cannot extend or limit these: the necessity for such condemnation must be determined by the legislature, and cannot be questioned by the judicial tribunals.[1] If the legislature attempts under this power to take property plainly not for public use, the courts may prevent it. Where the State has taken a fee simple, or authorized the taking thereof, and compensated the owner therefor, the subsequent abandonment of the use will not reinvest the owner with the title; if simply an easement is taken, the rule is otherwise. The right of determining the necessity of the work may be delegated, and the judicial tribunals may then be called upon to determine as to its necessity.[2]

§ 591 (457). **Same subject. Quantity; Estate.** — The cases which have established that the legislature may, if it sees proper authorize the compulsory appropriation of the fee, are to be distinguished from those in which it has been held that *no more in amount of private property* can be taken than the legislature has declared to be necessary to the accomplishment of the public purpose in view, even although compensation be made. It was accordingly decided in South Carolina, on sound principles, that the State cannot authorize part of a lot to be taken for a street, and in addition compel the owner, against his will, to part with the balance for the benefit, emolument, or private purposes of the corporation, since, in the opinion of the court, such an act "disseizes or deprives" the owner of his property "without the judgment of his peers" and contrary "to the law of the land." [3]

§ 592 (458). **Same subject.** — The *same principle, limiting the amount of land* that may be condemned, was subsequently declared by the Supreme Court and by the Court of Appeals of the State of

[1] Mills Em. Dom. sec. 11.

[2] Indianapolis Water Works Co. *v.* Burkhart, 41 Ind. 364 (1872). The legislature authorized its public agents to appropriate a fee simple in the lands taken for the constructions of its canals. The former owner had no right afterwards to take ice from the canal. *Ib.* Overruling Edgerton *v.* Huff, 26 Ind. 35.

[3] Dunn *v.* Charleston, Harper L. (S. C.) 189 (1825). This decision is right. Other cases in *South Carolina* holding that private property may be taken for streets, roads, &c., against the owner's consent and *without compensation* (State *v.* Dawson, 3 Hill (S. C.) 100, and cases cited), are not elsewhere regarded as law. Sedgwick on Stat. and Const. Law, 494. In Patrick *v.* Cross Roads Comm'rs, 4 McCord (S. C.), 540 (1828), it was held that the legislature might authorize a street to be laid out on private property without making compensation. And in *Massachusetts*, where a city appropriated land for a street forty-one feet wide, to be built at a grade above the adjoining land, it was held that an owner could maintain an action for damages caused by the placing of part of the embankment necessary to support the street upon his land. Mayo *v.* Springfield, 136 Mass. 10.

New York and of the State of Maryland.[1] The Constitution of the State of New York contained the provision that "no person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." The legislature enacted, with reference to the city of New York, that whenever *part* only of a lot should be required for a street, the commissioners for assessing compensation might, if they deemed it expedient, *include the whole* lot, and that the part not required for the street should, upon confirmation of their report, be vested in fee in the city, with authority to appropriate it to public uses, or, if not thus appropriated, to sell it. The court inclined to the opinion that the legislature did not intend by this provision to authorize the compulsory taking of more land than the public needed, and that the statute should be construed so as to require the *owner's consent* to the appropriation of the part not required for the public use. But the court expressly decided that if the statute did intend to authorize the compulsory taking of the whole, when part only was required for the use of a street, it would be in conflict with the above provision of the Constitution of the State, guaranteeing protection to private property. It was, however, further adjudged that the owner's consent to the appropriation would remove all objections on the ground of the unconstitutionality of the statute; that such consent need not be in writing; and that the receipt by the owner of damages allowed by the commissioners is evidence of his consent.[2]

[1] Albany Street, *In re*, 11 Wend. 148 (1834); Embury *v.* Conner, 3 N. Y. (3 Comst.) 511 (1850), reversing s. c. 2 Sandf. 98; Baltimore *v.* Clunet, 23 Md. 449 (1865); Mills Em. Dom. sec. 23; Lewis Em. Dom. sec. 269.

[2] Referring to this statute, in Embury *v.* Conner, *supra*, *Jewett*, J., delivering the opinion of the Court of Appeals, says, "It needs no argument to show that the end and design of this section was not to take private property for the use of the public. It manifestly goes upon the ground that the property so authorized to be taken is not wanted for the purpose of forming or improving a street, the object in view for which the proceedings are instituted. In the matter of Albany Street, 11 Wend. 148, the constitutionality of this enactment came directly under the consideration of the Supreme Court, on application to confirm the report of the commissioners in that matter. The court then held that if that provision was intended merely to give to the corporation *capacity* to take property under such circumstances, with the *consent* of the owner, and then to dispose of it, there could be no objection to it. But if it was to be taken literally, that the commissioners might, against the consent of the owner, take the whole lot, when only a part was required for public use, and the residue to be applied to private use, it assumed a power which the legislature did not possess.

"This decision went mainly upon the application contained in the last member of the clause of sec. 7 of art. 7 of the Constitution of 1821, — that 'no person shall be deprived of life, liberty, or property, *without due process of law;* nor shall private property be taken for public use without just compensation.' Chief Justice *Savage* said: 'The Constitution, by authorizing the appropriation of private property

§ 593. **Effect of accepting Damages.** — The *voluntary acceptance of damages* by the owner in the absence of fraud or mistake in fact operates as a waiver of whatever errors may have existed in the proceeding, and estops the party from disputing their legality.[1] So the *actual receipt of damages* by the party entitled thereto is a waiver of

to public use, impliedly declares that for any other use private property shall not be taken from one and applied to the private use of another.' In Bloodgood *v.* Mohawk & H. R. R. R. Co., 18 Wend. (N. Y.) 59, Mr. Senator Tracy said the words should be construed 'as equivalent to a constitutional declaration that private property, without the consent of the owner, shall be taken *only* for the public use, and then only upon a just compensation.' *Bronson*, J., in Taylor *v.* Porter, 4 Hill (N. Y.), 147, in reference to this question, said that although he felt no disposition to question the soundness of these views, yet it seemed to him that the case stood stronger upon the first member of the clause, — 'No person shall be deprived of life, liberty, or property, *without due process of law;*' that the words, 'due process of law,' in that place, could not mean less than a prosecution or suit, instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property. The same doctrine was held in John and Cherry Streets, *In re*, 19 Wend. (N. Y.) 659, and by the chancellor in Varick *v.* Smith, 5 Paige (N. Y.), 137, and was admitted by all the members of the Court for the Correction of Errors, whose opinions have been reported in the case referred to, of Bloodgood *v.* Mohawk & H. R. R. R. Co., 18 Wend. 1. I think these decisions should be regarded as having settled the point, that a statute is unconstitutional and void which authorizes the transfer of one man's property to another without the consent of the owner, although compensation is made. The late Chancellor *Kent*, in reference to the decision in Taylor *v.* Porter, says: 'I apprehend that the decision of the court was founded on just principles, and that taking private property for *private* uses without the consent of the owner is an abuse of the right of eminent domain, and contrary to fundamental and constitutional doctrine in the English and American law.' (2 Kent Com. (5th ed.) note *c*, 340.) But it is insisted that as the enactment is only held to be void on the ground that it takes private property for private uses against the owner's consent, if the consent be given, all objection on the ground of unconstitutionality is removed. The decisions to which I have referred proceed upon that principle, and Mr. Justice *Bronson*, in Taylor *v.* Porter, in terms concedes that the objection has no application when the owner consents. If we read the statute in question with the proviso that the owner consent, and I think we should, that consent removes all obstacles, and lets the statute in to operate the same as if it had in terms contained the condition."

That such is the *effect of consent*. Sedgw. on Stat. and Const. Law, 111, and Mr. Justice *Cooley's* opinion, Const. Lim. 541, note; Baltimore *v.* Clunet, 23 Md. 449 (1865).

[1] Hartshorn *v.* Potroff, 89 Ill. 509; Rees *v.* Chicago, 38 Ill. 322; Town *v.* Blackberry, 29 Ill. 137; Pursley *v.* Hays, 17 Iowa, 310; Deford *v.* Mercer, 24 Iowa, 118; 2 Smith Lead. Cas. (5 Am. ed.) 662; Brooklyn Park Comm'rs *v.* Armstrong, 45 N. Y. 234 (1871); Commonwealth *v.* Shuman's Adm., 18 Pa. St. 343; Burns *v.* Milw. & Miss. R. R. Co., 9 Wis. 450; Smith *v.* Warden, 19 Pa. St. 426; State *v.* Stanley, 14 Ind. 409; Magrath *v.* Brock Tp., 13 Up. Can. Q. B. 629; Kile *v.* Yellowhead, 80 Ill. 208; Mills Em. Dom. sec. 329, and cases.

Where a turnpike company accepted compensation for a portion of its road, taken by a city under its right of eminent domain, it was held that it was estopped from objecting to the exercise by the city of control over the road. Albany *v.* Watervliet T. & R. R. Co., 108 N. Y. 14.

delay in depositing and paying the money, and is a ratification of the proceedings.[1]

§ 594 (459). **Dower Right.** — As *dower* is not the result of contract, but is a positive legislative institution, it is constitutionally competent for the legislature to authorize lands to be taken by a municipal corporation for a market, street, or other public use, upon an appraisement and payment of their value to the husband, the holder of the fee; and such taking and payment will confer an absolute title, divested of any inchoate right of dower.[2] Nor is a widow *dowable in lands dedicated* by her husband in his lifetime to the public, where the dedication is complete, or has been accepted and acted upon by the municipal authorities. Therefore, where the husband agreed to open a street through his property, upon which a market-house was to be erected, and which was accordingly erected under an ordinance of the city, his widow was decided not to be entitled to dower in the ground covered by the market-house. The court was of opinion that the case was not to be distinguished from the ordinary one of a condemnation of land to public uses, and that such uses are inconsistent with the existence of private rights which could be enjoyed only by interfering with the rights of the public.[3]

§ 595 (460). **Public Use; what constitutes such a Use.** — It is agreed that individual property can be compulsorily appropriated by the public *only for public use*.[4] What *is a public use* has, in some

[1] Hawley *v.* Harrall, 19 Conn. 142, 151.

Confirmation of *defective proceedings* by legislative authority. Yost's Report, 17 Pa. St. 524; Bennett *v.* Fisher, 26 Iowa, 497 (1868). Compare Baltimore *v.* Horn, 26 Md. 194 (1866); Lennon *v.* New York, 55 N. Y. 361, 365 (1874); Indianapolis *v.* Kingsbury, 101 Ind. 200; *ante*, secs. 77, 79, 419, 544.

[2] Moore *v.* New York, 8 N. Y. 110 (1853). This case is commented on and limited in Simar *v.* Canaday, 53 N. Y. 298 (1873). *Post*, sec. 635; Lewis Em. Dom. sec. 323, and cases; Wheeler *v.* Kirtland, 27 N. J. Eq. 534.

[3] Gwynne *v.* Cincinnati, 3 Ohio, 25 (1827); Duncan *v.* Terre Haute, 85 Ind. 104. But where land, charged with a dower interest by decree of an Orphans' Court, was taken for a street without notice to the widow, it was held that the municipal corporation was liable for the income therefrom, to be recovered in an action of debt. York Borough *v.* Welsh, 117 Pa. St. 174. *Post*, sec. 635. Dower and homestead rights. Mills Em. Dom. sec. 71.

[4] Cole *v.* La Grange, 113 U. S. 1. One of the most acute and able American jurists maintains, in an interesting article, that the right to take private property for purposes of utility rests not in public *uses* but on public *policy*, or the law of *necessity*. Mr. Justice *Campbell*, Vol. I. No. 2, p. 97, Bench and Bar. See, in same publication, Vol. I. No. 1, p. 1, Prof. Washburn's article on "Taxation to Build Railroads," and an able article in Am. Law Rev. Oct. 1870. What are "public uses," discussed by Judge *Redfield* in Allen *v.* Jay, 60 Me. 124 (1871); s. c. 12 Am. Law Reg. (N. S.) 481, 493. *Post*,

aspects of the subject, given rise to much controversy, particularly in reference to the delegated exercise of the power by, or for the benefit of private corporations, companies, and individuals. Since municipal corporations are instituted for public purposes, authority to take property in order to carry out their chartered powers is not often open to the objection that the use is private and not public. Municipal uses proper are public uses. Highways are conceded to be, and manifestly are, matters of public concern; and hence the condemnation of property for streets, alleys, and public ways is, undeniably, for a public use.[1]

§ 596 (461). **Same subject.** — The mere fact that *individuals have subscribed money*, or given a bond to a city or town, to contribute towards the expense of laying out or altering a street, will not vitiate the proceedings, nor will it prove that the land was taken for the accommodation of private individuals, and not for public uses.[2] But if such a bond was made the basis of the proceedings,[3] or if the street was laid out or widened, "colorably," to use the expression of Parsons, C. J. "for the use of the city, but really for the benefit of the individual" giving or procuring the bond, the proceedings would be set aside.[4]

§ 597 (462). **Same subject. Water Supply, &c.** — We have seen above that lands can be condemned only for public uses. Let us consider *what are public uses* so far as respects municipalities. It is a competent and frequently a wise and just exercise of the right of eminent domain, to empower towns and cities, upon compensation being made, to appropriate private property for the purpose of

sec. 736. Power to condemn land for *cemetery purposes*. *Re* Deansville Cemetery Assoc., 66 N. Y. 569; Underwood *v.* Bailey, 59 N. H. 480; Varner *v.* Martin, 21 W. Va. 534; Mills Em. Dom. sec. 19; Lewis Em. Dom. sec. 176; *ante*, sec. 373.

[1] *Per Woodbury*, J., in West River Br. Co. *v.* Dix, 6 How. (U. S.) 545; Angell on Highways, sec. 86; Arnold *v.* Cov. & Cin. Br. Co., 1 Duvall (Ky.), 372; United States *v.* Railroad Bridge Co., 6 McLean, 517; Redfield on Railways, sec. 63. The private property of a citizen cannot, by the exercise of legislative power in any form, be taken from him and given to another, or to a corporation. Such act would deprive the citizen of his property without due process of law. Turner *v.* Althaus, 6 Neb. 54 (1877). So a city, having condemned land for a *public wharf*, has no power to lease it to a grain elevator company for a term of years. Belcher Sugar Refining Co. *v.* St. Louis Grain Elevator Co., 82 Mo. 121; Mills Em. Dom. sec. 23.

[2] Parks *v.* Boston, 8 Pick. (Mass.) 218 (1829); Copeland *v.* Packard, 16 Pick. (Mass.) 217; *ante*, sec. 458.

[3] *Ib.*; Commonwealth *v.* Sawin, 2 Pick. (Mass.), 547 (1824); Freeport *v.* Bristol, 9 Pick. (Mass.) 46 (1829).

[4] Commonwealth *v.* Cambridge, 7 Mass. 166, 167 (1810); Parks *v.* Boston, *supra*; Crockett *v.* Boston, 5 Cush. (Mass.) 182, 190 (1849), where the above cases are commented on; *ante*, sec. 458.

supplying the inhabitants with pure water. This is clearly a public use.[1] Other illustrations of what is a *public use* are given in the note.[2]

[1] Wayland *v.* Middlesex Co. Comm'rs, 4 Gray (Mass.), 500, *per Thomas*, J. (1855); Burden *v.* Stein, 27 Ala. 104 (1855). See Same *v.* Same, 25 Ala. 455; Reddall *v.* Bryan, 14 Md. 444 (1859); Gardner *v.* Newburgh Trs., 2 Johns. (N. Y.) Ch. 162 (1816); Ham *v.* Salem, 10 Mass. 350; Bailey *v.* Woburn, 126 Mass. 416; Martin *v.* Gleason, 139 Mass. 183; Tyler *v.* Hudson, 147 Mass. 609 (1888); Mills Em. Dom. sec. 18, and cases; Lewis Em. Dom. sec. 173; Rochester Water Comm'rs, *In re*, 66 N. Y. 413 (1876); Middletown Village, *In re*, 82 N. Y. 196; Spring Valley Water Works *v.* San Mateo Water Works, 64 Cal. 123; Lake, &c. Water Co. *v.* Con-

[2] It is not within the corporate powers of a city to open streets on *lands* within the corporate limits, *belonging to the United States*, and which have never been sold to private persons. United States *v.* Chicago, 7 How. (U. S.) 185. But the United States may *lay out and dedicate* lands for streets and public places the same as any other proprietor. State of Illinois *v.* Ill. Cent. R. R. (Chicago Lake Front Case) 33 Fed. Rep. 730, before *Harlan* and *Blodgett*, JJ. (1888). Private property, it was admitted by the *Maryland* Court of Appeals, can only be taken for "*public* use;" but the words "public use" were considered to mean not merely a use by the State or the inhabitants thereof, but also a *use for the government of the United States;* and, therefore, a statute of the State of *Maryland*, authorizing the expropriation of land in that State, for the purpose of supplying the city of Washington with water, was held constitutional. Reddall *v.* Bryan, 14 Md. 444 (1859). See, as to power of a State to condemn or to authorize the condemnation of lands owned by the United States, Mills Em. Dom. sec. 350, and cases; Lewis Em. Dom. sec. 203; Cooley Const. Lim. 525, 526, and note; Gilmer *v.* Lime Point, 18 Cal. 229; 19 Cal. 47. In *Massachusetts* it has been determined that a State may consent that the United States may compulsorily take and hold land for the *site of a post-office and public treasury*. Burt *v.* Merchants' Insurance Co., 106 Mass. 356 (1871); s. c. 8 Am. Rep. 339. The Supreme Court of *Michigan*, however, has decided that a State cannot condemn private property with a view to turn the same over to the United States for light-house purposes. People *v.* Humphrey, 23 Mich. 471 (1871); s. c. 9 Am. Rep. 94. It is now settled by the Supreme Court of the United States that *the general government may exercise the right of eminent domain in the States* so far as is necessary to the enjoyment of the powers conferred upon it by the Federal Constitution. Kohl *v.* United States, 91 U. S. 367 (1875). Where the State of *Georgia* purchased a tract of land for the purpose of the erection of car-shops, and other buildings necessary to the successful operation of the Western and Atlantic Railroad, the mayor and council of the city of Atlanta, under the general authority of their charter *to lay out streets*, &c., and sec. 965 of the Code, sought to appropriate a portion of said land for a street. *Held*, that such contemplated action was properly enjoined. Atlanta *v.* Central Railroad & B. Co., 53 Ga. 120 (1874).

In *Indiana* where, by statute, municipal corporations have express power *to make streets narrower*, it is held that the easement of owners of abutting property in the street, being a valuable property right recognized by law, cannot be appropriated against the consent of the owner without due compensation, and that when the legislature has authorized, by necessary implication, the abandoning of a part of a street to the adjoining owners, the improvement is thus declared to be for a public use by it, and the courts cannot interfere with such declaration, "unless it is apparent at first blush that the proposed use is not public." Rensselaer *v.* Leopold, 106 Ind. 29; see *post*, chap. xviii.

§ 598 (463). **Same subject. Public Park.** — On the ground that the public health, convenience, and welfare will be thereby promoted, the legislature may authorize the condemnation of private property for the purpose of using the same for a *public park*[1] or *pub-*

tra Costa Co., 67 Cal. 659. "Public" and "local" improvements as the words are used in a municipal charter construed. Kinsella *v.* Auburn, 26 N. Y. St. Rep. 884 (1889). In the act to supply the city of New York with pure and wholesome water, the city, under right of eminent domain, was authorized to take private property many miles distant from the corporate limits. Although regarded as going very far, it was not contended that the legislature had exceeded its power. New York *v.* Bailey, 2 Denio (N. Y.), 433, 446 (1845), *per Hand*, Senator; *post*, sec. 983. In the case of Kane *v.* Baltimore, *infra*, it is held that when property is compulsorily taken by the exercise of the right of eminent domain for a *specific public use*, as, for example, supplying the city with water, the city is limited to such use, all other rights not interfering therewith being left with the owner. It was not denied, however, that the power to condemn, in *fee simple*, might, if necessary to carry out the public end designed, be conferred by the legislature. Kane *v.* Baltimore, 15 Md. 240 (1859), *Tuck*, J., dissenting.

In *Massachusetts* the statute authorized the city of B. to take, hold, and convey to said city all the water of S. river at any point in or above the town of F., and provides for payment to any one injured in his property by the taking of or injury to any land, real estate, water or water-rights, or by flowage, or by the interference with or injury to any use or enjoyment of the water of said river to which any person at the time of such taking is legally entitled, subject to all the duties, liabilities, and regulations of the statutes. Under a petition to assess damages to plaintiff's rights, the only injury alleged to have been suffered (omitting an alleged right of fouling the water by its dye-works), is that the filing of the order or certificate, required by the statute to be recorded in the registry of deeds, is an appropriation of all the waters above the dam, and is equivalent to a warranty deed conveying those to the city by an absolute title. *Held*, that the statute does not make the city the owner of the water for any other purpose than that of supplying it with pure water; that the riparian proprietors higher up still retain all their common-law rights in the river so far as they are not inconsistent with the use defined in the statute; and that the defendant is at least entitled to say that it has not only done nothing as yet to practically diminish the petitioner's water-power, but that there is at most only a remote possibility that it will ever do so. Ipswich Mills *v.* Essex Co. Comm'rs, 108 Mass. 363, and Wamesit Power Co. *v.* Allen, 120 Mass. 352, distinguished. A riparian proprietor although it be a chartered municipality, has, in the absence of an express grant or prescription, no right *to foul or corrupt the water* of a running stream. An injury to the purity or quality of the water, to the detriment of other riparian owners, constitutes, in legal effect, a wrong and invasion of private right in like manner as a permanent obstruction or diversion of the water. Dwight Printing Co. *v.* Boston, 122 Mass. 583 (1877).

Where a city, in order to obtain a supply of water for its water-works, dug a well upon its own land on the bank of a mill-pond, which had been dammed up at great expense by its owner, and so near to the pond that the water percolated from it into the well, and also placed a pipe directly into the pond to be used whenever extra water was needed in case of fire, all of which was done without condemnation proceedings and without compensation to the owner of the pond, an injunction was issued restraining the city from taking the water either by means of the pipe or through the well. Emporia *v.* Soden, 25 Kan. 588.

[1] Central Park Extension, *In re*, 16 Abb. Pr. (N. Y.) 56; South Park Comm'rs *v.* Williams, 51 Ill. 57. The legislature may authorize the *condemnation*

lic square,[1] or for the construction of *drains* and *sewers*.[2] So, for the same reasons, a municipal corporation may be designated as the

of the fee for a public park (Mills Em. Domain, secs. 49, 50, and cases; Lewis Em. Dom. sec. 175), and the title of a city corporation to lands thus acquired is clothed with a trust to hold them for this specific purpose, but the legislature may (where there is no contract with creditors which will be thereby impaired) relieve the city from the trust and authorize a sale of the lands discharged therefrom. There is no contract in such cases with the owners of adjacent property. Brooklyn Park Comm'rs *v.* Armstrong, 45 N. Y. 234 (1871); *infra*, sec. 599, note; *post*, sec. 651. A *board of park commissioners* held to have power to use the name of the city in any proceeding at law or in equity that may be necessary to carry into effect the objects in the act creating the commission. Philadelphia *v.* Germantown Pass. R. Co., 10 Phila. (Pa.) 165.

For a learned discussion of the constitutionality of an act authorizing a city to *lay out parks outside of its corporate limits*, and to acquire land therefor, see Matter of Mayor of New York, 99 N. Y. 569. Nature of a city's ownership of a park situate outside of the city limits. Mayor *v.* Park Comm'rs, 44 Mich. 602; *ante*, sec. 565, note. As to the *uses of a public park*, see opinion of *Folger*, J., 45 N. Y. 240; *post*, sec. 648, note. For a collection of authorities upon the rights and liabilities of municipal corporations, and of abutting owners, in parks dedicated to public use, see valuable note, by the Reporter, to Morris *v.* Sea Girt Imp. Co., 38 N. J. Eq. (11 Stew.) 304.

In State *v.* Leffingwell, 54 Mo. 458 (1873), the Supreme Court of *Missouri* held the act of March 25, 1872, establishing for *the city of St. Louis, and outside of the city*, what is known as the *Forest Park*, to be unconstitutional. The park commissioners were created a body corporate, with power to purchase and to condemn lands for the park, and to issue $1,200,000 of bonds to be secured on the lands purchased and condemned. A park district was laid off, comprising lands surrounding the park within a designated district, and provision was made for the levy and collection for twenty years of a special tax on all lands within this district to pay the principal and interest of the park bonds. The act was held invalid on two grounds. 1. It infringed the constitutional provision, "Corporations may be

[1] Owners, &c., *In re* Pine St. *v.* Albany, 15 Wend. (N. Y.) 374 (1836). In this case, the legislature authorized the condemnation of property for a *public square* in the city of Albany, and required the damages to the land-owners whose property was taken to be apportioned amongst the owners of the ground to be benefited. The court sustained the validity of the enactment, and held that the taking of ground for such a purpose was as much a public use as if taken for a street, and that the mode of compensation (by an assessment of benefits instead of a general tax) was unimportant, and no evidence that the use is not a public one. As to *dedication* of land for "parks," "public squares," &c., see *post*, sec. 648.

[2] Hildreth *v.* Lowell, 11 Gray (Mass.), 345. The *power to condemn land for sewers must be plainly given*, and is not implied in the grant of power to enforce ordinances "to construct and regulate sewers, and to provide for the payment of the cost of constructing the same." Allen *v.* Jones, 47 Ind. 438 (1874). In this case *Downey*, J., says: "The right of eminent domain, or that right by which the sovereign power, for public uses, takes and appropriates the property of the citizen, is one which should be watched with great vigilance. It should never be exercised except when the public interest clearly demands it, and then cautiously and in accordance with law. The right is one which lies dormant in the State until legislative action is had pointing out the occasion, mode, conditions, and agencies for its exercise" (citing Dyckman *v.* New York, 5 N. Y. 434; Cooley Const. Lim. 527). Allen *v.* Jones, 47 Ind. 438 (1874); *post*, sec. 469.

public agency to "purchase or otherwise take lands" within a large district, on compensation being made, in order to *raise and drain* them so as to abate an existing nuisance thereon.[1]

formed under general laws, but shall not be created by special acts, except for municipal purposes; no municipal corporations, except cities, shall be created by special act." The Park Act was decided to be a special act and to create a corporation other than municipal. 2. It was invalid because it levied a special tax or local assessment exclusively upon certain designated lands *outside* of the city, for an object general in its nature, and which the act declared to be of great importance to the city of St. Louis, conducive to its dignity and character and to the health and recreation of its inhabitants. The remarks of *Wagner*, J., on the abuses of local assessments are emphatic, and, in view of the case before the court, just. He concludes by saying, "The Constitution has wisely erected a barrier against this exorbitant power, and there is a time in the tide of this special taxation when it must be said, 'Thus far shalt thou go, and no farther.'" A subsequent act, passed in consequence of the above decision, authorizing the appropriation of land for a public park for the benefit of the inhabitants of St. Louis *County* (which embraces the city of St. Louis), the park being located near to but outside of the limits of the city, and also authorizing the issue of bonds of the county to pay for the lands purchased and condemned, and for the improvement of the park, the bonds to be paid by taxation of all the property in the county, including the city, and the park to be laid out, improved, and managed by a board, one half of which was to be appointed by the county court and one half by the mayor of the city, was sustained as not in conflict with any provision of the Constitution of the State. The court distinctly held that such an appropriation of land was for a "public use," and that it was competent for the legislature to authorize a *county* to create a debt for the purpose of establishing a park for the benefit of its inhabitants, including the inhabitants of the city, who, in this instance, comprised the greater part of the population of the county. St. Louis Co. Court *v.* Griswold, 58 Mo. 175 (1874).

In Flatbush, &c., *In re*, 60 N. Y. 398 (1875), relating to Prospect Park in the city of Brooklyn, it was held that the legislature had not attempted to authorize the assessment of lands in the adjoining town of Flatbush to aid in paying for lands acquired for the park, and that it was beyond the competency of the legislature to assess lands in Flatbush to pay debts previously incurred by Brooklyn under prior acts. *Ante*, sec. 71. *As to local assessments*, see *post*, chap. xix.

[1] Dingley *v.* Boston, 100 Mass. 544 (1868); *supra*, sec. 589; New Orleans Draining Co., *In re*, 11 La. An. 338; Mills Em. Dom., secs. 16, 354, and cases; Lewis Em. Dom. secs. 185–197. In Reeves *v.* Wood County Treasurer, 8 Ohio St. 333, 345 (1858), a law authorizing an entry upon private property, and the construction of drains when demanded by private and not by public interest, was adjudged void. Approving Albany Street, *In re*, 11 Wend. (N. Y.) 149; Bloodgood *v.* Mohawk & H. R. R. R. Co., 18 Wend. (N. Y.) 9, 59; Varick *v.* Smith, 5 Paige (N. Y.), 137; Sedgw. on Const. Law, 514, 515; Rutherford's Case, 72 Pa. St. 82 (1872); s. c. 13 Am. Rep. 655; see, also, Cooley Const. Lim. 533; People *v.* Nearing, 27 N. Y. 306; Anderson *v.* Kerns Draining Co., 14 Ind. 199; Talbot *v.* Hudson, 16 Gray (Mass.), 417. The drainage act of *North Carolina* of 1795 is not unconstitutional as taking land for a mere *private purpose;* for although the canal may be private property, all persons may acquire the right to drain into it on just terms, and their reciprocal duties are subject to judicial regulation. Norfleet *v.* Cromwell, 70 N. C. 634 (1874); s. c. 16 Am. Rep. 787. The New York law of 1871, chap. dlxvi., authorizing the draining of private lots in the city of New York by the department of public works, on the certificate of the board of health that the same is necessary, &c., and providing for collecting the expense by an assessment on the property benefited, is unconstitutional, in making no provision for compensation to the land-owners. Cheesbrough, *In re*, 17 Hun (N. Y.), 561.

§ 599 (464). **Same subject. Ornamental Purposes.** — It has been said that since public necessity is the basis of the right of eminent domain, the right cannot be exercised except where the *purpose is useful*, and therefore that property cannot be compulsorily acquired against the owner's consent when wanted merely for *ornamental* purposes.[1] Chancellor Kent,[2] referring to the opinions of conti-

[1] Angell on Highways, sec. 85; Smith Commentaries on Stat. and Const. Law, sec. 335. By the Supreme Court of *Vermont* it is said that highways and streets cannot be laid out for the mere purpose, or mainly for the purpose, of *embellishing and ornamenting* the grounds about a public building, but that these results may be taken into consideration in connection with the public convenience and necessity; if the latter exist, the resulting incidental embellishment will not render the establishment of the highway or street illegal. Woodstock *v.* Gallup, 28 Vt. 587 (1856); s. c. 29 Vt. 347. See, on the general subject, the opinion of *Woodbury*, J., in West River Bridge Co. *v.* Dix, 6 How. 545, where the subject of eminent domain is ably examined. In the case last referred to, this learned judge, in the course of his opinion, observes: "When we go to other public uses, not so urgent, not connected with precise localities, not difficult to be provided for without the power of eminent domain, and in places where it would be only convenient, but not necessary, I entertain strong doubts of its applicability. Who ever heard of laws to condemn private property for public use, for a marine hospital or State prison? So a custom-house is a public use for the general government, and a court-house or jail for a State. But it would be difficult to find precedent or argument to justify taking private property, without consent, to erect them on, though appropriate for the purpose. No necessity seems to exist which is sufficient to justify so strong a measure. A particular locality as to a few rods in repect to their site is usually of no consequence, while as to light-house, or fort, or wharf, or highway between certain termini, it may be very important and imperative. I am aware of no precedents abroad for such seizures of private property, for objects like the former, though some such doctrines appear to have been advanced in this country." See, also, Boston Mill Corp. *v.* Newman, 12 Pick. (Mass.) 476; Cooley Const. Lim. 531, 533; Dunn *v.* Charleston, Harper (S. C.) Law, 189 (1824); Bankhead *v.* Brown, 25 Iowa, 540; Eldridge *v.* Smith, 34 Vt. 484; Wild *v.* Deig (private road), 43 Ind. 455 (1873); s. c. 13 Am. Rep. 399.

The legislature incorporated the "Memphis Freight Co.," giving to it "the privilege of loading and unloading freight, goods, and other property on boats that may touch at the port of Memphis; of erecting on the bank of the Mississippi River, in the city of Memphis, such sheds, railroad tracks, engines, and their equipments, as may be necessary for hauling freight." No right was given to the public to use the property or privileges given to the company, and no right of legislative regulation of tolls was reserved. It was held that this company, organized for private advantage and profit, could not be invested with the right to condemn property, against the owner's consent, to lay down a railroad track from the streets of the city to the margin of the river, for the reason that the use was not a public use, within the meaning of the Constitution. It will be noticed that "The Promenade," over which the right of way was sought, is treated by the case as the private property of the city of Memphis. There is, however, no discussion of the question as to the legislative power over property thus dedicated. Memphis Freight Co. *v.* Memphis, 4 Coldw. (Tenn.) 419 (1867).

[2] Gardner *v.* Newburgh Trs., 2 Johns. (N. Y.) Ch. 162, 166 (1816).

nental jurists on the subject of eminent domain, observes that Bynkershoeck[1] "insists that private property cannot be taken, *on any terms*, without the consent of the owner, for purposes of *public ornament or pleasure;* and he mentions an instance in which the Roman Senate refused to allow the prætors to carry an aqueduct through the farm of an individual, against his consent, when intended merely for ornament." If it be admitted or shown in any given case that the ornamental purpose is not associated with any useful purpose it would seem to be true that it is inconsistent with the respect in which all enlightened governments hold private property to say that it can be compulsorily taken from the owner. Such a use is not, within the meaning of the American Constitutions, a legitimate "*public* use." But if land for public squares and parks, which are largely, though not exclusively, for ornament, may be assumed by the State, upon payment to the owner, it would be difficult to hold an act unconstitutional which authorized the condemnation of land for a public fountain or as a site for a monument. The Roman Law, as we have seen, authorized legacies *ad ornatum civitatis* and *ad honorem civitatis*, which became frequent: and in respect of cities, it would perhaps be difficult to hold that the legislature could not authorize land to be taken for purposes which would fall within the description of ornamental rather than useful. It would be an extreme case where a purpose was wholly ornamental, and not at all useful. These questions, however, lie upon the boundary of legislative power, and have not been very fully illustrated by actual adjudications.[2]

[1] Bynkershoeck, Quæst. Jur. Pub. b. 2, chap. xv.

[2] An interesting illustration of the subject discussed in the text is afforded by the somewhat singular case of Higginson *v.* Nahant, 11 Allen (Mass.), 530 (1866). In *Massachusetts* the usual constitutional provision exists that the property of individuals can be appropriated to public uses only when the public exigencies require it; and the doctrine has been asserted therein that public ways are for travel and not for places of amusement. Blodgett *v.* Boston, 8 Allen (Mass.), 237. See Balch *v.* Essex Co. Comm'rs, 103 Mass. 106; *Re* Mt. Washington Road Co., 35 N. H. 134; *post*, sec. 1000. The proper authorities of the town in due form laid out a town way, and the above-mentioned case of Higginson *v.* Nahant presented the question whether the proceedings to establish it could be impeached by showing that the way was wholly upon the land of the plaintiffs; that it entered their land from a highway and returned to it near the place at which it entered; that it led to no other way or landing place, and could be used for no purposes of business or duty, or of access to the lands of any other person; but that it was laid out by the selectmen of the town with the design to provide access, not for the town merely, but for the public, to points or places in the lands of the plaintiffs which presented pleasing natural scenery. The court sustained the validity of the proceedings to establish the road. The substance of its reasoning is that the only true test is whether the road is wanted for public travel; that whether wanted for this purpose is a question not committed by the legislature to the determination of the courts, but to the local authorities; and that where there is a sufficient amount of travel to warrant the construction of a particular road the courts cannot enter upon an inquiry as to the reasons which may induce people to travel upon it. It is sufficient if they wish to travel upon it for any innocent and lawful purpose, whether for business, or duty, or pleasure. "The passing from place to place," says Mr. Justice *Hoar*, who gave the opinion of the court, "is a rightful object of public provision in itself; and the occasions for it are as extensive as the pursuits of life. *Pleasure travel may be accommodated as well as business travel.* If the doctrine for which the plaintiffs contend were supported, it would also follow that the legislature would not have the constitutional right to take private property for a public park or pleasure ground, making full compensation to the owner, — a conclusion which we should hesitate to arrive at without much farther consideration, in view of the important relations which air, exercise, and recreation bear to the general health and welfare of the community." Since the making of provision for opening public ways is confessedly a legislative duty, and such an object a public one (*ante*, secs. 158, 595), this case, it is evident, does not hold that it would be lawful compulsorily to acquire private property for mere purposes of pleasure wholly dissociated from purposes of utility. Mills Em. Dom. sec. 18, cites the cases bearing upon the subject discussed in the text. There is deep philosophy and wisdom in the saying "Take care of the beautiful; the useful will take care of itself." Looking to the fact that what may be called ornaments, such as squares, fountains, monuments, &c., have always existed in cities, the suggestion of the text is probably sound that it would be an extreme case where the use, though chiefly for ornament, was not at the same time useful in the degree that would support a legislative act authorizing the taking. If the use is public, the degree of usefulness is a legislative, not a judicial question. Mills Em. Dom. sec. 11 and cases; Lewis Em. Dom. chap. vii.

[1] People *v.* Smith, 21 N. Y. 597; Giesy *v.* Cinc., W. & Z. R. R. Co., 4 Ohio St. 308; Varick *v.* Smith, 5 Paige (N. Y.), 137; Brooklyn Park Comm'rs *v.* Armstrong, 45 N. Y. 234 (1871); Fowler, *In re*, 53 N. Y. 60 (1873). The reader will find a very full discussion of the subject in Scudder *v.* Trenton Del. Falls Co., 1 Saxt. (N. J.) 694; St. Louis Co. Court *v.* Griswold, 58 Mo. 175 (1874) (Forest Park Case); Tide Water Co. *v.* Coster, 18 N. J. Eq. (3 C. E. Green) 518; Mills Em. Dom. sec. 11, and cases. The text approved by *McAllister*, J., in Chicago *v.* Wright, 69 Ill. 327 (1873).

[2] Commonwealth *v.* Breed, 4 Pick. (Mass.) 463; Hazen *v.* Essex Co., 12

§ 600 (465). **Legislative and Judicial Domain distinguished.** — Of the *necessity or expediency* of exercising the right of eminent domain in the appropriation of private property to public uses, the opinion of the legislature or of the corporate body or tribunal upon which it has conferred the power to determine the question, is conclusive upon the courts, since such a question is essentially political in its nature, and not judicial.[1] But the question *whether the specified use is a public use or purpose*, or such use or purpose as will justify or sustain the compulsory taking of private property, is, perhaps, ultimately a judicial one, and, if so, the courts cannot be absolutely concluded by the action or opinion of the legislative department. But if the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably private, or the necessity for the taking plainly without reasonable foundation.[2] But if the use be public, or if it be so doubtful