thereof, *in repair*, this is binding upon it; and if the covenant is broken, and the party injured recovers of the city, it has its remedy over against the railway company upon the contract for the full amount it has been adjudged to pay.[1] Under its police power and authority over streets a city may require street railway companies *to keep their tracks watered*, so as to be free from dust.[2]

[1] Brooklyn *v.* B. City R. R. Co., 47 N. Y. 475; s. c. 7 Am. Rep. 469; People *v.* Brooklyn, 65 N. Y. 349 (1875); Bloomfield & R. N. Gasl. Co. *v.* Calkins, 62 N. Y. 386. *Duty as to keeping street in repair.* A requirement in a street railway charter to "keep the surface of the street inside the rails, and for two feet four inches outside thereof, in good repair," — *Held*, to mean two feet four inches on each side of the track. People *v.* Fort Street & E. Ry. Co., 41 Mich. 413. An ordinance authorizing a street railway company to use streets, and providing that when the city should pave the streets the company should pave and keep *in repair the space between the tracks*, held to be a contract; a subsequent legislative act empowering the city to require the company *to pave an additional space* on each side of the track, declared void as impairing the obligation of a contract. Coast Line Ry. Co. *v.* Savannah, 30 Fed. Rep. 646. Under authority to that end a city may assess adjoining property to make street repairs, although a street railroad company has agreed with the city to keep a portion of the streets in repair. People *v.* Brooklyn, 65 N. Y. 349 (1875). Where, after a railroad was constructed, a new street was extended across it, a city ordinance required the company to make a crossing over it; but nothing in the company's charter or any general law imposed such duty, — *Held*, that the company was not liable to this new burden any more than an individual would be; that in imposing a burden, without regard to benefits, the ordinance was in violation of certain constitutional provisions; and that the legislature itself could not impose such a burden without compensation. Illinois Central R. R. Co. *v.* Bloomington, 76 Ill. 447 (1875). By a city charter the common council had full power over the streets and sidewalks, and authority to keep them in repair; and the street commissioners were authorized to make all necessary repairs therein. A railroad company, after constructing its road through certain of the streets, neglected, though requested by the commissioners, to restore such streets and the sidewalks thereon to their former condition of usefulness, as the statute required; and the commissioners procured the necessary repairs to be made, for which payment was made by the city. *Held*, that the city could recover from the company all reasonable expenses so incurred. Oconto *v.* Chicago & N. W. Ry. Co., 44 Wis. 231 (1878). Provisions of the charter establishing the general policy of repairing streets and sidewalks under the direction of the street commissioners, *at the expense of the adjoining lots*, held inapplicable to the repairs in question. *Ib.* The railroad company, whose neglect of its own legal duty compelled the city to make the repairs, is not in a position to question, on technical grounds, the authority of the council to appropriate city funds to pay for the same. *Ib.* See, also, New York *v.* Broadway & S. A. R. R. Co., 17 Hun, 242; *post*, sec. 1034. Where the grant of the use of streets to a horse railway company was coupled with the requirement that it should *keep the part of the street used by it in good repair*, it was held that the city could not afterwards compel the company to pave it in a certain way, nor punish its officers or employees for violating the ordinance by which such paving was required. Kansas City *v.* Corrigan, 86 Mo. 67. See, also, State, *ex rel. v.* Corrigan Street Ry. Co., 85 Mo. 263, holding also that a requirement to repair a street does not impose an obligation to repave it.

[2] City and Suburban Ry. Co. *v.* Savannah, 77 Ga. 731.

§ 722 (573). **Use for Horse-Railway not an Additional Servitude.** — Whether the *use of a street for a horse railway is an additional burden* upon the land of the adjoining proprietor, or upon his easements in the street, is a question upon which there is a diversity of judicial opinion. In New York the decisions on the subject are hardly satisfactory. In cases where, as in the city of New York, the city has a qualified fee in the streets, a horse railway is not considered to be a new servitude for which the adjacent owner is entitled to compensation. Otherwise if the fee of the street is in the adjacent owner; while in later cases the location of the bare fee is held not to make any substantial difference in the abutter's rights.[1] In Connecticut such a use is not a new servitude upon the street, although in that State it is declared to be the law that a street or

[1] In the case of The People *v.* Kerr, 27 N. Y. 188 (1863), relating to the construction of a horse railway in the streets of New York under the express authority of an act of the legislature, and without the assent of the city having been obtained, the court held (it appearing that the fee of the streets was in the city in trust for public uses as streets), that the construction of such a railroad, on the surface of the street, was a legitimate use, or could be so declared by the legislature, as had been done in that case; and it was consequently held that the abutter had no right to enjoin defendant company from such a use of the streets. The case of The People *v.* Kerr, and what precisely was decided therein, were much considered in the case of Kellinger *v.* Forty-Second Street, &c. R. R. Co., 50 N. Y. 206, and in Story *v.* N. Y. Elev. R. R. Co., 90 N. Y. 122, 157, 159, 171, 173, by which it would appear that it can only be regarded as determining that legislative authority to construct a street railroad on the surface of the streets of New York city, without a change of grade, and without providing for compensation to the abutter, is a legitimate exercise of the power to regulate the use of public streets for public purposes. The fee in the streets in *Kerr's Case* was in the city of New York, subject to a trust for street uses proper. But in Craig *v.* Rochester City & B. R. R. Co., 39 N. Y. 404 (1868), it was held by the Court of Appeals that the building and operation of a horse railway on the surface of the streets of Rochester, the fee being in the abutter, was an additional servitude which the legislature could not impose without compensation. It was further held that an uncompensated abutter could enjoin such a use of the street, although the common council of the city had given its consent. As precisely the opposite conclusion had been reached in the *Kerr Case* in respect to a horse railway in the streets of the city of New York, the difference of result can only be explained by the fact that in the *Kerr Case*, the fee of the streets was in the city in trust for public uses as streets, and in the *Craig Case* the fee was in the abutter, subject to the right of the public to use them for all proper street purposes. *Kellinger's Case*, 50 N. Y. 206 (1872), followed the doctrine of the *Kerr Case*. In *Kellinger's Case* the abutting owner of property on a street of New York city (the fee being in the city in trust for street uses), was held to have no action against the horse railway company because it laid its track so near the sidewalk, in front of the plaintiff's property, as not to leave a sufficient space for a vehicle to stand. This, said the court, was a mere consequential or incidental injury. "When it is determined," says *Church*, C. J., "that a horse railroad is a public use of the street, the question is settled, that incidental inconveniences must be submitted to." (p. 211.) Compare Story *v.* N. Y. Elev. R. R. Co., 90 N. Y. 122; Lahr *v.* Metrop. Elev. Ry. Co., 104 N. Y. 268. *Infra*, secs. 723, 723 *a*–723 *c*.

highway cannot be used for an *ordinary* railway without compensation for such use to the owner of the fee.[1] And such is the prevailing and general opinion of the courts.[2] The author regards the

[1] Elliott *v.* Fair Haven & W. R. R. Co., 32 Conn. 579; distinguished from Imlay *v.* Union Br. R. R. Co., 26 Conn. 249, and that case commented on.

[2] See opinion of *Ranney*, J., in Cinc. & S. G. Av. Ry. *v.* Cumminsville, 14 Ohio St. 523 (1863). And it is the opinion, also, of the learned Chancellor *Zabriskie*, that a steam railway is while a horse railway is not an additional servitude. Jersey City & B. R. R. Co. *v.* J. C. & Hob. H. R. R. Co., 20 N. J. Eq. 61 (1869). See, also, to same effect, the opinion of *Green*, Chancellor, in Hinchman *v.* Paterson H. R. R. Co., 17 N. J. Eq. 75 (1864), and 20 N. J. Eq. 360; Citizens' Coach Co. *v.* Camden H. R. R., 33 N. J. Eq. 267; West Jersey R. R. Co. *v.* Cape May & S. L. R. R. Co., 34 N. J. Eq. 164; Savannah & T. R. R. *v.* Savannah, 45 Ga. 602; Floyd County *v.* Rome Street R. R. Co., 77 Ga. 614. Upon a full consideration of the adjudged cases upon the point, the Supreme Court of *Wisconsin* adopts the view that a horse railway on the public streets is not a new burden entitling the owner of the fee to compensation, unless, to use the language of Chief Justice *Dixon*, "such owner shows that he will suffer some private and pecuniary injury by being deprived of that free access to his premises he would otherwise have and enjoy;" but it was held that the right of the owner of a store to have drays and vehicles stand transversely upon the street while discharging goods was not such an injury as to give the right to compensation. Hobart *v.* Milw. City R. R. Co., 27 Wis. 194 (1870); s. c. 9 Am. Rep. 461, and note. It may be observed that the same court holds differently as to ordinary steam railways. Ford *v.* Chicago & N. W. R. R. Co., 14 Wis. 616; Pomeroy *v.* Milw. & C. R. R. Co., 16 Wis. 640; State *v.* Corrigan Cons. Street Ry. Co., 85 Mo. 263; Peddicord *v.* Balt., C. & E. M. Pass. Ry. Co., 34 Md. 463; Hodges *v.* Balt. Union Pass. Ry. Co., 58 Md. 603; Grand Rapids & Ind. R. R. Co., *v.* Heisel, 47 Mich. 393; Sears *v.* Marshalltown Street Ry. Co., 65 Iowa, 742; Carson *v.* Central R. R. Co., 35 Cal. 325; and see cases cited in note to sec. 719, *infra; ante*, secs. 702, 703. See, also, Sargent *v.* Ohio & Miss. R. R. Co., 1 Handy, Cinc. Superior Court, 52; Commonwealth *v.* Temple, 14 Gray (Mass.), 75; *post*, sec. 725; Texas & Pac. Ry. Co. *v.* Rosedale Street Ry. Co., 64 Tex. 80. In *Massachusetts* a board of aldermen has full power to locate horse-railway tracks and regulate the running of cars thereon. A license to such railway corporation to reasonably use a highway is not such appropriation of an additional easement as, without special provision therefor, will entitle abutters to compensation; and it violates no constitutional right in that regard. Attorney-General *v.* Metrop. R. R. Co., 125 Mass. 515. Mr. Lewis in his recent elaborate work on Eminent Domain (sec. 124) says: "It has been determined in numerous decisions, and without dissent except in the State of New York, that the use of a street by a horse railroad constructed and operated in the ordinary manner, falls within the purpose for which streets are established, and consequently, that for any damage resulting from such use to the abutting owner, he can recover no compensation, whether the fee is in him or in the public." Mr. Mills, Em. Dom. sec. 205, refers to many of the cases, and deduces from them the same result. See, also, 1 Hare Am. Const. Law, 365.

Steam motors in public streets: The power of municipal authorities to authorize a "steam motor," to be used to propel horse cars upon the public streets, the fee whereof was in the municipality in trust for the public, was fully considered, under the laws of *Iowa*, by the Supreme Court of that State, in Stanley *v.* Davenport, 54 Iowa, 463 (1879); adhered to on rehearing at October term, 1880. It was decided on demurrer to the complaint that the city had no authority to permit a steam motor to be used upon its streets, and also (conceding the allegations of the complaint to be true) that the city was liable in damages to a traveller whose horse was frightened by the motor, and who was in consequence thrown out of his wagon and injured. After reviewing the decisions in *Iowa* and elsewhere, *Seevers*, J., in delivering the opinion of the court on the re-hearing, said:—

"No adjudication to which our attention has been called, and we believe it may be safely affirmed none exists, in which it has been held a city may authorize *a railroad operated by the use of steam* to occupy the streets of a city, unless authority to this effect has been granted by the sovereign power. It is said, all courts everywhere have for the last fifteen years, without a dissenting opinion, conceded the authority of cities to grant the use of streets for *horse railways;* because of this, it is further said, when it is admitted cities have authority to decide that one kind of advanced mode of travel may be allowed, their jurisdiction is conceded and cannot be controlled by the courts. We shall not stop to discuss either proposition. It will be conceded, if no change is made in the grade of the street, the weight of authority seems to be the city may authorize a horse railway to occupy the same. [See Sears *v.* Marshalltown Street Ry. Co., 65 Iowa, 742.] This doctrine is based on the ground, 'there is no annoyance from fire, smoke, steam-whistles, or rapid progress, and it does not signify that the street railroad has an exclusive right to use its own track when occasion requires.' Mills Em. Dom. sec. 205. It was so held in Hinchman *v.* Paterson Horse R. R. Co., 17 N. J. Eq. 75, and in that State the fee of the streets is in the abutting owner. It had been previously held in Starr *v.* Camden & Atl. R. R. Co., 24 N. J. L. 592, that a highway could not be occupied by a railroad operated by steam, with legislative consent, without compensating the abutting owner. Both these cases are referred to with approval in Jersey City & B. R. R. Co. *v.* J. C. & Hob. H. R. R. Co., 20 N. J. Eq. 61, upon the ground, it is presumed, stated in Springfield *v.* Conn. River R. R. Co., 4 Cush. (Mass.) 63, that where a road is operated by steam and by the general public also, the two uses are 'almost, if not wholly inconsistent with each other, so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated.' This doctrine has not, to our knowledge, been anywhere impugned. It does not therefore follow from the conceded proposition that a city may lawfully allow the streets to be occupied by a horse railroad, that it may do so when the road is operated by steam power." As to steam-engines in streets as a means of locomotion, see *post*, sec. 730, note. In *Minnesota*, where the fee of the soil of a street is in the owner of the abutting property, it is held that the use of a public street, with the permission of the municipal authorities, by a railway company which propels its cars by a *steam motor, enclosed in a cab*, is the use of it in aid of a passenger street railway, and is not the imposition of an additional servitude. Newell *v.* Minneapolis, Lyndale & M. Ry. Co., 35 Minn. 112.

appropriation under legislative authority of a reasonable portion of a street for a horse railway, constructed on the graduated surface of the street, and used under municipal regulation in the ordinary mode, to be such a use as falls within the purposes for which the streets are dedicated or acquired under the power of eminent domain. When thus authorized, and so regulated by the public authorities as not to destroy the ordinary and usual street uses, this is a public use within the fair scope of the intention of the proprietor when he dedicates the street or is paid for property to be used as a street. Such proprietor must be taken to contemplate all improved and more convenient modes of use which are reasonably consistent with the use of the street by ordinary vehicles, and in

the usual modes. There is solid ground to distinguish between horse railways in streets, as ordinarily laid and used, which do not exclude the public, and steam railways, which are generally so constructed as altogether to exclude a portion of the street from public use in the accustomed methods;[1] and there is much to recommend as sound the view that where property is dedicated to the public for a street, the dedicator must be presumed to intend that it may be used as a street in such way as the legislature representing the public, and best acquainted with the public needs, may authorize, the limitations being that such use must not deprive the abutter of *his* property rights and easements in the street, or destroy the ordinary uses of the street as a public and common highway open to all.[2]

§ 723 (574). **Same subject.** — Where the original proprietor parts with the fee, which is vested by statutes in some of the States in the public, or in the municipality for the use of the public, the courts concur in holding that the legislature may, in such case, authorize the street or highway to be used in the usual manner, under municipal regulation, for a street railway, without his consent and without compensation to him. And as above shown, there is almost a *consensus* of judicial opinion that a street railway is not an additional servitude even where the fee of the street is in the abutting owner.[3]

[1] Eichels *v.* Evansville Street Ry. Co., 78 Ind. 261, approving the text.

[2] Briggs *v.* Lewiston & A. Horse R. R. Co., 79 Me. 363 (1887), where it was said *obiter* that "the motor is not the criterion; it is rather the *use* of the street. A change of motor is not a change of use." In this case the horse railway company was authorized to use steam motors.

[3] People *v.* Kerr, 27 N. Y. 188–211; s. c. 37 Barb. 357; Kellinger *v.* Forty-Second Street R. R. Co., 50 N. Y. 206 (1872). See Story *v.* N. Y. Elev. R. R. Co., 90 N. Y. 122; Lahr *v.* Metrop. Elev. Ry. Co., 104 N. Y. 268; Clinton *v.* Cedar Rap. & Mo. R. R. R. Co., 24 Iowa, 455; Sears *v.* Marshalltown Street Ry. Co., 65 Iowa, 742; Lexington & O. R. R. Co. *v.* Applegate, 8 Dana (Ky.), 289; Williams *v.* N. Y. Central R. R. Co., 16 N. Y. 97, *obiter;* Wager *v.* Troy Union R. R. Co., 25 N. Y. 526, and note observations, 533; Protzman *v.* Indianapolis & Cinc. R. R. Co., 9 Ind. 467; New Albany & S. R. R. Co. *v.* O'Daily, 13 Ind. 353; Eichels *v.* Evansville Street Ry. Co., 78 Ind. 261; Moses *v.* Pittsburgh, Ft. W. & C. R. R. Co., 21 Ill. 522; Pac. R. R. Co. *v.* Leavenworth, 1 Dillon C. C. R. 393–402; Milburn *v.* Cedar Rapids, 12 Iowa, 246. Mr. Justice *Cooley's* observations on the general subject are valuable. Const. Lim. 545–557; *ante*, sec. 628 *et seq.* Mills Em. Dom. sec. 205. An *unreasonable use* of a street by a street railroad company — as by storing its cars on a side track — gives a right of action to an owner of adjoining property for the special injury. Mahady *v.* Bushwick R. R. Co., 91 N. Y. 148.

As to nature of the FRANCHISES *in a charter to build and operate a street railway*, see Redfield on Railways, sec. 76, and notes; Metrop. R. R. Co. *v.* Quincy R. R. Co., 12 Allen, 262; Louisville & P. R. R. Co. *v.* L. City Ry. Co., 2 Duvall (Ky.), 175; Brooklyn Central R. R. Co. *v.* B. City R. R. Co., 32 Barb. N. Y. 358; Chicago *v.* Evans, 24 Ill. 52; Jersey City & B. R. R. Co. *v.* J. C. & Hob. H. R. R. Co., 20 N. J. Eq. 61 (1869); Cinc. & S. G. Av. Street Ry. *v.* Cumminsville, 14 Ohio St. 523. This case holds that the mere use of a street for a street railway does not impose a new use, so as to give the abutters the right to compensation, but under a peculiar view in that State as to *effect of a change of grade* (see Crawford *v.* Delaware, 7 Ohio St. 459, and previous cases), grades once fixed and acted on cannot be altered to the damage of the adjacent lot-owner.

Where the fee of the street is in the corporation, the adjoining lot-owners have, in common with the public, the right to pass and repass, and also the right of free access to their premises; but mere inconvenience of such access occasioned by an authorized use of the street gives to the owner no ground for a private action; and therefore where the defendant, a street railway company, having the right to lay down its track in the street, laid the same so near the sidewalk in front of the plaintiff's premises as not to leave sufficient space for a vehicle to stand, thus incommoding the plaintiff and lessening the value of his premises, it was held (no negligence or wilfulness on the part of the defendant being shown, — as to the effect of which, if shown, *quære*) that the plaintiff had no cause of action. This was considered to be the necessary legal result of the decision in The People *v.* Kerr, *supra.* Kellinger *v.* Forty Second Street R. R. Co., 50 N. Y. 206 (1872). See Mahady *v.* Bushwick R. R. Co., 91 N. Y. 148; compare Story *v.* N. Y. Elev. R. R. Co., 90 N. Y. 122; *supra*, secs. 720, note, 722, note.

Where a city granted to a street railroad company the *right to lay a double track in its streets*, and thereupon the company expended a large amount of money in the enjoyment of the franchise thus conferred, the city cannot afterwards limit the company to a single track in a street through which it proposed to extend its line, by an amendment to the ordinance. Before the city can, in the exercise of its police power, limit the company to a single track, it must have been made to appear that the exercise of the right granted by the original ordinance wrought injury. Burlington *v.* Burlington Street Ry., 49 Iowa, 144. Nature of the rights of the company in *the street*, discussed by *Sawyer*, J., North Beach & M. R. R. Co's Appeal, 32 Cal. 499. As to right of city to withdraw its consent. Pat. & Pas. H. R. Co. *v.* Paterson, 24 N. J. Eq. 158; Detroit *v.* Det. Ry. Co., 43 N. W. Rep. 447. See Index, titles: *Contracts, Ordinances, Repeals.*

Rights of city under provision in charter of a street railway giving the city an *election to purchase at a future time.* Cambridge *v.* Cambridge R. R. Co., 10 Allen, 50. Effect of use, under legislative authority, of street by *plank-road company.* Bagg *v.* Detroit, 5 Mich. 336; *ante*, sec. 679, note.

§ 723 *a*. **Elevated Railways in Streets; New York Legislation and its Construction; Correlative Rights of the abutting Owner and of the Public; Scope of Legislative Power.** — The *construction and operation on a large scale of elevated steam railways* in certain streets of the cities of New York and Brooklyn, have given rise to interesting questions of general constitutional law concerning the respective rights of the abutting owners and of the public; concerning the legitimate uses of streets, and the extent of legislative power to determine or to enlarge such uses, and the limitations on such power; and to special questions of constitutional law concerning the franchises of the companies to construct their railways, as affected by the Constitutional Amendment of January 1, 1875, elsewhere referred to, on the subject of laying down railroad tracks in streets, and the construction and operation of street railways. The two

main railways, the *New York Elevated Railway* and the *Metropolitan Elevated Railway*, had been authorized by special charters which antedated the Constitutional Amendment just mentioned; but the railways were in part constructed under authority given by the *General Rapid Transit Act* of June 18, 1875, passed after that Amendment took effect.[1] In what are known as the *New York Elevated Company's Case*,[2] and the *Gilbert Elevated Company Case*,[3] the Court of Appeals decided that the prior special charters of the companies were, on the facts of those cases, unaffected by the Constitutional Amendment; and also that the General Rapid Transit Act, as applied to these companies, was constitutional. These judgments, which definitively established the validity of franchises to

[1] For *brief history of the legislation and litigation* relating to these Elevated Railroads, and for the earlier cases in lower court, see 3 Abbott's New Cases, 301 *et seq.*, note.

New York statutes relating to Elevated Roads: chap. 885, p. 2179, Act of June 17, 1872 (Gilbert Company); chap. 837, p. 1253, Act of June 26, 1873 (Amendment to same); chap. 275, p. 331, Act of June 28, 1874; chap. 606, p. 740, Act of June 18, 1875 (Rapid Transit Act). Statute regulating *management of trains* on Elevated Roads. Laws of 1881, p. 540, chap. 399.

Decisions construing statutes: Re N. Y. Elev. R. R. Co., 70 N. Y. 327; s. c. 3 Abb. N. C. 401 (1877). Affirming Sup. Ct., 7 Hun, 239, where the General Rapid Transit Act (chap. 606, L. 1875), was held constitutional. (Same ruling in matter of Gilbert Elev. Ry. Co., 70 N. Y. 361 (1877), affirming 9 Hun, 303.) Held also (*Ib.* 354), that the act makes provision for compensating abutting owners for any property rights they may have in streets. This ruling was approved in Metrop. Elev. Ry. Co., *In re*, 18 N. Y. Sup. Ct. Rep. 134 (1888), where it was further held that the *leasing of the road of a railway company* does not deprive the lessor of the right of eminent domain, citing Kip *v.* N. Y. & Harlem R. R. Co., 6 Hun, 24; 67 N. Y. 227, and N. Y., Lack. & W. Ry. Co., *In re*, 99 N. Y. 12.

The Rapid Transit Act (chap. 606, L. 1875) and General Railroad Act *prohibit any allowance or deduction on account of any real or supposed benefits* arising from the construction of the road. N. Y., West Shore & B. Ry. Co., *In re*, 35 Hun, 260; N. Y., Lack. & W. Ry. Co., *In re*, 29 Hun, 1.

Further construction of Rapid Transit Act. See N. Y. Elev. R. R. Co., *In re*, 70 N. Y. 327; Gilbert Elev. Ry. Co., *In re*, 70 N. Y. 361; Kings Co. Elev. R. R. Co., *In re*, 105 N. Y. 97; N. Y. Cable Ry. Co., *In re*, 109 N. Y. 32; East River Br. & C. I. S. Transit Co., *In re*, 26 Hun, 490; N. Y. Elev. R. R. Co., *In re*, 41 Hun, 502 (1886). *Map of route, &c.* South Brooklyn R. R. & T. Co., *In re*, 50 Hun, 405; 18 N. Y. St. Rep. 51 (1888), Sup. Ct. Gen. Term, *Barnard*, P. J. *Condemnation of lands, &c.* Proceedings to acquire lands, &c.; proof required. *Re* Metrop. Ry. Co. (Supreme Court, 1882), 14 Weekly Dig., 520. As to duty of commissioners under the Act to *specify the particular easements injured* for which they awarded compensation, and practice in such cases, see N. Y. Elev. R. R. Co., *In re*, 35 Hun, 414 (1885). *Entry on lands* is authorized on deposit of a sum equal to one-half of the assessed value of the property. Harper *v.* Brooklyn Elev. R. R. Co., Supreme Court, Special Term, N. Y. Daily Reg., Sept. 9, 1885. *Proceedings to condemn. Re* Metrop. Elev. Ry. Co., 18 N. Y. St. Rep. 134 (1888), Sup. Ct. Special Term, *Andrews*, J.

[2] N. Y. Elev. Ry. Co., *In re*, 70 N. Y. 327.

[3] Gilbert Elev. Ry. Co., *In re*, 70 N. Y. 361, and see cases cited in note to last section. The nature and extent of the abutter's rights were more fully determined in the cases referred to in the next section.

build, enabled these languishing companies to go forward and to complete their works. In public utility and usefulness, these railways have been thoroughly successful. In respect of rapidity, ease, comfort, and convenience, they reach the highest degree of perfection yet attained in urban travel.

§ 723 *b.* **Same subject.** — In almost numberless prior cases the courts of New York, as well as elsewhere, had considered the respective rights of the abutter and of the public as to the construction and operation of railways on the surface of public streets. In the group of Elevated Railway Cases referred to in the note, the court had to deal with like questions as to the use of the streets for steam railways *above the surface*, and particularly with the nature and extent of the abutter's rights in and to the street in front of him, and with the correlative rights of the public therein. The fundamental question was whether the legislative power over the uses of the streets was supreme and uncontrolled, or whether it was limited by rights and easements in the abutter which were property rights, and as such were under the protection of the Constitution, and like other property could only be taken or appropriated or damaged on the condition of making compensation to the abutter. The judgments of the Court of Appeals have not only settled the law on this subject in New York, but these judgments, particularly those in the leading cases of *Story*[1] and *Lahr*,[2] by the clear conception and luminous exposition of the dual rights involved, have done much towards removing the distressing uncertainty and obscurity in which the subject had been embarrassed and left by the prior course of decision in New York and elsewhere.

§ 723 *c.* **Same subject. Nature and Extent of Abutter's Rights.** — These judgments and those that follow them rest upon the foundation principle that whether the fee in the street is in the abutter, subject to the rights of the public, — that is, to the paramount rights of the public for *street uses proper*, — or whether the fee is in the public in trust for street uses proper, in either case, and equally in both cases, the abutter is entitled to the benefit of the street for all uses except street uses proper, — subject, of course, to legislative and municipal regulation; and that such rights are property or property rights in the abutter, which can only be taken away by the legislature on the condition of making compensation. And the abutting owner's right in the street is not affected by the source

[1] Story *v.* N. Y. Elev. R. R. Co., 90 N. Y. 122.

[2] Lahr *v.* Metrop. Elev. Ry. Co., 104 N. Y. 268.

from which he derives his title, as whether he claims through mesne conveyances upon a covenant by the city itself, as in the *Story* case, or whether the easement remains in him or his grantor by operation of law after proceedings *in invitum*, as in the *Lahr* case.[1] If the abutter owns the fee of the street, his rights may be said to be legal in their nature. If he does not own the fee, these rights are in the nature of equitable easements in fee, — the soil of the street being the servient, the abutting owner's lot being the dominant tenement. Among the most important of such rights or easements is the abutter's right to access, to light, and to air. The court accordingly held that so far as the elevated railway structures interfered with such rights or easements, while the legislature might authorize their erection and use, yet this could only be done as respects the abutter by the exercise of the right of eminent domain, viz., on the condition of making compensation to the abutting owner for the damage which his property actually sustained.[2] The result of the

[1] See next note.

[2] Story *v.* N. Y. Elev. R. R. Co., 90 N. Y. 122 (1882); s. c. 11 Abb. N. C. 236, note (reversing Common Pleas, 3 Abb. N. C. 478), by a divided court, *Miller*, *Earle*, and *Finch*, JJ., dissenting. Story's case is the leading case. Story's title was derived from the city of New York through mesne conveyances, the original grant from the city describing the property by reference to streets, and containing a covenant to construct the streets, adding: "Which several streets shall forever thereafter continue and be for the free and common passage of, and as public streets and ways for, the inhabitants of said city, and all others passing and returning through or by the same, in such manner as the other streets of the same city now are or lawfully ought to be." It was held, —

1. That by virtue of the grant of the city to plaintiff's grantors the plaintiff, as abutting owner, had a right in the street, entitling him to have it kept open and continued as a public street for the benefit of his abutting property. 2. That this right is an easement in the bed of the street, and is private property, which cannot be taken for public use without compensation under the Constitution. 3. That the structure of the Elevated Railroad is inconsistent with the use of the street as a public street. 4. That plaintiff's property had been taken by the Elevated Company for public use without compensation. 5. That as the acts of the Elevated Company were unlawful, and as its structure is permanent, plaintiff may enjoin its erection and continuance. 6. That by statute the Elevated Company has power to acquire property by exercising the right of eminent domain. 7. That the injunction should not issue until the defendant had reasonable time to acquire the property in a lawful way.

The decision in this case, although by a divided court, was subsequently declared to be *stare decisis* not only as to questions expressly decided, but as to such as logically come within the principles established by it. Lahr *v.* Metrop. Elev. Ry. Co., 104 N. Y. 268; Glover *v.* Manhattan Ry. Co., 51 Super. Ct. (19 J. & S.) 1, (1884). Lahr *v.* Metrop. Elev. Ry. Co., 104 N. Y. 268 (1887), is the sequel to Story's Case. In this case the street was laid out by the city by proceedings *in invitum*, under the Act of 1813, which provided that the fee should vest in the city in trust, to be "kept open for or as a part of a public street . . . forever, in like manner as the other public streets . . . of the city are or of right ought to be." The owner at the time — from whom plaintiff derived title — was assessed $425 for benefits over and above the value of the land taken. The parties agreed upon a rule for the assessment of the

author's reflections upon this subject is, that the views of the Court of Appeals are sound and just; sound, because they recognize the abutter's damages. The court reaffirmed Story's Case (90 N. Y. 122), holding that it was there "definitely determined," —

1. That an elevated road in the streets of a city, constructed as to form, equipment, and dimensions like the present road, and operated by steam power, &c., is a perversion of the use of the street from the purposes originally designed for it, and is a use which neither the city nor the legislature can legalize or sanction without providing for compensation for injuries sustained by abutting owners. 2. That abutters claiming title from the city *by grant* with a covenant, as set forth in the Story Case, acquire an easement in the bed of the street for ingress and egress, and for the free passage of light and air through and over the street for the benefit of their property. 3. That such easement is an interest in real estate which, under the Constitution that forbids the appropriation of private property for public use, without compensation, cannot be taken for use of this railroad without compensation. 4. That the erection of an elevated road, such as the one here in question, in a public street, is the taking of an easement and an appropriation of it by the railroad corporation, making it liable to abutters for damages occasioned by the taking.

It was further held in this (Lahr's) case, that the rights of abutters in such case is the same, whether they derive title from the city by grant with a covenant, as in the Story Case, or through mesne conveyances from an owner whose property was taken by the city for a public street by proceedings in condemnation under the Act of 1813. Nor is it essential that any land should have been originally taken from him, as his interest is acquired by the judgment of a competent tribunal. It was also held that the railroad company is liable for the injury occasioned by the distribution in the air of gas, smoke, steam, dust, cinders, ashes, and other unwholesome and deleterious substances, from its locomotives and trains, provided it is established that they were destructive of the easements of light, air, and access. The court said: "Any incident of the structure which necessarily increases and aggravates the injury must be subject to the same rule of damages." "However the damage may be inflicted, provided it be effected by an unlawful use of the street, it constitutes a trespass, rendering the wrong-doer liable for the consequences of his acts."

In Fifth National Bank *v.* N. Y. Elev. R. R. Co., 24 Fed. Rep. 114 (U. S. Cir. Ct., 1885), *Shipman*, J., seems to be of the opinion that an elevated railway on a street is not necessarily an additional servitude. He says: —

"An abutting owner holds his easement in the street *subordinate* to the rights of the public in the street; if the new structures are not inconsistent with or destructive of the uses for which the street was originally taken, he has no cause to complain. Until the streets are burdened with an occupancy which substantially injures them as thoroughfares for travel, and they are permanently subjected by the new structures to a new use which is subversive of the original use, the abutting owner, though he may suffer inconvenience, is not legally injured, because his easement is subject to the controlling right of the public; and if the street continues to be a thoroughfare for ordinary travel, in accordance with the objects for which it was originally laid out, no right of the abutting owner is trenched upon." A new trial was granted (verdict having been for plaintiff) for the reason that the court feared "that the jury were unintentionally led into the opinion that because a new and permanent structure for the purposes of a steam road had been placed over a street of one hundred feet in width, therefore they were permitted to find that a new and inconsistent use was imposed upon the street, although travel was not practically impeded, and light in the travelled way was not sensibly diminished, and the street was not actually at that point made inconvenient for the accommodation of persons or vehicles."

paramount nature of the public right to put the street to this new and necessary form of public use; just, because they recognize and declare that the abutter has special *proprietary* rights or easements in the street, which, so far as they are special and individual in their nature, he is not called upon unequally to sacrifice, without compensation, for the public use. In effect the court says the just and true doctrine is, "Take, but pay."

§ 723 *d*. **Remedies of abutter at Law and in Equity; Measure of Damages; Right to Injunction, &c.** — As a necessary result of the principles established, it follows that the construction of steam railways upon or under or over the street is a trespass, and in legal contemplation a continuing nuisance, if constructed without the abutter's consent, or without having acquired from him, by purchase or condemnation and payment, the right to do so. The abutter may sue in a *common-law action* for his damages; but in such case he can only recover such damages as were sustained down to the time the action was brought. He may bring successive actions for damages, but cannot in actions simply for damages *recover for permanent depreciation*. The law on this point is regarded by the Court of Appeals as settled. It is not clear that the court is entirely satisfied with the rule. It may be doubted, we think, whether it is the better rule for either party. If the *abutting owner resorts to equity*, it would seem that he may obtain a decree which indirectly gives once for all the value of the permanent injury. The cases on this subject, as well as those relating to damages as affected by the form of the action, and to the measure of damages, are referred to in the note.[1]

[1] Rule as to Damages: Uline *v.* N. Y. Central & H. R. R. R. Co., 101 N. Y. 98 (1886), reversing Supreme Court. This is the leading case in New York upon the measure of damages for surface steam railways in trespass by abutting owner. It was held: 1. The private rights or interests of individuals in streets, or in the soil thereof, must be lawfully acquired in order to authorize the construction of a railroad upon or over the same; if constructed without having acquired them the company constructing it is a trespasser, and as such liable for all damages sustained by the owners of such rights and property. As to them the railroad is a *continuing nuisance*. 2. If these rights are duly acquired and the railroad constructed with proper care and skill, the railroad company is not liable for damages necessarily resulting from the construction and operation of its line. 3. Where a railroad is unlawfully constructed in a street, an owner of adjacent property in an action for damages can recover only such as were sustained up to the time when suit was commenced; for those sustained subsequently he may recover in successive actions until the nuisance is abated. Referring to remedies which adjacent owners may resort to, the court said, (page 123): "He may sue and recover his damages as often as he chooses, — once a year or once in six years, — and have successive recoveries for damages. He may enjoin the operation of the railroad and compel the abatement of the nuisance by an action in equity; and when his premises have been exclusively appropriated, or where a highway, in the soil of which he has title, has been exclusively appropriated by a railroad, he may undoubtedly maintain an action of ejectment."

This rule as to damages has been followed in later cases (see Wheelock *v.* Noonan, 108 N. Y. 179 (1888); N. Y. Nat. Exch. Bank *v.* Metrop. Elev. Ry. Co., 108 N. Y. 660 (1888); Reed *v.* State, 108 N. Y. 407, 1888); and approved in Pond *v.* Metrop. Elev. Ry. Co., 112 N. Y. 186 (1889). In this last case the Court of Appeals holds that the doctrine of Uline's case applies to actions against the Elevated Railway companies. The sole question was whether, in a common-law action, "the abutting owner could recover complete damages once for all as for a final and complete destruction *pro tanto* of the easement invaded by the defendant, or is confined to a recovery of such temporary damages as have accrued up to the commencement of the action." The court, *Andrews*, J., reviews the prior cases and says: "These cases have settled the rule that permanent depreciation cannot be recovered in an action like this." . . . "When he comes to the court for equitable relief the court may mould it to suit the circumstances, as was done in Henderson's case (78 N. Y. 423)." In Drucker *v.* Manhattan Ry. Co., 106 N. Y. 157 (1887), affirming Superior Court, 19 J. & S. 429, it was held, that in estimating damages the nature and extent of the general injury to the street — as the decrease in volume of the current of custom, and the change in its character — are necessarily to be considered; but defendant may show that a part or all of such decrease and change is due to other causes. The court says: "Smoke and gases, ashes and cinders affect and impair the easement of air. The structure itself and the passage of cars lessen the easement of light. The drippings of oil and water, and possibly the frequent columns interfere with convenience of access. These are elements of damage, even though the necessary concomitants of the construction and operation of the road, and not the product of negligence, for they abridge the landowner's easement, and to that extent, at least, are subjects for redress in an action for damages."

N. Y. Supreme Court Cases: Proper *measure of damages* held to be, the difference in value of the property with the full and unobstructed use of the easement and the value without it. Pond *v.* Metrop. Elev. Ry. Co., 42 Hun, 567, citing N. Y. West Shore & B. Ry. Co. *v.* Sutherland, 35 Hun, 260; N. Y. Lack. & W. Ry. Co., *In re*, 29 Hun, 1; and N. Y. Central & H. R. R. R. Co., *In re*, 15 Hun, 63, 67, 69. See also Meyer *v.* Metrop. Elev. Ry. Co., N. Y. Daily Reg., April 1, 1886, *N. Y. Com. Pleas*, Gen. Term; and N. Y. Elev. R. R. Co., *In re*, 36 Hun, 427 (1887).

N. Y. Common Pleas Cases: Peyser *v.* Metrop. Elev. Ry. Co., 13 Daly, 122 (1885) N. Y. Ct. Com. Pleas.

Abutting owners are entitled to compensation for a permanent diminution of their easement of light, air, and access from the street, caused by the construction and operation of an elevated road. Noise held to be *not* an element of damage. (Otherwise held by Superior Court.) *Rule of Damages stated:* "The damage recoverable is the loss occasioned by the permanent diminution of value of the plaintiff's property caused by the loss or obstruction of light, air, and access resulting directly from the defendant's structure and its uses." *Per J. F. Daly*, J. Meyer *v.* Metrop. Elev. Ry. Co., Gen. Term, Com. Pleas, N. Y. Daily Reg., April 1, 1886, *per Allen*, J.: "Does this railroad take any of the light and air which the plaintiff would otherwise receive, or obstruct the access which he would otherwise have to his premises, if the railroad was not there? If it does, what is the value of what has been taken? This is the question here,— not the loss plaintiff has sustained because an elevated railroad has been put in the street and the character of the street has been changed, and noise and bustle have succeeded peace and quiet. The question is, how much of that property in the street which he, in common with the abutting owners, owned, has he been

§ 724 (575). **Conclusions as to Railways in Streets summed up.** — In this section and the three following the author sums up the con-