

THE CITY OF MANILA, PLAINTIFF AND APPELLANT, VS. CHINESE COMMUNITY OF MANILA ET AL., DEFENDANTS AND APPELLEES.

G.R. No. L-14355. October 31, 1919

Ponente: JOHNSON, J.

Read online (full-text search, related cases, audio case brief): <https://batas.org/library/e460fa19d28d/>

JOHNSON, J.:

The important question presented by this appeal is: In expropriation proceedings by the city of Manila, may the courts inquire into, and hear proof upon, the necessity of the expropriation?

That question arose in the following manner: On the 11th day of December, 1916, the city of Manila presented a petition in the Court of First Instance of said city, praying that certain lands, therein particularly described, be expropriated for the purpose of constructing a public improvement. The petitioner, in the second paragraph of the petition, alleged:

"That for the purpose of constructing a public improvement, namely, the extension of Rizal Avenue, Manila, it is necessary for the plaintiff to acquire ownership in fee simple of certain parcels of land situated in the district of Binondo of said city within Block 83 of said district, and within the jurisdiction of this court."

The defendant, the Comunidad de Chinos de Manila [Chinese Community of Manila], answering the petition of the plaintiff, alleged that it was a corporation organized and existing under and by virtue of the laws of the Philippine Islands, having for its purpose the benefit and general welfare of the Chinese Community of the City of Manila; that it was the owner of parcels one and two of the land described in paragraph 2 of the complaint; that it denied that it was either necessary or expedient that the said parcels be expropriated for street purposes; that existing street and roads furnished ample means of communication for the public in the district covered by such proposed expropriation; that if the construction of the street or road should be considered a public necessity, other routes were available, which would fully satisfy the plaintiff's purposes, at much less expense and without disturbing the resting places of the dead; that it had a Torrens title for the lands in question; that the lands in question had been used by the defendant for cemetery purposes; that a great number of Chinese were buried in said cemetery; that if said expropriation be carried into effect, it would disturb the resting places of the dead, would require the expenditure of a large sum of money in the transfer or removal of the bodies to some other place or site and in the purchase of such new sites, would involve the destruction of existing monuments and the erection of new monuments in their stead, and would create irreparable loss and injury to the defendant and to all those persons owning and interested in the graves and monuments which would have to be destroyed; that the plaintiff was without right or authority to expropriate said cemetery or any part or portion thereof for street purposes; and that the expropriation, in fact, was not necessary as a public improvement.

The defendant Ildefonso Tambunting, answering the petition, denied each and every allegation of the complaint, and alleged that said expropriation was not a public improvement; that it was not necessary for the plaintiff to acquire the parcels of land in question; that a portion of the lands in question was used as a cemetery in which were the graves of his ancestors; that monuments and tombstones of great value were found thereon; that the land

had become quasi-public property of a benevolent association, dedicated and used for the burial of the dead and that many dead were buried there; that if the plaintiff deemed it necessary to extend Rizal Avenue, he had offered and still offers to grant a right of way for the said extension over other land, without cost to the plaintiff, in order that the sepulchres, chapels and graves of his ancestors may not be disturbed; that the land so offered, free of charge, would answer every public necessity on the part of the plaintiff.

The defendant Feliza Concepcion de Delgado, with her husband, Jose Maria Delgado, and each of the other defendants, answering separately, presented substantially the same defense as that presented by the Comunidad de Chinos de Manila and Ildefonso Tambunting above referred to.

The foregoing parts of the defense presented by the defendants have been inserted in order to show the general character of the defenses presented by each of the defendants. The plaintiff alleged that the expropriation was necessary. The defendants each alleged (a) that no necessity existed for said expropriation and (b) that the land in question was a cemetery, which had been used as such for many years, and was covered with sepulchres and monuments, and that the same should not be converted into a street for public purposes.

Upon the issue thus presented by the petition and the various answers, the Honorable Simplicio del Rosario, judge, in a very elucidated opinion, with very clear and explicit reasons, supported by abundance of authorities, decided that there was no necessity for the expropriation of the particular strip of land in question, and absolved each and all of the defendants from all liability under the complaint, without any finding as to costs.

From that judgment the plaintiff appealed and presented the above question as its principal ground of appeal.

The theory of the plaintiff is, that once it has established the fact, under the law, that it has authority to expropriate land, it may expropriate any land it may desire; that the only function of the court in such proceedings is to ascertain the value of the land in question; that neither the court nor the owners of the land can inquire into the advisable purpose of the expropriation or ask any questions concerning the necessities therefor; that the courts are mere appraisers of the land involved in expropriation proceedings, and, when the value of the land is fixed by the method adopted by the law, to render a judgment in favor of the defendant for its value.

That the city of Manila has authority to expropriate private lands for public purposes, is not denied. Section 2429 of Act No. 2711 (Charter of the city of Manila) provides that "the city (Manila) * * * may condemn private property for public use."

The Charter of the city of Manila contains no procedure by which the said authority may be carried into effect. We are driven, therefore, to the procedure marked out by Act No. 190 to ascertain how the said authority may be exercised. From an examination of Act No. 190, in its section 241, we find how the right of eminent domain may be exercised. Said section 241 provides that, "The Government of the Philippine Islands, or of any province or department thereof, or of any municipality, and any person, or public or private corporation having, by law, the right to condemn private property for public use, shall exercise that right in the manner hereinafter prescribed"

Section 242 provides that a complaint in expropriation proceeding shall be presented; that the complaint shall state with certainty the right of condemnation, with a description of the property sought to be condemned together with the interest of each defendant separately.

Section 243 provides that if the court shall find upon trial that the right to expropriate the land in question exists, it shall then appoint commissioners.

Sections 244, 245 and 246 provide the method of procedure and duty of the commissioners. Section 248 provides for an appeal from the judgment of the Court of First Instance to the Supreme Court. Said section 248 gives the

Supreme Court authority to inquire into the right of expropriation on the part of the plaintiff. If the Supreme Court on appeal shall determine that no right of expropriation existed, it shall remand the cause to the Court of First Instance with a mandate that the defendant be replaced in the possession of the property and that he recover whatever damages he may have sustained by reason of the possession of the plaintiff.

It is contended on the part of the plaintiff that the phrase in said section, "and if the court shall find that the right to expropriate exists" means simply that, if the court finds that there is some law authorizing the plaintiff to expropriate, then the courts have no other function than to authorize the expropriation and to proceed to ascertain the value of the land involved; that the necessity for the expropriation is a legislative and not a judicial question.

Upon the question whether expropriation is a legislative function exclusively, and that the courts cannot intervene except for the purpose of determining the value of the land in question, there is much legal literature. Much has been written upon both sides of that question. A careful examination of the discussions pro and con will disclose the fact that the decisions depend largely upon particular constitutional or statutory provisions. It cannot be denied, if the legislature under proper authority should grant the expropriation of a certain or particular parcel of land for some specified public purpose, that the courts would be without jurisdiction to inquire into the purpose of that legislation.

If, upon the other hand, however, the Legislature should grant general authority to a municipal corporation to expropriate private land for public purposes, we think the courts have ample authority in this jurisdiction, under the provisions above quoted, to make inquiry and to hear proof, upon an issue properly presented, concerning whether or not the lands were private and whether the purpose was, in fact, public. In other words, have not the courts in this jurisdiction the right, inasmuch as the questions relating to expropriation must be referred to them (sec. 241, Act No. 190) for final decision, to ask whether or not the law has been complied with? Suppose, in a particular case, it should be denied that the property is not private property but public, may not the courts hear proof upon that question? Or, suppose the defense is, that the purpose of the expropriation is not public but private, or that there exists no public purpose at all, may not the courts make inquiry and hear proof upon that question?

The city of Manila is given authority to expropriate private lands for public purposes. Can it be possible that said authority confers the right to determine for itself that the land is private and that the purpose is public, and that the people of the city of Manila who pay the taxes for its support, especially those who are directly affected, may not question one or the other, or both, of these questions? Can it be successfully contended that the phrase used in Act No. 190, "and if the court upon trial shall find that such right exists," means simply that the court shall examine the statutes simply for the purpose of ascertaining whether a law exists authorizing the petitioner to exercise the right of eminent domain? Or, when the case arrives in the Supreme Court, can it be possible that the phrase, "if the Supreme Court shall determine that no right of expropriation exists," that that simply means that the Supreme Court shall also examine the enactments of the legislature for the purpose of determining whether or not a law exists permitting the plaintiff to expropriate?

We are of the opinion that the power of the court is not limited to that question. The right of expropriation is not an inherent power in a municipal corporation, and before it can exercise the right some law must exist conferring the power upon it. When the courts come to determine the question, they must not only find (a) that a law or authority exists for the exercise of the right of eminent domain, but (b) also that the right or authority is being exercised in accordance with the law. In the present case there are two conditions imposed upon the authority conceded to the City of Manila: First, the land must be private; and, second, the purpose must be public. If the court, upon trial, finds that neither of these conditions exists or that either one of them fails, certainly it cannot be contended that the right is being exercised in accordance with law.

Whether the purpose for the exercise of the right of eminent domain is public, is a question of fact. Whether the land is public or private is also a question of fact; and, in our opinion, when the legislature conferred upon the courts of the Philippine Islands the right to ascertain upon trial whether the right exists for the exercise of eminent domain, it intended that the courts should inquire into, and hear proof upon, those questions. Is it possible that the owner of valuable land in this jurisdiction is compelled to stand mute while his land is being expropriated for a use not public, with the right simply to beg the city of Manila to pay him the value of his land? Does the law in this jurisdiction permit municipalities to expropriate lands, without question, simply for the purpose of satisfying the aesthetic sense of those who happen for the time being to be in authority? Expropriation of lands usually calls for public expense. The taxpayers are called upon to pay the costs. Cannot the owners of land question the public use or the public necessity?

As was said above, there is a wide divergence of opinion upon the authority of the court to question the necessity or advisability of the exercise of the right of eminent domain. The divergence is usually found to depend upon particular statutory or constitutional provisions.

It has been contended—and many cases are cited in support of that contention, and section 158 of volume 10 of Ruling Case Law is cited as conclusive—that the necessity for taking property under the right of eminent domain is not a judicial question. But those who cited said section evidently overlooked the section immediately following (sec. 159), which adds: "But it is obvious that if the property is taken in the ostensible behalf of a public improvement which it can never by any possibility serve, it is being taken for a use not public, and the owner's constitutional rights call for protection by the courts. While many courts have used sweeping expression in the decisions in which they have disclaimed the power of supervising the selection of the sites of public improvements, it may be safely said that the courts of the various states would feel bound to interfere to prevent an abuse of the discretion delegated by the legislature, by an attempted appropriation of land in utter disregard of the possible necessity of its use, or when the alleged purpose was a cloak to some sinister scheme." *Norwich City vs. Johnson*, 86 Conn., 151; *Bell vs. Mattoon Waterworks, etc. Co.*, 245 Ill., 544; *Wheeling, etc. R. R. Co. vs. Toledo Ry. etc. Co.*, 72 Ohio St., 368; *State vs. Stewart*, 74 Wis., 620.)

Said section 158 (10 R. C. L., 183) which is cited as conclusive authority in support of the contention of the appellant, says:

"The legislature, in providing for the exercise of the power of eminent domain, may directly determine the necessity for appropriating private property for a particular improvement for public use, and it may select the exact location of the improvement. In such a case, it is well settled that the utility of the proposed improvement, the extent of the public necessity for its construction, the expediency of constructing it, the suitability of the location selected and the consequent necessity of taking the land selected for its site, are all questions exclusively for the legislature to determine, and the courts have no power to interfere, or to substitute their own views for those of the representatives of the people."

Practically every case cited in support of the above doctrine has been examined, and we are justified in making the statement that in each case the legislature directly determined the necessity for the exercise of the right of eminent domain in the particular case. It is not denied that if the necessity for the exercise of the right of eminent domain is presented to the legislative department of the government and that department decides that there exists a necessity for the exercise of the right in a particular case, that then and in that case, the courts will not go behind the action of the legislature and make inquiry concerning the necessity. But, in the case of *Wheeling, etc. R. R. Co. vs. Toledo, Ry., etc. Co.* (72 Ohio St., 368 [106 Am. St. Rep., 622, 628]), which is cited in support of the doctrine laid down in section 158 above quoted, the court said:

"But when the statute does not designate the property to be taken nor how much may be taken, then the necessity of taking particular property is a question for the courts. Where the application to condemn or

appropriate is made directly to the court, the question (of necessity) should be raised and decided in limine."

The legislative department of the government very rarely undertakes to designate the precise property which should be taken for public use. It has generally, like in the present case, merely conferred general authority to take land for public use when a necessity exists therefor. We believe that it can be confidently asserted that, under such statute, the allegation of the necessity for the appropriation is an issuable allegation which it is competent for the courts to decide. (*Lynch vs. Forbes*, 161 Mass., 302 [42 Am. St. Rep., 402, 407].)

There is a wide distinction between a legislative declaration that a municipality is given authority to exercise the right of eminent domain, and a decision by the municipality that there exists a necessity for the exercise of that right in a particular case. The first is a declaration simply that there exist, reasons why the right should be conferred upon municipal corporation, while the second is the application of the right to a particular case. Certainly, the legislative declaration relating to the advisability of granting the power cannot be converted into a declaration that a necessity exists for its exercise in a particular case, and especially so when, perhaps, the land in question was not within the territorial jurisdiction of the municipality at the time the legislative authority was granted.

Whether it was wise, advisable, or necessary to confer upon a municipality the power to exercise the right of eminent domain, is a question with which the courts are not concerned. But when that right or authority is exercised for the purpose of depriving citizens of their property, the courts are authorized, in this jurisdiction, to make inquiry and to hear proof upon the necessity in the particular case, and not the general authority.

Volume 15 of the *Cyclopedia of Law and Procedure* (Cyc.), page 629, is cited as a further conclusive authority upon the question that the necessity for the exercise of the right of eminent domain is a legislative and not a judicial question. *Cyclopedia*, at the page stated, says:

"In the absence of some constitutional or statutory provision to the contrary, the necessity and expediency of exercising the right of eminent domain are questions essentially political and not judicial in their character. The determination of those questions (the necessity and the expediency) belongs to the sovereign power; the legislative department is final and conclusive, and the courts have no power to review it (the necessity and the expediency) * * *. It (the legislature) may designate the particular property to be condemned, and its determination in this respect cannot be reviewed by the courts."

The volume of *Cyclopedia*, above referred to, cites many cases in support of the doctrine quoted. While time has not permitted an examination of all of said citations, many of them have been examined, and it can be confidently asserted that said cases which are cited in support of the assertion that, "the necessity and expediency of exercising the right of eminent domain are questions essentially political and not judicial," show clearly and invariably that in each case the legislature itself usually, by a special law, designated the particular case in which the right of eminent domain might be exercised by the particular municipal corporation or entity within the state. (*Eastern R. Co. vs. Boston, etc., R. Co.*, 11 Mass., 125 [15 Am. Rep., 13] ; *Brooklyn Park Com'rs. vs. Armstrong*, 45 N. Y., 234 [6 Am. Rep., 70] ; *Hairston vs. Danville, etc. Ry. Co.*, 208 U. S., 598; *Cincinnati vs. Louisville, etc. Ry. Co.*, 223 U. S. 390; *U. S. vs. Chandler-Dunbar Water Power Co.*, 229 U. S., 53; *U. S. vs. Gettysburg, etc. Co.*, 160 U. S., 668; *Traction Co. vs. Mining Co.*, 196 U. S., 239; *Sears vs. City of Akron*, 246 U. S., 351 [erroneously cited as 242 U. S.].)

In the case of *Traction Co. vs. Mining Co.* (196 U. S., 239), the Supreme Court of the United States said: "It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain, either as to the nature of the use or the necessity to the use of any particular property. For if the use be not public or no necessity for the taking exists, the legislature cannot authorize the taking of private property against

the will of the owner, notwithstanding compensation may be required."

In the case of *School Board of Carolina vs. Saldana* (14 Porto Rico, 339, 356), we find the Supreme Court of Porto Rico, speaking through Justice MacLeary, quoting approvingly the following, upon the question which we are discussing: "It is well settled that although the legislature must necessarily determine in the first instance whether the use for which they (municipalities, etc.) attempt to exercise the power is a public one or not, their (municipalities, etc.) determination is not final, but is subject to correction by the courts, who may undoubtedly declare the statute unconstitutional, if it shall clearly appear that the use for which it is proposed to authorize the taking of private property is in reality not public but private." Many cases are cited in support of that doctrine.

Later, in the same decision, we find the Supreme Court of Porto Rico says: "At any rate, the rule is quite well settled that in the cases under consideration the determination of the necessity of taking a particular piece or a certain amount of land rests ultimately with the courts." (*Spring Valley etc. Co. vs. San Mateo, etc. Co.*, 64 Cal., 123.)

In the case of *Board of Water Com'rs., etc. vs. Johnson* (86 Conn., 571 [41 L. R. A., N. S., 1024]), the Supreme Court of Connecticut approvingly quoted the following doctrine from *Lewis on Eminent Domain* (3d ed.), section 599: "In all such cases the necessity of public utility of the proposed work or improvement is a judicial question. In all such cases, where the authority is to take property necessary for the purpose, the necessity of taking particular property for a particular purpose is a judicial one, upon which the owner is entitled to be heard," *Riley vs. Charleston, etc. Co.*, 71 S. C., 457, 489 [110 Am. St. Rep., 579]; *Henderson vs. Lexington* 132 Ky., 390, 403.)

The taking of private property for any use which is not required by the necessities or convenience of the inhabitants of the state, is an unreasonable exercise of the right of eminent domain, and beyond the power of the legislature to delegate. (*Bennett vs. Marion*, 106 Iowa, 628, 633; *Wilson vs. Pittsburg, etc. Co.*, 222 Pa. St., 541, 545; *Greasy, etc. Co. vs. Ely, etc. Co.*, 132 Ky., 692, 697.)

In the case of *New Central Coal Co. vs. George's, etc. Co.* (37 Md., 537, 564), the Supreme Court of the State of Maryland, discussing the question before us, said: "To justify the exercise of this extreme power eminent domain) where the legislature has left it to depend upon the necessity that may be found to exist, in order to accomplish the purposes of. the incorporation, as in this case, the party claiming the right to the exercise of the power should be required to show at least a reasonable degree of necessity for its exercise. Any rule less strict than this, with the large and almost indiscriminate delegation of the right to corporations, would likely lead to oppression and the sacrifice of private right to corporate power."

In the case of *Dewey vs. Chicago, etc. Co.* (184 Ill., 426, 433), the court said: "Its right to condemn property is not a general power of condemnation, but is limited to cases where a necessity for resort to private property is shown to exist. Such necessity must appear upon the face of the petition to condemn. If the necessity is denied the burden is upon the company (municipality) to establish it." (*Highland, etc. Co. vs. Strickley*, 116 Fed., 852, 856; *Kiney vs. Citizens' Water & Light Co.*, 173 Ind., 252, 257; *Bell vs. Mattoon Waterworks, etc. Co.*, 245 Ill., 544 [137 Am. St. Rep., 338].)

It is true that many decisions may be found asserting that what is a public use is a legislative question, and many other decisions declaring -with equal emphasis that it is a judicial question. But, as long as there is a constitutional or statutory provision denying the right to take land for any use other than a public use, it occurs to us that the question whether any particular use is a public one or not is ultimately, at least, a judicial question. The legislature may, it is true, in effect declare certain uses to be public, and, under the operation of the well-known rule that a statute will not be declared to be unconstitutional except in a case free, or comparatively free, from doubt, the courts will certainly sustain the action of the legislature, unless it appears that the particular use is clearly not of a

public nature. The decisions must be understood with this limitation; for, certainly, no court of last resort will be willing to declare that any and every purpose which the legislature might happen to designate as a public use shall be conclusively held to be so, irrespective of the purpose in question and of its manifestly private character. Blackstone in his Commentaries on the English Law remarks that, so great is the regard of the law for private property that it will not authorize the least violation of it, even for the public good, unless there exists a very great necessity therefor.

In the case of *Wilkinson vs. Leland* (2 Pet. [U. S.], 657), the Supreme Court of the United States said: "That government can scarcely be deemed free where the rights of property are left solely dependent on the legislative body, without restraint. The fundamental maxims of free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked in any general grant of legislative authority, or ought to be implied from any general expression of the people. The people ought not to be presumed to part with rights so vital to their security and well-being without very strong and direct expression of such intention." (Lewis¹ on Eminent Domain, sec. 603; *Lecoul vs. Police Jury*, 20 La. Ann., 308; *Jefferson vs. Jazem*, 7 La. Ann., 182.)

Blackstone, in his Commentaries on the English Law, said that the right to own and possess land—a place to live separate and apart from others—to retain it as a home for the family in a way not to be molested by others—is one of the most sacred rights that men are heirs to. That right has been written into the organic law of every civilized nation. The Acts of Congress of July 1, 1902, and of August 29, 1916, which provide that "no law shall be enacted in the Philippine Islands which shall deprive any person of his property without due process of law," are but a restatement of the time-honored protection of the absolute right of the individual to his property. Neither did said Acts of Congress add anything to the law already existing in the Philippine Islands. The Spaniard fully recognized the principle and adequately protected the inhabitants of the Philippine Islands against the encroachment upon the private property of the individual. Article 349 of the Civil Code provides that: "No one may be deprived of his property unless it be by competent authority, for some purpose of proven public utility, and after payment of the proper compensation. Unless this requisite (proven public utility and payment) has been complied with, it shall be the duty of the courts to protect the owner of such property in its possession or to restore its possession to him, as the case may be"

The exercise of the right of eminent domain, whether directly by the State, or by its authorized agents, is necessarily in derogation of private rights, and the rule in that case is that the authority must be strictly construed. No species of property is held by individuals with greater tenacity, and none is guarded by the constitution and laws more sedulously, than the right to the freehold of inhabitants. When the legislature interferes with that right, and, for greater public purposes, appropriates the land of an individual without his consent, the plain meaning of the law should not be enlarged by doubtful interpretation. (*Bensley vs. Mountainlake Water Co.*, 13 Cal., 306 and cases cited [73 Am. Dec, 576].)

The statutory power of taking property from the owner without his consent is one of the most delicate exercise of governmental authority. It is to be watched with jealous scrutiny. Important as the power may be to the government, the inviolable sanctity which all free constitutions attach to the right of property of the citizens, constrains the strict observance of the substantial provisions of the law which are prescribed as modes of the exercise of the / power, and to protect it from abuse. Not only must the authority of municipal corporations to take property be expressly conferred and the use for which it is taken specified, but the power, with all constitutional limitation and directions for its exercise, must be strictly pursued. (*Dillon on Municipal Corporations* [5th Ed.], sec. 1040, and cases cited; *Tenorio vs. Manila Railroad Co.*, 22 Phil., 411.)

It can scarcely be contended that a municipality would be permitted to take property for some public use unless some public necessity existed therefor. The right to take private property for public use originates in the necessity, and the taking must be limited by such necessity. The appellant contends that inasmuch as the legislature has given it general authority to take private property for public use, that the legislature has, therefore, settled the question of the necessity in every case and that the courts are closed to the owners of the property upon that question. Can it be imagined, when the legislature adopted section 2429 of Act No. 2711, that it thereby declared that it was necessary to appropriate the property of Juan de la Cruz, whose property, perhaps, was not within the city limits at the time the law was adopted? The legislature, then, not having declared the necessity, can it be contemplated that it intended that a municipality should be the sole judge of the necessity in every case, and that the courts, in the face of the provision that "if upon trial they shall find that a right exists," cannot in that trial inquire into and hear proof upon the necessity for the appropriation in a particular case?

The Charter of the city of Manila authorizes the taking of private property for public use. Suppose the owner of the property denies and successfully proves that the taking of his property serves no public use: Would the courts not be justified in inquiring into that question and in finally denying the petition if no public purpose was proved? Can it be denied that the courts have a right to inquire into that question? If the courts can ask questions and decide, upon an issue properly presented, whether the use is public or not, is not that tantamount to permitting the courts to inquire into the necessity of the appropriation? If there is no public use, then there is no necessity, and if there is no necessity, it is difficult to understand how a public use can necessarily exist. If the courts can inquire into the question whether a public use exists or not, then it seems that it must follow that they can examine into the question of the necessity.

The very foundation of the right to exercise eminent domain is a genuine necessity, and that necessity must be of a public character. The ascertainment of the necessity must precede or accompany, and not follow, the taking of the land. (*Morrison vs. Indianapolis, etc. Ry. Co.*, 166 Ind., 511; *Stearns vs. Barre*, 73 Vt., 281; *Wheeling, etc. R. Co. vs. Toledo, Ry. etc. Co.*, 72 Ohio St., 368.)

The general power to exercise the right of eminent domain must not be confused with the right to exercise it in a particular case. The power of the legislature to confer, upon municipal corporations and other entities within the State, general authority to exercise the right of eminent domain cannot be questioned by the courts, but that general authority of municipalities or entities must not be confused with the right to exercise it in particular instances.. The moment the municipal corporation or entity attempts to exercise the authority conferred, it must comply with the conditions accompanying the authority. The necessity for conferring the authority upon a municipal corporation to exercise the right of eminent domain is admittedly within the power of the legislature. But whether or not the municipal corporation or entity is exercising the right in a particular case under the conditions imposed by the general authority, is a question which the courts have the right to inquire into.

The conflict in the authorities upon the question whether the necessity for the exercise of the right of eminent domain is purely legislative and not judicial, arises generally in the wisdom and propriety of the legislature in authorizing the exercise of the right of eminent domain instead of in tide question of the right to exercise it in a particular case. (*Creston Waterworks Co. vs. McGrath*, 89 Iowa, 502.)

By the weight of authorities, the courts have the power of restricting the exercise of eminent domain to the actual reasonable necessities of the case and for the purposes designated by the law. (*Fairchild vs. City of St. Paul*, 48 Minn., 540.)

And, moreover, the record does not show conclusively that the plaintiff has definitely decided that there exists a necessity for the appropriation of the particular land described in the complaint. Exhibits 4, 5, 7, and E clearly

indicate that the municipal board believed at one time that other land might be used for the proposed improvement, thereby avoiding the necessity of disturbing the quiet resting place of the dead.

Aside from insisting that there exists no necessity for the alleged improvement, the defendants further contend that the street in question should not be opened through the cemetery. One of the defendants alleges that said cemetery is public property. If that allegations is true, then, of course, the city of Manila cannot appropriate it for public use. The city of Manila can only expropriate private property.

It is a well known fact that cemeteries may be public or private. The former is a cemetery used by the general community, or neighborhood, or church, while the latter is used only by a family, or a small portion of the community or neighborhood. (11 C.J., 50)

Where a cemetery is open to the public, it is a public use and no part of the ground can be taken for other public uses under general authority. And this immunity extends to the unimproved and unoccupied parts which are held in good faith for future use. (Lewis on Eminent Domain, sec. 434, and cases cited.)

The cemetery in question seems to have been established under governmental authority. The Spanish Governor-General in an order creating the same, used the following language:

" The cemetery and general hospital for indigent Chinese having been founded and maintained by the spontaneous and fraternal contribution of their protector, merchants and industrials, benefactors of mankind, in consideration of their services to the Government of the Islands its internal administration, government and regime must be necessarily be adjusted to the taste and traditional practices of those born and, educated in Chma. in order that the sentiments which animated the founders may be perpetually effectuated?"

It is alleged, and not denied, that the cemetery in question may be used by the general community of Chinese, which fact, in the general acceptance of the definition of a public cemetery, would make the cemetery in question public property. If that is true, then, of course, the petition[^] of the plaintiff must be denied, for the reason that the city of Manila has no authority or right under the law to expropriate public property.

But, whether or not the cemetery is public or private property, its appropriation for the uses of a public street, especially during the lifetime of those specially interested in its maintenance as a cemetery, should be a question of great concern, and its appropriation should not be made for such purposes until it is fully established that the greatest necessity exists therefor.

While we do not contend that the dead must not give place to the living, and while it is a matter of public knowledge that in the process of time sepulchres may become the seat of cities and cemeteries traversed by streets and daily trod by the feet of millions of men, yet, nevertheless such sacrifices and such uses of the places of the dead should not be made unless and until it is fully established that there exists an eminent necessity therefor. While cemeteries and sepulchres and the places of the burial of the dead are still within the memory and command of the active care of the living; while they are still devoted to pious uses and sacred regard, it is difficult to believe that even the legislature would adopt a law expressly providing that such places, under such circumstances, should be violated.

In such an appropriation, what, we may ask, would be the measure of damages at law, for the wounded sensibilities of the living, in having the graves of kindred and loved ones blotted out and desecrated by a common highway or street for public travel? The impossibility of measuring the damage and inadequacy of a remedy at law is too apparent to admit of argument. To disturb the mortal remains of those endeared to us in life sometimes becomes the sad duty of the living; but, except in cases of necessity, or for laudable purposes, the sanctity of the grave, the last resting place of our friends, should be maintained, and the preventative aid of the courts should be

invoked for that object. (Railroad Company vs. Cemetery Co., 116 Tenn., 400; Evergreen Cemetery Association vs. The City of New Haven, 43 Conn., 234; Anderson vs. Acheson, 132 Iowa, 744; Beatty vs. Kurtz, 2 Peters, 566.)

In the present case, even granting that a necessity exists for the opening of the street in question, the record contains no proof of the necessity of opening the same through the cemetery. The record shows that adjoining and adjacent lands have been offered to the city free of charge, which will answer every purpose of the plaintiff.

For all of the foregoing, we are fully persuaded that the judgment of the lower court should be and is hereby affirmed, with costs against the appellant. So ordered.

Arellano, C.J., Torres, Araullo, and Avanceña, JJ., concur.

CONCURRING
MALCOLM, J.,

The Government of the Philippine Islands is authorized by the Philippine Bill to acquire real estate for public use by the exercise of the right of eminent domain. (Act of Congress of July 1, 1902, sec 63.) A portion of this power has been delegated by the Philippine Legislature to the city of Manila, which is permitted to "condemn private property for public use." (Administrative Code of 1917, sec. 2429.) The Code of Civil Procedure, in prescribing how the right of eminent domain may be exercised, also limits the condemnation to "private property for public use." (Sec. 241.) As under the facts actually presented, there can be no question that a public street constitutes a public use, the only remaining question is whether or not the Chinese Cemetery and the other property here sought to be taken by the exercise of the right of eminent domain is "private property."

As narrowing our inquiry still further, let it be noted that cemeteries are of two classes, public and private. A public cemetery is one used by the general community, or neighborhood, or church; while a private cemetery is one used only by a family, or a small portion of a community. (Lay vs. State, 12 Ind. App., 362; Cemetery Association vs. Meninger [1875], 14 Kan., 312.) Our specific question, then, is, whether the Chinese Cemetery in the city of Manila is a public, or a private graveyard. If it be found to be the former, it is not subject to condemnation by the city of Manila; if it be found to be the latter, it is subject to condemnation.

The Chinese Cemetery of Manila was established during the Spanish administration in the Philippines by public spirited Chinese. The order of the Governor-General giving governmental recognition to the cemetery reads as follows: "The cemetery and general hospital for indigent Chinese having been founded and maintained by the spontaneous and fraternal contribution of their protectors, merchants and industrials, benefactors of mankind, in consideration of their services to the Government of the Islands, its internal administration, government and regime, must necessarily be adjusted to the taste and traditional practices of those born and educated in China in order that the sentiments which animated the founders may be perpetually effectuated," Sometimes after the inauguration of the new regime in the Philippines a corporation was organized to control the cemetery, and a Torrens title for the lands in question was obtained.

From the time of its creation until the present the cemetery has been used by the Chinese community for the burial of their dead. It is said that not less than four hundred graves, many of them with handsome monuments, would be destroyed by the proposed street. This desecration is attempted as to the last resting places of the dead of a people who, because of their peculiar and ingrained ancestral worship, retain more than the usual reverence for the departed. These facts lead us straight to the conclusion that the Chinese Cemetery is not used by a family or a small portion of a community but by a particular race long existing in the country and of considerable numbers.

The case, then, is one of where the city of Manila, under a general authority permitting it to condemn private property for public use, is attempting to convert a property already dedicated to a public use to an entirely different public use; and this, not directly pursuant to legislative authority, but primarily through the sole advice of the consulting architect.

Two well considered decisions coming from the American state courts on almost identical facts are worthy of our consideration. The first is the case of *The Evergreen Cemetery Association vs. The City of New Haven* ([1875], 43 Conn., 284), oft cited by other courts. Here the City of New Haven, Connecticut, under the general power conferred upon it to lay out, construct, and maintain all necessary highways within its limits, proceeded to widen and straighten one of its streets, and in so doing took a small piece of land belonging to the Evergreen Cemetery Association. This association was incorporated under the general statute. The city had no special power to take any part of the cemetery for such purposes. It was found that the land taken was needed for the purposes of the cemetery and was not needed for the purpose of widening and straightening the avenue. The court said that it is unquestionable that the Legislature has the power to authorize the taking of land already applied to one public use and devote it to another. When the power is granted to municipal or private corporations in express words, no question can arise. But, it was added, "The same land cannot properly be used for burial lots and for a public highway at the same time. * * * Land therefore applied to one use should not be taken, for the other except in cases of necessity. * * * There is no difficulty in effecting the desired improvement by taking land on the other side of the street. * * * The idea of running a public street, regardless of graves, monuments, and the feelings of the living, through one of our public cemeteries, would be shocking to the moral sense of the community, and would not be tolerated except upon the direst necessity." It was then held that land already devoted to a public use cannot be taken by the public for another use which is inconsistent with the first, without special authority from the Legislature, or authority granted by necessary and reasonable implication.

The second decision is that of *Memphis State Line Railroad Company vs. Forest Hill Cemetery Co.* ([1906], 116 Tenn., 400.) Here the purpose of the proceeding was to condemn a right of way for the railway company through the Forest Hill Cemetery. The railroad proposed to run through the southeast corner of the cemetery where no bodies were interred. The cemetery had been in use for about eight years, and during this period thirteen hundred bodies had been buried therein. The cemetery was under the control of a corporation which, by its character, held itself out as being willing to sell lots to any one who applies therefor and pays the price demanded, except to members of the Negro race.

It was found that there were two other routes along which the railroad might be located without touching the cemetery, while the present line might be pursued without interfering with Forest Hill Cemetery by making a curve around it. In the court below the railroad was granted the right of condemnation through the cemetery and damages were assessed. On appeal, the certiorari applied for was granted, and the supersedeas awarded. The court, in effect, found that the land of the Cemetery Company was devoted to a public purpose, and that under the general language of the Tennessee statute of eminent domain it could not be taken for another public purpose. The court said that in process of time the sepulchres of the dead "are made the seats of cities, and are traversed by streets, and daily trodden by the feet of man. This is inevitable in the course of ages. But while these places are yet within the memory and under the active care of the living, while they are still devoted to pious uses, they are sacred, and we cannot suppose that the legislature intended that they should be violated, in the absence of special provisions upon the subject authorizing such invasion, and indicating a method for the disinterment, removal, and reinterment of the bodies buried, and directing how the expense thereof shall be borne." Two members of the court, delivering a separate concurring opinion, concluded with this significant and eloquent sentence: "The wheels of commerce must stop at the grave."

For the foregoing reasons, and for others which are stated in the principal decision, I am of the opinion that the judgment of the lower court should be affirmed.

DISSENTING

STREET, J.,

It may be admitted that, upon the evidence before us, the projected condemnation of the Chinese Cemetery is unnecessary and perhaps ill-considered. Nevertheless I concur with Justice Moir in the view that the authorities of the city of Manila are the proper judges of the propriety of the condemnation and that this Court should have nothing to do with the question of the necessity of the taking.

DISSENTING

MOIR, J.,

I dissent from the majority opinion in this case, which has not yet been written, and because of the importance of the question involved, present my dissent for the record.

This is an action, by the city of Manila for the expropriation of land for an extension of Rizal Avenue north. The petition for condemnation was opposed by the "Comunidad de Chinos de Manila" and Ildefonso Tambunting and various others who obtained permission of the trial court to intervene in the case.

All of the defendants allege in their opposition that the proposed extension of Rizal Avenue cuts through a part of the Chinese Cemetery, North of Manila, and necessitates the destruction of many monuments and the removal of many graves.

The Court of First Instance of Manila, Honorable S. del Rosario, judge, after hearing the parties, decided that there was no need for constructing the street as and where proposed by the city, and dismissed the petition;

The plaintiff appealed and sets up the following errors:

- The court erred in deciding that the determination of the necessity and convenience of the expropriation of the lands of the defendants lies with the court and not with the Municipal Board of the city of Manila.
- The court erred in permitting the presentation of proofs over the objection and exception of the plaintiff tending to demonstrate the lack of necessity of the projected street and the need of the lands in question.
- The court erred in declaring that the plaintiff had no right to expropriate the lands in question.
- The court erred in dismissing the complaint.

The right of the plaintiff to expropriate property for public use cannot be denied. The "right of eminent domain is inherent in all sovereignties and therefore would exist without any constitutional recognition * * *. The right of eminent domain antedates constitutions * * *. The right can only be denied or restricted by fundamental law and is right inherent in society." (15 Cyc, pp. 557-8.)

This general right was recognized in the Philippine Code of Civil Procedure effective October 1st, 1901, which prescribed the manner of exercising the right. (Section, 241 et seq.)

It was further recognized in the Organic Act of July 1st, 1902, which provides in section 74 "that the Government of the Philippine Islands may grant franchises '* * * including the authority to exercise the right of eminent domain for the construction and operation of works of public utility and service, and may authorize said works to

be constructed and maintained over and across the public property of the United States including * * * reservations." This provision is repeated in the Jones Law of August, 1916.

The legislature of the Islands conferred the right on the city of Manila. (Section 2429, Administrative Code of 1917; section 2402, Administrative Code of 1916.)

Clearly having the right of expropriation, the city of Manila, selected the line of its street and asked the court by proper order to place the plaintiff in possession of the land described in the complaint, and to appoint Commissioners to inspect the property, appraise the value, and assess the damages. Instead of doing so, the court entered upon the question of the right of the city to take the property and the necessity for the taking.

The court says:

"The controversy relates to whether or not the Chinese Cemetery, where a great majority of this race is buried and other persons belonging to other nationalities have been formerly inhumed, is private or public; whether or not said cemetery, in case it is public, would be susceptible to expropriation for the purpose of public improvements proposed by the city of Manila; whether or not the latter is justified of the necessity and expediency of similar expropriation before its right to the same would be upheld by the courts of justice; and whether or not the appreciation of said necessity pertains to the legislative or the judicial department before which the expropriation proceedings have been brought.

"Relative to the first point, it is not necessary for the court to pass upon its consideration, in view of the conclusion it has arrived at the appreciation of the other points connected with each other.

"From the testimony of two reputable engineers produced by some of the defendants, it appears that the land chosen by the plaintiff for the extension of Rizal Avenue to the municipality of Caloocan is not the best or the less expensive, although upon it there may be constructed a straight road, without curves or winding; but that in order to construct said road upon said land, the city of Manila would have to remove and transfer to other places about four hundred graves and monuments, make some grubblings, undergo some leveling and build some bridges—the works thereon, together with the construction of the road and the value of the lands expropriated, would mean an expenditure which will not be less than P180,000.

"Beside that considerable amount, the road would have a declivity of 3 per cent which, in order to cover a distance of one kilometer, would require an energy equivalent to that which would be expended in covering a distance of two and one-half kilometers upon a level road.

"On the other hand, if the road would be constructed with the deviation proposed by Ildefonso Tambunting, one of the defendants, who even offered to donate gratuitously to the city of Manila part of the land upon which said road will have to be constructed, the plaintiff entity would be able to save more than hundreds of thousands of pesos, which can be invested in other improvements of greater pressure and necessity for the benefit of the taxpayers ; and it will not have to employ more time and incur greater expenditures in the removal and transfer of the remains buried in the land of the Chinese Community and of Sr. Tambunting, although with the insignificant disadvantage that the road would be a little longer by a still more insignificant extension of 426 meters and 55 centimeters, less than one-half kilometer, according to the plan included in the records; but it would offer a better panorama to those who would use it, and who would not have to traverse in their necessary or pleasure-making trips or walks any cemetery which, on account of its nature, always deserves the respect of the travellers. It should be observed that the proposed straight road over the cemetery, which the city of Manila is proposing to expropriate, does not lead to any commercial, industrial, or agricultural center, and if with said road it is endeavored to benefit some community or created interest, the same object may be obtained by the proposed deviation, of the road by the defendants. The road traced by the plaintiffs has the disadvantage that the lands on both sides thereof would not serve for residential purposes, for the reason that no one has the pleasure to construct buildings upon cemeteries, unless it be in very

overcrowded cities, so exhausted of land that every inch thereof represents a dwelling house."

And it is against this ruling, that it lies with the court to determine the necessity of the proposed street and not with the municipal board, that the appellant directs its first assignment of error.

It is a right of the city government to determine whether or not it will construct streets and where, and the court's sole duty was to see that the value of the property was paid the owners after proper legal proceedings ascertaining the value.

The law gives the city the right to take private property for public use. It is assumed it is unnecessary to argue that a public road is a public use.

But it is argued that plaintiff must show that it is necessary to take this land for a public improvement. The law does not so read, and it is believed that the great weight of authority, including the United States Supreme Court, is against the contention.

"The question of necessity is distinct from the question of public use, and the former question is exclusively for the legislature, except that if the constitution or statute authorizes the taking of property only in cases of necessity, then the necessity becomes a judicial question." (McQuillen Municipal Corporations, Vol. IV, pp. 3090-3091.)

"In the absence of some constitutional or statutory provision to the contrary, the necessity and expediency of exercising the right of eminent domain are questions essentially political and not judicial in their character. The determination of those questions belongs to the sovereign power; the legislative determination is final and conclusive, and the courts have no power to review it. It rests with the legislature not only to determine when the power of eminent domain may be exercised, but also the character, quality, method, and extent of such exercise. And this power is unqualified, other than by the necessity of providing that compensation shall be made. Nevertheless, under the express provisions of the constitution of some states the question of necessity is made a judicial one, to be determined by the courts and not by the legislature.

"While the legislature may itself exercise the right of determining the necessity for the exercise of the power of eminent domain, it may, unless prohibited by the constitution, delegate this power to public officers or to private corporations established to carry on enterprises in which the public are interested, and their determination that a necessity for the exercise of the power exists is conclusive. There is no restraint upon the power except that requiring compensation to be made. And when the power has been so delegated it is a subject of legislative discretion to determine what prudential regulations shall be established to secure a discreet and judicious exercise of the authority. It has been held that in the absence of any statutory provision submitting the matter to a court or jury the decision of the question of necessity lies with the body of individuals to whom the state has delegated the authority to take, and the legislature may by express provision confer this power on a corporation to whom the power of eminent domain is delegated unless prohibited by the constitution. It is of course competent for the legislature to declare that the question shall be a judicial one, in which case the court and not the corporation determines the question of necessity." (15 Cyc, pp. 629-632.)

To the same effect is Lewis on Eminent Domain (3d Edition, section 597).

I quote from the notes to Vol. 5, Encyclopedia of United States Supreme Court Reports, p. 762, as follows:

"Neither can it be said that there is any fundamental right secured by the constitution of the United States to have the questions of compensation and necessity both passed upon by one and the same jury. In many states the question of necessity is never submitted to the jury which passes upon the question of compensation. It is either settled affirmatively by the legislature, or left to the judgment of the corporation invested with the right to take property by condemnation. The question of necessity is not one of a judicial character, but rather one for determination by the lawmaking branch of the government. (Boom Co. vs. Patterson, 98 U. S., 403, 406 [25

L. ed., 206]; *United States vs. Jones*, 109 U. S., 513 [27 L. ed., 1015] ; *Backus vs. Fort Street Union Depot Co.*, 169 U. S., 557, 568 [42 L. ed., 853].)

"Speaking generally, it is for the state primarily and exclusively, to declare for what local public purposes private property, within its limits, may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned and taken. (*Madisonville Tract. Co. vs. St. Bernard Min. Co.*, 196 U. S., 239, 252 [49 L. ed., 462].)

"Courts have no power to control the legislative authority in the exercise of their right to determine when it is necessary or expedient to condemn a specific piece of property for public purposes. (*Adirondack R. Co. vs. New York States*, 176 U. S., 335 [44 L. ed., 492].)"

10 R. C. L. (p. 183), states the law as follows:

"158. Necessity for taking ordinarily not judicial question.—The legislature, in providing for the exercise of the power of eminent domain, may directly determine the necessity for appropriating private property for a particular improvement or public use, and it may select the exact location of the improvement. In such a case, it is well settled that the utility of the proposed improvement, the extent of the public necessity for its construction, the expediency of constructing it, the suitability of the location selected and the consequent necessity of taking the land selected for its site, are all questions exclusively for the legislature to determine, and the courts have no power to interfere, or to substitute their own views for these of the representatives of the people. Similarly, when the legislature has delegated the power of eminent domain to municipal or public service corporation or other tribunals or bodies, and has given them discretion as to when the power is to be called into exercise and to what extent, the court will not inquire into the necessity or propriety of the taking."

The United States Supreme Court recently said:

"The uses to which this land are to be put are undeniably public uses. When that is the case the propriety or expediency of the appropriation cannot be called in question by any other authority." (*Cincinnati vs. S. & N. R. R. Co.*, 223 U. S., 390, quoting *U. S. vs. Jones*, 109, U. S., 519.)

And in *Sears vs. City of Akron* (246 U. S., 242), decided March 4th, 1918, it said:

"Plaintiff contends that the ordinance is void because the general statute which authorized the appropriation violates both Article 1, paragraph 10, of the Federal Constitution, and the Fourteenth Amendment, in that it authorizes the municipality to determine the necessity for the taking of private property without the owners having an opportunity to be heard as to such necessity; that in fact no necessity existed for any taking which would interfere with the company's project; since the city might have taken water from the Little Cuyahoga or the Tuscarawas rivers; and furthermore, that it has taken ten times as much water as it can legitimately use. It is well settled that while the question whether the purpose of a taking is a public one is judicial (*Hairston vs. Danville & W. R. Co.*, 208 IT. S. 598 [52 L. ed., 637; 28 Sup. Ct. Rep., 331; 13 Ann. Cas., 1008]), the necessity and the proper extent of a taking is a legislative question. (*Shoemaker vs. United States*, 147 U. S., 282, 298 [57 L. ed., 170, 184; 13 Sup. Ct. Rep., 361]; *United States vs. Gettysburg Electric R. Co.*, 160 U. S. 668, 685 [40 L. ed., 576, 582; 16 Sup. Ct. Rep., 427] ; *United States vs. ChandlerDunbar Water Power Co.*, 229 U. S., 53, 65 [57 L. ed., 1063, 1076; 33 Sup. Ct. Rep., 667].)"

I think the case should be decided in accordance with foregoing citations, but one other point has been argued so extensively that it ought to be considered.

It is contended for the defense that this Chinese Cemetery is a public cemetery and that it cannot therefore be taken for public use. In its answer the "Comunidad de Chinos de Manila" says it is "a corporation organized and existing under and by virtue of the laws of the Philippine Islands," and that it owns the land which plaintiff seeks to acquire. The facts that it is a private corporation owning" land would seem of necessity to make the land it

owns private land. The fact that it belongs to the Chinese community deprives it of any public character.

But admitting that it is a public cemetery, although limited in its use to the Chinese Community of the city of Manila, can it not be taken for public use? Must we let the reverence we feel for the dead and the sanctity of their final resting-place obstruct the progress of the living? It will be instructive to enquire what other jurisdictions have held on that point.

On the Application of Board of Street Openings of New York City to acquire St. Johns Cemetery (133 N. Y., 329) the court of appeal said:

"* * * The board instituted this proceeding under the act to acquire for park purposes the title to land below One Hundred and Fifty-fifth street known as St. John's cemetery which belonged to a religious corporation in the city of New York, commonly called Trinity Church. It was established as a cemetery as early as 1801, and used for that purpose until 1839, during which time about ten thousand human bodies had been buried therein. In 1839 an ordinance was passed by the city of New York forbidding interments south of Eighty-sixth street, and since that time no interments have been made in the cemetery, but Trinity Church has preserved and kept it in order and prevented any disturbance thereof.

"It is contended on behalf of Trinity Church that under the general authority given by the statute of 1887, this land which had been devoted to cemetery purposes could not be taken for a park. The authority conferred upon the board by the act is broad and general. It is authorized to take for park purposes any land south of One Hundred and Fifty-fifth street. * * *

"The fact that lands have previously been devoted to cemetery purposes does not place them beyond the reach of the power of eminent domain. That is an absolute transcendent power belonging to the sovereign which can be exercised for the public welfare whenever the sovereign authority shall determine that a necessity for its exercise exists. By its existence the homes and the dwellings of the living, and the resting-places of the dead may be alike condemned.

"It seems always to have been recognized in the laws of this state, that under the general laws streets and highways could be laid out through cemeteries, in the absence of special limitation or prohibition. * * *"

In *Re Opening of Twenty-second Street* (102 Penn. State Reports, 108) the Supreme Court of the State said:

"This was an action for the opening of a street through a cemetery in the City of Philadelphia. It was contended for the United American Mechanics and United Daughters of America Cemetery Association that by an act of the legislature of the State approved March 20th, 1849, they were forever exempt from the taking of any their property for streets, roads or alleys and this Act was formally accepted by the Cemetery Company on April 9th, 1849, and there was, therefore, a contract between the Cemetery Company and the State of Pennsylvania, which would be violated by the taking of any part of their property for street purposes. It was further contended that there were 11,000 persons buried in the cemetery.

"The court held that property and contracts of all kinds must yield to the demand of the sovereign and that under the power of eminent domain all properties could be taken, and that if there was a contract between the State of Pennsylvania and the Cemetery Association, the contract itself could be taken for public use, and ordered the opening of the street through the cemetery."

In Vol. 5, *Encyclopedia of United States Supreme Court Reports* (p. 759), it is said:

"Although it has been held, that where a state has delegated, the power of eminent domain to a person or corporation, and where by its exercise lands have been subject to a public use, they cannot be applied to another public use without specific authority expressed or implied to that effect, yet, the general rule seems to be that the fact that property is already devoted to a public use, does not exempt it from being appropriated under the right of

eminent domain, but it may be so taken for a use which is clearly superior or paramount to the one to which it is already devoted." (Citing many United States Supreme Court decisions.)

A few cases have been cited where the courts refused to allow the opening of streets through cemeteries, but in my opinion they are not as well considered as the cases and authorities relied upon herein.

The holding of this court in this case reverses well settled principles of law of long standing and almost universal acceptance.

The other assignments of error need not be considered as they are involved in the foregoing.

The decision should be reversed and the record returned to the Court of First Instance with instructions to proceed with the case in accordance with this decision.

Judgment affirmed.

ABOUT BATAS.ORG

Study smarter at BATAS.org

The Philippine bar review and law-school companion built around how your brain actually remembers.

The complete Philippine law library - free for everyone.

More than 100,000 Supreme Court decisions, Republic Acts, and executive issuances - full-text searchable, browsable by category and year, and always free. No paywall, no login. This PDF came from it.

Audio case-brief lectures.

Any decision becomes a podcast-style lecture - facts, issues, ruling, and doctrine - with read-along highlighting and a hands-free presentation mode. Study while commuting, working out, or resting your eyes.

Bar review built on the science of memory.

Complete, sequenced courses for all eight bar subjects, narrated like podcasts and reinforced with retrieval practice and spaced review - the study techniques with the strongest evidence behind them.

The full law-school curriculum.

One subscription unlocks the entire J.D. curriculum - every subject, every lesson, with your progress tracked down to the paragraph so you can pick up exactly where you left off, on any device.

Mock exams that tell you where you stand.

Timed multiple-choice exams graded instantly, with per-subject score breakdowns and focus suggestions that point you at your weakest topics first.

A study planner that keeps you on pace.

Set your schedule and BATAS tells you every day whether you are on track for bar day - and exactly which lesson to take next.

Start free at <https://batas.org>

The law library is free forever - and your first lesson is one click away.

The text of this document is an official public record and remains in the public domain. Formatting, presentation, and compilation © 2026 batas.org.

Downloaded free from the batas.org Law Library. Share it freely - the library is free for every law student, bar reviewee, and practitioner.