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EXCESS CONDEMNATION A SOLUTION OF SOME PROBLEMS OF URBAN LIFE

Francis Hart

THE aim of this paper is to familiarize the reader in a general way with that exercise of the power of eminent domain which has become known as excess condemnation.

The first part of the paper shows the constitutional safeguards of private property and the methods by which private property may legally be taken for public use. A sketch of the Wisconsin procedure in condemnation is included.

The second part defines excess condemnation, gives reasons for the practice and cites specific instances where it would be used to advantage.

The third part is devoted to the legal history of excess condemnation and a resumé of the status of the question at present.

There is a short conclusion.

SAFEGUARDS ON RIGHT OF PRIVATE PROPERTY

Eminent domain is the right by virtue of which governments may take property from the individual for the use of the community. The duty of the state to compensate the private owner for property taken in an exercise of the right is recognized by all civilized countries; indeed, not to recognize such a duty would stamp a state as despotic.

To guarantee the fulfillment of the condition of compensation in public takings, we find in our own constitution1 the provision that "no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation," while in France, Belgium and Germany the fundamental law will be found to contain much the same safeguards.2

A further protection of the right of property in the United States is found in a constitutional amendment3 enacted subsequent to the fifth, which says, "no state shall deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law." In the United States, therefore, the private owner has a double protection thrown around his right of ownership: one saves it from abuse by the Federal government and the other from the state.

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1 U. S. Constitution, Amendments, Art. V.
2 The Law of City Planning and Zoning—Williams, page 13.
3 U. S. Constitution, Amendments, Art. XIV.
Not satisfied with this protection, the people of many of the states have incorporated similar provisions in the constitution of their own state, "The property of no person shall be taken for public use without just compensation therefor."

Many cases interpreting these constitutional clauses have been heard, most of them involving the questions of what is a public use and what is the taking of property.

It is axiomatic that the state needs buildings in which to carry on its functions, that it needs streets and roads for public travel, etc., but it is not self-evident that the state needs to set aside tracts of land for game preserves, or to limit the size and style of buildings to be built around a public building or along a certain street to avoid disfiguration.

It has become the settled law, however, that the doing of any act for the promotion of the public health, safety, morals and general convenience and prosperity is a public use of property taken for the purpose. It must be understood that public use need not imply an actual using of the property; it may consist simply of negativing a private use which would be detrimental to the public good.

To determine what is a "taking" of property it is necessary first to understand what is meant by property.

Property is a right. In the case of land it may be an estate for years, for life, in fee, a right to travel over it, to dig into it and take away certain minerals, or merely to have the air above it undisturbed by any human agency.

Absolute or complete ownership is the sum total of all the possible rights which an individual might legally have to the possession, use and enjoyment of his land. How difficult it would be to enumerate these is instantly apparent.

When any of the rights of the owner have been invaded, abridged or destroyed there has been a "taking."

**Takings Generally**

There are two general theories under which takings of private property occur, i.e., under eminent domain and under police power.

The term police power has been variously defined. Perhaps the most easily understood definition is that it is "A wide range of particular unexpressed powers . . . . affecting freedom of action, personal conduct and the use and control of property."

It may be said to be the power of sovereignty, inherent in the state which remains over and above the restrictions and powers of the constitution and statutes.

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*Wisconsin Constitution, Art. I, Sec. 13.*

*People v. King, 110 N.Y. 418.*
Under the police power of the state many takings occur for which no compensation is made, for instance, the building inspector for the City of Milwaukee recently ordered some sixty buildings torn down under the code provisions. No compensation is made to the owners of these buildings, in fact, if they refuse to comply with the order the inspector may have the work completed and charge the expense as a special assessment against the real estate.

It is conceded that any legislation under the police power is invalid which violates the Constitution of the United States or the state constitution and it would seem that this act was purely confiscatory and, as such, contrary to the Fourteenth Amendment of the United States Constitution, as well as the thirteenth section of Article I of our State Constitution. The courts, in interpreting the Constitution, however, have always been influenced by history as well as by usage and custom.

Justice Holmes has this to say, "If the Fourteenth Amendment is not to be a greater hamper upon the established practices of states in common with other governments than I think was intended, they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens of a part of the community are somewhat increased." "The traditions and habits of centuries were not intended to be overthrown when this amendment was passed."

While it has been well said that the difference between a taking under eminent domain and one under the police power is merely one of degree, there is a vast difference in the methods of the takings.

Under the police power it is simply necessary that a condition exist which is contrary to the general health, safety or welfare of the community at large. Once the existence of such a condition is established by those having authority to determine the fact, i.e., health department, police department, etc., an order issues demanding the remedy.

**Wisconsin Procedure on Takings**

For takings under eminent domain, however, there has been set up by the legislature a series of statutory requirements which must be met before the actual taking occurs.

A verified petition setting forth a description of the property, the purpose for which it is to be used and the names of the owners or occupants shall be presented to the county or circuit judge of the county in which the property is situated by anyone desiring to condemn property.

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6 Art. 29, Sec. 352, Milwaukee Code, 1914.
7 Art. 29, Sec. 353, Milwaukee Code, 1914.
9 Wisconsin Statutes, Sec. 32.04.
EXCESS CONDEMNATION AS A SOLUTION

The judge, upon receipt of the petition, will set a date for a hearing on it, notice of which must be served upon all persons interested at least twenty days in advance of the time fixed.\textsuperscript{10}

At any time within the twenty days' time of notice any person interested in the property may answer the petition, but in any event the court will impanel a jury to determine the necessity of the taking.\textsuperscript{11}

Upon a proper showing of the necessity of the taking the court will appoint three freeholders a commission to appraise the property to be taken and fix the compensation for such property.\textsuperscript{12}

The commissioners so appointed will fix a time and place of meeting and shall notify the persons interested at least ten days previous to the time of meeting. Evidence shall be heard as to the value of each separate estate and the damages sustained and fix the compensation.

Upon arriving at a report, the commission shall publish notice that the same has been made and that it is subject to review and correction for at least twenty days. During the time of notice the commission will hear any and all persons interested in making objection and may alter, correct or modify the report as it thinks just at the time.

Upon the expiration of the time of notice, the commissioners shall file the report signed by themselves, together with the testimony taken, with the clerk of the circuit court of the county.\textsuperscript{13}

Any party to the condemnation proceeding may appeal to the circuit court by filing a notice of appeal within thirty days of the filing of the commissioners' report. The clerk will enter the appeal as a case pending in such court with the parties making the appeal as plaintiffs and as defendants the parties seeking to condemn the property, and the action shall proceed as any action brought originally in the circuit court.\textsuperscript{14}

The report of the commission shall be recorded in the judgment book of the court and the persons condemning the property may pay to the clerk of the court or to the persons from whom the property is taken the sum fixed by the commissioners and enter upon the property for the purposes for which it was condemned.\textsuperscript{15}

From the preceding sketch of the statutory process of condemnation it is at once apparent that every precaution is taken for the protection of the property owner against a wrongful use of the power of eminent domain.

\textsuperscript{10} Wisconsin Statutes, Sec. 32.05.
\textsuperscript{11} Wisconsin Statutes, Sec. 32.07.
\textsuperscript{12} Wisconsin Statutes, Sec. 32.11.
\textsuperscript{13} Wisconsin Statutes, Sec. 32.10.
\textsuperscript{14} Wisconsin Statutes, Sec. 32.11.
\textsuperscript{15} Wisconsin Statutes, Sec. 32.12.
DEFINITION OF EXCESS CONDEMNATION

Excess condemnation is the name applied to that practice under the power of eminent domain which permits a municipality to acquire more property than is actually needed for the given purpose.

The proponents of the practice maintain that there are many cases in which the land adjacent to that required for the principal purpose should be taken for purposes incidental to the main object.

The name “excess condemnation” is misleading and perhaps unfortunate since the term “excess” in itself implies an abuse of the right of condemnation. Because of the opposition which the practice has met in some quarters, it has been suggested that it be called by the less harsh sounding name of “incidental condemnation.” However, the former is the name by which the practice is most generally described.

There are those who insist that in order to have excess condemnation it is necessary that the municipality resell the land which is not actually used for the principal purpose of the taking. Their argument is that so long as the municipality retains the title to the property taken it is in theory, if not in fact, a part of the principal purpose and cannot, therefore, be denominated as being in excess of that of which it is a part.

There is no quarrel here with those who entertain this view, although we do not agree that a resale of property taken is a condition precedent to a taking under the practice of what is known as excess condemnation. The conception of the writer is that excess condemnation results whenever more property is taken under the power of eminent domain than is actually required for the principal purpose of the taking, regardless of the ultimate disposition of the part which is unused for the principal enterprise.

THREE REASONS FOR EXCESS CONDEMNATION

There are three important reasons for an exercise of excess condemnation. The first is that it affords a solution of the problem of lot remnants, where a narrow street is widened or where a diagonal street is laid out through already plotted property. The second is that it can be employed for the protection of the beauty and usefulness of public improvements. The third and least important is that it affords the municipality an opportunity of recouping, through the sale of unused property, a part of the cost of expensive improvement.

THE PROBLEM OF REMNANTS OF LAND

Having said that the practice of excess condemnation is an effective solution to the problem presented by remnants, it would, perhaps, be well to say something of that problem.
Small, irregular shaped remnants bordering an improvement tend to defeat the purpose of the improvement itself. They are usually small and irregular in shape so that the owner cannot erect a suitable improvement and thus reap for himself the benefit to be derived from proximity to a public improvement. The owner behind the remnant who should be bordering on the improvement is kept from enjoying the benefit because the remnant shuts off his access to the street. Persons having in view the investing of money in a home or in a business place will hesitate to invest in a locality which invites the sort of improvement these small pieces attract. As a result the widened thoroughfare which it was hoped would attract the better class of buildings is bordered by unsightly one-story shacks and billboards.

Leaving remnants of parcels condemned results in a direct financial loss to the municipality. When a part of a lot is condemned and an unusable (to the owner) part is left, the municipality invariably is forced to pay the value of the entire lot although it only gets a part. That the owner should be paid for his entire holding when what is left to him is unusable is fair enough, but, having paid for the property, there is no equitable reason why the municipality should not be permitted to make use of it. In this connection the problem of assessments may be mentioned.

The general practice is to assess benefits against property for improvements made. While the procedure varies in different jurisdictions, the principle is the same. A remnant lying between adjoining property and the improvement will have a tendency to reduce the amount of the assessment which can equitably be made against the adjoining property with a resulting loss to the municipality.

Another factor of loss to the municipality, more speculative, perhaps, than those mentioned but probable, nevertheless, is ultimate loss in taxes. If, as it has been suggested, the improvement attracts the sort of buildings spoken of previously, land values, which ordinarily would increase as a result of the improvement, will be apt to remain at the original level or even decrease, with a consequent loss to the city.

As an indication of what has been the experience of some communities with the problem of remnants, it is desired to quote from the Massachusetts Committee of Eminent Domain where they say as to conditions in Boston:

It often happens that the owners of these remnants, desirous of deriving some income, erect temporary structures, unsuited for proper

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36 Mr. Lawson Purdy, President, Board of Commissioners of Taxes and Assessments of New York City.
habitation or occupancy. Such structures are frequently made intentionally objectionable, both in appearance and the character of their occupancy, for the purpose of compelling the purchase of the remnants at exorbitant prices. The result is that a new thoroughfare, which should be an ornament to the city, is frequently for a long period after its construction disfigured by unsightly and unwholesome structures to the positive detriment of the public interests.

Herbert S. Swan, in a report on Excess Condemnation for the Committee on Taxation of the City of New York, has this to say:

Since each parcel, by the mere fact of its adjacency, commands the values of the neighboring plats, every owner becomes, as it were, a monopolist. Knowing the strategic position of his own remnant and that its union with any other would immediately, without any effort on his own part, result in a greater value than the sum of the two separately, each proprietor over-estimates the true importance of his own plot and shrewdly bargains to get not only the proportion that his own parcel contributes to this, but also as much more as he is able to wring from the purchaser. Not succeeding in his designs by legitimate means, the owner, if he be unscrupulous, sometimes erects so objectionable a building on his land, or puts the land to such a use as practically to coerce the adjoining owner into either purchasing it at an exorbitant price or selling his own at a great sacrifice.

What occurs when street widening is carried out under the plan of condemning only that property which is used for the street is described here by the Chicago Bureau of Public Efficiency:

On Michigan Avenue the city (Chicago) took all, or parts of lots having a total frontage of approximately 3,000 feet. This does not include property taken for plazas. When the improvement is actually completed, along this 3,000 feet, there will be lot areas with a frontage of 617 feet, having depths varying from five feet to fourteen feet. When it comes to diagonal streets, the same authority says further:

When it comes to diagonal streets the situation is likely to be even worse. The proposed Ogden Avenue extension (Chicago) which is to be cut through as a new diagonal street, if carried out according to the present survey, will leave ninety-three remnants (with a frontage of approximately 3,300 feet on the proposed new street) that will be too small or too irregular in shape to be available for building purposes.

Loss in Assessments

As a specific instance of loss to the municipality in assessments where remnants are left, it is desired to quote again from the report of the Chicago Bureau of Public Efficiency.

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EXCESS CONDEMNATION AS A SOLUTION

By a comparison of the awards made and confirmed by the courts, it is shown that, in the opinion of the courts, property on Wabash Avenue is little less than one-half as valuable as property on Michigan Avenue at the point in question.

The lot at the northeast corner of Twelfth Street and Wabash Avenue (across the street from the property in question) was assessed at $16,000 for benefits, while the lot of similar size at the northwest corner of Twelfth Street and Michigan Avenue was assessed $32,000. At the same ratio of values for a thirty-two-foot lot on the corner of Wabash Avenue and Twelfth Street as widened, there would have been assessed a benefit of approximately $30,000, in view of the assessment of $60,000 for benefits on the new Michigan Avenue corner. As a matter of fact, because the property on Wabash Avenue consisted of two parcels, one a three-foot strip along the corner and the other inside property, the assessment of benefits was as follows: Twenty-five feet south of the three feet remaining on the corner of Wabash and Twelfth Street as widened—$11,000; four feet at the rate of $3,200 per twenty-five-foot frontage—$500; making a total of $11,500. And there was the three feet remaining on the corner for which there was no assessment of benefits, but instead an award for damages of $9,000, so that the net assessments for benefits was $2,500 instead of almost $30,000, which it might have been had the city been able to take the three-foot strip and for which it had paid full value in damages.20

RECOUPMENT

The principle on which the element of recoupment is based is that the municipality as a whole should reap some of the benefits flowing from an expenditure of public money in a costly improvement rather than have the major portion of such benefit accrue to a comparatively few land owners in the vicinity of the improvement.

Where there is a provision for assessment of benefits or of increment taxes as provided by most of our states, there can be at best but a poor case made for the employment of recoupment by the sale of land.

In European countries the plan has worked with varying degrees of success, but nowhere in this country has it been considered of more than secondary importance.

The experience of France employing the plan during the Haussmann developments, whether due to defective administration or not, shows that the net result "insofar as it was used in connection with the building of these 56.25 miles of streets, was, therefore, to recover to the city about one-fourth of what the city had paid in the first place for the land." 21

Every experience of the French in this regard was not so unhappy, however. The Rue de L'Opera was completed in 1876, here, "judging from its previous experience the city expected to pay $13,200,000 to the owners of the expropriated property and to recover through the sale of surplus lands, $4,200,000. Contrary to expectations, the city was obliged to pay but $10,800,000 for the land taken and the net cost of the undertaking was reduced to $6,600,000."22

After several disastrous attempts due to an unwise administrative policy, the cities of Belgium have arrived at a point where recoupment through the sale of surplus lands has become the accepted mode of financing municipal projects. It must be noted, however, that the Belgian practice is limited to a type of project for which recoupment is peculiarly adapted, namely, projects in which the area condemned stands in great and immediate need of rehabilitation.

The British experience in recoupment, as practiced by the Metropolitan Board, is little less gratifying than that of the French, the reasons given being, first, that the Metropolitan Board as a matter of policy paid more for the land taken than it was actually worth, adding 10 per cent to the appraised market value of the land; second, there were exceedingly high prices paid for trade interests disturbed; third, the corruption of the Board itself.

Under the London County Council, which followed the Metropolitan Board of Works, the project of the Kingsway was undertaken. This involved the construction of a thoroughfare through the heart of London connecting Halborn and the Strand. The street is three-fifths of a mile long and 100 feet wide, the entire project involving about twenty-eight acres, about fifteen of which will be resold or leased as building sites.

The project was opened in 1905 and the sale and leasing of lots has continued since 1902, but because of the leases for long terms it is not possible to say accurately how effective the recoupment will be. An accounting made in 1908 placed the gross cost at £5,136,150, with an estimate that the ultimate recoupment would keep the net cost at £774,200, the figure originally set.

There has been no American city which has used recoupment as a means of financing a public project as have the Belgian cities, nor is there a great deal of data available to show where recoupment has been used to any great extent to reduce costs.

No attempt will be made here to justify excess condemnation on the basis of the recoupment value of the surpluses; with statutes providing for benefit assessments or increment taxes the necessity for recoupment

EXCESS CONDEMNATION AS A SOLUTION

becomes almost negligible. However, in considering excess condemnation as a whole, the incidental value to the community of the power of recoupment must not be lost sight of, nor should the community be loathe to exercise its power to realize on the benefits it has created when a situation arises such as that created by the Kingsway where the greater part of the values of the land was traceable directly to the improvement.

THE REMEDY IS EXCESS CONDEMNATION

It is urgent that the municipality should have some control over the surroundings to public improvements into which public moneys have gone in order to afford assurance to the great mass of tax payers that the value of the improvement will not be impaired by the greed of a few.

After the examples that were cited it is surplusage to say that to widen a street for purposes of beauty and utility and leave it bordered with small useless remnants of lots in the hands of private owners is little better than to have left it alone, in many cases worse.

To spend a fortune in an imposing public building only to have it skirted on all sides by buildings of haphazard design and construction, increasing the fire hazard and completely destroying its beauty, is not a project for which tax payers will readily open their purse strings.

To set aside a tract of land at considerable expense for a public park and recreation spot only to have it surrounded by catch-penny resorts and refreshment stands is not the goal toward which recreation councils and boards of park commissioners have been striving.

The only avenue of control which is open to the municipality is through the power of eminent domain and the acquisition of title to property bordering its improvements. This is excess condemnation.

If the municipality has the power of excess condemnation, it can acquire enough land along a thoroughfare to be widened so that by replatting, suitable building lots may be provided, with the otherwise unsightly and useless remnants put to a legitimate use.

If the improvement is a public building of some importance, the land immediately adjacent to it may be acquired and resold with restrictions as to the kind and quality of building to be erected on it, thus preserving to the people that for which their money has been spent, a public building worthy of pride.

Should the improvement be a park or recreation spot, the adjacent land may be restricted as to use, preserving the place forever from the encroachments of that gentry which preys upon people on holidays.
LEGAL HISTORY OF EXCESS CONdemNATION

Excess condemnation has been used in France, Belgium and Great Britain for a great many years.\(^2\)

The first instance of its use in this country was in New York, where, in 1812, the legislature authorized the City of New York to condemn remnants left in cases of street and park openings. The land condemned in this manner was sold promptly with the adjoining owner given the first opportunity to buy.

In 1834 this practice was declared unconstitutional by the New York courts\(^4\) and nothing further was done until 1903 when an attempt was made to secure passage of an excess condemnation law in Massachusetts.

A committee of the Massachusetts legislature, sent to Europe to study excess condemnation there, had this to say in its recommendation:

It has already appeared . . . . that the present system of laying out new streets or widening or altering existing ones, under which only the land actually needed for the street is taken, is, especially in those parts of cities which are covered with existing buildings, productive of serious public disadvantages and a brief consideration of the matter is sufficient to show that this difficulty is inherent in the system itself, and must persist unless some modification of that system can be devised.\(^5\)

The Massachusetts legislature failed to pass the statute recommended, but passed a law allowing only the condemnation of the remnant itself when it was too small for independent development and its elimination by resale to adjoining owners.

A later legislature asked the opinion of the Massachusetts Supreme Court as to the constitutionality of a law allowing excess condemnation. The opinion rendered was that such a law would be unconstitutional.\(^6\)

In 1911, the Massachusetts Constitution was amended by the addition of Article XXXIX of Amendments allowing for the passage of such a law.

Following quickly upon the amendment of the Massachusetts Constitution, came amendments and statutory provisions allowing excess condemnation in many states. Among these was Wisconsin in 1912, with Article XI, Sec. 3a, of the Constitution, which provides:

The State or any of its cities may acquire by gift, purchase or condemnation, lands for establishing, laying out, widening, enlarging, extending and maintaining memorial grounds, streets, squares, parkways, boulevards, parks, playgrounds, sites for public buildings and reserva-

\(^2\) William's Law of City Planning and Zoning, p. 65.
\(^3\) Matter of Albany St. II Wend. 149.
\(^4\) Massachusetts House Document No. 288, 1904, p. 4.
\(^5\) Opinions of Justices, 204 Mass. 607.
tions in and about and along and leading to any or all of the same; and after the establishment, layout and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use of such real estate, so as to protect such public works and their environs, and to preserve the view, appearance, light, air and usefulness of such public works.  

LEGAL STATUS OF EXCESS CONDEMNATION

The question of whether or not excess condemnation will be held constitutional in this country depends on whether or not the condemnation can be fairly said to be for a public use. The purposes for which excess condemnation is used, elimination of remnants, enhancement of beauty or safety, protection of light and air, etc., are all purposes which are now generally recognized as public uses.

The only judicial statement on the constitutionality of excess condemnation as such is in the Massachusetts Opinions of the Justices and in a case in Pennsylvania.

The opinion of the Massachusetts justices are not given the weight of judicial decisions since under their constitution they are merely acting as advisers for the other branches of the government and not in any judicial capacity when rendering such opinions.

The Pennsylvania case turns on the ground that a taking by condemnation and a resale of the property so taken, reserving only an easement for light and air, is not a taking for public use and, therefore, contrary to the constitution, the conception of the court being that there must be an actual user of the property by the public to constitute a public use.

Such a position as that taken by the Pennsylvania court seems untenable in the face of the recent decisions of the United States Supreme Court in the cases where it held that state statutes for the condemnation of land for private use, such as mining and irrigation, were constitutional on the ground that the private use may be so conducive to public prosperity and well-being as to be a public use to secure which the power of eminent domain may be exercised.

Giving full weight to the older conception of what is a public use it must be remembered that in most of the legislation authorizing excess condemnation there is an interest in the land taken which is retained by the municipality. When the land is resold there is an easement kept

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Wisconsin Constitution, Art. XI, Sec. 3a.

Opinions of Justices, 204 Mass. 607 and 616.


by the municipality for light and air, to preserve the view, etc., and it is now recognized that such easements are subject to be taken by eminent domain.\textsuperscript{31}

As has been noted, the cases which have been heard on the constitutionality of excess condemnation have all arisen in state courts interpreting state statutes passed without constitutional amendments providing for excess condemnation.

In view of the recent drainage district cases and the general trend toward liberality in construing what are public uses, there seems to be little to fear in the United States Supreme Court by the friends of excess condemnation.

Especially is this true in states where a constitutional amendment has authorized the practice. The supreme court has never yet held a use to be private which the state legislature and state constitution, as interpreted by the courts, had held to be public.

In the words of Chief Justice Marshall:

It is but a decent respect to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt.\textsuperscript{32}

And again, "It has been truly said that the presumption is in favor of every legislative act, and that the whole burthen of proof lies on him who denies its constitutionality."\textsuperscript{33}

The necessity for a wider range in the exercise of eminent domain has become more and more apparent as the complexity of urban life has increased. Things which a half century ago were strictly within the province of the individual to provide for himself are now accepted as duties on the part of the municipality to do for him. With the paternalistic idea becoming more pronounced in governmental affairs, it naturally follows that the powers of the governing bodies will grow broader. With all the development in this and similar lines in mind, it seems only a matter of a short time until the principle of excess condemnation will be accepted throughout the country as a proper exercise of the power of eminent domain.

\textsuperscript{31} Attorney General v. Williams, 174 Mass. 476.
\textsuperscript{32} Ogden v. Saunders, 12 Wheaton (U.S.) 213.
\textsuperscript{33} Brown v. Maryland, 12 Wheaton (U.S.) 419; also 233 U.S. 685 citing others to same effect.