is to be distinguished from tortious acts done by the direction, procurement or sanction of a city corporation, for which it is liable.[1]

§ 711 (564). **Legislative Authority protects from Public Prosecution, but not from Liability to Abutter where his Property Rights are invaded.** — Where there is legislative authority, either immediately or through the authorized action of municipalities, for the occupation and use of streets for the uses of a railroad, this will protect the railway companies from prosecutions and suits for public nuisances, but it will not affect their liability to adjoining owners in those States where such owners are entitled to compensation for the additional servitude of such a use of their lands.[2] There are cases

not liable for any damages which may accrue to individuals." *Per Caton*, C. J., Murphy *v.* Chicago, 29 Ill. 279, 286 (1862); see *supra*, secs. 701, 702, 703, and notes, 704; *infra*, sec. 723; Davenport *v.* Stevenson, 34 Iowa, 225 (1872); Frith *v.* Dubuque, 45 Iowa, 406; see *supra*, sec. 702, note.

"We think it may be laid down broadly and upon general principles, that no city has any right or authority to give permission to any individual or corporation to construct or operate a *purely private railroad* upon any of the public streets of the city; and that all the statutes which have reference to railroad companies or others constructing or operating railroads through or upon the public streets of a city, simply have reference to such railroad companies as perform the duties of common or public carriers, and to such railroads as are public, or *quasi* public, in their character." *Valentine*, J., Mikesell *v.* Durkee, 34 Kan. 509; Heath *v.* Des Moines, &c. Ry. Co., 61 Iowa, 11; Macon *v.* Harris, 75 Ga. 761; State *v.* Trenton, 36 N. J. L. 79.

[1] Thayer *v.* Boston, 19 Pick. 511; 12 Pick. 184; *post*, chap. xxiii.

[2] Fletcher *v.* Auburn & S. R. R. Co., 25 Wend. 462 (1841); Mahon *v.* Utica & S. R. R. Co., Hill & D. Suppl. (N. Y.) 156; Hamilton *v.* N. Y. & H. R. R. Co., 9 Paige (N. Y.), 171; Drake *v.* Hudson River R. R. Co., 7 Barb. 508; Robinson *v.* N. Y. & Erie R. R. Co., 27 Barb. 512; Ford *v.* Chicago & N. W. R. R. Co., 14 Wis. 609 (1861); Protzman *v.* Indianapolis & Cinc. R. R. Co., 9 Ind. 467 (1857); Redfield on Railways, sec. 76, and notes; So. Pac. R. R. Co. *v.* Reed, 41 Cal. 256; see also *supra*, secs. 701–704, and notes; State *v.* St. Paul, Minneapolis & M. Ry. Co., 35 Minn. 131; Gulf, Col. & S. F. Ry. Co. *v.* Fuller, 63 Tex. 467.

"It is a legal solecism to call that a public nuisance which is maintained by public authority." Danville, H. & W. R. R. Co. *v.* Commonwealth, 73 Pa. St. 38; Randle *v.* Pacific R. R. Co., 65 Mo. 325, 333 (1877). The construction of a railroad track along a street, on which locomotives and trains of cars are used, is a new use or appropriation of the soil, and entitles the owner of the fee to an action for damages, and to all other remedies provided by law for the protection of rights to real property. Cox *v.* Louisville, N. A. & C. R. R. Co., 48 Ind. 178 (1874); s. P. St. Louis & T. H. R. R. Co. *v.* Capps, 67 Ill. 607 (1873); Cosby *v.* Owensboro & R. R. R. Co., 10 Bush (Ky.), 288 (1874); Indianapolis, B. & W. R. R. Co. *v.* Hartley, 67 Ill. 439 (1873); Cairo Railroad Co. *v.* People, 92 Ill. 170. See *supra*, secs. 701–704, and notes; *infra*, sec. 723. Damage from smoke, soot, or fire from locomotives thrown or blown into or against houses adjacent in such case will entitle the owner to recover therefor. *The measure of damage* in such cases will be the diminution of the value of the property occasioned by these circumstances, and not the difference between the value of the property before and after the building of the road. Eliz., L. & B. S. R. R. Co. *v.* Combs, 10 Bush (Ky.),

which hold that when railroad companies are authorized to use streets, either by the legislature or by competent municipal action, there is a liability, in certain cases, *to the adjoining proprietor for consequential damages, other than for property taken;* but elaborate treatment of questions of this character does not fall within the province of this work.[1]

382 (1874); *supra*, sec. 709, note. In *Pennsylvania*, in the absence of any express provision therefor in the charter, the company is not liable in damages for the annoyance arising from the noise, cinders, and smoke, and the hindrance to the passage of carriages. Struthers *v.* Dunkirk, W. & P. Ry. Co., 87 Pa. St. 282. See Story *v.* N. Y. Elev. R. R. C., 90 N. Y. 122; Lahr *v.* Metrop. Elev. Ry. Co., 104 N. Y. 268; Uline *v.* N. Y. Central & H. R. R. R. Co. (leading New York case on measure of damages) 101 N. Y. 98 (1886); Wheelock *v.* Noonan, 108 N. Y. 179 (1888); Reed *v.* State, 108 N. Y. 407 (1888).

[1] New Albany & S. R. R. Co. *v.* O'Daily, 13 Ind. 353 (1859); s. c. 12 Ind. 551; Lackland *v.* No. Mo. R. R. Co., 34 Mo. 259; Same *v.* Same, 31 Mo. 180; Porter *v.* Same, 33 Mo. 128; Hinchman *v.* Paterson Horse Ry. Co., 17 N. J. Eq. 75; Hogencamp *v.* Same, *Ib.* 83; Zabriskie *v.* Jersey City & B. R. R. Co., 13 N. J. Eq. 314; McLauchlin *v.* Charlotte & S. C. R. R. Co., 5 Rich. L. (S. C.) 583 (1850); Cinc. & S. G. Av. Street Ry. Co. *v.* Cumminsville, 14 Ohio St. 523; Atchison & Nev. R. R. Co. *v.* Garside, 10 Kan. 552 (1873), where the liability of the railroad company to the lot-owners is fully considered by *Valentine*, J.; Eliz., L. & B. S. R. R. Co. *v.* Combs, 10 Bush (Ky.), 382 (1874); s. c. 19 Am. Rep. 67; Pekin *v.* Brereton, 67 Ill. 477 (1873); s. c. 16 Am. Rep. 629.

Constitutional provisions have been ordained in recent years in several of the States, giving compensation for property "damaged" or "injured," as well as for property "taken." See *ante*, chap. xvi. on Eminent Domain, sec. 587 *a*, and note. Lewis on Eminent Domain, secs. 14–52, gives these and kindred provisions; and their judicial construction, in sec. 221 *et seq.* So Mills on Em. Dom., sec. 204 *a*. *Post*, secs. 995 *a*–995 *c*, 990, 992, and cases.

In *Illinois* cities are empowered to enforce police regulations as to the running of trains to secure protection to persons and property, and to compel railroad companies to raise or lower their tracks so as to conform to any grade which may at any time be established, and when such tracks run lengthwise of any street, alley, or highway to keep the same on a level with the street surface. Cairo & V. R. R. Co. *v.* People, 92 Ill. 179; Olney (City of) *v.* Wharf, 115 Ill. 519. Where tracks are laid in streets *connecting railroads with public warehouses, manufactories, wharves, &c., they are considered public* and for the public good. *Per Scholfield*, J. "In such cases the tracks so laid become in legal contemplation, to all intents and effects, tracks of the railway with which they are connected, and open to the public use and subject to the public control in all respects as other railway tracks are open to public use. We have not regarded the circumstances that they were laid with private funds, and that they terminated opposite or within convenient contiguity of a private manufacturing establishment, as materially affecting them and giving a private character to their use. . . . It may be, in such cases, that it is expected, or even that it is intended, that such tracks will be used almost entirely by the manufacturing establishment, yet, if there is no exclusion of an equal right of use by others, and this singleness of use is simply the result of location and convenience of access, it cannot affect the question." Chicago Dock & C. Co. *v.* Garrity, 115 Ill. 155, 167; see also Truesdale *v.* Peoria Grape Sugar Co., 101 Ill. 561; Mills *v.* Parlin, 106 Ill. 60. *Ante*, sec. 710, note.

In *Indiana*, the fee of the streets in towns and cities *seems* to be in the public; at all events, it is held that taking the street for the laying down of the track of a railroad is not taking such an "interest in the land" as, under the statute, will

§ 712. **Abutter may recover for Injuries to his Easements of Access, Light, and Air.** — There is a large class of cases in which no recovery can be had for mere consequential injuries to adjacent property from the construction of public improvements in the streets of towns and cities, the lot-owner holding subject to the right of the public to use the streets for any purpose consistent with the legitimate uses for which they were dedicated or acquired; but *lot-owners have a peculiar interest in the adjacent street,* viz., easements of access, light, and air, which are property or property rights, and as such are as inviolable as the property in the lots themselves; and they may recover from the company making such improvements such damages as they sustain by injuries to or invasions of such easements.[1]

§ 713 (565). **Municipal Control; Police Authority; Rate of Speed of Railway Trains; Obstructions.** — Resulting from the power over streets, and to protect the safety of citizens and their property, municipal corporations, in the absence of legislative restriction, may control the mode of propelling cars within their limits, may prohibit the use of steam power, and regulate the rate of speed.[1] Although a railway passing through the streets of a city under legislative authority is not a nuisance, yet if it is so operated as to be dangerous to private property, it may become a nuisance, and the company may be indicted, or otherwise proceeded against, accordingly.[2] A municipal corporation, by virtue of its police au-

entitle the adjoining proprietor to the statutory remedy for compensation. Such proprietor may sue for the consequential injury, but cannot *restrain* on the ground that a railroad in a city is a nuisance. New Albany & S. R. R. Co. *v.* O'Daily, 13 Ind. 353 (1859); s. c. 12 Ind. 551; Protzman *v.* Indianapolis, &c. R. R. Co., 9 Ind. 467 (1857). See Cox *v.* Louisville, N. A. & C. R. R. Co., 48 Ind. 178; Dwenger *v.* Chicago & G. T. Ry. Co., 98 Ind. 153; Terre Haute & L. R. R. Co. *v.* Bissell, 108 Ind. 113; compare with Story *v.* N. Y. Elev. R. R. Co., 90 N. Y. 122; Lahr *v.* Metrop. Elev. Ry. Co., 104 N. Y. 268; Pond *v.* Metrop. Elev. Ry. Co., 112 N. Y. 186 (1889). Further, as to nature of rights of adjoining lot-owner in street, regarding the use of the street as "appurtenant to the lot," and as property. Haynes *v.* Thomas, 7 Ind. 38; Crawford *v.* Delaware, 7 Ohio St. 459; Cook *v.* Burlington, 30 Iowa, 94, 102; *ante,* sec. 656 *a et seq.; post,* sec. 990, and note. City council cannot, by its license, give a railroad company such a right to lay down a track in a public street as will protect it from an action by the adjacent lot-owner who is injured by a change in the grade or elevation of the street. Protzman *v.* Indianapolis, &c. R. R. Co., 9 Ind. 467 (1857). Distinguished from Snyder *v.* Rockport, 6 Ind. 237 (1855). But see Slatten *v.* Des Moines Val. R. R. Co., 29 Iowa, 148. In *Iowa,* the code makes a distinction between steam railways and horse railways; owners of abutting lots being entitled to damages when steam railways are built along streets, but not when horse railways are so built. Sears *v.* Marshalltown Street Ry. Co., 65 Iowa, 742.

[1] Eliz., L. & B. S. R. R. *v.* Combs, 10 Bush (Ky.), 382 (1874); Indianapolis, B. & W. R. R. Co. *v.* Hartley, 67 Ill. 439 (1873); St. Louis, V. & T. H. R. R. Co. *v.* Capps, 67 Ill. 607 (1873); Stone *v.* Fairbury, P. & N. W. R. R. Co., 68 Ill. 394; Story *v.* N. Y. Elev. R. R. Co., 90 N. Y. 122; Lahr *v.* Metrop. Elev. Ry., 104 N. Y. 268; Uline *v.* N. Y. Central & H. R. R. R. Co., 101 N. Y. 98 (1886); Wheelock *v.* Noonan, 108 N. Y. 179; Reed *v.* State, 108 N. Y. 407 (1888); *supra,* secs. 701–704; Denver *v.* Bayer, 7 Col. 113; Sorensen *v.* Greeley, 10 Col. 369; Brakken *v.* Minneapolis & St. L. Ry. Co., 29 Minn. 41; see also Dillenbach *v.* Xenia, 41 Ohio St. 207.

[1] Donnaher *v.* State, 8 Sm. & Mar. (16 Miss.) 649 (1847); Redfield on Railways (6th ed.) sec. 226; Buffalo & N. F. R. R. Co. *v.* Buffalo, 5 Hill (N. Y.), 209. Supporting text. Richmond, F. & Pot. R. R. Co. *v.* Richmond, 96 U. S. 521 (1877). See Ordinances, *ante,* sec. 393. Whitson *v.* Franklin, 34 Ind. 392 (1870); Chicago, B. & Q. R. R. Co. *v.* Haggerty, 67 Ill. 113 (1873); Chicago, R. I. & P. R. R. Co. *v.* Reidy, 66 Ill. 43; Merz *v.* Missouri Pacific Ry. Co., 88 Mo. 672; Robertson *v.* Wabash, St. Louis & Pac. Ry. Co., 84 Mo. 119; North Chicago City Ry. Co. *v.* Lake View, 105 Ill. 183; Same *v.* Same, *Ib.* 207; Meyers *v.* Chicago, R. I. & P. R. Co., 57 Iowa, 555. An ordinance regulating the rate of speed of railroad trains in a city is not limited to such parts of it as are used by the public; it applies to switch-yards. Crowley *v.* Burlington, C. R. & N. Ry. Co., 65 Iowa, 658. Where an ordinance required that when an engine was used in the city, a man should ride in front of it when going forward and on the tender within twelve inches of the roadbed when going backward, it was held that its spirit and intent should be observed though a literal compliance was too dangerous for the man's safety. Baltimore & O. R. R. Co. *v.* Mali, 66 Md. 53. An incorporated town is authorized by statute to prohibit by ordinance riding or driving in its streets faster than an ordinary trot, and to inflict a fine therefor. Nealis *v.* Hayward, 48 Ind. 19 (1874). A person about to cross a railroad track upon the public street of a city, which has an ordinance limiting the speed of railroad trains, has a right to presume, until the contrary is made apparent, that the company will not run its trains in violation of such ordinance. The running of a railroad train within city limits at a prohibited rate of speed constitutes negligence *per se.* Where the statute imposes a duty, the failure to discharge this duty constitutes negligence; following Dodge *v.* B. C. R. & M. R. R. Co., 34 Iowa, 276. Correll *v.* B. C. R. & M. R. R. Co., 38 Iowa, 120. Bergman *v.* St. Louis, Iron Mountain & S. Ry. Co., 88 Mo. 678; Mahan *v.* Union Depot, &c. Co., 34 Minn. 29; Faber *v.* St. Paul, M. & M. Ry. Co., 29 Minn. 465. In order to justify a court in declaring void an ordinance *regulating the rate of speed of railway trains* in a city, as being in restraint of trade, "its unreasonableness or want of necessity as a measure for the protection of life and property should be clear, manifest, undoubted, so as to amount, not to a fair exercise, but to an abuse of discretion, or mere arbitrary exercise of the power of the council." *Gilfillan,* C. J., in Knoblock *v.* Chicago, Milwaukee & St. Paul Ry. Co., 31 Minn. 402.

A municipal regulation requiring street railroads to report quarterly the number of passengers carried is neither unreasonable nor in restraint of trade. St. Louis *v.* St. Louis R. R. Co., 89 Mo. 44.

A grant, by a municipal corporation to a railroad, of the right of way through land, made by an ordinance which requires the company to *fence in its road and maintain gates* at street crossings, is an exercise of the right of legislation, having the force of law within the city limits, and not merely a contract. Hayes *v.* Michigan Central R. R. Co., 111 U. S. 228. (In this case the general law under which the city was incorporated conferred upon cities power to require railroad companies to keep flagmen at crossings, and to "provide protection against injury to persons and property.")

[2] Hentz *v.* Long Island R. R. Co., 13 Barb. 646 (1852); State *v.* Tupper, Dudley L. (S. C.) 135 (1838). See, also, Redfield on Railways (6th ed.), sec. 226, and authorities there cited; Pierce on Railways, 245–248. Such an ordinance held to operate throughout entire limits of city, including portions not platted into lots.

thority and power over its streets, may enact an ordinance to prohibit cars from obstructing the crossing of its streets; and the court expressed the opinion that trains could be so made up, and the road so operated, as to make it unnecessary to block up the streets.[1]

§ 714. **Police Power over Railway Company occupying Streets.** — A railroad company incorporated under a general law, which by its terms is subject to amendment, is entitled to no exemption from the power of police regulation to which natural persons are subject in the use of their property. The legislature may, by subsequent act, *require the company to light* such portion of the railroad as is within a city or incorporated place.[2]

Whitson *v.* Franklin, 34 Ind. 392 (1870). Construction of *special charter* on the subject. State *v.* Jersey City, 29 N. J. L. 170 (1861); see *ante*, sec. 374, and notes. *Indictment*, *post*, secs. 865, note, 931, 933.

[1] Ill. Central R. R. Co. *v.* Galena, 40 Ill. 344 (1866); Toledo, P. & W. Ry. Co. *v.* Chenoa Trs., 43 Ill. 209; St. Louis, A. & T. H. R. R. Co. *v.* Belleville, 122 Ill. 376. An ordinance forbidding "any kind of obstruction" in the streets was deemed comprehensive enough to embrace the *obstruction of a street by a railroad company with its cars.* Ill. Central R. R. Co. *v.* Galena, 40 Ill. 344 (1866); Great Western R. R. Co. *v.* Decatur, 33 Ill. 381; Gahagan *v.* Boston & Lowell R. R. Co., 1 Allen (Mass.), 187. An ordinance passed by virtue of the police power and the general right to control streets, requiring a railroad company to keep *a flagman at a street crossing*, where there was but a single track and which was not an unusually dangerous crossing, was held to be unreasonable and void. Toledo, W. & W. Ry. Co. *v.* Jacksonville, 67 Ill. 37 (1873); s. c. 16 Am. Rep. 611. But a regulation *requiring a railroad company to place a flagman* at such places where danger to the public safety, in the judgment of prudent persons, might be apprehended at any time, would be a reasonable one, and could unquestionably be enforced. Toledo, W. & W. Ry. Co. *v.* Jacksonville, 67 Ill. 37 (1873).

As to duty of a railroad company to keep in repair new and substituted crossing in lieu of old and abandoned one, see People *v.* Chicago & A. R. R. Co., 67 Ill. 118 (1873). The relative powers, duties, and liabilities of municipal corporation and railroad company in respect to railway crossings over streets, under the legislation of *Connecticut*, are very fully considered, and former cases commented on, in Burritt *v.* New Haven, 42 Conn. 174 (1875). Railroads have no right to erect fences across platted streets or alleys though they are not in use nor in condition to be used by the public. Lathrop *v.* Central Iowa Ry. Co., 69 Iowa, 105. In *Kansas*, cities of the first class have power *to require railroads to erect viaducts* over their tracks at street crossings, and they may be compelled by *mandamus* to erect them. State *v.* Missouri Pacific Ry. Co., 33 Kan. 176.

[2] Cincinnati, H. & D. R. R. Co. *v.* Sullivan, 32 Ohio St. 152. The provision of the *Ohio* Munic. Code, chap. 32, — authorizing city and village councils by ordinance to require railroad corporations to light their roads, &c., and, on default, the lighting to be done at their expense, — is constitutional. On such default, the expense of such lighting may be assessed or declared a lien on any of the real estate of the corporation within the municipality. The expense of lighting is not a tax or assessment in the nature of a tax for local improvements, and cannot be summarily placed upon the county duplicate; it must be collected by suit in the name of the municipality, as prescribed in the Code, chap. xxxii., secs. 545–553. *Ib. Post*, sec. 720, and notes.

§ 715 (566). **Horse Railways in Streets; Municipal Control; Davis v. New York.** — The power of municipal corporations *to authorize the establishment of horse railways* within their limits, or to authorize the use of the public streets for that purpose, has presented some interesting questions for adjudication. In a leading case — Davis *v.* New York,[1] — it appeared that the city corporation, by its charter, possessed general power to open, alter, repair, and regulate the streets. By virtue of this power and without any express authority, mediately or immediately, from the *legislature*, the corporation of the city undertook, by resolution, to confer upon an association of persons the *exclusive* right to construct and maintain for a *term of years* a railway in Broadway for the transportation of passengers for profit. It was the opinion of five of the seven judges of the Court of Appeals taking part in the decision of the cause that the resolution was void. The judges delivering opinions discussed the question whether the municipal government, in the exercise of their authority over the streets, might construct, or by mere license, revocable at pleasure, authorize others to construct such a railway, but reached different conclusions upon it.[2]

§ 716 (567). **Same subject.** — The *judgment of the court in the case just mentioned* rests upon the sound principle that the powers of a corporation in respect to the control of its streets are held in trust for the public benefit, and cannot, unless clearly authorized by a valid legislative enactment, be surrendered or delegated by contract to private parties either corporate or natural. In this case there was no such authority, and hence the resolution of the council authorizing private persons to construct and operate a railroad upon certain terms, without power of revocation and without limit as to time, was not a license or act of legislation, but a contract; void, however, because if valid it would deprive the corporation of the control and regulation of its streets.[3] "Taking the whole ordinance together," says Comstock, J., in his opinion, "it is no less than an abrogation by the common council of their powers and duties over

[1] Davis *v.* New York, 14 N. Y. 506 (1856); see also Birmingham & P. M. St. Ry. Co. *v.* Birmingham St. Ry. Co., 79 Ala. 465; Newell *v.* Minn. &c. Ry. Co., 35 Minn. 112.

[2] By statute in *New York* (chaps. 65 and 642, Laws of 1866) cities may sell the right to construct street railroads to the highest bidder. In doing so they may impose conditions, but such conditions must be specified in the notice of sale, or they cannot be enforced. People *v.* Barnard, 110 N. Y. 548 (1888).

[3] Text quoted with approval. Des Moines Street R. R. Co. *v.* Des Moines Broad-Gauge St. Ry. Co., 73 Iowa, 513 (1887), where an *exclusive* grant to a street railroad company to use streets for thirty years was sustained as lawful under sec. 464 of the Code of Iowa. See Index, titles: *Contracts*, *Monopoly*, *Ordinances*.

and concerning the public streets, and a surrender of a considerable portion of those powers and duties into the hands of private individuals, or a private corporation. This the corporation of New York cannot do. Time and experience may give a very unfavorable solution to the question whether this railroad, or any railroad in Broadway, can be beneficial to the public; but the hands of the city government will be tied by the contract into which it has entered, and future change and improvement may be prevented by the voluntary surrender — in effect, in perpetuity — of its own powers. On this ground the ordinance is void."[1] This view was subsequently approved by the same court,[2] and is unquestionably sound.

§ 717 (568). **Legislative Sanction necessary to authorize Railways in Streets and Highways.** — In Great Britain, legislative authority or sanction is necessary to enable the town or others to occupy the streets or highways for the purpose of a horse or street railway;[3] and such is doubtless the law in this country.[4]

[1] *Per Comstock*, J., in Davis *v.* New York, 14 N. Y. 506, 532. That experience has since given a favorable solution to the question of a street railway in Broadway, does not at all impair the argument. The case of Davis *v.* New York is approved by *Clifford*, J., *arguendo*, in People's Railroad *v.* Memphis Railroad, 10 Wall. 38, 52; Citizens' Street Ry. Co. *v.* Jones, 34 Fed. Rep. 579.

[2] Milhau *v.* Sharp, 27 N. Y. 611 (1863); s. c. 15 Barb. 528; followed, Coleman *v.* Second Ave. R. R. Co., 38 N. Y. 201; Louisville City Ry. Co. *v.* Louisville, 8 Bush (Ky.), 415, 421; Covington Street Ry. Co. *v.* Covington, 9 Bush, 127. These cases are to be distinguished from Brooklyn *v.* Brooklyn City R. R. Co., 47 N. Y. 475 (1872); s. c. 7 Am. Rep. 469. See State *v.* Trenton, 36 N. J. L. 83; Protzman *v.* Indianapolis, &c. R. R. Co., 9 Ind. 468; Commonwealth *v.* Erie & M. E. R. R. Co., 27 Pa. St. 344; Stanley *v.* Davenport, 54 Iowa, 463 (1879); s. c. 9 C. L. J. 393; Hinchman *v.* Paterson Horse R. R. Co., 17 N. J. Eq. 75; Memphis City R. R. Co. *v.* Memphis, 4 Coldw. (Tenn.) 406 (1867); Richmond County Gasl. Co. *v.* Middletown (contract for gas), 59 N. Y. 228 (1874); *ante*, sec. 97. Where a gas company, with the permission of the municipal authorities, had laid down and was maintaining its pipes in the streets of a city, and a street railway company was wrongly informed by the employees of the gas company respecting the location of the latter's pipes, so that the railway track was laid over them, — *Held*, that while the gas company might be, yet in this case it was not, estopped from disturbing the railway track, in order to repair its property. Davenport Central R. R. Co. *v.* Davenport Gasl. Co., 43 Iowa, 301.

A city may determine what part of a street may be used by a horse railway. Where a grant has been made to a railway company to use the street generally, a subsequent grant to another company to use a particular portion will be protected after the road has been constructed under it. Fort Worth St. Ry. Co. *v.* Rosedale St. Ry. Co., 68 Tex. 169. See this case also for construction of ordinances granting use of streets conditionally.

[3] Galbreath *v.* Armour, 4 Bell App. Cas. 374; Queen *v.* Gas Co., 2 Ellis & El. 651; Queen *v.* Charlesworth, 16 Q. B. 1012; Regina *v.* Train, 9 Cox Cr. Cas. 180.

[4] Boston *v.* Richardson, 13 Allen, 146, 160, *per Gray*, J.; Denver & S. Ry. Co. *v.* Denver City Ry. Co., 2 Col. 673 (1875); Memphis City R. R. Co. *v.* Memphis, 4

Whether powers granted to a municipality will include the authority to consent to such a use of the streets by a company that is otherwise authorized thus to use them, is a question of construction when the authority is not conferred in express terms. If not thus conferred its existence will be denied unless upon the whole charter or legislation the implication is clear.[1]

§ 718 (569). **Special Charter Provision construed.** — The charter of New Orleans gave to the city the power "to *regulate* and *improve* streets," and to "regulate carts, &c., and vehicles of every description thereon;" and a State law, in relation to public improvements, declared that "no railroad, plank-road, or canal should be constructed through the streets of any incorporated city or town without the consent of the municipal council thereof." Under these circumstances, it was held competent for the city to grant the right of way in the streets to private individuals, for a specified time, for the purpose of laying down rails and running horse-cars over them, according to a tariff to be fixed by the common council.[2]

Coldw. (Tenn.) 406 (1867); State *v.* Hoboken, 35 N. J. L. 205; Newell *v.* Minneapolis, L. & M. Ry. Co., 35 Minn. 112; Mills Em. Dom. secs. 201–203, and cases cited; Redfield on Railways (3d ed.), p. 317, top, where the valuable report of this learned and able jurist to the *Massachusetts* legislature, in respect to the rights and interests of *street railways*, is reprinted. After stating that it is not competent for any one to lay a passenger railway in the streets at his option, and that municipalities cannot create such companies, Judge *Redfield*, in the report above mentioned, observes that "it is now entirely well settled that such a franchise in the highways can only be created by legislative grant. It is a franchise to carry passengers and to demand tolls. This is one of the prerogatives of sovereignty, and derivable only through the action of the legislature. . . . It is not like ordinary mechanical or manufacturing business, which any one may institute at pleasure." This report appears in 5th ed. of Redfield on page 328, top, vol. 1, following sec. 76, but is omitted entirely from the 6th edition — see page 330, top, first volume.

The Rapid-Transit Act of *New York*, authorizing an extensive system of rapid transit by *elevated railroads* through cities, was sustained against various objections to its constitutional validity. N. Y. Elevated R. R. Co., *In re*, 70 N. Y. 327; Gilbert Elevated Ry. Co., *In re*, *Ib.* 361 (1877). *Post*, secs. 723 *a*–723 *d*.

In the charter of a street railway company, it was authorized by the legislature to use the streets of a city upon obtaining the consent of the council, and by a supplement to the charter it was authorized to construct several tracks specified, no reference being made to any consent of the council; and it was decided that, as to such tracks, the consent of the council was unnecessary. Jersey City *v.* J. C. & B. R. R. Co., 20 N. J. Eq. 360 (1869).

[1] *Infra*, sec. 719. See Brown *v.* Duplessis, cited in next section. Newell *v.* Minneapolis, L. & M. Ry. Co., 35 Minn. 112, holding that general power over streets did not embrace the power to authorize the use of streets by horse railways.

[2] Brown *v.* Duplessis, 14 La. An. 842 (1859). The Supreme Court of *Louisiana*, in the case just cited, in holding that the adjacent lot-owners could not enjoin the city from authorizing the use of the public streets for laying down and operating horse railways, assign the following reasons for their judgment: "Streets, public walks, and quays are things which belong in common to all inhabitants of cities and other places, and to the use of which

§ 719 (570). **Charter Power of Municipalities as to Street Railways.** — Aside from the question as to the right of adjoining lot-owners to additional compensation, the legislature has, in the absence of special constitutional restriction, the undoubted power to authorize at pleasure the use of streets for railroad purposes; and the usual extensive powers conferred upon municipal corporations to improve and control streets and regulate their use, will, if there are no provisions showing a different legislative intent, it is believed, ordinarily authorize them to use or permit the use, in the usual manner, under municipal regulation, of a reasonable portion of the street *for horse railways*, provided they do not surrender or abdicate their legislative and police powers and functions with respect to the streets and the persons or corporations thus licensed to use them.[1] The legislature may authorize the municipalities to give or withhold an absolute assent to such a use of their streets, or it *may leave them free to annex conditions*, or it may itself require certain conditions to be met before the grant shall be made by the municipal authorities.[2]

all the inhabitants of a city or other place, and even strangers, are entitled in common (Civil Code, 449, 444, 445). Plaintiffs cannot, then, claim an exclusive use of the streets, or complain if their use be impeded by a similar use of the streets by other persons. . . . No citizen has a legal right to complain that the streets are used by other citizens in a peculiar manner, even if it cause him a little inconvenience, so long as he himself is allowed the free use of the streets in his peculiar mode. The streets are destined for public use, but not for a *particular* mode of public use. If the city of New Orleans wished to expend the money necessary for the laying of rails throughout the city, for the purpose of permitting all who wished to run their own cars thereupon, drawn by horses or mules, no one could complain [if it had the power thus to expend money] so long as it did not prevent other modes of traversing the streets; for travelling in cars on rails is one mode of using public streets, and there is no reason in the nature of things why it should be lawful to travel in a carriage or gig upon the streets, and not lawful to travel in a car upon rails fixed in the streets, but not so laid as to prevent the use of the streets by other modes of conveyance. If it does not suit the public coffers or the public convenience that the city should lay rails for the free use of the public, it follows from the premises [but see, on this point, Davis *v.* New York, *supra*] that the city has the prerogative of selling the right of way, for a specified time, to one or more persons, who shall lay rails and have the privilege of running cars, drawn by horses or mules, according to a tariff fixed by the common council. This does not impede the ordinary mode of use, promotes trade, unites distant parts of the city, benefits the health of citizens by enabling them to live beyond the crowded thoroughfares, and is not an alienation or appropriation of a portion of the public streets for private uses." *Per Cole*, J., in Brown *v.* Duplessis, 14 La. An. 842 (1859). *Ante*, secs. 97, 715, 716.

[1] But see *supra*, secs. 717, 718, and cases cited in the foregoing notes on this subject. As to *steam* railways in streets the legislative authority must appear by express provision or clear implication. *Supra*, sec. 707; Story's Case, 90 N. Y. 122, 160.

[2] No. Central R. R. Co. *v.* Baltimore, 21 Md. 93; Pacific R. R. Co. *v.* Leavenworth, 1 Dillon C. C. R. 393 (1871); Frankford & Phila. Pass. Ry. Co. *v.* Philadelphia, 58 Pa. St. 119 (1868); Moses *v.* Pittsburgh, Ft. W. & C. R. R. Co., 21 Ill. 522; Clinton *v.* Cedar Rap. & Mo. R. R. R. Co., 24 Iowa, 455; People *v.* Kerr, 27 N. Y. 188; Kellinger *v.* Forty-Second Street, &c. R. R. Co., 50 N. Y. 206 (1872); Hinchman *v.* Paterson Horse R. R. Co., 17 N. J. Eq. 75; Commonwealth *v.* Central Pass. Ry. Co., 52 Pa. St. 506; Philadelphia *v.* Lombard & S. S. Pass. R. R. Co., 3 Grant (Pa.), 403; New Albany & S. R. R. Co. *v.* O'Daily, 13 Ind. 353; Lex. & O. R. R. Co. *v.* Applegate, 8 Dana (Ky.), 289; Louisville City Ry. Co. *v.* Louisville, 4 Bush (Ky.), 478; Cosby *v.* Owensboro & R. R. R. Co., 10 Bush, 288 (1874); Tenn. & Ala. R. R. Co. *v.* Adams, 3 Head (Tenn.), 596; People *v.* N. Y. & Harlem R. R. Co., 45 Barb. 73; Sixth Av. R. R. Co. *v.* Kerr, 72 N. Y. 330; People *v.* Third Av. R. R. Co., 45 Barb. 63; McFarland *v.* Orange & N. H. C. R. R. Co., 13 N. J. Eq. 17; Brooklyn Central R. R. Co. *v.* B. City R. R. Co., 32 Barb. 358; N. Y. & Harlem R. R. Co. *v.* New York, 1 Hilton (N. Y.), 562; Mercer *v.* Pittsburgh, Ft. W. & C. R. R. Co., 36 Pa. St. 99 (1859); Memphis City R. R. Co. *v.* Memphis, 4 Coldw. (Tenn.) 406 (1867); Jersey City & B. R. R. Co. *v.* J. C. & Hob. H. R. R. Co., 20 N. J. Eq. 61 (1869); Damour *v.* Lyons, 44 Iowa, 276, citing text; Hodges *v.* Baltimore Union Pass. Ry. Co., 58 Md. 603.

The *extent of municipal power and control over street railways and common railways* depends, of course, on the charter of the company and that of the municipality, subject to the provisions of the Constitution. See State *v.* Hoboken, 30 N. J. L. 225; Middlesex R. R. Co. *v.* Wakefield (full discussion), 103 Mass. 261 (1869); Frankford Pass. Ry. Co. *v.* Philadelphia, 58 Pa. St. 119; New York *v.* Third Av. R. R. Co., 33 N. Y. 42; Philadelphia *v.* Lombard & S. S. Pass. R. R. Co., 3 Grant (Pa.), 403; Cinc. & S. G. Av. Street Ry. Co. *v.* Cumminsville, 14 Ohio St. 523; McFarland *v.* Orange & N. H. C. R. R. Co., 13 N. J. Eq. 17; State *v.* Jersey City, 29 N. J. L. 170; Pittsburgh & B. Pass. R. R. Co. *v.* Birmingham Bor., 51 Pa. St. 41; Wolfe *v.* Cov. & Lex. R. R. Co. 15 B. Mon. 404; Redfield on Railways, sec. 76, and notes; State *v.* Herod, 29 Iowa, 123 (1870); Slatten *v.* Des M. Val. R. R. Co., *Ib.* 148; Hobart *v.* Milwaukee City R. R. Co., 27 Wis. 194; s.c. 9 Am. Rep. 461, and notes; Louisville City Ry. Co. *v.* Louisville, 8 Bush, 415 (1871); Brooklyn *v.* Brooklyn City R. R. Co., 47 N. Y. 475 (1872); Coast Line R. R. Co. *v.* Cohen, 50 Ga. 451 (1873); Lewis Em. Dom. sec. 125, and cases; Mills Em. Dom. sec. 205, and cases. Relator had a grant from the city to lay a double track for a railroad on certain streets upon condition *inter alia* that no steam power should be used. It constructed and used a horse-railway. Afterwards it proposed to adopt the *cable system*, and applied to the commissioner of public works for a permit to make the necessary excavations in the street, which being refused, the relator sought to compel the granting of the permit by *mandamus*. It was held that he was not entitled to the writ, on the ground that the franchise granted did not embrace the right to excavate and use the streets for a cable road. People *v.* Newton, 112 N. Y. 396 (1889).

§ 720 (571). **Property Owner's Consent, when required, is jurisdictional; Police Control.** — Thus, by a statute of Ohio relating to the construction of street railways, city councils were prohibited from permitting their construction, without "the consent of a majority in interest of the owners of the property upon the street being first had and obtained;" and it was held that such consent was essential to the power of the city to grant such permission; and that the action of the city council giving permission did not conclude the property owner on the question whether the requisite majority had assented.[1] It was also decided in the same case that

[1] Roberts *v.* Easton, 19 Ohio St. 78 (1869); *ante*, secs. 521–532, 551.

a second or additional track was in the nature of a new enterprise, and required an independent consent of the property owners interested, and that those who had assented a year before to a single-track road could not be counted.[1] But even direct legislative authority to a street-passenger railway corporation to carry passengers in cars over the streets of a city does not exempt the corporation from municipal or police control. Indeed, the principle is a general one, that when a business is authorized to be conducted by a corporation within a municipality, the latter presumptively possesses the same right to regulate it that it possesses over the like business conducted by private persons.[2]

§ 721 (572). **Rights and Liabilities of the Company.** — Rails laid down by a horse railroad corporation in a public street *are the private property of the corporation,* so that a rival corporation cannot use them on the ground that they, as part of the public, have the right to travel and run cars anywhere on such street.[3] A street

[1] And it was further held in Roberts *v.* Easton, *supra,* that the act of the legislature forbidding city councils to permit the streets to be used for street railways without the assent of property owners thereon, recognizes in them such an interest as entitles *them* to an injunction against the construction of the road where the council granted permission without the requisite consent of the proprietors interested being obtained. *Ante,* sec. 661. *As to second track.* So. Pac. R. R. Co. *v.* Reed, 41 Cal. 256 (1871). See also Denver & S. Ry. Co. *v.* Denver City Ry. Co., 2 Col. 678 (1875); Lewis Em. Dom. sec. 117.

[2] Frankford Pass. Ry. Co. *v.* Philadelphia, 58 Pa. St. 119 (1868); State *v.* Herod, 29 Iowa, 123 (1870); Louisville City Ry. Co. *v.* Louisville, 4 Bush (Ky.), 478. So it has been held by the Supreme Court of New York in general term, that a street railway company has *no right to control or occupy any other portion of a street than that included between its tracks,* and cannot, by means of snow-plows, so deposit snow outside of its tracks as to interfere with the right of abutting owners to free access to and egress from their property, or with the right of the general public to use the street; the city having imposed upon it the duty of keeping the streets in proper condition for travel may, by ordinance, regulate the use of snow-plows by street railways. Broadway & Seventh Av. Ry. Co. *v.* New York, 49 Hun, 126. Streets cannot be used by a company to supply itself with depot or terminal facilities. Mahady *v.* Bushwick R. R. Co., 91 N. Y. 148; Barney *v.* Keokuk, 4 Dillon C. C. R. 593; s. c. affirmed, 94 U. S. 324. Lewis Em. Dom. sec. 637. *Ante,* sec. 714.

[3] Jersey City & B. R. R. Co. *v.* J. C. & Hob. H. R. R. Co., 20 N. J. Eq. 61 (1869); Brooklyn Central R. R. Co. *v.* B. City R. R. Co., 32 Barb. 358. See Denver & S. Ry. Co. *v.* Denver City Ry. Co., 2 Col. 673 (1875). Right of one company to *make crossing* over the track of another. Market Street Ry. Co. *v.* Central Ry. Co., 51 Cal. 583.

Taxation: Street railway companies have an easement in the land or street on which their track is laid; it is private property, *subject to taxation,* and, if no different provision be made, may be taxed as real property, or assessed for benefits derived from local improvements. No. Beach & M. R. R. Co.'s Appeal, 32 Cal. 499 (1867); *post,* sec. 789. *Preferential right to use of its track.* Passenger car on street railway is entitled, as against common vehicles, to *preference in the use of its rails,* and to an unobstructed road. Wilbrand *v.* Eighth Av. R. R. Co., 3 Bosw. (N. Y.) 314; s. p. Adolph *v.* Central

railway company authorized by the legislature to lay down its track upon the streets of a city, subject to such restrictions as the city council might impose, constructed its track under the direction of the city engineer, but in such a manner in crossing a gutter as *to cause surface waters to overflow and injure the property of an adjoining proprietor,* and it was held that the company was liable for the damages resulting from the improper construction of their track.[1] Where a street railway company, upon obtaining from the city authorities permission to lay down tracks upon the streets, covenanted in a bond executed to the city that it would *keep the pavement of the streets within the tracks,* and for a specified distance on each side

Park, &c. R. R. Co., 65 N. Y. 554 (1875). Municipal ordinance giving such preference sustained, and obstruction defined. State *v.* Foley, 31 Iowa, 527 (1871); s. c. 7 Am. Rep. 166; Commonwealth *v.* Temple, 14 Gray, 69. In *California,* a street railroad company was held to have only an equal right with the travelling public to the use of the street where its track is laid, with a few exceptions, such as, that the cars run on a track, and where a vehicle meets a car it must give way. Shea *v.* Potrero & B. V. R. R. Co., 44 Cal. 414 (1872); Mahady *v.* Bushwick R. R. Co., 91 N. Y. 148.

Liability ex delicto: It was held by the Commission of Appeals that a street car company was liable for a negligent injury to a person who was driving his wagon along the track of a street railroad. The court was of opinion that one has a right thus to use the track of the company at all times, if the preferred right of the cars to the use of the track be not unnecessarily interfered with. Adolph *v.* Central Park, &c. R. R. Co., 65 N. Y. 554 (1875), two judges dissenting.

Street railway company held *liable for an injury* to a traveller with carriage, caused by the projection of a spike, which ought not to have been permitted. Fash *v.* Third Av. R. R. Co., 1 Daly (N. Y.), 148. It is the duty of the company on the one hand, to exercise due care to avoid collisions, and the duty of travellers, on the other hand, to use proper diligence to avoid accidents and injuries. Liddy *v.* St. Louis R. R. Co., 40 Mo. 506; Lovett *v.* Salem & So. D. R. R. Co. (injury to boy), 9 Allen (Mass.), 557; Washington & G. R. R. Co. *v.* Gladmon (injury to child), 15 Wall. 401 (1872); Burton *v.* Phila., W. & B. R. R. Co., 4 Harring. (Del.) 252; Louisville & P. R. R. Co. *v.* Smith, 2 Duvall (Ky.), 556; State *v.* Foley, 31 Iowa, 527; Chicago City Ry. Co. *v.* Young, 62 Ill. 238 (1871); Covington Street Ry. Co. *v.* Packer (injury causing death), 9 Bush, 455 (1872); Whitaker *v.* Eighth Av. R. R. Co., 51 N. Y. 295 (1878); Mowrey *v.* Central City Ry. Co. (injury to child), 51 N. Y. 666 (1873).

In an action for damages against a street railroad company for running over a person on a street, where it appears that plaintiff was guilty of negligence directly contributing to the accident, he must show that the accident might have been avoided by defendant by the use of merely ordinary care. A driver is not bound to regulate his speed at such a rate as may be necessary to avoid harm to persons crossing the road in an unreasonable and improper manner. It is as much the duty of persons crossing the street to look out for vehicles as it is the duty of the driver to look out for those crossing the road. Where there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, there can be no recovery. Meyer *v.* Lindell Ry. Co., 6 Mo. App. 27 (1878). See, also, Cotton *v.* Wood, 8 C. B. N. S. 568; Williams *v.* Richards, 3 C. & K. 81; Cornman *v.* Eastern Counties Ry., 5 Jur. N. S. 657.

[1] Alton & U. A. Horse Ry. Co. *v.* Deitz, 50 Ill. 210 (1869). Lewis Em. Dom. sec. 89.