

The Status of Dedicated Land in Illinois

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COMMENTS

THE STATUS OF DEDICATED LAND IN ILLINOIS

Increased urban population in northern Illinois, coupled with public demand, gave rise to a search by the University of Illinois trustees for a permanent site for a Chicago campus for the University of Illinois. Many sites were considered, including Garfield Park, on the west side of Chicago, the Harrison-Halsted area, and Meigs Field. The Enabling Act of 1959 was passed to allow the University to obtain Chicago Park District land and to remove any restrictions thereon by condemnation proceedings.¹

Shortly thereafter, the University trustees obtained an option to purchase a section of Garfield Park which was dedicated to the city in 1882. The proposed sale was immediately contested by the State of Illinois, which challenged the constitutionality of the special act. It was also contested by residents near the park, who wished to protect their easements of view, light, and air. Property owners around the downtown area intervened because they realized that if Garfield Park could be taken, so could Grant Park, which is dedicated land along the lakefront in downtown Chicago.

The trial court, relying mainly on the *Grant Park Cases*² (four cases, decided between 1897 and 1911, which held that dedicated land in Illinois could neither be diverted nor condemned), held that (1) Garfield Park was dedicated land, (2) the special act was unconstitutional, and (3) an injunction should be issued to restrain any sale or condemnation proceedings.

On appeal to the Supreme Court of Illinois, the transfer was allowed, and *South Park Comm'rs v. Montgomery Ward & Co.*³—last of the four *Grant Park Cases*, which held that dedicated land could not be taken by eminent domain—was specifically overruled.

A petition for rehearing was filed. Under Illinois law no judgment becomes final until the petition for rehearing has been ruled upon or the time for filing a petition has elapsed.⁴ But before the petition could be heard by the court, the University trustees reversed themselves and chose

¹ ILL. REV. STAT. ch. 144, §§ 70.1-4 (1959).

² *Chicago v. Ward*, 169 Ill. 392, 48 N.E. 927 (1897); *Bliss v. Ward*, 198 Ill. 104, 64 N.E. 705 (1902); *Ward v. Field Museum*, 241 Ill. 496, 89 N.E. 731 (1909); *South Park Comm'rs v. Montgomery Ward & Co.*, 248 Ill. 299, 93 N.E. 910 (1911).

³ *Supra* note 2.

⁴ ILL. SUP. CT. R. 44, 45, ILL. REV. STAT. ch. 110, §§ 101.44-45 (1959).

the Harrison-Halsted area. They apparently were no longer interested in Garfield Park. Counsel for the residents, since the controversy had now become *moot*, moved that the Supreme Court remand to the trial court with directions to dismiss their (the residents') original cause of action. No objection was made by the Chicago Park District, and the motion was granted. The "opinion" of the Illinois Supreme Court was *withdrawn*; it will not be published and it will not be considered precedent.

The necessity for public construction will, in all likelihood, give rise to another instance in which dedicated land, if not Garfield Park itself, will once again be sought. Therefore, it would seem that a discussion of the status of dedicated lands is most apropos.

Illinois finds itself in a unique position. On one side of the coin, there are the *Grant Park Cases*, which held that dedicated land could neither be condemned nor diverted for other uses; on the other side is a *withdrawn opinion* overruling these cases. If dedicated land in the future is threatened by eminent domain, the question that will arise is what courses of action will be taken. In order to arrive at a probable answer to the above question, this article will cover the nature of dedicated land, the use of eminent domain, and the development of these concepts in Illinois.

THE NATURE AND USE OF DEDICATED PROPERTY

The appropriation or gift by the owner of land, or some interest or easement therein, to public use, and acceptance thereof, either express or implied, has been held by the Illinois courts to be a dedication.⁵ It is peculiar in three major respects, insofar as it operates to convey a right to real property: (1) There need be no writing;⁶ (2) there need be no grantee *in esse*;⁷ (3) the owner need not part with his title.⁸ Furthermore, an owner of land may, by reason of his acts or conduct, be estopped from denying a dedication to the use of the public.⁹ There have been times

⁵ *Kennedy v. Town of Normal*, 359 Ill. 306, 194 N.E. 576 (1934); *Du Pont v. Miller*, 310 Ill. 140, 141 N.E. 423 (1923).

⁶ *Marlowe v. Rich*, 252 Ill. 442, 96 N.E. 921 (1911). Furthermore, a dedication may be made in every conceivable way by which the intention of the party, whether by words or acts, can be manifested. *Kennedy v. Town of Normal*, *supra* note 5; *Wiehe v. Pein*, 281 Ill. 130, 117 N.E. 849 (1917); *Trammell v. Bradford*, 198 Ala. 513, 73 So. 894 (1917); *People v. Chicago & N. W. Ry.*, 239 Ill. 42, 87 N.E. 946 (1909); *Davidson v. Reed*, 111 Ill. 167 (1884).

⁷ *Village of Riverside v. Maclean*, 210 Ill. 308, 71 N.E. 408 (1904). This is so since the public is an ever-existing grantee, capable of taking a dedication for public use, and its interests are a sufficient consideration to support them. *Nelson v. Randolph*, 222 Ill. 531, 78 N.E. 914 (1906); *Warren v. President & Trustees*, 15 Ill. 236 (1853).

⁸ *City of Burlingame v. Norberg*, 210 Cal. 105, 290 Pac. 587 (1930); *Nelson v. Randolph*, *supra* note 7.

⁹ *People ex rel. Markgraff v. Rosenfield*, 383 Ill. 468, 50 N.E.2d 479 (1943); *Hooper v. Haas*, 332 Ill. 561, 164 N.E. 23 (1928); *Village of Benld v. Dorsey*, 311 Ill. 192, 142 N.E. 563 (1924).

when a landowner has been held to have dedicated his land to the public use by reason of his acquiescence in the use of such land by the public, when it was shown that he had knowledge of such use.¹⁰

If one were classifying dedications, the classifications would fall into two major categories: express¹¹ and implied¹² (wherein intent is gathered from the acts of the dedicator) dedications on one hand, and common-law and statutory dedications on the other. In Illinois, a statutory dedication is one that must be made strictly pursuant to the statute.¹³ This statute provides that the acknowledgement and recordation or filing of a plat shall be held to be a conveyance in *fee simple* of such portions as are noted and dedicated to the public. If, however, there is a defective statutory dedication, as, for example, if the plat is not acknowledged¹⁴ or is improperly acknowledged,¹⁵ the dedication may nevertheless operate as a common-law dedication when all the necessary elements are present.¹⁶ A common-law dedication may be created orally or by plat¹⁷ or deed,¹⁸ and conforms to the definition and discussion in the beginning of this section.

It thus appears that anything which would be a dedication at common law is still a dedication today, even when the attempt to have a statutory dedication fails. However, it should be noted that in Illinois, in statutory dedications there is a conveyance in fee simple determinable subject to being defeated¹⁹ when the land is no longer used for the purpose for which it was dedicated; whereas in common-law dedications a fee does not pass²⁰—the body politic is said to hold the property in trust for the public.²¹ Illinois also has conditional dedications.²² As the words imply,

¹⁰ *Town of Bethel v. Pruett*, 215 Ill. 162, 74 N.E. 111 (1905).

¹¹ *Richeson v. Richeson*, 8 Ill. App. 204 (1881); *Palmer v. City of Clinton*, 52 Ill. App. 67 (1893).

¹² *City of Athens v. Burkett*, 59 S. W. 404 (Tenn. Ch. 1900). This type of dedication is founded on the doctrine of equitable estoppel. *Cincinnati v. Lessee of White*, 31 U.S. [6 Pet.] 431 (1832). *Contra* Note, 16 HARV. L. REV. 128 (1902).

¹³ ILL. REV. STAT. ch. 109, § 3 (1959).

¹⁴ *Owen v. Village of Brookport*, 208 Ill. 35, 69 N.E. 952 (1904).

¹⁵ *Earl v. City of Chicago*, 136 Ill. 277, 26 N.E. 370 (1891).

¹⁶ *Farwell v. City of Chicago*, 247 Ill. 235, 93 N.E. 168 (1910).

¹⁷ *Ward v. Field Museum*, 241 Ill. 496, 89 N.E. 731 (1909).

¹⁸ *Richeson v. Richeson*, 8 Ill. App. 204 (1881).

¹⁹ *St. Clair County Housing Authority v. Southwestern Bell Tel. Co.*, 387 Ill. 180, 56 N.E.2d 357 (1944).

²⁰ *Kennedy v. Town of Normal*, 359 Ill. 306, 194 N.E. 576 (1934); *Clokey v. Wabash Ry.*, 353 Ill. 349, 187 N.E. 475 (1933).

²¹ *Hooper v. Haas*, 332 Ill. 561, 164 N.E. 23 (1928).

²² *Village of Lake Bluff v. Dalitsch*, 415 Ill. 476, 114 N.E.2d 654 (1953).

these are dedications upon which the dedicator has put restrictions with which there must be compliance, *i.e.*, providing that the restrictions are both consistent with, and will not interfere with, the grant.

Needless to say, the scope of the doctrine of dedication has been greatly expanded since its inception.²³ The courts have held that land may be dedicated for use by the public as a park, common, or public square;²⁴ as a wharf or landing place;²⁵ as a cemetery;²⁶ for school purposes;²⁷ for a street, alley, or highway;²⁸ for the erection of public buildings;²⁹ and for pleasure grounds or for the erection of public works.³⁰ One Illinois court has even gone so far as to state that an artificially constructed waterway may be dedicated.³¹ But the Illinois courts have held that land may *not* be dedicated for either a railway³² or for any private purpose.³³

A SUMMARY OF THE PROBLEMS WITH RESPECT TO DEDICATED LANDS

One of the most important problems involving dedicated lands is whether or not they may be diverted to other purposes. For example, this problem may appear where land has been dedicated for a park in an area that has become the heart of the business district of a town, so that the town leaders are desirous of putting the dedicated land to a more practical use. Specifically, there are two types of dedications: (1) Where property is dedicated for a specific purpose, *e.g.*, "for park purposes only," and (2) where property is unrestrictedly dedicated, *e.g.*, "for use by the public." Where property has been dedicated for a specific purpose, the *general rule* is that neither the legislature, a municipality, nor the general public has the power to use the property for any purpose other than the one designated.³⁴ This is so whether the use be public or pri-

²³ Baker v. Johnston, 21 Mich. 319 (1870). For a discussion of the early common-law theory of dedication see *Id.* at 340-41.

²⁴ Carstens v. City of Wood River, 332 Ill. 400, 163 N.E. 816 (1928).

²⁵ City of Alton v. Illinois Transp. Co., 12 Ill. 38 (1850).

²⁶ Wormley v. Wormley, 207 Ill. 411, 69 N.E. 865 (1904).

²⁷ Board of Regents v. Painter, 102 Mo. 464, 14 S.W. 938 (1890).

²⁸ City of Princeton v. Gustavson, 241 Ill. 566, 89 N.E. 653 (1909).

²⁹ Spires v. City of Los Angeles, 150 Cal. 64, 87 Pac. 1026 (1906).

³⁰ City of Morrison v. Hinkson, 87 Ill. 587 (1877).

³¹ Du Pont v. Miller, 310 Ill. 140, 141 N.E. 423 (1923).

³² Lake Erie & W. R.R. v. Whitham, 155 Ill. 514, 40 N.E. 1014 (1895).

³³ People *ex rel.* Scott v. Ricketts, 248 Ill. 428, 94 N.E. 71 (1911).

³⁴ Michigan Blvd. Bldg. Co. v. Chicago Park Dist., 412 Ill. 350, 106 N.E.2d 359 (1952); City of Chicago v. Ward, 169 Ill. 392, 48 N.E. 927 (1897); Village of Princeville v. Auten, 77 Ill. 325 (1875).

vate,³⁵ and this rule is not affected by the fact that the changed use may be advantageous to the public.³⁶ A dedication to a general public use, on the other hand, is not so strictly construed that a change may not be made by the legislature or municipality. A recent Illinois case on this point is *Schien v. City of Virden*.³⁷ In that case, land was dedicated by plat to the City of Virden by private citizens. The parcel of land dedicated was labeled as "public ground." The court followed an earlier decision,³⁸ which held such a designation to be an *unrestricted* dedication to public use. The city was allowed to erect a firehouse on this land for the benefit of all the citizens in the fire district, since this would be in furtherance, rather than in restriction, of public use. By way of dictum the court stated that any attempt to alienate would be restrained. But in *Babin v. City of Ashland*,³⁹ the Ohio Supreme Court held that by construing "public ground" to mean ground *belonging* to the public, rather than ground to be *used* by the public, the City of Ashland was able to convey the fee to dedicated lands.

But the courts are not confined to changing the uses of dedicated land solely on the ground that it is generally rather than restrictively dedicated. The *cy pres* doctrine was employed to change the use of dedicated land in *City of Aurora ex rel. Egan v. Y.M.C.A.*⁴⁰ There, land was dedicated to the city for "public purposes." Originally designed to be used as a park, it had neither been substantially used as such nor improved since 1945. Part of the parcel was being used as a parking lot for workers in nearby factories that had been built after the dedication was made; furthermore, city planners determined that the land was inappropriate for public use. In remanding the case with instructions to apply *cy pres*, the court stated:

Under the doctrine of *cy pres*, if property is given in trust to be applied to a particular charitable purpose, and it becomes impossible, impractical or illegal to carry out the particular purpose, . . . the trust will not fail but the court will direct the application of the property to some charitable purpose falling within the general purpose of the settlor.⁴¹

³⁵ *City of Fort Worth v. Burnett*, 131 Tex. 190, 114 S.W.2d 220 (1938); *Grady v. City of Greenville*, 129 S.C. 89, 123 S.E. 494 (1924).

³⁶ *Baldwin Manor v. City of Birmingham*, 341 Mich. 423, 67 N.W.2d 812 (1954).

³⁷ 5 Ill.2d 494, 126 N.E.2d 201 (1955).

³⁸ *Chicago, R. I. & P.R.R. v. City of Joliet*, 79 Ill. 25 (1875).

³⁹ 160 Ohio St. 328, 116 N.E.2d 580 (1953).

⁴⁰ 9 Ill.2d 286, 137 N.E.2d 347 (1956).

⁴¹ *Id.* at 294, 137 N.E.2d at 353.

The court volunteered that a similar trust should be imposed upon the proceeds of the sale.⁴²

In *Kingsville Independent School Dist. v. Crenshaw*,⁴³ the court arrived at a conclusion similar to that in the *Egan* case without recourse to the *cy pres* doctrine. A dedication by deed provided that the land should be used as a public park for the pleasure of the City of Kingsville and that no building should be built thereon. As in *City of Aurora ex rel. Egan v. Y.M.C.A.*,⁴⁴ the public did not use the land as a park; it was chiefly used as a place of crossing for pedestrians passing in that direction. The court determined that the property was needed for school construction purposes, that it was neither *practicable nor possible* to use any other property for the erection of a school, and that the land would serve the needs of the public better if the "park" were abandoned and a school built. Under such circumstances, the court decided that the land could be alienated or condemned.⁴⁵

No problem as to diversion arises where the city owns the absolute fee. In *Brooklyn Park Comm'rs v. Armstrong*,⁴⁶ the City of Brooklyn condemned certain land, acquired the fee, and dedicated the land to use as a public park. Later, the City decided to sell some of the land rather than retain it as a park. The court held that although the City could not of itself alienate the land in contravention of the public right, since it had obtained legislative authority, it had the power to so alienate. And in *Clarke v. City of Providence*,⁴⁷ where the complainant sought to enjoin the city from filling in a cove basin and from diverting the surrounding land—dedicated as a public park—to other uses, since the fee was in the City and the proper legislative authority given, the court also held that the City could discontinue the use of such lands and sell it.⁴⁸

Thus it can be seen that recourse to eminent domain is unnecessary where the fee is in the municipality.⁴⁹ The question of eminent domain

⁴² Other examples of *cy pres*: *Trustees of New Castle Common v. Gordy*, 33 Del. Ch. 334, 93 A.2d 509 (1952). *Board of Educ. v. City of Rockford*, 372 Ill. 442, 24 N.E.2d 366 (1939).

⁴³ 164 S.W.2d 49 (Tex. Civ. App. 1942).

⁴⁴ 9 Ill.2d 286, 137 N.E.2d 347 (1956).

⁴⁵ The statute under which the court would have allowed eminent domain was exceptionally broad. It in no way mentioned the type of land to be condemned.

⁴⁶ 45 N.Y. 234 (1871).

⁴⁷ 16 R. I. 337, 15 Atl. 763 (1888).

⁴⁸ See *Ferry v. City of Seattle*, 116 Wash. 648, 200 Pac. 336 (1921); *State v. Dexter*, 10 R. I. 341 (1872).

⁴⁹ Compare *City of Jacksonville v. Jacksonville Ry.*, 67 Ill. 540 (1873); *Warren v. Mayor of Lyons City*, 22 Ia. 351 (1867); *Le Clercq v. Town of Gallipolis*, 7 Ohio 218 (1835), where the fee was not in the city.

arises when the fee is in individual proprietors, or if it is in the cities or towns, is in them as trustees under a special trust for the public.

EMINENT DOMAIN

“Eminent domain” is a phrase used to designate the power of a sovereign state (or to those to whom the power is delegated) to take property within the sovereign’s jurisdiction for public use without the owner’s consent, if just compensation is made.⁵⁰ This right is an attribute of sovereignty and whatsoever exists in any form, tangible or intangible, may be seized and appropriated to public use when necessity demands it.⁵¹ No matter how broad these judicial definitions may be, there are areas which are impregnable to the thrust of eminent domain. It has been held that when federally-owned property is devoted to aiding the federal government in fulfilling the high trusts imposed upon it in carrying out the purposes of its existence, such property is protected from eminent domain.⁵² It has also been held that eminent domain is impotent to reach money and promissory notes,⁵³ or the privilege of fishing in private waters.⁵⁴ Further, the courts have decided that the taking of property through eminent domain so as to allow *B* to take land from *A* and devote it to the same recognized public use to which *A* had devoted it will not be tolerated.⁵⁵ This obviously would amount to nothing more than a compulsory change of hands;⁵⁶ therefore, property in public use cannot be taken to be used in the same manner and for the same purpose.⁵⁷

It has frequently been held that neither contracts themselves⁵⁸ nor the

⁵⁰ *Dept. of Public Works & Bldgs. v. Kirkendall*, 415 Ill. 214, 112 N.E.2d 611. (1953); *Litchfield & M. Ry. v. Alton & S.R.R.*, 305 Ill. 388, 137 N.E. 248 (1922); *Eddleman v. Union County Traction & Power Co.*, 217 Ill. 409, 75 N.E. 510 (1905).

⁵¹ *Metropolitan Co. Ry. v. Chicago W. D. Ry.*, 87 Ill. 317 (1877).

⁵² *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525 (1885); *United States v. City of Chicago*, 48 U.S. 185 (1849). This is not to say that all governmental lands were always immune. At one time, the courts made a distinction between lands held in a governmental capacity and those held in a proprietary one. The latter was subject to eminent domain by the states. *State v. Superior Court for Jefferson County*, 91 Wash. 454, 157 Pac. 1097 (1916). A later case held that a trust covers future uses when, and as they arise; thus making all federal lands immune, *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917).

⁵³ *Cary Library v. Bliss*, 151 Mass. 364, 25 N.E. 92 (1890).

⁵⁴ *Albright v. Sussex County Lake & Park Comm'n*, 71 N. J. L. 303, 57 Atl. 398 (1904).

⁵⁵ *Lake Shore & M. S. Ry. v. Chicago & W. I. R.R.*, 97 Ill. 506 (1881).

⁵⁶ *Suburban R.R. v. Metropolitan West Side Elevated R.R.*, 193 Ill. 217, 61 N.E. 1090 (1901).

⁵⁷ *Chicago & N. W. Ry. v. Chicago & E.R.R.*, 112 Ill. 589 (1884).

⁵⁸ *Long Island Water Supply Co., v. Brooklyn*, 166 U.S. 685 (1897); *Cornwall v. Louisville & N.R.R.*, 87 Ky. 72, 7 S.W. 553 (1888).

"contract clause" of the Constitution can bar the eminent domain power from reaching the property coveted for the power's legitimate ends.⁵⁹ However, some courts have recognized that unusual factual situations make the use of eminent domain untenable. To allow its use in such cases would unconscionably frustrate the fulfillment of the double trust⁶⁰ imposed by the terms of the dedication.⁶¹ For example, in *Hall v. Fairchild-Gilmore-Wilton Co.*,⁶² the City of San Diego, with legislative authority, attempted to lay a highway across a dedicated public park. The highway would, when completed, have taken up about sixty per cent of the public park. The court, in holding such taking illegal, stated that "the city council . . . was utterly without jurisdiction to take over . . . a public park, and make of it a highway. . . ."⁶³ The court added that "when land is once dedicated for park purposes it is beyond the authority of a city, or even the Legislature, to withdraw it therefrom."⁶⁴

At times, where property was held for public purposes by a municipal corporation, it was held that the land could not be condemned by third persons (a private person or a corporation) where the public use would be interfered with and curtailed.⁶⁵ The limitation, however, which prohibits a municipality from using dedicated land for another and inconsistent purpose *does not apply* against the United States, since the supremacy of a federal public use over all other uses must be recognized under the federal constitution.⁶⁶

DELEGATION OF LEGISLATIVE AUTHORITY

Eminent domain, as was above stated, is an inherent right of the government which may be delegated by legislative authority.⁶⁷ The federal

⁵⁹ *State ex rel. Peabody v. Superior Court*, 77 Wash. 593, 138 Pac. 277 (1914); *Cincinnati v. Louisville & N.R.R.*, 223 U.S. 390 (1912); *Village of Hyde Park v. Oak Woods Cemetery Ass'n*, 119 Ill. 141, 7 N.E. 627 (1886).

⁶⁰ A double trust may be defined as (1) a trust in behalf of the dedicator, and (2) a trust in behalf of the portion of those for whose benefit the dedication is made.

⁶¹ These are not cases where the dedication has been made without restriction, nor is it similar to *Cincinnati v. Louisville & N. Ry.*, 223 U.S. 390 (1912). In the latter case, eminent domain was allowed to reach the dedicated property where the result was not to deprive the public of a *substantial continuation* of the same or similar benefits.

⁶² 66 Cal. App. 615, 227 Pac. 649 (1924).

⁶³ *Id.* at 617, 227 Pac. at 651.

⁶⁴ *Ibid.*

⁶⁵ *City of Allegan v. Vonasek*, 261 Mich. 16, 245 N.W. 557 (1932); *State ex rel. Schade Brewing Co. v. Superior Court*, 62 Wash. 96, 113 Pac. 576 (1911).

⁶⁶ *United States v. Carmack*, 329 U.S. 230 (1946).

⁶⁷ *United States v. Certain Lands*, 78 F.2d 684 (6th Cir. 1935); *Adirondack Ry. v. New York*, 176 U.S. 335 (1900); *Kohl v. United States*, 91 U.S. 367 (1875).

constitution does not confer this right, but it does limit its exercise.⁶⁸ Once authority is given, the courts cannot extend or limit the power, since this would involve the courts in a political or legislative question.⁶⁹

Decisions which involve the determination of whether an eminent domain action shall be used,⁷⁰ the time when the eminent domain action shall be brought,⁷¹ the wisdom or feasibility of the proposed use of the property,⁷² the amount of property to be taken,⁷³ the nature of the estate,⁷⁴ and the choice of land to be taken,⁷⁵ are all legislative functions. In general, as a summation of the foregoing, it may be said that the legislature determines the *necessity* of the eminent domain action.

When the power of eminent domain has been delegated to an administrative agency, the determination of necessity is then within the power of this agency, subject, however, to the controls found in the appropriate statutes conferring the authority upon them.⁷⁶ If the agency, in exercising its authority, exceeds the scope of the statute, the courts have the right to decide and interpret whether the act of condemnation was authorized by the statute.⁷⁷

The determination of necessity by the legislature or administrative agency is conclusive upon the courts except in cases of gross error showing prejudice or corruption.⁷⁸ It should be noted that in certain circumstances, involving the determination of complex factual issues by experts specially trained in their fields, the courts are reluctant to substitute their judgment for those of the experts.⁷⁹ Although it is common that the high official making the determination as to necessity is not an expert himself, those advising him are skilled in their respective fields.⁸⁰

⁶⁸ Shoemaker v. United States, 147 U.S. 282 (1893).

⁶⁹ Bragg v. Weaver, 251 U.S. 57 (1919); North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925).

⁷⁰ Chicago & N. W. Ry. v. City of Morrison, 195 Ill. 271, 63 N.E. 96 (1902).

⁷¹ United States v. 23.263 Acres of Land, 45 F. Supp. 163 (W. D. Wash. 1942).

⁷² Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941); United States v. 385 Acres of Land, 61 F. Supp. 746 (E.D. Wis. 1945).

⁷³ Shoemaker v. United States, 147 U.S. 282 (1893); United States v. Gettysburg E. Ry., 160 U.S. 668 (1896).

⁷⁴ United States v. South Dakota, 212 F.2d 14 (8th Cir. 1954).

⁷⁵ Atlantic C. L. R.R. v. Town of Sebring, 12 F.2d 679 (5th Cir. 1926).

⁷⁶ North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925); Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923).

⁷⁷ Georgia v. City of Chattanooga, 264 U.S. 472 (1924).

⁷⁸ Shoemaker v. United States, 147 U.S. 282 (1893).

⁷⁹ See Trans-Pacific Airlines, Ltd. v. Hawaiian Airlines, Ltd., 174 F.2d 63 (9th Cir. 1949); Bristol-Meyers Co. v. FTC, 185 F.2d 58 (4th Cir. 1950).

⁸⁰ United States v. Certain Parcels of Land, 30 F. Supp. 372 (D. Md. 1939).

The burden of proof is on the "condemnee" to show that the determination of necessity contained prejudice, corruption, or bad faith.⁸¹ This burden on the "condemnee" prevents the condemnation proceedings from becoming merely a review by the courts of the issue of necessity. The Illinois Supreme Court, in *Pittsburgh, F. W. & C. Ry. v. Sanitary Dist.*⁸² gave a concise summary of the extent of judicial review by stating:

[T]he court . . . may rightfully determine whether the petitioner has the power to exercise the right of eminent domain; whether the property is subject to the right of eminent domain and is being taken for a public use; whether the power is being abused by the taking of an excessive amount of property, and other kindred questions which do not involve a determination of the necessity or the expediency of the taking. . . .⁸³

The distinction between judicial and legislative functions in eminent domain proceedings becomes more complicated with respect to dedicated property. Although the courts have recognized that eminent domain is an inherent power of the sovereign, they have imposed definite restrictions upon the legislative power by the exercise of their power of judicial review.

Where the use of eminent domain would frustrate the fulfillment of the trust,⁸⁴ it has been held that the granting of the power by the legislature, in *general terms*, cannot be construed to empower an appropriation of dedicated property unless the power can be *inferred* from the legislative enactment.⁸⁵ In *City of Moline v. Greene*,⁸⁶ the City was held to be without authority to condemn, for the purpose of widening the street, ten feet of land which was part of property devoted to use as a public library. The court said: "[S]uch property cannot be taken and appropriated to another and different use, unless the legislative intent to so take it has been manifested in express terms or by necessary implication."⁸⁷ Thus it can be seen that one of the methods used by the courts to limit the legislative power in cases where dedicated property is being threatened by eminent domain, is to state that the statute under which the power is sought to be exercised is *too general* or *too broad*.

Where there was express legislative authority to acquire "any real

⁸¹ *Ibid.*

⁸² 218 Ill. 286, 75 N.E. 892 (1905).

⁸³ *Id.* at 290, 75 N.E. at 894.

⁸⁴ *But see* *City of Norton v. Lowden*, 84 F.2d 663 (10th Cir. 1936), where the court granted the power since the trust would not be frustrated.

⁸⁵ *Western Union Tel. Co. v. Pennsylvania R.R.*, 195 U.S. 540 (1904).

⁸⁶ 252 Ill. 475, 96 N.E. 911 (1911).

⁸⁷ *Id.* at 477, 96 N.E. at 912.

estate required for the purpose of the incorporation,'⁸⁸ or to proceed against land when "the title is vested in any trustee, not authorized to sell,"⁸⁹ the courts have held that such language is not strong enough to warrant the use of eminent domain to appropriate property dedicated to the public use, when it would result in a violation of the obligation of the trust.⁹⁰ In a Vermont decision,⁹¹ it was held that authority to acquire "within or without its corporate limits, lands, springs, streams and water rights"⁹² was too general to allow condemnation for public use of land already dedicated to another public use.

*In re Southwestern State Normal School*⁹³ involved a statute authorizing condemnation of real estate needed for the use of state schools. The court held that property already devoted to public use, though subject to eminent domain, could not be taken without legislative authority expressly conferred or arising by necessary implication. The court further held that there could be no implication unless it arose from a necessity so absolute that the grant of eminent domain to the condemnor by the legislature would be defeated.

The courts, through judicial interpretation, have raised what may be considered the "rule against impairment." The courts themselves have raised the presumption that eminent domain is never granted with the intention of interfering with any prior public use. Sometimes, however, where the interference is slight and the benefit great, condemnation taking has been allowed.⁹⁴ It is exceedingly difficult to predict when the courts will allow eminent domain under a statute, since they may determine that it is specific enough, or they may say that it is too broad. The needs of the condemnor, in relation to public demands, is on one side; the needs of the "condemnee" in relation to the same demands is on the other. The courts, in balancing the importance of the contesting uses in cases involving the exercise of what they have determined to be a general power of eminent domain, have held that the public square of a village could not be taken for a school house;⁹⁵ that land for a public library could not be taken for widening a street;⁹⁶ that park land could

⁸⁸ In the matter of the Petition of the Boston & A.R.R. 53 N.Y. 574, 578 (1873).

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ Vermont Hydro-Elec. Corp. v. Dunn, 95 Vt. 144, 112 Atl. 223 (1921).

⁹² 112 Atl. at 225.

⁹³ 213 Pa. 244, 62 Atl. 908 (1906).

⁹⁴ Michigan Blvd. Bldg. Co. v. Chicago Park Dist., 412 Ill. 350, 106 N.E.2d 359 (1952); Codman v. Crocker, 203 Mass. 146, 89 N.E. 177 (1909).

⁹⁵ Davis v. Nichols, 39 Ill. App. 610 (1891).

⁹⁶ City of Moline v. Greene, 252 Ill. 475, 96 N.E. 911 (1911).

not be taken by an electric power-carrying line;⁹⁷ that streets and alleys could not be taken for a college campus;⁹⁸ that land could not be taken for a street;⁹⁹ and that even the federal government, when acting solely under the power given to it by a state, was prevented from condemning and taking land for government forestry purposes.¹⁰⁰ In each of these cases, the eminent domain power could not be used to take property although the property was desired and needed for a recognized public use or purpose.

Many of the courts, while rejecting the concept that authority is conferred by a general statute, go on to say in *dicta* that a special act of the legislature which specifically names the property to be taken would be effective to grant authority.¹⁰¹ An example of this is found in *Louisville & N.Ry. v. Cincinnati*,¹⁰² where the court ruled that a statute authorizing the railroad company to take land for a right-of-way through the city was too general and did not apply to a public commons which was dedicated for public use. The court then went on to say that their decision did not prevent the property from ever being taken, but that special legislation would be necessary for any appropriation in derogation of the trust established by the dedication. Yet even after the legislature has gone to great lengths to draw up a statute that will satisfy the courts, such a statute may be either attacked as unconstitutional,¹⁰³ or as in *South Park Comm'rs v. Montgomery Ward & Co.*,¹⁰⁴ the court may hold that the legislature is without power to authorize the invasion of the obligations of the trust.

THREE BACKGROUND CASES

The background which led up to the *South Park* case¹⁰⁵ can be found in three prior decisions. The first of these decisions was *Warren v. Mayor of Lyons City*.¹⁰⁶ In that case land was dedicated for a public square. The

⁹⁷ *Minnesota Power & Light Co. v. State*, 177 Minn. 343, 225 N.W. 164 (1929).

⁹⁸ *In re Southwestern State Normal School*, 213 Pa. 244, 62 Atl. 908 (1906).

⁹⁹ *City of Edwardsville v. Madison County*, 251 Ill. 265, 96 N.E. 238 (1911).

¹⁰⁰ *In re Certain Lands*, 119 Fed. 453 (D. Mass. 1902).

¹⁰¹ *McCormac v. Evans*, 107 S.C. 39, 92 S.E. 19 (1917).

¹⁰² *Louisville & N.R.R. v. City of Cincinnati*, 76 Ohio St. 481, 81 N.E. 983 (1907).

¹⁰³ *People v. Chicago Park Dist.*, Nos. 36171 & 36172, Sup. Ct. Ill., Jan. 17, 1961.

¹⁰⁴ 248 Ill. 299, 93 N.E. 910 (1911). See *Hall v. Fairchild-Gilmore-Wilton Co.*, 66 Cal. App. 615, 227 Pac. 649 (1924); *Cary Library v. Bliss*, 151 Mass. 364, 25 N.E. 92 (1890); *City of Jacksonville v. Jacksonville Ry.*, 67 Ill. 540 (1873).

¹⁰⁵ *South Park Comm'rs v. Montgomery Ward & Co.*, *supra* note 104.

¹⁰⁶ 22 Iowa 351 (1867).

defendants, proceeding under an act of the Legislature, wished to subdivide the public square and lease it to private individuals. The court held that the Legislature could not authorize the violation of the contract entered into between the plaintiff and the public, and that the statute which authorized this diversion was void.

In *City of St. Paul v. Chicago, M. & St. P. Ry.*,¹⁰⁷ land was dedicated to public use as a levee. The Legislature passed a statute authorizing a railway to use the land as a permanent site for its general freight warehouse. The court held that the Legislature itself had no power to destroy the trust or to divert land to another purpose, either public or private, which was inconsistent with the particular use for which it was granted, and that if the Legislature purported to do so, such an act would be a nullity. In addition, the court went on to say that the Legislature's power of control over such property had to be exercised in conformity with the purpose of the dedication.

The Supreme Court of Illinois, in *City of Jacksonville v. Jacksonville Ry.*,¹⁰⁸ had to pass upon the validity of a special act of the Legislature empowering the railway company to construct and operate its railway "in, over, across and along any and all the avenues, streets, public grounds, squares and alleys"¹⁰⁹ of Jacksonville, as applied to the appropriation by the railway of land dedicated as a public square. Justice Thornton stated:

In this case the attempted use of the public square by the railway company for the track of its road, is a manifest perversion of the trust created and declared; would operate injuriously to the public and the abutting lot owners; would mar the beauty of the ground, destroy it as a place of public recreation, and cannot be justified.¹¹⁰

The attempted appropriation was held void and the railroad company was perpetually enjoined from all attempts to acquire the dedicated land.

THE GRANT PARK CASES

The doctrine evolved from the above three cases was extended to include the power of eminent domain in the four so-called *Grant Park Cases*. The South Park Commissioners of Chicago had lost the first three cases involving the question of their power, under authorization of the Legislature, to erect buildings in Grant Park, which was land dedicated to park purposes. The Illinois Supreme Court held that any attempt by

¹⁰⁷ 63 Minn. 330, 68 N.W. 458 (1896).

¹⁰⁸ 67 Ill. 540 (1873).

¹⁰⁹ *Id.* at 542.

¹¹⁰ *Id.* at 545.

the Legislature to authorize the erection of buildings in Grant Park contrary to the terms of the dedication was void.¹¹¹

In *South Park Comm'rs v. Montgomery Ward & Co.*,¹¹² the last of the *Grant Park Cases*, the Legislature had passed an act which authorized the erection of a library and a museum in the park, and gave the commissioners the power to condemn any easement, interest, or property right requiring the park to remain open or vacant. The abutting property owners, who claimed an easement of view, light, and air, brought suit to enjoin the threatened construction. The court, in a four-to-three decision, stated:

If the Legislature had no power to change the uses of Grant Park, and to disregard the terms of the dedications by authorizing the erection and maintenance of buildings in the park, there could be no condemnation of the rights of the defendant that the park should be kept free from buildings, whatever the nature of such rights might be.¹¹³

If the Legislature had no right to erect the buildings, which are now alleged to be a public use, they could not provide for taking the right of any person or appropriating his property for such use. To say that having acquired the right to ascertain and pay the damage to the property of Ward gives the right to change the use and violate the restriction which did not before exist would be reasoning backward. A superstructure does not support the foundation, and a lawful public use lies at the very foundation of the right to appropriate property or property rights.¹¹⁴

The minority opinion concluded that the abutting property owners' easements, like all private property, are subject to the power of eminent domain, and although the State may not violate its contract, it may, when the public necessity requires it, condemn the property rights growing out of such contract.

Thus, for forty-nine years the law in Illinois was that dedicated land could neither be diverted nor condemned through the exercise of eminent domain, if the purported change would substantially impair the beneficial use for which the land was dedicated.¹¹⁵ Undoubtedly, many groups wished to use park land for civic purposes. The last *Ward* case¹¹⁶ stood against such encroachments as rigidly as the Praetorian guards in ancient

¹¹¹ *City of Chicago v. Ward*, 169 Ill. 392, 48 N.E. 927 (1897); *Bliss v. Ward*, 198 Ill. 104, 64 N.E. 705 (1902); *Ward v. Field Museum*, 241 Ill. 496, 89 N.E. 731 (1909).

¹¹² 248 Ill. 299, 93 N.E. 910 (1911).

¹¹³ *Id.* at 306, 93 N.E. at 913.

¹¹⁴ *Id.* at 310, 93 N.E. at 914.

¹¹⁵ *Michigan Blvd. Bldg. Co. v. Chicago Park Dist.*, 412 Ill. 350, 106 N.E.2d 359 (1952); *Cf. City of Aurora ex rel. Egan v. Y.M.C.A.*, 9 Ill.2d 286, 137 N.E.2d 347 (1956). (1956).

¹¹⁶ *South Park Comm'rs v. Montgomery Ward & Co.*, 248 Ill. 299, 93 N.E. 910 (1911).

Rome, but would have fallen because of the 1961 Illinois Supreme Court "case" of "*People v. Chicago Park Dist.*,"¹¹⁷ if the controversy had not become moot prior to the ruling on the petition for rehearing. In that controversy, the right of the Chicago Park District to convey certain land in Garfield Park to the University of Illinois for use as the permanent site of a Chicago campus of the University, was challenged. The plaintiffs argued that Garfield Park was dedicated land and that under the *Grant Park Cases* this land could neither be diverted nor condemned. The defendants maintained that such land was not dedicated land, that the Park District held the land in fee, and that a special act of the Legislature¹¹⁸ allowed the sale of such land. The court, in rendering the decision, which was later "withdrawn," held that the land was dedicated, and not held in fee by the Park District. No ruling was given on the Enabling Act of 1959, whose constitutionality was questioned as local or special legislation. The court instead allowed the condemnation under a statute that was not relied upon by either side. This statute provided that any municipality may transfer its right, title, and interest in *any real estate* to the State of Illinois.¹¹⁹ Furthermore, it provided that *any restriction* on the land may be removed by condemnation. In the definition of restriction, the words "dedication" or "lands held in a public trust" are not included.¹²⁰ It was observed earlier in this discussion that the courts are reluctant to allow condemnation unless the Legislature in express terms, or by necessary implication, authorizes the same. Therefore, it may be reasonably concluded that Chief Justice Schaefer, who wrote the withdrawn opinion, took an extremely liberal view in interpreting the statute as giving the power to condemn such lands.

CONCLUSION

The future of dedicated lands in Illinois can be reasonably ascertained from a careful study of the cases mentioned in this article, the *withdrawn opinion*, and the dissent in *South Park Comm'rs v. Montgomery Ward & Co.*,¹²¹ if the present Illinois Supreme Court either maintains the same personnel or at least adheres to a similar line of reasoning. With proper legislative authority, the Illinois Supreme Court apparently will allow condemnation of dedicated lands. The dissent from the last *Ward* case, quoted with approval in the *withdrawn opinion* stated:

¹¹⁷ Nos. 36171 & 36172, Sup. Ct. Ill., Jan. 17, 1961.

¹¹⁸ ILL. REV. STAT. ch. 144, §§ 70.1-4 (1959).

¹¹⁹ ILL. REV. STAT. ch. 30, § 158a (1959).

¹²⁰ ILL. REV. STAT. ch. 30, § 156d (1959).

¹²¹ 248 Ill. 299, 93 N.E. 910 (1911).