tion by a city, under express legislative authority, of a *levee along Front Street* to protect the city against inundation of a river, after a

once established the grade of any street, such grade shall not be changed until the damages have been assessed and tendered to the party injured, which damages shall be collected from the parties asking for such change of grade." Under this it is held that a city has no right to change an established grade until the damages have been assessed and tendered; if it makes such change and carries it into effect without such assessment and tender, it is an unlawful act for which it may be made directly liable in an action for damages. Lafayette *v.* Wortman, 107 Ind. 404 (1886). The point was made by the city that as the plaintiff did not enjoin the council from proceeding with the work of changing the grade, his only remedy was a *mandamus* to compel the city to have his damages assessed; citing Meth. Episc. Ch. Trs. of H. *v.* Hoboken, 33 N. J. L. 13, and Macy *v.* Indianapolis, 17 Ind. 267 (decided prior to the statute); but the point was overruled. *Infra*, sec. 993; Logansport *v.* Pollard, 50 Ind. 151 (1875); Lafayette *v.* Wortman, 107 Ind. 404; Wabash *v.* Alber, 88 Ind. 428, *quære;* Mattingly *v.* Plymouth (what is an established grade), 100 Ind. 545. What is a change of grade. *Ib.;* Kokomo *v.* Mahan, 100 Ind. 242; Lewis Em. Dom. 207; Lafayette *v.* Nagle, 113 Ind. 425.

So, in *New Jersey:* Quinn *v.* Paterson, 27 N. J. L. 35; Trenton W. P. Co. *v.* Raff, 36 N. J. L. 335, 340; Plum *v.* Morris Canal & B. Co., 10 N. J. Eq. 256. In *New Jersey* there is now a statute giving action for damages caused by a change of grade. Van Riper *v.* Essex Pub. R. Board, 38 N. J. L. 23; State *v.* Sayre, 41 N. J. L. 158; Lewis Em. Dom. sec. 212.

So, in *Nebraska:* Nebraska City *v.* Lampkin, 6 Neb. 27 (1877). Under a provision of the Constitution adopted in 1875 that private property shall not be taken *or damaged* except upon just compensation, a city is held liable for damages sustained by a lot-owner, who had erected buildings before a grade was established, by reason of the city having established a grade which required the street to be raised above the level of the lot. Harmon *v.* Omaha, 17 Neb. 548; Goodrich *v.* Omaha, 10 Neb. 98; Gottschalk *v.* C. B. & Q. R. R. Co., 14 Neb. 550; Omaha & R. V. R. R. Co. *v.* Struden, 22 Neb. 343; *post*, secs. 995 *a*–995 *c*, and notes.

So, in *Rhode Island* there is no common-law liability: Rounds *v.* Mumford, 2 R. I. 154 (1852); Wakefield *v.* Pawtucket, 12 R. I. 75; Inman *v.* Tripp, Treas., 11 R. I. 520; Smith *v.* Same, 13 R. I. 152. By statute (Gen. Stat. R. I. ch. 60, sec. 38) abutting owners now have a remedy for injuries caused by "any change in the grade of a highway." See Anness *v.* Providence, 13 R. I. 17; Aldrich *v.* Providence, 12 R. I. 241. Original grade held to be established by recognition by the city without formal official action establishing it. *Ib.*

So, in *Louisiana:* Reynolds *v.* Shreveport, 13 La. An. 426 (1856), approving Radcliff's Ex. *v.* Brooklyn, *supra*, and Goszler *v.* Georgetown, 6 Wheat. 593 (1821), cited *ante*, sec. 685.

So, in *Georgia:* Rome *v.* Omberg, 28 Ga. 46 (1859); Roll *v.* Augusta, 34 Ga. 326 (1866); Markham *v.* Atlanta, 23 Ga. 402 (1857); Mitchell *v.* Rome, 49 Ga. 29 (1873). Lot-owner cannot enjoin. *Ib.* Macon *v.* Hill, 58 Ga. 597; Fuller *v.* Atlanta, 66 Ga. 80. Shade-trees may be removed in grading. If destroyed, the lot-owner is not entitled to damages unless they were killed through negligence or carelessness. Castleberry *v.* Atlanta, 74 Ga. 164. A *constitutional provision* similar to that of *Illinois* (q. v. *infra*) is similarly construed. Atlanta *v.* Green, 69 Ga. 386; *infra*, secs. 995 *a*–995 *c*, and notes.

So, in *Illinois:* Murphy *v.* Chicago, 29 Ill. 279, 287 (1862); Roberts *v.* Chicago, 26 Ill. 249 (1861); Quincy *v.* Jones, 76 Ill. 231 (1875); s. c. 20 Am. Rep. 243; Nevins *v.* Peoria, 41 Ill. 502; Moses *v.* Pittsburgh, Ft. W. & C. R. R. Co., 21 Ill. 516. A *constitutional provision* (art. xi., sec. 13, adopted 1870) that "private property shall not be taken *or damaged for public use without just compensation*" imposes a municipal liability for damages to private property by bringing the street to grade

constitutional provision took effect which makes a city liable for private property "damaged" for public use, where no part of the

or by a change of the grade of its streets. Elgin *v.* Eaton, 83 Ill. 535 (1876); s. c. 25 Am. Rep. 412; Pekin *v.* Brereton, 67 Ill. 477; Bloomington *v.* Brokaw, 77 Ill. 194 (1875); Pekin *v.* Winkel, *Ib.* 56 (1875); Pittsburg, F. W. & C. R. R. Co. *v.* Reich, 101 Ill. 157; Chicago *v.* Union Build. Assoc., 102 Ill. 379. This position has received the approval of the Supreme Court of the United States. Chicago *v.* Taylor, 125 U. S. 161 (1887). When right accrues, and measure of damages. Elgin *v.* Eaton, *supra; infra*, secs. 995–995 *c*. In Nevins *v.* Peoria, 41 Ill. 502 (1866), relating to damages to abutting owners caused by surface-water from the streets, and decided before the adoption of the constitutional provision in 1870, above quoted, and noted *infra* (sec. 995 *c*), the court said: "While a *city has the right to grade its streets by raising or lowering them*, the property holder adjacent to the street thus graded cannot call the city to account for error in judgment in establishing the grade, nor can he recover damages for inconveniences or expense in adjusting the approach to his premises for the purposes of ingress or egress. Although the city may be the owner of its streets, it *has no more power over them than a private individual* over his own land, and it cannot, under the claim of public convenience, be permitted to exercise that dominion to the injury of another's property in a mode that would render a private individual responsible in damages, without itself becoming responsible. If it becomes necessary for the interest of the public, in grading or draining streets, that the lot of an individual should be rendered unfit for occupancy, either wholly or in part, the *public should pay for it to the extent to which the owner is deprived of its legitimate use*. Private property shall not be *taken* for public use without due compensation, applies as well to secure the payment for property partially taken for the use or convenience of a street, as where wholly taken and converted into a street. The question as to the extent to which the property is taken makes no difference in the application of the rule: private rights are never to be sacrificed to public convenience or necessity without full compensation, and for such an injury inflicted, an action may be maintained and damage recovered as a compensation." Nevins *v.* Peoria, 41 Ill. 502 (1866); followed Aurora *v.* Gillett, 56 Ill. 133; Aurora *v.* Reed, 57 Ill. 29; Dixon *v.* Baker, 65 Ill. 518; Alton *v.* Hope, 68 Ill. 167; Slack *v.* East St. Louis, 85 Ill. 377; Pekin *v.* Brereton, 67 Ill. 477; Stone *v.* Fairbury, P. & N. R. R. Co., 68 Ill. 394; Bloomington *v.* Brokaw, 77 Ill. 194 (1875); Tearney *v.* Smith, 86 Ill. 391; Elgin *v.* Eaton, 83 Ill. 535 (1876); Shawneetown *v.* Mason, 82 Ill. 337 (1876); but see *infra*, secs. 995–995 *c*, note, 1039, 1048–1052.

So in *Tennessee* there is no common-law liability: Humes *v.* Knoxville, 1 Humph. 403 (1839). Afterwards, by statute, compensation was given for changing an established grade. Nashville *v.* Nicol, 3 Baxter (Tenn.), 338. A grade may be established without an ordinance. Gray *v.* Knoxville, 85 Tenn. 99, noted *supra*, sec. 989, note.

So in *Maine:* Mason *v.* Kennebec & P. R. R. Co., 31 Me. 215; Hovey *v.* Mayo, 43 Me. 322 (1857).

So in *Missouri*, both as to grade and change of grade: Taylor *v.* St. Louis, 14 Mo. 20 (1851); St. Louis *v.* Gurno, 12 Mo. 414 (1849), following Callender *v.* Marsh, 1 Pick. 418; Hoffman *v.* St. Louis, 15 Mo. 651 (1852). The attempt in Thurston *v.* St. Joseph, 51 Mo. 510 (1873), to overrule St. Louis *v.* Gurno, *supra*, failed, and the last-named case remains law in *Missouri* to the present, except as changed by the constitutional provision below given. Schattner *v.* Kansas City, 53 Mo. 162 (1873); Imler *v.* Springfield, 55 Mo. 119 (1874), where the *Missouri* cases are commented on by *Vories*, J. "Municipal corporations acting under authority conferred by the legislature to make and repair, or to grade, level, and improve streets, if they exercise reasonable care and skill in the performance of the work, are not answerable to the adjoining owner for consequential damages to his premises. But if the injury can be shown to have been

plaintiff's property was taken,— the levee occupying the street alone, — but where the plaintiff's access was interfered with and water was

the result of the negligence or unskilfulness of the city or its employees in performing the work, then an action will lie, and the party injured will be entitled to damages." Wegmann *v.* Jefferson, 61 Mo. 55, 56 (1875), decided before the constitutional provision noted below. "Such," says *Wagner*, J., "is the well-established doctrine in *Missouri*." Thompson *v.* Booneville, 61 Mo. 282 (1875). Distinguished, Hunt *v.* Booneville, 65 Mo. 620; Foster *v.* St. Louis, 4 Mo. App. 564. But in accordance with a charter provision, the city of St. Louis was held liable. Stickford *v.* St. Louis, 7 Mo. App. 217 (1878). See also, Schumacher *v.* St. Louis, 3 Mo. App. 297; Fink *v.* St. Louis, 71 Mo. 52. In *Missouri*, under a *constitutional provision* adopted in 1875, that private property cannot be taken *or damaged* without just compensation, owners of adjoining property are entitled to damages caused by a change of grade. Sheehy *v.* Kan. City Cable Ry. Co., 94 Mo. 574 (1888); Householder *v.* Kansas City, 83 Mo. 488; Werth *v.* Springfield, 78 Mo. 107; Blanchard *v.* Kansas City, 16 Fed. Rep. 444; s. c. 5 McCrary C. C. R. 217; *post*, secs. 995 *a*–995 *c*, and notes; McElroy *v.* Kansas City, 21 Fed. Rep. 257.

A similar provision in the Constitution of *Colorado* is construed in the same way. Denver Circle R. Co. *v.* Nestor, 10 Col. 403 (railroad in street); Denver *v.* Bayer, 7 Col. 113. *Post*, secs. 995 *a*–995 *c*, and notes; also in *West Virginia:* Johnson *v.* Parkersburg, 16 W. Va. 402; Hutchinson *v.* Parkersburg, 25 W. Va. 226; *infra*, secs. 995 *a*–995 *c*; and in *Texas:* see *ante*, secs. 587, 686; *post*, secs. 995 *a*–995 *c*; Galveston R. R. Co. *v.* Fuller, 63 Tex. 467.

In *Connecticut*, the doctrine of municipal non-liability as stated in the text is adopted: Hooker *v.* New Haven & N. Co., 14 Conn. 146; Skinner *v.* Hartford Br. Co., 29 Conn. 523; Hollister *v.* Union Co., 9 Conn. 436; Bradley *v.* N. Y. & N. H. R. R. Co., 21 Conn. 294; Clark *v.* Saybrook, 21 Conn. 313; Burritt *v.* New Haven, 42 Conn. 174. See Healey *v.* New Haven, 49 Conn. 394, noted *supra* sec. 989, note.

So in *Arkansas:* Simmons *v.* Camden, 26 Ark. 276 (1870); s. c. 7 Am. Rep. 20. In 1874 *Arkansas* by its *Constitution* provided that compensation be made for property "*taken, damaged, or destroyed*," &c. Art. ii. sec. 22. Hot Springs R. R. Co. *v.* Williamson, 45 Ark. 429. *Post*, secs. 995 *a*–995 *c*, and notes.

So in *Florida:* Dorman *v.* Jacksonville, 13 Fla. 538 (1869); s. c. 7 Am. Rep. 253. In this case the court says: "A declaration, alleging that a city council, contriving and unjustly intending to injure, prejudice, and aggrieve the plaintiff, and to incommode and annoy him in the occupation and enjoyment of his property, dug away his sidewalk, destroyed his shade-trees, and created a nuisance in front of his premises, shows *prima facie* a cause of action at common law, the acts thus charged being in violation of law; and the declaration is not demurrable, although the city charter authorizes the city to grade and improve streets." The city must answer such allegations and plead its authority, and show that the acts alleged were within it. *Ib.*

So in *Iowa* the general doctrine of the text is held: Creal *v.* Keokuk, 4 G. Greene, 47 (1853), approving Callender *v.* Marsh, *supra:* Cotes *v.* Davenport, 9 Iowa, 227 (1859); Cole *v.* Muscatine, 14 Iowa, 296 (1862); Ellis *v.* Iowa City, 29 Iowa, 229 (1870); Russell *v.* Burlington, 30 Iowa, 262 (1870); Burlington *v.* Gilbert, 31 Iowa, 356 (1871); s. c. 7 Am. Rep. 105; Warren *v.* Henly, 31 Iowa, 31 (1870). Under the statute of that State lot-owners can recover damages both to land and buildings caused by a change of grade thereafter adopted, when they have improved their lots with reference to a grade previously established. Dalzell *v.* Davenport, 12 Iowa, 437; Hempstead *v.* Des Moines, 52 Iowa, 303; Cotes *v.* Davenport, 9 Iowa, 227 (1859); Kepple *v.* Keokuk, 61 Iowa, 653, holding that an established grade is one adopted by action of the city council. Meyer *v.* Burlington, 52 Iowa, 560. Where a city lowered the grade of a street four and one-half feet, but made no provision as to an intersecting street, it was held that the *alteration or change of the grade of the intersecting street*

thrown by the embankment upon his property, was held to render the city liable for the damages thereby occasioned. The embank-

was a necessary consequence which entitled an owner of property abutting upon it to compensation for damages as allowed by statute. Conklin *v.* Keokuk, 73 Iowa, 343 (1887). If in grading a street the city causes earth to be deposited upon the adjoining lot, it is liable for the damages thus caused. Hendershott *v.* Ottumwa, 46 Iowa, 658 (1877).

So, in *Mississippi*, the non-liability of the municipality for grading or changing grades is declared. White *v.* Yazoo City, 27 Miss. 357.

So, in *Minnesota:* Lee *v.* Minneapolis, 22 Minn. 13 (1875), approving Callender *v.* Marsh; Radcliff's Ex. *v.* Brooklyn; Smith *v.* Washington, 20 How. 135, above cited; Karst *v.* St. Paul, S. & T. F. R. R. Co., 22 Minn. 118 (1875); Alden *v.* Minneapolis, 24 Minn. 254; Henderson *v.* Minneapolis, 32 Minn. 319; Genois *v.* St. Paul, 35 Minn. 330. Where a city is made liable by statute for damage to abutting property by change of grade of a street, *the right of action accrues* when the change is legally and finally determined on and fixed, though the street has not been actually lowered to such grade; and in such action *the plaintiff may, where the statute gives an action, recover as damages* what it will cost to lower his lot to conform to the new grade, and to build a retaining wall, if the same is necessary, to protect his lot when so lowered, from the caving in of an adjacent lot. McCarthy *v.* St. Paul, 22 Minn. 527; s. p. Campbell *v.* Phila., 108 Pa. St. 300. This view seems doubtful; the change may never be executed; and the point has elsewhere been otherwise decided. Hempstead *v.* Des Moines, 63 Iowa, 36; Mulholland *v.* Railroad Co., 60 Iowa, 740; Brown *v.* Lowell, 8 Met. (Mass.) 172; Tyson *v.* Milwaukee, 50 Wis. 78; Jennings *v.* Leroy, 63 Cal. 397; Lewis Em. Dom. secs. 210, 667, and cases. The rule in *Minnesota* was stated to be that a municipal corporation is "liable for damages caused to private property by grading streets, when a private owner of the soil over which the streets are laid would be liable if improving it for his own use." O'Brien *v.* St. Paul, 25 Minn. 331; followed in Dyer *v.* St. Paul, 27 Minn. 457; and in Armstrong *v.* St. Paul, 30 Minn. 299. The last two cases hold that an owner may recover damages from a municipality for the removal of the natural support of his land, and that he cannot be taxed for the cost of a retaining wall to support his land. In O'Brien *v.* St. Paul, *supra*, the court briefly reviewed the cases above cited. It seems to the author that the legislature, and by delegation, a municipal corporation, has rightful authority over streets not limited by the rights which an individual owner of soil has over his property as respects the rights of an adjoining owner. See *infra*, secs. 991, 995 *a*–995 *c*.

In *California*, prior to the constitutional provision noted below, it was held that a city has a right to raise the grade of a street, and if the contractor or a city performs the work with proper care and skill, there is no responsibility for any consequential damage which may result to the contiguous property. Negligence or want of skill in the grading of a street, by a contractor under the city, will not be presumed or inferred from the mere fact of damage; it must be proved. Shaw *v.* Crocker, 42 Cal. 435 (1872). In 1879 *California* by *constitutional* provision provided for compensation for property "taken, appropriated, or damaged." Art. i. sec. 14. Reardon *v.* San Francisco, 66 Cal. 492. *Post*, secs. 995 *a*–995 *c*.

The general rule given in the text is recognized in the *Federal courts*. Goszler *v.* Georgetown, 6 Wheat. 593 (1821), cited *ante*, sec. 685; Smith *v.* Washington, 20 How. 135, where the power of the city was "to open and keep in repair streets," &c.; Northern Transp. Co. of O. *v.* Chicago, 99 U. S. 635; s. p. British Cast Plate Co. *v.* Meredith, 4 D. & E. T. R. 794; Sutton *v.* Clarke, 6 Taunt. 28; Boulton *v.* Crowther, 2 B. & C. 703.

In *Kentucky* the general doctrine that the corporation is not liable for consequential damages caused by changing the grade of a street has been affirmed by the Court of Appeals of that State. Keasy *v.* Louisville, 4 Dana, 154 (1836), opinion

ment was not regarded by the court as a mere elevation of the grade of the street, or as being made to improve the street, and hence was

by *Robertson*, C. J. But in a later case in that State the majority of the court qualified the doctrine, and assumed a middle ground, namely, that if the improvement of the street is of the usual character, and the incidental damages such as ordinarily result, the law affords no remedy ; but if the improvements are extraordinary, and peculiarly injurious, they can only be made on condition that the adjoining owners be compensated. This view makes the right to compensation depend not upon the fact of injury, but the amount, and treats the improvement of the street as a *taking* of the property of the lot-owner. If it is a taking, then, for *any* injury, he should be entitled to compensation. *Robertson*, J., dissented, holding, in accordance with the prevailing doctrine elsewhere, that the city might change the grade as it should judge the public interest required, taking care to avoid all peril or inconvenience which could be avoided by a proper execution of the work, and being liable only for such loss as might be occasioned by the wanton and unskilful mode of execution. Louisville *v.* L. Rolling Mill Co., 3 Bush, 416 (1867). Mr. Lewis says, "It does not seem to us that this decision is either logical or sound." Em. Dom. sec. 99. In Newport & Cinc. Br. Co. *v.* Foote, 9 Bush, 264 (1872), the prior cases in that State are reviewed, and the extent of legislative and municipal power as against the adjacent lot-owners determined. See Kemper *v.* Louisville, 14 Bush, 87 ; Pearson *v.* Zable, 78 Ky. 170.

In *Ohio* the common-law measure of liability of municipal corporations has been designedly and deliberately carried beyond the limits established by the current of decisions elsewhere. They are here held liable for consequential injuries which result from the exercise of their lawful powers, though these powers be exercised judiciously, without malice, and without illegality, the court proceeding upon the ground that if an act (digging drains, as in Rhodes *v.* Cleveland, 10 Ohio, 159, or cutting down a street, as in McCombs *v.* Akron Council, 15 Ohio, 474 ; s. c. 18 Ohio, 229), though legal and properly executed, be done for the good of all to the injury of an individual, the injury should, in justice and good morals, be shared by all.. See Goodloe *v.* Cincinnati, and Smith *v.* Same, 4 Ohio, 500, 514 (injuries to property by grading), and consult Crawford *v.* Delaware V., 7 Ohio St. 459 (1857) ; Scovil *v.* Geddings, 7 Ohio, Part 2, page 211 ; Hickox *v.* Cleveland, 8 Ohio, 543, which last two accord with authorities elsewhere. In Crawford *v.* Delaware, *supra*, the doctrine is admitted to be in "direct conflict with the decisions both in England and America," and was known to be so when decided. This doctrine, says *Bronson*, C. J., 4 N. Y. 195, 205, *supra*, is not law "beyond the State of *Ohio*." The later cases seem to modify the broad doctrines of the earlier ones, and make the municipal liability depend upon circumstances. Cincinnati *v.* Penny, 21 Ohio St. 499 (1871), where the prior cases are reviewed by *McIlvaine*, J., Youngstown *v.* More, 30 Ohio St. 133 (1876). See Simmons *v.* Providence, 12 R. I. 8. Referring to the *Ohio* cases, the Supreme Court of *Wisconsin* declared them not to be law, but observes that there is "much justice and equity in the principle they adopt." Alexander *v.* Milwaukee, 16 Wis. 247, 256 (1862), noted *supra*, sec. 988. Even in *Ohio*, a city which has constructed with reasonable and ordinary care a sewer excavation, by which *the lateral support of the plaintiff's house is withdrawn* so that the foundation walls give way, is not liable in damages therefor. Cincinnati *v.* Penny, 21 Ohio St. 499 (1871) ; s. c. 8 Am. Rep. 73. In a later decision in this State, it is held that the owner of a lot abutting on an improved street of a city or village, in erecting buildings thereon, assumes the risk of all damage which may result from the subsequent grading and improvement of the street by the municipal authorities, if made within the reasonable exercise of their power. The liability of a municipality for injury to buildings on abutting lots exists only where such buildings were erected with reference to a grade actually established, either by ordinance or such

not within the uses for which the street was dedicated or acquired ; but was an appropriation of the street to a *new use*, for which abutting owners are under the Constitution of 1870 entitled to compensation if they are thereby "damaged."[1]

improvement of the street as fairly indicated that the grade was permanently fixed, and the damage resulted from a change of such grade, or, when the buildings, if erected before a grade was so established, were injured by the subsequent establishment of an unreasonable grade. Whether a grade be unreasonable or not must be determined by the circumstances existing at the time the grade was established, and not by the circumstances existing at the time the abutting lots may have been improved. This principle of municipal liability applies where a lot is improved in anticipation of a reasonable future grade which is afterward established, and damage results from a subsequent change in the grade. Akron *v.* Chamberlain Co., 34 Ohio St. 328. But can the courts adjudge a grade to be unreasonable, which the city council has decided to be reasonable ? We should say not. As to amount of damages for appropriation of an easement for lateral support of street, see Dodson *v.* Cincinnati, 34 Ohio St. 276 ; Keating *v.* Cincinnati, 38 Ohio St. 141 (a street on a hillside so excavated as to cause a landslide on a lot fronting on another and higher street). In Cohen *v.* Cleveland, 43 Ohio St. 190 (1885), (erecting a viaduct) the same court said : "This court has, however, constantly acknowledged that McCombs *v.* Akron Council and cases following it are a departure from the current of authorities elsewhere ; and although these cases have not found favor with the judges delivering the opinions in Radcliff's Ex. *v.* Brooklyn, 4 N. Y. 195 ; Hill *v.* Boston, 122 Mass. 344 ; Alexander *v.* Milwaukee, 16 Wis. 247 ; Northern Transp. Co. of O. *v.* Chicago, 99 U. S. 635, we are entirely content with the doctrine, and would not change it if we could. But the justice of the Ohio rule, the firmness with which it has been adhered to for nearly half a century, and the manner in which it is recognized and enforced in our statutes, have established the doctrine as a rule of property, and it is now too late to enquire whether McCombs *v.* Akron Council was properly decided." Mr. Lewis reviews the Ohio cases at length, and considers them as "not founded upon a logical basis." Em. Dom. sec. 98.

The learned opinion of *Smith*, J., in Eaton *v.* B., C. & M. R. R. Co., 51 N. H. 504, 529 (1872), reviews, criticises and classifies "the highway grade cases," and distinguishes them from each other and from the case before the court (see note to sec. 991, *infra*), and propounds the basis on which the liability or non-liability in such cases should be made to depend. It may be usefully consulted. The learned judge seems inclined to favor views more liberal than those taken in many of the cases he refers to ; but see, in support of his opinion, Pumpelly *v.* Green Bay Co., 13 Wall. 166. *Infra*, sec. 995.

Municipal power to enlarge liability by ordinance in respect to damages caused by change of grade, see Goodall *v.* Milwaukee, 5 Wis. 32 (1856), but *quære*. Approved by *Paine*, J., Weeks *v.* Milwaukee, 10 Wis. 242, 270. See Pearce *v.* Milwaukee, 18 Wis. 32 ; Goodrich *v.* Milwaukee, 24 Wis. 422. Mr. Lewis thinks "the justice of the claim for compensation in such cases [street grade cases] so plain that any public corporation would undoubtedly be sustained in the voluntary discharge of such a claim." Em. Dom. sec. 108. We are unable to see, however, on what legal ground such a corporation could voluntarily create a legal liability. Damages under a special charter held to be recoverable for injury to an *unimproved lot* caused by a change of grade. French *v.* Milwaukee, 49 Wis. 584 ; s. c. 6 N. W. Rep. 244 ; Church *v.* Milwaukee, 31 Wis. 512 ; Stowell *v.* Milwaukee, 31 Wis. 523 ; Tyson *v.* Milwaukee, 50 Wis. 78. Remedy for injury done by regrading held to be by appeal, not by original action. Owens *v.* Milwaukee, 47 Wis. 461. *Ante*, secs. 97, 307, 317, 685.

[1] Shawneetown *v.* Mason, 82 Ill. 337

§ 991. **Same subject. No Right to lateral Support of Soil.** — Where the power is not exceeded, there is no implied or common-law liability to the adjacent owner for grading the whole width of the street, and so close to his line as to cause *his earth or fences and improvements to fall,* and the corporation is not bound to furnish supports or build a wall to protect it.[1] The abutting owner has as against a city no right to the lateral support of the soil of the street, and can acquire none from prescription or lapse of time.[2]

(1876). Similar principle under Act of Parliament. McCarthy *v.* Met. Board, 43 L. J. C. P. 385, embankment in public dock interfering with access to plaintiff's house.

Pecuniary loss is the measure of damages, and hence if the property is benefited as much as damaged there can be no recovery. Elgin *v.* Eaton, 83 Ill. 535 (1876); Stone *v.* Fairbury, P. & N. R. R. Co., 68 Ill. 394; Chicago & Pac. R. R. Co. *v.* Francis, 70 Ill. 238; Page *v.* Chicago, St. P. & M. Ry. Co., 70 Ill. 324; Shawneetown *v.* Mason, 82 Ill. 337; Rigney *v.* Chicago (street viaduct), 102 Ill. 64; Chicago *v.* Taylor (street viaduct), 125 U. S. 161 (1887); Lehigh Coal Co. *v.* Chicago, (street viaduct), 26 Fed. Rep. 415 (1886), *per Dyer,* J. *Post,* secs. 995 *a*–995 *c,* and notes. Index, tit. *Damages.*

[1] *Ante,* sec. 990, and cases cited; Taylor *v.* St. Louis, 14 Mo. 20 (1851); St. Louis *v.* Gurno, 12 Mo. 414 (1849); Pontiac *v.* Carter, 32 Mich. 164; Rome *v.* Omberg, 28 Ga. 46 (1859). In thus holding, *Lumpkin,* J., who delivers the opinion of the court, remarks: "I confess, my convictions are not so clear as I could wish them to be." The same doctrine was, however, substantially adhered to in Roll *v.* Augusta, 34 Ga. 326. But see Dyer *v.* St. Paul, 27 Minn. 457; Armstrong *v.* St. Paul, 30 Minn. 299, referred to in note to last section.

[2] Quincy *v.* Jones, 76 Ill. 231 (1875); s. c. 20 Am. Rep. 243; s. p. Mitchell *v.* Rome, 49 Ga. 19 (1873); s. c. 15 Am. Rep. 669; Hall *v.* Bristol (sewer excavation in street), L. R. 2 C. P. 322 (1867); Northern Transp. Co. of O. *v.* Chicago, 99 U. S. 635 (1878); s. c. 2 Thomps. Neg. 692. In this last case the court says: "There was evidence at the trial that during the progress of the necessary excavation of La Salle Street a portion of the walls of the plaintiff's buildings on the lot cracked and sunk. This was caused by the caving in of the excavation in the street, the timbers used for bracing the sides having given way. In reference to this testimony the court instructed the jury that if they were satisfied from the evidence that the sinking of the wall, or rather the cracking of the wall, was due to the weight of the wall upon the selvage or portion of the earth which was left, and not to the removal of the material which was taken out of the street, that is, from the pit, the defendants were not liable. If they were satisfied that if the wall had not stood upon the plaintiff's lot where it did, there would have been no change in the level of the ground there, but that the change in the level which caused the deflection of the wall was due to the weight of the wall resting upon the earth after the excavation was made, then the defendant was not liable for that. We think this instruction was entirely right. The general rule may be admitted that every land-owner has a right to have his land preserved unbroken, and that an adjoining owner excavating on his own land is subject to this restriction, — that he must not remove the earth so near to the land of his neighbor that his neighbor's soil will crumble away under its own weight and fall upon his land. *But this right of lateral support extends only to the soil in its natural condition.* It does not protect whatever is placed upon the soil increasing the downward and lateral pressure. If it did it would put it in the power of a lot-owner, by erecting heavy buildings on his lot, to greatly abridge the right of his neighbor to use his lot. It would make the rights of the prior occupant greatly superior to those of the latter. Wyatt *v.* Harrison, 3 Barn. & Ad. 871; Lasala *v.* Holbrook, 4 Paige, 169; Washburn on Easements, chap. iv. sec. 1." *Infra,* sec. 995.

§ 992 (784). **Consequential Damages not a "taking" of Property; Special Remedy.** — Provisions in a city charter, or other statute, sec. 990, note), where a city desires to change the grade of a street, and the property of any one who has built in accordance with the grade is damaged by such change, there must be an appraisal of damage before the work is commenced; if this is not done, an action for damage will lie against the city. The city is guilty of an unlawful act, because the granted power is not exercised in a lawful manner. Noyes *v.* Mason City, 53 Iowa, 418; s. c. 5 N. W. Rep. 595; Hempstead *v.* Des Moines, 63 Iowa, 36; s. c. 3 N. W. Rep. 123; Dore *v.* Milwaukee, 42 Wis. 18. On the general subject, see Crossett *v.* Janesville, 28 Wis. 420 (1871); Chambers *v.* Satterlee, 40 Cal. 497 (1871); Delphi *v.* Evans, 36 Ind. 90 (1871); Lewis Em. Domain, chap. viii. where the statutes and constitutions of several of the States giving a remedy in *street grade cases* are referred to and the decisions construing and applying these remedial provisions are collected.

Courts will not inquire whether the grade adopted is the best one, or whether one causing less damage would not equally have answered the purpose intended. Roberts *v.* Chicago, 26 Ill. 249 (1861); Snyder *v.* Rockport, 6 Ind. 237 (1855); Reynolds *v.* Shreveport, 13 La. An. 426 (1856). And the reason is, that the determination of such questions has been committed by the legislature to the governing body of the corporation, and not to the judicial tribunals.

As to wantonness, oppression, or malice in exercising the power. Rounds *v.* Mumford, 2 R. I. 154 (1852); Reynolds *v.* Shreveport, *supra;* Rudolphe *v.* New Orleans, 11 La. An. 242; Roberts *v.* Chicago, 26 Ill. 249 (1861); Philadelphia *v.* Randolph, 4 Watts & S. (Pa.) 514 (1842); *supra,* sec. 988, note; Henderson *v.* Ry. Co. (Court of Exchequer), 24 L. T. R. N. S. 881 (1871); *infra,* sec. 995, and note, in which an extract is given from the opinion of the Supreme Court of the United States, delivered by *Strong,* J., in Northern Transp. Co. of O. *v.* Chicago, 99 U. S. 635 (1878). *Supra,* sec. 987, note.

Construction of English Act giving compensation for lands "injuriously affected"

Under the legislation of *Iowa* (*supra,*

authorizing the opening and improving of streets or the construction of works of a public nature therein if these be within the scope of the legitimate uses of streets and highways, *are not unconstitutional*, in the absence of special provision to that effect, because they omit to provide compensation for those who, although their property be not *taken*, thereby suffer indirect or consequential damages. Although the adjoining property may by such improvement of the street be consequentially injured, still it is not, in a constitutional sense, *taken* for public use.[1]

by public works. Becket *v.* Midland Ry. Co. (change of grade impeding access), L. R. 3 C. P. 82 (1867); Hall *v.* Bristol (sewer excavation injuring building), L. R. 2 C. P. 322 (1867); Queen *v.* Wallesey L. Bd. of H. (making sewer and levelling street), L. R. 4 Q. B. 351 (1869); Queen *v.* Vestry of St. Luke, L. R. 6 Q. B. 572 (1871), affirmed L. R. 7 Q. B. 148; Caledonian Ry. Co. *v.* Ogilvie, 2 Macq. 229.

[1] Callender *v.* Marsh, 1 Pick. (Mass.) 418, 430 (1823); Thurston *v.* Hancock, 12 Mass. 220. Note doubts in the dissenting opinion of Mr. Justice *Story*, in Charles River Bridge *v.* Warren Bridge, 11 Pet. 638, and see note by Chancellor *Kent:* 2 Kent Com. 340, 6th ed. But the doctrine in the text was asserted by the Court of Appeals, upon great consideration, in Radcliff's Ex. *v.* Brooklyn, 4 N. Y. 195, 205 (1850).

What constitutes a *taking*. *Ante*, sec. 587; *infra*, secs. 995, 995 *a*–995 *c;* Cooley Const. Lim. 541. *Legitimate use of streets*, see chapter on Streets, *ante*, sec. 680 *et seq.*

Taking of private property. For a valuable discussion of *what constitutes a "taking" of private property*, the reader is referred to the case of Eaton *v.* B. C. & M. R. R. Co., 51 N. H. 504 (1872); s. c. 12 Am. Rep. 147. The opinion of *Smith*, J., in this case cites most of the leading adjudications, and attempts to classify them; and the learned judge evidently favors a less rigid view than is maintained in many of the cases. The precise point held by the court was that the legislature has no power to authorize a railroad corporation to divert the waters of a river, by cutting through, in the course of making their road-bed, a natural ridge, thereby causing the waters, "sometimes in floods and freshets," to flow upon the plaintiff's land, carrying thereon sand and gravel, without making provision for his compensation. And the ground of the decision is that such an injury is a *taking* of the property within the meaning of the Constitution. 51 N. H. 504. The same view has received the full sanction of the Supreme Court of the United States, which, after recognizing the conflict in the decisions of the State courts, held that "where the real estate is actually invaded by superinduced additions of water, earth, sand, or other materials, or by having any artificial structure placed on it, so as effectually to destroy or impair its usefulness, it is a *taking* within the meaning of the Constitution." "This proposition," says Mr. Justice *Miller*, who delivered the opinion of the court, "is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle." Pumpelly *v.* Green Bay Co., 13 Wall. 168, 181 (1871). Approved. Ashley *v.* Port Huron, 35 Mich. 296 (1877); s. c. 24 Am. Rep. 552; Cumberland *v.* Willison, 50 Md. 138; Arimond *v.* Green Bay & M. Canal Co., 31 Wis. 316; Rowe *v.* Portsmouth, 56 N. H. 291; s. c. 22 Am. Rep. 464; Thurston *v.* St. Joseph, 51 Mo. 510; s. c. 11 Am. Rep. 463; *post*, secs. 1046, 1047; Elgin *v.* Eaton, 83 Ill. 535 (1876); s. c. 25 Am. Rep. 412; Rigney *v.* Chicago, 102 Ill. 64 (constructing a viaduct so as to deprive plaintiff of access to his house except by means of stairs); Chicago *v.* Taylor, 125 U. S. 161 (1887); *infra*, secs. 995, note, 995 *a*–995 *c*, and notes. This subject was thoroughly considered by the Court of Appeals of New York in Story *v.* N. Y. Elev. R. R. Co., 90 N. Y. 122, the principles of which were restated and adhered to in Lahr *v.* Metrop. Elev. Ry. Co., 104 N. Y. 268. In these cases the court *inter alia* held that the erection of an elevated railroad, the use of which is intended to be permanent in a public street, and upon which cars are propelled by steam engines, generating gas, steam, and smoke, and distributing in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement of the abutting owner in the street, and its appropriation by the railroad corporation, thereby rendering it liable to the abutters for damages occasioned by such taking. See *ante*, chap. xviii., on Streets, where this subject is considered at length.

Party owning a house in which he carries on an inn is not entitled to be compensated for the *indirect injury to his trade* resulting from the diversion of traffic caused by an unauthorized act of lowering the roadway, but only for direct structural injury occasioned by the unauthorized interference with his cellar. Bigg *v.* London, L. R. 15 Eq. 376; but see Ricket *v.* Metrop. Ry. Co., L. R. 2 H. L. 175; Duke of Buccleuch *v.* Metrop. Bd. of Works, L. R. 5 H. L. C. 418; Beckett *v.* Midland Ry. Co., L. R. 3 C. P. 82; McCarthy *v.* Metrop. Bd. of Works, L. R. 7 C. P. 508; s. c. L. R. 8 C. P. 191. See further on this subject chapter on Streets, *ante*. Construction of constitutional provision in Illinois and in other States that "private property shall not be taken or *damaged*, for public use, without compensation." *Supra*, sec. 990, note; *infra*, sec. 995, note, 995 *a*–995 *c*, and notes, 998.

§ 993. **Change of Grade; Special Remedy exclusive.** — If, in such cases, the *statute provides a specific remedy*, or a remedy other than an ordinary civil action, that remedy alone can be pursued.[1] Accordingly, where a municipal charter provided that whenever the common council should change the grade of a street, "*they should make compensation to the owners of property for actual damages thereby caused*," and provide for such payment *by an assessment upon all real estate benefited*, and an action was brought against the city by an individual injured by a change in the grade of a street, alleging as a breach of duty that the city would not pay, or provide for the payment of, the damages, it was held that he could not recover, because the effect of a recovery would be to throw the burden upon the whole city, when the law imposed it on those locally ben-

[1] Heiser *v.* New York, 104 N. Y. 68 (1887); Hovey *v.* Mayo, 43 Me. 322 (1857); Ernst *v.* Kunkle, 5 Ohio St. 520 (1856); Andover *v.* Gould, 6 Mass. 40; Boston *v.* Shaw, 1 Met. (Mass.) 130; Cole *v.* Muscatine, 14 Iowa, 296 (1862); Dorman *v.* Jacksonville, 13 Fla. 50, 538 (1871); *supra*, sec. 958. *Ante*, sec. 990, note; *infra*, secs. 993, 994.

Construction of special statutes. Cole *v.* Muscatine (remedy in Commissioners' Court), 14 Iowa, 296 (1862); Dalzell *v.* Davenport, (mode of estimating and proof of damages), 12 Iowa, 437; Crossett *v.* Janesville (requiring recommendation of property owners), 28 Wis. 434 (1871); Freeland *v.* Muscatine, 9 Iowa, 461. Since the decision in Callender *v.* Marsh, *supra*, the law as there held has as above stated been changed by statute, and a specific remedy provided for such an injury. *Ante*, sec. 990, note. Fernald *v.* Boston, 12 Cush. (Mass.) 574. This remedy excludes a civil action for all damages *necessarily* occasioned. Flagg *v.* Worcester, 13 Gray, 601 (1859); *Ib.* 193; 6 Gray, 544; Benjamin *v.* Wheeler, 8 Gray, 409, 413. Statute giving damage caused by change of grade held to extend to *property outside* of the city limits, as well as to that within the city. Columbus *v.* Hydr. Woollen Mills Co., 33 Ind. 435 (1870).

efited. The court regarded the case as one where the law creating the liability had provided a special mode of obtaining payment from a particular fund, and where the plaintiff's remedy was not by a suit for damages, but by *mandamus* to compel the council to make the assessment and collection; and the judgment of the court was, we think, correct.[1]

§ 994. **Same subject. Remedy of Abutter by Injunction.** — When, however, the charter provides that the established grade of a street "shall not be changed until the damages have been assessed and tendered to the property owners *before* any such change shall be made," this is imperative, and the city may be enjoined by the abutter from entering on the work of changing the surface of the street, in conformity with the altered grade, until his damages have been *first* ascertained and tendered.[2]

§ 995. **Same subject. Judgment of the Supreme Court of the United States.** — The *principles stated in the preceding sections*, viz., that a city is not liable at common law for consequential damages caused by an authorized change in the grade of a public street, and that such a change, where private property is not actually encroached upon, though it may be injured in its use, is not a "taking" of property within the constitutional provision that private property shall not be "taken" for public use without compensation, have been recognized and applied in a judgment of the Supreme Court of the United States, in a case in which it was sought by the owner of property bounded on one side by the Chicago River and on another by a street, to recover of the city damages for special injuries to such property, sustained in consequence of the action of the city authorities in *constructing under express legislative authority a tunnel or passage-way within the limits of the street*, under the river where it intersected the street. The only constitutional provision then in force bearing on the question was

[1] Reock *v.* Newark, 33 N. J. L. 129 (1868). Nor would a suit for damages lie for the omission of the common council to make, or cause the assessment to be made, the remedy being by *mandamus*. *Ib.*; see, also, Heiser *v.* New York, 104 N. Y. 68. In *Illinois* it is held that a city is liable if it fails to have the damages assessed. Elgin *v.* Eaton, 83 Ill. 537; Clayburgh *v.* Chicago, 25 Ill. 535. So in *Indiana*. Lafayette *v.* Wortman, 107 Ind. 404 (1886), noted, sec. 990 *supra*, note; *ante*, secs. 482, 831, note; *supra*, sec. 980, note; sec. 989, note.

[2] Hurford *v.* Omaha, 4 Neb. 336 (1876). Grade ought, primarily, to be proved by the record and files; if these are lost, then by secondary evidence; but it cannot be established by admissions of municipal officers that such a grade had been made. Nebraska City *v.* Lampkin, 6 Neb. 27 (1877). Remedy by injunction, see Index, tit. *Equity, Injunction; infra*, sec. 995 *a*, note.

the usual one that private property shall not be "taken" for public use without compensation. The complaint of the lot-owner was that, by reason of the operations of the city, he was *deprived of access* to his premises on the side of the river, caused by a coffer-dam (which was, however, *necessary* to enable the city to construct the tunnel), and by obstructions in the street resulting from the work. Neither the coffer-dam nor the obstructions in the street were continued longer than was necessary. A recovery was sought on the ground that the erection of the coffer-dam and the necessary excavations in the street constituted a public nuisance, causing *special damages* beyond those suffered by the public at large. But the Supreme Court, on the principle that a nuisance cannot be predicated of that which the law authorizes, and that the city was the agent of the State in performing a public duty authorized by statute, held that there *was no implied or common-law liability even for such special damages*, since it did not appear that the power granted to the city had been exceeded, or that the owner's lot had been trespassed on, or that any wanton or negligent injury had been inflicted. Under such circumstances, it was regarded as settled on the soundest of legal reasons, that there is no right to compensation for consequential injuries caused by authorized erections or public works, unless such right is given by constitutional provision or legislative enactment, and that it was immaterial whether the fee of the street was in the State, or in the city, or in the abutter.[1]

[1] Northern Transp. Co. of O. *v.* Chicago, 99 U. S. 635 (1878); reprinted 2 Thomps. Neg. 692; annotated, *Ib.* 743, 747. In giving the judgment of the court in this case, Mr. Justice *Strong* observed: "It is undeniable that in *making the improvement* of which the plaintiffs complain the *city was the agent of the State, and performing a public duty imposed upon it by the legislature;* and that persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill, is a doctrine almost universally accepted, alike in England and in this country. It was asserted unqualifiedly in British Plate-glass M. Co. *v.* Meredith, 4 D. & E. T. R. 794; in Sutton *v.* Clarke, 6 Taunton, 29, and in Boulton *v.* Crowther, 2 Barn. & C. 703. It was asserted in Green *v.* Reading Bor., 9 Watts (Pa.), 384; O'Connor *v.* Pittsburg, 18 Pa. St. 187; in Callender *v.* Marsh, 1 Pick. (Mass.) 417, as well as by the courts of numerous other States. [*Ante*, sec. 990, and note.] It was asserted in Smith *v.* Washington Corp., 20 How. 135, in this court; and it has been held by the Supreme Court of *Illinois*. The decisions in *Ohio*, so far as we know, are the solitary exceptions. The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. *The State holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility of course should rest upon it. But it is the prerogative of the State to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the State is compelled to employ. The remedy, therefore, for a consequential injury resulting from the State's action through it*