§ 995 *a*. **Liability for Consequential Damages under Special Constitutional Provisions; Grades and Changes of Grade.** — Several

agents, if there be any, must be that, and that only, which the legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of Magna Charta, and the restriction to be found in the Constitution of every State that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held *not to be 'a taking'* within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. Cooley on Constitutional Limitations, page 542, and notes. The extremest qualification of the doctrine is to be found, perhaps, in Pumpelly *v.* Green Bay Co., 13 Wall. 166, 180, and in Eaton *v.* Boston C. & M. R. R. Co., 51 N. H. 504; [*supra*, sec. 991, note]. In those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient. The present Constitution of *Illinois* [see *infra*, sec. 995 *c*, and note] took effect [on the 8th day of August, 1870] after the work of constructing the tunnel had been substantially completed. It ordains that private property shall not be 'taken or *damaged*' for public use without just compensation. This is an extension of the common provision for the protection of private property. [*Ante*, sec. 990, note. *Post*, secs. 995 *a*–995 *c*.] But it has no application to this case, as was decided by the Supreme Court of the the State in the case of Chicago *v.* Rumsey, 87 Ill. 348; s. c. 10 Chicago Legal News, 333. That case also decides that the city is not liable for consequential damages resulting from an improvement made in the street, the fee of which is in the city, provided the improvement had the sanction of the legislature. [As to materiality of fee being in city, see *ante*, chap. xviii.] It also decides that La Salle Street is such a street, and declares that a recovery of such damages by an adjacent lot-holder has been denied by the settled law of the State up to the adoption of the present Constitution." See Elgin *v.* Eaton, 83 Ill. 535 (1876); s. c. 25 Am. Rep. 412; Pekin *v.* Brereton, 67 Ill. 477; Shawneetown *v.* Mason, 82 Ill. 337; People *v.* McRoberts, 62 Ill. 38; Chicago & Pac. R. R. Co. *v.* Francis, 70 Ill. 238; Putnam *v.* Douglas County, 6 Oreg. 328; Hornstein *v.* Atlantic & Gt. W. R. R. Co., 51 Pa. St. 87. [*Ante*, sec. 990 and notes. *Post*, secs. 995 *a*–995 *c*.] "We have examined," continues *Strong*, J., "the decisions of the courts of *Illinois*, and others to which we have been referred by the plaintiffs in error, but in none of them was it decided that a riparian owner on a navigable stream, or that an adjoiner on a public highway, can maintain a suit at common law against public agents to recover consequential damages, resulting from obstructing a stream or highway in pursuance of legislative authority, unless that authority has been transcended, or unless there was a wanton injury inflicted, or carelessness, negligence, or want of skill in causing the obstruction. Very many of the decisions relied upon were cases in which it appeared that the acts complained of as having wrought injurious consequences were done by *private individuals, for their own benefit and without sufficient legislative authority*. The distinction between cases of that kind and such as the present is very obvious. It was well stated by *Gibbs*, C. J., in Sutton *v.* Clarke, 6 Taunton, 29, which, as we have seen, was decided on the ground that the defendant was acting under the authority of an act of Parliament, deriving no advantage to himself personally, and acting to the best of his skill and within the scope of his authority, and so was not liable for consequential damages. 'This case,' said the chief justice, 'is totally unlike that of the individual who for his own benefit makes an improvement on his own land according to his best skill and diligence, not foreseeing it will produce injury to his neighbor; if he thereby, though unwittingly, injure his neighbor he is liable. The resemblance fails in this most important point, — that his act is not done for a public purpose, but for private emolument. Here the defendant is not a volunteer; he executes a duty imposed upon him by the legislature, which he is bound to execute.'" The case of The Transportation Co. *v.* Chicago is distinguished in Chicago *v.* Taylor (construction by city of a street viaduct), 125 U. S. 161 (1887), a case from *Illinois* which arose under the Constitution of 1870, which approves Rigney *v.* Chicago (Street Viaduct Case), 102 Ill. 64. In both of these cases the city was held liable under that Constitution to the abutter, for damages, although the *corpus* of his lot was not invaded. Rigney *v.* Chicago, *supra*, is the leading case in *Illinois* construing the constitutional provision imposing liability for property *damaged* for public use. See Chicago *v.* Union Blg. Assoc., 102 Ill. 379, distinguished from Rigney *v.* Chicago, and holding that the city could not be enjoined by the owner of lots distant three and one-half blocks, from vacating and closing up a street under legislative authority, and permitting it to be occupied by the Board of Trade with its building. *Infra*, sec. 995 *c*, and note.

of the more recent State Constitutions have as we have seen, ordained that "private property shall not be taken or *damaged* for public use without compensation."[1] This extension of the usual constitutional provision by the introduction of the word "damaged" was first adopted in 1870 in the Constitution of that year of the State of Illinois. Undoubtedly this word effects a very important change in the law, the exact scope of which remains yet to be definitely ascertained and limited by the courts. After much uncertainty and oscillation in the State of Illinois, it has at length been deliberately determined that this constitutional provision requires compensation to be made not only where property is actually invaded, but also where it appears that there has been a physical disturbance of a *right*, either public or private, which the property owner enjoys in connection with his property and which gives to it an additional value, and that by reason of such disturbance he has sustained damage with respect to his property in excess of that sustained by the public generally.[2] The interpretation was approved by the Supreme Court of the United States, in a case that came from that State.[3]

What *effect has the introduction of the word "damaged"* into the organic law on the liability of a municipal corporation for consequential damages caused by bringing a street to an established grade line, or by changing the established grade of a street? In answer-

[1] *Ante*, sec. 990, note. *Ante*, chapter on Eminent Domain, secs. 587 *a*–587 *d*, 618, note.

[2] Rigney *v.* Chicago (street viaduct case), 102 Ill. 64, which is the leading case in that State on this subject, modifying and explaining the previous decisions. See, also, Spencer *v.* R. R. Co., 23 W. Va. 406 (1884).

[3] Chicago *v.* Taylor (street viaduct case), 125 U. S. 161 (1887).

ing this question, it must be borne in mind that streets are essentially public in their nature, and as such are under the paramount control of the legislature, which, subject to the property rights of the abutting owners, has, except as specially limited by the Constitution, plenary power over them and their uses for all legitimate street purposes.[1] Power to graduate and improve streets so as to make them safe and convenient for public use unquestionably exists in the legislature, and is almost universally conferred by it upon the municipal or local authorities, to be used according to their judgment. This is a continuing power not exhausted by its first exercise.[2] When, under such legislation, an owner dedicates without restriction land for a public street, he must be taken to consent, for the reasons stated in a previous section, that the public authorities may determine grades, and possibly what future changes in grades may be necessary or desirable for the public convenience.[3] He must contemplate that hills within the limits of the street will be reduced from the natural surface, making a cut; that ravines and low places therein will be filled up to the ordained grade or level, leaving an embankment in front of the abutting property. The right to make such improvement of the street for street purposes would seem to be embraced in his grant or dedication to the public. If lands for a street are unconditionally acquired by eminent domain, the right thus to graduate and improve the street for street uses proper is included in the compensation awarded. In view of these considerations, it seems to us clear that for the original establishment of a grade line and the reduction of the natural surface of the street for street purposes to such line, there is no legal right or even natural equity in the dedicator or his assignee to compensation. That there is no implied or common-law liability on the part of a municipality to make compensation in such cases is everywhere admitted and adjudged; and in our examinations we have found no remedial statute expressly limited to city streets, creating a liability in favor of the abutting owner for damages caused by bringing the street down to a grade line for the first time established.

§ 995 *b*. **Same subject.** — But *where a grade has been officially established*, and particularly where improvements have been thereafter made according to such established grade, and it is afterwards changed to the injury of the abutting owners, there is a strong natural equity in their favor for compensation. This is manifested by the frequency of statutes creating liability for damages caused to property, and especially to improved property, by a change of an established grade.[1] For the reasons above suggested, it seems to us that, on principle, the mere provision of the Constitution imposing a liability for property *damaged* for public use does not create a liability on the part of the municipality for reducing the natural surface of the street, in the course of its normal and ordinary improvement for street purposes proper, to a grade line for the first time established. If there are cases to the contrary we doubt whether they were well considered and think that they are not well decided. Admitting that under the amended constitutional provision under consideration a municipality may be required to make compensation, not only in cases where there is an actual physical invasion of the adjoining property, but also a physical disturbance of a *right or easement* connected therewith, such as the easement of access, or of light and air, which causes a special damage over and above that which is sustained by the public generally, still such rights and easements of the abutting owner or the right to the support of his soil, is, in the case under consideration, subject, by the very terms and conditions of the dedication or acquisition of the street, to the right of the public to bring it down for street purposes proper to such grade line as the public authorities shall first adopt. Although sensible of the apparent difficulty of defining the grounds for the distinction, it seems to us, where a grade line has been officially established and where property has been improved on the faith of it (which is, of course, done on the assumption that the grade is permanent, although the power to change it for the public good exists), that such a case rests upon so strong a basis of natural justice as to bring it within the purpose of the constitutional provision in question, which was to prevent the unequal sacrifice for the public good which in such cases the abutting owner was, by the established course of decisions, required to make, since such decisions in many of the States limited his right to compensation to cases where there was a trespass upon or physical injury to the *corpus* of his property. The decisions under the amended constitutional provision upon the exact point, as to its effect on street grade cases, are not as yet very numerous, but some of those referred to in the note to the next section appear to give to this provision a scope greater than the one here suggested. Part of the decisions cited rest, however, in whole or in part upon statutes; and hence a critical examination of the legislation and of the opinions in the cases is necessary to ascertain the exact force, value, and effect of any given judicial judgment.

[1] *Ante*, secs. 656, 683. [2] *Ante*, secs. 685, 686. [3] *Ante*, sec. 989.

[1] *Ante*, sec. 990, note, where many of these statutes are referred to.

§ 995 *c*. **Same subject. Change of Grade for other than Street Purposes.** — Where, however, *the establishment or change of the grade is made, not for ordinary and usual street purposes,* but for the use and convenience of railway or other private companies, or even by the municipality for other than ordinary and usual street uses, and damages are thereby caused to the abutter, the decisions hold with scarcely any dissent, and we think properly, that the constitutional provision under consideration is applicable, and imposes or declares a liability therefor. Thus, if a city should, for the public benefit, put the street to an unusual use, as, for example, a high viaduct constructed by the city, thereby specially injuring the abutting owner's access or his light or air, such a case rightly falls within the remedial purpose of the constitutional amendment. In view of the wide-reaching and as yet somewhat undefined limits of the operation of the constitutional provisions in question, we have given the text thereof in the note, and have illustrated the subject by a very full reference to the decisions thereon in the several States. We only add, that unless the broad language of these provisions is carefully applied and limited to reach the evil in which the provisions themselves had their origin, they are capable of working mischiefs as great as those which they will remove or cure.[1]

[1] Alabama. — *Constitution*, art. xiv. sec. 7, "Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction." [Same as Pennsylvania (noted *infra*), except the omission of the words "or secured" after the word "paid."] In Montgomery City Council *v.* Townsend (street grade case), 80 Ala. 489 (1886), the municipal authorities had damaged plaintiff's property by cutting down the sidewalk contiguous thereto. Plaintiff's lot was thus left twenty feet above the street. It was held that the question ought to have been submitted to the jury whether the evidence showed a "construction or enlargement" of the highway within the meaning of the Constitution. The court said: "The Constitution requires compensation to be made for the extraordinary changes which may not be due to the natural formation of the surface, or to the mode of original construction, as then deemed sufficient to a safe and convenient way. A material change, operating injury to adjoining premises, occasioned by a contingency which could not have been reasonably and fairly foreseen, or made merely because the corporate authorities may judge that the public convenience would be increased thereby, or the general appearance of the street improved, is a new description of injury in the enlarged sense of the Constitution, which casts on the property owner an additional burden entitling him to compensation. Injuries by the construction of a highway, as provided for in the Constitution, include those injuries produced by alterations, which could not have been naturally and reasonably anticipated, and damages for which could not have been legally awarded in the preliminary assessment, if the land is condemned, or if dedicated, which the owner would not be estopped to claim. This construction effectuates the cardinal purposes of the Constitution, — the protection of private property, and the equal distribution of the public burdens, — avoids double compensation, and is applicable alike to all corporations, municipal and other, and individuals invested with the privilege of taking private property for public use." This case was remanded for a new trial. On the second appeal (City of Montgomery City Council *v.* Townsend, 84 Ala. 478 (1887), these principles were adhered to; and the rule as to measure of damages laid down in Pa. R. R. Co. *v.* Marchant, 119 Pa. St. 541 (noted *infra*), was approved. In Columbus & W. Ry. Co. *v.* Witherow (railroad in street), 82 Ala. 190 (1886), where a railroad company was about to construct a railroad through the middle of a street on which complainant was an abutting owner and in which he owned the fee, and the company was proceeding to raise an embankment in the street, from eight to thirteen feet high, an injunction was granted until security was given for the prepayment of compensation as required by the Constitution.

Arkansas. — *Constitution*, art. ii. sec. 22. "Private property shall not be taken, appropriated, or damaged for public use without compensation therefor." A railroad was constructed in a street on which plaintiff was an abutting owner. The road-bed was made fifty feet wide, and from three to four feet above the grade of the street. This made an obstruction, and otherwise injured the plaintiff's property. It was held that under the constitutional provision above quoted, plaintiff was entitled to compensation. Hot Springs R. R. Co. *v.* Williamson (railroad in street), 45 Ark. 429 (1885).

California. — *Constitution*, art. i. sec. 14. "Private property shall not be taken or damaged for public use, without just compensation having first been made or paid into court for the owner." Plaintiffs were owners of land abutting on Army Street in San Francisco. The city constructed a sewer in the street, and brought the street to the official grade (it seems for the first time). In doing so, the heavy street filling caused by its weight the soft earth in the street to be "squeezed out," and the foundations of the plaintiff's buildings and the buildings themselves to be thereby injured. It was held that the plaintiffs were entitled to recover compensation by virtue of the constitutional provision. Reardon *v.* San Francisco (street grade case), 66 Cal. 492 (1885). See Hall *v.* Bristol, L. R. 2 C. P. 322; *ante*, secs. 587 *d*, note, 991, note, and cases construing English statutes there cited; Index, tit. *Damages, Eminent Domain, Streets.*

Colorado. — *Constitution*, art. ii. sec. 15. "Private property shall not be taken or damaged, for public or private use, without just compensation." In Mollandin *v.* Union Pac. Ry. Co. (railroad in street), 14 Fed. Rep. 394 (1882) (*Hallett*, J.), where a steam railroad company had laid its track in the street in front of plaintiff's premises, it was held that plaintiff was, under the constitutional provision, entitled to compensation. In Denver *v.* Bayer (railroad in street), 7 Col. 113 (1883), it was said that the abutting owner is entitled to compensation from the railroad company, when the street is occupied by a railroad, and his property is injured thereby; and it is immaterial that the fee of the street is in the city. The case decided that the *city* is not liable.

Georgia. — *Constitution, Bill of Rights*, sec. 3, par. 1. "Private property shall not be taken or damaged for public purposes without just compensation being first made." In Atlanta *v.* Green (street grade case), 67 Ga. 386 (1881), *the city had raised the grade of the street* on which plaintiff was an abutting owner, making the level of the street opposite the plaintiff's premises fifteen feet higher than it was originally. It was held that the plaintiff was entitled to compensation, although there was no direct invasion of her premises; and that the *measure of damages* was the decrease in the value of the property, taking into account any benefit as well

Civil Liability in respect of Defective Streets.

§ 996 (785). **Liability for defective Streets and Sidewalks.** — We come now to consider the civil liability of municipal corporations