§ 799 (638). **Power to improve Streets construed.** — Under power to improve "any street," the city council is *not required* to improve *the entire length* of the street or none; it may improve part, and confine the assessment to the lots adjoining the part improved.[1] Where the widening of a street is sought to be made by sections instead of its entire length, the commissioners appointed to assess the benefits of a particular section may properly confine their assess-

lessee for a long term of years, and not the owner of the fee, was the "proprietor" or "owner" to assent to, or petition for, the paving of streets. Holland *v.* Baltimore, 11 Md. 186 (1857). Tenant in dower in actual possession is an "owner" within the meaning of the charter requiring "owners" of lots to build sidewalks in front thereof. White *v.* Nashville, 2 Swan (Tenn.), 364 (1852). Power to pave at the expense of the adjacent owner, being limited and special, must be exercised strictly according to law. Henderson *v.* Baltimore, 8 Md. 352 (1855); *supra*, secs. 763–765.

As to right to *relief in equity* against illegal taxes and assessments, see chap. xxii. *post*, secs. 906–924.

[1] Scoville *v.* Cleveland, 1 Ohio St. 133, approved and applied in No. Ind. R. R. Co. *v.* Connelly, 10 Ohio St. 159–163; s. p. Creighton *v.* Scott, 14 Ohio St. 438; Craycraft *v.* Selvage, 10 Bush (Ky.), 696 (1874). See, also, St. Louis *v.* Clemens, 36 Mo. 467; Lafayette *v.* Fowler, 34 Ind. 140. Compare Chestnut Av., *In re*, 68 Pa. St. 81; Alameda Macadamizing Co. *v.* Williams, 70 Cal. 534; People *v.* Hyde Park, 117 Ill. 462.

A town was empowered, "when requested in writing by the owners of two-thirds of the property on any street, or *part* thereof, to cause the same to be graded, and to levy the expense on the property bounding on such street," &c. Under this charter the Court of Appeals of *Maryland* decided that "the assent of the owners of two-thirds of the property on the whole line of the street to be improved was a prerequisite to the exercise of the authority conferred upon the corporation. If a *art* only is to be improved, the charter enables the corporation to grant an application made for that object by the owners of two-thirds of the property lying on that part, by an ordinance directing that particular part of the street to be improved. They can only order the *whole* street to be improved by an application from two-thirds of the property owners on the whole street." And it was held that where the town, on a petition of the owners of two-thirds of the property lying upon a *part* only of the street, improved the *whole* street, its action was unauthorized, and that it could not enforce the collection of the expenses of such improvement from the adjoining property owners. Swann *v.* Cumberland, 8 Gill (Md.), 150 (1849). May order sidewalk upon one side only. State *v.* Portage, 12 Wis. 562. Lot-owner opposite a public common held, upon construction of the statutes, to be liable for the expense of grading and paving the *whole*, and not simply half, of the street in front of his lot. McGonigle *v.* Allegheny, 44 Pa. St. 118 (1862). The city may grade and improve *less than the whole width*. Morrison *v.* Hershire, 32 Iowa, 271 (1871); *ante*, sec. 322, note. Under the charter of St. Louis it was held that special assessments or taxes for street improvements could not be enforced until the entire contract was completed, for the reason that the grading of a single lot or block, instead of the whole work, might be an injury rather than a benefit. St. Louis *v.* Clemens, 49 Mo. 552 (1872). See Neenan *v.* Smith, 60 Mo. 292 (1875). The property owner cannot refuse to pay because the paving does not extend to the sidewalk, the city being the judges as to how far it is necessary to pave. Moran *v.* Lindell, 52 Mo. 229 (1873). Right to join in a single assessment the expense of constructing sidewalks in different streets denied. Arnold *v.* Cambridge, 106 Mass. 352; but see Cuming *v.* Grand Rapids, 46 Mich. 150.

ment of benefits to lots situated upon that part of the street embraced in such particular section of the proposed improvement, and their action in this respect was, under the legislation involved, held to be conclusive as to the limits of the property which was specially benefited.[1]

§ 800 (639). **Assent of Abutters, when required, is jurisdictional.** — Where the *power* to pave or to improve depends upon *the assent or petition of a given number or proportion* of the proprietors to be affected, this fact is jurisdictional, and the finding of the city authorities or council that the requisite number had assented or petitioned is not, in the absence of legislative provision to that effect, conclusive; the want of such assent makes the whole proceeding void, and the non-assent may be shown as a defence to an action to collect the assessment,[2] or may, it has been held, be made the basis for a bill in

[1] Bigelow *v.* Chicago, 90 Ill. 49; Lake *v.* Decatur, 91 Ill. 596, distinguishing Chicago *v.* Baer, 41 Ill. 306; Scammon *v.* Chicago, 42 Ill. 192, and Parmelee *v.* Chicago, 60 Ill. 267.

[2] Henderson *v.* Baltimore, 8 Md. 352 (1855); Carron *v.* Martin, 26 N. J. L. 594 (1857); Camden *v.* Mulford, 26 N. J. L. 49 (1856); State *v.* Elizabeth, 30 N. J. L. 176 (1862); State *v.* Newark, 37 N. J. L. 415, reversing s. c. 35 N. J. L. 168; Sharp, *In re*, 56 N. Y. 257 (1874); s. c. 15 Am. Rep. 415; Sharp *v.* Johnson, 4 Hill (N. Y.), 92; Miller *v.* Mobile (injunction), 47 Ala. 163 (1872); s. c. 11 Am. Rep. 768; People *v.* Brooklyn (*certiorari*), 71 N. Y. 495 (1877); Boyle *v.* Brooklyn (bill to vacate assessment as a cloud on title), 71 N. Y. 1 (1877); *ante*, sec. 291, note; Bouldin *v.* Baltimore, 15 Md. 18 (1859); Holland *v.* Baltimore, 11 Md. 186 (1857); Kyle *v.* Malin, 8 Ind. 34; Ely *v.* Morgan Co. Comm'rs, 112 Ind. 361; Forsyth *v.* Kreuter, 100 Ind. 27; State *v.* Orange, 32 N. J. L. 49; State *v.* Hand, 31 N. J. L. 547; Baltimore *v.* Eschbach, 18 Md. 276 (1861); Wells *v.* Burnham, 20 Wis. 112 (1865); State *v.* Nelson, 57 Wis. 147; Covington *v.* Casey, 3 Bush, 698; Burnett *v.* Sacramento, 12 Cal. 76; Lexington *v.* Headley, 5 Bush, 508; McGuinn *v.* Peri, 16 La. An. 326 (1861); Daniel *v.* New Orleans, 26 La. An. 1 (1874); Welsford *v.* Weidlein, 23 Kan. 601, citing text; Shaffer *v.* Weech, 34 Kan. 595; People *v.* Rochester, 21 Barb. 656; Royal Street, *In re*, 16 La. An. 393; Litchfield *v.* Vernon, 41 N. Y. 123 (1869), distinguished; Kiernan, *In re*, 62 N. Y. 457 (1875); Louisville *v.* Hyatt, 2 B. Mon. 177 (1841); St. Louis *v.* Clemens, 36 Mo. 467 (1865); Jefferson Co. *v.* Cowan, 54 Mo. 234; Zimmerman *v.* Snouden, 88 Mo. 218; McKee *v.* Brown, 23 La. An. 306; Delphi *v.* Evans, 36 Ind. 90; Moberry *v.* Jeffersonville, 38 Ind. 198 (1871); Henry *v.* Thomas, 119 Mass. 583; Turrill *v.* Grattan, 52 Cal. 97; Mulligan *v.* Smith, 59 Cal. 206; Hager *v.* Burlington, 42 Iowa, 661; Richman *v.* Muscatine Co. Sup., 70 Iowa, 627; James *v.* Pine Bluff, 49 Ark. 199. See *ante*, chap. xiv. secs. 480–482; Pittsburgh *v.* Walter, 69 Pa. St. 365 (1871). This case holds that where the right of the city to collect the assessment is put in issue by a general denial, the *onus* is on the city to prove everything necessary to support the assessment, including the fact of the application by the requisite number of lot-owners, as such application is jurisdictional. *Ante*, sec. 458, and note. Same point as to *opening* streets. Zeigler *v.* Hopkins, 117 U. S. 683 (1885), noted *ante*, sec. 605, note. Lewis Em. Dom. chap. xiv. secs. 342–362, is devoted to the consideration of the *Petition*, its necessity and requisites, and the numerous cases on this subject are industriously collected. Mills Em. Dom. chap. xxiv. The legislature may

equity to restrain a sale of the owners' property to pay it.[1] Accordingly, where a charter provided that "the city council should have full power to procure all streets to be improved in any manner they may deem advisable, at the expense of the property owners; and that a petition in writing to the council of the owners of the larger part of the ground between the points to be improved should be

confer on a city power to improve its streets at the cost of the property owners without requiring a petition therefor. Dennison *v.* Kansas City, 95 Mo. 416; Farrar *v.* St. Louis, 80 Mo. 379.

Under the Municipal Act of *Canada* it is provided that local improvements of a certain character "shall not be undertaken by the council of any city, except under a by-law passed in pursuance of the fourth sub-section of the preceding section, otherwise than on the petition of two-thirds in number and one-half in value of real property to be directly benefited thereby, of the owners of such real property, — the number of such owners and the value of such real property having been *first ascertained and finally determined* in the manner and by the means provided by by-law in that behalf." Harr. Munic. Man. (2d ed.) 244. It will be observed that the number of the owners as well as the value of the real property is to be first ascertained and finally determined in the manner and by the means provided by by-law in that behalf. The court in one case refused to entertain an application to set aside a by-law for local improvements, on the ground that the petition on which the by-law was based was not signed by three-fourths in number, and one-half in value of the owners of real property to be benefited by the local improvement, contrary to the determination of the officer of the corporation in that behalf. *In re* Michie and the Corporation of Toronto, 11 Up. Can. C. P. 379.

Where the power to make a local improvement is dependent upon a petition in writing of a majority of the owners of land fronting on the improvement, one who signs such a petition, making therein no representations that the signers constitute a majority, is not estopped to deny that the required number did not sign, or to question the validity of the assessment. Sharp, *In re*, 56 N. Y. 257 (1874), questioning Burlington *v.* Gilbert, 31 Iowa, 356, and commenting on People *v.* Goodwin, 5 N. Y. 568 and Kellogg *v.* Ely, 15 Ohio St. 64.

[1] In Holland *v.* Baltimore, 11 Md. 186 (1857), the city was authorized to pave streets when the proprietors of the *majority* of the feet of ground fronting on any street should apply, in writing, therefor. Supposing that a majority of the proprietors had united in the application, a supposition which afterwards turned out not to be true, in consequence of one of the signers not being, in law, a proprietor, the city paved a certain street, and, among others, paved in front of the plaintiff's lot, he not having signed the application. After the work had been done, the city sought to enforce the collection of the amount. Plaintiff applied for an injunction to restrain the sale of his lot to pay the assessment. The Court of Appeals held: 1. That if the requisite majority of owners did not apply, the whole proceedings were null and void. 2. That a non-assenting owner might (notwithstanding he did not apply for the writ until after the work was done) have an injunction to prevent the sale of his property to pay the unauthorized assessment. S. P. Bouldin *v.* Baltimore, 15 Md. 18; Miller *v.* Mobile, 47 Ala. 163 (1872); S. C. 11 Am. Rep. 768. As to *estoppel* by joining in a petition for the improvement: Burlington *v.* Gilbert, 31 Iowa, 356, but *quære;* S. C. 7 Am. Rep. 143. The case is denied to be correct in Sharp, *In re*, 56 N. Y. 257 (1874); 15 Am. Rep. 415. See, however, as to estoppel, State *v.* Hudson, 34 N. J. L. 531; Quinn *v.* Paterson, 27 N. J. L. 35; State *v.* Burlington, 45 Iowa, 87 (1876); Johnson *v.* Allen, 62 Ind. 57; Keese *v.* Denver, 10 Col. 112, citing text; Tone *v.* Columbus, 39 Ohio St. 281, where the authorities are reviewed. See, also, Columbus *v.* Sohl, 44 Ohio St. 479.

sufficient to authorize the council to contract for such improvements: provided, further, that the council, by a vote of all the members elect, may cause such improvements to be made without petition or consent," it was held that an ordinance authorizing such work, not enacted at the instance of the property holders, nor on the unanimous vote of the council, was insufficient to fix the liability of the lot-owners.[1] A proviso in a paving contract made with the city, requiring the contractor to obtain the written consent of the owners of the property fronting or abutting upon the said sidewalks to the laying down of the said pavement, was held, in view of other special provisions of the contract, to have reference to the kind of materials to be used, and not to the execution of the work itself.[2]

§ 801 (640). **Same subject.** — So, where a statute enacted that "no contract should be made by the head of any department for work or materials for the city, unless for objects authorized by the city council," and the council authorized a department to contract for paving, with the condition that the *contractor be selected by a majority* of the owners of the front to be paved, and who were to pay the cost of the improvement, it was held that a selection of the contractor by a majority of the lot-owners was essential to their liability to the contractor to pay for the paving, and that the city, by adopting the work of a paver not thus chosen, could not oblige the lot-owners to pay for it.[3]

[1] Covington *v.* Casey, 3 Bush, 698; *ante*, sec. 247; Tallant *v.* Burlington, 39 Iowa, 543 (1874). See Merrill *v.* Abbott, 62 Ind. 549; Smith *v.* Duncan, 77 Ind. 92. The legislature may make the determination of the council that the requisite number of owners has signed the petition, "final and conclusive," in which case the decision of the council, in the absence of fraud, is not subject to judicial examination. Kiernan, *In re*, 62 N. Y. 457 (1875); Dolan *v.* New York, *Ib.* 472.

[2] Hitchcock *v.* Galveston, 96 U. S. 341 (1877).

The power of a city council in the matter of street improvements is a *specially delegated authority*, and the acts of the city government thereunder are legal only when in *strict conformity* with its directions. State *v.* Passaic, 41 N. J. L. 90; Brophy *v.* Landman, 28 Ohio St. 542 (1876); Perrine *v.* Farr, 22 N. J. L. 356; Merrill *v.* Abbott, 62 Ind. 549; Carron *v.* Martin, 26 N. J. L. 594; State *v.* Hudson, 29 N. J. L. 104.

[3] Reilly *v.* Philadelphia, 60 Pa. St. 467; distinguished from Philadelphia *v.* Wistar, 35 Pa. St. 427, and City *v.* Burgin, 50 Pa. St. 539. See Brophy *v.* Landman, 28 Ohio St. 542 (1876); Leach *v.* Cargill, 60 Mo. 316 (1875).

An *agreement or combination among parties petitioning* for the improvement of a street, by which a few individuals, desirous of causing the improvement to be made, procure the signatures of others to the petition by paying, or agreeing to pay, a consideration therefor, either directly or indirectly, is a fraud on the law, and contrary to public policy. Maguire *v.* Smock, 42 Ind. 1 (1873). Until the city authorities act on the application of real-estate owners to have a street improved, any one of the applicants *may revoke his action;* and if this reduces the number to less than that required by the

§ 802 (641). **Same subject.** — By one section of the organic law of a city it was authorized, on the *petition of two-thirds* of the owners of the abutting property, to make improvement of its streets; by a subsequent section, power was conferred upon the council to order such improvement by a *two-thirds vote of the council.* It was held that although proceedings relative to the improvement were commenced by petition from the property holders, yet, having been ordered by a two-thirds vote of the council, they are valid, although two-thirds of the property owners may not have united in the petition for the improvement, — the two-thirds vote of council made the proceedings valid, notwithstanding any defect in the prior proceedings of the petitioners.[1]

§ 802 *a.* **Power of the Legislature to dispense with Notice to Property Owner of Local Assessments.** — There is much discrepancy of judicial judgment as to how far, or in what cases, *notice to the abutter or property owner of proceedings for the assessment of benefits* to pay for local improvements can be legislatively dispensed with, or in other words whether such benefits can be directly determined by the legislature, or *ex parte,* by commissioners or agencies appointed or authorized by it. The question is connected with the duty of apportioning the charge on the basis of equality, elsewhere discussed, and is influenced by the nature of the particular improvement, and the views of the courts in respect of the validity of assessments based upon frontage, value, or superficial area.[2] But wherever the principle is adopted that assessments for local improvements can be

charter, the power to make such improvements is thereby taken away; if the city has entered into a contract to have the work done, it is too late for the property owner to revoke his consent. Irwin *v.* Mobile, 57 Ala. 6.

Where a statute relating to local improvements, to be made by special assessment, requires the passage of an ordinance "specifying therein the nature, character, locality, and description of such improvement," an assessment made under an ordinance, which does not conform to such requirements, is void. Kankakee *v.* Potter, 119 Ill. 327 (lowering a sewer); Sterling *v.* Galt, 117 Ill. 11 (constructing sewer); Levy *v.* Chicago, 113 Ill. 650 (paving and curbing); Hyde Park *v.* Spencer, 118 Ill. 446 (drainage).

[1] Indianapolis *v.* Mansur, 15 Ind. 112 (1860).

In a case under the General Incorporation Act of that State (see *ante,* sec. 41, note), it is held that the council of a city may, by a two-thirds vote, without any petition, cause the grade of a street which has been improved, — such improvements having been paid for by the owners of the property bordering on such street, and is in good repair, — to be changed, and the street as so changed to be improved, and may pay the damages occasioned by the change out of the general revenue of the city, and assess the expense of the improvement against the owners of the adjoining property, or cause such expense to be paid out of such general revenue. Lafayette *v.* Fowler, 34 Ind. 140; *supra,* sec. 752, note, sec. 780, fraudulent petition; *ante,* sec. 457, and note.

[2] *Ante,* sec. 761.

justified only to the extent of *special benefits actually received,* and must be apportioned accordingly, or wherever the apportionment or its basis has not been fixed by the legislature, although within its competency to do so, in either case, the question of the existence and extent of benefits becomes in its nature judicial (and not merely administrative), in such a sense that the property owner is entitled to a hearing, or to notice or an opportunity to be heard, although the kind of notice and the mode of giving it are matters of legislative discretion and regulation.[1]

[1] Washington Av., *In re,* 69 Pa. St. 352; Tide Water Co. *v.* Coster, 18 N. J. Eq. 518; Scott *v.* Philadelphia, 81 Pa. St. 80; Craig *v.* Philadelphia, 89 Pa. St. 269; 1 Hare Am. Const. Law, 305, 312–317; *infra,* secs. 803, 804, and cases cited. Stuart *v.* Palmer, 74 N. Y. 183. In this case an act empowering three persons to open and pave an avenue, and for the purpose "to take such land as was requisite, estimate the value thereof, and assess the amount on the lands benefited by the opening of the avenue in proportion to the benefits," but which provided for no notice to the property owner, was held unconstitutional and the proceedings invalid. Notice in some form was essential, and here the legislature had not provided for notice in any form. After the decision in Stuart *v.* Palmer, *supra,* the legislature, in 1881, passed an act directing a sum equal to so much of the first assessment as had not been paid, with interest, and a proportionate part of the expenses of that assessment, to be assessed upon and equitably apportioned among the lots upon which the former assessment had not been paid, first giving notice to all parties interested to appear and be heard upon the question of apportionment of this sum among these lots. But no notice or hearing was provided as to any apportionment between them and those lots upon which the first assessment had been paid. The Court of Appeals sustained the act of 1881. Spencer *v.* Merchant, 100 N. Y. 585 (1885). It held that the act of 1881 did not unconstitutionally deprive the parties of their property "without due process of law," contrary to art. i., sec. 7, of the Constitution of the State. The act of 1881 was regarded by the Court of Appeals as in effect a new assessment, fixing the amount of tax to be raised for the local improvement, the property to be assessed therefor, and the mode of apportionment, all of which the legislature in New York had the power to do, which power was not in that State subject to any special constitutional limitations or to judicial review; reaffirming Litchfield *v.* Vernon, 41 N. Y. 123, 141; People *v.* Brooklyn, 4 N. Y. 427; People *v.* Flagg, 46 N. Y. 405; Horn *v.* New Lots, 83 N. Y. 100. This judgment was taken to the Supreme Court of the United States, which decided that the act of 1881 did not deprive the parties thereby affected of their property without due process of law, in violation of the Fourteenth Amendment. Spencer *v.* Merchant, 125 U. S. 345 (1887). *Matthews* and *Harlan,* JJ., dissented on the ground that the decision of the Court of Appeals in Stuart *v.* Palmer was right, and that it was impossible to reconcile its subsequent decision in Spencer *v.* Merchant, *supra,* with it; and that it was an evasion to say that the act of 1881 was an original assessment upon a district created by law for that purpose, consisting of the lands adjudged by the legislature to be benefited by the improvement. *Supra,* sec. 760 *b.* Stuart *v.* Palmer, followed in Garvin *v.* Daussman, 114 Ind. 429 (1887), and see cases cited.

Opening streets and assessments of damages and benefits in respect thereof involve both the power of eminent domain and of taxation. The conflicting authorities on the *subject of notice* are collected by Lewis Em. Dom. chap. xv. secs. 363-385, and by Mills Em. Dom. chap. xi. secs. 94–104. In some of the States it is held that the property owner is not constitutionally entitled to notice in regard to the formation

§ 803 (642). **When Notice to Abutter is necessary.** — It depends upon the provisions of the special charter or legislative act whether or not *notice to the abutter* or proprietor is required in order to make him liable to pay the expense or cost of the local improvement, and in what manner it shall be given. It is sometimes a condition precedent to the authority to make the assessment, and sometimes not. The cases in the notes will illustrate the views of the courts under various enactments.[1]

of the tribunal, it being sufficient that he is given an opportunity by the act to be heard when the tribunal is constituted. In other States the contrary is held. *Supra*, sec. 754, note; Lewis Em. Dom. sec. 366, and cases.

[1] Owners are not bound to repair or improve the street unless the charter provisions as to notice, and other matters for the owners' benefit, are complied with; if not complied with the owners are not liable either on contract or *quantum meruit*. Cowen *v.* West Troy, 43 Barb. 48; Brewster *v.* Newark, 3 Stockt. 11 N. J. Eq. 114; State *v.* Hudson, 29 N. J. L. 475, reversing s. c. *Ib.* 104; State *v.* Perth Amboy, 29 N. J. L. 259; Hewes *v.* Reis, 40 Cal. 255. See, also, Myrick *v.* La Crosse, 17 Wis. 442; Rathbun *v.* Acker, 18 Barb. 393; Risley *v.* St. Louis, 34 Mo. 404; Palmyra *v.* Morton, 25 Mo. 593; Washington *v.* Nashville, 1 Swan (Tenn.), 177; White *v.* Same, 2 Swan (Tenn.), 364, Ottawa *v.* Chicago & R. I. R. R. Co., 25 Ill. 43; Jenks *v.* Chicago, 48 Ill. 296; Himmelman *v.* Oliver, 34 Cal. 246; Reis *v.* Graff, 51 Cal. 86; Merritt *v.* Portchester, 71 N. Y. 309; Remsen *v.* Wheeler, 105 N. Y. 573; Starr *v.* Burlington, 45 Iowa, 87. No assessments should be made without notice to the taxpayers. Lehrman *v.* Robinson, 59 Ala. 219; Philadelphia *v.* Miller, 49 Pa. St. 40; Darling *v.* Gunn, 50 Ill. 424; Butler *v.* Saginaw Co. Sup., 26 Mich. 22; Cleghorn *v.* Postlethwaite, 43 Ill. 428. Barker *v.* Omaha, 16 Neb. 269; Lent *v.* Tillson, 72 Cal. 404. An act authorizing street improvements without providing for notice of the proceedings to persons to be assessed, is unconstitutional. Boorman *v.* Santa Barbara, 65 Cal. 313. A law imposing an assessment for a local improvement, without notice to and a hearing (or an opportunity to be heard) on the part of the owner of the *property* assessed, has the effect to deprive him of his *property* without "due process of law," and is unconstitutional. An act which provides for assessing the expenses of regulating and grading a street without notice of *any kind* to the property owner, is unconstitutional, and an assessment thereunder is void. The owner must have notice of the assessment. Stuart *v.* Palmer, 74 N. Y. 183 (1878). See cases in last preceding note.

Notice held not essential to authority to make assessment. Finnell *v.* Kates, 19 Ohio St. 405, distinguished from Welker *v.* Potter, 18 Ohio St. 85; Galveston *v.* Heard, 54 Tex. 420. *Requisites of notice* to abutter to make local improvement. State *v.* Elizabeth, 32 N. J. L. 357; State *v.* Jersey City, 35 N. J. L. 404; Tufts *v.* Charlestown, 98 Mass. 583; Ottawa *v.* Macey, 20 Ill. 413; Simmons *v.* Gardner, 6 R. I. 255; Baltimore *v.* Bouldin, 23 Md. 328 (1865). Notice to "repave" is not sufficient where the assessment is for "paving," the work being different; as to converse, *quære*. State *v.* Jersey City, 27 N. J. L. 538 (1859); State *v.* Newark, 35 N. J. L. 171. Notice of *assessment*. Lowell *v.* Wentworth, 6 Cush. 221; Williams *v.* Detroit, 2 Mich. 560 (1861); Nashville *v.* Weiser, 54 Ill. 245 (1870); Butler *v.* Chicago, 56 Ill. 341 (1870); Ford, *In re*, 6 Lansing (N. Y.), 92 (1872). Notice of *confirmation* of report of commissioners. State *v.* Jersey City, 27 N. J. L. 536. Under the charter of St. Paul, such notice held essential and jurisdictional. Sewall *v.* St. Paul, 20 Minn. 511 (1874), where the subject is fully discussed by *McMillan*, C. J. Merritt *v.* Portchester, 71 N. Y. 309 (1877). Notice of time and place of hearing *objections* to proposed improvement. State *v.* Jersey City, 26 N. J. L. 444; State *v.* Jersey City, 25 N. J. L. 309; State *v.* Jersey City, 24 N. J. L. 662; State *v.* Newark, 25 N. J. L. 399; State *v.* Elizabeth, 31 N. J. L. 547. Waiver of such objections. State *v.* Jersey City, 26 N. J. L. 444; 29 *Ib.* 259; *ante*, sec. 606, note; State *v.* Paterson, 36 N. J. L. 159. An ordinance directing the city engineer to *make repairs upon streets* at the expense of the adjacent owners, without previously notifying them, held not unconstitutional, on the ground that the liability of the city for injuries to individuals by known defects requires that such defects shall be corrected without delay; and because the owner when sued upon the special tax-bill may have his day in court and make his defence. Kansas City *v.* Huling, 87 Mo. 203.

[1] *Ante*, Chapter on Eminent Domain, sec. 606; Hewes *v.* Reis, 40 Cal. 255.

[2] State *v.* Jersey City, 24 N. J. L. 662 (1855); State *v.* Plainfield, 38 N. J. L. 95; *ante*, sec. 606; State *v.* Pat. Av. R. Comm'rs, 41 N. J. L. 83; Vantilburgh *v.* Shann, 24 N. J. L. 740; State *v.* Trenton, 36 N. J. L. 499.

[3] Dubuque *v.* Wooten, 28 Iowa, 571 (1870); Burmeister, *In re*, 56 How. Pr. 416.

[4] Palmyra *v.* Morton, 25 Mo. 593, 597 (1857).

As to *notice and mode of giving the same*, by publication or otherwise, see Simmons *v.* Gardner, 6 R. I. 255; Scammon *v.* Chicago, 40 Ill. 146; Risley *v.* St. Louis, 34 Mo. 404; Hildreth *v.* Lowell (sewer), 11 Gray (Mass.), 345; Williams *v.* Detroit, 2 Mich. 560 (1861); State *v.* Elizabeth, 30 N. J. L. 365; Durant *v.* Jersey City, 25 N. J. L. 309; State *v.* Jersey City, 24 N. J. L. 662, in which, on *certiorari*, it was held that where a municipal corporation exercises the power to make improvements, and assess the expenses thereof upon the lands benefited thereby, the owners of lands assessed for such improvements, if accessible by reasonable diligence, are entitled to reasonable notice of the meeting of the commissioners for assessing the expenses, and this although the charter is silent on the subject of notice. This principle has been repeatedly reaffirmed in *New Jersey*. Hudson Co. Freeh. *v.* State, 24 N. J. L. 718; State *v.* Jersey City, 34 N. J. L. 31, 39; State *v.* Plainfield, 38 N. J. L. 95; State *v.* Guttenberg, *Ib.* 419; Brewster *v.* Newark, 3 Stockton (11 N. J. Eq.), 114; State *v.* Bayonne, 35 N. J. L. (1877); *ante*, sec. 266, note.

§ 804 (643). **Same subject.** — If the legislature *has required notice* and prescribed *how it shall be given*, that mode must be pursued.[1] Where the statute provides for a notice by advertisement, or otherwise, a notice by publication is sufficient.[2] Where, by charter, a city is authorized to levy a special tax on lots for grading, &c., and "to collect the same under such regulations as may be prescribed *by ordinance*," and the ordinance passed in pursuance thereof provided that the resolution of the council levying such tax should be *published* in the official paper of the city, and that thereupon the tax should be due and payable, such publication is necessary to the validity of the tax, and without it the corporation cannot enforce the payment thereof.[3] The notice to proprietors to make a local improvement, if there be no charter provision to the contrary, may, it has been held in Missouri, be contained in an ordinance directing the work to be done, of which ordinance the proprietors are bound to take notice.[4] In a case in Connecticut, the charter of a city in effect provided that the council might order the adjoining "proprietor" to build a sidewalk, failing to do which, the city might build it at his expense, and the same should be a "lien upon the property

and foreclosed as a mortgage;" and it was held that a *prior mortgagee* of the lot-owner was not entitled to *notice* to build the sidewalk; that his interest in such a proceeding was necessarily connected with the interest of the mortgagor; and that he was liable to be foreclosed of his right to redeem unless he paid the expenses of making the sidewalk.[1] If proper notice is not given, *certiorari* lies to remove the record of the proceedings from before the city council into the proper court, where, if they are substantially defective, they will be quashed.[2]

§ 805 (644). **Drains and Sewers; Regulation of Use thereof.** — Authority to a municipal corporation, by its charter, to repair and keep in order its streets, is sufficient, without special grant, to authorize it to *construct drains and sewers;* and, when constructed, the corporation will incidentally possess the power to pass ordinances regulating their use and the price at which private persons may tap them, and also to protect them against injury or invasion.[3]

[1] Norwich *v.* Hubbard, 22 Conn. 587 (1853); Whiting *v.* New Haven, 45 Conn. 303. If an abutting owner fails to remove an unsafe sidewalk after due notice by the city to do so, the city may remove and rebuild it in its own way, and cannot be enjoined by such owner from removing it because the material for the new one is not at hand. Emporia *v.* Gilchrist, 37 Kan. 532.

[2] Ottawa *v.* Chicago & R. I. R. R. Co., 25 Ill. 43 (1860). Failure, after notice, to object to an assessment before the city council, when it has the power to revise and correct, or annul it and direct a new assessment, may be held in equity, when the party applies for an injunction to restrain the collection of the assessment, as a waiver of all irregularities in the exercise of the power. *Ib.;* State *v.* Paterson, 36 N. J. L. 159; *post*, secs. 924, note, 925, 929, note.

As to *waiver* of objections to validity of assessment. Nashville *v.* Weiser, 54 Ill. 245; Gardner *v.* Boston, 106 Mass. 549 Hopkins *v.* Mason, 61 Barb. 469; State *v.* Perth Amboy, 29 N. J. L. 259; State *v.* Paterson (knowledge and estoppel), 36 N. J. L. 159; State *v.* Jersey City, 26 N. J. L. 444; State *v.* Paterson, 40 N. J. L. 244, 250.

As to remedy by *certiorari* and injunction, see chapter on Remedies against Illegal Corporate Acts, *post*, sec. 906 *et seq.*

[3] Fisher *v.* Harrisburg, 2 Grant (Pa.) Cas. 291 (1854); Cone *v.* Hartford, 28 Conn. 363 (1859). Construction of power; right to change, &c. Mauch Chunk Bor. *v.* Shortz, 61 Pa. St. 399; Stroud *v.* Philadelphia, *Ib.* 255; State *v.* Jersey City, 30 N. J. L. 148; State *v.* Jersey City, 29 N. J. L. 441; State *v.* Jersey City, 27 N. J. L. 493. A proprietor of adjoining lands does not by connecting his drain with a sewer waive the right to object to the validity of the local assessment to pay for the sewer. Watertown *v.* Fairbanks, 65 N. Y. 588 (1875). Including two distinct sewers in one construction contract held not illegal. Ingraham, *In re*, 64 N. Y. 310 (1876); *ante*, secs. 681, 687.

The municipality may also alter drains, or change its system of drainage, if the welfare and comfort of the inhabitants will be thereby enhanced, but it cannot exercise this power recklessly and in wanton disregard of private rights. Carondelet Canal & Nav. Co. *v.* New Orleans, 38 La. An. 308. Where an act of the legislature contemplates a plan of draining the territory embraced within the map therein referred to, by a main sewer running through certain streets in the said act designated, with such lateral sewers as the commissioners of sewers might deem necessary for the proper drainage of the said territory, the said commissioners have no right to abandon the single sewer, and adopt a plan substituting therefor two main sewers. State *v.* Chamberlain, 37 N. J. L. 51.

§ 806 (645). **Same subject. Contribution to Expense of making.** — It has been decided, in Massachusetts, that authority to make needful and salutary by-laws or perhaps authority to make regulations for the public health, will, in the absence of more specific power, authorize a city to construct a *common sewer*, and to subject the owners of the lots or land abutting, and who use the sewer, to contribute for the expenditure. But this contribution must be apportioned equally and fairly, or it cannot be recovered by the city, either by virtue of the ordinance which imposes it, or on an *indebitatus* count in the absence of express promise. The apportionment should be made upon the value of the *land, independently of the buildings,* and should be settled at the time of the transaction; and an ordinance contravening these principles and requiring every person connecting with the common sewer to pay his just proportion of the expense of making the sewer, having reference always to the last valuation of such person's estate in the assessor's books, previous to the expenditure, is void for inequality and unreasonableness.[1]

[1] Boston *v.* Shaw, 1 Met. (Mass.) 130 (1840). After this decision the legislature of *Massachusetts* passed an act (Stat. 1841, ch. cxv. Gen. Stats. 1860, p. 254, sec. 4) giving general authority to cities to construct drains or common sewers, and providing "that every person who enters his particular drain into the main drain or common sewer, or who, by more *remote* means, receives a benefit thereby for draining his cellar or land, shall pay to the city or town his proportional part of the charge of making or repairing the same," &c. A by-law apportioning the assessment for building a drain according to the value of the lands benefited, independently of improvements thereon, was held valid; and the "remote benefit" spoken of by the statute was considered to "mean the increased value given to vacant and unimproved lots by this *privilege* of letting in drains from them in case buildings should subsequently be erected. An assessment upon the proprietors of land so situated that it is, or may be, benefited by the sewer is just and equal," although it is at the time vacant territory. The proprietor of the land is liable to be charged, "although he never actually uses the drain; perhaps not, if there is no prospect of the possibility of benefit." But it does not invalidate an assessment that the greater part of one lot assessed is lower than the bottom of the sewer, as it might, and probably would, be graded so as to receive as much benefit as other lots. Downer *v.* Boston, 7 Cush. 277 (1871); S. P., and affirming the validity of the act of 1841, above cited, see Wright *v.* Boston, 9 Cush. 233 (1852), and note reference to People, &c. *v.* Brooklyn, 6 Barb. 209, which was overruled, 4 N. Y. 419; Patton *v.* Springfield, 99 Mass. 627.

Sewer taxes apportioned upon the value of lots without the improvements upon them held valid. Mason *v.* Spencer, 35 Kan. 512; Snow *v.* Fitchburg, 136 Mass. 183; Gilmore *v.* Hentig, 33 Kan. 156. Where a sewer tax is to be borne by the adjacent property owners, it should be imposed only upon those individuals who can use the sewer, and in proportion to the benefit received from its construction. Gilmore *v.* Hentig, *supra;* see also Hentig *v.* Gilmore, 33 Kan. 234 (special tax for grading alleys).

§ 807 (646). **Same subject. Scope of Incidental Power.** — Where the *power to make sewers* was held to be derived as an incident to the power of repairing highways, the court expressed the opinion that the common council were not authorized to construct sewers for the mere private convenience or benefit of particular individuals; and that they could (under such circumstances) "be lawfully made only when the commodiousness of the highway for its proper purposes, and its safety and the healthfulness of the vicinity require them."[1]

§ 808 (647). **Same subject. Means of making Payment for Cost of Sewers.** — If there be no special constitutional limitation, the cost of making sewers for the public convenience may be directed by the legislature to be paid out of funds provided by general taxation, or to be assessed upon the abutters or the property specially benefited.[2]

§ 809. **Same subject. Mode of making Sewer Assessments.** — The legislation in this country, however, as to the *mode of making assessments to pay the expense of constructing sewers*, although the burden is usually cast, wholly or in part, on the abutting property, is various. As in other local assessments, so in the case of

[1] Cone *v.* Hartford, 28 Conn. 363, 375 (1859). In Hitchcock *v.* Galveston, 96 U. S. 341 (1877), the various provisions of the charter of the city are collated, and the effect of them stated to be to authorize the city itself to construct sidewalks; and though the cost of construction is to be defrayed by the abutting lot-owners, the city may collect from them the cost, and in case of the sale of any lot made to enforce the collection, the city must pay to the owner the surplus of any proceeds of sale remaining after payment of the amount due to it. The resort to the lot-owners is to be after the work has been done, after the expense has been incurred, and it is to be for reimbursement to the city.

"Laying out" of sewer defined; what property liable to assessment of benefits; defence to assessment because sewer is a nuisance. See Cone *v.* Hartford, *supra*. Where cities which had "established a system of sewerage" were invested by statute with power to levy a sewer tax, a city which had created a department having charge of sewers, and had accepted plans and estimates for the extension of existing sewers, was held to have established a sewerage system within the meaning of the statute: it is not necessary that such system shall extend to all parts of the city. St. Louis Bridge Co. *v.* Pecple, 125 Ill. 226.

[2] *Supra*, secs. 752, 753, 754, 755, 761; Stroud *v.* Philadelphia, 61 Pa. St. 255; Philadelphia *v.* Tryon, 35 Pa. St. 401; Williamsport *v.* Commonwealth, 84 Pa. St. 487 (1877); Hildreth *v.* Lowell, 11 Gray, 345; Wright *v.* Boston, 9 Cush. 233; State *v.* Jersey City, 29 N. J. L. 441; State *v.* Jersey City, 41 N. J. L. 489 (see State *v.* Elizabeth, 40 N. J. L. 274); Cone *v.* Hartford, 28 Conn. 363–374. An arbitrary rule apportioning cost according to frontage alone, disapproved. Clapp *v.* Hartford, 35 Conn. 66; State *v.* Hudson, 29 N. J. L. 104 (1860). See *ante*, sec. 761. A municipal corporation authorized to construct sewers cannot be restrained from the removal of a street railway from the street if that is necessary. Kirby *v.* Citizens' Ry. Co., 48 Md. 168.

sewers, the correct principle is that the assessment upon each parcel of contributing property shall be according to the special benefits which the particular parcel receives. Benefit, actual and probable, is the only foundation upon which an assessment can lawfully rest.[1]

The legislature has, within legislative limits, a discretion in providing the mode of ascertaining the benefits; but even in the absence of express constitutional restriction, its power is not unlimited.[2] This ascertainment may be made, and usually is, by a separate and *actual estimate* of special benefits.[3] But where the lots in a town or

[1] Wright *v.* Boston, 9 Cush. 233, 241, *per Shaw*, C. J.; Washington Av., *In re*, 69 Pa. St. 360; s. c. 9 Am. Rep. 255; Seeley *v.* Pittsburgh, 82 Pa. St. 360 (1877); s. c. 22 Am. Rep. 760; Lowden, *In re*, 89 N. Y. 548; Paterson *v.* Soc. for E. U. Manuf., 24 N. J. L. 385; Tide Water Co. *v.* Coster, 18 N. J. Eq. 519; State *v.* Newark, 37 N. J. L. 415 (1875); s. c. 18 Am. Rep. 729; *ante*, sec. 760 *a*. This is the leading case on the subject in *New Jersey*, the Court of Errors and Appeals having reversed the judgment of the Supreme Court in the s. c. reported in 35 N. J. L. 168. The opinion of *Beasley*, C. J., is marked with his accustomed force and clearness. Thomas *v.* Gain, 35 Mich. 155 (1876); s. c. 24 Am. Rep. 535. In the opinion of *Cooley*, C. J., in this case, will be found a most satisfactory discussion of the proper method of levying assessments for sewers. In Clay *v.* Grand Rapids, 60 Mich. 451, a city replaced an old timbered race, which had been covered over as the growth of the city required, and was used for the discharge of water, &c., needing an outlet, by a brick sewer, and made an assessment for its cost as "for the grading, levelling, repairing, amending, and gravelling of" a street. In an action to set aside the proceedings, whereby the city had sold adjoining land for the assessment, it was held that the improvement was the *building of a sewer*, and not the *repairing of a street*, and that its cost should have been provided for by a method of taxation appropriate to it, and not assessed upon merely a part of the property benefited by it.

As to the rights and duties of cities in *Massachusetts*, in making assessments for building sewers under the statute of that State, see Collins *v.* Holyoke, 146 Mass. 298 (1888); Dorey *v.* Boston, *Ib.* 336. As to *what interest in the use of a sewer* authorizes assessment, see Fairbanks *v.* Fitchburg, 132 Mass. 42; Brown *v.* Fitchburg, 128 Mass. 282; King *v.* Reed, 43 N. J. L. 186; Wewell *v.* Cincinnati, 45 Ohio St. 407.

[2] *Per Cooley*, C. J., in Thomas *v.* Gain, 35 Mich. 162. The act should provide for notice or means of knowledge at some stage of the proceeding before the charge is finally established. *Ib.* 164, and cases cited. *Ante*, sec. 761. Where a sewer, as originally constructed, created a nuisance, its continuation to a river was held to be a necessity which *justified a second assessment* upon the property previously assessed for its construction. Green *v.* Hotaling, 44 N. J. L. 347.

[3] Reeves *v.* Wood Co. Treas., 8 Ohio St. 333; Thomas *v.* Gain, *supra*, citing many cases to this point; Seeley *v.* Pittsburgh, *supra*.

In England, assessments for sewers are generally laid in proportion to benefits, estimated according to the yearly value of the lands in the sewer district. *Per Cooley*, C. J., in Thomas *v.* Gain, *supra*, where the English cases on the point are cited. An assessment by the value of the land, exclusive of buildings, was sustained in Brewer *v.* Springfield, 97 Mass. 152. A surface tax on a drainage district for the purpose of defraying the expense of running and maintaining engines which are part of a sewerage system, cannot be sustained as an assessment, because it is not graduated by the benefit imparted to the land to be assessed; nor can it be maintained under