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"Necessity" in Eminent Domain Proceedings: Four Cases

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"NECESSITY" IN EMINENT DOMAIN PROCEEDINGS: FOUR CASES

Eminent domain is the power[1] of the state to take private property[2] for public use.[3] Exercise of the power is conditioned upon necessity combined with public use.[4] The seeming simplicity of this latter statement hides its actual complexity. In Montana, challenges to the necessity of condemnation are based on various combinations of four statutes: The property must be taken for a public use.[5] The taking must be necessary to such use.[6] The use must be located in a manner compatible with the greatest public good and the least private injury.[7] The public interest must be found to require the taking.[8] By constitution and statute, the question of necessity must be answered by the jury when a private road is opened.[9]

The problem in this area is that often counsel and courts frame their pleadings and decisions in terms of one kind of necessity, and then argue or hold in terms of another kind. The purpose of this comment is to explore some causes of this confusion, and to point out a recent distinct shift in the judicial attitude toward necessity questions.

NECESSITY AND PUBLIC USE

Private property may be taken only for a public use.[10] It may not be taken for a private use without violating the Fourteenth Amendment to the Constitution of the United States.[11] While these fundamental propositions are undisputed, there have been divergent lines of authority defining the nature of a public use. There are two principal theories, neither of which, happily, has suffered a full logical extension of its basic premise.

[1]The Montana Statute, Revised Codes of Montana, 1947 (hereinafter cited R. C. M. 1947), § 93-9901, defines it as the "*right* of the state. . . ." For a statement of the implications of "right" vis-a-vis "power" see NICHOLS, EMINENT DOMAIN § 1.11 (3d Ed. 1964) (hereinafter cited NICHOLS.)

[2]There is some reason to question whether all property, not merely private property, is subject to exercise of the power, as when, for example, property already subject to a public use is taken for "a more necessary public use." *See* R. C. M. 1947, § 93-9904(3). Of course, the power to shift property from one public use to another may be an unanalyzed sovereign power treated as if it were the power of eminent domain for procedural convenience.

[3]R. C. M. 1947, § 93-9901; NICHOLS, § 1.11; LEWIS, EMINENT DOMAIN, § 1 (3d Ed. 1909).

[4]29A C. J. S. *Eminent Domain* §§ 31, 90 (1965).

[5]R. C. M. 1947, §§ 93-9901, 93-9902.

[6]R. C. M. 1947, § 93-9905(2).

[7]R. C. M. 1947, § 93-9906.

[8]R. C. M. 1947, § 93-9911(4).

[9]MONT. CONST., art. III, § 15; R. C. M. 1947, § 93-9923.

[10]Billings Sugar Co. v. Fish, 40 Mont. 256, 106 P. 565, 566-67 (1910).

[11]Komposh v. Powers, 75 Mont. 493, 244 P. 298, 301-02, *aff'd*, 275 U. S. 504 (1926).

The first is that "public use" is equivalent to "use by the public," that the property condemned must be taken for the use of the general public in all cases.[12] This narrow view, presently held in a minority of jurisdictions, could logically be extended to authorize a taking for any use of property, such as for a hotel, which is bound to serve the public. Such extension has not been made, however.

The broader theory, and that applied in Montana, is that "public use" can be equated with "public advantage" or "public benefit." It sanctions exercise of the power in aid of activities which are requisite for the development of the resources of the state,[13] which crate new sources of wealth and employment, or which promote the general welfare:

> **A public purpose . . . has for its objective the promotion of the general welfare of all the inhabitants or residents of a given political division . . . .[14]**

Under the broad theory of public use as public benefit, the question of what constitutes a public use is often a local question.[15] When the legislature has declared a use to be a public use, the courts are reluctant to interfere in the absence of a clear showing that the legislature was wrong.[16] The existence of public interest when the legislature speaks is well-nigh conclusive.[17]

Although the power is exercised in aid of basic segments of the economy, such as mining and the timber industry in Montana, such aid is justified as being for an industry, not an individual.[18] But public advantage is not the exclusive determinant of the right to exercise the power. That approach would lead to something little better than judicial nose-counting to determine whether the proposed use presented sufficient public advantage. The *character* of the use from which the benefit is to be derived controls. Thus, the fact that the public generally may use a road, not the extent to which the road is actually used, determines whether the use is public.[19] The courts and the legislature have not extended this broad theory of public use to every advantage the state might enjoy from the prosperity of specific industries, or to activities which come into conflict with less productive uses. The theory of contribution to the public welfare does not reach that far.

[12]NICHOLS § 7.2(1).

[13]Butte, A. & P. Ry. Co. v. Montana U. Ry. Co., 16 Mont. 504, 41 P. 232, 31 L. R. A. 299 (1895).

[14]Rutherford v. City of Great Falls, 107 Mont. 512, 86 P.2d 656, 658 (1939).

[15]"This knowledge and familiarity (with local conditions) must have their due weight with the state courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own state." *Billings Sugar Co. v. Fish, supra* note 10; NICHOLS, § 7.212(1).

[16]*Rutherford v. City of Great Falls, supra* note 14.

[17]Berman v. Parker, 348 U. S. 26, 32 (1954).

[18]State *ex rel.* Butte-Los Angeles Mining Co. v. District Court, 103 Mont. 30, 60 P.2d 380, 383 (1936).

[19]*Komposh v. Powers, supra* note 11.

Though attacks on takings as not being for a public use are occasionally made, generally the question litigated is necessity. That was true in *State ex rel. Livingston v. District Court*,[20] decided in 1931. In that case, the county was taking a strip of land for highway purposes.[21] In order to avoid building two bridges, the county proposed to change the channel of the St. Regis River by diverting it through the tract sought to be condemned. The defendant alleged that the land was not being taken for a public use.[22] But his argument was that there was no public necessity to support the taking, and that public convenience and the saving of the cost of two bridges was insufficient to justify it. Instead of argument on the character of the use for which the property was sought to be taken, counsel proceeded to argue the necessity of the taking for the use.[23]

In its opinion, the court proceeded through the labyrinthine ways of degree of necessity (absolute necessity v. convenience), greatest public good and least private injury, and the presumptions favoring the selection of routes made by condemnors. It then decided the issue presented, but not argued: that the taking for a channel change in this case was part of the highway project, and was, therefore, a public use.[24]

The root of this confusion can be found in two questions commonly, but inaccurately, phrased in terms of public use. (1) Is taking an amount in excess of that required a taking for a public use? (2) Is the use necessary? The latter question is discussed in the section following, and, as will be seen, it shades off into a question of whether the use will serve the public interest. The proper resolution of the "excess taking" question is relatively simple. Property can only be taken for a public use.[25] If the amount taken is in excess of that required for the use, it can be argued that it is not taken *for* a public use.[26] But it is the quantum, not the purpose for which it is to be taken, which is the ground for challenge. It is the excess, not the use, which is forbidden by law in these cases.

The failure to distinguish public use from necessity is not uncommon.

[20]90 Mont. 191, 300 P. 916 (1931).

[21]Undoubtedly a public use. State Highway Commission v. Danielsen, 146 Mont. 539, 409 P.2d 443, 447 (1965).

[22]*State ex rel. Livingston v. District Court, supra* note 20 at 916.

[23]*Id.* at 917: "[T]he only object of taking the particular strip 7 is for the purpose of saving expense and *is not necessary. There is no public necessity* but merely public convenience. . . ." (Emphasis supplied.)

[24]*Id.* at 919. The conclusion is not express, but seems to be fairly implied.

[25]*Billings Sugar Co. v. Fish, supra* note 10.

[26]10 R. C. L. 88: "Inasmuch as property cannot constitutionally be taken by eminent domain except for the public use, it follows that no more property shall be taken than the public use requires; and this rule applies both to the amount of property and the estate or interest in such property to be acquired by the public. If an easement will satisfy the requirements of the public, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require, and to the public, which should not be obliged to pay for more than it needs." *See also* Annot. 6 A. L. R. 3d 297 (1966) and 79 A. L. R. 515 (1932) as to taking the minimum necessary interest. Problems of excess takings as such are beyond the scope of this comment.

People v. Lagiss[27] is a leading case, and, typically, involves the question of excess condemnation. There, the defendant answered the complaint in condemnation by asserting that the taking of the whole of a certain parcel was not necessary for a highway project for which it was sought to be taken. But the court discussed the answer in terms of "lack of public purpose in the proposed use." The decision was criticized by a later case:

> But the cases [one of which was Lagiss] upon which the 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.[28]

When the matter came up again,[29] the court clarified its position:

> It appears, therefore, that to a considerable degree the trial court and respective counsel confused "necessity" with "public use." The character of the use, and nots its extent, determines the question of public use. (Citing cases.) It is necessary, therefore, to distinguish between the amount of land and the necessity for its condemnation, as contrasted with the proposed purpose for which it is to be used.[30]

In defense of the Montana court in *Livingston, supra,*[31] it might be said that counsel mistook the ground he was standing on, but the court, whether from confusion or charity, finally isolated and apparently decided the real issue at bar, though it did so in a context replete with ventures into questions of necessity rather than public use.

The distinction is important because public use is always a justiciable issue,[32] but the determination of the condemnor on the question of necessity may be made conclusive without violating any constitutional right.[33]

NECESSITY OF THE USE — THE PUBLIC INTEREST

In *State Highway Commission v. Yost Farm Company,*[34] the state sought to condemn land for a frontage road which was to parallel an interstate highway for a distance of some seven miles. The complaint filed was the usual interstate highway condemnation complaint. It declared that the taking was necessary for the project, and prayed that the court adjudge that the use was a public use authorized by law, and that the public interest required the taking of such land.[35] The answer denied

[27]160 Cal. App. 2d 28, 324 P.2d 926 (1958).

[28]People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598, 602 (1959).

[29]People v. Lagiss, 223 Cal.App.2d 23, 35 Cal.Rptr. 554 (1963).

[30]*Id.* at 38-39.

[31]*Supra* note 20.

[32]University of So. Cal. v. Robbins, 1 Cal.App.2d 523, 525, 37 P.2d 163 (1934).

[33]Rindge Co. v. Los Angeles County, 262 U. S. 700 (1923). R. C. M. 1947, § 11-977, provides that a city ordinance authorizing the taking of property for municipal and public use is conclusive as to the necessity of the taking.

[34]142 Mont. 239, 384 P.2d 277 (1963).

[35]*Id.* at 278.

that the taking was necessary to the public use.[36] Thus was the issue of the necessity of the taking for the use raised. But the evidence presented by the defendant was all to the effect that the *use* was not necessary.[37] The trial court acknowledged the issue in these words:

> In view of the fact that the evidence produced at the hearing, including the presumption which is the sole basis for plaintiff's case, is all to the effect that there is no necessity for the building of the road in question, I would have to ignore the evidence to find otherwise than I have done.[38]

On appeal, the state specified as error that the evidence presented by the defendant was immaterial and irrelevant to the question of necessity, but the court introduced its discussion of the case with this observation:

> Also, we observe that appellant State's position on appeal is inconsistent with its own proceedings. It sought an adjudication of public necessity, but now urges that the court was without authority to deny necessity.[39]

This statement clearly treats "necessity" and "public necessity" as equivalent. The court was proceeding on the basis of two statutes. Section 93-9905 provides that it must appear that the taking is necessary to the use (that was the matter raised by the defendant in his answer). Section 93-9911 provides that if the court is satisfied from the evidence produced at the hearing that the public interest requires the taking, it must make a preliminary condemnation order.

Having equated "necessity" and "public necessity," the court then by the use of these statutes equated "public interest" with "public necessity." Ergo, "necessity" in § 93-9905 equals "public interest" in § 93-9911. This dubious result is reached in spite of the provision in § 93-9911 that the judge has power to limit the amount of property sought to be taken, if in his opinion the quantity sought is not necessary. That provision clearly refers back to the required showing under § 93-9905 that there must be a showing that the taking is necessary to the use.

If "necessity" and "public interest" are not synonymous, as suggested by *Yost,* what meaning can be found for the latter? The State of California, from which the Montana eminent domain law was transplanted, does not have the counterpart of the Montana requirement that the court consider "public interest." But Washington does have such a statute. It has been applied in three cases. In *Neitzel v. Spokane International Ry. Co.*,[40] while discussing whether a railroad corporation could

[36] *Id.*

[37] *I.e.*, that the locality was already served by a network of roads, that the proposed road would not improve existing access, and that it would not benefit the public. *Yost, supra* note 34, at 278.

[38] *Id.* at 278.

[39] *Id.*

[40] 65 Wash. 100, 117 P. 864 (1911).

condemn land for a warehouse to be leased for private warehouse purposes, the court said:

> The incorporation or establishment of mills, warehouses, factories, the kindred enterprises is as a rule of public interest to a greater or less degree, and beneficial to the public welfare, but they do not necessarily come within the realm of that public use for which private property may be taken under the right of eminent domain. The terms "public interest" and "public use" are not synonymous.[41]

And in *State v. Superior Court*,[42] condemnation for electric generating plant purposes was being resisted on the ground, among others, that it was inefficient to plan to use 6 second feet of water to produce 80 horsepower when 550 could be produced by the use of 10 second feet. The court said:

> Whether the use is a public use, and whether the public interest requires the prosecution of the enterprise, and what lands, etc., are necessary for the enterprise, are all matters referred to the court for determination. Rem. & Bal. Code, § 925. From this results the doctrine which for lack of a better name may be called comparative necessity. If by the plan proposed the present and future public use and interest, as now apparent from the evidence, are met, that is as far as the court need now inquire. If in the future a condemnation is sought for a public use which demands the development of the full power of which the stream and lake are capable, the court has the authority under the statute to determine whether the public interest then requires the prosecution of such new enterprise. . . . That is to say, when the issue between the two plans is presented, the court, under the statute, will have the power to decide which of the two is demanded by the public interest.[43]

In the first of these cases, the court was wrestling with the problem of public use versus public interest, and in the second, public interest versus comparative necessity. Both have possible application in Montana. While the Washington court found that public use and public interest are not synonymous, it appears that at that time, the narrow view of public use was held—that use by the public is controlling, rather than public advantage or public benefit.[44] In this context, they are indeed discrete ideas, for they relate to different *kinds* of things; the one to the general public welfare, the other to a right in the public to the use for which the property is taken. But in Montana, where the definition of "public use" is different,[45] that distinction does not so clearly obtain. Montana has adopted the broad interpretation of public use—the use *is* related to public welfare. Thus the difference is one of degree, rather than of kind. Public interest would seem to be a branch of public use, unless some

[41] *Id.* at 869.

[42] 71 Wash. 84, 127 P. 591 (1912).

[43] *Id.* at 593.

[44] *Neitzel, supra* note 40, at 869:
"There must be a general public right to a definite use of the property, as distinguished from a use by a private individual or corporation which may prove beneficial or profitable to some portion of the public." *Compare* the quotation from Rutherford v. City of Great Falls, 107 Mont. 512, 517, 86 P.2d 646 (1939) in the text at note 14 *supra*.

[45] See text at notes 13, 14, *supra*.

other meaning has been attached to it. If it is a question of public use, it is required to be determined by § 93-9911(2); if a question of comparative necessity, it is already covered by § 93-9904(3). This leads to the inquiry of whether, since the legislature used three terms,[46] it intended some separate meaning for each.

A third Washington case, *State v. Superior Court*,[47] dealt with public interest in terms of public necessity, as did the Montana court in *Yost*.[48] The Washington court said:

> It is contended on behalf of realtors that it does not appear that the public interest requires the prosecution of the enterprise. . . . So we have here a situation which we think does not warrant us in holding that the trial court erred in deciding that the use contemplated "is a public use and that necessity exists therefor"; this being the language of the finding of the trial court embodied with other findings in the recitals of adjudication of public use and necessity.[49]

In this context, *Yost* seems to mean that the court can determine the necessity of the use as measured by the degree of public utility or quantum of anticipated use by the public. That kind of test of public use seems to be foreign to our law, which has adopted the "public advantage" definition, as opposed to the narrow "use by the public" concept.

If, however, that is the proper conclusion, it does not appear clearly in the opinion why the court felt obliged to discuss the necessity of the taking for the use at all.[50] If the necessity of the use itself is being decided, there is no point in also establishing whether the particular property proposed to be taken would be necessary for the forbidden construction. Nor does its discussion of the degree of necessity[51] fortify the conclusion reached, for the Montana rule requires that the taking be "reasonable, requisite, and proper *for the accomplishment of the end in view*, under the peculiar circumstances of the case."[52] This language clearly indicates a consideration of whether the taking is appropriate for the end (construction of a road), not whether the end itself is proper.

Two California cases[53] are cited in a quotation from *Livingston*,[54] as authority for the proposition that the evidence should show that the land is reasonably required for the purpose of effecting the object for which it is condemned.[55] One case involved the necessity of taking particular

[46]"Public use" (§ 93-9902), "more necessary use" (§ 93-9904(3)), and "public interest" (§ 93-9911(4)).

[47]155 Wash. 651, 286 P. 33 (1930).

[48]*Supra* note 34.

[49]*Supra* note 47, at 36.

[50]A fact required by R. C. M. 1947, § 93-9905(2), before condemnation.

[51]*Yost, supra* note 34, at 279.

[52]*Id.* Emphasis supplied.

[53]Spring Valley Water-works v. Drinkhouse, 92 Cal. 528, 28 P. 681 (1891); City of Santa Ana v. Gildmacher, 133 Cal. 395, 65 P. 833 (1901).

[54]*See* section "Necessity and Public Use," *supra*, and note 20 *supra*.

[55]The cases do support that proposition: "There is no doubt of the proposition that before land can be taken for a public use, it must appear that the taking is necessary

land for a reservoir,[56] the other, the necessity of taking particular land land for a sewer.[57] In neither case was the question of the necessity of the use at issue.

The *Yost* court also cited a Montana case in connection with its discussion of public necessity:

> In a later case, State v. Whitcomb, 94 Mont. 415, 22 P.2d 823, the court, while holding that the evidence established the public necessity of the proposed public improvement, reaffirmed State ex rel. Livingston v. District Court, supra, and Northern Pacific R. Co. v. McAdow, supra.[58]

An examination of that case shows that the issue was whether the power of eminent domain ought to have been invoked, because of an insufficient showing of an attempt to purchase the land in question. The necessity of the particular route was called into question, (the necessity *to* the use) but the issue of whether there should be a road at all (the necessity *of* the use) was not at issue, and was not discussed.

There is nothing in the record in *Yost* to indicate that given the necessity of the use, the taking of the particular property would not have been reasonably necessary for that use. Yet the discussion of necessity in the opinion is almost wholly in terms of statutes and holdings on that very point. When the matters relating to the necessity of the taking to the use are stripped away, because they are irrelevant to what was actually decided, little, if anything, remains by way of argument or reasoning. *Yost* stands for the proposition that the district court may decide that there is no necessity for the proposed use, because that is what was actually decided. But in coming to that decision, the court proceeded through a discussion which suggests only that the district court has power to decide whether a particular taking is necessary to a use, not whether the use is necessary. The quantity of the irrelevant material may suggest that the court failed to distinguish the two. Whether it may, upon reconsideration, hold otherwise if the distinction is made clear, is an open question.

NECESSITY AND THE GREATEST PUBLIC GOOD.

Two cases decided in 1965 turned on the question of whether the greatest public good and least private injury requirement of the statutes[59] was served in a highway relocation. These cases, decided some ten months apart, mark a turning point in the judicial attitude toward the plight of

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for such use. . . . The evidence must be sufficient to show that the land is reasonably required for the purpose of effecting the object, or carrying on the business, for which plaintiff was organized.'' *Spring Valley Waterworks, supra* note 53. ''The evidence should show that the land is reasonably required for the purpose of effecting the object of its condemnation.'' *City of Santa Ana, supra* note 53.

[56]*Spring Valley Water-works, supra* note 53.

[57]*City of Santa Ana, supra* note 53.

[58]*Yost, supra* note 33, at 279.

the landowner. From a conservative unwillingness to interfere in route selections in the first case, the court moved to a more aggressive concern in the second.

State Highway Commission v. Crossen-Nissen Co.[60] was first. The State Highway Commission had proposed bypassing the City of Harlem, Montana. The bypass would shorten, straighten and level the highway, and would therefore save users some $39,000 per year in vehicle operating costs. For the landowner, it was argued that: reconstruction of the existing route would be cheaper, the economy of Harlem would suffer, less than one-half of the traveling public would benefit from the proposed bypass, and the tax base of the county would be reduced.[61] In disposing of these arguments, the court noted the countervailing factors listed above, and concluded:

> The evidence of hardship and the fact that another feasible route, over which the highway could be built, existed did not supply the clear and convincing proof required by this court before it will substitute its judgment for the judgment of an agency especially qualified for making such decisions.[62]

But then came *State Highway Commission v. Danielsen,*[63] where the commission had proposed to reroute the Poplar-Brockton highway. Three alternative routes were available—the existing (South) route, and the North and Middle routes. A hearing was held only on the Middle route. After surveys indicated that the North route would entail a slightly smaller construction cost,[64] it was selected. The South route was given no more than hasty consideration.[65] The lower court found that the route selected was not located in a manner most compatible with the greatest public good and least private injury.[66] The Supreme Court identified the issue before it on appeal as:

> . . . that of necessity of the proposed taking in light of the requirement that it be compatible with the greatest public good and least private injury.[67]

Counsel had argued that the three routes were nearly equal—so much so that "had the Commission merely drawn straws, any one of the three routes could legally be sustained."[68] That admission was condemned by the court as proof of arbitrary and capricious action in the light of the test of the greatest public good and least private injury. The court said

[59]R. C. M. 1947, §§ 93-9906, 32-1615.
[60]145 Mont. 251, 400 P.2d 283 (1965).
[61]*Id.* at 285.
[62]*Id.* at 286.
[63]146 Mont. 539, 409 P2.d 443 (1965).
[64]See Tippy, *Review of Route Selections for the Federal Aid Highway Systems,* 27 MONT. L. REV. 131 (1966).
[65]*Danielsen, supra* note 63, at 445.
[66]*Id.* at 445.
[67]*Id.* at 446.
[68]*Id.*

that, if the routes are equal, the public good would be served equally well by any, and that therefore, the question to be considered was which caused the least injury. The court concluded that, if the present route were equal to the other two, it should be selected because it involved the least private injury.[69]

In *Crossen-Nissen*,[70] the court had held that the discretion reposed in the State Highway Commission would be disturbed only on a showing of abuse. In *Danielsen*,[71] that discretion disappeared behind the screen of a disputable presumption that the location had been properly made. The court spoke of "abuse of discretion and arbitrary action."[72] Yet it distinguished *Crossen-Nissen* (where it found no abuse on substantially the same kind of evidence) on the ground that the private injury there was less. It stressed that there, only one landowner and one-half mile of right-of-way were involved, while in *Danielsen*, there was an unspecified number of landowners and 14.2 miles of right-of-way. The distinction is strained. Where will the line be drawn? At several owners in a short taking? At a single owner of a larger tract? The opinion gives no clue to whether the distinction concerns primarily the personal trauma of condemnation, or the size of the project, or some unidentified composite of both. Be that as it may, it seems clear from the two cases that the Commission has no more on its side than a disputable presumption that it acted correctly, and that presumption "fades away in the face of contrary facts."[73] A bare preponderance of evidence will suffice to wash it away.[74] If the following is any harbinger, the court may go even further in limiting the discretion of condemnors:

> **The courts of this state are by statute charged with the duty of protecting private property both from the eager slide rule of the engineer-architect and the arbitrary decision of an administrative board that enforces his action.[75]**

CONCLUSION

All of this suggests that, under existing statutes, the court will decide these questions: Whether a use is necessary, whether a taking for a use is necessary, and whether a taking for a use is so located as to occasion the greatest public good and the least private injury. It may do so without carefully distinguishing what it is deciding.

All of the decisions are on questions of necessity. A negative answer to any one of them will prevent condemnation. In developing its doctrines, the court has shifted from the hands-off attitude in *Livingston*

[69] *Id.*
[70] *Supra* note 60.
[71] *Supra* note 63.
[72] *Id.* at 446.
[73] *Yost, supra* note 34, at 282.
[74] *In re* Wray's Estate, 93 Mont. 525, 19 P.2d 1051, 1054 (1933).
[75] State Highway Comm. v. Wheeler, 419 P.2d 492, 496 (Mont. 1966).

and *Crossen-Nissen*[76] to the manifest hostility of *Wheeler*.[77] By shifting its emphasis from the protected discretion of the condemnor in *Crossen-Nissen* to a mere disputable presumption in favor of the condemnor in *Danielsen*,[78] the court has considerably enlarged the power of reluctant landowners to resist condemnation.

Whether the result is good is open to debate. The four principal cases were all highway location cases. Each was decided on a different basis—necessity of the taking, necessity of the use, discretion of the condemnor, presumption of proper location. This shifting may indicate that the court has not yet settled on a rationale for necessity holdings. It may also indicate, of course, that there are at least four proper grounds for such holdings.

It is clear that necessity is not inherently a judicial question. The decision of the condemnor may be made conclusive without violating the Fourteenth Amendment.[79] Neither does it appear that the framers of the Montana constitution intended it to be a question for the courts in all cases. Article III, § 14, is silent on the question of who shall determine necessity. But, significantly, the very next section provides that, in the case of a private road, ". . . the necessity of the road. . .shall first be determined by a jury. . . ." These contrasting provisions must have been written in light of each other. If so, it may be inferred that the provision for a determination in one case and not the other indicates an intention to keep the question out of the hands of the courts except as specified.

There are many reasons why the court should not be permitted to pass on the question of the necessity of the use. Modern systems of highway construction, for example, often involve more than just *this* taking for *this* particular segment of highway. 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 trial is not the time for it, because trial is the end of a process begun long before. A trial court in one county may find necessity up to the county line, while the court in an adjoining county may not find it in the extension. Someone finally has to judge, and it seems better in many ways to have that one by the person in control of the whole, so long as his decisions are checked by the ordinary prohibitions against arbitrary, capricious or malicious abuse of discretion.

[76] *Supra* notes 20, 60. "The court also pointed out that it was not the function of the judiciary to determine as an engineer the best place for the construction of a highway."

[77] *Supra* note 75.

[78] *Supra* note 63.

[79] Rindge Co. v. Los Angeles, 262 U. S. 700, 709 (1922): "Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment."

It is in the nature of the judicial process that a court can only entertain specific cases. It has to decide whether *this* taking is necessary. But before contested cases reach the stage of litigation, it is likely that many parcels of the same project will have been acquired by purchase. What has been done must be undone. An intermittent right of way is no right of way at all.

These factors should be considered in striving to find some acceptable middle ground between the fearsome "eager slide rule" and the delay, expense and uncertainty which result from the present state of the law in Montana. The court seems to be on the road toward substituting a tyranny of the condemnee for what it believed was a tyranny of the condemnor. Its position should be thoughtfully reviewed.

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