the corporation, it was held that this ordinance did not operate as a deed to pass the title: *first*, for the want of the seal of the grantors; *second*, for the want of a consideration; and *third*, for the want of delivery. Not only so, but it was held to be so obviously defective as a conveyance as not to give the "color of title" to the defendant, necessary (under the statute and decisions of North Carolina) to support an adverse possession.[1]

[1] Beaufort *v.* Duncan, 1 Jones (N. C.) Law, 239 (1853). But a release by a municipal corporation of a right in real property, by ordinance and not by deed, may be enforced in equity, when within the scope of the corporate power, and the releasee has paid the consideration, or entered into possession and made valuable improvements on the faith of it. Grant *v.* Davenport, 18 Iowa, 179, *obiter*, *per Wright*, C. J.

Extent of *legislative authority* over the property and property rights of municipal corporations. *Ante*, chaps. iv., vii., and viii.

Remedy against abuses by municipalities of *trust property* or property clothed with public duties, and against *collusive alienations* of property by municipal councils. *Post*, sec. 910 *et seq.*

Liability of municipal corporation as an *owner of property*. Osborne *v.* Detroit, 32 Fed. Rep. 36. *Post*, chap. xxiii. sec. 985 *et seq.*

CHAPTER XVI.

EMINENT DOMAIN.

§ 583 (452). **Mode of Treatment.** — Among the important powers usually conferred upon municipal corporations and deserving separate treatment, *is the authority to exercise, by grant from the legislature, the right of eminent domain;* that is, compulsorily to take private property, on making to the owner compensation in the prescribed mode, for designated municipal or public purposes. In this chapter the general nature of the power, the constitutional restrictions upon it, the principles which govern the construction and application of the legislative authority necessary to its existence and exercise by public agencies, the mode and measure of compensation to the property-owner, will be considered with special reference to the purposes for which it is commonly delegated to municipal corporations.[1]

§ 584 (453). **Nature and Scope of the Power.** — Social duties and obligations are paramount to individual rights and interests. Private rights not under the shield of the organic law must yield when they come in conflict with public necessity or the general

[1] In the tenth chapter of the work of Judge *Redfield* on the Law of Railways, and particularly in the last edition, the right of eminent domain, *in connection with railways*, is exhaustively treated, and may be usefully consulted by whoever desires to have a view of the state of the English and the American law upon almost any branch of this interesting inquiry. The learned author does not confine his consideration of the subject to its bearings on railways; but the nature of the right, the limitations upon its exercise, the mode of procedure, the time when compensation is to be made, and the rules to measure its amount, are clearly stated and fully illustrated. In his excellent work on Constitutional Limitations, chap. xv., Judge *Cooley* has presented the subject, particularly in its constitutional aspects, in a manner extremely satisfactory. Mr. Sedgwick's view, although less practical, will be found to be of great interest and value. Sedgwick on Stat. and Const. Law, 498, 534. Mr. Mills, of the St. Louis bar, and Mr. Lewis, of the Chicago bar, have published treatises on the Law of Eminent Domain, in which they have collected with diligence and stated with care, under a methodical arrangement, the results of the cases, English and American, many thousands in number, upon this subject. They are both useful and convenient works, and they go, of course, into greater detail on many points than is practicable in the present chapter. Their treatment is general; ours is limited to the subject chiefly in its relations to municipalities.

good. The maxim, *Salus populi suprema lex*, has an important meaning in its application to private rights, and in limiting the absoluteness of any possible ownership of private property. The legislature, as the authoritative representative of the public, and the constituted judge of what is demanded by the general weal, has the right to say, under such restrictions as exist in the Federal Constitution and in the Constitution of the particular State, to every private proprietor, "The public needs of your property thus much;" and the individual must submit. This is a right inherent in every government. It is a tremendous power, and one which is without theoretical limits, and indeed, without any legal limitations except such as may exist in the organic restraints upon legislative action; it has, in addition, practical limitations in the sense of justice, which ever prevails in enlightened communities, and which legislators cannot for any considerable period effectually or safely disregard; and experience has shown that there is a point beyond which no government can press its demands upon its subjects or citizens, and continue to exist. One branch of this governmental prerogative is known by the name *taxation*, which, in its application to municipalities, will be noticed in another chapter; and the other is now familiarly known as the *power of eminent domain*, by which is meant the right of every government to appropriate, otherwise than by taxation and its police authority (which are distinct powers from the right of eminent domain), private property for public use.[1]

§ 585 (454). **Constitutional Provisions.** — In the *Constitution of the United States*, and in the Constitutions of the several States, there is a *limitation upon the power* of eminent domain, usually expressed in substantially these words: "Private property shall not be taken for public use without just compensation." In some of the Constitutions there are, in addition, special provisions, of more recent origin, as to the mode of ascertaining the amount of the compensation and the time and manner of payment. Full treatment of this subject in its constitutional and other aspects would not be appropriate to the present work, and our consideration of it will accordingly be limited to a statement of the general principles

[1] As to the phrase "eminent domain," see Mr. Justice *Campbell's* article on the "Taking of Private Property for Purposes of Utility," Vol. I. No. 2, Bench and Bar, page 112. Mr. Carman F. Randolph of New Jersey has a learned article on "The Eminent Domain" in the July, 1887, number of the English Law Quarterly Review, 314, and in the New Jersey Law Journal, May, 1889, p. 133, on "Eminent Domain over Streets," in respect of the rights of owners of lands adjacent thereto.

relating to it, and a reference to the cases which illustrate the power as exercised by municipal corporations under delegated legislative authority.

§ 586. **Federal Constitution; Fifth and Fourteenth Amendments.** — The *fifth article* of the amendments of the Constitution of the United States was intended to prevent the *general government* from taking private property for public use without just compensation, and was *not* intended as a restraint upon the *State governments*.[1] The right of eminent domain residing in a State, says the Supreme Court of the United States, is an independent power, and all property is held and all contracts are made subject to this right. Therefore, the exercise of this right by the State does not impair the obligation of contracts within the meaning of the prohibition of the Constitution of the United States. Hence, a toll bridge owned by a private corporation, chartered by the State for that purpose, may, under the right of eminent domain, and under a general law of the State authorizing the act, be condemned and taken as part of a public road, compensation being made to the corporation in the same manner as to natural persons. Such an exercise of the right of eminent domain does not impair the obligation of the contract between the bridge corporation and the State.[2]

The *Fourteenth Amendment* of the Constitution of the United States, however, adopted in 1868, ordains that "No State shall make or enforce any law which shall deprive any person of life, liberty, or property without due process of law." This is a direct limitation upon the powers of the State governments, and puts these fundamental and immutable rights under the protection of the general government, as against invasion by the States. It is

[1] Barron *v.* Baltimore, 7 Pet. 243 (1833); Withers *v.* Buckley, 20 How. (U. S.) 84 (1857); Mills Em. Dom. sec. 348, and cases.

[2] West River Br. Co. *v.* Dix, 6 How. (U. S.) 507 (1848), affirming judgment of the Supreme Court of Vermont; Richmond, F. & P. R. R. Co. *v.* Louisa R. R. Co., 13 How. 71. The *same principle* has been frequently declared by the *State courts*. Ala. & Fla. R. R. Co. *v.* Kenney, 39 Ala. 307; Enfield Toll Br. Co. *v.* Hartford & N. H. R. R. Co., 17 Conn. 40; *Ib.* 454; Boston & L. R. R. Co. *v.* Salem & L. R. R. Co., 2 Gray (Mass.), 1; Central Br. Co. *v.* Lowell, 4 Gray (Mass.), 474; Red River Br. Co. *v.* Clarksville, 1 Sneed (Tenn.), 176; Armington *v.* Barnet, 15 Vt. 745; Redfield on Railways, sec. 70; Mills Em. Dom. secs. 37, 41, 42; Lewis Em. Dom. sec. 11; *infra*, sec. 588.

Where a condemnation proceeding assumes the nature of a suit in which the question to be tried is the value of the land, the case is one which, under the several acts of Congress, may, if it is otherwise within those acts, be transferred from the State to the Federal courts for trial. Patterson *v.* Miss. & R. R. Boom Co., 3 Dillon, 465 (1875), affirmed by the Supreme Court, 98 U. S. 103 (1878); Warren *v.* Wisconsin, &c. R. R. Co., 6 Biss. C. C. 425.

settled that corporations as well as natural persons are included in the amendment.[1]

§ 587 (455). **General Effect of the Constitutional Limitation stated.** — Mr. Sedgwick sums up his examination of the then existing usual *limitation upon the power of the legislature* over the appropriation of private property to public uses; and his statement of the result will serve as an appropriate introduction to our consideration of the subject in its application to municipal corporations. He says: "If the brief and sweeping clause, 'Private property shall not be taken for public use without just compensation,' be made to express the modifications and qualifications which construction has inserted in it and added to it, it will stand nearly as follows: Private property shall in no case be taken for *private use*. Private property may be taken for public use in the exercise of the general police powers of the State, or of taxation, without making compensation therefor. And the power of taxation includes the power of charging the expense of local improvements exclusively upon those immediately benefited thereby. Private property may also be taken for public use in the exercise of the power of eminent domain, but not without just compensation being made or provided for before the taking is absolutely consummated. The right to compensation, however, does not attach in cases where the value of property is merely impaired, and title to it not divested; nor does it exist in cases where the right to the property taken is not absolutely vested at the time of the legislative act affecting it. This is substantially the form that the constitutional provision has assumed in the hands of the courts; and upon a careful examination of the process by which this result has been arrived at, it must be admitted that in practice our constitutional guarantees are very flexible things, and that the judicial power exerts an influence in our system which makes the subject of interpretation one of the first magnitude."[2]

[1] See Davidson *v.* New Orleans, 96 U. S. 97, 105 (1887). In this case there is a *dictum* of Mr. Justice *Miller* to the effect that the provisions of the Fourteenth Amendment as to due process of law do not refer to eminent domain. Mr. Justice *Bradley* expresses his dissent from this view. See Mugler *v.* Kansas, 123 U. S. 623.

[2] Sedgwick, Stat. and Const. Law, 533, 534. It is not competent for the legislature to provide if a person shall make *improvements upon ground which will be embraced in a street*, if subsequently laid out and extended, that he shall not, if such street is thus laid out, be entitled to damages for such improvement. Such a provision is unconstitutional, because it deprives the owner of the use of his land, without compensation. Moale *v.* Baltimore, 5 Md. 314 (1854); *post*, sec. 992.

§ 587 *a*. **Recent Constitutional Amendments, ordaining liability for Property "Damaged."** — The *limited meaning of the word "property" and of the word "taken,"* referred to in the preceding section, by which the protective scope of the usual eminent domain clause of the Constitutions was by many tribunals confined to an actual trespass upon, or physical invasion or appropriation of the property of the owner, and did not include many other injuries to the owner's use and enjoyment of his property when such injuries were the result of acts done under express legislative sanction, was not in its practical workings satisfactory to the public mind and conscience, or to the professional judgment. Accordingly, the later Constitutions have added the words "damaged," "injured," or "destroyed," so that the clause therein now reads, in substance, that private property shall not be taken *or damaged* for public use without compensation.[1] This important change in the law is considered more at large in a subsequent chapter. It may be here remarked that the exact meaning and effect of the change is yet, in many respects, to be delimited by future adjudications. In the light of such decisions as have been already made,[2] and with a view of aiding in the proper construction of the clause as amended, the following views are offered for the reader's consideration.

§ 587 *b*. **Same subject. Meaning of the Word "Property."** — As above suggested, the remedial provisions in question had their origin in two main but related causes. One was the narrow meaning which judicial decisions had placed upon the word "property." The word "property" conveys no precise and invariably certain meaning,[3] and its meaning was not defined in the eminent domain clause of the Constitutions. A large class of decisions, construing the word "property" as there used, limited the owner's rights to the *corpus* of the soil within the exterior limits of his lot. In cases where the fee of the street or highway was in the public, and not in the abutter, such decisions were very numerous. These decisions overlooked the

[1] Illinois first in 1870; since then, Alabama, Arkansas, California, Colorado, Georgia, Missouri, Nebraska, Pennsylvania, Texas, and West Virginia; also Montana, North Dakota, South Dakota, and Washington. *Post*, secs. 995 *a*–995 *c*, where the language of the constitutional provisions or amendments, referred to in the text, is given, and the principal decisions thereon are cited.

[2] *Post*, sec. 995 *c*, and notes.

[3] "The word 'property' is used in so many senses as to be nearly useless for juristic purposes." Digby Hist. Real Property (2nd ed.), p. 266. Austin enumerates the principal of these. 2 Austin Jurisp. (5th ed.) 789, 805–820. Its substantial meaning, as used in the amended eminent domain clauses of the recent Constitutions, is, however, not difficult of ascertainment.

fact that, in legal conception, land or the soil is not property but the subject of property. They overlooked the fact that an easement or an incorporeal right annexed to land is as much property as the right to the land itself. In either case, the lawyer is concerned with the nature of the *rights*, and not of the property or thing which is the subject of those rights. Property is that congeries of rights secured by law in and over land or other thing, which in the aggregate constitute the owner's title thereto, his ownership, his right of user and enjoyment, and his right of disposition, as against competing claims on the part of others.[1] For example, an abutting owner's right of access to and from the street, subject only to legitimate public regulation, is as much his property as his right to the soil within his boundary lines. The same may be predicated of other easements or rights annexed to the ownership of the lot itself. When he is deprived of such right of access or of any other easement connected with the use and enjoyment of his property, other than by the exercise of legitimate public regulation, he is deprived of his property. When such a right is directly, specially and injuriously, affected by a public improvement his property is damaged.

§ 587 *c*. **Same subject. Meaning of the Word "Taken."** — Directly connected with the foregoing consideration is the restricted meaning which a large class of decisions puts upon the word

[1] Mr. Digby (History of the Law of Real Property, 2nd edition, page 270, note) puts this matter in a very clear light :—

"The division of hereditaments into corporeal and incorporeal, though deeply rooted in our legal phraseology, is most unfortunate and misleading. The confusion is inherited from the Roman lawyers (see Justinian, Inst. ii. tit. 2), but has been made worse confounded by our own authorities. Following the Romans, our lawyers distinguished between hereditaments as meaning the actual corporeal land itself, and another kind of hereditaments as not being the land itself but 'the rights annexed to or issuing out of the land.' A moment's reflection is sufficient to show that the distinction is untenable. The lawyer has nothing whatever to do with the material corporeal land, except so far as it is the subject of rights. It is the distinction between different classes of rights, and not between land on the one side and rights on the other, that he is concerned with. In such phrases as 'the land descends to the heir,' what is meant is, not that something happens to the land itself, but that a particular class of the ancestor's rights in relation to the land descends to the heir. The names 'corporeal and incorporeal' are most unfortunate, because if by 'corporeal' is meant 'relating to land,' then a large class of incorporeal hereditaments are also entitled to the name ; if by 'incorporeal' is meant that they are mere rights, then all hereditaments are incorporeal, because the lawyer is only concerned with different classes of rights. In reality however it appears that the names point to different classes of rights; and in fact, Stephen, in his edition of Blackstone, (5th ed., vol. i. p. 656), almost confines incorporeal hereditaments to *jura in alieno solo*. Austin Jurisp. ii. 707, 708." See, also, Rigney *v.* Chicago, 102 Ill. 64, 77 (1882), *per Mulkey*, J., where the subject is discussed. 2 Austin Jurisp. Lectures, 48, 49, 50, 51 ; 3 Bentham Works (Edinburgh) (1843), p. 221; Eaton *v.* B. C. & M. R. R. Co., 51 N. H. 504.

"taken," nothing being considered as a "taking" except a trespass upon or an actual appropriation of the *corpus* of the owner's lot; and hence all other rights connected therewith were subject to unlimited legislative control. Therefore, the legislature might, for example, authorize a railroad company to build and operate its railroad on the streets and highways in front of the abutting owner's lot or land, and even injuriously to change the level or grade of the street or highway, without liability for the damage thereby occasioned. If the judicial judgments had established that the abutting owner had property rights in streets whether the fee was in him or in the public, such as the right to access and to light and air, or other rights annexed to the lot or land, and that any direct and special injury to such rights was as much a "taking" of "property" as a trespass upon or an appropriation of the lot itself, the necessity for an extension of the constitutional provision would not have existed, and the change under consideration would probably not have been ordained. If the Constitutional Amendments had defined property so as to make the definition embrace, for the purposes of compensation to the owner, not only the taking of the *corpus*, but injuries to easements or to rights in, or over, or annexed to property, this would have effectuated, and would have been the logical method of effectuating, the end in view, instead of reaching it, not by defining rights, but by ordaining a provision which presupposes the existence of such rights.

§ 587 *d*. **Same subject. Scope and Purpose of the Amendment.** — The words "injured or damaged," found as they are in the eminent domain clause relating to the taking or appropriation of property for public use, as well as the history of the origin and cause of this provision, and a consideration of the mischief intended to be remedied, show that it was not the intention of the Constitutional Amendment to create a right and to give a remedy in all cases of consequential damage which may result from the exercise of legislative power in making public improvements, or even from the appropriation of private property or for injuries to private property for public use. A city, for example, under legislative authority, might condemn land for the purpose of establishing a hospital thereon or a prison, which, if established, would have the consequential effect to injure or depreciate the market or actual value of property in the neighborhood. Such injuries, however, would not, in our judgment, be within the Constitutional Amendment. This amendment must, as it seems to us, be limited to cases where the *corpus* of the owner's property itself, or some appurtenant right or easement connected

therewith or by the law annexed thereto, is directly (that is, in general, if not always, physically) affected, and is also specially affected (that is, in a manner not common to the property owner and to the public at large); and such direct and special injury must be such as to depreciate the value of the owner's property. These elements concurring, his property is "damaged" within the meaning of the Constitutional Amendment, and to the extent of such diminished value beyond the damages sustained by the public at large from the improvement, the property owner is, under the Constitutional Amendment, entitled to compensation. It may, perhaps, be premature to affirm that the meaning of the word "damaged," as used in the recent Constitutional Amendments, is absolutely confined to cases where the common law would have given a remedy for injuries to property or property rights, if the legislative authority to do the act which caused the damage had not, aside from such Constitutional Amendment, deprived, or been previously construed to deprive, the owner of his right to compensation therefor; and yet such is, in our judgment, its main, if not exclusive, purpose and effect.[1]

§ 588. **Power as applicable to Private Corporations.** — The *following propositions, more immediately applicable to private corpora-*

[1] The views expressed in the text are substantially coincident with those of the Supreme Court of Illinois in Rigney *v.* Chicago, 102 Ill. 64, which were approved by the Supreme Court of the United States in Chicago *v.* Taylor, 125 U. S. 161. *Post*, secs. 995 *a*–995 *c*.

"The English courts," says *Mulkey*, J., in Rigney *v.* Chicago (102 Ill. 81), "in construing certain statutes providing compensation for injuries occasioned by public improvements, in which the language [property injuriously affected] is substantially the same as that in our present Constitution, after a most thorough consideration of the question, lay down substantially the same rule here announced. Chamberlain *v.* West End of London & C. P. R. Co., 2 Best & Smith, 605; 110 E. C. L. R. 604; *Ib.* 617; Beckett *v.* Midland R. Co., L. R. 1 C. P. C. 241; on appeal 3 C. P. C. 82; McCarthy *v.* Metropolitan Board of Works, L. R. 7 C. P. C. 508. These statutes required compensation to be made where property was 'injuriously affected,' which words the English courts construe as synonymous with the word 'damaged.' Hall *v.* Bristol, L. R. 2 C. P. C. 322; East & West India Docks Co. *v.* Gattke, 3 MacN. & G. 155." See, also, New River Co. *v.* Johnson, 2 E. & E. 435; 105 E. C. L. R. 434; Ricket's Case, 2 Eng. & Ir. App. 175; Queen *v.* Eastern Counties Ry. Co., 2 Q. B. 347; 42 E. C. L. R. 706; Queen *v.* Great Northern Ry. Co., 14 Q. B. 25; 68 E. C. L. R. 24; Glover *v.* No. Staffordshire Ry. Co., 16 Q. B. 912; Wood *v.* Stourbridge Ry. Co., 16 C. B. N. S. 222; Eagle *v.* Charing Cross Ry. Co., L. R. 2 C. P. C. 638; Queen *v.* Vestry of St. Luke's, L. R. 6 Q. B. C. 572. Columbia Del. Bridge Co. *v.* Geisse (construing words "may be injured"), 35 N. J. L. 558 (1871); Ashby *v.* White, 1 Smith's L. Cas. 264.

As to what is a "taking," and the construction of recent constitutional provisions giving a right to compensation for property "injured" or "damaged," as well as for property "taken," see *post*, secs. 686, 990, 992, and notes, 995 *a*–995 *c*, and notes.

tions, are well supported by adjudged cases and seem to be founded on sound principles: —

1. That the legislature may, in the exercise of the right of eminent domain, deprive corporations of their property and franchises upon making compensation; but this can be done only under power to that end specially or expressly granted.[1]

2. If a corporation holds lands or property as a private proprietor and not for public uses, this may be taken under the power of eminent domain the same as if owned by an individual.[2]

3. But lands held by a corporation upon a special trust for public use, and thus used, cannot be compulsorily appropriated to another public use without special or clear authority from the legislature.[3]

4. And hence a corporation cannot, under a *general power* to condemn property for public use, take from another corporation having like power property held by it, under legislative authority, for public purposes, although it may, it seems, under such general power, ac-

[1] West River Br. Co. *v.* Dix, 6 How. (U. S.) 507; Backus *v.* Lebanon, 11 N. H. 19; New York Cent. & H. R. R. R. Co. *v.* Met. Gaslight Co., 63 N. Y. 326, 334 (1875); Buffalo, *In re*, 68 N. Y. 167; N. Y. Railway, *In re*, 99 N. Y.; Prospect Park & C. I. R. Co. *v.* Williamson, 91 N. Y. 552; Rochester Water Comm'rs, *In re*, 66 N. Y. 413, 418 (1876), *per Allen*, J.; Lewis Em. Dom. sec. 274; Mills Em. Dom. secs. 41, 42, 46; Leeds *v.* Richmond, 102 Ind. 372. Under a general power to lay out and extend streets, a *city may extend a street across the roadway of a railroad company*. "The appropriation made by the city is, of course, subject to the prior public use; but the two uses are not necessarily inconsistent, and in all ordinary cases may stand together. The general rule is that the power to extend streets across the right of way and tracks of a railway company is implied in the general authority conferred by city charters for such purposes, without express legislative provisions upon the subject." *Vanderburgh*, J., St. Paul, Minneapolis, & M. Ry. Co. *v.* Minneapolis, 35 Minn. 141. But under such a power *a city cannot lay out a street through the depot grounds* of a railroad company so as to destroy or impair the value of the company's easement therein lawfully acquired. Milwaukee & St. Paul Ry. Co. *v.* Faribault, 23 Minn. 167; St. Paul Union Depot Co. *v.* St. Paul, 30 Minn. 359; s. c. 15 N. W. Rep. 684; Prospect Park & C. I. R. R. *v.* Williamson, 91 N. Y. 552. Extent of legislative power over the property and franchises of municipal and public corporations, see *ante*, chaps. iv., vii.

[2] New York Cent. & H. R. R. R. Co. *v.* Met. Gaslight Co., 63 N. Y. 326, 334 (1875); Mills Em. Dom. sec. 41, and cases; Lewis Em. Dom. sec. 267.

[3] Boston & A. R. R. Co. *In re*, 53 N. Y. 574; Rochester Water Comm'rs, *In re*, 66 N. Y. 413, 418. A street is a public franchise which cannot be violated except by direct legislative grant. Pennsylvania Ry. Co.'s Appeal, 93 Pa. St. 150; Portland & W. V. R. R. Co. *v.* Portland, 14 Oreg. 188. In this case land which had been *dedicated for a levee or public landing was taken by a railroad company*, under authority of an act of the legislature, for a depot, freight house, &c., and it was held that the grant to the railroad company was not inconsistent with the use to which the land had been dedicated, but was in aid of it, and that the easement of a city in its streets or public places is not private property for which compensation must be given when taken for public use, but is public property, the use whereof may be regulated by the legislature. See *post*, chapters on Dedication and Streets.

quire an *easement in invitum* in such property, when this can be done without doing injury to the public, or essentially interfering with the uses for which it was acquired and is held by the corporation which owns it.[1]

§ 589 (456). **What may be taken or condemned.** — As the *legislature is the sole judge of the public necessity* which requires or renders expedient the exercise of the power of eminent domain without the owner's consent, so it is the exclusive judge of the *amount of land* and of the *estate in land* which the public end to be subserved requires shall be taken. But as the right originates in necessity, so it is limited by it. The principle and its limitations have found interesting illustrations in cases which we shall notice, arising under powers conferred upon municipalities to enable them to execute certain public purposes. The legislature has the constitutional power expressly to authorize a municipal corporation *compulsorily* to acquire *the absolute fee simple* to lands of private persons, required for public use, upon the payment of a just compensation.[2] Accordingly a statute "to enable" a city "to abate a nuisance and

[1] Rochester Water Comm'rs, *In re*, 66 N. Y. 413, 418 (1876). The right of a street railroad company to the use of a street for the purposes of its business is a property right, subject to condemnation for public use; and the legislature may authorize other persons, either natural or artificial, to do a similar business in the same street, or to use the tracks of the company, by making compensation to it whenever, in their judgment, the public good requires. The State, in the exercise of the right of eminent domain, or a corporation to which it has delegated the right, *is not bound to take the entire estate*, and strictly should take only such an interest as is necessary to be acquired to accomplish the public purpose in view. Sixth Av. R. Co. *v.* Kerr, 72 N. Y. 330; Lewis Em. Dom. sec. 267 *et seq.*, and cases.

[2] Heyward *v.* New York, 7 N. Y. 314 (1852), affirming s. c. 8 Barb. 486; distinguished from Embury *v.* Conner, 3 N. Y. 511, where an *unnecessary amount* was sought to be taken; s. p. Dingley *v.* Boston, 100 Mass. 544 (1868); Tyler *v.* Hudson, 147 Mass. 609 (1888); Brooklyn Park Comm'rs *v.* Armstrong, 45 N. Y. 234 (1871). So in *North Carolina* it is held that the legislature may authorize not simply the *use*, but the *entire interest* of the owner to be taken for public use, if it deems the public exigency to require it. Raleigh & G. R. Co. *v.* Davis, 2 Dev. & B. (N. C.) Law, 451 (1837); De Varaigne *v.* Fox, 2 Blatchf. C. C. 95; Kane *v.* Baltimore, 15 Md. 240, *arguendo;* Brooklyn Park Comm'rs *v.* Armstrong, 45 N. Y. 234 (1871); Washington Cemetery *v.* Prospect Park & C. I. R., 68 N. Y. 591; Cooley Const. Lim. 558; Patterson *v.* Miss. & R. R. Boom Co., 3 Dillon, 465 (1875); City of Buffalo, *In re*, 64 N. Y. 547 (1876); Bachler's Appeal, 90 Pa. St. 207; Challiss *v.* Atchison, T. & S. F. R. Co., 16 Kan. 117 (1876); see also Moore *v.* New York, 4 Sandf. 456 (power over dower interest); John and Cherry Streets, *In re*, 19 Wend. 659 (as to reverter of discontinued streets to adjacent owners); Kimball *v.* Kenosha, 4 Wis. 321. An enactment that on payment for land for a public park it shall "vest forever in the city," gives to the city a fee simple title to land thus acquired. Brooklyn Park Comm'rs *v.* Armstrong, 3 Lans. (N.Y.) 429 (1871); see s. c. 45 N. Y. 234 (1871); Mills Em. Dom. secs. 49, 50, and cases; Lewis Em. Dom. sec. 277 *et seq.* *Infra*, sec. 603.

for the preservation of the public health," which authorized the city to "purchase or otherwise take lands" within a large district, on payment of damages to the owners, and which directed the city to raise and drain the same, so as "to abate the present nuisance thereon," and declaring, further, that the "title to all land so taken shall vest in the city," was held to *vest the fee* of such lands in the city, and was not unconstitutional because it authorized the taking of a greater interest in the land than was necessary, nor as an attempt to exercise judicial power.[1] To land, the fee simple of which is thus acquired by a municipal corporation, the title is perfect, and it does not revert when sold by the corporation, or when the public good, in the opinion of the corporate authorities, requires the land to be used for other purposes than those for which it was originally obtained.[2] Thus property was appropriated in fee by the State, through its canal commissioners, for the purposes of a canal. Subsequent statutes gave to a city corporation power to enter upon a portion of the appropriated premises, and occupy the same "as a public highway, and for the use of water-pipes and for sewerage purposes," and also released to the city all of the right of the State in the premises in question. Under such legislation, one who claims to own a portion of the canal bed cannot contest the right of the city, on the ground that the change of use authorized by the legislature has terminated the public interest in the property.[3] But where the fee is not expressly authorized to be taken and an easement will fully satisfy the language and the object of the statute, the authority will be construed and limited accordingly.[4]

§ 590. **Same subject.** — The *right of eminent domain is inherent in the government;* it is not conferred, but limited by the Constitution. No property can be taken without legislative authority,[5] and it must be taken in the manner, and for the purposes authorized. Courts

[1] Dingley *v.* Boston, 100 Mass. 544 (1868); Page *v.* O'Toole, 144 Mass. 303; St. Louis County Court *v.* Griswold, 58 Mo. 175 (1874), establishing Forest Park in St. Louis County.

[2] Heyward *v.* New York, 7 N. Y. 314 (1852); Heard *v.* Brooklyn, 60 N. Y. 242 (1875); Heath *v.* Barmore, 50 N. Y. 302; De Varaigne *v.* Fox, 2 Blatchf. C. C. 95 (1848); Reynolds Heirs *v.* Stark County Comm'rs, 5 Ohio, 204 (1831); Le Clercq *v.* Gallipolis Trs., 7 Ohio, Part I. 218 (1835). See also chapter on Corporate Property, *ante*, and on Dedication, *post*. City corporation, owning land in fee, held entitled to compensation when taken for public use. Ninth Avenue, &c., *In re*, 45 N. Y. 729; *ante*, chap. iv.; *post*, sec. 701 *et seq.*

[3] Malone *v.* Toledo, 28 Ohio St. 643 (1876).

[4] See cases in last note but one. *Infra*, sec. 603; Washington Cemetery *v.* Prospect Park & C. I. R. Co., 68 N. Y. 591; Holt *v.* Somerville, 127 Mass. 408.

[5] See Cavanagh *v.* Boston, 139 Mass. 426.