deprived of self-defense if only he be *reasonably* free from fault in provoking the difficulty. This distinction is for practical purposes unimportant except in a few cases,[62] as only rarely would the defendant be reasonably free from fault and yet not completely without fault in bringing on the difficulty.

The Mississippi courts apparently are more liberal to the defendant than jurisdictions following the Missouri Supreme Court. In *Smith v. State*,[63] the court reversed a conviction of murder upon an improper refusal of the trial court to give an instruction requested that insulting words were not sufficient provocation to deprive the defendant of self-defense. This case is similar to the Missouri case of *State v. Culler*[64] in that the court failed to state whether in such a situation the defendant would be entitled to rely upon perfect or imperfect self-defense. Dicta in other Mississippi cases lean toward the former.[65]

JAMES C. LOGAN, '36.

"PUBLIC USE" IN FEDERAL EMINENT DOMAIN

Numerous projects contemplated or actually initiated by the present Administration require the use of the federal power of condemnation. Especially significant at the moment is the bill now before Congress appropriating some four billion dollars to be used by the President in various ways for relief against the effects of the depression, and authorizing him to acquire any real or personal property or any interest therein by the power of eminent domain.[1] It is the purpose of this discussion to examine the extent to which the United States Government, as distinguished from the States, can thus take private property, aside from questions of procedure and just compensation, as evidenced by the types of cases in which the power has been exercised in the past, and the principles established therein. In considering the problem it is well to remember that the power to condemn, practically if not theoretically, rises from the power to appropriate for the general welfare, and that the questions which arise in considering the validity of acts of either type are basically analogous.

For nearly a hundred years after the adoption of the Constitution it was considered doubtful by both writers and states-

[62] McBryde v. State, (1908) 156 Ala. 44, 47 So. 302. Brewer v. State, (1909) 160 Ala. 66, 49 So. 336.

[63] (1898) 75 Miss. 542, 23 So. 260.

[64] Supra, note 15.

[65] Prine v. State, (1896) 73 Miss. 838, 19 So. 711; Lofton v. State, (1902) 79 Miss. 732, 31 So. 420; Rogers v. State, (1903) 82 Miss. 479, 34 So. 320; Lucas v. State, (1915) 109 Miss. 82, 67 So. 851. See also Brown v. State, (1877) 58 Ga. 212.

[1] H. J. Res. 117.

men whether the power of condemnation resided in the federal government at all. When land was necessary for the use of the United States the taking was done in a State court under the authority of a State statue.[2] But the Supreme Court's declaration in *Kohl v. United States*[3] that the national government possesses an inherent power of eminent domain, implied from the prohibition against the taking of private property for public use without just compensation,[4] furnished an answer to the objectors.

That this attribute of sovereignty may be exercised to enable the nation to perform its functions has been affirmed in many subsequent decisions.[5] The power may be used directly by Congress or delegated to executive agencies[6] or private corporations.[7] And legislative declarations of the necessity for its use are final and not subject to review in the courts.[8] But although the Supreme Court has never declared an act of condemnation invalid,[9] as in excess of the constitutional powers of a federal agency, it has not said that the scope of activity in this field is limitless. On the contrary, it has, both directly and by way of dictum, consistently stated that the taking must be for a public purpose, and that in the courts alone rests jurisdiction to settle the limits of this ambiguous term.[10] The key to its meaning must remain substantially in the types of acts which have been allowed, and the analogies which may be drawn therefrom, in the absence of decisions on the other side.

The most obvious exercise of the power of eminent domain for a public use occurs when the government takes property to aid it in carrying out its normal functions as an operating organization. Included in this category might be land for public build-

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[2] 1 Nichols, Eminent Domain (2nd ed. 1917) sec. 34; Corwin, National Supremacy (1913) pp. 260-5.

[3] (1876) 91 U. S. 367.

[4] Const. U. S. Amendment V.

[5] Cf. Mississippi River Boom Co. v. Patterson (1879) 98 U. S. 406; U. S. v. Jones (1883) 109 U. S. 513; U. S. v. Lynah (1903) 188 U. S. 445. The power extends also to the territories. Cherokee Nation v. Southern Kansas By. Co. (1889) 135 U. S. 642.

[6] Old Dominion Land Co. v. U. S. (1925) 269 U. S. 55; U. S. v. Oregon Ry. and Navigation Co. (C. C. D. Ore 1883) 16 F. 524.

[7] California v. Central Pacific Ry. Co. (1888) 127 U. S. 1; Cherokee Nation v. Southern Kansas Ry. Co., supra note 5; Luxton v. North River Bridge Co. (1883) 153 U. S. 525.

[8] Mills v. County of St. Clair (1850) 8 How. 569; Monongahela Navigation Co. v. U. S. (1893) 148 U. S. 312. Where the power has been delegated to an official (the Secretary of War), his judgment is also final. U. S. v. Oregon Ry. and Navigation Co., supra note 6.

[9] But see U. S. v. Lands in Louisville Ky. (Jan. 1935) D. C. W. D. Ky. 2 U. S. Law Week No. 21 P. 9 for a recent example of such action by a District Court.

[10] Shoemaker v. U. S. (1892) 147 U. S. 282; U. S. v. Gettysburg Electric Ry. Co. (1896) 160 U. S. 668; Rindge Co. v. Los Angeles (1922) 262 U. S. 700; 3 Dillon, Municipal Corporations (5th ed.) sec. 1036.

ings,[11] a park for the District of Columbia,[12] and land taken to irrigate the public domain of the United States.[13] In connection with the power to regulate interstate and foreign commerce many acts of condemnation have been upheld. These comprise taking for light-houses, harbors and dams for ocean navigation; locks, dams and canals for inland waterways; and railroads, highways and bridge approaches for overland transportation and commerce.[14] Condemnation under the Act[51] creating the Federal Power Commission, which Congress declared was for the purpose of aiding navigation and constructing dams, etc., on public lands and navigable streams, was upheld as for a public purpose, although the incidental object was the generation and sale to private consumers of surplus power.[16] It is in this field of activity that the national power of eminent domain has been most widely used, and the existence of valid objections to the propriety of its application, in view of the acknowledged breadth of the field covered by the commerce clause, is doubtful.

Taking for military purposes, too, is established.[17] It results naturally from the power to make war and levy taxes to provide for the common defense. The recent gold hoarding case[18] furnishes another illustration. In that decision eminent domain was held to extend to any type of commodity,[19] whether affected with

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[11] Kohl v. U. S., supra note 3.

[12] Shoemaker v. U. S., supra note 10.

[13] Burley v. U. S. (C. C. A. 9, 1910) 179 F. 1. In Brown v. U. S. (1923) 263 U. S. 78 the Court allowed condemnation for a town site to replace a town flooded by the completion of a federal water project. It was a public use, since it was necessarily connected with the proper operations of the government.

[14] U. S. v. Lynah, supra note 5 (dam and harbor); Chappell v. U. S. (1896) 160 U. S. 499 (lighthouse); U. S. v. Chandler-Dunbar Co. (1912) 229 U. S. 53; Re Condemnations for Improvement of River Rouge (D. C. E. D. Mich., 1920) 266 F. 105; Monongahela Navigation Co. v. U. S., supra note 8 (lock for canal); U. S. v. Oregon Ry. and Navigation Co., supra note 8. For cases concerning public highways and railroads see Cherokee Nation v. Southern Kansas Ry. Co., supra note 5, Luxton v. North River Bridge Co., supra note 7, and California v. Central Pacific Ry. Co., supra note 7.

[15] 16 U. S. C. A. secs. 791, 807.

[16] Alabama Power Co. v. Gulf Power Co. (D. C. N. D. Ala., 1922) 283 F. 606. But if the sale of surplus power is not merely an incidental feature, stockholders in a competing utility company are deprived of their property without due process of law. And this is not justified by a purpose of social experimentation (the "yardstick" idea). Grubb, J., in Ashwander et al. v. TVA et al. (Dec. 1934) D. C. N. D. Ala. 2 U. S. Law Week No. 14, p. 45.

[17] Old Dominion Land Co. v. U. S., supra note 6. The government may condemn contracts for ships in time of war. Brooks Scanlon Corp. v. U. S. (1924) 265 U. S. 106.

[18] Campbell v. Chase National Bank (D. C. S. D. N. Y., 1933) 5 F. Supp. 156.

[19] But see Colvin, Property which cannot be reached by the power of Eminent Domain for a Public Use or Purpose (1929) 78 U. Pa. L. Rev. 1, 137.

a public interest or not. The taking of gold coin in bullion is a proper exercise of a power incident to that of regulating the value of currency. Creation of a memorial at the battlefield of Gettysburg as an object lesson for future citizens is a public purpose for which land may be appropriated, because of its national character and importance.[20]

In dealing with the types of situations classified above, certain general rules of construction and treatment have been adopted the influence of which seems likely to be more important than the actual sets of facts which have brought cases within the limits of the term public use. In the first place, the legislative judgment that the purpose is a public one, either expressly stated or implied from the mere exercise of the power, will be respected unless it is palpably without reasonable foundation.[21] This principle has been applied most frequently to State acts, for there the additional factor enters that special local conditions, whose influence is most apparent to State courts and lawmakers, bear largely on the nature of the use in question.[22] But when Congress condemned land, ostensibly for military purposes, but actually to avoid forfeiture of buildings erected during the war to a lessor because of the failure of the government to renew the lease, it was held that the taking was valid because military purposes at least *may* have been entertained.[23] In other words, Congress' decision is entitled to deference until it is shown to involve an impossibility. Secondly, if the primary purpose behind an act of condemnation is one which may be characterized as a public use, incidental objectives do not hazard the validiy of the taking. This rule has been applied extensively to the sale of excess power,[24] and also to cases where irrigation of the public domain was to be accompanied by distribution of water to unreclaimed lands of private individuals.[25] It should be noted that many cases have taken pains to point out that the private purpose must be

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[20] U. S. v. Gettysburg Electric Ry. Co., supra note 10.

[21] Idem; Walker v. Shasta Power Co. (C. C. A. 9, 1908) 160 F. 856. It is interesting to note that several State Constitutions have expressly provided that the question whether a contemplated use is public shall be judicially determined without regard to any legislative assertion. e. g. Const. Mo. Art. 2, Sec. 20.

[22] Rindge Co. v. Los Angeles, supra note 6. The court also stated in that case that not only the present demands of the public, but those which may be fairly anticipated in the future are to be considered. And see Green v. Frazier (1920) 253 U. S. 233 for a discussion of the weight of local determinations on the allied question of taxation for a public use and the XIVth Amendment.

[23] Old Dominion Land Co. v. U. S., supra note 6.

[24] U. S. v. Chandler-Dunbar Co., supra note 14; Alabama Power Co. v. Gulf Power Co., supra note 16; Kaukauma Co. v. Green Bay etc. Canal Co. (1891) 142 U. S. 254, 273.

[25] Burley v. U. S., supra note 13.

clearly incidental.[26] Third, it is not essential that the entire community, or even any considerable portion, should directly enjoy or participate in an improvement in order to constitute a public use.[27] But there is authority for the proposition that the use should be open in theory to all the public, even though practically available to only a part.[28] The enjoyment need not, however, be free in the sense that charges for the use or service are prohibited.[29] Finally, in cases involving state action the very broad doctrine has been announced that "an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use."[30] And there may be "exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to one other on due compensation, which, under other circumstances, would be left wholly to voluntary consent."[31] If the broad ultimate purpose and not the immediate one is to be the test of the character of the use, as these quotations might seem to indicate, whatever would benefit, in the largest sense of the term, would be valid.

Congress is now considering a grant to the President of the power to "acquire, by purchase or by the power of eminent domain, any real or personal property or any interest therein, and improve, develop, maintain, grant, sell, lease (with or without the privilege of purchasing) or otherwise dispose of any such property or interest therein."[32] This right is to be used in furtherance of projects including clearance of slums, rural housing, rural electrification, reforestation, prevention of soil erosion and reclamation of blighted areas, improving roads and constructing national highways, grade crossing elimination, and other Federal and non-Federal works. Among the proposals enumerated only one, highway improvement and construction, has been passed on

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[26] "It would be strange if the national government could enter the territory of a state (where there were no public lands) and by legislation provide a system of irrigation for the private lands within the state and control its administration. It would indeed be a strange proceeding, and obviously wholly outside of the authority of Congress." Idem.

[27] Rindge Co. v. Los Angeles, supra note 10; Fallbrook Irrigation District v. Bradley (1896) 164 U. S. 112; Mt. Vernon Woodberry Cotton Duck Co. v. Alabama Interstate Power Co. (1915) 240 U. S. 29.

[28] U. S. v. Lands in Louisville, Ky., supra note 9.

[29] Long Island Water Supply Co. v. Brooklyn (1897) 166 U. S. 685.

[30] Holmes, J., in Noble State Bank v. Haskell (1911) 219 U. S. 104. The applicability of this case, involving state bank deposit insurance, to federal question is, of course, indirect at the most.

[31] Strickley v. Highland Boy Gold Mining Co. (1905) 200 U. S. 527. See also Clark v. Nash (1905) 198 U. S. 361.

[32] "*Provided*, That any real property or interest therein acquired hereunder shall be reserved for the purpose of the project or projects for which it is acquired and shall not be included within the unreserved portion of the public domain. H. J. Res. 117.

by the courts as a public use for which the federal power of eminent domain may be exercised, although grade-crossing elimination, as an adjunct of interstate commerce, might be added by analogy. Federal electrification schemes have been upheld, it is true, but only when they were an incident to improvements in navigation. And several recent cases in the lower courts, not concerned with eminent domain, have denied the right of the national government to spend public funds for the construction of local power plants, the expenditure not being for the public use of the people of the United States.[33] The United States District Court held in *United States v. Certain Lands in Louisville, Ky.*[34] that Title II of the N. I. R. A. gave power to condemn only for a public purpose, and that a taking for a slum clearance project was not for such a purpose and so was invalid. The Court concluded that it was not a governmental function to build private homes for sale or lease to individuals; and the fact that tenants were to be selected by government agencies precluded the theory that the use was to be a right open to all the public on equal terms. And the statement that the state may not take private property for the purpose of selling or leasing it to others has considerable support in authority.[35] It would seem that the same objections apply in the case of rural housing. Reforestation, the prevention of soil erosion and reclamation may conceivably have a more national, as contrasted with purely local, purpose, in view of their fairly well demonstrated economic effects on large sections of the country; but speculation on their possible relation to the legal concept of public use, as well as on that of the infinite other possibilities opened to the administration under this law, would be worse than useless.

The similarity between the conception of public use as applied to eminent domain and the public purpose necessary, in theory at least, to justify taxation cannot be disregarded. The Supreme Court has never invalidated a tax laid by Congress on the ground that it was not for a public purpose, but it has often followed local tribunals in holding that State legislation was unconstitutional for that reason, being a deprivation of the individual's

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[33] Washington Water Power Co. v. City of Coeur D'Alene, Idaho (Dec. 1934) D. C. D. Idaho 2 U. S. Law Week No. 18, p. 12; Ashwander et al. v. TVA et al., supra note 16.

[34] Supra note 9. The case was placed on the docket of the U. S. Supreme Court on Feb. 9th.

[35] The power is abused when property is taken, not for public use, but to be leased out to private occupants to the end of raising money. Mills et al. v. County of St. Clair et al., supra note 8N; Buckingham et al. v. Smith and Dille (1840) 10 Ohio 288, 297. A definite right or use in the business or undertaking to which the property is devoted must result to the public from the law itself, not from the will of the donee of the power. Borden v. Trespalacios Rice and Irrigation Co. (1905) 98 Tex. 494, 86 S. W. 11. Certiorari denied 204 U. S. 667.

property without due process of law.[36] One difficulty, not present in condemnation proceedings, which has prevented a clear test of the taxing power is that there is ordinarily not sufficient interest to give the individual standing in the courts and a right to contest the legislation.[37] But the dispute over the extent of the national power to tax is based on two fundamental theories; one, that Congress may levy to provide for the general welfare in the broadest sense, and two, that it can tax only in connection with and to enable it to carry out the powers specifically granted by the Constitution.[38] And the same two opinions exist in the field of eminent domain. Taking is proper, on the one hand, where it is for the welfare, good, or benefit of the people;[39] or it is improper unless necessary to the execution of granted powers.[40] The authoritative adoption of one of these conflicting theories would aid the settlement of a situation which is none too clear.

T. S. McPHEETERS. JR. '36.

THE JUDICIAL RECOGNITION OF THE DISTINCTION BETWEEN COMPENSATED AND ACCOMMODATION SURETIES IN MISSOURI

The term "surety" as used before the latter part of the nineteenth century indicated the private accommodation surety who assumed legal obligations from motives of friendliness and not pecuniary gain, by becoming a party to a contract prepared and drawn by another.[1] The contract of suretyship antedated the Christian era by more than 2500 years; as a consequence, the rules of suretyship were formulated during the earlier and more plastic period of legal development.[2] In view of the gratuitous nature of the undertaking of the private accommodation surety, and the severity of the penalty imposed upon him in case of the

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[36] Loan Association v. Topeka (1874) 20 Wall. 655; Cole v. La Grange (1884) 113 U. S. 1. When the highest court of a state has declared a tax was for a public purpose its decision has never been reversed, though power to do so has not been disclaimed. See Hairston v. Danville & Western Ry. (1908) 208 U. S. 598.

[37] Cf. Massachusetts v. Mellon (1923) 262 U. S. 447.

[38] Corwin, The Spending Power of Congress (1923) 36 Harv. L. Rev. 548. The case of Washington Water Power Co. v. City of Coeur D'Alene, supra note 33, takes the contrary view, holding that because of the Xth Amendment Congress can appropriate only in the exercise of its enumerated powers.

[39] See the quotations from Mr. Justice Holmes, supra notes 30 and 31.

[40] Cherokee Nation v. Southern Kansas Ry. Co., supra note 5; U. S. v. Oregon Ry. & Navigation Co., supra note 6.

[1] See Arnold, The Compensated Surety, 26 Col. L. Rev. 171 (1926).

[2] Lloyd, The Surety, (1917) 66 U. Pa. L. Rev. 40; Morgan, The History and Economics of Suretyship, (1927) 12 Cornell L. Quart., 153, 487; Brandt, Suretyship and Guaranty, (3rd. ed. 1905) 17.