nances regulating the limits within which it should be lawful to erect stoops, porticos, porches, or other architectural ornaments to houses, under which authority the city passed an ordinance making it unlawful for any person to erect any porticos, stoops, or other ornamental structures a greater distance than nine feet from the building line. With such legislation and ordinance in force, Garrett erected a structure in front of his house on Mount Vernon Place which extended nearly nine feet from the building line, rectangular in shape, with an elevation of twenty-two feet from the ground and twenty-two feet in length. The face of this structure was of brown stone, the same as the house, with an ornamental panel in front. At the west end there was a stained glass window, and at the east end it was approached by steps, and through it an entrance was gained to the main hall of the building through three arcades or doorways set in the wall on the building line, and capable of being left open or closed by doors or hangings. The primary purpose of the structure was as a means of access to the building through the three doorways. It was held to be essentially an enclosed porch or portico. The owner of the adjoining property (Janes) filed a bill in equity charging that this structure in front of Garrett's house was a nuisance, in that it took a portion of the highway and deprived the complainant of sunshine, air, and view, thereby greatly diminishing the value of his property and preventing the comfortable enjoyment thereof, and asking for its abatement and removal. The court below sustained the bill; but this decree was reversed by the Court of Appeals and the bill dismissed, on the ground that the structure was such as was authorized by the legislative act and ordinance. No question seems to have been made — certainly none decided — that the legislative act was an invasion of the proprietary rights and easements of the complainant in the street; and considering that this structure, unlike an ordinary porch or portico, had solid walls, which not only interfered with the complainant's view, but obstructed light and air, the case would certainly seem to go to the limit (if it does not pass it) of legitimate legislative regulation.

§ 734 *b*. **Same subject. Massachusetts Cases.** — Certain persons owning land as tenants in common, in the city of Boston, laid it out so as to construct, among other things, a passageway or court, and afterwards erected buildings fronting on the court. A few years

The cases cited by the court in Garrett *v.* Janes, Aldred's Case, 9 Rep. 58 *b*, and Butt *v.* Imperial Gas Co., L.R. 2 Ch. App. 158, were both cases between adjoining owners, and did not in any way involve the consideration of the nature of an abutter's easement in a street.

later they made partition of their land, and the partition deed bounded the land upon the court, and provided that the way "shall be left and always lie open for the passageway or court aforesaid, for the common use and benefit of both of said parties and their respective estates." It was held that under this deed the right of an abutting owner was not simply a right of way, but a right to the use and benefit of an open court, extending as well to the light and air above as to actual travel upon the surface of the street; and that this right was violated by the *erection of a bridge over the court or passageway*, to connect two estates on opposite sides of the court.[1] So, where it was provided that "a passageway sixteen feet wide is to be laid out in the rear of said premises, and to be kept open and maintained by the abutters in common," it was held that the right in the way extended to light and air above as well as to a way upon the surface, and that the building of *bay windows* from a point eight feet above the sidewalk to the top of the house and extending three or four feet into the passageway, violated this right.[2]

§ 734 *c*. **Concluding Observations.** — Whoever shall read with attention the imperfect outline here presented of the law concerning Streets in Cities will be struck with the seeming uncertainty of the line which defines the respective rights therein, of the public and of the abutting owners. Nor is this merely a seeming uncertainty; it is real and substantial. At first view it would appear to be an extraordinary phenomenon that, concerning a subject and relation so universal, so important and so old, the law should be in essential respects yet unsettled, and in a state of transition and development. Reflection, however, readily supplies the explanation. Only a very small and circumscribed space can be lighted up by the wisdom of the most enlightened legislators, jurists, and judges. It is not within the limited capacity of the human intellect to formulate, in advance and with the requisite precision, a comprehensive system of legal rules and doctrines exactly adapted to new and untried relations. To walk in safety it is necessary to keep within the light of experience, and not venture much beyond it. The uses of highways and even of streets were originally almost confined to the right of public passage in the ordinary modes. Accordingly the

[1] Salisbury *v.* Andrews, 128 Mass. 336.

[2] Attorney-General *v.* Williams, 140 Mass. 329. The two Massachusetts cases above cited arose under certain grants which served as dedications of the ways therein mentioned. But it is doubtful if there was anything, either in the grants themselves or in the circumstances of those cases, to make the rights therein conferred any more extensive than the rights which the law will imply in the ordinary case of the dedication of a way.

courts asserted that this right was in the public, but that all other rights in ordinary highways, and all other rights in streets in cities except for street uses proper, were in the abutting owner. This relation was comparatively a simple one. In the course of time, however, came railways of different classes,— those operated by animal power and those operated by steam. These were surface railways. Later came the elevated and sub-surface railways, and also telegraph and telephone lines. With these new situations came the question of the power of the legislature, limited as it was by the ordinary eminent domain clause in our Constitutions, to authorize the construction, erection, and operation of such works on highways and streets without the consent of the abutter and without compensation to him. Great and valuable interests, public and private, were thus affected. This gave rise successively to more and more searching scrutiny of the respective public and private rights involved. Early adjudications as to the scope of legislative power, which made it almost as omnipotent as that of Parliament; early definitions of "property," which, as against legislative grants to such companies to use the streets and highways, practically confined the owner's property right within his exterior lines; and early decisions that private property was not, within the meaning of the Constitution, "taken" for public use, so long as it was not physically invaded, — all necessarily underwent further and closer study, with the result that they have been revised and corrected by legislative enactment, by constitutional provisions, and by judicial reconsideration. As respects these positive provisions, they are still so recent as to be yet in the stage of interpretation; and hence the existence and the explanation of that uncertainty to which we have referred. And thus the necessity exists, here as elsewhere, of adapting our law to new situations and circumstances, and notably to the changes wrought by iron, steam, and electricity in the means of communication and transportation, and in the work of the heating, lighting, and supplying water to our cities. In this "tender and delicate business" we must proceed with care and deliberation, heed the lessons of experience, and be content to go no faster or further than the exigencies of the special cases that arise for judgment shall from time to time require.[1]

[1] *Ante*, secs. 704, 704 *a*. The wisdom of Chief Justice *Hale's* observation was never more strikingly exemplified than by the course of decisions on the subject under consideration. "Time," he says, "is the wisest thing under heaven. It is most certain that time and long experience is much more ingenious, subtile, and judicious, than all the wisest and acutest wits, coexisting in the world, can be. It discovers such varieties of emergencies and cases, and such inconvenience in things, that no man would otherwise have imagined." Hargrave's Law Tracts, Amendment and Alteration of Laws. The value of our system of law as we now have it is

that it embodies the wisdom of time and experience. It is perhaps not too much to say, that not until it was sought to use public streets, not only for surface railways but for elevated and underground railways, and like modern uses, did the exact nature of these respective rights come to be thoroughly understood. Good fruit in the law, as in the natural world, is the product alone of patient cultivation. It ripens slowly, and can be gathered only at the appointed time. The exact state of the law on this subject in any given State can only be understood by a critical study of its special constitutional and legislative provisions, and line of judicial decisions.

NOTE. — *Street Railways operated by Electricity:* — A surface street railway operated by electricity as a motor power was held by the Supreme Court of Rhode Island in Taggart, *et al.*, *v.* The Newport Street Railway Co. (decided, 1890, since this chapter was in print), not to be an additional servitude upon the street which entitled the abutting owners to compensation. The case, which is one of novel impression, was thus: In 1885 the legislature of Rhode Island incorporated The Newport Street Railway Company, with authority "to operate its tracks or road [on city streets] with steam, horse, or *other power* as the council of said city may from time to time direct," but made no provision for compensation to abutting owners. With the consent of the city council the company commenced the construction on certain streets in Newport of its railroad to be operated by electricity. To this end poles, under municipal permission, were placed along the margins of the sidewalks of the streets about 120 feet apart. These poles supported a wire over the tracks of the road for the conducting of electricity, which was used as a motor on the Thomson-Houston plan for the passenger cars.

In the case of Taggart and others above mentioned, the abutters who owned the fee to the centre of the street brought a bill in equity to enjoin the company from erecting or maintaining these poles and wires in front of their estates. It was held: —

1. That the words "other power" in the act of incorporation, above quoted, authorized the company to use electricity as a motor. The court said that "as the charter was granted in 1885, when the idea that electricity might be brought into use as a motor was familiar, it seems probable that the words 'other power' were inserted with a view to its possible employment." 2. The charter of the company provided that it "shall not encumber any portion of the streets or highways not occupied by said tracks." It was held, construing the different sections of the charter, that the poles and wires overhead did not "encumber" the streets within the meaning of the charter. 3. The court was of opinion that while a railroad operated by steam would be a new servitude on the streets, entitling the abutter to compensation, yet that a street railway, constructed in the usual mode and operated by horse power, was not a new servitude; and it held that the defendant's railway, to be operated by electricity, fell within the latter category, it appearing as a fact in the case that it did not occupy the streets any more exclusively than if it were operated by horse power.

To the argument that the poles and wires in question were like telegraph and telephone wires, and that these were an additional servitude (*ante*, secs. 698, 698 *a*), the court, *per Durfee*, C. J., said: "But assuming that telegraph and telephone poles and wires do create a new servitude, we do not think it follows that the poles and wires erected and used for the service of the said street railway likewise create a new servitude. Telegraph and telephone poles and wires are not used to facilitate the use of the streets where they are erected for travel and transportation, or if so, very indirectly so; whereas the poles and wires here in question are directly ancillary to the uses of the streets as such, in that they communicate the power by which the street cars are propelled." Injunction refused and bill dismissed.

The distinction last mentioned is so fine as to be almost impalpable, and it suggests serious doubts whether both conclusions are sound and reconcilable. The general subject awaits further development and settlement.