CHAPTER XV.

THE EMINENT DOMAIN.

Every sovereignty possesses buildings, lands, and other property, which it holds for the use of its officers and agents, to enable them to perform their public functions. It may also have property from the rents, issues, and profits, or perhaps the sale, of which it is expected the State will derive a revenue. Such property constitutes the ordinary domain of the State. In respect to its use, enjoyment, and alienation, the same principles apply which govern the management and control of like property of individuals; and the State is in fact but an individual proprietor, whose title and rights are to be tested, regulated, and governed by the same rules that would have pertained to the ownership of the same property by any of its citizens. There are also cases in which property is peculiarly devoted to the general use and enjoyment of the individual citizens who compose the organized society, but the regulation and control of which are vested in the State by virtue of its sovereignty. The State may be the proprietor of this property, and retain it for the common use, as a means of contributing to the general health, comfort, or happiness of the people; but generally it is not strictly the owner, but rather the governing and supervisory trustee of the public rights in such property, vested with the power and charged with the duty of so regulating, protecting, and controlling them, as to secure to each citizen the privilege to make them available for his purposes, so far as may be consistent with an equal enjoyment by every other citizen of the same privilege. In some instances these rights are

1 In The Company of Free Fishers, &c. v. Gann, 20 C. B. 37s, 1, it was held that the ownership of the Crown in the bed of navigable waters is for the benefit of the subject, and cannot be used in any such manner as to deprive from or interfere with the right of navigation, which belongs by law to all the subjects of the realm. And that consequently the grantees of a particular portion, who occupied it for a fishery, could not be lawfully authorized to charge and collect anchorage dues from vessels anchoring therein. As regards public and exclusive rights of fishery in this country, see Carson v. Blazer, 2 Binn. 475, 4 Am. Dec. 465; Commonwealth v. Chapin, 5 Pick. 180, 16 Am. Dec. 386; Parker v. Millham Co., 20 Me. 333, 37 Am. Dec. 50; Parsons v. Clark, 76 Me. 476; Commonwealth v. Look, 108 Mass. 452; Cole v. Eastham, 133 Mass. 65; Packard v. Ryder, 114 Mass. 440, 11 N. E. 578; Sloan v. Biemiller, 34 Ohio St. 47; Lincoln v. Davis, 33 Mich. 375, 19 N. W. 103; Angel on Watercourses, § 55 a, and cases cited; Cooley on Torts, 388-390.
of such a nature, or the circumstances are such, that the most feasible mode of enabling every citizen to participate therein may seem to be for the State to transfer its control, wholly or partially, to individuals, either receiving by way of augmentation of the public revenues a compensation therefor, or securing in return a release to the citizens generally from some tax or charge which would have rested upon them in respect to such rights, had the State retained the usual control in its own hands, and borne the incidental burdens.

The rights of which we here speak are considered as pertaining to the State by virtue of an authority existing in every sovereignty, and which is called the eminent domain. Some of these are complete without any action on the part of the State; as is the case with the rights of navigation in its seas, lakes, and public rivers, the rights of fishery in public waters, and the right of the State to the precious metals which may be mined within its limits.\(^1\) Others only become complete and are rendered effectual through the State displacing, either partially or wholly, the rights of private ownership and control; and this it accomplishes either by contract with the owner, by accepting his gift, or by appropriating his property against his will through an exercise of its superior authority. Of these, the common highway furnishes an example; the public rights therein being acquired either by the grant or dedication of the owner of the land over which they run, or by a species of forcible dispossession when the public necessity demands the way, and the private owner will neither give nor sell it. All these rights rest upon a principle which in every sovereignty is essential to its existence and perpetuity, and which, so far as when called into action it excludes pre-existing individual rights, is sometimes spoken of as being based upon an implied reservation by the government when its citizens acquire property from it or under its protection.\(^a\)

And as there is not often occasion to speak of the eminent domain except in reference to those cases in which the government is called upon to appropriate property against the will of the owners, the right itself is generally defined as if it were restricted to such cases, and is said to be that superior right of property pertaining to the sovereignty by which the private property acquired by its citizens under its protection may be taken or its use controlled for

\(^1\) 1 Bl. Comm. 294; 3 Kent. 378, note. In California, it has been decided that a grant of public lands by the government carries with it to the grantee the title to all mines. Boggs v. Merced, &c. Co., 14 Cal. 279; Moore v. Smaw, 17 Cal. 199.

\(^a\) ["The right of eminent domain does not depend upon the Constitution, but exists independent of it, it is inherent in sovereignty." Stearns v. Barre, 73 Vt. 281, 50 Atl. 1056, 87 Am. St. 721.]

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the public benefit without regard to the wishes of its owners. More accurately, it is the rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand.  

When the existence of a particular power in the government is recognized on the ground of necessity, no delegation of the legislative power by the people can be held to vest authority in the department which holds it in trust, to bargain away such power, or

1 Vattel, c. 20, § 34; Byrniksheok, lib. 2, c. 15; Ang. on Watercourses, § 457; 2 Kent, 303-310; Redf. on Railw. c. 11, § 1; Waples, Pro. in Ten, § 212. "The right which belongs to the society or to the sovereign of disposing, in case of necessity, and for the public safety, of all the wealth contained in the State, is called the eminent domain." McKendry, J., in Pollard's Lessee v. Hagan, 3 How. 212, 223. "Notwithstanding the grant to individuals, the eminent domain, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property, in the manner directed by the constitution and laws of the State, whenever the public interest requires it. This right of resumption may be exercised, not only where the safety, but also where the interest, or even the expediency of the State is concerned: as where the land of the individual is wanted for a road, canal, or other public improvement." Walworth, Chancellor, in Breekman v. Santoga & Schenectady R. R. Co., 3 Paige, 43, 75, 22 Am. Dec. 679. The right is inherent in all governments, and requires no constitutional provision to give it force. Brown v. Bentley, 34 Miss. 227; Taylor v. Porter, 4 Hill, 140; Lake Shore & R. R. Co. v. Chicago, &c., R. R. Co., 97 Ill. 508, 2 Am. & Eng. R. R. Cas. 440; United States v. Jones, 109 U. S. 513, 3 Sup. Ct. Rep. 316. "Title to property is always held upon the implied condition that it must be surrendered to the government, either in whole or in part, when the public necessities, evidenced according to the established forms of law, demand." Hooper, J., in People v. Mayor, &c., of New York, 22 Barb. 102, 112. And see Heyward v. Mayor, &c., of New York, 7 N. Y. 314; Water Works Co. v. Burk- hard, 41 Ind. 304; Weir v. St. Paul, &c., R. R. Co., 18 Minn. 159. That one exercise of the power of appropriation will not preclude others for the same purpose, see Central Branch U. P. R. R. Co. v. Atchis- sor, &c., R. R. Co., 26 Kan. 669, 5 A. & E. R. R. Cas. 397, and cases in note; Peck v. Louisville, &c., Ry. Co., 101 Ind. 369; Dietrich v. Lincoln, &c., R. R. Co., 13 Neb. 361, 13 N. W. 621. But when a bridge company has once located its line of approach and begins work, it cannot change it without legislative authority. Matter of Poughkeepsie Bridge Co., 108 N. Y. 483, 15 N. E. 601. The constitutional prohibition against the taking of private property for public use without compensation is self-enforcing, and equity may enjoin the damaging of such property though the legislature has provided no method of determining compensation. Kansas City, St. J. & C. B. Ry. Co. v. Terminal Ry. Co., 97 Mo. 457, 10 S. W. 826, 3 L. R. A. 240; Hickman v. Kansas City, 120 Mo. 110, 25 S. W. 225, 22 L. R. A. 658, 41 Am. St. 684; Searle v. Lead, 10 S. D. 312, 73 N. W. 101, 39 L. R. A. 345. A taking under the police power is not in exercise of the power of eminent domain. State v. Schlemmer, 42 La. Ann. 1165, 8 So. 397, 10 L. R. A. 135. See Ruch v. City of New Orleans, 43 La. Ann. 275, 9 So. 473; Peart v. Meeker, 45 La. Ann. 421, 12 So. 490; Sweet v. Rechel, 37 Fed. Rep. 323; Id. 159 U. S. 529, 16 Sup. Ct. Rep. 43; State v. Griffin, 69 N. H. 1, 39 Atl. 260, 41 L. R. A. 177. So in case of destruction of mill and mill dam to avoid damage to highway and other property. Aitken v. Wells River, 50 Vt. 308, 40 Atl. 829, 67 Am. St. 672, 41 L. R. A. 566.]
to so tie up the hands of the government as to preclude its repeated exercise, as often and under such circumstances as the needs of the government may require. For if this were otherwise, the authority to make laws for the government and welfare of the State might be so exercised, in strict conformity with its constitution, as at length to preclude the State performing its ordinary and essential functions, and the agent chosen to govern the State might put an end to the State itself. It must follow that any legislative bargain in restraint of the complete, continuous, and repeated exercise of the right of eminent domain is unwarranted and void; and that provision of the Constitution of the United States which forbids the States violating the obligation of contracts could not be so construed as to render valid and effectual such a bargain, which originally was in excess of proper authority. (a) Upon this subject we shall content ourselves with referring in this place to what has been said in another connection.1

As under the peculiar American system the protection and regulation of private rights, privileges, and immunities in general belong to the State governments, and those governments are expected to make provision for the conveniences and necessities which are usually provided for their citizens through the exercise of the right of eminent domain, the right itself, it would seem, must pertain to those governments also, rather than to the government of the nation; and such has been the conclusion of the authorities. In the new Territories, however, where the government of the United States exercises sovereign authority, it possesses, as incident thereto, the right of eminent domain, which it may exercise directly or through the territorial governments; but this right passes from the nation to the newly formed State whenever the latter is admitted into the Union.2 So far, however,

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1 See ante, p. 396.
2 Pollard's Lessee v. Hagan, 3 How. 212; Goodtitle v. Kibbee, 9 How. 471; Doe v. Beebe, 13 How. 25; United States v. The Railroad Bridge Co., 6 McLean, 517; Weber v. Harbor Commissioners, 18 Wall. 57; Swan v. Williams, 2 Mich. 427; Warren v. St. Paul, &c. R. R. Co., 13 Minn. 381. [Article V. of the amendments to the Federal constitution providing among other things that private property shall not be taken for public use without just compensation is not applicable to a taking by a State or its authority, but is a limitation on the Federal Government only. Withers v. Buckley, 20 How. 84.] Although it has been held in some cases that the States have authority, under the eminent domain, to appropriate the property of individuals in order to donate it to the general government for national purposes: Reddall v. Bryan, 14 Md. 444; Gilmer v. Lime Point, 18 Cal. 229; Burt v. Merchants' Ins. Co., 106 Mass. 350, and Cummings v. Ash, 50 N. H. 501; [Lanecy v. King County, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817.] the contrary is now determined. See Trombley v. Auditor-General, 23 Mich. 471; Kohl v. United

(a) [Woodmere Cemetery v. Roulo, 104 Mich. 595 [599], 62 N. W. 1010; Lock Haven Bridge Co. v. Clinton County, 157 Pa. St. 379, 27 Atl. 726.]
as the general government may deem it important to appropriate lands or other property for its own purposes, and to enable it to perform its functions,—as must sometimes be necessary in the case of forts, light-houses, military posts or roads, and other conveniences and necessities of government,—the general government may still exercise the authority, as well within the States as within the territory under its exclusive jurisdiction, and its right to do so may be supported by the same reasons which support the right in any case; that is to say, the absolute necessity that the means in the government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties, or of any other authority.  

What Property is subject to the Right.

Every species of property which the public needs may require and which government cannot lawfully appropriate under any other right, is subject to be seized and appropriated under the right of eminent domain.  

Lands for the public ways; timber, stone, and gravel with which to make or improve the public ways; buildings standing in the way of contemplated improve-


ments, or for any other reason it becomes necessary to take, remove, or destroy for the public good; streams of water; corporate franchises; and generally, it may be said, legal and equi-

484; Bliss v. Hosmer, 15 Ohio, 44; Watkins v. Walker Co., 18 Tex. 583. In Eldridge v. Smith, 34 Va. 484, it was held competent for a railroad company to appropriate lands for piling the wood and lumber used on the road, and brought to it to be transported therewith.

1 Wells v. Somerset, &c., R. R. Co., 47 Me. 345. So of a pier. Matter of Union Ferry Co., 38 N. Y. 139. But the destruction of a private house during a fire to prevent the spreading of a conflagration has been held not to be an appropriation under the right of eminent domain, but an exercise of the police power.

"The destruction of property was authorized by the law of a wasting necessity; it was the exercise of a natural right belonging to every individual, not conferred by law, but tacitly accepted from all human codes." Per Sherman, Senator, in Russell v. Mayor, &c., of New York, 2 Denin, 461, 473. See also Sorocca v. Geary, 3 Cal. 69; Conwell v. Emric, 2 Ind. 55; American Print Works v. Lawrence, 21 N. J. 218; Saxe v. Saxe, 23 N. J. 4500; McDonald v. Redwing, 13 Minn. 38; Field v. Del Moines, 39 Iowa, 575. The municipal corporation whose officers order the destruction is not liable for the damages unless expressly made so by statute. White v. Charleston, 2 Hill (S. C.), 571; Danbar v. San Francisco, 1 Cal. 555; Stone v. Mayor, &c., of New York, 25 Wend. 157; Taylor v. Plymouth, 8 Met. 402; Ruggles v. Nantucket, 11 Cush. 433; Keller v. Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613. In the exercise of police power the State cannot authorize the taking of private property without compensation, when it can be condemned and paid for under the power of eminent domain. People v. Elk River, &c., Co., 107 Cal. 221, 40 Pac. 531, 48 Am. St. 121.

2 Gardner v. Mewburg, 2 Johns. Ch. 102, 7 Am. Dec. 526. In this case a stream was appropriated in order to supply a town with water. The appropriation might, of course, be made for any other object of public utility; and a stream may even be diverted from its course to remove it out of the way of a public im-

provement when not appropriated. See Johnson v. Atlantic, &c., R. R. Co., 35 N. H. 569; Baltimore, &c., R. R. Co. v. Magruder, 34 Md. 79, 6 Am. Rep. 310; Reusch v. Chicago, &c., R. R. Co., 57 Iowa, 687, 11 N. W. 617. But in general, in constructing a public work, it is the duty of those concerned to avoid diverting streams, and to construct the necessary culverts, bridges, &c., for that purpose.


table rights of every description

River Turnpike Co. v. Vermont Central R. R. Co., 21 Vt. 590; New Castle, &c. R. R. Co. v. Peru & Indiana R. R. Co., 3 Ind. 464; Springfield v. Connecticut River R. R. Co., 4 Cush. 63; Forward v. Hampshire, &c. Canal Co., 22 Pick. 462; Commonwealth v. Pittsburgh, &c. R. R. Co., 63 Pa. St. 29; Re Towanda Bridge Co., 91 Pa. St. 216; In re Twenty-Second St., 102 Pa. St. 108. "The only true rule of policy as well as of law is, that a grant for one public purpose must yield to another more urgent and important, and this can be effected without any infringement on the constitutional rights of the subject. If in such cases suitable and adequate provision is made by the legislature for the compensation of those whose property or franchise is injured or taken away, there is no violation of public faith or private right. The obligation of the contract created by the original charter is thereby recognized." Per Bigelow, J., in Central Bridge Corporation v. Lowell, 4 Gray, 474, 482. This subject receives a very full and satisfactory examination by Judges Pearson and Sharkswood, in Commonwealth v. Pennsylvania Canal Co., 66 Pa. St. 41, 5 Am. Rep. 329.

In Central City Horse Railway Co. v. Fort Clark Horse Railway Co., 87 Ill. 523, this subject is somewhat considered. The question involved is thus stated by the court: "Can a competing horse railway company in an incorporated city acquire by compulsion a title to or the joint use of [a part of] the track and superstructure of another like corporation, and for the express purpose of making the tracks so compulsorily taken a portion of its own line?" This question is answered in the negative, though at the same time it is intimated that "proceedings might be instituted, perhaps, to condemn the entire road and franchise, and thus pass it over as an entirety to the competing road." But as to this, see Lake Shore, &c. R. R. Co. v. Chicago, &c. R. R. Co., 97 Ill. 600; Re Rochester Water Commissioners, 66 N. Y. 413; Little Miami, &c. R. R. Co. v. Dayton, 23 Ohio St. 516. [A turnpike way may be condemned for an electric street railway. The legislature may determine when one grant must yield to another. Baltimore & F. T. R. R. Baltimore C. &c. R. Co., 81 Md.

ated. 1 From this statement, however, must be excepted money, or that which in ordinary use passes as such, and which the government may reach by taxation, and also rights in action, which can only be available when made to produce money; neither of which can it be needful to take under this power. 2

**Legislative Authority Requisite.**

The right to appropriate private property to public uses lies dormant in the State, until legislative action is had, pointing out

Co., 83 N. C. 489. See Chicago, &c. R. R. Co. v. Lake, 71 Ill. 333. A contract ceding to a telegraph company the exclusive right of operating and maintaining its lines over the right of way of a railroad company cannot preclude the State from authorizing the establishment of another telegraph line over the same right of way. New Orleans, &c. R. R. Co. v. Southern, &c. Telegraph Co., 53 Ala. 211. The bridge of a corporation may be taken under this power and made a free bridge. Re Towanda Bridge Co., 81 Pa. St. 210.


1 The appurtenant right of an abutter to have a street opened may be taken: Rensselaer v. Leopold, 106 Ind. 29, 5 N.E. 761; the right to pass over a private way: Buffalo, N. Y. & P. R. R. Co. v. Overton, 35 Hun., 137; the right to have a farm-crossing at a particular place. Matter of X. Y. L. &c. R. R. Co., 44 Hun., 194.

2 Private cemetery for public park, In re Board of Street Openings, &c., 133 N. Y. 329, 31 N. E. 102, 28 Am. St. 540; homestead for court house: Jockey v. Shawnee Co. Com'ts, 54 Kan. 750, 37 Pac. 621; leasehold interest in lands: Corrigan et al. v. City of Chicago, 144 Ill., 587, 33 N. E. 746, 21 L. R. A. 212. In such case the exercise of the right terminates the obligation to pay rent. Id.

2 Property of individuals cannot be appropriated by the State under this power for the mere purpose of adding to the revenues of the State. Thus it has been held in Ohio, that in appropriating the water of streams for the purposes of a canal, more could not be taken than was needed for that object, with a view to raising a revenue by selling or leasing it. "The State, notwithstanding the sovereignty of her character, can take only sufficient water from private streams for the purposes of the canal. So far the law authorizes the commissioners to invade private right as to take what may be necessary for canal navigation, and to this extent authority is conferred by the constitution, provided a compensation be paid to the owner. The principle is founded on the superior claims of a whole community over an individual citizen; but then in those cases only where private property is wanted for public use, or demanded by the public welfare. We know of no instances in which it has or can be taken, even by State authority, for the mere purpose of raising a revenue by sale or otherwise; and the exercise of such a power would be utterly destructive of individual right, and break down all the distinctions between nemum and tuum, and annihilate them forever at the pleasure of the State." Wood, J., in Buckingham v. Smith, 10 Ohio, 288, 297.

To the same effect is Cooper v. Williams, 5 Ohio, 392, 22 Am. Dec. 745.

Taking money under the right of eminent domain, when it must be compensated in money afterwards, could be nothing more or less than a forced loan, only to be justified as a last resort in a time of extreme peril, where neither the credit of the government nor the power of taxation could be made available. It is impossible to lay down rules for such a case, except such as the law of overruling necessity, which for the time being sets aside all the rules and protections of private right, shall then prescribe. [Kaysville v. Ellison, 18 Utah, 163, 55 Pac. 386, 72 Am. St. 772, 43 L. R. A. 81.] See post, p. 734, note.
the occasions, the modes, conditions, and agencies for its appropriations.\textsuperscript{1} Private property can only be taken pursuant to law; but a legislative act declaring the necessity, being the customary mode in which that fact is determined, must be held to be for this purpose "the law of the land," and no further finding or adjudication can be essential, unless the constitution of the State has expressly required it.\textsuperscript{2} When, however, action is had for this purpose, there must be kept in view that general as well as reasonable and just rule, that, whenever in pursuance of law the property of an individual is to be divested by proceedings against his will, a strict compliance must be had with all the provisions of law which are made for his protection and benefit, or the proceeding will be ineffectual.\textsuperscript{3} Those provisions must be regarded as in the nature of conditions precedent, which are not only to be observed and complied with before the right of the property owner is disturbed, but the party claiming authority under the

1 Barrow v. Page, 5 Hayw. 97; Railroad Co. v. Lake, 71 Ill. 383; Allen v. Jones, 47 Ind. 438. [But see Easthampton v. Hampshire County Comrs., 134 Mass. 424, 28 N. E. 298, 13 L. R. A. 157, where it is held that express authority is not necessary to the taking of part of a schoollhouse lot for a town way.] It cannot be presumed that any corporation has authority to exercise the right of eminent domain until the grant be shown. Phillips v. Dunkirk, &c. R. R. Co., 78 Pa. St. 177; Allen v. Jones, 47 Ind. 438. A foreign corporation, it is held in Nebraska, which may not acquire real estate, cannot condemn land indirectly through a domestic corporation. State v. Scott, 22 Neb. 628, 30 N. W. 121; Koenig v. Chicago, &c. R. R. Co., 27 Neb. 609, 43 N. W. 423.

2 "Whatever may be the theoretical foundation for the right of eminent domain, it is certain that it attaches as an incident to every sovereignty, and constitutes a condition upon which all property is held. When the public necessity requires it, private rights to property must yield to this paramount right of the sovereign power. We have repeatedly held that the character of the work for which the property is taken, and not the means or agencies employed for its construction, determines the question of power in the exercise of this right. It requires no judicial condemnation to subject private property to public uses. Like the power to tax, it resides with the legislative department to whom the delegation is made. It may be exercised directly or indirectly by that body; and it can only be restrained by the judiciary when its limits have been exceeded or its authority has been abused or perverted." Kramer v. Cleveland & Pittsburgh R. R. Co., 5 Ohio St. 140, 146. The mode of exercise is left to the legislative discretion, when not restrained by the constitution. Secombe v. Railroad Co., 23 Wall. 108. An owner is not entitled to notice of meeting of commissioners to determine the necessity of an improvement. Zimmerm an v. Canfield, 42 Ohio St. 463.

adverse proceeding must show affirmatively such compliance. For example, if by a statute prescribing the mode of exercising the right of eminent domain, the damages to be assessed in favor of the property owner for the taking of his land are to be so assessed by disinterested freeholders of the municipality, the proceedings will be ineffectual unless they show on their face that the appraisers were such freeholders and inhabitants.¹ So if a statute only authorizes proceedings *in invitum* after an effort shall have been made to agree with the owner on the compensation to be paid, the fact of such effort and its failure must appear.²

So if the statute vests the title to lands appropriated in the State or in a corporation on payment therefor being made, it is evident that, under the rule stated, the payment is a condition precedent to the passing of the title.³ And where a general railroad law


² Reitenbaugh v. Chester Valley R. R. Co., 21 Pa. St. 100; Ellis v. Pacific R. R. Co., 51 Mo. 200; United States v. Reed, 56 Mo. 505; Burt v. Brigham, 117 Mass. 307; Oregon Ry. & Nav. Co. v. Oregon, &c. Co., 10 Oreg. 444; Howland v. School Dist., 16 R.I. 257, 15 Atl. 74; Reed v. Ohio, &c. R. Co., 126 Ill. 48, 17 N. E. 897; Grand Rapids & I. R. R. Co. v. Weiden, 70 Mich. 330, 33 N. W. 294; West Va. Transportation Co. v. Volcanic Oil & Coal Co., 5 W. Va. 382, it was held that if the owner appears in proceedings taken for the assessment of damages, and contests the amount without objecting the want of any such attempt, the court must presume it to have been made.

³ Stacy v. Vermont Central R. R. Co., 27 Vt. 39. By the section of the statute under which the land was appropriated, it was provided that when land or other real estate was taken by the corporation, for the use of their road, and the parties were unable to agree upon the price of the land, the same should be ascertained and determined by the commissioners, together with the costs and charges accruing thereon, and upon the payment of the same, or by depositing the amount in a bank, as should be ordered by the commissioners, the corporation should be deemed to be seized and possessed of the lands. Held, that, until the payment was made, the company had no right to enter upon the land to construct the road, or to exercise any act of ownership over it; and that a court of equity would enjoin them from exercising any such right, or they might be prosecuted in trespass at law. This case follows Baltimore & Susquehanna R. R. Co. v. Nesbit, 10 How. 395, and Bloodgood v. Mohawk & Hudson R. R. Co., 18 Wend. 9, where the statutory provisions were similar. In Kentucky, payment in money must be made before entry. Covington Ry. Co. v. Piel, 87 Ky. 297, 8 S. W. 449. See further State v. Seymour, 35 N. J. 47; Cameron v. Supervisors, 47 Miss. 264; St. Joseph, &c. R. R. Co. v. Callender, 13 Kan. 496; Paris v. Mason, 37 Tex. 447; People v. McRoberts, 62 Ill. 38; St. Louis, &c. R. R. Co. v. Teters, 69 Ill. 144; Sherman v. Milwaukee, &c. R. R. Co., 40 Wis. 645; Buhlman v. Green Bay, &c. R. R. Co., 40 Wis. 157; Brady v. Bronson, 45 Cal. 610; Delphi v. Evans, 30 Ind. 90; Eidelmiller v. Wyandotte, 2 Dill. 376. In the case in Howard it is said: "It can hardly be questioned that without acceptance by the acts and in the mode prescribed [i. e., by payment of the damages assessed], the company were not bound; that if they had been dissatisfied with the estimate placed on the land, or could have procured a more eligible site for the location of their road, they would have been at liberty, before such acceptance, wholly to renounce the inquisition. The proprietors of the land could have no authority to enforce the company into its adoption." Daniel, J., 10 How. 395, 399.
authorized routes to be surveyed by associated persons desirous of constructing roads, and provided that if the legislature, on being petitioned for the purpose, should decide by law that a proposed road would be of sufficient utility to justify its construction, then the company, when organized, might proceed to take land for the way, it was held that, until the route was approved by the legislature, no authority could be claimed under the law to appropriate land for the purpose.¹ These cases must suffice as illustrations of a general rule, which indeed would seem to be too plain and obvious to require either illustration or discussion.²

So the powers granted by such statutes are not to be enlarged by intendment, especially where they are being exercised by a corporation by way of appropriation of land for its corporate purposes. "There is no rule more familiar or better settled than this: that grants of corporate power, being in derogation of common right, are to be strictly construed; and this is especially the case where the power claimed is a delegation of the right of eminent domain, one of the highest powers of sovereignty pertaining to the State itself, and interfering most seriously and often vexatiously with the ordinary rights of property."³ It has ac-

¹ Gillinwater v. Mississippi, &c. R. R. Co., 13 Ill. 1. "The statute says, that after a certain other act shall have been passed, the company may then proceed to take private property for the use of its road; that is equivalent to saying that that right shall not be exercised without such subsequent act. The right to take private property for public use is one of the highest prerogatives of the sovereign power; and here the legislature has, in language not to be mistaken, expressed its intention to reserve that power until it could judge for itself whether the proposed road would be of sufficient public utility to justify the use of this high prerogative. It did not intend to cast this power away, to be gathered up and used by any who might choose to exercise it."

² Ibid. p. 4.

³ See further the cases of Atlantic & Ohio R. R. Co. v. Sullivant, 5 Ohio St. 276; Parsons v. Howe, 41 Me. 218; Atkinson v. Marietta & Cincinnati R. R. Co., 15 Ohio St. 21.

² See further the cases of Atlantic & Ohio R. R. Co., 11 Ohio St. 222, 231; Miami Coal Co. v. Wigton, 19 Ohio St. 560. See ante, pp. 564, 565. [Authority to construct is not authority to condemn: City of Madison v. Daley, 58 Fed. Rep. 751; City of Tacoma v. State, 4 Wash. 64, 29 Pac. 847; Brunswick & W. Ry. Co. v. City of Waycross, 94 Ga. 102, 21 S. E. 145; Chicago & N. W. Ry. Co. v. Town of Cicero, 164 Ill. 656, 39 N. E. 544. Authority to construct works for fire protection and domestic use is not authority to furnish water for motive power for light manufacturing, though grant of power contained words "and other purposes:" Re Barre Water Co., 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 196. The words "any railway" in a statute authorizing condemnation proceedings, held not to include street railways operated by horse power or electricity. Thomson-Houston Elec. Co. v. Simon, 20 Oreg. 60, 22 Pac. 147, 10 L. R. A. 251. Authority to condemn for telegraph line, held to authorize condemnation for telephone line under New Jersey statute. State v. Central New Jersey Telegraph Co., 53 N. J. L. 341, 21 Atl. 499, 11 L. R. A. 604; San Antonio & A. P. Ry. Co. v. S. W. Telph. & Telne. Co., 93 Tex. 313, 55 S. W. 117, 49 L. R. A. 459. Other illustrations of this rule of strict construction may be found in the following cases: In re Theresa Drainage Dist., 90 Wis. 391, 63 N. W. 283; Bigler's Executors v. Penna. Canal Co., 177 Pa. St. 28, 35 Atl. 112; Trustees Atlanta University v. City
cordingly been held that where a railroad company was authorized by law to "enter upon any land to survey, lay down, and construct its road," "to locate and construct branch roads," &c., to appropriate land "for necessary side tracks," and "a right of way over adjacent lands sufficient to enable such company to construct and repair its road," and the company had located, and was engaged in the construction of its main road along the north side of a town, it was not authorized under this grant of power to appropriate a temporary right of way for a term of years along the south side of the town, to be used as a substitute for the main track whilst the latter was in process of construction.¹ And substantially the same strict rule is applied when the State itself seeks to appropriate private property; for it is not unreasonable that the property owner should have the right to insist that the State, which selects the occasion, and prescribes the conditions for the appropriation of his property, should confine its action strictly within the limits which it has marked out as sufficient. So high a prerogative as that of divesting one's estate against his will should only be exercised where the plain letter of the law permits it, and under a careful observance of the formalities prescribed for the owner's protection. (a)

The Purpose.

The definition given of the right of eminent domain implies that the purpose for which it may be exercised must not be a


mere private purpose; and it is conceded on all hands that the legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit. The right of eminent domain, it has been said, does not imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer. It seems not to be allowable, therefore, to authorize private roads.

1 The constitutional prohibition against taking private property for public use, operates by implication to prohibit the taking of property for private use. Richards v. Wolf, 82 Iowa, 558, 47 N. W. 1044, 21 Am. St. 501; Welton v. Dickson, 38 Neb. 707, 57 N. W. 550, 41 Am. St. 771, 22 L. R. A. 459. For a discussion of the meaning of the term "public" as used in this connection, see 51 Cent. L. Jour. 223.] In a work of this character, we have no occasion to consider the right of the government to seize and appropriate to its own use the property of individuals in time of war, through its military authorities. That is a right which depends on the existence of hostilities, and the suspension, partially or wholly, of the civil laws. For recent cases in which it has been considered, see Mitchell v. Harmony, 13 How. 115; Wilson v. Crockett, 43 Mo. 216; Wellman v. Wickerman, 44 Mo. 481; Yost v. Stuart, 4 Cold. 205; Sutton v. Tiller, 6 Cold. 593; Taylor v. Nashville, &c. R. R. Co., 6 Cold. 646; Coolidge v. Guthrie, 8 Am. Law Reg. x. s. 22; Echols v. Staunton, 3 W. Va. 571; Wilson v. Franklin, 63 N. C. 259.

2 Buckman v. Saratoga & Schenectady R. R. Co., 3 Paige, 73, 22 Am. Dec. 679; Tenneyck v. Canal Co., 18 N. J. 290, 37 Am. Dec. 233; Hepburn's Case, 3 Bland, 35; Sadler v. Langham, 24 Ala. 311; Pittsburg v. Scott, 1 Pa. St. 309; Matter of Albany Street, 11 Wend. 149, 25 Am. Dec. 618; Matter of John & Cherry Streets, 19 Wend. 659; Cooper v. Williams, 5 Ohio, 391, 24 Am. Dec. 299; Buckingham v. Smith, 10 Ohio, 288; Reeves v. Treasurer of Wood Co., 8 Ohio St. 333. See this subject considered on principle and authority by Senator Tracy in Bloodgood v. Mohawk & Hudson R. R. Co., 18 Wend. 955 et seq. See also Embury v. Conner, 3 N. Y. 511; Kramer v. Cleveland & Pittsburgh R. R. Co., 5 Ohio St. 140; Pratt v. Brown, 3 Wis. 693; Concord R. R. v. Georgeley, 17 N. H. 47; N. Y. & Harlem R. R. Co. v. Kip, 40 N. Y. 646, 7 Am. Rep. 355. [The closing of part of a public alley whereby the lands within the alley revert to the adjoining owner, held not to be for public use. Van Wilsen v. Gutman, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403. An act giving one street railway the right to use the tracks of another is not due process, when it is apparent that it was not a public benefit, but a benefit to the company, to whom the grant is made. Philadelphia, M. & S. S. R. Co., Petition of, — Pa. St. —, 53 Atl. 191. The power can only be exercised to supply some existing public need or to gain some present public advantage; not with a view to contingent results dependent on a projected speculation. Edgewood R. R. Co.'s Appeal, 79 Pa. St. 257. Nor is a mere public convenience; such as a company for loading and unloading freight on and from steamboats and other craft touching at a river port. Memphis Freight Co. v. Memphis, 4 Cold. 419. But land not needed at once may be condemned for extra tracks of a railroad. Matter of Staten Island Transit Co., 103 N. Y. 251, 8 N. E. 548. Under the internal improvement clause of the Constitution of South Carolina, a statute authorizing condemnation for railway connecting a private manufacturing plant with a public railway is valid. Ex parte Bacon, 36 S. C. 125, 15 S. E. 204, 16 L. R. A. 586. A private way cannot be authorized on a public highway against an adjoining proprietor who has a fee in the street. Bradley v. Pharr, 46 La. Ann. 426, 12 So. 618, 10 L. R. A. 647.
to be laid out across the lands of unwilling parties by an exercise of this right. The easement in such a case would be the property of him for whom it was established; and although the owner would not be deprived of the use in the land, the beneficial use and exclusive enjoyment of his property would in greater or less degree be interfered with. Nor would it be material to inquire what quantum of interest would pass from him: it would be sufficient that some interest, the appropriation of which detracted from his right and authority, and interfered with his exclusive possession as owner, had been taken against his will; and if taken for a purely private purpose, it would be unlawful. 1 Nor

1 Taylor v. Porter, 4 Hill, 140, per Brownson, J.; Clark v. White, 2 Swan, 540; White v. White, 5 Barb. 474; Sadler v. Langham, 34 Ala. 311; Pittsburgh v. Scott, 1 Pa. St. 300; Nesbit v. Trumbu, 39 Ill. 110; Osburn v. Hart, 24 Wis. 80, 1 Am. Rep. 161; Tyler v. Beacher, 44 Vt. 648, 9 Am. Rep. 398; Bankhead v. Brown, 25 Iowa, 540; Witham v. Osburn, 4 Oreg. 318, 18 Am. Rep. 827; Stewart v. Hartman, 46 Ind. 341; Wild v. Deig, 43 Ind. 455, 13 Am. Rep. 399; Blackman v. Halves, 72 Ind. 515; White v. Clark, 2 Swan, 290; Hickman’s Case, 4 Harr. 580; Robinson v. Swope, 12 Bush, 21; Varner v. Martin, 21 W. Va. 534. A neighborhood road is only a private road, and taking land for it would not be for a public use. Dickey v. Tenison, 27 Mo. 373. Welton v. Dickson, 38 Neb. 767, 57 N.W. 659, 41 Am. St. 771, 22 L. R. A. 496; Logan v. Stogdale, 123 Ind. 372, 21 N. E. 139, 8 L. R. A. 58, and note. Way laid out on application of single private person, to be paid for and kept in repair by him, but to be used by all who desire to use it, is a public way for which lands may be condemned. Latah County v. Peterson, 2 Idaho, 1118, 29 Pac. 1059, 16 L. R. A. 81.] But see, as to this, Ferris v. Bramble, 5 Ohio St. 109; Brock v. Barnet, 57 Vt. 172; Bell v. Prouty, 43 Vt. 279; Whittingham v. Bowen, 22 Vt. 317; Proctor v. Andover, 42 N. H. 318. It seems that a way essentially private may be given a public character by act of the legislature because of incidental public benefits. Los Angeles Co. v. Reyes, — Cal. —, 32 Pac. 233; Welton v. Dickson, 38 Neb. 767, 57 N.W. 554, 41 Am. St. 771, 22 L. R. A. 496; Monterey Co. v. Cushing, 89 Cal. 511, 23 Pac. 760. And see Wisconsin Water Co. v. Winans, 85 Wis. 26, 54 N. W. 1003, 39 Am. St. 813, and note; Latah Co. v. Peterson, 2 Idaho, 1118, 29 Pac. 1059, 16 L. R. A. 81; Butte, Anaconda, & P. Ry. Co. v. Montana U. Ry. Co., 10 Mont. 504, 41 Pac. 232, 31 L. R. A. 208. See Bridal Veil Lumbering Co. v. Johnson, 30 Oreg. 205, 46 Pac. 703, 34 L. R. A. 365, 60 Am. St. 613. To avoid this difficulty, it is provided by the constitutions of some of the States that private roads may be laid out under proceedings corresponding to those for the establishment of highways. There are provisions to that effect in the Constitutions of New York, Georgia, and Michigan. It is allowable under the Alabama Constitution also. Steele v. County Comrs., 83 Ala. 394, 3 So. 761. But in Harvey v. Thomas, 10 Watts, 63, it was held that the right might be exercised in order to the establishment of private ways from coal fields to connect them with the public improvements, there being nothing in the constitution forbidding it. See also the Paepson Road, 16 Pa. St. 15; Sherman v. Buick, 32 Cal. 241; Brewer v. Bowman, 9 Ga. 37; Robinson v. Swope, 12 Bush, 21. But in Illinois it is held expressly that such a road cannot be condemned. Sholl v. German Coal Co., 113 Ill. 427, 10 N. E. 199, and the doctrine of the cases just cited is directly opposed to Young v. McKenzie, 3 Ga. 31; Taylor v. Porter, 4 Hill, 140; Buffalo & N. Y. R. R. Co. v. Bramard, 9 N.Y. 109; Bradley v. N. Y. & N. H. R. R. Co., 21 Conn. 294; Reeves v. Treasurer of Wood Co., 8 Ohio St. 333, and many other cases; though possibly convenient access to the great coal fields of the State might be held to
could it be of importance that the public would receive incidental benefits, such as usually spring from the improvement of lands or the establishment of prosperous private enterprises: the public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devolve it.

We find ourselves somewhat at sea, however, when we undertake to define, in the light of the judicial decisions, what consti-

be so far a matter of general concern as to support an exercise of the power on the ground of the public benefit. So held as to a subterranean mining railway. De Camp v. Hibernia R. R. Co., 47 N. J. L. 43. In Iowa a statute authorizing condemnation of public ways in such cases was upheld though only the mine-owners may have occasion to use them. Phillips v. Watson, 62 Iowa, 28, 18 N. W. 659.


In the text we have stated what is unquestionably the result of the authorities; though if the question were an open one it might well be debated whether the right to authorize the appropriation of the property of individuals did not rest rather upon grounds of general public policy than upon the public purpose to which it was proposed to devote it. There are many cases in which individuals or private corporations have been empowered to appropriate the property of others when the general good demanded it, though the purpose was no more public than it is in any case where benefits are to flow to the community generally from a private enterprise. The case of appropriations for mill-dams, railroads, and drains to improve lands are familiar examples. These appropriations have been sanctioned under an application of the term "public purpose," which might also justify the laying out of private roads, when private property could not otherwise be made available. Upon this general subject the reader is referred to an article by Hon. J. V. Campbell, in the "Bench and Bar," for July, of.

1 Per Tracy, Senator, in Braddock v. Mohawk & Hudson R. R. Co., 18 Wend. 9, 60. A use is private so long as structures to be put on the land are to remain under private owner-ship and control, and no right to their use or to direct their management is conferred upon the public." Matter of Eureka Bason, &c. Co., 90 N. Y. 42. Sec Belcher Sugar Refining Co. v. St. Louis Elev. Co., 82 Mo. 121. The use must be by the general public of a locality, and not by particular individuals or estates. McQuillen v. Hatton, 42 Ohio St. 202; Ross v. Davis, 97 Ind. 79.
tutes a public use. It has been said by a learned jurist that, "if the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose." It is upon this principle that the legislatures of several of the States have authorized the condemnation of the lands of individuals for mill sites, where from the nature of the country such mill sites could not be obtained for the accommodation of the inhabitants without overflowing the lands thus condemned. Upon the same principle of public benefit, not only the agents of the government, but also individuals and corporate bodies, have been authorized to take private property for the purpose of making public highways, turnpike roads, and canals; of erecting and constructing wharves and basins; of establishing ferries; of draining swamps and marshes; and of bringing water to cities and villages. In all such cases the object of the legislative grant of power is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or through the medium of corporate bodies or of individual enterprise."

1 2 Kent, Com. 340. [Statute authorizing lands to be flowed by raising a pond for the culture of useful fishes, though the object of the owner is to secure his own pleasure and profit, is constitutional. Turner v. Nye, 154 Mass. 579, 28 N. E. 1018, 14 L. R. A. 487, an extreme case.]

CONSTITUTIONAL LIMITATIONS.

It would not be entirely safe, however, to apply with much liberality the language above quoted, that "where the public interest can be in any way promoted by the taking of private property," the taking can be considered for a public use. It is certain that there are very many cases in which the property of some individual owners would be likely to be better employed or occupied to the advancement of the public interest in other hands than in their own; but it does not follow from this circumstance alone that they may rightfully be dispossessed. It may be for the public benefit that all the wild lands of the State be improved and cultivated, all the low lands drained, all the unsightly places beautified, all dilapidated buildings replaced by new; because all these things tend to give an aspect of beauty, thrift, and comfort to the country, and thereby to invite settlement, increase the value of lands, and gratify the public taste; but the common law has never sanctioned an appropriation of property based upon these considerations alone; and some further element must therefore be involved before the appropriation can be regarded as sanctioned by our constitutions. The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use; and that only can be considered such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard

to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character, and the difficulty—or perhaps impossibility—of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide.

Every government is expected to make provision for the public ways, and for this purpose it may seize and appropriate lands. And as the wants of traffic and travel require facilities beyond those afforded by the common highway, over which any one may pass with his own vehicles, the government may establish the higher grade of highways, upon some of which only its own vehicles can be allowed to run, while others, differently constructed, shall be open to use by all on payment of toll. The common highway is kept in repair by assessments of labor and money; the tolls paid upon turnpikes, or the fares on railways, are the equivalents to these assessments; and when these improved ways are required by law to be kept open for use by the public impartially, they also may properly be called highways, and the use to which land for their construction is put be denominated a public use. The government also provides court-houses for the administration of justice; buildings for its seminars of instruction;¹ aqueducts to convey pure and wholesome water into large towns;² it builds levees to prevent the country being overflowed by the rising streams;³ it may cause drains to be

2 Reddall v. Bryan, 14 Md. 141; Kane v. Baltimore, 15 Md. 240; Gardner v. Newburgh, 2 Johns. Ch. 102, 7 Am. Dec. 526; Ham v. Salem, 100 Mass. 350; Burden v. Stein, 27 Ala. 104; Riche v. Bar Harbor Water Co., 75 Me. 91; Olmsted v. Prop's Morris Aqueduct, 40 N. J. L. 495; Lake Pleasanton W. Co. v. Contra Costa W. Co., 67 Cal. 659, 8 Pac. 501. Where land was to be taken for a canal, and it was set forth that "the uses for which said water is intended and designed are mining, irrigation, manufacturing, and household and domestic purposes," it was held a sufficient statement of public uses. Cummings v. Peters, 56 Cal. 593. A canal to bring logs and water to a city is for a public purpose. Dallas Lumbering Co. v. Urquhart, 16 Ore. 57, 19 Pac. 78. [A taking for the improvement of the navigation of a river is for a public use. Kaukauna Water Power Co. v. Green Bay and M. Canal Co., 142 U. S. 254, 12 Sup. Ct. Rep. 173. State cannot condemn to create water power for sole purpose of leasing for manufacturing purposes though may lease surplus power where condemnation primarily for public use, Id. Obstruction to use of landing of riparian owner incidental to action of government in improving navigation without actual taking, contact with or flowing of the lands does not give right to compensation. Gibson v. United States, 105 U. S. 203, 17 Sup. Ct. Rep. 578. State may authorize condemnation of water supply system by a city for its use. Long Island Water Supply Co. v. City of Brooklyn, 109 U. S. 685, 17 Sup. Ct. Rep. 718. Fact that such company has a contract with the city to supply 't water will not defeat such condemnation; a contract may be condemned like other property. Id.]
constructed to relieve swamps and marshes of their stagnant water; 1 and other measures of general utility, in which the public at large are interested, and which require the appropriation of private property, are also within the power, where they fall within the reasons underlying the cases mentioned. 2

1 Anderson v. Kerns Draining Co., 14 Ind. 199; Reeves v. Treasurer of Wood County, 8 Ohio St. 333. See a clear statement of the general principle and its necessity in the last mentioned case. The drains, however, which can be authorized to be cut across the land of unwilling parties, or for which individuals can be taxed, must not be mere private drains, but must have reference to the public health, convenience, or welfare. Reeves v. Treasurer, &c., supra. And see People v. Nearing, 27 N. Y. 300. [May condemn for drainage to abate nuisance. Sweet v. Reche, 139 U. S. 389, 16 Sup. Ct. Rep. 43. Term "sanitary" does not indicate public purpose. In re Theresa Drainage District, 90 Wis. 301, 63 N. W. 288; and see Poundstone v. Baldwin, 145 Ind. 129, 41 N. E. 101.] It is said in a New Jersey case that an act for the drainage of a large quantity of land, which in its present condition is not only worthless for cultivation but unfit for residence, and for an assessment of the cost by benefits, is for a purpose sufficiently public to justify an exercise of the right of eminent domain. Matter of Drainage of Lands, 35 N. J. 497. It is competent under the eminent domain to appropriate and remove a dam owned by private parties, in order to reclaim a considerable body of lands flowed by means of it, paying the owner of the dam its value. Talbot v. Hudson, 16 Gray, 417. See the valuable note to Reekman v. Railroad Co., 22 Am. Dec. 680, where the authorities as to what is a public use are collated.

2 Such, for instance, as the construction of a public park, which in large cities is as much a matter of public utility as a railway, or a supply of pure water. See Matter of Central Park Extension, 16 Abb. Pr. Rep. 56; Owners of Ground v. Mayor, &c., of Albany, 15 Wend. 374; Brooklyn Park Comrs v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; County Court v. Griswold, 58 Mo. 175. The legislature may authorize land to be taken by an exposition company. Rees' App., 12 Atl. 427. Or by a boom company for the purposes of a boom. Patterson v. Mississippi, &c., Boom Co., 3 Ill. 455. Or for the purposes of a telegraph line. Turnpike Co. v. News Co., 43 N. J. 381; New Orleans R. R. Co. v. Southern Tel. Co., 63 Ala. 211; Pierce v. Drew, 128 Mass. 75. Or sewers in cities. Hillard v. Lowell, 11 Gray, 345. Or for a market. Re Cooper, 28 Hun, 515. A city may be authorized to appropriate lands in order to fill them up, and thereby abate a nuisance upon them. Dingley v. Boston, 100 Mass. 544. But it may not appropriate a wharf to lease it to a private corporation. Belcher Sugar Refining Co. v. St. Louis Elev. Co., 82 Mo. 121. A private corporation may be empowered to exercise the right of eminent domain to obtain a way along which to lay pipe for the transportation of oil to a railroad or navigable water. West Va. Transportation Co. v. Volcanic Oil & Coal Co., 5 W. Va. 382. It is held in Evergreen Cemetery v. New Haven, 43 Conn. 234; Edgecombe v. Burlington, 46 Vt. 218, and Balch v. Commissioners, 103 Mass. 106; [Parneman v. Mt. Pleasant Cem. Assn., 135 Ind. 344, 35 N. E. 271; Wesfield Cem. Assn. v. Danielson, 62 Conn. 319, 29 Atl. 345; Staunard's Corners Rural Cem. Assn. v. Brandes, 14 Misc. (N. Y.) 270.] that lands may be appropriated under this power for a cemetery; but in Matter of Deansville Cemetery Association, 66 N. Y. 509, it is decided that this cannot be done for the exclusive use of a private corporation. [Board of Health v. Van Hoesen, 87 Mich. 533, 40 N. W. 894, and cases cited. These cases seem to proceed upon the theory that the right of burial is not common, but only at the will of the corporation owning.] Land may not be taken for a private warehouse and dock company: Matter of Eureka Basin, &c., Co., 96 N. Y. 42; nor for a railroad along the bottom of the Niagara Cliffs. Matter of Niagara Falls & W. Ry. Co., 108 N. Y. 375, 15 N. E. 429.

The development of mines has been
Whether the power of eminent domain can rightfully be exercised in the condemnation of lands for manufacturing purposes where the manufactories are to be owned, and occupied by individuals is a question upon which the authorities are at variance. Saw-mills, grist-mills, and various other manufactories are certainly a public necessity; and while the country is new, and capital not easily attainable for their erection, it sometimes seems to be essential that government should offer large inducements to parties who will supply this necessity. Before steam came into use, water was almost the sole reliance for motive power; and as reservoirs were generally necessary for this purpose, it would sometimes happen that the owner of a valuable mill site was unable to render it available, because the owners of lands which must be flowed to obtain a reservoir would neither consent to the construction of a dam, nor sell their lands except at extravagant and inadmissible prices. The legislatures in some of the States have taken the matter in hand, and have surmounted the difficulty, sometimes by authorizing the land to be appropriated, and at other times by permitting the erection of the dam, but requiring the mill-owner to pay annually to the proprietor of the land the damages caused by the flowing, to be assessed in some impartial mode.¹

The reasons for such statutes have been growing weaker with the introduction of steam power and the progress of improvement, but their validity has repeatedly been recognized in some of the States, and probably the same courts would continue still to recognize it, notwithstanding the public necessity may no longer appear to demand such laws.² The rights granted by these laws to mill-owners are said by Chief Justice Shaw, of Massachusetts, to be “granted for the better use of the water power, upon considerations of public policy and the general good;”³ and in this view, and in order to render available a valuable property which might otherwise be made of little use by narrow, selfish, and unfriendly conduct on the part of individuals, such laws may perhaps be sustained on the same grounds which support an exercise of the right of eminent

¹ See Angell on Watercourses, c. 12, for references to the statutes on this subject.
² “The encouragement of mills has always been a favorite object with the legislature; and though the reasons for it may have ceased, the favor of the legislature continues.” Wolcott Woollen Manufacturing Co. v. Uplam, 5 Pick. 292, 294. The practice in Michigan has been different. See Ryerson v. Brown, 25 Mich. 323, 24 Am. Rep. 564.
domain to protect, drain, and render valuable the lands which, by the overflow of a river, might otherwise be an extensive and worthless swamp. ¹

¹ Action on the case for raising a dam across the Merrimac River, by which a mill stream emptying into that river, above the site of said dam, was set back and overflowed, and a mill of the plaintiff situated thereon, and the mill privilege, were damaged and destroyed. Demurrer to the declaration. The defendant company were chartered for the purpose of constructing a dam across the Merrimac River, and constructing one or more locks and canals, in connection with said dam, to remove obstructions in said river by falls and rapids, and to create a water power to be used for mechanical and manufacturing purposes. The defendants claimed that they were justified in what they had done, by an act of the legislature exercising the sovereign power of the State, in the right of eminent domain; that the plaintiff’s property in the mill and mill privilege was taken and appropriated under this right; and that his remedy was by a claim of damages under the act, and not by action at common law as for a wrongful and unwarrantable encroachment upon his right of property. Shaw, Ch. J.: “It is then 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. The declared purposes are to improve the navigation of the Merrimac River, and to create a large mill power for mechanical and manufacturing purposes. In general, whether a particular structure, as a bridge, or a lock, or canal, or road, is for the public use, is a question for the legislature, and which may be presumed to have been correctly decided by them. Commonwealth v. Breed, 4 Pick. 460. That the improvement of the navigation of a river is done for the public use has been too frequently decided and acted upon to require authorities. And so to create a wholly artificial navigation by canals. The establishment of a great mill power for manufacturing purposes, as an object of great public interest, especially since manufacturing has come to be one of the great public industrial pursuits of the Commonwealth, seems to have been regarded by the legislature, and sanctioned by the jurisprudence of the Commonwealth, and in our judgment rightly so, in determining what is a public use, justifying the exercise of right of eminent domain. See St. 1825, c. 148, incorporating the Salem Mill Dam Corporation; Boston & Roxbury Mill Dam Corporation v. Newman, 12 Pick. 467. The acts since passed, and the cases since decided on this ground, are very numerous. That the erection of this dam would have a strong and direct tendency to advance both these public objects, there is no doubt. We are therefore of opinion that the powers conferred on the corporation by this act were so done within the scope of the authority of the legislature, and were not in violation of the Constitution of the Commonwealth.” Hazen v. Essex Company, 12 Cush. 475, 477. See also Boston & Roxbury Mill Corporation v. Newman, 12 Pick. 467; Fiske v. Framingham Manufacturing Co., 12 Pick. 67; Harding v. Goodlett, 3 Yerg. 41, 24 Am. Dec. 546. The courts of Wisconsin have sustained such laws. Newcome v. Smith, 1 Chand. 71; Thiens v. Voegtlender, 3 Wis. 401; Pratt v. Brown, 3 Wis. 603. But with some hesitation in later cases. See Fisher v. Horroxion Co., 10 Wis. 351; Curtis v. Whipple, 24 Wis. 350. And see the note of Judge Redfield to Allen v. Inhabitants of Jay, Law Reg., Aug. 1873, p. 498. And those of Connecticut. Olmstead v. Camp, 33 Conn. 532. And of Maine. Jordan v. Woodward, 40 Me. 317. And of Minnesota. Miller v. Troost, 14 Minn. 365. And of Kansas. Venard v. Cross, 8 Kan. 248; Harding v. Funk, 8 Kan. 315. And of Indiana. Hankins v. Lawrence, 8 Blackf. 296. And they have been enforced elsewhere without question.
On the other hand, it is said that the legislature of New York has never exercised the right of eminent domain in favor of mills of any kind, and that "sites for steam-engines, hotels, churches, and other public conveniences might as well be taken by the exercise of this extraordinary power." 1 Similar views have been taken by the Supreme Courts of Alabama and Michigan. 2 It is quite possible that, in any State in which this question would be entirely a new one, and where it would not be embarrassed by long acquiescence, or by either judicial or legislative precedents, it might be held that these laws are not sound in principle, and that there is no such necessity, and consequently no such imperative reasons of public policy, as would be essential to support an exercise of the right of eminent domain. 3 But accepting as correct the decisions which have been made, it must be conceded that the term "public use," as employed in the law of eminent domain, has a meaning much controlled by the necessity, and somewhat different from that which it bears generally. 4

Burgess v. Clark, 13 Ired. 109; McAfee's Heirs v. Kennedy, 1 Lit. 92; Smith v. Connolly, 1 T. B. Monr. 58; Shackelford v. Coffey, 4 J. J. Marsh. 40; Crenshaw v. Slate River Co., 6 Rand. 245; Gammel v. Potter, 6 Iowa, 548. The whole subject was very fully considered, and the validity of such legislation affirmed, in Great Falls Manuf. Co. v. Fernald, 47 N. H. 444. And see Ash v. Cummings, 50 N. H. 501. In Head v. Amoskeag Co., 113 U. S. 9, 5 Sup. Ct. Rep. 441, such an act was upheld as a regulation of the manner in which the rights of proprietors adjacent to a stream may be enjoyed. In Loughbridge v. Harris, 42 Ga. 500, an act for the condemnation of land for a grist-mill was held unconstitutional, though the tolls were regulated, and discrimination forbidden. In Newell v. Smith, 15 Wis. 101, it was held not constitutional to authorize the appropriation of the property, and leave the owner no remedy except to subsequently recover its value in an action of trespass.

1 Hay v. Cohoes Company, 3 Barb. 47.
2 Ryerson v. Brown, 35 Mich. 333, 24 Am. Rep. 564; Saddler v. Longham, 34 Ala. 311. In this last case, however, it was assumed that lands for the purposes of grist-mills which grind for toll, and were required to serve the public impartially, might, under proper legislation, be taken under the right of eminent domain. The case of Loughbridge v. Harris, 42 Ga. 500, is contra. In Tyler v. Becher, 44 Vt. 648, 8 Am. Rep. 398, it was held not competent, where the mills were subject to no such requirement. See the case, 8 Am. Rep. 398. And see note by Redfield, Am. Law Reg., Aug., 1873, p. 493.
3 See this subject in general discussed in a review of Angell on Watercourses, 2 Am. Jurist, p. 25.
4 In People v. Township Board of Salem, 29 Mich. 452, the court consider the question whether a use which is regarded as public for the purposes of an exercise of the right of eminent domain, is necessarily so for the purposes of taxation. They say: "Reasoning by analogy from one of the sovereign powers of government to another is exceedingly liable to deceive and mislead. An object may be public in one sense and for one purpose, when in a general sense and for other purposes it would be idle or misleading to apply the same term. All governmental powers exist for public purposes, but they are not necessarily to be exercised under the same conditions of public interest. The sovereign police power which the State possesses is to be exercised only for the general public welfare, but it reaches to every person, to every kind of business, to every species of property within the Commonwealth. The conduct of every individual, and the
The question what is a public use is always one of law. (a) Difference will be paid to the legislative judgment, as expressed in

use of all property and of all rights is regulated by it, to any extent found necessary for the preservation of the public order, and also for the protection of the private rights of one individual against encroachment by others. The sovereign power of taxation is employed in a great many cases where the power of eminent domain might be made more immediately efficient and available, if constitutional principles could suffer it to be resorted to; but each of these has its own peculiar and appropriate sphere, and the object which is public for the demands of the one is not necessarily of a character to permit the exercise of the other."

"If we examine the subject critically, we shall find that the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable; and we shall also find that the law does not so much regard the means as the need. The power is much nearer akin to that of the public police than to that of taxation; it goes but a step farther, and that step is in the same direction. Every man has an abstract right to the exclusive use of his own property for his own enjoyment in such manner as he shall choose; but if he should choose to create a nuisance upon it, or to do anything which would preclude a reasonable enjoyment of adjacent property, the law would interfere to impose restraints. He is said to own his private lot to the centre of the earth, but he would not be allowed to excavate it indefinitely, lest his neighbor's lot should disappear in the excavation. The abstract right to make use of his own property in his own way is compelled to yield to the general comfort and protection of the community, and to a proper regard to relative rights in others. The situation of his property may even be such that he is compelled to dispose of it because the law will not suffer his regular business to be carried on upon it. A needful and lawful species of manufacture may so injuriously affect the health and comfort of the vicinity that it cannot be tolerated in a densely settled neighborhood, and therefore the owner of a lot in that neighborhood will not be allowed to engage in that manufacture upon it, even though it be his regular and legitimate business. The butcher in the vicinity of whose premises a village has grown up finds himself compelled to remove his business elsewhere, because his right to make use of his lot as a place for the slaughter of cattle has become inconsistent with the superior right of the community to the enjoyment of pure air and the accompanying blessings and comforts. The owner of a lot within the fire limits of a city may be compelled to part with the property, because he is unable to erect a brick or stone structure upon it, and the local regulations will not permit one of wood. Eminent domain only recognizes and enforces the superior right of the community against the selfishness of individuals in a similar way. Every branch of needful industry has a right to exist, and the community has a right to demand that it be permitted to exist; and if for that purpose a peculiar locality already in possession of an individual is essential, the owner's right to undisturbed occupancy must yield to the superior interest of the public. A railroad cannot go around the farm of every unwilling person, and the business of transporting persons and property for long distances by rail, which has been found so essential to the general enjoyment and welfare, could never have existed if it were in the power of any unwilling person to stop the road at his boundary, or to demand unreasonable terms as a condition of passing him. The law interferes in these cases, and regulates the relative rights of the owner and of the community with as strict regard to justice and equity as the circumstances will permit. It does not deprive the owner of his property, but it compels him to dispose of so much of it as is essential on equitable terms. While,

enactments providing for an appropriation of property, but it will not be conclusive.¹

The Taking of Property.

Although property can only be taken for a public use, and the legislature must determine in what cases, it has been long settled that it is not essential the taking should be to or by the State itself, if by any other agency, in the opinion of the legislature, the use can be made equally effectual for the public benefit. There are many cases in which the appropriation consists simply in throwing the property open to use by such persons as may see fit to avail themselves of it; as in the case of common highways and public parks. In those cases the title of the owner is not disturbed, except as it is charged with this burden; and the State defends the easement, not by virtue of any title in the property, but by means of criminal proceedings when the general right is disturbed. But in other cases it seems important to take the title;² and in many of these it is convenient, if not necessary, that the taking be, not by the State, but by the municipality for which the use is specially designed, and to whose care and government it will be confided. When property is needed for a district school-house, it is proper that the district appropriate it;

therefore, eminent domain establishes no industry, it so regulates the relative rights of all that no individual shall have it in his power to preclude its establishment." On this general subject see Olmstead v. Camp, 33 Conn. 532, in which it was very fully and carefully considered.


and it is strictly in accordance with the general theory as well as with the practice of our government for the State to delegate to the district the exercise of the power of eminent domain for this special purpose. So a county may be authorized to take lands for its court-house or jail; a city, for its town hall, its reservoirs of water, its sewers, and other public works of like importance. In these cases no question of power arises; the taking is by the public; the use is by the public; and the benefit to accrue therefrom is shared in greater or less degree by the whole public.

If, however, it be constitutional to appropriate lands for mill dams or mill sites, it ought also to be constitutional that the taking be by individuals instead of by the State or any of its organized political divisions; since it is no part of the business of the government to engage in manufacturing operations which come in competition with private enterprise; and the cases must be very peculiar and very rare where a State or municipal corporation could be justified in any such undertaking. And although the practice is not entirely uniform on the subject, the general sentiment is adverse to the construction of railways by the State, and the opinion is quite prevalent, if not general, that they can be better managed, controlled, and operated for the public benefit in the hands of individuals than by State or municipal officers or agencies.

And while there are unquestionably some objections to compelling a citizen to surrender his property to a corporation, whose corporators, in receiving it, are influenced by motives of private gain and emolument, so that to them the purpose of the appropriation is altogether private, yet conceding it to be settled that these facilities for travel and commerce are a public necessity, if the legislature, reflecting the public sentiment, decide that the general benefit is better promoted by their construction through individuals or corporations than by the State itself, it would clearly be pressing a constitutional maxim to an absurd extreme if it were to be held that the public necessity should only be provided for in the way which is least consistent with the public interest. Accordingly, on the principle of public benefit, not only the State and its political divisions, but also individuals and corporate bodies, have been authorized to take private property for the construction of works of public utility, and when duly empowered by the legislature so to do, their private pecuniary interest does not preclude their being regarded as public agencies in respect to the public good which is sought to be accomplished.1

The Necessity for the Taking.

The authority to determine in any case whether it is needful to permit the exercise of this power must rest with the State itself; and the question is always one of strictly political character, not requiring any hearing upon the facts or any judicial determination. Nevertheless, when a work or improvement of local importance only is contemplated, the need of which must be determined upon a view of the facts which the people of the vicinity may be supposed best to understand, the question of necessity is generally referred to some local tribunal, and it may even be submitted to a jury to decide upon evidence. But parties interested have no constitutional right to be heard upon the question, unless the State constitution clearly and expressly recognizes and provides for it. On general principles, the final decision rests with the legislative department of the State; and if the question is necessity of any specific appropriation to be submitted to a jury; and this requirement cannot be dispensed with. Mansfield, &c. R. R. Co. v. Clarke, 23 Mich. 519; Arnold v. Decatur, 29 Mich. 77; [Saginaw, &c. Ry. Co. v. Bordner, 108 Mich. 266, 69 N. W. 62. As to what is "necessity," see City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; City of Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197; Detroit & S. P. Ry. Co. v. City of Detroit, 81 Mich. 562, 46 N. W. 12. Future as well as present needs to be considered. St. Louis & S. F. Ry. Co. v. Fultz, 52 Fed. Rep. 627; Kountze v. Prep. Morris Aqueduct, 58 N. J. L. 303, 33 Atl. 252, 58 N. J. L. 605, 34 Atl. 1093. Is a practical question: Butte A. & P. Ry. Co. v. Montana U. Ry. Co., 16 Mont. 604, 41 Pac. 232, 31 L. R. A. 298.]

referred to any tribunal for trial, the reference and the opportunity for being heard are matters of favor and not of right. The State is not under any obligation to make provision for a judicial contest upon that question. And where the case is such that it is proper to delegate to individuals or to a corporation (a) the power to appropriate property, it is also competent to delegate the authority to decide upon the necessity for the taking.  


Matter of New York Central R. R. Co., 60 N. Y. 407; In re St. Paul, & N. P. Ry. Co., 34 Minn. 227, 25 N. W. 345; Olmsted v. Prop's Morris Aqueduct, 46 N. J. L. 495; Tracy v. Elizabethtown, &c. R. R. Co., 80 Ky. 259; Spring Valley Water Works v. San Mateo Water Works, 61 Cal. 123, 28 Pac. 447. In the case first above cited, Denio, J., says: "The question then is, whether the State, in the exercise of the power to appropriate the property of individuals to a public use, where the duty of judging of the expediency of making the appropriation, in a class of cases, is committed to public officers, is obliged to afford to the owners of the property an opportunity to be heard before those officers when they sit for the purpose of making the determination. I do not speak now of the process for arriving at the amount of compensation to be paid to the owners, but of the determination whether, under the circumstances of a particular case, the property required for the purpose shall be taken or not; and I am of opinion that the State is not under any obligation to make provisions for a judicial contest upon that question. The only part of the constitution which refers to the subject is that which forbids private property to be taken for public use without compensation, and that which prescribes the manner in which the compensation shall be ascertained. It is not pretended that the statute under consideration violates either of these provisions. There is therefore no constitutional injunction on the point under consideration. The necessity for appropriating private property for the use of the public or of the government is not a judicial question. The power resides in the legislature. It may be exercised by means of a statute which shall at once designate the property to

(a) [Private corporation cannot be authorized to condemn for the use of a municipality or père verea. Seattle & Montana Ry. Co. v. State, 7 Wash. 150, 31 Pac. 551, 38 Am. St. 899, 22 L. R. A. 217.]
How much Property may be taken.

The taking of property must always be limited to the necessity of the case, and consequently no more can be appropriated in any instance than the proper tribunal shall adjudge to be needed for the particular use for which the appropriation is made. When a part only of a man's premises is needed by the public, the necessity for the appropriation of that part will not justify the taking of the whole, even though compensation be made therefor. The moment the appropriation goes beyond the necessity of the case, it ceases to be justified on the principles which underlie the right of eminent domain. If, however, the statute providing for such

be appropriated and the purpose of the appropriation; or it may be delegated to public officers, or, as it has been repeatedly held, to private corporations established to carry on enterprises in which the public are interested. There is no restraint upon the power, except that requiring compensation to be made. And where the power is committed to public officers, it is a subject of legislative discretion to determine what prudential regulations shall be established to secure a discreet and judicious exercise of the authority. The constitutional provision securing a trial by jury in certain cases, and that which declares that no citizen shall be deprived of his property without due process of law, have no application to the case. The jury trial can only be claimed as a constitutional right where the subject is judicial in its character.

The exercise of the right of eminent domain stands on the same ground with the power of taxation. Both are emanations of the law-making power. They are the attributes of political sovereignty, for the exercise of which the legislature is under no necessity to address itself to the courts. In imposing a tax, or in appropriating the property of a citizen, or a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law; though it would not be if it should undertake to appropriate the property of one citizen for the use of another, or to confiscate the property of one person or a class of persons, or a particular description of property, upon some view of public policy, where it could not be said to be taken for a public use. It follows from these views that it is not necessary for the legislature, in the exercise of the right of eminent domain, either directly, or indirectly through public officers or agents, to invest the proceedings with the forms or substance of judicial process. It may allow the owner to intervene and participate in the discussion before the officer or board to whom the power is given of determining whether the appropriation shall be made in a particular case, or it may provide that the officers shall act upon their own views of propriety and duty, without the aid of a forensic contest. The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the legislature in its discretion prescribes.


1 By a statute of New York it was enacted that whenever a part only of a lot or parcel of land should be required for the purposes of a city street, if the commissioners for assessing compensation should deem it expedient to include the whole lot in the assessment, they should have power so to do; and the part not wanted for the particular street or improvement should, upon the confirmation of the report, become vested in the
appropriation is acted upon, and the property owner accepts the compensation awarded to him under it, he will be precluded by this implied assent from afterwards objecting to the excessive appropriation. And where land is taken for a public work, there is nothing in the principle we have stated which will preclude the appropriation of whatever might be necessary for incidental conveniences: such as the workshops or depot buildings of a railway company, or materials to be used in the construction of their road, and so on. (a) Express legislative power, however, is needed for these purposes; it will not follow that, because such things are convenient to the accomplishment of the general object, the public may appropriate them without express authority of law; but the power to appropriate must be expressly con-

corporation, and might be appropriated to public uses, or sold in case of no such appropriation. Of this statute it was said by the Supreme Court of New York: "If this 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 the same, there can be no objection to it; but if it is to be taken literally, that the commissioners may, against the consent of the owner, take the whole lot, when only a part is required for public use, and the residue to be applied to private use, it assumes a power which, with all respect, the legislature did not possess. The constitution, by authorizing the appropriation of private property 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. It is in violation of natural right; and if it is not in violation of the letter of the constitution, it is of its spirit, and cannot be supported. This power has been supposed to be convenient when the greater part of a lot is taken, and only a small part left, not required for public use, and that small part of but little value in the hands of the owner. In such case the corporation has been supposed best qualified to take and dispose of such parcels, or gores, as they have sometimes been called; and probably this assumption of power has been acquiesced in by the proprietors. I know of no case where the power has been questioned, and where it has received the deliberate sanction of this court. Suppose a case where only a few feet, or even inches, are wanted, from one end of a lot to widen a street, and a valuable building stands upon the other end of such lot; would the power be conceded to exist to take the whole lot, whether the owner consented or not? The quantity of the residue of any lot cannot vary the principle. The owner may be very unwilling to part with only a few feet; and I hold it equally incompetent for the legislature thus to dispose of private property, whether feet or acres are the subject of this assumed power." Matter of Albany St., 11 Wend. 151, 25 Am. Dec. 618, per Savage, Ch. J. To the same effect is Dunn v. City Council, Harper, 129. And see Paul v. Detroit, 32 Mich. 103; Baltimore; &c. R. R. Co. v. Pittsburgh, &c. R. R. Co., 17 W. Va. 812.

1 Embury v. Conner, 3 N. Y. 511.

There is clearly nothing in constitutional principles which would preclude the legislature from providing that a man's property might be taken with his assent, whether the assent was evidenced by deed or not; and if he accepts payment, he must be deemed to assent. See Haskell v. New Bedford, 108 Mass. 298.


(a) [A question as to the amount to be taken is a legislative not a judicial one. U. S. v. Gettysburg Elec. Ry. Co., 100 U. S. 638, 16 Sup. Ct. Rep. 427.]
ferred, and the public agencies seeking to exercise this high prerogative must be careful to keep within the authority delegated, since the public necessity cannot be held to extend beyond what has been plainly declared on the face of the legislative enactment.

What constitutes a Taking of Property.

Any proper exercise of the powers of government, which does not directly encroach upon the property of an individual, or disturb him in its possession or enjoyment, will not entitle him to compensation, or give him a right of action. If, for instance, the State, under its power to provide and regulate the public highways, should authorize the construction of a bridge across a navigable river, it is quite possible that all proprietary interests in land upon the river might be injuriously affected; but such

injury could no more give a valid claim against the State for damages, than could any change in the general laws of the State, which, while keeping in view the general good, might injuriously affect particular interests.\(^1\) So if by the erection of a dam in order to improve navigation the owner of a fishery finds it diminished in value,\(^2\) or if by deepening the channel of a river to im-


2 Shrunk v. Schuylkill Navigation Co., 14 S. & R. 71. In Green v. Swift, 47 Cal. 536, and Green v. State, 73 Cal. 29, 11 Pac. 602, 14 Pac. 610, it is held that where one finds his land injured in consequence of a change in the current of a river, caused by straightening it, he cannot claim compensation as of right. A riparian proprietor is entitled to compensation for land taken for public dam, for overflow of his lands, and diversion of water by reason thereof. Kaukauna W. P. Co. v. Green Bay & M. C. Co., 142 U. S. 254, 12 Sup. Ct. Rep. 173. But not, it seems, for injury from washing away soil of banks through reasonable increase of flow of water at times, caused by a dam authorized by the legislature. Brooks v. Cedar Brook & S. C. R. I. Co., 82 Me. 17, 19 Atl. 87, 7 L. R. A. 460; nor for injuries to rice fields by construction of harbor improvements in a navigable stream. Mills v. United States, 46 Fed. Rep. 738, 12 L. R. A. 673; Farist Steel Co. v. City of Bridgeport, 60 Conn. 278, 22 Atl. 651, 13 L. R. A. 690; Ramsay v. N. Y. & E. Ry. Co., 133 N. Y. 73, 30 N. E. 654, 28 Am. St. 600. The construction by the United States of a pier in a navigable river under authority of Congress for the improvement of navigation gives for an owner of lands bordering on the river no right to compensation though his access to navigable water be cut off. Scranton v. Wheeler, 113 Mich. 605, 71 N. W. 1091, aff. 179 U. S. 141, 21 Sup. Ct. Rep. 48. Same doctrine, Sage v. New York, 154 N. Y. 61, 47 N. E. 1006, 61 Am. St. 592, 33 L. R. A. 606. A riparian owner on navigable water owns to high-water mark, which is that line below which the lands are so frequently flowed that they are not productive as agricultural lands, and the State cannot, even in aid of public navigation, by artificial means maintain such waters above high-water mark to the injury of riparian owners. In re Minnetonka Lake Improvement, 50 Minn. 513, 58 N. W. 295, 45 Am. St. 494. Below high-water mark the State has full authority and right on navigable waters to do whatsoever it pleases in aid of public navigation, and any injury resulting incidentally to the riparian owner is damnum absque injuria. In re Minnetonka Lake Improvement, supra. Right in lands flowed under exercise of right of eminent domain is more than a mere easement. It includes the right of exclusive occupation, and carries right to cut ice which forms on the water. Wright v. Woodcock, 85 Me. 118, 29 Atl. 963, 21 L. R. A. 499. See also, on general subject of taking riparian interests in lands, Patten Paper Co. Ltd. v. Kaukauna Water Power Co., 90 Wis. 370, 61 N. W. 1121, 63 N. W. 1019, 28 L. R. A. 443; Priew v. Wisconsin State Land & Imp. Co., 93 Wis. 634, 67 N. W. 918, 33 L. R. A. 645; Carlson v. St. Louis River D. & I. Co., 73 Minn. 128, 75 N. W. 1044, 72 Am. St. 610, 41 L. R. A. 371; Platt Bros. & Co. v. Waterbury, 72 Conn. 531, 45 Atl. 134, 48 L. R. A. 691; Valparaiso v. Hagen, 153 Ind. 337, 54 N. E. 1002, 48 L. R. A. 707. These last two cases are opposed to each other on the question whether a riparian owner is entitled to compensation for the casting of the sewage of a city upon his lands to their injury. The Connecticut case finds support in Smith v. Sedalia, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711, and in Grey ex rel. Simmons v. Paterson,—N. J.—, 45 Atl. 905. The retention of surface water on lot in city, caused by change of grade in street, is not a taking in violation of constitution. Jordan v. Benwood, 42 W. Va. 312, 26 S. E. 260, 57 Am. St. 859, 36 L. R. A. 619. In Maine and Massachusetts where the "great ponds" belong to the State, the taking of a reasonable quantity of water by authority of the State is not a "taking" as against a mill owner with a water power on the outlet. Auburn v.
prove the navigation a spring is destroyed,\(^1\) or by a change in the
grade of a city street the value of adjacent lots is diminished,\(^2\) —

Union Water Power Co., 90 Me. 576, 38
Att. 501, 38 L. R. A. 188. The diversion
of water from its natural course in which
it serves as motive power for a mill is in
Michigan unlawful, and will be enjoined
where such diversion is for drainage pur-
357, 72 N. W. 182, 38 L. R. A. 355.\(^1\)

\(^1\) Commonwealth v. Richter, 1 Pa. St.
407. But in Winklemann v. Des Moines,
\&c. Ry. Co., 62 Iowa, 11, 17 N. W. 82,
the value of a spring destroyed in rail-
road construction is held recoverable.
\[Incidental draining of a well through
construction of a public work is a "direct
injuring" of property within the meaning
of that term in a statute authorizing the
construction. United States v. Alexander,
It is justly said by Mr. Justice Miller, in
Wall. 106, 109, that the decisions "that
for the consequential injury to the prop-
erty of an individual from the prosecu-
tion of improvement of roads, streets, rivers,
and other highways for the public good,
there is no redress," have gone to the
extreme and limit of sound judicial con-
struction in favor of this principle, and in
some cases beyond it; and it remains
true that where real estate is actually
invaded by superimposed additions of
water, earth, sand, or other material, or
by having any artificial structure placed
on it, so as effectually to destroy or im-
pair its usefulness, it is a taking within
the meaning of the Constitution." See
also Arimond v. Green Bay, \&c. Co., 31
Wis. 316; Aurora v. Reed, 57 Ill. 29, 11
Am. Rep. 1. This whole subject is most
elaborately considered by Smith, J., in
Eaton v. Boston, C. \& M. R. R. Co., 51
N. H. 504. It was decided in that case
that, notwithstanding a party had re-
ceived a remedy at the common law
for the flooding of his land in conse-
quence of the road being cut through a
ridge on the land of another; and that
this flooding was a taking of his property
within the meaning of the constitution.
The cases to the contrary are all consid-
ered by the learned judge, who is able
to adduce very forcible reasons for his
conclusions. \[A change in the plan of
construction of a railway after condem-
nation may entitle the owner of lands
condemned to additional compensation.
Wabash, St. L. \& P. R. Co. v. McDougall,
126 Ill. 111, 18 N. E. 291, 1 L. R. A. 207.
The conversion of a public way into a
pleasure driveway, and excluding loaded
vehicles from it, is not, as against per-
sons desiring to use it with such vehicles,
a taking of their property for public use
without compensation. Cicero Lumber
Co. v. Cicero, 176 Ill. 9, 51 N. E. 750, 88
Am. St. 165, 42 L. R. A. 696.\]

Compare Aldrich v. Cheshire R. R. Co., 21 N. H.
350; West Branch, \&c. Canal Co. v.
Mulliner, 98 Pa. St. 357; Bellinger v.
N. Y. Central R. R. Co., 23 N. Y. 42;
49; and cases, ante, p. 757.

\(^2\) British Plate Manufacturing Co. v.
Meredith, 4 T. R. 794; Matter of Farman
Street, 17 Wend. 649; Radcliffe Ex'r v.
Mayor, \&c. of Brooklyn, 4 N. Y. 195;
Graves v. Otis, 2 Hill, 496; Wilson v.
Mayor, \&c. of New York, 1 Denio, 593;
Murphy v. Chicago, 29 III. 279; Roberts
v. Chicago, 26 III. 249; Charleston v. Alle-
ghany City, 1 Grant, 234; La Fayette v.
Bush, 19 Ind. 326; Macy v. Indianaapolis,
17 Ind. 267; Vincennes v. Richards, 23
Ind. 381; Green v. Reading, 9 Watts,
187; In re Ridge Street, 29 Pa. St. 301;
Callender v. Marsh, 1 Pick. 418; Creal
v. Kenkuk, 4 Greene (Towa), 47; Smith
Hartford Bridge Co., 29 Conn. 523; Ben-
den v. Nashun, 17 N. H. 477; Pontiac v.
Carter, 32 Mich. 164; Guszler v. George-
town, 6 Wheat. 593; Stewart v. Clinton,
70 Mo. 603; Kehrer v. Richmond, 51 Va.
745; Meth. Epis. Church v. Wyandotte,
31 Kan. 271, 5 Pac. 527. See cases, ante,
Co., 102 N. Y. 107, 6 N. E. 663; Uline v.
New York, \&c. R. R. Co., 101 N. Y. 38,
4 N. E. 536; Henderson v. Minneapolis,
32 Minn. 319, 20 N. W. 322; \[Schen
v. City of Jacksonville, 23 Fla. 558, 10 So.
457, 29 Am. St. 278 and note, 14 L. R. A.
370. It seems that where the constitu-

in these and similar cases the law affords no redress for the injury. So if in consequence of the construction of a public work an injury occurs, but the work was constructed on proper plan and without negligence, and the injury is caused by accidental and extraordinary circumstances, the injured party cannot demand compensation. 1

Compensation for property "damaged" for public use, that a change of grade, resulting in damage, gives an action. Rauenstein v. N. Y. L. & W. Ry. Co., 130 N. Y. 508, 32 N. E. 1074, 18 L. R. A. 768; O'Brien v. Philadelphia, 150 Pa. 589, 24 Atl. 1047, 30 Am. St. 832, and note, pp. 835 et seq.; Henderson v. McClain, 102 Ky. 402, 43 S. W. 700; 39 L. R. A. 349; Scarle v. City of London, 10 S. D. 312, 405, 73 N. W. 101, 013, 39 L. R. A. 345; Pueblo v. Strait, 20 Col. 113, 36 Pac. 759, 40 Am. St. 273, 24 L. R. A. 392; Dickerman v. Duluth, — Minn. —, 22 N. W. 1115; Brown v. City of Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. 241, 18 L. R. A. 161. Though property does not abut on the street but on an alley opening into it. Id. There is no taking as against abutting owner where a railway company constructs in a public way a stone abutment nine feet high which reduces the width in front of his premises to ten feet, interfering with access of light and air, and almost destroying access to the abutting property. Garrett v. Lake Roland Elevated R. Co., 70 Md. 277, 29 Atl. 830, 24 L. R. A. 394. Similar cases are Willis v. Winona, 59 Minn. 27, 60 N. W. 814, 26 L. R. A. 149; Home Building & C. Co. v. City of Roanoke, 91 Va. 52, 20 S. E. 605, 27 L. R. A. 555. But see Field v. Barling, 140 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, where it is held that an overhead bridge across an alley which obstructs access of light and air to abutting property is such an injury as must be compensated for though the city owns the alley and authorized the bridge. A similar conclusion was reached in Willamette Iron Works v. Oregon R. & N. Co., 28 Oreg. 224, 57 Pac. 1016, 29 L. R. A. 88, which involved a railway bridge approach in a public street. It is a taking against the constitutional inhibition to require abutting owners in New Hampshire to keep sidewalks free from snow and ice. State v. Juckman, 69 N. H. 318, 41 Atl. 347, 42 L. R. A. 438.] Compare cases, post, p. 812, note. The cases of McComb v. Akron, 15 Ohio, 474, 18 Ohio, 229, and Crawford v. Delaware, 7 Ohio St. 459, are contra. Those cases, however, admit that a party whose interests are injured by the original establishment of a street grade can have no claim to compensation; but they hold that when the grade is once established, and lots are improved in reference to it, the corporation has no right to change the grade afterwards, except on payment of the damages. And see Johnson v. Parkersburg, 16 W. Va. 482, 57 Am. Rep. 775. That if the lateral support to his land is removed by grading a street the owner is entitled to compensation, see O'Brien v. St. Paul, 26 Minn. 331; Buskirk v. Strickland, 47 Mich. 530, 11 N. W. 210. [Darke v. City of Seattle, 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 20 L. R. A. 68,] 1

As in Sprague v. Worcester, 13 Gray, 193, where, in consequence of the erection of a bridge over a stream on which a mill was situated, the mill was injured by an extraordinary rise in the stream; the bridge, however, being in all respects properly constructed. [The destruction of oysters by turning the sewage of a city upon their beds is a taking, requiring compensation. Hufnagle v. Brooklyn, 102 N. Y. 581, 57 N. E. 176, 48 L. R. A. 421.] In Hamilton v. Vicksburg, &c. R. R. Co., 110 U. S. 290, 7 Sup. Ct. Rep. 200, the obstruction of a navigable stream by unavoidable delay in rebuilding a lawful bridge was held not actionable. And see Brown v. Cuyuna, &c. R. R. Co., 12 N. Y. 468, where bridge proprietors were held liable for similar injuries on the ground of negligence. And compare Norris v. Vt. Central R. R. Co., 23 Vt. 99, with Mellen v. Western R. R. Corp., 4 Gray, 301. And see note on preceding page. The inconvenience from smoke and jar caused by the careful construction and operation of a railroad near property is not actionable. Carroll v. Wis. Cent. R. R. Co., 40 Minn. 168, 41
This principle is peculiarly applicable to those cases where property is appropriated under the right of eminent domain. It must frequently occur that a party will find his rights seriously affected, though no property to which he has lawful claim is actually appropriated. As where a road is laid out along the line of a man's land without taking any portion of it, in consequence of which he is compelled to keep up the whole of what before was a partition fence, one half of which his neighbor was required to support.\(^1\) No property being taken in this case, the party has no relief unless the statute shall give it. The loss is *damnum absque injuria.* So a turnpike company, whose profits will be diminished by the construction of a railroad along the same general line of travel, is not entitled to compensation.\(^2\) So where a railroad company, in constructing their road in a proper manner on their own land, raised a high embankment near to and in front of the plaintiff's house, so as to prevent his passing to and from the same with the same convenience as before, this consequential inquiry was held to give no claim to compensation.\(^3\)

So an increased competition with a party's business caused by the construction or extension of a road is not a ground of claim. *Harvey v. Lackawanna, &c. R. R. Co.,* 47 Pa. St. 428. "Every great public improvement must, almost of necessity, more or less affect individual convenience and property; and where the injury sustained is remote and consequential, it is *damnum absque injuria,* and is to be borne as a part of the price to be paid for the advantages of the social condition. This is founded upon the principle that the general good is to prevail over partial individual convenience." *Lansing v. Smith,* 8 Cow. 140, 149.


\(^2\) If construction of railway along opposite side of highway causes depreciation of lands, the owner is entitled to compensation for such depreciation as is occasioned by causes not affecting the public generally. *Lake Erie & Western Ry. Co. v. Scott,* 132 Ill. 423, 24 N. E. 73, 8 L. R. A. 330.


See also Indianapolis R. R. Co. v. Smith, 52 Ind. 428; Terre Haute & L. R. R. Co. v. Biasell, 108 Ind. 113, 9 N. E. 144; Indiana, B. & W. Ry. Co. v. Eberle, 110 Ind. 512, 11 N. E. 467; Pekin v. Breteron, 67 Ill. 477; Pekin v. Winkel, 77 Ill. 66; Grand Rapids, &c. R. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306. In the Vermont case above cited it was held that an excavation by the company on its own land, so near the line of the plaintiff's that his land, without any artificial weight thereon, slid into the excavation, would render the company liable for the injury; the plaintiff being entitled to the lateral support for his land. But if to bridge a cut made by a railroad in crossing a street the grade in front of a lot is raised, it is held not a taking for a new use, though access to the lot is cut off. Henderson v. Minneapolis, 32 Minn. 219, 20 N. W. 322; Conklin v. New York, &c. Ry. Co., 102 N. Y. 107, 6 N. E. 636. The same principle is followed in Uline v. New York, &c. R. R. Co., 101 N. Y. 98, 4 N. E. 536.

Susquehanna Canal Co. v. Wright, 9 W. & S. 9; Monongahela Navigation Co. v. Coons, 6 W. & S. 101. [But see Lee v. Pembroke Iron Co., 57 Me. 481, 2 Am. Rep. 59; Trenton Water Power Co. v. Roff, 46 N. J. L. 543; Red River Bridge Co. v. Clarksville, 1 Sneed, 170, 60 Am. Dec. 142.] In any case, if parties exercising the right of eminent domain shall cause injury to others by a negligent or improper construction of their work, they may be liable in damages. Rowe v. Granite Bridge Corporation, 21 Pick. 348; Sprague v. Worcester, 13 Gray, 193. And if a public work is of a character to necessarily disturb the occupation and enjoyment of his estate by one whose land is not taken, he may have an action on the case for the injury, notwithstanding the statute makes no provision for compensation. As where the necessary, and not simply the accidental, consequence was to flood a man's premises with water, thereby greatly diminishing their value. Hooker v. New Haven & Northampton Co., 14 Conn. 140, 16 Conn. 512; Evansville, &c. R. R. Co. v. Dick, 9 Ind. 453; Robinson v. N. Y. & Erie R. R. Co., 27 Barb. 512; Trustees of Wabash & Erie Canal v. Spears, 16 Ind. 441; Eaton v. Boston, C. & M. R. R. Co., 51 N. H. 604; Ashley v. Port Huron, 35 Mich. 296. So, where, by blasting rock in making an excavation, the fragments are thrown upon adjacent buildings so as to render their occupation unsafe. Hay v. Cohoes Co., 2 N. Y. 159; Tremain v. Same, 2 N. Y. 163; Carman v. Steubenville & Indiana R. R. Co., 4 Ohio St. 399; Sumner & Erie R. R. Co. v. Illmuel, 27 Pa. St. 99; Georgetown, &c. R. R. Co. v. Eagles, 9 Conn. 544, 13 Pac. 696. See Mairs v. Manhattan, &c. Ass., 89 N. Y. 498. There has been some disposition to hold private corporations liable for all incidental damages caused by their exercise of the right of eminent domain. See Tinsman v. Belvidere & Delaware R. R. Co., 26 N. J. 148; Alexander v. Milwaukee, 16 Wis. 217. [Opening of street adjacent to one's property, thus bounding it by streets on three sides and diminishing its value by rendering it unsightly to the public and destroying its privacy, is not a "taking" or "damaging" under the constitution. Peel v. City of Atlanta, 85 Ga. 158, 11 S. E. 582, 8 L. R. A. 787.]

property within a highway terminating on a private stream is not an appropriation of property, the ferry being a mere continuation of the highway, and the landing place upon the private property having previously been appropriated to public uses.

These cases must suffice as illustrations of the principle stated, though many others might be referred to. On the other hand, any injury to the property of an individual which deprives the owner of the ordinary use of it, is equivalent to a taking, and entitles him to compensation. Water front on a stream where

7 Am. Rep. 170; [Scranton v. Wheeler, 113 Mich. 565, 71 N. W. 1001, aff. 179 U. S. 141, 21 Sup. Ct. Rep. 43; Sage v. New York City, 164 N. Y. 61, 47 N. E. 1090, 61 Am. St. 592, 38 L. R. A. 606.] So far as these cases hold it competent to cut off a riparian proprietor from access to the navigable water, they seem to us to justify an appropriation of his property without compensation; for even those courts which hold the fee in the soil under navigable waters to be in the State admit valuable riparian rights in the adjacent proprietor. See Yates v. Milwaukee, 10 Wall. 407; Chicago, & R. R. Co. v. Stein, 75 Ill. 41. Compare Pennsylvania R. R. Co. v. New York, &c. R. R. Co., 23 N. J. Eq. 157. In the case of Railway Co. v. Renwick, 102 U. S. 180, it is decided expressly that the land under the water in front of a riparian proprietor and beyond the line of private ownership, cannot be taken and appropriated to a public purpose without making compensation to the riparian proprietor. This is a very sensible and just decision. See, in the same line, Langdon v. Mayor, 93 N. Y. 129; Kingsland v. Mayor, 110 N. Y. 669, 18 N. E. 435.


2 Hooker v. New Haven & Northampton Co., 14 Conn. 149; Pumpelly v. Green Bay, &c. Co., 13 Wall. 195; Arimond v. Green Bay, &c. Co., 31 Wis. 316; Ashley v. Port Huron, 35 Mich. 296. Any restriction or interruption of the common or necessary use of property that destroys its value, or strips it of its attributes, or to say that the owner shall not use his property as he pleases, takes it in violation of a constitutional provision forbidding the taking of private property for public use without compensation. City of Janesville v. Carpenter, 77 Wis. 288, 48 N. W. 128, 20 Am. St. 123.] The flowing of private lands by the operations of a booming company is a taking of property. Grand Rapids Boomng Co. v. Jarvis, 30 Mich. 308; Weaver v. Mississippi, &c. Co., 28 Minn. 524, 11 N. W. 114. And see cases, p. 786, note 1. The legislature cannot authorize a telegraph company to erect its poles on the lands of a railroad company without compensation. Atlantic, &c. Telegraph Co. v. Chicago, &c. R. R. Co., 6 Biss. 158. [A railway company cannot give authority to a telegraph or telephone company to construct a line of telegraph or telephone along its right of way as against the adjoining proprietor whose lands have been condemned for railway purposes only. American T. & T. Co. v. Smith, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200. Contra, if constructed in good faith for the use and benefit of the railway in the carrying on of its railway business. Id.] The erection of telephone, telegraph, and electric wire poles on a highway is a new use of it. Board of Trade Tel. Co. v. Barnett, 107 Ill. 507; Metr. Tel. &c., Co. v. Colwell Lead Co., 67 How. Pr. 365; Tiffany v. U.S. Illum. Co., Id. 73; [Western Union Telegraph Co. v. Williams, 86 Va. 696, 11 S. E. 106, 8 L. R. A. 429.] Contra, Pierce v. Drew, 139 Mass. 75; Julia Bldg' Ass. v. Bell Tel. Co., 88 Mo. 266. A statute cannot compel a railroad company to allow any one upon payment of one dollar to erect a grain elevator upon its station grounds. State v. Chicago, &c. Ry. Co., 36 Minn. 402, 31 N. W. 365. If under an ordinance an abutter on rebuilding is required to put his house back five feet from the street line, property is taken. In re Chestnut St., 118 Pa. St. 503, 12 Atl. 485; [City of St. Louis v. Hill, 116 Mo. 627, 22 S. W.
the tide does not ebb and flow is property, and, if taken, must be paid for as such.\(^1\) So with an exclusive right of wharfrage upon tide water.\(^2\) So with the right of the owner of land to use an adjoining street, whether he is owner of the land over which the street is laid out or not.\(^3\) So with the right of pasturage in streets, which belongs to the owners of the soil.\(^4\) So a partial destruction or diminution of value of property by an act of the government which directly and not merely incidentally affects it, is to that extent an appropriation.\(^5\)

It sometimes becomes important, where a highway has been laid out and opened, to establish a different and higher grade of way upon the same line, with a view to accommodate an increased public demand. The State may be willing to surrender the control of the streets in these cases, and authorize turnpike, plank-road, or railroad corporations to occupy them for their purposes; and if it shall give such consent, the control, so far as is necess-
sary to the purposes of the turnpike, plank-road, or railway, is thereby passed over to the corporation, and their structure in what was before a common highway cannot be regarded as a public nuisance. But the municipal organizations in the State have no power to give such consent without express legislative permission; the general control of their streets which is commonly given by municipal charters not being sufficient authority for this purpose. When, however, the public authorities have thus assented, it may be found that the owners of the adjacent lots, who are also owners of the fee in the highway subject to the public easement, may be unwilling to assent to the change, and may believe their interests to be seriously and injuriously affected thereby. The question may then arise, Is the owner of the land, who has once been compensated for the injury he has sustained in the appropriation of his land as a highway, entitled to a new assessment for any further injury he may sustain in consequence of the street being subjected to a change in the use not contemplated at the time of the original taking, but nevertheless in furtherance of the same general purpose?

When a common highway is made a turnpike or a plank-road, upon which tolls are collected, there is much reason for holding that the owner of the soil is not entitled to any further compensa-


2 Lackland v. North Missouri R. R. Co., 31 Mo. 180; New York & Harlem R. R. Co. v. Mayor, &c. of New York, 1 Illit. 562; Millham v. Sharp, 27 N. Y. 611; State v. Cincinnati, &c. Gas Co., 18 Ohio St. 262; State v. Trenton, 30 N. J. 79; Chamberlin v. Elizabethport, &c. Co., 41 N. J. Eq. 43; Garnett v. Jacksonville, &c. Co., 20 Fla. 889. In Inhabitants of Springfield v. Connecticut River R. R. Co., 4 Cush. 68, it was held that legislative authority to construct a railroad between certain termini, without prescribing its precise course and direction, would not prima facie confer power to lay out the road on and along an existing public highway. Per Shaw, C. J.: “The whole course of legislation on the subject of railroads is opposed to such a construction. The crossing of public highways by railroads is obviously necessary, and of course warranted; and numerous provisions are industriously made to regulate such crossings, by determining when they shall be on the same and when on different levels, in order to avoid collision; and, when on the same level, what gates, fences, and barriers shall be made, and what guards shall be kept to insure safety. Had it been intended that railroad companies, under a general grant, should have power to lay a railroad over a highway longitudinally, which ordinarily is not necessary, we think that would have been done in express terms, accompanied with full legislative provisions for maintaining such barriers and modes of separation as would tend to make the use of the same road, for both modes of travel, consistent with the safety of travellers on both. The absence of any such provision affords a strong inference that, under general terms, it was not intended that such a power should be given.” See also Commonwealth v. Erie & N. E. R. R. Co., 17 Pa. St. 339; Attorney-General v. Morris & Essex R. R. Co., 19 N. J. Eq. 386.
tion. The turnpike or the plank-road is still an avenue for public travel, subject to be used in the same manner as the ordinary highway was before, and, if properly constructed, is generally expected to increase rather than diminish the value of property along its line; and though the adjoining proprietors are required to pay toll, they are supposed to be, and generally are, fully compensated for this burden by the increased excellence of the road, and by their exemption from highway labor upon it. But it is different when a highway is appropriated for the purposes of a railroad. "It is quite apparent that the use by the public of a highway, and the use thereof by a railroad company, is essentially different. In the one case every person is at liberty to travel over the highway in any place or part thereof, but he has no exclusive right of occupation of any part thereof except while he is temporarily passing over it. It would be trespass for him to occupy any part of the highway exclusively for any longer period of time than was necessary for that purpose, and the stoppages incident thereto. But a railroad company takes exclusive and permanent possession of a portion of the street or highway. It lays down its rails upon, or imbeds them in, the soil, and thus appropriates a portion of the street to its exclusive use, and for its own particular mode of conveyance. In the one case, all persons may travel on the street or highway in their own common modes of conveyance. In the other no one can travel on or over the rails laid down, except the railroad company and with their cars specially adapted to the tracks. In one case the use is general and open alike to all. In the other it is peculiar and exclusive.

"It is true that the actual use of the street by the railroad may not be so absolute and constant as to exclude the public also from its use. With a single track, and particularly if the cars used upon it were propelled by horse-power, the interruption of the public easement in the street might be very trifling and of no practical consequence to the public at large. But this consideration cannot affect the question of right of property, or of the increase of the burden upon the soil. It would present simply a

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1 See Commonwealth v. Wilkinson, 16 Pick. 175, 24 Am. Dec. 624; Benedict v. Goit, 3 Barb. 460; Wright v. Carter, 27 N. J. 70; State v. Laverack, 34 N. J. 201; Chagrin Falls & Cleveland Plank Road Co. v. Cane, 2 Ohio St. 419; Douglas v. Turnpike Co., 22 Md. 210. But see Williams v. Natural Bridge Plank Road Co., 21 Mo. 550. A third-class road cannot be changed to one of the second class without compensation, as the burden on the owner is increased. Bounds v. Kirven, 63 Tex. 159. In Murray v. County Commissioners of Berkshire, 12 Met. 465, it was held that owners of lands adjoining a turnpike were not entitled to compensation when a turnpike was changed to a common highway.
question of degree in respect to the enlargement of the easement, and would not affect the principle, that the use of a street for the purposes of a railroad imposed upon it a new burden.

The case from which we here quote is approved in cases in Wisconsin, where importance is attached to the different effect the common highway and the railroad will have upon the value of adjacent property. "The dedication to the public as a highway," it is said, "enhances the value of the lot, and renders it more convenient and useful to the owner. The use by the railroad company diminishes its value, and renders it inconvenient and comparatively useless. It would be a most unjust and oppressive rule which would deny the owner compensation under such circumstances."


2 Ford v. Chicago & Northwestern R. R. Co., 14 Wis. 609, 616; followed in Pomroy v. Chicago & M. R. R. Co., 37 Wis. 61. The later cases allow compensation only when the fee of the street is in the owner and there is an actual physical interference with the property in the strict sense: Heissa v. Milwaukee, &c. R. R. Co., 69 Wis. 555, 34 N. W. 916; Hanlin v. Chicago, &c. Ry. Co., 61 Wis. 515, 21 N. W. 629; where there was no such interference, distinguishing Buchner.
It is not always the case, however, that the value of a lot of land will be enhanced by the laying out of a common highway across it, or diminished by the construction of a railway over the same line afterwards. The constitutional question cannot depend upon the accidental circumstance that the new road will or will not have an injurious effect; though that circumstance is properly referred to, since it is difficult to perceive how a change of use which may possibly have an injurious effect not contemplated in the original appropriation can be considered anything else than the imposition of a new burden upon the owner's estate. In Connecticut, where the authority of the legislature to authorize a railroad to be constructed in a common highway without compensation to land-owners is also denied, importance is attached to the terms of the statute under which the original appropriation was made, and which are regarded as permitting the taking for the purposes of a common highway, and for no other. The reasoning of the court appears to us sound; and it is applicable to the statutes of the States generally.\(^1\)

\(^1\) Inlay v. Union Branch R. R. Co., 26 Conn. 240, 255. \(\text{"When land is condemned for a special purpose," say the court, \"on the score of public utility, the sequestration is limited to that particular use. Land taken for a highway is not thereby convertible into a common. As the property is not taken, but the use only, the right of the public is limited to the use, the specific use, for which the proprietor has been divested of a complete dominion over his own estate. There are propositions which are no longer open to discussion. But it is contended that land once taken and still held for highway purposes may be used for a railway without exceeding the limits of the easement already acquired by the public. If this is true, if the new use of the land is within the scope of the original sequestration or dedication, it would follow that the railway privileges are not an encroachment on the estate remaining in the owner of the soil, and that the new mode of enjoying the public easement will not enable him rightfully to assert a claim to damages therefor. On the contrary, if the true intent and efficacy of the original condemnation was not to subject the land to such a burden as will be imposed upon it when it is consecrated to the uses and control of a railroad corporation, it cannot be denied that in the latter case the estate of the owner of the soil is injuriously affected by the supervening servitude; that his rights are abridged, and that in a legal sense his land is again taken for public uses. Thus it appears that the court have simply to decide whether there is such an identity between a highway and a railway, that statutes conferring a right to establish the former include an authority to construct the latter.\"

\(\text{"The term \textquoteleft public highway,' as employed in such of our statutes as convey the right of eminent domain, has certainly a limited import. Although, as suggested at the bar, a navigable river or a canal is, in some sense, a public highway, yet an easement assumed under the name of a highway would not enable the public to convert a street into a canal. The highway, in the true meaning of}\)
It would appear from the cases cited that the weight of judicial authority is against the power of the legislature to appropriate the word, would be destroyed. But as no such destruction of the highway is necessarily involved in the location of a railway track upon it, we are pressed to establish the legal proposition that a highway, such as is referred to in these statutes, means or at least comprehends a railroad. Such a construction is possible only when it is made to appear that there is a substantial practical or technical identity between the uses of land for highway and for railway purposes.

"No one can fail to see that the terms 'railway' and 'highway' are not convertible, or that the two uses, practically considered, although analogous, are not identical. Land as ordinarily appropriated by a railroad company is inconvenient, and even impassable, to those who would use it as a common highway. Such a corporation does not hold itself bound to make or to keep its embankments and bridges in a condition which will facilitate the transitus of such vehicles as ply over an ordinary road. A practical dissimilarity obviously exists between a railway and a common highway, and is recognized as the basis of a legal distinction between them. It is so recognized on a large scale when railway privileges are sought from legislative bodies, and granted by them. If the terms 'highway' and 'railway' are synonymous, or if one of them includes the other by legal implication, no act could be more superfluous than to require or to grant authority to construct railways over localities already occupied as highways.

"If a legal identity does not subsist between a highway and a railway, it is illogical to argue that, because a railway may be so constructed as not to interfere with the ordinary uses of a highway, and so as to be consistent with the highway right already existing, therefore such a new use is included within the old use. It might as well be urged, that if a common, or a canal, laid out over the route of a public road, could be so arranged as to leave an ample roadway for vehicles and passengers on foot, the land should be held to be originally condemned for a canal or a common, as properly incident to the highway use.

"There is an important practical reason why courts should be slow to recognize a legal identity between the two uses referred to. They are by no means the same thing to the proprietor whose land is taken; on the contrary, they suggest widely different standards of compensation. One can readily conceive of cases where the value of real estate would be directly enhanced by the opening of a highway through it; while its confiscation for a railway at the same or a subsequent time would be a gross injury to the estate, and a total subversion of the mode of enjoyment expected by the owner when he yielded his private rights to the public exigency.

"But essential distinctions also exist between highway and railway powers, as conferred by statute,—distinctions which are founded in the very nature of the powers themselves. In the case of the highway, the statute provides that, after the observance of certain legal forms, the locality in question shall be forever subservient to the right of every individual in the community to pass over the thoroughfare so created at all times. This right involves the important implication that he shall so use the privilege as to leave the privilege of all others as unobstructed as his own; and that he is therefore to use the road in the manner in which such roads are ordinarily used, with such vehicles as will not obstruct, or require the destruction of the ordinary modes of travel thereon. He is not authorized to lay down a railway track, and run his own locomotive and car upon it. No one ever thought of regarding highway acts as conferring railway privileges, involving a right in every individual, not only to break up ordinary travel, but also to exact tolls from the public for the privilege of using the peculiar conveyances adapted to a railroad. If a right of this description is not conferred when a highway is authorized by law, it is idle to pretend that any proprietor is divested of such a right. It would seem that, under such circumstances, the true construction of highway laws could hardly be debatable, and that the absence of legal identity
a common highway to the purposes of a railroad, unless at the same time provision is made for compensation to the owners of the fee. These cases, however, have had reference to the common railroad operated by steam. In one of the New York cases it is intimated, and in another case in the same State it was directly decided, that the ruling should be the same in the case of the street railway operated by horse power. There is generally, however, a very great difference in the two cases, and some of the considerations to which the courts have attached importance could have no application in many cases of common horse railways. A horse railway, as a general thing, will interfere very little with the ordinary use of the way by the public, even upon the very line of the road; and in many cases it would be a relief to an overburdened way, rather than an impediment to the previous use. In Connecticut, after it had been decided, as above shown, that the owner of the fee subject to a perpetual highway was entitled to compensation when the highway was appropriated for an ordinary railroad, it was also held that the authority to lay and use a horse-railway track in a public street was not a new servitude imposed upon the land, for which the owner of the fee would be entitled to damages, but that it was a part of the public use to which the land was originally subjected when taken for a street. The same distinction between horse railways and those operated by steam is also taken in recent New York cases.

between the two uses of which we speak was patent and entire.

"Again, no argument or illustration can strengthen the self-evident proposition that, when a railway is authorized over a public highway, a right is created against the proprietor of the fee, in favor of a person, an artificial person, to whom he before bore no legal relation whatever. It is understood that when such an easement is sought or bestowed, a new and independent right will accrue to the railroad corporation as against the owner of the soil, and that, without any reference to the existence of the highway, his land will forever stand charged with the accruing servitude. Accordingly, if such a highway were to be discontinued according to the legal forms prescribed for that purpose, the railroad corporation would still insist upon the express and independent grant of an easement to itself, enabling it to maintain its own road on the site of the abandoned highway. We are of opinion, therefore, as was distinctly intimated by this court in a former case (see opinion of Hinnan, J., in Nicholson v. N. Y. & N. H. R. R. Co., 22 Conn. 71, 85), that to subject the owner of the soil of a highway to a further appropriation of his land to railway uses is the imposition of a new servitude upon his estate, and is an act demanding the compensation which the law awards when land is taken for public purposes." And see South Carolina R. R. Co. v. Steiner, 44 Ga. 546.

But whether the mere difference in the motive power will make different principles applicable is a question which the courts will probably have occasion to consider further. Conceding that the interests of individual owners will not generally suffer, or their use of the highway be incommode by the laying down and use of the track of a horse railway upon it, there are nevertheless cases where it might seriously impede, if not altogether exclude, the general travel and use by the ordinary modes, and very greatly reduce the value of all the property along the line. Suppose, for instance, a narrow street in a city, occupied altogether by wholesale houses, which require constantly the use of the whole street in connection with their business, and suppose this to be turned over to a street-railway company, whose line is such as to make the road a principal avenue of travel, and to require such constant passage of cars as to drive all drayage from the street. The corporation, under these circumstances, will substantially have a monopoly in the use of the street; their vehicles will drive the business from it, and the business property will become comparatively worthless. And if property owners are without remedy in such case, it is certainly a very great hardship upon them, and a very striking and forcible instance and illustration of damage without legal injury.

When property is appropriated for a public way, and the proprietor is paid for the public easement, the compensation is generally estimated, in practice, at the value of the land itself. If, therefore, no other circumstances were to be taken into the account in these cases, the owner, who has been paid the value of his land, could not reasonably complain of any use to which it might afterwards be put by the public. But, as was pointed out in the Connecticut case, the compensation is always liable either to exceed or to fall below the value of the land taken, in consequence of incidental injuries or benefits to the owner as proprietor of the land which remains. These injuries or benefits will be estimated with reference to the identical use to which the property is appropriated; and if it is afterwards put to another use, which causes greater incidental injury, and the owner is not allowed further compensation, it is very evident that he has suffered by the change a wrong which could not have been foreseen and pro-

vided against. And if, on the other hand, he is entitled in any case to an assessment of damages, in consequence of such an appropriation of the street affecting his rights injuriously, then he must be entitled to such an assessment in every case, and the question involved will be, not as to the right, but only of the quantum of damages. The horse railway either is or is not the imposition of a new burden upon the estate. If it is not, the owner of the fee is entitled to compensation in no case; if it is, he is entitled to have an assessment of damages in every case.

In New York, where, by law, when a public street is laid out or dedicated, the fee in the soil becomes vested in the city, it has been held that the legislature might authorize the construction of a horse railway in a street, and that neither the city nor the owners of lots were entitled to compensation, notwithstanding it was found as a fact that the lot-owners would suffer injury from the construction of the road. The city was not entitled, because, though it held the fee, it held it in trust for the use of all the people of the State, and not as corporate or municipal property; and the land having been originally acquired under the right of eminent domain, and the trust being publici juris, it was under the unqualified control of the legislature, and any appropriation of it to public use by legislative authority could not be regarded as an appropriation of the private property of the city. And so far as the adjacent lot-owners were concerned, their interest in the streets, distinct from that of other citizens, was only as having a possibility of reverter after the public use of the land should cease; and the value of this, if anything, was inappreciable, and could not entitle them to compensation.¹

So in Indiana, in cases where the title in fee to streets in cities and villages is vested in the public, it is held that the adjacent land-owners are not entitled to the statutory remedy for an

¹ People v. Kerr, 37 Barb. 357, 27 N. Y. 188. The same ruling as to the right of the city to compensation was had in Savannah, &c. R. R. Co. v. Mayor, &c. of Savannah, 45 Ga. 692. And see Brooklyn Central, &c. R. R. Co. v. Brooklyn City R. R. Co., 33 Barb. 420; Brooklyn & Newtown R. R. Co. v. Coney Island R. R. Co., 35 Barb. 364; People v. Kerr, 37 Barb. 357; Chapman v. Albany & Schenectady R. R. Co., 10 Barb. 360. And as to the title reverting to the original owner, compare Water Works Co. v. Burkart, 41 Ind. 351; Gebhardt v. Reeves, 75 Ill. 301; Heard v. Brooklyn, 60 N. Y. 212. Although, in the case of People v. Kerr, the several judges seem generally to have agreed on the principle as stated in the text, it is not very clear how much importance was attached to the fact that the fee to the street was in the city, nor that the decision would have been different if that had not been the case. Where land has been dedicated to a city as a levee, the legislature may authorize its use by a railroad without compensation to the city, but the one who has dedicated it must be compensated for the injury to his ultimate fee. Portland & W. V. R. R. Co. v. Portland, 14 Ore. 188, 12 Pac. 265.
cessment of damages in consequence of the street being appropriated to the use of a railroad; and this without regard to the motive power by which the road is operated. At the same time it is also held that the lot-owners may maintain an action at law if, in consequence of the railroad, they are cut off from the ordinary use of the street. In Iowa it is held that where the title to city streets is in the corporation in trust for the public, the legislature may authorize the construction of an ordinary railroad through the same, with the consent of the city, and without awarding compensation to lot-owners; or even without the consent of the municipal authorities, and without entitling the city to compensation. But the city, without legislative permission, has no power to grant such a privilege, and it will be responsible for all damages to individuals using the street if it shall assume to do so.

In Illinois, in a case where a lot-owner had filed a bill in equity to restrain the laying down of the track of a railroad, by consent of the common council, to be operated by steam in one of the streets of Chicago, it was held that the bill could not be maintained; the title to the street being in the city, which might appropriate it to any proper city purpose.

1 Protzman v. Indianapolis & Cincinnati R. R. Co., 9 Ind. 467; New Albany & Salem R. R. Co. v. O’Daily, 13 Ind. 353; Same v. Same, 12 Ind. 551. Unless the railroad causes a physical disturbance of a right, as where the abutter owns the fee of the street or where his access is cut off, he is not entitled to compensation. Dwenger v. Chicago, &c. Ry. Co., 98 Ind. 153; Terre Haute & L. R. R. Co. v. Bissell, 108 Ind. 113, 9 N. E. 144; Indianapolis, B. & W. Ry. Co. v. Eberle, 110 Ind. 512, 11 N. E. 467. See also Street Railway v. Cumminsville, 14 Ohio St. 523; State v. Cincinnati Gas, &c. Co., 18 Ohio St. 262. In Nebraska although the fee is in the city, the right of access, which is property, may not be cut off without compensation. Burlington & M. R. R. Co. v. Reinmackle, 15 Neb. 279, 18 N. W. 69; Omaha V. R. R. Co. v. Rogers, 16 Neb. 117, 19 N. W. 603. If ingress and egress are not disturbed, no action lies in such case in Tennessee. Iron Mt. R. R. Co. v. Bingham, 87 Tenn. 522, 11 S. W. 705. The rule in Kansas is similar. Ottawa, &c. R. R. Co. v. Larson, 40 Kan. 301, 19 Pac. 661; Kansas, N. & D. Ry. Co. v. Cuylekendall, 42 Kan. 224, 21 Pac. 1051; Central B. & P. R. R. Co. v. Andrews, 30 Kan. 500, 2 Pac. 677.


5 Moses v. Pittsburgh, Fort Wayne, &c. R. R. Co., 21 Ill. 516, 522. We quote from the opinion of Coton, Ch. J.: "By the city charter, the common council is vested with the exclusive control and regulation of the streets of the city, the fee-simple title to which we have already decided is vested in the municipal corporation. The city charter also empowers the common council to direct and control the location of railroad tracks within the city. In granting this permission to locate the track in Beach Street, the common council acted under an express power granted by the legislature.
been decided that an abutting lot-owner who does not own the soil of a city street cannot recover for any injury to his freehold

So that the defendant has all the right which both the legislature and the common council could give it, to occupy the street with its track. But the complainant assumes higher ground, and claims that any use of the street, even under the authority of the legislature and the common council, which tends to deteriorate the value of his property on the street, is a violation of that fundamental law which forbids private property to be taken for public use without just compensation. This is manifestly an erroneous view of the constitutional guaranty thus invoked. It must necessarily happen that streets will be used for various legitimate purposes, which will, to a greater or less extent, inconvenience persons residing or doing business upon them, and just to that extent damage their property; and yet such damage is incidental to all city property, and for it a party can claim no remedy. The common council may appoint certain localities where hacks and drays shall stand waiting for employment, or where wagons loaded with hay or wood, or other commodities, shall stand waiting for purchasers. This may drive customers away from shops or stores in the vicinity, and yet there is no remedy for the damage. A street is made for the passage of persons and property; and the law cannot define what exclusive means of transportation and passage shall be used. Universal experience shows that this can best be left to the determination of the municipal authorities, who are supposed to be best acquainted with the wants and necessities of the citizens generally. To say that a new mode of passage shall be banished from the streets, no matter how much the general good may require it, simply because streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age. Steam has but lately taken the place, to any extent, of animal power for land transportation, and for that reason alone shall it be expelled the streets? For the same reason camels must be kept out, although they might be profitably employed. Some fancy horse or timid lady might be fright-
resulting from the construction of a steam railway in the street under legislative authority, but that he may have an action for any injury consequent on mismanagement amounting to a private nuisance; such as leaving cars standing in the street an unreasonable time, making unnecessary noises, &c. In New York it is held not competent for a city to authorize the construction of an elevated railroad in its streets without making compensation to abutting owners who had bought their lots in the city with a covenant that the streets should be kept open forever. This quoted assume that the use of the street by the railroad company is still a public use; and an appropriation of a street, or of any part of it, by an individual or company, for his or their own private use, unconnected with any accommodation of the public, would not be consistent with the purpose for which it was originally acquired. Mikesell v. Durkee, 34 Kan. 609, 9 Pac. 278. See Brown v. Duplessis, 14 La. Ann. 842; Green v. Portland, 82 Me. 431.

1 Grand Rapids, &c. R. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306; Same v. Same, 47 Mich. 393, 11 N. W. 212. [The rule seems to have been settled in New York by the case of Fobes v. Rome, W. & O. R. Co., 121 N. Y. 505, 24 N. E. 919, 8 L. R. A. 453, that, as against abutting owners, having no title in the bed of the street, the legislature might authorize a steam surface railway therein without compensation to the abutting owner. This broad statement of the rule is subject to the limitation, however, that where the construction rendered ingress and egress seriously difficult or dangerous, the owner is entitled to compensation. Reining v. N. Y., L. E. & W. R. Co., 128 N. Y. 157, 28 N. E. 610, 14 L. R. A. 153. This case reviews prior cases.]

2 Story v. New York Elevated Railway Co., 90 N. Y. 122. In Labr v. Metr. Elev. R. R. Co., 104 N. Y. 268, 10 N. E. 528, the doctrine was extended to a case where there was no such covenant and the plaintiff whose lot only went to the street line held under mesne conveyances, from one whose land had been condemned for use as a public street forever. [Abendroth v. Manhattan R. Co., 122 N. Y. 1, 25 N. E. 496, 19 Am. St. 461, 11 L. R. A. 654, one of the so-called "Elevated Railway Cases" presented the question of compensation of an abutting owner for an injury claimed to result from the erection of an elevated railway in the street. There was no claim that the abutter, or any predecessor in title, at the time of the injury complained of, or at any prior time, owned any interest or right in the street, except such as was appurtenant to ownership of lands abutting, which were never, so far as was made to appear, a part of the lands in the street. It was held in the case that an abutting owner had such property rights in the street as might be "taken" against the prohibition of the constitution, and this though that which results in the injury is done under legislative sanction. Andrews, J., says: "The judgments for damages which have been recovered and sustained against the elevated roads do not, and cannot, rest upon the ground that the roads are public nuisances, for they were constructed pursuant to statutes; and besides a public nuisance does not create a private cause of action unless a private right exists and is injured by it specially. The only remaining ground upon which they may and do stand is that by the common law the plaintiffs had private rights in the streets before the railways were built or authorized to be built. It is clear, we think, that these rights were not created by the statutes under which the corporations were organized, nor by the construction of the roads; nor do they exist by virtue of the judgment in Story's Case (90 N. Y. 122); but they existed anterior to the construction of the roads, and have simply been defined and protected by the decisions made in the litigations against these corporations. . . . It then becomes material to inquire whether rights of action are cut off because the road was constructed pursuant to legislative authority. The constitution of this State provides "Nor shall
last decision settles a long-pending controversy, and is in harmony with the cases in Indiana and Michigan above referred to. (a)

It is not easy, as is very evident, to trace a clear line of authority running through the various decisions bearing upon the appropriation of the ordinary highways and streets to the use of railroads of any grade or species; but a strong inclination is apparent to hold that, when the fee in the public way is taken from the former owner, it is taken for any public use whatever to which the public authorities, with the legislative assent, may see fit afterwards to devote it, in furtherance of the general purpose of the original appropriation; and if this is so, the owner must be private property be taken for public use without just compensation." Art. 1, sec. 6. It is settled by Story's Case and Lahr's Case (104 N. Y. 208, 10 N. E. 528), that such rights as plaintiff has in Pearl Street are 'private property' within the meaning of the constitutional provision quoted; and these cases also hold that by the construction and operation of an elevated road in the street in front of an owner's premises, his rights are 'taken for public use' within the meaning of the constitution. It follows that the authority conferred by the legislature to construct the road is not a defense to the action." It is to be noticed that this interpretation of the terms "taking of private property" does not necessarily involve an actual physical invasion of lands of the claimant in order to entitle him to compensation under the constitution, and that it is not necessary that the constitution should provide that compensation shall be made for "injury" or "damage" in order that compensation can be coerced by an abutting owner, though he have no interest in the fee of the street, for injury to his right to ingress and egress, to access of light and air, or for depreciation in value of the abutting property, by reason of the construction and operation of the improvement in the public street. But see these Elevated Railway Cases distinguished from the cases growing out of the so-called "Park Avenue Improvement" Cases in the same court: Fries v. New York & H. R. Co., 109 N. Y. 270, 62 N. E. 358; Muhlker v. N. Y. & H. R. Co., 173 N. Y. 540, 66 N. E. 558. O'Brien, J., in the Fries Case, says: The law is well settled in this State that where the property of an abutting owner is damaged, or even its easements interfered with in consequence of the work of an improvement in a public street conducted under lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases is held to be "damnum absque injuria." The Elevated Railway Cases are distinguished in this language: They "proceed upon the principle, that, as against abutting owners, the railroad was unlawfully in the street, as they had not consented to the construction or conveyed the right to interfere with their easements. But in the case at bar, we have an express finding that the defendant had acquired the right as against the plaintiff to use the street for the operation of the railroad. Hence the principles upon which that mass of litigation proceeded have no application to this case." Citing Connefer v. N. Y. C. & H. R. R. Co., 156 N. Y. 474, 51 N. E. 402. See Lewis v. New York & H. R. Co., 162 N. Y. 202, 50 N. E. 510. [1]

1 On this subject see, in addition to the other cases cited, West v. Bancroft, 32 Vt. 367; Kelsey v. King, 32 Barb. 410; Ohio & Lexington R. R. Co. v. Applegate, 8 Dana, 259; Hinchman v. Paterson Horse R. Co., 17 N. J. Eq. 70; Covington St. R. Co. v. Covington, &c. R. Co. (Ky.), 19 Am. Law Reg. s. 705. When, however, land is taken or dedicated specifically for a street, it would seem, although the fee is taken, it is taken for the restricted use only; that is to say, for such uses as streets in cities are commonly put to. See State v. Laverack, 31 N. J. 261;

(a) See reference to later cases in preceding note.
held to be compensated at the time of the original taking for any such possible use; and he takes his chances of that use, or any change in it, proving beneficial or deleterious to any remaining property he may own, or business he may be engaged in; and it must also be held that the possibility that the land may, at some future time, revert to him, by the public use ceasing, is too remote and contingent to be considered as property at all. 1 At the same time it must be confessed that it is difficult to determine precisely how far some of the decisions made have been governed by the circumstance that the fee was, or was not in the public, or, on the other hand, have proceeded on the theory that a railway was only in furtherance of the original purpose of the appropriation, and not to be regarded as the imposition of any new burden, even where an easement only was originally taken. 2


1 As to whether there is such possibility of reverter, see Heyward v. Mayor, &c. of New York, 7 N. Y. 314; People v. Kerr, 27 N. Y. 188, 211, per Wright, J.; Pitt v. Cox, 43 Pa. St. 496.

2 [The following case illustrates that view of the courts which makes ownership in the fee of the street essential to the right to compensation for the new or added use of the street. O'Brien v. Baltimore Belt Ry. Co., 74 Md. 365, 22 Atl. 111, 13 L. R. A. 126. The following illustrate the view that ownership of the fee is not essential to the right to compensation: Abendruth v. Manhattan Ry. Co., 122 N. Y. 1, 25 N. E. 496, 19 Am. St. 461, 11 L. R. A. 634 (elevated railway, injury to easement of light, air, and access); Kane v. N. Y. E. Ry. Co., 125 N. Y. 164, 20 N. E. 278, 11 L. R. A. 610; Stowers v. Postal Telegraph Co., 68 Miss. 550, 9 So. 356, 12 L. R. A. 804, 21 Am. St. 290; telegraph line in street: Egerer v. N. Y. C. & H. R. Ry. Co., 130 N. Y. 108, 29 N. E. 95, 14 L. R. A. 381, and note. Can be no damages for injury to easement of light and air if property worth more after than before the improvement: Somers v. Met. El. Ry. Co., 129 N. Y. 578, 29 N. E. 802, 14 L. R. A. 344.] There is great difficulty, as it seems to us, in supporting important distinctions upon the fact that the fee was originally taken for the use of the public instead of a mere easement. If the fee is appropriated or dedicated, it is for a particular use only; and it is a conditional fee,—a fee on condition that the land continue to be occupied for that use. The practical difference in the cases is, that when the fee is taken, the possession of the original owner is excluded; and in the case of city streets, where there is occasion to devote them to many other purposes besides those of passage, but nevertheless not inconsistent, such as for the laying of water and gas pipes, and the construction of sewers, this exclusion of any private right of occupation is important, and will sometimes save controversies and litigation. But to say that when a man has declared a dedication for a particular use, under a statute which makes a dedication the gift of a fee, he thereby makes it liable to be appropriated to other purposes, when the same could not be done if a perpetual easement had been dedicated, seems to be basing important distinctions upon a difference which after all is more technical than real, and which in any view does not affect the distinction made. The same reasoning which has sustained the legislature in authorizing a railroad track to be laid down in a city street would support its action in authorizing it to be made
Perhaps the true distinction in these cases is not to be found in the motive power of the railway, or in the question whether the fee-simple or a mere easement was taken in the original appropriation, but depends upon the question whether the railway constitutes a thoroughfare, or, on the other hand, is a mere local convenience. When land is taken or dedicated for a town street, it is unquestionably appropriated for all the ordinary purposes of a town street; not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use for carriages which run upon a grooved track; and the preparation of important streets in large cities for their use is not only a frequent necessity, which must be supposed to have been contemplated, but it is almost as much a matter of course as the grading and paving. The appropriation of a country highway for the purposes of a railway, on the other hand, is neither usual nor often impor-

into a canal; and the purpose of the original dedication or appropriation would thereby be entirely defeated. Is it not more consistent with established rules to hold that a dedication or appropriation to one purpose confines the use to that purpose; and when it is taken for any other, the original owner has not been compensated for the injury he may sustain in consequence, and is therefore entitled to it now? Notwithstanding a dedication which vests the title in the public, it must be conceded that the interest of the adjacent lot-owners is still property. "They have a peculiar interest in the street, which neither the local nor the general public can pretend to claim; a private right of the nature of an incorporeal hereditament, legally attached to their contiguous grounds, and the encroachments thereon; an incidental title to certain facilities and franchises assured to them by contracts and by law, and without which their property would be comparatively of little value. This easement, appurtenant to the lots, unlike any right of one lot-owner in the lot of another, is as much property as the lot itself." Crawford v. Delaware, 7 Ohio St. 459, 460. See some very pertinent and sensible remarks on the same subject by Rawley, J., in Street Railway v. Cummins, 14 Ohio St. 514. See also Railroad Co. v. Hambleton, 40 Ohio St. 496. It makes no difference that the fee is not in the abutter. Railway Co. v. Lawrence, 38 Ohio St. 41. He has, independent of the ownership of the soil, an interest in the street appurtenant to his lot, for the admission of light and air. Adams v. Chicago, &c. R. R. Co., 39 Minn. 296, 39 N. W. 629. Whether the fee is in him or the public, he is to be paid if a steam railroad is laid in the street, as the use is not for an ordinary street purpose. Thenboid v. Louisville, &c. Ry. Co., 66 Miss. 273, 6 So. 230. See Columbus & W. Ry. Co. v. Withrow, 82 Ala. 190, 3 So. 23, and cases p. 297, note 1, supra. [But see contra, Forbes v. Rome, W. & O. Ry. Co., 121 N. Y. 555, 24 N. E. 919, 8 L. R. A. 453.]

1 Attorney-General v. Railway Co., 125 Miss. 515, 28 Am. Rep. 201; Biss v. Railway Co., 52 Md. 242, 36 Am. Rep. 371; Covington St. R. Co. v. Covington, &c. R. Co. (Ky.), 19 Am. Law Reg. n. s. 765. See cases p. 794, note 4, supra. If a street railroad is used for passing from place to place on the street, a change in the motive power from horses to steam is not a change in the use. Not the motor but the use of the street is the criterion. Briggs v. Lewiston, &c. R. R. Co., 70 Me. 383, 10 Atl. 47. So where cars were run in trains by steam motors, but the use was no substantial infringement upon the common public right of passage. Newell v. Minneapolis, &c. Ry. Co., 35 Minn. 112, 27 N. W. 639.
tant; and it cannot with any justice be regarded as within the contemplation of the parties when the highway is first established. And if this is so, it is clear that the owner cannot be considered as compensated for the new use at the time of the original appropriation. (a)

(a) [What will constitute such a new use or additional servitude as will entitle an owner whose rights are subject to a prior use or servitude to compensation?


The cases thus far considered are those in which the original use is not entirely foreign to the purpose of the new appropriation; and it is the similarity that admits of the question which has been discussed. Were the uses totally different, there could be no question whatever that a new assessment of compensation must be made before the appropriation could be lawful.\(^1\) And in any

\(^1\) Where lands were appropriated by a railroad company for its purposes, and afterwards leased out for private occupation, it was held that the owner of the fee was entitled to maintain a writ of entry to establish his title and recover damages for the wrongful use. Proprietors of Locks, &c. v. Nashua & Lowell R. R. Co., 104 Mass. 1, 6 Am. Rep. 181. [Use of vacant portion of railroad depot grounds for place of business by customers of the railroad company is an additional servitude: Lyon v. McDonald, 78 Tex. 71, 14 S. W. 291, 9 L. R. A. 295. The legislature cannot authorize a commission to compel a railroad company to grant the use of its lands to private persons for elevator purposes. Missouri Pacific Ry. Co. v. Nebraska, 104 U. S. 403, 17 Sup. Ct. Rep. 130, rev. 29 Neb. 550, 45 N. W. 785. As to the use of streets by telegraph and telephone companies and the effect upon the rights of abutting owners, see 62 Cent. Law Jour. 283; Hall v. Columbus M. & S. Ry. Co., 66 Ohio, 106, 45 N. E. 141.] So a city may not condemn a pier to let it to a private corporation. Belcher Sugar Refining Co. v. St. Louis Elev. Co., 82 Mo. 121. As to what use may be made of land in which an easement has been condemned for a railroad station, see Pierce v. Boston, &c. R. R. Corp., 111 Mass. 481, 6 N. E. 96; Hoggatt v. Vicksburg, &c. R. R. Co., 34 La. Ann. 624. Where land has been taken for a street, it cannot be appropriated as a house to confine tramps: Winchester v. Capron, 63 N. H. 605, 4 Atl. 736; nor for the erection of a market building without making compensation: State v. Mayor, &c. of Mobile, 6 Porter, 279, 30 Am. Dec. 504; State v. Laverack, N. J. L. 666, 34 Atl. 1090, 33 L. R. A. 129; Reid v. Norfolk City Ry. Co., 94 Va. 117, 26 S. E. 428, 36 L. P. A. 274, 64 Am. St. 708.


Sewer system in a town road is not in Massachusetts: Lincoln v. Comm., 141 Mass. 1. Change of country road to city street is not to create a new servitude: Huddleston Adm'x. v. City of Eugene, 34 Ore. 313, 55 Pac. 868, 43 L. R. A. 411. Construction of grain elevator on lands condemned for railway by the railway company or its lessee is not misuse of easement condemned: Garney v. Minneapolis Union Elevator Co., 63 Minn. 70, 65 N. W. 136, 30 L. R. A. 534.]
case, to authorize lands already taken for one public use to be
34 N. J. 201. The opinion of Beasley, Ch. J., in the New Jersey case, will justify liberal quotations. He says (p. 204): “I think it undeniable that the appropriation of this land to the purposes of a market was an additional burthen upon it. Clearly it was not using it as a street. So far from that, what the act authorized to be done was incongruous with such use; for the market was an obstruction to it, considered merely as a highway. . . . When, therefore, the legislature declared that these streets in the city of Paterson might be used for market purposes, the power which was conferred in substance was an authority to place obstructions in these public highways. The consequence is that there is no force in the argument, which was the principal one pressed upon our attention, that the use of these streets for the purpose now claimed is as legitimate as the use of a public highway by a horse railroad, which latter use has been repeatedly sanctioned by the courts of the State. The two cases, so far as related to principle, stand precisely opposite. I have said that a market is an obstruction to a street, that it is not a use of it as a street, but, if unauthorized, is a nuisance. To the contrary of this, a horse railroad is a new mode of using a street as such, and it is precisely upon this ground that it has been held to be legal. The cases rest upon this foundation. That a horse railroad was a legitimate use of a highway was decided in Hinchman v. Paterson Horse Railroad Co., 17 N. J. Eq. 70; and, in his opinion, Chancellor Greene assigns the following as the reasons of his judgment: ‘The use of the road is nearly identical with that of the ordinary highway. The motive power is the same. The noise and jarring of the street by the cars is not greater, and ordinary less, than that produced by omnibuses and other vehicles in ordinary use. Admit that the nature of the use, as respects the travelling public, is somewhat variant, how does it prejudice the land-owner? Is his property taken? Are his rights as a land-owner affected? Does it interfere with the use of his property any more than the ordinary highway?’ It is clear that this reasoning can have no appropriate application to a case in which it appears that the use of the street is so far from being nearly identical with that of the ordinary highway that in law it has always been regarded as an injury to such public easement, and on that account an indictable offence.

‘I regard, then, a right to hold a market in a street as an easement additional to, and in a measure inconsistent with, its ordinary use as a highway. The question therefore is presented, Can such easement be conferred by the legislature on the public without compensation to the land-owner? I have already said that from the first it has appeared to me this question must be answered in the negative. I think the true rule is, that land taken by the public for a particular use cannot be applied under such a sequestration to any other use to the detriment of the land-owner. This is the only rule which will adequately protect the constitutional right of the citizen. To permit land taken for one purpose, and for which the land-owner has been compensated, to be applied to another and additional purpose, for which he has received no compensation, would be a mere evasion of the spirit of the fundamental law of the State. Land taken and applied for the ordinary purpose of a street would often be an improvement of the adjacent property; an appropriation of it to the uses of a market would, perhaps, as often be destructive of one-half the value of such property. Compensation for land, therefore, to be used as a highway, might, and many times would be, totally inadequate compensation if such land is to be used as a public market place. Few things would be more unjust than, when compensation has been made for land in view of one of these purposes, to allow it to be used without compensation for the other. The right of the public in a highway consists in the privilege of passage, and such privileges as are annexed as incidents by usage or custom, as the right to make sewers and drains, and to lay gas and water pipes. These subordinate privileges are entirely consistent with the primary use of the highway, and are no detriment to the land-owner. But I am not aware of any case in which it has been held that the public has any right in a highway which is incongruous with the
appropriate to another, there must be distinct and express legislative authority. 1

purpose for which it was originally created, and which at the same time is injurious to the proprietor of the soil. Such certainly has not been the course of judicial decision in our own courts. Indeed the cases appear to be all ranged on the opposite side. I have shown that the legalization of the use of a street by a horse railroad has been carefully placed on the ground that such an appropriation of the street was merely a new mode of its legitimate and ordinary use. The rationale adopted excludes by necessary implication the hypothesis that the dedication of a street to a new purpose, inconsistent with its original nature, would be legal with respect to the uncompensated land-owner. But beyond this it has been expressly declared that such superadded use would be illegal. In the opinion of Mr. Justice Haines, in Starr v. Camden & Atlantic R. R. Co., 24 N. J. 592, it is very explicitly held that the constitution of this State would prevent the legislature from granting to a railroad company a right to use a public highway as a bed for their road without first making compensation to the owner of the soil. And in the case of Hinckman v. The Paterson Horse Railroad Co., already cited, Chancellor Greene quotes these views, and gives the doctrine the high sanction of his own approval. See also the Central R. R. Co. v. Hetfield, 29 N. J. 295. 1

Although the regulation of a navigable stream will give to the persons incidentally affected no right to compensation, yet if the stream is diverted from its natural course, so that those entitled to its benefits are prevented from making use of it as before, the deprivation of this right is a taking which entitles them to compensation, notwithstanding the taking may be for the purpose of creating another and more valuable channel of navigation. The owners of land over which such a stream flows, although they do not own the flowing water itself, yet have a property in the use

of that water as it flows past them, for the purpose of producing mechanical power, or for any of the other purposes for which they can make it available, without depriving those below them of the like use, or encroaching upon the rights of those above; and this property is equally protected with any of a more tangible character.\(^1\)

**What Interest in Land can be taken under the Right of Eminent Domain.**

Where land is appropriated to the public use under the right of eminent domain, and against the will of the owner, we have seen how careful the law is to limit the public authorities to their precise needs, and not to allow the dispossession of the owner from any portion of his foothold which the public use does not require. This must be so on the general principle that the right, being based on necessity, cannot be any broader than the necessity which supports it. For the same reason, it would seem that, in respect to the land actually taken, if there can be any conjoint occupation of the owner and the public, the former should not be altogether excluded, but should be allowed to occupy for his private purposes to any extent not inconsistent with the public use. As a general rule, the laws for the exercise of the right of eminent domain do not assume to go further than to appropriate the use, and the title in fee still remains in the original owner. In the common highways, the public have a perpetual easement, but the soil is the property of the adjacent owner, and he may make any use of it which does not interfere with the public right of passage, and the public can use it only for the purposes usual with such ways.\(^2\) And when the land ceases to be used by the public as a way, the owner will again become restored to his complete and exclusive possession, and the fee will cease to be encumbered with the easement.\(^3\)


\(^2\) In Adams v. Rivers, 11 Barb. 390, a person who stood in the public way and abused the occupant of an adjoining lot was held liable in trespass as being unlawfully there, because not using the highway for the purpose to which it was appropriated. See, as to what is a proper use of highway by land, Bills v. South Hadley, 115 Mass. 91, 13 N. E. 352; Galvain v. Lowell, 111 Mass. 491, 11 N. E. 723; by water, Sterling v. Jackson, 69 Mich. 488, 37 N. W. 845. Hay standing on land which has been condemned for right of way belongs to the land-owner. Bailey v. Sweeney, 64 N. H. 393, 9 Atl. 543. So of ice. Julien v. Woodsmall, 82 Ind. 568.

\(^3\) Where in the course of a sewer improvement the fee of an island is not taken, the gravel taken from it may be used elsewhere in the sewer work. Thus v. Boston, 149 Mass. 101, 21 N. E. 310.

It seems, however, to be competent for the State to appropriate the title to the land in fee, and so to altogether exclude any use by the former owner, except that which every individual citizen is entitled to make, if in the opinion of the legislature it is needful that the fee be taken. The judicial decisions to this effect proceed upon the idea that, in some cases, the public purposes cannot be fully accomplished without appropriating the complete title; and where this is so in the opinion of the legislature, the same reasons which support the legislature in their right to decide absolutely and finally upon the necessity of the taking will also support their decision as to the estate to be taken. The power, it is said in one case, "must of necessity rest in the legislature, in order to secure the useful exercise and enjoyment of the right in question. A case might arise where a temporary use would be all that the public interest required. Another case might require the permanent and apparently the perpetual occupation and enjoyment of the property by the public, and the right to take it must be coextensive with the necessity of the case, and the measure of compensation should of course be graduated by the nature and the duration of the estate or interest of which the owner is deprived." And it was therefore held, where the statute provided that lands might be compulsorily taken in feesimple for the purposes of an almshouse extension, and they were taken accordingly, that the title of the original owner was thereby entirely divested, so that when the land ceased to be used for the public purpose, the title remained in the municipality which had appropriated it, and did not revert to the former owner or his heirs. And it does not seem to be uncommon to provide that,


1 Roanoke City v. Berkowitz, 80 Va. 616. See Matter of Amsterdam Water Commissioners, 90 N. Y. 351. This, however, is forbidden by the Constitution of Illinois of 1870, in the case of land taken for railroad tracks, Art. 2, § 13. And we think it would be difficult to demonstrate the necessity for appropriating the fee in case of any thoroughfare; and if never needful, it ought to be held incompetent. See New Orleans, &c. R. R. Co. v. Gay, 32 La. Ann. 471. [Any easement or right connected with land may be taken as well as the absolute fee. Johnston v. Old Colony R. Co., 18 R. I. 642, 29 Atl. 594, 49 Am. St. 800.]

2 Heyward v. Mayor, &c. of New York, 7 N. Y. 314, 325. See also Dingley v. Boston, 100 Mass. 544; Brooklyn Park Com'r s v. Armstrong, 2 Linn. 429; s. c. on appeal, 45 N. Y. 234, and 6 Am. Rep. 70.

in the case of some classes of public ways, and especially of city and village streets, the dedication or appropriation to the public use shall vest the title to the land in the State, county, or city; the purposes for which the land may be required by the public being so numerous and varied, and so impossible of complete specification in advance, that nothing short of a complete ownership in the public is deemed sufficient to provide for them. In any case, however, an easement only would be taken, unless the statute plainly contemplated and provided for the appropriation of a larger interest.\(^1\)

**The Damaging of Property.**

In addition to providing for compensation for the taking of property for public use, several States since 1869 have embodied in their constitutions provisions that property shall not be "damaged" or "injured" in the course of public improvements without compensation.\(^2\) The construction of these provisions has not been uniform. In some cases they are held to require compensation only where like acts done by an individual would warrant the recovery of damages at common law.\(^3\) In others a

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3 The purpose was to impose on corporations "having the right of eminent domain a liability for consequential damages from which they had been previously exempt," when for doing the same act an individual would have been liable. Edmundson v. Pittsburgh, &c. R. R. Co., 111 Pa. St. 316, 2 Atl. 404. "Injured" means such legal wrong as would have been the subject of an action for damages at common law. Pennsylvania R. R. Co. v. Marchant, 119 Pa. St. 541, 13 Atl. 630; Pa. S. V. R. R. Co. v. Walsh, 124 Pa. St. 541, 17 Atl. 185. "In all cases, to warrant a recovery it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where but for some legislative enactment an action would lie at the common law." Mulkey, J., in Rigney v. Chicago, 102 Ill. 64; followed in Chicago v. Taylor, 125 U. S. 101, 8 Sup. Ct. Rep. 820; Rude v. St. Louis, 93 Mo. 403, 6 S. W. 237. To the same effect is Trinity & S. Ry. Co. v. Meadows, 73 Tex. 32, 3 L. R. A. 555, 11 S. W. 145; Austin v. Augusta T. Ry. Co., 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755. To "damage" property within the meaning of that term as used in the Georgia constitution there must be some physical interference with property or with a right or use appurtenant to property. A railway company is not liable, therefore, to the owner of real property for diminution in the market value resulting from the making of noise or
broader scope has been given to them. Compensation has been awarded under them for the laying of a railroad track in the street, the fee of which the abutter does not own; for a change in the grade of the street; for cutting off egress by it; and for sending forth of smoke and cinders causing personal inconvenience and discomfort to only the occupants. Austin v. Terminal Ry. Co., 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755. Under constitution providing for compensation where property is "injured," one whose property is depreciated, in common with others of the general public, by reason of noise, smoke, etc., resulting from the ordinary operation of a railway, and suffered by the public generally, is not entitled to compensation. But if by reason of the near location of a turn-table this depreciation is unusual he is entitled to compensation. Louisville Ry. Co. v. Foster, 22 Ky. L. 458, 57 S. W. 480, 50 L. R. A. 813. In Alabama the provision in case of a change of grade is held to cover only such alterations as could not have been anticipated at the time of the first taking. City Council of Montgomery v. Townsend, 80 Ala. 489. The English statute covering the same ground as these provisions receives substantially the same construction as that put upon them in the Pennsylvania cases noted above. Caledonian Ry. Co. v. Walker's Trustees, L. R. 7 App. Cas. 259.

1 The word "damaged" embraces more than physical invasions of property. It is not restricted to cases where the owner is entitled to recover as for a tort at common law. Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317. The language is intended to cover "all cases in which even in the proper prosecution of a public work or purpose the right or property of any person in a pecuniary way may be injuriously affected." Gulf C. & S. F. Ry. Co. v. Fuller, 63 Tex. 407. See Gottschalk v. Chicago, &c., R. R. Co., 14 Neb. 590, 16 N. W. 475, 17 N. W. 120; Hot Springs R. R. Co. v. Williamson, 45 Ark. 429; Atlanta v. Green, 67 Ga. 356; Denver v. Bayer, 7 Col. 113, 2 Pac. 6; Denver Circle R. R. Co. v. Nestor, 10 Col. 403, 15 Pac. 714. The damages are not restricted to such as could reasonably have been anticipated when the structure was built. Omaha & R. V. R. R. Co. v. Standen, 22 Neb. 348, 35 N. W. 183. [Depreciation in value by reason of noise, smoke, and vibration incident to the operation of a railway near by, but entirely on lands of private persons, is "damage" within meaning of the term in the constitution, though no land taken. Gainesville, H. & W. Ry. Co. v. Hall, 78 Tex. 169, 14 S. W. 250, 9 L. R. A. 298.]


3 Reardon v. . San Francisco, 68 Cal.
other damage from the construction of public works.\footnote{1} It has been denied, however, where a railway viaduct has been built on the other side of a narrow street from the plaintiff’s lot,\footnote{2} and where the street has been rendered impassable at some distance from the property of the complaining party,\footnote{3} and where the damage results from the operation and not the construction of the work.\footnote{4}

Compensation for Property Taken.

It is a primary requisite, in the appropriation of lands for public purposes, that compensation shall be made therefor. Eminent domain differs from taxation in that, in the former case, the citizen is compelled to surrender to the public something beyond his due proportion for the public benefit. The public seize and appropriate his particular estate, because of a special need for it, and not because it is right, as between him and the government, that he should surrender it.\footnote{5} To him, therefore, the benefit and protection he receives from the government are not sufficient compensation; for those advantages are the equivalent for the taxes he pays, and the other public burdens he assumes in common with the community at large. And this compensation must be

\footnote{1} 492, 6 Pac. 317; Atlanta v. Green, 67 Ga. 386; Moon v. Atlanta, 70 Ga. 611; Sweeney v. Kansas City, &c. Co., 94 Mo. 574, 7 S. W. 579; New Brighton v. Per- sol, 107 Pa. St. 250; Hutchinson v. Par- kersburg, 25 W. Va. 226. So as to the establishment of the grade. Harmon v. Omaha, 17 Neb. 518, 23 N. W. 503. But if after a grade is established one buys and the walk is then cut down to grade, there is no damage. Denver v. Vernia, 8 Col. 399, 8 Pac. 656. In Alabama there is none, if the change might have been anticipated. City Council of Montgomery v. Townsend, 80 Ala. 489.


\footnote{3} Rude v. St. Louis, 93 Mo. 408, 9 S. W. 257; East St. Louis v. O’Flynn, 119 Ill. 200, 10 N. E. 305.

\footnote{4} Pennsylvania R. R. Co. v. Marchant, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. 659. [See Pennsylvania, &c. Ry. v. Walsh, 124 Pa. St. 544, 17 Atl. 186, 10 Am. St. 611, where these cases are interpreted as holding that the constitutional provision was not intended to apply to injuries which are the result of the operation of the railway, as distinguished from such as result from its construction. It is here held that where access to abutting property is cut off or rendered dangerous, the provision is applicable.]

\footnote{5} People v. Mayor, &c. of Brooklyn, 4 N. Y. 419; Woodbridge v. Detroit, 8 Mich. 274; Booth v. Woodbury, 32 Conn. 118.
pecuniary in its character, because it is in the nature of a payment for a compulsory purchase.¹

The time when the compensation must be made may depend upon the peculiar constitutional provisions of the State. In some of the States, by express constitutional direction, compensation must be made before the property is taken. No constitutional principle, however, is violated by a statute which allows private property to be entered upon and temporarily occupied for the purpose of a survey and other incipient proceedings, with a view to judging and determining whether or not the public needs require the appropriation, and, if they do, what the proper location shall be; and the party acting under this statutory authority would neither be bound to make compensation for the temporary possession, nor be liable to action of trespass.²

When, however, the land has been viewed, and a determination arrived at to appropriate it, the question of compensation is to be considered; and in the absence of any express constitutional provision fixing the time and the manner of making it, the question who is to take the property — whether the State, or one of its political divisions or municipalities, or, on the other hand, some private corporation — may be an important consideration.

When the property is taken directly by the State, or by any municipal corporation by State authority, it has been repeatedly held not to be essential to the validity of a law for the exercise of the right of eminent domain, that it should provide for making compensation before the actual appropriation. It is sufficient if provision is made by the law by which the party can obtain compensation, and that an impartial tribunal is provided for assessing it.³

¹ The effect of the right of eminent domain against the individual "amounts to nothing more than a power to oblige him to sell and convey when the public necessities require it." Johnson, J., in Fletcher v. Peck, 6 Cranch, 87, 145. And see Bradshaw v. Rogers, 20 Johns. 103, per Spencer, Ch. J.; People v. Mayor, &c. of Brooklyn, 4 N. Y. 419; Carson v. Coleman, 11 N. J. Eq. 106; Young v. Harrison, 6 Ga. 139; United States v. Minnesota, &c. R. R. Co., 1 Minn. 127; Railroad Co. v. Ferris, 26 Tex. 588; Curran v. Shattuck, 24 Cal. 427; State v. Graves, 19 Md. 351; Weckler v. Chicago, 61 Ill. 142, 147.


³ Bloodgood v. Mohawk & Hudson R. R. Co., 18 Wend. 9; Rogers v. Brad-
State has provided a remedy by resort to which the party can have his compensation assessed, adequate means are afforded for its satisfaction; since the property of the municipality, or of the State, is a fund to which he can resort without risk of loss. It is thus taken, it is, I apprehend, the settled doctrine, even as respects the State itself, that at least certain and ample provision must first be made by law (except in cases of public emergency), so that the owner can coerce payment through the judicial tribunals or otherwise, without any unreasonable or unnecessary delay; otherwise the law making the appropriation is no better than blank paper. Bloodgood v. McShaw & Hudson R. R. Co., 18 Wend. 9. The provisions of the statute prescribing the mode of compensation in cases like the present, when properly understood and administered, came fully up to this great fundamental principle; and even if any doubt could be entertained about their true construction, it should be made to lean in favor of the one that is found to be most in conformity with the constitutional requisite." People v. Hayden, 6 Hill, 559, 361. [Branson v. Gee, 25 Oreg. 462, 36 Pac. 627, 24 L. R. A. 355; Old Colony Ry. Co. v. Framingham Water Co., 153 Mass. 601, 27 N. E. 662, 13 L. R. A. 392; Sweet v. Rechel, 169 U. S. 380, 10 Sup. Ct. Rep. 43.] "A provision for compensation is an indispensable attendant upon the due and constitutional exercise of the power of depriving an individual of his property." Gardner v. Newburg, 2 Johns. Ch. 102, 108, 7 Am. Dec. 520; Buffalo, &c. R. R. Co. v. Ferris, 23 Tex. 588; Ash v. Cummings, 60 N. H. 591, 013; Haverhill Bridge Proprietors v. County Comrs., 103 Mass. 120, 4 Am. Rep. 518; Langford v. Comrs. of Ramsay Co., 16 Minn. 375; Southwestern R. R. Co. v. Telegraph Co., 49 Ga. 48. [Statute making no provision for measuring compensation is void. Mulligan v. City of Perth-Amboy, 52 N. J. L. 152, 18 Atl. 670. See also Tuttle v. Justice of Knox County, 69 Tenn. 137, 14 S. W. 486; Cherokee Nation v. Southern K. Ry. Co., 135 U. S. 641, 10 Sup. Ct. Rep. 955; Sweet v. Rechel, 169 U. S. 380, 10 Sup. Ct. Rep. 43.]

1 In Commissioners, &c. v. Bowie, 34 Ala. 461, it was held that a provision by
is essential, however, that the remedy be one to which the party can resort on his own motion; (a) if the provision be such that only the public authorities appropriating the land are authorized to take proceedings for the assessment, it must be held to be void. But if the remedy is adequate, and the party is allowed to pursue it, it is not unconstitutional to limit the period in which he shall resort to it, and to provide that, unless he shall take proceedings for the assessment of damages within a specified time, all right thereto shall be barred. The right to compensation, when property is appropriated by the public, may always be waived; and law that compensation, when assessed, should be paid to the owner by the county treasurer, sufficiently secured its payment. And see Zimmerman v. Canfield, 42 Ohio St. 403; Talbot v. Hudson, 16 Gray, 417; Chapman v. Gates, 54 N. Y. 132. But it is not competent to leave compensation to be made from the earnings of a railroad company. Conn. H. R. R. Co. v. Commissioners, 127 Mass. 60, 31 Am. Dec. 338. [As to whether sufficient where provision is for payment out of special fund of municipality, see In re Lincoln Park, 44 Minn. 298, 49 N. W. 355.]

1 Shepardson v. Milwaukee & Re- loit R. R. Co., 6 Wis. 605; Powers v. Bears, 12 Wis. 215. See McCann v. Sierra Co., 7 Cal. 121; Colton v. Rossi, 9 Cal. 605; Ragatz v. Dubuque, 4 Iowa, 343. An impartial tribunal for the ascertainment of the damage must exist when the land is taken. State v. Perth Amboy, 62 N. J. L. 132, 18 Atl. 670. But in People v. Hayden, 6 Hill, 359, where the statute provided for appraisers who were to proceed to appraise the land as soon as it was appropriated, the proper remedy of the owner, if they failed to perform this duty, was held to be to apply for a mandamus. If land is taken without provision for compensation, the owner has a common-law remedy. Hooker v. New Haven, &c. Co., 18 Conn. 140, 38 Am. Dec. 477. The party making an appropriation may abandon it if the terms, when ascertained, are not satisfactory. Lamb v. Schutter, 54 Cal. 319. But not after judgment: Drath v. Burlington, &c. R. R. Co., 15 Neb. 307, 18 N. W. 717; nor after verdict when an appeal has been taken and entry made. Witt v. St. Paul, &c. R. R. Co., 35 Minn. 404, 29 N. W. 101. But see Denver & N. O. R. R. Co. v. Lamborn, 8 Col. 380, 8 Pac. 582, contra.


(a) [Hickman v. City of Kansas, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 668. The constitutional guarantee is for the protection of a right and not for the redress of a wrong, and a rule which permits land to be taken without proof of the right to do so, and casts upon the owner the burden of instituting proceedings to save his property, does not meet the constitutional requirement. Stearns v. Barre, 73 Vt. 291, 60 Atl. 1068, 87 Am. St. 781.]
a failure to apply for and have the compensation assessed, when reasonable time and opportunity and a proper tribunal are afforded for the purpose, may well be considered a waiver.

Where, however, the property is not taken by the State, or by a municipality, but by a private corporation which, though for this purpose to be regarded as a public agent, appropriates it for the benefit and profit of its members, and which may or may not be sufficiently responsible to make secure and certain the payment, in all cases, of the compensation which shall be assessed, it is certainly proper, and it has sometimes been questioned whether it was not absolutely essential, that payment be actually made before the owner could be divested of his freehold.¹ Chancellor Kent has expressed the opinion that compensation and appropriation should be concurrent. “The settled and fundamental doctrine is, that government has no right to take private property for public purposes without giving just compensation; and it seems to be necessarily implied that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception, concurrently in point of time with the actual exercise of the right of eminent domain.”² And while this is not an inflexible rule unless in terms established by the constitution, it is so just and reasonable that statutory provisions for taking private property very generally make payment precede or accompany the appropriation, and by several of the State constitutions this is expressly required.³ And on general principles it is essential that an adequate fund be provided from which the owner of


³ See Kent, 339, note.

⁵ The Constitution of Florida provides “that private property shall not be taken or applied to public use, unless just compensation be first made therefor.” Art. 1, § 14. See also, to the same effect, Constitution of Colorado, art. 1, § 15; Constitution of Georgia, art. 1, § 17; Constitution of Iowa, art. 1, § 18; Constitution of Kansas, art. 12, § 4; Constitution of Kentucky, art. 13, § 13; Constitution of Maryland, art. 1, § 40; Constitution of Minnesota, art. 1, § 13; Constitution of Mississippi, art. 1, § 13; Constitution of Missouri, art. 2, § 21; Constitution of Nevada, art. 1, § 8; Constitution of Ohio, art. 1, § 19; Constitution of Pennsylvania, art. 1, § 10. The Constitution of Indiana, art. 1, § 21, and that of Oregon, art. 1, § 19, require compensation to be first made, except when the property is appropriated by the State. The Constitution of Alabama, art. 1, § 24, and of South Carolina, art. 1, § 23, are in legal effect not very different. A construction requiring payment before appropriation is given to the Constitution of Illinois. Cook v. South Park Com’rs, 61 Ill. 115, and cases cited; Phillips v. South Park Com’rs, 119 Ill. 528, 10 N. E. 230.
the property can certainly obtain compensation; it is not competent to deprive him of his property, and turn him over to an action at law against a corporation which may or may not prove responsible, and to a judgment of uncertain efficacy. For the consequence would be, in some cases, that the party might lose his estate without redress, in violation of the inflexible maxim upon which the right is based.

What the tribunal shall be which is to assess the compensation must be determined either by the constitution or by the statute which provides for the appropriation. The case is not one where, as a matter of right, the party is entitled to a trial by jury, unless the constitution has provided that tribunal for the purpose. Nevertheless, the proceeding is judicial in its character, and the party in interest is entitled to have an impartial tribunal, and the usual rights and privileges which attend judicial investigations. It is not competent for the State itself to fix the compensation through the legislature, for this would make it the judge in its own cause. And, if a jury is provided, the party must have the ordinary opportunity to appear when it is to be impaneled, that he may make any legal objections. And he has the same


4 Charles River Bridge v. Warren Bridge, 7 Pick. 344, 11 Pet. 420, 511, per McLean, J. And see Rhine v. McKinney, 53 Tex. 834; Tripp v. Overocker, 7 Col. 72, 1 Pac. 695.

5 People v. Tallman, 36 Barb. 222; Booneville v. Orrmold, 20 Mo. 193. That it is essential to any valid proceedings for the appropriation of land to public uses that the owner have notice and an
right to notice of the time and place of assessment that he would have in any other case of judicial proceedings, and the assessment will be invalid if no such notice is given.¹ These are just, as well as familiar rules, and they are perhaps invariably recognized in legislation.

It is not our purpose to follow these proceedings, and to attempt to point out the course of practice to be observed, and which is so different under the statutes of different States. An inflexible rule should govern them all, that the interest and exclusive right of the owner is to be regarded and protected so far as may be consistent with a recognition of the public necessity. While the owner is not to be dispossessed until compensation is provided, neither, on the other hand, when the public authorities have taken such steps as finally to settle upon the appropriation, ought he to be left in a state of uncertainty, and compelled to wait for compensation until some future time, when they may see fit to use his land. The land should either be his or he should be paid for it. Whenever, therefore, the necessary steps have been taken on the part of the public to select the property to be taken, locate the public work, and declare the appropriation, the owner becomes absolutely entitled to the compensation, whether the public proceed at once to occupy the property or not. If a street is legally established over the land of an individual, he is entitled to demand payment of his damages, without waiting for the street to be opened.² And if a railway line is located across his land, and the

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² Philadelphia v. Dickson, 38 Pa. St. 247; Philadelphia v. Dyer, 41 Pa. St. 463; Hallock v. Franklin County, 2 Met. 558; Harrington v. County Commissioners, 22 Pick. 203; Blake v. Dubuque, 13 Iowa, 63; Higgins v. Chicago, 18 Ill. 270; County of Peoria v. Harvey, 18 Ill. 304; Shaw v. Charlestown, 3 Allen, 638; Hampton v. Coffin, 4 N. H. 517; Clagug v. Unity, 18 N. H. 75. And where a city thus appropriates land for a street, it would not be allowed to set up, in defence
damages are appraised, his right to payment is complete, and he cannot be required to wait until the railway company shall actually occupy his premises, or enter upon the construction of the road at that point. It is not to be forgotten, however, that the proceedings for the assessment and collection of damages are statutory, and displace the usual remedies; that the public agents who keep within the statute are not liable to common-law action;¹ that it is only where they fail to follow the statute that they render themselves liable as trespassers;² though if they construct their work in a careless, negligent, and improper manner, by means of which carelessness, negligence, or improper construction a party is injured in his rights, he may have an action at the common law as in other cases of injurious negligence.³

The principle upon which the damages are to be assessed is always an important consideration in these cases; and the circumstances of different appropriations are sometimes so peculiar that it has been found somewhat difficult to establish a rule that shall always be just and equitable. If the whole of a man's estate is taken, there can generally be little difficulty in fixing upon the measure of compensation; for it is apparent that, in such a case, he ought to have the whole market value of his premises, and he cannot reasonably demand more. The question is reduced to one of market value, to be determined upon the testimony of those who have knowledge upon that subject, or whose business or experience entitles their opinions to weight. It may be that, in such a case, the market value may not seem to the owner an adequate compensation; for he may have reasons peculiar to himself, springing from association, or other cause, which make him unwilling to part with the property on the estimate of his neighbors; but such reasons are incapable of being taken into account in legal proceedings, where the question is one of compensation in money, inasmuch as it is manifestly impossible to measure them by any standard of pecuniary value. Concede to the government a right to appropriate the property on paying for it, and we are at once remitted to the same standards for estimating values which are applied in

to a demand for compensation, its own irregularities in the proceedings taken to condemn the land. Higgins v. Chicago, 18 Ill. 276; Chicago v. Wheeler, 25 Ill. 478.


other cases, and which necessarily measure the worth of property by its value as an article of sale, or as a means of producing pecuniary returns.

When, however, only a portion of a parcel of land is appropriated, just compensation may perhaps depend upon the effect which the appropriation may have on the owner's interest in the remainder, to increase or diminish its value, in consequence of the use to which that taken is to be devoted, or in consequence of the condition in which it may leave the remainder in respect to convenience of use. If, for instance, a public way is laid out through a tract of land which before was not accessible, and if in consequence it is given a front, or two fronts, upon the street, which furnish valuable and marketable sites for building lots, it may be that the value of that which remains is made, in consequence of taking a part, vastly greater than the whole was before, and that the owner is benefited instead of damned by the appropriation. Indeed, the great majority of streets in cities and villages are dedicated to the public use by the owners of lands, without any other compensation or expectation of compensation than the increase in market value which is expected to be given to such lands thereby; and this is very often the case with land for other public improvements, which are supposed to be of peculiar value to the locality in which they are made. But where, on the other hand, a railroad is laid out across a man's premises, running between his house and his out-buildings, necessitating, perhaps, the removal of some of them, or upon such a grade as to render deep cuttings or high embankments necessary, and thereby greatly increasing the inconveniences attending the management and use of the land, as well as the risks of accidental injuries, it will often happen that the pecuniary loss which he would suffer by the appropriation of the right of way would greatly exceed the value of the land taken, and to pay him that value only would be to make very inadequate compensation.

It seems clear that, in these cases, it is proper and just that the injuries suffered and the benefits received by the proprietor, as owner of the remaining portion of the land, should be taken into account in measuring the compensation. This, indeed, is generally conceded; but what injuries shall be allowed for, or what benefits estimated, is not always so apparent. The question, as we find it considered by the authorities, seems to be, not so much what the value is of that which is taken, but whether what remains is reduced in value by the appropriation, and if so, to what extent; in other words, what pecuniary injury the owner sustains by a part of his land being appropriated. But, in estimating
either the injuries or the benefits, those which the owner sustains or receives in common with the community generally, and which are not peculiar to him and connected with his ownership, use, and enjoyment of the particular parcel of land, should be altogether excluded, as it would be unjust to compensate him for the one, or to charge him with the other, when no account is taken of such incidental benefits and injuries with other citizens who receive or feel them equally with himself, but whose lands do not chance to be taken.1

1 In Somerville & Easton R. R. Co. ads. Doughlty, 22 N. J. 405, a motion was made for a new trial on an assessment of compensation for land taken by a railroad company, on the ground that the judge in his charge to the jury informed them "that they were authorized by law to ascertain and assess the damages sustained by the plaintiff to his other lands not taken and occupied by the defendants; to his dwelling-house, and other buildings and improvements, by reducing their value, changing their character, obstructing their free use; by subjecting his buildings to the hazards of fire, his family and stock to injury and obstruction in their necessary passage across the road; the inconvenience caused by embankments or excavations, and, in general, the effect of the railroad upon his adjacent lands, in deteriorating their value in the condition they were found, whether adapted for agricultural purposes only, or for dwellings, stores, shops, or other like purposes."

"On a careful review of this charge," says the judge, delivering the opinion of the court, "I cannot see that any legal principle was violated, or any unsound doctrine advanced. The charter provides that the jury shall assess the value of the land and materials taken by the company, and the damages. The damages here contemplated are not damages to the land actually occupied or covered by the road, but such damages as the owner may sustain in his other and adjacent lands not occupied by the company's road. His buildings may be reduced in value by the contiguity of the road and the use of engines upon it. His lands and buildings, before adapted and used for particular purposes, may, from the same cause, become utterly unfit for such purposes. The owner may be injured by high embankments or deep excavations on the line of the road, his buildings subjected to greater hazard from fire, his household and stock to injury and destruction, unless guarded with more than ordinary care. It requires no special experience or sagacity to perceive that such are the usual and natural effects of railroads upon the adjoining lands, and which necessarily deteriorate not only their marketable but their intrinsic value. The judge, therefore, did not exceed his duty in instructing the jury that these were proper subjects for their consideration in estimating the damages which the plaintiff might sustain by reason of the location of this road upon and across his lands." And in the same case it was held that the jury, in assessing compensation, were to adopt as the standard of value for the lands taken, not such a price as they would bring at a forced sale in the market for money, but such a price as they could be purchased at, provided they were for sale, and the owner asked such prices as, in the opinion of the community, they were reasonably worth; that it was matter of universal experience that land would not always bring at a forced sale what it was reasonably worth, and the owner, not desiring to sell, could not reasonably be required to take less. In Sater v. Burlington & Mount Pleasant Plank Road Co., 1 Iowa, 386, 393, Isbell, J., says: "The terms used in the constitution, 'just compensation,' are not ambiguous. They undoubtedly mean a fair equivalent; that the person whose property is taken shall be made whole. But while the end to be attained is plain, the mode of arriving at it is not without its difficulty. On due consideration, we see no more practical rule than to first ascertain the fair marketable value of the premises over which the proposed improvement is to pass, irrespective of such improvement, and also a like value of the same, in the condition
The question, then, in these cases, relates first to the value of the land appropriated; which is to be assessed with reference to what it is worth for sale, in view of the uses to which it may be applied, and not simply in reference to its productiveness to the owner in the condition in which he has seen fit to leave it. Second, if less than the whole estate is taken, then there is further to be considered how much the portion not taken is increased or diminished in value in consequence of the appropriation.

in which they will be immediately after the land for the improvement has been taken, irrespective of the benefit which will result from the improvement, and the difference in value to constitute the measure of compensation. But in ascertaining the depreciated value of the premises after that part which has been taken for public use has been appropriated, regard must be had only to the immediate, and not remote, consequence of the appropriation; that is to say, the value of the remaining premises is not to be depreciated by heaping consequence on consequence. While we see no more practical mode of ascertaining than this, yet it must still be borne in mind that this is but a mode of ascertaining; that, after all, the true criterion is the one provided by the constitution, namely, just compensation for the property taken.” See this rule illustrated and applied in Henry v. Dubuque & Pacific R. R. Co., 2 Iowa, 300, where it is said: “That the language of the constitution means that the person whose property is taken for public use shall have a fair equivalent in money for the injury done him by such taking; in other words, that he shall be made whole so far as money is a measure of compensation, we are equally clear. This just compensation should be precisely commensurate with the injury sustained by having the property taken; neither more nor less.” And see Richmond, & Co. v. Rogers, 1 Duvall, 135; Robinson v. Robinson, 1 Duvall, 102; Holton v. Milwau- kee, 31 Wis. 27; Root’s Case, 77 Pa. St. 270; East Branchwine, &c. R. R. Co. v. Ranck, 78 Pa. St. 464. ["The compensation to which owner is entitled for land taken for a street includes in addition to the value of land taken such expenses as are naturally incident to the taking, like cost of moving fence and the like. City of Detroit v. Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813; but not future and contingent expenses like assessments for improvements, nor for removing snow from sidewalks, for grading or paving. Id."]


2 Deaton v. Folk, 9 Iowa, 694; Parks
But, in making this estimate, there must be excluded from consideration those benefits which the owner receives only in common

v. Boston, 15 Pick. 198; Dickenson v. Fittehannah, 13 Gray, 546; Harvey v. Lack-


Doughty, 22 N. J. 495; Carpenter v. Landaff, 42 N. II. 218; Troy & Boston R. R. Co. v. Lee, 13 Barb. 169; Tide-

water Canal Co. v. Archer, 9 Gill & J. 479; Winona & St. Paul R. R. Co. v. Waldron, 11 Minn. 516; Nicholson v. N. Y. & N. H. R. R. Co., 22 Conn. 74; Nichols v. Bridgeport, 23 Conn. 189; Harding v. Funk, 8 Kau. 315; Holton v. Milwaukee, 31 Wis. 27. If the whole tract is not taken, the value of the part taken as part of the whole should be allowed. Chicago, B. & N. R. R. Co. v. Bowman, 122 Ill. 595, 13 N. E. 814; Balfour v. Louisville, &c. R. R. Co., 62 Miss. 608; Ashler v. Louisville, &c. R. R. Co., 87 Ky. 391, 8 S. W. 854. As to how far different lots or subdivisions used as one tract are to be held one parcel within this rule, see Port Huron, &c. Ry. Co. v. Voorheis, 50 Mich. 506, 15 N. W. 892; Wiccox v. St. Paul, &c. Ry. Co., 35 Minn. 439, 29 N. W. 148; Cox v. Mason City, &c. R. Co., 77 Iowa, 20, 41 N. W. 475; Ham v. Wiscons-
in, &c. Ry. Co., 61 Iowa, 716, 17 N. W. 157; Northeastern Ncb. Ry. Co. v. Frazer, 25 Neb. 22, 33, 40 N. W. 604, 605; Cameron v. Chicago, &c. Ry. Co., 32 Minn. 75, 43 N. W. 785; Potts v. Penn. S. V. R. R. Co., 119 Pa. St. 278, 13 Atl. 291. "Compensation is an equivalent for proper: taken, or for an injury. It must be ascertained by estimating the actual damage the party has sustained. That damage is the sum of the actual value of the property taken, and of the injury done to the residue of the property by the use of that part which is taken. The benefit is, in part, an equivalent to the loss and damage. The loss and damage of the defendant is the value of the land the company has taken, and the injury which the location and use of the road through his tract may cause to the re-

mainder. The amount which may be assessed for these particular the com-

pany admits that it is bound to pay. But, as a set-off, it claims credit for the

benefit the defendant has received from the construction of the road. That bene-

fit may consist in the enhanced value of the residue of his tract. When the com-

pany has paid the defendant the excess of his loss or damage over and above the benefit and advantage he has derived from the road, he will have received a just compensation. It is objected that the enhanced salable value of the land should not be assessed as a benefit to the defendant, because it is precarious and uncertain. The argument admits that the enhanced value, if permanent, should be assessed. But whether the appreciation is permanent and substantial, or transient and illusory, is a subject about which the court is not competent to determine. It must be submitted to a jury, who will give credit to the company according to the circumstances. The argument is not tenable, that an increased salable value is no benefit to the owner of land unless he sells it. This is true if it be assumed that the price will decline. The chance of this is estimated by the jury, in the amount which they may assess for that benefit. The sum assessed is therefore (so far as human foresight can anticipate the future) the exponent of the substantial increase of the value of the land. This is a bene-

fit to the owner, by enlarging his credit and his ability to pay his debts or pro-

vide for his family, in the same manner and to the same extent as if his fortune was increased by an acquisition of property." Greenville & Columbia R. R. Co. v. Partlow, 5, Rich. 428. And see Pennsylvania R. R. Co. v. Heister, 8 Pa. St. 446; Matter of Albany Street, 1 Wend. 149, 23 Am. Dec. 318; Upton v. South Reading Branch R. R., 8 Cush. 609; Proprietors, &c. v. Nashua & Lowell R. R. Co., 10 Cush. 385; Mayor, &c. of Lexington v. Long, 31 Mo. 309; St. Louis, &c. R. R. Co. v. Richardson, 46 Mo. 409; Little Miami R. R. Co. v. Col-

lett, 6 Ohio St. 182; Bigelow v. West Wisconsin R. R. Co., 27 Wis. 478. In Newby v. Platte County, 25 Mo. 253, the right to assess benefits was referred to the taxing power; but this seems not necessary, and indeed somewhat difficult on principle. See Sutton's Heirs v. Louisi-
with the community at large in consequence of his ownership of other property, and also those incidental injuries to other property,

village, 5 Dana, 28. [In measuring compensation for a taking it is not competent to increase compensation by any amount as the increase of value caused by the projected improvement. Shoemaker v. United States, 147 U. S. 282, 13 Sup. Ct. Rep. 301.]

1 Dickenson v. Inhabitants of Fitchburg, 13 Gray, 549; Chilis v. New Haven, &c. R. R. Co., 133 Mass. 253; Newby v. Platte County, 25 Mo. 258; Pacific R. R. Co. v. Chrysal, 25 Mo. 544; Carpenter v. Landaff, 42 N. H. 218; Mount Washington Co.'s Petition, 35 N. H. 134; Penrice v. Wallis, 37 Miss. 172; Huislip v. Wilkinson, &c. R. R. Co., 102 N. C. 376, 8 S. E. 926; Omaha v. Schaller, 26 Neb. 522, 42 N. W. 721; Railroad Co. v. Foreman, 24 W. Va. 652; Palmer Co. v. Ferrill, 17 Pick. 58; Meacham v. Fitchburg R. R. Co., 4 Cush. 201, where the jury were instructed that, if they were satisfied that the laying out and constructing of the railroad land occasioned any benefit or advantage to the lands of the petitioner through which the road passed, or lands immediately adjoining or connected therewith, rendering the part not taken for the railroad more convenient or useful to the petitioner, or giving it some pecular increase in value compared with other lands generally in the vicinity, it would be the duty of the jury to allow for such benefit, or increase of value, by way of set-off, in favor of the railroad company; but, on the other hand, if the construction of the railroad, by increasing the convenience of the people of the town generally as a place for residence, and by its anticipated and probable effect in increasing the population, business, and general prosperity of the place, had been the occasion of an increase in the salable value of real estate generally near the station, including the petitioner's land, and thereby occasioning a benefit or advantage to him, in common with other owners of real estate in the vicinity, this benefit was too contingent, indirect, and remote to be brought into consideration in settling the question of damages to the petitioner for taking his particular parcel of land. Upton v. South Reading Branch R. R. Co., 8 Cush. 600. See Pittsburgh, &c. R. R. Co. v. Reich, 101 Ill. 157; Chicago, B. & N. R. R. Co. v. Bowman, 122 Ill. 655, 13 N. E. 314. [This rule is applicable as well where the claim is for a "damaging" of property where such constitutional provisions exist as where it is for a "taking." Hickman v. Kansas City, 120 Mo. 116, 25 S. W. 225, 23 L. R. A. 658; Randolph v. Board of Freeholders, 63 N. J. L. 155, 41 Atl. 960. See Wagner v. Cage County, 3 Neb. 237.] Remote and speculative benefits are not allowed. Whitley v. Miss., &c. Co., 38 Minn. 523, 38 N. W. 753. Locating a depot near a lot is not a special benefit. Washburn v. Milwaukee, &c. R. R. Co., 59 Wis. 364, 18 N. W. 328. It has sometimes been objected, with great force, that it was unjust and oppressive to set off benefits against the loss and damage which the owner of the property sustains, because thereby he is taxed for such benefits, while his neighbors, no part of whose land is taken, enjoy the same benefits without the loss; and the courts of Kentucky have held it to be unconstitutional, and that full compensation for the land taken must be made in money. Sutton v. Louisville, 5 Dana, 28; Rice v. Turnpike Co., 7 Dana, 81; Jacob v. Louisville, 9 Dana, 114. So in Mississippi. Natchez, J. & C. R. R. Co. v. Currie, 62 Miss. 600. And some other States have established, by their constitutions, the rule that benefits shall not be deducted. See cases, note 4, 825. That the damage and benefits must be separately assessed and returned by the jury where part only of the land is taken, see Detroit v. Daly, 68 Mich. 653, 37 N. W. 11. But the cases generally adopt the doctrine stated in the text; and if the owner is paid his actual damages, he has no occasion to complain because his neighbors are fortunate enough to receive a benefit. Greenville & Columbia R. R. Co. v. Partlow, 5 Rich. 428; Mayor, &c. of Lexington v. Long, 31 Mo. 369. Benefits to the adjacent property owned in severalty may be deducted from damage to property owned jointly. Wilcox v. Meriden, 57 Conn. 120, 17 Atl. 306.
such as would not give to other persons a right to compensation; while allowing those which directly affect the value of the remainder of the land not taken, such as the necessity for increased fencing, and the like. And if an assessment on these principles makes the benefits equal the damages, and awards the owner nothing, he is nevertheless to be considered as having received full compensation, and consequently as not being in position to complain. But in some States, by constitutional provision or by statute, the party whose property is taken is entitled to have the value assessed to him without any deduction for benefits.

The statutory assessment of compensation will cover all consequential damages which the owner of the land sustains by means


2 Pennsylvania R. R. Co. v. Heister, 8 Pa. St. 445; Greenville & Columbia R. R. Co. v. Parklow, 5 Rich. 423; Dearborn v. Railroad Co., 24 N. H. 179; Carpenter v. Landaff, 42 N. H. 218; Dorlan v. East Brandywine, &c. R. R. Co., 40 Pa. St. 520; Winona & St. Peter's R. R. Co. v. Denman, 10 Minn. 267; Mount Washington Co.'s Petition, 35 N. H. 134. Where a part of a meeting-house lot was taken for a highway, it was held that the anticipated annoyance to worshippers by the use of the way by noisy and dissolute persons on the Sabbath, could form no basis for any assessment of damages. First Parish in Woburn v. Middlesex County, 7 Gray, 106.

3 White v. County Commissioners of Norfolk, 2 Cush. 301; Whitman v. Boston & Maine R. R. Co., 3 Allen, 133; Nichols v. Bridgeport, 23 Conn. 180; State v. Kansas City, 89 Mo. 21, 14 S. W. 515; Ross v. Davis, 97 Ind. 79. The benefits upon the owner's property not taken, but in the assessment district, may exceed the damages. Genet v. Brooklyn, 29 N. Y. 396; 1 N. E. 777. But it is not competent for the commissioners who assess the compensation to require that which is to be made to be wholly or in part in anything else than money. An award of "one hundred and fifty dollars, with a wagon-way and stop for cattle," is void, as undertaking to pay the owner in part in conveniences to be furnished him, and which he may not want, and certainly cannot be compelled to take instead of money. Central Ohio R. R. Co. v. Holler, 7 Ohio St. 220. See Rockford, &c. R. R. Co. v. Copinger, 66 Ill. 510; Toledo, A. & N. Ry. Co. v. Munson, 57 Mich. 42, 23 N. W. 455. [Compensation cannot be made by charging the owner with the amount of it, as a special tax on that portion of his lands not taken: Bloomington v. Latham, 142 Ill. 462, 32 N. E. 506, 18 L. R. A. 487.]

of the construction of the work, except such as may result from negligence or improper construction, and for which an action at the common law will lie, as already stated. (a)

(a) [Compensation. — The question of compensation may arise in one of three classes of cases:—

Tenn. 510, 13 S. W. 123, 8 L. R. A. 125. Value for special use, only competent as
assisting to fix market value: Miss. & R. R. Boom Co. v. Patterson, 88 U. S. 403;
Hampton, 162 Mass. 422, 39 N. E. 1129; N. Pacific & M. Ry. Co. v. Forbis, supra;
Not prospective, but present value: Omaha Bell Ry. Co. v. McDermott, 25 Neb. 714,
what its value may be to any particular person: City of Santa Ana v. Harlan, 69
Cal. 538, 24 Pac. 224.
If, in addition to material property, a franchise is destroyed,
compensation should cover value of material thing and also of the franchise: Clarion
B. Where part only of a single tract is taken. In this case the rule is variously
stated as follows: (1) Difference between the value of the whole tract just before
and just after the improvement is made: Chicago, P. & S. L. Ry. Co. v. Eaton, 138
Ill. 9, 29 N. E. 570; Evansville & R. Ry. Co. v. Swift, 128 Ind. 34, 27 N. E. 420;
Ry. Co. v. Gibson, 94 Ky. 234, 21 S. W. 1055; Driscoll v. City of Taunton, 100 Mass.
486, 33 N. E. 492; Richmond & M. Ry. Co. v. Humphreys, 90 Va. 425, 18 S. E. 501;
Pac. Ry. Co. v. Porter, 112 Mo. 361, 20 S. W. 569. This allows consideration of
benefts and injuries common to whole community. (2) Value of part taken as
a portion of whole and damage to remainder: Omaha So. Ry. Co. v. Todd, 39 Neb. 818,
v. City of Chicago, 161 Ill. 359, 37 N. E. 880; Orth v. City of Milwaukee, 92 Wis.
In State v. Sup. Ct. of King Co., — Wash. —, 70 Pac. 484, the measure of damages
allowed was the value of that taken and depreciation of portion not taken, disregarding
benefts. Upon principle, damages common to all in the community should not be
compensated for. See citations, post. Benefts accruing to owner by reason of the
construction of the improvement and not common to general public, which
enhance the value of lands not taken, but which were part of the same parcel, a portion
of which was taken, should be considered in determining compensation. Butchers
Slaughtering & Melting Ass'n v. Commonwealth, 163 Mass. 386, 40 N. E. 176; Good-
wine v. Evans, 134 Ind. 202, 33 N. E. 1031. Benefts common to all in the community
should not be considered in fiXing damages. Spencer v. Metropolitan Street Ry. Co.,
120 Mo. 154, 23 S. W. 126, 22 L. R. A. 683; Bevendorf v. Lewis, — Cal. —, 70 Pac.
1083. Injury to business by reason of taking of lands for right of way is held not re-
— Mass. —, 65 N. E. 52; following Monongahela Nav. Co. v. United States, 148
U. S. 312, 13 Sup. Ct. Rep. 922. If there is a grant of a portion of a tract of land for a
public use, such grant will operate to prevent recovery of damages for injuries to portion
23 L. R. A. 674. Where lands have been subdivided into lots, but not separated in
ownership, all belonging naturally to the particular tract are to be considered in
determining compensation. Metropolitan W. S. Fl. Ry. v. Johnson, 159 Ill. 484, 42
N. E. 871; Cox v. Mason City & Ft. Dodge Ry. Co., 77 Iowa, 29, 41 N. W. 475;
Atchinson & N. Ry. Co. v. Bearner, 34 Neb. 240, 51 N. W. 842, 33 Am. St. 837; Currie
v. Waverly & N. Y. B. Ry. Co., 52 N. J. L. 381, 20 Atl. 56, 18 Am. St. 492; Lincoln
N. Y. 237, 33 N. E. 1073; Kremer v. C. M. & St. P. Ry. Co., 51 Minn. 15, 62 N. W.
977, 38 Am. St. 408. If lots not adjacent, though parts of same general tract, they
CONSTITUTIONAL LIMITATIONS.


C. Where there is no actual taking, but such interference as directly affects and injures some right of property. — No new principle is involved in such cases, but compensation is assessed at the difference between the value of the property before and after the construction of the improvement. Nicks v. Chicago, St. P. & K. C. Ry. Co., 84 Iowa, 27, 60 N. W. 222; City of Bloomington v. Pollock, 141 Ill. 346, 31 N. E. 145; Beale v. City of Boston, 166 Mass. 53, 43 N. E. 1029. This condition arises most often in cases where there is a change in grade, or some new use granted of a public way, claimed, by an abutting owner who does not own the land under the street, to be injurious to him. The following cases illustrate the view of such courts as hold that such owner may be entitled to compensation. Adams v. Chicago, B. & Q. Ry. Co., 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493. Followed in Lumm v. Chicago, M. & St. P. Ry. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 298; Ottawa, O. C. & C. G. Ry. Co. v. Larsen, 40 Kan. 30, 19 Pac. 661, 2 L. R. A. 59. The so-called "Elevated Railway" Cases are of this class: Abendroth v. Manhattan Ry. Co., 122 N. Y. 1, 26 N. E. 496, 19 Am. St. 461; Arbenz v. Wheeling & Harrisburg Ry. Co., 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371. Much more is it true, where the adjoining proprietor owns the fee in the street. Reichert v. St. Louis & S. Ry. Co., 51 Ark. 491, 11 S. W. 696, 5 L. R. A. 183. Many of the cases holding that abutting proprietors may be entitled to compensation though no actual taking, are cases involving the construction of constitutional provisions providing for compensation where property is "damaged" for public use. Blair v. Charleston, 43 W. Va. 62, 20 S. E. 341, 35 L. R. A. 832, will illustrate. The injury must be peculiar as distinguished from such as is common to all in the neighborhood. Campbell v. Met. St. Ry. Co., 82 Ga. 320, 9 S. E. 1078; Ft. Worth & N. O. Ry. Co. v. Garoin. — Tex. —, 29 S. W. 794; Blair v. Charleston, 43 W. Va. 62, 20 S. E. 341, 35 L. R. A. 832. Generally it may be said that in assessing the amount of compensation the nature of the taking or injury should be considered. If permanent, the prospectual as well as present injury is an element in the proper measure of such compensation. Joy v. Grindstone-Neck Water Co., 85 Me. 109, 26 Atl. 1052; City of Centralia v. Wright, 166 Ill. 601, 41 N. E. 217; Highland Avenue & B. R. Co. v. Matthews, 99 Ala. 24, 10 So. 267, 14 L. R. A. 402. See notes, ante, pp. 811, 822, et seq., for other cases on these and similar propositions as to compensation. Where lands of railway company are condemned for street crossing, those expenses more properly the result of the exercise of the police power of the State are not assessable. Such are the expenses of erecting gates, planking the crossing, and maintaining a flagman: Chicago, B. & Q. Ry. Co. v. Chicago, 169 U. S. 228, 17 Sup. Ct. Rep. 651. Only nominal damages can be allowed as against a telegraph company for constructing telegraph line along and on lands of railway company through an agricultural country. Mobile & O. Ry. Co. v. Postal T. C. Co., 101 Tenn. 62, 40 S. W. 571, 41 L. R. A. 403. See case between same parties, 70 Miss. 731, 20 So. 370, 45 L. R. A. 223. Wife is not entitled to compensation for her inchoate right of dower in lands taken. Flynn v. Flynn, 171 Mass. 312, 60 N. E. 505, 68 Am. St. 427, 42 L. R. A. 98.]