§ 653 *a*. **Concluding Observations.** — In closing our survey of this interesting title we may stop pausefully for a moment to note how impressively the doctrines of our jurisprudence concerning it illustrate their thorough and complete adaptation to the wants and exigencies of civilized society. To meet these, the ordinary rules of law relating to private rights have been modified and limited by the public convenience and necessities. Thus the requirement of the common law that private grants must be made to a definite person, natural or artificial, is disregarded, because it would, if applied to dedications, frequently be detrimental to the public welfare. So, although the subject-matter of the dedication be land, interests therein can regularly be parted with by the owner and acquired by the public without the solemnity of a seal, or even the formality of a writing. So, also, the usual rules of law applicable to individuals respecting the necessary duration of adverse possession or of prescriptive user to give a right by possession or prescription, are here modified from considerations of public utility. A consummated intent on the part of the owner to dedicate is all that is required, and such intent may be shown by parol evidence of declarations and of acts *in pais* which unequivocally establish it. It may, we think, truly be affirmed, that the doctrines of our law on this subject as moulded and settled by judicial tribunals, though in many respects seemingly anomalous, are characterized by practical wisdom, and are beneficent in their operation. Rightfully applied they work no injustice to the supposed dedicator, since they draw the line with enlightened and considerate care between a just measure of his rights on the one hand and the rights of the public on the other.

the street is discontinued, such owner holds free from the easement. Wallace *v.* Fee, 50 N. Y. 694; Weisbod *v.* Railroad Co., 18 Wis. 43; Banks *v.* Ogden, 2 Wall. 57, 69. *Post*, sec. 666, note. And the street is not excluded by reason of the dimensions of the lot marked on the plat or described in the deed. Sherman *v.* McKeon, 38 N. Y. 271. See 3 Wash. Real Prop. 635, and cases as to *boundaries upon streets and rivers*.

CHAPTER XVIII.

STREETS.

§ 654 (516). **Prefatory.** — Municipal corporations in this country sustain most important relations to *streets and highways within their limits*. By statute or charter they are usually authorized to open, establish, alter, and vacate streets. Land may be dedicated for streets and ways, as we have elsewhere shown.[1] The authorities of these corporations are usually invested with the capacity to acquire property for streets for the public use and convenience, by the exercise of the power of eminent domain.[2] Streets, when dedicated and accepted by the corporation, or acquired by purchase or otherwise, are usually placed under the control of the corporation, with power to improve, grade, pave, regulate, &c. In some of the States there are statutes that the fee in the streets shall be in the municipality in trust for the public, while in other States the fee is considered to be in the adjoining proprietor, the public having only an easement (so-called) therein. The right to acquire public streets by dedication,[3] and the power to condemn private property for this purpose by the exercise of the delegated right of eminent domain, have been elsewhere considered,[4] and the liability of municipal corporations, in respect to defects and want of repair of the public streets within their limits, is reserved for treatment in another place.[5]

§ 655 (517). **Subject outlined.** — The subject of *Streets* has, in this edition, been reconsidered with diligence, and will be presented in this place under the following heads: —

1. *Legislative Control over Streets, and Their Uses;* and herein of *obstructions* and *the remedy* of the public *by indictment and in equity;* the remedy *of the adjoining proprietors and others,* including the municipal corporation; *the effect of adverse possession,* and the operation of *statutes of limitation* — secs. 656–675.

2. The Establishment and Control of *Ordinary Roads* and Ways within Corporate Limits — secs. 676–679.

[1] *Ante*, chap. xvii., on Dedication, sec. 626 *et seq.*

[2] *Ante*, chap. xvi., on Eminent Domain, sec. 583 *et seq.*

[3] *Ante*, chap. xvii. sec. 626 *et seq.*

[4] *Ante*, chap. xvi. sec. 583 *et seq.*; *post* sec. 680.

[5] *Post*, chap. xxiii., on Actions.

3. *Delegated Power of Municipal Corporations over Streets, and Their Uses;* and herein of the power *to grade* and *to improve streets;* and to authorize them to be used for other purposes than mere travel, such as public *sewers* and *cisterns, gas* and *water pipes, telegraph poles,* common *railroads, horse railways, elevated, cable* and *underground railways;* also, their powers and duties as to *bridges* within their limits — secs. 680–729.

4. *Limitations on the Right to Free Transit and Use of Streets* — secs. 730–734.

Legislative Control over Streets, and Their Uses; Its Extent; Legalization of Obstructions.

§ 656 (518). **Public Nature of Streets and Extent of Legislative Control.** — Public streets, squares, and commons, unless there be some special restriction, when the same are dedicated or acquired, are for the *public* use, and the use is none the less for the *public at large,* as distinguished from the municipality, because they are situate within the limits of the latter, and because the legislature may have given the supervision, control, and regulation of them to the local authorities. The legislature of the State represents the public at large, and has, in the absence of special constitutional restraint, and subject (according to the weight of more recent judicial opinion) to the property rights and easements of the abutting owner, full and paramount authority over all public ways and public places. "To the commonwealth here," says Chief Justice Gibson, "as to the king in England, belongs the franchise of every highway as a trustee for the public; and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals, or public roads, laid out by the authority of the quarter sessions."[1]

[1] *Per Gibson,* C. J., O'Connor *v.* Pittsburgh, 18 Pa. St. 187, 189 (1851). See, further, as to legislative power over public streets and their uses, Phila. & Trenton Railroad Case, 6 Whart. Pa. 25; Comm'rs, &c. of Northern Liberties *v.* N. L. Gas Co., 12 Pa. St. 318; Stuber's Road, 28 Pa. St. 199; Stormfeltz *v.* Manor Turnp. Co., 13 Pa. St. 555 (1860); Baird *v.* Rice, 63 Pa. St. 489 (1871); Gray *v.* Iowa Land Co., 26 Iowa, 387 (1868); distinguished from Warren *v.* Lyons City, 22 Iowa, 351; Albany Northern R. R. Co. *v.* Brownell, 24 N. Y. 345 (1862); Reading *v.* Commonwealth, 11 Pa. St. 196; Woodruff *v.* Neal, 28 Conn. 168 (1859); James River, &c. Co. *v.* Anderson, 12 Leigh (Va.), 278; Woodson *v.* Skinner (sale of commons), 22 Mo. 13 (1855); Bailey *v.* Phila., W. & B. R. R. Co., 4 Harring. (Del.) 389 (1846); Mercer *v.* Pittsburgh, Ft. W. & C. R. R. Co., 36 Pa. St. 99 (1859); Clinton *v.* Cedar Rap. & Mo. River R. R. Co., 24 Iowa, 455; Pacific R. R. Co. *v.* Leavenworth, 1 Dillon C. C. R. 393 (1871); Litchfield *v.* Vernon, 41 N. Y. 123 (1869); Metropolitan Board of Health *v.* Heister, 37 N. Y. 661, 672; Southwark R. R. Co. *v.* Philadelphia, 47 Pa. St. 314; *Ib.* 329; Barney *v.* Keokuk, 94 U. S. 324 (1876); s. c. 4 Dillon, 593, 599; Perry *v.* New Orleans, M. & C. Co., 55 Ala. 413, approving text; Stack *v.* East St. Louis, 85 Ill. 377 (1877); Stone *v.* F. P. & N. W. Railroad Co., 68 Ill. 394 (1873); Indianapolis B. & W. R. R. Co. *v.* Hartley, 67 Ill. 439 (1873); Cairo & V. R. R. Co. *v.* People, 92 Ill. 170; N. Y. Elevated Railway cases, *post,* secs. 723 *a*–723 *d*; Grand Rapids Electric, &c. Co. *v.* Grand Rapids Edison, &c. Co., 33 Fed. Rep. 659. The legislature may transfer the *control of streets to park commissioners* to be improved and used for park purposes, provided that such purposes are not inconsistent with their ordinary use as streets. People *v.* Walsh, 96 Ill. 232; *supra,* secs. 651, 651 *a.*

The legislature has power to determine where and when streets shall be constructed, their width and mode of improvement, and its action in these respects cannot be reviewed by the courts. It may adopt and sanction an improvement or expenditure which it could previously have authorized, and it may authorize an assessment for an improvement after the improvement is made.[1]

§ 656 *a.* **True Nature of a Public Street; Respective Rights of the Abutter and of the Public.** — The full conception of the true nature of a public street in a city, as respects the rights of the public on the one hand, and the rights of the adjoining owner on the other, has been slowly evolved from experience. It has been only at a recent period in our legal history that these two distinct rights have, separately and in their relations to each other, come to be understood and defined with precision.[2]

[1] Lennon *v.* New York, 55 N. Y. 365; Mead, *In re,* 74 N. Y. 216; Sackett, Douglas, and De Graw Streets, *In re,* 74 N. Y. 95; Sinton *v.* Ashbury, 41 Cal. 525 (1871). Even though the improvements are expensive, extraordinary, extravagant, and hurtful rather than beneficial. Commissioners of Assessment of Brooklyn, *In re,* 18 Alb. L. J. 199 (1878); see *ante,* chap. iv., as to extent of legislative power. See Index, tit. *Curative Acts.*

[2] Story *v.* N. Y. Elev. R. R. Co., 90 N. Y. 122; Mahady *v.* Bushwick R. R. Co., 91 N. Y. 148; N. Y. Cable Co. Case, 104 N. Y. 1; Lahr's Case, 104 N. Y. 268; N. Y. Dist. Ry. Case, 107 N. Y. 42.

The well considered and luminous judgment of *Danforth,* J., in Story's Case, *supra,* will be found especially instructive and satisfactory. In Lahr's Case, *supra, Ruger,* C. J., states with great care and clearness the doctrine of the Court of Appeals of New York as to the property *rights* of abutting lot-owners in the streets in front of their lots. *Post,* secs. 712, 730, and note and case of Fritz *v.* Hobson, there cited. As to highways, Chancellor *Kent* correctly states that: "They [that is, the abutting owners] may have every use and remedy that is consistent with the servitude or easement of a way over it, and with police regulations." 3 Kent's Com. 433. Mr. Justice *Danforth* in the Story Case, 90 N. Y. 161, says: "The public purpose of a street requires of the soil the surface only. Very ancient usage permits the introduction under it of sewers and water pipes, and upon it posts for lamps." Undoubtedly we must add the pipes, &c., laid under the surface, which are required by the various new agencies adopted in civilized life, such as gas, electricity, steam, and other things capable of that mode of distribution. Lord Justice *Bramwell* in Coverdale *v.* Charlton, L. R. 4 Q. B. Div. 104, says in substance: "Street" comprehends what we may call the surface, that is to say, not a surface bit of no reasonable thickness, but a surface of such a thickness as the local board may require for doing to it what is usually done in or under streets. *Post,* secs. 664, 664 *a,* 688–700, 730 note.

The injustice to the abutting owner arising from the exercise of unrestrained legislative power over streets in cities was such that the abutter necessarily sought legal redress, and the discussions thence ensuing led to a more careful ascertainment of the nature of streets, and of the rights of the adjoining owner in respect thereof. It was seen that he had in common with the rest of the public a right of passage. But it was further seen that he had rights not shared by the public at large, special and peculiar to himself, and which arose out of the *very relation of his lot to the street in front of it;* and that these rights, whether the bare fee of the streets was in the lot owner or in the city, were rights of property, and as such ought to be and were as sacred from legislative invasion as his right to the lot itself. In cities the abutting owner's property is essentially dependent upon sewer, gas, and water connections; for these such owner has to pay or contribute out of his own purse. He has also to pay, or contribute towards the cost of sidewalks and pavements. These expenditures, as well as the relations of his lot to the street, give him a special interest in the street in front of him, distinct from that of the public at large. He may make, as of right, all proper uses of the street subject to the paramount right of the public for all street uses proper, and subject also to reasonable and proper municipal and police regulation. Such rights, being property rights, are like other property rights under the protection of the Constitution.[1]

[1] That the rights of the abutters in the streets are *property rights*, the Court of Appeals of New York has frequently decided. We refer particularly to Gilbert's Case, 70 N. Y. 361; to the great judgment of Mr. Justice *Danforth*, speaking for the court in Story's Case, 90 N. Y. 122; to the careful and exhaustive judgment of the court delivered by Chief Judge *Ruger*, in the sequel to that case known as Lahr's Case, 104 N. Y. 268; to the still later judgment, clear and luminous, written by Mr. Justice *Finch*, in the New York District Railway Case, 107 N. Y. 42. Chief Judge *Ruger* in Lahr's Case said: "The abutter, though limited by deed to the side of the street, owns an easement in the bed of the street, which is an interest in real estate constituting property in the sense of the Constitution." Again, he said that "if the city has the fee it is a qualified fee, held in trust under the statute for a certain use, namely, for street purposes, all other uses residing with the owner from whom the land was taken." The third proposition which the Chief Judge in that case enunciated, as derived from the prior judgments of the court, is expressed in this language: "The ownership of such an easement is an interest in real estate constituting property within the meaning of that term as used in the Constitution of the State, and requires compensation to be made therefor before it can be lawfully taken from its owner for a public use."

In Sadler's Case, 104 N. Y. 229, the court held that the public could not take gravel *below the grade line* of a street to use on the street *elsewhere*, and that the abutter could restrain the removal of the gravel, on the principle that he owns the soil of the street and has the right to the use of it for all purposes but street purposes proper. And in the New York District Ry. Case, *supra*, the court distinctly decided that a railway to be built *beneath the surface* of a street in a city is a railway within the meaning of the amendment to the Constitution of January 1, 1875, and can only be authorized to be constructed in the manner prescribed by that amendment. In McCarthy *v.* Syracuse, 46 N. Y. 194, which was an action against the city for flooding from a defective sewer a vault which the plaintiffs had constructed under the street in front of their store, the Court of Appeals held that plaintiffs were entitled to recover, because they had a right to use the space under the street as they might any other part of their property, so long as they did no injury to the street. *Post*, secs. 664, 664 *a*, 730, note, and case of Fritz *v.* Hobson there cited.

Special constitutional limitation on legislative power over streets, see *post*, sec. 701 *a*.

§ 656 *b*. **Same subject. Result of the New York Cases stated.** — In some of the streets of the city of New York the fee is in the abutter, in others the fee is in the city; under the statute, however, it is not an absolute, but a qualified fee, viz., in trust for street uses proper. This qualification is important, and is so regarded in the adjudications. This subject of the abutter's rights has undergone in New York, in the cases relating to surface railways (both steam and horse railways), to elevated railways, and to underground railways in streets, the most thorough examination, and it is difficult, if not impossible, to reconcile the grounds of the earlier with those of the later judgments of the Court of Appeals, at least so far as the earlier cases make certain rights of the abutter to depend upon whether the bare fee of the soil is in him, or in the public in trust for street uses. To this extent the law, even in New York, cannot perhaps be said to be thoroughly settled. Certainly it is not in many of the other States. We deduce from the later decisions of the Court of Appeals of New York (which we regard as sound), the following doctrines; viz., that the abutting owners have *property rights* in the streets in front of them, such as the right of access, of light and of air, which are protected by the Constitution, and hence not subject to the absolute and unlimited power of the legislature. If they own the fee to the centre line of the streets, their rights therein are legal in their nature. If they only own the fee to the line of the street their rights in the street are in the nature of equitable easements in fee, but in extent are substantially the same as where the fee is in them subject to the public use. In either case the abutter is entitled as of right, subject to municipal and public regulation, to make any beneficial use of the soil of the street which is consistent with the prior and paramount rights of the public therein for street purposes proper. The right of the public to use the streets, not only for travel and passage, but for sewer, gas, water, and steam pipes, and the like purposes, is, of course, paramount to any proprietary rights of the abutter.[1] The abutter may, as a logical and necessary result, it is

[1] See cases cited in last preceding sec-

believed, whether the fee is in him or in the public, build, *as of right*, underground house vaults in the streets, subject, of course, to the paramount right of the public for street uses proper where the two rights come into competition, and subject also to reasonable legislative, municipal, or police regulations as to location, mode of construction, and use of such vaults.

§ 657 (519). **Legislative Power over Streets.** — By virtue of its authority over public ways, the *legislature may authorize acts to be done in and upon them*, or legalize obstructions therein, which would otherwise be deemed nuisances.[1] As familiar instances of this may be mentioned the authority to railway, water, telegraph, and gas companies to use or occupy streets and highways for their respective purposes. And it may be here observed that whatever the legislature may constitutionally authorize to be done is of course lawful, and of such acts, done pursuant to the authority given, it cannot be predicated that they are nuisances: if they were such without, they cease to be nuisances when having the sanction of, a valid statute.[2] As respects the public or municipalities, there is, in the absence of special constitutional restriction, no limit upon the power of the legislature as to the uses to which streets may be devoted. What limitations exist upon the power as respects the original proprietor of property dedicated to the public use, or the adjoining owner or others, is a subject which is elsewhere considered in this chapter.[3] Statutes authorizing or legitimating acts and obstructions upon the highways which would otherwise be nuisances are *strictly construed, and must be closely pursued*, and the authority given must be exercised with proper care.[4]

tion. As to abutter's easement of access, &c., see, *post*, secs. 664, 665, 666, 698 *a*, 712, 730, 754 *a*.

[1] The control of the streets in the *city of Washington* and the power to grant the use of them for other than ordinary purposes is primarily vested in Congress. District of Columbia Comm'rs *v.* Baltimore & Pot. R. R. Co., 114 U. S. 453.

[2] See sec. 656, *supra*, and cases there cited; Angell on Highways, sec. 237; First Bapt. Church *v.* Utica & S. R. Co., 6 Barb. (N. Y.) 313; Clinton *v.* C. R. & M. R. R. Co., 24 Iowa, 455; Transportation Co. *v.* Chicago, 99 U. S. 635 (1878); Text cited and approved in Perry *v.* New Orleans, &c. Co., 55 Ala. 413; Atlanta *v.* Gate City Gas L. Co., 71 Ga. 106; Irwin *v.* Great So. Telephone Co., 37 La. An. 63; Kirtland *v.* Macon, 66 Ga. 385; Cummins *v.* Seymour, 79 Ind. 491; Kumler *v.* Silsbee, 38 Ohio St. 445 (steam-heating pipes).

[3] *Ante*, secs. 656 *a*, 656 *b*; *post*, secs. 712, 730, and New York Elevated Railway cases, *post*, secs. 723 *a*–723 *d*.

[4] Angell on Highways, sec. 237; Hughes *v.* Worcester R. R. Co., 2 R. I. 493; Bordentown & S. A. Turnp. Co. *v.* Camden & A. R. R. Co., 2 Harr. (N. J.) 314. In virtue of its authority over highways and over streets, which are, in effect, highways, the legislature may establish a *turnpike gate in the streets* of a city. But as such a privilege would embarrass public trade and convenience, the intention of the legislature must be plainly expressed.

§ 658. **Delegation of Power to Municipality.** — The legislature, instead of exercising directly this authority as to the uses of streets and public places, may authorize it to be exercised by local or municipal authorities.[1] An act of the legislature, *legalizing, for the time being, encroachments on the public streets, may be repealed at pleasure*, — being a mere revocable license, — unless something was done or suffered in consideration of the act so as to invest it with

Stormfeltz *v.* Manor Turnp. Co., 13 Pa. St. 555 (1850); *infra*, sec. 658, note; Milarkey *v.* Foster, 6 Oreg. 378; s. c. 25 Am. Rep. 531 with note.

[1] *Infra*, secs. 680–727; Sinton *v.* Ashbury, 41 Cal. 525 (1871); Northern Transp. Co. *v.* Chicago, 99 U. S. 635 (1878). *Legislative authority to build tunnel under street, and what it implies.* A city is not liable to the adjoining owner for consequential injuries sustained by him by reason of the construction, under legislative authority, of a tunnel under a street intersected by a river, where the authority has not been transcended and no negligence is shown, and there has been no invasion of the plaintiff's property, although the obstructions in the street may have interfered with the owner's access to his property, and were of such a nature as to have been nuisances, causing special damage, if they had not been warranted by legislative authority; and it is immaterial, in such a case, "whether the fee of the street is in the State or in the city or in the adjoining lot-holders." Authority to build the tunnel carries with it all that is necessary for the exercise of the power, and a lot-owner, although he suffers special damage of a consequential nature, has, in such case, no private action, unless it is given by the legislature. Northern Transp. Co. *v.* Chicago, *supra*; Chicago *v.* Rumsey, 87 Ill. 348; s. c. 10 Chicago Legal News, 333; *post*, secs. 988, 990.

Toll-gates in streets: In a suit in equity in the name of the State, to enjoin the setting up a new toll-gate structure in place of a former one erected and removed by a plank-road company, the complaint being that the intended erection would be a public nuisance, the Supreme Court of *Michigan* held, in People *v.* Detroit & Howell Pl. Rd. Co., 37 Mich. 195 (1877): 1. That when the State gave the company the right to build their road from a point *in the city*, and to erect gates according to their reasonable discretion, but subject to the condition that none should be placed *in the city*, it contemplated the city as it then was in respect to limits, and meant that the privilege given *within the city* should not extend so far as to allow gates to be set up there, and, on the other hand, that the restriction should be confined territorially to the then fixed and determined bounds of the city. The State could not have designed that as fast as it might enlarge the city boundaries the defendant's franchises, covering the right to place toll-gates, should be correspondingly annihilated, and the gates themselves, thereby brought within the limits, be instantly converted into a public nuisance; citing Hall *v.* The State, 20 Ohio, 7; Somerville *v.* O'Neil, 114 Mass. 353; Barber *v.* Rorabeck, 36 Mich. 399; s. c. 5 Cent. L. J. 43. 2. That in view of the power and privilege given by the charter, the gates ought to be regarded, for the purpose of this case, as though their site was directly designated by the State. The impediment could not have become unlawful by the mere flow of time; and the fact that the State itself, since the location of the gate, has allowed railroads to cross near the site, and has thereby consented to the incidents which naturally happen in consequence of the concentration and combination of different ways, will hardly entitle it to turn round and assail the defendant's gate as a public nuisance. What the State validly authorizes it cannot prosecute as a nuisance; citing First Baptist Church *v.* Utica & Schenectady R. R. Co., 6 Barb. (N. Y.) 313, and cases cited; Hentz *v.* Long Island R. R. Co., 13 Barb. (N. Y.) 646; People *v.* Denslow, 1 Caines (N. Y.), 177; Cooley's Const. Lim. 594. *Supra*, sec. 657, note; *infra*, sec. 660, note.

the qualities of a contract.[1] How far a city can by contract or ordinance authorize an irrevocable use of its streets by others for public uses, depends upon its charter, and is a subject elsewhere considered.[2]

§ 659 (520). **Obstruction; Remedy of Public by Indictment and in Equity.** — The principle that streets and public places or the uses thereof, speaking generally, belong to the public is one of great importance. Because they are public, whether the technical fee be in the adjoining owner, in the original proprietor, or in the municipality in trust for the public use, any unauthorized obstruction of the public enjoyment is an indictable nuisance.[3] And the proper officer of the commonwealth may proceed, in the name of the public, by bill in equity, for an injunction or relief, or by other

[1] Reading *v.* Commonwealth, 11 Pa. St. 196 (1849); Detroit *v.* Detroit & E. Pl. R. Co., 12 Mich. 333.

[2] Louisville City R. R. Co. *v.* Louisville, 8 Bush (Ky.), 415 (1871); *ante*, sec. 97; sec. 314, and note; sec. 450, note.

[3] State *v.* Atkinson, 24 Vt. 448 (1852); State *v.* Wilkinson, 2 Vt. 480; Commonwealth *v.* Rush, 14 Pa. St. 186 (1850); Heckerman *v.* Hummel, 19 Pa. St. 64 (1852); New Orleans *v.* Gravier, 11 Mart. (La.) 620; Herbert *v.* Benson, 2 La. An. 770 (1847); Reading *v.* Commonwealth, 11 Pa. St. 196; Runyon *v.* Bordine, 2 J. S. Green (N. J.), 472 (1834); Smith *v.* State, 3 Zabr. (23 N. J. L.) 712; s. c. *Ib.* 130 (1852); Morris Canal & B. Co. *v.* Fagin, 22 N. J. Eq. 430; Davis *v.* Bangor, 42 Me. 522; State *v.* Cincinnati Gas, &c. Co., 18 Ohio St. 268 (1868); People *v.* Jackson, 7 Mich. 432; People *v.* Carpenter, 1 Mich. 273; Attorney-General *v.* Heishon, 18 N. J. Eq. 410 (1867).

Nuisances and obstructions: A railroad company is indictable for a nuisance if, without lawful authority, it erects and continues a *building in a public highway or street.* State *v.* Morris & E. R. R. Co., 3 Zabr. (23 N. J. L.) 360 (1852); Milhau *v.* Sharp, 27 N. Y. 611, 625. General grant held to confer such right. Cogswell *v.* N. Y., &c. R. R. Co., 103 N. Y. 10 (1888). Where a private person takes possession of a public common or square, or encloses it, or otherwise wholly excludes the public, such act is *ipso facto* a nuisance, and the court should so charge the jury as a matter of law. And it is no defence that the public inconvenience was more than counterbalanced by the public benefit. State *v.* Woodward (indictment for enclosing public common), 23 Vt. 92 (1850); State *v.* Atkinson, 24 Vt. 448. Rex *v.* Ward, 31 Eng. Com. Law, 180; 4 Ad. & El. 384, settled and put at rest this principle in England. A *public common* may, in such case, be described as a public highway. 2 Chitty Crim. Law, 389; State *v.* Atkinson, 24 Vt. 448.

Proper judgment: Where a defendant is indicted and convicted for erecting a building which encroaches upon a public street, *the proper judgment* is that the nuisance be abated, and that the defendant pay a fine. Smith *v.* State, 3 Zabr. (23 N. J. L.) 712 (1852). "This judgment," said the learned reporter, who was one of the counsel in this case, "is according to the old and well-settled authorities (citing them). The form of entry, framed from Rastell's Entries, 411, was as follows: 'Therefore, it is considered that the nuisance aforesaid be wholly removed and abated, and that the walls, erections, and buildings above mentioned be taken away and removed, and that the aforesaid common and public highway be opened to its right and lawful width, as it was until the erection of said nuisance, at the proper costs and expenses of the said defendant; and that he do pay a fine of five dollars,' &c." State *v.* Morris & E. R. R. Co., 3 Zabr. (23 N. J. L.) 360.

appropriate action or proceedings, to vindicate the rights of the public against encroachment or denial by individuals.[1] So where, by its charter or constituent act, a municipality has the usual control and supervision of the streets and public places, *it may, in its corporate name,* institute judicial proceedings to prevent or remove obstructions thereon.[2]

§ 660 (521). **Obstructions; Liability of Author of Obstruction; Remedy.** — The king cannot license the erection or commission of a nuisance;[3] nor in this country can a municipal corporation do so by virtue of any implied or general powers. A building, or other structure of a like nature, erected upon a street without the sanction of the legislature, is a nuisance, and the local corporate authorities of a place cannot give a valid permission thus to occupy streets without express power to this end conferred upon them by charter or statute.[4] The usual power to regulate and control streets

[1] People *v.* Vanderbilt, 26 N. Y. 287; Same *v.* Same, 28 N. Y. 396; State *v.* Mobile, 5 Port. (Ala.) 279 (1837); Moyamensing Comm'rs *v.* Long, 1 Pars. (Pa.) 145; Pittsburgh *v.* Scott, 1 Pa. St. 309; Commonwealth *v.* Rush, 14 Pa. St. 186 (1850); Heckerman *v.* Hummel, 19 Pa. St. 64 (1852); Columbus *v.* Jaques, 30 Ga. 506; Shawbut *v.* St. Paul, &c. R. R. Co., 21 Minn. 502, 506 (1875); Burlington *v.* Schwarzman, 52 Conn. 181; *post*, sec. 912 *et seq.* If the fact of encroachment is disputed and doubtful, it should be settled at law; if the bill be retained, an issue may be directed to try the fact. Attorney-General *v.* Heishon, 18 N. J. Eq. 410 (1867).

A city holds, by statute in *Illinois*, the fee of its streets in trust for the benefit of all the corporators, and in case of violation of such trust by an excess or abuse of power, and in bad faith, by public officers, resulting in an injury to the rights and property of an individual, it can, by its representative, the municipal authorities, maintain an action for recovery of the possession of or for an injury to the street. A court of equity has in such cases jurisdiction to grant relief. Quincy *v.* Jones, 76 Ill. 231 (1875); Carter *v.* Chicago, 57 Ill. 283 (1870); Cosby *v.* Owensboro & R. R. Co., 10 Bush (Ky.), 288 (1874). See also Peoria *v.* Johnston, 56 Ill. 45.

[2] Pittsburgh *v.* Scott, 1 Pa. St. 309; Mankato *v.* Willard, 13 Minn. 13; Winona *v.* Huff, 11 Minn. 119; Dummer *v.* Jersey City, 1 Spencer (20 N. J. L.) 86 (1843); Herbert *v.* Benson, 2 La. An. 770; Barclay *v.* Howell's Lessee, 6 Pet. 507; Watertown Trs. *v.* Cowen, 4 Paige (N. Y.), 510; Brooklyn Steam Transit Case, 78 N. Y. 524, 531; Cable Company Case, 104 N. Y. 38, 43; *post*, sec. 723 *d*; Dubuque *v.* Maloney, 9 Iowa, 450, 460, *per Stockton*, J., *arguendo.* Text approved. Cheek *v.* Aurora, 92 Ind. 107; *post*, chap. xxii.

Right of municipal corporation to file bill to restrain execution sale of lots and squares dedicated to educational, religious, and public uses, affirmed by a majority of the court in Cox *v.* Griffin, 18 Ga. 728 (1855). See M. E. Church *v.* Hoboken, 33 N. J. Law, 13 (1868). It has been held in *Louisiana* that a municipal corporation, without the institution of any judicial proceedings, *may pull down and remove houses and obstructions* in the public streets, and is not liable to the owner therefor. Daublin *v.* New Orleans, 1 Martin (La.), 184. And see Herbert *v.* Benson, 2 La. An. 770 (1847).

[3] Viner Abr. *Nuisance*, F.

[4] Flemingsburg *v.* Wilson, 1 Bush (Ky.), 203; Attorney-General Heishon, 18 N. J. Eq. 410 (1867); Stetson *v.* Faxon, 19 Pick. (Mass.) 147 (1837); Commonwealth *v.* Rush, 14 Pa. St. 186 (1850);

has even been held not to authorize the municipal authorities to allow them to be encroached upon by the adjoining owner, by

State *v.* Morris & E. R. R. Co., 3 Zabr. (23 N. J. L.) 360 (1852); Columbus *v.* Jaques, 30 Ga. 506; State *v.* Mobile, 5 Port. (Ala.) 279; State *v.* Laverack, 34 N. J. L. 201; Marini *v.* Graham, 67 Cal. 130, (obstruction in sidewalk); Gould *v.* Topeka, 32 Kan. 485: approving text, McDonald *v.* Newark, 42 N. J. Eq. (15 Stew.) 136; (using street for market purposes; *ante*, sec. 383). *Door-steps:* A statute providing that *door-steps* shall not project more than a certain distance is constitutional; a city has no power to pass an ordinance prohibiting the maintenance of door-steps erected under authority of such a statute. Cushing *v.* Boston, 128 Mass. 330; s. c. 124 Mass. 434; s. c. 122 Mass. 173. *Post*, sec. 734. Any *continuous obstruction* of a public highway or street, *not authorized* by competent legal authority, is a public nuisance. *Per Denio*, C. J., in Davis *v.* New York, 14 N. Y. (4 Kern.) 506 (1856), — the horse railway case relating to Broadway. Brooklyn Steam Transit Case, 78 N. Y. 531; Pond *v.* Met. Elev. Co., N. Y. Jan. 15, 1889; *post*, sec. 723 *d*. But an obstruction which is temporary and reasonable in its character and intended for the public safety and convenience is not a nuisance. Simon *v.* Atlanta, 67 Ga. 618 (ropes stretched across street during a parade). As to *wharves and depot buildings* in public streets, see Barney *v.* Keokuk, 94 U. S. 324 (1876); s. c. 4 Dillon, 593, 599. *Ante*, secs. 103–113; 633, 634. Unauthorized *toll-gate*. Milarkey *v.* Foster, 6 Oreg. 378 (1877); s. c. 25 Am. Rep. 531, with note. *Supra*, sec. 657, note; sec. 658, note. A *railway constructed in the public streets* of a city, without authority of law, is a continuous obstruction, which amounts to a public nuisance. Denver & Swansea Ry. Co. *v.* Denver City Ry. Co., 2 Col. 673 (1875).

In Cogswell *v.* N. Y., N. H. & H. R. R. Co., 103 N. Y. 10 (1886), reversing Superior Court, 16 J. & S. 31, a railroad company claimed legislative authority to erect and maintain *an engine house*, under an act which merely gave it power to run its cars over the road of another company, upon such terms as should be agreed upon between the companies. It was held that statutory authority, in order to justify an injury to private property, by a railroad, without the consent of the owner and without compensating him therefor, must be conferred expressly, and cannot be presumed from a general grant. Erecting and maintaining an engine house which distributed smoke, cinders, and coal dust upon adjoining property, without express authority of law and without compensating adjoining owners was held to be a nuisance; such owners may maintain actions to recover damages and to restrain the nuisance.

The erection of a *market-house* in the centre of a public street, rendering, as it does, the highway less commodious, is a nuisance, which may be prevented by a bill in equity. State *v.* Mobile, 5 Port. (Ala.) 279 (1837); s. p. Columbus *v.* Jacques, 30 Ga. 506 (1860); Savannah *v.* Wilson, 49 Ga. 476 (1873); Ketchum *v.* Buffalo, 14 N. Y. 374, *per Wright*, J.; *ante*, sec. 383; *post*, sec. 722. Index, title *Markets*.

A purpresture, or permanent encroachment *by the adjoining owner*, is in law a nuisance, and the public have a remedy by indictment or in equity. Smith *v.* State, 3 Zabr. (23 N. J. L.) 712; *Ib.* 130; Moyamensing Comm'rs *v.* Long, 1 Pars. (Pa.) 145; State *v.* Morris & E. R. R. Co., 3 Zabr. (23 N. J. L.) 360; Attorney-General *v.* Heishon, 18 N. J. Eq. 410; Clark *v.* Commonwealth, 14 Bush, 166; see also Driggs *v.* Phillips, 103 N. Y. 77.

Openings made and left in streets or sidewalks are nuisances. Beatty *v.* Gilmore, 16 Pa. St. 463; Runyon *v.* Bordine, 2 J. S. Green (N. J.), 472 (1834); Scammon *v.* Chicago, 25 Ill. 424; *post*, secs. 1032–1036; *infra*, secs. 699, 700; *post*, chap. xxiii.

It is a public nuisance, and indictable at common law, to *erect a stall for the public sale of articles on the street or pavement*, without authority from the municipal corporation; the owner of the adjoining premises can confer no such authority. Commonwealth *v.* Wentworth, Bright. (Pa.) 318. A building so erected that its *roof overhangs the street* is a nuisance, and its erection and maintenance an indictable

erections made for his exclusive use and advantage, such as *porches* extending into the streets, or *flights of stairs* leading from the ground to the upper stories of buildings standing on the line of the streets.[1] The person erecting or maintaining a nuisance upon a public street, alley, or place, is liable to the *adjoining owner* or other person who suffers *special* damage therefrom.[2]

offence. Garland *v.* Towne, 55 N. H. 55 (1875).

Property owners have the right to place *skids across the sidewalk* temporarily for the purpose of removing merchandise. Welsh *v.* Wilson, 101 N. Y. 254. A *scaffold* suspended from a building held not to be a nuisance or in violation of an ordinance prohibiting the hanging of goods, &c., in front of a building at a greater distance than one foot. Hexamer *v.* Webb, 101 N. Y. 377.

Respecting nuisances upon streets and highways, Mr. Justice *Appleton* says: "But nuisances may obviously be committed upon a highway by its unlawful use, for which those committing may be liable civilly to such as may suffer therefrom special damage, and be punished criminally, as thereby annoying the travelling public generally." Where the charter of a town gives it power to abate nuisances, the use of this term refers to the general law to determine what acts or things are such. In relation to streets and highways, "the carrying an unreasonable weight with an unusual number of horses (Rex *v.* Egerly, 3 Salk. 183); the driving a carriage through crowded streets with dangerous speed (United States *v.* Hart, Pet. [Circuit Court] 390); the selling by a constable at auction, in the public thoroughfares (Commonwealth *v.* Miliman, 13 Serg. & Rawle, Pa. 403); the placing at a window the effigy of a bishop, labelled, 'Spiritual Broker,' thereby drawing crowds to the shop (Rex *v.* Carlisle, 6 Carr. & P. 636); the keeping coaches at a stand in the street, awaiting customers (Rex *v.* Cross, 3 Campb. 226); the loading and unloading of wagons in the street (Rex *v.* Russell, 6 East, 427); the congregating of carts for the reception of slops from the distilleries (People *v.* Cunningham, 1 Denio, 524); the collecting crowds in the streets by using violent and indecent language to those passing in the street, thereby obstructing their free passage (Barker *v.* Commonwealth, 19 Pa. St. 412; Rex *v.* Sarmon, 1 Burr. 516), have severally been held nuisances, as annoying the whole community, and incommoding and endangering the travelling public." *Per Appleton*, J., in Davis *v.* Bangor, 42 Me. 522. *Making a speech* in a public street is not a nuisance *per se*, but may become so by obstructing the public way. Fairbanks *v.* Kerr, 70 Pa. St. 86 (1872); s. c. 10 Am. Rep. 664.

[1] People *v.* Carpenter, 1 Mich. 273 (1849). Chief Justice *Whipple*, in this case, denies that such a use of the streets can be authorized by the legislature, since it would destroy the vested rights of property owners under the dedication; but this is an extreme view. Commonwealth *v.* Blaisdell, 107 Mass. 234 (1871); *infra*, sec. 734.

A city has exclusive jurisdiction over its streets and alleys, not for the purpose of appropriating them in perpetuity to the use of private individuals, but to keep them open and free to all. Wood *v.* Mears, 12 Ind. 515; People *v.* Cunningham, 1 Denio, 524; Hart *v.* Albany, 9 Wend. 571. And where the owners of a building leased the same to the city, and the condition was that they were to construct an *iron stairway on the outside of the building, occupying for that purpose five feet of the adjoining alley*, and by the contract the city granted to said parties a perpetual right to maintain such stairway, the stairway was held a public nuisance, and that the city had no power to contract for such a structure in such a place. The common council of a city can only contract by ordinance, resolution, or order, and an illegal and void contract cannot form the groundwork of an estoppel. Pettis *v.* Johnson, 56 Ind. 139.

[2] Stetson *v.* Faxon, 19 Pick. (Mass.) 147; Hall *v.* McCaughey, 51 Pa. St. 43. An alley held not to be a public highway, so that an obstruction will be regarded as