§ 661 (522). **Jurisdiction in Equity at instance of Abutters.** — As to the right to relief in equity, it may be considered as settled that a party entitled to a right of way over a street may be protected in the enjoyment thereof by restraining the erection of obstructions thereon; but the mere allegation of irremediable mischief from the acts complained of is insufficient; *facts* must be stated to show that the apprehension of injury is well founded.[1] Individual

a public wrong. Paul *v.* Detroit, 32 Mich. 110; Bagley *v.* People, 43 Mich. 355; s. c. 5 N. W. R. 415.

What adjoining owner must show to maintain an action for damages. Abbott *v.* Mills, 3 Vt. 520; McLauchlin *v.* Charlotte & S. C. R. R. Co., 5 Rich. (S. C.) Law, 583; Runyon *v.* Bordine, 2 J. S. Green (N. J.), 472, holding that where a ditch was dug in an alley in front of the plaintiff's lot, trespass on the case was the proper form of action. Heckman *v.* Hummel, 19 Pa. St. 64; Stetson *v.* Faxon, 19 Pick. (Mass.) 147; and see learned opinion of *Putnam*, J., as to what constitutes special or particular damages. Haynes *v.* Thomas, 7 Ind. 38; Black *v.* Phila. & R. R. Co., 58 Pa. St. 249; Shaubut *v.* St. Paul & S. C. R. R. Co., 21 Minn. 502 (1875); Pettis *v.* Johnson, 56 Ind. 139. An adjoining owner cannot treat as a nuisance and fill up sewer constructed by municipal authority; his remedy is by action. McGregor (city of) *v.* Boyle, 34 Iowa, 268 (1872); *post*, secs. 1043–1053. A person obstructed in the prosecution of his business for five days, by an unauthorized *toll-gate* across a public highway, may recover his damages from the author of the nuisance. Milarkey *v.* Foster, 6 Oreg. 378 (1877); s. c. 25 Am. Rep. 531, and note, wherein Mr. Thompson has made a valuable collection of the cases. *Ante*, sec. 657, note; sec. 658, note. See *post*, secs. 723 *a*–723 *d*, as to right of abutting owners to maintain actions at law and in equity against elevated railway companies occupying the public streets.

Right of abutters in respect of public squares: Where the municipal corporation does not own an absolute estate, but holds property — as, for example, a public square — in trust for the use of the inhabitants, the right of adjoining lot-owners is such that without their consent the legislature cannot authorize the corporation to change the character of the dedication; as, for example, to make a lease of it for ninety-nine years, and to apply the avails to the improvement of the landing. Le Clercq *v.* Gallipolis, 7 Ohio, Pt. 1, 218 (1835); Haynes *v.* Thomas, 7 Ind. 38. See *ante*, ch. xv. on Dedication, secs. 645–653. See index, title *Abutter*.

[1] Roman *v.* Strauss (obstructing alley by railroad track), 10 Md. 89 (1856); White *v.* Flannigain, 1 Md. 525 (1852); Amelung *v.* Seekamp, 9 Gill J. (Md.) 468; People *v.* Vanderbilt, 26 N. Y. 287; Same *v.* Same, 28 N.Y. 396; Davis *v.* New York, 14 N. Y. 506; Milhau *v.* Sharp, 27 N. Y. 611 (1863).

The Supreme Court of *Illinois* holds the strict doctrine that, ordinarily, equity will not entertain jurisdiction of a bill where one citizen claims that another has erected buildings in the public streets, and seeks their abatement as a nuisance. To justify the interposition of equity in such cases, it should appear that the remedy at law is, for some reason, insufficient. Dunning *v.* Aurora, 40 Ill. 481 (1866). And such is the view in *New Jersey*. Higbee *v.* Camden & A. R. R. Co., 20 N. J. Eq. 435; Morris & E. R. R. Co. *v.* Prudden, *Ib.* 530 (1869). Compare Bechtel *v.* Carslake, 3 Stockt. Ch. (11 N. J. Eq.) 500. See Bunnell's Appeal, 69 Pa. St. 59. Coast Line R. R. *v.* Cohen, 50 Ga. 451 (1873). In this case the court holds that a court of equity will not entertain a bill in the name of one or more private citizens to restrain the obstruction of a public street, no private injury or threatened injury being alleged to such citizens or to their property. In such a case, the nuisance, being purely a public one, can only be restrained by the public on information filed by a public officer, to wit, by the solicitor-general for the circuit. It is not sufficient

owners of lots adjacent to a public square, the value of which is affected by the dedication, have such rights and interests that they may maintain a bill in equity to enforce the trust or to restrain the appropriation of the public square by the original proprietors, or by others, to their private use, or to any use inconsistent with the purpose for which it was dedicated.[1]

that one of the parties is a lot-owner on the street, no specific injury to the property being alleged, but only a general allegation that damage will result to said lot. *Ib.* The author prefers the view taken of this subject in White *v.* Flannigain, 1 Md. 525, where the court, having regard to the nature and uses of a street in a populous place, and considering any obstruction which denies the exercise of the right to use it as working irreparable mischief to the street *as a street*, sustained the equity jurisdiction; but to entitle the plaintiff to an injunction, the facts showing the special injury, — the situation of his property, &c., — should be stated. Elwell *v.* Greenwood, 26 Iowa, 377 (1868); Macon *v.* Franklin, 12 Ga. 239 (1852); People *v.* Vanderbilt, 26 N. Y. 287; Milhau *v.* Sharp, 27 N. Y. 611, 625 (1863); Cooper *v.* Alden, Harring. Ch. (Mich.) 72; Savannah, A. & G. R. R. Co. *v.* Shiels, 33 Ga. 601; Bechtel *v.* Carslake, 3 Stockt. Ch. (11 N. J. Eq.) 500; Parsons *v.* Atlanta University Trs., 44 Ga. 529; Payne *v.* McKinley, 54 Cal. 532. A railway erected upon a public street for a temporary purpose, by permission of the municipal corporation, may be a public nuisance; but, if so, it is to be abated by a proceeding on behalf of the State; an owner of abutting land cannot, it was held, enjoin the construction of such a road; but *quære*. Garnett *v.* Jacksonville, St. A. & H. Ry. Co., 20 Fla. 889; *post*, sec. 920, note; Potter *v.* Menasha, 30 Wis. 492.

Several distinct owners cannot join in a bill. Hinchman *v.* Paterson H. R. R. Co., 17 N. J. Eq. 75. But where the defendant is alleged to have no power to use the street and the question is common to all the abutters, their joinder in the suit would not seem to the author to make the bill multifarious. *But that such joinder is permissible*, see Belknap *v.* Trimble, 3 Paige Ch. 576; Oakley *v.* Trustees of Williamsburgh, 6 Paige Ch. 262; Catlin *v.* Valentine, 9 Paige Ch. 575; Peck *v.* Elder, 3 Sandf. Superior Ct. R. (N. Y.) 126; Wetmore *v.* Story, 22 Barb. 414; Doolittle *v.* Broome County Sup., 18 N. Y. 155; Cady *v.* Conger, 19 N. Y. 256; Milhau *v.* Sharp, 27 N. Y. 611; Gillespie *v.* Forrest, 18 Hun, 110.

A lot-owner has no right *to raise or lower the sidewalk or street in front of him*, when built to an established grade, without the consent of the municipal corporation having control of this matter; and an adjoining lot-owner, or, it seems, any other citizen having the right to use the streets, may, under the laws of *Louisiana*, without proving actual damage, enjoin such alteration. Duffey *v.* Tilton, 14 La. An. 283 (1859).

[1] Le Clercq *v.* Gallipolis, 7 Ohio, Part 1, 218 (1835); approved, Huber *v.* Gazley, 18 Ohio, 18, 27 (1849); Brown *v.* Manning, 6 Ohio, 298, 305 (1834). These cases, distinguished from Smith *v.* Heuston, 6 Ohio, 101, in which it was ruled that individual lot-owners around a square conveyed to the county for "the use of public county buildings," including a court-house, have not such special interest as will enable them to maintain a bill to enjoin the county authorities from leasing portions of the square to individuals; the court saying: "If the rights of the county are violated or threatened, redress must be sought in the name of the county or its acknowledged agents." See Chapman *v.* Gordon, 29 Ga. 250; Indianapolis *v.* Croas, 7 Ind. 9; Haynes *v.* Thomas, 7 Ind. 38; Rowan *v.* Portland, 8 B. Mon. (Ky.) 232; Cook *v.* Burlington, 30 Iowa, 94 (1870); Rutherford *v.* Taylor, 38 Mo. 315; Lutterloh *v.* Cedar Keys, 15 Fla. 306; Seguin *v.* Ireland, 58 Tex. 183; County of Harris *v.* Taylor, 58 Tex. 690; *ante*, sec. 653. Non-adjacent property owners upon square cannot complain of its being closed up by the municipal authorities. Kettle *v.* Fremont, 1 Neb. 329.

§ 662 (523). **Obstruction; Remedy of Corporation; Ejectment.** — A municipal corporation entitled to the possession and control of streets and public places may, in *its corporate name*, recover the same *in ejectment*. Where it possesses the fee, although in trust for public uses, there are no technical obstacles in the way of maintaining such an action against the adjoining proprietor or whoever may wrongfully intrude upon, occupy, or detain the property. And where the adjoining proprietor retains the fee, the courts have overcome the technical difficulty by regarding the right to the possession, use, and control of the property by the municipality as a legal, and not a mere equitable right.[1]

"It has been so often and uniformly held by the Supreme Court of *Louisiana* that public places within the limits of a corporation cannot be appropriated to private use, and that individual corporators, as well as the officers of the corporation [and the corporation in its own name], have the right to prevent such appropriation, and to sue for the demolition and removal of buildings erected on them by individuals, that the question can no longer be considered an open one." *Per Rost*, J., Herbert *v.* Benson, 2 La. An. 770 (1847). In this case the court sustained the action of the plaintiff seeking to abate as a nuisance a warehouse erected by the defendant on the bank of a river within the corporate limits and in front of the plaintiff's house. New Orleans *v.* Gravier, 11 Mart. (La.) N. S. 662, also holds that any inhabitant has this right. It has been held that no one has a right to occupy the street in front of another's house to carry on a trade or business, and the adjoining owner may, if necessary, use force to remove one who so occupies the street; therefore, where a cabman refused to drive away his cab from in front of a hotel, and was removed by a policeman at the request of the owner of the hotel, the policeman was not guilty of an assault. Vandersmith's Case, 10 Pa. Law J. 523.

As to rights of adjoining owner. Nelson *v.* Godfrey, 12 Ill. 22, 23; Indianapolis *v.* Croas, 7 Ind. 9; *Ib.* 38; Milhau *v.* Sharp, 27 N. Y. 611; Cooper *v.* Alden, Harring. Ch. (Mich.) 72; Alden *v.* Pinney, 12 Fla. 348; Price *v.* Thompson, 48 Mo. 363; Parsons *v.* Atlanta University Trs., 44 Ga. 529; Cosby *v.* Owensboro & R. R. Co., 10 Bush (Ky.), 288 (1874); Shaubut *v.* St. Paul & S. C. R. R. Co., 21 Minn. 502; and see Patterson *v.* Duluth, 21 Minn. 493; Severy *v.* C. P. R. R. Co., 51 Cal. 194; Gilbert's Case, 70 N. Y. 361; Story's Case, 90 N. Y. 156; Lahr's Case, 104 N. Y. 268; Sadler's Case, 104 N. Y. 229; N. Y. Dist. Ry. Co.'s Case, 107 N. Y. 54; McCarthy's Case, 46 N. Y. 199. *Post*, secs. 723 *a*, 723 *b*. *Ante*, secs. 656 *a*, 656 *b*. Branahan *v.* Cinc. Hotel Co., 39 Ohio St. 333 (using public street for a *hack-stand* held illegal and enjoined, though used under authority of a city ordinance).

In *Kansas* it is held that the mere fact that private lots fronting upon public grounds are thereby increased in value does not create a trust in such public grounds which the owners of the lots can enforce in equity; but that where the owners of lands dedicate a portion thereof to public uses, as parks, or otherwise, and after such dedication sell and convey lots in the remaining portion, fronting on such public grounds, to others, who erect lasting and valuable improvements thereon, a trust is created therein which may be enforced in equity by those lot-owners. Franklin County Comm'rs *v.* Lathrop, 9 Kan. 453 (1872); *ante*, chap. xvii. on Dedication, secs. 643, 651, 651 *a*.

[1] Dummer *v.* Jersey City ("market ground"), 20 N. J. L. 86 (1843); Hoboken Land & Imp. Co. *v.* Hoboken, 36 N. J. L. 540; Greenwich *v.* Easton & A. R. R. Co., 24 N. J. Eq. 217; 25 N. J. Eq. 565. See New York Elevated Railway cases, cited *post*, secs. 723 *a*–723 *d*. Lewis Em. Dom. sec. 647, and cases. Jersey City *v.* Central R. R. Co., 40 N. J. Eq. 417;

§ 663 (524). **Remedy of Abutter.** — Where the public acquires only the use, and *the fee remains in the original proprietor or abutter*,

holding, also, that a municipality having the control and supervision of highways may maintain a suit in equity to prevent any alteration of them or injury to them which will deprive the public of their safe and convenient use. Winona *v.* Huff ("public square"), 11 Minn. 119 (1866); Klinkener *v.* M'Keesport Sch. Dist., 11 Pa. St. 444; Hannibal *v.* Draper ("church ground"), 15 Mo. 634 (1852); Bath T. Comm'rs *v.* Boyd ("town commons"), 1 Ire. (N. C.) Law, 194 (1840); M. E. Church *v.* Hoboken (ejectment by city for public "square"), 33 N. J. L. 13 (1868); Weeping Water *v.* Reed, 21 Neb. 261 (also ejectment for "public square"). The text quoted and approved. Chicago *v.* Wright, 69 Ill. 322 (1873); City of California *v.* Howard, 78 Mo. 88. Where a corporation has a legal title to the soil of the commons or public streets, it may maintain ejectment to recover the possession thereof. Savannah *v.* Steamboat Co., R. M. Charlt. (Ga.) 342 (1830). *Law*, J., expressed, *arguendo*, the opinion that where the public or corporation have an easement only, and not the fee, the remedy for a violation of the right is not by private action, but by public prosecution. Under the statutes of *Wisconsin*, a city cannot maintain ejectment to recover a public street or alley. Racine *v.* Crotsenberg, 61 Wis. 481.

Remedy of *corporation in equity*, see Detroit *v.* Detroit & M. R. R. Co., 23 Mich. 173; Metropolitan City Ry. Co. *v.* Chicago, 96 Ill. 620. For an injury which an individual or a corporation suffers in common with the public generally, equity will not relieve. Denver & S. Ry. Co. *v.* Denver City Ry. Co., 2 Col. 673 (1875); *post*, secs. 706, note, 723 *d*.

Construction of Canadian Municipal Act vesting highways, streets, &c., in the municipality, gives only a qualified right to the municipality. The municipal act of *Upper Canada* contains the provision that "every public road, street, bridge, or other highway in a city, township, town, or incorporated village shall be *vested* in the municipality." The word "highway" is here used in its broadest sense, as including all public ways. It is made to include not only public roads, streets, and *bridges*, but *other* highways. See Fort Edward Pl. R. Co. *v.* Payne, 17 Barb. (N. Y.) 567; Perrysville & Z. Pl. R. Co. *v.* Thomas, 20 Pa. St. 91; Benedict *v.* Goit, 3 Barb. (N. Y.) 459; Perrysville & Z. Pl. R. Co. *v.* Ramage, 20 Pa. St. 95; Perrysville & Z. Pl. R. Co. *v.* Rineman, *Ib.* 99. The roads of *joint stock companies* are not included in the Act (St. Catharines *v.* Gardner, 20 Upper Can. C. P. 107; s. c. in appeal, 21 Upper Can. C. P. 190; see, also, Port Whitby, &c. Road Co. *v.* Whitby, 18 Upper Can. Q. B. 40; The Queen *v.* Brown & Street, 13 Upper Can. C. P. 356), unless purchased or otherwise legally acquired by the municipalities in which situate. The Queen *v.* Paris, 12 Upper Can. C. P. 445; The Queen *v.* Louth, 13 Upper Can. C. P. 615; see also Totten *v.* Halligan, *Ib.* 567; Sarnia *v.* Great Western Ry. Co., 21 Upper Can. Q. B. 59, 62; Fitzgibbon *v.* Toronto, 25 Upper Can. Q. B. 137; Thurlow *v.* Bogart, 15 Upper Can. Com. Pl. 1; Wellington *v.* Wilson, 14 Upper Can. Com. Pl. 299; s. c. 16 Upper Can. Com. Pl. 124. Harr. Munic. Man. (5th ed.) 482, 483. A municipal corporation may, it would seem, resort to equity in proper cases, to restrain an illegal interference by a railroad or other company with streets which are placed under municipal control. Attorney-General *v.* Bytown & Nepean Road Co., 2 Grant (Canada) R. 626; *post*, sec. 706, note. A road or bridge may have originated in the convenience or for the protection of individuals, and yet afterwards become of public right *a public road or bridge*. The King *v.* Northampton, 2 M. & S. 262; Rossin *v.* Walker, 6 Grant (Canada), 619; The Queen *v.* Boulton, 15 Upper Can. Q. B. 272; O'Brien *v.* Trenton, 6 Upper Can. C. P. 350; Daniel *v.* North, 11 East, 375, note; The Queen *v.* East Mark, 11 Q. B. 877; The Queen *v* Petrie, 4 E. & B. 737; Malloch *v.* Anderson, 4 Upper Can. Q. B. 481; The Queen *v.* Spence, 11 Upper Can. Q. B. 31; The Queen *v.* Gordon, 6 Upper Can. C. P. 213; The Queen *v.* Glamorganshire, 2 East, 356, note; The King *v.* West Yorkshire, 5

the latter is considered to be the owner of the soil for all purposes not inconsistent with the public rights, and may maintain actions accordingly. Thus it has been held that he may maintain ejectment against an individual who, without lawful authority, erects a private building upon a public square under a lease from the local authorities, they having no power to authorize such a use. The recovery is, of course, subject to the public easement. It does not fall within the plan of this work to treat at length of the rights of action of the original proprietor or adjoining owner, but they will be found discussed in the cases and authorities cited below. We remark only with respect to streets and public places in cities that ejectment by the adjoining owner seems to be a singularly inapt remedy for an illegal use or occupation thereof.[1] Where the fee

Burr. 2594; The Queen *v.* Yorkville, 22 Upper Can. C. P. 431; Houfe *v.* The Town of Fulton, 29 Wis. 296; s. c. 14 Am. Rep. 463. Every individual in the community has an equal right to use a public road, street, or bridge. The municipal corporations cannot be deemed proprietors, and as such entitled to control the possession, any more than any other corporation or person interested in the streets, roads, or highways. *The property vested in the municipal corporations by the Act is a qualified one*, to be held and exercised for the benefit of the whole body of the corporation. They hold as trustees for the public, and not by virtue of any title which confers possession sufficient to maintain an action of ejectment (Sarnia *v.* Great Western Ry. Co., 21 Upper Can. Q. B. 62), but may, it seems, sue for injuries done to roads or bridges within their jurisdiction. See Thurlow *v.* Bogart, 15 Upper Can. C. P. 1; Wellington *v.* Wilson *et al.*, 14 Upper Can. C. P. 299; s. c. 16 Upper Can. C. P. 124; The Queen *v.* Fitzgerald, 39 Upper Can. Q. B. 297; but see Vespra *v.* Cook, 26 Upper Can. C. P. 182. See Story's case, 90 N. Y. 156; Lahr's case, 104 N. Y. 268. Defendants, if intending to deny property or possession when sued by a municipal corporation as proprietors of a road claiming property or exclusive possession, should, by plea, put in issue the right of property of the plaintiffs. Sarnia *v.* Great Western Ry. Co., 17 Upper Can. Q. B. 65. Harr. Munic. Man. (5th ed.) 483.

[1] Pomeroy *v.* Mills (public square), 3 Vt. 279 (1830); Bolling *v.* Petersburg, 3 Rand. (Va.) 563 (1825); Warwick *v.* Mayor, 15 Gratt. (Va.) 528 (1860); Woodruff *v.* Neal, 28 Conn. 168; Cooper *v.* Smith, 9 Serg. & Rawle (Pa.), 26; Tillmes *v.* Marsh, 67 Pa. St. 512 (1871); Stiles *v.* Curtis, 4 Day (Conn.), 328; Peck *v.* Smith, 1 Conn. 103; 2 Smith Lead. Cas. 184, 185; Angell on Highways, chap. vii.; Bissell *v.* N. Y. Central R. R. Co., 23 N. Y. 61; Sherman *v.* McKeon, 38 N. Y. 266; Barney *v.* Keokuk, 94 U. S. 324; s. c. 4 Dillon, 593 (1876); Perry *v.* New Orleans, M. & C. Co., 55 Ala. 413, citing and approving text; Brakken *v.* Minneapolis & St. L. Ry. Co., 29 Minn. 41. An action for the recovery of the possession of real estate may be maintained against a railroad company occupying such real estate, being a street in a city, by virtue of a grant from the city council. Sharpe *v.* St. Louis & S. W. Ry. Co., 49 Ind. 296 (1874). Where a city took land, by proceedings in condemnation under its charter, for a street, and built a sewer therein, but did not pay the price awarded, and the owner subsequently brought ejectment and recovered judgment, and obtained a *hab. fac. poss.*, the city was *held* entitled to equitable relief, and an injunction was awarded on terms of payment of the award and interest, and costs of the ejectment. Jersey City *v.* Fitzpatrick, 30 N. J. Eq. 97.

In *Massachusetts*, the adjacent proprietor *owns to the middle of the street*, subject to the public easement. Boston *v.* Richardson, 13 Allen (Mass.), 152, 153;

is in the public the abutter may maintain the appropriate actions at law and in equity to enforce his proprietary rights and easements in the streets.[1]

White *v.* Godfrey, 97 Mass. 472; Bliss *v.* Ball, 99 Mass. 597; s. p. Bissell *v.* N. Y. Central R. R. Co., 23 N. Y. 61; Pennsylvania R. R. Co. *v.* Pittsburgh Grain Elev. Co., 50 Pa. St. 499. The same principle applies in *California*. San Francisco *v.* S. V. W. W., 48 Cal. 493 (1874). *Shade trees.* An adjacent owner may recover in trespass for destruction of *shade trees* in the street in front of his lot. Bliss *v.* Ball, 99 Mass. 597 (1868); White *v.* Godfrey, 97 Mass. 472. See *ante*, sec. 399. The unlawful cutting down of shade and ornamental trees is deemed an irreparable injury, and will be enjoined. Tainter *v.* Morristown, 19 N. J. Eq. 46; Cross *v.* Morristown, 18 N. J. Eq. 305, 313. A general grant of power to a city council "to declare what shall be a nuisance, and to prevent, remove, or abate the same," will not authorize the council to declare anything a nuisance which is not such at common law, or has not been declared such by statute. *Ante*, secs. 374–379. *Shade trees* standing just within the curbing of the sidewalk on a street do not constitute a nuisance where they are not obstructions to the travel along such street; and an owner of the abutting lot may enjoin the city authorities from cutting down such trees, although the city council may have declared the same a nuisance, and directed their abatement as such. Bills *v.* Belknap, 36 Iowa, 583; Patterson *v.* Vail, 42 Iowa, 143; Everett *v.* Council Bluffs, 46 Iowa, 66.

Ejectment by abutter against railway company: In Carpenter *v.* The Oswego & S. R. R. Co., 24 N. Y. 655 (1861), it was decided that *ejectment* would lie in favor of the owner of the fee in land subject to a public easement, — for example, a street, — against a party appropriating it to private occupation, such as the laying down therein, by a railroad company, of its track and rails. And it was thus held, notwithstanding it was argued that no judgment which the plaintiff could obtain would give *him* a right to the premises, as the *public* would still be entitled to use them as a street. s. p. Wager *v.* Troy Union R. R. Co., 25 N. Y. 526 (1862); Sherman *v.* McKeon, 38 N. Y. 266 (1868). In Cincinnati *v.* White, 6 Pet. 431, it was declared to be the opinion of the court that where the dedication is complete, and the rights of the public have attached, the owner of the soil, though retaining the naked legal title, cannot recover in ejectment. The reason given for this ruling has much force. It is, that ejectment is a possessory action, and that whatever deprives the plaintiff of the right of possession will deprive him of the remedy by ejectment. Exclusive possession of the land cannot, it was said, consistently with the rights of the public, be delivered to the plaintiff in execution of a judgment of recovery. The doctrine of Lord *Mansfield*, in Goodtitle *v.* Alker, 1 Burr. 143, "that *ejectment* will lie by the owner of the soil for land which is subject to a passage over it as the king's highway," was regarded by the court, or at least by the judge delivering the opinion, in Cincinnati *v.* White, 6 Pet. 431, 442, as unsound; although it was not denied that *trespass* would lie, as a recovery in damages would not be inconsistent with the public right. *Post*, secs. 723 *a*–723 *d*. So in *Kentucky*, where the fee of the streets is in the adjacent proprietor, subject to the public easement, it is held that the municipal corporation cannot maintain ejectment against the holders of the legal title, but must resort to indictment or injunction. West Covington *v.* Freking, 8 Bush (Ky.), 121 (1871); Perry *v.* New Orleans, 55 Ala. 413, citing and approving text. See American note to Dovaston *v.* Payne, 2 Smith Lead. Cas. 185, where this subject is discussed. Redfield *v.* Utica & S. R. R. Co., 25 Barb. (N. Y.) 54; Hunter *v.* Sandy Hill, 6 Hill (N. Y.), 407. That *trespass* would lie in such a case is well established. Wager *v.* Troy

[1] See *post*, secs. 723 *a*–723 *d*.

§ 664 (525). **Same subject.** — Where, however, the *fee or legal title* passes from the original proprietor, as in some of the States it is declared it shall, in statutory dedications, and in cases where land is acquired for streets and public purposes by the exercise of the right of eminent domain, such proprietor or the adjoining owner cannot maintain an action for injuries to the soil, or ejectment, but he nevertheless has a remedy for any special injury to his rights by the unauthorized acts of others.[1]

§ 664 *a*. **Effect of Fee being in the Abutter or the Municipality.** — An examination of the cases cited in the last two preceding sections will show that many of them *assert or assume that important differences* as to the nature and extent of the rights of the abutter and of the municipality exist, depending upon the question whether

Union R. R. Co., *supra*, and authorities cited in Mr. Justice *Sunderland's* opinion, p. 540. See also Mahon *v.* N Y. Central R. R. Co., 24 N. Y. 658; Fletcher *v.* Auburn & S. R. R. Co., 25 Wend. (N. Y.) 462 (1841); Weisbrod *v.* Chicago & N. W. Ry. Co., 21 Wis. 602; Bissell *v.* N. Y. Central R. R. Co., 23 N. Y. 61; *post*, secs. 709, 723 *a*–723 *d*; chap. xxii. sec. 906 *et seq.*

Remedy in equity; rights of abutters and of municipality: Though the party has a remedy at law for the trespass or nuisance, yet as the injury is of a continuing nature, he may go into equity, have an injunction to prevent a multiplicity of suits, and recover damages as incidental to this relief. Williams *v.* N. Y. Central R. R. Co., 16 N. Y. 97, 111 (1857). *Post*, secs. 723 *a*–723 *d*. The sound and settled rule in *New York* is that a railway company cannot exercise the right of eminent domain or occupy the streets or construct a railway therein, unless (*a*) it has a corporate existence *de jure;* unless (*b*) it has a valid and subsisting grant to that effect; and unless (*c*) it has strictly pursued and performed all the prescribed terms and conditions of its powers in this respect. Each of these three elements is essential to give a railroad company such authority. There are many cases to this effect. See, among others, Brooklyn Steam Transit Case, 78 N. Y. 524, 531; Cable Co. Case, 104 N. Y. 38, 43.

If an appropriation of a street, even by legislative and municipal sanction, unreasonably abridges the right of adjacent lot-owners to use the street as a means of ingress and egress, they are thereby deprived of a property-right without compensation, and an action will lie against the person or corporation guilty of usurping such unreasonable and exclusive use, for the recovery of such immediate and direct damages as the owner may sustain. Elizabethtown, L. & B. S. R. R. Co. *v.* Combs, 10 Bush (Ky.), 382 (1874).

[1] Canal Trustees *v.* Haven, 11 Ill. 554; Hunter *v.* Middleton, 13 Ill. 50; Moses *v.* Pittsburgh, Ft. W. & C. R. R. Co., 21 Ill. 522; Protzman *v.* Indianapolis & C. R. R. Co., 9 Ind. 467; New Albany & S. R. R. Co. *v.* O'Daily, 13 Ind. 353; People *v.* Kerr, 27 N. Y. 188; Kellinger *v.* Forty-Second Street, &c. R. R. Co., 50 N. Y. 206 (1872); Schurmeier *v.* St. Paul & Pac. R. R. Co., 10 Minn. 82; affirmed, 7 Wall. 272; Cooley Const. Lim. 556, and see note. The laying off and recording a town plat, or of an addition thereto, has, under the statute of *Iowa*, the effect to vest in the corporation the fee simple title to, and exclusive right of, dominion over the streets and alleys thus dedicated to the public use. In such case neither the original proprietor nor his grantee has the right to the subterraneous *deposits of coal* within the limits of such streets, and the corporation may maintain an action against him for coal mined and taken by him from beneath the same. Des Moines *v.* Hall, 24 Iowa, 234 (1868).

the fee is in the one or the other. The later and better considered judgments hold that it is comparatively unimportant, as respects the relative rights of the abutting owner and the public in and over streets, whether *the bare fee* is in the one or the other. If the fee is in the public the lawful rights of the adjoining owners are in their nature *equitable* easements; if the fee is in the abutter his rights in and over the street are in their nature *legal;* but, in the absence of controlling legislative provision, the extent of such rights is, in either event, substantially, perhaps precisely, the same.[1]

§ 665 (526). **Ejectment; Effect of Judgment or Decree against Municipal Corporation.** — It fairly results from the view taken in this chapter of the nature of the rights of the public at large in streets and public places, that a *judgment in ejectment* by the proprietor of land against a city corporation where the disputed question was as to the ownership of the soil, does not conclude or affect the right of the public to the easement of a street or public place, since the public is, in these respects, represented by the commonwealth, and such a judgment is *res inter alios acta* as to the public right.[2] In California, the court went even further in protection of the rights of the public, and decided not only that

[1] Barney *v.* Keokuk, 94 U. S. 324 (s. c. below, 4 Dillon, 593), where the Supreme Court of the United States said (p. 340): "On the general question as to the rights of the public in a city street we cannot see any material difference in principle, with regard to the extent of those rights, whether the fee is in the public or in the adjacent land-owner, or in some third person." See also Story's Case, 90 N. Y. 122; Lahr's Case, 104 N. Y. 268. Qualified nature of fee in the public. *Ib.* p. 291. The judgment of Mr. Justice *Danforth* in Story's Case, *supra*, and of Chief Judge *Ruger* in Lahr's Case, *supra*, present this subject with great ability and clearness, and are, perhaps, the most valuable discussions of it to be found in the reports. See *ante*, secs. 656 *a*, 656 *b; post*, secs. 723 *a*–723 *d*.

"The dedication (under the statute) passed the fee in all streets marked upon it to the county in which the city [of Detroit] was situated. But this was only in trust for street purposes. We attach no special importance to the fact that the title passed instead of a mere easement. The purpose of the statute is not to give the county the usual rights of a proprietor, but to preclude questions which might arise respecting the public uses, other than those of mere passage, to which the land might be devoted." *Per Cooley*, J., in Backus *v.* Detroit, 49 Mich. 110 (1882).

[2] Warwick *v.* Mayo, Mayor, 15 Gratt. (Va.) 528 (1860); Bolling *v.* Petersburg, 3 Rand. (Va.) 563. On the ground, which is hardly tenable, that the municipal authorities, as respects public squares and streets, represent not only the corporation but also the public, Mr. Justice *Rost* was of opinion that a final judgment against a corporation was also a judgment against the public, and conclusive upon individuals. Xiques *v.* Bujac, 7 La. An. 498 (1852), *per Rost*, J. But in the same case, Mr. Justice *Preston* expressed the opinion, which is believed to be the correct one, that a judgment against the right of a city to public property will not bar an individual not a party to the suit, and who is interested in maintaining the dedication.

there was no power in the municipality to mortgage property held for the public use, but that a *decree of foreclosure* of such a mortgage did not estop the public, or even the municipality, the decree and mortgage being equally null and ineffectual.[1]

§ 666 (527). **Vacation of Streets.** — The plenary power of the legislature over streets and highways is such that it may, in the absence of special constitutional restriction, vacate or discontinue the public easement in them, or invest municipal corporations with this authority.[2] Without a judicial determination, a municipal corporation, under the authority conferred in its charter "to locate and establish streets and alleys, and *vacate* the same," may constitutionally order the vacation of a street; and this power, when exercised with due regard to individual rights, will not be restrained at the instance of a property owner claiming that he is interested in keeping open the streets dedicated to the public.[1]

[1] Branham *v.* San Jose, 24 Cal. 585 (1864). The State of *California* has no proprietary interest in the streets of a city dedicated to public use; and where it grants to a private corporation an easement over the streets, not common to the public at large, it merely grants in its sovereign capacity a franchise, and not any proprietary interest in the streets. San Francisco *v.* S. V. W. W., 48 Cal. 493 (1874).

[2] Gray *v.* Iowa Land Co., 26 Iowa, 387 (1868); Kimball *v.* Kenosha, 4 Wis. 321; Paul *v.* Carver, 26 Pa. St. 223; Stuber's Road, 28 Pa. St. 199; Marshalltown *v.* Forney, 61 Iowa, 578; Barr *v.* Oskaloosa, 45 Iowa, 275; Whitsett *v.* Union Depot & R. R. Co., 10 Col. 243; Northern Liberties Comm'rs *v.* N. L. Gas Co., 12 Pa. St. 318; Trenton R. R. Case, 6 Whart. (Pa.) 25; Polack *v.* San Francisco Orphan Asylum, 48 Cal. 490 (1874); State *v.* Huggins, 47 Ind. 586 (1874); Spiegel *v.* Gansberg, 44 Ind. 418 (1873); Coster *v.* Albany, 43 N. Y. 399; Kellinger *v.* Forty-Second St. Railroad Co., 50 N. Y. 206; Fearing *v.* Irwin, 55 N. Y. 486 (1874); Jersey City *v.* State, 30 N. J. L. 521; Bailey *v.* Phila., W. & B. R. R. Co., 4 Harring. (Del.) 389 (1846); Riggs *v.* Board of Education of Detroit, 27 Mich. 262 (1873); Hinchman *v.* Detroit, 9 Mich. 103; People *v.* Ingham Co. Sup., 20 Mich. 95 (1870); People *v.* Kerr, 27 N. Y. 192, 193; Fearing *v.* Irwin, 4 Daly (N. Y.), 385; affirmed, 55 N. Y. 486; Central Park Comm'rs, *In re*, 61 Barb. (N. Y.) 40; Brook *v.* Horton, 68 Cal. 554; Cooper *v.* Detroit, 42 Mich. 584; see, also, Chicago *v.* Building Assoc., 102 Ill. 379, 397; People *v.* Walsh, 96 Ill. 232.

The power of the legislature to vacate streets and highways which in its judgment, or that of the municipal authorities to whom the power is delegated, are useless, inconvenient, or burdensome, and this without providing compensation to those whose private interests are thereby affected and without their consent, is affirmed in the most emphatic manner in Paul *v.* Carver (24 Pa. St. 207). This right was held not to be affected by the Constitution of 1874, which provides (article 1, sec. 10), that private property shall not be taken or applied to public uses without authority of law and without just compensation being first made or secured; and which further provides (article 16, sec. 8): "Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements." McGee's Appeal, 114 Pa. St. 470 (1886), citing text, sec. 666. Legislative act validating the action of the municipal authorities in vacating and changing location of a public park was sustained. Kettle *v.* Fremont, 1 Neb. 329. See Index, title *Curative Acts*. In Baird *v.* Rice, 63 Pa. St. 489 (1871), an act authorizing the erection of municipal public buildings on a square originally dedicated for that purpose, and the vacation of so much of two public streets as might be necessary, was held constitutional. *Ante*, sec. 645. Says Mr. Justice *Campbell*, in Riggs *v.* Board of Education of Detroit, *supra*: "In Hinchman *v.* Detroit [*supra*], the power of the city to vacate a portion of the Campus Martius was sustained, and it was held this might be done without determining in advance the future uses. And where private property is not taken, the right by authority of legislation to surrender or extinguish public rights has never been questioned. 3 Smith's Leading Cases, 96; People *v.* Ingham Co. Sup., 20 Mich. 95." But in *Indiana* the principle was regarded as sound, that in *addition to the public easement, and distinct from it, there exists in favor of the owner of a lot upon the street, and as appurtenant to it, a private right to use the street and to insist that the street shall forever be kept open to its full width.* [See on this point, *ante*, secs. 656 *a*, 656 *b*; *post*, secs. 712, 723 *a*–726 *b*, 730, and note; and case of Fritz *v.* Hobson, cited in the note.] And the court considered the conclusion to follow from this principle that the legislature cannot, without the consent of the lot-owner, or compensating him for the damage, vacate a street, or any part of it, in front of or adjoining the lot. Haynes *v.* Thomas, 7 Ind. 38 (1855); Indianapolis *v.* Croas, *Ib.* 9; Tate *v.* Ohio & Miss. R. R. Co., *Ib.* 479, 483. But as to this point, *quære*. In view of the considerations stated in secs. 656 *a*, 656 *b*, 712, 723 *a*, 726 *b*, 730, and note, that the abutter has *proprietary* rights or easements in the streets, there seems to be some difficulty in holding that although he has a remedy for obstructions to the streets and for invasions of his proprietary rights therein, he is without remedy if the street is altogether vacated. The text, however, states the general result of the authorities. Perhaps the distinction may be this. The State may abandon the public easement or right therein, or change the use, but cannot except by the exercise of the power of eminent domain close the street so as to deprive the abutter of his easement of access, &c. See Judge *Hare's* discussion of the subject, 1 Am. Const. Law, 372–378. Lewis Em. Dom. sec. 132. Authority to discharge the public servitude in a street or public place must come from the legislature; it does not, of course, inhere in a municipality. Hoboken Land & Imp. Co. *v.* Hoboken, 36 N. J. L. 540. What will confer the power. State *v.* Elizabeth, 37 N. J. L. 432 (1874). Its scope. Quinn *v.* Paterson, 27 N. J. L. 35; State *v.* New Brunswick, 3 Vroom (32 N. J. L.), 548. Power of the legislature over public uses. Newark *v.* Stockton, 44 N. J. Eq. 179; *ante*, secs. 648, 651, 651 *a*. A statute providing that on the vacation of a street the damage to property shall be *ascertained and paid*, gives a right only to damages *specially sustained* by the party, over and above that which is common to the public in general. East St. Louis *v.* O'Flynn, 119 Ill. 200; *Re* Centre St., 115 Pa. St. 247.

[1] Gray *v.* Iowa Land Co., 26 Iowa, 387; distinguished from Warren *v.* Lyons City, 22 Iowa, 351. *Ante*, sec. 651. Upon the discontinuance of an easement in a public highway, the freehold or soil, in general, *reverts to the owner of the land.* Harris *v.* Elliott, 10 Pet. (U. S.) 26. *As to streets in town.* Barclay *v.* Howell's Lessee, 6 Pet. 498, 513, *per McLean*, J., Hyde Park *v.* Borden, 94 Ill. 26; Wirt *v.* McEmery, 21 Fed. Rep. 233; Chicago *v.* Union Building Assoc., 102 Ill. 379; *ante*, sec. 653. As to power of vacation by boroughs in Pennsylvania, see *In re* Vacation of Osage St., 90 Pa. St. 114. The legislature may, without providing for compensation to adjoining owners, provide for closing one public way to their property if another way is left open. Coster *v.* Albany, 43 N. Y. 399; Kellinger *v.* Forty-Second Street, &c. R. R. Co., 50 N. Y. 206; Fearing *v.* Irwin, 55 N. Y. 486 (1874). The *municipal authorities* of a city cannot vacate a street without the authority of the legislature. Polack *v.* S. F. Orphan Asylum, 48 Cal. 490 (1874).

§ 667 (528). **Prescription and Adverse Possession; Statute of Limitations.** — Concerning rights and remedies with respect to streets and public places, an interesting topic remains on which the judicial judgments are not agreed, and that is, whether the rights of the municipality or of the public may be lost by non-user or adverse possession. There may be instances where the non-user has continued so long, and private rights have grown up of such a nature, as to amount to an *equitable estoppel*, or an estoppel *in pais*, on the public, which the courts will enforce upon principles of justice; but such cases are exceptional in their character, and it would perhaps be going too far to say that the courts have distinctly established such a principle.[1] The state of the law, aside from positive

It is for the common council, and not the courts, to decide on the expediency of vacating a street or alley of a city. When a petition is presented to the common council for the vacation of a street or alley, or a part thereof, and a remonstrance is filed against such vacation, it was held, construing the legislation involved, that the council had no power to order the street or alley to be vacated, unless the remonstrance be withdrawn, or two-thirds of all the owners of real estate of such city petition therefor. An injunction lies to prevent the common council from enforcing an illegal order made by it for vacating a street. Spiegel *v.* Gansberg, 44 Ind. 418 (1873). *Reverter:* Where the original owner has sold the adjoining lot, the land embraced in the street subsequently vacated does not, in *Iowa*, revert to him. Day *v.* Schroeder, 46 Iowa, 546 (1877); Barr *v.* Oskaloosa, 45 Iowa, 275; Kings County Fire Ins. Co. *v.* Stevens, 101 N. Y. 411. But see *ante*, sec. 653, note.

Abandonment; non-user; Vacation of Street; Remedy: Parol testimony that a street has been abandoned is not admissible to prove that it has been vacated, for that should be a matter of record. Lathrop *v.* Central Iowa Ry. Co., 69 Iowa, 105. Abandonment of a street will not be presumed from mere non-user when the public need has not required its use. Reilly *v.* Racine, 51 Wis. 526. "An alteration by competent authority of an existing road or way is a discontinuance of those portions of the way which do not come within the newly assigned limits; and no special order of discontinuance is necessary." Brook *v.* Horton, 68 Cal. 554, citing Commonwealth *v.* Westborough, 3 Mass. 406; Commonwealth *v.* Cambridge, 7 Mass. 158, and Bowley *v.* Walker, 8 Allen, 21. In order to maintain *a bill to enjoin the vacation of a street*, the party must show that he is liable to sustain a special injury, different from that of all other taxpayers or others in the vicinity. Hering *v.* Scott, 107 Ill. 600. The owner of land abutting upon the boundary of a city and upon the end of a street is a stranger to the city, and cannot object in proceedings to vacate the street. House *v.* Greensburg, 93 Ind. 533. For the method of vacating streets in cities in *Illinois* under the statute, see St. Louis, A. & T. H. R. R. Co. *v.* Belleville, 122 Ill. 376.

[1] Lane *v.* Kennedy, 13 Ohio St. 42, 49 (1861), *per Peck*, J.; 3 Kent Com. 451, note, where Chancellor *Kent*, noticing the case of New Orleans *v.* United States, 10 Pet. 662, suggests that there may be such non-user by the public, and such adverse claims by the original owner, as may, in time, bar the public; "for in this country," he adds, "time may [by legislation] create a bar to the sovereign's right." De Vaux *v.* Detroit, Harring. Ch. (Mich.) 98; the text approved. Brooks *v.* Riding, 46 Ind. 15 (1874). Where a city sought to enjoin the erection of a building projecting over the line of a street, after twenty-five years' open, continued, and adverse possession, it was held that the defendant had gained title thereto as against the public. Big Rapids *v.* Comstock, 65 Mich. 78; s. c. 31 N. W. Rep. 811; Check *v.* Aurora, 92 Ind. 107; Driggs *v.* Phillips, 103 N. Y. 77, where occupancy of an alley by fencing it up was held not to be an adverse possession when done by permission of the city. Carter *v.* LaGrange, 60 Tex. 636.

enactment, can best be exhibited by referring to the leading adjudications.

§ 668 (529). **Same subject.** — The doctrine is well understood, that to the sovereign power, the maxim, "*Nullum tempus occurrit regi*," applies, and that the United States and the several States are not, without express words, bound by statutes of limitation.[1] Although municipal corporations are considered as public agencies, exercising, in behalf of the State, public duties, there are many cases which hold that such corporations are not exempt from the operation of limitation statutes, but that such statutes, at least as respects ordinary real and personal actions, run in favor of and against these corporations in the same manner and to the same extent as against natural persons.[2]

[1] United States *v.* Hoar, 2 Mason C. C. R. 134; Johnston *v.* Irwin, 3 Serg. & Rawle (Pa.), 291; Allston's Lessee *v.* Saunders, 1 Bay (S. C.), 30; People *v.* Gilbert, 18 Johns. (N. Y.) 227; United States *v.* Kirkpatrick, 9 Wheat. (U. S.) 735; Dickinson *v.* New York, 92 N. Y. 584; Angell on Limitations, 36; *ante*, sec. 562, note. A State statute cannot bar the United States, nor can laches be imputed to the United States. United States *v.* Thompson, 98 U. S. 487 (1878).

[2] Lessee of Cincinnati *v.* First Presbyterian Church, 8 Ohio, 299 (1838). In this case the question was most thoroughly argued and examined by able lawyers, and no cases precisely in point as to municipal corporations were produced. The doctrine of the text was distinctly decided, and was adhered to and applied in the later cases of Cincinnati *v.* Evans, 5 Ohio St. 594, and Oxford Township *v.* Columbia, 38 Ohio St. 87. As a result of this doctrine, these cases hold that notorious and uninterrupted possession by a private individual or private corporation, under a claim of right to land dedicated to a city for public squares or streets for the period of the statutes of limitations, will bar the city of the claim to its use. In Lane *v.* Kennedy, 13 Ohio St. 42 (1861), the prior cases in that State are noticed; and it was held that a partial encroachment by a fence on a surveyed highway was not necessarily adverse to the public nor inconsistent with the easement of the public, the court, by *Peck*, J., observing that the case was distinguishable from Cincinnati *v.* Evans, 5 Ohio St. 594; and the principle was adopted that where the circumstances surrounding the possession are entirely reconcilable with a continued recognition of the ultimate right of the public, the possession is not adverse. Referring to Cincinnati *v.* Evans, *supra*, in which there was an encroachment of a permanent character on the street, the learned judge just named observed: "That case was, in this view of it, rightly determined; but it might, with equal if not greater propriety, have been placed [not upon the statute of limitations, but] upon the ground of an *estoppel in pais*, on the part of the city authorities, the building having been located by the *city surveyor* upon the lines *previously established and built upon*." See Jersey City *v.* State, 30 N. J. L. 521 (1863); Cross *v.* Morristown, 18 N. J. Eq. 305 (1867); Evans *v.* Erie County, 66 Pa. St. 222. In the same State it has been still more recently decided that the use, by a gas company, of the streets of a city for twenty years does not bar an inquiry by the *State* into the rightfulness of the use. State *v.* Cincinnati Gas Company, 18 Ohio St. 268 (1868). See, also, Philadelphia