§ 681 (539). **Ordinances on the Subject.** — So, authority *to erect and keep in repair bridges and streets* confers by implication the power to employ the means necessary to that end, and among these means may be the passage of an ordinance inflicting a fine for *wilful or negligent injuries thereto.*[1] Power thus to protect the public property of the corporation could probably also be derived from the usual authority to regulate the police of the city.[2] The *gutters and drains of a city* intended to carry off *surface water* can be used by manufacturers and others only by the consent, express or implied, of the local government. Such use is unlawful if it result in a nuisance, and may be prohibited by the municipal authorities.[3]

§ 682 (540). **Regulation of Vehicles, &c.** — Power to make such ordinances "respecting *streets, wagons, carts, drays,* &c., as to the council shall appear necessary for the *security, welfare,* and *convenience* of the city," authorizes an ordinance regulating the weight which wagons and other vehicles employed in the transportation of goods, wares, or produce of any kind shall carry through the streets of the city. In thus holding, the court admitted that "an ordinance which would operate as a total exclusion of the right of the citizen to pass over the streets of the city with his loaded wagon and team would be unreasonable and void, as against common right; but the

(1860). See, also, Shelton *v.* Mobile, 30 Ala. 540. Power of city to remove nuisances and obstructions on streets at the expense of the party creating them. See, generally, Hawley *v.* Harrall, 19 Conn. 142. As to power of city highway surveyor and street commissioner over sidewalks, see Noyes *v.* Ward, 19 Conn. 250, 270; Clark *v.* McCarthy, 1 Cal. 453. Power to prevent sidewalks from being obstructed by *swine.* Commonwealth *v.* Curtis, 9 Allen (Mass.), 266. *Relation of sidewalk to street.* See Index, title *Taxation and Assessment.* Hart *v.* Brooklyn, 36 Barb. 226. *An awning* erected without municipal consent may be declared an unlawful obstruction of a street. Pedrick *v.* Bailey, 12 Gray (Mass.), 161. *Hay-scales* erected by a private person in a street for private purposes may be removed by the city authorities, in case of his refusal to remove them himself. Injunction will not lie to restrain such a removal. Emerson *v.* Babcock, 66 Iowa, 257. In Everett *v.* Council Bluffs, 46 Iowa, 66, it is held that *shade trees* upon the edge of streets are not obstructions. *Ante,* secs. 319, 399, 663, note; *post,* chap. xxiii. sec. 1003 *et seq.,* note.

[1] *Ante,* secs. 319–322, as to power to adopt ordinances.

[2] Korah *v.* Ottawa, 32 Ill. 121 (1863). See Hooksett *v.* Amoskeag Manuf. Co., 44 N. H. 105. As to right of a town to maintain case against wrongdoers for injuries to the public highways and bridges; right of street officer to prevent injury to street. Clark *v.* McCarthy, 1 Cal. 453. Towns in the New England States have such interests in the highways within their limits as to enable them to maintain case or other suitable action for their obstruction (Laconia *v.* Gilman, 55 N. H. 127, 1875), or for their destruction or the conversion of materials. Troy *v.* Cheshire R. R. Co., 23 N. H. 83.

[3] Municipality No. 1 *v.* Gaslight Co., 5 La. An. 439 (1850); *post,* sec. 805, chap. xxiii.

ordinance in question merely *regulates* the exercise and enjoyment of the right, and is valid."[1]

§ 683 (541). **Public Nature of Streets; Paramount Legislative Control.** — Whether the fee of the street be in the municipality in trust for the public use, or in the adjoining proprietor, it is, in either case, of the essence of the street that it is public, and hence, as we have already shown, under the paramount control of the legislature as the representative of the public. Streets do not belong to the city or town within which they are situated, even although acquired by the exercise of the right of eminent domain, and the damages paid out of the corporation treasury. The authority of municipalities over streets they derive, as they derive all their other powers, from the legislature, — from charter or statute.[2] The fundamental idea of a street is not only that it is public, but public for all purposes of free and unobstructed passage, which is its chief and primary, but by no means sole, use.[3]

§ 684. **Open to all Suitable and Proper Uses; Steam-threshing Machine.** — On the ground that a highway, when not restricted in its dedication or by statute to some particular mode of use, is *open to all suitable methods;* that persons who make use of horses as a means of travel or traffic on the highways have no superior rights to those who make use thereof in other ways; and that a steam-engine as a means of locomotion in a highway is not *necessarily* a

[1] Nagle *v.* Augusta, 5 Ga. 546 (1848). Power to require *license* from persons with heavy loads using streets. Gartside *v.* East St. Louis, 43 Ill. 47; Brooklyn *v.* Breslin, 57 N. Y. 591 (1874); *ante,* secs. 319–322; *post,* sec. 762. Non-residents using streets cannot be taxed therefor. St. Charles *v.* Nolle, 51 Mo. 122 (1872); s. c. 11 Am. Rep. 440. But see Memphis *v.* Battaile, 8 Heisk. (Tenn.) 524; s. c. 24 Am. Rep. 285 (1871); *ante,* secs. 354, 355.

[2] Barter *v.* Commonwealth, 3 Pa. (Pen. & W.) 253; Commonwealth *v.* Erie & N. E. R. R. Co., 27 Pa. St. 339; Allegheny *v.* Ohio & Pa. R. R. Co., 26 Pa. St. 355.

[3] This passage cited and approved, Quincy *v.* Jones, 76 Ill. 231, 244 (1875); s. c. 20 Am. Rep. 243, 251; Henkel *v.* Detroit, 49 Mich. 249. It is held in *New York* that *pedestrians and vehicles* have the right of passage in common and neither any superior right of way; each is bound to use due care to avoid being injured and to avoid doing injury. Barker *v.* Savage, 45 N. Y. 191 (1871); *post,* sec. 1003, note. Duty of traveller upon street-crossing where vehicles are numerous, considered. *Ib.* A traveller on foot has no right of priority over vehicles in the street; and it was held negligence *per se* for such a traveller to attempt to cross a public thoroughfare ahead of approaching vehicles which he saw, upon nice "calculations" of the chances of injury, which turned out to be mistaken calculations. Belton *v.* Baxter, 54 N. Y. 245 (1873); approving Barker *v.* Savage, 45 N. Y. 191 (1871).

Uses of *alleys* as distinguished from streets. Beecher *v.* People, 38 Mich. 289 (1878). *Post,* secs. 688–700.

nuisance, the Supreme Court of Michigan held that the owner of an engine used mainly for threshing grain, mounted on wheels, and moving along a highway in the country by means of steam-power, and likely to frighten horses, was not absolutely liable for an injury to a traveller on the same highway, caused by his horse, though ordinarily gentle, taking fright at the engine, since in the opinion of the court the only ground of liability would be that of negligence, which would depend upon the question whether, under the circumstances, due care was exercised in the use and management of the locomotive engine.[1] It seems to us doubtful whether a similar use of such an engine in the streets of a city could lawfully be made without the consent, or at all events against a regulation, of the municipal authorities.[2]

§ 685 (542). **Power to Improve and Graduate is Continuing and Inalienable.** — That the use of the streets for travel may be made safe and convenient, the legislature usually confers upon the municipal authorities the power, in express terms, to *graduate and improve* them,[3] and supplies the means to carry the power into effect by requiring the inhabitants to perform labor upon the streets, or to pay specific taxes for that purpose, or taxes that may be so appropriated by the corporation. In another place will be considered more fully the liability of the corporation growing out of this power, in respect to maintaining the streets in a *safe* condition for travel. It will, however, be proper here to notice the nature of the power to grade and improve streets, as it has been judicially ascertained and settled. A leading case on this subject is that of Goszler *v.* Georgetown, decided by the Supreme Court of the United States.[4] By its constituent act, the corporation of Georgetown had "full power to make such by-laws and ordinances for the graduation and levelling of streets as they may judge necessary for the benefit of the town." Pursuant to this authority, the corporation passed an ordinance for the graduation of certain streets, the first section of which appointed commissioners for that purpose. The second section of the ordi-

[1] Macomber *v.* Nichols, 34 Mich. 212 (1876); s. c. 22 Am. Rep. 522. But see cases cited in Mr. Thompson's note. *Ib.* 528. A highway is a public way for the use of the public in general, for passage and traffic, without distinction. Starr *v.* Camden & Atl. R. R. Co., 24 N. J. L. 592; *post*, sec. 730, and note.

[2] *Ante*, sec. 680; *post*, sec. 730, and note.

[3] In *Pennsylvania* it is held that the authority to grade and pave streets is among the implied powers of a municipal corporation. Williamsport *v.* Commonwealth, 84 Pa. St. 487; White *v.* McKeesport, 101 Pa. St. 394; see, also, Barter *v.* Commonwealth, 3 Pa. 253, and Philadelphia *v.* Tryon, 35 Pa. St. 401.

[4] Goszler *v.* Georgetown, 6 Wheat. 593 (1821).

nance was as follows: "Be it ordained, that the said level and graduation, when signed by the commissioners and returned to the clerk of this corporation, *shall be forever thereafter* considered as the true graduation of the streets so graduated, and be binding upon this corporation, and all other persons whatever, and be forever thereafter regarded in making improvements upon said streets." The plaintiff made improvements according to this grade, and *afterwards* the corporation passed another ordinance directing the grade to be changed by being lowered, to the plaintiff's injury. The plaintiff's bill for an injunction was dismissed, the court holding: 1. That the power to graduate given by the legislature was not exhausted by its first exercise, but was a continuing one: the power is given to the town to legislate on the subject, to pass as many by-laws relating thereto as the corporation "may judge necessary for the benefit of the town." 2. The second section of the ordinance (above quoted) was not in the nature of a compact, and therefore was not final and irrepealable. In deciding this point, Mr. Chief Justice Marshall says: "But it cannot be disguised that a promise is held forth (by the second section of the ordinance) to all who should build on the graduated streets, that the graduation should be unalterable. The court, however, feels great difficulty in saying that this ordinance can operate as a perpetual restraint on the corporation. When a government enters into a contract, there is no doubt of its power to bind itself to any extent not prohibited by its Constitution. A corporation can make such contracts only as are allowed by the acts of incorporation. The power of this body to make a contract *which should so operate as to bind its legislative capacities forever thereafter*, and disable it from enacting a by-law, which the legislature enables it to enact, may well be questioned. We rather think that the corporation cannot abridge its own legislative power."[1]

[1] Goszler *v.* Georgetown, 6 Wheat. 597; *ante*, secs. 96, 97. *Post*, sec. 689, note. The power to lay out, open, and grade streets in a city carries with it, by necessary implication, the power to establish the grade of such streets. An order establishing the location, width, and grade of streets, if passed without authority, is rendered valid by being subsequently confirmed by the legislature. Himmelmann *v.* Hoadley, 44 Cal. 213 (1872).

Where a city has exclusive control of its streets, with power to improve and regulate them, the *manner* of their improvement rests in the discretion of the city authorities. In this case sodding the centre of a street, gravelling the sides and constructing a sewer were held to be but one improvement. Murphy *v.* Peoria, 119 Ill. 509. A city may adopt one mode of improvement for part of the streets and a different mode for the remainder. Oakland Paving Co. *v.* Rier, 52 Cal. 270. It is to be presumed that a city, in constructing a street, made it to conform to the grade as then established. Thompson *v.* Keokuk, 61 Iowa, 187.

§ 686 (543). **Same subject.** — That the *power to grade and improve streets,* like other legislative powers, is a *continuing one,* unless the contrary be indicated, has been frequently decided in both the Federal and State courts. It may, therefore, be exercised from time to time, as the wants of the public may require. Of the necessity or expediency of its exercise, the governing body of the corporation, and not the courts, is the judge.[1] And the law is also settled, as we shall have occasion hereafter more fully to illustrate, that, unless expressly so declared by special constitutional provision, or by charter or statute, a municipal corporation is not liable to property owners for the consequential damages necessarily resulting from either establishing a grade or changing an established grade of streets, although improvements were made in conformity with the first grade.[2] If the legislature prescribes a special remedy in such

[1] *Ante,* sec. 94; Lewis Em. Dom. sec. 107; Smith *v.* Washington, 20 How. (U. S.) 135; O'Connor *v.* Pittsburgh, 18 Pa. St. 187; Macy *v.* Indianapolis, 17 Ind. 267 (1861); Furman Street, *In re,* 17 Wend. (N. Y.) 649; Hoffman *v.* St. Louis, 15 Mo. 651 (1852); Markham *v.* Atlanta, 23 Ga. 402 (1857); New Haven *v.* Sargent, 38 Conn. 50 (1871); s. c. 9 Am. Rep. 360; Delphi *v.* Evans, 36 Ind. 90 (1871); s. c. 10 Am. Rep. 12; McCormick *v.* Patchen, 53 Mo. 33 (1873); s. c. 14 Am. Rep. 440; Koons *v.* Lucas, 52 Iowa, 177; Estes *v.* Owen, 90 Mo. 113; McKevitt *v.* Hoboken, 45 N. J. L. (16 Vroom) 482 (the same principle applied to building *sewers*); Dunham *v.* Hyde Park, 75 Ill. 371 (1875); Gall *v.* Cincinnati, 18 Ohio St. 563; Plum *v.* Morris Canal & B. Co., 2 Stockt. (10 N. J. Eq.) 256; Karst *v.* St. Paul, &c. R. R. Co., 22 Minn. 118 (1875), citing text. Text quoted and approved in Kokomo *v.* Mahan, 100 Ind. 242; Coates *v.* Dubuque, 68 Iowa, 550.

What acts amount to change of grade. Karst *v.* St. Paul, &c. R. R. Co., *supra; post,* sec. 780. Folkensen *v.* Easton Bor., 116 Pa. St. 523; Hutchinson *v.* Parkersburg, 25 W. Va. 226; Mattingly *v.* Plymouth, 100 Ind. 545; Kepple *v.* Keokuk, 61 Iowa, 653; Oakley *v.* Williamsburgh, 6 Paige (N. Y.), 262; Goodall *v.* Milwaukee, 5 Wis. 32; Aurora *v.* Reed, 57 Ill. 29; *ante,* sec. 98. Compare Lafayette *v.* Fowler, 34 Ind. 140; State *v.* Jersey City, 34 N. J. L. 277; Dewitt *v.* Duncan, 46 Cal. 342 (1873); Ft. Wayne *v.* Cody, 43 Ind. 197 (1873); Yeakel *v.* Lafayette, 48 Ind. 116 (1874).

[2] Same authorities; *post,* secs. 989–995; Taylor *v.* St. Louis, 14 Mo. 20 (1851); Hovey *v.* Mayo, 43 Me. 322 (1857); Callender *v.* Marsh, 1 Pick. (Mass.) 416; Brown *v.* Lowell, 8 Met. (Mass.) 172; St. Louis *v.* Gurno, 12 Mo. 414 (1849); Imler *v.* Springfield, 55 Mo. 119 (1874); Schattner *v.* Kansas City, 53 Mo. 162 (1873); Hooker *v.* New Haven & N. Co., 14 Conn. 146; Green *v.* Reading, 9 Watts (Pa.), 382; Philadelphia *v.* Randolph, 4 Watts & Serg. (Pa.) 516; Humes *v.* Knoxville, 1 Humph. (Tenn.) 403 (1839); Lafayette *v.* Bush, 19 Ind. 326; Delphi *v.* Evans (reviewing cases), 36 Ind. 90 (1871); s. c. 10 Am. Rep. 12; Creal *v.* Keokuk, 4 G. Green (Iowa), 47; Kepple *v.* Keokuk, 61 Iowa, 653; Genois *v.* St. Paul, 35 Minn. 330; Henderson *v.* Minneapolis, 32 Minn. 319. Mr. Lewis, on Eminent Domain, secs. 92–110, 207–224, gives a general survey of the adjudications in the several States on the subject of damages caused by change of grade. Mr. Mills, Em. Dom. secs. 195–197, states the points decided in many cases which he cites. In *Kentucky,* the right to change the grade without liability to pay damages is not absolute and unqualified. Louisville *v.* L. Rolling Mill Co., 3 Bush (Ky.), 416 (1867). A change of grade is not shown to be illegal by an allegation that it was made "without any necessity therefor," because the council of the city are the judges of the necessity of the change. Macy *v.* Indianapolis, 17 Ind. 267 (1861). The *establishment or change of a grade* is independent of the condemnation or opening of a street, and may be done either before or after a street is condemned. Kelly *v.* Baltimore, 65 Md. 171. Abutting property owners cannot require the city to excavate or fill up a street to grade; but when the city changes the surface of a street they may by statute compel it to observe the grade lines, or pay damages. Given *v.* Des Moines, 70 Iowa, 637. A statute fixing the grades of streets at their intersection, held to fix the grades at all intermediate points by connecting the points specified by a straight line. Gafney *v.* San Francisco, 72 Cal. 146. In grading streets and sidewalks *shade trees may be removed,* if necessary, and if destroyed, an adjoining owner cannot recover damages therefor, unless they were killed by reason of neglect or carelessness in the work. Castleberry *v.* Atlanta, 74 Ga. 164. One *who signs a petition for a change of grade is estopped* to claim damages resulting therefrom, on the ground that the petition was not signed by a sufficient number of persons. Cross *v.* Kansas City, 90 Mo. 13. Where a city agreed with railroad companies that, upon their erecting a bridge twenty feet high over their tracks, it would construct approaches thereto and close to travel that part of the street between the ends of the bridge, except upon the bridge, it was held that this amounted to *an alteration of the grade,* and that it could not be done without altering the established grade in the manner prescribed in the city charter. The construction of the bridge and approaches was enjoined at the suit of an owner of property situated opposite the approaches. Wilkin *v.* St. Paul, 33 Minn. 181. In *Iowa,* provision is *made by statute for compensating adjoining owners* for damages caused by a change of grade. Under it the right of action arises upon the actual change, and not upon the passage of the ordinance; and there is but one action for damages in cutting down a street and sidewalk; a recovery in one case is a bar to a new action in the other. Hempstead *v.* Des Moines, 63 Iowa, 36; Pratt *v.* Des Moines N. W. Ry. Co., 72 Iowa, 249; Mulholland *v.* Des Moines, A. & W. R. R. Co., 60 Iowa, 740; see, also, Phillips *v.* Council Bluffs, 63 Iowa, 576; Brown *v.* Lowell, 8 Met. (Mass.) 172. Compare McCarthy *v.* St. Paul, 22 Minn. 527; Lewis Em. Dom. secs. 210, 667. In *Indiana,* by statute, an established grade cannot be changed unless the damages which will be caused to adjacent property are first assessed and tendered to the owners. If the city fails to have damages assessed and to pay them, a common-law action lies. Lafayette *v.* Wortman, 107 Ind. 404. For effect of *constitutional provisions,* declaring liability for property "damaged," upon rights of abutting owners in cases of changes of grade, see notes to secs. 587, *ante,* and 990, *post;* Lewis Em. Dom. chap. v., secs. 223–224; Mills Em. Dom. sec. 204 *a.* *Mode of exercising power to grade.* Delphi *v.* Evans, 36 Ind. 90; s. c. 10 Am. Rep. 12. Proof of action of council establishing grade. Nebraska City *v.* Lampkin, 6 Neb. 27 (1877).

cases, that remedy alone can be pursued. But if the statute creates the right, and provides no special remedy, an ordinary civil action will lie.[1]

[1] Hovey *v.* Mayo, 43 Me. 322, 332; Andover & M. Turnp. Corp. *v.* Gould, 6 Mass. 40; Boston *v.* Shaw, 1 Met. (Mass.) 130; Brown *v.* Lowell, 8 Met. 172; Reock *v.* Newark, 33 N. J. L. 129; Dore *v.* Milwaukee, 42 Wis. 108; White *v.* McKeesport, 101 Pa. St. 394. Construction of remedial statutes allowing damages for change of grade. Mills Em. Dom. sec. 197; Lewis Em. Dom. secs. 207–218, 624. The owner of property adjacent to a street has a right to presume that the city will not permit an embankment above the established grade to remain in the street, or that it will provide proper culverts to prevent the embankment from impeding the flow of surface water. He is justified in building in reference to the established grade. Damour *v.* Lyons City, 44 Iowa, 276 (1876).

§ 687. **Right of Abutting Owner in the Soil.** — The rights of the abutting owner and of the public authorities in respect of streets and highways frequently come into competition. Thus, in New York, it is held that the public authorities cannot *take gravel below the grade line of a street to use on the street elsewhere,* and that the abutter can restrain such removal, 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 uses proper.[1] The right to do this within the grade lines would not, we think, be open to doubt. The right of *removal of soil from one public highway to another, for repairing the highway,* is learnedly considered by Mr. Chief Justice Gray, in a case in Massachusetts, and the conclusion is reached that such right existed by law and usage in the New England States.[2]

[1] Sadler's Case, 104 N. Y. 229. Compare Denniston *v.* Clark, *infra.* McCarthy *v.* Syracuse, 46 N. Y. 199; *infra*, sec. 689.

[2] Denniston *v.* Clark, 125 Mass. 216 (1878). In this case the Chief Justice says: "It is too clear to require any discussion that the proprietor of land over which a public highway has been laid, retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public, or by any corporation by authority derived constitutionally from the legislature. Tucker *v.* Tower, 9 Pick. 109, 110. The owner of the land therefore retains his title in trees, grass, growing crops, buildings and fences standing in the highway at the time of the laying out (unless he fails to remove them within a reasonable time after notice to do so), as as well as in any mines or quarries beneath, which are not part of the surface of the earth upon and of which the highway is made. Goodtitle *v.* Alker, 1 Kenyon, 427, 437 ; s. c. 1 Bur. 133, 143 ; Adams *v.* Emerson, 6 Pick. (Mass.) 57; Commonwealth *v.* Noxon, 121 Mass. 42; Tucker *v.* Eldred, 6 R. I. 404 ; Overman *v.* May, 35 Iowa, 89. Where there was a quarry in a street in which the city had an easement only, it was held that the city had no power to authorize a stranger to the fee to quarry stone therefrom and convert it to his own use. Althen *v.* Kelly, 32 Minn. 280. The decision in Smith *v.* Rome, 19 Ga. 89, noted sec. 688, note, unless it can be considered as substantially a case of a quarry, cannot be upheld. See Macon *v.* Hill, 58 Ga. 595 (1877).

"But it is equally clear that the grant of such an easement to the public, or to the corporation to which its rights have been delegated, authorizes the doing of any act in the highway, including the digging down or raising the soil to any extent that is necessary or proper to make and keep the way safe and convenient for the public travel. Callender *v.* Marsh, 1 Pick. 418 ; Smith *v.* Washington, 20 How. 135; Boston *v.* Richardson, 13 Allen, 146, 159; Pontiac *v.* Carter, 32 Mich. 164 ; Lawrence *v.* Nahant, 136 Mass. 477. All acts done for the purpose of repairing the way are of this character, although they may require the removal of the soil from one part of the way to another; and it is accordingly well settled that the public in the case of a highway, or a turnpike corporation or a railroad company in the case of a turnpike or railroad, has the right, acting through proper officers, for the purpose of repairing the same highway, turnpike, or railroad, to take earth, gravel, or stones from one part and deposit them on another [see Robert *v.* Sadler, 104 N. Y. 229], although if the officer applies them to other uses he may become liable as a trespasser. In Adams *v.* Emerson, 6 Pick. (Mass.) 58, for instance, in which an action was maintained by the owner of land over which a turnpike road had been laid out, against a servant of the corporation, for taking the herbage growing thereon, Mr. Justice *Wilde*, delivering the opinion of the court, said, 'The *locus in quo*, although part of a turnpike road, is the soil and freehold of the plaintiff. He has the exclusive right of property in the land, subject, however, to the easement or rights incident to a public highway; such as the right of passage over it, and the right which the turnpike corporation has to construct a convenient pathway, and to keep it always in good repair. To accomplish these purposes, the corporation may dig up and remove from place to place, within the limits laid out for the road, any earth, sand, and gravel, and may dig or cut up sods and turf.'" See also Phillips *v.* Bowers, 7 Gray (Mass.), 21, 26 ; Burr *v.* Leicester, 121 Mass. 241 ; Jackson *v.* Hathaway, 15 Johns. 447, 453 ; Fish *v.* Rochester, 6 Paige (N. Y.), 268, 272 ; Bissell *v.* Collins, 28 Mich. 277 ; Baxter *v.* Winooski Turnp. Co., 22 Vt. 114 ; Cole *v.* Drew, 44 Vt. 49 ; Chapin *v.* Sullivan R. R. Co., 39 N. H. 564 ; Aldrich *v.* Drury, 8 R. I. 554.

"In New England, at least, the same rule has been applied by law and usage to the taking of materials from one highway for the repair of another within the jurisdiction of the same municipal authorities." Hovey *v.* Mayo, 43 Me. 322 ; New Haven *v.* Sargent, 38 Conn. 50; compare Sadler's Case, *supra;* and see cases cited in note to sec. 688, *infra;* sec. 689, *infra;* Lewis Em. Dom. sec. 590; Kendall *v.* Post, 8 Oreg. 141. "In such a case, both highways must, for this purpose, be deemed as much parts of one plan of public improvement for the accommodation of the public travel as if they formed parts of a continuous line of road called by one name, as in the case of a turnpike or of a railroad."

§ 688 (544). **Municipal Control over Uses ; Right to use Soil in Repair of Streets, and to make Sewers, Drains, &c.** —The power of the public, or of the municipal authorities representing by delegated authority the public, over streets is not confined to their use for the sole purpose of travel, but they may be used for many other purposes required by the public convenience. The *uses to which streets in towns and cities may legitimately be put* are greater and more numerous than with respect to ordinary roads or highways in the country. With reference to the latter, all the public requires is the easement of passage and its incidents; and hence the owner of the soil parts with this use only, retaining the soil, and, by virtue of this ownership, is entitled, except for the purposes of repairs, to the earth, timber, and grass growing thereon, and to all minerals, quarries, and springs below the surface; and he may maintain actions against those who obstruct the road or interfere with his rights therein.[1] But with respect *to streets in populous places,* the

[1] Barclay *v.* Howell's Lessee, 6 Pet. 498, 512, *per McLean*, J.; Bliss *v.* Ball, 99 Mass. 597 (1868) ; White *v.* Godfrey, 97 Mass. 472 ; Boston *v.* Richardson, 13 Allen (Mass.), 152, 153 ; Stackpole *v.* Healey, 16 Mass. 33 ; Peck *v.* Smith, 1 Conn. 103 ; Adams *v.* Rivers, 11 Barb. (N. Y.) 393 ; Griffin *v.* Martin, 7 Barb. (N. Y.) 298 ; Jackson *v.* Hathaway, 15 Johns. (N. Y.) 447 ; Webber *v.* Eastern R. R. Co., 2 Met. (Mass.) 149 ; Louisville *v.* U. S. Bank, 3 B. Mon. (Ky.) 138, 158 ; *ante,* secs. 629, 633.

In Cincinnati *v.* White, 6 Pet. 431, the Supreme Court observes that "all public dedications must be considered with reference to the use for which they are made ; and streets in a town or city may require a more enlarged right over the use of the land, in order to carry into effect the purposes intended, than may be necessary for an appropriation of a highway in the country." This is manifestly true, and that is too narrow a view of the nature of a *street* which holds that the public gets nothing but a mere right of way, and that the adjoining owner retains as against the

public convenience requires more than the mere right to pass over and upon them. They may need to be graded and brought to a level; and therefore the public or municipal authorities may not only change the surface, but cut down trees, dig up the earth, and may use it in improving the street or elsewhere, and may make *culverts, drains, and sewers* upon or under the surface.[1] Whether the municipal corporation holds the fee of the street or not, the true doctrine is that the municipal authorities may, under the usual powers given them, do all acts appropriate or incidental to the beneficial use of the street by the public, of which, when not done in an improper and negligent manner, the adjoining fee-holder cannot complain.[2]

public every other right; the public must be taken to get every right necessary to the beneficial use and enjoyment of the street, and the public rights in the streets of a populous place are much more enlarged and various than with respect to ordinary highways. Some of the cases have overlooked this difference, and applied too strictly the settled rules of the latter, in all their extent, to the former. See *ante*, sec. 633; Cincinnati *v.* Penny, 21 Ohio St. 499.

The duty of keeping the highway in a safe condition for public travel involves the duty of a reasonable supervision of the highway. Cusick *v.* Norwich, 40 Conn. 376 (1873).

[1] Lawrence *v.* Nahant, 136 Mass. 477; *infra*, sec. 689.

[2] Boston *v.* Richardson, 13 Allen (Mass.), 146, 159 (1866), *per Gray*, J.; West *v.* Bancroft, 32 Vt. 367 (1859), *per Pierpont*, J.; Barter *v.* Commonwealth, 3 Pa. (Penr. & W.) 253; Philadelphia *v.* Tryon, 35 Pa. St. 401; Williamsport *v.* Commonwealth, 84 Pa. St. 487, 493 (1877), citing text; Bissell *v.* Collins, 28 Mich. 277 (1873); s. c. 15 Am. Rep. 217, and note explaining Cuming *v.* Prang, 24 Mich. 523; Kelsey *v.* King, 32 Barb. (N Y.) 410; Aurora *v.* Fox, 78 Ind 1; New Haven *v.* Sargent, 38 Conn. 50; s. c. 9 Am. Rep. 360 (1871). This case expressly holds that the city, as against the adjoining owner, is *entitled to the surplus soil of the street*, and the adjoining owner was restrained from removing it. Compare *dictum* in Cuming *v.* Prang, 24 Mich. 514 (1872); and see Delphi *v.* Evans, 36 Ind. 90; s. c. 10 Am. Rep., and notes; *supra*, sec. 687. The distinction made by the court in Delphi *v.* Evans is this: that the city authorities have no right to take earth from a street to the injury of the abutter, in order to improve *other streets*, unless it is done in pursuance of an order for the improvement of the street; but if a grade for streets has been established, and an order made to improve them, then the earth may be excavated from one street to improve another street in a different part of the city. In *Iowa*, the court held that, as against the adjoining lot-owner or original dedicator, the city holding the fee has full control over the whole street, and not simply over the surface; and it can maintain an action against any person who, without its permission, removes any material from the body of the street, whether that material be superficial or subterraneous. Des Moines *v.* Hall, 24 Iowa, 234. A city may impose conditions upon the abutter in respect of excavations of areas under sidewalks, and until such conditions are complied with it may forbid such excavation. Davis *v.* Clinton, 50 Iowa, 585 (1879).

In a case in *Georgia*, where it is held that the owner only parts with, and the city only acquires, *a right of way*, it was decided, but, in the author's judgment, erroneously, that stone within the limits of the street, which had to be removed in order to level and make the street passable, belonged to the adjoining owner as part of the soil, and not to the city as the owner of the right of way; and the latter could not, it was further held, use the

§ 689. **Right to Surplus Soil in Repair of Street; Right to construct Sewers in Streets.** — Although the fee of the street may be in the adjoining lot-owner, the city in grading the street may remove the soil, and use it in improving that street or any other street in the city.[1] It would seem that this right includes the right on the part of the city to dispose of the surplus soil to others who will remove it. And it has been decided that if the city does not desire the soil for the purpose of filling in other streets, and the adjoining owner does not remove it, the city may sell and dispose of it in any way it deems proper.[2] The *construction of sewers* is a lawful use of the street as against an abutting proprietor, no matter whether the fee of the street is in him or the city in trust for street uses.[3]

rock that might result from the process of levelling for macadamizing or other street improvements, and the corporation was enjoined from so doing. Smith *v.* Rome, 19 Ga. 89 (1855). The principle established in this case denied in Denniston *v.* Clark, 125 Mass. 216 (1878). See sec. 687, and note, *supra*. In Macon *v.* Hill, 58 Ga. 595 (1877), the city was held liable where it changed the grade to get materials to be used elsewhere in the city. But in *Maine* it is held that a corporation which, by its charter, has power to repair and grade streets, may make such repairs and do such grading by authorizing others, at their own expense and under the direction of the street commissioner, to take the materials from the street for their own private use. Hovey *v.* Mayo, 43 Me. 322 (1857). See also Palatine *v.* Kreuger, 121 Ill. 72 (1887). How power to grade must be exercised. Delphi *v.* Evans, 36 Ind. 90 (1871); s. c. 10 Am. Rep. 12; Terre Haute *v.* Turner, 36 Ind. 522; McGregor *v.* Boyle, 34 Iowa, 269 (1872); *post*, secs. 1043–1045.

[1] Griswold *v.* Bay City, 35 Mich. 452; Huston *v.* Fort Atkinson, 56 Wis. 350.

[2] Griswold *v.* Bay City, *supra*.

[3] *Supra*, secs. 687, 688; Lewis Em. Dom. secs. 127, 173. Although the fee of the streets of a city may be in the adjoining proprietor, subject to the public easement, yet the city, by virtue of its general authority over streets, *may cause sewers to be made* therein, and the owner is not entitled to have his damages assessed as for a new use or servitude. Cone *v.* Hartford, 28 Conn. 363 (1859). In this case the right of the city to make common sewers under the street was deduced from and regarded as an incident to its express and general authority to make and maintain highways and streets. s. p. Fisher *v.* Harrisburg, 2 Grant Cas. (Pa.) 291 (1854); Stoudinger *v.* Newark, 28 N. J. Eq. 187 (1877); see Glasby *v.* Morris, 18 N. J. Eq. 72. On the general question as to the rights of the public in a city street, "we cannot," says *Bradley*, J., "see any material difference, as to the extent of those rights, whether the fee is in the public or in the adjacent land-owner, or in some third person." Barney *v.* Keokuk, 94 U. S. 324 (1876); s. c. 4 Dillon, 593, 599; Lahr *v.* Metrop. Elev. Ry. Co., 104 N. Y. 268; Story *v.* N. Y. Elev. R. R. Co., 90 N. Y. 122; N. Y. Elev. R. R. Co., *In re*, 70 N. Y. 327; Gilbert Elev. Ry. Co., *In re*, 70 N. Y. 361; *post*, chap. xix. The *construction of a sewer* is a lawful use of a public street. Traphagen *v.* Jersey City, 29 N. J. Eq. 206 (1878); Stoudinger *v.* Newark, 28 N. J. Eq. 187; s. c. *Ib.* 446; *infra*, sec. 690, note. It is a *continuing* power unless restrained by charter. McKevitt *v.* Hoboken, 45 N. J. L. (16 Vroom) 482. Construction of sewer through a portion of a street not opened by law, where there is nothing in the act requiring the opening of the street before building of the sewer, is not illegal. Fowler, *In re*, 53 N. Y. 60 (1873). The judgment of the municipal council as to the *necessity* of constructing sewers is conclusive. Michener *v.* Philadelphia, 118 Pa. St. 535. What sewerage

§ 690 (545). **Right of City to construct Cisterns in Streets for Public Uses.** — Thus, although an easement only be acquired by the public, the municipal or local authorities may build a reservoir or *cistern in a street*, to retain water with which to sprinkle streets or extinguish fires.[1] In a case in Iowa, occurring in a city where the fee of the soil in the street was in the adjoining proprietor, subject to the public easement, it appeared that the city corporation built a cistern in the street underneath the surface, near the line of the defendant's lot, and that subsequently the defendant erected a building on his lot on the line of the street, and in excavating for his cellar and foundation wall, and in taking the earth from under the sidewalk in the street, occasioned the destruction of the cistern, for which an action was brought against him by the city; and it was held that the action could not be maintained, because, the fee of the street being in the defendant, subject to the public easement, the city had no right, without his consent, to construct the cistern. The court observes that, "subject to the public easement, the owner of the adjoining lots is the absolute owner of the soil of the streets, and retains his exclusive right in all mines, quarries, springs of water, timber, and earth, for every purpose not inconsistent with the public right of way."[2] So far as this case affirms that a municipal corpora-

is necessary for the welfare of a city and for the health of its inhabitants is a political or administrative question, to be determined by the legislative authority of the city. St. Louis Bridge Co. *v.* People, 125 Ill. 226.

The contract for the right of way, &c., between the city and the Louisville City Railway Company provided that the city shall not be liable for any damage "from any delay in the transportation of passengers that may be incurred by the laying of sewers, water or gas pipes," &c. The company refused to take up its track to enable the city to construct a sewer; and thereupon the city caused the track to be taken up, and refused to replace it. For thus taking up and refusing to replace the track, the city did not become liable for damages to the railway company. The city did not and could not surrender its right to construct sewers in such portions of its limits as might require them, and the railway company holds its right of way subject to this power. Louisville City Ry. Co. *v.* Louisville, 8 Bush, 415 (1871). *Ante*, secs. 94, 685.

The statute of *Massachusetts* imposes a liability upon towns for "damages occasioned by the laying, making, or maintaining" a sewer. Under this act damages have been awarded for the drying up of a well upon land not taken, and not adjoining that through which a sewer was made. Trowbridge *v.* Brookline, 144 Mass. 139. *Post*, secs. 1043–1054; Lewis Em. Dom. sec. 86.

[1] West *v.* Bancroft, 32 Vt. 367 (1859).

The cost of public wells and cisterns in Louisville may be apportioned among the owners of lots fronting the public ways to the middle of each square from the intersection of streets where located. Louisville *v.* Osborne, 10 Bush, 226 (1874).

[2] Dubuque *v.* Maloney, 9 Iowa, 450, 461 (1859), *per Stockton*, J. In towns and cities platted under the code of *Iowa*, the lot-owners do not hold the fee to the middle of the street, and have no other interest in the streets except a right of way common to the whole public. This is doubtless too broad a statement. Dubuque and Keokuk are exceptions in this respect. Milburn *v.* Cedar Rapids, 12

tion cannot rightfully construct a public cistern for municipal uses, in a public street, without the consent of the abutter holding the fee, it is directly opposed to the case from Vermont last cited, and to the sound and necessary principle above laid down, namely, that the city corporation may make every use of a street which reasonably conduces to the public convenience and enjoyment. It will never do, we think, to hold that a municipality, invested with the control of streets and charged with the duty of preserving the public health, promoting the public welfare, and of making provision to extinguish fires, may not, if it deems it expedient, construct a subterranean reservoir or sewer in the middle of a street without the assent of the opposite lot-owners.[1]

§ 691 (546). **Laying down Gas-Pipes in Public Streets.** — Lighting cities is so necessary for the safety and convenience of the inhabitants that the municipal authorities are usually given powers more or less extensive in respect to it.[2] The legislature may authorize the condemnation of property for such a purpose.[3] In Great Britain express legislative sanction is necessary to warrant the laying down of *gas pipes* in the public highways;[4] and so in this country it is also considered that the right to the use of the public streets of a city by a gas company, for the purpose of laying down its pipes,

Iowa, 246; *Ib.* 261; Haight *v.* Keokuk, 4 Iowa, 199; Dubuque *v.* Maloney, *supra*; Dubuque *v.* Benson, 23 Iowa, 248; Des Moines *v.* Hall, 24 Iowa, 234; Cook *v.* Burlington, 30 Iowa, 94 (1870). See chapter on Dedication, *ante*, secs. 629, 633. City has right to impose the conditions upon which an adjacent property owner may be permitted to excavate area under a sidewalk, and until the conditions are complied with, it is authorized to forbid such excavation being made. Davis *v.* Clinton, 50 Iowa, 585; Des Moines *v.* Hall, 24 Iowa, 234. A city also has power to fill up wells in streets, as a sanitary measure, and the passage of an ordinance for that purpose is *ipso facto* a revocation of permission to construct and maintain them. They may be abolished at the expense of the public and without compensation to the persons who constructed them. Ferrenbach *v.* Turner, 86 Mo. 416.

[1] In Glasby *v.* Morris, 18 N. J. Eq. 72 (1866), it seems to be the opinion of Chancellor *Zabriskie*, although the point is not much examined, that where the adjoining proprietors own the fee, a municipal corporation cannot construct a sewer in a public street without an express grant; and he held that in such a case the municipal corporation as against the adjoining owner's consent could not authorize a private person to build a subterranean drain in the street. See, however, Cincinnati *v.* Penny, 21 Ohio St. 499 (1871), which holds, correctly, as we think, sewerage to be a legitimate use of a street. *Post*, chap. xix.; *ante*, secs. 687, 689, note.

[2] *Ante*, sec. 3 *a*.

[3] Heyward *v.* New York, 8 Barb. 486.

[4] Regina *v.* Sheffield Gas. Co., 22 Eng. Law and Eq. 518; Ellis *v.* Sheffield Gas Co., 23 L. J. Q. B. 42; Galbreath *v.* Armour, 4 Bell App. Cas. 374; Queen *v.* Gas Co., 2 El. & El. 651; Queen *v.* Charlesworth, 16 Queen's B. 1012; Regina *v.* Train, 9 Cox Cr. Cas. 180; Boston *v.* Richardson, 13 Allen (Mass.), 146, 160, by *Gray*, J.; Thompson *v.* Sunderland Gas Co., L. R. 2 Ex. Div. 429.