THE UNIVERSITY OF MINNESOTA

GRADUATE SCHOOL

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of

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The undersigned, acting as a Committee of the Graduate School, have read the accompanying thesis submitted by Bert A. Wallace for the degree of Master of Arts. They approve it as a thesis meeting the requirements of the Graduate School of the University of Minnesota, and recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Arts.

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THE UNIVERSITY OF MINNESOTA

GRADUATE SCHOOL

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of

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Minneapolis, Minnesota

June 3 1920

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LEGAL AND CONSTITUTIONAL ASPECTS

OF

STATE AID AND CONTROL OF LAND SETTLEMENT

WITH SPECIAL REFERENCE TO MINNESOTA.

A THESIS SUBMITTED TO THE FACULTY OF THE

GRADUATE SCHOOL OF THE UNIVERSITY OF MINNESOTA.

BY

BERT A WALLACE

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS

FOR THE DEGREE OF

MASTER OF ARTS.

J U N E

1 9 2 0

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CHAPTER I.

I N T R O D U C T I O N.

I.

The purpose of this thesis is to investigate the legal and constitutional phases of state aid and control of land settlement in Minnesota. The call for a study of this kind arises from the growing need for a better utilization of our agricultural resources, the unsatisfactoriness of our present settlement policy; and the added fact that our form and theory of government throws peculiar obstacles in the way of a solution of the questions involved.

The degree of utilization of our present land area for agricultural purposes is shown in a recent report[1] of our Department of Agriculture. Of the total area of somewhat less than two billion acres, the rough hilly lands, the lands too dry for crop raising at present prices, and the desert areas, together total over a billion acres. This leaves about 850,000,000 acres in crops or potentially arable; of this area 480,000,000 acres were "improved" in 1910, and of this latter area only about two thirds was actually in crops; that is, less than one sixth of the area of the United States was in crops, or, expressed another way, about two fifths of the potentially arable land was in crops. Possible additions to the crop area are 30,000,000 acres of irrigable but as yet unirrigated lands; drainable areas of 60,000,000 or more acres , now in grass, forest, or water; dry farming lands to the extent of 82,000,000 acres; and woodland areas that might be used for farming of possibly 200,000,000 acres.

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(1). Year Book, 1918, U.S.D.A., p. 433

It may be granted that part of this area would possibly be of more economic value in forests than in farm lands. It must be granted too, that these figures are only rough estimates, and any one of them may easily be several million acres wide of the mark. With both these concessions, it remains clear, nevertheless, that we are very far from a complete utilization of our agricultural resources.

At the same time agricultural statisticians are pointing out the decline in our net agricultural exports from an average of $403,000,000 per year for the period 1902-1906 to an average of $270,000,000 per year for the three years just preceding the recent war.[2] Professor Hibbard shows[3] that in the sixty years preceding 1910 our land in farms multiplied by three, while our population multiplied by four, and that the least relative growth in farm lands was in the last decade of the sixty years when population gained twenty per cent, while farm lands were increasing five per cent. The city populations which consume the bulk of these agricultural products complain of the high prices of farm products; they urge greater activity on the part of all concerned to increase agricultural production that the prices of farm produce may cease their upward climb.

It is true that representatives of the farmers maintain that the advancing prices are warranted; that it is only in recent years that farming has been paying a reasonable return. In fact, one group that is willing to represent the farmer insists that what the farmer wants is not increased production but limitation

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(2). Year Book, U.S.D.A., 1915, p. 721.
(3). Econ. Rev. Supp., VIII, I, p. 55.

of production that will make possible still higher prices.

Some of those who believe in increased production insist that it can be brought about by more intensive farming of the lands already improved, that what we need is utilization of the lands we have rather than the extending of the farm frontier onto sub-marginal lands. In all this discussion no one seems able to offer a solution that meets with general acceptance. "Not only are we without a land policy of a comprehensive nature," says Hibbard;[4] "we are not ready to formulate one. We do not know how much land we have available for farming purposes; we know next to nothing of our capabilities."

It is not necessary to our discussion that we find a satisfactory answer to all these questions. The facts are that settlement is going on, that every locality with unsettled lands is endeavoring to secure settlers, that thousands of real estate agents are using every conceivable form of advertising to tempt people to buy their lands, that nearly every state with undeveloped lands has at least an immigration department to encourage the incoming of settlers to develop its lands and is possibly trying to formulate a definite land policy. On the other hand, the rising price of food stuffs they have to buy is inducing thousands of city people to look with longing eyes on the picture of themselves as sellers of food stuffs instead of buyers. It needs no argument to show that if effort is to be put forth and resources are to be expended , the effort and resources should not be wasted; should not be applied through years of unnecessary trials and discouragement, but should be utilized to the greatest advantage. Nor is argument

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(4). Economic Review Supp., VIII, I. p. 61.

needed for one to recognize that this utilization of effort and resources will not come through the haphazard methods of the past with settlers largely locating themselves without aid or with the aid of the curbstone real estate broker, but will come, if at all, through the working out and carrying out of a systematic plan for the utilization of our land resources.

Elwood Mead recommends[5] the adoption of a definite scheme of land settlement to be carried out through government aid and direction. This would be a radical departure from ideas that have prevailed in the past, "but that is not an objection; the time has come for a change. This is an entirely different nation from the one that gave 160,000,000 acres to the railroads and still more to the states." He points out the need of a classification of lands, indicating their productive values and the cost of development; he maintains that the farm unit should have been adapted to climatic conditions, that forest lands should have been retained in public ownership; that science should help first in creating conditions of settlement, then in aiding the settler in his task. "Because nothing was done, the heroic settlers were bedeviled by winds, cold, drouth, and pests. They wasted their efforts, lost their hopes and ambitions, and a tragic percentage left, impoverished and embittered. The tragic part of this history is that nearly all this suffering and loss could have been avoided under a carefully thought out plan of development."

Not to go so far back into the past, but to get a view of nearer times and places, let us look at the data secured in a

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(5). Mead: "Government Aid and Direction in Land Settlement." in Economic Review Supp., VIII, I. pp. 72-3.

survey of Northern Minnesota. A recent bulletin[6] gives the figures from 141 farms in the cut-over district. It shows that crop returns averaged $225 per farm, and from each farm live stock products were sold to the value of $373. When forest products of $217 were added to these, it made the total receipts per farm $815. When a family of four to eight persons is supported out of $815, it will be seen that land will not be cleared very fast on these farms, especially when the average cost of clearing land was $34.00 per acre. The acres cleared ranged from 2.2 acres per farm to 7 acres per farm with an average of 3.8 acres. In other words, 21 years of life in the woods 9.6 miles from town (6 to 17 miles was the range) will on the average secure an eighty acre farm. "One of the greatest problems and one that is constantly before the settlers is the slowness and difficulty of clearing the land for crop production. Many settlers express their belief in the practicability of some sort of state aid in the solution of this problem..... It is the key to constructive permanent settlement of these sections of the state. Unless this subject receives study and a constructive helpful program of land clearing and utilization is laid out, the northern part of the state will continue its process of retarded haphazard development." [7]

Not only this, but such matters as drainage, roads, bridges, to say nothing of the school facilities and social advantages are insurmountable tasks to the individual settler. Economical development requires the making of many farms at the same time in a locality settled. Even the clearing of land is far more economically done when several settlers cooperate. But with no system of group settlement, what is the probability of a sufficient

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(6). Bulletin 180, Minnesota Station.
(7). Bulletin 180, Minnesota Station, p. 19.

number happening to arrive together to make possible this co-operation in opening up a given district?

To look at the settlement problem from another angle, compare the present and the past. In the older days no one in village or country had the modern conveniences; every home even in settled localities was largely a self sufficing unit, with its own cow, garden, chiekens; the groceries bought were very few and the clothing of the family was largely made in the home; the factory worker was engaged mainly in production by hand with some contributing machine processes. In such a time, for a family to move out some miles from neighbors and live the life of the pioneer called for not much more economic independence than it was already exercising. Today farm homes except in food stuffs are practically as dependent on the store as are city homes; even in foods they are far more dependent than the homes of the earlier day. Pioneering now involves a revolution in one's methods of living.

Again, the laborer of today if he possesses any skill as a worker does not find it necessary to pioneer. Modern methods, machinery and organization have made man far more productive per unit than was the case even a half century ago. Each worker has a higher money income and a higher real income than the worker of that earlier day. When he recognizes that his present fairly satisfactory and gradually improving degree of comfort would have to be exchanged for twenty to forty years of drudgery and inconvenience and discomfort, the prospect does not appeal to him. One writer words it thus: Humanity will gradually filter into this wilderness and subdue it, but the subduing will be at too heavy a cost of the things that make life worth while. And the population that would choose such a life would be largely an immigrant

peasantry used to gnawing the bones of life, and not such as have learned to esteem highly, the higher things. We bid for that poor quality of citizenship when we leave raw difficult land to be settled under a let alone system.

A letter [8] from a settler says regarding a colonization plan suggested: "To one who has seen the heartbreaking isolation of settlers scattered here and there in this wilderness - the result of a system of private spoliation, a system without a system - the plan suggested would be as a sunburst illuminating a dark valley. Eleven years I have struggled with the conditions that handicap the settler of Northern Minnesota, I am winning slowly, but the world will never know how nearly at time we were overwhelmed by the indifference and neglect when it would be just as easy to lend us a helping hand. I have long considered this plan of colonization as the only means of bringing about real results in Northern Minnesota development."

This calls to our attention one of the big advantages of colonization. "Colonization of the land means land settlement by organized groups." It substitutes for the isolation, the helplessness, and discouragement of the one family settler the mutual help, sympathy, and cooperation of a community of neighbors. The crooked trail cut to the world is replaced by a road, the ford by a bridge, and speed, safety and larger loads result. The five or six months of one room school carrying the student about to the seventh grade gives way to the consolidated school with two or more years of high school. Clubs, social life, church, come into being. Various forms of cooperation in business enterprises become possible; farm clubs, movements to introduce alfalfa or standard breeds of stock or stan-

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(8). "The Farmer." February 15, 1919.

dard varieties of potatoes follow, and even a cooperative cheese factory or creamery may be built.

In fact one of the advantages of colonization methods of settlement is that generally part of the difficulties and obstacles a settler would suffer from through all his earlier years are overcome for its settlers by the colonizing company, possibly before the settler gets on the ground at all. One such company says:[9] "It is our endeavor to place settlers on the land in such a way that they will have a fair show of making a success, and to stay by them until they have become established..... We lay out and construct ditch systems and roads." This company offers to clear a few acres, put down a well and possibly put in some crop, at a total expense of $400.00 to $1200.00 per holding; to loan a promising settler money for building; and to furnish a revolving fund of $10,000 for the purchase of well bred stock to be sold to the settlers at cost and on credit at 6 per cent.

The Faast Land Company, operating in Rusk County, Wisconsin, sells the settler forty or eighty acres of land, with two acres cleared, a house to live in, a horse, a cow, two pigs, and twelve chickens. He buys it all one one contract with a small payment down and small annual payments. He is enabled to go on his place at once, apply whatever capital he may have to development, and have at least some income from the start.

Another company, at Moquah, Wisconsin, furnishes liberal credit on the land, and advances funds for stocking and developing the farms. Cooperative dairying has been introduced and Guernsey sires secured on the cooperative plan; the company

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(9). Duluth & Iron Range R.R. Co. in a letter to Dr. J.D.Black, April 28, 1919.

started a skimming station, and later a cooperative creamery came into being. The settlers are getting ready to market potatoes in car lots by adopting one standard variety of potatoes.

In his paper on "Private Colonization of Land", read to the American Economic Association, Professor Ely tells of three Wisconsin colonies (one of them the Faast Colony referred to above). He describes the care used in selecting lands, in selecting settlers, and in grouping them by nationalities. Besides the work done by the companies preliminary to the coming of the colonists, and the varied plans under which the colonist may secure land, Professor Ely shows that in buying lumber, machinery and stock, the colonist has the advice and often the financial help of the company thus securing better goods, better transportation rates, better prices and terms. The company looks out for roads, schools, telephones; it sets up model farms, demonstrates good farming methods, and calls in the help of the county agents for its colonists. The steps toward proprietorship of the land are first, contract for deed; second, deed with mortgage to colonization company; third, deed with loan from Federal Land Bank on the amortization plan. One chart covering 237 aggregate years of experience showed an average gain in value of each holding of $550.00 per year and that the company had hired each farmer for an average of 91 days per year on the company's projects.

Of course, no one should read into this account of success of the settlers the notion that they are having an easy time with no difficulties and worries. No one, settler or otherwise, has a right to expect an easy road to either wealth or success. But one has a right to an opportunity as fair as conditions permit, and the success of these and many other colonies seems to show that

colonization may furnish this opportunity. To modify somewhat Professor Ely's statement of what this fair opportunity means, we may say the settler desires a right to work on the land, to make a farm, to gain a reasonable livelihood while making the farm, to have something of social and educational opportunities around his family, and to acquire ownership in a reasonable time. (This is equally important when turned around, viz., to have a reasonable time in which to acquire ownership).

In sharp contrast with the American haphazard, let alone plan working out as described above are the government supervised, even government operated, systems of settlement in some other countries. E.g., nearly all the Australian states have a Lands Department charged with the administration of all laws regarding Crown lands. Lands are classified according to situation, soil, climate, and other conditions. Various ways are provided for the settler to secure the possession of the land, sales by auction for cash or on deferred payments, leases and licenses for various kinds, or sales at an appraised price. In all the states, Closer Settlement Acts have been passed authorizing the government to repurchase alienated lands, cut them up into lots of suitable size, and throw them open to settlement. Several of the states have laws providing for the establishment of cooperative communities, village settlements, and labor colonies. In four of the colonies the state may compel the owner to sell to the state. In allthe states, acts provide for financial aid to settlers, in erecting their buildings and improving their lands.[9]

New Zealand likewise has been granting aid to settlers for the past twenty-five years. The settler may borrow on security

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(9). Official Year Book of Australia, No. 8, pp. 221-5.

of his freehold or on any of the fifteen kinds of leases, and may repay in twenty to thirty-six years or before. A total of $70,000,000, has been advanced to the settlers of which over $35,000,000 was outstanding at time of report.[10] The Crown lands may be secured by the settler by purchase for cash; by lease at 5 per cent of purchase price, with option of purchase any time after six years, or option of renewable lease; or by lease for 66 years at 4 per cent of purchase price. By the Act of 1908, the government may clear the land hiring any unemployed labor for the purpose, or may allot the raw land to the settler, and pay the settler for clearing his own farm, adding this cash to the purchase price of the allotment.

The American governments, state and national, are bound by constitution; these constitutions were most of them written in an earlier day when lands and other natural resources were so abundant as to be almost free goods. The failure to recognize the need of protecting public rights in anything so abundant; the need of encouraging development of the resources; the feeling that the best way to encourage development was by property rights residing in and thoroughly protected in the private parties developing the resources - all these influences conspired toward overemphasis of private property rights and underemphasis of public or social interests in these same resources. Now, in these same states and nation, with the recent near exhaustion of public lands suitable without large expense for agriculture and the growing recognition of the land problem as of immense social import, lawmakers find the desired emphasis on the interests of society as a whole, impossible because inconsistent with the constitutions drawn in that earlier day; bills to that effect are rejected by judiciary committees as

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(10). Official Year Book of New Zealand, 1914, pp. 730-45.

unconstitutional, or the laws when passed are so declared by the courts.

n New Zealand and Australia could do the things described above because their governments are moulded on a system that does not give to the courts any power to declare legislation unconstitutional. Parliament is supreme; the work of the courts is to interpret and to apply to practical situations the legislation Parliament provides. An examination of their labor legislation and systems of taxation as well as the land legislation which is our particular topic shows this freedom from judicial restraint.

Our state and federal lawmaking bodies on the other hand, find in their constitutions provisions requiring taxation to be "uniform," guaranteeing to each one "the equal protection of the laws," protecting property from seizure "without due process of law," requiring taxation or an exercise of eminent domain to be for a "public purpose," forbidding property to be "taken for a private purpose." Numberless acts which legislators recognize as for the public welfare, they also recognize as certain to be held unconstitutional because courts will be so much influenced by the precedents, i.e., the interpretations placed on these legal limitations under wholly different social and economic conditions.

It is this particular situation which it is the purpose of this thesis to analyze. We shall leave to others the discussion of the merits of various plans for colonization or other forms of settlement. Our problems will be to discuss the difficulties of the settler, arising from our laws of his inequality in bargaining power with the colonizing company or real estate agents; and the legal and constitutional aspects of the principal devices suggested by which government may aid and control settlement to his and the

public advantage. It is hoped that such a discussion will bring out facts which will contribute negatively by pointing out legal and constitutional pitfalls to be avoided in attempted legislation, and positively by suggesting certain steps that can and should be taken.

The plan that we found in operation in Britain's Overseas Dominions is that of a state controlled and state operated colonization system. Chapters II and III deal with the constitutional possibilities of such a plan in Minnesota. Whether or not there is State Colonization, there will be private colonization companies operating in the state. Chapter IV discusses the legal difficulties confronting the colonist under this plan, and how the state may supervise private colonization to the advantage of both company and colonist. With either or both systems of colonization in operation there will be much settlement of the individual type; with State Control of this form of settlement, Chapter V will deal.

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CHAPTER II.

THE PURCHASE BY THE STATE OF LANDS NEEDED FOR A STATE COLONIZATION PLAN.

The carrying out of any State land settlement and colonization plan involves the possession by the state of a large amount of land, much of it in areas of several thousand acres in one locality. Minnesota owns thousands of acres of school lands, but they are scattered all over northern Minnesota, a section in a place. It owns no large areas. Hence, if Minnesota is to embark upon a plan of state colonization, it must first secure the lands for settlement by taking them out of the hands of their present owners. The question at once arises, can the State of Minnesota do this? Can it buy from owners willing to sell? Can it force present owners to sell unwillingly? Even if these things are possible, can Minnesota by taxation or borrowing raise the money with which to pay these willing or unwilling sellers?

It is evident that, so far as its right to contract is concerned, a state may acquire for its needs any piece of private property, if the owner is willing to sell, and the state is willing to pay his price. But while occasionally, and perhaps often, a governmental unit does secure land in this way, governments have never found this method of securing private property a sufficient means. The owner may be unwilling to sell, or he may have too high an estimate of the value of the property; he probably adds 30 per cent to 100 per cent to his estimate on learning that the government intends to buy. Hence, the idea of private property has never been allowed to grow to a point where society as represented by the government is at the mercy of a private owner's greed or selfishness. Governments have found other ways than at voluntary sale to secure the lands they have needed.

Furthermore, the lands required by governments in the

past have been relatively small in area, or the large areas have been few. For the purpose of land colonization, however, areas of twenty to eighty sections would be required, and not merely one or two such areas, but dozens and ultimately hundreds of them. This fact makes the situation much more difficult; a government could often deal on a voluntary basis with one or two owners; it could not hope to deal on such a basis where each colonization unit takes in land owned by a large number of owners. Some one or two owners would be almost sure to refuse entirely or to hold out for terms that would make the whole plan unwarrantably expensive. In securihg lands for colonization, then, governments can not rely on purchase at voluntary sale. Governments in the past have at times simply confiscated what they needed, but this is contrary to Anglo-Saxon ideas of justice. In Anglo-Saxon countries two devices have been used, viz., taxation and seizure of the land under eminent domain.

Leaving the second of these to our next chapter, we will consider the former at some length. The particular use of taxation under discussion here is to discourage private holding of the property desired by the government, and thus encourage its sale to the government. In case of land colonization, it means by rapidly progressive taxation to discourage and break up the large holdings of lands; also by the placing of especially heavy burdens of taxes on the holdings of absentee owners, or on lands held out of cultivation or other use, i.e., held for speculation. It is argued that such taxes tend to encourage the "one family farm." Can this device be employed to force the sale of large holdings to the government?

To the person who has spent his life in regions like Southern Minnesota, the first question to suggest itself is, Is much of the area of Minnesota held in large areas by single owners?

Were he to examine the platbook of almost any county in the northern 30,000 square miles of the State, it would show him in nearly any township one to six sections owned by a single individual or company. The lumber companies own hundreds of thousands of acres of "logged over" lands. The mining companies likewise hold large areas, possibly bought from the lumber companies after the valuable timber was removed, or possibly land never covered with trees and valuable thus far only for its possible stores of minerals. The railways received grants of some millions of acres; most of this has been sold, but they still own hundreds of thousands of acres. They would be glad to sell it to settlers, both for the purpose of securing the sale price of the lands, and for the continued returns arising from the increased tariffs, on incoming immigrant goods, and on the sales and purchases of a developing farming area, and from the transportation of passengers and goods. One railroad company estimates that each new family settled on a farm in its tributary territory means $500 yearly in railway receipts. Real estate companies too have their thousands of acres, secured in large measure from the holdings of lumber or railroad companies.

To make this concrete let us look for a moment at some extracts from the data already collected in the land settlement survey now being conducted by the Agricultural Economics Department. In township 127, range 32 owner No. 7 holds 34 forties in six adjacent sections; No. 66 owns 24 forties in four adjacent sections, and in one area five miles by three miles in dimension. three owners, viz., No. 23 with 28 forties; No. 24 with 67 forties; No. 46 with 32 forties, own 127 of the 240 forties in the fifteen sections. In township 139,Range 26, five owners with 27,23,43,38,and 75 forties respectively own 206 forties or over a third of the township. In

township 142, range 25, one owner has 144 forties, or one fourth of the township, while four other owners hold respectively 39,19, 53, and 37 forties, and of the whole township less than one fourth is accredited to persons who own less than 1,000 acres each in the county. In township 137, range 31 owner No. 37 has 3,200 acres; in township 139, range 25, three owners together own 193 forties, or one third of the township, while in township 139, range 28, one owner has 9,280 acres, or 40 per cent of the whole township.

A few minutes application of the adding machine to the figures from Beltrami county presents us 28 owners of twenty-five to fifty forties each who together control 954 forties, or an average of 1,360 acres each, while 23 persons or companies owning over fifty forties each have a total of 2,887 forties, or an average of 5,000 acres each. In Itasca county nine owners own a total of 1,257 forties; ten other owners, of 200 to 400 forties each, own a total of 2,880 forties; seven owners of over 400 forties each own a total of 4,012 forties. When totaled, this means that 26 owners hold 8,099 forties, or 323,960 acres of the lands of one Minnesota county. The three largest holders on the Great Northern Ore Properties with 679 forties, the International Lumber Company with 669 forties, and the Itasca Lumber Company with 838 forties, - in other words, three companies own 87,000 acres of one county of our state.

The plan of taxing these large holdings more heavily appeals to the settler as having a peculiar fitness. The land companies seem to be holding these lands at higher prices than the settlers think they can afford to pay. Most of the companies are selling their lands without plan or system to the first comers. As a result, the traveler in the region finds scattered helter

skelter in the midst of these large holdings, the little clearings of the settlers. Sometimes he finds two to a half dozen families in a little group not far apart; again he may travel miles in going from one clearing to another. As these scattered settlers improve their little holdings they see the unimproved lands around them advancing in value almost as rapidly as their own. They have had the struggle to make alone. Worse yet, under the prevailing system of taxation, the settler's taxes advance as they improve their holdings, while the lands held unimproved have escaped with low assessment and low taxes. Who can dispute that the speculator whose lands increase in value thro the labor of others, should pay at least as much as they for the support of the civil institutions, the roads, the bridges, the schools, that help to create the added values? The settler goes further; to him it seems fair that if not of the toil and sacrifice fall chiefly on the one group, the heavier burden of the tax should fall on the other. He feels that the present system of taxation tends to encourage land speculation and to discourage actual settlement.

New Zealand forty years ago found itself confronting a similar condition. Settlement was progressing altogether too slowly and altogether without system; immense areas of land were in the hands of a few private owners; the government had little land at points where settlement was feasible, and worse yet, found the large holdings increasing rather than decreasing. After some years of discussion it adopted in 1891-2 a tax of 1 d. per pound sterling on all assessed real and personal property, a tax aimed to secure more revenue and to discourage the large holdings. To this latter end, it provided from the first some deductions for improvements and in 1897 the law was amended to exempt all improve-

ments. This law was fairly successful in increasing revenue as is evidenced by these figures; 1892 (old plan) £357,000; 1893, £365,000; 1905-6, £647,000. The other objective in the law, viz., to discourage large holdings, was successful at first in a very limited degree. In 1896-7 there were 501 holdings of 10,000 acres or over, making up 54 per cent of the total privately owned holdings; in 1905-6 there were 502 holdings of 10,000 acres or over, making up 47 per cent of the total privately owned acreage. Thus the large number of holdings remained nearly unchanged; but the increase of large holdings had been checked, while the number of small farms increased, so that the large holdings formed a smaller percentage of the total. It may be further noted that the holdings of 50,000 acres or over declined from 30 per cent to 24 per cent of the total acreage. The burden of taxation had been lifted from the small land owner, for of 145,000 owners only 25,000 paid any taxes, and half of these 25,000 paid less than £5 each.

The relatively small effect of the land tax in breaking up the large estates is ascribed by Scheftel[1] to three causes, viz., poor systems of appraisal, evasion of the land tax, and the low rate of the progressive tax. The first of these difficulties could have been predicted; a land tax like any other to be effective must be based on accurate appraisal. To overcome this difficulty New Zealand in 1896 passed its "Government Valuation of Land Act," providing for the setting up of a separate Department of State charged with the duty of estimating the values of real estate in the dominion for taxation and other purposes of government. "It may be affirmed that the objects of the Act have been fairly attained with comparatively little friction and each successive revision of

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(1). Scheftel's "Taxation of Land Values."

values furnishes a safe basis for a further advance toward accuracy in values, and at a greatly reduced cost." [2]

The progressive tax on the large estates was evaded by means of bogus partnerships, one man companies, false sales and leases, nominal gifts, and division of large holdings among the members of the family. In 1917 New Zealand inserted in the law thirteen new clauses intended to check or at least reduce these evasions, and providing that life tenants, lessees, and buyers in possession are to be taxed as owners; that the holdings of two or more companies having practically the same stockholders should be combined into one holding for purposes of taxation, that shares in joint properties should be added to individual holdings in determining the rate of tax, and other clauses of similar tenor.

The tax, especially the progressive feature of it, was too low to be a serious deterrent to the large estates, but New Zealand "revised the tax from time to time to tighten the screw" until in 1907 the tax ranged from 1/32 d. per pound on the smaller estates to nearly 6 d. per pound on the largest. Besides this the ordinary rate is 1 d. per pound, and 50 per cent additional if the owner is an absentee. An opponent of the plan says:[3] "I know of one owner absent for his health who will be called on to pay £7,000 ($34,000) for the year. Of course this is confiscation pure and simple and it will compel the owner to sell."

In 1915[4] the owner of land whose value apart from improvements, together with mortgages owing him, and less mortgages owing

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(2). Year Book of New Zealand, 1915, p. 744.
(3). The Australian, August 24, 1907.
(4). See New Zealand Year Book, 1915, p. 711.

by him did not exceed £1500, was allowed an exemption of £500; where the unimproved value was over £1500 the exemption declines £1 for every £2 of increased value, so that at £2500 the exemption disappeared. Further, when the unimproved value of the land held by an individual was over £5,000, a graduated land tax was imposed increasing in rate with increasing value until it was 5 5/6 d. per pound in case of estates over £200,000.

On another page [5] are given the following figures as to number and size of holdings:

No of acres per holding:	Number of holdings: 1883	1892	1902	1910
5 - 320	25,407	32,211	34,800	36,204
320 - 640	2,695	3,553	4,735	5,394
640 - 1,000	931	1,143	1,580	2,063
1000 - 20,000	141	148	123	121
20,000 - 50,000	83	84	70	39
50,000 - 150,000	21	24	20	11

As to total areas held in the larger holdings, the following table is instructive:

Acres per holding:	1889	1906	1910
10,000 to 20,000	1,911,154	1,817,562	1,661,381
20,000 to 30,000	1,221,829	1,002,816	683,368
30,000 to 40,000	921,435	474,822	175,001
100,000 to 150,000	241,423		
over 150,000	1,389,664	223,242	

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(5). New Zealand Year Book, 1915, p. 502.

Also the average area held by owners of over 10,000 acres had steadily declined from 300,009 acres in 1889 to 20,523 acres, the most of this decline being in the last eight years.

Hence, it is quite evident that New Zealand has succeeded in checking the growth of immense landed estates and in reducing the number and size of those that already existed; that its system of taxation has contributed to this result; and that the exemption from land tax of the estates up to $7500 with increasing burdens on the larger estates has not reduced the revenues from this source; nor has it destroyed land values as so freely predicted. Scheftel[6] quotes the officials to the effect that "upon the introduction of the tax the tendency has been perhaps for the land to fall in value; but the value has soon advanced again." "The burden of those who have kept their land undeveloped in the hope of appropriating the increments has induced many to part with their land. But the purchasing of land for residential and business purposes has been stimulated." "The disintegration now going on in New Zealand is the strongest evidence that a heavy land tax checks speculative land holdings." "The tax discourages the withholding of land from use and tends to steady the value of lands." The whole tenor of the discussion in the Year Book[7] regarding Land Tenure, Settlement, is in favor of laws to discourage large holdings and to encourage small holdings, and carries the implication that much has been accomplished along this line and each succeeding year sees more accomplished.

Likewise in New South Wales, "The Crown Lands Act of 1884 and supplementary acts were passed chiefly for the purpose of putting

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(6). Scheftel: Taxation of Land Values, 114-116.
(7). New Zealand Official Year Book, 1915.

an end to speculative selection without bona fide intention of settlement."[8] The report goes on to refer to other legislation "which offers bona fide settlers special inducements." Some of the features of the Land and Taxation Laws of the Australian states are as follows:[9]

1. The tax is usually if not always on the unimproved value of the land thus removing from actual settler the burden of increased taxation for every improvement he makes.
2. There is an exemption that frees the owners of smaller holdings from the land tax; e.g., in New South Wales land to the value of £240. was exempt; in Victoria only "landed estates" paid land tax, landed estates being defined as lands of 640 acres or more under one ownership and within five miles of each other.
3. One state allowed a rebate of half the tax to the owner of improved land.
4. In most of the states some form of reduction or rebate was allowed in proportion to mortgages outstanding against the land.

But this is not a thesis on taxation, nor is it the purpose to discuss the wisdom of the methods, nor the merits of the results. We are considering the settlement of Minnesota lands, and this means ultimately the ownership of the land mainly in areas of forty to three hundred and twenty acres. One possible device to this end is a state colonization plan, to initiate which state must own large areas of land in large units; Minnesota has not such areas, but large areas within its borders are privately owned. Our purpose has been

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(8). Official Year Book of Australia, No. 8, p. 221.
(9). Official Year Book of Australia, No. 2, pp. 833-7.

merely to show that taxation can be used in such a situation, and has been used by several states successfully, to force the sale of these large holdings. At the same time, this system of taxation encouraged rather than discouraged the improvement of his lands by the small settler. Thus the State might get its opportunity to buy the needed lands.

But perhaps this method of securing the lands is attacked from another standpoint. Although possible under government of New Zealand or Australia where no supreme court can set aside the edicts of Parliament, this method might not be possible in an American State, where courts can and do frequently declare unconstitutional the acts of legislatures. Might "due process of law" or "uniform taxation" or some other constitutional term be invoked against this type of taxation? Let us examine the decisions of our courts to discover what we may learn of their attitude on this question.

Minnesota has had no heavily progressive land tax, so there are no Minnesota decisions directly bearing on that point. The St. Paul City Railway Company appealed to the courts of the state for protection against an assessment law classifying property into four classes with varying rates of assessment. The Supreme Court held [10] that such a law is not unconstitutional; the only requirement is that classification for taxation purposes must be reasonable and based on essential differences. An earlier case[11]

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(10). In State ex. rel. St. Paul City Ry. v. Minn. Tax. Com., 128 Minn. 384

(11). 104 Minn. 179- State ex.rel. Winona Motor Co. v. Minn. Tax. Com.

is quoted to the same effect; a quotation is also made from a decision [12] of the United States Supreme Court, in which several earlier cases are referred to and commented on thus: (These cases) "illustrate the power of the legislature of the State over subjects of taxation and the range of discrimination which may be exercised in classifying those subjects when not obviously exercised in a spirit of prejudice and favoritism..... Granting the power of classification, we must grant to government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous..... The state is not bound by any rigid quality ..... Its limitation is that it (the right of classification) must not be exercised in clear and hostile discrimination between particular persons and classes."

Another Minnesota decision [13] follows United States Supreme Court decisions in holding that it is enough if a law operates alike on all persons and property similarly situated.

The only doubt remaining in the writer's mind on this point is whether mere size of holding is a basis of classification for differing rates of taxation which American courts would accept. One attorney of wide Supreme Court experience, to whom this question was submitted, said: "If the legislature provides such a classification with progressive taxation on larger holdings, I can see no ground for its rejection by the courts. It is not arbitrary; it is based upon sound public policy of encouraging the widest possible ownership of the soil, it is a classification founded upon a reason." Certainly several of the expressions quoted below from the United

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(12). Citizen's Telephone Co. v. Fuller, 229 U.S. 322
(13). Assoc. Schools v. Dist. No. 83, 122 Minn. 254 quoted from 128 U.S. 578, Walston v Nevin, where it is quoted from 114 U.S. 606, Wantz v. Hoagland.

States Supreme Court correlate well with this view.

The decisions already quoted have thrown some light on the attitude of the United States Supreme Court on this question. But so much state legislation has been thrown aside because of the "due process of law" and "equal protection of the laws" clauses in the Constitution that a reader may well have doubts on this score still. A writer on these very phrases [14] says: The Fourteenth Amendment in guaranteeing "equal protection of the laws" was not intended as a restriction on the taxing power of the state, and "very few laws imposing taxes when brought to the bar of the Supreme Court have been declared invalid. Alleged discriminations have been upheld on the ground that the state has a right to classify the objects of taxation, provided the classification is not arbitrary, unreasonable, oppressive or capricious." In one case [15] Mr. Justice Field made it clear that the Supreme Court does not make it its business to decide the wisdom or merit of every state's devices for taxation. He said: "This court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal, and oppressive state legislation. The judicial power of the Federal Government can be invoked only when some right under the Constitution, law, or treaties of the United States is invaded. In all other cases the only remedy for the evils complained of rests with the people and must be obtained through a change of their representatives."

The application of the "due process of law" clause is clearly stated in another part of the decision quoted above; [16] Whenever by the laws of a State or by State authority, a tax,

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(14). Taylor: "Due Process of Law." p. 611
(15). Mobile Co. v. Kimball, 102 U.S. 691.
(16). 128 U.S. 578, 582, above.

assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

Another decision specifically sets forth very broad limits within which the State legislature has discretions. A railroad company had appealed to the courts against a tax based on the face value of their securities as unequal taxation.[17] The United States Supreme Court refused to interfere and said further. "The Fourteenth Amendment was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may if it chooses exempt certain classes of property from any taxation at all, such as churches, libraries, and property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rate of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for the payment of money; it may allow deductions for indebtedness or not allow them. All such regulations so long as they proceed within reasonable limits and general usage, are within the discretion (of legislature or State Constitution makers).....We are safe in saying that the Fourteenth Amendment was not intended to compel a State to adopt an iron rule of equal

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(17). Bell's Gap Railroad Co. v. Pennsylvania, 134 U.S. 232.

taxation." The Court goes on to point out (p.237) how this would be manifestly inexpedient. Then it quotes an earlier case[18] thus; No amendment"was designed to interfere with the power of the state, sometimes called its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

Other decisions not directly in point, but nevertheless serving to show how hesitant the Supreme Court of the United States is to declare state tax laws unequal or discriminatory, are the following:

It was held that a penalty of 50 per cent of non-payment of taxes by a telegraph company was not unconstitutional.[19]

The exemption of tracts of land below 1,000 acres from a provision for forfeiture of larger tracts for failures in payment of taxes would not seem to give "equal protection of the laws," but was held constitutional.[20]

A license tax imposed on refining companies, but exempting those companies that refine merely products of their own plantations was held not unconstitutional.[21]

A license tax on imigrant agents hiring labor to work outside the state, which did not tax likewise persons hiring labor to work within the state, was upheld.[22]

A North Carolina law was sustained tho it taxed "every

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(18). 113 U.S. 27,31..Barbier v. Connolly.
(19). Western Union Telegraph Company v. Indiana, 164 U.S. 304.
(20). 171 U. S. 404, King v. Mullins.
(21). American Sugar Refining Company v. Louisiana, 179 U.S. 89.
(22). Williams v. Fear, 179 U. S. 270.

meat packing house doing business in this state," but did not tax other sellers of packing house products.[23]

Certainly then it would seem that those who desire to tax large land holdings heavily, or to tax unimproved lands as heavily as improved lands, or even to tax lands of absentee owners more heavily than lands occupied as home farms, need not fear interference by the United States Courts, whether their purpose be merely to assist and encourage the small farmer, or to force the sale of large holdings and thus made it easier for the state to secure the lands needed for its state colonization plans. The real problem is to secure a survey and appraisal that will present the needed facts; then to work out a plan that bids fair to accomplish the purposes they intend, and then get to the legislature to enact the plan into law. We remember, too, that it had taken New Zealand twenty-four years to accomplish the part of the task represented in our data, with much left yet to do. Minnesota could profit by the experience of other states, and could avoid some of the weaknesses of their early attempts, but at best it would be several years before a changed system of taxation could bring about any considerable results. When governments in the past have needed land for public uses, they have sometimes bought as ordinary purchasers, sometimes may have used taxation as a help, but the final dependence has been the Right of Eminent Domain, especially if the need was imminent. The next question then, for us to solve is, Can Minnesota seize by eminent domain the lands needed for State Colonization? And, whether the land is bought through voluntary sale by private parties, or seized by eminent domain, it must be paid for. Can Minnesota by taxation or by borrowing secure the money to compensate the owners of the lands seized?

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(23). American Packing Company v. Lacy, 280 U. S. 226.

CHAPTER III.

EMINENT DOMAIN AND THE RAISING OF MONEY TO SECURE THE LANDS NEEDED FOR STATE COLONIZATION.

PART I.

EMINENT DOMAIN AS A MEANS OF SECURING THE NEEDED LANDS.

The preceding chapter has shown that a State Colonization plan would have frequent need to appeal to the right of Eminent Domain. "Eminent Domain is the right or power of a sovereign to appropriate private property to particular uses for the purpose of promoting the general welfare. It embraces all cases whereby authority of the State and for the public good, the property of an individual is taken without his consent, for the purpose of being devoted to a particular use, either by the State itself or by a corporation, public or private, or by a private citizen." Thus Lewis begins his two volumes on Eminent Domain.[1]

Before we take up the immediate application of this principle to the problem in hand, it will be well to note several facts and some differences of views regarding it.

First, it applies only to property rights; rights which are not property rights, as, e.g., the right to vote, are not subject to Eminent Domain.

Second, the right of Eminent Domain rests, not upon the ultimate ownership of the soil, but upon soverignty. Were Eminent Domain dependent on the feudal principle of ownership of the soil, then the declaration[2] in the Constitution of Minnesota. "All lands within the state are declared

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(1). Lewis' "Eminent Domain," pp. 1-2.
(2). Article I, Sect. 2 Constitution of Minnesota.

allodial, and feudal tenures of every description with all their incidents, are prohibited," would relieve privately owned lands from Eminent Domain. But to quote another writer[3] on this same subject, "Nothing in the nature of title to land can withdraw the land itself from subjection to the right of Eminent Domain." More directly to the point, Mr. Justice Strong:[4] says: "No one doubts the existence in the State governments of the right of Eminent Domain - a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessity of their being, not out of the tenure by which lands are held. The right is an offspring of necessity and it is inseparable from sovereignty, unless denied to it by its fundamental law." Lewis states it thus;[5] "The power of Eminent Domain is not a reversed but an inherent right, a right which pertains to sovereignty as a necessary, constant, and inextinguishable attribute."

For Minnesota, this view was expressly asserted by our Supreme Court[6] Since the power of Eminent Domain is not expressly delegated to the legislature, its <u>existence</u> which is <u>inherent</u> must be implied; and the courts upon consideration of its essential nature and effective application in the obvious necessity for its exercise by the highest popular element of the state authority, "have held it to be a legislative power." A similar view is expressed by the Court of another state:[7] "The right of eniment domain is an inherent and essential element of sovereignty; it results

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(3). Nichol's "Eminent Domain." I, p. 67
(4). Quoted in "Words and Phrases," 3, p. 2364, from 91 U.S. 367.
(5). Lewis' "Eminent Domain," I, p. 7.
(6). State ex rel. Ryan v. Dist.Court Ramsey Co. 87 Minn. 146,149.
(7). Brown v Beatty, 34 Miss. 227.

from the social compact and would exist without any express provision in the organic law upon the subject."

Third, the power of Eminent Domain may be delegated to individuals, or corporations; it is even immaterial that the control of the property is vested in private persons who are actuated by motives of private gain. "It has long been settled," says Cooley,[8] "that it is not essential that the taking be by the State itself, if, by any other agency, in the opinion of the legislature, the use can be made equally effectual for the public benefit." For parks, highways, space for school and county buildings, it is clear that the use is by and for the public. In case of mill dams, mill sites, railways, the use is directly by a private party for his own gain. To continue from Cooley: "While there are unquestionably some objections to compelling a citizen to surrender his property to a corporation whose corporators in receiving it are influenced by motives of private gain, so that to them the purpose of the appropriation is altogether private, yet, conceding it to be settled that these facilities ..... are a public necessity, if the legislature reflecting the public sentiment decides that the general benefit is better promoted by their construction through individuals than by the State itself, it would be pushing a constitutional maxim to an absurd extreme to hold that the public necessity should be provided for in the way that is least consistent with the public interest. Accordingly, on the principle of public interest, not only the state and its political divisions, but also corporations and individuals have been authorized to take private property for

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(8). Cooley: Constitutional Limitations, Chapter XV.

the construction of works of public utility, and, where duly empowered by the legislature to do so, their private pecuniary interest does not preclude their being regarded as public agencies in respect to the public good which is sought to be accomplished." In a Michigan case[9] the court said: "The most important consideration in the case of Eminent Domain is the necessity of accomplishing some public good which is otherwise impracticable, and the law does not so much regard the means, as the end." In the Mississippi case quoted above,[10] the Court further said: "When such enterprises (railroads, and other works of internal improvement) are engaged in by private individuals under charters of incorporation, although in respect to anticipated pecuniary gain of the corporation, they may be regarded as individual and private, yet the object and purpose being the public advantage, they are works of public character." Lewis refers to twelve other decisions of the same general tenor. To us the most important is the statement of our own court:[11] "The sovereign may exercise the power directly or it may delegate it to individuals or private corporations which are engaged in enterprises of a public nature."

Fourth, the benefit aimed at in an exercise of Eminent Domain, may be local and limited. This is evidenced in the familiar seizure of ground for a school yard for the children of a very few families; also in the seizure of land in many jurisdictions to create mill sites serving a relatively restricted area. Lewis sums up the principle thus:[12] "The public

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(9). People v. Township Board of Salem, 20 Mich. 452.
(10). Brown v. Beatty, 34 Miss. 227.
(11). Minn. Canal & Power Co. v. Koochicking Company, 97 Minn. 429.
(12). Lewis' "Eminent Domain," I, p. 501.

use required need not be the use or benefit of the whole public or any large portion of it." An Illinois decision says this:[13] "It is not essential to the public character of a use that the entire community or people of a state or any political division thereof, shall be benefited by its use."

Fifth, in case land is seized by Eminent Domain, what value shall be placed upon it? Shall the price be the measure of its value to the owner or the condemnor, of the value before or after the contemplated changes? Shall the adaptability of the land condemned to the particular use be considered?

"The measure of the land owner's compensation is the value of the land at the time it is taken; any supposed future increase of value should not be taken into account."[14] It is "not the worth of the land to the condemnor," for in a still earlier decision[15] the Minnesota Court denies the right "to make the company's necessity the land owner's opportunity to get more than the real value of the land." "The real question is the value of his land." And the United States Supreme Court held the same view:[16] "The value of the property to the government for a particular use is not the criterion; the owner is compensated when he is allowed full market value." Dunnell's Digest sums up a rather recent decision[17] of our own court thus: "The material consideration is not the benefit to be

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(13). Cleveland, Cin.Chi. & St.L.Ry. v. Polecat Drainage Dist., 213 Ill. 83.
(14). Union Depot,Street Railway & Transfer Co. v. Brunswick, 31 Minn. 297.
(15). Stinson v. Ch.Mil. & St.P. Ry.Co., 27 Minn. 284, 291.
(16). U.S. v. Chandler Dunbar Water Power Co., 229 U.S. 53.
(17). Ottertail Power Co. v. Brastad, 128 Minn. 415.

derived By the petitioner, but the damages sustained by the land owner;" and the United States Court decision just cited says in another place: "The owner of the land is not entitled to the probably advanced value resulting from the contemplated improvement. The value is to be fixed as of date of the proceedings." It goes on to quote a still earlier decision:[18] "The owner..... is not entitled to the additional value resulting as part of a comprehensive scheme of improvement requiring a taking of his property..... The Fifth Amendment is satisfied by payment to the owner of what he actually loses; it does not demand what the taker has gained."

Two qualifications are to be made however. "One whose land is taken by government for a particular purpose is entitled to have the fact that his land is peculiarly available for that purpose considered in its appraisal."[19] Again, where a condemnor has seized at one time certain lands adapted to his purpose, and at a later date finds that he must seize more land, he "must expect to pay the enhanced value of the land brought about by the construction" of the earlier improvements, but at that he should be required to pay "real values rather than fanciful."

With these two qualifications in mind, we find the principles laid down above are stated in numerous decisions and are well summed up in a decision handed down only a few years ago:[20] "The owner is entitled to what it may fairly be believed a purchase in fair market conditions would have given

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(18). Boston Chamber of Commerce v. City of Boston, 217 U.S.189.
(19). Minn. Digest Supp., 3050, quoted from 229 U.S. 53.
(20). City of New York v. Sage, 239 U. S. 57.

for it, and not what a tribunal at a later date may think a purchaser would have been wise to give ..... The owner is not entitled to the added value resulting from the union of his lot with others when the union was the result of the exercise of eminent domain and would not otherwise have been practicable.....The owner is entitled to the rise in value before the taking not caused by the expectation of the event."

Sixth, as to who shall decide and express for a sovereign state or nation the proper occasions for the exercise of Eminent Domain, the Connecticut Court long ago laid down the principle:[21] "It was for the General Assembly to determine whether building a compensating reservoir might be a proper and logical factor for supplying a municipality with water, and that its affirmative determination if not controlling was at least entitled to be received with great respect by the Courts." Dunnell's Digest [22] quotes a Minnesota decision: "The power of eminent domain rests exclusively in the legislature, and can be exercised only as authorized by the legislature. In all cases the expediency of condemning private property for public use is a purely legislative question." Many years earlier our Court had said:[23] "Where the use is a public use, the legislature is the exclusive judge of the amount of land and the estate therein which the public end to be subserved requires to be taken." And later a decision reads thus:[24] "If the use is a public use, the propriety of

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(21). Board of Water Commissioners of Hartford v. Allison,87 Conn. 193.
(22). Dunnell's Digest, 3027, quoting 127 Minn. 23.
(23). Fairchild v. St.,Paul, 46 Minn. 540.
(24). Stewart, Great Northern Railway, 65 Minn. 515, 517.

authorizing the exercise of the power of eminent domain is exclusively a legislative question;" and strengthened the position of the legislature still further by saying: "The term public use is flexible, and cannot be limited to the public use known at the time of forming the Constitution."

But it must not be inferred from this that the legislature is all powerful, and can make whatever use it may choose a public use by its mere declaration. The legislature cannot by its mere fiat make a private use a public use. In the last two cases quoted above the clauses "where the use is a public use," and "if a use is public" intimate a qualification of the legislature's power a final decision on one phase of the question lying elsewhere. The last quotation is preceded in the decision by these words: "What is a public use is a judicial, not a legislative question." Long before this our Court had held:[25] "It is for the Court to determine whether the uses for which lands are sought to be appropriated is a public use." The owner's rights to a court review before seizure under eminent domain are stated thus:[26] "Whether the purpose for which private property is to be taken is a public purpose is a judicial question which the owner has a right at sometime and in some manner to present to and have determined by the Courts before his property is actually seized." This whole question Nichols discusses at considerable length;[27] we should summarize his discussion thus: It rests in the legislature to initiate or authorize proceedings in eminent domain, upon the executive to decide whether the right shall be exercised in a specific case; and upon the judiciary

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(25). In re St. Paul & N.P. Ry. Co., 34 Minn. 227,228.
(26). Webb v. Lucas, 125 Minn. 403.
(27). Nichols, "Eminent Domain," I, 58-68.

to determine whether the assumption of eminent domain is valid in the case brought before it.

The real problem however, remains yet before us, namely, What constitutes public use? Some light has been thrown on it in the six points already made. A reading of twenty or thirty definitions of eminent domain brings out at once the fact that the larger number of them contain such phrases as "for public use," "to public use," "of buying what is necessary for the public use," "taking the property of its subjects for necessary public uses." It is equally obvious that a respectable proportion of the definitions are much less specific as to public use, and employ such expressions as "to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand..... The "right by which property may be taken for the public benefit without regard to the wishes of its owner;"[28] "for public good, the property of the individual may be taken without his consent;"[29] "right of sovereignty to use the property of its members for the public good, or public necessity."[30]

The legal commentators differ as widely as the decisions. Tiedeman says:[31] "A careful reading of authorities forces one to the conclusion that the term public use is either misused, or is given a peculiar meaning in the law of eminent domain, very different from what it bears in other branches of law. Indeed, it would appear more correct to say that while the term public use was originally employed in the law of eminent domain as meaning a use by some governmental agency, the ever increasing complications of

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(28). Cherokee Nation v. So. Kan. Ry. Co. 33 Fed. 900.
(29). Commonwealth v. Alger, 61 Mass. 53.
(30). Gilmer v. Throckmorton, 18 Cal. 229, 250.
(31). Tiedeman, Police Power, II. Sect. 141.

modern civilization have compelled an application of the right of eminent domain to other than public or governmental uses, and the meaning of the term public use was broadened from time to time in order to cover new applications of the right until now the term is synonymous with public good." He quotes Chancellor Walworth of the New York Supreme Court:[32] "If the public interest can in any way be promoted by the taking of private property (note how broad this is), it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize interference with the rights of private individuals for that purpose..... In all such cases the object of the legislative grant is the public benefit derived from the contemplated improvement."

Judge Cooley quotes from Kent in the exact words of the first sentence quoted above from Walworth and goes on to comment as follows:[33] "It would not be entirely safe to apply with much liberty the language quoted. It is certain that there are very many cases in which the property of some individual owners would be likely to be better employed or occupied to the advancement of the public interest in other hands than in their own; but it does not follow from the circumstance that they can rightfully be dispossessed. It may be for the public benefit that all the wild lands of the state be improved and cultivated, all the low lands be drained, all the unsightly places be beautified, all the dilapidated buildings be replaced by new; all these things tend to give an aspect of beauty, thrift, and comfort to the country, and thereby to invite settlement, increase the value of lands, and gratify the

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(32). Berkman v. Saratoga & Schenectady R.R.Co., 22 Am.Dec. 679.
(33). Cooley: "Constitutional Limitations," pp.654-60; 2 Kent Com. 340.

public taste; but the common law never sanctioned the appropriation of property based on these considerations alone, and some further element must therefore be involved before the appropriation can be regarded as sanctioned by our constitutions. The reason of the case, and the settled practice of free governments must be our guides in determining what is public use, and that only can be considered such when the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which on account of their peculiar character, and the difficulty - perhaps impossibility of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide." He goes on to enumerate some that have met approval by the courts, such as provision for the public ways, courthouses, buildings for schools, aqueducts for water for towns, levees, drains, "and other measures of general utility in which the public at large is interested, and which require the appropriation of private property, are also within the power, where they fall within the reasons underlying the cases mentioned."

Tiedeman quotes this discussion of Cooley's and grants in his discussion of it that the common law has never sanctioned the condemnation of private property for all the purposes enumerated by Judge Cooley, nor could it be called a public use; but, he maintains, there is nothing in our constitutions which requires a taking for public use. It has been judicial opinion that it is unrepublican to take private property for any but a public use, but, "we claim that the courts at least in later years meant thereby that private property cannot be taken except to promote some public good."..... "There is therefore no constitutional limitation upon

the power of government to declare an appropriation of lands in possession of private persons, for the construction of mills, the improvement of wild lands, the drainage of low lands, and for the promotion of any public benefit when the avarice or selfishness of a private owner necessitates the condemnation of such lands." "It is highly republican to place the public good above the selfish interest of the individual, and inasmuch as the ultimate property in lands is vested in the state for the common benefit, and it is not unreasonable to claim that all private property in land is acquired and held subject to the condition among others that it may be reclaimed by the State whenever the public interests demand it."

Tiedeman has here taken advanced ground, and it is to be noted that he is not alone in it. Chancellors Kent and Walworth have already been quoted to the same general tenor, and others can be quoted. The Connecticut Court said long ago:[32] "The words public use mean public utility, advantage, or what is productive of public benefit." Another court has said;[33] "Whatever is beneficially employed for the community is of public use and a distinction cannot be tolerated."

But certainly the great body of the decisions are not thus broad in interpreting public use. The principle is often laid down, e.g., that to constitute public use, the property must be taken into the direct control of the public, or the public must have the right to use in some way the property appropriated. The West Virginia Court lays down the requirements[34] for condemnation of lands to be directly occupied by private parties or corporations:

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(32). Olmstead v. Camp, 33 Conn. 532.
(33). Aldridge v. T.C. & D. R.R. Co., 23 Am. Dec. 307.
(34). Vanner v. Martin, 21 W.Va. 522,552.

First, the general public must have a definite and fixed use of the property to be condemned, a use independent of the will of the private parties in whom title rests. Second, this public use must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience. Third, it must be impossible, or at least very difficult to secure the same public uses and purposes in any other way than by (Eminent Domain).

The Washington Supreme Court, commenting on the broad interpretation of the public good, says:[35] "It seems to us that this is the announcement of a dangerous doctrine, tending to encroach on private rights the Constitution has attempted to safeguard, and to render such rights as uncertain and varying as the interests of different localities and opinions of different judges on different branches of business. The Constitution is the fundamental law. The enactments whether they constitute grants or limitations are presumed to be stable and uniform and to constitute a check on the more mutable sentiment and actions of the members of different legislatures. It seems to us the result of such a construction would be the virtual removal of any constitutional limitation on the legislative power, in this respect leaving the legislative will as free and untrameled as in those states (without a constitution)."

It is always interesting to speculate on what may or might be. One cannot but wonder whether the "private rights the Constitution has attempted to safeguard" may not be at times too jealously safeguarded; whether the courts have not possibly at times sacrificed great public needs to this desire to safeguard private property rights.

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(35). Healy Lumber Co. v. Shamgar Moviss et al, 33 Wash. 490.

A recent writer [36] makes the accusation that the purpose of the Convention of 1787 was "above everything else to safeguard the rights of private property against any leveling tendencies on the part of the propertyless masses." He quotes Madison to the effect that "tne great object of the Convention was to secure private rights against majority factions and at the same time preserve the form and spirit of popular government." Gouveneur Morris is quoted thus: "Life, and liberty were generally said to be of more valu than property. An accurate view of the matter would nevertheless prove that property was the main object of society." Madison is again quoted as saying in the Federalist (Tenth Number) that in his opinion the great merit of the newly framed Constitution was that it secured the rights of the minority against the superior force of an interested and overbearing majority, and is repeatedly quoted in the same general tenor as the quotation above from him.

Whatever may have been true in this respect of the Convention and the Constitution it formulated, it is not to that body nor to that document that we owe the difficulties of the present problem. The absence of any Bill of Rights was one nearly fatal objection to the adoption of the Constitution; tradition says that it was only the agreement of its friends to accept certain amendments making together a Bill of Rights that made possible its acceptance by some of the states. It is in these ten amendments and another adopted later that legislation attempting to broaden the interpretation of "public use" finds its obstacle. The Fifth Amendment, in particular, provides "nor shall any person .....

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(36). Beard: "Economic Interpretation of the Constitution."

be deprived of life, liberty, or property without due process of Law." This amendment is recognized not as a limitation upon the power of the States, but of Congress. But two generations later the Fourteenth Amendment applies this restriction and some others to the States: "Nor shall any State deprive any citizen of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is not the original Constitution, but these two amendments primarily to which appeal has been made to protect private property from seizure for what some legislative body thought was a public use. Furthermore, as pointed out a ove, neither the Constitution nor amendments say that a taking of private property must be for a public use; the limitation has arisen from the fact that Courts, in interpreting the "due process of law" clause, have held that the taking of property in order to be valid must be a taking for a public use.

When Tiedeman expresses the views that the interpretation of "public use" by the Courts has been undergoing change, and that public use is coming to mean public good, public benefit, the question arises, whether this does not point to a day of broader interpretations than those of the past. The Minnesota Court, conservative as it is generally in regard to public use, has held more than once that public use is not an inflexible thing; that constitution makers could not have foreseen what uses would be public uses. Then can the Courts - constitution-interpreters - judge more wisely in a given year what will be public use in years to come? But if not, why should courts, in interpreting this concept that must change with changing times and conditions feel so bound by precedents created under different conditions?

This flexibility of some legal terms, to which the Minnesota Court refers in case of public use, Professor Ely elaborates on [37] as one of means of making constitutions more subservient to public needs and less protective of property rights primarily. After pointing out "free," "freedom," "liberty," as words which got their meanings in the eighteenth century with courts sometimes still interpreting them in today's problems in their eighteenth century meanings, he refers to "reasonable," "rule of reason," "due process of law," as other terms whose interpretations can and must change as social conditions change. "Consider the flexibility of the terms public purpose, public use, public policy," he says: "The legislature may go far in defining them, and enlightened courts will apply these concepts to concrete cases in the spirit of our century and not in the meaning given them one hundred years ago." Eminent Domain, too, he thinks, is as flexible as public purpose, and he intimates that the future will not restrict eminent domain to real estate but will apply it to rights of other kinds needed to protect the public weal. In fact property itself is a bundle of rights, from which subtractions or to which additions, can be made from time to time.

An opinion written by Chief Justice Winslow of Wisconsin[38] is apt at this point: Constitutional commands and prohibitions either distinctly laid down in express words, or necessarily implied from general words, must be obeyed, and implicitly obeyed, so long as they remain unamended or unrepealed. Any other course on the part of either legislator or judge constitutes a violation of his oath of office; but when there is no such express command or prohibition, but only general language, or a general policy drawn from the four corners of the instrument, what shall be said about this? By what

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(37). All these references are to pp.697-704 Ely's "Property and Contract."

(38). Quoted in Ely's "Property and Contract," p.681, from 147 Wis.327

standard is this general policy or language to be interpreted and applied to present day conditions? When an eighteenth century constitution forms the charter of liberties of a twentieth century government, must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Certainly not. This were to command the sun to halt in his progress, to stretch the State upon a veritable bed of PROCRUSTES."

Where there is no express command or prohibition, but only general language or policy to be considered, the conditions at the time of its adoption must have due weight; but the changed social, economic, and governmental conditions and ideals of the time as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of the problems of construction and interpretation."

But all this, encouraging as it may be in its promise of gradually broadening interpretations of the constitutional limitations, is something that will come into fruition by slow degrees. The writer assumes, however, that land settlement in Northern Minnesota is a problem that should be solved soon; that every year's delay means several hundred settlers starting under circumstances less advantageous than they should, and possibly so disadvantageous as to make success impossible. Let us, then, lay aside these speculations and seek to learn how the Minnesota Courts look upon public use. Our own court must be our guide, as it is our final arbiter.

The Minnesota Constitution does not say expressly that private property may not be taken for a private purpose. What it

does say is that "no person shall be deprived of property without due process of law," the Court's interpretation has been that taking private property for any but a public purpose is taking property without due process of law, and is unconstitutional. "Lands can be acquired by eminent domain only for a public use or purpose."[39] One of the strictest interpretations the writer has found anywhere is the following:[40] "In Proceedings to condemn private property every reasonable doubt must be resolved in favor of the land owner. When the purposes stated in the petition are part public and part private, the right to proceed must be denied. A use is not public unless under proper regulation the public has the right to resort to the property for the use for which it was acquired, independently of the will or cparice of the owner." Dunnell's Digest[41] comments on this decision as "narrow, impractical, and reactionary," and quoted the Harvard Law Review[42] comment: "The sounder and more liberal view extends it to whatever is of benefit to any considerable portion of the community as regards health, material prosperity or other welfare." In fact, other decisions of our own Court are quite out of harmony with the strictness of this view. E.g., in a Norman County drainage case,[43] an act providing for the drainage of wet lands in the interests of public health, convenience, and welfare was upheld, and the court made clear that it does not matter that in advancing the public objects of the act, private interests are also advanced. Such a

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(39). Stewart v. Great Northern Railway, 65 Minn. 515.
(40). Minn. Canal and Power Co., v Koochicking Co., 97 Minn. 429.
(41). Minnesota Digest, I, p. 661.
(42). Talbot v. Hudson, 16 Mass. 417, cited by Harvard Law Rev.400
(43). Linn v. County Commissioners of Norman County, 80 Minn. 58.

result is incidental and does not affect the validity of the laws. It is true that this was a case of police power rather than eminent domain, but that does not destroy the conclusion that public use may be accompanied by private benefits. This same decision repeats however that the legislature has no power to exercise the right of eminent domain for private purposes.

As in the plan of State settlement and colonization the State would be securing the land with the idea of ultimately passing title to some private party, the question arises as to the State's right to pass title to a private party of what had been seized for a public use. A case that at first glance seems to be in point arose in St. Paul. The City had acquired by eminent domain and had paid for a "perpetual easement for the purpose of a public levee." As the City had not built the levee, it secured and utilized permission from the legislature [44] to lease the land" to any persons, company, or corporation for such purposes as said council shall prescribe." When the owner before the condemnation sued and the case came before the Supreme Court,[45] it held that the State's title is held in trust for a public use, and the legislature cannot divert it to an inconsistent use of a private nature, nor can it authorize the municipal authorities to so divert it." This case involves the seizure for one purpose, and the sale to private parties for a purpose not contemplated in the original seizure. A state settlement plan carries the assumption that the development of the unsettled areas of the state is a public purpose, and that the seizure of land to improve it and sell it to settlers at approximate cost is the most economical and efficient method to accomplish this public purpose. Thus, the sale to private parties

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(44). Sess. Laws, 1891, Chapter 255.
(45). Sanborn v. Van Duyne, 90 Minn. 215.

is not a diversion from the purpose for which the land had been condemned, as in the St. Paul case, but rather a step in carrying out the original public purpose, and the St. Paul case is not exactly in point. As we have seen above, "who holds or uses the land for the purpose for which it is taken, does not affect the character of the use."[46] But at another point in the decision handed down in the St. Paul case, the Court, quotes an earlier decision [47] far more dangerous to the hopes for a State Settlement plan: "The title which the state acquires.... it can neither sell nor devote to a private purpose." "If, after acquiring property for a public use, the legislature may divert it to a private use, it may do indirectly what it cannot do directly and accomplish what the Constitution forbids" (the taking of private property for other than a public use). Thus it is not clear that the State, having seized lands under eminent domain, could sell them to private parties. A more serious question is, Could it seize them in the first place, with the expressed intention of turning them soon to private owners?

Among the "public purposes" for which eminent domain has been exercised are the purpose of highways, of privately maintained roads for public use, of toll roads, of bridges, of ferries, of canals, of railways, of telegraph lines, of pipe line, of elevated tramways, of public grain elevators; of urban improvements such as sewers, gas, water mains, and reservoirs, electricity, water power; of schools, markets, hospitals, parks, cemeteries; of improvement of navigation; development of mines; of construction of drains, levees, ditches; of promoting fish culture and cranberry culture.

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(46). Crolley v. M. & St. L. Ry., 30 Minn. 541,544.
(47). Fairchild v. St. Paul, 46 Minn. 540.

The Digest lists[48] with the citation in each case the following uses which have been declared public uses by our own Supreme Court: flowage of lands by means of mill dams; booming of logs in navigable rivers; a public park; a railway sidetrack to a stone quarry; a railway switch track to a lumber mill; a grain elevator on a railway right of way; a railway spur track to a gravel pit; the drainage of wet lands; the generation and distribution of electricity and gas for use of the public. In relatively recent decisions the following have been held to be "public uses:" Use of a public highway for a fence to protect a municipal water supply from pollution:[49] use of land for an artificial water-course between two lakes in a city;[50] use of land for a public cartway to furnish access to the premises of a single owner and located on the premises of another;[51] use of lands for a railway track for the use of the University of Minnesota.[52]

The Drainage Acts of Minnesota have come before the Supreme Court from several different angles and probably present more clearly than any other group of cases the views of our Court.[53]

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(48). Dunnell's Digest, Vol. I, Sec. 3025.
(49). Bd. of Water Com. v. Belland, 113 Minn. 292.
(50). C.M. St. P. Ry. v. City of Minneapolis, 115 Minn. 460; affirmed 232 U.S. 460.
(51). Mueller v. Supervisors, 117 Minn. 290.
(52). State v. Reed., 125 Minn. 94.
(53). Here Lewis' "Eminent Domain," Vol. I, Sect. 294 has been followed in the Study of the Minnesota Session Laws and Cases; every case referred to by Lewis was examined, and an attempt made to give the main facts regarding all recognized to have a bearing on our problem. Then the Supplement to Dunnell's Digest of Minnesota Court decisions was used and cases referred to by it were examined with the same purpose.

An act of 1887 provided that on petition of property owners "setting forth the necessity thereof," the County Commissioners of a county could establish a ditch, "when the same shall be conducive to the public health, convenience, or welfare, or when the same will be of public benefit or utility" and if such board shall determine that the construction of such ditch will be of publib benefit or utility, or conducing to the public health convenience or welfare." The fifth section requires that "this act shall be literally construed so as to promote public health and the drainage and reclamation of wet or overflowed lands." This law was held valid as a proper exercise of police power.[54]

In 1901 the act of 1887 was repealed and a new act was substituted similar in scope, but to quote the decision;[55] "There is no express provision in the statute making it the duty of the Board to find whether the ditch will be a public benefit, nor is there in the act any express declaration that such fact must exist before a ditch may be ordered constructed. Yet the Court held that "in construcing such a statute we must assume if its language will admit that the legislature intended to act within its constitutional power;" "the legislature intended to provide exclusively for the public welfare," "the requirement that the petition shall state the necessity for the ditch must necessarily refer to,and mean the public necessity." The act was held valid.

The act was revised in 1905 and the establishment of the ditch was made conditional upon its being a public benefit or for the promotion of the public health. This act was held valid.[56]

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(54). Linn v. County Commissioners Norman County, 80 Minn. 58.
(55). State v. Board of County Commissioners Polk Co. 87 Minn. 325.
(56). Chapter 230, Laws of 1905, held valid in Miller v. Jensen, 102 Minn. 391.

In 1907 an act was passed (Chapter 191) which reads thus: "When any person or persons who are the owners of any swamp, marsh, or wet land which on account of its condition may endanger the public health, or the drainage of which will result in the reclamation of otherwise waste lands, desire to construct for the purpose of such drainage any open ditch, etc., thro the lands of another," or when the construction of such ditch or drains is of benefit to the lands of adjoining owner or owners." This act was declared unconstitutional and void, because "under express terms of the law the property of adjoining land owners may be taken for a private purpose only and for no public purpose whatever" and the statute thus "attempts to authorize the condemnation of private property for other than a public use."[57]

In a more recent case[58] arising under Chapter 230,1911, the Court said: "The theory upon which drainage legislation rests is public utility and welfare. The interests of individuals are incidental and can never alone justify either changing or affecting private property against the owner's consent. It is to serve a public purpose, and no private ends, that the law was enacted."

What is there here to encourage the belief that the Court would permit the seizure of lands, to be turned by the State at once or very soon into private hands, when the seizure does not bring about a different kind of use of the lands, but simply an earlier and possibly more efficient use of them of the same kind that would result without the seizure?

A decision handed down by the Supreme Court since the above was written is of some interest especially since it so nearly

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(57). State v. Board of Supervisors, 102 Minn. 442.
(58). Van Pelt v. Bertilrud, 117 Minn. 50.

reverses a decision of a few month's earlier. Both cases grow out of the attempts to enforce ordinances authorized by the legislature, establishing "restricted areas," or "residence districts" within the city of Minneapolis. In the earlier case,[59] an owner tried to secure a writ of mandamus to compel the issuance to him of a permit to install an electric lighting system in a store building within the restricted area, and was refused the writ by the lower court. On appeal, the decision hinged on the interpretation of public use. The Court granted the rights of the legislature presented above and added: "The legislature has power to regulate and restrict the manner in which the owner may make useful his property, so far as may be necessary for the general welfare." But later it goes on to say: But the police power "must be confined to such restrictions and burdens as are thus necessary to promote the public welfare, in other words, to prevent the infliction of a public injury." (Here quoting State v. C.M. St. P. Ry., 68 Minn. 381). It also quotes a decision of the U.S. Supreme Court:[60] "A State in the exercise of its police power is not confined to matters relating strictly to public health, morals and peace, but there may be interference whenever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine what the interests of the public require and what measures are necessary for the protection of such interests." It adds that "the subjects which may be legislated upon are of necessity continually arising as business increases and new phases, conditions, and methods appear."

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(59). State ex.rel. Lachtman v. Houghton.
(60). Lawton v. Steele, 152 U.S. 133.

But "while the police power of the state is a very extensive one, it is not without limits. A law enacted in the exercise of police power must be a police regulation in fact. If it will not conduce to any legitimate police purpose, or if it amounts to an arbitrary and unwarranted interference with the right of a citizen to pursue any lawful business, the courts have a right, and it is their duty to declare it unconstitutional:"only such use of property as may produce injurious consequences, or infringe the lawful rights of others can be prohibited without violating" the constitutional rights of the individual, and the ordinance was held invalid in so far as it applies to store buildings.

In the more recent case [61]the Court says:"the essential question is whether the State may authorize a common council to establish by condemnation a restricted residence district which shall exclude apartment buildings; and that question is whether there is a public use for such restrictions."

"That the public gets no physical use of the premises is clear. The use acquired so far as the general public is concerned is rather negative in character, except perhaps that its sense of the appropriate and harmonies will not be offended by the erection of the proscribed buildings. The taking consists in the restricting of the owner's use."

"The notion of what is public use changes from time to time. Public use expands with new needs, created by the advance of civilization." The decision quotes an earlier decision:[62] "What constitubes public use at the time it is sought to exercise the power of eminent domain is the test" and goes on to speak at length

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(61). State ex.rel. City Building & Investment Co., v Houghton.
(62). Stewart v. Great Northern Railway, 65 Minn. 515.

of aesthetic considerations as a very proper public use. It also emphasizes the rights of the legislature: "As it presents itself to the Courts, it is not whether the use was public, but whether the legislature might reasonably have considered it public. The presumption is that the use is public if the legislature has declared it to be such and the legislature must be treated with consideration as a coordinate branch of the government of the State." The decision sustains the ordinance and the building inspector in his enforcement of it.

This decision furnishes considerable encouragement to hope for broadening interpretation of public use. One's confidence that it will be followed ere long by others of the same general tenor is much lessened when he notes that the earlier case was decided by a three to two vote, and the reversal by a three to two vote, with a strong dissenting opinion presented by the two. In other words, two judges favored the liberal interpretation in both cases, and two the stricter, with one judge taking opposite sides in the two cases.

We have then arrived at these conclusions as to the application of Eminent Domain to the securing of necessary lands for a state land colonization system in Minnesota:

1. The abolition of feudal tenures by Sec. 15, Act. 1 of the State Constitution does not affect eminent domain.
2. The taking under eminent domain could be as legally by a private land company carrying out a part of the States land policy, as if by the state itself.
3. It would not defeat an exercise of eminent domain in taking lands for a colonization project that the benefits would not be equally distributed to all the people of the state.

4. The land seized under eminent domain would be paid for not at its value to the state or company purchasing it, but at its value to the seller at the beginning of the condemnation proceedings, aside from prospective added value due to the plans of the buyer.
5. The mere passage of a law granting the exercise of eminent domain to a private company or some commission in control of a state colonization project is not final. The determination "whether the assumption of eminent domain is valid in a particular case" rests finally with the courts.
6. The Constitution of neither the United States nor the State of Minnesota require in express words that eminent domain be exercised only for a public purpose. But the Courts have held that the requirement that "no person shall be deprived of property without due process of law" forbids the taking of private property for a private purpose.
7. The general tenor of interpretations of "public use" by the Minnesota Supreme Court lies strongly against the exercise of eminent domain to secure the lands for a State Land Settlement System.
8. The inadvisability from the standpoint of economy of purchasing the needed lands at ordinary private sale; the long time required to force sale of the large holdings (assuming that it is wise to attempt it, and that the state would be the buyer when sales occur); the impossibility of seizing lands for this purpose under eminent domain - together point to the necessity of an amendment to the Constitution of the State as the only means that can make possible the securing by the State of the lands needed for such a

policy.[63]

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(63). E.g., an amendment very similar to Amendment XLIII adopted by Massachusetts: "The General Court shall have power to authorize the Commonwealth to take land and to hold, improve, subdivide, build upon, and sell the same, for the purpose of relieving congestion of population, and providing homes for citizens; providing, however, that this amendment shall not be deemed to authorize the sale of such land or buildings at less than the cost thereof." Approved by the people, 1913

PART II.

CAN MINNESOTA RAISE MONEY BY TAXATION OR BORROWING AND APPLY IT TO BUYING LAND FOR COLONIZATION?

In the discussion thus far we have been concerned with the possibility of the State's acquiring title to the necessary lands by ordinary purchase, by purchase after pressure has been put on present owners by a tax system specially designed to that end, or by condemnation under eminent domain. Every one of these methods, however, requires payment for the lands by the State; it is of course unconstitutional as well as repugnant to the American sense of justice to secure them in any other way than by paying for them. So the question yet remains, even if other obstacles could be overcome, how can Minnesota secure the money needed to finance a system of state colonization?

One of the powers inherent in the sovereignty of the state is the power of taxation. The legislature as the representative of the people has plenary power over taxation, excepting only as restricted by the constitutions of the state and United States, by charters or franchises previously granted by the legislature, or by the nature of taxation itself.

As to the second of these limitations, the United States

Supreme Court had held that a state may contract away its right to tax a particular enterprise. The Territorial government of Minnesota did this in a few cases, and those are still binding on the state. These cases have no relation to our problem, and further bargaining away of the State's right to tax was forbidden by an amendment to the Constitution, so that Sect. 1 of Art.9 now reads: "The power of taxation shall never be surrendered, suspended, or contracted away." The point of real interest to us, however, is in the next sentence of this Section: "Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes." Public use, public purpose again! "The right to tax" says the Minnesota Supreme Court,"depends on the ultimate use, purpose, and object for which the fund is raised." "Taxes must be for a public purpose; if partly public and partly private, it invalidates the whole Act unless the amounts for public and for private purposes can be severed."[64]

Taxation has been approved as for a public use in case of taxes to raise money for a donation to a railroad company;[65] to make refunds on void tax sales:[66] to assist an industrial exposition;[67] for gratuities to soldiers;[68] to provide county drains.[69]

On the other hand, taxation has been held <u>not</u> for a public purpose, and so unconstitutional in cause of--

(a) Improvement of private water power, though certain public uses of the power and dam were stated in the ordinance authorizing.

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(64). Coates v. Campbell, 37 Minn. 498.
(65). Davidson v. County Commissioners Ramsay Co., 18 Minn. 492(432)
(66). Coates v. Campbell, above.
(67). City of Minneapolis v. Janney, 86 Minn. 111.
(68). Comer v. Wm. H.C. Folsom, 13 Minn. 219.
(69). Wright v. May, 127 Minn. 59.

This is the Coates v. Campbell case quoted above in which the Court said that a use partly private and partly public invalidates the whole act unless it is possible to sever the amounts.

(b). Seed grain loans to farmers. The Laws of 1893, Chaps. 225, 226, authorized any one owning over 160 acres of land free of incumbrance, to borrow of the state a limited amount of money to purchase seed grain. It had seemed to the legislature a "public use" to use a limited amount of money as a temporary loan to make possible to the farmers of certain sections a crop for the year, and thus to reduce the probable number of those needing charity at a later time. But the Supreme Court [70] said no; the state cannot secure money by taxation for such a purpose. "The state cannot tax for a private purpose except in case of paupers, or those in imminent danger of becoming paupers" (and the Court did not seem to think that true of persons owning a quarter section of land, free of incumbrance). Further, "the credit of the state shall never be given or loaned in aid of any individual, association or corporation."

(c). Bounty on manufacturing of sugar beets. The Laws of 1895, Chap. 205 amended by Chapter 307 of Laws of 1899 provided for payment of certain bounties to manufacturers of sugar from sugar beets raised in Minnesota. These acts came before the Supreme Court of the State in Minnesota Sugar Company v. Iverson,[71] and were held unconstitutional, as inconsistent with Sect. 5 of Act 9, forbidding the State to be a party to carrying on internal improvements, and Sect.10,

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(70) 75 Minn. 118, Deering & Company v. Peterson and others.
(71) 91 Minn.30.

forbidding the loan of the credit of the State, as well as an appropriation of money for other than a public purpose. The decision as well as a decision of the Wisconsin Supreme Court from which the Minnesota Court quotes state very clearly the principles as our Supreme Court sees them. Judge Collins wrote the decision: "That the legislature is without authority to appropriate money or to provide for the imposition of a tax except for a public purpose, has again and again been held by this Court; and it would seem self evident that if it cannot provide for the imposition of a tax except for a public purpose, it cannot appropriate money for such a purpose, the direct result being the imposition of a tax to replenish the treasury..... That a manufacturing company is not a public enterprise within the meaning of any well-settled rule, and that a gratuity or bounty thereto, is not a grant of money other than for a private purpose, is universally held in the courts of the United States. The raising of sugar beets for manufacture in this state is just as much a private business enterprise as is the manufacture of sugar therefrom, or the carrying on of any other kind ofmanufacturing business. All are private enterprises and the State is prohibited from engaging in them. It is universally held that the sanction a grant of public funds the public purpose must be direct." The decision goes on to quote Curtis v Whipple,[72] a Wisconsin decision, which is quoted here a little more fully than by Judge Collins. The village of Jefferson had attempted to levy a tax to assist a private educational institution located there. It was argued that it was a public benefit to Jefferson to have the "institution in its midst." The Court held: "Nor will the location of the institution

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(72). Curtis and Whipple, 24 Wis. 39.

at Jefferson and the incidental benefits that may arise thereby to the people of the town, sustain the tax. That is not the kind of public benefit and interest which will authorize resort to the power of taxation. Such benefits accrue to the people of all communities from the exercise in their midst of any useful trade or employment, and the argument pursued to its logical result, would prove that compulsory payment or taxation might be made use of for the purpose of building up an sustaining every such trade or employment tho carried on by private persons for private ends. That there exists in the state no power to tax for such a purpose is a proposition too plain to admit of controversy." Thus far is our own quotation from the decision, but beginning here Judge Collins quotes: "If we turn to the cases where taxation has been sustained as in pursuance of this power, we shall find in every one of them that there was some direct advantage accruing to the public from the outlay, either by its being the owner or part owner of the property or thing to be created or obtained with the money, or the party immediately interested in and benefited by the work to be performed, the same being matters of public concern, or because the proceeds of the tax were to be expended in defraying the legitimate expenses of government, or in promoting the peace, good order, and welfare of society."

It may be granted that these quotations still contain some phrases that allow freedom of interpretation; but taking them in their general spirit and the cases regarding which the decisions were made, and applying them to the question, Could the State of Minnesota borrow money or raise money by taxation to finance a State land development and colonization plan, the writer sees no escape from the conclusions that legislation to that end would be

declared unconstitutional, as

1. Taxation for other than a public purpose.
2. Making the State a party to carrying on internal improvement.
3. Loaning the credit of the State.

Before we leave this topic we must notice an act recently passed by the legislature of Oregon. Oregon has in its constitution several features of interest to this discussion and very similar to those in the Constitution of Minnesota, but here is a law providing for Oregon's participation indirectly in land settlement. Presumably the constitutional lawyers of the Oregon legislature think they have a law that gets around the restrictions of the Constitution.

This law, the Soldier' Land Settlement Act,[73] after stating its object, creates the Oregon Land Settlement Commission; authorizes and directs it to incorporate under the laws of the State of Oregon with a fully paid up capital stock equal in amount to the amount appropriated in a later section ($50,000); the corporation to have power to do any and all acts necessary to the purposes of this act; to issue its bonds from time to time as it may deem necessary, such bonds to be the obligation of such corporation and not the obligation of the State of Oregon. This Commission as a body corporate may acquire by purchase or gift land and property needed for the purposes of the act; it may improve, lease, sell, or otherwise dispose of the same; it may exercise the right of eminent domain to secure needed lands; it may utilize state lands for its purposes paying into the proper funds proper amounts therefore. There are several other provisions, but these are the parts of the

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(73). Chapter 303, Laws 1919.

Act essential to our purpose.

Now Article XI, Section 7 of Oregon's Constitution provides that "the legislative assembly shall not loan the credit of the State, nor in any manner create any debt or liabilities which shall singly or in the aggregate with previous debts exceed the sum of $50,000." It is obvious that $50,000 would not go far in financing a land settlement plan; the State cannot legally borrow the money needed but a legally formed corporation may borrow by sale of its bonds, so if this corporation can sell its bonds, as it is assumed it can, the money will be secured. But this corporation is the Oregon Land Settlement Corporation, and some greedy creditor might think he had some hold on the State for the obligations of a corporation formed at the express bidding of the legislature to carry out its orders; thus the credit of the state would become involved, contrary to the Constitution; so it is expressly provided that such bonds shall be the obligation of the Corporation and not of the State of Oregon.

Again, the State shall not subscribe to or be interested in the stock of any company, association, or corporation. (Art. XI, Sect. 6, Constitution). Apparently, the State does not give money to the Corporation; the State appropriates money for its Land Settlement Commission, which it is deemed legal to do, this commission, after it has been credited with the money on the books of the State Treasurer, organizes a corporation, and thereafter runs on in an independent existence -- the State of Oregon has neither subscribed to it, nor is financially interested in it.

Again, "corporation may be formed under the general laws, but shall not be created by the legislative assembly by special law." But this corporation is not created by this Act; the Act creates a

Land Settlement Commission, and instructs it to take out a charter under the general laws regarding corporations. Thus the provisions of the Constitution are met, and the purposes of the legislature to aid colonization and settlement especially by soldiers are accomplished.

The original appropriation of the $50,000 might not have any constitutional bar to surmount, for the Constitution of Oregon does not in express terms at least require taxation to be for a public purpose, and the phrase public purpose or public use does not appear in the Oregon Digest, either in its own name or under the headings of Finance and Taxation. Certain decisions of the Oregon Court run counter to this view however. In one case,[74] the Court held certain assessments were not "an attempt to raise money for a private purpose contrary to the Constitution of Oregon, Article XI, Section 9." Shepard's "Oregon Citations" refers to a more recent decision: "No tax can be imposed for a private purpose," but every citation given in this decision as a basis for it is taken from the courts of some other state; and this fact that in fifty-eight years of state history the Courts had no apt precedents in their own decisions at least indicates far less emphasis on "public use," than it has had in our state. Under these conditions it seems not unlikely that this law will be allowed to stand.[75]

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(74). 47 Oregon 103.

(75). It may be added in passing that an amendment to the Oregon Constitution was recently proposed to allow the credit of the State to be loaned and indebtedness incurred up to two per cent of the assessed valuation of all the property in the State, for the purpose of providing funds to be loaned on the security of farm lands within the State. While this is a distinct proposition, it is likely that its provisions will work to the advantage of the settlers in prospect in the law we are examining.

Why not in Minnesota such a law as this Oregon law?

"The State shall never contract any debts for works of internal improvements, or be a party in carrying on such works."[76] But under this act, not the State, but the Minnesota Land Settlement Corporation, is doing these things.

"The credit of the State shall never be loaned or given in aid of any individual, association, or corporation.[77] The credit of the state is not involved, for the obligations of the corporation are not obligations of the State.

But "the legislature shall pass no special law--------- creating corporations, or amending, renewing, extending, or explaining the charters thereof."[78] But the legislative act does not create any corporation; it merely instructs one of its commissions to take out a charter under the general laws of incorporation.

However, could the Minnesota legislature provide that "real property may be acquired by said commission as a body corporate by exercise of the right of eminent domain which said power is hereby conferred upon it," as the Oregon law provides? Our Constitution answers the question thus: "The legislature shall pass no special law granting to any corporations any special privilege whatever."[79]

Further, could money raised by taxation in Minnesota be applied to such projects as improving lands for settlers, the settlers to pay for land and improvements on long time payments?

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(76). Constitution of Minnesota, Art. IX, Sect. 5.
(77).Art. IX, Sect. 10.
(78).Art IV, Sect. 33.
(79).Art IV, Sect. 33.

That is, could the original $50,000 or $100,000 be appropriated? We found above that our Court held unconstitutional an ordinance providing for an appropriation for a use partly public and partly private, unless it is possible to sever the amounts. In the seed grain cases, the Court regarded the taxation to raise money and advance it for seed loans as taxation for a private purpose, and the advancing of the money to be repaid later, as a violation of the Constitutional injunction against loaning the credit of the State. In the sugar bounty case above, we remember that our court stated point blank that a manufacturing company is not a public enterprise and that a grant of money thereto is a grant for a private purpose. "Such benefits as accrue to the people of all communities from the exercise in their midst of any useful trade or employment" are "not the kind of public benefit that will authorize a resort to taxation." These decisions the writer regards as fatal to the expectation that our Court would allow the original appropriation to stand.

Hence, we conclude that a law like the Oregon law would probably be declared unconstitutional by our courts on the ground that it appropriates public money to private uses. Certainly our Court would not allow the legislature to extend to such a corporation the right to exercise eminent domain. Further, still, the writer strongly suspects that the whole proposition might be declared unconstitutional. When the legislature creates a commission, deciding how many its members shall be, how chosen and for how long a time, how much money it shall have to work with, just what its purposes shall be, and in considerable detail how it shall carry out its functions, and confers upon it rights that are not conferred upon corporations in general, it is dangerously close to special legislation creating a corporation, even though the corporation thus

directed to be formed takes out a charter under the general law.

Another solution of the difficulty confronting the friends of State Colonization has been proposed. The Amendment to the Constitution providing that "the legislature shall pass no special law creating corporations, or amending, renewing, extending, or explaining the provisions thereof"[80] was added in 1896. Seven years later a law was passed definitely recognizing the State Agricultural Society as a public corporation, and legislating regarding it. Hence, it is argued that the Constitutional Amendment applies only to private corporations and was not intended to forbid creation or modification of public corporations.

An examination of this law[81] shows among others the following provisions:

> "The State Agricultural Society as it now exists (1903) is hereby confirmed and established as a public corporation." The conveyance of the land to the State, and the purposes of the Society are set forth. Then "neither the State nor said Society shall ever encumber the property."
>
> Several sections follow regarding membership, meetings, officers, compensation, contingent fund, appropriations of the Society.
>
> Then Section 6502 reads: "The title to money and other property of the Society shall vest in the State, and there shall be no division of its assets among its members. All moneys redeived shall be used for the purpose of holding its annual fair, etc."

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(80). Constitution of Minnesota, Art. IV, Sect. 33.
(81). Sections 6491 to 6514, General Statutes, 1913.

Section 6503 provides: "The custody, management, and control of said fair grounds and all structures thereon shall be vested in the Society as a department of State."

When this act came before the Supreme Court as it did in an action brought for wrongful arrest by Fair Grounds police,[82] the Court held:-

That the State Agricultural Society is a department of state and immune from suit for the wrongful acts of its servants.

That the legality of the transfer to the State can be attacked only by the State or the original Society and is not open to attack in private action.

That the 1903 Act is not subject to the objection that it is special or class legislation. "The legislature by its clearly defined purpose accepted an agency at hand, and made it an arm of government, and there can be no question that the State has the power and authority to protect its own interests."

In a later suit between the same parties,[83] the decision is a restatement of these points so far as our question is concerned. Thus the Court leaves no doubt that it was constitutional to accept the Agricultural Society as a department of State, though the legality of the transfer of its property to the State was not passed upon; it is merely decided that the transfer can be attacked only by the parties to the transfer, neither of whom is likely to attack it. Do these decisions warrant the belief that a Land Settlement Corporation might likewise be accepted by the Supreme Court as a part of the State government, if so provided by the legislature?

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(82). 93 Minn. 126, Berman v. State Agricultural Society.
(83). 95 Minn. 353.

In the case of the State Agricultural Society, we have a society or corporation whose purpose is educational and recreational for all the people of the State who care to attend and whose second purpose of advertising to all comers the advantages of Minnesota as a home for people and for agricultural, mining, and manufacturing enterprises, is, as well as the first, clearly for the public welfare. Again, any property it owns, the public has the use of and will continue to have the use of. Third, the Agricultural Society is forbidden to encumber the property with outstanding obligations. Fourth, the Agricultural Society was a society already existent in which the State had considerable investment and over which the State was exercising partial control.

From every one of these view points it is not a situation in point for us in our problem. The purposes of a fair association have been passed upon by the Courts of this and other states and have been accepted repeatedly as public purpose. We and many others may well believe that expenditures for state colonization are for a public purpose, but we have found little to encourage us in the hope that our Supreme Court would so regard them. As to the second point, the property of a land settlement corporation would not be open to general public use while property of the corporation, and is held by it temporarily in the expectation of transfering to private ownership soon - an ownership which would insist on its right to exclude the public. Third, the Land Corporation must, in order to finance its amortization of the settler's payments and extend its colonization plans; (1) receive large appropriations, which we have found pretty certainly unconstitutional at present; (2) involve the credit of the State which is certainly unconstitutional, or (3) encumber its own possessions of land and securities, which the Agricultural

Society is forbidden to do. Lastly, the Corporation proposed is yet to be formed, to control property the State does not yet own, and for purposes that have not received the public and judicial recognition given to fairs and agricultural societies from tradition of a hundred years of usefulness. Hence, this proposed corporation could not be defined by the Supreme Court on the ground on which it did defend the Agricultural Society: "The legislature accepted an agency at hand, made it an arm of government, and there can be no question of the power of the State to protect its own interests." Thus, from four different view points, the parallel fails, and the decision of the Court in favor of the Agricultural Society furnishes at best no encouragement for the plans under discussion.

CHAPTER IV.

PRIVATE COLONIZATION OF LAND.

In the last chapter the evidence presented makes clear that any state colonization plan must be preceded by years of work in removing the legal obstacles. In such a case some other plan must fill in the interim. It has not yet been proved and many never develop that a State Colonization Plan is best, or that, even if regarded best by land economists, it will be adopted by the State. In this case some other plan must be substituted. Even the hasty glance we took at the advantages of group settlement would seem to indicate that the most obvious substitute is colonization under private auspices. With State Colonization in operation, it probably would be accompanied by private colonization. We have a large number of private colonization companies already operating in the State. They must be allowed to continue, and others like them to be organized unless it be shown that they carry with them evils so serious and so inherent in their nature that the evils cannot be eradicated without putting an end to private colonization. The writer knows of no demand for their discontinuance. So far, in fact, there has been practically no regulation of their activities nor of their pretensions.

In a recent address to the Minnesota Realty Owners and Dealers' Association, Mr. J. D. Black, pointed out that some land men call themselves colonizers, when inquiry will show that they are merely selling any piece of land they can buy or list to anyone who will buy it. But, as he went on to show, colonization in any accurate sense of the term means much more than that. He suggested the following ideas as included:

1. Either a solid block of territory or a group of smaller holdings so situated as to have some geographic unity.

2. Some system of giving aid and supervision to the settler long enough to put him on his feet.

3. Some systemmatic plan of development, of laying out roads if necessary, and of planting settlers.

4. Selection of settlers of similar experience and nationality.

He regards the first two of these ideas as essential and as far better when accompanied by one or both of the others. "The company which does not look after its settlers, however, but simply sells off a block of land piecemeal to the first comers can hardly be said to be colonizing." Evidently it is not easy to say just what is or is not colonization, and the question arises, Shall it be left to each individual or company to decide for itself with the risk of the public's being misled thereby? Shall each self-entitled colonization company be left to determine, unaided and unregulated, the conditions of its organization and entrance upon its work, its method of choosing and securing colonists, the terms of its contracts with them, its methods of raising funds, its treatment of its settlers?

The tradition of American governments has been one of non-interference. It has been believed that government should step in between the parties to a contract only when necessary to protect the public interest or to prevent positive fraud. Yet we have seen banking corporations, insurance companies, common carriers, trust companies, warehousemen, abstractors, and numberless others regulated by laws applying to their particular calling, and often inspected and supervised by officials especially provided for the purpose.

Long ago John Stuart Mill said: "Is the buyer always qualified to judge of the commodity? If not, the presumption in favor of the competition of the market does not apply to the case; and if the commodity be one in the quality of which society has much at stake, the balance of advantages may be in favor, of some mode and degree of intervention by the authorized representatives of the collective interest of the state." Certainly it would seem that the ignorance of the newcomer in a locality as to soil and crop conditions, weather, needs of drainage or irrigation, costs of labor, and on the other hand, the serious loss to the buyer and to society as a whole from misdirected effort and capital when mistakes are made, would put the land business in the same class as to need of supervision, as the callings listed above. The importance to the State of proper settlement of its lands, the number and complexity of the settler's problems; the possibility of mistake on the one hand, or fraud on the other, the fact that all colonization companies have in dozens of points of likeness the same road to travel through organization of company, selection of lands, planning of colony, securing of settlers, of constructing the roads, drains, bridges, of helping the settlers get started, etc. etc., all point to the advantage to all concerned through government regulation of colonization. It will protect the settler, it will aid the company in wise planning, it will make possible better terms of credit for both.

In our own state, Governor Burnquist, appointed a committee to investigate the question of land colonization and submit a report to him. This report he passed on to the legislature in his message at the beginning of the session. The committee said in this report:[1] "National prosperity depends to such a marked degree on the

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(1). Inaugural message of Gov. Burnquist,1919,Appendix; or for substance of report,see "Farmer," Jan. 4, 1919.

number of people living in content and prosperity on the land that land settlement is a matter of public rather than mere private concern. Whoever acquires land and creates thereon a home renders a service to the State. Whoever makes the attempt is entitled to all the consideration the State can safely extend. State regulation of colonization is the first essential. Supervised settlement with enlarged opportunity for the land owner and land purchaser is the second requirement. Proper credit is the third essential. The proper combination of land, labor, and capital will make possible the development of such of our idle lands as is suitable for profitable agriculture."

To quote again from Elwood Mead:[2] "Men of small capital are finding it increasingly difficult to become farm owners. The number who attempt it is decreasing; the years required to pay for a farm out of the proceeds of it have been doubled and quadrupled. .....We are doing less than the older European countries to enable those who have industry and thrift and little else, to buy and improve farms." He goes on to ask for more than a mere regulation of colonization. Referring to European and Australian government aided and operated land settlement and colonization, he says: "This plan of rural development is the greatest agrarian reform in the last century."

Professor Ely expresses himself thus:[3] "So far as we in the United States have had an economic theory, it has been that those who live on the land and cultivate it, taming the wild land and making farms, give a social return for what they receive, and very generally the pioneer farmer does render a large return for the

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(2). Economic Review Supp., VIII, p. 1.
(3). Private Colonization of Land, p. 2, Reprint from Am. Econ, Rev. Sept. 1918.

opportunity to make a farm. But what we are beginning to see is that wisely planned settlement might have given far better results." Now let us go on to ask whether unaided private colonization will give us this "wisely planned settlement."

A Colonization company made up we assume of men or ordinary honesty will still have as its primary aim to sell its land at a price that yields a profit and on terms that furnish protection to the company and secure it its money at the earliest time at all feasible. The stockholders have no illwill toward the settler, and may even desire to help him in various ways. Naturally, however, he is not their primary interest; he is expected to look out for his interests; if price and terms are not satisfactory, let him look elsewhere. That he contracts is evidence that the contract is satisfactory. "The agent's business is to make money off the settler, not to make money for the settler."

Colonization companies have not always felt a respnnsibility for seeing that soil and other conditions were suitable for the purposes the settler had in mind. The company's representatives may or may not have known much about soil, rainfall, frosts, possible crops, economic conditions; their business as they saw it was to put before the prospective buyer the data which would induce him to buy, and if they did this without any misstatement of fact, they had accomplished their purpose. The history of land settlement shows number less failures after years of effort on the settler's part under conditions that made success impossible from the first. It is fair to say that this is probably less true of colonization than of individual settlement. But the fact remains that the settler very often has not the business capacity to investigate sufficiently before he decides. "The lack of prudence and business judgment shown

by colonists was amazing."[4] In new sections especially (and here is where colonization is likely to occur) the settler finds less than in order communities to show him what can and what cannot be done. His industry, honesty, thrift, will be utilized to the best good of himself and of others, only if he is protected from mistake and given a fair start in the struggle.

One mistake that colonization companies have made is that they take a short time view of their project. The company "anxious to get its money out" as quickly as possible, has judged by the success of the pioneers who had ability, capital, and possibly luck and have as a result called in their contracts for altogether too rapid payments for the land -- have led the average settler to contract to do what the ablest settlers in such regions had done. The contract called for payments larger and faster than the holdings in the hands of the average colonist could produce the necessary earnings. The California Report just quoted, in its information about specific colonies,[5] is full of statements like "few of limited means have been able to make their payments," ninety per cent of the settlers are behind in their payments," "unable to meet payments on their land," "many settlers in arrears," "the settlers will not earn much of the payment money out of the land within the contract period." etc. In one of the most successful colonies, the settlers had contracted to pay for their land in seven years. This was soon recognized to be out of the question. This company fortunately had financial resources and felt a responsibility and an interest; their settlers are now on the way to success, although at present the 375 contracts are in arrears on principal and interest about $700,000.,

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(4). Report on Com. of Land Colonization, California, 1915, p. 52
(5). Report on Com. of Land Colonization, pp. 19-23.

and nearly $30,000 on money advanced for the purchase of stock or for other reasons. This section of the Report is introduced in a paragraph containing this statement: "We have not found a single settler, who bringing with him only the limited capital accepted by the state systems of other countries, has been able to pay for his land in the time agreed upon in his contract." Contrast the four, five, or seven years in which to pay for the land with the thirty-five to sixty-eight years allowed in the state systems. The contract,price, too, is more likely in state colonization systems than in private colonization systems to be fair - especially, in the California of a few years back.

It may seem that this argument is drawn too much from California and that colonization companies in the Lake States are not demanding contracts so difficult for the settler to fulfill. Professor Ely tells of thirty foreclosures of contracts advertised in one issue of a Northern Wisconsin paper, and says:[6] "Probably as many colonists come to grief on account of a miscalculation of the length of time required by the settler to make his farm pay for itself, as on any other account. Many a company becomes bankrupt because it has expected payments too soon; and the company in distress forecloses on the settler - a terrible tragedy in too many cases, meaning bitter disappointment and broken lives, Probably the customary plans of land settlements in the United States do not give on the average half the time required."

A typical clause frequently occurring in the settler's contract just after the clause defining the original payment and the dates and amounts of the instalments with the rate of interest,

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(6). Private Colonization of Land, p. 15.

is this:"And in case of failure of the said party of the second part to make either of the payments, or interest thereon, or any part thereof, or perform any of the covenants on his part hereby made and entered into, then the whole of said payments and interest shall at the election of the first party become immediately due and payable, and this Contract shall at the option of the party of the first part be cancelled, and determined, and all right, title, and interest acquired thereunder by said second party forfeited, etc." Now, it is granted that a contract must indicate a time when payments are to be made, and it must be in such form that payments can be enforced. But when we recognize that the contract probably calls for payments as large and as frequent as reasonably good fortune would provide; that as shown above the tendency of American colonization projects has been to contract for payments from two to five times as fast as they are called for in European systems, it must also be recognized that a year or two of poor crops, or late or early frosts, or disease among the settler's stock, or sickness of himself or other members of his family, may make such payments impossible, and place the settler at the mercy of the company. Granted that the company officials are human, that they wish their settlers to succeed, that hence they often extend the time of payments, especially of principal, still it remains true that it is entirely at their good will that the settler is not deprived of his holdings. Before the writer is another contract providing for initial payment of $500.00, in 1919, and $200.00 yearly thereafter until 1924, but follows with the clause: "and the said party of the first part will waive payment of the above payments and none of them shall become due until the fifth of July, 1924, if the party of the second part will improve as follows, etc." Why could not

contracts generally have this element of fairness and encouragement to improvement? Certainly a colonization company should have a capital sufficient to permit it to carry overdue instalments of principal and even interest in emergencies; for a considerable period of time. The contract should be so drawn that it is not merely the company official's goodness of heart, but the settler's right that protects him.

Again, in case a settler fails to make his payments, and the contract is either unfairly or necessarily set aside, in many contracts the settler receives no compensation for all the improvements he may have made, or return for the payments he has made. For example, a contract in hand reads: "It is mutually agreed..... that thirty days is a reasonable and sufficient notice to be so given to the said second party in case of failure to perform any of the covenants on his part hereby made and entered into and shall be sufficient to cancel all obligations hereunto on the part of said first party and fully reinvest said first party with all right title and interest hereby agreed to be conveyed, and the said party of the second part shall forfeit all payments made by him on this contract, and his right, title, and interest in all buildings, fences, and other improvements whatsoever, and such payments and improvements shall be retained by said party of the first part in full satisfaction of all damage by him sustained." By this contract,for example, if a settler was to pay $500.00 down and $200.00 a year with interest for ten years, and had made all payments for five years and had made improvements to the value of $1200.00 during the time, a failure to make the sixth payment of $200.00 and interest, for no matter how good a reason, would give the company legal warrant to eject him from the premises, with not

a cent of return for the $1500.00 plus interest paid and the $1200 of improvements made. Granted again that few companies would seize the land in so clear a case as this, and fewer still would refuse some compensation for the $2700. But, why have a contract that leaves the colonist at the mercy of the company for his rights? A contract can certainly protect the rights of the company, without making possible such unfairness as this contract implies.

The company counters sometimes with the fact that the land had on it valuable timber, and that during his occupancy the settler has cut off and sold the best of the timber and thereafter is willing "to let the land go back" to the company. This is not an easy thing to generalize about. Sometimes the contract requires, in case there is really valuable timber on the land, that as the settler sells off this timber, a certain percentage of the receipts must be paid to the company to apply on the purchase price of the land. Often however the timber is worth not much more than the cost of the labor to cut it and get it to market. In such a case a clause requiring part of the money to be paid to the company would simply discourage the settler's clearing his land and also lessen his chance to support his family in the years before the farm is cleared. But in any case there seems to be no sound reason why in case of failure to meet some requirement of the contract the settler should lose everything. Rather the contract should provide some way for a fair estimate of the value of the improvements and payments made on principal and an estimate of the damage if any to the property, and from the two arrive at a fair award.

Before the writer are Specimen Copies of four types of contracts in use by a St. Paul Company dealing in lands in Minnesota and North Dakota. There area "Crop Payment Plan," a "Half Earnings

Plan," and "Land Contract" of two other types. The variety of contracts is a praiseworthy feature from standpoint of buyer as well as seller. Every contract closes with the clause: "It is hereby declared and agreed by the party of the second part that he has entered into the above written contract, relying upon his own knowledge of the property and not upon any representations made by the party of the first part or by any other person regarding the situation, location, character, or quality thereof." This is all very proper to include if true, but one would hardly suppose it to be true in most cases. It looks like an attempt to prevent a buyer too ignorant or unwary to refuse to sign with such a clause included, from protecting himself later by proving or claiming misrepresentation before the purchase occurred. Certainly the same clause does not look as dangerous in the application form used by the Chippewa Valley Colonization Company, where it is preceded by a certificate on the buyer's part: I have "personally carefully looked on all the above described land and make this offer wholly upon my own judgment.....The only statements made to me in any way about said land, its location, character, or value on the house to be built on it, or the stock and personal property to be furnished with it are the following:

1. As to Soil.....
2. As to swamps....
3. As to stone.....
4. As to Roads .....
5. Any other facts...

Then follows two pages of description of the personal property and buildings to be furnished by the company.

Another element of unfairness sometimes (tho not so often as the above mentioned ones) appears in connection with the reservation of mineral rights. Certainly if the seller of any

piece of land wishes to reserve the mineral rights and the buyer consents and knows what he is agreeing to, the reservation is perfectly proper. One contract reads in this respect: "The party of the first part reserves from the sale hereof all of the minerals that may be or are on the land. He agrees however to pay the party of the second part $150.00 per acre for all lands taken or used in connection with the prospecting for minerals or the operation of a mine or mines on said land." This appeals to the writer as a fair contract of reservation of minerals. The amount of $150.00 may or may not be the exact amount it ought to be. In this contract the land sold to the settler at $25.00 per acre, and the contract seems to recognize that years later when the prospective mining operations may occur the land will probably be more valuable than at present, and further that a few acres cut out here and there for mining purposes might injure the farm more than the mere reduction in acreage would indicate, so the seller agrees in case he does enter upon the settler's land for this purpose to pay him a price per acre six times the present price of the land. But unfortunately when a clause like the first one appears on these contracts, it all too often is not accompanied by any clause similar to the second.

In all the above discussion it has been assumed that the colonizing company has intended to play fair with the settler, but it has been shown that it has made with him a contract which in itself protects the company but not the settler. Is there any doubt as to what the result will be? Sometimes - let us have faith to believe very often - the company continues in its attitude of fairness, and is even more than fair - is liberal in its interpretation of the terms of the contract. But does anyone believe that it will certainly do this? A change of control in the company, or financial

hard times for the company, or irritation at something displeasing said or done by the settler, or anyone of several other things, may result in a "stiffening" of the attitude of the company; or, on the other hand, fuller information as to what he has actually agreed to, gained from study of his contract, or from legal advice, may serve to further discourage the settler, or convince him of the unfairness of the company, when perhaps the contract was the only unfair element in all their dealings. And unfortunately, the assumption of honesty and good intentions on the part of the company is all too often not well founded. For colonization companies are "much like other people, some of them good, and some of them bad." In the words of Professor Ely again: "The land business has been proverbially a business on a low ethical plane. It is being put on a higher plane, and there are many conscientious real estate men who are rendering a social service of a high order in the work; yet there are many dishonest ones still active, and it is necessary that all right minded people use every effort to put the businnes of selling land and colonization on as high a plane as the best mercantile business. In addition to private efforts it is necessary to have public activity."[7] The California report refers repeatedly to error and misrepresentation of probable returns and of probable expenses of improvement, to the flocking in of real estate operators "not to develop agriculture in California but to exploit it." E.g., the report tells of a wheat ranch bought for $7.00 per acre; the buyer organized a syndicate made up of himself and his stenographer; he sold the land to his syndicate at $100.00 per acre, and the syndicate sold it to the settlers at $200.00 per acre. In another

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(7). Ely's "Private Colonization of Land," p. 18.

case, a colonization company bought 150,000 acres at $40 per acre. It sold to the settlers at first at $75 per acre and later at $175. The agent who received fifty per cent on this latter price thus got $52.50 per acre as commission, considerably more than the original price and probable real value of the land. Possibly some would maintain that these deals were unscrupulous mistreatment of the settlers; on the other hand, it is altogether likely that the company stockholders and managers would resent any imputation of dishonesty unless it could be proved that they had actually misrepresented some specific fact. Even the law holds the buyer responsible for winnowing the wheat from the chaff of salesman's talk, and will protect the buyer against fraud only where he proves that he was deceived by misrepresentation of a fact so important as to have made it unlikely that he would have bought had he known this fact.

Then to sum up our discussion thus far we have recognized that private colonization of land is sometimes in unscrupulous hands, and that the average settler has neither the ability nor the financial means, to investigate and to protect himself against the dangers that thus confront him. More often, private colonization is in the hands of men of ordinary business integrity, but here too the colonist nearly as often needs help and unprejudiced advice in his ignorance of soil, climatic, and economic conditions, and protection against inflated values, unfair contracts, and contracts that call for too early payments on his land. Hence, we maintain the necessity of government supervision of colonization. It should be evident from the preceding discussion that this supervision would be a boon not only to settlers, but to colonization companies and the general public as well. The California report

shows that private colonization in that state has been costly to its promoters and unsatisfactory to the settlers. The stockholders and managers of a colonization company whatever their intentions can profit by expert information and advice as to soil, climate, crop, stock, markets, roads, drainage, clearing of land, cooperative methods, and a multitude of like general questions as well as the more immediate problems of choice of settlers, form of contract, length of time of payments, credit arrangements for themselves and by them to their settlers, relations of company and settlers, etc., etc.,

In credit matters especially, in addition to the matters already discussed, government supervision of colonization would be of immense help to the company, and of course through the company to the settlers. It is seldom good finance for a colonization company to start out with all the funds it will ultimately need. Assuming that they know in advance approximately what they will need (and expert advice will help them determine this), they will almost certainly start out with less than that amount of capital. They will expect their advance capital to get the colony well started, some of the land improved at least to the extent of drainage and of putting in some of the roads, possibly buildings erected on some of the allotments, but the settlers are paying on all this only 10 per cent or 20 per cent down, with small payments following in the earlier years. Now comes ordinarily the issuance of bonds by the colonization company secured by a deposit of mortgages or contracts on land already sold. The sale of these bonds is handicapped by the fact that the many small investors who would be glad to buy a bond of recognized standing, are not in a position to investigate the security back of this bond, or, if they are, can do so only at expense of time and

money. The bonds thus go to the occasional investor who can be persuaded to buy on personal recommendation, or to the bond house which investigates the issue and all its conditions. The bond house acts as agent in sale of the bonds, or buys the issue to sell to its customers - in either case, the bonds yielding less to the company and costing the investors more than if they could be sold direct. Now, under a system of government supervision, the company, before issuing the bonds, will have consulted the government colonization commissioner. He has already at hand detailed information regarding titles, values, methods of operation, forms of contracts, payments made, past and prospective success of the colony - all gained from inspection of the land, sworn statements of officials, frequent visits of his inspector, reports of county agents, etc. He can advise the company as to the form of its bonds; at much lower cost than could a bond house, can advise the public as to the validity of the bonds. When he has stamped the bond, "This is an issue approved by the Minnesota State Colonization Commission and secured by a bond held in trust (briefly describing the same)," the bond is once given an easier transfer ability and a wider market, which means better prices to the company, ability to float bonds at a lower rate of interest, and hence cheaper money for the colonists. So important is this feature, that the so-called "Colonization Bill" before the last legislature was little more than a bill for an act to provide supervision and certification of bond issues of colonization companies.[8]

An act to provide for the supervision suggested above would contain the following or closely similar features:

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(8). The "Nord Colonization Bill," Senate Bill, 1919.

1. There is hereby created a land settlement commission which shall consist of five members, namely, the commissioner of agriculture, the commissioner of immigration, the director of the geological survey, the state forester, and the chairman of the state securities commission. The commissioner of agriculture shall be ex-officio chairman, and the commissioner of immigration ex-officio secretary and executive officer of said commission.

2. The duties and powers of the land settlement commission shall be as follows:

(a). It shall supervise and control the organization and operation of land colonization companies within this state; shall investigate the methods of colonization and settlement in this and other states; and shall report its findings and make recommendations to the legislature of legislation needed relating to colonization and settlement.

(b). It shall require reports annually or oftener, on forms which said commission shall provide, from all colonization companies operating within this state, and shall supplement the information thus received by visit to and inspection of the respective colonies through representatives of said commission, and by means of the reports of and correspondence or conference with county agricultural agents and the officers of counties and of other departments of the State government.

(c). It shall require of every colonization company copies of its pamphlet, circular, and newspaper advertisements and its contract, mortgage, and land transfer forms, and shall require the modification of any which in its judgment is found to be misleading, unfair, or impracticable.

(d). It shall investigate to determine the wisdom of

establishing and, if in its judgment deemed wise, shall establish a colonization council made up of one representative of each colonization company operating in this state, which said council shall recommend, forms for charters, mortgages, contracts, and bonds of colonization companies; shall recommend rates of interest for bonds issued and mortgage notes for land sold by such companies; and shall discuss colonization policies and methods and make recommendations to the commission regarding such policies and methods.

(e). Whenever application shall be made to the commission by a qualified colonization company for the flotation of an issue of bonds, said commission shall refer the application to one or more of its appraisers who shall investigate and make a written report on the titles to the lands, the values of the lands, the contracts outstanding and amounts paid and to be paid on them, the financial condition of the company and such other information as may be required by the commission. No such application shall be approved unless the report is favorable. (Here should follow in more detail than is needed for our purpose provisions regarding the bond interest rates, the deposit of the securities, the margin of security above face of the bond, the retiring of bonds, etc.). If the report of the appraisers is favorable, and if in the judgment of the commission the company has complied with the provisions of this and other laws of the State and the rules of the commission in pursuance thereof, the commission shall cause each bond of the said issue to be stamped: "This is an issue approved by the Minnesota Land Settlement Commission and secured by a bond held in trust (briefly describing the same.)"

(f). It shall receive and investigate complaints of colonists as to fraud, misrepresentation, or unfair treatment; for the purpose of such investigation the said commission or its representative shall have access to the books, correspondence, and contracts of the company complained against, relating to the matter in question, and shall have power to subpoena witnesses and examine them under oath. If the complaint is in its judgment well founded, the commission shall take such steps, legal or otherwise, as will in its judgment be most likely to rectify the wrong.

3. The charter of any colonization company organized within this state after this act shall have gone into effect shall be granted only after approval by the land settlement commission. This approval shall be given only if after investigation, the plan of settlement or colonization proposed to be followed by such prospective company shall be determined to be in the judgment of the commission beneficial to the colonists; if the lands to be colonized are found to be in fact agricultural lands; and if the terms and conditions of colonization are found to be just and practicable.[9]

4. Nothing in this act shall be interpreted to impair the obligation of any contract in existence at the time when this act shall go into effect, but this fact shall not debar the commission from receiving and acting on complaints of fraud or misrepresentation in such contract of whatever date.

5. Appeal may be taken from the action or decision of this commission or its executive officer, such appeal to be heard in the

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(9). Compare Wisconsin Statutes, 1919 amendments to paragraphs 100-140, Sect. 2024; Montana Statutes, 1919 Chapter 201; Wyoming Statutes, 1919, Chapter 143, Sect. 4.

district court of the district in which is located the main office of the colonization company appealing or the residence of the colonist appealing, but the appeal to the court and the findings of the court shall be only as to matters of law.

6. If any clause or clauses of this act shall be declared unconstitutional, such decision shall affect only that specific clause or those specific clauses, and the remainder of the act shall be of full force and effect.

We shall not here discuss the constitutional aspects of such a law, as the legislature's right to regulate private businesses and callings will be amply discussed in the next chapter.

CHAPTER V.

THE STATE AND THE INDIVIDUAL SETTLER.

It must be recognized that not all the settlement in the State can be conducted through colonization companies, State or private or both. The colonization companies can be developing at a given time only relatively restricted areas in the newer parts of the state. Other of the newer sections will not entirely postpone their development to await the coming of a colony, but will be getting a settler or two at occasional intervals; settlers too will be filtering into the older sections of the state; outsiders will be looking for suitable places and not by any means always as colonists. These individual settlers a state must be ready to welcome and help to settle under conditions that will lead them to recommend to their friends to follow them. Land transfers will be occurring continually and there is need of the real estate middleman to bring settler and seller together. So there is place in the land economy for a state for the immigration department and the real estate dealer. It is for us now to consider the work of these two, and to notice in particular how the law may contribute to efficiency in their performance of their functions.

Practically every one of our northwestern States has under some name an immigration department; they find too that similar departments of the Canadian provinces are strong competitors. So far as the writer's investigations have gone, the bringing in of new manufacturing plants and public utility enterprises has been left mainly to commercial clubs, city improvement leagues and the like; the immigration departments have devoted themselves primarily to encouraging the immigration of families to occupy and develop the agricultural lands of the state.

In a Journal interview with the Commissioner of Immigration

of this state he tells of the large number of cars of immigrant's goods arriving in Minnesota in November, 1919. "Minnesota is leading all competing states so far as receiving immigrants [1] is concerned. I believe this is largely because Minnesota has been carrying on a practical advertising campaign. At the livestock exposition at Chicago, Minnesota was the only state that had a practical agricultural display. We utilized the space to display samples of everything grown in Minnesota. (The display) attracted crowds. No one was permitted to go away without receiving a neat advertising pamphlet containing a postcard and asking interested persons to send for literature."

The literature consists principally of "Minnesota by Counties," a pamphlet of statistics and other facts about each county of the state; and five pamphlets, each presenting in favorable light the advantages of some one section of the state. "Northeastern Minnesota" is typical of the series; its headlines are "The Land of Certainties," "The Indian Paradise," "Big Profits in Potatoes,$200 to $300 per acre from Onions," "The Country is one Big Garden," "Crops never Fail," "Clover Seed Pays Big," "Swamp Lands the Richest, etc., etc." The aim and practically the sole aim of the Commissioner is an advertising campaign. In fact the interview credits the success of this state in gaining more immigrants than others to the fact that "competing states have devoted more time to giving advice and information to people within the state than to attracting people to their state." Worded another way, one method of securing settlers, and seemingly the more direct one is for a state to use every device of legitimate advertising to find pros-

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(1). The figures given in the interview are for card through the Minnesota Transfer. When figures for Chicago and Sioux City are combined with them, other states do not suffer so in the comparison.

pects and get them to decide to come to that state. When once the immigrant, his family, and his goods are in the state and on their way to locate at some point in it, the work of the immigration department is done.

But let us follow the case a little further. Suppose the settler finds a satisfactory location, receives fair treatment from land sellers, is assisted by sound advice, and in a year or two begins to see prospects of success ahead; is he not likely to recommend to others, relatives and friends, to settle near him? Or poor location, misrepresentation or fraud in selling land to him, mistakes due to his being in new surroundings, make him discouraged or even make him fail; is he not equally likely to recommend to others to stay away? The merchant who says: "Our satisfied customers are our best advertisers" has a lesson to teach to the state seeking settlers.

Another director of immigration says: "The transfer of title to land, the mere change in ownership, though it carry a commission to the broker and a profit to the seller, does not mean development in any sense of the word. Protecting incoming settlers from possible fraud at the hands of dishonest land dealers is a highly important function of any state inviting settlement."[2] The efforts of this department are aimed:

To secure attention of those seeking homes.

To arouse interest in the state.

To outline to intending settlers methods of opening up lands.

To bring about actual settlement.

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(2). Biennial Report, Dept. of Agric,, Wis., 1918, p. 143.

The titles to the bulletins gotten out in pursuance of these aims are suggestive: "First Aid to the Settler," "A Personal Word with the Home Seeker," "Farm Making in Upper Wisconsin." An examination of the bulletins shows them to be what they purport to be, "Hints to the Settler" - all sorts of suggestions regarding location, methods of clearing, kinds of stock, kinds of crops.

The Report gives twenty-two pages of extracts from letters from satisfied settlers to the number of nearly two hundred. Over twenty-three hundred settlers came to the state in the period, 15, 784 inquiries were answered, and most striking of all, 1,370 families were warned against the activities of certain Chicago real estate dealers and some Wisconsin dealers.

An examination of the laws of the two states establishing the respective immigration departments shows that the Wisconsin law goes into somewhat more detail than ours, but there is no difference in the law to warrant the outstanding difference in the two policies. It is a question of tradition in the state or personal policy of the two directors , or both. This would seem to show that, not being a question of law, this topic does not belong in this thesis. That it can be a question of law is shown in the provisions of the Idaho law (1919) creating a department of agriculture with forty-seven powers including -

"Sect. 24. To ascertain as far as possible what conditions make for the success of a homesteader and what conditions make for failure, and to assist in remedying such of the conditions which make for failure as are capable of remedy.

Sect. 25. To investigate and obtain evidence, in any case where fraud has been practiced upon or wrong done to a homesteader in the sale or transfer of real estate sought for the establishment

of a farm home and, if the facts justify, to cause the wrong doer to be prosecuted.

Sect. 26. To investigate any advertisements pertaining to colonization or settlement and to warn homesteaders against inaccurate or misleading statements contained in any literature sent out by promoters or others."

Furthermore, the Nord Bill before our legislature last winter and Senate Bill No. 61 before the Colorado legislature proposed to make the Commissioner of Immigration the real executive officer, in the one case of the colonization commission, in the other of the board to license real estate agents. Such bills as laws would strengthen the powers and obligations of the commissioner as a protector and guide to the settler.

From another standpoint too, the law can and does make for efficiency or inefficiency in the work of an immigration officer. Our state for example, has a department of agriculture, an immigration board, a livestock sanitary board, a state horticultural society, a state agricultural society, etc., each distinct from the rest. In another state one finds a unified department of agriculture, in which each of these is brought into correlation with the rest. This is a matter in which any official is helpless; the law must provide for the unification or it does not come to pass.[3]

But a capable, interested, and helpful immigration official is not all the help the settler needs, even if this official has the cooperation of the several other bureaus of any agricultural department.

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(3). Such a reorganization and unification of the various departments of Minnesota's government was proposed in 1915, but nothing has come of the proposal.

It has already been pointed out that the ordinary settler has neither the ability nor the financial means to investigate the proposition offered him and to protect himself in the transaction. To the individual settler this is more serious than it is to the colonist. The individual settler deals, not with a company which makes similar offers to dozens of settlers and must accordingly have a contract of a kind to meet the objections raised by quite a varied group; he deals in a transaction that may be quite unlike any other which the agent arranges during that season. While a satisfied colonist may help or a dissatisfied colonist may harm a colonization company's sales of land to prospective settlers, the probability that a dissatisfied individual settler will affect the future sales of the agent who sells to him is far less. Far more varied contracts, more varied kinds of lands, are offered in this case with correspondingly greater probability of mistake or fraud through which the settler may suffer. After the settler is on the ground and trying to carve out a home, the colony settler is side by side with others similarly situated, and talks over with them the common relations with the company. The wisdom of the wisest becomes the wisdom of all and with the strength of numbers to add to its force. Not so with the individual settler; he has his problems to solve unaided. The protection of the state we found is needed by the colonist; it is needed far more in case of this settler. From the state's standpoint it is just as essential that ten thousand buyers of its lands scattered over the state in several thousand places be successful, prosperous, and satisfied as that ten thousand buyers in seventy colonies be successful, prosperous, and satisfied.

The incapacity of the ordinary settler as a selector of land and as a business man has already been referred to. But success

demands that the settler secure land as good as is generally available; to do so requires either a capacity he is not likely to have, or capacity and honesty on the seller's part. The settler has come may be hundreds of miles; he is ignorant of land values in the region to which he has come, is ignorant of soil and crop conditions, is probably ignorant of the meaning of legal terms. And how is the settler's responsibility discharged?

We remember Professor Ely's accusation: "The land business has been proverbially on a low ethical plane. It is necessary that all right minded people use every effort to put the business of selling land on as high a plane as the best mercantile business, which finds a profit in protecting the consumer." He goes on at another place to say that,"Various associations of real estate dealers are engaged in praiseworthy efforts to expose dishonest practices and to encourage a right professional spirit. This promises much for the future, because the real estate man must always play a large role in the settlement of land, and if he is competent and high minded, he can perform services of a high order."[4]

Here as elsewhere much of the criticism falling upon the class belongs not to the regular workers in it so much as to those who perform only an occasional transaction. The Board of Trade is anxious that the public distinguish between the dealings on the curb and the operations on the exchange. Just so the real estate dealer who is making that his vocation insists and undoubtedly with justice that the offenses charged to real estate men are largely due to the "curbstone real estate brokers", e.g. the barber, the liveryman, the elevator man, who occasionally gets a chance to make a sale of a

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(4). Ely's Private Colonization of Land, p. 18.

piece of land he has learned is for sale. The professional real estate men maintain that if real estate transactions are confined to regular real estate men, the criticisms will be far less frequent. At this point, however, the real estate men are helpless unless the public comes to their aid. It is only when the State in its official capacity and in the exercise of its police power decides to regulate the real estate business at least to the extent of establishing a licensing system for real estate agents, which will eliminate the curbstone broker, that something definite will be accomplished. Then the system may go beyond this to any reasonable length in supervising the activities of the licensed brokers.

Such a law was proposed in the last Minnesota legislature and the Bulletin of the "Realty Association"[5] offered in its favor several arguments all in direct line with the purpose here advocated:

1. Such a law will put every dealer in the state on record as to his previous business experience and qualifications of character and reliability.
2. It will definitely do away with the curbstone dealer.
3. It will raise the ethical standard of business practice in real estate transactions. Any one who is guilty of unjust or unfair dealings with have his license revoked and be unable to do business.
4. It will make of the real estate brokers a definite professional class, subject to certain legal requirements, responsible to the state, and in which the public will have confidence.
5. It will provide for the use of state authorities a definite list of reliable, honorable, efficient dealers, which can

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(5). Minnesota Realty Owners and Dealers' Association, Bulletin, March, 1919.

be mailed to any part of the United States.

6. It will compel every real estate deal (involving the use of an agent) to pass thro the hands of a licensed broker and thus definitely fix responsibility.

7. It will put the whole real estate business in our State on a sounder basis and a higher plane.

The bill whose enactment into law was to accomplish all these things provided for the formation of a Real Estate Brokers' Board and for its officers, meetings, records, and legal assistance; Section 2 provided that the fees and fines collected should go into a special fund, to be applied first to expenses of this board.

Section 3 reads: "It shall be unlawful for any person, partnership, or corporation to engage in the business or occupation of or to act as a real estate broker in this state without first having procured a license under this act; provided, however, that any agent, salesman, or employee of a duly licensed broker while acting as such shall not be required to procure a separate license."

Sect. 4. "A real estate broker shall be deemed to be any person, partnership, or corporation except as hereinafter provided who for another for a compensation or commission sells, exchanges, buys, or offers to sell, exchange or buy any real estate or any interest therein."

Sect. 5. The provisions of this act shall not apply to -

(a). Receivers, trustees, administrators, executors, guardians, or other persons appointed by or acting under the judgment of a court.

(b). Public officers while performing their official duties.

(c). Employes of persons mentioned in "a" and "b" of

this section when engaged in their duties as such employees."

Sections, 6,7,8, provide for the application for a license, its consideration, the issuance of the license, its renewal; "No license shall be issued to any person, partnership, or corporation, who shall not have a fixed place of business, nor to any one who is not a citizen of the United States;" provides for the display of the license, and for changes in firm memberships.

Section 9. Provides for rejection of application and Section 10 for complaints by "any person injured by dishonest dealings on the part of any licensed broker or his employee" with revocation of license as a penalty for such acts if found guilty.

Section 11. "The Board shall have power to suspend temporarily or to revoke permanently any license issued under the provisions of this act at any time where the holder thereof in performing or attempting to perform any of the acts of a broker is guilty of:

(a). Making any substantial misrepresentation.

(b). Making any false promises of a character likely to influence, or persuade, or induce.

(c). A continued or flagrant course of misrepresentation, or making false promises thro agents or salesmen.

(d). Any other conduct whether of the same or a different character hereinabove specified which in the opinion of this Board is contrary to good business morals."

"The Board shall have power to subpoena witnesses and to take testimony by deposition" as prescribed in judicial procedure.

Succedding sections provide that appeals may be taken; that real estate brokerage or agency without a license shall be a

misdemeanor; and a date for the law to go into effect, with sixty days of grace thereafter before licenses shall be required.

It is difficult to see how an unprejudiced reader after considering even a few of the pitfalls for the unwary buyer of land, the utter incapacity of many land buyers to protect themselves, the importance to a state of having not simply settlers, but satisfied and prosperous settlers, could fail to see in such a law a step in the right direction. One may disagree at particular points, may feel that the law should be more or less stringent. But can any one doubt that the outcome of such legislation would be to put the real estate business upon a higher plan of ethics and of service?

However, the act did not become a law. In a conversation of the writer with one of the men instrumental in framing and pushing the bill, the failure of the bill to become a law was attributed to lack of a sufficient campaign to educate the public and the real estate men to the values of such a law. Alligned against it were all those who on principle favor a hands off policy on part of government toward business; the lawyers and bankers who wish to carry through a real estate deal now and then without putting on their walls a license that emphasizes their double calling; these real estate men who try to play the game fairly but fear misinterpretation if their work is to be inspected by outsiders; of course all those real estate men and curbstone brokers who regard the buyer simply as the possessor of money they wish to get by any means short of too open fraud. Certain provisions of the bill have aroused opposition. To an outsider it is not clear that every person on the Board must be a real estate broker of five year's experience; why not have a board partly of real estate men and partly of the public the board is to protect? But one real estate man in

favor of the bill said he is not willing to have complaints against him passed upon by persons who do not thoroughly understand the business from the inside.

It might be suggested that to add bankers to the number of those who are exempt from the provisions of the act on the ground that they are under the supervision of the banking board, and lawyers on the ground of their ample preparation for the work and their danger of disbarment in case of fraud would remove two of the strongest influences against the bill without weakening the bill. The danger in such a provision is illustrated in the unconstitutionality of the California law of 1917. This law for licensing real estate brokers exempted from its provisions those who hold licenses from the insurance commissioner or the supervisor of building and loan associations. The court held that the legal restrictions around these callings were not as stringent as those in the law under consideration; hence, the exemption was unwarranted and the law unconstitutional as special or class legislation.[6] The decision also referred to the exemption of lawyers as obscurely worded, and implied that lawyers in their capacity as attorneys-at-law should be exempt, but that a license to practice law should not be in itself a general real estate license. The act of 1919 [7] avoids this difficulty by exempting "attorneys-at-law when performing services as attorney-at-law." Similarly, the Wisconsin law[8] exempts "any bank, trust company, building and loan association, land mortgage or farm loan association organized under the laws of this state or the United States, when engaged in the transaction of business within the scope

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(6). Not yet in California Reports; see 151 Pac. 291.
(7). California Statutes, 1919, Chapter 605.
(8). Wisconsin Statutes, 1919, Chapter 656.

of its corporate powers as provided by law." It would seem that these two laws have put the distinction where it should be. Whatever acts are a part of a profession or function to which a corporation or individual is chartered or licensed should not require another license for their legal performance; on the other hand, the fact that one's calling may require his acting in a particular field temporarily should not be a warrant for his acting in that field when the duties of his calling do not require it. If he wishes to follow two or more callings, he should meet the legal requirements of each.

A comparison of the proposed Minnesota law with the laws of other States shows the grounds for revoking the license to be practically the same. The Wisconsin Act referred to above reaches back into the past by allowing the revoking of a license for a material misstatement in the application for a license; a license may be revoked also for incompetency as well as fraud. The Michigan Act allows revocation for an attempt to represent both parties to the transaction without the knowledge of this fact on the part of all concerned; also for attempt to represent any other broker than his employer; also for failure to account for or to remit moneys of another coming into his possession. But clause (d) of Section 11 of the proposed Minnesota law undoubtedly would be held to cover any of these provisions.

But what will be the attitude of the Minnesota Supreme Court toward the requirement license and fee that one may follow a business of obvious necessity and service to the community? The Minnesota Digest gives a page list of trades, occupations or institutions which are held within the police power of the state to regulate, with reference in each case to the Supreme Court decision so holding. Among them are laws regulating the practice of plumbing,

that of dentistry, the trade of barber, the handling on commission of farm produce and the practice of pharmacy. True, not in all these cases was a license the means of regulation; the point is that all these and dozens of others, recognized as needful occupations, legitimate from every standpoint, and each highly serviceable in its own field, are subject to the police power of the state; whether the state enforces its regulation by license, by special charter, or by inspection, is beside the point. If it be said that the cases cited above involve the public health and safety which the real estate business does not involve, one might reply by referring to Moore v. City of Minneapolis,[9] in which a law regulating employment agencies was upheld as a valid exercise of police power to prevent fraud. A law regulating freight and passenger rates was upheld on the ground that government is instituted for the benefit and protection of the people; an ordinance regulating draymen, on the score of checking fraud or imposition. In a Kansas case [10] directly in point in our discussion, a city ordinance had provided that no person should carry on a real estate business without having a license to do so; a firm without a license sued for a commission on a sale negotiated by it. It was held, that the transaction is unlawful and they cannot recover. The decision goes on to say: "The authorities do not uphold the distinction between the power to impose a license tax on those callings which are regarded as right and proper requiring no restriction or regulation, and those over which it is necessary to exercise supervision for police or sanitary purposes." So the right to require a license would lie even if it could be shown that regulation is utterly unnecessary. "The state in the exercise of its two great powers of taxation and police

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(9). 43 Minn. 418.
(10). 52 Kan. 629.

regulation may require the payment of a license fee or tax on the right to engage in any pursuit or occupation."[11]

Not many years ago a law for licensing auctioneers was brought before our Supreme Court[12]. Judge Bunn said: "It is conceded that the business or calling of auctioneer is one subject to legislative regulation. It is equally true that the business is a lawful and useful one..... The business is liable to abuse ..... Granting to the legislature as we must the right to regulate and control the vocation of auctioneering, to require a license and the payment of a substantial fee therefor, to limit the number of persons engaged in the business, to require a bond and an accounting, we see that regulation may go far without transgressing the constitutional rights of the individual."

Nor is a license law likely to be challenged on the score of the amount of the fee. "The legislature may make any business requiring police regulation pay the expense of regulating or controlling it, and this may be done by exacting license or inspection fees. The amount of the fees is within reasonable limits for the legislature to determine."[13]

If a law for the licensing of real estate agents be challenged on the ground that it confers legislative powers which the legislature has not the right to delegate to others, it must be answered that the courts do not regard the granting to an officer or commission of some discretion in the application of a law as a delegation of legislative functions; it is an administrative or executive function. Obviously no case involving powers of a real estate licensing board

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(11). 17 Ruling Case Law, p. 503.
(12). Wright v. May, 127 Minn. 150.
(13). Dunnell's Digest, 1608, based on 50 Minn. 290.

can be cited from our Reports, as Minnesota has had no such law or board. But the position of our Court on the question at issue was very clearly stated in a case involving the State Wage Commission. The Court said:[14] "It is well settled that a legislature may not delegate to a commission power to make laws. A Statute to be valid must be complete as a law, when it leaves the legislature. The legislature may however delegate to a commission the power to do some things which it might properly but cannot advantageously do itself. It may vest in a commission authority or discretion to be exercised in the execution of the law. It may delegate power to determine some fact or state of things upon which the law makes its application to depend; and may declare its law shall be operative or applicable only upon the subsequent establishment of some fact. ..... The true distinction is between the delegation of power to make the law which necessarily involves discretion as to what the law shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." (Numerous cases are cited in support).

The likelihood of the Court's interference with the decisions of a legally constituted board is stated thus by the Court[15] itself: "The issuance of licenses for occupations is an exercise of the police power of the state. The establishment of regulations for the government of such occupations is a legislative function; the enforcement of such regulations is an administrative function. The proceedings of a license board is in such cases quasi-judicial. The Court on appeal does not try the matter anew

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(14). 139 Minn. 32, Williams v. Evans.
(15). Huntstiger v. Kilian and others, 130 Minn. 474, 479.

as an administrative body and substitute its findings for those of the board. It will not disturb the action of the board unless such action is arbitrary, oppressive, or unreasonable, or is without evidence to support it, or is contrary to law."

With licensing of all sorts of occupations as common as it is in the various states, it would not seem necessary to prove that the United States Supreme Court will permit it. The only question that could arise is over the fee and the highest court rules thus as to that: "The Fourteenth Amendment was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways, or through its undoubted power to impose different taxes on different trades and professions."[16]

Thus the conclusion of the whole matter is that a State Colonization system is possible in Minnesota at any early date only through an amendment to the State Constitution permitting taxation and the loaning of the credit of the state for such a purpose, and the exercise of eminent domain to secure the needed lands. The steps immediately feasible are the provision of an immigration department with the primary aim of successful settlement, and with it the supervision of colonization, and the licensing and general control of real estate agents - all three of which are possible under the present state and federal constitutions.

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(16). Armour Pkg. Co., v. Lacy, 200 U.S. 226.