clusions at which he has arrived, after an examination of all the reported cases upon the subject of railways in streets.

1. As respects ordinary railways, operated by steam, and street railways, operated by animal power, legislative authority is necessary to warrant them to be placed in the streets or highways. The legislature may delegate to municipal or local bodies the right to grant or refuse such authority. The usual powers of a general nature in municipal corporations over streets are not sufficient to

deprived of, and what the value of that property is."

N. Y. Superior Court Cases. Caro *v.* Metropolitan Ry. Co., 46 Super. Ct. (14 J. & S.) 138 (1880). Equitable action for injunction, alleging defendant's inability to make reparation. Demurrer sustained by trial court; but overruled by General Term, which held, that polluting the air of a dwelling with smells, rendering the enjoyment of the premises uncomfortable, is to that extent a taking of property. Legislative authority to construct and operate an elevated road does not authorize it to pollute the air by such smells. In Ireland *v.* Metrop. Elev. Ry. Co., 52 Super. Ct. (20 J. & S.) 450 (1885), the action was to recover the *total damage* to the fee. *Held*, maintainable if plaintiff offers to convey the easement appropriated by the railway, as was substantially done in this case. The verdict assessed the total damage to the property, and an additional sum (under the charge of the court) as compensation for loss of rents. *Held*, error, and new trial ordered. *Noise* made in constructing and operating the road held to be an element of damage. Same ruling on this point, in Taylor *v.* Metrop. Elev. Ry. Co., 55 Super. Ct. (23 J. & S.) 555 (1888). See Seventh Ward Nat. Bank *v.* N. Y. Elev. R. R. Co., 53 Super. Ct. (21 J. & S.) 412 (1886); Taylor *v.* Metrop. Elev. Ry. Co., 50 Super. Ct. (18 J. & S.) 311 (1884); s. c. 55 Super. Ct. 555, where it was held: That, as a general rule, the appropriation of property by a railroad should be concurrent with the payment or deposit of money in payment therefor; but if no proceedings to condemn have been instituted the statutes impose no greater liability upon them for the taking than what would otherwise have been incurred. That such liability is only for the property actually taken, and the diminution in value of remaining property directly affected by the taking. That the appropriation of an easement in the street is a taking of private property only in so far as the structure and operation of the road are inconsistent with and in excess of the ordinary lawful use of the street. That only to the extent of such taking of the easement is compensation to be made to an abutting owner. That the proper measure of damages, in actions brought by lessees of abutting property, is the diminution of the rental value of the whole property, caused by the taking. That damages for loss of business cannot be allowed, being too remote. (On this point see generally Fritz *v.* Hobson, L. R. 14 Ch. Div. 542 (1880), and cases cited; Ricket *v.* Metrop. Ry. Co., L. R. 2 H. L. 175.) A lessee cannot recover for damages sustained after the expiration of the lease under which he had possession at the time the easement was appropriated. In same case, 55 Super. Ct. 555 (1888), noise was held to be an element of damage. N. Y. Exch. Nat. Bank *v.* Metrop. Elev. Ry. Co., 53 Super. Ct. (21 J. & S.) 511 (1886), affirmed without opinion, 108 N. Y. 660 (1888). Plaintiff was the owner of a leasehold interest in abutting property on the corner of Chambers Street and College Place. Judgment for specified sum (over $500), for damages sustained up to commencement of suit, and operation of road enjoined after a future day named, with a proviso that defendants might purchase so much of plaintiff's easement as had been taken by the road for $8,000, for which plaintiff should make a proper conveyance. In such case injunction should not issue. The provision enabling defendants to purchase, being in the nature of a privilege, was not error.

confer upon them the right to authorize the appropriation of streets by ordinary railroads which connect different towns, whose tracks are constructed in the usual manner, and whose trains are propelled by steam. But it is otherwise as respects horse railways; these are for local travel, and the ordinary powers of municipal corporations are often ample enough, in the absence of express or other legislation on the subject indicating a different intent, to authorize them to permit or refuse to permit the use of streets within their limits for such purposes. But they cannot, by an implied power, confer corporate franchises or authorize the taking of tolls. This must come from the legislature.[1]

§ 725 (576). 2. The weight of judicial authority undoubtedly is that where the public have only an easement in streets, and the fee is retained by the adjacent owner, the legislature cannot, under the constitutional guarantee of private property, authorize an ordinary *steam railroad* to be constructed thereon, against the will of the adjoining owner, without compensation to him. In other words, such a railway, as usually constructed and operated, is an additional servitude. As to *street railroads* constructed in the usual manner and operated under municipal regulation so as not to exclude the free passage of ordinary vehicles, the almost general, and in the author's judgment, the sound judicial view is, that they do not create a new burden upon the land, and hence the legislature, no matter whether the fee is in the abutter or in the public, is not bound to, although it may, provide for compensation to the adjoining proprietor.

§ 726 (577). 3. Where the *fee* of the street is in the municipality in trust for the public, or in the public, the weight of authority, at least until recently, has been that the control of the legislature is supreme, and it may authorize, or delegate to municipal bodies the power to authorize, either class of railways to occupy streets,

[1] Text quoted with approval in State *v.* Corrigan Street Ry. Co., 85 Mo. 263, citing also Hinchman *v.* Paterson Horse R. R. Co., 17 N. J. Eq. 75; and Jersey City & B. R. R. Co. *v.* J. C. & Hob. H. R. R. Co., 20 N. J. Eq. 69. "The consent of the city council to occupy the street *is a mere license, and until the company has availed itself of the license no contractual obligation or relation arises* which requires a judicial declaration of forfeiture. Until the license is accepted and used, no right vests in the railway company, and it may be revoked by the city council; and after the time within which it may be availed of expires, the license lapses, and no revocation is needed to terminate the same. The railway company or licensee cannot thereafter occupy the street or build its road thereon without a new permission from the city authorities." *Johnston*, J., Atchison Street Ry. Co. *v.* Nave, 38 Kan. 744. Compare Atl. & Pac. R. Co. *v.* St. Louis, 66 Mo. 228.

without providing for compensation either to the municipality or to the adjoining lot-owners. As elsewhere shown in this chapter, the distinction made in so many of the earlier cases as to the extent of the rights of the public and of the abutter depending upon whether the fee (unless it is an absolute and unconditional fee) was in the one or in the other, is seriously impaired, and it seems not improbable that it will ultimately come to be regarded as inconsiderate and unsound.

§ 727 (578). 4. As special legislative authority is necessary to enable a company to construct a passenger railway in the streets, the effect of such authority, when obtained and acted upon, is to give the company a property in the franchise and road, and hence no rival company has the right to use the track of the company which laid it down. Nor can an individual or another company, at pleasure and without legislative authority, construct a rival line in the same highway.[1] But a legislative grant of authority to construct a street railway is not exclusive unless so declared in terms, and therefore the legislature may, at will and without compensation to the first company, authorize a second railway on the same streets or line, unless it has disabled itself by making the first grant irrepealable and exclusive.[2] Whether it can effectually disable itself in this manner of its control over highways is a question of a nature elsewhere referred to, and which it is not necessary to discuss in this place. But whatever may be the extent of legislative power in this respect, it is clear that the legislature cannot, without compensation to the first company, authorize the second company to take or use the track of the first, although with compensation this might be done under the power of eminent domain, if, in its judgment, the public good required it. The extent of municipal, police, and other control over railways in streets depends, of course, upon the municipal charter, and the legislation of the State touching the subject.[3]

[1] It is held in *Texas* that the consent of a city to a street railway company to use a street is a mere license, which may be revoked and bestowed upon another company before the licensee has availed itself of the privilege; and that if it abandons the street after having used it, the act of giving consent to another company to use the street is *per se* a revocation of the first consent. Gulf City Ry. Co. *v.* Gulf City Street Ry. Co., 63 Tex. 529.

[2] Gulf City Street Ry. Co. *v.* Galveston City Ry. Co., 65 Tex. 502; Jackson County Horse Ry. Co. *v.* Interstate Rapid Transit Ry. Co., 24 Fed. Rep. 306 (citing text).

[3] Since the above was written, the author is gratified to learn that his views are coincident with those expressed by Chancellor *Zabriskie* in his able opinion in the Jersey City & B. R. R. Co. *v.* J. C. & Hob. H. R. R. Co., 20 N. J. Eq. 61 (1869); and with those of other courts. State *v.* Corrigan Street Ry. Co., 85 Mo. 263; Gulf City Ry. Co. *v.* Galveston City Ry. Co., 65 Tex. 502; Jackson Co. Horse Ry. Co. *v.* Interstate Rapid Transit Co., 24 Fed. Rep. 306; Eichels *v.* Evansville Street Ry. Co., 78 Ind. 261.

§ 728 (579). **Bridges; Duty of Repair; Municipal Control.** — Having considered the relation of municipal corporations to streets and highways within their limits, it remains to refer to bridges. Bridges are usually part of the street or highway.[1] In this country the power of municipal corporations to build them, and their authority over them, are wholly statutory, and their duties in respect to them are either prescribed by statute or spring from their powers. There is *no common-law responsibility* on municipal corporations in respect to the repair of bridges within their limits; but where bridges are part of the streets, and built by the municipal authorities under powers given to them by the legislature, *they are liable for defects therein*, on the same principles and to the same extent as for defective streets, — a subject elsewhere treated.[2]

[1] Chicago *v.* Powers, 42 Ill. 169 (1866); Manderschid *v.* Dubuque, 29 Iowa, 73; Jacksonville *v.* Drew, 19 Fla. 106; Goshen *v.* Myers, 119 Ind. 196 (1889).

A bridge is said to be a mere substitute for a ferry. *Per Savage*, C. J., in People *v.* Saratoga & R. R. R. Co., 15 Wend. (N. Y.) 133.

[2] *Ib.;* Smoot *v.* Wetumpka, 24 Ala. 112 (1854); Richardson *v.* Royalton & W. Turnp. Co., 6 Vt. 496 (1834); Wayne Co. Turnp. Co. *v.* Berry, 5 Ind. 286 (1850); Humphreys *v.* Armstrong County, 56 Pa. St. 204 (1867); Cooley *v.* Essex Fr., 27 N. J. L. 415 (1859); Mechanicsburg *v.* Meredith, 54 Ill. 84 (1870); *post*, chaps. xx., xxiii.; Chicago *v.* McGinn, 51 Ill. 266; Burritt *v.* New Haven, 42 Conn. 514; Jacksonville *v.* Drew, 19 Fla. 106; Howard County *v.* Legg, 93 Ind. 523; see *post*, sec. 997, note.

Bridge defined: State *v.* Gorham, 37 Me. 451; Regina *v.* Derbyshire, 2 Q. B. 745; Sussex Co. Fr. *v.* Strader, 3 Harris. (N. J.) 108. The word "bridge" may embrace within its meaning such abutments as are necessary to make the structure accessible and useful. Tolland *v.* Willington, 26 Conn. 578; Bardwell *v.* Jamaica, 15 Vt. 438; Sussex Co. Fr. *v.* Strader, 3 Harris. (N. J.) 108; Rex *v.* West Riding, 7 East, 596. *Approaches to bridge:* Commonwealth *v.* Deerfield, 6 Allen (Mass.), 449; Swanzey *v.* Somerset, 132 Mass. 312; Burritt *v.* New Haven, 42 Conn. 174 (1875).

One town has no *right of action for contribution from another town* of any part of the expense of erecting or repairing a bridge on the boundary line between them, unless there is an agreement to bear part of the expense. Dimmick H. Comm'rs *v.* Waltham H. Comm'rs, 100 Ill. 631. "It is clear that at the common law a county might be required to maintain a bridge or causeway across its boundary line, and extending into the territory of an adjoining county. The same rule prevails in this country." Mr. Justice *Woods*, Washer *v.* Bullitt County, 110 U. S. 558.

Duty to repair; Liability for defects: Both by the common law and the statute of 22 Henry VIII., affirming it, the *duty of repairing public bridges* rested upon the *county* in all cases where no private person or other body is specially charged therewith. 2 Inst. 700, 701; The King *v.* West Riding of Yorkshire, 2 East, 342, 356; Hill *v.* Livingston Co. Sup., 12 N. Y. 52; Follett *v.* People, *Ib.* 273; People *v.* Cooper, 6 Hill (N. Y.), 516; and at common law it was indispensable to the legal character of the bridge repairable by the county, that it should be shown to cross a stream or watercourse (The King *v.* Oxfordshire, 1 B. & Ad. 289; The King *v.* Salop County, 13 East, 95; The King *v.* Lindsey, 14 East, 317; The King *v.* Northampton, 2 M. & S. 262); but these words were held to cover water flowing in a channel between banks more or less defined, even though the channel were occasionally dry. The King *v.* Marquis of Buckingham, 4 Camp. 189; The King *v.*

§ 729 (580). **Municipal Power to construct Free Bridges over Streets.** — An incorporated town, being charged by its charter or by

Oxfordshire, 1 B. & Ad. 289. See also The King *v.* Trafford, *Ib.* 874 ; The King *v.* Whitney, 3 A. & E. 69 ; The King *v.* West Riding of Yorkshire, 2 East, 342 ; The King *v.* Northampton, 2 M. & S. 262; The King *v.* Marquis of Buckingham, 4 Camp. 189 ; The King *v.* Devon, Ry. & M. 144 ; The Queen *v.* Derbyshire, 2 Q. B. 745, 756. Whether the particular structure is a bridge or not, if there be reasonable evidence as to it, is a question for the jury. The Queen *v.* Gloucestershire, 1 C. & M. 506 ; Tolland *v.* Willington, 26 Conn. 578. But see Madison Co. Comm'rs *v.* Brown, 89 Ind. 48.

The common-law responsibility of counties to repair bridges has never prevailed in the United States. Hedges *v.* Madison County, 6 Ill. 567 ; Hill *v.* Livingston, 12 N. Y. 52 ; Huffman *v.* San Joaquin, 21 Cal. 426. In some of the States it is imposed by statute on townships. Lewis *v.* Litchfield, 2 Root (Conn.), 436 ; Swift *v.* Berry, 1 Root (Conn.), 448 ; Lobdell *v.* New Bedford, 1 Mass. 153 ; State *v.* Campton, 2 N. H. 513 ; State *v.* Canterbury, 8 Fost. (28 N. H.) 195 ; State *v.* Boscawen, 32 N. H. 331. And in some on counties. Wilson *v.* Jefferson, 13 Iowa, 181 ; Sussex Co. Fr. *v.* Strader, 3 Harr. (N. J.) 108 ; Bartlett *v.* Crozier, 17 Johns. 439 ; *post*, chap. xxiii. A provision in a statute that a certain bridge, when completed, shall be a public bridge, and "under the control of the *county supervisors*," makes it a *county* charge. The People *v.* Dutchess Co. Sup., 1 Hill (N. Y.), 50 (1841). In *Michigan*, by statute, townships are liable for injuries caused by defective bridges. Medina *v.* Perkins, 48 Mich. 67. It is there held that while maintaining a bridge a township is bound to keep it in such repair as is required by a bridge of its particular kind. Stebbins *v.* Keene Tp., 60 Mich. 214; Same *v.* Same, 55 Mich. 552 ; *post*, chap. xxiii. While in erecting public bridges a township is bound to make them safe for *ordinary use*, it is not required to anticipate unusual strains, such as the passage of very heavy machinery. Fulton Iron Works *v.* Kimball, 52 Mich. 146; McCormick *v.* Washington, 112 Pa. St. 185. See to same effect, Wilson *v.* Granby, 47 Conn. 59. Whether *mandamus* lies to compel the body bound to *repair bridges and highways* to do so, or whether the remedy *is by indictment, quœre.* 1 Hill, 50, *supra ; post*, sec. 836.

If a bridge is built by an *individual* for his *own exclusive benefit*, over a highway, he is bound to keep it in a safe condition, or respond to an action for damages to any person injured by his omission. *Per Nelson*, J., in Heacock *v.* Sherman, 14 Wend. (N. Y.) 58 (1835); 13 Co. 33 ; 1 Bac. Ab. tit. "*Bridges*," 535, note ; 2 East, 342 ; 5 Burr. 2594 ; 13 East, 220 ; Woolrych on Ways and Bridges, 202, 204, and cases ; 1 Salk. 359 ; 2 Blacks. 687. How long this obligation continues, where bridges become *useful* to and are generally *used* by the public, see 14 Wend. 58, *supra*. As to the repair, by the public, of bridges originally built by private persons, see also Bisher *v.* Richards, 9 Ohio St. 495, 502, *per Gholson*, J. ; State *v.* Campton, 2 N. H. 513; Dygert *v.* Schenck, 23 Wend. 446 ; Requa *v.* Rochester, 45 N. Y. 129 (1871); Sampson *v.* Goochland Co. Jus., 5 Gratt. 241 ; Monmouth *v.* Gardiner, 35 Me. 247 ; Pa. R. R. Co. *v.* Duquesne Bor., 46 Pa. St. 223 ; Smoot *v.* Wetumpka, 24 Ala. 112 (1854); Indianapolis *v.* McClure, 2 Ind. 147 (1850). In Houfe *v.* Fulton 34 Wis. 608 (1874) ; s. c. 17 Am. Rep. 463, the town was, under the circumstances, held estopped to deny its duty to keep the bridge in repair, though originally built by private subscription.

Powers and duties of cities in respect to bridging canals and rivers which intersect their streets. Korah *v.* Ottawa, 32 Ill. 121 ; Joliet *v.* Verley, 35 Ill. 58; Towles *v.* Chatham Co. Inf. Ct. Jus., 14 Ga. 391 ; Wayne Co. Turnp. Co. *v.* Berry, 5 Ind. 286 (1850) ; Scott *v.* Chicago (bridges over river in city limits), 1 Biss. 510 (1866) ; Chicago *v.* Powers, 42 Ill. 169 (1866). No common-law obligation on canal company to bridge a highway laid out subsequent to making of canal. Morris C. & B. Co. *v.* State, 24 N. J. L. 62.

Where a city lawfully builds over a

statute with the control over its streets and the duty to improve the same, may contract for the *construction of free bridges* over a stream dividing its streets, and issue its warrants or orders to raise money to be so expended. But such corporation has no implied power *to execute a deed of trust conveying a bridge erected by the corporation* to trustees, authorizing the charging of tolls thereon, and pledging the bridge and the tolls collected thereon for the payment of the debt created for its construction.[1] A city corporation, invested with the ordinary powers over streets, was held to be authorized to provide for the construction of a free bridge across a river running through it, upon ground dedicated and set apart for a street, although the city was laid off on only one side of the river, but was approached from the other side by a road touching the river where the bridge was located.[2]

Limitations and Restrictions on the Right of Free Transit and Use.

§ 730 (581). **Necessary and Temporary Obstructions to Use of Street are justifiable.** — We have heretofore shown that the primary purpose of a street is for passage and travel, and that unauthorized and illegal obstructions to its free use come within the legal notion of a nuisance. But it is not every obstruction, irrespective of its character or purpose, that is illegal, even although not sanctioned by any express legislative or municipal authority. On the contrary, the *right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations and restrictions.* The

navigable river *a bridge constructed with a draw*, the right to navigate the river, and the right to cross the bridge, co-exist and qualify each other, but such a bridge must not materially obstruct the navigation of the river; and the city, if charged with the *duty of working and keeping the draw open, is civilly liable* to a navigator for negligence, causing damage, in the performance of this duty. Scott *v.* Chicago, 1 Biss. 510 (1866). Measure of damages in such case stated by *Drummond*, J. *Ib.* City also liable to traveller for negligently leaving draw open and unguarded, and not properly lighted. Chicago *v.* Wright, 68 Ill. 586 (1873).

Municipal power to protect. Hooksett *v.* Amoskeag Manuf. Co., 44 N. H. 105 ; Korah *v.* Ottawa, 32 Ill. 121 (1863) ; Troy *v.* Cheshire R. R. Co., 23 N. H. 83 (1851) ; Freedom *v.* Ward, 40 Me. 383 ; Gallia Co. Comm'rs *v.* Holcomb, 7 Ohio, Pt. I. 232 ; Calais *v.* Dyer, 7 Me. 155 ; Andover *v.* Sutton, 12 Met. 182; Monmouth *v.* Gardiner, 35 Me. 247 ; *ante*, sec. 678, note.

[1] Mullarky *v.* Cedar Falls, 19 Iowa, 21 (1865) ; Dively *v.* Cedar Falls, 27 Iowa, 227 ; Clark *v.* Des Moines, 19 Iowa, 199 ; Chicago *v.* Powers, 42 Ill. 169 ; Corey *v.* Rice, 4 Lansing (N. Y.), 141 (1871).

[2] Dively *v.* Cedar Falls, 27 Iowa, 227. *But not a toll-bridge. Ib. ;* Mullarky *v.* Cedar Falls, 19 Iowa, 21 ; Bell *v.* Foutch, 21 Iowa, 119 ; Barrett *v.* Brooks, *Ib.* 144 ; *ante*, sec. 729.

A municipal corporation cannot, without express authority, erect a *toll-bridge and levy and collect tolls.* Clark *v.* Des Moines, 19 Iowa, 198 ; Colton *v.* Hanchett, 13 Ill. 615 (1852).

carriage and delivery of fuel, grain, goods, &c., are legitimate uses of a street, and may result in a temporary obstruction to the right of public transit. So the improvement of the street or public highway itself may occasion impediments to its uninterrupted use by the public. And so of the improvement of adjoining lots by digging cellars, by building, &c.; this may occasion a reasonable necessity for using a part of the street or sidewalk for the deposit of material. Temporary obstructions of this kind are not invasions of the public easement, but simply incidents to or limitations of it. They can be justified when, and only so long as they are, reasonably necessary. There need be no *absolute* necessity; it suffices that the necessity is a *reasonable* one. But this will never justify the leaving of the street or way in an unsafe and dangerous condition, or its use in an unreasonable manner or for an unreasonable time.[1]

[1] Angell on Highways, chap. vi.; Hawk. P. C. chap. lxxvi. sec. 49; *post*, sec. 995; Clark *v.* Fry, 8 Ohio St. 358, 373 (1858), *per Bartley*, C. J., *arguendo;* People *v.* Cunningham, 1 Denio (N. Y.), 524; Rex *v.* Jones, 3 Campb. 231; O'Linda *v.* Lothrop, 21 Pick. 292 (1838); Rex *v.* Ward, 4 Ad. & El. 405, relating to a hoard erected for repairing a house; Rex *v.* Russell, 6 Barn. & C. 566, as to temporary acts of loading coals in keels; Rex *v.* Cross, 3 Campb. 226; Rex *v.* Jones, 6 East, 230; Cline *v.* Cornwall, 21 Grant (Can.), 142; Grant *v.* Stillwater, 35 Minn. 242; State *v.* Omaha, 14 Neb. 265.

In Commonwealth *v.* Passmore, 1 Serg. & R. (Pa.) 217, the Supreme Court of *Pennsylvania*, speaking of this subject, says: "Necessity justifies actions which would otherwise be nuisances; this necessity need not be absolute, — it is enough if it be reasonable. No man has a right to throw wood or stones into the street at pleasure; but inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, brick, lime, sand, and other materials may be placed in the street, provided it be done in the most convenient manner," and be not unreasonably prolonged. Approved, People *v.* Cunningham, 1 Denio (N. Y.), 524, 530; Clark *v.* Fry, 8 Ohio St. 358, 374; Rex *v.* Cross, 3 Campb. 226; St. John *v.* New York, 3 Bosw. (N. Y.) 483. In Wood *v.* Mears, 12 Ind. 515 (1859) (an action for special damages against the author of the obstruction), it was held that a street of a city may be obstructed by placing material for building in it for a reasonable time and so as to occasion the least inconvenience, if, *from want of room elsewhere, it be reasonably necessary to deposit it in the street;* and a plea is defective which does not aver or show this reasonable necessity, as it cannot be judicially inferred from the fact that the building was being erected in a populous city. Undoubtedly, a man in the pursuit of his lawful business will be excused for acts which, if wantonly done, would be regarded as nuisances, yet no considerations of private interest or convenience will justify a person in the pursuit of his business unreasonably to incommode the public or interfere with their right to the free use of the street. Angell on Highways, sec. 231. The law on this point is well stated by the court in Rex *v.* Russell, 6 East, 427: "That the primary object of the street is for the free passage of the public, and anything which impeded that free passage, *without necessity*, was a nuisance. That if the nature of the defendant's business were such as to require the loading and unloading of so many more of his wagons than could be conveniently contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot." Same principle applied to congregation of *carts in the public streets* for the reception of slops from a distillery. People *v.* Cunningham, 1 Denio (N. Y.), 524. To the keeping of *coaches at a stand* in the street, waiting for passengers. Rex *v.* Cross, 3 Campb. 226. To a *timber merchant* depositing timber in the street. Rex *v.* Jones, 6 East, 230; and see, also, Rex *v.* Carlisle, 6 Carr. & P. 636; Rex *v.* Moore, 3 B. & Ald. 184. What uses of streets permissible, discussed. Norristown *v.* Moyer, 67 Pa. St. 355 (1871).

Mere neglect to repair a street will not render a municipal corporation liable to an adjoining owner for loss of business, unless he can show it to be a public nuisance which occasions a damage peculiar to himself. Gold *v.* Philadelphia, 115 Pa. St. 184.

Moving buildings on suitable streets, with expedition and care, is permissible. Graves *v.* Shattuck, 35 N. H. 257. *An exhibition of wild animals* on a public street is a nuisance; and when made under municipal authority rendering the use of the street dangerous to travellers, whereby a private injury was sustained, the city was held liable. Little *v.* Madison, 42 Wis. 643 (1877); s. c. 24 Am. Rep. 435.

Temporary obstruction of street by loading and unloading cars. Mathews *v.* Kelsey, 58 Me. 56 (1870). But a street cannot be used for depot purposes. Mahady *v.* Bushwick Ry. Co., 91 N. Y. 148. Lewis Em. Dom. sec. 117. The right *temporarily to obstruct the highway* springs from reasonable necessity and is limited by it; and those who exercise the right "must so conduct themselves as to discommode others as little as is reasonably practicable, and remove the obstruction or impediment within a reasonable time, having regard to the circumstances of the case; and when they have done this the law holds them harmless." Davis *v.* Winslow, 51 Me. 264, 297; Franklin Wharf Co. *v.* Portland, 67 Me. 46; s. c. 24 Am. Rep. 1.

Whether steam-engine in a street as a means of locomotion is a nuisance. Macomber *v.* Nichols, 34 Mich. 212 (1876); s. c. Am. Rep. 522, and note; *ante*, sec. 374, note. *Steam motors in streets*, see *ante*, sec. 722, note. A *railroad* in a street is not *per se* a nuisance, but may become so, if used in an improper or unreasonable manner. State *v.* Louisville, N. A. & C. Ry. Co., 86 Ind. 114. "A *cart* or *wagon may be unloaded* at a gateway, but this must be done with promptness. So as to the *repairing of a house*, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain." The King *v.* Jones, 3 Campb. 231; see, also, Thorpe *v.* Brumfitt, L. R. 8 Ch. Ap. 650. A man has no right to eke out the inconvenience of his own premises by taking the public highway into his timber-yard, *Ib.;* or stone-yard. Cushing *v.* Adams, 18 Pick. (Mass.) 110; Commonwealth *v.* King, 13 Met. (Mass.) 115. A highway is not to be used as a stable-yard. The King *v.* Cross, 3 Campb. 224; see also, Ridley *v.* Lamb, 10 Up. Can. Q. B. 354; Mott *v.* Schoolbred, L. R. 20 Eq. 22. Or as a place for the deposit of a cart and machinery for the purpose of taking photographic likenesses. The Queen *v.* Davis, 24 Up. Can. C. P. 575. Or a projecting show board. Read *v.* Perrett, L. R. 1 Ex. Div. 349; Original Hartlepool Collieries Co. *v.* Gibb, L. R. 5 Ch. Div. 713. A stage-coach may set down or take up passengers in the street, this being necessary for public convenience, but it must be done in a reasonable time. Rex *v.* Cross, 3 Campb. 224. So long as the alleged obstruction is for the public convenience there can be no reasonable ground of complaint. The King *v.* Russell, 6 B. & C. 566; but see The King *v.* Ward, 4 A. & E. 384. A *railway company* has no right to turn a highway into a yard for cars. Vars *v.* Grand Trunk Ry. Co., 23 Up. Can. C. P. 143; see, also, Harris *v.* Mobbs, L. R. 3 Ex. D. 268. A man has no right to occupy one side of a street before his warehouses in loading and

Although the distinction between the extent of the rights of the public in a street and the right of the abutting proprietor to *access*

to his premises from the street, has been often overlooked,[1] yet it is one which has been asserted by high authority, and which may be regarded as thoroughly established. The right of an abutting owner to access to and from the street is a *private right*, in the sense that it is something different from the right which the members of the public have to use the street for public purposes. It is an *easement* in favor of the abutter's lot in the legal sense of the term, and as such is property or a property right, protected by the Constitution against legislative appropriation without compensation.[2] Conformably to this distinction, and in part based upon it, a person owning or in possession of premises abutting on a public highway or street, *whose right of access to the same is unreasonably or unlawfully obstructed*, may recover from the person causing such obstruction damages for the private injury he sustains, where such damages are particular, direct, and substantial.[3]

unloading his wagons, for several hours at a time, both day and night, so that no carriage can pass on that side of the street, although there be room for two carriages to pass on the opposite side of the street. The King *v.* Russell, 6 East, 427. If a man does anything or permits anything on his premises in view of the public, and crowds of persons are thereby attracted by it, to the inconvenience of the public, that thing he cannot be allowed to do. The King *v.* Carlile, 6 C. & P. 636. Attracting and keeping crowds of people an unreasonable time by reason of speeches may be subject to prosecution. Rex *v.* Sarmon, 1 Burr. 516; Barker *v.* Commonwealth, 19 Pa. St. 412. A municipal corporation has no power to order the construction of *weigh scales* on one of the principal streets in the municipality (Cline *v.* Cornwall, 21 Grant Ch. (Ont.) 129), or to *authorize a cab-stand* to be so stationed on a public street as to be a nuisance to adjoining proprietors. *In re* Davis *v.* Mun. of Clifton, 8 Up. Can. C. P. 236 (1877), *Morrison*, J.

The acts of several persons in obstructing a highway may together constitute a nuisance which the Court of Chancery will restrain, though the damage occasioned by the acts of any one, if taken alone, would be inappreciable. Thorpe *v.* Brumfitt, L. R. 8 Ch. Ap. 650; Cline *v.* Cornwall, 21 Grant Ch. (Ont.) 129; Harr. Munic. Man. (5th ed.) 434.

[1] *Ante*, secs. 656 *a*, 656 *b*, 701–704, 712.

[2] Story *v.* N. Y. Elev. R. R. Co., 90 N. Y. 122; Lahr *v.* Metrop. Elev. Ry. Co., 104 N. Y. 268; Barnett *v.* Johnson, 15 N. J. Eq. 481; *ante*, secs. 656 *a*, 701–704, 712.

[3] Fritz *v.* Hobson (High Court of Justice, Chancery Div. 1880), L. R. 14 Ch. Div. 542; s. c. 19 Am. Law Reg. (N. S.) 615, with a valuable note referring to many English and American cases. The judgment in this case is based upon two grounds: 1. Private, special, particular, substantial damage, resulting from a public nuisance. 2. The owner of land "has a right to have access thereto, which is a totally different right from the public right of passing and repassing along the highway;" and an unlawful obstruction of this right gives a right of action. The action in the case cited was brought by the occupier of premises to recover of the defendant, a builder, damages caused by unlawfully obstructing access to the plaintiff's premises, by piling building material in the public ways near to the same. In speaking of the second above-mentioned ground of judgment, *Fry*, J., after stating that it appeared that the plaintiff had sustained loss in his business as a result of the defendant's building operations, and that the defendant's user of the public ways in front of or near to the plaintiff's premises was, under all the circumstances, unreasonable, says: —

§ 731 (582). **Municipal Control over use of Streets by deposit of Building Materials.** — As a city corporation may be compelled to pay damages caused by the negligent manner in which persons occupy or use sidewalks and streets with *building material*, it may impose reasonable conditions on those who wish thus to use or occupy the streets or sidewalks, — as, for example, require them, by ordinance, to give bond to indemnify the city against losses or damages caused by the manner in which the privilege to use and occupy the sidewalks and street is exercised.[1]

§ 732 (583). **Same subject.** — A city council, having "exclusive power over streets," has the right to determine, by ordinance, to what extent and under what circumstances they may be incumbered

"Then arises the question, or questions, how far this state of circumstances gives rise to any legal right in the plaintiff. Now, the cases of Rose *v.* Groves, 5 M. & G. 613, and Lyon *v.* Fishmongers' Co., L. R. 1 App. Cases, 662, in the House of Lords, appear to me to establish this: that where the private right of the owner of land to access to the road is interfered with, and unlawfully interfered with, by the acts of the defendant, he may recover damages from the wrongdoer to the extent of the loss of profits of the business carried on at that place. The case of Rose *v.* Groves was that of an owner of a riparian property; but it is referred to by the Lord Chancellor in the case of Lyon *v.* Fishmongers' Co., and he cites there an observation of Lord *Hatherly* in another case to this effect: '*I apprehend that the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally different right from the public right of passing and repassing along the highway or the river.*' Then the Lord Chancellor continues: 'The existence of such a private right of access was recognized in Rose *v.* Groves. As I understand the judgment in that case, it went, not on the ground of public nuisance, accompanied by particular damage to the plaintiff, but upon the principle that a private right of the plaintiff had been interfered with.' Then, after more fully examining that case, and expressing not the slightest intention to differ from it, his lordship says: 'Independently of the authorities, it appears to me quite clear that the right of a man to step from his own land on to a highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road. And though it is easy to suggest metaphysical difficulties when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right.' Applying that principle to the present case, it does appear to me that the evidence shows that the access to the plaintiff's door in the passage from the street was interfered with by the acts of the defendant, which I hold to be unreasonable, and therefore wrongful; and, that being so, the cases to which I have referred are authorities for the plaintiff on that ground, and entitle him to recover the amount of loss in his business carried on upon his property."

Legislation authorizing the use of streets for elevated and subsurface as well as other railways, or authorizing other obstructions to this private right of access, presents questions of great interest, which, so far as they have been adjudged, are above considered. Rude *v.* St. Louis, 93 Mo. 408 (quoting and approving the text).

[1] McCarthy *v.* Chicago, 53 Ill. 38 (1869).

with *building materials*, and such an ordinance will protect parties acting under it, not only from a prosecution by the city, but from actions by third persons, when such actions are not grounded upon the negligence of the defendant.[1]

§ 733 (584). **Same subject.** — Authority by the charter to a municipal council to make "salutary and needful by-laws" authorizes an ordinance *prohibiting the obstruction of any street for the purpose of building* "without the written license of the mayor *and aldermen;*" and under such an ordinance an agreement made in consideration of such license from the mayor *alone* is void, and no action lies thereon.[2]

§ 734 (585). **Abutter's Rights in respect of Doors, Shutters, Iron Gratings, &c.; Usage.** — The owners of lots bordering upon streets or ways have, or may have, in other respects, a right to make a *reasonable and proper use* of the street or way. What may be deemed such a use depends, in the absence of legislative or authorized municipal declaration, much upon the local situation and public usage, — that is, the use which others similarly situated make of their land, — this being evidence of a reasonable use.[3] Conformably to these principles, it was held that common and well-established usage in the city of Boston justified the owners of land in erecting thereon warehouses, on the line of the street or way, with *doors and windows opening upon the way or street*, and shutters projecting into the same, when open, and with sidewalks in front, having on their surface *iron gratings*, for admitting light to, and *trap-doors* for communicating with, the cellar or underground apartments of the warehouses, and used for putting in and taking out goods.[4] So, for the same reasons, it is not an unreasonable use of a street in a

[1] Wood *v.* Mears (action against builder for injuries caused by building materials deposited in street), 12 Ind. 515 (1859); distinguishing, Ball *v.* Armstrong, 10 Ind. 181; Sinclair *v.* Baltimore, 59 Md. 592. A city may *close a street temporarily* to permit adjacent owners to make improvements, but, in doing so, it must notify the public of its exclusion, in order to protect itself from liability for injuries sustained by one who attempts to use the street in ignorance of its being closed to traffic. Stephens *v.* Macon, 83 Mo. 345; *supra*, sec. 730, note.

[2] Lowell *v.* Simpson, 10 Allen, 88 1865.

[3] O'Linda *v.* Lothrop, 21 Pick. 292, 297 (1838); Gerard *v.* Cook, 2 Bos. & Pul. 109 (1806); Underwood *v.* Carney, 1 Cush. (Mass.) 285, 292 (1848), *per Forbes*, J. See, generally, as to rights of abutting owners on streets, 24 Cent. L. J. 51; Index, tit. *Abutters*.

[4] Underwood *v.* Carney, 1 Cush. (Mass.) 285 (1848); 21 Pick. 297, *supra; ante*, sec. 699; Irvine *v.* Wood, 51 N. Y. 224 (1872); s. c. 10 Am. Rep. 603. As to liability of city for these openings, if unsafe and dangerous, see Bacon *v.* Boston, 3 Cush. (Mass.) 174 (1849); Lowell *v.* Spaulding, 4 Cush. 275; *post*, secs. 996, 1000, 1032, 1033.

populous place, where land is valuable, so to erect structures as that the *gates and doors*, when opened, swing over the line of the street. Whatever may be the rights of the public, certain it is that these acts do not constitute a trespass upon the owner of the soil of the street.[1]

§ 734 *a*. **Abutter's Rights; Porches and Bay Windows in or over Streets.** — The right of the owner of a lot abutting on a public street to use, under legislative sanction and municipal regulation, a *portion of the street for the purpose of a stoop, porch, or portico*, as against the objection of an adjoining owner who suffers inconvenience or damage thereby, was considered by the Court of Appeals of Maryland in a case which excited at the time considerable attention.[2] The legislature authorized the city of Baltimore to pass ordi-

[1] O'Linda *v.* Lothrop, 21 Pick. 292 (1838); *supra*, sec. 680, *et seq.* *Paxon*, J., of the Common Pleas Court in Philadelphia, in Philadelphia *v.* Presbyterian Board of Publication, held that where the ashlar or true line of a building conformed strictly to the line of the street, but the ornamental parts encroached on it, an injunction would not be granted to restrain the erection of such building, especially as this has been the custom for years in Philadelphia, and councils have not legislated on the subject. 29 Leg. Int. 53; *supra*, sec. 660; Commonwealth *v.* Blaisdell, 107 Mass. 234 (1871).

Strictly speaking, no one has a right to project his building or any part of it beyond the line of road. But this does not necessarily mean a strict mathematical line. Tear *v.* Freebody, 4 C. B. N. S. 228; see also St. George's Vestry *v.* Sparrow, 16 C. B. N. S. 209. An obstruction beyond a substantially regular line must, if insisted upon by the municipal authorities, be removed. Bauman *v.* St. Pancreas, L. R. 2 Q. B. 528; Ecclesiastical Commissioners *v.* Clerkenwell, 4 L. T. N. S. 599; s. c. 3 DeG. F. & J. 688; The Queen *v.* Jay, 8 E. & B. 469.

[2] Garrett *v.* Janes, 65 Md. 266 (1886). The court held that the damage to the complainant was *damnum absque injuria*. The inconvenience suffered is that incident to residing in a city where the houses are necessarily close together and the legitimate use of his property by a neighbor, will unavoidably cause discomfort. It added: "As to any interruption of the plaintiff's facility of outlook in the sense of view merely, it has been long ago decided that for mere interference with prospect, it not being an incident of the estate, no remedy lies apart from contract. Aldred's Case, 9 Coke, 59; Butt *v.* Imperial Gas Co., L. R. 2 Ch. App. 158." While this statement may be true as between adjoining owners, and as to erections by one such owner upon his own land which is not situate on a street; yet a different rule exists as to erections on a way or street. An owner of land has, as a rule, no easement over his neighbor's land; but an owner of land abutting on a street has, as elsewhere shown in this chapter, an easement in and over the street. And such easement includes a right to light and air, as well as the right to travel upon the street. Story *v.* N. Y. Elev. R. R. Co., 90 N. Y. 122. The existence of such easement does not depend upon whether the abutter owns the fee in the street. Lahr *v.* Metrop. Elev. Ry. Co., 104 N. Y. 268. *Ante*, secs. 656 *a*, 656 *b*, 688–700, 712, 730. There seems to be no good reason why such easement should not include also the right (within reasonable limits) to an unobstructed view; and hence the right to insist upon the removal of an obstruction in the street which interferes materially and in an unusual manner with the abutter's prospect, even though light, air, and travel be not materially interfered with by such obstruction.