owner's rights are subject to the paramount rights of the public; and the rights of the public are not limited to a mere right of way, but extend, as we have shown, to all beneficial legitimate street uses, as the public good or convenience may from time to time require. The use of the streets for sewers, tunnelling, public cisterns, gas-pipes, water pipes, and other improvements, might be seriously affected by the recognition of a *right* in the abutter to make at pleasure openings in, or even under the sidewalk or street, except subject to reasonable municipal regulation. It is clear that all rights of this character are subject to legislative and municipal regulation. Whether the abutting lot-owner has the right to make sub-surface vaults in the street, as an incident of ownership, subject to municipal regulation, or whether it is a privilege dependent upon legislative or municipal sanction, express or implied from usage, is a question that is not settled by adjudication. It would seem to be a fair deduction from the New York cases that the lot-owner has the right to make such sub-surface excavations or vaults subject to municipal regulation.[1]

§ 700 (554). **Same subject.** — Speaking of this subject, the Supreme Court of Illinois remarks: "We are not prepared to admit that the defendant could, by reason of his ownership of the adjoining property, claim the absolute right to take up the sidewalk and extend his coal-cellar under it; but as such a privilege is a great convenience in a city, and may, with proper care, be exercised with little or no inconvenience to the public, we think that the authority to make such cellars may be implied, in the absence of any action of the corporate authorities to the contrary, they having been aware of the progress of the work. . . . But," the court adds, "while we infer a license thus to use a part of a public street, it is on the condition that the person doing so shall use *more than ordinary care* and *expedition* in the prosecution of the work. Neither the public nor other individuals derive any possible advantage from such a use of the sidewalk, but it is solely for the benefit of the person thus using it, and he must see to it that he does not endanger the safety of others, and that he incommodes the public as little as possible."[2]

[1] McCarthy *v.* Syracuse, 46 N. Y. 194; Robert *v.* Sadler, 104 N. Y. 229. Lahr's Case, 104 N. Y. 208, where *Ruger*, C. J., summarizes the previous decisions; Davis *v.* City of Clinton, 50 Iowa, 585; *post*, secs. 701 *b*, 734, 996–1000, 1032; Irvine *v.* Wood (coal-hole in sidewalk), 51 N. Y. 224 (1872); s. c. 10 Am. Rep. 603; New York Dist. Ry. Case, 107 N. Y. 42; Story's Case, 90 N. Y. 161.

[2] Nelson *v.* Godfrey, 12 Ill. 22, 23. Followed: Gridley *v.* Bloomington, 68 Ill. 50 (1873). *Supra*, sec. 660, note. In *New York*, in a case where the lot-owner owned the fee to the centre of the street, it was held that he has the right to excavate the soil *under the surface*, and to use the space for a basement or other uses which do not interfere with the public rights in the street. McCarthy *v.* Syracuse, 46 N. Y. 194 (1871). See also cases cited in the last note; Fisher *v.* Thirkell, 21 Mich. 1 (1870), referred to *post*, secs. 1032, 1033, note. "What may be deemed a reasonable and proper use of a way, public or private, must depend much on the local situation and much on public usage. The general use and acquiescence of the public is evidence of the right." O'Linda *v.* Lothrop, 21 Pick. 292, 297; Papworth *v.* Milwaukee, 64 Wis. 389; *infra*, secs. 701 *b*, 734, 996–1000, 1032.

Railroads in Cities; Use of Public Streets for Surface, Elevated, and Underground Railroads; Extent of Legislative and Municipal Authority; Constitutional Limitations.

§ 701 (555). **Scope of Legislative Power.** — Reference is elsewhere made to the plenary power of the legislatures of the States in this country over all public ways, including not only common highways but streets within the limits of muncipalities.[1] It has often been decided, and is settled, that the legislature has, unless specially restricted by the Constitution, the power to authorize the building of a railroad on a street or highway, without the consent of the municipal authorities,[2] and may directly exercise this power or devolve it upon the local or municipal authorities.[3]

[1] *Ante*, secs. 656 *et seq.*, 666, 680, 683.

[2] Savannah & T. R. R. Co. *v.* Savannah, 45 Ga. 602 (1872); Hine *v.* Keokuk & D. M. R. R. Co., 42 Iowa, 636 (1876); Dubach *v.* Hannibal & St. J. R. R. Co., 89 Mo. 483; Floyd County *v.* Rome Street R. R. Co., 77 Ga. 614; People *v.* Kerr, 27 N. Y. 188 (1863); Milwaukee *v.* Milw. & B. R. R. Co., 7 Wis. 85.

[3] *Ante*, sec. 656 *et seq.*; Mercer *v.* Pittsburgh, Ft. W. & C. R. R. Co., 36 Pa. St. 99 (1859); Black *v.* Phila. & R. R. R. Co., 58 Pa. St. 249; Phila. & T. R. R. Co., Case of, 6 Whart. (Pa.) 25, affirmed in Commonwealth *v.* Erie & N. E. R. R. Co., 27 Pa. St. 339, 354; Green *v.* Reading Bor., 9 Watts, 382; Henry *v.* Pittsburgh & A. Br. Co., 8 Watts & S. 85; O'Connor *v.* Pittsburgh, 18 Pa. St. 189; Tenn. & Ala. R. R. Co. *v.* Adams, 3 Head (Tenn.), 596; Moses *v.* Pittsburgh, Ft. W. & C. R. R. Co., 21 Ill. 516; Murphy *v.* Chicago, 29 Ill. 279; New Orleans & C. R. R. Co. *v.* Second Municipality, 1 La. An. 128; 9 La. An. 284; Geiger *v.* Filor, 8 Fla. 325; Springfield *v.* Conn. River R. R. Co., 4 Cush. (Mass.) 63; Cosby *v.* Owensboro & R. R. R. Co., 10 Bush (Ky.), 288 (1874); State *v.* Hoboken, 35 N. J. L. 205; Paterson & Pas. R. R. Co. *v.* Paterson, 24 N. J. Eq. 158; Morris & E. R. R. Co. *v.* Newark, 2 Stockt. (10 N. J. Eq.) 352, 357; Barney *v.* Keokuk, 94 U. S. 324 (1876); s. c. 4 Dillon, 593; Atchison Street Ry. Co. *v.* Missouri Pacific Ry. Co., 31 Kan. 660; Harrison *v.* N. O. Pacific Ry. Co., 34 La. An. 462; Tilton *v.* New Orleans City R. R. Co., 35 La. An. 1062.

In *Illinois* a city has the power to allow the construction of a railroad upon or over its streets, and the public will be bound by whatever may be lawfully done in regard to the streets by the city. Chicago & N. W. Ry. Co. *v.* Elgin, 91 Ill. 251; Murphy *v.* Chicago, 29 Ill. 279. Compare Indianapolis, B. & W. R. R. Co. *v.* Hartley, 67 Ill. 439; Chicago, B. & Q. R. R. Co. *v.* McGinnis, 79 Ill. 269; Board of Trade *v.* Barnett, 107 Ill. 507; Quincy *v.* Chicago, B. & Q. R. R. Co., 92 Ill. 21. Recent constitutional provision as to railways in *Illinois*, see art. 2, sec. 13; art. 4, sec. 22; art. 11, sec. 4, Const. 1870. A *municipal corporation* has the same right to question the corporate existence and the rights of a railroad company seeking to use its streets as a private owner would have where the use of his property is sought. Brooklyn Steam Transit Co. *v.* Brooklyn, 78 N. Y. 524. Such

§ 701 *a*. **Special Constitutional Limitation on Legislative Power over Streets and their Uses.** — In the State of New York the plenary power of the legislature over highways and streets (doubtless a sound general principle) had been exercised so often with such manifest injustice to the municipalities and to the owners of adjoining property, that its Constitution was amended, January 1, 1875, as follows: "The Legislature shall not pass a *private* or *local bill* in any of the following cases: —

. . . . . .

"Granting to *any* corporation, association, or individual *the right to lay down railroad tracks.*

"Granting to any private corporation, association, or individual *any exclusive privilege*, immunity or franchise whatever.

"The Legislature shall pass *general laws* providing for the cases enumerated in this section, and for all other cases which, in its judgment, may be provided for by general laws. But no law shall authorize the construction or operation of a *street railroad* except upon the condition that the *consent of the owners* of one-half in value

railroad company must be one *de jure*, not simply *de facto*. N. Y. Cable Co.'s Case, 104 N. Y. 43; Tate *v.* Ohio & Miss. R. R. Co., 7 Ind. 479; Savannah & T. R. R. Co. *v.* Savannah, 45 Ga. 602 (1872); Hine *v.* Keokuk & D. M. R. R. Co., 42 Iowa, 636 (1876); New Albany & S. R. R. Co. *v.* O'Daily, 13 Ind. 353; s. c. *Ib.* 551; People *v.* Kerr, 27 N. Y. 188; Clinton *v.* Cedar Rap. & Mo. R. R. R. Co., 24 Iowa, 455; Chicago, N. & S. W. R. R. Co. *v.* Newton, 36 Iowa, 299; Lackland *v.* No. Mo. R. R. Co., 31 Mo. 180; Porter *v.* No. Mo. R. R. Co., 33 Mo. 128 (1862); James River Co. *v.* Anderson, 12 Leigh (Va.), 276; Chicago *v.* Robbins, 2 Black (U. S.), 424; *ante*, secs. 71, 657. See So. Car. R. R. Co. *v.* Steiner, 44 Ga. 546 (1861); Vason *v.* So. Car. R. R. Co., 42 Ga. 631. After much conflict of opinion, the Supreme Court of *Louisiana* finally reached the conclusion that the legislature of the State had the power to authorize a railway company to use for its road, without compensation to abutting owners, part of the batture or levee in front of New Orleans. New Orleans, M. & C. R. R. Co. *v.* New Orleans, 26 La. An. 517; *Ib.* 478 (1874). Harrison *v.* N. O. Pacific Ry. Co., 34 La. An. 462; Hill *v.* Chicago, St. L. & N. O. R. R. Co., 38 La. An. 599. The conflicting cases in the several States are cited by Lewis on Eminent Domain, sec. 115, note.

A *different view* has been sometimes taken. Thus in Donnaher *v.* State, 8 Sm. & Mar. (16 Miss.) 649 (1847), the court decided that where the statute under which a city was laid out vested the title of the streets in the city, such streets cannot be subjected to the use of a railroad without the consent of the city, unless the damages to the city are assessed and paid. In other words, the legislature can only interfere with the use of the streets of the city by its exercise of the right of eminent domain; and if it exercise this right, it must compensate the city. But this conclusion seems to have been adopted without sufficient reflection, and is undoubtedly erroneous. *Ante*, chap. iv., secs. 54–63. Lewis on Eminent Domain, sec. 119, and cases.

In Great Britain *express legislative authority is necessary* to warrant streets to be used for the purposes of railways. Galbreath *v.* Armor, 4 Bell App. Cas. 374; Queen *v.* Longton Gas Co., 2 El. & El. 651; Queen *v.* Charlesworth, 16 Q. B. 1012; Regina *v.* Train, 9 Cox Cr. Cas. 180; 1 Barn. & Ad. 30. On the right of railways to occupy highways, see Redfield on Railways, sec. 76, and notes; Lewis on Eminent Domain, secs. 110–119.

of the property bounded on, and the *consent also of the local authorities* having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad, be first obtained," &c. (Art. 3, sec. 18.)

Several other States have ordained constitutional provisions of the same general character, although some of them do not so distinctly protect the abutting owners.[1] These salutary organic pro-

[1] *Special constitutional provisions respecting street railways and railroad tracks*: —

Colorado. — Constitution 1876, *Art.* 15, *Sec.* 2. *No street railroad* shall be constructed within any city, town, or incorporated village without the consent of the local authorities having the control of the street or highway proposed to be occupied by such street railroad.

Illinois. — Constitution 1870, *Art.* 4, *Sec.* 22. The General Assembly shall not pass local or special laws granting to any corporation, association, or individual the right to lay down railroad tracks, or amending existing charters for such purpose; granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever. In all other cases, where a general law can be made applicable, no special law shall be enacted.

Art. 11, *Sec.* 4. No law shall be passed by the General Assembly granting the right *to construct and operate a street railroad* within any city, town, or incorporated village, without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied by such street railroad. Chicago City Ry. Co. *v.* Story, 73 Ill. 541.

Missouri. — Constitution 1875, *Art.* 4, *Sec.* 53. The General Assembly shall not pass any local or special law granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity; or to any corporation, association, or individual the *right to lay down a railroad track.* Ewing *v.* Hoblitzelle, 85 Mo. 73, and cases cited.

Nebraska. — Constitution 1875, *Art.* 3, *Sec.* 15. The legislature shall not pass local or special laws in any of the following cases: . . . Granting to any corporation, association, or individual the right to lay down railroad tracks, or amending existing charters for such purpose; granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever.

Miscellaneous Corporations. Sec. 2. No general law shall be passed by the legislature granting the right to construct and operate a *street railroad* within any city, town, or incorporated village without first requiring the consent of a majority of the electors thereof.

New Jersey. — Constitution as amended in 1875, *Art.* 4, *Sec.* 7, *Paragraph* 11. The legislature shall not pass private, local, or special laws in any of the following cases: . . . granting to any corporation, association, or individual the right *to lay down railroad tracks.* Laws New Jersey, 1875, p. 72; *ib.* 1876, pp. 27, 433. See Pell *v.* Newark, 40 N. J. L. 71; Central R. R. Co. of N. J. *v.* Penn. R. R. Co., 31 N. J. Eq. 475, 489; State *v.* Hammer, 42 N. J. L. 435; Chamberlain *v.* Elizabethport S. Cordage Co., 41 N. J. Eq. 43.

Pennsylvania. — Constitution 1874, *Art.* 3, *Sec.* 7. The General Assembly shall not pass any local or special laws, . . . creating corporations, or amending, renewing, or extending the charters thereof: granting to any corporation, association, or individual any special or exclusive privilege or immunity; or to any corporation, association, or individual *the right to lay down a railroad track.*

Art. 17, *Sec.* 9. No street passenger railway shall be constructed within the limits of any city, borough, or township without the consent of its local authorities. Commonwealth *v.* Patton, 88 Pa. St. 258.

Montana; North Dakota; South Dakota. — The Constitutions of Montana (art. 15, sec. 12), North Dakota (art. 7, sec. 139), and South Dakota (art. 10,

visions, whose necessity originated in constantly growing private and public injuries and injustice arising from the free exercise of unrestrained legislative power, are founded upon a true conception of the nature of streets in cities so far as concerns the rights of the public therein, and of the special and peculiar proprietary rights of the abutting lot-owners (subject, of course, to reasonable municipal regulation) in and to the use of the streets for light, air, access, and all other objects which do not interfere with the legitimate public uses of the street for street purposes.[1] Hence, the above-mentioned constitutional limitations on legislative power are, in effect, that no local or special law shall be passed authorizing the laying down of railroad tracks anywhere; and that no general law shall be passed authorizing the construction or operation of street railroads, *without the consent of the two parties directly affected*, viz., of the municipal authorities as representing the local public interests involved, and of the abutting owners, in the manner provided, whose rights are by such a use of the streets necessarily and specially affected. These constitutional changes mark a distinct stage in the progressive development of our jurisprudence which we may well pausefully stop to consider.

§ 701 *b*. **Same subject.** — This constitutional provision ordains, in the most comprehensive language, that hereafter the legislature shall not, either by a local or a private act, grant to any corporation, whether new or old, or to any association or individual, the right to lay down railroad tracks anywhere, either in cities or out of them. The legislature, it is ordained, shall pass general laws; but no law shall authorize the construction or operation of a street railway except upon the consent of the city and of the owners of abutting property. The language is imperative; "by no local or private Act shall you legislate on this subject, you cannot touch it by any such act; you shall only legislate thereon by a *general* law," but no general law, even, shall be passed on this subject, unless it is of such a character that it can secure the assent of the municipality, and of one-half in value of the abutting property owners or of the substituted judicial tribunal. This constitutional provision not only operates as a limitation upon legislative power, but it is also an additional guarantee protecting the rights of every person in the State who owns property upon any public street. Before the Constitutional Amendment of 1875, it would have been competent for the legisla-

sec. 3) contain provisions similar to those quoted above.

[1] See *ante*, secs. 656 *a*, 656 *b*; *post*, secs. 723 *a*–723 *d*.

ture, by a local or a private or a general law, as it might see fit, to authorize any company or person to construct and operate a railway in any city or town in the State, on the single condition that it was willing to make compensation to the lot-owner for the damage. The Amendment is a limitation upon the power of eminent domain. No person who owns a lot can have the street in front of him touched by virtue of the provisions of any local or private act whatever, or by virtue of the provisions of any general act, unless it is such a one as shall be consented to by the municipality, and by one-half in value of the abutting property owners, or in lieu thereof by the prescribed judicial tribunal. This constitutional provision not only prohibits the legislature in any case from passing a local or private law granting the right to lay down railroad tracks, but it is a further limitation upon the legislative power, to the effect that not only the right of eminent domain but no other legislative power where the subject is the operation or construction of street railways, shall be exercised unless the law is a general law, and makes provision for obtaining the prescribed consent of the municipality and of the lot-owners. This, it is obvious, is a substantial limitation on the legislative power. Where the subject-matter of legislation is the authorization of either the construction or the operation of a street railway, the power of eminent domain cannot be exercised, though the party in whose favor the power is attempted to be granted is willing to pay for the property taken a hundred-fold, unless provision is made that the railway company shall obtain the required consent of the municipality and of the abutting owners. The Amendment protects the city and the abutting owner by requiring the legislative power to be exercised by *general* (instead of local or private) laws, and by requiring the consent both of the municipality and of a majority in value of the abutting property owners. Both these parties are interested, and hence the consent of both must be obtained in the manner specified in the Amendment,[1] which *applies equally to surface, elevated, and underground railways*.[2]

[1] Unrestrained power in the central legislative authority to bestow valuable franchises affecting cities and property therein, without the consent of the municipal authorities and of the property-owners who are injuriously affected, necessarily makes the city and such owners the victims of inconsiderate grants. Administered on business principles, a city ought to derive large revenues from the use of

[2] *Elevated Railway cases:* In the Elevated Railway cases (70 N. Y. 327, and 90 N. Y. 122) the court had to deal with the questions as to the use of the streets *above* the surface. Construing the Constitutional Amendment quoted in the text (sec. 701 *a*), the Court of Appeals in the N. Y. Elevated Railway cases (70 N. Y. 309, 338, 349), *per Earl*, J., said: "These constitutional provisions do not

§ 701 *c*. **Same subject. New York Arcade Railway cases.** — The value and efficiency of the provisions of the amendment to the Constitution of New York, referred to in the two preceding sections, in protecting the rights of the abutters, were notably exemplified in

wharves, from railways occupying streets with their tracks, from gas, water, and other companies to which are given the right to lay mains in the streets, &c. Effective organic limitations on the power both of the legislature and of the local authorities to make grants of this character ought to be devised, and the proprietary rights of adjoining property owners protected. It was in this spirit and for this purpose that the amendment of the Constitution of New York, of January 1, 1875, was adopted. Provisions still more specific to secure to cities the pecuniary value of grants made by them for the use of their streets ought also to be adopted. The legitimate sources of revenue thus opened to cities is well illustrated by the case of the city of Berlin. In that city, it is stated on good authority that the street railway companies not only pave a portion of all the streets they occupy, but pay a percentage of their receipts to the city, whose present revenue from this source is about $250,000 a year; and that in A.D. 1911, the street railways, with all of their equipment, will become the property of the city. Municipal gas-works yield about 18 per cent of the entire annual expenditure of the city as profit; the water-works also yield an annual profit of about $220,000; and even the great sewerage system produces a net revenue of considerable amount through the annual rates imposed upon householders for the use of sewers.

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prohibit a private or local bill to amend the charter of a private corporation by regulating powers, rights, privileges, and franchises which it previously possessed. Such a bill may not be passed to give to an existing corporation any new right to lay down railroad tracks, or any new exclusive privileges or franchises, but it may be passed to regulate and control the right to lay down tracks previously existing, or to give new privileges or franchises, provided they be not exclusive. A bill may be passed waiving a forfeiture of corporate rights. Such a bill would confer no new rights upon the corporation, but would simply be a surrender or waiver by the sovereign of its right to claim a forfeiture. A bill may be passed to extend the time within which corporate rights may be exercised. Such a bill would give no new substantial rights, but would simply extend the time within which rights previously granted could be exercised. So a bill may be passed giving a private railroad corporation the right to use a new or different motive power, provided the right be not exclusive. . . . It must be conceded that a distinct provision in the general law, granting to a specified corporation the right to lay down railroad tracks, might be as much in conflict with the Constitution as if the grant were in a separate bill. As to such provision the bill would be a private bill (People *v.* Chautauqua Co. Sup., 43 N. Y. 10). The Constitution (sec. 1, art. 8) provides that all general and special laws for the formation of corporations may be altered or repealed; but where a special act was passed prior to 1875, creating a private corporation, an act to amend its charter would be a private one, and it could not, therefore, since January 1, 1875, grant the right to lay down railroad tracks. Nothing can be done by the legislature under the power to alter acts of incorporation which it could not constitutionally do by an original bill. The Constitution does not forbid the legislature to grant the right to lay down railroad tracks. It simply forbids that such grant shall be made by private or local bill, and permits it to be made under general laws."

In the Gilbert Elevated Ry. Case (70 N. Y. 361, 1877), *Church*, C. J., discussing the question whether a given local act, amending a charter which was older than the constitutional amendment, granted the right to lay down railroad tracks contrary to the Constitution, said: "The changes required were *restrictive* in character. By the charter the whole street was to be covered by the structure; by the conditions imposed only a portion of some streets could be occupied. We cannot determine as a matter of law whether this change will be a benefit or a burden upon the company, nor whether the street itself will be less or more convenient for the public and abutting owners, than with the original structure. The reduction of fares and the requirement for extra trains at half fare were clearly restrictive of existing rights. I cannot accede to the proposition that any change in the structure and in the manner of occupying the street, however restrictive upon the company or beneficial to the public in the use of the streets, constitute a fresh grant of the right to lay down railroad tracks. It is a misnomer to call such restrictions grants of any right whatever. As well might the cutting down of a fee to a life estate be termed a grant of land. The purpose of the corporation and its substantial powers were the same after as before the passage of the act, and if in imposing conditions some benefits accrued, such as an extension of time, and the like, these would not change the character of the act. True, the act declares that the corporation, upon complying with the conditions imposed, shall have 'like power' with corporations authorized to be created. It possessed like power before, and this clause must be construed as confirmatory of such power, as applied to the changes and restrictions required and imposed. The constitutional clause was designed, I think, to prohibit an original and independent grant of the right to lay down railroad tracks, including the powers incident thereto. I agree with the objectors that the legislature cannot grant this right under the guise of an amendment to an existing charter, any more than by an original grant. It would be incompetent to grant this right to a corporation organized for a different purpose; but, in my judgment, an act restricting and regulating an existing right to lay down railroad tracks is not a grant of that right within the meaning of this clause. It is not within the letter of the clause, nor within the evil at which the provision was aimed."

In Astor *v.* N. Y. Arcade Ry. Co. (*infra*, sec. 701 *c*), *Gray*, J., quoting the language of *Church*, C. J., *supra*, added: "I think the meaning of the decision is clear. If the legislative act operates upon a charter in the direction of a regulation, an adjustment or a restriction of powers possessed, it could not be objectionable. Within its reserved powers the legislature may at all times amend or alter the charter; but the constitutional amendment will not permit it by a private bill to make any new grant of rights comprehended within those specified by the amendment. I do not think that it can be said in the present case, that every substantial right given by the act of 1886 existed previously. For the reasons I have briefly given I think the act of 1886 practically gave to this corporation a right to lay down railroad tracks, which it could not have exercised under the act of 1873, and also gave what are practically exclusive privileges. I think it contravened the Constitution, in the letter and in the spirit, and is therefore void."

Underground street railways: In the N. Y. District Ry. Case (107 N. Y. 42), the court held that the constitutional amendment applied to underground railways. *Finch*, J., delivering the judgment of the court on this point, said: "Where the railway runs under the streets, the adjoining owners are as much, and as dangerously affected as when it is on the surface, or above them. Whether the new surface is safe and sufficient, or weak and perilous, and invites or frightens away passage; whether the openings obstruct or hinder access to the abutter, or pour through the ventilators smoke and steam upon his premises; whether his vaults and foundations will remain safe and secure, or be undermined, or weakened, by vibration; whether his gas and water supply will continue ample and convenient, and the new sewerage work him no injury, — all these are to him questions of vital importance, affecting his comfort and convenience, the success of his business, and the value of his property. The same reason which dictated a constitutional protection against roads on or above the surface of the streets apply to those which are built

the great cases of *Astor and Bailey against the New York Arcade Railway Company.* The suits were brought by the plaintiffs as abutting owners of property on Broadway and Madison Avenue in the city of New York, to restrain the defendant company from creating a public nuisance by the construction of *an underground railway* in those streets without authority of law. The company claimed legal authority to build such railway by virtue of certain local and private acts, (some passed before and some after the Constitutional Amendment took effect), which attempted to engraft railway powers upon an old pneumatic tube charter. It was unanimously held by the Court of Appeals, that the act of 1873 to this effect was in conflict with the provision of the Constitution of New York which ordains that "no private or local bill shall be passed which shall embrace more than one subject, and that shall be expressed in the title." It was also held that the local and private acts passed in 1881 and 1886, after the above mentioned Constitutional Amendment took effect, which by their terms conferred railway powers, were in conflict therewith, and therefore void. These local and private acts did not require the consent of the municipal authorities or of the lot-owners. The court, recognizing that the Constitutional Amendment originated in a public necessity, and that it was founded upon a wise policy designed to protect interesting public and private rights, upheld with vigor, firmness, and ability its great remedial purposes. Municipal interests of incalculable value and private property estimated at three hundred millions of dollars, were seriously affected by this legislation, which, if valid, left its owners, as well as the municipality, voiceless in respect of the question whether this railway ought to be built. Not only the vast interests that were at stake in these cases, but the rights of every municipality and of every owner of property abutting on streets in the State of New York, are by this authoritative exposition of the Constitutional Amendment rendered for the future secure against like unauthorized, covert, and oblique evasions of its protective provisions.[1]

beneath, in the manner here contemplated, and those would as justly be deemed 'street railroads' within the meaning of the phrase as used in the Constitution."

The effect of the constitutional amendment of January 1, 1875, in limiting the power of the legislature over *old charters* is brought into plain view by the decisions of the Court of Appeals in the several cases relating to the Brooklyn, Winfield & Newtown Ry. Co., reported in 72 N. Y. 245; 75 N. Y. 335, and 81 N. Y. 69.

[1] Astor *v.* New York Arcade Ry. Co., 113 N. Y. 93; Bailey *v.* Same, *Ib.* 615 (1889). *Earl*, J., delivering the opinion of the court, concludes: "While by the acts of 1874, of 1881, and of 1886, the charter of the corporation was amended and its powers greatly enlarged, pneumatic tubes, propulsion by atmospheric pressure, and pneumatic railways are no-

§ 702 (556). **Where the Fee is in the Public.** — If the *fee in the streets or highways is in the public*, or in the municipality in trust for public use, and is not in the abutter, the doctrine seems to be settled that the legislature may authorize them to be used by a railroad company in the construction of its road, without compensation to adjoining owners or to the municipality, and without the consent, and even against the wishes, of either.[1]

where mentioned, and all that is left as a result of all the legislation is a grand scheme for underground railways operated by any motive power except such as shall emit 'smoke, gas, or cinders,' which, if carried into effect, would doubtless be one of the marvels of the world. But if it is as desirable and safe as it is marvellous, it should be placed upon a constitutional basis, and make an undisguised appeal upon its merits for the public sanction. Our conclusion, therefore, is that the act of 1873, for the insufficiency of its title, is unconstitutional and void, and hence all subsequent legislation based upon that act must fall with it. When the act of 1886 was passed, under which the defendant proposes to lay down its tracks and to construct its underground railways, it had no power to construct an underground railway for the transportation of passengers and general freight through tunnels; and therefore, that act is in conflict with section 17 of article 3 of the Constitution, which forbids the legislature to pass a private or local bill granting to any corporation the right to lay down railroad tracks or to construct a street railroad, except upon conditions mentioned in that section." See also N. Y. Dist. Ry. Co., *In re*, 107 N. Y. 42.

[1] Clinton *v.* Cedar Rapids & Mo. R. R. Co., 24 Iowa, 455 (1868); s. p. People *v.* Kerr, 27 N. Y. 188; compare, however, the later N. Y. cases cited *ante*, secs. 701 *a*, 701 *b*, and see *infra*, secs. 704, 723 *a*–723 *d*; Lexington & O. R. R. Co. *v.* Applegate, 8 Dana (Ky.), 289; Elizabethtown, &c. R. R. Co. *v.* Thompson, 79 Ky. 52; Williams *v.* N. Y. Central R. R. Co., 16 N. Y. 97, *obiter*; Wager *v.* Troy U. R. R. Co., 25 N.Y. 526; note observations on page 533; Protzman *v.* Indianapolis & C. R. R. Co., 9 Ind. 467; 13 Ind. 353; 9 Ind. 557; see Cox *v.* Louisville, N. A. & C. R. R. Co., 48 Ind. 178; Dwengen *v.* Chicago & G. T. Ry. Co., 98 Ind. 153; Moses *v.* Pittsburgh, Ft. W. & C. R. R. Co., 21 Ill. 522. Distinguished, Indianapolis, B. & W. R. R. Co. *v.* Hartley, 67 Ill. 439 (1873); s. c. 16 Am. Rep. 24; s. c. 5 Chicago Legal News, 486, and disapproving *dicta* in 21 Ill. 516 and 29 Ill. 279. See other Illinois cases cited *ante*, sec. 701, note. Ingraham *v.* Chicago, D. & M. R. R. Co., 34 Iowa, 249 (1872); Davenport *v.* Stevenson, 34 Iowa, 225. Compare Kucheman *v.* Chicago, C. & D. Ry. Co., 46 Iowa, 366; Davis *v.* Chicago & N. W. Ry. Co., *Ib.* 389; Simplot *v.* Chicago, M. & St. P. Ry. Co., 5 McCrary C. C. R. 158. See Cooley Const. Lim. 555, 556, and notes; Hinchman *v.* Paterson Horse R. R. Co., 17 N. J. Eq. 75; Jersey City & B. R. R. Co. *v.* J. C. & H. H. R. R. Co., 20 N. J. Eq. 61; Jersey City *v.* Same, *Ib.* 360; Barnett *v.* Johnson, 15 N. J. Eq. 481; People *v.* Law, 34 Barb. 494; Phila. & R. R. R. Co. *v.* Philadelphia, 47 Pa. St. 325; Struthers *v.* Dunkirk, W. & P. Ry. Co., 87 Pa. St. 282; Carson *v.* Central R. R. Co., 35 Cal. 325 (1868). But see Weyl *v.* Sonoma Val. R. R. Co., 69 Cal. 202; Hogan *v.* Railroad Co., 71 Cal. 83; Ford *v.* Santa Cruz R. R. Co., 59 Cal. 290; Southern Pac. R. R. Co. *v.* Reed, 41 Cal. 256. City not liable to lot-owner. Davenport *v.* Stevenson, 34 Iowa, 225; Harrison *v.* New Orleans Pac. Ry. Co., 34 La. An. 462; Lorie *v.* North Chicago City Ry. Co., 32 Fed. Rep. 270; Fifth National Bank *v.* N. Y. Elevated R. R. Co., 24 Fed. Rep. 114; Gulf, Col. & S. F. R. R. *v.* Eddins, 60 Tex. 656; Same *v.* Fuller, 63 Tex. 467; Houston & Tex. C. R. R. Co. *v.* Odum, 53 Tex. 343; Central Branch U. P. R. R. Co. *v.* Andrews, 30 Kan. 590; Same *v.* Twine, 23 Kan. 585; Hedrick *v.* Olathe, 30 Kan. 348, where the city was held not liable though it had granted the entire width of

§ 703 (557). **Where the Fee is in the Abutter.** — But where the *public have only an easement in the street or highway,* it has been generally, but not always, held that against the proprietor of the soil the use of the street or highway for the purpose of a steam railroad is an additional burden, which, under the Constitutions of the different States, cannot be imposed by the legislature without compensation to such proprietor for the new servitude.[1]

a street to a railroad. This rule does not apply to cases where abutting owners sustain *special damages.* "We therefore hold that municipal authorities have no power to grant authority to permanently obstruct a street without compensation be made to lot-owners abutting thereon who suffer special damages by such obstruction." *Maxwell,* J., in Burlington & Mo. River R. R. Co. *v.* Reinhackle, 15 Neb. 279. In a useful note to sec. 115 of Lewis on Eminent Domain many of the decisions of the different States are collected. Mills Em. Dom., secs. 200, 204 *a.*

[1] Williams *v.* N. Y. Central R. R. Co., 16 N. Y. 97 (1857); Wager *v.* Troy U. R. R. Co., 25 N. Y. 526 (1862); Mahon *v.* N. Y. Central R. R. Co., 24 N. Y. 658; Fletcher *v.* Auburn & S. R. R. Co., 25 Wend. (N. Y.) 462; Bissell *v.* N. Y. Central R. R. Co., 23 N. Y. 61; Davis *v.* New York, 14 N. Y. 526; Carpenter *v.* Oswego & S. R. R. Co., 24 N. Y. 655; Clarke *v.* Blackmar, 47 N. Y. 150 (1871). See later cases in New York cited *ante,* sec. 701 *a.* So. Pac. R. R. Co. *v.* Reed, 41 Cal. 256; Ford *v.* Santa Cruz R. R. Co., 59 Cal. 290; Harrington *v.* St. Paul & S. C. R. R. Co., 17 Minn. 215, 224; Gray *v.* St. Paul & Pac. R. R. Co., 13 Minn. 315; Cash *v.* Union Depot, &c. Co., 32 Minn. 101; Williams *v.* Natural Br. Pl. R. Co., 21 Mo. 580; Randle *v.* Pac. R. R. Co., 65 Mo. 325; Swenson *v.* Lexington, 69 Mo. 157; Cross *v.* St. Louis, K. C. & N. Ry. Co., 77 Mo. 318; Ford *v.* Chicago & N. W. R. R. Co., 14 Wis. 609; Pomeroy *v.* Milwaukee & C. R. R. Co., 16 Wis. 640; Indianapolis R. R. Co. *v.* Hartley, *supra;* Perry *v.* New Orleans, M. & C. Co., 55 Ala. 413; Carli *v.* Stillwater Street Ry. & T. Co., 28 Minn. 373 (a street railroad connecting two steam railroads, upon which freight cars were drawn by horses). The rule stated in the text is not adopted in *Kentucky.* Elizabethtown & P. R. R. Co. *v.* Thompson, 79 Ky. 52. A power to grant the right to lay down railroad tracks in streets, only after obtaining the consent of a majority of the owners of lands bordering thereon, held not to authorize the exercise of the right of eminent domain in favor of roads operated by steam, because not providing for the compensation of the land owners. Chamberlain *v.* Elizabethport S. Cordage Co., 41 N. J. Eq. 43.

Discussing the subject referred to in secs. 701 and 702 of the text, the Supreme Court of *Illinois* says: "A distinction is made where the municipality granting the right to lay the track owns the fee in the street, and where the fee remains in the abutting land-owner and it seems to us that it rests on sound principles, and is supported by the highest authorities. Where the fee remains in the original proprietor it is immaterial how the public acquired an easement over the lands, whether by condemnation or by dedication; it is only for the use of ordinary travel, such as we are accustomed to see on streets or highways. In case the proprietor dedicated the land it was for no other purpose, and if it was condemned his damages were assessed with no other view. A different use of the land from that for which it was intended cannot be justified on the ground that a railway is an improved highway. Railway companies are only public corporations in a limited sense. The right of way, the road-bed and the carriages propelled thereon, are owned by private individuals and not by the public. Fares are charged for travel thereon for the exclusive benefit of the parties owning the road. They are constructed and equipped in the interest of private speculation, but at the same time they are intended to subserve the public good. The

§ 704.[1] **Rights of Abutter and of the Public; Existing State of the Law in respect thereto.** — The *two preceding sections* (702, 703)

travel on them bears no analogy to our notions of travel on an ordinary street or highway, where every one travels at pleasure in his own conveyance without paying tolls or fares. The uses are totally different, and even inconsistent. The one is exclusive, in favor of private interest, and the other is open and free to all. The doctrine most in consonance with our sense of justice is, where the fee of the street remains in the abutting land-owner, the corporation may grant the right to a railway company to lay its track along or across any street; but the company avails of its privilege at its peril. If in laying its track it causes a private injury to him who owns the fee in the adjoining premises, it must make good the damages sustained." Indianapolis, B. & W. R. R. Co. *v.* Hartley, 67 Ill. 439 (1873); s. c. 16 Am. Rep. 624; s. c. 5 Chicago Leg. News, 486. The same rules were applied to the construction of telegraph lines in streets, in Board of Trade Tel. Co. *v.* Barnett, 107 Ill. 507. And this, referring to the doctrine stated in the text, says Judge *Cooley,* appears to be the weight of judicial authority. Const. Lim. 549. Such is also the opinion of Judge *Redfield.* Redfield on Railways, sec. 76, and note. Lewis (Em. Dom. sec. 115) says that where the fee is in the abutter the great weight of authority is that he may recover; that where it is in the public the authorities leave the abutter's right to recover in much doubt, and the learned author collects many of the cases in his note. The question is examined with great fulness of research in Kucheman *v.* Chicago, C. & D. Ry. Co., 46 Iowa, 366 (1877), and there was considerable diversity of opinion among the judges. See Mulholland *v.* Des Moines, A. & W. Ry. Co., 60 Iowa, 740; Morgan *v.* Des Moines & St. P. Ry. Co., 64 Iowa, 589. See Barney *v.* Keokuk, 94 U. S. 324 (1876); s. c. below, 4 Dillon, 593. Text cited, Atchison & Neb. R. R. Co. *v.* Garside, 10 Kan. 552, 565 (1873). An owner of land adjoining, but not including any portion of, a street cannot enjoin the obstruction of the street by a railroad, acting under municipal authority, unless his injury is of a different character, and not merely in degree, from that suffered by the public in general. Crowley *v.* Davis, 63 Cal. 460, following Payne *v.* McKinley, 54 Cal. 532, and Bigley *v.* Nunan, 53 Cal. 403. In *Ohio* an owner of abutting property who suffers material injury by the construction of a railroad in a street may enjoin the construction until the right of constructing is acquired under proceedings in condemnation, and it is not material whether he or the city owns the fee in the street. Scioto Val. Ry. Co. *v.* Lawrence, 38 Ohio St. 41.

It is now established as law in *New York,* by the cases above cited (secs. 701 *a,* 702, 703), that the use of a street or highway for a steam railroad is an *additional* burden beyond the public easement, which cannot be imposed by the legislature directly, or by a municipal corporation derivatively, without compensation to the abutter, whether it be city lots or country property; that such use, without his consent or without acquiring the right under the law, by compensating him for it, is a wrong, for which trespass will lie, or ejectment to recover possession of the land, subject to the public easement. Where the statute authorizes a railroad company to acquire only the *use* of lands for operating its road, the fee remains with the owner, and the railroad company can grant to a city no greater rights than it possesses; and on the abandonment of the *specific* use, the owner of the fee may re-enter, and cannot be deprived of his rights by legislative enactment without compensation. Heard *v.* Brooklyn, 60 N. Y. 242 (1875). Such a case is distinguishable from one where the *fee* is granted or taken, for then the owner has no reversionary interest. Heath *v.* Barmore, 50 N. Y. 302; *ante,* sec. 589. See

[1] New section: the section numbered 704 in previous editions is now embodied in the note to sec. 703. *Post,* sec. 734 *a.*