

See, also; Miller v. Florida Inland Navigation District, 130 So(2d) 615; State *ex rel.* Ervin v. Jacksonville Expressway Authority, 139 So(2d) 135.

**Georgia**—Parham v. Inferior Court Justices, 9 Ga 341.

**Illinois**—Chicago, etc., R. R. Co. v. Morrison, 195 Ill 271, 63 NE 96; Bell v. Mattoon Waterworks, etc., Co., 245 Ill 544, 92 NE 352, 137 Am St Rep 338, 19 Ann Cas 153; Trustees of School Tp. 37 v. Sherman Heights Corp., 20 Ill (2d) 357, 169 NE(2d) 800. See, also, Deerfield Park Dist. v. Progress Dev. Corp., 22 Ill (2d) 132, 174 NE(2d) 850, in which the court said:

“It is also well settled that State power cannot be used as an instrument to deprive any person of a right protected by the Federal constitution. Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed2d 110; Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161; Aaron v. Cooper, 358 U.S. 27, 78 S.Ct. 1397, 3 L.Ed.2d 1.

“However, we think that the 42-page complaint contains allegations sufficient to charge the Park District with using its power of eminent domain for the sole and exclusive purpose of preventing the sale of homes by Progress to Negroes in violation of Progress’s right to equal protection of the law.

“We consider such a charge, if proved, to be a denial of the necessary prerequisites to condemnation of necessity and public use, and therefore a defense to the petition.

• • •

“The material questions of fact are whether or not Deerfield needed park sites; whether or not Progress’s property is suitable for park sites; and whether or not these sites will be devoted to public use. On these issues the Park District has made a *prima facie* case. Trustees of Schools of Township 37 North, Range 11, Cook County Illinois v. Sherman Heights Corp., 20 Ill.2d 357, 169 N.E.2d 800.

• • •

“In the case at bar, the action protested—the condemnation of land for park purposes, is a legitimate and laudable municipal function. The designation of Progress’s land as a park site and its acquisition, standing alone, contains no such irresistible mathematical demonstration of illegal purpose as contained in the Alabama legislation.

“In Gomillion, the United States Supreme Court did not engage in any metaphysical investigation into the motives of the legislators. They found the inescapable illegal purpose from the act itself. From an examination of the record in the case at bar, it is apparent that many of the allegations of Progress are framed for the purpose of directing a judicial inquiry into the motives of the individual members of the Park District Board, rather than into the actual purpose for which this land is

sought. This is clearly an inappropriate area for judicial inquiry. *Detroit United Railway v. City of Detroit*, 255 U.S. 171, 178, 41 S.Ct. 285, 65 L.Ed. 570; *Soon Hing v. Crowley*, 113 U.S. 703, 710-711, 5 S.Ct. 730, 28 L.Ed. 1145; *Sinclair Refining Co. v. City of Chicago*, 7 Cir., 178 F.2d 214, 217. As we stated in *Ligare v. City of Chicago*, 139 Ill. 46, 28 N.E. 934, 936, in a condemnation case the purpose for which the power of eminent domain is exercised may be questioned, but 'the motives that may have actuated those in authority are not the subject of judicial investigation.'

"We cannot see how the rule could be otherwise. If parks are needed in Deerfield, and if the land so selected for them is appropriate for that purpose, the power of eminent domain cannot be made to depend upon the peculiar social, racial, religious or political predilections of either the condemning authority or the affected property owner. Progress is entitled to the same opportunity to hold land and operate a business as anyone else. They, like all others, hold their land subject to the lawful exercise of the power of eminent domain. They like all others are entitled to show, in a condemnation proceeding, that the land sought to be taken, is sought not for a necessary public purpose, but rather for the sole purpose of preventing Progress from conducting a lawful business. Cf. *Progress Development Corporation v. Mitchell*, 7 Cir., 286 F.2d 222."

**Indiana**—Unless the action of the legislature is arbitrary the courts will not interfere. *Guerreras v. Public Service Company of Indiana*, 227 Ind 556, 87 NE(2d) 721; *Cemetery Company v. Warren School Township*, 236 Ind 171, 139 NE(2d) 538.

**Iowa**—*Williams v. Carey*, 73 Iowa

194, 34 NW 813; *Bennett v. Marion*, 106 Iowa 628, 76 NW 844.

**Kentucky**—*Tracey v. Elizabethtown, etc., Ry. Co.*, 80 Ky 259.

**Louisiana**—*New Orleans Pac. Ry. Co. v. Gay*, 32 La Ann 471; *Central Louisiana El. Co. v. Covington & S. L. & I. Co.*, 131 So (2d) 369.

**Massachusetts**—*Clark v. Worcester*, 125 Mass 226; *Rockport v. Webster*, 174 Mass 385, 54 NE 852; *Framingham Water Co. v. Old Colony R. R. Co.*, 176 Mass 464, 57 NE 680.

When private property is taken in the exercise of the right of eminent domain, the taking must be limited to the reasonable necessities of the case, so far as the owners of the property taken are concerned. The right to take private property for a public use is founded upon and limited by public necessity. Where the necessity stops there stops the right to take, both as to amount of land and the nature of the interest therein. *Flower v. Billerica*, 324 Mass 519, 87 NE(2d) 189.

**Mississippi**—*Erwin v. Mississippi State H'way Comm.*, 213 Miss 885, 58 So (2d) 52.

**New Jersey**—*State v. Mayor of Orange*, 54 NJL 111, 22 A 1004, 14 LRA 62; *Albright v. Sussex County Comrs.*, 71 NJL 303, 57 A 398, 59 A 146, 69 LRA 768, 108 Am St Rep 749.

**New York**—*Rensselaer, etc., R. R. Co. v. Davis*, 43 NY 137.

**North Carolina**—*In re Housing Authority of City of Salisbury*, 235 NC 463, 70 SE(2d) 500.

**Ohio**—*Wheeling, etc., R. R. Co. v. Toledo, etc., Terminal Co.*, 72 Ohio St 368, 74 NE 209, 106 Am St Rep 622, 2 Ann Cas 941.

courts have frequently declared their power to set aside acts of the legislature upon such a ground, cases in which the power has been actually exercised seem rarely to have arisen.

A federal Court of Appeals has held that the judicial review of an administrative or legislative determination of necessity, based on the qualification of bad faith, arbitrariness, or ca-

**Oregon**—Port of Umatilla v. Richmond, 212 Or 596, 321 P(2d) 338, citing and quoting *Treatise*.

**Pennsylvania**—Pennsylvania R. R. Co. v. Diehn, 128 Pa 509, 18 A 522.

**South Carolina**—Riley v. Charleston Union Station Co., 71 SC 457, 51 SE 485, 110 Am St Rep 579; Bookhart v. Central Electric Power Cooperative, 222 SC 289, 72 SE(2d) 576.

**Texas**—Texas Electric Service Co. v. Linebery, 327 SW(2d) 657.

**Washington**—State v. Superior Court, 61 Wash (2d) 153, 377 P(2d) 425; Petition of Southwest Suburban Sewer Dist., 61 Wash (2d) 199, 377 P(2d) 431.

**West Virginia**—Baltimore, etc., R. R. Co. v. Pittsburgh, etc., R. R. Co., 17 W Va 812.

**Wisconsin**—Swenson v. County of Milwaukee, 266 Wis 139, 63 NW(2d) 103, in which the court said:

“No doubt a court would find it necessary to interfere to prevent an abuse of discretion by an attempted taking of land in utter disregard of the necessity of its use, and would not consider itself bound by a mere legislative declaration of such purpose as a means of concealing a design to take it for an illegal purpose; that is not the situation here, however.”

See, also: Branch v. Oconto

County, 13 Wis (2d) 595, 109 NW (2d) 105; Lehmann v. Waukesha County Hway. Comrs., 15 Wis (2d) 94, 112 NW(2d) 127.

See also footnote 19 under § 9.2, *infra*.

*Contra*:

**California**—People v. Chevalier, 165 CA(2d) 8, 331 P(2d) 237, in which the court said:

“However, conceding this to be the law, appellants contend that once they have alleged fraud, bad faith, or an abuse of discretion on the part of the condemning body, the question of ‘necessity’ for the take becomes a judicial issue, and cite various authorities therefor. Respondents reject them on the premise that they are in conflict with the basic theory of the right of eminent domain. *And so they seem to be.* Through the years our courts have made it plain that the right of eminent domain is an inherent attribute of sovereignty limited only by constitutional provisions which create only two judicial questions, ‘public use’ and ‘just compensation,’ all other matters falling within the exclusive jurisdiction of the legislature. Strictly following this basic theory, it would seem, therefore, that the only fraud, bad faith, or abuse of discretion that can be raised as a judicial issue is that going to the determination of public use.”

preciousness, is warranted only by dicta.<sup>93.1</sup> The court referred to the fact that the Supreme Court had left this question open.<sup>93.2</sup> Even when judicial review of the question of necessity is based upon alleged arbitrariness or excessiveness of the taking, it has been held that by virtue of the delegation of the power of eminent domain by the State to the condemnor there is necessarily left largely to the latter's discretion the location and area of the land to be taken. And one seeking to show that the taking has been arbitrary or excessive shoulders a heavy burden of proof in the attempt to persuade the Court to overrule the condemnor's judgment.<sup>93.3</sup>

It being settled that, while necessity is not primarily a judicial question, there may be such absolute lack of necessity as to render the proceedings void, it necessarily follows that an owner who alleges such lack of necessity is entitled to have the question passed upon by a judicial tribunal.<sup>94</sup> It is,

<sup>93.1</sup> *United States v. State of South Dakota*, 212 F(2d) 14, Citing, as examples: *Simmonds v. United States*, 199 F(2d) 305; *United States v. State of New York*, 160 F(2d) 479; *United States v. Meyer*, 113 F(2d) 387.

<sup>93.2</sup> *United States v. Carmack*, 329 US 230, 91 L Ed 209, 67 S Ct 252, in which the court said: "In this case it is unnecessary to determine whether or not this selection could have been set aside by the courts as unauthorized by Congress if the designated officials had acted in bad faith or so 'capriciously and arbitrarily' that their action was without adequate determining principles or was unreasoned."

See, however, *United States v. Certain Real Estate, etc.*, 217 F(2d) 920, in which the court said: "We are of opinion that condemnation of the Puckette tract fell within the discretion of the Public Works Administrator and that the exercise of his discretion was not reviewable by the United States Court, unless palpably arbitrary, capricious, or other-

wise unlawful; and we think it was not."

<sup>93.3</sup> *Arkansas — Gray v. Ouachita Creek Watershed District*, 351 SW (2d) 142.

<sup>94</sup> A statute giving a private corporation power to finally determine necessity would be unconstitutional.

*California — Mahoney v. Spring Valley Waterworks Co.*, 52 Cal 159.

*Ohio — Cincinnati v. Louisville, etc., R. R. Co.*, 88 Ohio St 283, 102 NE 951.

*South Carolina — South Carolina R. R. Co. v. Blake*, 9 Rich L 228.

Based upon its construction of the authorizing statute, a federal court has drawn a distinction between the acts of the legislature on the one hand and the acts of an administrative agency to whom the power has been delegated on the other. Conceding the non-reviewability of the determination of the legislature itself by the courts, the court went on to say: "The Secretary of the Army's deter-

however, generally held that the question of necessity need not be determinable in the condemnation proceedings themselves, since the legislative assertion of necessity is primarily conclusive, and that the constitutional rights of the owner, to be protected against a taking without possibility of necessity, are sufficiently guarded by his right to institute proceedings at law or in equity to save his property and have the taking

mination of 'necessity' under this grant of authority is subject to judicial review. The administrative determination has great weight, and the court must give due consideration to the action of an administrative agency in selecting a particular tract of land to be taken, but the administrative agency cannot invoke the political power of the Congress to such an extent as to immunize its action against judicial examination in contests between a citizen and the agency." *United States v. 1096.84 Acres*, 99 F Supp 544.

See, also, to same effect—*United States v. 1298.15 Acres*, 108 F Supp 549.

Almost at the same time another federal court held that the scope of judicial review of an agency's determination as to the extent of the property taken, the duration of the interest acquired, and the nature of the use, is extremely limited. *United States v. Fisk Building*, 99 F Supp 592.

See, also, *United States v. Southernly Portion of Bodie Island, N. C.*, 114 F Supp 427, wherein the court said: "In the absence of bad faith and non public use, it would seem that the wisdom of a government officer authorized to commence condemnation proceedings does not present a judicial question and is not subject to judicial review; for by the language of the Act he may commence such proceedings whenever in his opinion it is necessary or advantageous \* \* \*. 40 U.S.C.A. § 257.

Hence, it is his opinion and not the opinion of the Court that is controlling. The question of bad faith, as distinguished from bad judgment, is not here presented. To allege bad faith a party must charge facts rather than conclusions, and such facts must suggest actual malevolence by the officer towards the complaining party."

See, also:

**Florida**—*Miller v. Florida Inland Navigation District*, 130 So(2d) 615.

**Kentucky**—*Commonwealth v. Burdett*, 367 SW(2d) 262.

**Ohio**—*Solether v. Ohio Turnpike Commission*, 99 Ohio App 228, 133 NE(2d) 148, citing *Treatise*.

**Oregon**—*State v. Pacific Shore Land Co.*, 201 Or 142, 269 P(2d) 512, citing *Treatise*.

*Contra*:

**United States**—*United States v. Mischke*, 285 F(2d) 628, in which the court said:

"We cannot accept the theory that the assertion by a defendant in a condemnation proceeding that the official, duly authorized by Congress to select the lands necessary to be taken for a public use, has acted in bad faith and arbitrarily and capriciously in making the selection, can transmute what has invariably been held to be a legislative question into a judicial one."

set aside;<sup>95</sup> but, on the other hand, if the court has jurisdiction to dismiss the condemnation proceedings upon the ground of abuse of discretion, there is an adequate remedy at law and an injunction will not be issued in a collateral proceeding.<sup>96</sup>

<sup>95</sup> Connecticut—Norwich v. Johnson, 86 Conn 151, 84 A 727, 41 LRA (NS) 1024.

Georgia—Atlantic, etc., R. R. Co. v. Penny, 119 Ga 479, 46 SE 666.

Illinois—Pittsburgh, etc., Ry. Co. v. Sanitary Dist., 218 Ill 286, 75 NE 892, 2 LRA (NS) 226.

Minnesota—City of Austin v. Wright, 262 Minn 301, 114 NW(2d) 584.

North Dakota—Grafton v. St. Paul, etc., Ry. Co., 18 ND 313, 113 NW 598, 22 LRA (NS) 1, 15 Ann Cas 10.

Washington—Petition of City of Bellevue, 62 Wash (2d) 458, 383 P (2d) 286; Petition of Housing Authority of City of Seattle, 62 Wash (2d) 492, 383 P(2d) 295.

Wisconsin—State *ex rel.* Baltzell v. Stewart, 74 Wis 620, 43 NW 947, 6 LRA 394.

See, however, Stearns v. Barre, 73 Vt 281, 50 A 1086, 58 LRA 240, 87 Am St Rep 721, in which the court said: "There is, however, a growing disposition to assert that the rule which limits the taking to the necessity is something more than a theory; that the taking of the party making an appropriation under an indefinite grant is not conclusive upon the courts; and that if more is taken than is needed for the public use the aggrieved owner will be entitled to some proceeding to re-establish the bounds of his invaded right. But we think a remedy of this character comes short of the protection to which the owner is entitled. The

constitution gives him something more than the right to recover his property from a summary seizure under an indefinite grant. His property is not to be taken unless necessary for the public use. The existence of that necessity is the foundation of the right to take, and its ascertainment should precede or accompany, and not follow, the taking. We are not satisfied with a rule which permits the taking of land without proof of the right to do so, and casts upon the owner the burden of instituting proceedings to save his property. This imposes upon the owner the necessity of furnishing bail for repeated suits in trespass or bonds for the payment of injunction damages, and these are burdens and risks which in some cases might easily deter a prudent man from any attempt to assert his claim. Remedies of this nature do not meet the spirit of the requirement. The constitution guarantees the protection of a right rather than the redress of a wrong.

"We think an act which leaves the amount of the taking undetermined must provide for the determination a procedure which accords with the established principles of the law."

See, also:

Kentucky—Tracy v. Elizabethtown, etc., R. R. Co., 80 Ky 269.

Minnesota—*Re* Minneapolis, etc., Terminal Co., 38 Minn 157, 36 NW 105.

<sup>96</sup> Wheeling, etc., R. R. Co. v. Toledo, etc., Terminal Co., 72 Ohio St 368, 74 NE 209, 106 Am St Rep 622, 2 Ann Cas 941.

As illustrative of the cases in which the judiciary will interpose is the situation where it is sought to acquire property by eminent domain for an obvious or conceded future use. However, the great preponderance of opinion is to the effect that an acquisition for future use is justified as based upon present necessity. In New York the Court of Appeals many years' ago refused to be bound time-wise, by a narrow interpretation of the term "necessity."<sup>§§.1</sup> The Supreme Court of the United States, in dealing with this question, insofar as highways are concerned, declared that availability for future use was an element in the determination of present necessity.<sup>§§.2</sup> Other jurisdictions, too, have followed the same rule.<sup>§§.3</sup> Although the federal Court of Appeals<sup>§§.4</sup> upheld

<sup>§§.1</sup> Matter of Staten Island Rapid Transit Co., 103 NY 251, 256, 8 NE 548, wherein the court said: "It was conceded by the petitioner upon the hearing that the lands in question were not required for its present uses, and it is strenuously contended therefrom by the appellant, that the petitioner has not made a case for condemnation, or such a case as establishes a reasonable probability that such lands will be required for its uses in the future. It is quite obvious that the beneficial exercise of the power of acquiring property for public uses cannot be enjoyed unless allowed in anticipation of the contemplated improvement, and it is, therefore, well settled in this State, that the mere fact that land proposed to be taken for a public use is not needed for the present and immediate purpose of the petitioning party, is not necessarily a defense to a proceeding to condemn it.

"The statute authorizing the formation of railroad corporations confers power . . . to acquire lands by the exercise of the right of eminent domain . . . for its prospective as well as its present uses, provided its necessities for such use in the immediate future are established beyond reasonable doubt."

See, also: Queens Terminal Co. v. Schmuck, 147 AppDiv (NY) 502, 510, 132 NYS 164; Matter of Mayor (East 161st St.), 52 Misc (NY) 596, 600, 102 NYS 502.

<sup>§§.2</sup> In Rindge Co. v. Los Angeles County, 263 US 700, 707, 67 LEd 1186, 43 SCt 689, the court said: "Public-road systems, it is manifest, must frequently be constructed in instalments, especially where adjoining counties are involved. In determining whether the taking of property is necessary for public use not only the present demands of the public, but those which may fairly be anticipated in the future, may be considered."

<sup>§§.3</sup> Thus, in Central Pacific Ry. Co. v. Feldman, 162 Cal 303, 309, 92 Pac 849, 852, it was said: "In the seventh instruction given by the court, the jury is told that, in determining whether the proposed taking is necessary, they may consider 'if shown by the evidence, not only the present demands of the public upon the plaintiff, but those which may fairly be anticipated on account of the future growth of the city.' There was no error in this. Future necessity is a proper factor for consideration."

In Illinois the court said in City of

Chicago v. Vaccaro, 408 Ill 587, 97 NE(2d) 766: "It is, of course, permissible for the condemnor to take not only sufficient land for the present need, but it may, and should, anticipate the future increased demands for the public use to which the land is to be devoted. \* \* \* The City of Chicago, in its determination of whether the taking of property is necessary for public use in providing parking facilities at the airport, has a right to and should consider not only the present needs of the public, but those which may be fairly anticipated in the future."

In New Jersey the court said in *State v. Lanza*, 48 NJ Super 362, 137 A(2d) 622, aff'd 143 A(2d) 571:

"Our courts have long since recognized this problem in condemnation proceedings to acquire lands for future water supplies and systems and have been outspoken in sustaining as valid exercises of the power of acquisition for such future purposes. *Olmstead v. Proprietors of the Morris Aqueduct*, supra; *Kountze v. Morris Aqueduct*, 58 N.J.L. 303, 33 A. 252 (Sup.Ct. 1895), affirmed 58 N.J.L. 695, 34 A. 1099, (E. & A. 1896), which were condemnation cases involving private water companies."

"In the *Olmstead* case the court, 47 N.J.L. at page 329, said:

"It is impossible to estimate with precision the quantity of water that will be needed to supply the wants of a population of about six thousand; nor can it be computed with accuracy what the supply of water will be from the district hitherto relied upon. In a matter of such extreme necessity, all contingencies must be provided for, and the supply should be so ample that a lack of water could not be reasonably apprehended."

"So I conclude that it is no objec-

tion on any ground that the statute refers to 'the future establishment of a water supply system.' This expression is sufficiently definite under the circumstances to serve as an adequate guide or criterion for the Commissioner. He does not have to know or be told by the Legislature what kind of a system is ultimately to be established in order for the exercise of his judgment in acquiring lands to be validly based."

See, also:

Arkansas—*Wollard v. State Highway Comm.*, 220 Ark 731, 249 SW (2d) 561.

California—*Kern County Union High School Dist. v. McDonald*, 180 Cal-7, 179 Pac 180, 181.

Illinois—*Bell v. Mattoon Waterworks & Reservoir Co.*, 245 Ill 544, 92 NE 352; *Chicago & Western Indiana Railroad Co. v. City of Chicago*, 255 Ill 136, 99 NE 377; *Fountain Creek Drainage Dist. v. Smith*, 285 Ill 138, 106 NE 494; *Village of Depue v. Banschbach*, 273 Ill 574, 113 NE 156; *Department of Public Works & Bldgs. v. McCaughey*, 332 Ill 416, 163 NE 795; *City of Waukegan v. Stanczak*, 6 Ill(2d) 594, 129 NE(2d) 751.

Iowa—*Porter v. Iowa State Highway Comm.*, 241 Iowa 1208, 44 NW (2d) 682.

Kansas—*State Highway Comm. v. Ford*, 142 Kan 383, 46 P(2d) 849; *State v. State Highway Comm.*, 163 Kan 187, 182 P(2d) 127.

Kentucky—*McGee v. City of Williamstown*, 308 SW(2d) 795.

In *Commonwealth v. Burchett*, 367 SW(2d) 262, the court said:

"In this whole case we do not find one iota of evidence to support the claim of bad faith or abuse of dis-

a taking for future use, it must be observed that the statute involved authorized a taking whenever it was deemed necessary or *advantageous* by the official to whom the decision was committed.

In an adverse opinion on this question<sup>96.5</sup> the court was very evidently influenced by the admission of the condemnor that it would not need the property sought for thirty years or more. It did not, however, strike down the concept of futurity entirely, but confined such acquisitions to those which are needed in the "near future." In this connection it must be observed that several other cases, in sustaining a taking for future use, refer to "immediate future," "reasonably fore-

erection. It makes no difference that the department could have chosen another location or another plan for waste disposal. Probably any highway could be routed some other way. The state cannot reasonably be compelled to submit its administrative judgments to battle in every county court house. Cf. *Davidson v. Commonwealth ex rel. State Highway Commission*, 1933, 249 Ky. 568, 61 S.W.2d 34, 37. And if it be conceded that when the immediate purpose of the acquisition has been completed the state will be the owner of a valuable piece of property, so what? Is long-range planning by a governmental agency charged with the expenditure of astronomical sums of money to be regarded as *against* the public interest? Is the possibility that it may contemplate getting further use out of the property evidence of bad faith? On the question of 'public necessity,' is the highway department to be denied the exercise of prudence and foresight? Surely the answer is self-evident.

"The judicial power of government should not be invoked against the discretion of an agency of the executive branch in determining what is in the public interest, including what particular property is needed in con-

nection with a valid public project, unless there is such a clear and gross abuse of that discretion as to offend the guaranty of Const. § 2 against the exercise of arbitrary power."

Louisiana—*State v. Cooper*, 213 La 1016, 36 So(2d) 22; *Texas Pipe Line Company v. Barba*, 229 La 191, 85 So(2d) 260.

Mississippi—*Erwin v. Mississippi State Highway Comm.*, 213 Miss 885, 58 So(2d) 52.

Missouri—*State v. Curtis*, 359 Mo 402, 222 SW(2d) 64.

Oregon—*Port of Umatilla v. Richmond*, 212 Or 596, 321 P(2d) 338.

Pennsylvania—*Truitt v. Borough of Ambridge Water Authority*, 389 Pa 429, 133 A(2d) 797.

Washington—*State v. Superior Court for Cowlitz County*, 33 Wash (2d) 698, 266 P(2d) 1028.

96.4 (3d Cir.) *United States v. Certain Parcels of Land*, 215 F(2d) 140, 147.

96.5 *Board of Education v. Baczewski*, 340 Mich 265, 65 NW(2d) 810. See, also, *State v. City of Euclid*, 164 Ohio St 265, 130 NE(2d) 336.

seeable future," or "fairly anticipated in the future."<sup>66.6</sup>  
 In one case, at least, it was held that "the requirement as to land need not be restricted to the needs of the immediate future."<sup>66.7</sup>

The concept of a taking for future use has been recognized by Congress in the Federal Aid Highway Act of 1956.<sup>66.8</sup>

<sup>66.6</sup> California — Kern County Union High School Dist. v. McDonald, 180 Cal 7, 179 Pac 180, 184.

See, also, San Diego Gas & Electric Co. v. Lux Land Co., 194 CA(2d) 494, 14 Cal Rptr 899, in which the court said:

"It is apparent that the plaintiff seeks a gas line easement and a telephone line easement, along with an electric line easement upon the same property only to cover the possibility of a need therefor some time in the future. The right of a public utility to acquire property through eminent domain proceedings for a public use, although not limited to its present needs, extends only to those future needs which are fairly anticipated. Kern Co. High School Dist. v. McDonald, supra, 180 Cal. 7, 14, 179 P. 180; Central Pacific Ry. Co. v. Feldman, supra, 152 Cal. 303, 309, 92 P. 849; Spring Valley W. W. v. Drinkhouse, 92 Cal. 528, 532, 28 P. 681; City of Hawthorne v. Peebles, 186 Cal.App.2d 758, 761, 333 P.2d 442; Los Angeles County Flood Control Dist. v. Jan, 154 Cal.App.2d 389, 393, 316 P.2d 25; Vallejo & N. R. R. Co. v. Home Sav. Bk., 24 Cal.App. 168, 174, 140 P. 974; Northern Light etc. Co. v. Stacher, 13 Cal.App. 404, 407-408, 109 P. 896."

Connecticut—Adams v. Greenwich penditure on any of the Federal-aid Water Co., 138 Conn 205, 83 A(2d) 177, 182.

Illinois—City of Chicago v. Vaccaro, 408 Ill 587, 97 NE(2d) 766.

New York—Queens Terminal Co.

v. Schmuck, 147 App Div 502, 510, 132 NYS 164; Matter of Mayor (East 161st St.), 52 Misc 596, 600, 102 NYS 502.

<sup>66.7</sup> Texas Pipe Line Company v. Barbe, 229 La 191, 85 So(2d) 260.

<sup>66.8</sup> Public Law 627. Section 110, subd. (a) of said Act reads as follows:

"Advance Right-of-way Acquisitions.—For the purpose of facilitating the acquisition of rights-of-way on any of the Federal-aid highway systems, including the Interstate System, in the most expeditious and economical manner, and recognizing that the acquisition of rights-of-way requires lengthy planning and negotiations if it is to be done at a reasonable cost, the Secretary of Commerce is hereby authorized, upon request of a State highway department, to make available to such State for acquisition of rights-of-way, in anticipation of construction and under such rules and regulations as the Secretary of Commerce may prescribe, the funds apportioned to such State for ex-highway systems, including the Interstate System: Provided, That the agreement between the Secretary of Commerce and the State highway department for the reimbursement of the cost of such rights-of-way shall provide for the actual construction of a road on such rights-of-way within a period not exceeding five years following the fiscal year in which such request is made: Provided further, That Federal participation in the cost of rights-of-way so acquired shall not

**[3] Application of the rule that necessity is not a judicial question.**

Applying the foregoing cases, it may be said:

(1) That when the legislature itself determines that public necessity and convenience require the appropriation of private property for a particular public improvement, the owner of the land so appropriated is not entitled to a judicial hearing upon the utility of the proposed improvement, the extent of the public necessity for its construction and the expediency of constructing it;<sup>97</sup> but even in such a case, if there

exceed the Federal pro rata share applicable to the class of funds from which Federal reimbursement is made."

In sustaining a taking for future use, as based upon present necessity, the Louisiana court alluded to the federal government's contribution. See *State v. Cooper*, 213 La 1016, 36 So(2d) 22, in which the following statement appears:

"To avoid the commission of the same mistakes, and after giving special consideration to the importance of the Prairieville-Neaser link in our state and national system of highways and generally to the public convenience and safety of tomorrow, the chief engineer reached the decision now being assailed. Also, obviously, he took into account the matter of the federal government's contribution to the cost of the project, an assistance that cannot be expected if a lesser width obtains. In so deciding, we cannot say that he has abused his discretion or has acted arbitrarily."

<sup>97</sup> *United States—United States v. Jones*, 109 US 513, 27 L Ed 1015, 3 S Ct 346; *Monongahela Nav. Co. v. United States*, 148 US 312, 37 L Ed 463, 13 S Ct 622; *Adirondack R. Co. v. New York*, 176 US 335, 44 L Ed 492, 20 S Ct 460; *De Vairaine v. Fox*, 2 Blatchf 95, F Cas No. 3836; *United States v. Oregon*,

*etc.*, R. R. Co., 9 Sawy 61, 16 F 524; *Shasta Power Co. v. Walker*, 149 F 568; *United States v. Burley*, 172 F 615.

**Alabama—***Oldridge v. Tuscumbia, etc.*, R. R. Co., 2 Stew & P 199, 23 Am Dec 307; *Sadler v. Langham*, 34 Ala 311.

**Arkansas—***St. Louis, etc., R. R. Co. v. Petty*, 57 Ark 359, 21 SW 864, 20 LRA 434.

**California—***Gilmer v. Lime Point*, 18 Cal 229; *Sherman v. Buick*, 32 Cal 241, 91 Am Dec 577; *Lent v. Tillson*, 72 Cal 404, 14 P 71; *Santa Ana v. Brunner*, 132 Cal 234, 64 P 287.

**Colorado—***Gibson v. Cann*, 28 Colo 499, 66 P 879; *Ortiz v. Hansen*, 35 Colo 100, 83 P 964; *Tanner v. Treasury, etc., Reduction Co.*, 35 Colo 593, 83 P 464, 4 LRA (NS) 106.

**Connecticut—***Todd v. Austin*, 34 Conn 78; *New York, etc., R. R. Co. v. Long*, 69 Conn 424, 37 A 1070; *In re Hartford, etc., R. R. Co.*, 74 Conn 662, 51 A 943; *Waterbury v. Platt*, 76 Conn 435, 56 A 866; *Starr Burying Ground Ass'n v. North Lane Cem. Ass'n*, 77 Conn 83, 68 A 476.

**Delaware—***Wilson v. Baltimore, etc., R. R. Co.*, 5 Del Ch 524; *Whiteman v. Wilmington, etc., R. R. Co.*, 2 Harr 514, 33 Am Dec 411.

**Georgia**—Mims v. Macon, etc., R. R. Co., 3 Ga 31; Parham v. Inferior Court Justices, 9 Ga 341; Savannah, etc., Ry. Co. v. Postal Tel. Cable Co., 115 Ga 554, 42 SE 1; Gardner v. Georgia R. R., etc., 117 Ga 522, 43 SE 863; Poulan v. Atlantic Coast Line R. R. Co., 123 Ga 605, 51 SE 657.

**Hawaii**—State v. Chang, 46 Hawaii 279, 378 P(2d) 882, citing Treatise.

**Idaho**—Portneuf Irr. Co. v. Budge, 16 Idaho 116, 100 P 1046, 18 Ann Cas 674.

**Illinois**—Chicago, etc., R. R. Co. v. Smith, 62 Ill 268, 14 Am Rep 99; Chicago, etc., R. R. Co. v. Lake, 71 Ill 333; Dunham v. Hyde Park, 75 Ill 371; Smith v. Chicago, etc., R. R. Co., 105 Ill 511; Chicago, etc., R. R. Co. v. Wiltse, 116 Ill 449, 6 NE 49; Sholl v. German Coal Co., 118 Ill 427, 10 NE 199, 59 Am Rep 379; Hyde Park v. Oakwoods Cem. Ass'n, 119 Ill 141, 7 NE 627; Illinois Central R. R. Co. v. Chicago, 141 Ill 586, 30 NE 1044, 17 LRA 530; Chicago, etc., R. R. Co. v. Pontiac, 169 Ill 155, 43 NE 485; Pittsburgh, etc., R. R. Co. v. Sanitary Dist., 218 Ill 286, 75 NE 892, 2 LRA (NS) 226; Gillette v. Aurora R. R. Co., 228 Ill 261, 81 NE 1005; Terre Haute, etc., R. R. Co. v. Robbins, 247 Ill 376, 93 NE 398.

**Indiana**—Indianapolis Waterworks Co. v. Burkhardt, 41 Ind 364; Consumers' Gas Trust Co. v. Harless, 131 Ind 446, 29 NE 1062, 15 LRA 505; Richland School Tp. v. Overmyer, 164 Ind 382; 73 NE 811; Speck v. Kenoyer, 164 Ind 431, 73 NE 896; Bemis v. Guirl Drainage Co., 182 Ind 36, 105 NE 496.

**Indian Territory**—Tuttle v. Moore, 3 Indian Terr 712, 64 SW 585.

**Iowa**—Bankhead v. Brown, 25 Iowa 540; Creston Waterworks Co. v.

McGrath, 89 Iowa 502, 56 NW 680; Bennett v. Marion, 106 Iowa 628, 78 NW 844.

**Kansas**—Lake Koen Nav., etc., Co. v. Klein, 63 Kan 184, 65 P 684; Buckwalter v. School Dist., 65 Kan 607, 70 P 605.

**Kentucky**—Tracy v. Elizabethtown, etc., R. R. Co., 80 Ky 259; Board v. Du Pont, 110 Ky 743, 62 SW 891; Louisville, etc., R. R. Co. v. Louisville, 131 Ky 108, 114 SW 743.

**Louisiana**—Thibodeau v. Maggioli, 4 La Ann 73.

**Maine**—Riche v. Bar Harbor Water Co., 75 Me 91; Mosely v. York Shore Water Co., 94 Me 83, 46 A 809; Brown v. Gerald, 100 Me 351, 61 A 785, 70 LRA 472, 109 Am St Rep 526; Hayford v. Bangor, 102 Me 340, 66 A 731, 11 LRA (NS) 940; Lancaster v. Augusta Water District, 108 Me 137, 79 A 463, Ann Cas 1913 A 1252.

**Maryland**—New Central Coal Co. v. George's Creek Coal Co., 37 Md 537; Van Witsen v. Gutman, 79 Md 405, 29 A 608, 24 LRA 403.

**Massachusetts**—Boston, etc., R. R. Co. v. Salem, etc., R. R. Co., 2 Gray 1; Talbot v. Hudson, 16 Gray 417; Hingham, etc., Tpke. Co. v. Norfolk County, 6 Allen 353; Dingley v. Boston, 100 Mass 544; Haverhill Bridge Co. v. Essex County, 103 Mass 120, 4 Am Rep 518; Eastern R. R. Co. v. Boston, etc., R. R., 111 Mass 125, 15 Am Rep 13; Holt v. Somerville, 127 Mass 408; Moore v. Sanford, 161 Mass 285, 24 NE 323; Lynch v. Forbes, 161 Mass 302, 37 NE 437, 42 Am St Rep 402; Appleton v. Newton, 178 Mass 276, 59 NE 648; Miller v. Fitchburg, 180 Mass 32, 61 NE 277.

**Michigan**—Swan v. Williams, 2 Mich 427.

**Minnesota**—Langford v. Ramsey County, 16 Minn 375; State Park v. Henry, 38 Minn 266, 36 NW 874; Fairchild v. St. Paul, 46 Minn 540, 49 NW 325; Fohl v. Sleepy Eye Lake, 80 Minn 67, 82 NW 1097; Minneapolis, etc., R. R. Co. v. Hartland, 85 Minn 76, 88 NW 423; State *ex rel.* Utick v. Polk County, 87 Minn 325, 92 NW 216, 60 LRA 161; *In re* Rock County, 121 Minn 376, 141 NW 801.

**Missouri**—St. Louis County Court v. Griswold, 58 Mo 175; State v. Engelmann, 106 Mo 628, 17 SW 759; Simpson v. Kansas City, 111 Mo 237, 20 SW 38; St. Louis, etc., R. R. Co. v. Hannibal Union Depot Co., 125 Mo 82, 23 SW 483; Cape Girardeau v. Houck, 129 Mo 607, 31 SW 933; Kansas City v. March Oil Co., 140 Mo 458, 41 SW 943.

**Nebraska**—Paxton, etc., Land Co. v. Farmers', etc., Land Co., 45 Neb 884, 84 NW 343, 29 LRA 853, 50 Am St Rep 585.

**New Hampshire**—Concord R. R. Co. v. Greely, 17 NH 47; *In re* Mt. Washington Road Co., 35 NH 134.

**New Jersey**—Seudder v. Trenton Delaware Falls Co., 1 NJ Eq 604, 23 Am Dec 756; Tide Water Co. v. Coster, 18 NJ Eq 518, 90 Am Dec 634; Central R. R. Co. v. Pennsylvania R. R. Co., 31 NJ Eq 475.

**New York**—Varick v. Smith, 5 Paige 137, 28 Am Dec 417; *Re* Albany St., 11 Wend 149, 25 Am Dec 619; Buffalo, etc., R. R. Co. v. Brainard, 9 NY 100; People v. Smith, 21 NY 595; *In re* Townsend, 39 NY 171; Rensselaer, etc., R. R. Co. v. Davis, 43 NY 137; *Re* Deansville Cem. Ass'n, 66 NY 569, 23 Am Rep 86; *Re* Union Ferry Co., 98 NY 139; *Re* Brooklyn, 143 NY 596, 38 NE 983, 26 LRA 278; *Re* Burns, 155 NY 23, 49 NE 246; State Water Supply Comm. v. Curtis, 192 NY 319, 86 NE 148.

**North Carolina**—Raleigh, etc., R. R. Co. v. Davis, 2 Dev & B 451; Call v. Wilkesboro, 115 NC 337, 20 SE 468; Cozard v. Kanawha Hardwood Co., 139 NC 283, 51 SE 932, 1 LRA (NS) 969, 111 Am St Rep 779; State v. Jones, 139 NC 613, 52 NE 240, 2 LRA (NS) 313; Jeffress v. Greenville, 154 NC 490, 70 SE 919; Luther v. Buncombe County Comrs., 164 NC 241, 80 SE 386.

**North Dakota**—Bigelow v. Draper, 6 ND 152, 69 NW 570; Mountrail County v. Wilson, 27 ND 277, 146 NW 531.

**Ohio**—Giesy v. Cincinnati, etc., R. R. Co., 4 Ohio St 308; Malone v. Toledo, 34 Ohio St 541; Zimmerman v. Canfield, 42 Ohio St 463; Wheeling, etc., R. R. Co. v. Toledo, etc., Terminal Co., 72 Ohio St 368, 74 NE 209, 106 Am St Rep 622, 2 Ann Cas 941.

**Oklahoma**—Arthur v. Choctaw County Comrs., 43 Okl 174, 141 P 1.

**Oregon**—Dalles Lumbering Co. v. Urquhart, 16 Or 67, 19 P 78; Branson v. Gee, 25 Or 462, 36 P 527, 24 LRA 355; Bridal Veil Lumbering Co. v. Johnson, 30 Or 205, 46 P 790, 34 LRA 368, 60 Am St Rep 818; Apex Transp. Co. v. Garhade, 32 Or 582, 52 P 573, 54 P 367, 62 LRA 513; Dallas v. Hallock, 44 Or 246, 75 P 204; Grande Ronde Elec. Co. v. Drake, 46 Or 243, 78 P 1031.

**Pennsylvania**—Pittsburgh v. Scott, 1 Pa 309; Smedley v. Erwin, 51 Pa 445; Edgewood R. R. Co.'s Appeal, 79 Pa 257; Darlington v. United States 82 Pa 382, 22 Am Rep 766; Genesee Fork Impvmt. Co. v. Ives, 144 Pa 114, 22 A 887, 13 LRA 427.

**Rhode Island**—*Re* Rhode Island Sub. R. R. Co., 22 RI 467, 48 A 591, 52 LRA 879.

**South Carolina**—Dunn v. Charles-

can be no possible public need for the work, the courts will interfere.\*\*

ton, Harp L 189; South Carolina R. R. Co. v. Blake, 9 Rich L 228.

**South Dakota**—Winona, etc., R. R. Co. v. Watertown, 4 SD 323, 56 NW 1077; Chicago, etc., Ry. Co. v. Mason, 23 SD 564, 122 NW 601.

**Tennessee**—Anderson v. Turbeville, 6 Coldw 150; Ryan v. Louisville, etc., Terminal Co., 102 Tenn 111, 50 SW 744, 45 LRA 307; Southern Ry. Co. v. Memphis, 126 Tenn 267, 148 SW 662.

**Texas**—Morgan v. Oliver, 98 Tex 218, 82 SW 1028, 4 Ann Cas 900.

**Utah**—Postal Tel. Cable Co. v. Oregon Short Line R. R. Co., 23 Utah 474, 65 P 735, 90 Am St Rep 705.

**Vermont**—Williams v. School Dist., 33 Vt 271; Tyler v. Beecher, 44 Vt 648, 8 Am Rep 398.

**Virginia**—Tait v. Central Lunatic Asylum, 84 Va 271, 4 SE 697; Zircle v. Southern R. R. Co., 102 Va 17, 45 SE 802, 102 Am St Rep 805; Miller v. Pulaski, 109 Va 137, 63 SE 889.

**Washington**—Samish River Boom Co. v. Union Boom Co., 32 Wash 586, 73 P 678.

**West Virginia**—Varner v. Martin, 21 W Va 534.

**Wisconsin**—Ford v. Chicago, etc., R.R. Co., 14 Wis 609, 80 Am Dec 791; State *ex rel.* Baltzell v. Stewart, 74 Wis 620, 43 NW 947, 6 LRA 394; Priewe v. Wisconsin, etc., Impvmt. Co., 93 Wis 534, 67 NW 918, 33 LRA 645.

**Wyoming**—Edwards v. Cheyenne, 19 Wyo 110, 114 P 877.

\*\* United States—United States v.

277.97 Acres of Land, 112 F Supp 159; United States v. Certain Parcels of Land, 141 F Supp 300; United States v. 23,912.9 Acres of Land, 192 F Supp 101; Harwell v. United States, 316 F(2d) 791.

**Florida**—Rott v. City of Miami Beach, 94 So (2d) 168.

**Georgia**—Parham v. Inferior Court Justices, 9 Ga 341; Elberton Southern R. Co. v. State Highway Dept., 211 Ga 838, 89 SE(2d) 645; Housing Authority of City of Swainsboro v. Hall, 217 Ga 856, 126 SE(2d) 223.

**Illinois**—The general rule is that when the legislature has delegated to a corporation the authority to exercise the power of eminent domain, the corporation has also the authority to decide on the necessity for exercising the right, and its decision will be conclusive in the absence of a clear abuse of the power granted. An abuse of such power, however, will not be tolerated, and if no necessity for its exercise exists, or if it appears that the quantity of the property sought to be taken is grossly in excess of the amount necessary for the public use, the court will not permit the land to be taken. Chicago v. Vaccaro, 408 Ill 587, 97 NE(2d) 766.

**Kentucky**—Tracy v. Elizabethtown, etc., R.R. Co., 80 Ky 259.

**Louisiana**—State v. Guidry, 240 La 516, 124 So(2d) 531, citing *Treasure*. The court said:

"Prior to the enactment of Act 107 of 1964 the owner of expropriated property was entitled to contest the question of necessity of the taking before the courts, and may still do so when the property has been expropriated under the general expropriation laws of the State. Parish

of *Iberia v. Cook*, 238 La. 697, 116 So.2d 491; *City of Westwego v. Marrero Land & Imp. Ass'n*, 221 La. 564, 59 So.2d 885; *City of Shreveport v. Kansas City, S. & G. Ry. Co.*, 169 La. 1085, 126 So. 667. With the adoption of constitutional Article VI, Section 19.1 and Act 107 of 1954, however, when the Highway Department expropriates property under these provisions, there are only two questions which the courts may determine: (1) the adequacy of the compensation, and (2) whether the property was taken for a public purpose. Decisions relied upon by the Court of Appeal in reaching its decision that the question of the necessity or expediency of the taking by the Highway Department for highway purposes is subject to judicial review are no longer controlling. Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such a manner as the State may designate. They are legislative questions no matter who may be charged with their decision. *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186; see also *Nichols on Eminent Domain*, 3rd Ed., Vol. 1, Secs. 4.11, 4.11(1) and 4.11(3). In Louisiana, the Legislature has delegated to the Highway Department the power to determine the necessity for expropriating property for highway purposes and the owner of land expropriated has no constitutional right to have the department's decision as to the necessity thereof reviewed in judicial proceedings. See *State through Dept. of Highways v. Macaluso*, supra, wherein this Court stated (235 La. 1019, 106 So.2d 458):

"But the evident purpose of Article VI, Section 19.1, was to authorize such ex parte takings prior to judgment formerly and otherwise prohibited by the State constitutional provisions now relied upon by the

respondent property owners herein. This governing constitutional enactment, of course, overrides within its scope earlier expressions and holdings cited to the effect that the necessity of the taking is a matter for judicial determination.

• • • •

"Highways, super-highways, multi-lane highways, expressways with their cloverleaves, underpasses, overpasses, interchanges, approaches, et cetera, have become such an integral part of our life that in order properly to lay out, construct, maintain, operate and police same the Legislature by appropriate legislation and the people by constitutional amendment have seen fit to grant to the authorities in charge of highway construction and maintenance a liberal right in expropriation proceedings. Constitutional Article VI, Section 19.1, and Act 107 of 1954 (LSA-R.S. 48:441-48:460). They have eliminated the necessity of judicial determination of proving necessity in the taking of a person's property. Of course, the reasoning behind this is obvious. A great part of our tax money goes to the maintenance, operation and construction of highways. Highways, of course, transverse the State from one end to the other, and from an engineering point of view it is an economical undertaking to plan their construction on a state-wide basis. When this is done it can readily be seen that to permit a judicial review and determination of each one of thousands of parcels of property necessarily taken to construct a highway, such as U. S. Highway 80, to be an expressway which spans the State from Vicksburg, Mississippi, to Waskom, Texas, would be to impede the operation and construction to a point that would completely paralyze the Department of Highways. We have to consider these factors when we seek to determine the intent and meaning of

(2) That the legislature may, and usually does, delegate the power of selecting the land to be condemned to the public agent that is to do the work; in such case it makes little, if any, difference whether the grant of authority is, in terms, limited to such land as is "necessary" for the purpose in view, for a general grant of authority carries the same limitation by implication and in either case the necessity is for the condemnor and not for the courts to decide, and the decision of such condemnor is final as long as it acts reasonably and in good faith.<sup>99</sup> If the land is of some use to it in carry-

the constitutional amendment and legislative act referred to. We assume that a department, such as the Department of Highways, with the responsibility of expending as much money as they have to expend, will employ competent engineers to draw the plans and to certify that the property proposed to be taken is for public use. Were we called upon to determine judicially the necessity, such as route, area, number of feet, nature of title, et cetera, we, not being engineers, would naturally have to termination as to the necessity."

**Massachusetts**—Cary Library v. Bliss, 151 Mass 364, 25 NE 92, 7 LRA 705.

**Minnesota**—State v. Ohman, 263 Minn 115, 116 NW(2d) 101; State v. North Star Concrete Co., 122 NW (2d) 118.

**Missouri**—State v. Crain, 308 SW (2d) 451.

**New Jersey**—State v. Mayor of Orange, 54 NJL 111, 22 A 1004, 14 LRA 62; Albright v. Sussex County Comrs., 71 NJL 303, 57 A 398, 59 A 146, 69 LRA 768, 108 Am St Rep 749; City of Newark v. New Jersey Turnpike Authority, 7 NJ 377, 81 A (2d) 706, citing Treatise; Faubel v. Buckeye Pipe Line Co., 20 NJS 116, 89 A(2d) 286; State v. Lanza, 48 NJ Super 362, 137 A(2d) 622, aff'd 27 NJ 516, 143 A(2d) 571; Bergen County v. S. Goldberg & Co. Inc., 76

NJ Super 524, 185 A(2d) 38, citing Treatise.

**New York**—Tennessee Gas Transmission Co. v. Geng, 11 Misc(2d) 739, 175 NYS(2d) 488; Brown v. McMorrin, 39 Misc (2d) 716, 241 NYS(2d) 483.

**Texas**—Webb v. Dameron, 219 SW(2d) 581; Bradford v. Magnolia Pipe Line Co., 262 SW(2d) 242, citing Treatise.

<sup>99</sup> Thus in *Smith v. Chicago, etc., R.R. Co.*, 105 Ill 511, the court said: "It certainly was never contemplated by the legislature that, where the petitioner has brought itself within the provisions of the statute, the right of condemnation can be defeated by simply showing, in the opinions of witnesses who may have no interest in, or connection with, the objects of the proceeding, that the land sought to be condemned is not necessary for the purpose stated. . . . On the other hand, the law having authorized such companies to take private property for public use, when one, by a proper petition, has brought itself strictly within the provisions of the statute, and the court can see, from the facts stated, the land sought to be condemned is not manifestly in excess of what would be reasonably necessary for the purpose stated in the petition, the court will not be authorized to interpose on the ground suggested."

See, also, to the same effect:

**England**—Stockton, etc., Railway Co. v. Brown, 9 HL Cas 240; Lewis v. Weston-Super-Mare Local Board, 40 Ch Div 55.

**United States**—Boom Co. v. Paterson, 98 US 403, 25 L Ed 206 (see *infra*, footnote 6); Chesapeake, etc., Canal Co. v. Union Bank, 4 Cranch CC 75, F Cas No. 2653.

**District of Columbia**—MacFarland v. Elverson, 32 App DC 81.

**Arkansas**—McKennon v. St. Louis, etc., R.R. Co., 69 Ark 104, 61 SW 683.

**California**—Tuolumne W. P. Co. v. Frederick, 13 Cal App 498, 110 P 134; Vallejo, etc., R. R. Co. v. Home Savings Bank, 24 Cal App 166, 140 P 974.

**Georgia**—Savannah, etc., R. R. Co. v. Postal Tel. Cable Co., 112 Ga. 941, 38 SE 353; Gardner v. Georgia R. R., etc., Co., 117 Ga 522, 43 SE 836; Atlantic, etc., R. R. Co. v. Penny, 119 Ga 479, 46 SE 665.

**Illinois**—Lockie v. Mutual Union Tel. Co., 103 Ill 401; O'Hare v. Chicago, etc., R. R. Co., 139 Ill 151, 28 NE 923; Tedens v. Sanitary Dist., 149 Ill 87, 36 NE 1033; Schuster v. Sanitary Dist., 177 Ill 626, 52 NE 855; Chicago, etc., R. R. Co. v. Chicago Mechanics Institute, 239 Ill 197, 87 NE 933; Fountain Creek Drainage Dist. v. Smith, 265 Ill 138, 106 NE 494.

**Indiana**—Bass v. Fort Wayne, 121 Ind 389, 23 NE 259; Farneman v. Mount Pleasant Cem. Ass'n., 136 Ind 344, 23 NE 271; Illyes v. White River Light, etc., Co., 175 Ind 118, 93 NE 760.

**Iowa**—Stark v. Sioux City, etc., Ry. Co., 43 Iowa 501; Bennett v. Marion, 106 Iowa 628, 76 NW 844; Chicago, etc., Ry. Co. v. Mason City, 155 Iowa 99, 135 NW 9.

**Kansas**—Missouri, etc., Ry. Co. v. Cambern, 10 Kan App 581, 63 P 605.

**Kentucky**—Greasy Creek Mineral Co. v. Ely Jellico Coal Co., 132 Ky 692, 116 SW 1189.

**Louisiana**—Colorado Southern R. R. Co. v. Boagin, 118 La 268, 42 So 932; Louisiana, etc., R. R. Co. v. Louisiana, etc., R. R. Co., 125 La 756, 51 So 712.

**Maine**—Mosely v. York Shore Water Co., 94 Me 83, 46 A 809.

**Massachusetts**—Fall River Iron Works v. Old Colony R. R. Co., 5 Allen 221; Lynch v. Forbes, 161 Mass 302, 37 NE 437, 42 Am St Rep 402; Burnett v. Boston, 173 Mass 173, 53 NE 379.

**Minnesota**—Cotton v. Mississippi, etc., Boom Co., 22 Minn 372.

**Missouri**—North Missouri R. R. Co. v. Gott, 25 Mo 540.

**Montana**—State v. District Court, 34 Mont 536, 88 P 44, 115 Am St Rep 540.

**New Jersey**—Delaware River Transp. Co. v. Trenton, 85 NJL 479, 90 A 5.

**New York**—Matter of New York, etc., R. R. Co., 77 NY 298.

**North Carolina**—Durham v. Rigbee, 141 NC 128, 53 SE 531.

**Oklahoma**—Arthur v. Choctaw County Comrs., 43 Okl 174, 141 P 1.

**Pennsylvania**—Philadelphia v. Ward, 174 Pa 45, 34 A 458; Biddle v. Wayne Waterworks Co., 190 Pa 94, 42 A 380; Wilson v. Pittsburgh, etc., R. R. Co., 222 Pa 541, 72 A 235; Scranton Gas, etc., Co. v. Delaware, etc., R. R. Co., 225 Pa 152, 73 A 1097.

**South Dakota**—Chicago, etc., R. R.

ing out its public object, the degree of necessity is its own affair.<sup>1</sup> Whether there is any necessity whatever to justify the taking is, however, a judicial question,<sup>2</sup> and as a taking

Co. v. Mason, 23 SD 564, 122 NW 601.

**Texas**—Cane Belt R. R. Co. v. Hughes, 31 Tex Civ App 565, 72 SW 1020.

**Vermont**—Hill v. Western Vermont R. R. Co. 32 Vt 68; Williams v. School Dist., 33 Vt 271.

**Washington**—State v. Pierce County Court, 44 Wash 478, 87 P 521; Tacoma v. Titlow, 53 Wash 217, 101 P 827; State v. Lewis County Court, 60 Wash 193, 110 P 1017.

**Wisconsin**—Wisconsin Central R. R. Co. v. Cornell, 49 Wis 182, 5 NW 331.

<sup>1</sup> **Illinois**—Gillette v. Aurora Ry. Co., 228 Ill 261, 81 NE 1005.

See also: County Board of School Trustees v. Batchelder, 7 Ill (2d) 178, 130 NE(2d) 175, in which the court said:

"Upon careful consideration of the evidence we think the burden of showing necessity has been satisfied in the case at bar. The word 'necessary,' as used in this connection, is construed to mean expedient, reasonably convenient, or useful to the public, and does not mean 'indispensable' or 'an absolute necessity.'"

**Iowa**—Bennett v. Marion, 106 Iowa 628, 76 NW 844.

**Kentucky**—Tracy v. Elizabethtown, etc, R. R. Co., 80 Ky 259.

**Pennsylvania**—New York, etc., R. R. Co. v. Young, 33 Pa 175.

<sup>2</sup> **California**—Spring Valley Waterworks Co. v. San Mateo Waterworks Co., 64 Cal 123, 28 P 447.

**Connecticut**—*In re* New Haven

Water Co., 86 Conn 361, 85 A 361 (Necessity must be reasonable, and not merely for speculative purposes, to secure a monopoly, to forestall rivalry, or in bad faith.)

**Delaware**—State v. 0.62033 Acres of Land, 49 Del 90, 110 A(2d) 1, citing *Treatise*.

**Illinois**—Tedens v. Sanitary Dist., 149 Ill 87, 36 NE 1033; Chicago v. Lehmann, 262 Ill 468, 104 NE 829.

**Kansas**—Jockheck v. Shawnee County Comrs., 53 Kan 780, 37 P 621.

**Maryland**—Webster v. Susquehanna Pole Line Co., 112 Md 416, 76 A 254.

**Minnesota**—Milwaukee, etc., R. R. Co. v. Faribault, 23 Minn 167; *Re* St. Paul, etc., R. R. Co., 34 Minn 227, 25 NW 345; *Re* Minneapolis, etc., Terminal Co., 38 Minn 157, 36 NW 105.

**New Jersey**—Olmstead v. Morris Aqueduct, 46 NJL 495.

**Ohio**—Rockport v. Cleveland, etc., Ry. Co., 85 Ohio St 73, 97 NE 133.

**Pennsylvania**—Pennsylvania R. R. Co. v. Diehm, 128 Pa 509, 18 A 522; Delaware, etc., R. R. Co. v. Tobyhanna Co., 232 Pa 76, 81 A 132.

**South Carolina**—South Carolina R. R. Co. v. Blake, 9 Rich L 228.

**South Dakota**—Chicago, etc., Ry. Co. v. Mason, 23 SD 564, 122 NW 601.

**Vermont**—Stearns v. Barre, 73 Vt 281, 50 A 1086, 58 LRA 240, 87 Am St Rep 721.

**West Virginia**—Baltimore, etc., R.

without necessity in such a case would be unauthorized, the courts may hold it to be unlawful without the reluctance they feel in declaring acts of the legislature unconstitutional.

(3) That the legislature may delegate to municipal and private corporations the right to determine what public improvements they will construct and to take by eminent domain the land required for such improvements, and the decisions of such corporations upon the utility and necessity of the improvements which they decide to construct cannot be questioned in the courts,<sup>3</sup> except in a plain case of abuse.<sup>4</sup> In the

R. Co. v. Pittsburgh, etc., R. R. Co., 17 W Va 812.

That another route could have been selected does not show that there is no necessity, for the owners of lands on the other route might have made the same objection. Hyattsville v. Washington, etc., R. R. Co., 122 Md 660, 90 A 515.

It is held in Vermont that when a corporation has a "roving franchise" the necessity of the taking must be passed upon in the first instance by an impartial, but not necessarily by a judicial, tribunal, and that the Public Service Commission, subject to certiorari from the supreme court in case of errors of law, is a proper tribunal. George v. Consolidated Lighting Co., 87 Vt 411, 89 A 635.

<sup>3</sup> United States—Greenburg v. International Trust Co., 36 CCA 471, 94 F 755; Kaw Valley Drainage Dist. v. Metropolitan Water Co., 108 CCA 393, 186 F 315.

Alabama—Lowndes County v. Bowie, 34 Ala 461.

Arkansas—St. Louis, etc., R. R. Co. v. Petty, 57 Ark 359, 21 SW 884, 20 LRA 434; Cloth v. Chicago, etc., Ry. Co., 97 Ark 86, 132 SW 1005, Ann Cas 1912 C 1115.

California—Pasadena v. Stimson, 91 Cal 238, 27 P 604; Santa Ana v.

Harlin, 99 Cal 538, 34 P 224; Walzen v. San Francisco, 101 Cal 15, 35 P 353, 40 Am St Rep 17.

Colorado—Union Pac. R. R. Co. v. Colorado Postal Tel. Cable Co., 30 Colo 133, 69 P 564, 97 Am St Rep 106; Lavelle v. Julesburg, 49 Colo 290, 112 P 774; Warner v. Gunnison, 2 Colo App 430, 31 P 238.

Connecticut—New York, etc., R. R. Co. v. Long, 69 Conn 424, 37 A 1070; Norwich v. Johnson, 86 Conn 151, 84 A 727, 41 LRA (NS) 1024; Adams v. Greenwich Water Co., 138 Conn 205, 83 A(2d) 177.

District of Columbia—United States *ex rel.* Riley v. Baltimore, etc., R. R. Co., 27 App D C 105, 7 Ann Cas 335; Macfarland v. Elverson, 32 App D C 81.

Georgia—Savannah, etc., R. R. Co. v. Postal Tel. Cable Co., 115 Ga 554, 42 SE 1; Gardner v. Georgia R. R., etc., Co., 117 Ga 522, 43 SE 863; Atlantic, etc., R. R. Co. v. Penny, 119 Ga 479, 46 SE 665; Du Pre v. City of Marietta, 213 Ga 403, 99 SE (2d) 156.

Idaho—Washington W. P. Co. v. Waters, 19 Idaho 595, 115 P 682.

Illinois—Chicago, etc., R. R. Co. v. Lake, 71 Ill 333; Dunham v. Hyde Park, 75 Ill 371; Chicago, etc., R. R. Co. v. Pontiac, 160 Ill 155; Schuster v. Sanitary Dist., 177 Ill 626, 52 NE

855; Pittsburgh, etc., R. R. Co. v. Sanitary Dist., 218 Ill 286, 75 NE 892, 2 LRA (NS) 226; Smith v. Clausen Park Drainage, etc., Dist., 229 Ill 155, 82 NE 278; Bell v. Mattoon Waterworks, etc., Co., 245 Ill 544, 92 NE 352, 137 Am St Rep 338, 19 Ann Cas 153; Paris v. Cairo, etc., R. R. Co., 248 Ill 213, 93 NE 729; South Park Comrs. v. Ward, 248 Ill 299, 93 NE 910.

**Indiana**—Pittsburg, etc., R. R. Co. v. Wolcott, 162 Ind 399, 69 NE 451; Richland School Tp. v. Overmyer, 164 Ind 382, 73 NE 811; Westport Stone Co. v. Thomas, 174 Ind 319, 94 NE 406; Vandalia R. R. Co. v. La Fayette, etc., R. R. Co., 175 Ind 391, 94 NE 483; Chicago, etc., R. R. Co. v. Bough, 175 Ind 419, 94 NE 571.

**Iowa**—Bennett v. Marion, 106 Iowa 628, 76 NW 844.

**Kansas**—Challis v. Atchison, etc., R. R. Co., 16 Kan 117.

**Kentucky**—Henderson v. Lexington, 132 Ky 390, 111 SW 318, 22 LRA (NS) 20.

**Louisiana**—Orleans Parish School Board v. Brown, 154 So (2d) 545.

**Maine**—Baldwin v. Bangor, 36 Me 518; Brown v. Gerald, 100 Me 351, 61 A 785, 70 LRA 472, 109 Am St Rep 526; Hayford v. Bangor, 102 Me 340, 66 A 731, 11 LRA (NS) 940; Brown v. Kennebec Water Dist., 108 Me 227, 79 A 907.

**Massachusetts**—Eastern R. R. Co. v. Boston, etc., R. R., 111 Mass 125, 15 Am Rep 13; Lynch v. Forbes, 161 Mass 302, 37 NE 437, 42 Am St Rep 402; Hayeck v. Metropolitan District Comm., 335 Mass 372, 140 NE(2d) 210.

**Minnesota**—Stewart v. Great Northern Railway Co., 65 Minn 515, 68 NW 298, 33 LRA 427.

**Missouri**—St. Louis v. Brown, 155

Mo 545, 56 SW 298; Kansas, etc., Railway v. Northwestern C. & M. Co., 161 Mo 288, 61 SW 684, 61 LRA 936, 84 Am St Rep 717.

**Montana**—State v. District Court, 34 Mont 535, 88 P 44, 115 Am St Rep 540.

**New Hampshire**—Public Service Co. v. Shannon, 195 NH 67, 192 A(2d) 608, citing *Treatise*.

**New Jersey**—Central R. R. Co. v. Pennsylvania R. R. Co., 31 NJ Eq 473; Slingerland v. Newark, 54 NJL 62, 23 A 129; Cheyney v. Atlantic City Waterworks Co., 55 NJL 235, 26 A 95; Delaware River Transp. Co. v. Trenton, 85 NJL 479, 90 A 5.

**New York**—Matter of Albany St., 11 Wend 149, 25 Am Dec 618; People v. Smith, 21 NY 595; *Re* Fowler, 53 NY 60; New York, etc., R. R. Co. v. Albany S. T. Co., 161 App Div 329, 146 NYS 674.

**North Carolina**—Jeffress v. Greenville, 154 NC 490, 70 SE 919; Yadkin River P. Co. v. Wissler, 160 NC 269, 76 SE 267, 43 LRA (NS) 483.

**North Dakota**—Grafton v. St. Paul, etc., Ry. Co., 18 ND 313, 113 NW 593, 22 LRA (NS) 1, 15 Ann Cas 10.

**Ohio**—Wheeling, etc., R. R. Co. v. Toledo, etc., Terminal Co., 72 Ohio St 368, 74 NE 209, 106 Am St Rep 622, 2 Ann Cas 941.

**Oklahoma**—Arthur v. Choctaw County Comrs., 43 Okl 174, 141 P 1.

**Pennsylvania**—Cleveland, etc., R. R. Co. v. Speer, 56 Pa 325, 94 Am Dec 84; *Re* Lake Erie Limestone Co., 188 Pa 509, 41 A 648; Scranton Gas, etc., Co. v. Delaware, etc., R. R. Co., 225 Pa 152, 73 A 1097; Boalsburg Water Co. v. State College Water Co., 240 Pa 198, 87 A 609.

**South Carolina**—Riley v. Charles-

ton Union Station Co., 71 SC 457, 51 SE 485, 110 Am St Rep 570.

**Tennessee**—Quarles v. Sparta, 2 Tenn Ch App 714.

**Texas**—Palmer v. Harris, 20 Tex Civ App 340, 69 SW 229.

**Utah**—Postal Tel. Cable Co. v. Oregon Short Line R. R. Co., 23 Utah 474, 65 P 735, 90 Am St Rep 705.

**Virginia**—Culpeper County Supvrs. v. Gorrell, 20 Gratt 484; Zircle v. Southern Ry. Co., 102 Va 17, 45 SE 802, 102 Am St Rep 805.

**Washington**—Tacoma v. Titlow, 53 Wash 217, 101 P 827; State v. Lewis County Court, 60 Wash 193, 110 P 1017; State v. Benton County Court, 64 Wash 594, 117 P 487; Tacoma v. Brown, 69 Wash 538, 125 P 940.

**West Virginia**—Pittsburgh Hydro-Electric Co. v. Liston, 70 W Va 83, 73 SE 86, 40 LRA (NS) 602.

**Wisconsin**—Ford v. Chicago, etc., R. R. Co., 14 Wis 609, 80 Am Dec 791; State *ex rel.* Baltzell v. Stewart, 74 Wis 620, 43 NW 947, 6 LRA 394; Wisconsin Water Co. v. Winans, 85 Wis 26, 54 NW 1003, 20 LRA 662, 39 Am St Rep 813.

**Wyoming**—Edwards v. Cheyenne, 19 Wyo 110, 114 P 677.

<sup>4</sup> Thus it was held in State v. Benton County Court, 64 Wash 594, 117 P 487, that the selection of a location by a railroad makes a *prima facie* case of necessity, which can only be overcome by convincing proof that the taking would be so unnecessary and unreasonable as to be oppressive and an abuse of power.

In White's Case, 2 Overt (Tenn) 109, the order laying out a road was reversed by the court, because it was of little utility and of great injury to individuals, the court saying that in

general the local authorities were infinitely more competent to determine what roads should be laid out than the court, but in extreme cases the court would interfere.

In Yadkin River Power Co. v. Wissler, 160 NC 269, 76 SE 267, 43 LRA (NS) 483, it was said by the court that "The question of reasonable necessity for an exercise of the power of eminent domain by a public service corporation becomes a question for the court only upon allegation of facts tending to show bad faith on the part of the corporation attempting to exercise the power, or an oppressive or manifest abuse of its discretion."

See also:

**California**—San Diego Gas & Electric Co. v. Lux Land Co., 194 CA (2d) 494, 14 Cal Rptr 899, wherein the court said:

"The defendants also contend that there is no showing that the proposed easement was located in a manner most compatible with the greatest public good and the least private injury. There is adequate substantial evidence in support of the finding of the trial court favorable to the plaintiff on this issue; the defendants' objection goes to the weight of the evidence rather than its sufficiency as a matter of law. On appeal the court is required to accept that evidence and those inferences reasonably deducible therefrom which will support the judgment even though there is other evidence and other inferences which might support a contrary judgment. Primm v. Primm, 46 Cal.2d 690, 693, 299 P.2d 231; Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Church of Merciful Saviour v. Volunteers of America, 184 Cal.App. 2d 851, 856, 8 Cal.Rptr. 49.

"The selection of a particular route is committed in the first in-

stances to the person in charge of the use, and unless there is something to show an abuse of the discretion, the propriety of his selection ought not to be questioned, for certainly it must be presumed that the state or its agent has made the best choice for the public; and if this occasions peculiar and unnecessary damage to the owners of the property affected the proof of such damage should come from them.' *City of Pasadena v. Stimson*, 91 Cal. 238, 255, 27 P. 604, 608; cf. *Housing Authority v. Forbes*, 51 Cal.App.2d 1, 7, 124 P.2d 194.

There is no showing that the plaintiff abused its discretion in selecting the subject route for its power line. The defendants' objection is without merit."

**Connecticut**—*Connecticut Power Co. v. Powers*, 142 Conn 722, 118 A(2d) 304, in which the court said:

"When the legislature gives a public utility company, as it gave the plaintiff, the power to condemn such property as may be necessary for the carrying out of its corporate purposes, the determination of what is necessary to be taken lies in the discretion of the company. *Water Commissioners v. Johnson*, 86 Conn 151, 158, 84 A 727, 41 LRA, NS, 1024. Courts will interfere with the exercise of that discretion only in those cases where the company acts in bad faith or unreasonably. *Adams v. Greenwich Water Co.*, 138 Conn 205, 213, 83 A(2d) 177, and cases cited."

**Florida**—*Miller v. Florida Inland Navigation District*, 130 So(2d) 615, in which it was held that the taking of a fee interest was not necessary where an easement would be sufficient. The court said:

"There is no logical difference between the well-recognized illegality

in taking a greater quantity of property than is necessary to serve a particular public use and that of taking a greater interest or estate therein than is required for the contemplated use. In the latter aspect it is simply a matter of degree rather than of substance. In so holding we are cognizant of and adhere to the rule that in the absence of a clear showing of oppression, actual fraud, or bad faith the trial court is not entitled to invade the discretion of the condemning authority with respect to the extent of the use or the time during which it may be enjoyed. This rule will apply, of course, in the event it is determined that the petitioner herein is entitled, as the landowner insists, to acquire no greater interest than an easement to serve the public purpose stated by the petition. *State Road Department of Florida v. Southland, Inc.*, Fla.App. 1960, 117 So.2d 512; *Rott v. City of Miami Beach, Fla.*, 1957, 94 So.2d 168; *Peavy-Wilson Lumber Co. v. Brevard Co.*, 1947, 159 Fla. 311, 31 So.2d 433, 172 A.L.R. 168.

"Those allegations of the answer which are designed to provide a basis for a limitation upon the length of time during which an easement—serving an admittedly proper public use—should be permitted to continue in effect poses such indefinite factors as to make it impractical to produce a sound basis for the award of damages on that theory. These allegations are indeed inconsistent with those which admit the power of the petitioner to condemn a *perpetual* easement for the stated use. Assuming it is determined that the extent of the interest that may be appropriated herein is an easement upon the land, it may be that in course of time the necessity therefor would cease to exist. It must be presumed that when that time arrives the party enjoying the use will voluntarily relieve the property of the

easement or, failing that, that the easement will become extinguished by operation of law. These are matters, however, which can be determined only in the light of facts and circumstances yet to transpire. If in accordance herewith it should be held that the petitioner is entitled to acquire a permanent easement, the compensation paid to the landowner must necessarily be predicted on the permanency of the use. It would patently be inconsistent in the same proceeding to both compensate the landowner for a *permanent* burden upon his property and limit the use in point of time.

"The District's brief insists that it will not be unjustly enriched by acquisition of fee simple title as sought by the petition. It points out that it can only acquire that title by paying for it at the fair market value. It observes that an increase in value will undoubtedly occur when the land is converted from marshland to dry land but that such will be due completely to expenditures of the United States Government, and further, that 'the only manner in which these expenses may be recouped will be through the sale of the filled land,' and that 'any profit, meaning any increase in the sales price of the land by the Navigation District over the price which the Navigation District paid the appellant, will serve to decrease the tax burden of the taxpayers of the state of Florida.' This argument is unsound and pinpoints the abuse of power that results from the attempt to acquire a greater interest than that which is necessary for the contemplated public use. The anticipated result, however beneficial to the taxpayers generally, is immaterial and irrelevant to the question of the power of eminent domain and the extent to which it may be exercised."

**Illinois**—Department of Public

Works & Buildings v. Lewis, 411 Ill 242, 103 NE(2d) 595; County Board of School Trustees v. Batchelder, 7 Ill (2d) 178, 130 NE(2d) 175; Deerfield Park Dist. v. Progress Dev. Corp., 22 Ill (2d) 132, 174 NE(2d) 850; Deerfield Park Dist. v. Progress Dev. Corp., 26 Ill (2d) 296; 186 NE(2d) 360, cert. den. 372 US 968, 10 L Ed (2d) 131, 83 S Ct 1093.

In *City of Chicago v. Newberry Library*, 7 Ill (2d) 305, 131 NE(2d) 60, the court held that the taking of an entire city block for a parking facility for 1200 automobiles was not unreasonably excessive. The court said:

"The appellant has failed to show by any evidence that the city has abused its discretion in reaching the conclusion that the property proposed to be taken herein is excessive of an anticipated need. It is uniformly held that it is only where the evidence is clear and satisfactory that the action of the municipal authorities was taken without reasonable grounds and is oppressive that the judiciary will interfere to declare an ordinance for a local improvement unreasonable. If there is a basis for a difference of opinion, the action of the council or board is final."

**Indiana**—Cemetery Company v. Warren School Township, 236 Ind 171, 139 NE(2d) 538.

**Louisiana**—Texas Pipe Line Co. v. Barbe, 229 La 191, 85 So (2d) 260.

**Nevada**—Aeroville Corp. v. Lincoln County Power Dist. No. 1, 71 Nev 320, 290 P(2d) 970.

**New Jersey**—Burnett v. Abbott, 14 NJ 291, 102 A(2d) 16, citing *Treatise*; Tennessee Gas Transmission Co. v. Hirschfeld, 38 NJS 132, 118 A(2d) 64.

**New York**—Tennessee Gas Transmission Co. v. Geng, 11 Misc (2d) 739, 175 NYS(2d) 488.

**Ohio**—*Scott v. Fayette County Agricultural Society*, 72 Ohio Abs 564, 136 NE(2d) 85.

**Oklahoma**—*Town of Ames v. Weybrandt*, 203 Okl 307, 220 P(2d) 693; *Seba v. Independent School Dist. No. 3*, 208 Okl 83, 253 P(2d) 559; *Lansden v. Bear, Fall & Coon Creek W. & S. Con. Dist. #4*, 370 P(2d) 540.

**Pennsylvania**—*Eways v. Reading Parking Authority*, 385 Pa 592, 124 A(2d) 92.

Under some statutes delegating the power of eminent domain to a public service corporation it is required that the state public service commission pass upon the question of necessity before the power may be exercised. However, even under such statutes the power of the commission is not unlimited. *Lower Chichester Tp. v. Pennsylvania Pub. Utility Comm.*, 119 A(2d) 674, in which it was said:

"The voluntary expansion or extension of the facilities of a public utility company lies in the discretion of company management, but to the extent that property or rights or easements therein must be acquired through condemnation the utility must establish the necessity therefor and obtain the approval of the Public Utility Commission of the exercise of the right of eminent domain: *Duquesne Light Co. v. Upper St. Clair Township*, *supra*, 377 Pa 323, 105 A(2d) 287. In such a proceeding it is proper for the commission to pass upon the question of the location of facilities especially if the utility should act wantonly, arbitrarily, or unreasonably in selecting a site. See *Wilson v. Public Service Commission*, 89 Pa Super 352. However, it is not within the province of the commission to interfere with the management of a utility unless an abuse of discretion or arbitrary action by the utility is shown. Thus, in *Byers v. Pennsyl-*

*vania Public Utility Commission*, 176 Pa Super 620, 109 A(2d) 232, 234, Judge Hirt said: "The selection of a route for transmission lines is a matter for the public utility in the first instance and unless it is shown that it proposes to exercise the powers conferred upon it wantonly or capriciously the law does not intend that the Commission should withhold its approval merely because another route might have been adopted, which would damage the owners less or lessen the inconvenience to them in the operation of their farm."

In *Willits v. Pennsylvania Public Utility Comm.*, 183 Pa St 82, 128 A(2d) 105, the court said:

"In *Phillips v. Pennsylvania Public Utility Commission*, 181 Pa Super 625, 124 A(2d) 625, we have ruled on the questions of necessity and selection of route covering the proposed line here involved. We shall not repeat here what we said in that case. Upon a review of the record in the instant appeals we find that approval of the application by the Commission is amply supported by the evidence. Nor do appellants seriously challenge the question of necessity; instead, they devote their contentions mainly to whether the line should be placed underground instead of overhead and whether by underground construction the cost would be reduced which ultimately would reduce the rate to be charged.

"We are not concerned here with a rate case nor the costs which form the basis of a rate case. The question of comparative costs was considered by the Commission between overhead and underground lines in determining whether the route selected was arbitrary, wanton or capricious. We have stated that this Court will not substitute its own judgment for that of the Commission unless the order is clearly unreasonable and not in con-

fornity with the law, or where there is a flagrant abuse of discretion. *Phillips v. Pennsylvania Public Utility Commission, supra.*"

See, also *Laird v. Pennsylvania Public Utilities Comm.*, 183 Pa St 457, 133 A(2d) 579; *Truitt v. Borough of Ambridge Water Authority*, 389 Pa 429, 133 A(2d) 797; *Stallwagon v. Pyle*, 390 Pa 17, 133 A(2d) 819.

*Washington — State v. Superior Court*, 40 Wash (2d) 90, 240 P(2d) 1268.

*Contra:*

*California—County of Los Angeles v. Bartlett*, 203 CA(2d) 523, 21 Cal Rptr 776, in which the court said:

"Appellant's second argument is that the trial court erred in refusing to permit them to introduce evidence to prove 'that the public use had not been planned and located in a manner that would be most compatible with the greatest public good and the least private injury.' The complete answer to this argument is that the resolution adopted by the Board of Supervisors of Los Angeles County declared and conclusively established 'that the public interest and necessity require the acquisition of the fee simple title in and to the property hereinafter described for public buildings, and grounds, public mooring places for water craft, public parks, harbors, and for any public use authorized by law. That the said property is necessary for such public uses and purpose, and that such proposed public improvement and use is located in a manner which would be most compatible with the greatest public good and the least private injury \* \* \*'. The conclusiveness of the ordinance is expressly stated in section 1241, subdivision 2(a), (b) and (c) of the Code of Civil Procedure, and is established by the decisions in *People ex rel. Department of Public Works*

*v. Chevalier*, 52 Cal.2d 299, 307, 340 P.2d 598, and *People ex rel. Department of Public Works v. City of Los Angeles*, 179 Cal. App.2d 558, 568, 4 Cal.Rptr. 531, hereinafter quoted.

\* \* \* \*

"Appellants advance as one of their major assignments of error the complaint that the trial court refused to receive evidence in support of their allegations that there was no public necessity for the taking of their property for the purposes set forth in the complaint, and that the resolution adopted by the board of supervisors constituted an abuse of discretion for the reason that the amount of land to be appropriated was in excess of the land necessary for the indicated purpose, extravagant and an abuse of discretion. After referring to section 1241, subdivision 2, of the Code of Civil Procedure, the court, in *Chevalier, supra*, held as follows at page 307 of 52 Cal.2d, at page 603 of 340 P.2d:

"We therefore hold, despite the implications to the contrary in some of the cases, that the conclusive effect accorded by the Legislature to the condemning body's findings of necessity cannot be affected by allegations that such findings were made as the result of fraud, bad faith, or abuse of discretion. In other words, the questions of the necessity for making a given public improvement, the necessity for adopting a particular plan therefor, or the necessity for taking particular property, rather than other property, for the purpose of accomplishing such public improvement, cannot be made justiciable issues even though fraud, bad faith, or abuse of discretion may be alleged in connection with the condemning body's determination of such necessity. To hold otherwise would not only thwart the legislative purpose in making such de-

absence of any express statutory limitation on the amount of land to be taken, the delegatee of the power possesses a large discretion as to the amount of the land to be taken for the public purpose in question; the discretion is not reviewable by the courts except for gross abuse or fraud.<sup>4,1</sup>

(4) When it has been decided that a public improvement shall be constructed, whether the power of eminent domain shall be invoked is not a matter for judicial determination. The owner of the land condemned is not entitled to be heard upon the question whether an equally available site was not already in possession of the public, or could be bought elsewhere for less than the fair value of his land.<sup>2</sup> When it is

terminations conclusive but would open the door to endless litigation, and perhaps conflicting determinations on the question of "necessity" in separate condemnation actions brought to obtain the parcels sought to carry out a single public improvement. We are therefore in accord with the view that where the owner of land sought to be condemned for an established public use is accorded his constitutional right to just compensation for the taking, the condemning body's "motives or reasons for declaring that it is necessary to take the land are no concern of his." *County of Los Angeles v. Rindge Co.*, supra, 53 Cal.App. 166, 174, 200 P. 27, 31, affirmed *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186. Any language in the prior cases implying a contrary rule is hereby disapproved. It follows that there was no error in the trial court's ruling striking the "special defenses" relating to the question of necessity.<sup>1</sup>

<sup>4,1</sup> *Idaho*—Independent School Dist. v. C. B. Lauch Constr. Co., 74 Idaho 502, 264 P(2d) 687.

*Illinois*—Waukegan v. Stanezak, 6 Ill (2d) 594, 129 NE(2d) 751.

*Indiana*—Richland School Tp. v. Overmyer, 164 Ind 382, 73 NE 811, overruled on other gds. *Cemetery Co. v. Warren School Tp.*, 236 Ind 171, 139 NE(2d) 538.

*Kentucky*—Bell v. Board of Education, 192 Ky 700, 234 SW 311; *Pike County Board of Education v. Ford*, 279 SW(2d) 245.

*New York*—Binghamton v. Buono, 124 Misc 263, 268 NY Supp 60.

*North Carolina*—Board of Education v. Forrest, 190 NC 753, 130 SE 621.

*North Dakota*—Board of Education v. Park Dist., 70 NW(2d) 899.

*Pennsylvania*—Winger v. Hires, 371 Pa 242, 89 A(2d) 521; *Spann v. Joint Boards of School Directors*, 381 Pa 338, 113 A(2d) 281.

*Vermont*—Williams v. School Dist., 33 Vt 271.

*Washington*—State ex rel. Tacoma School Dist. No. 10 v. Stojack, 53 Wash (2d) 55, 330 P(2d) 567, 71 ALR(2d) 1064.

<sup>2</sup> *United States*—Oregon-Washington R. R., etc., Co. v. Wilkinson, 188 F 363.

*Arkansas*—St. Louis, etc., R. R.

decided to take land by eminent domain, what land shall be taken and how much, are matters in the discretion of the legislature,<sup>6</sup> though land that manifestly cannot be used

*Co. v. Petty*, 57 Ark 359, 21 SW 884, 20 LRA 434.

**California**—*Santa Ana v. Brunner*, 132 Cal 234, 64 P 287.

**Georgia**—*Atlantic, etc., R. R. Co. v. Penny*, 119 Ga 479, 46 SE 665.

**Indiana**—*Richland School Tp. v. Overmyer*, 164 Ind 382, 73 NE 811.

**Missouri**—*Kansas, etc., Ry. Co. v. Northwestern Coal, etc., Co.*, 161 Mo 288, 61 SW 684, 51 LRA 936, 84 Am St Rep 717; *American Tel., etc., Co. v. St. Louis, etc., Ry. Co.*, 202 Mo 256, 101 SW 576.

**New York**—*New York, etc., R. R. Co. v. Kip*, 46 NY 546, 7 Am Rep 385; *Rome v. Whitestown Waterworks Co.*, 187 NY 542, 80 NE 1106; *New York, etc., R. R. Co. v. Metropolitan Gas-Light Co.*, 5 Hun 201.

**Ohio**—*Lake Erie, etc., R. R. Co. v. Atlantic, etc., R. R. Co.*, 7 Ohio Dec Reprint 364; *City of Lakewood v. Thornayer*, 80 Ohio Abs 65, 154 NE (2d) 777, citing *Treatise*.

**Oregon**—*Dallas v. Hallock*, 44 Or 246, 75 P 204.

**Pennsylvania**—*Boyd v. Negley*, 40 Pa 377; *Frick Coke Co. v. Painter*, 198 Pa 468, 48 A 302.

**Texas**—*Cane Belt R. R. Co. v. Hughes*, 31 Tex Civ App 565, 72 SW 1020.

**Utah**—*Postal Tel. Cable Co. v. Oregon Short Line R. R. Co.*, 23 Utah 474, 65 P 735, 90 Am St Rep 705.

**Washington**—*Samish River Boom Co. v. Union Boom Co.*, 32 Wash 586, 73 P 670.

**West Virginia**—*Coffman v. Griffin*, 17 W Va 178.

**Wisconsin**—*Ford v. Chicago, etc., R. R. Co.*, 14 Wis 610, 80 Am Dec 791.

<sup>6</sup> *Boom Co. v. Patterson*, 98 US 403, 25 L Ed 206. "The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the constitutions of the several states providing for just compensation for property taken is a mere limitation upon the exercise of the right. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations to be exercised by them in the execution of works in which the public is interested."

See, also,

**United States**—*United States v. Gettysburg El. R. R. Co.*, 160 US 668, 40 L Ed 576, 16 S Ct 427; *United States v. Burley*, 172 F 616; *Cuyahoga River P. Co. v. Akron*, 210 F 524.

**California**—*California Cent. Ry. Co. v. Hooper*, 76 Cal 404, 18 P 596; *San Mateo County v. Coburn*, 130 Cal 631, 63 P 78.

**Connecticut**—*Todd v. Austin*, 35 Conn 78.

**Florida**—*Inland Waterway Dev. Co. v. Jacksonville*, 38 So (2d) 676.

**Illinois**—*Illinois, etc., R. R. Co. v.*

cannot be taken.<sup>7</sup> Although an easement is often all that

Chicago, 141 Ill 586, 30 NE 1044, 17 LRA 530.

**Indiana**—Protzman v. Indianapolis, etc., R. R. Co., 9 Ind 467, 68 Am Dec 650; Bass v. Ft. Wayne, 121 Ind 389, 23 NE 259.

**Iowa**—Bennett v. Marion, 106 Iowa 628, 76 NW 844.

**Louisiana**—Thibodeau v. Maggioli, 4 La Ann 73; Orleans Parish School Board v. Brown, 154 So (2d) 545.

**Massachusetts**—Hingham, etc., Bridge Co. v. Norfolk, 6 Allen 353; Lynch v. Forbes, 161 Mass 302, 37 NE 437, 42 Am St Rep 402.

**Minnesota**—Southern Minnesota, etc., R. R. Co. v. Stoddard, 6 Minn 150.

**Missouri**—St. Louis County Court v. Griswold, 58 Mo 175.

**Nebraska**—Dietrichs v. Lincoln, etc., R. R. Co., 13 Neb 361, 13 NW 624.

**New York**—Brooklyn Park Comrs. v. Armstrong, 45 NY 234, 6 Am Rep 70; *Re* Deansville Cem. Ass'n, 66 NY 569, 23 Am Rep 86; Cuglar v. Power Authority, 4 Misc (2d) 879, 163 NYS (2d) 902, aff'd 4 AD(2d) 801, 164 NYS(2d) 686, aff'd 3 NY(2d) 1006, 147 NE(2d) 733.

**Pennsylvania**—Struthers v. Dunkirk, etc., Ry. Co., 87 Pa 282.

**Rhode Island**—*Re* Rhode Island Sub. R. R. Co., 22 RI 457, 48 A 591, 52 LRA 879.

**Texas**—Webb v. Dameron, 219 SW(2d) 581.

**Washington**—Samiah River Boom Co. v. Union Boom Co., 32 Wash 586, 73 P 670.

**West Virginia**—Varner v. Martin, 21 W Va 534.

<sup>7</sup> **United States**—Chesapeake, etc., Canal v. Mason, 4 Cranch CC 123; Lake Shore, etc., R. R. Co. v. New York, etc., R. R. Co., 8 F 858.

**Georgia**—Atlantic, etc., R. R. Co. v. Penny, 119 Ga 481, 46 SE 665.

**Illinois**—Chaplin v. H'way Comrs., 129 Ill 651, 22 NE 484.

As to the amount of the land appropriated, a corporation having the power to exercise the right of eminent domain will be permitted a large discretion in determining for itself the amount of land to be taken. It is, of course, permissible for the condemnor to take not only sufficient land for the present need, but it may, and should, anticipate the future increased demands for the public use to which the land is to be devoted. Chicago v. Vaccaro, 408 Ill 587, 97 NE(2d) 766.

**Indiana**—Prather v. Jeffersonville, etc., R. R. Co., 52 Ind 16.

**Iowa**—Bennett v. Marion, 106 Iowa 628, 76 NW 844.

**Kentucky**—Tracy v. Elizabethtown, etc., Ry. Co., 80 Ky 259; Long v. Louisville, 98 Ky 67, 32 SW 271.

**Louisiana**—Texas Pipe Line Co. v. Barbe, 229 La 191, 85 So (2d) 260, in which it was held that the requirement as to the land taken need not be restricted to the needs of the immediate future.

**Massachusetts**—Rockport v. Webster, 174 Mass 385, 54 NE 852; Framingham Water Co. v. Old Colony R. R. Co., 176 Mass 404, 57 NE 680.

**Missouri**—State v. Curtis, 359 Mo 402, 222 SW(2d) 64.

**New York**—Rensselaer, etc., R. R. Co. v. Davis, 43 NY 137.

is condemned, if it is provided by the statute that the fee shall be taken the courts have no ground for interference,<sup>9</sup> unless it is too plain for argument that an easement is all that is reasonably necessary.<sup>10</sup>

**[4] Special constitutional and statutory provisions.**

A constitutional provision was adopted in Michigan in 1851 specifically requiring that when private property was taken for the public use, the necessity for the taking should be passed upon by a jury or by commissioners appointed by a court.<sup>10</sup> Previously, in Michigan, as in other states, necessity had not been considered a judicial question.<sup>11</sup> After

**North Dakota**—*Bigelow v. Draper*, 6 ND 152, 69 NW 570.

**West Virginia**—*Baltimore, etc., R. R. Co. v. Pittsburgh, etc., R. R. Co.*, 17 W Va 812.

<sup>9</sup> **United States**—*Sweet v. Rechel*, 159 US 380, 40 L Ed 188, 16 S Ct 43; *DeVaraigne v. Fox*, 2 Blatchf 95, F Cas No 3836.

**Connecticut**—*Driscoll v. New Haven*, 75 Conn 90, 52 A 618.

**Illinois**—*Smith v. Chicago, etc., R. R. Co.*, 105 Ill 511.

**Indiana**—*Edgerton v. Huff*, 26 Ind 35; *Indianapolis Waterworks Co. v. Burkhardt*, 41 Ind 364.

**Kansas**—*Challis v. Atchison, etc., R. R. Co.*, 16 Kan 117; *Central Branch, etc., R. R. Co. v. Atchison, etc., R. R. Co.*, 26 Kan 669.

**Massachusetts**—*Dingley v. Boston*, 100 Mass 544; *Holt v. Somerville*, 127 Mass 408.

**Minnesota**—*Fairchild v. St. Paul*, 46 Minn 540, 49 NW 325.

**New Jersey**—*Mangles v. Hudson County Freeholders*, 55 NJL 88, 25 A 322, 17 LRA 785; *Currie v. New York Transit Co.*, 66 NJ Eq 313, 58 A 308, 105 Am St Rep 647.

**New York**—*Heyward v. New York*,

3 Seld 314; *Rexford v. Knight*, 1 Kern 308; *Sweet v. Buffalo, etc., R. R. Co.*, 79 NY 293; *Eldridge v. Binghamton*, 120 NY 309, 24 NE 462; *In re City of New York*, 163 App Div 10, 147 NYS 1057; *Matter of the City of New York*, 217 NY 1, 111 NE 256.

**North Carolina**—*Raleigh, etc., R. R. Co. v. Davis*, 19 NC 451.

**Ohio**—*Malone v. Toledo*, 54 Ohio St 541.

**Virginia**—*Roanoke City v. Berkowitz*, 80 Va 623.

<sup>9</sup> **Louisiana**—*New Orleans Pac Ry. Co. v. Gay*, 32 La Ann 471.

**Massachusetts**—*Clark v. Worcester*, 125 Mass 226; *Rockport v. Webster*, 174 Mass 385, 54 NE 852; *Paul v. Detroit*, 32 Mich 108.

<sup>10</sup> Art. XIII, Sec. 1.

See also:

**Michigan**—*Hendershott v. Rogers*, 237 Mich 338, 211 NW 905; *New Products Corp. v. Ziegler*, 352 Mich 73, 88 NW(2d) 528.

<sup>11</sup> *Swan v. Williams*, 2 Mich 427; *Re Powers*, 29 Mich 504; *Paul v. Detroit*, 32 Mich 108; *Toledo, etc., R. R. Co. v. Dunlap*, 47 Mich 457, 11 NW 271.

the adoption of this provision, it became necessary in every case for the jury or commissioners to pass upon both the necessity of the improvement and the necessity of taking for the purposes of such improvement the land which it was sought to condemn;<sup>12</sup> an affirmative finding on both points is essential to further jurisdiction over the case.<sup>13</sup> The finding of the jury or commissioners upon the question of necessity, if there is any evidence to support it, is treated as final by the courts.<sup>14</sup> There is a similar provision in Wisconsin, but it is applicable only to the taking of land by municipal corporations.<sup>15</sup> In the states of Montana and New York when property is acquired for the purposes of a private road the necessity therefor must be judicially determined.<sup>16</sup>

In Massachusetts and several other states the constitutional provision aimed at the power of eminent domain is, in terms, applicable only "whenever the public exigencies require that the property of an individual be appropriated" and it has been said that this provision by implication forbade the appropriation of private property unless the public exigencies required it.<sup>17</sup> If this view is sound the existence of the exi-

<sup>12</sup> *Mansfield, etc., R. R. Co. v. Clark*, 23 Mich 519; *Paul v. Detroit*, 32 Mich 108; *Grand Rapids v. Grand Rapids, etc., R. R. Co.*, 58 Mich 641, 26 NW 159; *Detroit v. Beecher*, 75 Mich 454, 42 NW 986, 4 LRA 813; *Comrs. of Parks and Blvds. v. Mosta*, 91 Mich 149, 51 NW 903; *Detroit Water Comrs. v. Lorman*, 158 Mich 608, 123 NW 52.

<sup>13</sup> *Horton v. Grand Haven*, 24 Mich 465; *McClary v. Hartwell*, 25 Mich 139; *Marquette, etc., R. R. Co. v. Probate Judge*, 53 Mich 217, 18 NW 788; *Grand Rapids v. Grand Rapids, etc., R. R. Co.*, 58 Mich 641, 26 NW 159.

<sup>14</sup> *Toledo, etc., R. R. Co. v. Dunlap*, 47 Mich 457, 11 NW 271; *Port Huron, etc., R. R. Co. v. Voorheis*, 50 Mich 506, 15 NW 436; *Toledo, etc., R. R. Co. v. East Saginaw, etc., R. R. Co.*, 72 Mich 206, 40 NW 436; *Saginaw, etc., R. R. Co. v. Bordner*, 108 Mich 236, 66 NW 62; *Detroit,*

*etc., R. R. Co. v. Hall*, 133 Mich 302, 94 NW 1066.

<sup>15</sup> Art. 11, Sec. 2.

See *Seifert v. Brooks*, 34 Wis 443; *Redevelopment Authority of City of Madison v. Canepa*, 7 Wis (2d) 643, 97 NW(2d) 695. See also, *State v. Circuit Court of Milwaukee County*, 3 Wis (2d) 439, 88 NW(2d) 339, in which it was held that the provision applicable to municipal corporations does not apply to counties or towns.

<sup>16</sup> *Montana*—Art. III, Sec. 15.

*New York*—Art. I, Sec. 7.

<sup>17</sup> *Massachusetts*—*Harback v. Boston*, 6 Cush 395.

See, also,

*Massachusetts*—*Rockport v. Webster*, 174 Mass 385, 54 NE 852.

*Maine*—*Hayford v. Bangor*, 102 Me 340, 66 A 731, 11 LRA (NS) 940.

*Wisconsin*—In *David Jeffrey Co. v.*

gency would be a matter for judicial determination as fully as the question whether the use was public or the compensation just. The better view, however, seems to be that such a provision, not being a grant of power, is a limitation only upon the nature of the use and the sufficiency of the compensation,<sup>18</sup> and in practice it cannot be said that the courts of the states in which such a provision exists have assumed any greater power over the determination of necessity than the courts of other jurisdictions.<sup>19</sup>

Even in the absence of special constitutional provisions in regard to necessity, the legislature may confer upon the court the duty of determining the necessity of a proposed taking.<sup>20</sup> Such a duty, although primarily legislative, is not so essentially unjudicial that to impose it upon a court is a violation of the principle of the separation of powers, and in several states it has been enacted with respect to particular classes of public improvements that land shall not be taken unless the taking is found to be necessary by the court. Under such circumstances the necessity must be established by evidence or the proceeding fails.<sup>21</sup> In statutes of this character, it

*City of Milwaukee*, 267 Wis 550, 66 NW(2d) 362, it was held:

"When, for instance a city considers and determines the development of a public building, or park, it is not obliged to give notice of its deliberations regarding such undertaking, to property owners within the area of the contemplated site. However, when it attempts to acquire such property for such use by eminent domain, the owners of the property are entitled to challenge the necessity of the taking as provided in ch. 32, Stats. The steps required to be taken precedent to the right of the exercise of the power are legislative questions. The question as to whether such steps have been taken is judicial."

<sup>18</sup> *Cincinnati v. Louisville, etc., R. R. Co.*, 223 US 390, 56 L Ed 481, 32 S Ct 267.

<sup>19</sup> *Lynch v. Forbes*, 161 Mass 302, 37 NE 437, 42 Am St Rep 402.

<sup>20</sup> *United States—Greenburg v. International Trust Co.*, 36 CCA 471, 94 F 755.

*Indiana—Beunis v. Guird Drainage Co.*, 182 Ind 36, 105 NE 496.

*Louisiana—Avery v. Police Jury*, 12 La Ann 554; *Williams v. Department of Highways*, 92 So (2d) 98.

*North Dakota—State v. Teigen*, 80 NW(2d) 110, in which it was held that the statute requiring proof that the taking was necessary for the proposed use does not require that the question of a necessary taking must be determined before the question of damages can be tried. It requires only that necessity must appear before the property can be taken.

*Virginia—Stanpark Realty Corp. v. City of Norfolk*, 199 Va 716, 101 SE(2d) 527.

<sup>21</sup> *California—Wilmington Canal, etc., Co. v. Dominguez*, 59 Cal 505; *Santa Cruz v. Enright*, 95 Cal 105,

is generally held, necessity does not signify impossibility of constructing the improvement for which the power has been granted without taking the land in question, but merely requires that the land be reasonably suitable and useful for the improvement.<sup>22</sup>

30 P 197; *Santa Ana v. Gildmacher*, 133 Cal 396, 85 P 883.

In *Linggi v. Garavotti*, 274 P(2d) 942, the court said:

"In certain situations not here involved the statute makes the determination of certain agencies conclusive as to such necessity, but in all other cases, of which the instant case is one, it is for the court to decide whether such taking is necessary. In determining that question mere convenience is not sufficient. The person or agency seeking to enforce the right of condemnation must show that the proposed taking is indispensably necessary,—not merely convenient or profitable."

**Delaware**—*State v. 0.62033 Acres of Land*, 49 Del 90, 110 A(2d) 1, citing *Treatise*.

**Iowa**—*Creston Waterworks Co. v. McGrath*, 89 Iowa 502, 56 NW 680.

**Minnesota**—*Minnesota Canal, etc., Co. v. Koochiching Co.*, 97 Minn 429, 107 NW 405, 5 LRA (NS) 638, 7 Ann Cas 1182.

**New York**—*Rensselaer, etc., R. R. Co. v. Davis*, 43 NY 137; *Re New York Cent. R. R. Co.*, 66 NY 407; *Board of Education v. Gorga*, 13 Misc (2d) 2, 174 NYS(2d) 746.

**North Dakota**—*Bigelow v. Draper*, 6 ND 152, 69 NW 570.

**Washington**—*Seattle, etc., R. R. Co. v. State*, 7 Wash 150, 34 P 551, 22 LRA 217, 38 Am St Rep 866.

<sup>22</sup> **California**—*Spring Valley Waterworks v. San Mateo Waterworks*, 64 Cal 123, 28 P 447; *Rialto Irr. Dist. v. Brandon*, 103 Cal 384, 37 P 484.

In *City of Hawthorne v. Peebles*, 166 CA(2d) 758, 333 P(2d) 442, quoting *Treatise*, the court said:

"Generally, statutory requirements of necessity as a condition of the exercise of the power of eminent domain are liberally construed by the courts so as not to limit unnecessarily the power of the condemning agency. This liberal construction has been applied in several recent cases from other jurisdictions. In *Latchis v. State Highway Board*, 1957, 120 Vt. 120, 134 A.2d 191, 194, where the statute required 'necessity' for condemnation, the court said: 'The necessity specified by the statute \* \* \* does not mean an imperative or indispensable or absolute necessity but only that the taking provided for be reasonably necessary for the accomplishment of the end in view under the particular circumstances.'

\* \* \*

"It is, of course, a question for the trier of fact whether a taking is necessary. *Spring Valley Waterworks Co. v. Drinkhouse*, 92 Cal. 528, 532, 28 P. 681; see 17 Cal.Jur 2d 748-749, § 200.

"And, in considering the question of necessity, the court may consider immediate future needs (*Kern County High School Dist. v. McDonald*, 180 Cal. 7, 14, 179 P. 180), other available facilities (cf. *Rialto Irrigating Dist. v. Brandon*, 103 Cal. 384, 387, 37 P. 484; *Spring Valley Water Works v. San Mateo Water Works*, 64 Cal. 123, 28 P. 447), or public economic considerations. *Sacramento Municipal Utility Dist. v.*

*Pacific G. & E. Co.*, supra, 72 Cal. App.2d 638, 654, 165 P.2d 741; see 17 Cal.Jur.2d 743-750, §§ 200-201.

“In reviewing the evidence, which amply supported the disputed finding as to necessity, the court observed that the statute required . . . a balancing of the greatest public good and the least private injury. A parcel of land with objectionable features is not to be chosen just because poorer land is available.’ As stated in 1 *Nichols*, *Eminent Domain*, 391-392, § 4.11 [4], . . . it is generally held, necessity does not signify impossibility of constructing the improvement for which the power has been granted without taking the land in question, but merely requires that the land be reasonably suitable and useful for the improvement.’ See *Spring Valley Water Works v. San Mateo Water Works*, supra, 64 Cal. 123, 2c P. 447; *Rialto Irrigation District v. Brandon*, supra, 103 Cal. 384, 387, 37 P. 484; *City of Pasadena v. Stimson*, 91 Cal. 238, 253, 27 P. 604.”

**Colorado**—*Gibson v. Cann*, 28 Colo 499, 66 P 879.

**Connecticut**—*Town of West Hartford v. Talcott*, 138 Conn 82, 82 A(2d) 351. On the question of the necessity of a taking, needs which will arise in the reasonably foreseeable future must be taken into consideration. *Adams v. Greenwich Water Co.*, 138 Conn 205, 83 A(2d) 177.

**Georgia**—*Inferior Court Justices v. Griffin, et al.*, Road Co., 9 Ga 475.

**Illinois**—*Aurora, et al.*, R. R. Co. v. *Harvey*, 178 Ill 477, 53 NE 331.

The word “necessary” in such statutes should be construed to mean “expedient,” “reasonably convenient,” or “useful to the public,” and cannot be limited to an absolute

physical necessity. The word “necessary” does not mean “indispensable” or “an absolute necessity.” The imposition of a hardship upon the condemnee is not a proper factor in the determination of the question of necessity. The hardship involved goes solely to the question of compensation to be accorded in order that the condemnee be made whole. *Department of Public Works and Buildings v. Lewis*, 411 Ill 242, 103 NE(2d) 595.

**Indiana**—*Blizzard v. Riley*, 83 Ind 300; *Green v. Elliott*, 86 Ind 53; *Hyes v. White River L. & P. Co.*, 175 Ind 118, 93 NE 670; *Chicago, et al.*, R. R. Co. v. *Baugh*, 175 Ind 410, 94 NE 571.

**Michigan**—*Comrs. of Parks and Blvds. v. Moesta*, 91 Mich 149, 51 NW 903 (under Michigan constitution).

**Minnesota**—*Dairyland Power Cooperative v. Brennan*, 248 Minn 556, 82 NW(2d) 56, in which it was said that there is no need for a showing of absolute necessity but only that the proposed taking is reasonably necessary or convenient to the end in view. To the same effect, see *Chicago, et al.*, R. R. Co. v. *Jesse*, 249 Minn 324, 82 NW(2d) 227.

**New Hampshire**—*Public Service Co. v. Shannon*, 105 NH 67, 192 A(2d) 608, citing *Treatise*.

**North Dakota**—*Otter Tail Power Co. v. Malme*, 92 NW(2d) 514, citing *Treatise*. The court said:

“In several states, where the legislature has delegated the power of determining the necessity of exercising the power of eminent domain, a corporation vested with that power, in absence of statutory provision requiring the submission thereof to a court or jury, the decision of the question of necessity lies with the body to whom the state has delegated the authority to take property, and generally the determina-

tion of the grantee is conclusive and not subject to judicial review except for fraud, bad faith or clear abuse of discretion. 29 C.J.S. Eminent Domain § 89, pages 882 and 883. The rule in this state is found in the early case of *Bigelow v. Draper*, 6 N.D. 152, 69 N.W. 570, where this court determined that the legislature had seen fit to take it out of the power of the person or corporation to settle the question of necessity, and to trust the determination of the issue to the judicial branch of the government. This is still the rule in this state. *Pembina County v. Nord*, 78 N.D. 473, 49 N.W.2d 665; *Kessler v. Thompson*, N.D., 75 N.W.2d 172, 175. It is nevertheless true that much latitude is given to the corporation vested with the right of acquiring property by eminent domain to determine the extent of the property necessary to be taken. *Northern Pac. R. Co. v. Boynton*, 17 N.D. 203, 115 N.W. 679.

"Since a corporation vested with the right of acquiring property for a public use is entitled to much latitude in determining the extent of the property to be taken, it is entitled to the same latitude in determining the selection and location of the route for its power transmission line. Where it presents evidence showing the necessity for the taking of property for the construction of its transmission line, and such evidence indicates that the corporation vested with the power exercised good faith and used its best judgment in the selection of the route and the easements sought to be taken, and where it further appears from the evidence that the selection of the route is compatible with the greatest public benefit and the least private injury, this court, on appeal, will not disturb the trial court's findings that the plaintiff has

established the necessity for the taking of the easements sought over the route selected.

"While under the laws of this state necessity must be established by evidence, such necessity need not signify an impossibility of constructing the improvement for which the power has been granted without taking the land in question, but merely requires that the land be reasonably suitable and useable for the improvement. *Nichols on Eminent Domain, 3rd Ed., Volume 1, pages 391 and 392*. The evidence need only show reasonable or practical necessity. 29 C.J.S. Eminent Domain § 90, page 886.

"The landowner may not object merely because some other location might have been made or some other property obtained that would have been as suitable for the purpose. 18 Am.Jur., Eminent Domain, Section 108, page 735; 29 C.J.S. Eminent Domain § 91, page 887."

*New York—City of Buffalo v. Day*, 8 Misc (2d) 14, 162 NYS(2d) 817. In *Cuglar v. Power Authority*, 4 Misc (2d) 879, 163 NYS(2d) 902, aff'd 4 AD(2d) 801, 164 NYS(2d) 686, aff'd 3 NY(2d) 1006, 147 NE (2d) 733, the court said:

"In plaintiff's brief, counsel states their basic position to be that governmental agencies have the right to take only where the property so acquired is 'intimately connected with the public welfare' and 'absolutely necessary for the gravest economic or sociological reasons.' But authority does not exist for such a rule, so confined or restricted. The cases cited by plaintiffs, wherein the appropriation has been approved, cannot be so rationalized. The protective language, by way of dicta, with which the courts have sought to make their decisions clearly understood repre-

sents the limit of the rule which does not include any concept of *absolute* necessity or *intimate* connection with the public good."

See, also: *Andrews v. State*, 10 Misc (2d) 501, 172 NYS(2d) 703.

**Ohio**—*Solether v. Ohio Turnpike Commission*, 90 Ohio App 228, 133 NE(2d) 148, in which the court held that the word "necessary" in acts relating to eminent domain does not mean "absolutely necessary or indispensable," but "reasonably necessary to secure the end in view."

See also: *City of Lakewood v. Thornmyer*, 80 Ohio Abs 65, 154 NE (2d) 777, citing *Treatise*; *Ohio Edison Co. v. Ganz*, 109 Ohio App 127, 159 NE(2d) 478.

**Oregon**—*Moore Mill & Lumber Co. v. Foster*, 216 Or 204, 336 P(2d) 39. The court said:

"There is necessarily entrusted to those who possess the power of eminent domain a broad discretion in the selection of the property essential to the contemplated public use. If the proposed public use will be represented by a thoroughfare, those vested with the power of eminent domain must have broad discretion in the selection of the route. However, the owner whose land is under condemnation may always submit evidence showing fraud, bad faith or abuse of discretion. Frequently in cases of this kind the defendant offers evidence indicating that another route is available to the condemnor and that it will serve the latter's purposes better. Evidence of that kind is not admissible if it merely shows that another route is available and that it has attractive qualities. It must go on and establish abuse of discretion by indicating that the would-be condemnor's choice of the land under condemnation has no

basis in reason and is without any economic justification. If any other rule were employed, the court, and not the condemnor, would make the intricate and difficult choice of route."

**Pennsylvania**—*Pennsylvania R. R. Co's Appeal*, 128 Pa 509, 18 A 522.

**Rhode Island**—*Hunter v. Newport*, 5 RI 325.

**Vermont**—*Latchis v. State Highway Board*, 120 Vt 120, 134 A(2d) 191, in which the court said:

"The necessity specified by the statute for the condemnation of land for highways does not mean an imperative or indispensable or absolute necessity but only that the taking provided for be reasonably necessary for the accomplishment of the end in view under the particular circumstances. Cases to this effect include: *Wilton v. St. Johns County*, 98 Fla. 26, 123 So. 527, 65 A.L.R. 488; *Solether v. Ohio Turnpike Comm.*, 90 Ohio App. 228, 133 N.E.2d 148, 151; *Town of West Hartford v. Talcott*, 138 Conn. 82, 91, 82 A.2d 351; *Komposh v. Powers*, 75 Mont. 493, 244 P. 298, 303; *State ex rel. Department of Highways v. Pinson*, 86 Nev. 227, 207 P.2d 1105.

\* \* \* \*

"The argument that 'the state doesn't need to take my land' merely because some one else's land might be taken has no validity. After all, if there is to be a road, it of necessity has to go somewhere, some one's property has to be taken. If imperative or absolute necessity were the test, there would be no practical way in which the crooked road could be made straight. It could always be said 'The state already has a road.' To justify a taking, the interests of the State must require it, and it must be so shown, but only to the extent that it is reasonably necessary to accom-

plish the end in view after weighing all the circumstances which bear on any given situation. In determining whether a reasonable necessity exists with respect to highways, public safety has become the critical element. Where the volume and nature of traffic is such that public safety requires under the circumstances that the road be constructed; or reconstructed at a given location, a reasonable necessity exists, and a taking of land is justified, if reasonable in the light of all the concurring circumstances. Under our statute a broad discretion has been vested in the state highway board in determining what land it deems necessary for the particular location and route to be followed, and, as a safeguard, the appeal to county court with a provision for a hearing before an independent board of commissioners is provided. A determination made agreeably to the statute will not be interfered with by the courts if it is made in good faith and is not capricious or wantonly injurious. See 29 C.J.S. *Eminent Domain* § 91, p. 886; *Williams v. School District*, 33 Vt. 271, 279."

**Virginia**—*Stanpark Realty Corp. v. City of Norfolk*, 199 Va 716, 101 SE(2d) 527, citing *Treatise*.

**Washington**—*Samish River Boom Co. v. Union Boom Co.*, 32 Wash 586, 73 P 670.

**Wisconsin**—*Klump v. Cybulski*, 274 Wis 604, 81 NW(2d) 42, in which the court said: "The 'necessity' required to support condemnation is only a reasonable and not an absolute or imperative necessity." The court went on to demonstrate that even where necessity is made a justiciable issue the right of judicial review is limited in character.

"Where, as here, the application is for a right-of-way for an electric line, the petitioner shall determine the

necessity' 32.07 (2), *Stata. Blair v. Milwaukee Electric Ry. & Light Co.*, 187 Wis 552, 555, 203 NW 912. The determination of necessity is primarily for the legislature, and the judgment of the party to whom such determination has been delegated (in this case the power company) is beyond question by any court if there is reasonable ground to support it. *State ex rel. Allis v. Wiesner*, 187 Wis 384, 395-396, 204 NW 539.

"The right to locate the power line is given to the power company and the location cannot be challenged unless that right is arbitrarily or oppressively exercised. *Blair v. Milwaukee Electric Ry. & Light Co.*, 187 Wis 552, 558, 203 NW 912. A court will not interfere with the choice unless necessary to prevent an abuse of discretion by an attempted taking in utter disregard of necessity for it. *Swenson v. Milwaukee County*, 266 Wis 129, 133, 63 NW(2d) 103. Where a condemner is given the right by statute to determine necessity, its choice of location cannot be challenged on the ground that another location on its own land would be as convenient and cheaper. *Swenson v. Milwaukee County*, 266 Wis 129, 132, 63 NW(2d) 103.

"In the light of these principles, it is not for the court to decide whether the power company is making the best decision with respect to location of its power circuits or the need for acquiring the desired easement. Judicial interference with the utility's determination would at most be warranted only by a convincing showing that the determination is unreasonable, arbitrary, or not made in good faith."

Necessity, it has been held, cannot be proved by the opinion evidence of experts. *Eckart v. Ft Wayne, etc., Traction Co.*, 181 Ind 352, 104 NE 762.

It has been held, under such provisions, that "necessity" does not mean indefinite, remote or speculative future necessity but means necessity existing now or in the near future. It has been held also that such necessity must exist not only for the taking itself, but also for the projected improvement on behalf of which the taking is sought.<sup>22.1</sup>

In Arizona and California the statute requires that the proposed taking shall be located in a manner which will be most compatible with the greatest good and the least private injury.<sup>22.2</sup> The cases recognized that the choice as to the extent

<sup>22.1</sup> Michigan—Board of Education v. Baczewski, 340 Mich 265, 65 NW (2d) 810. The court said:

"The theory adopted in this case by both the appellee and the trial court that the school-board could justify the taking of appellants' property up to 30 years before it needed same by showing that by such action it would save money was a wrong theory or basis upon which to determine the question of necessity and constituted an error that may fairly be said to have had a controlling influence upon the jury.

"In condemnation proceedings in this State petitioner should prove that the property will either be immediately used for the purpose for which it is sought to be condemned or within a period of time that the jury determines to be the near future or a reasonably immediate use."

The width of the strip of land to be taken is also a practical question, and to some extent depends upon what the condemnor deems necessary for the uses and purposes of its business. Guerretax v. Public Service Company of Indiana, 227 Ind 556, 87 NE(2d) 721.

Minnesota — Northern States Power Co. v. Oslund, 236 Minn 135, 51 NW(2d) 808.

New Jersey—It is not a valid ob-

jection to a condemnation proceeding that the public improvement program, valid in its inception, becomes fatally defective if the estimated cost thereof should prove less than that ultimately needed for the completion of the project. A property owner, as to whom funds are available and adequate, may not intercept the program as to him because of an anticipated shortage thereafter and possible abandonment of the project. Walsh v. City of Asbury Park, 26 NJS 435, 98 A(2d) 113.

See, also, *supra*, § 4.11[2], footnotes 96.1 to 96.8 inclusive.

<sup>22.2</sup> Arizona—Chambers v. State, 82 Ariz 278, 312 P(2d) 155, in which the court said:

"The gist of this argument is based on our statute ARS § 12-1115, which provides in part:

"Where land is required for public use, the state, or its agents in charge of such use, may survey and locate the land, *but it shall be located in the manner which will be most compatible with the greatest public good and the least private injury.*" (Emphasis supplied.)

"This provision of our eminent domain statute was adopted from California and has been interpreted by the courts of that state to require a balancing of the greatest public good

and type of taking must rest largely in the sound business judgment of the condemnor, and that such choice will not be set aside by the court unless it is so oppressive, arbitrary or unreasonable as to suggest bad faith.<sup>22.3</sup>

and the least private injury in locating land for condemnation. See, *Montebello Unified School Dist. of Los Angeles County v. Keay*, 55 Cal App(2d) 839, 131 P(2d) 384. It was also held in *Los Altos School District of Santa Clara County v. Watson*, 133 Cal App(2d) 447, 281 P(2d) 513, that it is not necessary for the state to plead compliance with the above provision, but that the defendant must make it an issue (by his pleadings or otherwise); and if it then becomes an issue the defendant has the burden of proof. It is our view that these cases are reasonable interpretations of the statute involved. It therefore follows that evidence on the part of Mrs. Chambers, relative to the 'uses' she had made and intended to make of the land in question, may have been material on the question of her 'private injury' in the ultimate balancing of the greatest public good and the least private injury. However, it is our view that the refusal of the trial court to consider the proffered evidence did not prejudice Mrs. Chambers in the ultimate determination of this cause, for the reason that the court would then have presented to it the question of whether the greatest public good required the taking of the lands of a Newman Club. As to this, the public uses of the state would still override the possible private injury to that organization, even one with as worthy purposes and objectives as this.

"This conclusion is irresistibly true when considered in the light of the words of the California court interpreting this provision as expressed in the case of *Montebello Unified School Dist. of Los Angeles v. Keay*, *supra*.

We quote [55 CalApp(2d) 839, 131 P(2d) 387]:

"And we think that when an attempt is made to show that the location made is unnecessarily injurious the proof ought to be clear and convincing, for otherwise no location could ever be made. If the first selection made on behalf of the public could be set aside on slight or doubtful proof, a second selection would be set aside in the same manner, and so ad infinitum. The improvement could never be secured, because, whatever location was proposed, it could be defeated by showing another just as good."

**22.3 California—***People v. Chevalier*, 52 Cal (2d) 299, 340 P(2d) 598, in which the court said:

"We therefore hold, despite the implications to the contrary in some of the cases, that the conclusive effect accorded by the Legislature to the condemning body's findings of necessity cannot be affected by allegations that such findings were made as the result of fraud, bad faith, or abuse of discretion. In other words, the questions of the necessity for making a given public improvement, the necessity for adopting a particular plan therefor, or the necessity for taking particular property, rather than other property, for the purpose of accomplishing such public improvement, cannot be made justiciable issues even though fraud, bad faith, or abuse of discretion may be alleged in connection with the condemning body's determination of such necessity. To hold otherwise would not only thwart the legislative purpose

in making such determinations conclusive but would open the door to endless litigation, and perhaps conflicting determinations on the question of 'necessity' in separate condemnation actions brought to obtain the parcels sought to carry out a single public improvement. We are therefore in accord with the view that where the owner of land sought to be condemned for an established public use is accorded his constitutional right to just compensation for the taking, the condemning body's 'motives or reasons for declaring that it is necessary to take the land are no concern of his.' *County of Los Angeles v. Rindge Co.*, supra, 53 Cal. App. 166, 174, 200 P. 27, 31, affirmed *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186. Any language in the prior cases implying a contrary rule is hereby disapproved. It follows that there was no error in the trial court's ruling striking the 'special defenses' relating to the question of necessity."

**Maryland**—*Ligon v. Potomac Electric Power Co.*, 219 Md 438, 149 A(2d) 376.

**North Dakota**—*Northern States Power Co. v. Effertz*, 94 NW(2d) 268, in which the court said:

"When the necessity for the exercise of the power of eminent domain is proved or admitted, much latitude is given to the corporation, vested with the power, in the selection of the site or location to be taken for public use, and generally,

where there has been a carefully considered, good faith selection of a location by the corporation or its officers, the courts will not interfere. *Northern Pac. R. Co. v. Boynton*, 17 N.D. 203, 115 N.W. 679; *Otter Tail Power Co. v. Malm*, N.D., 92 N.W.2d 614."

**Washington**—*State v. Stojack*, 53 Wash (2d) 55, 330 P(2d) 567.