that the courts cannot pronounce it not to be such as to justify the compulsory taking of private property, the decision of the legislature, embodied in the enactment giving the power, that a necessity exists to take the property, is final and conclusive.[1]

§ 601 (466). **Municipal Exercise of Power.** — In exercising the power of eminent domain, the *city council need not preface their action*, as, for example, laying out of a highway or street, by declaring that they find the same to be necessary or expedient. This necessity is sufficiently implied in their action on the subject, inasmuch as they can act only in such a case. They need not record

Cush. (Mass.) 477; Bankhead *v.* Brown, 25 Iowa, 540; Hanson *v.* Vernon, 27 Iowa, 28; Concord Railroad *v.* Greely, 17 N. H. 47; 2 Kent Com. 340; Memphis Freight Co. *v.* Memphis, 4 Coldw. (Tenn.) 419 (1867); Taylor *v.* Porter, 4 Hill (N. Y.), 142; Guernsey *v.* Burlington Tp., 4 Dillon, 372, 375 (1877); Townsend, *In re*, 39 N. Y. 174; Deansville Cem. Assoc., *In re*, 66 N. Y. 569 (1876); Weismer *v.* Douglas, 64 N. Y. 91 (1876); City Cem. Assoc. *v.* Meninger, 14 Kan. 312 (1875); Cooley Const. Lim. 530 *et seq.* Speaking of this subject, *Shaw*, C. J., says: "It is contended that if this act was intended to authorize the defendant company to take the mill power and mill of the plaintiff, it was void, because it was *not taken for public use*, and it was not within the power of the government in the exercise of the right of eminent domain. This is the main question. In determining it, we must look to the declared purposes of the act; and if a public use is declared, it will be so held, unless it manifestly appears by the provisions of the act that they can have no tendency to advance and promote such public use." Hazen *v.* Essex Co., *supra;* Mills Em. Dom. sec. 10 and cases; Lewis Em. Dom. sec. 158; *infra*, secs. 603, 619, note. Consult on this subject opinion of *Appleton*, C. J., in Allen *v.* Inhabitants of Jay, 60 Me. 124 (1871); s. c. 12 Am. Law Reg. N. S. 481, and note by *Redfield*, J.; Burlington Tp. *v.* Beasley, 94 U. S. 310 (1876); Guernsey *v.* Burlington Tp., 4 Dillon, 372 (1877); County Comm'rs *v.* Chandler (toll bridges), 96 U. S. 205 (1877); *ante*, sec. 510, and notes. The Constitution of *Missouri* of 1875 (sec. 20, art. 2) provides that "the question whether the contemplated use be really public shall be a judicial question, and, as such, judicially determined, without regard to any legislative assertion that the use is public." See City of Savannah *v.* Hancock, 91 Mo. 54.

In *Kentucky* it has been decided that where real property has been taken, through the exercise of eminent domain, for a particular public use, it may be applied to another, but a kindred, public use, with the consent of the legislature, without working a reversion to the original owner. Curran *v.* Louisville, 83 Ky. 628.

[1] See authorities last cited. Talbot *v.* Hudson, 16 Gray (Mass.), 417. The Court of Appeals of New York has distinctly held that the question, whether the use is public or private, is a judicial one, and that the judgment of the legislature on the point is not conclusive. Deansville Cem. Assoc., *In re*, 66 N. Y. 569 (1876); S. P. St. Louis Co. Court *v.* Griswold (Forest Park case), 58 Mo. 175 (1874). The language of the text of this section is guarded, and the view there intimated is the safe and, perhaps, the sound one. The citizen is more secure in his rights where the ultimate decision respecting the *use* or *right to take* is left to deliberate, unimpassioned, and conservative judgment of the courts; but if the power of eminent domain rests alone upon the basis of the public necessities or of public policy, it seems somewhat difficult to maintain that the legislative determination of this question is not conclusive.

their motives where they have jurisdiction to act. It might be otherwise, were their jurisdiction made to depend upon their first finding a preliminary fact to be true.[1]

§ 602 (467). **Same subject.** — The legislature, instead of directly exercising the power to take private property for public use, *may delegate it*, attended, of course, by its constitutional restrictions, to private corporations organized for public purposes, and, of course, therefore, to municipal corporations, which are, for purposes of local government, essentially public in their nature and ends; and it may, also, confer upon them the right to decide upon the existence of the necessity for its exercise. Thus a municipal corporation may be constitutionally invested with the power to open and establish, by compulsory acquisition or by purchase, such streets or parks as its council may judge to be expedient or necessary.[2]

[1] Townsend *v.* Hoyle, 20 Conn. 1, 9 (1849), *per Ellsworth*, J. Text quoted and approved. Allen *v.* Jones, 47 Ind. 442 (1874). A finding, by the city authorities, that "public convenience requires" the laying out of a street, is equivalent to finding that it is "necessary" in the sense of the statute. Hunter *v.* Newport, 5 R. I. 325; Watson *v.* South Kingston, *Ib.* 562. See chapter on Ordinances, *ante*, sec. 318; *ante*, sec. 598, note.

[2] People *v.* Smith, 21 N. Y. 595 (1860); Wilson *v.* Bl. Cr. Marsh Co., 2 Pet. 251; Bloodgood *v.* Mohawk & H. R. R. Co., 18 Wend. (N. Y.) 9; West River Br. Co. *v.* Dix, 6 How. 507; Mercer *v.* Pittsburgh, Ft. W. & C. Railroad Co., 36 Pa. St. 99; Commonwealth *v.* Charlestown, 1 Pick. (Mass., 180; Scudder *v.* Trenton Del. Falls Co., 1 Saxt. (N. J.) 694; Harbeck *v.* Toledo, 11 Ohio St. 219; Shaffner *v.* St. Louis, 31 Mo. 264; Cherokee *v.* Sioux City & I. F. Town Lot Co., 52 Iowa, 279; Rhine *v.* McKinney, 53 Tex. 354; Swan *v.* Williams, 2 Mich. 427; Embury *v.* Conner, 3 N. Y. 511 (1850); Alexander *v.* Baltimore, 5 Gill (Md.), 383; Sedgw. on Stat. and Const. Law, 517; *ante*, sec. 44. Power may be delegated by the legislature to *park commissioners*. West Chicago Park Comm'rs *v.* West. Union Tel. Co., 103 Ill. 33.

As the right of eminent domain appertains to sovereignty, the legislature has no power to make a grant in restraint of it; such a grant is not binding upon the State and, even where it has been relied upon, the State may resume its sovereign right without violating the inhibition of the Federal Constitution against impairing the obligation of contracts. Hyde Park *v.* Oakwoods Cem. Assoc., 119 Ill. 141. General power to lay out streets held not to authorize the condemnation of the *lands of a cemetery association*. Cemetery Association *v.* New Haven, 43 Conn. 234 (1875); s. c. 21 Am. Rep. 643, and note. The expediency of exercising the power usually given to open streets is generally left solely to the judgment of the governing body of the corporation; and its judgment when rightfully exercised is not subject to judicial revision. Methodist Prot. Church *v.* Baltimore, 6 Gill, 391; *post*, sec. 832 *et seq.*; Curry *v.* Mt. Sterling, 15 Ill. 320 (1853). Power may be delegated to local authorities to determine the expediency of building a bridge over a creek. Commonwealth *v.* Charlestown, 1 Pick. (Mass.) 180. Streets may be established by direct action of the legislature, as by ordering a survey of a town to be made, and declaring the map to be a public record. Such streets are public highways without being formally opened or used. West *v.* Blake, 4 Blackf. (Ind.) 234 (1836). The law must provide a method of condemning streets before they can be opened and local assessments made. State *v.* West Hoboken Tp., 37 N. J. L. 77.

§ 603 (468). **Construction of Power.** — Whether the power be exercised directly by the legislature, or mediately through municipal corporations or other public agencies, the *purpose or use* for which private property is authorized to be appropriated *should be specified by the legislature*, and the power will not be enlarged by doubtful construction.[1] Therefore, authority to a city corporation to appropriate private property for streets, lanes, alleys, and public squares or grounds, does not confer the power compulsorily to take private property upon which to erect a city prison.[2] So where the purpose for which land is to be taken is as well met by construing the authority to warrant the taking of an easement only as of the fee, the grant, if doubtful, will be construed most favorably for the citizen.[3]

§ 604 (469). **Power must be strictly pursued.** — Not only must the authority to municipal corporations or other delegated legislative agents, to take private property, be expressly conferred, and the use for which it is taken specified, but the power, with all constitutional and statutory limitations and directions for its exercise, must be strictly pursued. Since the power to condemn private property against the will of the owner is a stringent and extraordinary one, based upon public necessity or an urgent public policy, the rule requiring the power to be strictly construed and the prescribed mode for its exercise strictly followed, is a just one, and should, within all reasonable limits, be inflexibly adhered to and applied.[4]

[1] *Supra*, sec. 589; *infra*, secs. 612, 765; Claiborne Street, *In re*, 4 La. An. 7; Exchange Alley, *In re*, 4 La. An. 4; East St. Louis *v.* St. John, 47 Ill. 463 (1868); Cooley Const. Lim. 530, 541; Kane *v.* Baltimore, 15 Md. 240 (1859). In proceedings to open streets, the *costs* thereof cannot, unless the right to do so be expressly or plainly given by the statute, be added to the damages and collected from the owners of the adjacent property. The words, "the *expenses* of said improvement," do not embrace the costs of the proceedings. In the absence of authority to collect the same from adjacent owners, the costs must be borne by the corporation. Morris *v.* Chicago, 11 Ill. 650 (1850); s. p. Ill. & Mich. Canal Trs. *v.* Chicago, 12 Ill. 403. See Philip Street, *In re*, 10 La. An. 313. See for rule in California, Sinton *v.* Ashbury, 41 Cal. 525 (1871); *post*, sec. 765.

[2] East St. Louis *v.* St. John, *supra*. It would seem to be the opinion of Mr. Justice *Woodbury* that private property could not be compulsorily taken for such a purpose, if the legislature had undertaken to grant the power. He says: "Who ever heard of laws to condemn private property for public use for a marine hospital or State prison?" West River Br. Co. *v.* Dix, 6 How. (U. S.) 545; *ante*, sec. 599.

[3] Edgarton *v.* Huff, 26 Ind. 35; *supra*, sec. 589. Compare Water Works Co. *v.* Burkhart, 41 Ind. 364 (1872). See Heyneman *v.* Blake, 19 Cal. 579; Kane *v.* Baltimore, 15 Md. 240; Mills Em. Domain, sec. 49, and cases.

[4] Shaffner *v.* St. Louis, 31 Mo. 264 (1860); Lexington *v.* Long, *Ib.* 369; Belcher Sugar Refining Co. *v.* St. Louis Grain Elevator Co., 82 Mo. 121; Helena *v.* Harvey, 6 Mont. 114; Lance's Appeal, 55 Pa. St. 16; Godchaux *v.* Carpenter, 19 Nev. 415; Northern Pac. Terminal Co. *v.* Portland, 14 Oreg. 24; St. Louis *v.* Gleason, 93 Mo. 33; s. c. 89 Mo. 67 (holding also that if the power is vested in one court it cannot be exercised by another); Specht *v.* Detroit, 20 Mich. 168 (1870); Buffalo, *In re*, 78 N. Y. 362; Southern Pac. R. R. Co. *v.* Wilson, 49 Cal. 396 (1875); Ventura County *v.* Thompson, 51 Cal. 577; Trumpler *v.* Bemerly, 39 Cal. 490; Leslie *v.* St. Louis, 47 Mo. 474 (1871); Anderson *v.* St. Louis, *Ib.* 479; Harbeck *v.* Toledo, 11 Ohio St. 219 (1860); Dyckman *v.* New York, 5 N. Y. 439; People *v.* Kniskern, 54 N. Y. 52 (1873); State *v.* Jersey City, 25 N. J. L. 309 (1855); State *v.* Jersey City, 26 N. J. L. 444; State *v.* Hudson City, 27 N. J. L. 214; Watson *v.* Acquackanonck Water Co., 36 N. J. L. 195; Cincinnati *v.* Coombs, 16 Ohio, 181 (1847); Mitchell *v.* Kirkland, 7 Conn. 229; *Ib.* 350; Nichols *v.* Bridgeport, 23 Conn. 189, 208 (1854); Judson *v.* Bridgeport, 25 Conn. 426; Van Wickle *v.* Camden & A. R. R. Co., 2 J. S. Green (N. J.), 162 (1833); Adams *v.* Saratoga & W. R. R. Co., 10 N. Y. 328; Cooley Const. Lim. 528, 541; People *v.* Brighton, 20 Mich. 57; Kidder *v.* Peoria, 29 Ill. 77 (1862); Exchange Alley, *In re*, 4 La. An. 4; Claiborne Street, *In re*, *Ib.* 7; Thompson *v.* Schermerhorn, 2 Seld. (6 N. Y.) 92; Burnett *v.* Buffalo, 17 N. Y. 383; Hunt *v.* Utica, 18 N. Y. 442; Kyle *v.* Malin, 8 Ind. 34, 37; Redfield on Railways, sec. 64; People *v.* Central Pac. R. R. Co., 43 Ill. 398 (1872); People, *ex rel. v.* Whitney's Point, 102 N. Y. 81; Baltimore & O. R. R. Co. *v.* Boyd, 63 Md. 325, where the condemnation of land for a street was held void because the damages assessed had not been paid, or tendered to the owner, nor invested, as required by statute; s. p. Baltimore *v.* Hook, 62 Md. 371, and Bartleson *v.* Minneapolis, 33 Minn. 468.

If a charter requires a council *to treat with an owner before condemning his land*, an honest compliance with the requirement is jurisdictional; merely receiving and tabling a proposal from the owner will not suffice. Lane *v.* Saginaw, 53 Mich. 442; *infra*, sec. 605; Weckler *v.* Chicago, 61 Ill. 142 (1871), holding that *two alleys cannot be included in one condemnation proceeding*, and the value of lands taken for one be compensated by benefits derived from the other, because one alley intersects the other. "It is a well-established rule that in matters of expropriation to public use, all the forms of law must be rigidly observed." Street Case, 16 La. An. 393 (1861); Dennis *v.* Hughes, 8 Up. Can. Q. B. 444. *Post*, sec. 763; Brice on *Ultra Vires* (Green's Am. ed.) 278 *et seq.*, 298.

An *enabling ordinance* held to be necessary before a street can be opened or property condemned for public use in a municipal corporation. People *v.* Hyde Park, 117 Ill. 462.

§ 605 (470). **Conditions Precedent.** — Especially will the courts require a *strict compliance with all conditions precedent* to the exercise of the power, and all provisions as to the manner of its exercise intended for the benefit and protection of the citizen. If the authority be not thus pursued, the proceedings will not have the effect to divest the owner of his property.[1] If defective in respect to

[1] See authorities last cited.

A statute of *California* provided for the opening of a street "whenever the owners of a majority on frontage shall petition," &c. The proper officials certified that the petition had been subscribed by the owners of the requisite amount of frontage. This report was confirmed by the court. It was held that a petition from a majority of frontage owners was *jurisdictional*, and that a lot owner, whose lot had been sold for the tax and against whom ejectment was brought, was not estopped to show that the petition was not signed by the owners of the requisite amount of frontage. Zeigler *v.* Hopkins, 117 U. S. 683 (1885), approving Mulligan *v.* Smith, 59 Cal. 206. The court held that, under the statute, neither the mayor nor county court was authorized to investigate or adjudicate upon "the sufficiency of the petition, or pass upon the question of frontage, or to make any record in ref-

jurisdictional requisites, they will be void; if irregular, simply, they will be set aside by the courts on *certiorari* or such other remedy as may be deemed appropriate in the particular State.[1] Not only so, but a municipal corporation, claiming title to streets or other public property by virtue of proceedings under the exercise of the right of eminent domain, must show affirmatively that the requirements of the statute have been complied with. Thus if, under the statute or charter, the *disagreement of the parties* as to the amount of the compensation is an essential prerequisite of the right of the city compulsorily to appropriate private property, this fact must be shown by the city.[2]

erence to it." Same point as to street improvement, *post*, sec. 800.

[1] Harbeck *v.* Toledo, 11 Ohio St. 219; Parks *v.* Boston, 8 Pick. (Mass.) 218; Shaffner *v.* St. Louis, 31 Mo. 264; Baltimore *v.* Eschback, 18 Md. 276; Welker *v.* Potter, 18 Ohio St. 85; *infra*, sec. 612, and note; *post*, chap. xxii. On the motion for reargument in the Cable Co. case, the Court of Appeals through *Rapallo*, J. (104 N. Y. 43), said: "In order to sustain proceedings by which a body claims to be a corporation and, as such, empowered to exercise the right of eminent domain, and under that right to take the property, it is not sufficient that it be a corporation *de facto*. It must be a corporation *de jure*. Where it is sought to take the property of an individual under powers granted by an act of the legislature to a corporation to be formed in a particular manner therein directed, the constitutional protection of the rights of private property requires that *the powers granted by the legislature be strictly pursued, and all the prescribed conditions performed.*"

[2] Dyckman *v.* New York, 5 N. Y. 434 (1851), a fully considered case arising out of the condemnation of the plaintiff's land for the Croton Water Works. If the statute authorizes the exercise of the power in case the parties fail to agree, an effort to agree which is unsuccessful is all that is necessary. *Re* Middletown, 82 N. Y. 196. The petition or complaint should state the failure to agree. Dyckman *v.* New York, *supra;* Mills Em. Dom. sec. 107. If, however, *the owner appears* in the proceedings to assess his damages, and contests the amount, without objecting that no effort had been made to agree, the court (it was held) will presume it to have been made. Reitenbaugh *v.* Railroad Co., 21 Pa. St. 100. *As to failure to agree with owner*, see also Pennsylvania R. R. Co. *v.* Porter, 29 Pa. St. 165; Neal *v.* Pittsburg & C. R. R. Co., 2 Grant (Pa.) Cases, 137; Doughty *v.* Somerville & E. R. R. Co., 21 N. J. L. 442; Gilmer *v.* Lime Point, 19 Cal. 47; Moses *v.* St. Louis Dock Co., 84 Mo. 242; *supra*, sec. 604, note. Mills Em. Dom. chap. xii., secs. 107, 108, collects the cases on this subject. The incapacity of the land-owner to sell is a sufficient refusal to sell within the Massachusetts Act of 1866. Balch *v.* Essex Co. Comm'rs, 103 Mass. 106. Effort and failure to agree held not a condition precedent. Bigelow *v.* Miss. Central & T. R. R. Co., 2 Head (Tenn.), 624. How the fact of the attempt to agree, and its failure, may be shown, *vide* opinions of *Foot* and *Gardiner*, JJ., in Dyckman *v.* New York, *supra*. See also, as to principle in text, Sharp *v.* Speir, 4 Hill (N. Y.), 76; Sharp *v.* Johnson, *Ib.* 92; Nichols *v.* Bridgeport, 23 Conn. 189. A general law regulating the condemnation of lands for public uses held not unconstitutional for not providing that before proceedings under it can be taken some attempt must be made to secure the consent of the owners. Grand Rapids *v.* Grand Rapids & Ind. R. R. Co., 58 Mich. 641. That owner *may waive constitutional or statutory provisions for his benefit*, — effect of receipt of payment, — powers and nature of jurisdiction of Supreme Court as to confirmation (under statute) of reports of commissioners, — and that title passes by *force of the statute and payment*, see Embury *v.* Conner, 3

§ 606 (471). **Notice.** — So *notice of the proceedings* to take property for public use is, when required to be given, the basis of the jurisdiction or of the right to proceed, and if not given, or if not given in the required manner, the proceedings are unauthorized and void.[1] It is, however, competent for the legislature, in the absence of a special constitutional restriction, to provide for constructive notice only to those interested.[2]

N. Y. 511; *Ib.* 197; Arnot *v.* McClure, 4 Denio (N. Y.), 45; Striker *v.* Kelly, 7 Hill (N. Y.), 9; s. c. in error, 2 Denio, 323; Doughty *v.* Hope, 3 Denio (N. Y.), 249; Kennedy *v.* Newman, 1 Sandf. (N. Y.) 187.

[1] Harbeck *v.* Toledo, 11 Ohio St. 219 (1860); Specht *v.* Detroit, 20 Mich. 168 (1870); Kidder *v.* Peoria, 29 Ill. 77 (1862); Baltimore *v.* Bouldin, 23 Md. 328 (1865); McMicken *v.* Cincinnati, 4 Ohio St. 394; Molett *v.* Keenan, 22 Ala. 484; Darlington *v.* Commonwealth, 41 Pa. St. 68; Nichols *v.* Bridgeport, 23 Conn. 189. As to notice and its requisites, see, also, Redfield on Railways, sec. 72. Mills Em. Dom. chap. xi., secs. 94–104, is devoted to the subject of *Notice*, when necessary, how given, when waived, &c.; Lewis Em. Dom. treats of the same subject in chap. xv. Waiver of notice. Cruger *v.* Hudson R. R. R. Co., 12 N. Y. 190; State *v.* Paterson, 36 N. J. L. 159; State *v.* Atlantic City, 34 N. J. L. 99; State *v.* Perth Amboy, 29 N. J. L. 259; *post*, sec. 804. Record must show proof of service. Nielsen *v.* Wakefield, 43 Mich. 434. As to notice in similar cases. Myrick *v.* La Crosse, 17 Wis. 442; Rathbun *v.* Acker, 18 Barb. (N. Y.) 393; Risley *v.* St. Louis, 34 Mo. 404; Welker *v.* Potter, 18 Ohio St. 85. Compare Furnell *v.* Cotes, 19 Ohio St. 405; State *v.* Elizabeth, 32 N. J. L. 357; Cairo & F. R. R. Co. *v.* Trout, 32 Ark. 17 (1877); McIntyre *v.* Easton & A. R. R. Co., 26 N. J. Eq. 425; State *v.* Orange, 32 N. J. L. 50; see, also, Lennon *v.* New York, 5 Daly, 347; affirmed, 55 N. Y. 361; Cowen *v.* West Troy, 43 Barb. (N. Y.) 48; State *v.* Hudson, 29 N. J. L. 475; Specht *v.* Detroit, 20 Mich. 168 (1870). A similar principle as to notice applies in proceedings to assess the owners of land for local improvements. State *v.* Jersey City, 24 N. J. L. 662, 666; Kean *v.* Asch, 27 N. J. Eq. 57; State *v.* Plainfield, 38 N. J. L. 95; *Ib.* 419; Adams *v.* Clarksburg, 23 W. Va. 203. In this case the law required service of the notice by publication, *and posting*, and a notice by publication only was held insufficient, there being no personal service upon nor appearance entered by the owners.

[2] Stewart *v.* Hinds Co. B. of Police, &c. 25 Miss. 479; Owners, &c. *v.* Albany, 15 Wend. 374; Wilkin *v.* St. Paul & Pac. R. R. Co., 16 Minn. 271. Notice "may be by advertisement, even to resident owners." Mills Em. Dom. sec. 98, citing cases. Such questions depend, however, upon the terms of the Constitution and statute conferring and regulating the power. Palmyra *v.* Morton, 25 Mo. 593, 597; Swan *v.* Williams, 2 Mich. 427. But in a later case it was said that in Swan *v.* Williams, *supra*, it was contemplated that notice should be given the owner for the reason that it authorized him to assist in drawing a jury; and it was held that a charter which did not provide for *personal service* of notice upon known owners, if residing in the city and upon whom service could be had, was fatally defective. Kundinger *v.* Saginaw, 59 Mich. 355, 363 (citing, State *v.* Fond du Lac, 42 Wis. 298; and Seifert *v.* Brooks, 34 Wis. 443); St. Paul, Minneapolis, & M. Ry. Co. *v.* Minneapolis, 35 Minn. 141. The *publication of the ordinance* which authorizes the opening of the street is frequently the only notice to property owners which is required by the charter or constituent act of the corporation. Curry *v.* Mt. Sterling, 15 Ill. 320 (1853); Johnson *v.* Joliet & C. R. R. Co., 23 Ill. 202. Where notice of the proceedings to open streets is required to be given by publication only, and it is thus given, "the law imputes notice, and will not admit testimony to disprove it;" and in such case want of actual notice in any part is no ground for relief, in equity or otherwise,

Where the charter, by a fair construction, provided that *each* applicant for a review of an assessment should himself have the right to select two appraisers, an ordinance denying this right and giving it to a majority of those to be affected by the laying out of a street is void.[1] So authority to *open a street and assess the damages* on the property benefited, does not give the power to assess for anything more than opening the street and paying for the right of way; it does not include the power to assess other property for the *improvement* of the street by grading, culverting, and the like.[2]

§ 607 (472). **Procedure.** — So if *damages* are to be assessed by *commissioners who are freeholders*, the fact that they are such should, it has been held, appear on the face of the proceedings.[3] But where the charter required the city council to appoint as commissioners disinterested freeholders residing in the city, and the corporation, in a proceeding *against it* by the land-owner for a *mandamus* to compel it to collect the amount awarded, admitted that its council had appointed the commissioners, it was held as against the city that the commissioners would be presumed to possess the requisite qualification, the contrary not appearing on the face of the proceedings.[4]

against such proceedings. Methodist Prot. Church *v.* Baltimore, 6 Gill (Md.), 391 (1848). See State *v.* Jersey City, 24 N. J. L. 662; State *v.* Plainfield (constructive notice), 38 N. J. L. 95; Dubuque *v.* Wooton, 28 Iowa, 571; *post*, chap. xix. sec. 804. Where the statute directed the *city council* to give notice of meetings for condemnation purposes, it was held that this duty could not be delegated to the clerk. State *v.* Jersey City, 25 N. J. Law, 309; *ante*, sec. 96, as to delegation of public powers.

[1] Cincinnati *v.* Coombs, 16 Ohio, 181 (1847), and see *Ib.* 574.

[2] Reed *v.* Toledo, 18 Ohio, 161 (1849). "Opening" street defined. *Ib.*; *post*, chapter on Taxation and Local Assessments. Whether the lowering of a sidewalk to the level of a street is a "construction of a highway," under the Constitution of *Alabama*, is a mixed question of law and fact. Montgomery *v.* Townsend, 80 Ala. 489.

[3] Nichols *v.* Bridgeport, 23 Conn. 189, 208 (1854). If not thus appearing, the proceedings will be held void. *Ib.* See also Judson *v.* Bridgeport, 25 Conn. 426; Griffin *v.* Rising, 2 Cush. (Mass.) 75; People *v.* Brighton, 20 Mich. 57 (1870). Mills Em. Dom., secs. 248, 249, as to *qualification of jurors*; Lewis Em. Dom. sec. 405.

[4] State *v.* Keokuk, 9 Iowa, 438 (1859). See Higgins *v.* Chicago, 18 Ill. 276; Chicago *v.* Wheeler, 25 Ill. 478; Bloomington *v.* Brokaw, 77 Ill. 194, 196 (1875). A provision in a charter that plans for opening streets shall be *recorded* in the the recorder's office, is directory. Sower *v.* Philadelphia, 35 Pa. St. 231. An order laying out a street or highway may refer to a "plan," in which case the plan meant may be shown and identified by evidence *aliunde*, and used to prove the location and limits of the highway. Stone *v.* Cambridge, 6 Cush. (Mass.) 270 (1850). *Sufficiency of description of proposed street.* Stewart *v.* Baltimore, 7 Md. 500.

As to *mode of procedure*, and various points of practice respecting the assessment of damages, see Redfield on Railways, sec. 72, where many of the cases are referred to and stated.

§ 608 (473). **Discontinuance of Proceedings.** — Under the language by which the power to open streets and to take private property for that purpose is usually conferred upon municipal corporations, they may at any time before taking possession of the property under completed proceedings, or before the final confirmation, recede from or *discontinue the proceedings* they have instituted. This may be done, unless it is otherwise provided by legislative enactment, at any time before vested rights in others have attached. Until the assessments of damages have been made, the amount cannot be known; and on the whole, it is reasonable that after having ascertained the expense of the project, the corporation should have a discretion to go on with it or not, as it sees fit,[1] it being liable in proper cases in damages for any wrongful acts injurious to the owner, as shown in the next section.

A commissioner was held not to be disqualified because he was a trustee of a religious corporation owning premises liable to assessment for benefits, he being under no personal liability for the debts of the corporation. People *v.* Syracuse, 63 N. Y. 291 (1875). Effect of *death* of one of the commissioners. *Ib.*; *ante*. sec. 99.

[1] Anthony Street, *In re*, 20 Wend. (N. Y.) 618, 619, and prior cases in New York there cited; Martin *v.* Brooklyn, 1 Hill (N. Y.) 541 (1841); Dover Street, *In re*, 18 Johns. (N. Y.) 506; Military Parade Ground, *In re*, 60 N. Y. 319 (1875); Comm'rs of Wash. Park, Albany, *In re*, 56 N. Y. 144; Pumphrey *v.* Baltimore, 47 Md. 145; Millard *v.* Lafayette, 5 La. An. 112 (1850); Roffignac Street, *In re*, 4 Rob. (La.) 357; Canal Street, *In re*, 11 Wend. 155; McLaughlin *v.* Municipality, 5 La. An. 504; St. Joseph *v.* Hamilton, 43 Mo. 282; State *v.* Hug, 44 Mo. 116; Hullin *v.* Second Municipality, 11 Rob. 97 (1845); Jersey City Water Comm'rs, 31 N. J. L. 72 (1864); Clough *v.* Unity, 18 N. H. 75; Pillsbury *v.* Springfield, 16 N. H. 565; Carson *v.* Hartford, 48 Conn. 68; *infra*, sec. 614, note; Higgins *v.* Chicago, 18 Ill. 276; State *v.* Graves, 19 Md. 351 (1862), where the subject is well discussed by *Bowie*, C. J. Mills Em. Dom. chap. xxvi. relates to the right to abandon proceedings. Lewis Em. Dom. sec. 655, 663, treats at large of the right to discontinue and abandon the proceedings. Unless otherwise provided by statute, the proceedings may be discontinued by the municipality at any time before the title is acquired. The subject is very fully examined, and the English cases, which it is admitted lay down a different doctrine, are reviewed by *Rapallo*, J., Comm'rs of Wash. Park, *In re*, 56 N. Y. 144 (1874). He says, "A long series of decisions [in this State] has established that in these street cases the corporation may be permitted to discontinue proceedings . . . at any time before the report of the commissioners is finally confirmed, and there is a final award in the nature of a judgment in favor of the property owners for their compensation." *Ib.*, p. 154. See also, Hamersley *v.* New York, 56 N. Y. 533 (1874); People *v.* Syracuse Com. Council, 78 N. Y. 57; Rhinebeck R. R. *In re*, 67 N. Y. 242. This doctrine is opposed to the English cases. King *v.* Market St. Comm'rs, 4 B. & Ad. 335; King *v.* Hungerford Market Co., *Ib.* 327; Stone *v.* Commercial Ry. Co., 4 M. & C. 122; Tawney *v.* Lynn & Ely Ry. Co., 16 L. J. N. S. Eq. 232; Walker *v.* Eastern Counties Ry. Co., 6 Hare, 544. The general doctrine of the English cases is that when the public authorities have elected to take the property in such a way as to be binding on the owner of the property, the electing authorities ought in like manner to be bound. Accordingly, all the appropriate legal remedies are open to the land-owner, such as *mandamus* or specific performance,

§ 609 (474). **Remedy of Land-Owner.** — Where proceedings are rightfully discontinued, the land-owner cannot have a *mandamus to collect, nor can he recover by action,* the sum that may have been estimated by commissioners; yet he may have a *special action for*

a relation analogous to that of vendor and vendee being established, though the notice to take the land does not strictly amount to a contract. Haynes *v.* Haynes, 1 Drew. & Sm. 426. *Rapallo*, J., admitted that there was a "strong equity" in the claim of the land-owner in this class of cases. Opinion of the court by *Rapallo*, J., Comm'rs of Wash. Park, *In re*, 56 N. Y. 148. See also remarks of *Keating*, J., in Fotherby *v.* Metrop. Ry. Co., L. R. 2 C. P. C. 196.

A corporation may abandon a proceeding to take lands, upon paying the taxable costs and expenses, without being required to pay also other charges and the counsel fees. Waverly Water Works Co., *In re*, 16 Hun (N. Y.), 57. Where the power of eminent domain is conferred upon a merely public agent, and the compensation to be made is to be ascertained by another body, as commissioners, or a jury, the agent has an election whether to pursue or abandon the condemnation, after the price is fixed, unless a contrary legislative intent is clearly indicated. If such an election has been once made, no right of reconsideration remains. Mabon *v.* Halsted, 39 N. J. L. 640. Upon verdict and judgment in favor of the land-owner (Hawkins *v.* Rochester, 1 Wend. (N. Y.) 54), or upon confirmation of the report, private rights attach, and the corporation cannot afterwards discontinue the proceedings, although the court may refuse a *mandamus* and leave the parties to their remedy by action. People *v.* Brooklyn, 1 Wend. (N. Y.) 318, and cases cited; Dover Street, *In re*, *supra;* Duncan *v.* Louisville, 8 Bush (Ky.), 98 (1871); Lafayette *v.* Schultz, 44 Ind. 97 (1873); Harrington *v.* Berkshire Co. Comm'rs, 22 Pick. (Mass.) 263. See on this point Garrison *v.* New York, 21 Wall. 196 (1874); Farnsworth *v.* Boston, 121 Mass. 173. Text approved. O'Neill *v.* Hudson County, 41 N. J. L. 161. A city "may revoke ordinances establishing new streets before they are opened, if, in the exercise of its discretion, it ascertains that the opening of them would be injurious to the public interest, provided, however, that no vested right acquired under the dedication is affected by the change. *Per Rost*, J., Municipality *v.* Levee S. C. P. Co., 7 La. An. 270 (1852). The author does not understand the case of the State *v.* Keokuk (9 Iowa, 438, 1859) to deny, but rather to affirm, the power of the city to abandon the project of the opening of a street at any time before the property is taken; but the case holds that the city, *while proceeding* with the work, has no *implied power* to set aside the report of commissioners it had appointed, and to appoint new ones at discretion "until the damages are brought to square" with its views. On this ground the case is sustainable, and in accordance with settled principles and sound reason. It is not to be taken as holding that the land-owner has a vested right to an assessment simply because one has been made. Power to set aside report and appoint a new board, see Redfield on Railways, sec. 72, and notes. Assessment made by commission must be approved or rejected by the court *in toto;* it cannot amend the report. Claiborne Street, *In re*, 4 La. An. 7; Anthony Street, *In re*, 20 Wend. (N. Y.) 618; Simmons *v.* Mumford, 2 R. I. 172; Clarke *v.* Newport, 5 R. I. 333. Where a city has accepted and confirmed the report of commissioners to assess damages, it is concluded from withholding payment because of an alleged error. Higgins *v.* Chicago, 18 Ill. 276; Chicago *v.* Wheeler, 25 Ill. 478. *Mandamus* to enforce payment by sale of city bonds. Duncan *v.* Louisville, 8 Bush (Ky.), 97 (1871). Although the statute may provide that the report of the commissioners, when confirmed, shall be "final and conclusive," this does not vest such a right in the award as to prevent the legislature from authorizing the proceedings to be vacated, and to refer the matter to new commissioners. Garrison *v.* New York, 21 Wall. 196 (1874).

damages for any wrongful and injurious acts of the corporation in the course of the proceedings.[1] And it has been even held that if the municipality deems it best to abandon the proposed work or project, it may do so, and discontinue proceedings, although it may have taken possession of the premises. By taking such possession, it is argued, the corporation does not impliedly agree to purchase at the appraisement. It may, nevertheless, discontinue the proceedings, and the land-owner can only demand the premises, and damages for being deprived of them and for injuries thereto.[2]

§ 610 (475). **When Municipality concluded.** — Nor *has the municipal corporation always been considered as concluded* and bound to pay the damages awarded, although the report of the commissioners appointed by it had been confirmed. The act to enable the city of Baltimore to procure a supply of water authorized the city to condemn lands, required the inquisition of damages to be returned to the Circuit Court, and provided that it "should be confirmed by the said court at its next sitting, if no sufficient cause to the contrary be shown," and the "valuation when paid or tendered shall entitle the city to use the land as fully as if it had been conveyed by the owner." It was held that the city was not bound by the mere inquisition of damages, although confirmed by the court, to pay the amount awarded, but could, nevertheless, abandon the location in question; that the judgment of confirmation simply decided the

[1] State *v.* Graves, 19 Md. 351 (1862); Graff *v.* Baltimore, 10 Md. 544; Norris *v.* Baltimore, 44 Md. 606; Baltimore *v.* Musgrave, 48 Md. 272; Milliard *v.* Lafayette, 5 La. An. 112 (1850); Roffignac Street, *In re*, 4 Rob. (La.) 357; Canal Street, *In re*, 11 Wend. (N. Y.) 155; Anthony Street, *In re*, 20 Wend. (N. Y.) 618; Walling *v.* Shreveport, 5 La. An. 660. Mills Em. Dom. sec. 313, and cases; Lewis Em. Dom. chap. xxvii, treats at large of the statutory and other remedies of the land-owner. Where a corporation commences proceedings to open a street, and notifies the proprietor not to continue the making of improvements he had begun, and the corporation *needlessly delays* and finally abandons the proceedings, it is, under these circumstances, liable for the actual damages suffered by the proprietor, arising from the suspension of his improvements. McLaughlin *v.* Municipality, 5 La. An. 504 (1850), distinguished from Milliard *v.* Lafayette, *Ib.* 112; Graff *v.* Baltimore, 10 Md. 544 (1857). *Mandamus* held to be the remedy of the abutter for delay in completing street improvements. Whiting *v.* Boston, 106 Mass. 89 (1870). Such delay is no legal excuse for refusal to pay assessment. *Ib.*

[2] Hullin *v.* Municipality, 11 Rob. (La.) 97 (1845); Feiten *v.* Milwaukee (approving text), 47 Wis. 494; Norris *v.* Baltimore, 44 Md. 606; and see Baltimore *v.* Musgrave, 48 Md. 272; Brokaw *v.* Terre Haute, 97 Ind. 176.

A city has the right through its council to authorize the purchase of a right of way for a ditch, and will be bound to reimburse the party authorized to procure it; but it cannot enter into an agreement with such party that it will construct the ditch, nor can he recover damages for any alleged injuries he may have suffered by a subsequent determination of the council not to proceed with the work. Stewart *v.* Council Bluffs, 50 Iowa, 668.

value of the land, and that payment or tender of the valuation is necessary to give the city a title to the property. It was admitted by the court, however, that if the owner suffered loss or injury by reason of the wrongful acts of the city, he might recover damages therefor.[1] But the language of the act or charter may be such as to give the land-owner a right to the sum assessed, and to prevent the corporation from setting aside or discontinuing proceedings, as where it is provided "that after the value and damages shall have been ascertained, the amount with interest shall be paid to the person interested, on demand."[2]

§ 611 (476). **Revisory Proceedings; Certiorari.** — If no *appeal or other special remedy* be given, it has been very generally held that *certiorari* lies against a town or city corporation with respect to its proceedings in laying out, altering, or improving a street, and if invalid they will be set aside by the courts.[3] Adopting what it

[1] Graff *v.* Baltimore, 10 Md. 544 (1857); State *v.* Graves, 19 Md. 351; Merrick *v.* Baltimore, 43 Md. 219; Norris *v.* Baltimore, 44 Md. 598; Black *v.* Baltimore, 50 Md. 236; Baltimore *v.* Black, 56 Md. 333; Baltimore *v.* Musgrave, 48 Md. 272, approving Baltimore & Susq. R. R. Co. *v.* Nesbit, 10 How. (U. S.) 395; Garrison *v.* New York, 21 Wall. 196 (1874). See, also, as to private rights vesting, State *v.* Clunet, 19 Md. 351 (1862). In *New York*, the rule is that where proceedings to condemn lands have so far progressed that the amount of compensation to be paid to the owner has been fixed as a finality, the proceedings cannot be discontinued or abandoned, the owner has a vested right to the compensation, and payment may be enforced according to statute, under which the proceedings were instituted. People *v.* Syracuse Com. Council, 78 N. Y. 57. On confirmation of report, the right of the city, in New York, to abandon proceedings ceases, and the duty to pay is absolute. Rhinebeck R. R., *In re*, 67 N. Y. 242. Mills Em. Dom. sec. 312; Lewis Em. Dom. sec. 532. In *New Jersey*, it is held that there is no power in the legislature to provide for the payment of an award for damages in anything but money, or to postpone the right of the land-owner to receive the same after the award becomes a finality. Butler *v.* Ravine R. Sewer Comm'rs, 39 N. J. L. 665 (1878).

[2] Stafford *v.* Albany, 7 Johns. (N. Y.) 541 (1811); s. c. 6 *Ib.* 1. Thus under the legislation of *Indiana*, which provides that if the city accepts the report of the commissioners it "shall direct the treasurer to tender to the owner the damages awarded by the commissioners," the city becomes liable for the damages when the report is accepted, and may be sued therefor. Lafayette *v.* Schultz, 44 Ind. 97 (1873), following Stafford *v.* Albany, *supra*, and Higgins *v.* Chicago, 18 Ill. 276, and Chicago *v.* Wheeler, 25 Ill. 478. See Garrison *v.* New York, 21 Wall. 196 (1874); Farnsworth *v.* Boston, 121 Mass. 173.

[3] See, *post*, chap. xxii.; *ante*, sec. 440. Also, State *v.* Wakely, 2 Nott & McCord (S. C.), 410 (1820); State *v.* Cockrell, 2 Rich. Law (S. C.), 6; Parks *v.* Boston, 8 Pick. (Mass.) 218 (1829); Preble *v.* Portland, 45 Me. 241 (1858); Stone *v.* Boston, 2 Met. (Mass.) 220; Pridgen *v.* Bannerman, 8 Jones (N. C.), 53; Baldwin *v.* Bangor, 36 Me. 518; Gay *v.* Bradstreet, 39 Me. 580; Dwight *v.* Springfield, 4 Gray (Mass.), 107 (1855); Kingman *v.* Plymouth Co. Comm'rs, 6 Cush. (Mass.) 306; French *v.* Springwells H. Comm'rs, 12 Mich. 267; Monterey *v.* Berkshire Co. Comm'rs, 7 Cush. (Mass.) 394; Intendant *v.* Chandler, 6 Ala. 899 (1844); Ruhlman *v.* Commonwealth, 5 Binn. (Pa.) 26; Tarlton, *In re*, 2 Ala. 35 (1841); Swan *v.* Cumberland, 8 Gill (Md.), 150 (1849); Camden *v.* Mulford, 2 Dutch. (N. J.) 49; Dorchester *v.* Wentworth, 11 Fost. (31 N. H.) 451; State *v.* Stewart, 5 Strob. (S. C.) Law, 29; State *v.* Swift, 1 Hill (S. C.), 360; Myers *v.* Simms, 4 Iowa, 500; McCrory *v.* Griswold, 7 Iowa, 248; Spray *v.* Thompson, 9 Iowa, 40; Campau *v.* Detroit, 14 Mich. 276 (1866); Duffield *v.* Detroit, 15 Mich. 474. As to function of appeal and *certiorari*. People *v.* Brighton, 20 Mich. 57; *post*, secs. 925–929.

So in *Vermont*, it is held that the proceedings by the county court to lay out roads are not by the course of the common law, and can only be revised upon *certiorari*, or by writ of *mandamus* in the nature of a *procedendo*. Adams *v.* Newfane, 8 Vt. 271; Lyman *v.* Burlington, 22 Vt. 131; Woodstock *v.* Gallup, 28 Vt. (2 Wms.) 587 (1856), where *Redfield*, C. J., very fully considers the proper office of writs of *certiorari* and *mandamus* in the nature of a *procedendo*. The latter was deemed the more appropriate remedy where the inferior tribunal disposed of the case upon an incidental question, and not upon the merits. See Rand *v.* Townsend, 26 Vt. 670. When remedy of abutter is by *certiorari*, and when in equity. See, further, Whiting *v.* Boston, 106 Mass. 89; Jones *v.* Boston, 104 Mass. 461; *post*, secs. 906–924. It is held in *New York* (People *v.* New York, 2 Hill (N. Y.), 9, (1841), and *Ohio* (Dixon *v.* Cincinnati, 14 Ohio, 240, 1846), that *certiorari* will not lie in such cases unless given by statute, but the cases above referred to will show that the opposite opinion has been very generally adopted. See People *v.* Stilwell, 19 N. Y. 531. Office of *certiorari*, in such cases. Mills Em. Dom. sec. 333. *Post*, chap. xxii. Review of proceedings and mode thereof. Lewis Em. Dom. chap. xxii. *Post*, secs. 925–927, and cases

[1] Ewing *v.* St. Louis, 5 Wall. 413 (1866); Hannewinkle *v.* Georgetown, 15 Wall. 547 (1872); Marsh *v.* Brooklyn, 59 N. Y. 280 (1874); Hatch *v.* Buffalo, 38 N. Y. 276; Guest *v.* Brooklyn, 69 N. Y. 506 (1877). In case first cited, the city of St. Louis had condemned a portion of the complainant's property for a street, and assessed benefits and damages, and rendered judgment accordingly. The complainant filed a bill in the United States Circuit Court to enjoin the enforcement of the judgment, and also to obtain compensation for the property appropriated for the street. The bill set forth various grounds of alleged illegality in the proceedings, and a demurrer thereto was sustained. "Of these grounds for relief, the principal are," says Mr. Justice

regarded as the well-established general doctrine, the Supreme Court of the United States has held that the Federal Circuit Courts, sitting in equity, will not interfere, by injunction or otherwise, with the proceedings and determinations of the municipal authorities in exercising the power to open streets, unless it becomes necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be proved by extrinsic evidence. There must be some recognized ground of chancery jurisdiction, or equity will not interfere. If the proceedings are void, and do not cast a cloud upon the owner's title, he must resort to the ordinary legal remedies. If the municipal authorities have failed to follow the provisions of the charter, or have exceeded the jurisdiction which it confers, the remedy of the land-owner for the review and correction of the proceedings is by *certiorari*, and not by bill in equity.[1]