although written nearly twenty years ago, the author allows to stand in this edition without change, since they correctly summarized the state of the law as it then existed. It will be seen that many of the cases cited make the rights of the abutter and the correlative rights of the public to depend in material respects upon whether the fee of the street or highway is in the one or the other. At that time it was very generally, indeed almost universally, held that if the fee was in the public, it was competent for the legislature to authorize the use of the streets by a steam railway company without compensation to the abutter. And it was likewise almost as universally held that if the fee was in the abutter it was not competent for the legislature to authorize such use without compensation to him. Since then, by special constitutional provisions in a number of the States, by legislative provisions in perhaps a still greater number, and by the general current of judicial judgment, the law has been tending towards the abrogation, in many respects at least, of the distinction that the rights of the abutter on the one hand, and of the public on the other, are essentially different whether the bare fee of the street or highway is in the one or the other, and towards the establishment of the doctrine that in either case the construction and operation of a steam railway upon a street or highway is not a normal or legitimate highway or street use, but is an additional servitude, for which the abutter is, under the Constitution, entitled to damages, and

supra, sec. 701 *a; infra*, secs. 704, 723 *a*–723 *d*. Consult Porter *v.* No. Mo. R. R. Co., 33 Mo. 128. See So. Car. R. R. Co. *v.* Steiner, 44 Ga. 546. In the absence of special constitutional restrictions, and where property rights are not invaded, the power of the legislature over all streets and highways and public places, and their *uses*, is plenary. The leading case in Pennsylvania on this subject is The Commonwealth *v* Phila. & Trenton R. R. Co., 6 Whart. (Pa.) 25; affirmed, 27 Pa. St. 339, 354; criticised, Williams *v.* N. Y. Central R. R. Co., 16 N. Y. 97, 106. See, also, O'Connor *v.* Pittsburgh, 18 Pa. St. 187, 189; Commonweath *v.* Passmore, 1 Serg. & R. 217; approved, Chicago *v.* Robbins, 2 Black (U. S.), 418; Struthers *v.* Dunkirk, W. & P. Ry. Co., 87 Pa. St. 282; Pusey *v.* Allegheny, 98 Pa. St. 526; Reading *v.* Althouse, 93 Pa. St. 400. A railroad proposed to be built exclusively *under the surface of a street* is a "street railroad" within the meaning of the Constitution of New York declaring that no law shall authorize the construction of a street railroad except upon the consent of the owners of one-half of the adjacent property, &c. New York District Ry. Co., *In re*, 107 N. Y. 42 (1887).

In *Georgia* legislative authority to a railroad company to use a public street for its track and trains does not exempt the company from liability for injuries to the adjoining property caused by smoke, noise, shaking down plastering, &c.; but *quære*. So. Car. R. R. Co. *v.* Steiner, 44 Ga. 546 (1871). If a party dedicates a public street through his land, and a railroad company afterwards procures a condemnation of land along the street for its track, and damages are awarded him therefor, this is no reason why he should not be awarded further damages, to be paid by another railroad company which seeks to build another track on the same street. So. Pac. R. R. Co. *v.* Reed, 41 Cal. 156 (1871).

of which right he cannot be deprived by the legislature without his consent or without compensation. We do not assume to say that this distinction, so repeatedly asserted as the essential groundwork of the judicial reasonings on this subject, is wholly overthrown. It may, however, be safely affirmed that it is, in important respects, seriously impaired, and that it seems likely, either as a result of positive provisions or of judicial reconsideration, that it will largely disappear. If in any given State or instance, the public has the *absolute fee* of the street or highway, and not a *qualified fee for street or highway uses proper*, it may well be that the legislature, as the representative of the public, may, in the absence of special constitutional restraint, authorize a railway company to use such street or highway for its road-bed without compensation to the abutter. But if the fee in the public is limited, expressly or by fair construction, to street and highway uses proper, the author's judgment is, that the scope of legislative power, as against the abutter's *property rights* in the street, even although these rights are *incorporeal*, is no greater than where the fee is in the abutter subject to an easement in the public for all legitimate street uses. If so, and in either event, since such a use of the highway or street is specially beneficial to the grantee of the franchise, or even to the public, yet as it is specially injurious to the abutting owner, it would seem to be the dictate of natural justice that for such use the latter's right to compensation should be regarded as a right of property not subject to the absolute control of the legislature.

§ 704 *a*. **Same subject.** — Many of the adjudged cases in the different States have been made *to turn upon the question whether the fee of the street was in the public or in the abutting owner*, and in many instances without any close inquiry as to the exact nature of the trusts attached to the fee. If the fee in the public is absolute (which it rarely is) and is not limited to street uses proper, there may well be substantial ground for the distinction; and so there may be, if by legislation or by grant the abutter has the fee for all purposes, except for some specific and definite public use within which a proposed new use does not come. A more deliberate reconsideration of the whole subject is necessary, for on the authorities as they stand, the rights of the abutter, as affected by the question of the location of the fee, must be confessed to be in many respects uncertain, leaving the law in an unsatisfactory condition; what was supposed to have been settled has been questioned and disturbed, if not undermined. It is obvious that the law on the subject is in a transitional state, and is undergoing those stages of discus-

sion and development that necessarily precede the final ascertainment of sound and true doctrines. It seemed plausible to solve the difficulties by a compendious reference to the fee; but a plausible doctrine or distinction not founded in true wisdom will not stand after the course of experience shows that it is not consonant with justice or with an enlightened view of the complex rights involved. When such injustice is clearly perceived, the slow and conservative process of judicial revision and rectification commences, and must be undergone, unless, indeed, a more speedy legislative remedy is applied.[1]

§ 705 (558). **Delegated Municipal Authority.** — The legislature, instead of granting, by direct act or general legislation, the power to railroad companies to occupy streets for the purpose of building and operating their roads, *may delegate to municipalities the right to say when and upon what conditions*, if at all, the public streets within their limits may be thus used.[2] The usual and ordinary

[1] Since this section was written, and as it is passing through the press, the author observes with satisfaction that the Supreme Court of *Mississippi* has, in a well-considered opinion, reached the conclusions which are expressed in the text. Theobold *v.* Louisville, &c. Ry. Co., April, 1889; 40 Alb. Law Jour. 335. *Arnold*, C. J. says: "The weight of judicial authority undoubtedly is that where the public have only an easement in the street, and the fee of the soil of the street is retained in the abutting owner, under the constitutional guaranty of private property, a steam railroad cannot be lawfully constructed and operated thereon, against his will, and without compensation. A distinction is made by some of the authorities in cases where the fee in the soil of the street is in the public, the State, county, or city, and where it remains in the abutting owner; and in the first case the right of the abutting owner to compensation is denied, and in the latter it is recognized and allowed. We perceive no well-founded difference in principle in such distinction. If the fee is in the public, it is held in trust, expressly or impliedly, that the land shall be used as a street, and it cannot be applied to any other purpose without a breach of trust. It is only where the fee is in the public, free from any trust or duty, that it may be disposed of for any purpose that the public may deem proper. Whether the abutting owner has simply an easement in the street, while the fee is in the public or in some other owner, or whether he has both the fee and an easement, he is equally entitled to require that nothing shall be done in derogation of his rights."

[2] Mercer *v.* Pittsburgh, Ft. W. & C. R. R. Co., 36 Pa. St. 99 (1859); Pac. R. R. Co. *v.* Leavenworth, 1 Dillon C. C. R. 393 (1871); Slatten *v.* Des Moines Val. R. R. Co., 29 Iowa, 148; Merchants', &c. Co. *v.* Railway Co., 70 Iowa, 105; Heath *v.* Des Moines, &c. Ry. Co., 61 Iowa, 11; Philadelphia *v.* Lombard & S. S. P. R. R. Co., 3 Grant (Pa.), 403; Moses *v.* Pittsburgh, Ft. W. & C. R. R. Co., 21 Ill. 516; Geiger *v.* Filor, 8 Fla. 325; Perry *v.* N. O. M. & C. R. R. Co., 55 Ala. 413; Tate *v.* O. & Miss. R. R. Co., 7 Ind. 479; Brooklyn Central R. R. Co. *v.* Brooklyn City R. R. Co., 32 Barb. 358; New York & Harl. R. R. Co. *v.* New York, 1 Hilton (N. Y.), 562; Hoyle *v.* New Orleans City R. R. Co., 23 La. An. 535 (1871); So. Pac. R. R. Co. *v.* Reed, 41 Cal. 256; Mathews *v.* Kelsey, 58 Me. 56 (1870); Wolfe *v.* Cov. & Lex. R. R. Co., 15 B. Mon. (Ky.) 404; Commonwealth *v.* Erie & N. E. R. R. Co., 27 Pa. St. 339; People's Pass. Ry. Co. *v.* Memphis City R. R. Co., 10 Wall. 38; Brooklyn *v.* B.

powers of municipal corporations to regulate streets and keep them free from obstructions are not sufficient, it is believed, to empower

City R. R. Co., 47 N. Y. 475 (1872); Richmond, F. & Pot. R. R. Co. *v.* Richmond, 96 U. S. 521 (1877); s. c. 10 Chicago Leg. News, 379; Newark & N. Y. R. R. Co. *v.* Newark, 23 N. J. Eq. 515, 522; State *v.* Atlantic City Council, 34 N. J. L. 99; Paterson & Pas. H. R. R. Co. *v.* Paterson, 24 N. J. Eq. 158; State *v.* Hoboken, 35 N. J. L. 205. Charter authority to a city to authorize, with the abutter's consent, the laying of railroads on streets was held to refer to horse railways. Chamberlain *v.* Eliz. S. Cordage Co., 41 N. J. Eq. 43. The grant by a city of the right to use streets to lay down railroad tracks held *not* to be *revocable* after confirmation by the legislature. Nash *v.* Lowry, 37 Minn. 261; Harrison *v.* New Orleans Pac. Ry. Co., 34 La. An. 462; Burlington & Mo. River R. R. Co. *v.* Reinhackle, 15 Neb. 279. It is not competent for a city to authorize such use of a street, dedicated as a street, as will *destroy it as a thoroughfare* for the public use. Dubach *v.* Hannibal & St. Joseph R. R. Co., 89 Mo. 483; Story *v.* N. Y. Elev. R. R. Co., 90 N. Y. 122. The grant of a franchise to construct and operate a street railway is to be construed strictly and in favor of the public, as against those claiming under the grant; such a grant will *not prevent the city from a reasonable regulation* of the operation of the road, nor from levying a license tax upon it. Wyandotte *v.* Corrigan, 35 Kan. 21. Where a city, exercising power delegated to it by the legislature, made an absolute grant to a horse railway company to use certain streets, and the company, having accepted the grant, built its road at great expense, it was held that these acts *constituted a contract* on behalf of the State, which could not be impaired by subsequent legislation in the way of an amendment of the city charter. Hovelman *v.* Kansas City Horse R. R. Co., 79 Mo. 632; *ante*, sec. 371.

Where a railway company is, by law, authorized to mortgage its property and franchises, it may include in the mortgage its rights derived from a municipality granting to it a right of way through streets therein, with the right to construct its railroad thereon, and such rights and franchises pass to the purchaser at a foreclosure sale, and may be exercised by him, including the right to operate the railroad and take tolls thereon. The grantee, having constructed its road under such authority, has a vested right of property which cannot be destroyed by a direct repeal, or by the grant of the same rights over the same streets and route, unless the power to do this was reserved at the time. New Orleans, S. F. & L. R. R. Co. *v.* Delamore, 114 U. S. 501 (1884). The grant to a railway company of the right to occupy a street whether by ordinance or by charter *must plainly appear;* it should not be left to implication from general language which does not clearly show an intent to give the permission. So where authority to lay such tracks "as may be necessary to the convenient use of any depot-grounds said company may now own, or hereafter acquire, in the vicinity of or adjoining said line of road," without specific mention of streets, it was held that no authority was conferred over streets not named in a preceding part of the ordinance. Chicago, D. & U. R. R. Co. *v.* Chicago, 121 Ill. 176; see also, Heath *v.* Des Moines & St. L. Ry. Co., 61 Iowa, 11. A city has no authority to grant a right of way over a proposed extension of a street not opened or extended. Wichita & Western R. R. Co. *v.* Fechheimer, 36 Kan. 45.

Grant construed not to be *exclusive* in the grantee. Brooklyn City & N., &c. R. R. Co. *v.* Coney Island & B. R. R. Co., 35 Barb. 364; s. c. 18 N. Y., 160; Sixth Av. R. R. Co. *v.* Kerr, 45 Barb. 138; Louisville & P. R. R. Co. *v.* L. City Ry. Co., 2 Duvall (Ky.), 175. Effect of municipal condition that another company should have joint use of the track laid on certain streets. Jersey City & Hob. H. R. R. Co. *v.* J. C. & Bergen R. R. Co., 21 N. J. Eq. 550.

If a railroad company is authorized to occupy the street of a city, it possesses, as a necessary incident, the power to make a "turn out" within the limits of the street, to communicate with the depot on

them to authorize the use thereof for the purpose of constructing and operating thereon a *steam* railway, at least one between different towns in the State, since such powers are not to be enlarged by construction, and were not conferred for this purpose.[1]

the street. New Orleans & C. R. R. Co. *v.* Second Municipality, 1 La. An. 128; s. p. Knight *v.* Carrollton R. R. Co., 9 La. An. 284. Power to construct *railroad* in streets, held to include right to build sidings and branches to wharves. Black *v.* Phila. & R. R. R. Co., 58 Pa. St. 249; Philadelphia *v.* Same, *lb.* 253. Or to elevators. Clarke *v.* Blackmar, 47 N. Y. 150 (1871).

In *Kansas*, although the fee of streets is in the county as the agent of the public, the power to provide for and regulate the passage of railways thereon is in the municipality. Atchison & Neb. R. R. Co. *v.* Garside, 10 Kan. 552 (1873).

[1] Savannah, A. & G. R. R. Co. *v.* Shiels, 33 Ga. 601 (1863). In this case it was held that the usual municipal power over streets does not give the municipal authorities the right to authorize a railroad company to lay their track lengthwise on one of the streets of the city on a grade requiring deep excavations and high embankments, to the great damage of the adjoining owner. See People *v.* Carpenter, 1 Mich. 273; *infra*, secs. 706, 707. Chamberlain *v.* Eliz. S. Cordage Co., 41 N. J. Eq. 43; Perry *v.* N. O. M. & C. R. R. Co., 55 Ala. 413; State *v.* Hoboken, 35 N. J. L. 205; Davis *v.* New York, 14 N. Y. 506; Lawrence R. R. Co. *v.* Williams, 35 Ohio St. 168. In *Kentucky* the doctrine is that the municipal authorities may consent to the use of streets by railway companies. Lex. & O. R. R. Co. *v.* Applegate, 8 Dana (Ky.), 289 (1839); Wolfe *v.* Cov. & Lex. R. R. Co., 15 B. Mon. (Ky.) 404 (1854); Louisville & F. R. R. Co. *v.* Brown, 17 B. Mon. (Ky.) 763 (1856); Covington Street Ry. Co. *v.* Covington, 9 Bush, 127; Cosby *v.* Owensboro & R. R. R. Co., 10 Bush, 288 (1874). An act of the legislature authorized a street railway company to construct its railway along such streets of the city of Covington as "it may consider beneficial to its interest, and to which the city council may *consent*, authority for which is hereby given to said council to *make an agreement therefor*," — *Held*, to authorize an agreement between the company and the city by which, among other things, the former agreed to pay to the latter an annual *bonus*, or compensation, for the consent of the city. Covington Street Ry. Co. *v.* Covington, 9 Bush, 127 (1872). The general council *cannot by contract* deprive itself of the power to regulate the reconstruction of railways made necessary by the changes in the character of pavement used upon the streets of the city. Louisville City Ry. Co. *v.* Louisville, 8 Bush (Ky.), 415 (1871); *ante*, sec. 97. In *Iowa*, it has been decided that municipal corporations have the authority to authorize the use of streets by railway companies on such grade as their councils may prescribe; and that the company is not liable for the necessary damages to adjoining lot-owners, resulting from the proper exercise of the power thus conferred. Slatten *v.* Des Moines Val. R. R. Co., 29 Iowa, 148 (1870). But under the statute, as construed, the right of a railroad company to occupy, *lengthwise*, a public street against the wish of the municipal authorities is subject to equitable control and police regulations. Chicago, N. & S. R. R. Co. *v.* Mayor of Newton, 36 Iowa, 299 (1873); Inghraham *v.* Chic., D. & M. R. R. Co., 34 Iowa, 249. See Davenport *v.* Dav. & St. P. R. R. Co., 38 Iowa, 99 (1873). General power to construct a railroad does not give this right to *occupy a highway longitudinally*. Morris & E. R. R. Co. *v.* Newark, 2 Stockt. (10 N. J. Eq.) 352, 362. See *ante*, sec. 680, note, and the cases there cited. Under the statute of *Indiana*, granting to cities exclusive power over streets, they may confer upon railroad companies the right to lay their tracks over, along, or across streets and alleys. Kistner *v.* Indianapolis, 100 Ind. 210. In *Missouri* if a municipality duly empowered grants to a railroad company the right to lay its track upon a street, the right is confined to laying the track *upon the grade* of the street. Cross *v.* St. Louis, K. C. & N. Ry. Co., 77 Mo. 318; Tate *v.* Missouri, K. & T. R. R. Co., 64 Mo. 158.

§ 706 (559). **Municipality may affix Conditions to its Consent.** — Where, under the general statutes of a State, a railroad company was forbidden to construct and operate its road upon the streets of an incorporated city, "without the assent of the corporate authorities," these are *not limited to a simple granting or denial of the right of way*, but may prescribe conditions on which they will give their assent, and if these are accepted by the railroad company, they are binding upon the parties; and, accordingly, where the right of way along a street was granted by a city, on condition that the company should build a depot in a certain part of a city, and grade, rip-rap, and pave the street it used, and the company agreed to accept it on these terms, it was held that it could not hold and enjoy the grant, and not comply with the conditions on which it was made.[1]

The act of Congress laying off the city of Burlington, *Iowa*, "reserved from public sale a strip of land along the bank of a river, to remain forever for *public use as a highway*, and for *other public uses*." *Held*, that *abutting lot-owners* acquired no *title* thereto, but did acquire the right to have the public trusts observed; and *held*, also, that the city authorities, while they could not alien the dedicated property, could permit the same to be *used by a railway company* as a right of way for its road, or for such other public uses as would justify the exercise of the right of eminent domain. Cook *v.* Burlington, 30 Iowa, 94 (1870); s. c. 36 Iowa, 357 (1873); *ante*, secs. 648, 649.

Where the common council is authorized by the legislature to permit any railroad to be laid along any street, subject to the same compensation to adjoining owners allowed under the general railroad law, the *council may authorize the laying of a branch track to a private elevator*, and it is not requisite that the ordinance giving the authority should provide for the compensation, as that is provided for in the statute. Clarke *v.* Blackmar, 47 N. Y. 150 (1871). A railway or tramway operated for carrying grain to and from a grain elevator for the proprietors thereof, held to be only a private railway, which a city has no authority to permit to be placed and operated upon its streets. Mikesell *v.* Durkee, 36 Kan. 97.

[1] Pacific R. R. Co. *v.* Leavenworth, 1 Dillon C. C. R. 393 (1871); s. p. Northern Central Ry. Co. *v.* Baltimore, 21 Md. 93; Jersey City & B. R. R. Co. *v.* Jersey City & H. R. R. Co., 20 N. J. Eq. 61, 360 (1869); Indianapolis & Cinc. R. R. Co. *v.* Lawrenceburg, 34 Ind. 304 (1870); Richmond, F. & Pot. R. R. Co. *v.* Richmond, 96 U. S. 521; Detroit *v.* Det. Ry. Co., 43 N. W. Rep. 447; and see Fink *v.* St. Louis, 71 Mo. 52. A proviso in a grant of the right of way, that the horse railway shall be completed within a specified time, is a *condition subsequent;* the right of way vests at once subject to being defeated by the city for breach of the condition. Hovelman *v.* Kansas City Horse R. R. Co., 79 Mo. 632. In the same way, under a general act declaring that cities have no power to grant the use of streets to railways except *upon the petition of the owners* of one-half of the frontage upon the street, it is held that the power lies dormant until the petition is made. Hunt *v.* Chicago Horse & D. Ry. Co., 121 Ill. 638.

The Cantor Act: The New York Act of 1886 (chap. 642) provides that the municipal authorities *shall sell at auction* the franchise or privilege of using the streets for street railways "to the bidder who will agree to give the largest percentage per annum of the gross receipts, with adequate security." Under the act the municipal authorities *may grant or withhold consent*, and may *impose any conditions in their discretion*

§ 707 (560). **Authority to occupy and use Streets; How conferred and construed.** — Legislative authority to railroad companies to occupy the streets of an incorporated place, although it must exist to warrant the occupation, need not be expressly conferred, but may be given by necessary implication.[1] But a general grant to construct a railroad between certain *termini*, without prescribing its exact course or line, was considered to authorize the *crossing* of public highways, because this was necessary in order to execute the grant, but was not regarded as *prima facie* conferring the power *to occupy highways longitudinally.*[2]

upon which their consent will be given. But if certain conditions be specified by the authorities and inserted in the notice of sale, and the right or privilege be sold, no other and further conditions can be exacted of or imposed upon the successful bidder, who may compel by *mandamus* the proper officer of the city to accept and approve of a bond containing only the proper conditions. People *v.* Barnard, 110 N. Y. 548.

In The Pacific R. R. Co. *v.* Leavenworth, 1 Dillon C. C. R. 393 (1871), an ordinance and contract, special in their terms, were construed *to give the city a right to re-enter* and take possession of the street, and remove the railroad track, on the failure of the company to comply with the conditions of the ordinance granting to it the right of way. The case also considers the principles which will, in such cases, govern the chancellor in granting or denying a temporary injunction against the city, to restrain it from taking possession of the street, and removing the rails, and preventing the running of the trains of the company.

Remedy by injunction by and against city corporation. Brooklyn Steam Transit Co. *v.* Brooklyn, 78 N. Y. 524, 531; N. Y. Cable Co. *v.* New York, 104 N. Y. 38, 43; Clinton *v.* Cedar Rap. & Mo. R. R. R. Co., 24 Iowa, 455; s. c. *Ib.* 485, note; Northern Central R. R. Co. *v.* Baltimore, 21 Md. 93; Morris & E. R. R. Co. *v.* Newark, 10 N. J. Eq. 352; Milwaukee *v.* Milw. & Beloit R. R. Co., 7 Wis. 85; Jamestown *v.* Chicago, B. & N. R. R. Co., 69 Wis. 648; *ante*, secs. 662, note, 701 *c*, and note; *post*, sec. 708. *Remedy by injunction by adjoining owners.* Zabriskie *v.* Jersey City & B. R. R. Co., 13 N. J. Eq. 314; Hinchman *v.* Paterson Horse R. R. Co., 17 N. J. Eq. 75; Ford *v.* Chicago & N. W. R. R. Co., 14 Wis. 609; Milburn *v.* Cedar Rapids, 12 Iowa, 246; *infra*, sec. 708; *post*, chap. xxii.; Lewis Em. Dom. sec. 635, and cases; Lahr *v.* Metrop. Elev. Ry. Co., 104 N. Y. 268; Story *v.* N. Y. Elev. R. R. Co., 90 N. Y. 122; Indianapolis & St. L. R. R. Co. *v.* Calvert, 110 Ind. 555. Effect of delay by city in applying for injunction when assent has been given, but conditions have not been complied with. No. Cent. R. R. Co. *v.* Baltimore, 21 Md. 93; Clinton *v.* Cedar Rap. & Mo. R. R. R. Co., 24 Iowa, 485, note.

[1] *Ante*, sec. 705; Commonwealth *v.* Erie & N. E. R. R. Co., 27 Pa. St. 339; Allegheny *v.* Ohio & Pa. R. R. Co., 26 Pa. St. 355; State *v.* Hoboken, 35 N. J. L. 205; Atty.-General *v.* Morris & E. R. R. Co., 20 N. J. Eq. 530; Perry *v.* N. O., M. & C. R. R. Co., 55 Ala. 413; Covington Street Ry. Co. *v.* Covington, 9 Bush (Ky.), 127; *infra*, sec. 719.

The implication must be a necessary one, and the legislative intent must appear with great clearness, to justify a company in laying their track through the entire length of a street, with a grade requiring deep excavations and high embankments, injurious to the adjoining property. Savannah, A. & G. R. R. Co. *v.* Shiels, 33 Ga. 601 (1863).

[2] Clinton *v.* Cedar Rap. & Mo. R. R. R. Co., 24 Iowa, 455, 480 (1868); Springfield *v.* Conn. River R. R. Co., 4 Cush. 63 (1849), where the subject is fully considered by *Shaw*, C. J. The court held that if the road, chartered by the legislature, could not be built (in Cabotville) without using a street or highway, so much of such street or highway might be used, (although there were no express words to that effect in the charter), as should be "reasonably sufficient to accommodate all the interests concerned, and to accomplish the objects for which the grant was made." See also Roxbury *v.* Boston & Prov. R. R. Co., 6 Cush. 424 (1850); Brainard *v.* Conn. River R. R. Co., 7 Cush. 506; Moses *v.* Pittsburgh, Ft. W. & C. R. R. Co., 21 Ill. 516; Northeastern R. R. Co. *v.* Payne, 8 Rich. L. (S. C.) 177; Commonwealth *v.* Erie & N. E. R. R. Co., 27 Pa. St. 339; Attorney-General *v.* Morris & E. R. R. Co., 19 N. J. Eq. 386; Lewis Em. Dom. sec. 270; Chicago & W. I. R. R. Co. *v.* Dunbar, 100 Ill. 110. *Ante*, sec. 705, note.

The Macon and Brunswick Railroad Company, under its charter and amendments authorizing it to construct a railroad from the city of Brunswick *to* the city of Macon, and clothing it with the rights, privileges, and immunities of the Central Railroad, is authorized to construct its road *into* the city of Macon, and is not limited to the city line; and a private citizen cannot enjoin it from appropriating ground for the location of its track, because of its want of authority to come within the city limits. Hazlehurst, Rec'r, *v.* Freeman, Tr., 52 Ga. 245; see also Houston & Tex. C. R. R. Co. *v.* Odam, 53 Tex. 343. And where a railroad company was authorized by its charter to construct a road *from* a city to another place, it was held that it could build it from any point within the city. Appeal of the Western P. R. R. Co., 99 Pa. St. 155. But where a railroad had power to run its road *to* the city of Augusta, and to connect with other roads, it was decided it had no authority to run *through* the city. Augusta C. Council *v.* Port Royal & A. Ry. Co., 74 Ga. 658. Power to lay a railroad through a town held not to authorize use of streets. St. Louis, V. & T. H. R. R. Co. *v.* Haller, 82 Ill. 208.

By construction of the statute in *Massachusetts*, a railroad corporation is primarily liable to third persons for damages caused to their estates by raising a street of a city so that its railroad may pass under the same; and this primary liability is not changed or affected by the fact that the city takes from the railroad company a bond of indemnity. Gardiner *v.* Boston & Wor. R. R. Corp., 9 Cush. (Mass.) 1 (1851); *post*, sec. 933, note.

Where railroad alters highway it is bound, by effect of the legislation in *Massachusetts* and *Connecticut*, to restore the highway to a safe condition, and this obligation is a continuing one, and the railroad company cannot protect itself against the liability to indemnify the town on the ground that the statute of limitations would bar an action against the railroad company for the original construction of the nuisance. The town may look to the railroad company which constructed the nuisance; and it is no defence, *it seems*, that at the time of the accident the road is in the hands of another company as lessee. Hamden *v.* New Haven & N. Co., 27 Conn. 158 (1858); approving Lowell *v.* Boston & L. R. R. Corp., 23 Pick. (Mass.) 24; Wellcome *v.* Leeds, 51 Me. 313; Veazie *v.* Mayo, 45 Me. 560; s. c. 49 Me. 156.

"The *common-law rule* is that where a person or corporation is given the right to build a railroad, or make a canal, across a public highway, this gives them *no right to destroy it as a thoroughfare, but they are bound to restore or unite the highway* at their own expense, by some reasonably safe and convenient means of passage, although the statute contains no express provision to that effect. . . . This duty is founded upon the equitable principle that it was their act, done in pursuit of their own advantage, which rendered this work necessary, and therefore they, and not the public, should be burdened with its expense." *Mitchell*, J., in State *v.* St. Paul, Minneapolis & M. Ry. Co., 35 Minn. 131. In this case the court also construed a clause in the charter of the railroad company which required it to put a street used by it "*in such condition and state of repair as not to impair or interfere with its free and proper use*," saying: "It is also clear,

§ 708 (561). **Unauthorized use by Railway Company; Remedies.** — A railway company that lays out its road over or on a high-

way or street so as to obstruct it, without statute authority, express or by necessary implication, is liable to *indictment for creating and maintaining a nuisance.*[1] And the company *may be enjoined* from laying down their track by the public authorities, or by lot-owners specially injured.[2]

§ 709 (562). **General Statute and special Charter Provisions, How construed.** — Under general laws conferring upon railway companies the right of way over highways, and under special charters or general acts giving to incorporated places the right to grade, improve, regulate, and control public streets within their limits, embarrassing and difficult questions have arisen, depending for their

upon both reason and authority, that this duty is a *continuing* one. It is not fulfilled by simply putting the street, at the time the railroad is built, in such condition as not to impair or interfere with its free and proper use at that time, nor even by maintaining it in such condition as would have accomplished that end had the circumstances and conditions originally existing continued." *Mandamus lies to compel the railroad company* to discharge its duty to restore the highway to the proper condition. People *v.* Dutchess & C. R. R. Co., 58 N. Y. 152; State *v.* St. Paul, Minneapolis & M. Ry. Co., 35 Minn. 131 (to compel the construction of a viaduct). The scope and function of the writ in such cases is very fully considered in the case of People *v.* Dutchess & C. R. R. Co. Indianapolis & Cinc. R. R. Co. *v.* Lawrenceburg, 37 Ind. 489; *post*, sec. 836. Respective rights of railroad company, the municipal corporation, and lot-owners, growing out of the crossing of streets and highways by railroads: see, generally, Hughes *v.* Prov. & Wor. R. R. Co., 2 R. I. 493; Great Western R. R. Co. *v.* Decatur, 33 Ill. 381; Chicago, B. & Q. R. R. Co. *v.* Payne, 59 Ill. 534 (1871); Karst *v.* St. Paul, S. & T. F. R. R. Co. (change of grade damages), 22 Minn. 118 (1875); Nicholson *v.* N. Y. & N. H. R. R. Co., 22 Conn. 74; *post*, sec. 1037.

[1] Commonwealth *v.* Old Col. & F. R. R. R. Co., 14 Gray (Mass.), 93. In such case a property-owner may recover damages from the railroad company. Cain *v.* Chicago, R. I. & P. R. Co., 54 Iowa, 255; Stange *v.* Hill & W. D. St. Ry. Co., 54 Iowa, 669; Grand Rapids & I. R. R. Co. *v.* Heisel, 47 Mich. 393.

Remedy by indictment. Pittsburgh, Va. & C. Ry, Co. *v.* Commonwealth, 101 Pa. St. 192. *Post*, sec. 934, and cases.

[2] Savannah, A. & G. R. R. Co. *v.* Shiels, 33 Ga. 601 (1863); *supra*, secs. 659, 661, 706, note; Brooklyn Steam Transit Co. *v.* Brooklyn, 78 N. Y. 524, 531. City held to have power to lay a street over a railroad track. Hannibal *v.* Han. & St. J. R. R. Co., 49 Mo. 480; Hannibal *v.* Winchell, 57 Mo. 172 (1873); Columbus & Western Ry. Co. *v.* Witherow, 82 Ala. 190 (*injunction* granted in favor of an abutting owner); Bell *v.* Edwards, 37 La. An. 475; Fanning *v.* Osborne, 102 N. Y. 441, where at the suit of an owner of abutting property, the *operation* of such a road was enjoined. *Ante*, sec. 706, note; Index, title *Injunction; post*, sec. 908, note. On the ground that building a house on a street in the city of New York was a *public nuisance of a continuous nature, causing special grievance to the abutting lot-owners*, Chancellor *Kent* restrained the erection of the house. Corning *v.* Lowerre, 6 Johns. Ch. 439. The same principle applied to the unauthorized construction of railways in streets. Story *v.* Elevated R. R. Co., 90 N. Y. 122, 154. *Ante*, sec. 701 *c*. The court ordered that the injunction should not issue until the defendant had a reasonable time after the decision to acquire of the abutting owner the right to build and operate a road in front of him, by agreement, or by proceedings to condemn the same. *Ib.*, p. 179. *Post*, secs. 723 *a*-723 *d*.

solution upon the supposed intention of the legislature, to be collected from the body of the legislation on the subject.[1]

§ 710 (563). **City not liable in Damages for Unauthorized Grant.** — If a city, without authority in its charter or by statute, and without rent or compensation, licenses individuals to occupy for their *private benefit* a public street with a railroad, and other property owners suffer special damage, the city is not liable therefor, even though the licensees may have given it a bond of indemnity. Such licensees are not the agents of the city, and the license does not authorize them to do any damage to others. If it had the power to grant such a license, "that power would not authorize it to make itself responsible for the acts of others, from which neither it nor its citizens derived any benefit, and which were not done for the accommodation of the public travel and business."[2] Such a case

[1] Milburn *v.* Cedar Rapids, 12 Iowa, 246; Clinton *v.* Cedar Rap. & Mo. R. R. Co., 24 Iowa, 455; Tenn. & Ala. R. R. Co. *v.* Adams, 3 Head (Tenn.), 596; Drake *v.* Hudson River R. R. Co., 7 Barb. 508; Milhau *v.* Sharp, 15 Barb. 193; s. c. 27 N. Y. 611; Plant *v.* Long Island R. R. Co., 10 Barb. 26; Adams *v.* Saratoga & W. R. R. Co., 11 Barb. 414; So. Pacific R. R. Co. *v.* Reed, 41 Cal. 256. Nature of right of company in street as against the abutter. *Ib.;* Redfield on Railways, sec. 76; Burritt *v.* New Haven, 42 Conn. 174 (1875).

In *California* the condemnation of land in a street for the use of a railroad company, to enable it to lay and operate its track, gives it no title to the land condemned, or any interest in it, except a mere easement in common with the general public. So. Pacific R. R. Co. *v.* Reed, 41 Cal. 256 (1871).

Power in the charter of a city "to open, alter, abolish, widen, extend, grade, or otherwise improve or keep in repair streets," does not authorize the council thereof *to grant the right to a railroad company to obstruct the street* by permanent structures inconsistent with its use as a street. Lackland *v.* No. Mo. R. R. Co., 31 Mo. 180 (1860); Same *v.* Same, 34 Mo. 259. Read in connection, Porter *v.* No. Mo. R. R. Co., 33 Mo. 128. In the case last cited it appeared that in the charter of the company it was authorized by the legislature to build its road "along or across any State or county road or street, or wharves of any city," but it "shall not be so constructed as to prevent the public from using the road, street, or highway along or across which it may pass;" and it was held that the ordinary use by a railroad under this charter, with the consent of the municipality, of a street, was not a perversion of the highway from its original purposes, and that the resulting damage to adjoining property was *damnum absque injuria*. But the company is liable to one suffering special damages for using the street in an unauthorized and illegal manner. 34 Mo. 259, *supra;* Commonwealth *v.* Erie & N. E. R. R. Co., 27 Pa. St. 339. See St. Louis, V. & T. H. R. R. Co. *v.* Capps, 67 Ill. 607 (1873). *Measure of damages* where the lot-owner brings suits against the railroad company. Adams *v.* Hastings & Dak. R. R. Co., 18 Minn. 260 (1872); Pekin *v.* Winkel, 77 Ill. 56; Lewis Em. Dom. secs. 121, 129, 493; Lahr *v.* Metrop. Elev. Ry. Co., 104 N. Y. 268.

[2] Green *v.* Portland, 32 Me. (2 Reding.) 431 (1851); Roll *v.* Augusta Council, 34 Ga. 326 (1866).

"It is the settled law of this court, as well as in most of the other States of the Union, that it is a legitimate use of a street or highway to allow [under legislative authority] a railroad track to be laid down in it, and for so doing the city is