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A TREATISE
ON THE
LAW OF EMINENT DOMAIN

IN THE
UNITED STATES

BY
JOHN LEWIS

THIRD EDITION

VOLUME I

CHICAGO
CALLAGHAN & COMPANY
1909

John Lewis
Author

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1909

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PREFACE TO THIRD EDITION.

The existence of between five and six thousand new cases on the subject of Eminent Domain, decided since the Second Edition was published, affords sufficient reason for a New Edition. These new cases deal with new questions, new conditions and new phases of old questions. The same plan has been followed, as in the old editions, of making the treatment thorough and exhaustive. On some questions the old authorities have been re-examined and the text rewritten. On all points, the citations have been brought down to date. Parallel references to the Reporter System, the Trinity and the L.R.A. have been incorporated. No change has been made in the arrangement. The sections have been renumbered and the old numbers placed in parentheses, so that any section can be readily found, whether referred to by the old or new number.

JOHN LEWIS.

Chicago, September, 1909.

PREFACE TO SECOND EDITION.

In the twelve years which have elapsed since the publication of the first edition, more decisions have been handed down on the subject of Eminent Domain than in all the previous history of the country. The same plan has been pursued, as in the former edition, of making the citations exhaustive. One hundred and ninety-two new sections have been added and the number and extent of the notes has, probably, been doubled. Half the increase in the size of the work will be found in the seven chapters which treat distinctively of constitutional questions.

In the preface to the former edition a list was given, showing the number of cases cited from each State. For the sake of comparison a similar list is subjoined, in which are included England, Canada, the Territories and Federal courts. The total number of cases cited is 12,822.

New York	1,728	Maryland	156
Pennsylvania	1,347	Vermont	135
Illinois	890	Canada	108
Massachusetts	809	Virginia	102
Indiana	652	Tennessee	96
Missouri	532	Mississippi	87
New Jersey	529	Colorado	85
Iowa	410	South Carolina	85
Federal Courts	380	Arkansas	81
Michigan	356	Oregon	75
Minnesota	356	Washington	68
Maine	327	Rhode Island	67
Wisconsin	305	West Virginia	64
California	295	Delaware	35
Ohio	277	Florida	32
Kansas	250	District of Columbia..	26
England	245	Montana	22
New Hampshire	228	Nevada	16
Kentucky	213	South Dakota	15
Connecticut	208	Utah	11
Nebraska	207	Idaho	6
Texas	198	North Dakota	6
Georgia	196	Dakota Territory	2
North Carolina	183	Wyoming	2
Louisiana	161	New Mexico	1
Alabama	156	Oklahoma	1

The notes in the present edition have been numbered in successive series of 1 to 99, instead of in a separate series for each section as in the old edition. This accomplishes the same purpose of enabling a reference to be made to any note of any section, and at the same time economizes space.

JOHN LEWIS.

Chicago, August, 1900.

PREFACE TO FIRST EDITION.

The work, which is now offered to the Profession and the Public, was commenced fourteen years ago and has been prosecuted with as much assiduity as the increasing demands of professional life would permit. Within that time the number of reported cases upon the subject treated has doubled; and, what is of greater moment, decisions of vast importance and far-reaching consequence have been rendered, which will, if they have not already, produce radical changes in many of the legal aspects of the subject.

Great attention has been paid to the constitutional side of the question, and nearly half the book is occupied with a discussion of the proper interpretation of the words "taken," "public use" and "just compensation," as used in the constitutions of the several States. The manner in which this part of the subject has been treated will be best ascertained by an examination of the work itself, but a few words of explanation may not be improper. Very early in the preparation of the work the writer became convinced that the earlier cases as to what constitutes a taking were based upon a radically defective interpretation of the constitution, which not only denied the right to compensation in many cases where it ought to be given, but greatly embarrassed the property-owner in obtaining it in those cases in which it was conceded to be due. These early cases attacked the question wrong end first, so to speak, through the word *taken* instead of through the word *property*. It is only by having a clear and correct conception of the idea of *property* that a uniform, consistent and just application of the constitution can be made to the many complicated and varied cases which come up for adjudication. It seems to the writer that the principles elaborated in the third chapter, and which are supported by a constantly increasing weight of authority, will enable such an application to be made.

The chapter on the meaning of the words "public use," is written upon the assumption, which accords with all the authorites, that the words import a limitation upon the power of the legislature. Conceding this to be the intent of the words, whether the conclusions reached by the author are correct must

be left for the reader to judge. They have been reached after years of consideration and the gradual resolution of many doubts and questions. One doubt concerning the matter, however, remains, and that is, whether the words in question were originally intended to operate as a limitation at all. The language of the provision does not indicate it. "Private property shall not be taken for public use without just compensation." If the intent had been to make the words, *public use*, a limitation, the natural form of expression would have been: "Private property shall not be taken *except* for public use, nor without just compensation." It is certainly questionable whether anything more was intended by the provision in question than as though it read, "Private property shall not be taken *under the power of eminent domain* without just compensation." Those cases which virtually give this interpretation to the provision and at the same time hold that the words, *public use*, are a limitation, it seems to the author are not logically sound. In some of the States the form of the provision is such as to leave no room for doubt that a limitation was intended.

It is unnecessary to comment upon that part of the work which treats of "just compensation," or upon what has been written concerning the effect of the constitutional provision as a whole.

The author has endeavored to make the citation of authorities exhaustive, and hence numerous cases are sometimes referred to in support of propositions which are not disputed. While this may seem unnecessary, it leads to no confusion and the advantage is gained of having substantially all the authorities at hand upon a given point when desired for any purpose.

Over six thousand cases are referred to, and the comparative extent to which each State contributes to the number might be made the subject of an interesting commentary, when it is remembered that they are an indication of material progress and of public improvements, but perhaps most can be said in the fewest words by giving the list itself and leaving the reader to his own reflections:

New York	830	Indiana	366
Massachusetts	599	New Jersey	338
Pennsylvania	534	Iowa	259
Illinois	377	Missouri	232

Maine	215	Tennessee	67
Wisconsin	208	Virginia	65
New Hampshire	186	Alabama	63
Ohio	171	Texas	61
Michigan	169	Nebraska	54
Minnesota	159	Mississippi	44
Kentucky	139	Arkansas	43
California	135	South Carolina	43
Connecticut	133	West Virginia	34
Louisiana	98	Rhode Island	29
Vermont	98	Oregon	26
Kansas	88	Delaware	19
Georgia	87	Colorado	14
North Carolina	83	Nevada	12
Maryland	81	Florida	6

The plan has been adopted of numbering the notes of each section consecutively, and in order to prevent confusion the notes of each section are headed by the number of the section to which they belong. This plan is believed by the author to be the most convenient for citation and reference, and advantage has been taken of it to refer, in the table of cases, to the particular note or notes in which each case appears.

JOHN LEWIS.

Chicago, June, 1888.

TABLE OF CONTENTS.

VOLUME I.

CHAPTER I.

THE POWER DEFINED AND DISTINGUISHED.

- § 1. The power defined.
- 2. Definitions considered.
- 3. Nature of the power.
- 4. Eminent domain distinguished from taxation.
- 5. Distinguished from special assessments or betterments.
- 6. Distinguished from the police power.
- 7. Distinguished from the damaging or destruction of property in cases of necessity.
- 8. Distinguished from the war power.

CHAPTER II.

CONSTITUTIONAL PROVISIONS.

- § 9. In general.
- 10. The constitutional provision a limitation, not a grant.
- 11. States having no constitutional provision.
- 12. The provision in the federal constitution.
- 13. Effect of a change in the constitution.
- 14. The provisions apply only to the power of eminent domain.
- 15. Provision in the federal constitution.
- 16-61. Constitutional provisions of the different states in the alphabetical order of states.

CHAPTER III.

WHAT CONSTITUTES A TAKING: GENERAL PRINCIPLES.

- § 62. Statement of the question.
- 63. What is property?
- 64. Meaning of the word property in the constitution.
- 65. Principles which determine when there has been a taking.
- 66. Changes which the law has undergone.
- 67, 68 Leading cases.

CHAPTER IV.

WHAT CONSTITUTES A TAKING: WATERS.

- § 70. Streams defined and classified.
71. Rights of riparian owners in the flow of the stream.
72. What constitutes a reasonable use of a stream by an upper proprietor.
73. What riparian rights in the flow of a stream attach to property held for public use.
74. Abstracting or diverting the water of a stream.
75. Increasing the quantity of water.
76. Interfering with the regularity of the current.
77. Pollution of the water.
78. Changing the current by works in, across or near the channel to the injury of those below.
79. Embankment on one side of stream causing an increase of flood water upon the opposite side.
80. Works which set back the water and cause a flooding of the lands above.
81. Bridges—Authority to construct—Damages thereby—Interfering with navigation.
82. Making a private stream public, or navigable, by statute.
83. Rights of riparian owners on private navigable streams.
84. An interference with such rights is a taking.
85. Damages by reason of improving navigation.
86. What streams are public.
87. Rights of riparian owners on public navigable streams.
88. Interfering with the flow of public streams.
89. Damage to authorized works on public streams.
90. Title to lakes and ponds.
91. What constitutes navigability.
92. The question of title to the bed of navigable waters and of the rights of riparian owners upon such waters is one of State policy and State law.
93. Nature and limitations of the title to the bed of navigable waters whether in the public or riparian owners.
94-100 Rights of riparian owners on public waters.
101. Injury to riparian rights upon public waters is a taking.
102. Interfering with access: Railroads and other works below high water mark.
103. Establishing harbor lines and interfering with piers and wharves.
104. Rights of riparian owners upon lakes and ponds and what interference therewith is a taking.
105. Withdrawing, diverting or polluting public waters.
106. Miscellaneous cases in regard to public waters.
107. Riparian rights cannot be abolished without compensation.
108. Damages from discharge of sewer.
109. Discharging water upon land; injury by seeping; saturating, etc.

- 110. Rights respecting surface water.
- 111. What constitutes surface water; flood waters of stream.
- 112. What interference with surface water is a taking.
- 113. Miscellaneous cases in regard to surface water.
- 114. Subterranean waters.
- 115. Interference with natural barriers against water.
- 116. Miscellaneous cases as to waters.

CHAPTER V.

WHAT CONSTITUTES A TAKING: ROADS AND STREETS.

I. GENERAL QUESTIONS—RIGHTS OF ABUTTING OWNERS.

- § 117. Nomenclature of public ways.
- 118. Distinction between rural highways and urban streets as to the extent of the public right or easement.
- 119. What is meant by "abutting owners."
- 120. Rights of abutting owners: Light, air and access.
- 121. Origin and basis of the rights or easements of light, air and access.
- 122. Further as to the right to light and air.
- 123. To how much of the street the easements of light, air and access extend.
- 124. Has the abutter other rights or easements than those of light, air and access?
- 125. Rights of abutting owners a matter of state law.
- 126. Rights of abutting owners as adjoining proprietors.
- 127. When the fee of streets is in the public the title is in trust for street uses only.
- 128. Ownership of the fee of streets and distinctions based thereon.

II. STREET GRADE CASES.

- 129. Early English cases.
- 130. Value of English precedent in constitutional questions.
- 131. Leading cases in the United States. *Callender v. Marsh*.
- 132. Other early cases.
- 133. The general doctrine.
- 134. *Ratio decidendi* of these cases.
- 135. The Ohio cases.
- 136. The law in Kentucky.
- 137. Interfering with access, light and air by change of grade not a taking.
- 138. Peculiar and extraordinary changes of grade, and changes for some ulterior purpose other than the improvement of the street.
- 139. Lowering grade: Interfering with support of soil.
- 140. Raising grade: Encroachment of the filling.
- 141. Damages from surface water.

142. Interfering with natural streams.
143. Unlawful change of grade.
144. When the work is negligently done.
145. Power to establish grades a continuing one.
146. Power of city to make compensation.
147. Miscellaneous cases.
148. Right to compensation for change of grade under statutes and recent constitutions.

III. RAILROADS IN STREETS.

149. In general.
150. Classification of railroads.
151. Is a commercial railroad a legitimate use of a street or highway?
152. Commercial railroad in street: Right to compensation generally.
153. Right to compensation when fee of street in abutter.
154. Right to compensation when fee of street in the public.
155. Right to compensation when fee of street in third party.
156. Commercial railroad on viaduct. New York Park Avenue cases.
157. Elevated railroads.
158. Horse railroads.
159. Cable railroads.
160. Steam motor railroads.
161. Electric trolley railroads.
162. Underground railroads in streets.
163. Other kinds of street railroads.
164. Street railroads. General conclusions.
165. Interurban railroads.
166. Street railroads carrying freight.
167. Railroads in streets. General conclusions.
168. Whether a railroad is a proper or legitimate street use is a question of law.
169. Authority to occupy a street, how granted and construed.
170. Rights of company as to manner of constructing and operating road.
171. The doctrine of an unreasonable or excessive use of streets by railroads, as a basis for compensation.
172. Railroads in streets constructed without authority or used in a way not authorized: Remedies of abutters.
173. Switch tracks to private property and railroads for private use.
174. Railroad across street: Right of abutter on street to compensation.
175. Right of municipality having the fee of street to receive compensation.
176. When the owner is estopped from claiming damages.
177. Measure of damages: Remedies.
178. When there is a change of grade in connection with a railroad in a street.
179. Compensation for additional track or change of use.

- § 180. Street railroads crossing commercial railroads.
 181. Railroads in streets: Miscellaneous cases.

IV. OTHER USES OF STREETS.

182. What are legitimate street uses generally.
 183. Sewers and drains.
 184. Water pipes.
 185. Gas pipes.
 186. Steam, electricity, etc.
 187. Telegraph and telephone poles.
 188. Electric wires for lighting and other purposes.
 189. Markets.
 190. Destruction of or injury to shade trees in streets.
 191. Interfering with access by obstructing street at a distance from the plaintiff's property.
 192. Damage to railroads, water pipes, gas pipes, etc., by the grading and improvement of streets.
 193. Damages to railroads, water and gas pipes by the construction of sewers.
 194. Miscellaneous cases.
 195. The franchise to use streets and its incidents.

V. DAMAGES FROM THE VACATION, DISCONTINUANCE AND CLOSING OF STREETS AND HIGHWAYS.

196. The power to vacate streets and highways.
 197. Right to compensation for the vacation or closing of streets: General principles.
 198. Private rights in streets and highways.
 199. What is special damage from the obstruction of a street.
 200. Vacating or closing street in front of property.
 201. Narrowing street in front.
 202. Vacating or closing street so as to cut off access in one direction.
 203. When the vacated part is beyond the next cross street from the plaintiff's property.
 204. Where the property is cut off entirely, though the street is left intact in front.
 205. Vacation and discontinuance of country highways.
 206. When damage by the vacation or closing of streets and highways amounts to a taking.
 207. When the depreciation of value from the vacation and closing of streets amounts to damage or injury within constitutions and statutes.
 208. Pennsylvania decisions on the subject.
 209. Purpose and motives of the vacation.
 210. Exercise and construction of the statutory authority.
 211. Effect of vacation upon private rights in street.
 212. Remedies.

CHAPTER VI.

OTHER CASES OF TAKING.

- § 213. Impairing franchises.
- 214. When the franchise is not exclusive.
- 215. When the franchise is exclusive.
- 216. What is an interference with an exclusive franchise? Bridges and ferries.
- 217. Same: Other franchises.
- 218. Electrical franchises and electrical interference.
- 219. Change of use, or an additional use.
- 220. Change of use: Instances.
- 221. New burdens on railroad right of way.
- 222. Joint use of tracks.
- 223. Interfering with an easement.
- 224. Restrictive covenants.
- 225. Possessory rights in public lands.
- 226. Mapping territory into streets and blocks for future improvement.
- 227. Establishing building lines.
- 228. Justifiable entries.
- 229. Injuries by blasting.
- 230. Injury to business.
- 231. Highways laid out adjacent to but not taking one's land.
- 232. Interfering with the right of exclusion.
- 233. Easement of levee in Louisiana.
- 234. Interfering with the right of support.
- 235. Consequential injuries to property by operation of railroad: Noise, smoke, cinders, jarring, vibrations, etc.
- 236. Polluting the atmosphere.
- 237. When the public use of land produces a physical or structural injury to adjacent land: Disturbance of the soil by pressure, vibration, flooding or percolation.
- 238. If the use of property for public purposes produces a nuisance, those injured are entitled to compensation.
- 239. Miscellaneous decisions as to what constitutes a taking.
- 240. Damages from negligence.
- 241. Public property not within the constitutional provision.
- 242. Taking under the guise of taxation.
- 243. Taking under the guise of the police power: Regulating the use of property, the construction, repair and height of buildings and the like: Fire limits.
- 244. Legislative regulation and control of railroads and other corporations: Imposing new liabilities.
- 245. Regulating or prohibiting businesses, occupations, contracts and the like.
- 246. Regulating rates and charges.
- 247. Taking, injuring or destroying property in the abatement of nuisances, or when made, kept or used in violation of law.

- § 248. Compelling railroads and others to make alterations and construct works for the purpose of promoting the public safety, convenience and welfare.
 249. Taking under the guise of the police power: Conclusions.

CHAPTER VII.

MEANING OF THE WORDS "PUBLIC USE."

- § 250. Taking for private use unauthorized.
 251. The question of public use a judicial one.
 252. State of the authorities as to the meaning of the words "public use."
 253. The question of public use not affected by the agency employed.
 254. Nor by the fact that the use or benefit is local or limited.
 255. Nor by the necessity or lack of necessity for the condemnation.
 256. The words "public use" a limitation.
 257. Statement of doctrines.
 258. Proper construction of the words "public use."
 259. Highways: Questions of public use, as affected by their character, purpose or other circumstances.
 260. Private roads.
 261. Toll roads, bridges and ferries.
 262. Canals.
 263. Railroads, their connections and appurtenances.
 264. Lateral and branch railroads, switch and spur tracks to private property.
 265. Other means of transportation; the telegraph, petroleum tubes, elevated tramways, etc.
 266. Public grain elevators.
 267. Urban improvements: Sewers, water, gas, etc.
 268. Electricity for light, heat and power and works for generating and transmitting same.
 269. The supply and distribution of water for power purposes.
 270. Public buildings: Schools, markets, hospitals, etc.
 271. Public parks or pleasure drives.
 272. Converting spots of historic interest into public grounds: Battle-fields.
 273. Cemeteries.
 274. Improvement of navigation.
 275. Water mills and water power.
 276. The same: Leading cases.
 277. The same: Law in the different States at the present time.
 278. The same: Review of the decisions.
 279. Massachusetts doctrine that the mill acts do not fall under the eminent domain power.
 280. The mill acts fall under the eminent domain power.
 281. Promoting fish culture, cranberry culture and the like.
 282. Development of mines.

- § 283. Drains, ditches, levees, etc., for improving wet and overflowed land.
- 284. Decisions referring such improvements to the police power, or power to legislate for the general welfare.
- 285. These improvements referable to the eminent domain power.
- 286. The question of public use.
- 287. Drains, etc.: Decisions of California.
- 288. Same: Illinois.
- 289. Same: Indiana.
- 290. Same: Iowa.
- 291. Same: Kansas.
- 292. Same: Kentucky.
- 293. Same: Michigan.
- 294. Same: Minnesota.
- 295. Same: Missouri.
- 296. Same: Nebraska.
- 297. Same: New Jersey.
- 298. Same: New York.
- 299. Same: North Carolina.
- 300. Same: North Dakota.
- 301. Same: Ohio.
- 302. Same: Oregon.
- 303. Same: Washington.
- 304. Same: Wisconsin.
- 305. Same: Other states.
- 306. Levees, dikes, etc.
- 307. The public health.
- 308. Irrigation.
- 309. Taking for the United States.
- 310. Taking for a foreign state.
- 311. Taking all of the tract when only a part is required.
- 312. Miscellaneous cases: Settling private controversies.
- 313. To constitute a public use the public must have a legal right to the use or service for which the property is taken.
- 314. Combination of public and private use in the same act or proceeding.
- 315. Taking for other than a public purpose violates the fourteenth amendment to the Federal constitution.

CHAPTER VIII.

MEANING OF THE WORDS "DAMAGED," "INJURED," OR "INJURIOUSLY AFFECTED."

I. IN STATUTES.

- § 316. Statutes giving damages for change of grade: Connecticut.
- 317. Same: Indiana.
- 318. Same: Iowa.
- 319. Same: Kansas.

- § 320. Same: Maine.
- 321. Same: Massachusetts.
- 322. Same: Michigan.
- 323. Same: Minnesota.
- 324. Same: Missouri.
- 325. Same: New Hampshire.
- 326. Same: New Jersey.
- 327. Same: New York.
- 328. Same: Ohio.
- 329. Same: Pennsylvania.
- 330. Same: Rhode Island.
- 331. Same: South Carolina.
- 332. Same: Tennessee.
- 333. Same: Vermont.
- 334. Same: Washington.
- 335. Same: Wisconsin.
- 336. Where the statute refers merely to a change of grade must it be from a previously established grade?
- 337. What constitutes an established grade.
- 338. What constitutes a change of grade.
- 339. The right and remedy are wholly dependent upon the statute.
- 340. When action accrues.
- 341. Whether the statute applies to changes ordered before but made after it takes effect.
- 342. Elements and measure of damages.
- 343. Estoppel to claim damages.
- 344. Statutes giving damages for railroads in streets.
- 345. Statutes giving damages in other cases.

II. IN CONSTITUTIONS.

- 346. Constitutional provisions.
- 347. The terms "damaged," "injured" and "injuriously affected" are synonymous.
- 348. Damages from change of grade.
- 349. Viaducts, tunnels, causeways, bridge approaches and the like in streets.
- 350. Decisions in Alabama and Pennsylvania: What constitutes a construction or enlargement of works, highways or improvements.
- 351. Damages by railroads in streets.
- 352. Damages by other uses of streets.
- 353. Damages by the vacation of streets.
- 354. Impeding access to premises by interfering with public ways not in front of same.
- 355. Competing ferries, bridges, etc.
- 356. Interference with water rights.
- 357. Damage from the operation of a railroad or its appurtenances on the private property of the company: Noise, smoke, vibrations, etc.

- § 358. Miscellaneous cases.
- 359. The words in question were intended to enlarge the right to compensation.
- 360. The words in question should be liberally construed.
- 361. They include any physical injury to property not held to be a taking.
- 362. Also any interference with private rights not held to be a taking.
- 363. And, generally, any damage to property arising from an interference with a right, public or private, which does not amount to a taking.
- 364. When claim based on an interference with a public right the plaintiff's damages must be special and peculiar.
- 365. Different views regarding the proper construction of the words "damaged" or "injured."
- 366. Damages not embraced by the words in question.

CHAPTER IX.

THE STATUTORY AUTHORITY.

- § 367. Power of the legislature generally.
- 368. People's charters.
- 369. The necessity or expediency of exercising the power is exclusively for the legislature.
- 370. When the power of eminent domain has been delegated, the propriety of its exercise rests with the grantee.
- 371. The authority to condemn must be expressly given or necessarily implied.
- 372. Illustrations.
- 373. How the authority may be given.
- 374. To whom authority may be given: Foreign corporations.
- 375. Direct appropriation by the legislature.
- 376. Delegation and transfer of authority: Contractors and agents.
- 377. A lease of the property and franchises of a corporation does not destroy its right to condemn.
- 378. The manner of proceeding may be changed at the pleasure of the legislature.
- 379. The right to impose additional liabilities.
- 380. Effect of the repeal, amendment or expiration of statutes.
- 381. General and special laws: Repeal by implication.
- 382. Two acts conferring same power.
- 383. Effect of a change in the form of municipal government.
- 384. Conflict of jurisdiction between different authorities having power in the same territory.
- 385. Statutes have no extra-territorial effect.
- 386. When a naked or defective authority to condemn may be exercised according to previous statutes, and when not.
- 387. The authority must be strictly pursued.
- 388. The authority to condemn will be strictly construed.

- § 389. Provisions as to compensation and remedy and in favor of the property owner should be liberally construed.
- 390. Construction of statutes as to location.
- 391. Construction of statutes as to the purpose for which the power may be exercised: Railroads.
- 392. Same: Branch and lateral railroads.
- 393. Same: Street and elevated railroads.
- 394. Same: Roads and streets.
- 395. Same: Statutes relating to the taking of materials for the repair of roads and bridges.
- 396. Same: Drains, levees, irrigation.
- 397. Same: Dams, water and water power.
- 398. Same: Telegraphs and telephones, electric companies.
- 399. Same: Municipal purposes.
- 400. Same: Miscellaneous.
- 401. Meaning of the words "to," "from," "at" or "near" a place, in statutes describing *termini* and location.
- 402. Change of location.
- 403. Successive appropriations.
- 404. Where the provisions of one statute are adopted by another, or extended to another jurisdiction.
- 405. Validity and effect of statutes legalizing defective proceedings.
- 406. The legislature cannot surrender or preclude itself from the exercise of the eminent domain power.
- 407. Agreements not to condemn.
- 408. Exercise of the power by congress.
- 409. Constitutionality of eminent domain statutes generally.
- 410. Parties availing of statute cannot object to its validity.

VOLUME II.

CHAPTER X.

WHAT MAY BE TAKEN.

- § 411. All property subject to the right of eminent domain.
- 412. Land and rights and easements in or appurtenant thereto.
- 413. Money, contracts, choses in action and other personal property.
- 414. Public lands and lands held by grant from the State or condemning authority.
- 415. Lands of Indian tribes.
- 416. Property affected by contracts, settlements or otherwise, or held for particular uses, educational, charitable or otherwise.
- 417. Taking railroad property for highways and streets.
- 418. To what extent one railway company may take the property of another.
- 419. Same: Taking tracks or joint use of same.

- § 420. Same: Taking part of right of way.
- 421. Same: Taking land used for depots, yards, shops and other appurtenances.
- 422. Same: Joint use of depot and terminal facilities.
- 423. Same: Joint use of tracks.
- 424. Same: Right of crossing.
- 425. Statutes regulating the right and manner of crossing.
- 426. Power to intersect, join, connect or unite with other railroads.
- 427. Taking railroad property for parks.
- 427a. Taking railroad property for telegraph and telephone lines.
- 428. Taking railroad property for drains and ditches.
- 429. Taking railroad property for other public uses.
- 430. Taking highways and streets.
- 431. Railroads across highways and streets.
- 432. Bridges, turnpikes, ferries, canals and mill property.
- 433. Property of gas and water companies and other public service corporations.
- 434. Parks and cemeteries.
- 435. Public school property.
- 436. Taking land devoted to other public or quasi-public uses.
- 437. Works upon, across or over navigable waters.
- 438. Corporate property and franchises may be taken.
- 439. Exclusive rights and privileges.
- 440. General principles deducible from the foregoing decisions in respect to the taking of property already devoted to public use.
- 441. The general rule does not apply to prevent the taking of easements or joint use, when no material injury.
- 442. Property not in use and not necessary.
- 443. Property acquired by contract.
- 444. Property of public service corporations not having the power of eminent domain.
- 445. Property voluntarily devoted to public use by individuals and corporations.
- 446. Property to be exempt must be used for public purposes in good faith.
- 447. Statutes giving right to take property in public use for a more necessary public use, or upon similar conditions.
- 448. Extent of interest which the legislature may authorize to be taken.
- 449. What estate vests when statute silent on the subject.
- 450. When the statute provides for a fee; nature of fee acquired.
- 451. What estate acquired under particular statutes; whether fee or easement.
- 452. Right to take temporary use of land or particular rights and privileges.
- 453. How much may be taken.
- 454. Same: Instances.
- 455. Construction of statutes prohibiting the taking of certain buildings and enclosures: Dwellings.
- 456. The same continued: Other buildings and structures.

- § 457. The same continued: Gardens, orchards, yards and other enclosures or exceptions.
- 458. Section 92 of the English land clauses consolidation act: Meaning of "house," "building," "manufactory."
- 459. What may be taken under the term "land," "ground," etc.
- 460. Designating the property to be taken.
- 461. What may be taken under particular statutes.

CHAPTER XI.

ACQUISITION OF PROPERTY BY AGREEMENT, PRESCRIPTION OR DEDICATION.

- § 462. The subject generally.
- 463. The power to obtain property by agreement.
- 464. Who are competent to agree or convey.
- 465. Validity of deeds and contracts: Fraud, public policy, consideration.
- 466. Delivery and acceptance.
- 467. Construction and sufficiency of the description in deeds and contracts.
- 468. The title or estate conveyed, or which may be acquired.
- 469. Conveyances upon condition: Whether provisions of deed will be construed as conditions or covenants.
- 470. Construction of, and compliance with, conditions: Forfeitures.
- 471. Same: Conditions and agreements relating to the establishment of stations.
- 472. Reservations, exceptions, restrictions, etc.
- 473. Forfeiting benefit of grant or agreement by delay.
- 474. Effect of conveyance as to damages to property of the grantor.
- 475. Release of damages in lieu of award.
- 476. Oral agreements in connection with written contracts.
- 477. Specific performance, and other remedies: Damages.
- 478. By and against whom the agreements may be enforced.
- 479. Notice of unrecorded deeds and contracts.
- 480. Contracts with promoters.
- 481. Oral agreements, releases and licenses.
- 482. Particular contracts construed.
- 483. Reserving right of way for public use in grants by railroads and others.
- 484. Agreement to furnish right of way.
- 485. Construction of contracts generally.
- 486. Rights by prescription.
- 487. Requisites of prescription.
- 488. Possession and color of title.
- 489. Rights by dedication: To what public uses it applies.
- 490. Statutory dedications.
- 491. Construction of map or plat as to public use intended or which may be made of the land dedicated.

- § 492. Common law dedications.
- 493. Who may make dedication.
- 494. The intent of the owner.
- 495. Acceptance by the public.
- 496. Miscellaneous matters relating to dedication.

CHAPTER XII.

PRELIMINARY AND MISCELLANEOUS MATTERS PERTAINING TO PROCEEDINGS.

- § 497. Necessity of an attempt to agree.
- 498. What is a sufficient attempt to agree.
- 499. How excused or waived: Owners under disability.
- 500. How the inability to agree should be alleged and shown.
- 501. An agreement precludes proceedings.
- 502. Priority of right to appropriate specific property: Mill cases.
- 503. The same continued: Railroads and other public works.
- 504. Priority of right to use streets.
- 505. The property must be legally designated: Plans, surveys, etc.
- 506. When an ordinance, resolution or vote of a municipal body is essential, and the requisites thereof.
- 507. When a previous refusal of some other tribunal is essential to jurisdiction.
- 508. Other matters and questions preliminary to the institution of proceedings.
- 509. Of the right to a common law jury.
- 510. It is sufficient, in any event, if a jury trial may be had on appeal.
- 511. What tribunal is sufficient.
- 512. Nature of the proceeding generally: Whether a "suit," "action," "special proceeding," etc.
- 513. Jurisdiction of the Federal Courts: Removals.
- 514. Proceedings by the United States.
- 515. Venue.

CHAPTER XIII.

THE PARTIES TO PROCEEDINGS AND THE VARIOUS ESTATES AND INTERESTS TO BE CONSIDERED.

- § 516. General view.
- 517. Grantor and grantee.
- 518. In case of executory contracts.
- 519. Heirs, devisees and personal representatives.
- 520. Trust estates.
- 521. Husband and wife.
- 522. Dower.
- 523. Mortgagees.
- 524. Judgment creditors and other lien-holders.

- § 525. Life tenants, lessees and revisioners.
- 526. Tenants in common and joint tenants.
- 527. Infants.
- 528. Towns and public authorities as parties.
- 529. Persons in possession of public lands.
- 530. Other rights and interests which must be considered.
- 531. Claims or interests for which compensation need not be made.
- 532. The proper plaintiff in condemnation proceedings.
- 533. Proper parties where the initiative is in owner: Mill acts.
- 534. Construction of statutes in regard to parties.
- 535. Joinder of parties.
- 536. New parties, misjoinder, etc.
- 537. Death of a party, or change of title pending proceedings.
- 538. Effect of omitting a necessary party.
- 539. What constitutes making a person a party?
- 540. General conclusions and principles in regard to parties.

CHAPTER XIV.

OF THE PETITION, COMPLAINT OR OTHER FORM OF APPLICATION.

- § 541. Scope of the chapter.
- 542. When a petition is necessary.
- 543. When not necessary.
- 544. Addressing, signing, verifying and filing.
- 545. When the signers must include a certain proportion of the property involved, or of the owners thereof.
- 546. When required to be signed by a certain class of persons.
- 547. General requisites as to form and substance.
- 548. Statement of parties, owners and persons interested.
- 549. Description of the property taken, or of the location of the improvement.
- 550. Descriptions held sufficient.
- 551. Descriptions held insufficient.
- 552. Descriptions in certain peculiar cases of condemnation: Taking joint use of land or tracks: The right to occupy streets, to withdraw water, etc.
- 553. Stating the purpose of the taking.
- 554. Stating the necessity for the taking.
- 555. Statement of title.
- 556. Stating the nature of the injury or damage.
- 557. Must show inability to agree.
- 558. Showing neglect or refusal of some other tribunal to make the improvement.
- 559. Joinder of improvements.
- 560. Cross petition.
- 561. Amendments.
- 562. Waiver of defects in the petition.
- 563. Miscellaneous questions.

CHAPTER XV.

NOTICE OF PROCEEDINGS.

I. CONSTITUTIONAL REQUIREMENTS.

- § 564. Cases holding that notice need not be given.
- 565. Cases holding that notice must be given.
- 566. "Due process of law" requires notice.
- 567. What is sufficient as to the subject matter of the notice? Of what notice must be given.
- 568. What is sufficient as to the manner of giving notice?
- 569. Giving notice when not required by statute and validity of statutes which do not provide for notice.

II. STATUTORY REQUIREMENTS.

- 570. The notice required by statute is jurisdictional and must be given.
- 571. Meaning of "reasonable notice" in statutes.
- 572. Form of the notice and compliance with statute generally.
- 573. Specifying time and place.
- 574. Signing.
- 575. Describing the property taken.
- 576. Stating the nature or purpose of the proposed action.
- 577. Describing the location or improvement.
- 578. Meaning of the terms, "owners," occupants," etc.
- 579. Serving, publishing, posting, etc.
- 580. Waiver of notice by appearance or otherwise.
- 581. Who is bound or affected by a particular notice.
- 582. The proof of notice.
- 583. The record must show a compliance with the statute as to notice.
- 584. Who may take advantage of want or defect of notice.
- 585. Notice of adjournments, and of other steps in the proceedings.
- 586. One entitled to notice is not bound, if not notified.

CHAPTER XVI.

OBJECTIONS TO THE APPLICATION.

- § 587. General considerations.
- 588. Where the application is to a ministerial officer or board.
- 589. Where the application is to a court.
- 590. Manner of raising objections apparent upon the face of the papers.
- 591. Manner of raising other objections. Propriety of a plea or answer.
- 592. Questioning the legal incorporation of the petitioner.
- 593. Proceedings by foreign corporations.
- 594. Controverting a compliance with the conditions imposed by the statute.

- § 595. The question of necessity: Whether statute must provide for a hearing upon this question.
- 596. The necessity of exercising the power for the purpose proposed.
- 597. The necessity of making the proposed work or improvement.
- 598. Statutes requiring the necessity to be passed upon in a particular manner.
- 599. Statutes which expressly limit the taking to what is necessary for the purpose.
- 600. The question of necessity when the statute is silent on the subject: Whether the constitution impliedly forbids the taking of what is not necessary.
- 601. Meaning of necessity and the principles to be applied in determining the question.
- 602. Practice in determining the question of necessity.
- 603. Power of legislature to determine necessity.
- 604. Objection that other property available.
- 605. Former proceeding for the same purpose.
- 606. Good faith of the proceedings.
- 607. Other objections.
- 608. Defences where proceedings are instituted by the owner.
- 609. Practice in hearing objections.
- 610. Amendments.
- 611. Waiver of objections by going to a hearing on the question of damages.

CHAPTER XVII.

SECURING THE TRIBUNAL TO ASSESS DAMAGES.

- 612. The case stated.
- 613. The order or warrant.
- 614. The writ of *ad quod damnum*.
- 615. Some further points as to the appointment and summoning of commissioners, etc.
- 616. Mandamus to compel the appointment of commissioners.
- 617. Setting aside order appointing viewers, commissioners, etc.
- 618. The qualifications of commissioners, jurors, etc.: Petitioners.
- 619. Same: Taxpayers.
- 620. Same: Relatives of parties or of their counsel.
- 621. Same: Owners of land affected.
- 622. Same: Stockholders.
- 623. Same: Miscellaneous points.
- 624. Whether the record should show that the commissioners, jurors, etc., possessed the qualifications required by law.
- 625. Waiver of objections to commissioners, jurors, etc.
- 626. Vacancies, effect of, and how filled.
- 627. Effect of the disagreement of special juries.
- 628. The presiding officer of special juries, his qualifications, duties, etc.

CHAPTER XVIII.

PROCEEDINGS BY AND BEFORE THE CONSTITUTED TRIBUNAL.

- § 629. The oath to be taken.
- 630. The form and sufficiency of the oath.
- 631. What the record should show as to the oath taken.
- 632. Waiver of defective oath.
- 633. The time and place of meeting and of acting.
- 634. Mode of procedure before the commissioners: Evidence, etc.
- 635. What questions may be considered.
- 636. Adjournments.
- 637. Whether a majority may act or decide.
- 638. Receiving *ex parte* communications.
- 639. Receiving entertainment.
- 640. Other improprieties.
- 641. Power of commissioners to reconsider or amend their report.
- 642. Where the proceedings are before a court.
- 643. View of the premises by the jury.
- 644. Effect to be given the view.
- 645. The right to open and close.
- 646. The practice as to consolidation of cases and separate trials.
- 647. Instructions.
- 648. Arbitration.

CHAPTER XIX.

EVIDENCE.

- § 649. The general rules of evidence apply.
- 650. Competency of evidence generally.
- 651. The burden of proof.
- 652. Competency of witnesses generally.
- 653. Limiting the number of witnesses.
- 654. Opinions of witness as to value.
- 655. Opinions as to the amount of damages or benefits.
- 656. Who are competent to give such opinions.
- 657. Opinions of witnesses as to other matters.
- 658. Admissions.
- 659. Whether the owner must prove his title.
- 660. Estoppel to deny title.
- 661. What is sufficient proof of title.
- 662. Proving sales of similar property.
- 663. Proving effect upon other property in suits for depreciation.
- 664. Proving the cost of the property or of improvements thereon.
- 665. Proving a sale of property claimed to be damaged made after the damage has been incurred.
- 666. Offers to buy or sell.
- 667. Purchase by the party condemning.

- § 668. Assessment for taxation.
- 669. Reports of commissioners, etc., as evidence.
- 670. Miscellaneous points.

CHAPTER XX.

JUST COMPENSATION AND DAMAGES.

- § 671. Right to compensation when the constitution does not require it in express terms.
- 672. Right to compensation generally: Scope of the chapter.
- 673. Statutes which authorize a taking must provide for compensation.
- 674. Exceptional cases in New Jersey and Pennsylvania.
- 675. What constitutes a sufficient provision for compensation.
- 676. Express constitutional provisions with reference to the time or manner of making compensation.
- 677. Questions which arise when the constitution is silent in these respects.
- 678. As to the time of making compensation.
- 679. Distinction between a taking by the public and by private parties.
- 680. What is sufficient security when the taking is by private parties.
- 681. Summary as to time of compensation.
- 682. Compensation must be made in money.
- 683. The legislature cannot fix the compensation or prescribe the rules for its computation.
- 684. Meaning of the phrase "just compensation."
- 685. Measure of damages when an entire property or tract is taken.
- 686. When part is taken, just compensation includes damages to the remainder.
- 687. The question of benefits.
- 688. Cases holding that benefits cannot be considered at all.
- 689. Cases holding that special benefits only may be set off against damages to the remainder, but not against the value of the land taken.
- 690. Cases holding that benefits, both general and special, may be set off against damages to the remainder, but not against the value of the part taken.
- 691. Cases holding that special benefits only may be set off against both the value of the part taken and damages to the remainder.
- 692. Cases holding that benefits, both general and special, may be set off against both damages to the remainder and the value of the part taken.
- 693. Conclusion as to the question of benefits.
- 694. Measure of damages where part of a tract is taken.
- 695. Constitutional provisions as to benefits.
- 696. Statutory provisions as to benefits and measure of damages.
- 697. Benefits or damages to a different tract.
- 698. What constitutes an entire tract: Farms and acre property.
- 699. Same: Town property.

- § 700. Same: Peculiar properties—quarries, mines, etc.
- 701. Same: Miscellaneous questions.
- 702. What are special benefits.
- 703. Further as to special benefits.
- 704. Assessing or taxing the part not taken to pay the damages awarded.
- 705. Time with reference to which damages should be estimated.
- 706. General principles in estimating value.
- 707. Value for particular uses.
- 708. Some particular elements of value and value in special cases.
- 709. Speculative inquiries as to a possible use or improvement of the property are improper.
- 710. Damage from construction, use and operation.
- 711. When works have been constructed before the assessment of damages.
- 712. When there is a stipulation or agreement as to the manner of construction.
- 713. When there is no stipulation or agreement as to the manner of construction.
- 714. Damages to be assessed on the basis of a proper construction and use. Damages from improper construction or use to be excluded.
- 715. Damages from trespass: Past damages.
- 716. Where there are different interests or estates. General rules.
- 717. Same: Life estates.
- 718. Same: Effect of the taking on the covenant to pay rent.
- 719. Same: Landlord and tenant.
- 720. Same: Other estates and interests. Mortgages.
- 721. When there are franchises, easements, or privileges appurtenant to property. Gratuitous or possible privileges.
- 722. When corporate property and franchises are taken.
- 723. When the title is subject to restrictions, conditions, easements, etc., or is held for particular cases.
- 724. Value of trees, crops, springs, wells, etc.
- 725. Value of coal, oil and other minerals.
- 726. Value of buildings and other structures.
- 727. Injury to business, loss of profits, etc.
- 728. Personal property: Fixtures: Cost of removal.
- 729. When one railroad crosses another.
- 730. When a street railroad is laid across a commercial railroad.
- 731. When one railroad takes the use of another's tracks.
- 732. Telegraph or telephone lines on railroad right of way.
- 733. When a highway is laid out across a railroad.
- 734. When a railroad is laid across or along a turnpike.
- 735. Railroads in streets: Measure of damages.
- 736. Railroads in streets: Elements of damage: Benefits.
- 737. Change of grade.
- 738. In case of viaducts, causeways, and the like in streets.
- 739. Various elements of damages when part of a tract is taken.
- 740. Danger from fire.
- 741. Cost of fencing.
- 742. The question of interest.

- § 743. When property is taken for a street which is subject to a public easement of way by dedication or prescription.
- 744. When a fee of an existing street is taken.
- 745. Enhancement caused by the work or improvement.
- 746. The right or estate acquired for the public use should be considered.
- 747. The extent of the use may be considered.
- 748. Damages which would be irremediable if no property taken.
- 749. Damages by retarding or preventing increase of value.
- 750. Whether the effect of the entire work or improvement is to be considered or merely that portion thereof which is on the part taken.
- 751. Measure of damages when property is damaged or injured but no part taken.
- 752. Where rights or easements are impaired or destroyed but no land taken.
- 753. When the taking produces damage which is preventable or necessitates a change, reconstruction or substitution of works.
- ✓ 754. Miscellaneous items of damage held allowable.
- ✓ 755. Miscellaneous items of damage held not allowable.
- 756. Reserving rights or easements, or requiring things to be done in lieu of money.
- 757. Mill cases.
- 758. Taking part of a town for federal purposes.
- 759. Where entry is made and works constructed before obtaining title.
- 760. When the owner is estopped to claim damages.

CHAPTER XXI.

THE REPORT OR VERDICT, AND ACTION THEREON.

- § 761. Requisites generally.
- 762. Describing the property to be taken, or location of the improvement.
- 763. Description of location in case of highways.
- 764. What is a sufficient finding on the question of damages.
- 765. What is a sufficient finding on the question of necessity, public utility, etc.
- 766. Of naming and describing the owners of property taken or affected.
- 767. Whether the award of damages should be joint or several.
- 768. Conditional and alternative awards.
- 769. As to the time of making report.
- 770. Filing and recording the report.
- 771. Action on the report by non-judicial bodies.
- 772. Action on the report by a court: General principles.
- 773. Defects in the proceedings prior to the appointment of commissioners.
- 774. Irregularities on the part of the commissioners, jurors, etc.
- 775. Accident, mistake or error of judgment on the part of the commissioners.

- § 776. Inadequate or excessive damages.
- 777. Departure from the petition in laying out a highway.
- 778. Miscellaneous objections.
- 779. The time and manner of objecting.
- 780. The practice in hearing objections.
- 781. Power of the court to amend or modify the report, or confirm it in part.
- 782. Rehearings, recommittals, reviews, etc.
- 783. When objectors are estopped.
- 784. The order confirming the report of commissioners.
- ✓ 785. The judgment to be entered on the verdict of a jury.
- 786. Setting aside the order of confirmation.

CHAPTER XXII.

REVIEW OF THE PROCEEDINGS. BY APPEAL OR OTHERWISE..

- 787. The subject generally: Right of appeal.
- 788. Statutes making the decision of commissioners or of inferior tribunals final and conclusive.
- 789. Practice in taking appeals.
- 790. Parties, and who may appeal.
- 791. Notice in case of appeals.
- 792. Practitioner and power of the appellate tribunal.
- 793. Effect of the appeal.
- 794. Certiorari: Its nature and office generally.
- 795. When it lies, and when the proper remedy.
- 796. Application for the writ and proceedings thereon.
- 797. When granted and when refused.
- 798. Form and effect of the writ.
- 799. Return to the writ.
- 800. Proceedings on the return.
- 801. What are sufficient grounds for quashing the proceedings: The judgment to be entered.
- 802. Appeals to appellate or Supreme Court.
- 803. What is a final order from which an appeal lies.
- 804. Construction of statutes as to when an appeal will lie to a court of appellate jurisdiction.
- 805. Practice in the supreme or appellate court.
- 806. Writs of error.
- 807. Limitations as to the time in taking an appeal or certiorari.
- 808. Estoppel to prosecute an appeal or certiorari.
- 809. When an appeal or certiorari is the proper remedy.
- 810. Statutes opening proceedings for review after final judgment.
- 811. Review by Supreme Court of the United States: Federal questions.

CHAPTER XXIII.

COSTS.

- § 812. General principles in regard to costs in condemnation cases.
- 813. Costs in the absence of special statutory provisions relating to eminent domain proceedings.
- 814. Costs under particular statutes.
- 815. Costs in case of appeals, reviews, etc.
- 816. Items of costs, attorney's fees, expert witnesses, etc.
- 817. Miscellaneous cases.

CHAPTER XXIV.

DAMAGES PRESUMED TO BE INCLUDED IN THE AWARD OR JUDGMENT.

- § 818. Statement of the question.
- 819. General doctrine of the decisions.
- 820. The doctrine of the cases criticised.
- 821. Damages arising from construction of the works.
- 822. Damages from works on land to which the assessment does not relate.
- 823. Damages to a distinct tract.
- 824. By interfering with the support of the adjacent soil.
- 825. By grading and changing the grade of streets.
- 826. By interfering with running streams.
- 827. By interfering with surface or subterranean waters.
- 828. Damages by blasting, trespass and the like.
- 829. The assessment does not include damages resulting from the improper construction or negligent use of the works.
- 830. Claims based upon changes in the works or plan of construction or upon the increased use of the property.
- 831. Items or claims omitted by mistake or otherwise.
- 832. Statutes giving a remedy for damages not foreseen and estimated.

CHAPTER XXV.

RIGHTS OF THE RESPECTIVE PARTIES IN THE PROPERTY CONDEMNED.

- § 833. General principles as to obtaining possession.
- 834. Statutes permitting possession upon a tender or deposit of the damages awarded.
- 835. Possession pending an appeal upon depositing the damages awarded.
- 836. Right of the owner to the damages deposited in such cases.

- § 837. Possession upon giving security for the compensation.
- 838. What constitutes an entry.
- 839. Remedy of condemnor to obtain possession when opposed by owner.
- 840. Remedy of owner to prevent an unlawful possession.
- 841. Miscellaneous cases as to obtaining or keeping possession.
- 842. Deposit at whose risk.
- 843. Judgment against owner when damages reduced on appeal.
- 844. The estate acquired in lands taken for public use.
- 845. Rights of company in land taken for railroad right of way.
- 846. The company an adjoining proprietor, and limited by the maxim,
sic uter tuo ut alienum non laedas.
- 847. Whether the company's possession is exclusive; Rights of fee-owner.
- 848. Adverse possession of railroad right of way.
- 849. Right to trees, herbage, minerals, materials, buildings, etc.
- 850. Property taken for other railroad uses.
- 851. Right of owner of fee to cross right of way of railroad: Matter
of private crossings generally.
- 852. Property taken for highways and streets.
- 853. Right to trees, herbage, materials, etc.
- 854. Adverse possession of streets and highways.
- 855. Property taken for turnpikes.
- 856. Lands taken or dedicated for public parks, squares and the like.
- 857. Property taken for other uses.
- 858. When a fee is taken for public use.
- 859. Transfers of the right or estate acquired by condemnation.
- 860. Effect of forced sales.
- 861. Reversion of lands taken for public use.
- 862. What amounts to an abandonment of the public use.
- 863. Right to improvements when land reverts.
- 864. No rights are acquired beyond the limits of the land condemned.

CHAPTER XXVI.

OF THE RECORD AND PROCEEDINGS WHEN CALLED IN QUESTION COLLATERALLY.

- § 865. In general.
- 866. When jurisdiction exists, the proceedings are good collaterally,
though erroneous.
- 867. What is essential to jurisdiction.
- 868. What irregularities, subsequent to jurisdiction, will vitiate the pro-
ceedings.
- 869. What the record should show.
- 870. Parol evidence to aid or contradict the record.
- 871. Estoppel to question proceedings collaterally.

CHAPTER XXVII.

OF THE REMEDIES AND PROCEEDINGS TO RECOVER THE DAMAGES AWARDED, OR WHICH SHOULD BE PAID, FOR PROPERTY TAKEN OR AFFECTED.

- § 872. When the statutory remedy is exclusive.
- 873. When not exclusive.
- 874. Action on the award or judgment.
- 875. Defences thereto.
- 876. When the damages are payable from an assessment of benefits.
- 877. When there has been no entry, or when the taking has been abandoned.
- 878. Mandamus to compel payment, or the raising of a fund for payment.
- 879. Mandamus to compel an assessment of damages.
- 880. Bill in equity for the same purpose.
- 881. Proceedings to obtain damages which have been deposited.
- 882. The remedy upon bonds given for security of damages.
- 883. Enjoining use and possession until damages are paid.
- 884. Suit to abate dam unless the damages are paid.
- 885. Enforcing the claim for damages as a vendor's lien.
- 886. The right to damages, as against those claiming under the party condemning.
- 887. Of the remedies as against those claiming under the party condemning.
- 888. Whether same rules apply to compensation for property damaged as for property taken.
- 889. Common law suits for the value of land appropriated without proceedings.
- 890. The remedy for property damaged, injured or injuriously affected.
- 891. The measure of damages in such cases.
- 892. Assessment of just compensation in an equitable proceeding to enjoin the construction or use of works.—New York elevated railroad cases.
- 893. When no damages are awarded, the only remedy is by appeal.
- 894. Conflicting claims to the damages awarded.—Following the award into the hands of those not entitled thereto.
- 895. Right to the compensation when there has been a transfer of title pending proceedings to take the property.
- 896. Rights and remedies of mortgages of the lands taken.
- 897. Rights and remedies of the owners of other liens and interests in the land taken.
- 898. Remedy of condemnor to have award applied to the payment of claims of mortgagees or lien-holders, who were not made parties.
- ✓ 899. Rights of an assignee of the damages awarded.
- 900. Miscellaneous cases.—Execution—specific performance, etc.

CHAPTER XXVIII.

THE REMEDY FOR A WRONGFUL INTERFERENCE WITH PROPERTY UNDER COLOR OF EMINENT DOMAIN AND OTHER REMEDIES.

- § 901. Injunction to prevent entry or construction of works before complying with the law, or without authority of law.
902. The grounds of jurisdiction in such cases.
903. When the relief will be refused.
904. Injunction to prevent the continued use of property until the damages are paid when the condemnor already in possession.
905. To prevent the laying or operating of commercial railroads in streets.
906. To prevent the construction or operation of elevated railroads in streets.
907. To prevent the laying or operating of surface street railroads.
908. To prevent construction and operation of interurban railroads in streets.
909. Summary as to injunctive relief in case of railroads in streets.
910. Some questions of practice in bills to enjoin railroads in streets.
911. To prevent other uses of streets or other interference with the abutting owner's rights.
912. To prevent the vacation of a street.
913. To prevent changing the grade of a street.
914. To prevent the construction of works in a particular manner.
915. To prevent the occupation or use of adjacent property not included in the condemnation.
916. To prevent an interference with water rights.
917. To prevent the infringement of a franchise or exclusive right.
918. To prevent the taking of property already devoted to public use.
919. To prevent one railroad from crossing another.
920. To prevent injury or damage to property not taken.
921. Some questions of practice in cases to enjoin the taking or damaging of property.
922. Injunction to prevent misuse or diversion of public streets and grounds.
923. Bill to protect the possession or rights of condemnor.
924. Bill to protect franchises in public streets.
925. Suit by public authorities to prevent unlawful use of street or to recover for damage thereto.
926. Enjoining condemnation proceedings.
927. Ejectment for land taken or occupied for public use.
928. Ejectment in cases of wrongful occupation of street.
929. When the owner is estopped to maintain ejectment.
930. Ejectment by condemnor.
931. Trespass.
932. Mandamus.
933. Remedy for damages arising from the negligent or improper construction of works.

- § 934. Relief in equity on account of error, mistake, new evidence, etc.
- 935. Compelling a railroad company to restore a highway.
- 936. Remedy for failure to construct or maintain private crossings.
- 937. The question of one action or successive actions. Statement and general principles.
- 938. Same: Interference with the flow of streams.
- 939. Same: Diverting or polluting the waters of a stream.
- 940. Same: Interfering with the flow of surface water.
- 941. Same: Overflow or percolation from a reservoir or canal.
- 942. Same: Change of grade causing surface water to flow upon the plaintiff's premises.
- 943. Same: Change of grade or viaduct in streets.
- 944. Same: Railroads in streets.
- 945. Same: Where there is an actual occupation of the plaintiff's land.
- 946. Same: Miscellaneous cases.
- 947. Same: Conclusions.
- 948. Same: Right of parties to elect in favor of permanent damages.
- 949. Who entitled to sue in case of transfer of title after construction or use of works causing the damage.
- 950. Effect of estates for life or years on the right to damages.
- 951. What constitutes special damage.
- 952. Certiorari to set aside ordinance.
- 953. Other remedies.

CHAPTER XXIX.

THE DISCONTINUANCE AND ABANDONMENT OF PROCEEDINGS.

- § 954. The right to discontinue proceedings before completion.
- 955. The right to abandon after the proceedings are completed.
- 956. What constitutes an abandonment.
- 957. The owner's right to recover for damages occasioned by proceedings which have been abandoned.
- 958. Statutes giving a right to recover for damages occasioned by proceedings.
- 959. Right to abandon under English statutes after notice to treat.
- 960. New proceedings for the same purpose as former proceedings which have been abandoned.
- 961. When entry is to be made or possession taken in a specified time, what is sufficient.
- 962. Improvements pending proceedings.

CHAPTER XXX.

LIMITATIONS TO ACTIONS AND PROCEEDINGS.

- § 963 When compensation need not be first made, the owner may be required to present his claim for damages within a time limited.—Construction of statutes.

- § 964. When the statutory remedy for just compensation accrues.
- 965. When there is no special limitation of the statutory remedy.—
Application of the general statute of limitations.
- 966. Limitation when compensation must be first made.
- 967. Limitations when property is appropriated without complying
with the law.
- 968. Common law suits for damages to property.
- 969. When an action accrues for consequential damages.
- 970. For change of street grade.
- 971. Miscellaneous.

TABLE OF CASES CITED.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

A.

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Abbot v. Upham, 13 Met. 172: 1526.
Abbott v. Board of Supervisors, 36 Ia. 354: 1019.
v. Cottage City, 143 Mass. 521: 1216.
v. County Comrs., 5 Kan. App. 162: 1360, 1514.
v. Duluth, 104 Fed. 833: 362.
v. Gatch, 13 Md. 314: 1256.
v. Kansas City etc. R. R. Co., 83 Mo. 271: 93, 152.
v. Milwaukee L. H. & T. Co., 126 Wis. 634: 284, 1297.
v. New York etc. R. R. Co., 145 Mass. 450: 684, 688.
v. Penobscot Co., 52 Me. 584: 1441.
v. Southern Pac. R. R. Co., 109 Cal. 282: 1304, 1330.
v. Stewartstown, 47 N. H. 228: 1327.
Abel v. Minneapolis, 68 Minn. 89: 617, 1525.
Abendroth v. Manhattan El. Ry. Co., 19 Abb. N. C. 247: 451.
v. Manhattan R. R. Co., 122 N. Y. 1: 177, 180, 265, 1296.
v. Manhattan Ry. Co., 52 N. Y. Supr. Ct. 274: 196.
v. Manhattan R. R. Co., 54 N. Y. Supr. Ct. 417: 265.
Abercrombie v. Simmons, 71 Kan. 538: 834, 838, 1497, 1500.
Aberdeen v. Bradford, 94 Md. 670: 74, 77, 162, 163, 1654.
Abney v. Clark, 87 Ia. 726: 1004, 1009, 1017, 1412.
v. Texarkana etc. R. R. Co., 105 La. 446: 1378.
Abraham v. Fremont, 54 Neb. 391: 83, 1604.
v. Oregon etc. R. R. Co., 37 Ore. 495: 1474.
v. Oregon etc. R. R. Co., 41 Ore. 550: 1474.
Abrahams v. London, 37 L. J. Ch. 732: 1115.
Acker v. Knoxville, 117 Tenn. 224: 248, 437, 614, 618, 1294.
v. New Castle, 48 Hun 312: 153, 235.
Ackerman v. Horicon Iron Mfg. Co., 16 Wis. 150: 1537.
v. Huff, 71 Tex. 317: 1033, 1461, 1517.
v. True, 56 App. Div. 54: 351, 373.
v. True, 71 App. Div. 143: 197, 199, 1596.
v. True, 175 N. Y. 353: 197, 199, 373, 1596.
Acquackanonk Water Co. v. Watson, 29 N. J. Eq. 366: 74, 85, 1603.
Acton v. Blundell, 12 M. & W. 324: 161, 165.
v. York County, 77 Me. 128: 981, 1102.
Adair v. Atlanta, 124 Ga. 288: 1488.
Adams, Inhabitants of, Petitioners, 10 Rich. 270: 1418.
Adams, In re, 73 Hun 581: 878, 1327.
Adams, In re, 141 N. Y. 297: 366, 878, 1327.
Adams, Matter of, 141 N. Y. 297: 366.
Adams v. Chicago, B. & Q. R. R. Co., 39 Minn. 286: 180, 181, 188, 190, 200, 242, 249, 253, 444, 448, 1295, 1335.
v. Clarksburg, 23 W. Va. 203: 707, 1078.
v. Durham & N. R. R. Co., 110 N. C. 325: 92, 94, 95, 1651, 1653.
v. Emerson, 6 Pick. 57: 1486, 1489.
v. Harrington, 114 Ind. 66: 980, 981, 1010, 1510.
v. Hastings & Dakota R. R. Co., 18 Minn. 260: 247, 1298, 1650, 1656, 1657.
v. London etc. Ry. Co., 18 L. J. Ch. N. S. 357: 1533.
v. London etc. R. R. Co., 2 McN. & G. 118: 1513.

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 v. Pearson, 7 Pick. 341: 1137.
 v. Pease, 2 Conn. 481: 103.
 v. Roanoke, 102 Va. 53: 1005.
 v. Rulon, 50 N. J. L. 313: 1368.
 1387.
 v. St. Johnsbury & Lake Champlain R. R. Co., 57 Vt. 240: 947,
 1188, 1540, 1544, 1564.
 v. San Angelo Water Works Co.,
 86 Tex. 486: 739.
 v. Saratoga & Washington R. R.
 Co., 11 Barb. 414: 224, 244.
 v. Saratoga etc. R. R. Co., 10 N. Y.
 328: 893, 895, 1517, 1626.
 v. Shelbyville, 154 Ind. 467: 10,
 463.
 v. Slater, 8 Ill. App. 72: 78.
 v. Toronto, 12 Ontario, 243: 631.
 v. Walker, 34 Conn. 466: 145, 146.
- Adams County v. Dobschlag, 19 Wash. 356: 1435.
- Adamson v. Nassau Electric R. R. Co.,
 89 Hun 261: 305.
 v. Nassau Elec. R. R. Co., 12 Misel.
 600: 305.
- Adden v. Railroad Co., 55 N. H. 413:
 1187, 1315.
- Addis v. Priest, 3 N. J. L. 378:
 1389.
- Adee v. Nassau Elec. R. R. Co., 65
 App. Div. 529: 302.
 v. Nassau Elec. R. R. Co., 72 App.
 Div. 404: 683, 744.
 v. Nassau Elec. R. R. Co., 173 N.
 Y. 580: 302.
 v. Nassau Elec. R. R. Co., 177 N.
 Y. 548: 683, 744.
- Adirondack Ry. Co. v. New York,
 176 U. S. 335: 909.
- Adkins v. Smith, 94 Ia. 758: 1476.
- Adler v. Met. El. R. R. Co., 138 N.
 Y. 173: 1585, 1590.
 v. Met. El. R. R. Co., 61 N. Y.
 Supr. Ct. 85: 1585, 1590.
- Adolph, Matter of, 102 App. Div.
 371: 1362.
- Adolph, Matter of, 186 N. Y. 547:
 1362.
- Adolph v. Minneapolis etc. R. R. Co.,
 42 Minn. 170: 1176, 1200, 1201,
 1629.
- Aetna Mills v. Brookline, 127 Mass.
 69: 74, 77.
 v. Brookline, 178 Mass. 482: 933.
 v. Waltham, 126 Mass. 422: 74,
 77, 78, 895.
- Afee v. Kennedy, 1 Litt. 9: 544.
- Agne v. Seitsinger, 85 Ia. 305: 850,
 852.
- Agne v. Seitsinger, (Ia.) 60 N. W.
 483: 862.
- Ahern v. Dubuque Lead & Level Min-
 ing Co., 48 Ia. 140: 563.
- Aitken v. Wells River, 70 Vt. 309:
 460.
- Aiken v. Parfrey, 35 Wis. 249: 1359,
 1526.
- Akers v. Philadelphia, 4 Phila. 56:
 1527, 1528.
 v. United New Jersey R. R. Co., 43
 N. J. L. 110: 711.
- Akin v. Commissioners, 36 Kan. 170:
 1028.
 v. Water Comrs., 82 Hun, 265:
 924, 1076.
- Akron v. Chamberlain Company, 34
 Ohio St. 328: 218.
 v. Huber, 78 Ohio St. 372: 219.
 v. McComb, 18 Ohio 229: 214.
- Alabama Consol. C. & I. Co. v.
 Turner, 145 Ala. 639: 69.
 v. Vines, 151 Ala. 398: 81.
- Alabama etc. R. R. Co. v. Bloom, 71
 Miss. 247: 640.
 v. Burkett, 42 Ala. 83: 1123, 1204,
 1330.
 v. Burkett, 46 Ala. 569: 1204,
 1317.
 v. Cumberland Tel. & Tel. Co., 88
 Miss. 438: 682, 1623.
 v. Kenny, 39 Ala. 307: 743, 747.
- Alabama G. S. R. R. Co. v. Collier,
 112 Ala. 681: 246, 248, 250.
 v. Gilbert, 71 Ga. 591: 708, 820.
 v. Prouty, 149 Ala. 7: 145, 151,
 1607.
 v. Shahan, 116 Ala. 302: 94.
- Alabama Lumber Co. v. Keel, 125
 Ala. 603: 98.
- Alabama M. R. R. Co. v. Coskry, 92
 Ala. 254: 324, 639.
 v. Newton, 94 Ala. 443: 924, 1673,
 1703.
 v. Williams, 92 Ala. 277: 319,
 1451, 1452, 1453.
- Alameda v. Cohen, 133 Cal. 5: 674,
 678, 1434.
- Alameda County v. Crocker, 125 Cal.
 101: 1444.
- Albany, Ex parte, 23 Wend. 277:
 1411, 1414, 1415, 1419.
- Albany v. Gilbert, 144 Mo. 224: 1158.
 v. Sikes, 94 Ga. 30: 154, 653.
 v. Watervliet etc. R. R. Co., 45
 Hun 442: 492.
 v. Watervliet T. & P. Co., 108 N.
 Y. 14: 746, 749, 1520.
- Albany etc. R. R. Co. v. Dayton, 10
 Abb. Pr. N. S. 182: 1177.

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 v. Lansing, 16 Barb. 68: 1096, 1205.
- Albany St., Matter of, 11 Wend. 149: 589, 1266.
- Albany Street, Matter of, 11 Wend. 151: 495, 496.
- Albany Street Opening, 6 Abb. Pr. 273: 1022, 1031.
- Albany Water Works Co. v. Albany Mayor's Court, 12 Wend. 292: 1414.
- Albert Lea v. Nielson, 80 Minn. 101: 137.
- Albertson v. Phila., 185 Pa. St. 223: 1313. .
 v. State, 95 Ind. 370: 1516.
- Albion R. R. Co. v. Heiser, 84 Cal. 43: 1347.
- Albot v. Gibson, 141 Mich. 698: 975.
- Albright v. Cedar Rapids etc. Ry. & Lt. Co., 133 Ia. 644: 153, 1450, 1454, 1639.
 v. Sussex County Lake & Park Commission, 68 N. J. L. 523: 498, 501, 503, 540, 807.
 v. Sussex County Lake & Park Commission, 71 N. J. L. 303: 540, 807.
 v. Sussex County Lake & Park Commission, 71 N. J. L. 309: 540.
- Albro v. Fall River, 175 Mass. 590: 605.
- Albuquerque L. & I. Co. v. Gutierrez, 10 N. M. 177: 587.
- Aleorn v. Harner, 38 Miss. 652: 586.
- Alcott v. Acheson, 49 Ia. 569: 1035, 1571.
- Alden v. Minneapolis, 24 Minn. 254: 234.
- Alden Coal Co. v. Challis, 200 Ill. 222: 883, 887, 889.
- Aldis v. Union El. R. R. Co., 203 Ill. 567: 266, 304, 639, 642, 1549, 1551.
- Aldredge v. School District, 10 Okla. 694: 1005, 1513, 1626.
- Aldrich v. Cheshire R. R. Co., 21 N. H. 359: 161, 1523.
 v. Drury, 8 R. I. 554: 1480.
 v. Met. West Side El. R. R. Co., 195 Ill. 456: 655, 663, 670.
 v. Minneapolis, 52 Minn. 164: 1665.
- Aldrich v. Providence, 12 R. I. 241: 612, 615, 1532.
 v. Wetmore, 52 Minn. 164: 372, 374.
- Aldridge v. Board of Education, 15 Okl. 354: 1005.
 v. Spears, 14 S. W. 118: 1397.
 v. Stillwater Board of Education, 15 Okl. 354: 1348.
 v. Tuscumbia, C. & D. R. R. Co., 2 Stew. & Por. 199: 501, 504, 524, 674, 926.
- Aldritt v. Fleischauer, 74 Neb. 66: 166.
- Aldworth v. Lynn, 153 Mass. 53: 144, 1639, 1662.
- Alexander v. Baltimore, 5 G. & J. (Md.) 383: 13.
 v. District of Columbia, 3 Mackey (D. C.) 192: 1634.
 v. Milwaukee, 16 Wis. 247: 167.
 v. Plattsburgh, 30 Neb. 117: 951.
 v. West London & Crystal Pal. Ry. Co., 30 Beav. 556: 822, 823.
 v. West London & Crystal Pal. Ry. Co., 31 N. J. Ch. N. S. 500: 822.
- Alexandria v. Morgan's La. etc. Co., 109 La. 50: 303.
- Alexandria & Fredericksburg R. R. Co. v. Alexandria & Washington R. R. Co., 75 Va. 780: 754.
- Alexandria etc. R. R. Co. v. Faunce, 31 Gratt. 761: 428, 744, 952, 953, 966, 1546, 1547.
- Alexian Bros. v. Oshkosh, 95 Wis. 221: 1236.
- Alfalfa Irr. Dist. v. Collins, 46 Neb. 411: 10.
- Aliso Water Co. v. Baker, 95 Cal. 268: 587, 987.
- Allaby v. Milwaukee Elec. Service Co., 135 Wis. 345: 550.
- Allaire v. Woonsocket, 25 R. I. 414: 1180, 1202.
- Allard v. Loban, 3 Martin La. N. S. 293: 430, 956.
- Allegheny's Appeal, 165 Pa. St. 367: 1670.
- Allegheny v. Black's Heirs, 99 Pa. St. 152: 1216.
 v. Millville etc. R. R. Co., 159 Pa. St. 411: 302.
- Allegheny Co. v. Gibson, 90 Pa. St. 397: 476.
- Allegheny County v. Smith, 11 Pa. Dist. Ct. 704: 989.

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 v. Bainbridge, 145 Mich. 366: 460.
 v. Boston, 137 Mass. 319: 1266.
 v. Boston, 159 Mass. 324: 143.
 v. Charlestown, 109 Mass. 243: 1185, 1216.
 v. Chicago, 176 Ill. 113: 958, 1069.
 v. Chippewa Falls, 52 Wis. 430: 234.
 v. Clausen, 114 Wis. 244: 315, 1587.
 v. Colorado Cent. R. R. Co., 22 Colo. 238: 1519.
 v. Commonwealth, 188 Mass. 59: 626, 660, 1273.
 v. Drew, 44 Vt. 174: 14, 462.
 v. Jersey City, 53 N. J. L. 522: 309, 778.
 v. Jones, 47 Ind. 438: 679, 680.
 v. Levee Comrs., 57 Miss. 163: 1412.
 v. Michel, 38 Ill. App. 313: 154, 1650, 1655.
 v. Northville, 39 Hun 240: 918.
 v. Paris, 1 Tex. App. Civil Cas. p. 506: 235.
 v. Parker County, 23 Tex. Civ. App. 536: 1029, 1030.
 v. Railroad Co., 107 Ga. 838: 936.
 v. Railroad Co., (Tex. Civ. App.) 25 S. W. 826: 1329.
 v. Reinhardt, 90 Ky. 466: 876.
 v. Thornapple Elec. Co., 144 Mich. 370: 69.
 v. Utica, etc. R. R. Co., 15 Hun 80: 1511, 1514.
 v. Wabash, St. Louis & Pacific R. R. Co., 84 Mo. 646: 1546.
 v. Welch, 125 Mo. App. 278: 1024, 1029.
- Allentown etc. Turnpike Co. v. Lehigh Val. Traction Co., 174 Pa. St. 273: 1292.
- Allen Township Road. 18 Pa. St. 463: 1082.
- Allison v. Cincinnati, 2 Cinn. Super. Ct. 462: 335.
 v. Comrs. of Highways, 54 Ill. 170: 1099, 1370, 1409.
 v. Delaware etc. Canal Co., 5 Wheat. 482: 1378.
 v. Taylor, 3 T. B. Monroe 7: 1423.
- Almon v. Chicago etc. R. R. Co., 155 Ill. 17: 1195, 1202, 1426.
- Alloway v. Nashville, 88 Tenn. 510: 1175, 1228, 1229, 1232, 1234, 1237, 1251, 1320.
- Allport v. Helena etc. R. R. Co., 12 Mont. 279: 1399.
- Allyn v. Providence etc. R. R. Co., 4 R. I. 457: 1136.
- Almand v. Atlanta Consolidated St. Ry. Co., 108 Ga. 417: 298.
 v. Rockdale Co., 78 Ga. 199: 1081.
- Almy v. Church, 18 R. I. 182: 869.
 v. Coggesshall, 19 R. I. 549: 235.
- Alstad v. Sim, 15 N. D. 629: 580, 1511.
- Alston's Petition, In re, I Penn. Del. 359: 672.
- Althen v. Kelly, 32 Minn. 280: 1489, 1594.
- Alton v. Fishback, 181 Ill. 396: 883.
 v. Hamilton etc. R. R. Co., 13 U. C. Q. B. 595: 158.
 v. Illinois Trans. Co., 12 Ill. 38: 872.
 v. Meenwenberg, 108 Mich. 629: 876.
- Alton etc. R. R. Co. v. Baugh, 14 Ill. 211: 1316.
 v. Carpenter, 14 Ill. 190: 1174, 1194.
- Altoona etc. R. R. Co. v. Tyrone etc. R. R. Co., 160 Pa. St. 633: 771.
- Amboy v. Ill. Cent. R. R. Co., 236 Ill. 236: 396, 397.
- Amer v. Union County, 17 Ore. 600: 981.
- American Bank Note Co. v. Met. El. R. R. Co., 63 Hun 506: 1277.
 v. New York El. R. R. Co., 129 N. Y. 252: 265, 448, 866, 869, 1296, 1297, 1303, 1304, 1333, 1554, 1555, 1584.
- American Cannel Coal Co. v. Huntingburg etc. R. R. Co., 130 Ind. 98: 1100, 1365, 1409.
- American Locomotive Co. v. Hoffman, 105 Va. 343: 94.
 v. Hoffman, 108 Va. 363: 1653.
- American Primitive Methodist Society v. Brooklyn El. R. R. Co., 46 Hun, 530: 264.
- American Print Works v. Lawrence, 21 N. J. L. 248: 17.
 v. Lawrence, 23 N. J. L. 590: 17.
- American Rapid Tel. Co. v. Hess, 125 N. Y. 641: 15, 489.
- American Tel. & Tel. Co. v. Harbor Creek Tp. 23 Pa. Supr. Ct. 437: 361, 491.
 v. Jones, 78 Ill. App. 372, 338, 1636.
 v. Mill Creek, 195 Pa. St. 643: 361, 491.
 v. Morgan Co. Tel. Co., 138 Ala. 597: 418.

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 v. St. Louis etc. Ry. Co., 202 Mo. 656: 677, 774, 988, 1247, 1284, 1286.
 v. Smith, 71 Md. 535: 425, 1159, 1473, 1568, 1573.
- American Trans. & Nav. Co. v. New York etc. R. R. Co., 58 N. J. L. 109: 909.
 v. New York etc. R. R. Co., 59 N. J. L. 156: 909.
- American Union Tel. Co. v. Wilmington etc. R. R. Co., 83 N. C. 420: 1423.
- American Unitarian Ass. v. Commonwealth, 193 Mass. 470: 468, 740.
- American Woolen Co. v. Kennebec Water Dist. 102 Me. 153: 110, 138.
- Americus v. Mitchell, 79 Ga. 807: 484.
- Ames v. Lake Superior & Miss. R. R. Co., 21 Minn. 241: 923, 927.
 v. San Diego, 101 Cal. 390: 1491.
 v. Union Pac. R. R. Co., 64 Fed. 165: 483.
- Amet v. Texas etc. Ry. Co., 117 La. 454: 1546, 1715.
- Amory v. Melrose, 162 Mass. 556: 1127, 1140, 1141.
- Amos v. Norcross, 58 N. J. Eq. 256: 117.
- Amoskeag Mfg. Co. v. Goodale, 46 N. H. 53: 91.
 v. Goodale, 62 N. H. 66: 549.
 v. Head, 56 N. H. 386: 549.
 v. Worcester, 60 N. H. 522: 549, 723, 1147.
- Amsterdam etc. R. R. Co., In re, 86 Hun 578: 920.
- Amsterdam Knitting Co. v. Dean, 162 N. Y. 278: 1603.
- Anaheim v. Longenberger, 134 Cal. 608: 886, 888.
- Anchor Brewing Co. v. Dobbs Ferry, 84 Hun 274: 157, 235.
- Anders v. Anders, 4 Jones Law 243: 1410.
- Anderson, Matter of, 91 App. Div. 563: 610, 611.
- Anderson, Matter of, 178 N. Y. 416: 610, 611.
- Anderson v. Atchison etc. Ry. Co., 71 Kan. 453: 1714.
 v. Atlantic Coast Line R. R. Co., 59 S. C. 350: 838, 1497.
 v. Bain, 120 Ind. 254: 602, 616, 918.
 v. Baker, 98 Ind. 587: 575.
- Anderson v. Bement, 13 Ind. App. 248: 1490.
 v. Board of Co. Comrs., 46 Minn. 237: 1400.
- v. Burlington etc. Ry. Co., 82 Minn. 293: 450.
- v. Caldwell, 91 Ind. 451: 922, 929.
- v. Chicago etc. Ry. Co., 85 Minn. 337: 450.
- v. Cincinnati So. R. R. Co., 86 Ky. 44: 69, 72, 75.
- v. Comrs., 12 Ohio St. 635: 1516, 1517, 1571.
- v. Decoria, 74 Minn. 339: 1028.
- v. Endicott, 101 Ind. 539: 700.
- v. Ft. Worth, 83 Tex. 107: 1116.
- v. Kerns Draining Co., 14 Ind. 199: 571, 574.
- v. McKinney, 24 Ohio St. 467: 1707, 1709.
- v. Messenger, 158 Fed. 250: 1005.
- v. Milwaukee, 82 Wis. 279: 615.
- v. New York Cent. etc. R. R. Co., 58 Misc. 72: 1562.
- v. Pemberton, 89 Mo. 61: 957, 1096, 1360, 1371.
- v. Rochester etc. R. R. Co., 9 How. Pr. 553: 420, 1494.
- v. St. Louis, 47 Mo. 479: 893, 894, 1035, 1574.
- v. San Francisco, 92 Minn. 57: 1028.
- v. Turbeville, 6 Coldw. 150: 178, 369, 388, 498, 503, 675, 923, 1005, 1008, 1165.
- v. Wharton Co., 27 Tex. Civ. App. 115: 1317.
- v. Word, 80 Ill. 15: 993.
- Anderson etc. R. R. Co. v. Kernhole, 54 Ind. 314: 1634.
- Andover v. Board of Comrs. 86 Me. 185: 1083.
- v. County Comrs. 5 Gray, 393: 1361.
- v. Sutton, 12 Met. 182: 1623.
- Andrew v. Nantasket Beach R. R. Co., 152 Mass. 506: 957.
- Andrews v. Farmers' Loan & Trust Co., 22 Wis. 288: 1579.
- v. Johnson, 1 Law Repos. N. C. 272: 1408.
- v. King, 77 Me. 239: 1415.
- v. Marion, 23 Minn. 372: 1405.
- v. Steel City, 2 Neb. (Unof.) 676: 155, 1606.
- Andrus v. Bay Creek Ry. Co., 60 N. J. L. 10, 1670.
- Angell v. Hornbeck, 31 Ind. App. 59: 1058.
- Anheuser-Busch Brewing Ass. v. Peterson, 41 Neb. 893: 166.

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 Anness v. Providence, 13 R. I. 17: 612: 618.
 Anniston etc. R. R. Co. v. Jacksonville etc. R. R. Co., 82 Ala. 297: 758, 794.
 Anthony v. Adams, 1 Met. 284: 722.
 v. County Comrs., 14 Pick. 189: 1386.
 v. Lawhorne, 1 Leigh 1: 1098.
 v. South Kingstown, 13 R. I. 129: 1081.
 Anthony St., Matter of, 20 Wend. 618: 1669, 1670.
 Antoinette Street, 8 Phila. 461: 1341.
 A. O. Hine v. Trevor, 4 Wall. 455: 103.
 Apex Transportation Co. v. Garbade, 32 Ore. 582: 498, 535, 675, 1042, 1043.
 Appleby Manor Road, 1 Grant, 443: 1371.
 Applegate v. Franklin, 109 Ill. App. 293: 109, 151.
 Appleton v. County Comrs., 80 Me. 284: 1399.
 v. Newton, 178 Mass. 276: 675, 733, 1001, 1003, 1008, 1157, 1164, 1707, 1708, 1709, 1712.
 Application for Drainage, Matter of, 35 N. J. L. 497: 577, 1044, 1187.
 Appointment of Viewers, In re, 6 Lutzner Leg. Reg. Rep. 13: 1081.
 Appropriation, Matter of, 23 App. Div. N. Y. 7: 1705.
 App's Tavern, Road from, 17 S. & R. 388: 1003, 1086.
 Aqua Pura Co. v. Las Vegas, 10 N. M. 6: 481.
 Arbegust v. Louisville, 2 Bush. 271: 465.
 Arbenz v. Wheeling etc. R. R. Co., 33 W. Va. 1: 256, 297, 306, 324, 640, 1581.
 Arbrush v. Oakdale, 28 Minn. 61: 1186, 1206.
 Arcata v. Arcata & M. R. R. Co., 92 Cal. 639: 303, 426.
 Arcata & Mad River R. R. Co. v. Murphy, 71 Cal. 122: 1223.
 Archer v. Salinas City, 93 Cal. 43: 871, 877, 887.
 Archibald v. New York Cent. etc. R. R. Co., 157 N. Y. 574: 122.
 v. Thompson, 2 Colo. 388: 996.
 Andrus v. Bay Creek Ry. Co. 60 N. J. L. 10: 1698.
 Argentine v. Atchison etc. R. R. Co., 55 Kan. 730: 487.
 Argo v. Barthand, 80 Ind. 63: 1510.
 Arimond v. Green Bay etc. Co., 31 Wis. 316: 63, 66, 90, 100, 144, 168.
 v. Green Bay etc. Co., 35 Wis. 41: 90, 92, 1074, 1710.
 Arizona etc. R. R. Co. v. Denver etc. Ry. Co., 13 N. M. 345: 900, 1619.
 Arkansas Cent. R. R. Co. v. Smith, 71 Ark. 189: 843, 852, 853, 1545.
 Arkansas etc. Ry. Co. v. Kennedy, 84 Ark. 364: 1470.
 Arkansas Val. etc. Ry. Co. v. Witt, 19 Okl. 262: 1245.
 Armington v. Barnett, 15 Vt. 745: 781, 788.
 Armistead v. Vicksburg etc. R. R. Co., 47 La. An. 1381: 873, 874.
 Armory Board, Matter of, 73 App. Div. 152: 1212, 1233, 1240.
 Armstrong v. Cincinnati, 5 Ohio 138: 1459, 1641.
 v. County Court, 54 W. Va. 503: 363.
 v. Moore, 1 Kan. App. 450, 948, 1563.
 v. New York Central etc. R. R. Co., 2 Hun 482: 1469.
 v. St. Louis, 69 Mo. 309: 1626.
 v. St. Louis, 3 Mo. App. 151: 239.
 v. St. Paul, 30 Minn. 299: 229, 442, 1453.
 Arn v. Kansas City, 4 McCrary, 558: 156.
 Arnd v. Cullman, 132 Ala. 540: 143.
 v. Union Pac. R. R. Co., 120 Fed. 912: 465.
 Arndt v. Thomas, 90 Minn. 355: 1569.
 Arnold v. Buffalo etc. Ry. Co., 32 Pa. Supr. Ct. 452: 945.
 v. Council Bluffs, 85 Iowa 441: 698.
 v. Covington & Cincinnati Bridge Co., 1 Duvall (Ky.) 372: 522, 1225, 1461, 1463.
 v. Decatur, 29 Mich. 77: 893, 1058, 1367.
 v. Elmore, 16 Wis. 509: 104.
 v. Hudson River R. R. Co., 55 N. Y. 661: 428.
 v. Klipper, 24 Mo. 273: 1604.
 v. Stanford, 113 Ky. 852: 455, 658.
 v. Weiker, 55 Kan. 510: 384, 390, 400, 876.
 Arnsperger v. Crawford, 101 Md. 247: 494, 496, 498, 505, 508, 509, 517, 520, 1395, 1519.
 Arrington v. Savannah & W. R. R. Co., 95 Ala. 434: 717.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

- Art St., Matter of, 20 Wend. 685: 1533.
- Asburn v. Chicago, 105 Ill. App. 217: 658.
- Ash v. Cummings, 50 N. H. 591: 549, 684, 685, 1164, 1525.
- Ashby v. Eastern R. R. Co., 5 Met. 368: 963.
- Asher v. Jones County, 29 Tex. Civ. App. 353: 1512.
- v. L. & N. R. R. Co., 87 Ky. 391: 1159, 1160, 1161, 1183, 1200, 1201, 1468.
- v. Louisville etc. R. R. Co., 118 Ky. 493: 1471.
- Asheville St. R. R. Co. v. West Asheville R. R. Co., 114 N. C. 725: 298.
- Ashland v. C. & N. W. Ry. Co., 105 Wis. 398: 395, 399, 406, 1492.
- v. No. Pac. Ry. Co., 119 Wis. 204: 395, 399, 406, 1492.
- Ashland Coal & I. R. R. Co. v. Davidson, (Ky.) 20 S. W. 270: 1464.
- Ashland etc. St. Ry. Co. v. Faulkner, 106 Ky. 332: 272, 274, 313.
- Ashley v. Burt County, 73 Neb. 159: 1354.
- v. Port Huron, 35 Mich. 296: 143, 233.
- v. Wolcott, 11 Cush. 192: 147.
- Askam v. King County, 9 Wash. 1: 492, 564, 568, 581, 1157.
- Aspinwall v. Chicago etc. R. R. Co., 41 Wis. 474: 947, 949, 1226, 1329.
- Astor v. Hoyt, 5 Wend. 603: 948, 949.
- v. New York, 5 Jones & S. 539: 13.
- v. New York, 62 N. Y. 580: 1087, 1101, 1102, 1103.
- Aswell v. Scranton, 175 Pa. St. 173: 1308.
- Atchison v. Atlanta, 81 Ga. 625: 653.
- Atchison etc. R. R. Co. v. Anderson, 65 Kan. 202: 1549.
- v. Armstrong, 71 Kan. 366: 351, 447.
- v. Arnold, 52 Kan. 729: 211, 252, 319.
- v. B. & O. R. R. Co., 110 U. S. 675: 772.
- v. Blackshire, 10 Kan. 417: 1203.
- v. Board of Comrs., 48 Kan. 576: 1290.
- v. Boerner, 34 Neb. 240: 190, 646, 1451, 1452.
- v. Boerner, 45 Neb. 453: 646, 1450, 1451, 1452.
- v. Davenport, 65 Kan. 206: 1245, 1457, 1485, 1519, 1646.
- Atchison etc. R. R. Co. v. Davidson, 52 Kans. 739: 179, 252, 311, 324, 1549, 1648, 1657.
- v. Forney, 35 Neb. 607: 1450.
- v. Garside, 10 Kan. 552: 249, 251, 316.
- v. General Elec. Ry. Co., 112 Fed. 689: 328, 766, 1282, 1611.
- v. Gough, 29 Kan. 94: 1208, 1311.
- v. Hammer, 22 Kan. 763: 157.
- v. Herman, 74 Kan. 77: 91.
- v. Jones, 110 Ill. App. 626: 88, 1456, 1639, 1653.
- v. Kansas City etc., Ry. Co., 67 Kan. 569: 708, 754, 793, 799, 1041, 1571.
- v. Lauterback, 8 Kan. App. 15: 1714.
- v. Lenz, 35 Ill. App. 330: 654.
- v. Long, 46 Kan. 701: 75, 1603.
- v. Luening, 52 Kan. 732: 252, 319.
- v. Lyon, 24 Kan. 745: 1311, 1438.
- v. Meyer, 62 Kan. 696: 1615.
- v. Patch, 28 Kan. 470: 1030, 1409.
- v. Plant, 24 Neb. 127: 1436, 1440.
- v. Platt, 53 Ill. App. 263: 639.
- v. Schneider, 127 Ill. 144: 1109, 1259, 1274, 1277, 1427, 1467.
- v. Weaver, 10 Kan. 344: 1159, 1525, 1634.
- v. Wilson, 66 Kan. 233: 1534, 1673.
- Atchison St. R. R. Co. v. Missouri Pac. R. R. Co., 31 Kan. 660: 299, 328, 767, 1610.
- v. Nave, 38 Kan. 744: 303, 314, 315, 1587, 1589.
- Athens Mfg. Co. v. Rucker, 80 Ga. 292: 95, 456.
- Athens Terminal Co. v. Athens F. & M. Works, 129 Ga. 393: 242, 297, 1581, 1617.
- Atkins v. Boston, 188 Mass. 77: 1186, 1220.
- Atkinson v. Asheville St. R. R. Co. 113 N. C. 581: 305.
- v. Atlanta, 81 Ga. 625: 154, 629, 1648, 1656, 1660, 1718.
- v. Marietta R. R. Co., 15 Ohio St. 21: 687, 729, 1048.
- v. Newton, 169 Mass. 242: 514.
- v. Washington Irr. Co., 44 Wash. 75: 957, 1569.
- Atlanta v. Central R. R. Co., 53 Ga. 120: 750, 926, 1182.
- v. Green, 67 Ga. 386: 629, 671.
- v. Holliday, 96 Ga. 546: 347, 349, 1487, 1594.
- v. Hunnicutt, 95 Ga. 138: 1331, 1496, 1524.
- v. Schneltzer, 83 Ga. 609: 1353.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Anness v. Providence, 13 R. I. 17: 612: 618.
 Anniston etc. R. R. Co. v. Jacksonville etc. R. R. Co., 82 Ala. 297: 758, 794.
 Anthony v. Adams, 1 Met. 284: 722.
 v. County Comrs., 14 Pick. 189: 1386.
 v. Lawhorne, 1 Leigh 1: 1098.
 v. South Kingstown, 13 R. I. 129: 1081.
 Anthony St., Matter of, 20 Wend. 618: 1669, 1670.
 Antoinette Street, 8 Phila. 461: 1341.
 A. O. Hine v. Trevor, 4 Wall. 455: 103.
 Apex Transportation Co. v. Garbade, 32 Ore. 582: 498, 535, 675, 1042, 1043.
 Appleby Manor Road, 1 Grant, 443: 1371.
 Applegate v. Franklin, 109 Ill. App. 293: 109, 151.
 Appleton v. County Comrs., 80 Me. 284: 1399.
 v. Newton, 178 Mass. 276: 675, 733, 1001, 1003, 1008, 1157, 1164, 1707, 1708, 1709, 1712.
 Application for Drainage, Matter of, 35 N. J. L. 497: 577, 1044, 1187.
 Appointment of Viewers, In re, 6 Luzerne Leg. Reg. Rep. 13: 1081.
 Appropriation, Matter of, 23 App. Div. N. Y. 7: 1705.
 App's Tavern, Road from, 17 S. & R. 388: 1003, 1086.
 Aqua Pura Co. v. Las Vegas, 10 N. M. 6: 481.
 Arbegust v. Louisville, 2 Bush. 271: 465.
 Arbenz v. Wheeling etc. R. R. Co., 33 W. Va. 1: 256, 297, 306, 324, 640, 1581.
 Arbrush v. Oakdale, 28 Minn. 61: 1186, 1206.
 Arcata v. Arcata & M. R. R. Co., 92 Cal. 639: 303, 426.
 Arcata & Mad River R. R. Co. v. Murphy, 71 Cal. 122: 1223.
 Archer v. Salinas City, 93 Cal. 43: 871, 877, 887.
 Archibald v. New York Cent. etc. R. R. Co., 157 N. Y. 574: 122.
 v. Thompson, 2 Colo. 388: 996.
 Andrus v. Bay Creek Ry. Co. 60 N. J. L. 10: 1698.
 Argentine v. Atchison etc. R. R. Co., 55 Kan. 730: 487.
 Argo v. Barthand, 80 Ind. 63: 1510.
 Arimond v. Green Bay etc. Co., 31 Wis. 316: 63, 66, 90, 100, 144, 168.
 v. Green Bay etc. Co., 35 Wis. 41: 90, 92, 1074, 1710.
 Arizona etc. R. R. Co. v. Denver etc. Ry. Co., 13 N. M. 345: 900, 1619.
 Arkansas Cent. R. R. Co. v. Smith, 71 Ark. 189: 843, 852, 853, 1545.
 Arkansas etc. Ry. Co. v. Kennedy, 84 Ark. 364: 1470.
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 Armington v. Barnett, 15 Vt. 745: 781, 788.
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 Armory Board, Matter of, 73 App. Div. 152: 1212, 1233, 1240.
 Armstrong v. Cincinnati, 5 Ohio 138: 1459, 1641.
 v. County Court, 54 W. Va. 503: 363.
 v. Moore, 1 Kan. App. 450, 948, 1563.
 v. New York Central etc. R. R. Co., 2 Hun 482: 1469.
 v. St. Louis, 69 Mo. 309: 1626.
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 v. St. Paul, 30 Minn. 299: 229, 442, 1453.
 Arn v. Kansas City, 4 McCrary, 558: 156.
 Arnd v. Cullman, 132 Ala. 540: 143.
 v. Union Pac. R. R. Co., 120 Fed. 912: 465.
 Arndt v. Thomas, 90 Minn. 355: 1569.
 Arnold v. Buffalo etc. Ry. Co., 32 Pa. Supr. Ct. 452: 945.
 v. Council Bluffs, 85 Iowa 441: 698.
 v. Covington & Cincinnati Bridge Co., 1 Duvall (Ky.) 372: 522, 1225, 1461, 1463.
 v. Decatur, 29 Mich. 77: 893, 1058, 1367.
 v. Elmore, 16 Wis. 509: 104.
 v. Hudson River R. R. Co., 55 N. Y. 661: 428.
 v. Klipper, 24 Mo. 273: 1604.
 v. Stanford, 113 Ky. 852: 455, 658.
 v. Weiker, 55 Kan. 510: 384, 390, 400, 876.
 Arnsperger v. Crawford, 101 Md. 247: 494, 496, 498, 505, 508, 509, 517, 520, 1395, 1519.
 Arrington v. Savannah & W. R. R. Co., 95 Ala. 434: 717.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
- Art St., Matter of, 20 Wend. 685: Atchison etc. R. R. Co. v. Davidson, 52 Kans. 739: 179, 252, 311, 324, 1549, 1648, 1657.
- Asburn v. Chicago, 105 Ill. App. 217: v. Forney, 35 Neb. 607: 1450.
- 658.
- Ash v. Cummings, 50 N. H. 591: v. Garside, 10 Kan. 552: 249, 251, 316.
- 549, 684, 685, 1164, 1525.
- Ashby v. Eastern R. R. Co., 5 Met. 368: 963.
- Asher v. Jones County, 29 Tex. Civ. App. 353: 1512.
- v. L. & N. R. R. Co., 87 Ky. 391: 1159, 1160, 1161, 1183, 1200, 1201, 1468.
- v. Louisville etc. R. R. Co., 118 Ky. 493: 1471.
- Asheville St. R. R. Co. v. West Asheville R. R. Co., 114 N. C. 725: 298.
- Ashland v. C. & N. W. Ry. Co., 105 Wis. 398: 395, 399, 406, 1492.
- v. No. Pac. Ry. Co., 119 Wis. 204: 395, 399, 406, 1492.
- Ashland Coal & I. R. R. Co. v. Davidson, (Ky.) 20 S. W. 270: 1464.
- Ashland etc. St. Ry. Co. v. Faulkner, 106 Ky. 332: 272, 274, 313.
- Ashley v. Burt County, 73 Neb. 159: 1354.
- v. Port Huron, 35 Mich. 296: 143, 233.
- v. Wolcott, 11 Cush. 192: 147.
- Askam v. King County, 9 Wash. 1: 492, 564, 568, 581, 1157.
- Aspinwall v. Chicago etc. R. R. Co., 41 Wis. 474: 947, 949, 1226, 1329.
- Astor v. Hoyt, 5 Wend. 603: 948, 949.
- v. New York, 5 Jones & S. 539: 13.
- v. New York, 62 N. Y. 580: 1087, 1101, 1102, 1103.
- Aswell v. Scranton, 175 Pa. St. 173: 1308.
- Atchison v. Atlanta, 81 Ga. 625: 653.
- Atchison etc. R. R. Co. v. Anderson, 65 Kan. 202: 1549.
- v. Armstrong, 71 Kan. 366: 351, 447.
- v. Arnold, 52 Kan. 729: 211, 252, 319.
- v. B. & O. R. R. Co., 110 U. S. 675: 772.
- v. Blackshire, 10 Kan. 417: 1203.
- v. Board of Comrs., 48 Kan. 576: 1290.
- v. Boerner, 34 Neb. 240: 190, 646, 1451, 1452.
- v. Boerner, 45 Neb. 453: 646, 1450, 1451, 1452.
- v. Davenport, 65 Kan. 206: 1245, 1457, 1485, 1519, 1646.
- Atlanta v. Central R. R. Co., 53 Ga. 120: 750, 926, 1182.
- v. Green, 67 Ga. 386: 629, 671.
- v. Holliday, 96 Ga. 546: 347, 349, 1487, 1594.
- v. Hunnicutt, 95 Ga. 138: 1331, 1496, 1524.
- v. Schneltzer, 83 Ga. 609: 1353.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 - Atlanta Consolidated St. Ry. Co. v. Jackson, 108 Ga. 634: 1504.
 - Atlanta etc. R. R. Co. v. Atlanta etc. R. R. Co., 124 Ga. 125: 760, 799, 800.
 - v. Atlanta etc. R. R. Co., 125 Ga. 529: 246, 639, 1580.
 - v. Barker, 105 Ga. 534: 1627, 1631.
 - v. Kimberly, 87 Ga. 161: 159, 454.
 - v. Redwine, 123 Ga. 736: 1042, 1624.
 - v. St. Louis, 66 Mo. 228: 693.
 - v. Southern Ry. Co., 131 Fed. 657: 908.
 - v. Southern Ry. Co., 153 Fed. 122: 1504.
 - Atlanta Ry. & P. Co. v. Atlanta Rapid Transit Co., 113 Ga. 481: 881, 1620.
 - Atlantic Ave. R. R. Co., In re, 136 N. Y. 292: 922.
 - Atlantic City v. Groff, 64 N. J. L. 527: 888.
 - v. Groff, 68 N. J. L. 670: 880.
 - v. New Auditorium Pier Co., 63 N. J. Eq. 644: 117.
 - v. Snee, 68 N. J. L. 39: 891.
 - Atlantic City Gas & W. Co. v. Consumers' Gas & Fuel Co., 70 N. J. Eq. 536: 1608.
 - Atlantic Coast Line Elec. R. R. Co. v. Griffin, 64 N. J. L. 513: 700.
 - Atlantic Coast Line R. R. Co. v. Corp. Commission, 206 U. S. 1: 488.
 - v. Florida, 203 U. S. 256: 480, 483.
 - v. Postal Tel. Cable Co., 120 Ga. 268: 733, 773, 1061, 1066, 1231, 1233, 1266, 1285, 1286, 1407.
 - v. South Bound R. R. Co., 57 S. C. 317: 740, 927, 1399.
 - Atlantic etc. R. R. Co., appellants, 100 Maine, 430: 752.
 - Atlantic etc. R. R. Co. v. Campbell, 4 Ohio St. 583: 1124, 1125.
 - v. Cordele, 125 Ga. 373: 361, 491.
 - v. Cordele, 128 Ga. 293: 361, 491.
 - v. Cumberland Co. Comrs., 28 Me. 112: 1444.
 - v. Cumberland Co. Comrs., 51 Maine 36: 1004.
 - v. Fuller, 48 Ga. 423: 1524.
 - v. Kirkland, 129 Ga. 552: 728.
 - v. Koblentz, 21 Ohio St. 334: 1323.
 - v. Lesuer, 2 Ariz. 428: 837.
 - v. McKnight, 125 Ga. 328: 629, 634, 639, 1297, 1301, 1302, 1549, 1552.
 - Atlantic etc. R. R. Co. v. Montezuma, 122 Ga. 1: 309, 1622.
 - v. Peake, 87 Va. 130: 92, 1651, 1653.
 - v. Penny, 119 Ga. 479: 815, 1059, 1060, 1061, 1063, 1065, 1066, 1519.
 - v. Prudhomme, 2 Montreal Supr. Ct. 21: 1322.
 - v. Seaboard Air Line Ry. Co., 116 Ga. 412: 1610, 1611.
 - v. Sullivan, 5 Ohio St. 76: 929, 1048.
 - Atlantic & P. Tel. Co. v. Chicago etc. R. R. Co., 6 Biss. 158: 425.
 - Atlee v. Packet Co., 21 Wall. 389: 99, 136.
 - Atley v. Clinton County, 77 Ohio St. 285: 1423.
 - Atterbury v. Chicago etc. R. R. Co., 134 Ill. App. 330: 152, 846, 847.
 - Attorney General v. Abbott, 154 Mass. 323: 871, 876, 878, 890.
 - v. Boston, 186 Mass. 209: 1487.
 - v. Boston & A. R. R. Co., 160 Mass. 62: 476.
 - v. Colney Hatch Lunatic Asylum, L. R. 4 Ch. App. 146: 81, 1605.
 - v. Conservators of the Thaines, 1 H. & M. 1: 128.
 - v. Delaware etc. R. R. Co., 27 N. J. Eq. 1: 97, 116.
 - v. Delaware etc. R. R. Co., 27 N. J. Eq. 631: 97, 116.
 - v. Detroit Common Council, 148 Mich. 1: 299.
 - v. Eau Claire, 37 Wis. 400: 523, 550, 593.
 - v. Goderich, 5 Grant 402: 421, 1494.
 - v. Hunter, 1 Dev. Eq. 12: 484.
 - v. Lake View Land Co., 143 Ala. 291: 870.
 - v. Leeds, 5 L. R. Ch. App. 583: 83.
 - v. Lonsdale, 7 L. R. Eq. Cas. 390: 649.
 - v. Lunatic Asylum, 4 L. R. Ch. App. 146: 81.
 - v. McCleary, 146 Mich. 45: 564, 576.
 - v. Metropolitan R. R. Co., L. R. (1894) 1 Q. B. D. 384: 451, 657.
 - v. Metropolitan R. R. Co., 125 Mass. 515: 268.
 - v. Morris etc. R. R. Co. 19 N. J. Eq. 386: 406, 1583.
 - v. Paterson, 58 N. J. Eq. 1: 1604.
 - v. Pingree, 120 Mich. 550: 739.
 - v. Revere Copper Co., 152 Mass. 444: 109, 110.
 - v. Sherry, 20 R. I. 43: 364, 368.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1710.]
- Attorney General v. Smith, 109 Wis. 532: 109, 114, 115, 128.
 v. Sunderland, L. R. 2 Ch. Div. 634: 420, 421, 1494.
 v. Sunderland, L. R. 2 Ch. Div. 638: 1494.
 v. Tarr, 148 Mass. 309: 356, 422, 1496, 1618.
 v. Tomline, 12 L. R. Ch. Div. 214: 166.
 v. Tomline, 14 L. R. Ch. Div. 58: 166.
 v. Turpin, 3 Hen. & Mun. 548: 1325, 1683.
 v. Vineyard Grove Co., 181 Mass. 507: 872.
 v. Williams, 174 Mass. 476: 468, 512, 540.
 v. Williams, 178 Mass. 330: 468.
 v. Woods, 108 Mass. 436: 113.
- Atwater v. Canandaigua, 56 Hun 293: 138.
 v. Canandaigua, 124 N. Y. 602: 138.
 v. Mayer, 29 Alb. L. J. 483: 1594.
- Attwood v. Bangor, 83 Maine, 582: 142, 1650, 1656.
 v. Moosehead Paper & Pulp Co., 85 Maine 379: 948.
 v. O'Brien, 80 Maine 447: 879.
 v. Partree, 56 Conn. 80: 385, 388, 406.
- Auburn v. Union Water Power Co., 90 Maine 576: 109, 138.
- Auchinloss v. Metropolitan R. R. Co., 69 App. Div. 63: 315.
- Auditor v. Crise, 20 Ark. 540: 1531.
- Auditor General v. Crane, 152 Mich. 94: 1511, 1637.
- Audubon v. Hand, 231 Ill. 334: 1017, 1020.
- Augusta v. Marks, 50 Ga. 612: 1182.
 v. Marks, 124 Ga. 365: 142, 453, 1649, 1654.
 v. Schrameck, 96 Ga. 426: 629, 1306, 1307, 1337.
 v. Tyner, 197 Ill. 242: 891.
- Augusta etc. R. R. Co. v. Augusta, 100 Ga. 701: 297.
- Aull v. Columbia etc. R. R. Co., 42 S. C. 431: 976, 996.
- Auman v. Philadelphia etc. R. R. Co., 113 Pa. St. 93: 1152.
- Aurora v. Elgin etc. Traction Co., 227 Ill. 485: 241, 284, 304.
 v. Fox, 78 Ind. 1: 229, 442, 1453.
 v. Gillett, 56 Ill. 132: 233.
 v. Love, 93 Ill. 521: 154.
 v. Reed, 57 Ill. 29: 233.
 v. West, 9 Ind. 74: 10, 26, 462.
- Aurora Elec. Lt. & P. Co. v. McWethy, 104 Ill. App. 479: 344, 1594.
- Aurora etc. R. R. Co. v. Harvey, 178 Ill. 477: 720, 1045, 1059, 1068.
 v. Lawrenceburg, 56 Ind. 80: 1047.
 v. Miller, 56 Ind. 88: 1044, 1047, 1048.
- Austel v. Atlanta, 100 Ga. 182: 1080, 1408.
- Austin v. Allen, 6 Wis. 134: 974, 1022, 1518.
 v. Augusta Terminal Ry. Co., 108 Ga. 671: 449, 666, 671.
 v. Austin City Cem. Assn., 87 Tex. 330: 469.
 v. Belleville etc. R. R. Co., 19 Ill. 310: 734, 1396.
 v. Detroit etc. Ry. Co., 134 Mich. 149: 272, 274, 280, 281, 324.
 v. Helms, 65 N. C. 560: 1102.
 v. Murray, 16 Pick. 121: 480.
 v. Rutland R. R. Co., 45 Vt. 215: 108, 830.
- Austin etc. R. R. Co. v. Anderson, 79 Texas 427: 155, 1651, 1655, 1716.
- Autensieth v. St. Louis etc. R. R. Co., 36 Mo. App. 254: 351, 372, 385, 1649, 1659.
- Avery v. Fox, 1 Abb. U. S. 246: 70, 75, 1163, 1603.
 v. Groton, 36 Conn. 304: 1103.
 v. Kansas City etc. R. R. Co., 113 Mo. 561: 1627, 1633.
 v. Maxwell, 4 N. H. 38: 1489.
 v. Police Jury, 12 La. Ann. 554: 160.
 v. Vandusen, 5 Pick. 182: 1185.
 v. Vermont Elec. Co., 75 Vt. 235: 508, 536, 551, 560, 591.
- Avis v. Vineland, 55 N. J. L. 285: 914.
- Avon-by-the-Sea L. & I. Co. v. Neptune City, 53 N. J. Eq. 178: 300.
- Avondale v. McFarland, 101 Ala. 381: 629, 638, 653.
- Avondale Land Co. v. Avondale, 111 Alabama, 523: 877, 1618.
- Axford v. Philadelphia, 19 Phila. 483: 1308.
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- Ayer v. Chicago, 149 Ill. 262: 1387, 1514.
- Ayres v. Gulf etc. Ry. Co., 39 Tex. Civ. App. 561: 746.
 v. Pennsylvania R. R. Co., 52 N. J. L. 405: 892.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Richards, 41 Mich. 680: 1328.
 v. Windsor, 14 Ont. 682: 236.

B.

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 v. Mackey, 10 Wis. 371: 550, 1523.
 Babcock v. Buffalo, 56 N. Y. 268: 484.
 v. Buffalo, 1 Sheldon 317: 122, 127, 132.
 v. Chicago etc. Ry. Co., 107 Wis. 280: 1547, 1714.
 v. Welsh, 71 Cal. 400: 1602.
 v. Western R. R. Co., 9 Met. 553: 1507.
 Bachelor v. Cole, 132 Ind. 143: 1409.
 v. New Hampton, 60 N. H. 207: 996, 1381.
 Bachler's Appeal, 90 Pa. St. 207: 673.
 Bachman's Road, 1 Watts 400: 1388.
 Bachus v. Fort St. Union Depot Co., 169 U. S. 55: 7.
 Backus v. Detroit, 49 Mich. 110: 131.
 v. Fort St. Union Depot Co., 169 U. S. 557: 927.
 v. Lebanon, 11 N. H. 19: 781, 788, 923.
 Bacon v. Boston, 154 Mass. 100: 166, 452, 453, 456, 457, 1524.
 v. Noble, 20 Ohio C. C. 281: 993.
 v. Walker, 77 Ga. 336: 657, 669, 1613.
 Bacot, Ex parte, 36 S. C. 125: 528, 534.
 Badgely v. Hamilton Co., 1 Disney Ohio 316: 1524, 1525.
 Badger v. Boston, 130 Mass. 170: 625, 1524, 1525.
 v. Merry, 139 Ind. 631: 1106, 1409.
 Bagnall v. London & N. W. Ry. Co., 1 H. & C. (Exch.) 544: 1639.
 Baier v. Hosmer, 107 Wis. 380: 1370, 1515, 1570, 1571.
 Bailey v. Boston etc. R. R. Co., 182 Mass. 537: 437, 1271.
 v. Carrollton, 28 La. Ann. 171: 1545.
 v. Culver, 84 Mo. 531: 371, 380, 388, 398, 644, 1595.
 v. Culver, 12 Mo. App. 175: 371.
 v. Culver, 12 Mo. App. 531: 380, 388, 398.
 v. Isle of Thanet St. Ry. Co., (1900) 1 Q. B. 722: 1240.
 v. McCain, 92 Ill. 277: 1510, 1512.

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 v. New York, 3 Hill 531: 624.
 v. People, 190 Ill. 28: 53.
 Bailey v. Philadelphia etc. R. R. Co. 4 Harr. (Del.) 389: 107, 108, 691, 922.
 v. Philadelphia etc. R. R. Co., 17 Pa. Dist. Ct. 115: 819.
 v. Sweeney, 64 N. H. 296: 1481.
 v. Woburn, 126 Mass. 416: 74, 77, 78, 1331, 1332, 1446.
 Bainard v. Newton, 154 Mass. 255: 79, 82.
 Baird v. Hunter, 12 Pick. 556: 1667.
 v. Monroe, 150 Cal. 560: 697.
 v. Schuylkill River E. S. R. R. Co., 154 Pa. St. 459: 1339.
 v. Wills, 22 Pick. 312: 899.
 Baker, Matter of, 54 App. Div. 21: 1410.
 Matter of, 59 App. Div. 625: 1086, 1087.
 Matter of, 173 N. Y. 249: 1086, 1087.
 Baker v. Ashland, 50 N. H. 27: 992.
 v. Atchison etc. R. R. Co., 122 Mo. 396: 943, 945.
 v. Boston, 12 Pick. 184: 14, 484, 557.
 v. Boston El. Ry. Co., 183 Mass. 178: 266, 448, 622, 666, 1303.
 v. Braman, 6 Hill 47: 1527, 1528.
 v. Chicago etc. R. R. Co., 57 Mo. 265: 858, 1631.
 v. Fall River, 187 Mass. 53: 1390.
 v. Hogaboom, 12 S. D. 405: 1492.
 v. Holderness, 26 N. H. 110: 923.
 v. Johnson, 2 Hill 342: 1496.
 v. Johnston, 21 Mich. 319: 879.
 v. Leka, 48 Ill. App. 353: 167, 1652, 1662.
 v. Metropolitan R. R. Co., 31 Beav. 504: 845, 861.
 v. New York, 31 App. Div. 112: 1565.
 v. Norwood, 74 Fed. 997: 1220.
 v. Pittsburg etc. R. R. Co., 219 Pa. St. 398: 1129.
 v. Rochester, 24 N. Y. App. Div. 383: 744, 1263.
 v. Runnels, 12 Maine 235: 1411, 1510.
 v. Selma St. & Suburban Ry. Co., 130 Ala. 474: 271, 305, 307.
 v. Selma St. & Suburban Ry. Co. 135 Ala. 552: 271, 306.
 v. Shepard, 24 N. H. 208: 1486, 1489.
 v. Shoals, 6 Ind. App. 319: 211, 601.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Thayer, 3 Met. 312: 1444.
 v. Vanderburg, 99 Mo. 378: 875.
 v. Windham, 25 Conn. 597: 1404, 1510, 1516.
- Balch v. County Comrs. of Essex, 103 Mass. 106: 542, 785, 897.
 v. Detroit, 109 Mich. 253: 1531.
- Baldwin v. Bangor, 36 Maine 518: 678, 1625.
 v. Buffalo, 29 Barb. 396: 1459, 1572.
 v. Buffalo, 35 N. Y. 375: 1326, 1412, 1571.
 v. Calkins, 10 Wend. 167: 1086, 1087.
 v. Chicago etc. Ry. Co., 35 Minn. 354: 1551, 1648, 1657.
 v. Newark, 38 N. J. L. 158: 1168, 1187, 1529.
 v. Ohio Tp. 70 Kan. 102: 147, 154.
 v. Postal Tel. Cable Co., 78 S. C. 419: 685.
- Baldwin etc. Tps. Road, 36 Pa. St. 9: 1371.
- Baldwin & Snowden Road, 3 Grant's Cases 62: 1371.
- Bales v. Pidgeon, 129 Ind. 548: 865, 870.
- Balfour v. Louisville etc. R. R. Co., 62 Miss. 508: 1179.
- Ball v. Herbert, 3 T. R. 253: 433.
 v. Humphrey, 4 G. Greene 204: 1409.
 v. Keokuk etc. R. R. Co., 71 Iowa 306: 996, 1425.
 v. Keokuk eae. R. R. Co., 74 Iowa 132: 1123, 1125, 1128, 1204.
 v. Maysville etc. R. R. Co., 102 Ky. 486: 179, 249, 253, 448, 639, 1544.
 v. Slack, 2 Whart. Pa. 538: 127.
 v. Tacoma, 9 Wash. 592: 1356.
- Ballance v. Peoria, 180 Ill. 29: 102.
- Ballard v. Ballard Vale Co., 5 Gray 468: 948.
 v. Struckman, 123 Ill. 636: 866, 869.
 v. Tomlinson, 26 L. R. Ch. Div. 194: 165.
 v. Tomlinson, L. R. 29 Ch. Div. 115: 165.
- Ballie v. Larson, 138 Fed. 177: 564.
- Balliet v. Commonwealth, 17 Pa. St. 509: 1489.
- Ballou v. Elder, 95 Iowa 693: 821.
- Baltimore v. Appbold, 42 Md. 442: 70, 79, 1604.
 v. Baltimore etc. Steamboat Co., 104 Md. 485: 1231, 1313.
- Baltimore v. Baltimore T. & G. Co., 166 U. S. 673: 309.
 v. Bouldin, 23 Md. 328: 917.
 v. Brick Co., 80 Md. 458: 1119.
 v. Brownel, 86 Md. 153: 886, 888.
 v. Clunet, 23 Md. 449: 589.
 v. Coates, 85 Md. 531: 1614.
 v. Cowen, 88 Md. 447: 355, 966.
 v. Fairfield Imp. Co., 87 Md. 352: 452.
 v. Fear, 82 Md. 246: 879.
 v. Friek, 82 Md. 77: 190, 367, 889.
 v. Grand Lodge, 44 Md. 436: 914.
 v. Greenmount Cemetery, 7 Md. 517: 13.
 v. Hook, 62 Md. 371: 431, 1159.
 v. Latrobe, 101 Md. 621: 743, 957, 958, 1253, 1255, 1257.
 v. Little Sisters, 56 Md. 400: 917.
 v. Merryman, 86 Md. 584: 91.
 v. Musgrave, 48 Md. 272: 1673, 1690, 1691.
 v. Northern Central R. R. Co., 88 Md. 427: 879.
 v. Porter, 18 Md. 284: 237.
 v. Rice, 73 Md. 307: 1257.
 v. St. Agnes' Hospital, 48 Md. 419: 431.
 v. Smith & S. Brick Co., 80 Md. 458: 1138, 1143.
 v. Warren Mfg. Co. 59 Md. 96: 86, 1604.
- Baltimore Belt R. R. Co. v. Baltzell, 75 Md. 94: 922, 1000, 1004, 1013, 1014, 1019.
 v. Lee, 75 Md. 596: 1569, 1574, 1576.
 v. Sattler, 100 Md. 306: 447.
 v. Sattler, 102 Md. 595: 1119, 1120, 1124, 1125.
 v. Sattler, 105 Md. 264: 447, 1659.
- Baltimore County W. & Elec. Co. v. Baltimore Co., 105 Md. 154: 172, 359.
- v. Dubreuil, 105 Md. 424: 172, 173, 176, 177, 337.
- Baltimore etc. Extension Co. v. Duke, 129 Pa. St. 422: 324, 640.
 v. Seipel, 129 Pa. St. 425: 1708.
- Baltimore etc. R. R. Co. v. Algire, 63 Md. 319: 857, 859, 1636.
 v. Baltimore, 98 Md. 535: 1290.
 v. Board of Comrs. 156 Ind. 260: 776, 799, 1510.
 v. Bouvier, 70 N. J. Eq. 158: 1226, 1347.
 v. Boyd, 63 Md. 325: 1159, 1634.
 v. Butler Pass. Ry. Co., 207 Pa. St. 406: 770.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Chase, 43 Md. 23: 127, 128, 129, 130.
 v. Duke, 129 Pa. St. 422: 324.
 v. Fifth Baptist Church, 108 U. S. 317: 450, 451.
 v. Fifth Baptist Church, 137 U. S. 568: 450.
 v. Fitzgerald, 2 App. Cas. D. C. 501: 309, 316.
 v. Flower, 132 Pa. St. 524: 1110.
 v. Hackett, 87 Md. 224: 152, 1664.
 v. Johnson, 84 Ind. 420: 1429, 1463.
 v. Ketting, 122 Ind. 5: 929.
 v. Lansing, 52 Ind. 229: 1310, 1311, 1316.
 v. Lersch, 58 Ohio St. 639: 1294.
 v. Magruder, 34 Md. 79: 87, 1454, 1476.
 v. Nesbitt, 10 How. U. S. 395: 690, 1431, 1674.
 v. North, 103 Ind. 486: 776, 786, 798, 1010, 1609.
 v. Parrette, 55 Fed. 50: 952, 966, 1629.
 v. Philadelphia etc. R. R. Co., 17 Phlia. 396: 770.
 v. Pittsburgh etc. R. R. Co., 17 W. Va. 812: 9, 21, 672, 675, 754, 799, 1005, 1008, 1009, 1010, 1011, 1013, 1014, 1043, 1045, 1061, 1074, 1075, 1077, 1424.
 v. Quillen, 34 Ind. App. 330: 152, 154, 1450, 1454, 1639, 1654.
 v. Reaney, 42 Md. 117: 440.
 v. Seymour, 154 Ind. 17: 864.
 v. Sloan, 131 Pa. St. 568: 1208.
 v. State, 159 Ind. 510: 928, 1010, 1288, 1642, 1644.
 v. Stewart, 128 Ill. App. 270: 91.
 v. Strauss, 37 Md. 237: 1583.
 v. Taylor, 6 App. D. C. 259: 315.
 v. Thompson, 10 Md. 76: 952, 961, 1132, 1635.
 v. Union R. R. Co., 35 Md. 224: 410.
 v. Van Ness, 4 Cranch 595: 524.
 v. Waters, 105 Md. 396: 717, 718.
 v. Winslow, 18 App. Cas. D. C. 438: 1620.
 Baltimore Extension R. R. Co., In re (1895) 1 I. R. 169: 1326.
 Baltimore & F. Turnpike Road v. Baltimore etc. R. R. Co., 81 Md. 247: 789, 798.
 Baltimore & Havre-de-Grace Turnpike Co. v. Northern Central R. R. Co., 15 Md. 193: 1422.
 Baltimore & Havre-de-Grace Turnpike Co. v. Union R. R. Co., 35 Md. 224: 409, 782, 1610.
 Baltimore & Ohio Tel. Co. v. Morgan's La. & Tex. R. R. Co., 37 La. Ann. 883: 775, 791.
 v. Western Union Tel. Co., 24 Fed. 318: 412, 832.
 Baltimore T. & G. Co. v. Baltimore, 64 Fed. 153: 303.
 Baltimore Traction Co. v. Baltimore Belt R. R. Co., 151 U. S. 137: 1005, 1433.
 Baltzeger v. Carolina Midland R. R. Co., 54 S. C. 242: 148, 159.
 Bancroft v. Boston, 115 Mass. 377: 1185.
 v. Cambridge, 126 Mass. 438: 484, 569, 586, 948, 1320.
 v. San Diego, 120 Cal. 432: 629, 1309, 1567.
 Bangor v. County Comirs., 30 Maine 270: 1415, 1419.
 v. Lansil, 51 Me. 521: 147.
 Bangor etc. R. R. Co. v. McComb, 60 Maine 290: 494, 1174, 1175, 1177, 1185, 1315, 1319.
 v. Smith, 47 Maine 34: 321.
 Banigan v. Worcester, 30 Fed. 392: 702, 929, 931.
 Bankhead v. Brown, 25 Iowa 540: 494, 495, 498, 516, 517, 520, 675.
 Bank of Auburn v. Roberts, 44 N. Y. 192: 948, 949, 1563.
 Bank of Hopkinsville v. Western Ky. Asylum, 108 Ky. 357: 76, 1654.
 Banks et al. appellants, 29 Maine 288: 1412.
 Banks v. Ogden, 2 Wall. 57: 130.
 v. School Directors, 194 Ill. 247: 960.
 Bannister v. McIntire, 112 Iowa 600: 1534.
 Bannon v. Angier, 2 Allen 128: 835.
 v. Rohmeiser, 90 Ky. 48: 369, 373, 382, 389, 391, 405, 1596.
 Banse v. Clark, 69 Minn. 53: 974, 992, 1157, 1365, 1707.
 Barbadoes St., In re, 8 Phila. 498: 1109, 1274.
 Barber v. Andover, 8 N. H. 398: 782.
 v. East Dallas, 83 Tex. 147: 1546.
 Barbier v. Chicago, 80 Ill. 482: 1392.
 Barbour v. Barbour, 46 Maine 9: 943.
 v. Lyddy, 49 Fed. 896: 183, 879.
 Barclay v. Abraham, 121 Iowa 619: 162.
 v. Howell, 6 Pet. 498: 1486.
 v. Lebanon, 11 N. H. 19: 422.
 v. Pickles, 38 Mo. 143: 1255.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Barden v. Portage, 79 Wis. 126: 89.
 Bardstown etc. R. R. Co. v. Metcalfe, 4 Met. (Ky.) 199: 1497.
 Bardstown etc. Turnpike Co. v. Nelson Co., 109 Ky. 800: 1672.
 Barfield v. Gleason, 111 Ky. 491: 11, 463, 1548.
 v. Maeon Co., 109 Ga. 386: 156, 629, 634.
 Barker v. Clark, 4 N. H. 380: 865.
 v. Hartman Steel Co., 6 Pa. Co. Ct. 183: 301, 688, 1582.
 v. Hartman Steel Co., 129 Pa. St. 551: 317.
 v. Milwaukee etc. R. R. Co., 60 Wis. 480: 929.
 v. Southern Ry. Co., 137 N. C. 214: 165, 1157, 1707, 1708.
 v. Taunton, 119 Mass. 392: 1353.
 Barlow v. Chicago etc. R. R. Co., 29 Iowa 276: 834, 854, 1497, 1503.
 v. Highway Comrs., 59 Mich. 443: 1095.
 Barnard v. Comrs., 172 Ill. 391: 1614.
 v. Fitch, 7 Met. 605: 976.
 v. Haworth, 9 Ind. 103: 1362.
 v. Shirley, 135 Ind. 547: 71, 82.
 Barnes v. Fox, 61 Iowa 18: 1018, 1571.
 v. Grafton, 61 W. Va. 408: 631.
 v. Hannibal, 71 Mo. 449: 91, 95.
 v. Michigan Air Line R. R. Co., 65 Mich. 251: 1245, 1450, 1451.
 v. Midland R. R. Terminal Co., 193 N. Y. 378: 1603, 1607.
 v. New York, 27 Hun 236: 1325.
 v. Springfield, 4 Allen 488: 703.
 v. Suddard, 117 Ill. 237: 837.
 v. Tidewater Ry. Co., 107 Va. 263: 1379.
 Barnet v. Passumpsic Turnpike Co., 15 Vt. 757: 423.
 Barnett v. Johnson, 15 N. J. Eq. 481: 188.
 v. Matagorda R. & I. Co., 98 Tex. 355: 148.
 v. Postal Tel. Cable Co., 79 S. C. 462: 685.
 v. Railroad Co., 68 Mo. 56: 475.
 v. St. Anthony etc. Co., 33 Minn. 265: 1119, 1121, 1127.
 v. St. Francis Levee Dist. 125 Mo. App. 61: 93, 1639, 1653, 1716.
 v. State, 15 Ala. 829: 1017, 1032, 1033, 1412.
 Barney v. Keokuk, 4 Dill. 593: 308, 1593.
 v. Keokuk, 94 U. S. 324: 104, 105, 110, 114, 201, 308.
 v. Barnsley Canal Co. v. Twibell, 13 L. J. Ch. 434: 952.
 Barnstable Savings Bank v. Boston, 127 Mass. 254: 948, 1638.
 Barnum v. Minnesota Transfer Ry. Co., 33 Minn. 365: 320, 352, 370, 384.
 Barr v. Flynn, 20 Mo. App. 383: 990.
 v. Omaha, 42 Neb. 342: 994, 1179, 1216, 1308.
 v. Oskaloosa, 45 Iowa 275: 199, 366, 376, 388, 395.
 v. Stevens. 1 Bibb. 292: 1403.
 Barrall v. Quick, 111 Ky. 22: 1113, 1316, 1332, 1439.
 Barre R. R. Co. v. Montpelier R. R. Co., 61 Vt. 1: 754, 759, 793, 798, 901, 908.
 Barrett v. Bangor, 70 Maine 335: 91.
 v. Kemp, 91 Iowa 296: 677, 1056.
 v. Metcalf, 12 Tex. Civ. App. 247: 141.
 v. Mt. Greenwood Cem. Assn., 57 Ill. App. 401: 79, 453, 1613.
 v. Mt. Greenwood Cem. Assn., 159 Ill. 385: 83, 1604.
 Barre Turnpike Co. v. Appleton, 2 Pick. 430: 1028, 1079.
 Barre Water Co. In re, 62 Vt. 27: 551, 595, 710, 723.
 Barre Water Co., In re, 72 Vt. 413: 1332.
 Barrickman v. Commissioners, 11 G. & J. 50: 1343.
 Barrington v. Meyer, 103 Ill. App. 124: 630, 1306.
 Barron v. Mayor etc. of Baltimore, 7 Peters 243: 23.
 v. Memphis, 113 Tenn. 89: 57, 87.
 Barrow v. Page, 5 Haywood (Tenn.) 97: 19.
 Barrows v. Guest, 5 Utah 91: 867.
 v. Sycamore, 150 Ill. 588: 179, 197, 355, 643, 657, 1488, 1497.
 v. Sycamore, 49 Ill. App. 590: 355.
 Barry v. Delaughery, 47 Neb. 354: 970, 992, 1004.
 v. Lowell, 8 Allen 127: 143.
 v. Smith, 191 Mass. 78: 455.
 Barstow Irr. Co. v. Black, 39 Tex. Civ. App. 80: 152.
 Bartels v. Houston, 32 Tex. Civ. App. 389: 226, 848.
 Barter v. Commonwealth, 3 Penn. & Watts 253: 355.
 Bartleson v. Minneapolis, 33 Minn. 468: 1626, 1629.
 Bartlett v. Bangor, 67 Maine 460: 880, 1326.
 v. Beardmore, 77 Wis. 356: 882.

- [The references are to the pages: Vol. I., pp. 1-742; Vol. II., pp. 743-1719.]
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 v. Tarrytown, 52 Hun 380: 609, 619, 1356.
 v. Tarrytown, 55 Hun 492: 610, 615.
- Bartley v. Cincinnati, 8 Ohio C. C. 226: 1219.
- Bartram v. Central Turnpike Co., 25 Cal. 283: 409.
- Bashfield v. Empire State Tel. Co., 71 Hun 532: 339.
- Bass v. Elliott, 105 Ind. 517: 929, 1367.
 v. Ft. Wayne, 121 Ind. 389: 677, 713, 822, 928, 1431, 1510, 1512, 1602.
 v. Metropolitan W. S. El. R. R. Co., 82 Fed. 857: 438, 953, 1570, 1575.
 v. Roanoke etc. Co., 111 N. C. 439: 1497, 1502.
 v. State, 34 La. Ann. 494: 440.
- Bassett v. Clement, 17 N. J. L. 166: 1102.
 v. Denn, 17 N. J. L. 432: 1092.
 v. Harwick, 180 Mass. 585: 865, 870.
 v. Pennsylvania R. R. Co., 201 Pa. St. 226: 1479.
- Bastable v. Syracuse, 8 Hun 587: 233.
- Bastain v. Philadelphia, 180 Pa. St. 227: 1252.
- Bate v. Philadelphia etc. R. R. Co., 1 Mont. Co. L. R. 47: 918, 1466, 1561, 1670.
- Bateman v. Covington, 90 Ky. 390: 197, 1496.
- Bates v. Boston El. Ry. Co., 187 Mass. 328: 948, 1261, 1564, 1717.
 v. Cooper, 5 Ohio 115: 725, 1165.
 v. Ray, 102 Mass. 458: 1310.
 v. Westborough, 151 Mass. 174: 143.
 v. Weymouth Iron Co., 8 Cush. 548: 554, 557.
- Bathgate v. Irvine, 126 Cal. 135: 70.
- Battle Creek etc. R. R. Co. v. Tiffany, 99 Mich. 471: 751.
- Battles v. Baintree, 14 Vt. 348: 1527.
- Baubie v. Ossman, 142 Mo. 499: 1511.
- Baudistel v. Jackson, 110 Mich. 357: 384, 390, 406, 1416.
 v. Michigan Central R. R. Co., 113 Mich. 687: 400, 384.
- Baugh v. Gulf etc. Ry. Co., 44 Tex. Civ. App. 443: 152.
 v. Texas etc. R. R. Co., 80 Tex. 56: 309, 316, 1651, 1659.
- Baugher v. Rudd, 53 Ark. 417: 1399.
- Baughman v. Heinzelman, 180 Ill. 251: 675, 1056.
- Bauman v. Boeckeler, 119 Mo. 189: 881, 882.
 v. New Castle, 12 Pa. Co. Ct. 22: 1649.
 v. Ross, 167 U. S. 548: 923, 1188.
- Baxter v. Turnpike Co., 22 Vt. 119: 1489.
- Bayo v. Lake City, 44 Fla. 491: 1568.
- Bayard v. Standard Oil Co., 38 Ore. 438: 865, 867, 871.
- Baychester Ave. Matter of, 120 App. Div. 393: 1270, 1271.
- Bay City Belt Line R. R. Co. v. Hitchcock, 90 Mich. 533: 972.
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- Beach v. Elmira, 22 Hun 158: 141, 1612.
 v. Scranton, 25 Pa. Supr. Ct. 430: 1450, 1457.
 v. Sterling Iron & Z. Co., 54 N. J. Eq. 65: 65, 81, 82, 1604.
 v. Wilmington etc. R. R. Co., 120 N. C. 498: 1649, 1655.
- Beacon v. Pittsburgh etc. R. R. Co., 1 Pa. Dist. Ct. 618: 1331, 1481.
- Beal v. Durham etc. R. R. Co., 136 N. C. 298: 936, 1360, 1559, 1560.
- Beale, Matter of, 39 Cal. 495: 1550.
 v. Boston, 166 Mass. 53: 1327.
 v. New York Central & Hudson River R. R. Co., 41 Hun 172: 1501.
 v. Pennsylvania R. R. Co., 86 Pa. St. 509: 1682.
- Beale St., Matter of, 39 Cal. 495: 617, 1717.
- Bean v. Hinman, 33 Maine 48: 960.
 v. Kulp, 7 Phila. 650: 949.
 v. Warner, 38 N. H. 247: 966.
- Bean's Road, 35 Pa. St. 280: 1364.
- Beard v. Henniker, 69 N. H. 279: 994.
 v. Henniker, 70 N. H. 197: 1683.
 v. Murphy, 37 Vt. 99: 145, 440, 441.
- Beardslee v. Dolge, 143 N. Y. 160: 1418.
 v. French, 7 Conn. 125: 1362, 1492, 1504.
- Beardsley v. Lehigh Valley R. R. Co., 65 Hun 502: 1483, 1645, 1646.
 v. Lehigh Valley R. R. Co., 142 N. Y. 173: 1645, 1646.
 v. New York etc. R. R. Co., 162 N. Y. 230: 484.
 v. Washington, 39 Conn. 265: 1105.
- Bearse v. Perry, 117 Mass. 211: 560.
 v. Bristol, 66 N. H. 420: 1525.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Mountain Lake Water Co., 13 Cal. 306: 706.
- Beatrice v. Leary, 45 Neb. 149: 143, 149, 153.
- Beatrice Gas Co. v. Thomas, 41 Neb. 662: 166.
- Beattie v. Carolina Central R. R. Co., 108 N. C. 425: 845.
- Beatty v. Beethe, 23 Neb. 210: 1018, 1020, 1569, 1571.
 v. Kuntz, 2 Pet. 566: 872.
 v. Kuntz, 6 Pet. 430: 872.
 v. Kinnear Mfg. Co., 21 Ohio C. C. 384: 191, 363, 371, 389, 392, 398, 405, 1596.
 v. St. Joseph, 57 Mo. App. 251: 237.
- Beaudrot v. Murphy, 53 S. C. 118: 516.
- Beaver v. Beaver Valley R. R. Co., 217 Pa. St. 280: 304.
 v. Harrisburg, 156 Pa. St. 547: 226, 635, 1356, 1452.
- Bechnel v. New Orleans etc. R. R. Co., 28 La. Ann. 522: 862.
- Beck v. Biggers, 66 Ark. 292. 1029, 1082, 1363.
 v. Brooklyn El. R. R. Co., 87 Hun 30: 1296, 1299, 1302.
 v. Erie Terminal R. R. Co., 11 Pa. Co. Ct. 363: 248, 641.
 v. Ingram, 1 Bush (Ky.) 355: 18.
 v. Louisville etc. R. R. Co., 65 Miss. 172: 857, 1627, 1633.
 v. Pennsylvania etc. R. R. Co., 148 Pa. St. 271: 1123.
 v. United N. J. R. R. Co., 39 N. J. L. 45: 708, 710.
- Becker v. Chicago etc. R. R. Co., 126 Ill. 436: 1426.
 v. Lebanon etc. St. Ry. Co., 30 Pa. Supr. Ct. 546: 1297.
 v. Lebanon etc. St. R. R. Co., 188 Pa. St. 484: 1588.
 v. Lebanon etc. St. Ry. Co., 195 Pa. St. 502: 1630.
 v. Metropolitan El. R. R. Co., 131 N. Y. 509: 1196, 1296, 1301, 1302.
 v. Philadelphia etc. R. R. Co., 177 Pa. St. 252: 1140, 1277.
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 v. Midland Ry. Co., 3 L. R. C. P. 82: 635, 640.
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 v. Railroad Co., 3 Paige 73: 495.
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 v. Magoun, 122 Iowa 94: 1007.
 v. Scheidt, 13 Ohio St. 406: 1011, 1511.
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 v. Newark, 65 N. J. L. 307: 197, 373.
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 v. Flint Ave. R. R. Co., 153 N. Y. 144: 358.
 v. Jackson County, 18 Ore. 283: 1100, 1101, 1177, 1187, 1200, 1215, 1366.
 v. Saratoga and Schenectady R. R. Co., 3 Paige 45: 6, 504, 524, 675, 746, 923.
 v. Third Ave. R. R. Co., 13 App. Div. 279: 180, 279, 297, 300.
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 v. Macfarland, 30 App. Cas. D. C. 538: 1424.
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 Belfast, Appellant, 53 Maine 431: 703, 1370.
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 Belknap v. Belknap, 2 Johns. Ch. 463: 709.
 Bell v. Atlantic & P. R. R. Co., 63 Fed. 417: 957.
 v. Boston, 101 Mass. 506: 856.
 v. C. B. & Q. R. R. Co., 74 Iowa 343: 1252, 1311, 1312.
 v. County Court, 61 Mo. App. 173: 928.
 v. Cox, 122 Ind. 153: 1046.
 v. Dayton & I. R. R. Co., 3 Ohio C. C. 31: 851, 855.
 v. Hull etc. R. R. Co., 6 M. & W. 699: 652.
 v. Louisville & Nashville R. R. Co., 1 Bush (Ky.) 404: 18.
 v. Mattoon W. W. & R. Co., 235 Ill. 218: 412.
 v. Norfolk So. R. R. Co., 101 N. C. 21: 160.
 v. Ohio etc. R. R. Co., 1 Grant 105: 707, 957, 1494, 1618.
 v. Southern Pac. R. R. Co., 144 Cal. 560: 832, 833, 841.
 Bellair v. B. & O. R. R. Co., 146 U. S. 117: 931.
 Bellenot v. Richmond, 108 Va. 314: 1492.
 Belleville v. Citizens' Horse R. R. Co., 152 Ill. 171: 303, 426.
 Bellevue v. Bellevue Imp. Co., 65 Neb. 52: 396.
 Bellinger v. New York Central R. R. Co., 23 N. Y. 42: 88, 94, 461.
 Bellingham Bay R. & N. Co. v. Loose, 2 Wash. 500: 434, 1526.
 Bellingham Bay etc. R. R. Co. v. Strand, 4 Wash. 311: 1113, 1242.
 v. Strand, 14 Wash. 144: 1320, 1348.
 Bellona Company Case, 3 Bland Chy. 442: 501, 504, 524, 710, 789.
 Bell Telephone Co. v. Parker, 115 App. Div. 920: 1042, 1044.
 v. Parker, 187 N. Y. 299: 986, 1042, 1044.
 Belmont v. New Eng. Brieck Co., 190 Mass. 442: 467.
 Belmont St. Opening, 128 App. Div. 636: 1324.
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 Bemis v. Springfield, 122 Mass. 110: 605.
 Bench v. Otis, 25 Mich. 29: 1421.
 v. Wilmington & W. R. R. Co., 120 N. C. 498: 155.
 Bendickson v. Great Northern Ry. Co., 80 Minn. 332: 332, 834.
 Benedict v. Goit, 3 Barb. 459: 422, 423.
 v. Heineberg, 43 Vt. 231: 1499, 1500.
 v. New York, 98 Fed. 789: 1221.
 v. State, 120 N. Y. 228: 91, 1707, 1708.
 Benham v. Dunbar, 103 Mass. 365: 1138, 1141.
 v. Potter, 52 Conn. 248: 1499.
 Benjamin v. Wheeler, 8 Gray 409: 239.
 Bennett, ex parte, 26 S. C. 317: 982, 1417.
 Bennett v. Atlantic Coast Line R. R. Co., 126 Ga. 411: 864, 867.
 v. Boyle, 40 Barb. 531: 495, 589,
 v. Camden & Amboy R. R. Co., 14 N. J. L. 145: 1374, 1375.
 v. Chicago etc. R. R. Co., 73 Fed. 696: 183, 875.
 v. Clemence, 6 Allen 10: 1119, 1120.
 v. County Comrs., 4 Gray 359: 1428.
 v. Cutler, 44 N. H. 69: 969, 1381, 1514.
 v. Drain Comrs., 56 Mich. 634: 984, 1032, 1419.
 v. Fisher, 26 Iowa 497: 734.
 v. Hall, 184 Mo. 407: 1186, 1406.
 v. Long Island R. R. Co., 181 N. Y. 431: 326, 1457, 1473.
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 v. Marion, 106 Iowa 628: 675, 815, 817, 1044, 1046, 1056, 1060, 1062, 1063, 1066.
 v. Marion, 119 Iowa 473: 84, 1650, 1654.
 v. Minneapolis etc. R. R. Co., 42 Minn. 245: 947, 1261, 1629.
 v. Woody, 137 Mo. 377: 1176, 1186, 1200.
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 Bennington v. Smith, 29 Vt. 254: 700.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Morrow, 61 Mo. 345: 104.
 v. St. Paul etc. R. R. Co., 62 Minn. 198: 881.
 v. Soule, 32 Maine 39: 1135.
 v. Wilmington, 9 Houston 359: 235.
 Bent v. Brigham, 117 Mass. 307: 1042.
 v. Emery, 173 Mass. 495: 1158.
 v. Trimboli, 61 W. Va. 509: 1596.
 Bentinek v. Norfolk Estuary Co., 8 Deg. MeN. & G. 714: 715, 813, 1624.
 Bentley v. Atlanta, 92 Ga. 623: 226, 635, 1664.
 v. Wabash etc. Ry. Co., 61 Iowa 229: 1537.
 Benton v. Brookline, 151 Mass. 250: 1131, 1150.
 v. Milwaukee, 50 Wis. 368: 1137, 1551.
 Benton Harbo Terminal Ry. Co. v. Hall, 131 Mich. 384: 1087.
 v. King, 131 Mich. 377: 1087, 1097.
 Bentonville R. R. Co. v. Baker, 45 Ark. 252: 151, 830, 952, 1310, 1524, 1545.
 v. Stroud, 45 Ark. 278: 958, 1045, 1136.
 Benzenhoefer's Appeal, 154 Pa. St. 547: 1419.
 Bequette v. Patterson, 104 Cal. 282: 865.
 Bergman v. Manhattan R. R. Co., 129 N. Y. 637: 924.
 v. Manhattan R. R. Co., 59 N. Y. Supr. 566: 924.
 v. St. Paul etc. R. R. Co., 21 Minn. 533: 1693.
 Berggren v. Fremont etc. R. R. Co., 23 Neb. 620: 1408.
 Berger v. Tracy, 135 Iowa 597: 1010.
 Bergen Neck R. R. Co., v. Point Breeze F. & I. Co., 57 N. J. L. 163: 1131.
 Berks Co. v. Reading City Pass. R. R. Co., 167 Pa. St. 102: 304.
 Berks & Dauphin Turnpike Road v. Lebanon Steam Co., 5 Pa. Co. Ct. 354: 338.
 Berks & D. Turnpike Co. v. Lebanon & M. St. R. R. Co., 3 Pa. Dist. Ct. 55: 306, 307.
 Berks St. Opening, *In re*, 15 Phila. 381: 1327.
 Berlew v. Electric Illuminating Co., 1 Pa. Co. Ct. 651: 345.
 Berlin Road, 3 Yates 263: 1388.
 Bern v. Pennsylvania Tp. Road, 2 Monaghan (Pa.) 105: 514.
 Bernard v. Brewer, 2 Wash. (Va.) 76: 1018, 1029, 1032.
 v. Calloway County Co., 28 Mo. 37: 1384.
 Bernhard v. Rochester, 127 App. Div. 875: 1524.
 Berrien Springs Water Power Co. v. Berrien Cire. Judge, 113 Mich. 48: 494, 508, 591, 592, 593.
 Berry v. Carle, 3 Greenl. 269: 103.
 v. Hebron, 38 N. H. 196: 1383.
 Berryman v. Little, 49 N. J. L. 182: 1414.
 Bertsch v. Lehigh Coal & Nav. Co., 4 Rawle, 130: 845.
 Beseman v. Pennsylvania R. R. Co., 50 N. J. L. 235: 445, 457, 1446, 1476.
 v. Pennsylvania R. R. Co., 52 N. J. L. 221: 445, 1446, 1476.
 Besuden v. Comrs., 7 Ohio C. C. 237: 1109.
 Bethel v. Bruett, 215 Ill. 162: 868, 884, 885, 886.
 v. County Comrs., 42 Maine 478: 992.
 Bethlehem South Gas & Water Co. v. Yoder, 112 Pa. St. 136: 1352, 1353, 1667.
 Bethlehem Toll-Bridge, 12 Pa. Co. Ct. 311: 781, 782.
 Bethum v. Turner, 1 Maine 111: 672.
 Betjeman v. New York El. R. R. Co., 1 Misc. 138: 1427.
 Bettis v. Geddes, 54 Mich. 608: 1017, 1036, 1420.
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 Beutel v. West Bay City Sugar Co., 132 Mich. 587: 384, 390.
 Beveridge v. South Park Comrs., 100 Ill. 75: 1325.
 v. West Park Comrs., 7 Ill. App. 460: 1325.
 Bevier v. Dillingham, 18 Wis. 529: 928, 1206.
 Bewley v. Graves, 17 Ore. 274: 974, 1021, 1511.
 Bexar County v. Terrell (Tex.) 14 S. W. 62: 1138.
 Beyer v. Tanner, 29 Ill. 135: 1636.
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- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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v. Hussman, 23 Mo. 579: 1255.
v. Hussman, 23 Mo. 602: 1255.
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v. Cambridge Turnpike Co., 7 Mass. 202: 1526.
v. Draper, 6. N. D. 152: 715, 744, 959, 995, 1059, 1060, 1061, 1064, 1066, 1427.
v. Mississippi Central & Tenn. R. R. Co., 2 Head. 624: 895.
v. Newell, 10 Pick. 348: 898.
v. West Wisconsin Ry. Co., 27 Wis. 478: 1175, 1180, 1205.
v. Whitcomb, 72 N. H. 473: 57, 67, 349, 473, 1490, 1491.
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v. Dils, 120 Ky. 563: 1183.
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v. Hannibal etc. R. R. Co., 30 Mo. App. 365: 91, 93, 95, 1649, 1653.
v. W. & M. R. R. Co., 8 Rich. Eq. S. C. 46: 711.
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v. Cary, 66 How. Pr. 627: 808.
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v. Chicago etc. Ry. Co., 65 Iowa 440: 1023, 1525, 1634.
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v. Louisville etc. R. R. Co., 152 Ala. 422: 760, 802, 941, 1623.
v. Queen, 20 L. J. Q. B. 304: 1533.
v. Parsons, 100 Ala. 662: 475, 487.
v. Smith, 89 Ala. 305: 1149.
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v. Birmingham Tr. Co., 128 Ala. 110: 1397.
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v. Oden, 146 Ala. 495: 639, 642, 1297.
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v. Birmingham Ry. & Elec. Co., 119 Ala. 129: 328, 1611.
v. Southern Bell Tel. & Tel. Co., 119 Ala. 144: 418, 1621.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. New York etc. R. R. Co., 198 U. S. 390: 258.
 Bischof v. Merchants' Nat. Bank, 75 Neb. 838: 373.
 Bischof v. New York El. R. R. Co., 138 N. Y. 257: 180, 193, 265, 448, 1196, 1296, 1300, 1305, 1333.
 Bisher v. Richards, 9 Ohio St. 495: 778, 779.
 Bishop v. Bagley, 104 Va. 29: 1101.
 v. Macon, 7 Ga. 200: 17.
 v. Medway, 12 Met. 125: 1683.
 v. Merchants' Nat. Bank, 75 Neb. 838: 1596.
 v. North Adams Fire Dist., 167 Mass. 364: 336, 814.
 v. Rouney, 59 Vt. 316: 753.
 v. Superior Judge, 87 Cal. 226: 893, 894.
 Bissell v. Collins, 28 Mich. 277: 1489.
 v. Larchmont, 57 App. Div. 61: 609, 616.
 Bittenhaus v. Johnston, 92 Wis. 477: 486.
 Bixby v. Goss, 54 Mich. 551: 941, 1017, 1036, 1412, 1420.
 Bizer v. Ottumwa Hydraulic Power Co., 70 Iowa 145: 1553.
 Black v. Baltimore, 50 Md. 235: 1673, 1691.
 v. Baltimore, 56 Md. 333: 1691.
 v. Brooklyn Heights R. R. Co., 32 App. Div. N. Y. 468: 1581.
 v. Campbell, 112 Ind. 122: 973.
 v. Delaware etc. Canal Co., 24 N. J. Eq. 455: 529.
 v. Delaware etc. Co., 22 N. J. Eq. 130: 1479.
 v. Philadelphia & R. R. R. Co., 58 St. 249: 255.
 v. Pittsburg etc. St. Ry. Co., 34 Pa. Supr. Ct. 416: 382, 391, 394, 404, 405, 1596.
 v. Thompson, 107 Ind. 162: 1095.
 Black Hills etc. Ry. Co. v. Tacoma Mill Co., 129 Fed. 312: 1624.
 Blackman v. Halves, 72 Ind. 515: 514.
 Black River etc. R. R. Co. v. Barnard, 9 Hun 104: 1200, 1201.
 Black River Imp. Co. v. LaCrosse Booming & Tram Co., 54 Wis. 659: 76, 100.
 Blackshire v. Atchison, Topeka & Santa Fe R. R. Co., 13 Kan. 514: 1626, 1628.
 Blackwell v. Lynchburg etc. R. R. Co., 111 N. C. 151: 435, 1455, 1476.
 v. Old Colony R. R. Co., 122 Mass. 1: 133.
 v. Plinney, 126 Mass. 458: 560, 1074.
 Blackwell etc. Ry. Co. v. Bebout, 19 Okl. 63: 1324, 1546.
 v. Gist, 18 Okla. 516: 201, 364.
 Blackwell's Island Bridge, Matter of, 118 App. Div. 272: 1241, 1270.
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 Blackwood v. Tanner, 112 Ky. 672: 414.
 Blaine Co. v. Brewster, 32 Neb. 264: 781, 1270.
 Blair v. Charleston, 43 W. Va. 62: 615, 631, 633.
 v. Claxton, 18 N. Y. 529: 1256.
 v. Coakley, 136 N. C. 405: 1400.
 v. Milwaukee etc. Co., 110 Wis. 64: 1364.
 v. St. Louis etc. R. R. Co., 24 Fed. 539: 864.
 Blaisdell v. Briggs, 23 Maine 123: 1517.
 v. Portsmouth, Great Falls & Conway R. R. Co., 51 N. H. 483: 857.
 v. Winthrop, 118 Mass. 138: 1373.
 Blake v. Co. Comrs., 114 Mass. 583: 514, 1104, 1105.
 v. Dubuque, 13 Ia. 66: 1545, 1675.
 v. McCarthy, 56 Miss. 654: 439, 1154.
 v. People, 109 Ill. 504: 574.
 v. Quiney, 113 Ind. 124: 1371, 1385.
 v. Rich, 34 N. H. 282: 1480, 1481.
 Blakeley v. Chicago etc. R. R. Co., 25 Neb. 207: 1129, 1176, 1200, 1201, 1243, 1251.
 v. Chicago etc. R. R. Co., 34 Neb. 284: 425, 1473, 1628.
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 v. Devine, 36 Minn. 53: 154.
 Blakely Road, 8 Pa. Co. Ct. 498: 993.
 Blakely Road, 8 Pa. Co. Ct. 592: 1105.
 Blakeslee v. Missouri Pac. R. R. Co., 43 Neb. 61: 1577.
 Blanchard v. Abraham, 115 La. 989: 413.
 v. Kansas City, 5 McCrary, 217: 631, 1160, 1549.
 v. Maysville etc. Turnpike Co., 1 Dana 86: 1526.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Blane v. Khimpke, 29 Cal. 156: 649.
 Blaney v. Salem, 160 Mass. 303: 1130, 1133.
 Blanton v. Richmond etc. R. R. Co., 86 Va. 618: 717.
 Bleck v. Keller, 73 Neb. 826: 868.
 Blennerhassett v. Forest City, 117 Ia. 680: 1492.
 Blesch v. Chicago & Northwestern Ry. Co., 43 Wis. 183: 1298, 1299, 1636.
 v. C. & N. W. Ry. Co., 48 Wis. 168: 247, 323, 1298, 1299, 1334, 1335.
 Blinceo v. Choctaw etc. R. R. Co., 16 Okl. 286: 1109, 1146, 1228, 1278.
 Bliss v. Ball, 99 Mass. 597: 349.
 v. Hosmer, 15 Ohio 44: 688.
 Blize v. Costlio, 8 Mo. App. 290: 973, 974, 1406.
 Blizzard v. Danville, 175 Pa. St. 479: 80.
 Block v. Gt. Northern Ry. Co., 101 Minn. 183: 156.
 Blocki v. People, 220 Ill. 444: 304.
 Blodgett v. N. W. El. Ill. R. R. Co., 80 Fed. 601: 1585.
 v. Utica etc. R. R. Co., 64 Barb. 580: 1353.
 v. Whaley, 47 Mich. 469: 1032, 1364.
 Blood v. Nashua & Lowell R. R. Co., 2 Gray, 137: 461.
 v. Woods, 95 Cal. 78: 892.
 Bloodgood v. Mohawk & Hudson R. R. Co., 14 Wend. 51: 524, 1164.
 v. Mohawk & Hudson R. R. Co., 18 Wend. 9: 8, 495, 496, 500, 509, 524, 684, 1154, 1164, 1171.
 Bloomfield v. Calkins, 1 N. Y. Supreme Ct. Rep. 549: 1310.
 Bloomfield etc. Gas Co. v. Calkins, 62 N. Y. 386: 172, 176, 337.
 Bloomfield etc. Gas Lt. Co. v. Calkins, 1 Thomp. etc. 541: 337.
 Bloomfield etc. Natural Gas Lt. Co. v. Richardson, 63 Barb. 437: 501, 503, 536.
 Bloomfield R. R. Co. v. Grace, 112 Ind. 128: 1545.
 v. Van Slike, 107 Ind. 480: 1628.
 Bloomington v. Bloomington Cem. Ass. 126 Ill. 221: 881, 884, 885.
 v. Brokaw, 77 Ill. 194: 629.
 v. Costello, 65 Ill. App. 407: 84, 453.
 v. Latham, 142 Ill. 462: 1220.
 v. Bloomington v. Miller, 84 Ill. 621: 994, 1195, 1366, 1392.
 v. Murnin, 36 Ill. App. 647: 142.
 v. Pollock, 141 Ill. 346: 25, 616, 618, 629, 632, 633, 1718.
 v. Pollock 38 Ill. App. 133: 25, 618, 1306, 1308.
 Blount v. Great Southern etc. R. R. Co., 2 Irish Ch. 40: 1566, 1700.
 Blue Earth Co. v. St. Paul & Sioux City R. R. Co., 28 Minn. 503: 1119, 1120, 1186, 1225, 1312.
 Bluefield v. Bailey, 62 W. Va. 302: 1424, 1427.
 Blum v. Manhattan R. R. Co., 1 Misel. 119: 1124.
 Blumenthal v. New York El. R. R. Co., 60 N. Y. Supr. Ct. 95: 1124, 1584.
 Blumfield v. Brown, 130 Mich. 504: 1429.
 Blunt v. Aiken, 15 Wend. 522: 960.
 Bly v. Edison Elec. Ill. Co., 111 App. Div. 170: 454.
 v. Edison Elec. Ill. Co., 172 N. Y. 1: 454.
 v. Edison Elec. Ill. Co., 188 N. Y. 82: 454.
 Board of Comrs. v. Beckwith, 10 Kan. 603: 808.
 v. Bisby, 37 Kan. 253: 1137.
 v. Bronne, 49 Kan. 291: 1353.
 v. Fahlor, 132 Ind. 426: 735, 1004.
 v. Hogan, 39 Kan. 606: 1200, 1310, 1316.
 v. Indianapolis Nat. Gas Co., 134 Ind. 209, 337.
 v. Labore, 37 Kan. 480: 961, 1209.
 v. Miller, 82 Ind. 572: 1634.
 v. Reeves, 148 Ind. 467: 10.
 v. Small, 61 Ind. 318: 1409.
 v. State, 38 Ind. 193: 1431, 1638.
 v. State, 147 Ind. 476: 461.
 v. State, 156 Ind. 550: 1531.
 v. Trees, 12 Ind. App. 479: 1547.
 v. Young, 59 Fed. 96: 872, 892, 1500, 1504.
 Board of County Comrs. v. Ingram, 31 Colo. 319: 1515.
 v. Mann, 43 Kan. 676: 964.
 Board of Directors v. Redditt, 79 Ark. 154: 733.
 Board of Education, Matter of, 59 App. Div. 258: 1565.
 Board of Education, Matter of, 169 N. Y. 456: 1565.
 Board of Education v. Bakewell, 122 Ill. 339: 459, 494, 496.
 v. Martin, 92 Cal. 209: 1491.
 v. Prior, 11 S. D. 292: 1047.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Du Pont, 110 Ky. 743: 7, 704, 708, 734.
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 v. McFadden, 57 Miss. 618: 782, 1609.
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 v. Blume, 176 Ill. 247: 1426.
 v. Darst, 192 Ill. 47: 1341.
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 v. Jones, 2 Ohio C. C. 482: 1409.
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 v. Lansing, 45 N. Y. 19: 1100.
 v. Perry, 69 Conn. 461: 73.
 v. Shutts, 25 App. Div. N. Y. 22: 1387.
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 v. Port Jervis Gas Light Co., 122 N. Y. 18: 451, 453.
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 Bonaparte v. Camden & Amboy R. R. Co., 1 Bald. 205: 434, 524, 922, 1155, 1163, 1570, 1571, 1574.
 Bond v. Mullins, 3 Met. 282: 1360.
 v. Pennsylvania R. R. Co., 171 Ill. 508: 246, 1580.
 v. Philadelphia, 218 Pa. St. 475: 630, 636, 1307.
 v. Wool, 107 N. C. 139: 127, 129.
 Bondurant v. North Carolina etc. R. R. Co., 5 Ky. L. R. 101: 253.
 Bonner v. Rio Grande So. R. R. Co., 31 Colo. 446: 957.
 v. Worth, 5 Tex. Civ. App. 560: 152, 1716.
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 v. New York El. R. R. Co., 147 N. Y. 298: 1296, 1299.
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 v. Patterson, 98 U. S. 403: 676, 684, 687, 931, 1234, 1329.
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 v. Wood, 27 N. J. Eq. 371: 947.
 Boorman v. Sunnuchs, 42 Wis. 233: 109, 125, 128.
 Booth v. Rome etc. R. R. Co., 140 N. Y. 267: 436, 1455, 1476.
 v. Woodbury, 32 Conn. 118: 462.
 Boothby v. Androscoggin & Kennebec R. R. Co., 51 Me. 318: 440, 442, 1452.
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 Borden v. Trespalacios R. & I. Co., 98 Tex. 494: 499, 508, 510, 587, 591, 592, 739.
 v. Vincent, 24 Pick. 301: 866.
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 Borer v. Lange, 44 Minn. 281: 878.
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 Borup, Matter of, 89 App. Div. 183: 611, 1042, 1046.
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 v. Sams, 95 Md. 400: 473.
 Boston v. Brookline, 156 Mass. 172: 786, 797, 798, 799.
 v. Richardson, 13 Allen, 146: 335, 337.
 v. Robbins, 121 Mass. 453: 1254.
 v. Robbins, 126 Mass. 384: 1567.
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 Boston etc. R. R. Co. Matter of, 10 Abb. N. C. 104: 912.
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 Boston etc. Ry. Co., Matter of, 79 N. Y. 64: 971.
 Boston etc. R. R. Co. v. Boston, 140 Mass. 87: 512, 721.
 v. Cambridge, 159 Mass. 283: 1289, 1290.
 v. Cambridge, 166 Mass. 224: 773.
 v. Charlton, 161 Mass. 32: 1443.
 v. Cilley, 44 N. H. 578: 696.
 v. County Comrs. 79 Me. 386, 1287, 1288, 1290.

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 v. Greenbush, 52 N. Y. 510: 490, 1287.
 v. Lawrence, 2 Allen, 107: 752.
 v. Lowell & Lawrence R. R. Co., 124 Mass. 368: 753, 793, 798, 800, 1609.
 v. Middlesex Co., 1 Allen, 324: 1290, 1292.
 v. Midland R. R. Co., 1 Gray, 340: 729.
 v. Montgomery, 119 Mass. 114: 1132, 1340.
 v. Old Colony & Fall River R. R. Co., 3 Allen, 142: 1127, 1273.
 v. Old Colony R. R. Co., 12 Cush. 605: 117, 131.
 v. Salem, etc. R. R. Co., 2 Gray, 1: 411, 412, 415, 1608.
 v. State, 32 N. H. 215: 475.
 v. Western R. R. Co., 14 Gray, 253: 476.
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 v. Baltimore etc. R. R. Co., 67 N. J. L. 281: 840, 842, 843, 853, 854, 1627.
 v. Baltimore etc. Ry. Co., 69 N. J. L. 149: 748.
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 v. Jacksonville, 52 Fla. 216: 179, 181, 210, 226.
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 v. Boston, 164 Mass. 107: 1141, 1330.
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 v. Braddock, 172 Pa. St. 596: 138, 1402, 1428.
 v. Citizens' Water Co., 162 Pa. St. 9: 74.
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 v. Logansport etc. Traction Co., 162 Ind. 587: 1042, 1624.
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 v. Peterborough & Shirley R. R. Co., 4 Cush. 467: 940.
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 v. Vandalia Levee & Dr. Dist., 236 Ill. 36: 90, 653, 1548.
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 Braddock Ferry Co's Appeal, 3 Penny. 32: 130.
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 v. Pickle, (1895) A. C. 587: 161.
 Bradley, Ex parte, 5 Dow. & L. 575: 1079.
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 v. Frankfort, 99 Ind. 417: 1082, 1086.
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 v. Northern Pac. R. R. Co., 38 Minn. 234: 1684.
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 v. Rice, 13 Me. 198: 109.
 v. Southern New Eng. Tel. Co., 66 Conn. 559: 342, 350, 1488.
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 v. Omaha, 1 Neb. 16: 465.
 v. Rodgers, 20 Johns. 103: 22.
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 Bradwell v. Kansas City, 75 Mo. 213: 231.
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 v. Blackington, 174 Mass. 559: 1523.
 v. Fall River, 121 Mass. 262: 605.
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 v. Northwestern Insurance Co., 11 Mich. 425: 468.
 v. Shinkle, 40 Ia. 576: 364, 380, 387, 388.
 v. Wilkesbarre, 161 Pa. St. 246: 630, 636.
 Brainard v. Boston & N. Y. Cent. R. R. Co., 12 Gray 407: 1135.
 v. Clapp, 10 Cush. 6: 1472, 1476, 1480.
 v. Connecticut R. R. Co., 7 Cush. 506: 1643.
 v. Mississiquoi R. R. Co., 48 Vt. 107: 407, 423, 782, 1503.
 Braine v. Northern Cent. Ry. Co., 218 Pa. St. 43: 87, 93.
 Brakebill v. Leonard, 40 Ga. 60: 19.
 Brakken v. Minneapolis etc. R. R. Co., 29 Minn. 41: 320, 351, 372, 385, 1298, 1650, 1659.
 v. Minneapolis & St. Louis Ry. Co., 31 Minn. 45: 320, 351, 385, 1298.
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- Bridgeman v. Hardwick, 67 Vt. 653: 1319, 1340, 1358.
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- Bridgeport v. Eisenman, 47 Conn. 34: 1116.
- v. Giddings, 43 Conn. 304: 1082, 1086.
- v. Hubbell, 5 Conn. 237: 696.
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 v. Purcell, 1 Ired. Law 232: 1345.
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- Bridport, Matter of, 24 Vt. 176: 713, 917.
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 v. Edmonds, 7 Gray. 359: 438.
 v. Holmes, 14 Allen 184: 1073.
 v. Wheeler, 12 Allen 89: 1524.
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 v. Cape Cod Ship Canal Co., 137 Mass. 71: 1047, 1164, 1683.
 v. Chicago etc. R. R. Co., 56 Kan. 526: 947, 1352.
 v. Lewiston & Auburn Horse R. R. Co., 79 Me. 363: 211, 268, 270, 279, 324.
 v. Union Drainage Dist. 140 Ill. 53: 13.
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- Brine v. Great Western R. R. Co., 31 L. J. Q. B. 101: 1457.
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 v. Kansas City etc. R. R. Co., 17 Mo. App. 177: 88.
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 v. Wemple, 1 Wend. 470: 1556.
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 v. Parker, 145 N. C. 14: 145.
 v. Young, 131 N. C. 386: 89.
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 v. Bristol etc. Water Co., 23 R. I. 274: 1266.
 v. New Chester, 3 N. H. 533: 459.
- Bristol etc. R. R. Co. v. Somerset R. R. Co., 22 W. R. 601: 908.
- British Cast Plate Manufacturers v. Meredith, 4 T. R. 794: 206.
- Britton v. Des Moines etc. R. R. Co., 59 Ia. 540: 1204.
 v. Dubuque & Pac. R. R. Co., 11 Ia. 15: 1480, 1481.
- Broadbent v. Imperial Gas Co., 7 DeG. McM. & G. 436: 457, 733.
 v. Ramsbotham, 11 Exch. 602: 146.
- Broadmoor Land Co. v. Curr, 133 Fed. 37: 932.
- Broadmoor Land Co. v. Curr, 142 Fed. 421: 932.
- Broad Street Road's Case, 7 S. & R. 444: 1091, 1092.
- Broadway etc. R. R. Co., 73 Hun 7: 990, 1048, 1076.
- Broadway & Seventh Ave. R. R. Co., Matter of, 69 Hun 275: 1020.
- Broadway Surface R. R. Co., Matter of, 34 Hun 414: 921.
- Broadway Underground Ry. Co., Matter of, 23 Hun 693: 921.
- Broadway Widening, Matter of, 61 Barb. 483: 458, 1393, 1431, 1678.
- Broadway Widening, Matter of, 63 Barb. 572: 1035, 1370.
- Broadway Widening, Matter of, 42 How. Pr. 220: 1393, 1678.
- Broadway Widening, Matter of, 49 N. Y. 150: 1393, 1431, 1678.
- Broadwell v. Kansas City, 75 Mo. 213: 67.
- Broadwell Dr. Dist. v. Lawrence, 231 Ill. 86: 147.
- Brock v. Barnett, 57 Vt. 172: 515, 1029.
 v. Chase, 39 Me. 300: 865.
 v. Dore, 166 Mass. 161: 726.
 v. Hishen, 40 Wis. 674: 1167, 1531.
 v. Old Colony R. R. Co., 146 Mass. 194: 928, 1003, 1011, 1157, 1164, 1626, 1707.
- Brockelbank v. Whitehaven Junction Ry. Co., 15 Sim. 632: 695.
- Brocket v. Ohio & Pennsylvania R. R. Co., 14 Pa. St. 241: 823.
- Brokaw v. Comrs. of Highways, 99 Ill. App. 415: 1206.
 v. Terre Haute, 97 Ind. 451: 1672, 1675.
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[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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- v. Gee, 25 Ore. 462: 1005, 1160, 1167.
- v. Wallingford, 54 Conn. 513: 234.
- Brookfield, Matter of, 78 App. Div. 520: 839.
- Brookfield, Matter of, 176 N. Y. 138: 839.
- Brookhaven v. Smith, 98 App. Div. 212: 127, 129.
- v. Smith, 188 N. Y. 74: 127, 129.
- Brookline v. County Comrs., 114 Mass. 548: 1711.
- Brooklyn, In re, 73 Hun 499: 408.
- Brooklyn, In re, 143 N. Y. 596: 407, 408, 498, 783.
- Brooklyn, Matter of, 73 N. Y. 179: 1327.
- Brooklyn v. Copeland, 106 N. Y. 496: 1494, 1500.
- v. Franz, 87 Hun 54: 485.
- v. Mackey, 13 App. Div. 105: 129.
- v. Messerole, 26 Wend. 132: 1570.
- v. Long Island Water Supply Co., 88 Hun 176: 1437.
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- v. Seaman, 30 Misc. 507: 935, 1561.
- Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co., 32 Barb. 358: 426, 427, 728, 762, 763.
- Brooklyn Central etc. R. R. Co. v. Brooklyn City R. R. Co., 33 Barb. 420: 765.
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- Brooklyn El. R. R. Co., Matter of, 6 App. Div. 53: 1305, 1315.
- Brooklyn El. R. R. Co., Matter of, 32 App. Div. N. Y. 221: 1083.
- Brooklyn El. R. R. Co., Matter of, 95 App. Div. 108: 1295.
- Brooklyn El. R. R. Co., Matter of, 105 App. Div. 111: 991, 1225, 1304.
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- Brooklyn El. R. R. Co., Matter of, 125 N. Y. 434: 695.
- Brooklyn El. R. R. Co. v. Brooklyn, 2 App. Div. 98: 354.
- v. Flynn, 87 Hun 104: 1305.
- v. Flynn, 147 N. Y. 344: 1213.
- v. Nagel, 75 Hun 590: 986.
- Brooklyn etc. R. R. Co., Matter of, 55 How Pr. 14: 694, 1049.
- Brooklyn etc. R. R. Co., Matter of, 72 N. Y. 245: 694, 1047, 1048, 1049.
- Brooklyn Heights, Matter of, 48 Barb. 288: 1327.
- Brooklyn Heights R. R. Co. v. Brooklyn, 152 N. Y. 244: 309.
- Brooklyn Park Co. v. Armstrong, 45 N. Y. 234: 539, 1520.
- Brooklyn Rapid Transit Co., Matter of, 62 How. Pr. 404: 260.
- Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524: 694, 1583, 1622.
- Brooklyn St., Opening of, 118 Pa. St. 640: 879, 1327.
- Brooklyn St. R. R. Co., Matter of, 82 App. Div. 567: 1437.
- Brooklyn St. R. R. Co., Matter of, 176 N. Y. 213: 1437.
- Brooklyn Union El. R. R. Co., Matter of, 113 App. Div. 817: 1096, 1297, 1303, 1304.
- Brooklyn Union El. R. R. Co., Matter of, 188 N. Y. 553: 1096, 1297, 1303, 1304.
- Brook's Appeal, 32 Cal. 558: 1384.
- Brooks v. Boston, 19 Pick. 174: 437, 1259, 1260, 1274.
- v. Cedar Brook Imp. Co., 82 Me. 17: 100, 625.
- v. Davenport & St. Paul R. R. Co., 37 Ia. 99: 1204, 1310.
- v. Hubbard, 73 Vt. 122: 1563.
- v. Kirby, 19 Ala. 72: 1413, 1421.
- Brook Ave, Matter of, 8 App. Div. 294: 1397.
- Broome v. New York & N. J. Tel. Co., 42 N. J. Eq. 141: 340, 1593.
- v. N. Y. & N. J. Tel. Co., 49 N. J. L. 624: 340.
- Broumel v. White, 87 Md. 521: 878.
- Broussard v. Sabine etc. R. R. Co., 80 Tex. 329: 158, 1639.
- Brower v. Chester County, 1 Pa. Co. Ct. I: 635, 638.
- Brown v. Ark. Cent. Ry. Co., 72 Ark. 456: 963, 1559.
- v. Asheville Elec. Co., 138 N. C. 533: 350.
- v. Atlanta, 66 Ga. 71: 79, 80, 81.
- v. Atlanta Ry. & P. Co., 113 Ga. 462: 308.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Beatty, 34 Miss. 227: 495, 500, 524, 1178, 1431, 1523.
 v. Board of Supervisors, 124 Cal. 274: 665.
 v. Bowman, 9 Ga. 37: 1154.
 v. Bridges, 31 Ia. 138: 1506.
 v. Brown, 50 N. H. 538: 1511, 1514.
 v. Buffalo etc. R. R. Co., 22 N. Y. 191: 475.
 v. Calumet Riv. R. R. Co., 125 Ill. 600: 1047, 1176, 1227, 1228.
 v. Carthage, 128 Mo. 10: 873, 874, 892.
 v. Cayuga & Susquehanna R. R. Co., 12 N. Y. 486: 167.
 v. Chadbourne, 31 Me. 9: 97, 103, 113.
 v. Chicago etc. R. R. Co., 137 Mo. 529: 311, 527.
 v. Chicago etc. R. R. Co., 64 Neb. 62: 1162, 1172, 1465, 1470, 1526, 1527, 1534.
 v. Chicago etc. R. R. Co., 66 Neb. 106: 1172, 1465, 1470, 1471, 1526, 1527, 1534.
 v. Cincinnati, 14 Ohio 541: 1192.
 v. Commissioners, L. R. 15, I. L. 240: 1268.
 v. Corey, 43 Pa. St. 495: 530, 811, 1187, 1410.
 v. Co. Comrs., 12 Met. 208: 938, 1354.
 v. Duplessis, 14 La. Ann. 842: 268.
 v. Ellis, 26 Ia. 85: 1115.
 v. Forest Water Co., 213 Pa. St. 440: 1229, 1232, 1237.
 v. Gardner, Harr. Ch. (Mich.) 291: 1572, 1574.
 v. Gerald, 100 Me. 351: 21, 494, 496, 498, 501, 503, 537, 538, 593, 675, 684, 743, 1071, 1568, 1572.
 v. Gold Coin Min. Co. 48 Ore. 277: 69.
 v. Grant, 116 U. S. 207: 854.
 v. Illinois etc. Ry. Co., 209 Ill. 402: 1121.
 v. Illinois, 25 Conn. 583: 165, 166.
 v. Kennedy, 5 H. & J. 195, 103.
 v. Lowell, 8 Met. 172: 606, 618, 955, 1010, 1718.
 v. Macfarland, 19 App. Cas. D. C. 525: 706, 1394.
 v. Merrill, 3 Chand. 46: 1180.
 v. Ontario Talc Co., 81 App. Div. 273: 1604.
 v. Philadelphia, W. & B. R. R. Co., 58 Md. 539: 731.
 v. Pierce County, 28 Wash. 345: 460.
- Brown v. Pittsburg etc. R. R. Co., 29 Pa. Supr. Ct. 131: 853, 1646.
 v. Powell, 25 Pa. St. 229: 952, 961, 1635.
 v. Preston, 38 Conn. 219: 788.
 v. Providence & Springfield R. R. Co., 12 R. I. 238: 1124, 1129.
 v. Providence, Warren & Bristol R. R. Co., 5 Gray 35: 435, 1149.
 v. Radnor Tp. Elec. Lt. Co., 208 Pa. St. 453: 682.
 v. Rea, 150 Cal. 171: 250, 1613.
 v. Roberts, 23 Ill. App. 461: 993, 1418, 1419.
 v. Robertson, 123 Ill. 631: 1395.
 v. Rome etc. R. R. Co., 86 Ala. 206: 897, 979, 984, 1558.
 v. St. Paul etc. R. R. Co., 38 Minn. 506: 1026.
 v. Sams, 119 Ga. 22: 1364.
 v. San Francisco, 124 Cal. 274: 378, 391, 399, 406, 666.
 v. Seattle, 5 Wash. 35: 212, 629, 631, 647, 659, 664, 670, 1601, 1612.
 v. So. Pac. Co., 36 Ore. 128: 856.
 v. Starks, 83 Cal. 636: 877.
 v. Stein, 38 Neb. 596: 884.
 v. Township Board, 92 Mich. 294: 1397.
 v. Township Board, 109 Mich. 557: 1397.
 v. United States, 81 Fed. 55: 140.
 v. Watrous, 47 Me. 161: 649.
 v. Weaver Power Co., 140 N. C. 333: 536, 537, 1228, 1234, 1546, 1548.
 v. Webster City, 115 Ia. 511: 236.
 v. Winona etc. R. R. Co., 53 Minn. 259: 148, 157.
 v. Worcester, 13 Gray 31: 1343.
 v. Wyandotte etc. Ry. Co., 68 Ark. 134: 1049, 1254.
 v. Young, 69 Ia. 625: 837.
- Brown's Petition, 57 N. H. 367: 1421.
 Brown Co. v. Burkhalter, 75 Kan. 321: 1316, 1404.
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- v. Collis, 21 N. Y. Misc. 155: 710, 1167.
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[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 Brumit v. Railroad Co., 106 Tenn. 124: 255, 313.
 Brumley v. State, 83 Ark. 236: 1033, 1517.
 Brunes v. Cote St. Louis, 2 Montreal L. Q. B. 103: 828.
 Brunswick, Inhabitants of, Appellants, 37 Me. 446: 1386.
 Brunswick etc. R. R. Co. v. Hardy, 112 Ga. 604: 351.
 v. McLaren, 47 Ga. 546, 1123, 1149, 1310.
 v. Waycross, 88 Ga. 68: 322, 639, 1622.
 v. Waycross, 91 Ga. 573: 883.
 v. Waycross, 94 Ga. 102: 738, 1154, 1156, 1568, 1572.
 Brunswick etc. Water District v. Maine Water Co., 99 Me. 371: 1263.
 Brunswick Gas Light Co. v. Brunswick, 92 Me. 493: 354.
 Brush v. Detroit, 32 Mich. 43: 1025, 1420.
 Brushy Mound v. McClintonck, 150 Ill. 129: 868, 870.
 Bryan v. Branford, 50 Conn. 246: 540.
 v. Burnett, 2 Jones L. 305: 1525.
 v. Moore, 81 Ind. 9: 979.
 Bryant v. County Comrs., 79 Me. 128: 981, 1381.
 v. Glidden, 36 Me. 36: 929, 976, 1358.
 v. Knox & Lincoln R. R. Co., 61 Me. 300: 1383.
 v. Merritt, 71 Kan. 272: 147.
 v. New Castle etc. R. R. Co., 6 Pa. Co. Ct. 53: 918.
 v. Pottsville Water Co., 190 Pa. St. 366: 1232, 1237.
 v. Robbins, 74 Wis. 608: 1427.
 Bryn Mawr Water Co. v. Lower Marion Tp., 15 Pa. Co. Ct. 527: 354.
 Bryson's Road, 2 P. & W. 207: 1091.
 Bubenzier v. Philadelphia etc. R. R. Co., (Del. Ch.) 57 Atl. 242: 1646.
 Buchanan v. Beavor, 171 Pa. St. 567: 1596.
 v. James, 130 Ga. 546: 1155, 1568.
 v. Kansas City, 208 Mo. 674: 1534, 1557, 1565.
 Buchanan Co. v. Bledsoe, 200 Mo. 630: 1086.
 Buchanan Co. Bank v. Cedar Rapids etc. R. R. Co., 62 Ia. 494: 1558.
 Buchner v. Chicago etc. Ry. Co., 56 Wis. 403: 247, 319, 1616.
 v. Chicago etc. Ry. Co. 60 Wis. 264: 182, 319.
 Buck v. Connecticut etc. R. R. Co., 42 Vt. 370: 320, 1643.
 v. Met. El. R. R. Co., 73 Hun 251: 1296, 1299, 1300.
 Buckholtz v. New York etc. R. R. Co., 71 App. Div. 452: 321, 380, 383, 388, 398.
 v. New York etc. R. R. Co., 66 Hun 377: 753.
 Buckholz v. New York etc. R. R. Co., 148 N. Y. 640: 320, 321, 351, 372, 380, 383, 781.
 v. New York etc. R. R. Co., 177 N. Y. 550: 321, 380, 383, 388, 398.
 Buckhout v. New York, 82 App. Div. 218: 1565.
 v. New York, 176 N. Y. 363: 1565.
 Bucki v. Cone, 25 Fla. 1: 112.
 Buckingham v. Smith, 10 Ohio 288: 522, 523.
 Buckles v. Northern Bank of Kentucky, 63 Ill. 268: 1206.
 Buckley v. Drake, 41 Hun 384: 1081, 1431.
 v. New Bedford, 155 Mass. 64: 142.
 Buckman v. Oskaloosa, 130 Ia. 600: 889.
 Bucks Co. Road, 3 Whart. 105: 1461.
 Buckwalter v. Atchison etc. R. R. Co., 64 Kan. 403: 1631.
 v. Black Rock Bridge Co., 38 Pa. St. 281: 624.
 v. School District, 65 Kan. 603: 1004, 1008, 1163.
 Buckwalter's Road, 3 S. & R. 236: 1388.
 Budd v. Camden, 69 N. J. L. 193: 1416.
 v. Camden Horse R. R. Co., 61 N. J. Eq. 543: 272, 274, 1586, 1587.
 v. Camden Horse R. R. Co., 70 N. J. L. 782: 272, 274.
 v. New Jersey R. R. Co., 14 N. J. L. 467: 1417, 1533.
 v. New York, 143 U. S. 517: 482.
 v. Reidelbach, 128 Ind. 145: 1407.
 Buel, Matter of, 57 App. Div. 629: 977.
 Buel, Matter of, 168 N. Y. 423: 977.
 Buel v. Lockport, 3 N. Y. 197, 1528.
 Buell v. Ball, 20 Ia. 282: 465.
 v. Worcester, 119 Mass. 372: 1307.
 Buffalo, Matter of, 116 App. Div. 555: 743, 1057, 1328.
 Buffalo, Matter of, 72 Hun 422: 773.
 Buffalo, Matter of, 52 Misc. 313: 1026.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Buffalo, Matter of, 68 N. Y. 167:
 754, 776, 794, 795.
 Buffalo, Matter of, 189 N. Y. 163:
 743, 1057, 1328.
 Buffalo v. Delaware etc. R. R. Co., 68
 App. Div. 488: 888.
 v. Delaware etc. R. R. Co., 178 N.
 Y. 561: 888.
 v. Hoffeld, 6 Miscel. 197: 1505.
 v. Pratt, 131 N. Y. 293: 200, 1328.
 v. Strait, 20 Colo. 13: 659.
 Buffalo Bayou etc. R. R. Co. v. Fer-
 ris, 26 Tex. 588: 524, 923, 1163,
 1169, 1170, 1183, 1635.
 Buffalo etc. R. R. Co., Matter of, 32
 Hun 289: 1105, 1106, 1374.
 Buffalo etc. R. R. Co. v. Brainard,
 9. N. Y. 100: 503, 524, 675, 683,
 684.
 v. Du Bois Traction Pass. R. R.
 Co., 149 Pa. St. 1, 328, 765, 771.
 v. Harvey, 107 Pa. St. 319: 1540,
 1541, 1543.
 v. New York etc. R. R. Co., 72
 Hun 587: 328, 765, 773, 1282.
 v. Overton, 35 Hun, 157: 743.
 v. Reynolds, 6 How. Pr. 96: 1074.
 Buffalo Grade Crossing Comrs. Mat-
 ter of, 116 App. Div. 549: 1208,
 1309.
 Buffalo Stone & Cement Co. v. Dela-
 ware etc. R. R. Co., 130 N. Y.
 152: 1484, 1645, 1647.
 Buffm v. Harris, 5 R. I. 243: 146.
 v. New York etc. R. R. Co., 4 R. I.
 221: 1129.
 Buhl v. Fort St. Union Depot Co.,
 98 Mich. 596: 364, 371, 384, 388,
 391, 398.
 Bullard v. New York etc. R. R. Co.,
 178 Mass. 570: 862.
 Bumpus v. Miller, 4 Mich. 159: 865.
 Bunderson v. Burlington etc. R. R.
 Co. 43 Neb. 545: 149, 150, 155.
 Bundy v. Catto, 61 Ill. App. 209:
 1489.
 Bungenstock v. Nishnabotna Dr.
 Dist. 163 Mo. 198: 461, 1456,
 1639, 1652.
 Bunker v. Hudson, 122 Wis. 43: 231,
 232, 439.
 Bunten v. Danville, 93 Va. 200: 876,
 884.
 Burbank v. Conrad, 96 U. S. 291: 19.
 v. Fay, 65 N. Y. 57: 78.
 Burbridge v. New Albany & Salem R.
 R. Co., 9 Ind. 546: 1259.
 Burch v. Augusta etc. R. R. Co., 80
 Ga. 296: 850.
 v. McKeesport, 166 Pa. St. 57: 432.
- Burchard v. State, 128 App. Div.
 750: 1097, 1435, 1443.
 Burchardt v. Wausau Boom Co., 54
 Wis. 107: 94.
 Burchmann v. St. Louis, 121 Mo.
 523: 873, 878, 885, 886, 887.
 Burde v. St. Joseph, 130 Mo. App.
 453: 648, 1210, 1212.
 Burden v. Nashua, 17 N. H. 477: 211.
 v. Stein, 24 Ala. 130: 1028.
 v. Stein, 27 Ala. 104: 73, 536.
 Burdick, Matter of, 27 N. Y. Misc.
 298: 513.
 Burgess v. Clark, 13 Ired. Law 109:
 1347.
 v. Georgia, 11 Vt. 134: 976.
 v. Grafton, 10 Vt. 321: 1385.
 Burgett v. Norris, 25 Ohio St. 308:
 734.
 Burgwyn v. Lockhart, Winston Law
 269: 516.
 Burk v. Ayers, 19 Hun 17: 564.
 v. Baltimore, 77 Md. 469: 912, 914.
 v. Simonson, 104 Ind. 173: 78.
 Burkard v. Brooklyn, 6 Miscel. 431:
 1561, 1564.
 Burke v. Cumberland Traction Co.,
 15 Pa. Co. Ct. 159: 302.
 v. Kansas City, 118 Mo. 309: 928,
 1511, 1512.
 v. Manhattan Ry. Co., 120 App.
 Div. 684: 866.
 v. Mo. Pac. R. R. Co. 29 Mo. App.
 370: 147, 159.
 v. Sanitary District, 152 Ill. 125:
 1066, 1243.
 Burkham v. Ohio & M. R. R. Co., 122
 Ind. 344: 322, 601, 619, 1582.
 Burkleo v. Washington, 38 Minn.
 441: 914.
 Burky v. Lake, 30 Ill. App. 23: 646,
 1335.
 Burlington v. Burlington St. R. R.
 Co., 49 Ia. 144: 309.
 v. Gilbert, 31 Ia. 356: 211, 1550.
 v. Penn. R. R. Co., 56 N. J. Eq.
 259: 197, 243, 297, 298, 778,
 1618.
 Burlington R. R. Co. v. Beebe, 14
 Neb. 46: 1124, 1137.
 v. Billings, 38 Kan. 243: 965.
 v. Colo. Eastern R. R. Co., 38 Colo.
 95: 829.
 v. Columbus Junction, 104 Ia. 110:
 865.
 v. Dobson, 17 Neb. 450: 1384.
 v. Johnson, 38 Kan. 142: 956.
 v. Reinhacke, 15 Neb. 279: 178,
 254, 1548, 1550.
 v. Sater, 1 Ia. 421: 1669.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Schweikert, 10 Colo. 178: 1172, 1344.
 v. Spere, 24 Neb. 125: 1436, 1440.
 v. White, 28 Neb. 166: 1124, 1232.
- Burlington Gas Lt. Co. v. Burlington etc. R. R. Co., 91 Ia. 470: 378.
 v. Burlington etc. R. R. Co., 165 U. S. 370: 378, 422, 1581.
- Burnet v. Knowles, 3 Dow. 280: 1524.
- Burnett v. Commonwealth, 169 Mass. 417: 806, 825.
 v. Gt. Northern Ry. Co., 76 Minn. 461: 88.
 v. Meehan, 83 Ind. 566: 1132.
 v. Nicholson, 86 N. C. 99: 1339, 1345.
 v. Postal Tel. Cable Co., 71 S. C. 146: 832.
 v. Postal Tel. Cable Co., 79 S. C. 462: 1634.
 v. Railroad Co., 4 Sned. 528: 1478, 1496.
 v. Sacramento, 12 Cal. 76: 13, 745, 1162.
 v. Southern Ry. Co., 62 S. C. 281: 1668.
- Burnham v. Goffstown, 50 N. H. 560: 1086.
 v. Story, 3 Allen, 378: 1523.
 v. Thompson, 35 Ia. 421: 549, 1035.
- Burnish St. Widening, In re, 140 Pa. St. 531: 738, 1154.
- Burns v. Annas, 60 Me. 288: 865.
 v. Chicago, etc. R. R. Co., 102 Ia. 7: 1430.
 v. Chicago etc. Ry. Co., 110 Ia. 385: 1470.
 v. Columbus Citizens' Tel. Co., 10 Ohio C. C. (N. S.) 307: 343, 1594.
 v. Dodge, 9 Wis. 458: 1520.
 v. Liberty, 131 Mo. 372: 881.
 v. Milwaukee & Mississippi R. R. Co., 9 Wis. 450: 1520.
 v. Multnomah Ry. Co., 8 Sawyer 543: 734, 1005, 1372.
 v. School District, 61 Neb. 351: 1347.
 v. Spring Green, 56 Wis. 230: 1405.
- Burr v. Leichester, 121 Mass. 241: 605.
- Burrage v. Boston, 198 Mass. 580: 1320.
- Burrall v. Am. Tel. & Tel. Co., 224 Ill. 266: 338, 1593.
- Burrill v. Martin, 12 Me. 345: 1439.
- Burritt v. New Haven, 42 Conn. 174: 210, 623.
- Burroughs v. Cherokee, 134 Ia. 429: 887, 888, 889, 890, 891, 1492.
- Burrow v. Terre Haute & Logansport R. R. Co. 107 Ind. 432: 834, 856.
- Burrows v. Gray's Harbor Boom Co., 44 Wash. 630: 118, 128, 132, 1607.
- v. Vandevier, 3 Ohio 383: 695.
- Burrus v. Columbus, 105 Ga. 42: 1581.
- Burt v. Brigham, 117 Mass. 307: 895.
 v. Commissioners of Highways, 32 Mich. 190: 1417.
 v. Merchants' Ins. Co., 106 Mass. 356: 539, 588, 685.
 v. Merchants' Ins. Co., 115 Mass. 1: 1222, 1224, 1253.
 v. Wigglesworth, 117 Mass. 302: 1112, 1114, 1115, 1120, 1222, 1227, 1241.
- Burtiss v. Parks, 65 Me. 559: 1033.
- Burton Lumber Co. v. Houston, 45 Tex. Civ. App. 363: 635.
- Burwell v. Commissioners, 93 N. C. 73: 58.
 v. Sneed, 104 N. C. 118: 516, 522.
- Buschman v. St. Louis, 121 Mo. 523: 881.
- Busenbark v. Crawfordsville, 9 Ind. App. 578: 1527.
- Buser v. Cedar Rapids, 115 Iowa 683: 603.
- Bush v. Dubuque, 69 Iowa 233: 484.
 v. Peru Bridge Co., 3 Ind. 21: 409, 414.
 v. Portland, 19 Or. 45: 235.
 v. Trowbridge Water Co., 44 L. J. Ch. 645: 652.
 v. Trowbridge Water Co., L. R. 10 Ch. App. 459: 652, 1612.
- Buskirk v. Harrod, 48 Mich. 258: 1017.
- Bushwick Avenue, Matter of, 48 Barb. 9: 539.
- Butchers' Ice & Coal Co. v. Philadelphia, 156 Pa. St. 54: 132, 142.
- Butchers' Slaughtering & M. Assn. v. Commonwealth, 169 Mass. 103: 1186, 1216.
- Butchers' Union Co. v. Crescent City Co., 111 U. S. 746: 469, 492, 736.
 v. Crescent City Co., 4 Wood 96: 469.
- Butis v. Geddes, 54 Mich. 608: 941.
- Butler v. Barr, 18 Mo. 357: 1634.
 v. County Comrs., 42 Kan. 416: 1356.
- v. Frontier Telephone Co., 109 App. Div. 217: 438, 1627.

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 v. Parker, 9 Ind. 534: 1428.
 v. Peck, 16 Ohio St. 334: 145.
 v. Sewer Comrs., 39 N. J. L. 665: 1172.
 v. Thomasville, 74 Ga. 570: 83, 679, 1572.
 v. White Plains, 59 App. Div. 30: 83, 85.
- Butler Hard Rubber Co. v. Newark, 61 N. J. L. 32: 74, 1263.
- Butler Street, 25 Pa. Supr. Ct. 357: 1713.
- Butler Tp. Road, 6 Luzerne Leg. Reg. Rep. 443: 1091.
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 v. Vermont Central R. R. Co., 27 Vt. 500: 1458, 1459.
- Butte Co. v. Boydston, 64 Cal. 110: 515, 1316, 1317.
 v. Boydston, 68 Cal. 189: 1404.
- Butte Elec. Ry. Co. v. Mathews, 34 Mont. 487: 1319, 1324, 1378.
- Butte etc. R. R. Co. v. Montana U. R. R. Co., 16 Mont. 504: 528, 534, 563, 758, 793, 796, 797, 798, 805.
 v. Montana U. R. R. Co., 16 Mont. 550: 769, 771.
- Butterfield v. Pollock, 45 Iowa 257: 983, 1380.
- Butterworth v. Bartlett, 50 Ind. 537: 363, 385, 387, 390, 402.
- Butts v. Geary County, 7 Kan. App. 302: 514.
- Byberry Road, 6 Phila. 384: 1371, 1381.
- Byer v. New Castle, 124 Ind. 86: 1517.
 v. Tanner, 29 Ill. 135: 1506.
- Byles, In re, 25 L. J. Ex. 53: 1098.
- Byrne v. Cambria etc. Ry. Co., 219 Pa. St. 277: 1122.
 v. Chicago General R. R. Co., 169 Ill. 75: 302.
 v. Chicago General R. R. Co., 63 Ill. App. 438: 302.
 v. Drain, 127 Cal. 663: 697.
 v. Farmington, 64 Conn. 367: 157.
 v. Keokuk etc. R. R. Co., 47 Mo. App. 383: 160.
 v. Minn. & St. Louis R. R. Co., 38 Minn. 212: 91, 94, 150, 1454, 1650, 1653.
- Byrnes v. Cohoes, 5 Hun 602: 141.
 v. Cohoes, 67 N. Y. 204: 233.
 v. Riverton, 64 N. J. L. 210: 433.
- Byron v. Blount, 97 Ill. 62: 976, 1043, 1046.
- Byron v. Louisville etc. R. R. Co., 22 Ky. L. R. 1007: 1615.
- C.
- Cabell v. Williams, 127 Ala. 320: 372.
- Cabot v. Kingman, 166 Mass. 403: 335, 443.
- Caccia v. Brooklyn El. R. R. Co., 98 App. Div. 294: 829, 856.
- Cadiz R. R. Co. v. Roach, 114 Ky. 934: 833.
- Cadle v. Muscatine Western R. R. Co., 44 Iowa 11: 251, 316, 1648, 1657.
- Cage v. Tragar, 60 Miss. 563: 1086, 1516.
- Cahill v. Baltimore, 93 Md. 233: 154, 157.
 v. Norwood Park, 149 Ill. 156: 895, 1092, 1378.
- Cain v. Hays, 4 Dana Ky. 338: 1345.
 v. Omaha, 42 Neb. 120: 13, 26, 463, 464.
- v. South Bound R. R. Co., 62 S. C. 25: 155.
- Cairo etc. R. R. Co. v. Brevoort, 62 Fed. 129: 89, 151, 1478.
 v. People, 92 Ill. 97: 475.
- v. Stevens, 73 Ind. 278: 157.
- v. Trout, 32 Ark. 17: 25, 922.
- v. Turner, 31 Ark. 494: 22, 23, 524, 1155, 1163, 1169.
- v. Woodyard, 226 Ill. 331: 728, 1042, 1043, 1044.
- Cake v. Philadelphia etc. R. R. Co., 87 Pa. St. 307: 777.
- Calais v. Dyer, 7 Maine 155: 956.
- Calcasien Lumber Co. v. Harris, 77 Tex. 18: 1497.
- Calder v. Police Jury, 44 La. Ann. 173: 706, 1154, 1155, 1568.
- Caldwell v. Carthage, 49 Ohio St. 334: 919.
 v. East Broad Top R. R. Co., 169 Pa. St. 99: 168, 844.
- v. Gale, 11 Mich. 77: 1639.
- v. Nashua, 122 Iowa 179: 237.
- v. New York etc. R. R. Co., 111 App. Div. 164: 257.
- Caledonia R. R. Co. v. Colt, 3 Macqueen 833: 1524.
- v. Lockhart, 3 Macqueen 808: 1244, 1450.
- v. Ogilvy, 2 Macq. Sc. App. 229: 645.
- v. Walker's Trustees, L. R. 7 App. Cas. 259: 372, 645, 646, 662, 671.
- Calhoun v. Colfax, 105 La. 416: 877.
 v. Palmer, 8 Gratt. 88: 1459.
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211, 212, 213, 229, 1452.
v. Painesville etc. R. R. Co., 11
Ohio St. 516: 1045.
- California v. Central Pac. R. R. Co.,
127 U. S. 1: 687.
- California etc. R. R. Co. v. Hooper,
76 Cal. 404: 964, 980, 984.
v. State, 1 Cal. App. 142: 746.
- California Nav. & Imp. Co. v. Union
Transp. Co., 126 Cal. 433: 873,
883.
- California Northern R. R. Co. v.
Gould, 21 Cal. 254: 430, 956.
- California Pacific R. R. Co. v. Armstrong,
46 Cal. 85: 1192, 1347.
v. Central Pacific R. R. Co., 47 Cal.
528: 434, 1162.
v. Central Pacific R. R. Co., 47 Cal.
549: 754.
v. Frisbie, 41 Cal. 356: 1366.
- California Reduction Co. v. Sanitary
Reduction Works, 199 U. S. 306:
474.
- California Southern R. R. Co. v. Kimball,
61 Cal. 90: 1071, 1223.
v. Southern Pacific R. R. Co., 65
Cal. 295: 1424.
v. Southern Pacific R. R. Co., 67
Cal. 59: 1346.
- Calking v. Baldwin, 4 Wend. 667:
543, 1523.
- Calkins v. Bloomfield Gas Lt. Co., 1
N. Y. Supn. 541: 176, 337.
v. Postal Tel. Co., 11 Pa. Dist. Ct.
305: 936, 1560.
- Call v. County Comrs., 2 Gray 232:
1711.
v. Wilkesboro, 115 N. C. 337: 675.
- Callaghan v. Dunn, 78 Cal. 366: 1673.
- Callahan v. Dunn, 78 Cal. 366: 1675.
- Callaman v. Port Huron & N. W. Ry.
Co., 61 Mich. 15: 1353.
- Callen v. Columbus Edison Elec. Lt.
Co., 66 Ohio St. 166: 53, 54, 57,
175, 197, 198, 344, 345, 1593.
- Callison v. Hedrick, 15 Gratt. 244:
1710.
- Callon v. Jacksonville, 147 Ill. 113:
912, 914.
- Callowhill St., Matter of, 32 Pa. St.
361: 700.
- Calumet Riv. R. R. Co. v. Brown, 136
Ill. 322: 947, 949, 1558, 1566.
v. Brown, 37 Ill. App. 113: 947,
949, 1558, 1566.
v. Moore, 124 Ill. 329: 1231, 1236,
1426.
- Calvert v. State, 34 Neb. 616: 765,
767, 1611.
- Cambria Street, 75 Pa. St. 357: 1029,
1091, 1092, 1103, 1388.
- Cambridge v. Cook (Iowa) 66 N. W.
884: 886.
v. County Comrs., 6 Allen 134:
1428.
v. County Comrs., 117 Mass. 79:
1366.
v. County Comrs., 125 Mass. 529:
605, 615.
- Cambridge R. R. Co. v. Charles Riv.
St. R. R. Co., 139 Mass. 454:
762, 1284.
- Camden etc. Land Co. v. Lippincott,
45 N. J. L. 405: 130.
v. United States Cast Iron Pipe
& F. Co., 68 N. J. Eq. 279: 272.
- Camden Horse R. R. Co. v. Citizens'
Coach Co., 28 N. J. Eq. 145: 416,
427.
v. Citizens' Coach Co., 29 N. J. Eq.
299: 427.
v. West Jersey Traction Co., 58 N.
J. L. 102: 300.
- Camden & R. Water Co. v. Ingraham,
85 Maine 179: 948.
- Cameron v. Board of Supervisors of
Washington Co., 47 Miss. 264:
1570.
v. Charing Cross Ry., 16 C. B. N.
S. 430: 645.
- v. Chicago etc. R. R. Co., 42 Minn.
75: 444, 1208.
v. Chicago etc. R. R. Co., 51 Minn.
153: 1232.
v. Chicago etc. R. R. Co., 63 Minn.
384: 475.
v. New York El. R. R. Co., 38 App.
Div. N. Y. 16: 1664.
v. New York El. R. R. Co., 23 Misc.
N. Y. 590: 1664.
v. Pittsburgh etc. R. R. Co., 157
Pa. St. 617: 1208.
v. Wasco County, 27 Ore. 318:
1034, 1422.
v. Wellington R. R. Co., 28 Grant
Ch. 327: 841.
- Camp, Matter of, 126 N. Y. 377:
1254.
- Campan v. Charbeneau, 105 Mich.
422: 1018.
v. Detroit, 104 Mich. 560: 865.
v. LeBlanc, 127 Mich. 179: 1511,
1512.
- Campbell's Appeal, 4 Mont. Co. L. R.
47: 1602.
- Campbell v. Cincinnati, 49 Ohio St.
463: 914.
v. Detroit, 14 Mich. 276: 696.
v. Dwiggin, 83 Ind. 473: 1004,
1006.

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 v. Indianapolis & Vincennes R. R. Co., 110 Ind. 490: 858.
 v. Kansas City, 102 Mo. 326: 872, 876, 892, 1499, 1504.
 v. Metropolitan St. R. R. Co., 82 Ga. 320: 639, 642, 659, 664, 666, 671, 1294, 1302, 1337, 1338.
 v. Pennsylvania S. V. R. R. Co., 2 Mont. Co. L. R. 139: 1601.
 v. Philadelphia, 108 Pa. St. 300: 612, 618, 1718.
 v. Point Pleasant etc. R. R. Co., 23 W. Va. 448: 1577, 1615.
 v. Race, 7 Cush. 408.
 v. Railroad Co., 110 Ind. 490: 1616.
 v. Windham, 63 N. H. 465: 1409.
- Campbell Turnpike Co. v. Dye, 18 B. Mon. 761: 377, 385, 387, 388.
- Canada So. Ry. Co., In re, 20 Am. & Eng. R. R. Cas. 196: 1479.
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- Canadian Pac. R. R. Co. v. Western Union Tel. Co., 17 Can. S. C. 151: 412, 832.
- Canal Appraisers v. Kempshall, 26 Wend. 404: 105.
 v. People, 17 Wend. 603: 95.
- Canal Bank v. Albany, 9 Wend. 244: 1341, 1385.
- Canal & Charles Sts., 18 R. I. 129: 917.
- Canal & C. Nav. Co. v. Comrs., 26 La. Ann. 740: 1547.
- Canal Comrs. v. Kempshall, 26 Wend. 404: 98, 99.
 v. People, 5 Wend. 423: 105, 106, 108, 117, 1533.
 v. People, 13 Wend. 355: 105, 106, 117.
- Canal & C. R. R. Co. v. Crescent City R. R. Co., 44 La. Ann. 485: 427, 762, 763, 764, 1283.
 v. Orleans R. R. Co., 44 La. Ann. 54: 426, 427, 762, 763, 1283.
 v. St. Charles St. R. R. Co., 44 La. Ann. 1069: 427, 762, 763, 1283.
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- Canal Place, Matter of, 64 App. Div. 605: 804.
- Canal Street, Matter of, 11 Wend. 154: 1670.
- Canal Trustees v. Chicago, 12 Ill. 406: 12.
- Canal & Walker Sts., Matter of, 12 N. Y. 406: 1397.
- Canandaigua v. Benedict, 8 App. Div. 475: 1465.
 v. Benedict, 13 App. Div. 600: 1404.
 v. Benedict, 24 N. Y. App. Div. 348: 710, 780.
- Canandaigua etc. R. R. Co. v. Payne, 16 Barb. 273: 1244.
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- Candler v. Asheville Elec. Co., 135 N. C. 12: 1546, 1653.
- Cane Belt R. R. Co. v. Hughes, 31 Tex. Civ. App. 565: 824, 1065, 1068, 1228, 1230.
 v. Ridgeway, 38 Tex. Civ. App. 108: 153, 316, 846, 847, 1639, 1658.
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- Cannon v. St. Joseph, 67 Mo. App. 367: 149, 155.
- Canton v. Canton Cotton Warehouse Co., 84 Miss. 268: 299, 309, 321, 1472, 1473.
 v. Shock, 66 Ohio St. 19: 73.
- Canton County v. Baltimore etc. R. R. Co., 99 Md. 202: 1503, 1504.
 v. Baltimore, 104 Md. 582: 865.
 v. Baltimore, 106 Md. 69: 367, 878, 879, 880, 884, 886, 1630.
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 v. Paine (Miss.) 19 So. 199: 149, 152, 1454.
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- Canty v. Latterner, 31 Minn. 239: 942.
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 v. Toole, 9 Idaho 561: 996.
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 Capps v. Texas etc. Ry. Co., 21 Tex. Civ. App. 84: 859, 1633.
 Carbon Coal & Mining Co. v. Drake, 26 Kan. 345: 1155, 1571.
 Caretta Ry. Co. v. Virginia-Pocahontas Coal Co., 62 W. Va. 185: 527, 528, 591, 1051, 1070.
 Carey v. Dewey, 127 App. Div. 478: 495, 1634.
 Carl v. Sheboygan & Fond du Lac R. R. Co., 46 Wis. 625: 243, 247, 1137, 1298, 1552, 1651, 1658.
 Carleton St. Widening, 16 Hun 497: 914, 1026.
 Carley v. Sylvester, 49 Wis. 429: 1635.
 Carli v. Stillwater & St. Paul R. R. Co., 16 Minn. 260: 966, 1186, 1225.
 v. Stillwater Street R. & T. Co., 28 Minn. 373: 127, 128, 129, 131, 338.
 v. Union Depot, Street Ry. & Transfer Co., 32 Minn. 101: 1298.
 Carlile v. Des Moines etc. R. R. Co., 99 Iowa 345: 1510.
 Carlisle etc. Ry. Co. v. Philadelphia etc. R. R. Co., 199 Pa. St. 532: 771.
 Carl v. Northport, 11 App. Div. 120: 231, 234.
 Carlson v. County Comrs., 38 Wash. 616: 1354.
 v. Duluth Short Line R. R. Co., 38 Minn. 305: 863.
 v. St. Louis etc. Co., 73 Minn. 128: 80, 1604.
 Carlton v. State, 8 Blackf. 208: 1362.
 Carlton St. Widening, 16 Hun 497: 914, 1026.
 Carlton St. Widening, 78 N. Y. 362: 914.
 Carman v. Indiana R. R. Co., 4 Ohio St. 399: 435, 436.
 v. St. Louis, 97 Mo. 92: 665.
 v. Steubenville & Indiana R. R. Co., 4 Ohio St. 399: 1455.
 Carmel v. Shaw, 155 Ill. 37: 378.
 v. Shaw, 52 Ill. App. 429: 378.
 Carmody v. Chicago & Alton R. R. Co., 111 Ill. 69: 815.
 Carnochan v. Norwich & Spalding Ry. Co., 26 Beav. 169: 1537, 1578.
 Caro v. Manhattan El. Ry. Co., 46 N. Y. Supr. Ct. 138: 53, 451.
 Carolina Cent. Ry. Co. v. Love, 81 N. C. 434: 1058, 1061.
- Carolina Cent. Ry. Co. v. McCaskill, 94 N. C. 746: 1475, 1503, 1523, 1707, 1708.
 v. Wilmington St. R. Co., 120 N. C. 520: 331.
 Carolina etc. Ry. Co. v. Pennearden L. & M. Co., 132 N. C. 644: 709, 1005.
 Carondelet Canal & Nav. Co. v. New Orleans, 38 La. Ann. 308: 239.
 Carothers v. Philadelphia Co., 118 Pa. St. 468: 704.
 Carpenter, In re, 11 Misc. 690: 1427.
 Carpenter's Petition, 67 N. H. 574: 1075.
 Carpenter v. Board of Comrs., 56 Minn. 513: 100, 105, 110.
 v. Capital Elec. Co., 178 Ill. 29: 344, 1593.
 v. County Comrs., 21 Pick. 258: 1040, 1080, 1638.
 v. Easton & Amboy R. R. Co., 24 N. J. Eq. 249: 1246, 1248, 1602.
 v. Easton & Amboy R. R. Co., 24 N. J. Eq. 408: 1246, 1602.
 v. Easton & Amboy R. R. Co., 26 N. J. Eq. 168: 1246, 1248, 1602.
 v. Gold, 88 Va. 551: 69, 76.
 v. Grisham, 59 Missouri 247: 1571, 1573.
 v. Highway Comrs., 64 Mich. 476: 1416.
 v. Jennings, 77 Ill. 250: 1194.
 v. Landaff, 42 N. H. 218: 1187.
 v. New York, 44 App. Div. 230: 1565.
 v. New York, 51 App. Div. 584: 1565.
 v. New York, 27 Misc. 272: 1565.
 v. Oswego & S. R. R. Co., 24 N. Y. 655: 247, 315, 1630.
 v. Pennsylvania R. R. Co., 195 Pa. St. 160: 394.
 v. Sims, 3 Leigh. 674: 989, 1075.
 v. Spencer, 2 Gray 407: 1116.
 Carpenter St., 3 Walker's Pa. Supm. Ct. 286: 1011, 1327.
 Carr v. Berkley, 145 Mass. 539: 1371.
 v. Boone, 108 Ind. 241: 1028, 1031, 1675.
 v. Fayette Co., 37 Iowa 608: 1032.
 v. Northern Liberties, 35 Pa. St. 324: 142.
 v. State, 103 Ind. 548: 941, 978, 1010, 1033.
 Carrraher v. Revere, 182 Mass. 427: 1314.
 Carrico v. Colvin, 92 Ky. 342: 1159, 1161, 1460.
 Carriger v. R. R. Co., 7 Lea 388: 158, 1455.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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v. Atlanta, 74 Ga. 386: 81.
v. Campbell, 108 Mo. 550: 414.
v. Campbell, 110 Mo. 557: 411.
v. Griffith, 117 Tenn. 500: 710, 1154.
v. Marshall, 99 Mo. App. 464: 1308.
v. New York El. R. R. Co., 14 App. Div. 278: 1426.
v. Rye Tp., 13 N. D. 458: 153.
v. Wisconsin Central R. R. Co., 40 Minn. 168: 444.
- Carron v. Great Western R. R. Co., 14 U. C. Q. B. 192: 159.
v. Western R. R. Co., 8 Gray 423: 456.
- Carson v. Blazer, 2 Binn. 475: 104.
v. Central R. R. Co., 35 Cal. 325: 246, 250, 268, 307.
v. Coleman, 11 N. J. Eq. 106: 1155, 1187.
v. Hartford, 48 Conn. 68: 1673, 1685.
v. Springfield, 53 Mo. App. 289: 155, 630, 653, 1306, 1309, 1650, 1656.
v. Western R. R. Co., 8 Gray 423: 1472.
- Carter v. Barkley, 137 Iowa 510: 886.
v. Chicago, 57 Ill. 283: 197, 357.
v. Moulton, 58 N. H. 64: 818.
v. New York El. R. R. Co., 134 N. Y. 168: 1124.
v. Ridge Turnpike Co., 208 Pa. St. 515: 866, 1626, 1713, 1714.
v. Ridge Turnpike Co., 22 Pa. Supr. Ct. 162: 866.
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- Carthage v. Central N. Y. Tel. & Tel. Co., 110 App. Div. 625: 361, 489.
v. Central N. Y. Tel. & Tel. Co., 185 N. Y. 448: 361, 489.
v. Frederick, 122 N. Y. 268: 492.
v. Garner, 209 Mo. 688: 361.
- Cartwright v. Liberty Telephone Co., 205 Mo. 126: 348, 350.
- Carvalho v. Brooklyn etc. Turnpike Co., 56 App. Div. 522: 133.
v. Brooklyn etc. Turnpike Co., 173 N. Y. 586: 133.
- Carville v. Commonwealth, 189 Mass. 273: 1409.
v. Commonwealth, 192 Mass. 570: 1157, 1164, 1707.
- Cary v. Daniels, 8 Met. 466: 554, 556.
- Cary Library v. Bliss, 151 Mass. 364: 494, 496, 676, 792.
- Cascades R. R. Co. v. Sohns, 1 Wash. Ter. N. S. 558: 698.
- Case v. Cayuga County, 34 N. Y. Supp. 595: 254.
v. Meyers, 6 Dana 330: 1017.
v. Pennsylvania Co., 159 Pa. St. 273: 635.
v. Thompson, 6 Wend. 634: 1164, 1167.
- Casey v. Kilgore, 14 Kan. 478: 933, 981, 982.
- Cash v. Kruschke, 134 Wis. 130: 975, 1671, 1674.
v. Union Depot etc. Co., 32 Minn. 101: 253.
v. Whitworth, 13 La. Ann. 401: 440.
- Caskey v. Greensburg, 78 Ind. 233: 1576.
- Cason v. Harrison, 135 Ind. 330: 1410, 1510, 1512.
- Cass v. Dicks, 14 Wash. 75: 148, 151.
v. Pennsylvania Co., 159 Pa. St. 273: 226, 641, 1649, 1656, 1660, 1718.
- Cass Farm Co. v. Detroit, 124 Mich. 433: 11, 464.
v. Detroit, 181 U. S. 396: 11, 464.
- Cassidy v. Kennebec & Portland R. R. Co., 45 Maine 263: 1078.
v. Old Colony R. R. Co., 141 Mass. 174: 157, 1457, 1473.
v. Smith, 13 Minn. 129: 1517.
v. Sullivan, 75 Neb. 847: 890.
- Castle v. Bell Telephone Co., 49 App. Div. 437: 343.
v. Berkshire, 11 Gray 26: 371, 379, 391.
- Castlebury v. Atlanta, 74 Ga. 164: 348, 629.
- Castle Rock Irr. & W. P. Co. v. Jurisch, 67 Neb. 377: 921, 1624.
- Catawba Toll Bridge Co. v. Flowers, 110 N. C. 381: 414.
- Catawissa R. R. Co.'s Appeal, 2 Walker's Pa. Supm. Ct. 175: 771, 772.
- Catharine Tp. Road, 76 Pa. St. 189: 1077.
- Cater v. North Western Tel. Exch. Co., 60 Minn. 539: 333, 341.
- Cates v. Waddington, 1 McCord 580: 104.
- Cathedral of the Holy Trinity v. West Ont. Pae. R. R. Co., 14 Ont. 246: 823.
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 Cauldwell v. Curry, 93 Ind. 363: 1510.
 Cavanagh v. Bayonne, 63 N. J. L. 176: 1374, 1415.
 Cavanaugh v. Boston, 139 Mass. 426: 485.
 Cave's Executor v. Colmes, 3 A. K. Marsh. 36: 1673, 1675.
 Cedar Co. v. Lammers, 73 Neb. 744: 941.
 Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co., 79 Wis. 297: 125, 128, 137, 1607.
 Cedar Rapids, In re, 85 Iowa 39: 698, 1056, 1072, 1167, 1168.
 Cedar Rapids v. Marion City Ry. Co., 125 Iowa 430: 280.
 v. Young, 119 Iowa 552: 865.
 Cedar Rapids Canning Co. v. Burlington etc. Ry. Co., 120 Iowa 724: 1480.
 Cedar Rapids etc. R. R. Co. v. Chicago etc. Ry. Co., 60 Iowa 35: 1403.
 v. Raymond, 37 Minn. 204: 1315, 1331, 1477, 1483.
 v. Ryan, 37 Minn. 38: 1132, 1186, 1208.
 v. Whelan, 64 Iowa 694: 1412.
 Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa 234: 481.
 Cella v. Chicago etc. R. R. Co., 217 Ill. 326: 1409.
 Cemetery Assn. v. Meninger, 14 Kan. 312: 512, 513, 865, 880, 881, 884, 885, 886, 890.
 Central Branch U. P. R. R. Co. v. Andrews, 26 Kan. 702: 251, 1227, 1229, 1551, 1662.
 v. Andrews, 30 Kan. 590: 251, 1295.
 v. Andrews, 34 Kan. 565: 251.
 v. Andrews, 37 Kan. 162: 251, 1119, 1127, 1133, 1134.
 v. Andrews, 37 Kan. 641: 251.
 v. Andrews, 41 Kan. 370: 251, 311, 1294.
 v. Atchison etc. R. R. Co., 26 Kan. 669: 731.
 v. Atchison, T. & S. F. R. Co., 28 Kan. 453: 673, 922, 1463, 1465.
 v. Twine, 23 Kan. 585: 249, 251.
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 Centralia v. Wright, 156 Ill. 561: 1545, 1547.
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 Centralia etc. R. R. Co. v. Brake, 125 Ill. 393: 1314, 1318.
 v. Brake, 31 Ill. App. 459: 1535.
 v. Henry, 31 Ill. App. 456: 1535.
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 Central Mills Co. v. New York & New England R. R. Co., 127 Mass. 537: 831.
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 v. Union Springs etc. Ry. Co., 144 Ala. 639: 726, 1047.
 v. Windham, 126 Ala. 552: 156.
 v. Wright, 207 U. S. 127: 1005, 1007.
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 v. Bayonne, 52 N. J. L. 503: 883.
 v. English, 73 Ga. 366: 453.
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 v. Hatfield, 29 N. J. L. 206: 22, 1634.
 v. Hatfield, 29 N. J. L. 571: 1634.
 v. Hudson Terminal Co., 46 N. J. L. 289: 708, 1064.
 v. Merkel, 32 Tex. 723: 936.
 v. Pennsylvania R. R. Co., 59 Fed. 192: 96.
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 v. Standard Oil Co., 33 N. J. Eq. 127: 777.
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 v. tState, 123 Ind. 113: 481.
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 v. Woodstock R. R. Co., 50 Vt. 452: 1610.
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- Chad's Ford, 5 Binney 481: 1419.
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 v. Iowa Tel. Co., 119 Iowa 619: 342, 358, 362.
 v. Missouri Elec. Lt. & P. Co., 158 Mo. 1: 454.
 v. Morgan, 68 Pa. St. 168: 538, 1167.
 v. Northeastern R. R. Co., 41 S. C. 399: 1497, 1500.
 v. West End of London etc. Ry. Co., 2 Best & Smith 605: 645.
 v. West End of London etc. Ry. Co., 2 Best & Smith 617: 645.
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 v. Cincinnati & Ga. R. R. Co., 69 Ga. 320: 1159, 1570.
 v. Cleveland etc. Traction Co., 5 Ohio C. C. (N. S.) 298: 281, 285, 1589.
 v. Farry, 1 Yates 167: 423, 1491.
 v. Great Northern Power Co., 100 Minn. 214: 808, 1499, 1504.
 v. Lewis, 9 Iowa 583: 1414.
 v. Saterlee, 40 Cal. 497: 13.
 v. South Chester, 140 Pa. St. 510: 1306, 1307, 1308, 1337.
 v. Talladega Real Est. & L. Assn., 126 Ala. 296: 365, 877.
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 v. County Comrs., 2 Nev. 271: 1159, 1570, 1579.
 v. Crandon, 84 Wis. 405: 148.
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 v. McCrea, 165 N. Y. 264: 695, 988.
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 v. New York, 3 Paige 573: 1571.
- Chandler v. Austin, 4 Ariz. 347: 70.
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 v. Heisler, 153 Mich. 1: 1514, 1569, 1571.
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 v. Morey, 96 Ill. App. 278: 1561.
 v. New York El. R. R. Co., 34 App. Div. N. Y. 305: 1664.
 v. Reading, 129 Mo. App. 63: 521, 708.
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 v. Brown, 15 R. I. 579: 880.
 v. Sullivan R. R. Co., 39 N. H. 564: 1480.
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 v. Highway Comrs., 27 Ill. App. 643: 1571.
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 v. Clark, 49 Mich. 305: 1093.
 v. Gates, 54 N. Y. 132: 1164, 1168, 1171.
 v. Gates, 63 N. Y. 136: 1168.
 v. Graves, 8 Blackf. 308: 1374, 1377.
 v. Kimball, 9 Conn. 38: 103.
 v. Monmouthshire Ry. & C. Co., 2 H. & N. 267: 1529.
 v. Monmouthshire Ry. & Canal Co., 27 L. J. N. S. Ex. 97: 1529.
 v. Oshkosh & Miss. R. R. Co., 33 Wis. 629: 107, 247.
 v. Rochester, 110 N. Y. 273: 86, 1605, 1617.
 v. Sault Ste. Marie, 146 Mich. 23: 890.
 v. Swan, 65 Barb. 210: 1100, 1102, 1518.
- Chappell v. Edmondson Ave., 83 Md. 512: 1395.
 v. New York etc. R. R. Co., 62 Conn. 195: 855.
 v. United States, 81 Fed. 764: 932,
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 v. Werner, 38 S. C. 488: 15, 484.
 v. Werner, 46 S. C. 323: 484.
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 v. Fleming, 118 Ga. 699: 1483.
 v. Fleming, 119 Ga. 995: 521, 522.
 v. Garlington, 74 S. C. 161: 1625.
 v. Hughes, 105 Ga. 1: 966.
 v. Leech, 39 S. C. 446: 830.
 v. Reynolds, 69 S. C. 481: 830, 1226, 1227, 1320, 1715.
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 v. Gibbs, 142 U. S. 386: 475.
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 v. Hatheway, 14 Mass. 222: 1007, 1014.
 v. Lowell, 149 Mass. 85: 349.
 v. New York Cent. R. R. Co., 24 Barb. 273: 155.
 v. Oskosh, 81 Wis. 313: 348, 1488.
 v. Portland, 86 Maine 367: 604, 618, 619, 1185, 1215, 1308, 1337.
 v. Rutland, 47 Vt. 393: 1082.
 v. School District, 8 Utah 231: 1348.

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 v. Sutton Manufacturing Co., 4 Cush. 152: 424, 1497.
 v. Worcester, 108 Mass. 60: 1134, 1185.
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 v. Terminal R. R. Co., 67 Fed. Rep. 273: 1165.
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 v. Davis 89 Ga. 708: 833.
 v. East Rome Town Co., 89 Ga. 732: 1545.
 v. Felton, 69 Fed. 273: 754.
 v. Jones, 80 Ga. 264: 1615.
 v. Philpot, 112 Ga. 153: 521.
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- Cheltenham Roal, 3 Mont. Co. L. R. 37: 1360, 1364.
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- v. Lake Drummond C. & W. Co., 140 N. C. 422: 439, 1546, 1649, 1659, 1716.
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- v. Rock Hill, 48 S. C. 553: 384, 389, 399, 1666.
- v. Williams, 147 N. C. 452: 454.
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- v. Grove, 11 G. & J. 398: 1445.
- v. Hoye, 2 Gratt. 511: 1369.
- v. Key, 3 Cranch, C. C. 599: 522, 711, 1078, 1175, 1194.
- v. Mason, 4 Cranch 123: 815, 1385.
- v. Tyree, 7 W. Va. 693: 1225.
- v. Union Bank, 4 Cranch, C. C. 75: 1005, 1010, 1013, 1360.
- v. Union Bank, 5 Cranch, C. C. 509: 131.
- v. Western Md. R. R. Co., 99 Md. 570: 748.
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- v. Chambers, 95 Va. 503: 1457.
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- v. Dyer County, 87 Tenn. 712: 321.
- v. Halstead, 7 W. Va. 301: 1343.
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- v. Paek, 6 W. Va. 397: 819, 1389.
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- v. Patton, 9 W. Va. 648: 690, 1086.

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- v. Baltimore & O. R. R. Co., 217 Pa. St. 402: 309.
- v. Wabash etc. R. R. Co., 182 Ill. 382: 302, 1630.
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- v. Altgeld, 33 Ill. App. 23: 937, 1648, 1656.
- v. Anglum, 104 Ill. App. 188: 635, 1306.
- Chicago v. Baker, 86 Fed. 753: 373, 382, 391.
- v. Baker, 98 Fed. 830: 373, 391, 398.
- v. Barbian, 80 Ill. 482: 1673, 1675, 1680, 1684.
- v. Bowman Dairy Co., 234 Ill. 294: 473.
- v. Brennan, 61 Ill. App. 247: 1150.
- v. Burcky, 158 Ill. 103: 372, 382, 391, 398, 1665.
- v. Chicago etc. R. R. Co., 152 Ill. 561: 881, 883.
- v. Chicago League Ball Club, 97 Ill. App. 637: 460, 1547.
- v. Chicago Terminal Transfer R. R. Co., 121 Ill. App. 197: 303, 304.
- v. Colby, 20 Ill. 614: 12.
- v. Crosby, 111 Ill. 538: 492.
- v. Drexel, 141 Ill. 89: 873, 877, 886, 888, 890, 891.
- v. Galt, 224 Ill. 421: 869.
- v. Garrity, 7 Ill. App. 474: 1255.
- v. Gunning System, 214 Ill. 628: 471.
- v. Hayward, 176 Ill. 130: 828, 1673, 1675.
- v. Hayward, 60 Ill. App. 582: 1527.
- v. Hill, 124 Ill. 646: 884, 1137.
- v. Jackson, 196 Ill. 496: 467, 629.
- v. Laflin, 49 Ill. 172: 15, 123, 470.
- v. Larned, 34 Ill. 203: 12.
- v. LeMoyne, 119 Fed. 662: 635, 1309, 1313.
- v. Lonergan, 196 Ill. 518: 226, 629, 1313.
- v. McDonough, 112 Ill. 85: 1122, 1309.
- v. McGinn, 51 Ill. 266: 96.
- v. McShane, 102 Ill. App. 239: 635.
- v. McCartney, 216 Ill. 377: 1219.
- v. Messler, 38 Fed. 308: 965, 1556, 1561.
- v. Murdock, 212 Ill. 9: 435, 456.
- v. O'Brien, 111 Ill. 532: 492.
- v. Palmer, 93 Ill. 125: 1325.
- v. Pooley, 112 Ill. App. 343: 199.
- v. Puleyn, 129 Ill. App. 179: 320, 372, 383, 646.
- v. Rogers Park Water Co., 214 Ill. 212: 481, 483.
- v. Rogers Park Water Co., 116 Ill. App. 200: 481, 483.
- v. Rothschild, 212 Ill. 590: 1422.
- v. Rumsey, 87 Ill. 348: 25, 224, 633, 635.
- v. Rust, 117 Ill. App. 427: 443.
- v. Seben, 165 Ill. 371: 142.
- v. Shepard, 8 Ill. App. 602: 1673.

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 v. Spoer, 190 Ill. 340: 1212, 1309.
 v. Stinson, 124 Ill. 510: 884, 886.
 v. Taylor, 125 U. S. 161: 631, 635, 660, 663.
 v. Union Bldg. Assn., 102 Ill. 379: 178, 370, 371, 383, 392, 398.
 v. Union Stock Yards & Transit Co., 164 Ill. 224: 484, 1620.
 v. Verdon, 119 Ill. App. 494: 197, 199.
 v. Van Ingen, 152 Ill. 624: 129.
 v. Ward, 169 Ill. 392: 876, 1618.
 v. Webb, 102 Ill. App. 232: 373, 375, 391.
 v. Wells, 236 Ill. 129: 53, 57, 461.
 v. Wheeler, 25 Ill. 478: 1325, 1527, 1528, 1530.
 v. Wright, 69 Ill. 318: 197, 357, 1579.
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- Chicago etc. Elec. R. R. Co. v. Chicago etc. Ry. Co., 211 Ill. 352: 731, 757, 759, 1043, 1044, 1409.
 v. Mallman, 206 Ill. 182: 1312.
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 v. Abbott, 44 Kan. 170: 913.
 v. Ackley, 94 U. S. 179: 480.
 v. Aldrich, 134 Ill. 9: 1195, 1312, 1442.
 v. Alexander, 47 Wash. 131: 1146, 1152, 1242.
 v. Anderson, 42 Kan. 297: 942.
 v. Andreesen, 62 Neb. 456: 92, 93, 1454, 1456, 1639, 1653, 1716.
 v. Atterbury, 156 Ill. 281: 1314.
 v. Ayres, 106 Ill. 511: 639, 671.
 v. Baker, 102 Mo. 553: 1208, 1318, 1365.
 v. Bastin, 97 Ill. App. 38: 1602.
 v. Bates, 109 Mo. 53: 926.
 v. Bean, 69 Iowa 257: 1505, 1510.
 v. Beatrice Rapid Transit & P. Co., 47 Neb. 741: 328.
 v. Berg, 10 Ill. App. 607: 639, 1294.
 v. Blake, 116 Ill. 163: 1119, 1129, 1195, 1241, 1379.
 v. Blume, 137 Ill. 448: 1243, 1310, 1312, 1314.
- Chicago etc. R. R. Co. v. Board of Comrs., 49 Kan. 763: 1290.
 v. Bowman, 122 Ill. 595: 1109, 1202, 1243, 1311, 1312, 1314, 1426, 1437.
 v. Brink, 16 S. D. 644: 1244.
 v. Brinkman, 47 Ill. App. 287: 1246, 1249.
 v. Broquet, 47 Kan. 571: 1098, 1150, 1200, 1201.
 v. Brunson, 43 Kan. 371: 1208, 1213.
 v. Buel, 56 Neb. 205: 1128, 1179, 1200, 1323.
 v. Buel, 76 Neb. 420: 91, 94.
 v. Bull, 20 Ill. 218: 1438.
 v. Butts, 55 Kan. 660: 964.
 v. Carpenter, 125 Ill. App. 306: 91.
 v. Casey, 90 Ill. 514: 151.
 v. Casper, 42 Kan. 561: 1128.
 v. Catholic Bishop, 119 Ill. 525: 1134, 1146, 1222, 1258, 1266.
 v. Cedar Rapids etc. R. R. Co., 86 Iowa 500: 181.
 v. Chamberlain, 84 Ill. 333: 897, 1033, 1086, 1516.
 v. Chappell, 124 Mich. 72: 489, 1154.
 v. Chicago, 121 Ill. 176: 297, 778, 780.
 v. Chicago, 132 Ill. 372: 1382.
 v. Chicago, 140 Ill. 309: 753, 1287.
 v. Chicago, 143 Ill. 641: 1045, 1070, 1074, 1624, 1701.
 v. Chicago, 148 Ill. 141: 895, 1469.
 v. Chicago, 148 Ill. 479: 1675, 1701.
 v. Chicago, 149 Ill. 457: 750, 1267, 1287, 1288, 1497.
 v. Chicago, 149 Ill. 495: 895, 1287.
 v. Chicago, 150 Ill. 597: 895, 1287.
 v. Chicago, 151 Ill. 348: 751, 1624.
 v. Chicago, 166 U. S. 226: 1267, 1288, 1432.
 v. Chicago etc. R. R. Co., 112 Ill. 589: 726, 761, 797, 1043, 1047, 1246.
 v. Chicago etc. R. R. Co., 60 Iowa 35: 966.
 v. Chicago etc. R. R. Co., 91 Iowa 16: 767.
 v. Chicago Mechanics Inst., 239 Ill. 197: 708, 729, 1115, 1260.
 v. Cicero, 154 Ill. 656: 749, 752, 1115, 1120, 1287, 1292.
 v. Cicero, 155 Ill. 51: 749, 1287.
 v. Cicero, 157 Ill. 48: 1287.
 v. Cicero, 157 Ill. 89: 1287.
 v. Clapp, 201 Ill. 418: 1503, 1504, 1627.
 v. Coggeswell, 44 Ill. App. 388: 654, 656, 663, 1245, 1246.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Connors, 25 Ill. App. 561: 154.
 v. Cook, 43 Kan. 83: 1409.
 v. Cooper, 42 Kan. 561: 1247, 1249.
 v. Curless, 27 Ind. App. 306: 1378.
 v. Darke, 148 Ill. 226: 448, 654, 671, 1544.
 v. Davidson, 49 Kan. 589: 1151, 1236.
 v. Dill, 41 Kan. 736: 1124, 1151.
 v. Diver, 213 Ill. 26: 1195, 1247, 1249, 1314, 1318, 1322, 1379.
 v. Denelson, 45 Kan. 189: 1132.
 v. Douglass, 33 Tex. Civ. App. 262: 862, 1130.
 v. Douglass County, 1 Neb. (Unof.) 247: 1162, 1569.
 v. Drainage Comrs., 212 Ill. 103: 492.
 v. Drainage Comrs., 200 U. S. 561: 493.
 v. Drake, 46 Kan. 568: 1121.
 v. Dressel, 110 Ill. 89: 1210, 1271.
 v. Dunbar, 100 Ill. 110: 1071.
 v. Durant, 44 Minn. 361: 851.
 v. Easley, 46 Kan. 337: 1130.
 v. Eaton, 136 Ill. 9: 1085, 1195, 1246, 1249, 1270, 1318, 1442.
 v. Eisert, 127 Ind. 156: 324, 326, 1582, 1591.
 v. Elgin, 91 Ill. 251: 330.
 v. Elliott, 108 Mo. 321: 926.
 v. Elliott, 117 Mo. 549. 1440.
 v. Ellis, 52 Kan. 41: 952, 1404.
 v. Ellis, 52 Kan. 48: 952.
 v. Ellithorpe, 78 Iowa 415: 1018, 1513, 1571.
 v. Elmhurst, 165 Ill. 148: 12.
 v. Ely, 77 Neb. 809: 91, 1456.
 v. Emery, 51 Kan. 16: 1139, 1203.
 v. Emmert, 53 Neb. 237: 94, 151, 1650, 1653.
 v. Englehart, 57 Neb. 444: 858, 1631.
 v. Englewood Connecting Ry. Co., 115 Ill. 375: 53, 1280.
 v. Englewood Connecting R. R. Co., 17 Ill. App. 141: 1610.
 v. Eubanks, 130 Mo. 270: 1322, 1466.
 v. Francis, 70 Ill. 238: 639, 1195, 1581.
 v. Galey, 141 Ind. 360: 1540, 1541, 1543, 1544, 1545.
 v. Galt, 133 Ill. 657: 715, 1626.
 v. Garrett, 239 Ill. 397: 1557.
 v. Gates, 120 Ill. 86: 964, 1162, 1627, 1669.
 v. General Electric R. R. Co., 79 Ill. App. 569: 272, 328, 1611.
 Chicago etc. R. R. Co. v. George, 10 Ill. App. 646: 639, 1294.
 v. George, 145 Mo. 38: 1202, 1426, 1477.
 v. Glenney, 117 Ill. 487: 153.
 v. Glenney, 28 Ill. App. 364: 154.
 v. Glos, 239 Ill. 24: 1136.
 v. Goodwin, 111 Ill. 273: 830, 1346, 1347.
 v. Grand Rapids etc. Ry. Co., 153 Mich. 686: 977.
 v. Graney, 137 Ill. 628: 1310.
 v. Grantham, 165 Ind. 279: 1545.
 v. Greimey, 137 Ill. 628: 134, 1202, 1243, 1311, 1318.
 v. Griesser, 48 Kan. 663: 1035, 1510, 1636.
 v. Griffith, 44 Neb. 690: 1140.
 v. Grovier, 41 Kan. 685: 1138, 1404, 1409.
 v. Guthrie, 192 Ill. 579: 690, 696, 740, 1700.
 v. Hall, 90 Ill. 42: 639.
 v. Hall, 8 Ill. App. 621: 639.
 v. Hall, 135 Ind. 91: 1540, 1541, 1543, 1545.
 v. Hazels, 26 Neb. 364: 448, 654, 664, 668, 1334, 1337.
 v. Henneberry, 153 Ill. 354: 151.
 v. Henneberry, 28 Ill. App. 110: 151, 1648, 1655.
 v. Henneberry, 42 Ill. App. 126: 152, 1639.
 v. Hildebrand, 136 Ill. 467: 1243.
 v. Hoag, 90 Ill. 339: 145.
 v. Hock, 118 Ill. 587: 924, 1274, 1277.
 v. Hogan, 105 Ill. App. 136: 849.
 v. Hopkins, 90 Ill. 316: 994, 1045, 1108, 1310.
 v. Hough, 61 Mich. 507: 1290.
 v. Huncheon, 130 Ind. 529: 1208, 1213.
 v. Hunter, 128 Ind. 213: 1247, 1251.
 v. Hurst, 30 Iowa 73: 1404.
 v. Hurst, 41 Kan. 740: 956, 1253.
 v. Illinois Central R. R. Co., 113 Ill. 156: 689, 731, 737, 749, 766.
 v. Indianapolis etc. Traction Co., 165 Ind. 453: 764, 766.
 v. Iowa, 94 U. S. 155: 15, 480.
 v. Jacobs, 110 Ill. 414: 1108, 1234, 1236.
 v. Joliet, 79 Ill. 25: 875, 1494.
 v. Joliet, L. & A. Ry. Co., 105 Ill. 388: 1280, 1281, 1344.
 v. Jones, 149 Ill. 361: 481, 483.
 v. Jones, 103 Ind. 386: 913, 1075, 1391.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 - v. Kansas City etc. R. R. Co., 110 Mo. 510: 769.
 - v. Keith, 67 Ohio St. 279: 489, 1005.
 - v. Kelly, 221 Ill. 498: 1152, 1195, 1202, 1231.
 - v. Kline, 220 Ill. 334: 1138, 1142, 1143, 1250, 1332.
 - v. Knox College, 34 Ill. 195: 1631.
 - v. Knuppke, 36 Kan. 367: 1481.
 - v. Lake, 71 Ill. 333: 674, 750, 1609.
 - v. Leah, 152 Ill. 249: 448, 654, 1243, 1302.
 - v. Leah, 41 Ill. App. 584: 639, 1294, 1302.
 - v. Lemonweir Riv. Dr. Dist. 135 Wis. 228: 1515.
 - v. Liebel, 27 Ky. L. R. 716: 1385.
 - v. Loeb, 118 Ill. 203: 937, 1551, 1553, 1648, 1657, 1662, 1663, 1717.
 - v. Loeb, 8 Ill. App. 627: 639, 937, 1551.
 - v. Maher, 91 Ill. 312: 652, 937, 1551, 1553, 1648, 1658, 1662, 1663.
 - v. Mason, 26 Ind. App. 395: 1192, 1201, 1313.
 - v. McAuley, 121 Ill. 160: 639, 1648.
 - v. McCarthy, 20 Ill. 385: 1636.
 - v. McCutchen, 80 Ark. 235: 158, 1649, 1654.
 - v. McGinnis, 79 Ill. 269: 251.
 - v. McGrew, 104 Mo. 282: 1172, 1175, 1186, 1217, 1274, 1314, 1339, 1344, 1477.
 - v. McGrew, 113 Mo. 390: 926.
 - v. Melville, 66 Ill. 329: 1343.
 - v. Miller, 233 Ill. 508: 1045, 1046, 1136.
 - v. Miller, 106 Mo. 458: 926, 1340.
 - v. Milwaukee, 97 Wis. 418: 1288, 1289.
 - v. Milwaukee etc. R. R. Co., 95 Wis. 561: 243, 247, 285, 1610.
 - v. Mines, 221 Ill. 448: 1109, 1138, 1143, 1222.
 - v. Minnesota, 134 U. S. 418: 95, 480, 483.
 - v. Mitchell, 159 Ill. 406: 1119.
 - v. Mitchell, 74 Neb. 563: 93, 1639, 1716.
 - v. Moffit, 75 Ill. 524: 87.
 - v. Moggridge, 116 Tenn. 445: 1127, 1226, 1323.
 - v. Moore, 60 Kan. 107: 1485.
 - v. Moore, 63 Ill. App. 163: 1243, 1294, 1302, 1314.
 - v. Morehouse, 112 Wis. 1: 533.
 - Chicago etc. R. R. Co. v. Morrison, 195 Ill. 271: 503, 749, 751, 1056, 1291.
 - v. Mouriquand, 45 Kan. 170: 1128.
 - v. Muller, 45 Kan. 85: 1124, 1146.
 - v. Naperville, 166 Ill. 87: 1287.
 - v. Naperville, 169 Ill. 25: 514, 1464.
 - v. Nashua Savings Bank, 52 Kan. 467: 948.
 - v. Nebraska, 170 U. S. 57: 487.
 - v. Need, 2 Kan. App. 492: 948.
 - v. Neiman, 45 Kan. 533: 1124.
 - v. Newton, 36 Iowa 299: 251, 321.
 - v. Nix, 137 Ill. 141: 1122, 1128, 1176, 1243, 1310, 1312, 1314.
 - v. Noblesville, 159 Ind. 237: 1288.
 - v. Nolin, 221 Ill. 367: 1312, 1314.
 - v. O'Conner, 42 Neb. 90: 640, 643, 655, 1294, 1303, 1314, 1337, 1472.
 - v. O'Neill, 58 Neb. 239: 646, 1337, 1548, 1552, 1649, 1660.
 - v. Oshkosh etc. R. R. Co., 107 Wis. 192: 1050.
 - v. Palmer, 44 Kan. 110: 1312.
 - v. Parsons, 51 Kan. 408: 1109, 1176, 1227, 1231.
 - v. Patterson, 26 Ind. App. 295: 1314, 1545.
 - v. Patchin, 16 Ill. 198: 1496.
 - v. People, 212 Ill. 103: 487, 1644.
 - v. People, 222 Ill. 396: 729.
 - v. People, 222 Ill. 427: 197, 305, 1618, 1622.
 - v. People, 120 Ill. App. 306: 305, 1622.
 - v. People, 200 U. S. 561: 487.
 - v. Phelps, 125 Ill. 482: 1118, 1430, 1467.
 - v. Phillips, 10 Ill. App. 648: 639, 1294.
 - v. Pigg, 63 Ill. App. 163: 1425.
 - v. Pontiae, 169 Ill. 155: 675, 678, 751, 1287, 1426.
 - v. Porter, 72 Iowa 426: 106, 131, 132.
 - v. Porter, 43 Minn. 527: 1045.
 - v. Quincy, 136 Ill. 563: 352.
 - v. Quincy, 139 Ill. 355: 306.
 - v. Randolph Town-Site Co., 103 Mo. 451: 898, 1226, 1361.
 - v. Reed, 2 Kan. App. 492: 825.
 - v. Reeder, 6 Ohio C. C. 354: 327.
 - v. Reuter, 223 Ill. 387: 146, 158, 1650, 1654.
 - v. Richardson, 86 Wis. 154: 977, 1060.
 - v. Riley, 25 Ill. App. 569: 154.
 - v. Ritter, 1 Tex. App. Civil Cases p. 107: 1206.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Sanford, 23 Mich. 418: 924.
 v. Schaffer, 124 Ill. 112: 90, 1651.
 v. Schaffer, 26 Ill. App. 280: 90, 1651, 1653.
 v. Scott, 225 Ill. 352: 1109, 1147, 1377.
 v. Scott, 232 Ill. 419: 1342.
 v. Scott, 71 Kan. 874: 91.
 v. Selders, 4 Kan. App. 497: 1010, 1461.
 v. Shafer, 49 Neb. 25: 1129, 1243, 1312.
 v. Shaw, 63 Neb. 380: 152, 158, 1716.
 v. Sheldon, 53 Kan. 169: 948, 949, 1558, 1560.
 v. Shepard, 39 Neb. 523: 937.
 v. Smith, 78 Ill. 96: 706, 999, 1023, 1030.
 v. Smith, 111 Ill. 363: 846.
 v. Snyder, 120 Ia. 532: 1248, 1478, 1517, 1519.
 v. Springfield etc. R. R. Co., 67 Ill. 142: 1279.
 v. Springfield etc. R. R. Co., 96 Ill. 274: 1279.
 v. Staley, 221 Ill. 405: 1229, 1233, 1234, 1312, 1314.
 v. Starkweather, 97 Ia. 159: 750.
 v. State, 158 Ind. 180: 1288.
 v. State, 47 Neb. 550: 487.
 v. State, 50 Neb. 399: 472, 495, 1474.
 v. Steck, 51 Kan. 737: 147, 150, 157.
 v. Stein, 75 Ill. 41: 652.
 v. Stewart, 47 Kan. 704: 1121, 1139.
 v. Stewart, 50 Kan. 33: 1130, 1545.
 v. Stroud, 129 Ill. App. 348: 152.
 v. Sturey, 55 Neb. 137: 254, 1294.
 v. Sutton, 130 Ind. 405: 1518.
 v. Swan, 120 Mo. 30: 984, 1035.
 v. Swinney, 38 Ia. 182: 830, 853, 1625.
 v. Titerington, 84 Tex. 218: 830, 840.
 v. Tompkins, 176 U. S. 167: 480, 483.
 v. Tounsdin, 45 Kan. 771: 929, 1437, 1439.
 v. Union Inv. Co., 51 Kan. 600: 252, 311, 1294, 1304, 1652.
 v. Van Cleave, 52 Kan. 665: 956, 1336.
 v. Vaughn, 206 Ill. 234: 830, 1346, 1347.
 v. Vivian, 33 Mo. App. 583: 1187, 1200.
- Chicago etc. R. R. Co. v. Ward, 128 Ill. 349: 807, 1262.
 v. Watkins, 43 Kan. 50: 1460, 1636.
 v. Wedel, 144 Ill. 9: 639, 1545.
 v. Wellman, 143 U. S. 339: 480.
 v. West Chicago St. R. R. Co., 156 Ill. 255: 765, 767, 1610.
 v. West Chicago St. R. R. Co., 156 Ill. 270: 272, 328, 657, 1282.
 v. White, 36 Mont. 437: 1556.
 v. Whiting etc. St. R. R. Co., 139 Ind. 297: 272, 282, 328, 657, 765, 767, 1282, 1611.
 v. Wiebe, 25 Neb. 545: 1179, 1199, 1200, 1243.
 v. Willets, 45 Kan. 110: 1455, 1507.
 v. Willi, 53 Ill. App. 603: 92, 94, 1454, 1639.
 v. Williams, 148 Fed. 442: 750, 1609.
 v. Wilson, 17 Ill. 123: 526, 731, 1040, 1080.
 v. Wiltse, 116 Ill. 449: 532, 676, 677, 708.
 v. Winslow, 27 Ind. App. 316: 1192.
 v. Wolf, 137 Ill. 360: 1339, 1426.
 v. Woodward, 47 Kan. 191: 1203.
 v. Wright, 153 Ill. 307: 856.
 v. Wynkoop, 73 Kan. 590: 1248, 1249, 1485, 1519, 1646.
 v. Wyson Land Co., 163 Ind. 288: 1120, 1123, 1205, 1378.
 v. Young, 96 Mo. 39: 706, 973, 1017, 1031, 1032, 1419, 1420.
- Chicago etc. Traction Co. v. Flaherty, 222 Ill. 67: 1700.
- Chicago Dock & Canal Co. v. Gar-
rity, 115 Ill. 155: 318, 526, 532.
- Chicago General R. R. Co. v. Chicago City R. R. Co., 62 Ill. App. 502: 197, 408, 762.
 v. Chicago City R. R. Co., 10 Nat. Corp. 651: 426, 763.
- v. Chicago etc. R. R. Co., 181 Ill. 605: 329.
- v. West Chicago St. R. R. Co., 63 Ill. App. 464: 331, 1620.
- Chicago Gt. Western Ry. Co. v. First M. E. Church, 102 Fed. 85: 308, 450, 458.
- Chicago League Ball Club v. Chicago, 77 Ill. App. 124: 1545.
- Chicago Municipal Gas L. Co. v. Lake, 130 Ill. 42: 412.
- Chicago North Shore St. Ry. Co. v. Payne, 192 Ill. 239: 454, 655, 1337, 1648, 1659, 1716.
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- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Chicago Tel. Co. v. N. W. Tel. Co., 199 Ill. 324: 197, 342, 360, 410, 418, 1621.
 v. North W. Telephone Co., 100 Ill. App. 57: 1621.
 Chicago Terminal Ry. Co. v. Chicago, 217 Ill. 343: 1328.
 Chicago Terminal Transf. R. R. Co. v. Bugbee, 184 Ill. 353: 1150, 1309, 1379.
 v. Chicago, 203 Ill. 576: 304, 362.
 v. Chicago, 217 Ill. 343: 1150.
 v. Chicago, 220 Ill. 310: 297, 303.
 v. Prencil, 236 Ill. 491: 1423.
 Chicago-Virden Coal Co. v. Wilson, 67 Ill. App. 443: 1650, 1659.
 Chicago West Division R. R. Co. v. Metropolitan W. S. El. R. R. Co., 152 Ill. 519: 761, 800, 1260.
 Child v. Boston, 4 Allen 41: 142, 143.
 v. New York El. R. R. Co., 89 App. Div. 598: 1562.
 Childs v. Central R. R. Co. of N. J., 33 N. J. L. 323: 732.
 v. Franklin Co., 128 Mass. 97: 1366.
 v. Kansas City etc. R. R. Co., 117 Mo. 414: 1546, 1547.
 v. Nelson, 69 Wis. 125: 348.
 v. New Haven & Northampton R. R. Co., 133 Mass. 253: 1217.
 v. New Haven & Northampton Co., 135 Mass. 570: 1439.
 v. Newport, 70 Vt. 62: 988, 1353.
 Chisman v. Deck, 84 Iowa 344: 349.
 Chisolm v. Caines, 67 Fed. 285: 113, 114, 115.
 Choate v. Southern Ry. Co., 143 Ala. 316: 1519.
 Choctaw etc. Ry. Co. v. True, 35 Tex. Civ. App. 309: 1635.
 Chope v. Detroit & Howell Plank Road Co., 37 Mich. 195: 727.
 Chorman v. Queen Anne's R. R. Co., 3 Penn. Del. 407: 146, 154.
 Chouteau v. Missouri Pac. R. R. Co., 122 Mo. 375: 837, 943, 945, 962.
 v. St. Louis, 8 Mo. App. 48: 631, 1309.
 Chowan & S. R. R. Co. v. Parker, 105 N. C. 246: 923, 924.
 Chrisman v. Omaha etc. Ry. & B. Co., 125 Iowa 133: 373, 404.
 Christ Church Wardens v. Woodward, 26 Maine 172: 1373.
 Christian v. St. Louis, 127 Mo. 109: 1595.
 Christian County Court v. Rankin, 2 Duv. Ky. 502: 18.
 Christy v. Newton, 60 Barb. 332: 1100, 1102.
 Chronic v. Pugh, 136 Ill. 539: 574.
 Church's Application, 92 N. Y. 1: 1164, 1167.
 Church v. Grand Rapids etc. R. R. Co., 70 Ind. 161: 940.
 v. Joint School District, 55 Wis. 399: 1165, 1569, 1574.
 v. Milwaukee, 31 Wis. 512: 615, 619, 1307, 1308.
 v. Milwaukee, 34 Wis. 66: 615, 619.
 v. Northern Central Ry. Co., 45 Pa. St. 339: 1419.
 Churchill v. Beethe, 48 Neb. 87: 147, 1176, 1243, 1446.
 v. Burlington Water Co., 94 Iowa 89: 452, 454.
 Churchman v. Martin, 54 Ind. 380: 23.
 Church of the Holy Apostles, 21 App. Div. N. Y. 47: 1305.
 Church of Holy Communion v. Patterson etc. R. R. Co., 63 N. J. L. 470: 441.
 v. Patterson etc., R. R. Co., 66 N. J. L. 218: 441.
 v. Patterson etc. R. R. Co., 68 N. J. L. 399: 441.
 Church Road, 5 W. & S. 200: 976.
 Church Street, Matter of, 49 Barb. 455: 956.
 Chute v. Washburn, 44 Minn. 312: 840, 841, 864.
 Cicero Lumber Co. v. Cicero, 176 Ill. 9: 357.
 Cincinnati v. Cincinnati So. Ry. Co., 1 Ohio N. P. (N. S.) 361: 731.
 v. Combs, 16 Ohio 181: 1546.
 v. Evans, 5 Ohio St. 594: 1492.
 v. First Presbyterian Church, 8 Ohio 298: 1492.
 v. Hamilton Co. 1 Disney, 5: 402.
 v. Hosea, 19 Ohio C. C. 744: 1520.
 v. Morton, 10 Ohio C. C. (N. S.) 416: 1107.
 v. Penny, 21 Ohio St. 499: 218, 335.
 v. Roth, 20 Ohio C. C. 317: 220, 611, 616.
 v. Sherike, 47 Ohio St. 217: 709, 1017, 1710.
 v. Whetstone, 47 Ohio St. 196: 220, 1323.
 v. White, 6 Pet. 431: 872, 882, 885.
 Cincinnati Con. Belt R. R. Co. v. Burksi, 4 Ohio C. C. (N. S.) 98: 447.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Lohe, 68 Ohio St. 101: 281.
- Cincinnati etc. R. R. Co., In re, 19 Ohio C. C. 308: 390.
- Cincinnati etc. R. R. Co. v. Anderson, 139 Ind. 490: 750, 793, 796, 797, 798, 1609.
- v. Bareelow, 4 Ohio C. C. 49: 1427.
- v. Bay City etc. R. R. Co., 106 Mich. 473: 897, 982.
- v. Belle Centre, 48 Ohio St. 273: 538, 776, 793, 796, 800, 802, 1518.
- v. Campbell, 51 Ohio St. 328: 1549, 1651, 1658.
- v. Cincinnati, 62 Ohio St. 465: 464, 1219.
- v. Clifford, 113 Ind. 460: 1625, 1631.
- v. Danville etc. R. R. Co., 75 Ill. 113: 759, 985, 1047.
- v. Mims, 71 Ga. 240: 1119.
- v. Miller, 36 Ind. App. 26: 1657.
- v. Troy, 68 Ohio St. 510: 491, 1290.
- v. Wabash R. R. Co., 162 Ind. 303: 764, 1461, 1463.
- v. Wachter, 70 Ohio St. 113: 837, 1483, 1486.
- v. Ward, 120 Ill. App. 212: 152.
- v. Zinn, 18 Ohio St. 417: 1292.
- Cincinnati etc. St. R. R. Co. v. Cumminsville, 14 Ohio St. 523: 247, 1586.
- Cincinnati etc. Traction Co. v. Felix, 5 Ohio C. C. (N. S.) 270: 740, 1438.
- Cincinnati Inclined Plane R. R. Co. v. City & Suburban Tel. Asso., 48 Ohio St. 390: 272, 332, 343, 417, 911, 1622.
- Cincinnati International R. R. Co. v. Murray, 10 Ohio N. P. (N. S.) 301: 716, 747, 896.
- Cincinnati Iron Stove Co. v. Cincinnati So. Ry. Co., 9 Ohio C. C. 103: 1147, 1272.
- Cincinnati R. R. Co. v. Geisel, 119 Ind. 77: 837, 1475, 1481.
 v. Longworth, 30 Ohio St. 108: 1203, 1236.
- Cincinnati Southern R. R. Co. v. Chattanooga etc. R. R. Co., 44 Fed. 470: 1570.
 v. Haas, 42 Ohio St. 239: 1703.
- C. I. R. R. Co. v. M. & A. R. R. Co., 57 Iowa 249: 1502.
- Citizens Coach Co. v. Camden Horse R. R. Co., 28 N. J. Eq. 145: 1621.
 v. Camden H. R. R. Co., 29 N. J. Eq. 299: 416.
- Citizens Coach Co. v. Camden H. R. R. Co., 31 N. J. Eq. 525: 416, 1621.
 v. Camden Horse R. R. Co., 33 N. J. Eq. 267: 278, 415, 1621.
- Citizens' Gas etc. Co. v. Elwood, 114 Ind. 332: 338, 411.
- Citizens' Horse R. R. Co. v. Belleville, 47 Ill. App. 388: 302, 426, 763.
- Citizens' Nat. Bank v. Graham, 147 Mo. 250: 594.
- Citizens' Pass. R. R. Co. v. East Harrisburg Pass. R. R. Co., 164 Pa. St. 274: 778.
- Citizens' St. R. R. Co. v. Africa, 100 Tenn. 26: 297.
 v. Memphis, 53 Fed. 715: 299.
- Citizens' Water Co. v. Bridgeport Hydraulic Co., 55 Conn. 1: 416.
- Citizens' W. W. Co., Matter of, 32 App. Div. N. Y. 54: 918.
- Citizens' W. W. Co. v. Parry, 59 Hun. 202: 920, 1044.
 v. Parry, 128 N. Y. 669: 920, 1044.
- City Council v. Georgia etc. R. R. Co., 98 Ga. 161: 750.
- City etc. R. R. Co. v. Savannah, 77 Ga. 731: 476.
 v. Smith, 72 Miss. 677: 151.
- City Store v. San Jose etc. Ry. Co., 150 Cal. 277: 250, 1614.
- Clack v. White, 2 Swan, 540: 495, 516.
- Claffin v. Boston & A. R. R. Co., 157 Mass. 489: 844.
- Clairborne St., Matter of, 4 La. An. 7: 1386.
- Clapp v. Boston, 133 Mass. 367: 1341.
 v. Macfarland, 20 App. Cas. D. C. 224: 1385.
 v. Manter, 78 Maine 358: 1524.
 v. Minn. Grass Twine Co., 81 Minn. 511: 577.
 v. Spokane, 53 Fed. 515: 354, 1620.
- Clapper, Ex parte, 3 Hill 458: 817.
- Claremont Ry. & Lt. Co. v. Putney, 73 N. H. 431: 672, 679, 683, 708, 720.
- Clarendon v. Medina Quarry Co., 102 App. Div. 217: 1491.
 v. Rutland R. R. Co., 75 Vt. 6: 491, 1288.
- Clarion Turnpike & Bridge Co. v. Clarion Co., 172 Pa. St. 243: 1264, 1266.
- Clark, In re, 74 Hun 294: 1715.
- Clark v. Allaman, 71 Kan. 206: 69, 71.
 v. Birmingham etc. Co. 41 Pa. St. 147: 96.
- v. Board of County Comrs., 69 Kan. 542: 494, 516.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Brooklyn City R. R. Co., 30 Hun 409: 247, 1635.
 v. Cambridge etc. Improv. Co., 45 Neb. 799: 69, 70, 113, 1607, 1615, 1616.
 v. Close, 43 Iowa 92: 939.
 v. Dasso, 34 Mich. 86: 1481, 1491.
 v. Drain Comr., 50 Mich. 618: 1511.
 v. Dyer, 81 Tex. 339: 160, 1651, 1655, 1716.
 v. Elizabeth, 37 N. J. L. 120: 432, 878, 879, 1326, 1327.
 v. Elizabeth, 40 N. J. L. 172: 878, 879, 1327.
 v. Elizabeth, 61 N. J. L. 505: 608.
 v. Hampstead, 19 N. H. 365: 1683.
 v. Hannibal & St. Joe R. R. Co., 36 Mo. 202: 157, 1450, 1455.
 v. Irrigation Co., 45 Neb. 799: 116, 140.
 v. Lawrence, 6 Jones Eq. 83: 165.
 v. McCormick, 174 Ill. 164: 874.
 v. Meyerdirek, 107 Md. 63: 1557.
 v. Middletown-Goshen Traction Co., 10 App. Div. 354: 273.
 v. Miller, 54 N. Y. 528: 925.
 v. Mitchell, 64 Mo. 564: 18.
 v. Nash, 198 U. S. 361: 587, 595, 596, 597.
 v. Pennsylvania R. R. Co., 145 Pa. St. 438: 69, 72, 75, 1342.
 v. Phelps, 4 Cow. 190: 821.
 v. Philadelphia, 171 Pa. St. 30: 1356.
 v. Providence, 10 R. I. 437: 183, 878, 880, 889, 1618.
 v. Providence, 16 R. I. 337: 420, 1493.
 v. Rochester, 43 Hun 367: 149, 153, 155, 235.
 v. Rockland Water Co. 52 Maine 68: 137, 1131, 1524.
 v. Saybrook, 21 Conn. 313: 133.
 v. Second etc. St. R. R. Co., 3 Phil. 259: 307.
 v. Syracuse, 13 Barb. 32: 492.
 v. Utica, 18 Barb. 451: 924.
 v. Wabash R. R. Co., 132 Iowa 11: 1226.
 v. Washington, 11 Pa. Co. Ct. 433: 1251.
 v. Water Comrs., 148 N. Y. 1: 1424, 1713, 1715.
 v. Wilmington, 5 Harr. (Del.) 243: 235.
 v. Worcester, 125 Mass. 226: 808, 1186.
 Clarke v. Birmingham etc. R. R. Co., 41 Pa. St. 147: 96.
 Clarke v. Blackmar, 47 N. Y. 150: 318, 526, 533, 712.
 v. Chicago etc. R. R. Co., 23 Neb. 613: 1378.
 v. Gilmanton, 12 N. H. 515: 955.
 v. Long Island Realty Co., 126 App. Div. 282: 1559.
 v. Manchester, 56 N. H. 502: 1669, 1671, 1683, 1685.
 v. Newport, 5 R. I. 333: 1373.
 v. Ohio Riv. R. R. Co., 39 W. Va. 732: 1646.
 v. Patapsco Guano Co., 144 N. C. 64: 151.
 v. Rochester, 24 Barb. 446: 462.
 v. Rochester etc. R. R. Co., 18 Barb. 350: 1484.
 v. South Kingston, 18 R. I. 283: 913, 921.
 v. White, 5 Bush 353: 423.
 Clarke Co. v. Mississippi Lumber Co., 80 Miss. 535: 164.
 Clarksburg Elec. Lt. Co. v. Clarksburg, 47 W. Va. 739: 361, 408, 409.
 Clarkson v. Wood, 168 Ind. 582: 1384.
 Clarksville etc. Turnpike Co. v. Atkinson, 1 Sneed, 426: 1097, 1377, 1385.
 Clarren v. Jefferson School, 169 Ind. 140: 995.
 Clary v. Woodbury County, 135 Iowa 488: 933.
 Classen v. Guano Co., 81 Md. 258: 137.
 Clauson v. Chicago etc. Ry. Co., 106 Wis. 308: 153.
 Clay v. Pennoyer Creek Imp. Co., 34 Mich. 204: 976, 1403.
 v. Pittsburg etc. Ry. Co., 164 Ind. 439: 147, 157.
 v. Postal Tel. Co., 70 Miss. 406: 1636.
 v. St. Albans, 43 W. Va. 539: 155.
 Claybaugh v. Baltimore & Ohio R. R. Co., 108 Ind. 262: 1371.
 Clayton v. Chicago etc. R. R. Co., 67 Iowa 238: 1108.
 v. County Court, 58 W. Va. 253: 425, 958, 1569.
 Clear Creek Land & Ditch Co. v. Kilkenney, 5 Wyo. 38: 425.
 Clear Creek Water Co. v. Gladeville Imp. Co., 107 Va. 278: 744.
 Clear Lake Water Co. Matter of, 48 Cal. 586: 1383.
 Cleckler v. Morrow, 150 Ala. 524: 1407.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Clemans v. Hatch, 168 Ind. 291: 695.
 Clemens v. Conn. Mut. Life Ins. Co., 184 Mo. 46: 1161, 1601, 1612.
 v. Speed, 93 Ky. 284: 440.
 Clement v. Burns, 43 N. H. 609: 969, 983.
 v. Durgin, 5 Me. 9: 860, 1354.
 v. Wichita etc. R. R. Co., 53 Kan. 682: 1020, 1517.
 Clements v. Watkins Land Co., 36 Tex. Civ. App. 339: 72.
 Clenehan v. Omaha etc. R. R. Co., 25 Neb. 531: 93.
 Clercq v. Gallipolis, 7 Ohio (pt. 1) 217: 420, 1494, 1618.
 Cleveland v. Augusta, 102 Ga. 233: 488.
 v. Cleveland City Ry. Co. 194 U. S. 517: 482.
 v. Cleveland Elec. Ry. Co., 194 U. S. 538: 482.
 v. Standard Bag & Paper Co., 72 Ohio St. 324: 83, 866, 870.
 v. Wick, 18 Ohio St. 303: 1204.
 Cleveland Burial Case Co., 4 Ohio C. C. (N. S.) 365: 1581.
 Cleveland Elec. Ry. Co. v. Cleveland etc. Ry. Co., 204 U. S. 116: 304, 305, 407.
 Cleveland etc. R. R. Co. v. Akron, 1 Ohio C. C. (N. S.) 174: 1624.
 v. Akron, 6 Ohio N. P. (N. S.) 81: 750, 752, 1609.
 v. Ball, 5 Ohio St. 568: 1119, 1124, 1207, 1244.
 v. Coburn, 91 Ind. 557: 839.
 v. Feight, 41 Ind. App. 416: 281, 329, 1611.
 v. Gorash, 8 Ohio C. C. (N. S.) 297: 1140, 1270.
 v. Hayes, 35 Ind. App. 539: 1430.
 v. Hobbie, 61 Ill. App. 396: 851.
 v. Huddleston, 21 Ind. App. 621: 159.
 v. Kennedy, 20 Ind. App. 315: 1545.
 v. Kline, 29 Ind. App. 390: 92, 1639, 1654.
 v. Munsell, 192 Ill. 430: 1457, 1472.
 v. Nowlin, 163 Ind. 497: 1430.
 v. Ohio Postal Tel. Cable Co., 68 Ohio St. 306: 774, 1042, 1045, 1046, 1284, 1285.
 v. Patterson, 67 Ill. App. 351: 449, 1650, 1659.
 v. Polecat Dr. Dist., 213 Ill. 83: 501, 507, 574, 704, 1047.
 Cleveland etc. R. R. Co. v. Porter, 210 U. S. 177: 11, 464.
 v. South, 78 Ohio St. 10: 709, 715.
 v. Speer, 56 Pa. St. 325: 255.
 v. Stackhouse, 10 Ohio St. 567: 1547.
 v. Urbana etc. Ry. Co., 5 Ohio C. C. (N. S.) 583: 328, 765.
 v. Wisehart, 162 Ind. 208: 92, 1445, 1454.
 Click v. Lamar Co., 79 Tex. 121: 865.
 Clifford v. Eagle, 35 Ill. 444: 1366.
 Clifford et al. Appellants, 59 Me. 262: 1082.
 Clift v. Brown, 95 Ind. 53: 980.
 Clifton Heights v. Kent Mfg. Co., 220 Pa. St. 585: 297.
 Cline v. Cornwall, 21 Grant Ch. 129: 356.
 v. Stock, 71 Neb. 70: 1523, 1603.
 Clinical Instruction Co. v. New York El. R. R. Co., 81 Hun 608: 1302.
 Clinkingbeard v. St. Joseph, 122 Mo. 641: 630, 633, 1308.
 Clinton v. Cedar Rapids & Mo. River R. R. Co. 24 Ia. 455: 251, 321.
 v. Clinton & Lyons Horse Ry. Co., 37 Ia. 61: 268, 321.
 v. Walliker, 98 Ia. 655: 734.
 Clinton Ave., Matter of, 57 App. Div. 166: 515, 539, 739, 806, 807.
 Clinton Ave., Matter of, 107 N. Y. 624: 515, 539, 739, 806, 807.
 Clinton Tp. Road, 3 Pa. Co. Ct. 170: 1091, 1100, 1101, 1384.
 Close v. Samm, 27 Ia. 503: 1109.
 Clothier v. Webster, 12 C. B. N. S. 790: 1457.
 v. Webster, 104 E. C. L. R. 789: 1457.
 Clough v. Unity, 18 N. H. 75: 1683.
 Cloure v. Canada So. R. R. Co., 4 Ont. 28: 850.
 Cloverdale v. Smith, 128 Cal. 230: 154.
 Clowes Private Road, 31 Pa. St. 12: 1165.
 Clowe's Road, 2 Grant's Cases, 129: 1390.
 Cloyes v. Middlebury Elec. Co., 80 Vt. 109: 92, 1604, 1612, 1617.
 Clute v. Carr, 20 Wis. 531: 858.
 v. Fisher, 65 Mich. 48: 109.
 Clymer v. Roberts, 220 Pa. St. 162: 368.
 C. N. O. & S. P. Ry. Co., In re, 19 Ohio C. C. 308: 384.
 Coalville Pass. R. R. Co. v. Wilkes-Barre Southside R. R. Co. 5 Luzerne Leg. Reg. Rep. 340: 197.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Dubuque, 68 Iowa 550: 603.
 v. Iowa, 68 Ia. 550: 616.
 v. New York, 7 Cow. 585: 14.
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 v. Clarence Ry. Co., 1 Russ. & Mynle, 181: 1601.
- Coatsville etc. St. Ry. Co. v. Uwchlan St. Ry. Co., 18 Pa. Super. Ct. 524: 910.
- Coatsworth v. Lehigh Val. Ry. Co., 115 App. Div. 7: 1596.
 v. Lehigh Val. R. R. Co., 156 N. Y. 451: 247, 255, 260, 324, 1580.
- Cobb v. Boston, 112 Mass. 181: 1147, 1148, 1221.
 v. Boston, 109 Mass. 438: 1121, 1221, 1271, 1276.
 v. Davenport, 32 N. J. L. 369: 109.
 v. Davenport, 33 N. J. L. 223: 109.
 v. Illinois etc. Co., 68 Ill. 233: 1570, 1574.
 v. Smith, 16 Wis. 661: 1537.
 v. Warren St. Ry. Co., 218 Pa. St. 366: 248, 635, 1585.
- Coberly v. Butler, 63 Mo. App. 656: 872, 885.
- Cobia v. Ellis, 149 Ala. 108: 1603.
- Coburn v. Ames, 52 Cal. 385: 1460.
 v. New Telephone Co., 156 Ind. 90: 341, 343.
 v. Pacific Lumber & Mill Co., 46 Cal. 31: 1461, 1627.
 v. Sands, 150 Ind. 141: 1541.
 v. San Mater Co., 75 Fed. 520: 869, 876.
 v. Townsend, 103 Cal. 233: 1467.
- Cochran v. Missouri etc. Ry. Co., 94 Mo. App. 469: 1347.
- Cochrane v. Commonwealth, 175 Mass. 299: 1229.
 v. Malden, 152 Mass. 365: 169.
- Cockcroft's Appeal, 60 Conn. 161: 1397.
- Codman v. Evans, 5 Allen, 308: 191, 192.
- Coe v. Aiken, 61 Fed. 24: 814, 912, 1061, 1064, 1572.
 v. Columbus etc. R. R. Co., 10 Ohio St. 372: 1579.
 v. New Jersey M. Ry. Co., 30 N. J. Eq. 21: 854.
 v. New Jersey Midland Ry. Co., 31 N. J. Eq. 105: 908.
- Coe College v. Cedar Rapids, 120 Ia. 541: 876.
- Coffey County v. Venard, 10 Kan. 95: 363, 387, 388.
- Coffeyville M. & Gas Co. v. Citizens' Nat. Gas Co., 55 Kan. 179: 338, 1621.
- Coffin v. Left Hand Ditch Co., 6 Colo. 443: 70.
- Coffman v. St. Francis Dr. Dist., 83 Ark. 54: 11, 464.
- Coghill v. Mobile etc., R. R. Co., 92 Ala. 252: 870, 1468.
- Cogswell v. Essex Mill Corp., 6 Pick. 94: 544, 1155, 1524.
 v. New York, N. H. & H. R. R. Co., 103 N. Y. 10: 67, 210, 451.
- Cohen v. Alameda, 124 Cal. 504: 911.
 v. Cleveland, 43 Ohio St. 190: 226.
 v. Gray, 70 Cal. 85: 695.
 v. La Canada L. & W. Co., 142 Cal. 437: 78.
- v. Railroad Co., 34 Kan. 158: 1329.
- v. St. Louis etc. R. R. Co., 34 Kan. 158: 1235, 1320, 1346, 1347.
- v. United States, 162 Fed. 364: 76, 1342.
- Cohn v. Wansau Boom Co., 47 Wis. 314: 101.
- Cohoes v. Del. & H. Canal Co., 134 N. Y. 397: 878.
- Coker v. Atlanta etc. Ry. Co., 123 Ga. 483: 363, 372, 384, 392, 399, 405.
- Colbert v. Shepard, 89 Va. 401: 872, 882.
- Colburn v. Kittridge, 131 Mass. 470: 1343.
- Colby v. La Grange, 65 Fed. 554: 141, 724.
- Colby University v. Canandaigua, 69 Fed. 671: 783.
- Colclough v. Milwaukee, 92 Wis. 182: 226.
- Colecough v. Nashville etc. R. R. Co., 2 Head, 171: 952, 961, 963, 1523.
- Colden v. Botts, 12 Wend. 234: 1414.
- Cole v. Boston, 181 Mass. 374: 468, 1122, 1186.
 v. County Comrs., 78 Me. 532: 1069, 1070.
 v. Canaan, 29 N. H. 88: 1381.
 v. Drew, 44 Vt. 49: 357, 1489.
 v. Eastham, 133 Mass. 65: 138.
 v. Ellwood Power Co., 216 Pa. St. 283: 1269.
 v. Hadley, 162 Mass. 579: 183, 878.
 v. La Grange, 113 U. S. 1: 552, 554.
 v. Muscatine, 14 Ia. 296: 211, 603, 617, 1550.
 v. Peoria, 18 Ill. 301: 1385.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Shannon, 1 J. J. Marsh. 218: 377, 384, 387, 390, 1427.
 v. West London & Crystal Pal. Ry. Co., 27 Beav. 242: 822.
- Colegrove Water Co. v. Hollywood, 151 Cal. 425: 1488.
- Coleman v. Andrews, 48 Me. 562: 1017, 1032, 1387.
 v. Holden, 88 Miss. 798: 363, 406, 952, 1596.
 v. Moody, 4 Hen. & Munf. 1: 1029, 1105.
 v. State, 134 N. Y. 564: 866.
- Coles v. Midland Tel. & Tel. Co., 67 N. J. L. 490: 896, 971.
 v. Williamsburg, 10 Wend. 659: 1164, 1167, 1168, 1373.
- College Point v. Dennett, 5 N. Y. Supreme Ct. 217: 1234.
- Collier v. Chicago etc. R. R. Co., 48 Mo. App. 398: 147, 157.
 v. Union Ry. Co., 113 Tenn. 96: 527, 716.
- Collins v. Asheville Land Co., 128 N. C. 563: 190, 366, 880.
 v. Buffalo Furnace Co., 73 App. Div. 22: 366, 878, 888.
 v. Chartiers Valley Gas Co., 130 Pa. St. 111: 162.
 v. Chartiers Valley Gas Co., 131 Pa. St. 143: 162.
 v. Creely, 8 Jones L. 333: 722.
 v. Houghton, 4 Ired. L. 420: 1397, 1412.
 v. Philadelphia, 93 Pa. St. 272: 236.
 v. Rupe, 109 Ind. 340: 981, 982.
 v. Saratoga Springs, 70 Hun 583: 1029.
 v. Savannah, 77 Ga. 745: 432.
 v. South Staffordshire Ry. Co., 21 L. J. Ex. N. S. 247: 1116.
- Collis. Matter of, 76 App. Div. 368: 1379.
- Colon v. Lisk, 153 N. Y. 188: 486.
- Colonial City Traction Co. v. Kingston City R. R. Co., 153 N. Y. 540: 917, 1053.
 v. Kingston City R. R. Co., 154 N. Y. 493: 920.
- Colony v. Dublin, 32 N. H. 432: 696.
- Colorado Cent. R. R. Co. v. Allen, 13 Cal. 229: 831, 942.
 v. Humphreys, 16 Colo. 34: 1085, 1217.
- Colorado Consol L. & W. R. Co. v. Morris, 1 Colo. App. 401: 1638; Colorado Eastern R. R. Co. v. Chicago etc. Ry. Co., 141 Fed. 898: 1570, 1624.
 v. Union Pac. R. R. Co., 41 Fed. 293: 527, 534, 679, 714, 754, 800, 1068.
 v. Union Pac. R. R. Co., 94 Fed. 312: 930.
- Colorado Fuel & Iron Co. v. Four Mile Ry. Co., 29 Colo. 90: 706, 897, 1042, 1046, 1085, 1108, 1461.
- Colorado M. R. R. Co. v. Brown, 15 Colo. 193: 1176, 1200.
 v. Croman, 16 Colo. 381: 1137.
 v. Jones, 29 Fed. 193: 929, 931.
 v. Trevarthen, 1 Colo. App. 152: 639.
- Colorado So. etc. R. R. Co. v. Boagni, 118 La. 268: 1068, 1378.
- Colorado Springs v. Colorado etc. Ry. Co., 38 Colo. 107: 331.
- Colston v. St. Joseph, 106 Mo. App. 714: 348.
- Colton v. Rossi, 9 Cal. 595: 1162.
 v. New York El. R. R. Co., 7 Misc. 626: 1120, 1121.
- Columbia v. Melton, 81 S. C. 356: 1624.
- Columbia Delaware Bridge Co. v. Geisse, 35 N. J. L. 474: 1097.
 v. Geisse, 35 N. J. L. 558: 628.
 v. Geisse, 36 N. J. L. 537: 1097.
 v. Geisse, 38 N. J. L. 39: 964.
- Columbia etc. R. R. Co. v. Seattle, 6 Wash. 332: 118.
 v. Seattle, 33 Wash. 513: 882, 885.
- Columbia Heights Realty Co. v. Macfarland, 31 App. Cas. D. C. 112: 691, 1378.
- Columbia Val. R. R. Co. v. Portland etc. Ry. Co., 49 Wash. 88: 901.
- Columbia W. P. Co. v. Nunamaker, 73 S. C. 550: 1625.
- Columbus v. Bidlingmeier, 7 Ohio C. C. 136: 1109.
 v. Columbus etc. R. R. Co., 37 Ind. 294: 303, 1503, 1620.
 v. Columbus Gas Co., 76 Ohio St. 309: 361, 408, 410.
 v. Hydraulic Woolen Mills Co. 33 Ind. 435: 1597.
 v. McDaniel, 117 Ga. 823: 629.
 v. Storey, 33 Ind. 195: 210, 1597.
 v. Union Pac. R. R. Co., 137 Fed. 869: 399.
 v. Willard, 7 Ohio C. C. 113: 229, 442.
- Columbia etc. Bridge Co. v. Geise, 34 N. J. L. 268: 954.
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- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Richardson, 7 Ind. 543: 1017.
 v. Simpson, 5 Ohio St. 251: 1192.
 v. Williams, 53 Ohio St. 268: 835.
- Columbus Gas Lt. & Coke Co. v. Columbus, 50 Ohio St. 65: 238, 352.
- Columbus Tel. & Tel. Co. v. St. Louis etc. Ry. Co., 117 La. 199: 1052.
- Columbus & Western Ry. Co. v. Withrow, 82 Ala. 190: 638, 966, 1579.
- Columbus W. W. Co. v. Long, 121 Ala. 245: 588, 684, 988, 989, 1043, 1044.
- Colusa Co. v. Hudson, 85 Cal. 633: 1238, 1319.
- Colville v. St. Paul & Chicago Ry. Co., 19 Minn. 283: 1119, 1122, 1186, 1205, 1314, 1378.
- Colville v. Judy, 73 Mo. 651: 990.
 v. Langdon, 22 Minn. 565: 1464.
- Combs v. Smith, 78 Mo. 32: 1186.
- Comesky v. Postal Tel. Cable Co., 41 App. Div. N. Y. 245: 339, 1651.
 v. Suffern, 179 N. Y. 393: 609, 616, 1073.
 v. Suffern, 83 App. Div. 137: 609, 616, 1073.
- Comins v. Bradbury, 10 Me. 447: 1155.
- Commett v. Pearson, 18 Me. 344: 1101.
- Commissioner of Public Works, Matter of, 111 App. Div. 285: 690, 696, 1396.
- Commissioner of Public Works, Matter of, 185 N. Y. 391: 690, 696, 1396.
- Commissioners v. Allen, 25 Kan. 616: 1710.
 v. Barry, 66 Ill. 496: 1095.
 v. Banmgarten, 41 Ill. 254: 1100, 1101.
 v. Carthage, 27 Ill. 140: 1411, 1421.
 v. Cook, 86 N. C. 18: 1423.
 v. Durham, 43 Ill. 86: 1366.
 v. Espen, 12 Kan. 531: 1510, 1512, 1576.
 v. Green, 156 Ill. 504: 1572, 1602.
 v. Harper, 38 Ill. 103: 1017, 1032, 1095, 1413.
 v. Heed, 33 Kan. 34: 1028.
 v. Hoblit, 19 Ill. App. 259: 1020.
 v. Jacksonville, 36 Fla. 196: 171.
 v. Johnston, 71 N. C. 398: 1187.
 v. Judge, 13 Wend. 432: 1409.
 v. Judges, 7 Wend. 264: 1058.
 v. Judges, 10 Wend. 434: 1415.
 v. Judges, 17 Wend. 9: 683, 726.
 v. Judges, 25 Wend. 453: 1407.
- Commissioners v. Mallory, 21 Ill. App. 184: 982, 984.
 v. Moesta, 91 Mich. 149: 738, 1058, 1274.
 v. Murray, 1 Rich. L. 335: 1018, 1029.
 v. Quinn, 38 Ill. App. 192: 1403.
 v. Supervisors, 53 Ill. 320: 1401, 1402.
 v. Tarver, 25 Ala. 480: 933.
 v. Thompson, 18 Ala. 694: 933.
 v. Whitsett, 15 Ill. App. 318: 233.
- Commissioners' Court v. Bowie, 34 Ala. 461: 678, 1087, 1163.
 v. Street, 116 Ala. 28: 710, 1158, 1317, 1318, 1392.
 v. Thompson 18 Ala. 694: 1516.
 v. Traber, 25 Ala. 480: 1419.
- Comrs. etc. on Pequest River, Matter of, 39 N. J. L. 433: 564, 578.
- Comrs. etc. on Pequest River, Matter of, 41 N. J. L. 175: 564, 566, 578, 584.
- Comrs. etc. on Pequest River, Matter of, 42 N. J. L. 553: 578.
- Comrs. of Canal Fund v. Perry, 5 Ohio 58: 514.
- Commissioners of Highways v. Baer, 224 Ill. 259: 975.
 v. Barnes, 195 Ill. 43: 1398, 1412, 1416.
 v. Claw, 15 Johns. 537: 1013, 1014, 1405.
 v. Ellwood, 193 Ill. 304: 973.
 v. Green, 156 Ill. 504: 1574.
 v. Harrison, 108 Ill. 398: 1573.
 v. Husker, 133 Ill. App. 252: 1409.
 v. Jackson, 165 Ill. 17: 1531.
 v. Ludwick, 151 Mich. 498: 787.
 v. Meserole, 10 Wend. 122: 975.
 v. Newby, 31 Ill. App. 78: 1421.
 v. People, 38 Ill. 347: 1637.
 v. People, 2 Ill. App. 24: 1032.
 v. People, 4 Ill. App. 391: 1637.
 v. People, 61 Ill. App. 634: 1371, 1372.
 v. Quinn, 136 Ill. 604: 383, 400, 1402.
 v. Riker, 79 Mich. 551: 869.
 v. Smith, 217 Ill. 250: 1017, 1033, 1034, 1099, 1418.
 v. Snyder 15 Ill. App. 645: 1531.
 v. Sperling, 120 Mich. 493: 322.
 v. Sweet, 77 Ill. App. 641: 154.
 v. Young, 34 Ill. App. 178: 1614.
- Comrs. of Homochitto River v. Withers, 29 Miss. 21: 76, 100.
- Comrs. of Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446: 486.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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- v. Moesta, 91 Mich. 149: 738.
- v. Detroit etc. R. R. Co., 91 Mich. 291: 1290.
- v. Detroit etc. R. R. Co., 93 Mich. 58: 751.
- Comrs. of State Reservation at Niagara, Matter of, 15 Abb. N. C. 159: 106, 1168.
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- Comrs. of State Reservation, Matter of, 16 Abb. N. C. 159: 1397.
- Commissioners of State Reservation at Niagara, 37 Hun 537: 106, 923.
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- Comrs. of Washington Park, Matter of, 52 N. Y. 131: 978.
- Commonwealth v. Abbott, 160 Mass. 282: 912, 914, 1057.
- v. Alger, 7 Cush. 53: 136, 467, 470, 480, 557.
- v. Alger, 7 Cush. 84: 14.
- v. Allegheny Val. Ry. Co., 14 Pa. Supr. Ct. 336: 1643, 1644, 1645.
- v. Atlantic Coast Line Ry. Co., 106 Va. 61: 483.
- v. Bacon, 13 Bush (Ky.) 210: 15, 472.
- v. Bainbridge, 6 J. J. Marsh. 436: 1427.
- v. Barker, 140 Pa. St. 189: 882, 885.
- v. Beatty, 1 Watts, 382: 695.
- v. Beaver, 171 Pa. St. 542: 357.
- v. Blue Hill Turnpike, 5 Mass. 420: 1392, 1422.
- v. Bond, 214 Pa. St. 307: 427, 763.
- v. Boston, 12 Cush. 254: 1510.
- v. Boston Advertiser Co., 188 Mass. 348: 57, 67, 471, 540, 738, 1154.
- v. Boston etc. R. R. Co., 3 Cush. 25: 107, 1439.
- v. Boston etc. R. R. Co., 134 Mass. 211: 475.
- v. Boston & A. R. R. Co., 150 Mass. 174: 401.
- v. Boston Terminal Co., 185 Mass. 281: 746.
- v. Bowman, 3 Pa. St. 202: 420, 1494.
- Commonwealth v. Breed, 4 Pick. 460: 96.
- v. Broad St. Ry. Co., 219 Pa. St. 11: 362, 736, 791.
- v. Cambridge, 4 Mass. 627: 955, 1004.
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- v. Carpenter, 3 Mass. 268: 1436.
- v. Chapin, 5 Pick. 199: 103.
- v. Chase, 2 Mass. 170: 955, 1004, 1017.
- v. Comrs., 2 Mass. 489: 1316.
- v. Coombs, 2 Mass. 489: 955, 969, 1185, 1368.
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- v. Covington & Cinn. Bridge Co. (Ky.) 21 S. W. 1042: 481, 483.
- v. Covington & Cinn. Bridge Co., 154 U. S. 204: 481.
- v. Cutter, 156 Mass. 52: 492.
- v. Dudley, 5 T. B. Mon. 22: 1427.
- v. Eastern R. R. Co., 103 Mass. 254: 486.
- v. Egremont, 6 Mass. 491: 955, 1058.
- v. Ellis, 11 Mass. 462: 981.
- v. Emmers, 221 Pa. St. 298: 86, 473.
- v. Emmers, 33 Pa. Supr. Ct. 151: 84.
- v. Erie & North East R. R. Co., 27 Pa. St. 339: 727.
- v. Favis, 5 Rand. 691: 1459.
- v. Fisher, 1 P. & W. (Pa.) 462: 1156, 1157, 1360.
- v. Fitchburg R. R. Co., 8 Cush. 240: 711.
- v. Follett, 164 Mass. 477: 471.
- v. Frankfort, 92 Ky. 149: 252, 300, 310, 314, 316, 1582.
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- v. Hartford & New Haven R. R. Co., 14 Gray 379: 319.
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- v. Interstate Consolidated St. Ry. 187 Mass. 436: 484.
- v. Ipswich, 2 Pick. 70: 1100.
- v. Kevin, 202 Pa. St. 23: 479.
- v. Logan, 5 Litt. 286: 865.
- v. Low, 3 Pick. 413: 872.
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 v. Northeastern El. R. R. Co., 161 Pa. St. 409: 268, 719.
 v. Noxon, 121 Mass. 42: 1343.
 v. Parks, 155 Mass. 531: 457.
 v. Pennsylvania Canal Co., 66 Pa. St. 41: 15, 486.
 v. Penn. R. R. Co., 117 Pa. St. 637: 1643, 1645.
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 v. Peters, 3 Mass. 229: 969, 1004, 1013.
 v. Philadelphia, 2 Whart. 286: 1532.
 v. Philadelphia & R. R. Co., 135 Pa. St. 256: 883.
 v. Pittsburgh & Connellsville R. R. Co., 58 Pa. St. 26: 1173.
 v. Royce, 152 Pa. St. 88: 890, 891.
 v. Russell, 172 Pa. St. 506: 85, 1605.
 v. Sawin, 2 Pick. 547: 514.
 v. Sessions of Middlesex, 9 Mass. 388: 1185.
 v. Sheldon, 3 Mass. 188: 1017.
 v. Shoemaker, 14 Pa. Supr. Ct. 194: 366.
 v. Sisson, 178 Mass. 578: 479.
 v. Sisson, 189 Mass. 247: 866.
 v. Snyder, 2 Watts, 418: 625.
 v. Stevens, 10 Pick. 247: 779.
 v. Tewksbury, 11 Met. 55: 14, 470.
 v. Trent, 117 Ky. 35: 471.
 v. Uwehlan St. Ry. Co., 203 Pa. St. 608: 427, 763.
 v. Vrooman, 164 Pa. St. 306: 479.
 v. Weimer, 3 Met. 445: 1034.
 v. Westborough, 3 Mass. 406: 1028, 1093.
 v. West Boston Bridge, 13 Pick. 195: 1422.
 v. West Chester, 9 Pa. Co. Ct. 542: 272, 642.
 v. Young Men's Christian Asso., 169 Pa. St. 24: 105.
 Como v. Worcester, 177 Mass. 543: 1245.
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 v. Susquehanna R. R. Co., 3 Bland Ch. 386: 1163, 1165.
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 Conabeer v. New York Central etc. R. R. Co., 84 Hun 34: 1354.
 v. New York Cent. etc. R. R. Co., 156 N. Y. 474: 846, 849.
 Conan v. Ely, 91 Minn. 127: 1229, 1268.
 Conant, In re, 83 Me. 42: 1425.
 Conant's Appeal, 102 Me. 477: 1081.
 Conant v. Deep Creek etc. Irr. Co., 23 Utah 627: 934.
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 Concord, Petition of, 50 N. H. 530: 364, 383, 387.
 Concord etc. R. R. Co. v. Boston etc. R. R. Co., 68 N. H. 519: 762.
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 Concordia Cem. Assn. v. Minnesota etc. R. R. Co., 121 Ill. 199: 1138, 1267.
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 Concord R. R. Co. v. Greeley 17 N. H. 47: 23, 495, 496, 498, 500, 506, 524, 534, 684, 1029.
 v. Greely, 20 N. H. 157: 1428.
 v. Greely 23 N. H. 237: 1138, 1146.
 Concord Tp's Appeal, 1 Walker's Pa. Supm. Ct. 195: 780, 1643.
 Condemnation of Land at Nahant, In re, 128 Fed. 185: 780, 1346.
 Condemnation of Land for New State House, In re, 19 R. I. 382: 1221, 1329.
 Condict v. Ramsey, 65 N. J. L. 503: 1102.
 Condon v. County Comrs., 89 Me. 409: 1028.
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 Coney Island etc. R. R. Co., Matter of, 12 Hun 451: 913.
 Conger v. Burlington & S. W. R. R. Co., 41 Ia. 419: 1625, 1629.
 v. Hudson Riv. R. R. Co., 12 N. Y. 190: 1102.
 v. New York etc. R. R. Co., 120 N. Y. 29: 843, 852.
 Conklin v. Keokuk, 73 Ia. 343: 602, 604, 619, 965, 1405.
 v. Mackinaw City, 120 Mich. 67: 878, 887, 890.
 v. New York etc. Ry. Co., 102 N. Y. 107: 211, 226, 319.
 v. Old Colony R. R. Co., 154 Mass. 155: 809.
 Conkling v. Zerga, 72 Hun 134: 1649, 1659.
 Connable v. Chicago etc. R. R. Co., 60 Ia. 27: 966, 1403.
 Connecticut & Passumpsic Rivers R. R. Co. v. Holton, 32 Vt. 43: 1477, 1481.

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- v. Woods, 13 Ida. 591: 1047, 1050, 1071.
- Conrad v. County of Lewis, 10 W. Va. 784: 993, 1022.
- v. Smith, 32 Mich. 429: 336, 1487, 1594.
- v. Waples, 96 U. S. 279: 19.
- v. West End Hotel & Land Co., 126 N. C. 776: 420, 878.
- Conshohocken Ave., 1 Walker's Pa. Supm. Ct. 424: 1098.
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- v. Huntsinger 12 Ind. App. 285: 1112, 1409.
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- v. Emrie, 4 Ind. 209: 234.
- v. Hagerstown Canal Co., 2 Ind. 588: 1522.
- v. Springfield etc. R. R. Co., 81 Ill. 282: 834, 1354.
- v. Tate, 107 Ind. 171: 1385.
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- v. Bath. L. R. 6 Eq. Cas. 177: 372, 382, 391.
- v. Boone Subn. Elec. Ry. Co., 122 la. 437: 1208.
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- v. Chicago etc. R. R. Co., 83 Ia. 278: 1293, 1304.
- v. Covert, 71 Mich. 249: 1017, 1520.
- v. New York El. R. R. Co., 3 Miscl. 248: 1151, 1301, 1302.
- v. New York El. R. R. Co., 144 N. Y. 115: 1150, 1151, 1302.
- v. Quick, 127 Ind. 477: 385, 386, 390, 402.
- v. Seaboard Air Line Ry. Co. 107 Va. 32: 151.
- v. South Park Comrs., 61 Ill. 115: 539, 1115, 1162, 1222, 1324, 1392.
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 Coolman v. Fleming, 82 Ind. 117: 995, 996, 1028.
 Coolville Pass. R. R. Co. v. Wilkes-Barre South Side R. R. Co., 5 Luzerne Leg. Reg. Rep. 340: 299.
 Coombs v. County Comrs., 68 Me. 484: 514.
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 v. Salt Lake etc. R. R. Co., 9 Utah 322: 1581, 1617.
 Coon v. Mason Co., 22 Ill. 666: 1398.
 Cooper's Application, 28 Hun 515: 539.
 Cooper v. Alden, Harr. Mich. 72: 297, 308, 315.
 v. Anniston etc. R. R. Co., 85 Ala. 106: 731, 1624.
 v. Board of Works, 108 Eng. Com. Law 181: 1014.
 v. Chester R. R. Co., 19 N. J. Eq. 199: 1463.
 v. Dallas, 83 Tex. 239: 153, 1309, 1339.
 v. Hall, 5 Ohio 320: 94.
 v. Manhattan R. R. Co., 85 Hun 217: 1305.
 v. Monterey Co., 104 Cal. 437: 881, 886.
 v. St. Louis etc. R. R. Co., 123 Mo. App. 141: 160.
 v. Scranton City, 21 Pa. Supr. Ct. 17: 631, 1251, 1523, 1525.
 v. Williams, 4 Ohio 253: 78, 523.
 v. Williams, 5 Ohio 391: 522.
 Cooper etc. Application of, 93 N. Y. 507: 1389.
 Coosa Riv. Steamboat Co. v. Barclay, 30 Ala. 130: 475.
 Copeutt v. Yonkers, 83 Hun 178: 912, 914.
 Copeland v. Packard, 16 Pick. 217: 514, 1028.
 Coquard v. Boehmer, 81 Mich. 445: 1027.
 Corbin v. Cedar Rapids etc. Ry. Co., 66 Ia. 73: 1669, 1700.
 v. Marsh, 2 Duv. Ky. 463: 18, 807, 1154.
 v. Wisconsin etc. R. R. Co., 66 Ia. 269: 1046, 1073.
 Corby v. Chicago etc. R. R. Co., 150 Mo. 457: 180, 311, 1582.
 Corcoran v. Benicia, 96 Cal. 1: 235.
 v. Chicago etc. R. R. Co., 149 Ill. 291: 1581.
 v. Chicago etc. R. R. Co., 37 Ill. App. 417: 1581.
 Cord v. High, 24 Ia. 336: 236.
 Core v. Norfolk, 99 Va. 190: 894.
 Coreghino v. Ore. Short Line R. R. Co., 26 Utah 467: 1590.
 Corey v. Buffalo etc. R. R. Co., 23 Barb. 482: 246, 248, 324.
 v. Chicago etc. R. R. Co., 100 Mo. 282: 893, 898, 959, 980, 982, 1091.
 v. Probate Judge, 56 Mich. 524: 1017, 1036, 1420.
 v. Swagger, 74 Ind. 211: 990, 1406.
 v. Swagger, 74 Ind. 481: 979, 1150.
 v. Wrentham, 164 Mass. 18: 1683.
 Cork etc. R. R. Co. v. Harnett, 16 Ir. Ch. Rep. 268: 1566.
 v. Harnett, 5 Irish Rep. Eq. 308: 1566.
 Corley v. Kennedy, 28 Ill. 143: 1017.
 Cornelius v. Glen, 7 Jones L. 512: 15, 486.
 Cornell v. Crawford Co., 11 Ark. 604: 1412.
 Corning v. Woolner, 206 Ill. 190: 182, 888.
 Cornish v. Milwaukee etc. R. R. Co., 60 Wis. 476: 929.
 Cornplanter Tp. Road, No. 1: 26 Pa. Super. Ct. 20: 982.
 Cornplanter Tp. Road, 26 Pa. Supr. Ct. 29: 1029.
 Cornville v. Co. Comrs., 33 Me. 237: 1370.
 Cornwall v. Louisville etc. R. R. Co., 87 Ky. 72: 737, 745, 749, 1262, 1492.
 v. Louisville etc. R. R. Co., 104 Ky. 29: 1671.
 Corporation v. Manhattan Co., 1 Caines Rep. 507: 1020, 1081, 1377.
 Corporation Commission v. Atl. Coast Line R. R. Co., 137 N. C. 1: 488.
 v. Atl. Coast Line R. R. Co., 139 N. C. 126: 488.
 v. Seaboard Air Line R. R. Co., 127 N. C. 283: 481.
 v. Seaboard Air Line R. R. Co., 140 N. C. 239: 488, 489, 533.
 Corr v. Philadelphia, 14 Pa. Dist. Ct. 35: 1504.
 v. Philadelphia, 212 Pa. St. 123: 1503: 1504.

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v. London etc. Ry. Co., 5 M. & G. 219: 1029.
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- Cortelyou v. Van Brundt, 2 Johns. 357: 1486.
- Cortland & Homer Horse R. R. Co., Matter of, 98 N. Y. 336: 1281, 1438.
- Corwin v. Cowan, 12 Ohio St. 629: 808, 1506.
v. Erie R. R. Co., 84 App. Div. 555: 93, 1607.
v. Erie R. R. Co., 178 N. Y. 590: 93, 1607.
v. St. Louis etc. R. R. Co., 51 Kan. 451: 1519.
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- Coster v. Albany, 52 Barb. 276: 624.
v. Albany, 43 N. Y. 399: 363, 370, 371, 380, 388, 625, 666.
v. New Jersey R. R. Co., 23 N. J. L. 227: 893, 1021, 1033.
v. New Jersey etc. R. R. Co., 24 N. J. L. 730: 748, 1097, 1347.
v. Tide Water Co., 18 N. J. Eq. 54: 14, 497, 498, 501, 565, 566, 577, 578, 584, 675.
v. Tide Water Co., 18 N. J. Eq. 518: 14, 675.
- Costigan v. Pennsylvania R. R. Co., 54 N. J. L. 233: 446, 455, 456, 847, 856, 1476.
- Cotanch v. Grover, 57 Hun 272: 1490.
- Cotes v. Davenport, 9 Ia. 227: 235, 604, 618.
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- Cottle v. New York etc. R. R. Co., 27 App. Div. N. Y. 604: 1526.
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v. Miss. & R. Riv. Boom Co., 19 Minn. 497: 100.
v. Mississippi & Rum River Boom Co., 22 Minn. 372: 101, 543, 677.
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- Couch, Ex parte, 14 Ark. 337: 1412.
- Coulter v. Hunter, 4 Rand. 58: 723.
- Council Bluffs etc. R. R. Co. v. Bentley, 62 Ia. 446: 898.
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v. Humphrey, 47 Ga. 565: 1568.
v. McGee, 20 Ohio C. C. 201: 1674.
- County Court v. Griswold, 58 Mo. 175: 539, 676, 814, 1043.
- Coutant v. Catlin, 2 Sandf. 485: 1253.
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v. Cranford, 141 N. Y. 521: 77.
v. O'Connor, 8 Watts 470: 104.
v. Pittsburg etc. Ry. Co., 204 Pa. St. 341: 864, 869.
- Covey v. Buffalo etc. R. R. Co., 23 Barb. 482: 244.
v. Edgewood, 18 Pa. Supr. Ct. 216: 1620.
v. Probate Judge, 56 Mich. 524: 941.
- Covington v. Berry, 120 Ky. 582: 141, 1335.
v. McDonald, 94 Ky. 1, 879.
v. Southgate, 15 B. Mon. 491: 465.
v. Taffee, 24 Ky. L. R. 373: 630, 1306, 1307.
v. Worthington, 88 Ky. 206: 13, 464, 1220.
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v. Magruder, 63 Ohio St. 455: 7, 748.
- Covington etc. R. R. & Bridge Co. v. Kleymeier, 105 Ky. 609: 253, 310, 448, 654, 661, 1648, 1657.
- Covington & L. Turnpike R. Co. v. Sandford (Ky.) 20 S. W. 1031: 481, 483.
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- Covington Short Route Transfer Co. v. Piel, 87 Ky. 267: 1159, 1166, 1274, 1467.
v. Piel, 9 Ky. L. R. 665: 1467.
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 v. Covington & Cinn. St. R. R. Co., 1 Ky. 341: 426, 762, 807.
 v. Covington etc. R. R. Co., 1 Ky. L. R. 318: 301.
- Cowan's Case, 1 Overton 310: 700.
- Cowan v. Glover, 3 A. K. Marsh. 356: 1083.
 v. Penobscott R. R. Co., 44 Me. 140: 690.
 v. Southern R. R. Co., 118 Ala. 354: 830, 942, 1541, 1542, 1630.
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 v. North Plainfield, 63 N. J. L. 61: 739.
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 v. Thayer, 5 Met. 253: 95.
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 v. Commissioner of Highways, 83 Mich. 193: 993, 1027.
 v. Comrs. of Highways, 194 Ill. 355: 865, 1363, 1515.
 v. Cummings, 33 Ga. 549: 19.
 v. Easter, 1 Porter 130: 909.
 v. Hannibal etc. R. R. Co., 174 Mo. 588: 147, 160.
 v. Howell, 108 Tenn. 130: 69, 72.
 v. Little Rock & M. R. R. Co., 55 Ark. 454: 933.
 v. Louisville etc. R. R. Co., 48 Ind. 178: 200, 242, 246, 251, 279, 315, 1580.
 v. Mason City etc. R. R. Co., 77 Ia. 20: 1210.
 v. Phila. etc. R. R. Co., 215 Pa. St. 506: 1189, 1201, 1229, 1233, 1234, 1241.
 v. State, 3 Blaekf. 193: 103.
 v. Tifton, 18 Mo. App. 450: 708.
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 v. Warrior So. Ry. Co., 137 Ala. 553: 1473, 1497.
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 v. Norfolk etc. R. R. Co., 136 N. C. 49: 79, 167.
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 Craig v. Allegheny, 53 Pa. St. 477: 1500.
 v. Lewis, 110 Mass. 377: 858.
 v. North, 3 Met. (Ky.) 187: 1364.
 v. Rochester City etc. R. R. Co., 39 Barb. 494: 269, 273, 1586.
 v. Rochester City etc. R. R. Co., 39 N. Y. 404: 200, 1586.
 v. Supervisors, 10 Wend. 585: 733.
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 v. McElheney, 146 Mich. 191: 1577.
 v. Taunton, 110 Mass. 421: 1411.
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 v. Roselle, 236 Ill. 97: 82, 1606.
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- Crater v. Fritt, 44 N. J. L. 374: 1206, 1377.
- Craugh v. Harrisburg, 1 Pa. St. 132: 1254.
- Crawford v. Delaware, 7 Ohio St. 459: 178, 207, 213, 215, 220.
 v. Comrs. of Elk Co., 32 Kan. 555: 1017, 1033.
 v. Metropolitan El. R. R. Co., 120 N. Y. 624: 1121.
 v. Rutland, 52 Vt. 412: 1042, 1045.
 v. Topeka, 53 Kan. 756: 471.
 v. St. Francis Levee Dist. 79 Ark. 606: 830, 952.
 v. Snowden, 3 Littell, 288: 1017, 1030.
 v. Valley R. R. Co., 25 Gratt. 467: 1385.
- Crawford Co. v. Hathaway, 60 Neb. 754: 69.
 v. Hathaway, 61 Neb. 317: 69.
 v. Hathaway, 67 Neb. 325: 69, 70, 71, 72, 587.
- Crawford Paving Co. v. Baum, 97 Va. 501: 1379.
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- Crawfordsville R. R. Co. v. Wright, 5 Ind. 252: 1634.
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- Creal v. Keokuk, 4 G. Greene (Ia.) 47: 211, 238.
- Crear v. Crossly, 40 Ill. 175: 516, 520.
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 v. Water Comrs., 143 N. C. 171: 1267.

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 v. Snyder, 117 Mo. 167: 1511.
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 Crescent Ave. Opening, Matter of, 183 N. Y. 14: 1557.
 Crescent City etc. Co. v. Butchers Union etc. Co., 4 Wood C. C. 96, 15.
 Crescent City R. R. Co. v. New Orleans etc. R. R. Co., 48 La. An. 856: 427.
 Crescent Pipe Line Co., 2 Pa. Dist. Ct. 93: 918.
 Crescent Tp. v. Pittsburg etc. R. R. Co., 210 Pa. St. 334: 1511.
 Creston W. W. Co. v. McGrath, 89 Ia. 502: 1060, 1064, 1074, 1075.
 Creswell v. Comrs., 24 Ala. 282: 958.
 Crewson v. Grand Trunk R. R. Co., 27 U. C. Q. B. 68: 158.
 Cribbs v. Benedict, 64 Ark. 555: 13, 979, 1018, 1155.
 Crill v. Rome, 47 How. Pr. 398: 106, 138.
 Crimmins v. Met. El. R. R. Co., 87 Hun 187: 1665.
 Crimson v. Deck, 84 Ia. 344: 1487, 1594.
 Crippen v. White, 28 Colo. 298: 70.
 Crise v. Auditor, 17 Ark. 572: 1510, 1531, 1532.
 Crittenden v. Wilson, 5 Cow. 165: 91, 1523.
 Crocker v. Boston Elec. Lt. Co., 180 Mass. 516: 361, 491.
 v. New York, 15 Fed. 405: 136.
 Crockett v. Boston, 5 Cush. 182: 860, 1073.
 v. Millett, 65 Me. 191: 1524.
 Croft v. Bennington etc. R. R. Co., 64 Vt. 1: 1029, 1571.
 v. London & North W. Ry. Co., 3 B. & S. 436: 846.
 Crolley v. Minneapolis & St. Louis Ry. Co., 30 Minn. 541: 1497, 1498, 1503.
 Cromer v. Logansport, 38 Ind. App. 661: 154.
 Cromie v. Board of Trustees, 71 Ind. 208: 808.
 Crompton Carpet Co. v. Worcester, 119 Mass. 375: 1423.
 v. Worcester, 123 Mass. 498: 938.
 Cromwell v. Brown, 50 Conn. 470: 363.
 Cromwell Ave. Matter of, 96 App. Div. 424: 1325.
 Crooke v. Flatbush Water Works Co., 27 Hun 72: 336.
 Crooke v. Flatbush Water Works Co., 29 Hun 245: 336.
 Crosbie v. Chicago etc. Ry. Co., 62 Ia. 189: 840, 841.
 Crosby v. Dracut, 109 Mass. 206: 1632.
 v. Hanover, 36 N. H. 404: 513, 701, 781, 788.
 v. Owensboro etc. R. R. Co., 10 Bush 288: 249, 252.
 v. Smith, 19 Wis. 449: 1537.
 Cross v. Kansas City, 90 Mo. 13: 1353.
 v. Morristown, 18 N. J. Eq. 305: 349, 1266, 1491, 1594.
 v. Morristown, 18 N. J. Eq. 313: 1487.
 v. Plymouth, 125 Mass. 557: 1115, 1186, 1216.
 v. St. Louis etc. Ry. Co., 77 Mo. 318: 254, 307, 311.
 Crossett v. Janesville, 28 Wis. 420: 236.
 v. Owens, 110 Ill. 378: 1091, 1094.
 Crossly v. O'Brien, 24 Ind. 325: 788.
 Crossman v. Furman, 57 App. Div. 393: 479.
 v. Lurman, 171 N. Y. 329: 479.
 Crosstown St. R. R. Co. Matter of, 68 Hun 236: 305.
 Crouse v. Whitlock, 46 Ill. App. 260: 1028, 1520.
 Crow v. Judy, 139 Ind. 562: 698.
 Crowder v. Sullivan, 128 Ind. 486: 346, 408, 411.
 Crowe v. Charlestown, 62 W. Va. 91: 631.
 Crowell v. Londonderry, 63 N. H. 42: 713, 818, 1087.
 Crowley v. Board of Comrs., 14 Mon. 292: 1086, 1362, 1511.
 Crownier v. Watertown & Rome R. R. Co., 9 How. Pr. 457: 1671.
 Cruger v. Hudson River R. R. Co., 12 N. Y. 190: 925, 1018, 1029, 1101.
 Crum v. Hargrove, 119 Ga. 471: 510.
 Crume v. Wilson, 104 Ind. 583: 1671.
 C. Scheerer & Co. v. Hutton, 7 Cal. App. 524: 1393, 1431, 1510.
 C. Street, 118 Pa. St. 171: 734, 1396.
 Cubit v. O'Dett, 51 Mich. 347: 154, 233.
 Cuckfield Burial Board, In re, 24 L. J. Ch. N. S. 585: 747.
 Culbertson v. Culbertson, 17 Okla. 370: 1486.
 Culbertson & Blair Provision Co. v. Chicago, 111 Ill. 651: 1108, 1138, 1553.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Culley v. Cunningham, 96 Ala. 583: 1408.
 Cullough v. St. Paul etc. R. R. Co., 52 Minn. 12: 440.
 Culpepper County v. Gorrell, 20 Gratt. 484: 681, 703, 824, 1024.
 Culver v. Chicago etc. R. R. Co., 38 Mo. App. 130: 93, 1639.
 v. Fair Haven, 67 Vt. 163: 721.
 Cumberland v. Willison, 50 Md. 138: 234.
 Cumberland etc. Canal Co. v. Hitchings, 65 Me. 140: 1650, 1658.
 Cumberland etc. R. R. Co. v. Penn. R. R. Co., 57 Md. 267: 1610.
 Cumberland Telephone Co. v. United Elec. Co., 17 Fed. 825: 682.
 Cumberland Tel. & Tel. Co. v. Avritt, 120 Ky. 34: 333, 334, 341.
 v. Cassedy, 78 Miss. 666: 350.
 v. Foster, 117 Ky. 389: 443.
 v. Louisville Home Tel. Co., 110 Fed. 593: 418.
 v. Louisville Home Tel. Co., 110 Fed. 596: 418.
 v. Morgan's etc. Co., 112 La. 287: 1048, 1052.
 v. United Elec. R. R. Co., 42 Fed. 272: 417, 1622.
 v. United Electric R. R. Co., 93 Tenn. 492: 272, 418, 911.
 v. Yazoo etc. R. R. Co., 90 Miss. 686: 685, 724.
 Cumberland Valley R. R. Co. v. Martin, 100 Md. 165: 1086.
 v. McLanahan, 59 Pa. St. 23: 524, 1523.
 v. Rhoadarmer, 107 Pa. St. 214: 625.
 Cuming v. Prang, 24 Mich. 514: 1489.
 Cumming v. St. Louis, 90 Mo. 259: 1618.
 Cummings v. Dixon, 139 Mich. 269: 211, 606.
 v. Huse etc. Co., 156 Mo. 28: 1618.
 v. Hyatt, 54 Neb. 35: 587.
 v. Noble Co. Comrs., 13 Okla. 21: 1407.
 v. Peters, 56 Cal. 593: 536, 587.
 v. Railroad Co., 70 Mo. 570: 475.
 v. St. Louis, 90 Mo. 259: 1493.
 v. Union El. R. R. Co., 169 Ill. 33: 1585.
 v. Williamsport, 84 Pa. St. 472: 1187, 1228, 1404.
 Cummings Realty & Inv. Co. v. Deere & Co., 208 Mo. 66: 378, 384, 392.
 Cummins v. Des Moines & St. Louis Ry. Co., 63 Ia. 397: 1139, 1210, 1245, 1330, 1332.
 v. Seymour, 79 Ind. 491: 234, 336.
 v. Shields, 34 Ind. 154: 821, 1407.
 v. Summendumwot Lodge, 9 Kan. App. 153: 309.
 Cunard v. Manhattan R. R. Co., 1 Misc. 151: 1296, 1301.
 Cunningham v. Campbell, 33 Ga. 625: 19.
 v. Fitzgerald, 138 N. Y. 165: 878.
 v. Hendricks, 89 Wis. 632: 876, 882, 883, 884, 885.
 v. Pacific R. R. Co., 61 Mo. 33: 893, 894.
 v. Rome R. R. Co., 27 Ga. 499: 1478, 1618.
 v. San Saba Co., 1 Tex. Civ. App. 480: 867, 870.
 Cupp v. Comrs. of Seneca Co., 19 Ohio St. 173: 1011, 1101, 1709.
 Cureton v. South Bound R. R. Co., 59 S. C. 371: 830, 953, 1546.
 Curran, Matter of, 38 App. Div. N. Y. 82: 817.
 Curran v. East Pittsburg, 20 Pa. Supr. Ct. 590: 1523, 1525, 1639.
 v. Louisville, 83 Ky. 628: 1503.
 v. Shattuck, 24 Cal. 427: 706, 966, 1018, 1155, 1162, 1570, 1579.
 v. Sibley County, 47 Minn. 313: 576, 735, 1018.
 v. Sibley Co., 56 Minn. 432: 576, 735, 1018.
 Curren, Matter of, 25 N. Y. Misc. 432: 1034.
 Currie v. Atlantic City, 66 N. J. L. 140: 302.
 v. Atlantic City, 66 N. J. L. 671: 302.
 v. Jersey City etc. R. R. Co., (N. J.) 1462.
 v. Natchez etc. R. R. Co., 61 Miss. 725: 858, 1634, 1636.
 v. Natchez etc. R. R. Co., 62 Miss. 506, 858, 1636.
 v. New York Transit Co., 66 N. J. Eq. 313: 806, 807, 812, 1497.
 v. Waverly etc. R. R. Co., 52 N. J. L. 381: 1132, 1210, 1235, 1243, 1329.
 Currier v. Grafton, 28 N. H. 73: 1437.
 v. Marietta & Cincinnati R. R. Co., 11 Ohio St. 228: 813.
 Curry v. Jones, 4 Del. Ch. 559: 1100, 1571.
 v. Mt. Sterling, 15 Ill. 320: 678, 1194.
 v. Rosell, 99 Mich. 524: 400, 1004

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Rochester R. R. Co., 78 Hun 555: 330.
 v. Columbus etc. R. R. Co., 34 Pa. Co. Ct. 52: 816.
- Curtis v. Columbus etc. R. R. Co., 34 Pa. Co. Ct. 52: 816.
 v. Columbus etc. R. R. Co., 16 Pa. Dist. Ct. 1017: 716.
 v. Eastern R. R. Co., 14 Allen, 55: 153.
 v. Pocahontas County, 72 Ia. 151: 989.
 v. Portland, 60 Me. 55: 1409, 1672.
 v. St. Paul etc. R. R. Co., 20 Minn. 28: 1119, 1120, 1122, 1128, 1312, 1314, 1472.
 v. St. Paul etc. R. R. Co., 21 Minn. 497: 1392.
 v. Water Co., 20 Or. 34: 1617.
- Curtiss v. Ayrault, 47 N. Y. 73: 146.
 v. Smith, 35 Conn. 156: 899.
- Curtiss St.. Matter of, 1 Sheldon (N. Y.) 425: 1097, 1393.
- Curwensville, Appeal of, 129 Pa. St. 74: 707, 1569.
- Cushing v. Boston, 144 Mass. 317: 1341.
 v. Gay, 23 Me. 9: 1058, 1367, 1368.
 v. Nantucket Beach R. R. Co., 143 Mass. 77: 1152.
 v. Webb, 102 Me. 157: 969, 980, 1510.
- Cushing-Wetmore Co. v. Gray, 152 Cal. 118: 179, 190, 351, 385.
- Cushman v. Smith, 34 Me. 247: 59, 434, 1163, 1635.
 v. Wood, 6 Hun 520: 1558.
- Cuthbert v. Kuhn, 3 Whart. 357: 1255.
- Cutler v. New York, 92 N. Y. 166: 1326.
 v. Sours, 80 Ill. App. 618: 1673.
- Cuyler v. Rochester, 12 Wend. 165: 817.
- C. W. etc. R. R. Co. v. Clinton County, 1 Ohio St. 101-2: 462.
 v. Comrs., 1 Ohio St. 77: 10.
- Cypress Pond Dr. Co. v. Hooper, 2 Met. (Ky.) 350: 467, 494, 570, 575, 583.
- Cyr v. Dufour, 68 Me. 492: 975.
- D.
- Daggy v. Coats, 19 Ind. 250: 1407.
 v. Green, 12 Ind. 303: 976, 1082.
- Dahlman v. Milwaukee, 131 Wis. 427: 230, 442.
- Daiber v. Scott, 3 Ohio C. C. 313: 878, 890.
- Daigneault v. Woonsocket, 18 R. I 378: 1150.
- Dailey v. State, 51 Ohio St. 348: 332, 339, 1487, 1488, 1667.
- Daily v. Swope, 47 Miss. 367: 586.
- Dairy v. Iowa Cent. Ry. Co., 113 Ia. 716: 320, 351, 372, 383.
- Dakota Co. v. Cheney, 22 Neb. 437: 577.
- Dale v. St. Joseph, 59 Mo. App. 566: 616, 618, 1306, 1337.
 v. Southern Ry. Co. 132 N. C. 705: 152, 1549.
- Daley v. St. Paul, 7 Minn. 390: 1681.
 v. Watertown, 192 Mass. 116: 154, 157.
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 v. Hallock, 44 Ore. 246: 990, 1056, 1060, 1068, 1072.
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 v. Kinnard (Tex. Supm.) 18 S. W. 1062: 92.
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- Dalrymple v. Whittingham, 26 Vt. 345: 1116, 1177, 1202, 1529.
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 v. Water Comrs. 49 Cal. 222: 700.
- Daly, In re, 139 Cal. 216: 469.
- Daly, In re, 88 Hun. 188: 1369.
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- Daly, Matter of, 23 App. Div. N. Y. 232: 1369.
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 v. Georgia Southern etc. R. R. Co., 80 Ga. 793: 297, 298, 314.
- v. Smith, 18 App. Div. 194: 1229.
- Dalzell v. Davenport, 12 Ia. 437: 603, 1123, 1125.
- Damkoehler v. Milwaukee, 124 Wis. 144: 230, 441, 442.
- Damon v. Baldwin, 101 Minn. 414: 1024.
 v. Baltimore R. R. Co., 119 Pa. St. 287: 817, 818.
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- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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40 Cal. 154: 706, 933, 1358.
 Dana v. Boston, 176 Mass. 97: 606.
 v. Craddock, 66 N. H. 593: 1238.
 Danforth v. Bangor, 85 Me. 423: 877,
 1326.
 v. Groton Water Co., 176 Mass.
 118: 733.
 v. Suydam, 4 N. Y. 66: 949.
 Daniel v. Ft. Worth etc. Ry. Co., 96
 Tex. 327: 449, 655, 661.
 Daniels v. Almy, 18 R. I. 244: 880,
 882.
 v. Chicago etc. R. R. Co., 41 Ia.
 52: 1347, 1352.
 v. Chicago & North Western R. R.
 Co., 35 Iowa. 129: 1625.
 v. Citizens Savings Institution,
 127 Mass. 534: 95.
 v. Smith, 38 Mich. 660: 1033.
 Dantzer v. Indianapolis Union R. R.
 Co., 141 Ind. 604: 179, 190, 191,
 370, 371, 383, 388, 398.
 Danube, Comrs. of, Ex parte, 1 Cow.
 142: 1409.
 Danvers v. County Comrs., 2 Met.
 185: 1082.
 Danville v. McAdams, 153 Ill. 216:
 895.
 v. Schultz, 99 Ill. App. 287: 629.
 Dansville etc. R. R. Co. v. Hammond,
 77 Hun 39: 1437.
 v. Tidrick, 137 Ill. App. 553: 372,
 646, 1131, 1297, 1304.
 Danville etc. Road Co. v. Campbell,
 87 Ind. 57: 422.
 Danville, H. & W. R. R. Co. v. Com-
 monwealth, 73 Pa. St. 29: 255.
 Dargan v. Carolina Central R. R. Co.,
 113 N. C. 596: 1710.
 Darling v. Newport Elec. Lt. Co., 74
 N. H. 515: 350.
 Darling's Admr. v. Blackstone Mfg.
 Co., 16 Gray 187: 965, 1073.
 Darlington v. Allegheny City, 189 Pa.
 St. 202: 1128.
 v. Clond Co., 75 Kan. 810: 153.
 v. New York, 31 N. Y. 164: 476.
 v. United States, 82 Pa. St. 382:
 672, 911, 991.
 Darrow v. Chicago etc. R. R. Co.,
 169 Ind. 99: 707, 942, 971, 980,
 995.
 Darst v. Griffin, 31 Neb. 668: 577,
 918, 969, 1018, 1511, 1512, 1513.
 Dartmouth v. County Comrs., 153
 Mass. 12: 988, 996.
 Dartmouth College v. Woodward, 4
 Wheat. 625: 412.
 Danbert v. Penn. R. R. Co., 155 Pa.
 St. 178: 1627, 1633.
 Daugey v. London, 38 L. J. C. P. 298:
 733.
 Daugherty v. Brown, 91 Mo. 26:
 1186.
 Daughters of Am. Rev. v. Schenley,
 204 Pa. St. 572: 394.
 Davenport v. Buffington, 97 Fed. 234:
 420.
 v. Dedham, 178 Mass. 382: 351,
 370, 384, 647.
 v. Hyde Park, 178 Mass. 385: 351,
 370, 384, 647.
 v. Stevenson, 34 Ia. 225: 251.
 Davenport etc. Ry. Co. v. Sinnet,
 111 Ill. App. 75: 448, 654, 661,
 1337.
 Davenport etc. Terminal Co. v. John-
 son, 188 Ill. 472: 639, 1580,
 1591.
 David Bradley Mfg. Co. v. Chicago
etc. Traction Co., 229 Ill. 170:
 683, 1210.
 Davidheiser v. Rhodes, 133 Pa. St.
 226: 145, 146.
 Davidson v. Boston & Maine R. R.
 Co., 3 Cush. 91: 936.
 v. New Orleans, 96 U. S. 97: 14,
 1007.
 v. Railroad Co., 3 Tex. Ct. of App.
 p. 473, § 400: 1348.
 v. Texas etc. Ry. Co., 29 Tex. Civ.
 App. 54: 958, 1511, 1557.
 y. Wight, 16 App. Cases, D. C. 371:
 464.
 Davies v. Epstein, 77 Ark. 221: 372,
 876, 877.
 v. Los Angeles, 86 Cal. 37: 1004,
 1010.
 v. St. Joseph, 98 Mo. App. 611:
 180.
 Daviess v. County Court, 1 Bibb 453:
 1091.
 v. Co. Court, 1 Bibb 514: 1367.
 Davis v. Appleton, 109 Wis. 580:
 355, 1594.
 v. Baltimore etc. R. R. Co., 102 Md.
 371: 447, 1614.
 v. Board of Supervisors, 89 Mich.
 295: 400.
 v. Bonaparte, 137 Ia. 197: 882,
 885.
 v. Boone Co., 28 Neb. 837: 1075,
 1407.
 v. Brigham, 29 Me. 391: 960.
 v. Charles River Branch R. R. Co.,
 11 Cush. 506: 941, 1146.
 v. C. & N. W. Ry. Co., 46 Ia. 389:
 251, 307.
 v. Cleveland etc. R. R. Co., 140
 Ind. 468: 864, 1485.
 v. Comrs., 143 Ill. 9: 1488.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Covington etc. R. R. Co., 77 Ga. 322: 1614.
 v. Crawfordsville, 119 Ind. 1: 234.
 v. East Tenn. etc. R. R. Co., 87 Ga. 605: 777, 1298, 1649, 1657.
 v. East Tenn. & Ga. R. R. Co., 1 Sneed 94: 431.
 v. Fry, 14 Okla. 340: 166.
 v. Hill, 11 Ired. L. 9: 1444.
 v. LaCrosse & Mississippi R. R. Co., 12 Wis. 16: 1523, 1536, 1579.
 v. Lake Shore etc. R. R. Co., 114 Ind. 364: 1004.
 v. Londgreen, 8 Neb. 43: 145.
 v. Memphis etc. R. R. Co., 87 Ala. 633: 839, 1330, 1501.
 v. Mo. Pac. R. R. Co., 119 Mo. 180: 616, 630, 632, 633, 1308.
 v. Morris, 132 N. C. 435: 368.
 v. Newark, 54 N. J. L. 595: 608, 1219.
 v. New Bedford, 133 Mass. 549: 1712.
 v. New York, 14 N. Y. 506: 268, 297, 298, 301, 315, 1588.
 v. Nichols, 39 Ill. App. 610: 786.
 v. North Penn. R. R. Co. 2 Phila. 146: 1325, 1391.
 v. Northwestern El. R. R. Co., 170 Ill. 595: 897, 1109, 1243, 1426, 1467.
 v. Pa. R. R. Co., 215 Pa. St. 581: 1132, 1145.
 v. Russell, 47 Me. 443: 1163, 1522, 1635.
 v. Sacramento, 59 Cal. 596: 90.
 v. San Lorenzo R. R. Co., 47 Cal. 517: 434, 1162, 1467.
 v. Saratoga Springs, 17 App. Div. 623: 84.
 v. Saratoga Springs, 163 N. Y. 581: 84.
 v. Sawyer, 133 Mass. 239: 457.
 v. Silverton, 47 Ore. 171: 231, 439.
 v. Smith, 130 Mass. 113: 515.
 v. S. W. Pa. Pipe Line Co., 34 Pa. Supr. Ct. 438: 1578.
 v. Stevens, 57 Me. 593: 954, 963.
 v. T. C. & D. R. R. Co., 4 Stew. & Por. 421: 524.
 v. Titusville & Oil City Ry. Co., 114 Pa. St. 308: 900, 937, 1560.
 v. Wheeling etc. R. R. Co., 12 Pa. Dist. Ct. 93: 1523.
 v. Wheeling etc. R. R. Co., 26 Pa. Supr. Ct. 364: 1458, 1473.
 v. Winslow, 51 Me. 264: 71.
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 Dawson v. Katter, 48 Ga. 133: 17.
 v. Moores, 4 Mumf. 535: 1360.
 v. Pittsburgh, 159 Pa. St. 317: 1123, 1126, 1306, 1307, 1337, 1338, 1409.
 Day v. Board of Aldermen of Springfield, 102 Mass. 310: 733.
 v. Forest City Ry. Co., 5 Ohio C. C. (N. S.) 393: 302.
 v. Hulbert, 11 Met. 321: 1523.
 v. Louisville etc. R. R. Co., 69 Miss. 589: 1507.
 v. New Orleans Pacific Ry. Co., 37 La. Ann. 131: 1553.
 v. Railroad Co., 41 Ohio St. 392: 856.
 v. Railroad Co., 44 Ohio St. 406: 1499.
 v. Springfield, 102 Mass. 310: 1572.
 v. Stetson, 8 Maine 365: 409, 522.
 Dayton v. Bauman, 66 Ohio St. 379: 464, 1219.
 v. Drainage Comrs., 128 Ill. 271: 145.
 v. Lincoln, 39 Neb. 74: 630, 1179, 1199.
 Dayton etc. Ry. Co. v. Dayton etc. Traction Co., 4 Ohio C. C. (N. S.) 320: 765, 772.
 v. Dayton etc. Traction Co., 72 Ohio St. 429: 1409.
 v. Lewton, 20 Ohio St. 401: 1538, 1540, 1541.
 v. Marshall, 11 Ohio St. 497: 1670.
 Dayton Mining Co. v. Seawell, 11 Nev. 394: 495, 498, 500, 502, 511, 561.
 D. C. R. R. Co. v. C. & G. R. R. Co., 8 Ore. 102: 782.
 Deaconess Home & Hospital v. Bontjes, 207 Ill. 553: 454, 658.
 Deadwood Cent. R. R. Co. v. Barker, 14 S. D. 558: 161, 162.
 Dean v. Ann Arbor St. R. R. Co., 93 Mich. 330: 272.
 v. Ann Arbor R. R. Co., 137 Mich. 459: 373, 382, 390, 398, 1596.
 v. Colt, 99 Mass. 486: 1523, 1524.
 v. Millard, 151 Mich. 582: 356.
 Deansville Cemetery Assn. Matter of, 5 Hun 482: 675, 683.
 Deansville Cemetery Association, Matter of, 66 N. Y. 569: 498, 543.
 Deaton v. Polk Co., 9 Iowa 594: 1404, 1490.
 Dearborn v. Boston etc. R. R. Co., 24 N. H. 179: 1118, 1177, 1446, 1447, 1451.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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- DeBen v. Gerard, 4 La. Ann. 30: 1489.
- DeBuol v. Freeport etc. Ry. Co., 111 Ill. 499: 1098, 1271.
- De Camp v. Dix, 159 N. Y. 436: 97. v. Hibernia Underground R. R. Co., 47 N. J. L. 43: 532, 748, 811, 813, 823.
- v. Hibernia Underground R. R. Co., 47 N. J. L. 518: 532, 811, 813, 823.
- v. Robbins, 29 N. J. Eq. 36: 837.
- v. Robbins, 31 N. J. Eq. 671: 837.
- v. Thompson, 16 App. Div. 528: 97.
- Decatur v. Vaughan, 233 Ill. 50: 1230, 1231.
- Decker v. Evansville Suburban etc. R. R. Co., 133 Ind. 493: 179, 251, 256, 447, 1582.
- v. Washburn, 8 Ind. App. 673: 1703.
- Deemer v. Bells Run R. R. Co., 212 Pa. St. 491: 1071, 1572.
- Deems v. Baltimore, 80 Md. 164: 485.
- Deepwater Ry. Co. v. Western P. C. & L. Co., 152 Fed. 824: 931, 932.
- Deer v. Commissioners of Highways, 109 Ill. 379: 1382.
- v. Sheroden, 220 Pa. St. 307: 237.
- Deere v. Cole, 118 Ill. 165: 1602.
- v. Guest, 1 Mylne & Craig 516: 1537.
- Deering, Matter of, 93 N. Y. 361: 352.
- Deering v. County Conrs., 87 Maine 151: 701, 976, 1387.
- v. New York, 51 App. Div. 402: 1505.
- v. York & Cumberland R. R. Co., 31 Maine 172: 1570.
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- Delafield, In re, 109 Fed. 577: 932.
- Delancey Street, Matter of, 120 App. Div. 700: 1253, 1256, 1258.
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- v. Metropolitan Board of Works, L. R. 2 C. P. 532: 1710.
- Delap v. Brooklyn, 3 Miscl. 22: 687, 1558, 1561.
- v. Brooklyn, 144 N. Y. 265: 1561.
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- DeLappe v. Kansas City etc. R. R. Co., 69 Mo. App. 572: 147, 157.
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[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Syracuse, 165 Fed. 631 (C. C. A.) 308.
 v. Wilkes-Barre etc. R. R. Co., 11 Pa. Co. Ct. 165: 771.
 v. Wilkes-Barre etc. R. R. Co., 6 Luzerne L. R. Rep. 342: 1282.
 v. Wilkes-Barre etc. R. R. Co., 1 Pa. Dist. Ct. 627: 328, 765.
 Delaware St., in re, 3 Luzerne Leg. Reg. Rep. 353: 1385.
 Dell Rapids v. Irving, 7 S. D. 310: 927.
 Delmar Tp. Road, 13 Pa. Co. Ct. 505: 1081.
 DeLong v. Schimmel, 58 Ind. 64: 1364.
 v. Spring Lake etc. Co., 65 N. J. L. 1: 881.
 v. Warren (Cal.) 36 Pac. 1009: 629.
 Delphi v. Evans, 36 Ind. 90: 229.
 Delsol v. Spokane etc. Ry. Co., 4 Ida. 456: 1270, 1472.
 DeLueca v. North Little Rock, 142 Fed. 597: 1601.
 Demartine v. San Francisco, 107 Cal. 402: 881.
 Demby v. Kingston, 60 Hun 294: 84.
 v. Kingston, 133 N. Y. 538: 84.
 Deming v. Cleveland, 22 Ohio C. C. 1: 70, 97.
 Demopolis v. Webb, 87 Ala. 659: 877, 879.
 Dempsey v. Burlington, 66 Ia. 387: 199, 377, 380, 388, 395, 1502.
 v. Donnelly, 58 Ill. 40: 1517.
 Demules v. St. Paul etc. R. R. Co., 44 Minn. 436: 1295, 1335.
 Den v. Jersey Co., 15 How. 426: 115.
 v. Morris Canal Co., 24 N. J. L. 587: 22, 26, 1164.
 Deneen v. Unverzagt, 225 Ill. 378: 1700.
 Denham v. Co. Comrs. of Bristol, 108 Mass. 202: 515, 516.
 Deninger v. Recorder's Court, 145 Cal. 629: 481.
 v. Recorder's Court, 145 Cal. 638: 481, 482.
 Dennis v. Mobile etc. Ry. Co., 137 Ala. 649: 383, 392, 398, 406, 1595, 1612.
 v. Osborn, 75 Kan. 557: 154.
 Dennison v. Somerset etc. R. R. Co., 21 Pa. Supr. Ct. 248: 156.
 v. Taylor, 15 Abb. (N. C.) 439: 939.
 Denniston v. Clark, 125 Mass. 216: 1489.
 v. Philadelphia Co., 161 Pa. St. 41: 1251, 1450, 1457.
 v. Philadelphia Co., 1 Pa. Supr. Ct. 599: 1245, 1251, 1446.
 Denny v. Bush, 95 Ind. 315: 1407.
 Denslow v. New Haven & Northampton Co., 16 Conn. 98: 66, 74.
 Densmore v. Central Ia. R. R. Co., 72 Ia. 182: 447.
 Dent v. Smith, 76 Kan. 381: 516.
 Denton v. Nanny, 8 Barb. 618: 946.
 v. Thompson, 136 Ind. 446: 1400.
 Denver v. Bayer, 7 Colo. 113: 53, 178, 250, 639, 642, 659, 671, 1294.
 v. Cincinnati, 161 Fed. 633: 1145.
 v. Denver Cable City R. R. Co., 22 Colo. 565: 491.
 v. Denver etc. R. R. Co., 17 Col. 583: 330, 886, 887, 888, 890.
 v. Jacobson, 17 Colo. 497: 876, 881, 883, 885.
 v. Mullen, 7 Col. 345: 484.
 v. Rhodes, 9 Colo. 554: 143.
 v. Vernia, 8 Colo. 399: 633.
 Denver City Irr. & W. Co. v. Mid-daugh, 12 Colo. 434, 1445, 1519.
 Denver etc. R. R. Co. v. Barsaloux, 15 Colo. 290: 308, 1581.
 v. Bourne, 11 Colo. 59: 639, 1302.
 v. Costes, 1 Colo. App. 336: 327, 639, 643, 1299.
 v. Davidson, 2 Colo. App. 443: 475.
 v. Denver City Ry. Co., 2 Colo. 673: 415, 1608.
 v. Denver, S. P. & P. R. R. Co., 17 Fed. 867: 794.
 v. Domke, 11 Colo. 247: 242, 250, 639, 643, 1161, 1581.
 v. Griffith, 17 Colo. 598: 1046, 1119, 1225.
 v. Jackson, 6 Colo. 340: 1424.
 v. Lamborn, 8 Colo. 380: 1673, 1675.
 v. Lamborn, 9 Colo. 119: 1673, 1675, 1685.
 v. Lockwood, 54 Kan. 586: 836.
 v. Otis, 7 Colo. 198: 1443.
 v. Outcalt, 2 Colo. App. 395: 475.
 v. Schmitt, 11 Colo. 56: 639, 1145, 1302.
 v. School District, 14 Colo. 327: 1627, 1631.
 v. Stark, 16 Colo. 291: 1358.
 v. Stancliff, 4 Utah 117: 1348.
 v. Toohey, 15 Colo. 297: 309, 1581.
 v. Union Pac. R. R. Co., 34 Fed. 386: 527, 534.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Denver Power & Irr. Co. v. Denver etc. R. R. Co., 30 Colo. 204: 564, 684, 777, 797, 798, 799, 804, 1042, 1045.
 Department of Parks, Matter of, 73 N. Y. 560: 1534.
 Department of Public Parks, Matter of, 53 Hun 280: 687, 1227, 1232, 1272, 1277, 1323.
 Department of Public Works, In re, 35 N. Y. Supp. 332: 1558.
 Department of Public Works, Matter of, 2 Hun 374: 1670.
 Department of Public Works, Matter of, 6 Hun 486: 1327.
 Department of Public Works, Matter of, 53 Hun 556: 887, 888, 889, 1327.
 Depew & S. W. R. R. Co., In re, 92 Hun 406: 909.
 DePeyster v. Mali, 27 Hun 439: 1555.
 Depriest v. Jones, 2 Va. Dec. 109: 1492.
 Derby v. Framingham etc. R. R. Co., 119 Mass. 516: 706, 919, 1053.
 v. Gage, 60 Mich. 1: 1392, 1683.
 Derry Tp. Road, 11 Pa. Supr. Ct. 232: 985.
 Derry Tp. Road, 30 Pa. Supr. Ct. 538: 414.
 DeRuttan v. Canadian No. Ry. Co., 12 Ont. 187: 1348, 1352.
 Derwell v. Bauer, 41 N. Y. App. Div. 53: 1490.
 Deshong v. New York, 74 App. Div. 234: 1488.
 v. New York, 176 N. Y. 475: 1488.
 Des Moines v. Laymon, 21 Ia. 153: 1409.
 Des Moines City R. Co. v. Des Moines, 90 Ia. 770: 354, 1620.
 Des Moines St. R. R. Co. v. Des Moines etc. R. R. Co., 73 Iowa 513: 301.
 Dethampl v. Lake Keom Nav. etc. Co., 73 Kan. 54: 1330.
 Detloe v. Grand Trunk R. R. Co., 15 U. C. Q. B. 595: 1523.
 Detmold v. Drake, 46 N. Y. 318: 1260.
 Detroit v. Beecher, 75 Mich. 454: 895, 971, 1319, 1341.
 v. Brennan, 93 Mich. 338: 1274.
 v. Bruder, 104 Mich. 221: 1426.
 v. C. H. Little Co., 141 Mich. 637: 647, 952, 1309.
 v. C. H. Little Co., 146 Mich. 373: 647, 952, 1309.
 v. Co. Comrs., 35 Me. 373: 1415.
 Detroit v. Daly, 68 Mich. 503: 698, 1220.
 v. Detroit City R. R. Co., 56 Fed. 867: 301, 1587, 1590.
 v. Detroit etc. R. R. Co., 112 Mich. 304: 1290.
 v. Detroit & Howell Plank Road Co., 43 Mich. 140: 417.
 v. Ft. Wayne etc. R. R. Co., 90 Mich. 646: 352.
 v. Myers, 152 Mich. 666: 875.
 v. Parker, 181 U. S. 399: 11, 464.
 v. Robinson, 93 Mich. 426: 993.
 v. Schilling, 93 Mich. 429: 940, 1558.
 v. Wabash etc. R. R. Co., 63 Mich. 712: 708, 726, 1027.
 Detroit Board of Education v. Mross, 151 Mich. 625: 916.
 Detroit Citizens St. Ry. Co. v. Board of Public Works, 126 Mich. 554: 308.
 v. Board of Public Works, 126 Mich. 554: 732.
 v. Detroit, 64 Fed. 628: 298, 301, 1502.
 v. Detroit, 110 Mich. 384: 297, 301.
 v. Detroit, 171 U. S. 48: 301.
 Detroit City R. R. Co. v. Mills, 85 Mich. 634: 272, 1586, 1590.
 Detroit etc. R. R. Co. In re, 2 Doug. (Mich.) 367: 1088.
 Detroit etc. R. R. Co. v. Campbell, 140 Mich. 384: 893, 1042, 1045, 1049, 1105.
 v. Detroit, 49 Mich. 47: 966.
 v. Detroit, 91 Mich. 444: 1624.
 v. Detroit Suburban R. R. Co., 103 Mich. 585: 779.
 v. Ferguson, 140 Mich. 400: 893, 1042, 1045, 1049, 1105.
 v. Gartner, 95 Mich. 318: 986, 1040.
 v. Graham, 46 Mich. 642: 1421.
 v. Hall, 133 Mich. 302: 1378, 1395.
 Detroit Leather Specialty Co. v. Mich. Cent. R. R. Co., 149 Mich. 588: 428, 958, 1569.
 Detroit Sharpshooters' Assn. v. Highway Comrs., 34 Mich. 36: 706, 1033, 1420.
 Detroit So. R. R. Co. v. Lawrence County Comrs., 71 Ohio St. 454: 1438.
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 Devine v. Olney, 68 N. J. L. 284: 1389.
 Devlin v. New York, 131 N. Y. 123: 948, 1261, 1324, 1563.
 v. Philadelphia, 206 Pa. St. 518: 634, 1718.
 Devoe v. Smeltser, 86 Ia. 385: 400, 890.
 Devon v. Cincinnati, 161 Fed. 633: 1176, 1270.
 Detwiler v. Citizens Water Co., 25 Pa. Co. Ct. 481: 724.
 Dewey v. Atlantic Coast Line R. R. Co., 142 N. C. 392: 488.
 v. Chicago etc. Elec. Ry. Co., 184 Ill. 426: 720.
 DeWint, Matter of, 2 Cow. 498: 1534.
 DeWitt v. Duncan, 46 Cal. 342: 683, 824.
 v. Ithaca, 15 Hun 568: 880.
 Dexter v. Boston, 176 Mass. 247: 463.
 v. Broat, 16 Barb. 337: 239.
 Diamond Jo Line Steamers v. Davenport, 114 Ia. 432: 801, 804.
 v. Davenport etc. Ry. Co., 115 Ia. 480: 1201, 1229.
 Diamond Match Co. v. Ontonagon, 72 Mich. 249: 366, 369, 878, 880, 886, 888.
 Diamond Mills Emery Co. v. Philadelphia, 22 Pa. Co. Ct. 9: 1277.
 Dibsell v. Morris, 89 Tenn. 497: 53.
 Dice v. Sherman, 107 Va. 424: 508, 551.
 Dickenson v. Fitchburg, 13 Gray, 546: 1121, 1130, 1145, 1231.
 Dickerman v. Duluth, 88 Minn. 288: 630, 634.
 v. Marion, 122 Ill. App. 154: 881.
 v. New York etc. R. R. Co., 72 Conn. 271: 1718.
 Dickerson v. Comrs. of Highways, 18 Ill. App. 88: 1624.
 v. Detroit, 99 Mich. 498: 876.
 Dickey v. Chicago, 152 Ill. 468: 1018, 1025, 1513.
 v. Maysville Road Co., 7 Dana 113: 414.
 v. Tennison, 27 Mo. 373: 495, 498, 516, 517, 675, 1004, 1013, 1014.
 Dickinson v. Amherst Water Co., 139 Mass. 210: 1436.
 v. Ark. City Imp. Co., 77 Ark. 570: 881, 888.
 v. Grand Junction Canal Co., 7 Exch. 282: 165.
 Dickinson v. Highway Comrs., 41 Mich. 638: 1017.
 v. New Haven etc. Co., 155 Mass. 16, 780.
 v. Pere Marquette R. R. Co., 148 Mich. 461: 441.
 v. Van Wormer, 39 Mich. 141: 893, 894, 1017, 1420.
 v. Worcester, 7 Allen 19: 234.
 Dickinson Tp. Road, 23 Pa. Supr. Ct. 34: 519.
 Dickson v. Baltimore & Philadelphia R. R. Co., 3 McArthur D. C. 362: 1550.
 v. Chicago etc. R. R. Co., 71 Mo. 575: 87, 1552, 1650, 1652.
 Diebold v. Ky. Traction Co., 117 Ky. 146: 241.
 Diedrich v. N. W. U. R. R. Co., 42 Wis. 248: 105, 108, 124, 128, 130, 131.
 Diedricks v. Northwestern Union Co., 33 Wis. 219: 1570.
 Diehl v. Met. El. R. R. Co., 11 Misc. 14: 448, 1303, 1304.
 Dierks v. Comrs. of Highways, 142 Ill. 197: 142, 167, 453, 1044, 1624.
 Dietrich v. Murdock, 42 Mo. 279: 530, 1348.
 Dietrichs v. Lincoln etc. R. R. Co., 12 Neb. 225: 1145.
 v. Lincoln etc. R. R. Co., 14 Neb. 355: 1136.
 Dietrick v. Highway Comrs., 6 Ill. App. 70: 1412.
 Diets v. Frazier, 50 Mich. 227: 1412.
 Diffendal v. Virginia M. R. Co., 86 Va. 459: 855.
 Dill v. School Board, 47 N. J. Eq. 421: 180, 183, 191, 878.
 Dillard v. Webb, 55 Ala. 468: 485.
 Dillenbach v. Xenia, 41 Ohio St. 207: 1553.
 Dilley v. Wilkes-Barre Pass. R. R. Co., 12 Pa. Co. Ct. 270: 327, 642, 643, 1586.
 Dillman v. Crooks, 91 Ind. 158: 1132.
 Dillon v. Chicago etc. R. R. Co., 58 Neb. 472: 1393.
 v. Kansas City etc. R. R. Co., 67 Kan. 687: 524, 1519.
 Dills v. Hatcher, 6 Bush (Ky.) 606: 18.
 Dilworth v. State (Tex. Civ. App.) 36 S. W. 274: 473.
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v. New York, 182 N. Y. 542: 1338.
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v. Gardiner, 73 Me. 63: 1522.
- Dinsmore v. Auburn, 26 N. H. 356: 992.
- Dinwiddie v. Roberts, 1 G. Greene 363: 1570.
- Directors of Poor v. Railroad Co., 7 W. & S. 236: 697, 1135.
- Disosway v. Winant, 34 Barb. 538: 1441.
- District of Columbia v. Armes, 8 App. Cas. D. C. 393: 432.
v. Atchison, 31 App. Cas. D. C. 250: 210, 237.
v. Gray, 6 App. D. C. 314: 143.
v. Hutchinson, 1 App. Cas. D. C. 403: 1545, 1648, 1658, 1662.
v. Prospect Hill Cemetery, 5 App. Cas. D. C. 497: 1198, 1229, 1422, 1625.
v. Robinson, 14 App. Cas. D. C. 512: 865, 1490.
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- Dix v. Shaver, 14 Hun 392: 833, 861.
- Dixon v. Allemand, 136 Ill. App. 449: 1506.
v. Baker, 65 Ill. 518: 233, 1309.
v. Baltimore etc. R. R. Co., 1 Mackey (D. C.) 78: 938.
v. Eaton, 68 Me. 542: 723.
v. Highway Comrs., 75 Mich. 225: 1017, 1027, 1099.
v. Louisville etc. R. R. Co., 115 Tenn. 362: 1250.
v. Rockwell etc. R. R. Co., 75 Ia. 367: 1404.
- Doane v. Chicago City R. R. Co., 160 Ill. 22: 302.
v. Lake St. El. R. R. Co., 165 Ill. 510: 266, 302, 1585, 1648, 1657.
- Dobbins v. Los Angeles, 139 Cal. 179: 469.
v. Los Angeles, 195 U. S. 223: 469.
- Dobson v. Hohenadel, 148 Pa. St. 367: 183, 878.
v. Penn. S. V. R. R. Co., 6 Mont. Co. L. R. 109: 1071.
v. Postal Tel. Cable Co., 79 S. C. 429: 1635.
- Doctor v. Hartman, 74 Ind. 221: 1058.
- Dodd v. Consolidated Traction Co., 57 N. J. L. 482: 349.
- Dodd v. St. Louis etc. R. R. Co., 108 Mo. 581: 858, 1627, 1631.
- Doddrige Co. Suprs. v. Stout, 9 W. Va. 703: 1087, 1379.
- Dodge v. Aeworth, 32 N. H. 474: 1428.
v. Boston & P. R. R. Co., 154 Mass. 299: 842, 855.
v. Burns, 6 Wis. 514: 1520.
v. Council Bluffs, 57 Ia. 560: 684.
v. County Comrs. of Essex, 3 Met. 380: 435, 436, 623.
v. Omaha & South Western R. R. Co., 20 Neb. 276: 961, 1564.
v. Pennsylvania R. R. Co., 43 N. J. Eq. 351: 366, 368, 384, 390, 398, 1595.
v. Pennsylvania R. R. Co., 45 N. J. Eq. 366: 366, 368, 384, 390, 398, 1595.
v. Rockport, 199 Mass. 274: 1174, 1320.
- Dodge Co. v. Acom, 61 Neb. 376: 577, 707, 982.
- Dodson v. Cincinnati, 34 Ohio St. 276: 231, 1331.
- Doe v. Georgia R. R. & B. Co., 1 Ga. 524: 22, 24, 1154, 1163, 1169, 1524.
v. Leeds etc. R. R. Co., 20 L. J. Q. B. 486: 860, 1627, 1631.
- Dolan v. Chicago etc. Ry. Co., 118 Wis. 362: 449.
v. Mayor etc., 62 N. Y. 472: 1393.
v. New York etc. R. R. Co., 74 App. Div. 434: 257, 258.
v. New York etc. R. R. Co., 175 N. Y. 367: 257, 258, 488.
- Dolbeer v. Suncock N. W. Co., 72 N. H. 562: 110, 138.
- Dole v. Manhattan R. R. Co., 70 Hun 374: 1437.
- Dolfeld v. Western Md. R. R. Co., 107 Md. 584: 731.
- Dollarhide v. Muscatine County, 1 G. Greene 158: 1094.
- Dolores No. 2 L. & C. Co. v. Hartman, 17 Colo. 138: 1435, 1436.
- Dolphin v. Pedley, 27 Wis. 469: 1365.
- Domestic Tel. Co. v. Newark, 49 N. J. L. 344: 358.
- Dominick v. Delaware etc. R. R. Co., 180 Pa. St. 468: 1645.
- Domsehke v. Met. El. R. R. Co., 74 Hun 442: 1663.
v. Metropolitan El. R. R. Co., 148 N. Y. 337: 1143.
- Donahue v. Keystone Gas Co., 90 App. Div. 386: 201, 347.
v. Keystone Gas Co., 181 N. Y. 313: 192, 193, 201, 347.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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v. St. Louis etc. R. R. Co., 52 Ia.
411: 936, 1545.
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1410.
- Donnaker v. State, 8 S. & M. 649:
253, 321.
- Donnell v. Comrs. of York County,
87 Me. 223: 917, 1419.
- Donnelly v. Decker, 58 Wis. 461:
565, 566, 567, 568, 582.
- Donnington Street, In re, 3 Pa. Co.
Ct. 455: 700.
- Domnistorpe v. Fremont etc. R. R.
Co., 30 Neb. 142: 425, 850, 1458.
- Donora Southern R. R. Co. v. Pa.
R. R. Co., 213 Pa. St. 119: 1619.
- Donovan v. Allert, 11 N. D. 289:
332, 339, 1593.
v. Royal, 26 Tex. Civ. App. 248:
83, 85, 1605.
v. Springfield, 125 Mass. 371: 1147.
- Doody v. Vaughn, 7 Neb. 28: 973,
974, 1018, 1032, 1513, 1516.
- Dooley v. Kansas City, 82 Mo. 444:
1634.
- Dooley Block v. Salt Lake Rapid
Transit Co., 9 Utah 31: 181, 201,
273, 313, 314, 315, 1587, 1591.
- Doolittle v. Branford, 59 Conn. 402:
487.
v. East Tenn. etc. R. R. Co., 80
Ga. 658: 1614.
- Doon v. Natick, 171 Mass. 228: 806.
- Dooner v. Pennsylvania R. R. Co.,
142 Pa. St. 36: 449, 655.
- Doorman v. Ames, 12 Minn. 451:
71, 88, 91, 94.
- Doran v. Central Pacific R. R. Co.,
24 Cal. 245: 430, 956.
- Dorchester v. Wentworth, 31 N. H.
451: 1427.
- Dore v. Milwaukee, 42 Wis. 108: 236,
614, 617, 631.
- Doremus v. Paterson, 63 N. J. Eq.
605: 1569.
v. Paterson, 69 N. J. Eq. 188: 83,
1605, 1606, 1615.
v. Paterson, 69 N. J. Eq. 775:
83, 1605, 1606, 1615.
- Dorgan v. Boston, 12 Allen 223: 1185,
1330.
v. Railroad Co., 131 N. C. 623:
1523.
- Dorlan v. East Brandywine etc. R.
R. Co., 46 Pa. St. 520: 1118,
1241.
- Dorman v. Bates Mfg. Co., 82 Me.
438: 182, 877.
v. Jacksonville, 13 Fla. 538: 210.
- Dorman v. Lewiston, 81 Me. 411:
1019, 1367.
v. State, 24 Ala. 216: 478.
- Dorr v. Sharon, 198 Mass. 240: 920.
- Dorrence Street, Matter of, 4 R. I.
230: 13, 1220.
- Dorsett, Matter of, 92 App. Div. 523:
1319, 1326.
- Dorsett, Matter of, 179 N. Y. 496:
1319, 1326.
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- Doubet v. Independent Dist., 135 Ia.
95: 728.
- Doucette v. Little Falls I. & N. Co.,
71 Minn. 206: 99.
- Doud v. Mason City etc. R. R. Co.,
76 Ia. 438: 1268, 1455, 1507.
- Dougherty v. Brown, 91 Mo. 26: 975,
1020.
v. Wabash etc. Ry. Co., 19 Mo.
App. 419: 1472.
- Doughty v. Atlantic City etc. Trac-
tion Co., 71 N. J. L. 131: 1078.
v. Hope, 3 Denio 249: 1100, 1101.
v. Somerville etc. R. R. Co., 7
N. J. Eq. 51: 913, 1159, 1625.
v. Somerville etc. R. R. Co., 21 N.
J. L. 442: 893, 898, 913, 1021,
1159, 1463.
- Douglas v. Indianapolis etc. Trac-
tion Co., 37 Ind. App. 332: 1471.
v. N. Y. El. R. R. Co., 14 App.
Div. 471: 1144.
v. New York El. R. R. Co., 45
App. Div. 596: 1122, 1144.
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v. Taylor, 50 Neb. 535: 630, 1546,
1567.
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Co., 22 Md. 219: 422, 423.
v. Byrnes, 59 Fed. 29: 562, 679,
714, 1071.
v. Byrnes, 63 Fed. 16: 1105, 1376.
v. Leavenworth, 6 Kan. App. 96:
305.
v. Montgomery, 118 Ala. 599: 420,
1493, 1618.
v. Ohio Riv. R. R. Co., 51 W. Va.
523, 852.
v. Rawlins, 4 Hayward, Tenn. 111:
1091, 1094.
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204: 885.
v. Portsmouth Bridge, 17 N. H.
200: 96, 133, 1622.
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1670.
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480, 482.
v. Electric Co., 68 N. H. 59: 695,
740, 741.

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 v. More, 12 Colo. 316: 564.
 Downs v. Ansonia, 73 Conn. 33: 159, 234.
 v. Huntington, 35 Conn. 588: 695.
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 v. Manhattan R. R. Co., 128 N. Y. 488: 1121, 1133.
 v. Sycamore, 193 Ill. 501: 355.
 Drady v. Des Moines etc. R. R. Co., 57 Ia. 393: 620, 691, 1298, 1550, 1552.
 Drainage Comrs v. Griffin, 134 Ill. 330: 1412.
 v. Ilarms, 238 Ill. 414: 1397.
 v. Knox, 237 Ill. 148: 56, 57, 438, 1105, 1331.
 v. People, 26 Ill. App. 276: 1024.
 v. Volke, 163 Ill. 243: 1415, 1416, 1418.
 v. Volke, 59 Ill. App. 283: 1195, 1416, 1421.
 Drainage District v. Dowd, 132 Ill. App. 440: 1548.
 Drain Commissioners v. Baxter, 57 Mich. 127: 681.
 Draining Certain Swamp Lands, Matter of, 5 Hun 116: 579.
 Drake v. Chicago etc. R. R. Co., 70 Iowa 59: 147.
 v. Chicago etc. Ry. Co., 63 Iowa 302: 152, 1454, 1551, 1654, 1716.
 v. Clay, Sneed, 139: 522.
 v. Hamilton Woolen Co., 99 Mass. 574: 81.
 v. Hudson River R. R. Co., 7 Barb. 508: 244.
 v. Lady Ensley Coal etc. Co., 102 Ala. 501: 71, 81.
 v. Rogers, 3 Hill 604: 1410.
 Draper v. Brown, 115 Wis. 361: 128, 137, 1607.
 v. Mackey, 35 Ark. 497: 1157, 1510, 1512.
 Draper v. Williams, 2 Mich. 536: 828.
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 Dreber v. Iowa etc. R. R. Co., 59 Iowa 599: 1310.
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 Dresden v. Comrs., 62 Maine 365: 1415.
 Dressen v. Board of Comrs., 76 Minn. 290: 109, 115, 577.
 Dries v. St. Joseph, 98 Mo. App. 611: 351, 372, 382.
 Driggs v. Phillips, 103 N. Y. 77: 1492.
 Drinkhouse v. Spring Valley Water Works, 87 Cal. 253: 965.
 Driscoll v. New Haven, 75 Conn. 92: 806, 811.
 v. Taunton, 160 Mass. 486: 698, 1200.
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 Driver v. St. Francis Levee Dist., 70 Ark. 358: 880.
 v. Western Union R. R. Co., 32 Wis. 569: 1180, 1225, 1273, 1706.
 Drouberger v. Reed, 11 Ind. 420: 922, 1160, 1167.
 Drouin v. Boston etc. R. R. Co., 74 Vt. 343: 1479, 1520.
 Drucker v. Manhattan R. R. Co., 51 N. Y. Supr. Ct. 429: 1295.
 v. Manhattan Ry. Co., 106 N. Y. 157: 1296.
 v. Metropolitan El. R. R. Co., 73 Hun 102: 1301.
 Druley v. Adams, 102 Ill. 177: 80.
 Drummond v. Eau Claire, 85 Wis. 556: 236.
 Drury v. Boston, 101 Mass. 439: 1699.
 v. Midland R. R. Co., 127 Mass. 571: 131, 936, 991, 1146, 1263, 1319, 1320, 1540.
 Dryades St., 11 La. Ann. 458: 1389.
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- v. Nolan Co., 85 Tex. 225: 1183.
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- Dumass v. Francis, 15 Ill. 543: 1516.
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- v. San Francisco, 1 Cal. 355: 17.
 - v. Wightman, 51 Mo. 432: 1460.
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- v. Levee Comrs., 74 Miss. 125: 1176.
 - v. Louisville, 8 Bush. 98: 1531, 1681.
 - v. Pennsylvania R. R. Co., 94 Pa. St. 435: 26, 640, 692.
 - v. Pennsylvania R. R. Co., 13 Phil. 68: 640.
 - v. Ramish, 142 Cal. 686: 1567.
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- v. Charleston, Harper (S. C.) 189: 495, 589.
 - v. Pownal, 65 Vt. 116: 916, 930.
 - v. Tarentum, 23 Pa. Supr. 332: 1353.
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- v. Sanitary District, 203 Ill. 170: 994, 996, 1042, 1075, 1109, 1247, 1248, 1249.
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100 Maine 238: 86.
v. Rigsbee, 140 N. C. 128: 894, 897,
991, 1042, 1053, 1057.
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& D. R. R. Co., 106 N. C. 16:
698, 912.
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234.
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141.
- Dusenbury v. Mutual Union Tel. Co.,
11 Abb. New Cases, 440: 339.
v. Mutual Union Telegraph Co., 64
How. Pr. 206: 1164.
v. New York etc. Traction Co., 46
App. Div. 267: 302.
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Ann. 575: 1545, 1636.
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866, 870.
v. Strong, 1 Black 23: 128, 129.
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3 Am. R. R. & Corp. Rep. 744:
180, 181, 187, 199, 240.
v. New York El. R. R. Co., 15
Daly 294: 265.
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J. Eq. 375: 197, 887.
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R. R. Co., 98 Ind. 153: 251.
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514, 942.
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533: 955.
v. County Comrs., 11 Cush. 201:
1122.
v. Hays, 150 Ill. 273: 71, 83, 858,
1604, 1605, 1614, 1617.
v. Springfield, 4 Gray 107: 1411.
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Mass. 583: 86.
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360: 351, 372.
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954, 1029, 1520.
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Kan. 488: 1557.
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710, 927, 1011.
v. Belfast, 88 Maine 140: 710,
1425.
v. Philadelphia, 4 Phila. 328: 1325.
v. St. Louis, 11 Mo. App. 590: 607.
v. St. Paul, 27 Minn. 457: 229,
442, 1453.
v. Tuscaloosa Bridge Co., 2 Porter
(Ala.) 296, 3, 407, 409, 1522.
v. Wightman, 66 Pa. St. 425: 1255.
- E.
- Eachus v. Los Angeles Consol. El. R.
R. Co., 103 Cal. 614: 179, 616,
629, 631, 632, 633, 635, 639, 664,
669, 671, 1122, 1309, 1548, 1549,
1552, 1656, 1660, 1718.
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L. R. Ch. 638: 656.
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cinnati, 1 Cinn. Supr. Ct. 154:
220.
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11 Met. 570: 1345.
v. Northumberland, 44 N. H. 67:
969, 1381.
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846.
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579: 626, 1273.
v. DeHart, 12 N. J. L. 280: 145.
v. Poat, 63 S. C. 439: 865.
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874, 877.
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Ry. Co., L. R. 10 Ch. Div. 707:
75, 77.
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Ry. Co., L. R. 11 Eq. Cas. 568:
1537.
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43 Kan. 746: 1480.
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484.
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ley R. R. Co., 12 Cush. 224:
1639.
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S. 340: 1479, 1499.
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Co., 69 Mich. 207: 725.
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Ranck, 78 Pa. St. 454: 1133,
1187.
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Matter of, 49 Misc. 99: 536.
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1381.
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St. 190: 1094.
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Tenn. 747: 200, 240, 270.
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15 S. W. 1117: 881.
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Hawkes, 24 L. J. Ch. 601: 851.
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R. R. Co., 111 Mass. 125: 688,
743, 754, 1263.
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Tex. Civ. App. 170: 1146.

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 v. St. Anthony Falls W. P. Co., 43 Minn. 60: 837.
 v. Stowe, 37 Maine 86: 1116.
 East Montpelier v. Wheelock, 70 Vt. 391: 460.
 Easton, Appeal of, 47 Pa. St. 255: 1540, 1541.
 Easton Borough v. Rinek, 116 Pa. St. 1: 1354.
 East 161st Street. Matter of, 52 Misc. 596: 750.
 East 187th St., Matter of, 78 App. Div. 355: 610.
 Easton etc. R. R. Co. Matter of, 37 N. J. L. 222: 1322.
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 Easton Road Case, 3 Rawle 195: 700.
 East Penn. R. R. Co. v. Hiester, 40 Pa. St. 53: 1134, 1139, 1310.
 v. Holtenstine, 47 Pa. St. 28: 1187.
 v. Schollenberger, 54 Pa. St. 144: 860.
 East Penn. Tp. Road, 2 Pa. Co. 453: 1093, 1094.
 East River Bridge etc., Matter of, 26 Hun 490: 254, 260.
 East River Bridge & Rapid Transit Co., Matter of, 10 Abb. New Cases, 245: 260.
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 v. Murphy, 89 Ill. App. 22: 629.
 v. O'Flynn, 119 Ill. 200: 363, 371, 383, 390, 392, 398.
 v. O'Flynn, 19 Ill. App. 64: 53, 646, 1122.
 v. St. John, 47 Ill. 463: 725.
 v. Wiggins Ferry Co., 11 Ill. App. 254: 1309.
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 East St. Louis R. R. Co. v. Bellville City R. R. Co., 159 Ill. 544: 1047.
 v. Eisentraut, 134 Ill. 96: 88, 144.
 v. Nugent, 147 Ill. 254: 864.
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 East St. Louis Union R. R. Co. v. East St. Louis, 39 Ill. App. 398: 303.
 East Tennessee etc. R. R. Co. v. Boardman, 96 Ga. 353.
 v. Davis, 91 Ala. 615: 859.
 v. Love, 3 Head 63: 942, 1180.
 v. Sellers, 85 Ga. 853: 1478, 1619.
 v. Telford's Exrs., 89 Tenn. 293: 425, 1157, 1472, 1477, 1478, 1479, 1707, 1708.
 East Tenn. Tel. Co. v. Anderson Co. Tel Co., 115 Ky. 488: 342, 359, 418.
 v. Russellville, 106 Ky. 667: 342.
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 East and West Ill. R. R. Co. v. Miller, 201 Ill. 413: 1379.
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 v. European & North American Ry. Co., 59 Me. 520: 435, 1455, 1506, 1636.
 v. Framingham, 6 Cush. 245: 1401.
 Eberhart v. Chicago etc. R. R. Co., 70 Ill. 347: 655, 1195.
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 E. B. W. & M. Co., Matter of, 96 N. Y. 42: 590.
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 Eckerson v. Haverstraw, 6 App. Div. 102: 888.
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 Eddings v. Seabrook, 12 Rich. 504: 1272, 1317.
 Eddieleman v. Union Co. Traction & P. Co., 217 Ill. 409: 525, 896, 1061, 1066, 1115.
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 v. People, 15 Ill. 386: 1007, 1014.
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 Edgecumbe v. Burlington, 46 Vt. 218: 543.
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 v. Huff, 26 Ind. 35: 806, 1495.
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 Edgewood Water Co. v. Troy Water Co., 7 Pa. Co. Ct. 476: 731, 783, 918, 1625.
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 Edmonds v. Boston, 108 Mass. 535: 1276, 1277, 1319, 1683.
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 v. Pittsburgh etc. R. R. Co., 111 Pa. St. 316: 671.
 Ednia v. Short, 129 Mo. 354: 1405.
 Edsall v. Jersey Shore, 220 Pa. St. 591: 1307.
 Edwards v. Bruerton, 184 Mass. 529: 10, 463.
 v. Charlotte etc. R. R. Co., 39 S. C. 472: 148, 158.
 v. Harger, 180 Ill. 99: 161.
 v. Missouri etc. Ry. Co., 82 Mo. App. 96: 846, 847, 1451, 1456.
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 v. Stonington Cemetery Association, 20 Conn. 466: 542.
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 Edwardsville v. Barnsback, 66 Ill. App. 381: 882, 886.
 Edwardsville R. R. Co. v. Sawyer, 92 Ill. 377: 315, 1630.
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 Eels v. American Tel. & Tel. Co., 65 Hun 516: 1626.
 v. Am. Tel. & Tel. Co., 143 N. Y. 133: 172, 174, 175, 204, 331, 339, 1630.
 v. Chesapeake etc. Ry. Co., 49 W. Va. 65: 87, 1639, 1651, 1652.
 Effingham v. Surrels, 77 Ill. App. 460: 154.
 Egan v. Hart, 45 La. Ann. 1358: 132, 135, 440.
 Egbert v. Lake Shore etc. R. R. Co., 6 Ind. App. 350: 319, 847, 1451, 1452, 1453.
 Egerer v. New York etc. R. R. Co., 3 App. Div. 157: 148.
 v. New York Central etc. R. R. Co., 130 N. Y. 108: 180, 255, 259, 324, 378.
 Eggleston v. New York & Harlem R. R. Co., 35 Barb. 162: 857.
 Egyptian Levee Co. v. Hardin, 27 Mo. 495: 583, 584, 586.
 Egypt Street, 2 Grant's Cases, 455: 784.
 Ehmen v. Gothenburg, 50 Neb. 715: 875.
 Ehret v. Camden etc. Ry. Co., 60 N. J. Eq. 246: 274.
 v. Camden etc. R. R. Co., 61 N. J. Eq. 171: 272, 274, 282.
 v. Schuylkill Bridge E. S. R. R. Co., 151 Pa. St. 158: 964, 1257, 1259, 1274, 1339, 1546, 1547.
 Ehrsam, Matter of, 37 N. Y. App. Div. 272: 609, 610.
 Eichels v. Evansville St. Ry. Co., 78 Ind. 261: 268.
 Eidemiller v. Wyandotte City, 2 Dillon 376: 1160, 1571, 1574.
 Eighth School District v. Copeland, 2 Gray 414: 1495, 1634.
 Eisenbach v. Hatfield, 2 Wash. 236: 117, 119, 136.
 Eisendrath v. Chicago, 192 Ill. 320: 366, 881.
 Elam, Ex parte, 6 Colo. App. 233: 162, 471.

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- v. Sims, 228 Ill. 9: 1268, 1269, 1331, 1481.
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- v. Collins, 75 Neb. 65: 865.
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- Eleventh Ave. Opening, Matter of, 81 N. Y. 436: 368.
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- v. Hoag, 25 Ill. App. 650: 144.
- v. Kimball, 90 Ill. 356: 154, 233.
- v. McCallum, 23 Ill. App. 186: 629, 1306, 1308.
- v. Welch, 16 Ill. App. 483: 233.
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- Elgin Hydraulic Co. v. Elgin, 74 Ill. 433: 142.
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- v. Cattlesburg Water Co., 110 Ky. 175: 996, 1176, 1243, 1409, 1519.
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- v. Helm's Heirs, 8 Bush 681: 935, 1182, 1231.
- v. Thompson, 79 Ky. 52: 245, 252, 1392.
- v. Tierney, 11 Ky. L. R. 526: 310.
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- Elkins Elec. Co. v. Western Md. R. R. Co., 163 Fed. 724: 772.
- Elk Road, 2 Pa. Co. Ct. 45: 1383.
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- Elliot v. Lewis, 1 A. K. Marsh. 514: 1091, 1094.
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- v. Ferguson, 37 Tex. Civ. App. 40: 454, 1613, 1614.
- v. Oil City, 129 Pa. St. 570: 155.
- Elliott's Appeal, 154 Pa. St. 541: 1387.
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- v. Iowa City, 29 Iowa 229: 211, 235.
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- v. Chickasaw County, 40 Iowa 571: 377, 380, 387, 388.
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 v. Parsons, 55 Conn. 83: 865, 867.
 v. Rochester, 26 Barb. 133: 236, 1602.
 Elyton Land Co. v. South & North Ala. R. R. Co., 95 Ala. 631: 1472.
 Embury v. Conner, 3 N. Y. 511: 495, 496, 589, 816, 1520.
 v. Conner, 2 Sandf. 89: 495, 589, 1520.
 Emerson v. Commonwealth, 108 Pa. St. 111: 413, 416.
 v. Reading, 14 Vt. 279: 1073.
 v. Western Union R. R. Co., 75 Ill. 176: 696, 1206, 1346.
 Emery v. Boston Terminal Co., 178 Mass. 172: 1073, 1135, 1257, 1260.
 v. San Francisco Gas Co., 28 Cal. 345: 13.
 Emigrant Ditch Co. v. Webber, 108 Cal. 88: 1053.
 Emigrant Mission Com. v. Brooklyn R. R. Co., 20 App. Div. 596: 447.
 v. Brooklyn R. R. Co., 165 N. Y. 604: 447.
 Emmons v. Minneapolis & St. Louis Ry. Co., 35 Minn. 503: 487.
 v. Minneapolis etc. R. R. Co., 40 Minn. 133: 1122.
 Empire City Bank, Matter of, 18 N. Y. 199: 1013.
 Empire City Subway Co. v. Broadway & S. A. R. R. Co., 87 Hun 279: 338, 409.
 Emporia v. Soden, 25 Kan. 588: 70, 74, 77, 1603.
 Emry v. Raleigh etc. R. R. Co., 102 N. C. 209: 91, 866, 870, 1454, 1651, 1653, 1716.
 Enders v. Friday, 78 Neb. 510: 370.
 Endicott, Petitioner, 24 Pick. 339: 1430.
 Enfield Mfg. Co. v. Ward, 190 Mass. 314: 838, 1504.
 Enfield Toll Bridge Co. v. Connecticut River Co., 7 Conn. 28: 1173.
 v. Hartford etc. R. R. Co., 17 Conn. 63: 407, 413, 524, 682, 1608.
 v. Hartford etc. R. R. Co., 17 Conn. 454: 682, 781, 788.
 Engle v. Hunt, 50 Neb. 358: 868.
 Englehardt v. Brooklyn, 3 Miscl. 30: 1558, 1561.
 Englewood Connecting Ry. Co. v. Chicago & Eastern Ill. R. R. Co., 117 Ill. 611: 954.
 Englewood Connecting Ry. Co. v. Chicago & Eastern Ill. R. R. Co., 17 Ill. App. 141: 954.
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 v. Danville, 69 Ill. App. 288: 357.
 v. New Haven & Northampton Co., 32 Conn. 240: 487.
 Ennis v. Gilder, 32 Tex. Civ. App. 351: 92.
 Eno v. Metropolitan El. R. R. Co., 56 N. Y. Supr. Ct. 95: 1526.
 v. Metropolitan El. R. R. Co., 56 N. Y. Supr. 313: 1555, 1584, 1615.
 Enoch v. Spokane Falls & N. R. R. Co., 6 Wash. 393: 957.
 Enochs v. Philadelphia, 2 Pa. Dist. Ct. 83: 647.
 Enos v. Chicago etc. R. R. Co., 78 Iowa 28: 620.
 Enterprise v. Smith, 62 Kan. 815: 739.
 Epler v. Niman, 5 Ind. 459: 1081.
 Epling v. Dickson, 170 Ill. 329: 1324, 1435.
 Epps v. Cralle, 1 Mumford 258: 1078, 1359.
 Erickson v. Cass Co., 11 N. D. 494: 579.
 v. Crookston W. W. P. & L. Co., 100 Minn. 481: 162, 163.
 v. Crookston W. W. P. & L. Co., 105 Minn. 182: 162, 163.
 Erie etc. R. R. Co. v. Brown, 57 Misc. 164: 895, 1053.
 v. Casey, 26 Pa. St. 287: 1499, 1502.
 v. Johnson, 101 Pa. St. 555: 852.
 v. Welch, 1 App. Div. 140: 976.
 Erie R. R. Co. v. Delaware etc. R. R. Co., 21 N. J. Eq. 283: 1579, 1616.
 v. Paterson, 74 N. J. L. 738: 914.
 v. Steward, 59 App. Div. 187: 1395.
 v. Steward, 61 App. Div. 480: 709, 718, 728, 920, 1042, 1046.
 v. Steward, 170 N. Y. 172: 679, 709, 718, 728, 920, 1042, 1046.
 v. Welsh, 1 App. Div. 140: 1043.
 v. Youngstown, 5 Ohio C. C. 332: 914.
 Erkenbrecher v. Cincinnati, 2 Cinn. Sup. Ct. 412: 78.
 Erlich v. Mason City etc. R. R. Co., 75 Iowa 443: 1315.
 Ermentrout v. Stitzel, 170 Pa. St. 540: 366.
 Erskine v. Boston, 14 Gray 216: 1717.
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 Eslich v. Mason City etc. R. R. Co., 75 Iowa 443: 307, 324, 1293.
 Essery v. Grand Trunk R. R. Co., 21 Ontario 224: 937, 1560.
 Essex v. Local Board, L. R. 14 H. L. 153: 447, 451, 453, 1244, 1252, 1333.
 v. Local Board, 14 Q. B. D. 753: 447, 451, 453.
 v. Local Board, 17 Q. B. D. 447: 447.
 Essex Avenue, In re, 121 Mo. 98: 1380.
 Essex Co. v. County Comrs., 7 Gray 450: 1711.
 Essexville v. Emery, 90 Mich. 183: 1492.
 Estabrooks v. Peterborough etc. R. R. Co., 12 Cuss. 224: 87, 88, 91, 461.
 Estes v. Macon, 103 Ga. 780: 1309.
 Ethel St., Matter of, 3 Misel. 403: 183, 1098.
 Etter v. Edwards, 4 Watts 63: 1350.
 Ettlinger v. Weil, 184 N. Y. 179: 1151.
 Eubank v. Pence, 5 Litt. 338: 1358, 1359.
 Eufaula v. Simmons, 86 Ala. 515: 154, 1638.
 Eureka v. Armstrong, 83 Cal. 623: 577, 890.
 v. Croghan, 81 Cal. 524: 877, 888.
 v. Fay, 107 Cal. 166: 879.
 v. Gates, 137 Cal. 89: 877, 887.
 Eureka Basin Warehouse & Mfg. Co., Matter of, 96 N. Y. 42: 495, 505.
 Eustis v. Milton St. Ry. Co., 183 Mass. 586: 272, 334.
 Evans v. Atlantic etc. R. R. Co., 6 Mon. Supr. Ct. 493: 1456.
 v. Boston, 190 Mass. 525: 1029, 1519.
 v. Blankenship, 4 Ariz. 307: 871, 875, 877, 891.
 v. Chicago etc. R. R. Co., 86 Wis. 597: 247, 306, 316.
 v. Foss, 194 Mass. 523: 429.
 v. Gulf etc. R. R. Co. (Tex. Civ. App.) 28 S. W. 903: 858.
 v. Haefner, 29 Mo. 141: 1480.
 v. James, 4 Wis. 408: 1674.
 v. Letitz, 162 Pa. St. 561: 882.
 v. McLucas, 15 S. C. 67: 1475.
 v. Missouri, Iowa & Neb. Ry. Co., 64 Mo. 453: 1535, 1536, 1578.
 Evans v. New Auditorium Pier Co., 63 N. J. Eq. 674: 117.
 v. New Auditorium Pier Co., 67 N. J. Eq. 315: 117.
 v. Santana Live Stock & Land Co., 81 Tex. 622: 1027, 1577.
 v. Savannah etc. R. R. Co., 90 Ala. 54: 1663.
 v. Sharkey Co., 89 Miss. 302: 1399.
 v. Shields, 3 Head 70: 1407, 1423.
 v. Welch, 29 Colo. 355: 884.
 v. West, 138 Ind. 621: 1510.
 Evanston v. Clark, 77 Ill. App. 234: 1675.
 v. O'Leary, 70 Ill. App. 124: 1468.
 Evansville v. Decker, 84 Ind. 325: 233.
 Evansville etc. R. R. Co. v. Charlton, 6 Ind. App. 56: 1305, 1355.
 v. Cochran, 10 Ind. 560: 1109, 1119.
 v. Diek, 9 Ind. 433: 66, 86, 88.
 v. Evansville, 15 Ind. 395: 1518.
 v. Fitzpatrick, 10 Ind. 120: 1123, 1128, 1205, 1316, 1391.
 v. Grady, 6 Bush 144: 1159, 1160, 1636.
 v. Miller, 30 Ind. 209: 922, 927, 1112, 1392.
 v. Nye, 113 Ind. 223: 858, 1560.
 v. State, 149 Ind. 276: 1288.
 v. Stringer, 10 Ind. 551: 1123, 1205, 1316, 1391.
 v. Swift, 128 Ind. 34: 931.
 v. Terre Haute, 161 Ind. 26: 1395, 1396.
 Evansville etc. Traction Co. v. Henderson Bridge Co., 141 Fed. 51: 685, 686.
 Evansville Traction Co. v. Henderson Bridge Co., 134 Fed. 973: 701.
 Everett v. Cedar Rapids etc. R. R. Co., 28 Iowa 417: 1032, 1033, 1420.
 v. Council Bluffs, 46 Iowa 66: 349, 1487, 1594.
 v. Fall River, 189 Mass. 513: 1073.
 v. Union Pac. Ry. Co., 59 Iowa 243: 1118, 1139, 1142, 1227, 1236.
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 Evergreen Cemetery Association v. New Haven, 43 Conn. 234: 542.
 v. Beecher, 53 Conn. 551: 543, 903, 989.
 Evers v. Vreeland, 50 N. J. L. 386: 1387.
 Everse v. North-West R. R. Co., 2 Montreal Supr. Ct. 290: 1570.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Ewing v. Alabama & V. R. R. Co., 68 Miss. 551: 524, 714, 731.
 v. St. Louis, 5 Wall. 413: 1412.
 Ewings Mill Road, 32 Pa. St. 282: 1384.
 Exchange Alley, Matter of, 4 La. Ann. 4: 1035.
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 Fairbanks v. Commonwealth, 183 Mass. 373: 626, 922, 1273.
 v. Fitchburg, 110 Mass. 224: 1240.
 v. Rockingham, 73 Vt. 124: 614, 1641.
 v. Rockingham, 75 Vt. 221: 614, 618, 1641.
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 Fairbury Brick Co. v. Chicago etc. Ry. Co., 79 Neb. 854: 91.
 Fairbury Union Agricultural Board v. Holly, 169 Ill. 9: 890.
 Fairchild v. St. Louis, 97 Mo. 85: 648, 665.
 v. St. Paul, 46 Minn. 540: 673, 675, 806, 809, 814, 1021, 1027, 1057, 1067, 1489.
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 Fairfield's Appeal, 57 Conn. 167: 487.
 Fair Haven etc. R. R. Co. v. New Haven, 203 U. S. 379: 491.
 Fairmonut Park, In re, 9 Phila. 553: 1187.
 Faler v. Easthampton, 162 Mass. 422: 1236, 1263.
 Falker v. New York, West Shore & Buffalo Ry. Co., 17 Abb. New Cas. 279: 1295, 1581.
 Falter v. Packard, 219 Ill. 356: 865, 868.
 Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112: 587, 595, 1432.
 Fall River Iron Works Co. v. Old Colony & Fall River R. R. Co., 5 Allen 221: 712, 727.
 Fall River Print Works v. Fall River, 110 Mass. 428: 1147, 1148.
 Fall River R. R. Co. v. Chase, 125 Mass. 483: 1408, 1410.
 Falls v. Belfast etc. R. R. Co., 12 I. C. L. R. 233: 652.
 Fallsburg P. & Mfg. Co. v. Alexander, 101 Va. 98: 495, 508, 536, 591, 592, 593.
 Falls Mfg. Co. v. Oconto Riv. Imp. Co., 87 Wis. 134: 81, 99, 113.
 Falmouth v. Falmouth Water Co., 180 Mass. 325: 1266.
 Fancher v. Coffin, 41 Ind. App. 489: 980.
 Fanning v. Gilliland, 37 Ore. 369: 498, 513, 678, 1057.
 v. Gregoire, 16 How. 524: 411.
 v. Osborne & Co., 34 Hun 121: 243, 301, 317, 1580, 1581.
 v. Osborne, 102 N. Y. 441: 317.
 Fargo v. Browning, 45 App. Div. 507: 1556.
 Farlow, Re, 2 Barn. & Adol. 341: 1257.
 Farist Steel Co. v. Bridgeport, 60 Conn. 278: 115, 136, 540, 543, 732, 1070.
 Farmer v. Cedar Rapids, 116 Iowa 322: 602, 603, 616.
 v. Hooksett, 28 N. H. 244: 1382.
 v. Lewis, 1 Bush (Ky.) 66: 18.
 v. McDonald, 59 Ga. 509: 858.
 v. Myles, 106 La. 333: 172.
 v. Pauley, 50 Ind. 583: 983.
 v. Stillwater Water Co., 99 Minn. 119: 1237, 1240, 1339.
 v. Waterloo & City R. R. Co., L. R. (1895) 1 Ch. D. 527: 438.
 Farmers' Co-Op. Mfg. Co. v. Albermarle etc. R. R. Co., 117 N. C. 579: 96, 133.
 Farmers' Market Co. v. Philadelphia R. R. Co., 10 Pa. Co. Ct. 25: 507.
 Farmer's Turnpike v. Coventry, 10 Johns. 389: 726.
 Farm Investment Co. v. Carpenter, 9 Wyo. 110: 70.
 Farnandis v. Great Northern Ry. Co., 41 Wash. 486: 436, 443, 456.
 Farneman v. Mt. Pleasant Cem. Ass., 135 Ind. 344: 989, 1056, 1176.
 Farnham v. Delaware & Hudson Canal Co., 61 Pa. St. 265: 1523.
 Farnsworth v. Boston, 126 Mass. 1: 484, 948, 949.
 v. Lime Rock R. R. Co., 83 Maine 440: 500, 533, 894, 991.
 v. Rockland, 83 Maine 508: 1486, 1489.
 Farnum v. Blackstone Canal Co., 1 Sumner 46: 702.
 v. Haverhill etc. St. Ry. Co., 178 Mass. 300: 720.
 Farnum's Petition, 51 N. H. 376: 690.
 Farrand v. Clarke, 63 Minn. 181: 1534.
 v. Marshall, 19 Barb. 380: 440, 441.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Midland Elec. Ry. Co., 162 Mo. 469: 630, 634.
 Farrell v. Manhattan El. R. R. Co., 43 App. Div. N. Y. 143: 1664.
 v. St. Paul, 62 Minn. 271: 229, 236.
 Farrell Road, 35 Pa. Supr. Ct. 86: 1101.
 Farrington v. Blish, 14 Me. 423: 976.
 v. Mt. Vernon, 51 App. Div. 250: 609, 616.
 v. Mt. Vernon, 166 N. Y. 233: 609, 616.
 v. New York, 83 Hun 124: 1511, 1512.
 Farwell v. Boston, 180 Mass. 433: 1218, 1219.
 v. Boston, 192 Mass. 15: 1219.
 v. Cambridge, 11 Gray 413: 1185, 1216.
 v. Chicago etc. R. R. Co., 52 Neb. 614: 1117, 1232.
 Faulkner v. Somerset & Dorset Ry. Co., 42 L. J. Ch. 851: 823.
 Faulkner, Town of, 56 N. H. 255: 1711.
 Faust v. Huntsville, 83 Ala. 279: 1411.
 v. Passenger Ry. Co., 3 Phil. 164: 243, 245, 255.
 Faville v. Greene, 12 Wis. 11: 990.
 Fay v. Salem & Danvers Aqueduct Co., 111 Mass. 27: 109, 117, 138.
 Fayetteville etc. R. R. Co. v. Combs, 51 Ark. 324: 1122, 1125, 1200, 1201, 1243, 1311, 1378, 1476.
 Fayetteville St. Ry. Co. v. Aberdeen etc. R. R. Co., 142 N. C. 423: 900, 904, 906, 1619.
 v. Hunt, 51 Ark. 330: 1208, 1213.
 Fazendel v. Morgan, 31 La. Ann. 549: 860, 861.
 Fearing v. Irwin, 55 N. Y. 486: 363, 384, 388.
 Fehr v. Schuylkill Navigation Co., 69 Pa. St. 161: 1523.
 Feiber v. Coyle, 3 Watts 407: 1493.
 Feiten v. Milwaukee, 47 Wis. 494: 1697, 1698.
 Felch v. Gilman, 22 Vt. 38: 1520.
 Fellows v. New Haven, 44 Conn. 240: 212, 213, 229, 231.
 Felt v. Vicksburg etc. R. R. Co., 46 La. Ann. 549: 159, 160.
 Fenelon's Petition, 7 Pa. St. 173: 696.
 Fenn, Matter of, 128 N. Y. 10: 1397.
 Fenter v. Toledo etc. R. R. Co., 29 Ill. App. 250: 90, 1638.
 Fereebe v. Lake Drummond C. & W. Co., 130 N. C. 745: 1454, 1653.
 Fereday v. Mankedick, 172 Pa. St. 535: 366.
 Feree v. Meily, 3 Yeats 153: 1359.
 Ferguson's Appeal, 117 Pa. St. 426: 183, 878, 1595.
 Ferguson v. Covington etc. Bridge Co., 108 Ky. 662: 179, 253, 310, 1657, 1717.
 v. Firmenich Mfg. Co., 77 Ia. 576: 69, 81, 1454, 1650, 1654.
 v. Loar, 5 Bush (Ky.) 689: 19.
 v. London, Brighton & South Coast Ry. Co., 33 Beav. 103: 823.
 v. London, Brighton & South Coast Ry. Co., 3 DeG. J. & S. 653: 823.
 Fernald v. Boston, 12 Cush. 574: 605, 619, 1356.
 v. Palmer, 83 Me. 244: 520, 1528.
 Fernold v. Knox Woolen Co., 82 Me. 48: 109, 137.
 Ferrand v. Bradford, 21 Beav. 412: 1603.
 v. Chicago etc. R. R. Co., 21 Wis. 435: 1123.
 Ferrar v. Comrs., 4 L. R. Exch. 227: 733.
 Ferree v. Sixth Ward School District, 76 Pa. St. 376: 824.
 Ferrenbach v. Turner, 86 Mo. 416: 1488.
 Ferris v. Bramble, 5 Ohio St. 109: 515, 1033, 1165, 1170.
 v. Ward, 9 Ill. 499: 1357, 1521.
 Ferrus v. Stafford etc. R. R. Co., 41 L. J. Eq. 362: 1443.
 Fertilizing Co. v. Hyde Park, 97 U. S. 659: 14, 736.
 Fesser v. Achenbach, 29 Ill. App. 373: 377, 387, 390.
 Fessler v. Union, 67 N. J. Eq. 14: 420, 872, 875, 878, 1494, 1618.
 Feuerstein v. Jackson, 8 Ohio C. C. 396: 236.
 Fevee v. Meily, 3 Yates 153: 1156.
 Fick v. Pennsylvania R. R. Co., 157 Pa. St. 622: 152, 159.
 Ficken v. Atlanta, 114 Ga. 970: 629.
 Fidelity Trust etc. Co. v. Mobile St. R. R. Co., 53 Fed. 687: 416, 1621.
 Field v. Barling, 149 Ill. 556: 190, 197, 366, 369, 373, 877.
 v. Carnarvon etc. Ry. Co., L. R. 5 Eq. Cas. 190: 1570.
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 v. Des Moines, 39 Ia. 575: 17.
 v. Field, 38 N. J. L. 290: 1100.
 v. Vermont & Mass. R. R. Co., 4 Cush. 150: 1075.
 v. West Orange, 36 N. J. Eq. 118: 233, 1606.
 v. West Orange, 46 N. J. Eq. 183: 146, 155.
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 Fifer v. Ritter, 159 Ind. 8: 1192, 1310, 1316.
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 Fifteenth St. Opening, 10 Phila. 214: 1317.
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- Firman Street. Matter of, 17 Wend. 649: 8, 659, 1229.
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 v. Thompson, 116 Ala. 166: 1564.
 v. Tyson, 133 Ala. 459: 190, 191, 192, 373, 1596.
 v. Tyson, 144 Ala. 457: 191, 1596.
 v. West River R. R. Co., 49 Vt. 167: 1531, 1557.
 v. West River R. R. Co., 46 Vt. 633: 1531, 1675.
- First Parish v. County of Plymouth, 8 Cush. 475: 1316, 1317.
 v. Middlesex Co., 7 Gray 106: 1266.
- First St. Opening, Matter of, 66 Mich. 42: 736, 745, 747, 749, 1290.
 Fischer v. Laack, 76 Wis. 313: 882.
 v. Catawissa R. R. Co., 175 Pa. St. 554: 1670, 1682.
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 v. Rochester, 6 Paige 268: 211.
- Fisher v. Allen, 8 N. J. L. 301: 1091.
 v. Baden Gas Co., 138 Pa. St. 301: 1175, 1187.
- v. Bountiful City, 21 Utah 29: 57, 70.
- v. Chicago & Springfield R. R. Co., 104 Ill. 323: 526, 731.
- v. Coyle, 3 Watts 407: 1630.
- v. Feige, 137 Cal. 39: 69.
- v. Hobbs, 42 Ind. 276: 996, 1028.
- v. Horicon Iron & Manf. Co., 10 Wis. 351: 550, 1523.
- v. Naysmith, 106 Mich. 71: 236.
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 v. Framingham Manuf. Co., 12 Pick. 68: 544, 554, 557, 1667.
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- v. Eastern R. R. Co., 6 Allen 98: 1377.
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- Fitch, In re, 147 N. Y. 334: 1412.
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 Fitzmaurice v. Turney, 214 Mo. 610: 1391.
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 Flammer v. Manhattan Ry. Co., 56 App. Div. 183: 1562.
 Flanders v. Colebrook, 51 N. H. 300: 1381.
 v. Franklin, 70 N. H. 168: 159, 235.
 v. Wood, 24 Wis. 572: 821, 1572.
 Flannagan v. Philadelphia, 42 Pa. St. 219: 104.
 Flatbush Ave., Matter of, 1 Barb. 286: 408, 410, 978.
 Flaten v. Moorhead, 51 Minn. 518: 420, 1494, 1618.
 Flat Swamp etc. Co. v. McAllister, 74 N. C. 159: 928.
 Fleener v. Claman, 126 Ind. 166: 1410.
 Fleetwood Streets, 8 Pa. Co. Ct. 210: 992.
 Fleming v. Baltimore etc. R. R. Co., 51 W. Va. 54: 1485.
 v. Chicago etc. R. R. Co., 34 Ia. 353: 1211, 1315.
 v. Hight, 95 Ind. 78: 1403, 1406.
 v. Hull, 73 Ia. 598: 494, 549, 553, 564, 570, 571, 575.
 v. Lockwood, 36 Mont. 384: 144.
 v. Rome, 130 Ga. 383: 1601, 1612.
 v. Wilmington & W. R. R. Co., 115 N. C. 676: 88, 157, 1449, 1454, 1459, 1476, 1512.
 Flersheim v. Baltimore, 85 Md. 489: 879.
 Fletcher v. The Auburn & Syracuse R. R. Co., 25 Wend. 462: 152, 244.
 v. Chicago etc. R. R. Co., 67 Minn. 339: 813, 989.
 v. Great Western R. R. Co., 29 L. J. Exch. 253: 837, 1475.
 v. Seattle, 43 Wash. 627: 631, 632, 634.
 Fletcher's Heirs v. Fugate, 3 J. J. Marsh, Ky. 631: 513, 1004, 1017, 1077, 1367.
 Flinn v. New York Central etc. R. R. Co., 58 Hun 230: 1472.
 Flint etc. R. R. Co. v. Detroit etc. R. R. Co., 64 Mich. 350: 990, 1281.
 v. Norton, 64 Mich. 248: 1412.
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 Florence etc. R. R. Co. v. Lilley, 3 Kan. App. 588: 825.
 v. Pember, 45 Kan. 625: 1119, 1312.
 v. Shepherd, 50 Kan. 438: 1203.
 Florida Cent. etc. R. R. Co. v. Bear, 43 Fla. 319: 706, 708, 1392, 1427, 1673.
 v. Bell, 43 Fla. 359: 911, 977, 979.
 v. Ocala St. R. R. Co., 39 Fla. 306: 301.
 Florida East Coast R. R. Co. v. Worley, 49 Fla. 297: 871, 875, 876, 877.
 Florida So. R. R. Co. v. Brown, 23 Fla. 104: 200, 250, 315, 1294.
 v. Hill, 40 Fla. 1: 1535, 1537, 1631.
 Flower v. London etc. R. R. Co., 2 D. & S. 330: 815, 1061, 1572.
 Floyd v. Turner, 23 Tex. 292: 1571.
 Floyd Co. v. Rome St. R. R. Co., 77 Ga. 614: 321, 424, 1489.
 Flynn v. Detroit, 93 Mich. 590: 1492.
 v. Kings Co. El. R. R. Co., 3 App. Div. 254: 1133.
 v. Taylor, 127 N. Y. 596: 1665.
 v. Woolman, 133 Mich. 508: 1511.
 Fobes v. Rome etc. R. R. Co., 121 N. Y. 505: 200, 202, 243, 254, 1328, 1584.
 Fogg v. Nevada etc. R. R. Co., 20 Neb. 429: 1592.
 Fohl v. Chicago etc. Ry. Co., 84 Minn. 314: 997.
 v. Sleepy Eye Lake, 80 Minn. 67: 749, 751, 752.
 Foley v. Cedar Rapids, 130 Ia. 453: 603.
 v. County Court, 54 W. Va. 16, 1569, 1574.
 Folkenson v. Easton Borough, 116 Pa. St. 523: 633.
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 Folmar v. Folmar, 68 Ala. 120: 1083.
 v. Folmar, 71 Ala. 136: 981, 1436.
 Folmsbee v. Amsterdam, 142 N. Y. 118: 236, 610, 616, 1549, 1550.
 v. Amsterdam, 66 Hun 214: 236, 610, 1549, 1550.

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 v. St. Louis etc. R. R. Co., 60 Fed. 316: 1511, 1512, 1619.
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 v. Lorraine etc. Ry. Co., 21 Ohio C. C. 319: 1232, 1254, 1268.
 v. Manhattan R. R. Co., 58 Hun 478: 1663, 1664.
 v. Met. El. R. R. Co., 147 N. Y. 367: 1663, 1664.
 v. New Haven & Northampton Co., 23 Conn. 214: 857.
- Forbell v. New York, 164 N. Y. 522: 163, 1637.
 v. New York, 27 N. Y. Misc. 12: 163.
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 v. Cannon, 35 Mont. 424: 941, 1556.
 v. Delashmutt, 68 Iowa 164: 1098, 1572.
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 v. Chicago & N. W. Ry. Co., 14 Wis. 609: 243, 247, 315, 1580.
 v. Chicago Milk Shippers' Asso., 11 Am. R. R. & Corp. Rep. 433: 410.
 v. County Comrs., 64 Me. 408: 1365.
 v. Danbury, 44 N. H. 388: 1382.
 v. Ford, 110 Ind. 89: 1028.
 v. Harris, 95 Ga. 97: 877.
 v. Metropolitan R. R. Co., L. R. 17 Q. B. D. 12: 645.
 v. Railroad Co., 14 Wis. 609: 1651, 1658.
 v. Santa Cruz R. R. Co., 59 Cal. 290: 249, 250, 1298, 1552, 1649, 1657.
 v. Surgeon, 46 Miss. 130: 18.
 v. Whitaker, 1 Nott & McCord 5: 1373.
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 v. Wolfe, 82 Tex. 145: 966, 1559, 1560.
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 v. Western N. C. R. R. Co., 101 N. C. 526: 817, 1634.
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 v. Cumberland Valley R. R. Co., 23 Pa. St. 371: 1713.
 v. Scott, 136 N. Y. 577: 57, 67, 431, 432, 1154.
 v. Scott, 60 N. Y. Supr. 313: 431, 432, 1154.
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 v. Kreuter, 100 Ind. 27: 973, 975, 996, 1075, 1406.
 v. Wheeling, 19 W. Va. 318: 1569, 1574.
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 v. Hammond, 68 Fed. 774: 23, 466.
 v. Wilcox, 143 Ind. 144: 1086, 1192, 1426.
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 v. New Haven & N. Co., 23 Conn. 214: 144.
- Fort Collins Dev. Ry. Co. v. France, 41 Colo. 512: 646, 1119, 1120, 1127, 1149.
 v. Hoyt, 35 Colo. 480: 1424.
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 v. Jones, 83 Mich. 415: 1383.
 v. Morton, 83 Mich. 265: 527, 684, 1092.
 v. Peninsular Stove Co., 103 Mich. 637: 1430.

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v. Hamilton, 132 Ind. 487: 1545, 1547.
v. Lake Shore etc. R. R. Co., 132 Ind. 558: 749, 1609.
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v. Hogsett, 1 Tex. Civ. App. Cas. 200: 984, 1135.
v. Jennings, 76 Tex. 373: 425, 1473.
v. Lamphear, 1 Tex. App. Civil Cases p. 127: 1390.
v. Scott, 2 Tex. App. Civ. Cas. 137: 155, 1267.
v. State, 100 Tex. 425: 489.
v. Sweatt, 20 Tex. Civ. App. 543: 858, 1503.
v. S. W. Tel. & Tel. Co., 96 Tex. 160: 724, 774.
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v. Boston Park Comrs., 131 Mass. 225: 539.
v. Buffalo, 64 How. Pr. 127: 420, 1498, 1618.
v. Chicago etc. R. R. Co., 10 Tex. Civ. App. 476: 989.
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v. Foster, 81 S. C. 307: 831.
v. Kansas, 112 U. S. 201: 478.
v. London etc. R. R. Co., L. R. (1895) 1 Q. B. 711: 1475.
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v. St. Louis, 71 Mo. 157: 234.
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v. Sebago Imp. Co., 100 Me. 196: 866, 868, 870.
v. Stafford National Bank, 57 Vt. 128: 67, 128, 1163, 1165.
v. Winona County, 84 Minn. 308: 1011.
v. Worcester, 164 Mass. 419: 1494.
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v. N. H. & N. R. R. Co., 112 Mass. 334: 88, 108, 1446, 1551, 1652, 1662.
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v. Des Moines etc. R. R. Co., 91 Ia. 533: 1648, 1657.
v. Holbrook, 17 Pick. 188: 1526.
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v. Cincinnati, 104 U. S. 783: 523, 1496.
v. Holcomb, 34 Mich. 298: 976, 1419.
v. New York City Interborough R. R. Co., 112 App. Div. 832: 302.
v. Union Sugar Co., 109 Mass. 292: 366.
v. Virgin. 11 Ill. App. 513: 867.
v. Western Pacific R. R. Co., 31 Cal. 538: 1162, 1171, 1467.
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 Frankel v. Chicago, B. & P. Ry. Co., 70 Ia. 424: 1443.
 Frankle v. Jackson, 30 Fed. Rep. 398: 640, 1717.
 Franklin v. Durgee, 71 N. H. 186: 153.
 v. Fisk, 13 Allen, 211: 147.
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 Franklin & Columbia Turnpike Co. v. County Court of Maury, 8 Humph. 342: 410, 414, 1608.
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 Frankstown Road, 26 Pa. St. 472: 1370.
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 Franz v. Sioux City etc. R. R. Co., 55 Ia. 107: 319.
 Fraser v. Mulany, 129 Wis. 377: 707, 1018, 1571.
 Frater v. Hamilton Co., 90 Tenn. 661: 181, 224, 1546.
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 v. Frinfrock, 43 Ohio St. 335: 1017, 1032, 1033.
 Frazee v. Manufacturers L. & H. Co., 20 Pa. Supr. Ct. 420: 1107.
 Frazer v. Bigelow Carpet Co., 141 Mass. 126: 1320.
 v. Chicago, 186 Ill. 480: 658.
 v. Mulany, 129 Wis. 377: 1513, 1570.
 Frazier v. East Tenn. Tel. Co., 115 Tenn. 416: 333, 342.
 Fred v. Kansas City Cable R. R. Co., 65 Mo. App. 121: 227, 324, 1355.
 Frederick v. Groshon, 30 Md. 436: 1568, 1574.
 v. Shane, 32 Ia. 254: 1204.
 Fredericks v. Hoffmeister, 62 N. J. L. 565: 817, 1419.
 v. New York, 44 App. Div. 274: 1326.
 v. New York, 27 Misc. 588: 1326.
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 v. Pennsylvania Canal Co., 148 Pa. St. 317: 653.
 Frederick St., 11 Pa. Co. Ct. 114: 915.
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 Frederick St., In re, 155 Pa. St. 623: 914, 1376, 1409.
 Freedie v. North Carolina R. R. Co., 4 Jones Law 89: 1206.
 Freedom v. Norris, 128 Ind. 377: 1504.
 Freeland v. Muscatine, 9 Ia. 461: 211, 236.
 v. Penn. R. R. Co., 66 Pa. St. 91: 108.
 v. Pa. R. R. Co., 197 Pa. St. 529: 87, 116.
 Freeman v. Cook, 113 Ky. 461: 1400.
 v. Cornish, 52 N. H. 141: 1428.
 v. Hunter, 7 Ohio C. C. 117: 1219.
 v. Price, 63 N. J. L. 151: 700, 1381.
 v. Weeks, 45 Mich. 335: 1520.
 Freeport Water Co. v. Freeport, 186 Ill. 179: 481.
 v. Freeport, 180 U. S. 587: 481.
 Freetown v. County Comrs., 9 Pick. 46: 1019.
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 Freight Tax Case, 15 Wall. 232: 594.
 Fremont etc. R. R. Co. v. Bates, 40 Neb. 381: 1200, 1223, 1243, 1312.
 v. Harlin, 50 Neb. 698: 149, 155, 846, 847, 1456.
 v. Mattheis, 35 Neb. 48: 980, 982, 995, 1523.
 v. Meeker, 28 Neb. 94: 1310, 1312, 1409.
 v. Morley, 25 Neb. 138: 155, 1124.
 v. Setright, 34 Neb. 253: 630, 635, 939, 1548.
 v. Whalen, 11 Neb. 585: 1124, 1179, 1251.
 French v. Barber Asphalt Pav. Co., 181 U. S. 324: 11, 463.
 v. Braintree Manf. Co., 23 Pick. 216: 544, 554, 899.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Inhabitants of Quincy, 3 Allen 9: 523.
 v. Lowell, 117 Mass. 363: 1185, 1217.
 v. Milwaukee, 49 Wis. 584: 615, 618, 619, 1307.
 v. Owen, 5 Wis. 112: 695, 1524.
 v. Robb, 67 N. J. L. 260: 344, 1630.
 v. White, 24 Conn. 170: 570.
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 v. Ft. Worth etc. R. R. Co., 5 Tex. Civ. App. 29: 861.
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 v. Shipley, 74 Md. 220: 918.
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 v. New York etc. R. R. Co., 180 N. Y. 550: 450.
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 Friend, Appellant, 53 Me. 387: 1083.
- Friendsville Road, 16 Pa. Co. Ct. 172: 1034, 1383.
- Fries v. New York etc. R. R. Co., 57 App. Div. 577: 257, 358.
 v. New York etc. R. R. Co., 169 N. Y. 270: 257, 258, 358.
 v. Southern Penn. Ry. Co., 85 Pa. St. 73: 1538, 1682.
 v. Wheeling etc. R. R. Co., 56 Ohio St. 135: 1547, 1631.
- Frink v. Lawrence, 20 Conn. 117: 649.
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 v. Justices of the Inferior Court, 30 Ga. 723: 1091.
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 v. Leatherman, 55 Mich. 33: 973, 983, 1419, 1513, 1516.
 v. People, 193 Ill. 635: 485.
 v. Worthington Co. R. R. Co., 96 Me. 76: 128, 134.
- Frostburg v. Dufty, 70 Md. 47: 143, 154, 1650, 1656.
 v. Hitchins, 70 Md. 56: 143, 154, 1650.
 v. Wineland, 98 Md. 239: 349, 1594.
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 v. Finfrock, 43 Ohio St. 335: 1017.
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 v. Belleville, 67 N. J. Eq. 468: 155, 1606.
 v. Chicago Manf. Co., 16 Gray 46: 1345.
 v. County Comrs. of Plymouth, 15 Pick. 81: 860, 1073.
 v. Detroit, 97 Mich. 597: 1511.
 v. Edings, 11 Rich. 239: 1272, 1523.
 v. French, 10 Met. 359: 1526, 1530.
 v. Grand Rapids, 105 Mich. 529: 231.
 v. Mt. Vernon, 64 App. Div. 621: 236.
 v. Mt. Vernon, 171 N. Y. 247: 236.
 v. Shedd, 161 Ill. 462: 109.
- Fuller Co. v. Amorous, 89 Ga. 614: 1033.
- Fulmer v. Williams, 122 Pa. St. 191: 104, 106, 108, 119, 128, 129, 138.
- Fulton v. Cummins, 132 Ind. 453: 1082.
 v. Davenport, 17 Ia. 404: 465.
 v. Dover (Del.) 31 Atl. 974: 879.
 v. Dover, 6 Del. Ch. 1: 672, 928.
 v. Dover, 8 Houston (Del.) 78: 672, 928, 1192.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Monahan, 4 Ohio, 426: 1059.
 v. Short Route R. R. Trans. Co., 85 Ky. 640: 179, 200, 243, 245, 248, 252, 267, 310, 448, 1243, 1294, 1302.
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 v. Phillips, 91 Ga. 66: 1545.
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 v. Midland Ry. Co., L. R. 6 Eq. Cas. 473: 822.
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- G.
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 v. Chicago, 146 Ill. 499: 1364.
 v. Judson, 111 Fed. 350: 1241.
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 v. Linn Co., 21 Ore. 430: 1403.
 v. Lunsford, 120 Ga. 370: 521, 1058.
 v. Merryman, 95 Va. 660: 887.
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 v. Waples, 3 Tex. Ct. of App. p. 482, § 409: 1112, 1310, 1315.
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 v. Philadelphia Co., 2 Pa. Supr. Ct. 359: 1129, 1201.
 v. Prentice, 109 Mo. App. 498: 1392.
 v. Yates, 79 Minn. 436: 153.
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 v. Haslam, 73 Ill. 494: 938, 1107, 1122.
 v. Pound, 22 Ill. 399: 1517.
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 v. Kingston Water Co., 25 App. Div. 82: 74, 1603.
 v. Montecito Val. Water Co., 101 Cal. 242: 866.
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 v. Donahoo, 59 Tex. 128: 155, 830, 1310, 1546, 1548.
 v. Eddins, 29 Alb. L. J. 518: 249, 255.
 v. Eddins, 60 Tex. 656: 1294, 1303.
 v. Fuller, 63 Tex. 467: 640, 659, 671, 1294.
 v. Galveston, 91 Tex. 17: 302.
 v. Graves, 1 Tex. App. Civ. Cas. 301: 640.
 v. Henning, 90 Tex. 656: 640.
 v. Lyons, 2 Tex. App. Civ. Cases, 133: 1225.
 v. Mud Creek etc. Co., 1 Tex. App. Civ. Cas. 169: 984, 1135.
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 v. Pfeuffer, 56 Tex. 66: 936.
 v. Ryan, 2 Tex. Civ. App. 545: 158.
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 v. Pettyjohn, 116 Mo. 375: 881.
 v. Philadelphia, 2 Pa. Dist. Ct. 560: 1327.
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 Ganson v. Buffalo, 1 Keyes 454: 1526.
 Ganz v. Ohio Postal Tel. Cable Co., 140 Fed. 692: 361, 491.
 Garbutt Lumber Co. v. Ga. etc. Ry. Co., 111 Ga. 714: 534, 738, 1154, 1155, 1623.
 Gardiner v. Baltimore, 96 Md. 361: 1519, 1559.
 v. Boston & Worcester R. R. Co., 9 Cush. 1: 623.
 v. Camden, 86 Me. 377: 157.
 v. Tisdale, 2 Wis. 153: 872.
 Gardner v. Brookline, 127 Mass. 358: 1138, 1141, 1176, 1234, 1236, 1241.
 v. Charing Cross Ry. Co., 2 J. & H. 248: 823.
 v. Chester, 13 Pa. Co. Ct. 4: 1397.
 v. Ga. R. R. & B. Co., 117 Ga. 522: 697, 714, 730, 731.
 v. Michigan, 199 U. S. 325: 474.
 v. Newburg, 2 Johns. Ch. 161: 74, 1603.
 v. St. Joseph, 96 Mo. App. 657: 237, 634.
 v. Town Council of Johnstown, 16 R. I. 94: 612, 616.
 Gardner's Petition, Matter of, 41 Mo. App. 589: 895, 982, 1033.
 Gardner Water Co. v. Gardner, 185 Mass. 190: 1262, 1265.
 Gargan v. Louisville etc. R. R. Co., 89 Ky. 212: 369, 373, 382, 389, 391.
 Garitee v. Baltimore, 52 Md. 422: 127, 128, 129, 132.
 Garland v. Aurin, 103 Tenn. 555: 146.
 Garland Novelty Co. v. State, 71 Ark. 138: 485.
 Garlick v. Pittsburg etc. Ry. Co., 67 Ohio St. 223: 1497, 1502.
 v. Strong, 3 Paige 440: 945.
 Garmoe v. Sturgeon, 65 Ia. 147: 966.
 Garnett v. Jacksonville etc. R. R. Co., 20 Fla. 889: 243, 315, 1580.
 Garroux v. Greenville, 53 S. C. 575: 212, 613, 618, 1525.
 Garretson v. Baker, 65 N. J. L. 184: 1419.
 Garrett v. Lake Roland El. R. R. Co., 79 Md. 277: 265, 324, 325, 1582, 1584, 1592.
 v. St. Louis, 25 Mo. 505: 13.
 Garrison v. New York, 21 Wall. 196: 1163, 1431, 1674, 1678, 1681.
 Garrity v. Boston, 161 Mass. 530: 605, 617.
 Garth L. & S. Co. v. Johnson, 151 Mich. 205: 97.
 Gartner v. Chicago etc. Ry. Co., 71 Neb. 444: 1649, 1661.
 Garvey v. Harbison-Walker Refractories Co., 213 Pa. St. 177: 183, 366, 606, 878, 879, 889, 1596.
 v. Long Island R. R. Co., 9 App. Div. 254: 449, 1613.
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 Garvin v. Dausman, 114 Ind. 429: 1004, 1007.
 Garwood v. New York Central etc. R. R. Co., 17 Hun 356: 75, 1603.
 v. New York Central etc. R. R. Co., 83 N. Y. 400: 71, 73, 75, 77.
 Gascho v. Sohl, 155 Ind. 417: 700.
 Gashweller's Heirs v. Mellroy, 1 A. K. Marsh. 84: 1160, 1167, 1368.
 Gas Lt. & Coke Co. v. New Albany, 158 Ind. 268: 1192, 1220.
 Gas Light Co. v. Hart, 40 La. An. 474: 485.
 v. Richardson, 63 Barb. 437: 172, 176.
 Gastner v. Chicago etc. Ry. Co., 71 Neb. 444: 1655.
 Gaston v. Portland, 41 Ore. 373: 1462.
 Gate City v. Richmond, 97 Va. 337: 883, 885.
 Gately v. Old Colony R. R. Co., 171 Mass. 494: 1011, 1707.
 Gates v. Boston etc. R. R. Co., 53 Conn. 333: 679.
 v. Chicago etc. R. R. Co., 82 Ia. 518: 620.
 v. De La Mare, 142 N. Y. 307: 1558, 1561.
 v. Kansas City etc. R. R. Co., 111 Mo. 28: 330, 642, 648, 665, 667.
 v. McDaniel, 2 Stew. 211: 414.
 Gaus & Sons Manuf. Co. v. St. Louis etc. Ry. Co., 113 Mo. 308: 311.
 Gauster v. Met. Elec. Co., 214 Pa. St. 628: 454.
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 Gavit v. Chambers, 3 Ohio 495: 104.
 Gaw v. Bristol etc. R. R. Co., 196 Pa. St. 442: 714.
 Gay v. Bradstreet, 49 Me. 580: 1510.
 v. Caldwell, Hardin (Ky.) 68: 1078, 1086.
 v. Gardiner, 54 Me. 477: 1319.
 v. Mutual Union Tel. Co., 12 Mo. App. 485: 341, 342.

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 v. Welles, 7 Pick. 217: 1526, 1528.
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 Gay & West Sts., 7 Pa. Co. Ct. 217: 400, 914, 1017.
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 v. Dubuque & Sioux City R. R. Co., 20 Ia. 523: 1673, 1685.
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 Geary v. Board of Supervisors, 107 Cal. 530: 918.
 Geauyeau v. Gt. Western R. R. Co., 3 U. C. App. 412: 841.
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 v. Reeves, 75 Ills. 301: 198, 1500.
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 Geddes v. Rice, 24 Ohio St. 60: 993.
 Gedney v. Tewksbury, 3 Mass. 307: 1522.
 Geer v. Durham Water Co., 127 N. C. 349: 74, 1549, 1552.
 Gehris v. Fuhrman, 68 Neb. 325: 868.
 Geissinger v. Hellertown, 133 Pa. St. 522: 1188, 1200, 1319.
 Geizy v. C. W. & Z. R. R. Co., 4 Ohio St. 308: 2, 20, 524, 676.
 General Electric R. R. Co. v. Chicago City R. R. Co., 66 Ill. App. 362: 309, 409.
 v. Chicago etc. R. R. Co., 184 Ill. 588: 328, 765, 1586, 1612.
 Genesee Chief, 12 How. 43: 103.
 Genesee Fork Imp. Co. v. Ives, 144 Pa. St. 114: 918.
 Genesee River R. R. Co. v. Boyington, 60 Misc. 416: 1341.
 Genet v. Brooklyn, 99 N. Y. 296: 687, 824, 1196.
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 Geneva etc. R. R. Co. v. N. Y. Cent. etc. R. R. Co., 24 App. Div. N. Y. 335: 297.
 v. New York Cent. etc. R. R. Co., 90 Hun 9: 765, 772.
 v. N. Y. Cent. etc. R. R. Co., 163 N. Y. 228: 329, 695, 772.
 Genois v. St. Paul, 35 Minn. 330: 211.
 Gentry v. Richmond etc. R. R. Co., 38 S. C. 284: 158, 1649, 1655.
 George v. Chester, 59 Mise. 533: 141, 470.
 v. Wabash Western R. R. Co., 40 Mo. App. 433: 88, 144, 1639.
 George's Creek Coal Co. v. New Central Coal Co., 40 Md. 425: 999, 1000, 1389.
 Georgetown etc. Traction Co. v. Mulholland, 25 Ky. L. R. 578: 272, 281.
 Georgia etc. R. R. Co. v. Archer, 87 Ga. 237: 1570.
 v. Berry, 78 Ga. 744: 90, 1664.
 v. Harvey, 84 Ga. 372: 314, 1596.
 v. Jernigan, 128 Ga. 501: 153.
 v. Ray, 84 Ga. 376: 639, 1581, 1592.
 v. Scott, 38 S. C. 34: 831, 961.
 v. Small, 87 Ga. 355: 1225.
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 Georgia Northern Ry. Co. v. Tifton etc. Ry. Co., 109 Ga. 762: 412.
 Georgia Pacific R. R. Co. v. Strickland, 80 Ga. 776: 1354, 1469.
 Georgia R. & B. Co. v. Bohler, 98 Ga. 184: 92, 93, 1454.
 v. Smith, 128 U. S. 174: 480, 482.
 v. Atlanta, 118 Ga. 486: 884, 886, 1568.
 v. Baker, 88 Ga. 28: 154.
 v. Decatur, 129 Ga. 502: 681, 1288.
 v. Gardner, 115 Ga. 945: 1634.
 v. Haas, 127 Ga. 187: 1506.
 v. Maddox, 116 Ga. 64: 450, 656, 666, 1613.
 v. Union Point, 119 Ga. 809: 679, 680, 1288, 1568.
 Georgia Southern etc. R. R. Co. v. Jones, 90 Ga. 292: 1426.
 Geraghty v. Boston, 120 Mass. 416: 605.
 Gerber v. Metropolitan El. R. R. Co., 3 Miscl. 427: 1151, 1302.
 Gerdon v. Tucker, 6 Maine 247: 1116.
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 Germantown Ave., Change of Grade of, 15 Phila. 413: 612.

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 Gerst v. St. Louis, 185 Mo. 191: 443, 643.
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 Gibbons v. Mobile etc. R. R. Co., 36 Ala. 410: 10, 462.
 v. Railway Co., 40 Mo. App. 146: 1443, 1695.
 Giboney v. Cape Girardeau, 58 Mo. 141: 466.
 Gibson v. Bridge Co., 192 Pa. St. 55: 1211.
 v. Cann, 28 Colo. 499: 1058, 1060, 1062, 1065.
 v. Fisher, 68 Iowa 29: 95.
 v. Greenville, 64 S. C. 455: 1080, 1532, 1637.
 v. Hammersmith & City Ry. Co., 2 Drewry & Smale, 603: 1276.
 v. Kelley, 15 Mont. 417: 104.
 v. Mason, 5 Nev. 283: 10, 462.
 v. Norwalk, 13 Ohio C. C. 428: 1231, 1237, 1330.
 v. United States, 166 U. S. 269: 99, 102, 116.
 v. Zimmerman, 27 Mo. App. 90: 607, 616.
 Gibson & Guy's Mill Road, 37 Pa. St. 255: 1384.
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 Giesy v. Cincinnati etc. R. R. Co., 4 Ohio St. 308: 1055, 1067, 1115, 1204.
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 v. New Jersey R. R. Co., 10 N. J. Eq. 171: 1608.
 v. Norwich, 30 Conn. 35: 955.
 v. Republican Valley etc. R. R. Co., 20 Neb. 538: 1401.
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 v. Greeley etc. R. R. Co., 13 Colo. 501: 647.
 v. Hall, 115 Ind. 549: 1046.
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 v. Savannah, Griffin & North Ala. R. R. Co., 69 Ga. 396: 846.
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 Gilbert Elevated Ry. Co., Matter of, 70 N. Y. 361: 260, 1071.
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 Gildersleeve v. Hammond, 109 Mich. 431: 440.
 Gile, Admr. v. Stevens, 13 Gray 146: 1185, 1267.
 Giles v. London etc. R. R. Co., 1 Drewry & Smale, 406: 1460.
 v. London etc. R. R. Co., 30 L. J. Ch. 603: 822.
 Gilfeather v. Council Bluffs, 69 Iowa 310: 234.
 Gilford v. Winnipiseogee Lake Co., 52 N. H. 262: 866.
 Gilford's Petition, 25 N. H. 124: 1095.
 Gilkerson v. Scott, 76 Ill. 509: 1088.
 Gilkey v. Watertown, 141 Mass. 317: 1361, 1510, 1704.
 Gill v. Chicago etc. Ry. Co., 117 Iowa 278: 1504.
 v. Lake Charles, 119 La. 17: 1592.
 v. Milwaukee etc. R. R. Co., 76 Wis. 293: 929.
 Gillan v. Hutchinson, 16 Cal. 153: 431, 494, 496, 563, 956, 1162.
 Gillender v. New York, 127 App. Div. 612: 351, 372, 1592, 1615.
 Gillespie v. Buffalo etc. Ry. Co., 33 Pa. Co. Ct. 513: 1458, 1473.
 v. Duling, 41 Ind. App. 217: 885.
 v. Thomas, 15 Wend. 464: 1255, 1260, 1678.

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 Gillham v. Madison County R. R. Co., 49 Ill. 484: 151.
 Gilliam v. Canaday, 11 Ired. L. 106: 1523.
 Gilligan v. Providence, 11 R. I. 258: 612, 952, 953, 961, 1532.
 Gillinwater v. Mississippi etc. R. R. Co., 13 Ill. 1: 920, 1040.
 Gillison v. Charleston, 16 W. Va. 282: 233.
 v. Savannah etc. R. R. Co., 7 S. C. 173: 1537, 1540, 1541.
 Gilluly v. Madison, 63 Wis. 518: 234.
 Gilman v. Laconia, 55 N. H. 130: 143.
 v. Milwaukee, 55 Wis. 328: 420, 1494, 1618.
 v. Philadelphia, 3 Wall. 713: 96, 133.
 v. Sheboygan, 2 Black. 510: 462.
 v. Sheboygan etc. R. R. Co., 37 Wis. 317: 1170, 1540, 1543.
 v. Sheboygan etc. R. R. Co., 40 Wis. 653: 1536, 1540, 1541.
 v. Westfield, 47 Vt. 20: 513.
 Gilmer v. Hunnicutt, 57 S. C. 166: 923, 1165, 1167.
 v. Lime Point, 18 Cal. 229: 501, 588, 674, 685.
 v. Lime Point, 19 Cal. 47: 893, 894, 898, 1053.
 Gilmore v. Driscoll, 122 Mass. 199: 440, 441.
 v. Pittsburgh, Va. & C. R. R. Co., 104 Pa. St. 275: 1267, 1316.
 v. Sapp, 100 Ill. 297: 1004.
 Gilpin v. Ansonia, 68 Conn. 72: 601.
 Gilroy, In re, 78 Hun 260: 1379.
 Gilroy, In re, 85 Hun 424: 1092, 1237: 1329.
 Gilroy, Matter of, 26 App. Div. N. Y. 314: 1272.
 Gilroy, Matter of, 60 Misc. 125: 1254.
 Gilroy, Matter of, 32 N. Y. App. Div. 216: 817, 1061.
 Gilson v. State, 5 Lea 161: 1511.
 Gilzinger v. Saugerties Water Co., 66 Hun 173: 69, 74, 1603.
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 Ginn v. Moultrie etc. Dr. Dist., 188 Ill. 305: 1195.
 Girard Ave., In re, 18 Phil. 499: 1357, 1626, 1714.
 Girard Ave., Matter of, 11 Phil. 449: 1098.
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 Gish v. Drainage Dist., 136 Iowa 155: 1204.
 v. Drainage Dist., 137 Iowa 711: 1204.
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 Given v. Des Moines, 70 Iowa 637: 307.
 v. State, 160 Ind. 552: 471.
 Givens v. Van Studdiford, 4 Mo. App. 498: 649.
 Gladfelter v. Walker, 40 Md. 1: 81.
 Glaessner v. Anheuser-Busch Brewing Assn., 100 Mo. 508: 301, 314, 317, 320, 351, 372, 383, 533, 649, 665, 1582 1589.
 Glasby v. Morris, 18 N. J. Eq. 72: 335, 336.
 Glaser v. Glenwood R. R. Co., 208 Pa. St. 328: 689, 819.
 Glasgow v. Altoona, 27 Pa. Supr. 55: 84.
 v. Fazie, 14 Sess. Cas. (4th Series) 346: 821.
 v. Mathews, 106 Va. 14: 887, 888.
 v. St. Louis, 87 Mo. 678: 384, 401, 406.
 v. St. Louis, 107 Mo. 198: 367, 371, 384, 392, 395, 396, 398, 644, 1595.
 v. St. Louis, 15 Mo. App. 112: 384, 401, 406.
 Glass v. Basin Min. etc. Co., 22 Mon. 151: 706, 897, 992.
 Glassburn v. Deer, 143 Ind. 174: 1400.
 Glazier v. New Jersey etc. R. R. Co., 60 N. J. L. 353: 1081.
 Gleason v. Assabet Manf. Co., 101 Mass. 72: 899.
 v. Jefferson, 78 Ill. 399: 1576.
 v. Tuttle, 46 Maine 288: 866.
 Glencoe v. Reed, 93 Minn. 518: 1486, 1490.
 Glenn County v. Johnston, 129 Cal. 404: 1566.
 Glennon v. Chicago etc. R. R. Co., 79 Ill. 501: 1274.
 Glick v. Baltimore & O. R. R. Co., 19 D. C. 412: 246, 248, 250, 309, 316.
 Globe Fire Ins. Co. v. Lexington, 173 Mass. 6: 626.
 Gloe v. Chicago etc. Ry. Co., 65 Neb. 680: 842, 851.
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- Gluek v. Baltimore, 81 Md. 315: 952, 1255, 1256, 1258.
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- v. Gibbs, 70 Maine 243: 963.
- v. Merrill, 48 Maine 282: 1402.
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 Gottschalk v. C. & B. & Q. R. R. Co., 14 Neb. 550: 640, 642, 659, 664, 671.
 v. Lincoln etc R. R. Co., 14 Neb. 389: 959.
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 Gould v. Booth, 66 N. Y. 62: 235.
 v. Boston Dock Co., 13 Gray 442: 554, 556.
 v. Eaton, 111 Cal. 639: 161.
 v. Glass, 19 Barb. 179: 1156.
 v. Hudson River R. R. Co., 12 Barb. 616: 117, 131.
 v. Hudson River R. R. Co., 6 N. Y. 522: 117, 121, 128, 130, 131.
 v. Rochester, 105 N. Y. 46: 453.
 Gouverneur v. National Ice Co. 134 N. Y. 355: 109.
 Gowen v. Penobscot R. R. Co., 44 Me. 140: 1163, 1710.
 Grab, Matter of, 157 N. Y. 69: 1423.
 Grade Crossing Comrs., In re, 64 App. Div. 71: 937, 1564.
 Grade Crossing Comrs., In re, 169 N. Y. 605: 937, 1564.
 Grade Crossing Comrs., Matter of, 6 App. Div. 327: 1077, 1244.
 Grade Crossing Comrs., Matter of, 17 App. Div. N. Y. 54: 952, 1272.
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 Grade Crossing Comrs., Matter of, 59 App. Div. 498: 660, 710, 1210.
 Grade Crossing Comrs., Matter of, 116 App. Div. 549: 1211.
 Grade Crossing Comrs., Matter of, 154 N. Y. 550: 610, 616.
 Grade Crossing Comrs., Matter of, 154 N. Y. 561: 1080.
 Grade Crossing Comrs., Matter of, 164 N. Y. 575: 1377.
 Grade Crossing Comrs., Matter of, 166 N. Y. 69: 320, 384, 388, 398, 647.
 Grade Crossing Comrs., Matter of, 168 N. Y. 659: 660, 710.
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 Grading Bledsoe Hill, In re, 200 Mo. 630: 706.
 Grady v. Case, 51 N. J. Eq. 426: 947.
 v. Dunden, 30 Ore. 333: 928, 1005, 1018, 1571.
 v. N. W. Loan & Inv. Co., 93 Wis. 229: 1534.
 Graf v. St. Louis, 8 Mo. App. 562: 893, 895.
 Graff v. Baltimore, 10 Md. 544: 1669, 1673, 1685.
 v. Evergreen R. R. Co., 2 Pa. Co. Ct. 502: 717.
 Grafton v. Baltimore & Ohio R. R. Co., 21 Fed. 309: 622, 1294, 1549.
 v. St. Paul etc. Ry. Co., 16 N. D. 313: 1057, 1288, 1289.
 Grafton Dolomite Stone Co. v. St. Louis etc. Ry. Co., 199 Ill. 458: 851, 1620.
 Graham v. Chicago etc. Ry. Co., 39 Ind. App. 294: 91, 1639, 1653, 1668.
 v. Columbus & Indianapolis Central R. R. Co., 27 Ind. 260: 1625.
 v. Connerville etc. R. R. Co., 36 Ind. 463: 1222, 1348.
 v. Flynn, 21 Neb. 229: 865, 1034.
 v. Keene, 143 Ill. 425: 154, 167.
 v. Northern R. R. Co., 10 Grant Ch. 259: 75.
 v. Pittsburgh etc. R. R. Co., 145 Pa. St. 504: 1188, 1200, 1226.
 v. St. Louis etc. Ry. Co., 69 Ark. 562: 837, 1476, 1633.
 v. United States, 2 Ct. of Claims 327: 459.
 v. Virgin, 78 Me. 338: 1522.
 Grand Ave. R. R. Co. v. Citizens' R. R. Co., 148 Mo. 665: 427, 764, 1282, 1284.
 v. Lindell R. R. Co., 148 Mo. 637: 427, 764, 1284.
 v. People's R. R. Co., 12 Am. R. R. & Corp. Rep. 594: 427.
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- v. Coit, 149 Mich. 668: 1058, 1132, 1387.
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 - v. Luce, 92 Mich. 92: 1058, 1146.
 - v. Perkins, 78 Mich. 93: 1109.
 - v. Powers, 89 Mich. 94: 116, 129, 136.
- Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308: 60, 67, 90, 100, 101, 680.
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 - v. Chesebro, 74 Mich. 466: 897, 1089, 1174, 1176, 1310, 1456.
 - v. Grand Rapids etc. R. R. Co., 35 Mich. 265: 765, 788, 1610.
 - v. Heisel, 38 Mich. 62: 247, 253, 279, 309.
 - v. Heisel, 47 Mich. 393: 242, 247, 253, 309, 622, 1294.
 - v. Horn, 41 Ind. 479: 1112, 1205.
 - v. Van Driels, 24 Mich. 409: 990, 1058.
 - v. Weiden, 69 Mich. 572: 894, 992, 1419, 1421.
 - v. Weiden, 70 Mich. 390: 893, 894, 895, 896, 991, 1274, 1377.
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- v. Richardson, 91 U. S. 454: 1475.
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- v. Postal Tel. Co., 70 S. C. 528: 830, 1635.
 - v. Syracuse, 38 How. Pr. 308: 1196.
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- v. Davenport, 18 Ia. 179: 129, 136, 875.
 - v. Hyde Park, 67 Ohio St. 166: 238, 707, 1246, 1250, 1314, 1446.
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- v. United States, 1 Ct. of Cl. 41: 18.
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- v. Trah, 115 Ill. App. 291: 630, 631, 634.
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- Grape St., In re, 103 Pa. St. 121: 1708.
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- v. Middletown, 137 Ind. 400: 1029, 1514, 1518.
 - v. Otis, 2 Hill, 466: 211, 972.
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- v. Baynard, 5 Del. Ch. 499: 1489.
 - v. Burlington etc. R. R. Co. 37 Ia. 119: 843, 844, 851.
 - v. Case, 51 N. J. Eq. 426: 1564.
 - v. Chicago etc. Ry. Co., 189 Ill. 400, 843.
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 - v. Dundas, 11 Ont. 317: 84.
 - v. First Division of St. Paul & Pacific R. R. Co., 13 Minn. 315: 247.
 - v. Fort Plain, 105 App. Div. 215: 1338, 1554.
 - v. Greenville etc. Ry. Co., 59 N. J. Eq. 372: 370, 384, 718.
 - v. Haas, 98 Ia. 502: 869.
 - v. Iowa Land Co., 26 Iowa 387: 284, 390.
 - v. Iowa Cent. Ry. Co., 129 Iowa 68: 980.
 - v. Jones, 178 Ill. 169: 1402.
 - v. Knoxville, 85 Tenn. 99: 145.
 - v. Liverpool & Bury Ry. Co., 9 Veas. 391: 709.
 - v. Manhattan R. R. Co., 128 N. Y. 499: 1121, 1554, 1615.
 - v. Middletown, 56 Vt. 53: 1081.
 - v. New York etc. T. Co., 56 N. J. Eq. 463: 297.
 - v. New York etc. Telephone Co., 68 N. J. L. 454: 1116.
 - v. New York & Phila. Traction Co., 56 N. J. Eq. 463: 1618.
 - v. No. Versailles Tp., 208 Pa. St. 77: 1508.
 - v. St. Louis & San Francisco Ry. Co., 81 Mo. 126: 684, 1633, 1683.
 - v. St. Paul etc. R. R. Co., 13 Minn. 315: 304.
 - v. York State Telephone Co., 92 App. Div. 89: 339, 1593.

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Misc. 109: 339, 1593.
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Christy, 92 Ill. 337: 1115.
- Great Bend Road, 2 Pa. Co. Ct. 335:
1504.
- Great Falls Manf. Co. v. Attorney-
General, 124 U. S. 581: 1029.
- v. Fernald, 47 N. H. 444: 544, 549.
- v. Garland, 25 Fed. 521: 923, 1165,
1167, 1576.
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etc. R. R. Co., 104 Va. 416: 528,
540, 806.
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61 Minn. 1: 878.
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Hawkins, 30 Ind. App. 557: 21,
494, 498, 499, 507, 549, 929, 988,
1042, 1044.
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1527.
- Greeley v. Maine Central R. R. Co.,
53 Me. 200: 147, 157.
- v. Quimby, 22 N. H. 335: 865.
- Greeley etc. R. R. Co. v. Yount, 7
Colo. App. 189: 1176, 1320,
1547.
- Green v. Bethen, 30 Ga. 896: 1328.
- v. Chicago, 97 Ill. 370: 1108, 1121,
1195.
- v. City & Suburban R. R. Co., 78
Md. 294: 280, 281, 324.
- v. Eales, 2 A. & E. N. S. 225: 1260.
- v. East Haddam, 51 Conn. 547:
1105, 1387.
- v. Elliott, 86 Ind. 53: 1407.
- v. Fall River, 113 Mass. 262: 1142,
1185.
- v. Green, 34 Ill. 320: 1703.
- v. Ivey, 45 Fla. 338: 408, 409, 414,
1608.
- v. Londenslager, 54 N. J. L. 478:
993.
- v. Missouri Pacific Ry. Co., 82 Mo.
653: 1628.
- v. New York Central R. R. Co.,
65 How. Pr. 154: 316.
- v. Portland, 32 Me. 431: 291, 304,
316, 533, 1667.
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- v. Road Board, 126 Ga. 693: 1363,
1515.
- v. St. Louis, 106 Mo. 454: 1444.
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- v. South Bound R. R. Co., 112 Ga.
849: 936, 1559.
- v. State, 56 Wis. 583: 1024.
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- v. Tacoma, 51 Fed. 622: 1626.
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Tex. 604: 158, 1639.
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kauna Water Power Co., 90 Wis.
370: 71, 76.
- Greensburg v. Western Turf Asso.,
148 Cal. 126: 467.
- v. Western Turf. Asso., 140 Cal.
357: 467.
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165.
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85: 1570, 1624.
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1381.
- v. O'Connor, 18 R. I. 25: 513.
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Pa. St. 527: 1081.
- Greenland v. Co. Comrs., 68 Md. 59:
1397, 1428.
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161.
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514: 1094.
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37: 778.
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Co., 88 Ky. 659: 1643.
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27 S. W. 292: 454.
- v. Earle, 80 S. C. 321: 613, 1353.
- v. Mouldin, 64 S. C. 438: 613,
1625.
- Greenville etc. Ry. Co., Matter of, 75
App. Div. 220: 730.
- Greenville etc. Ry. Co., Matter of, 172
N. Y. 462: 730.
- Greenville etc. Ry. Co. v. Grey, 62
N. J. Eq. 768: 760, 1473.
- v. Nunnemaker, 4 Rich. L. 107:
1386.
- v. Partlow, 5 Rich. 428: 1192, 1194,
1317.
- v. Parlow, 6 Rich. 286: 1436, 1484.
- Greenwood v. Freight Co., 105 U. S.
13: 407.
- v. School District, 126 Mich. 81:
859.
- v. Wilton R. R. Co., 23 N. H. 261:
1331.
- Greer, Matter of, 39 N. Y. App. Div.
22: 610, 615.
- Greesemer v. Oley Val. R. R. Co., 13
Pa. Dist. Ct. 225: 1332.
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624, 1309, 1550.
- v. Northern R. R. Co., 67 N. H.
452: 1143, 1228, 1243.

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 v. Bush, 64 Mich. 37: 146, 147, 150, 154.
 v. Forbes, 96 N. C. 77: 127, 129.
 Gregsten v. Chicago, 40 Ill. App. 607: 197.
 Greit v. Amrbyn, 80 Conn. 280: 400.
 Gresinger v. Hellertown, 133 Pa. St. 522: 1402.
 Greve v. First Division of the St. Paul etc. R. R. Co., 26 Minn. 66: 1347.
 Grey v. Greenville etc. R. R. Co., 60 N. J. Eq. 153: 760.
 v. Greenville etc. Ry. Co., 59 N. J. Eq. 372: 320, 351.
 v. Paterson, 58 N. J. Eq. 1: 83.
 v. Paterson, 60 N. J. Eq. 385: 82, 83, 84, 1604, 1606, 1615.
 Gridley v. Bloomington, 88 Ill. 554: 492.
 Griffin's Petition, 27 N. H. 343: 701.
 Griffin v. Augusta & Knoxville R. R. Co., 70 Ga. 164: 1536.
 v. Dogan, 48 Miss. 11: 10.
 v. Foster, 8 Jones L. 337: 866.
 v. House, 18 Johns. 397: 726.
 v. Jacksonville etc. R. R. Co., 33 Fla. 606: 1630.
 v. Lawrence, 135 Mass. 365: 144.
 v. Martin, 7 Barb. 297: 357, 1489.
 v. Penn. S. V. R. R. Co., 1 Mont. Co. L. R. 169: 1189, 1317.
 v. Shreveport etc. R. R. Co., 41 La. Ann. 808: 640, 1294, 1337.
 Griffith v. Holman, 23 Wash. 347: 113.
 v. Pence, 9 Kan. App. 253: 575.
 Griffiths v. Galindo, 86 Cal. 192: 877.
 Grigg v. Northern R. R. Co., 67 N. H. 452: 745.
 Griggs v. Foote, 4 Allen 195: 829, 1551.
 Grigsby v. Burtnett, 31 Cal. 406: 1570, 1573.
 Grimes v. Doyle. Sneed (Ky.) 58: 1091, 1367.
 v. Eddy, 126 Mo. 168: 594.
 Grimshaw v. Fall River, 160 Mass. 483: 1403.
 Grimwood v. Macke, 79 Ind. 100: 1406.
 Grindley v. Barker, 1 Bos. & Pul. 229: 1100.
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 Grinnell v. Portage Co. Comr., 6 Ohio C. C. (N. S.) 180: 375, 386, 388, 405, 1596.
 Griscom v. Gilmore, 15 N. J. L. 475: 707, 1102, 1358.
 v. Gilmore, 16 N. J. L. 105: 1101, 1364.
 Griswold v. Guilford, 75 Conn. 192: 600.
 v. McGee, 102 Minn. 114: 943.
 v. Met. El. R. R. Co., 122 N. Y. 640: 1663.
 v. Minneapolis etc. Ry. Co., 12 N. D. 435: 840, 842, 843, 854, 1627, 1629.
 Griveau v. South Chicago City Ry. Co., 130 Ill. App. 519:
 Groce v. Zumwalt, 4 Mo. 567: 1004, 1385.
 Groff v. Bird-in-Hand Turnpike Co., 128 Pa. St. 621: 2, 779, 793, 798, 1595.
 v. Bird-in-Hand Turnpike Co., 144 Pa. St. 150: 779, 793, 798, 1595.
 v. Frederick City, 44 Md. 67: 466.
 Gross v. Lampsacus, 74 Tex. 195: 143.
 v. McNutt, 4 Ida. 286: 865.
 Grosser v. Rochester, 60 Hun 379: 942.
 v. Rochester, 148 N. Y. 235: 942, 1569.
 Grossman v. Houston etc. Ry. Co., 99 Tex. 641: 328.
 v. Patton, 186 Mo. 661: 710, 1085.
 Grosvenor v. Hempstead Junction R. R. Co., 1 DeG. & J. 446: 822.
 Grote v. New York, 117 App. Div. 768: 1325.
 v. New York, 190 N. Y. 235: 1325.
 Groton's Petition, 43 N. H. 91: 1385.
 Groton v. Hurlbut, 22 Conn. 178: 788.
 Grove v. Allen, 92 Ia. 519: 387, 388.
 Grover v. Cornet, 135 Mo. 21: 1306.
 Groves etc. R. R. Co. v. Herman, 206 Ill. 34: 1109, 1379.
 Grove St., In re, 61 Cal. 438: 977, 1518.
 Grugan v. Philadelphia, 158 Pa. St. 337: 1711.
 Grundy v. Louisville etc. R. R. Co., 98 Ky. 117: 862.
 Gruner v. Hartman, 66 N. J. L. 189: 1362.
 Gudger v. Richmond etc. R. R. Co., 106 N. C. 481: 1707, 1708.
 Gue v. Tide Water Canal Co., 24 How. 257: 1499.
 Guerkink v. Petaluma, 112 Cal. 306: 169, 1617.
 Guess v. South Bound R. R. Co., 40 S. C. 450: 832.

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 Guest v. Church Hill, 90 Md. 689: 154, 211, 233.
 v. Reynolds, 69 Ill. 478: 440.
 Guild v. Shedd, 150 Mass. 255: 873.
 Guilford's Petition, 25 N. H. 124: 1029.
 Guilford v. County Comrs., 40 Me. 296: 992.
 v. Minneapolis etc. R. R. Co., 94 Minn. 108: 1595.
 Guilford Town. Matter of, 85 App. Div. 207: 1386, 1402.
 Guillotte v. New Orleans, 12 La. An. 432: 485.
 Quinn v. Iowa etc. Ry. Co., 125 Ia. 301: 1245, 1311.
 v. Iowa etc. Ry. Co., 131 Ia. 680: 1109, 1245, 1311, 1320, 1450.
 v. Ohio Riv. R. R. Co., 46 W. Va. 151: 256, 640, 1297, 1552.
 Gulf Coast Ice & Mfg. Co. v. Bowers, 80 Miss. 570: 344.
 Gulf etc. R. R. Co. v. Abney, 3 Tex. Civ. App. p. 485: 1149.
 v. Brugger, 24 Tex. Civ. App. 367: 1112, 1221, 1329.
 v. Dunman, 85 Tex. 176: 853.
 v. Ellis, 70 Tex. 307: 844, 1311.
 v. Fink (Tex.) 18 S. W. 492: 1305.
 v. Ft. Worth etc. R. R. Co., 86 Tex. 537: 772, 894, 1511, 1512.
 v. Frederickson (Tex.) 19 S. W. 124: 158, 1651, 1655.
 v. Hartley, 88 Miss. 674: 1455, 1506.
 v. Haskell, 4 Tex. Civ. App. 550: 1651, 1653.
 v. Heffly, 158 U. S. 98: 482.
 v. Helsley, 62 Tex. 593: 152, 1552, 1651, 1655.
 v. Hepner, 83 Tex. 136: 92, 1651, 1653.
 v. Holliday, 65 Tex. 512: 152.
 v. Jones, 63 Tex. 524: 167.
 v. Jones, 82 Tex. 156: 831, 850.
 v. Jones, 3 Tex. Ct. of App. p. 41: 152.
 v. Kerfoot, 85 Tex. 267: 1409.
 v. Locker, 78 Tex. 279: 86, 92.
 v. Martin, 38 Tex. Civ. App. 379: 843, 844, 852.
 v. Milam Co., 90 Tex. 355: 1288.
 v. Mud Creek, I. A. & M. Co., 1 Tex. App. Civil Cas. p. 169: 707, 984.
 v. Neeco (Tex.) 15 S. W. Rep. 1102: 449, 654, 1244.
 v. Poindexter, 70 Tex. 98: 707, 831, 1526.
 v. Pomeroy, 67 Tex. 498: 94.
- Gulf etc. R. R. Co. v. Pool, 70 Tex. 713: 88, 1457.
 v. Richards, 83 Tex. 203: 862.
 v. Rowland, 70 Tex. 298: 844, 1311.
 v. Singleterry, 78 Miss. 772: 839.
 v. S. W. Tel. & Tel. Co., 18 Tex. Civ. App. 500: 682, 724, 988.
 v. S. W. Tel. & Tel. Co., 25 Tex. Civ. App. 488: 682, 684, 690, 696, 724.
 v. Steele, 29 Tex. Civ. App. 328: 152.
 v. Taequard, 3 Tex. Ct. App. 179: 715.
 v. Tait, 63 Tex. 223: 155, 1552, 1651, 1655.
 Gunn v. Ohio Riv. R. R. Co., 46 W. Va. 151: 1550.
 Gunnerus v. Spring Prairie, 91 Minn. 473: 57, 155.
 Gunning v. Pittsburg etc. Ry. Co., 2 Ohio N. P. (N. S.) 411: 1588.
 Gunning System v. Buffalo, 62 App. Div. 497: 471.
 v. Buffalo, 75 App. Div. 31: 471.
 Gunter v. Geary, 1 Cal. 462: 139.
 Guptail v. Teft, 16 Ill. 365: 1517, 1634.
 Gurnee v. Chicago, 40 Ill. 165: 1093.
 Gurney v. Minneapolis etc. R. R. Co., 41 Minn. 223: 1105, 1108.
 v. Minneapolis Union Elevator Co., 63 Minn. 70: 809, 1474.
 Gurnsey v. Edwards, 26 N. H. 224: 1518, 1520.
 v. Northern Cal. Power Co., 7 Cal. App. 534: 344.
 Gustafson v. Hamm, 56 Minn. 334: 180, 181, 190, 300, 317, 533, 1582, 1589.
 Guthrie etc. Ry. Co. v. Faulkner, 12 Okla. 532: 1330, 1332, 1477.
 Gutschow v. Washington Co., 74 Neb. 794: 1180, 1220.
 Guttery v. Glenn, 201 Ill. 275: 351, 370, 383, 871, 875.
 Guyandot Valley Ry. Co. v. Buskirk, 57 W. Va. 417: 1129, 1145, 1228.
 Gwinner v. Lehigh R. R. Co., 55 Pa. St. 126: 698.
 Gwynne v. Cincinnati, 3 Ohio 24: 943, 945.
- H.
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 Haas v. Evansville, 20 Ind. App. 482: 1489.
 Hab v. Georgetown, 46 Wash. 642: 1353.
 Hackett v. Brown, 128 Mich. 141: 1419.
 v. State, 113 Ind. 532: 1034, 1514.

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 v. Passaic Co., 73 N. J. L. 197: 1138, 1148, 1250.
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 Hagaman v. Moore, 84 Ind. 496: 1123, 1125, 1192, 1310, 1316.
 Hagar v. Brainard, 44 Vt. 294: 947, 966, 1024, 1036.
 v. Board of Supervisors of Yolo Co., 47 Cal. 222: 13, 564, 572.
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 Hagerstown v. Groh, 101 Md. 560: 947, 949, 961, 1563.
 Haggard v. Algona School Dt., 113 Ia. 486: 1134, 1210, 1392, 1673.
 Haggerty v. Scranton, 23 Pa. Supr. 279: 373, 382, 394, 647.
 Hagner v. Pennsylvania S. V. R. R. Co., 154 Pa. St. 475: 819.
 Haight v. Keokuk, 4 Ia. 199: 104.
 v. Littlefield, 147 N. Y. 338: 878.
 Haines v. Hall, 17 Or. 165: 113.
 v. St. Louis etc. R. R. Co., 65 Ia. 216: 1208.
 v. Twenty-second St. etc. Pass. R. R. Co., 1 Pa. Dist. Ct. 506: 297, 315, 316, 1587, 1590.
 Haislip v. Wilmington & W. R. R. Co., 102 N. C. 376: 1187, 1252.
 Haldeman v. Bruckhart, 45 Pa. St. 514: 165.
 v. Penn. R. R. Co., 50 Pa. St. 425: 809, 1500.
 Hale v. Burwell, 2 Patten & Heath, 608: 929, 931, 965.
 v. Lawrence, 21 N. J. L. 714: 19.
 v. McLea, 53 Cal. 578: 165.
 v. McLeod, 2 Met. Ky. 98: 872.
 v. Point Pleasant & Ohio R. R. Co., 23 W. Va. 454: 1160, 1294, 1580.
 Haley v. Philadelphia, 68 Pa. St. 45: 1324.
 Hall v. Baird, 73 Ia. 528: 1515.
 v. Boyd, 14 Ga. 1: 1163.
 v. Breyfogle, 162 Ind. 494: 366, 877, 880, 882, 1491.
 v. Bristol, L. R. 2 C. P. 322: 628.
 v. Carter, 33 Tex. Civ. App. 230: 866.
 v. Ionia, 38 Mich. 493: 74.
 Hall v. Kaufman, 106 Cal. 451: 889.
 v. Lebanon, 31 Ind. App. 265: 384, 390.
 v. Manchester, 39 N. H. 295: 1361.
 v. Manchester, 40 N. H. 410: 1100.
 v. Meriden, 48 Conn. 416: 891.
 v. Palmer, 54 Mich. 270: 1444.
 v. Pa. R. R. Co., 215 Pa. St. 172: 315, 1590.
 v. People, 57 Ill. 307: 1162, 1637, 1638.
 v. Pettit, 88 Mich. 158: 516, 522, 976, 1419.
 v. Pickering, 40 Me. 548: 834, 1522.
 v. Ragsdale, 4 S. & P. 252: 410, 414.
 v. St. Paul, 56 Minn. 428: 865.
 v. Smith, 2 Bing. 156: 206.
 v. State, 72 App. Div. 360: 866, 1262.
 v. State, 92 App. Div. 96: 866, 869.
 v. Thayer, 105 Mass. 219: 1082.
 v. Trenton, 86 Mo. App. 326: 237.
 Halleran v. Bell Telephone Co., 64 App. Div. 47: 1594.
 v. Bell Telephone Co., 177 N. Y. 573: 1594.
 Hallock v. Franklin Co., 2 Met. 558: 1087, 1682.
 v. Woolsey, 23 Wend. 328: 1527, 1528.
 Halse Tp. Road, 4 Luzerne Leg. Reg. Rep. 423: 1059.
 Halse Tp. Road, 6 Luzerne Leg. Reg. Rep. 463: 778.
 Halsey v. Lehigh Valley R. R. Co., 45 N. J. L. 26: 1524.
 v. Rapid Transit R. R. Co., 47 N. J. Eq. 380: 181, 201, 279, 333, 1586, 1590.
 Halstead v. Manhattan R. R. Co., 58 N. Y. Supr. Ct. 270: 1085.
 Halsted v. Buster, 119 U. S. 341: 996.
 Halter v. Nebraska, 205 U. S. 34: 468.
 v. State, 74 Neb. 757: 473.
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 Ham v. Levee Comrs. 83 Miss. 534: 153, 584, 679, 1057, 1063, 1070.
 v. Salem, 100 Mass. 350: 352, 1142, 1144.
 v. Wisconsin etc. Ry. Co., 61 Ia. 716: 1138, 1204, 1208.
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 Hamel v. Minneapolis etc. Ry. Co., 97 Minn. 334: 842, 843, 844, 853, 1627.

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 v. Ashbrook, 62 Ohio St. 571: 79.
 v. Chicago etc. R. R. Co., 124 Ill. 235: 886.
 v. Comrs. of Highways, 203 Ill. 269: 1017, 1412, 1420.
 v. Fort Wayne, 73 Ind. 1: 1397.
 v. Manhattan R. R. Co., 57 N. Y. Supr. Ct. 491: 1444.
 v. Manhattan R. R. Co., 58 N. Y. Supr. Ct. 17: 1121, 1305, 1665.
 v. New York & Harlem R. R. Co., 9 Paige. 171: 1582.
 v. Pittsburg etc. R. R. Co., 190 Pa. St. 51: 1272, 1315.
 v. Spokane etc. R. R. Co., 2 Idaho. 898: 431.
 v. Vicksburg etc. R. R. Co., 119 U. S. 280: 133.
 Hamilton Ave., Matter of, 14 Barb. 405: 408, 1107.
 Hamilton County v. Garrett, 62 Tex. 602: 1382, 1546.
 v. Rape, 101 Tenn. 222: 181, 222.
 Hamilton etc. Traction Co. v. Hamilton etc. Elec. Traction Co., 69 Ohio St. 402: 416, 910.
 v. Parrot, 67 Ohio St. 181: 302.
 Hamilton G. & C. Co. v. Hamilton, 146 U. S. 258: 409.
 Hamilton St. Opening, In re, 6 Mont. Co. L. Rep. 207: 878.
 Hamlin v. Kansas Ry. Co., 73 Kan. 565: 1503.
 v. New Bedford, 143 Mass. 192: 703, 1434.
 v. New York etc. R. R. Co., 160 Mass. 459: 845.
 v. New York etc. R. R. Co., 166 Mass. 462: 1485.
 Hamman v. County Comrs., 154 Mass. 509: 387.
 Hammel v. Cumberland Valley R. R. Co., 175 Pa. St. 537: 1458.
 Hammersley v. New York, 67 Barb. 35: 1325.
 v. New York, 56 N. Y. 533: 1168, 1325, 1326.
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 v. Phila., 65 Pa. St. 146: 14, 744.
 Hammon v. Commissioners, 38 Ill. App. 237: 1020.
 v. County Comrs., 154 Mass. 509: 371, 379, 388, 1415.
 v. Harvard, 31 Neb. 635: 630.
 v. Port Royal & A. R. R. Co., 15 S. C. 10: 854.
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 v. Rose, 11 Colo. 524: 70.
 v. Shepard, 186 Ill. 235: 109.
 Hamor v. Bar Harbor Water Co., 78 Me. 127: 70, 74, 912, 1522, 1525.
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 Hampden P. & C. Co. v. Springfield etc. R. R. Co., 124 Mass. 118: 1222, 1320.
 Hampstead v. Junction R. R. Co., 1 DeG. & J. 446: 823.
 Hampton v. Chicago etc. Ry. Co., 125 Ill. App. 412: 352.
 v. Clinton Water etc. Co., 65 N. J. L. 158: 707, 708, 917, 1050.
 v. Coffin, 4 N. H. 517: 1683.
 v. Commonwealth, 19 Pa. St. 329: 695, 1674.
 v. Kansas City, 74 Mo. App. 129: 630, 1323.
 v. Poland, 50 N. J. L. 367: 514, 1057, 1419.
 Hancock v. Boston, 1 Met. 122: 1028, 1415, 1416.
 v. Philadelphia, 4 Pa. Dist. Ct. 345: 1327.
 v. Philadelphia, 175 Pa. St. 124: 1426.
 v. Worcester, 62 Vt. 106: 1415.
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 Hanes v. North Carolina R. R. Co., 109 N. C. 490: 1359, 1360.
 Haney v. G. C. & S. F. R. R. Co., 3 Tex. Ct. of App. 336: 666.
 v. Kansas City, 94 Mo. 334: 143, 235.
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v. Southern Ry. Co., 111 Tenn. 538: 487, 1288.
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v. Harrington, 1 Met. 404: 1373.
v. Ia. Cent. Ry. Co., 126 Ia. 388: 199, 351, 377, 380, 388, 395, 1502.
v. People, 6 Barb. 607: 1518.
v. Probate Judge, 153 Mich. 660: 1105.
v. St. Paul & Sioux City R. R. Co., 17 Minn. 215: 242, 247, 315, 936, 1314, 1580, 1650, 1657.
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v. Brewster, 154 Pa. St. 22: 966, 1558.
v. Coltraine, 3 Hawks, N. C. 312: 1444.
v. Curtis, 34 Ind. App. 438: 993.
v. Howes, 75 Me. 436: 1258, 1369, 1556.
v. Kingston Realty Co., 116 App. Div. 704: 936, 1561.
v. Marblehead, 10 Gray, 40: 687, 706, 1626.
v. Philadelphia, 155 Pa. St. 76: 141, 1651, 1656.
v. Ross, 112 Ind. 314: 1514.
v. Schuylkill Riv. E S R. R. Co., 141 Pa. St. 242: 1187, 1215, 1232, 1236.
v. Schuylkill Riv. E. S. R. R. Co., 159 Pa. St. 468: 1535.
v. Thompson, 9 Barb. 350: 498, 675.
v. Woodstock, 27 Conn. 567: 1103.
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v. McPherson, 200 Pa. St. 343: 11, 464.
v. Roller, 97 Va. 582: 212, 237.
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Harrisburg City Pass. R. R. Co. v. Harrisburg, 7 Pa. Co. Ct. 593: 331.
v. Harrisburg, 149 Pa. St. 465: 299, 1620.
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v. Peffer, 84 Pa. St. 295: 1566.
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v. Lexington etc. Co., 9 B. Mon. 470: 1497.
v. Mt. Auburn Cable R. R. Co., 17 Weekly Bull. 265: 269.
v. Myer, 92 U. S. 111: 19.
v. Newman, 71 Kan. 324: 1026.
v. New Orleans Pacific R. R. Co., 34 La. Ann. 462: 248, 253, 1582.
v. Thompson, 9 Barb. 350: 495.
v. Young, 9 Ga. 359: 1112, 1329.
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 - Harrison County v. Seal, 66 Miss. 129: 886, 890.
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v. Baraboo, 101 Wis. 368: 234.
v. Baton Rouge, 10 La. Ann. 171: 129, 137.
v. Board of Levee Comrs., 54 Fed. 559: 440.
v. Buckner, 54 Fed. 925: 181, 297, 315, 1587, 1590.
v. Piedmont etc. R. R. Co., 52 W. Va. 396: 640, 883.
v. Seattle, 42 Wash. 113: 631, 1601, 1612.
v. Seattle, 45 Wash. 300: 1601, 1612.
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v. Wagner, 73 Conn. 506: 693, 1719.
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- Hartman v. Pittsburgh Inclined Plane R. R. Co., 159 Pa. St. 442: 145.
v. Pittsburgh Inclined Plane Co., 11 Pa. Supr. Ct. 438: 1651.
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v. Tresise, 36 Colo. 146: 494, 591.
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v. Chaddock, 135 N. Y. 116, 89.
v. Chicago etc. R. R. Co., 52 Ia. 613: 1208.
v. Ill. Val. Traction Co., 210 Ill. 609: 682, 720.
v. Ill. Val. Ry. Co., 216 Ill. 392: 1233, 1234.
v. Pottroff, 89 Ill. 509: 1519, 1520.
v. South Reading, 3 Allen 501: 379, 391.
v. Worcester, 113 Mass. 111: 1307.
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v. St. Clair etc. Drainage Co., 51 Ill. 130: 927.
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v. Aurora etc. Ry. Co., 186 Ill. 283: 300, 303, 304, 720, 1071.
v. Dwoeddy, 18 Ark. 252: 485.
v. G. C. & S. F. R. R. Co., 3 Tex. Ct. of App. 336: 647.
v. Georgia Southern etc. R. R. Co., 90 Ga. 66: 179, 190, 320, 351, 372, 639, 646, 1593, 1596.
v. Kansas etc. R. R. Co., 54 Kan. 228: 842.
- Harvey v. Laackawanna etc. R. R. Co., 47 Pa. St. 428: 1341.
v. Lloyd, 3 Pa. 331: 530, 971, 1187.
v. Mason City etc. R. R. Co., 129 Ia. 465: 158, 1454, 1548, 1552, 1639, 1650, 1655, 1662.
- v. Parkdale, 16 Ontario 372: 1239.
v. Parkdale, 17 Ontario App. 468: 1239.
v. Thomas, 10 Watts, 63: 21, 530, 1349.
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- Harwell v. Bennett, 1 Rand. 282: 1383.
- Harwinton v. Catlin, 19 Conn. 520: 678.
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v. West Randolph, 64 Vt. 41: 1229, 1268.
- Haskell v. County Comrs., 9 Gray. 341: 1711.
v. Denver Tramway Co., 23 Colo. 60: 196, 277, 1586.
v. New Bedford, 108 Mass. 208: 142, 787, 1354, 1606.
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- Hastings & Grand Island R. R. Co., v. Ingalls, 15 Neb. 123: 243, 939, 1378.
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- Haswell v. Vermont Central R. R. Co., 23 Vt. 228: 1403, 1533, 1534.
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v. Barnes, 124 Ia. 251: 735, 1492.
v. Cincinnati & Indiana R. R. Co., 18 Ohio St. 92: 424, 1310, 1314.
v. Dwight, 17 Mass. 289: 556.
v. Hawkes, 126 Mass. 177: 1519.
v. New York, 82 N. Y. 436: 1557.
v. Pottawattamie Co., 43 Ia. 442: 575.
v. Tacoma etc. R. R. Co., 6 Wash. 1: 256, 304, 324, 1667.
v. Vermont Central R. R. Co., 25 Vt. 49: 256.
v. Vermont Central R. R. Co., 23 Vt. 142: 256.
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 - v. Straus, 117 App. Div. 671: 291, 294, 317, 1588.
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 - Hatfield Tp. Road, 4 Yeates 392: 695.
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 - v. Yakima W. L. & P. Co., 14 Wash. 469: 858.
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 - v. Strong's S. S. Sanitarium, 55 Misc. 445: 163.
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 - Hause's Appeal, 3 Walker's Pa. Super. Ct. 54: 1388.
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 - v. County Comrs., 2 Allen, 254: 941.
 - v. Fall River, 119 Mass. 94: 1119, 1120.
 - v. Justices of Truesdale County, 12 Lea 351: 970.
 - v. Nelson, 40 Ala. 553: 19.
 - v. Pittsburg, 220 Pa. St. 7: 433, 708, 728.
 - v. Randolph County, 1 Murphy, 118: 1425.
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 - v. Stanford, 138 Ind. 267: 1576.
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 - v. Harrall, 19 Conn. 142: 1163.
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 - v. Commonwealth, 183 Mass. 294: 1221, 1319.
 - v. Lexington, 114 Ky. 665: 630, 634.
 - v. Springfield Water Co., 207 Pa. St. 38: 1577.
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 - v. State, 132 N. Y. 533: 912, 987.
 - v. Stewart, 71 Kan. 11: 373, 382, 404.
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 - v. Chicago etc. R. R. Co., 46 Minn. 349: 320, 351, 372, 385.
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 - v. Wells, 26 Ark. 464: 413.
 - Hays v. B. & O. R. R. Co., 3 Penny. 52: 1325.
 - v. Bowman, 1 Rand. 417: 104.
 - v. Briggs, 74 Pa. St. 373: 1139.
 - v. Briggs, 24 P. F. S. 373: 1140.
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[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Lewis, 28 Ohio St. 326: 816.
 v. Ottawa etc. R. R. Co., 54 Ill. 373: 1122, 1206, 1216, 1245.
 v. Parish, 52 Ind. 132: 1094, 1102.
 v. Risher, 32 Pa. 169: 530.
 v. Shackford, 3 N. H. 10: 1362, 1634.
 v. South Easton Borough, 10 Pa. Super. Ct. 390: 1546.
 v. State, 8 Ind. 425: 1363.
 v. T. & P. R. R. Co., 62 Tex. 397: 714, 857, 864, 1626.
 v. Waldron, 44 N. H. 580: 71.
 Hayward v. Bath, 40 N. H. 100: 1106.
 v. Charlestown, 34 N. H. 23: 969.
 v. Davidson, 41 Ind. 212: 837.
 v. New York, 8 Barb. 486: 539, 1500.
 v. New York, 7 N. Y. 314: 1500.
 v. Snohomish Co., 11 Wash. 429: 564, 581, 1157.
 Haywood v. Bath, 35 N. H. 514: 1421.
 v. Charlestown, 43 N. H. 61: 1372.
 Hazelhurst v. Baltimore, 37 Md. 199: 1510, 1512.
 v. Freeman, 52 Ga. 244: 726.
 v. Mayes, 84 Miss. 7: 180, 344, 350.
 Hazen v. Boston & Maine R. R. Co., 2 Gray, 574: 1636.
 v. Essex Co., 12 Cush. 475: 543, 549, 555, 783, 1164, 1165, 1170, 1522.
 H. B. Anthony Shoe Co. v. West Jersey R. R. Co., 57 N. J. Eq. 607: 254, 1581.
 H. C. Frick Coke Co. v. Painter, 198 Pa. St. 468: 1058, 1062, 1064, 1188, 1201, 1209.
 Heacock v. Sullivan, 70 Kan. 750: 735, 1154, 1514.
 Head v. Amoskeag Manuf. Co., 113 U. S. 9: 549, 554, 578, 596.
 Headrick v. Larson, 152 Fed. 93: 755.
 Heady v. Vevay etc. Turnpike Co., 52 Ind. 117: 703, 1109, 1406.
 Heagy v. Black, 90 Ind. 534: 1518.
 Healey v. Atlanta, 125 Ga. 736: 884, 886.
 v. Babbitt, 14 R. I. 533: 1499.
 v. New Haven, 49 Conn. 394: 601, 1524, 1550, 1718.
 v. New Haven, 47 N. H. 305: 211.
 v. Newton, 119 Mass. 480: 1010.
 Health Dept v. Trinity Church, 145 N. Y. 32: 490.
 Healy Lumber Co. v. Morris, 33 Wash. 490: 505, 508, 510, 516.
 Heard v. Brooklyn, 60 N. Y. 242: 424.
 Heard v. Middlesex Canal, 5 Met. 81: 1185.
 v. Proprietors of Middlesex Canal, 5 Met. 81: 1711.
 v. Talbot, 7 Gray 113: 1504.
 Heath v. Barman, 49 Barb. 496: 422.
 v. Barmore, 50 N. Y. 302: 422, 837, 838.
 v. Des Moines & St. Louis Ry. Co., 61 Ia. 11: 300, 316, 712, 1583.
 v. Sheetz, 164 Ind. 665: 1058, 1192, 1378.
 v. Texas & Pac. Ry. Co., 37 La. An. 728: 846.
 v. Williams, 25 Me. 209: 69, 95, 900.
 Heaton v. Chester, 59 Misc. 558: 141, 470.
 Hebron Gravel Road Co. v. Harvey, 90 Ind. 192: 91, 95, 137, 1607.
 Hector Tp. Road (No. 1), 19 Pa. Super. Ct. 120: 1363.
 Hector Tp. Road (No. 2), 19 Pa. Super. Ct. 124: 1363.
 Hedeen v. State, 47 Kan. 402: 1028, 1520.
 Hedges v. Metropolitan Ry. Co., 28 Beav. 109: 1533.
 v. West Shore R. R. Co., 80 Hun, 310: 102, 122, 127, 131.
 Hedrick v. Hedrick, 55 Ind. 78: 995, 1075.
 v. Olathe, 30 Kan. 348: 1553.
 Heermans v. Jacksonville etc. Ry. Co., 40 Fla. 85: 1389.
 Heffner v. Cass & Morgan Cos. 193 Ill. 439: 321, 439, 574.
 Heffron v. Galveston, 33 Tex. Civ. App. 52: 872.
 Hegar v. Chicago & N. W. Ry. Co., 26 Wis. 624: 247, 1293.
 Hegemeyer v. Board of Co. Comrs., 71 Minn. 42: 1404.
 Hegenbaumer v. Heckenkamp, 202 Ill. 621: 1411, 1414.
 Heick v. Voight, 110 Ind. 279: 566, 575, 976, 1069.
 Heidelberg Tp. Road, 1 Pa. Co. Ct. 7: 1105.
 Heidelberg Tp. Road, 47 Pa. St. 536: 1370.
 Heilbron v. Canal Co., 75 Cal. 426: 74, 1603, 1614.
 v. Land & Water Co., 80 Cal. 189: 71, 72, 76.
 v. Superior Court, 151 Cal. 271: 1461, 1463, 1464.
 Heilman v. Lebanon & A. St. R. R. Co., 10 Pa. Co. Ct. 241: 272, 642, 1586, 1590.

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 v. Lebanon etc. St. R. R. Co., 175 Pa. St. 188: 1587.
 v. Lebanon etc. St. R. R. Co., 180 Pa. St. 627: 306, 307, 1587, 1616.
 v. Union Canal Co., 50 Pa. St. 268: 74, 78, 937.
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 v. Manhattan Ry. Co., 162 N. Y. 352: 323, 1355.
- Heine v. Columbia etc. R. R. Co., 16 Pa. Dist. Ct. 840: 677, 714.
- Heinl v. Terre Haute, 161 Ind. 44: 690, 696.
- Heinrich v. St. Louis, 125 Mo. 424: 364, 369, 375, 376, 391, 1337.
- Heinz v. Buekham, 104 Minn. 389: 1035, 1412, 1420.
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 v. East Portland, 13 Or. 97: 173.
- Heise v. Penn. R. R. Co., 62 Pa. St. 67: 1077.
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 v. New York, 104 N. Y. 68: 609, 617.
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- Heitz v. St. Louis, 110 Mo. 618: 878, 891.
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 v. Helena W. W. Co., 122 Fed. 1: 409, 410.
 v. Hornor, 58 Ark. 151: 1492.
 v. Rogan, 26 Mont. 452: 707, 804, 805, 934, 987.
 v. Rogan, 27 Mont. 135: 805, 934, 987.
 v. Thompson, 29 Ark. 569: 236.
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 v. Spratt, 35 Mont. 108: 495, 536, 537, 587, 592, 672, 684, 685, 686, 1045, 1046.
- Helena W. W. Co. v. Helena 195 U. S. 383: 410.
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- Hellen v. Medford, 188 Mass. 42: 806, 807, 1172.
- Helm v. Grayville, 224 Ill. 274: 682, 725, 980.
 v. McClure, 107 Cal. 199: 877, 880, 881.
 v. Webster, 85 Ill. 116: 198, 1502.
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 v. Cargill, 46 Minn. 141: 1716.
 v. Des Moines, 52 Ia. 303: 603, 1306, 1550.
 v. Des Moines, 63 Ia. 36: 603, 618, 619, 1551, 1656, 1718.
 v. Salt Lake City, 32 Utah 261: 631.
- Hench v. Pritt, 62 W. Va. 270: 499, 505, 531, 591.
- Hendershott v. Ottumwa, 46 Ia. 658: 230.
- Henderson v. Adams, 5 Cush. 610: 930, 1116.
 v. Chicago etc. R. R. Co. 83 Ia. 221: 1634.
 v. Davis, 106 N. C. 88: 1018, 1032, 1513.
 v. McClain, 102 Ky. 402: 630, 659, 661. .
 v. Minneapolis, 32 Minn. 319: 211.
 v. New York Cent. R. R. Co., 17 Hun 344: 1580.
 v. N. Y. C. R. R. Co., 78 N. Y. 423: 247, 315, 323, 1293, 1580.
 v. Ogden City R. R. Co., 7 Utah 199: 298, 301, 763.
 v. Winstead, 109 Ky. 328: 1306.
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 v. DeChamp, 14 Ky. L. R. 44: 620.
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- Henry v. Centralia etc. R. R. Co., 121 Ill. 264: 1045, 1074.
- v. Dubuque & Pacific R. R. Co., 2 Ia. 288: 808, 1204.
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- v. Newburyport, 149 Mass. 582: 119, 132.
- v. Ohio Riv. R. R. Co., 40 W. Va. 234: 149, 152, 1651, 1658.
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- v. Wabash Western R. R. Co., 44 Mo. App. 100: 321, 1643.
- v. Ward, 49 Neb. 392: 1569.
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- [The references are to the pages: Vol. I., pp. 1-742; Vol. II., pp. 743-1719.]
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 Hespelheide's Appeal, 4 Penny. 71: 688, 715.
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 Hessler v. Drainage Comrs., 53 Ill. 105: 12.
 Hess's Mill Road, 21 Pa. St. 217: 778.
 Hester v. Chambers, 84 Mich. 562, 1083.
 Heston v. Canal Comrs., Brightley's N. P. 183: 1571.
 v. Canal Comrs., 1 Pa. Rep. 25: 1577.
 Hetfield v. Central R. R. Co., 29 N. J. L. 571: 936.
 v. Central R. R. Co., 29 N. J. L. 206: 936.
 Heth v. Fond du Lac, 63 Wis. 228: 148, 234.
 Hetzel v. B. & O. R. R. Co., 169 U. S. 26: 315.
 Hewes v. Andover, 16 Vt. 510: 973, 974.
 v. Crete, 175 Ill. 348: 888.
 Hewett v. Canton, 182 Mass. 220: 157, 326, 606, 1667.
 v. Co. Comrs., 85 Me. 308: 1343, 1414.
 Hewin v. Atlanta, 121 Ga. 723: 479.
 Hewitt's Appeal, 88 Pa. St. 55: 466.
 v. County Comrs., 85 Me. 308: 1345, 1415.
 v. Pittsburgh etc. R. R. Co., 19 Pa. Supr. Ct. 304: 1140, 1189, 1201.
 v. St. Paul etc. R. R. Co., 35 Minn. 226: 729.
 v. Western U. Teleg. Co., 4 Mack. 424: 1593.
 Heyl v. Philadelphia, 12 Phila. 291: 1115.
 Heyneman v. Blake, 19 Cal. 579: 808, 810.
 Heyward v. Farmers' Min. Co., 42 S. C. 138: 113, 115.
 Heyward v. New York, 8 Barb. 486: 807, 1500.
 v. New York, 7 N. Y. 314: 8, 806, 807, 932, 1500.
 Hibbard v. Chicago, 173 Ill. 91: 199.
 v. Chicago, 59 Ill. App. 470: 197, 199.
 v. Delaware Co., 1 Pa. Supr. Ct. 204: 1531.
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 Hibberd v. Melvillee (Cal.) 33 Pac. 201: 881.
 Hibbs v. Chicago & Southwestern Ry. Co., 39 Ia. 340: 1535, 1536, 1578.
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 Hickerson v. Mexico, 58 Mo. 61: 1546, 1548.
 Hickey v. Mich. Central R. R. Co., 96 Mich. 498: 1507.
 Hickman's Case, 4 Harr. (Del.) 580: 515, 518.
 Hickman v. Kansas City, 120 Mo. 110: 619, 630, 632, 1186, 1337, 1525, 1546.
 Hickok v. Chicago etc. R. R. Co., 78 Mich. 615: 842, 1503.
 v. Hine, 23 Ohio St. 523: 97, 788.
 Hickory Tree Road, 43 Pa. St. 139: 696.
 Hiekox v. Chicago etc. R. R. Co., 94 Mich. 237: 841.
 v. Cleveland, 8 Ohio 543: 214.
 Hicks v. Chicago etc. R. R. Co., 84 Ia. 27: 1300.
 v. Foster, 32 Ga. 414: 1089.
 v. Ward, 69 Me. 436: 364.
 Hidden v. Davison, 51 Cal. 138: 941.
 Higbee v. Camden & Amboy R. R. Co., 19 N. J. Eq. 276: 308, 1593.
 v. Camden & Amboy R. R. Co., 20 N. J. Eq. 435: 297, 1593.
 v. Peed, 98 Ind. 420: 1384.
 Higgins v. Chicago, 18 Ill. 276: 1531, 1532, 1680.
 v. Curtis, 39 Kan. 283: 1374, 1393.
 v. Flemington Water Co., 36 N. J. Eq. 538: 74, 1603.
 v. Hamor, 88 Me. 25: 1510.
 v. New York etc. R. R. Co., 78 Hun 567: 93, 94.
 v. Reynolds, 31 N. Y. 151: 1491.
 v. Sharon, 5 Pa. Super. Ct. 92: 366.
 Higginson v. Nahant, 11 Allen 530: 514, 539.
 High v. Big Creek Ditching Assn., 44 Ind. 356: 1082.
 Highbarger v. Milford, 71 Kan. 331: 182, 190, 366, 382, 389, 404, 1596.
 High Bridge Lumber Co. v. United States, 69 Fed. Rep. 320: 92, 457, 932, 933, 1316, 1451.
 Highland Ave. R. R. Co. v. Birmingham Union R. R. Co., 93 Ala. 505: 328, 765, 767, 1611.
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- Highway, Matter of, 3 N. J. L. 242: 973, 974, 1069.
- Highway, Matter, 3 N. J. L. 244: 1370.
- Highway, Matter of, 3 N. J. L. 272: 1389.
- Highway, Matter of, 3 N. J. L. 504: 1084.
- Highway, Matter of, 3 N. J. L. 590: 1069.
- Highway, Matter of, 7 N. J. L. 37: 992.
- Highway, Matter of, 15 N. J. L. 39: 1031.
- Highway, Matter of, 16 N. J. L. 345: 1409.
- Highway, Matter of, 16 N. J. L. 391: 979, 1022, 1093, 1099.
- Highway, Matter of, 18 N. J. L. 291: 1376.
- Highway, Matter of, 22 N. J. L. 293: 22, 1156, 1157.
- Highway Comrs. v. Ely, 54 Mich. 173: 336, 1487.
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- Hilcoat v. Archbishop, 19 L. J. C. P. 376: 1267.
- Hildreth v. Lowell, 11 Gray 345: 535, 1010, 1024, 1366.
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- Hill v. Baker, 28 Me. 9: 963.
v. Board of Supervisors, 95 Cal. 239: 918, 982.
v. Bridges, 6 Porter 197: 1427.
v. Chicago etc. R. R. Co., 38 La. Ann. 599, 253.
v. Cincinnati etc. R. R. Co., 109 Ind. 511: 157
v. Co. Comrs., 4 Gray, 414: 1638.
v. Glendon etc. Mfg. Co., 113 N. C. 259: 830.
v. Higdon, 5 Ohio St. 243: 14.
v. McGinniss, 64 Neb. 187: 865.
v. Mohawk & Hudson R. R. Co., 5 Denio 206: 1343.
v. Mohawk & Hudson R. R. Co., 7 N. Y. 152: 1246, 1343, 1344.
- Hill v. St. Louis, 59 Mo. 412: 236.
v. Sayles, 4 Cush. 549: 1667.
v. Sayles, 12 Cush. 454: 1607.
v. Sayles, 12 Met. 142: 1667.
v. Sedalia, 64 Mo. App. 494: 881, 886.
v. Sewald, 3 P. F. Smith 271: 1350.
v. Southern Ry. Co., 67 S. C. 548: 727, 1479.
v. Wadley Southern Ry. Co., 128 Ga. 705: 481, 483.
v. Ward, 2 Gil. (Ill.) 285: 90.
v. Western Vt. R. R. Co., 32 Vt. 68: 827, 834, 837, 1499.
v. Wine, 35 N. Y. App. Div. 520: 948, 1563.
- Hiller v. Atchison etc. R. R. Co., 28 Kan. 625: 384, 390.
v. Railroad Co., 28 Kan. 628: 369.
- Hilltown Road, 18 Pa. St. 233: 1082, 1087.
- Hilltown Road, 2 Walker's Pa. Supn. Ct. 78: 778, 1094.
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v. Thirty-fourth Street R. R. Co., 1 How. Pr. N. S. 453: 922.
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- Himmelman v. Hoadley, 44 Cal. 213: 237, 734.
- Hinchman v. Patterson H. R. R. Co., 17 N. J. Eq. 75: 268, 279, 1586.
- Hinckley. Ex parte, 8 Me. 146: 1081, 1420.
- Hinckley et al. Petitioners, 15 Pick. 447: 955, 1004, 1010, 1013, 1014, 1029.
- Hinckley v. Franklin, 69 N. H. 614: 608, 617.
v. Nickerson, 117 Mass. 213: 560.
v. Manhattan Ry. Co., 103 App. Div. 504: 866.
- Hindley v. Manhattan Ry. Co., 185 N. Y. 335: 866.
- Hinde v. Wabash Navigation Co., 15 Ill. 72: 688.
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v. Manhattan R. R. Co., 132 N. Y. 477: 1145.
v. Manhattan R. R. Co., 58 N. Y. Supr. 377: 1146.
v. New Haven, 40 Conn. 478: 14, 485.
v. New York El. R. R. Co., 36 Hun. 293: 1124.
v. New York El. R. R. Co., 54 Hun. 425: 180, 264.

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 v. Co. Comrs., 131 Mass. 519: 1638.
 v. Danbury & Newark R. R. Co., 25 Conn. 516: 1519.
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 v. Frostburg, 70 Md. 56: 1656.
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 v. Switzer, 61 Ill. 294: 437.
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 v. Sacramento, 52 Cal. 142: 89.
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 v. Plymouth Co., 100 Mass. 159: 1133.
 v. Milwaukee City Ry. Co., 27 Wis. 194: 268, 284, 329.
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 v. Long Distance Tel. & Tel. Co., 147 Ala. 393: 341.
 v. Nashville etc. Ry. Co., 122 Ala. 602: 1382, 1641.
 v. State Trust Co., 68 Fed. 618: 1537, 1538, 1540, 1542.
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 v. Lehigh Val. R. R. Co., 56 Fed. 195: 93.
 v. Sloan, 107 N. Y. 244: 429.
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 v. Board of Suprs. 49 Neb. 666: 1569.
 v. Hodges, 5 Met. 205: 1524.
 v. Milligan, 42 Kan. 396: 927.
 v. Seaboard etc. R. Co., 88 Va. 653: 243, 247, 622, 1580, 1591.
 v. Western Union Tel. Co., 72 Miss. 910: 463.
 v. Western Union Tel. Co., 133 N. C. 225: 425, 837, 1473.
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 v. Long Island R. R. Co., 4 Edwards Ch. 411: 224.
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 v. Connor, 76 N. Y. 121: 1144.
 v. Flint etc. R. R. Co., 114 Mich. 316: 247, 253, 1650, 1657.
 v. Manhattan El. R. R. Co., 1 Miscl. 155: 1296, 1302.
 v. Muscatine, 113 Ia. 332: 156.
 v. Port Huron, 102 Mich. 417: 836.
 v. Rodman, 39 N. J. L. 252: 1363.
 v. St. Louis, 15 Mo. 651: 211, 234, 238.
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 v. Chicago etc. R. R. Co., 208 Ill. 161: 327, 643.
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- Hollister v. Clark, 9 Ida. 672: 536, 537, 746.
- v. State, 9 Ida. 8: 7, 536, 537, 746, 956.
- v. Union Co., 7 Conn. 436: 100.
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- v. Bell, 155 Ind. 502: 1510.
- v. Calhoun County, 97 Ia. 360: 149, 154, 1606.
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 v. Montpelier R. R. Co., 62 Vt. 47: 1229, 1236, 1425.
 v. New Haven & Northampton Co., 14 Conn. 146: 66, 144.
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 v. Rochester, 57 App. Div. 530: 1042, 1624.
 v. Rochester, 37 Hun 181: 84.
 v. Rochester, 172 N. Y. 665: 1042, 1624.
 v. Utica etc. Road Co., 12 Wend. 371: 1499, 1500.
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 v. Savannah & Memphis R. R. Co., 69 Ala. 529: 840, 854, 1202.
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 v. Norfolk & Western R. R. Co., 79 Va. 283: 830.
 v. Philadelphia etc. R. R. Co., 211 Pa. St. 401: 1128, 1129, 1188, 1201.
 v. Shiver, 77 Ark. 177: 877.
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 v. Welling, 24 N. J. L. 127: 1035.
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 v. Chicago etc. Ry. Co., 76 Minn. 70: 1477.
 v. Contra Costa County, 106 Cal. 566: 918.
 v. Cravely, 85 Tex. 189: 1462, 1511, 1512, 1576.
 v. Crombie, 4 N. H. 520: 890, 1030, 1034, 1521.
 v. Fla. Cent. etc. R. R. Co., 97 Ga. 107: 524, 708.
 v. Great Western Ry. Co., L. R. 2 Q. B. D. 221: 651.
 v. Kansas City etc. R. R. Co., 79 Mo. 98: 1048.
 v. Keller, 16 Neb. 569: 1431, 1511, 1512, 1576.
 v. Ottawa, 59 Ill. App. 288: 629, 1306.
 v. Philadelphia etc. R. R. Co., 94 Md. 257: 731.
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 v. Colwyn etc., (1908) 1 K. B. 327: 1313.
 v. Fulton, 130 Ga. 466: 81.
 v. Grand Haven, 24 Mich. 465: 1058.
 v. Hoyt, 11 Ia. 496: 1570.
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 v. Kansas City etc. R. R. Co. 60 Mo. 329: 152, 157, 858.
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 v. Warner, 7 Gray 177: 1074.
 v. Warner, 15 Gray 46: 929, 1079, 1119, 1185.
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 v. Rochester, 15 Barb. 517: 928.
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 v. Bryan, 2 Tex. Civ. App. 553: 155.
 v. Houston City St. R. R. Co., 83 Tex. 548: 301, 409, 427.
 v. Hutcheson, 39 Tex. Civ. App. 337: 155, 233.
 v. Paterson etc. Traction Co., 69 N. J. L. 168: 920, 965.
 v. Western W. R. R. Co., 204 Pa. St. 321: 1133.
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 v. Adams, 63 Tex. 200: 1507.
 v. Barr, 44 Tex. Civ. App. 57:
 v. Chaffin, 60 Tex. 553: 1716.
 v. Dallas, 98 Tex. 396: 488.
 v. Davis, 45 Tex. Civ. App. 212: 654.
 v. East, 98 Tex. 146: 162, 164.
 v. Meador, 50 Tex. 77: 861.
 v. Kansas City etc. Ry. Co., 109 La. 581: 764, 766.
 v. McKinney, 55 Tex. 176: 850.
 v. Milburn, 34 Tex. 224: 923, 1380.
 v. Odum, 53 Tex. 343: 255.
 v. Postal Tel. Cable Co., 18 Tex. Civ. App. 502: 934, 938, 1212.
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 v. Mayo, 43 Me. 322: 147, 1489.
 v. Perkins, 63 N. H. 516: 981.
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 v. Board of Supervisors, 54 Neb. 443: 675, 1427.
 v. Crouch, 47 Neb. 133: 1306.
 v. Hutchinson, 10 Me. 335: 970, 1004, 1013, 1372.
 v. Proprietors of Locks & Canals, 12 Cush. 259: 929, 1073.
 v. Providence, 6 R. I. 514: 1127, 1147.
 v. St. Clair Dr. Co., 51 Ill. 130: 12.
 v. Schmidt, 70 Kan. 640: 1028, 1510, 1517.
 v. State, 47 Ark. 431: 1007, 1018.
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 v. Warren, 7 Ired. L. 20: 940.
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 v. Harding, 76 Tex. 17: 1537.
 v. Howard, 158 Mass. 278: 1150.
 v. Jamaica, 19 Vt. 607: 973, 974, 994.
 v. Ray, 110 Mass. 298: 952.
 v. Ray, 113 Mass. 88: 1185.
 v. West End St. R. R. Co., 167 Mass. 46: 272, 281.
 v. Weymouth, 148 Mass. 605: 1331.
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 v. Morrisville, 212 Pa. St. 349: 391, 394, 647.
 v. Redlon, 44 Kan. 558: 973, 974.
 v. Western Union Tel. Co., 4 Mackey 424: 340.
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- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 1366.
 v. School District, 15 R. I. 184:
 921.
 v. School District, 16 R. I. 257:
 894.
- Howley v. Central Valley R. R. Co.,
 213 Pa. St. 36: 426.
 v. Pittsburg, 204 Pa. St. 428: 938,
 1649, 1718.
- Hoy v. Cohoes Co., 2 N. Y. 159:
 1507.
 v. Hubbell, 125 App. Div. 60: 1521.
 v. Salamanca, 57 Misc. 81: 609,
 617.
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 1511, 1520.
 v. Swan's Lessee, 5 Md. 237: 494,
 590.
- Hoyt v. Chicago etc. Ry. Co., 117 Ia.
 296: 1116, 1208, 1209, 1213.
 v. Gleason, 65 Fed. 685: 875.
 v. Hudson, 27 Wis. 656: 148, 234,
 235.
 v. Southern New Eng. Tel. Co., 60
 Conn. 385: 350, 1487, 1488.
- Hubbard v. Bell, 54 Ill. 112: 103.
 v. Kansas City, St. Joseph etc. R.
 R. Co., 63 Mo. 68: 840, 843, 851,
 852.
 v. Great Falls Mfg. Co., 80 Me. 39:
 706, 1042, 1383.
 v. Hartford, 74 Conn. 452: 1427.
 v. Medford, 20 Ore. 315: 468.
 v. Toledo, 21 Ohio St. 379: 523,
 625.
 v. Webster, 118 Mass. 599: 1309.
 v. Wickliffe, 2 A. K. Marsh. 503:
 1077.
 v. Wickliffe, 1 Litt. 80: 1077.
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 v. Merkel, 117 Wis. 355: 162, 164,
 471, 495.
- Hubert v. Missouri etc. R. R. Co., 80
 Mo. App. 87: 1545.
- Huckenstein v. Allegheny, 165 Pa.
 St. 367: 634.
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 175.
 v. West Bellevue, 111 Pa. St. 110:
 155, 233.
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 Co., 47 Tex. 56: 424.
 v. Voreis, 134 Ind. 642: 1362,
 1571.
- Hudson & Delaware Canal Co. v. N.
 Y. & Erie R. R. Co., 9 Paige,
 323: 410, 416, 728, 1608.
- Hudson etc. R. R. Co. v. Wendell,
 112 App. Div. 822: 826.
- Hudson etc. R. R. Co. v. Wendel, 122
 App. Div. 917: 808, 898.
 v. Wendell, 186 N. Y. 535: 826.
 v. Wendel, 193 N. Y. 166: 808, 898.
- Hudson River R. R. Co. v. Outwater,
 3 Sand. 689: 697, 1670, 1685.
- Hudson River R. & T. Co. v. Day, 54
 Fed. 545: 931.
- Hudson Riv. Telephone Co. v. For-
 restal, 56 Misc. 133: 339.
 v. Watervliet T. & R. R. Co., 61
 Hun 140: 417, 1621, 1622.
 v. Watervliet T. & R. R. Co., 135
 N. Y. 393: 343, 417, 911, 1621.
- Hueston v. Eaton etc. R. R. Co., 4
 Ohio St. 685: 1165, 1547.
- v. Miss. & Rum Riv. Boom Co., 76
 Minn. 251: 91.
- Huff v. Donehoo, 109 Ga. 638: 459,
 658, 670.
- Huffman v. State, 21 Ind. App. 449:
 337.
- Huffmire v. Brooklyn, 22 App. Div.
 N. Y. 406: 142.
 v. Brooklyn, 162 N. Y. 584: 57, 67.
- Huggins v. Hurt, 23 Tex. Civ. App.
 404: 975, 1512, 1576.
- v. Manhattan R. R. Co., 1 Misel.
 110: 1196.
- Hughes v. Anderson, 68 Ala. 280:
 145.
- v. Arkansas etc. R. R. Co., 74 Ark.
 194: 490, 1288, 1643.
- v. Bingham, 135 N. Y. 347: 873.
- v. Clark, 134 N. C. 457: 878, 879,
 889.
- v. Mermod, 121 Mo. 98: 924, 1409.
- v. Metropolitan El. R. R. Co., 130
 N. Y. 14: 177, 180, 183, 187,
 265, 1137, 1261, 1555, 1584.
- v. Metropolitan El. R. R. Co., 57
 N. Y. Supr. Ct. 378: 1261, 1555,
 1584.
- v. Milligan, 42 Kan. 396: 927,
 1004, 1167, 1568.
- v. Miss. & Mo. R. R. Co., 12 Ia.
 261: 245, 251.
- v. Sellers, 34 Ind. 337: 941, 978,
 996, 1390.
- v. Todd, 2 Duv. Ky. 188: 18, 807.
- v. Trustees of Morden College, 1
 Ves. Sr. 188: 821, 1572.
- Hulbert v. Harris, 3 App. Div. 30:
 570.
- Hulett v. Missouri etc. R. R. Co., 80
 Mo. App. 87: 325.
- Huling v. Kaw Valley R. R. Co., 130
 U. S. 559: 1011, 1515, 1517.
- Hull v. Baird, 73 Ia. 528: 569, 570,
 575.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Kansas City etc. Ry. Co., 70 Neb. 756: 838.
 v. Phillips, 128 Mo. App. 247: 1561.
 v. Westfield, 133 Mass. 433: 1523.
 Hullin v. Second Municipality of New Orleans, 11 Rob. La. 97: 1669, 1685.
 Hulse v. Powell, 21 Tex. Civ. App. 471: 1618.
 Humboldt Co. v. Dinsmore, 75 Cal. 604: 974, 1361, 1365.
 Humer v. Mayer, 1 Humph. 403: 197.
 Humes v. Knoxville, 1 Humph. 403: 209, 212, 213.
 v. Mo. Pac. R. R. Co., 115 U. S. 512: 475.
 v. Railroad Co., 82 Mo. 221: 475.
 v. Shugart, 10 Leigh, 332: 899.
 Humeston etc. R. R. Co. v. Chicago etc. R. R. Co., 74 Iowa 554: 767, 1610.
 Hummett v. Phila. 65 Pa. St. 146: 10.
 Humphreys v. Ft. Smith Traction L. & P. Co., 71 Ark. 152: 297, 298, 1354.
 v. Richmond & D. R. R. Co., 88 Va. 431: 833.
 v. Woodstown, 48 N. J. L. 588: 1516.
 Hunt v. Arnbruster, 17 N. J. Eq. 208: 459.
 v. Boston, 152 Mass. 168: 1120, 1138.
 v. Card, 94 Me. 386: 698.
 v. Chicago Horse & D. R. R. Co., 121 Ill. 638: 302.
 v. Iowa Central R. R. Co., 86 Ia. 15: 158, 1456, 1650, 1655.
 v. Missouri Pac. R. R. Co., 76 Mo. 115: 1507.
 v. New York, Chicago, & St. Louis Ry. Co., 99 Ind. 593: 913.
 v. Smith, 9 Kan. 137: 913, 1023, 1203, 1360.
 v. Whitney, 4 Met. 603: 557, 1673.
 Hunter, Matter of, 47 App. Div. 102: 890.
 Hunter, Matter of, 163 N. Y. 542: 890.
 Hunter v. Burlington etc. R. R. Co. 76 Ia. 490: 855.
 v. Burlington etc. R. R. Co., 84 Ia. 605: 855, 1715.
 Hunter v. Chesapeake etc. Ry. Co., 107 Va. 158: 1176, 1228, 1238, 1272, 1385.
 v. Jones, 13 Minn. 307: 1519, 1520.
 v. Matthews, 12 Leigh, 228: 1083.
 v. Matthews, 1 Rob. (Va.) 468: 1010.
 v. Newport, 5 R. I. 325: 1367.
 v. Sandy Hill, 6 Hill, 407: 871, 872.
 Hunting v. Curtis, 10 Ia. 152: 1669.
 Huntington v. Amiss, 167 Ind. 375: 535, 575, 1086.
 v. Attrill, 118 N. Y. 365: 1139.
 v. Bireh, 12 Conn. 142: 1033.
 v. Griffith, 142 Ind. 280: 602, 616, 1597.
 v. Kenowen, 12 Ind. App. 456: 1545, 1548.
 Huntington County v. Kaufman, 126 Pa. St. 305: 1434.
 Huntington etc. R. R. Co's. Appeal, 149 Pa. St. 133: 698.
 Huntington, Road in, 11 Pa. Co. Ct. 119: 700.
 Huntress v. Effingham, 17 N. H. 584: 1389.
 Huntsville v. Ewing, 116 Ala. 576: 159, 1648, 1659.
 Hunting v. Hartford St. Ry. Co., 73 Conn. 179: 349.
 Hupert v. Anderson, 35 Ia. 578: 1701.
 Hurd v. Atchison etc. Ry. Co., 73 Kan. 83: 533, 731, 1577, 1614.
 Hurdman v. North Eastern R. R. Co., 1 R. 3 C. P. D. 168: 145.
 Hurford v. Omaha, 4 Neb. 336: 1597.
 Hurley v. Jones, 165 Pa. St. 34: 1634.
 v. South Thomaston, 101 Me. 538: 604.
 v. West St. Paul, 83 Minn. 401: 884.
 Hurniker v. Contoocook Valley R. R. Co., 29 N. H. 146: 1523.
 Hursh v. First Division of St. Paul etc. R. R. Co., 17 Minn. 439: 1634.
 Hurst v. Martinsburg, 80 Minn. 40: 705: 1025.
 Hussey v. Bryant, 95 Me. 49: 1519.
 Hussner v. Brooklyn City R. R. Co., 30 Hun 409: 247, 1635.
 v. Brooklyn City R. R. Co., 114 N. Y. 433: 271, 314, 1298, 1553, 1651, 1658.
 Husted v. Greenwich, 11 Conn. 383: 995.
 Huston v. Cincinnati etc. R. R. Co., 21 Ohio St. 235: 1247, 1484.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Fort Atkinson, 56 Wis. 350: 1489.
- Hutchins v. Vandalia L. & D. Dist., 217 Ill. 561: 924.
- Hutchinson v. Delano, 46 Kan. 345: 84, 1605.
 v. Parkersburg, 25 W. Va. 226: 631, 942.
 v. Storrie, 92 Tex. 685: 10, 463, 464, 1005.
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- Hutlacher v. Harris, 2 Wright 491: 1350.
- Hutt v. Chicago, 187 Ill. 145: 981.
- Hutton v. Indiana Cent. R. R. Co., 7 Ind. 522: 251, 307.
 v. London & S. W. Ry. Co., 18 L. J. Ch. N. S. 345: 1612.
- Hyde v. Boston etc. St. Ry. Co., 194 Mass. 80: 211, 226, 319, 606.
 v. Fall River, 189 Mass. 439: 379, 391, 454, 627.
 v. Fall River, 197 Mass. 4: 370, 378, 391.
 v. Middlesex Co., 2 Gray 267: 1343.
- Hyde Park v. Cemetery Ass., 119 Ill. 141: 736, 737, 785.
 v. Dyer, 7 Ohio N. P. (N. S.) 244: 1561.
 v. Dunham, 85 Ill. 569: 1195.
 v. Spencer, 118 Ill. 446: 828, 912, 914.
 v. Washington Ice Co., 117 Ill. 233: 1231.
 v. Wiggin, 157 Mass. 94: 930, 1075.
- Hyde Park T. H. Light Co. v. Porter, 167 Ill. 276: 454, 1648, 1659.
- Hydes Ferry Turnpike Co. v. Davidsson Co., 91 Tenn. 291: 409, 414.
- Hyland v. Ossining, 127 App. Div. 291: 1592.
- Hyman v. Ann Arbor R. R. Co., 141 Mich. 84: 428.
- Hymes v. Aydelott, 26 Ind. 431: 922.
- Hyneman v. Blake, 19 Cal. 579: 1042.
- Hynes v. Manhattan Ry. Co., 54 App. Div. 256: 1296.
- Hyslop v. Finch, 99 Ill. 171: 696, 706, 1195, 1416.
 I.
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- Ihmsen v. Monongahela Nav. Co., 32 Pa. St. 153; 625.
- I. & G. N. Ry. Co. v. Benitos, 59 Tex. 326: 1546.
- I. & G. N. Ry. Co. v. Bost, 2 Tex. Civ. Cas. 334: 846, 1473.
 v. Klaus, 64 Tex. 293: 88.
 v. Pape, 62 Tex. 313: 1451.
- Illinois & Mich. Canal Co. v. C. & R. I. R. R. Co., 14 Ill. 314: 410, 416.
- Illinois & St. Louis R. R. Co. v. Febringer, 82 Ill. 129: 151.
- Illinois & St. Louis R. R. & Coal Co. v. Switzer, 117 Ill. 399: 1246.
- Illinois & Wis. R. R. Co. v. Van Horn, 18 Ill. 257: 1119, 1120, 1378.
- Illinois Central R. R. Co. v. Allen, 39 Ill. 205: 937.
 v. Anderson, 73 Ill. App. 64: 846.
 v. Anderson, 73 Ill. App. 621: 849, 1472.
 v. Bloomington, 76 Ill. 447: 490.
 v. Bloomington, 167 Ill. 9: 891.
 v. Champaign, 163 Ill. 524, 1701.
 v. Chicago, 138 Ill. 453: 749, 985.
 v. Chicago, 141 Ill. 586: 751, 1287.
 v. Chicago, 156 Ill. 98: 751, 1292.
 v. Chicago, 169 Ill. 329: 1122, 1131 1243, 1287.
 v. Chicago, 173 Ill. 471: 115, 712.
 v. Chicago, 176 U. S. 646: 712.
 v. C. B. & Q. R. R. Co., 121 Ill. 483: 772.
 v. Chicago, etc. R. R. Co. 122 Ill. 473: 753, 757, 793, 796, 798, 931.
 v. Comrs., 161 Ill. 247: 1288.
 v. Copiah Co., 81 Miss. 685: 491, 1288, 1644.
 v. Davis, 71 Ill. App. 99: 327.
 v. Ferrell, 108 Ill. App. 659: 91, 1548, 1553, 1653.
 v. Grabill, 50 Ill. 242: 649, 1662.
 v. Hasenwinkle, 232 Ill. 224: 1028, 1478.
 v. Heisner, 45 Ill. App. 143: 154, 159.
 v. Heisner, 93 Ill. App. 469: 152.
 v. Heisner, 192 Ill. 571: 152, 153, 154.
 v. Hodge, 21 Ky. L. R. 1479: 1474.
 v. Hoskins, 80 Miss. 730: 1347, 1625.
 v. Illinois, 146 U. S. 387: 105, 108, 110, 111, 112, 114, 119, 123, 128, 129.
 v. Interstate Com. Com. 203 U. S. 441: 480.
 v. Kreeble, 95 Ill. App. 185: 639.
 v. Le Blanc, 74 Miss. 650: 1352, 1626, 1629.
 v. Lockwood, 112 Ill. App. 423: 91, 144, 1653, 1663.
 v. Lostant, 167 Ill. 85: 980, 1343.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

- Illinois Central R. R. Co. v. Miller, 68 Miss. 760: 147, 149, 155.
 v. Normal, 175 Ill. 562: 751, 1426.
 v. Railroad Co., 85 Ill. 211: 1578.
 v. Rucker, 14 Ill. 153: 1038, 1040, 1080, 1638.
 v. Schmidgall, 91 Ill. App. 23: 639, 1297, 1302.
 v. Smith, 110 Ky. 203: 89, 1124, 1639, 1648, 1652.
 v. Swalm, 83 Miss. 631: 491, 1288, 1511, 1642, 1644.
 v. Thomas, 75 Miss. 54: 1580.
 v. Trustees of Schools, 212 Ill. 406: 448, 654, 661, 663, 1243, 1338.
 v. Trustees of Schools, 128 Ill. App. 111: 448, 654.
 v. Turner, 194 Ill. 575: 304, 639, 1297, 1302.
 v. Turner, 97 Ill. App. 219: 304, 639, 1297, 1302.
 v. Walthen, 17 Ill. App. 582: 1474, 1482.
 v. Wilbourn, 74 Miss. 284: 93, 1452.
 v. Willenberg, 117 Ill. 203: 1485, 1645.
- Illinois etc. Ry. Co. v. Easterbrook, 211 Ill. 624: 1195.
 v. Freeman, 210 Ill. 270: 1080, 1208, 1312.
 v. Humiston, 208 Ill. 100: 1138, 1310, 1379.
 v. Ring, 219 Ill. 91: 1314, 1379.
 v. Mayrand, 93 Ill. 591: 994, 1¹36.
 v. McClintock, 63 Ill. 514: 1380.
 v. McClintock, 68 Ill. 296: 1325.
 v. St. Louis, 2 Dill. 70: 422, 1496.
- Illinois Southern Ry. Co. v. Borders, 201 Ill. 459: 859.
- Illinois Steel Co. v. Beloit, 109 Wis. 418: 115.
- Illinois State Trust Co. v. St. Louis etc. Ry. Co. 208 Ill. 419: 7, 917, 1053.
- Illsley v. Portland & Rochester R. R. Co., 56 Me. 531: 1536.
- Imber v. Springfield, 30 Mo. App. 669: 630, 634, 1029.
- Imbescheid v. Old Colony R. R. Co., 171 Mass. 209: 1164, 1319, 1320, 1323.
- Imlay v. Railroad Co., 26 Conn. 256: 196.
 v. Union Branch R. R. Co. 26 Conn. 249: 242, 246, 279, 315, 323, 1293.
- Imler v. Springfield, 55 Mo. 119: 234.
- Imperial Gas Co. v. Broadbent, 7 H. L. 600: 457, 1524.
 v. Broadbent, 7 DeG. McN. & G. 436: 1524.
- Improvement Co. v. Hoboken, 36 N. J. L. 540: 201.
- Independence Ave. Boulevard, In Re, 128 Mo. 272: 895, 926, 1409.
- Independent Nat. Gas Co. v. Butler Water Co., 210 Pa. St. 177: 784, 1577, 1615, 1624.
- Indiana Central R. R. Co. v. Hunter, 8 Ind. 74: 1192, 1205.
 v. Oakes, 20 Ind. 9: 897.
 v. Boden, 10 Ind. 96: 246, 251, 1550.
- Indiana County, 51 Pa. St. 296: 1388.
- Indiana etc. R. R. Co. v. Allen, 100 Ind. 409: 831, 936, 1028, 1177, 1346.
 v. Allen, 113 Ind. 368: 1545.
 v. Allen, 113 Ind. 581: 1631.
 v. Brittingham, 98 Ind. 294: 831.
 v. Connors, 184 Ill. 178: 1254.
 v. Eberle, 110 Ind. 542: 152, 178.
 v. Finnell, 116 Ind. 414: 850.
 v. McBroom, 114 Ind. 198: 1631.
 v. Patchett, 59 Ill. App. 251: 158, 1639.
 v. Rinehart, 14 Ind. App. 588: 995, 1247.
 v. Stauber, 185 Ill. 9: 1314, 1379.
- Indiana Natural Gas & O. Co. v. Jones, 14 Ind. App. 55: 1343.
- Indiana Oolithic Limestone Co. v. Louisville etc. R. R. Co., 107 Ind. 301: 1576.
- Indiana Power Co. v. St. Joseph & Elkhart Power Co., 159 Ind. 42: 801, 900, 907.
- Indiana Ry. Co. v. Hoffman, 162 Ind. 593: 304.
- Indianapolis v. Board of Church Extension, 28 Ind. App. 319: 891.
 v. Consumers' Gas Trust Co., 144 Fed. 640: 725.
 v. Consumers' Gas Trust Co., 140 Ind. 107: 476.
 v. Croas, 7 Ind. 9: 182, 366, 877.
 v. Cumberland Gravel Road Co., 93 Ind. 360: 927.
 v. Huffer, 30 Ind. 235: 143.
 v. Kingsbury, 101 Ind. 200: 182, 366, 425, 877.
 v. Lawyer, 38 Ind. 348: 233.
- Indianapolis Cable St. R. R. Co. v. Citizens' St. R. R. Co., 127 Ind. 369: 268, 910.
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 v. Christian, 93 Ind. 360: 922, 927.
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- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Calvert, 110 Ind. 555: 307, 1583.
 v. Christian, 93 Ind. 360: 976.
 v. Cook, 102 Ind. 133: 1112.
 v. Hartley, 67 Ill. 439: 172, 200, 242, 246, 251, 279, 726, 1635.
 v. Hood, 130 Ind. 594: 1407.
 v. Indianapolis etc. Rapid Transit Co., 33 Ind. App. 337: 743, 759, 793.
 v. Lawrenceburg, 37 Ind. 489: 1642.
 v. Lewis, 119 Ind. 218: 835.
 v. Newsom, 54 Ind. 121: 976, 983.
 v. Price, 153 Ind. 31: 940, 1560.
 v. Pugh, 85 Ind. 279: 1119, 1120.
 v. Reed, 52 Ind. 357: 912.
 v. Reynolds, 116 Ind. 356: 835, 836.
 v. Smith, 52 Ind. 428: 246, 319.
 v. Smythe, 45 Ind. 322: 1390.
- Indianapolis Northern Traction Co. v. Dunn, 37 Ind. App. 248: 1146.
- Indianapolis etc. Traction Co. v. Larabee, 168 Ind. 237: 1310, 1312.
 v. Shepherd, 35 Ind. App. 601: 1112, 1145.
- Indianapolis Water Co. v. Am. Strawboard Co., 53 Fed. 970: 71, 82, 84.
 v. Multe, 126 Ind. 373: 855.
- Indianola L. I. & C. Co. v. Montgomery, 85 Miss. 304: 878, 889.
- Ingalls v. Byer's Administrator, 94 Ind. 134: 854, 1557.
- Inge v. Birmingham etc. Ry. Co. 3 DeG. MeN. & G. 658: 1533.
 v. Police Jury, 14 La. Ann. 117: 936.
- Ingleside Mfg. Co. v. Charleston L. & W. Co., 76 S. C. 95: 1624.
- Ingraham v. Camden & R. Water Co., 82 Me. 335: 987, 1522.
 v. C. D. & M. R. R. Co. 34 Ia. 249: 251.
- Ingram v. C. D. & M. R. R. Co., 38 Ia. 669: 251.
 v. Me. Water Co., 98 Me. 566: 91, 550, 558, 930.
 v. State, 39 Ala. 247: 478.
 v. Wilson, 4 Humph. 424: 1077.
- Inhabitants of Hamilton v. Wainwright, 52 N. J. Eq. 419: 160.
- Inland Empire Ry. Co. v. McKinley, 48 Wash. 675: 1427.
- Inmann v. Tripp, 11 R. I. 520: 233.
- Innes v. Manhattan R. R. Co. 3 App. Div. 541: 1144.
- Inskeep v. Lecony, 1 N. J. L. 112: 694.
- Interlaken Land Co. v. Seattle, 47 Wash. 603: 1233, 1239.
- International Bridge & T. Co. v. McLane, 8 Tex. Civ. App. 665: 1348.
- International etc. Ry. Co. v. Capers, 33 Tex. Civ. App. 283: 1639.
 v. Slusher, 42 Tex. Civ. App. 631: 152.
- Interstate Consol. R. R. Co. v. Early, 46 Kan. 197: 211, 323, 604, 617.
- Iowa College v. Davenport, 7 Ia. 213: 1159, 1570.
- Iowa St., 12 Pa. Co. Ct. 611: 918.
- Ipswich v. Co. Comrs. of Essex, 10 Pick. 519: 1087, 1417.
- Ipswich Mills v. County Comrs. 108 Mass. 363: 1712.
- Ireland v. Metropolitan El. R. R. Co., 52 N. Y. Supr. Ct. 450: 1295.
- Irish v. Burlington & S. Ry. Co., 44 Ia. 380: 1535, 1578.
- Iron Mt. R. R. Co. v. Bingham, 87 Tenn. 522: 200, 243, 255, 309, 313, 316, 325.
- Iron R. R. Co. v. Ironton, 19 Ohio St. 299: 678, 800, 802.
- Irrigation v. De Lappe, 79 Cal. 351: 587.
- Irrigation Dist. v. Williams, 76 Cal. 360: 587.
- Irving v. Ford, 65 Mich. 241: 884, 886.
- v. Media Borough, 10 Pa. Supr. Ct. 132: 73, 74, 77, 870, 1637.
 v. Media Borough, 194 Pa. St. 648: 73, 74, 870.
- Irwin v. Armuth, 129 Ind. 340: 1422.
- v. Great Southern Tel. Co., 37 La. Ann. 63: 341.
 v. Scobee, 3 T. B. Monroe 50: 1078.
 v. Yeager, 74 Ia. 174: 16, 1507.
- Iselin v. Starin, 144 N. Y. 453: 881, 890.
- Isham v. Smith, 21 Wis. 32: 1364.
- Isom v. Low Fare Ry. Co. 10 Ohio C. C. (N. S.) 89: 302.
 v. Mississippi Central R. R. Co., 36 Miss. 300: 1173, 1179.
- Israel v. Jewett, 29 Ia. 475: 1204.
 v. Met. El. R. R. Co. 10 Misel. 722: 1296, 1299, 1437.
- Issenhuth v. Baum, 11 S. D. 222: 1029, 1098.
- Ives v. East Haven, 48 Conn. 272: 1027, 1028, 1034, 1387.
- Ivey v. Georgia etc. R. R. Co., 84 Ga. 536: 639, 1588, 1615.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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|---|--|
| <p>J.
 Jabb v. Hull Dock Co., 9 A. & E. N. S. 443: 625, 1274.
 Jackman v. Missouri Pac. R. R. Co., 15 Neb. 524: 847, 1454.
 Jackson v. Big Sandy etc. R. R. Co., 63 W. Va. 18: 419, 1569.
 v. Centerville etc. R. R. Co., 64 Iowa, 292: 829, 947, 1629.
 v. Chicago etc. R. R. Co., 41 Fed. 656: 313, 325, 640, 1298.
 v. Edwards, 7 Paige, 386: 946.
 v. Edwards, 22 Wend. 498: 943, 946.
 v. Edwards, 22 Wend. 519: 943.
 v. Harrington, 2 Allen, 242: 95.
 v. Hatheway, 15 Johns. 447: 1486, 1491.
 v. Housel, 17 Johns. 281: 53.
 v. Jackson, 16 Ohio St. 163: 178, 217.
 v. Pittsburgh, 36 Pa. Supr. Ct. 274: 948, 1564.
 v. Portland, 63 Me. 55: 1251.
 v. Rankin, 67 Wis. 285: 722, 980, 1363.
 v. Rutland & Burlington R. R. Co., 25 Vt. 150: 1477.
 v. State, 104 Ind. 516: 1518.
 v. Stevenson, 156 Mass. 496: 429.
 v. Winn's Heirs, 4 Littell, 322: 746, 1160.</p> <p>Jackson etc. Traction Co. v. Comrs. of Railroads, 128 Mich. 164: 329, 769, 770.</p> <p>Jackson Co. v. Waldo, 85 Mo. 637: 1186.</p> <p>Jackson Co. H. R. R. Co. v. Interstate R. T. Ry. Co., 24 Fed. 306: 411.</p> <p>Jackson St., In re, 47 Wash. 243: 1108.</p> <p>Jacksonville v. Doan, 145 Ill. 23: 84, 453.
 v. Doan, 48 Ill. App. 247: 84, 453.
 v. Lambert, 62 Ill. 519: 141.
 v. Loar, 65 Ill. App. 218: 1337.</p> <p>Jacksonville etc. R. R. Co. v. Adams, 27 Fla. 443: 1018, 1513, 1626.
 v. Adams, 28 Fla. 631: 748, 1347.
 v. Adams, 29 Fla. 260: 1422, 1424.
 v. Adams, 33 Fla. 608: 924, 925, 1422, 1424.
 v. Caldwell, 21 Ill. 75: 1129.
 v. Cox, 91 Ill. 500: 154.
 v. Kidder, 21 Ill. 131: 1246.
 v. Lockwood, 33 Fla. 573: 315, 1293, 1549, 1552, 1648, 1657.
 v. Thompson, 34 Fla. 346: 315, 325, 351, 647.
 v. Walsh, 106 Ill. 253: 1271.</p> | <p>Jacob v. Louisville, 9 Dana, 114: 1182.
 Jacobs v. Clearview Water Supply Co., 220 Pa. St. 388: 1, 6, 499, 501, 505, 508, 538, 591, 673.
 Jacobs, Matter of, 33 Hun 374: 492.
 Jacobs, Matter of, 98 N. Y. 98: 479, 480, 492.
 Jacobs's Petition, Matter of, 3 Harr. Del. 321: 993.
 Jacquelin v. Manhattan R. R. Co., 9 Misel. 329: 1584.
 Jager v. Dey, 80 Ia. 23: 715.
 v. New York, 75 App. Div. 258: 1338, 1554.
 <p>Jamaica v. Board of Comrs., 56 Ind. 466: 1408.</p> <p>Jamaica etc. Plank Road Co. v. New York etc. Ry. Co., 25 Hun 585: 1164, 1610.</p> <p>Jamaica Pond Aqueduct Co. v. Brookline, 121 Mass. 5: 352.</p> <p>James v. Darlington, 71 Wis. 173: 375, 400, 406, 1596.
 v. Ontario etc. R. R. Co., 12 Ont. 624: 1319.
 v. Sammis, 132 N. Y. 239: 865.
 v. West Chester, 220 Pa. St. 490: 1226, 1332.</p> <p>James Kinney, Petition of, 5 Harr. 18: 1023.</p> <p>James River & Kanawha Co. v. Thompson, 3 Gratt. 270: 788.
 v. Turner, 9 Leigh 313: 1180.</p> <p>Jamestown etc. R. R. Co. v. Jones, 7 N. D. 619: 431, 957.</p> <p>Jamieson v. Board of Comrs., 56 Ind. 466: 1441.
 v. Burlington etc. R. R. Co., 87 Ia. 265: 1326.
 v. Ind. Nat. Gas & O. Co., 128 Ind. 555: 14, 470.
 v. Kings County Elevated R. R. Co., 147 N. Y. 322: 1143, 1151, 1304.</p> <p>Jamison v. Bell Tel. Co., 186 N. Y. 493: 1630.
 v. Burlington etc. Ry. Co., 69 Ia. 670: 1401, 1406.
 v. Springfield, 53 Mo. 224: 1004, 1546, 1548.</p> <p>Jane Evans, In re, 42 L. J. Ch. 357: 957.</p> <p>Janesville v. Carpenter, 77 Wis. 288: 57, 99, 125, 128, 129, 136, 139, 141.</p> <p>Janesville Bridge Co. v. Stoughton, 1 Pinney 667: 409.</p> <p>Janssen v. Lammers, 29 Wis. 88: 1708.</p> </p> |
|---|--|

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
- | | |
|--|--|
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| Jarboe v. Carrollton, 73 Mo. App. 347: 325. | Jerome v. Ross, 7 Johns. Ch. 315: 813, 825, 1602. |
| Jarden v. Philadelphia etc. R. R. Co., 3 Whart. 502: 1569. | Jerome Ave., Matter of, 120 App. Div. 201: 1196. |
| Jarvis v. Grafton, 44 W. Va. 453: 890. | Jerome Ave., Matter of, 120 App. Div. 297: 1328. |
| Jasper Co. Elec. Ry. Co. v. Curtis, 154 Mo. 10: 834, 842, 850. | Jersey City v. Central R. R. Co., 40 N. J. Eq. 417: 708. |
| Jaynes v. Omaha St. R. R. Co., 53 Neb. 631: 180, 191, 197, 274, 295, 333, 640. | v. Gardner, 32 N. J. Eq. 586: 1578. |
| Jeffers v. Annapolis, 107 Md. 268: 297, 281, 282, 1589. | v. Gardner, 33 N. J. Eq. 622: 1526, 1578. |
| Jefferson v. Delachaise, 22 La. Ann. 26: 706, 1106, 1358. | v. Fitzpatrick, 30 N. J. Eq. 97: 1631. |
| v. New York El. R. R. Co. 132 N. Y. 483: 1121. | v. Hamilton, 70 N. J. L. 48: 1430. |
| Jefferson Co. v. Cowan, 54 Mo. 234: 973, 974. | v. Morris Canal & B. Co., 12 N. J. Eq. 547: 1491. |
| Jefferson etc. R. R. Co. v. Hazeur, 7 La. Ann. 182: 1061. | v. National Doeks R. R. Co., 55 N. J. L. 194: 898. |
| v. New Orleans, 31 La. Ann. 478: 1571. | v. Sackett, 44 N. J. L. 428: 1528. |
| Jeffersonville v. Myers, 2 Ind. App. 532: 224, 1356. | Jersey City etc. R. R. Co. v. Central R. R. Co., 48 N. J. Ch. 379: 766, 767, 1410. |
| Jeffersonville etc. R. R. Co. v. Bowen, 40 Ind. 545: 1109. | v. Jersey City & H. R. R. Co., 20 N. J. Eq. 61: 268, 427, 762, 1283, 1610. |
| v. Dougherty, 40 Ind. 33: 1160, 1167. | Jersey City & Hoboken Horse R. R. Co. v. Jersey City & Bergen R. R. Co., 21 N. J. Eq. 550: 427, 762, 763, 764, 1283, 1610. |
| v. Esterle, 13 Bush. 667: 249, 252, 1293, 1551, 1648, 1657, 1662. | Jersey City Water Comrs., Matter of, 31 N. J. L. 72: 1669, 1671, 1685. |
| Jeffrey v. Blue Hill Turnpike Co., 10 Mass. 368: 1526. | Jessup v. Grand Trunk R. R. Co., 28 Grant Ch. 583: 841. |
| Jeffries v. Jeffries, 117 Mass. 184: 429. | v. Grand Trunk R. R. Co., 7 U. C. App. 128: 841. |
| v. Maccown, 30 Ind. 226: 1464. | v. Loucks, 55 Pa. St. 350: 1499. |
| v. Philadelphia etc. R. R. Co., 3 Houst. Del. 447: 1343. | Jessup & M. Paper Co. v. Ford, 6 Del. Ch. 52: 69, 81. |
| v. Swampscott, 105 Mass. 535: 1361, 1371, 1373, 1571. | Jessup etc. Co. v. Ford, 6 Del. Ch. 52: 1604. |
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| v. Riggs, 100 Md. 427: 1362, 1510. | v. Swett, 178 Ill. 96: 154, 1606. |
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 v. Atlantic City R. R. Co., 73 N. J. L. 767: 857, 1559, 1630, 1633.
 v. Baltimore etc. R. R. Co., 45 N. J. Eq. 454: 1261, 1460, 1461, 1462, 1463, 1569.
 v. Boorman, 63 Wis. 268: 866.
 v. Chicago etc. R. R. Co., 37 Minn. 519, 1314.
 v. Chicago etc. R. R. Co., 80 Wis. 641: 148, 158.
 v. Chicago, Milwaukee & St. Paul Ry. Co., 58 Ia. 537: 816.
 v. Clayton County, 61 Ia. 89: 1421.
 v. Clontarf, 98 Minn. 281: 973, 1512, 1513, 1569, 1571.
 v. Cox, 42 Misc. 301: 404.
 v. Crow, 87 Pa. St. 184: 408, 412.
 v. Dadeville, 127 Ala. 244: 882.
 v. Freeport & Miss. Riv. Ry. Co., 111 Ill. 413: 994, 1045, 1119, 1128, 1131, 1134, 1135.
 v. Freeport & Miss. River Ry. Co., 116 Ill. 521: 994, 1423.
 v. Grays Point Terminal Ry. Co. 111 Mo. App. 378: 151.
 v. Joliet & Chicago R. R. Co., 23 Ill. 202: 922, 998, 999, 1015, 1162.
 v. Met. W. S. El. R. R. Co., 160 Ill. 477: 1467.
 v. New York El. R. R. Co., 10 Misel. 136: 1151, 1302.
 v. New York etc. Tel. & Tel. Co., 76 App. Div. 564: 339.
 v. Old Colony R. R. Co., 18 R. I. 642: 181, 183, 191, 320, 351: 366, 382, 391, 404, 744, 1338.
 v. Ontario etc. R. R. Co., 11 U. C. 203: 952.
 v. Ontario etc. R. R. Co., 11 U. C. Q. B. 246: 1635.
 v. Parkersburg, 16 W. Va. 402: 631, 659, 671, 1549.
 v. Pettit, 120 App. Div. 774: 1559.
 v. Rankin, 70 N. C. 550: 1170.
 v. St. Louis, 137 Fed. 439: 643, 1549.
 v. St. Louis etc. Ry. Co., 32 Ark. 758: 1522.
 v. School Trustees, 26 Grant Ch. 204: 821.
 v. Shelter Is. Grove & Camp-Meeting Ass., 47 Hun 374: 880.
 v. Shelter Island Grove & Camp-Meeting Ass., 122 N. Y. 330: 880.
 Johnson v. Sherman Co. I. W. P. & I. Co., 71 Neb. 452: 850.
 v. Southern Ry. Co., 71 S. C. 241: 1523.
 v. State, 1 Ga. App. 196: 865, 876.
 v. Stephenson, 39 Ill. App. 88: 1033, 1420.
 v. Supervisors of Clayton Co., 61 Ia. 89: 512.
 v. Sutliff, 17 Neb. 423: 1440, 1436, 1437.
 v. Thompson-Houston Electric Co., 54 Hun 469: 345.
 v. Utica Water Works Co., 67 Barb. 415: 731.
 v. White, 26 R. I. 207: 149, 155, 156, 233, 1455.
 Johnson City v. Wolfe, 103 Tenn. 277: 882, 884.
 Johnson Co. v. Minnear, 72 Kan. 326: 515.
 Johnson, In re, 49 N. J. L. 381: 1020, 1095.
 Johnston v. Callery, 173 Pa. St. 129: 936.
 v. Callery, 184 Pa. St. 146: 1705.
 v. District of Columbia, 118 U. S. 19: 142.
 v. Lonstorf, 128 Wis. 17: 375, 388, 400, 405, 513, 1596.
 v. Rankin, 70 N. C. 550: 22, 23, 1082, 1164, 1571.
 v. Supervisors, 19 Johns. 272: 1531.
 v. Vandyke, 6 McLean, 422: 943.
 Johnstown v. Frederick, 35 N. Y. App. Div. 44: 1437.
 Johnsville v. Smith, 90 App. Div. 618: 1348.
 v. Smith, 184 N. Y. 341: 1348.
 Joliet v. Blower, 155 Ill. 414: 629, 1245, 1254.
 v. Blower, 49 Ill. App. 464: 629, 1249.
 v. Spring Creek Dr. Dist., 222 Ill. 441: 924.
 Joliet & Chicago R. R. Co. v. Barrows, 24 Ill. 562: 1413, 1669.
 Jolly v. Pittsburgh etc. R. R. Co., 16 Pa. Co. Ct. 1: 300, 1587, 1590.
 v. Wimbledon etc. R. R. Co., 1 B. & S. 807: 1626.
 Jones v. Adams, 19 Nev. 78: 71.
 v. Asheville, 116 N. C. 817: 953.
 v. Bangor, 144 Pa. St. 638: 618, 632, 1353, 1718.
 v. Bird, 5 B. & Ald. 837: 206.
 v. Bright, 140 Ala. 268: 870.
 v. Chicago etc. R. R. Co., 68 Ill. 380: 994, 1138, 1251.
 v. Clark, 7 Jones Law 418: 1073.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Commonwealth, 1 Bush (Ky.) 34: 19.
 v. Erie & W. R. R. Co., 151 Pa. St. 30: 449.
 v. Erie & W. R. R. Co., 169 Pa. St. 333: 306, 327.
 v. Florida etc. R. R. Co., 41 Fed. 70: 957, 1570, 1576.
 v. Franklin Co. Comrs. 130 N. C. 451: 1523.
 v. Goffstown, 39 N. H. 254: 1096.
 v. Houston, 45 Tex. Civ. App. 1: 1307.
 v. Met. El. R. R. Co., 59 N. Y. Supr. Ct. 437: 1427.
 v. Miller, 2 Va. Dec. 232: 1565.
 v. New Orleans etc. Co., 70 Ala. 227: 1202, 1347, 1351.
 v. North Ga. Elec. Co., 125 Ga. 618: 7, 536, 537, 672.
 v. Oxford, 45 Me. 419: 1527.
 v. Pettibone, 2 Wis. 308: 104.
 v. Phillips, 30 Me. 455: 1345.
 v. Pa. R. R. Co., 143 Pa. St. 374: 859.
 v. Pittsburg etc. R. R. Co., 11 Pa. Supr. Ct. 202: 749.
 v. Portland, 57 Me. 42: 1019.
 v. Railroad Co., 151 Pa. St. 30: 267.
 v. St. Louis etc. Ry. Co., 84 Mo. 151: 152.
 v. Seaboard Air Line Ry. Co., 67 S. C. 181: 847, 1451, 1457, 1639.
 v. Seattle, 23 Wash. 753: 229, 1307, 1566.
 v. Seligman, 81 N. Y. 190: 1645, 1646, 1647.
 v. Skinner, 61 Me. 25: 976.
 v. Stafford Justices, 1 Leigh 584: *1638.
 v. Theiss, 30 Ind. 311: 1399.
 v. United States, 48 Wis. 385: 92, 738.
 v. Van Bochoven, 103 Mich. 98: 837, 1504.
 v. Venable, 120 Ga. 1: 521, 534.
 v. Wabash etc. R. R. Co., 18 Mo. App. 251: 157.
 v. Walker, 2 Paine C. C. 688: 6, 672, 745.
 v. Wills Valley R. R. Co., 30 Ga. 43: 1182.
 v. Zink, 65 Mo. App. 409: 707, 1086.
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 Joplin Con. Min. Co. v. Joplin, 124 Mo. 129: 84, 653, 981, 1008.
 Jordan v. Benwood, 42 W. Va. 312: 148, 156, 233.
 v. Chenoa, 166 Ill. 530: 886.
 v. Greig, 33 Colo. 360: 996.
 v. Haskell, 63 Me. 189: 1503.
 v. Hyatt, 3 Barb. 275: 12.
 v. Met. El. R. R. Co., 60 N. Y. S. 385: 448, 1303, 1555.
 v. School District, 60 Me. 540: 1409.
 v. St. Paul etc. R. R. Co. 42 Minn. 172: 148, 157.
 v. Woodward, 40 Me. 317: 502, 550, 1495.
 Jordan et al., Petitioners, 32 Me. 472: 1417.
 Jorgenson v. Superior, 111 Wis. 561: 615, 617, 619, 1356, 1550.
 Joseph v. Truckenmiller, 183 Mo. 9: 1107.
 v. Zimmerman, 142 Mo. 155: 1186.
 Joy v. Grindstone Neck Water Co., 85 Me. 109: 1247, 1445.
 Joyce v. East St. Louis El. St. R. R. Co., 43 Ill. App. 157: 322, 1355.
 Judd v. Hartford, 72 Conn. 350: 143.
 Judge v. New York Central etc. R. R. Co., 56 Hun 60: 1630.
 Judson v. Bridgeport, 25 Conn. 426: 1086, 1515.
 Julia Building Ass'n v. Bell Tel. Co., 88 Mo. 258: 341, 643.
 Juliatta v. Smith, 12 Ida. 288: 865.
 Junction Pass. R. R. Co. v. Williamsport Pass. R. R. Co., 154 Pa. St. 116: 304.
 Jungblum v. Minneapolis etc. R. R. Co., 70 Minn. 153: 152, 1650, 1655.
 Jurries v. Virgins, 104 Minn. 71: 1515.
 Justice v. Nesquehoning Valley R. R. Co., 87 Pa. St. 28: 1348, 1351, 1626, 1629.
 v. Philadelphia, 169 Pa. St. 297: 953.
 v. Philadelphia, 169 Pa. St. 503: 952, 1560.
 Justices etc. v. Griffin etc. Road Co., 15 Ga. 39: 779, 1057.
 v. Plank Road Co., 9 Ga. 475: 706, 779.
 Justices of Williamson v. Jefferson, 1 Coldw. 419: 1531.
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[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 Kaje v. Chicago etc. R. R. Co., 57 Minn. 422: 320, 351, 382, 388, 399, 444.
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 Kakie v. St. Paul etc. Ry. Co., 44 Minn. 438: 352.
 Kalamazoo v. Kalamazoo H. L. & P. Co., 124 Mich. 74: 360, 361, 410.
 Kales v. Spokane Val. L. & W. Co., 42 Wash. 43: 137.
 Kamer v. Clatsop Co., 6 Ore. 238: 975, 1069.
 Kamm v. Normand, 50 Ore. 9: 81, 1604.
 Kanaga v. St. Louis etc. R. R. Co., 76 Mo. 207: 858, 1627, 1631.
 Kanawha etc. R. R. Co. v. Glen Jean etc. R. R. Co., 45 W. Va. 119: 901.
 Kane v. Baltimore, 15 Md. 240: 536, 1495.
 v. New York El. R. R. Co., 125 N. Y. 164: 180, 181, 183, 187, 197, 198, 199, 202, 240, 255, 264, 265, 1296.
 Kankakee etc. R. R. Co. v. Chester, 62 Ill. 235: 1369.
 v. Horan, 131 Ill. 288: 90, 95, 1638, 1648, 1653.
 v. Horan, 22 Ill. App. 145: 151, 156, 1648, 1655.
 v. Horan, 23 Ill. App. 259: 151.
 v. Horan, 30 Ill. App. 552: 90, 95, 1648, 1653.
 v. Straut, 102 Ill. 666: 1107.
 Kankakee Water Co. v. Reeves, 45 Ill. App. 285: 145.
 Kanne v. Minneapolis & St. Louis Ry. Co., 30 Minn. 423: 1461, 1626, 1628.
 v. Minneapolis & St. Louis Ry. Co., 33 Minn. 419: 1626.
 Kansas v. Colorado, 185 U. S. 125: 170.
 v. Colorado, 206 U. S. 46: 170.
 Kansas Cent. R. R. Co. v. Allen, 22 Kan. 285: 1477.
 v. Allen, 24 Kan. 33: 1119, 1120, 1125, 1128.
 v. Board of Co. Comrs., 45 Kan. 716: 1290.
 Kansas City v. Baird, 98 Mo. 215: 678, 1057.
 v. Brady, 52 Kan. 297: 169.
 v. Butterfield, 89 Mo. 646: 1109.
 v. Campbell, 62 Mo. 585: 894.
 v. Duncan, 135 Mo. 571: 1011.
 Kansas City v. Hennegan, 152 Fed. 249: 931, 932.
 v. Hill, 80 Mo. 523: 923.
 v. Hyde, 196 Mo. 498: 1071.
 v. Hyde, 196 Mo. 515: 1071.
 v. Kansas City Belt R. R. Co., 102 Mo. 633: 354, 487.
 v. Kansas City Belt Ry. Co., 187 Mo. 146: 490, 1422.
 v. Kansas City etc. R. R. Co., 84 Mo. 410: 1378.
 v. Kansas City etc. R. R. Co., 189 Mo. 245: 1403.
 v. Kansas Pac. Ry. Co., 18 Kan. 331: 1410, 1673.
 v. Marsh Oil Co., 140 Mo. 458: 9, 674.
 v. Mastin, 169 Mo. 80: 1011.
 v. Met. Water Co., 164 Fed. 728: 931.
 v. Morse, 105 Mo. 510: 1270.
 v. Mulkey, 176 Mo. 229: 1703.
 v. Napiecek, 76 Kan. 693: 1270, 1344.
 v. No. Am. Trust Co., 110 Mo. App. 647: 1563.
 v. Scarritt, 169 Mo. 471: 872, 892.
 v. Slangstrom, 53 Kan. 431: 88, 92, 93.
 v. Street, 36 Mo. App. 666: 1109.
 v. Vineyard, 128 Mo. 75: 926.
 v. Ward, 134 Mo. 172: 1011, 1186.
 Kansas City etc. R. Co. v. Baird, 41 Kan. 69: 1128, 1311.
 v. Baker, 183 Mo. 312: 873.
 v. Baker, 196 Mo. 593: 1557.
 v. Campbell, 62 Mo. 585: 893, 1029, 1377.
 v. Cook, 57 Ark. 387: 158, 1638.
 v. Cox, 41 Mo. App. 499: 926.
 v. Dawley, 50 Mo. App. 480: 1119, 1130, 1310, 1312.
 v. Fisher, 49 Kan. 17: 1228.
 v. Fisher, 53 Kan. 512: 1018, 1513, 1540, 1541, 1543, 1545.
 v. Hurst, 42 Kan. 462: 1428.
 v. Kansas City etc. R. R. Co. 118 Mo. 599: 1281.
 v. Kansas City etc. R. R. Co., 129 Mo. 62: 1619.
 v. Kennedy, 49 Kan. 19: 1391.
 v. Kregelo, 32 Kan. 608: 1246, 1314, 1330, 1342, 1477.
 v. Lackey, 72 Miss. 881: 87, 88, 89, 1456.
 v. Littler, 70 Kan. 556: 1208.
 v. La. Western R. R. Co., 116 La. 178: 533, 714, 764, 769.
 v. Merrill, 25 Kan. 421: 1208, 1392.
 v. Morley, 45 Mo. App. 304: 354.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. St. Joseph Terminal R. R. Co., 97 Mo. 457: 312, 328, 657, 765, 769, 1282.
 v. Schwake, 70 Kan. 141: 252, 260, 1297.
 v. Shoemaker, 160 Mo. 425: 1310, 1315.
 v. Smith, 51 La. Ann. 1079: 1426.
 v. Smith, 72 Miss. 677: 89.
 v. Spencer, 72 Miss. 491: 487.
 v. Splitlog, 45 Kan. 68: 1150, 1241, 1545.
 v. State, 74 Neb. 868: 868.
 v. Story, 96 Mo. 611: 926, 1176.
 v. Turley, 71 Kan. 256: 1387.
 v. Vickroy, 46 Kan. 248: 1120, 1231, 1236, 1241.
 v. View, 156 Mo. 608: 1557.
 v. Weaver, 86 Mo. 473: 1254, 1557.
 v. Weidenmann, 77 Kan. 300: 1128, 1139, 1225.
 v. Wiggal, 82 Miss. 223: 96.
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 v. McElroy, 161 Mo. 584: 1150, 1186, 1217.
 v. Norcross, 137 Mo. 415: 1137, 1210.
- Kansas etc. R. R. Co. v. Burns, 70 Kan. 627: 1477, 1633.
 v. Cuykendall, 42 Kan. 234: 251, 311, 325.
 v. LeFlora, 49 Fed. 119: 426, 1474, 1608, 1615.
 v. Mahler, 45 Kan. 565: 252, 311,
 v. McAfee, 42 Kan. 239: 252, 311, 316.
 v. N. W. Coal & M. Co., 161 Mo. 288: 528, 530, 592, 824, 1042, 1045, 1050, 1052, 1068, 1070.
 v. Payne, 49 Fed. 114: 410, 413, 426, 1474, 1608, 1615.
 v. Phipps, 4 Kan. App. 252: 1010, 1461.
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 v. Mihlman, 17 Kan. 224: 1551, 1648, 1658, 1715.
 v. Streeter, 8 Kan. 133: 1004, 1626.
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- Karnes v. Drake, 103 Ky. 134: 711, 1077.
- Karst v. St. Paul etc. R. R. Co., 22 Minn. 118: 237, 1306, 1648, 1657.
 v. St. Paul etc. R. R. Co., 23 Minn. 401: 237, 1306.
- Katharine Water Co., 32 Pa. Supr. Ct. 94: 918.
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- Kaufman v. Greismer, 26 Pa. St. 407: 146.
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 v. Tacoma etc. R. R. Co., 11 Wash. 632: 256, 304, 324, 640, 1294, 1300, 1549, 1649, 1657.
- Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254: 495, 522, 523, 1432.
- Kavanagh v. Mobile etc. R. R. Co., 78 Ga. 271: 296, 308, 314, 315, 1581, 1591.
- Kavanaugh v. Brooklyn, 32 N. Y. 489: 234.
- Kay v. Glade Creek etc. R. R. Co., 47 W. Va. 467: 1123, 1315, 1316, 1379.
 v. Kirk, 76 Md. 41: 79, 88.
- Kean v. Elizabeth, 54 N. J. L. 462: 370, 371, 384, 390, 406.
 v. Elizabeth, 55 N. J. L. 337: 370, 371, 384, 390, 406.
 v. Stetson, 5 Pick. 492: 1634.
- Kearney v. Metropolitan El. R. R. Co., 129 N. Y. 76: 1296, 1554, 1584, 1665.
 v. Themanson, 48 Neb. 74: 147, 149, 158.
- Kearney Tp. v. Ballentine, 54 N. J. L. 194: 698.
- Kearns v. Thomas, 37 Wis. 118: 1400.
- Kearsley v. Gibbs, 44 N. J. L. 169: 1368.
- Keasy v. Louisville, 4 Dana (Ky.) 154: 209, 211, 238.
- Keating v. Cincinnati, 38 Ohio St. 141: 229, 230, 442, 1453.
- Keck v. Vanghouse, 127 Ia. 520: 89.
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 v. Chapman, 25 Me. 126: 1522.
 v. Metropolitan El. R. R. Co., 79 Hun 451: 1305.
 Kehoe v. Philadelphia, 199 Pa. St. 45: 1251, 1457.
 Kehrer v. Richmond City, 81 Va. 745: 212.
 Kiefer v. Bridgeport, 68 Conn. 401: 1634.
 Keigwin v. Drainage Comrs., 115 Ill. 347: 1431, 1510, 1576.
 Keim v. Philadelphia, 2 Pa. Co. Ct. 149: 883.
 Keine v. Cass County, 71 Neb. 677: 1435.
 Keith v. Bingham, 100 Mo. 300: 13.
 v. Brockton, 147 Mass. 618: 1717.
 Keithsburg & East R. R. Co. v. Henry, 79 Ill. 290: 1122, 1128, 1194, 1309, 1311, 1314.
 Kelenke v. West Homestead, 216 Pa. St. 476: 630.
 Kellar v. Earl, 98 Wis. 488: 1636.
 v. Riverton Consolidated Water Co., 34 Pa. Supr. Ct. 301: 731.
 Keller v. Bading, 64 Ill. App. 198: 1559.
 v. Corpus Christi, 50 Tex. 614: 17.
 v. Harrisburg etc. R. R. Co., 151 Pa. St. 67: 1713.
 v. Harrisburg etc. R. R. Co., 161 Pa. St. 594: 1535.
 v. Pittsburgh etc. R. R. Co., 151 Pa. St. 67: 1708.
 v. Riverton Water Co., 161 Pa. St. 422: 1068.
 Kelley v. Green Bay etc. R. R. Co. 80 Wis. 328: 1578.
 v. Horton, 2 Cow. 424: 1634, 1636.
 v. Kennard, 60 N. H. 1: 514.
 v. New York, 6 Misc. 516: 85, 1164.
 v. Pittsburgh, 85 Pa. St. 170: 466.
 Kellner v. Miller, 97 Mass. 71: 1147.
 Kellinger v. Forty-second Street etc. R. R. Co., 50 N. Y. 206: 178, 269, 307.
 Kellogg v. Kirksville, 132 Mo. App. 519: 84, 1654.
 v. Malin, 50 Mo. App. 496: 1500.
 v. New Britain, 62 Conn. 232: 84.
 v. Thompson, 66 N. Y. 88: 168, 866, 1491.
 Kellor's Appeal, 2 Walker's Pa. Supm. 32: 948.
 v. Danby, 46 Vt. 504: 701.
 v. Donahoe, 2 Met. (Ky.) 482: 1489.
 v. Dunning, 39 N. J. Eq. 482: 146.
 v. Harrison, 2 Johns. Cas. 29: 943.
 v. Minneapolis, 57 Minn. 294: 226.
 v. Pennsylvania S. V. R. R. Co. 5 Mont. Co. L. R. 175: 819.
 v. Pittsburg etc. R. R. Co., 28 Ind. App. 457: 91, 1639, 1716.
 Kelsay v. Chicago etc. R. R. Co. 41 Ind. App. 128: 1644.
 Kelsey v. King, 32 Barb. 410: 335, 678.
 Kelso, In re, 147 Cal. 609: 467.
 Kelsoe v. Oglethorpe, 120 Ga. 951: 886, 890, 1492, 1568.
 Kemp v. Penn. R. R. Co., 156 Pa. St. 430: 847.
 v. Polk County, 46 Ore. 546: 978.
 v. Smith, 7 Ind. 471: 995, 1021, 1406.
 v. Southeastern R. R. Co., 7 L. R. Ch. 364: 1061.
 Kemper v. Collins, 97 Mo. 644: 872, 886.
 v. Louisville, 14 Bush. 87: 66, 234.
 Kemper's Lessee v. Cincinnati etc. Turnpike Co., 11 Ohio 392: 815.
 Kenan, In re, 109 Ga. 819: 726.
 Kendall v. Columbia, 74 S. C. 539: 212, 613, 618, 1525.
 v. Post, 8 Or. 141: 923.
 v. Railroad Co., 55 Vt. 438: 1536, 1537, 1538, 1539, 1540.
 Kendrick v. Towle, 60 Mich. 368: 1323.
 Kenedy v. Erwin, Busbee L. 387: 495.
 Kenesin v. Arlington, 144 Mass. 456: 912.
 Kenkele v. Manhattan R. R. Co., 55 Hun 398: 1295.
 Kennebec Water District v. Waterville, 96 Me. 234: 21, 498, 503, 675, 733, 788, 789, 930, 1263, 1265.
 v. Waterville, 97 Me. 185: 788, 1263, 1265.
 Kennedy v. Detroit R. R. Co., 108 Mich. 390: 307, 1588.
 v. Dubuque & Pacific R. R. Co., 2 Iowa 521: 1204.
 v. Indianapolis, 103 U. S. 599: 1194.
 v. Milwaukee & St. Paul Ry. Co., 22 Wis. 581: 947, 949, 1226, 1564.
 v. Minneola etc. Traction Co., 77 App. Div. 484: 273.
 v. Minneola etc. Traction Co., 178 N. Y. 508: 273.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Kennett's Petition, 24 N. H. 139: 437,
 917, 1118, 1362.
 Kenney v. Kansas City etc. R. R. Co.,
 69 Mo. App. 569: 147, 157.
 v. Kansas City etc. R. R. Co., 74
 Mo. App. 301: 94.
 v. Pittsburg etc. Ry. Co., 208 Pa.
 St. 30: 748.
 Kennison v. Beverly, 146 Mass. 467:
 145.
 Kensington's Case, 2 Rawle, 445: 781,
 788.
 Kensington v. Wood, 10 Pa. St. 93:
 1137.
 Kensington & Oxford Turnpike, In re,
 97 Pa. St. 260: 1383.
 Kent v. Board of County Comrs., 42
 Kan. 534: 1395, 1568.
 v. Pratt, 73 Conn. 573: 881.
 v. St. Joseph, 72 Mo. App. 42:
 1306.
 v. Wallingford, 42 Vt. 651: 1530,
 1683.
 Kent Co. v. Goodwin, 98 Md. 84: 153.
 Kenton Co. Ct. v. Bank Lick Turn-
 pike Co., 10 Bush. 529: 782.
 Kentucky Cent. R. R. Co. v. Clark,
 5 Ky. L. R. 184: 180, 253.
 v. Paris, 95 Ky. 627: 865.
 Kentucky etc. R. R. Co. v. Harrison,
 4 Ky. L. R. 448: 1358.
 Kentucky & Ind. Bridge Co. v. Held,
 16 Ky. L. R. 160: 1144.
 v. Kreiger, 93 Ky. 243: 310, 314.
 Kenyon v. New York Cent. etc. R. R.
 Co., 29 App. Div. N. Y. 80: 1651,
 1658.
 Keokuk etc. Ry. Co. v. Donnell, 77 Ia.
 221: 1046, 1073, 1624.
 Kepley v. Taylor, 1 Blackf. 492:
 549, 553, 1519.
 Kepple v. Keokuk, 61 Iowa 653: 603,
 616.
 Kern v. Isgrig, 132 Ind. 4: 1568,
 1574, 1576.
 Kern Island Irr. Co. v. Bakersfield,
 151 Cal. 403: 835.
 Kernochan v. Manhattan Ry. Co., 161
 N. Y. 339: 1554, 1562.
 v. New York El. R. R. Co., 128 N.
 Y. 559: 182, 1298, 1663, 1665.
 v. New York El. R. R. Co., 130 N.
 Y. 651: 1121.
 Kerr v. South Park Comrs., 117 U. S.
 379: 539, 1143.
 v. West Shore R. R. Co., 127 N. Y.
 269: 788.
 Kerrigan v. Backus, 69 App. Div. 329:
 366.
- Kerr's Petition, Matter of, 42 Barb.
 119: 684, 788.
 Kersey v. Schuylkill Riv. E. S. R. R.
 Co., 133 Pa. St. 234: 1188, 1201,
 1274, 1339.
 Kershaw v. Philadelphia, 10 Pa. Co.
 Ct. 153: 1550, 1718.
 v. Philadelphia, 20 Phila. 318:
 618, 1551, 1649, 1656.
 Kersley v. Gibbs, 44 N. J. L. 169:
 1386.
 Kester v. Western Union Tel. Co.,
 108 Fed. 926: 339.
 Ketcham v. New York etc. R. R. Co.,
 76 App. Div. 619: 258.
 v. New York etc. R. R. Co., 177
 N. Y. 247: 258.
 Kettle River R. R. Co. v. Eastern
 R. R. Co., 41 Minn. 461: 533,
 832.
 Kewanee v. Otley, 204 Ill. 402: 82,
 83, 1604, 1650, 1654.
 Keyes v. Minneapolis, 42 Minn. 467:
 1382, 1514.
 v. Tait, 19 Ia. 123: 974, 1516.
 Keyport v. Freehold etc. R. R. Co.,
 74 N. J. L. 480: 878, 890.
 Keyes v. Morin Co., 42 Cal. 252:
 1415, 1416.
 v. Williamson, 31 Ohio St. 561:
 1033.
 Keyser v. Lake Shore etc. Ry. Co.,
 142 Mich. 143: 1294, 1304, 1550,
 1648, 1657.
 Keysport v. Cherry, 51 N. J. L. 417:
 710.
 Keystone Bridge Co. v. Summers, 13
 W. Va. 476: 948.
 Keystone State Tel. & Tel. Co. v.
 Ridley Park, 28 Pa. Super. Ct.
 635: 362.
 Kidd v. Pearson, 128 U. S. 1: 478.
 Kidder v. Jennison, 21 Vt. 108: 1018.
 v. Oxford, 116 Mass. 165: 1319.
 v. Peoria, 29 Ill. 77: 1018, 1513.
 Kidder Tp. Road, 1 Luzerne Leg.
 Reg. Rep. 10: 1091.
 Kiebler v. Holmes, 58 Mo. App. 119:
 935, 1558, 1560.
 Kiecher v. Killbuck Turnpike Co.,
 33 Ind. 333: 1628.
 Kiekenapp v. Supers., 64 Minn. 547:
 1082.
 Kiernan v. Chicago etc. R. R. Co.,
 123 Ill. 188: 1109, 1150, 1176,
 1200, 1202, 1312, 1313, 1506.
 Kiesel v. Ogden City, 8 Utah 237:
 143.
 Killbuck Private Road. 77 Pa. St.
 39: 707, 721, 1362.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Homan, 74 Mich. 699: 364, 367, 384, 388, 400, 406, 1004.
 v. Kenosha, 4 Wis. 321: 196, 197, 366, 384.
 v. Salt Lake City, 32 Utah. 253: 631, 634, 1307, 1308, 1323.
 v. Yates, 14 Ill. 464: 1096.
- Kimball Admx. v. Rockland, 71 Me. 137: 1526, 1530, 1683.
- Kimble v. White Water Valley Canal Co., 1 Ind. 285: 1445, 1522.
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- Kimel v. Kimel, 4 Jones Law 121: 923, 1345.
- Kincaid v. Indianapolis Nat'l Gas Co., 124 Ind. 577: 172, 176, 200, 337, 1594, 1615.
- Kine v. Defenbaugh, 64 Ill. 291: 24.
- King, Matter of, 42 Misc. 480: 1362, 1381.
- King v. Bristol Dock Co., 6 B. & C. 181: 206.
 v. Bristol Dock Co., 12 East 429: 85.
 v. Brown, 31 Pa. Supr. Ct. 50: 1325.
 v. C. B. & Q. R. R. Co., 71 Ia. 696: 160.
 v. Danville, 32 Ky. L. R. 1188: 74, 1654.
 v. Davenport, 98 Ill. 305: 14, 485.
 v. Granger, 21 R. I. 93: 143.
 v. Greenwood Cem. Assn., 67 Ohio St. 240: 924, 927, 1397.
 v. Hayes, 80 Me. 206: 486.
 v. Hungerford Market Co., 4 Barn. & Adol. 596: 1257.
 v. Iowa Midland R. R. Co., 34 Ia. 458: 1139, 1147.
 v. Kent, 10 Barn. & Cres. 477: 1358.
 v. Minneapolis Union Ry. Co., 32 Minn. 224: 1276.
 v. New York, 36 N. Y. 182: 929, 1397.
 v. New York, 102 N. Y. 171: 938.
 v. Norfolk & W. R. R. Co., 90 Va. 210: 836, 1504.
 v. Nottingham Waterworks, 6 A. & E. 355: 1533.
 v. Philadelphia Co., 154 Pa. St. 160: 337.
 v. Portland, 38 Ore. 402: 10, 463.
 v. Southern Ry. Co., 119 Fed. 1017: 1560, 1631.
 v. Tarlton, 2 Harris & McH. (Md.) 473: 1135.
 v. United States, 59 Fed. Rep. 9: 92, 1716.
- King v. Vicksburg Ry. & Lt. Co., 88 Miss. 456: 453, 454, 655, 661, 664, 1175, 1337, 1668.
 v. Wycombe Ry. Co., 28 Beav. 104: 822.
 v. Wycombe Ry. Co., 29 L. J. Ch. N. S. 462: 822.
- Kingman County Comrs. v. Plymouth, 6 Cush. 306: 1416.
- Kingman et al., Petitioners, 153 Mass. 566: 535.
- Kings Co. v. Sea View Ry. Co., 23 Hun 180: 1583, 1622.
- Kings County El. R. R. Co., Matter of, 20 Hun 217: 921.
- Kings County Elevated Ry. Co., Matter of, 82 N. Y. 95: 260.
- Kings Co. Fire Ins. Co. v. Stevens, 101 N. Y. 411: 368, 380, 388.
- King's Lake L. & D. Dist. v. Jamison, 176 Mo. 557: 1082.
- Kingsland v. Clark, 24 Mo. 24: 1255.
 v. New York, 35 Hun 458: 130.
 v. New York, 110 N. Y. 569: 428, 1262, 1342.
- King's Leasehold Estates, L. R. 16 Eq. Cas. 521: 1260.
- King's Prerogative etc., 12 Coke 12: 16.
- King's Road, 1 Dall. 11: 1388.
- Kingston Road, In re, 134 Pa. St. 409: 1366, 1376.
- Kingston Tp. Road, 5 Luzerne Leg. Reg. Rep. 43: 1387.
- Kinion v. Kansas City etc. R. R. Co., 118 Mo. 577: 956.
- Kinnealy v. St. Louis etc. R. R. Co., 69 Mo. 658: 459.
- Kinnear Mfg. Co. v. Beatty, 21 Ohio C. C. 384: 380.
 v. Beatty, 65 Ohio St. 264: 371, 380, 388, 392, 398, 1595.
- Kinney v. Pittsburg etc. Ry. Co., 208 Pa. St. 30: 743.
- Kinnie v. Bare, 68 Mich. 625: 564, 569, 570, 576, 979, 980, 1088.
 v. Bare, 80 Mich. 345: 1034, 1380.
- Kinsey v. New York, 75 App. Div. 262: 1338, 1554.
 v. New York, 177 N. Y. 568: 1338, 1554.
 v. Union Traction Co., 169 Ind. 563: 280, 286, 289, 292, 313, 334, 1589, 1591.
- Kinsman St. R. R. Co. v. Broadway & N. St. R. R. Co., 36 Ohio St. 239: 426, 427, 762, 763, 764, 1283.
- Kinston etc. R. R. Co. v. Stroud, 132 N. C. 413: 919, 1050

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. New York & Harlem R. R. Co., 67 N. Y. 227: 689.
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 v. Chicago etc. Ry. Co., 106 Fed. 551: 931.
 v. Citizens' R. Co., 48 Md. 168: 354.
 v. Citizens' Telephone Co., 17 S. D. 362: 342.
 v. Panhandle etc., Ry. Co., 39 Tex. Civ. App. 252: 1216, 1219, 1251.
- Kirchman v. West & So. Towns St. R. R. Co., 58 Ill. App. 515: 1587.
- Kirk's Appeal, 28 Pa. St. 185: 1419.
- Kirk v. Kansas City etc. R. R. Co., 51 La. Ann. 664: 846, 847, 1485.
 v. Kansas City etc. R. R. Co., 51 La. An. 667: 846, 847.
 v. Lynd, 106 U. S. 315: 19.
- Kirkendall v. Hunt, 4 Kan. 514: 1570.
 v. Omaha, 39 Neb. 1: 1179, 1215, 1308.
- Kirkhart v. Roberts, 123 Ia. 137: 1070, 1623.
- Kirkland v. Atlantic etc. Ry. Co., 126 Ga. 246: 728.
 v. State, 72 Ark. 171: 484.
- Kirn v. Cape Girardeau etc. R. R. Co., 124 Mo. App. 271: 1696.
- Kirtland v. Meriden, 39 Conn. 107: 1683.
- Kishler v. So. Pac. R. R. Co., 134 Cal. 636: 1227, 1233.
- Kiskiminitas Tp. Road, 32 Pa. St. 9: 1423.
- Kissam v. Brooklyn El. R. R. Co., 86 Hun 598: 1555.
- Kissinger v. Hanselman, 33 Ind. 80: 512, 517, 1033.
- Kitsap County v. Melker, 50 Wash. 29: 1020.
- Kittell v. Missisquoi R. R. Co., 56 Vt. 96: 1536, 1538, 1540, 1541.
- Kivett v. McKeitham, 90 N. C. 106: 857.
- Klages v. Philadelphia etc. R. R. Co., 160 Pa. St. 386: 1324.
- Klaus v. Jersey City, 69 N. J. L. 127, 608, 619, 1532, 1718
- Klein v. St. Paul etc. Ry. Co., 30 Minn. 451: 1404, 1405.
- Klenk v. Walnut Lake, 51 Minn. 381: 881, 885.
- Klenk v. West Homestead, 216 Pa. St. 476: 632, 636.
- Klicker v. Guilbaud, 47 N. J. L. 277: 721.
- Klinger v. Bickal, 117 Pa. St. 326: 468.
- Klipstein v. New York El. R. R. Co., 8 Miscel. 457: 924.
- Klopp v. Chicago etc. Ry. Co., (Ia.) 119 N. W. 373: 1332.
- Klosterman v. Chesapeake etc. Ry. Co., 114 Ky. 426: 1299, 1657.
- Klous v. Commonwealth, 188 Mass. 149: 1127.
- Klug v. Jeffers, 88 App. Div. 246: 882, 884.
- Knapp v. McAuley, 39 Vt. 275: 1631.
 v. New York El. R. R. Co., 4 Miscel. 408: 1379.
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- Knapp Stout & Co. v. St. Louis, 153 Mo. 560: 384, 392, 398, 1595.
 v. St. Louis, 156 Mo. 343: 384, 392, 398, 1595.
- v. St. Louis Transfer R. R. Co. 126 Mo. 26: 254, 311, 314, 1582, 1591, 1592.
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- Knickerbocker Ice Co. v. Forty-second Street R. R. Co., 55 App. Div. 530: 115.
 v. Forty-second Street R. R. Co., 176 N. Y. 408: 115.
- v. Philadelphia & Reading R. R. Co., 15 Phila. 48: 315.
- Knight v. Ala. Midland R. R. Co., 101 Ala. 407: 841.
 v. Albemarle etc. R. R. Co., 110 N. C. 58: 93.
- v. Albemarle etc. R. R. Co., 111 N. C. 80: 92, 1454.
- v. Aroostook Riv. R. R. Co., 67 Me. 291: 698.
- v. Carrollton R. R. Co., 9 Ia. Ann. 284: 304.
 v. Heaton, 22 Vt. 480: 1402.
- Knoblauch v. Minneapolis, 56 Minn. 321: 678, 1011, 1057, 1085.
- Knock v. Metropolitan Ry. Co., 38 L. J. C. P. 78: 625.
 v. Metropolitan Ry. Co., 4 L. R. C. P. 131: 625.
- Knorr v. Germantown R. R. Co., 5 Whart. 256: 1523.
- Knoth v. Barelay, 8 Colo. 300: 929, 956.
 v. Manhattan Ry. Co., 109 App. Div. 802: 1588.
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 Knowles' Petition, 23 N. H. 193: 1437.
 Knowles v. Knowles, 25 R. I. 325: 887, 1492.
 v. Muscatine, 20 Ia. 248: 721, 1362.
 v. Norfolk & S. R. R. Co., 102 N. C. 381: 832, 1456, 1523.
 Knox v. Chalomer, 42 Me. 150: 103.
 v. Epsom, 56 N. H. 14: 1034.
 v. Met. El. R. R. Co., 58 Hun 517: 1584, 1591.
 v. Met. El. R. R. Co., 128 N. Y. 625: 1584, 1591.
 v. New York, 55 Barb. 404: 356.
 Knoxville v. Africa, 77 Fed. 501: 297, 298, 305.
 v. Bird, 12 Lea. 121: 468.
 v. Harth, 105 Tenn. 436: 613.
 Knoxville etc. R. R. Co. v. Beeler, 90 Tenn. 548: 836.
 Knoxville W. Co. v. Knoxville, 200 U. S. 22: 410, 411, 417.
 Kobbe v. New Brighton, 23 App. Div. 243: 453, 1613.
 Kobs v. Minneapolis, 22 Minn. 159: 233.
 Koch v. Del. L. & W. R. R. Co., 53 N. J. L. 256: 167, 470, 1475.
 v. Del. L. & W. R. R. Co., 54 N. J. L. 401: 88, 144.
 v. Ky. & Ind. Bridge Co., 26 Ky. L. R. 216: 640, 1356.
 v. North Ave. R. R. Co., 75 Md. 222: 267.
 v. Sackman-Phillips Inv. Co., 9 Wash. 405: 231, 1309, 1339.
 v. Williamsport Water Co., 65 Pa. St. 288: 1523.
 Koefller v. Milwaukee, 85 Wis. 397: 237, 1597.
 Koehler v. New York El. R. R. Co., 9 App. Div. 449: 1355.
 v. New York El. R. R. Co., 159 N. Y. 218: 1355, 1562.
 Koehmel v. New Orleans etc. R. R. Co., 27 La. Ann. 442: 253, 307.
 Koelle v. Kuecht, 99 Ill. 396: 532.
 Koenig v. Winona Co., 10 Minn. 238: 1424.
 v. C. B. & Q. R. R. Co., 27 Neb. 699: 686, 1578.
 Koepen v. Sedalia, 89 Mo. App. 648: 237.
 Koerper v. St. Paul & N. R. R. Co., 42 Minn. 340: 1211.
 Kohl v. United States, 91 U. S. 367: 672, 931, 932.
 Kohlhepp v. West Roxbury, 120 Mass. 596: 1518.
 Kokomo v. Mahan, 100 Ind. 242: 210, 238, 602, 617, 1597.
 Koopman v. Blodgett, 70 Mich. 610: 80, 1604.
 Kopetzky v. Metropolitan El. R. R. Co., 14 Misel. 311: 1304.
 Kopp v. Northern Pac. R. R. Co., 41 Minn. 310: 441, 1338, 1453.
 Koppik v. State Capitol Comrs., 16 Cal. 248: 927, 1004.
 Kornder v. Kings County El. R. R. Co., 61 App. Div. 439: 1555.
 Kossler v. Pittsburgh etc. Ry. Co., 208 Pa. St. 50, 1188, 1201, 1213, 1241, 1273.
 Kothe v. Board of Suprs., 19 S. D. 427: 942, 972, 1029.
 Kotz v. Ill. Cent. R. R. Co., 188 Ill. 578: 658, 1457, 1472.
 Kough v. Dorcey, 11 N. J. L. 237: 1636.
 Kownslar v. Ward, Gilmer, Va. 127: 1359.
 Kraeer v. Pa. R. R. Co., 218 Pa. St. 569: 842, 864, 1485, 1646.
 Kramer v. Cleveland etc. R. R. Co., 5 Ohio St. 140: 923, 927, 1013, 1192.
 v. Cleveland & Pittsburgh R. R. Co., 5 Ohio St. p. 165: 1016.
 v. Los Angeles, 147 Cal. 668: 501.
 Krause v. Oregon Steel Co., 45 Or. 378: 92, 1604.
 Kreigh v. Chicago, 86 Ill. 407: 197, 357.
 Kremer v. Chicago etc. R. R. Co., 51 Minn. 15: 857, 1176, 1627, 1632.
 v. Chicago etc. R. R. Co., 54 Minn. 157: 1626.
 Krenick v. Cordova, 95 Minn. 372: 1031.
 Kreuger v. Wis. Telephone Co., 106 Wis. 96: 339, 1593.
 Kroffe v. Springfield, 86 Mo. App. 530: 237.
 Krone v. Kings County El. R. R. Co., 50 Hun 431: 1614.
 Kronenwetter's Appeal, 135 Pa. St. 176: 1386.
 Kroop v. Forman, 31 Mich. 144: 706, 969, 1361, 1420.
 Krug v. St. Mary's Borough, 152 Pa. St. 37: 93.
 Kruger v. Le Blanc, 70 Mich. 76: 865, 867, 1358, 1516.
 Krumweide v. Manhattan R. R. Co., 9 Misel. 552: 1196, 1296, 1300.
 Kucheman v. C. C. & D. Ry. Co., 46 Ia. 366: 200, 242, 247, 251, 323, 1293, 1299, 1335.

[The references are to the pages: Vol. I., pp. 1-742; Vol. II., pp. 743-1719.]

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 Kuhl v. Chicago & N. W. R. R. Co., 101 Wis. 42: 248, 621, 858, 1719.
 Kuhn v. Ill. Cent. R. R. Co., 111 Ill. App. 323: 450, 655, 661.
 v. New York El. R. R. Co., 7 Miscl. 53: 1301.
 v. Truman, 15 Kan. 423: 939.
 Kundinger v. Saginaw, 59 Mich. 355: 1013, 1084, 1395, 1402.
 Kuschke v. St. Paul, 45 Minn. 225: 229, 987, 1011, 1021, 1504.
 Kushequa R. R. Co. v. Pittsburgh etc. R. R. Co., 200 Pa. St. 526: 900.
 Kyle v. Auburn etc. R. R. Co., 2 Barb. Ch. 489: 1386, 1446, 1483.
 v. Board of Comrs., 94 Ind. 115: 1393.
 v. Logan, 87 Ill. 67: 867.
 v. Malin, 8 Ind. 34: 919.
 v. Miller, 108 Ind. 90: 1378.
 v. Texas & N. O. R. R. Co., 3 Tex. Civ. App. p. 518: 533.
 Kyne v. Wilmington etc. R. R. Co., 8 Houst. 185: 780.
- L.
- Labry v. Gilmour, 121 Ky. 367: 197, 199.
 Lacey, Ex parte, 108 Cal. 326: 469.
 Lachlan v. Gray, 105 Ia. 259: 387.
 Lackawanna Ave. Viaduct, 14 Pa. Co. Ct. 603: 1081.
 Lackawanna Tp. Road, 112 Pa. St. 212: 1390.
 Lackland v. North Mo. R. R. Co., 31 Mo. 180: 178, 253, 254, 307, 309.
 v. North Missouri R. R. Co. 34 Mo. 259: 253, 307.
 v. Railroad Co., 31 Mo. 183: 311.
 Lacroix v. Medway, 12 Met. 123: 1527.
 La Crosse City Ry. Co. v. Higbee, 107 Wis. 389: 273, 274, 275.
 La Crosse & Milwaukee R. R. Co. v. Seeger, 4 Wis. 268: 1116, 1527.
 Ladd v. Boston, 151 Mass. 585: 430, 957.
 v. French, 6 N. Y. Supp. 56: 1490.
 v. Philadelphia, 171 Pa. St. 485: 643.
 La Farrer v. Hardy, 66 Vt. 200: 1009, 1018, 1513.
 La Fayette v. Bush, 19 Ind. 326: 1160, 1570.
 v. Nagle, 113 Ind. 425: 236, 601, 617, 1119, 1128, 1550, 1648, 1656, 1718.
 v. Spencer, 14 Ind. 399: 210.
 v. Spencer, 19 Ind. 326: 210.
- La Fayette v. Shultz, 44 Ind. 97: 1681.
 v. Wortman, 107 Ind. 404: 601, 617, 1135, 1137, 1550.
 Lafayette etc. R. R. Co. v. Butner, 162 Ind. 460: 7, 672, 673, 927, 929, 1042, 1045, 1046, 1395.
 v. Murdoch, 68 Ind. 137: 424, 1221, 1353;
 v. Smith, 6 Ind. 249: 1522.
 v. Winslow, 66 Ill. 219: 1270.
- La Fayette Plank Road Co. v. New Albany & Salem R. R. Co., 13 Ind. 90: 407, 409, 410, 411, 782, 788.
- Lefeu v. York County, 20 Pa. Supr. Ct. 573: 635.
- Lafferty v. Girardville, 1 Monaghan (Pa. Supm.) 513: 235.
 v. Schuylkill Riv. etc. R. R. Co., 124 Pa. St. 297: 952, 1259, 1635.
- Laflin v. Chicago etc. R. R. Co., 33 Fed. 415: 1110, 1139, 1177, 1217.
 v. Chicago etc. R. R. Co., 34 Fed. 859: 1150.
- Lager v. Sibley County, 100 Minn. 85: 713.
- Laguna Dr. Dist. v. Charles Martin Co., 144 Cal. 209: 497, 501, 564, 572, 573.
 v. Charles Martin Co., 5 Cal. App. 166: 1067, 1070, 1378.
- La Harpe v. Elm Tp. Gas etc. Co., 69 Kan. 97: 322, 338, 358, 536, 1622.
- Lahr v. Metropolitan El. R. R. Co., 104 N. Y. 268: 67, 178, 184, 197, 199, 202, 263, 264, 1296.
- Laing v. Americus, 86 Ga. 758: 199.
 v. United N. J. R. & C. Co., 54 N. J. L. 576: 1147, 1293, 1303, 1314.
- Laird v. Pittsburg, 205 Pa. St. 1: 421, 539, 1494.
- Lake v. Bok, 31 Ill. App. 45: 153.
 v. Burcky, 57 Ill. App. 547: 382, 391, 398, 644.
 v. Loysen, 66 Wis. 424: 981, 991.
 v. Va. & Truckee R. R. Co., 7 Nev. 294: 408, 413.
- Lake City v. Fulkerson, 122 Ia. 569: 377, 395, 1502.
- Lake Erie etc. R. R. Co. v. Board of Comrs., 57 Fed. 945: 776, 797.
 v. Boswell, 137 Ind. 336: 881, 883.
 v. Comrs., 63 Ohio St. 23: 569.
 v. Griffin, 92 Ind. 487: 1540, 1543.
 v. Griffin, 107 Ind. 464: 1540.
 v. Hancock Co., 63 Ohio St. 23: 495, 580, 581, 776, 1341.
 v. Heath, 9 Ind. 558: 923, 929.
 v. Hilfiker, 12 Ind. App. 280: 154.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Kinsey, 87 Ind. 514: 1463, 1464, 1628.
 v. Kokomo, 130 Ind. 224: 749, 1409.
 v. Lauter, 47 Ill. App. 339: 1504.
 v. Lee, 14 Ind. App. 328: 1646.
 v. Michener, 117 Ind. 465: 1568, 1602.
 v. Priest, 131 Ind. 413: 840, 854, 947.
 v. Purell, 75 Ill. App. 573: 87, 1648, 1652.
 v. Scott, 132 Ill. 429: 448, 655, 671.
 v. Scott, 32 Ill. App. 292: 655.
 v. Shelby, 163 Ind. 36: 1192, 1288.
 v. Whitham, 155 Ill. 514: 872.
 v. Young, 135 Ind. 426: 93, 1601, 1604.
 v. Ziebarth, 6 Ind. App. 228: 835, 836, 845.
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 v. McLain etc. Co., 69 Kan. 334: 1224, 1236, 1270, 1316, 1321, 1400.
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- Lake Roland El. R. R. Co. v. Baltimore, 77 Md. 352: 303, 427.
 v. Frick, 86 Md. 259: 1144, 1293, 1334.
 v. Hibernian Society, 83 Md. 420: 1355.
 v. Webster, 81 Md. 529: 621, 1293, 1549, 1552, 1650, 1657.
 v. Weir, 86 Md. 273: 1149.
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 v. Brown, 16 Ohio C. C. 269: 226.
 v. Chicago, 148 Ill. 509: 749, 895, 1287.
 v. Chicago, 151 Ill. 359: 749, 895, 1287, 1292.
 v. Chicago etc. R. R. Co., 100 Ill. 21: 1280.
 v. Chicago etc. R. R. Co., 96 Ill. 125: 1624.
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 v. Cincinnati, 30 Ohio St. 604: 476.
 v. Elyria, 14 Ohio C. C. 48: 197.
 v. Elyria, 69 Ohio St. 414: 197, 309, 1489, 1642.
 v. New York etc. R. R. Co., 8 Fed. 858: 754, 759, 1061, 1609.
 v. Smith, 173 U. S. 684: 484.
 v. Whiting, 161 Ind. 76: 175, 1445, 1457, 1487.
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 v. St. Paul etc. Ry. Co., 44 Minn. 438: 370, 384, 1295, 1335.
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 v. Comrs. Court, 21 Ala. 772: 1411.
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 v. North London R. R. Co., 4 L. R. Ch. 522: 709.
 v. Pontiac etc. R. R. Co., 150 Mich. 340: 1484, 1646.
 v. Rickets, 11 Ohio, 311: 104.
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 v. Leaman, 107 Ky. 35: 1376.
 v. Leaman, 110 Ky. 251: 1407.
 v. Pope, 1 Mass. 86: 1033.
 v. Richardson, 4 Lans. 136: 347, 1491.
 v. Richmond, 83 Me. 534: 1527.
 Lancaster City Road, 68 Pa. St. 396: 962, 1017, 1036.
 Lancaster County v. Lancaster, 170 Pa. St. 108: 1511, 1512.
 Lance v. Chicago, Mil. & St. P. Ry. Co., 57 Ia. 636: 1267, 1316, 1404.
 Lance's Appeal, 55 Pa. St. 16: 1475.
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 Land v. Smith, 44 La. Ann. 931: 877.
 v. Wilmington etc. R. R. Co., 107 N. C. 72: 1713.
 Landaff's Petition, 34 N. H. 163: 1097, 1415, 1421.
 Landerbrun v. Dufly, 2 Pa. St. 398: 434, 1455.
 Lander v. Bath, 85 Me. 141: 235.
 Landers v. Whitefield, 154 Ill. 630: 865, 870.
 Lane v. Boston, 125 Mass. 519: 605, 615.
 v. Burnap, 39 Mich. 736: 1033, 1420.
 v. Harbor Comrs., 70 Conn. 685: 139.
 v. Lamke, 53 App. Div. 395: 347.
 v. Met. El. R. R. Co., 69 App. Div. 231: 1245, 1332.
 v. Mich. Traction Co., 135 Mich. 70: 851, 1615.
 v. Miller, 17 Ind. 58: 858, 966.
 v. Miller, 22 Ind. 104: 858, 1522.
 v. Saginaw, 53 Mich. 442: 896.
 v. Smith, 71 Conn. 65: 139.
 v. Smith Bros., 80 Conn. 185: 129.
 Lanesborough v. County Comrs., 22 Pick. 278: 955, 1425.
 Laney v. Jasper, 39 Ill. 46: 145.
 Langdon v. New York, 59 Hun 434: 1229, 1147.
 v. New York, 93 N. Y. 129: 108, 127, 132.
 v. New York, 133 N. Y. 628: 1139, 1147.
 Lange v. La Crosse etc. Ry. Co., 118 Wis. 558: 248, 1589.
 Langford v. Co. Comrs., 16 Minn. 375: 922, 927, 1004, 1010.
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 Lansing v. Caswell, 4 Paige, 519: 817.
 v. Smith, 8 Cow. 146: 133.
 v. Smith, 4 Wend. 9: 133.
 Lanterman v. Blairstown R. R. Co., 28 N. J. Eq. 1: 1576.
 Lantis, Matter of, 9 Mich. 324: 1416, 1417.
 Lapan v. Comrs., 65 Me. 160: 1415.
 Lapish v. Bangor Bank, 8 Greenl. 85: 103.
 La Plaisance Bay Harbor Co. v. Monroe, Walk. Ch. 155: 104.
 Laplant v. Marshalltown, 134 Ia. 261: 1624.
 Large v. Philadelphia, 3 Phila. 382: 1036, 1570.
 Larimer etc. St. Ry. Co. v. Larimer, St. Ry. Co., 137 Pa. St. 533: 300, 910.
 Larkin v. Scranton, 162 Pa. St. 289: 1029, 1330.
 Larned v. Briscoe, 62 Mich. 393: 237.
 Larney v. New York etc. R. R. Co., 62 App. Div. 311: 257, 1299.
 Laroe v. Northampton St. Ry. Co., 189 Mass. 254: 307, 606.
 Laroz v. Northampton St. Ry. Co., 189 Mass. 254: 324.
 Larrabee v. Cloverdale, 131 Cal. 96: 90, 236.
 Larsh v. Test, 48 Ind. 130: 898.
 Larsen v. Oregon R. R. Co., 19 Or. 240: 957.
 Larson v. Chicago etc. Ry. Co., 19 S. D. 284: 883.
 v. Superior Short Line Ry. Co., 64 Wis. 59: 1400, 1405.
 Lasala v. Holbrook, 4 Paige 169: 440, 441.
 Lasher v. Saratoga Springs, 17 App. Div. 624: 84.
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 La Societa Italiana v. San Francisco, 131 Cal. 169: 1498.
 Lassiter v. Norfolk etc. R. R. Co., 126 N. C. 509: 156, 1549, 1552, 1655, 1716.
 Latah Co. v. Hasfurther, 12 Ida. 797: 515, 1091, 1092, 1406.
 v. Peterson, 2 Idaho, 1118: 515, 521.
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 Lathrop Tp. Road, In re, 84 Pa. St. 126: 1390.
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 Laurel Hill Cemetery v. San Francisco, 152 Cal. 464: 473.
 Laverty v. State, 109 Ind. 217: 1514.
 Laviosa v. Chicago St. L. & N. O. R. R. Co., 1 McGloin La. 299: 253, 307.
 Law v. Galena etc. R. R. Co., 18 Ill. 324: 1419.
 v. Railroad, 63 N. H. 557: 1231.
 v. Sanitary District, 197 Ill. 523: 1361.
 Lawlor v. Baring Boom Co., 56 Me. 443: 87, 94.
 Lawless v. Reese, 4 Bibb 309: 678, 1004, 1032, 1403.
 Lawondoski v. Wilkes-Barre etc. Ry. Co., 35 Pa. Supr. Ct. 10: 1130.
 Lawrence v. Boston, 119 Mass. 126: 1129, 1134, 1228.
 v. Fairhaven, 5 Gray 110: 91, 236.
 v. Great Northern R. R. Co., 16 Q. B. 642: 89.
 v. Metropolitan El. R. R. Co., 15 Daly, 502: 1146.
 v. Metropolitan El. R. R. Co., 126 N. Y. 483: 1304.
 v. Miller, 2 N. Y. 245: 943.
 v. Miller, 1 Sandf. 516: 943.
 v. Morgan's R. & S. S. Co., 39 La. Ann. 427: 1631.
 v. Nahant, 136 Mass. 477: 1030, 1641.
 v. Newark, 38 N. J. L. 151: 1168.
 v. New York, 2 Barb. 577: 197, 378, 388, 406, 1596.
 v. Philadelphia, 154 Pa. St. 20: 392, 394, 630, 647.
 v. Saratoga Lake Ry. Co., 36 Hun 467: 843, 844, 851, 852.
 v. Second Municipality, 2 La. An. 651: 1319.
 v. Second Municipality, 12 Rob. La. 453: 1545, 1548.
 Lawrenceburg etc. R. R. Co. v. Smith, 3 Ind. 253: 1398.
 Lawrence County v. Deadwood etc. Co., 11 S. D. 74: 961.
 Lawrence & Others Appeal, 78 Pa. St. 365: 856, 1258.
 Lawrence Railroad Co. v. Cobb, 35 Ohio St. 94: 1137, 1710.
 v. O'Hara, 48 Ohio St. 343: 243, 247, 924, 1136.
 v. O'Hara, 50 Ohio St. 667: 940, 996, 1546, 1559.
 Lawrie v. Silsby, 76 Vt. 240: 71.
 Lawton, Matter of, 24 N. Y. Misc. 426: 513.
 v. New Rochelle, 123 App. Div. 832: 610.
 v. Seaboard Air Line R. R. Co., 75 S. C. 82: 92, 94, 1651, 1653.
 v. South Bound R. R. Co., 61 S. C. 548: 148, 158.
 v. Steele, 119 N. Y. 226: 486.
 v. Steele, 152 U. S. 133: 14, 15, 486.
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 Lazarus v. Metropolitan El. R. R. Co., 5 App. Div. 398: 1302.
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 v. Metropolitan El. R. R. Co., 69 Hun 190: 1301.
 v. Morris, 29 Pa. Co. Ct. 505: 812, 1499.
 v. Morris, 212 Pa. St. 128: 7, 21, 709, 806, 812, 1499.
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 Lea v. Johnson, 9 Iredell Law, 15: 709.
 Leach v. Day, 27 Cal. 643: 516.
 Leader v. Moxon, 3 Wils. 461: 205.
 Leadville v. Bohn Min. Co., 37 Colo. 248: 196, 1497.
 v. Coronado Min. Co., 29 Colo. 17: 198, 1497.
 v. Coronado Min. Co., 37 Colo. 234: 1497.
 v. St. Louis S. & M. Co., 29 Colo. 40: 198, 1497.
 League Island, In re, 1 Brews. Pa. 524: 588.
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 Leavenworth v. Douglass, 59 Kan. 416: 363, 384, 390, 398.
 v. Duffy, 10 Kan. App. 124: 604.
 Leavenworth County Comrs. v. Es- pen, 12 Kan. 531: 1018.
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 v. Curtan, 51 Kan. 432: 179, 252 320, 351, 373, 382, 388, 398 1294, 1549, 1648, 1657, 1662.
 v. Herley, 45 Kan. 535: 1124, 1251 1252.
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 v. Paul, 28 Kan. 816: 1124, 1126, 1316.
 v. Usher, 42 Kan. 637: 1252, 1455.
 v. Wilkins, 45 Kan. 674: 1208, 1212, 1545.
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 v. Eastman, 77 Me. 117: 1018, 1033.
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 v. Minneapolis, 22 Minn. 13: 211.
 v. Northwestern Union Ry. Co., 33 Wis. 222: 1402.
 v. Pembroke Iron Co., 57 Me. 481: 67, 90, 95, 108.
 v. Springfield Water Co., 176 Pa. St. 223: 74, 1123.
 v. Tebo & Neosho R. R. Co., 53 Mo. 178: 1186.
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 v. Richmond, 102 Ind. 372: 335, 672, 680.
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 v. Denver, 36 Colo. 110: 633.
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 Leonard v. Cassidy, 8 Ohio C. C. 529: 226.
 v. Detroit, 108 Mich. 599: 865.
 v. Rutland, 66 Vt. 105: 1331.
 v. Sparks, 117 Mo. 103: 1018, 1027, 1086, 1515, 1516, 1518.
 v. Wading Riv. Res. Co., 113 Mass. 235: 1524.
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 Leroy etc. R. R. Co. v. Hawk, 49 Kan. 638: 1128.
 v. Ross, 40 Kan. 598: 1124, 1125, 1203, 1312.
 v. Small, 46 Kan. 300: 862, 1547.
 Lesher v. Wabash Navigation Co., 14 Ill. 85: 688.
 Lesley v. Klamath Co., 44 Ore. 491: 970.
 Leslie v. St. Louis, 47 Mo. 474: 893, 894.
 L'Esperance v. Great Western R. R. Co., 14 U. C. Q. B. 187: 158, 847.
 Less v. Butte, 28 Mont. 27: 630, 632, 1549.
 Lessieur v. Custer Co. 61 Neb. 612: 1135.
 Lester v. Lobley, 7 A. & E. 124: 961.
 v. Lobley, 34 E. C. L. R. 86: 961.
 Lester Real Estate Co. v. St. Louis, 169 Mo. 227: 1601.
 v. St. Louis, 170 Mo. 31: 1695.
 Letherman v. Hauser, 77 Neb. 731: 400, 406, 973, 1513, 1596.
 Levant v. Comrs 67 Me. 429: 1414.
 Levee Comrs. v. Allen, 60 Miss. 93: 1086.
 v. Dancy, 65 Miss. 335: 1157, 1426, 1713.
 v. Harkleroads, 62 Miss. 807: 1310.
 v. Hendricks, 77 Miss. 483: 1119, 1176, 1227.
 v. Lee, 85 Miss. 508: 1229, 1378.
 v. Nelms 82 Miss. 416: 1119, 1128, 1138, 1143.
 Levee District v. Farmer, 101 Cal. 178: 363, 377, 386, 388, 390.
 Levenson v. Boston El. Ry. Co. 191 Mass. 75: 1144, 1151.
 Leverett v. Middle Georgia etc. R. R. Co., 96 Ga. 385: 728.
 Levering v. Philadelphia etc. R. R. Co., 8 W. & S. 459: 1464, 1628.
 Levering St. In re, 14 Phila. 349: 612, 631, 636.
 Levisay v. Delp, 9 Baxt. 415: 1608.
 Levi v. Worcester Consol. St. Ry. Co., 193 Mass. 116: 428.
 Levin v. Goodwin, 191 Mass. 341: 457.
 v. New York El. R. R. Co., 165 N. Y. 572: 1137.
 Lewis v. Newton, 75 Fed. 884: 337.
 Leviston v. Junction R. R. Co., 7 Ind., 597: 1522.
 Levitt v. Eastman, 77 Me. 117: 1517.
 Lewis v. Baker, 39 Neb. 636: 1492.
 v. Darby, 166 Pa. St. 613: 630, 636, 1353.
 v. Englewood El. R. R. Co., 223 Ill. 223: 1130, 1149.
 v. Germantown etc. R. R. Co., 16 Phila., 608: 688, 778.
 v. Germantown etc. R. R. Co., 16 Phila. 621: 754, 759, 788, 793, 796.
 v. Homestead, 194 Pa. St. 199: 612, 634.
 v. Johnson, 76 Fed. 476: 129.
 v. Jones, 1 Pa. St. 336: 1486.
 v. McGuire, 3 Bush (Ky.) 202: 19.
 v. New Britain, 32 Conn. 568: 1341.
 v. New York etc. R. R. Co., 162 N. Y. 202: 257, 866.
 v. Portland, 25 Ore. 133: 118, 137.
 v. Rough, 26 Ind. 398: 1574.
 v. Seattle, 5 Wash. 741: 1160, 1161, 1188, 1203, 1207, 1216, 1546.
 v. St. Paul etc. R. R. Co., 5 S. D. 148: 707, 1517.
 v. Springfield Water Co., 176 Pa. St. 230: 1129.
 v. Washington, 5 Gratt. 265: 513, 520.
 v. Wilmington etc. R. R. Co., 11 Mich. Law 91: 937.
 Lewis County v. Gordon, 20 Wash. 80: 501, 570, 581.
 v. McGeorge, 47 Wash. 414: 735, 1348.
 v. Schobey, 31 Wash. 357: 895.
 Lewis Street, Matter of, 2 Wend. 472: 183, 1326.
 Lewiston v. Co. Comrs., 30 Me. 19: 917, 1363.
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- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Lexington Ave., Matter of, 29 Hun 303: 738.
 Lexington Ave. Opening, Matter of, 50 How. Pr. 113: 1393.
 Lexington etc. R. R. Co. v. Applegate, 8 Dana, 289: 178, 369, 388, 524.
 v. Fitchburg R. R. Co., 14 Gray 266: 476.
 Lexington etc. Turnpike Co. v. McMurtry, 3 B. Mon. 516: 423, 957.
 Lexington Print Works v. Canton, 167 Mass. 341: 912, 1571.
 v. Canton, 171 Mass. 414: 1617.
 Lex or Mica St.. In re, 12 Phila. 622: 1682.
 Leyba v. Armijo, 11 N. M. 437: 707, 1004, 1420.
 L'Hote v. New Orleans, 51 La. Ann. 93: 473.
 v. New Orleans, 177 U. S. 587: 473.
 Liber v. Minneapolis & North Western Ry. Co., 29 Minn. 256: 1353.
 Liberty Alley, In re, 8 Pa. St. 381: 721.
 Libmann v. Manhattan R. R. Co., 59 Hun 428: 923.
 Lickly v. Bishopp, 150 Mich. 256: 1083.
 Lidgewood v. Mickalek, 12 N. D. 348: 977, 1673.
 Lieber v. People, 33 Colo. 493: 868.
 Lieberman v. Chicago etc. R. R. Co., 141 Ill. 140: 268, 718, 898, 1042, 1075, 1222, 1246, 1247, 1426.
 Liebole v. Traster, 41 Ind. App. 278: 1571.
 Liedel v. Northern Pac. Ry. Co., 89 Minn. 284: 533, 1457, 1473.
 Lien v. Norman County, 80 Minn. 58: 501, 565, 567, 576, 739.
 Ligare v. Chicago, 139 Ill. 46: 132, 135, 788.
 v. Chicago etc. R. R. Co., 166 Ill. 249: 748, 920, 1228, 1236.
 Ligat v. Commonwealth, 19 Pa. St. 456: 729, 923.
 Lightcap v. North Judson, 154 Ind. 43: 886.
 Lile v. Gibson, 91 Mo. App. 480: 577.
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 Lilley v. Pa. R. R. Co., 219 Pa. St. 447: 1129.
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 Limerick etc. Turnpike Co.'s Appeal, 80 Pa. St. 425: 233.
 Limerick. Inhabitants of, 18 Me. 183: 1408.
 Limerick Tp. Road, 16 Pa. Co. Ct. 567: 1087.
 Lime Rock R. R. Co. v. Farnsworth, 86 Me. 127: 982, 1482.
 Linblom v. Ramsey, 75 Ill. 246: 1461.
 Lincoln v. Colusa Co., 28 Cal. 662: 706, 893, 894, 1707, 1710.
 v. Commonwealth, 164 Mass. 1: 335.
 v. Commonwealth, 164 Mass. 368, 447, 453, 1130, 1208, 1244, 1334.
 v. Grant, 38 Neb. 369: 1523, 1526.
 Lincoln County v. Brock, 37 Wash. 14: 1188, 1204.
 Lincoln etc. R. R. Co. v. Sutherland, 44 Neb. 526: 149, 158.
 Lincoln St. R. R. Co. v. Adams, 41 Neb. 737: 149, 155.
 Lind v. Clemens, 44 Mo. 540: 893, 894.
 v. San Luis Obispo, 109 Cal. 340: 84, 453, 1604.
 Lindell v. Hannibal etc. R. R. Co., 25 Mo. 550: 722.
 Lindell's Admr. v. Hannibal & St. Joseph R. R. Co., 36 Mo. 543: 1523.
 Linden Land Co. v. Milwaukee Elec. Ry. & Lt. Co., 107 Wis. 493: 273, 292.
 Linderwood v. Michalek, 12 N. D. 348: 977.
 Lindner v. Yazoo etc. R. R. Co., 116 La. 262: 1546.
 Lindsay v. Commissioners etc., 2 Bay (S. C.) 38: 22.
 v. Hubbard, 44 Conn. 109: 458.
 v. Lindley, 20 Ark. 573: 413.
 v. Omaha, 30 Neb. 512: 364, 375, 406.
 v. Southern Ry. Co., 149 Ala. 349: 90.
 Lindsay Irrigation Co. v. Mehrdens, 97 Cal. 676: 587.
 Line v. Phila. etc. R. R. Co., 218 Pa. St. 604: 1245.
 Lingo v. Burford, 112 Mo. 149: 1033, 1186, 1518.
 Linhart v. Buiff, 11 Cal. 280: 996.
 Link v. Brooks, Phillips Law 499: 1516.
 Linning v. Barnett, 134 Ind. 332: 400.
 Lins v. Seefield, 126 Wis. 610: 878.

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 v. New York, 79 Hun 479: 456.
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 v. Pond, 186 N. Y. 66: 434, 738, 1154, 1634, 1635.
 v. Vernon 41 N. Y. 123: 14.
 v. Wilman, 2 Root, Conn. 288: 1492.
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 v. Chicago etc. R. R. Co., 65 Minn. 48: 934.
 v. May, 3 Hawks N. C. 599: 1029.
 v. Stanbank, 63 N. C. 285: 95, 1345.
 v. Thompson, 24 Ind. 146: 975, 1017.
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 v. Cox, 15 La. Ann. 67: 516.
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 v. Comrs., 31 Ohio St. 338: 780, 1643.
 v. Perrin, 16 Ohio 479: 1406.
 v. Naylor, 2 Ohio St. 235: 308, 729.
 v. Whitacre, 8 Ohio St. 590: 1523.
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 v. Allister, 68 Ark. 600: 1206, 1217, 1561.
 v. Birnie, 59 Ark. 66: 843.
 v. Chapman, 39 Ark. 463: 1648, 1655.
 v. Greer, 77 Ark. 387: 639, 1716.
 v. McGehee, 41 Ark. 202: 1236, 1545.
 v. Newman, 73 Ark. 1: 320, 383, 392.
 v. Payne, 33 Ark. 816: 475.
 v. Wallis, 82 Ark. 447: 151.
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- Littleton v. Berlin Mills Co., 73 N. H. 11: 710, 738, 1154, 1158, 1164, 1634.
- Litz v. West Hammond, 230 Ill. 310: 828, 829.
- Litzell v. Philadelphia, 211 Pa. St. 1: 882.
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 v. Norfolk County, 186 Mass. 133: 964.
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 v. Ellis Co., 30 Tex. Civ. App. 19: 485.
 v. McDonald, 21 Ia. 160: 145, 146.
 v. New York, 8 Wend. 85: 23, 183, 923, 1175, 1196.
 v. Padueah, 80 Ky. 656: 463.
 v. Sulzer, 19 Hun 375: 1257.
 v. Van Ingen, 9 Johns. 507: 410.
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 v. Philadelphia, 17 Phila. 202: 631, 636, 1550.
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- Londonderry Tp. Road, 6 Pa. Co. Ct. 391: 1105.
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- v. Smith, 1 McN. & G. 216: 1612.
- v. Trustees of Gower Walk School, L. R. 24 Q. B. D. 40: 657.
- v. Truman, L. R. 11 H. L. 45: 450, 451, 714, 1068.
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- Long's Appeal, 87 Pa. St. 114: 690.
- Long v. Billings, 7 Wash. 267, 520, 521, 673.
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- v. Comrs' Court, 18 Ala. 482: 1094, 1421.
- v. Duluth, 49 Minn. 280: 409, 411, 413.
- v. Elberton, 109 Ga. 28: 657, 669.
- v. Emporia, 59 Kan. 46: 84, 825, 1035.
- v. Fuller, 68 Pa. St. 170: 538, 1167.
- v. Harrisburg & P. R. R. Co., 126 Pa. St. 143: 1187, 1206, 1215.
- v. Louisville & N. R. R. Co., 89 Ky. 544: 862.
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v. Reilly, 89 App. Div. 166: 1379.
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- Long Point Road, 5 Harr. Del. 152: 1402.
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v. Meriden & W. R. R. Co., 61 Conn. 451: 319, 1356, 1451, 1452.
v. Sedevic, 165 Mo. 221: 366, 383, 404, 882, 1596.
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428: 73, 1603.
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- Loomis v. Andrews, 49 Cal. 239: 1461.
- Loop v. Chamberlain, 17 Wis. 504: 1636.
v. Chamberlain, 20 Wis. 135: 1635, 1636.
- Lorain v. Rolling, 3 Ohio C. C. (N. S.) 660: 455.
- Lorain St. R. R. Co. v. Sinning, 17 Ohio C. C. 649: 1202.
- Lord v. Atkins, 138 N. Y. 184: 366, 878.
- Lonsdale Co. v. Woonsocket, 25 R. I. v. Meadville Water Co., 135 Pa. St. 122: 72, 73, 74.
- Lorden v. Coffey, 178 Mass. 489: 463.
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- Lorenz v. Jacob, 63 Cal. 73: 494.
- Lorie v. North Chicago City R. R. Co., 32 Fed. 270: 269.
- Loring v. Boston, 12 Gray 209: 1683, 1711.
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- Los Angeles v. Dehail, 97 Cal. 13: 913.
v. Kysor, 125 Cal. 463: 888.
v. Leaves, 119 Cal. 164: 698.
v. Pomeroy, 124 Cal. 597: 164, 743, 815, 817, 979, 1107, 1176, 1222, 1229, 1233.
v. Pomeroy, 132 Cal. 340: 1410.
- Los Angeles Cem. Assn. v. Los Angeles, 95 Cal. 420: 842.
v. Los Angeles, 103 Cal. 461: 153, 235.
v. Los Angeles, 32 Pac. 240: 881, 889.
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v. San Jose Land & W. Co., 96 Cal. 93: 920, 1041.
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- Losch's Appeal, 109 Pa. St. 72: 966, 1403.
- Loshbaugh v. Birdsell, 90 Ind. 466: 1132.
- Lostutter v. Aurora, 126 Ind. 436: 172, 175, 355.
- Lotzee v. Cincinnati, 61 Ohio St. 272: 220.
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v. Moseley, 117 La. 313: 1045, 1075.
v. Vicksburg etc. Ry. Co., 112 La. 915: 760.
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v. Kohn, 116 La. 159: 1365, 1378, 1386.
v. Morere, 116 La. 997: 1082, 1128, 1145, 1149, 1150.
v. Sarpy, 117 La. 156: 1128, 1130.
v. Xavier Realty Co., 115 La. 328: 1061, 1063, 1065, 1066, 1212, 1222, 1329.
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v. La. Cent. L. & I. Co., 119 La. 927: 1377.
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v. Bitzer, 115 Ky. 359: 10, 463.

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 v. Hegan, 20 Ky. L. R. 1532: 630.
 v. Kaye, 122 Ky. 599: 1306.
 v. Norris, 111 Ky. 903: 141, 142, 1660, 1716.
 v. Louisville Rolling Mill Co., 3 Bush 416: 221, 1597.
 v. Snow, 107 Ky. 536: 877, 886, 890.
- Louisville Bagging Mfg. Co. v. Central Pass. R. R. Co., 95 Ky. 50: 272, 329.
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 v. Asher, 15 S. W. 517: 1183, 1201, 1251.
 v. Barrett, 91 Ky. 487: 1202.
 v. Beck, 119 Ind. 124: 1545, 1547, 1631.
 v. Berkey, 136 Ind. 591: 1631.
 v. Brinton, 109 Ky. 180: 154, 831, 846, 1455.
 v. Brown, 17 B. Mon. 763: 245, 252.
 v. Bowling Green Ry. Co., 110 Ky. 788: 303, 328, 1611.
 v. Chapell, Rice (18 S. C.) 383: 524.
 v. Chicago etc. R. R. Co., 97 Ill. 506: 764.
 v. Cincinnati etc. Ry. Co., 3 Ohio N. P. (N. S.) 109: 314.
 v. Cincinnati, 76 Ohio St. 481: 422, 1495.
 v. Commonwealth, 104 Ky. 35: 865.
 v. Cornelius, 111 Ky. 752: 154, 1650, 1655, 1716.
 v. Covington, 2 Bush 526: 841.
 v. Cumnock, 25 Ky. L. R. 1330: 328, 635.
 v. Day, 67 Miss. 227: 939.
 v. Dickson, 63 Miss. 380: 1347, 1353.
 v. Dryden, 39 Ind. 393: 923.
 v. Faulkner, 2 Head 65: 1667.
 v. Finlay, 86 Ky. 294: 319, 382, 389, 454.
 v. Finlay, 7 Ky. L. R. 129: 253, 1297.
 v. Geibel, 9 Ky. L. R. 813: 448.
 v. Glazebrook, 1 Bush 325: 1182, 1316.
 v. Hennin, 14 Ky. L. R. 526: 368, 375, 388, 404.
 v. Hodge, 6 Bush 141: 319.
- Louisville etc. R. R. Co. v. Hopson, 73 Miss. 773: 1226.
 v. Ingram, 12 Ky. L. R. 456: 1176, 1183.
 v. Ingram, 14 S. W. 534: 1182, 1183, 1201, 1378.
 v. Interstate R. R. Co., 107 Va. 225: 772.
 v. Interstate R. R. Co., 108 Va. 502: 722, 762, 1155, 1569.
 v. Leibfreid, 92 Ky. 407: 297, 1486, 1629, 1632.
 v. Louisville City Ry. Co., 2 Duval 175: 415.
 v. McAfee, 30 Ind. 291: 160.
 v. McVean (Ky.) 34 S. W. 525: 1081.
 v. Mississippi, 133 U. S. 587: 488.
 v. Mississippi T. R. R. Co., 92 Tenn. 681: 764.
 v. Mobile etc. R. R. Co., 124 Ala. 162: 297, 298, 1589.
 v. Mossman, 90 Tenn. 157: 866.
 v. Neafus, 93 Ky. 53: 850, 852, 853.
 v. N. O. Terminal Co., 120 La. 978: 329.
 v. Orr, 91 Ky. 109: 252, 310, 448, 1303, 1545, 1549.
 v. Orr, 10 Ky. L. R. 677: 1545.
 v. O. V. B. & T. Co., 105 Ky. 600: 863.
 v. People's St. R. R. Co., 101 Ala. 331: 1425.
 v. Postal Tel. Cable Co., 68 Miss. 806: 896, 1086, 1426.
 v. Power, 119 Ind. 269: 852, 853.
 v. Quinn, 14 Lea 65: 1165, 1635.
 v. Rudd (Ky.) 30 S. W. 604: 1625.
 v. Ryan, 64 Miss. 399: 1145, 1232, 1392, 1672.
 v. Scamp, 124 Ky. 330: 1314, 1445, 1457, 1459, 1472, 1639, 1660.
 v. Scott, 132 Ill. 429: 663.
 v. Smith, 128 Fed. 1: 864, 1619.
 v. Smith, 125 Ky. 336: 1478, 1479.
 v. Smith, 31 Ky. L. R. 1: 1479.
 v. Sparks, 12 Ind. App. 410: 158, 1648, 1655.
 v. State, 3 Head 523: 1643.
 v. Stephens, 96 Ky. 461: 829, 873.
 v. Taylor, 96 Ky. 241: 833.
 v. Thompson, 18 B. Mon. 735: 1182.
 v. Whitley County Court, 95 Ky. 215: 306, 314, 322, 777, 793, 956, 1623.
 v. Whitsell, 125 Ky. 433: 76, 1654, 1661.
 v. Zachritz, 13 Ky. L. R. 141: 1657.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Lellyett, 114 Tenn. 368: 450, 655, 661, 1459, 1474, 1639, 1659.
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 Louisville Ry. Co. v. Foster, 108 Ky. 743: 272, 274.
 Louisville So. R. R. Co. v. Cogar, 15 Ky. L. R. 444: 253, 310, 639.
 v. Hooe, 18 Ky. L. R. 521: 253, 310, 448, 639.
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 Loveland v. Berlin, 27 Vt. 713: 516.
 Low, Matter of, 103 App. Div. 530: 1437.
 Low v. Galena etc. R. R. Co., 18 Ill. 324: 526, 1094.
 Lowe v. Aroma, 21 Ill. App. 598: 1516.
 v. Brannan, 105 Ind. 247: 1381.
 v. Conroy, 120 Wis. 151: 485.
 v. Lawrenceburg R. M. Co., 161 Ind. 495: 401.
 v. Omaha, 33 Neb. 587: 630, 1179, 1199, 1201, 1216, 1228, 1306, 1308.
 v. Ryan, 94 Ind. 450: 1407.
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 v. Shaw, 15 Me. 242: 1540, 1543.
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 Lowenthal v. New York, 5 Lans. 532: 143.
 Lower v. Chicago etc. R. R. Co., 59 Ia. 563: 685, 904, 1361.
 Loweree v. Newark, 38 N. J. L. 151: 1187, 1529.
 Lower Merian Road, 58 Pa. St. 66: 1364.
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 Lowery v. Pekin, 186 Ill. 387: 1568.
 Lowndes County v. Bowie, 34 Ala. 461: 1167.
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 Lowther v. Bridgeman, 57 W. Va. 306: 342, 361.
 Lucas v. Sawyer, 17 Ia. 517: 943.
 v. Wattles, 49 Mich. 380: 1323.
 Lucas & Chesterfield Gas & Water Board, In re, (1908) 1 K. B. 571: 1238.
 Ludlam v. Swain, 73 N. J. L. 162: 1381.
 Ludlow v. Detwiler, 20 Ky. L. R. 894: 231, 630, 664.
 v. Froste, 20 Ky. L. R. 216: 231.
 v. Hudson River R. R. Co., 6 Lans. 128: 441, 442, 443.
 v. Norfolk, 87 Va. 349: 1423.
 Ludlow Street, Matter of, 59 App. Div. 180: 690, 696, 918.
 Ludlow Street, Matter of, 172 N. Y. 542: 690, 696, 917.
 Lull v. Curry, 10 Mich. 397: 1461.
 v. Fox & Wisconsin Improvement Co., 19 Wis. 100: 963.
 Lullamire v. Kaufman Co., 3 Tex. Ct. of App. p. 392: 1018.
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 v. St. Paul, 82 Minn. 497: 929, 1564.
 v. St. Paul, 85 Minn. 234: 1361.
 Lummary v. Braddy, 8 Ia. 33: 899.
 Lumsden v. Milwaukee, 8 Wis. 485: 1091, 1571.
 Lund v. Idaho etc. R. R. Co., 50 Wash. 574: 181, 640, 1580, 1615.
 v. Midland Ry. Co., 34 L. J. Eq. 276: 1067.
 v. New Bedford, 121 Mass. 286: 74, 952, 1514.
 Lusby v. Kansas City etc. R. R. Co., 73 Miss. 360: 728.
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 Lutgen v. Stearns County Comrs., 99 Minn. 499: 1025.
 Luther v. Winnisimmet Co., 9 Cush. 171: 147.
 Lutterloh v. Cedar Keys, 15 Fla. 306: 346, 356, 1594.
 Lux v. Haggins, 69 Cal. 255: 70, 141, 587, 1603.
 Luxton v. North River Bridge Co., 147 U. S. 337: 932, 1423.
 v. North River Bridge Co., 153 U. S. 525: 96, 513, 522, 737.
 Lybe's Appeal, 106 Pa. St. 626: 161, 165.
 Lygett v. Stafford & Uttoxeter Ry. Co., 13 Eq. Cas. L. R. 261: 1537.
 v. Stafford v. Uttoxeter Ry. Co., 41 L. J. Eq. 474: 1537.
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- [The references are to the pages: Vol. I., pp. 1-742; Vol. II., pp. 743-1719.]
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Lyles v. Texas etc. R. R. Co., 73 Tex. 95: 640.
Lyman v. Boston, 164 Mass. 99: 1131, 1141.
 v. Burlington, 22 Vt. 131: 1091, 1093, 1097.
 v. Gedney, 114 Ill. 388: 1500.
 v. Suburban R. R. Co., 190 Ill. 320: 842, 843.
Lynch v. Forbes, 161 Mass. 302: 678, 1057, 1060, 1067.
 v. Metropolitan El. R. R. Co., 129 N. Y. 274: 923, 1554, 1555, 1584, 1617.
 v. New York, 76 N. Y. 60: 234.
 v. Rutland, 66 Vt. 570: 1009, 1018, 1513, 1626.
 v. Stone, 4 Denio. 356: 1523.
Lynn etc. R. R. Co. v. Boston etc. R. R. Co., 114 Mass. 88: 765.
Lyon v. Fishmongers Co. L. R. 1 App. Cases 662: 125, 128.
 v. Gormley, 53 Pa. St. 261: 1480.
 v. Green Bay & Minn. Ry. Co., 42 Wis. 538: 1094, 1225, 1226, 1348.
 v. Hammond etc. R. R. Co., 167 Ill. 527: 1149, 1247, 1426.
 v. Hamor, 73 Me. 56: 516, 721.
 v. Jerome, 15 Wend. 569: 687.
 v. Jerome, 26 Wend. 485: 687, 688.
 v. McDonald, 78 Tex. 71: 1475.
Lyon Co. Comrs. v. Kiser, 26 Kan. 279: 1115.
Lyons v. N. Y. El. R. R. Co., 26 App. Div. N. Y. 57: 1144.
 v. Philadelphia etc. Ry. Co., 209 Pa. St. 550: 953, 1258.
Lyons Cem. Assn., Matter of, 93 App. Div. 19: 542.
Lytle v. Breckenridge, 3 J. J. Marsh. 663: 407.
- M.
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Mabon v. Halsted, 39 N. J. L. 640: 1673, 1684.
MacArthur v. The King, 8 Can. Exch. 245: 372, 382, 647.
MacDonnell v. Caledonia Canal Comrs., 8 S. & D. 881: 97.
Macey v. Indianapolis, 17 Ind. 267: 238.
 v. Metropolitan Board of Works, 33 L. J. Ch. 377: 1612.
 v. Met. El. R. R. Co., 59 Hun 365: 1584, 1664.
 Macey v. Met. El. R. R. Co., 128 N. Y. 624: 1584, 1664.
Macfarland v. Saunders, 25 App. Cas. D. C. 438: 1394.
MaeGinnitie v. Silvers, 167 Ind. 321: 385.
Macintosh v. Nome, 1 Alaska, 492: 363.
Mack v. Commissioners of Highways, 41 Ill. 378: 713.
 v. Eastern R. R. Co., 10 Pa. Dist. Ct. 102: 948.
Macon v. Daley, 2 Ga. App. 355: 629, 1306, 1307.
 v. Dannenberg, 113 Ga. 1111: 158.
 v. Harris, 73 Ga. 42: 316.
 v. Harris, 75 Ga. 761: 300, 316, 1581.
 v. Hill, 58 Ga. 595: 210, 224, 237.
 v. Owen, 3 Ala. 116: 899, 1361.
 v. Patty, 57 Miss. 378: 14, 26.
 v. Wing, 113 Ga. 90: 179, 181.
Macon Consol. St. R. R. Co. v. Macon, 112 Ga. 782: 491.
Macon etc. R. R. Co. v. Bowen, 45 Ga. 531: 834, 860, 1354.
 v. Macon & D. R. R. Co., 86 Ga. 83: 712.
 v. Riggs, 87 Ga. 158: 787, 789, 831.
Macungie Tp. Road, 26 Pa. St. 221: 1093, 1419.
Macy v. Indianapolis, 17 Ind. 267: 210, 213.
Madden v. Louisville etc. R. R. Co., 66 Miss. 258: 965, 1086, 1520, 1629, 1633.
 v. Pa. R. R. Co., 21 Ohio C. C. 73: 190, 351, 366, 377, 384, 388, 404, 405, 1596.
Maddox v. Ware, 2 Bailey 314: 1006.
Madera Co. v. Raymond Granite Co., 138 Cal. 244: 1410.
 v. Raymond Granite Co., 139 Cal. 128: 515, 980, 1434.
Madera Irrigation Dist., In re, 92 Cal. 296: 587.
Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668: 497, 501, 527, 528, 533.
Madison v. Daley, 58 Fed. 751: 709, 912, 915.
 v. Gallagher, 159 Ill. 105: 869.
 v. Ross, 3 Ind. 236: 91, 94.
Madison Road, 37 Pa. St. 417: 402.
Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239: 931, 932.
Madson v. Spokane Val. L. & W. Co., 40 Wash. 414: 137, 1607, 1612, 1615.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. London etc. R. R. Co., 6 Grant U. C. 170: 177, 1609.
 v. Overshiner, 150 Ind. 127: 333, 341.
 v. Penn. S. V. R. R. Co., 13 Pa. Super. Ct. 187: 155.
 Magee Furnace Co. v. Commonwealth, 166 Mass. 480: 1455.
 Magnolia Ave., In re, 117 Pa. St. 56: 1098.
 Magnolia Ave., In re, 20 Phila. 387: 1371.
 Magnolia, Steam Boat, v. Marshall, 39 Miss. 109: 104.
 Magnolia St., 8 Phil. 468: 1105.
 Magnolia, The, 20 How. 296: 103.
 Maguire v. Centerville, 76 Ga. 84: 153.
 Mahady v. Brunswick R. R. Co., 91 N. Y. 148: 254, 269, 309, 316.
 Mahaffey v. Beech Creek R. R. Co., 163 Pa. St. 158: 1215, 1262, 1342.
 Mahler v. Brunder, 92 Wis. 477: 888.
 Mahon v. New York Central R. R. Co., 24 N. Y. 658: 423, 1635.
 v. Utica & Schenectady R. R. Co., Hill & Denio's Supplement, 156: 244, 248.
 Mahoney v. Beaver Meadow etc. R. R. Co., 13 Pa. Co. Ct. 344: 642, 1587.
 v. Spring Valley Water Works, 52 Cal. 159: 688.
 Mahoney Tp. v. Comry, 103 Pa. St. 362: 687, 824.
 Maine & Hamburgh St. Canal, Matter, 50 How. Pr. 70: 776.
 Main St., Altering etc., Matter of, 30 Hun 424: 696.
 Main St., Altering etc., Matter of, 98 N. Y. 454: 696.
 Mairs v. Gallahue, 9 Gratt. 94: 1358, 1360.
 Maise v. Kruse, 85 Wis. 302: 1505.
 Maitland v. Manhattan R. R. Co., 9 Miscel. 616: 327.
 Major v. Taylor, 1 A. K. Marsh. 552: 1359.
 Makepiece v. Worden, 1 N. H. 16: 1490.
 Mak-Saw-Ba Club v. Construction Comr., 169 Ind. 204: 1395.
 Malcolm v. New York El. R. R. Co., 147 N. Y. 308: 1296, 1299.
 Mallard v. LaFayette, 5 La. Ann. 112: 1688.
 Mallory v. Bradford, 1 Pa. Dist. Ct. 670: 337, 1594.
 v. Huntington, 64 Conn. 88: 1116.
 Mallott v. Johnston, 106 Ill. App. 545: 1639, 1653, 1663.
 Malone v. Toledo, 28 Ohio St. 643: 808, 1500.
 v. Toledo, 3⁴ Ohio St. 541: 807, 808, 1500, 1707, 1708.
 v. Waukesha Elec. Lt. Co., 120 Wis. 485: 345, 1594.
 v. Williams, 18 Tenn. 390: 470.
 Malott v. Mersea, 9 Ontario 611: 79, 1604.
 Malthers v. Shields, 2 Met. (Ky.) 553: 465.
 Maltman v. Chicago etc. R. R. Co., 41 Ill. App. 229: 327, 639, 643, 880, 171.
 Manchester Road, 15 Pa. Co. Ct. 623: 1333.
 Manda v. Orange, 75 N. J. L. 251: 707, 709, 976.
 Manderson, In re, 51 Fed. 501: 680, 1154.
 Mangam v. Sing Sing, 26 N. Y. App. Div. 464: 1504.
 Manhattan Co., Ex parte, 22 Wend. 653: 779.
 Manhattan R. R. Co. v. Astor, 126 App. Div. 907: 305, 679.
 v. Comstock, 74 App. Div. 341: 1379.
 v. Kent, 80 Hun 557: 1437.
 v. McKee, 1 App. Div. 488: 1444.
 v. New York, 89 Hun 429: 229, 750.
 v. O'Sullivan, 6 App. Div. 571: 1397.
 v. O'Sullivan, 8 App. Div. 320: 1465.
 v. O'Sullivan, 150 N. Y. 569: 1397.
 v. Stroub, 68 Hun 90: 1078.
 v. Stroub, 70 Hun 363: 1410.
 v. Stuyvesant, 126 App. Div. 848: 1139.
 v. Taber, 78 Hun 434: 1437, 1467.
 v. Tompkins, 59 App. Div. 572: 1393.
 Manheim Tp. Road, 12 Pa. Supr. 279: 401.
 Manigault v. Springs, 199 U. S. 473: 86, 1612, 1613, 1614.
 Manion v. Louisville etc. R. R. Co., 90 Ky. 491: 1673, 1674.
 Maniquinet v. Commissioners of Roads, 4 McCord (S. C.) 541: 22.
 Manistee etc. R. R. Co. v. Fowler, 73 Mich. 217: 980, 984, 1419.
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- [The references are to the pages: Vol. I., pp. 1-742; Vol. II., pp. 743-1719.]
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 Mann v. Bergman, 203 Ill. 406: 877, 879, 880.
 v. Marston, 12 Maine 32: 1372.
 v. Willey, 51 App. Div. 169: 1605.
 v. Willey, 168 N. Y. 664: 1605.
 Mannel v. Detroit etc. Ry. Co., 139 Mich. 106: 272.
 Manning v. Bruce, 186 Mass. 282: 455, 1519, 1613.
 v. Lowell, 130 Mass. 21: 233.
 v. Lowell, 173 Mass. 100: 1127, 1147, 1149, 1232, 1268.
 v. Port Reading R. R. Co., 54 N. J. Eq. 46: 1616.
 v. Shreveport, 119 La. 1044: 630, 632, 633, 1183, 1308.
 Mansfield's Appeal, 158 Pa. St. 314: 1402.
 Mansfield v. Balliet, 65 Ohio St. 451: 70, 82, 84.
 v. Hunt, 19 Ohio C. C. 488: 84, 1654.
 Mansfield etc. R. R. Co. v. Clark, 23 Mich. 519: 980, 1058, 1086.
 Manson v. Boston, 163 Mass. 479: 1339.
 v. South Bound R. R. Co., 64 S. C. 120: 420, 1618.
 Mantell v. Buevyn's Tel. Co., 20 Ohio C. C. 345: 339, 1593.
 Manteufel v. Wetzel, 133 Wis. 619: 146.
 Manton v. South Shore Traction Co., 121 App. Div. 410: 1587.
 Mantorville Ry. & Tr. Co. v. Slingerland, 101 Minn. 488: 1186, 1217, 1219.
 Manufacturer's Land & Imp. Co. v. Camden, 71 N. J. L. 490: 608.
 v. Camden, 73 N. J. L. 263: 608.
 Manufacturers' Nat. Gas. Co. v. Leslie, 22 Ind. App. 677: 1176, 1251, 1456.
 Manufacturing Co. v. Green, 39 La. Ann. 455: 12.
 Manville Co. v. Worcester, 138 Mass. 89: 702.
 Marble v. Whitney, 28 N. Y. 297: 860, 1100, 1101.
 Marblehead v. County Comrs. of Essex, 5 Gray 451: 787.
 Marcey v. Fries, 18 Kan. 353: 1185, 1345.
 March v. New York, 69 App. Div. 1: 276.
 v. Portsmouth & Concord R. R. Co., 19 N. H. 372: 1138, 1142, 1247, 1251, 1322.
 Merchant v. Maple Grove, 48 Minn. 271: 865, 867.
 v. Pennsylvania R. R. Co., 153 U. S. 380: 656, 1432.
 Marietta Chair Co. v. Henderson, 121 Ga. 399: 362, 363, 377, 398, 406.
 Marion Co. v. Harper, 44 Ill. 482: 1398.
 Marin Co. Water Co. v. Marin Co., 145 Cal. 586: 804, 805.
 Mariner v. Shulte, 13 Wis. 692: 104.
 Marino v. Central R. R. Co., 69 N. J. L. 628: 1484, 1646.
 Marion Co. Lumber Co. v. Tilghman L. Co., 75 S. C. 220: 901.
 Marion etc. R. R. Co. v. Ward, 9 Ind. 123: 1073.
 Mariposa Co. v. Knowles, 146 Cal. 1: 515.
 Mark v. State, 97 N. Y. 572: 1707, 1708.
 Market v. Manhattan R. R. Co., 87 Hun 213: 1299.
 Market St. Ry. Co. v. Central R. R. Co., 51 Cal. 583: 268, 765.
 Market St. Widening, Matter of, 11 Phila. 409: 1380.
 Markham v. Anamosa, 122 Iowa 689: 237.
 v. Atlanta, 23 Ga. 402: 210, 1597.
 v. Brown, 37 Ga. 277: 438, 472.
 Markowitz v. Kansas City, 125 Mo. 485: 1138, 1306, 1337, 1648, 1656, 1660.
 v. Pittsburgh etc. R. R. Co., 216 Pa. St. 535: 1120, 1129.
 Marks v. Bradshaw Mt. R. R. Co., 8 Ariz. 379: 1233.
 Markwardt v. Guthrie, 18 Okla. 32: 84.
 Marling v. Burlington etc. R. R. Co., 67 Iowa 331: 1519.
 Marlor v. Philadelphia etc. R. R. Co., 166 Pa. St. 524: 697.
 Marquette etc. R. R. Co. v. Harlow, 37 Mich. 554: 861.
 v. Longyear, 133 Mich. 94: 966, 997, 1071, 1378.
 v. Probate Judge, 53 Mich. 217: 1385, 1389.
 Marsden v. Cambridge, 114 Mass. 490: 1263.
 Marsh, Matter of, 10 Hun 49: 976.
 Marsh, Matter of, 71 N. Y. 315: 893, 894, 898, 1044.
 Marsh v. Fairbury, 163 Ill. 401: 874, 877, 887.
 v. Lehigh etc. R. R. Co., 215 Pa. St. 141: 1485, 1645.
 v. Milwaukee Lt. H. & T. Co., 134 Wis. 384: 284.
 v. Oregon City, 105 Mo. 226: 1008.
 v. Portsmouth & Concord R. R. Co., 19 N. H. 372: 1311.

- [The references are to the pages: Vol. I. pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Chicago, 77 Ill. App. 351: 1271.
 Marshall Fishing Co. v. Hadley Falls Co., 5 Cush. 602: 1439, 1442.
 Marshalltown v. Forney, 61 Iowa 578: 199, 395, 398, 1502.
 Marsh et al., Petitioners, 2 Aiken 239: 1393.
 Marson v. London, Chatham & Dover Ry. Co., 37 L. J. Ch. 483: 822.
 v. London, Chatham & Dover Ry. Co., L. R. 6 Eq. Cas. 101: 822.
 Martin, Ex parte, 13 Ark. 198: 22, 23, 90, 1155.
 Martin v. Benoist, 20 Mo. App. 262: 147.
 v. Beverley, 5 Call 444: 976.
 v. Brooklyn, 1 Hill 545: 1670, 1678, 1696.
 v. Burns, 155 N. Y. 23: 498, 501, 544.
 v. Chicago etc. R. R. Co., 220 Ill. 97: 994, 1115.
 v. Chieago etc. R. R. Co., 47 Mo. App. 452: 180, 224, 1549, 1552, 1649, 1656, 1660.
 v. District of Columbia, 205 U. S. 135: 10, 464.
 v. Dix, 52 Miss. 53: 23, 466.
 v. Fillmore County, 44 Neb. 719: 1176, 1179, 1205.
 v. Franklin Co., 62 Maine 455: 978.
 v. Gainesville etc. R. R. Co., 78 Ga. 307: 141.
 v. Gleason, 139 Mass. 183: 823.
 v. London etc. Ry. Co., 1 L. R. Eq. Cas. 145: 948.
 v. Louisville, 97 Ky. 30: 382, 400, 1522.
 v. Marks, 154 Ind. 549: 372, 1596.
 v. New York etc. R. R. Co., 62 N. Y. 331: 475.
 v. Riddle, 26 Pa. St. 415: 145, 146.
 v. Rushton, 42 Ala. 289: 708, 1358, 1516.
 v. St. Louis, 139 Mo. 246: 1324.
 v. Stillwell, 50 N. J. L. 530: 1370.
 v. Tyler, 4 N. D. 270: 580, 923, 1154, 1159, 1160.
 v. Waddell, 16 Pet. 367: 115.
 Martini v. Gzonski, 13 U. C. Q. B. 298: 1455.
 Martinsville etc. R. R. Co. v. Bridges, 6 Ind. 400: 978.
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 Marylebone Imp. Act, In re, L. R. 12 Eq. Cas. 389: 953.
 Marylebone Improvement Act, In re, 40 L. J. Eq. 697: 953.
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 Marysville Water Co. v. West Fairview etc. St. Ry. Co., 13 Pa. Dist. Ct. 365: 739.
 Mason v. Brooklyn City etc. R. R. Co., 35 Barb. 373: 268, 726, 728.
 v. Chicago, 163 Ill. 351: 874, 880.
 v. Harper's Ferry Bridge Co., 17 W. Va. 396: 411, 414, 651, 1570.
 v. Iowa Cent. Ry. Co., 131 Iowa 468: 1047, 1069.
 v. Kennebec & Portland R. R. Co., 31 Maine 215: 1311, 1522.
 v. Lake Erie etc. Ry. Co., 9 Biss. 239: 809, 1500.
 v. Mattoon, 95 Ill. App. 525: 83, 1604.
 v. Ohio River R. R. Co., 51 W. Va. 183: 313, 1622.
 v. Postal Tel. Cable Co., 71 S. C. 150: 832.
 v. Postal Tel. Cable Co., 74 S. C. 557: 832, 1123.
 v. Stokes Bay Pier & Ry. Co., 32 L. J. Ch. 110: 1533.
 Mason City etc. R. R. Co. v. Boynton, 158 Fed. 599: 1392, 1674.
 v. Boynton, 204 U. S. 570: 931, 932.
 v. Wolf, 148 Fed. 961: 382, 391, 647, 654, 664, 1337.
 Mason City Salt & Mining Co. v. Mason, 23 W. Va. 211: 1570.
 Massachusetts Central R. R. Co. v. Boston, Clinton & Fitchburg R. R. Co., 121 Mass. 124: 1278.
 Masters v. McHolland, 12 Kan. 17: 513, 1034, 1555.
 Masters etc. Ry. Co., In re, (1901) 2 K. B. 84: 958, 1260.
 Masters etc. Ry. Co., In re, (1900) 2 Q. B. 677: 958, 1260.
 Matheny v. Aiken, 68 S. C. 163: 84, 1523.
 Mathews v. Droud, 114 Ind. 268: 1028, 1407.
 v. St. Paul etc. R. R. Co., 18 Minn. 434: 857, 1164, 1634.
 Mathewson v. Supervisors, 8 Pa. Co. Ct. 204: 1011.
 Mathias v. Drainage Comrs., 49 Mich. 465: 984.
 Matson v. Port Townsend etc. R. R. Co., 9 Wash. 449: 840.
 Matteson v. New York Cent. etc. R. R. Co., 218 Pa. St. 527: 87.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Duryee, 4 Keys 525: 946.
 v. Stillwater G. & E. L. Co., 63 Minn. 493: 452, 454.
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 v. Plymouth, 100 Ind. 545: 602, 616.
- Mattison v. Alton etc. Traction Co., 235 Ill. 346: 303.
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 v. New York El. Ry. Co., 67 How. Pr. 232: 305, 308, 314, 712, 1590.
 v. New York El. R. R. Co., 1 Miscl. 339: 1296, 1302.
 v. New York El. R. R. Co., 14 Miscl. 291: 1614.
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- Mauldin v. Greenville, 53 S. C. 285: 613.
 v. Greenville, 64 S. C. 444: 613, 618, 619, 1306, 1307, 1308, 1391.
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 v. Central D. & P. Tel. Co., 51 W. Va. 121: 342, 343, 643, 1594.
 v. La Brune, 68 Iowa 689: 1404.
- May v. Boston, 158 Mass. 21: 840, 1141, 1330.
 v. Carbondale Traction Co., 167 Pa. St. 343: 642, 1294.
 v. Kornhaus, 9 W. & S. 121: 1547.
- Mayer v. New York, 127 App. Div. 926: 611.
 v. New York, 193 N. Y. 535: 611, 1524.
- Maynard v. Northampton, 157 Mass. 218: 1231.
- Mayo v. Springfield, 136 Mass. 10: 231.
 v. Springfield, 138 Mass. 70: 231.
 v. Turner, 1 Mumford 405: 1374.
- Mayor, Matter of, 20 Misc. 520: 1084, 1085.
- Mayor v. Brown, 9 Heisk. 1: 197.
 v. Hopkins, 13 La. Ann. 326: 1496.
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- Maysville etc. R. R. Co. v. Ball, 108 Ky. 241: 1357.
 v. Conner (Ky.) 29 S. W. 344: 310.
- Maysville etc. R. R. Co. v. Ingram (Ky.) 30 S. W. 8: 253, 310, 448, 1303, 1549, 1552, 1648, 1657.
 v. Pelham (Ky.) 20 S. W. 384: 1520.
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- McAllister v. Pickup, 84 Iowa 65: 869.
 v. Reed, 53 Mo. App. 81: 1258, 1556.
- McAntire v. Joplin Tel. Co., 75 Mo. App. 535: 349.
- McArthur v. Kelly, 5 Ohio 139: 523.
 v. McEachin, 64 N. C. 454: 1640.
 v. Morgan, 49 Conn. 347: 899, 1387.
- McAuley v. C. C. & I. C. Ry. Co., 83 Ill. 348: 1047.
 v. Western Vermont R. R. Co., 33 Vt. 311: 860, 1631, 1632.
- McBride v. Akron, 11 Ohio C. C. 610: 84.
 v. Chicago, 22 Ill. 576: 12.
 v. State, 130 Ind. 525: 955, 1510.
- McCaffrey v. Smith, 41 Hun 117: 357.
- McCall v. Marion County, 43 Ore. 536: 1392, 1407, 1439.
- McCallister v. Shney, 24 Iowa 362: 976, 1032, 1033.
- McCandless v. Richmond etc. R. R. Co., 38 S. C. 103: 15.
- McCandless' Appeal, 70 Pa. St. 210: 495, 520, 529.
- McCandless v. Richmond & D. R. R. Co., 38 S. C. 103: 475.
- McCandless Road, 110 Pa. St. 605: 1419.
- McCann v. Johnson Co. Tel. Co., 69 Kan. 210: 341.
 v. Mt. Gilead Cemetery, 166 Ind. 573: 784, 822.
 v. Oregon R. R. Co., 13 Ore. 455: 118.
 v. Otoe Co., 9 Neb. 324: 828, 1116.
 v. Sierra Co., 7 Cal. 121: 1162, 1570.
- McCarter v. Hudson Co. Water Co., 70 N. J. Eq. 525: 170.
 v. Hudson Co. Water Co., 70 N. J. Eq. 595: 169.
- McCarthy v. Far Rockaway, 3 App. Div. 379: 149, 155, 211, 233.
 v. Met. Board of Works, L. R. 7 C. P. 508: 372. 644.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Met. Board of Works, L. R. 7 Eng. & I. App. 243: 372, 644, 662, 671.
 v. Murphy, 119 Wis. 159: 128, 129.
 v. St. Paul, 22 Minn. 527: 606, 615, 617, 618, 1307, 1718.
 v. Southern Pac. Co., 144 Cal. 677: 1496.
 v. Southern Pac. Co., 148 Cal. 211: 679, 969, 1496.
 v. Syracuse, 46 N. Y. 194: 1488.
 v. Whalen, 19 Hun 503: 970.
- McCartney v. Chicago etc. R. R. Co., 112 Ill. 611: 726.
- McCarty v. C. B. & Q. R. R. Co., 34 Ill. App. 273: 327, 643, 1378.
 v. Chicago etc. R. R. Co., 34 Ill. App. 273: 639.
 v. Clark County, 101 Mo. 179: 1626.
 v. St. Paul, 22 Minn. 527: 1550.
 v. St. Paul etc. Ry. Co., 31 Minn. 278: 846.
- McCash v. Burlington, 72 Iowa 26: 603, 1306.
- McCauley v. Brooks, 16 Cal. 11: 458, 952.
 v. Dunlap, 4 B. Mon. 57: 516, 519.
 v. Waller, 12 Cal. 500: 458, 1162.
- McChesney v. Chicago, 161 Ill. 110: 1701.
- McClain v. Chicago etc. R. R. Co., 90 Iowa 646: 1504.
 v. People, 9 Colo. 190: 1466.
- McClane v. McClane, 207 Pa. St. 465: 831, 1569.
- McClarren v. Jefferson School, 169 Ind. 140: 695, 1347.
- McClary v. Hartwell, 25 Mich. 139: 1058, 1367.
- McCloskey v. McDaniel, 37 Ind. App. 59: 884, 886, 890.
- McClaysburg Road, 4 S. & R. 200: 1081.
- McClean v. Chicago etc. Ry. Co., 67 Iowa 568: 1120, 1293.
- McClellan v. Fisher, 16 Gray 185: 939.
- McClelland v. Miller, 28 Ohio St. 488: 1516, 1521.
- McClenaghan v. Curwin, 6 Binn. 509: 1156, 1157.
 v. Curwin, 3 Yeats 362: 1156, 1157.
- McClennahan v. Omaha R. R. Co., 25 Neb. 523: 93, 153.
- McClinton v. Pittsburgh etc. R. R. Co., 66 Pa. St. 404: 1160, 1546, 1625, 1629, 1713.
 v. Pittsburgh, Fort Wayne & Chicago R. R. Co., 68 Pa. St. 408: 1626.
- McClinton v. Railroad Co., 16 P. F. Smith 409: 1349.
- McCloskey v. Pacific Coast Co., 160 Fed. 794: 129, 131.
 v. Atlantic City R. R. Co., 70 N. J. L. 20: 159, 326.
- McClure's Appeal, 137 Pa. St. 590: 1081.
- McClure v. Ala. Midland Ry. Co., 130 Ala. 436: 1159, 1161, 1620.
 v. Groton, 50 N. H. 49: 1025.
 v. Red Wing, 28 Minn. 186: 234.
- McColgan v. Baltimore Belt R. R. Co., 85 Md. 519: 1566.
- McComb v. Akron, 15 Ohio 474: 214, 215.
 v. Bell, 2 Minn. 295: 13.
- McCombs v. Pittsburgh, 194 Pa. St. 348: 1201.
 v. Stewart, 40 Ohio St. 647: 808, 1499.
- McConnell v. Am. Bronze Powder Mfg. Co., 41 N. J. Eq. 447: 1505.
 v. Lexington, 12 Wheat. 582: 872.
- McConnell's Mill Road, 32 Pa. St. 285: 1364.
- McCook Irr. & W. P. Co. v. Crews, 70 Neb. 109: 70, 71, 76.
- McCord v. Doniphan Branch Ry. Co., 21 Mo. App. 92: 860.
 v. High, 24 Iowa 336: 75.
 v. Sylvester, 32 Wis. 451: 550, 1343.
- McCord's Road Case, 13 S. & R. 83: 1363.
- McCormack v. Brooklyn, 108 N. Y. 49: 687, 1526, 1530.
- McCormick, Appeal of, 165 Pa. St. 386: 237.
 v. Kansas City etc. R. R. Co., 57 Mo. 433: 1446, 1451, 1455.
 v. Kansas City, St. Joe & C. B. R. R. Co., 70 Mo. 359: 155.
 v. LaFayette, 1 Ind. 48: 1163, 1165, 1170.
 v. Terre Haute & Richmond R. R. Co., 9 Ind. 283: 1522.
 v. West Chicago Park Comrs., 118 Ill. 655: 1392.
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 v. Graudy, 3 Ohio St. 463: 459.
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 v. Port Royal R. R. Co., 3 S. C. 381: 690, 697.

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 v. Campbellsport, 123 Wis. 334: 212, 229, 231, 439.
 v. St. Paul etc. R. R. Co., 52 Minn. 12: 441, 1453.
 v. State, 41 S. C. 220: 478.
 v. Virginia, 172 U. S. 102: 594.
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 v. Warren etc. R. R. Co., 172 Mass. 197: 621, 1529.
- McDevitt v. People's Nat'l Gas Co., 160 Pa. St. 367: 172, 175, 337, 367, 644, 1524.
- McDonald v. Payne, 114 Ind. 359: 980, 982, 1576.
 v. Red Wing, 13 Minn. 38: 17.
 v. Southern Cal. R. R. Co., 101 Cal. 206: 848.
 v. Stark, 176 Ill. 456: 877, 890.
 v. Western N. C. Insane Asylum, 101 N. C. 656: 1406.
- v. Wilson, 59 Ind. 54: 980, 983.
- McDough v. Clark, 7 B. Mon. 448: 899, 1311.
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 v. Blue Ridge etc. Ry. Co., 144 N. C. 721: 853.
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 v. Kansas City etc. Air Line, 172 Mo. 576: 1186.
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 v. Missouri etc. Ry. Co., 41 Tex. Civ. App. 350: 153.
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 v. Orange etc. R. R. Co., 13 N. J. Eq. 17: 712.
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 v. People, 97 Ill. App. 587: 302.
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 v. Mathis, 21 Ark. 40: 586.
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 v. Kansas City, 69 Kan. 606: 357.
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 v. Wilkes-Barre, 36 Pa. Supr. Ct. 418: 1492.
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[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. El Paso Co., 15 Colo. App. 78: 420, 1494, 1618.
 v. Lukes, 77 Tex. 259: 1018, 1029, 1513.
 v. Marine, 93 Ind. 193: 1010, 1012.
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 v. Grand Rapids, 137 Mich. 200: 1615.
 v. Hull, 69 Wis. 657: 860.
 v. St. Louis, 17 Mo. 184: 963.
 v. St. Louis etc. R. R. Co., 49 Mo. App. 174: 91, 1650, 1653.
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 v. Porter, 134 Ind. 483: 996.
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 v. Brooklyn Union El. R. R. Co., 184 N. Y. 391: 182, 1562.
 v. St. Louis etc. Ry. Co., 69 Ark. 104: 1628.
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 v. Haines, 123 Wis. 557: 887.
 v. Miss. & Rum River Boom Co., 29 Minn. 288: 67, 90, 94.
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- McLachlan v. Gray, 105 Ia. 259: 363, 384, 388, 395, 406.
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 v. Municipality No. 2, 5 La. Ann. 504: 1688.
 v. Sandusky, 17 Neb. 110: 722, 1574.
 v. State, 8 Ind. 281: 1522.
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 v. Great Western R. R. Co., 33 U. C. Q. B. 198: 1631.
 v. Llewellyn Iron Works, 2 Cal. App. 346: 182, 366.
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 v. Crofton, 6 Greenl. (Me.) 307: 996.
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 v. So. Deerfield Water Supply Dist. 193 Mass. 6: 710.
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 v. Council Bluffs, 12 Ia. 268: 236, 335, 336.
 v. St. Louis etc. R. R. Co., 41 La. Ann. 827: 640, 666, 1161, 1294, 1303, 1334, 1337, 1582, 1615.
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 v. McDonough, 107 Ill. 95: 925, 1028.
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 v. Klaw & Erlanger Con. Co., 107 App. Div. 407: 199, 373.
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 v. Minn. Cent. R. R. Co., 12 Minn. 388: 1407, 1425.
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- McNichols v. Wilson, 42 Ia. 385: 1429.
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- McOsker v. Burrell, 55 Ind. 425: 722.
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 v. Leathers, 29 Ind. 65: 1406.
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- McQuigg v. Cullins, 56 Ohio St. 649: 190, 385, 386, 387, 388, 404, 405, 1596.
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 v. Burlington & Ohio Ry. Co., 106 Ill. 152: 1195.
 v. Kansas City etc. R. R. Co., 110 Mo. 484: 1546, 1547.
 v. Kansas City etc. R. R. Co., 34 Mo. App. 581: 1209.
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 v. Seattle, 45 Wash. 380: 878, 882, 891.
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 v. Haynes, 3 Rand. 33: 104, 969.
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 v. Hein, 28 Wis. 533: 937.
 v. Mellette, 18 S. D. 523: 164, 1604.
 v. Portland, 45 Ore. 1: 360.
 v. Portland, 200 U. S. 148: 238.
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 v. United States, 2 Ct. of Claims 224: 745.
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 v. Puyallup, 5 Wash. 759: 892.
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Melliehar v. Iowa City, 116 Ia. 390: 1671, 1700.
Mellor v. Philadelphia, 160 Pa. St. 614: 372, 382, 385, 391, 394, 630, 636, 646, 647, 671.
Melon St., In re, 182 Pa. St. 397: 181, 187, 191, 364, 368, 374, 382, 391, 394, 403, 404, 646, 651, 1666.
Melon St., In re, 1 Pa. Super. Ct. 63: 382, 394, 644.
Melrose v. Cutter, 157 Mass. 461: 1496.
Memphis v. Bolton, 9 Heisk. 508: 1180.
v. Hastings, 113 Tenn. 142: 733, 1158, 1169.
v. Wright, 6 Yerg. 497: 422, 1495, 1496.
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v. Hopkins (Ala.) 18 So. 845: 1425.
v. Organ, 67 Ark. 84: 864, 869, 1545, 1714.
v. Parsons Town Co., 26 Kan. 503: 1031, 1034, 1626.
v. Payne, 37 Miss. 700: 1634.
v. Union Ry. Co., 116 Tenn. 500: 677, 739, 760, 761, 768, 1068.
Memphis Freight Co. v. Memphis, 6 Coldw. 419: 505, 544, 591.
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Memphis Tel. Co. v. Hun, 16 Lea. 456: 343, 350, 1488.
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Menard Co. v. Kincaid, 71 Ill. 587: 6, 695.
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Mendez v. Dugart, 17 La. Ann. 171: 1499.
Mendocino Co. v. Peters, 2 Cal. App. 24: 514, 913.
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v. County Comrs., 5 Allen 13: 1418.
v. Worcester Co., 10 Pick. 235: 1089.
Meng v. Coffee, 67 Neb. 500: 69, 71.
Menges v. Albany, 56 N. Y. 374: 925.
Meranda v. Spurlin, 100 Ind. 380: 786, 934, 1384.
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v. Atlantic etc. R. R. Co., 63 Fed. 910: 412, 832.
v. Texas & P. R. R. Co., 51 Fed. 529: 483.
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Mercer v. McWilliams, Wright (Ohio) 132: 1165.
v. Pittsburg etc. R. R. Co., 36 Pa. St. 99: 255, 368.
v. Williams, Walker Ch. (Mich.) 85: 1574.
Mercer County v. Wolff, 237 Ill. 74: 683, 704, 896, 1072, 1548.
Mercer Co. Traction Co. v. United N. J. R. R. & C. Co., 64 N. J. Eq. 588: 302.
v. United N. J. R. R. & C. Co., 65 N. J. Eq. 574: 302.
v. United N. J. R. R. & C. Co., 68 N. J. Eq. 714: 302, 771.
Mercer etc. R. R. Co. v. Delaware etc. R. R. Co., 26 N. J. Eq. 464: 1463, 1464.
Mercer. Road in, 14 S. & R. 447: 700.
Merchants P. & D. Tel. Co. v. Citizens Tel. Co., 123 Ky. 90: 419, 1622.
Merchant St., In re, 9 Phila. 590: 976.
Merchants' Union Barb Wire Co. v. Chicago, B. & Q. R. R. Co., 70 Ia. 105: 298, 620, 1553.
v. Chicago etc. R. R. Co., 79 Ia. 614: 1354.
Meredith v. Sayre, 32 N. J. Eq. 557: 1595.
Meriam v. Brown, 128 Mass. 391: 1348.
Meridian v. Farmers' L. & T. Co., 143 Fed. 67: 410.
v. Higgins, 81 Miss. 376: 1179.
v. Poole, 88 Miss. 108: 891.
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Merrick v. Baltimore, 43 Md. 219: 1673.
v. Intramontaine R. R. Co., 118 N. C. 1081: 277.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Merrifield v. Worcester, 110 Mass. 216: 82.
 Merrill v. Berkshire, 11 Pick. 269: 954, 1089.
 v. Calkins, 74 N. Y. 1: 1580.
 Messenger v. Manhattan R. R. Co., 129 N. Y. 502: 193, 265, 448, 1296, 1303, 1304.
 v. Manhattan R. R. Co., 129 N. Y. 648: 1333.
 Messer v. Wildman, 53 Conn. 494: 1410.
 Messerole v. Brooklyn, 8 Paige 198: 1571.
 Messner v. Lykens etc. St. Ry. Co., 13 Pa. Supr. Ct. 429: 1592.
 Metcalf v. Bingham, 3 N. H. 459: 515.
 v. Nelson, 8 S. D. 87: 161.
 Methodist Church v. Baltimore, 6 Md. 391: 678, 1010.
 Methodist Episcopal Church v. Wyandotte, 31 Kan. 721: 211, 238.
 Metlar v. Middlesex etc. Traction Co., 72 N. J. L. 524: 708, 717.
 Metler v. Easton & Ambry R. R. Co., 25 N. J. Eq. 214: 1325, 1569.
 v. Easton & Ambry R. R. Co., 37 N. J. L. 222: 1225, 1227, 1321, 1323, 1438, 1439.
 Metropolitan Bd. of Works v. McCarthy, L. R. 7 Eng. & I. App. 243: 214, 651.
 v. Metropolitan Ry. Co., 37 L. J. C. P. 281: 1453.
 v. Metropolitan Ry. Co., 38 L. J. C. P. 172: 1453.
 v. Saut, 38 L. J. Eq. 7: 1557.
 Metropolitan City Ry. Co. v. Chicago West Div. Ry. Co., 87 Ill. 317: 743, 744, 747, 789, 920, 1036, 1044, 1071.
 Metropolitan El. R. R. Co., In re, 76 Hun 375: 1109, 1377.
 Metropolitan El. R. R. Co., Matter of, 128 N. Y. 600: 1425.
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 Metropolitan Gas Co. v. Hyde Park, 27 Ill. App. 361: 416, 1621.
 Metropolitan R. R. Co. v. Broadway R. R. Co., 99 Mass. 238: 761, 1284.
 v. Chicago West Div. Ry. Co., 87 Ill. 317: 791.
 v. Highland R. R. Co., 118 Mass. 290: 761, 1282, 1283, 1284.
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 v. Quiney R. R. Co., 12 Allen 262: 761, 1283, 1284.
 Metropolitan St. R. R. Co. v. Toledo El. St. R. R. Co., 9 Ohio C. C. 664: 765, 768.
 v. Walsh, 197 Mo. 392: 525, 1119, 1129, 1138, 1146, 1147, 1148, 1228, 1229.
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 v. Colwell Lead Co., 50 N. Y. Supr. Ct. 488: 339, 1593.
 Metropolitan Tr. Co., Matter of, 111 N. Y. 588: 1072.
 Metropolitan Water Co. v. Kansas City, 164 Fed. 738: 931, 1167.
 Metropolitan West Side El. R. R. Co. v. Claney, 153 Ill. 270: 1195, 1215.
 v. Dickinson, 161 Ill. 22: 1130, 1426.
 v. Eschner, 233 Ill. 210: 991, 1136.
 v. Goll, 100 Ill. App. 323: 53, 57, 323, 448, 654, 663, 1337.
 v. Siegel, 161 Ill. 638: 1274, 1422.
 v. Springer, 159 Ill. 434: 1211, 1378.
 v. Springer, 171 Ill. 170: 190, 266, 438, 1195, 1243, 1335, 1426.
 v. Stieckney, 150 Ill. 362: 1195, 1215, 1313, 1665.
 v. White, 166 Ill. 375: 1133.
 Mettly v. Marsh, 124 Ind. 18: 982, 1407.
 Metuchen v. Pa. R. R. Co., 71 N. J. Eq. 404: 1643.
 Metzler & Hugus's Road, 62 Pa. St. 151: 1096, 1371.
 Mewes v. Crescent Pipe Line Co., 170 Pa. St. 364: 1128, 1130, 1131.
 Meyer v. Burlington, 52 Ia. 560: 1306.
 v. Covington, 103 Ky. 546: 1057.
 v. Lincoln, 33 Neb. 566: 1492.
 v. Tacoma etc. Co., 8 Wash. 144: 69, 161, 164.
 v. Teutopolis, 131 Ill. 552: 363, 396, 399.
 Meyers v. Brown, 55 Ind. 596: 978.
 v. Hudson Co. Elec. Co., 63 N. J. L. 573: 361.
 v. St. Louis, 8 Mo. App. 266: 107.
 v. Schuylkill Riv. E. S. R. R. Co., 5 Pa. Co. Ct. 634: 1128.
 v. Vermillion, 7 Ohio N. P. (N. S.) 90: 155, 1606.

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- v. Barnes, 44 Mich. 222: 1097, 1365.
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- v. Bullard, 120 Mich. 416: 1474.
- v. Probate Judge, 48 Mich. 638: 1384.
- v. Spring Creek Dr. Dist., 215 Ill. 501: 924, 1195.
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- v. McCue, 149 Mass. 103: 168.
- Middlesex etc. Traction Co. v. Metlar, 70 N. J. L. 98: 709, 717.
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- v. Mason City etc. R. R. Co., 127 Ia. 433: 620.
- v. Sage, 8 Conn. 221: 103.
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- Middletown etc. R. R. Co. v. Middletown Electric R. R. Co., 4 Pa. Dist. Ct. 32: 910.
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- v. Checkley, 4 L. R. Eq. Cas. 19: 1496.
- v. Galey, 141 Ind. 483: 1425.
- v. Smith, 109 Ind. 488: 984, 996.
- v. Smith, 113 Ind. 233: 1568, 1578.
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- Milbridge etc. Elec. R. R. Co. Appellants, 96 Me. 110: 272, 299, 321, 358.
- Milburn v. Cedar Rapids, 12 Iowa 246: 200, 243, 251.
- Miles v. Benton Tp., 11 S. D. 450: 587.
- v. Worcester, 154 Mass. 511: 439, 1508.
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- v. Sharp, 27 N. Y. 611: 297, 298, 301, 1586.
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- v. Bank of Belleville, 148 Mich. 339: 9, 1604.
- v. Banks, 146 Ind. 219: 1381.
- v. Beaver & LeRoy, 37 Minn. 203: 1186, 1215.
- v. Black Rock Spring Imp. Co., 99 Va. 747: 161, 163.
- v. Board of Comrs., 3 Ohio C. C. 617: 786, 1429.
- v. Brown, 56 N. Y. 383: 707.
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 - v. Brooklyn, 32 N. Y. 489: 142, 234.
 - v. County Comrs., 3 Seam. 53: 1261.
 - v. East Syracuse, 20 Misel. N. Y. 651: 1529.
 - v. Evans, 100 Ia. 712: 865.
 - v. Nashua, 63 N. H. 42: 142.
 - v. Parlin, 106 Ill. 60: 318, 532, 1581.
 - v. St. Clair Co., 8 How. 569: 409, 709, 1637.
 - v. Seattle etc. R. R. Co., 10 Wash. 520: 840.
 - v. United States, 46 Fed. 738: 139.
 - v. Van Voorhies, 20 N. Y. 412: 946.
 - Millvale, Borough of, Appeal of, 131 Pa. St. 1: 299, 308.
 - Milton v. Wacker, 40 Mich. 229: 1032, 1361, 1420.
 - Milwaukee v. Gimbel Bros., 130 Wis. 31: 1623.
 - v. Milwaukee etc. R. R. Co., 7 Wis. 85: 321, 1583, 1622.
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 - v. Faribault, 23 Minn. 167: 750, 798, 1609.
 - v. Milwaukee, 34 Wis. 271: 524, 1059.
 - v. Stolze, 101 Wis. 91: 1670, 1671.
 - v. Strange, 63 Wis. 178: 860, 1560.
 - Milwaukee etc. Traction Co. v. Milwaukee Northern Ry. Co., 132 Wis. 313: 901, 904, 912.
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 - Mine Hill etc. R. R. Co., v. Zerbe, 2 Walker's Pa. Supm. 409: 952, 961, 1523.
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[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Gilmour, 12 Moore P. C. 131: 128.
 v. New York Cent. etc. R. R. Co., 123 N. Y. 242: 864, 1330, 1501.
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 Mineral Range Ry. Co. v. Detroit & Lake Superior Copper Co., 25 Fed. 515: 931.
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 Minhannah v. Haines, 29 N. J. L. 388: 700, 1531.
 Mining Co. v. Pennsylvania, 125 U. S. 181: 687.
 Minneapolis v. Wilkin, 30 Minn. 140: 922.
 v. Wilkin, 30 Minn. 145: 1321, 1322, 1324.
 Minneapolis Eastern R. R. Co. v. Minnesota, 134 U. S. 467: 480, 483.
 Minneapolis etc. R. R. Co., In re, 39 Minn. 162: 767, 769.
 Minneapolis etc. R. R. Co., Matter of, 36 Minn. 481: 769.
 Minneapolis etc. R. R. Co. v. Britt, 105 Ia. 198: 888.
 v. Brown, 99 Minn. 384: 863.
 v. Chicago etc. R. R. Co., 116 Ia. 681: 893, 908, 1035.
 v. Emmons, 40 Minn. 133: 475.
 v. Emmons, 149 U. S. 364: 475, 487.
 v. Hartland, 85 Minn. 76: 675, 749, 751, 1057, 1058.
 v. Kanne, 32 Minn. 174: 1020.
 v. Manitou Forest Syndicate, 101 Minn. 132: 765, 766.
 v. Marble, 112 Mich. 4: 857, 873.
 v. Minneapolis & W. R. R. Co., 61 Minn. 502: 426, 755, 756, 959.
 v. Minnesota, 193 U. S. 53: 488.
 v. Nester, 3 N. D. 480: 25, 924, 1076.
 v. Nestor, 50 Fed. 1: 931.
 v. Nicolin, 76 Minn. 302: 533.
 v. Olson, 81 Minn. 265: 1043, 1044.
 v. Woodworth, 32 Minn. 452: 1410, 1699.
 Minneapolis Mill Co. v. Board of Water Comrs., 56 Minn. 485: 106, 138.
 v. Minneapolis etc. R. R. Co., 51 Minn. 304: 857, 1627, 1632.
 Minneapolis Terminal Co., In re, 38 Minn. 157: 1061, 1076, 1081, 1431.
 Minneapolis W. R. R. Co. v. Minneapolis etc. R. R. Co., 58 Minn. 128: 857, 1627, 1632.
 Minnesota Belt Line R. R. Co. v. Gluck, 45 Minn. 463: 1122, 1145.
 Minnesota Canal & Power Co., v. Koochiching Co., 97 Minn. 429: 494, 496, 498, 499, 501, 508, 536, 538, 593, 988.
 v. Pratt, 101 Minn. 197: 536, 787, 920.
 Minnesota Central R. R. Co. v. McNamara, 13 Minn. 508: 1217, 1418.
 v. Patterson, 31 Minn. 42: 1424.
 Minnesota etc. R. R. Co., In re, 103 Wis. 191: 1423.
 Minnesota L. & T. Co. v. St. Anthony Falls W. P. Co., 82 Minn. 505: 71, 72.
 Minnesota Valley R. R. Co. v. Doran, 15 Minn. 230: 1208, 1213.
 v. Doran, 17 Minn. 188: 1112, 1114, 1318.
 Minot v. Cumberland Co. Comrs., 28 Maine 121: 1135.
 Minton v. New York El. R. R. Co., 130 N. Y. 332: 1554, 1584, 1664.
 Miocene Ditch Co. v. Jacobson, 146 Fed. 680: 563, 1616.
 v. Lyng, 138 Fed. 544: 684, 686.
 Miskey v. Philadelphia, 68 Pa. St. 48: 1324.
 Missionary Society v. New York El. R. R. Co., 12 Miscl. 359: 1207, 1300.
 Mississippi Central R. R. Co. v. Carruth, 51 Miss. 77: 158.
 v. Mason, 51 Miss. 234: 87, 91, 158.
 Mississippi etc. R. R. Co. v. Byington, 14 Iowa 572: 1429.
 v. Devaney, 42 Miss. 555: 729.
 v. Rousseau, 8 Iowa 373: 1406.
 v. Texas etc. R. R. Co., 4 Wood 360: 768, 1610.
 v. Wooten, 36 La. Ann. 441: 1478, 1483.
 Mississippi Levee Comrs. v. Johnson, 66 Miss. 248: 927, 953.
 Mississippi R. R. Co. v. McDonald, 12 Heisk. 54: 690, 1180.
 Mississippi River Bridge Co. v. Longergan, 91 Ill. 508: 107.
 v. Ring, 58 Mo. 491: 1186, 1227, 1229, 1230, 1324, 1385, 1386.
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 Missouri v. Illinois, 180 U. S. 208: 170.
 v. Illinois, 200 U. S. 496: 170.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Chenault, 24 Tex. Civ. App. 481: 1483.
 v. Crow, 43 Tex. Civ. App. 280: 152.
 v. Graham, 12 Tex. Civ. App. 54: 1719.
 v. Green, 44 Tex. Civ. App. 247: 152, 1137, 1552, 1655.
 v. Haines, 10 Kan. 439: 1243, 1244, 1245, 1312.
 v. Mott, 98 Tex. 91: 837, 1459, 1474.
 v. Murphy, 75 Kan. 707: 1526, 1540.
 v. Roe, 77 Kan. 224: 1211.
 v. Schmuck, 69 Kan. 272: 1176, 1185, 1201, 1268, 1481.
 v. State, 100 Tex. 420: 489.
 v. State, 100 Tex. 426: 489.
 v. Texas & St. Louis Ry. Co., 4 Wood 360: 931, 1610.
 v. Ward, 10 Kan. 325: 1353.
 v. Wetz, 97 Tex. 581: 1485.
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 v. Cambern, 10 Kan. App. 581: 584.
 v. Carter, 85 Mo. 448: 933, 955, 964, 1360.
 v. Cass Co., 76 Neb. 396: 491, 1288, 1289.
 v. Coon, 15 Neb. 232: 1127.
 v. Dulaney, 38 Kan. 246: 1120, 1310.
 v. Duncan, 87 Minn. 91: 1150.
 v. Gano, 47 Kan. 457: 859, 1627.
 v. Hays, 15 Neb. 224: 1310.
 v. Houseman, 41 Kan. 300: 1018, 1020, 1513, 1626.
 v. Humes, 115 U. S. 512: 487, 923.
 v. Keys, 55 Kan. 205: 151.
 v. Lee, 70 Tex. 496: 883.
 v. Nebraska, 29 Neb. 550: 472.
 v. Nebraska, 164 U. S. 403: 472, 1474.
 v. Porter, 112 Mo. 361: 1277.
 v. Renfro, 52 Kan. 237: 147, 157.
 v. Roberts, 187 Mo. 309: 1150.
 v. Smith, 60 Ark. 221: 483.
 v. Webster, 3 Kan. App. 166: 92,
 v. Wernway, 35 Mo. App. 449: 1222.
 v. Wilson, 45 Mo. App. 1: 964.
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 v. Shepard, 9 Kan. 647: 913, 1010.
 Mitchell v. Bass, 33 Tex. 259: 1502.
 v. Bond, 11 Bush. 614: 917.
 v. Bourbon County, 25 Ky. L. R. 512: 1503.
 v. Bridgewater, 10 Cush. 411: 1078, 1354.
 v. Denver, 33 Colo. 37: 876, 884.
 v. Franklin & Columbia Turnpike Co., 3 Humph. 456: 1523.
 v. Great Western R. R. Co., 35 U. C. Q. B. 148: 1680.
 v. Harmony, 13 How. 115: 18.
 v. Holderness, 29 N. H. 523: 1081.
 v. Illinois etc. Co., 68 Ill. 286: 24.
 v. Illinois etc. Co., 69 Ill. 286: 1667.
 v. Illinois & St. Louis R. R. & Coal Co., 85 Ill. 566: 1109.
 v. Kansas City etc. R. R. Co., 138 Mo. 326: 1511.
 v. Metropolitan El. R. R. Co., 56 Hun 543: 965, 1584.
 v. Metropolitan El. R. R. Co., 132 N. Y. 552: 1425.
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 v. Missouri Pac. Ry. Co., 82 Mo. 106: 996.
 v. New Orleans etc. R. R. Co., 41 La. Ann. 363: 1546.
 v. New York, Lake Erie & Western R. R. Co., 36 Hun 177: 153.
 v. Rome, 49 Ga. 19: 229, 1452.
 v. St. Louis, 14 Mo. App. 600: 607.
 v. Smale, 140 U. S. 406: 109.
 v. Thornton, 21 Gratt. 164: 1075, 1180.
 v. White Plains, 62 Hun 231: 941, 1154, 1168, 1572.
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 Mix v. Lafayette etc. R. R. Co., 67 Ill. 319: 448, 639, 894, 1295, 1303.
 Mizell v. McGowan, 120 N. C. 134: 146.
 v. McGowan, 125 N. C. 439: 146.
 v. McGowan, 129 N. C. 93: 80, 147.
 Moale v. Baltimore, 5 Md. 314: 431, 1690.
 Mobile v. Fowler, 147 Ala. 403: 886.
 v. Louisville etc. R. R. Co., 84 Ala. 115: 303, 472, 1620.
 v. Louisville etc. R. R. Co., 124 Ala. 132: 297, 304.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 Mobile County v. Kimball, 102 U. S. 691: 10, 462.
 Mobile etc. R. R. Co. v. Ala. Midland R. R. Co., 87 Ala. 501: 706, 708, 753, 754, 758, 759, 788, 793, 796, 798.
 v. Alabama Mid. R. R. Co., 87 Ala. 520: 758, 759, 793, 796, 798, 1461, 1609.
 v. Alabama Midland R. R. Co., 116 Ala. 51: 246, 250, 1595.
 v. Ala. Midland Ry. Co., 123 Ala. 145: 1568, 1574.
 v. Bynum (Miss.) 15 So. 795: 87.
 v. Coghill, 85 Ala. 456: 870.
 v. Fowle Lumber Co., 152 Ala. 320: 1535, 1578, 1615.
 v. Hester, 122 Ala. 249: 1200, 1202, 1392.
 v. Hoye, 87 Miss. 571: 941, 1642.
 v. Postal Tel. Cable Co., 120 Ala. 21: 534, 773, 988, 1048, 1284, 1392, 1673.
 v. Postal Tel. Cable Co., 76 Miss. 731: 1285, 1286.
 v. Riley, 119 Ala. 260: 1118, 1202.
 Mobley v. Breed, 48 Ga. 44: 1625.
 Moellering v. Evans, 121 Ind. 195: 440, 441.
 Moeschen v. Tenement House Dept., 203 U. S. 583: 490.
 Moetter v. Comrs. of Highways, 39 Mich. 726: 1032, 1420.
 Moffett v. Brewer, 1 G. Greene 348: 70.
 Moffitt v. South Park Comrs., 138 Ill. 620: 881.
 Mohawk Bridge Co. v. Utica & Schenectady R. R. Co., 6 Paige, 554: 413, 726.
 Mohawk etc. R. R. Co. v. Arther, 6 Paige 83: 516, 819, 1609.
 Moison v. Great Western R. R. Co., 14 U. C. Q. B. 109: 93.
 Mold v. Wheatercroft, 27 Beav. 510: 1537.
 Molett v. Keenan, 22 Ala. 484: 1033.
 Moll v. Benckler, 30 Wis. 584: 1364.
 v. Sanitary District, 228 Ill. 633: 1322, 1324.
 Mollandin v. Union Pacific R. R. Co., 4 McCrary 290: 640.
 Molton v. Newburyport Water Co., 137 Mass. 163: 1231.
 Monaghan v. Memphis Fair etc. Co., 95 Tenn. 108: 880.
 Monagle v. County Comrs., 8 CUSH. 360: 1707.
 Monarch Mfg. Co. v. Omaha etc. Ry. Co., 127 Iowa, 511: 157, 326.
 Monchet v. Great Western Ry. Co., 1 Ry. Cas. 567: 1611.
 Monmouth v. Gardiner, 35 Maine 247: 956.
 Monmouth County v. Red Bank etc. Turnpike Co., 18 N. J. Eq. 91: 423, 1536.
 Monongahela Bridge Co. v. Kirk, 46 Pa. St 112: 96.
 Monongahela Nav. Co. v. Blair, 20 Pa. St. 71: 691.
 v. Coon, 6 Pa. St. 379: 691.
 v. Coons, 6 W. & S. 101: 108, 117.
 v. United States, 148 U. S. 312: 108, 789, 790, 1158, 1173, 1174, 1199, 1261, 1264, 1266, 1272.
 Monroe v. Crawford 163 Mo. 178: 1004, 1513, 1569, 1571.
 v. Danbury, 24 Conn. 199: 700.
 v. Detroit etc. Ry. Co., 143 Mich. 315: 303.
 Monroe Mill Co. v. Mensel, 35 Wash. 487: 81, 1604.
 Monson v. County Comrs., 84 Maine 99: 1416.
 Montana Central Ry. Co. v. Helena etc. R. R. Co., 6 Mont. 416: 794.
 Montana R. R. Co. v. Freerer, 29 Mont. 210: 1223, 1245, 1456.
 v. Warren, 6 Mon. 275: 1129, 1236.
 v. Warren, 137 U. S. 348: 1127, 1129.
 Montclaire Military Academy v. N. J. St. Ry. Co., 65 N. J. L. 328: 272, 302.
 v. N. J. St. Ry. Co., 70 N. J. L. 229: 272, 302.
 Montclair R. R. Co. v. Benson, 36 N. J. L. 557: 1146: 1225.
 Montecito Val. Water Co. v. Santa Barbara, 144 Cal. 578: 77, 864, 1603.
 v. Santa Barbara, 151 Cal. 377: 72.
 Montello, The, 20 Wall. 430: 103.
 Monterey v. County Comrs., 7 CUSH. 394: 701.
 v. Molasin, 99 Cal. 290: 864.
 Monterey Co. v. Cushing, 83 Cal. 507: 515, 959.
 Montgomery, In re, 48 Fed. 896: 680, 894, 976, 991, 1154.
 Montgomery v. Baltimore etc. R. R. Co., 29 Ind. App. 692: 1390.
 v. Kelly, 142 Ala. 552: 479.
 v. Lemle, 121 Ala. 609: 629, 1161, 1601, 1612.
 v. Maddox, 89 Ala. 181: 629, 631, 636, 637, 659, 670, 1306, 1337.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Parker, 114 Ala. 118: 193.
 v. Santa Ana & W. R. R. Co., 104 Cal. 186: 172, 173, 175, 242, 243, 245, 248, 250, 270, 287, 289, 639, 642, 1630.
 v. Shaver, 40 Ore. 244: 118, 127, 129.
 v. Somers, 50 Ore. 259: 1124.
 v. Townsend, 80 Ala. 489: 629, 636, 659, 671, 1306.
 v. Townsend, 84 Ala. 478: 636.
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 v. Varner, 19 Ala. 185: 1123.
 v. Waltan, 14 Ala. N. S. 207: 1461, 1469, 1619.
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 v. Stockton, 43 Ind. 328: 1205, 1310, 1311, 1445.
- Montour R. Co. v. Scott, 1 Penny 503: 1317.
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- Montrose Canal Co. v. Loutsenhiser Ditch Co., 23 Colo. 223: 73.
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 v. Saratoga Springs, 17 App. Div. N. Y. 207: 83, 84, 85, 1605.
 v. Saratoga Springs, 163 N. Y. 581: 84, 85.
- Mooers v. Kennebec & Portland R. R. Co., 58 Maine 279: 1537, 1579.
- Moon v. Sandown, 19 N. H. 93: 1081.
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 v. New York El. R. R. Co., 13 App. Div. 380: 1562.
 v. New York El. R. R. Co., 16 Daly 145: 1305.
 v. New York El. R. R. Co., 163 N. Y. 242: 1554, 1562.
- Moore's Appeal, 68 Maine 405: 1399.
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 v. Ange, 125 Ind. 562: 513.
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 v. Bailey, 8 Mo. App. 156: 1412.
 v. Boston, 8 Cush. 274: 940, 1683, 1712.
 v. Camden etc. Ry. Co., 73 N. J. L. 599: 275, 1630.
 v. Cape Girardeau, 103 Mo. 470: 89c.
 v. Clear Lake W. W., 68 Cal. 146: 73.
 v. Great Southern etc. R. R. Co., 10 Irish C. L. 46: 631, 1550.
 v. Hancock, 11 Ala. 245: 1403.
 v. McIntyre, 110 Mich. 237: 1416.
 v. New York, 8 N. Y. 110: 943, 944, 945, 946.
 v. New York, 4 Sandf. 456: 943, 944.
 v. New York El. R. R. Co., 130 N. Y. 523: 1296, 1298, 1333, 1652.
 v. Roberts, 64 Wis. 538: 1520.
 v. Sanford, 151 Mass. 285: 543, 1572, 1577.
 v. Street Passenger R. R. Co., 3 Phila. 417: 1101.
 v. Superior & St. Croix R. R. Co., 34 Wis. 173: 698.
- Moore Tp. Road, 17 Pa. St. 116: 1081.
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- Moores v. Bel Air W. & L. Co., 79 Md. 391: 1429.
- Moorman v. Seattle etc. R. R. Co., 8 Wash. 98: 852.
- Moose v. Carson, 104 N. C. 431: 183, 366, 377, 378, 388.
- Moran v. Lydecker, 11 Abb. N. C. 298: 1583.
 v. McClarus, 63 Barb. 185: 155.
 v. Ross, 79 Cal. 159: 9, 524, 674, 683, 684.
 v. Ross, 79 Cal. 549: 1192, 1200.
 v. Troy, 9 Hun 540: 13.
- Moravian Seminary v. Bethlehem, 153 Pa. St. 583: 1671, 1685.
- Mordhurst v. Ft. Wayne etc. Traction Co., 163 Ind. 268: 285, 289, 313, 334.
- Morean v. Ditchernendy, 18 Mo. 522: 943.
- Morehouse v. Burgot, 22 Ohio C. C. 174: 1491.
- Morey v. Fitzgerald, 56 Vt. 487: 433.
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- Morgan's Appeal, 39 Mich. 675: 1058, 1346, 1378.
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 v. Binghamton, 32 Hun 602: 83, 453, 1606.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. King, 18 Barb. 277: 97.
 v. King, 35 N. Y. 454: 97.
 v. Lake Shore etc. R. R. Co., 130 Ind. 101: 1631.
 v. Metropolitan Ry. Co., 4 L. R. C. P. 97: 1533.
 v. Miller, 59 Iowa 481: 1568.
 v. Monmouth Plank Road Co., 26 N. J. L. 99: 422.
 v. New York & M. R. R. Co., 130 N. Y. 692: 1528.
 v. Oliver, 98 Tex. 218: 1005, 1008, 1013, 1014, 1513.
 v. Reading, 3 S. & M. 366: 104.
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 v. Bourdier, 1 McGloin La. 232: 807, 954, 1017.
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 v. St. Paul etc. Ry. Co., 30 Minn. 100: 1225.
- Moritz v. St. Paul, 52 Minn. 409: 1564.
- Morley v. Buchanan, 124 Mich. 128: 159, 233.
- Morrell v. Chicago, etc. R. R. Co., 49 Minn. 526: 315, 1635.
- Morrill v. Mackman, 24 Mich. 279: 858.
 v. Wabash etc. R. R. Co., 96 Mo. 174: 841, 1502.
- Morris v. Baltimore, 44 Md. 598: 1324.
 v. Chicago, 11 Ill. 650: 1423.
 v. Council Bluffs, 67 Iowa 343: 234.
 v. Edwards, 132 Wis. 91: 400, 1018, 1098, 1513.
 v. Healy Lumber Co., 33 Wash. 451: 1667.
 v. Heppenheimer, 54 N. J. L. 268: 923, 927, 928.
 v. Montgomery Traction Co., 143 Ala. 246: 272.
 v. New York, 55 Hun 476: 1087, 1391, 1511, 1576.
 v. Philadelphia, 70 Pa. St. 333: 1325.
 v. Philadelphia, 199 Pa. St. 357: 378, 406, 1595.
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 v. Salle (Ky.) 19 S. W. 527: 990, 1004, 1407.
 v. Sault Ste Marie, 143 Mich. 672: 226, 1650, 1656.
 v. Schallsville Branch etc., 4 Bush. 448: 818.
 v. Turnpike Road, 6 Bush. 671: 1496.
 v. Washington County, 72 Neb. 174: 710, 738, 1154, 1158.
 v. Wisconsin Midland R. R. Co., 82 Wis. 541: 330.
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 v. Jersey City, 12 N. J. Eq. 252: 432.
 v. State, 24 N. J. L. 62: 782.
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 v. Ryerson, 27 N. J. L. 457: 847, 848, 1456.
 v. Seward, 23 N. J. L. 219: 1459, 1667.
 v. State, 14 N. J. L. 411: 1414, 1417.
- Morris & C. Dredging Co. v. Jersey City, 64 N. J. L. 587: 351, 372.
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 v. Central R. R. Co., 31 N. J. L. 205: 693, 728, 765.
 v. Green, 15 N. J. Eq. 469: 833, 856.
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 v. Hudson Tunnel R. R. Co., 25 N. J. Eq. 384: 434, 1159, 1570.
 v. Newark, 10 N. J. Eq. 352: 243, 254, 297, 315, 322.
 v. Newark Pass. R. R. Co., 51 N. J. Eq. 379: 328, 765, 768.
 v. Orange, 63 N. J. L. 252: 1291.
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 v. Prudden, 20 N. J. Eq. 530: 297, 406, 1588.
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 v. Hinkson, 87 Ill. 587: 197, 355, 643, 654, 1137.
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 v. Morey, 146 Mo. 543: 13, 586.
 v. Rice, 35 Minn. 436: 943.
 v. Semple, 6 Binn. (Pa.) 94: 53.
 v. Thistle Coal Co., 119 Iowa 705: 513, 532.
- Morrissey v. C. B. & Q. R. R. Co., 38 Neb. 406: 150, 151, 157.
- Morristown v. East Tenn. Telephone Co., 115 Fed. 304: 343, 360, 361.
 v. Pennsylvania R. R. Co., 3 Mont. Co. L. Rep. 5: 304.
- Morrow v. Commonwealth, 48 Pa. St. 305: 728.
 v. Highland Grove Traction Co., 219 Pa. St. 619: 420, 872, 875, 1618.
 v. St. Louis etc. R. R. Co., 81 Tex. 405: 256, 640, 1294, 1337.
- Morse v. Stockee, 1 Allen 150: 439, 1571.
 v. Wheeler, 69 N. H. 292: 1410.
- Morseman v. Ionia, 32 Mich. 283: 893, 894.
- Morss v. Boston & M. R. R. Co., 2 Cush. 536: 1345.
- Morss, Petitioner, 18 Pick. 443: 1343, 1345, 1438, 1439.
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 v. Manhattan R. R. Co., 57 N. Y. Supr. 509: 1665.
 v. New York El. R. R. Co., 57 N. Y. Supr. Ct. 244: 180, 264.
 v. Southwestern Ry. Co., 102 E. C. L. R. 374: 1529.
 v. Southwestern Ry. Co., 1 Ellis & Ellis 375: 1529.
 v. Southwestern Ry. Co., 38 L. J. Q. B. 129: 1529.
- Morton v. Burlington, 106 Iowa 50: 603, 617.
 v. Franklin Co., 62 Maine 455: 976.
 v. New York, 65 Hun 32: 456.
 v. New York, 140 N. Y. 207: 92, 456, 714.
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 v. York Shore Water Co., 94 Maine 83: 675, 733, 1060.
- Moses v. Pittsburgh etc. R. R. Co., 21 Ill. 516: 200, 243, 251, 726.
 v. St. Louis Sectional Dock Co., 84 Mo. 242: 893, 894, 1036, 1520, 1626.
 v. Sandford, 11 Lea 731: 410, 1261.
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- Mott v. Consumers Water Co., 188 Pa. St. 521: 74.
 v. Eno, 97 App. Div. 580: 687, 806, 813.
 v. Eno, 181 N. Y. 346: 687, 806, 813.
 v. New York, 2 Hilton 358: 236.
- Mottman v. Olympia, 45 Wash. 361: 371, 384, 392, 399, 647.
- Moulton v. Newburyport W. Co., 137 Mass. 167: 1237, 1263.
- Mound City Land & Stock Co. v. Miller, 170 Mo. 240: 577.
- Moundsville v. Ohio R. R. Co., 37 W. Va. 92: 306, 315, 1643, 1644.
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- Mt. Auburn Cable R. R. Co. v. Neare, 54 Ohio St. 153: 302, 316, 1587.
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 v. Shaw, 155 Ill. 37: 399.
 v. Shaw, 52 Ill. App. 429: 349, 399, 1487, 1594.
- Mt. Clemens v. Macomb Circ. Judge, 119 Mich. 293: 739, 1085.
 v. Mt. Clemens Sanitarium Co., 127 Mich. 115: 873.
- Mt. Hope Cemetery v. Boston, 158 Mass. 509: 459.
- Mountjoy v. Oldham, 1 A. K. Marsh. 535: 1359.
- Mount Morris Square, Matter of, 2 Hill 14: 1393, 1417.
- Mt. Olive v. Hunt, 51 N. J. L. 274: 1363, 1365, 1368, 1421.
- Mount Pleasant Ave., Matter of, 10 R. I. 320: 1019.
- Mt. Pleasant Coal Co. v. Delaware etc. R. R. Co., 200 Pa. St. 434: 864, 1485, 1646.
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 v. Jephson, 21 Ky. L. R. 1028: 630, 634.
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 Mouser's Case, 12 Coke 62: 16, 17.
 Mowrey v. Boston, 173 Mass. 425: 1330.
 Mowry v. Providence, 16 R. I. 422: 420, 1493, 1618.
 Moyer v. New York Cent. etc. R. R. Co., 88 N. Y. 351: 89.
 v. Preston, 6 Wyo. 308: 70.
 Moyer Street, In re, 6 Phila. 81: 1341.
 Moynahan v. Superior Court, 42 Wash. 172: 1025.
 Mueller v. St. Louis & Iron Mt. R. R. Co., 31 Mo. 262: 1634.
 Mugler v. Kansas, 123 U. S. 623: 477, 568.
 Muhle v. New York etc. R. R. Co., 86 Tex. 459: 1502.
 Muhlker v. New York etc. R. R. Co. 60 App. Div. 621: 257.
 v. New York etc. R. R. Co., 173 N. Y. 549: 256, 257, 258, 358.
 v. New York etc. R. R. Co., 197 U. S. 544: 181, 258, 259.
 Muir v. Johnson, 49 Wash. 66: 1607.
 Muire v. Falconer, 10 Gratt. 12: 1027, 1029, 1407.
 Mulholland v. Des Moines etc. R. R. Co., 60 Ia. 740: 691, 1550, 1718.
 Mull v. Indianapolis etc. Traction Co., 169 Ind. 214: 498, 503, 525, 675, 688, 739.
 Mullen v. Lake Drummond C. & W. Co., 130 N. C. 496: 1454, 1456, 1649, 1653.
 Muller v. Earle, 35 N. Y. Supr. Ct. 461: 1257.
 v. Southern Pac. R. R. Co., 83 Cal. 240: 639, 1146, 1231, 1242, 1293.
 Mulligan v. Smith, 59 Cal. 206: 972, 1004, 1007, 1011, 1013.
 Mulliner v. Midland R. R. Co., L. R. 11 Ch. Div. 611: 1475.
 Mullins v. Met St. Ry. Co., 126 Mo. App. 507: 862, 1507.
 Mumford v. Terry, 2 N. C. L. R. 425: 1523.
 v. Whitney, 15 Wend. 380: 857.
 Mumpower v. Bristol, 90 Va. 151: 71, 76.
 Mums v. Isle of Wight R. R. Co., 17 W. R. 1081: 851.
 Muncey Elec. L. H. & P. Co. v. People's Elec. L. H. & P. Co., 218 Pa. St. 636: 410, 412.
 Muncey v. Joest, 74 Ind. 409: 1033, 1518.
 Muncie Nat. Gas Co. v. Allison, 31 Ind. App. 50: 1221, 1251, 1456.
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 v. Martin, 164 Ind. 30: 81.
 Mundorf v. New York El. R. R. Co., 62 Hun 465: 1252.
 Mundy v. New York etc. R. R. Co., 75 Hun 479: 92, 93, 94, 456.
 v. Water Comrs., 75 N. J. L. 25: 828.
 Munger v. St. Paul, 57 Minn. 9: 194, 224.
 Municipality No. 1, 8 La. Ann. 377: 1020.
 Municipality No. 1 v. Millanden, 12 La. Ann. 769: 1566.
 v. Young, 5 La. Ann. 362: 701.
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 Municipality No. 2 for opening Emphrosine St., 7 La. Ann. 72: 1159.
 Munkers v. Kansas City etc. R. R. Co., 60 Mo. 334: 152, 157.
 v. Kansas City etc. R. R. Co., 72 Mo. 514: 152, 157.
 Munkwitz v. Chicago, Milwaukee & St. Paul R. R. Co., 64 Wis. 402: 1111, 1150, 1242.
 Munn v. Boston, 183 Mass. 421, 239, 376, 391, 402, 428, 1338.
 v. Corbin, 8 Colo. App. 113: 486.
 v. Illinois, 94 U. S. 113: 480, 482, 483.
 v. People, 69 Ill. 80: 14.
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 Munson. Matter of, 29 Hun 325: 1670.
 Munson v. Blake, 101 Ind. 78: 1371, 1383, 1404.
 v. Board of Comrs., 43 La. Ann. 15: 12.
 v. Brimfield Manf. Co., 15 Pick. 554: 1345.
 v. Mallory, 36 Conn. 165: 357.
 Murdock v. Prospect Park & Coney Island R. R. Co., 10 Hun 598: 322.
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- v. Boston, 120 Mass. 419: 605.
 - v. Chicago, 29 Ill. 279: 200, 210, 243.
 - v. Groot, 44 Cal. 51: 1461, 1570.
 - v. Indianapolis, 158 Ind. 238: 143.
 - v. King Co., 45 Wash. 587: 1493.
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 - v. Gibson, 21 Ill. App. 488: 172, 336.
 - v. Grass Lake, 125 Mich. 2: 138.
 - v. Mefee, 20 Ark. 561: 411.
 - v. Norfolk Co., 149 Mass. 328: 807.
 - v. Pannaci, 64 N. J. Eq. 147: 166.
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 - v. Sharp, 1 Bos. 539: 139.
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- Myer v. Schnylkill Riv. R. R. Co., 17 Phila. 468: 1236.
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 - v. Delaware etc. R. R. Co., 3 Luzerne Leg. Reg. Rep. 347: 918.
 - v. Kenyon, 7 Cal. App. 112: 877.
 - v. McGavock, 39 Neb. 843: 686.
 - v. Oceanside, 7 Cal. App. 87: 875, 886, 888.
 - v. Old Mission & Whitbeck Road, 7 Ia. 315: 1404.
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- v. Nichols, 3 Bax. 338: 613, 710.
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- v. Hammond, 104 Ala. 191: 835, 836.
 - v. Hobbs, 120 Ala. 600: 979, 1382, 1520, 1626.
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- v. Penn. R. R. Co., 54 N. J. Eq. 10: 1611.
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- v. Penn. R. R. Co., 57 N. J. L. 265: 1281.
- v. Pennsylvania R. R. Co., 57 N. J. L. 637: 1281.
- v. State, 52 N. J. L. 90: 765.
- v. State, 53 N. J. L. 217: 765.
- v. United N. J. R. etc. Co., 52 N. J. Eq. 366: 1462.
- v. United N. J. R. R. Co., 52 N. J. L. 90: 767, 768, 769, 1281.
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- Navan etc. R. R. Co., In re, 10 Irish Rep. Eq. 113: 1323.
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- Neale v. Cogar, 1 A. K. Marsh. 589: 1358.
- v. Superior Court, 77 Cal. 28: 1469.
- Nealy v. Brown, 6 Ill. 10: 928, 1517.
- Nebraska City v. Lampkin, 6 Neb. 27: 211.
- v. Northcutt, 45 Neb. 456: 1549, 1664.
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- v. Storer, 22 Neb. 90: 1401.
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- Nebraska Tel. Co. v. Western Independent L. D. T. Co., 68 Neb. 772: 342, 359.
- v. York Gas & El. Light Co., 27 Neb. 284: 346, 418, 911.
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- Neeld's Road, 1 Pa. St. 353: 955, 1005.
- Neely v. Western Allegheny R. R. Co., 219 Pa. St. 349: 1120, 1140.
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- v. Penn. R. R. Co., 202 Pa. St. 371: 428, 1263, 1338.
- v. Reed, 98 Ind. 341: 563, 575, 723, 1115.
- v. Smith, 91 Ia. 87: 1505.
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- Nehall v. Galena etc. R. R. Co., 14 Ill. 273: 717.
- Neilson v. Chicago, Mil. N. W. Ry. Co., 58 Wis. 516: 1123, 1180, 1251.
- v. Chicago etc. R. R. Co., 91 Wis. 557: 1323.
- Neis v. Franzen, 18 Wis. 537: 1513.
- Neitsey v. Baltimore & O. R. R. Co., 5 Mackey 34: 245, 248, 250, 309, 316, 1298.
- Nelson v. Butterfield, 21 Me. 220: 960, 990, 1135.
- v. Fehd, 203 Ill. 120: 1488.
- v. Fehd, 104 Ill. App. 114: 1488.
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- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Jenkins, 42 Neb. 133: 865, 869.
 v. Minneapolis etc. R. R. Co., 40 Minn. 131: 475, 1317.
 v. Miss. & Rum Riv. Boom Co., 99 Minn. 484: 86.
 v. Randolph, 222 Ill. 531: 877, 886, 892.
 v. Sneed, 76 Neb. 201: 868.
 v. Vermont & Canada R. R. Co., 26 Vt. 717: 487.
 v. West Duluth, 55 Minn. 497: 231, 1306, 1307.
 v. Yamhill County, 41 Ore. 560: 980.
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- Nesbitt v. Trumbo, 39 Ill. 110: 494, 496, 516, 517.
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 v. New York El. R. R. Co., 2 Miscl. 62: 1196, 1216, 1300.
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- Nevada & M. R. R. Co. v. De Lissa, 103 Mo. 125: 1119, 1123, 1672, 1675.
- Nevins v. Peoria, 41 Ill. 502: 66, 232, 235.
- New v. Ewing, 1 A. K. Marshall 55: 1017.
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 v. White, 100 Ind. 206: 1570.
 v. Williams, 126 Ind. 1: 873, 882.
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 v. Higman, 18 Ind. 77: 157.
 v. Huff, 19 Ind. 315: 1123.
 v. O'Dailey, 12 Ind. 551: 246, 251, 1582.
 v. O'Dailey, 13 Ind. 353: 251, 1550.
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 v. Weeks, 71 N. J. L. 448: 608, 619, 1308.
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 v. Passaic, 46 N. J. Eq. 552: 1614.
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 New Bedford R. R. Co. v. Acushnet R. R. Co., 143 Mass. 200: 762.
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 v. United Presbyterian Church, 96 Pa. St. 331: 630, 632, 636.
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 v. Newburyport, 168 Mass. 541: 740, 1261, 1265.
 v. Newburyport, 193 U. S. 561: 740, 788.
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- New Castle v. Central D. & P. Tel. Co., 207 Pa. St. 371: 343, 361, 491.
- v. Commissioners, 87 Me. 227: 973, 984, 995.
- v. Lake Erie etc. R. R. Co., 155 Ind. 18: 260, 866.
- v. Raney, 6 Pa. Co. Ct. 87: 484.
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- v. Brumback, 5 Ind. 543: 1118, 1205.
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 v. Smith, 1 Chandler, 71: 550, 553, 672, 923, 1164.
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- v. Sass, 142 Ill. 104: 182, 877, 1595.
- v. Smith, 15 Wis. 101: 937, 1170, 1547.
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 Newgass v. St. Louis etc. R. R. Co., 54 Ark. 140: 1222, 1243, 1251, 1319, 1320, 1329, 1347, 1516.
 New Hamburg etc. R. R. Co., In re, 76 Hun 76: 919.
 New Hannover Road, 18 Pa. St. 220: 1103.
 New Haven v. Heminway, 7 Conn. 186: 129.
 v. New Haven & D. R. R. Co., 62 Conn. 252: 833.
 v. New York etc. R. R. Co., 72 Conn. 225: 882, 1004.
 v. Sargent, 38 Conn. 50: 1489, 1490.
 New Haven etc. R. R. Co. v. County Comrs., 173 Mass. 12: 825.
 New Haven & Northampton Co. v. Northampton, 102 Mass. 116: 1439.
 New Haven Steam Saw Mill Co. v. New Haven, 72 Conn. 276: 1324.
 New Haven Water Co. v. Wallingford, 72 Conn. 293: 784, 802, 908.
 New Jersey etc. R. R. Co. v. Suydam, 17 N. J. L. 25: 1242, 1318, 1385.
 v. Tutt, 168 Ind. 205: 1119, 1120, 1176, 1222, 1245, 1251, 1310, 1314, 1445.
 New Jersey Midland Ry. Co. v. Van Syckle, 37 N. J. L. 496: 851, 854, 859.
 New Jersey So. R. R. Co. v. Chandler, 65 N. J. L. 173: 1419.
 New Jersey Southern R. R. Co. v. Long Branch Comrs., 39 N. J. L. 28: 750, 793.
 New Jersey Zinc & I. Co. v. Morris C. & B. Co., 44 N. J. Eq. 398: 119, 132.
 New London v. Davis, 74 N. H. 56: 1515.
 New Madrid Co. v. Phillip, 125 Mo. 61: 954, 966, 1556.
 Newman v. Chicago, 153 Ill. 469: 912, 914.
 v. Metropolitan El. R. R. Co., 118 N. Y. 618: 180, 265, 1176, 1196, 1216, 1296, 1297, 1300.
 New Marlborough v. County Comrs., 9 Met. 423: 1028.
 New Mexican R. R. Co. v. Hendricks, 6 N. M. 611: 254, 1124, 1125, 1294, 1550.
 New Milford Water Co. v. Watson, 75 Conn. 237: 936, 1043, 1112, 1242, 1323, 1423, 1434.
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 New & Old Decatur Belt etc. R. R. Co. v. Karcher, 112 Ala. 676: 674, 706, 958.
 New Orleans, In re, 20 La. An. 394: 440, 1137.
 New Orleans v. Cotonio, 111 La. 545: 1397, 1422.
 v. Elliott, 10 La. Ann. 59: 12.
 v. Manfree, 111 La. 927: 1143.
 v. Morgan, 111 La. 851: 1378.
 v. Murat, 119 La. 1093: 467.
 v. Shroeder, 111 La. 653: 1378.
 v. Sohr, 16 La. An. 393: 706, 972.
 v. Steinharde, 52 La. An. 1043: 514, 678, 1057, 1378.
 v. United States, 10 Pet. p. 723: 787.
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 v. Bougere, 23 La. An. 803: 1035.
 v. Brown, 64 Miss. 479: 441, 1506.
 v. Canal & C. R. R. Co., 47 La. An. 1476: 427, 762, 763, 764, 1283.
 v. Delamore, 114 U. S. 501: 242.
 v. Drake, 60 Miss. 621: 927.
 v. Frank, 39 La. An. 707: 1426.
 v. Frederick, 46 Miss. 1: 1036.
 v. Gay, 32 La. An. 471: 807, 808, 813, 1061, 1075.
 v. Hemphill, 35 Miss. 17: 929, 1000, 1084, 1094.
 v. Jones, 68 Ala. 48: 1161, 1631.
 v. Lagarde, 10 La. An. 150: 1183.
 v. McNeely, 47 La. An. 1298: 1378.
 v. Morese, 48 La. An. 1273: 1426.
 v. Moye, 39 Miss. 374: 253, 1179.
 v. New Orleans, 26 La. An. 517: 253, 297.
 v. New Orleans, 44 La. An. 728: 298, 301.
 v. New Orleans, 44 La. An. 748: 197, 298, 301.

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 v. Southern & Atlantic Tel. Co., 53 Ala. 211: 534, 773, 791, 1043, 1425.
 v. Zerringue, 23 La. Ann. 521: 1380.
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 v. Drainage Commission, 197 U. S. 453: 354.
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 v. Murrell, 36 La. An. 344: 1183, 1310, 1343.
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 v. Teller, 113 La. 733: 980, 1042, 1045, 1046, 1051, 1070.
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 v. St. Tammany Water Works Co., 4 Wood. 134: 15.
- Newport's Petition, 39 N. H. 67: 701, 1383.
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 v. Newport Light Co., 89 Ky. 454: 346.
 v. Temescal Water Co., 149 Cal. 531: 1614.
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 v. Lake, 101 Va. 334: 883.
 v. Lake, 105 Va. 311: 1348.
- New Reservoir, Matter of, 1 Sheldon (N. Y.) 408: 1253, 1378.
- New River Co. v. Johnson, 105 E. C. L. R. 434: 628.
 v. Johnson, 2 E & E. 435: 628.
- New Rochelle Water Co., Matter of, 46 Hun 525: 536.
- New Salem's Petition, 6 Pick. 470: 1034.
- Newton v. Agricultural Branch R. R. Co., 15 Gray 27: 1506.
 v. Ala. Midland R. R. Co., 99 Ala. 468: 996, 1406, 1408.
 v. Manufacturers Ry. Co., 115 Fed. 781: 421, 811.
 v. Newton, 188 Mass. 226: 808, 823.
 v. New York etc. R. R. Co., 72 Conn. 420: 320, 351, 371, 380, 388, 398.
 v. New York etc. R. R. Co., 72 Conn. 421: 191.
 v. Perry, 163 Mass. 319: 808, 1495.
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- Newville Road Case, 8 Watts 172: 1353.
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- New Whatcom v. Fairhaven Land Co., 24 Wash. 493: 69, 109, 118, 128, 137, 1603.
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 Matter of, 34 App. Div. 468: 696.
 Matter of, 39 App. Div. 589: 1210, 1276.
 Matter of, 40 App. Div. 281: 1221, 1227, 1319, 1323, 1565.
 Matter of, 42 App. Div. 198: 1556.
 Matter of, 73 App. Div. 394: 1493.
 Matter of, 74 App. Div. 197: 197, 809, 1497.
 Matter of, 74 App. Div. 343: 787, 1232.
 Matter of, 101 App. Div. 527: 1253, 1256, 1276.
 Matter of, 104 App. Div. 445: 920, 1053.
 Matter of, 113 App. Div. 84: 1253.
 Matter of, 114 App. Div. 904: 956.
 Matter of, 117 App. Div. 553: 1262.
 Matter of, 118 App. Div. 272: 1145, 1151, 1229.
 Matter of, 120 App. Div. 819: 806, 1174, 1183, 1195, 1202, 1205, 1218, 1220.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 Matter of, 122 App. Div. 890: 1260, 1276.
 Matter of, 124 App. Div. 465: 1259.
 Matter of, 125 App. Div. 393: 1211, 1257.
 Matter of, 128 App. Div. 150: 1559.
 Matter of, 6 Cow. 571: 1393.
 Matter of, 34 Hun 441: 687, 824, 1100, 1101, 1167, 1260.
 Matter of, 51 Hun 416: 773, 900.
 Matter of, 56 Misc. 306: 1151.
 Matter of, 56 Misc. 311: 1145, 1270.
 Matter of, 99 N. Y. 569: 687, 1100, 1101, 1167, 1260.
 Matter of, 135 N. Y. 253: 422, 776.
 Matter of, 157 N. Y. 409: 591.
 Matter of, 168 N. Y. 134: 115, 127, 132.
 Matter of, 174 N. Y. 26: 197, 809, 1497.
 Matter of, 182 N. Y. 281: 1253, 1256, 1276.
 Matter of, 186 N. Y. 237: 956.
 Matter of, 190 N. Y. 350: 806, 1174, 1183, 1195, 1202, 1205, 1218, 1220.
 Matter of, 192 N. Y. 295: 1260, 1276.
 Matter of, 193 N. Y. 117: 1211, 1257.
 Matter of, 193 N. Y. 503: 429.
 New York v. Bailey, 2 Denio 433: 1456.
 v. Bailey, 3 Hill 531: 1456.
 v. Dover Street, 1 Cow. 74: 1383.
 v. Furze, 3 Hill 612: 143.
 v. Hesterberg, 211 U. S. 31: 471.
 v. Knickerbocker Trust Co., 104 App. Div. 223: 1623.
 v. Lord, 17 Wend. 285: 17.
 v. Lord, 18 Wend. 126: 17.
 v. Mapes, 6 Johns. Ch. 46: 1670, 1705.
 v. Pents, 24 Wend. 668: 17.
 v. Pine, 185 U. S. 93: 74: 169, 1603, 1616, 1617.
 v. Starin, 106 N. Y. 1: 407, 413, 1608.
 v. Stone, 20 Wend. 139: 17.
 v. Twenty-third St. R. R. Co., 113 N. Y. 311: 476.
 New York Bridge Co., Matter of, 67 Barb. 295: 1117.
 New York Bridge Co.'s Petition, 4 Hun 635: 1074, 1075.
 New York & B. Bridge, In re, 75 Hun 558: 943, 945, 947, 1558.
 New York & B. Bridge, In re, 89 Hun 219: 943, 945, 947.
 New York & B. Bridge, Matter of, 18 App. Div. N. Y. 8: 1341.
 New York Cable Co., Matter of, 36 Hun 355: 922.
 New York Cable Co. v. New York, 104 N. Y. 1: 1048.
 New York Cement Co. v. Consolidated R. Cement Co., 84 App. Div. 635: 1496.
 v. Consolidated R. Cement Co., 178 N. Y. 167: 1496.
 New York Central etc. R. R. Co., Matter of, 67 Barb. 426: 731.
 Matter of, 5 Hun 86: 988.
 Matter of, 15 Hun 63: 1293.
 Matter of, 33 Hun 274: 896.
 Matter of, 35 Hun 306: 1277.
 Matter of, 59 Hun 7: 524, 816, 1061, 1065.
 Matter of, 60 N. Y. 116: 1463.
 Matter of, 66 N. Y. 407: 1045, 1061, 1066, 1074.
 Matter of, 70 N. Y. 191: 979.
 Matter of, 77 N. Y. 248: 524, 823.
 New York Cent. etc. R. R. Co. v. Aldridge, 135 N. Y. 83: 122, 131, 133.
 v. Auburn Interurban R. R. Co., 178 N. Y. 75: 282.
 v. Dailey, 57 Misc. 311: 713, 799, 802.
 v. Haffen, 90 Hun 260: 432.
 v. Marshall, 120 App. Div. 742: 1338.
 v. Marshall, 127 App. Div. 534: 1670, 1672.
 v. Metropolitan Gas Light Co., 5 Hun 201: 524.
 v. Metropolitan Gas Lt. Co., 63 N. Y. 326: 783, 789, 798, 802.
 v. New York, 22 App. Div. N. Y. 124: 1041, 1045.
 v. Rochester, 127 N. Y. 591: 141, 1606.
 v. State, 37 App. Div. N. Y. 57: 1716.
 v. Warren St. R. R. Co., 188 Pa. St. 85: 771.
 New York City and Northern R. R. Co. v. Central Union Tel. Co., 21 Hun 261: 775.
 New York Dist. Ry. Co., Matter of, 107 N. Y. 42: 275.
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 Matter of, 36 Hun 414: 1296.
 Matter of, 36 Hun 427: 1295, 1296, 1303.
 Matter of, 4 Hun 502: 1295.
 Matter of, 70 N. Y. 327: 260, 304.
 New York Elevated R. R. Co. v. Fifth Nat'l Bank, 135 U. S. 432: 267, 432, 1652, 1662.
 New York etc. R. R. Co.'s Appeal, 58 Conn. 532: 487.
 New York etc. R. R. Co., Matter of, 62 Barb. 85: 893, 912, 1017.
 Matter of, 21 How. Pr. 434: 1360.
 Matter of, 63 How. Pr. 265: 1377.
 Matter of, 1 How. Pr. N. S. 190: 1670.
 Matter of, 2 How. Pr. N. S. 225: 1377.
 Matter of, 4 Hun 381: 977.
 Matter of, 6 Hun 149: 1211.
 Matter of, 20 Hun 201: 784.
 Matter of, 21 Hun 250: 1380.
 Matter of, 26 Hun 194: 964.
 Matter of, 26 Hun 592: 1437.
 Matter of, 27 Hun 116: 1235, 1329.
 Matter of, 27 Hun 151: 1236.
 Matter of, 28 Hun 426: 1172.
 Matter of, 29 Hun 1: 1339.
 Matter of, 29 Hun 269: 117.
 Matter of, 29 Hun 602: 1377.
 Matter of, 29 Hun, 609: 1124, 1126.
 Matter of, 29 Hun 646: 1339.
 Matter of, 33 Hun 148: 714, 971, 1097, 1112, 1114.
 Matter of, 33 Hun 231: 1134.
 Matter of, 33 Hun 270: 772.
 Matter of, 33 Hun 293: 1359.
 Matter of, 33 Hun 639: 1242, 1377.
 Matter of, 35 Hun 220: 689, 1045, 1061, 1064.
 Matter of, 35 Hun 232: 1359.
 Matter of, 35 Hun 260: 1377.
 Matter of, 35 Hun 306: 1387.
 Matter of, 35 Hun 575: 1087.
 Matter of, 35 Hun 633: 1276, 1277.
 Matter of, 39 Hun 338: 1430, 1463.
 Matter of, 40 Hun 130: 1081.
 Matter of, 44 Hun 194: 745, 748.
 Matter of, 51 Misc. 333: 1463.
 Matter of, 60 N. Y. 116: 1430.
 Matter of, 64 N. Y. 60: 1376, 1377, 1393.
 Matter of, 77 N. Y. 248: 1061, 1062, 1063, 1066.
 Matter of, 88 N. Y. 279: 712.
 Matter of, 89 N. Y. 453: 996.
- New York etc. R. R. Co. Matter of, 93 N. Y. 385: 1377, 1388.
 Matter of, 94 N. Y. 287: 1436, 1440.
 Matter of, 98 N. Y. 12: 1430, 1463, 1465.
 Matter of, 98 N. Y. 447: 1242, 1377.
 Matter of, 99 N. Y. 12: 689, 803, 1045, 1061, 1064.
 Matter of, 101 N. Y. 685: 133, 1451.
 Matter of, 102 N. Y. 704: 1377.
 Matter of, 110 N. Y. 374: 772.
 New York etc. Ry. Co. v. Arnot, 27 Hun 151: 1139, 1196.
 v. Blacker, 178 Mass. 386: 1219, 1262.
 v. Boston etc. R. R. Co., 36 Conn. 196: 9, 693, 743, 761, 908.
 v. Bridgeport Traction Co., 65 Conn. 410: 272, 328, 657, 767, 769, 1282, 1610.
 v. Bristol, 62 Conn. 527: 487.
 v. Bristol, 151 U. S. 556: 487.
 v. Capner, 49 N. J. L. 555: 1095, 1099.
 v. Church, 31 Hun 440: 1104.
 v. Coburn, 6 How. Pr. 223: 1408.
 v. Comstock, 60 Conn. 200: 1476, 1478, 1483, 1647.
 v. Drummond, 46 N. J. L. 644: 751, 798.
 v. Drury, 133 Mass. 167: 1320.
 v. Fair Haven etc. R. R. Co., 70 Conn. 610: 424.
 v. Forty Second St. R. R. Co., 50 Barb. 285, 410.
 v. Forty Second St. R. R. Co., 50 Barb. 309: 410.
 v. Forty Second St. R. R. Co., 26: How. Pr. 68: 410.
 v. Gennett, 37 Hun 317: 1144, 1270, 1348.
 v. Gunnison, 1 Hun 496: 527, 715.
 v. Gunnison, 3 N. Y. Supn. Ct. 632: 715.
 v. Hamlet Hay Co. 149 Ind. 344: 94, 1716.
 v. Hammond, 132 Ind. 475: 1540, 1543, 1544, 1545.
 v. Illy, 79 Conn. 526: 947, 957, 1004, 1135.
 v. Jones, 94 Md. 24: 154, 156.
 v. Kip, 46 N. Y. 546: 524, 525, 709, 710, 714.
 v. Le Fevre, 27 Hun 537: 1208.
 v. Long, 69 Conn. 424: 498, 684, 911.
 v. Long, 72 Conn. 10: 127, 128, 129.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. McBride, 45 Misc. 516: 1438.
 v. Miller, 165 Mass. 514: 1485.
 v. New Haven (Conn.) 71 Atl. 780: 749, 1287.
 v. New York etc. R. R. Co., 11 Abb. N. C. 386: 912.
 v. Offield, 77 Conn. 417: 499, 529, 738, 743, 745, 788.
 v. Offield, 78 Conn. 1: 529, 745.
 v. Paterson, 61 N. J. L. 408: 750, 1666.
 v. Price, 4 Penny. 200: 1107, 1408.
 v. Providence, 16 R. I. 746: 840.
 v. Railroad Comrs., 162 Mass. 81: 862.
 v. Rhodes (Ind.) 86 N. E. 840: 749, 1288.
 v. Speelman, 12 Ind. App. 372: 151.
 v. Stanley's Heirs, 34 N. J. Eq. 55: 855, 1540, 1543, 1631.
 v. Stanley's Heirs, 35 N. J. Eq. 283: 855, 1540, 1543, 1544.
 v. Stanley's Heirs, 39 N. J. Eq. 361: 1317.
 v. Townsend, 36 Hun 630: 1084, 1105.
 v. Trimmer, 53 N. J. L. 1: 1469, 1633.
 v. Waterbury, 60 Conn. 1: 487, 753, 1287, 1288.
 v. Welsh, 143 N. Y. 411: 684, 698.
 v. Wheeler, 72 Conn. 481: 740.
 v. Young, 33 Pa. St. 175: 108, 684.
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 v. Smith, 148 N. Y. 540: 694, 738, 1049.
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 Matter of, 68 Hun 391: 1409.
 Matter of, 108 N. Y. 375: 495, 498, 507, 528, 672, 675, 676.
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- Nicetown Lane, Matter of, 11 Phila. 377: 1094.
- Nicholai v. Vernon, 88 Wis. 551: 1577.
- Nichols v. Ann Arbor etc. R. R. Co., 87 Mich. 361: 240, 241, 271, 280, 282, 324, 1586, 1587, 1591.
 v. Bridgeport, 23 Conn. 189: 1086, 1185, 1516, 1517.
 v. Duluth, 40 Minn. 389: 194, 195, 229, 230, 440, 442, 1453, 1488.
 v. Norfolk etc. R. R. Co., 120 N. C. 495: 152, 1649, 1655.
 v. Richmond, 162 Mass. 170: 364, 371, 377, 379, 391, 398, 666.
 v. Salem, 14 Gray 490: 1034, 1576.
 v. Somerset etc. R. R. Co., 43 Me. 356: 1163, 1165, 1522.
 v. Sutton, 22 Ga. 369: 1574.
- Nicholson v. Me. Cent. R. R. Co., 97 Me. 43: 911.
 v. New York & N. H. R. R. Co., 22 Conn. 74: 246, 319, 623, 1185.
 v. Stockett, Walker, Miss. 67: 377, 400.
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- Nicherson v. Lynch, 135 Mo. 471: 707.
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- Nicks v. Chicago etc. R. R. Co., 84 Ia. 27: 226, 620, 621, 1293, 1304.
- Nicoll v. New York etc. Co., 62 N. J. L. 156: 339.
 v. New York etc. Co., 62 N. J. L. 733: 338.
 v. New York & Erie R. R. Co., 12 N. Y. 121: 827, 837, 838, 839, 842.
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 Nieman v. Detroit Suburban St. R. R. Co., 103 Mich. 256: 272, 279, 1586, 1590.
 Niemeyer v. Little Rock Junction R. R. Co., 43 Ark. 111: 527, 716, 1048.
 Niles v. Los Angeles, 125 Cal. 572: 888.
 Ninety-Fourth St. Opening, Matter of, 22 Misc. N. Y. 32: 1327.
 Ninth Ave., Matter of, 45 N. Y. 729: 1266.
 Ninth Ave. R. R. Co. v. New York Elevated R. R. Co., 3 Abb. New Cases, 347: 260.
 Nischen v. Hawes (Ky.), 21 S. W. 1049: 821, 973, 1376.
 Nishnabotna Dr. Dist. v. Campbell, 154 Mo. 151: 706, 1011, 1017, 1384.
 Nittany Val. R. R. Co. v. Empire Steel & I. Co., 218 Pa. St. 224: 1560, 1563.
 Noble v. Aasen, 8 N. D. 77: 155.
 v. Des Moines & St. Louis Ry. Co., 61 Ia. 637: 1441.
 v. St. Albans, 56 Vt. 522: 144.
 Noble Street Case, 5 Whart. 333: 1383.
 Noble Street, Matter of, 1 Ashmead 276: 1563.
 Noblesville v. Lake Erie & W. R. R. Co., 130 Ind. 1: 892.
 Noeton v. Penn. R. R. Co., 32 Pa. Supr. Ct. 555: 394.
 Noe v. Chicago etc. R. R. Co., 76 Ia. 360: 91, 150, 1123, 1132.
 Noel v. Ewing, 9 Ind. 37: 943.
 v. Sale, 1 Call 495: 1425.
 Nolan v. Brookway Park Imp. Co., 76 Hun 458: 122.
 v. New Britain, 69 Conn. 668: 83, 1604.
 Nolensville v. Baker, 4 Humph. 315: 422.
 Noll v. Dubuque etc. R. R. Co., 32 Ia. 66: 8, 1497, 1502, 1505.
 Nolmsville Turnpike Co. v. Quimby, 8 Humph. 476: 1511.
 Nolte v. Cincinnati, 3 Ohio C. C. 503: 220, 602, 633.
 Noon v. Scranton City, 7 Pa. Co. Ct. 123: 438, 1496, 1546, 1548.
 Noonan v. Albany, 79 N. Y. 470: 233.
 Norfleet v. Cromwell, 70 N. C. 634: 571, 579, 584.
 Norfolk v. Chamberlain, 89 Va. 196: 14, 1180, 1219.
 Norfolk v. Nottingham, 96 Va. 34. 888.
 Norfolk etc. R. R. Co. v. Carter, 91 Va. 587: 148, 149, 155, 156, 1455, 1456.
 v. Davis, 58 W. Va. 620: 1110, 1230, 1232, 1241, 1268.
 v. Lynchburg Cotton Mills Co., 106 Va. 376: 709, 718.
 v. Nighbert, 46 W. Va. 202: 1377.
 v. Pendleton, 156 U. S. 667: 480, 482.
 v. Pendleton, 88 Va. 350: 481.
 v. Perdue, 40 W. Va. 442: 1547.
 v. Stephens, 85 Va. 302: 1317.
 v. Consolidated Turnpike Co., 100 Va. 243: 297, 298.
 v. Ely, 101 N. C. 8: 1042, 1074, 1076.
 Norfolk Southern R. R. Co. v. Ely, 95 N. C. 77: 697, 1395, 1397, 1402.
 Norman v. Ince, 8 Okla. 412: 145.
 Normandale Lumber Co. v. Knight, 89 Ga. 111: 520, 521, 1058.
 Norrell v. Augusta Ry. & Elec. Co., 116 Ga. 313: 1491.
 Norris v. Baltimore, 44 Md. 598: 1689.
 v. Clymer, 2 Pa. St. 277: 458.
 v. Pueblo, 12 Colo. App. 290: 958.
 v. Vermont Central R. R. Co., 28 Vt. 99: 87, 846.
 v. Waco, 57 Tex. 635: 462, 466.
 Norristown's Appeal, 3 Walker (Pa. Supr. Ct.) 146: 616, 630, 632, 636.
 Norristown etc. Turnpike Co. v. Burkett, 26 Ind. 53: 923, 926, 1135, 1159.
 Norristown & Whitpain Road, 4 Pa. St. 337: 1367.
 North Alton v. Dorsett, 59 Ill. App. 612: 629, 1306, 1307.
 North Am. Cold Storage Co. v. Chicago, 211 U. S. 306: 485, 486.
 Northampton v. Abell, 127 Mass. 507: 1514.
 Northampton Bridge Case, 116 Mass. 442: 781, 824, 1401.
 North Ark. etc. Ry. Co. v. Cole, 71 Ark. 38: 1082, 1314, 1315.
 North Baltimore Pass. R. R. Co. v. Baltimore, 75 Md. 247: 301, 408.
 v. North Ave. R. R. Co., 75 Md. 233: 427, 762, 763, 764, 1283.
 North Berwick v. Comrs. of York, 25 Me. 69: 516.
 North Branch Canal Co. v. Hiren, 44 Pa. St. 418: 809.
 North Carolina R. R. Co. v. Carolina Central R. R. Co., 83 N. C. 489: 761.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 North Chester v. Eckfeldt, 1 Monaghan (Pa. Supm. Ct.) 732: 618, 1128, 1130, 1649, 1656, 1718:
 North Chicago City Ry. Co. v. Lake View, 105 Ill. 207: 487.
 North Chicago St. R. R. Co. v. Chetham, 58 Ill. App. 318: 1586.
 North Chillicothe v. Burr, 185 Ill. 322: 892.
 North Coast Ry. Co. v. No. Pac. Ry. Co. 48 Wash. 529: 758, 759.
 Northeastern Neb. R. R. Co. v. Frazier, 25 Neb. 42: 966, 1208, 1213, 1426.
 v. Frazier, 25 Neb. 53: 1129, 1223.
 North Eastern R. R. Co. v. Payne, 8 Rich. S. C. 177: 726.
 v. Sineath, 8 Rich. L. 185: 1317.
 Northern Central R. R. Co. v. Baltimore, 21 Md. 93: 1583, 1622.
 v. Baltimore, 46 Md. 425: 752, 1291.
 v. Canton Co., 104 Md. 682: 1580, 1589.
 v. Harrisburg Elec. Co., 177 Pa. St. 142: 1611.
 v. Holland, 117 Pa. St. 613: 327, 643, 691, 692.
 Northern Coal & Iron Co. v. Wilkes-Barre, 218 Pa. St. 269: 780.
 Northern Countries Invest. Trust Co. v. Enyard, 24 Wash. 366: 1480.
 Northern Ohio Ry. Co. v. Hancock Co. Comrs., 63 Ohio St. 32: 581, 776.
 Northern Pac. etc. R. R. Co. v. Coleman, 3 Wash. 228: 1329, 1425.
 v. Forbes, 15 Mont. 452: 1233, 1480, 1481.
 Northern Pac. R. R. Co. v. B. & M. R. R. Co., 4 Fed. 298: 1570.
 v. Duncan, 87 Minn. 91: 1229, 1262.
 Northern Pac. R. R. Co. v. Ely, 25 Wash. 384: 1480.
 v. Georgetown, 50 Wash. 580: 1701, 1703.
 v. Hasse, 28 Wash. 353: 1480.
 v. Jackman (Dak.) 50 N. W. 123: 1533.
 v. Murray, 87 Fed. 648: 1663.
 v. St. Paul, Minneapolis etc. R. R. Co., 1 McCrary 302: 765, 1160, 1571.
 v. Smith, 171 U. S. 260: 1631.
 v. Spokane, 45 Wash. 229: 1480.
 v. Spokane, 56 Fed. 915: 879, 883, 1479.
 v. Spokane, 64 Fed. 506: 883.
 Northern Pac. R. R. Co. v. Townsend, 190 U. S. 267: 1479.
 Northern Pacific Terminal Co. v. Lowenberg, 9 Sawyer 348: 931.
 v. Portland, 14 Ore. 24: 1086, 1517.
 Northern R. R. Co. v. Concord & Claremont R. R. Co., 27 N. H. 183: 759, 1364.
 v. Earhart, 167 Mo. 612: 1213.
 v. Englewood, 62 N. J. L. 188: 915.
 Northern Traction Co. v. Dunn, 37 Ind. App. 248: 1192.
 v. Rainer, 37 Ind. App. 264: 1192.
 Northern Transportation Co. v. Chicago, 7 Biss. 45: 437.
 v. Chicago, 99 U. S. 635: 437.
 North Hempstead v. Gregory, 53 App. Div. 350: 127, 129, 130.
 North Hudson Co. R. R. Co. v. Boor-aem, 28 N. J. Eq. 450: 947, 1227, 1347, 1352, 1564.
 North Judson v. Lighteap, 41 Ind. App. 565: 234.
 North Lebanon Tp. Road, 3 Pa. Co. Ct. 401: 1099.
 North Lebanon Tp. Road, 6 Pa. Co. Ct. 598: 1364.
 North Manheim v. Reading etc. R. R. Co., 18 Phil. 650: 781.
 North Missouri R. R. Co. v. Gott, 25 Mo. 540: 697.
 v. Lackland, 25 Mo. 515: 1424, 1669, 1685.
 v. Reynal, 25 Mo. 534: 1424, 1669, 1685.
 North Pacific R. R. Co. v. Reynolds, 50 Cal. 90: 1309.
 North Penn. R. R. Co. v. Davis, 26 Pa. St. 238: 952, 961, 1257.
 v. Inland Traction Co., 205 Pa. St. 579: 328.
 North Reading v. Co. Comrs., 7 Gray 109: 1366.
 North Riv. Boom Co. v. Smith, 15 Wash. 338: 958.
 North River Water Front. Matter of, 118 App. Div. 685: 1257, 1276.
 North River Water Front. Matter of, 120 App. Div. 849: 1196.
 North River Water Front, Matter of, 189 N. Y. 508: 1257, 1258, 1276.
 North Shore R. R. Co. v. Pion, 14 App. Cas. 612: 127, 128, 129, 131.
 v. Pion, 14 Duvall 677: 127, 128, 131.
 North Spring Water Co. v. Tacoma, 21 Wash. 517: 408, 409.
 North Thirteenth Street. Matter of, 5 Hun 175: 1461, 1670.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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- North Vernon v. Voegler, 89 Ind. 77: 233.
v. Voegler, 103 Ind. 314: 142, 210, 237, 1251, 1551, 1648, 1656.
- North & West Branch Ry. Co. v. Swank, 105 Pa. St. 555: 846.
- Northwestern Fertilizing Co. v. Hyde Park, 70 Ill. 634: 14, 452, 455, 469.
v. Hyde Park, 97 U. S. 659: 14, 452, 455, 469.
- N. W. Telephone Exch. Co. v. Chicago etc. Ry. Co., 76 Minn. 334: 682, 775, 793, 796, 977, 1072.
v. Minneapolis, 81 Minn. 140: 360, 362, 489, 682.
v. Twin City Telephone Co. 89 Minn. 495: 418, 419, 1621.
- Northwood v. Raleigh, 3 Ontario 347: 156.
- Norton v. Hodges, 100 Mass. 241: 961.
v. London etc. Ry. Co., L. R. 9 Ch. 623: 1494.
v. Peck, 3 Wis. 714: 1165.
v. Studley, 17 Ill. 556: 1162.
v. Truitt, 70 N. J. L. 611: 1381, 1382.
v. Walkill Valley R. R. Co., 61 Barb. 476: 824.
v. Walkill Valley R. R. Co., 63 Barb. 77: 1017.
v. Walkill Valley etc. R. R. Co., 42 How. Pr. 228: 679.
- Norvall v. Canada Southern R. R. Co., 28 U. C. C. P. 309: 1523, 1626.
- Nowalk v. Blatz, 9 Ohio C. C. 417: 83, 866.
- Norway Plains Co. v. Bradley, 52 N. H. 86: 104.
- Norwich v. Story, 25 Conn. 44: 700.
- Norwich R. R. Co. v. Wodehouse, 11 Beav. 282: 1619.
- Norwegian Street, 81 Pa. St. 349: 915.
- Norwood, In re, 161 Mass. 259: 487.
- Norwood v. Baker, 172 U. S. 269: 10, 14, 23, 464, 1203, 1219, 1432.
v. Gonzales Co., 79 Tex. 218: 700, 1567.
- Norwood etc. R. R. Co., Matter of, 47 Hun 489: 1347.
- Nosser v. Seeley, 10 Neb. 460: 898.
- Nottingham v. B. & P. R. R. Co., 3 McArthur 517: 250, 319.
- Novich v. Trinity etc. Ry. Co., 45 Tex. Civ. App. 664: 654, 1337.
- Novotney v. Danforth, 9 S. D. 301: 440, 441.
- Noyes v. Chapin, 6 Wend. 461: 829.
- Noyes v. Cosselman, 29 Wash. 635: 1607.
v. Mason City, 53 Ia. 418: 1550.
v. Springfield, 116 Mass. 87: 1416.
- Nugent v. New York, 58 Misc. 453: 609, 1718.
- Null v. White Water Valley Canal Co., 4 Ind. 431: 1522.
v. Zierle, 52 Mich. 540: 983, 1419.
- Nunnemaker v. Columbia etc. R. R. Co., 47 S. C. 485: 710, 846.
- Nussbaum v. Bell Co., 97 Tex. 86: 153.
- Nutter v. Gallagher, 19 Or. 375: 112.
- Nutting v. Kings Co. El. R. R. Co., 91 Hun 251: 1425.
- Nye v. Taunton Branch R. R. Co., 113 Mass. 277: 838.
- Nypano Ry. Co. v. Wadsworth Salt Co., 9 Ohio C. C. 114: 1109, 1244, 1273.
- O.
- Oak Cliff Sewerage Co. v. Marsalis, 30 Tex. Civ. App. 42: 892.
- Oakland v. Oakland Water Front Co., 118 Cal. 160: 118.
v. Thompson, 151 Cal. 572: 698.
- O'Bannan v. Jackson, Sneed 201: 1360.
- Oberfelder v. Metropolitan El. R. R. Co., 138 N. Y. 181: 1372.
- O'Brien v. Ball, 119 Mass. 28: 1255.
v. Baltimore Belt R. Co., 74 Md. 363: 324, 622, 1581, 1592.
- v. Central Iron etc. Co., 158 Ind. 218: 190, 351, 369, 372, 382.
- v. Commissioners of Baltimore County, 51 Md. 15: 734.
- v. Norwich & Worcester Ry. Co., 17 Conn. 371: 133.
- v. Philadelphia, 150 Pa. St. 589: 630, 632, 636.
- v. St. Paul, 25 Minn. 331: 67, 233.
- v. Shenley Park etc. Ry. Co., 194 Pa. St. 336: 1229.
- v. Penn. Schuylkill Val. R. R. Co., 4 Mont. Co. L. R. 57: 641, 1649.
- v. Penn. S. V. R. R. Co., 119 Pa. St. 184: 618, 630, 636, 646, 1549, 1550, 1652, 1660.
- Obst v. Covell, 93 Minn. 30: 1222, 1561.
- Occum Co. v. Sprague Manuf. Co., 35 Conn. 496: 548, 899.
- Ocean City R. R. Co. v. Bray, 57 N. J. Eq. 164: 1577.
- Ocean City Land Co. v. Ocean City, 73 N. J. L. 493: 420.
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- [The references are to the pages: Vol. I. pp. 1-742; Vol. II., pp. 743-1719.]
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 Oconee Elec. Lt. & P. Co. v. Carter, 111 Ga. 106: 679, 708, 726, 1623.
 O'Connell v. Bowman, 45 Ill. App. 654: 869.
 v. Chicago Terminal Transfer R. R. Co., 184 Ill. 308: 242, 868, 1580.
 v. East Tenn. V. & G. R. R. Co., 87 Ga. 246: 89, 150.
 O'Connor v. Fond du Lac, A. & P. Ry. Co., 52 Wis. 526: 158.
 v. Nova Scotia Tel. Co., 22 Duvall 276: 350, 1488.
 v. Pittsburgh, 18 Pa. St. 187: 211.
 v. St. Louis etc. R. R. Co., 56 Iowa 735: 251, 320, 351.
 v. Southern Pac. R. R. Co., 122 Cal. 681: 1580.
 Octoraro Water Co.'s Petition, 15 Pa. Dist. Ct. 767: 169, 934.
 Odd Fellows Cem. Assn. v. San Francisco, 140 Cal. 226: 473.
 v. San Francisco, 140 Cal. 609: 14.
 Ode v. Manhattan R. R. Co., 56 Hun 199: 1298, 1651, 1658.
 O'Dea v. State, 16 Neb. 241: 1505.
 Odell v. Bretney, 62 App. Div. 595: 357.
 v. DeWitt, 53 N. Y. 643: 1158.
 v. Metropolitan El. R. R. Co., 3 Misc. 335: 1664.
 v. New York El. R. R. Co., 130 N. Y. 690: 1296, 1299, 1300.
 Odneal v. City of Sherman, 77 Tex. 182: 355.
 O'Donnell v. White, 23 R. I. 318: 231, 439.
 v. White, 24 R. I. 483: 159, 212, 612, 616.
 v. Preston, 74 App. Div. 86: 357.
 v. Syracuse, 102 App. Div. 80: 79.
 v. Syracuse, 184 N. Y. 1: 79.
 Odum v. Rutledge etc. R. R. Co., 94 Ala. 488: 1116, 1481.
 Oehler v. New York El. R. R. Co., 4 App. Div. 152: 1664.
 Ortman v. Union Pac. Ry. Co., 32 Kan. 419: 1408.
 Oettinger v. District of Columbia, 18 App. Cas. D. C. 375: 881.
 Offield v. New York etc. R. R. Co., 203 U. S. 372: 745.
 Offutt v. Montgomery Co., 94 Md. 115: 324.
 Oftelie v. Hammond, 78 Minn. 275: 147, 149.
 Ogburn v. Conner, 46 Cal. 346: 145.
 Ogden v. Philadelphia, 143 Pa. St. 430: 25, 618, 630, 633, 636, 1718.
 Ogden v. Stokes, 25 Kan. 517: 1520.
 Ogden City R. R. v. Ogden City, 7 Utah 207: 298, 763.
 Ogden St. Opening, Matter of, 63 Hun 188: 1082.
 Ogle v. Philadelphia etc. R. R. Co., 3 Hous. Del. 302: 864.
 O'Hara v. Lexington & Ohio R. R. Co., 1 Dana (Ky.) 232: 524.
 v. Pennsylvania R. R. Co., 25 Pa. St. 445: 991, 1358.
 O'Hara Tp. Road, In re, 87 Pa. St. 366: 1366.
 O'Hare v. Chicago etc. R. R. Co., 139 Ill. 151: 677, 679, 1074, 1143, 1426.
 v. Dubuque, 22 Iowa 144: 465.
 v. Railroad Co., 139 Ill. 151: 1046.
 Ohio v. Carman, Tappan (Ohio) 162: 1372.
 Ohio etc. R. R. Co. v. Barker, 134 Ill. 470: 1100, 1101.
 v. Bridgeport, 63 Ill. App. 224: 780, 1645.
 v. Combs, 43 Ill. App. 119: 91, 152, 159.
 v. Long, 52 Ill. App. 670: 91.
 v. Neutzel, 43 Ill. App. 108: 91, 152, 1454, 1651, 1653.
 v. Ramey, 139 Ill. 9: 90, 94.
 v. Ramey, 39 Ill. App. 409: 151.
 v. Hillman, 143 Ill. 127: 90, 93, 94, 1649, 1653.
 v. Hillman, 43 Ill. App. 78: 90, 94, 152, 1454, 1635.
 v. Webb, 142 Ill. 402: 90.
 v. Wallace, 14 Pa. St. 245: 1365.
 v. Dooley, 32 Ill. App. 228: 158.
 v. Gallagher, 33 Pa. Ct. 489: 1506.
 v. Gallagher, 17 Pa. Dist. Co. 142: 1506.
 v. Russell, 115 Ill. 52: 487.
 v. Wachter, 123 Ill. 440: 90, 93, 1548, 1651, 1653, 1662.
 v. Wachter, 23 Ill. App. 415: 1638.
 v. Webb, 142 Ill. 402: 94.
 Ohio Oil Co. v. Indiana, 177 U. S. 190: 164, 471.
 v. Indiana, 177 U. S. 212: 471.
 v. Indiana, 177 U. S. 213: 471.
 v. State, 150 Ind. 694: 471.
 v. State, 150 Ind. 698: 471.
 Ohio Riv. R. R. Co. v. Blake, 38 W. Va. 718: 1086, 1427.
 v. Harness, 24 W. Va. 511: 1360.
 v. Johnson, 50 W. Va. 499: 1472.
 v. Ward, 35 W. Va. 481: 1098, 1581.
 Ohio Valley R. & T. Co. v. Kerth, 130 Ind. 314: 1131.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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- Oklahoma City etc. Ry. Co. v. Dunham, 39 Tex. Civ. App. 575: 323, 1458, 1472.
- Old Colony etc. R. R. Co. v. Plymouth Co., 14 Gray 155: 55, 67, 1289, 1290, 1292.
- Old Colony R. R. Co. v. Fall River, 147 Mass. 455: 749, 1510, 1614. v. F. P. Robinson Co., 176 Mass. 387: 1141.
- v. Framingham Water Co., 153 Mass. 561: 793, 796, 1169.
- v. Miller, 125 Mass. 1: 1319, 1320, 1331.
- Old Colony R. R. Co., In re, 163 Mass. 356: 487.
- Old Town v. Dooley, 81 Ill. 255: 1487.
- Olean v. Steyner, 135 N. Y. 341: 366, 1137, 1327, 1328.
- Olean St. R. R. Co. v. Pa. R. R. Co., 75 App. Div. 412: 772.
- v. Pa. R. R. Co., 175 N. Y. 468: 772.
- O'Leary v. Pittsburg Terminal Ry. Co., 210 Pa. St. 522: 819, 1569, 1572.
- Olive v. Sabine etc. R. R. Co., 11 Tex. Civ. App. 208: 835, 1478.
- Oliver v. Monona County, 117 Ia. 43: 975, 1016, 1510, 1518.
- v. Thompson's Run Bridge Co., 197 Pa. St. 344: 1050.
- v. Union Point etc. R. R. Co., 83 Ga. 257: 922, 1397, 1461, 1463, 1570.
- Oliver Schlemmer Co. v. Steinman & M. Furn. Co., 2 Ohio N. P. (N. S.) 293: 368, 370, 375, 404, 405, 1596.
- v. Steinman & M. Furn. Co., 7 Ohio C. C. (N. S.) 468: 368, 375, 404, 405, 1596.
- Oliphant v. Atkinson Co. Comrs., 18 Kan. 386: 969, 1518, 1571.
- Olmstead v. Camp, 33 Conn. 532: 504, 548.
- v. Proprietors of the Morris Aqueduct Co., 47 N. J. L. 311: 536, 1044, 1060, 1062, 1063, 1066.
- v. Proprietors of the Morris Aqueduct Co., 46 N. J. L. 495: 536, 1044, 1060, 1062, 1063, 1066.
- Olney v. Wharf, 115 Ill. 519: 243, 1553.
- Olson v. Merrill, 42 Wis. 203: 104, 125.
- Olson v. St. Paul etc. R. R. Co., 38 Minn. 419: 154.
- v. Seattle, 30 Wash. 687: 939, 1569.
- Olympia v. Mann, 1 Wash. 380: 468.
- Omaha v. Croft, 60 Neb. 57: 1233, 1234, 1546.
- v. Clarke, 66 Neb. 33: 1556, 1642.
- v. Flood, 57 Neb. 124: 1718.
- v. Hanover, 49 Neb. 1: 879.
- v. Howell Lumber Co., 30 Neb. 633: 1179.
- v. Kramer, 25 Neb. 492: 630, 635, 659, 660, 664, 667, 1124, 1306, 1337.
- v. McGavock, 47 Neb. 313: 227.
- v. Redick, 61 Neb. 163: 1546, 1548.
- v. Schaller, 26 Neb. 522: 630, 1216, 1308.
- v. Williams, 52 Neb. 40: 619.
- Omaha Belt R. R. Co. v. McDermott, 25 Neb. 717: 640, 664, 1243, 1294, 1300.
- Omaha B. & T. Ry. Co. v. Reed, 3 Neb. (Unof.) 793: 947, 962, 1399, 1404.
- v. Reed, 69 Neb. 514: 947, 961, 1399, 1404.
- v. Whiting, 68 Neb. 389: 1347.
- Omaha etc. R. R. Co. v. Brown, 14 Neb. 170: 88, 94.
- v. Brown, 16 Neb. 161: 88.
- v. Brown, 29 Neb. 492: 93, 1664.
- v. Doney, 3 Kan. App. 515: 1176, 1243.
- v. Gerrard, 17 Neb. 587: 1136.
- v. Janecek, 30 Neb. 276: 448, 640, 654, 655, 671, 1294, 1303, 1337.
- v. Menk, 4 Neb. 21: 1343, 1535.
- v. Moschel, 38 Neb. 281: 449, 654, 1715.
- v. Redick, 16 Neb. 313: 1631.
- v. Rickards, 38 Neb. 847: 864, 867, 868, 871, 980, 981, 984.
- v. Rogers, 16 Neb. 117: 640.
- v. Standen, 22 Neb. 343: 91, 1650, 1653, 1716.
- v. Standen, 29 Neb. 622: 93.
- v. Struden, 22 Neb. 343: 659.
- v. Walker, 17 Neb. 432: 1109, 1112, 1329.
- Omaha Horse R. R. Co. v. Cable Tramway Co., 32 Fed. 727: 667.
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- Omaha, Niobrara & Black Hills R. R. Co. v. Umstead, 17 Neb. 459: 1112.
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- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 O'Malley v. Commonwealth, 182 Mass. 196: 1138, 1141, 1148.
 O'Neal v. Sherman, 77 Tex. 182: 709, 839, 1488, 1595.
 One Hundred & Seventy-third Street, In re, 78 Hun 487: 1328.
 One Hundreth & Sixteenth Street, Opening of, Matter of, 1 App. Div. 436: 879.
 One Hundred and Sixty-third St., Matter of, 61 Hun 365: 929, 1384.
 One Hundred and Thirty-eighth St., Matter of, 60 How. Pr. 290: 1379.
 One Hundreth & Twenty-seventh Street, Matter of, 56 How Pr. 60: 432.
 Oneida St., Matter of, 37 App. Div. N. Y. 266: 1005.
 Oneida St. Matter of, 22 Misc. N. Y. 235: 947, 1005.
 O'Neil v. Armstrong, 17 Phila. 273: 357.
 O'Neill v. Hoboken, 72 N. J. L. 67: 577.
 v. Hudson, 41 N. J. L. 161: 1673, 1675, 1684.
 Oneonta etc. R. R. Co. v. Coopers-town etc. R. R. Co., 85 App. Div. 284: 772.
 Onondaga Co. v. White, 38 Misc. 587: 1670.
 Onset St. R. R. Co. v. County Comrs., 154 Mass. 395: 271, 622, 1415.
 Onthank v. Lake Shore etc. Ry. Co., 71 N. Y. 194: 835, 864.
 Opelousas etc. Ry. Co. v. Bradford, 118 La. 506: 1222, 1227, 1228, 1229, 1242.
 v. St. Landry Cotton Oil Co., 118 La. 290: 1222.
 Opening First St., Matter of, 66 Mich. 42: 683.
 Opening of Streets through Girard College Grounds, 10 Phila. 145: 747.
 Opinion of the Justices, 25 N. H. 538: 63.
 Opinion of the Justices, 41 N. H. 555: 594.
 Opinion of Justices, 186 Mass. 603: 462.
 Opinion of Justices, 190 Mass. 611: 462.
 Opinion of the Justices, 103 Me. 506: 14, 474.
 Opinion of the Justices, 66 N. H. 629: 20, 22, 789, 1156, 1173.
 Opp v. Timmons, 149 Ind. 236: 514.
 Oran Comrs. v. Hoblit, 19 Ill. App. 250: 1412.
 Orange Belt R. R. Co. v. Craver, 32 Fla. 28: 1128, 1176, 1243, 1375.
 Orange Co. v. Ellsworth, 98 App. Div. 275: 704, 1029, 1042, 1055.
 Orange House v. Montgomery Co., 218 Pa. St. 204: 1407.
 Orange Street, Matter of, 50 How. Pr. 244: 1022.
 Ordway v. Canisteo, 66 Hun 569: 80.
 O'Reiley v. Kankakee Valley Draining Co., 32 Ind. 169: 501, 564, 565, 566, 571.
 O'Reilly v. New York El. R. R. Co., 76 Hun 283: 1296, 1299.
 v. New York El. R. R. Co., 148 N. Y. 347: 1296, 1299, 1554, 1614.
 Oregon v. Memphis etc. R. R. Co., 51 Ark. 235: 1537.
 Oregon & Cal. R. R. Co. v. Barlow, 3 Ore. 311: 1112, 1223.
 Oregon Cascade R. R. Co. v. Bailey, 3 Ore. 164: 753.
 Oregon Central R. R. Co. v. Wait, 3 Ore. 91: 1206.
 v. Wait, 3 Ore. 428: 1206.
 Oregon City v. Oregon etc. R. R. Co., 44 Ore. 165: 875, 882.
 Oregon City Trans. Co. v. Columbia St. Bridge Co., 53 Fed. 549: 96.
 Oregon etc. R. R. Co. v. Mitchell, 7 Utah 505: 1223.
 v. Oregon Steam Nav. Co., 3 Ore. 178: 827, 1386.
 v. Day, 3 Wash. Ter. 252: 856, 1712.
 Oregon R. R. & Nav. Co. v. McCormick, 46 Wash. 45: 1080.
 v. Mosler, 14 Ore. 519: 1348.
 v. Owsley, 3 Wash. Ter. 38: 1247, 1249, 1356.
 Oregon Ry. Co. v. Bridwell, 11 Ore. 282: 1392.
 v. Hill, 9 Ore. 377: 1159.
 Oregon Ry. etc. Co. v. Oregon Real Estate Co., 10 Ore. 444: 894, 897.
 Oregon Short Line R. R. Co. v. Fox, 28 Utah 311: 1206.
 v. Jones, 29 Utah 147: 1322.
 v. Postal Tel. Cable Co., 104 Fed. 623: 1284, 1286.
 v. Postal Tel. Cable Co., 111 Fed. 842: 714, 775, 796, 799, 804, 1048, 1050, 1066, 1068, 1284, 1286.

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 v. Russell, 27 Utah 457: 1379.
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 v. Tilden, 110 Ind. 131: 1028.
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 v. Norwalk, 77 Conn. 663: 73, 866.
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 v. Auburn Telephone Co., 111 App. Div. 702: 339, 350, 1593.
 v. Detroit, 32 Mich. 282: 1017.
 v. Knife Falls Boom Co., 32 Minn. 412: 99.
 v. Mo. Pac. R. R. Co., 35 Fed. Rep. 84: 640, 1582.
 v. Mo. Pac. R. R. Co., 147 U. S. 248: 640, 641, 1582.
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 v. Chicago, 44 Ill. App. 532: 629, 1306, 1308.
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 v. Sills, 24 Ont. 526: 148.
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 v. Yentzer, 160 Ill. 509: 868, 881.
- Ottawa etc. R. R. Co. v. Adolph, 41 Kan. 600: 1124.
 v. Larson, 40 Kan. 301: 252, 311, 330.
 v. Peterson, 51 Kan. 604: 252, 1294, 1652.
- Ottawa Gas Light Co. v. Graham, 28 Ill. 73: 166, 649.
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 v. Manhattan R. R. Co., 2 App. Div. 396: 1302.
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- Ottenot v. New York etc. R. R. Co., 119 N. Y. 603: 226, 319, 1553, 1651, 1658.
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 v. St. Paul, 39 Minn. 120: 231, 1018, 1032, 1513, 1516, 1634.
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 v. Jordan, 27 Ala. 608: 1358.
 v. St. Paul etc. R. R. Co., 12 Wash. 313: 938, 1354, 1629.
 v. Springfield, 83 Mo. App. 557: 1695.
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 v. Lancaster, 182 Pa. St. 257: 79, 84, 453, 1637.
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- Oxford v. Brands, 45 N. J. L. 332: 1106, 1368, 1386.
 v. Columbia, 38 Ohio St. 87: 1492.
 v. Philadelphia, 19 Phila. 483: 633.
 v. Willoughby, 87 App. Div. 609: 1623.
 v. Willoughby, 181 N. Y. 155: 1623.
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- Pacific Postal Tel. Cable Co. v. Irvine, 49 Fed. 113: 339.
 v. Oregon etc. R. R. Co., 163 Fed. 967: 775, 823.
 v. Western Union Tel. Co., 50 Fed. 493: 412, 832, 1476.
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 v. Leavenworth City, 1 Dill. 393: 306.
 v. Perkins, 36 Neb. 456: 1024.
 v. Reed, 41 Cal. 256: 249.
 v. Seely, 45 Mo. 212: 833.
 v. Wade, 91 Cal. 449: 426, 427, 761, 763, 1283.
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 v. Bergen Neck R. R. Co., 54 N. J. L. 229: 1187, 1247, 1366.
- Packard v. Bergen Neck R. R. Co., 54 N. J. L. 553: 1132, 1187, 1200, 1247, 1366.
 v. County Comrs., 80 Me. 43: 979, 984.
- Packer v. Bird, 137 U. S. 661: 114.
 v. Sunbury etc. R. R. Co., 19 Pa. St. 211: 709, 900.
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 v. Sorrels, 50 Ark. 466: 356, 1488.
- Paducav v. Allen, 111 Ky. 361: 658, 1138, 1337.
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 v. Storall, 12 Heisk. 1: 1100, 1207.
- Page v. Baltimore, 34 Md. 558: 745, 748.
 v. Belvin, 88 Va. 985: 1457.
 v. Boston, 106 Mass. 84: 1717.
 v. Chicago etc. R. R. Co., 70 Ill. 324: 1177, 1195.
 v. Heineberg, 40 Vt. 81: 827, 837, 838, 1500.
 v. Huckins, 150 Mich. 103: 154.
 v. O'Toole, 144 Mass. 303: 809.
- Pagel v. County Comrs., 17 Mont. 586: 984, 1363, 1571.
- Pagels v. Oaks, 64 Ia. 198: 513, 1032, 1033, 1069, 1416.
- Paige v. Schenectady Ry. Co., 77 App. Div. 571: 1586, 1587.
 v. Schenectady Ry. Co., 84 App. Div. 91: 273.
 v. Schenectady Ry. Co., 178 N. Y. 102: 273.
- Paine v. Boston, 4 Allen, 168: 1138, 1142.
 v. Delhi, 116 N. Y. 224: 143.
 v. Leicester, 22 Vt. 44: 513, 1421.
 v. Lettsville, 103 Ia. 481: 236.
 v. Woods, 108 Mass. 160: 109, 948, 980, 1133, 1217.
- Paine Lumber Co. v. Oshkosh, 86 Wis. 397: 431, 1572.
 v. Oshkosh, 89 Wis. 449: 1505.
 v. United States, 55 Fed. 854: 92, 128, 129, 136.
- Painter v. St. Clair, 98 Va. 85: 672, 673, 687, 707, 709, 1515, 1569, 1571.
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 v. Conway, 22 N. H. 144: 1088.
 v. East River Gas Co., 115 App. Div. 677: 890.
 v. Hickory Grove Cem., 84 App. Div. 600: 1625.
 v. Highway Comr., 49 Mich. 45: 996.
 v. Harris Co., 29 Tex. Civ. App. 340: 1057, 1377.
 v. Larchmont Electric Co., 6 App. Div. 12: 345, 1593.
 v. Larchmont Electric Co., 158 N. Y. 231: 175, 344.
 v. Logansport etc. Gravel R. Co., 108 Ind. 137: 422, 1595.
 v. Mulligan, 3 Caines Rep. 307: 71, 76.
 v. O'Donnell, 15 Ill. App. 324: 233.
 v. Rich, 12 Mich. 414: 973.
 v. State, Wright (Ohio), 364: 722.
 v. Union El. R. R. Co., 64 Ill. App. 534: 1585.
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- Panton Turnpike Co. v. Bishop, 11 Vt. 198: 422.
- Pape v. New York etc. R. R. Co., 74 App. Div. 175: 257.
 v. New York etc. R. R. Co. 175 N. Y. 504: 257.
- Papooshek v. Winona etc. R. R. Co., 44 Minn. 195: 247, 1127, 1128, 1131.
- Pappenheim v. Railway Company, 128 N. Y. 436: 182, 1553, 1554, 1584, 1591, 1663.
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- Paradise Road, 29 Pa. St. 20: 1100, 1101.
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 v. Bayonne, 40 N. J. L. 333: 1548.
 v. New York El. R. R. Co., 60 N. Y. Supr. 441: 1664.
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 v. Coltraine, 3 Hawks. (N. C.) 312: 1438.
 v. Current, 15 Ky. L. R. 126: 237.
 v. Mason, 37 Tex. 447: 1163, 1183, 1571.
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 v. Seattle, 8 Wash. 78: 942, 1145.
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 v. Am. Woolen Co., 195 Mass. 591: 81.
 v. Atchison, 46 Kan. 14: 604, 618, 1306, 1308, 1337.
 v. Atkinson, 58 Kan. 29: 89.
 v. Boston & M. R. R. Co., 3 Cush. 107: 226, 623.
 v. Boston, 15 Pick. 198: 1109.
 v. Catholic Bishop, 146 Ill. 158: 363, 382, 391, 396, 398, 406, 644, 1595.
 v. Catholic Bishop, 41 Ill. App. 74: 363, 382, 391, 396, 398, 406.
 v. Commonwealth, 178 Mass. 199: 468.
 v. Cutter Milldam Co., 20 Me. 253: 133.
 v. East Tenn. etc. R. R. Co., 13 Lea 669: 1165, 1526, 1570.
 v. Ft. Worth etc. R. R. Co., 84 Tex. 333: 985, 1018, 1513, 1518.
 v. Framingham, 8 Met. 260: 368.
 v. Hotchkiss, 25 Conn. 321: 71.
 v. Metropolitan Ry. Co., 109 Mass. 506: 691.
 v. Nashua, 59 N. H. 402: 235.
 v. Norfolk Co., 150 Mass. 489: 1468.

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N. C. 676: 155.
v. Norfolk etc. R. R. Co. 123 N. C.
71: 155, 1449.
v. People, 111 Ill. 581: 486.
v. Rogers, 8 Ore. 183, 118.
v. St. Paul, 47 Minn. 317: 1503,
1504.
v. Smith, 17 Mass. 413: 368.
v. Superior Court, 25 Wash. 544:
1042, 1043, 1044, 1397, 1399,
1424.
v. Taylor, 7 Ore. 435: 118.
v. West Coast Packing Co., 17 Ore.
510: 118.
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App. 36: 424.
- Parker, Petitioner, 36 N. H. 84: 948.
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30 W. Va. 435: 413, 416.
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498.
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301.
v. Vanderveer, 48 N. J. L. 80: 981,
1023.
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v. Boston, 15 Pick. 198: 1221,
1222, 1255, 1320.
v. Dallas Terminal etc. Co., 34
Tex. Civ. App. 341: 1429.
v. Hampden Co., 120 Mass. 395:
395, 1186.
v. Newburyport, 10 Gray 28: 147.
v. Southern Ry. Co., 143 N. C.
289: 156, 1455, 1707, 1708.
v. Wisconsin Central R. R. Co., 33
Wis. 413: 1123.
- Parmelee v. Oswego etc. R. R. Co., 7
Barb. 599: 787.
v. Oswego & Syracuse R. R. Co., 6
N. Y. 24: 839.
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278: 1414.
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59 Hun 196: 1603.
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889, 1493.
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Co., 127 Ia. 419: 1455, 1506.
v. Cincinnati etc. R. R. Co., 3 Ohio
St. 330: 249, 255.
v. Cincinnati etc. R. R. Co., 10
Ohio St. 624: 247, 249, 255, 330,
448, 1295, 1303.
v. Lawrence, 2 Dill. 332: 414.
- Parry v. Citizens' Water Works Co.,
59 Hun 196: 69, 72, 74.
v. New Orleans M. & C. R. R. Co.,
55 Ala. 413: 250.
v. Richmond, 27 Ind. 66: 858, 860.
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1082.
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1371.
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v. Detroit etc. Ry. Co., 122 Mich.
462: 844.
v. Howe, 41 Me. 218: 715.
v. Hunt, 98 Tex. 420: 859.
v. Pettingill, 11 Allen, 507: 17.
v. VanWyck, 56 App. Div. 329:
421.
v. Waterville etc. Ry. Co., 101 Me.
173: 272.
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46 Kan. 120: 1380.
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Kan. 752: 1124, 1495.
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1116.
- Partridge v. Arlington, 193 Mass.
530: 965, 1525, 1707.
v. Ballard, 2 Me. 50: 1390.
v. Great Western R. R. Co., 8 U.
C. C. P. 97: 937, 1559.
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738, 1334.
- Paschall St., 81 Pa. St. 118: 1092,
1103.
- Passaic v. Paterson Bill Posting Co.,
71 N. J. L. 75: 471.
v. Paterson Bill Posting Co., 72
N. J. L. 285: 57, 67, 471, 540.
- Passyunk Ave., In re, 2 Pa. Co. Ct.
269: 1189.
- Patch v. Boston, 146 Mass. 52: 1133,
1138, 1151.
- Patchin v. Brooklyn, 2 Wend. 377:
1108.
v. Brooklyn, 8 Wend. 47: 1108.
v. Brooklyn, 10 Wend. 664: 1418.
v. Doolittle, 3 Vt. 457: 514, 1461.
v. Morrison, 3 Vt. 590: 1461.
- Patent v. Philadelphia etc. R. R. Co.,
43 Legal Intel. 79: 692.
v. Philadelphia etc. R. R. Co., 17
Phil. 291: 692.
v. Phil. & Reading R. R. Co., 14
Weekly Notes (Pa.) 545: 643.
- Paterson's Appeal, 129 Pa. St. 109:
1614.
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Grant U. C. 521: 1540.
v. Duluth, 21 Minn. 493: 367.
v. Railroad Co., 47 N. J. Eq. 331:
1619.
- Paterson etc. R. R. Co. v. Kamlah,
42 N. J. Eq. 93: 859, 1320, 1631.
v. Kamlah, 47 N. J. Eq. 331: 1320.
v. Newark, 61 N. J. L. 80: 1250,
1292.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Omaha, 1 Neb. (Unof.) 250: 484.
 v. Young Men's C. Ass., 120 Mich. 185: 873, 892.
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 v. Northern Cent. R. R. Co., 33 Pa. St. 426: 1315.
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 v. Boom Co., 98 U. S. 403: 543.
 v. Boston, 20 Pick. 159: 1255, 1259, 1274.
 v. Boston, 23 Pick. 425: 1259, 1274.
 v. Chicago, D. & V. R. R. Co., 75 Ill. 588, 639, 1581.
 v. Duluth, 21 Minn. 493: 384.
 v. Mead, 148 Mich. 659: 973, 993.
 v. Munyan, 93 Cal. 128: 864.
 v. People's Nat. Gas Co., 172 Pa. St. 554: 882.
 v. Vail, 43 Ia. 142: 348.
 v. Wollman, 5 N. D. 608: 413, 1608.
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 v. Olympia D. & L. Co., 15 Wash. 210: 315, 1554.
 v. Philadelphia, 175 Pa. St. 88: 1339.
 v. Rome, 124 Ga. 525: 378, 379.
 v. State, 50 Ark. 53: 864.
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 v. Detroit, 32 Mich. 108: 1058, 1104.
- Paulsen v. Portland, 149 U. S. 30: 1013.
- Pause v. Atlanta, 98 Ga. 92: 635, 1271, 1272, 1306.
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- Pawnee Co. v. Storm, 34 Neb. 735: 1011, 1013, 1709.
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- v. Morgan's R. R. etc. Co., 38 La. Ann. 164: 152, 1476.
- v. Morgan's R. R. Co., 43 La. Ann. 981: 160, 1546, 1547.
- v. Wayland, 131 Ia. 659: 452, 454.
- Peabody v. Boston El. Ry. Co., 191 Mass. 513: 1216, 1300.
- v. Boston etc. R. R. Co., 181 Mass. 76: 325, 1549.
- v. New York etc. R. R. Co., 187 Mass. 489: 325, 1144, 1145, 1151, 1306, 1323.
- v. Sweet, 3 Ind. 514: 1017, 1032.
- Peach Bottum Road, In re, 3 Penny. Pa. 541: 1034, 1100, 1383.
- Pearce v. Chicago, 176 Ill. 152: 1534.
 v. Chicago, 67 Ill. App. 671: 1534.
 v. Gilmer, 54 Ill. 25: 1362.
 v. Milwaukee, 18 Wis. 428: 614, 619.
- Pearce's Heirs v. Patton, 7 B. Mon. 162: 459, 494, 591.
- Pearl Street, Matter of, 19 Wend. 651: 1385.
- Pearl St. Opening of, In re, 111 Pa. St. 565: 880.
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 v. Eaton County, 74 Mich. 558: 56, 57, 185, 369, 375, 386, 388, 400, 405, 1004, 1058.
 v. Post, 20 Wend. 111: 726, 867, 871, 872.
- Pearsoll v. Post, 22 Wend. 425: 872.
- Pearson v. Allen, 151 Mass. 79: 183, 366, 384, 392.
 v. Island County, 3 Wash. 497: 1402.
 v. Johnson, 54 Miss. 259: 543, 1159, 1170.
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 v. Wolfborough, 37 N. H. 286: 955, 1029, 1103, 1308.
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- Peck v. Goodberlett, 109 N. Y. 180: 147.
 v. New Albany & Chicago R. R. Co., 101 Ind. 366: 731.
 v. Smith, 1 Conn. 103: 1486.
 v. Schenectady etc. Ry. Co., 67 App. Div. 359: 273, 1586.
 v. Schenectady etc. Ry. Co., 170 N. Y. 298: 273, 1586.
 v. Van Rensselaer, 8 Blackf. Ind. 312: 748.
 v. Whitney, 6 B. Mon. 117: 1367.
- Peckham v. Dutchess Co. R. R. Co., 145 N. Y. 385: 1484, 1645, 1647.
 v. Lebanon, 39 Conn. 231: 513.
 v. School District, 7 R. I. 545: 1106.
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- Pedrick v. Raleigh etc. R. R. Co., 143 N. C. 485: 133.
- Peel v. Atlanta, 85 Ga. 138: 438, 629, 664, 666, 670.
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 v. Hyde Park, 176 Mass. 101: 1260, 1271, 1276, 1277, 1319.
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 v. New York El. R. R. Co., 147 N. Y. 135: 182, 923, 1663, 1664.
 v. New York El. R. R. Co., 59 N. Y. Supr. Ct. 570: 1664.
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 v. Winkel, 77 Ill. 56: 629.
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 v. County Comrs., 12 Cush. 351: 979, 1381.
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- Pennsylvania Co.'s Appeal, 115 Pa. St. 529: 1665.
- Pennsylvania Co. v. Bond, 202 Ill. 95: 197, 375, 1596.
 v. Erie & Pittsburgh R. R. Co., 108 Pa. St. 621: 855
 v. Ohio Riv. Junction R. R. Co., 204 Pa. St. 356: 900, 1619.
 v. Platt, 47 Ohio St. 336: 425, 1546, 1578.
 v. Plotz, 125 Ind. 26: 881, 883.
 v. Stanley, 10 Ind. App. 421: 179, 190, 319, 372, 382.
- Pennsylvania Company for Insurance v. Pennsylvania S. V. R. R. Co., 151 Pa. St. 334: 449, 655.
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 v. Root, 53 N. J. L. 253: 1131.
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- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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- v. B. & O. R. R. Co., 60 Md. 263: 772, 1154, 1173.
- v. Baltimore & O. R. R. Co., 63 Md. 263: 427, 756, 762, 772.
- v. Bogert, 209 Pa. St. 589: 753.
- v. Braddock El. R. R. Co., 11 Pa. Co. Ct. 163: 771.
- v. Braddock Electric R. R. Co., 152 Pa. St. 116: 770, 771.
- v. Bruner, 55 Pa. St. 318: 1359.
- v. Chicago, 181 Ill. 289: 199, 1618.
- v. Conshohocken R. R. Co., 15 Pa. Co. Ct. 454: 771.
- v. Cooper, 58 Pa. St. 408: 1324.
- v. Diehm, 128 Pa. St. 509: 677, 679, 1057, 1063, 1068.
- v. Duncan, 111 Pa. St. 352: 693.
- v. Ely, 107 Pa. St. 166: 952, 961, 1634, 1635.
- v. Edgewood, 200 Pa. St. 45: 1489.
- v. Freeport, 138 Pa. St. 91: 1504.
- v. Friday, 4 Penny, 158: 1457.
- v. Greensburg etc. R. R. Co., 176 Pa. St. 559: 331.
- v. Heister, 8 Pa. St. 445: 1187.
- v. Inland Traction Co., 25 Pa. Super. Ct. 115: 328.
- v. Keiffer, 22 Pa. St. 356: 1097, 1438.
- v. Lippincott, 116 Pa. St. 472: 449, 640, 655.
- v. Lutheran Congregation, 53 Pa. St. 445: 923, 994.
- v. Marchant, 119 Pa. St. 541: 449, 640, 655, 656, 664, 665, 666, 668, 671.
- v. Miller, 112 Pa. St. 34: 74, 77, 1476.
- v. Miller, 132 U. S. 75: 26, 267, 475, 640, 693.
- v. Montgomery Co. Pass. R. R. Co., 14 Pa. Co. Ct. 88: 172, 274, 1586.
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- v. Philadelphia Belt R. R. Co., 10 Pa. Co. Ct. 625: 298, 778.
- v. Philadelphia Co., 220 Pa. St. 100: 483.
- v. Porter, 29 Pa. St. 165: 992, 995.
- v. Reichert, 58 Md. 261: 1345.
- v. Stanley, 10 Ind. App. 421: 320, 351.
- v. Suburban Rapid Transit Co., 11 Pa. Co. Ct. 591: 771.
- v. Thompson, 45 N. J. Eq. 870: 446, 1583, 1592.
- v. Turtle Creek Val. R. R. Co., 179 Pa. St. 584: 300, 920.
- v. Warren St. R. R. Co., 188 Pa. St. 74: 771.
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- v. Philadelphia etc. R. R. Co., 7 Pa. Co. Ct. 490: 771.
- v. Philadelphia etc. R. R. Co., 157 Pa. St. 42: 301, 306, 308, 327.
- v. Philadelphia etc. R. R. Co., 160 Pa. St. 232: 753, 778.
- v. Philadelphia etc. R. R. Co., 160 Pa. St. 277: 771.
- v. Reading Paper Mills, 149 Pa. St. 18: 331, 1595.
- v. Schuylkill Nav. Co., 167 Pa. St. 576, 759.
- v. Walsh, 124 Pa. St. 544: 641, 664, 665, 666.
- v. Ziemer, 124 Pa. St. 560: 640, 1147, 1324, 1549, 1651, 1717.
- Pennsylvania Steel Co.'s Appeal, 161 Pa. St. 561: 1422.
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- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1: 687, 775, 832.
 People v. Adam, 74 App. Div. 604: 1411, 1412.
 v. Adam, 79 App. Div. 306: 1411, 1412.
 v. Adam, 83 App. Div. 620: 1411, 1412.
 v. Adirondack R. R. Co., 39 App. Div. 34: 540.
 v. Adirondack R. R. Co., 160 N. Y. 225: 1, 9, 21, 540, 675, 736, 743, 900, 909, 927, 1009, 1164, 1624.
 v. Allen, 37 App. Div. N. Y. 248: 1018.
 v. Atchison etc. Ry. Co., 217 Ill. 594: 197, 398, 400, 406.
 v. Barnard, 48 Hun 57: 763.
 v. Barnard, 110 N. Y. 548: 763.
 v. B. & O. R. R. Co., 117 N. Y. 150: 9, 743, 744, 1496.
 v. Beaudry, 91 Cal. 213: 890.
 v. Blake, 19 Cal. 579: 808, 922, 1061.
 v. Blocki, 203 Ill. 363: 318, 532.
 v. Board of Assessors, 59 Hun 407: 928, 1005, 1013.
 v. Board of Health, 140 N. Y. 1: 484.
 v. Board of R. R. Comrs., 4 App. Div. 259: 909.
 v. Board of R. R. Comrs., 124 App. Div. 47: 920, 1411, 1412.
 v. Board of Supervisors, 33 Cal. 487: 695.
 v. Board of Trustees, 137 N. Y. 88: 912.
 v. Bowen, 30 Barb. 24: 337, 338.
 v. Bridges, 142 Ill. 30: 471.
 v. Brighton, 20 Mich. 57: 930, 1086, 1413.
 v. Brooklyn, 6 Barb. 209: 13, 1195.
 v. Brooklyn, 9 Barb. 535: 13.
 v. Brooklyn, 49 Barb. 136: 1106, 1107, 1417.
 v. Brooklyn, 4 N. Y. 419: 10, 13, 14, 744.
 v. Brooklyn, 1 Wend. 318: 1670, 1678.
 v. Brown, 47 Hun 459: 1005, 1362.
 v. Budd, 117 N. Y. 1: 482.
 v. Buffalo, 76 N. Y. 558: 17.
 v. Burton, 65 N. Y. 452: 1029, 1132.
 v. Calder, 89 App. Div. 503: 433.
 v. Calder, 153 Mich. 724: 740.
 People v. Canal Appraisers, 9 Barb. 496: 1708.
 v. Canal Appraisers, 13 Hun 64: 1401.
 v. Canal Appraisers, 33 N. Y. 461: 105, 106, 117.
 v. Canal Appraisers, 13 Wend. 355: 94.
 v. Canal Board, 7 Lans. 220: 1374, 1409, 1515.
 v. Carman, 47 Hun 380: 1409.
 v. Central Union Tel. Co., 192 Ill. 307: 359, 410.
 v. Champion, 16 Johns. 61: 1637.
 v. Cheritree, 4 N. Y. Supm. Ct. 289: 1417.
 v. Chicago Telephone Co., 220 Ill. 238: 631, 1623.
 v. Clean St. Co., 225 Ill. 470: 199.
 v. Cline, 23 Barb. 197: 1082.
 v. Coler, 60 App. Div. 77: 1324.
 v. Coler, 168 N. Y. 644: 1324.
 v. Collins, 19 Wend. 56: 1364, 1637.
 v. Colorado Eastern R. R. Co., 8 Colo. App. 301: 1049.
 v. Commissioners, 27 Barb. 94: 1058, 1100, 1101, 1515, 1517, 1638.
 v. Commissioners, 3 Hill 599: 1396, 1402.
 v. Commissioners, 42 Hun 463: 1638.
 v. Commissioners, 16 Mich. 63: 1033.
 v. Commissioners, 37 N. Y. 360: 778.
 v. Commissioners, 1 N. Y. Supm. Ct. 193: 1638, 1670.
 v. Comrs. of Greenbush, 24 Wend. 367: 1078.
 v. Commissioners of Highways, 53 Barb. 70: 378, 387, 395.
 v. Comrs. of Highways, 103 Ill. 640: 1638.
 v. Comrs. of Highways, 188 Ill. 150: 1409.
 v. Comrs. of Highways, 57 N. Y. 549: 821.
 v. Comrs. of Highways, 13 Wend. 310: 1637.
 v. Comrs. of Land Office, 135 N. Y. 447: 105, 122.
 v. Common Council, 20 How. Pr. 491: 1530, 1678.
 v. Common Council, 2 Misc. 7: 697, 1531.
 v. Common Council, 78 N. Y. 56: 1671, 1679.
 v. Common Council, 140 N. Y. 300: 697, 1531.

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 v. County Court, 28 Hun 14: 1047.
 v. Co. Court, 152 N. Y. 214: 1412.
 v. Covert, 1 Hill 674: 1417.
 v. Craycroft, 111 Cal. 544: 300.
 v. Crissman, 41 Colo. 450: 460.
 v. Curyea, 16 Ill. 547: 1637.
 v. Dains, 38 Hun 43: 1079, 1081, 1418.
 v. Davidson, 79 Cal. 166: 889.
 v. Decatur etc. Ry. Co., 120 Ill. App. 229: 1622.
 v. Delany, 120 App. Div. 801: 1532.
 v. Delaware etc. Co., 81 App. Div. 335: 781, 1642, 1643.
 v. Delaware etc. Co., 177 N. Y. 337: 781, 1642, 1643.
 v. Delaware etc. R. R. Co., 11 App. Div. 280: 1287.
 v. Detroit etc. R. R. Co., 79 Mich. 471: 491, 1290.
 v. Detroit United Ry. Co., 134 Mich. 682: 488.
 v. District Court, 11 Colo. 147: 534, 745, 1470.
 v. Diver, 19 Hun 263: 1364.
 v. D'Onenb., 111 N. Y. 359: 468.
 v. Dodge, 45 Hun 310: 1080.
 v. Drain Comrs., 40 Mich. 745: 1415, 1416, 1417.
 v. Eaton, 100 Mich. 208: 341.
 v. Eel River etc. R. R. Co., 98 Cal. 665: 881, 883.
 v. Eggleston, 13 How. Pr. 123: 1069.
 v. Eldredge, 3 Hun 541: 1196.
 v. Ellison, 115 App. Div. 254: 361, 489.
 v. Ellison, 188 N. Y. 523: 361, 489.
 v. Ferris, 41 Barb. 121: 1107.
 v. Ferris, 36 N. Y. 218: 1421.
 v. First Judge of Columbia, 2 Hill 398: 1083, 1418.
 v. Fisher, 116 App. Div. 677: 806, 813.
 v. Fisher, 190 N. Y. 468: 7, 672, 675, 1061, 1064.
 v. Fitch, 78 Hun 321: 1531.
 v. Fitch, 147 N. Y. 355: 609, 1531, 1532.
 v. Ft. Wayne & E. R. R. Co., 92 Mich. 522: 272, 277, 313.
 v. Foss, 80 Mich. 559: 1486, 1489.
 v. Friend, 233 Ill. 572: 398.
 v. Gallagher, 4 Mich. 244: 23.
 v. Gardner, 24 N. Y. 583: 1358, 1515.
 v. General Electric Ry. Co., 172 Ill. 129: 1618.
 v. Geneva etc. Traction Co., 112 App. Div. 581: 491.
 People v. Geneva etc. Traction Co., 186 N. Y. 516: 491.
 v. Gillson, 109 N. Y. 389: 479, 480.
 v. Gilon, 76 Hun 346: 609, 619, 1095, 1365.
 v. Gilon, 121 N. Y. 551: 609, 1005, 1013, 1417.
 v. Gloversville, 128 App. Div. 44: 879, 1327.
 v. Goodwin, 5 N. Y. 568: 820, 1418.
 v. Grand Appraisers, 9 Barb. 496: 1707.
 v. Gray, 49 Hun 465: 1005, 1013.
 v. Green, 85 App. Div. 400: 471, 1532, 1533.
 v. Griswold, 67 N. Y. 59: 1637.
 v. Griswold, 2 N. Y. Supm. Ct. 351: 1637.
 v. Haines, 49 N. Y. 587: 437.
 v. Hamburg, 58 Mise. 643: 1532, 1637.
 v. Harris, 203 Ill. 272: 197, 199, 373.
 v. Harris, 63 N. Y. 391: 1406.
 v. Haverstraw, 80 Hun 385: 927, 1164, 1167.
 v. Haverstraw, 137 N. Y. 88: 911.
 v. Hawley, 3 Mich. 330: 14, 477.
 v. Hayden, 6 Hill 359: 1532.
 v. Hesterberg, 184 N. Y. 126: 471.
 v. Hibernia S. & L. Soc., 84 Cal. 634: 877.
 v. Hildreth, 126 N. Y. 360: 1412, 1413.
 v. Hinds, 30 N. Y. 470: 1100.
 v. Highway Comrs., 88 Ill. 141: 1532.
 v. Highway Comrs., 14 Mich. 528: 1033.
 v. Highway Comrs., 15 Mich. 347: 701.
 v. Highway Comrs., 16 Mich. 63: 1516.
 v. Highway Comrs., 35 Mich. 15: 376, 386, 388, 391.
 v. Highway Comrs., 38 Mich. 247: 1027.
 v. Highway Comrs., 40 Mich. 165: 1032, 1420.
 v. Highway Comrs., 13 Wend. 310: 1362.
 v. Horton, 8 Hun 357: 821.
 v. Hulbert, 131 Mich. 156: 73, 74, 137.
 v. Hyde Park, 117 Ill. 462: 1673.
 v. Hynds, 30 N. Y. 470: 1102.
 v. Ingham Co., 20 Mich. 95: 384, 387, 388, 406.
 v. Jefferds, 2 Hun 149: 1533.

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 v. Jessup, 28 App. Div. 524: 96.
 v. Jessup, 160 N. Y. 249: 96.
 v. Johnson, 237 Ill. 237: 886, 887, 888.
 v. Jones, 63 N. Y. 306: 1069.
 v. Jones, 2 N. Y. Supr. Ct. 360: 917, 1058.
 v. Judge of Recorder's Court, 40 Mich. 64: 969, 1638.
 v. Judges of Dutchess County, 23 Wend. 360: 821, 1419.
 v. Keating, 62 App. Div. 348: 357.
 v. Keating, 168 N. Y. 390: 357.
 v. Kerr, 37 Barb. 357: 268.
 v. Kerr, 27 N. Y. 188: 178, 196, 197, 198, 298, 321.
 v. Kimball, 4 Mich. 95: 24.
 v. Kingman, 24 N. Y. 599: 821.
 v. Kniskern, 50 Barb. 87: 1517.
 v. Kniskern, 54 N. Y. 52: 1017.
 v. La Grange, 2 Mich. 187: 1025, 1325.
 v. Lake County, 33 Cal. 487: 701, 1370.
 v. Lake Shore etc. Ry. Co., 52 Mich. 277: 490.
 v. Lake St. El. R. R. Co., 54 Ill. App. 348: 1623.
 v. Landreth, 1 Hun 544: 1083, 1416.
 v. Law, 34 Barb. 494: 268, 1586.
 v. Law, 22 How. Pr. 109: 247, 1580.
 v. Lawrence, 54 Barb. 589: 1405.
 v. Lee, 29 Hun 216: 1404.
 v. Leonard, 87 App. Div. 269: 611.
 v. Lewis, 26 How. Pr. 378: 1389.
 v. Loew, 39 Hun 490: 1155.
 v. Loew, 102 N. Y. 471: 1155.
 v. Lowell, 9 Mich. 144: 1531, 1532.
 v. Lyon, 114 App. Div. 583: 1177, 1229.
 v. Lyon, 186 N. Y. 545: 1177, 1229.
 v. Marin Co., 103 Cal. 223: 889.
 v. Marshall, 6 Ill. 672: 23.
 v. May, 27 Barb. 238: 1402.
 v. Marx, 99 N. Y. 376: 478.
 v. McCarthy, 102 N. Y. 630: 1139.
 v. McGann, 34 Hun 358: 478.
 v. McDonald, 69 N. Y. 362: 734.
 v. McRoberts, 62 Ill. 38: 1162.
 v. Michigan Southern R. R. Co., 3 Mich. 496: 922, 1164, 1166, 1497, 1707, 1708.
 v. Miller, 82 Cal. 153: 1018, 1513, 1571.
 v. Morgan, 97 App. Div. 267: 1531.
 People v. Morrison, 54 App. Div. 262: 1360.
 v. Morrison, 165 N. Y. 644: 1360.
 v. Mosier, 56 Hun 64: 1412, 1420.
 v. Mould, 37 App. Div. 35: 122, 1618.
 v. Mott, 2 Hun 672: 1106.
 v. Mott, 60 N. Y. 649: 1106.
 v. Muh, 101 App. Div. 423: 610.
 v. Muh, 183 N. Y. 540: 610.
 v. Murray, 5 Hill 468: 1535.
 v. Mutual Gas Lt. Co., 38 Mich. 154: 1623.
 v. Myers, 73 Hun 43: 1531.
 v. Nearing, 27 N. Y. 306: 564, 568, 579.
 v. Newton, 112 N. Y. 396: 269, 304.
 v. New York & H. R. R. Co., 45 Barb. 73: 715, 728.
 v. New York Central etc. R. R. Co., 61 App. Div. 494: 1484.
 v. New York Central etc. R. R. Co., 156 N. Y. 570: 750.
 v. New York Central etc. R. R. Co., 168 N. Y. 187: 1484.
 v. O'Brien, 111 N. Y. 1: 302, 426, 762, 1502.
 v. Osborn, 32 N. Y. Supp. 358: 867, 870.
 v. Osborn, 20 Wend. 186: 1404, 1405.
 v. Otis, 90 N. Y. 48: 66.
 v. Palmer, 52 N. Y. 83: 1087.
 v. Park etc. R. R. Co., 76 Cal. 156: 421, 1494.
 v. Parks, 58 Cal. 624: 572.
 v. Pfeiffer, 59 Cal. 89: 1423.
 v. Phillips, 88 App. Div. 560: 610.
 v. Pitt, 64 App. Div. 316: 464.
 v. Pitt, 169 N. Y. 521: 11, 464.
 v. Pittsburgh R. R. Co., 53 Cal. 694: 529.
 v. Platt, 17 Johns. 195: 486.
 v. Pope, 53 Cal. 437: 1491.
 v. Porter, 26 Hun 622: 459.
 v. Port Jervis, 100 N. Y. 283: 972.
 v. Potter, 36 Hun 181: 1081.
 v. Reed, 81 Cal. 70: 877, 884.
 v. Rierecker, 58 App. Div. 391: 479.
 v. Rierecker, 169 N. Y. 53: 479.
 v. Robertson, 17 How. Pr. 74: 1018.
 v. Robinson, 29 Barb. 77: 941.
 v. Rochester, 50 N. Y. 525: 681.
 v. Rock Island, 215 Ill. 488: 1492.
 v. Ruby, 59 Ill. App. 653: 1638.
 v. Ruthruff, 40 Mich. 175: 1032, 1420.
 v. St. Lawrence, 5 Cow. 292: 1531, 1532.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 - v. Salem, 1 Cow. 23: 1637.
 - v. Salem, 20 Mich. 452: 524, 684.
 - v. Sanitary District, 210 Ill. 171: 956.
 - v. San Luis Obispo, 116 Cal. 617: 83, 1604.
 - v. Sass, 171 Ill. 357: 1532.
 - v. Scio, 3 Mich. 121: 1532.
 - v. Schuyler, 69 N. Y. 242: 1531, 1532.
 - v. Scott, 8 Hun 566: 1084.
 - v. Severance, 125 Mich. 556: 127.
 - v. Silberwood, 110 Mich. 103: 108, 140.
 - v. Simon, 176 Ill. 165: 460.
 - v. Smith, 15 Ill. 326: 1401.
 - v. Smith, 7 Hun 17: 1034, 1420.
 - v. Smith, 21 N. Y. 595: 503, 675, 923, 1008.
 - v. South Park Comrs., 221 Ill. 522: 297.
 - v. Sperry, 116 Cal. 593: 881.
 - v. Springfield, 12 Mich. 434: 1382.
 - v. Springwells, 13 Mich. 462: 1069.
 - v. Stedman, 57 Hun 280: 1017, 1420.
 - v. Stillings, 75 App. Div. 569: 735, 1719.
 - v. Stillings, 76 App. Div. 143: 735, 1719.
 - v. Stillings, 124 App. Div. 195: 1411, 1412.
 - v. Stuart, 97 Ill. 123: 862.
 - v. Suburban R. R. Co., 178 Ill. 594: 302.
 - v. Supervisors, 3 Barb. 332: 24.
 - v. Suprs. of Westchester, 4 Barb. 64: 697.
 - v. Supervisors, 12 Barb. 446: 24.
 - v. Supervisors, 32 Barb. 473: 1358, 1638.
 - v. Supervisors, 36 How. Pr. 544: 1023.
 - v. Supervisors, 26 Mich. 22: 564.
 - v. Supervisors of Richmond County, 20 N. Y. 252: 829.
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 - v. Supervisors, 7 Wend. 530: 1409, 1638.
 - v. Supervisors of Oneida County, 19 Wend. 102: 437.
 - v. Sutter St. Ry. Co., 117 Cal. 604: 1623.
 - v. Syracuse, 63 N. Y. 291: 1083, 1087.
 - v. Syracuse, 78 N. Y. 56: 1671, 1679.
 - v. Talmage, 46 Hun 603: 1419.
 - v. Taylor, 34 Barb. 481: 979, 1087.
 - v. Thayer, 63 N. Y. 348: 1511.
 - People v. Thompson, 65 How. Pr. 407: 344.
 - v. Thompson, 67 How. Pr. 491: 779.
 - v. Thompson, 98 N. Y. 6: 779, 793.
 - v. Thornton, 122 App. Div. 287: 952, 961.
 - v. Tallman, 36 Barb. 222: 1004, 1010, 1013.
 - v. Township Board, 2 Mich. 187: 1531, 1532.
 - v. Township Board, 25 Mich. 153: 738.
 - v. Township Board, 38 Mich. 558: 1033.
 - v. Toynbee, 2 Parker (N. Y.) 490: 23.
 - v. Trustees, 137 N. Y. 88: 914.
 - v. Underhill, 144 N. Y. 316: 878, 890.
 - v. Union Pac. R. R. Co., 20 Colo. 186: 487.
 - v. Van Alstyne, 32 Barb. 131: 1418.
 - v. Van Alstyne, 3 Keyes 35: 513.
 - v. Van Brunt, 99 App. Div. 564: 1419.
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 - v. Walsh, 96 Ill. 232: 357.
 - v. Wasson, 64 N. Y. 167: 1639, 1640.
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 - v. Wieboldt, 233 Ill. 572: 396, 406.
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 - v. Williams, 36 N. Y. 441: 1100, 1102.
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 v. Maschall St. R. R. Co., 20 Phila. 203: 910.
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 v. Grand Ave. R. R. Co., 149 Mo. 245: 1446.
 v. Memphis R. R. Co., 10 Wall. 38: 298, 301.
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 v. Barton, 38 Ill. App. 469: 92, 1639.
 v. Birbett, 62 Ill. 332: 24, 1246.
 v. Black, 58 Ill. 33: 1409.
 v. Bryant, 57 Ill. 473: 1136, 1311.
 v. Lansie, 63 Ill. 264: 1136.
 v. Mitchell, 74 Ill. 394: 1392.
 v. Peoria etc. R. R. Co., 66 Ill. 174: 754, 799, 1392.
 v. Peoria & F. Ry. Co., 105 Ill. 110: 1047, 1246.
 v. Rice, 75 Ill. 329: 965, 1673.
 v. Sawyer, 71 Ill. 361: 994, 1109, 1310, 1311, 1312.
 v. Schertz, 84 Ill. 135: 1581.
 v. Warner, 61 Ill. 52: 999, 1004, 1010, 1013, 1014, 1015.
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 v. Vance, 234 Ill. 36: 1121, 1122, 1127, 1131, 1260, 1267, 1268, 1361.
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 v. Haywood, 132 Ind. 95: 1029, 1444.
 v. Jewett, 11 Allen 9: 879.
 v. Maine Central R. R. Co., 72 Me. 95: 858, 1636.
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 v. St. Louis etc. R. R. Co., 103 Mo. 54: 475
 v. St. Louis etc. R. R. Co., 143 Mo. 513: 1435.
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 v. Chandler, 6 Mass. 454: 1488.
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 v. Pa. R. R. Co., 72 N. J. L. 398: 319, 351, 847, 1356, 1452.
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 v. Lehigh Val. R. R. Co., 9 Miscl. 515: 1457, 1476.
 v. New Orleans M. & C. R. R. Co., 55 Ala. 413: 248, 298.
 v. Oregon, 139 Ill. App. 606: 485.
 v. Pennsylvania S. V. R. R. Co., 2 Pa. Co. Ct. 59: 1399.
 v. Sberborn, 11 Cush. 388: 996.
 v. Webb, 21 La. An. 247: 516.
 v. Wilkes-Barre & K. Pass. R. R. Co., 4 Luzerne Leg. Rep. 519: 277, 642.
 v. Wilson, 7 Mass. 393: 100, 679, 680.
 v. Worcester, 6 Gray 544: 87, 236.
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 v. Brown, 10 Ind. App. 597: 143.
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 v. Griffee, 108 Ind. 121: 1030.
 v. Hastings & Dakota Ry. Co., 19 Minn. 260: 1400.
 v. Lewis, 28 Wash. 366: 155.
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- Peterson, Matter of, 94 App. Div. 143: 929.
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 v. Brown, 22 Utah 43: 1635.
 v. Ferreby, 30 Ia. 327: 1463, 1464.
 v. Fisher, 71 Neb. 238: 973, 1018, 1513.
 v. Hopewell, 55 Neb. 670: 1571.
 v. Navy Yard etc. Ry. Co., 5 Phila. 199: 268.

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 v. Smith, 6 Wash. 163: 926.
 v. Waltham, 150 Mass. 564: 1523.
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 v. LaCrosse & Milwaukee R. R. Co., 14 Wis. 443: 1537.
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 v. Macon, 95 Ga. 645: 881.
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 v. New York Elevated R. R. Co., 12 Abb. New Cases 276: 263.
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 v. Lake St. El. R. R. Co., 165 Ill. 526: 1585.
 v. Lake St. El. R. R. Co., 60 Ill. App. 471: 1585.
 v. Morehouse, 12 La. An 649: 409.
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 v. Cox, 21 Ohio St. 248: 1491.
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 v. Comrs. of Fairmount Park, 16 Pa. Co. Ct. 625: 421.
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 v. Dyer, 41 Pa. L. 463: 949, 1261, 1323, 1325, 1530.
 v. Empire Passenger R. R. Co., 3 Brews. 547: 255.
- v. Fairmount Park Comrs., 16 Pa. Co. Ct. 625: 1494.
- v. Field, 58 Pa. St. 320: 23.
- v. McManes, 175 Pa. St. 28: 421.
- v. Penn. Hospital, 143 Pa. St. 367: 13.
- v. Phila. etc. R. R. Co., 7 Pa. Co. Ct 390: 322.
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- v. Phila. etc. R. R. Co., 19 Phil. 507: 322, 717, 1622.
- v. Randolph, 4 W. & S. 514: 235, 236.
- v. River Front R. R. Co., 173 Pa. St. 334: 299.
- v. Rudderow, 166 Pa. St. 241: 630, 634, 636, 1187, 1308.
- v. Scott, 81 Pa. St. 80: 15, 491, 492.
 v. Scott, 9 Phila. 171: 491.
- v. Slocum, 14 Phil. 141: 347.
- v. Thirteenth etc. R. R. Co., 8 Phil. 648: 1587.
- v. Ward, 174 Pa. St. 45: 1063, 1486.
- v. Wiskey, 68 Pa. St. 49: 1325.
- v. Wright, 100 Pa. St. 235: 26, 612.
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 v. Phila., 192 Pa. St. 632, 1306, 1308.
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- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 - v. Cake, 95 Pa. St. 139: 1359.
 - v. Cooper, 105 Pa. St. 239: 1160, 1627.
 - v. Davis, 68 Md. 281: 145, 152, 159.
 - v. Getz, 105 Pa. St. 547: 1277.
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 - v. Johnson, 2 Whart. 275: 1436, 1438.
 - v. Lawrence, 10 Phila. 604: 1481.
 - v. Obert, 109 Pa. St. 193: 1135.
 - v. Patterson, 3 Walker's Pa. Sup. Ct. 143: 1152.
 - v. Pennsylvania S. V. R. R. Co., 151 Pa. St. 569: 1565.
 - v. Pennsylvania etc. R. R. Co., 16 Phila. 636: 760.
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 - v. Philadelphia, 47 Pa. St. 325: 492.
 - v. Philadelphia, 9 Phila. 563: 746, 750.
 - v. Pottsville Water Co., 182 Pa. St. 418: 73.
 - v. Railroad Co., 12 Pa. Co. Ct. 513: 982, 1262, 1342.
 - v. Rogers, 2 Walker's Pa. Sup. 275: 1315, 1316, 1339.
 - v. Shipley, 72 Md. 88: 1393.
 - v. Smick, 2 Whart. 273: 1408.
 - v. Smith, 64 Fed. 679: 93.
 - v. Trimble, 4 Wharton, 47: 1311, 1365.
 - v. Williams, 54 Pa. St. 103: 731, 823.
 - Philadelphia etc. St. Ry. Co.'s Petition, 203 Pa. St. 354: 427, 529, 763, 788, 1424.
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 - v. Council Bluffs, 63 Ia. 576: 1597.
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 - v. Hutchinson, 34 Ind. App. 486: 1510.
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 - v. New York El. R. R. Co., 14 App. Div. 595: 1426.
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 - v. Phila. etc. R. R. Co., 184 Pa. St. 537: 1244.
 - v. Postal Tel. Cable Co., 130 N. C. 513: 22, 24, 425, 966, 1473, 1546, 1559.
 - v. St. Claire Inclined Plane Co., 153 Pa. St. 230: 880, 1523.
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 - v. Seales Mound, 195 Ill. 353: 679, 706, 708, 989, 1174, 1227, 1229.
 - v. Sherman, 61 Me. 548: 954.
 - v. Sherman, 64 Me. 171: 80, 81.
 - v. South Park Commissioners, 119 Ill. 626: 1162, 1320, 1325.
 - v. Thompson, 1 Johns. Ch. 131: 827, 829, 858.
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 - v. Watson, 63 Ia. 28: 532.
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 - v. West Maryland R. R. Co., 66 Md. 319: 200, 242, 247.
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25 N. J. Eq. 316: 1579.
 Pickett v. Toledo etc. R. R. Co., 131
Ind. 562: 1714.
 Pickford v. Lynn, 98 Mass. 491: 1030,
1420.
 Pickles v. Ansonia, 76 Conn. 278:
601, 618, 619, 1307, 1718.
 Pickman v. Peabody, 145 Mass. 480:
723.
 Pickneyville v. Hutchings, 63 Ill.
App. 137: 91, 1548, 1653.
v. Rhine, 63 Ill. App. 139: 91,
1648, 1653.
 Pickup v. Phila. etc. Ry. Co., 29 Pa.
Super. Ct. 631: 309.
 Piedmont etc. Ry. Co. v. Speelman,
67 Md. 260: 712, 1568, 1577.
 Pierce v. Boston, 164 Mass. 92: 1121,
1141.
v. Boston & L. R. R. Co., 141 Mass.
481: 1474, 1482.
v. Chicago etc. Elec. R. R. Co.,
(Wis.) 119 N. W. 297: 1332.
v. County Comrs., 63 Me. 252:
1358.
v. Drew, 136 Mass. 75: 337, 341,
342, 534, 1593.
v. Gibson County, 107 Tenn. 224:
141, 453, 1605, 1606.
v. Roberts, 57 Conn. 31: 877, 1618.
v. Somersworth, 10 N. H. 369: 422.
v. Worcester & Nashua R. R. Co.,
105 Mass. 199: 1314.
 Piercy v. Morris, 2 Iredell Law 168:
1406.
 Pier No. 15, Matter of, 95 App. Div.
501: 1262.
 Pier 39, Matter of, 62 App. Div. 271:
1258.
 Pier 39, Matter of, 168 N. Y. 254:
1258.
 Pierpont v. Harrisville, 9 W. Va.
215: 1569, 1574.
 Pierson v. Boston El. Ry. Co., 191
Mass. 223: 1120, 1146, 1152,
1297, 1304.
v. Speyer, 178 N. Y. 270: 71.
 Pike Tp. Road, 30 Pa. Supr. Ct. 644:
1101.
 Pile v. Pile, 3 L. R. Ch. D. 36: 1563.
 Pillsbury v. Alexander, 40 Neb. 242:
878.
v. Brown, 82 Me. 450: 867, 870.
v. Springfield, 16 N. H. 565: 1374,
1670.
 Pinchin v. London & Blackwall Ry.
Co., 5 DeG. McN. & G. 851: 823.
v. London & Blackwall Ry. Co., 24
L. J. N. S. Ch. 417: 813.
 Pine v. New York, 76 Fed. 418: 1603.
 Pine v. New York, 103 Fed. 337: 74,
169, 1603, 1617.
v. New York, 112 Fed. 98: 74, 169,
1603, 1617.
 Pine Bluff etc. Ry. Co. v. Kelly, 78
Ark. 83: 1252, 1669, 1671, 1672.
 Pine Grove v. Talcott, 19 Wall. 666:
462.
 Pingree v. Co. Comrs., 30 Me. 351:
706, 1358, 1420.
 Pingrey v. Cherokee & D. R. R. Co.,
78 Ia. 438: 1128, 1252, 1311,
1314, 1315.
 Pinkerton v. Boston & Albany R. R.
Co., 109 Mass. 257: 939.
 Pinkham v. Chelmsford, 109 Mass.
225: 1119, 1128, 1240, 1633.
 Pinkstaff v. Steffy, 216 Ill. 406: 146.
 Pinney v. Winstead, 79 Conn. 606:
1097, 1098, 1135, 1520, 1568,
1573.
 Pinnix v. Lake Drummond Canal Co.,
132 N. C. 124: 153, 439.
 Piollet v. Simmons, 106 Pa. St. 95:
1486, 1487.
 Pion v. North Shore R. R. Co., 14
Duvall 677: 129.
 Piper v. Connersville & Liberty Turn-
pike Co., 12 Ind. 400: 923, 1100.
v. Union Pacific Ry. Co., 14 Kan.
568: 1345.
 Pipkin v. Wynns, 2 Dev. (N. C.) 402:
423.
 Pippin v. May, 78 Ark. 18: 515, 521.
 Piscataqua Bridge Co. v. N. H.
Bridge Co., 7 N. H. 35: 22, 411,
412, 413, 791, 1155, 1170, 1608.
 Piseataway & B. Tps., In re, 54 N. J.
L. 539: 700.
 Pitcher v. United States, 1 Ct. of Cl.
7: 458.
 Pitkin v. Springfield, 112 Mass. 509:
734, 1221.
 Pittock v. Central Dist. & Print. Tel.
Co., 31 Pa. Supr. Ct. 589: 425,
1636.
 Pitton v. Cincinnati, 3 Ohio C. C.
593: 220.
 Pitts v. Baltimore, 73 Md. 326: 884.
 Pittsburgh. District of, 2 W. & S. 320:
21, 432.
 Pittsburgh v. Brown, 82 Me. 450: 865.
v. Cluley, 74 Pa. St. 262: 1517.
v. Consolidated Gas. Co., 34 Pa.
Super. Ct. 374: 352, 491.
v. Epping-Carpenter Co., 194 Pa.
St. 318: 887, 890, 1623.
v. Irwin's Exrs., 85 Pa. St. 420:
1535.
v. Pittsburg etc. R. R. Co., 205 Pa.
St. 13: 299, 300.

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 498, 504, 543, 710, 1165, 1167, 1521.
 Pittsburgh etc. R. R. Co.'s Appeal, 130 Pa. St. 190: 1428, 1429.
 Pittsburgh etc. R. R. Co.'s Appeal, 1 Penny 449: 297, 299.
 Pittsburgh etc. R. R. Co. v. Beck, 152 Ind. 421: 1545.
 v. Bentley, 88 Pa. St. 178: 1254.
 v. Benwood Iron Works, 31 W. Va. 710: 317, 495, 499, 531, 533.
 v. Bruce, 102 Pa. St. 23: 424, 709, 808, 1499, 1500, 1629.
 v. Chicago, 159 Ill. 369: 309.
 v. Commonwealth, 101 Pa. St. 192: 1643.
 v. Commonwealth, 104 Pa. St. 583: 422.
 v. Crothersville, 159 Ind. 330: 449.
 v. Crown Point, 150 Ind. 536: 865.
 v. Garlick, 20 Ohio C. C. 561: 808, 1474, 1497, 1500, 1503.
 v. Gilleland, 56 Pa. St. 445: 1446, 1451, 1454, 1457.
 v. Greenville, 69 Ohio St. 487: 1041, 1609, 1610, 1624.
 v. Hall, 25 Pa. St. 336: 954, 1369.
 v. Jones, 111 Pa. St. 204: 410, 1261.
 v. Jones, 59 Pa. St. 433: 1627, 1629.
 v. Lyons, 159 Ill. 576: 1426.
 v. McClosky, 110 Pa. St. 436: 1187, 1315, 1317.
 v. Noftsger, 148 Ind. 101: 179, 251, 1315.
 v. Noftsger, 26 Ind. App. 614: 1657.
 v. Oliver, 131 Pa. St. 408: 940, 1627, 1633.
 v. Patterson, 107 Pa. St. 461: 1139, 1140, 1241, 1272, 1274.
 v. Peet, 152 Pa. St. 488: 815.
 v. Perkins, 22 Ohio C. C. 630: 784, 829.
 v. Perkins, 49 Ohio St. 326: 936, 1226, 1559.
 v. Pittsburgh etc. R. R. Co., 159 Pa. St. 331: 530, 731, 900, 904, 912.
 v. Point Bridge Co., 165 Pa. St. 37: 304, 423, 1621.
 v. Reich, 101 Ill. 157: 639, 643, 1211.
 v. Robinson, 95 Pa. St. 426: 1120, 1123, 1131, 1187, 1216, 1218.
 v. Rose, 74 Pa. St. 362: 622.
 v. Sanitary District, 218 Ill. 286: 675, 776, 977, 988, 989, 1042, 1045, 1056, 1063, 1066.
 v. Tod, 72 Ohio St. 156: 919, 1422.
 v. Vance, 115 Pa. St. 325: 1130, 1140, 1228, 1232.
 v. West Chicago St. R. R. Co., 54 Ill. App. 273: 328, 657, 765, 767, 1611.
 v. Wolcott, 162 Ind. 399: 749, 1056, 1192, 1288.
 Pittsburgh Junction R. R. Co.'s Appeal, 122 Pa. St. 511: 753, 760, 793, 796, 798, 1609.
 Pittsburgh Junction R. R. Co. v. Allegheny Valley R. R. Co., 146 Pa. St. 297: 760, 798.
 v. Fort Pitt St. Pass. R. R. Co., 192 Pa. St. 44: 771.
 Pittsburgh Nat'l Bank of Commerce v. Shoenerger, 111 Pa. St. 95: 814.
 Pittsfield & North Adams R. R. Co., v. Foster, 1 Cush. 480: 1089.
 Pittston Road, 4 Luzerne Leg. Reg. Rep. 305: 1360.
 Pitt Tp. Road, 1 Pa. St. 356: 1390.
 Pitzer v. Williams, 2 Rob. Va. 241: 1029.
 Placke v. Union Depot R. R. Co., 140 Mo. 634: 272, 1586, 1587.
 Plainfield v. Packer, 11 Conn. 576: 992.
 Plains Tp. Road, 7 Luzerne Leg. Reg. Rep. 233: 1094, 1100, 1101.
 Plan 166, In re, 143 Pa. St. 414: 612, 633.
 Planet P. & F. Co. v. St. Louis etc. R. R. Co., 115 Mo. 613: 1582.
 Plank Road Co. v. Ramage, 20 Pa. St. 95: 1156, 1157, 1310, 1317.
 v. Rea, 20 Pa. St. 97: 1187.
 v. Thomas, 21 Pa. St. 91: 1118, 1156, 1157.
 Plant v. Long Island R. R. Co., 10 Barb. 26: 239, 244, 437.
 Plath v. Manhattan R. R. Co., 86 Hun 263: 1304.
 Platt v. Bright, 22 N. J. Eq. 128: 1564.
 v. Bright, 29 N. J. Eq. 128: 947, 949, 1563.
 v. Bright, 31 N. J. Eq. 81: 947, 949, 1563, 1564.
 v. Bright, 32 N. J. Eq. 362: 947, 949, 1653.
 v. Chicago etc. R. R. Co., 74 Ia. 127: 422, 1496, 1618.
 v. Milford, 66 Conn. 320: 600, 618, 1306.
 v. Oneonta, 88 App. Div. 192: 358.

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 v. Penn. Co., 47 Ohio St. 366: 1473.
 v. Pennsylvania R. R. Co., 43 Ohio St. 228: 425, 1192, 1473.
 v. Root, 15 Johns. 213: 71, 76.
- Platt Bros. & Co. v. Waterbury, 72 Conn. 531: 57, 66, 453, 725, 1604, 1606, 1612.
 v. Waterbury, 80 Conn. 179: 83, 1654.
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- Plecker v. Rhodes, 30 Gratt. 795: 522.
- Plessy, Ex parte, 45 La. Ann. 80: 488.
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 v. Morris Canal Co., 10 N. J. Eq. 256: 211.
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- Plum Creek Tp. Road, 110 Pa. St. 544: 1034.
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 v. Wansau Boom Co., 49 Wis. 449: 965.
- Plumley v. Massachusetts, 155 U. S. 461: 478.
- Plummer v. Sheldon, 94 Cal. 533: 881.
 v. Sturtevant, 32 Me. 325: 438.
 v. Waterville, 32 Me. 566: 1510, 1512.
- Plymouth v. Chestnut Hill & N. R. R. Co., 168 Pa. St. 181: 302.
 v. County Comrs., 16 Gray, 341: 1100.
 v. Pere Marquette R. R. Co., 139 Mich. 347: 1290, 1292.
 v. Russell Mills, 7 Allen 438: 1640.
- Plymouth Cordage Co., In re, 135 Fed. 1000: 996.
- Plymouth R. R. Co. v. Colwell, 39 Pa. St. 337: 711.
- Plymouth Road, 5 Rawle 150: 1105.
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 Pocopson Road, 7 Pa. Co. Ct. 617: 983.
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- Pohlman v. Chicago etc. Ry. Co., 131 Iowa 89: 157.
- Poillon v. Brooklyn, 101 N. Y. 132: 591, 1546, 1547.
- Point Pleasant Elec. Lt. & P. Co. v. Bayhead, 62 N. J. Eq. 296: 362.
- Polack v. S. F. Orphan Asylum, 48 Cal. 490: 362, 363, 383, 390, 399.
- Pollard v. Dickinson County, 71 Iowa 438: 993, 1409.
 v. Ferguson, 1 Litt. 196: 1106, 1107.
 v. Moore, 51 N. H. 188: 1671.
- Pollard's Lessee v. Hogan, 3 How. 212: 2, 110.
- Pollock v. Maysville etc. R. R. Co., 103 Ky. 84: 1479.
 v. Morris, 105 N. Y. 676: 1557.
- Polly v. Saratoga etc. R. R. Co. 9 Barb. 449: 22, 434, 1011, 1098.
- Pomeroy v. Chicago etc. Ry. Co., 25 Wis. 641: 937, 1352, 1560.
 v. Granger, 18 R. I. 624: 443.
 v. Milwaukee & Chi. R. R. Co., 16 Wis. 640: 247.
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 v. Metropolitan El. R. R. Co., 112 N. Y. 186: 1553, 1554, 1651, 1657.
 v. Milford, 35 Conn. 32: 1086.
- Ponder v. Quitman Ginnery, 122 Ga. 20: 451.
- Ponisich v. Hoquiam Sash & Door Co., 41 Wash. 303: 363, 371, 380, 392, 396, 398, 647.
- Pontchartrain R. R. Co. v. La Fayette & Pontchartrain R. R. Co., 10 La. Ann. 741: 727.
- Pontiac v. Carter, 32 Mich. 164: 211, 212, 213, 238.
 v. Lull, 111 Mich. 509: 996.
- Pool v. Breese, 114 Ill. 594: 1410, 1573.
 v. Butler, 141 Cal. 46: 1673.
 v. Simmons, 134 Cal. 621: 1056.
 v. Trexler, 76 N. C. 297: 565, 567, 571, 579.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Lake Forest, 238 Ill. 305: 875.
- Poor v. Blake, 123 Mass. 543: 1468, 1704.
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 v. Union, 18 N. J. Eq. 282: 878.
- Port v. Huntington etc. R. R. Co., 168 Pa. St. 19: 1310, 1311, 1646.
- Port Angeles Pac. R. R. Co. v. Cooke, 38 Wash. 184: 1392, 1674.
- Porter v. Allen, 8 Ind. 1: 103.
 v. Armstrong, 129 N. C. 101: 579.
 v. Armstrong, 132 N. C. 66: 1607.
 v. Armstrong, 134 N. C. 447: 579, 1397.
 v. Armstrong, 139 N. C. 179: 579, 1106.
 v. Carpenter, 39 Fla. 14: 366.
 v. County Comrs., 13 Met. 479: 1010.
 v. Durham, 74 N. C. 767: 145, 146.
 v. Kansas City etc. R. R. Co., 103 Mo. App. 422: 1660.
 v. Metropolitan El. R. R. Co., 120 N. Y. 284: 1652, 1662.
 v. Midland R. R. Co., 125 Ind. 476: 1631, 1648, 1657.
 v. North Missouri R. R. Co., 33 Mo. 128: 243.
 v. Railroad Co., 33 Mo. 128: 311.
 v. Scranton City, 36 Pa. Supr. Ct. 218: 1272, 1308.
 v. Stout, 73 Ind. 3: 962, 1518.
- Porterfield v. Bond, 38 Fed. 391: 450, 1457.
- Port Huron etc. Ry. Co. v. Callanan, 61 Mich. 12: 926.
 v. Voorhies, 50 Mich. 506: 1097, 1210.
- Porth v. Manhattan R. R. Co., 134 N. Y. 615: 1585, 1590.
 v. Manhattan R. R. Co., 58 N. Y. Supr. Ct. 366: 1585, 1590.
- Portland v. Kamm, 10 Ore. 383: 1123, 1245, 1410, 1453.
 v. LeeSam, 7 Ore. 397: 1705.
 v. Midland R. R. Co., 125 Ind. 476: 246.
- Portland etc. R. R. Co. v. Clarke County, 48 Wash. 509, 1427.
 v. County Comrs., 64 Me. 505: 1429.
 v. County Comrs. 65 Me. 292: 1390.
 v. Deering, 78 Me. 61: 490, 1290.
 v. Grand Trunk Ry. Co., 46 Me. 69: 691.
 v. Ladd, 47 Wash. 88: 929.
 v. Portland, 14 Ore. 188: 422, 1496.
- Portland & G. Turnpike Co. v. Bobb, 88 Ky. 226: 893, 894, 980, 991, 1044.
- Port Reading R. R. Co., In re, 75 N. J. L. 430: 1684.
- Port Richmond etc. R. R. Co. v. Staten Island etc. R. R. Co., 71 Hun 179: 773.
 v. Staten Island etc. R. R. Co., 144 N. Y. 445: 773.
- Portsmouth Gas Light Co. v. Shahan, 65 N. H. 233: 354.
- Port Townsend v. Lewis, 34 Wash. 413: 1630.
- Port Townsend Southern R. R. Co. v. Barbare, 46 Wash. 275: 1147, 1231, 1392.
- Post v. Kreischer, 32 Hun 49: 139.
 v. Logan, 1 N. Y. Leg. Obs. 59: 1255.
- v. Manhattan R. R. Co., 125 N. Y. 697: 1665.
- v. Rutland R. R. Co., 80 Vt. 551: 707, 913, 1514, 1569, 1573.
- v. West Shore etc. R. R. Co., 50 Hun 301: 855, 1540.
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- Postal Tel. Cable Co., Ex parte, 72 S. C. 552: 1412.
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- v. Alabama G. S. R. R. Co., 92 Ala. 331: 924.
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- v. Chicago etc. Ry. Co., 30 Ind. App. 654, 733, 775, 799.
- v. Cleveland etc. Ry. Co., 94 Fed. 234: 775.
- v. Eaton, 170 Ill. 520: 338, 1630.
- v. Farmville etc. R. R. Co., 96 Va. 661: 774.
- v. Kuhnem, 127 Ga. 20: 1634.
- v. Louisiana Western Ry. Co., 49 La. An. 1270: 1286.
- v. Louisville etc. R. R. Co., 43 La. An. 522: 1286, 1426.
- v. Morgan's etc. S. S. Co., 49 La. Ann. 58: 775, 799, 1286.
- v. Norfolk etc. R. R. Co., 88 Va. 920: 774.
- v. Ore. Short Line R. R. Co., 114 Fed. 787: 775, 799, 1048, 1050, 1285.
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- v. Ore. Short Line R. R. Co., 23 Utah 474: 534, 775, 799, 934, 988, 1048, 1050, 1062, 1063, 1064, 1068.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Southern R. R. Co., 98 Fed. 190: 734.
 v. Southern Ry. Co., 122 Fed. 156: 932.
 Poston v. Terry, 5 J. J. Marsh. 220: 1077, 1360.
 Potlatch Lumber Co. v. Peterson, 12 Ida. 769: 7, 97, 504, 541, 726.
 Potomac S. B. Co. v. Upper S. B. Co., 109 U. S. 672: 131.
 Pottawattamie Co. Comrs. v. O'Sullivan, 17 Kan. 58: 1185, 1203, 1214.
 Potter v. Ames, 43 Cal. 75: 1022, 1162, 1634, 1710.
 v. Coltis, 156 N. Y. 16: 358.
 v. Indiana etc. R. R. Co., 95 Mich. 389: 135.
 v. McCounack, 127 Ind. 438: 1407.
 v. Putnam, 74 Conn. 189: 1326.
 Potts v. Penn. S. V. R. R. Co., 4 Mont. Co. I. R. 121: 1207.
 v. Penn. S. V. R. R. Co., 119 Pa. St. 278: 1212.
 v. Quaker City El. R. R. Co., 12 Pa. Co. Ct. 593: 268, 1585, 1590.
 v. Quaker City El. R. R. Co., 161 Pa. St. 396: 268, 297, 719, 1585, 1590.
 Pott's Appeal, 15 Pa. St. 414: 1387.
 Pottsgrove Road, 2 Walker's Pa. Supm. Ct. 503: 1094.
 Pottsgrove Tp. Road, 4 Mont. Co. L. Rep. 114: 785.
 Pottstown Gas Co. v. Murphy, 39 Pa. St. 257: 166.
 Pottsville v. People's R. R. Co., 148 Pa. St. 175: 425, 1472.
 Poudler v. Minneapolis, 103 Minn. 479: 878.
 Poughkeepsie Bridge Co., Matter of, 108 N. Y. 483: 672, 673, 675, 709, 728, 1044.
 Poughkeepsie etc. R. R. Co., Matter of, 63 Barb. 151: 1212.
 Poulan v. Atlantic Coast Line R. R. Co., 123 Ga. 605: 678, 704, 749, 751, 752, 939, 1056, 1288, 1568.
 Poundstone v. Baldwin, 145 Ind. 139: 575, 995, 1034.
 Powell v. Clelland, 82 Ind. 24: 1555.
 v. Gilman, 38 Ill. App. 611: 877.
 v. Greensburg, 150 Ind. 148: 749.
 v. Hitchner, 32 N. J. L. 211: 989, 1381.
 v. Lash, 64 N. C. 456: 95.
 Powell v. Macon etc. R. R. Co., 92 Ga. 209: 298, 639, 1613.
 v. Pennsylvania, 127 U. S. 678: 15, 478.
 v. Sammon, 31 Ala. 552: 407, 412, 491.
 v. Whitaker, 88 Pa. St. 445: 1565.
 Powelton Ave., In re, 11 Phila. 447: 915.
 Power v. Athens, 26 Hun 282: 408, 412, 1608.
 v. Athens, 99 N. Y. 592: 408, 412, 1608.
 v. Ridgeway, 149 Pa. St. 317: 1523.
 Power's Appeal, 29 Mich. 504: 1026, 1058.
 Powers v. Armstrong, 19 Ga. 427: 1163.
 v. Bears, 12 Wis. 213: 928, 1165, 1169, 1570.
 v. Bergen, 6 N. Y. 358: 459.
 v. Brooklyn El. R. R. Co., 89 Hun 288: 1301.
 v. Brooklyn El. R. R. Co., 157 N. Y. 105: 1334.
 v. City Council of Springfield, 116 Mass. 84: 700.
 v. Council Bluffs, 45 Ia. 652: 1551, 1648, 1659, 1716.
 v. Council Bluffs, 50 Ia. 197: 235.
 v. Hazleton etc. R. R. Co., 33 Ohio St. 429: 1048.
 v. Hurmet, 51 Mo. 136: 1520.
 v. Irish, 23 Mich. 429: 976, 977.
 v. Railway Co., 33 Ohio St. 429: 894, 898, 1242.
 v. St. Louis etc. Ry. Co., 158 Mo. 87: 89, 1649, 1652.
 v. State Line Telephone Co., 116 App. Div. 737: 339, 1593.
 Pownal, Inhabitants of, 8 Me. 271: 916.
 Poynder v. Great Northern Ry. Co., 2 Phillips 330: 1570.
 Prahl v. Brown County, 104 Minn. 227: 1378, 1423.
 Prairie Co. v. Fink, 65 Ark. 492: 781.
 Prather v. Chicago So. Ry. Co., 221 Ill. 190: 815, 1061, 1063, 1066, 1247, 1249.
 v. Ellison, 10 Ohio 396: 1491.
 v. Jeffersonville etc. R. R. Co., 52 Ind. 16: 26, 731, 1059, 1060, 1061, 1062, 1163, 1165.
 v. Western U. Tel. Co., 89 Ind. 501: 807.
 Pratt v. Brown, 3 Wis. 603: 550, 672, 695.
 v. Buffalo City Ry. Co., 19 Hun 30: 183, 1581.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Holmes St. R. R. Co., 49 Mo. App. 63: 1353.
 v. New York R. R. Co., 77 Hun 139: 1124.
 v. New York Central etc. R. R. Co., 90 Hun 83: 1582, 1614.
 v. People, 13 Hun 664: 1514.
 v. Roseland R. R. Co., 50 N. J. Eq. 150: 1569.
 v. Saline Valley Ry. Co., 130 Mo. App. 175: 1254, 1546.
 v. Stratford, 14 Ontario 260: 1550.
 v. Stratford, 16 U. S. App. 5: 631.
 Preble v. Portland, 45 Me. 241: 1008.
 Prentice v. Weston, 111 N. Y. 460: 472.
 Prentis v. Atlantic Coast Line R. R. Co., 211 U. S. 210: 480, 483.
 Prentiss v. Parks, 65 Me. 559: 1018, 1516.
 Presbrey v. Old Colony etc. R. R. Co., 103 Mass. 1: 1147, 1148, 1478, 1483.
 Prescott v. Beyer, 34 Minn. 493: 856, 1514, 1569, 1573.
 v. Curtes, 42 Me. 64: 980.
 v. Edwards, 117 Cal. 298: 182, 879.
 v. Patterson, 44 Mich. 525: 1018, 1032, 1634.
 Prescott Irrigation Co. v. Flathers, 20 Wash. 454: 587, 920.
 Preslin v. Sabine etc. R. R. Co., 70 Tex. 375: 1348.
 President v. Trenton City Bridge Co., 13 N. J. Eq. 46: 96.
 President & Comrs. of Revenue v. State, 45 Ala. 399: 462.
 President etc. v. Diffebach, 1 Yates 367: 897.
 v. Mifflin, 1 Yeats, 430: 1359.
 Preston v. Cedar Rapids, 95 Ia. 71: 619, 1118, 1306, 1353.
 v. Dubuque & Pacific R. R. Co., 11 Ia. 15: 1480.
 v. Liverpool etc. R. R. Co., 5 H. L. Cas. 605: 833, 856.
 Prezinger v. Fording, 114 Ind. 599: 1034, 1518.
 v. Harness, 114 Ind. 491: 1034, 1516, 1518.
 Price v. Engelking, 58 Ill. App. 547: 1558, 1561, 1673, 1675.
 v. Knott, 8 Oreg. 438: 237, 1597.
 Price v. Milwaukee & St. Paul Ry. Co., 27 Wis. 98: 1245, 1277, 1312.
 v. Oregon R. R. Co., 47 Ore. 350: 93.
 v. Pa. R. R. Co., 209 Pa. St. 81: 714.
 v. Plainfield, 40 N. J. L. 608: 1491.
 v. Poynton, 1 Bush (Ky.) 387: 19.
 v. Southbury, 29 Conn. 490: 1367.
 v. Stagray, 68 Mich. 17: 400, 1017, 1032, 1099.
 v. Stratton, 45 Fla. 535: 366, 877.
 v. Thompson, 48 Mo. 361: 1494.
 v. Weehawken Ferry Co., 31 N. J. Eq. 31: 830, 1347.
 Prichard v. Bixby, 71 Wis. 422: 1100, 1101.
 Pridgen v. Bannerman, 8 Jones L. 53: 1425.
 Priebe v. Ames, 104 Minn. 419: 1707.
 Priest v. Maxwell, 127 Ia. 744: 89.
 Priewe v. Wisconsin State Land & Imp. Co., 93 Wis. 534: 125, 141, 499.
 Prime v. Yonkers, 116 App. Div. 609: 79.
 v. Yonkers, 192 N. Y. 105: 79.
 Prince v. Baintree, 64 Vt. 540: 1238.
 v. Crocker, 116 Mass. 347: 276, 299.
 v. Crocker, 166 Mass. 347: 784.
 Princeton v. County Comrs., 17 Pick. 154: 1382.
 v. Gieske, 93 Ind. 102: 235.
 v. Templeton, 71 Ill. 68: 1328.
 Princeville v. Auten, 77 Ill. 325: 420, 1494, 1618.
 Prior, In re, 55 Kan. 724: 482.
 Prior v. Buehler etc. Co., 170 Mo. 439: 11, 464.
 v. Hardwick, 94 Ky. 408: 1625.
 v. Swartz, 62 Conn. 132: 127, 129, 137, 494.
 Pritchard v. Edison Elec. Ill. Co., 92 App. Div. 178: 454.
 v. Edison Elec. Ill. Co., 179 N. Y. 364: 454.
 Private Road Case, 1 Ashmead 417: 1327.
 Private Road etc., 112 Pa. St. 183: 1017, 1032, 1034.
 Proctor v. Andover, 42 N. H. 348: 515.
 v. Old Colony R. R. Co., 154 Mass. 251: 91.
 Proetz v. St. Paul Water Co., 17 Minn. 163: 1353.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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- v. Lowell, 7 Gray 223: 783, 793.
- v. Nashua & L. R. R. Co., 104 Mass. 1: 1475, 1478.
- Proprietors of Mills v. Braintree Water Supply Co., 149 Mass. 478: 138, 1603.
- v. Commonwealth, 164 Mass. 227: 472.
- Propst v. Cass County, 51 Neb. 736 1546.
- Prospect Park etc. R. R. Co., Matter of, 8 Hun 30: 918.
- Matter of, 13 Hun 345: 247, 1293.
- Matter of, 16 Hun 261: 1293.
- Matter of, 24 Hun 199: 1380.
- Application of, 67 N. Y. 371: 896.
- Matter of, 85 N. Y. 489: 1397.
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- v. Williamson, 91 N. Y. 552: 750, 798, 1609.
- Prosser v. Davis, 18 Ia. 367: 423.
- v. Northern Pac. R. R. Co., 152 U. S. 59: 118, 136.
- v. Wappello, 18 Ia. 327: 423, 1123.
- Protzman v. Indianapolis & Cinc. R. R. Co., 9 Ind. 467: 246, 251, 307, 324, 1548.
- Providence v. Droon, 20 Ind. 238: 1406.
- Providenee etc. R. R. Co., In re, 17 R. I. 324: 728, 730, 753, 755, 800.
- Providenee etc. R. R. Co. v. Norwich & W. R. R. Co., 138 Mass. 277: 754, 756, 793, 798.
- v. Worcester, 155 Mass. 35: 1147, 1148, 1212, 1230, 1231, 1263.
- Providenee etc. Steamboat Co. v. Fall River, 183 Mass. 535: 740, 1253, 1319.
- Provost v. Chicago etc. R. R. Co., 57 Mo. 256: 858, 1631.
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- v. New Chester Water Co., 162 Pa. St. 275: 336, 337.
- Pruyn v. Graham, 1 Wend. 370: 1069.
- Pry v. Mankedick, 172 Pa. St. 535: 880.
- Pryor, In re, 55 Kan. 724: 481.
- Pryzblowicz v. Missouri Riv. R. R. Co., 3 McCrary 586: 858, 1627, 1631.
- Public Alley, In re, 160 Pa. St. 89: 698.
- Public Road, 5 Harr. 242: 1081.
- Public Road, 4 N. J. L. 290: 1099, 1363.
- Public Road, Matter of, 4 N. J. L. 31: 979.
- Public Road, Matter of, 4 N. J. L. 396: 1091, 1092.
- Public Roads, 5 Harr. 174: 1027.
- Public Road Vacation, In re, 160 Pa. St. 104: 400.
- Pueblo v. Shutt Investment Co., 28 Colo. 524: 1096.
- v. Strait, 20 Colo. 13: 635, 660, 664, 671.
- Pueblo etc. R. R. Co. v. Rudd, 5 Colo. 270: 1358, 1374.
- Pugh, Matter of, 22 Misc. N. Y. 43: 1097.
- Pugh v. Wheeler, 2 Dev. & B. (N. C.) 50: 900.
- Pulaski Ave., 33 Pa. Supr. Ct. 108: 938.
- Pulling v. London, Chatham & Dover Ry. Co., 33 Beav. 644: 823.
- v. London, Chatham & Dover Ry. Co., 3 DeG. J. & S. 661: 823.
- Pullman Co. v. Chicago, 224 Ill. 248: 1151, 1379.
- Pumpelly v. Green Bay Co., 13 Wall. 166: 23, 66, 90, 100, 144, 168, 554, 558.
- Purdy v. Erie R. R. Co., 162 N. Y. 42: 484.
- v. Manhattan R. R. Co., 3 Misc. 50: 448, 1300, 1303.
- v. Martin, 31 Mich. 455: 1033, 1420.
- Purifoy v. Richmond & D. R. R. Co., 108 N. C. 100: 726, 913, 1157, 1707, 1708.
- Purinton v. Somerset, 174 Mass. 556: 606.
- Purnell v. McLane, 98 Md. 589: 359.
- Pursell v. Edison Portland Cement Co., 65 N. J. L. 541: 1382.
- Purviance v. Drover, 20 Ind. 278: 1409.
- Pusey v. Allegheny, 98 Pa. St. 522: 630, 631, 924, 1115, 1245, 1453.
- v. Wright, 31 Pa. St. 387: 852.
- Putnam v. Boston etc. R. R. Co., 182 Mass. 351: 191, 319, 379, 384, 385, 390, 402, 647.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

- Putnam v. Douglas Co., 8 Ore. 328: 1187, 1192.
 Putney Bros. Co. v. Milwaukee Lt. H. & T. Co., 134 Wis. 379: 284, 1455.
 Puyallup v. Lacey, 43 Wash. 110: 710, 725, 895, 1397.
 Pychlicke v. St. Louis, 98 Mo. 497: 155.
 Pye v. Mankato, 36 Minn. 373: 154.
 Q.
 Quackenbush v. Dist. of Columbia, 9 Mackey 300: 1017, 1021, 1571.
 Quayle v. M. K. & T. Ry. Co., 63 Mo. 465: 1102, 1514.
 Queen v. Birmingham etc. Ry. Co., 4 Eng. L. & Eq. 276: 1700.
 v. Birmingham etc. Ry. Co., 6 Ry. Cas. 628: 1700.
 v. Bristol etc. R. R. Co., 2 Eng. R. R. Cas. 99: 1413.
 v. Brown, 2 L. R. Q. B. 630: 1236.
 v. Cambria Ry. Co., L. R. 6 Q. B. 422: 651.
 v. Cambrian Ry. Co., 40 L. J. Q. B. 169: 414.
 v. Commissioners of Woods & Forests, 15 A. & E. N. S. 761: 1700.
 v. Clarke, 5 Can. Exch. 64: 1221, 1270.
 v. Darlington Local Board of Health, 35 L. J. Q. B. 45: 1524.
 v. Eastern Counties Ry. Co., 2 A. & E. N. S. 347: 631, 640.
 v. Eastern Counties Ry. Co., 42 E. C. L. R. 706: 631.
 v. Harwood, 6 Can. Exch. 420: 1231.
 v. Lancaster & Preston Junction Ry. Co., 6 A. & E. N. S. 759: 1077.
 v. Lancaster & Preston Junction Ry. Co., 51 E. C. L. R. 757: 1677.
 v. London etc. R. R. Co., 10 A. & E. 2: 1258.
 v. London etc. Ry. Co., 16 A. & E. N. S. 864: 1533.
 v. London & Greenwich Ry. Co., 3 A. & E. N. S. 166: 823.
 v. London etc. Ry. Co., 3 E. & B. 443: 1370.
 v. London etc. Ry. Co., 77 E. C. L. R. 443: 1370.
 v. London etc. Ry. Co., 23 L. J. Q. B. N. S. 185: 1135.
 v. Longton Gas Co., 2 El. & El. 651: 338.
 v. New York etc. Ry. Co., 71 E. C. L. R. 886: 1533.
 Queen v. Poulter, 20 L. R. Q. B. D. 132: 1259.
 v. Rynd, 16 I. C. L. R. 29: 652.
 v. South Wales R. R. Co., 13 A. & E. N. S. 988: 1343.
 v. The Inns of Court Hotel Co., 32 L. J. Q. B. 367: 1098.
 v. Vaughn, 4 L. R. Q. B. 190: 1272.
 v. Vaughan, 38 L. J. Q. B. 71: 1260.
 v. Vestry of St. Luke's etc. L. R. 6 Q. B. 572: 631.
 v. Vestry of St. Luke's etc., 7 L. R. Q. B. 148: 631.
 v. Wallasey Local Board of Health, L. R. 4 Q. B. 351: 631.
 v. Wismer, 6 U. C. Q. B. 293: 882.
 v. York etc. Ry. Co., 16 A. & E. N. S. 886: 1533.
 Queen County Water Co. v. Monroe, 83 App. Div. 105: 829.
 Quick v. Cotman, 124 Ia. 102: 885.
 v. Taylor, 113 Ind. 540: 806, 808.
 v. White Water Township, 7 Ind. 570: 23.
 Quicksall v. Philadelphia, 177 Pa. St. 301: 366, 878.
 Quigley v. Montgomery etc. Elec. Ry. Co., 208 Pa. St. 238: 850.
 v. Penn. S. V. R. R. Co., 2 Mont. Co. L. R. 109: 641, 1524.
 v. Penn. S. V. R. R. Co., 4 Mont. Co. L. Rep. 179: 330.
 v. Penn. S. V. R. R. Co., 121 Pa. St. 35: 330, 1327.
 Quigley's Case, 3 P. & W. 139: 1187.
 Quimby v. Consumers' Gas Trust Co., 144 Fed. 362: 725.
 v. Vermont Central R. R. Co., 23 Vt. 387: 809.
 Quincy v. Jones, 76 Ill. 231: 210, 213, 229, 441.
 Quincy & Palmyra R. R. Co. v. Taylor, 43 Mo. 35: 1019.
 Quincy etc. R. R. Co. v. Kellog, 54 Mo. 334: 964, 980.
 v. Ridge, 57 Mo. 599: 1186.
 Quindaro Tp. v. Squier, 51 Fed. 152: 865, 869.
 Quinn v. Chicago etc. R. R. Co., 63 Ia. 510: 453.
 v. Paterson, 27 N. J. L. 35: 1506.
 v. Schnider, 118 Mo. App. 39: 1576.
 Quinton v. Burton, 61 Ia. 471: 1487.
 Quirk v. Seattle, 38 Wash. 25: 1219.
 R.
 Raab v. Roberts, 30 Ind. App. 6: 1058.
 Race Street, 8 Pa. Co. Ct. 95: 1360, 1363.

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 Race Street, Condemnation, 9 Pa. Dist. Ct. 615: 1276.
 Radcliff's Executors v. Brooklyn, 4 N. Y. 195: 209, 211, 212, 213, 215, 229, 245, 1452.
 Radke v. Minneapolis etc. R. R. Co., 41 Minn. 350: 848.
 Radnor Road, 5 Binn. 612: 1081.
 Radnor Tp. Elec. Lt. Co.'s Petition, 208 Pa. St. 460: 682.
 Radnor Tp. Elec. Lt. Co. v. Brown, 208 Pa. St. 461: 682, 1619.
 Rafferty v. Central Traction Co., 147 Pa. St. 579: 177, 241, 269, 279, 642, 1586, 1590, 1592.
 Ragan v. Kansas City etc. R. R. Co., 111 Mo. 456: 1127, 1186, 1226, 1548.
 v. Kansas City etc. R. R. Co., 144 Mo. 623: 1226, 1320, 1546.
 Ragsdale v. Southern Ry. Co., 60 S. C. 381: 1573.
 Rahn Tp. v. Tamaqua & L. St. R. R. Co., 4 Pa. Dist. Ct. 29: 683, 719.
 v. Tamaqua & L. St. R. R. Co., 167 Pa. St. 84: 305.
 Railroad Comrs., In re, 83 Me. 273: 769.
 Railroad Comrs. v. Pensacola & A. R. R. Co., 24 Fla. 417: 480.
 Railroad Co. v. Alling, 99 U. S. 463: 901.
 v. Benson, 36 N. J. L. 357: 1138.
 v. Benson, 36 N. J. L. 557: 1139.
 v. Bohn, 34 Ohio St. 114: 988.
 v. Boyer, 13 Pa. St. 497: 957, 961, 963.
 v. Bucher, 7 Watts 33: 954.
 v. Bunnell, 81 Pa. St. 414: 1139.
 v. Burnett's Exrs., 11 Lea 525: 1325.
 v. Burson, 11 P. F. Smith 379: 1349.
 v. Calderwood, 15 La. An. 481: 1183.
 v. Carr, 38 Ohio St. 448: 89.
 v. Cobb, 35 Ohio St. 94: 1323, 1325.
 v. County Comrs., 79 Me. 386: 490.
 v. Crow, 108 Tenn. 17: 834, 1479.
 v. Donovan, 104 Tenn. 465: 1479.
 v. Duggan, 109 Ill. 537: 475.
 v. Duncan, 111 Pa. St. 352: 269.
 v. Ferguson, 105 Tenn. 552: 96, 113, 133.
 v. Foreman, 24 W. Va. 662: 1123, 1180, 1463, 1464.
 Railroad Co. v. French, 100 Tenn. 209: 1474.
 v. Gardner, 45 Ohio St. 309: 621, 1124, 1125, 1244, 1294, 1303.
 v. Gesner, 20 Pa. St. 240: 1319, 1379.
 v. Gilson, 8 Watts 243: 1187, 1207, 1313.
 v. Halstead, 7 W. Va. 301: 1172.
 v. Hambleton, 40 Ohio St. 496: 255, 1549, 1553.
 v. Hester, 40 Pa. St. 53: 1139.
 v. Hiester, 4 Wright 53: 1140.
 v. Higdon, 111 Tenn. 121: 92, 1651, 1653.
 v. Keith, 53 Ga. 178: 1139.
 v. Lawrence, 38 Ohio St. 41: 1581.
 v. Longworth, 30 Ohio St. 108: 1236.
 v. Louisville, 8 Bush 415: 354.
 v. Montgomery Co. Pass. R. R. Co., 14 Pa. Co. Ct. 88: 171.
 v. Pearson, 35 Cal. 247: 1139.
 v. Renwick, 49 Ia. 664: 131.
 v. Renwick, 102 U. S. 180: 108, 131.
 v. Richmond, 96 U. S. 521: 487.
 v. Robbins, 35 Ohio St. 531: 1547.
 v. Rose, 24 P. F. S. 362: 1140.
 v. Roseville, 76 Ohio St. 108: 882, 890.
 v. Schurmier, 7 Wall. 272: 105.
 v. Shutte, 103 U. S. 118: 594.
 v. Smith, 113 Ind. 233: 1616.
 v. State, 9 Bax. 522: 703.
 v. Swinney, 97 Ind. 586: 1323.
 v. Telegraph Co., 101 Tenn. 62: 774, 775, 1284, 1286.
 v. Tyree, 7 W. Va. 693: 1180.
 v. Waterbury, 55 Conn. 19: 487.
 v. Williams, 35 Ohio St. 168: 243, 247.
 v. Woodruff, 49 Ark. 381: 1329.
 v. Yeiser, 8 Pa. St. 366: 1315.
 v. Railway, 30 Ohio St. 604: 765, 1278.
 Rainey v. Herbert, 55 Fed. 443: 183.
 v. Hinds County, 78 Miss. 308: 630, 631.
 v. Red River etc. Ry. Co., 99 Tex. 276: 450, 453, 655, 1613.
 Raissier v. Grimmer, 130 Ind. 219: 1512.
 Rait v. Furrow, 74 Kan. 101: 68.
 Rakowsky v. Duluth, 44 Minn. 188: 211, 236.
 Raleigh v. Peace, 110 N. C. 32: 12, 464.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
- Raleigh etc. R. R. Co. v. Davis, 2 Bev. & B. Law (N. C.) 451: 8, 23, 806, 923, 927, 1164.
 v. Glendon etc. Co., 112 N. C. 661: 759, 1609.
 v. Jones, 1 Ired. L. 25: 1425.
 v. Sturgeon, 120 N. C. 225: 808, 1478.
 v. Wicker, 74 N. C. 220: 152, 1187.
 Ralpho Tp. Road, 1 Monaghan (Pa. Supm. Ct.) 427: 1388.
 Ralston v. Weston, 46 W. Va. 544: 1492.
 Ramey v. Baltimore etc. R. R. Co., 235 Ill. 502: 90, 1663.
 Ramsden v. Manchester etc. Ry. Co., 1 Exch. 723: 1635.
 Ramsey v. People, 142 Ill. 380: 479.
 Ramsey County v. Stees, 27 Minn. 14: 1425.
 v. Stees, 28 Minn. 326: 814.
 Ranek v. Cedar Rapids, 134 Ia. 563: 1139, 1229, 1231, 1232, 1236, 1270, 1276, 1329.
 Rand v. Boston, 164 Mass. 354: 454.
 v. Ft. Scott etc. R. R. Co., 50 Kan. 114: 948, 949, 1563.
 v. Newton, 6 Allen, 38: 1120.
 v. Townshend, 26 Vt. 670: 937, 963.
 Randall v. Christiansen, 76 Ia. 169: 336.
 v. Jacksonville St. R. R. Co., 19 Fla. 409: 268, 1586, 1590.
 v. Roselstad, 105 Wis. 410: 882.
 v. Texas Central Ry. Co., 63 Tex. 586: 830, 942.
 Randecker v. Commissioners, 61 Ill. App. 426: 1418.
 Randle v. Pacific R. R. Co., 65 Mo. 325: 249, 253, 309, 448, 1119, 1120, 1295, 1303.
 Rand Lumber Co. v. Burlington, 122 Ia. 203: 455, 1604.
 Randolph v. Boomfield, 77 Ia. 50: 453, 1650, 1654.
 v. Comrs. of Highways, 8 Ill. App. 128: 988.
 v. Pennsylvania S. V. R. R. Co., 186 Pa. St. 541: 81.
 v. Union, 63 N. J. L. 155: 1187, 1206.
 Rangely v. Midland R. R. Co., 37 L. J. Ch. 313: 695.
 Ranken v. East & West India Docks etc. Co., 12 Beav. 298: 949, 1460, 1570.
 v. St. Louis & B. Suburban Ry. Co., 98 Fed. 479: 282.
 Rankin v. Great Western R. R. Co., 40 U. C. C. P. 463: 860, 1627, 1631.
 Rankin v. Harrisonburg, 104 Va. 524: 79, 95, 1345.
 v. Sievern etc. R. R. Co., 58 S. C. 532: 1635.
 Rannow v. Hazard, 61 N. Y. Supr. 211: 1150, 1305, 1665.
 Ransom v. Citizens' R. R. Co., 104 Mo. 375: 277, 308, 327, 732.
 v. Sault Ste. Marie, 143 Mich. 661: 226, 1650, 1656.
 Raphael v. Thomas Valley R. R. Co., 36 L. J. Ch. 209: 851.
 Rapid Transit R. R. Comrs., Matter of, 128 App. Div. 103: 276, 1158.
 Rapid Transit R. R. Co. v. Simpson, 45 Kan. 714: 1203.
 Rapp v. Stratton, 41 Wash. 263: 1492.
 Raritan v. Port Reading R. R. Co., 49 N. J. Eq. 11: 778, 780, 1643.
 Raritan Canal Co., 24 N. J. Eq. 455: 745.
 Raritan Water Power Co. v. Veghte, 21 N. J. Eq. 463: 859.
 Rassier v. Grimmer, 130 Ind. 219: 1510.
 Ratcliff v. Wichita Union Stock Yards Co., 74 Kan. 1: 482.
 Rathbun v. New York etc. R. R. Co., 20 R. I. 61: 1484.
 Rathke v. Gardner, 134 Mass. 14: 153.
 Rauenstein v. New York etc. R. R. Co., 120 N. Y. 661: 320.
 v. New York etc. R. R. Co., 136 N. Y. 528: 181, 255, 319.
 Raulet v. Concord R. R. Co., 62 N. H. 561: 1259, 1262, 1272, 1273, 1276, 1277, 1342.
 Ravatte v. Race, 152 Ill. 672: 1399.
 Ravenswood v. Flemings, 22 W. Va. 52: 104, 129, 137.
 Rawlings v. Biggs, 85 Ky. 251: 1409.
 Rawston v. Taylor, 11 Exch. 367: 161.
 Ray v. Atchison & Nebraska R. R. Co., 4 Neb. 439: 1535, 1536, 1570.
 v. Fletcher, 12 Cush. 200: 866.
 v. New York Bay Extension R. R. Co., 34 App. Div. 3: 247, 743.
 Raymond v. Clay County, 68 Ia. 130: 1404.
 v. Commonwealth, 192 Mass. 486: 1157, 1164, 1707.
 v. County Comrs., 63 Maine 110: 1095.
 v. County Comrs., 63 Maine 112: 977.
 v. Fish, 51 Conn. 80: 485.
 v. Griffin, 23 N. H. 340: 1381.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. 948.
 v. Camden, 53 N. J. L. 322: 224,
 226, 914, 1666.
 v. Camden, 54 N. J. L. 347: 224,
 226, 914, 1666.
 v. Victoria Station & R. R. Co.,
 32 L. J. Ex. 167: 1098.
- Reading v. Althouse, 93 Pa. St. 400:
 652.
 v. Davis, 153 Pa. St. 360: 1495.
 v. Keppleman, 61 Pa. St. 223: 211.
- Reading Co. v. Seip, 30 Pa. Supr.
 Ct. 330: 1479.
- Reading & P. R. R. Co. v. Balthaser,
 119 Pa. St. 472: 1217.
 v. Balthaser, 126 Pa. St. 1: 1324.
- Readington v. Dilley, 24 N. J. L.
 209: 1097, 1311, 1317, 1421.
- Ready v. Missouri Pac. Ry. Co., 98
 Mo. App. 467: 155.
- Reagan v. Farmers' L. & T. Co., 154
 U. S. 362: 483.
 v. Farmers' L. & T. Co., 154 U. S.
 420: 483.
 v. Mercantile Trust Co., 154 U. S.
 413: 483.
 v. Mercantile Trust Co., 154 U. S.
 418: 483.
- Reardon v. San Francisco, 66 Cal.
 492: 629, 659, 671.
- Reclamation Dist. v. Superior Court,
 151 Cal. 263.
- Reckner v. Warner, 22 Ohio St. 275:
 927, 1640, 1707, 1708.
- Reddall v. Bryan, 14 Md. 444: 536,
 588.
- Reddin v. Metropolitan Board of
 Works, 31 L. J. Ch. 660: 823.
- Redman v. Boulevard Co., 189 Pa.
 St. 437: 1588.
 v. Philadelphia etc. Ry. Co., 33 N.
 J. Eq. 165: 1159, 1160, 1465,
 1570.
- Redmond v. Chacey, 7 N. D. 231: 579.
- Red River Bridge Co. v. Clarksville,
 1 Sneed. 176: 781, 788, 1533,
 1608.
- Red River etc. Ry. Co. v. Hughes, 36
 Tex. Civ. App. 472: 1183, 1201,
 1340.
 v. Sture, 32 Minn. 95: 746, 956,
 1369.
- Reed v. Acton, 117 Mass. 384: 1366.
 v. Acton, 120 Mass. 130: 1371,
 1373.
 v. Birmingham, 92 Ala. 339: 1491.
 v. Board of Park Comrs., 100
 Minn. 167: 808, 811, 1494.
 v. Brenneman, 72 Ind. 288: 1387.
- Reed v. Chicago, M. & St. P. Ry. Co.,
 25 Fed. 886: 931, 1225, 1391.
 v. Hanover Branch R. R. Co., 105
 Mass. 303: 941, 963, 1221, 1227,
 1319, 1320.
- v. Leeds, 19 Conn. 182: 1486.
 v. Louisville Bridge Co., 8 Bush.
 69: 1060.
- v. Ohio & Miss. R. R. Co., 126 Ill.
 48: 893, 894, 896, 991, 1176,
 1227, 1231.
- v. Peck, 163 Mo. 333: 237.
- v. Pittsburg etc. R. R. Co., 210 Pa.
 St. 211: 1120, 1129, 1379.
- v. State, 108 N. Y. 407: 144, 1651,
 1655.
- Reelford Lake Levee Dist. v. Dawson,
 97 Tenn. 151: 584.
- Rees v. Addams, 16 S. & R. 40: 1565.
 v. Chicago, 38 Ill. 322: 1519, 1520.
- Reeves v. Backus-Brooks Co., 83
 Minn. 339: 127, 129, 132, 1606.
- v. Wood Co., 8 Ohio St. 333: 438,
 570, 580.
- Regan v. Boston Gas Lt. Co., 137
 Mass. 37: 190, 366.
- v. New York etc. R. R. Co., 60
 Conn. 124: 475.
- v. Rochester, 45 N. Y. 129: 865.
- Regents Canal Co. v. Ware, 23 Beav.
 575: 1566.
- v. Ware, 26 L. J. Ch. 566: 851.
- Regina v. Buffalo etc. R. R. Co., 23
 U. C. Q. B. 208: 131.
- v. Comrs., 2 Jur. N. S. 861: 952.
- v. Metropolitan Board of Works,
 3 B. & S. 710: 161.
- v. Metropolitan Board of Works,
 4 L. R. Q. B. 358: 645, 652.
- v. Perth, 14 L. R. Q. B. 156: 212.
- v. Stone, L. R. 1 Q. B. 529: 1260.
- v. Train, 9 Cox C. C. 180: 297.
- v. Wilts etc. Canal Co., 8 Dowling
 623: 1533.
- Reiber v. Butler etc. R. R. Co., 201
 Pa. St. 49: 1229, 1236, 1242.
- Reichenbach v. Wash. Short Line R.
 R. Co., 10 Wash. 357: 837, 842.
- Reichert v. St. Louis R. R. Co., 51
 Ark. 491: 242, 246, 1486, 1629,
 1631.
- Reichert Milling Co. v. Freeburg, 217
 Ill. 384: 1492.
- Reid v. Atlanta, 73 Ga. 523: 143.
- v. Norfolk City R. R. Co., 94 Va.
 117: 273.
- v. Ohio Miss. R. R. Co., 126 Ill. 48:
 706.
- v. Wall Tp., 34 N. J. L. 275: 1530.
- Reiff v. Conner, 10 Ark. 241: 1393.

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 v. Manhattan R. R. Co., 43 N. Y. App. Div. 80: 1210.
 v. Manhattan R. R. Co., 33 N. Y. Supp. 391: 1301.
 v. Racine, 51 Wis. 526: 348.
 Reining v. New York etc. R. R. Co., 128 N. Y. 157: 180, 181, 182, 223, 255, 259, 324, 325.
 Reis v. New York, 113 App. Div. 464: 190, 367, 384, 388, 399.
 v. New York, 188 N. Y. 58: 190, 367, 384, 388, 399.
 Reisert v. New York, 69 App. Div. 302: 163, 1338.
 v. New York, 101 App. Div. 93: 1338, 1554.
 v. New York, 174 N. Y. 196: 163, 1338.
 Reisner v. Strong, 24 Kan. 410: 1047, 1537.
 v. Union Depot & R. R. Co., 27 Kan. 382: 1203, 1210, 1322.
 Reitenbaugh v. Chester Valley R. R. Co., 21 Pa. St. 100: 894, 897, 991, 1005, 1017, 1359.
 Remey v. Iowa Cent. Ry. Co., 116 Iowa 133: 1505.
 v. Municipality No. 2, 12 La. Ann. 500: 1097.
 Renard v. Grande, 29 Ind. App. 579: 1192.
 Rennich v. Board of County Comrs., 45 Kan. 442: 1429.
 Rennsalaer & Saratoga R. R. Co., Matter of, 4 Paige 553: 1318.
 Reno Smelting Works v. Stevenson, 20 Nev. 269: 70.
 Rensselaer v. Leopold, 106 Ind. 29: 178, 210, 369, 378, 388, 396, 401, 402, 404, 743.
 Rensselaer & S. R. R. Co. v. Davis, 43 N. Y. 137: 524, 525, 526, 1056, 1061, 1063, 1064, 1066.
 v. Davis, 55 N. Y. 145: 1437.
 Renthorp v. Bourg, 4 Martin O. S. (La.) 97: 23.
 Rentz v. Detroit, 48 Mich. 544: 1369, 1429.
 Renwick v. D. & N. W. Ry. Co., 49 Iowa 664: 127, 1257.
 v. D. & N. W. Ry. Co., 102 U. S. 180: 127.
 v. New York El. R. R. Co., 59 N. Y. Supr. Ct. 591: 1584.
 Reny v. Municipality No. 2, 15 La. Ann. 657: 1496.
 Reock v. Newark, 33 N. J. L. 129: 1550.
 Respulica v. Sparhawk, 1 Dall. 357: 18.
 Republican Valley R. R. Co. v. Arnold, 13 Neb. 485: 1119, 1124, 1128.
 v. Fellers, 16 Neb. 169: 646, 848, 1551, 1550.
 v. Fink, 18 Neb. 82: 1525, 1526, 1634.
 v. Hayes, 13 Neb. 489: 1124, 1136.
 v. Linn, 15 Neb. 234: 1119.
 Rericke v. Kern, 14 S. & R. 267: 858.
 Reserve Tp. Road, 2 Grant's Cas. 204: 1371.
 Reserve Tp. Road, 80 Pa. St. 165: 778.
 Ressegien v. Sioux City, 94 Iowa 543: 603.
 Restesky v. Delmar Ave. etc. R. R. Co., 106 Mo. App. 382: 630.
 Rettinger v. Passaic, 45 N. J. L. 146: 1520.
 Reubel. Matter of, 52 Misc. 604: 936, 1561.
 Reuben v. Ontario etc. R. R. Co., 5 Montreal Supr. Ct. 211: 1325.
 Reupert v. C. etc. R. R. Co., 43 Iowa 490: 1369.
 Reusch v. C. B. & Q. R. R. Co., 57 Iowa 687: 527.
 Revell v. People, 177 Ill. 468: 109, 115, 130.
 Revere v. Boston, 14 Gray 218: 1717.
 Revere Water Co. v. Winthrop, 192 Mass. 455: 408, 409.
 Rex v. Pease, 4 B. & A. 30: 451.
 Rexford v. Knight, 15 Barb. 627: 808, 1195.
 v. Knight, 11 N. Y. 308: 1164, 1500, 1707, 1708.
 Reyenthaler v. Philadelphia, 160 Pa. St. 195: 1341.
 Reynolds, Ex parte, 52 Ark. 330: 1466.
 Reynolds v. Baltimore & Ohio Ry. Co., 106 Ill. 152: 1113.
 v. Barre, 63 Vt. 541: 1385.
 v. Dunkirk & State Line R. R. Co., 17 Barb. 613: 831.
 v. Kansas City etc. R. R. Co., 110 Mo. 484: 1186.
 v. Louisiana etc. R. R. Co., 59 Ark. 171: 1567, 1669.
 v. Presidio etc. R. R. Co., 1 Cal. App. 229: 314, 315, 639, 642, 1588.
 v. Reynolds, 15 Conn. 83: 516, 519, 1390.
 v. Shreveport, 13 La. Ann. 426: 211, 213, 238.
 v. Shults, 106 Ind. 291: 1406.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 Reynolds v. R. R. Co., 134 Pa. St. 541: 771.
 Rhea v. Newport etc. R. R. Co., 50 Fed. 16: 96.
 Rheimer v. Stillwater Ry. & Transfer Co., 29 Minn. 147: 1378.
 Rhine v. McKinney, 53 Tex. 354: 923, 927, 928, 1572.
 Rhinebeck etc. R. R. Co., Matter of, 8 Hun 34: 1391, 1566, 1678.
 Rhinebeck etc. R. R. Co., Matter of, 67 N. Y. 242: 1678.
 Rhinehart v. Redfield, 93 App. Div. 410: 197.
 Rhoades v. Toledo, 6 Ohio C. C. 9: 916, 1220.
 Rhode Island Hospital Trust Co. v. Hayden, 20 R. I. 544: 1255.
 Rhode Island Suburban Ry. Co., In re, 22 R. I. 455: 498, 499, 525, 593, 594, 720.
 Rhode Island Suburban Ry. Co., In re, 22 R. I. 457: 498, 594, 508, 525, 720.
 Rhodes v. Airedale Drainage Comrs., L. R. 1 C. P. Div. 380: 652, 1529.
 v. Airedale Drainage Comrs., L. R. 1 C. P. Div. 402: 652.
 v. Brightwood, 145 Ind. 21: 877, 887, 891.
 v. Cissel, 82 Ark. 367: 109.
 v. Cleveland, 10 Ohio 159: 214, 233.
 v. Clivedale Dr. Comrs., 45 L. J. Com. Pleas 337: 952.
 v. Halvorson, 120 Wis. 99: 865.
 Rialto Irr. Dist. v. Brandon, 103 Cal. 384: 723, 1068.
 Ricard Boiler & Engine Co. v. Toledo, 6 Ohio C. C. (N. S.) 501: 358.
 Rice v. Alley, 1 Sneed 51: 516.
 v. Danville, Lancaster etc. Turnpike Co., 7 Dana 81: 1182, 1423.
 v. Chicago, 57 Ill. App. 558: 1468, 1558, 1561, 1673, 1675.
 v. Chicago etc. R. R. Co., 30 Ill. App. 481: 306, 777.
 v. Evansville, 108 Ind. 7: 142.
 v. Flint, 67 Mich. 401: 153, 194, 1489.
 v. Norfolk etc. R. R. Co., 130 N. C. 375: 75, 79, 156.
 v. Parkman, 16 Mass. 326: 458.
 v. Rindge, 53 N. H. 530: 513.
 v. Ruddiman, 10 Mich. 125: 104, 109, 110, 128.
 v. Waterman, 5 Ohio C. C. 334: 1030.
 v. Wellman, 5 Ohio C. C. 334: 1058, 1367, 1431, 1515.
 Rice Exr. v. Barre Turnpike Co., 4 Pick. 130: 1558.
 Rich v. Chicago, 59 Ill. 286: 922, 923, 999.
 v. Gow, 19 Ill. App. 81: 1624.
 v. Minneapolis, 37 Minn. 423: 1489, 1490, 1491.
 v. New York El. R. R. Co., 16 Daly 518: 1614.
 Richards v. Des Moines Valley R. R. Co., 18 Iowa 259: 1535, 1578.
 v. Dougherty, 133 Ala. 569: 455.
 v. Ferguson Implement Co., 125 Mo. App. 428: 533.
 v. New York etc. R. R. Co., 77 Conn. 501: 127, 129, 135.
 v. Ohio Riv. R. R. Co., 56 W. Va. 592: 89, 93, 151, 1639.
 v. Wolf, 82 Iowa 358: 513.
 Richardson v. Centerville, 137 Iowa 353: 1176, 1251, 1313, 1392, 1443.
 v. Curtis, 2 Cush. 341: 1115.
 v. Davis, 91 Md. 390: 351, 372.
 v. Eureka, 96 Cal. 443: 90.
 v. Levee Comrs., 58 Miss. 539: 440.
 v. Levee Comrs., 68 Miss. 539: 1340.
 v. Levee Comrs., 77 Miss. 518: 57, 91.
 v. Lone Star Salt Co., 20 Tex. Civ. App. 486: 351, 372, 1492.
 v. Munson, 23 Conn. 94: 458.
 v. Sioux City, 136 Iowa 436: 236, 1119, 1120, 1306, 1307, 1308.
 v. Vermont Central R. R. Co., 25 Vt. 465: 256, 441.
 v. Webster City, 111 Iowa 427: 236, 603, 618, 1123, 1125, 1306.
 Riche v. Bar Harbor Water Co. (Me.) 28 Alb. L. J. 498: 501.
 v. Bar Harbor Water Co., 75 Maine 91: 536, 1026, 1163.
 Richert Milling Co. v. Freeburg, 217 Ill. 384: 891.
 Richi v. Chattanooga Brewing Co., 105 Tenn. 651: 317, 1582, 1590.
 Richland School Tp. v. Overmeyer, 164 Ind. 382: 672, 673, 677, 678, 815, 1068, 1070.
 Richman v. Board of Supervisors, 70 Iowa 627: 972, 1414, 1419.
 v. Board of Supervisors, 77 Iowa 10: 513, 734.
 Richmond v. Gallego Mills Co., 102 Va. 165: 872.
 v. James River & Kanawha Company, 9 Leigh, 313: 1199.
 v. James Riv. & Kanawha Co., 12 Leigh 278: 779.
 v. Muire, 2 Rob. (Va.) 458: 1085.

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 v. Smith, 148 Ind. 294: 347, 1595.
 v. Smith, 101 Va. 161: 356.
 v. Test, 18 Ind. App. 482: 82.
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 v. Durham, & N. R. R. Co., 104 N. C. 658: 759, 857.
 v. Estill Co., 105 Ky. 808: 321.
 v. Humphreys, 90 Va. 425: 1152, 1348, 1427.
 v. Johnson, 103 Va. 456: 750.
 v. Knopf, 86 Va. 981: 1425.
 v. Louisa R. R. Co., 13 How. 71: 415.
 v. Thomas, 19 Ky. L. R. 1488: 1545, 1548.
 v. Wicker, 13 Gratt. 375: 818.
- Richmond etc. Turnpike Co. v. Madison Co., 114 Ky. 351: 1263.
- Richmond & L. Turnpike Road Co. v. Rogers, 1 Duval 135: 1261.
- Richmond Manufacturing Co. v. Atlantic DeLaine Co., 10 R. I. 106: 81.
- Richmond Traction Co. v. Murphy, 98 Va. 104: 273, 296, 622, 1305.
- Rickert v. Philadelphia etc. Ry. Co., 15 Pa. Dist. Ct. 32: 939.
- Rickett's Case, 2 Eng. & Irish App. 193: 628.
- Rickett v. Metropolitan Ry. Co., 5 B. & S. 149: 645.
 v. Metropolitan Ry. Co., L. R. 2 H. L. 175: 645.
- Ricks v. Hall, 4 Porter 178: 1395.
- Riddell v. Animas Cañon Toll Road Co., 5 Colo. 230: 911.
- Riddle v. Del. Co. Comrs., 3 Pa. Co. Ct. 598: 96.
- Riddle's Exrs. v. Delaware County, 156 Pa. St. 643: 95, 457, 1337.
- Ridenour v. Saffin, 1 Handy 464: 14.
- Rider v. Stryker, 2 Hun 115: 1168.
 v. Stryker, 63 N. Y. 136: 1164.
- Ridge Ave., In re, 99 Pa. St. 469: 612.
- Ridge Ave. Pass. R. R. Co. v. Philadelphia, 181 Pa. St. 592: 352.
 v. Philadelphia, 10 Phil. 37: 352.
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- Ridge Turnpike Co. v. Stoever, 6 W. & S. 378: 1493, 1636.
- Ridgeway v. Ludlow, 58 Ind. 248: 109.
 v. Osceola (Ia.) 117 N. W. 974: 375, 377, 389, 391, 406.
- Ridgway L. & H. Co. v. Pennsylvania R. R. Co., 18 Phila. 601: 776.
- Ridley v. Seaboard etc. R. R. Co., 118 N. C. 996: 92, 1649, 1653, 1663.
- v. Seaboard etc. R. R. Co., 124 N. C. 34: 94.
- Rieck v. Omaha, 73 Neb. 600: 947, 1563.
- Riedman v. Mt. Morris Elec. Light Co., 56 App. Div. 23: 1615.
- Rifenburg v. Muskegon, 83 Mich. 279: 1027.
- Riggs v. St. Francois County Ry. Co., 120 Mo. App. 335: 285.
 v. Winterrock, 100 Md. 439: 1362.
- Righter v. Jersey City Water Supply Co., 73 N. J. L. 298: 144.
- v. Philadelphia, 161 Pa. St. 73: 816, 848, 1356.
- Rigney v. Chicago, 102 Ill. 64: 383, 645, 659, 663, 671.
- v. Tacoma Light & W. Co., 9 Wash. 576: 70, 73, 74.
- Riker v. New York, 3 Daly 174: 1343.
- Riley v. Buehman, 116 Ky. 625: 890.
 v. Charleston Union Station Co., 67 S. C. 84: 815, 1041, 1064, 1066, 1067.
- v. Charleston Union Station Co., 71 S. C. 457: 527, 815, 1041, 1055, 1063, 1064, 1066, 1067, 1624.
- v. Pennsylvania R. R. Co., 32 Pa. Supr. Ct. 579: 308, 1583.
- Rimback v. Essex Co. Bank, 62 N. J. L. 494: 1404.
- Rinard v. Burlington & W. R. R. Co., 66 Iowa 440: 330.
- Rindge v. Sargent, 64 N. H. 294: 147.
- Rinehart v. Cowell, 44 N. J. L. 360: 1416.
- Rines v. Portland, 93 Maine 227: 1403.
- Ring v. Mississippi Bridge Co., 57 Mo. 496: 1546.
- Ringle v. Board of Chosen Freeholders, 56 N. J. L. 661: 1406.
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 v. Chicago etc. R. R. Co., 22 Minn. 44: 1466.
 v. Chicago etc. R. R. Co., 23 Minn. 18: 125, 127, 129, 1135, 1407.
 Rische v. Texas Trans. Co., 27 Tex. Civ. App. 33: 291, 640.
 Rise v. Flint, 67 Mich. 401: 456.
 Rising Sun & Hartford Turnpike v. Hamilton, 50 Ind. 580: 980.
 Ritchie v. Kansas etc. R. R. Co., 55 Kan. 38: 840, 841, 844, 864, 1629.
 v. People, 155 Ill. 98: 53, 477, 479.
 Rittenhouse v. Creasey, 2 Luzerne Leg. Rep. (Pa.) 241: 538.
 Riverhead etc. R. R. Co., Matter of, 36 N. Y. App. Div. 514: 727.
 Riverside v. MacLain, 210 Ill. 398: 420, 784, 877, 879, 889, 892, 1494, 1618.
 v. Pennsylvania R. R. Co., 74 N. J. L. 476: 865, 1630.
 Riverside Cotton Mills v. Lanier, 102 Va. 148: 146.
 Riverside Drive, In re, 83 Hun 50: 1101.
 Riverside Park, Matter of, 59 App. Div. 603: 687, 1319, 1565.
 Riverside Park, 95 App. Div. 552: 733.
 Riverside Park, Matter of, 167 N. Y. 627: 687, 1319, 1565.
 Riverside Park Extension, Matter of, 27 Misc. 373: 1227.
 Riverton Ferry Co. v. McKeesport etc. Bridge Co., 179 Pa. St. 466: 1261, 1266.
 v. McKeesport & D. Bridge Co., 1 Pa. Supr. Ct. 587: 413, 1340.
 Road Case, 1 Brown 210: 1084.
 Road Case, 6 Phila. 143: 971.
 Road Case, 2 S. & R. 277: 1366, 1370.
 Road Case, 2 S. & R. 419: 1413:
 Road Case, 4 S. & R. 106: 171, 1421.
 Road Case, 9 S. & R. 35: 982.
 Road Case, 4 W. & S. 39: 816: 1362.
 Road Case, 4 Yates 514: 516, 982.
 Road Comrs. v. Fickinger, 51 Pa. St. 48: 1419.
 v. Morgan, 47 Pa. St. 276: 1083.
 Road District v. Beebe, 231 Ill. 147: 865.
 Road etc., In re, 166 Pa. St. 132: 1058.
 Road from App's Tavern, 17 S. & R. 388: 1101.
 Road from Mrs. Cully's, 13 S. & R. 25: 1103.
 Road in Collins, 36 Pa. St. 85: 1383.
 Road in Upper Darby, 2 Pa. Co. Ct. 366: 513.
 Road Leading etc., 1 Brown 210: 1100, 1101.
 Road Notices, 4 Harr. Del. 324: 1020.
 Roads, 2 T. B. Mon. 91: 1030.
 Road to Ewing's Mill, 32 Pa. St. 282: 1103.
 Road to York Water Co., 24 Pa. St. 397: 733.
 Roake v. Am. Tel. & Tel. Co., 41 N. J. Eq. 35: 340.
 Roanoke v. Bolling, 101 Va. 182: 468.
 Roanoke City v. Berkowitz, 80 Va. 616: 8, 673, 675, 809, 813, 1087, 1344.
 Roanoke Gas Co. v. Roanoke, 88 Va. 810: 238, 252.
 Roanoke Investment Co. v. Kansas City etc. R. R. Co., 108 Mo. 50: 840, 841, 1503, 1504.
 Roaring Creek Road, 11 Pa. St. 356: 713.
 Roath v. Driscoll, 20 Conn. 532: 161, 165.
 v. Driscoll, 20 Conn. 533: 161.
 Robb v. LaGrange, 158 Ill. 21: 83, 1605.
 v. LaGrange, 57 Ill. App. 386: 84, 453, 1613.
 v. Maysville & Mt. Sterling Turnpike Road Co., 3 Met. (Ky.) 117: 1236.
 Robbins v. Barman, 1 Pick. 122: 1493.
 v. Bridgewater, 6 N. H. 524: 1411, 1516, 1526, 1528.
 v. Guffy, 20 Phila. 400: 439.
 v. Lexington, 8 Cusch. 292: 1411.
 v. Milwaukee & H. R. R. Co., 6 Wis. 636: 1135, 1137, 1317.
 v. Omaha etc. R. R. Co., 27 Neb. 73: 1408.
 v. Railroad Co., 6 Wis. 636: 1165, 1166.
 v. St. Paul etc. R. R. Co., 22 Minn. 286: 1330.
 v. St. Paul etc. R. R. Co., 24 Minn. 191: 1392.
 v. Scranton, 217 Pa. St. 577: 372, 382, 391, 394, 647.
 v. Willmon, 71 Minn. 403: 154.
 Robert v. Sadler, 37 Hun 377: 1489.
 v. Sadler, 104 N. Y. 229: 1489, 1490, 1491, 1594.
 Roberts v. Boston, 149 Mass. 346: 1127, 1138, 1146.
 v. Boston & Lowell R. R. Co., 115 Mass. 57: 1428.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Chicago, 26 Ill. 249: 210, 236.
 v. Claremont Ry. & Lt. Co., 73 N. H. 121: 1569.
 v. Comrs. of Brown Co., 21 Kan. 247: 1214.
 v. Easton, 19 Ohio St. 78: 973, 1586.
 v. Highway Comrs., 25 Mich. 23: 973, 974, 1513, 1516.
 v. Huntington R. R. Co., 56 Misc. 62: 273.
 v. Mathews, 137 Ala. 523: 366, 877, 1596.
 v. New York El. R. R. Co., 12 Misc. 345: 941.
 v. New York El. R. R. Co., 128 N. Y. 455: 1121, 1124.
 v. New York El. R. R. Co., 155 N. Y. 31: 1334, 1355.
 v. Northern Pac. R. R. Co., 158 U. S. 1: 937, 1560.
 v. Reed, 16 East 215: 1716.
 v. Rust, 104 Wis. 619: 95, 1607.
 v. Sioux City etc. R. R. Co., 73 Neb. 8: 1061, 1478, 1479, 1520.
 v. Smith, 115 Mich. 5: 13.
 v. Stark, 47 N. H. 223: 1029.
 v. Williams, 13 Ark. 355: 1095, 1413.
 v. Williams, 15 Ark. 43: 512, 515, 517, 706, 966, 1368.
 v. Wisconsin Telephone Co., 77 Wis. 589: 682.
- Robertson v. Daviess Gravel Road Co., 116 Ky. 913: 154.
 v. Hartenbower, 120 Iowa 410, 1411, 1412, 1673, 1701.
- Robey v. State, 76 Neb. 450: 533.
- Robins v. Milwaukee & Horicon R. R. Co., 6 Wis. 636: 1180.
- Robinson v. Brown, 182 Mass. 266: 191, 370.
 v. Great Northern R. R. Co., 48 Minn. 445: 211, 226.
 v. Logan, 31 Ohio St. 466: 1382.
 v. Matherick, 5 Neb. 252: 1032, 1518.
 v. New York El. R. R. Co., 73 App. Div. 626: 1122, 1144.
 v. New York El. R. R. Co., 175 N. Y. 219: 1122, 1144.
 v. New York etc. R. R. Co., 27 Barb. 512: 86, 87, 166, 167, 461.
 v. Norwood, 215 Pa. St. 375: 1523.
 v. Norwood, 27 Pa. Supr. Ct. 481: 1523, 1663.
 v. Pennsylvania R. R. Co., 161 Pa. St. 561: 816, 1061, 1067, 1628.
 v. Pennsylvania R. R. Co., 174 Pa. St. 199: 995.
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 v. Robinson, 1 Duvall 162: 1358, 1366.
 v. Southern Cal. Ry. Co., 129 Cal. 8: 864, 1625, 1714.
 v. Swope, 12 Bush. 21: 494, 495, 519.
 v. West Penn. Ry. Co., 72 Pa. St. 316: 1500.
 v. White, 42 Maine 209: 109.
 v. Winch, 66 Vt. 110: 513, 1029, 1360, 1364, 1511, 1512.
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- Roby v. New York Central etc. R. R. Co., 65 Hun 532: 1475.
 v. New York Central etc. R. R. Co., 142 N. Y. 176: 1476, 1477, 1503, 1504.
 v. South Park Comrs., 215 Ill. 200: 1397.
 v. Yates, 70 Hun 35: 1475.
- Rochester, In re, 136 N. Y. 83: 1534.
- Rochester, In re, 137 N. Y. 243: 1020.
- Rochester, Matter of, 97 App. Div. 642: 1437.
- Rochester, Matter of, 102 App. Div. 99: 929, 1396, 1424.
- Rochester, Matter of, 102 App. Div. 181: 938, 1011, 1174, 1556.
- Rochester, Matter of, 40 Hun 588: 1119.
- Rochester, Matter of, 181 N. Y. 322: 1437.
- Rochester v. Sledge, 82 Ky. 344: 1365.
 v. West, 29 App. Div. 125: 471.
 v. West, 164 N. Y. 510: 471.
- Rochester Electric R. R. Co., In re, 123 N. Y. 351: 297, 299, 300, 920, 1053.
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- Rochester El. R. R. Co., 123 N. Y. 351: 980.
- Rochester etc. C. & I. Co. v. Berwind-White Min. Co., 24 Pa. Co. Ct. 104: 530.
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 v. Budlong, 6 How. Pr. 467: 1097, 1124.
 v. Budlong, 10 How. Pr. 289: 1124, 1125.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. New York etc. Ry. Co., 44 Hun 206: 900.
 v. New York etc. R. R. Co., 110 N. Y. 128: 900, 906, 908, 1619.
 v. Rochester, 17 App. Div. N. Y. 257: 750, 1609.
 v. Tolan, 116 App. Div. 676: 1085.
 Rochester etc. Water Co. v. Rochester, 84 App. Div. 71: 358, 360, 695.
 v. Rochester, 176 N. Y. 36: 358, 360, 695.
 Rochester R. R. Co. v. Robinson, 133 N. Y. 242: 977, 1074.
 Rochester Water Comrs., Matter of, 66 N. Y. 413: 783, 799, 800, 959.
 Rochester Water Works Co. v. Wood, 60 Barb. 137: 1386.
 v. Wood, 41 How. Pr. 53: 1386.
 Rochester White Lead Co. v. Rochester, 3 N. Y. 463: 91.
 Rochette v. Chicago, Mil. & St. Paul Ry. Co., 32 Minn. 201: 320, 351, 370, 384.
 Rockafeller v. Northern Central Ry. Co., 212 Pa. St. 485: 392, 394.
 Rockford etc. R. R. Co. v. Coppering, 66 Ill. 510.
 v. Keyt, 117 Ill. App. 32: 284, 1233.
 v. McKinley, 64 Ill. 338: 1095.
 v. Shunick, 65 Ill. 223: 849.
 Rockford Gas etc. Co. v. Ernst, 68 Ill. App. 300: 350.
 Rockingham Co. L. & P. Co. v. Hobbs, 72 N. H. 531: 495, 496, 498, 501, 508, 536, 537, 549, 591, 592, 682.
 Rock Island etc. R. R. Co. v. Dimick, 144 Ill. 628: 853, 854.
 v. Gordon, 184 Ill. 456, 1229, 1236, 1314, 1379.
 v. Johnson, 204 Ill. 488: 246, 327, 873.
 v. Krapp, 74 Ill. App. 158: 87.
 v. Leisy Brewing Co., 174 Ill. 547: 1222, 1426, 1480.
 v. Lynch, 23 Ill. 645: 1083, 1318.
 Rockland Water Co. v. Rockland, 83 Me. 267: 352.
 v. Tillson, 69 Me. 255: 849, 860.
 v. Tillson, 75 Me. 170: 1496.
 Rockport v. Webster, 174 Mass. 385: 808, 1495.
 Rockwell v. Bowers, 88 Iowa 88: 1046, 1510, 1512, 1576.
 Rodemacher v. Milwaukee & St. Paul R. R. Co., 41 Iowa 297: 1456, 1459.
 Rodgers v. Freemansburg, 2 Pa. Co. Ct. 518: 991.
 v. Parker, 9 Gray 445: 366, 392, 406.
 v. Philadelphia, 181 Pa. St. 243: 1453.
 Roe, Matter of, 59 Misc. 535: 959.
 Roe v. Howard Co. 75 Neb. 448: 155, 1456.
 Roebling v. Trenton Pass. R. R. Co., 58 N. J. L. 666: 272, 274.
 Roeck v. Newark, 33 N. J. L. 129: 1525.
 Roehrborn v. Schmidt, 16 Wis. 519: 1517, 1520.
 Roelker v. St. Louis etc. R. R. Co., 50 Ind. 127: 1582.
 Roffingnac Street Widening, 4 Rob. La. 357: 1386, 1669.
 Rogers, Ex parte, 7 Cow. 526: 1101, 1531.
 Rogers v. Coal River Boom Co., 39 W. Va. 272: 89, 1651, 1652.
 v. Dock Co., 34 L. J. Eq. 165: 952.
 v. Freemansburg, 2 Pa. Co. Ct. 518: 1029.
 v. Kennebec & Portland R. R. Co., 35 Me. 319: 1639.
 v. Omaha, 75 Neb. 318: 1527.
 v. St. Charles, 3 Mo. App. 41: 1701.
 v. Venis, 137 Ind. 221: 786, 976.
 Rogers Place, Matter of, 65 App. Div. 1: 611.
 Rohn Tp. v. Tamaqua etc. R. R. Co., 4 Pa. Dist. Ct. 29: 920.
 Rohrer v. Harrisburg, 20 Pa. Supr. Ct. 543: 155.
 Roll v. Augusta, 34 Ga. 326: 234, 250.
 Rollins v. Atlantic City R. R. Co., 70 N. J. L. 664: 1135.
 Roman Catholic Church v. Texas etc. R. R. Co., 41 Fed. 564: 841, 842.
 Romano v. Yazoo etc. R. R. Co., 87 Miss. 721: 1299, 1717.
 Rome v. Omberg, 28 Ga. 46: 229, 1452.
 v. Perkins, 30 Ga. 154: 1545.
 v. Whitestown W. W. Co., 113 App. Div. 547: 536, 909, 1060, 1061, 1066.
 v. Whitestown W. W. Co., 187 N. Y. 542: 536, 909, 1060, 1061, 1066.
 Rome etc. R. R. Co. v. Gleason, 42 N. Y. App. Div. 530: 1245.
 v. Jennings, 85 Ga. 444: 1259.
 v. Ontario etc. R. R. Co., 16 Hun 445: 772.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Pennsylvania R. R. Co., 17 Phil. 339: 1505.
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 v. Field, 38 How. Pr. 187: 1385.
- Rooker v. Perkins, 14 Wis. 79: 1345.
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- Roosa v. Henderson County, 59 Ill. 446: 1424.
 v. St. Joseph & I. R. R. Co., 114 Mo. 508: 926, 1511.
- Roosevelt v. Godard, 52 Barb. 533: 15, 470.
 v. New York El. R. R. Co., 57 N. Y. Supr. Ct. 438: 1121.
- Roper v. New Britain, 70 Conn. 459: 1529.
- Rosa v. Missouri, Kansas etc. Ry. Co., 18 Kan. 124: 430, 431, 956.
 v. St. Joseph etc. R. R. Co., 114 Mo. 309: 1626.
- Rose v. Farmington, 196 Ill. 226: 846, 1379.
 v. Groves, 5 M. & G. 613: 128.
 v. Kansas City etc. R. R. Co. 128 Mo. 135: 1098, 1360, 1370.
 v. New York etc. R. R. Co., 108 App. Div. 206: 1379.
 v. St. Charles, 49 Mo. 509: 91, 157, 234.
 v. Taunton, 119 Mass. 99: 1143.
 v. Washington Co., 42 Neb. 1: 970.
- Rosenberger v. Miller, 61 Mo. App. 422: 884, 890.
- Rosenthal v. Taylor etc. R. R. Co., 79 Tex. 325: 1294, 1649, 1657, 1662.
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- Ross v. Adams, 28 N. J. L. 160: 1534.
 v. Board of Supervisors, 128 Iowa, 427: 690, 696, 1004, 1011, 1034, 1036, 1395, 1398.
 v. Chicago, Burlington & Quincy R. R. Co., 77 Ill. 127: 835, 851, 852, 861.
 v. Cincinnati etc. Ry. Co., 5 Ohio C. C. (N. S.) 565: 450.
 v. Clinton, 46 Iowa 606: 235.
 v. Davis, 97 Ind. 79: 501, 566, 575, 1192.
 v. Elizabethtown etc. R. R. Co., 2 N. J. Eq. 422: 1537, 1570.
 v. Elizabethtown etc. R. R. Co., 20 N. J. L. 230: 952, 1025, 1369.
 v. Faust, 54 Ind. 471: 103.
 v. Georgia etc. R. R. Co., 33 S. C. 477: 1523.
 v. Grand Trunk R. R. Co., 10 Ont. 447: 864, 1713.
 v. Long Branch, 73 N. J. L. 292: | Royce v. Carpenter, 80 Vt. 37: 92, 421, 913, 1494.
- Ross Tp. Road, 4 Luzerne Leg. Reg. Rep. 67: 1105.
- Ross Township Road, 36 Pa. St. 87: 400, 985, 1100, 1384.
- Rosser v. Randolph, 7 Porter 238: 95, 1614.
- Rossiter v. Russell, 18 N. H. 73: 1462.
- Rossmiller v. State, 114 Wis. 169: 109, 115, 128, 140.
- Rostraver Tp. Road, 34 Pa. Co. Ct. 176: 1100, 1101.
- Rothan v. St. Louis etc. R. R. Co., 113 Mo. 132: 927, 1160, 1463.
- Rothschild v. Chicago, 227 Ill. 205: 199.
- Roughton v. Atlanta, 113 Ga. 948: 629.
- Rounds v. Mumford, 2 R. I. 154: 212, 238.
- Rourke v. Central Mass. Elec. Co., 177 Mass. 46: 1122.
 v. Central Mass. Elec. Co., 177 Mass. 48: 1122.
 v. Kings County El. R. R. Co., 22 App. Div. 511: 1145.
- Rousey v. Wood, 47 Mo. App. 471: 1511.
 v. Wood, 57 Mo. App. 650: 706, 1514, 1516.
 v. Wood, 63 Mo. App. 460: 1511, 1516.
- Roushlangue v. Chicago & A. R. R. Co., 115 Ind. 106: 456, 837, 846, 847, 1476.
- Rout v. Mountjoy, 3 B. Mon. 300: 516, 519, 1017, 1027, 1359.
- Rowan v. Portland, 8 B. Mon. 232: 131, 365, 366, 880.
- Rowe v. Addison, 34 N. H. 306: 235.
 v. East Orange, 69 N. J. L. 600: 1029, 1085.
 v. Granite Bridge Corp., 21 Pick. 344: 86, 112.
- v. Rochester, 22 U. C. C. P. 319: 156.
 v. Rochester, 29 U. C. Q. B. 590: 156, 233.
 v. St. Paul etc. R. R. Co., 41 Minn. 384: 148, 157.
- Rowland v. Miller, 139 N. Y. 93: 429.
- Rowzee v. Pierce, 75 Miss. 846: 420, 1494.
- Roxedale v. Seip, 32 La. Ann. 435: 400, 401.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Rozell v. Anderson, 91 Ind. 591: 142.
 Rube v. Sullivan, 23 Neb. 779: 884.
 Rubel v. Title Guarantee & Trust Co., 199 Ill. 110: 1260.
 Rubottom v. McClure, 4 Blackf. 505: 1163, 1165.
 Ruch v. New Orleans, 43 La. Ann. 275: 433, 440.
 Ruckert v. Grand Ave. Ry. Co., 163 Mo. 260: 272, 296, 622, 642.
 Rudd v. Farmville etc. R. R. Co., 2 Va. Dec. 346: 1461.
 Ruddick v. St. Louis etc. R. R. Co., 116 Mo. 25: 855.
 Ruddiman v. Taylor, 95 Mich. 547: 874, 878.
 Rude v. St. Louis, 93 Mo. 408: 312, 648.
 v. St. Marie, 121 Wis. 634: 583.
 Rudel v. Los Angeles Co., 118 Cal. 281: 79.
 Rudisill v. State, 40 Ind. 485: 1160.
 Rudolph v. Penn. S. V. R. R. Co., 6 Mont. Co. L. R. 114: 1071.
 v. Pennsylvania S. V. R. R. Co., 166 Pa. St. 430: 530, 818.
 v. Pennsylvania S. V. R. R. Co., 186 Pa. St. 541: 1211, 1313.
 Ruduyai v. Harwinton, 79 Conn. 91: 154.
 Ruehl v. Voight, 28 Wis. 153: 1708.
 Rugby Portland Cement Co. v. London etc. Ry. Co., (1908) 1 K. B. 925: 1269.
 v. London etc. Ry. Co., (1908) 2 K. B. 606: 1269.
 Rugg v. Commercial Union Tel. Co., 66 Vt. 208: 343.
 Ruggles v. Illinois, 108 U. S. 526: 480, 482.
 v. Lesun, 24 Pick. 187: 858.
 Rugheimer, In re, 36 Fed. 369: 969, 1199, 1230.
 Rugsdale v. Southern Ry. Co., 60 S. C. 381: 1475.
 Rhuland v. Supervisors, 55 Wis. 664: 1099.
 Rumsey v. New York etc. R. R. Co., 63 Hun 200: 1651, 1658.
 v. New York & N. E. R. R. Co., 114 N. Y. 423: 122.
 v. New York & N. E. R. R. Co., 125 N. Y. 681: 122, 131, 133.
 v. New York & N. E. R. R. Co., 130 N. Y. 88, 28 N. E. 763: 122.
 v. New York etc. R. R. Co., 133 N. Y. 79: 102, 122, 123, 127, 128, 129, 131, 133s.
 v. New York etc. R. R. Co., 136 N. Y. 543: 122, 131, 133s.
- Rundell v. Blakeslee, 47 Mich. 575: 1058, 1366.
 Rundle v. Delaware & Raritan Canal Co., 14 How. 80: 108.
 Runner v. Keokuk, 11 Iowa 543: 1406.
 Runshart v. Railroad Co., 54 Ga. 579: 1536.
 Runyon v. Altan, 78 Minn. 31: 1399, 1405.
 Ruppert v. West Side Belt R. R. Co., 25 Pa. Supr. Ct. 613: 441.
 Rusch v. Milwaukee, L. & W. Ry. Co., 54 Wis. 136: 1369.
 Ruscomb Street, 30 Pa. Super. Ct. 476: 364, 392, 394, 403.
 Ruscomb St., 33 Pa. Super. Ct. 148: 382, 392, 394, 403.
 Rush v. McDermott, 50 Cal. 471: 831.
 Ruston v. Grimwood, 30 Ind. 364: 1360.
 Rushton v. Martin, 43 Ala. 555: 1094, 1367.
 Rushville v. Rushville Nat. Gas Co., 132 Ind. 575: 408, 481.
 Rusk v. Berlin, 173 Ill. 634: 874.
 Russ v. Pennsylvania Tel. Co., 15 Pa. Co. Ct. 226: 343, 1594.
 Russell v. Burlington, 30 Iowa 262: 211, 235, 238.
 v. Chicago etc. Elec. Ry. Co., 205 Ill. 155: 305, 366, 874, 886, 888, 891, 1588.
 v. Lincoln, 200 Ill. 511: 366, 873, 874, 879, 889, 1491.
 v. New Bedford, 5 Gray 31: 1707, 1708.
 v. New York, 2 Denio, 461: 16, 17.
 v. St. Louis S. W. Ry. Co., 71 Ark. 451: 684, 1243, 1339.
 v. St. Paul etc. Ry. Co., 33 Minn. 210: 1236.
 v. Turner, 62 Me. 496: 978, 995.
 Russell Mills v. Co. Comrs., 16 Gray 347: 1526.
 Rutherford's Case, 72 Pa. St. 82: 1005, 1013, 1014.
 Rutherford v. Davis, 95 Ind. 245: 1510, 1512.
 v. Holley, 105 N. Y. 632: 235.
 v. Hudson Riv. Traction Co., 73 N. J. L. 227: 302.
 Rutherford's Road, 10 S. & R. 120: 1359.
 Rutland v. County Comrs., 20 Pick. 71: 1030.
 v. Supervisors, 55 Wis. 664: 1096.
 Rutland-Canadian R. R. Co. v. Cent. Vt. Ry. Co., 72 Vt. 128: 760, 793, 794, 797, 798.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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v. Chaffee, 72 Vt. 404: 953, 1477, 1631, 1633.
- Rutledge v. Drainage Comrs., 16 Ill. App. 655: 1506, 1602.
- Ryan v. Boston, 118 Mass. 248: 605, 1309.
v. Brown, 18 Mich. 196: 470.
v. Hoffman, 26 Ohio St. 109: 1531, 1683.
v. Mississippi Val. etc. R. R. Co., 62 Miss. 162: 864.
v. Pennsylvania S. V. R. R. Co., 2 Mont. Co. L. R. 31: 641, 1524.
v. Preston, 59 App. Div. 97: 357.
v. Preston, 32 Misc. 92: 357.
v. Terminal Co., 102 Tenn. 111: 498, 500, 503, 508, 527, 591, 675, 739, 1056, 1060.
- Ryan Tp. Road, 3 Luzerne Leg. Reg. Rep. 76: 1091, 1094, 1100, 1101.
- Ryckman v. Gillis, 6 Lans. 79: 442.
- Ryder v. Brooklyn El. R. R. Co., 89 Hun 29: 1301.
v. Horsting, 130 Ind. 104: 962, 1004, 1510, 1513.
- Ryers. Matter of, 72 N. Y. 1: 564, 569, 570, 578, 584.
- Ryerson v. Brown, 35 Mich. 333: 502, 551.
- Ryker v. McElroy, 28 Ind. 179: 516.
- S.
- Sabetto v. New York Cent. etc. R. R. Co., 127 App. Div. 832: 153.
- Sabin v. Vermont Central R. R. Co., 25 Vt. 363: 435, 436, 1455, 1456.
- Sabine v. Johnson, 35 Wis. 185: 937, 960.
- Sabine etc. R. R. Co. v. Brouard, 69 Tex. 617: 158, 159.
v. Brouard, 75 Tex. 597: 93.
v. Gulf etc. R. R. Co., 92 Tex. 162: 760, 768.
v. Johnson, 65 Tex. 389: 152.
- Sacks v. Minneapolis, 75 Minn. 30: 784.
- Sacramento etc. R. R. Co. v. Harlan, 24 Cal. 334: 930, 1425.
- Sacramento Val. R. R. Co. v. Moffatt, 6 Cal. 74: 1316.
v. Moffatt, 7 Cal. 577: 1557.
- Sadd v. Maddon Ry. Co., 6 Exch. 143: 814.
- Sadler v. Langham, 34 Ala. 311: 494, 497, 499, 516, 517, 551, 552, 593, 674, 1163.
- Sadlier v. New York, 104 App. Div. 82: 454.
- Sadlier v. New York, 40 Misc. 78: 454.
v. New York, 185 N. Y. 408: 454.
- Sadorus v. Black, 65 Ill. App. 72: 1488.
- Sadsbury Tp. Roads, In re, 147 Pa. St. 471: 992.
- Sage v. Brooklyn, 89 N. Y. 189: 1158, 1164, 1168, 1171, 1526, 1530.
v. New York, 10 App. Div. 294: 129.
v. New York, 154 N. Y. 61: 122, 132.
- Saginaw v. Campau, 102 Mich. 594: 1085.
- Saginaw etc. R. R. Co. v. Bordner, 108 Mich. 236: 524, 1027, 1061.
- Sahr v. Scholle, 89 Hun 42: 486.
- St. Albans v. Seymour, 41 Vt. 579: 940.
- St. Anthony etc. Co. v. King Bridge Co., 23 Minn. 186: 1489.
- St. Anthony Falls Water Power Co. v. St. Paul Water Comrs., 168 U. S. 349: 106, 110, 114, 138, 1432.
- St. Charles v. Rogers, 49 Mo. 530: 1412.
v. Stuart, 49 Mo. 132: 1412.
- St. Clair v. San Francisco etc. Ry. Co., 142 Cal. 647: 639.
- St. Francis Levee Dist. v. Redditt, 79 Ark. 154: 928, 1570.
- St. Francois Co. v. Marks, 14 Mo. 539: 1531.
v. Peers, 14 Mo. 537: 1531.
- St. Helena Water Co. v. Forbes, 62 Cal. 182: 69, 73, 536.
- St. Johnsbury etc. R. R. Co. v. Willard, 61 Vt. 134: 1347.
- St. Johnsville v. Smith, 61 App. Div. 380: 1395.
v. Smith, 90 App. Div. 618: 1352.
v. Smith, 184 N. Y. 341: 1144, 1352, 1634.
- St. Joseph v. Geiwetz, 148 Mo. 210: 923, 1034, 1186, 1387.
v. Hamilton, 43 Mo. 282: 1669, 1673.
v. Zimmerman, 142 Mo. 155: 710, 1158.
- St. Joseph etc. R. R. Co. v. Baldwin, 7 Neb. 247: 956.
v. Callender, 13 Kan. 496: 1626, 1628, 1632.
v. Cudmore, 103 Mo. 634: 24, 926.
v. McCarty, 3 Neb. (Unof.) 626: 158.
v. Orr, 8 Kan. 419: 1145, 1203, 1224.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 St. Joseph Hydraulic Co. v. Cincinnati etc. R. R. Co., 109 Ind. 172: 1510, 1512, 1520, 1631.
 St. Joseph Terminal R. R. Co. v. Hannibal etc. R. R. Co. 94 Mo. 535: 1045.
 St. Julien v. Morgan's La. & Tex. R. R. Co., 35 La. An. 924: 1631.
 St. Lawrence etc. R. R. Co. In re, 133 N. Y. 270: 971, 1469.
 St. Lawrence etc. R. R. Co., Matter of, 66 Hun 306: 1164, 1170, 1467.
 St. Louis v. Annex Realty Co., 175 Mo. 63: 1719.
 v. Bell Tel. Co., 96 Mo. 623: 341.
 v. Bissell, 46 Mo. 157: 852.
 v. Brown, 155 Mo. 545: 498, 503, 710, 1085, 1271.
 v. Conn. Mutual Life Ins. Co., 90 Mo. 135: 807, 1331.
 v. Conn. Mut. Life Ins. Co., 107 Mo. 92: 492.
 v. Cruikshank, 16 Mo. App. 495: 915.
 v. Frank, 9 Mo. App. 579: 976, 1074.
 v. Franks, 78 Mo. 41: 706, 913, 915.
 v. Galt, 179 Mo. 8: 468, 473.
 v. Gleason, 89 Mo. 67: 918.
 v. Gleason, 15 Mo. App. 25: 918, 972, 1035.
 v. Gurno, 12 Mo. 414: 211, 234.
 v. Hill, 116 Mo. 527: 53, 54, 56, 67, 433.
 v. Lang, 131 Mo. 412: 25, 1381.
 v. Lanigan, 97 Mo. 175: 1425, 1426.
 v. Lawton, 189 Mo. 474: 1386.
 v. Meintz, 107 Mo. 611: 1442.
 v. Missouri Pac. R. R. Co., 114 Mo. 13: 130, 131, 322, 1629.
 v. Nelson, 169 Mo. 461: 1399.
 v. Roe, 184 Mo. 324: 926.
 v. Speck, 67 Mo. 403: 13.
 v. Stern, 3 Mo. App. 48: 484.
 v. Stern, 3 Mo. Ap. 694: 14.
 v. Stoddard, 15 Mo. App. 173: 699.
 v. Terminal R. R. Ass., 211 Mo. 364: 180.
 v. Thomas, 100 Mo. 223: 1422.
 v. Weber, 140 Mo. 515: 1381.
 v. Western Union Tel. Co., 148 U. S. 92: 463.
 v. Western Union Tel. Co., 149 U. S. 465: 343, 463.
 v. Wetzel, 110 Mo. 260: 1378.
 St. Louis Belt etc. Ry. Co. v. Cartan Real Est. Co., 204 Mo. 565: 1106, 1187, 1201, 1269.
 v. Mendonza, 193 Mo. 518: 1314.
 St. Louis Brewing Ass. v. St. Louis, 168 Mo. 37: 1669, 1695.
 St. Louis County, 58 Mo. 175: 1067.
 St. Louis Co. Ct. v. Griswold, 58 Mo. 175: 498.
 St. Louis etc. Elec. Ry. Co. v. Van Hoorebeke, 191 Ill. 633: 846, 851, 1445.
 St. Louis etc. R. R. Co. v. Almeroth, 62 Mo. 343: 1385.
 v. Anderson, 39 Ark. 167: 1118, 1127, 1128, 1203, 1309, 1314, 1316.
 v. Anderson, 62 Ark. 360: 149, 151, 1716.
 v. Aubuchon, 199 Mo. 352: 1118, 1210, 1430.
 v. Barnsback, 234 Ill. 344: 1122, 1315, 1377.
 v. Belleville, 122 Ill. 376: 886.
 v. Belleville, 20 Ill. App. 580: 301.
 v. Belleville City R. R. Co., 158 Ill. 390: 754, 799, 1047.
 v. Biggs, 52 Ark. 240: 1654, 1655.
 v. Bradley, 4 C. C. A. 528: 1129.
 v. Bradley, 54 Fed. 630: 1127, 1132.
 v. Brady, 83 Ark. 489: 846.
 v. Brooksher, 86 Ark. 91: 87, 849, 1124, 1125, 1456.
 v. Brown, 58 Ill. 61: 1209.
 v. Brown, 34 Ill. App. 552: 92, 94, 1639.
 v. Capps, 67 Ill. 607: 621.
 v. Capps, 72 Ill. 188: 621.
 v. Chapman, 38 Kan. 307: 1128, 1233.
 v. Clark, 119 Mo. 357: 1461, 1463, 1465, 1466, 1471.
 v. Clark, 121 Mo. 169: 1138, 1247, 1342, 1477, 1483.
 v. Continental Brick Co., 198 Mo. 698: 1128, 1239, 1243, 1271, 1314.
 v. Craig, 10 Tex. Civ. App. 238: 87.
 v. Crandall, 75 Ark. 89: 843, 850, 851, 853.
 v. Davenport, 80 Ark. 244: 846.
 v. Davis, 75 Ark. 283: 867.
 v. Donovan, 149 Mo. 93: 1114, 1408, 1430.
 v. Drennan, 26 Ill. App. 263: 1636.
 v. Drummond R. & I. Co., 205 Mo. 167: 1389.

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 v. Eby, 152 Mo. 606: 1354.
 v. Evans & Howard Fire Brick Co., 85 Mo. 307: 1423, 1430, 1463.
 v. Evans & Howard Fire Brick Co., 15 Mo. App. 152: 1430, 1463.
 v. Fayetteville, 75 Ark. 532: 677, 678, 749, 1288.
 v. Foltz, 52 Fed. 627: 686, 1631.
 v. Fowler, 113 Mo. 458: 980, 982, 1031, 1225, 1322.
 v. Fowler, 142 Mo. 670: 1149, 1186, 1202, 1217, 1245.
 v. Gill, 156 U. S. 649: 480, 483.
 v. Gordon, 157 Mo. 71: 881, 883.
 v. Grayson Co., 31 Tex. Civ. App. 611: 956.
 v. Guswelle, 236 Ill. 214: 1140, 1314.
 v. Haller, 82 Ill. 208: 621, 778, 780, 1138.
 v. Hammers, 51 Kan. 127: 1312.
 v. Hanks, 80 Ark. 417: 846.
 v. Hannibal Union Depot Co., 125 Mo. 82: 726, 754, 760, 797, 798.
 v. Harris, 47 Ark. 340: 87, 848.
 v. Henderson, 86 Tex. 307: 853.
 v. Hoshall, 82 Ark. 387: 92, 1638, 1653.
 v. Hurst, 14 Ill. App. 419: 154, 846, 847, 1455.
 v. Hurst, 25 Ill. App. 98: 154, 847, 1455.
 v. Jacobs, 44 La. Ann. 922: 1456.
 v. Karnes, 101 Ill. 402: 1519.
 v. Kirby, 104 Ill. 345: 1195, 1318.
 v. Kirkwood, 159 Mo. 239: 303.
 v. Knapp, Stout & Co., 160 Mo. 396: 995, 1186, 1202, 1230, 1247, 1271, 1277, 1311, 1471.
 v. Lewright, 113 Mo. 660: 684, 921, 982, 1435.
 v. Lindell Ry. Co., 190 Mo. 246: 328, 881.
 v. Lux, 63 Ill. 523: 1398.
 v. Lyman, 57 Ark. 512: 90, 1120, 1131, 1649, 1653.
 v. Martin, 29 Kan. 750: 1441, 1443.
 v. McAuliff, 43 Kan. 185: 1310, 1314.
 v. Mo. Pac. R. R. Co., 114 Mo. 13: 132.
 v. Mitchell, 47 Ill. 165: 1246, 1318.
 v. Moldenhauer, 130 Mo. App. 243: 1461, 1471.
 v. Mollett, 59 Ill. 235: 1267.
 v. Morris, 35 Ark. 622: 90, 93, 95, 158, 847, 1199, 1200, 1456, 1648, 1653, 1715, 1716.
 St. Louis etc. R. R. Co. v. Morse, 50 Kan. 99: 1400.
 v. Neely, 63 Ark. 636: 306.
 v. North, 31 Mo. App. 345: 1112, 1311, 1315.
 v. Nyee, 61 Kan. 394: 1346, 1347, 1564.
 v. Oliver, 17 Okla. 589: 1225, 1312, 1321, 1324, 1515.
 v. Petty, 57 Ark. 359: 524, 534, 731, 816, 1068.
 v. Petty, 63 Ark. 94: 1072.
 v. Pfau, 212 Mo. 398: 1150, 1271, 1314.
 v. P. O. & G. R. R. Co., 42 Ark. 249: 909, 1281.
 v. Postal Tel. Co., 173 Ill. 508: 895, 934, 994, 1176, 1247, 1285, 1286.
 v. Quinn, 24 Kan. 370: 1399.
 v. Ramsey, 53 Ark. 314: 104, 105, 107.
 v. Richardson, 45 Mo. 466: 1186.
 v. Royall, 75 Ark. 530: 1288.
 v. Rundell, 53 Ark. 32: 833.
 v. Russell, 150 Mo. 453: 1408, 1430.
 v. St. Louis Union Stock Yard Co., 120 Mo. 541: 1120, 1123, 1186, 1217.
 v. Saunders, 78 Ark. 589: 90.
 v. Saunders, 84 Ark. 111: 90.
 v. Schneider, 30 Mo. App. 620: 135, 147, 157.
 v. Shaw, 99 Tex. 559: 450, 655, 661.
 v. Smith, 42 Ark. 265: 1144.
 v. Smith, 216 Ill. 339: 1318, 1332, 1339.
 v. S. W. Tel. & Tel. Co., 121 Fed. 276: 701, 773, 894, 931, 932, 1048, 1286, 1624.
 v. Springfield etc. R. R. Co., 96 Ill. 274: 764.
 v. State, 85 Ark. 561: 1643.
 v. Stewart, 201 Mo. 491: 1216.
 v. Sullivan, 7 Kan. App. 527: 94.
 v. Teters, 68 Ill. 144: 1312, 1392, 1673, 1675.
 v. Thomas, 34 Fed. 774: 673, 675.
 v. Tropp, 64 Ark. 357: 859.
 v. Trustees, 43 Ill. 303: 786.
 v. Union Trust & S. Co., 209 Ill. 457: 1379.
 v. Wabash Ry. Co., 152 Fed. 849: 762.
 v. Wallrlink, 47 Ark. 330: 847, 1319.
 v. Wilder, 17 Kan. 239: 939, 1392, 1673.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Yarborough, 56 Ark. 612: 158, 1132, 1649, 1654.
 v. Yount, 67 Kan. 396: 853, 1545.
- St. Louis Gas Lt. Co. v. St. Louis Gas F. & P. Co., 16 Mo. App. 52: 411.
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 v. Northwestern St. Louis Ry. Co., 69 Mo. 65: 412, 1608.
 v. Postal Tel. Cable Co., 173 Ill. 508: 773.
 v. Southern R. R. Co., 138 Mo. 591: 1695.
 v. Thomas, 34 Fed. 774: 673.
- St. Louis Transfer R. R. Co. v. St. Louis etc. R. R. Co., 100 Mo. 419: 771.
 v. St. Louis Merchants' B. & T. R. R. Co., 111 Mo. 666: 765, 769.
- St. Michael's P. E. Church v. Forty-second St. etc. R. R. Co., 26 Misc. 601: 277.
- St. Nicholas Terrace, In re, 76 Hun 209: 1253.
- St. Nicholas Terrace, In re, 143 N. Y. 621: 183, 878, 1253.
- St. Paul v. Chicago etc. R. Co., 45 Minn. 387: 1492.
 v. Chicago etc. R. R. Co., 63 Minn. 330: 197, 199.
 v. Nickl, 42 Minn. 262: 679, 927, 928, 1009, 1057.
- St. Paul etc. Ry. Co., In re, 34 Minn. 227: 498, 747, 1045, 1061, 1423.
- St. Paul etc. R. R. Co., In re, 37 Minn. 164: 767, 769.
- St. Paul etc. R. R. Co. v. Covell, 2 Dak. 483: 1097.
 v. Duluth, 56 Minn. 494: 142.
 v. Matthews, 16 Minn. 341: 1137, 1364.
 v. Minneapolis, 35 Minn. 141: 749, 929, 1011.
 v. Minneapolis, 44 Minn. 149: 881, 883.
 v. Minneapolis, 45 Minn. 400: 1492.
- St. Paul etc. R. R. Co. v. Murphy, 19 Minn. 500: 1112, 1186, 1209, 1213, 1310, 1311.
 v. St. Paul U. D. R. R. Co., 44 Minn. 325: 862.
- St. Paul Union Depot Co. v. St. Paul, 30 Minn. 359: 750, 755.
- St. Peter v. Denison, 58 N. Y. 416: 435, 436, 688, 1507.
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- St. Thomas Hospital v. Charing Cross Ry. Co., 1 J. & H. 400: 823.
- St. Vincent v. Greenfield, 12 Ontario 297: 913.
- St. Vincent Orphan Asylum v. Troy, 76 N. Y. 108: 1492.
- Salazar v. Smart, 12 Mont. 395: 587, 1603.
- Salem v. Eastern R. R. Co., 98 Mass. 431: 557.
 v. Maynes, 123 Mass. 372: 468.
- Salem etc. R. R. Co. v. County Comrs., 9 Allen 563: 1261, 1265.
- Salem & Hamburg Turnpike Co. v. Lyme, 18 Conn. 451: 409, 411, 791.
- Salem Mills Co. v. Lord, 42 Ore. 82: 73.
- Salem R. R. Co. v. Alderman & Sons Co., 78 S. C. 1: 533, 1062.
- Salem Road, 7 Luzerne Leg. Reg. Rep. 105: 1031.
- Salem Tp. Road, In re, 103 Pa. St. 250: 1371.
- Salem Turnpike etc. Corporation v. County of Essex, 100 Mass. 282: 923.
- Salisbury v. Great Northern R. R. Co., 17 Q. B. 840: 695, 1700.
 v. Western N. C. R. R. Co., 91 N. C. 490: 168.
- Salisbury Mills v. Forsaith, 57 N. H. 124: 702.
- Sallden v. Little Falls, 102 Minn. 358: 630, 632, 1306, 1307.
- Sallieotte v. King Bridge Co., 122 Fed. 378: 89.
- Salisbury v. Gaskin, 66 N. J. L. 111: 700.
- Salisbury v. Western N. C. R. R. Co., 91 N. C. 490: 1664.
- Salt Co. v. Brown, 7 W. Va. 191: 500, 502, 506, 531.
- Salt Creek Val. Turnpike Co. v. Parks, 50 Ohio St. 568: 1007.
- Salter v. Metropolitan District Ry. Co., 39 L. J. Eq. 567: 822.
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[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Salt Lake City, 25 Utah 441: 798, 799.
- Samish River Boom Co. v. Union Boom Co., 32 Wash. 586: 21, 543, 673, 677, 714, 901, 1060, 1062.
- Sammons v. Gloversville, 67 App. Div. 628: 83, 85, 1605, 1612, 1615.
 v. Gloversville, 81 App. Div. 332: 83, 1605.
 v. Gloversville, 175 N. Y. 346: 83, 85, 1605, 1612, 1615.
- Samon v. Trenton, 47 N. J. L. 489: 1033.
- Sampf's Appeal, 116 Pa. St. 33: 172.
- Sample v. Carroll, 132 Ind. 496: 713.
- Sampson v. Bradford, 6 Cush. 303: 960.
- Sams v. Port Royal etc. R. R. Co., 15 S. C. 484: 858.
- Samuels v. County of Dubuque, 13 Ia. 536: 458.
- San Antonio v. Grandjean, 91 Tex. 430: 1520.
 v. Mullaly, 11 Tex. Civ. App. 596: 631.
 v. San Antonio St. R. R. Co., 15 Tex. Civ. App. 1: 354.
 v. Sullivan, 23 Tex. Civ. App. 658: 1642.
- San Antonio etc. Ry. Co. v. Gurley, 37 Tex. Civ. App. 283: 152.
 v. Gwynn, 4 Tex. Ct. of App. p. 338: 152.
 v. Hunnicutt, 18 Tex. Civ. Ann. 310: 1226, 1229, 1356.
 v. Knoepfli, 82 Tex. 270: 1626.
 v. Kiersey, 98 Tex. 590: 88.
 v. Ruby, 80 Tex. 172: 936, 1144, 1226.
 v. S. W. Tel. & Tel. Co., 93 Tex. 313: 682, 686.
 v. State, 79 Tex. 264: 488.
- San Antonio Rapid Transit St. R. R. Co. v. Limburger, 88 Tex. 79: 272, 274, 642.
- San Bernardino & E. R. R. Co. v. Haven, 94 Cal. 489: 1203, 1310.
- Sanborn v. Belden, 51 Cal. 266: 1162, 1170, 1467.
 v. Meredith, 58 N. H. 150: 1025.
 v. Rice, 129 Mass. 387: 429.
 v. Van Duyne, 90 Minn. 215: 197, 838, 1495, 1618.
- Sand Creek Lateral Irr. Co. v. Davis, 17 Colo. 326: 587, 1058.
 Sander v. State, 90 App. Div. 618: 259.
 v. State, 182 N. Y. 400: 259.
- Sanders, Ex parte, 4 Cow. 544: 1637.
 v. McCracken, Hardin (Ky.) 266: 966.
- Sanderson v. Haverstick, 8 Pa. St. 294: 1491.
 v. Herman, 108 Wis. 662: 615, 616.
- Sanford v. Martin, 31 Ia. 67: 725.
- San Diego Land & Town Co. v. Neale, 78 Cal. 63: 1128, 1176, 1227, 1233, 1237, 1329.
 v. Neale, 78 Cal. 80: 1460, 1469.
 v. Neale, 88 Cal. 50: 1130, 1131, 1435.
- San Diego Water Co. v. San Diego, 118 Cal. 556, 483.
- Sandpoint v. Doyle, 14 Ida. 749: 226.
- Sandy Lick Creek Road, 51 Pa. St. 94: 519.
- Sanford v. Tueson, 8 Ariz. 247: 497, 672, 990, 1042, 1043, 1044, 1061, 1062, 1066, 1067.
 v. Webster County, 5 Neb. (Unof.) 364: 1511, 1516.
- San Francisco v. Burr, 108 Cal. 460: 362, 401.
 v. Burr (Cal.) 36 Pac. 771: 877.
 v. Collins, 98 Cal. 259: 1435, 1436.
 v. Itsett, 80 Cal. 57: 1493.
 v. Kiernan, 98 Cal. 614: 696, 698.
 v. Scott, 4 Cal. 114: 1162, 1435.
- San Francisco & Alameda Water Co. v. Alameda Water Co., 36 Cal. 639: 908.
- San Francisco etc. R. R. Co. v. Caldwell, 31 Cal. 367: 524, 1174, 1176, 1192.
 v. Gould, 122 Cal. 601: 982.
 v. Lewiston, 134 Cal. 412: 1325, 1434.
 v. Mahoney, 29 Cal. 112: 1098, 1223, 1423.
 v. Taylor, 86 Cal. 246: 1347.
- San Francisco Savings Union v. G. R. Petroleum & Min. Co., 144 Cal. 134: 114, 127, 1606.
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 v. Township Board, 118 Mich. 19: 1404.
- Sanguinette v. Pock, 136 Cal. 466: 68, 145.

- [The references are to the pages: Vol. I. pp. 1-742; Vol. II, pp. 743-1719.]
- Sanitary District v. Alderman, 113
 Ill. App. 23: 144, 846, 1456.
v. Bernstein, 175 Ill. 215: 1700.
v. Chapin, 226 Ill. 499: 930, 1072,
 1222.
v. Conroy, 109 Ill. App. 367: 144.
v. Cullerton, 147 Ill. 385: 1106,
 1426.
v. Lee, 79 Ill. App. 159: 829.
v. Loughran, 160 Ill. 362: 1222,
 1262, 1329.
v. Martin, 227 Ill. 260: 851, 854.
v. McGuirl, 81 Ill. App. 392: 1271.
v. Pittsburg etc. Ry. Co., 216 Ill.
 575: 777, 991, 1042, 1136, 1174,
 1233, 1239, 1266.
v. Ray, 85 Ill. App. 115: 1456.
v. Ray, 199 Ill. 63: 1456, 1649,
 1653.
- San Jose v. Freyschlog, 56 Cal. 8:
 1328.
v. Reed, 65 Cal. 241: 1136, 1137.
- San Jose & A. R. R. Co. v. Mayne,
 83 Cal. 566: 1149, 1223.
- San Jose Ranch Co. v. Brooks, 74
Cal. 463: 351.
- San Luis Land etc. Co. v. Kenil-
worth Canal Co., 3 Colo. App.
244: 587, 1466.
- San Luis Obispo v. Brizzolara, 100
Cal. 434: 1150.
- San Luis Obispo Co. v. Simas, 1 Cal.
App. 175: 917, 997, 1247, 1461.
- San Mateo County v. Coburn, 130
Cal. 631: 7, 497, 499, 503, 512,
514, 674, 1203.
- San Mateo Water Co. v. Sharpstein,
50 Cal. 284: 1162, 1171, 1461,
1467.
- San Pedro etc. R. R. Co. v. Board
of Education, 32 Utah 305: 1244.
- Santa Ana v. Bruuner, 132 Cal. 234:
678, 1046, 1063, 1070, 1228.
v. Gildmacher, 133 Cal. 395: 1060,
1062, 1063, 1064.
v. Harlin, 99 Cal. 538: 514, 678,
1056, 1128, 1176, 1227, 1231,
1240.
- Santa Barbara v. Gould, 143 Cal.
421: 783.
- Santa Cruz v. Enright, 95 Cal. 105:
697, 1060, 1063.
- Santry v. Penn. S. V. R. R. Co., 4
Mont. Co. L. R. 144: 647.
- Sappington v. Little Rock etc. R.
R. Co., 37 Ark. 23: 855.
- Saratoga & Schenectady R. R. Co.,
Matter of, 66 How. Pr. 43: 1461.
- Saratoga Springs v. Saratoga G. E.
L. & P. Co., 191 N. Y. 123: 481.
- Sargeant v. Ohio & Mississippi R.
R. Co., 1 Handy (Ohio) 52:
620.
- Sargent v. Machias, 65 Me. 591:
938.
- v. Merrimac, 196 Mass. 171: 1228,
1231, 1234, 1237.
- v. Tacoma, 10 Wash. 212: 614, 616,
1718.
- Sarle v. Lead, 10 S. D. 312: 659.
- Sarvis v. Carter, 116 Ia. 707: 889.
- Sater v. Burlington & Mount Pleasant
Plank Road Co., 1 Ia. 386:
1174.
- Satterfield Admx. v. Crow, 8 B. Mon.
553: 965.
- Satterly v. Winne, 101 N. Y. 218:
981, 1365.
- Sauer v. New York, 44 App. Div.
305: 1273.
v. New York, 90 App. Div. 36:
181, 211, 228.
v. New York, 40 Misc. 585: 228.
v. New York, 180 N. Y. 27: 181,
211, 227, 228.
v. New York, 206 U. S. 536: 194,
228.
- Saunders v. Bluefield W. W. & Imp.
Co., 58 Fed. 133: 72, 73, 74,
701, 1603.
- v. Lowell, 131 Mass. 387: 1074.
v. New York Cent. etc. R. R. Co.,
71 Hun 153: 122, 131.
- v. New York Cent. etc. R. R. Co.,
144 N. Y. 75: 115, 122, 127, 129,
131, 132, 133.
- v. New York El. R. R. Co., 16
Daly 261: 924.
- v. Railroad Co., 101 Tenn. 206:
1165, 1629.
- Sautter v. Utica City Nat. Bank, 45
Misc. 15: 373.
- Savage v. Board of Comrs., 10 Ill.
App. 204: 1411, 1419.
v. Salem, 23 Or. 381: 355.
- Savanna v. Loop, 47 Ill. App. 214:
629, 1306, 1308, 1309, 1336.
- Savannah v. Hancock, 91 Mo. 54:
498, 512.
v. Hartridge, 37 Ga. 113: 1182.
v. Vernon Shell Road Co., 88 Ga.
342: 413, 779.
- Savannah etc. Canal v. Bourquin, 51
Ga. 378: 1649, 1656.
- v. Suburban etc. R. R. Co., 93 Ga.
240: 783.
- Savannah etc. R. R. Co. v. Atkinson,
94 Ga. 780: 839, 841.
- v. Buford, 106 Ala. 303: 151, 1149,
1716.
- v. Davis, 25 Fla. 917: 1634.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Gill, 118 Ga. 737: 351, 372, 865.
 v. Parish, 117 Ga. 893: 169, 1638.
 v. Postal Tel. Cable Co., 112 Ga. 941: 773, 1068, 1285.
 v. Postal Tel. Cable Co., 113 Ga. 916: 773, 1285.
 v. Postal Tel. Cable Co., 115 Ga. 554: 503, 773, 1285, 1619.
 v. Savannah, 45 Ga. 602: 268, 321.
 v. Savannah, 96 Ga. 680: 1004, 1016, 1571.
 v. Shiels, 33 Ga. 601: 250, 307, 1581.
 v. Woodruff, 86 Ga. 94: 732, 1581, 1592.
- Saver v. Philadelphia, 35 Pa. St. 231: 1570.
- Savings Fund & Loan Assn. v. Schmidt, 15 Ia. 213: 1510, 1576.
- Sawyer v. Boston, 144 Mass. 470: 1120, 1138, 1320.
 v. Commonwealth, 182 Mass. 245: 626, 922, 1273.
 v. Commonwealth, 185 Mass. 356: 626, 1273.
 v. Hamilton, 1 Murphy N. C. 253: 1005.
 v. Keene, 47 N. H. 173: 608.
 v. Landers, 56 Ia. 422: 947, 949, 1563, 1564.
 v. Met. Water Board, 178 Mass. 267: 733, 1271, 1273.
- Saxton v. New York El. R. R. Co., 12 App. Div. 263: 1562.
 v. New York El. R. R. Co., 60 N. Y. Supr. Ct. 421: 1305.
 v. New York El. R. R. Co., 139 N. Y. 320: 1196, 1296, 1300, 1301.
- Sayre v. Newark, 58 N. J. Eq. 136: 85, 117, 139, 142.
 v. Newark, 60 N. J. Eq. 361: 84, 85, 117, 138, 142, 1606.
 v. State, 123 N. Y. 291: 144.
- Seace v. Wayne Co., 72 Neb. 162: 659, 1176, 1208, 1209.
- Scallon v. Manhattan Ry. Co., 112 App. Div. 262: 866.
 v. Manhattan Ry. Co., 185 N. Y. 359: 866.
- Seammon v. Chicago, 40 Ill. 146: 1018, 1027, 1513.
- Scanlon v. London etc. R. R. Co., 23 Grant Ch. 559: 1533.
- Scarborough v. Commissioners, 41 Me. 604: 916, 992.
- Searritt v. Kansas City etc. R. R. Co., 127 Mo. 298: 1627, 1631.
 v. Kansas City etc. R. R. Co., 148 Mo. 676: 1503.
- Schaaf v. Cleveland etc. Ry. Co., 66 Ohio St. 215: 285, 1589.
- Schade v. Theel, 45 Kan. 628: 973, 974.
- Schaefer v. Werling, 188 U. S. 516: 464.
- Schafer v. Brooklyn & L. I. R. R. Co., 124 N. Y. 630: 268, 719.
- Schaller v. Omaha, 23 Neb. 325: 630, 659, 660, 664, 1334.
- Schattner v. Kansas City, 53 Mo. 162: 238, 239.
- Schatz v. Pfeil, 56 Wis. 429: 513, 1520.
- Schaufele v. Doyle, 86 Cal. 107: 237, 1597.
- Scheer v. Long Island R. R. Co., 127 App. Div. 267: 864, 964, 1520.
- Scheff v. Upper Conn. River & Lake Imp. Co., 57 N. H. 110: 981.
- Scheh v. Detroit, 45 Mich. 626: 520.
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 v. Furman, 145 N. Y. 482: 491.
- Schenectady Ry. Co. v. Lyon, 41 Misc. 506: 894, 895.
 v. Lyon, 44 Misc. 275: 1438.
 v. Peck, 88 App. Div. 201: 683, 744.
- Schepman v. Buhner, 32 Ind. App. 562: 1095.
- Schermeely v. Stillwater & St. Paul R. R. Co., 16 Minn. 506: 1407.
- Schermerhorn v. Peck, 43 Kan. 667: 948, 1564.
- Scheurich v. S. W. Mo. Lt. Co., 109 Mo. App. 406: 724.
- Scheutter v. Lynch, 23 Utah 305: 882.
- Schier v. Cane Belt Ry. Co., 45 Tex. Civ. App. 295: 640.
- Schliehauf v. Canada So. R. R. Co., 28 Grant Ch. 236: 843.
- Schlosser v. Comrs. of Highways, 235 Ill. 214: 1106, 1416.
- Schmeckpepper v. Chicago etc. R. R. Co., 116 Wis. 592: 92.
- Schmidt v. Densmore, 42 Mo. 225: 672, 679, 688, 1634.
 v. Manhattan R. R. Co., 11 Miscl. 18: 1302.
 v. Minneapolis etc. R. R. Co., 38 Minn. 491: 1311.
 v. N. Y. El. R. R. Co., 2 App. Div. 481: 1124.
- Schmied v. Kceney, 72 Ind. 309: 1406.
- Schmitt v. San Francisco, 100 Cal. 302: 888.
- Schmitz v. Brooklyn Union El. R. R. Co., 111 App. Div. 308: 180, 1334.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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- Schneider v. Brown, 142 Mich. 45: 231, 439.
- v. Detroit, 72 Mich. 240: 211, 226, 227, 236.
- v. Jacob, 86 Ky. 101: 182, 877.
- v. Kniekerbocker Ice Co., 119 Wis. 171: 864.
- v. Mo. Pac. R. R. Co., 29 Mo. App. 68: 151.
- v. Rochester, 33 App. Div. 458: 707.
- v. Rochester, 160 N. Y. 165: 707, 968, 1374, 1624.
- v. Schneider, 36 Colo. 518: 920, 1058, 1442.
- Schock v. Falls City, 31 Neb. 599: 1569.
- Schoen v. Kansas City, 65 Mo. App. 134: 84, 1650, 1654.
- Schofield v. Cooper, 126 Ia. 334: 154.
- v. Penn. S. V. R. R. Co., 12 Pa. Co. Ct. 122: 530, 717.
- Schoff v. Cleveland etc. R. R. Co., 16 Ohio C. C. 252: 272.
- v. Upper Conn. River etc. Co., 57 N. H. 110: 990.
- Scholl v. Emerich, 36 Pa. Supr. Ct. 404: 1499.
- v. German Coal Co. 118 Ill. 427: 8.
- Seholle v. Met. El. R. R. Co., 60 App. Div. 368: 1562.
- Schomaecker v. Michaels, 117 App. Div. 125: 1562.
- v. Michaels, 189 N. Y. 61: 182, 1532.
- Schonhardt v. Pa. R. R. Co., 216 Pa. St. 224: 1272.
- School District v. Copeland, 2 Gray 414: 1018.
- v. Hart, 3 Wyo. 563: 1500.
- v. Hodgin, 180 Mo. 70: 1047, 1049.
- v. Oellien, 209 Mo. 464: 921, 976.
- v. Searl, 38 Fed. 18: 1348.
- Sehopp v. St. Louis, 117 Mo. 131: 199, 346.
- Schreiber, Matter of, 53 How. Pr. 359: 707.
- Schreiber v. Chicago & Evanston R. R. Co., 115 Ill. 340: 953.
- Schrivier v. Johnstown, 71 Hun 232: 83, 1605.
- Sehrodt v. St. Joseph, 109 Mo. App. 627: 1137.
- Schroeder v. De Graff, 28 Minn. 299: 1634.
- v. Detroit etc. R. R. Co., 44 Mich. 387: 1047, 1098, 1419.
- v. Joliet, 189 Ill. 48: 629, 1306, 1308.
- Schroeder v. Klipp, 120 Wis. 245: 400.
- v. Lancaster City, 15 Pa. Co. Ct. 466: 1399.
- v. Onekama, 95 Mich. 25: 1512, 1516, 1517.
- Schrope v. Pioneer Tp. 111 Ia. 113: 156.
- Schuchardt v. New York, 59 Barb. 295: 1343.
- v. New York, 53 N. Y. 202: 1459.
- Schuetz v. Stillwater, 80 Minn. 287: 159, 235.
- Schulenberg & B. L. Co. v. St. Louis etc. R. R. Co., 129 Mo. 455: 254, 311, 314, 1582, 1591.
- Schuler v. Board of Supvrs., 12 S. D. 460: 1123, 1313, 1317.
- Schuller v. Northern Liberties etc. R. R. Co., 3 Whart. 555: 1463.
- Schulte v. North Pacific Transportation Co., 50 Cal. 592: 250.
- Schumacher v. St. Louis, 3 Mo. App. 297: 607.
- v. Toberman, 56 Cal. 508: 735.
- Schurmeier v. St. Paul & Pacific R. R. Co., 8 Minn. 113: 1582.
- v. St. Paul etc. R. R. Co., 10 Minn. 82: 104, 197, 200, 247, 249, 253, 1580.
- Schuster v. Lemond, 27 Minn. 253: 384, 400, 1402, 1403.
- v. Sanitary District, 177 Ill. 626: 677, 815, 1061, 1066, 1232.
- Schuylkill Falls Road, 2 Binn. 250: 1086.
- Schuylkill etc. Navigation Co. v. Decker, 2 Watts 343: 1670, 1674.
- Schuylkill Navigation Co. v. Farr, 4 W. & S. 362: 963, 1144, 1270, 1272, 1273, 1706.
- v. Freedley, 6 Whart. 109: 1267.
- v. Kittera, 2 Rawle 438: 1440.
- v. Loose, 19 Pa. St. 15: 710.
- v. McDonough, 33 Pa. St. 73: 1456, 1639.
- v. Pottsville & M. R. R. Co., 17 Phil. 648: 783.
- v. Thoburn, 7 S. & R. 411: 948, 1187, 1227, 1272.
- Schuylkill Riv. etc. R. R. Co.'s Petition, 17 Phila. 11: 918.
- Schuylkill River E. S. R. Co. v. Harris, 124 Pa. St. 215: 1410.
- v. Kersey, 133 Pa. St. 234: 1339.
- v. Rees, 135 Pa. St. 629: 1227.
- v. Stocker, 128 Pa. St. 233: 1150, 1178.
- Schwarzenbach v. Electric Water Power Co., 101 App. Div. 345: 144, 1607.
- v. Electric Water Power Co., 184 N. Y. 546: 144, 1607.

- {The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. Hemrich Bros. Brewing Co., 29 Wash. 21: 298, 300, 1582, 1590.
 Schwerdtle v. Placer Co. 108 Cal. 589: 865, 1504.
 Scott v. Bruckett, 89 Ind. 413: 1032.
 v. Central Val. R. R. Co., 33 Pa. Supr. Ct. 574: 1523.
 v. Donald, 165 U. S. 58: 485.
 v. Lasell, 71 Ia. 180: 930, 1401.
 v. Manhattan R. R. Co., 60 N. Y. Supr. Ct. 233: 1229.
 v. Metropolitan El. R. R. Co., 2 Misc. 150: 1152.
 v. Nevada, 56 Mo. App. 189: 142, 1652, 1654, 1662.
 v. St. Paul & Chicago Ry. Co., 21 Minn. 322: 806.
 v. Toledo, 36 Fed. 385: 1005, 1220.
 v. Wilson, 3 N. H. 321: 104.
 Scott Lumber Co. v. Wolford, 62 W. Va. 555: 531, 591.
 Scottish N. E. R. R. Co. v. Stewart, 3 Macq. 382: 833, 856.
 Scovel v. Detroit, 146 Mich. 93: 357.
 Scovell v. St. Louis etc. Ry. Co., 117 La. 459: 873, 1546, 1715.
 Seovil v. Geddings, 7 Ohio, pt. 2, 211: 213.
 Seoville v. Cleveland, 1 Ohio St. 126: 14.
 Scranton's Appeal, 121 Pa. St. 97: 1606.
 Scranton v. Barnes, 147 Pa. St. 461: 914.
 v. Del. & H. Canal Co., 12 Pa. Co. Ct. 283: 1622.
 v. Minneapolis, 58 Minn. 437: 879.
 v. Thomas, 141 Pa. St. 1: 880.
 v. Wheeler, 57 Fed. 803: 99, 115, 116, 132.
 v. Wheeler, 113 Mich. 565: 99.
 v. Wheeler, 179 U. S. 141: 99, 102.
 Scranton etc. Traction Co. v. Del. & H. Canal Co., 1 Pa. Supr. Ct. 409: 277, 766, 771.
 v. Del. & H. Canal Co., 180 Pa. St. 636: 770.
 Scranton Gas & W. Co. v. Coal & I. Co., 145 Pa. St. 21: 783, 802.
 v. Northern Coal & Iron Co., 192 Pa. St. 80: 784, 802, 1044, 1609.
 v. Scranton, 11 Pa. Dist. Ct. 671: 354.
 v. Scranton City, 214 Pa. St. 586: 352.
 Scraper v. Piper, 59 Ind. 158: 983, 1407.
 Scrivner v. Paris, 26 Tex. Civ. App. 196: 453.
 Scruggs v. Reese, 128 Ind. 399: 723.
 Scrutchfield v. Choctaw etc. R. R. Co., 18 Okla. 308: 191, 320, 380, 389.
 Seudder v. Trenton Del. Falls. Co., 1 N. J. Eq. 694: 495, 498, 547, 549, 552, 923.
 Seuffletown Fence Co. v. McAllister, 12 Bush. (Ky.) 312: 589.
 Scully v. Cincinnati, 9 Ohio C. C. 63: 1565.
 Seaboard Air Line Ry. Co. v. Chamberlin, 108 Va. 42: 1147.
 v. Florida, 203 U. S. 261: 480, 483.
 v. Olive, 142 N. C. 257: 1061, 1477, 1480, 1619.
 v. Southern Invest. Co., 53 Fla. 832: 246, 1580.
 Seaboard & R. R. Co. v. Ambrose, 122 Ga. 47: 1638.
 Seabright v. Allgor, 69 N. J. L. 641: 1630.
 v. Central R. R. Co., 72 N. J. L. 8: 1511, 1519.
 v. Central R. R. Co., 73 N. J. L. 625: 1511, 1519.
 Seafield v. Bohne, 169 Mo. 537: 514, 1511.
 Seale v. Lead, 10 S. D. 312: 631.
 Seaman v. Smith, 24 Ill. 523: 103, 108.
 v. Washington, 172 Pa. St. 467: 630, 636, 698, 894, 1308.
 Searcy v. Clay Co., 176 Mo. 493: 1035, 1511.
 Searing v. Saratoga Springs, 39 Hun 307: 142.
 Searl v. School District, 133 U. S. 553: 1175, 1348, 1352.
 v. School District No. 2, 124 U. S. 197: 931.
 Searle v. Lackawanna etc. R. R. Co., 33 Pa. St. 57: 1268.
 v. Lackawanna R. R. Co., 9 Casey 57: 1140.
 v. Lead. 10 S. D. 312: 1601.
 Sears v. Crocker, 184 Mass. 586: 276, 334.
 v. Marshalltown St. Ry. Co., 65 Ia. 742: 620.
 v. Street Comrs., 173 Mass. 350: 10, 463.
 v. Tuolumne Co., 132 Cal. 167: 1493.
 Seaside & B. B. El. R. R. Co. v. South Reformed Dutch Church, 83 Hun 143: 193, 1303.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Seasongood v. Cincinnati, 5 Ohio C. C. 225: 603, 611.
 Seattle, In re, 26 Wash. 602: 1564.
 Seattle v. Board of Home Missions, 138 Fed. 307: 1307, 1308.
 v. Columbia etc. R. R. Co., 6 Wash. 379: 118, 353.
 v. Fidelity Trust Co., 22 Wash. 154: 709, 1370.
 v. Hill, 23 Wash. 92: 876, 887.
 v. Park, 42 Wash. 151: 1136.
 v. Smith, 37 Wash. 119: 865.
 v. Williams, 41 Wash. 366: 1110, 1379.
 Seattle etc. R. R. Co. v. Bellingham Bay etc. R. R. Co., 29 Wash. 491: 759, 1413.
 v. Corbett, 22 Wash. 189: 1348.
 v. Gilchrist, 4 Wash. 509: 1113, 1130, 1138, 1310, 1315.
 v. Murphine, 4 Wash. 448: 1113, 1229, 1311, 1317.
 v. Roeder, 30 Wash. 244: 1110, 1132, 1188, 1202, 1203, 1269, 1273.
 v. Scheike, 3 Wash. 625: 1257.
 v. State, 52 Fed. 594: 931.
 v. State, 7 Wash. 150: 118, 746, 825.
 Seattle Land & Imp. Co. v. Seattle, 37 Wash. 274: 1494, 1496, 1500.
 Seattle Transfer Co. v. Seattle, 27 Wash. 520: 229, 640, 1357, 1601.
 Seavey v. Seattle, 17 Wash. 361: 1674.
 Secomb v. Milwaukee etc. R. R. Co., 49 How. Pr. 75: 524, 673, 748, 1634.
 v. Railroad Co., 23 Wall. 108: 673, 1516, 1626.
 Second St. etc. R. R. Co. v. Green & Coats Sts. Pass. R. R. Co., 3 Phila. 430: 1621.
 Second Street Extension, 23 Pa. St. 346: 819.
 Second Street, Harrisburg, 66 Pa. St. 132: 1325.
 Second & Third Sts. Pass. R. R. Co. v. Green & Coats Sts. Pass. R. R. Co., 3 Phila. 430: 764, 1283.
 Secretary of the Treasury, In re, 45 Fed. 396: 738.
 Sedalia v. Missouri etc. Ry. Co., 17 Mo. App. 105: 1344, 1378.
 Sedalia etc. Ry. Co. v. Abell, 18 Mo. App. 632: 1242, 1318.
 Sedgeley Ave., In re, 88 Pa. St. 509: 432, 1682, 1705.
 Sedgeley Ave., In re, 217 Pa. St. 313: 631.
 Sedgwick v. Watford etc. R. R. Co., 36 L. J. Ch. 379: 1537.
 Seefeld v. Chicago, Milwaukee & St. Paul Ry. Co., 67 Wis. 96: 1111, 1138, 1150, 1321.
 Seeger v. Mueller, 133 Ill. 86: 880.
 Seeley v. Amsterdam, 54 App. Div. 9: 1524.
 Seely v. Sebastian, 4 Oregon 25: 504, 564, 571, 581.
 Seibert v. Linton, 5 W. Va. 57: 734.
 Seidel's Road, In re, 2 Woodward's Decs. 275: 1381.
 Seidensparger v. Spear, 17 Maine 123: 858.
 Seidschlag v. Antioch, 207 Ill. 280: 876, 883, 885.
 Seifert v. Brooks, 34 Wis. 443: 1005, 1009, 1013, 1016.
 v. Brooklyn, 101 N. Y. 136: 155, 233.
 Seipel v. Baltimore etc. Extension Co., 129 Pa. St. 425: 1713.
 Seitz v. Lafayette Traction Co., 5 Pa. Co. Ct. 469: 1589.
 Selden v. Delaware & H. Canal Co., 24 Barb. 362: 144.
 v. Delaware & Hudson Canal Co., 29 N. Y. 634: 858.
 v. Jacksonville, 28 Fla. 558: 53, 54, 57, 179, 181, 210, 222, 226.
 Self v. Gowin, 80 Mo. App. 398: 1018.
 Sellards v. Zomes, 5 Bush. (Ky.) 90: 19.
 Selma etc. R. R. Co. v. Camp, 45 Ga. 180: 1207.
 v. Gammage, 63 Ga. 604: 1322, 1378.
 v. Keith, 53 Ga. 178: 1146, 1182, 1231, 1454, 1476.
 v. Redewine, 51 Ga. 470: 1309.
 Semon v. Trenton, 47 N. J. L. 489: 1370.
 Senaker v. Justices of Sullivan, 4 Snead. 116: 1436, 1444.
 Seneca Road Co. v. Auburn & Rochester R. R. Co., 5 Hill 170: 408, 410, 1155, 1635.
 Senior v. Metropolitan Ry. Co., 2 H. & C. (Ech.) 258: 645.
 Sennott v. St. Johnsbury etc. R. R. Co., 59 Vt. 226: 1539, 1540.
 Senor v. Board of Comrs., 13 Wash. 48: 739.
 Sensenig v. Lancaster Co., 130 Pa. Supr. Ct. 224: 1671.
 Sentman v. B. & O. R. R. Co., 78 Md. 222: 159.
 Sequin v. Ireland, 57 Tex. 183: 420, 1494, 1618.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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- Setzler v. Pennsylvania S. V. R. R. Co., 112 Pa. St. 56: 1150, 1187, 1251.
- Seufferle v. Macfarland, 28 App. Cas. D. C. 94: 453, 1242.
- Seuter v. Pugh, 9 Gratt. 260: 401.
- Seventeenth Street, Matter of, 1 Wend. 262: 1326.
- Seventh Ave., Matter of, 59 App. Div. 175: 1561.
- Severin v. Cole, 38 Iowa 463: 947, 948, 961, 1564.
- Sewell v. Chicago Terminal Trans. R. R. Co., 177 Ill. 93: 1128.
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- Shamokin Road, 6 Binn. 36: 1390.
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- v. Mills, 9 Cush. 503: 1358.
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v. Wells, 5 Cush. 537: 1522.
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v. Potrero etc. R. R. Co., 44 Cal. 414: 306.
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v. Fall River, 187 Mass. 356: 320, 321, 1260.
v. Flynn, 59 Minn. 436: 148, 157.
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v. Erie R. R. Co., 68 N. J. Eq. 615: 851.
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v. Kalamazoo, 24 Mich. 383: 1636.
v. Minneapolis & St. Louis Ry. Co., 29 Minn. 318: 1118, 1145, 1210.
v. Rockwell, 9 Wis. 166: 1607.
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v. Birmingham, 62 Conn. 456: 600, 619, 1307.
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 - v. Third Municipality of New Orleans, 6 Rob. La. 349: 958.
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v. New Orleans, 6 Rob. La. 349: 137.
v. Turner, 129 Cal. 530: 706.
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v. Kansas City Belt R. R. Co., 142 Mo. 172: 180, 254, 311, 1582.
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v. Butcher, 72 N. J. L. 53: 348.
v. Fall River Iron Works Co., 5 Allen 213: 165.
v. Kane, 46 N. Y. Supr. Ct. 310: 589.
v. Milwaukee Lake Shore & Western R. R. Co., 40 Wis. 645: 247, 1636.
 - v. St. Paul etc. Ry. Co., 30 Minn. 227: 1119, 1122, 1236.
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v. Tobey, 3 Allen 7: 722.
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 v. Justees of Green Co., 2 Coldw. 60: 1413.
 v. McMahan, 101 Ind. 591: 976.
 v. Norfolk etc. R. R. Co., 129 N. C. 1: 807, 1270, 1481.
 v. Ohio, 95 U. S. 319: 691.
 v. Pittsburg, 201 Pa. St. 328: 936.
 v. Titus, 46 Ohio St. 528: 183, 878, 1595.
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 Shinkle v. Magill, 58 Ill. 422: 1033, 1381.
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 v. Continental R. R. Co., 13 Phil. 128: 1587, 1590.
 v. Pittsburg etc. R. R. Co., 216 Pa. St. 512: 1257.
 v. Western Md. Tidewater R. R. Co., 99 Md. 115: 1506, 1507, 1602.
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 v. Chicago, 195 Ill. 298: 1491.
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 v. Southern Ry. Co., 121 Ky. 187: 1268, 1407.
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 v. Lankford, 174 Mo. 535: 710, 739, 1085, 1462.
 v. Parker, 9 Ore. 500: 118.
 v. Welch, 10 Sawyer 136: 118.
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 v. United States, 147 U. S. 282: 499, 539, 738, 814, 1068, 1093, 1243, 1323, 1330, 1379.
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 v. Stump, 24 Pa. Supr. Ct. 48: 808.
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 v. Dale Township, 63 Ill. 209: 1069.
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 v. St. Louis S. W. Ry. Co., 115 La. 885: 306.
 v. Yousee, 114 La. 182: 1109, 1377.
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 v. Decker, 51 Ind. 241: 983.
 Sidener v. Essex, 22 Ind. 201: 1192, 1362.
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 v. Talbot, 25 Iowa 214: 1407.
 Sillecooks v. Manhattan R. R. Co., 10 Miscl. 259: 1296, 1299.
 Silsby Mfg. Co. v. State, 104 N. Y. 562: 1456.
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 Silver Creek Nav. & Imp. Co. v. Mangum, 64 Miss. 682: 91, 1311.
 v. Yazoo etc. R. R. Co., 90 Miss. 345: 97.
 Silver Spring etc. Co. v. Wanskuck Co., 13 R. I. 611: 69, 70, 81, 1605.
 Silvester v. St. Louis, 164 Mo. 601: 1530, 1673.
 Sim v. Rosholt, 16 N. D. 77: 580.
 Siman v. Rhodes, 24 Minn. 25: 947.
 Simar v. Canaday, 53 N. Y. 298: 943, 945.
 Sime v. Spencer, 30 Ore. 340: 983, 985, 1516, 1571.
 Simmons, Matter of, 58 Miss. 581: 626, 1096, 1221, 1229, 1231, 1238, 1273.
 Simmons, Matter of, Misc. 607: 1145, 1270.
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 v. Mumford, 2 R. I. 172: 1373.
 v. Passaic, 42 N. J. L. 619: 1156.
 v. St. Paul & Chicago Ry. Co., 18 Minn. 184: 1122, 1186.
 v. Toledo, 5 Ohio C. C. 124: 272.
 v. Toledo, 8 Ohio C. C. 535: 272, 302.
 Simms v. Brooklyn, 33 N. Y. Supp. 859: 1561.
 v. Memphis etc. R. R. Co., 12 Heisk 621: 1707, 1708.
 Simon v. Northrop, 27 Ore. 488: 357.
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 Simplot v. Chicago, M. & St. Paul Ry. Co., 5 McCrary 158: 251.
 v. Worcester, 5 McCrary, 158: 931.
 Simpson v. Berkowitz, 59 Misc. 160: 1670.
 v. Kansas City, 111 Mo. 237: 673, 675, 1669, 1695.
 v. Keokuk, 34 Iowa 568: 143.
 v. Lancaster & Carlisle Ry. Co., 15 Sim. 580: 731.
 v. Mikkelsen, 196 Ill. 575: 429, 875.
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 v. Seavy, 8 Maine 138: 103.
 v. South Staffordshire Water Works Co., 34 L. J. Eq. 380: 708.
 Sims v. Ohio Riv. etc. Ry. Co., 56 S. C. 30: 439.
 Sinai v. Louisville etc. R. R. Co., 71 Miss. 547: 152.
 Singer v. New York, 47 App. Div. 42: 432.
 v. New York, 165 N. Y. 658: 432.
 Singleton v. Atchison etc. Ry. Co., 67 Kan. 284: 169.
 v. Comrs., 2 Nott & McC. 526: 516.
 Sings v. Joliet, 237 Ill. 300: 485, 486.
 Sinickson v. Johnson, 17 N. J. L. 129: 21, 22, 91.
 Sioux City etc. R. R. Co. v. Brown, 13 Neb. 317: 1323.
 v. Chicago etc. Ry. Co., 27 Fed. 770: 906, 907.
 v. Weimer, 16 Neb. 272: 1129, 1340, 1426, 1451, 1453.
 Sisson v. Board of Supervisors, 128 Iowa 442: 7, 494, 499, 501, 507, 569, 575, 672, 675, 739, 926, 1158, 1169.
 v. Carithers, 35 Ind. App. 161: 995.
 v. New Bedford, 137 Mass. 255: 604, 1366.
 v. Stonington, 73 Conn. 348: 1525.
 Sistersville Ferry Co. v. Russell, 52 W. Va. 356: 408, 411, 413, 982.
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 v. Kerr, 45 Barb. 138: 427, 756, 762.
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 v. Metropolitan El. R. R. Co., 56 Hun 182: 1151, 1304.
 v. Metropolitan El. R. R. Co., 138 N. Y. 548: 1118, 1296, 1301, 1303.
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 v. Stiles, 10 Wash. 388: 581.
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 v. Skaneateles, 184 U. S. 354: 409.
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 v. Lake View Ave. Co., 57 Ill. 151: 971, 1028.
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 v. St. Louis, 120 Mo. 183: 1309.
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 v. International C. Co., 169 N. Y. 60: 99.
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 v. Georgia etc. R. R. Co., 87 Ga. 602: 524, 941.
 v. Pennell, 31 Maine 267: 916, 1510.
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 v. Hart, 75 Wis. 471: 819.
 v. Johnston, 17 R. I. 778: 1577.
 v. Portsmouth & Concord R. R. Co., 20 N. H. 233: 1527, 1530, 1681.
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 v. Martin, 57 Wis. 364: 514, 675, 1165, 1166.
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 v. Agawam Canal Co., 2 Allen 355: 71.
 v. Alexander, 24 Ind. 454: 1028.
 v. Alexandria, 33 Gratt. 208: 237.
 v. Applegate, 23 N. J. L. 352: 1385.
 v. Atlanta, 75 Ga. 110: 141.
 v. Atlanta, 92 Ga. 119: 438, 1182, 1545.
 v. Atlantic & Gt. Western R. R. Co., 25 Ohio St. 91: 570, 581, 584, 924.
 v. Barre Water Co., 73 Vt. 310: 538, 595, 723.

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878, 890.
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 - v. Boston, 7 Cush. 254: 364, 371, 379, 391.
 - v. Boston, 1 Gray 72: 1366.
 - v. Boston etc. R. R. Co., 99 App. Div. 94: 211.
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 - v. Brooklyn, 18 App. Div. N. Y. 340: 77, 163.
 - v. Brooklyn, 32 App. Div. N. Y. 257: 77, 163.
 - v. Brooklyn, 160 N. Y. 357: 74, 77, 163.
 - v. Central District P. & Tel. Co., 2 Ohio C. C. 259: 337, 339, 1593.
 - v. Chicago, 107 Ill. App. 270: 876, 890, 892.
 - v. Chicago etc. R. R. Co., 67 Ill. 191: 935, 966, 1035, 1626.
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 - v. Chiltenham, 35 Pa. Supr. Ct. 507: 211.
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 - v. Claussen Park D. & L. Dist. 229 Ill. 155: 683, 704, 980, 1246, 1247, 1457.
 - v. Cochrane, 9 Wash. 85: 738, 926, 927, 1005, 1013.
 - v. Commissioners, 150 Ill. 385: 1069, 1418.
 - v. Comrs. of Cumberland, 42 Maine 395: 1421.
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 - v. Conway, 17 N. H. 586: 514, 781, 981, 1382.
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 - v. Eau Claire, 78 Wis. 487: 212, 615, 618.
 - v. Ferris, 6 Hun 553: 939, 962.
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 - v. Gorrell, 81 Iowa 218: 1505.
 - v. Gould, 59 Wis. 631: 76, 1523.
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 - v. Goulding, 6 Cush. 154: 858, 860.
 - v. Hall, 103 Iowa 95: 806, 838.
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 - v. Inge, 80 Ala. 283: 1156, 1625.
 - v. Jackson & Battle Creek Traction Co., 137 Mich. 20: 282.
 - v. Kansas City, 128 Mo. 23: 630, 1306, 1307, 1339.
 - v. Kansas City etc. R. R. Co., 98 Mo. 20: 254, 260, 307, 323, 324, 325, 616, 642, 1549, 1650, 1657.
 - v. Los Angeles, 136 Cal. 156: 629.
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 - v. Leavenworth, 15 Kan. 81: 1497.
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 - v. Macon, 129 Ga. 227: 363.
 - v. McAdams, 3 Mich. 506: 922, 1164, 1166, 1497, 1707, 1708.
 - v. McDowell, 148 Ill. 51: 197, 199, 369, 395, 398, 406, 877.
 - v. Milwaukee, 18 Wis. 63: 235.
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 - v. Montgomery, 2 Idaho 1187: 881.
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 - v. New York etc. R. R. Co., 165 Mass. 569: 1504.
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 - v. Osage, 80 Iowa 84: 874.
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 - v. Point Pleasant & Ohio R. R. Co., 23 W. Va. 451: 1160, 1294, 1580.
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 - v. Rogers, Litt. Select Cas. (Ky.) 117: 1369.
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 v. St. Paul, 69 Minn. 276: 1529.
 v. St. Paul, 72 Minn. 472: 874.
 v. St. Paul etc. Ry. Co., 39 Wash. 355: 384, 392, 449, 647, 654, 659, 661, 666, 671.
 v. San Luis Obispo, 95 Cal. 463: 881.
 v. Scearce, 34 Ind. 285: 1424.
 v. School District No. 2, 40 Mich. 143: 1087.
 v. Sedalia, 152 Mo. 283: 84, 653, 866.
 v. Sedalia, 182 Mo. 1: 84, 870, 1338, 1654.
 v. Sherry, 50 Wis. 210: 466.
 v. Simmons, 103 Pa. St. 32: 336.
 v. Smith, 120 App. Div. 278: 366, 404.
 v. Smith, 96 Ind. 273: 1383.
 v. Southern Pac. R. R. Co., 146 Cal. 164: 250, 639.
 v. State, 59 Ohio St. 278: 867, 869.
 v. Street R. R. Co., 87 Tenn. 626: 270.
 v. Taylor, 34 Tex. 589: 929.
 v. Trenton Delaware Falls Co., 17 N. J. L. 5: 1077, 1100, 1102, 1369.
 v. Union S. & T. Co., 17 Pa. Supr. Ct. 444: 183, 366, 878.
 v. Weldon, 73 Ind. 454: 983, 1574.
 v. White Plains, 67 Hun 81: 211, 609, 610, 618, 1550.
 Smith Canal & Ditch Co. v. Colo. Ice & Storage Co., 34 Colo. 485: 808, 812, 1496.
 Smith Jr. v. Chicago & Western Indiana R. R. Co., 105 Ill. 511: 1045.
 Smithko v. Pittsburgh etc. R. R. Co., 5 Pa. Dist. Ct. 543: 715.
 Smoot v. Schooler, 87 Ky. 157: 1078.
 Smythe v. Ames, 169 U. S. 466: 483.
 v. Brooklyn El. R. R. Co., 121 App. Div. 282: 323, 1355.
 v. Brooklyn El. R. R. Co., 193 N. Y. 335: 323, 1355.
 Snead v. West Side Belt R. R. Co., 210 Pa. St. 480: 679, 709, 716.
 Sneed v. Falls Co., 91 Tex. 168: 1086, 1518.
 Snively v. Washington Tp. 218 Pa. St. 249: 1487.
 Snoddy v. Bolen (Mo.), 24 S. W. 142: 874.
 v. Pettis Co., 45 Mo. 361: 974, 1369, 1390.
 Snodgrass v. Chicago, 152 Ill. 600: 1128, 1202, 1313, 1426.
 Snodley v. Asheville, 110 N. C. 84: 1402.
 Snouffeur v. Chicago etc. R. R. Co., 105 Iowa 681: 1329.
 Snow v. Boston & Maine R. R. Co., 65 Me. 230: 1108, 1119, 1122.
 v. Moses, 53 Me. 546: 860.
 v. Provincetown, 109 Mass. 123: 605, 615.
 v. Sandgate, 66 Vt. 461: 513.
 v. Whitehead, 27 L. R. Ch. Div. 588: 165.
 Snowden v. Shelby Co., 118 Tenn. 725: 1323.
 v. Wilas, 19 Ind. 10: 1522.
 Snydaeker v. West Hammond, 225 Ill. 154: 828, 829.
 Snyder v. Baltimore etc. R. R. Co., 210 Pa. St. 500: 689, 819.
 v. Chicago etc. R. R. Co., 112 Mo. 527: 948, 1627.
 v. Cowan, 120 Mo. 389: 1463, 1465.
 v. Cowan, 50 Mo. App. 430: 1534.
 v. Ft. Madison St. R. R. Co., 105 Iowa 284: 272, 275, 1588.
 v. Mt. Pulaski, 176 Ill. 397: 199.
 v. Pennsylvania R. R. Co., 55 Pa. St. 340: 248, 255, 308.
 v. Plass, 28 N. Y. 465: 821.
 v. Rockport, 6 Ind. 237: 210.
 v. Trumphour, 38 N. Y. 355: 821, 1021.
 v. Warford, 11 Mo. 513: 520.
 v. Western Union R. R. Co., 25 Wis. 60: 1123, 1310.
 Snyder Avenue, Matter of, 14 Phil. 346: 432.
 Sohier v. Mass. General Hospital, 3 Cush. 483: 458.
 S. O. Houghton's Appeal, 42 Cal. 35: 1397, 1398.
 Soller v. Brown Tp. 67 Mich. 422: 1028, 1415.
 Somerset Coal Canal Co. v. Hareourt, 24 Beav. 571: 1071.
 Somerset etc. Road, 74 Pa. St. 61: 700.
 Somerton Turnpike, 16 Pa. Supr. Ct. 400: 1264.
 Somerville etc. R. R. Co. v. Doughty, 22 N. J. L. 495: 1312, 1314, 1378, 1380.
 Sommerville v. Waltham, 170 Mass. 160: 591.
 v. Wimbush, 7 Gratt. 205: 409.
 Sonnek v. Minnesota Lake, 50 Minn. 558: 1360, 1364.
 Sorenson v. Greeley, 10 Colo. 369: 303, 1667.

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 South Abington Road, 109 Pa. St. 118: 1005, 1013, 1032, 1376.
 South Amboy v. New York etc. R. R. Co., 66 N. J. L. 623: 878, 879, 889.
 Southampton Road, 21 Pa. St. 356: 778.
 Southard v. Brooklyn, 1 App. Div. N. Y. 175: 144, 1651, 1655.
 v. Ricker, 43 Me. 575: 1017, 1032, 1033.
 South Balt. Harbor etc. Co. v. Smith, 85 Md. 537: 882.
 South Beach R. R. Co., Matter of, 53 Hun 131: 720, 814, 1061.
 South Beach R. R. Co., Matter of, 119 N. Y. 141: 720, 814, 1061.
 South Berwick v. County Comrs., 98 Me. 108: 882.
 South Bound R. R. Co. v. Burton, 63 S. C. 348: 1625.
 v. Burton, 67 S. C. 515: 181, 201, 202, 243, 249, 255, 304, 1297, 1303, 1625.
 South Brooklyn R. & T. Co., Matter of, 50 Hun 405: 731.
 South Buffalo Ry. Co. v. Kirkover, 86 App. Div. 55: 1195, 1200, 1202, 1243.
 v. Kirkover, 176 N. Y. 301: 1195, 1200, 1202, 1243.
 South Carolina v. Georgia, 93 U. S. 4: 76.
 South Carolina etc. R. R. Co. v. Am. Tel. & Tel. Co., 63 S. C. 199: 1624.
 v. American Tel. & Tel. Co., 65 S. C. 459: 733, 988, 1247, 1286, 1624.
 South Carolina R. R. Co., Ex parte, 2 Rich. L. S. C. 434: 728.
 South Carolina R. R. Co. v. Blake, 9 Rich. S. C. 228: 1042, 1045, 1061, 1066, 1074, 1075.
 v. Columbia etc. R. R. Co., 13 Rich. Eq. S. C. 339: 765.
 v. Steiner, 44 Ga. 546: 242, 249, 250, 279, 323, 448, 1155, 1295, 1302.
 South Chester Road, 80 Pa. St. 370: 700.
 South Chicago City R. R. Co. v. Calumet etc. St. R. R. Co., 70 Ill. App. 254: 737, 768, 1611.
 South Chicago City R. R. Co. v. Chicago, 196 Ill. 490: 1509, 1510.
 v. Dix, 109 Ill. 237: 532, 1043, 1061, 1063.
 South Covington etc. R. R. Co. v. Berry, 93 Ky. 43: 476.
 South Dak. Cent. Ry. Co. v. Chicago etc. Ry. Co., 141 Fed. 578: 759, 931, 932.
 Southeast etc. Ry. Co. v. Evansville etc. R. R. Co., 169 Ind. 339: 329, 765, 766, 768, 1611.
 Southern Bell Tel. & Tel. Co. v. Francis, 109 Ala. 224: 342, 349.
 v. Mobile, 162 Fed. 523: 359, 1619, 1622.
 v. Nalley, 165 Fed. 263: 342.
 v. Richmond, 103 Fed. 33: 343, 362.
 Southern Boulevard, Matter of, 3 Abb. Pr. N. S. 447: 1083.
 Southern Boulevard R. R. Co., In re, 58 Hun 497: 330, 1154.
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 Southern Boulevard R. R. Co., In re, 146 N. Y. 352: 736.
 Southern Cal. Mt. Water Co. v. Cameron, 141 Cal. 283: 1669.
 Southern Cal. Ry. Co. v. Slanson, 138 Cal. 342: 1630.
 Southern Cotton Oil Co. v. Bull, 116 Ga. 776: 315, 351, 372, 1596.
 Southern Cotton Press & Mfg. Co. v. Galveston Wharf Co., 3 Tex. Civ. App. p. 309: 747, 749, 1183.
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 v. Stone, 194 Mo. 175: 686, 1186.
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 v. Brown, 30 Ind. App. 684: 1717.
 Southern Kansas R. R. Co. v. Board of Comrs., 52 Kan. 138: 1290.
 v. Oklahoma City, 12 Okl. 82: 360, 750, 1291.
 v. State, 100 Tex. 437: 489.
 Southern Minn. R. R. Co. v. Stoddard, 6 Minn. 150: 824.
 Southern Mo. etc. Ry. Co. v. Woodward, 193 Mo. 656: 1123.
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 v. Pomona, 144 Cal. 339: 883.
 Southern Pac. R. R. Co. v. Dufour, 95 Cal. 615: 161.
 v. Ferris, 93 Cal. 263: 881, 1619.

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 v. Oakland, 58 Fed. 50: 1570, 1619.
 v. Reed, 41 Cal. 256: 242, 246, 250, 307.
 v. San Francisco Savings Union, 146 Cal. 290: 1477.
 v. Southern Cal. R. R. Co., 111 Cal. 221, 754, 799.
 v. Wilson, 49 Cal. 396: 1385.
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 v. Atlantic Stove Works, 128 Ga. 207: 481, 483.
 v. Birmingham etc. Ry. Co., 131 Ala. 663: 1159, 1410, 1568.
 v. Cook, 106 Ga. 450: 151.
 v. Cook, 117 Ga. 286: 151, 1649, 1654.
 v. Ferguson, 105 Tenn. 552: 97.
 v. Gossett, 79 S. C. 372: 1477.
 v. Gregg, 101 Va. 308: 1537, 1540, 1541.
 v. Hardeman, 130 Ga. 222: 153.
 v. Hays, 150 Ala. 212: 1568, 1574.
 v. Hood, 126 Ala. 312: 1540, 1620.
 v. Leard, 146 Ala. 349: 92.
 v. Platt, 131 Ala. 312: 92, 1638.
 v. Selma etc. Ry. Co., 130 Ala. 660: 926, 1159, 1160, 1435, 1464, 1465.
 v. Southern & Atlantic Tel. Co., 46 Ga. 43: 1159.
 v. Stantiford, 21 Ky. L. R. 1023: 830, 873, 882, 1628.
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 v. Highland Ave. etc. R. R. Co., 119 Ala. 105: 720, 757.
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 v. United Parishes etc. (1903) 2 K. B. 728: 1267.
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 v. Dunlevy, 91 Ill. 49: 1222, 1224, 1236, 1325.
 v. Todd, 112 Ill. 379: 947.
 v. Trustees of Schools, 107 Ill. 489: 1113, 1379.
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 v. Southern & Atlantic Tel. Co., 46 Ga. 43: 923, 1609.
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 v. Newton, 60 N. J. Eq. 399: 73, 74, 1201, 1263, 1554.
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 v. Groton, 68 N. H. 77: 1362, 1380, 1381.
 v. Lowell, 23 Pick. 71: 523.
 v. Milwaukee etc. Ry. Co., 57 Wis. 304: 1403.
 v. Nourse, 143 Mass. 490: 734.
 v. Wesson (Cal.) 45 Pac. 807: 881.
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 v. Drainage Comrs., 113 Ill. 632: 1122.
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 v. Erie R. R. Co., 64 N. J. Eq. 601: 855, 1646, 1647.
 v. Erie R. R. Co., 68 N. J. Eq. 615: 855, 1646.
 v. Erie R. R. Co., 70 N. J. Eq. 318: 855, 1646.
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 v. Schuylkill Riv. E. S. R. R. Co., 10 Pa. Dist. Ct. 515: 1477.
 v. Schuylkill Riv. E. S. R. R. Co., 201 Pa. St. 568: 1485.
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 v. Hartford, Providence, & T. R. R. Co., 10 R. I. 14: 88, 1251, 1451, 1454.
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 v. Merchant, 125 U. S. 345: 735.
- v. Metropolitan St. R. R. Co., 120 Mo. 154: 180, 630, 635, 642, 1123, 1186.
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- v. Peterson, 41 Ore. 257: 878, 879, 889.
- v. Point Pleasant & Ohio R. R. Co., 23 W. Va. 406: 256, 1160, 1294, 1299, 1335, 1580.
- v. Seaboard Air Line Ry. Co., 137 N. C. 107: 7, 529, 745.
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- v. Metropolitan El. R. R. Co., 137 N. Y. 596: 1196, 1296, 1300, 1301.
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- Spierling v. Ohl, 232 Ill. 581: 838, 1497.
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 v. Schofield, 66 Ind. 168: 1363.
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 v. Lieuallen, 3 Idaho 381: 1147, 1222.
- v. Ziegler, 61 Fed. 392: 1206.

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 v. Spokane Falls, 6 Wash. 521: 299.
 Sporato v. New York, 75 App. Div. 304: 1338, 1562.
 v. New York, 178 N. Y. 583: 1338, 1562.
 Spouenberg v. Gloversville, 96 App. Div. 157: 1605, 1615.
 Sprague v. Dorr, 185 Mass. 10: 86.
 v. No. Pac. Ry. Co., 122 Wis. 509: 1671, 1674.
 v. Worcester, 13 Gray 193: 147, 234.
 Spratt v. Helena Power Transmission Co., 37 Mont. 60: 500, 536, 739, 748, 1071.
 Spring v. Delaware etc. R. R. Co., 88 Hun 385: 449, 1613.
 v. Lowell, 1 Mass. 422: 1091, 1094.
 v. Park, 89 Md. 406: 469.
 v. Russell, 7 Me. 273: 99, 103.
 Springboro School Dist., 21 Pa. Co. Ct. 23: 726.
 Springbrook Road, 64 Pa. St. 451: 1107, 1387.
 Spring City Gas Lt. Co. v. Penn. S. V. R. R. Co., 167 Pa. St. 6: 672, 684, 783, 802, 1175.
 Springer v. Chicago, 135 Ill. 552: 629, 635, 1108, 1146, 1195, 1549, 1648, 1656, 1660.
 v. Chicago, 37 Ill. App. 206: 1145, 1336.
 v. Russell, 7 Me. 273: 99, 103.
 Springfield v. Conn. Riv. R. R. Co., 4 Cush. 63: 242, 297, 756, 777, 793, 795, 796.
 v. Dalbey, 139 Ill. 34: 1383.
 v. Griffith, 21 Ill. App. 93: 1307.
 v. Griffith, 46 Ill. App. 246: 629, 1306, 1307, 1337.
 v. Robertson Ave. R. R. Co., 69 Mo. App. 544: 1618.
 v. Schmook, 68 Mo. 394: 1146, 1147, 1186, 1215.
 v. Sleeper, 115 Mass. 587: 1115.
 v. Whitlock, 34 Mo. App. 642: 893, 991.
 Springfield etc. Ry. Co. v. Calkins, 90 Mo. 538: 1119, 1129, 1213.
 v. Hall, 67 Ill. 99: 690.
 v. Henry, 44 Ark. 360: 154, 1252.
 v. Rhea, 44 Ark. 258: 1112, 1149, 1203, 1309, 1310, 1378.
 v. Turner, 68 Ill. 187: 1392.
 Springfield Road, 73 Pa. St. 127: 1364.
 Springfield Tp. Road, In re, 91 Pa. St. 260: 778.
 Springfield W. W. Co. v. Jenkins, 62 Mo. App. 74: 163.
 Spring Garden Road, 43 Pa. St. 144: 1419.
 Spring Garden Street's Case, 4 Rawle 192: 1097.
 Spring St. Opening, 112 Pa. St. 258: 1531.
 Spring Valley Water Works, Matter of, 17 Cal. 132: 1047.
 Spring Valley Water Works v. Drinkhouse, 92 Cal. 528: 1060, 1062, 1063, 1066, 1231.
 v. Drinkhouse, 95 Cal. 220: 1425, 1463.
 v. San Francisco, 22 Cal. 434: 1047, 1135.
 v. San Francisco, 82 Cal. 286: 481.
 v. San Mateo W. W., 64 Cal. 123: 1060, 1062.
 v. Shottler, 110 U. S. 347: 481.
 Springville v. Fullmer, 7 Utah 450: 683.
 Sproule v. Ala. etc. Ry. Co., 78 Miss. 88: 1477.
 Spurgeon v. Bartlett, 56 Mo. App. 349: 706.
 Spurlock v. Dornan, 182 Mo. 242: 941, 1514, 1516.
 Spurrier v. Wirtner, 48 Ia. 486: 1406.
 Spuyten Duyvil Parkway. Opening of. Matter of, 67 How. Pr. 341: 1075, 1076.
 Squire, In re, 125 N. Y. 131: 1524.
 Squire v. Somerville, 120 Mass. 579: 1144.
 Squires v. Neenah, 24 Wis. 588: 1058.
 Stacey v. Glen Ellyn Hotel Co., 223 Ill. 546: 884.
 v. Metropolitan El. R. Co., 15 App. Div. 534: 1302.
 v. Vermont Central R. R. Co., 27 Vt. 39: 1674.
 Stack, Matter of, 50 Hun 385: 610, 617.
 v. East St. Louis, 85 Ill. 377: 635, 656, 1553.
 v. Seaboard Air Line R. R. Co., 139 N. C. 366: 1716.
 Stackpole v. Healy, 16 Mass. 33: 1489.
 Stadler v. Milwaukee, 34 Wis. 98: 615, 619.
 Stafford v. Albany, 6 Johns. 1: 1681.
 v. Albany, 7 Johns. 541: 1681.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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- Stahl v. Pennsylvania Co., 155 Pa. St. 309: 818.
- Stanton v. Met. Board of Works, 26 L. J. Ch. 300: 643, 1612.
- Stalker v. Dunwick, 15 Ont. 342: 156.
- Stamford v. Stamford H. R. Co., 56 Conn. 381: 322, 1622.
- Stamford Water Co. v. Stanley, 39 Hun 424: 70, 74, 536, 933.
- Stamnes v. Milwaukee etc. Ry. Co., 131 Wis. 85: 829, 947.
- Stamps v. Birmingham & Stone Valley Ry. Co., 2 Phillips 673: 731.
- Standen v. New Rochelle Water Co., 91 Hun 272: 71, 72, 74.
- Standish v. Liverpool, 1 Drewry 1: 1468.
v. Washburn, 21 Pick. 237: 1150.
- Standley v. Atchison etc. Ry. Co., 121 Mo. App. 537: 91.
- Stanford v. San Francisco, 111 Cal. 198: 233.
v. Worn, 27 Cal. 171: 960, 1017, 1027.
- Stange v. Dubuque, 62 Ia. 303: 1298.
v. Hill & West Dubuque St. Ry. Co., 54 Ia. 669: 268, 271.
- Stanislaus Co. v. San Joaquin etc. Irr. Co., 192 U. S. 201: 481.
- Stanley v. Davenport, 54 Ia. 463: 197, 268, 271.
- Stannard v. Aurora etc. R. R. Co., 220 Ill. 469: 832, 1504.
- Stannards Corners Rural Cem. Asso. v. Brandes, 35 N. Y. Supp. 1015: 542, 976, 995.
- Stanton v. Chicago, 154 Ill. 23: 912, 914.
v. Metropolitan Bd. of Works, 26 L. J. Ch. 300: 161.
- Stanwood v. Malden, 157 Mass. 17: 370, 371, 377, 379, 380, 392, 393, 402, 660, 666.
- Staple v. Spring, 10 Mass. 72: 1069.
- Star & Crescent Milling Co. v. Sanitary District, 120 Ill. App. 555: 635, 1716.
- Stark v. Sioux City & Pacific R. R. Co., 43 Ia. 501: 816.
v. Mansfield, 178 Mass. 76: 1254.
v. McGown, 1 Nott & McCord (S. C.) 387: 22.
- Starling v. Grand Junction R. R. Co., 30 U. C. C. P. 247: 1540.
- Starnes v. Molson, 1 Montreal L. Q. B. 425: 131.
- Starr v. Camden etc. R. R. Co., 24 N. J. L. 592: 247, 318, 1635.
v. London, 7 L. R. Eq. Cas. 236: 1115.
v. People, 17 Colo. 458: 876, 881, 883, 884, 885.
v. Rochester, 6 Wend. 564: 820.
- Starry v. Treat, 102 Ia. 449: 1024.
- Starr Burying Ground Asso. v. North Lane Cem. Asso., 77 Conn. 83: 542, 785, 792.
- State v. Adams, 54 N. J. L. 506: 1418.
v. Adkins, 42 Kan. 203: 884.
v. Aiken, 42 S. C. 222: 478.
v. Allen, 58 N. J. L. 315: 817.
v. Anchard, 22 Mont. 14: 1018.
v. Anderson, 39 Ia. 274: 1018.
v. Anderson, 130 Wis. 227: 1414, 1415.
v. Anthoine, 40 Me. 435: 787.
v. Armwel, 8 Kan. 288: 1507.
v. Ashtabula Co. Comrs., 7 Ohio C. C. (N. S.) 469: 488.
v. Ashtabula Co. Comrs., 8 Ohio C. C. (N. S.) 169: 488.
v. Atkinson, 27 N. J. L. 420: 1081, 1381.
v. Atlantic Coast Air Line, 48 Fla. 114: 481.
v. Atlantic Coast Air Line, 48 Fla. 146: 481.
v. Atlantic etc. R. R. Co., 141 N. C. 736: 309.
v. Ayres, 15 N. J. L. 479: 1091, 1092.
v. Bailey, 6 Wis. 291: 1098.
v. Bangor, 98 Me. 114: 781, 789.
v. Barlow, 61 Ia. 572: 970.
v. Barnes, 13 N. J. L. 268: 1091.
v. Barton, 36 Minn. 145: 384, 400, 1402.
v. Bayonne, 35 N. J. L. 332: 917.
v. Bayonne, 35 N. J. L. 476: 1086, 1091, 1093.
v. Bayonne, 54 N. J. L. 293: 236, 972.
v. Bayonne, 59 N. J. L. 101: 342, 1666.
v. Beackmo, 8 Blackf. 246: 1172.
v. Beardsley, 108 Ia. 396: 486.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

- State v. Beeman, 35 Me. 242: 1010.
 v. Bennett, 25 N. J. L. 329: 1366.
 v. Berditta, 73 Ind. 185: 199.
 v. Bergen, 21 N. J. L. 342: 1099.
 v. Bergen, 33 N. J. L. 39: 914.
 v. Bergen, 33 N. J. L. 72: 707,
 914.
 v. Bergen, 34 N. J. L. 438: 734.
 v. Bergen, 35 N. J. L. 332: 918.
 v. Bergen Neck R. R. Co., 53 N. J.
 L. 108: 693.
 v. Bergers, 21 N. J. L. 342: 993.
 v. Berry, 12 Ia. 58: 969, 1032,
 1510, 1512.
 v. Birmingham, 74 Ia. 407: 881,
 884, 885, 886.
 v. Bishop, 39 N. J. L. 226: 513,
 678.
 v. Black Riv. Phosphate Co., 32
 Fla. 82: 115, 127.
 v. Blake, 35 N. J. L. 208: 14,
 577.
 v. Blake, 36 N. J. L. 442: 14, 565,
 566, 568, 577, 1441.
 v. Blauvelt, 33 N. J. L. 36: 1368.
 v. Blauvelt, 34 N. J. L. 261: 1421.
 v. Board of Chosen Freeholders,
 51 N. J. L. 454: 918.
 v. Board of Chosen Freeholders, 52
 N. J. L. 398: 919.
 v. Board of Chosen Freeholders, 56
 N. J. L. 416: 297, 304.
 v. Board of Park Comrs., 33 Minn.
 524: 1673, 1683.
 v. Board of Park Comrs., 100
 Minn. 150: 363.
 v. Board of Public Works, 42
 Ohio St. 607: 829.
 v. Board of Supr., 102 Minn. 442:
 567, 570, 576.
 v. Board of Supervisors, 66 Wis.
 199: 75.
 v. Bogardus, 63 Kan. 259: 1018,
 1513.
 v. Boone County, 78 Neb. 271:
 746.
 v. Boston, 11 N. H. 407: 1502.
 v. Bradley, 31 Mo. 308: 865.
 v. Brown, 27 N. J. L. 13: 837.
 v. Brown, 53 N. J. L. 181: 1383.
 v. Bruggerman, 31 Minn. 493: 734.
 v. Burlington etc. R. R. Co., 99
 Ia. 565: 1646.
 v. Burlington & Mt. Pl. Plank Road
 Co., 1 Ia. 386: 1204.
 v. Burgeson, 108 Wis. 174: 1363.
 v. Burnell, 104 Wis. 246: 765,
 1638.
 v. Burnett, 14 N. J. L. 385: 1102,
 1381.
 v. Cake, 24 N. J. L. 516: 1363.
 State v. Calais, 48 Me. 456: 1373.
 v. Camden, 53 N. J. L. 322: 487.
 v. Canterbury, 28 N. H. 195: 104,
 781, 788, 1511.
 v. Canterbury, 40 N. H. 307: 1381.
 v. Cape May, 58 N. J. L. 565: 299,
 1666.
 v. Capital City Dairy Co., 62 Ohio
 St. 350: 479.
 v. Carragan, 36 N. J. L. 52: 431.
 v. Centralia etc. Ry. & P. Co., 42
 Wash. 632: 536, 537, 594, 921,
 1064, 1071.
 v. Chapman, 69 N. J. L. 464: 477,
 479.
 v. Charleston Lt. & W. Co., 68 S.
 C. 540: 133.
 v. Chicago etc. R. R. Co., 80 Ia.
 586: 1010.
 v. Chicago etc. R. R. Co., 86 Ia.
 304: 1485.
 v. Chicago etc. R. R. Co., 36 Minn.
 402: 472, 1173.
 v. Chicago etc. R. R. Co., 29 Neb.
 412: 1642.
 v. Cincinnati etc. R. R. Co., 17
 Ohio St. 103: 1390, 1673, 1684.
 v. Cincinnati Gas Lt. & C. Co., 18
 Ohio St. 262: 411, 1623.
 v. City Council, 40 Minn. 483:
 1673, 1701.
 v. City Council, 12 Rich. S. C.
 702: 13.
 v. Clark, 1 N. J. L. 226: 1363.
 v. Clark, 38 N. J. L. 102: 1416.
 v. Clark, 25 N. J. L. 54: 700.
 v. Clyde, 130 Wis. 159: 1069:
 1381.
 v. Colfax County, 51 Neb. 28:
 1515.
 v. Collins, 6 Ohio 126: 514.
 v. Collis, 20 App. Div. 341: 687,
 1227.
 v. Commissioners, 23 N. J. L. 510:
 525.
 v. Comr., 30 Ohio St. 58: 831.
 v. Commissioners, 54 Ohio St. 333:
 739.
 v. Connover, 7 N. J. L. 203: 1374.
 v. Convery, 53 N. J. L. 588: 1020.
 v. Cooper, 23 N. J. L. 381: 1366.
 v. County Comrs., 23 Fla. 632:
 701.
 v. Cowles, 64 Ohio St. 162: 738.
 v. Cozzens, 42 La. Ann. 1069:
 476.
 v. Crane, 36 N. J. L. 394: 1083,
 1085.
 v. Crosby, 92 Minn. 176: 739.
 v. Cruser, 14 N. J. L. 401: 1389

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
- | | |
|---|--|
| State v. Curtis, 86 Wis. 140: 916, 1367, 1516, 1517.
v. Dalton, 22 R. I. 77: 479.
v. Davis, 13 N. J. L. 10: 1091, 1092.
v. Dawson, 3 Hill (S. C.) 101: 22, 1153.
v. Dayton Traction Co., 64 Ohio St. 272: 281, 291.
v. Dearing, 173 Mo. 492: 771.
v. Delesdernier, 11 Me. 473: 1081, 1083.
v. Demarest, 32 N. J. L. 528: 462.
v. Des Moines City Ry. Co., 135 Ia. 694: 1623.
v. Dickson, 3 Mo. App. 464: 1463.
v. Digby, 5 Blackf. 543: 1207.
v. District Court, 42 Minn. 247: 1289.
v. District Court, 44 Minn. 244: 1413.
v. District Court, 50 Minn. 14: 1383.
v. District Court, 52 Minn. 283: 954, 966.
v. District Court, 77 Minn. 248: 787.
v. District Court, 83 Minn. 464: 1419, 1421.
v. District Court, 87 Minn. 146: 7, 21, 674.
v. District Court, 87 Minn. 268: 1085, 1438.
v. District Court, 14 Mont. 476: 520, 521.
v. District Court, 28 Mont. 528: 439.
v. District Court, 34 Mont. 535: 715.
v. Dobard, 45 La. Ann. 1412: 479.
v. Dover, 10 N. H. 394: 1390.
v. Driggs, 45 N. J. L. 91: 578.
v. Dubuque etc. R. R. Co., 88 Ia. 508: 876.
v. Dunlap, 49 Wash. 385: 322.
v. Dupquier, 46 La. Ann. 577: 479.
v. East Fifth St. R. R. Co., 140 Mo. 539: 297, 1623.
v. Easton & Amboy R. R. Co., 36 N. J. L. 181: 941, 962, 966.
v. Eau Claire, 40 Wis. 533: 523, 536, 593.
v. Edwards, 86 Me. 102: 551.
v. Elizabeth, 37 N. J. Eq. 432: 878.
v. Elizabeth, 32 N. J. L. 357: 914, 1023, 1084.
v. Elizabeth, 54 N. J. L. 462: 185, 396. | State v. Elizabeth, 55 N. J. L. 337: 185, 397.
v. Elkinton, 30 N. J. L. 335: 1637.
v. Elk Island Boom Co., 41 W. Va. 796: 115.
v. Ellis, 113 La. 555: 1061.
v. Emmons, 24 N. J. L. 45: 1364.
v. Engleman, 106 Mo. 628: 673, 678, 1057, 1399.
v. English, 22 N. J. L. 291: 1359.
v. English, 22 N. J. L. 713: 1359.
v. Essex Public Road Board, 37 N. J. L. 273: 1358.
v. Evans, 2 Seam. 208: 1194.
v. Everett, 23 N. J. L. 378: 1365, 1419, 1420.
v. Fackler, 91 Wis. 418: 594.
v. Fillmore Co., 32 Neb. 870: 155, 1606.
v. Findley, 67 Wis. 86: 1100.
v. Fire Creek C. & C. Co., 33 W. Va. 188: 479.
v. Fisher, 117 N. C. 733: 887, 888, 890.
v. Fischer, 26 N. J. L. 129: 954, 1369.
v. Fisk, 15 N. D. 219: 580.
v. Fond du Lac, 42 Wis. 287: 1005, 1010, 1011, 1013, 1016.
v. Ford, 6 Wis. 291: 1638.
v. Fort, 180 Mo. 97: 1676.
v. Franklin Falls Co., 49 N. H. 240: 22.
v. French, 24 N. J. L. 736: 1381.
v. French, 71 Ohio St. 186: 486.
v. Frorhlick, 115 Wis. 32: 739.
v. Garch, 9 Wash. 226: 1444.
v. Garretson, 23 N. J. L. 388: 1369.
v. Geneva, 107 Wis. 1: 514, 1403.
v. Gill, 84 Mo. 248: 1410.
v. Gilmanton, 9 N. H. 461: 104, 109.
v. Glen, 7 Jones L. 321: 15, 108, 486.
v. Goodwill, 33 W. Va. 179: 477, 479.
v. Graeme, 130 Mo. App. 138: 350.
v. Graffam, 74 Wis. 643: 970, 1638.
v. Grand Island etc. R. R. Co., 31 Neb. 209: 1531.
v. Graves, 19 Md. 351: 1673, 1685.
v. Graves, 120 Wis. 607: 1370.
v. Green, 15 N. J. L. 88: 1364.
v. Green, 18 N. J. L. 179: 1022, 1416.
v. Griftner, 61 Ohio St. 201: 1500.
v. Guilbert, 56 Ohio St. 575: 460.
v. Haines, 58 Minn. 96: 1409.
v. Hall, 8 Pick. 440: 1017.
v. Hall, 17 N. J. L. 374: 1102. |
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[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

- State v. Hamilton, 109 Tenn. 276: 191, 366.
 v. Hamilton, 47 Ohio St. 52: 409, 413.
 v. Hampton, 2 N. H. 22: 779.
 v. Hanna, 97 Ind. 469: 1431.
 v. Harland, 74 Wis. 11: 1517.
 v. Hart, 17 N. J. L. 185: 1091, 1092, 1364.
 v. Hemsley, 59 N. J. L. 149: 1086.
 v. Hendrickson, 80 Minn. 352: 1363, 1515.
 v. Heppenheimer, 54 N. J. L. 268: 1010, 1160.
 v. Hernsley, 59 N. J. L. 149: 707.
 v. Hoboken, 35 N. J. L. 205: 297.
 v. Hoetz, 67 Wis. 84: 1093.
 v. Hogue, 71 Wis. 384: 687, 1013, 1014, 1091, 1165, 1167, 1511.
 v. Holman, 40 Minn. 369: 384, 400, 1402.
 v. Hopping, 18 N. J. L. 423: 1363.
 v. Horn, 34 Kan. 556: 1095, 1515.
 v. Hudson Co., 55 N. J. L. 88: 1187.
 v. Hudson County Ave. Comrs., 37 N. J. L. 12: 432.
 v. Hudson County Board, 55 N. J. L. 88: 807, 1199, 1312.
 v. Hudson River R. R. & T. Co. (N. J.) 25 Atl. Rep. 853: 1027.
 v. Hudson Tunnel R. R. Co., 38 N. J. L. 17: 1040, 1048.
 v. Hudson Tunnel R. R. Co., 38 N. J. L. 548: 726, 1040, 1048.
 v. Hug, 44 Mo. 116: 1392, 1673, 1701, 1702.
 v. Hulick, 3 N. J. L. 70: 1363.
 v. Hulick, 33 N. J. L. 307: 942, 1363, 1381.
 v. Humes, 34 Wash. 347: 1325, 1326.
 v. Hutchinson, 10 N. J. L. 242: 1091.
 v. Illinois Central R. R. Co., 116 U. S. 347: 480.
 v. Indiana etc. R. R. Co., 133 Ind. 69: 488.
 v. Indianapolis Un. Ry. Co., 160 Ind. 45: 488.
 v. Iowa Cent. R. R. Co., 91 Ia. 275: 1017.
 v. Isanti Co. Comrs., 98 Minn. 89: 144, 1414.
 v. Jacksonville etc. R. R. Co., 20 Fla. 616: 1163, 1467.
 v. Jacksonville St. R. R. Co., 29 Fla. 590: 268, 298, 299.
 State v. Jacksonville Terminal Co., 41 Fla. 377: 426, 428, 761.
 v. Janesville St. R. R. Co., 87 Wis. 72: 330.
 v. Jersey City, 24 N. J. L. 662: 1014.
 v. Jersey City, 25 N. J. L. 309: 707, 914, 1029, 1086, 1358.
 v. Jersey City, 29 N. J. L. 441: 921, 1071.
 v. Jersey City, 34 N. J. L. 31: 485.
 v. Jersey City, 54 N. J. L. 49: 698, 707, 708, 734.
 v. Jersey City, 55 N. J. L. 117: 141.
 v. Jersey City, 56 N. J. L. 216: 980.
 v. Jersey City, 57 N. J. L. 293: 272, 1666.
 v. Jersey City, 58 N. J. L. 262: 783.
 v. Johnson, 114 N. C. 846: 468.
 v. Jones, 139 N. C. 613: 923, 1005, 1008, 1082.
 v. Joyce, 121 N. C. 610: 1511.
 v. Judges, 69 Ohio St. 372: 1409, 1422.
 v. Justice, 24 N. J. L. 413: 514, 1033, 1105.
 v. Kansas City, 89 Mo. 34: 1186, 1418.
 v. Kansas City etc. R. R. Co., 54 Ark. 608: 780, 1718.
 v. Kansas City etc. R. R. Co., 32 Fed. 722: 488.
 v. Kansas Natural Gas Co., 71 Kan. 508: 359.
 v. Kinne, 41 N. H. 238: 1434.
 v. Kinney, 39 Ia. 226: 1510, 1514.
 v. Klein, 140 Mo. 502: 1471.
 v. Laclede Gas & L. Co., 102 Mo. 472: 481, 482.
 v. Langer, 29 Wis. 68: 1029.
 v. Larabee, 59 N. J. L. 259: 707, 1387.
 v. Larabee, 58 N. J. L. 314: 1418.
 v. Latrobe, 81 Md. 222: 303.
 v. Laverack, 34 N. J. L. 201: 346, 419, 422.
 v. Lawrence, 5 N. J. L. 850: 1091.
 v. Leaver, 62 Wis. 387: 348.
 v. Leighton, 83 Me. 419: 96.
 v. Leslie, 30 Min. 533: 1366.
 v. Lewis, 22 N. J. L. 564: 1033, 1511, 1516.
 v. Lindell R. R. Co., 151 Mo. 162, 299.
 v. Lindig, 96 Minn. 419: 1361, 1362.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
- State v. Lippincott, 25 N. J. L. 434: 1363.
 v. Lloyd, 133 Wis. 468: 865.
 v. Logue, 73 Wis. 598: 1517, 1018.
 v. Long Branch Comrs., 54 N. J. L. 484: 916, 1666.
 v. Longfellow, 169 Mo. 109: 104, 105, 114, 115.
 v. Longstreet, 38 N. J. L. 312: 1431.
 v. Loomis, 115 Mo. 307: 479.
 v. Lord, 26 N. J. L. 140: 1358, 1421.
 v. Lubke, 85 Mo. 307: 1465.
 v. Lubke, 15 Mo. App. 152: 1465.
 v. Luce, 9 Houst. 396: 451.
 v. Lyle, 100 N. C. 497: 22, 495, 496, 923, 1164.
 v. Macalester College, 87 Minn. 165: 11, 464.
 v. Madison, 59 Me. 538: 1505.
 v. Madison St. Ry. Co., 72 Wis. 612: 1623.
 v. Maine, 27 Conn. 641: 422, 522.
 v. Mallard, 143 N. C. 666: 1462, 1634.
 v. Martin, 51 Kan. 462: 716.
 v. Mason City etc. R. R. Co., 85 Ia. 516: 1645.
 v. McDonald, 28 Minn. 445: 974, 1374.
 v. McGowan, 138 Mo. 187: 594.
 v. McHatton, 15 Mont. 159: 1463, 1465.
 v. McIver, 88 N. C. 686: 1164, 1165, 1167.
 v. McNay, 90 Wis. 104: 565, 567, 568, 582.
 v. Meiley, 22 Ohio St. 534: 1534.
 v. Messenger, 27 Minn. 119: 1160, 1167.
 v. Miller, 23 N. J. L. 383: 1106, 1187, 1379.
 v. Mills, 29 Wis. 322: 1391, 1392, 1674.
 v. Milwaukee etc. R. R. Co., 116 Wis. 142: 306.
 v. Mines, 38 W. Va. 125: 594.
 v. Minneapolis etc. R. R. Co., 88 Ia. 689: 1517.
 v. Minneapolis etc. R. R. Co., 39 Minn. 219: 487, 1642, 1643, 1644.
 v. Mo. etc. Telephone Co., 189 Mo. 83: 481.
 v. Mo. Pac. Ry. Co., 98 Minn. 429: 490, 1288.
 v. Mo. Pac. Ry. Co., 75 Neb. 4: 951.
 v. Mobile, 5 Porter (Ala.) 279: 346, 1488, 1594.
 v. Molly, 18 Iowa 525: 1381, 1514.
- State v. Monongahela Riv. R. R. Co., 37 W. Va. 108: 1643.
 v. Monroe, 40 Wash. 545: 358.
 v. Montclair R. R. Co., 35 N. J. L. 328: 787.
 v. Morse, 51 N. H. 98: 969.
 v. Muncie Pulp Co., 119 Tenn. 47: 104.
 v. Murphy, 130 Mo. 10: 346, 476.
 v. Murphy (Mo.) 34 S. W. 51: 346.
 v. National Docks etc. R. R. Co., 54 N. J. L. 180: 1088.
 v. National Docks etc. R. R. Co., 57 N. J. L. 183: 1063.
 v. Nelson, 52 Ohio St. 88: 476.
 v. Nelson, 57 Wis. 147: 974, 1087.
 v. Neptune City, 57 N. J. L. 362: 300.
 v. Neville, 110 Mo. 345: 928, 1638.
 v. Newark, 25 N. J. L. 411: 1014.
 v. Newark, 27 N. J. L. 185: 734, 735.
 v. Newark, 28 N. J. L. 491: 700.
 v. Newark, 28 N. J. L. 529: 782.
 v. Newark, 35 N. J. L. 168: 14.
 v. Newark, 54 N. J. L. 62: 683, 724, 1068.
 v. Newark, 54 N. J. L. 102: 304, 914, 1666.
 v. Newark, 57 N. J. L. 309: 300.
 v. New Brunswick, 58 N. J. L. 225: 514, 917.
 v. New Boston, 11 N. H. 407: 423.
 v. New Haven etc. R. R. Co., 43 Conn. 351: 476.
 v. New Haven etc. Co., 45 Conn. 331: 728.
 v. Northern Pac. Ry. Co., 98 Minn. 429: 1289, 1644.
 v. Northrup, 18 N. J. L. 271: 979, 981.
 v. Noyes, 47 Maine 189: 407, 409, 487.
 v. O'Connor, 78 Wis. 282: 980, 983, 1021, 1381.
 v. Officer, 4 Ore. 180: 1034, 1516.
 v. Ohio Oil Co., 150 Ind. 21: 164, 470.
 v. Ohio Riv. R. R. Co., 38 W. Va. 242: 1643.
 v. Oliver, 24 N. J. L. 129: 992, 1368.
 v. Olympia L. & P. Co., 46 Wash. 511: 536, 537, 594.
 v. Orange, 32 N. J. L. 49: 941, 972, 1017, 1032.
 v. Orange, 54 N. J. L. 111: 514, 675, 738, 1057, 1666.
 v. Oshkosh, 84 Wis. 548: 1005, 1021, 1395, 1397.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
- State v. Oshkosh etc. R. R. Co., 100 Wis. 538: 1412, 1423.
 v. Otis, 53 Minn. 318: 1164, 1167.
 v. Otoe Co., 6 Neb. 129: 969, 1017, 1018, 1021, 1031, 1032, 1033.
 v. Paine Lumber Co., 84 Wis. 205: 887.
 v. Park Comrs., 33 Minn. 524: 1531.
 v. Passaic, 36 N. J. L. 382: 695, 734, 1017, 1396.
 v. Passaic, 37 N. J. L. 65: 734.
 v. Pendergrass, 106 N. C. 664: 469.
 v. Pennsylvania Co., 133 Ind. 700: 488.
 v. Perth Amboy, 52 N. J. L. 132: 927, 1154, 1155, 1156.
 v. Perth Amboy, 57 N. J. L. 482: 1086.
 v. Philadelphia, 195 Pa. St. 101: 1523, 1525.
 v. Phipps, 4 Ind. 515: 779.
 v. Pierson, 37 N. J. L. 363: 1381.
 v. Pillsbury, 82 Minn. 359: 463.
 v. Pitman, 38 Iowa 252: 976.
 v. Plainfield, 41 N. J. L. 138: 893, 894, 1021, 1023, 1035.
 v. Polk Co. Comrs., 87 Minn. 325: 494, 567, 576, 710, 979, 1395.
 v. Potts, 4 N. J. L. 347: 1156.
 v. Pownal, 10 Maine 24: 916.
 v. Price, 21 Md. 448: 513.
 v. Prine, 25 Iowa 231: 1033, 1516.
 v. Proprietors of Morris Aqueduct Co., 58 N. J. L. 303: 912.
 v. Prosser, 2 Wash. 530: 118, 136.
 v. Prosser, 4 Wash. 816: 118.
 v. Putnam Co., 23 Fla. 632: 171.
 v. Railway Co., 40 Ohio St. 504: 528, 529, 534.
 v. Railroad Comrs., 56 Conn. 308: 524, 714, 1638.
 v. Ramseyer, 73 N. H. 31: 479.
 v. Rapp, 39 Minn. 65: 675, 683, 684, 927, 930, 982, 1637.
 v. Reckless, 38 N. J. L. 393: 1105.
 v. Red Lodge, 30 Mont. 338: 342, 362, 685.
 v. Red Lodge, 33 Mont. 345: 342, 362.
 v. Redmond, 134 Wis. 89: 470.
 v. Reed, 38 N. H. 59: 823, 1004.
 v. Richcreek, 167 Ind. 217: 479.
 v. Richmond, 26 N. H. 232: 1511.
 v. Rivers, 5 Ired. L. 297: 1499.
 v. Rixie, 50 Wash. 676: 865.
 v. Robb, 100 Maine 180: 474.
 v. Robert P. Lewis Co., 72 Minn. 87: 11, 464.
 v. Robert P. Lewis Co., 82 Minn. 390: 11, 464.
 State v. Runyan, 24 N. J. L. 256: 1366.
 v. Rutherford, 55 N. J. L. 540: 236.
 v. Ryan, 127 Wis. 599: 514, 1515, 1638.
 v. Rye, 35 N. H. 368: 1376, 1381, 1511.
 v. St. Louis, 62 Mo. 244: 1186.
 v. St. Louis, 67 Mo. 113: 1031, 1032.
 v. St. Louis, 145 Mo. 551: 534.
 v. St. Louis, 161 Mo. 371: 199.
 v. St. Louis, 1 Mo. App. 503: 1031, 1086, 1358.
 v. St. Paul City Ry. Co., 78 Minn. 331: 309, 361, 467.
 v. St. Paul etc. R. R. Co., 35 Minn. 131: 487, 714, 1642, 1644.
 v. St. Paul etc. R. R. Co., 38 Minn. 246: 487, 1642, 1644.
 v. St. Paul etc. R. R. Co., 62 Minn. 450: 874.
 v. St. Paul etc. Ry. Co., 98 Minn. 380: 490, 1288, 1289, 1642, 1644.
 v. Salem Water Co., 5 Ohio C. C. 58: 679, 683, 689.
 v. Sargent, 45 Conn. 358: 129, 136, 470.
 v. Sayer, 41 N. J. L. 158: 608.
 v. Schanck, 9 N. J. L. 107: 1365.
 v. Schilb, 47 Iowa 611: 1361.
 v. School District, 79 Mo. App. 103: 893, 921, 1532.
 v. Scott, 22 Neb. 628: 686.
 v. Scott, 9 N. J. L. 17: 1095, 1358.
 v. Scott County Road Co., 207 Mo. 54: 460.
 v. Scougal, 3 S. D. 55: 479.
 v. Seaboard Air Line R. R. Co., 48 Fla. 150: 481.
 v. Seaboard Air Line R. R. Co., 139 N. C. 366: 1655.
 v. Several Parcels of Land, 79 Neb. 638: 1164, 1167.
 v. Seymour, 35 N. J. L. 47: 432, 434, 1155, 1156.
 v. Shardlow, 43 Minn. 524: 1289.
 v. Sheboygan, 111 Wis. 23: 343, 358, 362, 682.
 v. Shelton, 154 Mo. 670: 1412, 1424.
 v. Shivers, 58 N. J. L. 124: 300.
 v. Shreeve, 15 N. J. L. 57: 1420.
 v. Shreve, 4 N. J. L. 297: 979, 1022, 1102.
 v. Sioux City etc. R. R. Co., 43 Iowa 501: 1472.
 v. Sioux City etc. R. R. Co., 46 Neb. 682: 483.
 v. Simons, 145 Ala. 95: 434.
 v. Smiley, 65 Kan. 240: 594.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
- | | |
|--|---|
| State v. Smith, 58 Minn. 35: 476.
v. Smith, 100 N. C. 550: 970, 1509,
1511.
v. Smith, 21 N. J. L. 91: 1363.
v. Snedecker, 30 N. J. L. 80: 363,
400.
v. Snook, 53 Ohio St. 521: 809.
v. Snow, 3 R. I. 64: 485.
v. South Amboy, 57 N. J. L. 252:
878, 887.
v. Spencer, 53 Kan. 655: 687, 927.
v. Sewart, 74 Wis. 620: 565, 567,
568, 570, 582, 675.
v. Stiles, 13 N. J. L. 172: 1382.
v. Stockhouse, 14 S. C. 417: 520,
721.
v. Stoke, 80 Iowa 68: 1469.
v. Stoner, 39 Ind. App. 104: 199,
356.
v. Summerville, 104 La. 74: 1159,
1568.
v. Sunapee Dam Co., 70 N. H. 458:
117, 138.
v. Superior, 81 Wis. 649: 1167,
1168.
v. Superior, 108 Wis. 16: 615, 1356,
1637.
v. Superior Court (Wash.) 99 Pac.
3: 538.
v. Superior Court, 26 Wash. 278:
53, 56, 1161, 1581, 1586, 1591,
1612, 1615.
v. Superior Court, 28 Wash. 317:
739.
v. Superior Court, 29 Wash. 1:
512, 1057.
v. Superior Court, 30 Wash. 219:
181, 1412.
v. Superior Ct., 31 Wash. 32: 1412.
v. Superior Court, 31 Wash. 445:
746, 1034, 1036.
v. Superior Ct., 33 Wash. 542:
563, 1072.
v. Superior Ct., 35 Wash. 303: 725.
v. Superior Court, 36 Wash. 381:
709, 746.
v. Superior Court, 40 Wash. 389:
759, 760.
v. Superior Court, 41 Wash. 450:
1429.
v. Superior Court, 42 Wash. 521:
513, 1027, 1072.
v. Superior Court, 42 Wash. 660:
508, 537, 591, 594.
v. Superior Court, 42 Wash. 675:
528, 533, 1046.
v. Superior Court, 42 Wash. 684:
1416, 1429.
v. Superior Ct., 43 Wash. 34: 1413.
v. Superior Ct., 43 Wash. 91: 1407. | State v. Superior Court, 44 Wash.
108: 912, 917, 1073, 1208.
v. Superior Court, 44 Wash. 476:
721, 739, 895, 1058, 1062.
v. Superior Court, 44 Wash. 554:
1412.
v. Superior Court, 45 Wash. 270:
760.
v. Superior Court, 45 Wash. 316:
1073.
v. Superior Court, 45 Wash. 316:
754, 799, 1073.
v. Superior Court, 45 Wash. 321:
980.
v. Superior Court, 46 Wash. 35:
1412.
v. Superior Court, 46 Wash. 303:
1412.
v. Superior Court, 46 Wash. 500:
73, 908.
v. Superior Court, 46 Wash. 516:
533, 1060, 1062, 1064, 1068.
v. Superior Court, 47 Wash. 11:
512, 1511, 1516.
v. Superior Court, 47 Wash. 166:
787, 792, 796, 798, 894, 897.
v. Superior Court, 47 Wash. 310:
976, 989.
v. Superior Court, 47 Wash. 397:
501, 544, 1051, 1071.
v. Superior Court, 48 Wash. 277:
54, 502, 897, 988, 1051, 1073.
v. Superior Court, 49 Wash. 390:
1073.
v. Superior Court, 49 Wash. 392:
1068.
v. Superior Court, 50 Wash. 13:
537, 591, 1043.
v. Supervisors, 66 Wis. 199: 1532.
v. Supervisors, 68 Wis. 502: 976.
v. Taff, 37 Conn. 392: 1372.
v. Tarrelly, 36 Mo. App. 282: 706.
v. Taylor, 54 S. C. 294: 868.
v. Taylor, 107 Tenn. 455: 197, 384,
390, 404, 1596.
v. Taylor, 36 Wash. 607: 408, 409.
v. Ten Eyck, 18 N. J. L. 373: 1416.
v. Tenny, 58 S. C. 215: 697.
v. Theriault, 70 Vt. 617: 471.
v. Thompson, 46 Minn. 302: 1380.
v. Toledo, 48 Ohio St. 112: 536.
v. Toledo Ry. & T. Co., 1 Ohio C.
C. (N. S.) 513: 533.
v. Tower, 84 Maine 444: 411.
v. Towers, 71 Conn. 657: 338.
v. Trask, 6 Vt. 355: 872.
v. Travis Co., 85 Tex. 435: 872,
892, 1496.
v. Trenton, 35 N. J. L. 485: 1092.
v. Trenton, 36 N. J. L. 79: 301,
317. |
|--|---|

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Trenton, 36 N. J. L. 499: 893, 894, 1004, 1011, 1011, 1013, 1014.
 v. Trenton, 53 N. J. L. 178: 1017, 1024.
 v. Trenton, 54 N. J. L. 92: 304, 914, 1666.
 v. Trenton Pass. R. R. Co., 58 N. J. L. 666: 313, 316.
 v. Troth, 34 N. J. L. 377: 700, 817, 818, 819.
 v. Troth, 36 N. J. L. 422: 817.
 v. Twiford, 136 N. C. 603: 113.
 v. Union, 33 N. J. L. 350: 734, 735.
 v. Union, 37 N. J. L. 268: 1083.
 v. Union Terminal R. R. Co., 72 Ohio St. 455: 716.
 v. Vanbuskirk, 21 N. J. L. 86: 1099, 1381.
 v. Vandevere, 25 N. J. L. 233: 1419.
 v. VanGeison, 15 N. J. L. 339: 707, 1095, 1102, 1358.
 v. Varnum, 81 Wis. 593: 1018, 1637.
 v. Vineland, 56 N. J. L. 474: 349, 1487, 1666.
 v. Wabash etc. R. R. Co., 83 Mo. 144: 488.
 v. Wabash R. R. Co., 206 Mo. 251: 1642.
 v. Waite, 2 Ohio C. C. (N. S.) 49: 1410.
 v. Waite, 70 Ohio St. 149: 1410.
 v. Waldron, 17 N. J. L. 369: 1706.
 v. Wallman, 110 Wis. 312: 1396, 1412.
 v. Walters, 69 Mo. 463: 865.
 v. Warner, 51 Mo. App. 174: 865.
 v. Waterman, 79 Ia. 360: 865, 870, 1020, 1031.
 v. Weare, 38 N. H. 314: 1100, 1101, 1511, 1518.
 v. Weimer, 64 Ia. 243: 1032.
 v. Welch, 66 N. H. 178: 109, 115.
 v. Wellman, 83 Me. 282: 1637.
 v. Wells, 142 N. C. 590: 1460, 1462.
 v. Wertzel, 62 Wis. 184: 1368, 1520.
 v. West Hoboken, 37 N. J. L. 77: 992, 1154.
 v. West Hoboken, 54 N. J. L. 508: 698.
 v. Wheeler, 97 Wis. 96: 1403.
 v. Wheeling & B. Bridge Co., 18 How. 421: 98.
 v. White, 151 Ind. 364: 1529.
 State v. White River Power Co., 39 Wash. 648: 505, 508, 537, 538, 591.
 v. Williams, 125 Ala. 115: 1428.
 v. Willingborough Road, 1 N. J. L. 128: 1088.
 v. Wilson, 17 Wis. 687: 1087, 1532.
 v. Wilton R. R. Co., 19 N. H. 521: 712.
 v. Wis. Cent. Ry. Co., 123 Wis. 551: 1483, 1645, 1646.
 v. Witherspoon, 75 N. C. 222: 1511.
 v. Withrow, (Mo.) 24 S. W. 638: 1566.
 v. Woodmanse, 1 N. D. 246: 478.
 v. Woodruff, 36 N. J. L. 204: 1364, 1368, 1416.
 v. Woodward, 9 N. J. L. 21: 1417.
 v. Wright, 54 N. J. L. 130: 119, 1021, 1082.
 v. Youger, 29 N. J. L. 384: 1358.
 State Bank v. State, 1 Blackf. 267: 417.
 State Board v. People, 229 Ill. 430: 731.
 State Historical Assn. v. Lincoln, 14 Neb. 336: 420.
 Staten Island M. R. R. Co. v. Staten Island Elec. R. R. Co., 34 N. Y. App. Div. 181: 764.
 Staten Island Rapid Transit R. R. Co., Matter of, 38 Hun 381: 1047.
 Staten Island Rapid Transit Co., Matter of, 41 Hun 392: 1106.
 Staten Island Rapid Transit Co., Matter of, 47 Hun 396: 1096, 1379.
 Staten Island Rapid Transit Co., Matter of, 103 N. Y. 251: 815.
 State Line Telephone Co. v. Ellison, 121 App. Div. 499: 322.
 State Lunatic Asylum v. Worcester Co., 1 Met. 437: 1135.
 State Park Comrs. v. Henry, 38 Minn. 266: 675, 1227, 1324, 1669, 1673.
 State St., In re, 8 Pa. St. 485: 1381.
 State Water Supply Commission v. Curtis, 125 App. Div. 117: 710, 1008.
 v. Curtis, 192 N. Y. 319: 710, 1008.
 Staton v. Atl. Coast Line R. R. Co., 147 N. C. 428: 180, 255, 304, 1581, 1583, 1717.
 v. Norfolk, R. R. Co., 111 N. C. 278: 23, 146, 155, 156, 1449, 1455.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 v. East Stroudsburg, 215 Pa. St. 143: 1129, 1226, 1713, 1714.
- Staunchfeld v. Newton, 142 Mass. 110: 143.
- Stearns v. Barre, 73 Vt. 281: 7, 21, 502, 677, 814, 815, 1055, 1061, 1067.
 v. Deerfield, 51 N. H. 372: 1382.
- Stearns' County v. St. Cloud etc. R. R. Co., 36 Minn. 425: 1622.
- Stearns' Exrs. v. Richmond, 88 Va. 992: 194, 196, 229, 441, 442, 1453, 1488.
- Stebbins v. Evanston, 136 Ill. 37: 1255.
- Steele's Petition, 44 N. H. 220: 1087.
- Steel v. Portland, 23 Or. 176: 872, 878.
 v. Tanana Mines Ry. Co., 2 Alaska, 451: 1568.
- Steele v. County Comrs., 83 Ala. 304: 9, 21, 520, 1421.
 v. Empson, 142 Ind. 397: 1086, 1383.
 v. Midland R. R. Co., L. R. 1 Ch. App. 275: 822.
 v. Sanchez, 72 Ia. 65: 106.
 v. Western Inland Lock Nav. Co., 2 Johns. 283: 1310, 1456.
- Steelton Borough v. East Harrisburg Pass. R. R. Co., 11 Pa. Co. Ct. 161: 297, 299, 1622.
- Steers v. Brooklyn, 101 N. Y. 51: 122, 127.
- Steets v. New York El. R. R. Co., 79 Hun 288: 1152.
- Stehr v. Mason City etc. Ry. Co., 77 Neb. 641: 378, 391, 664, 1297, 1303.
- Steigerwald v. Manhattan Ry. Co., 50 App. Div. 487: 1122, 1144.
- Steinaur v. Tell City, 146 Ind. 490: 884, 888.
- Stein v. Ashby, 24 Ala. 521: 73.
 v. Ashby, 30 Ala. 363, 73.
 v. Bienville Water Supply Co., 34 Fed. 145: 414, 416.
 v. Burden, 24 Ala. 130: 73, 77.
 v. Burden, 29 Ala. 127: 73.
 v. La Fayette, 6 Ind. App. 414: 937, 1648, 1656.
 v. Mobile, 24 Ala. 591: 10, 462.
- Steinert v. Metropolitan El. R. R. Co., 12 Miscl. 370. 1304.
- Steinhart v. Superior Court, 137 Cal. 575: 1159, 1160, 1461, 1467.
- Steinmeyer v. St. Louis, 3 Mo. App. 256: 234.
- Stenson v. Mt. Vernon, 104 App. Div. 17: 609, 610, 616, 617.
- Stephen v. Commissioners, 36 Kan. 664: 1028.
- Stephens v. Marshall, 3 Chand. Wis. 222: 695.
 v. New York etc. R. R. Co., 61 App. Div. 612: 323, 836.
 v. New York etc. R. R. Co., 175 N. Y. 72: 323, 327, 836.
- Stephenson v. Mo. Pac. R. R. Co., 68 Mo. App. 642: 180.
- Stephenville v. Brown, 29 Tex. Civ. App. 384: 453.
- Stephensburg v. Overby, 3 Tex. Civ. App. 173: 982.
- Sterling's Appeal, 111 Pa. St. 35: 172, 176, 337, 1594.
- Sterling v. Pawnee Diten Co., 42 Colo. 421: 1603.
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- Sternberger v. Metropolitan El. R. R. Co., 2 Miscl. 113: 1150.
- Sterrett v. Delmar Ave. Ry. Co., 108 Mo. App. 650: 1695.
- Sterrett Township Road, In re, 114 Pa. St. 627: 981, 1011, 1364.
- Sterrett Tp. Road, 123 Pa. St. 231: 700.
- Sterritt v. Bangor, 60 Me. 313: 1326.
 v. Bangor, 73 Me. 357: 1326.
 v. Chicago & Evanston R. R. Co., 75 Ill. 74: 639, 1581.
 v. Faxon, 19 Pick. 147: 649.
 v. Young, 14 Wyo. 146: 1005, 1016, 1040, 1570, 1572.
- Stettegast v. Houston, 38 Tex. Civ. App. 623: 328.
- Steubenville etc. Ry. Co. v. Cleveland etc. Ry. Co., 2 Ohio N. P. (N. S.) 45: 759.
 v. Patrick, 7 Ohio St. 170: 1422, 1464.
- Steubing v. New York El. R. R. Co., 138 N. Y. 658: 1301.
- Stevens v. Board of Supvrs., 41 Ia. 341: 976.
 v. Cedar Rapids, 128 Ia. 227: 602.
 v. County Comrs., 97 Me. 121: 1417, 1418.
 v. Danbury, 53 Conn. 9: 1673, 1688.
 v. Duck River Navigation Co., 1 Sneed 237: 1078, 1670, 1671, 1685.
 v. Erie R. R. Co., 21 N. J. Eq. 259: 788, 1607.
- Stevens v. Goffstown, 21 N. H. 454: 1389.

[The references are to the pages: Vol. I, pp. 1-743; Vol. II, pp. 743-1719.]

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 v. Manchester, 63 N. H. 390: 818.
 v. New York El. R. R. Co., 130 N. Y. 95: 1305.
 v. New York El. R. R. Co. 57 N. Y. Supr. Ct. 416: 1305.
 v. Patterson etc. R. R. Co., 34 N. J. L. 532: 117, 121, 128, 131.
 v. Proprietors of the Middlesex Canal, 12 Mass. 466: 1522.
 v. St. Louis Merchants Bridge T. Ry. Co., 152 Mo. 212: 425: 1483.
 v. Stevens, 11 Met. 251: 857.
 v. Worcester, 196 Mass. 45: 74, 1637.
 Stevenson v. Missouri Pac. R. R. Co. (Mo.) 31 S. W. 793: 314, 316, 1294.
 v. New York, 3 N. Y. Supr. 133: 695.
 Stevens Point Boom Co. v. Reilly, 44 Wis. 295: 99, 680.
 v. Reilly, 46 Wis. 237: 99.
 Stewart's Appeal, 56 Pa. St. 413: 687.
 Stewart v. Baltimore, 7 Md. 500: 431, 917, 927.
 v. Board of Police, 25 Miss. 479: 929, 1000.
 v. Chicago General Street R. R. Co., 166 Ill. 61: 1586.
 v. Chicago General St. R. R. Co., 58 Ill. App. 446: 1586.
 v. Clinton, 79 Mo. 603: 234.
 v. Conley, 122 Ala. 179: 890.
 v. Council Bluffs, 84 Ia. 61: 603, 618, 1306, 1308, 1339.
 v. County, 2 Pa. St. 340: 1325, 1704.
 v. Great Northern R. R. Co., 65 Minn. 515: 535, 675, 776.
 v. Hartman, 46 Ind. 331: 516, 517.
 v. Ohio Riv. R. R. Co., 38 W. Va. 438: 201, 248, 249, 256, 640, 642, 1294, 1299, 1550, 1552, 1649, 1657.
 v. Palmer, 74 N. Y. 183: 1005.
 v. Raymond R. R. Co., 7 S. & M. 568: 947, 1535, 1570.
 v. Rutland, 58 Vt. 12: 142, 1251, 1457.
 v. Supervisors of Polk County, 30 Ia. 9: 462.
 v. Wallis, 30 Barb. 344: 707, 1102, 1517, 1638.
 Stewart Wire Co. v. Lehigh C. & N. Co., 203 Pa. St. 474: 1603, 1615, 1616.
 Stickford v. St. Louis, 75 Mo. 309: 607, 617.
 v. St. Louis, 7 Mo. App. 217: 607, 617, 631.
 Stillman v. Northern Pac. etc. R. R. Co., 34 Minn. 420: 1314.
 v. Pendleton, 26 R. I. 585: 155, 1651, 1655, 1656.
 Stillwater v. Lowry, 83 Minn. 275: 298.
 Stillwater Board of Education v. Aldridge, 13 Okla. 205: 1005, 1016.
 Stillwater etc. St. Ry. Co., Matter of, 72 App. Div. 294: 291, 773.
 Stillwater etc. St. Ry. Co., Matter of, 171 N. Y. 589: 291, 772.
 Stillwater etc. R. R. Co. v. Boston etc. R. R. Co., 67 App. Div. 367: 1423.
 v. Slade, 36 N. Y. App. Div. 587: 897.
 v. Stillwater, 66 Minn. 176: 1719.
 Stillwater Water Co. v. Farmer, 89 Minn 58: 162.
 v. Stillwater, 50 Minn. 498: 352.
 Stillwell v. Kenedy, 36 Misc. 359: 1562.
 v. St. Louis etc. R. R. Co., 39 Mo. App. 221: 840, 852, 853, 1646.
 Stiltz v. Indianapolis, 55 Ind. 515: 466.
 Stiminel v. Brown, 1 Houst. 219: 440.
 Stinson v. Brookline, 197 Mass. 568: 91.
 v. Chicago etc. Ry. Co., 27 Minn. 284: 1139, 1235.
 v. Dunbarton, 46 N. H. 385: 1388.
 Stinson Mill Co. v. Board of Harbor Line Comrs., (Wash.) 29 Pac. 938: 118.
 Stith v. Louisville etc. R. R. Co., 109 Ky. 168: 152.
 Stockdale v. Rio Grande Western R. R. Co., 28 Utah 201: 57, 318, 449, 533, 640, 654, 661, 1580, 1590, 1612.
 Stock v. Boston, 149 Mass. 410: 142.
 v. Jefferson Township, 114 Mich. 357: 78, 1603.
 Stocker v. Nemaha County, 72 Neb. 255: 1446, 1450, 1456.
 v. Nemaha Co., 4 Neb. (Unof.) 230: 1606.
 Stockett v. Nicholson, Walker, Miss. 75: 706, 1517.
 Stockley v. Robbstown Bridge Co., 5 Watts 546: 1489.
 Stockport etc. Ry. Co., In re, 33 L. J. Q. B. 251: 1315.
 Stockton v. Baltimore etc. R. R. Co., 32 Fed. 9: 96.
 v. Chicago, 136 Ill. 434: 1426.
 v. North Jersey St. R. R. Co., (N. J. Ch.) 34 Atl. 688: 300.

- [The references are to the pages: Vol. I, pp. 1-743; Vol. II, pp. 743-1719.]
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 v. Galgiani, 49 Cal. 139: 1275, 1386.
 v. Stockton, 41 Cal. 147: 497.
 Stockton & Linden Gravel Co. v. Stodden & Copperopolis R. R. Co., 53 Cal. 11: 1292.
 Stoddard v. Saratoga Springs, 127 N. Y. 261: 141.
 Stodghill v. Chicago etc. R. R. Co., 43 Ia. 26: 846, 847, 1454, 1476.
 v. Chicago etc. R. R. Co., 53 Ia. 341: 1551, 1648, 1654.
 Stofflet v. Estes, 104 Mich. 208: 96, 97, 133.
 Stokes v. Manhattan Ry. Co., 47 App. Div. 58: 1562.
 v. Parker, 53 N. J. L. 183: 939.
 Stolze v. Manitowoc Terminal Co., 100 Wis. 208: 1128, 1138, 1245, 1441.
 v. Milwaukee etc. R. R. Co., 104 Wis. 47: 1441, 1464, 1536, 1578.
 v. Milwaukee etc. R. R. Co., 113 Wis. 44: 1435, 1442, 1462, 1464, 1536, 1578.
 Stone v. Augusta, 46 Me. 127: 87, 195, 236, 456, 1454, 1548.
 v. Boston, 2 Met. 220: 1017, 1420.
 v. Cambridge, 6 Cush. 270: 1361.
 v. Commercial Ry. Co., 9 Sim. 621: 823.
 v. Fairbury etc. R. R. Co., 68 Ill. 394: 639, 654.
 v. Farmers L. & T. Co., 116 U. S. 307: 480, 482.
 v. Heath, 135 Mass. 561: 1317.
 v. Illinois Central R. R. Co., 116 U. S. 347: 482.
 v. Mississippi, 101 U. S. 814: 469, 736.
 v. Mo. Pac. Ry. Co., 75 Kan. 600: 1248, 1249, 1457, 1485, 1519, 1646, 1647.
 v. New Orleans etc. R. R. Co., 116 U. S. 352: 480.
 v. New York, 25 Wend. 157: 1277, 1411.
 v. So. Ill. & Mo. Bridge Co., 206 U. S. 267: 684.
 v. State, 138 N. Y. 124: 89, 144.
 Stoneham v. London etc. Ry. Co., 7 L. R. Q. B. 1: 957.
 Stoner v. Rice, 121 Ind. 51: 109.
 Stonington v. States, 31 Conn. 213: 678.
 Stopf v. Wolt. 177 Ill. 620: 1561.
 Storch v. Metropolitan El. R. R. Co., 131 N. Y. 514: 1301.
- Storck v. Metropolitan El. R. R. Co., 131 N. Y. 514: 1196, 1296.
 Store v. San Jose etc. Ry. Co., 150 Cal. 277: 314.
 Storer v. Hobbs, 52 Me. 144: 1634.
 Stork v. Philadelphia, 195 Pa. St. 101: 1251, 1639.
 Storm v. Manchaug Co., 13 Allen, 10: 554, 557, 559.
 Storm Lake v. Iowa Falls & Sioux City Ry. Co., 62 Ia. 218: 952.
 Storms v. Manhattan R. R. Co., 77 App. Div. 94: 1562.
 v. Manhattan R. R. Co., 178 N. Y. 493: 1562.
 Storrs v. Pensacola & A. R. R. Co., 29 Fla. 617: 480.
 Story v. New York Elevated R. R. Co., 3 Abb. New Cases 478: 260.
 v. New York El. R. R. Co., 90 N. Y. 122: 67, 178, 183, 186, 187, 197, 199, 202, 249, 254, 260.
 v. N. Y. El. R. R. Co., 90 N. Y. 149: 428.
 v. New York El. R. R. Co., 90 N. Y. 161: 337.
 v. New York El. R. R. Co., 90 N. Y. 177: 333.
 v. Ullman, 88 Md. 244: 888.
 Story St., In re, 11 Phila. 456: 1327.
 Stoudinger v. Newark, 28 N. J. Eq. 187: 335.
 v. Newark, 28 N. J. Eq. 446: 335.
 Stough v. Chicago etc. R. R. Co., 71 Ia. 641: 1549.
 Stoughton v. Paul, 173 Mass. 148: 1071.
 Stout v. Freeholders, 25 N. J. L. 202: 678.
 v. Hopping, 17 N. J. L. 471: 1638.
 Stowe v. Newborn, 127 Ga. 421: 679, 704.
 Stowell v. Board of Public Works, 184 Mass. 416: 1511, 1523.
 v. Flagg, 11 Mass. 364: 544, 1522.
 v. Johnson, 7 Utah 215: 70.
 v. Milwaukee, 31 Wis. 523: 615, 619, 1123, 1307.
 Stowers v. Postal Tel. Cable Co., 68 Miss. 559: 338, 1593.
 Stoy v. Indiana Hydraulic Power Co., 166 Ind. 316: 536.
 Strachen v. Brown, 39 Mich. 168: 1004, 1010, 1013, 1420.
 Strack v. Miller, 134 Mich. 311: 1624.
 Strader v. Cincinnati, 1 Handy 446: 197, 369, 385, 388, 404, 405, 1497.
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R. R. Co., 193 Ill. 217: 759, 792,
1071.
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of, 16 Abb. N. C. 152: 991, 1071.
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York, 128 N. Y. 510: 773, 909.
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1018, 1513.
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143: 1064.
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1487.
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487.
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Land & Imp. Co., 137 N. C. 330:
1149, 1187, 1232.
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Reg. Rep. 469: 1105.
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N. J. Eq. 247: 117, 133.
- Suisun City v. De Feritas, 142 Cal.
350:
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1514.
- Sullens v. Chicago etc. R. R. Co., 74
Ia. 659: 150, 1639, 1650, 1653,
1716.
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790: 781, 782, 1346.
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1236, 1385.
- v. Missouri etc. Ry. Co., 29 Tex.
Civ. App. 429: 1145, 1146, 1228,
1229, 1313.
- v. North Hudson Co. R. R. Co., 51
N. J. L. 518: 266, 1199, 1201,
1215, 1243.
- v. Phillips, 110 Ind. 320: 233, 1606.
- v. Robbins, 109 Ia. 235: 1510.
- v. Tichenor, 179 Ill. 97: 890.
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649: 1040, 1041, 1638.
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Fed. 644: 128, 129.
- Sultan W. & P. Co. v. Weyerhauser
Timber Co., 31 Wash. 558: 1207,
1208, 1210.
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357, 586.
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15, 472.
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Div. 455: 611.
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26: 1102.
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112: 979, 1030, 1420.
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1524.
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27 Pa. St. 99, 1315.
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1578.
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459: 1382.
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1510.
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1325, 1526.
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322.
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1187, 1206.
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W. & S. 9: 108.
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Pa. St. 384: 336.
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73 Md. 268: 451, 455.
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157: 973, 1031, 1032, 1033.
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536: 881, 883.
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933, 981, 982, 1019, 1086, 1407.
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137 N. Y. 592: 1196, 1296, 1300,
1302.
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474: 977, 993, 1058.
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C. 320: 86.
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474: 731.
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731.
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1129, 1244.

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 v. Miss. & Rum River Boom Co., 42 Minn. 532: 133.
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 v. Saratoga Springs, 164 N. Y. 609: 84.
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 v. Mont. Cent. Ry. Co., 19 Mont. 163: 847.
 v. Mont. Cent. Ry. Co., 25 Mont. 543: 847.
 v. Shakespeare, 42 La. Ann. 614: 105, 1496.
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 v. Rechel, 37 Fed. 323: 485.
 v. Rechel, 159 U. S. 380: 586, 807, 1157, 1165, 1167.
 v. Syracuse, 128 N. Y. 680: 739.
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 v. Delaware etc. R. R. Co., 66 N. J. Eq. 34: 199, 317.
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- T.
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 v. New Bedford, 135 Mass. 162: 1510.
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 v. St. Louis, 14 Mo. 20: 211, 229, 234, 235.
 v. St. Paul, 25 Minn. 129: 607, 617, 1524.
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 v. Strayer, 167 Ind. 23: 695.
 v. Todd, 48 Mo. App. 550: 706, 1025, 1513, 1516, 1517, 1576.
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 v. Moeschen, 179 N. Y. 325: 14, 15, 467, 490.
 v. Moeschen, 203 U. S. 583: 14, 15.
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 v. Evansville etc. R. R. Co., 149 Ind. 174: 733, 926.
 v. Turner, 36 Ind. 522: 210.
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 v. Crawford, 100 Ind. 550: 1390.
 v. Flora, 29 Ind. App. 442: 1192.
 v. Harris, 126 Ind. 7: 1547.
 v. Indianapolis etc. Traction Co., 167 Ind. 193: 1400.
 v. McCoy, 113 Ind. 498: 143.
 v. McKinley, 33 Ind. 274: 87, 461.
 v. Scott, 74 Ind. 29: 1719.
 v. Zehner, 166 Ind. 149: 91, 1486.
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 v. Rankin, 2 Bush. 453: 19.
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 v. McClung, 104 Va. 599: 695, 722.
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 v. Matthews, 60 Tex. 215: 1183, 1267.
 v. O'Mahoney, 24 Tex. Civ. App. 631: 144.
 v. Orange etc. Ry. Co., 29 Tex. Civ. App. 38: 1467.
 v. Rosedale Ry. Co., 64 Tex. 80: 268, 1586.
 v. Scott, 77 Fed. 726: 843.
 v. Snyder, 18 S. W. 559: 152.
 v. So. Development Co., 52 La. An. 535: 1377.
 v. Sutor, 56 Tex. 496: 859, 1347.
 v. Sutor, 59 Tex. 29: 859.
 v. Whitaker, 36 Tex. Civ. App. 571: 158.
 v. Wilson, 108 La. 1: 1378, 1379.
 Texas Midland R. R. Co. v. S. W. Tel. & Tel. Co., 24 Tex. Civ. App. 198: 690, 696, 1467.
 Texas Pac. R. R. Co. v. Saunders (Tex.) 18 S. W. 792: 1664.
 Texas R. R. Co. v. Eddings, 30 Tex. Civ. App. 170: 1297.
 Texas Trunk R. R. Co. v. Elan, 1 Tex. Civ. App. 201: 92, 158.
 Texas Western R. R. Co. v. Cave, 80 Tex. 137: 1226.
 v. Wilson, 83 Tex. 153: 864, 869.
 Textor v. Baltimore etc. R. R. Co., 107 Md. 221: 1395, 1397, 1398.
 Thames Conservators v. Victoria etc. R. R. Co., 4 L. R. C. P. 59: 1353.
 Tharp v. Witham, 65 Ia. 566: 1576.
 Thatcher v. Crisman, 6 Colo. App. 49: 973.
 v. Dartmouth Bridge Co., 18 Pick. 501: 680, 1634.
 Thaxter v. Turner, 17 R. I. 799: 183, 877, 880.
 Thayer v. Brooks, 17 Ohio 489: 161, 934.
 v. Burger, 100 Ind. 262: 977, 1383, 1407.
 v. Co. Comrs., 10 Cush. 151: 996.
 v. New Bedford R. R. Co., 125 Mass. 253: 117, 131.
 v. Rochester City etc. R. R. Co., 15 Abb. N. C. 52: 269, 1586.
 Thebodoreaux v. Maggioli, 4 La. An. 73: 1341.
 Theilan v. Porter, 14 Lea 622: 485.
 Themanson v. Kearney, 35 Neb. 881: 236.
 Theobold v. Louisville, N. O. & T. R. R. Co., 66 Miss. 279: 180, 188, 197, 201, 243, 247, 249, 253, 295.
 Theresa Dr. Dist., In re, 90 Wis. 301: 495, 565, 567, 568, 570, 582, 738.
 Thetford v. Kilburn, 36 Vt. 179: 955, 1005.
 Thibodaux v. Thibodaux, 46 La. An. 1528: 169.
 Thicknesse v. Lancaster Canal Co. 4 M. & W. 471: 693, 1524.
 Thien v. Voegtlante, 3 Wis. 461: 550.
 Third Ave. R. R. Co., In re, 56 Hun 537: 302.
 Third Ave. R. R. Co., In re, 121 N. Y. 536: 269, 302.
 Third Ave. R. R. Co. v. New York El. R. R. Co., 19 Abb. N. C. 261: 1581.
 Third, Fourth & Fifth Avenues, In re, 49 Wash. 109: 828, 916, 993, 1509, 1511.
 Thirteenth Street etc. R. R. Co. v. Southern Pass. R. R. Co., 15 Pa. Co. Ct. 145: 1621.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Thirty-fourth St., 81 Pa. St. 27: 1419.
 Thirty-fourth St. R. R. Co., Matter of, 37 Hun 442: 1040, 1080.
 Thirty-fourth St. R. R. Co., Matter of, 102 N. Y. 343: 1040, 1080.
 Thirty-fourth St., Widening of, 10 Phila. 197: 721.
 Thirty-second Street, Matter of, 19 Wend. 128: 1326.
 Thom v. Ga. Mfg. & Public Service Co., 128 Ga. 187: 594, 674, 731, 1070, 1623.
 Thoman v. Covington, 23 Ky. L. R. 117: 154.
 Thomas v. Ashland etc. Ry. Co., 122 Wis. 519: 128, 135.
 v. Boyd, 108 Va. 584: 1642.
 v. Ford, 63 Md. 346: 1486.
 v. Grand View Beach R. R. Co., 76 Hun 601: 1578.
 v. Hunt, 134 Mo. 392: 1629.
 v. Inter-County St. R. R. Co., 167 Pa. St. 120: 314, 315, 1587, 1590, 1665.
 v. Junction City Irr. Co., 80 Tex. 550: 1652.
 v. Milledgeville R. R. Co., 99 Ga. 714: 674.
 v. St. Louis etc. R. R. Co., 164 Ill. 634: 896, 939, 1047.
 v. South Side El. R. R. Co., 218 Ill. 571, 1049.
 v. Wade, 48 Fla. 311: 96, 133.
 Thomas Jefferson, The, 10 Wheat. 428: 103.
 Thomason v. Seaboard Air Line R. R. Co., 142 N. C. 300: 449.
 v. Seaboard Air Line Ry. Co., 142 N. C. 318: 1459, 1472.
 Thompson v. Augusta etc. R. R. Co., 37 S. C. 382: 1460.
 v. Hodgson, 2 Hun 146: 356.
 Thompson, In re, 85 Hun 438: 1379.
 Thompson, In re, 86 Hun 405: 724, 726.
 Thompson, In re, 89 Hun 32: 1561.
 Thompson, Matter of, 43 Hun 416: 437.
 Thompson, Matter of, 45 Hun 261: 1379.
 Thompson, Matter of, 57 Hun 419: 684, 806, 810, 833, 1331.
 Thompson, Matter of, 121 N. Y. 277: 1425.
 Thompson, Matter of, 127 N. Y. 463: 1139, 1147.
 Thompson v. Androscoggin River Improvement Co., 54 N. H. 545: 62, 80, 436, 437.
 v. Androscoggin Riv. Imp. Co., 58 N. H. 108: 100.
 v. Berlin, 87 Minn. 7: 1020, 1023, 1033, 1518.
 v. Board of Supervisors, 111 Cal. 553, 300.
 v. Booneville, 61 Mo. 282: 237.
 v. Canada Central R. R. Co., 3 Ontario, 136: 860.
 v. Chicago etc. R. R. Co., 110 Mo. 147: 948, 949, 1027, 1261, 1511.
 v. Citizens' Traction Co., 181 Pa. St. 131: 1549, 1657.
 v. Citizens' Traction Co. (Mo.) 31 S. W. 793: 1294.
 v. Conway, 53 N. H. 622: 1377.
 v. Crabb, 6 J. J. Marsh. 222: 1091, 1094.
 v. Deprez, 96 Ind. 67: 1132.
 v. De Weese-Dye Ditch & Res. Co., 25 Colo. 243: 1066, 1378.
 v. Goldthwait, 132 Ind. 20: 1083.
 v. Grand Gulf R. R. Co., 3 Illow. (Miss.) 240: 1159, 1170.
 v. Keokuk, 61 Ia. 187: 1306, 1307.
 v. Louisville etc. R. R. Co., 110 Ky. 973: 1478.
 v. Macon City, 106 Mo. App. 84: 324, 631.
 v. Major, 58 N. H. 242: 1504.
 v. Maloney, 199 Ill. 276: 366, 873, 874, 875, 877.
 v. Manhattan R. R. Co., 16 Daly 64: 1664.
 v. Manhattan R. R. Co., 130 N. Y. 360: 1554, 1584, 1664.
 v. McElarney, 82 Pa. St. 174: 858.
 v. Milwaukee & St. Paul Ry. Co., 27 Wis. 93: 1245, 1307.
 v. Multnomah Co., 2 Ore. 34: 1017, 1032, 1034, 1081, 1358, 1411.
 v. New York & Harlem R. R. Co., 3 Sandf. Ch. 625: 413.
 v. Ocean City R. R. Co., 60 N. J. L. 74: 297, 778.
 v. Pennsylvania R. R. Co., 51 N. J. L. 42: 314, 316, 1124.
 v. Seaboard Air Line Ry. Co., 142 N. C. 318: 447.
 v. Southern Cal. Motor Road Co., 82 Cal. 497: 836.
 v. State, 20 Ala. 54: 821, 1069.
 v. Treasurer of Wood Co., 11 Ohio St. 678: 580.
 v. Trowe, 82 Minn. 471: 982, 1186.
 v. Trustees of Schools, 218 Ill. 540: 911.

[The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]

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 v. Simon, 20 Ore. 60: 719.
- Thomsen v. McCormick, 136 Ill. 135: 873, 874, 877.
- Thomson v. Sebasticook & M. R. R. Co., 81 Me. 40: 1232.
- Thorington v. Montgomery, 147 U. S. 490: 23.
- Thorn v. Sweeney, 12 Nev. 251: 536, 1578.
- Thorndike v. County Comrs., 117 Mass. 566: 1035.
- Thornton v. North Providence, 6 R. I. 433: 1369.
 v. Roll, 118 Ill. 350: 1602.
 v. Sheffield etc. R. R. Co., 84 Ala. 109: 842, 1535, 1579.
- Thorp v. Rutland & Burlington R. R. Co., 27 Vt. 140: 487.
 v. Witham, 65 Ia. 566: 926, 927, 1431.
- Thorpe v. Co. Comrs., 9 Gray, 57: 1382, 1415.
- Thrall v. Gosnell, 28 Ind. App. 174: 973, 994, 1035.
- Threat v. Middletown, 8 Conn. 243: 992.
- Thunder Bay Booming Co. v. Speechley, 31 Mich. 336: 80.
- Thurman v. Emerson, 4 Bibb 279: 1370.
- Thurston v. Alstead, 26 N. H. 259: 1683.
 v. Hancock, 12 Mass. 220: 440.
 v. Portland, 63 Me. 149: 1135.
 v. St. Joseph, 51 Mo. 510: 67, 178, 183, 187, 233, 234.
- Thurston County v. Walker, 27 Wash. 500: 882.
- Tibbetts v. Knox & Lincoln R. R. Co., 62 Me. 437: 435, 1455.
 v. West & So. Towns St. R. R. Co., 54 Ill. App. 180: 1586.
 v. West & South Towns St. Ry. Co., 153 Ill. 147: 302, 1587.
- Tide Water Canal Co. v. Archer, 9 Gil. & J. (Md.) 479: 684, 1092, 1179, 1241, 1369, 1690.
- Tide Water Co. v. Coster, 18 N. J. Eq. 518: 577, 584, 586.
- Tidewater Ry. Co. v. Cowan, 106 Va. 817: 1341, 1379.
 v. Shartzer, 107 Va. 562: 629, 651, 654, 659, 660, 661, 668.
- Teck v. Board of Comrs., 11 Minn. 292: 1523.
- Tiedt v. Carstensen, 61 Ia. 334: 1419.
- Tietze v. International etc. Ry. Co., 35 Tex. Civ. App. 136: 1657.
- Tiffany v. United States Illuminating Co., 67 How. Pr. 73: 339, 1593.
 v. United States Illuminating Co., 51 N. Y. Supr. Ct. 280: 339, 345, 1593.
- Tiffany St., Matter of, 84 App. Div. 525: 611.
- Tift v. Buffalo, 82 N. Y. 204: 1499, 1500.
- Tift v. Dougherty Co., 74 Ga. 340: 1625.
- Tileston v. Brookline, 134 Mass. 438: 1712.
- Tillamook Water Co. v. Tillamook City, 150 Fed. 117: 409, 410.
- Tilley v. Mitchell & L. Co., 121 Wis. 1: 191, 372, 373, 374, 382, 384, 389, 391, 396, 397, 398, 406, 651.
- Tillman v. Kircher, 64 Ind. 104: 574.
 v. People, 12 Mich. 401: 886.
- Tilzie v. Hage, 8 Wash. 187: 873, 874.
- Tingley v. Providence, 8 R. I. 493: 1120, 1124, 1125.
 v. Providence, 9 R. I. 388: 1029.
- Tingle v. Tingle, 12 Bush 160: 1365.
- Tinicum Fishing Co. v. Carter, 61 Pa. St. 21: 139.
 v. Carter, 90 Pa. St. 85: 139.
- Tinker v. Rockford (Ill.) 28 N. E. 573: 629, 635.
 v. Rockford, 137 Ill. 123: 629, 635, 1356, 1451, 1452, 1453.
 v. Rockford, 36 Ill. App. 460: 846, 847, 1451.
- Tinkham v. Arnold, 3 Me. 120: 866.
- Tinsman v. Belvidere Del. R. R. Co., 26 N. J. L. 148: 95.
 v. Monroe Probate Judge, 82 Mich. 562: 993.
- Tintsman v. National Bank, 100 U. S. 6: 1114.
- Tioga St., In re, 213 Pa. St. 345: 1029.
- Tipton v. Miller, 3 Yerg. 423: 1079, 1358.
- Tisbury v. Vineyard Haven Water Co., 193 Mass. 196: 1266.
- Tise v. Whitaker-Harvey Co., 144 N. C. 507: 351, 372, 1596.
 v. Whitaker-Harvey Co., 146 N. C. 374: 883.
- Tisso v. Great So. Tel. & Tel. Co., 39 La. An. 996: 350.
- Titus v. Boston, 149 Mass. 164: 810, 1450, 1491, 1496.
 v. Boston, 161 Mass. 209: 453.
- Titusville Elec. Lt. & P. Co. v. Titusville, 196 Pa. St. 3: 408.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Tobey v. Moore, 130 Mass. 448: 429.
 Tobie v. Brown Co. Comrs., 20 Kan. 14: 1185.
 Todd v. Austin, 34 Conn. 78: 2, 6, 20, 504, 548.
 v. Kankakee & Illinois River R. R. Co., 78 Ill. 530: 1206.
 v. Macfarland, 20 App. Cas. D. C. 176: 1394.
 v. Rome, 2 Me. 55: 1372.
 v. York, 3 Neb. (Unof.) 763: 84.
 v. York Co., 72 Neb. 207: 149, 157.
 Todernier v. Aspinwall, 43 Ill. 401: 943, 1363, 1368.
 Toledo v. Converse, 21 Ohio C. C. 239: 876, 884, 887, 890.
 v. Sanwald, 13 Ohio C. C. 496: 1526.
 Toledo Consol. St. R. R. Co. v. Toledo Elec. St. R. R. Co., 6 Ohio C. C. 362: 427, 756, 762, 764, 985, 1282, 1283.
 v. Toledo Electric St. R. R. Co., 50 Ohio St. 603: 427, 756, 762, 764, 986, 1283.
 Toledo etc. R. R. Co. v. Campau, 83 Mich. 33: 1098, 1359.
 v. Chicago etc. R. R. Co., 155 Ill. 9: 1601, 1607.
 v. Cosand, 6 Ind. App. 222: 855.
 v. Daniels, 16 Ohio St. 390: 731.
 v. Darst, 61 Ill. 231: 869, 1426.
 v. Detroit etc. R. R. Co., 62 Mich. 564: 770, 893, 894, 991, 985, 1281.
 v. Detroit etc. R. R. Co., 63 Mich. 645: 770.
 v. Dunlap, 47 Mich. 456: 685, 896, 1347, 1434.
 v. East Saginaw etc. R. R. Co., 72 Mich. 206: 494, 533, 976, 990.
 v. Fostoria, 7 Ohio C. C. 293: 1291.
 v. Green, 67 Ill. 199: 1480.
 v. Jacksonville, 67 Ill. 37: 476.
 v. Loop, 139 Ind. 542: 1507.
 v. Morgan, 72 Ill. 155: 937.
 v. Munson, 57 Mich. 42: 706, 984, 1343.
 v. Pence, 68 Ill. 524: 25.
 v. Toledo etc. R. R. Co., 6 Ohio C. C. 521: 1422.
 Toledo etc. Ry. & T. Co. v. Hayes, 70 Ohio St. 425: 1315.
 Toledo etc. Traction Co. v. Indiana etc. Interurban Ry. Co., (Ind.) 86 N. E. 54: 900, 907.
 Toluca etc. Ry. Co. v. Haws, 194 Ill. 92: 934, 1246, 1247, 1249, 1457.
 Tomlin v. Dubuque, B. & M. R. R. Co., 32 Ia. 106: 104, 117, 130, 131.
 Tomlinson v. Wallace, 16 Wis. 224: 1517.
 Tompkins v. Augusta etc. R. R. Co., 21 S. C. 420: 831, 1631.
 v. Augusta etc. R. R. Co., 33 S. C. 216: 1626.
 v. Augusta etc. R. R. Co., 37 S. C. 382: 1626.
 v. Hodgson, 2 Hun 146: 337.
 Tonawanda v. Lyon, 181 U. S. 389: 11, 464.
 Toney v. Johnson, 26 Ind. 382: 1522.
 Tonica etc. R. R. Co. v. Cooper, 22 Ill. 224: 1217.
 v. Unsicker, 22 Ill. 221: 1309, 1316.
 Tonnes v. Augusta, 52 S. C. 396: 94.
 Toole v. Delaware etc. R. R. Co., 27 Pa. Supr. Ct. 577: 155, 157.
 Toops v. State, 92 Ind. 13: 1518.
 Toote v. Clifton, 22 Ohio St. 247: 145.
 Topeka v. Cower, 48 Kan. 345: 864, 868.
 v. Martineau, 42 Kan. 387: 604, 619, 1109, 1124, 1307, 1339.
 v. Sells, 48 Kan. 520: 236, 604, 617, 1525.
 Topliff v. Chicago, 196 Ill. 215: 357.
 Toppan's Petition, 24 N. H. 43: 1022.
 Torge v. Salamanca, 86 App. Div. 211: 610.
 v. Salamanca, 176 N. Y. 324: 610.
 Toronto Belt Line R. R. Co., In re, 26 Ont. 413: 947, 948, 949, 1564.
 Torrey v. Scranton, 133 Pa. St. 173: 155, 233.
 Torrington v. Messenger, 74 Conn. 321: 159, 710.
 v. Nash, 17 Conn. 197: 916, 992.
 Tosper v. Saline Co. Comrs., 27 Kan. 391: 1185.
 Totel v. Bonnefoy, 123 Ill. 653: 145.
 Towamenein Road, 10 Pa. St. 195: 1069.
 Towanda Bridge Co., In re, 91 Pa. St. 216: 687, 781, 788.
 Tower v. Boston, 10 Cush. 235: 624, 1522.
 v. Pittstick, 55 Ill. 115: 1514.
 Towle v. Eastern Railroad, 17 N. H. 519: 319.
 v. Eastern R. R. Co., 18 N. H. 547: 691.
 Town v. Blackberry, 29 Ill. 137: 1519.
 v. Foulkner, 56 N. H. 255: 1551.
 v. Missouri Pac. R. R. Co., 50 Neb. 768: 148, 149, 157.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Townes v. City Council, 46 S. C. 15: 144.
 v. Klamath County, 33 Ore. 225: 515, 676, 982, 1008, 1029, 1068.
 Townsend, Matter of, 39 N. Y. 171: 500.
 v. Blewett, 5 How. (Miss.) 503: 413.
 v. Chicago etc. R. R. Co., 91 Ill. 545: 976, 1510.
 v. Epstein, 93 Md. 537: 180, 181, 190, 197, 199, 373, 1596.
 v. Hoyle, 20 Conn. 1: 514.
 v. Mich. Cent. R. R. Co., 101 Fed. 757: 1570.
 v. New York Cent. etc. R. R. Co., 56 Misc 253: 1457, 1473.
 v. Norfolk Ry. & Lt. Co., 105 Va. 22: 453, 454.
 v. State, 147 Ind. 624: 164.
 Township Board v. Hackman, 48 Mo. 243: 502, 538, 1075.
 Tracewell v. Wood Co., 58 W. Va. 283: 156.
 Tracey v. Corse, 58 N. Y. 143: 1008.
 v. Bittle, 213 Mo. 302: 542, 872.
 v. Elizabethtown etc. R. R. Co., 78 Ky. 309: 1423.
 v. Elizabethtown etc. R. R. Co., 80 Ky. 259: 1004, 1010, 1013, 1014, 1045, 1056, 1061, 1062, 1063, 1066, 1067, 1074.
 v. Troy etc. R. R. Co., 54 Hun 550: 273, 1586, 1614.
 Trade Dollar Consol. Min. Co. v. Fraser, 148 Fed. 585: 1603.
 Trahern v. San Joaquin Co., 59 Cal. 320: 24.
 Trainer v. Lawrence, 36 Ill. App. 90: 1078, 1420.
 Transportation Co. v. Chicago, 99 U. S. 635: 212, 658.
 Transylvania University v. Lexington, 3 B. Mon. 25: 178, 369, 388.
 Traphagen v. Jersey City, 29 N. J. Eq. 206: 335, 1616.
 Trant v. New York etc. R. R. Co., 1 Monaghan (Pa. Supm. Ct.) 394: 1342.
 Travers v. Merrick County, 14 Neb. 327: 550.
 Traverse City etc. R. R. Co. v. Seymour, 81 Mich. 378: 1418.
 Travis County v. Trogden, 88 Tex. 302: 1160, 1183, 1570.
 Treacy v. Elizabethtown etc. R. R. Co., 80 Ky. 266: 696, 697, 698.
 v. Elizabethtown etc. R. R. Co., 85 Ky. 270: 696, 697.
 Treadway v. Railroad Co., 43 Ia. 527: 475.
 Treat v. Bates, 27 Mich. 390: 91.
 v. Lord, 42 Me. 552: 97.
 v. Middletown, 8 Conn. 243: 916.
 Treford v. Coney Island etc. R. R. Co., 5 App. Div. 464: 1587.
 v. Coney Island etc. R. R. Co., 6 App. Div. 204: 1587.
 Tremain v. Cohoes Co., 2 N. Y. 163: 435, 1455.
 Trenton v. McQuade, 52 N. J. Eq. 669: 238.
 Trenton Horse R. R. Co. v. Trenton, 53 N. J. L. 132: 476.
 Trenton St. Ry. Co. v. Penn. R. R. Co., 63 N. J. Eq. 276: 297.
 v. United N. J. R. R. & C. Co., 60 N. J. Eq. 500: 329, 771.
 Trenton Water Power Co. v. Chambers, 9 N. J. Eq. 471: 859, 1631.
 v. Chambers, 13 N. J. Eq. 199: 1446.
 v. Raff, 36 N. J. L. 335: 67, 90, 95, 1155.
 Trepenning v. Smith, 46 Barb. 208: 1513.
 Trester v. Missouri Pac. R. R. Co., 23 Neb. 242: 686.
 v. Missouri Pac. R. R. Co., 33 Neb. 171: 685, 971, 976, 978, 1017, 1409.
 v. Sheboygan, 87 Wis. 496: 828.
 Trevitt v. Prison Ass., 98 Va. 332: 84.
 Trickey v. Schlader, 52 Ill. 78: 1520.
 Triest v. New York, 126 App. Div. 934: 611.
 v. New York, 55 Misc. 459: 236.
 v. New York, 193 N. Y. 525: 611.
 Trimmer v. Pennsylvania etc. R. R. Co., 55 N. J. L. 46: 1227, 1238.
 Trine v. Pueblo, 21 Colo. 102: 886.
 Trinity Ave., Matter of, 81 App. Div. 215: 611, 1327.
 Trinity Ave., Matter of, 116 App. Div. 252: 936, 1561.
 Trinity Church v. Higgins, 4 Robt. 1: 915.
 Trinity College v. Hartford, 32 Conn. 452: 1185, 1190.
 Trinity etc. R. R. Co. v. Meadows, 73 Tex. 32: 168, 653, 664, 665, 666, 670.
 Tripp v. County Comrs., 2 Allen 556: 1078, 1105.
 v. Overocker, 7 Colo. 72: 53, 1550.
 Troe v. Larson, 84 Ia. 649: 95, 137, 1607.
 Trogden v. Winona etc. R. R. Co., 22 Minn. 198: 948, 1261.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Trook v. B. & P. R. R. Co., 3 Me. Arthur, D. C. 392: 309.
 Trosper v. Comrs. of Saline Co., 27 Kan. 391: 1216.
 Trotier v. St. Louis etc. R. R. Co., 180 Ill. 471: 897, 931.
 Troutman v. Barnes, 4 Met. (Ky.) 337: 519, 1078.
 Trowbridge v. Brookline, 144 Mass. 139: 164, 623.
 v. Detroit, 99 Mich. 443: 698.
 Troy v. Cheshire R. R. Co., 23 N. H. 83: 322, 1551, 1649, 1658, 1660.
 v. Coleman, 58 Ala. 570: 154, 233, 1649, 1654.
 Troy etc. R. R. Co. v. Cleveland, 6 How. Pr. 238: 963, 1079.
 v. Lee, 13 Barb. 169: 1195, 1378.
 v. Northern Turnpike Co., 16 Barb. 100: 437, 1119, 1292, 1375.
 v. Potter, 41 Vt. 265: 1477, 1481.
 Truax v. Sterling, 74 Mich. 160: 1027, 1058, 1258, 1513, 1515.
 Trudeau v. Sheldon, 62 Vt. 198: 912.
 True v. Freeman, 64 Me. 573: 992, 1510.
 Truesdale v. Peoria Grape Sugar Co., 101 Ill. 561: 318, 532, 1581.
 Trustees v. Atlanta, 93 Ga. 468: 744, 789, 824, 986.
 v. Hoboken, 33 N. J. L. 13: 872, 874, 876, 892, 1494.
 v. Johnson, 2 Ind. 219: 1638.
 v. Leary, 89 Hun 219: 1558.
 v. Metropolitan District R. R. Co., 19 L. T. N. S. 692: 1417.
 v. Milwaukee etc. R. R. Co., 77 Wis. 158: 247, 248, 325, 330, 622.
 v. Walsh, 57 Ill. 363: 1572.
 Trustees Common School Dist. v. Nashville etc. R. R. Co., 22 Ky. L. R. 243: 1716.
 Trustees etc., Matter of, 1 Barb. 34: 1533.
 Trustees etc. v. Auburn & Rochester R. R. Co., 3 Hill 567: 244, 318, 1635.
 v. Clark, 137 N. Y. 95: 1425.
 Trustees of Belfast Academy v. Salmon, 11 Me. 109: 747.
 Trustees of College Point v. Dennett, 5 N. Y. Supreme Court, 217: 1237.
 Trustees of Columbia College v. Lynch, 70 N. Y. 440: 429.
 v. Thatcher, 87 N. Y. 311: 429.
 Trustees of P. E. Church v. Anamosa, 76 Ia. 538: 237.
 Trustees of Schools v. Schroll, 120 Ill. 509: 109, 114.
 Trustees of Southampton v. Jessup, 162 N. Y. 122: 133.
 Tuckahoe Canal Co. v. Tuckahoe etc. R. R. Co., 11 Leigh. (Va.) 42: 407, 410, 416, 1155, 1165.
 Tucker's Petition, 27 N. H. 405: 1416.
 Tucker v. Campbell, 36 Me. 346: 954.
 v. Chicago etc. R. R. Co. 66 Mo. App. 141: 152.
 v. Chicago etc. R. R. Co., 91 Wis. 576: 1714.
 v. Eden, 68 Vt. 168: 970.
 v. Eldred, 6 R. I. 404: 1489.
 v. Erie etc. R. R. Co., 27 Pa. St. 281: 971, 1446.
 v. Mass. Central R. R. Co., 116 Mass. 124: 1423.
 v. Parker, 50 Mich. 5: 1412.
 v. Rankin, 15 Barb. 471: 1102.
 v. Russell, 14 Pick. 279: 356.
 v. Tower, 9 Pick. 109: 1493.
 Tudor v. Chicago etc. R. R. Co., 164 Ill. 73: 1320.
 v. Chicago etc. R. R. Co., (Ill.) 27 N. E. 915: 825.
 Tufts v. Charlestown, 2 Gray 271: 1267, 1327.
 v. Charlestown, 4 Gray, 537: 1185, 1327.
 v. Charlestown, 117 Mass. 401: 1135.
 Tulley v. Northfield, 6 Ill. App. 356: 1372.
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 Turner's Appeal, 2 Walker's Pa. Supn. Ct. 229: 1073.
 Turner v. Althaus, 6 Neb. 54: 10, 465, 466.
 v. Dartmouth, 13 Allen 291: 234.
 v. Detroit, 104 Mich. 326: 464.
 v. Holleran, 11 Minn. 253: 1423.
 v. Nye, 154 Mass. 579: 494, 549, 554, 559, 560.
 v. Rising Sun etc. Turnpike Co., 71 Ind. 547: 422.
 v. Robbins, 133 Mass. 207: 1254.
 v. Sheffield & Rotherham R. R. Co., 10 M. & N. 425: 656, 657.
 v. Stanton, 42 Mich. 506: 860, 1353, 1354.
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 v. State, 3 Wall. 210: 410.
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 v. Penn. R. R. Co., 6 Mont. Co. L. R. 105: 782.
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 Turpen v. Turloek Irr. Dist. 141 Cal. 1: 144, 1251, 1456.
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 Tuthill, Matter of, 36 App. Div. 49: 508, 570.
 Tuthill, Matter of, 163 N. Y. 133: 22, 495, 496, 508, 564, 570, 579, 595, 598.
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 v. Port Royal & A. R. R. Co., 28 S. C. 388: 941, 1707, 1708.
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 v. Justice, 89 Tenn. 157: 1154, 1158.
 v. Knox Co., 89 Tenn. 157: 698, 738.
 v. Moore, 3 Ind. Ter. 712: 504, 590.
 Tutwiler C. & I. Co. v. Niehols, 146 Ala. 364: 69.
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 Twenty-eighth Street Opening, Matter of, 11 Phila. 436: 1359.
 Twenty-eighth St. Sewer, In re, 158 Pa. St. 464: 1383.
 Twenty-fifth Street Opening, Matter of, 18 Phil. 461: 1466.
 Twenty-fifth Street Opening, Matter of, 18 Phil. 488: 1253, 1255.
 Twenty-fifth St. Opening, 79 Mich. 584: 1378.
 Twenty-ninth St., Matter of, 1 Ill. 189: 190, 367, 1326.
 Twenty-second Street, In re, 102 Pa. St. 108: 736, 737, 785.
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 Twenty-sixth St. Matter of, 12 Wend. 203: 1084.
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 Twin Village Water Co. v. Damarcotta Gas Lt. Co., 98 Me. 325: 359.
 Twombly v. Madbury, 27 N. H. 433: 1400.
 T. W. & W. Ry. Co. v. Morrison, 71 Ill. 616: 153, 156.
 Tyler v. Beacher, 44 Vt. 648: 495, 499, 551, 675.
 v. Bowen, 1 Pitts. Pa. 225: 1026.
 v. Columbus, 6 Ohio C. C. 224: 916.
 v. Hindson, 147 Mass. 609: 810.
 v. Revere, 183 Mass. 98: 157.
 v. St. Louis, 56 Mo. 60: 1220.
 v. State, 83 Ind. 563: 1004, 1006.
 v. Tehama County, 109 Cal. 618: 653.
 v. Texas etc. R. R. Co., 73 Tex. 95: 1717.
 Tyrion v. Baltimore County, 28 Md. 510: 89.
 Tyrone v. Burns, 102 Minn. 318: 1034, 1036.
 Tyrone Tp. School District's Appeal, 1 Monaghan (Pa. Supm. Ct.) 20: 591, 786.
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 v. Rogers, 33 Ga. 473: 19, 672, 744.
 v. Washington County, 78 Neb. 211: 739.
 U.
 Uhl v. Ohio Riv. R. R. Co., 47 W. Va. 59: 845, 1485.
 v. Ohio River R. R. Co., 51 W. Va. 106: 838, 1481.
 v. Ohio Riv. R. R. Co., 56 W. Va. 494: 89, 93, 151, 1639.
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 Unangst's Appeal, 55 Pa. St. 128: 860.
 Uncanoonuck Road Co. v. Orr, 67 N. H. 541: 849, 858.
 Underhill v. Saratoga & Washington R. R. Co., 20 Barb. 455: 859.
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 v. Bailey, 59 N. H. 480: 513.
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 v. Landis, 9 Watts 228: 104, 108.
 v. LaSalle, 136 Ill. 119: 1496.
 v. O'Brien, 4 Rawle, 358: 991.
 v. Woodside, 11 Pa. St. 176: 928.
 Union Co. v. Peckham, 16 R. I. 64: 878.
 Union Depot etc. Co. v. Brunswick, 31 Minn. 297: 125, 127, 128, 129, 131, 1231, 1235, 1329.
 Union Depot Co. v. Frederick, 117 Mo. 138: 928, 964, 1029, 1115, 1511, 1512.
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 Union El. R. R. Co., Matter of, 112 N. Y. 61: 1005, 1011, 1048.
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 v. B. & M. R. R. Co., 1 McCrary 452: 765.
 v. Burlington etc. R. R. Co., 1 McCrary 452: 1102.
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 v. Colo. Postal Tel. Cable Co., 30 Colo. 133: 534, 713, 773, 799, 1285.
 v. Dyche, 31 Kan. 120: 87, 1476.
 v. Foley, 19 Colo. 280: 639, 647, 1294, 1295, 1335.
 v. Hall, 91 U. S. 343: 727.
 v. Harris, 76 Kan. 255: 431.
 v. Kindred, 43 Kan. 134: 750, 1078, 1479, 1513, 1571, 1609.
 v. Leavenworth etc. Ry. Co., 29 Fed. 728: 765, 1005, 1046.
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 v. Phila. etc. R. R. Co., 188 Pa. St. 115: 771.
 v. Chicasaw Cooperage Co., 116 Tenn. 594: 422, 1495.
 v. Hunton, 114 Tenn. 609: 1138, 1151, 1260.
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 v. Standard Wheel Co., 149 Fed. 698: 1391, 1674, 1680.
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- v. Ross, 92 U. S. 281: 19.
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- v. Smith, 110 Fed. 338: 1347.
- v. Suprs. of Summit, 1 Pinney, 566: 1086, 1515.
- v. Taffee, 78 Fed. 524: 1237.
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 Updegraff v. Palmer, 107 Ind. 181: 934, 971, 1028, 1384.
 Updegrave v. Penn. S. V. R. R. Co., 132 Pa. St. 540: 846.
 v. Schuylkill Val. R. R. Co., 3 Pa. Co. Ct. 74: 1073.
 Updike v. Wright, 81 Ill. 49: 722.
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 v. Worcester, 113 Mass. 97: 1185.
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 Uren v. Walsh, 57 Wis. 98: 1570, 1574.
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 Utter v. Richmond, 112 N. Y. 610: 948, 949, 1563.
 Uwchlan Tp. Road, 30 Pa. St. 156: 696.
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 v. Mix, 74 Ill. 127: 866.
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 Vaile v. Independence, 116 Mo. 333: 634, 1353.
 Vale Mills v. Nashua, 63 N. H. 42: 83, 84.
 Valentine v. Boston, 20 Pick. 201: 930, 1425.
 v. Boston, 22 Pick. 75: 1326.
 Valley City Salt Co. v. Brown, 7 W. Va. 191: 495, 563.
 Valley Ry. Co. v. Bohm, Admr., 29 Ohio St. 633: 965.
 v. Franz, 43 Ohio St. 623: 1552, 1651, 1652, 1715, 1716.
 Valparaiso v. Adams, 123 Ind. 250: 602, 616.
 v. Chicago etc. R. R. Co., 123 Ind. 467: 750.
 v. Hazen, 153 Ind. 337: 82, 1605.
 v. Keyes, 30 Ind. App. 447: 141.
 v. Parker, 148 Ind. 379: 1384.
 v. Spaeth, 166 Ind. 14: 154, 210, 233, 234.
 Valparaiso City Water Co. v. Dickover, 17 Ind. App. 233: 137, 1650.
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 Van Auken v. Commissioners, 27 Mich. 414: 1033.
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 Vanbilaricum v. State, 7 Blackf. 209: 1192, 1245.
 Van Bokelen v. Brooklyn City Ry. Co., 5 Blatch. 379: 268.
 Van Brunt v. Flatbush, 59 Hun 192: 172, 176, 333, 336.
 v. Flatbush, 128 N. Y. 50: 172, 176, 336.
 Van Buren v. Fishkill W. W. Co., 50 Hun 448: 74, 1272.
 Van Buskirk v. Harrod, 48 Mich. 258: 1032.
 Vance v. Martin, 21 W. Va. 534: 505.
 Van Cleve v. Passaic Val. Sewerage Comrs., 71 N. J. L. 183: 739.
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 Vanderbilt v. Adams, 7 Cow. 349: 14.
 Vanderbilt Ave., Matter of, 95 App. Div. 533: 364, 403.
 Vanderbright v. Delaware R. R. Co., 2 Houst. Del. 287: 1343.
 Vanderburgh v. Minneapolis, 93 Minn. 81: 399, 406, 1595.
 v. Minneapolis, 98 Minn. 329: 373, 382, 383, 388, 391, 399, 406.
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 v. Philadelphia, 103 Pa. St. 102: 143.
 Vanderstolph v. Highway Comr., 50 Mich. 330: 1414.
 Van de Vere v. Kansas City, 107 Mo. 83: 657, 659, 664, 665, 666, 669, 670.
 Vanduser v. Comstock, 3 Mass. 184: 976, 1073.
 Van Egmond v. Seaforth, 6 Ont. 599: 69, 81, 83, 1605.
 Van Emburgh v. Paterson etc. Traction Co., 70 N. J. L. 668: 690, 696, 697, 1395, 1397.
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 Vanhorn v. Grand Trunk R. R. Co., 18 U. C. Q. B. 356: 158.
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 v. Albany, 15 Abb. N. C. 457: 1606.
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 Van Siclen v. Jamaica Elec. Lt. Co., 45 App. Div. 1: 350.
 v. Jamaica Elec. Lt. Co., 168 N. Y. 650: 350.
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 Van Vorst, Heirs of, Ex parte, 2 N. J. Eq. 292: 1534.
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 Vanwickle v. Camden & Ambry R. R. Co., 14 N. J. L. 162: 1097, 1377.
 Van Witsen v. Gutman, 79 Md. 405: 368, 373, 382, 389, 395, 398, 494, 498, 673, 877.
 Van Wycklen v. Brooklyn, 118 N. Y. 424: 77.
 Varick v. Smith, 5 Paige, 137: 522
 Varner v. Martin, 21 W. Va. 534: 495, 499, 502, 505, 516, 517, 551.
 v. St. Louis etc. R. R. Co., 55 Ia. 677: 851, 855, 1539.
 Vartie v. Underwood, 18 Barb. 561: 946.
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 Vasselborough, Inhabitants of, 19 Me. 338: 514, 1100, 1417.
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 Vauneman v. Young, 3 Am. R. R. & Corp. Rep. 662: 1048.
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 Vawter v. Gilliland, 55 Ind. 278: 1368.
 Veamans v. County Comrs., 16 Gray 36: 1367.
 Veazie v. Dwinel, 50 Me. 479: 1495.
 Veazie v. Mayo, 45 Me. 560: 487, 780.
 Vedder v. Marion County, 22 Ore. 264: 982, 1025.
 v. Marion County, 28 Ore. 77: 993, 1057.
 v. Marion Co., (Ore.) 36 Pac. 535: 1374.
 Velte v. United States, 76 Wis. 278: 92, 1319.
 Venable v. Wabash Western R. R. Co., 112 Mo. 103: 943, 945.
 Venard v. Cross, 8 Kan. 248: 549, 779, 1033.
 Venice v. Madison Co. Ferry Co., 216 Ill. 345: 888, 891.
 Venner v. Chicago City Ry. Co., 236 Ill. 349: 361.
 Ventura Co. v. Thompson, 51 Cal. 577: 1206.
 Verdier v. Port Royal R. R. Co., 15 S. C. 477: 858.
 Verdugo Cañon Water Co. v. Verdugo, 152 Cal. 655: 162.
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- v. Hennessey, 55 Vt. 207: 829, 947, 962, 1564.
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- v. Boston, 8 Cush. 279: 1128.
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- v. Caywood, 31 N. Y. 51: 422.
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- v. City Council, 1 Bailey Ch. (S. C.) 443: 1640.
- v. Corn, 3 A. K. Marshall 167: 1004, 1017.
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- v. Manchester, 58 N. H. 438: 1326.
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[The references are to the pages: Vol. I, pp. 1-743; Vol. II, pp. 743-1719.]

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- v. Richmond, 94 Va. 204: 485, 673.
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- v. McConnell, 19 Wis. 417: 976.
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- Wallman v. R. Connor Co., 115 Wis. 617: 513, 516.
- Wall Street, Matter of, 17 Barb. 617: 1705.
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- Walrath v. Redfield, 18 N. Y. 457: 1323.
- Walsh v. Board of Education, 73 N. J. L. 643: 1119, 1130, 1676, 1684.
- v. Brooklyn Union El. R. R. Co., 69 App. Div. 389: 1584.
- v. Milwaukee, 95 Wis. 16: 212, 224.
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- v. Wallace, 26 Nev. 299: 70.
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- v. St. Louis, 132 Mo. 1: 227.
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- v. Warner, 25 Mo. 277: 434, 1166, 1169, 1171.
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- Wamesit Power Co. v. Allen, 120 Mass. 352: 706, 1514, 1634.
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- v. Folly, 5 N. J. L. 482: 865.
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- v. Metropolitan El. R. R. Co., 82 Hun 545: 849, 856.
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- v. Minnesota & Northwestern R. R. Co., 119 Ill. 287: 898, 1047, 1048.
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- v. State, 12 Lea 469: 1506.
- v. Triple State Nat. Gas & Oil Co., 115 Ky. 723: 337, 837, 838.
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- v. Regents Canal Co., 3 DeG. & J. 212: 653.
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- v. Lowman, 103 N. C. 122, 516, 522, 976, 1076.
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- v. Franklin County, 131 Mass. 348: 992.
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 Warrell, Appeal of, 130 Pa. St. 600: 1561.
 Warren v. Brown, 31 Neb. 8: 882, 886, 1514.
 v. Bunnell, 11 Vt. 600: 431.
 v. First Division of the St. Paul & Pacific R. R. Co., 18 Minn. 384: 824, 930, 1159, 1424.
 v. First Division St. Paul & Pacific R. R. Co., 21 Minn. 424: 1225, 1227, 1321, 1322, 1323, 1326.
 v. Gloversville, 81 App. Div. 291: 1605.
 v. Grand Haven, 30 Mich. 24: 335.
 v. Henry, 31 Ia. 31: 603, 616.
 v. Parkhurst, 105 App. Div. 239: 1605.
 v. Parkhurst, 186 N. Y. 45: 1605.
 v. Spencer Water Co., 143 Mass. 9: 912, 1634.
 v. Spencer Water Co., 143 Mass. 155: 1127, 1131.
 v. Wisconsin Valley R. R. Co., 6 Biss. 425: 931.
 Warren Academy of Sciences, 29 Pa. Co. Ct. 30: 709.
 Warren County v. Rand, 88 Miss. 395: 1306, 1308.
 Warren etc. R. R. Co. v. Garrison, 74 Ark. 136: 1631.
 Warrior Run Road, 3 Binn 3: 1359.
 Warwick Institute for Savings v. Providence, 12 R. I. 144: 947, 1023.
 Washburn v. Milwaukee etc. R. R. Co., 59 Wis. 364: 1110, 1111, 1120, 1123, 1138, 1180, 1216, 1408, 1439.
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 Washburn & M. Mfg. Co. v. Worcester, 153 Mass. 494: 84, 1337.
 Washington v. Barnes, 2 N. Y. Supm. Ct. 637: 1670.
 v. Fisher, 43 N. J. L. 377: 700, 1368.
 v. Gibbs, 44 N. J. L. 169: 1366.
 Washington Ave., 69 Pa. St. 352: 10.
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 v. Coeur D'Alene R. & N. Co., 60 Fed. 981: 728, 905.
 v. Coeur D'Alene Ry. & Nav. Co., 3 Ida. 263: 1107.
 v. Switzer, 26 Gratt. 661: 1097, 1384.
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 v. Lay, 103 Ind. 48: 974, 1028, 1069.
 v. White, 166 Ill. 375: 1215.
 Washington Park, 1 Sandf. 283: 1383.
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 Waterbury's Appeal, 57 Conn. 84: 1395.
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 v. Darien, 19 Conn. 252: 1387.
 v. Dry Dock etc. R. R. Co., 54 Barb. 388: 909.
 v. Platt Bros. & Co., 75 Conn. 387: 453, 708, 724, 813, 1606.
 v. Platt Bros. & Co., 75 Conn. 435: 1163.
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 Water Comrs., Matter of, 55 App. Div. 77: 1263.
 Water Comrs., Matter of, 71 App. Div. 544: 1266.
 Water Comrs., Matter of, 3 Edwards Ch. 290: 117, 133.
 Water Comrs., Matter of, 3 Edwards Ch. 552: 732, 879, 1267, 1330.
 Water Comrs., Matter of, 4 Edw. Ch. 545: 1253.
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 Water Comrs. v. Lawrence, 3 Edw. Ch. 552: 731, 810, 813, 893.
 Water Comrs. of Amsterdam, Matter of, 96 N. Y. 351: 809, 813.
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- v. Philadelphia, 208 Pa. St. 189: 882, 884, 885.
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- v. Mayo, 109 Mass. 315; 14, 469.
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- v. New Milford Water Co., 71 Conn. 442: 73.
- v. New York Cent. R. R. Co., 47 N. Y. 157: 949, 951, 961.
- v. New York Cent. R. R. Co., 1 Sheldon 159: 949.
- v. Pittsburgh & Connellsville R. R. Co., 37 Pa. St. 469: 624.
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- v. South Kingston, 5 R. I. 562: 513.
- v. Trustee, 21 Ohio St. 667: 438, 1155.
- v. VanMeter, 43 Ia. 76: 1459.
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- Watterson v. Allegheny etc. R. R. Co., 74 Pa. St. 208: 850, 852, 853.
- Watts v. Derry, 22 N. H. 498: 1118.
- v. Norfolk & W. R. R. Co., 39 W. Va. 196: 846, 1263, 1455, 1662.
- Watuppa Reservoir Co. v. Fall River, 134 Mass. 267: 74, 78, 961.
- v. Fall River, 147 Mass. 548: 109, 119, 138.
- v. Fall River, 154 Mass. 305: 138.
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- [The references are to the pages: Vol. I, pp. 1-743; Vol. II, pp. 743-1719.]
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 Wayne County Sav. Bank v. Stockwell, 84 Mich. 586: 865, 867.
 Waynesborough School District, 1 Pa. Co. Ct. 422: 1670.
 Wayne Tp. Road, 34 Pa. Co. Ct. 576: 1095.
 Wayzata v. Great Northern R. R. Co., 46 Minn. 505: 876, 1578.
 v. Great Northern R. R. Co., 50 Minn. 438: 308, 314, 322, 1492, 1643.
 v. Gt. Northern R. R. Co., 67 Minn. 385: 305.
 Wead v. St. Johnsbury etc. R. R. Co., 64 Vt. 52: 319, 620, 622.
 Weage v. Chicago etc. R. R. Co., 227 Ill. 421: 197, 395, 401.
 Weatherby Water Co's Petition, 21 Pa. Co. Ct. 330: 1682.
 Weathersfield v. Humphry, 20 Conn. 218: 788.
 Weaver v. Gregg, 6 Ohio St. 547: 943, 945.
 v. Miss. & Rum Riv. B. Co., 28 Minn. 534: 67, 90, 94, 100.
 v. Miss. etc. Boom Co. 30 Minn. 477: 90.
 Weaver's Road, 45 Pa. St. 405: 1417.
 Webb v. Co. Comrs., 77 Me. 180: 1371.
 v. Demopolis, 95 Ala. 116: 104, 114, 1491.
 v. Fuel Co., 16 Wkly. L. B. 121: 176.
 v. Manchester etc. R. R. Co., 4 Mylne & Craig 116: 815, 1061, 1572.
 v. New York, 64 How. Pr. 10: 459.
 v. Rocky Hill, 21 Conn. 468: 401.
 Webber v. Pere Marquette Boom Co., 62 Mich. 626: 104, 114, 115.
 Weber v. Berlin, 8 Ont. 302: 84.
 v. Eastern R. R. Co., 2 Met. 147: 1314.
 v. Harbor Comrs., 18 Wall. 57: 136.
 v. Iowa City, 119 Ia. 633: 1492.
 v. Ryers, 82 Mich. 177: 1412.
 v. Santa Clara County, 59 Cal. 265: 24.
 v. Stagray, 75 Mich. 32: 1182, 1512, 1516, 1634.
 v. Toledo, 3 Ohio C. C. (N. S.) 319: 882, 940, 1561.
 Webster v. Bridgewater, 63 N. H. 296: 996.
 Webster v. Fargo, 9 N. D. 208: 11, 464.
 v. Fargo, 181 U. S. 394: 11, 464.
 v. Harris, 111 Tenn. 668: 113.
 v. Holland, 58 Me. 168: 954, 963.
 v. Kansas City etc. R. R. Co., 116 Mo. 114: 1146, 1229, 1232, 1235, 1320, 1546, 1547.
 v. Lowell, 142 Mass. 324: 376, 391, 402, 1492.
 v. Pittsburg etc. R. R. Co., 78 Ohio St. 87: 1715.
 v. Washington Co., 26 Minn. 220: 1083.
 Weekler v. Chicago, 61 Ill. 142: 992.
 Weed v. Boston, 172 Mass. 28: 10, 463.
 v. Goodwin, 36 Wash. 31: 739, 1177.
 Weeks v. Grace, 194 Mass. 296: 9.
 v. Milwaukee, 10 Wis. 242: 235.
 v. N. Y. & N. J. Tel. Co., 86 App. Div. 257: 343, 1594.
 Wegmann v. Jefferson, 61 Mo. 55: 237.
 Wehn v. Commissioners of Gage Co., 5 Neb. 494: 58.
 Wehrenberg v. Seiferd, 56 Misc. 356: 1562.
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 Weimer v. Bumbury, 30 Mich. 201: 1007.
 Weir v. Borough of Plymouth, 148 Pa. St. 566: 155.
 v. Claude, 16 Devall 575: 866.
 v. Owensboro & N. R. R. Co. (Ky.) 21 S. W. 643: 324.
 v. St. Paul, etc. R. R. Co., 18 Minn. 155: 673, 683, 1010, 1186, 1206, 1400, 1466.
 Weirston v. Waggoner, 5 J. J. Marsh. 41: 1077.
 Weis v. Madison, 75 Ind. 241: 233.
 Weiss v. Oregon etc. Co., 13 Or. 496: 70.
 v. South Bethlehem, 136 Pa. St. 294: 882, 885, 1319, 1324.
 Welch v. Boston, 126 Mass. 442: 484, 948.
 v. Hodge, 94 Mich. 493: 952, 966, 1017.
 v. Milwaukee & St. Paul Ry. Co., 27 Wis. 108: 1208, 1210.
 v. Piercey, 7 Ired. L. 365: 1636.
 v. Swasey, 193 Mass. 364: 468.

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 Wellington et al. Petitioners, 16 Pick. 87: 784.
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 v. County Comrs. 79 Me. 522: 778.
 v. Harris, 137 Mo. 512: 438.
 v. Hicks, 27 Ill. 343: 1095.
 v. McLaughlin, 17 Ohio 97: 701.
 v. New Haven etc. Co., 1 Am. R. R. & Corp. Rep. 708: 1647, 1662.
 v. New Haven etc. R. R. Co., 151 Mass. 46: 144, 1650, 1652, 1715.
 v. Northern R. R. Co., 14 Ontario 594: 1485, 1646.
 v. Rhodes, 114 Ind. 467: 996, 1028, 1046, 1407.
 v. Somerset & Kennebec R. R. Co., 47 Me. 345: 818.
 Wells Ave. Sewer, Matter of, 46 Hun 534: 1670.
 Wellsburg etc. R. R. Co. v. Pan Handle Traction Co., 56 W. Va. 18: 772.
 Wells Co. Road, Matter of, 7 Ohio St. 16: 975, 1100, 1406.
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 v. Metropolitan El. R. R. Co., 57 N. Y. Supr. Ct. 408: 1427.
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 v. New York El. R. R. Co., 16 Daly 515: 1300, 1664.
 v. Taylor, 134 N. Y. 450: 1504.
 v. Tippery, 66 Neb. 604: 859.
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 Wentworth v. Farmington, 48 N. H. 207: 696.
 v. Farmington, 49 N. H. 119: 1088.
 v. Farmington, 51 N. H. 128: 1095.
 v. Milton, 46 N. H. 448: 981.
 v. Portsmouth, 68 N. H. 392: 1320, 1324.
 Werges v. St. Louis etc. R. R. Co., 35 La. An. 641: 243, 245, 248, 447, 448, 1303.
 Werley v. Huntington Waterworks Co., 138 Ind. 148: 1376.
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 Wirth v. Postal Tel. Cable Co., 7 Ohio C. C. 290: 1593.
 v. Springfield, 78 Mo. 107: 237, 630.
 v. Springfield, 22 Mo. App. 12: 634.
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 West v. Bancroft, 32 Vt. 371: 337, 355.
 v. McGurn, 43 Barb. 198: 1400.
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 v. Octoraro Water Co., 159 Fed. 528: 934, 1616.
 v. Parkdale, 7 Ont. 270: 319.
 v. Parkdale, 8 Ont. 59: 319, 709, 710.
 v. Parkdale, 15 Ont. 319: 236, 1307, 1309.
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- v. McMullen, 134 Ill. 170: 732.
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- v. People, 214 Ill. 9: 97, 102, 488, 1644.
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 v. Mulholland, 159 Mo. 86: 467.
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 v. Dix, 16 Vt. 446: 678, 781, 788.
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 v. Volcanic Coal & Oil Co., 5 W. Va. 382: 534, 896.
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 v. Lancashire & Yorkshire Ry. Co. 16 L. R. Q. B. 227: 156.
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 v. United States, 153 Fed. 876: 430.
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 v. Bloomington, 105 Ill. App. 97: 630, 1306.
 v. Clark, 58 N. Y. 267: 368, 380, 388.
 v. Essex Public Road Board, 39 N. J. L. 29: 1344.
 v. Fitchburg, 150 Mass. 350: 1468, 1704.
 v. Kirtland, 27 N. J. Eq. 534: 943, 945, 1565.
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 v. Spinola, 54 N. Y. 377: 109.
 v. Young, 4 Wend. 647: 1166.
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 v. Triadelphia, 58 W. Va. 487: 303, 360.
 v. Warrell, 122 Pa. St. 613: 1460, 1626.
 v. Wheeling S. & I. Co., 41 W. Va. 747: 1423.
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 v. State, 109 Ind. 600: 1514.
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 v. Landaff, 48 N. H. 153: 1070.
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 v. Boston & Providence R. R. Co., 6 Cush. 420: 1150, 1344.
 v. Bridge Co., 189 Pa. St. 500: 1210.
 v. Charleston, 2 Hill S. C. 571: 17.
 v. Charlotte etc. R. R. Co., 6 Rich. 47: 1192.
 v. Chicago etc. R. R. Co., 122 Ind. 317: 326, 425, 1457, 1472.
 v. Cincinnati etc. R. R. Co., 34 Ind. App. 287: 807, 1192, 1201, 1270, 1276, 1331.
 v. Codd. 39 Wash. 14: 92.
 v. Coleman, 6 Gratt. 138: 1081.
 v. Co. Comrs., 2 Cush. 361: 1409.
 v. Co. Comrs., 70 Me. 317: 969, 1414, 1415.
 v. East Lake Land Co. 96 Ga. 415: 71, 72, 77.
 v. Fitchburg R. R. Co., 4 Cush. 440: 1147.
 v. Flannigan, 1 Md. 542: 183, 877, 1595.
 v. Foxborough, 151 Mass. 28: 1317.
 v. Godfrey, 97 Mass. 472: 349.
 v. Ivey, 34 Ga. 186: 19.
 v. Landaff, 35 N. H. 128: 1376, 1511.
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 v. McKeesport, 101 Pa. St. 394: 1550.
 v. Meadville, 177 Pa. St. 643: 416, 417.
 v. Medford, 163 Mass. 164: 1252, 1340, 1639.
 v. Memphis etc. R. R. Co., 64 Miss. 566: 840, 1086, 1516.
 v. Metropolitan West Side El. R. R. Co., 154 Ill. 620: 1207.
 v. Nashville etc. R. R. Co. 7 Heisk. 518: 8, 1536, 1540, 1541, 1615.
 v. New York etc. R. R. Co., 156 Mass. 181: 844.
 v. Northwestern N. C. R. R. Co., 113 N. C. 610: 180, 188, 190, 201, 203, 243, 247, 249, 255, 1548, 1549, 1552, 1649, 1657, 1662.
 v. People, 94 Ill. 604: 12.
 v. Smith, 37 Mich. 291: 874, 878, 886, 889.
 v. South Shore R. R. Co., 6 Cush. 412: 783.
 v. Tide Water Oil Co., 50 N. J. Eq. 1: 368: 377.
 v. Wabash etc. Ry. Co., 64 Ia. 281: 1464, 1470, 1534, 1626, 1628.
 v. Whitney Mfg. Co., 60 S. C. 254: 71.
 v. Yazoo City, 27 Miss. 357: 335, 336.
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 v. Denver, 13 Colo. App. 134: 914, 1046.
 v. Manor, 23 Pa. Supr. Ct. 314: 1307.
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 v. Fellows, 100 E. C. L. R. 765: 1651, 1655.
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Whitemarsh Road, 3 Luzerne Leg. Reg. Rep. 474: 1105.
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Whitestown, Matter of, 24 N. Y. Misc. 150: 513.
White Water Valley Canal Co. v. Ferris, 2 Ind. 331: 1707, 1708.
v. Henderson, 8 Blackf. 528: 1399.
v. Henderson, 3 Ind. 3: 1101, 1510, 1512, 1526, 1528.
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Whiting v. Commonwealth, 196 Mass. 468: 626, 1273.
v. New Haven, 45 Conn. 303: 948.
Whittingham v. Bowen, 22 Vt. 317: 515.
Whitlock v. Hankins, 105 Va. 242: 735.
Whitman v. Boston & Maine R. R. Co., 3 Allen 133: 940, 1116, 1137, 1241, 1271.
v. Boston & Maine R. R. Co., 7 Allen 313: 1128, 1130, 1145, 1185, 1319.
v. Boston & M. R. R. Co., 16 Gray. 530: 996.
v. Comrs. of Highways, 96 Ill. 292: 383, 1403.
v. Nantucket, 169 Mass. 147: 1157, 1707.
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Whitmier & F. Co. v. Buffalo, 118 Fed. 773: 471.
Whitmore v. Smith, 29 L. J. Ex. 402: 1116.
v. Tarrytown, 137 N. Y. 409: 609, 617.
Whitney v. Boston, 98 Mass. 312: 1130, 1185, 1210.
v. Commonwealth, 190 Mass. 531: 626.
v. Fitchburg R. R. Co., 178 Mass. 559: 75, 1603.
v. Gilman, 33 Me. 273: 976.
v. Lynn, 122 Mass. 338: 1699.
v. Milwaukee, 57 Wis. 636: 1557.
v. New York, 28 Barb. 233: 1583.
v. New York, 96 N. Y. 240: 424.
v. Toledo, 8 Ohio C. C. (N. S.) 577: 336, 1605.
v. Willamette Bridge R. R. Co., 23 Or. 188: 160.
Whitsett v. Union Depot & R. R. Co., 10 Colo. 243: 362, 371, 383, 392, 398.
Whittaker v. Deadwood, 12 S. D. 523: 882.
v. Gutheridge, 52 Ill. App. 460: 973, 996, 1403, 1576.
Whittier v. North Providence, 10 R. I. 266: 1532.
v. Portland & Kennebec R. R. Co., 38 Me. 26: 319.
Whittingham v. Hopkins, 69 N. J. L. 189: 1025, 1381.
v. Hopkins, 70 N. J. L. 322: 707, 1096, 1100, 1381.
Whittlesey v. Hartford, Providence & Fishkill R. R. Co., 23 Conn. 421: 1519.
Whittredge v. Concord, 36 N. H. 530: 1030.
Whitworth v. Berry, 69 Miss. 882: 879.
v. Puckett, 2 Gratt. 531: 386, 970, 1459.
Whoriskey v. Old Colony R. R. Co., 173 Mass. 432: 1157, 1707.
Whyte v. Kansas City, 22 Mo. App. 409: 1669, 1695.
v. St. Louis, 153 Mo. 80: 872, 884.
Wichita etc. R. R. Co. v. Fechheimer, 36 Kan. 45: 1545, 1548.
v. Fechheimer, 49 Kan. 643: 439, 1105, 1336, 1545, 1547.
v. Kuhn, 38 Kan. 104: 1124, 1203, 1245, 1251, 1322, 1391, 1444, 1673.
v. Kuhn, 38 Kan. 675: 1124, 1203.
v. Smith, 45 Kan. 264: 252, 311.
v. Thayer, 54 Kan. 259: 948.
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Widder v. Buffalo etc. R. R. Co., 20 U. C. Q. B. 638: 131.

- [The references are to the pages: Vol. I, pp. 1-743; Vol. II, pp. 743-1719.]
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- Wilkins v. Chicago etc. R. R. Co., 110 Tenn. 442: 191, 1495.
- v. Gaffney City etc. R. R. Co., 54 S. C. 199: 255, 1580.
- v. Manchester, 74 N. H. 275: 1327.
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- v. District of Columbia, 22 App. Cas. D. C. 289: 965.
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- v. Cambridge, 3 Allen, 574: 370, 379.
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 v. Norfolk So. R. R. Co., 98 N. C. 263: 157, 160.
 v. People, 36 Ill. App. 609: 884, 886.
 v. Southeastern Ry. Co., 1 McN. & G. 58: 1570.
 William A. Fowler, Matter of, 53 N. Y. 60: 675.
 Willliam & Anthony Sts., Matter of, 19 Wend. 678: 943, 1257, 1368, 1378.
 William H. Moudy Mfg. Co. v. Pa. R. R. Co., 212 Pa. St. 156: 1189, 1201.
 v. Pa. R. R. Co., 215 Pa. St. 110: 1189, 1201, 1229.
 Williams v. Boston, 190 Mass. 541: 468.
 v. Brooklyn El. R. R. Co., 126 N. Y. 96: 265, 296, 1298, 1553, 1651, 1658.
 v. Camden v. Rockland Water Co., 79 Me. 543: 1522, 1524.
 v. Cammack, 27 Miss. 209: 13, 464, 586.
 v. Carey, 73 Iowa 194: 199, 390, 395, 677, 679, 721, 1595.
 v. Chicago etc. R. R. Co., 110 Tenn. 442: 422.
 v. City Electric Street R. R. Co., 41 Fed. Rep. 556: 240, 241, 271, 279, 1586, 1587.
 v. Commonwealth, 168 Mass. 364: 1277.
 v. County Comrs. of Lincoln Co., 35 Me. 345: 695.
 v. Courteney, 77 Mo. 587: 943.
 v. Detroit, 2 Mich. 561: 13.
 v. Etting Woolen Co., 33 Conn. 353: 1624.
 v. First Presbyterian Church, 1 Ohio St. 478: 1492.
 v. Fulmer, 151 Pa. St. 405: 106, 108, 119, 128, 138.
 v. Galveston etc. R. R. Co., 1 Tex. App. Civil Cas. 131: 640.
 v. Giblin, 86 Wis. 147: 1517.
 v. Hartford & New Haven R. R. Co., 13 Conn. 110: 1423.
 v. Hartford & New Haven R. R. Co., 13 Conn. 397: 893, 894, 898, 911.
 v. Holmes, 2 Wis. 129: 973, 1513, 1518.
 v. Hudson, 130 Wis. 297: 232, 439, 872, 1354.
 v. Hutchinson etc. Ry. Co., 62 Kan. 412: 949, 962.
 v. Jackman, 2 J. J. Marsh. 352: 1436.
 Williams v. Judge of Eighteenth Judicial Dist., 45 La. Ann. 1295: 494, 498, 1415.
 v. Kirby, 169 Mo. 622: 706, 976, 984, 1017.
 v. Lake Drummond C. & W. Co., 130 N. C. 746: 1454, 1653.
 v. Lockman, 46 Ohio St. 416: 1109.
 v. Los Angeles Ry. Co., 150 Cal. 592: 179, 191, 308.
 v. Macon & B. R. R. Co., 94 Ga. 709: 1113.
 v. Mitchell, 49 Wis. 284: 1020, 1081.
 v. Monroe, 125 Mo. 574: 1019.
 v. Natural Bridge Plank Road, 21 Mo. 580: 422, 423.
 v. Nelson, 23 Pick. 141: 554, 557, 559, 866, 1073.
 v. New Orleans etc. R. R. Co., 60 Miss. 689: 1540, 1673.
 v. New York, 105 N. Y. 419: 122, 127, 128.
 v. New York Central R. R. Co., 18 Barb. 222: 244.
 v. New York Cent. R. R. Co., 16 N. Y. 97: 200, 243, 245, 279, 1580.
 v. Parker, 188 U. S. 491: 1160, 1167.
 v. Railroad Co., 2 Mich. 259: 1478.
 v. Read, 106 Va. 453: 1180.
 v. Riley, 79 Neb. 554: 1623.
 v. Routt Co., 37 Colo. 55: 1025, 1033, 1510, 1513, 1517.
 v. St. Louis, 120 Mo. 403: 1491.
 v. School District, 33 Vt. 271: 502, 538.
 v. Stevenson, 103 Ind. 243: 1032.
 v. Stonington, 49 Conn. 229: 1105.
 v. Taunton, 125 Mass. 34: 1263.
 v. Taunton, 126 Mass. 287: 1434.
 v. Turner Tp., 15 S. D. 182: 1406.
 v. Wingo, 177 U. S. 601: 411.
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- Williams et al. Petitioners, 59 Me. 517: 955, 1004, 1013, 1014.
- William's Executors v. Pittsburgh, 83 Pa. St. 71: 924, 1115.
- Williamson v. Canal Co., 78 N. C. 156: 579, 1155.
- v. Carlton, 51 Maine, 449: 1137.
- v. Cass County, 84 Ill. 361: 1426.
- v. East Amwell, 28 N. J. L. 270: 1377.
- v. Houser, 169 Ind. 397: 734, 1383, 1397.
- v. Missouri etc. Ry. Co., 115 Mo. App. 72: 160.

- [The references are to the pages: Vol. I, pp. 1-742; Vol. II, pp. 743-1719.]
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 Williamsport etc. R. R. Co. v. Philadelphia etc. R. R. Co., 8 Pa. Co. Ct. 10: 753, 759, 793, 796, 900.
 v. Philadelphia etc. R. R. Co., 141 Pa. St. 407: 904, 905, 912.
 v. Supervisors, 4 Pa. Co. Ct. 588: 750.
 Williams St. In re, 191 Pa. St. 472: 1399.
 WilliamSTON etc. R. R. Co. v. Battle, 66 N. C. 540: 840, 851, 854.
 Willing v. Baltimore R. R. Co., 5 Whart. 460: 1378.
 Willis v. Erie T. & T. Co., 37 Minn. 347: 340, 341, 1593.
 v. Erie City Pass. Ry. Co., 188 Pa. St. 56: 305.
 v. Erie Pass. Ry. Co., 188 Pa. St. 71: 303.
 v. Kentucky & Ind. Bridge Co., 104 Ky. 186: 249, 448, 639, 654, 661.
 v. Perry, 92 Iowa 297: 165.
 v. Sproule, 13 Kan. 257: 974, 1516, 1518.
 v. Winona, 59 Minn. 27: 224, 607.
 Willits v. Chicago etc. R. R. Co., 80 Iowa 531: 158.
 v. Chicago etc. R. R. Co., 88 Iowa 281: 158, 1650, 1655.
 Willoughby v. Shipman, 28 Mo. 50: 819.
 Willow Creek Irr. Co. v. Michaelson, 21 Utah 248: 161.
 Willson v. Blackbird Creek Marsh Co., 2 Pet. 245: 96, 133.
 Willyard v. Hamilton, 7 Ohio (pt. 2) 111: 501, 522, 923, 1165, 1170.
 Wilmarth v. Knight, 7 Gray 294: 1073, 1078.
 Wilmes v. Minneapolis & Northwestern Ry. Co., 29 Minn. 242: 1208.
 Wilmington Ave., 213 Pa. St. 238: 993.
 Wilmington Canal etc. R. R. Co. v. Dominguez, 50 Cal. 505: 1060, 1062, 1367.
 Wilmington etc. R. R. Co. v. Condon, 8 G. & J. 443: 1389, 1425.
 v. Smith, 99 N. C. 131: 1187, 1215.
 v. Stauffer, 60 Pa. St. 374, 1315.
 v. Walker, 15 Pa. Dist. Ct. 373: 1479.
 Wilmington Star Min. Co. v. Fulton, 205 U. S. 60: 468.
 Wilmington Water Power Co. v. Evans, 166 Ill. 548: 407, 857, 858, 1537.
 Wilmot v. Yazoo etc. R. R. Co., 76 Miss. 374: 1477.
 Wilshire, In re, 103 Fed. 620: 471.
 Wilson v. Acree, 97 Tenn. 378: 878.
 v. Alderman, 69 S. C. 176: 1569.
 v. Atkin, 80 Mich. 247: 1099.
 v. Baltimore & P. R. R. Co., 5 Del. Ch. 524: 23, 1004.
 v. Beaver Borough, 13 Pa. Co. Ct. 75: 1309.
 v. Beaver Val. R. R. Co., 33 Pa. Co. Ct. 604: 1244, 1480.
 v. Beaver Val. R. R. Co., 17 Pa. Dist. Ct. 151: 1480.
 v. Bondurant, 142 Ill. 645: 1573.
 v. Campbell, 76 Me. 94: 1524.
 v. Carpenter, 17 Wis. 512: 1635.
 v. Cochran, 4 Harr. 88: 1558.
 v. Commissioners, 18 Kan. 575: 1399.
 v. Des Moines etc. R. R. Co., 67 Iowa 509: 448, 1298, 1303, 1550.
 v. Duncan, 74 Iowa 491: 336.
 v. Equitable Gas Co., 152 Pa. St. 566: 1236.
 v. European & North Am. Ry. Co., 67 Me. 358: 947, 949, 962, 1636.
 v. Harvey, 3 Harr. 500: 1558.
 v. Hatheway, 42 Iowa 173: 928, 1010.
 v. Hull, 7 Utah 90: 882.
 v. Lynn, 119 Mass. 174: 1514, 1634.
 v. McClain, 131 Ind. 335: 1399.
 v. Mineral Point, 39 Wis. 160: 1569, 1574.
 v. Muskegon etc. R. R. Co., 132 Mich. 469: 1625.
 v. New Bedford, 108 Mass. 261: 144.
 v. New York, 1 Denio 595: 213, 234.
 v. New York El. R. R. Co., 9 Misel. 657: 190.
 v. Northampton etc. Ry. Co., L. R. 9 Ch. 279: 852.
 v. Pittsburgh etc. R. R. Co., 34 Pa. Supr. Ct. 575: 976, 989.
 v. Port Hope, 2 Grant U. C. 370: 1570, 1574.
 v. Rockford etc. R. R. Co., 59 Ill. 273: 1206, 1377.
 v. Scranton, 141 Pa. St. 621: 1409.
 v. Talley, 144 Ind. 74: 1409.
 v. Township Board, 87 Mich. 240: 973, 1017, 1412.
 v. Trenton, 53 N. J. L. 645: 1024.
 v. Welch, 12 Ore. 353: 118, 127.

[The references are to the pages: Vol. I, pp. 1-743; Vol. II, pp. 743-1719.]

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 v. Whitsell, 24 Ind. 306: 1370.
 v. Woolman, 133 Mich. 350: 1615.
 Wilson Bros. v. Trenton, 53 N. J. L. 178: 897, 898.
 Wilzinski v. Greenville, 85 Miss. 393: 11, 464.
 v. Louisville etc. R. R. Co., 66 Miss. 595: 1475.
 Winchell v. Waukesha, 110 Wis. 101: 82, 83, 84, 85, 453, 1605, 1612.
 Winchester v. Capron, 63 N. H. 605: 356, 1488.
 v. Hinsdale, 12 Conn. 88: 1386.
 v. Stevens Point, 58 Wis. 350: 182, 224, 1135, 1137, 1309, 1552, 1651, 1656.
 Winchester etc. Turnpike Co. v. Evans, 110 Ky. 463: 1402.
 Winchester & Potomac R. R. Co. v. Washington, 1 Rob. Va. 67: 1343, 1370.
 Winder, Ex parte, L. R. 6 Ch. Div. 696: 957.
 Windfall Nat. Gas Co. v. Terwilliger, 152 Ind. 364: 337.
 Windham v. Cumberland Co. Comrs., 26 Me. 406: 700, 1382.
 v. Litchfield, 22 Conn. 226: 994.
 Windham Inhabitants of Petitioners, 32 Me. 452: 1096, 1370.
 Windle v. Crescent Pipe Line Co., 186 Pa. St. 224: 832.
 Windsor v. Del. & H. Canal Co., 92 Hun 127: 1718.
 v. Field, 1 Conn. 279: 990, 1358, 1383.
 v. McVeigh, 93 U. S. 274: 1008.
 v. State, 103 Md. 611: 473.
 Winebiddle v. Pennsylvania R. R. Co., 2 Grant's Cases 32: 1098.
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 Wingfield v. Crenshaw, 3 Ill. & M. 245: 1403.
 Winkelmann v. Chicago, 213 Ill. 360: 658, 1673, 1698.
 v. Drainage District, 24 Ill. App. 242: 1195.
 Winklemans v. Des Moines Northwestern Ry. Co., 62 Ia. 11: 1119, 1139, 1150.
 Winkler v. Winkler, 40 Ill. 179: 1624.
 Winkley v. Salisbury Mfg. Co., 14 Gray 443: 1524.
 Winn v. Board of Park Comrs. (Ky.) 14 S. W. Rep. 421: 539.
 v. Rutland, 52 Vt. 481: 141.
 Winnebago Furn. Mfg. Co. v. Wisconsin M. R. Co., 81 Wis. 389: 976, 996, 1011.
 Winner v. Grauer, 173 Pa. St. 43: 632, 1356.
 Winnetka v. Chicago etc. Elec. Ry. Co., 204 Ill. 297: 272.
 v. Chicago etc. Elec. Ry. Co., 107 Ill. App. 117: 272.
 v. Clifford, 201 Ill. 475: 351, 383, 391, 402, 1337.
 Winnisimmet Co. v. Grueby, 111 Mass. 543: 1112, 1146.
 Winona etc. R. R. Co. v. Chicago etc. R. R. Co., 50 Minn. 300: 771.
 v. Denman, 10 Minn. 267: 1175, 1186, 1225, 1317, 1318.
 v. Waldron, 11 Minn. 515: 21, 1119, 1186, 1198, 1318.
 v. Watertown, 4 S. D. 323: 9, 672, 673, 675, 684, 750, 752.
 Winslow v. Baltimore etc. R. R. Co., 28 App. Cas. D. C. 126: 814, 1399.
 v. Baltimore etc. R. R. Co., 188 U. S. 646: 1620.
 v. Co. Comrs., 31 Me. 444: 1406, 1409.
 v. Gifford, 6 Cush. 327: 434.
 v. Winslow, 95 N. C. 24: 565, 567, 579.
 Winston v. Waggoner, 5 J. J. Marsh. 41: 1367.
 Winter v. City Council, 83 Ala. 589: 629, 643.
 v. N. Y. & N. J. Tel. Co., 51 N. J. Eq. 83: 340, 976, 986, 1053.
 v. Payne, 33 Fla. 470: 366, 877.
 v. Petersen, 24 N. J. L. 524: 1490.
 Winter Ave., 23 Pa. Supr. Ct. 353: 993.
 Winterbottom v. Wright, 10 Mees. & W. 115: 1256.
 Wirth v. Jersey City, 56 N. J. L. 216: 985.
 Wirth v. Postal Tel. Cable Co., 7 Ohio C. C. 290: 343.
 Wisconsin v. Duluth, 96 U. S. 379: 76.
 Wisconsin Central R. R. v. Cornell University, 49 Wis. 162: 814, 929, 1061, 1424.
 v. Cornell University, 52 Wis. 537: 1060, 1064, 1067, 1074.
 v. Kneale, 79 Wis. 89: 930, 1059, 1060, 1064, 1066, 1068, 1075, 1434.
 v. Wieczorek, 51 Ill. App. 498: 448, 1337.

- [The references are to the pages: Vol. I, pp. 1-743; Vol. II, pp. 743-1719.]
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 v. Pier (Wis.) 118 N. W. 857: 506, 536, 538, 592.
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 v. Philadelphia, 71 Pa. St. 44: 1460.
- Witcher v. Holland W. W. Co., 66 Hun 619: 172, 175, 336, 536.
 v. Holland W. W. Co., 142 N. Y. 626: 336.
- Witham v. Osburn, 4 Ore. 318: 495, 516, 517, 520.
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- Witherspoon v. Meridan, 69 Miss. 288: 878.
- Witman v. Reading, 191 Pa. St. 134: 1211.
 v. Smeltzer, 16 Pa. Supr. 285: 366.
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 v. St. Paul etc. R. R. Co., 38 Minn. 122: 247, 325, 1635.
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 v. Whitecomb, 40 Vt. 40: 515.
 v. Woolen Manf. Co., 5 Pick. 292: 544.
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 v. Coffey, 4 J. J. Marsh. 41: 1667.
 v. Covington & Lexington R. R. Co., 15 B. Mon. 404: 322.
- Wolfe v. Pearson, 114 N. C. 621: 211, 237.
 v. Sullivan, 133 Ind. 331: 877.
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- Wolford v. Fisher, 48 Ore. 479: 323, 533.
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- Womelsdorf Alley, 8 Pa. Co. Ct. 207: 1011.
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- Wood, Matter of, 111 App. Div. 781: 1029.
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 v. Charing Cross Ry. Co., 33 Beav. 290: 1537.
- v. Chicago etc. R. R. Co., 60 Ia. 456: 105, 131.
- v. Comrs. of Bridges, 122 Mass. 394: 936, 964.
- v. Comrs. of Highways, 62 Ill. 391: 1095, 1099.
- v. Hamilton etc. R. R. Co., 25 Grant Ch. 135: 1249.
- v. Hudson, 114 Mass. 513: 1185.
- v. Hurd, 34 N. J. L. 87: 881, 886.
- v. Hustis, 17 Wis. 416: 1523.
- v. Kelley, 30 Me. 47: 559, 866, 869.
- v. Macon & Brunswick R. R. Co., 68 Ga. 539: 785.
- v. McGrath, 150 Pa. Ct. 451: 172, 175, 336.
- v. Mears, 12 Ind. 515: 1487.
- v. Michigan Air Line R. R. Co., 90 Mich. 212: 1714.
- v. Michigan Air Line R. R. Co., 90 Mich. 334: 850.
- v. Mobile, 107 Fed. 846: 813.
- v. Moulton, 146 Cal. 317: 146.
- v. Quincy, 11 Cush. 487: 1428.
- v. Seattle, 23 Wash. 1: 408, 409.
- v. State Hospital, 164 Pa. St. 159: 1682.
- v. Stourbridge Ry. Co., 16 Q. B. N. S. 222: 645.
- v. Truckee Turnpike Co., 24 Cal. 474: 1499.
- v. Trustees, 164 Pa. St. 159: 1675.
- v. Westborough, 140 Mass. 403: 1563.
- v. Wilson, 12 Ind. 657: 1030.
- Woodbridge v. Cambridge, 114 Mass. 483: 1710.
- v. Detroit, 8 Mich. 274: 12, 13.
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[The references are to the pages: Vol. I, pp. 1-743; Vol. II, pp. 743-1719.]

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 Woodbury v. Beverly, 153 Mass. 245: 605, 618, 619, 668.
 v. Marblehead Water Co., 145 Mass. 509: 912.
 v. Parsley, 7 N. H. 237: 857.
 Woodcliff L. I. Co. v. N. J. Shore Line R. R. Co., 72 N. J. L. 137: 746, 980, 995.
 Woodcock v. Wabash Ry. Co., 135 Ia. 559: 1443.
 Woodfolk v. Nashville & Chattanooga R. R. Co., 2 Swan 422: 1180, 1182, 1228.
 Woodhouse v. Burlington, 47 Vt. 300: 14.
 Woodman v. County Comrs., 24 Me. 151: 1443.
 Woodmene Cemetery v. Roulo, 104 Mich. 595: 785.
 Woodring v. Forks Township, 28 Pa. St. 355: 1488.
 Woodruff v. Catlin, 54 Conn. 277: 487.
 v. Douglass Co., 17 Ore. 314: 707, 976, 983.
 v. Fisher, 17 Barb. 224: 579, 586.
 v. Glendale, 23 Minn. 537: 1569.
 v. Glendale, 26 Minn. 78: 1466.
 v. Mining Co., 18 Fed. Rep. 753: 92.
 v. Neal, 28 Conn. 165: 357, 1489, 1629.
 v. New York etc. R. R. Co., 59 Conn. 63: 487.
 v. North Bloomfield Gravel Min. Co., 18 Fed. 753: 745.
 v. Taylor, 20 Vt. 65: 1008.
 Woodruff Place v. Raschig, 147 Ind. 517: 877.
 Woods v. Greensboro Nat. Gas. Co., 204 Pa. St. 606: 679, 709, 726, 1569, 1572.
 v. Nashua Mfg. Co., 4 N. H. 527: 1523.
 Woodstock v. Gallup, 28 Vt. 587: 540, 1638.
 Woodward v. Central Vt. Ry. Co., 180 Mass. 599: 494.
 v. Kilbourne Mfg. Co. 1 Abb. U. S. C. 158: 99.
 v. Seely, 11 Ill. 157: 858.
 v. Webb, 65 Pa. St. 254: 624.
 Woodward Iron Co. v. Cabaniss, 87 Ala. 328: 926.
 Woodworth v. Spirit Mound, 10 S. D. 504: 996.
 Wool v. Edenton, 115 N. C. 10: 127.
 Woolard v. Clymer, (Tenn. Ch. App.) 35 S. W. 1086: 886.
 v. Nashville, 108 Tenn. 353: 709, 918, 1005, 1013, 1014, 1165, 1523, 1635.
 v. Woolecott Woolen Mfg. Co. v. Upham, 5 Pick. 292: 1522.
 v. Woolever v. Stewart, 36 Ohio St. 146: 486.
 v. Woollaeott v. Chicago, 187 Ill. 504: 884, 886.
 v. Woolsey's Application, 95 N. Y. 135: 1389.
 v. Woolsey v. Board of Suprvs., 32 Ia. 130: 1032, 1033, 1093.
 v. New York El. R. R. Co., 134 N. Y. 323: 1261, 1554, 1555, 1584.
 v. Tompkins, 23 Wend. 324: 1101, 1363.
 Worcester v. Great Falls Manf. Co., 41 Me. 159: 1345.
 v. Keith, 5 Allen 17: 970.
 v. Lakeside Mfg. Co., 174 Mass. 299: 1624.
 v. Norwich & Worcester R. R. Co., 109 Mass. 103: 688, 691.
 v. Western R. R. Co., 4 Met. 564: 1474.
 Worcester Gas Light Co. v. County Comrs., 138 Mass. 289: 84, 85, 1712.
 Worcester & Nashua R. R. Co. v. Railroad Comrs., 118 Mass. 561: 753, 1609.
 Workman v. Mifflin, 30 Pa. St. 362: 954, 962, 1255.
 v. So. Pac. R. R. Co., 129 Cal. 536: 307, 308, 732.
 World's Columbian Exposition v. Brennan, 51 Ill. App. 128: 369, 1595.
 Wormley v. Dist. of Columbia, 181 U. S. 402: 11, 464.
 v. Mason City etc. Ry. Co., 120 Ia. 684: 1443.
 v. Wormley, 207 Ill. 411: 872.
 Wormser v. Brown, 72 Hun 93: 180, 185, 370, 495.
 Worsham v. G. H. & W. R. R. Co., 3 Tex. Civ. App. 496: 1183, 1207.
 Worth v. Postal Tel. Cable Co., 7 Ohio C. C. 290: 343.
 Worthington v. Bicknell, 1 Bland 186: 819, 1576.
 v. Coward, 114 N. C. 289: 1409.
 Wooster v. Great Falls Mfg. Co., 39 Me. 246: 702, 933, 1524.
 v. Sugar River Valley R. R. Co., 57 Wis. 311: 947, 1123, 1565.

- [The references are to the pages: Vol. I, pp. 1-743; Vol. II, pp. 743-1719.]
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 Wray v. Knoxville etc. R. R. Co., 113 Tenn. 544: 1123, 1149, 1177, 1180, 1201, 1206, 1229.
 Wrentham v. Corey, 159 Mass. 93: 1402.
 Wright v. Austin, 143 Cal. 236: 1486, 1487.
 v. Baker, 94 Ky. 343: 928, 1080.
 v. Butler, 64 Mo. 165: 1136.
 v. Carter, 27 N. J. L. 76: 422.
 v. Chicago, 46 Ill. 44: 12.
 v. Comrs. of Highways, 145 Ill. 48: 1099.
 v. Doniphan, 169 Mo. 601: 1491.
 v. Georgetown, 4 Cranch 534: 1550.
 v. Highway Comrs., 150 Ill. 138: 1411.
 v. Milwaukee El. R. & L. Co., 95 Wis. 29: 1506.
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 v. Syracuse etc. R. R. Co., 92 Hun 32: 315, 1580, 1589.
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 v. Wells, 29 Ind. 354: 1020, 1031, 1033.
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 v. Wilson, 95 Ind. 408: 979, 1017, 1373.
 v. Wisconsin Central R. R. Co., 29 Wis. 341: 1408, 1410.
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- X.
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 v. Clarke, 120 La. 1044: 966.
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 v. Lefoldt, 87 Miss. 317: 630, 634.
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[The references are to the pages: Vol. I, pp. 1-743; Vol. II, pp. 743-1719.]

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 v. Riddle, 84 Iowa 147: 13, 1006.
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 Yonkers, In re, 117 N. Y. 564: 333, 335, 1137.
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 v. McKenzie, 3 Ga. 31: 22, 24, 522, 706, 746.
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Z.

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[The references are to the pages: Vol. I, pp. 1-743; Vol. II, pp. 743-1719.]

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EMINENT DOMAIN.

CHAPTER I.

THE POWER DEFINED AND DISTINGUISHED.

§ 1. **The power defined.** Eminent domain is the right or power of a sovereign State to appropriate private property to particular uses, for the purpose of promoting the general welfare.¹) It embraces all cases where, by authority of the State and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use, either by the State itself or by a corporation,

¹Definition adopted in *Gano v. Minneapolis etc. R. R. Co.*, 114 Ia. 713, 721, 87 N. W. 714, 89 Am. St. Rep. 393, 55 L.R.A. 263. The phrase eminent domain has received a great variety of definitions. "It is defined to be that *dominium eminens*, or superior right, which of necessity resides in the sovereign power, in all governments, to apply private property to public use in those great public emergencies which can reasonably be met in no other way." 1 Redfield on Railroads, p. 228. "The right of every government to appropriate, otherwise than by taxation and its police authority (which are distinct powers), private property for public use." Dillon on Municipal Corporations, § 584 (453). "It is the rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citi-

Em. D.—1.

zens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand." Cooley, Const. Limbs. p. 524. "The power of the sovereign to condemn private property for public use." Mills on Em. Dom. § 1. "The power of eminent domain is the right of the state, as sovereign, to take private property for public use upon making just compensation." People v. Adirondack R. R. Co., 160 N. Y. 225, 237. "The right of eminent domain is the right to take private property for a public use." Wheeling etc. R. R. Co. v. Toledo etc. R. R. Co., 72 Ohio St. 368, 74 N. E. 209, 106 Am. St. Rep. 622. To same effect, Jacobs v. Clearview Water Supply Co., 220 Pa. St. 388, 69 Atl. 870. "The right which belongs to the society, or to the sovereign, of disposing, in case of ne-

public or private, or by a private citizen.² This definition relates to the power of eminent domain as it exists unrestricted in the sovereign state. Apart from constitutional considerations, it is not essential, in order to constitute an act of eminent domain, that the use for which the property is taken should be of a public nature, that is, a use in which the public participates, directly or indirectly, as in case of highways, railroads, public service plants and the like. It is sufficient that the use of the particular property for the purpose proposed, is necessary to enable individual proprietors to utilize and develop the natural resources of their land, as by reclaiming wet or arid tracts, improving a water power or working a mine. In such cases the public welfare is promoted by the increased prosperity which necessarily results from developing the natural resources of the country. Such exercises of the power of eminent domain have been upheld by many courts, including the Supreme Court of the United States³ and, we think, must be regarded as legitimate exercises of the power, in the absence of constitutional restrictions which limit the taking to public uses. Doubtless the definitions which restrict eminent domain to a taking for public use have been inspired by these constitutional provisions which prevail in the United States and impose this limitation on the exercise of the power. Some courts hold that the words *public use* in the constitution are equivalent to public welfare and are broad enough to include the cases referred to in which property is taken for private use when necessary to promote the public welfare.⁴ But other courts hold that the words *public use* are to be taken more strictly and as precluding a taking for private use in any case, even though such taking may promote the public welfare and though the public good in question could not rea-

cessity, and for the public safety, of all the wealth contained in the State, is called the eminent domain." Vattel, b. 1, c. 20, § 244. The last definition is adopted by the court in Pollard's Lessee v. Hogan, 3 How. 223. *And see* Geizy v. C. & W. R. R. Co., 4 Ohio St. 308; Orr v. Quimby, 54 N. H. 590, 611; Lake Merced Water Co. v. Cowles, 31 Cal. 215; The Boston and Roxbury Mill Co. v. Newman, 12 Pick. 467; Todd v.

Austin, 34 Conn. 78; Forney v. Fremont etc. R. R. Co., 23 Neb. 465, 36 N. W. 806; Groff v. Turnpike Co., 128 Pa. St. 621, 18 Atl. 431; Cherokee Nation v. So. Kans. R. R. Co., 33 Fed. 900.

²Adopted by the court in Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. 1062, 15 L.R.A. 505.

³Post, §§ 275-308.

⁴Post, 257.

sonably be attained in any other way.⁵ In view of the different constructions thus put upon the words *public use* and in view of the widely held opinion that such words were intended as a restriction upon the power, it seems objectionable to define eminent domain as the power to take private property for public use. If the eminent domain provision of the constitution was eliminated altogether, doubtless a broader scope would be given to the power than is now permitted with the constitutional provision in force. Just what this broader scope includes cannot be laid down in advance and will vary with the customs and opinions of the people and the economic conditions which surround them. But in a general way it includes any purpose which is calculated to promote the public welfare and which cannot reasonably and practically be attained without an exercise of the power. Hence, in its broad and unrestricted sense eminent domain is the power to take private property for the purpose of promoting the public welfare.⁶

§ 2. Definitions considered. From the definitions cited in the foregoing section, it will be seen that some writers and jurists have given to the phrase *eminent domain* a more extended signification than the one above laid down. (Thus Judge Cooley defines it as "the rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand."⁷ No court has ever referred either the control and regulation of rights of a public nature or of individual property to the power of eminent domain, and Judge Cooley himself treats of these matters, not under the head of eminent domain, but under the head of the police power. This enlarged definition finds sanction in the works of many theoretical writers and in the dicta of various judicial opinions, but, however, well sanctioned, it is certainly objectionable; *first*, because it does not correspond to the practical application of the term, and, *second*, because it invests the term with a certain vagueness and elasticity, that

⁵Post, 258.

⁶The purposes for which private property may be taken under the power of eminent domain are considered at length in Chapter 7.

⁷Cooley, Const. Lims. 524; and see Dyer v. Tuscaloosa Bridge Co., 2 Porter (Ala.) 296, 27 Am. Dec. 655; Hartwell Matter, 2 Nisi Prius Rep. (Mich.) 97.

preclude the formation of any definite conception. All exercises of sovereign power over private property, which have been judicially determined to fall under the right of eminent domain, have been cases in which there has been an appropriation of such property to particular uses.

The rights and powers which the State has in, or over, public property may be classified under a few heads, as follows:

First. The State may possess property in its individual or organic capacity which it holds for sale or profit, and in which the people distributively have no right whatsoever. In respect to property of this sort, the State stands in the same relation as any citizen to the property he possesses, and may use, enjoy, control and dispose of it in the same manner.

Second. The State possesses property of a public nature, such as forts, arsenals, public buildings and the like, which is employed for defense, or the transaction of the public business and affairs. In this class of property, also, individual citizens have no rights, and are only entitled to use it as they have dealings with the government, and then only subject to such regulations as the government may see fit to establish. The State can dispose of this property at pleasure, subject to such limitations as attached to its rights in the property at the time of its acquisition.

Third. The State possesses property which it holds as trustee for the public, such as navigable waters, highways, and the like. This class of property is exclusively for the public use, and the State, as the only representative of the public, may be said to be invested with the title thereto. The State may control and regulate the use of such property as the public welfare may demand, but cannot rightfully deprive any part of the public of the privilege of such use.

All property under the control of the State will be found to fall into one of these classes, and all acts of the State in respect to these classes of property may be referred, either to the right of proprietorship, the right of police regulation, or the general power of a State to do all such acts as are necessary for the public safety or conducive to the public good; none of such acts can properly be referred to the power of eminent domain.

If we turn now to the power of the State over *private* property, we shall see that all legitimate acts of power may be classified as follows:

First. The State may regulate the making of contracts between citizens in respect to property and prescribe generally as to their validity and effect, and may make such enactments as to the acquisition and disposition of property as the public welfare requires. Instances of this right are seen in the statute of frauds, statute of wills, recording acts, conveyancing acts, and the like.

Second. The State may deprive an individual of his property and vest it in another in order to compel the former to fulfill a moral or legal obligation which he owes the latter. Upon this right are founded the laws for the attachment and sale of property on civil process, the bastardy laws, laws making the support of wife and children compulsory, and so forth.⁸

Third. The State may deprive an individual of his property, as a punishment for the violation of law. All laws imposing fines and forfeitures are examples of this power.

Fourth. The State may regulate the use of property in such manner as the public health, safety, convenience and welfare may require. The establishment of fire limits and building regulations in cities, and the prohibiting of certain noxious trades and manufacture's within certain localities, are familiar illustrations of this power. It is known as the Police Power, or the Right of Police Regulation.

Fifth. The State may exact of the individual a contribution of a portion of his property based upon some rule of apportionment, or the possession of some privilege or franchise, or the exercise of some trade or calling, in order to provide a fund for defraying the necessary expenses of the government. This is known as the Right of Taxation.

Sixth. The State may deprive a person of his property, or of some right or interest therein, for the purpose of appropri-

⁸"Beside the right of the State to take private property for public use under the right of eminent domain, the right of taxation and the right to assess fines and forfeitures for crimes, the State may also take the private property of one individual, and transfer it to another whenever in equity and good conscience the former has no right to withhold it from the latter, or to enable the State to

fulfill some moral obligation resting upon such individual which he refuses to fulfill. Thus the State may take the private property of an individual to fulfill his contract, to pay his debts, or to make compensation for injuries to person, reputation or property, which he has caused; or to support his wife or children when he refuses to do so." Willetts v. Jeffries, 5 Kan. 470, 475. (Bastardy Case.)

ating the same, or making it subservient, to particular uses. Thus private property is taken and held by the State, or vested in public corporations, for the public use, as in the case of highways, canals, parks, public buildings and the like; or private corporations, or individuals, are authorized to institute proceedings for the purpose of compelling a transfer of property to themselves, to be devoted to some particular use, either of a public nature, such as railroads, turnpikes, etc., or of a private nature, such as private ways, mills and the like.

The acts which are described and included under this last division are universally spoken of as pertaining to the eminent domain. All other exercises of power over private property and every species of right in, and control and regulation over, property of a public nature, may properly be referred, as we have shown, to some other of the sovereign powers of the State. Therefore eminent domain is properly limited in its application to the appropriation by a sovereign State of private property to particular uses, as the public welfare demands. This definition strips the term of all ambiguity and uncertainty, without robbing it of any significance or application which it properly embraces, or has acquired by common usage.

§ 3. Nature of the power. There has existed, and still exists, among jurists a difference of opinion as to the nature of the power of eminent domain. Some maintain that it is a kind of reserved right, or supereminent estate or interest in all property, vested in the sovereign power. Thus the Supreme Court of Connecticut says: "The right to take private property for public use, or of eminent domain, is a reserved right attached to every man's land, and paramount to his right of ownership. He holds his land subject to that right, and cannot complain of injustice when it is lawfully exercised." And again: "The true theory and principle of the matter is, that the legislature resume dominion over the property, and, having resumed it, instead of using it by their agents, to effect the intended public good, and to avoid entanglement in the common business of life, they revest it in other individuals or corporations, to be used by them, in such manner as to effect, directly or indirectly, or incidentally as the case may be, the public good intended."⁹ This view is

⁹Todd v. Austin, 34 Conn. 78. See also Harding v. Goodlett, 3 Yerg. (Tenn.) 41. 24 Am. Dec. 546; Beekman v. Saratoga and Schneectady R.

R. Co., 3 Paige, 45; Jacobs v. Clearview Water Supply Co., 220 Pa. St. 388, 69 Atl. 870.

favored by the etymology of the name, and was doubtless the view entertained by those who brought the name into use. But the name is of comparatively recent origin,¹⁰ and was applied to a power already existing and recognized, and we must look to the power, and not to the name, to determine its true significance. The implication which the name imports was perceived by writers contemporary with its introduction, who protested against the implication of its etymology, but accepted it as a convenient name for a power which was well defined.¹¹

(The correct view is that the power of eminent domain is not a reversed, but an inherent right,¹² a right which pertains to sovereignty as a necessary, constant and inextinguishable attribute.¹³)

¹⁰The name appears to have been brought into use by Grotius and other continental writers in the early part of the seventeenth century.

¹¹Thus Puffendorf, writing in the seventeenth century, says: "The eminent domain (*dominium eminens*) is what some are afraid of, more upon account of the name than the thing. The sovereign power, say they, was erected for the common security, and that alone will give a Prince a sufficient right and title to make use of the goods and fortunes of his subjects whenever necessity requires; because he must be supposed to have a right to everything without which the public good cannot be obtained. And the eminent domain is too arrogant and ambitious a word and which ill princes may sometimes abuse to the damage and ruin of their subjects. But, as it is trifling to dispute about words, so I think there can be no absurdity or danger in giving a particular name to a particular branch of the sovereign power as it exerts itself in a certain way upon certain things." Puff. b. 8, c. 5, § 7, Eng. Translation 1703.

¹²The power of eminent domain is an inherent attribute of sovereign-

ty. San Mateo County v. Coburn, 130 Cal. 631, 63 Pac. 78; Chestates Pyrites Co. v. Cavenders Creek Gold Min. Co., 119 Ga. 354, 46 S. E. 422, 100 Am. St. Rep. 174; Jones v. No. Ga. Elec. Co., 125 Ga. 618, 54 S. E. 85, 6 L.R.A. (N.S.) 122; Hollister v. State, 9 Ida. 8, 71 Pac. 541; Potlatch Lumber Co. v. Peterson, 12 Ida. 769, 88 Pac. 426, 118 Am. St. Rep. 233; Ill. Steel Trust Co. v. St. Louis etc. Ry. Co., 208 Ill. 419, 70 N. E. 357; Lafayette etc. Ry. Co. v. Butner, 162 Ind. 460, 70 N. E. 529; Sisson v. Board of Supervisors, 128 Ia. 442, 104 N. W. 454, 70 L.R.A. 440; Board of Park Comrs. v. DuPont, 110 Ky. 743, 62 S. W. 891; State v. District Court, 87 Minn. 146, 91 N. W. 300; Southern Ill. & Mo. Bridge Co. v. Stone, 174 Mo. 1, 73 S. W. 453, 63 L.R.A. 301; People v. Fisher, 190 N. Y. 468, 83 N. E. 482; Spencer v. Seaboard Air Line Ry. Co., 137 N. C. 107, 49 S. E. 96; Covington & Cin. Bridge Co. v. Magruder, 63 Ohio St. 455, 59 N. E. 216; Lazarus v. Morris, 212 Pa. St. 128, 61 Atl. 815; Stearns v. Barre, 73 Vt. 281, 50 Atl. 1086, 87 Am. St. Rep. 721, 58 L.R.A. 240; Painter v. St. Clair, 98 Va. 85, 34 S. E. 989.

¹³"It is a necessary attribute of

§ 4. Eminent domain distinguished from taxation. Besides the power of eminent domain, the State is clothed, by virtue of its sovereignty, with other powers over private property, with which it is closely allied and sometimes confounded.

sovereignty in the State rather than any reserved right in the grant of property to the citizen." Noll v. Dubuque, B. & M. R. R. Co., 32 Ia. 66; Hartwell Matter, 2 Nisi Prius Rep. (Mich.) 97; 2 Redfield on R. R., p. 229. "But, practically, it is immaterial whether the right be supposed to have been impliedly reserved because it ought not to be granted, or because it is a portion of the national sovereignty which is inalienable by the government, or whether the right is created by the public necessity, which at the time calls for its exercise,—its existence in every State is indispensable and incontestible." Raleigh & Gaston R. R. Co. v. Davis, 2 Bev. & B. Law (N. C.) 451. "Whether this principle be denominated the right of transcendental propriety, or of eminent domain, or as is more properly by Grotius, the force of supereminent dominion, it means nothing more or less than an inherent political right, founded on a common necessity and interest, of appropriating the property of individual members of the community to the great necessities of the whole community. This principle or right does not rest, as supposed by some, upon the notion that the State had an original and absolute ownership of the whole property possessed by the individual members of it, antecedent to their possession of it, and that their possession and enjoyment of it being subsequently derived from a grant by the sovereign, it is held subject to a tacit agreement or implied reservation that it may be resumed, and all individual rights to it ex-

tinguished by a rightful exertion of sovereign power. Such a doctrine is bringing the principles of the social system back to the slavish theory of Hobbes, which however plausible it may be in regard to lands once held in absolute ownership by the sovereignty, and directly granted by it to individuals, it is inconsistent with the fact that the security of pre-existing rights to their own property is the great motive and object of individuals for associating into governments. Besides, it will not apply at all to personal property, which in many cases is entirely the creation of its individual owners; and yet the principle of appropriating private property to public use, is full as extensive in regard to personal as to real property." Bloodgood v. M. & H. R. R. Co., 18 Wend. 9, 57. "The exercise of the right of eminent domain by a sovereign cannot be the creation of grant or compact. It inheres in the existence of an independent government, and comes into being *eo instanti* with its establishment, and continues as long as the government endures. The United States did not derive the right to exercise it in Louisiana from France, or in Florida from Spain, or in California from Mexico, or in Alaska from Russia; the right was coeval with its proprietorship as sovereign." United States v. Cooper, 9 Mackey, D. C. 104, 117. See also Scholl v. German Coal Co., 118 Ill. 427; Matter of Firman Street, 17 Wend. 649, 659; Heyward v. Mayor etc. of New York, 7 N. Y. 314; White v. Nashville etc. R. R. Co., 7 Heisk. 518; Roanoke City v.

These are the power of taxation and the power of police regulation. A tax is a contribution exacted by the government from all the individuals of the State, or from those of a particular class or locality, for the purpose of defraying the public expenses.¹⁴ The contribution may be of money or of property.¹⁵ But when property is exacted instead of money, it is not because the State needs the particular property, but because that form of exaction, owing to the scarcity of money, will be more promptly and certainly complied with. Taxation is also based upon some rule of apportionment, as when made upon persons according to number, or upon property according to value or quantity or benefits. In all these respects a tax differs from an exercise of the power of eminent domain. "Taxation exacts money, or services, from individuals, as and for their respective shares of contribution to any public burthen. Private property taken for public use by right of eminent domain, is taken not as the owner's share of contribution to a public burthen, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty and creates no obligation to repay, otherwise than in the proper application of the tax. Taxation operates upon a community or upon a class of persons in a community and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual and

Berkowitz, 80 Va. 616; Baltimore & Ohio R. R. Co. v. Pittsburg etc. R. R. Co., 17 W. Va. 812, 841; Steele v. County Comrs., 83 Ala. 304; Moran v. Ross, 79 Cal. 159, 21 Pac. Rep. 547; People v. B. & O. R. R. Co., 117 N. Y. 150, 22 N. E. 1026; Winona & St. P. R. R. Co. v. City of Watertown, 4 S. D. 323, 56 N. W. 1077; Jones v. Walker, 2 Paine C. C. 688; Cherokee Nation v. So. Kans. R. R. Co., 33 Fed. 900; Kansas City v. Marsh Oil Co., 140 Mo. 458, 464; Bridal Veil Lumbering Co. v. Johnson, 30 Ore. 205, 46 Pac. 790, 60 Am. St. Rep. 818, 34 L.R.A. 368; People v. Adirondack R. R. Co., 160 N. Y. 225, 237; Weeks v. Grace, 194 Mass. 296, 80 N. E. 220.

The right cannot be bargained away or extinguished. Puff. b. 8, c. 5, § 7; New York, H. & N. R. R. Co. v. Boston, H. & E. R. R. Co., 36 Conn. 196; Sholl v. German Coal Co., 118 Ill. 427; Tait's Executor v. Central Lunatic Asylum, 84 Va. 271, 4 S. E. 297; *post*, § 406.

¹⁴"Taxes are defined as being the enforced proportional contribution of persons and property, levied by the authority of the State for the support of the government, and for all public needs." Cooley on Taxation, p. 1. *See also* Burroughs on Taxation, chap. I.; Hilliard, *id.*, Introduction.

¹⁵See Dowell's Hist. Taxation in England.

without reference to the amount, or value exacted from any other individual, or class of individuals."¹⁶

§ 5. Distinguished from special assessments or betterments. There is a peculiar species of taxation, known as special assessments or betterments, which is often confounded with the power of eminent domain. The system prevails in all the States, of assessing a part, or the whole, of the cost of local improvements upon the property specially benefited. These local improvements are usually made to accommodate a particular locality, generally at the instance of property owners in that locality, who urge the improvement for the express purpose of enhancing the value of their property. It seems but just that those whose property is thus enhanced, and who thus receive peculiar benefits from the improvement, should contribute specially to defray its cost.¹⁷ Special benefits being thus the foundation, or principle, upon which the special contribution is based, it should not exceed the benefits conferred.¹⁸ But this is a question of policy and not of power and, in the absence of some special constitutional provision on the subject, it is held that the legislative power may fix the district to be taxed for the local improvement, which may consist of the abutting property only, and may assess a part or the whole of the cost

¹⁶People v. Mayor etc. of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266, 1851. *Approved* in Hummett v. Philadelphia, 65 Pa. St. 146, 1870. *See also* C. W. etc. R. R. Co. v. Coms. of Clinton County, 1 Ohio St. 77, 101, 102; Washington Ave., 69 Pa. St. 352; Gibson v. Mason, 5 Nev. 283, 303; Griffin v. Dogan, 48 Miss. 11; Turner v. Althaus, 6 Neb. 54; City of Aurora v. West, 9 Ind. 74; Gibbons v. Mobile etc. R. R. Co., 36 Ala. 410; Stein v. Mayor etc. of Mobile, 24 Ala. 591; Harward v. St. Clair etc. Drainage Co., 51 Ill. 130; Richman v. Board of Supervisors, 77 Ia. 513, 42 N. W. 422; Alfalfa Irrigation Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086; County of Mobile v. Kimball, 102 U. S. 691, 703; Board of Commissioners v. Reeves, 148 Ind. 467. *And see post §§ 5 and 242.*

¹⁷Lockwood v. St. Louis, 24 Mo. 20, 22.

¹⁸Louisville v. Bitzer, 115 Ky. 359, 73 S. W. 1115; Weed v. Boston, 172 Mass. 28, 51 N. E. 204, 42 L.R.A. 642; Sears v. Street Comrs., 173 Mass. 350, 53 N. E. 138; Dexter v. Boston, 176 Mass. 247, 57 N. E. 379, 79 L.R.A. 306; London v. Coffey, 178 Mass. 489, 60 N. E. 124; Edwards v. Bruerton, 184 Mass. 529, 69 N. E. 328; Hutchinson v. Storrie, 92 Tex. 685, 51 S. W. 848, 45 L.R.A. 289; Norwood v. Baker, 172 U. S. 269. *And see* Adams v. Shelbyville, 154 Ind. 467, 57 N. E. 114, 77 Am. St. Rep. 484, 49 L.R.A. 797; King v. Portland, 38 Ore. 402, 63 Pac. 2, 55 L.R.A. 812; Martin v. District of Columbia, 205 U. S. 135, 27 S. C. 440.

of the improvement upon such district, without regard to benefits.¹⁹ But the courts will intervene to prevent an abuse of this power, as when the special tax or assessment amounts to a confiscation or spoliation of property, because there is no benefit or presumption of benefit to support it.²⁰ A special assessment is thus seen to be a contribution levied upon a particular class of individuals, and apportioned among them according to the quantity or value of property possessed by each in the locality of the improvement, or in proportion to benefits received. Here is every element of a tax and not one element of the exercise of eminent domain. Under the latter power it is always sought to appropriate specific property, without regard to any ratio or apportionment. A special assessment is a contribution of money the same as a general tax. The compensation received in benefits does not differ in principle from the compensation received, or supposed to be received, for general taxes, and is often a myth in fact in the one case as in the other. All this seems so evident that the wonder is that any court should have come to a contrary conclusion. The only State in which the doctrine has been unequivocally announced that special assessments fall under the power of eminent domain, is Illinois, and

¹⁹Montgomery v. Moore, 140 Ala. 638, 37 So. 291; Voris v. Pittsburg Plate Glass Co., 163 Ind. 599, 70 N. E. 249; Cass Farm Co. v. Detroit, 124 Mich. 433, 83 N. W. 108; Goodrich v. Detroit, 123 Mich. 559, 82 N. W. 255; Wilzinski v. Greenville, 85 Miss. 393, 37 So. 807; Prior v. Buehler etc. Co., 170 Mo. 439, 71 S. W. 205; McMillan v. Butte, 30 Mont. 220, 76 Pac. 203; People v. Pitt, 169 N. Y. 521, 62 N. E. 662, 58 L.R.A. 372; Webster v. Fargo, 9 N. D. 208, 82 N. W. 732, 56 L.R.A. 156; Harrisburg v. McPherson, 200 Pa. St. 343, 49 Atl. 988; French v. Barber Asphalt Pav. Co., 181 U. S. 324, 21 S. C. 625; Wight v. Davidson, 181 U. S. 371, 21 S. C. 616; Tonawanda v. Lyon, 181 U. S. 389, 21 S. C. 609; Webster v. Fargo, 181 U. S. 394, 21 S. C. 645; Cass Farm Co. v. Detroit, 181 U. S. 396, 21 S. C. 644; Detroit v. Parker, 181 U. S. 399, 21 S. C.

645; Wormley v. District of Columbia, 181 U. S. 402, 21 S. C. 609; Shumate v. Heman, 181 U. S. 402, 21 S. C. 645; Shaefier v. Werling, 188 U. S. 516, 23 S. C. 449; Hibben v. Smith, 191 U. S. 310, 24 S. C. 88; Cleveland etc. Ry. Co. v. Porter, 210 U. S. 177, 28 S. C. 647; Cleveland etc. Ry. Co. v. Porter, 210 U. S. 177. See State v. Robert P. Lewis Co., 72 Minn. 87, 75 N. W. 108, 42 L.R.A. 639; State v. Robert P. Lewis Co., 82 Minn. 390, 402, 85 N. W. 207, 86 N. W. 611, 53 L.R.A. 421; State v. Macalester College, 87 Minn. 165, 91 N. W. 484.

²⁰Coffman v. St. Francis Dr. District, 83 Ark. 54, 103 S. W. 179; Barfield v. Gleason, 111 Ky. 491, 63 S. W. 964; Wight v. Davidson, 181 U. S. 371, 385, 21 S. C. 616; Cass Farm Co. v. Detroit, 181 U. S. 396, 21 S. C. 644.

in that State the courts seem to have been driven to that conclusion in order to sustain such assessments at all, owing to the peculiar provisions as to taxation in the constitution of that State then in force.²¹ Since this difficulty was removed by the adoption of the present constitution, the Supreme Court of that State has concluded that a special assessment is a tax and not an exercise of the power of eminent domain.²² Other courts have exhibited some vacillation on this subject.²³ But we believe

²¹The provision requiring uniformity. Chicago v. Larned, 34 Ill. 203; Canal Trustees v. Chicago, 12 Ill. 406; Chicago v. Colby, 20 Ill. 614; McBride v. Chicago, 22 Ill. 576; Peoria v. Kidder, 26 Ill. 351; Town of Pleasant v. Kost, 29 Ill. 490; Howard v. St Clair Drain Co., 51 Ill. 130; Hessler v. Drainage Coms., 53 Ill. 105; Wright v. Chicago, 46 Ill. 44. The Supreme Court of Michigan encountered the same obstacle in the constitution of that State, but overcame it by holding that the constitutional provisions applied only to taxes of the ordinary kind for State, county and municipal expenses, and that therefore the legislature had plenary power over this other kind of taxation, and so sustained special assessments as a tax. Woodbridge v. Detroit, 8 Mich. 274. In City of Raleigh v. Peace, 110 N. C. 32, 14 S. E. 521, 17 L.R.A. 330, a special assessment was sustained as an exercise of the taxing power, notwithstanding a similar provision in the constitution of that State. *And see* Munson v. Board of Commissioners, 43 La. Ann. 15, 8 So. 906; Sperry v. Flygare, 80 Minn. 325, 83 N. W. 177, 81 Am. St. Rep. 261, 49 L.R.A. 757.

²²White v. People, 94 Ill. 604, 1880; Chicago etc. R. R. Co. v. Elmhurst, 165 Ill. 148, 46 N. E. 43.

²³In Louisiana the court first held special assessments to be an exercise of the taxing power in Municipality, No. 2 v. White, 9 La. Ann.

446, 1854, and afterwards in the New Orleans Drainage Co. etc., 11 La. Ann. 338, 1856, and Surgi v. Snetchman, 11 id. 387, 1856, held them to be an exercise of the power of eminent domain, but finally leave the question in uncertainty in Wallace v. Shelton, 14 id. 503, 1859, and City of New Orleans etc., 20 id. 407, 1868; *and see further* New Orleans v. Elliott, 10 La. An. 59, 1855; Yeatman v. Crandall, 11 id. 220, 1856. Recent cases have settled that a special assessment is a tax in its essential nature, though not a tax within the meaning of the constitutional provisions on the subject of taxation. Munson v. Board of Comrs., 43 La. An. 15, 8 So. 906; Charnock v. Levee Co., 38 La. An. 323; Manufacturing Co. v. Green, 39 La. An. 455, 1 So. 873. In the first of these cases it is said: "The levy of a local assessment is an exercise of the taxing power in its broadest and most comprehensive sense; yet it is not a tax, *co nomine*, and is not governed by the provisions of the constitution on the general subject of taxation; but it is exerted entirely independently of all its provisions on the subject of taxation." In New York the Court of Errors in 1844-5 held assessments to be an exercise of the taxing power. Striker v. Kelley, 7 Hill, 9, 1844; S. C. 2 Denio, 323, 1845. Afterwards there were three decisions to the contrary in the Supreme Court. Jordan v. Hyatt, 3 Barb. 275, 1848;

that the doctrine is now universal to the effect that special assessments are to be referred to the power of taxation.²⁴

§ 6. Distinguished from the police power. Every one is bound so to use his own property as not to interfere with the reasonable use and enjoyment by others of their property. For a violation of this duty the law provides a civil remedy. Besides this obligation, which every property owner is under to the owners of neighboring property, he is also bound so to use and enjoy his own as not to interfere with the general welfare of the

People ex rel. etc. v. Mayor etc. of Brooklyn, 6 id. 209, 1849; People ex rel. etc. v. Mayor etc. of Brooklyn, 9 id. 535, 1850. But the doctrine was finally settled in favor of the text in the case of People ex rel. etc. v. Mayor etc. of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266, 1851, where the court discusses at length the distinguishing characteristics of a tax and of an exercise of the eminent domain power. To same effect, Astor v. Mayor etc. of New York, 5 Jones & S. 539; Moran v. City of Troy, 9 Hun 540. Other cases holding or intimating that special assessments fall under the power of eminent domain are the following: Extension of Hancock Street, 18 Pa. St. 26; Zoeller v. Kellogg, 4 Mo. Ap. 163; State v. City Council, 12 Rich. S. C. 702; Sutton's Heirs v. City of Louisville, 5 Dana 28. See Cribbs v. Benedict, 64 Ark. 555. In Philadelphia v. Penn Hospital, 143 Pa. St. 367, 22 Atl. 744, an ordinance that the footways of all streets and highways should be graded, curbed, paved and kept in repair at the expense of the abutting owner, was held to be an exercise of the police power and not of the power of taxation.

²⁴"The form and manner, spirit and bearing of an act of State, decide whether it be an exercise of the right of eminent domain, or the right of taxation, and not the mere physical nature of the thing ultimately

obtained by it for the public use." In the Matter of Dorrence Street, 4 R. I. 230, 246. In support of the text, see: Burnett v. Mayor etc. of Sacramento, 12 Cal. 76; Creighton v. Manson, 27 Cal. 613; Emery v. San Francisco Gas Co., 28 Cal. 345, 350; Chambers v. Saterlee, 40 Cal. 497; Hagar v. Board of Supervisors of Yolo Co., 47 Cal., 222; German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 70 Pac. 1067; Nichols v. Bridgeport, 23 Conn. 189; Edgerton v. Green Cove Springs, 19 Fla. 140; Speer v. Athens, 85 Ga. 49, 9 L.R.A. 402, 11 S. E. 802; Briggs v. Union Drainage Dist., 140 Ill. 53, 29 N. E. 721; Yeomans v. Riddle, 84 Ia. 147, 50 N. W. 886; Bradley v. McAtee, 7 Bush, 667, 3 Am. Rep. 309; City of Covington v. Worthington, 88 Ky. 206, 10 S. W. 790, 11 S. W. 1038; Alexander v. Mayor etc. of Baltimore, 5 G. & J. (Md.) 383; Mayor etc. of Baltimore v. Greenmount Cemetery, 7 Md. 517; Williams v. Mayor etc. of Detroit, 2 Mich. 561; Woodbridge v. Detroit, 8 Mich. 274; Roberts v. Smith, 115 Mich. 5, 72 N. W. 1091; McComb v. Bell, 2 Minn. 295; Williams v. Cammack, 27 Miss. 209; Garrett v. St. Louis, 25 Mo. 505; Newby v. Platt Co., 25 Mo. 258; Palmyra v. Morton, 25 Mo. 593; St. Louis v. Speck, 67 Mo. 403; Keith v. Bingham, 100 Mo. 300, 13 S. W. 683; Morrison v. Morey, 146 Mo. 543, 43 S. W. 629; Cain v. Omaha, 42 Neb. 120, 60 N. W. 368;

community in which he lives.²⁵ It is the enforcement of this last duty which pertains to the police power of the State so far as the exercise of that power affects private property. Whatever restraints the legislature imposes upon the use and enjoyment of property within the reason and principle of this duty, the owner must submit to, and for any inconvenience or loss which he sustains thereby, he is without remedy. It is a regulation, and not a taking, an exercise of police power, and not of eminent domain.²⁶ But the moment the legislature passes

State v. Mayor etc. of Newark, 35 N. J. L. 168; State v. Blake, 36 N. J. L. 442; S. C. 35 N. J. L. 208; Coster v. Tide Water Co., 18 N. J. Eq. 54; S. C. on appeal, 18 N. J. Eq. 518; People v. Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Litchfield v. Vernon, 41 N. Y. 123; Scoville v. City of Cleveland, 1 Ohio St. 126; Hill v. Higdon, 5 Ohio St. 243, 67 Am. Dec. 289; Ridenour v. Saffin, 1 Handy, 464; Allen v. Drew, 44 Vt. 174; Woodhouse v. Burlington, 47 Vt. 300; City of Norfolk v. Chamberlain, 89 Va. 196, 16 S. E. 730; Walston v. Nevin, 128 U. S. 578, 9 S. C. 192; Norwood v. Baker, 172 U. S. 269. The nature of special assessments will be found to be exhaustively discussed and the authorities reviewed in Town of Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451; Hammett v. Philadelphia, 65 Pa. St. 146; Hancock Street, 18 Pa. St. 26; Davidson v. New Orleans, 96 U. S. 97. Where a city assessed land for repairing and curbing a street which had just been paved and curbed by the city and was in good condition, the object being to make the street conform to a new and different plan, it was held that the assessment would be in derogation of the rights of private property. Wistar v. Philadelphia, 8 Pa. St. 505.

²⁵"Every right, from an absolute ownership in property, down to a mere easement, is purchased and

holden subject to the restriction, that it shall be so exercised as not to injure others." Coates v. Mayor etc. of New York, 7 Cow. 585, 605. See also Jamieson v. Ind. Nat. Gas & Oil Co., 128 Ind. 555, 28 N. E. 76, 12 L.R.A. 652; Opinion of the Justices, 103 Me. 506, 69 Atl. 627; Commonwealth v. Alger, 7 Cush. 84; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Lawton v. Steele, 152 U. S. 133; Tenement House Dept. v. Moescher, 89 A. D. 526, 85 N. Y. S. 704; Same v. Same, 90 A. D. 603, 85 N. Y. S. 1148; same cases *affirmed*, 179 N. Y. 325, 72 N. E. 231, 103 Am. St. Rep. 910, 7 L.R.A. 704; latter case *affirmed* without opinion, 203 U. S. 583; and see post, §§ 243-249.

²⁶Odd Fellows Cem. Asso. v. San Francisco, 140 Cal. 226, 73 Pac. 987; In re Kelso, 147 Cal. 609, 82 Pac. 241, 109 Am. St. Rep. 178, 2 L.R.A. (N.S.) 796; Hine v. New Haven, 40 Conn. 478; King v. Davenport, 98 Ill. 305, 38 Am. Rep. 89; Munn v. People, 69 Ill. 80; S. C. *affirmed*, 94 U. S. 113; N. W. Fertilizing Co. v. Hyde Park, 70 Ill. 634; S. C. *affirmed*, 97 U. S. 659; Jamieson v. Ind. Nat. Gas & Oil Co., 128 Ind. 555, 28 N. E. 76, 12 L.R.A. 652; People v. Hawley, 3 Mich. 330; Baker v. Boston, 12 Pick. 184, 22 Am. Dec. 421; Commonwealth v. Tewksbury, 11 Met. 55; Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; St. Louis v. Stern, 3 Mo. App. 48; Vanderbilt v. Adams, 7 Cow.

beyond mere regulation, and attempts to deprive the individual of his property, or of some substantial interest therein, under pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power.²⁷) We shall defer until a subsequent chapter a discussion of the limits of the police regulation of private property and of the acts which, though under the guise of police regulation, amount to a taking of property for public use, and which, therefore, can only be accomplished

349; Roosevelt v. Godard, 52 Barb. 533; Am. Rapid Tel. Co. v. Hess, 125 N. Y. 641, 26 N. E. 919, 4 Am. R. R. & Corp. Rep. 199, 13 L.R.A. 454; Tenement House Dept. v. Moescher, 179 N. Y. 325, 72 N. E. 231, 103 Am. St. Rep. 910, 70 L.R.A. 704; S. C. affirmed, 203 U. S. 583; McCandless v. Richmond & D. R. Co., 38 S. C. 103, 16 S. E. 429, 7 Am. R. R. & Corp. Rep. 366, 18 L.R.A. 440; City of Charleston v. Werner, 38 S. C. 488, 17 S. E. 33, 8 Am. R. R. & Corp. Rep. 73; Town of Summerville v. Presby, 33 S. C. 56, 11 S. E. 545, 3 Am. R. R. & Corp. Rep. 101, 8 L.R.A. 854; Beer Co. v. Massachusetts, 97 U. S. 25; C. B. & Q. R. R. Co. v. Iowa, 94 U. S. 155; Peik v. C. & N. W. R. R. Co., 94 U. S. 164; Powell v. Pennsylvania, 127 U. S. 678, 8 S. C. 992, 1257; Lawton v. Steele, 152 U. S. 133; S. C. 119 N. Y. 326, 23 N. E. 878, 16 Am. St. Rep. 813, 7 L.R.A. 134. In Philadelphia v. Scott, 81 Pa. St. 80, 22 Am. Rep. 738, the court, speaking of the powers of eminent domain and police, says: "In their leading features, these powers are plainly different, the latter reaching even to destruction of property, as in tearing down a house to prevent the spread of a conflagration, or to removal at the expense of the owner, as in case of a nuisance tending to breed disease. In the first instance, the community pro-

ceeds on the ground of overwhelming calamity; and in the second, because of the fault of the owner of the thing; and in either case compensation is not a condition of the exercise of the power. The same general principles attend its exercise in other directions, and it is generally based upon disaster, fault, or inevitable necessity. On the other hand, the power of eminent domain is conditioned generally upon compensation to the owner, and for the most part is founded, not in calamity or fault, but in public utility. These distinctions clearly mark the cases distant from the border line between the two powers, but in or near to it they begin to fade into each other, and it is difficult to say when compensation becomes a duty and when not."

²⁷Lake View v. Rose Hill Cemetery Co., 70 Ill. 192, 22 Am. Rep. 71; Chicago v. Laflin, 49 Ill. 172; Commonwealth v. Bacon, 13 Bush. 210, 26 Am. Rep. 189; Matter of Petition of Cheesbrough, 78 N. Y. 232; Commonwealth v. Penn. Canal Co., 66 Pa. St. 41, 5 Am. Rep. 329; State v. Glenn, 7 Jones L. 321; Cornelius v. Glenn, 7 Jones L. 512; Turnpike Co. v. Davidson Co., 3 Tenn. Ch. 396; New Orleans Water Works Co. v. St. Tammany Water Works Co., 4 Wood C. C. 134; Crescent City etc. Co. v. Butchers' Union etc. Co., 4 Wood C. C. 96.

under the power of eminent domain.²⁸ It is sufficient for the present purpose to point out the distinction between the two powers. Under the one, the public welfare is prompted by regulating and restricting the use and enjoyment of property by the owner; under the other, the public welfare is promoted by taking the property from the owner and appropriating it to some particular use.)

§ 7. Distinguished from the damaging or destruction of property in cases of necessity. At common law the right exists in individuals, in cases of emergency where the danger is imminent and admits of no delay, to control and destroy property in order to avert a public calamity.²⁹ The most common example of the exercise of this right, is the demolition of buildings to prevent the spreading of a conflagration.³⁰ In all such cases, if the judgment of the individual was a reasonable one under the circumstances in which he was placed, he is not liable, even though it should finally turn out that the destruction was, in fact, unnecessary.³¹ Though the right is regulated by statute and officers designated to determine upon the necessity and order the destruction, the nature of the act remains unchanged. In such cases no remedy exists except such as was previously given

²⁸Post, §§ 243-249.

²⁹2 Kent's Com. 338; Dillon Munic. Corp. § 955 (756); Mouser's Case, 12 Coke, 62; King's Prerogative in Saltpeter, 12 Coke, 12; Bowditch v. Boston, 101 U. S. 16; and cases cited in subsequent notes to this section. "The best elementary writers lay down the principle, and adjudications upon adjudications have for centuries sustained, sanctioned and upheld it, that in a case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, or any other great public calamity, the private property of any individual may be lawfully destroyed for the relief, protection or safety of the many, without subjecting the actors to personal responsibility for the damages which the owner has sustained." Senator Sherman in Russell v. Mayor etc. of New York, 2 Denio 461, 474.

³⁰The right of a traveler to go upon adjacent property when a highway is impassable is referred to the same law of necessity. Irwin v. Yeager, 74 Ia. 174, 37 N. W. 136. This was trespass for such a use of private property when the highway was blockaded by snow. The court says:

"This right is based on the ground of inevitable necessity; and also when the public convenience and necessity come in conflict with private right, the latter must yield to the former. Such fact, therefore, may be pleaded and shown as an excuse for the alleged trespass. Such temporary and unavoidable use of private property must be regarded as one of those incidental burdens to which all property in a civilized community is subject." p. 177.

³¹Conwell v. Emrie, 2 Ind. 35; Surocco v. Geary, 3 Cal. 69, 58 Am.

by the common law, or is conferred by the statute.³² The regulation of the right by statute does not bring its exercise under the power of eminent domain.³³ This right is plainly distinguishable from the right of eminent domain. It is a right which exists in the individual, and not in the State; by nature, and not as the result of political organization.³⁴

Dec. 385; *Dunbar v. The Alcalde etc. of San Francisco*, 1 Cal. 355; *McDonald v. City of Red Wing*, 13 Minn. 38; *Field v. Des Moines*, 39 Ia. 575, 18 Am. Rep. 46; *Hale v. Lawrence*, 21 N. J. L. 714; *Bowditch v. Boston*, 101 U. S. 16; *Mouser's Case*, 12 Coke, 62. In *Bishop v. Macon*, 7 Ga. 200, 50 Am. Dec. 400, a contrary doctrine appears to be held.

³²*People ex rel. v. Common Council of Buffalo*, 76 N. Y. 558, 32 Am. Rep. 337; *Bowditch v. City of Boston*, 4 Clifford, 323; *Keller v. Corpus Christi*, 50 Tex. 614, 32 Am. Rep. 613; *Mayor etc. of New York v. Lord*, 17 Wend. 285; S. C. 18 Wend. 126; *Mayor etc. of New York v. Pentz*, 24 Wend. 668; *Russell v. Mayor etc. of New York*, 2 Denio 461; *American Print Works v. Lawrence*, 21 N. J. L. 248, 57 Am. Dec. 420; S. C. 21 N. J. L. 714; 23 N. J. L. 590; *Parsons v. Pettengill*, 11 Allen 507; *Taylor v. Plymouth*, 8 Met. 462; *White v. City Council of Charleston*, 2 Hill S. C. 571; *Field v. Des Moines*, 39 Ia. 575, 18 Am. Rep. 46; *Bowditch v. Boston*, 101 U. S. 16; *Town of Dawson v. Katter*, 48 Ga. 133. For a construction of the New York statute as to goods in buildings destroyed, see *Mayor etc. of New York v. Stone*, 20 Wend. 139.

³³In *American Print Works v. Lawrence*, 21 N. J. L. 248, 258, 57 Am. Dec. 420, Green, C. J., says: "I am of opinion, therefore, that the destruction of buildings to prevent the spread of a conflagration, is not

the taking of property for public use within the meaning of the constitution. Nor is the principle altered by the fact that the destruction in the present instance was committed under legislative sanction. The right of destruction existed prior to the enactment. The statute created no new power. It conferred no new right. It merely converted a right of necessity into a legal right. It regulated the mode in which a previously existing power should be exercised." See also S. C. 23 N. J. L. 590; *Russell v. Mayor etc. of New York*, 2 Denio 461; *Field v. Des Moines*, 39 Ia. 575; *Keller v. Corpus Christi*, 50 Tex. 614; *Bowditch v. City of Boston*, 4 Clifford 323. Compare *Hale v. Lawrence*, 21 N. J. L. 714.

³⁴"The right of eminent domain is a public right, it arises from the laws of society, and is vested in the State or its grantee, acting under the right and power of the State, and is the right to take or destroy private property for the use or benefit of the State, or of those acting under and for it. The right of necessity arises under the law of nature; it is older than the laws of society or society itself. It is the right of self-defense, of self-preservation, whether applied to persons or to property. It is a private right vested in every individual, and with which the rights of the State or State necessity has nothing to do." Per Randolph, J., in *American Print Works v. Lawrence*, 23 N. J. L. at 615; S. C. 21 N. J. L. at p. 257.

§ 8. **Distinguished from the war power.** The taking, injuring and destruction of property in time of war, is clearly allied to the injury and destruction of property referred to in the last section. The war power is founded on necessity. It is exercised by the State and its authorized agents, not by individuals acting independently and upon their own authority.³⁵ According to the laws of war, private property in the enemy's country, whether belonging to friend or foe, useful to the enemy for attack, or defense, or subsistence, may be rightfully taken or destroyed.³⁶ The owners of property injured, or destroyed, in the actual operations of war, in battle, in the movement of troops, in the construction of works of attack or defense, are without remedy.³⁷ So of property wantonly destroyed by troops. The destruction of property to prevent its falling into the hands of the enemy falls under the same power.³⁸ In such cases the officer acts at his peril and upon his own responsibility. If his judgment was a reasonable one, in view of the circumstances as they appeared to him at the time, and the information he had a right to rely upon, the act is justifiable, and the loss is the owner's misfortune. If the officer's action was not justified as above explained, he is personally responsible.³⁹ It is in no event an exercise of the power of eminent domain. There is not wanting, however, some authority for a contrary view.⁴⁰ Where the property of a citizen is impressed into the

³⁵See *Beck v. Ingram*, 1 Bush (Ky.) 355.

³⁶*Bell v. Louisville & Nashville R. R. Co.*, 1 Bush (Ky.) 404; see 13 Am. Law Reg. N. S. 275. "For the purposes of capture, property found in enemy territory is enemy property, without regard to the status of the owner. In war, all residents of enemy country are enemies." *Lamar v. Browne*, 92 U. S. 187, 194.

³⁷*Bell v. Louisville & Nashville R. R. Co.*, 1 Bush (Ky.) 404; see article in 13 Am. Law Reg. N. S. 337.

³⁸*Respublica v. Sparhawk*, 1 Dall. 357; *Ford v. Surget*, 46 Miss. 130; Article 13 Am. Law Reg. N. S. 401.

³⁹*Mitchell v. Harmony*, 13 How. 115; *Farmer v. Lewis*, 1 Bush (Ky.) 66, 89 Am. Dec. 610; *Dills v. Hatch-*

er, 6 Bush (Ky.) 606; *Christian County Court v. Rankin*, 2 Duv. Ky. 502, 87 Am. Dec. 505. And see *Clark v. Mitchell*, 64 Mo. 564; S. C. 69 Mo. 627.

⁴⁰*Grant v. United States*, 1 Ct. of Cl. 41; *Mitchell v. Harmony*, 13 How. 115. But see comments on these cases in 13 Am. Law Reg. 415, note. In *Corbin v. Marsh*, 2 Duv. Ky. 463, and *Hughes v. Todd*, 2 Duv. Ky. 188 the act of Congress providing for the enlistment or drafting of colored persons or slaves, authorizing a compensation of not exceeding \$300 to the loyal owner of any such slave and that such slave should be free, and also providing that the mother, wife and children of the soldier should be free, was held to be unconstitutional, as in violation

service of the State in time of war, which would ordinarily be procured by contract, except for the emergency, there is a taking within the meaning of the constitution, and the owner is entitled to compensation.⁴¹ But if there is a lack of good faith, or of a sufficient emergency, or of proper authority, the person taking the property will be liable.⁴² In case of such impressment of property, the compensation must be fixed by an impartial tribunal, and not arbitrarily by the government.⁴³ Personal property once rightly impressed vests absolutely in the government, and does not revert when the emergency ceases.⁴⁴ It has been held that money and real estate cannot be lawfully impressed.⁴⁵

of the eminent domain clause of the Constitution.

⁴¹Drehman v. Stifel, 41 Mo. 184, 97 Am. Dec. 268; Wallace v. Alvord, 39 Ga. 609; Price v. Poynton, 1 Bush (Ky.) 387.

⁴²Barrow v. Page, 5 Haywood (Tenn.) 97; Tyson v. Rogers, 33 Ga. 473; Jones v. Commonwealth, 1 Bush (Ky.) 34, 89 Am. Dec. 771; Sellards v. Zomes, 5 Bush (Ky.) 90; Brakebill v. Leonard, 40 Ga. 60; Lewis v. McGuire, 3 Bush (Ky.) 202; Hogue v. Penn. 3 Bush (Ky.) 663; Ferguson v. Loar, 5 Bush (Ky.) 689.

⁴³Cox v. Cummings, 33 Ga. 549; Cunningham v. Campbell, 33 Ga. 625.

⁴⁴Taylor v. Nashville & Chattanooga R. R. Co., 6 Cold. 646. *Contra*,

Fryer v. McRae, 8 Porter (Ala.) 187. *And see* Hawkins v. Nelson, 40 Ala. 553, 91 Am. Dec. 492.

⁴⁵White v. Ivey, 34 Ga. 186; Terrell v. Rankin, 2 Bush 453. On the general subject of the section the following cases, arising under the federal captured and abandoned property act, will be found of interest. Harrison v. Myer, 92 U. S. 111; Whitefield v. United States, 92 U. S. 165; Lamar v. Brown, 92 U. S. 187; United States v. Ross, 92 U. S. 281; United States v. Dickelman, 92 U. S. 520; Conrad v. Waples, 96 U. S. 279; Burbank v. Conrad, 96 U. S. 291; Branch v. United States, 100 U. S. 673; Walker v. United States, 106 U. S. 413; Kirk v. Lynd, 106 U. S. 315.

CHAPTER II.

CONSTITUTIONAL PROVISIONS.

§ 9. **In general.** The eminent domain, as we have already seen, is a sovereign power and devolves upon those persons in a State who are clothed with the supreme authority. In the States of the American Union these persons are the people, or, more strictly, that portion of the people invested with the elective franchise. The power of eminent domain has been delegated by the people to the legislative department of the government in the general grant of legislative power.¹ In nearly all the States this grant has been accompanied by an express limitation upon the legislature in the exercise of the power. The ordinary and typical form of this limitation is, that private property shall not be taken for public use without just compensation. The later constitutions, however, display a tendency to amplify and complicate this simple prohibition with special reference to the taking of property by municipal and private corporations, and also with reference to the time and manner of compensation. As these constitutional provisions form the basis of a great multitude of decisions, they have, for convenience of reference and the better understanding of the decided cases, been collated at the end of this chapter. It will be observed that but one State, North Carolina, now remains without a provision on this subject in its organic law.² Other States have been without such a provision, as follows: New York, until 1822; New Jersey, until 1844; Louisiana, until 1845; Maryland, until 1851, and Arkansas, Georgia and South Carolina, until 1868. The pro-

¹"The power itself is an inseparable incident of sovereignty, and its exercise was delegated by the sovereign power to the general assembly, in the general grant of legislative authority." *Geizey v. C. W. & Z. R. R. Co.*, 4 Ohio St. 308, 323; *also Todd v. Austin*, 34 Conn. 78; *ante*, § 3.

²The Constitution of New Hampshire does not expressly require compensation to be made and is virtually without any provision on the subject. *See post*, § 41, and *Opinion of the Justices*, 66 N. H. 629, 33 Atl. 1076. *See also* the Constitution of Virginia, *post*, § 57.

vision in the constitution of Kansas relates only to the taking of rights of way by corporations. The provision first appears in the constitution of Vermont, adopted in 1777. Massachusetts and Pennsylvania follow in 1780 and 1790 respectively. The principal questions which have arisen in construing these constitutional provisions are, first, what constitutes a taking; second, what is a public use, and, third, what is just compensation; and these questions are discussed in the succeeding chapters.

§ 10. The constitutional provision a limitation, not a grant. The constitutional provisions in regard to the eminent domain are limitations upon the power as vested in the legislative department of the State. They are neither to be regarded as declaratory of what the law would be without them, nor as grants of the power in question to the legislature.³ “This power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law, that the right to compensation, is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle.”⁴

³United States v. Jones, 109 U. S. 513, 518; B. & O. R. R. Co. v. P. W. & Ky. R. R. Co., 17 W. Va. 812, 841; Challiss v. A. T. & S. F. R. R. Co., 16 Kan. 117; District of City of Pittsburg, 2 W. & S. 320; Steele v. County Comrs., 83 Ala. 304; People v. Adirondack R. R. Co., 160 N. Y. 225, 237; The Water Works Co. of Indianapolis v. Burkhardt, 41 Ind. 364; Kennebec Water District v. Waterville, 96 Me. 234, 52 Atl. 774; Brown v. Gerald, 100 Me. 351, 360, 61 Atl. 785, 109 Am. St. Rep. 526, 70 L.R.A. 472; State v. District Court, 87 Minn. 146, 91 N. W. 300; Samish Riv. Boom Co. v. Union Boom Co., 32 Wash. 586, 595, 73 Pac. 670; Winona etc. R. R. Co. v. Waldron, 11 Minn. 515, 539, 88 Am. Dec. 100. In the latter case the court says: “The right of eminent domain is not conferred by the constitution; but, if affected at all,

is limited thereby, and only to the extent of the limitation can the citizen obtain any redress.” Again, in Harvey v. Thomas, 10 Watts 63, “The clause by which it is declared that no man’s property shall be taken or applied to public use without the consent of his representatives and without just compensation is a disabling, not an enabling, one, and the right would have existed in full force without it.”

⁴Sinnickson v. Johnson, 17 N. J. L. 129, 145. “The right of eminent domain is limited, not conferred by the Constitution.” Gt. Western Nat. Gas & Oil Co. v. Hawkins, 30 Ind. App. 557, 565, 66 N. E. 765, “It exists independent of constitutional mandate, and it existed prior to constitutions.” Lazarus v. Morris, 212 Pa. St. 128, 130, 61 Atl. 815; Stearns v. Barre, 73 Vt. 281, 50 Atl. 1086, 87 Am. St. Rep. 721, 58 L.R.A. 240.

§ 11 (10). States having no constitutional provision. It is an interesting question, whether, in those States whose constitutions contain no provision in regard to taking private property for public use, the legislature is under any restraint whatever in the exercise of the power. But this question has lost most of its practical interest, from the fact that all States except one⁵ now have an express limitation in their organic law touching the exercise of this power. The courts of nearly all the States which are, or have been, without such a limitation, have held that the limitation itself was simply declaratory of certain great and fundamental principles of natural justice and equity which were as binding and obligatory upon the legislature as though expressly incorporated into the written constitution.⁶ The idea,

⁵North Carolina. *See ante*, § 9.

⁶Spencer, J., in *Bradshaw v. Rodgers*, 20 Johns. 103, 1822, speaking of these constitutional provisions, says: "They are declaratory of a great and fundamental principle of government; and any law violating that principle must be deemed a nullity, as it is against natural right and justice." S. C. 20 Johns. 735, 1823. In *Harness v. The Chesapeake & Ohio Canal Co.*, 1 Md. Ch. 248, 1848, it was said that, independent of constitutions, "there was a principle of right and justice inherent in the nature and spirit of the social compact, which restrained and set bounds to the authority of the legislature, and beyond which it could not be allowed to pass—that principle which protects the life, liberty and property of the citizen from violation in the unjust exercise of legislative power." *And see Martin et al. ex parte*, 13 Ark. 198; *Cairo & Fulton R. R. Co. v. Turner*, 31 Ark. 494; *Doe v. Georgia R. R. & B. Co.*, 1 Ga. 524; *Young v. McKenzie*, 3 Ga. 31; *Parham v. Justices etc. of Decatur County*, 9 Ga. 341; *Loughbridge v. Harris*, 42 Ga. 501; *Sinnickson v. Johnson*, 17 N. J. L. 129; *Matter of Highway*, 22 N. J.

L. 293; *The Central R. R. Co. v. Hetfield*, 29 N. J. L. 206, 1861; *Den v. Morris Canal Co.*, 24 N. J. L. 587, 1854; *Petition of Mt. Washington Road Co.*, 35 N. H. 134, 141, 142; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 160, 82 Am. Dec. 201; *State v. Franklin Falls Co.*, 49 N. H. 240, 251, 6 Am. Rep. 513; *Piscataqua Bridge Co. v. N. H. Bridge Co.*, 7 N. H. 35, 66, 70; *Opinion of the Justices*, 66 N. H. 629, 33 Atl. Rep. 1076; *Polly v. Saratoga etc. R. R. Co.*, 9 Barb. 449; *Matter of Tuthill*, 163 N. Y. 133, 57 N. E. 303, 79 Am. St. Rep. 574, 49 L.R.A. 781; *Johnston v. Rankin*, 70 N. C. 550; *State v. Lyle*, 100 N. C. 497, 6 S. E. 379; *Phillips v. Postal Tel. Cable Co.*, 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868; *Southport etc. R. R. Co. v. Platt Land*, 133 N. C. 266, 45 S. E. 589; *Cosard v. Kanawha Hardwood Co.*, 139 N. C. 283, 51 S. E. 932, 111 Am. St. Rep. 779, 1 L.R.A.(N.S.) 969. *Contra*, *Lindsay v. Commissioners etc.* 2 Bay (S. C.) 38, 1796; *Stark v. McGown*, 1 Nott & McCord (S. C.) 387, 1818; *Patrick v. Commissioners etc.* 4 McCord (S. C.) 541, 1828; *Maniquinet v. Commissioners of Roads*, 4 McCord (S. C.) 541, 1828; *State v.*

however, that the legislature of a State is restrained by limitations which are not to be found in the written constitution, is not founded upon any sound legal or philosophical principles. The later authorities and the better reasoning are against such a view. The subject has been fully treated by Mr. Sedgwick and Mr. Cooley in their admirable treatises on constitutional law.⁷ In some of the States, which have or have had, no provision on the subject, the right to compensation has been worked out through other provisions of the constitution, such as the one that no person shall be deprived of life, liberty or property without due process of law.⁸ The latter is undoubtedly the correct view of the matter, for a law which authorizes the taking of private property without compensation or for other than a public purpose, cannot be considered as due process of law in a free government.⁹

§ 12 (11). The provision in the federal Constitution. The provision in the Constitution of the United States, that private property shall not be taken for public use without just compensation, applies only to the operations of the federal government and is not a limitation upon the power of the States.¹⁰

Dawson, 3 Hill (S. C.) 101, 1836; Ex parte Withers, 3 Brevard (S. C.) 83; Raleigh & Gaston R. R. Co. v. Davis, 2 Dev. & B. L. (N. C.) 451, 1837.

⁷Sedgwick on Const. & Stat. Law, pp. 123-132, 150-159; Cooley, Const. Lim. pp. 85, 86, 172, 173. See also Slack v. Maysville & Lexington R. R. Co., 13 B. Mon. 1, 22; City of Logansport v. Seybold, 59 Ind. 225; Churchman v. Martin, 54 Ind. 380; Quick v. White Water Township, 7 Ind. 570; Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. 1062, 15 L.R.A. 505; Philadelphia v. Field, 58 Pa. St. 320; People v. Toynbee, 2 Parker (N. Y.) 490; People v. Gallagher, 4 Mich. 244; People v. Marshall, 6 Ill. 672; Forsythe v. City of Hammond, 68 Fed. 774.

⁸Martin ex parte, 13 Ark. 198; Harness v. Chesapeake & Ohio Canal Co., 1 Md. Ch. 248; Parham v.

Justices etc. of Decatur County, 9 Ga. 341; Norwood v. Baker, 172 U. S. 269. See especially Staton v. Norfolk, R. R. Co., 111 N. C. 278, 16 S. E. 181, 17 L.R.A. 838. But a different conclusion is reached in the South Carolina cases cited *ante*, n 46.

⁹See post, § 315.

¹⁰Barron v. Mayor etc. of Baltimore, 7 Peters, 243; Withers v. Buckley, 20 How. 84; Pumpelly v. Green Bay Co., 13 Wall. 166, 176; Thorington v. Montgomery, 147 U. S. 490, 13 S. C. 394; Livingston v. Mayor etc. of New York, 8 Wend. 85; Cairo and Fulton R. R. Co. v. Turner, 31 Ark. 494; Raleigh & Gaston R. R. Co. v. Davis, 2 Dev. & B. Law (N. C.) 451; Johnston v. Rankin, 70 N. C. 550; Concord R. R. Co. v. Greeley, 17 N. H. 47; Martin v. Dix, 52 Miss. 53, 24 Am. Rep. 661; Renthorp v. Bourg, 4 Martin, O. S. (La.) 97; Wilson v. Balti-

The only dissent from this proposition is found in an early case in Georgia;¹¹ but the Supreme Court of that State afterwards modified its views and held in accordance with the text.¹² The provision applies to the territories.¹³

§ 13 (12). Effect of a change in the constitution. A constitution may be revised or amended so as to introduce important changes regarding the power of eminent domain. The question may arise as to the effect of such changes upon existing laws, pending proceedings or works in progress. The solution of such questions pertains more properly to works on constitutional law;¹⁴ but a brief discussion of them will not be out of place in this connection. Much must depend upon the facts of each case, but in general it may be said that provisions intended to secure the citizen additional rights and safeguards against the exercise of the power in question, or affecting the remedy or procedure only, will be deemed to go into operation immediately and without the aid of legislation, unless the operation of such provisions is expressly made dependent upon laws to be afterwards enacted. Thus where, by a change in the constitution, the compensation or damages for property taken is required to be ascertained in a particular mode, all laws inconsistent therewith are at once abrogated;¹⁵ and proceedings under such laws thereafter are void and of no effect even collaterally.¹⁶ But a party by participating in proceedings under such a statute and invoking the benefit thereof will thereafter be estopped to assert its

more & P. R. R. Co., 5 Del. Ch. 524; Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 521, 41 S. E. 1022, 89 Am. St. Rep. 868.

¹¹Doe v. Georgia R. R. & B. Co., 1 Ga. 524.

¹²Young v. McKenzie, 3 Ga. 31; Parham v. Justices of Decatur County, 9 Ga. 341.

¹³Territory of Utah v. Daniels, 6 Utah, 288, 22 Pac. 159.

¹⁴See Cooley, Const. Lim. chap. 4.

¹⁵Kine v. Defenbaugh, 64 Ill. 291; Mitchell v. Illinois etc. Co., 68 Ill. 286; Householder v. City of Kansas, 83 Mo. 488; St Joseph & I. R. R. Co. v. Cudmore, 103 Mo. 634, 15 S. W. 535; People v. Supervisors, 12

Barb. 446; Lamb v. Lane, 4 Ohio St. 167. *But see* as to proceedings pending on appeal, People v. Supervisors, 3 Barb. 332. In the following case the right to go on with pending proceedings was held to be secured by a saving clause. Peoria etc. R. R. Co. v. Birbett, 62 Ill. 332.

¹⁶Mitchell v. Illinois etc. Co., 68 Ill. 286; People v. Kimball, 4 Mich. 95; Perrysburg Canal and Hydraulic Co. v. Fitzgerald, 10 Ohio St. 513; Whitehead v. The Arkansas Central R. R. Co., 28 Ark. 460; Weber v. County of Santa Clara, 59 Cal. 265; Trahern v. San Joaquin Co., 59 Cal. 320.

invalidity.¹⁷ A constitution will not be so construed as to have a retroactive effect.¹⁸

The constitution of Arkansas of 1868 provided that the compensation for a right of way appropriated by a corporation should be ascertained by a jury of twelve men in a court of record as should be prescribed by law.¹⁹ The Cairo & Fulton R. R. Co. was organized under an act of 1855 which provided for the assessment of damages by five commissioners on the application of either party. In 1874 Trout filed his petition against the said company under the act of 1855 for an assessment of damages. An act was passed in 1873 applicable to all railroads, which provided a mode of assessing damages in accordance with the constitution, but it gave the initiative to the railroad company alone. The petitioners' land was entered upon before the passage of this act. The court held that the constitution did not execute itself, but plainly indicated that it was to be carried into effect only by legislation. It was further held that as the petitioner's right accrued before the act of 1873 was passed, he could proceed under the act in force at the time his right accrued.²⁰ Where by the adoption of a new constitution compensation is required to be made for property injured or damaged as well as for property taken, it has been held that it did not apply to damages occasioned by works which had been ordered and contracted for before the new constitution went into effect.²¹ But where an ordinance was passed for a change of grade before the new constitution went into effect, and the change was not made until afterwards, it was held that the new constitution applied and that the municipality would be liable for damages to abutting property thereby occasioned.²² The right to impose

¹⁷Minneapolis etc. R. R. Co. v. Nester, 3 N. D. 480, 57 N. W. 510.

¹⁸Toledo etc. R. R. Co. v. Pence, 68 Ill. 524.

¹⁹Art. V, Sec. 48. *See post*, § 17.

²⁰Cairo & Fulton R. R. Co. v. Trout, 32 Ark. 17. In *Supervisors of Dodridge County v. Stout*, 9 W. Va. 703, it was held that where, pending proceedings to condemn, a new constitution went into effect requiring compensation to be ascertained in such manner as should be prescribed by general law, provided,

that either party should have the right to a jury of twelve freeholders, the existing laws remained in force until a general law was passed as contemplated by the constitution.

²¹Chicago v. Rumsey, 87 Ill. 348.

²²City of Bloomington v. Pollock, 141 Ill. 346, 31 N. E. 146; S. C. 38 Ill. App. 133. *Compare Stroudsburg Borough v. Stroudsburg Pass. R. R. Co.*, 12 Pa. Co. Ct. 124; *St. Louis v. Lang*, 131 Mo. 412, 33 S. W. 54; *Ogden v. Philadelphia*, 143 Pa. St. 430, 22 Atl. Rep. 694.

upon existing corporations, by an amendment to the constitution or otherwise, a liability for consequential damages, where none existed before, is considered in a future section.²³

§ 14 (13). The provisions apply only to the power of eminent domain. As we have already seen, private property may be taken or affected for public use, not only under the power of eminent domain, but also under other powers vested in the State, as the power of taxation, the police power and the war power.²⁴ Some courts have held that the constitutional provision in question is a limitation upon the exercise of all these powers.²⁵ But the better view undoubtedly is that it applies only to the power of eminent domain.²⁶ The just compensation re-

²³Post, § 379. See Pennsylvania R. R. Co. v. Miller, 132 U. S. 75, 10 S. C. Rep. 34, 1 Am. R. R. & Corp. Rep. 15; Prather v. Jeffersonville etc. R. R. Co., 52 Ind. 16; Den v. Morris Canal etc. Co., 24 N. J. L. 587; Duncan v. Pennsylvania R. R. Co., 94 Pa. St. 435; Philadelphia v. Wright, 100 Pa. St. 235; McElroy v. Kansas City, 21 Fed. R. 257.

²⁴Ante, Chap. I.

²⁵In Macon v. Patty, 57 Miss. 378, 399, 34 Am. Rep. 451, the court says: "We must apply this provision in all cases, notwithstanding it has been said that it is only applicable to property taken under the right of eminent domain, which right does not extend to the taking of money. We agree that the most important use of this provision is to restrain the right of eminent domain; but that is not its whole force. For the prohibition is general and absolute: 'Private property shall not be taken for public use, except upon due compensation,' is the language of the constitution. The prohibition is not as to the methods in which the appropriation may be made, but is a denial of the power to make it at all by any method, under any circumstances, and under any pretence whatever, unless compensation is

first made. It was intended to secure the absolute inviolability of private property of all kinds against any and all invasions under public authority. If the right of eminent domain does not extend to the taking of money, this is no reason why that kind of property should not come within the protection of this clause of the constitution; but, on the contrary, the absence of the right is but an additional safeguard for its protection. It is true that money exacted from the citizen, in the way of lawful and constitutional taxation, is not within the meaning of this clause, because it is taken in discharge of a debt to the State or public. But if, under the guise of taxation, money is attempted to be exacted beyond the limits of the taxing power, it is a violation of the security afforded by this clause of the constitution." See also Cheaney v. Hooser, 9 B. Mon. 330, 341; Cain v. City of Omaha, 42 Neb. 120, 60 N. W. Rep. 368.

²⁶"It is only the taking of specific pieces of property of an individual that is prohibited by the constitutional provision mentioned." City of Logansport v. Seybold, 59 Ind. 225, 228; City of Aurora v. West, 9 Ind. 74, 83.

quired to be made is an equivalent, either in money, or in special benefits to particular property.²⁷ In no case is the individual compensated in this manner for money exacted for taxation or loss occasioned by an exercise of police power. In short, these powers would be rendered nugatory, if such compensation was obligatory in case of their exercise. It is enough that a tax or police regulation promotes, or is calculated or intended to promote, the general welfare. The individual receives his only compensation by sharing in the common benefit. But, if the constitutional provision for just compensation is satisfied by a participation in the general welfare, then its efficacy to protect the individual against the power of eminent domain is entirely gone. As the provision must have a uniform interpretation and cannot be made to mean one thing at one time and another thing at another time, one thing when applied to the power of eminent domain and another when applied to taxation or police regulation, we think it is clear that its application must be confined to the former power. It does serve to keep the other powers within their legitimate bounds, but within those bounds it has no application.²⁸ These conclusions are enforced by considering those provisions which require the "just compensation" to be first made. It can hardly be contended that this modification changes entirely the scope and purposes of the provision. But it is evident that it would absolutely preclude the exercise of the power of taxation or police regulation, if applied thereto; for it is impossible to receive the benefit of a tax until it has been collected and expended, or of a police regulation until it has been made and enforced.

§ 15 (14). Constitutional provisions.—United States.
Art. 5. Amendments of 1791. * * * "nor shall private property be taken for public use, without just compensation."

Ordinance of 1787. Sec. 9, Art. 2. "No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land; and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same."

²⁷We do not mean at this point to give a construction of the words in question. All we mean is that the least effect courts have ever given to them, is that the "just compensa-

tion" required to be made may consist of special benefits. See post §§ 687, 693.

²⁸Sce post, §§ 242-249.

§ 16 (15). Alabama.

1819. Art. 1, § 13. * * * "nor shall any person's property be taken or applied to public use, unless just compensation be made therefor."

1865. Art. 1, § 25. "That private property shall not be taken or applied for public use, unless just compensation be made therefor; nor shall private property be taken for private use, or for the use of corporations other than municipal, without the consent of the owner; provided, however, that laws may be made securing to persons or corporations the right of way over the lands of other persons or corporations, and for works of internal improvement, the right to establish depots, stations and turn-outs; but just compensation shall, in such cases be first made to the owner."

1868. Art. 1, § 25. The same provision is continued, except for "other persons or corporations" read "either persons or corporations," and in the last line in place of "such cases" read "all cases."

Art. 13, § 5. "No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or secured by a deposit of money to the owner, irrespective of any benefit from any improvements proposed by such corporation; which compensation shall be ascertained by a jury of twelve men in a court of record, as shall be prescribed by law."

1875. Art. 1, § 24. "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use the same as individuals. But private property shall not be taken for or applied to public use, unless just compensation be made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, that the general assembly may, by law, secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; and provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or

any other kind of corporations other than municipal, or for the benefit of any individual or association."

Art. 14, § 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. The general assembly is hereby prohibited from depriving any person from an appeal from any preliminary assessment of damages against any such corporation or individuals, made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury according to law."

1901. § 23. That the exercise of the right of eminent domain shall never be abridged or so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected; but private property shall not be taken for, nor applied to, public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, the legislature may by law secure to persons or corporations the right of way over land of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall in all cases, be first made to the owner; and, provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association."

§ 227. "Any person, firm, association or corporation, who may construct or operate any public utility along or across the public streets of any city, town or village, under any privilege or franchise permitting such construction or operation, shall be liable to abutting proprietors for the actual damage done to the abutting property on account of such construction or operation."

§ 235. "Municipal and other corporations and associations invested with its privilege of taking property for public use,

shall make just compensation, to be ascertained as may be provided by law, 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. The legislature is hereby prohibited from denying the right of appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise, but such appeal shall not deprive those who have obtained the judgment of condemnation from a right of entry, provided the amount of damages assessed shall have been paid into court in money, and a bond shall have been given in not less than double the amount of the damages assessed, with good and sufficient sureties, to pay such damages as the property owner may sustain; and the amount of damages in all cases of appeals shall on the demand, of either party, be determined by a jury according to law."

§ 17 (16). Arkansas.

1836. No provision.

1864. No provision.

1868. Art. 1, § 15. "Private property shall not be taken for public use without just compensation therefor."

Art. 5, § 48. * * * "No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men in a court of record, as shall be prescribed by law."

1874. Art. 2, § 22. "The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated, or damaged for public use without just compensation therefor."

Art. 12, § 9. "No property nor right of way shall be appropriated to the use of any corporations until full compensation therefor shall be first made to the owner in money, or first secured to him by a deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation, shall be ascertained by a jury of twelve men, in a court of competent jurisdiction, as shall be prescribed by law."

§ 11. "Foreign corporations * * * shall not have power to condemn or appropriate private property."

Art. 17, § 9. "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals."

§ 12. "All railroads, which are now or may be hereafter built and operated either in whole or in part, in this State, shall be responsible for all damages to persons and property, under such regulations as may be prescribed by the general assembly."

§ 18 (17). California.

1849. Art. 1, § 8. * * * "nor shall private property be taken for public use without just compensation."

1879. Art. 1, § 14. "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained or paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law."

Art. 12, § 8. "The exercise of the right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals."

Art. 14, § 1. "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law."

§ 19 (18). Colorado.

1876. Art. 2, § 14. "That private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches on or across the land of others, for agricultural, mining, milling, domestic, or sanitary purposes."

§ 15. "That private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required

by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."

Art. 15, § 8. "The right of eminent domain shall never be abridged, nor so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals."

§ 20 (19). Connecticut.

1818. Art. 1, § 11. "The property of no person shall be taken for public use without just compensation therefor."

§ 21 (20). Delaware.

1776. No provision.

1792. Art. 1, § 8 * * * "nor shall any man's property be taken or applied to public use without the consent of his representatives, and without compensation being made."

1831. Art. 1, § 8. Same.

1897. Art. 1, § 8. Same.

§ 22 (21). Florida.

1838. Art. 1, § 14. "That private property shall not be taken or applied to public use unless just compensation be made therefor."

1865. Art. 1, § 14. "That private property shall not be taken or applied to public use, unless just compensation be first made therefor."

1868. Art. 1, § 9. * * * "nor shall private property be taken without just compensation."

1886. Declaration of rights, § 12. * * * "nor shall private property be taken without just compensation."

Art. 16, § 29. "No private property nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by any such corporation or individual, shall be ascertained by a

jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law."

§ 23 (22). Georgia.

1777. No provision.

1789. No provision.

1798. No provision.

1865. Art. 1, § 17. "In cases of necessity, private ways may be granted upon just compensation being first paid; and with this exception private property shall not be taken, save for public use, and then only on just compensation, to be first provided and paid, unless there be a pressing, unforeseen necessity; in which event the general assembly shall make early provision for such compensation."

1868. Art. 1, § 20. "Private ways may be granted upon just compensation being paid by the applicant."

1877. Art. 1, Sec. III, ¶ 1. "In cases of necessity, private ways may be granted upon just compensation being first paid by the applicant. Private property shall not be taken or damaged for public purposes, without just and adequate compensation being first paid."

Art. III, Sec. VII, ¶ 20. "The General Assembly shall not authorize the construction of any street passenger railway within the limits of any incorporated town or city, without the consent of the corporate authorities."

Art. IV, Sec. II, ¶ 2. "The exercise of the right of eminent domain shall never be abridged, nor so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as property of individuals." * * *

§ 24 (22a). Idaho.

1889. Art. 1, § 14. "The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use, for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the State, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the State."

"Private property may be taken for public use, but not until a just compensation, to be ascertained in a manner prescribed by law, shall be paid therefor."

Art. 11, § 8. "The right of eminent domain shall never be abridged, or so construed as to prevent the legislature from taking the property and franchise of incorporated companies and subjecting them to public use, the same as property of individuals."

See also the whole of article 15 as to water rights.

§ 25 (23). Illinois.

1818. Art. 8, § 11. * * * "nor shall any man's property be taken or applied to public use, without the consent of his representatives in the general assembly, nor without just compensation being made to him."

1848. Art. 13, § 11. Same.

1870. Art. 2, § 13. "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it was taken."

Art. 4, § 30. "The general assembly may provide for establishing and opening roads and eartways, connected with a public road, for private or public use."

Art. 11, § 14. "The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking, by the general assembly, of the property and franchises of incorporated companies already organized, and subjecting them to the public necessity the same as of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of the said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right."

Art. 4, § 31, as amended in 1878. "The General Assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes, across the lands of others, and provide for the organization of drainage districts and vest the corporate authorities thereof, with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore

constructed under the laws of this State, by special assessments upon the property benefited thereby.”

§ 26 (24). Indiana.

1816. Art. 1, § 7. “That no man’s particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without a just compensation being made therefor.”

1851. Art. 1, § 21. “No man’s particular serviees shall be demanded without just compensation. No man’s property shall be taken by law without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.”

§ 27 (25). Iowa.

1846. Art. 1, § 18. “Private property shall not be taken for public use without just compensation first being made, or secured, to be paid to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken.”

1857. Art. 1, § 18. Same.

§ 28 (26). Kansas.

1859. Art. 12, § 4. “No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation.”

§ 29 (27). Kentucky.

1792. Art. 12, § 12. * * * “nor shall any man’s property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.”

1799. Art. 10, § 12. Same.

1850. Art. 13, § 14. Same.

1891. § 195. “The Commonwealth, in the exercise of the right of eminent domain, shall have and retain the same powers to take the property and franchises of incorporated companies for public use which it has and retains to take the property of individuals.”

§ 242. Municipal and other corporations and individuals, invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured

or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction. The general assembly shall not deprive any person of an appeal from any preliminary assessment of damages against any other corporation or individual made by commissioners or otherwise; and upon appeal from such preliminary assessment the amount of such damages shall, in all cases, be determined by a jury, according to the course of the common law."

§ 30 (28). Louisiana.

Civil Code, Art. 489. "No one can be divested of his property, unless for some purpose of public utility and on consideration of an equitable and previous indemnity and in a manner previously prescribed by law. By an equitable indemnity in this case is understood, not only a payment for the value of the thing of which the owner is deprived, but a remuneration for the damages which may be caused thereby."

1812. No provision.

1845. Title 6, Art. 109. "Vested rights shall not be divested unless for purposes of public utility, and for adequate compensation previously made."

1852. Title 6, Art. 105. Same.

1864. Title 6, Art. 109. Same.

1868. Title 6, Art. 110. Same, omitting the word previously.

1879. Art. 156. "Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."

1898. Art. 167. Private property shall not be taken nor damaged for public purposes without just and adequate compensation being first paid.

§ 31 (29). Maine.

1819. Art. 1, § 21. "Private property shall not be taken for public use without just compensation, nor unless the public exigencies require it."

§ 32 (30). Maryland.

1776. No provision.

1851. Art. 3, § 46. "The legislature shall enact no law authorizing private property to be taken for public use, without just compensation, as agreed upon between the parties or award-

ed by a jury, being first paid or tendered to the party entitled to such compensation."

1864. Art. 3, § 39. Same.

1867. Art. 3, § 40. Same.

§ 33 (31). Massachusetts.

1780. Part 1st, Art. 10. "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal services or an equivalent when necessary; but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the public of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

§ 34 (32). Michigan.

1835. Art. 1, § 19. "The property of no person shall be taken for public use without just compensation therefor."

1850. Art. 10, § 11. "The board of supervisors of each organized county may provide for laying out highways, constructing bridges, and organizing townships, under such restrictions and limitations as shall be prescribed by law."

Art. 15, § 9. "The property of no person shall be taken by any corporation for public use without compensation being first made or secured, in such manner as may be prescribed by law."

Art. 15, § 15. "Private property shall not be taken for public improvements in cities and villages without the consent of the owner, unless the compensation therefor shall first be determined by a jury of freeholders, and actually paid or secured in the manner provided by law."

Art. 18, § 2. "When private property is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of twelve freeholders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record,

as shall be prescribed by law. Provided, The foregoing provisions shall in no case be construed to apply to the action of commissioners of highways in the official discharge of their duties as highway commissioners." (Proviso added in 1860.)

Art. 18, § 14. "The property of no person shall be taken for public use without just compensation therefor. Private roads may be opened in the manner to be prescribed by law; but in every case the necessities of the road and the amount of all damages to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of proceedings, shall be paid by the person or persons to be benefited."

§ 35 (33). Minnesota.

1857. Art. 1, § 13. "Private property shall not be taken for public use without just compensation therefor, first paid or secured."

Art. 10, § 4. "Lands may be taken for public way, for the purpose of granting to any corporation the franchise of way for public use. In all cases, however, a fair and equitable compensation shall be paid for such land and the damages arising from the taking of the same; but all corporations being common carriers, enjoying the right of way in pursuance to the provisions of this section, shall be bound to carry the mineral, agricultural and other productions or manufactures on equal and reasonable terms."

1896, Art. 1, § 13, (as amended). Private property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured.

§ 36 (34). Mississippi.

1817. Art. 1, § 13. * * * "nor shall any person's property be taken or applied to public use, without the consent of his representatives, and without just compensation being made therefor."

1832. Art. 1, § 13. * * * "nor shall any person's property be taken or applied to public use without the consent of the legislature, and without just compensation being first made therefor."

1868. Art. 1, § 10. "Private property shall not be taken for public use except upon due compensation first being made to the owner or owners thereof in a manner to be provided by law."

1890. Art. 3, § 17. "Private property shall not be taken or

damaged for public use except upon due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and as such determined without regard to legislative assertion that the use is public."

Art. 7, § 190. "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the legislature from taking the property and franchises of incorporated companies and subjecting them to public use."

Art. 11, § 233. "The levee boards shall have and are hereby granted authority and full power to appropriate private property in their respective districts for the purpose of constructing, maintaining and repairing levees therein; and when any owner of land, or any other person interested therein, shall object to the location or building of the levee thereon, or shall claim compensation for any land that may be taken, or for any damages he may sustain in consequence thereof, the president, or other proper officer or agent of such levee board, or owner of such land, or other person interested therein, may forthwith apply for an assessment of damages, to which said person claiming the same may be entitled."

§ 37 (35). Missouri.

1820. Art. 13, § 7. * * * "and that no private property ought to be taken or applied to public use without just compensation."

1865. Art. 1, § 16. Same.

1875. Art. 2, § 20. "That no private property can be taken for private use with or without compensation, unless by the consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in such manner as may be prescribed by law; and that whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public."

Art. 2, § 21. "That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as

may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without the consent of the owner thereof shall remain in such owner, subject to the use for which it is taken."

Art. 12, § 4. "The exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking, by the general assembly, of the property and franchises of incorporated companies already organized, or that may be hereafter organized, and subjecting them to the public use, the same as that of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when in the exercise of said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right."

§ 38 (35a). Montana.

1889. Art. 3, § 14. "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner."

Art. 3, § 15. "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, distribution or other beneficial use and the right of way over the lands of others, for all ditches, drains, flumes, canals and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be a public use. Private roads may be opened in the manner to be prescribed by law, but in every case the necessity of the road, and the amount of all damages to be sustained by the opening thereof, shall be first determined by a jury, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited."

Art. 15, § 9. "The right of eminent domain shall never be abridged, nor so construed as to prevent the legislative assembly from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals."

§ 39 (36). Nebraska.

1867. Art. 1, § 13. "The property of no person shall be taken for public use without just compensation therefor."

Art. 2, § 3. "The people of the State, in their right of

sovereignty, are declared to possess the ultimate property in and to all lands within the jurisdiction of the State."

1875. Art. 1, § 21. "The property of no person shall be taken or damaged for public use without just compensation therefor."

Art. 11, § 6. "The exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking by the legislature of the property and franchises of incorporated companies already organized or hereafter to be organized, and subjecting them to the public necessity, the same as of individuals."

Art. 11, § 8. "No railroad corporation organized under the laws of any other State, or of the United States, and doing business in this State, shall be entitled to exercise the right of eminent domain, or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this State."

§ 40 (37). Nevada.

1864. Art. 1, § 8. * * * "nor shall private property be taken for public use without just compensation having been first made or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall afterwards be made."

Art. 8, § 7. "No right of way shall be appropriated to the use of any corporation until full compensation be first made or secured therefor."

§ 41 (38). New Hampshire.

1776. No provision.

1784. Part I, Art. 12. * * * "but no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people."

1792. Part I, Art. 12. Same.

§ 42 (39). New Jersey.

1776. No provision.

1844. Art. 1, § 16. "Private property shall not be taken for public use, without just compensation; but land may be taken for public highways, as heretofore, until the Legislature shall direct compensation to be made."

Art. 4, § 7, cl. 9. "Individuals or private corporations shall

not be authorized to take private property for public use without just compensation first made to the owner."

§ 43 (40). New York.

1777. No provision.

1821. Art. 7, § 7. * * * "nor shall private property be taken for public use without just compensation."

1846. Art. 1, § 6. Same.

Art. 1, § 7. "When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity for the road, and the amount of all damages to be sustained by the opening thereof, shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited."

Art. 1, § 11. "The people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State."

1894. Same, with the following added to Section 7: General laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dykes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for such purposes.

§ 44 (41) North Carolina.

1776. No provision.

1868. No provision.

1876. No provision.

§ 45 (41a). North Dakota.

1889. Art. 1, § 14. "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived."

Art. 7, § 134. "The exercise of the right of eminent domain shall never be abridged, or so construed as to prevent the legislative assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals."

§ 46 (42). Ohio.

1802. Art. 8, § 4. "Private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner."

1851. Art. 1, § 19. "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner in money, and in all other cases where private property shall be taken for public use a compensation therefor shall be first made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

Art. 13, § 5. "No right of way shall be appropriated to the use of any corporation, until full compensation therefor shall be first made in money, or first secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law."

§ 47. Oklahoma.

1907. Sec. 32. No private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner, except for private ways of necessity, or for drains and ditches across the lands of others for agricultural, mining, or sanitary purpose, in such manner as may be prescribed by law.

Sec. 33. Private property shall not be taken or damaged for public use without just compensation. Such compensation, irrespective of any benefit from any improvement proposed, shall be ascertained by a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law. The commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all parties interested. The commissioners shall be selected from the regular

jury list of names prepared and made as the legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation. The fee of the land taken by common carriers for right of way, without the consent of the owner, shall remain in such owner subject only to the use for which it is taken. In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question."

§ 48 (43). Oregon.

1857. Art. 1, § 19. "Private property shall not be taken for public use, nor the particular services of any man be demanded without just compensation, nor except in case of the State, without such compensation first assessed and tendered."

Art. 11, § 4. "No person's property shall be taken by any corporation under authority of law, without compensation being first made or secured, in such manner as may be prescribed by law."

§ 49 (44). Pennsylvania.

1776. Art. 8. * * * "but no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives."

1790. Art. 9, § 10. * * * "nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being made."

1838. Art. 7, § 4. "The legislature shall not invest any corporate body or individual with the privilege of taking private property for public use, without requiring such corporation or individual to make compensation to the owners of said property, or give adequate security therefor, before such property shall be taken."

Art. 9, § 10. Same as in 1790.

1874. Art. 1, § 10. * * * "nor shall private property be taken or applied to public use without authority of law, and without just compensation being first made or secured."

Art. 16, § 3. "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals."

§ 8. "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed, by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction. The general assembly is hereby prohibited from depriving any person from an appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury according to the course of the common law."

§ 50 (45). Rhode Island.

1842. Art. 1, § 16. "Private property shall not be taken for public uses, without just compensation."

§ 51 (46). South Carolina.

1776. No provision.

1778. No provision.

1790. No provision.

1865. No provision.

1868. Art. 1, § 23. "Private property shall not be taken or applied for public use, or for the use of corporations, or for private use, without the consent of the owner or a just compensation being made therefor: Provided, however, that laws may be made securing to persons or corporations the right of way over the lands of either persons or corporations, and for works of internal improvement, the right to establish depots, stations, turnouts, etc.; but a just compensation shall, in all cases, be first made to the owner."

Art. 6, § 3. "The people of the State are declared to possess the ultimate property in and to all lands within the jurisdiction of the State."

Art. 12, § 3. "No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a

jury of twelve men, in a court of record, as shall be prescribed by law."

1895. Art. 1, § 17. "Private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being made therefor."

Art. 9, § 20. No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner or secured by a deposit of money, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

Art. 14, § 3. The people of the State are declared to possess the ultimate property in and to all lands within the jurisdiction of the state.

§ 52 (46a). South Dakota.

1889. Art. 6, § 13. "Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained and before possession is taken. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken."

Art. 17, § 4. "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the legislature from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals."

Art. 17, § 18. "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works or improvements, which compensation shall be paid or secured before such taking, injury or destruction. The legislature is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise, and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury as in other civil cases."

§ 53 (47). Tennessee.

1796. Art. 11, § 21. "That no man's particular services shall be demanded or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor."

1834. Art. 1, § 21. Same.

1870. Art. 1, § 21. Same.

§ 54 (48). Texas.

1836. Republic of Texas, Declaration of Rights, 13th. "No person's particular services shall be demanded, nor property taken or applied to public use, unless by the consent of himself or his representatives, without just compensation being made therefor according to law."

1845. State of Texas, Art. 1, § 14. "No person's property shall be taken or applied to public use, without adequate compensation being made, unless by the consent of such person."

1866. Art. 1, § 14. Same.

1868. Art. 1, § 14. Same.

1876. Art. 1, § 17. "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured, by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the legislature or created under its authority shall be subject to the control thereof."

§ 55 (50a). Utah.

1895. Art. 1, § 22. "Private property shall not be taken or damaged for public use without just compensation."

Art. 12, § 11. "The exercise of the right of eminent domain shall never be so abridged or construed, as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals.

§ 56 (49). Vermont.

1777. Chap. 1, § 2. "That private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."

1786. Chap. 1, § 2. Same.

1793. Chap. 1, § 2. Same, except for "any particular man's property" read "any person's property."

§ 57 (50). Virginia.

1776. Bill of Rights, § 6. * * * "that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected."

1850. Bill of Rights, § 6. Same.

1870. Art. 1, § 8. Same.

1902. Art. 1, § 6. That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or damaged in, their property for public uses, without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good.

Art. 4, § 58. It (the general assembly) shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation.

Art. 12, § 159. The exercise of the right of eminent domain shall never be abridged, nor so construed as to prevent the general assembly from taking the property and franchises of corporations and subjecting them to public use, the same as the property of individuals.

§ 58 (50a). Washington.

Art. 1, § 16. "Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes. No private property shall be taken or damaged for public or private use, without just compensation having been first made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases, in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property

for a use alleged to be public, the question whether the contemplated use be really public, shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."

Art. 12, § 10. "The exercise of the right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals."

Art. 22, § 1. "The use of the waters of this State for irrigation, mining and manufacturing purposes shall be deemed a public use."

§ 59 (51). West Virginia.

1861-3. Art. 2, § 6. "Private property shall not be taken for public use without just compensation."

1872. Art. 3, § 9. "Private property shall not be taken or damaged for public use without just compensation; nor shall the same be taken by any company incorporated for the purposes of internal improvement until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporations, the compensation to the owner shall be ascertained in such manner as may be prescribed by general law: Provided, that when required by either of the parties such compensation shall be ascertained by an impartial jury of twelve freeholders."

Art. 11, § 12. "The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking, by the legislature, of the property and franchises of incorporated companies already organized, and subjecting them to the public use, the same as of individuals."

§ 60 (52). Wisconsin.

1848. Art. 1, § 13. "The property of no person shall be taken for public use without just compensation therefor."

Art. 9, § 3. "The people of this State, in their right of sovereignty, are declared to possess the ultimate property in and to all lands within the jurisdiction of the State."

Art. 11, § 2. "No municipal corporation shall take private property for public use against the consent of the owner, without the necessity thereof being first established by the verdict of a jury."

§ 61 (52a). Wyoming.

Art. 1, § 32. "Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes, or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without due compensation."

Art. 1, § 32. "Private property shall not be taken or damaged for public or private use without just compensation."

Art. 8, § 1. "The water of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the State, are hereby declared to be the property of the State."

§§ 2 to 5 of the same article provide for the control and utilization of such waters.

Art. 10, § 9. "The right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies and subjecting them to the public use the same as the property of individuals."

CHAPTER III.

WHAT CONSTITUTES A TAKING; GENERAL PRINCIPLES.

§ 62 (53). **Statement of the question.** The constitutional limitations upon the power of eminent domain, which have been considered in the last chapter, though seemingly plain and definite, nevertheless contain three important ambiguities. These are found in the word "taken" and in the phrases "public use" and "just compensation." The first of these, or what constitutes a *taking* of property, within the meaning of the constitution, will form the subject of inquiry in the present and succeeding chapters. In regard to personal property, no question can ordinarily arise. It is seldom necessary to appropriate it, but if appropriated, it is *taken*; if not appropriated, it can be removed beyond the influence of any particular improvement and so escape the deterioration or injury it might otherwise sustain.¹ Nor does any question arise in regard to real property when some legal estate or interest therein is acquired, or a physical appropriation made. But it frequently happens when land has been taken for some public purpose, that the use of the land for that purpose, or the adaptation of the land for such use, may occasion damage to adjacent property, the title and possession of which remain wholly unaffected. Such damage may consist of a real structural or physical injury to the property, of an interference with certain rights appurtenant thereto, or enjoyed in connection therewith, or of a mere deterioration in value. Do such damages, whether structural or otherwise, come within the purview of the constitution? Are they, in any case, a *taking* for which compensation must be made?

§ 63 (54). **What is property?** In determining the question of what constitutes a *taking* of property, it is important to have at the outset, a clear understanding of what *property* really is.

¹The constitution protects personality as fully as real estate. *Teter v. W. Va. Cent. & P. R. Co.*, 35 W. Va. 433, 14 S. E. 146.

The term is applied with many different meanings.² "Sometimes," says Austin, "it is taken in a loose and vulgar acceptation to denote not the right of property or *dominium*, but the subject of such a right; as where a horse or piece of land is called my property."³ A little reflection, however, will suffice to convince any one that property is not the corporeal thing itself of which it is predicated, but certain rights in or over the thing. Land undergoes no corporeal change by the mere fact of being reduced to the dominion and ownership of man. An animal *feræ naturæ* may be precisely the same before and after capture, but in his former state no one would speak of him as property.⁴ We must, therefore, look beyond the thing itself, beyond the mere corporeal object, for the true idea of property. Property may be defined as certain rights in things which pertain to persons and which are created and sanctioned by law.⁵ These rights are the right of user, the right of exclusion and the right of disposition.⁶ These rights are not pos-

²At the close of his forty-seventh lecture, Mr. Austin enumerates some of the "various meanings of the very ambiguous word property." 2 Austin's Jurisprudence, § 1051.

³Austin's Jur., § 1051.

⁴Animals *feræ naturæ* are not property until reduced to possession. Ex parte Fritz, 86 Miss. 210, 38 So. 722, 109 Am. St. Rep. 700.

⁵We do not mean to be understood as announcing the doctrine that property was originally created by law. Property and the laws of property grew up together out of a primitive condition of things in which neither existed. See Laveleye's Primitive Property, Morgan's Ancient Society, and Works of Sir Henry Maine. What we mean to assert is that now property is exactly what the law makes it.

⁶"The integral or entire right of property," says Benthan, "includes four particulars: 1. Right of occupation. 2. Right of excluding others. 3. Right of disposition, or the right of transferring the integral right to other persons. 4. Right of

transmission, in virtue of which the integral right is often transmitted after the death of the proprietor, without any disposition on his part to those in whose possession he would have wished to place it."³ 3 Benthan's Works, ed. 1843, Edinburgh, p. 182. The same author also says: "Property is entirely the creature of the law. * * * There is no form, or color, or visible trace, by which it is possible to express the relation which constitutes property. It belongs not to physics, but to metaphysics; it is altogether a creature of the mind. * * * I can reckon upon the enjoyment of that which I regard as my own, only according to the promise of the law, which guarantees it to me. It is the law alone which allows me to forget my natural weakness; it is from the law alone that I can enclose a field and give myself to its cultivation, in the distant hope of the harvest." Principles of the Civil Code, chap. viii. Works, vol. 1, p. 308. "Property signifies the right or interest which one has in land or chattels.

sessed in an absolute degree, but are limited. The right of user is limited by those regulations which are enacted for the general good and by those restraints which are imposed by the common law under the maxim *sic utere tuo ut alienum non laedas*. It may also be limited in various ways by contract and testamentary dispositions. The right of exclusion must yield to the requirements of legal process and to the law of necessity. The right of disposition may be limited and regulated in the same

In this sense it is used by the learned and unlearned, by men of all ranks and conditions. We find it so defined in dictionaries, and so understood by the best authors." Tilghman, C. J., in Morrison v. Semple, 6 Binn. (Pa.) 94, 98, 1813. This definition is approved by the court in Jackson v. Housel, 17 Johns. 281, 283, 1820, and Spencer, C. J., in that case adds the following: "Property is defined to be the highest right a man can have to a thing; being used for that right which one hath to lands or tenements, goods or chattels, which no way depend on another man's courtesy." "Property itself in a legal sense is nothing more than the exclusive right 'of possessing, enjoying and disposing of a thing,' which, of course, includes the use of a thing." Chicago & Western Indiana R. R. Co. v. Englewood Connecting Ry. Co., 115 Ill. 375, 385, 56 Am. Rep. 173. "Property, in its broader and more appropriate sense, is not alone the chattel or land itself, but the right to freely possess, use and alienate the same; and many things are considered property which have no tangible existence, but which are necessary to the satisfactory use and enjoyment of that which is tangible." City of Denver v. Bayer, 7 Colo. 113. "Sometimes the term is applied to the thing itself, as to a horse or tract of land. These things, however, though the subjects of property, are, when coupled with posses-

sion, but the indicia, the visible manifestations of invisible rights, 'the evidence of things not seen.' Property, then, in a determinate object, is composed of certain constituent elements, to wit., the unrestricted right of use, enjoyment and disposal, of that object." City of St. Louis v. Hill, 116 Mo. 527, 22 S. W. 861, 8 Am. R. R. & Corp. Rep. 422. "The term 'property' includes every interest any one may have in any and everything that is the subject of ownership by man, together with the right to freely possess, use, enjoy and dispose of the same." Bailey v. People, 190 Ill. 28, 33, 60 N. E. 98, 83 Am. St. Rep. 116, 54 L.R.A. 838. See also Tripp v. Overocker, 7 Colo. 72; Selden v. Jacksonville, 28 Fla. 558, 10 So. 457; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 46 Am. St. Rep. 315, 29 L.R.A. 79; Chicago v. Wells, 236 Ill. 129; Drainage Comrs. v. Knox, 237 Ill. 148; East St. Louis v. O'Flynn, 19 Ill. App. 64; Metropolitan W. S. El. R. R. Co. v. Goll, 100 Ill. App. 325; De Landier v. Baltimore Co., 94 Md. 1, 50 Atl. 427; Eaton v. B. C. & M. R. R. Co., 51 N. H. 504, 511; Wynehamer v. People, 13 N. Y. 378, 433, 12 Am. Rep. 147; Caro v. Met. El. R. R. Co. 46 N. Y. Supr. Ct. 138; Callen v. Columbus Edison Elec. Lt. Co., 66 Ohio St. 166, 64 N. E. 141, 58 L.R.A. 72; Lycoming Gas & W. Co. v. Moyer, 99 Pa. St. 615; Dibsell v. Morris, 89 Tenn. 497, 15 S. W. 87; State v. Superior Court, 26 Wash.

way as the right of use.⁷ A person's right of property in things, therefore, consists of the right to possess, use and dispose thereof in such manner as is not inconsistent with the law of the land.

As regards real property, in addition to the rights already enumerated, which pertain to the use and disposition of that limited area which a man calls his own, there are others which pertain to the use which may lawfully be made of contiguous and surrounding areas and which form an important part of that aggregate of rights constituting property in land. Such are the rights to the support of soil, to light and air, the right to be undisturbed by nuisances or the unreasonable use of neighboring property, the right to the protection afforded by natural barriers against tide and flood, waves and currents, rights in tide waters and running streams and various rights respecting waters flowing upon the surface or percolating through the soil in no defined channel. These rights, wherever they exist, and to the extent to which they are secured by law, are part and parcel of the owner's property in land.⁸

§ 64 (55). Meaning of the word property in the constitution. Having indicated the true meaning of the word property, it remains to inquire what meaning it has in the constitution. Undoubtedly, in such an instrument, it should be given a meaning that accords with the ordinary usage and understanding of the people who made the instrument. We do not refer to the small body of persons who actually formulated the instrument, but the large body of citizens who gave it vitality by their votes. The sovereign people say to their agents and servants, the executive and legislative officers of the State: We delegate to you all of our sovereign powers, but you must not

278, 66 Pac. 385; *State v. Superior Court*, 48 Wash. 277, 93 Pac. 423; 1 Bl. Com. 138; Austin's Jurisprudence, §§ 47 and 48; Rutherford, b. 1, c. iv, § 1. "Full property in a thing," says the author last cited, "is a perpetual right to use it to any purpose and to dispose of it at pleasure."

72 Austin's Jurisp. 825, 826, sec. 48; 3 Bentham's Works, p. 182 *et seq.*; Rutherford, b. 1, c. iv.

8An interesting and instructive article by Mr. A. G. Sedgwick in

which he considers the different meanings of the word property will be found in the North American Review for September, 1882. Vol. 135, p. 253.

The views of this section are very fully adopted in the following cases: *City of St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861; *Selden v. City of Jacksonville*, 28 Fla. 558, 10 So. Rep. 457, 29 Am. St. Rep. 278, 14 L.R.A. 370; *Callen v. Columbus Edison Elec. Lt. Co.*, 66 Ohio St. 166, 64 N. E. 141, 58 L.R.A. 782.

take our private property for public use without making us a just compensation therefor. What did they mean by property? The dullest individual among the people knows and understands that his property in anything is a bundle of rights. It is no more common for ordinary people to speak of things as property than it is for them to speak of their rights in things, as the right to dispose of a thing in this way or that, the right to use a thing in this way or that, the right to compel a neighbor to desist from doing this or that, etc. Although, as Austin says, all men speak loosely of things as property, yet practically all men understand that property consists of certain rights in things which are secured by law. They constantly act upon this understanding, although they may never have formulated a definition of the word and would be at a loss to do so. However unable a man may be to formulate his ideas, yet if you turn a stream of water on his land, or defile his atmosphere with gas or smoke, or create other like disturbance, you will soon find that he has a very clear idea of his right to be exempt from such intrusion. Now it seems to us that the word property in the constitution should be given a meaning which, while in accord with the sense in which it is practically used and understood by the people, will also secure to the individual the largest degree of protection against the exercise of the power intended to be restricted. The meaning which, in our opinion, fulfills both of these conditions, is the one set forth in the preceding section.⁹ Chief Justice Shaw, of Massachusetts, in speaking on this subject says: "The word 'property,' in the tenth article of the Bill of Rights, which provides that 'whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor,' should have such a liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such.""¹⁰

⁹See the article referred to in the last note. In that article Mr. Sedgwick says: "If the views here suggested are sound, the process of interpretation through which the constitutional provision as to taking 'property' is passing, is one under which what Austin calls the true or strict sense of the word is being substituted for the vulgar acceptation in which the subject of property is

confounded with the property itself. That the second of these two views must in the end prevail and render the first obsolete, no one who has paid much attention to the development of the law on the subject in this country can for a moment doubt."

¹⁰Old Colony & Fall River R. R. Co. v. County of Plymouth, 14 Gray, 155, 161. "The constitutional pro-

And the supreme court of Washington speaking of the word *property*, says: "It is used in the constitution in a comprehensive and unlimited sense, and so it must be construed. It is not any particular kind of property that is mentioned, but the wording is, 'no private property.' It need not be any physical or tangible property which is subjected to a tangible invasion. The right to the use and possession of a lot abutting on a public street is property. The right to light and air and access is equally property. * * * And the modern authorities are uniform that these are rights which are guaranteed by constitutional provisions similar to ours."¹¹

§ 65 (56). Principles which determine when there has been a taking. If property, then, consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence, that his property may be taken, in the constitutional sense, though his title and possession remain undisturbed; and it may be laid down as a general proposition, based upon the nature of property itself, that, whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, *pro tanto*, taken, and he is entitled to compensation.¹² "Any substantial interference

vision is adopted for the protection of and security to the rights of the individual as against the government, and the word 'taking' should not be used in an unreasonable or narrow sense." *Pearsall v. Board of Supervisors*, 74 Mich. 558, 42 N. W. 77.

¹¹*State v. Superior Court*, 26 Wash. 278, 286, 66 Pac. 385. In *Drainage Comrs. v. Knox*, 237 Ill. 148, 151, the court says: "Property in land is the right of user and disposition and dominion to the exclusion of all others, and that is the sense in which it is used in the constitution."

¹²*Quoted and approved. State v. Superior Court*, 26 Wash. 278, 287, 66 Pac. 385; *Nahant v. United*

States

136 Fed. 273, 70 C. C. A. 641, 69 L.R.A. 723. "Property, then, in a determinate object, is composed of certain constituent elements, to wit, the unrestricted right of use, enjoyment, and disposal, of that object. It follows from this premise that anything which destroys or subverts any of the essential elements aforesaid is a taking or destruction *pro tanto* of property, though the possession and power of disposal of the land remain undisturbed, and though there be no actual or physical invasion of the *locus in quo*." *City of St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861, 8 Am. R. R. & Corp. Rep. 422. Similar rulings and expressions of opinion will be found in the following cases: *San Mateo*

with private property which destroys or lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is, in fact, and in law, a taking, in the constitutional sense, to, the extent of the damages suffered, even though the title and possession of the owner remain undisturbed.”¹³

It will thus be seen that, in order that there may be a recovery of compensation for damages to property no part of which is taken, such damages must be the result of a violation of some one or more of the rights which constitute property. In other words, the damage must be actionable damage, that is, damage which would be remediable if done by an individual without any pretense of statutory authority. If, for damage caused to my land by certain acts of my neighbor done upon his own land for his own use, I may have compensation, and if, for the same damage caused by the same acts done upon the same land by the public or its agents for public use I can have no compensation, it is plain that the right upon which the former action was founded has been taken from me, that so much has been subtracted from my property in the land. Every such taking we hold to be within the constitutional prohibition requiring compensation to be made. In any given case, therefore, where the land of an

Water Works v. Sharpstein, 50 Cal. 284; Platt Bros. & Co. v. Waterbury, 72 Conn. 531, 45 Atl. 154, 77 Am. St. Rep. 335, 48 L.R.A. 691; Selden v. Jacksonville, 28 Fla. 558, 10 So. 457, 29 Am. St. Rep. 278, 14 L.R.A. 370; Chicago v. Wells, 236 Ill. 129; Drainage Comrs. v. Knox, 237 Ill. 148; Metropolitan W. S. El. R. R. Co. v. Goll, 100 Ill. App. 323; Commonwealth v. Boston Advertiser Co., 188 Mass. 348, 74 N. E. 601, 108 Am. St. Rep. 494, 69 L.R.A. 817; Pearsall v. Board of Supes., 74 Mich. 558, 42 N. W. 77; Gunnerus v. Spring Prairie, 91 Minn. 473, 98 N. W. 340, 974; Richardson v. Levee Comrs., 77 Miss. 518, 26 So. 963; Bigelow v. Whitcomb, 72 N. H. 473, 57 Atl. 680, 65 L.R.A. 676; Pennsylvania R. R. Co. v. Angell, 41 N. J. Eq. 316, 329, 7 Atl. 432, 56 Am. St.

Rep. 1; Passaic v. Patterson Bill Posting Co., 72 N. J. L. 285, 62 Atl. 267, 111 Am. St. Rep. 676; Forster v. Scott, 136 N. Y. 577, 32 N. E. Rep. 976, 18 L.R.A. 543, 8 Am. R. R. & Corp. Rep. 428 note; Huffmire v. Brooklyn, 162 N. Y. 584, 57 N. E. 176, 48 L.R.A. 421; Callen v. Columbus Edison Elec. Lt. Co., 66 Ohio St. 166, 64 N. E. 141, 58 L.R.A. 782; Bollinger v. Southern Pipe Line Co., 2 Pa. Dist. Ct. 604; Barron v. Memphis, 113 Tenn. 89, 80 S. W. 832, 106 Am. St. Rep. 810; Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128. See also the succeeding sections.

¹³Stockdale v. Rio Grande Western Ry. Co. 28 Utah 201, 211, 77 Pac. 849. To same effect, Fisher v. Bountiful City, 21 Utah 29, 36, 59 Pac. 520.

individual has been damaged or diminished in value by the construction or operation of works for public use, whether he is entitled to compensation or not will depend upon whether the damage or deterioration is due to an interference with any right appurtenant to the land or parcel of his property in it. If this question can be answered in the affirmative, there is a right to compensation; otherwise, not. Thus, if a city takes a lot adjacent to my own and, under proper authority, erects thereon works, the operation of which necessarily fills my premises with noxious gases, whereby my property is depreciated in value, I am entitled to compensation, because my right not to be damaged by an unreasonable use of the adjacent lot has been violated. But if the city erects upon the same lot a school-house and uses it for school purposes and thereby my premises are lessened in value, I am remediless, because no right whatever which I had, as owner of my lot, respecting the use which could be made of the adjoining lot, has been violated. A school is not a nuisance in a legal sense, and the city, in the case supposed, has done no more than any individual could have done upon the same premises.¹⁴

§ 66 (57). Changes which the law has undergone. The law as to what constitutes a taking has been undergoing radical changes in the last few years. Mr. Sedgwick, writing in 1857, in speaking of this subject, says: "It seems to be settled that, to entitle the owner to protection under this clause, the property must be actually taken, in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential damage, no matter how serious or how clearly and unquestionably resulting from the exercise of the power of eminent domain."¹⁵ The Supreme Court of Maine, in interpreting the constitutional provision in question, in 1852, said: "The design appears to have been simply to declare, that private property shall not be changed to public property, or transferred from the owner to others, for public use,

¹⁴We do not remember any decision which exactly covers the illustration used, but there are cases which involve the same principle. Thus it has been decided that a suit will not lie either to prevent, or to recover damages for, the erection of a jail upon adjoining property.

Wehn v. Commissioners of Gage Co., 5 Neb. 494, 25 Am. Rep. 497; Burwell v. Commissioners, 93 N. C. 73, 53 Am. Rep. 454. See post, §§ 234-236, 363-366.

¹⁵Sedgwick Const. Law, 2d ed. pp. 456-458.

without just compensation.”¹⁶ These quotations present a fair statement of the condition of the law in the middle of the nineteenth century.¹⁷ The learned author just quoted, after reviewing the decisions which he has summed up in the above quotation, ventures his own opinion upon the subject as follows: “To differ from the voice of so many learned and sagacious magistrates may almost wear the aspect of presumption; but I can not refrain from the expression of the opinion, that this limitation of the term taking to the actual physical appropriation of the property or a divesting of title is, it seems to me, far too narrow a construction to answer the purposes of justice, or to meet the demands of an equal administration of the great powers of government. The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes. If by reason of a consequential damage the value of real estate is positively diminished, it does not appear arduous to prove that, in point of fact, the owner is deprived of property, though a particular piece of property may not be actually taken.”¹⁸

Numerous cases decided since Mr. Sedgwick wrote have vindicated his view of what the law should be. In stating, in the last section, the conclusions at which we have arrived after a careful examination of all the decided cases, and in discussing the principles upon which those conclusions are based, we have not referred to the decisions, because they must be referred to under the different divisions of the subject to which they respectively pertain, and because the soundness of the conclusions we have announced must be tested, not by the few cases which discuss general principles, but by the points actually adjudicated in all the cases. But, in view of the great importance of the question, the numerous cases which call for its solution, and the magnitude of the interests involved, we shall, at the risk of some repetition, refer to some of the leading cases in support of the views we have expressed.

¹⁶Cushman v. Smith, 34 Me. 247, 258.

¹⁷In the recent case of Hart v. Atlanta, 100 Ga. 274, it is said that a “taking” “means a physical, tangible

appropriation of the property of another.”

¹⁸Sedgwick Const. Law, 2d ed. pp. 462-463.

§ 67 (58). **Leading cases.** The leading case upon the subject, and the one which has contributed more than any other towards bringing about the change referred to in the last section, is *Eaton v. B. C. & M. R. R. Co.*,¹⁹ decided by the Supreme Court of New Hampshire in 1872. In referring to this case, Judge Christiany, of Michigan, says: "But the most satisfactory and best considered case which can be found in the books upon this subject, which examines, classifies and analyzes nearly all the cases, and in the conclusions of which I wholly agree, is that of *Eaton v. B. C. & M. R. R. Co.*, 51 N. H. 504."²⁰

The defendant, a railroad company, laid out its road through the plaintiff's farm, whose damages were duly assessed, paid and released. But in constructing their road the company cut through a ridge north of plaintiff's farm, through which in times of freshet the waters of an adjacent river found their way, flooding the plaintiff's land and bringing down and lodging upon it quantities of earth and stones, thereby rendering the land unfit for cultivation or use. The plaintiff brought suit to recover for this damage, and the court held in an elaborately considered opinion that he was entitled to succeed. It was conceded in the case "that, if the cut through the ridge had been made by a private landowner, who had acquired no rights from the plaintiff or from the legislature, he would be liable for the damages sought to be recovered in this action." "The vital issue then is," says the court, "whether the injuries complained of amount to a taking of the plaintiff's property, within the constitutional meaning of those terms. To constitute 'a taking of property,' it seems to have sometimes been held necessary that there should be 'an exclusive appropriation,' 'a total assumption of possession,' 'a complete ouster,' an absolute or total conversion of the entire property, 'a taking the property altogether.' These views seem to us to be founded upon a misconception of the meaning of the term 'property,' as used in the various State constitutions. In a strict legal sense, land is not 'property,' but the subject of property. The term property, although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the right of the owner in relation to it.' 'It denotes a right over a determinate thing.' 'Property is the right

¹⁹51 N. H. 504.

²⁰Grand Rapids Booming Co. v.
Jarvis, 30 Mich. 308, 321.

of any person to possess, use, enjoy, and dispose of a thing.²¹ If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference ‘takes,’ pro tanto, the owner’s ‘property.’ The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. ‘Use is the real side of property.’ This right of user necessarily includes the right and power of excluding others from using the land.²² From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner’s ‘property.’ If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes ‘property,’—although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to a qualified ownership. Restricting A’s unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A than to take from him the title in fee simple to one acre, leaving him the unrestricted right of using the remaining ninety-nine acres. Nobody doubts that the latter transaction would constitute a taking of ‘property.’ Why not the former? * * * The principle must be the same whether the owner is wholly deprived of the use of his land, or only partially deprived of it; although the amount or value of the property taken in the two instances may widely differ. If the railroad corporation takes a strip four rods wide out of a farm to build their track upon, they cannot escape paying for the strip by the plea that they have not taken the whole farm. So a partial, but substantial, restriction of the right of user may not annihilate all the owner’s rights of property in the land, but it is none the less true that a part of his property is taken. * * * The injury complained of in this case is not a mere personal inconvenience or annoyance to the occupant. Two marked characteristics distinguish this injury from that

²¹Selden, J., in *Wynehamer v. People*, 13 N. Y. 378, 433; 1 Bl. Com. 138; 2 Austin’s Jurisprudence, 3d ed. 817, 818.

²²Citing, 2 Austin on Jurisprudence, 3d ed. 836; Wells, J., in *Walker v. O. C. W. R. R. Co.*, 103 Mass. 10, p. 14.

described in many other cases. First, it is a physical injury to the land itself, a physical interference with the rights of property, an actual disturbance of the plaintiff's possession. Second, it would clearly be actionable if done by a private person without legislative authority. * * * We think there has been a taking of the plaintiff's property; that, as the statutes under which the defendants acted make no provision for the plaintiff's compensation, they afford no justification; that the defendants are liable in this action as wrong-doers; and that the ruling of the court was correct." The true ground of this decision is that the plaintiff as owner of this farm had a right to the protection of the natural barrier against the overflow upon his land of the river in question, that this right was a part of the property in his land, and that the acts of the defendant company amounted to a taking of this right and consequently to a taking of his property in the land *pro tanto*, for which he was entitled to compensation under the constitution.

§ 68 (59). Leading cases, continued. The decision in the Eaton case was reviewed two years later by the same court, in the case of Thompson v. The Androscoggin River Improvement Company,²³ and the true principles of the decision set forth with great clearness and ability. As the Eaton case has exerted so large an influence upon this branch of the law of eminent domain since its rendition, we shall give the views of the court at length from the case last cited:

"Property in land must be considered, for many purposes, not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges, the limits of which are prescribed by the equality of rights, and the correlation of rights and obligations necessary for the highest enjoyment of land by the entire community of proprietors. Two of Eaton's proprietary rights in the tract of land described as his farm—his right of exclusive possession and his right of reasonable use of the soil—inclnded the right that the soil should not be injured by R either appropriating it to his own use, or committing a trespass upon it, or making an unreasonable use of his own land. When Eaton's right of not being injured by an unreasonable use of R's land was invaded, his property was taken, in the same legal sense in which it would have been taken if his right of not being injured by a trespass or appropriation had been infringed. If Eaton's farm

had been damaged by R's reasonable use of his own land, Eaton would have had no cause of action; his rights would not have been invaded by R exercising his right of reasonably using his own. The proprietary rights of each were limited in that manner. They were not absolute in respect to each one's use of his own; they included a right in respect to the use of the other's. The soil is often called property; and this use of language is sufficiently accurate for some purposes. But the proposition that the soil is property conveys a very imperfect idea of the numerous and variously limited rights comprised in landed estate; and it is sometimes necessary to remember that the name of property belongs to some of the essential proprietary rights vested in the person called the owner of the soil. A refusal to pay a debt is an injury to the property of the creditor.²⁴ A patent right, a copy right, a right of action, an easement, an incorporeal hereditament, may be property as valuable as a granite quarry; and the owner of such property may be practically deprived of it,—such property may be practically taken from its owner,—although it is not corporeal. So those proprietary rights, which are the only valuable attributes or ingredients of a land-owner's property, may be taken from him, without an asportation or adverse personal occupation of that portion of the earth which is his, in the limited sense of being the subject of certain legally recognized proprietary rights which he may exercise for a short time. Property is taken, when any one of those proprietary rights is taken, of which property consists.²⁵ Eaton's right of not being injured in his real estate by an unreasonable use of R's land was one of the proprietary rights of which his general and comprehensive right of property was composed. And that particular right of being uninjured by an unreasonable use of R's land was equally an element of his property, whether such a use were made of R's land by R or by the defendants.

"The right of R to make a reasonable use of his own (although such a use might cause damage to Eaton's farm), like other rights included in R's property, could be transferred to the defendants (the B. C. & M. R. R.) by R himself, or by the legislature exercising the public power of compulsory purchase, commonly called eminent domain. But the right, by an unreasonable use of R's land, to cause a damage to Eaton's farm, not

²⁴Citing, Opinion of the Justices,
25 N. H. 538, 540.

²⁵Citing, Arimond v. Green Bay
etc. Co., 31 Wis. 316, 335.

being R's right, could not be transferred from R to the defendants by R, or by eminent domain, or by any other person or power. Eaton's right of not suffering the damage done his farm by the unreasonable use of R's land could be legally taken from him; he could voluntarily divest himself of it; he could be compulsorily deprived of it by the legislature wielding that power of eminent domain which requires compensation. * * * In Eaton v. Railroad, the public (by their agents, the defendants) took from R, and converted to its own use, R's right to make a reasonable use of his own land—that is, a right to make such a use of his land as it would be reasonable for him to make without compensating Eaton or any one else for any damage resulting therefrom. In making such a use of R's land, the defendants would not transcend the authority conferred upon them. But in making an unreasonable use of R's land as against Eaton, and thereby causing Eaton's land to be injured, they took Eaton's property without compensation, and transcended their authority. The power of eminent domain could neither take from R a right (to make such a use of his land) which he never possessed, nor take from Eaton, without compensation, his proprietary right to be unharmed by such a use of R's land. Thus interpreted and applied, the rule, fairly stated by Sedgwick as the result of the adjudicated cases, is intelligible and sound. It is generally called a rule of consequential damages; and it may safely be called so, if sufficient pains be taken to give such an explanation of its operation and effect as will show how unmeaning and inappropriate the name is.

"If the railroad company, by changing the course of traffic and travel and causing a village to be built on R's land, had reduced the value of Eaton's property in a neighboring village more than the entire worth of his farm, they would not have been liable to him for that damage. They would have been justified, not on the ground that the damage was remote and consequential, in the sense of being a remote consequence, but on the ground that a railroad changing the channels of commerce and causing a rival village to spring up, would be a reasonable use for others to make of their land, an exercise of their rights of property in land, and not a violation of Eaton's right. The idea sometimes conveyed, in such a case, by the supposed doctrine of remote and consequential damage is, that, although the sufferer's legal right is violated, the damage is too remotely conse-

quential, too remote in degree, to be actionable; as if the law would not give redress for the violation of a legal right, when the space between cause and effect exceeds a certain prescribed legal distance. A proprietor's right may be more seriously infringed by a cut through the bank of a river at a great distance from his land, than by a railway built across his hearth-stone.

* * * Suppose, in Eaton's case, R—the former owner of the land where the cut was made—had owned not only that, but also all the rest of the strip on which the railroad was built, from Concord to the northern end of the road, or had, by contract, acquired from the owners the right to build and use a railroad upon it; and suppose he could have built and used it without infringing any public right of way on land or water, or any other public right; he could, without legislative authority, have lawfully built and used a railroad there for his exclusive private purposes, or for carrying the passengers and freight now carried by the railroad corporation; he could have built it over the spot where the cut was made, without violating Eaton's right. Such a use of his own land would have been reasonable; but if he had made such a cut there as the corporation made, without taking the precautions necessary to prevent the natural, apparent, and expected consequence of the river being poured upon Eaton's farm, he would have been liable, because such a cut, causing such an injury, would have been an unreasonable use of his own land. His liability, under such circumstances, was understood to be admitted, and would seem to be too clear to be contested.

"Then modify the supposed case, by inserting the fact that he could not have built the road, on the route on which it was built, without infringing public rights of way on land and water; and suppose that difficulty obviated by an act of the legislature, authorizing him to encroach upon public rights of way to an extent necessary for the building of a railroad, to be used by him in the business of a common carrier; such a modification of public rights would not affect Eaton's private right of not being injured in his property by R pouring Baker's river upon his farm. Modify the supposed case further, by inserting the fact that R obtains a charter, making him a corporation by the name of R; Eaton's right of property would not be affected by the circumstance that the river was poured upon his farm by R, acting, not in his natural capacity, but as an artificial being—invisible, intangible, and existing only in contem-

plation of law. How, then, could R acquire the right to pour the river upon Eaton's farm through a cut which it would be an unreasonable use of his own land for him to make? By a purchase, voluntary or compulsory. The public, exercising the public power of compulsory purchase, otherwise called eminent domain, whereof compensation is an essential element, could authorize him as a public agent, in his natural or in his artificial capacity, to take as many of Eaton's rights of property as were necessary for a public use. In that way R, as an agent of the public, could obtain Eaton's right of not being injured by an unreasonable use of R's land. That right was property before the B. C. & M. Railroad acquired any of R's rights; and it continued to be property afterwards. It was property that the railroad corporation could not acquire from R; and it could not be transferred to them from Eaton by a compulsory purchase without compensation.”²⁶

²⁶We shall not take the space to quote to any extent from the opinions of other courts. The Supreme Court of the United States in a case which is often cited on this question says: “It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert,

the constitutional provision into a restriction upon the rights of the citizen, as these rights stood at the common law, instead of the government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.” Pumphelly v. Green Bay Co., 13 Wall. 166, 177. 1871. *Approved and followed in* Arimond v. The Green Bay and Miss. Canal Co., 31 Wis. 316, 1872.

“Depriving an owner of property of one of its essential attributes, is depriving him of his property.” People v. Otis, 90 N. Y. 48, 52.

The following are also leading cases on the question: Conniff v. San Francisco, 67 Cal. 45; Hooker v. New Haven & Northampton Co., 14 Conn. 146, 36 Am. Dec. 477; Same v. Same, 15 Conn. 312; Denslow v. Same, 16 Conn. 98; Platt Bros. Co. v. Waterbury, 72 Conn. 531, 45 Atl. 154, 77 Am. St. Rep. 335, 48 L.R.A. 691; Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392; Evansville & Crawfordsville R. R. Co. v. Dick, 9 Ind. 433; Kemper v. Louisville, 14 Bush,

87; *Lee v. Pembroke Iron Co.*, 57 Me. 481, 2 Am. Rep. 59; *Old Colony & Fall River R. R. Co. v. County of Plymouth*, 14 Gray 155; *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 74 N. E. 601, 108 Am. St. Rep. 494, 69 L.R.A. 817; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Vanderlip v. Grand Rapids*, 73 Mich. 522, 41 N. W. 677; *O'Brien v. St. Paul*, 25 Minn. 331; *Weaver v. Boom Co.*, 28 Minn. 534; *McKenzie v. Miss. & Rum River Boom Co.*, 29 Minn. 288; *Peters v. Fergus Falls*, 35 Minn. 549; *Thurston v. St. Joseph*, 51 Mo. 510; *Broadwell v. City of Kansas*, 75 Mo. 213, 42 Am. Rep. 406; *St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861; *Bigelow*

v. *Whitecomb*, 72 N. H. 473, 57 Atl. 680, 65 L.R.A. 676; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Passaic v. Patterson Bill Posting Co.*, 72 N. J. L. 285, 62 Atl. 267, 111 Am. St. Rep. 676; *Story v. N. Y. El. R. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664; *Cogswell v. New York, New Haven & Hartford R. R. Co.*, 103 N. Y. 10, 57 Am. Rep. 701; *Lahr v. Metropolitan El. R. R. Co.*, 104 N. Y. 268; *Forster v. Scott*, 136 N. Y. 577, 32 N. E. Rep. 976, 18 L.R.A. 543; *Hummire v. Brooklyn*, 162 N. Y. 584, 57 N. E. 176, 48 L.R.A. 421; *Foster v. Stafford National Bank*, 57 Vt. 128.

CHAPTER IV.

WHAT CONSTITUTES A TAKING: WATERS.

§ 70 (60). **Streams defined and classified.** Running streams consist of a well defined channel with sides or banks, in which water habitually flows, though it need not flow continuously.¹ Some streams are small and incapable of navigation for any purpose. All the authorities agree that such streams are wholly private property and that the title of the riparian owner extends to the middle of the stream.² In regard to navigable streams, there is much conflict of authority, both as to the title of the riparian owner to the bed of the stream and as to his rights in the stream itself. As to what constitutes navigability is a question which does not fall within the province of this treatise, and for a solution of it the reader is referred to other works.³ So also as to title to the bed of navigable streams.⁴ The decisions of the different States vary upon these questions, and especially upon the latter. For the purposes of this treatise it is necessary to ascertain and define the rights of riparian owners; and, as respects such rights, streams may be divided into three classes: First, private non-navigable streams; second, private navigable streams; third, public navigable streams.⁵ The second and third classes are public highways by water, the only difference being that in the second class the title to the bed of the stream is in the riparian proprietors, while in the third class it is in the public. Important distinctions are, by some courts, based upon this circumstance which will be noticed hereafter.

¹Angell on Watercourses, §§ 1-4; Gould on Waters, § 41; 2 Farnham on Waters, §§ 455-460; Sanguinette v. Pock, 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169; Rait v. Furrow, 74 Kan. 101, 85 Pac. 934, 6 L.R.A. (N.S.) 157.

²Angell on Waterc., §§ 10 & 11; Gould on Waters, §§ 46, *et seq.*; 1 Farnham on Waters, § 29b.

³Angell on Watercourses, chap.

xiii; Gould on Waters, §§ 19, 41, *et seq.*; 1 Farnham on Waters, § 23; *post.* § 91.

⁴Angell on Waterc., chap. xiii; Gould on Waters, §§ 19, 41, *et seq.*; 1 Farnham on Waters, §§ 36-50; *post.* §§ 87, 94-100.

⁵Angell on Waterc., chap. xiii; Gould on Waters, chap. iii; Wood on Nuisances (1st ed.), § 586.

§ 71 (61). Rights of riparian owners in the flow of the stream. It may be laid down as a well-settled principle that every proprietor over or past whose land a stream of water flows has a right that it shall continue to flow to and from his premises in the quantity, quality and manner in which it is accustomed to flow by nature, subject to the right of the upper proprietors to make a reasonable use of the stream as it flows past their land.⁶ This right is a part of his property in the land and in many cases constitutes its most valuable element.⁷ It

⁶Angell on Watercourses, §§ 90-96; Gould on Waters, § 204; Ala. Consol. C. & I. Co. v. Turner, 145 Ala. 639, 39 So. 603, 117 Am. St. Rep. 61; Tutwiler C. & I. Co. v. Nichols, 146 Ala. 364, 39 So. 762, 119 Am. St. Rep. 34; Fisher v. Feige, 137 Cal. 39, 69 Pac. 618, 92 Am. St. Rep. 77, 59 L.R.A. 333; Duckworth v. Watsonville W. & L. Co., 150 Cal. 520, 89 Pac. 338; Jessup & M. Paper Co. v. Ford, 6 Del. Ch. 52; Tampa Water Works Co. v. Cline, 37 Fla. 586, 20 So. 780, 53 Am. St. Rep. 262, 33 L.R.A. 376; Ferguson v. Firmenich Mfg. Co., 77 Ia. 576, 42 N. W. 448, 14 Am. St. Rep. 319; Shamleffer v. Peerless Mill Co., 18 Kan. 24; Clark v. Allaman, 71 Kan. 206, 80 Pac. 571, 70 L.R.A. 971; Anderson v. Cinn. So. R. R. Co., 86 Ky. 44, 5 S. W. 49; Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265; Allen v. Thornapple Elec. Co., 144 Mich. 370, 108 N. W. 79, 115 Am. St. Rep. 453; Liles v. Cawthorn, 78 Miss. 558, 29 So. 834; Clark v. Cambridge etc. Impv. Co., 45 Neb. 799, 64 N. W. 239; Slattery v. Harley, 58 Neb. 575, 79 N. W. 151; Crawford Co. v. Hathaway, 60 Neb. 754, 84 N. W. 271; Crawford Co. v. Hathaway, 61 Neb. 317, 85 N. W. 303; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 108 N. W. 647, 60 L.R.A. 889; Meng v. Coffee, 67 Neb. 500, 93 N. W. 713, 108 Am. St. Rep. 697, 60 L.R.A. 910; New York Rubber Co. v. Rothery, 132 N. Y. 293, 30 N. E. 841; Strobel v. Kerr Salt Co., 164 N. Y. 303, 58 N. E. 142, 79 Am. St. Rep. 643, 51 L.R.A. 687; Parry v. Citizens' Water Works Co., 59 Hun 196, 37 N. Y. St. 715, 14 N. Y. Supp. 471; Gilzinger v. Saugerties Water Co., 66 Hun 173, 21 N. Y. Supp. 121; Brown v. Gold Coin Min. Co., 48 Ore. 277, 86 Pac. 361; Clark v. Pa. R. R. Co., 145 Pa. St. 438, 22 Atl. 989, 27 Am. St. Rep. 710; Silver Spring Co. v. Wanskuck Co., 13 R. I. 611; Cox v. Howell, 108 Tenn. 130, 65 S. W. 868, 58 L.R.A. 487; Watkins Land Co. v. Clements, 98 Tex. 578, 86 S. W. 733, 107 Am. St. Rep. 653, 70 L.R.A. 964; Carpenter v. Gold, 88 Va. 551, 14 S. E. 329; Neselhous v. Walker, 45 Wash. 621, 88 Pac. 1032; New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735, 54 L.R.A. 190; Van Egmond v. Seaforth, 6 Ont. 599; United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690; also numerous cases cited in the following sections. Where the waters of a stream gradually sink into the sand and disappear, finding their way by percolation along the valley of the stream to a lake, they no longer constitute a natural water course, and may be treated as percolating water. Meyer v. Tacoma L. & P. Co., 8 Wash. 144, 35 Pac. 601. *And see post.* § 114.

⁷Bottoms v. Brewer, 54 Ala. 288; St. Helena Water Co. v. Forbes, 62

necessarily follows, therefore, that any violation of this right in the exercise of the power of eminent domain is a taking of private property for which compensation must be made.⁸ Such a violation must occur in one of three ways: (1) By abstracting or diverting water above, (2) by changing or corrupting the current, or (3) by works below which prevent the water flowing off in its accustomed manner. As respects the rights of the riparian owner in the flow of the water, we apprehend it makes no difference whether the stream is public or private, navigable,

Cal. 182, 45 Am. Rep. 659; Lux v. Haggin, 69 Cal. 255; Wadsworth v. Tillotson, 15 Conn. 365, 373, 39 Am. Dec. 391; Harding v. Stamford Water Co., 41 Conn. 87; Elberton v. Hobbs, 121 Ga. 749, 49 S. E. 779; Moffett v. Brewer, 1 G. Greene, 348; Shamleffer v. Peerless Mill Co., 18 Kan. 24; Emporia v. Soden, 25 Kan. 588, 37 Am. Rep. 265; Clark v. Cambridge etc. Impv. Co., 45 Neb. 799, 64 N. W. 239; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 108 Am. St. Rep. 647, 60 L.R.A. 889; Ten Eyck v. Delaware & Raritan Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233; Stamford Water Co. v. Stanley, 39 Hun 424; Mansfield v. Balliet, 65 Ohio St. 451, 63 N. E. 86, 58 L.R.A. 528; Deming v. Cleveland, 22 Ohio C. C. 1; Weiss v. Oregon etc. Co., 13 Ore. 496; Silver Spring etc. Co. v. Wanskuck Co., 13 R. I. 611; Fisher v. Bountiful City, 21 Utah 29, 59 Pac. 520; Rigney v. Tacoma L. & T. Co., 9 Wash. 576, 38 Pac. 147; Avery v. Fox, 1 Abb. U. S. 246; Gould on Waters, § 204. "The right of a riparian proprietor, as such, is property, and, when vested, can be destroyed or impaired only in the interest of the general public, upon full compensation, and in accordance with established law." Clark v. Cambridge etc. Impv. Co., 45 Neb. 799, 64 N. W. 239.

In some of the arid States the common law rules as to the rights

of riparian owners upon streams are held to be inapplicable to the conditions there existing, and therefore not in force, and in several the common law rules are modified by constitutions or statutes. See Chandler v. Austin, 4 Ariz. 347, 42 Pac. 483; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158; Coffin v. Left Hand Ditch Co., 6 Colo. 443; Hammond v. Rose, 11 Colo. 524, 7 Am. St. Rep. 258; Crippen v. White, 28 Colo. 298, 64 Pac. 184; Reno Smelting Works v. Stevenson, 20 Nev. 269, 21 Pac. 317, 19 Am. St. Rep. 364, 4 L.R.A. 160; Walsh v. Wallace, 26 Nev. 299, 67 Pac. 914, 99 Am. St. Rep. 692; Stowell v. Johnson, 7 Utah, 215, 26 Pac. 290; Moyer v. Preston, 6 Wyo. 308, 44 Pac. 845; Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 258, 87 Am. St. Rep. 918, 50 L.R.A. 747.

⁸Lux v. Haggin, 69 Cal. 255; Elberton v. Hobbs, 121 Ga. 749, 49 S. E. 779; Hamor v. Bar Harbor Water Co., 78 Me. 127; Mayor etc. of Baltimore v. Apphold, 42 Md. 442; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 108 Am. St. Rep. 647, 60 L.R.A. 89; McCook, Irr. & W. P. Co. v. Crews, 70 Neb. 109, 96 N. W. 996; Mansfield v. Balliet, 65 Ohio St. 451, 63 N. W. 86, 58 L.R.A. 628; Fisher v. Bountiful City, 21 Utah 29, 59 Pac. 520. And see cases cited in the succeeding sections.

or not navigable;⁹ but we shall recur to the rights of riparian owners upon public and navigable streams hereafter.¹⁰

§ 72 (61a). What constitutes a reasonable use of a stream by an upper proprietor. Although this question does not fall strictly within the scope of this work, some reference to authorities on the question may be found convenient.¹¹ The principal uses to which the water of a stream may be put are for domestic purposes, for watering stock, for irrigation and for manufacturing. The right to take water for domestic purposes and for watering stock is an absolute right, and each proprietor may take what is necessary for these purposes, without regard to the effect upon lower proprietors.¹² But the right

⁹Gould on Waters, § 204.

¹⁰Post, §§ 87, 94-100.

¹¹The following are some of the leading cases in which the question of reasonable use is discussed: Drake v. Lady Ensley Coal etc. Co., 102 Ala. 501, 14 So. 749, 48 Am. St. Rep. 77, 24 L.R.A. 64; Heilbron v. Land & Water Co., 80 Cal. 189, 22 Pae. 62; Parker v. Hotchkiss, 25 Conn. 321; White v. East Lake Land Co., 96 Ga. 415, 23 S. E. 393, 51 Am. St. Rep. 141; Dwight v. Hays, 150 Ill. 273, 37 N. E. 218, 41 Am. St. Rep. 367; Barnard v. Shirley, 135 Ind. 547, 34 N. E. Rep. 600, 35 N. E. 117; Clark v. Allaman, 71 Kan. 206, 80 Pac. 571, 70 L.R.A. 971; Davis v. Winslow, 51 Me. 264, 81 Am. Dec. 573; Helfrich v. Catonsville Water Co., 74 Md. 269, 22 Atl. 72, 28 Am. St. Rep. 245; Smith v. Agawam Canal Co., 2 Allen 355; Doorman v. Ames, 12 Minn. 451; Minn. L. & T. Co. v. St. Anthony Falls W. P. Co., 82 Minn. 505, 85 N. W. 520; Creek v. Bozeman Water Works Co., 15 Mont. 121, 38 Pac. 459; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 108 Am. St. Rep. 647, 60 L.R.A. 889; Meng v. Coffee, 67 Neb. 500, 93 N. W. 713, 108 Am. St. Rep. 697, 60 L.R.A. 910; McCook Irr. & W. P. Co. v. Crews, 70 Neb. 109, 96 N. W. 996; Jones v. Adams,

19 Nev. 78, 6 Pac. 442, 3 Am. St. Rep. 788; Hays v. Waldron, 44 N. H. 580, 84 Am. Dec. 105; Holden v. Lake Co. 53 N. H. 552; Garwood v. N. Y. Cent. etc. R. R. Co., 83 N. Y. 400; Strobel v. Kerr Salt Co., 164 N. Y. 303, 58 N. E. 1242, 79 Am. St. Rep. 643, 51 L.R.A. 687; Person v. Speyer, 178 N. Y. 270, 70 N. E. 799, 102 Am. St. Rep. 499; Henderson Real Est. Co. v. Carroll etc. Co., 189 N. Y. 531, *affirming*, 113 A. D. 775, 99 N. Y. S. 365; Platt v. Root, 15 Johns. 213; Palmer v. Mulligan, 3 Caines Rep. 307, 2 Am. Dec. 270; Standen v. New Rochelle Water Co., 91 Hun 272, 36 N. Y. Supp. 92; Jones v. Conn, 39 Ore. 30, 64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, 54 L.R.A. 630; Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 6 Atl. 453; White v. Whitney Mfg. Co., 60 S. C. 254, 38 S. E. 456; Lawrie v. Silsby, 76 Vt. 240, 56 Atl. 1106, 104 Am. St. Rep. 927; Mumpower v. City of Bristol, 90 Va. 151, 17 S. E. 853, 44 Am. St. Rep. 902; Green Bay etc. Canal Co. v. Kaukauna Water Power Co., 90 Wis. 370, 61 N. W. 1121, 48 Am. St. Rep. 937; Indianapolis Water Co. v. Am. Straw Board Co., 53 Fed. Rep. 970, 57 Fed. Rep. 100; Gould on Waters, §§ 205 *et seq.*

¹²Garwood v. New York Central

to take the water for irrigation or manufacturing purposes is qualified and limited by the existence of like rights in the lower owners, and must be exercised with a due regard to such rights.¹³ The rights of a riparian owner have no dependence upon the extent of the watershed which he owns, except perhaps as respects irrigation.¹⁴ A riparian owner has no right, as against lower proprietors, to take and divert water for the use of non-riparian owners, or for the use of his own non-riparian lands.¹⁵

§ 73 (61b). What riparian rights in the flow of a stream attach to property held for public use. Riparian rights in a stream pertain to the land abutting on the stream. They pass with the title to the property and are the same, whether the property is owned by a natural or an artificial person. The rights are not dependent upon the uses made of the property or the purposes for which it is held. The fact that the property is held for public use, therefore, would not seem to

etc. R. R. Co., 83 N. Y. 400; Anderson v. Cinn. So. R. R. Co., 86 Ky. 44, 5 S. W. 49; White v. East Lake Land Co., 96 Ga. 415, 23 S. E. 393, 51 Am. St. Rep. 141; Cox v. Howell, 108 Tenn. 130, 65 S. W. 868, 58 L.R.A. 487; Watkins Land Co. v. Clements, 90 Tex. 578, 86 S. W. 733, 107 Am. St. Rep. 653, 70 L.R.A. 964.

¹³Same; Minnesota L. & T. Co. v. St. Anthony Falls W. P. Co., 82 Minn. 505, 85 N. W. 520; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 108 Am. St. Rep. 647, 60 L.R.A. 889.

¹⁴Standen v. New Rochelle Water Co., 91 Hun 272, 36 N. Y. Supp. 92. As to what are to be deemed riparian lands see 2 Farnham on Waters, § 463; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 108 Am. St. Rep. 647, 60 L.R.A. 889; Jones v. Conn, 39 Ore. 30, 64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, 54 L.R.A. 630; Watkins Land Co. v. Clements, 98 Tex. 578, 86 S. W. 733, 107 Am. St. Rep. 653, 70 L.R.A. 964.

¹⁵Ulbrecht v. Eufaula Water Co., 86 Ala. 587, 4 L.R.A. 572; Heilbron v. Land & Water Co., 80 Cal. 189, 22 Pac. 62; Wutchuma Water Co. v. Pogue, 151 Cal. 105; Montecito Val. Water Co. v. Santa Barbara, 151 Cal. 377, 90 Pac. 935; Anderson v. Cinn. So. R. R. Co., 86 Ky. 44, 5 S. W. 49; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 108 Am. St. Rep. 647, 60 L.R.A. 889; Parry v. Citizens' Water Works Co., 59 Hun 196, 37 N. Y. St. 715, 14 N. Y. Supp. 471; Standen v. New Rochelle Water Co., 91 Hun 272, 36 N. Y. Supp. 92; Appeal of Haupt, 125 Pa. St. 211, 17 Atl. 436, 3 L.R.A. 536; Clark v. Pennsylvania R. R. Co., 145 Pa. St. 438, 32 Atl. 989, 27 Am. St. Rep. 710; Lord v. Meadville Water Co. 135 Pa. St. 122, 19 Atl. 1007, 20 Am. St. Rep. 864, 8 L.R.A. 202; Watkins Land Co. v. Clement, 98 Tex. 578, 86 S. W. 733, 107 Am. St. Rep. 653, 70 L.R.A. 964; Clements v. Watkins Land Co., 36 Tex. Civ. App. 339, 82 S. W. 665; Saunders v. Bluefield W. W. Co., 58 Fed. 133.

affect the question of riparian rights.¹⁶ But as the right to use the water pertains to the property, the use must be upon the property for the benefit of the same or its occupants.¹⁷ As a natural person may not take and sell the water to non-riparian owners, so the same may not be done by a city or water company owning land upon a stream.¹⁸ As a natural person may not use the water in his business upon non-riparian property, so a railroad company or other corporation of a public nature is restricted in like manner.¹⁹ It has been held in Oregon that the State, as a riparian proprietor on a stream may not divert water for the supply of a penitentiary and insane asylum situated on the riparian lands.²⁰ But the contrary has been held in Pennsylvania.²¹

§ 74 (62). Abstracting or diverting the water of a stream. Where the waters of a stream or any part thereof are taken or diverted to supply a city or village with water,²² or for

¹⁶Saunders v. Bluefield etc. Co., 58 Fed. 133; Lord v. Meadville Water Co., 135 Pa. St. 122, 19 Atl. 1007, 20 Am. St. Rep. 864, 8 L.R.A. 202; Appeal of Haupt, 125 Pa. St. 211, 17 Atl. 436, 3 L.R.A. 536; Rigney v. Tacoma Light & W. Co., 9 Wash. 576, 38 Pac. 147; People v. Hulbert, 131 Mich. 156, 91 N. W. 211, 100 Am. St. Rep. 588, 64 L.R.A. 265.

¹⁷Garwood v. New York Cent. etc. R. R. Co., 83 N. Y. 400.

¹⁸Montrose Canal Co. v. Loutsenhisler Ditch Co., 23 Colo. 223, 48 Pac. 532; Osborn v. Norwalk, 77 Conn. 663, 60 Atl. 645; Elberton v. Pearle Cotton Mills, 123 Ga. 1, 50 S. E. 977; People v. Hulbert, 131 Mich. 156, 91 N. W. 211, 100 Am. St. Rep. 588, 64 L.R.A. 265; Sparks Mfg. Co. v. Newton, 60 N. J. Eq. 399, 45 Atl. 596; Philadelphia etc. R. R. Co. v. Pottsville Water Co., 182 Pa. St. 418, 38 Atl. 404; Irving v. Media, 194 Pa. St. 648, 45 Atl. 482, *affirming* 10 Pa. Supr. Ct. 132; Lonsdale Co. v. Woonsocket, 25 R. I. 428, 56 Atl. 448; State v. Superior Court, 46 Wash. 500, 90 Pac. 650; *post*, § 74. *Contra*,

Canton v. Shock, 66 Ohio St. 19, 63 N. E. 600, 90 Am. St. Rep. 557, 58 L.R.A. 637. *See* Framingham Water Co. v. Old Colony R. R. Co., 176 Mass. 404, 57 N. E. 680.

¹⁹Same.

²⁰Salem Mills Co. v. Lord, 42 Ore. 82, 69 Pac. 1033, 70 Pac. 832.

²¹Filbert v. Dechert, 22 Pa. Supr. Ct. 362.

²²Stein v. Burden, 24 Ala. 130, 55 Am. Dec. 453; Stein v. Ashby, 24 Ala. 521; Burden v. Stein, 27 Ala. 104, 62 Am. Dec. 758; Stein v. Burden, 29 Ala. 127; Stein v. Ashby, 30 Ala. 363; Ulbricht v. Eufaula Water Co., 86 Ala. 587; St. Helena Water Co. v. Forbes, 62 Cal. 182, 45 Am. Rep. 659; Moore v. Clear Lake W. W., 68 Cal. 146; Harding v. Stamford Water Co., 41 Conn. 87; Board of Water Comrs. v. Perry, 69 Conn. 461, 37 Atl. 1059; Fisk v. Hartford, 70 Conn. 720, 40 Atl. 906, 66 Am. St. Rep. 147; Watson v. New Milford Water Co., 71 Conn. 442, 42 Atl. 265; Osborn v. Norwalk, 77 Conn. 663, 60 Atl. 645; Elberton v. Hobbs, 121 Ga. 749, 49 S. E. 779; Elberton v. Pearle Cotton Mills, 123 Ga. 1, 50 S.

the use of a canal²³ or railroad company,²⁴ or to improve a

E. 977; Emporia v. Soden, 25 Kan. 588, 37 Am. Rep. 265; King v. Danville, 32 Ky. L. R. 1188; Hamor v. Bar Harbor Water Co., 78 Me. 127; Aberdeen v. Bradford, 94 Md. 670, 51 Atl. 614; Lund v. New Bedford, 121 Mass. 286; Aetna Mills v. Waltham, 126 Mass. 422; Bailey v. Woburn, 126 Mass. 416; Aetna Mills v. Brookline, 127 Mass. 69; Watuppa Reservoir Co. v. Fall River, 134 Mass. 267; Nemasket Mills v. Taunton, 166 Mass. 540, 44 N. E. Rep. 609; Stevens v. Worcester, 196 Mass. 45; Hall v. Ionia, 38 Mich. 493; People v. Hulbert, 131 Mich. 156, 91 N. W. 211, 100 Am. St. Rep. 588, 64 L.R.A. 265; Creek v. Bozeman W. W. Co., 15 Mon. 121, 38 Pac. 439; Higgins v. Flemington Water Co., 36 N. J. Eq. 538; Acquackanonk Water Co. v. Watson, 29 N. J. Eq. 366; East Jersey Water Co. v. Bigelow, 60 N. J. L. 201; Butler Hard Rubber Co. v. Newark, 61 N. J. L. 32, 40 Atl. 224; Sparks Mfg. Co. v. Newton, 60 N. J. Eq. 399, 45 Atl. 596, *reversing* S. C. 57 N. J. Eq. 367, 41 Atl. 385; Gardner v. Village of Newburgh, 2 Johns. Ch. 161, 7 Am. Dec. 526; Smith v. City of Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Smith v. Brooklyn, 160 N. Y. 357, 45 L.R.A. 664; Stamford Water Co. v. Stanley, 39 Hun 424; Van Buren v. Fishkill W. W. Co., 50 Hun 448, 21 N. Y. St. 448, 3 N. Y. Supp. 336; Parry v. Citizens' W. W. Co., 59 Hun 196, 37 N. Y. St. 715, 14 N. Y. Supp. 471; Gilzinger v. Saugerties W. Co., 66 Hun 173, 21 N. Y. Supp. 121; Standen v. New Rochelle Water Co., 91 Hun 272, 36 N. Y. Supp. 92; Covert v. Brooklyn, 13 App Div. 188, 42 N. Y. S. 310; Duesler v. Johnstown, 24 A. D. 608; Gallagher v. Kingston Water Co., 25 App. Div. 82; Geer v. Durham Water Co., 127 N. C. 349, 37 S. E. 474; Hough v. Doylestown, 4 Brews., 333; Appeal of Haupt, 125 Pa. St. 211, 17 Atl. 436, 3 L.R.A. 536; Lord v. Meadville Water Co., 135 Pa. St. 122, 19 Atl. 1007, 20 Am. St. Rep. 864, 8 L.R.A. 202; Bowers v. Citizens' Water Co., 162 Pa. St. 9, 29 Atl. 98; Hogg v. Connellsburg Water Co., 168 Pa. St. 456, 31 Atl. 1010; Lee v. Springfield Water Co., 176 Pa. St. 223, 35 Atl. 184; Irving v. Media Borough, 194 Pa. St. 648, 45 Atl. 482, *affirming* S. C. 10 Pa. Supr. Ct. 132; Lonsdale v. Woonsocket, 25 R. I. 428, 56 Atl. 448; Rigney v. Tacoma L. & Water Co., 9 Wash. 576, 38 Pac. 147, 26 L.R.A. 425; New York v. Pine, 185 U. S. 93, 22 S. C. 592; Pine v. New York, 112 Fed. 98, 50 C. C. A. 145, *affirming* S. C. 103 Fed. 337; Saunders v. Bluefield W. W. etc. Co., 58 Fed. Rep. 133; Swindon Water Works Co. v. Wilts & Berks Canal Navigation Co., L. R. 7 E. & I. App. Cas. 697. A temporary diversion by a water company for the purpose of repairing its dam was held not actionable. Mott v. Consumers Water Co., 188 Pa. St. 521, 41 Atl. 611.

²³Denslow v. New Haven & Northampton Canal Co., 16 Conn. 98; Heilman v. Union Canal Co., 50 Pa. St. 268; Walker v. Board of Public Works, 16 Ohio 540; Heilbron v. Canal Co., 75 Cal. 426, 7 Am. St. Rep. 183; Beidler v. Sanitary Dist., 211 Ill. 628, 71 N. E. 1118, 67 L.R.A. 820.

²⁴It has been held that a railroad company, being a riparian proprietor, either by virtue of its right of way crossing a stream or otherwise, may take therefrom a reasonable amount of water for the purpose of supplying its locomotives or for other use. Eliot v. Fitchburg R. R. Co., 10 Cush. 191; Pennsylvania R.

highway by land,²⁵ or to make a new channel either for the improvement of navigation,²⁶ or for the protection of a public

R. Co. v. Miller, 112 Pa. St. 34; Earl of Sandwich v. Great Northern Ry. Co., L. R. 10 Ch. Div. 707; Graham v. Northern R. R. Co., 10 Grant Ch. 259. But this right is denied in Anderson v. Cinn. So. R. R. Co., 86 Ky. 44, 5 S. W. 49, and a railroad company was held liable to the lower proprietor for withholding water for railroad uses. *To the same effect* is Garwood v. New York Central etc. R. R. Co., 83 N. Y. 400, S. C. 17 Hun 356. This case also denies the right of a railroad company to withdraw water for its locomotives to the injury of a lower proprietor. After stating that a riparian proprietor has an absolute right to withdraw sufficient water for domestic purposes and for cattle and a qualified right to use the water for irrigation and manufacturing, provided the use is upon the land to which the right is incident, the court says: "Now in the case before us the defendant has done something more; it has not been content with exercising this privilege; it has diverted a considerable portion of the stream not for any use upon the land past which it flows, but for the transaction of its business in other places, and for purposes in no respect pertaining to the land itself. * * * So far as the plaintiff is concerned, it has carried away from his premises the water, as effectually as if it had been turned into another channel and discharged at Albany or Buffalo; and from this, as the jury has found, he has sustained damages." In Clark v. Penn. R. R. Co., 145 Pa. St. 438, 22 Atl. 989, 27 Am. St. Rep. 710, it is held that, no matter what the necessities of the defendant's business, it had no right to take

water from a stream for its locomotives, without compensation to those damaged hereby. And this would seem to be the correct rule. See § 72; Whitney v. Fitchburg R. R. Co., 178 Mass. 559, 60 N. E. 384; Rice v. Norfolk etc. R. R. Co., 130 N. C. 375, 41 S. E. 1031.

Where a railroad company, in constructing its road totally diverted a stream from a lower proprietor, the latter was held entitled to a mandatory injunction for its restoration. Atchison, T. & S. F. R. R. Co. v. Long, 46 Kan. 701, 27 Pac. 182, 26 Am. St. Rep. 165. But an owner may lose his right to equitable relief by keeping silent while he sees the company expend large sums in diverting a small stream. Slocumb v. C. B. & Q. R. R. Co., 57 Ia. 675.

²⁵McCord v. High, 24 Ia. 336.

²⁶Avery v. Fox, 1 Abb. U. S. 246, 253. In this case the court says: "To divert a stream from its natural channel into an artificial one, for the purpose of affording improved navigation and benefiting commerce, may be a work of great public concernment and advantage, but if thereby a riparian owner is wholly or injuriously deprived of the use of its waters, which he is employing advantageously as an incident to his land, it is taking the private property of such owner in and to the use of that water for public use, and, unless just compensation is made, is against both the principles of the common law and the provisions of the Constitution of the United States, and courts have no alternative but to so administer the law as to secure and protect such rights in a proper case." The improvement in

road,²⁷ or for any other public use, compensation must be made to the inferior proprietors on the banks of the stream who are injured thereby.²⁸ The only dissenting case which has come to our notice is that of the Commissioners of Homoehitto River v. Withers, in which the Supreme Court of Mississippi held that it was not a taking, to divert a stream of water from the plaintiff's property into a new channel for the purpose of improving navigation.²⁹ This decision is so palpably wrong that we do not think it requires discussion. Where a railroad company divert a stream into a new channel for a short distance, it is bound to restore it unimpaired to its natural channel, and where in such case the stream escaped from the new channel by percolation the company was held liable.³⁰

this case was being made by the United States and so the federal Constitution applied to the case.

To same effect. Cohen v. United States, 162 Fed. 364.

²⁷Smith v. Gould, 59 Wis. 631. 18 N. W. 457; S. C. 61 Wis. 31. 20 N. W. 369; State ex rel. Smith v. Board of Supervisors, 66 Wis. 199, 28 N. W. 140. So where a stream was diverted into a new channel by a railroad company. Louisville etc. R. R. Co. v. Whitsell, 125 Ky. 433.

²⁸See also the following cases, in most of which, however, the diversion was not for public use. Heilbron v. Land & Water Co., 80 Cal. 189, 22 Pac. 62; Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. 762; Bank of Hopkinsville v. Western Ky. Asylum, 108 Ky. 357, 56 S. W. 525; McCook Irr. & W. P. Co. v. Crews, 70 Neb. 109, 96 N. W. 996; Harper H. & D. Co. v. Mountain Water Co., 65 N. J. Eq. 479, 56 Atl. 297; Platt v. Root, 15 Johns. 213; Palmer v. Mulligan, 3 Caines Rep. 307, 2 Am. Dec. 270; New York Rubber Co. v. Rothery, 132 N. Y. 293, 30 N. E. 841; Hogg v. Connellsville Water Co., 168 Pa. St. 456, 31 Atl. 1010; Carpenter v. Gold, 88 Va. 551, 14 S. E. 329; Mumpower v. City of Bristol, 90 Va. 151, 17 S.

E. 853; Green Bay etc. Canal Co. v. Kaukauna W. P. Co., 90 Wis. 370, 61 N. W. 1121, 48 Am. St. Rep. 937.

²⁹29 Miss. 21, 32, 64 Am. Dec. 126. The court says: "It appears to us that it (the constitution) applies to such property as belongs absolutely to the individual, and of which he has the exclusive right of disposition; property of a specific, fixed, and tangible nature, capable of being had in possession and transmitted to another, as houses, lands, and chattels. But it is not easy to understand how a man can be said to have a property in water, light, or air of so fixed and positive a character as to deprive the sovereign power of the right to control it for the public good and general convenience." In South Carolina v. Georgia, 93 U. S. 4, it was held that Congress might close one of two navigable channels of a river. No question of private right was involved in this case and, besides, causing the water of a stream to flow in one of two natural channels is quite different from diverting it wholly into an artificial channel. See also Black Riv. Imp. Co. v. La Crosse Booming & Tram. Co., 54 Wis. 659; Wisconsin v. Duluth, 96 U. S. 379.

³⁰Cott v. Lewiston R. R. Co., 36

The manner in which the diversion is accomplished is immaterial, whether by an artificial channel, by pumping, by percolation into a well or gallery, or by other means. The injury consists in taking the water. Under a general authority to take water for the purpose of supplying its inhabitants with water for domestic use, for extinguishing fires and for manufacturing, a city purchased land on a stream bordering a mill pond and dug a well about seventy-five feet from the water's edge, from which it pumped a supply. The water came to the well by percolation from the pond. The city also extended a pipe directly into the pond, to be used only in case of fire. The owner of the pond and of the mill which the pond supplied brought suit for the damages. It was held that he was entitled to recover, that the city had no more right to draw the water from the pond indirectly, by percolation, than directly, by a pipe or other means, and that the distance of the well from the pond was immaterial, provided its supply came from the pond.³¹ Similar decisions have been made in Massachusetts and other States.³² The fact that the city is the owner in fee of land on the stream where such works are constructed does not alter the case.³³ The right of a riparian owner to take sufficient water for domestic use does not apply to a city. It is not an individual and has no natural wants.³⁴ Where a city under a special act has voted to take a

N. Y. 214. *See also* White v. East Lake Land Co., 96 Ga. 415, 23 S. E. 393, 51 Am. St. Rep. 141; Louisville etc. R. R. Co. v. Whitsell, 31 Ky. L. R. 76, 101 S. W. 834.

³¹City of Emporia v. Soden, 25 Kan. 588, 37 Am. Rep. 265.

³²Bailey v. Woburn, 126 Mass. 416; Aetna Mills v. Waltham, 126 Mass. 422; Aetna Mills v. Brookline, 127 Mass. 69; Cowdrey v. Woburn, 136 Mass. 409; Hollingsworth & V. Co. v. Foxborough Water Supply Dist., 165 Mass. 186, 42 N. E. 574; Montecito Val. Water Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; Aberdeen v. Bradford, 94 Md. 670, 51 Atl. 614; Van Wycklen v. City of Brooklyn, 118 N. Y. 424, 24 N. E. 179; Covert v. Cranford, 141 N. Y. 521, 36 N. E. 597, 38 Am. St.

Rep. 826; Smith v. Brooklyn, 18 App. Div. N. Y. 340; Smith v. Brooklyn, 160 N. Y. 357, 45 L.R.A. 664, *affirming* S. C. 32 App. Div. N. Y. 257; Irving v. Media Borough, 10 Pa. Supr. Ct. 132.

³³Same; *also* Stein v. Burden, 24 Ala. 130, 55 Am. Dec. 453; and as respects other corporations withdrawing water for a public use as riparian proprietors, *see* Garwood v. N. Y. Cent. & H. R. R. Co. 83 N. Y. 400; Pennsylvania R. R. Co. v. Miller, 112 Pa. St. 34; Swindon Water Works Co. v. Welts & Berks Canal Co., L. R. 7 E. & I. App. Cas. 697; Earl of Sandwich v. Great Northern Ry. Co., L. R. 10 Ch. Div. 707; *ante*, note 18.

³⁴City of Emporia v. Soden, 25 Kan. 588, 607. The court says:

million gallons a day from a river, and has constructed a filtering gallery on land adjacent to the river into which water comes by percolation both from the river and from other sources, a riparian owner on the stream is entitled to have his damages assessed on the basis of the taking of the maximum amount daily.³⁵

The riparian owners upon a stream which flows through or from a pond or lake, are entitled to compensation for water taken from the lake.³⁶ Where a canal company used a stream of water for a period of years, in pursuance of a contract, and continued the use after the contract expired, it was held to be an appropriation under the eminent domain powers conferred upon the company and that the owner at the time of the appropriation was entitled to compensation.³⁷ But, where a canal company constructs an artificial feeder over an individual's land, he acquires no right to the use of the water as against the company, and the latter may divert it at pleasure.³⁸ Where a canal company has the right to take water from a stream for navigation purposes only, it cannot take a surplus for the purpose of leasing it to mill owners.³⁹ The same rules apply to springs which flow in a surface stream, as to the stream itself.⁴⁰

§ 75 (63). Increasing the quantity of water. Not only is it a violation of the right of a riparian owner to obstruct or divert the water of a stream before it reaches his land, but it is equally a violation of his rights to increase the quantity of

"The city, as a corporation, may own land on the banks, and thus in one sense be a riparian owner. But this does not make each citizen a riparian owner. And the corporation is not taking the water for its own domestic purposes; it is not an individual; it has no natural wants, it is not taking for its own use, but to supply a multitude of individuals; it takes to sell."

³⁵Aetna Mills v. Waltham, 126 Mass. 422.

³⁶Bailey v. Town of Woburn, 126 Mass. 416; Watuppa Reservoir Co. v. Fall River, 134 Mass. 267; Smith v. City of Rochester, 92 N. Y. 463, 44 Am. Rep. 393; S. C. 38 Hun 612; Stock v. Township of Jefferson, 114 Mich. 357, 72 N. W. 132, 38 L.R.A. 355; Neal v. Rochester,

156 N. Y. 213, *affirming* S. C. 88 Hun 614.

³⁷Heilman v. Union Canal Co., 50 Pa. St. 268.

³⁸Cooper v. Williams, 4 Ohio 253; Erkenbrecher v. Cincinnati, 2 Cinn. Sup. Ct. 412; Burbank v. Fay, 65 N. Y. 57. But where a natural water course was changed into a canal, and used as such for twenty years, it was held the riparian proprietors had the same rights as though it had continued a natural water course. Burk v. Si...onson, 104 Ind. 173, 54 Am. Rep. 304.

³⁹Adams v. Slater, 8 Ills. App. 72.

⁴⁰Suisun City v. DeFeritas, 142 Cal. 350, 75 Pac. 1092; Cohen v. La Canada L. & W. Co., 142 Cal. 437, 76 Pac. 47.

water flowing past his land by artificial means not connected with the reasonable use of the land above.⁴¹ Thus plaintiff owned land on both sides of Roland's Run, which was a natural stream. The City of Baltimore proposed to introduce into the stream, above plaintiff, an artificial supply of ten million gallons a day, for the purpose of increasing the supply in a reservoir situated in the run below plaintiff's land, from which the city was supplied. It appeared that this increase would cause the stream to overflow some of plaintiff's land and saturate and injure other parts. The court held that the plaintiff was entitled to have the stream "continue to flow through his land in its usual quantity, at its natural place and at its usual height," and that the city should be enjoined from doing the damage until it had acquired the right by condemnation.⁴² No action lies for raising the water in a stream by drains and sewers which conduct surface water only, and which only increase the flow by draining the watershed more quickly.⁴³ But where a city collected the water from the watershed of a small

⁴¹Wood on Nuisances, § 365.

⁴²Mayor of Baltimore v. Apphold, 42 Md. 442. *To same effect*, Rudel v. County of Los Angeles, 118 Cal. 281; Smafield v. Smith, 153 Mich. 270; McKee v. Del. & H. Canal Co., 125 N. Y. 353, 26 N. E. 305, 21 Am. St. Rep. 740; S. C. 52 Hun 52, 22 N. Y. St. 222, 4 N. Y. Supp. 753; Brewster v. J. & J. Rogers Co. 169 N. Y. 73, 62 N. E. 264, 58 L.R.A. 495, *affirming* S. C. 42 App. Div. 343, 59 N. Y. S. 32; Craft v. Norfolk etc. R. R. Co., 136 N. C. 49, 48 S. E. 519; Pfeiffer v. Brown, 165 Pa. St. 267, 30 Atl. 844, 44 Am St. Rep. 660; Owens v. Lancaster, 182 Pa. St. 257; Rankin v. Harrisburg, 104 Va. 524, 52 S. E. 555, 113 Am. St. Rep. 1050, 3 L.R.A.(N.S.) 919; Malott v. Mersea, 9 Ontario 611; *and see* Grant v. Kugler, 81 Ga 637; Kay v. Kirk, 76 Md. 41, 24 Atl. 326; Barrett v. Mt. Greenwood Cem. Ass., 57 Ill. App. 401; Plattsburgh Water Co. v. Smith, 57 Neb. 579, 78 N. W. 275; Rice v. Norfolk etc. R. R. Co., 130

N. C. 375, 41 S. E. 1031; Miller v. Wisenberger, 61 Ohio St. 561, 56 N. E. 454. In Brown v. Atlanta, 66 Ga. 71, the defendant city had a reservoir above plaintiff and let off the water in a way to damage plaintiff by the increased flow. It was held that the city had a right to do so, provided it exercised that care which a prudent person would do who had lands below, and provided it did no more harm than nature's floods would do had there been no reservoir, and provided the flow would not, in the absence of other causes, more than fill the bed of the stream.

⁴³Bainard v. City of Newton, 154 Mass. 255, 27 N. E. 995; O'Donnell v. Syracuse, 184 N. Y. 1, 76 N. E. 738, *reversing* S. C. 102 App. Div. 80, 92 N. Y. S. 55; Prime v. Yonkers, 192 N. Y. 105, *reversing* S. C. 116 App. Div. 699; Penfield v. New York, 115 App. Div. 502, 101 N. Y. S. 442; Hamilton v. Ashbrook, 62 Ohio St. 571, 57 N. E. 239; Strauss

stream in its sewers which drained the watershed with such rapidity as to cause the stream to overflow, it was held liable.⁴⁴ Water turned into a running stream by a riparian proprietor, becomes, after leaving his land, identified with the natural stream as to any benefit to the lower proprietors, and one such lower proprietor cannot abstract an amount equal to that artificially added, to the injury of another.⁴⁵

§ 76 (64). Interfering with the regularity of the current. The upper proprietor may always make a reasonable use of the water as it passes over his land, although such use may to a certain extent change the natural current of the stream or affect its volume or quality. What constitutes a reasonable use in any given case is a question of fact for the jury.⁴⁶ Beyond this neither individuals nor the public can go without compensation to the inferior proprietor who suffers damage. Any interference with the regularity of the current for public use, so as to make the flow fitful, uncertain and intermittent, is a violation of the common law right to have the stream flow as it is wont by nature, and a recovery may be had for any damages so occasioned.⁴⁷ Where a booming company erects dams across a stream and lets off the water from time to time in floods for the purpose of floating logs, and in the intervals retains the water for such purpose, a lower proprietor whose mill is interfered with or whose lands are flooded may recover compensation.⁴⁸ But a boom company was held not liable for damages caused by an unusual accumulation of logs and an unusual rise

v. Allentown, 215 Pa. St. 96, 63 Atl. 1073; Miller v. Newport News, 101 Va. 432, 44 S. E. 712. *And see* Mizell v. McGowan, 129 N. C. 93, 39 S. E. 729, 85 Am. St. Rep. 705.

⁴⁴Hents v. Mt. Vernon, 78 App. Div. 515, 79 N. Y. S. 774.

⁴⁵Druley v. Adams, 102 Ill. 177.

⁴⁶Thompson v. The Androscoggin River Improvement Co., 54 N. H. 545; Phillips v. Sherman, 64 Me. 171. *See ante*, § 72.

⁴⁷Osborn v. Norwalk, 77 Conn. 663, 60 Atl. 645; Boston Belting Co. v. City of Boston, 152 Mass. 307, 25 N. E. 613; Carlson v. St. Louis etc. Co., 73 Minn. 128, 75 N. W. 1044; McKee v. Del. & H. Canal Co., 125

N. Y. 353, 26 N. E. 305, 21 Am. St. Rep. 740; Ordway v. Village of Canisteo, 66 Hun 569, 21 N. Y. Supp. 835; Lakeside Paper Co. v. State, 15 App. Div. N. Y. 169; Blizzard v. Danville, 175 Pa. St. 479, 34 Atl. 846; Lone Tree Ditch Co. v. Rapid City E. & G. Lt. Co., 16 S. D. 451, 93 N. W. 650; *Compare* Brown v. Atlanta, 66 Ga. 71. *See ante*, § 72.

⁴⁸Thunder Bay Booming Co. v. Speechly, 31 Mich. 336; Middleton v. Flat River Booming Co., 27 Mich. 533; Koopman v. Blodgett, 70 Mich. 610, 38 N. W. 649, 14 Am. St. Rep. 527; Folsom v. The Apple River Log Driving Co., 41 Wis. 602; Thompson v. Androscoggin River Improvement

of water.⁴⁹ And a recent case in Wisconsin holds that a river improvement company, authorized to construct dams and other works, to aid in the floating of logs, was not liable to a mill owner below for damages resulting from alternately retaining and letting off the water.⁵⁰

§ 77 (65). Pollution of the water. The general right to the flow of a stream in its natural purity is fully established by the decisions.⁵¹ The upper proprietor may, of course, make a reasonable use of the stream or of his land, though the stream is to some extent polluted thereby.⁵² This right to pure water

Co., 54 N. H. 545; Phillips v. Sherman, 64 Me. 171; Carroll v. Atlanta, 74 Ga. 386; Brown v. Atlanta, 66 Ga. 71; Kamm v. Normand, 50 Ore. 9, 91 Pac. 448, 11 L.R.A.(N.S.) 290; Monroe Mill Co. v. Mensel, 35 Wash. 487, 77 Pac. 813, 102 Am. St. Rep. 905, 70 L.R.A. 272; Matthews v. Belfast Mfg. Co., 35 Wash. 662, 77 Pac. 1046; Hackstack v. Keshena Improvement Co., 66 Wis. 439. In the last case the plaintiff's property was situated twenty miles below the improvements. It was flooded by water detained and let off in large volumes for the purpose of floating logs. In Massachusetts it is held that under the Mill act a mill owner is not liable for any injury done to intervening land by letting down water from his reservoir dam for the use of his mill, for which he would not be liable at common law. Drake v. Hamilton Woolen Co., 99 Mass. 574.

⁴⁹Lawler v. Baring Boom Co., 56 Me. 443.

⁵⁰Falls Mfg. Co. v. Oconto Riv. Imp. Co., 87 Wis. 134, 58 N. W. Rep. 257. As to damages by works for the improvement of navigation see post, § 85.

⁵¹Drake v. Lady Ensley Coal etc. Co., 102 Ala. 501, 14 So. 749, 48 Am. St. Rep. 77, 24 L.R.A. 64; Alabama C. C. & I. Co. v. Vines, 151 Ala. 398, 44 So. 377; Horton v. Fulton, 130 Ga. 466; Jessup & Moore Paper

Co. v. Ford, 6 Del. Ch. 52; Western Paper Co. v. Pope, 155 Ind. 394, 57 N. E. 719, 56 L.R.A. 899; West Muncie Strawboard Co. v. Slack, 164 Ind. 21, 72 N. E. 879; Muncie Pulp Co. v. Martin, 164 Ind. 30, 72 N. E. 882; Muncie Pulp Co. v. Keesling, 166 Ind. 479, 76 N. E. 1002; Ferguson v. Firmenich Mfg. Co., 77 Ia. 576, 42 N. W. 448, 14 Am. St. Rep. 319; Gladfelter v. Walker, 40 Md. 1; West Arlington Imp. Co. v. Mount Hope Retreat, 97 Md. 191, 54 Atl. 982; Parker v. Am. Woolen Co., 195 Mass. 591; MacNamara v. Taft, 196 Mass. 597; Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335; Beach v. Sterling Iron & Z. Co., 54 N. J. Eq. 65, 33 Atl. 286; Sterling Iron & Z. Co. v. Sparks Mfg. Co., 55 N. J. Eq. 824, 41 Atl. 1117; Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453, 7 L.R.A.(N.S.) 321; Richmond Manufacturing Co. v. Atlantic DeLaine Co., 10 R. I. 106; Randolph v. Pennsylvania S. V. R. R. Co., 186 Pa. St. 541; Silver Spring etc. Co. v. Waunskuck Co., 13 R. I. 611; Van Egmond v. Seaforth, 6 Ontario 599; Attorney General v. Lunatic Asylum, 4 L. R. Ch. App. 146; Angell on Waters, § 136; Wood on Nuisances, § 697; ante, § 71.

⁵²Helfrich v. Catonsville Water Co., 74 Md. 269, 22 Atl. 72, 28 Am.

is property⁵³ and any interference with the right is a taking, to the extent of such interference.⁵⁴ It necessarily follows that a stream may not be polluted for private purposes against the will of the riparian owner, with or without compensation;⁵⁵ also that it cannot be polluted for public purposes, except under authority of law, and upon compensation made.⁵⁶ In Indiana and Massachusetts⁵⁷ it has been held that it is a reasonable use of a stream running through a city, to empty into it the public sewers of the town, and that for such pollution as arises therefrom the lower proprietor has no remedy. This is contrary to the principle just enunciated and seems to us a wrong conclusion. Undoubtedly the lower proprietor must endure without remedy such impurities as find their way into a stream from the natural wash and drainage of a city situated on its banks. Drains and sewers may be constructed for the purpose of facilitating the drainage into the stream of the water which falls upon the surface or percolates beneath.⁵⁸ This is no more than a reasonable use of the stream. But it is a different thing to conduct directly into the stream, by means of sewers and artificial supplies of water, the waste and filth which come from a dense population. There is no principle upon which this can be justified. A city is not a riparian proprietor simply because

St. Rep. 245; Grey v. Paterson, 60 N. J. Eq. 385, 45 Atl. 995, 83 Am. St. Rep. 642, 48 L.R.A. 717. The question of reasonable use, as respects pollution, is much considered in Indianapolis Water Co. v. Am. Strawboard Co., 53 Fed. 970, 57 Fed. Rep. 1000, and Barnard v. Shirley, 135 Ind. 547, 34 N. E. 600. *And see ante*, § 72.

⁵³Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388; Beach v. Sterling Iron & Z. Co., 54 N. J. Eq. 65, 33 Atl. 286; S. C. affirmed Sub Nom. Sterling Iron & Z. Co. v. Sparks Mfg. Co., 55 N. J. Eq. 824, 41 Atl. 1117; Mansfield v. Balliet, 65 Ohio St. 451, 63 N. E. 86, 58 L.R.A. 628; Winchell v. Waukesha, 110 Wis. 101, 85 N. W. 668, 84 Am. St. Rep. 902; *ante*, § 64.

⁵⁴Same; Grey v. Paterson, 60 N.

J. Eq. 385, 45 Atl. 995, 83 Am. St. Rep. 642, 48 L.R.A. 717; New Odorless Sewerage Co. v. Wisdom, 30 Tex. Civ. App. 224, 70 S. W. 354.

⁵⁵Beach v. Sterling Iron & Z. Co., 54 N. J. Eq. 65, 33 Atl. 286; S. C. affirmed on opinion below. Sterling Iron & Z. Co. v. Sparks Mfg. Co., 55 N. J. Eq. 824, 41 Atl. 1117.

⁵⁶Post, §§ 367, 671, 672, 673.

⁵⁷Merrifield v. Worcester, 110 Mass. 216, 14 Am. Rep. 592; compare Middlesex Co. v. City of Lowell, 149 Mass. 509, 21 N. E. 872. So in Indiana, Valparaiso v. Hagen, 153 Ind. 337, 54 N. E. 1062, 74 Am. St. Rep. 305, 48 L.R.A. 707; Richmond v. Test, 18 Ind. App. 482.

⁵⁸Crane v. Roselle, 236 Ill. 97; Bainard v. City of Newton, 154 Mass. 255, 27 N. E. 995.

a stream runs through or past its limits.⁵⁹ Those who own the banks of the stream are the riparian proprietors. And even if the city could be regarded as a riparian owner, either because the stream was within its corporate limits or because its streets or public grounds intersected or bounded on it, there is no riparian right to cast filth directly into the stream. A single proprietor upon a very small stream would not be allowed to place his privy over the stream and turn directly into it the refuse from his kitchen and stable. No more can a hundred proprietors on a larger stream or the corporate authorities of a city through which it runs. Accordingly it has been held in numerous cases that an action will lie against a municipality to enjoin the pollution of a stream with sewerage,⁶⁰ or to recover damages for such pollution.⁶¹ The terms and conditions upon which injunctive relief will be granted are considered in a sub-

⁵⁹Vale Mills v. Nashua, 63 N. H. 42; *ante*, § 73.

⁶⁰People v. San Luis Obispo, 116 Cal. 617, 48 Pac. 723; Nolan v. New Britain, 69 Conn. 668; Butler v. Thomasville, 74 Ga. 570; Wayeross v. Houk, 113 Ga. 963, 39 S. E. 577; Village of Dwight v. Hayes, 150 Ill. 273, 37 N. E. 218, 41 Am. St. Rep. 367; Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388; Mason v. Mattoon, 95 Ill. App. 525; Middlesex Co. v. Lowell, 149 Mass. 509, 21 N. E. 872; Grey v. Paterson, 58 N. J. Eq. 1, 42 Atl. 749; Grey v. Paterson, 60 N. J. Eq. 385, 45 Atl. 995, 83 Am. St. Rep. 642, 48 L.R.A. 717; Doremus v. Paterson, 69 N. J. Eq. 188, 57 Atl. 548; S. C. *affirmed*, 69 N. J. Eq. 775, 61 Atl. 396; Sammons v. Gloversville, 175 N. Y. 346, 67 N. E. 622, *affirming* 67 App. Div. 628; Morgan v. Bingham, 32 Hun 602; Schriver v. Village of Johnstown, 71 Hun 232, 24 N. Y. Supp. 1083; Moody v. Saratoga Springs, 17 App. Div. N. Y. 207; Butler v. White Plains, 59 App. Div. 30, 69 N. Y. S. 193; Warner v. Gloversville, 81 App. Div. 291, 80 N. Y. S. 912; Sammons v. Gloversville, 81 App. Div. 332, 81

N. Y. S. 466; Donovan v. Royal, 26 Tex. Civ. App. 248, 63 S. W. 1054; Winchell v. Waukesha, 110 Wis. 101, 85 N. W. 668, 84 Am. St. Rep. 902; Goldsmid v. Tunbridge Wells Impr. Comrs., L. R. 1 Ch. App. 349, *affirming* S. C. L. R. 1 Eq. 161; Van Egmond v. Seaforth, 6 Ontario 599; Attorney General v. Leeds, 5 L. R. Ch. App. 583, 589. *And see* Robb v. La Grange, 158 Ill. 1, 42 N. E. 77; Barrett v. Mt. Greenwood Cem. Ass. 159 Ill. 385, 42 N. E. 891, 31 L.R.A. 109; Lefrois v. Monroe County, 24 App. Div. 421; Abraham v. Fremont, 54 Neb. 391, 74 N. W. 834; Peterson v. Santa Rosa, 119 Cal. 387. In Cleveland v. Standard Bag & Paper Co., 72 Ohio St. 324, 74 N. E. 206, 106 Am. St. Rep. 613, a city was held to have a prescriptive right to pollute a stream with sewerage after twenty years user and an injunction was refused. *See* Norwalk v. Blatz, 9 Ohio C. C. 417.

⁶¹Birmingham v. Land, 137 Ala. 538, 34 So. 613; Watson v. New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345; Gorham v. New Haven, 79 Conn. 670, 66 Atl. 505; Platt Bros. & Co. v. Waterbury, 80

sequent chapter.⁶² The legislature may doubtless authorize the pollution of streams with sewerage, upon providing for compensation to riparian owners and this has been done in some States.⁶³

Conn. 179; Jacksonville v. Doan, 145 Ill. 23, 33 N. E. 878, *affirming* S. C. 48 Ill. App. 247; Bloomington v. Costello, 65 Ill. App. 407; Loughram v. Des Moines, 72 Ia. 382; Hollenbeck v. Marion, 116 Ia. 69, 89 N. W. 210; Bennett v. Marion, 119 Ia. 473, 93 N. W. 558; Vogt v. Grinnell, 123 Ia. 332, 98 N. W. 782; Vogt v. Grinnell, 133 Ia. 363, 110 N. W. 603; Long v. Emporia, 59 Kan. 46; Edmondson v. Moberly, 98 Mo. 523, 11 S. W. 990; Schoen v. Kansas City, 65 Mo. App. 134; Smith v. Sedalia, 152 Mo. 283, 53 S. W. 907, 48 L.R.A. 711; S. C. 182 Mo. 1, 81 S. W. 165; Kellogg v. Kirksville, 132 Mo. App. 519; Todd v. York, 3 Neb. (Unof.) 763, 92 N. W. 1040; Vale Mills v. Nashua, 63 N. H. 42; Hooker v. Rochester, 37 Hun 181; Denby v. City of Kingston, 60 Hun 294, 38 N. Y. St. 42, 14 N. Y. Supp. 601; S. C. *affirmed* without opinion 133 N. Y. 538; Moody v. Saratoga Springs, 17 App. Div. 207, 45 N. Y. S. 365; S. C. *affirmed*, 163 N. Y. 581, 57 N. E. 1118; Davis v. Same, 17 App. Div. 623; S. C. *affirmed*, 163 N. Y. 581, 57 N. E. 1108; Lasher v. Same, 17 App. Div. 624; S. C. *affirmed*, 163 N. Y. 582, 57 N. E. 1115; Swart v. Same, 25 App. Div. 622; S. C. *affirmed*, 164 N. Y. 609, 58 N. E. 1092; Mansfield v. Balliet, 65 Ohio St. 451, 63 N. E. 86, 58 L.R.A. 628; McBride v. Akron, 11 Ohio C. C. 610; Mansfield v. Hunt, 19 Ohio C. C. 488; Markwardt v. Guthrie, 18 Okla. 32, 90 Pae. 26, 9 L.R.A.(N.S.) 1150; Good v. City of Altoona, 162 Pa. St. 493, 29 Atl. 741, 42 Am. St. Rep. 840; Owens v. Lancaster, 182 Pa. St. 257; Glasgow v. Altoona, 27 Pa. Supr. 55; Matheny v. Aiken, 68 S. C. 163, 47 S. E. 56; Paris v. Allred, 17 Tex. Civ. App. 125, 43 S. W. 62; Trevitt v. Prison Ass., 98 Va. 332, 36 S. E. 373, 81 Am. St. Rep. 727, 50 L.R.A. 564; Weber v. Berlin, 8 Ont. 302. *See also* Lind v. City of San Luis Obispo, 109 Cal. 340, 42 Pac. 437; Robb v. LaGrange, 57 Ill. App. 386; Pfeiffer v. Brown, 165 Pa. St. 267, 30 Atl. 844, 44 Am. St. Rep. 660; Gray v. Dundas, 11 Ontario 317; City of Hutchinson v. Delano, 46 Kan. 345, 26 Pac. 740. A mill owner may be enjoined from depositing sawdust in a stream to the damage of a lower proprietor. Waterman v. Buck, 58 Vt. 519. *See also* Indianapolis Water Co. v. Am. Strawboard Co., 53 Fed. 970, 57 Fed. 1000.

⁶²Post, § 916. *See especially*, Grcy v. Paterson, 60 N. J. Eq. 385, 45 Atl. 995, 83 Am. St. Rep. 642, 48 L.R.A. 717; Winchell v. Waukesha, 110 Wis. 101, 85 N. W. 668, 84 Am. St. Rep. 902.

⁶³Kellogg v. New Britain, 62 Conn. 232, 24 Atl. 996; Washburn & M. Mfg. Co. v. City of Worcester, 153 Mass. 494, 27 N. E. Rep. 664; Worcester Gas Light Co. v. County Comrs., 138 Mass. 289; Joplin Con. Min. Co. v. Joplin, 124 Mo. 129, 27 S. W. 406. *And see* Sayre v. Newark, 60 N. J. Eq. 361, 45 Atl. 985, 83 Am. St. Rep. 629, 48 L.R.A. 722; Matheny v. Aiken, 68 S. C. 163, 47 S. E. 56. In Pennsylvania an act of 1905 prohibits the discharge of sewerage into the streams and waters of the State, except by sewerage systems already constructed. Commonwealth v. Emmers, 33 Pa. Supr. Ct. 151.

But a general authority to construct sewers, or even to discharge them into a stream, will not be construed as authorizing the pollution of the stream or the creation of a nuisance.⁶⁴ In a New York case the charter of the defendant city empowered its common council to construct sewers and discharge them into the stream in question. Of this authority the court says: "This is a permission and not a direction, and a legislative permission neither implies a right to appropriate property, without compensation; nor confers a license to commit a nuisance."⁶⁵ In New Jersey it has been held that in case of a stream where the tide ebbs and flows, the title to the water and bed of the stream is absolutely in the public and that the legislature may authorize its use for sewerage disposal without compensation to the riparian owners.⁶⁶ It has been held that a company to supply a village with water could not take the water of a stream and return to it an equal amount of inferior quality to the damage of a lower proprietor.⁶⁷ Under authority to take the waters of a stream for sewer purposes, a section was taken, the sewer constructed and the waters of the stream conducted through it, but the same were restored to their natural channel before reaching plaintiff's land. It was held a taking of the waters as to plaintiff and that his right to compensation accrued at the time of such appropriation.⁶⁸ Where a river is public, that is where the title to the bed is in the State, it has been held that the remedy for pollution must be sought through the attorney-general.⁶⁹ One who has been accustomed to foul a stream by using the water for manufacturing purposes, but

⁶⁴Edinondson v. Moberly, 98 Mo. 523, 11 S. W. 990; Moody v. Saratoga Springs, 17 App. Div. 207, 45 N. Y. S. 365; S. C. *affirmed*, 163 N. Y. 581, 57 N. E. 1118; Butler v. White Plains, 59 App. Div. 30, 69 N. Y. S. 193; Donovan v. Royal, 26 Tex. Civ. App. 248, 63 S. W. 1054; Winchell v. Waukesha, 110 Wis. 101, 85 N. W. 668, 84 Am. St. Rep. 902.

⁶⁵Sammons v. Gloversville, 175 N. Y. 346, 352, 67 N. E. 622, *affirming* S. C. 67 App. Div. 628. The point is elaborately discussed in the Wisconsin case last cited.

⁶⁶Sayre v. Newark, 60 N. J. Eq.

361, 45 Atl. 985, 83 Am. St. Rep. 629, 48 L.R.A. 722, *reversing* S. C. 58 N. J. Eq. 136, 42 Atl. 1068.

⁶⁷Aequackanonk Water Co. v. Watson, 29 N. J. Eq. 366.

⁶⁸Worcester Gas Light Co. v. County Comrs., 138 Mass. 289.

⁶⁹Newark Aqueduct Board v. City of Passaic, 45 N. J. Eq. 393, 18 Atl. 106. *See also* King v. Bristol Dock Co., 12 East, 429. As to the protection of a public water supply from pollution see Kelley v. New York, 6 Misc. 516, 27 N. Y. Supp. 164; Commonwealth v. Russell, 172 Pa. St. 506, 33 Atl. 709.

has acquired no right to do so by grant or prescription, cannot recover damages when compelled to relinquish such use of the water by reason of the stream being taken at a point below his mill under the power of eminent domain to supply a city with water.⁷⁰ But if the mill-owner has acquired such right by prescription or otherwise, then the right must be condemned. As the riparian owner has no right to pollute a stream, the legislature may prohibit such pollution without compensation.⁷¹

§ 78 (66). Changing the current by works in, across or near the channel to the injury of those below. Works of public utility must be so constructed as not to interfere with the accustomed flow of the stream, otherwise there is a right to recover for any consequent damage to private property.⁷² Authority to bridge or cross a stream does not imply authority to interfere with its current.⁷³ Where a railroad company, in carrying its road across a stream, erected a bridge and embankment in such a way as to change and increase the current of the stream in times of high water, thereby causing damage to the lands of a proprietor some distance below, none of whose land was taken, it was held he could recover compensation for the loss.⁷⁴ And, generally, if a railroad company in bridging a

⁷⁰Baltimore v. Warren Manufacturing Co., 59 Md. 96; Dwight Printing Co. v. Boston, 122 Mass. 583.

⁷¹Sprague v. Dorr, 185 Mass. 10, 69 N. E. 344; Commonwealth v. Einmers, 221 Pa. St. 298.

⁷²Durham v. Lisbon Falls Fibre Co., 100 Me. 238, 61 Atl. 177; Rowe v. Granite Bridge Corp., 21 Pick. 344; Nelson v. Miss. & Rum Riv. Boom Co., 99 Minn. 484, 109 N. W. 1118; Bowers v. Miss. & Rum Riv. Boom Co., 78 Minn. 398, 81 N. W. 208, 79 Am. St. Rep. 395; Ten Eyck v. Delaware & Raritan Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233; Robinson v. N. Y. & E. R. R. Co., 27 Barb. 512; Chapman v. City of Rochester, 110 N. Y. 273, 18 N. E. 88, 6 Am. St. Rep. 366, 1 L.R.A. 296; Howard Co. v. Chicago etc. R. R. Co., 130 Mo. 652, 32 S. W. 651; Sutton v. Catawba Power Co., 76 S. C. 320,

56 S. E. 966; Gulf etc. R. R. Co. v. Locker, 78 Tex. 279, 14 S. W. 611. See Bedford v. United States, 192 U. S. 217, 24 S. C. 238; Manigault v. Springs, 199 U. S. 473, 26 S. C. 127.

⁷³Rowe v. Granite Bridge Corporation, 21 Pick. 344; Robinson v. N. Y. & E. R. R. Co., 27 Barb. 512.

⁷⁴Evansville & Crawfordsville R. R. Co. v. Dick, 9 Ind. 433, 436. "A proper construction of the word taken," says the court, "makes it synonymous with seized, injured, destroyed, deprived of. It is, therefore, evident that the legislature have no power to authorize, in any case, either a direct or consequential injury to private property, without compensation to the owner." But where the road crossed on the land of the plaintiff it was held that it must be presumed that he had been compensated for all such

stream changes in any way the natural current of the stream to the damage of private property, there is a right to compensation.⁷⁵ So where a railroad crossed a small stream obliquely and a culvert was put in at right angles to the road, thereby changing the course of the stream and causing it to flow upon the plaintiff's land to his damage.⁷⁶ The same rule applies to a bridge built by a town or city as part of a highway.⁷⁷ It is held that one over whose land such crossing is made is entitled to receive compensation for all such damages as will result from constructing the bridge or other crossing in a reasonable and proper manner.⁷⁸ If no part of one's land is taken, he may always recover for damages occasioned by such interference with the current of a stream, either by an assessment under

damages as would result from constructing the bridge in a reasonable and proper manner with a view both to the safety of passengers and the protection of the property-holder, and that he could only recover for damages resulting from improper construction as thus explained. See also *Terre Haute & Indianapolis R. R. Co. v. McKinley*, 33 Ind. 274.

⁷⁵*Chicago, Rock Island & P. Ry. Co. v. Moffitt*, 75 Ill. 524; *Rock Island etc. R. R. Co. v. Krapp*, 74 Ill. App. 158; *Lake Erie etc. R. R. Co. v. Purell*, 75 Ill. App. 573; *Union Pac. Ry. Co. v. Dyche*, 31 Kan. 120; *Estabrooks v. Peterborough etc. R. R. Co.*, 12 *Cush.* 224; *Kansas City etc. R. R. Co. v. Lackey*, 72 *Miss.* 881, 16 *So.* 909; *Mobile & O. R. R. Co. v. Bynum (Miss.)*, 15 *So.* 795; *Dickson v. Chicago etc. R. R. Co.*, 71 *Mo.* 575; *Delaware etc., Canal Co. v. Lee*, 22 *N. J. L.* 243; *Robinson v. N. Y. & E. R. R. Co.*, 27 *Barb.* 512; *Freeland v. Pa. R. R. Co.*, 197 *Pa. St.* 529, 47 *Atl.* 745, 80 *Am. St. Rep.* 850, 58 *L.R.A.* 206; *Braine v. Northern Cent. Ry. Co.*, 218 *Pa. St.* 43, 66 *Atl.* 985; *Matteson v. New York Cent. etc. R. R. Co.*, 218 *Pa. St.* 527, 67 *Atl.* 847; *St. Louis etc. R. R. Co. v. Craig*, 10 *Tex. Civ. App.* 238, 31 *S. W.* 207; *Eells v.*

Chesapeake etc. Ry. Co., 49 *W. Va.* 65, 38 *S. E.* 479, 87 *Am. St. Rep.* 787. *Contra:* *Norris v. Vermont Central R. R. Co.*, 28 *Vt.* 99; *Henry v. Same*, 30 *Vt.* 638.

⁷⁶*St. Louis etc. Ry. Co. v. Brooksher*, 86 *Ark.* 91.

⁷⁷*Perry v. Worcester*, 6 *Gray* 544; *Stone v. Augusta*, 46 *Me.* 127; *Barron v. Memphis*, 113 *Tenn.* 89, 80 *S. W.* 832, 106 *Am. St. Rep.* 810. Where road officers diverted a stream of water on to plaintiff they were held personally liable for the consequences. *Wrightsel v. Fee*, 76 *Ohio St.* 529.

⁷⁸*Terre Haute & Indianapolis R. R. Co. v. McKinley*, 33 Ind. 274; *Mississippi Central R. R. Co. v. Mason*, 51 *Miss.* 234; *Baltimore & Potomac R. R. Co. v. Magruder*, 34 *Md.* 79. As to the correctness of this position, see *post*, chap. xxiv. Where an owner grants a right of way over his land to a railroad, with the right to change water-courses, this only authorizes changes on his own land, and he may recover damages caused to his land by a change made by the company on the land of another. *St. Louis etc. R. R. Co. v. Harris*, 47 *Ark.* 340. To the same effect, *Eaton's Case*, 54 *N. H.* 502.

the statute,⁷⁹ or by a common law action.⁸⁰ Damages which result from negligent or improper construction may always be recovered, whether there has been an assessment of damages or not.⁸¹ In bridging a stream, by legislative authority, a railroad company is only required to exercise reasonable diligence and foresight to avoid damages by reason of extraordinary floods and ice gorges.⁸² Such floods are deemed an act of God, for the consequences of which no one is liable.⁸³ A railroad company, in crossing a small stream, diverted it into a ditch along its track for about 300 feet and then discharged it through a culvert upon the plaintiff's land, whence it sought the regular channel. In times of flood, stones and gravel were deposited upon the plaintiff's land. It was held that this amounted to a taking of the plaintiff's property, which could not be accomplished without a condemnation, and that, in the absence of such condemnation, a bill would lie to compel a restoration of the stream to its original channel.⁸⁴ Changing the channel or direction of the current, so that the stream is cast upon the lower proprietor in a different place, or so that the current strikes his land from a different direction, to his injury, is a taking or actionable injury.⁸⁵ The channel of the American River, a

⁷⁹Estabrooks v. Peterborough & Shirley R. R. Co., 12 Cush. 224.

8 S. W. 535; *and see post*, § 80 note 3.

⁸⁰Delaware & Raritan Canal Co. v. Lee, 22 N. J. L. 243; Evansville & Crawfordsville R. R. Co. v. Dick, 9 Ind. 433.

⁸³Doorman v. Ames, 12 Minn. 451.

⁸¹Spence v. Hartford, Providence & T. R. R. Co., 10 R. I. 14; Fowle v. N. H. & N. R. R. Co., 112 Mass. 334, 17 Am. Rep. 103; Kansas City etc. R. R. Co. v. Lackey, 72 Miss. 881, 16 So. Rep. 909; Brink v. Kansas City etc. R. R. Co., 17 Mo. App. 177; I. & G. N. Ry. Co. v. Klaus, 64 Tex. 293; Shores v. Southern Ry. Co., 72 S. C. 244, 51 S. E. 699; San Antonio etc. Ry. Co. v. Kiersey, 98 Tex. 590, 86 S. W. 744; *post*, §§ 829, 933.

⁸⁴Wright v. Syracuse etc. R. R. Co., 49 Hun 445, 23 N. Y. St. 78,

3 N. Y. Supp. 480; S. C. *affirmed without opinion*, 124 N. Y. 668. *To the same effect*, East St. Louis etc. R. R. Co. v. Eisentraut, 134 Ill. 96, 24 N. E. 760; Atchison etc. Ry. Co. v. Jones, 110 Ill. App. 626; Burnett v. Gt. Northern Ry. Co., 76 Minn. 461, 79 N. W. 523; George v. Wabash Western R. R. Co., 40 Mo. App. 433; Koch v. Del. L. & W. R. R. Co., 54 N. J. L. 401, 24 Atl. 442; Fleming v. Wilmington & W. R. R. Co., 115 N. C. 676, 20 S. E. Rep. 714. *Compare* City of Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. Rep. 706.

⁸²Bellinger v. New York Central R. R. Co., 23 N. Y. 42; Omaha & R. V. R. R. Co. v. Brown, 14 Neb. 170; S. C. 16 Neb. 161; Gulf C. & S. F. R. R. Co. v. Pool, 70 Tex. 713,

⁸⁵Same; *also* Grant v. Kugler, 81 Ga. 637, 12 Am. St. Rep. 348, 3 L.R.A. 606; Kay v. Kirk, 76 Md. 41,

tributary of the Sacramento, was changed so as to enter the latter river opposite the plaintiff's premises. During a high flood, the force of the current was such as to wash away the plaintiff's land and buildings, causing damage to the amount of \$28,000. It was held by the Supreme Court of California that the damage was not a taking and that there was no liability on the part of the commissioners engaged in the work or of the city for whose benefit it was done.⁸⁶

§ 79 (66a). Embankment on one side of stream causing an increase of flood water upon the opposite side. Where a railroad company builds an embankment on one side of a stream, which causes an increased flow of flood waters upon the lands situated along the opposite bank, to their damage, the company will be liable.⁸⁷ Some cases, however, hold the contrary.⁸⁸ A city was held not liable because a levee which it had built caused the flood water to accumulate to a greater depth upon the plaintiff's lots which were situated between the

24 Atl. 326; Parker v. Atkinson, 58 Kan. 29; Ill. Cent. R. R. Co. v. Smith, 110 Ky. 203, 61 S. W. 2; Powers v. St. Louis etc. Ry. Co., 158 Mo. 87, 57 S. W. 1090. *And see* Briscoe v. Young, 131 N. C. 386, 42 S. E. 893; Stone v. State, 138 N. Y. 124, 33 N. E. 733; Rogers v. Coal River B. & D. Co., 39 W. Va. 272, 19 S. E. 401. *Contra:* Warfel v. Cochran, 34 Pa. St. 381; Sallicotte v. King Bridge Co., 122 Fed. 378, 58 C. C. A. 466, 65 L.R.A. 620.

⁸⁶Green v. Swift, 47 Cal. 536; Hoagland v. Sacramento, 52 Cal. 142; *see also* a similar case in Ohio: Railroad Co. v. Carr, 38 Ohio St. 448, 43 Am. Rep. 428; *see* §. 115.

⁸⁷O'Connell v. East Tenn. V. & G. R. R. Co., 87 Ga. 246, 13 S. E. 489, 27 Am. St. Rep. 246, 13 L.R.A. 394, which contains a valuable review of cases; Barden v. City of Portage, 79 Wis. 126, 48 N. W. 210; Cairo etc. R. R. Co. v. Brevoort, 62 Fed. 129; Hartshorn v. Chaddock, 135 N. Y. 116, 31 N. E. 997, 17 L.R.A. 426; Lawrence v. Great Northern R.

R. Co., 16 Q. B. 642. *See* Uhl v. Ohio Riv. R. R. Co., 56 W. Va. 494, 49 S. E. 378, 107 Am. St. Rep. 968, 68 L.R.A. 138; Richards v. Ohio Riv. R. R. Co., 56 W. Va. 592, 49 S. E. 385; Keck v. Vanghouse, 127 Ia. 529, 103 N. W. 773; Priest v. Maxwell, 127 Ia. 744, 104 N. W. 344.

⁸⁸Kansas City etc. R. R. Co. v. Smith, 72 Miss. 677, 17 So. 78, 48 Am. St. Rep. 579, 27 L.R.A. 762; Kansas City etc. R. R. Co. v. Lackey, 72 Miss. 881, 16 So. 909; Moyer v. New York Cent. etc. R. R. Co., 88 N. Y. 351. In Tyron v. Baltimore County, 28 Md. 510, it was held there was no liability for similar injuries caused by a wall erected by county authorities to protect a public road. *And see* De Baker v. Southern California R. R. Co., 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237. As to whether flood waters, overflowing the banks of a stream, are to be regarded as surface water or as a part of the stream, *see post*, § 111.

levee and the river.⁸⁹ But where a levee built by a drainage district on one side of a stream caused a flooding and washing of plaintiff's lands on the opposite side of the stream, which would not otherwise have occurred, the district was held liable as for a taking or damaging of the plaintiff's property within the constitution.⁹⁰

§ 80 (67). Works which set back the water and cause a flooding of the lands above. The right to have a stream flow as it is wont by nature,⁹¹ includes the right to have the water flow off from one's premises as it is accustomed to do, and this right is property.⁹² Where works are constructed below the lands of a proprietor, such as a bridge, or culvert, or dam, or alteration of the channel, which cause the water to set back and overflow the land of such proprietor, there is a violation of such right and, if the works are authorized by law, there is a taking for which compensation must be made.⁹³ Works

⁸⁹Hoard v. Des Moines, 62 Ia. 326.

⁹⁰Bradbury v. Vandalia Levee & Dr. Dist., 236 Ill. 36.

⁹¹Ante, § 71.

⁹²Trenton Water Power Co. v. Raff, 36 N. J. L. 335.

⁹³The cases which support this proposition are very numerous. The leading cases are the following: Pumpelly v. Green Bay Co., 13 Wall. 166; Lee v. Pembroke Iron Co., 57 Me. 481, 2 Am. Rep. 59; Grand Rapids Boom Co. v. Jarvis, 30 Mich. 308; Weaver v. Miss. etc. Boom Co., 28 Minn. 534; S. C. 30 Minn. 477; McKenzie v. Miss. etc. Boom Co., 29 Minn. 288; Trenton Water Power Co. v. Raff, 36 N. J. L. 335; Arimond v. Green Bay etc. Co., 31 Wis. 316; Same v. Same, 35 Wis. 41.

Of numerous other cases in support of the text we cite the following: Bottoms v. Brewer, 54 Ala. 288; Lindsay v. Southern Ry. Co., 149 Ala. 349, 43 So. 139; Martin ex parte, 13 Ark. 198; St. Louis etc. R. R. Co. v. Lyman, 57 Ark. 512, 22 S. W. Rep. 170; St. Louis etc. R. R. Co. v. Morris, 35 Ark. 622; St. Louis,

etc. Ry. Co. v. Saunders, 78 Ark. 589, 94 S. W. 709; St. Louis, etc. Ry. Co. v. Saunders, 84 Ark. 111; Davis v. Sacramento, 59 Cal. 596; Richardson v. Eureka, 96 Cal. 443, 31 Pac. 458; Larrabee v. Cloverdale, 131 Cal. 96, 63 Pac. 143; Georgia etc. R. R. Co. v. Berry, 78 Ga. 744; Westbrook v. Baldwin Co., 121 Ga. 442, 49 S. E. 286; Warner v. Maxwell, 124 Ga. 518, 52 S. E. 809; Hill v. Ward, 2 Gil. (Ill.) 285; Ohio etc. R. R. Co. v. Wachter, 123 Ill. 440, 5 Am. St. Rep. 532; Chicago, B. & Q. R. R. Co. v. Schaffer, 124 Ill. 112, *affirming* 26 Ill. App. 280; Kankakee & S. R. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621; S. C. 30 Ill. App. 552; Ohio & M. R. R. Co. v. Ramey, 139 Ill. 9, 28 N. E. 1087, 32 Am. St. Rep. 176; Ohio & M. R. R. Co. v. Webb, 142 Ill. 402, 32 N. E. 527; Ohio & M. R. R. Co. v. Thillman, 143 Ill. 127, 32 N. E. 529, 36 Am. St. Rep. 339; S. C. 43 Ill. App. 78; Gaylord v. Sanitary District, 204 Ill. 576, 68 N. E. 522, 98 Am. St. Rep. 235, 63 L.R.A. 582; Ramey v. Baltimore etc. R. R. Co., 235 Ill. 502; Fenter v. Toledo etc. R. R. Co., 29 Ill. App.

which obstruct the flow of a stream are not authorized by law, unless the authority under which they are constructed, is practically incapable of execution without causing such obstruc-

250; Ohio & M. R. R. Co. v. Combs, 43 Ill. App. 119; Ohio & M. R. Co. v. Neutzel, 43 Ill. App. 108; St. Louis etc. R. R. Co. v. Winkleman, 47 Ill. App. 276; Ohio & M. R. R. Co. v. Long, 52 Ill. App. 670; City of Centralia v. Wright, 58 Ill. App. 51; City of Pickneyville v. Hutchings, 63 Ill. App. 137; City of Pickneyville v. Rhine, 63 Ill. App. 139; Illinois Cent. R. R. Co. v. Ferrell, 108 Ill. App. 659; Illinois Cent. R. R. Co. v. Lockwood, 112 Ill. App. 423; Chicago etc. Ry. Co. v. Carpenter, 125 Ill. App. 306; St. Louis Merchants Bridge Terminal Ry. Co. v. Schulz, 126 Ill. App. 552; Baltimore etc. R. R. Co. v. Stewart, 128 Ill. App. 270; Melendy v. Chicago etc. Ry. Co., 132 Ill. App. 431; Madison v. Ross, 3 Ind. 236; Trustees of Wabash & Erie Canal v. Spears, 16 Ind. 441; Hebron Gravel Road Co. v. Harvey, 90 Ind. 192, 46 Am. Rep. 199; Terre Haute etc. R. R. Co. v. Zahner, 166 Ind. 149, 76 N. E. 169, 3 L.R.A. (N.S.) 277; Kelly v. Pittsburg etc. R. R. Co., 28 Ind. App. 457, 63 N. E. 233, 91 Am. St. Rep. 134; Lewis Tp. Imp. Co. v. Royer, 38 Ind. App. 151, 76 N. E. 1068; Graham v. Chicago etc. Ry. Co., 39 Ind. App. 294, 77 N. E. 57; Noe v. Chicago, B. & Q. R. Co., 76 Ia. 360, 41 N. W. 42; Hough-taling v. Chicago Gt. Western Ry. Co., 117 Ia. 540, 91 N. W. 811; Chicago etc. R. R. Co. v. Scott, 71 Kan. 874, 81 Pac. 1131; Atchison etc. Ry. Co. v. Herman, 74 Kan. 77, 85 Pac. 817; Barrett v. Bangor, 70 Me. 335; Ingram v. Me. Water Co., 98 Me. 566, 57 Atl. 893; Baltimore v. Merryman, 86 Md. 584; Estabrooks v. Peterborough & Shirley R. R. Co., 12 Cush. 224; Lawrence v. Fairhaven, 5 Gray 110; Proctor v. Old Colony R. R. Co., 154 Mass. 251, 28 N. E. 13; Stinson v. Brookline, 197 Mass. 568; Treat v. Bates, 27 Mich. 390; Miller v. Cornwell, 71 Mich. 270, 38 N. W. 912; Miller v. Bank of Belleville, 148 Mich. 339, 111 N. W. 1062; Doorman v. Ames, 12 Minn. 451; Byrne v. Minn. & St. Louis R. R. Co., 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 668; Hueston v. Miss. & Rum Riv. Boom Co., 76 Minn. 251, 79 N. W. 92; Mississippi Central R. R. Co. v. Mason, 51 Miss. 234; Silver Creek Nav. and Imp. Co. v. Mangum, 64 Miss. 682; Richardson v. Levee Comrs. 77 Miss. 518, 26 So. 963; Leflore Co. v. Cannon, 81 Miss. 334, 33 So. 81; Rose v. St. Charles, 49 Mo. 509; Barnes v. City of Hannibal, 71 Mo. 449; Young v. City of Kansas, 27 Mo. App. 101; Bird v. Hannibal & St. J. R. R. Co., 30 Mo. App. 365; McKee v. St. Louis etc. R. R. Co., 49 Mo. App. 174; Standley v. Atchison etc. Ry. Co., 121 Mo. App. 537, 97 S. W. 244; Omaha etc. R. R. Co. v. Standen, 22 Neb. 343; Chicago etc. Ry. Co. v. Buel, 76 Neb. 420, 107 N. W. 590; Chicago etc. Ry. Co. v. Ely, 77 Neb. 809, 110 N. W. 539; Fairbury Brick Co. v. Chicago etc. Ry. Co., 79 Neb. 854; Eastman v. Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201; Amoskeag Mfg. Co. v. Goodale, 46 N. H. 53; Sinickson v. Johnson, 17 N. J. L. 129, 34 Am. Dec. 184; Delaware etc. Canal Co. v. Lee, 22 N. J. L. 243; Crittenden v. Wilson, 5 Cow. 165, 15 Am. Dec. 462; Rochester White Lead Co. v. Rochester, 3 N. Y. 463; Benedict v. State, 120 N. Y. 228, 24 N. E. 314; Emry v. Raleigh

tion.⁹⁴ In that case the damages caused by the interference with the natural flow of the stream are a taking, and compensation must be made according to the constitution.⁹⁵ But if such interference can be avoided by the exercise of reasonable care and skill, then the interference is not authorized, and the works which cause it are a nuisance. Many of the cases already referred to in this section go upon this ground, and there are many more of the same purport.⁹⁶ Some of the cases imply that

etc. R. R. Co., 102 N. C. 209, 9 S. E. 139; Ridley v. Seaboard etc. R. R. Co., 118 N. C. 996, 24 S. E. 730, 32 L.R.A. 857; Adams v. Durham & N. R. R. Co., 110 N. C. 325, 14 S. E. 857; Knight v. Albermarle etc. R. R. Co., 111 N. C. 80, 15 S. E. 929; Krause v. Oregon Steel Co., 45 Ore. 378, 7 Pac. 883; Barelay R. R. & C. Co. v. Ingham, 36 Pa. St. 194; Wallace v. Columbia & G. R. R. Co., 37 S. C. 335, 16 S. E. 35; Lampley v. Atlantic Coast Line R. R. Co., 63 S. C. 462, 41 S. E. 517; Lawton v. Seaboard Air Line R. R. Co., 75 S. C. 82, 55 S. E. 128; Railway Co. v. Higdon, 111 Tenn. 121, 76 S. W. 895; Gulf etc. R. R. Co. v. Locker, 78 Tex. 279, 14 S. W. 611; Gulf etc. R. R. Co. v. Hepner, 83 Tex. 136, 18 S. W. 441; Dallas & W. R. R. Co. v. Kinnard (Tex. Supm.), 18 S. W. 1062; Texas Trunk R. R. Co. v. Elan, 1 Tex. Civ. App. 201; Ennis v. Gilder, 32 Tex. Civ. App. 351, 74 S. W. 585; Willey v. Hunter, 59 Vt. 479; Royee v. Carpenter, 80 Vt. 37, 66 Atl. 888; Cloyes v. Middlebury Elec. Co., 80 Vt. 109, 66 Atl. 1039; Atlantic etc. R. R. Co. v. Peake, 87 Va. 130, 12 S. E. 348; Watkinson v. McCoy, 23 Wash. 372, 63 Pac. 245; White v. Codd, 39 Wash. 14, 80 Pac. 836; Neal v. Ohio Riv. R. R. Co., 47 W. Va. 316, 34 S. E. 914; Pickens v. Coal Riv. Boom & T. Co., 58 W. Va. 11, 50 S. E. 872; Arimond v. Green Bay etc. Co., 35 Wis. 41; Jones v. United States, 48 Wis. 385; Velte v. United States, 76 Wis. 278, 45 N. W. 119; Schmeck-

pepper v. Chicago etc. Ry. Co., 116 Wis. 592, 93 N. W. 533; United States v. Lynch, 188 U. S. 445, 23 S. C. 349; Woodruff v. Mining Co., 18 Fed. Rep. 753; King v. United States, 59 Fed. Rep. 9; Paine Lumber Co. v. United States, 55 Fed. Rep. 854; High Bridge Lumber Co. v. United States, 69 Fed. Rep. 320, 16 C. C. A. 460.

⁹⁴Chicago, etc. R. R. Co. v. Anderson, 62 Neb. 456, 87 N. W. 167; Morton v. New York, 140 N. Y. 207, 35 N. E. 490, 22 L.R.A. 241; Mundy v. New York etc. R. R. Co., 75 Hun, 479, 27 N. Y. Supp. 469; and many of the cases cited in last note.

⁹⁵Cases cited in note 88.

⁹⁶In addition to the cases cited in the last section, the following are more especially based upon negligence: Southern Ry. Co. v. Plott, 131 Ala. 312, 31 So. 33; Southern Ry. Co. v. Leard, 146 Ala. 349, 39 So. 449; St. Louis etc. Ry. Co. v. Hoshall, 82 Ark. 387, 102 S. W. 207; Georgia R. & B. Co. v. Bohler, 98 Ga. 184; St. Louis etc. R. R. Co. v. Brown, 34 Ill. App. 552; Peoria etc. R. R. Co. v. Barton, 38 Ill. App. 469; Chicago & A. R. R. Co. v. Willi, 53 Ill. App. 603; Cleveland etc. Ry. Co. v. Wischart, 162 Ind. 208, 67 N. E. 993; Cleveland etc. R. R. Co. v. Kline, 29 Ind. App. 390, 63 N. E. 483; Vyse v. Chicago etc. R. R. Co., 126 Ia. 90, 101 N. W. 736; Kansas City v. Slangstran, 53 Kan. 431, 36 Pac. 706; Missouri Pac. R. R. Co. v.

if reasonable care and skill have been exercised to avoid injury to neighboring proprietors, there is no liability, although the flow of the stream is obstructed to their damage.⁹⁷ But we apprehend that the question of care and skill is one which affects the remedy only and not the liability. If the works are constructed with due care and skill they are not a nuisance, and the only remedy is one for compensation, and the damages must be recovered once for all.⁹⁸ If otherwise, then the works may be prevented by injunction,⁹⁹ or abated as a nuisance,¹ and successive actions may be brought as damages are sustained.²

Webster, 3 Kan. App. 166, 42 Pac. Rep. 845; Illinois Cent. R. R. Co. v. Wilbourn, 74 Miss. 284; Abbott v. Kansas City etc. R. R. Co., 83 Mo. 271, 53 Am. Rep. 581; Culver v. Chicago etc. R. R. Co. 38 Mo. App. 130; Barnett v. St. Francis Levee Dist., 125 Mo. App. 61, 102 S. W. 583; McCleneghan v. Omaha etc. R. R. Co., 25 Neb. 523, 41 N. W. 350, 13 Am. St. Rep. 508; Omaha etc. R. R. Co. v. Brown, 29 Neb. 492, 46 N. W. 39; Omaha etc. R. R. Co. v. Standen, 29 Neb. 622, 46 N. W. 46; Chicago etc. R. R. Co. v. Anderson, 62 Neb. 456, 87 N. W. 167; Chicago etc. R. R. Co. v. Mitchell, 74 Neb. 563, 104 N. W. 1144; Orvis v. Elmira etc. R. R. Co., 17 App. Div. N. Y. 187; Mundy v. New York etc. R. R. Co., 75 Hun 479, 27 N. Y. Supp. 469; Higgins v. New York etc. R. R. Co., 78 Hun 567, 29 N. Y. Supp. 563; Corwin v. Erie R. R. Co., 84 App. Div. 555, 82 N. Y. S. 753; S. C. affirmed, 178 N. Y. 590, 70 N. E. 1097; Knight v. Albemarle etc. R. R. Co., 110 N. C. 58, 14 S. E. 650; Price v. Oregon R. R. Co., 47 Ore. 350, 83 Pac. 843; Krug v. Borough of St. Mary's, 152 Pa. St. 37, 25 Atl. 161, 34 Am. St. Rep. 616; Miller v. Buffalo etc. R. R. Co., 29 Pa. Supr. Ct. 515; Wallace v. Columbia etc. R. R. Co., 34 S. C. 62, 12 S. E. 815; Sabine etc. R. R. Co. v. Broussard, 75 Tex. 597, 12 S. W.

1126; Taylor v. B. & O. R. R. Co., 33 W. Va. 39, 10 S. E. 29; Uhl v. Ohio Riv. R. R. Co., 56 W. Va. 494, 49 S. E. 378, 107 Am. St. Rep. 968, 68 L.R.A. 138; Richards v. Ohio Riv. R. R. Co., 56 W. Va. 592, 49 S. E. 385; Hodge v. Lehigh Val. R. R. Co., 56 Fed. 195; Philadelphia etc. R. R. Co. v. Smith, 64 Fed. 679, 12 C. C. A. 384, 27 L.R.A. 131; Moison v. Great Western R. R. Co., 14 U. C. Q. B. 109.

⁹⁷See especially St. Louis etc. R. R. Co. v. Morris, 35 Ark. 622; Georgia R. & B. Co. v. Bohler, 98 Ga. 184; Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. 706; Illinois Central R. R. Co. v. Wilbourn, 74 Miss. 284; Cleneghan v. Omaha etc. R. R. Co., 25 Neb. 531, 41 N. W. 350; Braine v. Northern Cent. Ry. Co., 218 Pa. St. 43, 66 Atl. 985; Wallace v. Columbia etc. R. R. Co., 34 S. C. 62, 12 S. E. 815.

⁹⁸Ohio etc. R. R. Co. v. Wachter, 123 Ill. 440, 5 Am. St. Rep. 532; City of Centralia v. Wright, 58 Ill. App. 51; Melandy v. Chicago etc. Ry. Co., 132 Ill. App. 431; Bird v. Hannibal etc. R. R. Co., 30 Mo. App. 365.

⁹⁹Lake Erie & W. R. R. Co. v. Young, 135 Ind. 426, 35 N. E. 177, 41 Am. St. Rep. 430.

¹Miller v. Cornwell, 71 Mich. 270, 38 N. W. 912.

²Ohio etc. R. R. Co. v. Thillman,

The practical outcome of the cases is that a work which interferes with the flow of a stream, either at its ordinary height or in case of such floods as are to be anticipated, is negligently constructed, and the only exemption from liability is in those cases where the damage is caused by a flood of such an extraordinary and unprecedented character as to amount to an act of God.³

In the case of damages by flooding, it is immaterial whether the flooding is continuous and permanent or only occasional. Where the works of a boom company cause lands to be occasionally flooded and obstructed by stranded logs, there is a taking to the extent of the injury.⁴ It has been held in New York and Ohio that merely raising the water in the channel of a stream without producing any actual injury affords no ground of action,⁵ but a contrary view is taken by the Supreme Court

143 Ill. 127, 32 N. E. 529, 36 Am. St. Rep. 359; St. Louis etc. R. R. Co. v. Brown, 34 Ill. App. 552; Chicago & A. R. R. Co. v. Willi, 53 Ill. App. 603; Melendy v. Chicago etc. R. R. Co., 132 Ill. App. 431; Byrne v. Minn. & St. L. R. R. Co., 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 668; Adams v. Durham etc. R. R. Co., 110 N. C. 325, 14 S. E. 857; Lawton v. Seaboard Air Line R. R. Co., 75 S. C. 82, 55 S. E. 128; Pickens v. Coal Riv. Boom & T. Co., 58 W. Va. 11, 50 S. E. 872; and see post, §§ 938-948.

³Alabama Great Southern R. R. Co. v. Shahan, 116 Ala. 302, 22 So. 509; Ohio etc. R. R. Co. v. Ramey, 139 Ill. 9, 28 N. E. 1087; Ohio etc. R. R. Co. v. Webb, 142 Ill. 402, 32 N. E. 527, 32 Am. St. Rep. 176; Ohio etc. R. R. Co. v. Thillman, 143 Ill. 127, 32 N. E. 529; S. C. 43 Ill. App. 78; Madison v. Ross, 3 Ind. 236; New York etc. R. R. Co. v. Hamlet Hay Co., 149 Ind. 344; St. Louis etc. R. R. Co. v. Sullivan, 7 Kan. App. 527; Lawler v. Baring Boom Co., 56 Me. 443; Penley v. Me. Cent. R. R. Co., 92 Me. 59, 42 Atl. 233; Doorman v. Ames, 12 Minn. 451; Kenney v. Kan-

sas City etc. R. R. Co., 74 Mo. App. 301; Omaha & R. V. R. R. Co. v. Brown, 14 Neb. 170; Chicago etc. R. R. Co. v. Emmert, 53 Neb. 237, 73 N. W. 540, 68 Am. St. Rep. 602; Chicago etc. Ry. Co. v. Buel, 76 Neb. 420, 107 N. W. 590; Bellinger v. New York Central R. R. Co., 23 N. Y. 42; Higgins v. New York etc. R. R. Co., 78 Hun 567, 29 N. Y. Supp. 563; Mundy v. New York etc. R. R. Co., 75 Hun 479, 27 N. Y. Supp. 469; Ridley v. Seaboard etc. R. R. Co., 124 N. C. 34; Tonnes v. Augusta, 52 S. C. 396, 29 S. E. 851; Gulf etc. R. R. Co. v. Pomeroy, 67 Tex. 498; Am. Locomotive Co. v. Hoffman, 105 Va. 343, 54 S. E. 25, 6 L.R.A.(N.S.) 252; Taylor v. B. & O. R. R. Co., 33 W. Va. 39, 10 S. E. 29; Burchardt v. Wausau Boom Co., 54 Wis. 107.

⁴Weaver v. Mississippi & Rum River Boom Co., 28 Minn. 534; S. C. 30 Minn. 477; McKenzie v. Same, 29 Minn. 288.

⁵Cooper v. Hall, 5 Ohio 320; People v. Canal Appraisers, 13 Wend. 355. But this is certainly the violation of a right and should entitle the upper proprietor to nominal

of North Carolina,⁶ and Virginia;⁷ but if damage results, as by rendering abutting land wet and soggy, an action will lie;⁸ so if the water is set back upon a mill.⁹ Where a city or railroad company undertakes to make a new channel for a creek, it interferes with the stream at its peril, and if, by reason of the insufficiency of the new channel, lands are flooded, it will be liable.¹⁰ A lake had its outlet through a bed of porous gravel, which outlet was obstructed by a gravel-road company, causing the lake to rise and flood the plaintiff's land. The company was held liable.¹¹ Where one has a right to maintain a dam at a certain height, he will not be liable for additional flooding caused by repairing the dam and making it tight.¹²

§ 81 (67a). Bridges—authority to construct—damages thereby—interfering with navigation. Congress has paramount authority over interstate commerce and over the ways and means of transportation for such commerce.¹³ It may, therefore, control rivers navigable for such commerce and

damages. *Canal Appraisers v. People*, 17 Wend. 603.

⁶*Little v. Stanbank*, 63 N. C. 285.

See ante, § 75.

⁷*Rankin v. Harrisburg*, 104 Va. 524, 52 S. E. 555, 113 Am. St. Rep. 1050, 3 L.R.A.(N.S.) 919.

⁸*Athens Mfg. Co. v. Rucker*, 80 Ga. 292; *Westbrook v. Baldwin Co.*, 121 Ga. 442, 49 S. E. 286.

⁹*Gibson v. Fisher*, 68 Ia. 29; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Barclay R. R. & Coal Co. v. Ingham*, 36 Pa. St. 194; *Tinsman v. Belvidere Del. R. R. Co.*, 26 N. J. L. 148; *Lee v. Pembroke Iron Co.*, 57 Me. 481, 2 Am. Rep. 59; *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265; *Riddle's Exrs. v. Delaware County*, 156 Pa. St. 643, 27 Atl. 569; *Rosser v. Randolph*, 7 Porter 238, 31 Am. Dec. 712.

¹⁰*St. Louis etc. R. R. Co. v. Morris*, 35 Ark. 622; *Kankakee etc. R. R. Co. v. Horan*, 30 Ill. App. 552; *affirmed* 131 Ill. 288, 23 N. E. 621; *Barnes v. Hannibal*, 71 Mo. 449; *Bird v. Hannibal etc. R. R. Co.*, 30

Mo. App. 365; *Adams v. Durham & R. Co.*, 110 N. C. 325, 14 S. E. 857.

¹¹*Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192, 46 Am. Rep. 199. *To same effect*, *Troe v. Larson*, 84 Ia. 649, 51 N. W. 179, 35 Am. St. Rep. 336; *Roberts v. Rust*, 104 Wis. 619, 80 N. W. 914.

¹²*Cowell v. Thayer*, 5 Met. 253, 38 Am. Dec. 400; *Jackson v. Harrington*, 2 Allen, 242. But where there is a prescriptive right to flood certain land, and a new dam, tighter but not higher, causes additional flooding and saturating, there is a liability. *Powell v. Lash*, 64 N. C. 456. Where a person has a right to maintain a dam at a certain height, it is no ground of complaint that, because of non use of mill, the water stands higher than it otherwise would. *Daniels v. Citizens Savings Institution*, 127 Mass. 534.

¹³*Chicago etc. R. R. Co. v. Minnesota*, 134 U. S. 418, 10 S. C. Rep. 462, 2 Am. R. R. & Corp. Rep. 564 and note.

authorize bridges in aid thereof.¹⁴ The States may authorize bridges over navigable streams wholly within their limits, subject to the power of congress to regulate and control the same.¹⁵ A bridge between two States can only be authorized by congress or by the concurrence of both States.¹⁶ The subject of damages to private property by bridges has been considered in the preceding sections. The question of authority does not fall within the province of this treatise, but in case of damage to property would be important as affecting the remedy.¹⁷ The interference with navigation by an authorized bridge affords no cause of action to those who are merely inconvenienced thereby.¹⁸ If the bridge is unauthorized, or if the interference is due to the bridge being negligently or improperly constructed or managed, it is otherwise.¹⁹ But where the bridge interferes with access to property there is a remedy.²⁰ And in Michigan it has been held that a riparian owner may enjoin the erection of

¹⁴Luxton v. North River Bridge Co., 153 U. S. 525, 14 S. C. Rep. 891; Stockton v. Baltimore etc. R. R. Co., 32 Fed. Rep. 9.

¹⁵Willson v. Blackbird Creek Marsh Co., 2 Pet. 245; Gilman v. Philadelphia, 3 Wall. 713; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 8 S. C. 811; Chicago v. McGinn, 51 Ill. 266, 2 Am. Rep. 295; State v. Leighton, 83 Me. 419, 22 Atl. 380; Kansas City etc. R. R. Co. v. Wiggal, 82 Miss. 223, 32 So. 965, 61 L.R.A. 578; Dover v. Portsmouth Bridge, 17 N. H. 200; People v. Jessup, 160 N. Y. 249; reversing 28 App. Div. 524; Clark v. Birmingham etc. Co., 41 Pa. St. 147; Monongahela Bridge Co. v. Kirk, 46 Pa. St. 112, 84 Am. Dec. 527; Railroad Co. v. Ferguson, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908; Rhea v. Newport etc. R. R. Co., 50 Fed. 16; Oregon City Trans. Co. v. Columbia St. Bridge Co., 53 Fed. 549.

¹⁶President v. Trenton City Bridge Co., 13 N. J. Eq. 46.

¹⁷One whose property will be damaged thereby may enjoin the erec-

tion of an unauthorized bridge. Ridgle v. Del. Co. Comrs., 3 Pa. Co. Ct., 598, 600, 605; and see Stofflet v. Estates, 104 Mich. 208, 62 N. W. 347.

¹⁸Pensacola etc. R. R. Co. v. Hyer, 32 Fla. 539, 14 So. 381, 22 L.R.A. 368; Thomas v. Wade, 48 Fla. 311, 37 So. 743; State v. Leighton, 83 Me. 419, 22 Atl. 380; Commonwealth v. Breed, 4 Pick. 460; Silver v. Mo. Pac. R. R. Co., 101 Mo. 79, 13 S. W. 410; Clarke v. Birmingham etc. R. R. Co., 41 Pa. St. 147; Monongahela Bridge Co. v. Kirk, 46 Pa. St. 112, 84 Am. Dec. 527; Cantwell v. Knoxville etc. R. R. Co., 90 Tenn. 638, 18 S. W. 271; Railroad Co. v. Ferguson, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908.

¹⁹Oregon City Trans. Co. v. Columbia St. Bridge Co., 53 Fed. 549; Central R. R. Co. v. Pennsylvania R. R. Co., 59 Fed. 192, 8 C. C. A. 86; Farmers' Co-op. Mfg. Co. v. Albemarle etc. R. R. Co., 117 N. C. 579, 23 S. E. 43, 29 L.R.A. 700; Delaware etc. R. Co. v. Mehrhof Bros. Mfg. Co., 53 N. J. L. 205, 23 Atl. 170.

²⁰Post, § 102.

a bridge without a draw, which will prevent navigation between his mill and a railroad station, although the bridge would not interfere with access to his property from the navigable water.²¹ It has been held that authority to bridge a navigable stream, is not authority to construct a bridge without a draw or so as to obstruct navigation.²²

§ 82 (68). Making a private stream public, or navigable, by statute. As we have already stated, streams which are not navigable are wholly private property. The riparian owner, by means of dams, or otherwise, may make a reasonable use of the water as it flows over his land. An act of the legislature declaring such a river public, or navigable, will not affect such rights,²³ and the riparian owner cannot be deprived of the use of the water,²⁴ or his private rights or works on the stream interfered with without compensation.²⁵ Compensation must be made for all damages occasioned to private rights by improvements making such a stream navigable in fact.²⁶

§ 83 (69). Rights of riparian owners on private navigable streams. Private streams which are navigable are public highways by water, and the rights of riparian proprietors thereon are subject to the paramount right of the public to use and improve the stream as such highway.²⁷ In all other respects riparian owners have the same rights as upon private, non-

²¹Stofflet v. Estes, 104 Mich. 208, 62 N. W. 347.

De Camp v. Thompson, 16 App. Div. N. Y. 528.

²²Silver Creek Nav. & Imp. Co. v. Yazoo etc. R. R. Co., 90 Miss. 345, 43 So. 478; Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255; Southern R. R. Co. v. Ferguson, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908.

Maedonnell v. Caledonia Canal Commissioners, 8 Shaw & Dunl. 881; White Deer Creek Improvement Co. v. Sassaman, 67 Pa. St. 415; De Camp v. Dix, 159 N. Y. 436, 54 N. E. 63; Brewster v. Rogers Co., 42 N. Y. App. Div. 343. *See post*, § 107.

²³Potlatch Lumber Co. v. Peterson, 12 Ida. 769, 88 Pac. 426, 118 Am. St. Rep. 233; Murray v. Preston, 106 Ky. 561, 50 S. W. 1095, 90 Am. St. Rep. 232. *See* Deming v. Cleveland, 22 Ohio C. C. 1. An act declaring a stream navigable and providing for compensation to riparian owners is valid. Matter of Wilder, 90 App. Div. 262, 85 N. Y. S. 741.

Attorney General v. Delaware etc. R. R. Co., 27 N. J. Eq. 1; S. C. affirmed, 27 N. J. Eq. 631; Brown v. Chadbourne, 31 Me. 9, 50 Am. Dec. 641; Treat v. Lord, 42 Me. 552, 66 Am. Dec. 447; Dwinel v. Veazie, 44 Me. 167, 69 Am. Dec. 94; Beidler v. Sanitary District, 211 Ill. 628, 71 N. E. 1118, 67 L.R.A. 820; West Chicago St. R. R. Co. v. People, 214 Ill. 9, 73 N. E. 393. The right of navigation confers no right to use the banks of the stream. Garth L.

²⁴Walker v. Board of Public Works, 16 Ohio 540.

²⁵Morgan v. King, 35 N. Y. 454, 91 Am. Dec. 58; S. C. 18 Barb. 277; Em. D.—7.

navigable streams, and the further right of making use of the navigable waters in connection with their property, including the right to build piers, booms and the like.²⁸ "The public right is one of passage, and nothing more; as in a common highway. It is called by the cases an easement and the proprietor of the adjoining land has a right to use the land and water of the river in any way not inconsistent with this easement."²⁹ The Court of Appeals of New York, in a recent opinion, speaking of this easement, says: "It is an elementary principle that all easements are limited to the very purpose for which they were created, and their enjoyment cannot be extended by implication. This right, being founded upon the public benefit supposed to be derived from their use as a highway, cannot be extended to a different purpose inconsistent with its original use."³⁰ And again in another case: "The legislature, except under the power of eminent domain, upon making compensation, can interfere with such streams only for the purpose of regulating, preserving and protecting the public easement. Further than that, it has no more power over these fresh-water streams than over other private property. It may make laws for regulating booms, dams, ferries and bridges, only so far as is necessary to protect and preserve the public easement; and when it goes further, it invades private rights protected under the constitution."³¹ These conclusions, so well put by the New York court, state fully and correctly the rights of riparian owners upon private navigable streams, and the limitations to which they are subject, and are fully sustained by the authorities.³² These limitations necessarily prevent any structure on the bed or banks of the stream which interferes with navigation, such

& S. Co. v. Johnson, 151 Mich. 205, 115 N. W. 52; Watkins v. Dorris, 24 Wash. 636, 64 Pac. 840, 54 L.R.A. 199; Lownsdale v. Grays Harbor Boom Co., 36 Wash. 198, 78 Pac. 904. See Ala. Lumber Co. v. Keel, 125 Ala. 603, 28 So. 204, 82 Am. St. Rep. 265.

²⁸Post, §§ 94-100.

²⁹Ex parte Jennings, 6 Cow. 518, 527, 16 Am. Dec. 447.

³⁰Smith v. Rochester, 92 N. Y. 463, 483, 44 Am. Rep. 393.

³¹Chenango Bridge Co. v. Paige, 83 N. Y. 178, 185, 38 Am. Rep. 407.

³²Hooker v. Cummings, 20 Johns. 90, 99, 11 Am. Dec. 249; State of Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421; Canal Commissioners v. Kempshall, 26 Wend. 404.

as a dam,³³ or boom,³⁴ and all such structures are nuisances and may be abated.³⁵

§ 84 (70). An interference with such rights is a taking. Such being the rights of the riparian owner upon a private navigable stream, it follows that any interference with these rights, under legislative sanction, for any purpose not connected with the navigation of the stream, is a taking.³⁶ The water cannot be taken as a feeder for a canal,³⁷ or to supply a town with water,³⁸ or for any public purpose without compensation. Any interference with the accustomed flow of the stream, in its quantity, quality or uniformity, to the damage of a riparian proprietor, except for the improvement of navigation, will be actionable, and the authorities heretofore referred to in treating of non-navigable streams apply with full force. A statute making it unlawful to drive piles, or build piers, cribs or other structures in the bed of a private navigable river, without regard to whether the same obstruct navigation, was held invalid, as depriving the riparian owners of their property without compensation and without due process of law.³⁹

§ 85 (71). Damages by reason of improving navigation. The public easement in a private navigable stream includes not only the right to use, but also the right to improve. The public may make such changes and construct such works in the bed of the stream, as may be deemed necessary to promote its usefulness and efficiency as a highway.⁴⁰ If such improve-

³³Wisconsin River Improvement Co. v. Lyons, 30 Wis. 61; Woodward v. Kilbourn Mfg. Co., 1 Abb. U. S. C. 158.

³⁴Warner v. Ford L. & M. Co., 123 Ky. 103, 93 S. W. 650; Stevens Point Boom Co. v. Reilly, 44 Wis. 295; S. C. 46 Wis. 237.

³⁵Atlee v. Packet Co., 21 Wall. 389.

³⁶Beidler v. Sanitary District, 211 Ill. 628, 71 N. E. 1118, 67 L.R.A. 820; Chenango Bridge Co. v. Paige, 83 N. Y. 178, 185, 44 Am. Rep. 393.

³⁷Ex parte Jennings, 6 Cow. 518; Canal Commissioners v. Kempshall, 26 Wend. 404.

³⁸Smith v. Rochester, 92 N. Y. 463, 38 Am. Rep. 407.

³⁹City of Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128.

⁴⁰Spring v. Russell, 7 Me. 273; Scranton v. Wheeler, 113 Mich. 565, 71 N. W. 1091, 67 Am. St. Rep. 484; Osborne v. Knife Falls Boom Corp., 32 Minn. 412, 50 Am. Rep. 590; Doucette v. Little Falls Imp. & Nav. Co., 71 Minn. 206, 73 N. W. 847; Slingerland v. International Contracting Co., 169 N. Y. 60, 62 N. E. 1097, 56 L.R.A. 494, *affirming* S. C. 43 App. Div. 215, 60 N. Y. S. 12; Falls Mfg. Co. v. Oconto Riv. Imp. Co., 87 Wis. 134, 58 N. W. Rep. 257; Scranton v. Wheeler, 57 Fed. Rep. 803, 6 C. C. A. 585; Gibson v. United States, 166 U. S. 269, 17 S. C. Rep. 578; Scranton v. Wheeler, 179

mènts change the current of the stream so as to wash away the land of a proprietor, it is *damnum absque injuria*.⁴¹ The riparian owner, in such case, must protect his bank. But, if such works cause private property to be overflowed, compensation must be made.⁴² The banks of the stream and land adjoining, being private property, cannot be occupied without compensation.⁴³ It has been held in Wisconsin that a side chute, or subsidiary channel, though forming a navigable connection with the main stream, may be closed for the purpose of turning all the water into the principal channel, and that a proprietor upon the former, who is thus cut off from all access to the river, is not entitled to compensation.⁴⁴ The Supreme Court of Mississippi has gone so far as to hold that a stream may be turned into an entirely new channel without compensation to those whose use of it is thus destroyed.⁴⁵ The latter decision seems to us erroneous. The public right is a right of passage only, including the right to improve the navigation. It is necessarily limited to the bed of the stream.⁴⁶ So far as the water is concerned, it can only use it for navigation; it cannot take it or divert it.⁴⁷ The public easement includes the right to make

U. S. 141, 21 S. C. 48; Bedford v. United States, 192 U. S. 217, 24 S. C. 238; and cases cited in succeeding notes. In *Thompson v. Androscoggin Riv. Impv. Co.*, 58 N. H. 108, it is held that the right of the public is one of reasonable use and to make reasonable improvements in aid of that use, and that, for damages resulting from unreasonable improvements, a recovery may be had.

⁴¹*Hollister v. Union Co.*, 9 Conn. 436, 25 Am. Dec. 36; *Brooks v. Cedar Brook Impv. Co.*, 82 Me. 17, 19 Atl. 87, 17 Am. St. Rep. 459, 7 L.R.A. 460; *Bedford v. United States*, 192 U. S. 217, 24 S. C. 238. But it is held that one State cannot authorize works for the improvement of navigation which will produce damage, either direct or consequential, to lands in another State. *Holyoke Water Power Co. v. Connecticut River Co.*, 22 Blatch. 131; S. C. 52 Conn. 570.

⁴²*Arimond v. Green Bay & Mississippi Canal Co.*, 31 Wis. 316; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *United States v. Lynch*, 188 U. S. 445, 23 S. C. 349; *Grand Rapids Boom Co. v. Jarvis*, 30 Mich. 308; *Carpenter v. Board of Comrs.*, 56 Minn. 513, 58 N. W. 295; *see also ante*, § 80.

⁴³Same; *Cotton v. Mississippi & Rum River Boom Co.*, 19 Minn. 497; *Perry v. Wilson*, 7 Mass. 393.

⁴⁴*Black River Improvement Co. v. La Crosse Booming & Trans. Co.*, 54 Wis. 659.

⁴⁵*Commissioners of Homochitto River v. Withers*, 29 Miss. 21, 64 Am. Dec. 126. This case was taken to the Supreme Court of the United States, but there dismissed for want of jurisdiction. *Withers v. Buckley*, 20 How. 84.

⁴⁶*Weaver v. Miss. & Rum River Boom Co.*, 28 Minn. 534, 538.

⁴⁷*See easements cited ante*, § 74.

any use of the water or bed of the stream, for promoting the navigation of the stream itself, which the legislature deems expedient. But the public right is one of passage only, and improvements can be made only for that purpose. While these general principles are admitted by all, there is much diversity in their application. It has recently been held in Wisconsin that it was competent to confer upon a corporation the exclusive right of constructing and operating booms for a certain distance on the Wisconsin River, where the result was not only to deprive the riparian owner of the right or privilege of constructing a boom opposite his own bank, but also to cut him off from the navigable part of the river.⁴⁸ Plaintiff had about two thousand feet of frontage on the river and was owner of timber lands above. The channel was about two hundred feet from shore. He had bought the property for the purpose of erecting saw mills thereon and with a view to constructing in front thereof booms for storing logs. The defendant company constructed a boom along the whole front of his land, extending from near the shore to the channel. The maintenance of the defendant's works would virtually ruin his property. The court held the defendant's works to be a legitimate exercise of the public easement of navigation, that no property of the plaintiff's was taken, and that he was not entitled to any relief. Undoubtedly a boom in such a stream is a work of public utility for which property may be taken.⁴⁹ But the construction of a boom for the storing, sorting and handling of logs can hardly be called an improvement of the right of passage in a stream. It is a legitimate use of highways to drive cattle along them, and the public may make the ways safe and convenient for that purpose; but it would not be contended that this would justify the construction of cattle yards in front of a man's door to enable the drover to feed, water, rest or sell his stock.⁵⁰ The right of access

⁴⁸Cohn v. Wausau Boom Co., 47 Wis. 314.

⁴⁹Cotton v. Mississippi & Rum River Boom Co., 22 Minn. 372; *post*, § 274.

⁵⁰We wish to credit this illustration, which is a very apt one, to its proper source. In *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, 319, Christianey, J., says: "This river, so far as it is navigable for

vessels, or floatable for logs, is but a public highway by water; the right to navigate the one or float the other is but a right of passage, including only such rights as are incident to that right and necessary to render it reasonably available. And though the drover has the right to drive his herds of cattle along a public road, no one will contend that he has a right to convert a certain

to the navigable part of the river⁵¹ and the right to construct booms for logs adjacent to one's premises,⁵² which do not interfere with the public use of the stream, are valuable riparian rights which cannot be taken or impaired without compensation.⁵³ A lighthouse, being in aid of navigation, may be built in the bed of the stream without compensation to the riparian owner.⁵⁴ A dike built in aid of navigation so changed the current as to prevent access to the plaintiff's wharf below, except in high water. It was held that there was no taking and no liability.⁵⁵ Where the riparian owner's title extends to the middle of the stream, the appurtenances of a bridge cannot be placed in the bed of the stream without compensation.⁵⁶ Where the riparian owner has built a tunnel under the Chicago river by permission of the city, he may be compelled to lower it at his own expense, when it has become an obstruction to navigation.⁵⁷ The improvement of navigation to which riparian rights on a stream are subject relates solely to the improvement of the stream itself as a natural highway by water, and when such rights are impaired by the construction of an artificial channel, connecting such stream with another stream and designed to reverse the current of the former, there is a right to compensation.⁵⁸ Where the plaintiff had a rice plantation upon a fresh water stream which had its outlet through a lake and bayou to the sea and by the improvement of navigation in the lower waters the stream was made salt and its value destroyed for the

length of the highway into a cattle yard, and occupy it for that purpose for months or weeks, or even a day, while he is purchasing, collecting and bringing in his droves, assorting, dividing or selling them.

* * * Every man sees at once that, however convenient such right might be to the drover, and however necessary to enable him to make his business profitable, it is a convenience and necessity for which he must pay."

⁵¹Rumsey v. New York etc. R. R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. Rep. 600, 15 L.R.A. 618, 6 Am. R. R. & Corp. Rep. 67; Hedges v. West Shore etc. R. R. Co., 80 Hun

310, 30 N. Y. Supp. 92; Bigaouette v. North Shore R. R. Co., 17 Duvall 363; *post*, §§ 94-100.

⁵²Williamsburg Boom Co. v. Smith, 84 Ky. 372.

⁵³*Post*, § 101 *et seq.*

⁵⁴Hawkins Point Light House Case. 39 Fed. 77. *To same effect*, Scranton v. Wheeler, 179 U. S. 141, 21 S. C. 48.

⁵⁵Gibson v. United States, 166 U. S. 269, 17 S. C. 578.

⁵⁶Ballance v. Peoria, 180 Ill. 29.

⁵⁷West Chicago St. R. R. Co. v. People, 214 Ill. 9, 73 N. E. 393.

⁵⁸Beidler v. Sanitary District, 211 Ill. 628, 71 N. E. 1118, 67 L.R.A. 820.

irrigation of rice lands it was held that he was entitled to compensation.⁵⁹

§ 86 (72). What streams are public. At common law all streams and waters where the tide ebbed and flowed were regarded as navigable, and the soil below high water mark was held to be in the public. All other waters were regarded as private property.⁶⁰ In this country, with its great inland lakes and rivers, there has been some tendency to depart from the common law doctrine, but no definite rule has been enunciated by any State by which it can be determined in any given case whether the title to the bed of a stream is in the public or the riparian owners. The Supreme Court of the United States, after originally confining admiralty jurisdiction to tide waters, in accordance with the common law of England,⁶¹ at length overcame the force of English precedent and extended that jurisdiction to all waters navigable in fact for purposes of commerce, without regard to the ebbing and flowing of the tide;⁶² and even where the river was only rendered navigable for boats of any size by means of locks and canals, as in the case of the Fox River, Wisconsin.⁶³ Most of the States have adhered to the common law rule. Of these are Connecticut,⁶⁴ Illinois,⁶⁵ Indiana,⁶⁶ Kentucky,⁶⁷ Maine,⁶⁸ Maryland,⁶⁹ Massachusetts,⁷⁰ Mich-

⁵⁹Bigham Bros. v. Port Arthur C. & D. Co., 100 Tex. 192. 97 S. W. 686.

⁶⁰De Juris Maris, Part I, C. 2; Angell on Watereourses, §§ 542-551; Wood on Nuisances, (1st ed.) § 575; Gould on Waters, chap. iii.; 1 Farnham on Waters, §§ 36-55.

⁶¹The Thomas Jefferson, 10 Wheat. 428; The Steamboat New Orleans v. Phoebus, 11 Peters, 175.

⁶²The Propeller Genesee Chief, 12 How. 43; The Magnolia, 20 How. 296; A. O. Hine v. Trevor, 4 Wall. 455.

⁶³The Montello, 20 Wall. 430.

⁶⁴Adams v. Pease, 2 Conn. 481; Chapman v. Kimball, 9 Conn. 38, 21 Am. Dec. 707; East Haven v. Hemingway, 7 Conn. 186; Middleton v. Sage, 8 Conn. 221.

⁶⁵Middletown v. Pritchard, 3 Seam. 510; People v. St. Louis, 5 Gil. 351; Seaman v. Smith, 24 Ill. 523; Hubbard v. Bell, 54 Ill. 112,

5 Am. Rep. 98; Braxton v. Bressler, 64 Ill. 488.

⁶⁶Cox v. State, 3 Blackf. 193; Porter v. Allen, 8 Ind. 1, 65 Am. Dec. 750; Sherlock v. Bainbridge, 41 Ind. 35, 41, 13 Am. Rep. 302; Ross v. Faust, 54 Ind. 471, 23 Am. Rep. 655.

⁶⁷Williamsburg Boom Co. v. Smith, 84 Ky. 372.

⁶⁸Berry v. Carle, 3 Greenl. 269; Laphish v. Bangor Bank, 8 Greenl. 85; Springer v. Russell, 7 Me. 273; Simpson v. Seavy, 8 Me. 138, 22 Am. Dec. 228; Wadsworth v. Smith, 11 Me. 278, 26 Am. Dec. 525; Brown v. Chadbourne, 31 Me. 9, 50 Am. Dec. 641; Knox v. Chaloner, 42 Me. 150; Granger v. Avery, 64 Me. 292.

⁶⁹Brown v. Kennedy, 5 H. & J. 195.

⁷⁰Commonwealth v. Chapin, 5 Pick. 199; Gray v. Bartlett, 20 Pick. 186, 32 Am. Dec. 208.

igan,⁷¹ Mississippi,⁷² New Hampshire,⁷³ Ohio,⁷⁴ Virginia,⁷⁵ and Wisconsin,⁷⁶ and perhaps other States.⁷⁷ On the other hand several of the States have held some of our large inland rivers to be public streams, in the fullest sense of the term. This has always been the doctrine in Pennsylvania, which holds the title to navigable streams to be in the public from low water mark.⁷⁸ Several decisions in Iowa in relation to the Mississippi River have held the title to the bed of the stream to be in the public from high water mark.⁷⁹ Several other States have held or inclined to similar views.⁸⁰ The Supreme Court of the United States, while holding that the question is one of State policy and State law,⁸¹ yet inclines to approve the doctrine maintained

⁷¹La Plaisance Bay Harbor Co. v. Monroe, Walk. Ch. 155; Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; Rice v. Ruddiman, 10 Mich. 125; Webber v. Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. 469.

⁷²Morgan v. Reading, 3 S. & M. 366; Steamboat Magnolia v. Marshall, 39 Miss. 109.

⁷³Scott v. Wilson, 3 N. H. 321; State v. Gilmanton, 9 N. H. 461; State v. Canterbury, 28 N. H. 195; Norway Plaines Co. v. Bradley, 52 N. H. 86.

⁷⁴Gavit v. Chambers, 3 Ohio 495; Lamb v. Rickets, 11 Ohio 311; Walker v. Board of Public Works, 16 Ohio 540.

⁷⁵Hays v. Bowman, 1 Rand. 417; Mead v. Haynes, 3 Rand. 33.

⁷⁶Jones v. Pettibone, 2 Wis. 308; Mariner v. Shulte, 13 Wis. 692; Arnold v. Elmore, 16 Wis. 509; Olsen v. Merrill, 42 Wis. 203.

⁷⁷See 1 Farnham on Waters, §§ 48-50.

⁷⁸Carson v. Blazer, 2 Binn. 475; Shrunk v. Schuylkill Navigation Co., 14 S. & R. 71; Union Canal Co. v. Landis, 9 Watts 228; Covert v. O'Connor, 8 Watts 470; Barclay Road v. Ingham, 36 Pa. St. 194, 201; Flanagan v. Philadelphia, 42 Pa. St. 219; Fulmer v. Williams, 122 Pa.

St. 191, 15 Atl. 726, 9 Am. St. Rep. 88, 1 L.R.A. 603.

⁷⁹McManus v. Carmichael, 3 Ia. 1; Haight v. Keokuk, 4 Ia. 199; Tomlin v. Dubuque, B. & M. R. R. Co., 32 Ia. 106, 7 Am. Rep. 176; Musser v. Hershey, 42 Ia. 356. In Houghton v. C. D. & M. R. R. Co., 47 Ia. 370, high water mark is defined "as co-ordinate with the limit of the river bed. What the river does not occupy long enough to wrest from vegetation, so far as to destroy its value for agriculture, is not river bed."

⁸⁰Webb v. City of Demopolis, 95 Ala. 116, 13 S. E. 289, 21 L.R.A. 62; St. Louis etc. R. R. Co. v. Ramsey, 53 Ark. 314, 13 S. W. 931, 22 Am. St. Rep. 195, 8 L.R.A. 559; Harlan & H. Co. v. Parchall, 5 Del. Ch. 435; Terrell v. Paducah, 122 Ky. 331, 92 S. W. 310; Gibson v. Kelly, 15 Mont. 417, 39 Pac. 517; Benson v. Morrow, 61 Mo. 345; State v. Longfellow, 169 Mo. 109, 69 S. W. 374; State v. Muncie Pulp Co., 119 Tenn. 47; Ravenswood v. Flemings, 22 W. Va. 52, 46 Am. Rep. 485; Cates v. Waddington, 1 McCord, 580; Schurmann v. Railroad Co., 10 Minn. 82, 88 Am. Dec. 59.

⁸¹Barney v. Keokuk, 94 U. S. 324.

by the Iowa court.⁸² The decisions in New York are seemingly conflicting, but the common law doctrine may be said to prevail, except as to the Mohawk and Hudson. These rivers are exceptional, owing to the fact that they were originally under the jurisdiction of the Dutch, and through them were, so to speak, impressed with the doctrines of the civil law.⁸³ As we have before said, it is not within the purview of this treatise to examine these decisions and work out the true doctrine in respect to the title to navigable streams. The subject is fully treated in works upon Waters, where the authorities are referred to and discussed.⁸⁴ We have referred to the question here for the purpose of showing how it stands. The question which concerns us is, what consequences follow from the title to the bed of the stream being in the public?

The boundary line between public and private ownership where the tide ebbs and flows is high water mark.⁸⁵ Where the tide does not ebb and flow the boundary "is to be determined by examining the bed and banks, and ascertaining where the presence and action of the water are so common and usual as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation as well as the nature of the soil."⁸⁶ The owner cannot extend his ownership by filling in below high water mark.⁸⁷ The Des Moines River was declared navigable by Congress, and afterwards the act was repealed. It was held that the title of riparian owners was not thereby extended to the thread of the stream.⁸⁸

⁸²Railroad Co. v. Schurmier, 7 Wall. 272; Barney v. Keokuk, 94 U. S. 324.

⁸³Canal Commissioners v. People, 5 Wend. 423; S. C. 13 Wend. 355; 17 Wend. 570; Canal Appraisers v. Kempshall, 26 Wend. 404; People v. Canal Appraisers, 33 N. Y. 461; Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393. In the latter case prior decisions are reviewed, explained and distinguished.

⁸⁴Gould on Waters, §§ 46-79; 1 Farnham on Waters, §§ 48-53b.

⁸⁵See *ante*, n. 60.

⁸⁶Carpenter v. Board of Comrs., 56 Minn. 513, 58 N. W. 295; St. Louis etc. R. R. Co. v. Ramsey, 53

Ark. 314, 13 S. W. 931, 22 Am. St. Rep. 195. 8 L.R.A. 559.

It is held to be low water mark in State v. Longfellow, 169 Mo. 109, 69 S. W. 374.

⁸⁷Diedrich v. N. W. U. R. R. Co., 42 Wis. 248; People v. Comrs. of Land Office, 135 N. Y. 447, 32 N. E. 139; Illinois Cent. R. R. Co. v. Illinois, 146 U. S. 387, 13 S. C. 110; Sweeney v. Shakespeare, 42 La. An. 614, 7 So. 729; Commonwealth v. Young Men's Christian Asso., 169 Pa. St. 24, 32 Atl. 121; but see Hanford v. St. Paul etc. R. R. Co., 43 Minn. 104, 44 N. W. 1144, 7 L.R.A. 722.

⁸⁸Wood v. Chicago etc. R. R. Co.,

§ 87 (73). Rights of riparian owners on public navigable streams. So far as these rights are connected with the navigation of the stream, we shall treat of them under the general head of "Rights of riparian owners on public waters."⁸⁹ We shall only discuss here the right to the flow of the stream. In New York it has been held that the State has an absolute right to appropriate the water of public streams in any way it sees fit, as to supply a city with water,⁹⁰ or create a feeder for a canal,⁹¹ without compensation to the riparian owners. So it has been held in Minnesota that the water of public streams may be taken for a public water supply without compensation.⁹² The doctrine is not without support in other States, especially in Pennsylvania.⁹³ The logic of these cases is, that a public river may be entirely appropriated by the State, so as to leave the riparian owners abutting on a dry river bed, and yet violate no right of private property. It seems to us that this is a result not to be tolerated, and that the principles which involve it are erroneous. As respects the flow of the stream, we think there is no difference between public and private navigable rivers. Though title is declared to be in the State, it holds it as a mere trustee, for the benefit of the public and the riparian owners alike.⁹⁴ The public are beneficiaries to the extent of having a common right of passage, and perhaps of fishery; the riparian owners are beneficiaries to the extent of having a right to all those advantages which the stream affords, and which can be enjoyed without interfering with the public rights. These beneficiary rights are property, and within the protection of the constitution. They are attached to the riparian property by

60 Ia. 456; *Serrin v. Grefe*, 67 Ia. 196; *Steele v. Sanchez*, 72 Ia. 65, 2 Am. St. Rep. 233; Chicago etc. R. R. Co. v. *Porter*, 72 Ia. 426.

⁸⁹Post, §§ 94-100.

⁹⁰*Crill v. Rome*, 47 How. 398.

⁹¹*Canal Commissioners v. People*, 5 Wend. 423; S. C. 13 Wend. 355; 17 Wend. 570; *People v. Canal Appraisers*, 33 N. Y. 461. In matter of Commissioners of State Reservation at Niagara, 37 Hun 537, affirmed in 102 N. Y. 734, it was held that a riparian owner could acquire by prescription a right to such use of the stream as did not interfere with the

rights of the public, and that he was entitled to compensation when such right was taken. S. C. 15 Abb. N. C. 159 and 395.

⁹²*Minneapolis Mill Co. v. Board of Water Comrs.*, 56 Minn. 485, 58 N. W. 33. And see *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.*, 168 U. S. 349.

⁹³See *Fulmer v. Williams*, 122 Pa. St. 191, 15 Atl. 726, 9 Am. St. Rep. 88, 1 L.R.A. 603; *Williams v. Fulmer*, 151 Pa. St. 405, 25 Atl. 103, 31 Am. St. Rep. 767; post, § 89 and cases cited.

⁹⁴See post, § 93.

nature, are universally estimated as part of its value in all the dealings between man and man, and should receive the protection of the law. For a justification of these conclusions we refer to what is said further on in regard to rights in public waters.⁹⁵

§ 88 (74). Interfering with the flow of public streams. According to the conclusions announced in the last section, any damage to riparian owners on public streams by works for any purpose not connected with the improvement of navigation is a taking for which compensation is to be made. Exactly the same rules apply as in case of private navigable streams.⁹⁶ Where the city of St. Louis extended a street or pier seven hundred feet into the Mississippi River, thereby destroying a channel adjacent to plaintiff's property and greatly depreciating its value, the city was held liable.⁹⁷ But most of the decisions on this question are of older date and adverse to the views we have expressed. We referred in the last section to some cases in relation to diverting the water of public streams,⁹⁸ and will now refer to some additional cases holding the same doctrine. A railroad company, authorized to cross a tidal river, constructed a bridge, the piers of which caused a change in the current of the river, which rendered additional sea wall and piling necessary in order to protect the plaintiff's land. It was held that the company was not liable. "It is incident to the power of the legislature," says the court, "to regulate a navigable stream so as best to promote the public convenience, and if, in doing so, some damage is done to riparian proprietors, and some increased expense thrown upon them, it is *damnum absque injuria*."⁹⁹ It is difficult to reconcile this case with another in the same volume which seems to hold that precisely the same item of damages is allowable.¹

⁹⁵Post § 94 *et seq.* In St. Louis etc. R. R. Co. v. Ramsey, 53 Ark. 314, 13 S. W. 931, 22 Am. St. Rep. 195, 8 L.R.A. 559, it is held that a riparian owner cannot maintain an action for gravel removed from the bed of a public stream by a railroad company.

⁹⁶Ante, §§ 71-80.

⁹⁷Meyers v. St. Louis, 8 Mo. Ap. 266; see also Chapman v. Oshkosh & Miss. R. R. Co., 33 Wis. 629, and

Commonwealth v. Boston & Maine R. R. Co., 3 Cush. 25.

⁹⁸See cases cited in last section.

⁹⁹Fitchburg R. R. Co. v. Boston & Maine R. R. Co., 3 Cush. 58, 88; also Bailey v. Philadelphia etc. R. R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593; to the same point, Mississippi River Bridge Co. v. Lonergan, 91 Ill. 508.

¹Commonwealth v. Boston & Maine R. R. Co., 3 Cush. 25; see also

§ 89 (75). Damage to authorized works on public streams. It has been repeatedly held, in Pennsylvania, that, where a dam has been built on a public navigable stream, under an act of the legislature granting permission to do so, the grant is a mere license, revocable at pleasure, and that where such dam is injured or destroyed by reason of other improvements in or upon the stream, authorized by the legislature, no compensation need be made.² The Supreme Court of the United States, in a case which went up from Pennsylvania, characterize this doctrine as "somewhat peculiar," but, nevertheless, follow it as being a rule of property in that State.³ In Virginia and other States it has been held, in such case, that, the legislature having granted the right to erect the dam, and the grantees having erected it, he had a vested right to maintain it which could not be taken or impaired without compensation.⁴ This would seem to be the better rule and to be of general application to all works erected in public waters by legislative authority.⁵

§ 90 (76). Title to lakes and ponds. The title to the great fresh-water lakes of the United States is universally held to be in the public from low water mark.⁶ As to the smaller

Fowle v. N. H. & N. Co., 112 Mass. 334, 17 Am. Rep. 106. The following cases from Pennsylvania tend to support the doctrine that the water of a public stream cannot be diverted from the riparian owner without compensation. Fulmer v. Williams, 122 Pa. St. 191, 15 Atl. 726, 9 Am. St. Rep. 88, 1 L.R.A. 603; Williams v. Fulmer, 151 Pa. St. 405, 25 Atl. 103, 31 Am. St. Rep. 767.

²Union Canal Co. v. Landis, 9 Watts 228; Monongahela Navigation Co. v. Coons, 6 W. & S. 101; Susquehanna Canal Co. v. Wright, 9 W. & S. 9, 42 Am. Dec. 312; New York & Erie R. R. Co. v. Youngs, 33 Pa. St. 175: McKeen v. Delaware Canal Co., 49 Pa. St. 424; Freeland v. Penn. R. R. Co., 66 Pa. St. 91; see also Bailey v. Phil. W. & B. R. R. Co., 4 Harr. Del. 389, 44 Am. Dec. 593.

³Rundle v. Delaware & Raritan Canal Co., 14 How. 80, 93.

⁴Crenshaw v. Slate River Co., 6 Rand. Va. 245; Glover v. Powell, 10 N. J. Eq. 211; Lee v. Pembroke Iron Co., 57 Me. 481, 2 Am. Rep. 59; State v. Glen, 7 Jones L., 321; and see Langdon v. Mayor etc. of New York, 93 N. Y. 129; Railroad Company v. Renwick, 102 U. S. 180.

⁵Monongahela Nav. Co. v. United States, 148 U. S. 312, 13 S. C. Rep. 622.

⁶Illinois Central R. R. Co. v. Illinois, 146 U. S. 387, 13 S. C. Rep. 110; Hardin v. Jordan, 140 U. S. 371, 382; Diedrich v. N. W. Ry. Co., 42 Wis. 248; Seaman v. Smith, 24 Ill. 521. These cases relate to Lake Michigan, and, in the latter, the precise limit of private ownership in that lake is held to be the line where the water usually stands when unaffected by disturbing causes. Smith v. Rochester, 92 N. Y. at p. 479, 44 Am. Rep. 393; Canal Commissioners v. People, 5 Wend. 423, 446; Aus-

lakes, varying in size from one or two to many miles in circumference, the decisions are conflicting, some holding that the title to the bed of the lake is in the riparian owners,⁷ others that it is in the public from low or high water mark.⁸ By colonial ordinances of 1641 and 1647, all great ponds in Massachusetts containing more than ten acres were made public and common forever, and in that State it has been held that the title to all such ponds below low water mark is in the public.⁹ The same

tin v. Rutland R. R. Co., 45 Vt. 215; *Revell v. People*, 177 Ill. 468, 52 N. E. 1052, 69 Am. St. Rep. 257; *People v. Silberwood*, 110 Mich. 103, 32 L.R.A. 694.

⁷*Hardin v. Jordan*, 140 U. S. 371, 11 S. C. 808, 838; *Mitchell v. Smale*, 140 U. S. 406, 11 S. C. 819; *Rhodes v. Cissel*, 82 Ark. 367, 101 S. W. 758; *Fuller v. Shedd*, 161 Ill. 462, 44 N. E. 286, 52 Am. St. Rep. 380, 33 L.R.A. 146; *Applegate v. Franklin*, 109 Ill. App. 293; *Ridgeway v. Ludlow*, 58 Ind. 248; *Stoner v. Rice*, 121 Ind. 51, 22 N. E. 968, 6 L.R.A. 387; *Rice v. Ruddiman*, 10 Mich. 125; *Clute v. Fisher*, 65 Mich. 48; *Cobb v. Davenport*, 32 N. J. L. 369; S. C. 33 N. J. L. 223; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *Gouverneur v. National Ice Co.*, 134 N. Y. 355, 31 N. E. 865, 30 Am. St. Rep. 669, 18 L.R.A. 695; *Ledyard v. Ten Eyck*, 36 Barb. 102; *Lembeck v. Nye*, 47 Ohio St. 336, 24 N. E. 686, 21 Am. St. Rep. 828, 8 L.R.A. 578. *Hardin v. Jordan*, 140 U. S. 371, 11 S. C. 808, holds the common law rule to be that the title to small lakes and ponds is in the riparian owners.

⁸*Trustees of Schools v. Schroll*, 120 Ill. 509; *Hammond v. Shepard*, 186 Ill. 235, 57 N. E. 867, 78 Am. St. Rep. 274; *Bradley v. Rice*, 13 Me. 198, 29 Am. Dec. 501; *Robinson v. White*, 42 Me. 209; *Fernold v. Knox Woolen Co.*, 82 Me. 48, 19 Atl. Rep. 93; *Paine v. Woods*, 108 Mass.

160; *Fay v. Salem & D. Aqueduct Co.*, 111 Mass. 27; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 1 L.R.A. 466; *Attorney General v. Revere Copper Co.*, 152 Mass. 444, 25 N. E. 605; *Lamphrey v. State*, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541; *Witty v. Board of Comrs.*, 76 Minn. 286, 79 N. W. 112; *Dressen v. Board of Comrs.*, 76 Minn. 290, 79 N. W. 113; *State v. Gilmanston*, 9 N. H. 461; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. 718, 18 L.R.A. 679; *State v. Welch*, 66 N. H. 178, 28 Atl. 21; *Wheeler v. Spinola*, 54 N. Y. 377 (The last case is distinguished, or overruled, in *Gouverneur v. National Ice Co.*, 134 N. Y. 355, 31 N. E. 865, 30 Am. St. Rep. 669, 18 L.R.A. 695); *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735, 54 L.R.A. 190; *Brace & H. Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278; *Dela-plaine v. C. & N. W. R. R. Co.*, 42 Wis. 214; *Boorman v. Sunnuck*, 42 Wis. 233; *Attorney General v. Smith*, 109 Wis. 532, 85 N. W. 512; *Ross-miller v. State*, 114 Wis. 169, 89 N. W. 839, 91 Am. St. Rep. 910, 58 L.R.A. 93. See also *Fuller v. Shedd*, 161 Ill. 462, 44 N. E. 286; *Auburn v. Union Water Power Co.*, 90 Me. 576, 38 Atl. 561, 38 L.R.A. 188; *New England T. & S. Club v. Mather*, 68 Vt. 338, 35 Atl. 323, 33 L.R.A. 569.

⁹*West Roxbury v. Stoddard*, 7 Allen, 158; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 1 L.R.A.

rule obtains in Maine¹⁰ and New Hampshire.¹¹ The rule in Minnesota is thus stated by the Supreme Court of that State in a syllabus of its own: "The same rules govern the rights of riparian owners on lakes or other still waters as govern the rights of riparian owners upon streams. Hence, if a meandered lake is 'non-navigable,' in fact the patentee of the riparian land takes the fee to the center of the lake; but if the lake is 'navigable' in fact, its waters and bed belong to the State, in its sovereign capacity, and the riparian patentee takes the fee only to the water line, but with all the rights incident to riparian ownership on navigable waters, including the right to accretions or reclensions formed in front of his land by the action or recession of the water. The division of waters into navigable and non-navigable is merely a method of dividing them into public and private, which is the more natural classification; and the definition or test of navigability to be applied to our inland lakes must be sufficiently broad and liberal to include all the public uses, including boating for pleasure, for which such waters are adapted. So long as they continue capable of being put to any beneficial public use, they are public waters."¹² In Michigan the title to small lakes and ponds is held to be in the riparian owners, subject to the public right of navigation.¹³ The question as to the ownership of the bed of streams and lakes is one which each State is at liberty to determine for itself, in accordance with its own views of public law and public policy.¹⁴

The question of title then may be summarized as follows: All agree that the great lakes emptying into the St. Lawrence are public.¹⁵ All agree that there is a class of lakes and ponds so small as to be wholly private.¹⁶ Between the two extremes

466; *Attorney General v. Revere Copper Co.*, 152 Mass., 444, 25 N. E. 605.

¹⁰*American Woolen Co. v. Kennebec Water Dist.*, 102 Me. 153, 66 Atl. 316.

¹¹*Dolbeer v. Suncook W. W. Co.*, 72 N. H. 562, 58 Atl. 504.

¹²*Lamphrey v. State*, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541. *See also Carpenter v. Board of Commissioners*, 56 Minn. 513, 58 N. W. Rep. 295.

¹³*Rice v. Ruddiman*. 10 Mich. 125.

¹⁴*Delaplaine v. C. & N. W. Ry. Co.*, 42 Wis. 214, 225; *Barney v. Keokuk*, 94 U. S. 324, 338; *Pollard's Lessee v. Hogan*, 3 How. 212; *Hardin v. Jordan*, 140 U. S. 371, 382, 383; *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.*, 168 U. S. 349; *post*, § 92.

¹⁵*Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. 718, 18 L.R.A. 679; *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 31 S. C. 110; *ante*, note 6.

¹⁶"In respect to title the law di-

the cases are conflicting. It is not the province of this treatise to resolve this question of title, or of what waters are public and what private. But as it is agreed on all hands that the test of the ebb and flow of the tide must be abandoned in this country, it is manifest that some other test must be sought.¹⁷ To say that the five or six great lakes are public and all the others private is purely arbitrary.¹⁸ There would seem to be no reasonable criterion to be applied but that of navigability in fact.¹⁹ This is said by the Supreme Court of the United States to be the real reason of the common law rule which makes the ebb and flow of the tides the test of public ownership.²⁰ If this test is adopted, then the only question which remains is to define what is meant by navigability and, upon this point, the position of the Supreme Court of Minnesota, that any water which is navigable for either profit or pleasure is within the rule, seems a reasonable one.²¹ In the larger sense the reason

vides natural fresh water ponds into two classes,—the small, which pass by an ordinary grant of land, like brooks and rivers, from which, as conveyable property, they are not distinguished; and the large, which are exempt from the operation of such a grant, for reasons that stop private ownership at the water's edge of the sea and its estuaries.” Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25 Atl. 718, 719, 18 L.R.A. 679.

¹⁷In the case last cited, referring to lakes and ponds, it is said: “The standard of size, or other test, that establishes their public or private title, is a point left undecided by our reported cases. But the law, classing large ponds with tide waters, and small ponds with fresh waters and brooks, necessarily provides a mode of determining to which class every pond belongs.” Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25 Atl. 718, 720, 18 L.R.A. 679. But the court does not make it clear what this mode is and later in the opinion indicates that the question may have to be determined

arbitrarily. “The abandonment of the arbitrary tidal test makes it necessary to choose another, and it may be impossible to find one that is not arbitrary.” *Ibid.* 25 Atl. p. 731.

¹⁸“Nothing can be more arbitrary than six exceptions to the English rule” (meaning the exception of the six great lakes). *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. 718, 731, 18 L.R.A. 679.

¹⁹*Lamphrey v. State*, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541.

²⁰“So, also, by the common law, the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England.” *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 436, 13 S. C. 110.

²¹“Most of the definitions of ‘navigability’ in the decided cases, while perhaps conceding that the size of

for declaring any waters public is thereby the better to preserve them for the public use and benefit, and if beneficial use by the public is taken as the test, then any waters are public which are capable of such beneficial use, whether for pecuniary gain or for health and pleasure.²²

§ 91 (76a). What constitutes navigability. As the question of title to land under water depends largely, if not wholly, upon the question of navigability, we refer briefly to some authorities upon that question. Many of the cases affirm or imply that a stream or lake, in order to be navigable in the legal sense, must be navigable for some useful purpose connected with trade or agriculture. Thus in a Florida case it is said: "A stream of sufficient capacity and volume of water to float to market the products of the country will answer the conditions of navigability, and is a public highway, open to all persons for the business of floatage to which it is adapted, whatever the character of the product, or the kind of flotage suited to their conditions; though it may not be adapted to the use of vessels, and only fit for floating logs and rafts, yet if required for such use, and there is sufficient business, present or prospective, to render the easement a matter of public concern, it will be regarded as a public stream for that purpose; and it is not essential to the easement that the stream should be continuously, at all seasons of the year, in a state suited to such floatage."²³ So in a Massachusetts case it is said that, in order that a stream may have the character of navigability in law, "it must be navigable to some purpose, useful to trade or agriculture."²⁴ But more

the boats or vessels is not important, and, indeed, that it is not necessary that navigation should be by boats at all, yet seem to convey the idea that the water must be capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure. But if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly we do not see why boating or sailing for pleasure

should not be considered navigation, as well as boating for mere pecuniary profit." *Lamphrey v. State*, 52 Minn. 181, 53 N. W. 1139, 1143, 38 Am. St. Rep. 541.

²²*See Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 436, 13 S. C. 110; *New England T. & S. Club v. Mather*, 68 Vt. 338, 35 Atl. 323, 32 L.R.A. 569; *post*, § 91.

²³*Bucki v. Cone*, 25 Fla. 1, 6 So. 160.

²⁴*Rowe v. Granite Bridge Corp.*, 21 Pick. 344. *To the same effect: Charlestown v. County Comrs.*, 3 Met. 202; *Murdock v. Stickney*, 8 Cush. 113, 115; *Nutter v. Gallagher*,

recent cases are to the effect that it is the capacity of being navigated, and not the purpose of the navigation, which determines the question of navigability in law.²⁵ The Massachusetts court, referring to the language already quoted from that State, says: "But this language is applied to the capacity of the stream, and is not intended to be a strict enumeration of the uses to which it must be actually applied in order to give it this character. Navigable streams are highways; and a traveler for pleasure is as fully entitled to protection in using a public way, whether by land or by water, as a traveler for business. Certainly fishing and fowling are as really regarded, on navigable waters, as trade and agriculture, though not mentioned in the case cited above; and in *West Roxbury v. Stoddard*,²⁶ it is said that the use of great ponds, which are public property, may as well be for bathing, boating, skating, fishing and fowling, as for business, and is entitled to equal consideration. If water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has ever been upon it for the purposes of trade or agriculture. The purpose of the navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation."²⁷ The question of navigability is one of fact.²⁸

§ 92 (76b). The question of title to the bed of navigable waters and of the rights of riparian owners upon such waters is one of State policy and State law. It has

19 Ore. 375, 24 Pac. 250; *Haines v. Hall*, 17 Ore. 165, 20 Pac. 831; *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *East Hoquaim B. & L. Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001; *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L.R.A. 178.

²⁵ *Attorney General v. Woods*, 108 Mass. 436; *Lamphrey v. State*, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541; *Falls Mfg. Co. v. Oconto Riv. Imp. Co.*, 87 Wis. 134, 58 N. W. 257; *Heyward v. Farmers' Min. Co.*, 42 S. C. 138, 19 S. E. 963, 46 Am. St. Rep. 702, 28 L.R.A. 42; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. 718, 18 L.R.A. Em. D.—8.

679; *Clark v. Cambridge*, 45 Neb. 799, 64 N. E. 239; *Chisolm v. Caines*, 67 Fed. 285.

²⁶ 67 Allen 158, 171.

²⁷ To same effect is *Lamphrey v. State*, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541. See on question of navigability, *Murray v. Preston*, 106 Ky. 561, 50 S. W. 1095, 90 Am. St. Rep. 232; *Webster v. Harris*, 111 Tenn. 668, 69 S. W. 782; 1 *Farnham on Waters*, § 23.

²⁸ *Railroad Co. v. Ferguson*, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908; *State v. Twiford*, 136 N. C. 603, 48 S. E. 586; *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L.R.A. 178; 1 *Farnham on Waters*, § 26.

been repeatedly held by the Supreme Court of the United States that it is for each State to determine whether the title to the bed of navigable waters is in the State or in the riparian owner, and to what extent the prerogative of the State shall be exerted over such waters and the lands under them.²⁹ And so it is held, by the same high authority, that each State may determine for itself what rights, if any, attach to the ownership of lands adjacent to such waters.³⁰ Upon these questions the Federal Courts follow the decisions of the State Court.³¹

§ 93 (76c). Nature and limitations of the title to the bed of navigable waters, whether in the public or riparian owners. The nature of the public title to the bed of navigable waters received very careful consideration at the hands of the Supreme Court of the United States, in the recent case of Illinois Central R. R. Co. v. Illinois.³² The legislature of the State had assumed to grant to the railroad company a thousand acres of the submerged lands of Lake Michigan adjacent to the shore in the city of Chicago. The grant extended for a considerable distance along the shore and embraced both shoal and deep water. The court held that the grant was revocable, if not absolutely void, and discussed at length the nature of the State's title to such lands. The title of the State is held to be in trust for the people at large, for the purposes of navigation and fishing.³³ In Wisconsin it is held that the title to the bed of navigable waters in the State is vested in the State in trust to preserve the same for the enjoyment of the people; that the State has no proprietary rights in such beds, or in the water

²⁹St. Anthony Falls Water Power Co. v. St. Paul Water Comrs., 168 U. S. 349; Hardin v. Jordan, 140 U. S. 371, 382, 11 S. C. 808; Illinois Central R. R. Co. v. Illinois, 146 U. S. 387, 13 S. C. 110; Shively v. Bowlby, 152 U. S. 1, 40, 14 S. C. 548; Packer v. Bird, 137 U. S. 661; Barney v. Keokuk, 94 U. S. 324. See also Webb v. City of Demopolis, 95 Ala. 116, 13 So. 289, 21 L.R.A. 62; Webber v. Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. 469; Chisolm v. Caines, 67 Fed. 285. But the determination of this question by the federal courts does not always appear to be in harmony with

the decisions of the State courts. Compare Hardin v. Jordan, 140 U. S. 371, 11 S. C. 838, and Trustees of Schools v. Schroll, 120 Ill. 509.

³⁰Same.

³¹Shively v. Bowlby, 152 U. S. 1, 14 S. C. 548.

³²146 U. S. 387, 13 S. C. 110.

³³San Francisco Savings Union v. G. R. Petroleum & Min. Co., 144 Cal. 134, 77 Pac. 823, 103 Am. St. Rep. 72, 66 L.R.A. 242; State v. Longfellow, 169 Mo. 109, 69 S. W. 374; Attorney General v. Smith, 109 Wis. 532, 85 N. W. 512; Illinois Cent. R. R. Co. v. Illinois, 146 U. S. 387, 452-454, 455, 456.

above the same, nor in the fish that inhabit such water, or the fowls that resort thereto, or the ice which forms thereon, which it can deal in by sale or otherwise; and that the power of the State over navigable waters within its boundaries is limited to the enactment and enforcement of such reasonable police regulations as may be deemed necessary to preserve the common right of all to enjoy the same for navigation by boats or otherwise, and all incidents of navigable waters, including the taking of ice therefrom for domestic use or sale.³⁴ Numerous other cases assert the trust character of the public title to the bed of navigable waters, and that the trust is for the benefit of the whole people and to aid in preserving and promoting the public rights of navigation and fishing.³⁵ All navigable streams and bodies of water have more or less shoal water along the shores which is not navigable. A distinction may, doubtless, be made between the soil under shoal water and the soil under deep water. The former may be reclaimed and devoted to private uses without detriment to the public interests.

³⁴Rossmiller v. State, 114 Wis. 169, 89 N. W. 839, 91 Am. St. Rep. 910, 58 L.R.A. 93. The same court, speaking of a small navigable lake about three miles in diameter, says: "The title to its bed is in the State in trust for legitimate public uses, such as fishing, navigation, and the like; and the State cannot convey it away for private uses, nor can it abdicate the trust." Attorney General v. Smith, 109 Wis. 532, 539, 85 N. W. 512.

³⁵Farist Street Co. v. Bridgeport, 60 Conn. 278, 22 Atl. 561; State v. Black Riv. Phosphate Co., 32 Fla. 82, 13 So. 640; Illinois Cent. R. R. Co. v. Chicago, 173 Ill. 471, 50 N. E. 1104; Revell v. People, 177 Ill. 468, 52 N. E. 1052, 69 Am. St. Rep. 257; Lamphrey v. State, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541; Witty v. Board of Comrs., 76 Minn. 286, 79 N. W. 112; Dressen v. Board of Comrs., 76 Minn. 290, 79 N. W. 113; State v. Longfellow, 169 Mo. 109, 69 S. W. 374; Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25 Atl.

718, 18 L.R.A. 679; State v. Welch, 66 N. H. 178, 28 Atl. 21; Saunders v. New York Central R. Co., 144 N. Y. 75, 38 N. E. 992, 43 Am. St. Rep. 729, 26 L.R.A. 378; Matter of New York, 168 N. Y. 134, 61 N. E. 158, 56 L.R.A. 500; Knickerbocker Ice Co. v. Forty-Second Street R. R. Co., 176 N. Y. 408, 68 N. E. 864, *affirming* S. C. 85 App. Div. 530, 83 N. Y. S. 469; Heyward v. Farmers' Min. Co., 42 S. C. 138, 19 S. E. 963, 46 Am. St. Rep. 702, 28 L.R.A. 42; Illinois Steel Co. v. Beloit, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905; Martin v. Waddell, 16 Pet. 367; Den v. Jersey Co., 15 How. 426; Shively v. Bowlby, 152 U. S. 1, 14 S. C. 548; Chisolm v. Caines, 67 Fed. 285; Scranton v. Wheeler, 57 Fed. 803, 6 C. C. A. 585. As to the power of the legislature over the public rights of navigation and fishing *see also* Bedlow v. New York Floating Dry Dock Co., 112 N. Y. 263, 19 N. E. 800, 2 L.R.A. 629; State v. Elk Island Boom Co., 41 W. Va. 796, 24 S. E. 590.

It may be otherwise with the latter. Just what are the limitations upon the power of the State over lands under public waters, is not definitely settled, beyond the fact that it is subject to the paramount authority of Congress to regulate interstate and foreign commerce and to control navigable waters and the soil therenunder in the interest of such commerce.³⁶

In those States in which the title to the bed of non-tidal navigable waters is held to be in the riparian owners, the private right is subject to the public rights of navigation and fishing and to the control of the State in the interest of such public rights.³⁷ The State may use the submerged lands for the improvement of navigation or promotion of commerce. Subject to such use and control the riparian owner may make any use of the submerged lands which does not materially interfere with the rights of the public.³⁸

According to what seems to the writer the better view, there is thus no practical difference in the rights of riparian owners on navigable waters, whether the title to the bed is in the riparian owners or the public. If the former, the title and riparian rights are subject to the right of the public to use, improve and regulate. If the latter, the right of the public is limited to the same purposes; the title to the bed is thus wholly unimportant.

§ 94 (77). Rights of riparian owners on public waters. There is not more diversity of opinion among the courts as to the title to the bed and shores of navigable streams and waters than there is as to the rights of riparian owners in such waters as are conceded to be entirely *publici juris*. The older authorities hold that such an owner has no private rights in the stream or body of water which are appurtenant to his land, and, in short, no rights beyond that of any other member of the public, and that the only difference is that he is more conveniently situated to enjoy the privileges which all the public have in common, and that he has access to the waters over his own land, which the

³⁶Gibson v. United States, 166 U. S. 269, 17 S. C. 578.

³⁷Webber v. Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. 469; Williamsburg Boom Co. v. Smith, 84 Ky. 372; City of Grand Rapids v. Powers, 89 Mich. 94, 50 N. W. 661, 28 Am. St. Rep. 276, 14 L.R.A. 498.

⁵Am. R. R. & Corp. Rep. 490; Attorney General v. Delaware etc. R.

R. Co., 27 N. J. Eq. 1; S. C. affirmed, 27 N. J. Eq. 631; Scranton v. Wheeler, 57 Fed. 803, 6 C. C. A. 585; Clark v. Irrigation Co., 45 Neb. 799, 64 N. W. 239; Freeland v. Pa. R. R. Co., 197 Pa. St. 529, 47 Atl. 745, 80 Am. St. Rep. 850, 58 L.R.A. 206.

³⁸Same.

public do not. The stream is regarded as an adjoining freehold, the title to which is absolutely in the public, and which the public may use and control in the same manner as an individual could if the stream was his private property. Access to and use of the stream by the riparian owner is regarded as merely permissive on the part of the public and liable to be cut off absolutely if the public sees fit to do so.³⁹ Wood, in his work on Nuisances, states the doctrine as follows: "The State is the owner, absolutely, of the *alveus* of the stream to high-water mark, and, as such owner, may devote the stream, or any part thereof, to such purposes as it sees fit, so long as it does not materially obstruct navigation. Riparian owners, as such, upon this class of streams, have no more rights than any other member of the public, either in the stream, or any of the lands covered thereby. They cannot erect a wharf thereon, or use any portion

³⁹The leading cases in support of this doctrine are *Stevens v. Patterson etc. R. R. Co.*, 34 N. J. L. 532, 3 Am. Rep. 269, 1870, and *Gould v. Hudson River R. R. Co.*, 6 N. Y. 522, 1852 (*overruled* in 1892, see § 96). Other cases in which the same doctrine is held are the following: *Tomlin v. Dubuque B. & M. R. R. Co.* 32 Ia. 106 (Beck, J., dissents), 7 Am. Rep. 176; *Boston & Worcester R. R. Co. v. Old Colony R. R. Co.*, 12 *Cush.* 605; *Fay v. Salem & Danvers Aqueduct Co.*, 111 Mass. 27; *Thayer v. New Bedford R. R. Co.*, 125 Mass. 253; *State v. Sunapee Dam Co.*, 70 N. H. 458, 50 Atl. 108, 59 L.R.A. 55; *Pennsylvania R. R. Co. v. New York etc. R. R. Co.*, 23 N. J. Eq. 157 (opinion of Chancellor only); *Sugar Refining Co. v. Jersey City*, 26 N. J. Eq. 247 (opinion of Chancellor only); *Amos v. Norcross*, 58 N. J. Eq. 256, 43 Atl. 195 (V. C.); *Sayre v. Newark*, 60 N. J. Eq. 361, 45 Atl. 785, 83 Am. St. Rep. 629, 48 L.R.A. 722, *affirming* S. C. 58 N. J. Eq. 136, 42 Atl. 1068; *Atlantic City v. New Auditorium Pier Co.*, 63 N. J. Eq. 644, 53 Atl.

99 (V. C.); *Evans v. Same*, 63 N. J. Eq. 674, 53 Atl. 111 (V. C.); *Same v. Same*, 67 N. J. Eq. 315, 58 Atl. 191 (V. C.); *Canal Commissioners v. People*, 5 Wend. 423; S. C. 13 Wend. 355; 17 Wend. 570; *People v. Canal Appraisers*, 33 N. Y. 461; *Gould v. Hudson River R. R. Co.*, 12 Barb. 616; *Matter of Water Commissioners*, 3 Edwards Ch. 290; *Getty v. Hudson River R. R. Co.*, 21 Barb. 617; *Matter of N. Y., W. S. & B. Ry. Co.*, 29 Hun 269; *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101; *McKeen v. Delaware Canal Co.*, 49 Pa. St. 424. See also *Hoboken v. Pennsylvania R. R. Co.*, 124 U. S. 656, which states and applies the law of New Jersey. Since the first edition was published, this view of the law has received its chief support, from the states of Oregon and Washington. In *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pae. 539, 12 L.R.A. 632, which is the leading authority in the latter State, the court says: "The result of our investigation of the authorities leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the State

of the *alveus* of the stream for any purpose whatever, except in the exercise of the common right of navigation. They may cross and recross the same for the purpose of approaching the sea, and so may any other member of the public. They may use the waters of the stream for ordinary domestic purposes, and so may any one else. The owner of the bank has no *jus privatum*, or special usufructuary interest, in the water. He does not, from the mere circumstance that he is the owner of the bank, acquire any special or particular interest in the stream, over any other member of the public, except that, by his proximity thereto, he enjoys greater conveniences than the public generally. To him, riparian ownership brings no greater

have no special or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the State to deal with its own property as it may deem best for the public good. If the State cannot exercise its constitutional right to erect wharves and other structures without the consent of adjoining owners, it is obviously deficient in the powers of self-development, which every government is supposed to possess.—a proposition to which we cannot assent. *See Galveston v. Menard*, 23 Tex. 349. Nor do we think this view in any way conflicts with the constitution of the State, but, on the contrary, we believe it is in strict harmony with it, when all its parts are construed together. We cannot think that the building by the State or its grantees of wharves, upon shores of navigable waters, would constitute either a taking or damaging of private property for public use, in contemplation of the constitution.” (Stiles, J., dissents.) *See also State ex rel. Yesler v. Prosser*, 2 Wash. 530, 27 Pac. 550; *Stinson Mill Co. v. Board of Harbor Line Comrs.* (Wash.), 29 Pac. 938; *State ex rel. v. Prosser*, 4 Wash. 816, 30 Pac. 734; *Columbia etc. R. R. Co. v. City of Seattle*, 6 Wash. 332, 33 Pac. 824, 34 Pac. 725;

City of Seattle v. Columbia etc. R. R. Co., 6 Wash. 379, 33 Pac. 1048; *Seattle & M. R. R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 22 L.R.A. 217; *Yesler v. Washington Harbor Line Comrs.*, 146 U. S. 646, 13 S. C. 190; *Prosser v. Northern Pac. R. R. Co.*, 152 U. S. 59, 14 S. C. 528. *Compare New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735, 54 L.R.A. 190; *Burrows v. Grays Harbor Boom Co.*, 44 Wash. 630, 87 Pac. 937. The same rule is held in Oregon. *Bowlby v. Shively*, 22 Or. 410; *S. C. 152 U. S. 1*; *Hinman v. Warren*, 6 Ore. 408; *Parker v. Taylor*, 7 Ore. 435; *Parker v. Rogers*, 8 Ore. 183; *Shively v. Parker*, 9 Ore. 500; *McCann v. Oregon R. R. Co.*, 13 Ore. 455; *Shively v. Welch*, 10 Sawyer, 136, 140, 141. *Compare Parker v. West Coast Packing Co.*, 17 Or. 510, 21 Pac. 822; *Montgomery v. Shaver*, 40 Ore. 244, 66 Pac. 923; *Wilson v. Welch*, 12 Ore. 353. But it has been held that where a wharf has been built out to navigable water by the express or implied license of the State, it cannot be appropriated to public use without compensation. *Lewis v. City of Portland*, 25 Ore. 133, 35 Pac. 256, 42 Am. St. Rep. 772, 22 L.R.A. 736. *And see Oakland v. Oakland Water Front Co.*, 118 Cal. 160.

rights than those incident to all the public, except that he can approach the water more readily, and over lands which the general public have no right to use for that purpose. But this is a mere convenience, arising from his ownership of the lands adjacent to the ordinary high water mark, and does not prevent the State from depriving him entirely of this convenience, by itself making erections upon the shore, or authorizing the use of the shore by others, in such a way as to deprive him of this convenience altogether, and the injury resulting to him therefrom, although greater than that sustained by the rest of the public, is *damnum absque injuria*.⁴⁰

§ 95 (78). The same continued. On the other hand, there are cases which hold that the riparian owners, upon waters the bed of which belongs to the public, have valuable rights appurtenant to their estates, of which they cannot be deprived without compensation. This seems to us the better and sounder rule. The opposite conclusion has been reached by a narrow and technical course of reasoning, based upon the fact that the title to the soil is in the State, or the public. It is assumed that this title gives the State the same absolute and exclusive control of the waters and their bed, as an individual possesses over his private property. But there is really no analogy between the relations of a riparian owner to the waters upon which he abuts and the relations between the proprietors of adjoining lands. The State holds the title to public waters as a trustee, merely, for the use of all the public in common. The very object of declaring the title in the public is the better to secure this common use and benefit.⁴¹ The riparian owner is pecu-

⁴⁰Wood on Nuisances (1st ed.), 592. See further on the subject, Payne v. English, 79 Cal. 540, 21 Pac. 952; Pacific Gas Imp. Co. v. Ellert, 64 Fed. 421; Watuppa Reservoir Co. v. Fall River, 147 Mass. 548, 1 L.R.A. 466; Henry v. Newburyport, 149 Mass. 582, 22 N. E. 75, 5 L.R.A. 179; Mehrhof Bros. Brick Mfg. Co. v. Delaware etc. R. R. Co., 51 N. J. L. 56, 16 Atl. 12; Easton & A. R. R. Co. v. Central R. R. Co., 52 N. J. L. 267, 19 Atl. 722; State v. Wright, 54 N. J. L. 130, 23 Atl. 116; New Jersey Zinc Co. v. Morris C. & B. Co.,

44 N. J. Eq. 398, 15 Atl. 227, 1 L.R.A. 133; Fulmer v. Williams, 122 Pa. St. 191, 15 Atl. 726, 9 Am. St. Rep. 88, 1 L.R.A. 603; Williams v. Fulmer, 151 Pa. St. 405, 25 Atl. 103, 12 L.R.A. 632; Wood on Nuisances, (1st ed.), 592. Stiles, J., in Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539, 551, 12 L.R.A. 632, says that Mr. Wood is the only modern text writer who maintains this ground.

⁴¹Illinois Central R. R. Co. v. Illinois, 146 U. S. 387, 452, 453, 455, 456, 457, 13 S. C. 110; Lamphrey v. State, 52 Minn. 181, 53 N. W. 1139,

liarly situated for the enjoyment of these advantages. He has rights in the waters upon which he abuts which no private owner has in the land of his neighbor. No private owner holds his lands for the purpose of being used by his neighbors and the public. The conclusions, therefore, which are based upon the artificial and purely metaphysical notion of title, carried to its extremest logical consequences, as in the case of ordinary private ownership, are, it seems to us, unsound and unwarranted. As matter of fact, riparian owners have always enjoyed, in connection with their estates, various privileges in the contiguous shore and waters, and, practically, these privileges have been regarded as annexed to their estates and estimated as part of the property in business transactions touching the value of the same. When a court is called upon to say whether these privileges are rights appurtenant to the property and part and parcel of it, it must establish a rule of law and of property, whichever way it decides the question. To look simply to the fact of title and then apply the law relating to adjoining proprietors, is to ignore some of the most important features in the case. True, the title is in the State, but it is only in the State by the declaration of courts, and then only as trustee for the benefit of all the public in common, including the riparian owners. And, looking further, it is seen that the riparian owner, in addition to rights which he shares in common with others, has other rights or privileges which are peculiar to himself, such as the right to accretions, the right of wharfage, the right of access to and from his lot, and the like, which destroy all analogy to the case of adjoining proprietors. It is more reasonable, more logical and more just to say that these privileges are in fact rights, as inviolable as the soil itself. The public loses nothing, for it is conceded that all these rights are subject to the paramount right of the State to use and improve the waters as shall best subserve the common rights of all.⁴²

38 Am. St. Rep. 541; Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25 Atl. 718, 721, 724, 725, 18 L.R.A. 679; *ante*, § 93. In the first case cited, speaking of this title, the court says: "But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the

public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties," p. 452.

⁴²*Ante*, § 93.

§ 96 (79). The same continued. These views are not without a strong support in the earlier cases and cases already cited, and have been vindicated by several late decisions by courts of the highest authority. In *Gould v. Hudson River Railroad Co.*,⁴³ Judge Edmonds filed an elaborate dissenting opinion, in which he combated the conclusions of the majority with great learning and ability. He enumerates eight rights which the riparian owner has, that are peculiar to himself and appurtenant to his property: 1. The right of navigating the river to and from his land, and landing upon his shore. 2. The right, under the statute, to be preferred in the grant of a ferry right terminating upon his land and in a grant of the soil under water opposite his land. 3. The right of fishing in the river and of using his land in connection therewith. 4. The right to accretions. 5. The right to use the water in his business, whatever it may be, and for domestic purposes. 6. The right to lade and unlade upon the bank. 7. The right of way from his land to the channel of the river. 8. The right to be and remain a riparian owner, and have the water lave his land. And so in the case of *Stevens v. Paterson & Newark R. R. Co.*,⁴⁴ two of the Judges unite with the Chancellor in a dissenting opinion in which similar views are maintained. Says the Chancellor: "The right, on the principles of the common law, which I for convenience call the right of adjacency, consists in the right of ferriage, of landing boats alongside a wharf, or land by the shore, and unloading goods upon or taking them from it, the right of fishing from the shore, and drawing nets upon it, of entering upon it from the land, for bathing or procuring water, and such other benefits as can be enjoyed only by the adjoining owner, peculiar to him, and not common to the rest of the public." And he concludes as follows:

"The conclusions to which I have arrived are these:

"First. That the owner of lands upon tide waters has a right to the natural advantages conferred on his land by its adjacency to the water, which, like the right to have fresh water streams flow unobstructed and unpolluted upon and from his land, and like the right to support for the natural soil from the adjacent soil, is an incident to the land, and is property.

⁴³ 6 N. Y. 522.

⁴⁴ 34 N. J. L. 532, 562, 3 Am. Rep.

"Second. That, by the law of New Jersey, being the common law as adopted here, altered to suit the circumstances and necessities of the people and the genius of our government, the right to wharf out from the lands situate on tide waters over the shore in front, has become an incident to such lands and a right of property.

"Third. That, by the wharf act of 1851, the right to fill in and appropriate the shore is conferred upon the shore owner as an incident to his property.

"Lastly. That all these rights, being incidents to an estate which add to its value, are property, and cannot be taken away by general or special legislation, except by the power of eminent domain for public use and upon compensation."⁴⁵

Since the first edition was published the case of *Gould v. Hudson River R. R. Co.* has been overruled and the law of New York declared to be in accordance with the dissenting opinion of Judge Edmonds.⁴⁶

⁴⁵Judge Cooley, in his work upon Constitutional Limitations (p. 544), speaking of these cases, says: "So far as these cases hold it competent to cut off a riparian proprietor from access to the navigable water, they seem to us to justify an appropriation of his property without compensation; for, even those courts which hold the fee in the soil under navigable streams to be in the State, admit valuable riparian rights in the adjacent proprietor."

⁴⁶Rumsey v. New York & N. E. R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. Rep. 600, 15 L.R.A. 618, 6 Am. R. R. & Corp. Rep. 67. For other litigation between the same parties and growing out of the same facts, see: Rumsey v. New York & N. E. R. R. Co., 114 N. Y. 423, 21 N. E. 1066; Rumsey v. New York & N. E. R. R. Co., 125 N. Y. 681, 25 N. E. 1080; Rumsey v. New York & N. E. R. R. Co., 130 N. Y. 88, 28 N. E. 763; Rumsey v. New York & N. E. R. R. Co., 136 N. Y. 543, 32 N. E. 979. The following are other New York cases bearing on the ques-

tion: *Steers v. City of Brooklyn*, 101 N. Y. 51; *Williams v. New York*, 105 N. Y. 419; *New York Cent. etc. R. R. Co. v. Aldridge*, 135 N. Y. 83, 32 N. E. 50; *People ex rel. etc. v. Comrs. of Land Office*, 135 N. Y. 447, 32 N. E. 139; *Saunders v. New York Cent. etc. R. R. Co.*, 144 N. Y. 75, 38 N. E. 992, 43 Am. St. Rep. 729, 26 L.R.A. 378; *Sage v. New York*, 154 N. Y. 61, 47 N. E. 1096, 61 Am. St. Rep. 592; *Archibald v. New York Central etc. R. R. Co.*, 157 N. Y. 574, 52 N. E. 567; *Saunders v. New York Cent. etc. R. R. Co.*, 71 Hun 153, 23 N. Y. Supp. 927; *Nolan v. Brockway Park Imp. Co.*, 76 Hun 458, 28 N. Y. Supp. 102; *Hedges v. West Shore R. R. Co.*, 80 Hun 310, 30 N. Y. Supp. 92; *Babcock v. City of Buffalo*, 1 Sheldon 317; *People v. Mould*, 37 App. Div. 35; and see New York cases cited *post*, § 99, note 56.

In *Saunders v. New York Cent. etc. R. R. Co.*, 144 N. Y. 75, 38 N. E. 992, 43 Am. St. Rep. 729, 26 L.R.A. 378, the court, in speaking of the rights of riparian owners,

§ 97 (80). The same continued. The same doctrine is affirmed in a recent case in the Supreme Court of the United States which went up from Wisconsin. The plaintiff had extended a wharf into the Milwaukee River. Afterwards the city of Milwaukee, acting under certain legislative acts, established dock lines upon the river, and declared a part of plaintiff's wharf which projected beyond these lines a nuisance and ordered its abatement. The plaintiff filed his bill to enjoin and prevailed. The court says that, though the title to the bed of the river is in the public, yet the abutting owner has riparian rights, and "among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. * * * This riparian right," says the court, "is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."⁴⁷ These views have been confirmed by recent decisions of the same court.⁴⁸

§ 98 (81). The same continued. Several well considered cases upon this question are to be found in the 42d volume of the Wisconsin Reports. In one of these cases it appeared that one Diedrich owned a lot on Lake Michigan and had, by artificial means, extended his lot some eighty-five feet into the lake. A railroad company located its road across this new land, and instituted proceedings to condemn so much of the land as was required for its track. On appeal the court held that Diedrich

says: "What these rights are has been decided in the Rumsey case, 133 N. Y. 79, 30 N. E. 654, and since that decision reaffirmed in the case of Illinois Cent. R. R. Co. v. Illinois, 146 U. S. 387, 13 S. C. 110. They embrace the right of access to the channel or navigable part of the river for navigation, fishing, and such other uses as commonly belong to riparian ownership, the right to make a landing, wharf or pier for

his own use or for that of the public, with the right of passage to and from the same with reasonable safety and convenience."

⁴⁷Yates v. Milwaukee, 10 Wall. 497, 504. *To the same effect*, Chicago v. Laflin, 49 Ills. 172.

⁴⁸Illinois Central R. R. Co. v. Illinois, 146 U. S. 387, 13 S. C. 110; Shively v. Bowlby, 152 U. S. 1, 14 S. C. 548.

had no title to the made land on which the railroad was laid, and that, as the damages awarded had been given for the land taken, and not for injury to riparian rights, the case must be reversed. The question of riparian rights was discussed and the opinion expressed that, for any injury thereto, the owner would be entitled to compensation.⁴⁹

In another case⁵⁰ a railroad company constructed its road across a small lake in the city of Madison so as entirely to cut off the plaintiff from access to the lake and leave a stagnant pool in front of his premises. The lake was navigable and about nine miles in circumference. The plaintiff sued for damages. The title to the bed of the lake beyond the water's edge was held to be in the State, but the court held the plaintiff had riparian rights appurtenant to his land of which he could not be deprived without compensation. The court says: "But, while the riparian proprietor only takes to the water line, it by no means follows, nor are we willing to admit, that he can be deprived of his riparian rights without compensation. As proprietor of the adjoining land, and as connected with it, he has the right of exclusive access to and from the waters of the lake at that particular place; he has the right to build piers and wharves in front of his land, out to navigable waters, in aid of navigation, not interfering with the public use. These are private rights incident to the ownership of the shore, which he possesses distinct from the rest of the public. All the facilities which the location of his land with reference to the lake affords, he has the right to enjoy for purposes of gain or pleasure; and they oftentimes give property thus situated its chief value. It is evident, from the nature of the case, that these rights of user and of exclusion are connected with the land itself, grow out of its location, and cannot be materially abridged or destroyed without inflicting an injury upon the owner which the law should redress. It seems unnecessary to add the remark, that these riparian rights are not common to the citizens at large, but exist as incidents to the right of the soil itself adjacent to the water. In other words, according to the uniform doctrine of the best authorities, the foundation of riparian rights, *ex vi termini*, is the ownership of the bank or shore. In such ownership they have their origin. They may and do exist, though the fee in the bed of the river or

⁴⁹Diedrich v. N. W. U. Ry. Co.,
42 Wis. 248.

⁵⁰Delaplaine v. C. & N. W. Ry.
Co., 42 Wis. 214, 226.

lake be in the State. If the proprietor owns the bed of the stream or lake, this may possibly give him some additional right; but his riparian rights, strictly speaking, do not depend on that fact.”⁵¹

The same views are entertained by the Supreme Court of Minnesota, which in a recent case, says: “In this State it is the settled doctrine that the riparian owner has the fee to low water mark. But, while he only has the fee to low water mark, he has certain rights incident to the ownership of real estate bordering upon a navigable stream. Among these are the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain suitable landings, piers, and wharves, on and in front of his land, and to extend the same therefrom into the river to the point of navigability, even beyond low water mark, and, to this extent, exclusively to occupy for such and like purposes, the bed of the stream, subordinate only to the paramount public right of navigation. These riparian rights are property, and cannot be taken away without paying just compensation therefor.”⁵²

Since the first edition various other States have rendered decisions in conformity with these views.⁵³

§ 99 (82). The same continued. These views are fully sustained by a decision of the House of Lords, in the late case of *Lyon v. Fishmongers Co.*⁵⁴ The question was, whether a riparian proprietor on the banks of a tidal navigable river had any rights or natural easements similar to those which belong to a riparian proprietor upon a non-tidal stream. This question was answered in the affirmative. “I cannot entertain any doubt,” says the Lord Chancellor, “that the riparian owner on a navigable river, in addition to the right connected with navi-

⁵¹The same questions of right are discussed in the following cases, which, however, do not involve any exercise of the eminent domain power: *Olson v. Merrill*, 42 Wis. 203; *Boorman v. Sunnuehs*, 42 Wis. 233. See also *Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co.*, 79 Wis. 297, 48 N. W. Rep. 371; *City of Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. Rep. 128; *Priewe v. Wisconsin State Land & Imp. Co.* 93

Wis. 534, 67 N. W. 918, 33 L.R.A. 645; and cases cited § 99 note 56.

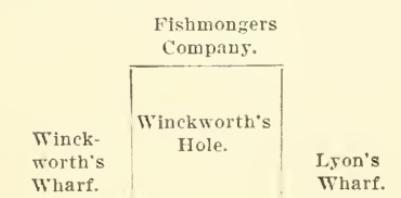
⁵²*Union Depot etc. Co. v. Brunswick*, 31 Minn. 297, 301. See also *Lamphrey v. State*, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541; *Bradshaw v. Duluth Imperial Mill Co.*, 52 Minn. 59, 53 N. W. 1066; *Rippe v. Chieago etc R. R. Co.*, 23 Minn. 18.

⁵³See cases cited, post, § 99, note 56

⁵⁴Law Reports, 1 Appeal Cases, 662, 674, 682; 1876.

gation to which he is entitled as one of the public, retains his rights, as an ordinary riparian owner, underlying and controlled by, but not extinguished by, the public right of navigation." And from Lord Selbourne's opinion we take the following: "The rights of a riparian proprietor, so far as they relate to any natural stream, exist *juræ naturæ*, because his land has, by nature, the advantage of being washed by the stream; and if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow the course of nature in every part of the same stream. Water which is more or less salt by reason of the flow of the tides may still be useful for many domestic and other purposes, though there are no doubt some purposes which fresh water only will serve. The general law as to riparian rights is not stated by any authorities, that I am aware of, in terms which require this distinction, and, if there is any sound principle on which it ought to be made, the burden of proof seems to lie on those who so affirm. As for the public right of navigation, it may well co-exist with private riparian rights, which must of course be enjoyed subject to it; just as where there is no navigation, each riparian proprietor's right is concurrent with, and is so far limited by, the rights of other proprietors. With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights, properly so called, because the word 'riparian' is relative to the bank, and not the bed, of the stream; and the connection, when it exists, of property on the bank with property in the bed of the stream depends, not upon nature, but on grant or presumption of law."⁵⁵

⁵⁵In this case the facts were as follows: Lyon owned a wharf which fronted south on the Thames and west on an inlet extending north about forty feet, known as Winckworth's Hole, at the bottom of which was the defendant company's wharf, and west of the inlet was Winckworth's wharf, thus:—



By an act of parliament, a body called the Conservators of the Thames was constituted, with power to grant to the owner or occupier of any land fronting and immediately adjoining the Thames a license to make any dock or other work immediately in front of his land and into the body of said river, but not so as to take away, alter or abridge any right to which any owner or occupier of lands on the banks of the river, including the banks thereof, was by law entitled. The defendants obtained a license to extend their wharf to the main line of the

This case may safely be regarded as settling the law of England in favor of the conclusions reached in the text. Further confirmation of the text will be found in the cases cited in the note and in the following sections.⁵⁶

river, so as entirely to displace the water in Winckworth's Hole, and cut off the plaintiff from access to his premises on the west side thereof. The plaintiff applied for an injunction, which was granted by the Vice Chancellor. On appeal, the decision of the Vice Chancellor was reversed, on the ground that the plaintiff had no right or claim which would be taken away, altered or abridged by the execution of the projected improvement. (Law Rep., 10 Ch. App. 679.) The broad ground was taken that a riparian owner on tidal waters has no private right in the waters appurtenant to his land. The latter decision was reversed by the House of Lords without a dissenting opinion. See also Bill v. Quebec, L. R. 5 H. L. 84; North Shore R. R. Co. v. Pion, 14 App. Cas. 612, affirming S. C. 14 Duvall 677; Bigaouette v. North Shore R. R. Co., 17 Duvall 363.

⁵⁶The authorities sustaining these views are here collated, for convenience of examination and comparison with the cases supporting the opposite view, to be found in note 39, § 94: Organ v. Memphis & L. R. R. Co., 51 Ark. 235, 11 S. W. 96; San Francisco Savings Union v. Petroleum & Min. Co., 144 Cal. 134, 77 Pac. 823, 103 Am. St. Rep. 72, 66 L.R.A. 242; Prior v. Swartz, 62 Conn. 132, 25 Atl. 398, 36 Am. St. Rep. 333, 18 L.R.A. 668; New York etc. R. R. Co. v. Long, 72 Conn. 10, 43 Atl. 559; Richards v. New York etc. R. R. Co., 77 Conn. 501, 60 Atl. 295, 69 L.R.A. 929; Harlan & H. Co. v. Parchall, 5 Del. Ch. 435; State v. Black Riv. Phosphate Co., 32 Fla. 82, 13 So. 640, 21 L.R.A. 189; Ren-

wick v. D. & N. W. Ry. Co., 49 Ia. 664, affirmed, 102 U. S. 180; Baltimore etc. R. R. Co. v. Chase, 43 Md. 23; Gariter v. Baltimore, 52 Md. 422; People v. Severance, 125 Mich. 556, 84 N. W. 1089; Rippe v. Chicago etc. R. R. Co., 23 Minn. 18; Carli v. Stillwater Street R. & T. Co., 28 Minn. 373, 41 Am. Rep. 290; Brisbine v. St. Paul & Sioux City R. R. Co., 23 Minn. 114; Union Depot etc. Co. v. Brunswick, 31 Minn. 297; Lamphrey v. State, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541; Reeves v. Backus-Brooks Co., 83 Minn. 339, 86 N. W. 337; Myers v. St. Louis, 82 Mo. 367; Gough v. Bell, 2 Zab. 441; Langdon v. New York, 93 N. Y. 129; Steers v. City of Brooklyn, 101 N. Y. 51; Williams v. New York, 105 N. Y. 419; Rumsey v. New York & N. E. R. R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. Rep. 600, 15 L.R.A. 618, 6 Am. R. R. & Corp. Rep. 67; Saunders v. New York Central etc. R. R. Co., 144 N. Y. 75, 38 N. E. 992, 43 Am. St. Rep. 729, 26 L.R.A. 378; Matter of New York, 168 N. Y. 134, 61 N. E. 158, 56 L.R.A. 500; Brookhaven v. Smith, 188 N. Y. 74, 9 L.R.A. (N.S.) 326, reversing S. C. 98 App. Div. 212, 90 N. Y. S. 646; Hedges v. West Shore R. R. Co., 80 Hun 310, 30 N. Y. Supp. 92; Babcock v. City of Buffalo, 1 Sheldon 317; North Hempstead v. Gregory, 53 App. Div. 350, 65 N. Y. S. 867; Gregory v. Forbes, 96 N. C. 77; Bond v. Wool, 107 N. C. 139, 12 S. E. 281; Wool v. Town of Edenton, 115 N. C. 10, 20 S. E. 165; Wilson v. Welch, 12 Ore. 353; Montgomery v. Shaver, 40 Ore. 244, 66 Pac. 923; Ball v. Slack, 2 Whart. Pa. 538, 30 Am. Dec. 278;

§ 100 (83). The same concluded. In conclusion, the following rights may be enumerated as appurtenant to property upon public waters:

First. The right to be and remain a riparian proprietor and to enjoy the natural advantages thereby conferred upon the land by its adjacency to the water.⁵⁷

Second. The right of access to the water, including a right of way to and from the navigable part.⁵⁸

Sherman v. Sherman, 18 R. I. 504, 30 Atl. 459; Chesapeake etc. Ry. Co. v. Walker, 100 Va. 69, 40 S. E. 633, 914; New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735, 54 L.R.A. 190; Burrows v. Grays Harbor Boom Co., 44 Wash. 630, 87 Pac. 937; Delaplaine v. C. & N. W. Ry. Co., 42 Wis. 214; Boorman v. Sunnucks, id. 233; Diedrich v. N. W. Union Ry. Co., id. 248; Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128; Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co., 79 Wis. 297, 48 N. W. 371; Attorney General v. Smith, 109 Wis. 532, 85 N. W. 512; Rossmiller v. State, 114 Wis. 169, 89 N. W. 839, 91 Am. St. Rep. 910, 58 L.R.A. 93; Draper v. Brown, 115 Wis. 361, 91 N. W. 1001; McCarthy v. Murphy, 119 Wis. 159, 96 N. W. 531, 100 Am. St. Rep. 163; Thomas v. Ashland etc. Ry. Co., 122 Wis. 519, 100 N. W. 993, 106 Am. St. Rep. 1000; Dutton v. Strong, 1 Black 23; Yates v. Milwaukee, 10 Wall. 497; Illinois Central R. R. Co. v. Illinois, 146 U. S. 387, 13 S. C. 110; Shively v. Bowlby, 152 U. S. 1, 14 S. C. 548; Paine Lumber Co. v. United States, 55 Fed. 854; Sullivan Timber Co. v. Mobile, 124 Fed. 644; Lyon v. Fishmongers' Company, L. R. 1 App. Cas. 662; Duke of Buccleuch v. Metropolitan Board of Works, L. R. 5 H. L. 418; Bill v. Quebec, L. R. 5 H. L. 84; North Shore R. R. Co. v. Pion, 14 App. Cas. 612; S. C. 14 Duvall 677; Big-aoutte v. North Shore R. R. Co.,

17 Duvall 363; Miner v. Gilmour, 12 Moore P. C. 131; Rose v. Groves, 5 M. & G. 613; Attorney General v. Conservators of the Thames, 1 H. & M. 1. See Frost v. Worthington Co. R. R. Co. 96 Me. 76, 51 Atl. 806, 59 L.R.A. 68; Western Pac. Ry. Co. v. Southern Pac. Co., 151 Fed. 376, 80 C. C. A. 606.

⁵⁷Dissenting opinion, Stevens v. Patterson, 34 N. J. L. 532, 3 Am. Rep. 269; opinion of Judge Edmonds, dissenting in Gould v. Hudson River R. R. Co. 6 N. Y. 522; Lyon v. Fishmongers Co., L. R. 1 App. Cas. 662; Delaplaine v. C. & N. W. Ry. Co., 42 Wis. 214; Rice v. Ruddiman, 10 Mich. 125, 142; Illinois Cent. R. R. Co. v. Illinois, 146 U. S. 387, 13 S. C. 110; Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25 Atl. 718, 18 L.R.A. 679; Fulmer v. Williams, 122 Pa. St. 191, 15 Atl. 726, 9 Am. St. Rep. 88, 1 L.R.A. 603; Williams v. Fulmer, 151 Pa. St. 405, 25 Atl. 103, 31 Am. St. Rep. 767.

⁵⁸Same, Shirley v. Bishop, 67 Cal. 543; New York etc. R. R. Co. v. Long, 72 Conn. 10, 43 Atl. 559; Baltimore & Ohio R. R. Co. v. Chase, 43 Md. 23, 35; Garitee v. Baltimore, 52 Md. 422; Brisbine v. St. Paul etc. R. R. Co., 23 Minn. 114; Carli v. Stillwater Street R. & T. Co., 28 Minn. 373; Union Depot etc. Co. v. Brunswick, 31 Minn. 297; Concord Mfg. Co. v. Robertson, 68 N. H. 1, 25 Atl. 718, 18 L.R.A. 679; Williams v. New York, 105 N. Y. 419; Rumsey v. New York & N. E. R. R. Co.,

Third. The right to build a pier or wharf out to navigable water, subject to any regulations of the State.⁵⁹

133 N. Y. 79, 30 N. E. 654, 6 Am. R. N. & Corp. Rep. 67, 28 Am. St. Rep. 600, 15 L.R.A. 618; Saunders v. New York Cent. etc. R. R. Co., 144 N. Y. 75, 38 N. E. 992, 43 Am. St. Rep. 729, 26 L.R.A. 378; North Hempstead v. Gregory, 53 App. Div. 350, 65 N. Y. S. 867; Montgomery v. Shaver, 40 Ore. 244, 66 Pac. 923; Fulmer v. Williams, 122 Pa. St. 191, 15 Atl. 726, 9 Am. St. Rep. 88, 1 L.R.A. 603; Sherman v. Sherman, 18 R. I. 504, 30 Atl. 459; McCarthy v. Murphy, 119 Wis. 159, 96 N. W. 531, 100 Am. St. Rep. 163; Yates v. Milwaukee, 10 Wall. 497; Illinois Cent. R. R. Co. v. Illinois, 146 U. S. 387, 13 S. C. 110; Paine Lumber Co. v. United States, 55 Fed. 854; Lewis v. Johnson, 76 Fed. 476; Sullivan Timber Co. v. Mobile, 124 Fed. 644; McCloskey v. Pacific Coast Co., 160 Fed. 794 (C. C. A.); North Shore R. R. Co. v. Pion, 14 App. Cas. 612; Pion v. North Shore R. R. Co., 14 Duvall 677; Bigaouette v. North Shore R. R. Co., 17 Duvall 363. See Sage v. New York, 10 App. Div. 294, 41 N. Y. Supp. 938.

⁵⁹Organ v. Memphis etc. R. R. Co., 51 Ark. 235, 11 S. W. 96; New Haven v. Hemingway, 7 Conn. 186; State v. Sargent, 45 Conn. 358; Prior v. Swartz, 62 Conn. 132, 25 Atl. 398, 36 Am. St. Rep. 333, 18 L.R.A. 668; New York etc. R. R. Co. v. Long, 72 Conn. 10, 43 Atl. 559; Richards v. New York etc. R. R. Co., 77 Conn. 501, 60 Atl. 295, 69 L.R.A. 929; Lane v. Smith Bros., 80 Conn. 185; Chicago v. Van Ingen, 152 Ill. 624, 38 N. E. 894, 43 Am. St. Rep. 285; Grant v. Davenport, 18 Ia. 179; Musser v. Hershey, 42 Ia. 356, 361; Baltimore & Ohio R. R. Co. v. Chase, 43 Md. 23, 35; Garitee v. Mayor etc.

Em. D.—9.

of Baltimore, 52 Md. 422; Grand Rapids v. Powers, 89 Mich. 94, 50 N. W. 661, 28 Am. St. Rep. 276, 14 L.R.A. 498; Rippe v. Chicago etc. R. R. Co., 23 Minn. 18; Brisbne v. St. Paul etc. R. R. Co., 23 Minn. 114; Carli v. Stillwater Street R. & T. Co., 28 Minn. 373, 380, 41 Am. Rep. 290; Union Depot etc. Co. v. Brunswick, 31 Minn. 297; Reeves v. Backus-Brooks Co., 83 Minn. 339, 86 N. W. 337; Gough v. Bell, 2 Zab. 441; Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25 Atl. 718, 18 L.R.A. 679; Sturs v. Brooklyn, 101 N. Y. 51; Rumsey v. New York & N. E. R. R. Co., 133 N. Y. 79, 30 N. E. 654, 6 Am. R. R. & Corp. Rep. 67, 28 Am. St. Rep. 600, 15 L.R.A. 618; Saunders v. New York Cent. etc. R. R. Co., 144 N. Y. 75, 38 N. E. 992, 43 Am. St. Rep. 729, 26 L.R.A. 378; Brookhaven v. Smith, 188 N. Y. 74, 9 L.R.A.(N.S.) 326, reversing S. C. 98 App. Div. 212, 90 N. Y. S. 646; Brooklyn v. Mackey, 13 App. Div. 105; North Hempstead v. Gregory, 53 App. Div. 350, 65 N. Y. S. 867; Gregory v. Forbes, 96 N. C. 77; Bond v. Wool, 107 N. C. 139, 12 S. E. 281; Montgomery v. Shaver, 40 Ore. 244, 66 Pac. 923; Delaplaine v. Chicago etc. Ry. Co., 42 Wis. 214; Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128; McCarthy v. Murphy, 119 Wis. 159, 96 N. W. 531, 100 Am. St. Rep. 163; Dutton v. Strong, 1 Black 23; Yates v. Milwaukee, 10 Wall. 497; Illinois Central R. R. Co. v. Illinois, 146 U. S. 387, 13 S. C. 110; Paine Lumber Co. v. United States, 55 Fed. 854; Sullivan Timber Co. v. Mobile, 124 Fed. 644. See Hart v. Baton Rouge, 10 La. An. 171; Gregory v. Forbes, 96 N. C. 77; Ravenswood v. Flemings, 22 W. Va.

Fourth. The right to accretions or alluvium.⁶⁰

Fifth. The right to make a reasonable use of the water as it flows past or laves the land.⁶¹

In addition to these rights, which are recognized by the common law, the riparian owner upon public waters is frequently invested with rights by statute.⁶² All these rights are subordinate to the regulation and use of the waters by the public for navigation and fishing.

§ 101 (84). Injury to riparian rights upon public waters is a taking. According to principles heretofore laid down, it follows that any injury to riparian rights for public use is a taking for which compensation must be made.⁶³ "These riparian rights founded on the common law, are property, and are valuable, and while they must be enjoyed in due subjection to the rights of the public, they cannot be abridged or capriciously destroyed or impaired. They are rights of which, when once vested, the owner can only be deprived in accordance with the law of the land, and, if necessary that they be taken for public use, upon due compensation."⁶⁴ The general proposition is sufficiently illustrated by the cases reviewed in the preceding sections.

§ 102 (84a). Interfering with access; railroads and

52, 46 Am. Rep. 485; Western Pac. Ry. Co. v. Southern Pac. Co., 151 Fed. 376, 80 C. C. A. 606. But this does not authorize the riparian owner to build out piers for the purpose of making new land, and such piers may be abated as a nuisance at the suit of the State. Revell v. People, 177 Ill. 468, 52 N. E. 1052, 69 Am. St. Rep. 257; Gordon v. Winston, 181 Ill. 338, 54 N. E. 1095. See North Hempstead v. Gregory, 53 App. Div. 350, 65 N. Y. S. 867.

⁶⁰Lockwood v. New York etc. R. R. Co., 37 Conn. 387; Tomlin v. D. B. & M. R. R. Co., 32 Ia. 106, 109, 7 Am. Rep. 176; Baltimore etc. R. R. Co. v. Chase, 43 Md. 23, 35; Girard's Lessee v. Hughes, 1 G. & J. 249; Lamphrey v. State, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541; St. Louis v. Mo. Pac. R. R. Co., 114 Mo. 13, 21 S. W. 202; Camden

& Atlantic Land Co. v. Lippincott, 45 N. J. L. 405; Chesapeake etc. Ry. Co. v. Walker, 100 Va. 69, 40 S. E. 633, 914; Banks v. Ogden, 2 Wall. 57.

⁶¹Opinion of Judge Edmonds in Gould v. Hudson River R. R. Co., 6 N. Y. 522. The above enumeration of rights is approved in Taylor v. Commonwealth, 102 Va. 759, 47 S. E. 875, 102 Am. St. Rep. 865.

⁶²As to the right of the riparian owner to maintain a ferry, see Braddock Ferry Co.'s Appeal, 3 Penny. 32; McRoberts v. Washburn, 10 Minn. 23.

⁶³See ante, §§ 63-65, 84.

⁶⁴Baltimore & O. R. R. Co. v. Chase, 43 Md. 23, 35. To same effect Diedrich v. N. W. Union R. R. Co., 42 Wis. 248; Kingsland v. New York, 35 Hun 458.

other works below high-water mark. The legislature cannot authorize the construction of a railroad between high and low water mark, or anywhere below the line of private ownership, without compensation to the riparian owner.⁶⁵ It is immaterial that a public highway intervenes between the plaintiff's lot and high water mark, if the fee is in the plaintiff.⁶⁶ So when a speedway was constructed along a tidal river, mostly below high water mark, which could not be crossed except by

⁶⁵Druxy v. Midland R. R. Co., 127 Mass. 571; Carli v. Stillwater St. R. & T. Co., 28 Minn. 373, 41 Am. Rep. 290; Union Depot etc. Co. v. Brunswick, 31 Minn. 297; Rumsey v. New York & N. E. R. R. Co., 125 N. Y. 681, 25 N. E. 1080; Rumsey v. New York & N. E. R. R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. Rep. 600, 15 L.R.A. 618, 6 Am. R. R. & Corp. Rep. 67; Rumsey v. New York & N. E. R. R. Co., 136 N. Y. 543, 32 N. E. 979; Saunders v. N. Y. Cent. etc. R. R. Co., 144 N. Y. 75, 38 N. E. 992; Saunders v. New York Cent. etc. R. R. Co. 71 Hun 153, 23 N. Y. Supp. 927; Hedges v. West Shore R. R. Co., 80 Hun 310, 30 N. Y. Supp. 92; Delaplaine v. C. & N. W. Ry. Co., 42 Wis. 214; Diedrich v. N. W. Union Ry. Co. id. 248; Railway Co. v. Renwick, 102 U. S. 180; S. C. 49 Ia. 664; North Shore R. R. Co. v. Pion, 14 App. Cas. 612, *affirming* S. C. 14 Duvall 677; Bigouette v. North Shore R. R. Co., 17 Duvall, 363; and see New York Cent. etc. R. R. Co. v. Aldridge, 135 N. Y. 83, 32 N. E. 50; Mehrhof Bros. Brick Mfg. Co. v. Delaware etc. R. R. Co., 51 N. J. L. 56, 16 Atl. 12. *Contra:* Gould v. Hudson River R. R. Co., 6 N. Y. 522; S. C. 12 Barb. 616; Getty v. Same, 21 Barb. 617; Pennsylvania R. R. Co. v. New York etc. R. R. Co., 23 N. J. Eq. 157; Stevens v. Paterson etc. R. R. Co., 34 N. J. L. 532, 3 Am. Rep. 269; Tomlin v. D. B. & M. R. R. Co., 32 Ia. 106, 7 Am. Rep. 176; Boston & Worcester

R. R. Co. v. Old Colony R. R. Co., 12 Cush. 605; Thayer v. New Bedford R. R. Co., 125 Mass. 253; Ormerod v. New York etc. R. R. Co., 13 Fed. 370. *And see* Wood v. Chicago etc. R. R. Co., 60 Ia. 456; Chicago etc. R. R. Co. v. Porter, 72 Ia. 426; Starnes v. Molson,¹ Montreal L. Q. B. 425; Widder v. Buffalo etc. R. R. Co., 20 U. C. Q. B. 63S; Regina v. Buffalo etc. R. R. Co., 23 U. C. Q. B. 208; Widder v. Buffalo etc. R. R. Co., 24 U. C. Q. B. 222.

⁶⁶Brisbine v. St. Paul & Sioux City Ry. Co., 23 Minn. 114; Chesapeake & Ohio Canal Co. v. Union Bank, 5 Cranch, C. C. 509. But it is otherwise where the fee of the street is in the public. Ellinger v. Mo. Pac. R. R. Co., 112 Mo. 525, 20 S. W. 800; City of St. Louis v. Mo. Pac. R. R. Co. 114 Mo. 13, 21 S. W. 202. *To the same effect* as the last cases cited: Backus v. Detroit, 49 Mich. 110, 13 N. W. 380, 43 Am. Rep. 447; Smith v. St. Louis Public Schools, 30 Mo. 290; Potomac S. B. Co. v. Upper S. B. Co., 109 U. S. 672, 3 S. C. 445, 4 S. E. 15. Some cases hold that a street along the water front cuts off the riparian rights of the adjacent owner, without regard to whether the public has a fee or an easement. Godfrey v. Alton, 12 Ill. 27, 52 Am. Dec. 476; Rowan v. Portland, 8 B. Mon. 232; Pewaukee v. Savoy, 103 Wis. 271, 79 N. W. 436, 74 Am. St. Rep. 859, 50 L.R.A. 836; McCloskey v. Pacific Const. Co., 160 Fed. 794, — C. C. A. —.

pedestrians above or below grade.⁶⁷ Booms may not be constructed so as to cut off access to riparian property.⁶⁸ Nor can a city, in making an improvement of the channel of a tidal river, deposit mud and débris in front of private property so as to cut off access to the channel.⁶⁹ In Massachusetts it is held that a riparian owner has no right to the ebb and flow of the tide over flats between high and low water mark, which belong in fee to another, and that a city, owning the fee of such flats, may fill them up and thus prevent the flow of the tide, to the riparian owner, without being liable to him in damages.⁷⁰ A navigable slip adjacent to plaintiff's premises cannot be filled up, or obstructed, by a city, without compensation.⁷¹ But as riparian rights are held to be subject to the public right, works for the improvement of navigation may be constructed, though access from private property to navigable water is thereby prevented or impaired.⁷²

The right of the State, as the trustee for the public, of lands below high water mark, to grant a right of way over the same to a railroad corporation, is considered and sustained in *Saunders v. New York Central etc., R. R. Co.*⁷³ Whether the grant or condemnation of a right of way below high water mark, or along the bank, takes absolutely the riparian rights, would doubtless depend upon whether a fee or an easement was acquired. In the former case there would probably be a complete taking of the riparian rights,⁷⁴ but in the latter a taking only to the extent of the impairment.⁷⁵

⁶⁷*Matter of New York*, 168 N. Y. 134, 61 N. E. 158, 56 L.R.A. 500.

⁶⁸*Reeves v. Backus-Brooks Co.*, 83 Minn. 339, 86 N. W. 337; *Burrows v. Gray's Harbor Boom Co.*, 44 Wash. 630, 87 Pac. 937; *see ante*, § 85.

⁶⁹⁻⁷⁰*Garitee v. Mayor etc. of Baltimore*, 52 Md. 422. *See also Langdon v. Mayor etc. of New York*, 93 N. Y. 129; *Butcher's Ice & Coal Co. v. Philadelphia*, 156 Pa. St. 54, 27 Atl. 376.

⁷¹*Henry v. City of Newburyport*, 149 Mass. 582, 22 N. E. 75, 5 L.R.A. 179.

⁷²*Babcock v. City of Buffalo*, 1 Sheldon 317; *Ligare v. City of Chicago*, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179, 5 Am. R. R. &

Corp. Rep. 176. *Compare Egan v. Hart*, 45 La. Ann. 1358, 14 So. 244; *Payne v. English*, 79 Cal. 540, 21 Pac. 952.

⁷³*Sage v. New York*, 154 N. Y. 61, 61 Am. St. Rep. 592; *Scranton v. Wheeler*, 57 Fed. 803, 6 C. C. A. 585; *and see ante*, § 85.

⁷⁴144 N. Y. 75, 38 N. E. 992, 43 Am. St. Rep. 729, 26 L.R.A. 378. *See also Chicago etc. R. R. Co. v. Porter*, 72 Ia. 426.

⁷⁵*City of St. Louis v. Mo. Pac. R. R. Co.*, 114 Mo. 13, 21 S. W. 202; *Hanford v. St. Paul & D. R. R. Co.*, 43 Minn. 104, 44 N. W. 1144, 7 L.R.A. 722; *Ellinger v. Mo. Pac. R. R. Co.*, 112 Mo. 525, 20 S. W. 800.

⁷⁶*New Jersey Zinc & I. Co. v.*

It has been held that a proprietor upon a navigable stream cannot recover for any damages to his property by reason of an authorized dam or bridge across the river which prevents navigation between his premises and the general system of waters with which the stream connects.⁷⁷ So the construction of a bridge or highway across the mouth of a cove, which prevented those living on its shore from having access to the sea, has been held not to be a taking of any property of such shore owners.⁷⁸ Two recent cases upon this point deserve mention. In one case, the plaintiff owned property situated on a cove connected with Passamaquoddy bay by a navigable channel, by which the plaintiff had access to the bay and high seas. His property consisted of a grist mill and store and he transported most of his goods and supplies by water. The defendant railroad company

Morris, 44 N. J. Eq. 398, 15 Atl. 227, 1 L.R.A. 133; New York Central etc. R. R. Co. v. Aldridge, 135 N. Y. 83, 32 N. E. 50; Rumsey v. New York & N. E. R. R. Co., 125 N. Y. 681, 25 N. E. 1080; Saunders v. New York Central etc. R. R. Co., 144 N. Y. 75, 38 N. E. 992, 43 Am. St. Rep. 729, 26 L.R.A. 378. In Smart v. Aroostook Lumber Co., 103 Me. 37, the plaintiff owned a summer cottage on a navigable stream about five miles above the village of P. The defendant built a dam and mill at P. and filled the river with logs so as to prevent navigation between P. and the plaintiff's cottage. It was held that he suffered special damage and could recover.

⁷⁷Parker v. Cutter Milldam Co., 20 Me. 253; Blackwell v. Old Colony R. R. Co., 122 Mass. 1; Swanson v. Miss. & Rum River Boom Co., 42 Minn. 532, 44 N. W. 986; Dover v. Portsmouth Bridge, 17 N. H. 200; Sugar Refining Co. v. Jersey City, 26 N. J. Eq. 247; Matter of Water Commissioners, 3 Edwards, Ch. 290; Lansing v. Smith, 8 Cow. 146; S. C. 4 Wend. 9; State v. Charleston Lt. & W. Co., 68 S. C. 540, 47 S. E. 979; Gilman v. Philadelphia, 3 Wall.

713. See Thomas v. Wade, 48 Fla. 311, 37 So. 743; Stofflet v. Estes, 104 Mich. 208, 62 N. W. 347; Viebahn v. Crow Wing Co., 96 Minn. 276, 104 N. W. 1089, 3 L.R.A.(N.S.) 1126; Pedrick v. Raleigh etc. R. R. Co., 143 N. C. 485, 55 S. E. 877, 10 L.R.A. (N.S.) 554; Railroad Co. v. Ferguson, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908. No recovery can be had for the temporary interruption of navigation while rebuilding a draw. Hamilton v. Vicksburg etc. R. R. Co., 119 U. S. 280; and see Willson v. Marsh Co., 2 Pet. 245; Farmers' Mfg. Co. v. Albemarle R. R. Co., 117 N. C. 579, 23 S. E. 213, 29 L.R.A. 700; Mehrhof Bros. Mfg. Co. v. Delaware etc. R. R. Co., 51 N. J. L. 56, 16 Atl. 12.

⁷⁸O'Brien v. Norwich & Worcester Ry. Co., 17 Conn. 371; Clark v. Saybrook, 21 Conn. 313. See Ockerhausen v. Tyson, 71 Conn. 31, 40 Atl. 1041; Matter of New York, West Shore & Buffalo Ry. Co., 101 N. Y. 685; Trustees of Southampton v. Jessup, 162 N. Y. 122, 56 N. E. 538; Carvalho v. Brooklyn etc. Turnpike Co., 56 App. Div. 522, 67 N. Y. S. 539; S. C. affirmed, 173 N. Y. 586, 65 N. E. 1115.

was authorized to cross the channel upon a trestle and this construction was approved by the federal government. The effect was to prevent navigation through the channel, whereby the plaintiff's business was injured and his property depreciated in value. In a suit against the railroad for damages the court held that the bridge was a lawful structure and that his loss was *damnum absque injuria*.⁷⁹

- ⁷⁹Frost v. Washington Co. R. R. Co., 96 Me. 76, 51 Atl. 806, 59 L.R.A. 68. The court says: "The only right of the plaintiff interfered with by the defendant company was his right of navigation by water in and out of the cove through the channel. This right of the plaintiff, however, was not his private property nor even his private right. It could not be bought, sold, leased or inherited. He did not earn it, create it or acquire it. He did not own it as against the sovereign. The right was the right of the public, the title and control being in the sovereign in trust for the public and for the benefit of the general public, and not for any particular individual. The plaintiff only shared in the public right. He had no right against the public. The sovereign had absolute control of it and could regulate, enlarge, limit or even destroy it, as he might deem best for the whole public and this without making or providing for any compensation to such individuals as might be inconvenienced or damaged thereby. The sovereign cannot take private property for public uses without providing for just compensation to its owner, but this constitutional provision does not limit the power of the sovereign over public rights. If, in the evolution of life and commerce, the sovereign comes to believe that the public good will be increased by the creation of some new or additional means of communication and commerce at the expense

or even sacrifice of some older one enjoyed merely as a public right, the sovereign can so ordain, even to the detriment of individuals. If, in the judgment of the sovereign, a railroad across a navigable channel of water and completely obstructing its navigation is of more benefit to the public than the navigation of the channel, he has the unrestricted power to thus close the channel to navigation, without making compensation to those who had been wont to use it. Every individual making use of a merely public privilege must bear in mind that he may be lawfully deprived of that privilege whenever the sovereign deems it necessary for the public good, and he must order his business accordingly. Unless the person authorized by statute to obstruct or close a navigable channel is required by statute to make compensation to persons injured by such action, he is under no legal obligation to do so. In such case the inconvenience and loss however great, an *damnum absque injuria*. The company has damaged the plaintiff but it has not wronged him. The defendant company has not interfered with the private property nor private rights of the plaintiff. It has lawfully by express authority of the sovereign, merely abridged the use of a public right which was within the exclusive control of the sovereign. For this lawful act it is not obliged to make any compensation to the plaintiff any more than to all other persons who might

In the other case the plaintiff owned about five hundred feet of frontage on a cove which connected with a tidal navigable river. The defendant railroad company was authorized to cross the mouth of the cove by an embankment and bridge. The cove was shallow, being practically dry at low tide and having two to three feet of water at high tide. It was found as a fact that the uses of the cove and outlet for navigation had always been and in the nature of things must always continue to be insignificant and that the bridge and embankment were no material interference with such navigation as was possible. On the rights of shore owners in the cove, the court says: "Riparian proprietors in the cove have the right to wharf out, and to reclaim, but they are rights confined to the cove, and to be exercised therein, and not in the main river; and to be exercised by each, subject to the riparian rights of his neighbors, and to the rights of the public in the cove and its waters. They also have, each, the important right of access; that is, the right to go from their land to the river, and from the river to their land, through the waters of the cove. This right is distinct from the right of each as a member of the public to navigate the waters of the cove. It is a private right belonging to each as an owner of land bordering upon waters forming part of a great water highway. However much courts may differ upon the question whether such a right can be destroyed or impaired by the state without compensation to the owner, they all agree that the right of access exists."⁸⁰

Building a bridge or dam across the mouth of a non-navigable bayou is held to give abutters on the bayou no cause of action, although it might be made navigable.⁸¹ But a city cannot lay out a street across a navigable waterway or bayou so as to destroy the same for navigation.⁸²

§ 103 (84b). Establishing harbor lines and interfering

have occasion, however seldom, to navigate the channel." pp. 85, 86.

⁸⁰Richards v. New York etc. R. R. Co., 77 Conn. 501, 505, 60 Atl. 295, 69 L.R.A. 929. In Thomas v. Ashland etc. Ry. Co., 122 Wis. 519, 100 N. W. 993, 106 Am. St. Rep. 1000, it is held that riparian owners on a cove are entitled to access to navigable water.

⁸¹Egan v. Hart, 45 La. Ann. 1358,

14 So. 244; St. Louis etc. R. R. Co. v. Schneider, 30 Mo. App. 620; Potter v. Indiana etc. R. R. Co., 95 Mich. 389, 54 N. W. 956. In the latter case it is said the plaintiff may recover if he shows special damage.

⁸²Ligare v. City of Chicago, 139 Ill. 46, 28 N. E. 934, 5 Am. R. R. & Corp. Rep. 176, 32 Am. St. Rep. 179.

with piers and wharves. The establishing of harbor lines or dock lines is simply a regulation of the private right of building piers and wharves out to navigable water, in the interest of the public right of navigation and commerce. The establishment of such lines and prohibiting the building of piers and wharves beyond such lines, is not a taking of private property, and no compensation need be made to riparian owners on account thereof.⁸³ But existing piers, extending beyond the lines so established, cannot be taken or destroyed without compensation, unless they are an obstruction to navigation.⁸⁴ Merely establishing a harbor line, which cuts off a portion of plaintiff's wharf, is not a taking, when no attempt is made to remove it.⁸⁵ A pier which obstructs navigation is a public nuisance,⁸⁶ and the owner is not entitled to compensation if it is taken or impaired by works for the improvement of navigation.⁸⁷ Where the abutter owns the bed of a stream, a dock line cannot be established which prevents the erection of such structures in or over the water as do not interfere with the public use of the stream.⁸⁸ Nor can a dock line be established which at certain points passes across the natural bank of the river.⁸⁹ The right to collect wharfage fees cannot be taken without compensation.⁹⁰

⁸³State v. Sargent, 45 Conn. 358; Farist Steel Co. v. City of Bridgeport, 60 Conn. 278, 22 Atl. 561; Harlan & H. Co. v. Paschall, 5 Del. Ch. 435; Commonwealth v. Alger, 7 Cush. 53; City of Grand Rapids v. Powers, 89 Mich. 94, 50 N. W. 661, 5 Am. R. R. & Corp. Rep. 490, 28 Am. St. Rep. 276, 14 L.R.A. 498; Bowlby v. Shively, 22 Ore. 410, 30 Pac. 154; Sherman v. Sherman, 18 R. I. 504, 30 Atl. 459; Eisenback v. Hatfield, 2 Wash. 236, 26 Pac. 539, 12 L.R.A. 632; State v. Prosser, 2 Wash. 530, 27 Pac. 550; Yates v. Milwaukee, 10 Wall. 497; Weber v. Harbor Comrs., 18 Wall. 57; Atlee v. Packet Co., 21 Wall. 389; Yesler v. Wash. Harbor Line Comrs., 146 U. S. 646, 13 S. C. 190; Prosser v. Northern Pac. R. R. Co., 152 U. S. 59, 14 S. C. 528; Shively v. Bowlby, 152 U. S. 1, 14 S. C. Rep. 548. The State may, of course, provide for compensation in such cases, if it sees fit to do so.

Farist Steel Co. v. City of Bridgeport, 60 Conn. 278, 22 Atl. 561.

⁸⁴Yates v. Milwaukee, 10 Wall. 497; City of Chicago v. Laflin, 49 Ill. 172.

⁸⁵Prosser v. Northern Pac. R. R. Co., 152 U. S. 59, 14 S. C. 528; Yesler v. Washington Harbor Line Comrs., 146 U. S. 646, 13 S. C. 190; Paine Lumber Co. v. United States, 55 Fed. 854.

⁸⁶Atlee v. Packet Co., 21 Wall. 389.

⁸⁷Paine Lumber Co. v. United States, 55 Fed. 854.

⁸⁸City of Grand Rapids v. Powers, 89 Mich. 94, 50 N. W. 661, 5 Am. R. R. & Corp. Rep. 490, 28 Am. St. Rep. 276, 14 L.R.A. 498; and see City of Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128.

⁸⁹Same.

⁹⁰Grant v. Davenport, 18 Ia. 179; Crocker v. New York, 15 Fed. 405.

Those States which hold the doctrine of the absolute title of the public to public waters, of course, deny any redress for injury to riparian rights, for the reason that they do not recognize the existence of such rights. It has accordingly been held in such States that the converting of a private wharf into a public one,⁹¹ or the building of public wharves in front of private property, to be owned and controlled by the public, are things which may be done without compensation to the riparian owner.⁹² But even in such States a wharf which has been built by express license from the State cannot be taken for public use, as for the pier of a bridge, without compensation.⁹³ The grant by the State of the right to plant oysters is subject to the right of the riparian owner to wharf out through such beds.⁹⁴

§ 104 (84c). Rights of riparian owners upon lakes and ponds and what interference therewith is a taking. The rights of riparian owners upon lakes and ponds are the same as upon other waters.⁹⁵ Accordingly the abutting owners upon a lake or pond, whether the title to the bed is in the public or the abutters, have a right to have the water stand at its natural level,⁹⁶ and it follows that the waters cannot be raised or lowered or taken away without compensation.⁹⁷ The temporary raising of the water in a pond and flooding of plaintiff's land

⁹¹Hart v. Mayor etc. of Baton Rouge, 10 La. Ann. 171; Shepherd v. New Orleans, 6 Rob. La. 349.

⁹²Ravenswood v. Fleming, 22 W. Va. 52, 46 Am. Rep. 485; Payne v. English, 79 Cal. 540, 21 Pac. 952.

⁹³Lewis v. City of Portland, 25 Ore. 133, 35 Pac. 256, 42 Am. St. Rep. 772, 22 L.R.A. 736; *and see* Classen v. Guano Co., 81 Md. 258, 31 Atl. 808.

⁹⁴Prior v. Swartz, 62 Conn. 132, 25 Atl. 398, 36 Am. St. Rep. 333, 18 L.R.A. 668.

⁹⁵Lamphrey v. State, 52 Minn. 181, 53 N. W. 1139; *and cases cited in* § 90.

⁹⁶Albert Lea v. Nielsen, 80 Minn. 101, 82 N. W. 1104, 81 Am. St. Rep. 242; Madson v. Spokane Val. L. & W. Co., 40 Wash. 414, 82 Pac. 718; Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co., 79 Wis. 297, 48 N. W.

371; Draper v. Brown, 115 Wis. 361, 91 N. W. 1001.

⁹⁷Same; Valparaiso City Water Co. v. Dickover, 17 Ind. App. 233; Hebron v. Gravel Road Co., 90 Ind. 192, 46 Am. Rep. 199; Troe v. Larson, 84 Ia. 649, 51 N. W. 179, 35 Am. St. Rep. 336; Clark v. Rockland Water Co., 52 Me. 68; Fernold v. Knox Woolen Co., 82 Me. 48, 19 Atl. 93; People v. Hulbert, 131 Mich. 156, 91 N. W. 211, 100 Am. St. Rep. 588, 64 L.R.A. 265; Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25 Atl. 718, 18 L.R.A. 679; Peay v. Salt Lake City, 11 Utah 331, 40 Pac. 206; New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735, 54 L.R.A. 190; *ante*, § 87. *And see* next section. Compare Kales v. Spokane Val. L. & W. Co., 42 Wash. 43, 84 Pac. 395.

by a coffer dam in the outlet, for the purpose of constructing a bridge, was held to be no actionable injury.⁹⁸ And where a city, on the recommendation of its board of health and pursuant to statutory authority, raised the surface of a lake as a health measure, whereby the plaintiff's riparian lands were flooded, the city was held not liable on the ground that it acted as an agent of the State.⁹⁹ The question of a taking was not discussed.

§ 105 (84d). Withdrawing, diverting or polluting public waters. We have considered this question with reference to public rivers in a former section.¹ We have there endeavored to sustain the view that the right to the flow of the stream is the same, whether the bed is public or private property. The same principles which apply to public streams apply to public lakes and ponds, so far as the conditions make them applicable.² It would follow that the water of public lakes and ponds could not be withdrawn for public use, without compensation to the riparian owners. But some of the courts hold that the waters of a public stream or pond may be taken for public use, as to supply a city with water, or for a canal, without compensation to the riparian owner.³ But in Massachusetts, where this doctrine prevails, it is held not to apply to the case of private ponds.⁴ In New Jersey it is held that public waters belong absolutely to the public and that the legislature may authorize the pollution of a tidal stream with sewerage, without liability to riparian proprietors.⁵

⁹⁸Atwater v. Village of Canandai-gua, 124 N. Y. 602, 27 N. E. 385, *affirming* S. C. 56 Hun 293, 30 N. Y. Supp. 577.

⁹⁹Murray v. Grass Lake, 125 Mich. 2, 83 N. W. 995.

¹*Ante*, § 87.

²See last section.

³Am. Woolen Co. v. Kennebec Water Dist., 102 Me. 153, 66 Atl. 316; Fay v. Salem & D. Aqueduct Co. 111 Mass. 27; Cole v. Eastham, 133 Mass. 65; Watuppa Reservoir Co. v. Fall River, 147 Mass. 548, 1 L.R.A. 466; Minneapolis Mill Co. v. Board of Water Comrs., 56 Minn. 485, 58 N. W. 33; State v. Sunapee Dam Co., 70 N. H. 458, 50 Atl. 108, 59 L.R.A. 55; Dolbear v. Suncook W. W. Co., 72 N. H. 562, 58 Atl.

504; Crill v. Rowe, 47 How. Pr. 398; and see Fulmer v. Williams, 122 Pa. St. 191, 15 Atl. 726, 9 Am. St. Rep. 88, 1 L.R.A. 603; Williams v. Fulmer, 151 Pa. St. 405, 25 Atl. 103, 31 Am. St. Rep. 767; Auburn v. Union Water Power Co., 90 Me. 576, 38 Atl. 561, 38 L.R.A. 188; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs., 168 U. S. 349.

⁴Watuppa Reservoir Co. v. Fall River, 154 Mass. 305, 28 N. E. Rep. 257. And the taking the water of a public pond by a water company, without authority of law, will be enjoined. Proprietors of Mills v. Braintree Water Supply Co., 149 Mass. 478, 21 N. E. 761.

⁵Sayre v. Newark, 60 N. J. Eq. 361, 45 Atl. 985, 83 Am. St. Rep.

§ 106 (85). **Miscellaneous cases in regard to public waters.** The plaintiff had land on an island in the Savannah River and also on the banks of the same, prepared for rice fields. There were canals by which the water could be let in at high tide and drained off at low tide, both operations being essential for rice. The government, for the purpose of improving the navigation of the river, built a dam, which raised the water so that the plaintiff could not drain his lands at low tide and thereby interfered with their use for raising rice and diminished their value. It was held that there was no taking of the plaintiff's property and that he could not recover any compensation.⁶ It has been held that interfering with a fishery by a wall or wharf,⁷ or destroying a fording by deepening the channel of a public river,⁸ were *damnum absque injuria*. A statute of Wisconsin made it unlawful for any person to drive piles, build piers, cribs or other structures in Rock River, in Rock County. It was held to be an attempt to take the property of riparian owners without compensation, and upon this and other grounds was declared invalid.⁹ Where a company is authorized to construct tide-water mills, with suitable basins and other works below high water mark, a railroad company cannot cross the same without compensation for the damages occasioned.¹⁰ It has been held in California that one who erected a house in San Francisco Bay had a right of property therein as against the city of San Francisco, which proposed to take the ground it occupied for a public slip.¹¹ One who has planted oysters in public waters for thirty years acquires no rights as against the public.¹² If one has an exclusive right to the wharfage of a pier, the city cannot appropriate the adjoining slip to the purposes of a ferry without compensation.¹³ Defendant was pro-

629, 48 L.R.A. 722, reversing S. C. 58 N. J. Eq. 136, 42 Atl. 1068.

⁶Mills v. United States, 46 Fed. 738.

⁷Tinieum Fishing Co. v. Carter, 61 Pa. St. 21; S. C. 90 Pa. St. 85.

⁸Zimmerman v. Union Canal Co., 1 W. & S. 346.

⁹City of Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128. The court says: "Any restriction or interruption of the common and necessary use of property that destroys its value, or strips it of its attri-

butes, as to say that the owner shall not use his property as he pleases, takes it in violation of the constitution."

¹⁰Boston Water Power Co. v. Boston & Worcester R. R. Co., 16 Pick. 512.

¹¹Gunter v. Geary, 1 Cal. 462.

¹²Post v. Kreischer, 32 Hun 49; Lane v. Harbor Comrs., 70 Conn. 685; Lane v. Smith, 71 Conn. 65, 41 Atl. 18.

¹³Murray v. Sharp, 1 Bos. 539.

ceeding to erect a building at the foot of a street terminating on Chataqua Lake, a navigable body of water, and the city filed a bill to enjoin him from doing so. It was held that the city had no riparian rights and could not maintain the bill and that only the Attorney-General could interfere.¹⁴ The State of Virginia granted to plaintiff submerged lands in York River for oyster beds. The United States in improving the navigation of the river cut a channel through these lands, deposited materials thereon and diverted water therefrom, thus occupying part and destroying the value of the remainder for oyster raising. It was held that the plaintiff had a property right in the lands granted and was entitled to compensation from the federal government.¹⁵ A law setting apart certain submerged lands on the margin of Lake Erie for a public shooting ground and forbidding the cutting of rushes thereon was held not to interfere with the riparian owner's rights.¹⁶ The State may develop and utilize the natural resources in land under tide water, when there is no actual interference with riparian rights in so doing.¹⁷ A statute of Wisconsin forbade, under a penalty, the cutting of ice upon any meandered lake of the State for shipment out of the State, without a license from the Secretary of State and the payment of ten cents a ton upon all ice so cut and shipped. The act was held void on the ground that it violated the fourteenth amendment of the federal Constitution and amounted to a taking of property without compensation.¹⁸

§ 107 (85a). Riparian rights cannot be abolished without compensation. A statute of Nebraska authorized corporations to appropriate the water of streams more than twenty feet in width, for purposes of irrigation, without compensation to riparian owners. It was held to be contrary to the constitution.¹⁹ The court says: "The right of a riparian proprietor, as such, is property, and, when vested, can be destroyed or impaired only in the interest of the general public, upon full com-

¹⁴Village of Mayville v. Wilcox, 61 Hun 223, 40 N. Y. St. 892, 16 N. Y. Supp. 15.

¹⁵Brown v. United States, 81 Fed. 55.

¹⁶People v. Silberwood, 110 Mich. 103, 32 L.R.A. 694.

¹⁷Taylor v. Commonwealth, 102

Va. 759, 47 S. E. 875, 102 Am. St. Rep. 865.

¹⁸Rossmiller v. State, 114 Wis. 169, 89 N. W. 839, 91 Am. St. Rep. 910, 58 L.R.A. 93.

¹⁹Clark v. Irrigation Co., 45 Neb. 799, 64 N. W. 239.

pensation, and in accordance with established law. That the State may, in the exercise of the right of eminent domain, appropriate the water of any stream to any purpose which will subserve the public interests, is not doubted. And that the reclamation of the inarable lands of the State is a work of public utility, within the meaning of the constitution, is a proposition not controverted in this proceeding. But even the State, in its sovereign capacity, is, as we have seen, within the restrictions of the constitution, and can take or damage private property only upon the conditions thereby imposed. The proposition that the rights of riparian proprietors were abolished by operation of the statute is therefore without merit.”²⁰ A statute of Texas, declaring the unappropriated waters of every river or natural stream within the arid portions of the State to be the property of the public, was held to be inoperative as to existing riparian owners on such streams.²¹ It has been held that the State cannot, under the guise of a police regulation, deprive the riparian owners upon a lake of the ordinary and customary uses of the water for bathing, boating, fishing, and watering stock, without compensation.²²

§ 108 (86). Damages from discharge of sewer. A municipal corporation has no right to discharge a sewer upon private property, either directly or indirectly, and will be liable for any damage thereby occasioned.²³ Nor has it a right to

²⁰See also *Lux v. Haggin*, 69 Cal. 255, 10 Pae. 674; *City of Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. 128; *Priewe v. Wisconsin State Land & Imp. Co.*, 93 Wis. 534, 67 N. W. 918, 33 L.R.A. 645.

²¹*McGee Irrigation Diteh Co. v. Hudson*, 85 Tex. 587, 22 S. W. 967; *Barrett v. Metcalfe*, 12 Tex. Civ. App. 247, 33 S. W. 758. See *ante*, § 82.

²²*George v. Chester*, 59 Misc. 553; *Heaton v. Chester*, 59 Misc. 558.

²³*Smith v. Atlanta*, 75 Ga. 110; *Martin v. Gainsville etc. R. R. Co.*, 78 Ga. 307; *Langley v. Augusta*, 118 Ga. 590, 45 S. E. 486, 98 S. E. 133; *Jacksonville v. Lambert*, 62 Ill. 519; *Valparaiso v. Keyes*, 30 Ind. App. 447, 66 N. E. 175; *Louisville v. Nor-*

ris, 111 Ky. 903, 64 S. W. 958, 98 Am. St. Rep. 437; *Covington v. Berry*, 120 Ky. 582, 87 S. W. 317; *State v. Jersey City*, 55 N. J. Eq. 117; *Stoddard v. Saratoga Springs*, 127 N. Y. 261, 27 N. E. 1030; *New York Central etc. R. R. Co. v. Rochester*, 127 N. Y. 591, 28 N. E. 416; *Bradt v. Albany*, 5 Hun 591; *Byrnes v. Cohoes*, 5 Hun 602; *Beaeh v. Elmira*, 22 Hun 158; *Duryea v. Mayor etc. of New York*, 26 Hun 120; *Harris v. City of Philadelphia*, 155 Pa. St. 76, 26 Atl. 874; *Pierce v. Gibson County*, 107 Tenn. 224, 64 S. W. 33, 89 Am. St. Rep. 946, 55 L.R.A. 477; *Winn v. Rutland*, 52 Vt. 481; *Whipple v. Fair Haven*, 63 Vt. 221, 21 Atl. 533; *Colby v. Village of LaGrange*, 65 Fed. 554. But there is no lia-

discharge the same into a private race-way or canal,²⁴ or mill pond,²⁵ or even into tide waters so as to impede access to a private wharf or pier,²⁶ nor so as to create a nuisance in the neighborhood of private property.²⁷ But the contrary is held in New Jersey with respect to tide waters. The city of Newark under legislative authority, discharged a sewer into a tide water river within twenty-five feet of the plaintiff's premises, and thereby created an offensive nuisance in the vicinity of his property. The court of errors and appeals held that the plaintiff was without remedy.²⁸ Where the plaintiff had an oyster bed, held under a grant from the State and the same was destroyed by sewerage discharged into the water some three hundred feet away, it was held that there was a taking of the plaintiff's property and that he was entitled to compensation.²⁹ A city is not liable for not providing sufficient sewerage or sewers of sufficient size,³⁰ nor for an injudicious plan of sewerage,³¹ but will of course be liable for any damages caused by negligence

bility if the sewer is laid with the plaintiff's consent. *Searing v. Saratoga Springs*, 39 Hun 307.

²⁴*Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Elgin Hydraulic Co. v. Elgin*, 74 Ill. 433; *Augusta v. Marks*, 124 Ga. 365, 52 N. E. 539.

²⁵*Mills v. Nashua*, 63 N. H. 42.

²⁶*Sleight v. Kingston*, 11 Hun 594; *Haskell v. New Bedford*, 108 Mass. 208; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470; *Breed v. Lynn*, 126 Mass. 367; *Constitution Wharf Co. v. City of Boston*, 156 Mass. 397, 30 N. E. 1134; *Butchers' Ice & C. Co. v. Philadelphia*, 156 Pa. St. 54, 27 Atl. 376. Nor so as to destroy an oyster bed. *Huffmire v. Brooklyn*, 22 App. Div. N. Y. 406. *And see Atwood v. Bangor*, 83 Me. 582, 22 Atl. 466.

²⁷*Scott v. Nevada*, 56 Mo. App. 189; *Bloomington v. Murnin*, 36 Ill. App. 647; *Dierks v. Comrs. of Highways*, 142 Ill. 197, 31 N. E. 496; *Stewart v. Rutland*, 58 Vt. 12; *Champaign v. Forrester*, 29 Ill. App. 117.

²⁸*Sayre v. Newark*, 60 N. J. Eq. 361, 45 Atl. 985, 83 Am. St. Rep. 629, 48 L.R.A. 722, reversing S. C. 58 N. J. Eq. 136, 42 Atl. 1068.

²⁹*Huffmire v. Brooklyn*, 162 N. Y. 584, 57 N. E. 176, 48 L.R.A. 421.

³⁰*Carr v. Northern Liberties*, 35 Pa. St. 324, 78 Am. Dec. 342; *Wright v. Wilmington*, 92 N. C. 156; *Kozell v. Anderson*, 91 Ind. 591; *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22; *St. Paul etc. R. R. Co. v. Duluth*, 56 Minn. 494, 58 N. W. Rep. 159.

³¹*Chicago v. Seben*, 165 Ill. 371, 46 N. E. 244, 56 Am. St. Rep. 245; *Seymour v. Cummins*, 119 Ind. 148, 24 N. E. 549, 5 L.R.A. 126; *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680; *Stock v. Boston*, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430; *Buckley v. New Bedford*, 155 Mass. 64, 29 N. E. 201; *Mills v. Brooklyn*, 32 N. Y. 489; *Johnston v. District of Columbia*, 118 U. S. 19. *But see North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821; *Louisville v. Norris*, 111 Ky. 903, 64 S. W. 958, 98 Am. St. Rep. 437. "Where the plan

in their construction or management.³² Damages arising from changing, obstructing or otherwise interfering with the flow of surface water by means of sewers, drains and culverts are considered in subsequent sections.³³

§ 109 (87). Discharging water upon land; injury by seeping, saturating, etc. An early and important decision as to what constitutes a taking was made in Connecticut. Defendant was incorporated for the purpose of constructing and maintaining a canal from New Haven to Northhampton. The canal was built and water escaped from the canal by a waste wier, and after passing over the land of intermediate proprietors, washed and gullied the plaintiff's land. In a suit for the damages, it was held that any injury to the land which deprived the owner of the ordinary use and enjoyment of it was equiva-

adopted by the municipality must necessarily cause an injury to private property equivalent to some appropriation of the enjoyment thereof to which the owner is entitled, then the municipality is liable; but where the fault found is with the wisdom of the measure, or its sufficiency or adaptability to carry out or accomplish the purpose intended, and where its construction according to the plan adopted invades no private rights, then the municipality is not liable." *Defer v. City of Detroit*, 67 Mich. 346, 34 N. W. 680.

³²*Arnd v. Cullman*, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922; *Spangler v. San Francisco*, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158; *Denver v. Rhodes*, 9 Colo. 554; *Judd v. Hartford*, 72 Conn. 350, 44 Atl. 510, 77 Am. St. Rep. 312; *District of Columbia v. Gray*, 6 App. D. C. 314; *Reid v. Atlanta*, 73 Ga. 523; *Logansport v. Wright*, 25 Ind. 512; *Indianapolis v. Huffer*, 30 Ind. 235; *Terre Haute etc. R. R. Co. v. McCoy*, 113 Ind. 498; *Murphy v. Indianapolis*, 158 Ind. 238, 63 N. E. 469; *City of Peru v. Brown*, 10 Ind. App. 597; *Simpson v. Keokuk*, 34 Ia. 568;

Frostburg v. Dufty, 70 Md. 47, 16 Atl. 642; *Frostburg v. Hutchins Bros.*, 70 Md. 56, 16 Atl. 380; *Child v. Boston*, 4 Allen, 41; *Barry v. Lowell*, 8 Allen, 127; *Stauchfeld v. City of Newton*, 142 Mass. 110; *Bates v. Westborough*, 151 Mass. 174, 23 N. E. 1070, 7 L.R.A. 156; *Allen v. Boston*, 159 Mass. 324, 34 N. E. 519; *Ashley v. Port Huron*, 35 Mich. 296, 20 Am. Rep. 629; *Defer v. Detroit*, 67 Mich. 346, 34 N. W. 680; *Taylor v. Austin*, 32 Minn. 247; *Haney v. Kansas City*, 94 Mo. 334, 7 S. W. 417; *City of Beatrice v. Leary*, 45 Neb. 149, 63 N. W. 370, 50 Am. St. Rep. 546; *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175; *New York v. Furze*, 3 Hill, 612; *Paine v. Delhi*, 116 N. Y. 224, 22 N. E. 405, 5 L.R.A. 797; *Lewenthal v. New York*, 5 Lans. 532; *Vanderslice v. Philadelphia*, 103 Pa. St. 102; *King v. Granger*, 21 R. I. 93, 79 Am. St. Rep. 779; *Gross v. City of Lampasacus*, 74 Tex. 195, 11 S. W. 1086; *Kiesel v. Ogden City*, 8 Utah, 237, 30 Pac. 758; and see generally on this subject 2 *Dill. Munic. Corp.* §§ 1046-1052.

³³See post §§ 112, 113, 141.

lent to a taking, and that the plaintiff should recover.³⁴ Causing water to flow upon land is a clear violation of the right of exclusive occupation and enjoyment, which cannot be taken or interfered with without compensation. Numerous cases support this conclusion.³⁵ So damage to land caused by percolation and seeping from a mill-pond, canal or reservoir, may be recovered.³⁶ A railroad company which permitted the waste water from a tank to run upon private property, where it caused damage by freezing and otherwise, was held liable for the dam-

³⁴Hooker v. New Haven & Northampton Co., 14 Conn. 146, 36 Am. Dec. 477, *affirmed* in Same v. Same, 15 Conn. 312.

³⁵How v. Chesapeake & Delaware Canal Co., 5 Harr. Del. 245; Foot v. New Haven & N. Co., 23 Conn. 214; Phinizy v. City Council of Augusta, 47 Ga. 260; East St. Louis & C. R. R. Co. v. Elsentraut, 134 Ill. 96, 24 N. E. 760; City of Elgin v. Hoag, 25 Ill. App. 650; Sanitary District v. Conroy, 109 Ill. App. 367; Illinois Central R. R. Co. v. Lockard, 112 Ill. App. 423; Sanitary District v. Alderman, 113 Ill. App. 23; Wells v. New Haven etc. R. R. Co., 151 Mass. 46, 23 N. E. 724, 1 Am. R. R. & Corp. Rep. 708; State v. Isanti Co. Comrs., 98 Minn. 89, 107 N. W. 730; George v. Wabash Western R. R. Co. 40 Mo. App. 433; Koch v. Delaware etc. R. R. Co., 54 N. J. L. 401, 24 Atl. 442; Stone v. State, 138 N. Y. 124, 33 N. E. 733; Wright v. Syracuse etc. R. R. Co., 49 Hun 445, 23 N. Y. St. 78, 3 N. Y. Supp. 480; S. C. *affirmed*, 124 N. Y. 668; Selden v. Delaware & H. Canal Co., 24 Barb. 362; Mattuson v. Lehigh Val. R. R. Co., 36 Pa. Super. Ct. 66; Wendel v. Spokane County, 27 Wash. 121, 67 Pac. 576; Arimond v. Same, 31 Wis. 316; Pumpelly v. Green Bay Co., 13 Wall. 166; United States v. Lynch, 188 U. S. 445, 23 S. C. 349; *Contra*: West Branch & Susquehanna Canal Co. v.

Mulliner, 68 Pa. St. 357. *And see* Noble v. St. Albans, 56 Vt. 522.

³⁶Consolidated Home Supply Ditch & R. R. Co. v. Hamlin, 6 Colo. App. 341, 40 Pac. 582; Ellington v. Bennett, 59 Ga. 286; Young v. Extension Ditch Co., 13 Ida. 174, 89 Pac. 296; Wilson v. New Bedford, 108 Mass. 261; Griffin v. Lawrence, 135 Mass. 365; Aldworth v. City of Lynn, 153 Mass. 53, 26 N. E. 229, 25 Am. St. Rep. 608, 10 L.R.A. 210; Righter v. Jersey City Water Supply Co., 73 N. J. L. 298, 63 Atl. 6; Reed v. State, 108 N. Y. 407, 15 N. E. 735; Sayre v. State, 123 N. Y. 291, 25 N. E. 163; Southard v. Brooklyn, 1 App. Div. N. Y. 175, 37 N. Y. Supp. 136; Schwarzenbach v. Electric W. P. Cō., 101 App. Div. 345, 92 N. Y. S. 187; S. C. *affirmed*, 184 N. Y. 546, 76 N. E. 1108; Spilman v. Roanoke Navigation Co., 74 N. C. 675; Welliver v. Pa. Canal Co., 23 Pa. Super. Ct. 79; Townes v. City Council, 46 S. C. 15; Texas etc. Ry. Co. v. O'Mahoney, 24 Tex. Civ. App. 631, 60 S. W. 902; Turpen v. Turlock Irr. Dist. 141 Cal. 1, 74 Pac. 295; Fleming v. Lockwood, 36 Mont. 384, 92 Pac. 962. In Idaho Springs v. Woodward, 10 Colo. 104, the defendant town was held not liable, for that it granted leave to a company to build a flume in a street, the water of which leaked upon plaintiff's premises and caused damage.

ages resulting therefrom.³⁷ Where a railroad company filled its land and built a retaining wall against plaintiff's house wall, through which the moisture oozed into plaintiff's house, it was held to be an unreasonable use of the company's land.³⁸ Where water percolated from a catch-basin into plaintiff's cellar, the town was held not liable.³⁹

§ 110 (88). Rights respecting surface water. Respecting surface water which accumulates from rains and melting snows and seeks a lower level, by force of gravity, without flowing in any defined channel, the rights of an owner of land are very different from those respecting running streams. There is considerable conflict in the decisions upon this subject, but we think it may be laid down as the better and more approved doctrine, that an owner of land has a right to have the surface water flow off from his land by the courses and channels in which it is naturally accustomed to flow, and that the lower proprietor has no right to prevent or hinder such flow by erecting barriers or otherwise.⁴⁰ The owner of land also has a right

³⁷Chicago & N. W. R. R. Co. v. Hoag, 90 Ill. 339. *To same effect*, Kankakee Water Co. v. Reeves, 45 Ill. App. 285; Norman v. Ince, 8 Okl. 412, 58 Pac. 632.

³⁸Hurdman v. North Eastern R. R. Co., L. R. 3 C. P. D. 168. *To same effect*, Hartman v. Pittsburgh Inclined Plane R. R. Co. 159 Pa. St. 442, 28 Atl. Rep. 145.

³⁹Kennison v. Beverly, 146 Mass. 467.

⁴⁰Hughes v. Anderson, 68 Ala. 280, 44 Am. Rep. 147; Alabama Gr. So. R. R. Co. v. Prouty, 149 Ala. 7, 43 So. 352; Ogburn v. Conner, 46 Cal. 346, 13 Am. Dec. 213; Sanguinette v. Peck, 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169; Adams v. Walker, 34 Conn. 466; Laney v. Jasper, 39 Ill. 46; Totel v. Bonnefoy, 123 Ill. 653, 5 Am. St. Rep. 570; Dayton v. Drainage Comrs., 128 Ill. 271, 21 N. E. 198; Livingston v. McDonald, 21 Ia. 160, 89 Am. Dec. 563; Pickerill v. Louisville, 125 Ky. 213; Philadelphia etc. R. R. Co. v. Davis, 68 Md. 281, 11 Atl. 822; Da-

vis v. Londgreen, 8 Neb. 43; Boynton v. Langley, 19 Nev. 169, 6 Pac. 437, 3 Am. St. Rep. 781; Earle v. DeHart, 12 N. J. L. 280; Porter v. Durham, 74 N. C. 767; Briscoe v. Parker, 145 N. C. 14; Toote v. Clifton, 22 Ohio St. 247; Butler v. Peck, 16 Ohio St. 334, 88 Am. Dec. 452; Charlton v. Allegheny City, 1 Grant's Cases, 208; Martin v. Riddle, 26 Pa. St. 415; Davidheiser v. Rhodes, 133 Pa. St. 226, 19 Atl. 400; Gray v. Knoxville, 85 Tenn. 99; Beard v. Murphy, 37 Vt. 99, 86 Am. Dec. 493; Wood on Nuisances, (1st ed.) § 386; Washburn on Easements, pp. 427, 429, (2d ed.) The latter author says: "The owner of the upper field, in such case, has a natural easement, as it is called, to have the water which falls upon his own land flow off the same upon the field below, which is charged with a corresponding servitude, in the nature of dominant and servient tenements." p. 429. Gould on Waters, chap. ix.

that the proprietor of lands higher than his own shall not, by artificial means, materially increase the flow of such surface water or discharge it upon him in new or unusual channels.⁴¹ This is the rule of the civil law and, in addition to the cases cited is supported by many others referred to in the following sections.⁴² Any proprietor may, of course, consume all the surface water which he finds upon his premises, no matter whence its source, and divert the same whither he pleases, provided he does not injure others by turning it upon them. In other words, the lower estate has no right to the continued or uninterrupted flow of such water.⁴³ These rights are subject to the paramount right of every proprietor to make a reasonable use of his own land. In agricultural districts one may plough

⁴¹Adams v. Walker, 34 Conn. 466; Livingston v. McDonald, 21 Ia. 160, 89 Am. Dec. 563; Gregory v. Bush, 64 Mich. 37, 31 N. W. 90, 8 Am. St. Rep. 797; Chapel v. Smith, 80 Mich. 100, 45 N. W. 69; Kelly v. Dunning, 39 N. J. Eq. 482; Field v. West Orange, 46 N. J. Eq. 183; Porter v. Durham, 74 N. C. 767; Staton v. Norfolk & C. R. R. Co., 109 N. C. 337, 13 S. E. 933; Staton v. Norfolk & C. R. R. Co., 111 N. C. 278, 16 S. E. 181, 17 L.R.A. 838; Kauffman v. Greismer, 26 Pa. St. 407; Hays v. Hinkleman, 68 Pa. St. 324; Davidheiser v. Rhodes, 133 Pa. St. 226, 19 Atl. Rep. 400; Wood on Nuisances, (1st ed.) § 386; Martin v. Riddle, 26 Pa. St. 415. In the latter case the court say: "When two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. The inconvenience arises from its position, and is usually more than compensated by other circumstances. Hence the owner of the lower ground has no right to erect embankments whereby the natural flow of the water from the upper ground shall be stopped; nor has the owner of the upper ground a right to make any

excavations or drains by which the flow of the water is diverted from its natural channel, and a new channel made on the lower ground; nor can he collect into one channel waters usually flowing off into his neighbor's field by several channels, and thus increase the wash upon the lower fields." See Manteufel v. Wetzel, 133 Wis. 619.

⁴²See Wood v. Moulton, 146 Cal. 317, 80 Pac. 92; Chorman v. Queen Anne's R. R. Co., 3 Penn. Del. 407, 54 Atl. 687; Pinkstaff v. Steffy, 216 Ill. 406, 75 N. E. 163; Chicago etc. Ry. Co. v. Reuter, 223 Ill. 387, 79 N. E. 166; Cranson v. Snyder, 137 Mich. 340, 100 N. W. 674; Launstein v. Launstein, 150 Mich. 524, 114 N. W. 383; Mizell v. McGowan, 120 N. C. 134, 26 S. E. 783; Same v. Same, 125 N. C. 439, 34 S. E. 538; Garland v. Aurin, 103 Tenn. 555, 53 S. W. 940, 76 Am. St. Rep. 699, 48 L.R.A. 862; Riverside Cotton Mills v. Lanier, 102 Va. 148, 45 S. E. 875.

⁴³Buffum v. Harris, 5 R. I. 243; Cott v. Lewiston, 36 N. Y. 214, 217; Curtiss v. Ayrault, 47 N. Y. 73; Broadbent v. Ramsbotham, 11 Exch. 602; Angell on Watercourses, § 108 r; Washburn on Easements, p. 435.

and cultivate his land, though such use may in some degree change the quantity or direction of the flow of surface water upon a lower proprietor, or may in some degree obstruct the flow of such water onto his premises from higher land.⁴⁴ In determining the question of reasonable use, says the court in one of the cases cited, all the circumstances of the case would have to be taken into consideration, "and among them the nature and importance of the improvements sought to be made, the extent of the interference with the water, and the amount of injury done to the other land owners as compared with the value of such improvements, and also whether such injury could or could not have been reasonably foreseen."⁴⁵

These views in respect to surface water are in conflict with decisions in several of the States.⁴⁶ The courts of these States

⁴⁴Swett v. Cutts, 50 N. H. 439, 446, 9 Am. Rep. 276; Gregory v. Bush, 64 Mich. 37, 31 N. W. 90; Peck v. Goodberlett, 109 N. Y. 180, 16 N. E. 350; Rindge v. Sargent, 64 N. H. 294. In the last case it is held that the reasonableness of the use of land, which obstructs the flow of surface water, is determined by its operation upon the interests of all parties affected by it.

⁴⁵Swett v. Cutts, 50 N. H. 439, 446, 9 Am. Rep. 276. See Broadwell Dr. Dist. v. Lawrence, 231 Ill. 86, 83 N. E. 104; Oftelie v. Hammond, 78 Minn. 275, 80 N. W. 1123; Baldwin v. Ohio Tp., 70 Kan. 102, 78 Pac. 424, 109 Am. St. Rep. 414, 67 L.R.A. 642; Mizell v. McGowan, 129 N. C. 93, 39 S. E. 729, 85 Am. St. Rep. 705.

⁴⁶Clay v. Pittsburg etc. Ry. Co., 164 Ind. 439, 73 N. E. 904; Drake v. Chicago etc. R. R. Co. 70 Ia. 59; Kansas City & Emporia R. R. Co. v. Riley, 33 Kan. 374; Chicago etc. R. R. Co. v. Steek, 51 Kan. 737, 33 Pac. 601; Mo. Pac. R. R. Co. v. Renfro, 52 Kan. 237, 34 Pac. 802, 39 Am. St. Rep. 344; Baldwin v. Ohio Tp., 70 Kan. 102, 78 Pac. 424, 109 Am. St. Rep. 414, 67 L.R.A. 642;

Bryant v. Merritt, 71 Kan. 272, 80 Pac. 600; Hovey v. Mayo, 43 Me. 322; Bangor v. Lansil, 51 Me. 521; Greeley v. Maine Central R. R. Co., 53 Me. 200; Morrison v. Bucksport & Bangor R. R. Co., 67 Me. 353; Gannon v. Hargadon, 10 Allen 106, 87 Am. Dec. 625; Inhabitants of Franklin v. Fisk, 13 Allen 211; Parks v. Newburyport, 10 Gray 28, 90 Am. Dec. 194; Luther v. Winnisimmet Co., 9 Cush. 171; Ashley v. Wolcott, 11 Cush. 192; Sprague v. Worcester, 13 Gray 193; Flagg v. Same, Id. 601; Illinois Cent. R. R. Co. v. Miller, 68 Miss. 760, 10 So. 61; Cox v. Hannibal etc. R. R. Co., 174 Mo. 588, 74 S. W. 854; Martin v. Benoit, 20 Mo. App. 262; Field v. Chicago etc. R. R. Co., 21 Mo. App. 600; Burke v. Mo. Pac. R. R. Co., 29 Mo. App. 370; St. Louis etc. R. R. Co. v. Schneider, 30 Mo. App. 620; Collier v. Chicago & A. R. R. Co., 48 Mo. App. 398; Kenney v. Kansas City etc. R. R. Co., 69 Mo. App. 569; De Lappe v. Kansas City etc. R. R. Co., 69 Mo. App. 572; Graves v. Kansas City etc. R. R. Co., 69 Mo. App. 574; Kearney v. Themanson, 48 Neb. 74, 66 N. W. 996; Churchill v. Beethe, 48 Neb. 87,

hold that the owner of land may use or improve it without any regard to the surface water which comes upon or flows over it, that he may erect a barrier so as to prevent its flow on to his land, and may discharge it in new channels or in augmented quantities upon the land below. This is known as the "common law rule," or as the "old common law rule." This has been so far modified by the later decisions that it is held by many courts adhering generally to the common law rule, that surface water flowing in a ravine, draw, swale or well defined natural depres-

66 N. W. 992, 35 L.R.A. 442; *Town v. Missouri Pac. R. R. Co.*, 50 Neb. 768; *Egerer v. New York etc. R. R. Co.*, 3 App. Div. 157, 38 N. Y. S. 319; *Edwards v. Charlotte etc. R. R. Co.*, 39 S. C. 472, 18 S. E. 58, 39 Am. St. Rep. 746, 22 L.R.A. 246; *Baltzge v. Carolina-Midland R. R. Co.*, 54 S. C. 242, 32 S. E. 358, 71 Am. St. Rep. 789; *Lawton v. South Bound R. R. Co.* 61 S. C. 548, 39 S. E. 752; *Barnett v. Matagorda R. & I. Co.*, 98 Tex. 355, 83 S. W. 801, 107 Am. St. Rep. 636; *Norfolk etc. R. R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517; *Cass v. Dicks*, 14 Wash. 75, 53 Am. St. Rep. 859; *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L.R.A. 519; *Neal v. Ohio Riv. R. R. Co.*, 47 W. Va. 316, 34 S. E. 914; *Hoyt v. Hudson*, 27 Wis. 656; *Heth v. Fond du Lac*, 63 Wis. 228, 53 Am. Rep. 279; *Waters v. Bay View*, 61 Wis. 642; *Johnson v. Chicago etc. R. R. Co.*, 80 Wis. 641, 50 N. W. 771, 27 Am. St. Rep. 76, 14 L.R.A. 495; *Champion v. Crandon*, 84 Wis. 405, 54 N. W. 775, 19 L.R.A. 856; *Crawson v. Grand Trunk R. R. Co.*, 27 U. C. Q. B. 68; *Ostrom v. Sills*, 24 Ont. 526.

In Minnesota the common law rule as to surface water has been generally adopted.

Rowe v. St. Paul etc. R. R. Co., 41 Minn. 384, 43 N. W. 76, 16 Am. St. Rep. 706; *Jordan v. St. Paul etc.*

R. R. Co., 42 Minn. 172, 43 N. W. 849, 6 L.R.A. 573; *Follman v. City of Mankato*, 45 Minn. 457, 48 N. W. 192; *Brown v. Winona etc. R. R. Co.*, 53 Minn. 259, 55 N. W. 123, 39 Am. St. Rep. 603; *Werner v. Papf*, 94 Minn. 118, 102 N. W. 366. In the case of *Sheehan v. Flynn*, 59 Minn. 436, 61 N. W. 462, 26 L.R.A. 632, the court, to some extent, criticises and disapproves former cases, and sums up the rule of the court as follows: "1. The old common law rule that surface water is a common enemy, which each owner may get rid of as best he can, is in force in this state, except that it is modified by the rule that he must so use his own as not unnecessarily or unreasonably to injure his neighbor. Under this rule, it is the duty of an owner draining his own land to deposit the surface water in some natural drain, if one is reasonably accessible; and he is entitled to deposit the same in such natural drain, though it is thereby conveyed upon the land of his neighbor, if it does not thereby unreasonably injure him. 2. A circumstance to be considered in determining what is a reasonable use of one's own land, under this rule, is the amount of benefit to his estate thus drained, as compared with the amount of injury to his neighbor's estate by reason of casting the burden of the surface water upon it. 3. Subject to these limitations, and

sion, may not be obstructed to the material injury of the upper estate.⁴⁷ Also that surface water may not be collected and poured in a stream upon the lower proprietor.⁴⁸ The common law rule is still further modified, indirectly, by introducing the doctrine of negligence, whereby any injurious interference with the flow of surface water in the construction of works for public use, is made actionable upon that ground.⁴⁹ But negligence implies a corresponding duty, and every duty implies a corresponding right. To hold that a certain manner of construction which interferes with the flow of surface water is negligent is to hold that the corporation owes a duty not to make such interference; and this again is to hold that the party injured has a right to have the waters flow without such interference. Every one of these cases based upon negligence, in reality affirms that proprietors have rights respecting the flow of surface water, and

the rule that he must in all cases do what is reasonable to dispose of the surface water to the least injury to his neighbors, such owner has a right to drain his own land for some proper use and cast the water upon theirs, whether such drainage is the direct and sole purpose of the improvement, or only results incidentally therefrom." See *Oftelie v. Hammond*, 78 Minn. 275, 80 N. W. 1123.

The Nebraska court, while adopting the common law rule, adopts also substantially the same modifications of it. *Lincoln etc. R. R. Co. v. Sutherland*, 44 Neb. 526, 62 N. W. 859; *City of Beatrice v. Leary*, 45 Neb. 149, 63 N. W. 370; *Todd v. York Co.*, 72 Neb. 207, 100 N. W. 299, 66 L.R.A. 561.

⁴⁷*St. Louis etc. R. R. Co. v. Anderson*, 62 Ark. 360, 35 S. W. 791; *Wharton v. Stevens*, 84 Ia. 107, 50 N. W. 562, 35 Am. St. Rep. 296, 15 L.R.A. 630; *Canton etc. R. R. Co. v. Paine* (Miss.) 19 So. 199; *Lincoln etc. R. R. Co. v. Sutherland*, 44 Neb. 526, 62 N. W. 859; *City of Beatrice v. Leary*, 45 Neb. 149, 63 N.

W. 370; *Town v. Mo. Pac. R. R. Co.*, 50 Neb. 768; *Norfolk & W. R. R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517; *Henry v. Ohio Riv. R. R. Co.*, 40 W. Va. 234, 21 S. E. 863. And see *Sullivan v. Browning*, 67 N. J. Eq. 391, 58 Atl. 302, and cases cited in § 89.

⁴⁸*Holmes v. Calhoun County*, 97 Ia. 360, 66 N. W. 145; *Follman v. City of Mankato*, 45 Minn. 457, 48 N. W. 192; *Illinois Central R. R. Co. v. Miller*, 68 Miss. 760, 10 So. 61; *Cannon v. St. Joseph*, 67 Mo. App. 367; *Lincoln St. R. R. Co. v. Adams*, 41 Neb. 737, 60 N. W. 83; *Bunderson v. Burlington etc. R. R. Co.*, 43 Neb. 545, 61 N. W. 721; *Fremont etc. R. R. Co. v. Harlin*, 50 Neb. 698; *Clark v. Rochester*, 43 Hun 367; *McCarthy v. Far Rockaway*, 3 App. Div. 379, 38 N. Y. S. 989; *Bidell v. Sea Cliff*, 18 App. Div. N. Y. 261; *Johnson v. White*, 26 R. I. 207, 58 Atl. 658, 65 L.R.A. 250; *post*, § 112, n. 55.

⁴⁹See § 112 and cases cited; *Kearney v. Themanson*, 48 Neb. 74, 66 N. W. 996.

are, therefore, in effect, innovations upon the old common law rule.

The conflicting decisions in regard to surface water illustrate the fact that property in land differs in the different States. It is not the same in Illinois that it is in the adjoining State of Wisconsin. In the former State it includes certain rights in respect to surface water, which are not included in the latter. The subject of this section will be found very fully discussed in Gould on Waters, chapter ix.

§ 111 (88a). What constitutes surface water.—Flood waters of stream. As a general rule, there is not much question as to what constitutes surface water and what does not. In those States which recognize no rights, or substantially none, in respect to surface water, it is often made a nice question whether the waters flowing in a ravine, channel or natural depression constitute a stream, which cannot be interfered with without liability, or mere surface water, which may be treated as a common enemy. It is also a mooted question whether the flood waters of a stream, which spread out over the lowlands in times of high water, are a part of the stream or only surface water. Without entering upon a discussion of these questions, we refer to some of the authorities where they are discussed.⁵⁰

⁵⁰As to whether the course by which surface water finds its way to lower levels, is a water course or not, see Morrisey v. Chicago etc. R. R. Co., 38 Neb. 406, 56 N. W. 946; Bunderson v. Burlington etc. R. R. Co., 43 Neb. 545, 61 N. W. 721; Chicago etc. R. R. Co. v. Steck, 51 Kan. 737, 33 Pac. 601; Gregory v. Bush, 64 Mich. 37, 31 N. W. 90, 8 Am. St. Rep. 797; Neal v. Ohio Riv. R. R. Co., 47 W. Va. 316, 34 S. E. 914.

As to the flood waters of a stream, it is said by the court, in O'Connell v. East Tenn. V. & G. R. R. Co., 87 Ga. 246, 13 S. E. 489, 27 Am. St. Rep. 246, 13 L.R.A. 394: "If the flood water becomes severed from the main current, or leaves the stream never to return, and spreads out over the low ground, it has become surface water; but if it forms

a continuous body with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi*, presently to return, as by the recession of the waters, it is to be regarded as still a part of the stream. The identity of the river does not depend upon the volume of water which may happen to flow down its course at any particular season. The authorities hold that a stream may be wholly dry at times without losing the character of a water course. So, on the other hand, it may have a 'flood channel' to retain the surplus waters until they can be discharged by the natural flow." To same effect Sullens v. Chicago etc. R. R. Co., 74 Ia. 659, 38 N. W. 545, 7 Am. St. Rep. 501; Noe v. C. B. & Q. R. R. Co., 76 Ia. 360, 41 N. W. 42; Byrne v. Minn. & St. L. R. R. Co., 38 Minn.

A body of water twenty-five hundred acres in extent, formed solely from rains and snows, varying in depth, from three to six feet, filled with swampy vegetation and the land under which had been surveyed and sold to individuals, was held to be like a temporary body of surface water and the owners of the land under the water and around it were held to have no riparian rights.⁵¹

§ 112 (89). What interference with surface water is a taking. An interference with any right respecting surface water in the exercise of the eminent domain power is a taking. If a railroad company so constructs its road as to obstruct the flow of surface water and dam it back upon private property, it will be liable therefor.⁵² The same rule applies to a munici-

212, 36 N. W. 339, 8 Am. St. Rep. 668; Morrissey v. C. B. & Q. R. R. Co., 38 Neb. 406, 56 N. W. 946; Chicago etc. R. R. Co. v. Emmert, 53 Neb. 237, 73 N. W. 540; Sparks Mfg. Co. v. Newton, 57 N. J. Eq. 367; Clarke v. Patapsco Guano Co., 144 N. C. 64, 56 S. E. 858, 119 Am. St. Rep. 931; Grande Ronde Elec. Co. v. Drake, 46 Ore. 243, 78 Pac. 1031; Cook v. Seaboard Air Line Ry. Co., 107 Va. 32; Uhl v. Ohio Riv. R. R. Co., 56 W. Va. 494, 49 S. E. 378, 107 Am. St. Rep. 968, 68 L.R.A. 138; Richards v. Ohio Riv. R. R. Co., 56 W. Va. 592, 49 S. E. 385; Cairo etc. R. R. Co. v. Brevoort, 62 Fed. 129.

For the contrary view see New York etc. R. R. Co. v. Speelman, 12 Ind. App. 372, 40 N. E. 541; Missouri Pac. R. R. Co. v. Keys, 55 Kan. 205, 40 Pac. 275, 49 Am. St. Rep. 249; City etc. R. R. Co. v. Smith, 72 Miss. 677, 17 So. 78, 48 Am. St. Rep. 579, 27 L.R.A. 762; Senneider v. Mo. Pac. R. R. Co., 29 Mo. App. 68; Johnson v. Grays Point Terminal Ry. Co., 111 Mo. App. 378, 85 S. W. 941. And see Yazoo etc. R. R. Co. v. Davis, 73 Miss. 678, 19 So. 487, 32 L.R.A. 262; Cass v. Dicks, 14 Wash. 75, 44 Pac. 113, 53 Am. St. Rep. 859.

⁵¹Applegate v. Franklin, 109 Ill. App. 293. It was held that one owner could drain off the water without liability to other owners.

⁵²Savannah etc. R. R. Co. v. Buford, 106 Ala. 303, 17 So. 395; Shohan v. Alabama Great Southern Ry. Co., 115 Ala. 181; Alabama Gt. So. R. R. Co. v. Prouty, 149 Ala. 7, 43 So. 352; Bentonville R. R. Co. v. Baker, 45 Ark. 252; St. Louis etc. R. R. Co. v. Anderson, 62 Ark. 360, 35 S. W. 791; Little Rock, etc. Ry. Co. v. Wallis, 82 Ark. 447, 102 S. W. 390; Southern Ry. Co. v. Cook, 106 Ga. 450, 32 S. E. 585; Southern Ry. Co. v. Cook, 117 Ga. 286, 43 S. E. 697; Gillham v. Madison County R. R. Co., 49 Ill. 484; Illinois & St. Louis R. R. Co. v. Fehringer, 82 Ill. 129; Chicago Rock Island & Pacific R. R. Co. v. Casey, 90 Ill. 514; Chicago & A. R. R. Co. v. Henneberry, 153 Ill. 354, 38 N. E. 1043; Tetherington v. St. Louis etc. R. R. Co., 226 Ill. 129, 80 N. E. 697; St. Louis Merchants' Bridge Terminal Ry. Ass. v. Schultz, 226 Ill. 409, 80 N. E. 879; Kankakee etc. R. R. Co. v. Horan, 22 Ill. App. 145; Same v. Same, 23 Ill. App. 259; Chicago & A. R. R. Co. v. Henneberry, 28 Ill. App. 110; Ohio & M. R. R. Co. v.

Ramey, 39 Ill. App. 409; Chicago & A. R. R. Co. v. Henneberry, 42 Ill. App. 126; Ohio & M. R. R. Co. v. Thillman, 43 Ill. App. 78; Ohio & M. R. R. Co. v. Combs, 43 Ill. App. 119; Ohio & M. R. R. Co. v. Neutzel, 43 Ill. App. 108; Wabash R. R. Co. v. Sanders, 47 Ill. App. 436; Miller v. Chicago & E. R. R. Co., 60 Ill. App. 51; Illinois Cent. R. R. Co. v. Heisner, 93 Ill. App. 469; S. C. affirmed, 192 Ill. 571; Cincinnati etc. Ry. Co. v. Ward, 120 Ill. App. 212; Tetherington v. St. Louis etc. R. R. Co., 128 Ill. App. 139; Chicago, etc. R. R. Co. v. Stroud, 129 Ill. App. 348; Atterbury v. Chicago etc. R. R. Co., 134 Ill. App. 330; Indiana etc. Ry. Co. v. Eberle, 110 Ind. 542, 59 Am. Rep. 225; Baltimore etc. R. R. Co. v. Quillen, 34 Ind. App. 330, 72 N. E. 661, 107 Am. St. Rep. 183; Drake v. Chicago, R. I. & P. Ry. Co., 63 Ia. 302, 50 Am. Rep. 746; Stith v. Louisville etc. R. R. Co. 109 Ky. 168, 58 S. W. 600; Payne v. Morgan's La. & Tex. R. R. etc. Co., 38 La. An. 164, 58 Am. Rep. 174; Philadelphia etc. R. R. Co. v. Davis, 68 Md. 281, 11 Atl. 822, 6 Am. St. Rep. 440; Baltimore etc. R. R. Co. v. Hackett, 87 Md. 224; Jungblum v. Minneapolis etc. R. R. Co., 70 Minn. 153, 72 N. W. 971; Sinai v. Louisville etc. R. R. Co., 71 Miss. 547, 14 So. 87; Canton etc. R. R. Co. v. Paine (Miss.), 19 So. 199; Tucker v. Chicago etc. R. R. Co., 66 Mo. App. 141; Chicago etc. Ry. Co. v. Shaw, 63 Neb. 380, 88 N. W. 508, 56 L.R.A. 341; Fletcher v. Auburn, 25 Wend. 462; Raleigh & Augusta Air Line R. R. Co. v. Wicher, 74 N. C. 220; Nichols v. Norfolk etc. R. R. Co. 120 N. C. 495; Dale v. Southern Ry. Co., 132 N. C. 705, 44 S. E. 399; Fick v. Pennsylvania R. R. Co., 157 Pa. St. 622, 27 Atl. 783; Gulf, Col. & S. F. Ry. Co. v. Helsley, 62 Tex. 593; Sabine & East Tenn. R. R.

Co. v. Johnson, 65 Tex. 389; Gulf, Col. & Santa Fe R. R. Co. v. Holliday, 65 Tex. 512; Owens v. Missouri Pacific Ry. Co. 67 Tex. 679; Texas Central Ry. Co. v. Clifton, 2 Tex. App. Civil Cas. 433; Texas & P. R. R. Co. v. Snyder, 18 S. W. 559; Gulf etc. R. R. Co. v. Jones, 3 Tex. Ct. of App. J. 41, § 22; S. A. & A. R. R. Co. v. Gwynn, 4 Tex. Ct. of App. J. 338, § 219; Bonner v. Worth, 5 Tex. Civ. App. 560, 24 S. W. 306; Texas etc. Ry. Co. v. Maddox, 26 Tex. Civ. App. 297, 63 S. W. 134; Texarkana etc. Ry. Co. v. Spencer, 28 Tex. Civ. App. 251, 67 S. W. 196; Gulf etc. Ry. Co. v. Steele, 29 Tex. Civ. App. 328, 69 S. W. 171; San Antonio etc. Ry. Co. v. Gurley, 37 Tex. Civ. App. 283, 83 S. W. 842; Texas Cent Ry. Co. v. Brown, 38 Tex. Civ. App. 610, 86 S. W. 659; Barstow Irr. Co. v. Black, 39 Tex. Civ. App. 80, 86 S. W. 1036; International etc. R. R. Co. v. Slusher, 42 Tex. Civ. App. 631, 95 S. W. 717; Missouri etc. Ry. Co. v. Crow, 43 Tex. Civ. App. 280, 95 S. W. 743; Missouri, etc. Ry. Co. v. Green, 44 Tex. Civ. App. 247, 99 S. W. 573; Baugh v. Gulf etc. Ry. Co., 44 Tex. Civ. App. 443, 100 S. W. 958; Houston etc. Ry. Co. v. Barr, 44 Tex. Civ. App. 57, 99 S. W. 437; McGehee v. Tidewater Ry. Co., 108 Va. 508; Henry v. Ohio Riv. R. R. Co., 40 W. Va. 234, 21 S. E. 863. In Shane v. Kansas City etc. R. R. Co., 71 Mo. 237, 36 Am. Dec. 480, the Supreme Court of Missouri holds in accordance with the text in an elaborate opinion, which overrules prior cases. Compare Munkers v. Same, 72 Mo. 514; S. C. 60 Mo. 334, and Hosher v. Same, 60 Mo. 329. But Shane's case is in turn overruled in Abbot v. Kansas City & St. Joseph R. R. Co., 83 Mo. 271, 53 Am. Rep. 581, and Jones v. St. Louis etc. Ry. Co., 84 Mo. 151. Where a railroad embankment ob-

pal corporation executing a public work.⁵³ A railroad company constructed an embankment which formed a barrier to the natural flow of surface water and caused the same to collect in a ditch beside the road, in which it ran for a long distance and was then discharged through a culvert upon the plaintiff's land, where it had not been accustomed to flow before. The company was held liable on the ground of its being a taking.⁵⁴ And,

structed surface water and created a stagnant pool, injurious to health, the company was held liable. Georgia etc. Ry. Co. v. Jernigan, 128 Ga. 501, 57 S. E. 791; Southern Ry. Co. v. Hardeeman, 130 Ga. 222, 60 S. E. 539; Cane Belt R. R. Co. v. Ridgeway, 38 Tex. Civ. App. 108, 85 S. W. 496; McFadden v. Missouri etc. Ry. Co., 41 Tex. Civ. App. 350, 92 S. W. 989. See Sabetto v. New York Cent. etc. R. R. Co., 127 App. Div. 832.

⁵³Conniff v. San Francisco, 67 Cal. 45; Los Angeles Cem. Ass. v. Los Angeles, 103 Cal. 461, 37 Pac. 375; Maguire v. Centerville, 76 Ga. 84; Lake v. Bok, 31 Ill. App. 45; Pickerill v. Louisville, 125 Ky. 213, 100 S. W. 873; Bowman v. New Orleans, 27 La. Ann. 501; Rice v. City of Flint, 67 Mich. 401, 34 N. W. 719; Peters v. Fergus Falls, 35 Minn. 549; Ham v. Levee Comrs., 83 Miss. 534, 35 So. 943; City of Beatrice v. Leary, 45 Neb. 149, 63 N. W. 370, 50 Am. St. Rep. 546; Clark v. Rochester, 43 Hun 271; Acker v. Town of New Castle, 48 Hun 312, 15 N. Y. St. 894, 1 N. Y. Supp. 223; Pinnix v. Lake Drummond Canal Co., 132 N. C. 124, 43 S. E. 578; Cooper v. City of Dallas, 83 Tex. 239, 18 S. W. 565, 29 Am. St. Rep. 645; Nussbaum v. Bell Co., 97 Tex. 86, 76 S. W. 97. See Darlington v. Cloud Co., 75 Kan. 810, 88 Pac. 529; Kent Co. v. Goodwin, 98 Md. 84, 56 Atl. 478; Galbraith v. Yates, 79 Minn. 436, 82 N. W. 683; Franklin

v. Durgee, 71 N. H. 186, 51 Atl. 911, 58 L.R.A. 112; Carroll v. Rye Tp., 13 N. D. 458, 101 N. W. 894.

⁵⁴T. W. & W. Ry. Co. v. Morrison, 71 Ill. 616; Illinois Central R. R. Co. v. Heisner, 192 Ill. 571, 61 N. E. 656; Albright v. Cedar Rapids etc. Ry. & Lt. Co., 133 Ia. 644, 110 N. W. 1052; Fossum v. Chicago etc. Ry. Co., 80 Minn. 9, 82 N. W. 979; Benson v. Chicago & Alton R. R. Co., 78 Mo. 504; Hogenson v. St. Paul, Minneapolis & Manitoba Ry. Co., 31 Minn. 224. In Chicago & Alton R. R. Co. v. Glenney, 118 Ill. 487, where damages were claimed in a similar case, it was held that the company was not liable for damages caused by water brought into its ditch by artificial channels connected with the ditch without its consent. *And see* Curtis v. Eastern R. R. Co., 14 Allen 55; Moses v. St. Louis, Iron Mountain & Southern Ry. Co., 85 Mo. 86; Mitchell v. New York, Lake Erie & Western R. R. Co., 36 Hun 177; Rathke v. Gardner, 134 Mass. 14.

It is no defense that the railroad is properly constructed so far as its use for railroad purposes is concerned. "A railroad company must construct its road not only with reference to the safety of the traveling public, but also with reference to the rights of adjacent landowners." McCleneghan v. Omaha R. R. Co., 25 Neb. 523, 13 Am. St. Rep. 508; Clauson v. Chicago etc. Ry. Co., 106 Wis. 308, 82 N. W. 146 is a similar case in which the

generally, it is a taking to collect surface water into a channel and turn it in a body upon the land of another, whether the water would have found its way there by nature or not.⁵⁵ The decisions are substantially unanimous as to the liability in such cases, but the ground of liability is usually that of improper

company was held not liable on the ground that it was the duty of the company to protect its road from surface water and that incidental injuries to property in so doing was *damnum absque injuria*.

⁵⁵Troy v. Coleman, 58 Ala. 570; Enfaula v. Simmons, 86 Ala. 515; Springfield etc. R. R. Co. v. Henry, 44 Ark. 360; Cloverdale v. Smith, 128 Cal. 230, 60 Pac. 851; Ruduyay v. Harwinton, 79 Conn. 91, 63 Atl. 948; Chorman v. Queen Anne's R. R. Co., 3 Penn. Del. 407, 54 Atl. 687; Frisbie v. Cowen, 18 App. Cas. D. C. 381; Atkinson v. Atlanta, 81 Ga. 625, 7 S. E. 692; Georgia etc. Co. v. Baker, 88 Ga. 28, 13 S. E. 831; City of Albany v. Sikes, 94 Ga. 30, 20 S. E. 257, 26 L.R.A. 653; Elgin v. Kimball, 90 Ill. 356; Jacksonville R. R. Co. etc. v. Cox, 91 Ill. 500; Aurora v. Love, 93 Ill. 521; Young v. Comrs., 134 Ill. 569, 25 N. E. 689; Graham v. Keene, 143 Ill. 425, 32 N. E. 180; Jewett v. Swett, 178 Ill. 96, *affirming* S. C. 71 Ill. App. 641; Illinois Cent. R. R. Co. v. Heisner, 192 Ill. 571, 61 N. E. 656; Chicago etc. R. R. Co. v. Conners, 25 Ill. App. 561; Chicago & A. R. R. Co. v. Riley, 25 Ill. App. 569; St. Louis etc. R. R. Co. v. Hurst, 25 Ill. App. 98; S. C. 14 Ill. App. 419; Chicago & A. R. R. Co. v. Glenney, 28 Ill. App. 364; Allen v. Michel, 38 Ill. App. 313; Illinois Central R. R. Co. v. Heisner, 45 Ill. App. 143; Effingham v. Surrells, 77 Ill. App. 460; Commissioners of Highways v. Sweet, 77 Ill. App. 641; Crawfordsville v. Bond, 96 Ind. 236; Patoka Tp. v. Hopkins, 131 Ind. 142, 30 N.

E. 896; Valparaiso v. Spaeth, 166 Ind. 14, 76 N. E. 514; Lake Erie & W. R. R. Co. v. Hilfiker, 12 Ind. App. 280, 40 N. E. 80; Baltimore, etc. R. R. Co. v. Quillon, 34 Ind. App. 330, 72 N. E. 661, 107 Am. St. Rep. 183; Cromer v. Logansport, 38 Ind. App. 661, 78 N. E. 1045; Holmes v. Calhoun County, 97 Ia. 360, 66 N. W. 145; Schofield v. Cooper, 126 Ia. 334, 102 N. W. 110; Baldwin v. Ohio Tp., 70 Kan. 102, 78 Pac. 424, 109 Am. St. Rep. 414, 67 L.R.A. 642; Dennis v. Osborn, 75 Kan. 557, 89 Pac. 925; Louisville etc. R. R. Co. v. Brinton, 109 Ky. 180, 58 S. W. 604; Louisville etc. R. R. Co. v. Cornelius, 111 Ky. 752, 64 S. W. 732; Robertson v. Daviess Gravel Road Co., 116 Ky. 913, 77 S. W. 189; Thomas v. Covington, 23 Ky. L. R. 117, 62 S. W. 721; Hitchins v. Frostburg, 68 Md. 100, 11 Atl. 826, 6 Am. St. Rep. 422; Frostburg v. Hitchins, 70 Md. 56, 16 Atl. 380; Frostburg v. Dufty, 70 Md. 47, 16 Atl. 642; Guest v. Church Hill, 90 Md. 689, 45 Atl. 882; Cahill v. Baltimore, 93 Md. 233, 48 Atl. 705; New York etc. R. R. Co. v. Jones, 94 Md. 24, 50 Atl. 423; Daley v. Watertown, 192 Mass. 116, 78 N. E. 143; Cubit v. O'Dett, 51 Mich. 347; Gregory v. Bush, 64 Mich. 37, 31 N. W. 90, 8 Am. St. Rep. 797; Page v. Huckins, 150 Mich. 103, 113 N. W. 577; Blakeley v. Devine, 36 Minn. 53; Pye v. Mankato, 36 Minn. 373; Olson v. St. Paul etc. R. R. Co., 38 Minn. 419, 37 N. W. 953; Follman v. City of Mankato, 45 Minn. 457, 48 N. W. 192; Robbins v. Willmon, 71 Minn. 403, 73 N. W. 1097;

construction. But all the cases recognize the right of a proprietor not to be injured by having the water poured upon his land in a stream, and if this right is interfered with by a permanent maintenance of the works causing the injury, there

Gunnerus v. Spring Prairie, 91 Minn. 473, 98 N. W. 340, 974; Illinois Cent. R. R. Co. v. Miller, 68 Miss. 760, 10 So. 61; McCormick v. Kansas City, St. Joe & C. B. R. R. Co., 70 Mo. 359; Pychlicke v. City of St. Louis, 98 Mo. 497, 11 S. W. 1001; Carson v. City of Springfield, 53 Mo. App. 289; Cannon v. St. Joseph, 67 Mo. App. 367; Ready v. Mo. Pac. Ry. Co., 98 Mo. App. 467, 72 S. W. 707; Fremont etc. R. R. Co. v. Morley, 25 Neb. 138, 40 N. W. 948; State v. Fillmore County, 32 Neb. 870, 49 N. W. 769; Lincoln St. R. R. Co. v. Adams, 41 Neb. 737, 60 N. W. 83; Bunderson v. Burlington etc. R. R. Co., 43 Neb. 545, 61 N. W. 721; Fremont etc. R. R. Co. v. Harlin, 50 Neb. 698, 61 Am. St. Rep. 578, 36 L.R.A. 417; Roe v. Howard Co., 75 Neb. 448, 106 N. W. 587; Andrews v. Steele City, 2 Neb. (Unof.) 676, 89 N. W. 739; West Orange v. Field, 37 N. J. Eq. 600; Field v. West Orange, 46 N. J. Eq. 183; Soule v. City of Passaic, 47 N. J. Eq. 28, 20 Atl. 346; Fuller v. Belleville, 67 N. J. Eq. 468, 58 Atl. 176; Seifert v. Brooklyn, 101 N. Y. 136, 54 Am. Rep. 664; Clark v. Rochester, 43 Hun 271; McCarthy v. Far Rockaway, 3 App. Div. 379, 38 N. Y. Supp. 989; Bedell v. Sea Cliff, 18 App. Div. 261; Chase v. New York Cent. R. R. Co., 24 Barb. 273; Moran v. McClarum, 63 Barb. 185; Wickham v. Lehigh Val. R. R. Co. 85 App. Div. 182, 83 N. Y. S. 146; Branson v. New York Cent. etc. R. R. Co., 111 App. Div. 737, 97 N. Y. S. 788; Staton v. Norfolk etc. R. C. Co., 109 N. C. 337, 13 S. E. 933; Staton v. Norfolk etc. R. R. Co., 111 N. C. 278, 16 S. E. 181, 17 L.R.A. 838;

Parker v. Norfolk etc. R. R. Co., 119 N. C. 676; Bench v. Wilmington & W. R. R. Co., 120 N. C. 498; Parker v. Norfolk etc. R. R. Co., 123 N. C. 71, 31 S. E. 381; Noble v. Aasen, 8 N. D. 77, 76 N. W. 990; Meyers v. Vermillion, 7 Ohio N. P. (N. S.) 90; Huddlestone v. Borough of West Bellvue, 111 Pa. St. 110; Gordon v. Pennsylvania R. R. Co. (Pa.), 6 Rep. 727; Elliott v. Oil City, 129 Pa. St. 570, 18 Atl. 553; Torrey v. City of Scranton, 133 Pa. St. 173, 19 Atl. 351; Weir v. Borough of Plymouth, 148 Pa. St. 566, 24 Atl. 94; Bohan v. Borough of Avoca, 154 Pa. St. 404, 26 Atl. 604; Magee v. Pa. Seneca Valley R. R. Co., 13 Pa. Supr. Ct. 187; Rohrer v. Harrisburg, 20 Pa. Supr. Ct. 543; Toole v. Delaware etc. R. R. Co., 27 Pa. Supr. Ct. 577; Johnson v. White, 26 R. I. 207, 58 Atl. 658, 65 L.R.A. 250; Stillman v. Pendleton, 26 R. I. 585, 60 Atl. 234; Cain v. South Bound R. R. Co. 62 S. C. 25, 39 S. E. 792; Tyrus v. Kansas City etc. R. R. Co., 114 Tenn. 579, 86 S. W. 1074; Gulf etc. Ry. Co. v. Donahue, 59 Tex. 128; G. H. & S. A. Ry. Co. v. Tait, 63 Tex. 223; Austin etc. R. R. Co. v. Anderson, 79 Tex. 427, 15 S. W. 484, 23 Am. St. Rep. 350; Texas & P. R. R. Co. v. Dunn (Tex.), 17 S. W. 822; City of Houston v. Bryan, 2 Tex. Civ. App. 553, 22 S. W. 231; Fort Worth & Denver City Ry. Co. v. Scott, 2 Tex. App. Civil Cas. p. 137; Houston v. Hutcheson, 39 Tex. Civ. App. 337, 81 S. W. 96; Norfolk etc. R. R. Co. v. Carter, 91 Va. 587, 22 S. E. 517; Peters v. Lewis, 28 Wash. 366, 68 Pac. 869; Clay v. St. Albans, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883; McCray v. Fairmont, 46

is a taking within the constitution.⁵⁶ "No one has a right to collect surface water in any considerable quantity upon his own premises and then turn the same in a concentrated form upon the premises of his neighbor in such a manner as to cause him damage. * * * And the law doubtless is that a city has no greater power over its streets, in the matter of disposing of surface water which accumulates thereon, than a private individual has in disposing of the surface water which falls or collects upon his own land."⁵⁷ And this language will apply to all corporations constructing public works under the power of eminent domain. A railroad company cut through a ridge whereby surface water was brought upon the plaintiff's land, which before had flowed off in other directions. The company was held liable for the damage.⁵⁸ And as a general rule when, in the execution of public works, the course of surface water is changed and caused to flow upon land where it had not been accustomed to flow, the owner may recover for the damage.⁵⁹ Where a railroad company diverted surface water upon the land of a third party with his consent whence it flowed upon the plaintiff's land to his damage, the company was held liable.⁶⁰ So

W. Va. 442, 33 S. E. 245; Tracewell v. Wood Co., 58 W. Va. 283, 52 S. E. 185; Arn v. City of Kansas, 4 McCrary, 558; Whalley v. Lancashire & Yorkshire Ry. Co., 13 L. R. Q. B. 131; S. C. *affirmed* 16 Same, 227; Northwood v. Raleigh, 3 Ontario 347; Stalker v. Dunwick, 15 Ontario 342; Miner v. Buffalo etc. R. R. Co., 9 U. C. C. P. 280; Rowe v. Rochester, 22 U. C. C. P. 319; Rowe v. Rochester, 29 U. C. Q. B. 590.

⁵⁶T. W. & W. R. R. Co. v. Morrison, 71 Ill. 616; Kankakee etc. R. R. Co. v. Horan, 22 Ill. App. 145; New York etc. R. R. Co. v. Jones, 94 Md. 24, 50 Atl. 423; Miller v. Morrisstown, 47 N. J. Eq. 62, 2 Atl. 61; Wickham v. Lehigh Val. R. R. Co. 85 App. Div. 182, 83 N. Y. S. 146; Staton v. Norfolk etc. R. R. Co., 111 N. C. 278, 16 S. E. 181; Tyrus v. Kansas City etc. R. R. Co., 114 Tenn. 579, 86 S. W. 1074; Norfolk & W. R. R. Co. v. Carter, 91 Va. 587, 22 S. E. 517.

⁵⁷Johnson v. White, 26 R. I. 207, 208, 209, 58 Atl. 658, 65 L.R.A. 250.

⁵⁸Block v. Gt. Northern Ry. Co., 101 Minn. 183, 112 N. W. 66. It was held to be a question of fact whether it was reasonable for the company to set loose this water and not make provision to take care of it.

⁵⁹Central of Ga. Ry. Co. v. Windham, 126 Ala. 552, 28 So. 392; Barfield v. Macon Co., 109 Ga. 386, 34 S. E. 596; Elser v. Gross Point, 223 Ill. 230, 79 N. E. 27, 114 Am. St. Rep. 326; Waukegan v. Weale, 118 Ill. App. 460; Schrope v. Pioneer Tp., 111 Ia. 113, 82 N. W. 466; Hoffman v. Muscatine, 113 Ia. 332, 85 N. W. 17; Lassiter v. Norfolk etc. R. R. Co., 126 N. C. 509, 36 S. E. 48; Rice v. Norfolk etc. R. R. Co., 130 N. C. 375, 41 S. E. 1031. See Parks v. Southern Ry. Co., 143 N. C. 289, 55 S. E. 701; Jordan v. Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L.R.A. 519.

⁶⁰Dennison v. Somerset etc. R. R.

where a railroad in laying its track in a street, diverted surface water onto the plaintiff.⁶¹ But in such case the municipality is not liable.⁶²

In those States which hold the common law doctrine as to surface water, decisions will be found contrary to the foregoing statements of the law.⁶³ In Nebraska where the common law rule prevails, if a railroad company obstructs a draw or depression which forms a natural outlet for surface water it will be

Co., 21 Pa. Supr. Ct. 248; Toole v. Delaware etc. R. R. Co., 27 Pa. Supr. Ct. 577. *To same effect*, Cahill v. Baltimore, 93 Md. 233, 48 Atl. 705; Daley v. Watertown, 192 Mass. 116, 78 N. E. 143.

⁶¹Monarch Mfg. Co. v. Omaha etc. Ry. Co., 127 Ia. 511, 103 N. W. 493.

⁶²Hewett v. Canton, 182 Mass. 220, 65 N. E. 42.

⁶³Byrne v. Town of Farmington, 64 Conn. 367, 30 Atl. 138; Hannaker v. St. Paul etc. R. R. Co., 5 Dak. 1; Herring v. District of Columbia, 3 Mackey 572; New Albany & Salem R. R. Co. v. Higman, 18 Ind. 77; Cairo & Vincennes R. R. Co. v. Stevens, 73 Ind. 278, 38 Am. Rep. 139; Hill v. Cincinnati etc. R. R. Co., 109 Ind. 511; Clay v. Pittsburg etc. Ry. Co., 164 Ind. 439, 73 N. E. 904; Pohlman v. Chicago etc. Ry. Co., 131 Ia. 89, 107 N. W. 1025, 6 L.R.A.(N.S.) 146; Atchison etc. R. R. Co. v. Hammer, 22 Kan. 763, 31 Am. Rep. 216; Chicago etc. R. R. Co. v. Steck, 51 Kan. 737, 33 Pac. 601; Missouri Pac. R. R. Co. v. Renfro, 52 Kan. 237, 34 Pac. 802, 39 Am. St. Rep. 344; Parish of Concordia v. Natchez etc. R. R. Co., 44 La. An. 613, 10 So. 809; Greeley v. Me. Cent. R. R. Co. 53 Me. 200; Morrison v. Bucksport etc. R. R. Co. 67 Me. 353; Gardiner v. Camden, 86 Me. 377, 30 Atl. 13; Cassidy v. Old Colony R. R. Co., 141 Mass. 174; Tyler v. Revere, 183 Mass. 98, 66 N. E. 597; Rowe v. St. Paul etc. R. R. Co., 41 Minn. 384, 43 N. W. 76, 16 Am. St. Rep.

706, (*disapproved in* Sheehan v. Flynn, 59 Minn. 436, 61 N. W. 462, 26 L.R.A. 632); Jordan v. St. Paul etc. R. R. Co., 42 Minn. 172, 43 N. W. 849, 6 L.R.A. 573, (*criticised in* Sheehan v. Flynn, 59 Minn. 436, 61 N. W. 462, 26 L.R.A. 632); Brown v. Winona etc. R. R. Co., 53 Minn. 259, 55 N. W. 123, 39 Am. St. Rep. 603; Clark v. Hannibal & St. Joe R. R. Co., 36 Mo. 202; Rose v. St. Charles, 49 Mo. 509; Hoshier v. K. C. St. J. & C. B. R. R. Co., 60 Mo. 329; Munkres v. Same, 60 Mo. 334; Same v. Same, 72 Mo. 514; Payne v. Kansas City etc. R. R. Co., 112 Mo. 6, 20 S. W. 322, 17 L.R.A. 628; Jones v. Wabash etc. R. R. Co., 18 Mo. App. 251; St. Louis etc. R. R. Co. v. Schneider, 30 Mo. App. 620; Collier v. Chicago etc. R. R. Co., 48 Mo. App. 398; Kenney v. Kansas City etc. R. R. Co., 69 Mo. App. 569; De Lapp v. Kansas City etc. R. R. Co., 69 Mo. App. 572; Graves v. Kansas City etc. R. R. Co., 69 Mo. App. 574; Morrissey v. Chicago etc. R. R. Co., 38 Neb. 406, 56 N. W. 946; Town v. Missouri Pac. R. R. Co., 50 Neb. 769; Todd v. York Co., 72 Neb. 207, 100 N. W. 299, 66 L.R.A. 561; Wagner v. Long Island R. R. Co., 2 Hun 633; Anchor Brewing Co. v. Village of Dobbs Ferry, 84 Hun 274, 32 N. Y. Supp. 371; Willey v. Norfolk So. R. R. Co., 98 N. C. 263; Jenkins v. Wilmington & W. R. R. Co., 110 N. C. 438, 15 S. E. 193; Fleming v. Wilmington & W. R. R. Co., 115 N.

liable.⁶⁴ In addition to the cases already referred to, there are numerous others which are more particularly grounded upon negligence in constructing and maintaining insufficient culverts or ditches, or in allowing the same to become filled up and out of repair.⁶⁵ Cases in respect to damages from surface

C. 676, 20 S. E. 714; Edwards v. Charlotte etc. R. R. Co., 39 S. C. 472, 18 S. E. 58, 39 Am. St. Rep. 746, 22 L.R.A. 246; Lawton v. South Bound R. R. Co., 61 S. C. 548, 39 S. E. 752; Texas Trunk R. R. Co. v. Elam, 1 Tex. App. Civ. 201; O'Connor v. Fond du Lae, A. & P. Ry. Co., 52 Wis. 526, 38 Am. Rep. 754; Johnson v. Chicago etc. R. R. Co., 80 Wis. 641, 50 N. W. 771, 27 Am. St. Rep. 76, 14 L.R.A. 495; Wallace v. Grank Trunk R. R. Co., 16 U. C. Q. B. 551; Vanhorn v. Grand Trunk R. R. Co., 18 U. C. Q. B. 356; Crewson v. Grand Trunk R. R. Co., 27 U. C. Q. B. 68. It has been held in Massachusetts that such damages may be taken into consideration in assessing compensation under the statute. Walker v. Old Colony & Newport R. R. Co., 103 Mass. 10, 4 Am. Rep. 509.

⁶⁴Chicago etc. Ry. Co. v. Shaw, 63 Neb. 380, 88 N. W. 508, 56 L.R.A. 341; St. Joseph etc. Ry. Co. v. McCarty 3 Neb. (Unof.) 626, 92 N. W. 750.

⁶⁵St. Louis etc. R. R. Co. v. Morris, 35 Ark. 622; St. Louis etc. R. R. Co. v. Yarborough, 56 Ark. 612, 20 S. W. 515; Kansas City etc. R. R. Co. v. Cook, 57 Ark. 387, 21 S. W. 1066; Chicago etc. Ry. Co. v. McCutchen, 80 Ark. 235, 96 S. W. 1054; Macon v. Dannenberg, 113 Ga. 1111, 39 S. E. 446; Chicago etc. Ry. Co. v. Renter, 223 Ill. 387, 79 N. E. 166; Ohio etc. R. R. Co. v. Dooley, 32 Ill. App. 228; Indiana etc. R. R. Co. v. Patchett, 59 Ill. App. 251; Louisville etc. R. R. Co. v. Sparks, 12 Ind. App. 410, 40 N. E. 546; Ger-

man Theological School v. Dubuque, 64 Ia. 736; Willits v. Chicago etc. R. R. Co., 80 Ia. 531, 45 N. W. 516; Hunt v. Iowa Central R. R. Co., 86 Ia. 15, 52 N. W. 668, 41 Am. St. Rep. 473; Willits v. Chicago etc. R. R. Co., 88 Ia. 281, 55 N. W. 313, 21 Am. St. Rep. 608; Harvey v. Mason City etc. R. R. Co. 129 Ia. 465, 105 N. W. 958, 113 Am. St. Rep. 483, 3 L.R.A. (N.S.) 973; Mississippi Central R. R. Co. v. Caruth, 51 Miss. 77; Same v. Mason, 51 Miss. 234; Lincoln etc. R. R. Co. v. Sutherland, 44 Neb. 526, 62 N. W. 859; Kearney v. Themanson, 48 Neb. 74, 66 N. W. 996; Johnson v. Atlantic & St. Lawrence R. R. Co., 35 N. H. 569; Walters v. Greenleaf Johnson Lumber Co., 115 N. C. 648, 20 S. E. 718; Waldrop v. Greenwood etc. R. R. Co., 28 S. C. 157, 5 S. E. 471; Gentry v. Richmond & D. R. R. Co., 38 S. C. 284, 16 S. E. 893; Carriger v. R. R. Co., 7 Lea, 388; Sabine etc. R. R. Co. v. Brouard, 69 Tex. 617, 7 S. W. 374; Green v. Taylor etc. R. R. Co., 79 Tex. 604, 15 S. W. 685; Brouard v. Sabine etc. R. R. Co., 80 Tex. 329, 16 S. W. 30; Gulf etc. R. R. Co. v. Frederickson (Tex.) 19 S. W. 124; Galveston etc. R. R. Co., v. Ryan, 2 Tex. Civ. App. 545, 21 S. W. 1011; Texas etc. Ry. Co. v. Whitaker, 36 Tex. Civ. App. 571, 82 S. W. 1051; Taylor v. San Antonio etc. Ry. Co., 36 Tex. Civ. App. 658, 83 S. W. 738; Waterman v. C. & P. R. R. Co., 30 Vt. 610; Neal v. Ohio Riv. R. R. Co., 47 W. Va. 316, 34 S. E. 914; Alton v. Hamilton etc. R. R. Co., 13 U. C. Q. B. 595; L'Esperance v. Great Western R. R.

water, resulting from the grading and improvement of streets are referred to in the next chapter.⁶⁶

§ 113 (89a). Miscellaneous cases in regard to surface water. Where the damages are due solely to a fall of rain so extraordinary as to amount to an act of God, there is no liability.⁶⁷ A railroad company is not liable for water which comes upon the plaintiff's land from its road-way, but which is caused to accumulate or flow upon the right of way by the acts of others.⁶⁸ And where the accumulation of water causing the damage is due in part to the acts of others than the defendant, the defendant is not excused for its own part and it is held to be the province of the jury to determine what this is as best they can.⁶⁹ Where a borough turned surface water upon a township road and the township got rid of it by turning it upon plaintiff, it was held the latter had no cause of action against the borough.⁷⁰ Where a railroad company causes water to accumulate and form a stagnant pool, injurious to health, it will be liable.⁷¹ Where a city conducted water into a hole in an

Co., 14 U. C. Q. B. 187; Carron v. Great Western R. R. Co., 14 U. C. Q. B. 192; *see* Hopper v. Douglas Co., 75 Neb. 329, 106 N. W. 330.

⁶⁶*Post*, § 141, and *see* Huntsville v. Ewing, 116 Ala. 576, 22 So. 984; Downs v. Ansonia, 73 Conn. 33, 46 Atl. 243; Torrington v. Messenger, 74 Conn. 321, 50 Atl. 873; Holmes v. Atlanta, 113 Ga. 961, 39 S. E. 458; Holbrook v. Norcross, 121 Ga. 319, 48 S. E. 922; Cleveland etc. R. R. Co. v. Huddleston, 21 Ind. App. 621; Morley v. Buchanan, 124 Mich. 128, 82 N. W. 802; Dudley v. Buffalo, 73 Minn. 347, 74 N. W. 44; Schuett v. Stillwater, 80 Minn. 287, 83 N. W. 180; Harrelson v. Kansas City etc. R. R. Co., 151 Mo. 482; Flanders v. Franklin, 70 N. H. 168, 47 Atl. 88; McClosky v. Atlantic City R. R. Co., 70 N. J. L. 20, 56 Atl. 669; Sharp v. Cincinnati, 4 Ohio C. C. (N. S.) 19; O'Donnell v. White, 24 R. I. 483, 53 Atl. 633; Baltzeger v. Carolina Midland R. R. Co., 54 S. C. 242, 32 S. E. 258, 71 Am. St. Rep. 789;

Borchsenius v. Chicago etc. R. R. Co., 96 Wis. 448.

⁶⁷Philadelphia etc. R. R. Co. v. Davis, 68 Md. 281, 11 Atl. 822; Sabine etc. R. R. Co. v. Brounsard, 69 Tex. 617, 7 S. W. 374; and *see* Fick v. Pennsylvania R. R. Co., 157 Pa. St. 622, 27 Atl. 783; Sentman v. B. & O. R. R. Co., 78 Md. 222, 27 Atl. 1074.

⁶⁸Brimberry v. Savannah etc. R. R. Co., 78 Ga. 641; Burke v. Mo. Pac. R. R. Co., 29 Mo. App. 370; and *see* Felt v. Vicksburg etc. R. R. Co., 46 La. An. 549, 15 So. 177.

⁶⁹Ohio & M. R. R. Co. v. Combs, 43 Ill. App. 119; Illinois Central R. R. Co. v. Heisner, 45 Ill. App. 143.

⁷⁰West Bellevue Bor. v. Huddleston, 1 Monaghan (Pa. Supn.) 129.

⁷¹Lockett v. Ft. Worth etc. R. R. Co., 78 Tex. 211, 14 S. W. 564; and *see* Atlanta etc. R. R. Co. v. Kimberly, 87 Ga. 161, 13 S. E. 277.

alley, whence it overflowed plaintiff, it was held liable.⁷² Where a railroad intersected ditches, which took the water from the railroad ditches, to the damage of land either above or below, it was held not liable.⁷³ The fact that a ditch is built along a railroad right of way, which carries the water from adjoining lands to a stream, does not require the company to keep it open and no action will lie for allowing it to become obstructed.⁷⁴ It has been held that one who has stood by and seen a railroad embankment constructed without a culvert is estopped to complain of such defect.⁷⁵ One has no legal ground of complaint that there is caused to flow upon his land such surface water as would come thereon by nature, though it has been temporarily deflected from his land by non-natural causes.⁷⁶

In Missouri it is provided by statute that every railroad, within three months after its completion, shall "cause to be constructed and maintained suitable ditches and drains along each side of the road-bed of such railroad, to connect with ditches, drains or water courses, so as to afford sufficient outlet to drain and carry off the water along such railroad wherever the draining of such water has been obstructed or rendered necessary by the construction of such railroad."⁷⁷ A failure to comply with the statute, affords a cause of action to one damaged by such failure.⁷⁸ But the statute does not apply unless there are ditches, drains or water courses with which to connect.⁷⁹ There are similar statutes in other States.⁸⁰

§ 114 (90). Subterranean waters. In regard to water

⁷²City of New Albany v. Ray, 3 Ind. App. 321, 29 N. E. 611.

⁷³Bell v. Norfolk So. R. R. Co., 101 N. C. 21, 7 S. E. 467; Willey v. Norfolk So. R. R. Co., 98 N. C. 263.

⁷⁴Louisville etc. R. R. Co. v. McAfee, 30 Ind. 291.

⁷⁵Payne v. Morgan's R. R. Co., 43 La. An. 981, 10 So. 10.

⁷⁶Avery v. Police Jury, 12 La. An. 554; Whitney v. Willamette Bridge R. R. Co., 23 Or. 188, 31 Pac. 472; Felt v. Vicksburg etc. R. R. Co., 46 La. An. 549, 15 So. 177; Inhabitants of Hamilton v. Wainwright, 52 N. J. Eq. 419, 29 Atl. 200; King v. C. B. & Q. R. R. Co., 71 Ia. 696.

⁷⁷Mo. R. S. § 810; Byrne v. Keo-

kuk etc. R. R. Co., 47 Mo. App. 383; Clark v. Dyer, 81 Tex. 339, 16 S. W. 1061.

⁷⁸Cox v. Hannibal etc. R. R. Co., 174 Mo. 588, 74 S. W. 854; Byrne v. Keokuk etc. R. R. Co., 47 Mo. App. 383; Williamson v. Missouri etc. Ry. Co., 115 Mo. App. 72, 90 S. W. 401; Gebhardt v. St. Louis etc. R. R. Co., 122 Mo. App. 503, 99 S. W. 773; Cooper v. St. Louis etc. R. R. Co., 123 Mo. App. 141, 100 S. W. 494.

⁷⁹Field v. Chicago etc. R. R. Co., 21 Mo. App. 600.

⁸⁰See Clark v. Dyer, 81 Tex. 339, 16 S. W. Rep. 1061.

which permeates the soil but is not collected in any stream under ground, the prevailing doctrine is that the owner of the soil may use or divert it as he sees proper, provided, of course, that he does not turn it upon others in an unreasonable manner, to their injury.⁸¹ Accordingly, where the construction of a railroad resulted in draining off a tract of low, marshy ground which had served as a sort of reservoir for the plaintiff's mill, so that in dry times the supply was insufficient and in times of rain too great, it was held that the plaintiff had no cause of action.⁸² And where a railroad company has appropriated a stream of water fed by a spring on another's land, it cannot prevent the owner of such land from digging trenches for the improvement of his own land, though the effect will be to divert the percolating waters which supply the spring.⁸³ Where a well, dug by a railroad on its own land, destroyed a spring on the plaintiff's land, it was held there was no liability.⁸⁴ So where a spring was destroyed by the construction of a sewer in a public street;⁸⁵ also where plaintiff's well was drained by a tunnel built by a railroad on its right of way.⁸⁶

⁸¹Acton v. Blundell, 12 M. & W. 324; Chasemore v. Richards, 7 H. L. Cas. 349; 5 H. & N. 982; 2 H. & N. 168; Rawston v. Taylor, 11 Exch. 367; Bradford v. Pickle, (1895) A. C. 587; Gould v. Eaton, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201; Roath v. Driscoll, 20 Conn. 533; Tampa W. W. Co. v. Cline, 37 Fla. 586, 20 So. 780, 53 Am. St. Rep. 262, 33 L.R.A. 376; Edwards v. Haeger, 180 Ill. 99; Greenleaf v. Francis, 18 Pick. 117; Ocean Grove Camp Meeting Association v. Asbury Park, 40 N. J. Eq. 447; Elster v. City of Springfield, 49 Ohio St. 82, 30 N. E. 274; Metcalf v. Nelson, 8 S. D. 87, 65 N. W. 911, 59 Am. St. Rep. 746; Deadwood Cent. R. R. Co. v. Barker, 14 S. D. 558, 86 N. W. 619; Willow Creek Irr. Co. v. Michaelson, 21 Utah, 248, 60 Pac. 943, 81 Am. St. Rep. 687, 51 L.R.A. 280; Harriman Irr. Co. v. Keel, 25 Utah, 96, 69 Pac. 719; Miller v. Black Rock Springs Imp. Co., 99 Va. 747, 40 S. E. 27, 86 Am. St. Rep. 924; Meyer v. Em. D.—11.

Tacoma L. & W. Co., 8 Wash. 144, 35 Pac. 601; Wood on Nuisances (1st ed.) § 383; Washburn on Easements, pp. 452-457; Gould on Waters, § 280.

⁸²Waffle v. New York Central R. R. Co., 58 Barb. 413; S. C. *affirmed* 53 N. Y. 11; Regina v. Metropolitan Board of Works, 3 B. & S. 710; Thayer v. Brooks, 17 Ohio 489, 49 Am. Dec. 474.

⁸³Southern Pac. R. R. Co. v. Dufour, 95 Cal. 615, 30 Pac. 783.

⁸⁴Hougan v. Milwaukee & St. Paul Ry. Co., 35 Ia. 558, 14 Am. Rep. 502; Aldrich v. Cheshire R. R. Co., 21 N. H. 359, 53 Am. Dec. 212; and see Lybe's Appeal, 106 Pa. St. 626, 51 Am. Rep. 542 and Roath v. Driscoll, 20 Conn. 532; Ocean Grove Camp Meeting Association v. Asbury Park, 40 N. J. Eq. 447.

⁸⁵Elster v. City of Springfield, 49 Ohio St. 82, 30 N. E. 274; Stanton v. Metropolitan B'd of Works, 26 L. J. Ch. 300.

⁸⁶Galgay v. Great Southern R. R.

Many of the cases referred to assert the absolute ownership of the proprietor of the soil in the waters percolating therein and the absolute right of such proprietor to dispose of such waters or to make any use of his land, regardless of the effect upon the subterranean waters in his neighbor's land.⁸⁷ But this rule is undergoing modification and the doctrine of reasonable use or of correlative rights and duties, is being applied with respect to such waters. In Pennsylvania it has been held that the reason of the rule of nonliability for drawing off or interfering with subterranean waters, is that the damage could not be foreseen or avoided and that when the reason fails the rule does not apply. Thus a natural gas company in boring a well encountered salt water in one of the lower strata, which rose in the well, found its way through the upper rock formation and destroyed the neighboring wells. The existence of the salt water in the lower stratum, the geological formation in the vicinity which permitted the spread of the salt water and the probable consequences were all well known and the damage could have been prevented by a small outlay. The company was held liable.⁸⁸ And many cases now support the doctrine that one proprietor may not unreasonably interfere with subterranean waters to the damage of his neighbor and, accordingly, that he may not wantonly or maliciously waste the water or merchandise it to the detriment of other proprietors.⁸⁹

Co., 4 I. C. L. R. 456. *To same effect*, Deadwood Cent. R. R. Co. v. Barker, 14 S. D. 558, 86 N. W. 619; Harriman Irr. Co. v. Keel, 25 Utah 96, 69 Pac. 719. But in Sheldon v. Boston etc. R. R. Co., 172 Mass. 180, 57 N. E. 1078, where a railroad in making a deep cut on its own land drained the plaintiff's well, it was held liable.

⁸⁷In addition to cases already cited see Houston etc. R. R. Co. v. East, 98 Tex. 146, 81 S. W. 279, 107 Am. St. Rep. 620, 66 L.R.A. 738; Huber v. Merkel, 117 Wis. 355, 94 N. W. 354, 98 Am. St. Rep. 933, 62 L.R.A. 589.

⁸⁸Collins v. Chartiers Valley Gas Co., 131 Pa. St. 143, 18 Atl. 1012, 17 Am. St. Rep. 791, 6 L.R.A. 280;

Same v. Same, 139 Pa. St. 111, 21 Atl. 147.

⁸⁹Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 99 Am. St. Rep. 35, 64 L.R.A. 236; Verdugo Cañon Water Co. v. Verdugo, 152 Cal. 655, 93 Pac. 1021; Ex parte Elam, 6 Cal. App. 233; Gagnon v. French Lick Springs Hotel Co., 163 Ind. 687, 72 N. E. 849; Barclay v. Abraham, 121 Ia. 619, 96 N. W. 108, 100 Am. St. Rep. 365, 64 L.R.A. 265; Aberdeen v. Bradford, 94 Md. 670, 51 Atl. 614; Stillwater Water Co. v. Farmer, 89 Minn. 58, 93 N. W. 907, 99 Am. St. Rep. 541, 66 L.R.A. 875; Erickson v. Crookston W. W. P. & L. Co., 100 Minn. 481, 111 N. W. 391, 8 L.R.A. (N.S.) 1250; S. C. 105 Minn. 182, 117 N. W. 435; Springfield W. W.

Where a city obtained a part of its water supply from wells upon its own land, to which a powerful suction was applied by means of pumps and machinery, and the effect was to destroy a stream and spring on the plaintiff's land half a mile away, the city was held liable.⁹⁰ So where the plaintiff's land was rendered valueless for agricultural purposes by the withdrawal of the underground water in the same manner and for the same purpose.⁹¹ And where a city obtained its water supply from artesian wells by pumping and thereby the water level in many other artesian wells was lowered beyond the point where they could be pumped by hand, the doctrine of correlative rights was applied, and the liability of the water company was held to depend upon whether its use was reasonable in view of all the conditions and this was held to be a question of fact to be determined from the evidence.⁹² But in Texas, where a railroad company dug a well upon lots which it owned in fee simple and

Co. v. Jenkins, 62 Mo. App. 74; *Smith v. Brooklyn*, 160 N. Y. 357, 54 N. E. 787, 45 L.R.A. 664; *Forbell v. New York*, 164 N. Y. 522, 58 N. E. 644, 79 Am. St. Rep. 666, 51 L.R.A. 695; *Reisert v. New York*, 174 N. Y. 196, 66 N. E. 731, reversing S. C. 69 App. Div. 302, 74 N. Y. S. 673; *Westphal v. New York*, 177 N. Y. 140, 69 N. E. 369; *Hathorn v. Strong's S. S. Sanitarium*, 55 Misc. 445, 106 N. Y. S. 553; *Miller v. Black Rock etc. Co.*, 99 Va. 747, 40 S. E. 27,

In *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 663, 99 Am. St. Rep. 35, 64 L.R.A. 236, it is said that the right of each proprietor is limited "to such amount of water as may be necessary for some useful purpose in connection with the land from which it is taken."

⁹⁰*Smith v. Brooklyn*, 160 N. Y. 357, 54 N. E. 787, 45 L.R.A. 664, affirming S. C. 32 App. Div. 257; *Smith v. Brooklyn*, 18 App. Div. 340; and see *Hollingsworth & V. Co. v. Foxborough Water Supply Dist.*, 165 Mass. 186, 42 N. E. Rep. 574; *Merrick Water Co. v. Brooklyn*, 32

App. Div. N. Y. 454; *Forbell v. New York*, 27 N. Y. Misc. 12.

⁹¹*Forbell v. New York*, 164 N. Y. 522, 58 N. E. 644, 79 Am. St. Rep. 666, 51 L.R.A. 695; *Reisert v. New York*, 174 N. Y. 196, 66 N. E. 731, reversing S. C. 69 App. Div. 302, 74 N. Y. S. 673; *Westphal v. New York*, 177 N. Y. 140, 69 N. E. 369, affirming S. C. 75 App. Div. 252, 78 N. Y. S. 56.

⁹²*Erickson v. Crookston W. W. P. & L. Co.*, 100 Minn. 481, 111 N. W. 391, 8 L.R.A.(N.S.) 1250; S. C. 105 Minn. 182, 117 N. W. 435. To same effect, *Aberdeen v. Bradford*, 94 Md. 670, 51 Atl. 614. In the first case the court says:—

"The English rule was of necessity based upon the geological conditions affecting water supply as they existed in England. The reasons for the rule lay in deductions from essentially absolute private rights in land, and also largely in the conception of a sound public policy applicable to these conditions. It was thought that the recognition of correlative rights in subterranean waters would work mischievous re-

by a steam pump took therefrom twenty-five thousand gallons daily to supply its engines and shops, and thereby drained the plaintiff's well, it was held there was no liability and the old rule as to subterranean waters was fully recognized.⁹³

Where an act of Congress for the construction of a tunnel to supply the city of Washington with water provided for compensation to any person injured in any property right thereby, it was held that a claim for damages by the draining of a well five hundred feet away was within the act.⁹⁴ Where the waters of a stream sink into the ground and become percolating water, the same rule applies thereto as to other percolating waters, and the owner of the soil may divert them without liability.⁹⁵ But percolating waters adjacent to a stream and moving in the same direction may constitute a part of the stream.⁹⁶ In regard

sults in curtailing improvements upon land, would burden its use with liabilities which would render the exercise of legal rights extremely hazardous, and would result in a rule which would be too indefinite in itself and which the landowner would not be able to satisfactorily enforce. * * * Nothing is better settled than that the fundamental principles of right and justice on which the common law is founded, and which its administration is intended to promote, require that a different rule should be adopted whenever it is found that, owing to the physical features and character of a state, and the peculiarities of its climate, soil, products and water supply, the application of a common law rule tends constantly to cause injustice and wrong, rather than the administration of justice and right."
p. 484. In *Clarke Co. v. Miss. Lumber Co.*, 80 Miss. 535, 31 So. 905, the lumber company pumped artesian wells on its own land to form a basin for the storage of logs for its mill. The effect was to lower other artesian wells in the vicinity and greatly to impair their value. It was held that the company had

a right to so use the water upon the land from which it was taken, in the business there carried on by the owner. *See Mead v. Melitte*, 18 S. D. 523, 101 N. W. 355.

⁹³*Houston etc. R. R. Co. v. East*, 98 Tex. 146, 81 S. W. 279, 107 Am. St. Rep. 620, 66 L.R.A. 738. A statute making it a penal offense to waste natural gas was held valid in Indiana. *Townsend v. State*, 147 Ind. 624, 47 N. E. 19; *State v. Ohio Oil Co.* 150 Ind. 21, 49 N. E. 809; *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 22 S. C. 576. But a similar statute as to wasting water from artesian wells was held void in Wisconsin. *Huber v. Merkel*, 117 Wis. 355, 94 N. W. 354, 98 Am. St. Rep. 933, 62 L.R.A. 589.

⁹⁴*United States v. Alexander*, 148 U. S. 186, 13 S. C. 527. So under a statute rendering a city liable for "damages occasioned by the laying, making or maintaining" of a sewer, it was held liable for draining a well on adjoining land. *Trowbridge v. Brookline*, 144 Mass. 139.

⁹⁵*Meyer v. Tacoma L. & W. Co.*, 8 Wash. 144, 35 Pac. 601.

⁹⁶*Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585.

to subterranean streams, there is much confusion among the authorities as to the rights of the owner of the soil. The better opinion, perhaps, is, that the same rules apply to them as to percolating waters.⁹⁷ Some confusion exists in regard to the pollution of water coursing in subterranean streams or percolating through the ground.⁹⁸ It seems to us, however, that the better doctrine is, that one has no more right to send impurities into the soil below the surface than he has into the air above the surface. One who creates or permits noxious and offensive substances upon his premises ought to take care that they do not escape either in a fluid or gaseous form into or upon his neighbor's land.⁹⁹ The owner of land has a right not to be

⁹⁷Lybe's Appeal, 106 Pa. St. 626; Smith v. Adams, 6 Paige 435; Wheatley v. Baugh, 25 Pa. St. 528; Dickinson v. Grand Junction Canal Co., 7 Exch. 282; Acton v. Blundell, 12 M. & W. 324; Roath v. Driscoll, 20 Conn. 532; Brown v. Illius, 25 Conn. 583; Hale v. McLea, 53 Cal. 578; Haldeman v. Brueckhart, 45 Pa. St. 514, 84 Am. Dec. 511; Angell on Watercourses, pp. 150-159; Washburn on Easements, pp. 441-448; Gould on Waters, § 281. In a recent case the Supreme Court of Florida in its syllabus states the law as follows: "The owner of land through which subsurface water, without any distinct, definite, and known channel, percolates or filters through the soil to that of an adjoining owner, is not prohibited from digging into his own soil, and appropriating water found there to any legitimate purposes of his own, though, by so doing, the water may be entirely diverted from the land to which it would otherwise naturally have passed; but, if subterranean water has assumed the proportions of a stream flowing in a well-defined channel, the owner of the land through which it flows will not be authorized to divert it, pollute it, or improperly use it, any more than if the stream ran upon the surface

in a well-defined course." Tampa Water Works Co. v. Cline, 37 Fla. 586, 20 So. 780, 53 Am. St. Rep. 262; 33 L.R.A. 376. *And see* Willis v. Perry, 92 Ia. 297, 60 N. W. 727; Washington Co. Water Co. v. Gardner, 91 Md. 398, 46 Atl. 979. Any interference with rights in subterranean streams by authority of law for public use would be a taking.

⁹⁸Hodgkinson v. Ennor, 4 B. & S. 229; Womersley v. Church, 17 L. T. Rep. N. S. 190; Brown v. Illius, 25 Conn. 583; Greencastle v. Hazelett, 23 Ind. 186; Sherman v. Fall River Iron Works Co., 5 Allen 213. In Greencastle v. Hazelett, a bill was filed to enjoin the City of Greencastle from establishing a cemetery on a certain lot, on the ground that it would corrupt the waters of a valuable spring on plaintiff's land. The court held the city was the owner of the subterranean streams of its own land and would not be liable for any damages resulting in the manner alleged in the bill. But a different view was taken by the court in a similar case in Clark v. Lawrence, 6 Jones Eq. 83, 78 Am. Dec. 241.

⁹⁹Ballard v. Tomlinson, L. R. 29 Ch. Div. 115, reversing S. C. 26 L. R. Ch. Div. 194; Snow v. Whitehead, 27 L. R. Ch. Div. 588; Sherman v.

injured in this manner, and an interference with this right would be a taking, if done under the power of eminent domain.¹

§ 115 (91). Interference with natural barriers against water. The owner of land has a right to the protection afforded by natural barriers against the overflow of streams and ponds or the action of waves and tides.² When this right is violated in the exercise of the right of eminent domain, and damage ensues, the owner is entitled to compensation. The leading case upon this question is *Eaton v. B. M. & C. R. R. Co.*, 51 N. H. 504, which has already been given at length in the preceding chapter.³ Similar decisions have been made in

Fall River Iron Works, 5 Allen 213; *Brown v. Illius*, 25 Conn. 583; *Ottawa Gas Light Co. v. Graham*, 28 Ill. 73, 81 Am. Dec. 263; *Pensacola Gas Co. v. Pebley*, 25 Fla. 381, 5 So. 593; *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257; *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 59 N. W. 925; *Anheuser-Busch Brewing Ass. v. Peterson*, 41 Neb. 893, 60 N. W. 375.

¹The City of Boston, in order to remove a nuisance, caused by the discharge of a sewer into a pond, was authorized to construct such canals, basins, tanks, etc., as were necessary to cleanse the pond and water flowing in the sewer, and to take land therefor. The city took land and constructed works which injured the plaintiff's wells by percolation. It was held that the act did not authorize the nuisance and that the city was liable in tort for the injury. *Bacon v. Boston*, 154 Mass. 100, 28 N. E. 9. It would follow that if the legislature had authorized the works, as constructed, the damage would have been a taking. *Davis v. Fry*, 14 Okl. 340, 78 Pac. 180, 69 L.R.A. 460; *Brandenberg v. Zeigler*, 62 S. C. 18, 39 S. E. 790, 89 Am. St. Rep. 887, 55 L.R.A. 414; *Attorney General v. Tomline*, 12 L. R. Ch. Div. 214, 48 L. J. Ch. Div. 593; *S. C. on appeal*, 14 L. R. Ch. Div. 58, 49 L. J. Ch. Div. 377.

In the latter case Cotton L. J. states the case as follows (14 L. R. Ch. Div. p. 68): "The plaintiff's land is situated a short distance from the sea, and the only land intervening between the plaintiff's land and the sea is the land of the defendant, and the complaint is that the defendant is so dealing with that land, by removing the shingle which constitutes the whole of the surface of that land, that the sea will at a time which cannot positively be stated, but within a reasonable time, undermine and destroy the land and the building of the plaintiff upon his land. * * * Then the question which we have to consider is this, whether or no that prospective or apprehended injury to the land of the plaintiff is one, which, if done, would be actionable, and one which the court ought to restrain by injunction. I am of opinion that it is." And the case was so determined in both courts. *Compare Aldritt v. Fleischauer*, 74 Neb. 66, 103 N. W. 1084; *Shaw v. Ward*, 131 Wis. 646, 111 N. W. 671.

²*Eaton v. Railroad Co.*, 51 N. H. 504, 12 Am. Rep. 147; *Murray v. Pannaci*, 64 N. J. Eq. 147, 53 Atl. 595; *Robinson v. New York etc. R. R. Co.*, 27 Barb. 512.

³*Ante*, § 67.

New York,⁴ and Illinois.⁵ A railroad company cut a channel through the watershed between two streams, whereby the water from one flowed into the other and caused the latter to overflow its banks, and flood the plaintiff's land. The company was held liable.⁶ In another case a county laid out a road across a lake and, instead of bridging the lake, cut through its banks and drained off the water which found its way to the plaintiff's land seven miles away and flooded and impaired its value. It was held that the plaintiff's property was taken and the county liable.⁷ But there is no right to the maintenance of an artificial barrier, such as a railroad embankment, and parties who are protected by such an embankment, have no legal ground of complaint, because openings are made therein which let in the tide.⁸

In this connection we call attention to an important case which arose in Milwaukee, and which seems to us to have been wrongly decided.⁹ The plaintiff owned lots on the Milwaukee River, near Lake Michigan, upon which he had valuable improvements. The city, under authority of a special act of the legislature, made an artificial channel, 260 feet wide and twelve or fourteen feet deep, from a point near the plaintiff's property to the lake. In consequence of this opening, when the winds were from the east, the waters of the lake were driven in upon the plaintiff's property, producing very serious loss and damage. A recovery was denied, on the ground that a municipal corporation, making a great public improvement, solely for the public benefit, in the precise way authorized by the legislature and in

⁴Brown v. Cayuga & Susquehanna R. R. Co., 12 N. Y. 486; Robinson v. N. Y. & E. R. R. Co., 27 Barb. 512. In the latter case the court say: "The excavation and removal of the banks of the stream left the water to flow out of the natural channel of the creek and to overflow the plaintiff's premises. And this overflow the jury have found would not have happened but for such alteration and excavation of the natural banks of the stream. For the damages resulting from such alteration and excavation, I think this action clearly maintainable."

⁵Graham v. Keene, 143 Ill. 425, 32 N. E. 180; Baker v. Leka, 48 Ill. App. 353; Dierks v. Comrs. of Highways, 142 Ill. 197, 31 N. E. 496; Hotz v. Hoyt, 34 Ill. App. 488; and see Gulf etc. R. R. Co. v. Jones, 63 Tex. 524; Hocutt v. Wilmington etc. R. R. Co., 124 N. C. 214.

⁶Craft v. Norfolk etc. R. R. Co., 136 N. C. 49, 48 S. E. 519.

⁷Wendel v. Spokane Co., 27 Wash. 121, 67 Pac. 576.

⁸Koch v. Del. L. & W. R. R. Co., 53 N. J. L. 256, 21 Atl. 284.

⁹Alexander v. Milwaukee, 16 Wis. 247.

a careful and discreet manner, was not liable for consequential damages resulting to private property therefrom. A distinction was taken between a public corporation acting for the public benefit and a private corporation executing a public work for the sake of private emolument. It was virtually conceded that if the cut had been made by an individual upon his private property for his own use, he would have been liable. But on what grounds would he have been liable? Clearly on the ground that the plaintiff had a right to have the natural barrier between his property and the lake remain in the condition in which nature had placed it. The legislature could not authorize this right to be taken from him by a public or private corporation, for any purpose, without compensation.¹⁰

§ 116 (91a). Miscellaneous cases as to waters. A railroad company constructed its road along the banks of a stream. The soil washed into the stream from the embankment and was carried down and filled up plaintiff's mill pond. Held that the company was not liable.¹¹ Where a natural stream was diverted into a highway by the plaintiff, acting as overseer of highways, where it ran for a number of years, and was then turned back into its old channel, it was held the plaintiff had no ground of complaint.¹² Under the guise of removing obstructions from a small non-navigable stream, a city cannot widen the stream and take the property of the riparian owner without compensation.¹³ If a railroad company, without authority, removes a levee and builds a new one, which gives way, it will be liable for the resulting damages.¹⁴ Where commissioners authorized to widen, straighten and deepen a stream, through a city for drainage purposes, adopt a culvert put in by the city, which proves insufficient to vent the increased flow, the city will not be liable

¹⁰The correctness of this decision has been questioned. *See Pumelly v. Green Bay Co.*, 13 Wall. 166, 180; *Arimond v. Green Bay Co.*, 31 Wis. 316.

¹¹*Trinity etc. R. R. Co. v. Meadows*, 73 Tex. 32, 11 S. W. 145. It seems to be implied in *Salisbury v. Western N. C. R. R. Co.*, 91 N. C. 490, which was a similar case, that the plaintiff could recover. *See also Middlesex County v. McCue*,

149 Mass. 103, 21 N. E. 230, 14 Am. St. Rep. 402; *Miller v. New York etc. R. R. Co.*, 125 N. Y. 118, 26 N. E. 35; *Caldwell v. East Broad Top R. R. Co.*, 169 Pa. St. 99, 32 Atl. 85.

¹²*Kellogg v. Thompson*, 66 N. Y. 88.

¹³*City of Schenectady v. Furman*, 61 Hun 171, 39 N. Y. St. 975.

¹⁴*Hotard v. Texas & P. R. R. Co.*, 36 La. An. 450.

for damages to property flooded thereby.¹⁵ Where a town bridge was destroyed by a dam, it was held that the town could maintain an action for the damage.¹⁶ Where the outlet to a lake was deepened and the flow increased and so continued for twenty-four years it was held that it should be regarded the same as though the condition and flow were natural and that the same could not be interfered with for public use without compensation.¹⁷ A city has no right to change the course of a natural stream and cause it to run in a public street and thereby interfere with access to abutting property.¹⁸ Where a railroad company created a stagnant pool upon its right of way it was held liable for the nuisance.¹⁹ When a railroad embankment was built across a depression in the bank of a river which prevented flood waters from reaching plaintiff, it was held there was no liability.²⁰

The United States may prevent such interference by a State with the sources or tributaries of a navigable stream as will impair or destroy its navigability.²¹ Riparian rights in a stream are not affected by State lines.²² And where the diversion or obstruction of a stream in one State affects lands or riparian rights in another State, the parties injured may have the appropriate remedies.²³ It is held that one State cannot authorize an injury to lands or riparian rights in another State.²⁴ One State may prevent the diversion of water to another State,²⁵ and may sue in the federal supreme court to prevent the unreason-

¹⁵Cochrane v. City of Malden, 152 Mass. 365, 25 N. E. 620. *See also* Kansas City v. Brady, 52 Kan. 297, 34 Pac. 884, 39 Am. St. Rep. 349.

¹⁶Hooksett v. Amoskeag Mfg. Co., 44 N. H. 105.

¹⁷Lakeside Paper Co. v. State, 15 App. Div. N. Y. 169. *See also* Strobel v. Bor. of Ephrota, 178 Pa. St. 50, 35 Atl. 713.

¹⁸Guerkink v. Petaluma, 112 Cal. 306, 44 Pac. 570. *See* Thibodaux v. Town of Thibodaux, 46 La. An. 1528, 16 So. 450.

¹⁹Savannah etc. Ry. Co. v. Pavish, 117 Ga. 893, 45 S. E. 280.

²⁰Singleton v. Atchison etc. Ry. Co., 67 Kan. 284, 72 Pac. 786.

²¹United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690.

²²Hoge v. Eaton, 135 Fed. 441.

²³Vyse v. Chicago etc. R. R. Co., 126 Ia. 90, 101 N. W. 736; Pine v. New York, 103 Fed. 337; S. C. affirmed, Pine v. New York, 112 Fed. 98, 50 C. C. A. 145; New York v. Pine, 185 U. S. 93, 22 S. C. 592; Hoge v. Eaton, 135 Fed. 441.

²⁴Same; Octoraro Water Co.'s Petition, 15 Pa. Dist. Ct. 767.

²⁵McCarter v. Hudson Co. Water Co., 70 N. J. Eq. 595, 65 Atl. 489,

able diversion or pollution of an inter-state stream under the laws of another State.²⁶

118 Am. St. Rep. 754, *affirming* S. C. 70 N. J. Eq. 525, 61 Atl. 710; Henderson Co. Water Co. v. McCarter, 209 U. S. 349.

²⁶Kansas v. Colorado, 185 U. S.

125, 22 S. C. 552; Same v. Same, 206 U. S. 46, 27 S. C. 655; Missouri v. Illinois, 180 U. S. 208, 21 S. C. 418; Missouri v. Illinois, 200 U. S. 496, 26 S. C. 268.

CHAPTER V.

WHAT CONSTITUTES A TAKING: ROADS AND STREETS.

I.—GENERAL QUESTIONS.—RIGHTS OF ABUTTING OWNERS.

§ 117 (91b). Nomenclature of public ways. It is the design of the present chapter to consider what injury or damage to abutting property by the use or improvement of the public way on which it abuts amounts to a *taking* within the meaning of the constitution. Under "roads and streets" all sorts of public ways by land are intended to be included, whether designated as a highway, road, street, alley, lane, place or boulevard. The word "street" is ordinarily applied to a public way in a city, town or village,¹ and the word "road" to a free public way in the country.² The word "highway" is often used as synonymous with either, though it has a much more comprehensive meaning, being applied to rivers, canals, lakes and railroads, as well as to roads and streets.³ But the word "street" is frequently applied to a public way in the country and the word "road" to a public way in a city or village, and we shall use the words road, street, and highway, as substantially synonymous. None of the terms applied to public ways, indicate anything definite as to the rights of either the abutting owner or the public.

§ 118 (91c). Distinctions between rural highways and urban streets as to the extent of the public right or easement. Many cases assert a broad distinction between the ex-

¹Elliott, Roads and Streets, p. 12; State v. Comrs. of Putnam Co., 23 Fla. 632, 3 So. 164; Commissioners v. City of Jacksonville, 36 Fla. 196, 18 So. 339.

²Elliott, Roads and Streets, pp. 4, 5. In Pennsylvania R. R. Co. v. Montgomery Co. Pass. R. R. Co., 14 Pa. Co. Ct. 88, street and road are said to be synonymous. So as to street and highway. Case of Road etc., 4 S. & R. 106.

³"The term highway," says Bouvier, "is the generic name for all kinds of public ways, whether they be carriage-ways, bridle-ways, foot-ways, bridges, turnpike roads, railroads, canals, ferries or navigable rivers." Bouvier's Dict., Tit. highway. So also Elliott, Roads and Streets, p. 1.

tent of the public right or easement in city streets and its extent in country highways.⁴ In one of the cases cited, it is said that "there is a wide distinction between a highway in the country and a street in a city or village as to the mode and extent of the enjoyment, and, as a sequence, in the extent of the servitude in the land upon which they are located. The country highway is needed only for the purpose of passing and repassing, and, as a general rule, to which there are a few needed exceptions, the right of the public and of the authorities in charge is confined to the use of the surface, with such rights incidental thereto as are essential to such use. In the case of streets in a city there are other and further uses, such as the construction of sewers and drains, laying of gas and water pipes, erection of telegraph and telephone wires, and a variety of other improvements, beneath, upon and above the surface, to which in modern times urban streets have been subjected. These urban servitudes are essential to the enjoyment of streets in cities, and to the comfort

⁴This distinction is particularly discussed or emphasized in the following cases: Western R. R. of Ala. v. Ala. G. T. R. R. Co., 96 Ala. 272, 11 So. 483, 17 L.R.A. 474; Montgomery v. Santa Ana & W. R. R. Co., 104 Cal. 186, 37 Pac. 786, 43 Am. St. Rep. 89, 25 L.R.A. 654; 10 Am. R. R. & Corp. Rep. 25; Kincaid v. Indianapolis Nat'l Gas Co., 124 Ind. 577, 24 N. E. 1066, 19 Am. St. Rep. 113, 8 L.R.A. 602, 3 Am. R. R. & Corp. Rep. 1; Lostutter v. City of Aurora, 126 Ind. 436, 26 N. E. 184, 12 L.R.A. 259; Chesapeake & O. Tel. Co. v. Mackenzie, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219; Baltimore Co. W. & Elec. Co. v. Baltimore Co., 105 Md. 154, 66 Atl. 34; Baltimore Co. W. & Elec. Co. v. Dubreuil, 105 Md. 424, 66 Atl. 439; Van Brunt v. Town of Flatbush, 128 N. Y. 50, 27 N. E. 973; S. C. 59 Hun 192, 37 N. Y. St. 200, 13 N. Y. Supp. 545; Eels v. Am. Tel. & Tel. Co., 143 N. Y. 133, 38 N. E. 202, 25 L.R.A. 640, 10 Am. R. & Corp. Rep. 69; Witcher v. Hol-

land W. W. Co., 66 Hun 619, 20 N. Y. Supp. 560; Lockhart v. Railway Co., 139 Pa. St. 319, 21 Atl. 26; Wood v. McGrath, 150 Pa. St. 451, 24 Atl. 682, 16 L.R.A. 715; McDevitt v. Peoples' Nat'l Gas Co., 160 Pa. St. 367, 28 Atl. 948; Pennsylvania R. R. Co. v. Montgomery Co. Pass. R. R. Co., 167 Pa. St. 62, 31 Atl. 468, 46 Am. St. Rep. 659, 27 L.R.A. 766, reversing S. C. 14 Pa. Co. Ct. 88, 3 Pa. Dist. Ct. 58; Elliott, Roads. and Streets, 299 *et seq.*; Zehren v. Milwaukee Elec. R. & L. Co., 99 Wis. 83, 67 Am. St. Rep. 844. Other cases cited in support of the distinction are the following: Bloomfield etc. Gas Co. v. Calkins, 62 N. Y. 386; Gas Light Co. v. Richardson, 63 Barb. 437; Sterling's Appeal, 111 Pa. St. 35, 2 Atl. 105; Sampf's Appeal, 116 Pa. St. 33, 8 Atl. 865; Long v. Wilson, 119 Ia. 267, 93 N. W. 282, 97 Am. St. Rep. 315, 60 L.R.A. 720; Farmer v. Myles, 106 La. 333, 30 So. 858; Murray v. Gibson, 21 Ill. App. 488; Indianapolis etc. R. R. Co. v. Hartley, 67 Ill.

of citizens in their more densely populated limits.”⁵ Similar views are expressed in the other cases. But it may be doubted whether the public right or easement is any different in its legal essence, though there may be a difference in its practical exercise. The legitimate use of a public way is necessarily much greater in the city than in the country, but what constitutes a legitimate use would seem to present the same question whether it concerns a city street or a country road. There are now many city streets which were once country roads, but there does not seem to be any doubt but what they are subject to the same uses and servitudes as streets newly established.⁶ According to Mr. Elliott the moment a country road is brought within the jurisdiction of a town or city, the public easement forthwith becomes enlarged and extended by operation of law.⁷ If this is so, then something has been subtracted from the private property of the abutting owner and added to the public ease-

439; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453.

⁵*Montgomery v. Santa Ana & W. R. R. Co.*, 104 Cal. 186, 37 Pac. Rep. 786, 43 Am. St. Rep. 89, 25 L.R.A. 654, 10 Am. R. R. & Corp. Rep. 25.

⁶In *Town of Palatine v. Kreuger*, 121 Ill. 72, the defendant was prosecuted under an ordinance which forbade the removal of dirt or earth from any of the streets of the town. The defendant removed the earth under the direction of the owner of the fee and relied upon the rights of such owner as a defense. The street in question was laid out by road commissioners before the town was incorporated, that is, while the town was a rural community. The town was incorporated by a special charter which gave it the usual powers of a city or village over its streets. The court held that upon the incorporation of the town the public at once acquired the right to the enlarged use and control of streets, usually accorded to cities and villages, and that the town had the same power over the street as though it had been laid out after

incorporation. The court says: “Smith street, as appears from the stipulation, was originally a public highway laid out by the road commissioners of the town of Palatine, but when the town was incorporated the highway became a street of the incorporated town, and it is to be treated in the same way as a street laid out by the authorities of the incorporated town, and the rights and obligations of the defendant, and the rights of the public in reference to the street, are the same as if it had been so laid out by the town after it became incorporated.” p. 72. In *Heiple v. East Portland*, 13 Or. 97, it is intimated that the legislature could change a country road to a city street with all the usual incidents by a simple enactment. See also *Smith v. Goldsboro*, 121 N. C. 350; *Baltimore Co. W. & Elec. Co. v. Dubreuil*, 105 Md. 424, 66 Atl. 439.

⁷“There is some conflict in the cases as to whether the erection of a municipal corporation does of itself oust the jurisdiction of the county or township officers over existing highways. Our opinion is that

ment, without compensation. This is clearly contrary to the constitution and, therefore, cannot be the correct view. The public can no more take, without compensation, an easement for the urban uses of highways, than it can take, without compensation, an easement for the rural uses of highways. It follows, either that the public must have a very limited control and easement in country roads after they become city streets, or else that the easement is the same in both cases, and that the same principles are to be applied to both in determining what is a legitimate use. The latter seems to us the correct view, and the public easement may be defined as the right to use and improve the way for highway purposes as the public needs demand.⁸ The

as soon as a town or city is incorporated, the public ways, that is, ways belonging to the public and not owned by private corporations, come within the jurisdiction and control of the new public corporation, unless the statute expressly or impliedly continues the authority of the county or township officers. It is apparent that the ways must of necessity change character and the servitude be much extended. This extension carries with it wider duties and greater liabilities, thus requiring an essentially different control and care." Elliott, Roads and Streets, pp. 312, 313. And again: "The change which takes place in the extent of a servitude in a public way is not effected by the act of the donee nor after acceptance by the act of the donor, but by operation of law, and in order to meet the demands of the public welfare and necessity." Same, p. 316.

⁸This is implied in the opinion of Peckham, J. in *Eels v. Am. Tel. & Tel. Co.*, 143 N. Y. 133, 38 N. E. 202, 25 L.R.A. 640, 10 Am. R. R. & Corp. Rep. 69, wherein he says: "While concurring in the view that the easement in a public street in a city or village may well be greater as the actual necessities of the case are greater for sewers and gas and

water pipes, yet in this case, as we have to deal with the easement in a purely country highway, it is not important to discuss how the easement became greater in the one case than in the other, or as to the time when the right to the enlarged use of the highway or street attaches, or the method or means by which the right to such enlarged use was attained. Density of population creates public necessities for water, light, drainage and other conveniences which do not exist in purely rural districts, and along a purely rural highway. Yet the same land might alter from a country highway to a city street, and it might be determined that there was an implied dedication of the country highway at the time the land was taken to the uses which the future village or city street might require." Mr. Pierce, in speaking of the distinction between city and country highways, says: "But as both the highway and the street are appropriated for the same general purposes, and a highway in a district sparsely inhabited at one time may, by the growth of population, become a street in a city, this distinction does not appear to rest upon a sound basis." Pierce Railways, p. 232. This doctrine has now become fully established in New

public needs will demand a larger use in the city than in the country. But whatever the public needs demand, in the way of legitimate highway uses, that the public have a right to enjoy. Whether a particular use or improvement is within the public right, does not depend, therefore, upon whether the highway is in the city or country, but upon the nature of the use or improvement, that is, whether it is or is not within the legitimate purposes of a highway. In an Oregon case, where the limits of a city were extended to include a country road, which was located and established as a city street, it was expressly held that the abutting owner, having the fee, was not entitled to any additional compensation.⁹

Nor do the authorities afford much but *dicta* in support of the distinction asserted between urban and rural highways. In one class of cases certain uses of a country road were held not to be within the purpose for which such roads are established, but the same courts have not held that the same uses of a city street were legitimate.¹⁰ In another class of cases certain uses of city streets are declared to be legitimate,¹¹ but this is quite different

York by the recent case of Palmer v. Larchmont Electric Co., 158 N. Y. 231, 52 N. E. Rep. 1092, wherein the court says: "But the owner of the fee in a country highway, taken, opened and dedicated for a public use, is entitled to no further compensation after the territory has become thickly settled and the highway has become a street of an incorporated city. This was recognized in the Eels case, and it is, therefore, apparent that, at the time the land was taken for a highway, it was impliedly dedicated to the uses which the public might in the future require." p. 236.

⁹Huddleston v. Eugene, 34 Ore. 343, 55 Pac. 868, 43 L.R.A. 444. To same effect, Lake Shore etc. Ry. Co. v. Whiting, 161 Ind. 76, 67 N. E. 933; DeKalb Co. Tel. Co. v. Dutton, 228 Ill. 178, 81 N. E. 838, 10 L.R.A. (N.S.) 1057; Callen v. Columbus Edison Elec. Lt. Co., 66 Ohio St. 166, 64 N. E. 141, 58 L.R.A. 782.

¹⁰Western R. R. Co. v. Ala. G. T. R. R. Co., 96 Ala. 272, 11 So. 483, 17 L.R.A. 474; Board of Trade Tel. Co. v. Barnett, 107 Ill. 507, 47 Am. Rep. 453; Eels v. Am. Tel. & Tel. Co. 143 N. Y. 133, 38 N. E. 202, 10 Am. R. R. & Corp. Rep. 69, 25 L.R.A. 640.

¹¹Montgomery v. Santa Ana & W. R. R. Co., 104 Cal. 186, 37 Pac. 786, 43 Am. St. Rep. 89, 25 L.R.A. 654, 10 Am. R. R. & Corp. Rep. 25; Lostutter v. City of Aurora, 126 Ind. 436, 26 N. E. 184, 12 L.R.A. 259; Witcher v. Holland W. W. Co., 66 Hun 619, 20 N. Y. Supp. 560; Lockhart v. Craig St. R. R. Co., 139 Pa. St. 319, 21 Atl. 26; Wood v. McGrath, 150 Pa. St. 451, 24 Atl. 682, 16 L.R.A. 715; McDevitt v. People's Nat. Gas Co., 160 Pa. St. 367, 28 Atl. 948. In Chesapeake & P. Tel. Co. v. Mackenzie, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219, which contains *dicta* to the effect that city streets may be used for

from holding that the same or similar uses of country roads would not be legitimate. The cases most relied upon are those which hold that country highways cannot be used for laying down gas pipes for the conveying of natural gas.¹² But when these cases are examined it is found that the pipes were proposed to be laid, not for lighting the highway in question, or of furnishing gas to the occupiers of abutting property, but of conveying it past their premises to a distant city. It is not probable that the same use would be permitted of a city street. The reason of the rule that permits the use of streets for gas and water pipes would not apply to such a case.¹³ So it was held in *Van Brunt v. Town of Flatbush*,¹⁴ that a sewer could not be laid through a rural highway in a town, the fee of which was in the abutting owners, for the purpose of conveying the sewerage of an adjoining town to the ocean. But it was plainly intimated that the authorities of the town in which the highway was situated might have laid a sewer therein for the use of abutters and the local community. In a Maryland case it was held that a water main could not be laid in a country road for the purpose of conveying water past the abutting premises to towns and villages beyond.¹⁵ But the court recognizes that country roads may become city streets and be subjected to urban servitudes without additional compensation to the owner of the fee.¹⁶ These cases

purposes for which country roads may not, it was held that a telephone line was not a legitimate use of a city street.

¹²*Bloomfield Gas Co. v. Calkins*, 62 N. Y. 386; *Calkins v. Bloomfield Gas Light Co.*, 1 N. Y. Supn. 541; *Gas Light Co. v. Richardson*, 63 Barb. 437; *Sterling's Appeal*, 111 Pa. St. 35, 2 Atl. Rep. 105; *Stumpf's Appeal*, 116 Pa. St. 33, 8 Atl. 865; *Webb v. Fuel Co.*, 16 Wkly. L. B. 121; *Kineaid v. Indianapolis Natural Gas Co.*, 124 Ind. 577, 24 N. E. 1066, 19 Am. St. Rep. 113, 8 L.R.A. 602, 3 Am. R. R. & Corp. Rep. 1.

¹³*See Cone v. City of Hartford*, 28 Conn. 363.

¹⁴128 N. Y. 50, 27 N. E. 973, reversing S. C. 59 Hun 192, 37 N. Y. St. 200, 13 N. Y. Supp. 545.

¹⁵*Baltimore Co. W. & Elect. Co. v. Dubreuil*, 105 Md. 424, 66 Atl. 439.

¹⁶The court holds that it is a question of fact in each case whether the new use is within the scope of the original easement and says: "The tribunal whose duty it is to determine the question is not to be governed alone by the mode of user first adopted or by the conditions existing at the time the highway is acquired by the public. For example, if the easement when acquired be over land which is in the open country, but is so situated that it will probably be built upon, like a street of a city or town, and is afterwards so built upon, it would be wholly unreasonable to hold that the public must again compensate

afford very little support for the contention that city streets may be used for purposes which would not be legitimate in the case of country roads. The only court in which it has been unequivocally adjudicated that a certain use was legitimate in the case of city streets and not legitimate in the case of country highways, is that of Pennsylvania, in which it has been held that an electric passenger railway is a legitimate use of a city or village street,¹⁷ but not of a country road.¹⁸

§ 119 (91d). What is meant by abutting owners. The New York court of appeals has defined an "abutting owner," as one who owns land upon a street and whose title terminates at the street line.¹⁹ While, strictly speaking, a lot, the title to which extends to the middle of the street, may not be said to abut upon the street, yet we believe the phrase "abutting owners," has been applied indifferently to all owners of lots or lands upon or along a street or highway, whether their title extended to the center of the street or stopped at the street line, and we shall so use the words in this treatise.²⁰

§ 120 (91e). Rights of abutting owners.—Light, air and access. As we have already seen, to constitute a taking, when no title or interest passes, a private right must be impaired or destroyed.²¹ Therefore, to determine whether certain dam-

the owner of the fee before it can make such use of the highway as its then condition requires and justifies, provided of course, they be within the scope of the original easement. Indeed we have many instances in this State of such changed conditions —where the highway when acquired by the public was in the open country, but subsequently become a street of a town. It could not be successfully contended that water and gas pipes could not be laid in such street without additional compensation to the owner of the fee, merely because the land was originally taken for a rural highway." Baltimore Co. W. & Elec. Co. v. Dubreuil. 105 Md. 424, 66 Atl. 439.

¹⁷Lockhart v. Craig St. R. R. Co., 139 Pa. St. 319, 21 Atl. 26; Rafferty v. Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. Rep. 763, 6 Am. R. R. & Corp. Rep. 287.

Em. D.—12.

¹⁸Pennsylvania R. R. Co. v. Montgomery Co. Pass. R. R. Co., 167 Pa. St. 62, 31 Atl. 468, 46 Am. St. Rep. 659, 27 L.R.A. 766.

¹⁹In Hughes v. Metropolitan El. R. R. Co., 130 N. Y. 14, 28 N. E. 765, the court defines an "abutting lot" as follows: "It denotes a lot bounded on the side of a public street, in the bed or soil of which the owner of the lot has no title, estate, interest or private rights except such as are incident to a lot so situated." See also Abendroth v. Manhattan R. R. Co., 122 N. Y. 1. 25 N. E. 496, 19 Am. St. Rep. 461. 11 L.R.A. 634, 3 Am. R. R. & Corp. Rep. 309, 312.

²⁰Elliott Roads and Streets, pp. 519, *et seq.*; Dillon Munic. Corp., Title "Abutter."

²¹Ante, § 65.

ages, resulting to abutting property from the use or improvement of a street, amount to a taking, we must inquire whether any private right has been interfered with. If yes, and the damages result from such interference, then there has been a taking, and the right to compensation follows. It thus becomes necessary to inquire what private rights, if any, an abutting owner has in, or in respect to, the street in front of his property. As these questions arise almost wholly with respect to urban property, we shall, in this discussion, have regard mainly to the conditions of urban life. While highways are established in the country largely for the accommodation of the general public in traveling from place to place, streets are laid out in cities and villages, either partly or wholly, for the purpose of affording access, light and air to the property through which they pass. As the country road of the present may become the city street of the future, it seems evident that the same rules must apply to both.²² It having been always one of the recognized uses and purposes of establishing streets, to afford access, light and air to the property through which they pass, we think that with the establishment of a street there attach to the adjacent property, as appurtenant to and parcel of it, the private rights of access and of light and air.²³ Numerous cases, decided since

²²*Ante*, § 120.

²³*Denver v. Bayer*, 7 Colo. 113; *Chicago v. Union Building Ass.*, 102 Ill. 379, 397, 40 Am. Rep. 598; *Haynes v. Thomas*, 7 Ind. 38; *Tate v. Ohio & Miss. R. R. Co.*, 7 Ind. 479; *Rennslaer v. Leopold*, 106 Ind. 29; *Indiana, Bloomington & Western Ry. Co. v. Eberle*, 110 Ind. 542. 59 Am. Rep. 225; *Lexington etc. R. R. Co. v. Applegate*, 8 Dana 289, 33 Am. Dec. 497; *Transylvania University v. Lexington*, 3 B. Mon. 25, 27, 38 Am. Rep. 173; *Elizabethtown etc. R. R. Co. v. Coombs*, 10 Bush 382; *Lackland v. North Mo. R. R. Co.*, 31 Mo. 180; *Thurston v. St. Joseph*, 51 Mo. 510; *Burlington & Mo. R. R. Co. v. Reinhackle*, 15 Neb. 279, 48 Am. Rep. 342; *People v. Kerr*, 27 N. Y. 188, 215; *Kellinger v. 42d St. R. R. Co.*, 50 N. Y. 206; *Story v. New York El. R. R. Co.*, 90 N. Y.

122, 43 Am. Rep. 146; *Lahr v. Met. El. R. R. Co.*, 104 N. Y. 268; *Crawford v. Delaware*, 7 Ohio St. 459; *Jackson v. Jackson*, 16 Ohio St. 163; *Anderson v. Turbeville*, 6 Coldw. 150. In Indiana, *Bloomington & Western Ry. Co. v. Eberle*, 110 Ind. 542, 545, 59 Am. Rep. 225, the court say: "Whatever may be the rule of decision elsewhere, nothing is better settled in this State, than that the owners of lots abutting on a street may have a peculiar and distinct interest in the easement in the street in front of their lots. This interest includes the right to have the street kept open and free from any obstruction which prevents or materially interferes with the ordinary means of ingress to and egress from the lots. It is distinguished from the interest of the general public, in that it becomes a right appendant, and legal-

the first edition of this work, establish beyond question the existence of these rights, or easements, of light, air and access, as appurtenant to abutting lots, and that they are as much property as the lots themselves.²⁴ But as all streets are established

ly adhering to, the contiguous grounds and the improvements thereon, as the owner may have adapted them to the street. To the extent that the street is a necessary and convenient means of access to the lot, it is as much a valuable property right as the lot itself. It cannot, therefore, be perverted from the uses to which it was originally dedicated, or devoted to uses inconsistent with street purposes, without the abutting lot-owner's consent, until due compensation be first made according to law for any injury and damage which may directly result from such interference; nor can a street be invaded so as to inflict special and peculiar damage or injury upon the adjacent lot-owner's property, without rendering the wrongdoer liable for such damage. * * * The interest in the street which is peculiar and personal to the abutting lot-owner, which is distinct and different from that of the general public, is the right to have free access over it to his lot and buildings, substantially in the manner he would have enjoyed the right in case there had been no interference with the street. The right of access by way of the street is an incident to the ownership of the lot, which cannot be taken away or materially impaired without liability to the owner to the extent of the damage actually incurred. In this respect, and in this only, is the interest of the abutting property-owner different in the street in front of, and beyond the line of, his lot, from that of the public." Similar views will be found

expressed in nearly all the cases cited in this note, and in many of the cases cited in the next note.

²⁴ *Eachus v. Los Angeles Consol. El. R. R. Co.*, 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; *Bigelow v. Ballesino*, 111 Cal. 559, 44 Pac. 307; *Williams v. Los Angeles*, 150 Cal. 592, 89 Pac. 330; *Cushing-Wetmore Co. v. Gray*, 152 Cal. 118, 92 Pac. 70; *Coats v. Atchison etc. Ry. Co.*, 1 Cal. App. 441, 82 Pac. 640; *Selden v. City of Jacksonville*, 28 Fla. 558, 10 So. 457, 29 Am. St. Rep. 278, 14 L.R.A. 370; *Bowden v. Jacksonville*, 52 Fla. 216, 42 So. 394; *Harvey v. Georgia Southern etc. R. R. Co.*, 90 Ga. 66, 15 S. E. 783; *Macon v. Wing*, 113 Ga. 90, 38 S. E. 392; *Barrows v. City of Sycamore*, 150 Ill. 588, 37 N. E. 1096, 41 Am. St. Rep. 400, 10 Am. R. R. & Corp. Rep. 62; *Decker v. Evansville Suburban etc. R. R. Co.*, 133 Ind. 493, 33 N. E. 349; *Dantzer v. Indianapolis Union R. R. Co.*, 141 Ind. 604, 39 N. E. 223, 50 Am. St. Rep. 343, 34 L.R.A. 769, 11 Am. R. R. & Corp. Rep. 249; *Pittsburg etc. R. R. Co. v. Noftsger*, 148 Ind. 101, 47 N. E. 332; *Pennsylvania Co. v. Stanley*, 10 Ind. App. 421, 37 N. E. 288, 38 N. E. 421; *Long v. Wilson*, 119 Ia. 267, 93 N. W. 282, 97 Am. St. Rep. 315, 60 L.R.A. 720; *Leavenworth etc. R. R. Co. v. Curtan*, 51 Kan. 432, 33 Pac. 297; *Atchison etc. R. R. Co. v. Davidson*, 52 Kans. 739, 35 Pac. 787; *Fulton v. Short Route R. R. Trans. Co.*, 85 Ky. 640, 4 S. W. 332, 7 Am. St. Rep. 619; *Ball v. Maysville etc. R. R. Co.*, 102 Ky. 486, 43 S. W. 731, 80 Am. St. Rep. 362; *Ferguson v. Covington etc. Bridge Co.*, 108 Ky.

primarily for the public use and general good, the right of the public is paramount to the right of the individual. And so the private rights of access, light and air are held and enjoyed subject to the paramount right of the public to use and improve the

662, 57 S. W. 460; Ky. Cent. R. R. Co. v. Clark, 5 Ky. L. R. 184; Hepting v. New Orleans Pac. R. R. Co., 36 La. An. 898; Chesapeake & P. Tel. Co. v. Mackenzie, 74 Md. 36, 21 Atl. 690; Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 86 Am. St. Rep. 441, 52 L.R.A. 408; Adams v. C. B. & Q. R. R. Co., 39 Minn. 286, 39 N. W. 629, 12 Am. St. Rep. 644, 1 L.R.A. 493; Gustafson v. Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L.R.A. 565; Theobold v. Louisville, N. O. & T. R. R. Co., 66 Miss. 279, 6 So. 230, 14 Am. St. Rep. 564, 4 L.R.A. 735; Hazelhurst v. Mayes, 84 Miss. 7, 36 So. 33, 64 L.R.A. 805; Henry Gaus & Sons Mfg. Co. v. St. Louis etc. R. R. Co., 113 Mo. 308, 20 S. W. 658, 18 L.R.A. 339, 7 Am. R. R. & Corp. Rep. 235; Spencer v. Metropolitan St. R. R. Co., 120 Mo. 154, 23 S. W. 126, 22 L.R.A. 668; Sherlock v. Kansas City Belt R. R. Co., 142 Mo. 172, 64 Am. St. Rep. 551; Corby v. Chicago etc. R. R. Co., 150 Mo. 457; DeGeofroy v. Merchants Bridge Terminal Ry. Co., 179 Mo. 698, 79 S. W. 386, 101 Am. St. Rep. 524, 64 L.R.A. 959; St. Louis v. Terminal R. R. Ass., 211 Mo. 364, 109 S. W. 641; Martin v. Chicago etc. R. R. Co., 47 Mo. App. 452; Wallace v. Kansas City etc. R. R. Co., 47 Mo. App. 491; Stephenson v. Mo. Pac. R. R. Co., 68 Mo. App. 642; Davies v. St. Joseph, 98 Mo. App. 611, 73 S. W. 723; Jaynes v. Omaha St. R. R. Co., 53 Neb. 631, 74 N. W. 67, 39 L.R.A. 751; Dill v. School Board, 47 N. J. Eq. 421, 20 Atl. 739; Newman v. Metropolitan El. R. R. Co., 118 N. Y. 618, 23 N. E. 901, 7 L.R.A. 289, 2 Am. R. R. & Corp.

Rep. 318; Abendroth v. Manhattan R. R. Co., 122 N. Y. 1, 25 N. E. 496, 19 Am. St. Rep. 461, 11 L.R.A. 634, 3 Am. R. R. & Corp. Rep. 309; Kane v. New York El. R. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L.R.A. 640; S. C. Sub. Nom. Duyckinck v. New York El. R. R. Co., 3 Am. R. R. & Corp. Rep. 744; Reining v. New York etc. R. R. Co., 128 N. Y. 157, 28 N. E. 640, 14 L.R.A. 133, 5 Am. R. R. & Corp. Rep. 476; Bohm v. Metropolitan El. R. R. Co., 129 N. Y. 576, 29 N. E. 802, 14 L.R.A. 344, 5 Am. R. R. & Corp. Rep. 416; Hughes v. Metropolitan El. R. R. Co., 130 N. Y. 14, 28 N. E. 765; Egerer v. New York Central etc. R. R. Co., 130 N. Y. 108, 29 N. E. 95, 5 Am. R. R. & Corp. Rep. 241; Bischoff v. New York El. R. R. Co., 138 N. Y. 257, 33 N. E. 1073; Holloway v. Southmayd, 139 N. Y. 390, 34 N. E. 1047; Mortimer v. New York El. R. R. Co., 57 N. Y. Supr. Ct. 244, 6 N. Y. Supp. 898; Hine v. New York El. R. R. Co., 54 Hun 425, 27 N. Y. St. 303, 7 N. Y. Supp. 464; Wormser v. Brown, 72 Hun 93, 25 N. Y. Supp. 553; Beekman v. Thira Ave. R. R. Co., 13 App. Div. 279, 43 N. Y. Supp. 174; Schmitz v. Brooklyn Union El. R. R. Co. 111 App. Div. 308, 97 N. Y. S. 791; White v. Northwestern N. C. R. R. Co., 113 N. C. 610, 18 S. E. 330, 37 Am. St. Rep. 639, 22 L.R.A. 627, 9 Am. R. R. & Corp. Rep. 103; Staton v. Atl. Coast Line R. R. Co., 147 N. C. 428; McNulta v. Rolston, 5 Ohio C. C. 330; McQuaid v. Portland & V. R. R. Co., 18 Ore. 237, 22 Pac. 899, 1 Am. R. R. & Corp. Rep. 34; Willamette Iron Works v. Oregon R. & N.

street for the purposes of a highway.²⁵ And as these private rights are thus subject to the right of the public to use and improve as a highway, it follows that, when such uses or improvements are made, no private right is interfered with and consequently no private property is taken. It follows also that, as these private rights are subject *only* to the use and improvement of the street by the public for the purpose of a highway, an interference with these rights by the use or improvement of the street for any other purpose or by any other agency, under legislative authority, is a taking of private property to the extent of such interference.²⁶ The rights of a railroad company as an owner of abutting property are the same and no greater than the

Co., 26 Ore. 224, 37 Pac. 1016; *In re Melon St.* 182 Pa. St. 397, 38 Atl. 482, 28 L.R.A. 275; *Johnsen v. Old Colony R. R. Co.*, 18 R. I. 642, 29 Atl. 594; *Edmison v. Lowry*, 3 S. D. 77, 52 N. W. 583, 44 Am. St. Rep. 774, 17 L.R.A. 275; *South Bound R. R. Co. v. Burton*, 67 S. C. 515, 46 S. E. 340; *Frater v. Hamilton Co.*, 90 Tenn. 661, 19 S. W. 233; *Hamilton County v. Rape*, 101 Tenn. 222, 47 S. W. 416; *Dooley Block v. Salt Lake Rapid Transit Co.*, 9 Utah 31, 33 Pac. 229, 8 Am. R. R. & Corp. Rep. 327; *State v. Superior Court*, 30 Wash. 219, 70 Pac. 484; *Lund v. Idaho etc. R. R. Co.*, 50 Wash. 574, 97 Pac. 665; *Hart v. Buckner*, 54 Fed. 925, 5 C. C. A. 1; *Muhlker v. New York etc. R. R. Co.*, 197 U. S. 544, 25 S. C. 522. In the last case the statement of the text is held to express the correct doctrine and the court adds that "it is impossible for us to conceive of a city without streets, or any benefit in streets, if the property abutting on them has not attached to it as an essential and inviolable part easements of light and air as well as of access."

p. 563.

²⁵*Selden v. City of Jacksonville*, 28 Fla. 558, 10 So. 457; *Bowden v. Jacksonville*, 52 Fla. 216, 42 So. 394; *Adams v. C. B. & Q. R. R. Co.*, 39

Minn. 286, 39 N. W. 629; *Gustafson v. Hamlin*, 56 Minn. 334, 57 N. W. 1054; *Henry Gaus & Sons Mfg. Co. v. St. Louis etc. R. R. Co.*, 113 Mo. 308, 20 S. W. 658, 18 L.R.A. 339, 7 Am. R. R. & Corp. Rep. 235; *Halsey v. Rapid Transit St. R. R. Co.*, 47 N. J. Eq. 380, 20 Atl. 859; *Kane v. New York El. R. R. Co.*, 125 N. Y. 164, 26 N. E. 278, 11 L.R.A. 640; *S. C. Sub Nom. Duyckinck v. New York El. R. R. Co.*, 3 Am. R. R. & Corp. Rep. 744; *Reining v. New York etc. R. R. Co.*, 128 N. Y. 157, 28 N. E. 640, 5 Am. R. R. & Corp. Rep. 476; *Rauenstein v. New York etc. R. R. Co.*, 136 N. Y. 528, 32 N. E. 1047, 18 L.R.A. 768, 7 Am. R. R. & Corp. Rep. 520; *Sauer v. New York*, 180 N. Y. 27, 72 N. E. 579, 70 L.R.A. 717, *affirming*, 90 App. Div. 36, 85 N. Y. S. 636.

²⁶*Macon v. Wing*, 113 Ga. 90, 38 S. E. 392; *Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321; *Long v. Wilson*, 119 Ia. 267, 93 N. W. 282, 97 Am. St. Rep. 315, 60 L.R.A. 720; *Townsend v. Epstein*, 93 Md. 537, 49 Atl. 629, 86 Am. St. Rep. 441, 52 L.R.A. 409; *Adams v. C. B. & Q. R. R. Co.*, 39 Minn. 286, 39 N. W. 629; *Kane v. New York El. R. R. Co.*, 125 N. Y. 164, 26 N. E. 278; *S. C. Sub. Nom. Duyckinck v. New York El. R. R. Co.*, 3 Am. R. R. & Corp. Rep.

rights of an individual owner.²⁷ The rights or easements of light, air and access so long as they exist are indissolubly annexed to the abutting property. They may be released or extinguished, in whole or in part, but they cannot be reserved or conveyed, or exist separate from the property to which they pertain, so that the property shall be owned by one and the easements by another.²⁸

§ 121 (91f). Origin and basis of the rights or easements of access, light and air. The existence of this private right in all cases may be reasoned out as follows: When the owner of a tract of land lays the same out into lots and streets, and sells the lots, the purchasers of such lots acquire as appurtenant thereto a private right of way and access over the streets.²⁹ This private right arises without any express

744, *Reining v. New York etc. R. R. Co.*, 128 N. Y. 157, 28 N. E. 640, 5 Am. R. R. & Corp. Rep. 476; *Willamette Iron Works v. Oregon R. & N. Co.*, 26 Ore. 224, 37 Pac. 1016, 46 Am. St. Rep. 620, 29 L.R.A. 88; *Winchester v. Stevens Point*, 58 Wis. 350; *Buchner v. Chicago etc. Ry. Co.*, 60 Wis. 264. *And see post*, §§ 149 *et seq.*

²⁷*Appeal of Philadelphia etc. R. R. Co.*, 2 Walker's Pa. Supm. Ct. 291, *affirming* 1 Montg. Co. L. Rep. 129.

²⁸*Pegram v. New York El. R. R. Co.*, 147 N. Y. 135, 41 N. E. 424; *Kernoehan v. New York El. R. R. Co.*, 128 N. Y. 559, 29 N. E. 65; *Pappenheim v. Railway Company*, 128 N. Y. 436, 28 N. E. 518, 26 Am. St. Rep. 486, 13 L.R.A. 401; *McKenna v. Brooklyn Union El. R. R. Co.*, 184 N. Y. 391, 77 N. E. 615, *reversing* S. C. 95 App. Div. 226, 88 N. Y. S. 762; *Schomaker v. Michaels*, 189 N. Y. 61, 81 N. E. 555. In the Kernoehan Case the court says: "The easements of an abutting owner, invaded, are appurtenant to his premises, and, in the nature of things, they are indissolubly annexed thereto, until extinguished by release or otherwise. They are incapable of a

distinct and separate ownership." Where the deed reserved the right to damages to the premises, past, present and future, by reason of the construction and operation of the road, it was held that while the right of action was in the grantee, yet that he was a trustee for the grantor with respect thereto and that the damages belonged to the latter who could recover them from the grantee, or those claiming under him. *Shepard v. Manhattan Ry. Co.*, 169 N. Y. 160, 62 N. E. 151, *affirming* S. C. 48 App. Div. 452, 62 N. Y. S. 977; *Western Union Tel. Co. v. Shepard*, 169 N. Y. 170, 62 N. E. 154, 58 L.R.A. 115, *reversing* S. C. 49 App. Div. 345, 63 N. Y. S. 435.

²⁹*Prescott v. Edwards*, 117 Cal. 298, 49 Pac. 178, 59 Am. St. Rep. 186; *McLean v. Llewellyn Iron Works*, 2 Cal. App. 346, 83 Pac. 1082, 1085; *Newell v. Sass*, 142 Ill. 104, 31 N. E. 176; *Corning v. Woolner*, 206 Ill. 190, 69 N. E. 53; *Indianapolis v. Croas*, 7 Ind. 9; *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749; *Dubuque v. Malony*, 9 Ia. 450; *Highbarger v. Milford*, 71 Kan. 331, 80 Pac. 633; *Schneider v. Jacob*, 86 Ky. 101, 5 S. W. 350; *Dorman v.*

grant, and in the absence of any statute.³⁰ The law presumes that the parties had in mind the advantages to be derived from the use of the proposed streets, and implies a right to such use as a part of the grant. This position is not open to controversy, and is as good sense as it is good law. If several persons, owners of distinct parts of a tract, should join in laying the same out into streets and lots, the result would be the same. The law would imply the grant of mutual easements of way and access, appurtenant to the respective lots, and this, as before, in the absence of any statute or express mention of such easements. These private rights or easements are the presumed, as well as the real, consideration for the grant or dedication of a part of the tract to public use. These private rights remain the same whether the streets are accepted by the public or not.³¹ If, instead of making a gift of the streets to the public, the pro-

Bates Mfg. Co., 82 Me. 438, 19 Atl. 915; White v. Flannigan, 1 Md. 542; 54 Am. Dec. 668; Pearson v. Allen, 151 Mass. 79; Cole v. Hadley, 162 Mass. 579, 39 N. E. 279; Thurston v. St. Joseph, 51 Mo. 510; McLemon v. McNeley, 56 Mo. App. 556; Dill v. School Board, 47 N. J. Eq. 421, 20 Atl. 739; Matter of Lewis Street, 2 Wend. 472; Livingston v. Mayor etc. of New York, 8 Wend. 85; Story v. New York El. R. R. Co., 90 N. Y. 122, 165, 43 Am. Dec. 146; Pratt v. Buffalo City Ry. Co., 19 Hun 30; In re St. Nicholas Terrace, 143 N. Y. 621, 37 N. E. 635; Matter of Ethel St., 3 Miscl. 403, 24 N. Y. Supp. 689; Moore v. Carson, 104 N. C. 43, 10 S. E. 689; Shields v. Titus, 46 Ohio St. 528, 22 N. E. 717; Ferguson's App. 117 Pa. St. 426, 11 Atl. 885; Dobson v. Hohenadel, 148 Pa. St. 367, 23 Atl. 1128; Hobson v. City of Philadelphia, 150 Pa. St. 595, 24 Atl. 1048; Garvey v. Harbison-Walker Refractories' Co., 213 Pa. St. 177, 62 Atl. 778; South State Normal School's Case, 213 Pa. St. 244, 62 Atl. 908; Smith v. Union S. & T. Co., 17 Pa. Supr. Ct. 444; Carroll v. Asbury, 28 Pa. Supr. Ct.

354; Clark v. Providence, 10 R. I. 437; Thaxter v. Turner, 17 R. I. 799, 24 Atl. 829; Johnsen v. Old Colony R. R. Co., 18 R. I. 642, 29 Atl. 594; Wolf v. Brass, 72 Tex. 133, 12 S. W. 159; Cook v. Totten, 49 W. Va. 177, 38 S. E. 491, 87 Am. St. Rep. 792; Barbour v. Lyddy, 49 Fed. 896; Fitzgerald v. Barbour, 55 Fed. 440, 5 C. C. A. 180; Rainey v. Herbert, 55 Fed. 443, 5 C. C. A. 183; Bennett v. Chicago etc. R. R. Co., 73 Fed. 696; United States v. Certain Lands, 140 Fed. 463.

³⁰Story v. New York El. R. R. Co., 90 N. Y. 122, 145, 43 Am. Rep. 146; Kane v. New York El. R. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L.R.A. 640, 3 Am. R. R. & Corp. Rep. 744; Hughes v. Met. El. R. R. Co. 130 N. Y. 14, 28 N. E. 765; Long v. Wilson, 119 Ia. 267, 93 N. W. 282, 97 Am. St. Rep. 315, 60 L.R.A. 720.

³¹Carroll v. Asbury, 28 Pa. Supr. Ct. 354; Johnsen v. Old Colony R. R. Co., 18 R. I. 642, 29 Atl. 594; Clark v. Providence, 10 R. I. 437; Cook v. Totten, 49 W. Va. 177, 38 S. E. 491, 87 Am. St. Rep. 792.

prietors should voluntarily grant the streets for a consideration agreed upon and paid by the public, it would still be true in fact, and therefore presumed by law, that, in fixing the consideration to be paid, the parties had in mind the advantages to be derived from the use of the streets. That is, the consideration to each proprietor would be the right to make use of the streets in connection with his lots, and a certain sum of money paid. The first part of this consideration would be utterly fallacious, unless the right in question is protected by the law of the land the same as any other right. To make the right a part consideration of the grant, and then to allow the public to invade or destroy it at pleasure, would be a fraud which the law will neither impute nor allow.³² Therefore, in the case of such a grant, there arises by operation of law a private right to use the streets in connection with the lots of each proprietor, which is as inviolable as any other right of property. If the streets, instead of being established by dedication or voluntary grant, are acquired by forced sale or condemnation, how is the matter changed? The price to be paid, instead of being agreed upon, is ascertained in some mode provided by law. The transfer of title is accomplished by legal proceedings, instead of a deed of the parties. In fixing the price to be paid to each proprietor, the advantages to be derived from the use of the street or streets are taken into consideration.³³ Generally, he actually pays a

³²"The claim made that the owner of property taken for a street, obtains, through the award of the commissioners, full compensation for his property, is unfounded, unless the benefits for which he is assessed are inviolably secured to him by such proceedings. Any other construction of the statute would render it an efficient engine of fraud and injustice. An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to and through his property. These rights

are not only valuable to him for sanitary purposes, but are indispensable to the proper and beneficial enjoyment of his property, and are legitimate subjects of estimate by the public authorities, in raising the fund necessary to defray the cost of constructing the street. He is therefore compelled to pay for them at their full value, and if in the next instant they may by legislative authority be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property." Lahr v. Met. El. R. R. Co., 104 N. Y. 268, 290, 291.

³³"The benefits to be received by a person whose land is taken by the

fixed price for these advantages, in the form of an assessment of benefits upon his remaining property.³⁴ Now, it would be the grossest inequity to compel a man to pay for advantages, whether in the form of deductions from the price to be paid or of an assessment of benefits, unless those advantages are secured to him by a clear title. The result of every such proceeding, therefore, is that there is created and attached to the lot or tract of each proprietor through which the street runs, a private right, independent of the public easement, to use the street for the purposes of access to the lot and of outlet to the general system of highways. The proceedings have precisely the same effect as a voluntary grant by the several proprietors, and, in case of a voluntary grant, the law will imply a transfer

public for a road are a part of the consideration for the release of the land, or its condemnation for a road, and when once vested in him, or he becomes entitled thereto, they are as much his property as the land itself, and neither the State nor any of its subordinate agencies can deprive him of them, except in the manner pointed out by the constitution, and that has not been done in this case." Pearsall v. Board of Supervisors, 74 Mich. 558, 42 N. W. 77.

³⁴In Wormser v. Brown, 72 Hun 93, 25 N. Y. Supp. 553, it is held that an assessment of benefits must be regarded as a payment for the privileges of light, air and access afforded by the street. A different view is taken by the Supreme Court of New Jersey in State v. City of Elizabeth, 54 N. J. L. 462, 24 Atl. 495, wherein the court says: "It is assumed by counsel for prosecutrix that, because the prosecutrix was assessed for a benefit resulting from the opening of this street, peculiar to herself, she got a vested right in the continued existence of the street, of which she could not be stripped without compensation. But

this, I think, is more plausible than substantial. While the right she got may have been of peculiar benefit to her property, yet it was a right which she shared with the public. The privilege of using the street was shared by each member of the community. It may not have been of the same value to each member of the community, but the right to use the street was in each citizen the same. It was exclusively a public right, put under the control of the representatives of the public. It was subject to alteration or abolition, when, in the judgment of those to whom the public interests were confided, those interests demanded such action. The assessment of benefits is presumed to be based upon the recognized power of the State and its agencies to modify or destroy the improvement. The attitude of those who have been assessed for peculiar benefits differs in no respect from that of any other citizen in regard to this control of the public over a public right." The case was affirmed in the court of errors and appeals, but without affirming these views. 55 N. J. L. 337, 26 Atl. 939.

of mutual easements of way and access appurtenant to the several lots.³⁵

The right to light and air from over the space occupied by the street arises in the same way and stands upon the same footing as the right of access. The reasoning advanced and authorities cited in this section fully establish the proposition that, when a highway is established, and irrespective of the mode by which it is established, or of the interest acquired by the public in the soil, there is attached to the abutting property a right to receive light and air from the space above the surface of the street. The New York Court of Appeals, in speaking of the origin of these easements of light, air and access, says: "The plaintiff's easements, or rights in the nature of easements, are not created by grant or covenant. They arise, we think, from the situation, the course of legislation, the trust created by statute, the acting upon the faith of public pledges, and upon a contract between the public and the property owner implied, from all the circumstances, that the street shall be kept open as a public street, and shall not be diverted to other and inconsistent uses. There is some analogy, we think, between the rights of abutting owners as against the public, and those acquired by the public against private persons, in streets or highways by dedication. The public acquires, upon acceptance of a dedication by the owner of land of a highway over the same a perpetual easement therein for a highway, although there may be no deed or writing or covenant, and no formalities attending the transaction, such as is required for the creation of an easement at common law. Here the State has dedicated the streets in the city of New York to be public streets. The abutting owners have acted upon the dedication, and upon the pledge of the public faith that they shall continue to be open public streets forever. It would be gross injustice to deprive them of the advantages intended, without compensation. The dedica-

³⁵"The proceedings by which land is acquired by the exercise of the right of eminent domain amount to a statutory conveyance of the same to the public or the corporation, and there is no distinction between such a conveyance and a voluntary conveyance made for public use. Where property is acquired for public use by proceedings *in invitum*,

the statute which authorizes the acquisition constitutes the contract between the citizen and the public, and where the interest has once been acquired it cannot be changed or enlarged without further compensation." *Story v. New York El. R. R. Co.*, 90 N. Y. 122, 172, 43 Am. Rep. 146.

tion ought to be, and we think is, irrevocable.”³⁶ The existence of these private rights and easements is, therefore, entirely independent of the mode in which the highway is established, or of the estate or interest which the public acquires in the soil of the street, whether a fee or less.³⁷ These views are fully sustained by the opinion in *Story v. New York El. R. R. Co.*³⁸

³⁶*Kane v. New York El. R. R. Co.*, 125 N. Y. 164, 26 N. E. 278, 11 L.R.A. 640, 3 Am. R. R. & Corp. Rep. 744, 753, 754. And in *Hughes v. Met. El. R. R. Co.*, 130 N. Y. 14, 28 N. E. 765, the same court says: “These street rights of an abutting owner are not originated by grant, in terms, of such incidental rights, and their existence need not be established by conveyances in specific terms, conveying such right, for there are none; nor by adverse possession by an abutting owner, for the right is incapable of such possession as against the city. The private rights appurtenant to abutting lots arise by operation of law from contiguity, like rights for the adjacent and subjacent support of land, and their existence is presumed.” The views of the text are also sustained by the reasoning in *In re Melon Street*, 182 Pa. St. 397, 402, 403, 38 Atl. 482, 28 L.R.A. 275.

³⁷“What are the rights of a lot-holder in reference to the adjacent streets and alleys? The owner in fee of a tract of land may have it surveyed into town lots, streets and alleys, and without selling any of the lots or acknowledging the plat, he may destroy the survey and vacate the streets and alleys. But if he convey away any of the lots, the right of the free use of the adjacent streets will pass to the grantees as appurtenant to their lots; and such grantees will not only have a servitude or easement in the adjacent streets and alleys as appurtenant to

the lots, but the conveyance itself would be a dedication of the streets and alleys to the public as well as to the private use of the lots. This would be the result without any statutory dedication by acknowledging and filing the plat with the county recorder. The effect of a statutory dedication, however, is precisely the same. It vests in the adjacent lot-holder the right to the use of the streets as appurtenant to his lot, and this easement is as much property as the lot itself. It is a property interest, independent of the right of the public highways, and the lot-holder is as much entitled to protection in the enjoyment of this appurtenant easement as he is in the enjoyment of the lot itself. Hence, whatever injures or destroys this easement, is to that extent a damage to the lot. So if in grading a street it be raised so high as to throw the surface water back upon the lot, or prevent a free access to the street; or if the street be excavated so low as to render the easement of no use to the lot, the lot-holder is thereby damaged to the extent of the loss of such easement.” *Thurston v. City of St. Joseph*, 51 Mo. 510. *And see post*, § 127.

³⁸90 N. Y. 122, 43 Am. Rep. 146. Also by numerous cases decided by the same court since the first edition. See especially *Kane v. New York El. R. R. Co.*, 125 N. Y. 164, 26 N. E. 278, 11 L.R.A. 640; *S. C. Sub. Nom. Duyekinek v. New York El. R. R. Co.*, 3 Am. R. R. & Corp. Rep. 744; *Hughes v. Met. El. R. R. Co.*,

§ 122 (91g). Further as to the right to light and air. The existence and nature of this right are very ably expounded in an opinion of the Court of Errors and Appeals of New Jersey, which is worthy of special attention.³⁹ Complainant owned land abutting on the Morris Canal, and had erected a building with windows overlooking the canal. The fee of the right of way occupied by the canal was vested in the Canal Company for public use as a canal. The Canal Company authorized the defendant to erect a building over the canal and adjacent to complainant's lot, the effect of which would be to close up the windows in complainant's building and completely cut him off from light, air or access over the canal. The court held, fourteen judges concurring, that, though the canal was a public highway and the fee was vested in the company, yet the complainant had a right to light and air which, though subordinate to the use of the land as a public highway, was paramount to any other use, and that, as the building was not for the improvement of the canal as a highway, its erection should be enjoined. The court says:

"There are, it appears to me, two classes of rights, originating in necessity and in the exigencies of human affairs, springing up coeval with every public highway, and which are recognized and enforced by the common law of all civilized nations. The first relates to the public passage; the second, subordinate to the first, but equally perfect and scarcely less important, relates to the adjoining owners. Among the latter is that of receiving from the public highway light and air.

"In the first place, has not the adjacent owner upon the '*alta regia via*,' the ordinary public highway, of common right the privilege of receiving from it light and air? Universal usage is common law. What has this been? Men do not first build cities, and then lay out roads through them, but they first lay out roads, and then cities spring up along their lines. As a matter of fact and history, have not all villages, towns

130 N. Y. 14, 28 N. E. 765; and cases cited in § 120, note 24. The reasoning and conclusions of this section have been fully adopted and approved in White v. Northwestern N. C. R. R. Co., 113 N. C. 610, 18 S. E. 330, 37 Am. St. Rep. 639, 22 L.R.A. 627, 9 Am. R. R. & Corp. Rep. 103,

and Theobald v. Louisville etc. R. R. Co., 66 Miss. 279, 6 So. 230, 14 Am. St. Rep. 564, 4 L.R.A. 735. See also Adams v. C. B. & Q. R. R. Co., 39 Minn. 286, 39 N. W. 629, 12 Am. St. Rep. 644, 1 L.R.A. 493.

³⁹Barnett v. Johnson, 15 N. J. Eq. 481, 487.

and cities in this country and in all others, now and at all times past, been built upon this assumed right of adjacency? Is not every window and every door in every house in every city, town and village the assertion and maintenance of this right?

“When people build upon the public highway, do they inquire or care who owns the fee of the road-bed? Do they act or rely upon any other consideration, except that it is a public highway and they the adjacent owners? Is not this a right of universal exercise and acknowledgment in all times and in all countries, a right of necessity, without which cities could not have been built, and without the enforcement of which they would soon become tenantless? It is a right essential to the very existence of dense communities. What must be the consequence, to permit the accidental owner of a part or the whole of the road-bed to wall up or throw a thin curtain in front of the adjacent buildings or by any other contrivance shut out from them the light and air? Suppose the owner of the fee should try the experiment to the east of the complainant’s house, and wall up Broad street, would it be tolerated for a moment, or, if enforced, would it not soon turn our streets into tunnels, and seal up cities in darkness?

“If it be said that there are no cases sustaining this right, so there are none establishing this right, to light and air at all, or to the right of passage. It is a right founded in such an urgent necessity that all laws and legal proceedings take it for granted. A right so strong that it protects itself, so urgent that, upon any attempt to annul or infringe it, it would set at defiance all legislative enactment and all judicial decisions. It is the mode by which the sovereign power, in the exercise of its eminent domain, since land has become the object of private ownership, *ab imo usque ad cælum*, at the same time that it creates a right of passage, opens up and reserves to all, as the increasing density of the population demands it, the use of the common elements of light and air. We cannot conclude otherwise than that a right so essential, so universal in its exercise in all time and among all nations, exists, not, as was said in the case of Gough v. Bell, 2 Zab. 441, by a common law local to New Jersey, but by a law common to the whole civilized world.”

This case anticipates the principle upon which compensation was at last secured in the elevated railway cases in New York.

§ 123 (91h). To how much of the street the rights or easements of light, air and access extend. It would seem just that these rights or easements should extend to so much of the street as is necessary for their reasonable enjoyment. They undoubtedly extend to the full width of the street, at least, as respects light and air.⁴⁰ Some cases would limit the easements of light and air to the space in front of the property in question,⁴¹ but it may be doubted whether these easements do not extend so far on either side of a lot as is necessary to prevent any erection or use which will obstruct the access of light and air to the lot.⁴² The extent and limits of the right of access cannot well be defined. But, in general, it includes the right to use the street as an outlet from the abutting property to a connecting highway, by any mode of travel or conveyance appropriate to a highway; also, the right to use the street in front of the property, in connection with the use and enjoyment of the property, in such manner as is customary or reasonable.⁴³

⁴⁰Metropolitan W. S. El. R. R. Co. v. Springer, 171 Ill. 170, 49 N. E. 416; Adams v. C. B. & Q. R. R. Co., 39 Minn. 286, 39 N. W. 629, 12 Am. St. Rep. 644, 1 L.R.A. 493; Gustafson v. Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L.R.A. 565; White v. Northwestern N. C. R. R. Co., 113 N. C. 610, 18 S. E. 330, 9 Am. R. R. & Corp. Rep. 103, 37 Am. St. Rep. 639, 22 L.R.A. 627; Madden v. Pa. R. R. Co., 21 Ohio C. C. 73; Willamette Iron Works v. Oregon R. & N. Co., 26 Or. 224, 37 Pac. 1016.

⁴¹Adams v. C. B. & Q. R. R. Co., 39 Minn. 286, 39 N. W. 629, 12 Am. St. Rep. 644, 1 L.R.A. 493.

⁴²In Wilson v. New York El. R. R. Co., 9 Miscl. 657, 30 N. Y. Supp. 547, it is held that the easements are not confined to the space immediately in front of the lot. *And see* First Nat. Bank v. Tyson, 133 Ala. 459, 32 So. 144, 91 Am. St. Rep. 46, 59 L.R.A. 379; Field v. Barling, 149 Ill. 556, 37 N. E. 850, 41 Am. St. Rep. 311, 10 Am. R. R. & Corp. Rep. 707; Townsend v. Epstein, 93 Md.

537, 49 Atl. 629, 86 Am. St. Rep. 481, 52 L.R.A. 409.

⁴³Cushing-Wetmore Co. v. Gray, 152 Cal. 118, 92 Pac. 70; Harvey v. Georgia Southern etc. R. R. Co., 90 Ga. 66, 15 S. E. 783; Dantzer v. Indianapolis Union R. R. Co., 141 Ind. 604, 39 N. E. 223, 11 Am. R. R. & Corp. Rep. 249, 50 Am. St. Rep. 343, 34 L.R.A. 769; O'Brien v. Central I. & S. Co., 158 Ind. 218, 63 N. E. 302, 92 Am. St. Rep. 305, 57 L.R.A. 508; Pennsylvania Co. v. Stanley, 10 Ind. App. 421, 37 N. E. 288, 38 N. E. 421; Highbarger v. Milford, 71 Kan. 331, 80 Pac. 633; Hawley v. Baltimore, 33 Md. 270, 280; Baltimore v. Frick, 82 Md. 77; Regan v. Boston Gas Lt. Co., 137 Mass. 37; Atchison etc. R. R. Co. v. Boerner, 34 Neb. 240, 51 N. W. 842, 33 Am. St. Rep. 637; Matter of Twenty-ninth St., 1 Hill, 189; Reis v. New York, 188 N. Y. 58, 80 N. E. 573, *affirming* S. C. 113 App. Div. 464, 99 N. Y. S. 291; Collins v. Asheville Land Co., 128 N. C. 563, 39 S. E. 21, 83 Am. St. Rep. 720; Mc-

In one of the cases cited it is said: "We think we may safely assert, however, that the obstruction of the easement of access need not always be upon the front of the lot whose owner is affected, but that if the obstruction, though remote, renders access to such lot impossible, or impairs it in a substantial manner, at the point where it abuts upon the street, the property right of the lot owner is invaded, and he may recover. To illustrate this proposition, if a street were fully obstructed on either side of one's lot, so that the lines of the lot could not be reached, access would be denied to the lot owner, though the street in front of his lot had upon it no obstruction. The property rights of the lot owner, as against the public, are coterminous with the lines of his lot, but that property right may be obstructed, and its uses defeated, by cutting off ingress and egress to and from such lines from points upon the street beyond such lines. In such case there should be, and is, a remedy."⁴⁴

§ 124 (91i). Other rights of abutting owners; easement of view, etc. Recent cases support the right of the abutter to an unobstructed view, or right of prospect, as it is sometimes called, which would include both an unobstructed view from the premises and an unobstructed view of the premises from any part of the street.⁴⁵ In one of the cases cited it is

Quigg v. Cullens, 56 Ohio St. 649, 47 N. E. 595; Beatty v. Kinnear, 21 Ohio C. C. 384; *In re Melon St.*, 182 Pa. St. 397, 38 Atl. 482, 28 L.R.A. 275; Johnsen v. Old Colony R. R. Co., 18 R. I. 642, 29 Atl. 594; *State v. Hamilton*, 109 Tenn. 276, 70 S. W. 619; Wilkins v. Chicago etc. R. R. Co., 110 Tenn. 442, 75 S. W. 1026; Cook v. Totten, 49 W. Va. 177, 38 S. E. 491, 87 Am. St. Rep. 792; Tilly v. Mitchell & Lewis Co., 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007; *post*, §§ 191, 196-212. Compare *Newton v. New York etc. R. R. Co.*, 72 Conn. 421, 44 Atl. 813; *Robinson v. Brown*, 182 Mass. 266, 65 N. E. 377; *Putnam v. Boston etc. R. R. Co.*, 182 Mass. 351, 65 N. E. 790; *Shehan v. Fall River*, 187 Mass. 356, 73 N. E. 544; *Cheney v. Boston Consolidated Gas Co.*, 198 Mass. 356; *Scrutchfield v. Choctaw*

etc. R. R. Co., 18 Okl. 308, 88 Pac. 1048, 9 L.R.A. (N.S.) 496.

⁴⁴*Dantzer v. Indianapolis Union R. R. Co.*, 141 Ind. 604, 39 N. E. 223, 11 Am. R. R. & Corp. Rep. 249, 50 Am. St. Rep. 343, 34 L.R.A. 769.

⁴⁵*First Nat. Bank v. Tyson*, 133 Ala. 459, 32 So. 144, 91 Am. St. Rep. 46, 59 L.R.A. 399; *First Nat. Bank v. Tyson*, 144 Ala. 457, 39 So. 560; *Williams v. Los Angeles Ry. Co.*, 150 Cal. 592, 89 Pac. 330; *Codman v. Evans*, 5 Allen 308; *Jaynes v. Omaha St. R. R. Co.*, 53 Neb. 631, 74 N. W. 67, 39 L.R.A. 751; *Dill v. School Board*, 47 N. J. Eq. 421, 20 Atl. 739. Judge Dillon says: "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 on the removal of an obstruction in the

said: "It is difficult to understand, why an easement of view, from every part of a public street, is not, like light and air, a valuable right, of which the owner of a building on the street, ought not to be deprived by an encroachment on the highway by a coterminous or adjacent proprietor. The right of view, or prospect, is one implied, like other rights, from the dedication of the street to public uses. As was well said by the learned judge below in respect to this right: 'It seems to be a valuable right appurtenant to the ownership of land abutting on the highway, and to stand upon the same footing, as to reason, with the easement of motion, light and air, and to be inferior to them only in point of convenience and necessity, and that an interference with it is inconsistent with the public right acquired by dedication. The opportunity of attracting customers by a display of goods and signs is valuable, as I have no doubt the streets of any city in the world will demonstrate,'"⁴⁶ And in a recent New York case, in speaking of the easement of the abutter, it is said: "The easement extends to all parts of the street which enlarge the use and increase the value of the adjacent lot. It is not limited to light, air and access, but includes all the advantages which spring from the situation of the abutter's land upon the space of the open street."⁴⁷ This language would clearly embrace the right of view, though the right of view was not in question in the case. The suit was brought by an abutting owner to recover for the negligent destruction of shade trees in front of his property, where the fee of the street was in the public. The court sustained the right of recovery and, in an elaborate opinion, holds that the abutting owner has other rights than those of light, air and access.⁴⁸ This right

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." 2 Dill. Munic. Corp., p. 889, note 2. In Codman v. Evans, 5 Allen 308, 311, the court says that an abutter is entitled "to have the whole space occupied by a street open from the soil upwards for the free admission of light and air and the prospect unobstructed from any point."

⁴⁶First Nat. Bank v. Tyson, 133

Ala. 459, 32 So. 144, 91 Am. St. Rep. 46, 59 L.R.A. 399.

⁴⁷Donahue v. Keystone Gas Co., 181 N. Y. 313, 73 N. E. 1108, 106 Am. St. Rep. 549, 70 L.R.A. 761.

⁴⁸The court says: "The easement (of the abutter in the street), as for convenience it may be called, consists in the right to have the street kept open and includes all the incidental privileges which may fairly be implied from that right. It is the proximity of the street, the situation of the abutting land with reference to an open street, which

is subject of course to all legitimate street uses, but it cannot be interfered with for private purposes with or without compensation nor by structures placed in the street for public purposes which are not legitimate street uses, unless compensation is made.⁴⁹ An abutter has no greater right to use the street in front of his property than any other member of the public, except in connection with his abutting property.⁵⁰

§ 125. Rights of abutting owners a matter of State law. It will be quite manifest from this chapter that the rights of abutting owners differ in different States. What they are is a matter of State law to be declared by the legislature or determined by the courts of the State. Upon this point the supreme court of the United States says: "The same law which declares

gives to the abutting owner the special right to the enjoyment and use of whatever is permitted or maintained by the public authorities as a part of the street. These easements are created by operation of law when streets are opened and they are presumed to be paid for by taking the benefits into account when land is procured for the purpose. Such benefits are 'coextensive with the use' to which the street may by law be devoted. They frequently induce owners of land to donate or dedicate a part thereof for the purpose of a street. If the street is improved so as to be more useful, or ornamented so as to be more beautiful, the public is benefited generally and the abutter is benefited specially. So long as a hitching post or a shade tree is physically and legally a part of the street, he is entitled to all the special benefits which flow therefrom to his lot, free from interference by a wrongdoer, but subject to removal by the municipal government. The easement extends to all parts of the street which enlarge the use and increase the value of the adjacent lot. It is not limited to light, air and access, but includes all the advantages

which spring from the situation of the abutter's land upon the open space of the street. These rights exist whether he owns the fee of the street or not. As they are dependent upon the street and cannot exist without it, they are a part of it and become 'an integral part of the estate' of the abutting owner, subject to interference by no one except the representatives of the public." *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 319, 320, 73 N. E. 1108, 106 Am. St. Rep. 549, 70 L.R.A. 761.

⁴⁹See cases already cited in this section. It has been held in New York that in estimating the just compensation to be made for injury to the abutter's rights by an elevated railroad, nothing could be allowed for noise, loss of privacy, or obstructing the view of the premises from the opposite side of the street. *Messenger v. Manhattan R. R. Co.*, 129 N. Y. 502, 29 N. E. 955; *Bischoff v. New York El. R. R. Co.*, 138 N. Y. 257, 33 N. E. 1073; *Seaside & B. B. R. R. Co. v. South Reformed Dutch Church*, 83 Hun 143, 31 N. Y. Supp. 630.

⁵⁰*Montgomery v. Parker*, 114 Ala. 118, 62 Am. S^t. Rep. 95.

the easements defines, qualifies and limits them. Surely such questions must be for the final determination of the State court. It has authority to declare that the abutting land owner has no easement of any kind over the abutting street; it may determine that he has a limited easement, or it may determine that he has an absolute and unqualified easement. The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States, and the decisions have been conflicting, and often in the same State irreconcilable in principle. The courts have modified or overruled their own decisions, and each State has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy.”⁵¹

§ 126 (91j). Rights of abutting owners as adjoining proprietors. The public, as owner of the street, is in fact an adjoining proprietor, whether it owns the fee or only an easement. Has the public any greater right than an individual proprietor, or does it hold the street subject to the same limitations and conditions that attach to private ownership? We think the latter. In the use of the street the public is subject to the same limitations that an individual would be who held the street as his private property.⁵² The abutting owner has the same rights with respect to the use of the street that he has with respect to the use of any other adjacent property. Consequently, he has a right to the support of the soil by that of the street, a right to the exclusive possession of his inclosure as against encroachments from the street, a right not to be injured by any interference with the flow of surface water or running streams

⁵¹Sauer v. New York, 206 U. S. 536, 27 S. C. 686.

⁵²“In the control and improvement of its thoroughfares for public use the city has the same rights and powers as a private owner has over his own land and is subject to the same liabilities. It would be liable for damages caused to plaintiff's property by grading the avenue and street, just as a private owner of the soil over which they were laid would have been liable when improving it for his own use; and the right to

inflict damage beyond that which a private owner might have inflicted without liability did not exist.” Munger v. City of St. Paul, 57 Minn. 9, 58 N. W. 601. *To same effect*, Stearn's Exrs. v. City of Richmond, 88 Va. 992, 14 S. E. 847, 6 Am. R. R. & Corp. Rep. 247; Rice v. City of Flint, 67 Mich. 401, 34 N. W. 719; Nichols v. City of Duluth, 40 Minn. 389, 42 N. W. 84; City of New Westminster v. Brighouse, 20 Duvall 520; and many cases cited in the following sections.

caused by the use of the street which would be actionable if made by an individual, and, generally, a right not to be injured by any unreasonable use of the land which forms the street.⁵³ These rights, unlike those of access and frontage, are absolute and paramount in the individual, and the public must so use and improve the streets as not to interfere with such rights, or else make "just compensation" for the damages occasioned by such interference.⁵⁴

It is evident that these rights exist in the abutting owner, unless they are taken or acquired by the public when the street is established. They always exist with respect to adjoining property, unless they have been expressly reserved or granted in favor of other property. These rights are never expressly granted, released or condemned when a street is established. The land alone is taken, or granted, or dedicated, as the case may be. But land is always understood to have attached to it these universal rights and obligations relating to its use and enjoyment. When the public take land for a street *in invitum*, why should they be held to have acquired by implication something which they did not ask for? Why should a grant or dedication of land to the public, for a particular use, be held to have vested in the public more than a grant of the same land, for the same use, to an individual, would vest in him? The use of the land for a street does not necessarily require that these rights of support, etc., should be in the public. It is always possible and practicable to improve a street without interfering with such rights. It is vastly more for the public interest that the public should occasionally incur increased expense in making improvements, to avoid interfering with such rights, than that the public should in all cases be compelled to pay for the loss of such rights when a street is established. It has been said, in some cases, that a jury or other tribunal for assessing damage, when a street is laid out, take into consideration the possibility of future damage by improving the street, and increase

⁵³Post, §§ 139-142, 234. "The rights of the public in property are to be governed by the same rules of law as the rights of individuals, and the maxim *sic utero tuo ut alienum non laedas*, applies with equal force in the one case as in the other." Stone v. Augusta, 46 Me. 127.

⁵⁴Same; and §§ 234, 852. In Nichols v. City of Duluth, 40 Minn. 389, 42 N. W. 84, the court, in speaking of one of these rights, says: "This right of the lateral support of the adjoining soil, being a natural one, is absolute, and independent of any question of negligence."

their allowance accordingly.⁵⁵ We think the fact is otherwise, but the impossibility of forming an accurate or even approximate estimate of such damages is sufficient to rebut any presumption of their having been included in the assessment. Who can estimate what the needs of the public will require, or the whims of public officers suggest? To attempt to include such damages is to send the jury into the realm of pure speculation. The more reasonable, the more practicable and the juster view is that such damages are not the subject of assessment in such cases.⁵⁶ While these views as to the rights of abutting owners do not accord with all the decided cases—no views can do that—they are supported, if not by the more numerous, at least by the later and better-reasoned cases.⁵⁷ We shall go more fully into the decisions in the following sections in the treatment of the separate rights to which we have referred in this section.

§ 127 (91k). Whether the public have a fee or an easement in the street, the title is in trust for street uses only. Though the fee of a street is in the public, yet it is not an absolute, but only a qualified or conditional fee.⁵⁸ The public, whether represented by city, State or county, holds the fee in trust for public use as a street, and for no other purpose,⁵⁹ and when the use ceases the fee reverts to him from whom it was

⁵⁵See authorities cited *post*, § 134, note 98.

⁵⁶*Post*, chap. xxiv.

⁵⁷This section is quoted and approved in Stearns' *Ex'r v. City of Richmond*, 88 Va. 992, 14 S. E. 847, 6 Am. R. R. & Corp. Rep. 247.

⁵⁸*Leadville v. Bohn Min. Co.*, 37 Colo. 248, 86 Pac. 1038, 8 L.R.A. (N.S.) 422; *People v. Kerr*, 27 N. Y. 188; *Kimball v. Kenosha*, 4 Wis. 321; *Goodall v. Milwaukee*, 5 Wis. 32; and see *Abendroth v. Manhattan Ry. Co.*, 52 N. Y. Supr. Ct. 274 and cases cited in next note. In *Matter of Gilbert Elevated Ry. Co.*, 38 Hun 437, 448, 452-3, the court approve the following language from the commissioners' report: "The city takes the fee in terms, but only for one specified purpose, viz., in trust to keep the land open as a public street. The fee is not an absolute, unqualified, unconditional fee.

The city cannot sell or convey it, or encumber it in any way, or consent that it shall be encumbered. It cannot build upon it, or permit others to do so. The land could not be sold for the debts of the city, for its estate is only a trust estate. The act provides what the city can do with the fee, and that is to keep it open as a public street, and that is all the city can do with it and is all the right the public has taken away from the original owner. The whole duty, power and trust of the city, in the fee, is to keep it open, the fee being taken because the city can thereby better perform its duty and its trust in that regard than if any other quality of estate were taken."

⁵⁹*Haskell v. Denver Tramway Co.*, 23 Colo. 60, 46 Pac. 121; *Leadville v. Bohn Min. Co.*, 37 Colo. 248, 86 Pac. 1038, 8 L.R.A. (N.S.) 422; Im-

lay v. Railroad Co., 26 Conn. 256, 68 Am. Dec. 392; Carter v. Chicago, 57 Ill. 283; Chicago v. Wright, 69 Ill. 318; Kreigh v. Chicago, 86 Ill. 407; City of Morrison v. Hinkson, 87 Ill. 587, 589, 29 Am. Rep. 77; Smith v. McDowell, 148 Ill. 51, 35 N. E. 141, 22 L.R.A. 393; Field v. Barling, 149 Ill. 556, 37 N. E. 850, 41 Am. St. Rep. 311, 24 L.R.A. 406, 10 Am. R. R. & Corp. Rep. 707; Barrows v. City of Sycamore, 150 Ill. 588, 37 N. E. 1096, 10 Am. R. R. & Corp. Rep. 62, 41 Am. St. Rep. 400; Chicago Tel. Co. v. N. W. Tel. Co., 199 Ill. 324, 65 N. E. 329; Pennsylvania Co. v. Bond, 202 Ill. 95, 66 N. E. 941; People v. Harris, 203 Ill. 272, 67 N. E. 785, 96 Am. St. Rep. 304; People v. Atchison etc. Ry. Co., 217 Ill. 594, 75 N. E. 573; Chicago etc. Ry. Co. v. People, 222 Ill. 427, 78 N. E. 790; Weage v. Chicago etc. N. R. Co., 227 Ill. 421, 81 N. E. 424, 11 L.R.A.(N.S.) 589; Gregsten v. Chicago, 40 Ill. App. 607; Hibbard v. Chicago, 59 Ill. App. 470; Chicago General R. R. Co. v. Chicago City R. R. Co., 62 Ill. App. 502; Chicago v. Verdon, 119 Ill. App. 494; Stanley v. Davenport, 54 Ia. 463; Gilchrist Co. v. Des Moines, 128 Ia. 49, 102 N. W. 831; Bateman v. City of Covington, 90 Ky. 390, 14 S. W. 361, 3 Am. R. R. & Corp. Rep. 508; Larry v. Gilmour, 121 Ky. 367, 89 S. W. 231; New Orleans etc. R. R. Co. v. City of New Orleans, 44 La. Ann. 748, 11 So. 77; Pool v. Falls Road Elec. R. R. Co., 88 Md. 533, 41 Atl. 1069; Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 86 Am. St. Rep. 441, 52 L.R.A. 409; Schurmeyer v. St. Paul, etc. R. R. Co., 10 Minn. 82, 88 Am. Dec. 59; St. Paul v. Chicago etc. R. R. Co., 63 Minn. 330, 63 N. W. 267, 34 L.R.A. 184, 65 N. W. Rep. 649, 68 N. W. Rep. 458; Sanborn v. Van Duyne, 90 Minn. 215, 96 N. W. 41; Theobold v. Louisville etc. R. R. Co., 66 Miss. 279,

14 Am. St. Rep. 564, 4 L.R.A. 735; Jaynes v. Omaha St. R. R. Co., 53 Neb. 631, 74 N. W. 67, 39 L.R.A. 751; Burlington v. Penn. R. R. Co., 56 N. J. Eq. 259, 38 Atl. 849; Duyne v. Knox Hat Mfg. Co., 71 N. J. Eq. 375; People v. Kerr, 27 N. Y. 188; Story v. New York El. R. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Lahr v. Met. El. R. R. Co., 104 N. Y. 268; Kane v. New York El. R. R. Co., 125 N. Y. 164, 26 N. E. 278, 3 Am. R. R. & Corp. Rep. 744, 11 L.R.A. 640; Matter of New York, 174 N. Y. 26, 66 N. E. 584, *affirming* S. C. 74 App. Div. 197, 77 N. Y. S. 737; Ackerman v. True, 175 N. Y. 353, 67 N. E. 629, *reversing* S. C. 71 App. Div. 143, 75 N. Y. S. 695; Lawrence v. New York, 2 Barb. 577; Rhinehart v. Redfield, 93 App. Div. 410, 87 N. Y. S. 789; Callen v. Columbus Edison Elec. Lt. Co., 66 Ohio St. 166, 64 N. E. 141, 58 L.R.A. 782; Lake Shore, etc., Ry. Co. v. Elyria, 69 Ohio St. 414, 69 N. E. 738; Lake Shore etc. R. R. Co. v. Elyria, 14 Ohio C. C. 48; Strader v. Cincinnati, 1 Handy, 446; Coalville Pass. R. R. Co. v. Wilkes-Barre Southside R. R. Co. 5 Luzerne Leg. Reg. Rep. 340; Humer v. Mayer, 1 Hnmpf. 403; Mayor v. Brown, 9 Heisk. 1; Smith v. Railroad Co., 87 Tenn. 626, 630; State v. Taylor, 107 Tenn. 455, 64 S. W. 766; Cereghino v. Ore. Short-Line R. R. Co., 26 Utah 467, 73 Pac. 634, 90 Am. St. Rep. 843; Kimball v. City of Kenosha, 4 Wis. 321, 330; Goodall v. Milwaukee, 5 Wis. 32. "The grant is expressly upon trust (though dedicated or confiscated), for a public purpose, that the lands may be appropriated and used forever as public streets. * * * The city has neither the right nor the power to apply any such property to other than public uses, and those included within the objects of the grant. Whatever may be the quantity or the quality of the estate of the city of New York in it.

acquired, unless otherwise provided by statute.⁶⁰ If the public has only an easement there is no question about its being held in trust for street uses only.⁶¹ In one of the cases cited, which related to a platted street where the statute provided that the effect of the plat should be to vest the fee of the streets in the municipality, the court says: "It seems plain that the effect of the provision is not to vest in the municipality a fee simple absolute in the streets, but only a determinable and a qualified fee, and that what is granted to the city is to be held in trust for the uses intended, viz: for street uses, and street uses only."⁶² It was further held in the same case that this limitation upon the public title necessarily implied that there was a substantial interest in the street not conveyed by the plat and that this interest remained in the abutting owners and was in the nature of an incorporeal hereditament. It has sometimes been supposed that the public might have such an absolute fee as would authorize it to make any use of the street it saw fit irrespective of the abutting owners.⁶³ But we know of no instance of such a fee, nor do we see how it would be possible. However absolute the fee of the public may have once been, its devotion of the land to street uses and the express or implied invitation to abutters to improve their property with reference to the street, would give rise to mutual rights and obligations which could not be abrogated at the will of either party. By acting upon the invitation to use the land as a street, the abutters would acquire a right to have the space kept open as a street and to enjoy light, air and access therefrom.⁶⁴ It follows that a municipality has no power to grant the use of streets

streets, that estate is essentially public and not private property and the city, in holding it, is the agent and trustee of the public and not a private owner for profit or emolument." People v. Kerr, 27 N. Y. 188, 197.

⁶⁰Gebhart v. Reeves, 75 Ill. 301; Helen v. Webster, 85 Ill. 116; United States v. Harris, 1 Sumner 21. But in Kansas it is held that the fee reverts to the abutting owner. Showalter v. So. Kan. R. R. Co., 49 Kan. 421, 32 Pac. 92. See generally Elliott, Roads & Streets, pp. 670, 671.

⁶¹See cases in last two notes.

⁶²Callen v. Columbus Edison Elec. Lt. Co., 66 Ohio St. 166, 64 N. E. 141, 58 L.R.A. 782. Where the city had the fee it was held to own the mineral, underneath the surface. Leadville v. Coronado Min. Co., 29 Colo. 17, 67 Pac. 289; Leadville v. St. Louis S. & M. Co., 29 Colo. 40, 67 Pac. 1126.

⁶³See 2 Dill. Munic. Corp. § 704.

⁶⁴Kane v. New York El. R. R. Co., 125 N. Y. 164, 26 N. E. 278, 3 Am. R. R. & Corp. Rep. 744, 11 L.R.A. 640.

for private purposes and that abutting owners who suffer special damages by reason thereof may have the appropriate remedies to prevent or recover damages therefor.⁶⁵

§ 128 (911). Ownership of the fee of streets and distinctions based thereon. There is great confusion and conflict in the authorities arising out of considerations based upon the fee of streets. Thus the New York decisions hold that the abutting owner is entitled to compensation when an elevated railroad is constructed in front of his property, whether he owns the fee of the street or not,⁶⁶ but as to surface railroads of all kinds, award him compensation if he owns the fee and deny

⁶⁵Beebe v. Little Rock, 68 Ark. 39, 56 S. W. 791; Laing v. Amerieus, 86 Ga. 758, 13 S. E. 107, 4 Am. R. R. & Corp. Rep. 228; Smith v. McDowell, 148 Ill. 51, 35 N. E. 141, 22 L.R.A. 393; Hibbard v. Chicago, 173 Ill. 91, 50 N. E. 256, 40 L.R.A. 621; Snyder v. Mt. Pulaski, 176 Ill. 397, 52 N. E. 62, 44 L.R.A. 407; Penn. R. R. Co. v. Chicago, 181 Ill. 289, 54 N. E. 825; People v. Harris, 203 Ill. 272, 67 N. E. 785, 96 Am. St. Rep. 304; People v. Clean St. Co., 225 Ill. 470, 80 N. E. 298, 116 Am. St. Rep. 156, 9 L.R.A.(N.S.) 455; Hibbard v. Chicago, 59 Ill. App. 470; Chicago v. Pooley, 112 Ill. App. 343; Chicago v. Verdon, 119 Ill. App. 494; Chicago Cold Storage Warehouse Co. v. People, 127 Ill. App. 179; State v. Berditta, 73 Ind. 185, 38 Am. Rep. 117; Labry v. Gilmour, 121 Ky. 367, 89 S. W. 231; Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 86 Am. St. Rep. 441, 52 L.R.A. 409; Brauer v. Baltimore Refrigerating etc. Co. 99 Md. 367, 58 Atl. 21, 105 Am. St. Rep. 304, 66 L.R.A. 403; St. Paul v. Chicago etc. R. R. Co., 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L.R.A. 184; Schopp v. St. Louis, 117 Mo. 131, 22 S. W. 898, 8 Am. R. R. & Corp. Rep. 391, 20 L.R.A. 783; State v. St. Louis, 161 Mo. 371, 61 S. W. 658; Beecher v. Newark, 65 N. J. L. 307, 47 Atl.

466, *affirming* S. C. 64 N. J. L. 475, 46 Atl. 166; Swift v. Delaware etc. R. R. Co., 66 N. J. Eq. 34, 57 Atl. 456; Ackerman v. True, 175 N. Y. 353, 67 N. E. 629, *reversing* S. C. 71 App. Div. 143, 75 N. Y. S. 695; McMillan v. Klaw & Erlanger Con. Co., 107 App. Div. 407, 95 N. Y. S. 365; Herrick v. Cleveland, 7 Ohio C. C. 470; Cereghino v. Ore. Short-Line R. R. Co., 26 Utah 467, 73 Pac. 634, 90 Am. St. Ry. 843. *Compare* Rothschild v. Chicago, 227 Ill. 205, 81 N. E. 407; State v. Stoner, 39 Ind. App. 104, 79 N. E. 399.

A different rule prevails in Iowa where it is held that the city takes an absolute fee which it may dispose of for private uses. Barr v. Oskaloosa, 45 Ia. 275; Marshalltown v. Forney, 61 Ia. 578, 16 N. W. 740; Dempsey v. Burlington, 66 Ia. 387, 24 N. W. 508; Williams v. Carey, 73 Ia. 194, 34 N. W. 813; Spitzer v. Runyan, 113 Ia. 619, 85 N. W. 782; Harrington v. Ia. Cent. Ry. Co., 126 Ia. 388, 102 N. W. 139.

⁶⁶Story v. N. Y. El. R. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Lahr v. Metropolitan El. R. R. Co., 104 N. Y. 268; Kane v. New York El. R. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L.R.A. 640; S. C. Sub. Nom. Duyekinek v. New York El. R. R. Co., 3 Am. R. R. & Corp. Rep. 744.

him compensation if he does not.⁶⁷ Commercial railroads and even horse railroads are held in this State not to be legitimate street uses, but if the abutter does not happen to own the fee, he can get no compensation, however much he may be damaged. In the elevated railroad cases he gets compensation, because his easements are interfered with by a use foreign to the purposes of a highway. But in case of the commercial railroad he cannot get compensation though the same easements are interfered with by a use also inconsistent with street purposes and differing only as to the structure placed in the street. It has accordingly been held in New York that, in a proceeding to condemn the fee of a street, the abutter is entitled to substantial damages.⁶⁸ So in Tennessee it is held that the abutting owner may recover compensation for a steam dummy railroad in the street in front of his property if he owns the fee, but otherwise if the fee is in the public.⁶⁹ Similar distinctions are made in other States.⁷⁰

On the other hand, many recent cases question or repudiate distinctions based upon the ownership of the fee, as respects the uses which the public may make of the soil or the right of the abutter to compensation.⁷¹ The opinions of the text writers

⁶⁷Fobes v. Rome etc. R. R. Co., 121 N. Y. 505, 24 N. E. 919, 3 Am. R. R. & Corp. Rep. 182, 8 L.R.A. 453; Williams v. New York Cent. R. R. Co., 16 N. Y. 97, 69 Am. Dec. 632; Craig v. Railroad Co., 39 N. Y. 404; Kellinger v. Railroad Co., 50 N. Y. 206.

⁶⁸City of Buffalo v. Pratt, 131 N. Y. 293, 30 N. E. 233, 6 Am. R. R. & Corp. Rep. 499, 27 Am. St. Rep. 592, 15 L.R.A. 413.

⁶⁹East End St. R. R. Co. v. Doyle, 88 Tenn. 747, 13 S. W. 936, 9 L.R.A. 100, 2 Am. R. R. & Corp. Rep. 747; Smith v. Railroad Co., 87 Tenn. 626, 11 S. W. 709; Iron Mt. R. R. Co. v. Bingham, 87 Tenn. 522, 11 S. W. 705, 4 L.R.A. 622.

⁷⁰Florida So. R. R. Co. v. Brown, 23 Fla. 104; Moses v. Pittsburgh etc. R. R. Co., 21 Ill. 516; Murphy v. Chicago, 29 Ill. 279, 81 Am. Dec. 307; Indianapolis etc. R. R. Co. v.

Hartley, 67 Ill. 439; Cox v. Louisville etc. R. R. Co., 48 Ind. 178; Kineaid v. Indianapolis Natural Gas Co., 124 Ind. 577, 24 N. E. 1036, 19 Am. St. Rep. 113, 8 L.R.A. 602; Milburn v. Cedar Rapids, 12 Iowa, 246; Kucherman v. C. C. & D. R. R. Co., 46 Iowa, 366; Phipps v. West Maryland R. R. Co., 66 Md. 319; Western Union Tel. Co. v. Williams, 86 Va. 696, 11 S. E. 106, 19 Am. St. Rep. 908; *post*, §§ 153, 154.

⁷¹Fulton v. Short Route R. R. Trans. Co., 85 Ky. 640, 4 S. W. 332, 7 Am. St. Rep. 619; Hepting v. New Orleans Pac. R. R. Co., 36 La. Ann. 898; Chesapeake & P. Tel. Co. v. Mackenzie, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219; Schurmeier v. St. Paul etc. R. R. Co., 10 Minn. 82, 88 Am. Dec. 59; Adams v. C. B. & Q. R. R. Co., 39 Minn. 286, 39 N. W. 629, 12 Am. St. Rep. 644, 1 L.R.A. 493; Lamm v. Chicago etc. R. R.

also incline in the same direction.⁷² "It is difficult to imagine," says the supreme court of South Carolina, "a right more empty and theoretical than private ownership of the fee in the street

Co., 45 Minn. 71, 47 N. W. 455, 10 L.R.A. 268; Theobold v. Louisville etc. R. R. Co., 66 Miss. 279, 6 So. 230, 14 Am. St. Rep. 564, 4 L.R.A. 735; Bronson v. Albion Telephone Co., 67 Neb. 111, 93 N. W. 201, 60 L.R.A. 426; Improvement Co. v. Hoboken, 36 N. J. L. 540; Van Horne v. New York Pass. R. R. Co., 48 N. J. Eq. 332; Halsey v. Rapid Transit R. R. Co., 47 N. J. Eq. 380; Donahue v. Keystone Gas Co., 181 N. Y. 313, 73 N. E. 1108, 106 Am. St. Rep. 549, 70 L.R.A. 761, *affirming* S. C. 90 App. Div. 386, 85 N. Y. S. 478; White v. Northwestern N. C. R. R. Co., 113 N. C. 610, 18 S. E. 630, 9 Am. R. R. & Corp. Rep. 103, 37 Am. St. Rep. 639, 22 L.R.A. 627; Blackwell etc. Ry. Co. v. Gist, 18 Okla. 516, 90 Pac. 889; McQuade v. Portland etc. R. R. Co., 18 Ore. 237, 22 Pac. 899, 1 Am. R. R. & Corp. Rep. 34; Willamette Iron Works v. Oregon R. & N. Co., 26 Ore. 224, 37 Pac. 1016, 46 Am. St. Rep. 620, 29 L.R.A. 88; South Bound R. R. Co. v. Burton, 67 S. C. 515, 46 S. E. 340; Dooley Block v. Salt Lake Rapid Transit Co., 9 Utah 31, 33 Pac. Rep. 229, 8 Am. R. R. & Corp. Rep. 327; Stewart v. Ohio Riv. R. R. Co., 38 W. Va. 438, 18 S. E. Rep. 604; Barney v. Keokuk, 94 U. S. 324. In McQuade v. Portland etc. R. R. Co., 18 Ore. 237, 22 Pac. 899, Thayer, C. J., speaking for the court, says: "Too much importance, it seems to me, has been attached to the question of ownership of the fee in the street. * * * The use of the land as a street includes practically its entire beneficial interest. There is no estate of a private character left in the dedicator, if the fee does remain in him,

which he can utilize, and if it vests in the lot owner by virtue of his deed to the lot, it confers no rights which are not secured to him by the implied covenant, arising out of the conveyance, that he shall have a right of way over the street, and egress and ingress to and from his premises by means thereof. The lot owner's rights in the street are just as sacred, so far as I can see, in the one case as in the other." In a recent Mississippi case it is said: "A distinction is made by some of the authorities in cases where the fee in the soil of the street is in the public—the State, county, or city—and where it remains in the abutting owner; and in the first case, the right of the abutting owner to compensation is denied, and in the latter, it is recognized and allowed. We perceive no well-founded difference in principle in such distinction. If the fee is in the public, it is held in trust, expressly or impliedly, that the land shall be used as a street, and it cannot be applied to any other purpose without a breach of trust. It is only where the fee is in the public, free from any trust or duty, that it may be disposed of for any purpose that the public may deem proper. Whether the abutting owner has simply an easement in the street, while the fee is in the public or in some other owner, or whether he has both the fee and the easement, he is equally entitled to require that nothing shall be done in derogation of his rights." Theobold v. Louisville etc. R. R. Co., 66 Miss. 279, 6 So. 230, 14 Am. St. Rep. 564, 4 L.R.A. 735.

⁷²Cooley Const. Lim., p. 682, note 3 (6th Ed.) ; 2 Dill. Munic. Corp.

of an established city. The possibility of regaining possession of the property by abandonment of the street is so remote that it may ordinarily be regarded as a negligible factor. The adjacent owner has no present beneficial use differing in the slightest degree from that which is acquired by a purchaser, for himself and his assigns, who buys a lot abutting on a street laid out by the State or the city on its own land. In the one case, in his dedication he retains, and in the other, by the state's or city's dedication he acquires, certain street privileges which constitute property.”⁷³

The cases which have contributed more than any others to break down the distinction made in the earlier cases, as to the ownership of the fee of streets, are the New York Elevated railroad decisions.⁷⁴ The authority of these cases is somewhat shaken by the fact that the same court has, since the earlier decisions, reaffirmed the old distinction in the case of surface railroads.⁷⁵ The inconsistency of the two positions seems manifest, and, doubtless, if the court had not been embarrassed by prior decisions, the result in *Fobes v. Rome etc., R. R. Co.* would have been different. Courts of other States will be more likely to follow the logic and good sense of the elevated railroad cases and reject the fine distinctions attempted in the case of surface railroads.⁷⁶

In transactions between man and man concerning property, we are not aware of any instance in which the ownership of the fee of the street has cut any figure in fixing the price of the property or influencing the parties. The width of the street, the manner in which it is improved, the condition of the pave-

§§ 704, 704a; Keasby on Electric Wires, pp. 61-68.

⁷³*South Bound R. R. Co. v. Burton*, 67 S. C. 515, 46 S. E. 340.

⁷⁴*Story v. New York El. R. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Lahr v. Metropolitan El. R. R. Co.*, 104 N. Y. 268; *Kane v. New York El. R. R. Co.*, 125 N. Y. 164, 26 N. E. 278, 11 L.R.A. 640, 3 Am. R. R. & Corp. Rep. 744.

⁷⁵*Fobes v. Rome etc. R. R. Co.*, 121 N. Y. 505, 24 N. E. 919, 8 L.R.A. 453, 3 Am. R. R. & Corp. Rep. 182.

⁷⁶Thus in *Lamm v. Chicago etc. R. R. Co.*, 45 Minn. 71, 47 N. W. 455,

10 L.R.A. 268, it is said: “If the abutting owner, independently of the ownership of the fee of the street, has an easement in the street in front of his lot to the full width of it for the purpose of access, light and air, which is property, and cannot be taken from him without compensation, it is difficult for us to see what difference it makes whether the easement is taken away or its enjoyment interfered with by a railroad constructed and operated on the surface of the ground, or at an elevation above it.”

ment, the question of sewers, water, gas, etc., are factors of more or less importance. But whether the title extended to the center of the street or stopped at the street line, we never knew to be the subject of inquiry. "The right of adjacency, the advantage of having your land upon the highway with right of access and light and air, this is what the people understand and value. Who owns the fee they do not know nor care."⁷⁷ So in case of any use of the street prejudicial to the abutting property, as by a railroad, the amount of damage actually done to the property would not vary one iota, whether the abutter owned the fee or not. The damage to the technical fee is nothing. The whole appreciable injury is sustained by the property beyond the street line, and arises from the interference with the easements of light, air and access and the annoyances occasioned by the particular use of the street, whatever it may be.

So the uses which the public may make of a street do not depend upon the ownership of the fee.⁷⁸ If the fee is in the abutting owner, it is subject to all legitimate street uses. If it is in the public, it is in trust for street uses, and is subject to certain rights or easements in the abutting owner which cannot

⁷⁷Keasby on Electric Wires, pp. 66, 67.

⁷⁸"Distinctions based upon the legal ownership of the fee in respect to the rights of the abutting proprietor have produced much confusion, resulting in many conflicting decisions; but the true principle, which has been slowly but surely evolved from protracted discussion and experience, is that in respect to the use of the soil for the purposes of a street (and apart from those reversionary or other rights peculiar to legal ownership) it is wholly immaterial where the legal title resides. The very power to take private property for public use, as well as the capacity of a municipal corporation to acquire it in any way, necessarily implies that it is to be held in trust for public purposes; and in the case of land acquired for the purposes of a street there is something in the nature of a con-

tract, under which two co-existent and inviolable rights are created—one belonging to the public to use and improve the street for the ordinary purposes of a street; the other, to the abutting owner to have access to and from his property, and to enjoy such use of the street as is customary and reasonable. If the owner voluntarily dedicates or grants a strip of land to a city for a street it must be presumed that he does so in consideration of the contemplated benefits accruing to his adjoining property by reason of the strip being used for the legitimate purposes of a street only. If the grant be made upon a pecuniary consideration, it is also fair to assume that in estimating the amount to be paid the value of the benefits above mentioned were likewise considered." White v. Northwestern N. C. R. R. Co., 113 N. C. 610, 18 S. E. 330, 9 Am. R. R. & Corp. Rep. 103,

be impaired by any diversion of the street to other uses.⁷⁹ Whether, therefore, the public has an easement only or the fee, it has nothing more than a perpetual right to use the land for street or highway purposes. The street cannot be devoted to other uses without violating the rights of the abutting owners. What are legitimate street uses, is a question which in no way depends upon the fee. It necessarily follows from what has already been said, that the abutting owner's right to compensation, in case of any particular use of the street, depends upon whether the use is within the purposes for which highways and streets exist and are established. If it is, then the abutting owners' rights are subject to that use and he has no legal cause for complaint. If not, then the use is a perversion of the street, a violation of the trust and authority vested in the public, and an unlawful interference with the property rights of the abutting owner, for which he may have the appropriate remedies.

Undoubtedly the ownership of the fee would make a difference in the remedies open to the abutter in case of an improper use of the street.⁸⁰ But the right to compensation and the measure of damages should, in equity and good conscience, be the same whether the fee is in the abutter or in the public, and this result may be worked out, not only without violence to legal principles, but in harmony with them. When part of a tract or property is taken, just compensation is the difference in value before and after the taking, excluding general benefits.⁸¹ Where the abutter owns the fee of a street and it is used for some purpose which is not a legitimate street use, he is entitled to compensation the same as in any case of partial taking.⁸² Where the fee is in the public, the abutter has easements of light, air and access which are property. To take or impair these is to take a part of the property in the abutting lot, as much so as to take the right of exclusion. Logically, there is a partial taking of the lot, as much as if one corner of it was cut off, and the same rule of compensation may be applied, as in the former case.⁸³

37 Am. St. Rep. 639, 22 L.R.A. 627.
To the same effect *Eels v. Am. Tel. & Tel. Co.*, 143 N. Y. 133, 38 N. E. 202, 10 Am. R. R. & Corp. Rep. 69, 25 L.R.A. 640.

⁷⁹See chap. xxviii.

⁸⁰*Post*, § 693.

⁸¹*Post*, § 735.

⁸²*Post*, § 503.

⁸³*See* the preceding sections, §§ 119-126.

It seems every way desirable that a distinction, which is never made in the every day dealings between man and man, touching abutting property, should be abandoned by the courts. There is no substantial distinction between a perpetual easement for street uses and a fee for street uses. There is a manifest injustice in awarding compensation to one man for a railroad in a street or other similar use, and denying it to another, solely on a distinction which is so purely technical and unsubstantial. And so of any distinction in the elements or measure of damages.

II.—STREET GRADE CASES.

§ 129 (92). **Early English cases.** The earliest case to recover for a change of grade is that of *Leader v. Moxon*,⁸⁴ decided in 1773, in the English Court of Common Pleas. Certain commissioners were authorized by act of parliament “to pave, repair, sink or alter certain streets in such manner as they should think fit.” Defendants, acting under these commissioners, raised the grade of a street some six feet in front of plaintiff’s house, intercepting the light and preventing access thereto. The plaintiff brought suit for the damages so occasioned to his premises, and the action was sustained. The case is badly reported and the ground of the decision is hard to make out. But Gould, J., is reported as saying: “Every man of common sense must understand that this act of parliament ought to be carried into execution without doing such enormous injury to individuals as hath been manifestly done to the plaintiff in this case. Whenever a trust is put in commissioners by act of parliament, if they misdemean themselves in that trust, they are answerable criminally in the King’s Bench; if they aggrieve and damnify the subject, as they have done in the present case, they are answerable in this court, *civiliter* in damages to the party injured.⁸⁵ Blackstone, J., says: “I am of the same opinion. * * * I think the commissioners have acted arbitrarily and tyrannically, and that the damages are too small.” This case, instead of becoming an authority, was speedily overruled and explained away. Twenty years later Lord Kenyon laid down the law in the case of *The Governor and Company of the British*

Cast Plate Manufacturers v. Meredith,⁸⁶ which has ever since been a leading case, both in England and America. Certain commissioners, acting under and in accordance with an act of parliament, raised the street in front of the land of the plaintiff who brought suit for damages. Lord Kenyon says: "If this action could be maintained, every turnpike act, paving act, and navigation act, would give rise to an infinity of actions. If the legislature think it necessary, as they do in many cases, they enable the commissioners to award satisfaction to the individuals who happen to suffer; but if there be no such power, the parties are without remedy, provided the commissioners do not exceed their jurisdiction. * * * Some individuals suffer an inconvenience under all these acts of parliament; but the interests of the individual must give way to the accommodation of the public." His Lordship questioned the correctness of the report of Leader v. Moxon, and explained it on the ground that the commissioners in that case had abused their authority and acted in an arbitrary and abusive manner.⁸⁷ The principle of this decision is that no action will lie for the doing of that which is authorized by an act of parliament; and the reason is that an act of parliament is, in England, the supreme law of the land. The same principle has been reiterated in numerous cases.⁸⁸

§ 130 (93). Value of English precedent in constitutional questions. The English cases to which we have referred have been much cited in America to show that the owner

⁸⁶4 T. R. 794, 1792.

⁸⁷Leader v. Moxon has been similarly explained in other cases. In Sutton v. Clark, 6 Taunton, 28, 1815, the court, referring to it, says: "The court thought that they (the commissioners in that case) were acting in a most tyrannical and oppressive manner, and that, though they had a right to pave, and perhaps to raise, the street, they had acted so arbitrarily, that they were answerable." Also in Boulton v. Crowther, 2 B. & C. 703, 708, 1824; S. C. 9 E. C. L. R. 306. Bailey, J., said: "In Leader v. Moxon the decision proceeded upon the ground that the commissioners had exceeded their

authority in raising the pavement so as to obstruct the plaintiff's windows." So Littledale to the same effect.

⁸⁸Sutton v. Clark, 6 Taunton, 28; 1 E. C. L. R. 493; Jones v. Bird, 5 B. & Ald. 837; 7 E. C. L. R. 455; Hall v. Smith, 2 Bing. 156; 9 E. C. L. 524; Boulton v. Crowther, 2 B. & C. 703; 9 E. C. L. R. 306; The King v. The Bristol Dock Co., 6 B. & C. 181. In Boulton v. Crowther, the act provided for compensation for property taken, and it was insisted that to diminish its value by cutting off access, etc., was a taking within the act, but it was held otherwise.

of property damaged by works of a public nature, such as a change of grade, cannot recover compensation for such damage. But it is evident that they have no proper application in such cases. In England, as we have said, an act of parliament is the supreme law of the land. Courts cannot declare that wrong which an act of parliament has made lawful. In all cases of damage from the execution of public works, the English courts have simply to inquire whether the works were authorized by law and whether they have been executed with care and skill. If so, there can be no recovery unless a remedy is provided by the act. But in the United States an act of the legislature may be no justification whatever. The legislature is powerless to do that which the constitution prohibits. And, in case of damages caused by public works, it is necessary in this country to inquire, not only whether the works are authorized by law and have been carefully executed, but also whether the damage amounts to a taking of property within the meaning of the constitution. In solving this last question the English cases afford us no aid, or practically none. This distinction is frequently lost sight of, and we wish to insist upon it here, once for all.⁸⁹

⁸⁹This distinction is pointed out by the Supreme Court of Ohio in *Crawford v. Village of Delaware*, 7 Ohio St. 459, 466, 1857, from which we quote as follows: "The power of the English parliament is supreme. It would be quite as absurd for English courts to pronounce an act of parliament, adopted by the three Estates of the Realm, unconstitutional, or unauthorized, as for this court to pronounce a provision of the Constitution of the United States unconstitutional and void. 'What the parliament doeth, no authority on earth can undo.' An authority, therefore, derived from the supreme power of the State, or, in other words, operations undertaken and conducted by virtue of an act of parliament, cannot be deemed unauthorized in view of the English law, or lay any foundation for a common law action for damages. If, indeed,

the supreme power of a State authorizes and directs an act to be done, who has the power to pronounce that act unlawful? No co-ordinate power exists to control it. The grantee of a franchise or a public agent, so long as he does not transcend the authority conferred upon him by act of parliament, in the exercise even of eminent domain or its incidents, represents the supreme power of the State; and just so far as the same supreme power has provided the mode and means of compensation for the violation of the rights of private property, in the exercise of eminent domain or its incidents, there is a remedy; but no further. It is true, that it is the duty of parliament, and one which is in general scrupulously performed, to provide compensation to individuals who are deprived of their property, for the public use, or

§ 131 (94). Leading cases in the United States. Callendar v. Marsh. The leading case in this country is that of Callendar v. Marsh, decided in 1823.⁹⁰ The defendant, acting as highway surveyor for the city of Boston, cut down the street in front of plaintiff's house so as to lay bare its walls and endanger its falling, to remedy which he was obliged to incur large expense. The court having determined that the work was authorized by legislative enactment, proceeded to consider whether the plaintiff's property was *taken* within the meaning of the constitution, and whether he could recover upon any ground. This question they solved in the negative. The court held this provision applied only to property actually taken and appropriated by the government, and not to consequential damages; that when the highway was established, whether by condemnation or otherwise, the public acquired not only the right to pass over the surface in the state it was in when first made a street, but also the right to repair and amend the street in such manner as the public needs might from time to time require; that the liability to damages by such alterations was a proper subject for the inquiry of those who laid out the road, or, if the title was acquired by purchase, the proprietor might claim compensation not only for the land taken, but for such damages, and that persons purchasing upon a street after the lay-out, were supposed to indemnify themselves against loss by reason of further improvements or to take the chance of such improvements. The court also says that the same principle applied as in case of adjoining proprietors.⁹¹ This case has had an important influence in moulding the law of this country.

§ 132 (95). Other early cases. A few years after the decision in Callendar v. Marsh, the same question arose in Tennessee and Kentucky, and was decided in the same way, though without reference to the case from Massachusetts. In both

who are injuriously affected by the erection of public works. But there is no power over parliament to enforce this duty, or to create a liability, beyond what parliament specifically recognizes and provides. Hence the English courts, in holding that an action against commissioners of streets or municipal officers or their agents, acting under the authority of an act of parliament, will not lie

for damages occasioned by the construction of a public work, any further than is specially provided for by the law itself, do not simply decide a principle of municipal law, but announce a constitutional principle, inseparable from a recognition of the fiat of the supreme power of State."

⁹⁰1 Pick. 417, 430.

⁹¹On this point the court says:

the former States, the law applicable to adjoining proprietors was made the basis of the rule laid down.⁹² The question was disposed of in a summary way in an early case in Pennsylvania by a reference to the English cases, and a sweeping assertion that the defendant corporation had the power and could not be made responsible for mere consequential injury.⁹³

The question was elaborately considered by the New York Court of Appeals in Radcliff's Executors v. Mayor, etc., of Brooklyn, in 1850.⁹⁴ The street was cut down in front of plaintiff's premises so that his soil, shrubbery, fences, etc., fell into the street, and he was put to great expense in restoring his premises and adapting them to the new grade. The case was said "to fall within the principle that a man may enjoy his land in the way such property is usually enjoyed, without being answerable for the indirect or consequential damages which

"The streets on which the plaintiff's house stands had become public property by the act of laying them out conformably to law, and the value of the land taken must have been either paid for, or given to the public, at the time, or the street could not have been legally established. Being legally established, although the right or title in the soil remained in him from whom the use was taken, yet the public acquired the right, not only to pass over the surface in the state it was in when first made a street, but the right also to repair and amend the street, and, for this purpose, to dig down and remove the soil sufficiently to make the passage safe and convenient. Those who purchase house lots bordering upon streets are supposed to calculate the chance of such elevations and reductions as the increasing population of the city may require, in order to render the passage to and from the several parts of it safe and convenient, and, as their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy, or take the chance of future im-

EIN. D.—14.

provements, as they shall see fit. The standing laws of the land giving to surveyors the power to make these improvements, every one who purchases a lot upon the summit or on the decline of a hill, is presumed to foresee the changes which public necessity or convenience may require, and may avoid or provide against a loss." And again, "We can perceive no difference in the principle on which this action is founded, and that which was involved in the case of Thurston v. Hancock, 12 Mass. 220." The latter is a leading case as to the rights of adjoining proprietors, in which the rule is laid down that if a man does what he has a right to do on his own land, without trespassing upon any law, custom, title or possession, he is not liable for injurious consequences which may result, unless he acts maliciously.

⁹²Keasy v. City of Louisville, 4 Dana, Ky. 154, 29 Am. Dec. 395, 1836; Humes v. Mayor etc. of Knoxville, 1 Humph. 403, 1839.

⁹³Green v. Borough of Reading, 9 Watts, 382.

⁹⁴4 N. Y. 195, 203, 53 Am. Dec. 357.

may be sustained by an adjoining land owner." "In leveling and grading the street," says the court, "they (the defendants) were at work on their own land, doing a lawful act for a lawful purpose." The conclusion follows that they could not be liable, for no person is responsible for the consequences of a lawful act done upon his own property. It was also held upon authority and upon principle that the damages complained of were not a taking within the constitution, and consequently that the laws authorizing the acts which produced the injuries were valid and a complete justification. "If the statute under which the defendants acted is constitutional, it is settled that they are not answerable to third persons, whatever damage they may have suffered. Indeed, it is absurd to say, that public officers may be liable to an action for what they have done under lawful authority, and in a proper manner."⁹⁵

This case, with that of *Callendar v. Marsh*, *ante*, may be considered as having settled the law of this country as respects claims for damages caused by elevating or depressing the grade of streets. Many cases in other States have been disposed of by a simple reference to these two authorities.

§ 133 (96). The general doctrine. In conformity with the foregoing cases, it has been held in nearly every State in the Union, that there can be no recovery for damages to abutting property resulting from a mere change of grade in the street in front of it, there being no physical injury to the property itself, and the change being authorized by law.⁹⁶

⁹⁵The same court, in *Cogswell v. New York, New Haven & Hartford R. R. Co.*, 103 N. Y. 10, 57 Am. Rep. 701, in reference to Radcliff's case, says: "The case carries to the utmost limit the right of the legislature, for public reasons, to interfere with private property to the injury of the owner without making compensation."

⁹⁶*Simmons v. City of Camden*, 26 Ark. 276; *Burritt v. New Haven*, 42 Conn. 174; *Durand v. Ansonia*, 57 Conn. 70, 17 Atl. 283; *District of Columbia v. Atchison*, 31 App. Cas. D. C. 250; *Dorman v. Jacksonville*, 13 Fla. 538, 7 Am. Rep. 253; *Selden v. City of Jacksonville*, 28 Fla. 558,

10 So. 457, 29 Am. St. Rep. 278, 14 L.R.A. 370; *Bowden v. Jacksonville*, 52 Fla. 216, 42 So. 394; *Markham v. Atlanta*, 23 Ga. 402; *Mayor etc. of Macon v. Hill*, 58 Ga. 595; *Fuller v. Atlanta*, 66 Ga. 80; *Roberts v. Chicago*, 26 Ill. 249; *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Dec. 307; *City of Quincy v. Jones*, 76 Ill. 231; *Snyder v. Rockport*, 6 Ind. 237; *La Fayette v. Spencer*, 14 Ind. 399; *Macy v. Indianapolis*, 17 Ind. 267; *La Fayette v. Spencer*, 19 Ind. 326; *Columbus v. Storey*, 33 Ind. 195; *Terre Haute v. Turner*, 36 Ind. 522; *Kokomo v. Mahan*, 100 Ind. 242; *North Vernon v. Voegler*, 103 Ind. 314; *Rensselaer v. Leopold*, 106 Ind. 29; *Valparaiso v.*

§ 134 (97). Ratio decidendi of these cases. An examination of the cases cited in the last section shows that, so far as the courts have attempted to reason out their decisions, their conclusions have been made to rest upon one or more of the following grounds:

First. That, when a street or highway is laid out, compensation is given once for all, not only for the land taken, but

Spaeth, 166 Ind. 14, 76 N. E. 514; Baker v. Shoals, 6 Ind. App. 319, 33 N. E. 664; Creal v. Keokuk, 4 G. Greene (Ia.), 47; Freeland v. City of Muscatine, 9 Ia. 461; Cole v. Same, 14 Ia. 296; Ellis v. Iowa City, 29 Ia. 229; Russell v. City of Burlington, 30 Ia. 262; City of Burlington v. Gilbert, 31 Ia. 356; Reilly v. Ft. Dodge, 118 Ia. 633, 92 N. W. 887; Wilbur v. Ft. Dodge, 120 Ia. 555, 95 N. W. 186; Methodist Episcopal Church v. Wyandotte, 31 Kan. 721; Interstate Consol. R. R. Co. v. Early, 46 Kan. 197, 26 Pac. 422; Atchison etc. R. R. Co. v. Arnold, 52 Kan. 729, 35 Pac. 780; Keasy v. City of Louisville, 4 Dana (Ky.) 154, 29 Am. Dec. 395; Newport & Cincinnati Bridge Co. v. Foote, 9 Bush (Ky.) 264; Reynolds v. Shreveport, 13 La. An. 426; Briggs v. Lewiston & Auburn Horse R. R. Co., 79 Me. 363, 1 Am. St. Rep. 316; Peddicord v. Baltimore etc. H. R. R. Co., 34 Md. 463; Guest v. Church Hill, 90 Md. 689, 45 Atl. 882; De Lander v. Baltimore Co., 94 Md. 1, 50 Atl. 427; Callendar v. Marsh, 1 Pick. 418; Underwood v. Worcester, 177 Mass. 173, 58 N. E. 589; Hyde v. Boston etc. St. Ry Co., 194 Mass. 80, 80 N. E. 517; Pontiac v. Carter, 32 Mich. 164; Schneider v. Detroit, 72 Mich. 240, 40 N. W. 329, 2 L.R.A. 54; Cummings v. Dixon, 139 Mich. 269, 102 N. W. 751; Lee v. City of Minneapolis, 22 Minn. 13; Henderson v. Minneapolis, 32 Minn. 319; Genois v. St. Paul, 35 Minn. 330; Rakowsky v. City of Duluth, 44 Minn. 188, 46 N. W. 338; Robinson

v. Great Northern R. R. Co., 48 Minn. 445, 51 N. W. 384; Yanish v. City of St. Paul, 50 Minn. 518, 52 N. W. 925; St. Louis v. Gurno, 12 Mo. 414; Taylor v. St. Louis, 14 Mo. 20, 55 Am. Dec. 89; Hoffman v. St. Louis, 15 Mo. 651; Shattner v. City of Kansas, 53 Mo. 162; Nebraska City v. Lampkin, 6 Neb. 27, 1877; Burden v. Nashua, 17 N. H. 477, 1845; Healey v. New Haven, 47 N. H. 305; Plum v. Morris Canal Co., 10 N. J. Eq. 256; Fish v. Mayor etc. of Rochester, 6 Paige 268; Graves v. Otis, 2 Hill 466; Waddell v. Mayor etc. of New York, 8 Barb. 95; Radcliff's Executors v. Mayor etc. of Brooklyn, 4 N. Y. 195; Conklin v. New York etc. Ry. Co., 102 N. Y. 107; Sauer v. New York, 189 N. Y. 27, 72 N. E. 579, 70 L.R.A. 717, affirming S. C. 90 App. Div. 36, 85 N. Y. S. 636; Smith v. Boston etc. R. R. Co., 181 N. Y. 132, 73 N. E. 679, affirming S. C. 99 App. Div. 94, 91 N. Y. S. 412; Hosmer v. Gloversville, 27 Misc. 669; McCarthy v. Far Rockaway, 3 App. Div. 379, 38 N. Y. Supp. 989; Smith v. White Plains, 67 Hun 81, 22 N. Y. Supp. 450; Wolfe v. Pierson, 114 N. C. 627, 19 S. E. 264; Brand v. Multnomah Co., 38 Ore. 79, 60 Pac. 390, 62 Pac. 209, 84 Am. St. Rep. 772, 50 L.R.A. 389; Green v. Borough of Reading, 9 Watts, 382; Henry v. Pittsburgh & Allegheny Bridge Co., 8 W. & S. 85; O'Connor v. Pittsburgh, 18 Pa. St. 187; In re Ridge Street, 29 Pa. St. 391; City of Reading v. Kepplerman, 61 Pa. St. 233; Smith v. Chiltenham, 35

for damages which may at any time be occasioned by adapting the surface of the street to the public needs.⁹⁷

Second. That the public, as proprietors of the street, stand in the same relation to the abutting lot owners as an individual would who owned the strip of land constituting the street, and that their rights, duties and liabilities are determined by the same rules as apply to adjoining proprietors of land.⁹⁸

^a Pa. Supr. Ct. 507; Rounds v. Mumford, 2 R. I. 154; Gerhard v. Seekonk Riv. Bridge, 15 R. I. 334, 5 Atl. 199; Sullivan v. Webster, 16 R. I. 33, 11 Atl. 771; O'Donnell v. White, 24 R. I. 483, 53 Atl. 633; Garraux v. Greenville, 53 S. C. 575, 31 S. E. 597; Bramlett v. Laurens, 58 S. C. 60, 36 S. E. 444; Kendall v. Columbia, 74 S. C. 539, 54 S. E. 777; Humes v. Mayor etc. of Knoxville, 1 Humph. (Tenn.) 403; Penniman v. St. Johnsbury, 54 Vt. 306; Smith v. City Council of Alexandria, 33 Gratt. 208; Kehrer v. Richmond City, 81 Va. 745; Home Bldg. Co. v. City of Roanoke, 91 Va. 52, 20 S. E. 895, 27 L.R.A. 551; Harrisburg v. Roller, 97 Va. 582, 34 S. E. 523; Brown v. City of Seattle, 5 Wash. 35, 31 Pac. 313, 7 Am. R. R. & Corp. Rep. 64; Smith v. Eau Claire, 78 Wis. 487, 47 N. W. 830; Walsh v. Milwaukee, 95 Wis. 16; McCullough v. Campbellsport, 123 Wis. 334, 101 N. W. 709; Goszler v. Georgetown, 6 Wheat. 593, 1821; Smith v. Corporation of Washington, 20 How. 135, 1857; Transportation Co. v. Chicago, 99 U. S. 635; Regina v. Perth, 14 L. R. Q. B. 156.

⁹⁷ Callendar v. Marsh, 1 Pick. 418; Skinner v. Hartford Bridge Co., 29 Conn. 523; Rounds v. Mumford, 2 R. I. 154; Fellows v. City of New Haven, 44 Conn. 240, 26 Am. Rep. 447; City of Pontiac v. Carter, 32 Mich. 164, 172. In the latter case the court, per Cooley, J., says: "The injury in all these cases is incidental to an exercise of public authority, which in itself must be assumed to be proper, because it is had by a

public body acting within its jurisdiction, and not charged with malice or want of good faith. It must, therefore, be regarded as an injury that every citizen must contemplate as one that, with more or less likelihood, might happen. When the land was taken for a street, if damages were assessed, they would cover this possible injury, and it could never be known subsequently that the jury, in estimating them, did not calculate upon a change in the grade of the proposed street as probable, and attach considerable importance to it in their estimate. It is matter of common observation, that much beyond the value of land taken is sometimes given in these cases; not because of any present injury, but because contingencies cannot be fully foreseen. And the rule in such cases is, that all possible damages are covered by the award, except such as may result from an improper or negligent construction of the public work, or from an excess of authority in constructing it. In other words, the award covers all damages resulting from the doing in a proper manner whatever the public authorities have the right to do; but it does not cover injuries from negligence or from trespasses. And one who gives his land for the purpose of a public way is supposed to contemplate all the same contingencies, and to make the gift on the supposition that the incidental benefits will equal or exceed all possible incidental injuries."

⁹⁸ Callendar v. Marsh, 1 Pick. 418; Radcliff v. Mayor etc. of Brooklyn,

Third. That this species of damages is not a taking within the meaning of the constitution, and, consequently, if the works occasioning the damage are authorized by law, no action will lie.⁹⁹ We shall advert to these principles further on.¹

§ 135 (98). The Ohio cases. The decisions in Ohio are exceptional. The first cases went up on a demurrer to the declaration. In *Goodloe v. Cincinnati*,² the suit was for damages caused to plaintiff's property by cutting down a street, and the declaration alleged that it was done *illegally* and *maliciously*. In *Smith v. Cincinnati*,³ the facts were the same, except that the acts were only charged to have been done *illegally*. In both cases a demurrer to the declaration was overruled, and in both cases there were afterwards trials and judgments for the plaintiff in the court below upon the general issue. These demurrers would not have been decided differently, probably, in any other State.⁴ In *Scovil v. Geddings*,⁵ the defendants, by authority of the trustees of Cleveland, lowered the street in front of plaintiff's property, and the suit was for damages thereby occasioned. The court held that such damages were not a taking within the constitution, and that the action would not lie. The leading case of *Callendar v. Marsh* was cited with approval. This case is explained or reconciled in the later decisions by distinguishing between the corporate authorities and their agents, holding that the latter would not in any event be personally liable for doing that, as agents of the corporation, which the corporation had power to do.⁶ This, however, would be contrary to the general rule that in actions *ex delicto* agents and principals are alike responsible.

The question of the liability of the corporation was presented to the court in a case which went up shortly after from the

4 N. Y. 195; *Quincy v. Jones*, 76 Ills. 231; *Waddell v. Mayor etc. of New York*, 8 Barb. 95; *Humes v. Mayor etc. of Knoxville*, 1 Humph. 403; *Simmons v. City of Camden*, 26 Ark. 276; *Smith v. Corporation of Washington*, 20 How. 135. The analogy is expressly denied in some cases: *Fellows v. New Haven*, 44 Conn. 240, 253; *Goodall v. Milwaukee*, 5 Wis. 32.

⁹⁹*Callendar v. Marsh*, 1 Pick. 418; *Macy v. Indianapolis*, 17 Ind. 267;

Radcliff v. Brooklyn, 4 N. Y. 195; *Wilson v. New York*, 1 Denio 595; *Reynolds v. Shreveport*, 13 La. An. 426; *City of Pontiac v. Carter*, 32 Mich. 164.

¹*Ante*, §§ 120-128.

²4 Ohio 500, 1831, 22 Am. Dec. 764.

³4 Ohio 515, 1831.

⁴*Post*, § 143.

⁵7 Ohio, Pt. 2, 211, 1836.

⁶See *Crawford v. Village of Delaware*, 7 Ohio St. 459.

same city,⁷ and it was again held that such damages did not constitute a taking or give any right of action, and Callendar v. Marsh and Scovil v. Geddings are cited with approbation. In both these cases in the 7th and 8th Ohio it appears that a statute gave a remedy in such cases, but the decisions, unless possibly the latter, are not put upon the ground that the statutory remedy was exclusive. It remained for the court to discover, in a later case, that this was the ground of decision in those cases.⁸

In Rhodes v. Cleveland,⁹ it appeared that the city cut ditches and water courses along the streets in such a manner as to cause water to flow upon and wash away the plaintiff's land. The defendant was held liable, but not upon any very tangible grounds. The decision was not based upon constitutional right, but rather upon natural equity and the maxim *sic utere tuo ut alienum non laedas*.¹⁰ This case is the starting point of the peculiar doctrine of the Ohio court, but it is to be observed that it was not for damages caused by a change of grade, but by a physical invasion of the property, and belongs to a class in which a recovery has been allowed in many other States.¹¹ The next case is that of McComb v. Town of Akron,¹² which was twice in

⁷Hickox v. Cleveland, 8 Ohio 543, 1838.

⁸10 Ohio 159, 1840.

⁹10 Ohio 159, 1840.

¹⁰The court says: "Upon the whole, then, we believe that justice and good morals require that a corporation should repair a consequential injury, which ensues from the exercise of its functions, and that if we go further than adjudicated cases have yet gone, we do not transcend the line, to which we are conducted by acknowledged principles. * * * That the rights of one should be so used, as not to impair the rights of another, is a principle of morals, which from very remote ages has been recognized as a maxim of law. If an individual, exercising his lawful powers, commit an injury, the action on the case is the familiar remedy; if a corporation, acting within the scope of its authority, should work wrong to an-

other, the same principle of ethics demands of them to repair it and no reason occurs to the court, why the same remedy should not be applied, to compel justice from them." The fault with this reasoning is, first, that courts do not administer law upon ethical principles, and, second, that individuals cannot commit injuries in the proper exercise of their lawful powers. An injury is the violation of a legal right, and lawful power in one to violate the legal right of another is an absurdity, a contradiction in terms. Of course a person may exercise lawful powers with negligence and so render himself liable, but then the liability is based upon the negligence and not on the exercise of the powers.

¹¹Post, § 141.

¹²15 Ohio 474, 1846; Town of Akron v. McComb, 18 Ohio 229, 51 Am. Dec. 453, 1849.

the Supreme Court. McComb had erected a store upon his lot and adjusted it to the grade of Howard street, upon which his lot abutted. There was at this time, however, no established grade. Afterwards the town lowered the grade, in consequence of which the value of the plaintiff's property was greatly depreciated, though it was not otherwise damaged. The corporation was held liable "to the extent of the real and substantial injury done to the plaintiff's property by its act of leveling the street." The decision appears to rest upon the broad ground of natural right and justice. Thus the court say: "If a municipal corporation, for the good of all within its limits, see proper to cut down a street, it is nothing more than right that an injury there done to a single individual should be shared by all."¹³ In all these cases the question whether a corporation can be made liable in an action of tort is much discussed, with an implication that if that question is answered in the affirmative its liability in this class of cases would necessarily follow.¹⁴

The unsatisfactory nature of these decisions seems to have impressed itself upon the Ohio court, and, when the question next comes up for decision, we find them making a careful review of all the prior cases; and, although their results are approved and adhered to, the loose grounds upon which they rest are tacitly abandoned and their doctrine established upon a new basis. The case referred to is that of *Crawford v. Village of Delaware*.¹⁵ In that case, the plaintiff had built a house upon his lot, with reference to the grade of the adjacent street as it then existed. Afterwards the defendant established a grade for the street some six feet below the natural surface, and

¹³¹⁵ Ohio, p. 480.

¹⁴Bronson, C. J., of the New York Court of Appeals, referring to *McComb v. Akron*, 15 Ohio 474, says: "If the case goes on the ground that the corporation, though it had ample authority to grade the street, did it in an illegal and improper manner, and thereby caused an injury to the plaintiff's property, the decision is well enough. But if the doctrine of the case be, that the corporation was answerable, because it was a corporation, and when a natural person, acting under the like authority,

would not have been liable, the decision is entitled to no respect whatever. If the court intended to hold, that persons, whether artificial or natural, were answerable for the damages which might result to an adjoining landowner from the grading of the street, though the act was done under ample authority, and in a proper manner, the case is in conflict with many decisions, and cannot be law beyond the State of Ohio." *Radcliff v. Mayor etc. of Brooklyn*, 4 N. Y. 195, 205, 1850.

¹⁵7 Ohio St. 459, 1857.

made the necessary excavation opposite the plaintiff's premises. The court instructed the jury, among other things, "that when such corporation neglects to fix any grade, and none is established for a street, and the owner of a lot builds upon and improves his lot in reference to the then existing state of the road or street used in front of his lot, and uses ordinary discretion and judgment in making his improvements, having reference to the probable future improvements of the town, and with reference also to the right possessed by the corporate authorities to make a reasonable and proper grade of such street, and he is afterwards injured by the making of such grade, he is entitled to recover for actual damages he may sustain, even though the grade so afterward made may be a reasonable and proper one. But if he so locates his house without such reasonable reference to future reasonable and proper improvements of the streets adjoining his lot, and without such exercise of discretion and judgment, and the town afterwards makes such reasonable and proper grade, and he is thereby injured, he cannot recover for such injury. That in ascertaining whether such act of the defendant in making the improvement, was a just and reasonable exercise of its authority to improve the street, the jury are authorized to take into consideration any evidence showing that it was the first improvement and the first grading of the street, also showing the inequality of the ground, and that the plaintiff's property was so situated in relation to it, as that the grade and improvements should have been reasonably anticipated by the plaintiff; and where such grade and improvements could have been thus anticipated by the exercise of ordinary discretion and judgment, the plaintiff is not entitled to damages for the making of such reasonable and proper grade and improvement." There was conflicting evidence upon the points submitted by the instructions; the jury appear to have found for the defendant, and judgment on the verdict was affirmed.¹⁶ The right to recover at all in such cases is based upon the ground that an abutting owner's right to the use of a street is itself property which cannot be taken without compensation.¹⁷ The court then go on to lay down the following propositions:

¹⁶We say "appear to have found for the defendant," because it is a matter of inference only. The plaintiff took the case up. It may be the jury found a small verdict in his

favor which he sought to have set aside.

¹⁷Thus the court: "Distinct from the right of the public to use a street, is the right and interests of

First. That the owner of an unimproved lot cannot recover for filling, ditching or cutting down a street, for he is presumed to purchase the lot with a view to the future improvement of the street in such reasonable manner as the public authorities may deem expedient.

Second. That the owner of a lot upon a street, the grade of which has not been established, must use reasonable care and judgment in making his improvements, with reference to the right possessed by the corporation to make a reasonable and proper grade.

Third. That when the owner of a lot makes improvements with reasonable care and judgment, in view of the right of the corporation to make a reasonable and proper grade, or makes improvements with reference to a grade already established, and a change is afterwards made in the street which interferes with the access to his improvements from the street, he is entitled to recover damages.

"It is," says the court, "as positive and substantial an injury to private property, and as direct an invasion of private right, incident to a lot, as if the erections upon the lot were taken for public use. It comes not within the letter, but manifestly within the spirit, of the constitution, which requires compensation for property taken for public use."

In *Jackson v. Jackson*,¹⁸ the ground of recovery in such cases is still more explicitly stated. A township road ran through the plaintiff's farm, connecting with a county road. This was altered up to, but not upon, his farm. This suit was brought to recover damages alleged to have been occasioned to his farm by such alteration. A recovery was denied, on the ground that the damages were too remote. In commenting upon prior cases, it was held that compensation had been given in highway cases, in obedience to the constitution, as for private property taken for public use, and that the cases only went to the extent

the owners of lots adjacent. The latter have a peculiar interest in the street, which neither the local nor the general public can pretend to claim: a private right of the nature of an incorporeal hereditament, legally attached to their contiguous grounds, and the erections thereon; an incidental title to certain facili-

ties and franchises, assured to them by contracts and by law, and without which their property would be comparatively of little value. This easement, appurtenant to the lots, unlike any right of one lot owner in the lot of another, is as much property as the lot itself." p. 469.

¹⁸16 Ohio St. 163, 168, 1865.

of holding that the adjacent owner, "has a private right of access to and from the street or highway; and, when he has made improvements on his land, with direct reference to the adjoining highway as then established, and with reasonable reference to its prospective improvement and enjoyment by the public, he has a private right of way, or passage, to and from the highway as it then exists; and any substantial change in the highway, to the injury of such passage or way, is an invasion of his private property; and this private right extends so far as the reasonable and convenient enjoyment of such improvements requires the use of the adjacent highway; but, beyond such necessary use thereof, the private right is merged in that of the public;" that, as the plaintiff had not been deprived of any such private right in this case, no property of his had been taken, and he could not recover.

In *Cincinnati v. Penny*¹⁹ all the cases were again reviewed and the same doctrines affirmed. Penny sued for damages to a building occasioned by excavating for a sewer. His recovery was defeated on the ground that he did not exercise reasonable prudence in the erection of his building, in view of the right of the city to appropriate the alley to such uses in the future. "We have no disposition," says the court, "to depart from the line of decisions formerly made by this court upon this subject. * * * We believe the principles established by our former cases to be most just and equitable."

In *Youngstown v. Moore*,²⁰ the same principles were fully approved, and a judgment for damages caused by lowering the grade of a street was affirmed.

Next comes the case of *Akron v. The Chamberlain Company*,²¹ decided in 1878. In 1842 the Chamberlain Company built a flouring mill upon the lot in question. At that time no grade had been established for the street in front. In 1876 the grade of the street was raised fourteen feet in front of the mill, and the company brought this suit for the damages thereby occasioned, and recovered a verdict and judgment for \$9,600.

The court "adhere, with entire satisfaction, to the doctrines enunciated, in *Cincinnati v. Penny*," but explain that it never had been decided, and that the court had never intended to de-

¹⁹21 Ohio St. 499, 504, 1871, 8 Am. Rep. 73. ²¹34 Ohio St. 328, 1878, 32 Am. Rep. 367.

²⁰30 Ohio St. 133, 1876.

cide, that if an owner used reasonable care and judgment in making improvements and was afterwards injured by the establishment of a grade, he could recover though the grade was a reasonable and proper one. "We are now unanimously of opinion," says the court, "that if the subsequent grade, in such case, be reasonable, or, in other words, if it be established in the reasonable exercise of the authority conferred on the municipality, at the time it is made, then such grade should have been anticipated by the owner of the adjacent lot, and his improvements should have been made with reference thereto."

The right of recovery is limited to three cases: (1) where one builds to an established grade and it is changed to his damage; (2) where one builds before a grade is established, but succeeds in anticipating the grade which is afterwards established, and the grade after being so established is changed; (3) where one builds before a grade is established and afterwards an unreasonable grade is established. The court holds that a grade may be established in the sense here intended, not only by an ordinance or resolution for that purpose, but also by any improvement of the street indicating permanency.²²

In the recent case of Akron v. Huber,²³ the court affirms the doctrine of Akron v. The Chamberlain Co., but refuses to extend the liability of municipalities for a change of grade, and a recovery was denied on the ground that the grade established was a reasonable one and should have been anticipated by the plaintiff when he built.

²²The court says: "While we recognize the general rule to be, that no liability on the part of a municipality for injury to abutting property, by reason of improvement of a street, exists where such improvement is properly made, yet this rule is subject, as we have seen, to the exception that where abutting property is improved with reference to an existing street, so graded or improved under the authority of the public agents having the control thereof, as to indicate fairly and reasonably, permanency in the character of the street improvement, a liability is cast upon the city or village for injury resulting from

subsequent changes. And it would seem to follow, as a logical sequence, that if, before a permanent grade is thus established, the owner of an abutting lot improves the same with reference to a reasonable grade to be established in the future and his anticipations are realized in the subsequent establishment of the grade, he should thereafter, in respect to such improvement, be entitled to enjoy the same right in the grade of the street which was thus fairly and reasonably anticipated, as if he had improved his lot after the grade had been so established."

²³78 Ohio St. 372, 85 N. E. 583.

The right of recovery is in all cases limited to the property in front of which the change is made. Where the grade of a street on which the plaintiff abutted was raised on a part near but not in front of plaintiff, it was held he could not recover, although his property was damaged.²⁴

Upon a review of all the Ohio cases, therefore, it appears that no recovery can be had in any case for damages to unimproved property by reason of a change of grade, that where property is improved and the improvements are adjusted to an established grade, whether built before or after its establishment, a recovery may be had for any damages occasioned by a change of grade, and finally that, if improved property is damaged by an unreasonable grade or by an unreasonable exercise of the power to grade, then there may be a recovery.²⁵ Where a grade was lowered two feet but the convenience of access was not impaired nor the property depreciated in value, it was held that there was no taking and no liability.²⁶

In all the later cases the right of recovery is based upon the constitutional guaranty that private property shall not be taken for public use without just compensation. The private property which is taken in such cases is spoken of as the right of access.²⁷ But the right of access exists the same, whether the property is improved or unimproved, and whether a grade has been established or not. If to interfere with it in one case is a taking, then such interference should be a taking in every case. No good ground exists for a distinction. That there ought to be compensation in some cases and not in others is a consideration which addresses itself to the legislature and not to the courts. The uncertain, rambling and contradictory condition of the Ohio cases on this subject is itself evidence that they are not founded upon a logical basis.

²⁴Eagle White Lead Company v. Cincinnati, 1 Cinn. Supr. Ct. 154, 1871; Smith v. Board of Comrs., 50 Ohio St. 628, 35 N. E. 796.

²⁵Since the first edition was written there have been no decisions which change the rule of the prior cases, or which afford any new illustrations of its application. See City of Cincinnati v. Whetstone, 47 Ohio St. 196, 24 N. E. 409; Smith v. Board of Comrs., 50 Ohio St. 628, 35 N. E. 796; Neubert v. City of To-

ledo, 9 Ohio C. C. 462; Cheseldine v. Conirs., 6 Ohio C. C. 450; Pitton v. City of Cincinnati, 3 Ohio C. C. 593; Nolte v. City of Cincinnati, 3 Ohio C. C. 503. Cutting down the margin of a street to the established grade of the driveway, held not a change of grade. Cincinnati v. Roth, 20 Ohio C. C. 317.

²⁶Lotzee v. Cincinnati, 61 Ohio St. 272, 55 N. E. 828.

²⁷Crawford v. Village of Delaware, 7 Ohio St. 469.

§ 136 (99). **The law of Kentucky.** It appears from cases already cited²⁸ that the earlier decisions in Kentucky accord with the prevailing doctrine, but in a somewhat recent case the court of that State has taken an intermediate ground.²⁹ The plaintiff, a rolling-mill company in the city of Louisville, owned an entire block of ground upon which it had erected extensive works at a cost of some two hundred thousand dollars. The premises and adjacent streets were subject to an annual overflow from the Ohio River. The works were constructed in such manner that their only outlet was onto and over Brook street. The city passed an ordinance for raising the grade of Brook street so that, at the point of the company's gateway, which was their only means of ingress and egress, the street would be twelve feet above the company's lot. The ordinance also required the company either to fill up their lot or build a retaining wall for the protection of the street, and provided that, in default of the company doing so, the city might construct the same at the company's expense. It appeared that the result of this improvement would be to render the property of the company almost worthless, and besides, if the ordinance was carried out as to the retaining wall, it would compel the company to incur a large expense to accomplish the destruction of its own property. It was one of the "hard cases" so proverbial for "bad law." The court seem to have been appalled by the magnitude of the loss with which the company was threatened, and granted an injunction restraining the work until compensation should be made to the company. The decision, which is by a majority of the court, seems to be based upon the ground that the case was an extraordinary one, in which all the ordinary principles and presumptions failed; that, while lot-owners may be taxed specially for local improvements, yet such right rests upon the fact that special benefits are conferred and that when the foundation of the right fails, as in this case, the right is gone, and that, while such lot-owners may be presumed to have purchased in contemplation of the right of the public to make such improvements as are ordinary and usual, yet, that this was of such an extraordinary and unusual character that the law would not presume that it was assented to by the plaintiff when

²⁸*Ante*, § 132.

²⁹*Louisville v. Rolling Mill Co.*, 3 Bush. 416, 1867.

it purchased the property. It does not seem to us that this decision, as put by the court, is either logical or sound. It is treated in the opinion as the case of raising the grade of a street for its improvement. In this view there is nothing extraordinary or unusual about the improvement. It is not unusual for a street to be raised or lowered ten feet. The only extraordinary and unusual feature presented by the case is the very large amount of damage accruing to the complainant. Had it not been for this feature of the case, that is, the extreme hardship of it, the bill would undoubtedly have been summarily dismissed. The only possible ground which we can see for justifying the decision is that it was proposed to raise the grade of the street, not for the purpose of improving the street for use as a highway, but to form a dike or levee against the river. But even this view would not warrant the injunction, but only an action for damages. There is no logical ground for a distinction between usual and slight changes and great and unusual changes in the grade of a street. There is no reason why compensation should be given for the large damage caused by raising the grade ten feet, and none for the small damage by raising the grade one foot. The damages are the same in kind in all cases where the grade of a street is changed, and logically there should be a right to recover in all cases or in none.³⁰ A recent case in Tennessee also holds that where access to abutting property is impaired or destroyed by a change of grade there is a taking.³¹

§ 137 (100a). **Interfering with access, light and air by change of grade not a taking.** It has already been shown that the private rights of access, light and air are subject to the right of the public to use and improve the street for highway purposes.³² As these rights are subject to the right of the public to improve, it follows that when such improvements are made no private right is interfered with and consequently that no private property is taken. This is the ground upon which the prevailing doctrine as to change of grade must rest. If the rights of access, light and air are subject to the right of the public to improve, then when access is rendered less convenient by

³⁰See comments of Judge Dillon on this case in his work on Municipal Corporations, § 784, note. See also remarks of the court in *Selden v. City of Jacksonville*, 28 Fla. 558, 10

So. 457. 29 Am. St. Rep. 278, 14 L.R.A. 370.

³¹*Hamilton County v. Rape*, 101 Tenn. 222, 47 S. W. 416.

³²*Ante*, § 120.

the exercise of that right by the public, or the light and air are obstructed thereby, the owner has no legal ground of complaint.

§ 138 (100b). Peculiar and extraordinary changes of grade, and changes for some ulterior purpose other than the improvement of the street. The doctrine that the rights of abutting owners are subject to the right of the public to grade and improve streets, is one which has often resulted in great hardship to individuals. This is a reason why the doctrine should be restricted, so far as is consistent with sound legal principles. The doctrine is founded upon the theory that when a street is established there is taken into consideration the fact that future improvements of the street may necessitate a change in the surface and the land is supposed to be given, or compensation made, with this in view.³³ But it is manifest that only ordinary changes of grade can be thus anticipated, that is, such changes as may be necessary to secure a uniform, even surface for the purpose of facilitating traffic on the street. The rule should cease to apply when the reason of it fails. Consequently the rule should not apply where the grade is changed for some ulterior purpose not connected with the improvement of the street, or when it is made necessary by artificial conditions, such as a railroad, canal or bridge.³⁴ This reasoning is sustained by

³³*Ante*, §§ 120-128, 134.

³⁴In *Reining v. New York etc. R. R. Co.*, 128 N. Y. 157, 168, 28 N. E. 640, 14 L.R.A. 133, the court, in speaking of the power to establish and change grades, says: "The primary object of this power contained in municipal charters, is to enable the municipal authorities to render a street more safe and convenient for public travel, to afford drainage, in short, to adapt it more perfectly to the purposes of a public way. It is claimed that the city under this power could lawfully authorize an embankment in part of the street, leaving the other part on a lower level. We are not called upon to say whether there is any limit to the exercise of municipal authority or that the city cannot in exercising the power to establish and alter the grade of streets, raise an embank-

ment in part of a street if, in its judgment, this will promote the public convenience and the purposes of the street as a highway. But we think it cannot under the guise of exercising the power, appropriate a part of the street to the exclusive, or practically to the exclusive, use of a railroad company, so as to cut off abutting owners from the use of any part of the street in the accustomed way, without making compensation for the injury sustained." The city had permitted a railroad to construct a sloping causeway twenty-four feet wide in the middle of the street and had approved the grade upon which it was built. The railroad company was held liable to the abutting owner for the damages to his property. In Kentucky where a street was depressed to go under a railroad it was held that the cost

some of the authorities, but not by all. It has been held that if the grade is raised, not for the purpose of improving the street, but for the purpose of forming a dike, the abutting owner may recover for the damage to his property.³⁵ So where the change was made for the purpose of procuring material to be used elsewhere.³⁶ Where a street was on a side hill it was held that a different grade could be established for the two halves of the street, with a retaining wall in the center, without liability to the abutters,³⁷ but it might reasonably be held that such an improvement was an ordinary one, in view of the contour of the surface. It has been held that a tunnel beneath the surface of the street,³⁸ or the open approach to a tunnel in the center of the street,³⁹ do not entitle the abutting owner to compensation. In bridging streams it frequently becomes necessary to place the bridge above the grade of the adjacent shores and to build elevated approaches to it upon the connecting streets. Whether the damage to private property by such approaches is a taking is a question upon which the authorities disagree. The weight of authority is that where the bridge is exclusively for street traffic, the approaches thereto are to be treated as mere changes of grade for which no recovery can be had.⁴⁰ In an Oregon case the defendant was authorized to build a bridge across the Willamette river

of the improvement, in so far as it was made necessary by the railroad could not be made a charge upon abutting property. Louisville Steam Forge Co. v. Mehler, 112 Ky. 438, 64 S. W. 396, 652.

³⁵Shawneetown v. Mason, 82 Ill. 337, 25 Am. Rep. 321; Winchester v. Stevens Point, 58 Wis. 350; City of Jeffersonville v. Myers, 2 Ind. App. 532, 28 N. E. 999.

³⁶Mayor etc. of Macon v. Hill, 58 Ga. 595.

³⁷Yanish v. City of St. Paul, 50 Minn. 518, 52 N. W. 925; Munger v. City of St. Paul, 57 Minn. 9, 58 N. W. 601. See Read v. Camden, 53 N. J. L. 322, 21 Atl. 565; S. C. reversed 54 N. J. L. 347, 24 Atl. 549.

³⁸Hodgkinson v. Long Island R. R. Co., 4 Edwards Ch. 411; Adams v. Saratoga & Washington R. R. Co., 11 Barb. 414.

³⁹Chicago v. Rumsey, 87 Ills. 348. But see Coyne v. Memphis, 118 Tenn. 651, 102 S. W. 355.

⁴⁰Newport v. Cinn. Bridge Co., 9 Bush. 264; Willis v. Winona, 59 Minn. 27, 60 N. W. 814; Willets Mfg. Co. v. Mercer Co., 62 N. J. L. 95, 40 Atl. 782; Brand v. Multnomah Co., 38 Ore. 79, 60 Pac. 390, 62 Pac. 209, 84 Am. St. Rep. 772, 50 L.R.A. 389; Sullivan v. Webster, 16 R. I. 33, 11 Atl. 771; Walsh v. Milwaukee, 95 Wis. 16. In Frater v. Hamilton Co., 90 Tenn. 661, 19 S. W. 233, it was held there could be recovery in case of a county bridge. See also Martin v. Chicago etc. R. R. Co., 47 Mo. App. 452; Wallace v. Kansas City etc. R. R. Co. 47 Mo. App. 491.

between the cities of Portland and East Portland, "for the purpose of travel and commerce, as a railroad, wagon road and passenger bridge, and to charge and collect tolls and fares thereon." In pursuance of such authority it constructed a double-decked steel bridge, the upper deck being for ordinary street traffic and the lower for railroad traffic. An approach was constructed to the upper deck, starting upon Third street at G street and extending along the middle of Third street until near H street, and thence reaching the bridge by a curve. The approach was thirty feet wide, and rose from the grade of G street to a height of thirteen and one-half feet at H street. Though built of timbers, it was, practically, a solid structure. The plaintiff's property abutted on Third street and extended from G street to H street. At G street and for most of the distance there was eighteen feet between the approach and the lot line and eight feet between it and the sidewalk. The inference is that plaintiff did not own the fee of the street. The court held that the structure was not to be treated as a mere change of grade but was an exclusive appropriation of a part of the street to the use of a private corporation, subversive of and repugnant to its use as a public thoroughfare, which could not be made without compensation to the plaintiff.⁴¹ So where a bridge was

⁴¹Willamette Iron Works v. Oregon Ry. & Nav. Co., 26 Ore. 224, 37 Pac. 1016, 46 Am. St. Rep. 620, 29 L.R.A. 88. To the point that the approach was a mere change of grade the court says: "The argument that the building of the approach was a mere change of the grade of the street, authorized by proper municipal authority, is clearly untenable. The city of Portland has undoubtedly plenary power to alter or change the grade of a public street by proper proceedings under its charter, but the act of the municipal authorities in granting defendant permission to occupy the street did not purport to be an exercise of such power. It was simply conferring upon the defendant, so far as the city was able, the right to the exclusive and permanent use of a portion of the public

street; and, while such permission included as a consequence the construction of a solid roadway above and over the street surface, it does not follow that what was done was in exercise of the power to alter or change the grade of a street. The street grade remained the same after the approach was built as before, and this approach is no part of the street, but is foreign thereto, and as useless for general street purposes as any of the structures referred to in the cases cited. We do not think a public street, or any portion thereof, can lawfully be appropriated to the exclusive and permanent use of a private corporation under the guise of an exercise of the power to alter or change the grade. The primary object of this grant of power is to enable the municipality to make the streets safe and con-

built over a private canal or raceway and was put at a high grade to accommodate the owner and not to improve the street for purposes of travel, it was held that abutters could recover for damages by the approach.⁴² Where streets are carried over railroads by means of a bridge or viaduct or under them by depressing the street with approaches in front of abutting property, which impair or destroy access, or interfere with light and air, the viaducts and their approaches have been put by the courts upon the same footing as an ordinary change of grade and, consequently, are held not to be any additional servitude upon the street or taking of the property rights of abutting owners.⁴³ There may be a recovery in Ohio, under the peculiar doctrines of that State,⁴⁴ and some States give a remedy in such cases by statute.⁴⁵ So the abutter may recover in such cases where the constitution guarantees compensation for property damaged, injured or destroyed.⁵⁰ In Michigan it is held that a city can-

venient for public travel, and not to divert them from legitimate street purposes to the exclusive use of some private corporation. Conceding, therefore, that defendant occupies this street by lawful authority, and hence its structure is not a nuisance, yet it invades the legal rights of an abutting owner, and is an appropriation of the property of such owner without compensation, which is beyond the power of the legislature or municipality, or both, constitutionally, to authorize or sanction."

⁴²Ranson v. Sault Ste Marie, 143 Mich. 661, 107 N. W. 439; Morris v. Sault Ste. Marie, 143 Mich. 672, 107 N. W. 443. See Bartels v. Houston, 32 Tex. Civ. App. 389, 74 S. W. 326; Sandpoint v. Doyle, 14 Ida. 749, 95 Pac. 945.

⁴³Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457, 29 Am. St. Rep. 278, 14 L.R.A. 370; Bowden v. Jacksonville, 52 Fla. 216, 42 So. 394; Hart v. Atlanta, 100 Ga. 274; Hyde v. Boston etc. St. Ry. Co., 194 Mass. 80, 80 N. E. 517; Schneider v. City of Detroit, 72 Mich. 240, 40 N. W.

329, 2 L.R.A. 54; Robinson v. Great Northern R. R. Co., 48 Minn. 445, 51 N. W. 384; Conklin v. New York etc. R. R. Co., 102 N. Y. 107, 6 N. E. 663; Ottenot v. New York etc. R. R. Co., 119 N. Y. 603, 23 N. E. 169; Home Bldg. etc. Co. v. City of Roanoke, 91 Va. 52, 20 S. E. 895, 27 L.R.A. 551; Colclough v. Milwaukee, 92 Wis. 182, 65 N. W. 1039.

⁴⁴Cohen v. Cleveland, 43 Ohio St. 190; Leonard v. Cassidy, 8 Ohio C. C. 529; Lake Shore etc. R. R. Co. v. Brown, 16 Ohio C. C. 269; *ante*, § 135.

⁴⁵Nicks v. Chicago etc. R. R. Co., 84 Ia. 27, 50 N. W. 222; Parker v. Boston & M. R. R. Co., 3 Cush. 107, 50 Am. Dec. 709; Kelly v. City of Minneapolis, 57 Minn. 294, 59 N. W. 304, 47 Am. St. Rep. 605, 26 L.R.A. 92; Read v. City of Camden, 54 N. J. L. 347, 24 Atl. 549, *reversing* 53 N. J. L. 322, 21 Atl. 565.

⁵⁰Bentley v. City of Atlanta, 92 Ga. 623, 18 S. E. 1013; Chicago v. Lonergan, 196 Ill. 518, 63 N. E. 1018; Beaver v. City of Harrisburg, 156 Pa. St. 547, 27 Atl. 4; Cass v. Pennsylvania R. R. Co., 159 Pa. St.

not build such a viaduct and approaches under the general power to establish grades and that, when built without other authority it is an illegal structure and that the city is liable for the damages thereby sustained by abutting owners.⁵¹ In Tennessee where the center of a street was depressed in order to make a subway under a railroad, thereby interfering with access to abutting property, such interference was held to be a taking for which compensation must be made.⁵² Changes of grade in connection with railroads upon or across streets, are considered in subsequent sections.⁵³

It has been held in New York that the legislature may authorize the construction of a viaduct in a street, so as to create a second street surface, without providing for compensation to abutting property owners. The plaintiff, in the case referred to, owned a building and property in New York city at the corner of 155th street and Eighth avenue. One Hundred and Fifty Fifth street is intersected by a bluff seventy feet high. The viaduct connected with the top of the bluff and was supported by iron columns in the street and occupied its full width. At the plaintiff's premises it was fifty feet high. It impaired the easements of access, light and air and annoyed the occupants of the property by the dirt, dust and noise occasioned by the structure and its use. The suit was to enjoin the use of the viaduct, and compel its removal, or in the alternative for the recovery of just compensation for taking the easements and in either case for the recovery of past damages. The court held that the viaduct was a proper street use and a decree dismissing the bill was affirmed. The court says: "It is devoted to ordinary traffic by teams, vehicles and pedestrians. It is prohibited for railroad purposes. It is one of the uses to which public highways were primarily opened and devoted. It was constructed under legislative authority in the exercise of governmental powers for a public purpose. It is not, therefore, a nuisance and the plaintiff is not entitled to have its maintenance enjoined or to recover in this action the consequential damages sustained."⁵⁴ The decision was affirmed

273, 28 Atl. 161; *Walters v. St. Louis*, 132 Mo. 1, 33 S. W. 441; *Fred v. Kansas City Cable R. R. Co.*, 65 Mo. App. 121; *Omaha v. McGavoek*, 47 Neb. 313, 66 N. W. 415; *post*, § 349.

**Schneider v. Detroit*, 72 Mich.

240, 40 N. W. 329; *Phelps v. Detroit*, 120 Mich. 447, 79 N. W. 640.

⁵²*Coyne v. Memphis*, 118 Tenn. 651, 102 S. W. 355.

⁵³*Post*, §§ 174, 178.

⁵⁴*Sauer v. New York*, 180 N. Y. 27, 33, 72 N. E. 579, 70 L.R.A. 717,

by the Supreme Court of the United States on the ground that the rights of abutting owners was a matter of State law and, the highest court of the State having held that the plaintiff had no easements of light, air and access as against a structure erected by the public and devoted to street traffic, its decision was conclusive of the matter.⁵⁵

It seems to the writer that this decision is erroneous, that the viaduct was not a change of grade, since the old grade remained exactly as before, that it was an improvement of a most extraordinary character which could not have been contemplated when the street was established and was not within the public right acquired, and, consequently, that it was such an improvement as could not be made without compensation to the abutting owners. It was in effect the establishment of a new street over the existing one, which could not be done without compensation for property taken. We think the true view is expressed by Vann, J., in his dissenting opinion who says: "I dissent upon the ground that the construction by a municipal corporation of a new and independent street in the form of a bridge, fifty feet high and sixty-three feet wide, extending lengthwise through block after block of an existing street, which, graded and paved for years, is left undisturbed except by the huge columns supporting the elevated structure, is neither the improvement of the street as a street, nor a proper street use sanctioned by precedent, or coming within the reasonable contemplation of the parties when the fee of the surface street was acquired from the abutting owner, who has no access to the aerial street from his premises, and when this is done without compensation, it is a taking of private property for public use in direct violation of the constitution."⁵⁶

affirming 90 App. Div. 36, 85 N. Y. S. 636, which in turn affirmed Sauer v. New York, 40 Misc. 585, 83 N. Y. S. 27. In Sauer v. New York, 44 App. Div. 305, 60 N. Y. S. 648, the same plaintiff brought suit for damages to his business and recovered a judgment for \$30,000 which was reversed for error in the admission of evidence, the court holding that the viaduct was not a change of grade nor a proper street use, and, that the interference with the plain-

tiff's easement was a taking of his property for which he was entitled to compensation under the constitution.

⁵⁵Sauer v. New York, 206 U. S. 536, 27 S. C. 686. Justices McKenna and Day dissent.

⁵⁶Sauer v. New York, 180 N. Y. 27, 34, 72 N. E. 579, 70 L.R.A. 717. Bartlett J. concurring with Vanu J. adds: "Under the judgment about to be made the city could bridge Fifth Avenue, from 110th

§ 139 (101). Lowering grade.—Interfering with support of soil. We have stated in a previous section the reasons in support of the position that the abutting owner has a right to the support of his soil in that of the street.⁵⁷ It follows that an interference with this right, by cutting down a street and removing the support of the adjacent soil, is a taking for which compensation must be made. But the older cases are against this position.⁵⁸ The older cases make no distinction between the different kinds of damages which may be occasioned to abutting property by the improvement of the streets. All such damages are treated as consequential and remediless. Yet, in some of these cases, and in others by the same courts, the rights and liabilities of the public with respect to the adjoining owner are held to be governed by the law of adjoining proprietors. But adjoining proprietors have mutual rights of support, and, if the analogy is carried out, it must be held that the adjacent owner has a right to the support of his soil in that of the street. This seems to us the juster view, and the more recent cases have so adjudicated.⁵⁹ In such cases recovery may be had for injury

Street to Washington Square, at a level above the heights of the adjoining structures, thereby impairing the light, air and access of every residence and business building, and under the plea of a street use escape all liability for damages. If this can be done it simply amounts to confiscation," p. 34. Where the viaduct interfered with the station of an elevated railroad the city was held liable. *Manhattan R. R. Co. v. New York*, 89 Illn 429, 35 N. Y. S. 505. In *Seattle Transfer Co. v. Seattle*, 27 Wash. 520, 68 Pac. 90, the construction of an elevated roadway twenty feet wide in the center of a street was held to entitle the abutters to damages, but the constitution of that State requires compensation to be made for property damaged as well as for property taken.

⁵⁷*Ante*, § 126; *post*, § 234.

⁵⁸*Fellows v. New Haven*, 44 Conn. 240, 26 Am. Rep. 447; *Rome v. Omberg*, 28 Ga. 46; *Mitchell v.*

Rome, 49 Ga. 19; *Quincey v. Jones*, 76 Ill. 231; *Taylor v. St. Louis*, 14 Mo. 20, 55 Am. Dec. 89; *Callendar v. Marsh*, 1 Pick. 418; *Radcliffe v. Brooklyn*, 4 N. Y. 195; *Mears v. Comrs. of Wilmington*, 9 Ired. L. 73, 49 Am. Dec. 412; *Cheever v. Shedd*, 13 Blatch. 258.

⁵⁹*Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12; *Aurora v. Fox*, 78 Ind. 1; *Dyer v. St. Paul*, 27 Minn. 457; *Armstrong v. St. Paul*, 30 Minn. 299; *Nichols v. City of Duluth*, 40 Minn. 389, 42 N. W. 84; *Kuschke v. St. Paul*, 45 Minn. 225, 47 N. W. 786; *Farrell v. St. Paul*, 62 Minn. 271, 64 N. W. 809; *Keating v. Cincinnati*, 38 Ohio St. 141; *Columbus v. Willard*, 7 Ohio C. C. 113; *Stearns Ex'r v. City of Richmond*, 88 Va. 992, 14 S. E. 847, 6 Am. R. R. & Corp. Rep. 247; *Parke v. City of Seattle*, 5 Wash. 1, 31 Pac. Rep. 310, 32 Pac. 82, 34 Am. St. Rep. 839, 20 L.R.A. 68; *Jones v. Seattle*, 23 Wash. 753, 63 Pac. 553; *McCullough v. Campbellsport*, 123 Wis. 334, 101 N.

to improvements where their weight did not cause the slide.⁶⁰ Where the excavation of a street causes a slide which reaches property not abutting on the street, the right to compensation would seem to be clear since it cannot be presumed that the owner was compensated therefor when the street was established.⁶¹ In Washington, where a city cut down the grade of a street so that it would be seventy-seven feet below the plaintiff's lot and proposed to cut a slope upon the plaintiff's lot extending back seventy-seven feet, it was held that there was a *damaging* but not a *taking* of the plaintiff's property, within the constitution.⁶²

§ 140 (102). Raising grade.—Encroachment of the filling. The right of exclusion, or the right of complete possession and enjoyment, is one of the essential elements of property in land. If any one has a right to encroach upon my land in any way, then I have not complete control of it, nor a full and absolute property in it. The public have no right, in raising the grade of a street, to allow the filling to slide or encroach upon the adjoining land. Such an occupation of or encroachment upon adjacent property is actionable.⁶³ Such a direct

W. 709; *Damkoehler v. Milwaukee*, 124 Wis. 144, 101 N. W. 706; *Dahlman v. Milwaukee*, 131 Wis. 427, 110 N. W. 479, 111 N. W. 675; *New Westminster v. Brighouse*, 20 Duvall 520. *See Moore v. Albany*, 98 N. Y. 396. In *Nichols v. Duluth*, 40 Minn. 389, 42 N. W. 84, the court says: "Every person has a right *ex jure naturae* to the lateral support of the adjoining soil, and is entitled to damages for its removal. A municipal corporation has no greater rights or powers in that regard over the soil of the streets than a private owner has over his own land, and will be liable in damages for removing this lateral support the same as would a private owner if improving his property for his own use. It is no defense that the excavation was necessary for the purpose of grading the street. If the city desires greater rights than those possessed by private owners it must acquire them by the exercise of eminent do-

main. It must either do this, or else itself substitute other lateral support in place of the soil which it removes. The liability of the city in these cases does not depend, as appellant assumes, upon its negligence in making the excavation. This right of the lateral support of the adjoining soil, being a natural one, is absolute, and independent of any question of negligence."

Talcott Bros. v. Des Moines, 134 Ia. 113, 109 N. W. 311, 120 Am. St. Rep. 419, is the only case decided to the contrary since the first edition was published.

⁶⁰*Keating v. Cincinnati*, 38 Ohio St. 141.

⁶¹*Keating v. Cincinnati*, 38 Ohio St. 142; *Damkoehler v. Milwaukee*, 124 Wis. 144, 101 N. W. 706.

⁶²*Compton v. Seattle*, 38 Wash. 514, 80 Pac. 757.

⁶³*Hendershott v. Ottumwa*, 46 Ia. 658, 26 Am. Rep. 182; *West Cov-*

invasion of one's property is without right and might undoubtedly be enjoined. It is the duty of the public in such a case to support the filling by a retaining wall in the street itself. But if this is not done and an action is brought for damages and a recovery had, the public thereby acquire a right of lateral support for the causeway in the street.⁶⁴ If the property is vacant, the damages could hardly exceed the cost of a retaining wall and of removing the filling which had fallen upon the lot. If the property is improved, any injury to the improvements would be included.⁶⁵ In Nelson v. West Duluth,⁶⁶ it is held that the measure of damages is the diminution in the value of the property by reason of the earth being imposed upon it, and that the cost of removing the earth and building a retaining wall cannot be recovered, if it is more than such diminution. So in

ington v. Schultz, 30 S. W. 410, 16 Ky. L. R. 831; Ludlow v. Froste, 20 Ky. L. R. 216, 45 S. W. 661; Ludlow v. Detwiler, 20 Ky. L. R. 894, 47 S. W. 881; Vanderlip v. Grand Rapids, 73 Mich. 522, 41 N. W. 677, 3 L.R.A. 247; Schneider v. Brown, 142 Mich. 45, 105 N. W. 13; Overman v. St. Paul, 39 Minn. 120, 39 N. W. 66; Nelson v. West Duluth, 55 Minn. 497, 57 N. W. 149; Bradwell v. City of Kansas, 75 Mo. 213; Tegeler v. Kansas City, 95 Mo. App. 162, 68 S. W. 953; Dodson v. Cincinnati, 34 Ohio St. 276; Davis v. Silverton, 47 Ore. 171, 82 Pac. 16; O'Donnell v. White, 23 R. I. 318, 50 Atl. 333; Koch v. Sackman-Phillips Inv. Co., 9 Wash. 405, 37 Pac. 703; Bunker v. Hudson, 122 Wis. 43, 99 N. W. 448; McCullough v. Campbellsport, 123 Wis. 334, 101 N. W. 709. In Broadwell v. City of Kansas, 75 Mo. 213, the defendant raised the grade of a street about even with the top of plaintiff's house, and the filling encroached upon his lot to such an extent as to crush and ruin his house. The court says: "Moreover, section 16 article 1 of the Constitution of 1865, provided that: 'no private property ought to be taken or applied to public use, without

just compensation.' Here the city and its servant took the property of plaintiffs within the meaning of that section. The taking of property within that prohibition may be either total or absolute, or a taking *pro tanto*. Any injury to the property of an individual which deprives the owner of the ordinary use of it, is equivalent to a taking and entitles him to compensation. So a partial destruction or diminution of value of property by an act of government which directly and not merely incidentally affects it, is to that extent an appropriation." See Fuller v. Grand Rapids, 105 Mich. 529, 63 N. W. 530; Harley v. Jones, 165 Pa. St. 34, 30 Atl. 499.

To the contrary: Fellows v. City of New Haven, 44 Conn. 240, 26 L.R.A. 447; Shaw v. Crocker, 42 Cal. 435; Mayo v. Springfield, 136 Mass. 10; Mayo v. Same, 138 Mass. 70; and see Moore v. Albany, 98 N. Y. 396; Carll v. Northport, 11 App. Div. 120, 42 N. Y. Supp. 576.

⁶⁴Dodson v. Cincinnati, 34 Ohio St. 276; Bunker v. Hudson, 122 Wis. 43, 99 N. W. 448.

⁶⁵Bradwell v. City of Kansas, 75 Mo. 213.

⁶⁶55 Minn. 497, 55 N. W. 149.

Wisconsin where it is held that as between the cost of a retaining wall and the removal of the earth on the one hand and the diminution in value of the estate on the other, the verdict should be for the less sum.⁶⁷ If the owner consents in advance that the city may deposit earth upon his lot to support the filling of the street, he dedicates an easement of support to the public use and will be estopped to claim damages or compel a removal of the earth.⁶⁸

§ 141 (103). Damages from surface water. Nevins v. City of Peoria,⁶⁹ is a leading case upon this question. The city of Peoria graded its streets in such a manner as to cause a stream of water and mud to flow on to the plaintiff's property in times of rain, and also to cause a pond to accumulate upon adjacent property, which, by becoming stagnant, diffused unwholesome vapors over the plaintiff's premises. The city was held liable, on the ground that the damages complained of were a taking, within the meaning of the constitution.⁷⁰ It was held

⁶⁷Bunker v. Hudson, 122 Wis. 43, 99 N. W. 448. The court says: "The recovery of depreciated value, limited as it was to the cost of a retaining wall and removal of the earth, clearly contemplates that one or the other of those situations is going to be permanent. If plaintiffs recovered for the diminished value of their premises resulting from this wall of earth serving to support the grade of the street to its full width, then they would have received payment for the privilege of keeping the earth there. In other words, they would have in practical effect, sold to the city an easement to that extent. Hence they would have no right to remove that earth so as to jeopardize the street or cause it to cave or wash away. Doubtless, by limiting their damages to the cost of a retaining wall and of the removal of the earth, they would have the right, after the collection of this judgment, to exercise their choice to do such acts at their own expense, but must then at their peril so construct the wall as to furnish safe

and perfect support for the street at its established grade to the utmost of its legal limits." p. 56.

⁶⁸Williams v. Hudson, 130 Wis. 297, 110 N. W. 239.

⁶⁹41 Ill. 502, 508, 89 Am. Dec. 392.

⁷⁰The court says: "The city is the owner of the streets, and the legislature has given it power to grade them. But it has no more power over them than a private individual has over his own land, and it cannot, under the specious plea 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 being responsible itself. Neither State nor municipal government can take private property for public use without due compensation and this benign provision of our constitution is to be applied by the courts whenever the property of the citizen is invaded, and without reference to the degree." This case has been followed and approved in the follow-

that the city had no greater power over its streets than a private individual had over his own land, and that the law of adjoining proprietors was applicable. This is the true rule to be applied in all such cases. In any given case, the test is: If an individual owned the streets in question, and had made the same works, would he be liable for the damages complained of? It is now almost uniformly held that, if a city so grades or otherwise improves its streets as to collect surface water in a stream and pour it directly upon private property, it will be liable for the ensuing damages.⁷¹ This is a direct and entirely unauthorized invasion of property rights. There is, however, considerable dissent from

ing subsequent decisions in the same State: *City of Aurora v. Gillett*, 56 Ill. 132; *City of Aurora v. Reed*, 57 Ill. 29, 11 Am. Rep. 1; *City of Dixon v. Baker*, 65 Ill. 518, 16 Am. Rep. 591; *Tearney v. Smith*, 86 Ill. 391. In *Aurora v. Reed* the street in question was improved while the plaintiff's lot was vacant. He afterwards built upon his lot, and the water ran into his basement. It was held that this circumstance made no difference, that he had a right to improve his lot and enjoy it free from any such invasion or annoyance.

⁷¹*Troy v. Coleman*, 58 Ala. 570; *Union Springs v. Jones*, 58 Ala. 654; *Holmes v. Atlanta*, 113 Ga. 961, 39 S. E. 458; *Elgin v. Kimball*, 90 Ill. 356; *Elgin v. Welch*, 16 Ill. App. 483; S. C. 23 Ill. App. 185; *Indianapolis v. Lawyer*, 38 Ind. 348; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *North Vernon v. Voegler*, 89 Ind. 77; *Crawfordsville v. Bond*, 96 Ind. 236; *Sullivan v. Phillips*, 110 Ind. 320; *Valparaiso v. Spaeth*, 166 Ind. 14, 76 N. E. 514; *Guest v. Church Hill*, 90 Md. 689, 45 Atl. 882; *Manning v. Lowell*, 130 Mass. 21; *Penoyer v. Saginaw*, 8 Mich. 296; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Cubit v. O'Dett*, 51 Mich. 347; *Mor-*

ley v. Buchanan, 124 Mich. 128, 82 N. W. 802; *Kobs v. Minneapolis*, 22 Minn. 159; *O'Brien v. St. Paul*, 25 Minn. 331; *Thurston v. St. Joseph*, 51 Mo. 510; *Field v. West Orange*, 36 N. J. Eq. 118; *West Orange v. Field*, 37 N. J. L. 600; *Byrnes v. Cohoes*, 67 N. Y. 204; *Bastable v. Syracuse*, 8 Hun 587; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664; *Rhodes v. Cleveland*, 10 Ohio 159; *Limerick etc. Turnpike Co.'s Appeal*, 80 Pa. St. 425; *Huddleston v. West Bellevue*, 111 Pa. St. 110; *Torrey v. City of Scranton*, 133 Pa. St. 173, 19 Atl. 351; *Inmann v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520; *Johnson v. White*, 26 R. I. 207, 58 Atl. 658, 65 L.R.A. 250; *Houston v. Hutcheson*, 39 Tex. Civ. App. 337, 81 S. W. 96; *Gillison v. Charleston*, 16 W. Va. 282, 37 Am. Rep. 763; *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L.R.A. 519; *McCrary v. Fairmount*, 46 W. Va. 442, 33 S. E. 245; *Pettigrew v. Evansville*, 25 Wis. 223; *Rowe v. Rochester*, 29 U. C. Q. B. 590; *ante*, § 112. *And see Stamford v. San Francisco*, 111 Cal. 198, 43 Pac. 605; *Commissioners v. Whitsett*, 15 Ill. App. 318; *Palmer v. O'Donnell*, 15 Ill. App. 324; *Wilbur v. Ft. Dodge* 120 Ia. 555, 95 N. W. 186; *McCarthy v.*

this view, especially in the earlier cases.⁷² Where a natural outlet for surface water is obstructed by raising the grade of a street, and the water is thus caused to accumulate and stand on private property, the corporation will be liable.⁷³ And so in some States where the water is obstructed and caused to accumulate on the plaintiff's property, though no defined channel or marked depression is interfered with.⁷⁴ But where the law of the State is that every owner of land may improve his lot as he pleases, without liability on account of surface water, there will, of course, be no liability on the part of municipal corporations for any interference with the flow of surface water whereby it is dammed back or turned upon private property.⁷⁵

Far Rockaway, 3 App. Div. 379, 38 N. Y. Supp. 989; Carll v. Northport, 11 App. Div. 120, 42 N. Y. Supp. 576.

⁷²Bronson v. Wallingford, 54 Conn. 513; Downs v. Ansonia, 73 Conn. 33, 46 Atl. 243; Roll v. Augusta, 34 Ga. 326; Conwell v. Emrie, 4 Ind. 209; Vincennes v. Richards, 23 Ind. 381; Platter v. Seymour, 86 Ind. 323; Cummings v. Seymour, 79 Ind. 491; Cumberland v. Willison, 50 Md. 138; Flagg v. Worcester, 13 Gray 601; Turner v. Dartmouth, 13 Allen 291; Alden v. Minneapolis, 24 Minn. 254; St. Louis v. Gurno, 12 Mo. 414; Taylor v. City of St. Louis, 14 Mo. 20, 55 Am. Dec. 89; Hoffman v. St. Louis, 15 Mo. 651; (Last three cases overruled in Thurston v. St. Joseph, 51 Mo. 510); Steinmeyer v. St. Louis, 3 Mo. App. 256; Foster v. St. Louis, 4 Mo. App. 564; Same v. Same, 71 Mo. 157; Stewart v. Clinton, 79 Mo. 603; Durkee v. Town of Union, 38 N. J. L. 21; Kavanaugh v. Brooklyn, 38 Barb. 232; Mills v. Brooklyn, 32 N. Y. 489; Lynch v. Mayor etc. of New York, 76 N. Y. 60; Wright v. Wilmington, 92 N. C. 156; Wakefield v. Newell, 12 R. I. 75; Allen v. Chippewa Falls, 52 Wis. 430, 38 Am. Rep. 748; Waters v. Bay View, 61 Wis. 642; Heth v. Fond du Lac, 63 Wis. 228; *see also* the following

cases where the lots were below grade: Freyburg v. Davenport, 63 Ia. 119; Gilfeather v. Council Bluffs, 69 Ia. 310; Morris v. Council Bluffs, 67 Ia. 343, 56 Am. Rep. 343; Hessing v. District of Columbia, 3 Mackey, 572; Gilluly v. Madison, 63 Wis. 518, 52 Am. Rep. 299; Hirth v. Indianapolis, 18 Ind. App. 673; Hart v. Baraboo, 101 Wis. 368; Yager v. Fairmount, 43 W. Va. 259; Sharp v. Cincinnati, 4 Ohio C. C. (N. S.) 19.

⁷³Kemper v. Louisville, 14 Bush (Ky.) 87; McClure v. City of Red Wing, 28 Minn. 186. A similar case was differently decided in Hoyt v. Hudson, 27 Wis. 656, where it was held that the defendant was not liable for obstructing a ravine which formed the natural outlet of surface water.

⁷⁴See ante. §§ 112, 113; North Judson v. Lightcap, 41 Ind. App. 565.

⁷⁵Herring v. District of Columbia, 3 Mackey 572; Davis v. City of Crawfordsville, 119 Ind. 1, 21 N. E. 449; Valparaiso v. Spaeth, 166 Ind. 14, 76 N. E. 514; Walter v. County Comrs., 35 Md. 385; Sprague v. Worcester, 13 Gray 193; Dickinson v. Worcester, 7 Allen 19; Rose v. St. Charles, 49 Mo. 509; Imler v. Springfield, 55 Mo. 119; Wilson v. Mayer etc. of New York, 1 Denio 595; Mills

In Iowa it is held that, where the injury to adjoining property could be foreseen, and it was practicable and reasonable to prevent it by the construction of sewers and culverts, it is the duty of the corporation to do so, and that for neglect of this duty it will be liable.⁷⁶ The liability is put upon the ground of a want of care and skill in the construction of the works.⁷⁷ Where surface water is caused to accumulate in a pond which, by becoming stagnant, diffuses unwholesome vapors over the neighborhood, the corporation will be liable, provided the accumulation is due to its wrongful act as by obstructing a natural outlet for such water.⁷⁸ The subject of surface water, and liability for interference with the flow of the same, are treated in a former chapter.⁷⁹

§ 142 (104). Interfering with natural streams. Where a municipal corporation, in improving its streets or in building or repairing a bridge, interferes with the flow of a natural stream, it will be liable for any damage resulting to private

v. City of Brooklyn, 32 N. Y. 489; Gould v. Booth, 66 N. Y. 62; Watson v. City of Kingston, 114 N. Y. 88, 21 N. E. 102; Acker v. Town of New Castle, 48 Hun 312, 15 N. Y. St. 894, 1 N. Y. Supp. 223; Anchor Brewing Co. v. Village of Dobbs Ferry, 84 Hun 274, 32 N. Y. Supp. 371; Bush v. City of Portland, 19 Or. 45, 23 Pac. 667, 20 Am. St. Rep. 789; Lafferty v. Girardville, 1 Mongaghan (Pa. Supm.) 513; Hoyt v. Hudson, 27 Wis. 656; and see Lander v. City of Bath, 85 Me. 141, 26 Atl. Rep. 1091; Almy v. Coggeshall, 19 R. I. 549. So held also where a natural watercourse was intercepted; Mayor etc. of Philadelphia v. Randolph, 4 W. & S. 514.

⁷⁶Cotes v. Davenport, 9 Ia. 227; Templin v. Iowa City, 14 Ia. 59, 81 Am. Dec. 455; Ellis v. Same, 29 Ia. 229; Damour v. Lyons City, 44 Ia. 276; Russell v. Burlington, 30 Ia. 262; Ross v. Clinton, 46 Ia. 606, 26 Am. Rep. 169; Powers v. Council Bluffs, 50 Ia. 197; see Commissioners of Kensington v. Wood, 10 Pa. St.

93; Rowe v. Addison, 34 N. H. 306; Parker v. Nashua, 59 N. H. 402; Clark v. Rochester, 43 Hun 271.

⁷⁷See also Los Angeles Cemetery Ass. v. Los Angeles, 103 Cal. 461, 37 Pac. Rep. 375; Princeton v. Gieske, 93 Ind. 102; Benson v. Wilmington, 9 Houston 359; Schuett v. Stillwater, 80 Minn. 287, 83 N. W. 180; Haney v. City of Kansas, 94 Mo. 334, 7 S. W. 417; Flanders v. Franklin, 70 N. H. 168, 47 Atl. 88; Rutherford v. Holley, 105 N. Y. 632.

⁷⁸Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392; Weeks v. Milwaukee, 10 Wis. 242; Smith v. Milwaukee, 18 Wis. 63; Clark v. Rochester, 43 Hun 271; and see ante §§108, 112, 113. *Contra:* Clark v. Wilmington, 5 Harr. (Del.) 243; Taylor v. St. Louis, 14 Mo. 20, 55 Am. Dec. 89; Russell v. Burlington, 30 Ia. 262; Allen v. City of Paris, 1 Tex. App. Civil Cas. p. 506; and see Corcoran v. City of Benicia, 96 Cal. 1, 30 Pac. Rep. 798; Watson v. Kingston, 43 Hun 367.

⁷⁹Ante, §§ 110-113.

property.⁸⁰ If a city substitutes a drain or sewer of insufficient capacity for a natural watercourse, and the water is set back upon private property, it will be liable.⁸¹ And, generally, a city interferes with a stream of water at its peril.⁸²

§ 143 (105). Unlawful change of grade. A recovery may be had in all cases where the change of grade is unlawful,⁸³ as when the statute requires the consent of a certain proportion of the property holders, and the change is made without such consent,⁸⁴ or provides that the work shall not be done until after an assessment of benefits to defray the expense has been confirmed, and such provision is disregarded,⁸⁵ or requires a two-

⁸⁰ Mayor etc. of Helena v. Thompson, 29 Ark. 569; Larrabee v. Cleverdale, 131 Cal. 96, 63 Pac. 143; McCord v. High, 24 Ia. 336; Lawrence v. Inhabitants of Fairhaven, 5 Gray 110; Perry v. Worcester, 6 Gray 544; Stone v. Augusta, 46 Me. 127: *but sec* Mayor etc. of Philadelphia v. Randolph, 4 W. & S. 514; Ely v. Rochester, 26 Barb. 133.

⁸¹ Mayor etc. of Helena v. Thompson, 29 Ark. 569. A similar case was differently and it seems to us wrongly decided in Collins v. Philadelphia, 93 Pa. St. 272.

⁸² In McMahon v. Council Bluffs, 12 Ia. 268, it was held that a bill would not lie to prevent a city changing the bed of a stream so as to cause the same to flow in the street in front of the plaintiff's property. On the subject of interfering with the flow of streams see the last chapter.

⁸³ Roberts v. Chicago, 26 Ill. 249; Lafayette v. Nagle, 113 Ind. 425; Freeland v. Muscatine, 9 Ia. 461; Richardson v. Webster City, 111 Ia. 427, 82 N. W. 920; Brown v. Webster City, 115 Ia. 511, 88 N. W. 1070; Richardson v. Sioux City, 136 Ia. 436, 113 N. W. 928; Topeka v. Sells, 48 Kan. 520, 29 Pac. 604; Schneider v. Detroit, 72 Mich. 240, 40 N. W. 329, 2 L.R.A. 54; Phelps v. Detroit, 120 Mich. 447, 79 N. W.

640; Rakowsky v. Duluth, 44 Minn. 188, 46 N. W. 338; Hill v. St. Louis, 59 Mo. 412; Themanson v. City of Kearney, 35 Neb. 881, 53 N. W. 1009; Fuller v. Mt. Vernon, 171 N. Y. 247, 63 N. E. 964, *affirming* S. C. 64 App. Div. 621; Leman v. New York, 5 Bos. 414; Triest v. New York, 55 Misc. 459, 105 N. Y. S. 571; Meinzer v. Racine, 68 Wis. 241; Drummond v. City of Eau Claire, 85 Wis. 556, 55 N. W. 1028; Ayres v. Windsor, 14 Ont. 682; West v. Parkdale, 15 Ont. 319. *But sec* West v. Parkdale, 12 U. C. App. 393. The power to establish grades must be strictly pursued. State v. City of Bayonne, 54 N. J. L. 293, 23 Atl. 648; State v. Borough of Rutherford, 55 N. J. L. 450, 26 Atl. 933; Farrell v. St. Paul, 62 Minn. 271, 64 N. W. 809, 54 Am. St. Rep. 641; Feuerstein v. Jackson, 8 Ohio C. C. 396; Fisher v. Naysmith, 106 Mich. 71, 64 N. W. 19; Blanden v. Ft. Dodge, 102 Ia. 441; Paine v. Lettsville, 103 Ia. 481; Sweet v. Conley, 20 R. I. 381, 39 Atl. 326.

⁸⁴ Crossett v. Janesville, 28 Wis. 420; Mott v. New York, 2 Hilton, 358; Fohnsbee v. City of Amsterdam, 142 N. Y. 118, 36 N. E. 821, *affirming* S. C. 66 Hun 214, 21 N. Y. Supp. 42.

⁸⁵ Dore v. Milwaukee, 42 Wis. 108; Friedrich v. Milwaukee, 114 Wis. 304, 90 N. W. 174.

thirds vote of the city council which is not obtained,⁸⁶ or when the change is made by a railroad company or individuals without authority.⁸⁷ A city was held liable where the grade of a street was changed, not for the purpose of improving the street, but to get material to be used in other parts of the city.⁸⁸ An unauthorized change of grade may be made valid by ratification,⁸⁹ or by act of the legislature.⁹⁰ In such case it has been held that a party injured can only recover the damages sustained between the making of the change and the ratification or confirmation.⁹¹ It is held that an unauthorized change of grade may be enjoined.⁹² Where a city could only change a grade by ordinance, and a change was made without an ordinance, it was held the city was not liable, though the persons executing the work would be.⁹³

§ 144 (106). When the work is negligently done. Damages which result from negligence or unskillfulness in doing the work are actionable.⁹⁴ In such cases the question of a taking

⁸⁶Trustees of P. E. Church v. Anamosa, 76 Ia. 538, 41 N. W. 313; Caldwell v. Nashua, 122 Ia. 179, 97 N. W. 1000; Markham v. Anamosa, 122 Ia. 689, 98 N. W. 493.

⁸⁷Karst v. St. Paul S. & T. F. R. R. Co., 22 Minn. 118; Same v. Same, 23 Minn. 401; Price v. Knott, 8 Oreg. 438; Schaufele v. Doyle, 86 Cal. 107, 24 Pac. 834; Larned v. Briscoe, 62 Mich. 393, 29 N. W. 22; Gebling v. City of St. Joseph, 49 Mo. App. 430.

⁸⁸Mayor etc. of Macon v. Hill, 58 Ga. 595.

⁸⁹Appeal of McCormick, 165 Pa. St. 386, 30 Atl. 986; Deer v. Sheraden, 220 Pa. St. 307, 69 Atl. 814; Wolfe v. Pearson, 114 N. C. 627, 19 S. E. 264.

⁹⁰Himmelmann v. Hoadley, 44 Cal. 213; Hoadley v. San Francisco, 50 Cal. 265.

⁹¹Wolfe v. Pearson, 114 N. C. 627, 19 S. E. 264.

⁹²Schaufele v. Doyle, 86 Cal. 107, 24 Pac. 834; Koefler v. City of Milwaukee, 85 Wis. 397, 55 N. W. 400;

and see Mayor etc. of Baltimore v. Porter, 18 Md. 284.

⁹³Reed v. Peck, 163 Mo. 333, 63 S. W. 734; Gebling v. St. Joseph, 49 Mo. App. 430; Beatty v. St. Joseph, 57 Mo. App. 251; Hall v. Trenton, 86 Mo. App. 326; Kroffe v. Springfield, 86 Mo. App. 530; Koeppen v. Sedalia, 89 Mo. App. 648; Gardner v. St. Joseph, 96 Mo. App. 657, 71 S. W. 63. And so where the grade was raised above the established grade by mistake of the city engineer in giving the grades. Sievers v. San Francisco, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153.

⁹⁴District of Columbia v. Atchison, 31 App. Cas. D. C. 250; North Vernon v. Voegler, 103 Ind. 314; Paris v. Current, 15 Ky. L. R. 126; Wegmann v. Jefferson, 61 Mo. 55; Thompson v. Booneville, 61 Mo. 282; Werth v. Springfield, 78 Mo. 107; Mears v. Wilmington, 9 Ired. L. 73, 49 Am. Dec. 412; Smith v. Alexandria, 33 Gratt. 208; Harrisburg v. Roller, 97 Va. 582, 34 S. E. 523.

does not arise. The gist of the action is negligence, and the recovery is limited to such damages as result from that cause.

§ 145 (107). Power to establish grades a continuing one. It is immaterial whether the damages complained of are caused by bringing the natural surface of the street into conformity with the first established grade, or by changing a grade already established. The power to improve and graduate streets is a continuing power, which municipal corporations or public authorities possess for the public benefit, and which is not exhausted by the first exercise nor capable of being bargained away. This question first arose in a very early case in the Supreme Court of the United States.⁹⁵ The corporation of Georgetown, having power to graduate and level streets, passed an ordinance to fix the grade of certain streets, and provided that the grade so established should forever thereafter be considered as the true graduation of the streets so graduated and be binding upon the corporation and all other persons whatever, and be forever thereafter regarded in making improvements on said streets. The plaintiff improved his lot with reference to the grade so established, and the corporation afterwards passed an ordinance changing the grade. The suit was to enjoin the change. The court held that the plaintiff had no remedy, that the power in question was a continuing one, and that the corporation could not, by contract or otherwise, abridge or annul its legislative functions. All the authorities are in accord with this decision.⁹⁶

§ 146 (108). Power of city to make compensation. The justice of the claim for compensation in such cases is so plain, that any public corporation would undoubtedly be sus-

⁹⁵ Goszler v. Georgetown, 6 Wheat. 593.

⁹⁶ Macey v. Indianapolis, 17 Ind. 267; Kokomo v. Mahon, 100 Ind. 242; Creal v. Keokuk, 4 G. Greene, Ia. 47; Russell v. Burlington, 30 Ia. 262; Methodist Episcopal Church v. Wyandotte, 31 Kan. 721; Keasy v. Louisville, 4 Dana 154, 29 Am. Dec. 395; Reynolds v. Shreveport, 13 La. Ann. 426; Peddicord v. Baltimore etc. H. R. R. Co., 34 Md. 463; City of Pontiac v. Carter, 32 Mich. 164; Hoffman v. St. Louis, 15 Mo. 651; Schattner v. City of Kansas, 53 Mo.

162; Waddell v. Mayor etc. of New York, 8 Barb. 95; Rounds v. Mumford, 2 R. I. 154; Matter of Furman Street, 17 Wend. 649; City of Trenton v. McQuade, 52 N. J. Eq. 669, 29 Atl. 354; Columbus Gas Light etc. Co. v. City of Columbus, 50 Ohio St. 65, 33 N. E. 292, 40 Am. St. Rep. 648, 19 L.R.A. 510; Wabash v. Defiance, 52 Ohio St. 262, 40 N. E. 89; Grant v. Hyde Park, 67 Ohio St. 166, 175, 65 N. E. 891; Roanoke Gas Co. v. Roanoke, 88 Va. 810, 14 S. E. 665; Mead v. Portland, 200 U. S. 148, 26 S. C. 171.

tained by the courts in the voluntary discharge of such a claim. And where a city, by ordinances, establishes a grade and pledges its faith that such grade shall not thereafter be changed to the injury of any individual without full compensation, the city will be compelled to live up to its pledge.⁹⁷

§ 147 (109). *Miscellaneous cases.* A city is not liable for inconvenience occasioned by a ditch along a street which is constructed under proper authority, even though it becomes enlarged by erosion so as greatly to impair access to adjoining property.⁹⁸ Where a turnpike company takes a highway, it will have the same right to repair and improve it as the highway commissioners, and will not be liable for consequential damages for which the commissioners are not liable.⁹⁹ No recovery can be had for damage to business during the progress of improvements on a street.¹ Where the charter of a city provided that the council should establish the general grade of its streets as soon as practicable, and that the city should pay for damages caused by any change of such grades, in a case arising under the charter it was held that the court could not determine when it was practicable for the city to establish general grades, and consequently could not cast the city in damages on the ground of neglect to comply with the law.² Where it was shown that a proposed change of grade would render the street impassable, and be no benefit but a detriment to the public, it was held that a bill would lie to enjoin the change.³

§ 148 (109a). *Right to compensation for change of grade under statutes and recent constitutions.* The right to compensation for a change of grade under statutes specially providing therefor, and under recent constitutions giving compensation for property damaged or injured, as well as for property taken, is treated of in a subsequent chapter.⁴

⁹⁷Goodall v. Milwaukee, 5 Wis. 32; and see Fisk v. Springfield, 116 Mass. 88.

⁹⁸Lambar v. St. Louis, 15 Mo. 610; Benjamin v. Wheeler, 8 Gray 409; but see Carondelet Canal & Nav. Co. v. New Orleans, 38 La. An. 308.

⁹⁹Dexter v. Broat, 16 Barb. 337.

¹Plant v. Long Island R. R. Co., 10 Barb. 26. See Munn v. Boston, 183 Mass. 421, 67 N. E. 312.

²Schattner v. City of Kansas, 53 Mo. 162.

³Armstrong v. St. Louis, 3 Mo. App. 151.

⁴Post, chap. viii.

III.—RAILROADS IN STREETS.

§ 149 (110). In general. It is common all over the country for railroads to be laid down upon the streets of cities and villages. The loss which has been occasioned to individuals by this means is very great; the suits which have been instituted to recover for such loss are very numerous; the decisions which have been rendered therein by the different courts, and even by the same courts at different times, are conflicting and irreconcileable.⁵ “Few questions,” says the New York Court of Appeals, “have come before the courts in this generation of greater practical importance, or involving larger pecuniary interests, than those growing out of the construction of railways in city streets.”⁶

§ 150 (110a). Classification of railroads. Railroads now exist in great variety as regards motors and motive power, the size and style of cars and coaches, the nature of their traffic and methods of operation and construction. It is probable that these variations will be multiplied in the coming years. It is doubtful whether any permanent and satisfactory classification can now be made. There has been a general concurrence, however, in embracing all railroads in two divisions or classes; (1) *commercial railroads*, and (2) *street railroads*.^{6a} Commercial railroads embrace all railroads for general freight and passenger traffic between one town and another, or between one place and another.⁷ So far they have not been successfully operated, to any extent at least, except by steam. They are usually not constructed upon the public streets or highways except for short

⁵This was said in the first edition and has been greatly emphasized by the litigation since that time.

⁶Kane v. New York El. R. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L.R.A. 640; S. C. Sub. Nom. Duyeknick v. New York El. R. R. Co., 3 Am. R. R. & Corp. Rep. 744.

^{6a}Wilder v. Aurora etc. Elec. Traction Co., 216 Ill. 493, 75 N. E. 194.

⁷This class of railroads is most generally referred to as the “ordinary steam railroad.” See 2 Dill. Munic. Corp., § 725. They are called

“Railroads for general traffic” by Caldwell, J., in Williams v. City Electric Street R. R. Co., 41 Fed. Rep. 556. They are also called “Commercial railroads” as in Newell v. Minneapolis etc. R. R. Co., 35 Minn. 112, 119, 59 Am. Rep. 303; East End St. R. R. Co. v. Doyle, 88 Tenn. 747, 9 L.R.A. 100, 2 Am. R. R. & Corp. Rep. 747, and Nichols v. Ann Arbor etc. R. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L.R.A. 371. The phrase “Commercial railroads” is employed in many other cases cited in the following sections.

distances. Street railroads embrace all such as are constructed and operated in the public streets for the purpose of conveying passengers with their ordinary hand luggage from one point to another on the street.⁸ Street passenger railroads exist in great variety as regards their modes of construction and operation and may be classified as follows: (1) Horse railroads. (2) Elevated railroads. (3) Cable roads. (4) Steam motor railroads. (5) Electric railroads. (6) Under ground railroads. As different conclusions have been reached by the same courts regarding the use of streets for these different sorts of roads, we shall consider them separately.

There is now a kind of railroads known as *interurban roads*, which connect different towns and generally resemble both the commercial railroad and the street railroad. For convenience they may be regarded as a third and distinct class of railroads and, as respects the use of streets, they will be considered in a separate section.⁹

§ 151 (111). Is a commercial railroad a legitimate use of a street or highway? To us it seems so clear that a commercial railroad is foreign to the legitimate uses of a highway, that we never have been able to understand how a court could reach a contrary conclusion. Highways are established to accommodate the public in traveling from place to place. From time immemorial, prior to the discovery of steam, they were for the common use of every citizen, by any means of locomotion

⁸ Harvey v. Aurora etc. R. R. Co., 174 Ill. 295, 51 N. E. 163; Aurora v. Elgin etc. Traction Co., 227 Ill. 485, 81 N. E. 544, 118 Am. St. Rep. 284; Gillette v. Aurora Rys. Co., 228 Ill. 261, 81 N. E. 1005; Diebold v. Ky. Traction Co., 117 Ky. 146, 77 S. W. 674, 63 L.R.A. 637; Nichols v. Ann Arbor etc. R. R. Co., 87 Mich. 361, 49 N. W. 538, 541, 16 L.R.A. 371; Rafferty v. Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. Rep. 763, 6 Am. R. R. & Corp. Rep. 287; Williams v. City Elec. St. R. R. Co., 41 Fed. 556. In Aurora v. Elgin etc. Traction Co., 227 Ill. 485, 81 N. E. 544, 118 Am. St. Rep. 284, the court says: "The chief characteristic of a street rail-

way is, that it is built upon and passes along streets and avenues for the convenience of those moving from place to place thereon. Its fundamental purpose is to accommodate street travel, and not travel to or from points beyond the city lines. Commercial railroads embrace all railroads for general freight and passenger traffic between one town and another, and street railways embrace all such as are constructed and operated in the public streets for the purpose of carrying passengers with their ordinary luggage from one point to another on the street." p. 496.

⁹ Post, § 258.

he chose to select. They were not used by one person in any way which was not open to all. No one had a private right or any exclusive privilege therein. It was free to all upon like conditions. Such being the character of the public highway, it was subject to use by any new means of locomotion which could be employed by all the public, and was not destructive of the old methods of travel. A carriage propelled upon the ordinary surface of the road by steam or electricity would be just as legitimate as a carriage drawn by horses. Such use would be equally open to every citizen. The railroad does not fall within the scope of such uses. It requires a permanent structure in the street, the use of which is private and exclusive, so far as its peculiar traffic is concerned. It gives to an individual or corporation a franchise and easement in the street,¹⁰ inconsistent with the public right. To hold that a commercial railroad is one of the proper and legitimate uses of a street leads to the absurd consequence that a street might be filled with parallel tracks which would practically exclude all ordinary travel and still be devoted to the ordinary uses of a highway. The law ought not to tolerate such a consequence. We shall not review the authorities or attempt to reconcile them. They will be found in the note.¹¹

The question first arose in this country in case of Philadel-

¹⁰New Orleans, Spanish Fort & Lake R. R. Co. v. Delamore, 114 U. S. 501.

¹¹We shall cite in this note only cases in which the particular point is discussed. The same point is involved in other cases subsequently cited.

First, cases holding commercial railroads not to be one of the legitimate users of a street: Western Ry. of Ala. v. Ala. G. T. R. R. Co., 96 Ala. 272, 11 So. 483, 17 L.R.A. 474; Reichert v. St. Louis R. R. Co., 51 Ark. 491, 5 L.R.A. 183; Southern Pacific R. R. Co. v. Reed, 41 Cal. 256; (*but see* Montgomery v. Santa Ana & W. R. R. Co., 104 Cal. 186, 37 Pac. 786, 10 Am. R. R. & Corp. Rep. 25, 43 Am. St. Rep. 89, 25 L.R.A. 654); Denver etc. R. R. Co. v. Domke, 11 Colo. 247; Imlay v. Union

Branch R. R. Co., 26 Conn. 249, 68 Am. Dec. 392; South Carolina R. R. Co. v. Steiner, 44 Ga. 546; Athens Terminal Co. v. Athens F. & M. Works, 129 Ga. 393, 58 S. E. 891; Indianapolis etc. R. R. Co. v. Hartley, 67 Ill. 439; O'Connell v. Chicago etc. R. R. Co., 184 Ill. 308, 56 N. E. 353; Spalding v. Macomb etc. Ry. Co., 225 Ill. 585, 80 N. E. 327; Cox v. Louisville R. R. Co., 48 Ind. 178; Kucheman v. C. C. & D. Ry. Co., 46 Ia. 366; Phipps v. West Maryland R. R. Co., 66 Md. 319; Springfield v. Connecticut Riv. R. R. Co., 4 Cush. 63, 71; Grand Rapids & Indiana R. R. Co. v. Heisel, 47 Mich. 393; Ecorse Tp. v. Jackson etc. Ry. Co., 153 Mich. 393; Harrington v. St. Paul & Sioux City R. R. Co., 17 Minn. 215; Adams v. C. B. & Q. R. R. Co., 39 Minn. 286, 39 N. W. 629,

phia & Trenton R. R. Co., decided in 1840.¹² The case was *certiorari* to review proceedings for the location of the road. The location had been made upon certain streets in pursuance of the charter of the company which authorized such use of the streets without providing for any compensation to the abutting owners. It was contended that the charter was invalid because it took the property of the abutters without compensation and because such use of the streets was "in derogation of the public and private uses to which they had been applied." The proceedings were affirmed and the most absolute control of the State over the streets asserted. The court says: "What is the dominion of the public over such a street? In England a highway is the property of the king as *parens patriæ*, or universal trustee; in Pennsylvania, it is the property of the people, not of a particular

¹² Am. St. Rep. 644, 1 L.R.A. 493; Theobald v. Louisville etc. R. R. Co., 66 Miss. 279, 6 So. 230, 14 Am. St. Rep. 564, 4 L.R.A. 735; Hastings & Grand Island R. R. Co. v. Ingalls, 15 Neb. 123; Chamberlain v. Elizabethport Steam Cordage Co., 41 N. J. Eq. 43; Burlington v. Penn. R. R. Co., 56 N. J. Eq. 259, 38 Atl. 849; Williams v. New York Central R. R. Co., 16 N. Y. 97, 69 Am. Dec. 632; Fanning v. Osborn & Co., 34 Hun 121; Fobes v. Rome etc. R. R. Co., 121 N. Y. 505, 24 N. E. 919, 8 L.R.A. 453, 3 Am. R. R. & Corp. Rep. 182; Syracuse Solar Salt Co. v. Rome etc. R. R. Co., 67 Hun 153, 22 N. Y. Supp. 321; White v. Northwestern N. C. R. R. Co., 113 N. C. 610, 18 S. E. 330, 9 Am. R. R. & Corp. Rep. 103, 37 Am. St. Rep. 639, 22 L.R.A. 627; Railroad Co. v. Williams, 35 Ohio St. 168; Lawrence R. R. Co. v. O'Hara, 48 Ohio St. 343, 28 N. E. 175; South Bound R. R. Co. v. Burton, 67 S. C. 515, 46 S. E. 340; Iron Mt. R. R. Co. v. Bingham, 87 Tenn. 522, 11 S. W. 705, 4 L.R.A. 622; Hodges v. Seaboard etc. R. R. Co., 88 Va. 653, 14 S. E. 380; Ford v. Chicago & N. W. R. R. Co., 14 Wis. 609, 80 Am. Dec. 791; Carl v. Sheboygan & Fond du Lac R. R. Co.,

46 Wis. 625; Chicago etc. R. R. Co. v. Milwaukee etc. R. R. Co., 95 Wis. 561, 70 N. W. 678, 60 Am. St. Rep. 136, 37 L.R.A. 856.

Second, cases holding the contrary: Montgomery v. Santa Ana & W. R. R. Co., 104 Cal. 186, 37 Pac. 786, 10 Am. R. R. & Corp. Rep. 25, 43 Am. St. Rep. 89, 25 L.R.A. 654; Garnett v. Jacksonville etc. R. R. Co., 20 Fla. 889; Moses v. Pittsburgh etc. R. R. Co., 21 Ill. 516; Murphy v. Chicago, 29 Ill. 279, 81 Am. Dec. 307; (These cases are also overruled by 67 Ill. 439, *ante*. *But see* City of Olney v. Wharf, 115 Ill. 519, 56 Am. Rep. 178); Milburn v. Cedar Rapids, 12 Ia. 246; Cook v. Burlington, 36 Ia. 357; (These cases are overruled by 46 Ia. 366, *ante*); Fulton v. Short Route R. R. Trans. Co., 85 Ky. 640, 4 S. W. 332, 7 Am. St. Rep. 619; Werges v. St. Louis etc. R. R. Co., 35 La. An. 641; Hepting v. New Orleans Pac. R. R. Co., 36 La. An. 898; Porter v. North Missouri R. R. Co., 33 Mo. 128; Morris & Essex R. R. Co. v. Newark, 10 N. J. Eq. 352; Chapman v. Albany & Schenectady R. R. Co., 10 Barb. 360; Faust v. Passenger Ry. Co., 3 Phil. R. 164.

¹²⁶ Wharton, 25, 36 Am. Dec. 202.

district, but of the whole State; who, constituting as they do the legitimate sovereign, may dispose of it by their representatives, and at their pleasure. Highways, therefore, being universally the property of the State, are subject to its absolute direction and control."

The question arose almost simultaneously in the State of New York, in *Fletcher v. The Auburn & Syracuse R. R. Co.*¹³ The defendant constructed its road across a highway near plaintiff's premises, on an embankment four feet high, in such manner as to impede access thereto and to cause them to be frequently inundated with water. The defendants were duly authorized by the legislature, but the court say that this authority was only intended to protect the company from indictment for a public nuisance, and not against claims for private damages arising from consequential injury to adjacent owners, and, further, that if, by a fair construction of the grant, the power conferred was broad enough to protect the company against consequential damages to private interests, the grant, to that extent, would be void, since it would be a violation of the fundamental law of the land. The right to recover was based upon the constitution and treated as a matter beyond doubt. This doctrine was affirmed in a similar case which arose a year later in the same court.¹⁴ In the latter case it was urged that the use of the highway by the defendant was only in accordance with the original design for which the way was laid out, viz., the accommodation of the public, and that for this compensation had been made. But the court held that the railroad was a new and distinct user, different from the original design, and constituted an additional burden or easement on the land.¹⁵ Following these cases are a number of decisions in the Supreme Court in which the doctrine is maintained that a railroad, upon a public street, is a use in accordance with the legitimate purposes of a street, being simply a new and improved mode of public travel.¹⁶ The law of the

¹³25 Wend. 462, 1841.

¹⁴Trustees etc. v. The Auburn & Rochester R. R. Co., 3 Hill 567, 1842.

¹⁵See also *Mahon v. Utica & Schenectady R. R. Co.*, Hill & Denio's Supplement, 156, 1843.

¹⁶These cases are *Drake v. Hudson River R. R. Co.*, 7 Barb. 508, 1849; *Plant v. Long Island R. R.*

Co., 10 Barb. 26, 1850; *Chapman v. Albany & Schenectady R. R. Co.*, 10 Barb. 360, 1851; *Adams v. Saratoga & Washington R. R. Co.*, 11 Barb. 414, 1851; *Hentz v. Long Island R. R. Co.*, 13 Barb. 646, 1852; *Milhau v. Sharp*, 15 Barb. 193, 1853; *Williams v. New York Central R. R. Co.*, 18 Barb. 222, 1854; *Covey v. Buffalo etc. R. R. Co.*, 23 Barb. 482,

State was, however, finally established by the Court of Appeals in favor of the earlier cases, in *Williams v. New York Central R. R. Co.*¹⁷

§ 152 (112). Commercial railroad in street.—Right to compensation generally. If it be conceded that a railroad is one of the uses for which a street was originally designed, it of course follows that the abutting owner is not entitled to compensation when a railroad is laid in front of his property. In such case the establishment of a railroad on a street does not differ in principle from the establishment of a stage line along the same street or the introduction of some new kind of vehicle. Accordingly, all courts which maintain this doctrine, hold that there is no right to compensation.¹⁸ The doctrine itself is prac-

1856. In these decisions the cases of *Fletcher v. Auburn & Syracuse R. R. Co.* and *Trustees etc. v. Auburn & Rochester R. R. Co.*, *ante*, are regarded as distinguishable or as overruled by *Radeliff v. Mayor etc. of Brooklyn*, 4 N. Y. 195.

1716 N. Y. 97, 108, 69 Am. Dec. 632. The court says: "If the only difference consisted in the introduction of a new motive power, it would not be material. But is there no distinction between the common right of every man to use upon the road a conveyance of his own at will, and the right of a corporation to use its conveyances to the exclusion of all others; between the right of a man to travel in his own carriage without pay, and the right to travel in the car of a railroad company on paying their price?" Again: "The right of the public in a highway is an easement, and one that is vested in the whole public. Is not the right of a railroad company, if it has a right to construct its track upon the road, also an easement? This cannot be denied, nor that the latter easement is enjoyed, not by the public at large, but by a corporation; because it will not be pretended that every man would have a right to go and lay down his tim-

bers, and his iron rails, and make a railroad upon a highway. Here, then, are two easements; one vested in the public, the other in the railroad company. These easements are property, and that of the railroad company is valuable. How was it acquired? It has cost the company nothing. The theory must be that it is carved out and is a part of the public easement, and is therefore the gift of the public. This would do if it was given solely at the expense of the public. But it is manifest that it is at the joint expense of the public and the owner of the fee. Ought not the latter, then, to have been consulted?"

¹⁸See § 151, note 11, part second; also *Huges v. Miss. & Mo. R. R. Co.*, 12 Ia. 261; *Louisville & Frankfort R. R. Co. v. Brown*, 17 B. Mon. 763; *Elizabethtown & Paducah R. R. Co.*, 79 Ky. 52; *Fulton v. Short Route Transf. Co.*, 85 Ky. 640, 4 S. W. 332, 7 Am. St. Rep. 619; *Faust v. Passenger Ry. Co.*, 3 Phil. 164; *Montgomery v. Santa Ana & W. R. R. Co.*, 104 Cal. 186, 37 Pac. 786, 43 Am. St. Rep. 89, 25 L.R.A. 654, 10 Am. R. R. & Corp. Rep. 25; *Werges v. St. Louis etc. R. R. Co.*, 35 La. An. 641; *Hepting v. New Orleans Pac. R. R. Co.*, 36 La. An. 898; *Neitsey v.*

tically obsolete, having been overruled in nearly every State that formerly adopted it.

§ 153 (113). Right to compensation when fee of street in abutting owner. With respect to the interest of the abutting owner, highways may be divided into two classes: First, those in which the public have an easement only; second, those in which the public have the fee.¹⁹ In respect to the first class, the abutting owner is entitled to every right and advantage, in that part of the street of which he owns the fee, not required by the public. He has the entire right and property in the soil, subject to the easement of the public.²⁰ The easement of the public is the right to use and improve the street for the purposes of a highway only. A commercial railroad on a street, being foreign to such purposes,²¹ is an interference with the adjoining owners' proprietary rights in the soil, and an acquisition or taking of an estate or interest in his land, for which he is entitled to compensation as in other cases.²² If the abutting owner

Baltimore & O. R. R. Co., 5 Mackey 34; Glick v. Baltimore & O. R. R. Co., 19 D. C. 412; Tate v. M. K. & T. R. R. Co., 64 Mo. 149; Corey v. Buffalo etc. R. R. Co., 23 Barb. 482; Appeal of Philadelphia etc. R. R. Co., 2 Walker's Pa. Supm. Ct. Rep. 291; Yates v. Town of West Grafton, 34 W. Va. 783, 12 S. E. 1075.

¹⁹As to distinctions based upon the ownership of the fee of streets see *ante*, § 124.

²⁰Post, § 852.

²¹See *ante*. § 151.

²²Western R. R. Co. v. Ala. G. S. R. R. Co., 96 Ala. 272, 11 So. 483, 17 L.R.A. 474; Alabama G. S. R. R. Co. v. Collier, 112 Ala. 681; Mobile etc. R. R. Co. v. Alabama Midland R. R. Co., 116 Ala. 51, 23 So. 57; Reichert v. St. Louis etc. R. R. Co., 51 Ark. 491, 5 L.R.A. 183; Southern Pac. R. R. Co. v. Reed, 41 Cal. 256; Carson v. Central R. R. Co., 35 Cal. 325; Weyl v. Sonoma Valley R. R. Co., 69 Cal. 202; Imlay v. Union Branch R. R. Co., 26 Conn. 249, 68 Am. Dec. 392; Nicholson v. New York & New Haven R. R. Co., 22

Conn. 73; McKean v. New York etc. R. R. Co., 75 Conn. 343, 53 Atl. 656, 61 L.R.A. 730; Knapp & C. Mfg. Co. v. New York etc. R. R. Co., 76 Conn. 311, 56 Atl. 502, 100 Am. St. Rep. 994; Seaboard Air Line Ry. Co. v. Southern Invest. Co., 53 Fla. 832, 44 So. 351; Atlanta etc. R. R. Co. v. Atlanta etc. R. R. Co., 125 Ga. 529, 54 S. E. 736; Indianapolis etc. R. R. Co. v. Hartley, 67 Ill. 439; Bond v. Pennsylvania R. R. Co., 171 Ill. 508, 49 N. E. 545; Rock Island etc. R. R. Co. v. Johnson, 204 Ill. 488, 68 N. E. 549; Spalding v. Macomb etc. Ry. Co., 225 Ill. 585, 80 N. E. 327; Protzman v. Indianapolis & Cinn. R. R. Co., 9 Ind. 467, 68 Am. Dec. 650; Indiana Central Ry. Co. v. Boden, 10 Ind. 96; New Albany & Salem R. R. Co. v. O'Dailey, 12 Ind. 551; Cox v. Louisville R. R. Co., 48 Ind. 178; Indianapolis etc. Ry. Co. v. Smith, 52 Ind. 428; Terre Haute & Logansport R. R. Co. v. Bissell, 108 Ind. 113; Strickler v. Midland R. R. Co., 125 Ind. 412, 25 N. E. 455; Porter v. Midland R. R. Co., 125 Ind. 476, 25 N. E. 556, 3 Am. R.

has title to the center of the street only, and the railroad is laid wholly on the half of the street beyond his line, his right to compensation would be controlled by the same principles as where the fee of the whole is in the public, which is discussed in the

R. & Corp. Rep. 357; Kucheman v. C. C. & D. Ry. Co., 46 Ia. 366; Phipps v. West Md. R. R. Co., 66 Md. 319; Grand Rapids & Ind. R. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306; S. C. 47 Mich. 393; Hoffman v. Flint etc. R. R. Co., 114 Mich. 316, 72 N. W. 167; Schurmeier v. St. Paul etc. R. R. Co., 10 Minn. 82, 88 Am. Dec. 59; Gray v. First Division of St. Paul & Pacific R. R. Co., 13 Minn. 315; Molitor v. Same, 14 Minn. 285; Harrington v. St. Paul & Sioux City R. R. Co., 17 Minn. 215; Adams v. Hastings & Dakota R. R. Co., 18 Minn. 260; Hartz v. St. Paul & Sioux City R. R. Co., 21 Minn. 358; Witt v. St. Paul etc. R. R. Co., 38 Minn. 122, 35 N. W. 862; Papooshek v. Winona etc. R. R. Co., 44 Minn. 195, 46 N. W. 329; Theobald v. Louisville etc. R. R. Co., 66 Miss. 279, 6 So. 230, 14 Am. St. Rep. 564, 4 L.R.A. 735; Central R. R. Co. v. Hatfield, 18 N. J. Eq. 323; Starr v. Camden etc. R. R. Co., 24 N. J. L. 592; Chamberlain v. Elizabethport Steam Cordage Co., 41 N. J. Eq. 43; Bork v. United N. J. R. R. & C. Co., 70 N. J. L. 268, 57 Atl. 412, 103 Am. St. Rep. 808; Wager v. Troy Union R. R. Co., 25 N. Y. 526; Carpenter v. Oswego & S. R. R. Co., 24 N. Y. 655; Henderson v. N. Y. C. R. R. Co., 78 N. Y. 423; Coatsworth v. Lehigh Val. R. R. Co., 156 N. Y. 451; Washington Cemetery v. Prospect Park & Coney Island R. R. Co., 7 Hun 655; Matter of Prospect Park etc. R. R. Co., 13 Hun 345; Hussner v. Brooklyn City R. R. Co., 30 Hun 409; People v. Law, 22 How. Pr. 109; Clark v. Brooklyn City R. R. Co., 30 Hun 409; Syra-
euse Solar Salt Co. v. Rome etc. R. R. Co., 67 Hun 153, 22 N. Y. Supp. 321; Ray v. New York Bay Extension R. R. Co., 34 App. Div. 3 (For other New York cases see *ante*, § 151); White v. Northwestern N. C. R. R. Co., 113 N. C. 610, 18 S. E. 330, 9 Am. R. R. & Corp. Rep. 103, 37 Am. St. Rep. 639, 22 L.R.A. 627; Parrott v. Cincinnati etc. R. R. Co., 10 Ohio St. 624; Cincinnati etc. R. R. Co. v. Cumminsville, 14 Ohio St. 523; Railroad Co. v. Williams, 35 Ohio St. 168; Lawrence R. R. Co. v. O'Harra, 48 Ohio St. 343, 28 N. E. 175; Harmon v. Louisville etc. R. R. Co., 87 Tenn. 614, 11 S. W. 703; Hodges v. Seaboard etc. R. Co., 88 Va. 653, 14 S. E. 380; Petersburg R. R. Co. v. Burtons, 1 Va. Dec. 397; Ford v. Chicago & N. W. Ry. Co., 14 Wis. 609, 80 Am. Dec. 791; Pomeroy v. Milwaukee & Chi. R. R. Co., 16 Wis. 640; Hegar v. Chicago & N. W. Ry. Co., 26 Wis. 624; Sherman v. Mil. Lake Shore & Western R. R. Co., 40 Wis. 645; Chapman v. Oshkosh & Miss. R. R. Co., 33 Wis. 629; Carl v. Sheboygan & Fond du Lac. R. R. Co., 46 Wis. 625; Blesch v. C. & N. W. Ry. Co., 48 Wis. 168; Buckner v. Chi. Mil. & N. W. Ry. Co., 56 Wis. 403; Hanlin v. Chicago & N. W. Ry. Co., 61 Wis. 515; Trustees v. Milwaukee etc. R. R. Co., 77 Wis. 158, 45 N. W. 1086; Taylor v. Chicago etc. R. R. Co., 83 Wis. 636, 53 N. W. 853; Evans v. Chicago etc. R. R. Co., 86 Wis. 597, 57 N. W. 357, 39 Am. St. Rep. 908; Frey v. Duluth etc. R. R. Co., 91 Wis. 309, 64 N. W. 1038; Chicago etc. R. R. Co. v. Milwaukee etc. R. R. Co., 95 Wis. 561, 70 N. W. 678, 60 Am. St. Rep.

following sections.²³ Where a railroad is laid upon a turnpike, the owner of the fee may have compensation for the additional burden.²⁴ Where a railroad company is authorized to appropriate a highway and lay out a new one to accommodate the public, the appropriation of the highway amounts to a vacation of it, the title reverts to the owner, and he is entitled to compensation as if no highway existed.²⁵

§ 154 (115). Right to compensation where fee of street in the public. It having been determined that, though the fee of a street is in the public, the abutting owner has certain private rights therein, appurtenant to his property,²⁶ it follows that, when those rights are interfered with under the power of eminent domain, or by a use of the street which is not within the public easement, there has been a taking within the constitution.²⁷ The existence and operation of a commercial rail-

136, 37 L.R.A. 856; Lange v. La Crosse etc. Ry. Co., 118 Wis. 558, 95 N. W. 952.

To the contrary are the following cases: Harrison v. New Orleans, Pacific R. R. Co., 34 La. An. 462, 44 Am. Rep. 438; Snyder v. Pennsylvania R. R. Co., 55 Pa. St. 340; Phila. & Trenton R. R. Co., 6 Whart. 25, 36 Am. Dec. 202; McLauchlin v. Railroad Co., 5 Rich. S. C. 583; Perry v. New Orleans M. & C. R. R. Co., 55 Ala. 413, 28 Am. Rep. 740; Montgomery v. Santa Ana & W. R. R. Co., 104 Cal. 186, 37 Pac. 786, 43 Am. St. Rep. 89, 25 L.R.A. 654; Neitsey v. Baltimore & O. R. R. Co., 5 Mackey 34; Glick v. Baltimore & O. R. R. Co., 19 D. C. 412; Fulton v. Short Route R. R. Trans. Co., 85 Ky. 640, 4 S. W. 332, 7 Am. St. Rep. 619; Werger v. St. Louis etc. R. R. Co., 35 La. An. 641; Hepting v. New Orleans, Pac. R. R. Co., 36 La. An. 898; Tate v. M. K. & T. R. R. Co., 64 Mo. 149; Corey v. Buffalo etc. R. R. Co., 23 Barb. 482; Appeal of Philadelphia etc. R. R. Co., 2 Walker's Pa. Supm. Ct. Rep. 291; Yates v. Town of West Grafton, 34 W. Va. 783, 12 S. E. 1075.

²³"If the road is laid wholly on the other half of the street, the abutter's right to compensation would be the same as in cases where the fee of the entire street is in the public." Stewart v. Ohio Riv. R. R. Co., 38 W. Va. 438, 18 S. E. 604. See Terre Haute & Logansport R. R. Co. v. Bissell, 108 Ind. 113; Heiss v. Milwaukee & Lake Winnebago R. R. Co., 69 Wis. 555; Kuhl v. Chicago & N. W. R. R. Co., 101 Wis. 42; Trustees v. Milwaukee etc. R. R. Co., 77 Wis. 158, 45 N. W. Rep. 1086; Beck v. Erie Terminal R. R. Co., 11 Pa. Co. Ct. 363; Alabama G. S. R. R. Co. v. Collier, 112 Ala. 681, 14 So. 327; Cobb v. Warren St. Ry. Co., 218 Pa. St. 366, 67 Atl. 654; Ackar v. Knoxville, 117 Tenn. 224, 96 S. W. 973.

²⁴Mahon v. Utica & Schenectady R. R. Co., Supl. to Hill & Denio, 156; Mifflin v. Railroad Co., 16 Pa. St. 182. In the latter case the turnpike was vested in the railroad company by act of the legislature.

²⁵Phillips v. Dunkirk, Warren & Pittsburgh R. R. Co., 78 Pa. St. 177.

²⁶Ante, §§ 120-124.

²⁷Ante, § 65.

road in the street is such a use and is necessarily some interference with the rights of abutting owners, and, to the extent of such interference, a right to compensation exists.²⁸ For any physical injury to the abutting property, as by casting cinders upon it, polluting the air with smoke and gases, or by vibrations communicated through the soil to an extent which would be actionable if the property was not a street, a recovery may be had.²⁹ With respect to this class of injuries the abutting owner's rights are the same as though the street was private property, and these rights are discussed elsewhere.³⁰ The tendency of the later decisions is towards the protection of private rights and the more accurate ascertainment and definition of those rights. It is now well settled by the great weight of authority that, where the fee of a street is in the abutting owner, he may recover for the additional burden caused by a commercial railroad laid on the street. These cases necessarily proceed upon the basis that a commercial railroad is not a legitimate street use. The cases which deny compensation in any case, on the ground that such a railroad is a legitimate use of a highway, are so clearly against good sense and reason that we do not think

²⁸Western R. R. Co. v. Ala. G. T. R. R. Co., 96 Ala. 272, 11 So. 483, 17 L.R.A. 474; Pacific R. R. Co. v. Reed, 41 Cal. 256; Ford v. Santa Cruz R. R. Co., 59 Cal. 290; South Carolina Railroad Co. v. Steiner, 44 Ga. 546; C. B. U. P. R. R. Co. v. Twine, 23 Kan. 585, 33 Am. Rep. 203; Ft. Scott W. & W. R. R. Co. v. Fox, 42 Kan. 490, 22 Pac. 583; Elizabethtown etc. R. R. Co. v. Combs, 10 Bush 382; J. M. & I. R. R. Co. v. Esterle, 13 Bush, Ky. 667; Schurmeier v. St. Paul & Pacific R. R. Co., 10 Minn. 82, 88 Am. Dec. 59; Adams v. C. B. & Q. R. R. Co., 39 Minn. 286, 39 N. W. 629, 12 Am. St. Rep. 644, 1 L.R.A. 493; Theobold v. Louisville etc. R. R. Co., 66 Miss. 279, 6 So. 230, 14 Am. St. Rep. 564, 4 L.R.A. 735; Story v. New York Elevated R. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; White v. Northwestern N. C. R. R. Co., 113 N. C. 610, 18 S. E. 330, 9 Am. R. R. & Corp.

Rep. 103, 37 Am. St. Rep. 639, 22 L.R.A. 627; South Bound R. R. Co. v. Burton, 67 S. C. 515, 46 S. E. 340; Stewart v. Ohio Riv. R. R. Co., 38 W. Va. 438, 18 S. E. 604.

²⁹South Carolina R. R. Co. v. Steiner, 44 Ga. 546; Atchison & Nebraska R. R. Co. v. Garside, 10 Kan. 552; Crosby v. Owensboro etc. R. R. Co., 10 Bush, 288; Elizabethtown R. R. Co., v. Combs, 10 Bush, 382; J. M. & I. R. R. Co. v. Esterle, 13 Bush 667; Ball v. Maysville etc. R. R. Co., 102 Ky. 486, 43 S. W. 731, 80 Am. St. Rep. 362; Willis v. Ky. & Ind. Bridge Co., 104 Ky. 186, 46 S. W. 488; Short Route Transfer Ry. Co. v. Fulton, 12 Ky. L. R. 232; Randle v. Pacific R. R. Co., 65 Mo. 325; Parrott v. Cincinnati etc. R. R. Co., 3 Ohio St. 330; Same v. Same, 10 Ohio St. 624; G. C. & S. F. R. R. Co. v. Eddins, 29 Alb. L. J. 518.

³⁰See Post, §§ 236-238.

they require further discussion. The right to recover where the fee is in the public is involved in so much doubt by the authorities that we have collected in a note all the cases which involve the question, with such comment as seems appropriate.³¹

³¹Alabama. No recovery, whether fee in owner or public. *Parry v. New Orleans M. & C. R. R. Co.*, 55 Ala. 413. This case is overruled and the contrary doctrine established by *Western R. R. Co. v. Alabama G. T. R. R. Co.*, 96 Ala. 272, 11 So. 483, 17 L.R.A. 474; *Alabama G. S. R. R. Co. v. Collier*, 112 Ala. 681; *Mobile etc. R. R. Co. v. Ala. Midland R. R. Co.*, 116 Ala. 51, 23 So. 57.

California. Fee in public, no compensation. *Carson v. Central R. R. Co.*, 35 Cal. 325. Overruled by later cases. *Southern Pacific R. R. Co. v. Reed*, 41 Cal. 256; *Selhulte v. North Pacific Transportation Co.*, 50 Cal. 592; *Ford v. Santa Cruz R. R. Co.*, 59 Cal. 290. But no recovery can be had unless actual damages are sustained. *Hogan v. Central Pacific R. R. Co.*, 71 Cal. 83. The late case of *Montgomery v. Santa Ana & W. R. R. Co.*, 104 Cal. 186, 37 Pac. Rep. 786, 43 Am. St. Rep. 89, 25 L.R.A. 654, 10 Am. R. R. & Corp. Rep. 25, again holds that a railroad for freight and passengers is a legitimate street use, but holds also that the abutter is entitled to damages, whether or not he may be vested with the fee to the center of the street if his right of ingress and egress or his right to light and air are interfered with. See Constitution of California, *ante*, § 18, also *Smith v. So. Pac. R. R. Co.*, 146 Cal. 164, 79 Pac. 868, 106 Am. St. Rep. 17; *Brown v. Rea*, 150 Cal. 171, 88 Pac. 713; *City Store v. San Jose etc. Ry. Co.*, 150 Cal. 277, 88 Pac. 977; *Coats v. Atchison etc. Ry. Co.*, 1 Cal. App. 441, 82 Pac. 640.

Colorado. In favor of recovery.

Denver v. Bayer, 7 Colo. 113; *Denver etc. R. R. Co. v. Domke*, 11 Colo. 247.

District of Columbia. Against recovery whether fee in the abutter or in the public. *Nottingham v. B. & P. R. R. Co.*, 3 McArthur 517; *Neitsey v. Baltimore & O. R. R. Co.*, 5 Mackey 34; *Gliek v. Baltimore & O. R. R. Co.*, 19 D. C. 412.

Florida. See *Florida Southern R. R. Co. v. Brown*, 23 Fla. 104.

Georgia. Earlier cases against recovery. *Savannah, A. & G. R. R. Co. v. Shields*, 33 Ga. 601; *Roll v. City Council of Augusta*, 34 Ga. 326; Overruled in *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546, 560. In this case the court says: "The owners of lands and tenements on Washington street are entitled to have and enjoy all the rights and privileges which legally appertain thereto, incorporeal as well as corporeal; for when the law doth give anything to one, it giveth impliedly whatsoever is necessary for enjoying the same. If the railroad companies, by permission of the public authorities, have located their road on the public street of the city, and by the use thereof, in running their trains, have invaded any of the legal rights of the owners of the lands and tenements on the street by hindering, obstructing or disturbing them in the regular use and lawful enjoyment of the same, then the owners of such lands and tenements are entitled to recover such damages as they have actually sustained by such invasion of their legal rights to the enjoyment of their property, although the railroad companies may not have located their road on any part of it.

We have allowed this to stand as it was written in the first edition. Since then it has become very firmly established that the abutter, though he has not the fee of the street, has certain

The invading, hindering, obstructing or disturbing them in the regular use and lawful enjoyment of their property is an interference with their private legal rights to that property, and, to that extent, is the taking of private property for public use, for which just compensation should be made."

Illinois. Fee in public, no compensation, on the ground that a railroad is a legitimate use. *Moses v. Pittsburgh, Ft. W. & C. R. R. Co.*, 21 Ill. 516. The ground of this case overruled in *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ill. 439; *see also C. B. & Q. R. R. Co. v. McGinnis*, 79 Ill. 269. The right to recover is now settled by the constitution; *ante*, § 25.

Indiana. *Tate v. Ohio & Miss. R. R. Co.*, 7 Ind. 479; *Hutton v. Indiana Cent. R. R. Co.*, 7 Ind. 522; *Protzman v. Indianapolis & Cin. R. R. Co.*, 9 Ind. 467, 68 Am. Dec. 650; *Indiana Cent. R. R. Co. v. Broden*, 10 Ind. 96; *New Albany & Salem R. R. Co. v. O'Daily*, 12 Ind. 551; *Same v. Same*, 13 Ind. 353; *Cox v. Louisville R. R. Co.*, 48 Ind. 178; *Dwenger v. Chicago & Grand Trunk R. R. Co.*, 98 Ind. 153. These cases leave the question in doubt where the fee is in the public and the railroad is laid on the surface of the street. In *Decker v. Evansville Suburban R. R. Co.*, 133 Ind. 493, 33 N. E. 349, it is held that an abutter, though he has not the fee is entitled to compensation if his access is materially interfered with. *And see Pittsburgh & C. R. Co. v. Noftsger*, 148 Ind. 101.

Iowa. Rule of no compensation where fee in public is firmly upheld. *Milburn v. Cedar Rapids*, 12 Ia. 246; *Hughes v. Miss. & Mo. R.*

R. Co.

12 Ia. 261; *Clinton v. Cedar Rapids etc. R. R. Co.*, 24 Ia. 455; *Slatten v. Des Moines Valley R. R. Co.*, 29 Ia. 148, 4 Am. Rep. 205; *Davenport v. Stevenson*, 34 Ia. 225; *Ingraham v. C. D. & M. R. R. Co.*, 34 Ia. 249; *Ingram v. Same*, 38 Ia. 669; *Chicago etc. R. R. Co. v. Newton*, 36 Ia. 299; *Hine v. K. & D. M. R. R. Co.*, 42 Ia. 636; *Cadle v. Muscatine Western R. R. Co.*, 44 Ia. 11; *Frith v. Dubuque*, 45 Ia. 406; *Davis v. C. & N. W. Ry. Co.*, 46 Ia. 389; *Simplot v. Chicago, M. & St. Paul Ry. Co.*, 5 McCrary 158. The ground taken, in some of the cases, that a railroad is a legitimate use of a street, is overruled in *Kucherman v. C. C. & D. Ry. Co.*, 46 Ia. 366. But the later case of *O'Connor v. St. Louis etc. R. R. Co.*, 56 Ia. 735, affirms the doctrine of no compensation, when the fee is in the public. Compensation is now required by statute. § 344, *post*.

Kansas. No recovery, fee in public. *Atchison & Nebraska R. R. Co. v. Garside*, 10 Kan. 552. This case is virtually, though not expressly, overruled in the later cases of *C. B. U. P. R. R. Co. v. Twine*, 23 Kan. 585, 33 Am. Rep. 203; *Same v. Andrews*, 26 Kan. 702; *Central Branch Union Pacific R. R. Co. v. Andrews*, 30 Kan. 590. This last case has been several times in the Supreme Court since the first edition and is reported as follows: 34 Kan. 565; 37 Kan. 162; 37 Kan. 641; 41 Kan. 370, 21 Pac. 276. In Kansas, *N. & D. R. R. Co. v. Cuykendall*, 42 Kan. 234, 21 Pac. 1051, the rule to be deduced from recent decisions of the court is stated to be that, "in order to justify a recovery for damages by the abutting

private rights of access, light and air, which are as much property as the lot itself; also that any interference with such rights by a use which is not within the legitimate purposes of a high-

lot-owner, there must be such a practical obstruction of the street in front of the lots that the owner is denied ingress and egress to and from them. While the title to the streets is in the county, the legislature has given to the city government the power of full control. The abutting lot-owner has no greater right to the use of the public street than a railroad company that has been authorized to construct its line along it. Each must respect the use of the other, but nothing short of a practical obstruction of the use by one will be a cause of action to the other. A railroad is not an unreasonable obstruction to the free use of the street, but rather a new and improved method of using the same, and germain to its principal object as a passageway, like the electric, steam-motor and horse-car lines. So that, if the location and construction of the line of railroad is authorized by the city council, and its location in the street is such as to give the lot-owner ingress and egress to and from his lots, such use of the street by the railroad company does not interfere with the use of the lot-owner, and consequently he cannot recover for those remote and indirect inconveniences 'arising from smoke, noise, offensive vapors, sparks, fires, shaking of the ground,' and other annoyances." See Ottawa etc. R. R. Co. v. Larson, 40 Kan. 301, 19 Pac. 661. 2 L.R.A. 59; Kansas, K. & N. R. Co. v. McAfee, 42 Kan. 239, 21 Pac. 1052; Ft. Scott, W. & W. R. R. Co. v. Fox, 42 Kan. 490, 22 Pac. 583; Wichita etc. R. R. Co. v. Smith, 45 Kan. 264, 25 Pac. 623; Kansas, N. & D. R. R. Co. v. Mahler, 45 Kan. 565, 26 Pac. 22;

Herndon v. Kansas, N. & D. R. R. Co., 46 Kan. 560, 26 Pac. 959; Leavenworth etc. R. R. Co. v. Curtan, 51 Kan. 432, 33 Pac. 297; Chicago etc. R. R. Co. v. Union Inv. Co., 51 Kan. 600, 33 Pac. 378; Ottawa etc. R. R. Co. v. Peterson, 51 Kan. 604, 33 Pac. 606; Atchison etc. R. R. Co. v. Luening, 52 Kan. 732, 35 Pac. 801; Atchison etc. R. R. Co. v. Arnold, 52 Kan. 729, 35 Pac. 780; Atchison etc. R. R. Co. v. Davidson, 52 Kan. 739, 35 Pac. 787; Kansas City etc. R. R. Co. v. Schwake, 70 Kan. 141, 78 Pac. 431, 68 L.R.A. 673.

Kentucky. The general doctrine is that the abutting owner cannot recover, whether fee in the public or otherwise. Lexington & Ohio R. R. Co. v. Applegate, 8 Dana (Ky.) 289, 33 Am. Dec. 497; Wolf v. Covington & Lexington R. R. Co., 15 B. Mon. 404; Louisville & Frankfort R. R. Co. v. Brown, 17 B. Mon. 763; Crosby v. Owensboro & Russellville R. R. Co., 10 Bush, (Ky.) 288; Elizabethtown & Paducah R. R. Co. v. Thompson, 79 Ky. 52. But the abutting owner's right to use the street is recognized as property, and any unreasonable use of the street by a railroad is actionable. Elizabethtown etc. R. R. Co. v. Combs, 10 Bush, 382; J. M. & I. R. R. Co. v. Esterle, 13 Bush 667; Fulton v. Short Route R. R. Trans. Co., 85 Ky. 640, 4 S. W. 332, 7 Am. St. Rep. 619; Louisville & N. R. R. Co. v. Orr, 91 Ky. 109, 15 S. W. 8; Commonwealth v. City of Frankfort, 92 Ky. 149, 17 S. W. 287; Strickley v. Chesapeake & O. R. R. Co., 93 Ky. 323, 20 S. W. 261; Henderson Belt R. R. Co. v. Dechamp, 95 Ky. 219, 24 S. W. 605; Chesapeake & O. R. R. Co. v. Kobs, (Ky.) 30 S. W. 6;

Maysville & B. S. R. R. Co. v. Ingram, (Ky.) 30 S. W. 8; Dulaney v. Louisville etc. R. R. Co., 100 Ky. 628. Exactly at what point the use becomes unreasonable and what rule is to be applied in determining what is an unreasonable use the cases do not inform us. But, when it is conceded that the abutting owners have a private right to use the street, we think a right to recover follows in every case of a disturbance of that right. The later cases sustain a recovery for any material interference with the right of access and for damages by smoke, cinders, noise and vibration. Ball v. Maysville etc. R. R. Co., 102 Ky. 486, 43 S. W. 731, 80 Am. St. Rep. 362; Covington etc. R. R. & B. Co. v. Kleymeyer, 105 Ky. 609, 49 S. W. 484; Ferguson v. Covington etc. Bridge Co., 108 Ky. 662, 57 S. W. 460; Ky. Cent. R. R. Co. v. Clark, 5 Ky. L. R. 184; Louisville etc. R. R. Co. v. Finlay, 7 Ky. L. R. 129; Short Route Transfer Ry. Co. v. Fulton, 12 Ky. L. R. 232; Louisville So. R. R. Co. v. Cogar, 15 Ky. L. R. 444; Louisville So. R. R. Co. v. Hooe, 18 Ky. L. R. 521, 35 S. W. 266, 38 S. W. 131. There is no presumption that the abutter owns the fee. Bondurant v. North Carolina etc. R. R. Co., 5 Ky. L. R. 101.

Louisiana. No right to compensation in any case. New Orleans, M. & C. R. R. Co., 26 La. An. 517; Koehmel v. Same, 27 La. An. 442; Harrison v. New Orleans Pacific R. R. Co., 34 La. An. 462, 44 Am. Rep. 438; Hill v. Chicago, St. Louis & New Orleans R. R. Co., 38 La. An. 599. But an unreasonable location in a street so as to take part of plaintiff's awning was restrained in Laviosa v. Chi. St. L. & N. O. R. R. Co., 1 McGloin, La. 299. A right to compensation is now assured by the constitution. *Ante*, § 30, *see*: Hept-

ing v. New Orleans Pac. R. R. Co., 36 La. An. 898.

Michigan. Right to recover when fee in public not directly passed upon; *but see* Grand Rapids etc. R. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306; Same v. Same, 47 Mich. 393. Abutter may recover when he owns the fee. Hoffman v. Flint etc. R. R. Co., 114 Mich. 316, 72 N. W. 167.

Minnesota. Abutting owner may have compensation, though fee in the public. Schurmeir v. St. Paul & Pacific R. R. Co., 10 Minn. 82, 105, 88 Am. Dec. 59; Cash v. Union Depot etc. Co., 32 Minn. 101; Adams v. C. B. & Q. R. R. Co., 39 Minn. 286, 39 N. W. 629, 12 Am. St. Rep. 644, 1 L.R.A. 493; Lamm v. Chicago etc. R. R. Co., 45 Minn. 71, 47 N. W. 455, 10 L.R.A. 268.

Mississippi. See Donnaker v. State of Mississippi, 8 S. & M. 649; New Orleans, J. & G. N. R. R. Co. v. Moye, 39 Miss. 374. Neither of these cases passes directly upon the right to compensation when the fee is in the abutting owner. In the recent case of Theobald v. Louisville N. O. & T. R. R. Co., 66 Miss. 279, 6 So. 230, 14 Am. St. Rep. 564, 4 L.R.A. 735, it is held that the abutting owner is entitled to compensation whether he owns the fee or not, and the positions taken in this chapter as to the rights of abutting owners are fully approved.

Missouri. In this State no distinction appears to have been based upon the ownership of the fee. No damages can be recovered for a railroad on the surface of a street, if built and operated in a proper manner. Lackland v. North Mo. R. R. Co., 31 Mo. 180; Same v. Same, 34 Mo. 259; Tate v. M. K. & T. R. R. Co., 64 Mo. 149; Randle v. Pacific R. R. Co., 65 Mo. 325; Swenson v. Lexington, 69 Mo. 157; Botto v. Mo.

Pacific R. R. Co., 11 Mo. App. 589; Cross v. St. Louis, K. C. & N. Ry. Co., 77 Mo. 318; Henry Gaus & Sons Mfg. Co. v. St. Louis etc. R. R. Co., 113 Mo. 308, 20 S. W. 658, 7 Am. R. R. & Corp. Rep. 235, 18 L.R.A. 339. In the last case the court goes so far as to hold that a commercial railroad laid at the surface of a street is not only not a taking of the property of abutting owners, but not even a damaging of their property within the meaning of a constitution requiring compensation for property damaged as well as taken. *See post*, § 351. But where the railroad is laid on an embankment, or elevated structure, or upon or close to the sidewalk, or in a narrow street so as practically to destroy it as a thoroughfare, it is held the abutter may have a remedy, either for damages or an injunction. Smith v. Kansas City etc. R. R. Co., 98 Mo. 20, 11 S. W. Rep. 259; Lockwood v. Wabash R. R. Co., 122 Mo. 86, 26 S. W. 698, 24 L.R.A. 516; Knapp, Stout & Co. v. St. Louis Transfer R. R. Co., 126 Mo. 26, 28 S. W. 626; Schulenburg etc. Co. v. St. Louis etc. R. R. Co., 129 Mo. 455, 31 S. W. 796; De Geofroy v. Merchants Bridge Terminal Ry. Co., 179 Mo. 698, 79 S. W. 386, 101 Am. St. Rep. 524, 64 L.R.A. 959. In the case of *Sherlock v. Kansas City etc. R. R. Co.*, 142 Mo. 172, 43 S. W. 629, 64 Am. St. Rep. 551, the court says: "While this court, by a long line of decisions from *Lackland v. R. R.*, 31 Mo. 180, down to and including *Gaus & Sons v. R. R.*, 113 Mo. 308, has held that 'the laying of a railroad track on the established grade and operating a steam railroad thereon, does not subject the street to a servitude different from that which was contemplated in the original dedication,' it has been seriously questioned, and it may be gravely doubted whether the weight

of modern authority in this country is not rightly arrayed against such a doctrine."

Nebraska. The abutting owner may recover, though the fee is in the public. *Burlington & Missouri Riv. R. R. Co. v. Reinhacke*, 15 Neb. 279, 48 Am. Rep. 342; *Chicago etc. R. R. Co. v. Sturey*, 55 Neb. 137, 75 N. W. 557.

New Jersey. Morris & Essex R. R. Co. v. Newark, 10 N. J. Eq. 352; H. B. Anthony Shoe Co. v. West Jersey R. R. Co., 57 N. J. Eq. 607. A commercial railroad is an additional burden on the fee. *Bork v. United N. J. R. R. & C. Co.*, 70 N. J. L. 268, 57 Atl. 412, 103 Am. St. Rep. 808.

New Mexico. *See New Mexican R. R. Co. v. Hendricks*, (N. M.) 30 Pac. 901.

New York. The right to compensation, when the fee is in the public, would seem to be settled by the elevated railroad cases. *Story v. New York Elevated R. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Mahady v. Brunswick R. R. Co.*, 91 N. Y. 148; *Matter of East River Bridge etc.*, 26 Hun 490. This prediction, made in the first edition, has not been fulfilled, but the court of appeals, while adhering fully to the doctrine enunciated in the elevated railroad cases, above cited, has reaffirmed the earlier doctrine, that an abutting owner, not having the fee of the street, cannot recover for a commercial railroad laid on the surface or legal grade of the street. *Fobes v. Rome, W. & O. R. R. Co.*, 121 N. Y. 505, 24 N. E. 919, 8 L.R.A. 453, 3 Am. R. R. & Corp. Rep. 182; *Case v. Cayuga County*, 34 N. Y. Supp. 595. In the Fobes case it is intimated that there might be a remedy for an excessive use of the street. But if access is interfered with by an embankment, made for the accommodation of the railroad and not in good faith as a change of

grade, then the abutter may recover for such interference. *Reining v. New York etc. R. R. Co.*, 128 N. Y. 157, 28 N. E. 640, 14 L.R.A. 133, 5 Am. R. R. & Corp. Rep. 476; *Egerer v. New York Central etc. R. R. Co.*, 130 N. Y. 108, 29 N. E. 95, 5 Am. R. R. & Corp. Rep. 241; *Coatsworth v. Lehigh Valley R. R. Co.*, 156 N. Y. 451, 51 N. E. 301. *Compare Rauenstein v. New York etc. R. R. Co.*, 136 N. Y. 528, 32 N. E. 1047, 7 Am. R. R. & Corp. Rep. 520, 18 L.R.A. 768. *And see cases cited in § 156.*

Nevada. *Virginia & T. R. R. Co. v. Lynch*, 13 Nev. 92.

North Carolina. *White v. Northwestern N. C. R. R. Co.*, 113 N. C. 610, 18 S. E. 330, 9 Am. R. R. & Corp. Rep. 103, 37 Am. St. Rep. 639, 22 L.R.A. 627, repudiates the distinctions based upon the ownership of the fee of the street and holds that the abutter may recover whether he has the fee or not. *So also Staton v. Atlantic Coast Line R. R. Co.*, 147 N. C. 428.

Ohio. *Parrott v. Cincinnati etc. R. R. Co.*, 3 Ohio St. 330; *S. C. 10 Ohio St. 624*; *Railroad Co. v. Hambleton*, 40 Ohio St. 496.

Pennsylvania. Right to compensation denied in all cases. *Phila. & Trenton R. R. Co.*, 6 Wharton, 25, 36 Am. Dec. 202; *Mercer v. Pittsburgh, Ft. W. & C. R. R. Co.*, 36 Pa. St. 99; *Snyder v. Pennsylvania R. R. Co.*, 55 Pa. St. 340; *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 325, 94 Am. Dec. 84; *Black v. Phila. & R. R. R. Co.*, 58 Pa. St. 249; *Danville, H. & W. R. R. Co. v. Commonwealth*, 73 Pa. St. 29; *Struthers v. Dunkirk etc. Ry. Co.*, 87 Pa. St. 282. In the latter case the court was urged to overrule former decisions, but refused to do so. *See also Philadelphia v. Empire Passenger R. R. Co.*, 3 Brews. 547; *Faust v. Passenger Railway Co.*, 3 Phila. 164.

Compensation is now secured by the constitution of 1874. In *Kane v. New York El. R. R. Co.*, 125 N. Y. 164, 26 N. E. 278, 3 Am. R. R. & Corp. Rep. 744, 11 L.R.A. 640, it is said by Andrews, J., delivering the opinion of the court, and referring to the Pennsylvania courts: "The courts of that State have strenuously asserted the supreme power of the legislature to appropriate streets to public uses destructive of their ordinary use as public ways, and have denied the right of abutting owners to compensation, however serious the injury to their property occasioned by such appropriation. The injustice of this rule led to the insertion in the new constitution of Pennsylvania, adopted in 1874, of a provision declaring that municipal and other corporations, invested with the privilege of taking private property for public use, should make compensation for property 'taken, injured or destroyed,' by the construction of their works, etc."

South Carolina. Recovery denied without regard to fee. *McLauchlin v. Railroad Co.*, 5 Rich. 583. This case overruled and the right to recover compensation, though the fee is in the public, affirmed. *South Bound R. R. Co. v. Burton*, 67 S. C. 515, 46 S. E. 340. *And see Wilkins v. Gaffney City*, 54 S. C. 199, 32 S. E. 299.

Tennessee. When fee in the public there can be no recovery unless the abutter's right of access is unreasonably interfered with. *Iron Mt. R. R. Co. v. Bingham*, 87 Tenn. 522, 11 S. W. 705, 4 L.R.A. 622; *Brumit v. Railroad Co.*, 106 Tenn. 124, 60 S. W. 505.

Texas. Fee in the public, no compensation. *H. & T. C. R. R. Co. v. Odum*, 53 Tex. 343; overruled in *G. C. & S. F. R. R. Co. v. Eddins*, 29 Alb. L. J. 518. The right to recover is now settled by the constitution.

way, is a taking within the constitution and that a commercial railroad is such a use.³²

§ 155 (115a). Right to compensation where fee of street in third party. It sometimes happens that the fee of a street is in neither the abutting owner or the public, but in a third party.³³ In such case the rights of the abutting owner, as against the public, are the same as though the public had the fee, and the rights of the public are the same as though the fee was in the abutting owner. The right to compensation would be the same as in cases where the public has the fee, and is treated in the last section.

§ 156. Commercial railroad on viaduct: New York Park avenue cases. An interesting series of cases arose in New York out of the following facts: The New York and Harlem Railroad Company occupied Park Avenue in New York city with its tracks, which were constructed at some places in cuts and at other places upon a solid embankment of earth and masonry. Park Avenue crosses the Harlem river and in 1890 Congress passed an act requiring the existing bridges over the Harlem to be replaced by bridges twenty-four feet above high tide.³⁴ In order to meet this requirement the legislature of New York in 1892 passed an act for the reconstruction and elevation of the railroad tracks on Park avenue and for the construction of a new and higher bridge over the Harlem river. The railroad was to be placed on a steel structure, at a much higher grade than be-

Ante, § 54; Morrow v. St. Louis etc. R. R. Co., 81 Tex. 405, 17 S. W. 44.

Vermont. Hatch v. Vermont Central R. R. Co., 25 Vt. 49; S. C. 28 Vt. 142; Richardson v. Same, 25 Vt. 465, 60 Am. Dec. 459.

Washington. The constitution gives compensation for property taken or damaged. See Hatch v. Tacoma etc. R. R. Co., 6 Wash. 1, 32 Pac. 1063; Kaufman v. Tacoma etc. R. R. Co., 11 Wash. 632, 40 Pac. 137.

West Virginia. The propriety of distinctions based upon the ownership of the fee is much discussed in Spencer v. Point Pleasant & Ohio R. R. Co., 23 W. Va. 406, 426-432, but the case is decided on other grounds. It is now settled that, under the con-

stitution of 1872, the abutter may recover to the extent his property is depreciated by the construction and operation of the railroad, whether he owns the fee or not. Stewart v. Ohio Riv. R. R. Co., 38 W. Va. 438, 18 S. E. 604; Arbenz v. Wheeling & H. R. R. Co., 33 W. Va. 1, 10 S. E. 14, 5 L.R.A. 371; Guinn v. Ohio Riv. R. R. Co., 46 W. Va. 151, 33 S. E. 87, 76 Am. St. Rep. 806.

³²*Ante*, §§ 120, 151.

³³Decker v. Evansville Suburban & R. R. Co., 133 Ind. 493, 33 N. E. 349.

³⁴Vol. 26 U. S. Stats. at Large, p. 437. See Muhlker v. New York etc. R. R. Co., 173 N. Y. 549, 66 N. E. 558.

fore, and Park avenue was to be improved for travel at the ordinary grade. The work was to be done by the State through a commission appointed by the mayor of New York and the expense was to be equally divided between the city and the railroad company up to \$1,500,000, the railroad company paying all excess over that sum. The fee of the street was in the public. The work was done pursuant to the act and the railroads commenced using the structure on Feb. 16, 1897. The statute made no provision for compensation to abutting owners. Abutting owners on Park avenue brought suits for damages or injunction and in the first case which reached the court of appeals, it was held that the plaintiff was entitled to recover all damages occasioned by the excess in height and width of the new structure over the old.³⁵ But in later cases it was determined that there could be no recovery on the ground that the work was done by the State for the improvement of the street.³⁶ There was a strong dissent from this conclusion and many instructive opinions were filed. The elevated railroad cases are distinguished on the ground that they were an additional use of the street for the benefit of a private corporation while the viaduct in question was a scheme for improving the street for ordinary travel.³⁷ In later cases it was held that there might be a recov-

³⁵Lewis v. New York etc. R. R. Co., 162 N. Y. 202, 56 N. E. 540.

³⁶Fries v. New York etc. R. R. Co., 169 N. Y. 270, 62 N. E. 358, reversing S. C. 57 App. Div., 577, 68 N. Y. S. 670; Muhlker v. New York etc. R. R. Co., 173 N. Y. 549, 66 N. E. 558, reversing S. C. 60 App. Div. 621; Dolan v. New York etc. R. R. Co., 175 N. Y. 367, 67 N. E. 612, reversing S. C. 74 App. Div. 434, 77 N. Y. S. 815. In the last case it is said: "The evident purpose of this legislation was to open up Park avenue as a street through its entire width, and to facilitate travel across the same between the portions of the city lying on either side of the street." p. 370. See also the following cases growing out of the same improvement: Wilde v. New York etc. R. R. Co., 168 N. Y. 597, 61 N. E. 554; Siegel v. New York Em. D.—17.

etc. R. R. Co., 62 App. Div. 290, 70 N. Y. S. 1088: S. C. reversed 173 N. Y. 644, 66 N. E. 1116; Larney v. New York etc. R. R. Co., 62 App. Div. 311, 71 N. Y. S. 27; Pape v. New York etc. R. R. Co., 74 App. Div. 175, 77 N. Y. S. 725; S. C. reversed, 175 N. Y. 504, 67 N. E. 1086; Caldwell v. New York etc. R. R. Co., 111 App. Div. 164, 97 N. Y. S. 588; Wallach v. New York etc. R. R. Co., 111 App. Div. 273, 97 N. Y. S. 717; Bremer v. New York Central etc. R. R. Co., 118 App. Div. 139, 103 N. Y. S. 318.

³⁷"The decisions in the elevated railroad cases are not in point. There no attempt was made by the state to improve the street for the benefit of the public. Instead, it granted to a corporation the right to make an additional use of the street, in the doing of which it took

ery for damages caused by a station, outside the limits of the regular structure.³⁸ Cases involving liability for the structure itself were taken to the Supreme Court of the United States, and there the ruling of the New York court was reversed. The plaintiff, in the case decided, acquired his property after the decisions in the New York elevated railroad cases and he was held thereby to have acquired by contract a right to the easements of light, air and access as adjudicated in those cases which could not be impaired by the State or its agents without compensation. It was held that there was no room for distinction between the elevated railroad cases and the one under discussion and that the former were in point and decisive.³⁹

Much stress was laid by the New York courts upon the fact that the Park avenue viaduct was built by the State and the railroads compelled to occupy it.⁴⁰ Upon this point and, referring to the elevated railroad cases, the United States Supreme Court says: "Another distinction is claimed, as we have already observed, between the case at bar and those cases. The act of the railroad in occupying the viaduct, it is said, was the act of the

certain easements belonging to abutting owners, which it was compelled to compensate them for." Muhlker v. New York etc. R. R. Co., 173 N. Y. 549, 536, 66 N. E. 588. And see Fries v. New York etc. R. R. Co., 169 N. Y. 270, 62 N. E. 358.

³⁸Dolan v. New York etc. R. R. Co., 175 N. Y. 367, 67 N. E. 612, reversing S. C. 74 App. Div. 434, 77 N. Y. S. 815; Ketcham v. New York etc. R. R. Co., 177 N. Y. 247, 69 N. E. 533, reversing S. C. 76 App. Div. 619.

³⁹Muhlker v. New York etc. R. R. Co., 197 U. S. 544, 25 S. C. 522; Birrell v. New York etc. R. R. Co., 198 U. S. 390, 25 S. C. 667. The fact that access was improved was held to be no reason why the plaintiff should not recover for interference with light and air. Four judges dissent from the decision.

⁴⁰Thus in Muhlker v. New York etc. R. R. Co., 173 N. Y. 549, 66 N. E. 588, at page 554, the court says: "The State had the power to do

these things and all of them, and defendant, having the right to move its trains over the street, which could not be taken away from it, did not lose that right and became a trespasser because it obeyed the command of the statute, which it could not refuse to obey, to operate its trains upon the structure which the State had built. The plaintiff was injured by the change as appears from the findings. But who caused the injury? The defendant, which obeyed the command of the statute which it had not the right to resist, or the State, which had power to make the changes which were made in the street and did make them and then compelled defendant to make use of them? The question admits of but one answer, and that is, it was the State." To the same effect is Fries v. New York etc. R. R. Co., 169 N. Y. 270, 62 N. E. 358. See especially pages 277, 282 and 283 of the official report.

State. * * * The answer need not be hesitating. The permission, or command of the State, can give no power to invade private rights, even for a public purpose without payment of compensation; and payment of such compensation, when necessary to the performance of the duties of a railroad company, may be, as we have already observed, part of its submission to the command of the State.”⁴¹ This decision was rendered in 1905 and in the meantime the legislature of New York passed an act providing for compensation to abutting owners on account of the viaduct, to be paid by the State, and ascertained by the court of claims, with a proviso that the award should not include any damages for which any railroad corporation was or might be liable and that the facts proved should be such as to make out a case of liability were the State a corporation or private individual.⁴² This act has been held to be valid,⁴³ but how it will be applied, in view of the decision of the federal court, remains to be seen.

In Missouri, where a commercial railroad at the grade of the street is held to be a legitimate street use, it is also held that, if it is constructed upon an elevated structure, it constitutes an additional burden for which compensation must be made to the abutting owner.⁴⁴ So in New York where the abutter has no remedy when the fee of the street is in the public and a commercial railroad is laid at grade, he may recover when the road is laid on an embankment or causeway in the middle of the street.⁴⁵

But the true view is that a commercial railroad is not a proper street use⁴⁶ and cannot be authorized without compensation to the abutting owner, whether he owns the fee or otherwise and the manner of construction simply goes to the question of damages, not to the question of liability. Such a railroad is manifestly more injurious when constructed upon a steel viaduct, or upon an embankment or in a cut than upon the surface.⁴⁷

⁴¹Muhlker v. New York ete. R. R. Co., 197 U. S. 544, 569, 25 S. C. 522.

ferman v. Long Island R. R. Co., 120 App. Div. 528, 105 N. Y. S. 487.

⁴²Laws of 1901, chap. 729.

⁴⁵Reining v. New York ete. R. R.

⁴³Sander v. State, 182 N. Y., 400, 75 N. E. 234, reversing S. C. 90 App. Div. 618.

Co., 128 N. Y. 157, 28 N. E. 640, 14 L.R.A. 133; Egerer v. New York Cent. ete. R. R. Co., 130 N. Y. 108, 29 N. E. 95, 14 L.R.A. 381.

⁴⁴De Geofroy v. Merchants Bridge Terminal Ry. Co., 179 Mo. 698, 79 S. W. 386, 101 Am. St. Rep. 524, 64 L.R.A. 959. To same effect is Lef-

⁴⁶Ante, §§ 151-154.

⁴⁷Besides the cases already cited in this section we refer to the fol-

§ 157 (115b). Elevated street railroads. The railroads here intended are of the type found in New York and Chicago, consisting of a steel structure supported by columns in the street, upon which the cars are operated in trains, with stations at convenient distances. They are devoted to passenger traffic only. Such railroads are clearly not within the ordinary and legitimate uses for which highways are established. If the fee of the street is in the abutting owner, he is entitled to compensation, as in case of the ordinary steam railroad.⁴⁸ If the fee is not in the abutting owner, he is still entitled to recover for damages occasioned to his property by interfering with his right of access and his right to light and air. These rights are property, and, to impair or destroy them is a taking.⁴⁹ Various questions in reference to the elevated railways of New York City came before the courts of New York prior to 1882,⁵⁰ but the right to compensation was not authoritatively passed upon until the decision made by the Court of Appeals in *Story v. New York Elevated Railroad Co.* decided in that year.⁵¹ Plaintiff owned an improved lot abutting on Front street, in which the defendant proposed to construct "a road upon a series of columns, about fifteen inches square, fourteen feet and six inches high, placed five inches inside the edge of the sidewalk, and carrying girders, from thirty-three to thirty-nine inches deep, for the support of cross ties for three sets of rails for a steam rail-

lowing: Railroad on embankment in street: *Smith v. Kansas City etc. R. R. Co.*, 98 Mo. 20, 11 S. W. 259. In cut: *Kansas City etc. R. R. Co. v. Schwake*, 70 Kan. 141, 78 Pac. 431, 68 L.R.A. 673. In tunnel: *Terry v. Richmond*, 94 Va. 537, 27 S. E. 429. *And see New Castle v. Lake Erie etc. R. R. Co.*, 155 Ind. 18, 57 N. E. 516; *Coatsworth v. Lehigh Valley R. R. Co.*, 156 N. Y. 45, 51 N. E. 301; *ante*, § 138; *post*, § 178.

⁴⁸*Ante*, § 153.

⁴⁹*Ante*, § 64.

⁵⁰*Matter of New York Elevated R. R. Co.*, 70 N. Y. 327; *Matter of Gilbert Elevated Ry. Co.*, 70 N. Y. 361; *Matter of Kings County Elevated Ry. Co.*, 82 N. Y. 95; *Sixth Ave. Ry. Co. v. Gilbert Elevated Ry.*, 43 N. Y. Supr. Ct. 292; S. C. 41 N.

Y. Sup. Ct. 489; *Matter of East River Bridge & Rapid Transit Co.*, 10 Abb. New Cases, 245; *Matter of East River Bridge etc. Co.*, 26 Hun 490; *Matter of Brooklyn Rapid Transit Co.*, 62 How. Pr. 404. A collection of Elevated Railway cases with a note will be found in Vol. 3, Abbott's New Cases, as follows: *Patten v. New York Elevated R. R. Co.*, p. 306; *Ninth Ave. R. R. Co. v. Same*, p. 347; *Sixth Ave. R. R. v. Gilbert Elevated R. R. Co.*, p. 372; *Matter of New York Elevated R. R. Co.*, p. 401; *Gilbert Elevated R. R. Co. v. Anderson*, p. 434; *Spader v. New York Elevated R. R. Co.*, p. 467; *Story v. Same*, p. 478.

⁵¹90 N. Y. 122, 43 Am. Rep. 146, decided Oct. 17th, 1882, found also in 11 Abb. New Cases, p. 236.

road." The cars intended for the road, when placed thereon, would extend eleven feet above the tracks, would project two feet over the sidewalk on either side of the street and reach within nine feet of plaintiff's buildings. It was found as matter of fact that the existence of this structure and operation of the road would interfere with access to the plaintiff's premises, and would, to some extent, intercept the light and air from his building and impair the enjoyment and value of his property. The lot and street in question were originally a part of a tract of land platted and sold by the city of New York, and in the deeds from the city it is declared that "the said several streets shall forever thereafter continue and be for the free and common passage of, and as public streets and ways for the inhabitants of the said city, and all others passing and returning through or by the same, in like manner as the other streets of the said city now are or lawfully ought to be." Front street was one of the streets referred to. Plaintiff's lot was originally conveyed as bounded on Front street, and whatever rights in the street had attached to the lot originally were duly vested in the plaintiff. The case was principally considered on the theory that the fee of the street was in the city. It was held that the original purchaser acquired certain rights in the street, in the nature of an easement therein appurtenant to his lot. "But what is the extent of this easement?" says the court (p. 146). "What rights or privileges are secured thereby? Generally, it may be said, it is to have the street kept open, so that from it access may be had to the lot, and light and air furnished across the open way. The street occupies the surface and to its uses the rights of the adjacent lots are subordinate, but above the surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner. To hold otherwise would enable the city to derogate from its own grant, and violate the arrangement on the faith of which the lot was purchased. This in effect was an agreement, that if the grantee would buy the lot abutting on the street, he might have the use of light and air over the open space designated as a street. In this case it is found by the trial court in substance, that the structure proposed by the defendant, and intended for the street opposite the plaintiff's premises, would cause an actual diminution of light, depreciate the value of the plaintiff's warehouse and thus work his injury.

In doing this thing the defendant will take his property as much as if it took the tenement itself.”⁵²

Although, in this particular case, the street in question was laid out by the city itself, which also originally granted the plaintiff's lot with a covenant that the street should forever remain open as a public street, yet the principles of the decision will apply with equal force to property abutting upon streets established by private dedication or by condemnation. In platting and conveying the property the city acted merely as a private party. The deeds of conveyance executed by the city did not expressly transfer any rights in the streets as appurtenant to the abutting property, nor define how the streets were to be used and enjoyed except in general terms which would have been implied by law. The meaning of the covenant in the deed, that the streets in question are to be kept open, as public streets, “in like manner as the other streets of the said city now are or lawfully ought to be,” is to be determined by reference to the

⁵²The conclusions of the court upon the whole case are given by Tracy, J., as follows:

“First. That the plaintiff, by force of the grant of the city, made to his grantors, has a right or privilege in Front street, which enables him to have the same kept open and continued as a public street for the benefit of his abutting property.

“Second. That this right or privilege constitutes an easement, in the bed of the street, which attaches to the abutting property of the plaintiff, and constitutes private property, within the meaning of the constitution, of which he cannot be deprived without compensation.

“Third. That such a structure as the court found the defendant was about to erect in Front street, and which it has since erected, is inconsistent with the use of Front street as a public street.

“Fourth. That the plaintiff's property has been taken and appropriated by the defendant for public use without compensation being made therefor.

“Fifth. That the defendant's acts are unlawful, and as the structure is permanent in its character and, if suffered to continue, will inflict a permanent and continuing injury upon the plaintiff he has the right to restrain the erection and continuance of the road by injunction.

“Sixth. That the statutes under which the defendant is organized authorize it to acquire such property as may be necessary for its construction and operation by the exercise of the right of eminent domain.

“Seventh. The injunction prohibiting the continuance of the road in Front street, should not be issued until the defendant has had a reasonable time after this decision to acquire the plaintiff's property by agreement, or by proceedings to condemn the same.” pp. 178, 179. The decision of the court is by Andrews, Ch. J., Rapallo, Danforth, and Tracy, JJ. Miller, Earl and Finch, JJ., dissent.

general law and custom which regulates the uses of streets in cities. The court does not determine whether an elevated railroad is a legitimate use of Front street by reference to the deed of the city, but by reference to the manner in which the streets of a city have been immemorially used and enjoyed. Had the property in question been platted and sold by a private individual, the purchasers would have acquired the same rights in Front street as the grantees of the city acquired. And so, had the streets in question been established by condemnation, the result to the abutting property would have been the same.⁵³ In short, the right to light, air and access over a public street is a universal and inseparable constituent of abutting property. Such right is property, as sacred as the lot itself, and cannot be interfered with or taken for public use without compensation.⁵⁴

These views in regard to the logical scope of the decision in the Story case are in accordance with the later case of *Lahr v. Metropolitan Elevated R. R. Co.*⁵⁵ In the latter case the Court of Appeals was strenuously urged to reconsider or modify its decision in the Story case, or at least confine its application to property held by grant from the city itself upon covenants similar to those in question in the Story case. But the court refused to do either, and expressly approved of its former decision and declared that, "wherever the principles of that case logically lead us we feel constrained to go, and give full effect to the rule therein stated, that abutters upon public streets in cities are entitled to such damages, as they may have sustained by reason of a diversion of the street from the use for which it was originally taken, and its illegal appropriation to other and inconsistent uses."⁵⁶

⁵³ *Ante*, §§ 120-123.

⁵⁴ *Peyser v. New York Elevated R. R. Co.*, 12 Abb. New Cases, 276; *Glover v. Manhattan Ry. Co.*, 66 How. Pr. 77.

⁵⁵ 104 N. Y. 268.

⁵⁶ "We hold that the Story case has definitely determined:

"First. That an elevated railroad in the streets of a city, operated by steam power and constructed as to form, equipments, and dimensions like that described in the Story case,

is a perversion of the use of the street from the purposes originally designed for it, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation for the injury inflicted upon the property of abutting owners.

"Second. That abutters upon a public street, claiming title to their premises by grant from the municipal authorities, which contains a covenant that a street is to be laid

Accordingly, in the case last referred to, the principles of the Story case were applied where the street was established by condemnation and the fee acquired by the public for use as a highway. In another case it appeared that the street was established under an act which provided that the streets opened thereunder should be converted to the use of the public in the manner "now designated and settled by law, and in such other manner as the legislature may hereafter deem proper to enact." It was held, however, that the legislature could not enact that an elevated railroad should be operated in the street without compensation to the abutting owners.⁵⁷

Since the first edition in 1888 the question has been decided in accordance with the earlier cases in numerous decisions of the New York courts and in respect to streets established under almost every conceivable variety of circumstances and conditions.⁵⁸ It is the settled law of that State that the abutting

out in front of such property shall forever thereafter continue for the free and common passage of, and as public streets and ways for the inhabitants of said city, and all others passing and returning through or by the same, in like manner as the other streets of the same city now are or lawfully ought to be, acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of the property situated thereon.

"Third. That the ownership of such easement is an interest in real estate, constituting property within the meaning of that term, as used in the constitution of the State, and requires compensation to be made therefor before it can lawfully be taken from its owner, for public use.

"Fourth. 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 steam and smoke, and dis-

tributing 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, and its appropriation by the railroad corporation, rendering it liable to the abutters for the damage occasioned by such taking." *Lahr. v. Met. El. R. R. Co.*, 104 N. Y. 268, 288.

⁵⁷*American Primitive Methodist Society v. Brooklyn El. R. R. Co.*, 46 Hun 530.

⁵⁸*In Kane v. New York El. R. R. Co.*, 125 N. Y. 164, 26 N. E. 278, 11 L.R.A. 640. 3 Am. R. R. & Corp. Rep. 744, the question arose, with reference to a street established under the Dutch régime and while the civil law was in force in the city, but the same conclusions were reached. *See also Hine v. New York El. R. R. Co.*, 54 Hun 425, 27 N. Y. St. 303, 7 N. Y. Supp. 464 and *Mortimer v. New York El. R. R. Co.*, 57 N. Y. Supr. Ct. 244, 6 N. Y. Supp. 898, where the same phase is elaborately discussed.

owner, irrespective of the ownership of the fee, and irrespective of the manner in which the street was established, has certain easements of light, air and access and is entitled to compensation when these are interfered with by an elevated railroad in the street.⁵⁹

A system of elevated railroads has been established in Chicago, partly upon streets and alleys and partly upon property acquired or condemned for that purpose. It has been held that

⁵⁹The elevated railroad cases in New York are very numerous, but most of them relate to other questions than the right to compensation and will be referred to in their appropriate connection. We cite the following as among the more important new cases, which deal with the rights of abutting owners and the right to compensation: *Newman v. Met. El. R. R. Co.*, 118 N. Y. 618, 23 N. E. 901, 7 L.R.A. 289, 2 Am. R. R. & Corp. Rep. 318; *Abendroth v. Manhattan R. R. Co.*, 122 N. Y. 1, 25 N. E. 496, 19 Am. St. Rep. 461, 11 L.R.A. 634, 3 Am. R. R. & Corp. Rep. 309, *affirming S. C.* 54 N. Y. Supr. Ct. 417; *Kane v. New York El. R. R. Co.*, 125 N. Y. 164, 26 N. E. 278; *S. C. Sub. Nom. Duyckinck v. New York El. R. R. Co.*, 3 Am. R. R. & Corp. Rep. 744, *affirming S. C.* 15 Daly 294, 6 N. Y. St. 526; *Williams v. Brooklyn El. R. R. Co.*, 126 N. Y. 96, 26 N. E. 1048; *American Bank Note Co. v. New York El. R. R. Co.*, 129 N. Y. 252, 29 N. E. 302, 5 Am. R. R. & Corp. Rep. 583; *Messenger v. Manhattan R. R. Co.*, 129 N. Y. 502, 29 N. E. 955; *Bohm v. Metropolitan El. R. R. Co.*, 129 N. Y. 576, 29 N. E. 802, 14 L.R.A. 344, 5 Am. R. R. & Corp. Rep. 416; *Hughes v. Met. El. R. R. Co.*, 130 N. Y. 14, 28 N. E. 765; *Bischoff v. New York El. R. R. Co.*, 138 N. Y. 257, 33 N. E. 1073; *Bremer v. Manhattan Ry. Co.*, 191 N. Y. 333, 84 N. E. 59. In a recent Maryland case the court, referring to the New York Elevated

R. R. cases, says: "The New York doctrine involves this inextricable dilemma, viz.: If the grading of a street by a municipal corporation cuts off all access to a person's house, albeit his property is thereby destroyed and rendered valueless, it is not taken, in the constitutional sense; but if a railroad company, in lawfully constructing its road, does precisely the same thing that the city did in grading the street, then the abutter's property is taken, though not physically entered upon at all." *Garrett v. Lake Roland El. R. R. Co.*, 79 Md. 277, 29 Atl. 830, 10 Am. R. R. & Corp. Rep. 39. But the court here ignores an important and controlling distinction between grading a street and constructing an elevated railroad in it. The former is a legitimate use of the street for highway purposes, the latter is not. The abutter's rights of light, air and access, being subject to the right of the public to use and improve the street for highway purposes (*ante*, § 120), he cannot complain of a change of grade, and nothing is taken from him thereby; but such rights not being subject to any but legitimate street uses, and an elevated railroad not being such a use, any interference with the easements by its construction and operation is so much taken from his property and he is entitled to compensation therefor under the constitution. *Ante*, § 64.

they are a lawful use of the streets, but the court evidently intend by this that it is competent for the legislature to authorize their construction therein.⁶⁰ Compensation to abutting owners is guaranteed by the constitution, in the provision which requires compensation to be made for property *damaged* as well as for property taken, so that the question of whether such use of the streets constitutes a taking does not necessarily arise.⁶¹ There are elevated railways in Boston but the statute which authorized them required that compensation should be made to abutting owners, "who are damaged by reason of the location, construction, maintenance and operation of said lines of railway."⁶² Under this statute it is held to make no difference whether the abutter owns the fee or not.⁶³ In New Jersey compensation is required by statute and provision made for condemning in advance the rights of abutting owners.⁶⁴ A few

⁶⁰Doane v. Lake Street Elevated R. R. Co., 165 Ill. 510, 46 N. E. 520, 56 Am. St. Rep. 265, 36 L.R.A. 97. The court says: "It is conceded that the common council of the City of Chicago is, by the provisions of our statute, given exclusive control and supervision of its streets, the fee of which is vested in the municipality. While they are held in trust for the public use and can only be appropriated to the purposes for which they were dedicated, it is the settled law of this State that permitting street railroads to be placed therein is not subjecting them to an unlawful use. It has often been so decided by this court as to surface roads, and no good reason has been suggested, and none we think can be offered, for making a distinction in this regard between elevated and surface roads. The road in question, if constructed in conformity with the requirements of the ordinance, will certainly obstruct travel upon the street by other means less, and be less hazardous to the public, than would be a surface road. The pillars

upon which the superstructure is to be built, which, it is claimed, will exclude the public from a part of the street, are but a necessary part of the road as much so as are the rails and other parts of tracks constructed upon the ground, or as are trolley posts placed in the street for operating an electric road by the trolley system. It is true that all these things do to some extent interfere with the use of the street by ordinary vehicles, but the inconvenience is one which must be borne for the benefit resulting to the public from the better modes of travel thus afforded." *And see* Metropolitan W. S. El. R. R. Co. v. Springer, 171 Ill. 170, 49 N. E. 416; Chicago Office Bldg. v. Lake St. Ry. Co., 87 Ill. App. 594.

⁶¹Aldis v. Union El. R. R. Co., 203 Ill. 567, 68 N. E. 95.

⁶²Baker v. Boston El. Ry. Co., 183 Mass. 178, 66 N. E. 711.

⁶³Ibid.

⁶⁴Sullivan v. North Hudson County R. R. Co., 51 N. J. L. 518, 18 Atl. 689.

miscellaneous cases bearing somewhat upon the subject of the section are referred to below.⁶⁵

It seems to the writer that elevated street railroads may constitute a distinct class as distinguished from surface street railroads of all kinds. The elevated structure creates a second street surface, a second story, so to speak, which seems utterly at variance with the original dedication of the street to public use as a highway. If such a structure and use is legitimate we might have one with two or three stories, each devoted to the same or different kind of traffic, or such a one as was contemplated in a recent New York case, consisting of a two-storied viaduct, supported on brick arches, the first story fifty feet above the surface and the second seventy-five feet.⁶⁶

The question of what constitutes an elevated railroad has been passed upon in Maryland.⁶⁷ The question was whether a certain structure, proposed to be built upon North avenue, in the city of Baltimore, was an elevated railroad within the meaning of a statute, which provided that no elevated railroad should be constructed in or through the city of Baltimore, except under a special charter of the general assembly. It was held that a street railroad built upon vertical iron pillars at an elevation of twenty feet above the street, and extending a distance of three quarters of a mile, was an elevated road, within the meaning of the statute, and the fact that the road was elevated only for the purpose of avoiding the tracks of a steam railroad on the surface of the street, and that a descent was made as soon as said tracks were out of the way, would not take the case out of the operation of the statute.

⁶⁵New York El. R. R. Co. v. Fifth Nat'l Bank, 135 U. S. 432, 10 S. C. Rep. 743; Fifth Nat'l Bank v. New York El. R. R. Co., 24 Fed. 114; Hayes v. Waverly & P. R. R. Co., 51 N. J. Eq. 345, 27 Atl. 648; Pennsylvania R. R. Co. v. Miller, 132 U. S. 75, 10 S. C. 34, 1 Am. R. R. & Corp. Rep. 15; Jones v. Railroad Co., 151 Pa. St. 30, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L.R.A. 758; Fulton v. Short Route R. R. Trans. Co., 85 Ky. 640, 4 S. W. 332, 7 Am. St. Rep. 619; Freiday v. Sioux City Rapid Transit Co., 92 Ia. 191, 60 N. W. 656, 26 L.R.A. 246.

⁶⁶People's Rapid Transit Co. v. Dash, 125 N. Y. 93, 26 N. E. 25. The question involved was whether a corporation to construct such a railroad could be formed under the general incorporation law. It was decided in the negative. The railroad was not to be a street railroad but was to be used exclusively for passenger traffic.

⁶⁷Koch v. North Ave. R. R. Co., 75 Md. 222, 23 Atl. 463, 15 L.R.A. 377. See Fulton v. Short Route R. R. Trans. Co., 85 Ky. 640, 4 S. W. 287, 7 Am. St. Rep. 619.

In Illinois it has been held that an elevated railroad may be constructed under the general railroad law of the State.⁶⁸ A different conclusion has been reached in Pennsylvania⁶⁹ and New York.⁷⁰

§ 158 (115c). Horse railroads. It has been determined in numerous decisions, and without dissent except in the State of New York, that the use of a street by a horse railroad constructed and operated in the ordinary manner falls within the purposes for which streets are established and maintained, and consequently, that for any damages resulting from such use to the abutting owner, he can recover no compensation, whether the fee of the street is in him or in the public.⁷¹ In New York State, after various decisions which left the matter in doubt,⁷² it was finally held, in *Craig v. Rochester City & Brighton R. R.*

⁶⁸ *Lieberman v. Chicago etc. R. R. Co.*, 141 Ill. 140, 30 N. E. 544.

⁶⁹ *Potts v. Quaker City El. R. R. Co.*, 161 Pa. St. 396, 29 Atl. 108; *Commonwealth v. Northeastern El. R. R. Co.*, 161 Pa. St. 409, 29 Atl. 112; *Potts v. Quaker City El. R. R. Co.*, 12 Pa. Co. Ct. 593.

⁷⁰ *People's Rapid Transit Co. v. Dash*, 125 N. Y. 93, 26 N. E. 25; *Schafer v. Brooklyn & L. I. R. R. Co.*, 124 N. Y. 630, 26 N. E. 311.

⁷¹ *Carson v. Central R. R. Co.* 35 Cal. 325; *Market Street Ry. Co. v. Central R. R. Co.*, 51 Cal. 583; *Elliott v. Fair Haven & Westville R. R. Co.*, 32 Conn. 579 (a *nisi prius* case only); *Randall v. Jacksonville St. R. R. Co.*, 19 Fla. 409; *State v. Jacksonville St. R. R. Co.*, 29 Fla. 590, 10 So. 590; *Savannah & Thunderbolt R. R. Co. v. Savannah*, 45 Ga. 602; *Eichels v. Evansville Street Ry. Co.*, 78 Ind. 261, 41 Am. Rep. 561; *Clinton v. Clinton & Lyons Horse Railway Co.*, 37 Ia. 61; *Stange v. Hill & West Dubuque Street Ry. Co.*, 54 Ia. 669; *Stanley v. Davenport*, 54 Ia. 463; *Brown v. Duplessis*, 14 La. An. 842; *Briggs v. Lewiston & Auburn R. R. Co.*, 79 Me. 363, 1 Am. St. Rep. 316; *Peddicord v. Baltimore etc. R. R. Co.*, 34 Md. 463; *Hiss v.*

Baltimore etc. Ry. Co., 52 Md. 242, 36 Am. Rep. 371; *Hodges v. Baltimore Passenger Ry. Co.*, 58 Md. 603; *Attorney General v. Metropolitan R. R. Co.*, 125 Mass. 515; *Hinchman v. Patterson H. R. R. Co.*, 17 N. J. Eq. 75; *Hogenecamp v. Same*, 17 N. J. Eq. 83; *Jersey City & Bergen R. R. Co. v. Jersey City & Hoboken H. R. R. Co.*, 20 N. J. Eq. 61; *Patterson etc. H. R. R. Co. v. Patterson*, 24 N. J. Eq. 158; *West Jersey R. R. Co. v. Cape May etc. R. R. Co.*, 34 N. J. Eq. 164; *Van Horne v. Newark Pass. R. R. Co.*, 48 N. J. Eq. 332, 21 Atl. 1034; *Street Railway v. Cumminsville*, 14 Ohio St. 524; *Peterson v. Navy Yard etc. Ry. Co.*, 5 Phil. 199; *Texas & Pacific Ry. Co. v. Rosedale Ry. Co.*, 64 Tex. 80, 53 Am. Rep. 739; *Hobart v. Milwaukee City Ry. Co.*, 27 Wis. 194, 9 Am. Rep. 461; *Van Bokelen v. Brooklyn City Ry. Co.*, 5 Blatch. 379.

⁷² *Davis v. Mayor etc. of New York*, 14 N. Y. 506; *Milhau v. Sharp*, 15 Barb. 193, 27 N. Y. 611; *Wetmore v. Story*, 22 Barb. 414; *Mason v. Brooklyn City etc. R. R. Co.*, 35 Barb. 373; *People v. Law*, 34 Barb. 494; *People v. Kerr*, 37 Barb. 357, 27 N. Y. 188, 25 How. Pr. 258.

Co.,⁷³ that a horse railroad was an additional burden upon the soil for which the abutting owner, having the fee, was entitled to compensation. In a later case it was determined that, where the fee of the street is in the public, the laying of a horse railroad on the surface of the street, under lawful authority from the municipality, was not a taking of any property of the abutting owner.⁷⁴

§ 159 (115d). Cable railroads. Although the cable system of operating railroads has been in use for a long time, there seems to have been little question made as to the right to employ this system when authorized by the legislature. As the cable road leaves the street in substantially the same condition as the horse railroad and is operated in substantially the same manner, except as to motive power, it has doubtless been assumed that the same principles would apply to it. This assumption has been verified by a recent case in Pennsylvania which holds that a cable road is not an additional burden upon the soil, entitling the abutting owner to compensation. The reasoning of the court is, that street railways are legitimate highway uses and "whether the motive power of the cars be horses, electricity or a submerged cable makes no difference in the use, and no one of these modes of use confers any right of action upon the abutting owner."⁷⁵

§ 160 (115e). Steam motor railroads. The question whether a street railroad, operated by means of a steam motor, is a legitimate street use, was first passed upon in Minnesota in 1886.⁷⁶ The plaintiff brought ejectment to recover possession of the street in front of his property as against the defendant which had occupied it with its railroad. The defendant's road

⁷³Craig v. Rochester City etc. R. R. Co., 39 Barb. 494, 39 N. Y. 404; see also Thayer v. Rochester City etc. R. R. Co., 15 Abb. N. C. 52.

⁷⁴Kellinger v. Forty-second Street etc. R. R. Co., 50 N. Y. 206; see also Mahady v. Brunswick R. R. Co., 91 N. Y. 148.

⁷⁵Rafferty v. Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. Rep. 763, 6 Am. R. R. & Corp. Rep. 287. To the same effect is Harrison v. Mt. Auburn Cable R. R. Co., 17 Weekly Bull. 265 (Hamilton Co. C. P. Ohio), referred to in Keasby on Electric Wires, p. 104, note 4.

See also, Indianapolis Cable St. R. R. Co. v. Citizens' St. R. R. Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L.R.A. 539; Brady v. Kansas City Cable Ry. Co., 111 Mo. 329, 19 S. W. 953; People v. Newton, 112 N. Y. 396, 3 L.R.A. 174; In re Third Ave. R. R. Co., 121 N. Y. 536, 24 N. E. 951, 9 L.R.A. 124; Railroad v. Duncan, 111 Pa. St. 352; Lorie v. North Chicago City R. R. Co., 32 Fed. Rep. 270.

⁷⁶Newell v. Minneapolis etc. R. R. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303.

extended from a point within the city of Minneapolis to Lake Minnatonka, eighteen miles beyond the city. The track consisted of T rails laid so as to conform to the surface of the street and placed so as to be readily crossed. The cars used were from thirty-four to thirty-seven feet long. The motors were about twenty feet long. The trains consisted of from one to four cars. Within the city it was operated like any ordinary street passenger railway so far as concerned speed and the taking up and letting down of passengers. Beyond the city it was operated like any ordinary steam railroad for general traffic. It was held to be a proper and legitimate use of the street as a highway, and a judgment for the defendant was affirmed. Mitchell, J., dissented on the ground that the road was a new and different use of the street from that contemplated when it was acquired. The opinion of the court proceeds on the basis that a horse railway is a legitimate street use, and that the road in question is not substantially different; that the surface of the street was not essentially disturbed; that it did not appear to seriously interfere with the ordinary use of the street and was an aid to the traffic thereon. The same doctrine is held in California and Maine.⁷⁷ In Tennessee a steam dummy street railroad was held to be an additional servitude upon the fee of the street, and a use different from and inconsistent with the ordinary use of a highway. The reasons for this conclusion are found in those features which resemble the general traffic railroad, viz.: the steam engine, the noise, smoke and vibration, the weight, length and speed of the trains, and the danger to life and property.⁷⁸ In an Oregon case the plaintiff sued for dam-

⁷⁷Montgomery v. Santa Ana etc. Co., 104 Cal. 186, 37 Pac. 784, 43 Am. St. Rep. 89, 25 L.R.A. 654; Briggs v. Lewiston & Auburn R. R. Co., 79 Me. 363, 1887. The court held, in the latter case, that whether operated by horse or steam power the use was legitimate. As to the motor, it says: "We do not think the motor is the criterion. It is rather the use of the street. If the railroad company exclusively occupy the land—shut off the street from it, deprive it of its character of bearing the easement of a street—use it, not for street traffic, but for what is

known as railroad traffic, the company may, perhaps, be said to make a new and different use of the land. But we have no occasion now to express any opinion on that question. This defendant company is using the land as a street. Its railroad is a street railroad. Its cars are used by those who wish to pass from place to place on the street. A change in the motor is not a change in the use."

⁷⁸East End St. R. R. Co. v. Doyle, 88 Tenn. 747, 13 S. W. 936, 9 L.R.A. 100, 2 Am. R. R. & Corp. Rep. 747. Compare Smith v. Street R. R. Co., 87 Tenn. 626.

ages to his property by reason of the construction and operation of a street railroad in front of his property. The road was operated with steam motors, and appears to have been used solely for street passenger traffic. The plaintiff claimed to own the fee of the street, but the court held that this was immaterial, that the only substantial rights the plaintiff had in the street were the rights of ingress and egress and that these existed the same whether he owned the fee or not; that the construction of a railroad of any kind in a street under authority from the legislature, does not necessarily violate the right of the fee owner and does not "put the land to a use foreign to that contemplated in the establishment of the highway." It also held that if the railway interfered with the enjoyment of the plaintiff's property by obstructing access thereto, to such an extent as to materially depreciate its value, then he was entitled to recover the amount of such depreciation.⁷⁹ In Michigan a street railway, operated by a steam motor, constructed on the side of a street, with cuts and fills and laid with T rails, was held to be an additional burden on the fee of the street.⁸⁰ A few other cases bearing on the question are referred to in the note, but none of them are directly in point.⁸¹ It is plain, therefore, that the authorities leave it very much in doubt whether a steam motor railroad is a legitimate street use or not.

§ 161 (115f). Electric trolley railroads. There is a very unanimous concurrence of the courts in the position that the construction and operation of a street passenger railway on the surface of a street by means of the trolley system is a legitimate street use and not the imposition of an additional burden on the fee, and that the abutter, whether he owns the fee or not, is not entitled to compensation for any damages resulting therefrom.⁸² The first case to be decided by a court

⁷⁹McQuaid v. Portland R. R. Co., 18 Or. 237, 22 Pac. 899, 1 Am. R. R. & Corp. Rep. 34. To the same effect: Paquet v. Mt. Tabor St. R. R. Co., 18 Or. 233, 22 Pac. 906.

⁸⁰Nichols v. Ann Arbor & Y. St. R. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L.R.A. 371. The court stood three to two.

⁸¹Stange v. Hill & West Dubuque St. R. R. Co., 54 Ia. 669; Stanley v. City of Davenport, 54 Ia. 463; Wil-

liams v. City Electric St. R. R. Co., 41 Fed. 556; Hussner v. Brooklyn City R. R. Co., 114 N. Y. 433, 11 Am. St. Rep. 679; Onset St. R. R. Co. v. County Comrs., 154 Mass. 395, 28 N. E. 286.

⁸²Birmingham Traction Co. v. Birmingham R. R. & Elec. Co., 119 Ala. 137, 24 So. 502, 43 L.R.A. 233; Baker v. Selma St. & Suburban Ry. Co., 130 Ala. 474, 30 So. 464; Same v. Same, 135 Ala. 552, 33 So. 685, 93

Am. St. Rep. 42; Morris v. Montgomery Traction Co., 143 Ala. 246, 38 So. 834; New York etc. R. R. Co. v. Bridgeport Traction Co., 65 Conn. 410, 32 Atl. 953, 29 L.R.A. 367; Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107; Southern Ry. Co. v. Atlanta Ry. & P. Co., 111 Ga. 679, 36 S. E. 873, 51 L.R.A. 125; Chicago B. & Q. R. R. Co. v. West Chicago St. R. R. Co., 156 Ill. 270, 40 N. E. 1008, 12 Am. R. R. & Corp. Rep. 522; Winnetka v. Chicago etc. Elec. Ry. Co., 204 Ill. 297, 68 N. E. 407, *affirming* S. C. 107 Ill. App. 117; Chicago etc. R. R. Co. v. General Electric Co., 79 Ill. App. 569; Chicago etc. T. R. R. Co. v. Whiting, 139 Ind. 297, 38 N. E. 604, 11 Am. R. R. & Corp. Rep. 507, 47 Am. St. Rep. 264, 26 L.R.A. 337; Snyder v. Ft. Madison St. R. R. Co., 105 Ia. 284, 75 N. W. 179, 41 L.R.A. 345; Louisville Bagging Mfg. Co. v. Central Pass. R. R. Co., 95 Ky. 50, 23 S. W. 592; Ashland etc. St. Ry. Co. v. Faulkner, 106 Ky. 332, 51 S. W. 806, 43 L.R.A. 554; Louisville Ry. Co. v. Foster, 108 Ky. 743, 57 S. W. 480, 50 L.R.A. 813; Georgetown etc. Traction Co. v. Mulholland, 25 Ky. L. R. 578, 76 S. W. 148; Taylor v. Portsmouth etc. R. R. Co., 91 Me. 193, 39 Atl. 560, 64 Am. St. Rep. 216; Millbridge etc. Elec. R. R. Co., appellants, 96 Me. 110, 51 Atl. 818; Parsons v. Waterville etc. St. Ry. Co., 101 Me. 173, 63 Atl. 728; Poole v. Falls Road Elec. R. R. Co., 88 Md. 533, 41 Atl. 1069; Lonaconing etc. Ry. Co. v. Consolidated Coal Co., 95 Md. 630, 53 Atl. 420; Howe v. West End St. R. R. Co., 167 Mass. 46, 44 N. E. 386; Eustis v. Milton St. Ry. Co., 183 Mass. 586, 67 N. E. 663; Detroit City R. R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007; People v. Ft. Wayne & E. R. R. Co., 92 Mich. 522, 52 N. W. 1010; Dean v. Ann Arbor St. R. R. Co., 93 Mich. 330, 53 N. W. 396; Niemann v. Detroit Subur-

ban St. R. R. Co., 103 Mich. 256, 61 N. W. 519; Austin v. Detroit etc. Ry. Co., 134 Mich. 149, 96 N. W. 35; Mannel v. Detroit etc. Ry. Co., 139 Mich. 106, 102 N. W. 633; Placke v. Union Depot R. R. Co., 140 Mo. 634, 41 S. W. 915; Ruckert v. Grand Ave. Ry. Co., 163 Mo. 260, 63 S. W. 814; Nagel v. Lindell Ry. Co., 167 Mo. 89, 66 S. W. 1090; State v. Jersey City, 57 N. J. L. 293, 30 Atl. 531, 26 L.R.A. 281; Roebling v. Trenton Pass. R. R. Co., 58 N. J. L. 666, 34 Atl. 1090, 33 L.R.A. 129; Montelaire Military Academy v. N. J. St. Ry. Co., 70 N. J. L. 229, 57 Atl. 1050; S. C. 65 N. J. L. 328, 47 Atl. 890; Budd v. Camden Horse R. R. Co., 70 N. J. L. 782, 59 Atl. 229; Ehret v. Camden etc. R. R. Co., 61 N. J. Eq. 171, 47 Atl. 562; Budd v. Camden Horse R. R. Co., 61 N. J. Eq. 543, 48 Atl. 1028; Camden etc. Ry. Co. v. U. S. Cast Iron Pipe & F. Co., 68 N. J. Eq. 279, 59 Atl. 523; Cincinnati Inclined Plane R. R. Co. v. City & Suburban Tel. Ass., 48 Ohio St. 390, 27 N. E. 890, 12 L.R.A. 534; Mt. Adams etc. R. R. Co. v. Winslow, 3 Ohio C. C. 425; Simmons v. City of Toledo, 5 Ohio C. C. 124; Simmons v. Toledo, 8 Ohio C. C. 535; Schoff v. Cleveland etc. R. R. Co., 16 Ohio C. C. 252; Lockhart v. Craig St. R. R. Co., 139 Pa. St. 419, 21 Atl. 26; Lockhart v. Craig St. R. R. Co., 8 Pa. Co. Ct. 470; Commonwealth v. West Chester, 9 Pa. Co. Ct. 542; Heilman v. Lebanon & A. R. R. Co., 10 Pa. Co. Ct. 241; Central Pa. Tel. etc. Co. v. Wilkes-Barre etc. R. R. Co., 11 Pa. Co. Ct. 417; Taggart v. Newport St. R. R. Co., 16 R. I. 668, 19 Atl. 326, 2 Am. R. R. & Corp. Rep. 44; Cumberland Tel. & Tel. Co. v. United Electric R. R. Co., 93 Tenn. 492, 29 S. W. 104, 10 Am. R. R. & Corp. Rep. 549, 27 L.R.A. 236; San Antonio Rapid Transit St. R. R. Co. v. Limburger, 88 Tex. 79, 30 S. W. 533, 53 Am. St.

of last resort was in Rhode Island.⁸³ The object of the suit was to enjoin the defendant from erecting and maintaining poles and wires in the street in front of the plaintiff's property, for the purpose of operating its road by means of electricity. The court, while recognizing the distinction between the ordinary steam railroad and the horse railroad, held that the distinction properly rested "not on any difference in the motive power, but in the different effects produced by them, respectively, on the highways or streets which they occupy." It held that a street railway, operated in the usual manner, was in furtherance of the original uses of the street, and not obstructive of such uses, and that the use of electricity as a motive power made no difference; that as the motive power was not the criterion, electricity might be used, and the poles and wires necessary to conduct the electricity were thus "directly ancillary to the uses of the street as such."

The New York court of appeals, following its decision in regard to horse railroads,⁸⁴ holds that an electric street railroad is an additional burden upon the fee of the street.⁸⁵ But if the abutter has not the fee he has no remedy.⁸⁶ The supreme court of Mississippi holds that an electric street railway is not a legitimate street use and imposes an additional burden on the soil.⁸⁷ In Nebraska it has been held that the poles and wires

Rep. 730; Dooley Block v. Salt Lake Rapid Transit Co., 9 Utah 31, 33 Pac. 229, 8 Am. R. R. & Corp. Rep. 327; Reid v. Norfolk City R. R. Co., 94 Va. 117, 26 S. E. 428, 64 Am. St. Rep. 708, 36 L.R.A. 274; Richmond Traction Co. v. Murphy, 98 Va. 104, 34 S. E. 982; La Crosse City Ry. Co. v. Higbee, 107 Wis. 389, 83 N. W. 701, 51 L.R.A. 923; Linden Land Co. v. Milwaukee Elec. Ry. & Lt. Co., 107 Wis. 493, 83 N. W. 851; Younkin v. Milwaukee L. H. & T. Co., 112 Wis. 15, 87 N. W. 861; Same v. Same, 120 Wis. 477, 98 N. W. 215.

⁸³Taggart v. Newport St. R. R. Co., 16 R. I. 668, 19 Atl. 326, 2 Am. R. R. & Corp. Rep. 44, 1890.

⁸⁴Craig v. Rochester etc. R. R. Co., 39 N. Y. 404.

Em. D.—18.

⁸⁵Peck v. Schenectady etc. Ry. Co., 170 N. Y. 298, 63 N. E. 357, affirming S. C. 67 App. Div. 359, 73 N. Y. S. 794; Paige v. Schenectady Ry. Co., 178 N. Y. 102, 70 N. E. 213, reversing S. C. 84 App. Div. 91, 82 N. Y. S. 192. See Tracy v. Troy & L. R. R. Co., 54 Hun 550, 27 N. Y. St. 633, 7 N. Y. Supp. 892; Clark v. Middletown-Goshen Traction Co., 10 App. Div. 354, 41 N. Y. Supp. 1109.

⁸⁶Kennedy v. Minneola etc. Traction Co., 178 N. Y. 508, 71 N. E. 102, affirming S. C. 77 App. Div. 484, 78 N. Y. S. 937. So where the road is on the further half of the street. Roberts v. Huntington R. R. Co., 56 Misc. 62.

⁸⁷Slaughter v. Meridian St. & Ry. Co., (Miss.), 48 So. 6.

of a trolley road are an additional burden on the street, because they permanently and exclusively occupy parts of the street.⁸⁸

In Pennsylvania it is held that an electric railway cannot be laid down upon a country road though it is a proper use of city or village streets.⁸⁹ The decision goes both upon the ground that the statutes in regard to street railroads were not intended to apply to country roads and also upon the ground that a distinction exists between urban and rural highways and that the latter are not subject to many uses which the former are. But the weight of authority, as well as the reason of the matter, is that the same rule applies to country roads as to city streets.⁹⁰

It has been held that an abutter has no legal ground of complaint because the road is laid wholly on his side of the street or near his boundary⁹¹ but he would have a remedy for any unreasonable or excessive use of the street or for any unnecessary interference with his easement of access,⁹² as by planting a trol-

⁸⁸Jaynes v. Omaha St. R. R. Co., 53 Neb. 631, 74 N. W. 67, 39 L.R.A. 751.

⁸⁹Pennsylvania R. R. Co. v. Montgomery Co. Pass. R. R. Co., 167 Pa. St. 62, 31 Atl. 468, 46 Am. St. Rep. 659, 27 L.R.A. 760, *reversing* 14 Pa. Co. Ct. 88, 3 Pa. Dist. Ct. 58.

⁹⁰Austin v. Detroit etc. Ry. Co., 134 Mich. 149, 96 N. W. 35; Ehret v. Camden etc. Ry. Co., 60 N. J. Eq. 246, 46 Atl. 578; Same v. Same, 61 N. J. Eq. 171, 47 Atl. 562; *ante*, § 118.

⁹¹Ashland etc. St. Ry. Co. v. Faulkner, 106 Ky. 332, 51 S. W. 803, 43 L.R.A. 554; Austin v. Detroit etc. Ry. Co., 134 Mich. 149, 96 N. W. 35; Budd v. Camden Horse R. R. Co., 61 N. J. Eq. 543, 48 Atl. 1028; Budd v. Camden Horse R. R. Co., 70 N. J. L. 782, 59 Atl. 229; San Antonio Rapid Transit St. Ry. Co. v. Limburger, 88 Tex. 79, 30 S. W. 533, 53 Am. St. Rep. 730.

⁹²Louisville Ry. Co. v. Foster, 108 Ky. 743, 57 S. W. 480, 50 L.R.A. 813; Roebling v. Trenton Pass. Ry. Co., 58 N. J. L. 666, 34 Atl. 1090, 33 L.R.A.

129; La Crosse City Ry. Co. v. Higbee, 107 Wis. 389, 83 N. W. 701, 51 L.R.A. 923. In the first of these cases the plaintiff sued for damages to his property by reason of noise, smells, dust, etc., caused by a turn table near his premises, the sweeping of ears and use of the street as a terminal and the court held that the plaintiff "as the owner of city property fronting on the street, must submit to all those noises, smells and disturbances that are usual in city life, including the use of the highway by the street railway, in so far as they were reasonably incidental to the operation of a street railway in a city, and borne by the public generally; and that, so far as the injury complained of arose from these causes, there could be no recovery; but that she could recover for any substantial injury to her property arising from the location or operation of the turntable or cars that was caused by such noises, smells, and disturbances as were not fairly incidental to the usual operation of such a street railway, and borne by the

ley pole in front of his door.⁹³ The right to use streets for the electric trolley railroad and its limitations are well summed up by the supreme court of Wisconsin, as follows: "1. A railroad constructed on the grade of a street and operated so as not to materially interfere with the common use thereof for public travel by ordinary modes, or with private rights of abutting land owners, and for the purpose of transporting persons from place to place on such streets at their reasonable convenience, is not an additional burden on the fee thereof. 2. A railroad satisfies the above essentials, regardless of the motive power used or how it is applied, if it be strictly a street railroad for the carriage of passengers on the street, taking them on and discharging them at reasonable points, and it be so constructed and operated as not to materially interfere with the ordinary modes of using the street for public travel or with private rights. 3. A supporting trolley wire pole, set in the street in front of the sidewalk, does not violate the above rule if it be placed with reasonable regard for the convenience of the owner of the fee of the land on which it is located, and so as not to materially interfere with access to his lot outside the street line."⁹⁴

§ 162 (115g). Subways or underground street railroads. The first case involving such a railroad arose in New York. In the matter of New York District Railway Co.,⁹⁵ a proposed railway, confined to the limits of a city and constructed on the streets underneath their surface was held to be a street railway. The case was an application by the railway company for the appointment of commissioners to determine whether its railroad ought to be built. The question whether such a railway was a legitimate street use or whether abutting owners would be entitled to compensation in case their property was injured

property owners generally along the line."⁹⁶ 751.

⁹³Trolley poles should be so placed as to do no unnecessary damage to the abutting property. *Snyder v. Ft. Madison St. R. R. Co.*, 105 Ia. 284, 75 N. W. 179, 41 L.R.A. 345. Where the location of poles is fixed by the municipality, the abutter may compel the removal of a pole in a different location. *Moore v. Camden etc. Ry. Co.*, 73 N. J. L. 599, 64 Atl. 116.

⁹⁴Sylabus in *La Crosse City Ry. Co. v. Higbee*, 107 Wis. 389, 83 N. W. 701, 51 L.R.A. 923.

⁹⁵107 N. Y. 42. See *Terry v. Richmond*, 94 Va. 537. In this case it was held that a railroad, which had authority to go through a street in a tunnel, must make compensation for injury to private rights.

or depreciated thereby was not before the court. The court would seem to indicate that they would be. "Where the railway runs under the streets, the adjoining owners are as much and as dangerously affected as where it runs on their surface or above them. Whether the new surface is safe and sufficient, or weak and perilous, and invites or frightens away passage; whether the openings obstruct or hinder access to the abutter, or pour out through the ventilators smoke and steam upon his premises; whether his vaults and foundations will remain safe and secure, or be undermined or weakened by vibration; whether his gas and water supply will continue ample and convenient, and the new sewerage work him no injury; all these are to him questions of vital importance, affecting his comfort and convenience, the success of his business and the value of his property."

Subways for street passenger railroads are in operation in Boston and the same have been held not to be a taking of any property of the owner of the fee. The court says:—"It can hardly be contended that this is an unreasonable mode of using the streets in reference either to travelers or abutters. If it is not an unreasonable mode of using them, the mere fact that it deprives abutters of the use of vaults and other similar underground structures in the streets, which they have heretofore maintained is of little consequence. Abutters are bound to withdraw from occupation of streets above or below the surface whenever the public needs the occupied space for travel. The necessary requirements of the public for travel were all paid for when the land was taken, whatever they may be, and whether the particulars of them were foreseen or not. The only limitation upon them is that they shall be of a kind that are not unreasonable."⁹⁶

Whether the subway in New York city is a proper street use has been questioned but not decided.⁹⁷ Where an unauthorized deviation was made from the authorized route, whereby the

⁹⁶Sears v. Crocker, 184 Mass. 586, 588, 589, 69 N. E. 327, 100 Am. St. Rep. 577. The legislature may authorize the construction of a subway for street railroads in the streets of a city without the consent of the city. Prince v. Crocker, 116 Mass. 347, 44 N. E. 446.

⁹⁷March v. New York, 69 App. Div. 1, 74 N. Y. S. 630. In a recent case in the supreme court it has been held that an abutting owner, having the fee, is entitled to compensation. Matter of Rapid Transit R. R. Comrs., 128 App. Div. 103.

tunnel was brought nearer the abutting property and great damage done to it, the court refused to approve of the deviation, except on condition that compensation be made for such damage.⁹⁸

§ 163. Other kinds of street railroads. The electric trolley railroad has, for the most part, displaced all other kinds of street roads. There are in New York city and possibly elsewhere street railroads operated by means of an "underground trolley," that is the wire carrying the electric current is underground and connection is made through a slot between the rails. There are also electric railways operated by means of a storage battery. It is manifest that both of these are less injurious than the overhead trolley and must be accounted legitimate street uses if the latter are. The "underground trolley" railroad has been held not to be an additional burden on the street.⁹⁹

§ 164 (115h). Street railroads.—General conclusions. As already shown a street railroad is ordinarily understood to mean a railroad constructed and operated in a public street and confined to local passenger traffic. In addition to the cases cited in the preceding sections there are many others which hold that a street railroad, as thus defined, is a legitimate street use, without taking into account the motive power or the way in which it is applied.¹

In the history of street railroads, we have in the order of time, as a propelling power: first, animals; second, steam, and third, electricity. For twenty years or more after the introduction of street railroads, they were operated by animal power exclusively. Horse railroads and street railroads were for a long time practically synonymous. During this time the doctrine was worked out by the courts that horse railroads were a le-

⁹⁸Matter of Board of Rapid Transit R. R. Comrs., 104 App. Div. 468, 93 N. Y. S. 930; S. C. 117 App. Div. 160, 102 N. Y. S. 400.

⁹⁹St. Michael's P. E. Church v. Forty-second St. etc. R. R. Co., 26 Misc. 601.

¹Finch v. Riverside & A. R. R. Co., 87 Cal. 597, 25 Pac. 765; Haskell v. Denver Tramway Co., 23 Colo. 60, 46 Pac. 121; People v. Ft. Wayne & E. R. R. Co., 92 Mich. 522, 52 N. W. 1010, 16 L.R.A. 752; Taylor v. Bay City St. R. R. Co., 101 Mich. 140, 59

N. W. 447; Ecorse Tp. v. Jackson etc. Ry. Co., 153 Mich. 393; Elfelt v. Stillwater St. R. R. Co., 53 Minn. 68, 55 N. W. 116; Ransom v. Citizens' R. R. Co., 104 Mo. 375, 16 S. W. 416; Merrick v. Intramontaine R. R. Co., 118 N. C. 1081, 24 S. E. 667; Perry v. Wilkes-Barre & K. Pass. R. R. Co., 4 Luzerne Leg. Rep. 519; Scranton etc. Traction Co. v. Del. & H. Canal Co., 1 Pa. Supr. Ct. 409; Smith v. East End St. R. R. Co., 87 Tenn. 626, 11 S. W. 709.

gitimate street use. The reasons assigned in support of this doctrine consisted in the tracks being laid on the surface of the street in such manner as to be readily crossed or used longitudinally by ordinary vehicles, in the motive power being the same as that of ordinary vehicles, in the fact that the cars were operated with no more noise, jar or disturbance than that produced by other vehicles, and in the fact that their business consisted in conveying passengers from one point to another on the street in aid of the ordinary street traffic. The horse railroad decisions were also founded upon certain negative reasons, so to speak, or particulars which distinguish them from the steam railroad. They were held to be legitimate street uses because they presented certain positive characteristics, and also because they did not present certain other characteristics which were peculiar to steam railroads. Thus horse railroads were distinguished from steam railroads, in the rails and construction of the track, in the motive power, in the speed with which the cars were propelled, in the noise and vibrations produced, the smoke and steam emitted, the liability of the engine to frighten horses, the danger to life and limb and the size and weight of the cars and locomotives.² When the steam motor and electric roads

²Thus in *Citizens' Coach Co. v. Camden Horse R. R. Co.*, 33 N. J. Eq. 267, 36 Am. Rep. 542, it is said: "Considering the developments of the railroads of the country, it is now perfectly obvious that the use of a public highway longitudinally by a railroad operated by steam, is a use entirely inconsistent with and destructive of the public use to which the highway was originally devoted. The rate of speed at which such roads are operated are dangerous to the public, who would otherwise use the highway. It makes use of rails not adapted to, but obstructive of, the ordinary public use of the highway by the usual vehicles of travel thereon. The noise, the danger, the obstruction of its roadway, all combine to make the use of the highway by such a railroad incompatible with its general use as a public highway. * * * It is

obvious, however, that an ordinary horse railroad, in occupying a highway with its track, and making use of it with its cars, produces a different result from that produced by such an occupation and use by a railroad operated by steam. By legislative direction, the track of the horse railroad is required to be (as in this case) so constructed not only as not to interfere with or prevent the passage of other vehicles, but to be adapted to such passage both across and along the rails. The cars are drawn by animals such as usually draw the vehicles used on public highways. They carry along the highway such passengers as otherwise would be obliged to pass over it on foot or in other vehicles, and do so with no more injury in the way of noise, jar, or disturbance than would be occasioned by the passage of other vehicles. The

came before the courts, the doctrine in regard to horse railroads was already well established. The phrase *street railroads* was conveniently substituted for that of *horse railroads* in the *formulae* of this doctrine, and the horse railroad cases were thus made to sanction the steam motor and electric railroad. Every reason but one on which the horse railroad decisions were founded was disregarded. It was held that the track need not be like the horse railroad track, but might consist of T rails.³ It was held that the motive power was immaterial,⁴ and the matter of noise, smoke and vibration was lost sight of altogether. The whole matter was made to turn upon the nature of the

use, if it be novel and peculiar in its form, it is but a modification of the original use to which the highway was devoted when it became a highway. The burden imposed thereby upon the landowner, so far as the use of his property is concerned, is identical in kind and no greater in degree than was originally imposed upon the land when the highway was opened."

In *South Carolina R. R. Co. v. Stein*, 44 Ga. 546, 558 (1871), it is said: "I think the streets may be used, and bars laid upon them and cars drawn over them by horses; but there is something in a locomotive power, in throwing smoke into the houses along the street, its tremendous weight shaking the houses and breaking plastering and walls; and in the noise and screeching of whistles, which, in the machinery employed, may make it the subject matter of injury, which the horse car, slowly driving along, would not occasion. It is not in the use of the street for cars, but in the mode of use." In *Hinchman v. Paterson, H. R. Co.*, 17 N. J. Eq. 75, 80, 1864, the chancellor says of horse railways: "They are ordinarily, as in this case, required to be laid level with the surface of the street, in conformity with existing grades. No excavations or embankments to af-

fect the land are authorized or permitted. The use of the road is nearly identical with that of the ordinary highway. The motive power is the same. The noise and jarring of the street by the cars is not greater, and ordinarily less, than that produced by omnibuses and other vehicles in ordinary use."

See also Hodges v. Baltimore Union Pass. R. R. Co., 58 Md. 603; *Indianapolis etc. R. R. Co. v. Huntley*, 67 Ill. 439, 444; *Cox v. Louisville etc. R. R. Co.*, 48 Ind. 178; *Grand Rapids etc. R. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306; *Williams v. New York Central etc. R. R. Co.*, 16 N. Y. 97, 108, 69 Am. Dec. 632; *Imlay v. Union Branch R. R. Co.*, 26 Conn. 249, 68 Am. Dec. 392.

³*Newell v. Minneapolis etc. R. R. Co.*, 35 Minn. 112, 59 Am. Rep. 303; *Niemann v. Detroit Suburban St. R. R. Co.*, 103 Mich. 256, 61 N. W. 519.

⁴*Briggs v. Lewiston etc. Horse R. R. Co.*, 79 Me. 363; *Halsey v. Rapid Transit R. R. Co.*, 47 N. J. Eq. 380, 20 Atl. 859; *Williams v. City Electric St. R. R. Co.*, 41 Fed. 556; *Taggart v. Newport St. R. R. Co.*, 16 R. I. 326, 19 Atl. 326, 2 Am. R. R. & Corp. Rep. 44; *Rafferty v. Central Traction Co.*, 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. Rep. 763.

traffic, the transportation of passengers from one point to another upon the street.

Considering all the cases, except a few to be noticed in the two following sections, and having due regard to the weight of authority and the trend of judicial opinion we should say that the general doctrine to be extracted from the street railroad cases is that a railroad is a legitimate street use provided, *first*, that the road is devoted exclusively to street passenger traffic, and, *second*, that its track is laid to conform to the surface of the street, and so as to obstruct ordinary travel as little as possible. This excludes a road with cuts and fills, because of the cuts and fills.⁵ It excludes the elevated railroad, because of the elevation of the tracks above the surface and the superstructure which such elevation makes necessary. It excludes the commercial railroad because of the nature of its traffic. It admits any sort of motive power and any sort of motor; it admits any size or weight of cars and trains of any length;⁶ it admits any sort of superstructure or substructure which may be necessary to apply the motive power, which does not materially interfere with the ordinary use of the street or with access to abutting property.

§ 165. Interurban railroads. An *interurban railroad*, as commonly understood in the first decade of the twentieth century, means an electric railway operated through and between different cities and towns, and carrying only passengers, or passengers, light freight and express.⁷ They are sometimes

⁵Nichols v. Ann Arbor etc. R. R. Co., 87 Mich, 361, 49 N. W. 538; Westheffer v. Lebanon & A. St. R. R. Co., 163 Pa. St. 54, 29 Atl. 873. See Green v. City & Suburban R. R. Co., 78 Md. 294, 28 Atl. 626, 44 Am. St. Rep. 288; *post*, § 178. In Austin v. Detroit etc. Ry. Co., 134 Mich. 149, 96 N. W. 35, a trolley road was held not to be an additional burden on a country highway though the grade was cut down some four feet along the plaintiff's farm.

⁶The length of trains would doubtless be subject to municipal or legislation regulation, even after the franchise had been granted and had become a binding contract. See Kin-

sey v. Union Traction Co., 169 Ind. 563, 81 N. E. 922.

⁷In Iowa an interurban railway is defined by statute as follows: "Any railway operated upon the streets of a city or town by electric or other power than steam, which extends beyond the corporate limits of such city or town to another city, town or village, or any railway operated by electric or other power than steam, extending from one city, town or village to another city, town or village, shall be known as an interurban railway." Cedar Rapids v. Marion City Ry. Co., 125 Ia. 430, 101 N. W. 176. The case relates only to the mode of as-

constructed wholly upon streets and highways and sometimes partly or mostly on private rights of way. In passing into or through cities and towns, where there are street railways, they are usually operated upon the street railway tracks. The name, in so far as it is descriptive, is not exclusively applicable to the class of roads referred to. All commercial railroads are interurban railroads. And many street railroads are also interurban roads, especially in the vicinity of large cities. But the name may be accepted as a convenient one to designate a class of railroads which are becoming increasingly numerous. The questions to be considered are whether these railroads when constructed and operated upon streets and highways constitute an additional burden upon the soil or a taking of any rights of the abutting owners.

As far back as the day of horse railroads there were many interurban street railroads between cities and their suburbs or between adjacent or nearby towns. They were constructed and operated as ordinary street railroads and were held to be legitimate street uses without noticing their interurban character.⁸ When electric power was introduced these roads were multiplied in number and extended in their operations until the true interurban railroad was evolved.⁹ Interurban street passenger railroads, constructed and operated like the ordinary street railroad, have generally been held not to impose an additional burden on the street or highway.¹⁰ In none

sessing the property of such railroads for taxation. In Ohio interurban railroads are classed by statute with street railroads. State v. Dayton Traction Co., 64 Ohio St. 272, 60 N. E. 291; Cincinnati, Lawrenceburg & Aurora Elec. St. R. R. Co. v. Lohe, 68 Ohio St. 101, 67 N. E. 161; Cincinnati etc. Elec. St. Ry. Co. v. Cincinnati etc. R. R. Co., 21 Ohio C. C. 391; Chambers v. Cleveland etc. Traction Co., 5 Ohio C. C. (N. S.) 298.

⁸Peddicord v. Baltimore, Catonsville & Ellicott's Mills Pass. R. R. Co., 34 Md. 463; Hiss v. Baltimore & Hampden Pass. Ry. Co., 52 Md. 242.

⁹The process of development is traced in Zehren v. Milwaukee Elec.

Ry. & Lt. Co., 99 Wis. 83, 74 N. W. 538, 67 Am. St. Rep. 844, 41 L.R.A. 575.

¹⁰Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107; Cleveland etc. Ry. Co. v. Feight, 41 Ind. App. 416; Georgetown & Lexington Traction Co. v. Mulholland, 25 Ky. L. R. 578, 76 S. W. 148; Taylor v. Portsmouth etc. Ry. Co., 91 Me. 193, 39 Atl. 560, 64 Am. St. Rep. 216; Green v. City and Suburban Ry. Co., 78 Md. 294; Lonaeoning Midland & Frostburg Ry. Co. v. Consolidated Coal Co., 95 Md. 630, 53 Atl. 420; Jeffers v. Annapolis, 107 Md. 268; Howe v. West End St. Ry. Co., 167 Mass. 46, 44 N. E. 386; Austin v. Detroit etc.

of the cases cited, except two, was any account taken of the distinction between interurban passenger traffic and urban passenger traffic.¹¹ In Pennsylvania such a road was held to be an additional burden upon a country highway, not because it was an interurban road but because a street railroad is held not to be within the public easement in such a highway.¹² In Wisconsin an interurban street passenger railway is held to be an additional burden both upon country highways and city streets. The question first arose with respect to the country highway. A corporation operating the street

Ry. Co., 134 Mich. 149, 96 N. W. 35; Smith v. Jackson & Battle Creek Traction Co., 137 Mich. 20, 100 N. W. 121; Newell v. Minneapolis etc. R. R. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303; West Jersey R. R. Co. v. Camden, Gloucester & Woodbury Ry. Co., 52 N. J. Eq. 31, 29 Atl. 423; Ehret v. Camden & Trenton R. R. Co., 61 N. J. Eq. 171, 47 Atl. 567; Ranken v. St. Louis & B. Suburban Ry. Co., 98 Fed. 479. In Nichols v. Ann Arbor etc. R. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L.R.A. 371, such a road was held to be an additional burden, because constructed with cuts and fills. *See also* Chicago etc. R. R. Co. v. Whiting etc. R. R. Co., 139 Ind. 297, 38 N. E. 604, 47 Am. St. Ry. 264, 26 L.R.A. 337; New York Central etc. R. R. Co. v. Auburn Interurban R. R. Co., 178 N. Y. 75, 70 N. E. 117; McQuaide v. Portland etc. R. R. Co., 18 Ore. 237, 22 Pac. 899; Paquet v. Mt. Tabor St. R. R. Co., 18 Ore. 233, 22 Pac. 906.

¹¹Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107; Newell v. Minneapolis etc. R. R. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303. In the former case, speaking of the street railway, the court says: "Its main purpose is presumably, and should be in fact, to facilitate and further the use of every street through which it

passes. If it should run over a thinly settled country road between two cities, this would be no less true. Highways are for through travel as fully as for local travel. A street railway laid over them must always serve both purposes, to a greater or less extent. If it fails in either, it loses its identity with ordinary highway use. A steam railroad ordinarily serves but one, and thus has not such identity." p. 154. In the latter case the court referring to the interurban traffic of the road in question, says: "A person who desires to go from any part of Minneapolis to San Francisco has the same right to use the streets of the former city for the purpose of passing out of it on his way to his destination as a person who simply desires to pass from one place in Minneapolis to another in the same city. The use of the streets is just as legitimate, and just as clearly and completely a lawful and proper enjoyment of the public and common easement, in the one case as in the other." To same effect, Jeffers v. Annapolis, 107 Md. 268.

¹²Pennsylvania R. R. Co. v. Montgomery Co. Pass. Ry. Co., 167 Pa. St. 62, 31 Atl. 468, 46 Am. St. Rep. 659, 27 L.R.A. 766. *And see* Heilman v. Lebanon & Anville St. Ry. Co., 145 Pa. St. 23, 23 Atl. 329.

car system in Milwaukee proposed to construct a line to a suburban village through an intervening country town. In a suit by an abutting owner to enjoin the construction of the road on one of the highways in such town, it was held that the road was an additional burden and could not be constructed without compensation to the owner of the fee¹³. Subsequently the same rule was applied to city streets and it was held that an interurban railway, transporting passengers through and be-

¹³Zehren v. Milwaukee Elec. Ry. & Lt. Co., 99 Wis. 83, 74 N. W. 538, 67 Am. St. Rep. 844, 41 L.R.A. 575. The court says: "The street railway in its inception is a purely urban institution. It is intended to facilitate travel in and about the city, from one part of the municipality to another, and thus relieve the sidewalks of foot passengers and the roadway of vehicles. It is thus an aid to the exercise of the easement of passage; strictly, a city convenience, for use in the city, by people living or stopping therein, and fully under the control of municipal authorities, who have been endowed with ample power for that purpose. This strictly urban character of the street railways remained practically unchanged for many years, and during these years the long line of decisions grew up recognizing the street railway as merely an improved method of using the street, and rather as a help to the street than as a burden thereon. Time, however, has made changes in conditions. New motive power has been discovered, and it is found that by its use an enlarged city street car may profitably be run long distances, and compete to some extent with the steam railway. It is proposed to convert the city railways into lines of passenger transportation, covering long distances and connecting widely separated cities and villages, by using the country highways, and operating long and heavy

coaches, sometimes made up into trains of heavy cars. Thus the urban railway has developed into the interurban railway, and threatens soon to develop into the interstate railway. The small car which took up passengers at one corner, and dropped them at another, has become a large coach, approximating the ordinary railway coach in size, and has become a part, perhaps, of a train which sweeps across the country from one city to another, bearing its load of passengers ticketed through, with an occasional local passenger picked up on the highway. The purely city purpose which the urban railway subserved has developed into or been supplanted by an entirely different purpose, namely, the transportation of passengers from city to city over long stretches of intervening country. Where this train or car, with its load of through passengers, is passing through a country town it is clearly serving no township purpose, save in the most limited sense. It is very difficult to say that this use of a country highway is not an additional burden. It is built and operated mainly to obtain the through travel from city to city, and only incidentally to take up a passenger in the country town. This through travel is unquestionably composed of people who otherwise would travel on the ordinary steam railroad, and would not use the highway at all. Thus, the operation of this newly developed street

tween cities, was an additional burden upon the city streets.¹⁴ In a proceeding by such a railroad to condemn the right to use a city street, it was held that damages should be assessed on the same basis as though the road was a commercial railroad.¹⁵

But many interurban railroads are authorized to carry and make a practice of carrying both freight and passengers and the question arises whether such a road is an additional burden on a street or highway. In Illinois such railroads are classed as commercial railroads as respects the use of streets, even though limited to the transportation of ordinary baggage, mail, express and milk.¹⁶ So in Ohio an interurban railroad, authorized to carry baggage, packages, boxed and barrelled freight, farm produce, express matter and U. S. mail, was held to be an additional

railway (so called) upon the country road is precisely opposite to the operation of the urban railway upon the city street. It burdens the road with travel which otherwise would not be there, instead of relieving it by the substitution of one vehicle for many.

"However we regard this development of the urban into the interurban railway, it seems utterly impossible and illogical to say that it is essentially the same in its purpose and effects as the mere street railway, which was held in the Hobart Case (*Hobart v. Milwaukee City R. R. Co.*, 27 Wis. 194) not to be an additional burden on the fee. The reasons given for that holding in that case either do not apply at all, or only in a very limited degree, to the interurban railroad. The difference is not so much in the change of motive power as in the entirely different character of the use. Suppose a steam railway corporation were organized to carry passengers only from city to city, and should attempt to lay its tracks upon the country roads without compensation; is there any doubt but that it would be held that it could not do so? We think not. Our conclu-

sion is that an interurban electric railway running upon the highways through country towns, is an additional burden upon the highway."

pp. 95-97.

¹⁴*Younkin v. Milwaukee L. H. & T. Co.*, 112 Wis. 15, 87 N. W. 861; *Same v. Same*, 120 Wis. 477, 98 N. W. 215.

¹⁵*Abbott v. Milwaukee L. H. & T. Co.*, 126 Wis. 634, 106 N. W. 523, 4 L.R.A.(N.S.) 202. See also the following, which were proceedings by the same company to condemn the easements infringed upon. *Wilbur Lumber Co. v. Milwaukee Lt. H. & Traction Co.*, 134 Wis. 352, 114 N. W. 813; *Briekles v. Same*, 134 Wis. 358, 114 N. W. 810; *Gosa v. Same*, 134 Wis. 369, 114 N. W. 815; *Templeton v. Same*, 134 Wis. 377, 114 N. W. 808; *Putney Bros. Co. v. Same*, 134 Wis. 379, 114 N. W. 809; *Marsh v. Same*, 134 Wis. 384, 114 N. W. 804; *Petrie v. Same*, 134 Wis. 394, 114 N. W. 808.

¹⁶*Wilder v. Aurora etc. Elec. Traction Co.*, 216 Ill. 493, 75 N. E. 194; *Aurora v. Elgin etc. Traction Co.*, 227 Ill. 485, 81 N. E. 544, 118 Am. St. Rep. 284; *Rockford etc. Ry. Co. v. Keyt*, 117 Ill. App. 32.

burden on a highway.¹⁷ An electric railroad proposed to be built on roads and streets between Milwaukee and Kenosha and authorized to carry freight and passengers, express and mail matter, was held to be a commercial railroad by the supreme court of Wisconsin.¹⁸ The question has received elaborate consideration in two Indiana cases. In the earlier case a bill was filed to enjoin the use of a street in Ft. Wayne by an interurban railroad. The company was authorized to carry passengers, express, mail and baggage. Cars were to be operated singly, unless by permission of the city when trains of two cars could be run. It was held not to be an additional burden on the street. "If constructed and operated in the manner described," says the court, "in what essential particular will the defendant's railroad differ from an ordinary electric street railroad? Both kinds of roads, when deemed necessary, use the T rail, and their cars are propelled by the same motive power. The carriage of light express matter, passenger baggage, and mail matter upon street cars would not constitute ground of complaint on the part of abutting lot owners. If only one car is run, the street is occupied, and obstructed by it to no greater extent than it would be by a street car. If two constitute a train, they will take up no more space and do no more injury than a motor car and trailer, which are commonly run upon street railroad tracks when the business of the company requires such additional car. The fact that light express matter, passenger baggage, and United States mail matter are carried on a car does not affect the property owner nor injure his property. The transportation of articles of this kind does not create any resemblance between the interurban electric railroad and a steam railroad carrying ordinary goods and merchandise, and results in none of the annoyances and injuries which are caused by either passenger or freight trains, on such a railroad."¹⁹ In the later case, suit was brought to enjoin the operation of interur-

¹⁷Schaaf v. Cleveland etc. Ry. Co., 66 Ohio St. 215, 64 N. E. 145; Chambers v. Cleveland etc. Traction Co., 5 Ohio C. C. (N.S.) 298.

¹⁸Chicago etc. R. R. Co. v. Milwaukee etc. R. R. Co., 95 Wis. 561, 70 N. E. 678, 60 Am. St. Rep. 136, 37 L.R.A. 856. *And see* Hannah v. Met. St. Ry. Co., 81 Mo. App. 78 and Riggs v. St. Francois County Ry.

Co., 120 Mo. App. 335, 96 S. W. 707, where interurban railroads carrying freight and passengers were classed with commercial railroads, as respects the duty to fence their tracks.

¹⁹Mordhurst v. Ft. Wayne etc. Traction Co., 163 Ind. 268, 275, 71 N. E. 642, 106 Am. St. Rep. 222, 66 L.R.A. 105.

ban cars and trains over a street railroad track in Indianapolis. The company was authorized to carry passengers, mail, express and baggage as in the former case. There appears to have been no limit to the number of cars which might be operated together and trains of three cars, each sixty feet long, were in fact run upon the street. The trains did not stop between the city limits and the terminal of the road. There were opinions by all the judges. Three of the judges held that such a road, operated in a proper and reasonable manner, with due regard to the rights of abutting owners and the demands of ordinary traffic, was not an additional burden on the street. The case was decided on demurrer to the complaint, which alleged the trains were run at from twenty to thirty miles an hour, that the plaintiff's house was jarred so that the plaster fell and pictures were shaken from the walls, that horses hitched in the street were frightened and the sleep of the family disturbed by the noise. The same judges held that the complaint showed an unlawful and unjustifiable manner of operating the road and that the plaintiff was entitled to recover the damages caused by such unlawful use.²⁰ Two of the judges were of the opinion that an interurban railroad carrying freight and passengers was an additional burden. A California case holds that an interurban road for the transportation of both freight and passengers is a proper use of a street and that an abutting owner cannot prevent such use but that,

²⁰Kinsey v. Union Traction Co.,
169 Ind. 563, 81 N. E. 922.

The conclusion of the court was guardedly stated as follows: "I therefore conclude upon this point that interurban cars of suitable size, construction and finish, for the carriage of both passengers, and express and light-package freight, with permission of the city authorities, may be run singly into the city of Indianapolis, upon the tracks of the local company, laid according to the law regulating street railroad tracks in city streets, to a point within the city, and over the tracks first designated by the board of public works and common council, at a reasonable rate of speed, not exceeding that allowed by law or ordinance to the cars of the local com-

pany, and in conformity to such city regulations as the authorities may from time to time impose upon street cars operated in the streets of the city, and with the sanction and under the regulation of the city authorities, temporarily, and in times of emergency created by special occasion, such a reasonable and limited number more than one as shall be required to meet the transient wants of the public for passenger carriage, provided such increased number, in size and manner of operation, is in substantial conformity to the authorized custom of the local company on like occasions, and does not materially increase the burden of the highway easement, nor unduly interfere with other proper and legitimate uses of the street."

under the constitutional provision giving compensation for property taken or damaged, he may recover for any damage to his property occasioned by such use.²¹ These, so far as we are aware, embrace all the decisions relating to the use of streets by interurban railroads.

Starting with the well settled propositions that the street passenger railway is a legitimate street use and that the commercial railroad is not, it does not seem difficult to dispose of the interurban railroad. In so far as it is operated as a street passenger railway, in aid of local travel, stopping at street crossings, or at convenient intervals to take up and let down passengers, it is on the same basis as the urban street railway. If not operated for the accommodation of local travel and in substantially the same manner as the urban street railway, it should be classed with the commercial railroad, with the consequent liability to abutting owners. Such a railroad, with its trains sweeping across the country at twenty or thirty miles an hour, and sometimes more, stopping only at cities and towns and at infrequent intervals in the country, and in the cities and towns stopping only for the accommodation of its interurban passengers and not at all for local traffic on the street, is clearly analogous to the steam railroad and competes with it and it alone. If the interurban railroad of this class had followed the horse railroad, in the order of development, there is no doubt but what it would have been classed with the steam railroad and not with the horse railroad.

If the interurban railroad carries freight as well as passengers, the analogy to the steam railroad is complete. Most of the freight so carried is such as would otherwise seek transportation on the steam railroad rather than in drays and wagons on the streets and highways. The question of freight traffic is further considered in the following section.

§ 166. Street railroads carrying freight. The question whether a street railroad carrying both freight and passengers is a legitimate street use or additional burden on the street, is a question which is now pressing for solution. Such use of the streets has been authorized in several of the States. There is no question, of course, but what the legislature has power to do

²¹Montgomery v. Santa Ana etc.
Co., 104 Cal. 186, 37 Pac. 786, 43
Am. St. Rep. 89, 25 L.R.A. 654.

this. The only question is whether it can be done without compensation to the abutting owners.

This question has been considered to some extent in the section upon interurban railroads.²² In one of the cases there cited, which involved the transportation of freight cars over the street railway tracks in Indianapolis, the court says: "Undoubtedly the chief business of street cars is the carriage of passengers, but there appears in the law of the highway no objection to the carriage of light and package freight. It has, perhaps, always been the custom in Indianapolis to carry for its passengers, hand baggage, filled and unfilled market baskets, tool boxes, baby carriages, clothes baskets, and all manner of small articles and packages that may be conveniently handled from the platform; also, to carry without an accompanying passenger, the United States mail from the central office to the various substations of the city; likewise, a large number of packages of newspapers from down town offices, and depots receiving consignments from St. Louis, Cincinnati and Chicago, to the hundreds of distributing points throughout the city. Repair and construction materials, and perhaps some private freight, are hauled through the city in the local company's cars, and no complaint is heard or inconvenience manifest. Besides, what principle can be advanced in condemnation of the inclosed, reasonably sized, neatly constructed freight or express car? Was not the transportation of property over the roads as deeply seated in the dedicatory purpose as the passage of persons? Plainly, the reasons which justify the one support the other. The heavy drays and wagons employed in handling the commerce of the city are a greater obstruction to the street, and menace to the safety of those using it, than the number of pedestrians. Therefore a suitable car, comparatively noiseless, confined to a fixed track four or five feet wide, in the center of the street, to which track vehicles may be safely adjusted by keeping to the right, and which car will carry twenty fold more freight or express than a wagon occupying the same amount of space on the street, and meandering in an irregular track, cannot, for any sufficient reason, be declared a nuisance, or an improper use of the street. No use should be improper that produces no extra hazard, and makes the way easier, safer and more convenient, as a passageway for the public in com-

²²*Ante*, § 165.

mon.²³ Similar views have been expressed by the supreme court of California in case of an interurban street railroad authorized to carry both freight and passengers.²⁴

²³Kinsey v. Union Traction Co., 169 Ind. 563, 81 N. E. 922, 940. See also Mordhurst v. Ft. Wayne etc. Traction Co., 163 Ind. 268, 71 N. E. 642, 106 Am. St. Rep. 222, 66 L.R.A. 105.

²⁴Montgomery v. Santa Ana & W. R. R. Co., 104 Cal. 186, 37 Pac. Rep. 786, 43 Am. St. Rep. 89, 25 L.R.A. 654, 10 Am. R. R. & Corp. Rep. 25. The court says: "A 'street railway' has been defined as 'a railway laid down upon roads or streets for the purpose of carrying passengers.' Elliott, *supra*, 557. It is further said by the same author that 'the distinctive and essential feature of a street railway, considered in relation to other railroads, is that it is a railway for the transportation of passengers, and not of freight.' It is said to exclude the idea of the carriage of freight, and that a railroad over which heavily-laden freight trains are drawn cannot be considered a street railway. Street cars are little more than carriages for transportation of passengers, propelled over fixed tracks, to which their wheels are adapted, and as a convenient, comfortable, and economical mode of conveyance, their use has become well-nigh universal in cities, and as they add, when properly constructed, little or nothing to the burdens of the servient tenement, their use is upheld without the necessity of compensation to the abutting owner. The use of a public street, however, for an ordinary railway for the transportation of freight and passengers, it has been said by the highest authority, imposes a new burden upon the street, not contemplated in its

dedication, and, therefore, the user cannot be indulged without compensation to the abutting owner of property upon such public street. We are at a loss for any good reason for this distinction, or to see why the transportation of freight by modern and improved methods is not equally entitled to encouragement with the transportation of passengers. The essential wants of the citizens demand the former equally with the latter. If there is any difference in the burden imposed upon the street, it is in degree, and not in kind. The great highways of England were constructed, not so much for the convenience of passengers as for the transportation of freight. In the infancy of commerce, when trade and traffic by land was insignificant in volume, when the sumpter horse, which answered to our modern pack mule, answered all the purposes of transportation for goods, footpaths, bridlepaths, and lanes served all needed purposes; but with the growth of inland commerce, and the need of greater facilities for the interchange of commodities, the use of wheeled vehicles, and, as a means thereto, the highway, as we know it, became a necessity. The Appian Way, commenced 312 B. C., which has provoked the admiration of the world, was entitled to commendation for its roadway sixteen feet in width, constructed for the transportation of burdens, while the paths of eight feet on each side of it for foot passengers, and upon which the Roman legions were wont to march, were unpaved. In the construction of modern highways, urban and suburban, the great difficulty and the prominent object

In New York a statute passed in 1890 authorizes street railroads to convey "persons and property in cars for compensation." In a suit by an abutting owner, having the fee of the street, to enjoin a street railroad from operating express cars over his land, the court of appeals affirmed a decree dismissing the bill.²⁵ In subsequent cases in the same court this decision has been regarded as settling the question of the right to operate

has been to build and adapt them, by grade, width and structure of roadbed, to the carriage of freight. Yet we are told in effect that, so far as modern methods are concerned, so far as ease, speed and economy are involved, improvements are to be limited to the transportation of passengers; that cars with wheels adjusted to move upon fixed tracks, when applied to the transportation of passengers, are within the contemplated objects in view in opening a road or street, and, therefore, add nothing material to the burden of the servitude of the abutting landowner, while a precisely similar structure, adapted to the transportation of freight, adds an additional burden, of a different character, to the servitude, and cannot be tolerated without compensation to the abutting owner. An interminable string of heavy drays may thunder through the street from early morning until set of sun, a menace to all who frequent the thoroughfare, and an inconvenience to all dwellers thereon; but the cars of a railway, which move usually but a few times a day, and with infinitely less annoyance to the public, upon tracks so adjusted to the surface as to occasion little or no inconvenience, cannot be tolerated. We fail to appreciate the philosophy of the distinction. On the contrary, we affirm that, when a public street in a city is dedicated to the general use of the public, it involves its use subject to municipal control and limita-

tions, for all the uses and purposes of the public as a street, including such methods for the transportation of passengers and freight as modern science and improvements may have rendered necessary, and that the application of these methods, and indeed of those yet to be discovered, must have been contemplated when the street was opened and the right of way obtained, whether by dedication, purchase or condemnation proceedings, and hence that such a user imposes no new burden or servitude upon the owner of the abutting land. The object of the user being within the conceded rights of the public, the methods of its accomplishment are subject to legislative control, and subject, also, to an action for damages by any abutting owner, whether or not he may be vested with the fee to the center of the street, whose right of ingress and egress, or his right to light and air shall be interfered with."

²⁵De Grauw v. Long Island Elec. Ry. Co., 43 App. Div. 502, 60 N. Y. S. 163; S. C. *affirmed* on opinion below, 163 N. Y. 597, 57 N. E. 1108. The Supreme Court says: "In the struggle which is going on for the transportation of persons and property, it must be confessed that street surface railroads are not backward in the assertion of all the rights which the grant of power confers. But the law is, and the courts may be relied upon to enforce the law, that the right of use of the street by the public is first and

freight cars upon street railroads.²⁶ In Massachusetts a private horse railroad laid upon a street or highway from a quarry to a steam railroad and used for the transportation of freight only was held to be within the public easement and not an additional burden on the soil.²⁷ In Texas it has been held that a street railroad for the transportation of freight may be authorized to use the streets and that the abutter cannot enjoin such use but that such a road is to be treated as a commercial railroad as respects the right of the abutting owner to compensation.²⁸ In Ohio street railroads are authorized by statute to carry both freight and passengers and the right to do so has been upheld, but the suit did not involve the rights of abutting owners.²⁹ In Wisconsin an act of 1898 authorizes the formation of street railway corporations with power to carry freight and passengers, and also authorizes municipal corporations to grant the use of streets to such corporations for both kinds of traffic. In a suit to annul a franchise to such a corporation it

primary; the right of use by the street surface railroad is secondary and subordinate. It has the paramount right of use of its tracks, but not the exclusive use, and when the right of the public or an individual member of it requires the use of the street for a proper purpose, the right of the railroad company must yield thereto, even though the effect be, for the time, to stop the operation of its cars thereon. We have, at all times, been mindful of these conditions, and when upholding the rights of a railroad in a given case, we have been careful to place a limitation thereon, and have uniformly asserted that whatever be the character of operation by the railroad, and whatever use it sought to make of the street, such use is subject to the authority of the public therein, and the public authority may, whenever necessary for the preservation of the street for street purposes, regulate and restrain the use thereof by the railroad. We are not at all sure that the transportation in single cars of such property as is

the subject of the present contract increases, or will increase, the burden of use of the street. Such property must be transported through the city in cars or upon wagons. Whether the use of the former is more burdensome than would be the latter is, to say the least, an open question. Time will demonstrate.” p. 509.

²⁶“That the power exists to run such cars is no longer an open question in this court.” *Matter of Stillwater etc. St. Ry. Co.*, 171 N. Y. 589, 597, 64 N. E. 511, reversing S. C. 72 App. Div. 294, 76 N. Y. S. 69. *And see Hatfield v. Straus*, 189 N. Y. 208, 82 N. E. 172, affirming S. C. 117 App. Div. 671, 102 N. Y. S. 934.

²⁷*White v. Blanchard Bros. etc. Co.*, 178 Mass. 363, 59 N. E. 1025. *Compare Green v. Portland*, 32 Me. 431.

²⁸*Aycock v. San Antonio Brewing Co.*, 26 Tex. Civ. App. 341, 63 S. W. 953; *Rische v. Texas Trans. Co.*, 27 Tex. Civ. App. 33, 66 S. W. 324.

²⁹*State v. Dayton Traction Co.*, 64 Ohio St. 272, 60 N. E. 291.

was taken for granted that such a railroad would be an additional burden on the street but the question was not directly passed upon.³⁰ An act of Maryland of 1898 authorized the street railway companies of Baltimore to transact an express business upon their lines of railway in Baltimore and adjoining counties. A city and suburban express company arranged with the railway companies to operate its own express cars over the railway tracks and obtained from the city authority to lay a switch track from the tracks in the street to its premises. The owner of the property adjoining the premises of the express company filed a bill to enjoin the laying of the switch track. The supreme court held that the railway company was authorized to make the traffic arrangement, that the express company was doing a public business and that the switch track to facilitate the conduct of the business was a proper use of the street and could not be prevented by the plaintiff.³¹ It would seem to follow that the operation of express cars on the street railway tracks was a legitimate use of the street. The use of street cars for the transportation of freight has but just begun. Whether the practice is likely to increase and become general remains to be seen. When we direct our attention to the moving freight car, taking the place of twenty drays, twenty pairs of horses and twenty drivers,³² the advantages of such a use of the streets seem obvious. It is presumably more economical. It saves wear and tear of the street, diminishes the accumulation of dirt and filth, relieves congestion and diminishes the noise and confusion. The movement of the freight car would no more interfere with abutting property than the movement of the passenger car. To the extent that the freight car is a substitute for traffic teams on the street it thus tends to make the street quieter, cleaner, freer and more sanitary. And since the street exists as much for the movement of freight as for the movement of persons, there seems to be no reason why the street freight car should not be put upon the same basis as the street passenger car, *in so far as concerns the mere movement of the car on the tracks and in so far as it carries freight which would otherwise be carried in vehicles on the streets.* Certainly the street railroad decisions cannot be made to justify the street freight car

³⁰Linden Land Co. v. Milwaukee Ry. & Lt. Co., 107 Wis. 493, 83 N.W. 851.

³¹Dulaney v. United Rys. & Elec.

Co., 104 Md. 423, 65 Atl. 45.

³²Kinsey v. Union Traction Co., 169 Ind. 563, 81 N.E. 922.

for anything but local freight traffic. Through freight traffic is the business of the commercial railroad. To bring freight traffic on the street which would otherwise not come there at all is not to aid the street traffic or relieve the street but rather to put an additional burden upon it and interfere with the ordinary use.

But how is local freight traffic to be handled upon street freight cars? There is a wide difference between the transportation of freight and the transportation of passengers. Freight cannot handle itself. The operation of freight cars on street railroad tracks for the collection and delivery of freight from door to door on the street would seem to be utterly out of the question. The stopping, standing and starting of such cars and the transfer of freight to and from the abutting property would greatly interfere with the ordinary traffic on the street. If such cars were operated on the same tracks with passenger cars, the passenger service would be rendered of no value. If on separate tracks, the street would be still further incumbered and ordinary traffic still more inconvenienced. In either case the street would be turned into a freight yard from end to end. The only other way of handling local freight would be by means of switch tracks to abutting property. These curved tracks with their frogs and intersections and the movement of cars in and out would also be a serious interference with ordinary traffic. Since this privilege could not be granted to one and denied to another, such switch tracks might become so numerous on business streets as to render ordinary traffic difficult and dangerous. Whichever method is employed it is manifest that such traffic and such conditions bear little analogy to the street passenger service and cannot be justified as legitimate street uses on the basis of the street railroad cases. The street passenger service involves simply the movement of the car and its stopping for very brief intervals to receive and discharge passengers. The passengers look after themselves. Freight transportation is an entirely different matter. The freight must be loaded and unloaded, which involves long stops on the street or the removal of the car from the street by means of switch tracks to abutting property. There is no reason why the principle of the street railway cases should be extended to include a traffic so entirely different in its nature and involving such a different use of the street.

It would seem from the nature of the case that the transportation of local freight in street cars was only practicable between

points that can be reached by means of switch tracks to abutting property. But it has been held in New York that such switch tracks to private property are a purely private purpose for which the use of streets cannot be granted.³³ If this view is correct but little, if any, use can be made of street railways for local freight traffic, since the legislature cannot take property for private use with or without compensation.

§ 167 (115i). Railroads in streets.—General conclusions. In regard to the use of streets for railroad purposes two things may be regarded as settled: *First*, that the ordinary commercial steam railroad is not a legitimate street use and that it cannot be laid in a street or highway without compensation to the abutting owner, whether he owns the fee or not; *second*, that the ordinary surface street railroad for local passenger traffic only is a legitimate street use and that such use of a street may be made without compensation to the abutting owner, without regard to the ownership of the fee. Beyond this the law is unsettled. Just now the battle is over the interurban railroad and the street car carrying freight. What new questions may arise in the future, in consequence of new ideas in railroad construction and operation, or new inventions in motive power and appliances, or new demands for traffic, cannot be foreseen. That new questions will arise is as certain as that progress will continue. It is also probable that it will become more and more difficult to distinguish railroads on the basis of their physical characteristics, their methods of operation or the nature of their traffic. Originally the distinction between the steam railroad and the horse railroad was very marked. But through the discovery and application of electrical power the horse railroad has developed into the trolley road and that in turn into the interurban railroad. The latter certainly resembles the steam railroad more than it does the horse railroad. If street cars should carry freight and if the steam railroads should adopt electrical power, the differences between the different railroads would become very shadowy. It will probably be more and more difficult to maintain distinctions in law between different sorts of railroads, based upon differences in motive power, traffic or methods of construction and operation.

³³Hatfield v. Straus, 189 N. Y. Compare Dulaney v. United Rys. & 208, 82 N. E. 172, affirming S. C. Elec. Co., 104 Md. 423, 65 Atl. 45. 117 App. Div. 671, 102 N. Y. S. 934. And see post, § 173.

It seems to the writer that there is no rational basis for a distinction between surface roads and that either all should be admitted as legitimate, or all excluded as illegitimate, street uses. As between these alternatives the latter should be chosen. A railroad involves a fixed and permanent structure in the street which is more or less of an obstruction to ordinary travel. If one track is a legitimate use there seems to be no escape from the consequence that any number of tracks is legitimate. It rests simply with the proper public authorities to determine how many tracks will best subserve the public interests.³⁴ And so a street might be filled with railroad tracks and all ordinary traffic excluded therefrom, and yet be held to be devoted to legitimate and proper street uses.³⁵ And this is a palpable absurdity.³⁶ For these reasons we think that railroads are not legitimate street uses.³⁷ This conclusion does not prevent the use of streets by railroads, since property devoted to one public use may be taken for another public use or a joint use permitted.

³⁴See *post*, § 171.

³⁵"To hold that a railroad is one of the legitimate uses of a public street leads to the inconsistency that the street may be monopolized by a corporation or an individual, and filled with parallel tracks, which would practically exclude all ordinary travel, and still be said to be devoted to the ordinary uses of a public street." *Theobald v. Louisville R. R. Co.*, 66 Miss. 279, 6 So. 230, 14 Am. St. Rep. 564, 4 L.R.A. 735. And the court in *Jaynes v. Omaha St. R. R. Co.*, 53 Neb. 631, 74 N. W. 67, 39 L.R.A. 751, in holding that the plaintiff was entitled to compensation for a trolley pole in front of her premises, said: "If a railway company without responsibility to the abutting owner, may build and maintain in the street one track, it may construct and maintain any number. If it may with impunity place and maintain in the street in front of the lot owner's property poles fifty feet apart, it may place them five feet apart, or closer, until the premises, with poles

and wires in front, will resemble the pictures one sees of the staked corral of the South African Zulu. Such a staking in of premises would, of course, impair their value; and yet the difference in the case supposed and the one under consideration is one of degree only." pp. 654, 655.

³⁶Courts which hold that certain railways are legitimate street uses would avoid this absurdity by also holding that there is a limit to the extent of such use, that railroads cannot monopolize a street even with legislative authority, unless compensation is made to the abutter. *See Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146, 36 Atl. 1107; *Lonaconing Midland etc. Ry. Co. v. Consolidated Coal Co.*, 95 Md. 630, 53 Atl. 420; *West Jersey R. R. Co. v. Camden etc. Ry. Co.*, 52 N. J. Eq. 31, 29 Atl. 423. But how and upon what principle are the courts to set limits to legitimate street uses which the legislature has authorized?

³⁷*See Slaughter v. Meridian L. & Ry. Co. (Miss.),* 48 So. 6.

It simply prevents such use being made without just compensation to abutting property owners. The justice of this view is shown by numerous statutes and constitutions which require compensation in such cases.³⁸ The manifest justice of requiring compensation where damage is inflicted should incline courts to extend the analogy of the steam railroad cases rather than that of the horse railroad cases.

§ 168 (115j). Whether a railroad is a proper or legitimate street use is a question of law. Nearly all the cases which determine whether a railroad is, or is not, a legitimate street use, treat the question as one of law.³⁹ The question was directly passed upon in *Williams v. Brooklyn El. R. R. Co.*,⁴⁰ in which the court says: "But it cannot be left to the jury to say whether the structure is or is not one which the legislature or the municipality may authorize as against an abutting owner, upon the theory that it is a question of fact, and not of law, depending upon the extent of the interference in a particular case with the public right of passage or with the enjoyment by the abutting owners of their premises." So in a Minnesota case where it is said: "This question of consistency or inconsistency is a question of law; that is to say, the facts of a given case being ascertained, it is for the court to pronounce upon their effect, and to determine whether the manner of using the street complained of is or is not, all things considered, a substantial infringement upon the common public right."⁴¹

§ 169 (116). Authority to occupy a street, how granted and construed. Before a railroad company can lawfully occupy a street, it must have authority to do so from the legislature, or from some municipal corporation having power to grant it. A railroad cannot occupy a street under its general authority to make a location, but such right must be expressly granted or necessarily implied.⁴² This is true of all kinds of railroads, for though street railroads are generally held to be a

³⁸See *Ruckert v. Grand Ave. Ry. Co.*, 163 Mo. 260, 63 S. W. 814; *Strickford v. Boston etc. R. R. Co.*, 73 N. H. 81, 59 Atl. 367; *Richmond Traction Co. v. Murphy*, 98 Va. 104, 34 S. E. 982; *post*, §§ 344, 351.

³⁹Perhaps the only exception is to be found in those cases which make the right of recovery depend upon

the manner in which the railroad is constructed and used. See § 171.

⁴⁰126 N. Y. 96, 26 N. E. 1048.

⁴¹*Newell v. Minneapolis etc. R. R. Co.*, 35 Minn. 112, 115, 27 N. W. 839, 59 Am. Rep. 303.

⁴²*Kavanagh v. Mobile etc. R. R. Co.*, 78 Ga. 271. 2 S. E. 636; *Daly v. Georgia Southern etc. R. R. Co.*,

legitimate street use, they are not so in the sense that any who choose may occupy the streets for that purpose. Municipal corporations cannot grant the use of streets for railroad purposes without legislative authority.⁴³ In case of commercial railroads

50 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286; Athens Terminal Co. v. Athens F. & M. Works, 129 Ga. 393, 58 S. E. 891; Chicago etc. R. R. Co. v. Chicago, 121 Ill. 176, 11 N. E. 907; Chicago Terminal Transfer R. R. Co. v. Chicago, 220 Ill. 310, 77 N. E. 204; People v. South Park Comrs., 221 Ill. 522, 77 N. E. 925; Louisville etc. R. R. Co. v. Liebfreid, 92 Ky. 407, 17 S. W. 870; New Orleans etc. R. R. Co. v. City of New Orleans, 26 La. An. 517; Springfield v. Conn. Riv. R. R. Co., 4 Cush. 63; Cooper v. Alden, Harr. Mich. 72; Nash v. Lowry, 37 Minn. 261, 33 N. W. 787; Morris & Essex R. R. Co. v. Newark, 10 N. J. Eq. 352; Van Horne v. Newark Passenger R. R. Co., 48 N. J. Eq. 332, 21 Atl. 1034; Burlington v. Penn R. R. Co., 56 N. J. Eq. 259, 38 Atl. 849; Gray v. New York etc. Traction Co., 56 N. J. Eq. 463, 40 Atl. 21; Trenton St. Ry. Co. v. Penn. R. R. Co., 63 N. J. Eq. 276, 49 Atl. 481; State v. Hoboken, 35 N. J. L. 205; State v. Board of Chosen Freeholders, 56 N. J. L. 416, 28 Atl. 553; Davis v. Mayor etc. of New York, 14 N. Y. 506; Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314; Wetmore v. Story, 22 Barb. 414; *In re Rochester Electric R. R. Co.*, 123 N. Y. 351, 25 N. E. 381; Sloan v. People's Elec. R. R. Co., 7 Ohio C. C. 84; Steelton Borough v. East Harrisburgh Pass. R. R. Co., 11 Pa. Co. Ct. 161; Watkins v. West Phila. Pass R. R. Co., 1 Pa. Dist. Ct. 463; Haines v. Twenty-second St. etc. Pass. R. R. Co., 1 Pa. Dist. Ct. 506; Appeal of Pittsburg etc. R. R. Co., 1 Penny. 449; Citizens' St. R. R. Co. v. Africa, 100 Tenn. 26;

Norfolk Ry. & Lt. Co. v. Consolidated Turnpike Co., 100 Va. 243, 40 S. E. 897; Hart v. Buchner, 54 Fed. 925, 5 C. C. A. 1; Knoxville v. Africa, 77 Fed. 501, 23 C. C. A. 252; Pembroke v. Canadian Cent. R. R. Co., 3 Ontario 503; Regina v. Train, 9 Cox C. C. 180. So as to crossing street. Clifton Heights v. Kent Mfg. Co., 220 Pa. St. 585, 69 Atl. 1114. It has been held that lawful authority to occupy a street will be presumed after the lapse of twenty years. Higbee v. Camden & Amboy R. R. Co., 20 N. J. Eq. 435; Morris & Essex R. R. Co. v. Prudden, 20 N. J. Eq. 530.

⁴³Louisville etc. R. R. Co. v. Mobile etc. R. R. Co., 124 Ala. 162, 26 So. 895; Mobile v. Louisville etc. R. R. Co., 124 Ala. 132, 26 So. 902; Humphreys v. Ft. Smith Traction, L. & P. Co., 71 Ark. 152, 71 S. W. 662; Daly v. Ga. Southern R. R. Co., 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286; Augusta etc. R. R. Co. v. Augusta, 100 Ga. 701, 28 S. E. 126; Jeffers v. Annapolis, 107 Md. 268; Detroit Citizens St. R. R. Co. v. Detroit, 110 Mich. 384, 68 N. W. 304, 64 Am. St. Rep. 350; State v. East Fifth St. R. R. Co., 140 Mo. 539, 41 S. W. 955, 62 Am. St. Rep. 742, 38 L.R.A. 218; Thompson v. Ocean City R. R. Co., 60 N. J. L. 74, 36 Atl. 1087; Tallon v. Hoboken, 60 N. J. L. 212, 37 Atl. 895; Beekman v. Third Ave. R. R. Co., 13 App. Div. 279, 43 N. Y. Supp. 174; Geneva etc. R. R. Co. v. N. Y. Cent. etc. R. R. Co., 24 App. Div. N. Y. 335; Potts v. Quaker City El. R. R. Co., 161 Pa. St. 396, 29 Atl. 108; Arbenz v. Wheeling etc. R. R. Co., 33 W. Va.

the prevailing doctrine is that this authority must be given in express terms, and that it cannot be derived from a general power to control and regulate the streets of the municipality.⁴⁴ Power to "make ordinances concerning the rights of way, regulation of street cars, street railways, and other railroads" was held not to confer power to grant the use of a street to a steam railroad company.⁴⁵ Whether such general power is sufficient to authorize a municipality to grant the use of its streets to a street railroad company is a disputed question.⁴⁶ A want of

1, 10 S. E. 14, 5 L.R.A. 371; Knoxville v. Africa, 77 Fed. 501, 23 C. C. A. 252. The franchise emanates from the State, though granted immediately by a municipality. *Ibid.* Where the power is conferred upon a city, only the legislative body can grant the franchise. *Schwede v. Hamrich Bros. Brewing Co.*, 29 Wash. 21, 69 Pac. 362. The legislature may provide that the right shall only be granted to corporations. *Goddard v. Chicago etc. Ry. Co.*, 202 Ill. 362, 66 N. E. 1066.

⁴⁴*Perry v. New Orleans & Chattanooga R. R. Co.*, 55 Ala. 413, 28 Am. Rep. 740; *Daly v. Ga. Southern R. R. Co.*, 80 Ga. 793, 12 Am. St. Rep. 286; *Covington St. Ry. Co. v. City of Covington*, 9 Bush 127; 2 Dillon, *Munic. Corp.* § 705. A city having power to give such consent and not being restricted to any particular mode, may do so by resolution or vote, as well as by ordinance. *Merchant's Union Barb Wire Co. v. Chicago, B. & Q. R. R. Co.*, 70 Ia. 105. A provision in a city charter authorizing the laying of railroads in streets on consent of a majority of the land owners was held to refer to horse railroads only. *Chamberlain v. Elizabethport Steam Cordage Co.*, 41 N. J. Eq. 43. A provision in a charter that the company should not occupy any street without the consent of the city was held not to confer authority even with consent. *Pennsylvania R. R. Co. v. Phila.*

Belt R. R. Co., 10 Pa. Co. Ct. 625. *And see Asheville St. R. R. Co. v. West Asheville R. R. Co.*, 114 N. C. 725, 19 S. E. 697; *Tallon v. Hoboken*, 60 N. J. L. 212; *Burlington v. Penn. R. R. Co.*, 56 N. J. Eq. 259, 38 Atl. 849.

⁴⁵*Louisville etc. R. R. Co. v. Mobile etc. R. R. Co.*, 124 Ala. 162, 26 So. 895. If the power is in doubt it does not exist. *Ibid.*

⁴⁶The following cases deny the authority: *Humphreys v. Ft. Smith T. L. & P. Co.*, 71 Ark. 152, 71 S. W. 662; *Covington St. Ry. Co. v. Covington*, 9 Bush. 127; *Stillwater v. Lowry*, 83 Minn. 275, 86 N. W. 103; *Davis v. New York*, 14 N. Y. 506; *People v. Kerr*, 27 N. Y. 188; *Milhau v. Sharp*, 27 N. Y. 611; *Norfolk Ry. & Lt. Co. v. Consolidated Turnpike Co.*, 100 Va. 243, 40 S. E. 897. *Contra*: *State v. Jacksonville St. R. R. Co.*, 29 Fla. 590, 10 So. 590; *Henderson v. Ogden City R. R. Co.*, 7 Utah 199, 26 Pac. 286; *Ogden City R. R. Co. v. Ogden City*, 7 Utah 207, 26 Pac. 288; *Detroit Citizens' St. R. R. Co. v. City of Detroit*, 64 Fed. 628, 12 C. C. A. 365. *See Powell v. Macon etc. R. R. Co.*, 92 Ga. 209, 17 S. E. 1027; *Almand v. Atlanta Consolidated St. Ry. Co.*, 108 Ga. 417, 34 S. E. 36; *New Orleans etc. R. R. Co. v. New Orleans*, 44 La. An. 748, 11 So. 77; *Same v. Same*, 44 La. An. 728, 11 So. 78; *People's R. R. Co. v. Memphis R. R. Co.*, 10 Wall. 38. A grant by a

previous authority may be cured by ratification.⁴⁷ The legislature may grant the use of streets to railroads without the consent of the municipality in which they are situated.⁴⁸ But the consent of the municipality is frequently, if not generally required, and when required, is a condition precedent to any valid franchise to use the streets.⁴⁹ A consent procured by means of

city contrary to law is void. Coolville Pass. R. R. Co. v. Wilkes-Barre Southside R. R. Co., 5 Luzerne Leg. Reg. Rep. 340. A constitutional provision against the granting of special privileges and immunities does not prevent the grant of such a franchise. Atchison St. R. R. Co. v. Mo. Pac. R. R. Co., 31 Kan. 660. Under authority to "grade, pave, repair or otherwise improve its streets," a city cannot lay street railroad tracks in a street for the purpose of leasing them to others to be operated as a street railroad. Attorney General v. Detroit Common Council, 148 Mich. 1, 111 N. W. 860.

⁴⁷Nash v. Lowry, 37 Minn. 261, 33 N. W. 787; Pembroke v. Canada Central R. R. Co., 3 Ontario 503. A city may be estopped from alleging that tracks were laid in a street without authority. Spokane St. R. R. Co. v. City of Spokane Falls, 6 Wash. 521, 33 Pac. 1072.

⁴⁸State v. Jacksonville St. R. R. Co., 29 Fla. 590, 10 So. 590; Milbridge etc. Elec. R. R. Co., appellants, 96 Me. 110, 51 Atl. 818; Canton v. Canton Cotton Warehouse Co., 84 Miss. 268, 36 So. 266, 105 Am. St. Rep. 428, 65 L.R.A. 561; Appeal of Borough of Milvale, 131 Pa. St. 1, 18 Atl. 993, 1 Am. R. R. Corp. Rep. 151; Harrisburg City Pass. R. R. Co. v. City of Harrisburg, 149 Pa. St. 469, 24 Atl. 56; Citizens' St. R. R. Co. v. City of Memphis, 53 Fed. Rep. 715. The legislature may authorize the construction of a subway for railroads in the streets of a city without the consent of such

city. Prince v. Crocker, 116 Mass. 347, 44 N. E. Rep. 446. But it is otherwise provided by the constitution in Missouri. State v. Lindell R. R. Co., 151 Mo. 162. The adoption of a constitutional provision that "any association or corporation organized for the purpose, shall have the right to construct and operate a railroad between any points within the state, and to connect at the State line with railroads of other States," was held not to repeal or annul a statute prohibiting railroads from occupying any street, lane or alley, in any incorporated city without the consent of such city. Pittsburg v. Pittsburg etc. R. R. Co., 205 Pa. St. 13, 54 Atl. 468.

⁴⁹City of Philadelphia v. River Front R. R. Co., 173 Pa. St. 334, 34 Atl. 60; Appeal of Pittsburgh etc. R. R. Co., 1 Penny. 449; West Jersey Traction Co. v. Camden Horse R. R. Co., 53 N. J. Eq. 163, 35 Atl. 49; State v. Cape May, 58 N. J. L. 565, 34 Atl. 397; McKeesport v. Citizens' Pass R. R. Co., 2 Pa. Supr. Ct. 249.

The fact that the railroad is laid on a turnpike with the consent of the turnpike corporation will not relieve it from also getting the consent of the municipality. In re Rochester Electric R. R. Co., 123 N. Y. 351, 25 N. E. 381; Steelton Borough v. East Harrisburg Pass. R. R. Co., 11 Pa. Co. Ct. 161. In all such cases the franchise comes from the State. Chicago City R. R. Co. v. People, 73 Ill. 541. A law requiring such consent was held to apply to grants previously

bribery, duress or fraud is invalid.⁵⁰ So if it is not given in the manner and in accordance with the conditions imposed by the statute.⁵¹ Where a company was organized to construct a street railroad through several municipalities, it was held that it must get the consent of all before it could construct any part.⁵² A city has no power to authorize railroads upon streets for private use.⁵³

made but not acted upon. *Hanson v. Chicago etc.* R. R. Co., 61 Iowa 588; *Appeal of Lorimer etc.* R. R. Co., 137 Pa. St. 533, 20 Atl. 570. *But see Stroudsburg v. Stroudsburg Pass.* R. R. Co., 12 Pa. Co. Ct. 124. Where the act requires the consent of the "local authorities" it means "the officers of the city, town or village whose duties and powers relate to the supervision, care and maintenance of the streets or highways." *In re Rochester Electric R. R. Co.*, 123 N. Y. 351, 25 N. E. 381. *Compare Sewede v. Henrich Bros. Brewing Co.*, 29 Wash. 21, 69 Pac. 362. The provision in the constitution of Pennsylvania that "any association or corporation organized for the purpose, shall have the right to construct and operate a railroad between any points within the State, and to connect at the State line with railroads of other States," was held not to repeal or abrogate a prior statute prohibiting railroads from occupying any street, lane or alley in any incorporated city without the consent of such city. *Pittsburg v. Pittsburgh etc.* R. R. Co., 205 Pa. St. 13, 54 Atl. 468.

⁵⁰*Lehigh Coal & Nav. Co. v. Inter-county St. R. R. Co.*, 167 Pa. St. 75, 31 Atl. 471; *Tamaqua & L. St. R. R. Co. v. Inter-county St. R. R. Co.*, 167 Pa. St. 91, 31 Atl. 473. An ordinance giving consent was held invalid, where stockholders of the company were members of the council and their votes were necessary to its

passage. *Jolly v. Pittsburgh etc. R. R. Co.*, 16 Pa. Co. Ct. 1.

⁵¹*Thompson v. Board of Supervisors*, 111 Cal. 553, 44 Pac. 230; *People v. Craycroft*, 111 Cal. 544, 44 Pac. 463; *Harvey v. Aurora etc. Ry.* Co. 186 Ill. 283, 57 N. E. 857; *Avon-by-the-Sea L. & I. Co. v. Neptune City*, 53 N. J. Eq. 178, 32 Atl. Rep. 220; *State v. Newark*, 57 N. J. L. 309, 30 Atl. Rep. 528; *State v. Neptune City*, 57 N. J. L. 362, 30 Atl. Rep. 529; *Camden Horse R. R. Co. v. West Jersey Traction Co.*, 58 N. J. L. 102, 32 Atl. Rep. 72; *State v. Shivers*, 58 N. J. L. 124, 33 Atl. Rep. 55; *Stockton v. North Jersey St. R. R. Co.* (N. J. Ch.), 34 Atl. Rep. 688; *Beekman v. Third Ave. R. R. Co.*, 13 App. Div. 279, 43 N. Y. Sup. 174. Where by statute the right can only be granted to a corporation, a grant to individuals is void. *Wilder v. Aurora etc. Elec. Traction Co.*, 216 Ill. 493, 75 N. E. 194.

⁵²*Pennsylvania R. R. Co. v. Turtle Creek Val. R. R. Co.* 179 Pa. St. 584, 36 Atl. 348; *Penn. R. R. Co. v. Parkersburg etc. St. Ry. Co.*, 26 Pa. Supr. Ct. 159.

⁵³*Macon v. Harris*, 75 Ga. 761; S. C. 73 Ga. 428; *Heath v. Des Moines & St. Louis Ry. Co.*, 61 Ia. 11; *Michall v. Durkee*, 34 Kan. 509; *Commonwealth v. City of Frankfort*, 92 Ky. 149, 17 S. W. 287; *Greene v. Portland*, 32 Me. 431; *Bradley v. Pharr*, 45 La. An. 426, 12 So. 618, 19 L.R.A. 647; *Gustafson v. Hamm*, 56 Minn. 334, 57 N. W. 1054, 22 L.R.A.

There is a difference of opinion in the authorities, as to whether the grant of a franchise to operate a railroad in a street, can be made exclusive, even by authority of the legislature.⁵⁴ But it is quite clear that a municipal corporation cannot make such a grant, without express authority,⁵⁵ and that a grant will not be construed to be exclusive unless so expressed.⁵⁶ It is held that the grant may be for a period extending beyond the corporate existence of the grantee.⁵⁷ In some States municipal corporations are not authorized to grant or consent to the construction of a railroad in a street without the consent of the owners

⁵⁶⁵; Glaesner v. Anheuser-Busch Brewing Assn., 100 Mo. 508, 13 S. W. 707, 2 Am. R. R. & Corp. Rep. 420; State v. Trenton, 36 N. J. L. 79; Fanning v. Osborne & Co., 34 Hun 121; S. C. 102 N. Y. 441; Appeal of Hartman Steel Co., 129 Pa. St. 551, 18 Atl. 553; Barker v. Hartman Steel Co., 6 Pa. Co. Ct. 183. *But see* White v. Blanchard Bros. Granite Co., 178 Mass. 363, 59 N. E. 1025. As to whether a track or railroad is for private or public use *see post*, § 264.

⁵⁴Elliott Roads and Streets, pp. 566-569; 2 Dill. Munic. Corp. §§ 715, 716, 727; Birmingham etc. R. R. Co. v. Birmingham St. R. R. Co., 79 Ala. 465, 58 Am. Rep. 315; Des Moines St. R. R. Co. v. Des Moines etc. R. R. Co., 73 Iowa 513, 33 N. W. 610, 35 N. W. 602; Davis v. New York, 14 N. Y. 506; Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314; 11 Am. R. R. & Corp. Rep. 448, *note* 2.

⁵⁵Florida Cent. R. R. Co. v. Ocala St. R. R. Co., 39 Fla. 306; St. Louis etc. R. R. Co. v. Belleville, 20 Ill. App. 580; New Orleans City etc. R. R. Co. v. New Orleans, 44 La. An. 748, 11 So. 77; Same v. Same, 44 La. An. 728, 11 So. 78; Detroit Citizens' St. R. R. Co. v. Detroit, 110 Mich. 384, 68 N. W. 304, 64 Am. St. Rep. 350; Parkhurst v. City of Salem, 23 Or. 472, 32 Pac. 304, 7 Am. R. R. & Corp. Rep. 562; Henderson v. Ogden City R. R. Co., 7 Utah 199, 26 Pac. 286;

11 Am. R. R. & Corp. Rep. 463, note 6 and numerous cases there cited; Detroit Citizens' St. R. R. Co. v. Detroit, 171 U. S. 48; New Orleans City R. R. Co. v. Crescent City R. R. Co., 12 Fed. 308.

⁵⁶Covington St. R. R. Co. v. Covington etc. R. R. Co., 1 Ky. L. R. 318; North Baltimore Pass. R. R. Co. v. Mayor etc. of Baltimore, 75 Md. 247, 23 Atl. 470; Turney v. So. Pac. Co., 44 Ore. 280, 75 Pac. 144, 76 Pac. 1080; Pennsylvania S. O. R. R. Co. v. Philadelphia etc. R. R. Co., 157 Pa. St. 42, 27 Atl. 683; Philadelphia etc. R. R. Co. v. Berks County, 2 Woodward's Dees. 361; City of Houston v. Houston St. R. R. Co., 83 Tex. 548, 19 S. W. 127, 6 Am. R. R. & Corp. Rep. 106; Newport News etc. Ry. & Elec. Co. v. Hampton Roads Ry. & Elec. Co., 102 Va. 795, 47 S. E. 839; 11 Am. R. R. & Corp. Rep. p. 463, note 7 and cases cited.

⁵⁷Detroit Citizens' St. R. R. Co. v. City of Detroit, 64 Fed. 628, 12 C. C. A. 365. As to power of city to grant franchise for a term of years *see* City of Houston v. Houston City St. R. R. Co., 83 Tex. 548, 19 S. W. 127, 6 Am. R. R. & Corp. Rep. 106; People's R. R. v. Memphis R. R., 10 Wall. 38; City of Detroit v. Detroit City R. R. Co., 56 Fed. 867; Louisville Trust Co. v. City of Cincinnati, 75 Fed. 716.

of a certain amount of frontage on the street.⁵⁸ A municipality may impose reasonable conditions in giving its consent to use the street⁵⁹ and, when it has an absolute right of refusal, it

⁵⁸Without attempting to discuss the questions arising under such statutes we refer to some cases thereon. Wiggins Ferry Co. v. East St. Louis etc. R. R. Co., 107 Ill. 450; Hunt v. Chicago Horse & D. R. R. Co., 121 Ill. 638; Tibbets v. West & South Towns St. R. R. Co., 153 Ill. 147, 38 N. E. 664; Doane v. Chicago City R. R. Co., 160 Ill. 22, 45 N. E. 507, 35 L.R.A. 588; Doane v. Lake St. El. R. R. Co., 165 Ill. 510, 46 N. E. 520, 56 Am. St. Rep. 265, 36 L.R.A. 97; McGann v. People, 194 Ill. 526, 62 N. E. 941, reversing S. C. 97 Ill. App. 587; Mercer County Traction Co. v. United N. J. R. R. & C. Co., 64 N. J. Eq. 588, 54 Atl. 819; Same v. Same, 65 N. J. Eq. 574, 56 Atl. 897; Same v. Same, 68 N. J. Eq. 714, 61 Atl. 461; Orton v. Metuchen, 66 N. J. L. 572, 49 Atl. 814; Currie v. Atlantic City, 66 N. J. L. 671, 50 Atl. 504, reversing S. C. 66 N. J. L. 140, 48 Atl. 615; Shepard v. East Orange, 69 N. J. L. 133, 53 Atl. 1047; Same v. Same, 70 N. J. L. 203, 57 Atl. 441; Montclair Military Academy v. N. J. St. Ry. Co., 70 N. J. L. 229, 57 Atl. 1050; S. C. 65 N. J. L. 328, 47 Atl. 890; In re Third Ave. R. R. Co., 121 N. Y. 536, 24 N. E. 951, 9 L.R.A. 124; S. C. 56 Hun 537, 31 N. Y. St. 645, 9 N. Y. Supp. 833; White v. Manhattan R. R. Co., 139 N. Y. 19, 34 N. E. 887, 8 Am. R. R. & Corp. Rep. 739, and cases cited in note; Dusenbury v. New York etc. Traction Co., 46 App. Div. 267, 61 N. Y. S. 420; Adey v. Nassau Elec. R. R. Co., 65 App. Div. 529, 72 N. Y. S. 992; S. C. affirmed, 173 N. Y. 580, 65 N. E. 1113; Fox v. New York City Interborough R. R. Co., 112 App. Div. 832, 98 N. Y. S. 338; Mt. Auburn Cable R. R. Co. v.

Neare, 54 Ohio St. 153, 42 N. E. 768; Hamilton etc. Traction Co. v. Parrot, 67 Ohio St. 181, 65 N. E. 1011, 60 L.R.A. 531; Forest City etc. R. R. Co. v. Day, 73 Ohio St. 83, 76 N. E. 396; Sloane v. People's Elec. R. R. Co., 7 Ohio C. C. 84; Simmons v. Toledo, 8 Ohio C. C. 535; Day v. Forest City Ry. Co., 5 Ohio C. C. (N. S.) 393; Isom v. Low Fare Ry Co., 10 Ohio C. C. (N. S.) 89; Beeson v. Chicago, 75 Fed. 880.

⁵⁹Byrne v. Chicago General R. R. Co., 169 Ill. 75, 48 N. E. 703; People v. Suburban R. R. Co., 178 Ill. 594, 53 N. E. 349; Chester v. Wabash etc. R. R. Co., 182 Ill. 382, 55 N. E. 524; Citizens Horse R. R. Co. v. City of Belleville, 47 Ill. App. 388; Byrne v. Chicago General R. R. Co., 63 Ill. App. 438; Rutherford v. Hudson Riv. Traction Co., 73 N. J. L. 227, 63 Atl. 84; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 7 Am. St. Rep. 684, 2 L.R.A. 255; Gaedeke v. Staten Island Midland R. R. Co., 46 App. Div. 219, 61 N. Y. S. 290; Delaware etc. R. R. Co. v. Oswego, 92 App. Div. 551, 86 N. Y. S. 1027; City of Allegheny v. Millville etc. St. R. R. Co., 159 Pa. St. 411, 28 Atl. 202; Township of Plymouth v. Chestnut Hill & N. R. R. Co., 168 Pa. St. 181, 32 Atl. 19; S. C. 15 Pa. Co. Ct. 442; Minersville v. Schuylkill Elec. Ry. Co., 205 Pa. St. 394, 54 Atl. 1050; Edwards v. Pittsburg Junction R. R. Co., 215 Pa. St. 597, 64 Atl. 798; Burke v. Cumberland Traction Co., 15 Pa. Co. Ct. 159. Illegal conditions do not vitiate the grant. Galveston etc. R. R. Co. v. Galveston, 91 Tex. 17, 36 L.R.A. 44. Conditions inconsistent with a statute are void. Los Angeles Ry. Co. v. Los Angeles, 152 Cal. 242, 92 Pac. 490.

can impose any conditions it sees fit.⁶⁰ When a grant has been made and accepted or acted upon it constitutes an irrevocable contract.⁶¹ In Maryland it has been held that such a grant may be revoked by a city after the tracks are laid, but there would be an obligation to make compensation.⁶² Where the grant is to construct a road within a limited time, the grant will be forfeited if the condition is not complied with.⁶³ Where the grant is to lay one or more tracks within three years, additional tracks cannot be laid after the three years have expired.⁶⁴ Where the grant was without limit but reserved the right to forfeit the franchise if the road was not built within five years, it was held the road could be built at any time before a forfeiture was declared.⁶⁵ A municipal corporation by granting the franchise is not thereby made liable for damages by the construction and operation of the road.⁶⁶

⁶⁰Chicago Terminal Transfer R. R. Co. v. Chicago, 220 Ill. 310, 77 N. E. 204; Monroe v. Detroit etc. Ry. Co., 143 Mich. 315, 106 N. W. 704; St. Louis etc. R. R. Co. v. Kirkwood, 159 Mo. 239, 60 S. W. 110, 53 L.R.A. 300.

⁶¹Port of Mobile v. Louisville etc. R. R. Co., 84 Ala. 115; Town of Arcata v. Arcata & M. R. R. Co., 92 Cal. 639, 28 Pac. 676; City of Belleville v. Citizens' Horse R. R. Co., 152 Ill. 171, 38 N. E. 584, 26 L.R.A. 681; Harvey v. Aurora etc. R. R. Co., 186 Ill. 283, 57 N. E. 857; Mattison v. Alton etc. Traction Co., 235 Ill. 346, 85 N. E. 596; Columbus v. Columbus etc. R. R. Co., 37 Ind. 294; East Louisiana R. R. Co. v. New Orleans, 46 La. An. 526, 15 So. 157; Willis v. Erie Pass. Ry. Co., 188 Pa. St. 71, 41 Atl. 1119; Wheeling etc. R. R. Co. v. Philadelphia, 58 W. Va. 487, 52 S. E. 499, 4 L.R.A. (N. S.) 321; Baltimore T. & G. Co. v. City of Baltimore, 64 Fed. Rep. 153. The grant may of course be revoked before acceptance. East St. Louis Union R. R. Co. v. East St. Louis, 39 Ill. App. 398. A general grant to a street railway company of the right to use any and all streets of a city from

time to time as it may elect, was held to be revocable at any time as to streets not used. Logansport Ry. Co. v. Logansport, 114 Fed. 688.

⁶²Lake Roland El. R. R. Co. v. City of Baltimore, 77 Md. 352, 26 Atl. 510, 7 Am. R. R. & Corp. Rep. 619, 20 L.R.A. 126.

⁶³Atchison Street R. R. Co. v. Nave, 38 Kan. 744, 17 Pac. 587, 5 Am. St. Rep. 800; State v. Latrobe, 81 Md. 222, 31 Atl. 788. A city cannot declare a forfeiture for breach of condition unless the right to do so is reserved, as the power to adjudicate a forfeiture pertains to the judiciary. Alexandria v. Morgan's La. etc. Co., 109 La. 50, 33 So. 65.

⁶⁴Chicago Terminal Transfer R. R. Co. v. Chicago, 220 Ill. 310, 77 N. E. 204; Chicago v. Chicago Terminal Transfer R. R. Co., 121 Ill. App. 197; Eastern Wis. Ry. & Lt. Co. v. Winnebago Traction Co., 126 Wis. 179, 105 N. W. 571. For a forfeiture clause in a statute held self-executing see Los Angeles Ry. Co. v. Los Angeles, 152 Cal. 242, 92 Pac. 490.

⁶⁵Louisville etc. R. R. Co. v. Bowling Green Ry. Co., 110 Ky. 788, 63 S. W. 4.

⁶⁶Sorensen v. Greeley, 10 Colo.

Authority to occupy a street, whether obtained directly from the legislature or from a local municipality, only protects the company to the extent of the public right or easement in the street, and leaves the company to deal with private rights as in other cases.⁶⁷ Authority to occupy a street includes authority to use a bridge forming part of the street, even though it belongs to a private corporation.⁶⁸ Grants of authority are strictly construed.⁶⁹ Authority to occupy a street has been held to include authority to construct a turnout to a depot,⁷⁰ and to lay switch-tracks to abutting property.⁷¹ Authority to build an elevated railroad in a street does not authorize any part

369; *Green v. Portland*, 32 Me. 431; *Terry v. Richmond*, 94 Va. 537; *Hatch v. Tacoma etc. R. R. Co.*, 6 Wash. 1, 32 Pac. 1063; *Kaufman v. Tacoma etc. R. R. Co.*, 11 Wash. 632, 40 Pac. 137.

⁶⁷*Coats v. Atchison etc. R. R. Co.*, 1 Cal. App. 441, 82 Pac. 640; *Illinois Cent. R. R. Co. v. Turner*, 194 Ill. 575, 62 N. E. 798, *affirming S. C. 97 Ill. App. 219*; *Aldis v. Union El. R. R. Co.*, 203 Ill. 567, 68 N. E. 95; *Gray v. St. Paul etc. R. R. Co.*, 13 Minn. 315; *Lamm v. Chicago etc. R. R. Co.*, 45 Minn. 71, 47 N. W. 455, 10 L.R.A. 268; *Cape Girardeau etc. Road Co. v. Renfoe*, 58 Mo. 265; *Washington Cemetery v. P. P. & C. I. R. R. Co.*, 68 N. Y. 591; *Matter of New York El. R. R. Co.*, 70 N. Y. 327, 354; *Staton v. Atlantic Coast Line R. R. Co.*, 147 N. C. 428; *South Bound R. R. Co. v. Burton*, 67 S. C. 515, 46 S. E. 340; *Eastern Wis. Ry. & Lt. Co. v. Hackett*, 135 Wis. 464.

⁶⁸*Pittsburgh etc. R. R. Co. v. Point Bridge Co.*, 165 Pa. St. 37, 30 Atl. 511, 26 L.R.A. 323. But the railroad company may be made to bear the expense of strengthening the bridge if necessary, and may be prevented from using the bridge until the work is done. *Berks County v. Reading City Pass. R. R. Co.*, 167 Pa. St. 102, 31 Atl. 474, 663; *Laure v. Oil City St. R. R. Co.*, 170 Pa. St. 249, 32 Atl.

977. *See State v. Board of Chosen Freeholders*, 56 N. J. L. 416, 28 Atl. 553.

⁶⁹*Mobile v. Louisville etc. R. R. Co.*, 124 Ala. 132, 26 So. 902; *Harvey v. Aurora etc. R. R. Co.*, 186 Ill. 283, 57 N. E. 857; *Blocki v. People*, 220 Ill. 444, 77 N. E. 172; *Chicago Terminal Transfer R. R. Co. v. Chicago*, 203 Ill. 576, 68 N. E. 99; *Aurora v. Elgin etc. Traction Co.*, 227 Ill. 485, 81 N. E. 544, 118 Am. St. Rep. 284; *Chicago v. Chicago Terminal Transfer R. R. Co.*, 121 Ill. App. 197; *Indiana Ry. Co. v. Hoffman*, 162 Ind. 593, 69 N. E. 399; *State v. City of Trenton*, 54 N. J. L. 92, 23 Atl. 281; *State v. City of Newark*, 54 N. J. L. 102, 23 Atl. 284; *People v. Newton*, 112 N. Y. 396, 19 N. E. 831, 3 L.R.A. 174; *City of Philadelphia v. Citizens' Pass. R. R. Co.*, 151 Pa. St. 128, 24 Atl. 1099; *Junction Pass. R. R. Co. v. Williamsport Pass. R. R. Co.*, 154 Pa. St. 116, 26 Atl. 295; *Cleveland Elec. Ry. Co. v. Cleveland etc. Ry. Co.*, 204 U. S. 116, 27 S. C. 202.

⁷⁰*New Orleans etc. R. R. Co. v. 2d Municipality*, 1 La. An. 128; *Knight v. Carrollton R. R. Co.*, 9 La. An. 284.

⁷¹*Beaver v. Beaver Val. R. R. Co.*, 217 Pa. St. 280, 66 Atl. 520; *Morrisstown v. Pennsylvania R. R. Co.*, 3 Mont. Co. L. Rep. 5.

of the depot or stairs to be constructed on a cross street.⁷² A city has no power to grant the use of a street for a station or for yard purposes and an ordinance granting such right was annulled at the suit of the people.⁷³ Where a company must specify its route in its articles of incorporation, the consent of the city that it may occupy streets not specified in its route, is of no validity.⁷⁴ Authority to lay a single track with necessary switches, does not justify switches of unnecessary length and frequency so as to make practically a double track.⁷⁵ Under a grant to construct a surface road and to intersect, cross, join and unite with other railroads, an incline cannot be built to connect with an elevated road.⁷⁶ Authority to occupy a street when necessary means a practical necessity.⁷⁷ A grant is not void because the location of the tracks in the street is not specified, as that is a matter for subsequent regulation.⁷⁸ In case of a dedicated street, it has been held that the municipal authorities could not authorize its use by a street railroad, until after acceptance.⁷⁹ When the franchise expires the road and its equipment remain the property of the company holding the franchise and the municipality cannot take possession of the same or make a valid grant thereof to another company.⁸⁰

⁷²Mattlage v. New York El. R. R. Co., 67 How. Pr. 232; S. C. 14 Daly 1; Bremer v. Manhattan Ry. Co., 191 N. Y. 333, 84 N. E. 59; *and see* Douglass v. Leavenworth, 6 Kan. App. 96; Birrell v. New York etc. R. R. Co., 41 N. Y. App Div. 506; Manhattan Ry. Co. v. Astor, 126 App. Div. 907.

⁷³Chicago etc. Ry. Co. v. People, 222 Ill. 427, 78 N. E. 790, *affirming* S. C. 120 Ill. App. 306.

⁷⁴Knoxville v. Africa, 77 Fed. Rep. 501, 23 C. C. A. 252.

⁷⁵Willis v. Railroad, 188 Pa. St. 56, 41 Atl. 307; Bridgewater v. Beaver Val. Traction Co., 214 Pa. St. 343, 63 Atl. 796.

⁷⁶Eldert v. Long Island Elec. R. R. Co., 28 App. Div. N. Y. 451.

⁷⁷Wayzata v. Great Northern R. R. Co., 67 Minn. 385.

⁷⁸Baker v. Selma St. & Subn. Ry. Co., 130 Ala. 474, 30 So. 464.

Em. D.—20.

⁷⁹Russell v. Chicago Elec. Ry. Co., 205 Ill. 155, 68 N. E. 727. But such an act would itself seem to be an acceptance of the street, unless acceptance was required to be made in some specified way. *See post*, § 495.

⁸⁰Cleveland Elec. Ry. Co. v. Cleveland etc. Ry. Co. 204 U. S. 116, 27 S. C. 202. We refer to a few miscellaneous cases on the giving of authority to railroads to occupy streets. Matter of Crosstown St. R. R. Co., 68 Hun 236, 22 N. Y. Supp. 818; Adamson v. Nassau Electrie R. R. Co., 89 Hun 261, 34 N. Y. Supp. 1073; S. C. 12 Miscl. 600; Atkinson v. Asheville St. R. R. Co., 113 N. C. 581, 18 S. E. 284; Rahn Township v. Tamaqua & L. St. R. R. Co., 167 Pa. St. 84, 31 Atl. 472; Homestead St. R. R. Co. v. Pittsburgh etc. St. R. R. Co., 166 Pa. St. 162, 30 Atl. 950, 27 L.R.A. 383. In Wisconsin a

§ 170 (117). Rights of company as to manner of constructing and operating road. If the grant of authority specifies the particular part of the street to be occupied, or imposes any conditions as to construction or operation, such provisions must be complied with.⁸¹ Every such grant is accompanied with the implied condition, that the road shall be so constructed and operated as to produce no unnecessary or unreasonable interference with public or private rights.⁸² This necessarily follows from the fact that the user is a joint one, and that the highway is not abandoned, though the soil is devoted to an ad-

franchise to construct and operate a street railroad cannot be granted to a railroad company organized under the general railroad law. *State v. Milwaukee etc. R. R. Co.*, 116 Wis. 142, 92 Wis. 546. Where a company obtained permission to use a street it was held estopped to deny that it was a street. *Bedenbaugh v. Southern Ry. Co.*, 69 S. C. 1, 48 S. E. 53.

⁸¹*Pacific R. R. Co. v. Leavenworth City*, 1 Dill. 393. Where a statute required tracks to be placed as nearly as possible in the middle of a street, it means as nearly as practicable. *Finch v. Riverside & A. R. R. Co.*, 87 Cal. 597, 25 Pac. 765.

⁸²*Baker v. Selma St. & Suburban Ry. Co.*, 135 Ala. 552, 33 So. 685, 93 Am. St. Rep. 42; *St. Louis etc. R. R. Co. v. Neely*, 63 Ark. 636, 37 L.R.A. 616; *Shea v. Potrero etc. R. R. Co.*, 44 Cal. 414; *Chicago, B. & Q. R. R. Co. v. City of Quincy*, 139 Ill. 355, 28 N. E. 1069; *Town of Rice v. Chicago etc. R. R. Co.*, 30 Ill. App. 481; *Louisville & N. R. R. Co. v. Whitley Co.*, 95 Ky. 215, 24 S. W. 604, 44 Am. St. Rep. 220; *Hepting v. New Orleans Pass. R. R. Co.*, 36 La. An. 898; *Shreveport v. St. Louis S. W. Ry. Co.*, 115 La. 885, 40 So. 298; *Poole v. Falls Road Elec. R. R. Co.*, 88 Md. 533, 41 Atl. 1069; *Pennsylvania S. V. R. R. Co. v. Phila. & R. R. Co.*, 157 Pa. St. 42, 27 Atl. 683; *Jones v. Erie & W. R. R. Co.*, 169

Pa. St. 333, 32 Atl. 535, 47 Am. St. Rep. 916; *Heilman v. Lebanon etc. R. R. Co.*, 180 Pa. St. 627, 37 Atl. 199; *Philadelphia & N. R. R. Co. v. Berks County R. R. Co.*, 2 Woodward's Dees. 361; *Stroudsburg Borough v. Stroudsburg Pass. R. R. Co.*, 12 Pa. Co. Ct. 124; *Stroudsburg Borough v. Wilkes-Barre etc. R. R. Co.*, 12 Pa. Co. Ct. 395; *Berks & D. Turnpike Co. v. Lebanon & M. St. R. R. Co.*, 3 Pa. Dist. Ct. 55; *Arbenz v. Wheeling & H. R. R. Co.*, 33 W. Va. 1, 10 S. E. 14, 5 L.R.A. 371; *City of Moundsville v. Ohio R. R. Co.*, 37 W. Va. 92, 16 S. E. 514, 20 L.R.A. 161; *Evans v. Chicago etc. R. R. Co.*, 86 Wis. 597, 57 N. W. 354. In *Heilman v. Lebanon etc. R. R. Co.*, 180 Pa. St. 627, 628, 37 Atl. 199, the court says: "When permission is given them to occupy a public street, they acquire thereby not an exclusive right upon its surface, but a right concurrent with that of the general public. Their cars are a substitute for the private carriage and the public omnibus. They must move them along their tracks upon the surface of the street to the grade of which they are required to conform. They have no right to grade or fill or in any manner interfere with the access to private property from the highway, or so to construct the road as to interfere with public travel, or disturb adjacent owners."

ditional public use. Thus, under a general authority to occupy a street, the road must be laid substantially at the grade of the street, that is, with only such elevations and depressions as are necessary to secure a regular grade,⁸³ and in the traveled roadway, and not over the curb or sidewalk.⁸⁴ Under such general authority only a single track can be laid down, and that can only be used for purposes of transportation.⁸⁵ But the authorities are not uniform upon this point⁸⁶ and doubtless much would

⁸³Savannah etc. R. R. Co. v. Shiels, 33 Ga. 601; Tate v. Ohio & Miss. R. R. Co., 7 Ind. 479; Hutton v. Indiana Central Ry. Co., 7 Ind. 522; Protzman v. Indianapolis & Cinn. R. R. Co., 9 Ind. 467, 68 Am. Dec. 650; Lackland v. North Missouri R. R. Co., 31 Mo. 180; S. C. 34 Mo. 259; Randle v. Pacific R. R. Co., 65 Mo. 325; Swenson v. Lexington, 69 Mo. 157; Cross v. St. Louis etc. Ry. Co., 77 Mo. 318; Smith v. Kansas City etc. R. R. Co., 98 Mo. 20, 11 S. W. 259; Farrar v. Midland Elec. Ry. Co., 101 Mo. App. 140, 74 S. W. 500; Heilman v. Lebanon etc. R. R. Co., 180 Pa. St. 627, 37 Atl. 199; Berks & D. Turnpike Co. v. Lebanon & M. St. R. R. Co., 3 Pa. Dist. Ct. 55. The company may make such alterations of grade as are reasonably necessary for the proper construction of the road. Laroe v. Northampton St. Ry. Co., 189 Mass. 254, 75 N. E. 255. Authority to lay tracks on a street at a given grade, means that the final surface must be of that grade, not that the street may be brought to that grade and then the ties and rails placed on top of that. Given v. Des Moines 70 Ia. 637. But in such case the company will be estopped from alleging that its road was not properly constructed. Eslich v. Mason City etc. R. R. Co., 75 Ia. 443, 39 N. W. 700.

⁸⁴Lavison v. Chicago, St. L. & N. O. Ry. Co., 1 McGloin, La. 299; *but see contra*, Koehmel v. New Orleans, M. & C. R. R. Co., 27 La. An. 442;

Kennedy v. Detroit R. R. Co., 108 Mich. 390, 66 N. W. 495; Breen v. Pittsburg etc. Ry. Co., 220 Pa. St. 612, 69 Atl. 1047. If some other location than the middle of the street is specified in the grant, the road may, of course, be laid as specified. Kellinger v. Forty-second St. R. R. Co., 50 N. Y. 206; Carson v. Central R. R. Co., 35 Cal. 325; Clark v. Second etc. St. R. R. Co., 3 Phil. 259. But in Ohio it is held that if the track is so located as to be an obstruction to the convenient access to the abutting property, the owner is entitled to compensation. Street Railway v. Cumminsville, 14 Ohio St. 523. A grant is not bad because it does not specify the location of the tracks, as that is a matter for subsequent regulation. Baker v. Selma St. & Suburban Ry. Co., 130 Ala. 474, 30 So. 464.

⁸⁵Lackland v. North Missouri R. R. Co., 31 Mo. 180; Southern Pacific R. R. Co. v. Reed, 41 Cal. 256; *contra*: Davis v. C. & N. W. Ry. Co., 46 Ia. 389.

⁸⁶The following hold the contrary: Workman v. So. Pac. R. R. Co., 129 Cal. 536, 62 Pac. 185; Davis v. C. & N. W. Ry. Co., 46 Ia. 389; *and see* Street Railway Co. v. West Side Ry. Co., 48 Mich. 433. In Indianapolis & St. Louis R. R. Co. v. Calvert, 110 Ind. 555, it was held that one who had granted the right to lay one track in the street in front of his property could not enjoin the construction of a switch which was laid

depend upon the language of the grant. Authority to construct a *line* of street railway on a specified street was held to authorize a double track.⁸⁷ Such an authority does not authorize a double decked road.⁸⁸ Authority to cross a street does not sanction the occupation of the street with concrete abutments supporting a trestle.⁸⁹ Authority to lay tracks or a single or double track is not exhausted by laying one track.⁹⁰ The company, having once located its track, has exhausted its right of choice, and may not move it to a different location.⁹¹ The company may not build a depot⁹² or passenger platform,⁹³ a water hydrant,⁹⁴ a switch tower⁹⁵ or other structure⁹⁶ in the street, or turn it into

on the same ties and projected fourteen inches for a space of nineteen feet opposite his property. But authority to construct a single track was held not to authorize side tracks in *Kavanagh v. Mobile etc. R. R. Co.*, 78 Ga. 271.

⁸⁷*Brown v. Atlanta Ry. & P. Co.*, 113 Ga. 462, 39 S. E. 71.

⁸⁸*Matter of Long Island R. R. Co.*, 189 N. Y. 428, 82 N. E. 443; *Dunmore v. Scranton Ry. Co.*, 34 Pa. Supr. Ct. 294.

⁸⁹*Delaware etc. R. R. Co. v. Syracuse*, 165 Fed. 631 (C. C. A.)

⁹⁰*Workman v. So. Pac. R. R. Co.*, 129 Cal. 536, 62 Pac. 185; *Varwig v. Cleveland etc. R. R. Co.*, 6 Ohio C. C. 439; *Detroit Citizens St. Ry. Co. v. Board of Public Works*, 126 Mich. 554, 85 N. W. 1072; *Ransom v. Citizens' R. R. Co.*, 104 Mo. 375, 16 S. W. 416. Where a company had authority to occupy so much of certain streets as "may be necessary for the construction of its track, sidings and branches," and it constructed and used a single track for many years, it was held to have exhausted its power. *Pennsylvania S. V. R. R. Co. v. Philadelphia & N. R. R. R. Co.*, 157 Pa. St. 42, 27 Atl. 683.

⁹¹*Little Miami R. R. Co. v. Naylor*, 2 Ohio St. 235, 59 Am. Dec. 667; especially if the new position is more injurious to abutting property. *Dubach v. Hannibal & St. Joseph R. R. Co.*, 89 Mo. 483. *See contra*. *Snyder*

v. *Pennsylvania R. R. Co.*, 55 Pa. St. 340. It is held that a company may change the gauge of its road at pleasure, when not restricted. *Appeal of Borough of Millvale*, 131 Pa. St. 1, 18 Atl. 993, 1 Am. R. R. & Corp. Rep. 151. *And see Denver etc. R. R. Co. v. Barsaloux*, 15 Col. 290, 25 Pac. 165; *Denver etc. R. R. Co. v. Toohey*, 15 Col. 297, 25 Pac. 166. If tracks are first laid too near together, they may be changed to give the proper space. *Simpson v. Phila. etc. R. R. Co.*, 4 Mont. Co. L. Rep. 102.

⁹²*Barney v. Keokuk*, 4 Dill. 593, *affirmed* 94 U. S. 324; *Cooper v. Alden, Harr. Mich.* 72; *Village of Wayzata v. Great Northern R. R. Co.*, 50 Minn. 438, 52 N. W. 913; *Riley v. Pennsylvania Co.*, 32 Pa. Super. Ct. 579. Authority to construct an elevated railroad on a street does not authorize a depot or stairs on an intersecting street. *Mattlage v. New York El. Ry. Co.*, 67 How. Pr. 232.

⁹³*Higbee v. Camden & Amboy R. R. Co.*, 19 N. J. Eq. 276, 20 N. J. Eq. 435.

⁹⁴*Chicago Great Western Ry. Co. v. First M. E. Church*, 102 Fed. 85, 42 C. C. A. 178, 50 L.R.A. 488.

⁹⁵*Williams v. Los Angeles Ry. Co.*, 150 Cal. 592, 89 Pac. 330.

⁹⁶*Taber v. New York etc. R. R. Co.*, 28 R. I. 269.

a switch yard or freight delivery or place for the storage of cars.⁹⁷ Nor change the grade of its tracks without authority. The company may lay a switch track to its barns and occupy for a short distance for that purpose a street not named in its grant.⁹⁸ And the company may lay water pipes on its right of way across streets to conduct water to a suitable place for its engines.⁹⁹ Where two companies have a franchise on the same street each should locate with due regard to the rights of the other and so as to best accommodate the public.¹ The rights of the company are at all times subject to reasonable regulation by the municipality.²

⁹⁷Neitzey v. Baltimore etc. R. R. Co., 5 Mackey 34; Trook v. B. & P. R. R. Co., 3 McArthur, D. C. 392; Glick v. Baltimore & O. R. R. Co., 19 D. C. 412; Fitzgerald v. Baltimore & O. R. R. Co., 19 D. C. 513; Baltimore & O. R. R. Co. v. Fitzgerald, 2 App. Cas. D. C. 501; Atlantic etc. Ry. Co. v. Montezuma, 122 Ga. 1, 49 S. E. 738; Owensborough etc. R. R. Co. v. Sutton (Ky.) 13 S. W. 1036; Grand Rapids etc. R. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306; S. C. 47 Mich. 393; Lackland v. North Missouri R. R. Co., 31 Mo. 180; Randle v. Pacific R. R. Co., 65 Mo. 325; Pennsylvania R. R. Co. v. Angel, 41 N. J. Eq. 316; Mahady v. Brunswick R. R. Co., 91 N. Y. 148; Iron Mt. R. R. Co. v. Bingham, 87 Tenn. 522, 11 S. W. 705, 4 L.R.A. 622; Baugh v. Texas & N. O. R. R. Co., 80 Tex. 56, 15 S. W. 587. As to whether a city may authorize such a use of streets as against abutting owners, see Gilchrist Co. v. Des Moines, 128 Ia. 49, 102 N. W. 831; Cummins v. Summunduwot Lodge, 9 Kan. App. 153, 58 Pac. 486; Lake Shore etc. Ry. Co. v. Elyria, 69 Ohio St. 414, 69 N. E. 738; Pickup v. Phila., etc. Ry. Co., 29 Pa. Super. Ct. 631. In Baltimore etc. R. R. Co. v. Fitzgerald, 2 App. Cas. D. C. 501, the court says: "What the legislative power has given to the company

is simply the right which individuals have by the common law, the right of transit over certain streets of the city—substantially that and nothing more. Individuals, in their use of the right of transit, may not convert the streets into freight yards, or into places of storage for their wagons, or into stables for their horses. When the right of transit is given to a railroad company, why should it be construed to mean any more than it does in the case of an individual, due regard being had to the different instrumentalities used." Chester v. B. O. R. R. Co., 217 Pa. St. 402, 66 Atl. 654.

⁹⁸Brooklyn Heights R. R. Co. v. Brooklyn, 152 N. Y. 244, 46 N. E. Rep. 509.

⁹⁹Canton v. Canton Cotton Warehouse Co., 84 Miss. 268, 36 So. 266, 105 Am. St. Rep. 428, 65 L.R.A. 561.

¹General Electric R. R. Co. v. Chicago City R. R. Co., 66 Ill. App. 362.

²State v. St. Paul City Ry. Co., 78 Minn. 331, 81 N. W. 200; Allen v. Jersey City, 53 N. J. L. 522, 22 Atl. 257; State v. Atlantic etc. R. R. Co., 141 N. C. 736, 53 S. E. 290; Baltimore v. Baltimore T. & G. Co., 166 U. S. 673, 17 S. C. Rep. 696. And see Pittsburgh etc. R. R. Co. v. Chicago, 159 Ill. 369, 42 N. E. Rep. 781; Burlington v. Burlington St. R. R. Co., 49 Ia. 144.

§ 171 (117a). **The doctrine of an unreasonable or excessive use of streets by railroads, as a basis for compensation.** Some of the States which hold that railroads of all kinds are legitimate street uses, have sought to avoid the harsh consequences of this doctrine by introducing the qualification, that for any unreasonable or excessive use of the street the abutter may have compensation. Thus in a recent Kentucky case it is said: "The design of a railroad is to facilitate travel. It, therefore, subserves the object of a street dedication instead of destroying it. It may, therefore, under legislative sanction, have a joint occupancy of a street with other modes of travel having the same end in view; but it cannot occupy or use it to the unreasonable exclusion or obstruction of such other modes. The limitation upon the public right is that the appropriation of the street must not be inconsistent with the end for which it was established." And again: "It follows that the construction of a railroad along a public street is not, *per se*, an encroachment upon the individual right of the abutting lot-owner, and whether he can complain depends not upon the fact of its existence, but the manner of its construction and operation. If he is thereby deprived of its reasonable use, he may appeal to the courts for relief; but if he is merely inconvenienced thereby, or suffers some remote consequential injury, it is *damnum absque injuria*." And in a subsequent part of the opinion the court indicates what might be regarded as an unreasonable use. "Undoubtedly, if the structure shall be so located as to unreasonably obstruct the abutting lot-owner's means of egress and ingress from and to his lot; or, if he suffers substantial injury by having smoke, sparks or cinders thrown into his house; or its walls be cracked by the movement of heavy trains, he would be entitled to recover for the damages directly resulting from such causes."³ There are a number of cases in other States

³Fulton v. Short^t Route Trans. Co., 85 Ky. 640, 652-655, 4 S. W. 332, 7 Am. St. Rep. 619. See also Louisville & N. R. R. Co. v. Orr, 91 Ky. 109, 15 S. W. 8; Commonwealth v. City of Frankfort, 92 Ky. 149, 17 S. W. 287; Kentucky & I. Bridge Co. v. Kreiger, 93 Ky. 243, 19 S. W. 738; Strickley v. Chesapeake & O. R. R. Co., 93 Ky. 323, 20 S. W. 261; Chesapeake & O. R. R. Co. v. Kobs (Ky.),

30 S. W. 6; Maysville & B. S. R. R. Co. v. Ingram (Ky.), 30 S. W. 8; Maysville etc. R. R. Co. v. Conner (Ky.), 29 S. W. 344; Covington etc. R. R. & Bridge Co. v. Kleymeyer, 105 Ky. 609, 49 S. W. 484; Ferguson v. Covington etc. Bridge Co., 108 Ky. 662, 57 S. W. 460; Elizabethtown etc. R. R. Co. v. Tierney, 11 Ky. L. R. 526; Louisville Southern R. R. Co. v. Cogar, 15 Ky. L. R. 444; Louis-

which give more or less of support to this doctrine.⁴ In a Tennessee case the court, in enjoining the laying of a third track in a street forty-one feet wide, said: "A public street, either with or without the consent of municipal authorities, cannot be converted into a mere roadbed for railroad tracks, over which trains will be constantly operated, to the destruction of the public use, and of the business and property interest of

ville Southern R. R. Co. v. Hooe, 18 Ky. L. R. 521, 35 S. W. 266, 38 S. W. 131.

⁴In Kansas, while it is the general doctrine that the abutter cannot recover for the ordinary inconveniences occasioned by a commercial railroad in a street, yet he may recover, if there is such a practical obstruction of the street in front of his lots as to amount to a denial of access. Kansas etc. R. R. Co. v. Cuykendall, 42 Kan. 234, 21 Pac. 1051; Wichita etc. R. R. Co. v. Smith, 45 Kan. 264, 25 Pac. 623; Atchison etc. R. R. Co. v. Davidson, 52 Kan. 739, 35 Pac. 787. The court appears to rule, as matter of law, that where there is ample room between the sidewalk and the railroad for the passage of vehicles, there can be no recovery. Kansas etc. R. R. Co. v. Cuykendall, 42 Kan. 234, 21 Pac. 1051: Kansas etc. R. R. Co. v. Mahler, 45 Kan. 565, 26 Pac. 22; Wichita etc. R. R. Co. v. Smith, 45 Kan. 264, 25 Pac. 623; Herndon v. Kansas etc. R. R. Co. 46 Kan. 560, 26 Pac. 959. See also Ottawa etc. R. R. Co. v. Larson, 40 Kan. 301, 19 Pac. 661, 2 L.R.A. 59; Central Branch U. P. R. R. Co. v. Andrews, 41 Kan. 370, 21 Pac. 276; Kansas etc. R. R. Co. v. McAfee, 42 Kan. 239, 21 Pac. 1052; Chicago etc. R. R. Co. v. Union Inv. Co., 51 Kan. 600, 33 Pac. 378. In Missouri the doctrine that a commercial railroad, laid at the grade of a street, is a legitimate use of the street, has long been established, but late cases have

introduced the qualification that if the street is so narrow that the running of trains excludes ordinary traffic for the time being, or if the road is laid on one side or over the sidewalk, so as to be especially injurious to abutting property, the abutting owners may enjoin its construction or operation. Lockwood v. Wabash R. R. Co., 122 Mo. 86, 26 S. W. 698, 24 L.R.A. 516; Knapp, Stout & Co. v. St. Louis Trans. Co., 126 Mo. 26, 28 S. W. 627; Schulenburg & B. L. Co. v. St. Louis etc. R. R. R. Co., 129 Mo. 455, 31 S. W. 796; Brown v. Chicago etc. R. R. Co., 137 Mo. 529, 38 S. W. 1099; Watson v. Robertson Ave. R. R. Co., 69 Mo. App. 548; Sherlock v. Kansas City Belt R. R. Co., 142 Mo. 172, 43 S. W. 629, 64 Am. St. Rep. 551; Corby v. Chicago etc. R. R. Co., 150 Mo. 457, 52 S. W. 282. In the first of these cases the court says: "Beginning with Lackland v. Railroad Co., 31 Mo. 183, this court has uniformly held that laying a track on the established grade of a street, under legislative authority, and operating a steam railway thereon, was not subjecting the street to a public use different from that contemplated in the original grant. This proposition was most ably and strenuously attacked in Gaus & Sons Mannf. Co. v. St. Louis etc. Ry. Co., 113 Mo. 308, 20 S. W. 658, but we felt constrained by the unbroken line of decisions to adhere to it. Porter v. Railroad Co., 33 Mo. 128; Cross v. Railway Co., 77 Mo. 321; Smith v.

Railroad Co., 98 Mo. 24, 11 S. W. Rep. 259; Kansas City, St. J. & C. B. R. R. Co. v. St. Joseph T. R. R. Co., 97 Mo. 469, 10 S. W. 826; Rude v. City of St. Louis, 93 Mo. 408, 6 S. W. 257. This proposition unqualifiedly leads to this conclusion: A city may authorize a steam railroad to occupy a street with its tracks, and operate its trains over it. The abutting proprietors cannot recover damages for the injury resulting to their property, although it is subject to smoke, noise and cinders at all hours of day and night, and all ingress and egress for the legitimate purposes of business cut off, except at such times as the railroad may elect not to run trains upon it. Debarred from redress in that direction, they apply to a court of equity to restrain what they conceive is a public and private nuisance, and ask for protection of their own right to use the street as abutting owners, and are met with the assertion that what the law itself licenses cannot be a nuisance, and that they must submit to whatever inconvenience ensues, because they might have anticipated that the street would be subjected to this servitude when they purchased their property. If these propositions are true, then it results that an abutting property owner on a street may have his property damaged or destroyed without redress, notwithstanding the constitutional guaranty 'that private property shall not be taken or damaged for public use without just compensation.' Const. art. 2, § 21. But, while it has been said that a city might authorize a railroad company to lay its tracks in its streets, it also has been determined by this court and many others that the city could not, in the exercise of its power, create a nuisance in the streets, or devote them, or any part of them, to a purpose in-

consistent with the rights of the public or abutting property owners. Thus, in Dubach v. Railroad Co., 89 Mo. 483, 1 S. W. Rep. 86, Judge Henry, speaking for the whole court, said: 'If the character of a street should be such that defendant's track could not be laid upon the street without hindering the public from using it, then, no matter how important to the company that its track should be laid in that street, it could not be done.' 'Nor is it competent for a city to authorize such use of a street dedicated as a street as will destroy it as a thoroughfare for the public use.' In this case it is too plain to be evaded that the grant conferred by this ordinance practically creates a monopoly in defendant in the use of this street. * * * Every time the defendant uses this street with its trains it absolutely deprives all teamsters of ordinary freight wagons access to this street, and, as the ordinance gives defendant the privilege of using it with its trains as often as it pleases, such use is utterly incompatible with the purposes for which this street was created, and is unreasonable. The municipal assembly had no right to appropriate this street to defendant's use in this way. * * * No case in this State is authority for such exclusive use of a highway, and, if it was, we should not follow it. The company is a common carrier, and entitled as such to collect tolls, but not exclusive right to monopolize a public street, and shut out the public and other carriers. Holding, as we do, that this ordinance, in view of the facts developed, amounts to a practical condemnation of this portion of Collins street to the private and almost exclusive use of defendant, we think the injunction was properly granted by the Circuit Court, and plaintiffs had such an interest

those abutting thereon.”⁵ The doctrine is not confined to commercial railroads, but has been applied to street railroads⁶ and interurban roads.⁷ These cases, as it seems to the writer, are a virtual confession of error in holding railroads to be a legitimate street use. They illustrate, however, the tendency of courts to work out in one way or another, substantial justice to the property owner. The theory of the cases would seem to be that while a railroad is a proper street use and in line with the purposes for which streets are established, yet if it materially interferes with the abutting owner’s rights or easements in the street, or interferes with the enjoyment of such rights and easements so as to produce a material impairment of the property, then the abutter is entitled to compensation. The question turns upon the effect of the railroad on the abutting property. There does not seem to be any criterion to measure this effect but a pecuniary one. If property is depreciated in value from any cause it is materially affected and it does not seem as though any distinction could be made between a large and a small depreciation. These cases, if thus interpreted, will, therefore, bring about the same result as those which hold that a railroad is not a legitimate street use, for in the latter class of cases there can be no recovery, if there is no diminution in value.⁸

In a recent Kentucky case, at the suit of an abutting owner,

as would enable them to maintain the action.” The following cases also may be referred to as being more or less in line with the foregoing, though some of them contain *dicta* only. *Newell v. Minneapolis etc. R. R. Co.*, 35 Minn. 112, 59 Am. Rep. 303; *People v. Ft. Wayne etc. R. R. Co.*, 92 Mich. 522, 52 N. W. 1010, 16 L.R.A. 752; *State v. Trenton Pass. R. R. Co.*, 58 N. J. L. 666, 34 Atl. 1090; *Iron Mt. R. R. Co. v. Bingham*, 87 Tenn. 522, 11 S. W. 705, 4 L.R.A. 622; *Brumit v. Railroad Co.*, 106 Tenn. 124, 60 S. W. 505; *Jackson v. Chicago etc. R. R. Co.*, 41 Fed. 656.

⁵*Pepper v. Union Ry. Co.*, 113 Tenn. 53, 85 S. W. 864, to same effect; *Mason v. Ohio River R. R. Co.*, 51 W. Va. 183, 41 S. E. 418.

⁶*Ashland, etc. St. Ry. Co. v. Faulkner*, 106 Ky. 332, 51 S. W. 806, 43 L.R.A. 554; *McQuaid v. Portland & V. R. R. Co.*, 18 Or. 237, 22 Pac. 899, 1 Am. R. R. & Corp. Rep. 34; *Paquet v. Mt. Tabor St. R. R. Co.*, 18 Ore. 233, 22 Pac. 906; *Dooley Block v. Salt Lake Rapid Transit Co.*, 9 Utah, 31, 33 Pac. 229, 8 Am. R. R. & Corp. Rep. 327; *Smith v. East End. St. R. R. Co.*, 87 Tenn. 626, 11 S. W. 709.

⁷*Mordhurst v. Ft. Wayne etc. Traction Co.*, 163 Ind. 268, 71 N. E. 642, 106 Am. St. Rep. 222, 66 L.R.A. 105; *Kinsey v. Union Traction Co.*, 169 Ind. 563, 81 N. E. 922.

⁸*Post*, § 751.

a decree was entered, limiting a railroad company, which had authority to occupy a street, to a single track laid in the middle of the street and also restricting the number of freight trains which might be operated during business hours. On appeal the decree was sustained as to the former part and reversed as to the latter, thus holding that a court of equity cannot, in advance, restrict a company as to the use of its tracks.⁹

§ 172 (117b). Railroads in streets constructed without authority, or used in a way not authorized.—Remedies of abutters. A railroad in a street may be unauthorized because constructed without any color of authority whatever, or because constructed under an apparent authority which is void for any reason,¹⁰ or has expired,¹¹ or because constructed in a manner or location not within the authority granted.¹² In all such cases the railroad is a public nuisance¹³ and the abutter is entitled to the same remedies as in any other similar case of

⁹Kentucky & I. Bridge Co. v. Kreiger, 93 Ky. 243, 19 S. W. 738.

¹⁰Daly v. Georgia etc. R. R. Co., 80 Ga. 793, 12 Am. St. Rep. 286; Georgia etc. R. R. Co. v. Harvey, 84 Ga. 372, 10 S. E. 971; Commonwealth v. City of Frankfort, 92 Ky. 149, 17 S. W. 287; Lockwood v. Wabash R. R. Co., 122 Mo. 86, 26 S. W. 698, 24 L.R.A. 516; Schulenberg etc. Co. v. St. Louis etc. R. R. Co., 129 Mo. 455, 31 S. W. 796; Stevenson v. Mo. Pac. R. R. Co. (Mo.), 31 S. W. Rep. 793; Appeal of Hartman Steel Co., 129 Pa. St. 551, 18 Atl. 553; Thomas v. Inter-County St. R. R. Co., 167 Pa. St. 120, 31 Atl. 426.

¹¹Atchison St. R. R. Co. v. Nave, 38 Kan. 744, 17 Pac. 587, 5 Am. St. Rep. 800.

¹²Reynolds v. Presidio etc. R. R. Co., 1 Cal. App. 229, 81 Pac. 1118; Louisville & N. R. R. Co. v. Whitley County Court, 95 Ky. 215, 24 S. W. 604, 44 Am. St. Rep. 220; Hepting v. New Orleans Pac. R. R. Co., 36 La. An. 898; Village of Wayzata v. Great Northern R. R. Co., 50 Minn. 438, 52 N. W. Rep. 913; Knapp, Stout & Co. v. St. Louis Transfer

R. R. Co., 126 Mo. 26, 28 S. W. Rep. 627; Thompson v. Pennsylvania R. R. Co., 51 N. J. L. 42, 15 Atl. 833; Hussner v. Brooklyn City R. R. Co., 114 N. Y. 433, 21 N. E. 1002, 11 Am. St. Rep. 679; Mattlage v. New York El. R. R. Co., 67 How. Pr. 232, 14 Daly 1; Galveston Wharf. Co. v. Gulf etc. R. R. Co., 81 Tex. 494, 17 S. W. 57; Dooley Block v. Salt Lake Rapid Transit Co., 9 Utah 31, 33 Pac. 229, 8 Am. R. R. & Corp. Rep. 327.

¹³Birmingham Ry. Lt. & P. Co. v. Moran, 151 Ala. 187, 44 So. 152; City Store v. San Jose etc. Ry. Co., 150 Cal. 277, 88 Pac. 977; Kavanagh v. Mobile etc. R. R. Co., 78 Ga. 271; Glaesner v. Anheuser-Busch Brewing Assn., 100 Mo. 508, 13 S. W. 707, 2 Am. R. R. & Corp. Rep. 420; Van Horne v. Newark Pass. R. R. Co., 48 N. J. Eq. 332, 21 Atl. 1034; Louisville etc. R. R. Co. v. Cincinnati etc. Ry. Co., 3 Ohio N. P. (N.S.) 109; Appeal of Hartman Steel Co., 129 Pa. St. 551, 18 Atl. 553; Thomas v. Inter-County St. R. R. Co., 167 Pa. St. 120, 31 Atl. 476; Watkins v. West Phila. Pass. R. R. Co., 1 Pa. Dist. Ct.

public nuisance in the streets.¹⁴ If the abutting owner has the fee, he is entitled to the same rights and remedies as though the public easement did not exist, and may maintain trespass,¹⁵ ejectment¹⁶ or bill for injunction.¹⁷ If the fee is in the public, as both title and possession would be in a third party, the only remedy of the abutting owner is an action on the case, or a bill for injunction.¹⁸ But a bill cannot be maintained for that purpose by one who does not own property upon the street, though he be a tax-payer.¹⁹ If the abutter does not own the fee he must show some special damages in order to be entitled to an action,²⁰ but this may consist in the diminution in the value of

463; *Haines v. 22d. St. etc. R. R. Co.*, 1 Pa. Dist. Ct. 506; *City of Moundsville v. Ohio R. R. Co.*, 37 W. Va. 92, 16 S. E. 514, 20 L.R.A. 161; *Hetzell v. B. & O. R. R. Co.*, 169 U. S. 26.

¹⁴*Baltimore etc. R. R. Co. v. Taylor*, 6 App. D. C. 259; *Garnett v. Jacksonville etc. R. R. Co.*, 20 Fla. 889; *Morris etc. R. R. Co. v. Newark*, 10 N. J. Eq. 352; *Parrot v. Cincinnati etc. R. R. Co.*, 3 Ohio St. 330; *Cooper v. Alden, Harr. Mich.* 72; *Knickerbocker Ice Co. v. Philadelphia & Reading R. R. Co.*, 15 Phila. 48; *Hopkins v. Calasauqua Mfg. Co.*, 180 Pa. St. 199, 36 Atl. 735; *Patton v. Olympnia D. & L. Co.*, 15 Wash. 210, 46 Pac. 237.

¹⁵*Morrell v. Chicago etc. R. R. Co.*, 49 Minn. 526, 52 N. W. 140; *Florida Southern R. R. Co. v. Brown*, 23 Fla. 104; *Jacksonville etc. R. R. Co. v. Lockwood*, 33 Fla. 573, 15 So. 327; *Post*, § 931, and, generally, as to remedies in such cases, *see post*, chap. xxviii.

¹⁶*Wager v. Troy Union R. R. Co.*, 25 N. Y. 526; *Carpenter v. Oswego & S. R. R. Co.*, 24 N. Y. 655. *Contra*: *Edwardsville R. R. Co. v. Sawyer*, 92 Ill. 377. *See post*, § 926.

¹⁷*Imlay v. Union Branch R. R. Co.*, 26 Conn. 249, 68 Am. Dec. 392; *Southern Cotton Oil Co. v. Bull*, 116 Ga. 776, 43 S. E. 52; *Cox v. Louis-*

ville R. R. Co., 48 Ind. 178; *Harrington v. St. Paul etc. R. R. Co.*, 17 Minn. 215; *Swinhart v. St. Louis etc. Ry. Co.*, 207 Mo. 423, 105 S. W. 1043; *Henderson v. New York Cent. R. R. Co.*, 78 N. Y. 423; *Wright v. Syracuse etc. R. R. Co.*, 92 Hun 32, 36 N. Y. S. 901; *Auchinloss v. Met. R. R. Co.*, 69 App. Div. 63, 74 N. Y. S. 534; *Thomas v. Inter-County St. R. R. Co.*, 167 Pa. St. 120, 31 Atl. 476; *Hannum v. Media etc. Elec. Ry. Co.*, 200 Pa. St. 44, 49 Atl. 789; *Hall v. Pa. R. R. Co.*, 215 Pa. St. 172, 64 Atl. 408; *Ford v. Chicago & N. W. Ry. Co.*, 14 Wis. 609, 80 Am. Dec. 791; *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181; *post*, § 891.

¹⁸*Atchison St. R. R. Co. v. Nave*, 38 Kan. 744, 17 Pac. 587, 5 Am. St. Rep. 800; *Dooley Block v. Salt Lake Rapid Transit Co.*, 9 Utah 31, 33 Pac. 229, 8 Am. R. R. & Corp. Rep. 327; *Hart v. Buchner*, 54 Fed. 925.

¹⁹*Davis v. New York*, 14 N. Y. 506.

²⁰*Reynolds v. Presidio etc. R. R. Co.*, 1 Cal. App. 229, 81 Pac. 1118; *Jacksonville etc. R. R. Co. v. Thompson*, 34 Fla. 346, 16 So. 282; *Kavanagh v. Mobile etc. R. R. Co.*, 78 Ga. 271; *East Tennessee etc. R. R. Co. v. Boardman*, 96 Ga. 356, 23 S. E. 403; *Atchison St. R. R. Co. v. Nave*, 38 Kan. 744, 17 Pac. 587, 5 Am. St. Rep. 800; *Van Horne v.*

his property.²¹ When the road is constructed in a negligent and improper manner,²² or when it is so operated or used as to unnecessarily obstruct the street,²³ the company will be liable. The subject of remedies is elsewhere discussed.²⁴

§ 173. Switch tracks to private property and railroads for private use. It is a general rule that the use of streets cannot be granted for private purposes.²⁵ It follows necessarily that a purely private railway cannot be constructed upon, across or along a public street or highway. There is practically no question about this proposition, the difficulty lying in its application. The great weight of authority is that a side, switch or spur track connecting a railroad with private property, such as a factory, elevator, quarry or other place of business and for the accommodation of the owner of the property is a private use and that such tracks cannot be laid upon or across the streets and highways.²⁶ The question was much debated

Newark Pass. R. R. Co., 48 N. J. Eq. 332, 21 Atl. 1034; Watkin v. W. Phila. Pass. R. R. Co., 1 Pa. Dist. Ct. 463; Haines v. 22d St. etc. R. R. Co., 1 Pa. Dist. Ct. 506.

²¹See *post*, §§ 199, 951.

²²Cadle v. Muscatine Western R. R. Co., 44 Ia. 11; Brewer v. Boston C. & F. R. R. Co., 113 Mass. 52; Kansas etc. R. R. Co. v. McAfee, 42 Kan. 239, 21 Pae. 1052; Hepting v. New Orleans Pae. R. R. Co., 36 La. An. 898; McQuaid v. Portland & V. R. R. Co., 18 Ore. 237, 22 Pac. 899, 1 Am. R. R. & Corp. Rep. 34; Paquet v. Mt. Tabor St. R. R. Co., 18 Ore., 233, 22 Pac. 906; Harman v. Louisville R. R. Co., 87 Tenn. 614, 11 S. W. 703; Cane Belt R. R. Co. v. Ridgeway, 38 Tex. Civ. App. 108, 85 S. W. 496; Evans v. Chicago etc. R. R. Co., 86 Wis. 597, 57 N. W. 354, 39 Am. St. Rep. 908.

²³Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146; Neitzey v. Baltimore etc. R. R. Co., 5 Mackey 34; Glick v. B. & O. R. R. Co., 19 D. C. 412; Fitzgerald v. B. & O. R. R. Co., 19 D. C. 513; Baltimore & P. R. R. Co. v. Fitz-

gerald, 2 App. Cas. D. C. 501; Frith v. Dubuque, 45 Ia. 406; Atchison & Nebraska R. R. Co. v. Garside, 10 Kan. 552; Owensborough etc. R. R. Co. v. Sutton (Ky.), 13 S. W. 1086; Stevenson v. Mo. Pac. R. R. Co. (Mo.), 31 S. W. 793; Thompson v. Pennsylvania R. R. Co., 51 N. J. L. 42, 15 Atl. 833; State v. Trenton Pass. R. R. Co., 58 N. J. L. 666, 34 Atl. 1090, 33 L.R.A. 129; Mahady v. Brunswick R. R. Co., 91 N. Y. 148; Green v. New York Central R. R. Co., 65 How. Pr. 154; Mt. Auburn Cable R. R. Co. v. Neare, 54 Ohio St. 153, 42 N. E. 768; Smith v. East End St. R. R. Co., 87 Tenn. 626, 11 S. W. 709; Iron Mt. R. R. Co. v. Bingham, 87 Tenn. 522, 4 L. R. A. 622; Baugh v. Texas & N. O. R. R. Co., 80 Tex. 56, 15 S. W. 587.

²⁴See Chapters 27 and 28.

²⁵Ante, § 127.

²⁶Macon v. Harris, 73 Ga. 42; Macon v. Harris, 75 Ga. 761; Heath v. Des Moines etc. Ry. Co., 61 Ia. 11; Mikesell v. Durkee, 34 Kan. 509; Commonwealth v. Frankfort, 92 Ky. 149, 17 S. W. 287; Bradley v. Pharr, 45 La. An. 426, 12 So. 618; Green

in one of the New York cases cited where the proprietor of a department store in the city of New York was licensed by the city authorities to construct a switch track from his store to the street car tracks in front with a view to operating freight cars between his store and a delivery station some miles away. At the suit of the owner of the adjoining property the court enjoined the construction of the track, as being for a private use. "There can be no doubt," says the court, "that an abutting owner in a city has the right of free access to and from his property in the usual way. He may use for that purpose such means of conveyance for the transportation and delivery of goods and merchandise as are usual and customary, but the right of ingress and egress by railroad cars running upon railroad tracks has not yet, I think, been sanctioned by custom or by law. The claim of right in that regard is far in advance of any use of the public streets that has heretofore been recognized. It may be argued that if the abutting owner may use carriages, wagons, trucks and even motor cars for the purpose of free access and the transaction of his business, why not permit him to use railroad cars upon a railroad track? Such an argument is misleading, since if carried to its logical conclusion the result would be that the governing body in a city would have the power to surrender the use of streets to private parties for exclusively private purposes."²⁷

v. Portland, 32 Me. 431; Gustafson v. Hamm, 56 Minn. 334, 57 N. W. 1054; Glaesner v. Anheuser-Busch Brewing Co., 100 Mo. 508, 13 S. W. 707, 2 Am. R. R. & Corp. Rep. 420; Swift v. Delaware etc. R. R. Co., 66 N. J. Eq. 34, 57 Atl. 456; State v. Trenton, 36 N. J. 79; Fanning v. Osborne, 102 N. Y. 441, *reversing* S. C. 34 Hun 121; Hatfield v. Straus, 189 N. Y. 208, 82 N. E. 172, *affirming* S. C. 117 App. Div. 671, 102 N. Y. S. 934; Barker v. Hartman Steel Co., 129 Pa. St. 551, 18 Atl. 553; Richi v. Chattanooga Brewing Co., 105 Tenn. 651, 58 S. W. 646; Cereghino v. Ore. Short Line R. R. Co., 26 Utah 467, 73 Pac. 634, 90 Am. St. Rep. 843; Pittsburgh etc. R. R. Co. v. Benwood Iron Works,

31 W. Va. 710, 8 S. E. 453. *And see post*, § 264.

²⁷Hatfield v. Straus, 189 N. Y. 208, 82 N. E. 172, *affirming* S. C. 117 App. Div. 671, 102 N. Y. S. 934. Four judges concurred in the opinion and three dissented. We quote from the dissenting opinion as follows: "The right to lay pipes or other conduits for the transmission of gas, electricity, steam, light, heat or power, like the right to lay tracks for cars in which to transport passengers or property, must be granted for public use, but for the purpose of using the gas, electricity, steam, light, heat and power individual members of society constituting the public are granted permission to excavate in the public streets and high-

In Illinois such spur or switch tracks are regarded as a part of the railway and a public use, though serving but a single establishment and constructed at the expense of its owner.²⁸ When such a track is open to all who wish to use it and either does serve various parties or is capable of doing so, it is a public use and may be laid in a street.²⁹ So such a track may be laid to the premises of an express company for use in its business, as such companies are common carriers and the use is a public one.³⁰

§ 174 (118). Railroad across street.—Right of abutter on street to compensation. A railroad cannot be laid across a highway without compensation to the owner of the fee.³¹ Generally, the mode of crossing and the duties of the company in

ways and permanently lay pipes and other conduits to connect their abutting property with the pipes and other conduits in the streets and highways through which to take the gas, etc. for private use. Unless spur tracks of some kind are allowed to the owners of abutting property, the loading and unloading of express cars must necessarily be confined to the public streets, and thus public travel will be delayed and the general public as well as individuals be greatly inconvenienced.

"For the purpose of confining abutting owners to a reasonable use of the public streets it is no more necessary to require that express cars be loaded and unloaded in the streets and highways than it is that individual consumers of gas or water be required to take the same in some way from the distributing pipes in the public streets. A reasonable use of all public service corporations would seem to require that abutting owners of property be allowed to make such reasonable connection with the public service pipes, conduits or tracks as will tend to public utility. The defendant's goods, wares and merchandise must be transported from place to place, and I cannot see that running one car over a spur track from the street

surface railroad would be more inconvenient to the public than running heavy motor cars or trucks drawn by horses at irregular intervals over the defendant's driveway. If such a use of the street tends to public benefit it cannot be said to be an unreasonable use thereof. No actual permanent taking of a portion of the street for private purposes is proposed. The board of estimate and apportionment in their discretion may have found that the use of such spur track within the hours mentioned would relieve a congested street and generally tend to the public good." pp. 229, 230.

²⁸Truesdale v. Peoria Grape Sugar Co., 101 Ill. 561; Mills v. Parlin, 106 Ill. 60; Chicago Dock & Canal Co. v. Garrity, 115 Ill. 155, 3 N. E. 448; People v. Blocki, 203 Ill. 363, 67 N. E. 809. *And see* White v. Blanchard Bros. etc. Co., 178 Mass. 363, 59 N. E. 1025; Stockdale etc. v. Rio Grande Western Ry. Co., 28 Utah 201, 77 Pac. 849.

²⁹Clark v. Blackmar, 47 N. Y. 150; *post*, § 264.

³⁰Dulaney v. United Rys. & Elec. Co., 104 Md. 423, 65 Atl. 45.

³¹Trustees v. Auburn & Rochester R. R. Co., 3 Hill 567; Starr v. Camden etc. R. R. Co., 24 N. J. L. 592.

respect to the same are defined by statute. Crossings above or below grade are frequently made, requiring alteration in the surface of the street to make suitable approaches. For damages resulting from such lateral approaches, the right to recover depends upon principles already discussed in this chapter. Different States hold different doctrines. If the crossing above or below grade is wholly unnecessary, the company will be liable for damages caused by the lateral approaches.³² As such changes of grade are made solely to accommodate the railroad company, and not at all for the purpose of improving the highway for travel, being always, in fact, a detriment to the highway as such, the abutting owners should receive compensation for any injury to their rights in the street as already defined, as by interfering with access or light and air, as well as for actual invasion of their lots, as by turning surface water onto them or otherwise. Some courts have allowed a recovery for such damages,³³ and others have denied it.³⁴ Damages to abutting property by the

³²Louisville & Nashville R. R. Co. v. Hodge, 6 Bush 141; Farrant v. First Division of St. Paul & Pac. Ry. Co., 13 Minn. 311. The company may make necessary alterations; Commonwealth v. Hartford & New Haven R. R. Co., 14 Gray 379.

³³Alabama M. R. R. Co. v. Williams, 92 Ala. 277, 9 So. 203; Nicholson v. New York & New Haven R. R. Co., 22 Conn. 74; Longworth v. Meriden & W. R. R. Co., 61 Conn. 451, 23 Atl. 827; Indianapolis etc. R. R. Co. v. Smith, 52 Ind. 428; Egbert v. Lake Shore etc. R. R. Co., 6 Ind. App. 350, 33 N. E. 659; Pennsylvania Co. v. Stanley, 10 Ind. App. 421, 37 N. E. 288, 38 N. E. 421; Hitchcock v. Chicago etc. R. R. Co., 88 Iowa, 242, 55 N. W. 337; Louisville & N. R. R. Co. v. Finley, 86 Ky. 294, 5 S. W. 753; Kaiser v. St. Paul S. & T. F. R. R. Co., 22 Minn. 149; Perrine v. Pa. R. R. Co., 72 N. J. L. 398, 61 Atl. 87; McNulta v. Ralston, 5 Ohio C. C. 330; Wead v. St. Johnsbury & L. C. R. R. Co., 64 Vt. 52, 24 Atl. 361; Buchner v. C. M. & N. W. Ry. Co., 56 Wis. 403; Buchner v. Chicago, Mil.

& St. Paul Ry. Co., 60 Wis. 264; Shealy v. Chicago etc. R. R. Co., 72 Wis. 471, 40 N. W. 145; Shealy v. Chicago etc. R. R. Co., 77 Wis. 653, 46 N. W. 887; West v. Parkdale, 8 Ont. 59; West v. Parkdale, 7 Ont. 270.

³⁴Nottingham v. B. & P. R. R. Co., 3 McArthur, 517; Franz v. Sioux City etc. R. R. Co., 55 Ia. 107; Atchison etc. R. R. Co. v. Arnold, 52 Kan. 729, 35 Pac. 780; Atchison etc. R. R. Co. v. Luening, 52 Kan. 732, 35 Pac. 801; Whittier v. Portland & Kennebec R. R. Co., 38 Me. 26; Putnam v. Boston etc. R. R. Co., 182 Mass. 351, 65 N. E. 790; Hyde v. Boston etc. St. Ry. Co., 194 Mass. 80, 80 N. E. 517; Phelps v. Detroit, 120 Mich. 447, 79 N. W. 640; Towle v. Eastern Railroad, 17 N. H. 519; Uline v. New York Cent. R. R. Co., 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661; Conklin v. New York, Ontario & Western Ry. Co., 102 N. Y. 107; Ottenot v. New York etc. R. R. Co., 119 N. Y. 603, 23 N. E. 169; Rauenstein v. New York etc. R. R. Co., 136 N. Y. 528, 32 N. E. 528, 18 L.R.A.

construction of viaducts or bridges over railroads, and by the approaches to such viaducts or bridges, are considered in another section.³⁵ Where a railroad crosses a *cul de sac*, and so interferes with the access to property thereon, a recovery may be had, although the surface of the street is not interfered with.³⁶ But where a street was crossed by a cut two blocks away from the plaintiff's property, it was held he could not recover, as his right of access or outlet was not interfered with.³⁷ Where a street was crossed seventy-one feet from the plaintiff's property and blocked up at that point, so as to leave plaintiff on a *cul de sac*, he was held entitled to recover damages.³⁸ So where one end of an alley was blockaded, so as to interfere with access to the rear of plaintiff's lot.³⁹ Where the crossing is at a distance from the plaintiff's property and the street is obstructed or rendered inconvenient and the plaintiff's property is thereby depreciated in value, the question of liability is one upon which

768, 7 Am. R. R. & Corp. Rep. 520; S. C. 120 N. Y. 661, 24 N. E. 1020; Buck v. Conn. & Pass. River R. R. Co., 42 Vt. 370; Richardson v. Vermont Central R. R. Co., 25 Vt. 465, 60 Am. Dec. 459.

³⁵Ante, § 138, post, §§ 178, 191. Harvey v. Georgia Southern etc. R. R. Co., 90 Ga. 66, 15 S. E. Rep. 783.

³⁶Brakken v. Minneapolis etc. R. R. Co., 29 Minn. 41; Hayes v. Chicago etc. R. R. Co., 46 Minn. 349, 49 N. W. Rep. 61.

³⁷Shaubut v. St. Paul & Sioux City R. R. Co., 21 Minn. 502; and see Brakken v. Minneapolis & St. Louis Ry. Co., 32 Minn. 425; S. C. 31 Minn. 45, and 29 Minn. 41; also Rochette v. Chicago, Mil. & St. Paul Ry. Co., 32 Minn. 201; Barnum v. Minnesota Transfer Co., 33 Minn. 365; Lakkie v. Chicago etc. R. R. Co., 44 Minn. 438, 46 N. W. 912. But see Glaessner v. Anheuser-Busch Brewing Assn., 100 Mo. 508, 13 S. W. 707, 2 Am. R. R. & Corp. Rep. 420.

³⁸Johnsen v. Old Colony R. R. Co., 18 R. I. 642, 29 Atl. 594. But see O'Connor v. St. Louis etc. R. R. Co., 56 Ia. 735.

³⁹Harvey v. Georgia So. R. R. Co., 90 Ga. 66, 15 S. E. 783; Pennsylvania R. R. Co. v. Stanley, 10 Ind. App. 421, 37 N. E. 288, 38 N. E. 421; Kaji v. Chicago etc. R. R. Co., 57 Minn. 422, 59 N. W. 493; Leavenworth etc. R. R. Co. v. Curtan, 51 Kan. 432, 33 Pac. 297.

⁴⁰In addition to the cases already cited we refer to the following cases favoring the right of recovery: Chicago v. Pulcyn, 129 Ill. App. 179; Danville etc. R. R. Co. v. Tidrick, 137 Ill. App. 553; Park v. C. & S. W. R. R. Co., 43 Ia. 636; Dairy v. Iowa Cent. Ry. Co., 113 Ia. 716, 84 N. W. 688. *Contra*: Little Rock, etc. R. R. Co. v. Newman, 73 Ark. 1, 83 S. W. 653, 108 Am. St. Rep. 17; Newton v. New York etc. R. R. Co., 72 Conn. 420, 44 Atl. 813; Grey v. Greenville, etc. Ry. Co., 59 N. J. Eq. 372, 46 Atl. 638; Matter of Grade Crossing Comrs., 166 N. Y. 69, 59 N. E. 706; Scrutchfield v. Choctaw etc. R. R. Co., 18 Okl. 308, 88 Pac. 1048, 9 L.R.A. (N.S.) 496. And see Sheehan v. Fall River, 187 Mass. 356, 73 N. E. 544; Buckholz v. New York etc. R. R. Co., 148 N. Y. 640, 43 N. E. 76; Buckholtz

the authorities are very conflicting.⁴⁰ The question is more fully treated in a subsequent section.⁴¹

The duty of a railroad company to restore a highway crossed is a continuing one, and where it crosses by a bridge, it must be replaced when necessary.⁴² But it is not obliged to strengthen a bridge in order to make it safe for a street railway.⁴³ Authority to cross any highway in the line of the railway does not authorize a track on a curve, which does not cross the highway but begins a branch road.⁴⁴ Legislative authority to cross any *public road or way*, was held to include city streets as well as country roads.⁴⁵

§ 175 (119). Right of municipality having the fee of street to receive compensation. As we have already had occasion to observe a municipal corporation, though holding the fee of its streets, holds them simply as a trustee for the public.⁴⁶ It has no such private right or interest therein, as entitles it to compensation when a railroad is laid thereon by legislative authority, though without its consent.⁴⁷ The same rule applies to street railroads as to commercial railroads.⁴⁸ So as to a public bridge.⁴⁹ So the legislature may authorize the use of city streets

v. New York etc. R. R. Co., 71 App. Div. 452, 75 N. Y. S. 824, S. C. affirmed 177 N. Y. 550, 69 N. E. 1121; Western Union Tel. Co. v. Shepard, 72 App. Div. 108, 76 N. Y. S. 247; Shepherd v. Baltimore etc. R. R. Co., 130 U. S. 426, 9 S. C. 598.

⁴¹Post, § 191.

⁴²Chesapeake etc. R. R. Co. v. Dyer County, 87 Tenn. 712, 11 S. W. 943, and see Henry v. Wabash Western R. R. Co., 44 Mo. App. 100.

⁴³Briden v. New York etc. R. R. Co., 27 R. I. 569, 65 Atl. 315.

⁴⁴Bangor etc. R. R. Co. v. Smith, 47 Me. 34.

⁴⁵Canton v. Canton Cotton Warehouse Co., 84 Miss. 268, 36 So. 266, 105 Am. St. Rep. 428, 65 L.R.A. 561.

⁴⁶Ante, § 127.

⁴⁷Savannah etc. R. R. Co. v. Savannah, 45 Ga. 602; Clinton v. Cedar Rapids & Mo. River R. R. Co., 24 Ia.

⁴⁵⁵; Chicago etc. R. R. Co. v. New-

ton, 36 Ia. 299; Canton v. Canton Cotton Warehouse Co., 84 Miss. 268, 36 So. 266, 105 Am. St. Rep. 428, 65 L.R.A. 561; People v. Kerr, 27 N. Y. 188; Milwaukee v. Milwaukee etc. R. R. Co., 7 Wis. 85. See Richmond etc. R. R. Co. v. Estill Co., 105 Ky. 808, 49 S. W. 805. *Contra*, Donnaker v. State, 8 S. & M. 649.

⁴⁸Savannah & Thunderbolt R. R. Co. v. Savannah, 45 Ga. 602; Clinton v. Clinton & Lyons H. Ry. Co., 37 Ia. 61; Milbridge etc. Elec. R. R. Co., Appellants, 96 Me. 110, 51 Atl. 818; People v. Kerr, 27 N. Y. 188.

⁴⁹County of Floyd v. Rome St. R. R. Co., 77 Ga. 614. So the legislature may authorize a drainage district to remove a county bridge and require the county to rebuild at its own expense. Heffner v. Cass & Morgan Cos., 193 Ill. 439, 62 N. E. 201, 58 L.R.A. 353.

for other purposes, as for gas pipes,⁵⁰ or a telephone line,⁵¹ without compensation to the municipality.⁵² But where a railroad company made an exclusive appropriation of a part of a public highway including a bridge, and tore down the bridge and used the materials, it was held that the town could recover therefor,⁵³ being put in this respect upon the same footing as a turnpike company. And where a railroad was so constructed as to destroy a portion of a county road, it was held that the county could maintain an action for damages.⁵⁴ A municipality may enjoin the construction of a railroad upon a street without authority,⁵⁵ and when a railroad or any of its appurtenances is unlawfully upon a street, it can maintain an action for its removal.⁵⁶

§ 176 (120). When the owner is estopped from claiming damages. Where the owner of property urges or induces a railroad company to locate its road upon the adjacent street, or gives his consent thereto, he will, after the invitation or consent has been acted upon, be estopped from claiming damages or enjoining the operation of the road.⁵⁷ But a consent to locate

⁵⁰La Harfe v. Elm Tp. Gas etc. Co., 69 Kan. 97, 76 Pac. 448.

⁵¹State Line Telephone Co. v. Ellison, 121 App. Div. 499, 106 N. Y. S. 130; Zanesville v. Zanesville Tel. & Tel. Co., 64 Ohio St. 67, 59 N. E. 781, 83 Am. St. Rep. 725, 52 L.R.A. 150.

⁵²In State v. Dunlap, 49 Wash. 385, 95 Pac. 321, it appears that a statute permitted railroad companies to take highways not in any municipality upon making compensation to the county. So in Nebraska not excepting city streets. South Omaha v. Omaha B. & T. Ry. Co., 76 Neb. 718, 107 N. W. 988.

⁵³Troy v. Cheshire R. R. Co., 23 N. H. 83, 55 Am. Dec. 177.

⁵⁴Louisville & N. R. R. Co. v. Whitley County Court, 95 Ky. 215, 24 S. W. 604, 44 Am. St. Rep. 220; Big Sandy Ry. Co. v. Boyd County, 125 Ky. 345. And where a highway was flooded by a dam it was held the public authorities could recover damages. Commissioners of Highways v. Sperling, 120 Mich. 493, 79 N. W. 693.

⁵⁵Stamford v. Stamford H. R. R. Co., 56 Conn. 381, 1 L.R.A. 375; Brunswick & W. R. R. Co. v. City of Waycross, 88 Ga. 68, 13 S. E. 835; City of Philadelphia v. Phila. etc. R. R. Co., 19 Phil. 507; Williamsport v. Williamsport Pass. R. R. Co., 3 Pa. Co. Ct. 39; Philadelphia v. Phila. etc. R. R. Co., 7 Pa. Co. Ct. 390. *But see* Supervisors v. Sea View R. R. Co., 23 Hun 180.

⁵⁶Village of Wayzata v. Great Northern R. R. Co., 50 Minn. 438, 52 N. W. 913; City of St. Louis v. Mo. Pac. R. R. Co., 114 Mo. 13, 21 S. W. 202; Morris & Essex R. R. Co. v. Newark, 10 N. J. Eq. 352; Rio Grande R. R. Co. v. Brownsville, 45 Tex. 88.

⁵⁷Joyce v. East St. Louis El. St. R. R. Co., 43 Ill. App. 157; Burkham v. Ohio & M. R. R. Co., 122 Ind. 344, 23 N. E. 799; Union Barb Wire Co. v. Chicago etc. R. R. Co., 79 Ia. 614, 44 N. W. 900; Wolf v. Covington & Lexington R. R. Co., 15 B. Mon. 404; Miller v. Railroad Co., 6 Hill 61; Murdock v. Prospect Park & Coney Island R. R.

an elevated railroad in the middle of the street, is not a consent to build over the sidewalk and will not bar an action for the latter mode of construction.⁵⁸ Where the location of a railroad in a street was indicated by a single red line, a consent to the location is a consent to a single track only, and does not bar an action for an additional track.⁵⁹

§ 177 (121). Measure of damages: Remedies. A discussion of the proper measure of damages and of the elements which may properly be considered in all cases where a recovery may be had for injuries by a railroad laid in a public street, together with a consideration of the proper remedies to be resorted to in such cases, are reserved for a subsequent part of this treatise, to which the reader is referred.⁶⁰

§ 178 (121a). Where there is a change of grade in connection with the construction of a railroad in a street. It has already been shown that damages occasioned by a change of grade for the purpose of improving a street as a highway are not a taking within the constitution.⁶¹ We have also endeavored to show that if the grade is changed for any other purpose than to improve the street for passage, any injury to the abutting property caused thereby will amount to a taking.⁶² Ordinarily when a railroad is laid in a street it is required to conform to the grade of the street.⁶³ If a grade has been established and the street has never been brought to the grade so established, a railroad will not be liable to abutters for merely bringing the street to the established grade in order to lay its tracks at such grade.⁶⁴

Co., 10 Hun 598; Heinburg v. Manhattan Ry. Co., 162 N. Y. 352, 56 N. E. 899; Smythe v. Brooklyn El. R. R. Co., 193 N. Y. 335, *modifying* 121 App. Div. 282; Wolford v. Fisher, 48 Ore. 479, 84 Pac. 850, 87 Pac. 530, 7 L.R.A.(N.S.) 991. *See further post*, § 760; Oklahoma City etc. Ry. Co. v. Dunham, 39 Tex. Civ. App. 575, 88 S. W. 849.

⁵⁸Shaw v. New York El. R. R. Co., 78 App. Div. 290, 79 N. Y. S. 915.

⁵⁹Stephens v. New York etc. R. R. Co., 175 N. Y. 72, 67 N. E. 119, *reversing* 61 App. Div. 612.

⁶⁰Measure of Damages. *post*. § 735. A few of the leading cases are here cited. Inlay v. Union Branch R. R.

Co., 26 Conn. 249; South Carolina R. R. Co. v. Steiner, 44 Ga. 546; Henderson v. N. Y. Central R. R. Co., 78 N. Y. 423. As to the apportionment of damages where only part of the track is on the land of the abutting owner, *see* Blesch v. C. & N. W. Ry. Co., 48 Wis. 168; S. C. 43 Wis. 183; Kucherman v. C. C. & D. Ry. Co., 46 Ia. 366. Remedies, *post*, chapters xxvii and xxviii.

⁶¹*Ante*, §§ 96, 137.

⁶²*Ante*, §§ 137, 138.

⁶³Smith v. Kansas City etc. R. R. Co., 98 Mo. 20, 11 S. W. 259; Farrar v. Midland Elec. Ry. Co., 101 Mo. App. 140, 74 S. W. 500.

⁶⁴Interstate Consol. R. T. R. R. Co.

But sometimes the grade is changed, not for the purpose of facilitating ordinary traffic, but of accommodating the tracks of a railroad company. According to the better reason, as we conceive it, the abutter in such case is entitled to recover for any damage to his property caused by the change. The authorities, however, are conflicting and, perhaps, on the whole, do not favor a recovery.⁶⁵ In a New York case a railroad was constructed

v. Early, 46 Kan. 197, 26 Pac. 422; Offut v. Montgomery Co., 94 Md. 115, 50 Atl. 419; Underwood v. Worcester, 177 Mass. 173, 58 N. E. 589. *Contra*: Stritesky v. Cedar Rapids, 98 Ia. 373, 67 N. W. 271.

⁶⁵The following are opposed to a recovery on the ground of a taking. Protzman v. Indianapolis etc. R. R. Co., 9 Ind. 467; Weir v. Owensboro & N. R. R. Co. (Ky.), 21 S. W. 643; Briggs v. Lewiston etc. R. R. Co., 79 Me. 363, 10 Atl. 47, 1 Am. St. Rep. 316; O'Brien v. Baltimore Belt R. R. Co., 74 Md. 363, 22 Atl. 141; Garrett v. Lake Roland El. R. R. Co., 79 Md. 277, 29 Atl. 830, 10 Am. R. R. & Corp. Rep. 39; Offutt v. Montgomery Co., 94 Md. 115, 50 Atl. 419; Underwood v. Worcester, 177 Mass. 173, 58 N. E. 589; Laroz v. Northampton St. Ry. Co., 189 Mass. 254, 75 N. E. 255; Austin v. Detroit etc. Ry. Co., 134 Mich. 149, 96 N. W. 35; Thompson v. Macon City, 106 Mo. App. 84, 80 S. W. 1; Corey v. Buffalo etc. R. R. Co., 23 Barb. 482; County of Chester v. Brewer, 117 Pa. St. 647, 12 Atl. 577. *And see* Green v. City & Suburban R. R. Co., 78 Md. 294, 28 Atl. 626, 44 Am. St. Rep. 288.

The following cases favor a recovery: Chicago etc. R. R. Co. v. Eisert, 127 Ind. 156, 26 N. E. 759; Atchison & C. R. R. Co. v. Davidson, 52 Kan. 739, 35 Pac. 787; Nichols v. Ann Arbor etc. R. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L.R.A. 371; Tate v. M. K. & T. R. R. Co., 64 Mo. 149; Egerer v. New York Cent. etc. R. R. Co., 130 N. Y. 108, 29 N. E. 95, 5 Am. R.

R. & Corp. Rep. 241; Reining v. New York etc. R. R. Co., 128 N. Y. 157, 28 N. E. 640, 14 L.R.A. 133, 5 Am. R. R. & Corp. Rep. 476; Coatsworth v. Lehigh Val. R. R. Co., 156 N. Y. 451; Coyne v. Memphis, 118 Tenn. 651, 102 S. W. 355; Zehren v. Milwaukee Elec. R. R. Co., 99 Wis. 83, 74 N. W. 538, 67 Am. St. Rep. 844.

The following cases, involving the right to recover in such cases, arose under constitutions or statutes giving compensation for property damaged or injured as well as for property taken: Alabama M. R. R. Co. v. Coskry, 92 Ala. 254, 9 So. 202; Eslich v. Mason City etc. R. R. Co., 75 Ia. 443, 39 N. W. 700; Taylor v. Bay City St. R. R. Co., 101 Mich. 140, 59 N. W. 447; Sheely v. Kansas City Cable R. R. Co., 94 Mo. 574, 7 S. W. 579, 4 Am. St. Rep. 396; Smith v. Kansas City etc. R. R. Co., 98 Mo. 20, 11 S. W. 259; Brady v. Kansas City Cable R. R. Co., 111 Mo. 329, 19 S. W. 953; Spencer v. Met. St. R. R. Co., 58 Mo. App. 513; Fred v. Kansas City Cable R. R. Co., 65 Mo. App. 121; Nebraska etc. R. R. Co. v. Scott, 31 Neb. 571, 48 N. W. 390; County of Chester v. Brewer, 117 Pa. St. 647, 12 Atl. 577; Baltimore etc. R. R. Co. v. Duke, 129 Pa. St. 422, 18 Atl. 560; Westheffer v. Lebanon & A. St. R. R. Co., 163 Pa. St. 54, 29 Atl. 873; Hatch v. Tacoma etc. R. R. Co., 6 Wash. 1, 32 Pac. 1063; Kaufman v. Tacoma etc. R. R. Co., 11 Wash. 632, 40 Pac. 137; Arbenz v. Wheeling etc. R. R.

on an embankment supported by retaining walls in the middle of a street. The embankment was twenty-four feet wide and six feet high opposite the plaintiff's property. The grade and plan were approved by the city authorities. It was held that the interference with access to the plaintiff's property was a taking within the constitution, though the fee of the street was in the city.⁶⁶ In a precisely similar case in Maryland it was held that there was no taking.⁶⁷ A change of grade for the benefit of a railroad company does not come within the general authority vested in municipal corporations to establish and change the grade of streets.⁶⁸ If a change of grade is made by a railroad company without authority, the company will be liable in tort for all damages thereby occasioned to abutting property.⁶⁹ Where, after a railroad had been constructed on its own right of way fifty feet wide, land on either side was taken for a street, abutters are not entitled to damages for a change of grade of the

Co. 33 W. Va. 1, 10 S. E. 14, 5 L.R.A. 371. *See also* Jacksonville etc. R. R. Co. v. Thompson, 34 Fla. 346, 16 So. 282; Kansas etc. R. R. Co. v. Cuykendall, 42 Kan. 234, 21 Pac. 1051; Witt v. St. Paul & N. P. R. R. Co., 38 Minn. 122, 35 N. W. 862; Jarboe v. Carrollton, 73 Mo. App. 347; Hulett v. Missonri etc. R. R. Co., 80 Mo. App. 87; Iron Mt. R. R. Co. v. Birmingham, 87 Tenn. 522, 11 S. W. 705, 4 L.R.A. 622; Trustees First Cong. Church v. Milwaukee etc. R. R. Co., 77 Wis. 158, 45 N. W. 1086; Jackson v. Chicago etc. R. R. Co., 41 Fed. 656; Hendrie v. Toronto etc. R. R. Co., 26 Ontario 667.

⁶⁶Reining v. New York etc. R. R. Co., 128 N. Y. 157, 28 N. E. 640, 14 L.R.A. 133.

⁶⁷Garrett v. Lake Roland El. R. R. Co., 79 Md. 277, 29 Atl. Rep. 830, 24 L.R.A. 396, 10 Am. R. R. & Corp. Rep. 39. The defendant railroad company built a causeway about fifteen feet wide in the center of a street, to form the approach to a bridge by which the railroad was carried over another railroad. The causeway was of masonry and left

less than ten feet between it and the curb. It was nine feet high at the bridge and declined to the grade of the street. Plaintiff owned lots abutting on the street opposite, but did not own the fee of the street. Held, that the interference with access and other injury to plaintiff's property did not constitute a taking thereof within the meaning of the constitution.

⁶⁸Phelps v. Detroit, 120 Mich. 447, 79 N. W. 640; Reining v. New York etc. R. R. Co., 128 N. Y. 157, 28 N. E. 640, 14 L.R.A. 33; Zehren v. Milwaukee Elec. R. R. Co., 99 Wis. 83, 74 N. W. 538, 67 Am. St. Rep. 844.

⁶⁹Peabody v. Boston etc. R. R. Co., 181 Mass. 76, 62 N. E. 1047; Peabody v. New York etc. R. R. Co., 187 Mass. 489, 73 N. E. 649; Smith v. Kansas City etc. R. R. Co., 98 Mo. 20, 11 S. W. 259; Farrar v. Midland Elec. Ry. Co., 101 Mo. App. 140, 74 S. W. 500; United N. J. R. R. & C. Co. v. Lewis, 68 N. J. Eq. 437, 59 Atl. 227; Murray Hill Land Co. v. Milwaukee Lt., H. & T. Co., 110 Wis. 555, 86 N. W. 199.

railroad, the same being still on its private right of way.⁷⁰ If a railway so constructs its road in a street as to turn surface water on the plaintiff's property, it will be liable.⁷¹ Under the general rule as to damages from a change of grade, if the grade of tracks is changed in good faith for the benefit of the highway, there can be no recovery.⁷²

§ 179 (121b). Compensation for additional track or change of use. In Indiana it has been held that when a railroad company locates its road upon a public street, the fee of which is in the abutting owners, and damages are assessed and paid in the usual way, the company will acquire the right to lay down as many tracks as its business may require, and that such right can be exercised from time to time as the business of the company increases.⁷³ According to this view a railroad company, by condemning a right of way through a street, would acquire the same rights in the street, at least as against abutting owners, as it would have in a right of way over private property. Certainly such a result ought not to be countenanced unless the statutes clearly compel it. When a railroad seeks to condemn a right of way in a street it can only acquire a right to the joint use of the street, and its application should describe exactly the extent of the right or joint use proposed to be acquired; in other words, the number of tracks to be laid down and their location, and how they are to be used.⁷⁴ This is the only way in which the rights of the railroad, the public and the abutting

⁷⁰Bennett v. Long Island R. R. Co., 181 N. Y. 431, 74 N. E. 418, *affirming* S. C. 89 App. Div. 379, 85 N. Y. S. 938.

⁷¹Monarch Mfg. Co. v. Omaha etc. Ry. Co., 127 Ia. 511, 103 N. W. 493; McCloskey v. Atlantic City R. R. Co., 70 N. J. L. 20, 56 Atl. 669; *ante*, §§ 112, 141. *See* Hewett v. Canton, 182 Mass. 220, 65 N. E. 42.

⁷²Welde v. New York etc. R. R. Co., 28 App. Div. 379.

⁷³White v. Chicago etc. R. R. Co., 122 Ind. 317, 23 N. E. 782, 7 L.R.A. 257, 2 Am. R. R. & Corp. Rep. 138; Chicago etc. R. R. Co. v. Eisert, 127 Ind. 156, 26 N. E. 759. In the first of these cases the court says: "In appropriation of a right of way, or

the location of a railroad along, upon and over a street or highway, the location and appropriation is made with a view of future use and occupancy by the railroad company to the full extent and purpose as the future operation and business of the company may demand. It gives to the company, as against the property owners affected thereby, the right to use such street or highway, upon which the road is located, a full and complete right to use the same, for railroad purposes, in as full and ample a manner as the necessity of the company may demand."

⁷⁴Post, §§ 549-552.

owners can be defined and the damages assessed upon an intelligent basis.⁷⁵ In most cases railroads are constructed in streets by virtue of a legislative or municipal grant of authority, and not by virtue of a condemnation. If the construction of the railroad is wrongful as against the abutting owner, he has his remedy for damages, but he can only recover for the damages actually sustained, and these must depend upon the use which has actually been made of the street. He can only recover the damages caused by the tracks already laid. If, after damages have been assessed for the original entry, or after the same have been barred by the lapse of time, an additional track is laid, either under the original or a subsequent authority, there is a clear right to recover the damages thereby occasioned.⁷⁶ The fact that a narrow gauge track is changed to a standard gauge laid on the same ties or that heavier trains are operated was held to give no right to compensation.⁷⁷ But in another case, where a dummy passenger railroad changed hands and was used by the purchaser chiefly for heavy freight trains drawn by the ordinary locomotive, it was held that an abutting owner had a right of action for the damage resulting to his property from

⁷⁵Philadelphia etc. R. R. Co. v. Berks County R. R. Co., 2 Woodward's Dees. (Pa. Supm.) 361; Pennsylvania S. V. R. R. Co. v. Philadelphia etc. R. R. Co., 157 Pa. St. 42, 27 Atl. 683; Jones v. Erie & W. V. R. R. Co., 169 Pa. St. 333, 32 Atl. 335, 47 Am. St. Rep. 916. In the last case the court says: "The presumption arising under the general railroad laws that a railroad company takes, when it enters by virtue of the right of eminent domain, the breadth of 60 feet for its right of way, is only applicable where the entry is adverse, and upon property subject to seizure or appropriation under general laws. It does not apply to an entry upon a public street, whether made under authority of the act of assembly incorporating the company, or by virtue of municipal consent."

⁷⁶Denver & R. G. R. R. Co. v. Costes, 1 Col. App. 336, 28 Pac. 1129;

Rock Island etc. R. R. Co. v. Johnson, 204 Ill. 488, 68 N. E. 549; Hogan v. Chicago etc. R. R. Co., 208 Ill. 161, 69 N. E. 853; McCarty v. C. B. & Q. R. R. Co., 34 Ill. App. 273; Maltman v. Chicago etc. R. R. Co., 41 Ill. App. 229; Stephens v. New York etc. R. R. Co., 175 N. Y. 72, 67 N. E. 119; In re New York El. R. R. Co., 76 Hum 384, 28 N. Y. Supp. 110; Maitland v. Manhattan R. R. Co., 9 Miscl. 616, 30 N. Y. Supp. 428; C. C. & St. L. R. R. Co. v. Reeder, 6 Ohio C. C. 354; Northern Central R. R. Co. v. Holland, 117 Pa. St. 613, 12 Atl. 575. And see Ranson v. Citizens' R. R. Co., 104 Mo. 375, 16 S. W. 416; Varwig v. Cleveland etc. R. R. Co., 6 Ohio C. C. 439; Dilley v. Wilkes-Barre Pass. R. R. Co., 12 Pa. Co. Ct. 270; Illinois Central R. R. Co. v. Davis, 71 Ill. App. 99.

⁷⁷Kakeldy v. Columbia etc. R. R. Co., 37 Wash. 675, 80 Pac. 205.

the change.⁷⁸ So where the track was changed from the surface of the street to an embankment.⁷⁹

§ 180 (121c). Street railroads crossing commercial railroads. The right of way which a steam railroad acquires across a street is subject to the easement of the public in the street and to the use of the street for all legitimate street purposes. A street railroad, being generally held to be a legitimate street use,⁸⁰ it follows that it may be laid across the tracks of a steam railroad, intersecting the street without compensation.⁸¹ The same rule has been held to apply in case of interurban railroads constructed on a street or highway and crossing a commer-

⁷⁸Grossman v. Houston etc. Ry. Co., 99 Tex. 641, 92 S. W. 836; Birmingham Belt Ry. Co. v. Lockwood, 150 Ala. 610, 43 So. 819. See Stettengast v. Houston, 38 Tex. Civ. App. 623, 87 S. W. 197.

⁷⁹Louisville etc. R. R. Co. v. Cumnock, 25 Ky. L. R. 1330, 77 S. W. 933.

⁸⁰*Ante*, §§ 164, 167.

⁸¹New York etc. R. R. Co. v. Bridgeport Traction Co., 65 Conn. 410, 32 Atl. 953, 29 L.R.A. 367; Southern Ry. Co. v. Atlanta Ry. & P. Co., 111 Ga. 679, 36 S. E. 873, 51 L.R.A. 125; Chicago etc. R. R. Co. v. West Chicago St. R. R. Co., 156 Ill. 270, 40 N. E. 1008, 12 Am. R. R. & Corp. Rep. 522; General Elec. Ry. Co. v. Chicago etc. R. R. Co., 184 Ill. 588, 56 N. E. 963; Pittsburgh etc. R. R. Co. v. West Chicago St. R. R. Co., 54 Ill. App. 273; Chicago etc. R. R. Co. v. Whiting etc. R. R. Co., 139 Ind. 297, 38 N. E. 604, 11 Am. R. R. & Corp. Rep. 507, 47 Am. St. Rep. 264, 26 L.R.A. 337; Elizabethtown etc. R. R. Co. v. Ashland & C. St. R. R. Co., 96 Ky. 347, 26 S. W. 181; Louisville etc. R. R. Co. v. Bowling Green Ry. Co., 110 Ky. 788, 63 S. W. 4; Central Pass. Ry. Co. v. Philadelphia etc. R. R. Co., 95 Md. 428, 52 Atl. 752; St. Louis & Suburban Ry. Co. v. Lindell R. R. Co., 190 Mo. 246,

88 S. W. 634; Morris etc. R. R. Co. v. Newark Pass. R. R. Co., 51 N. J. Eq. 379, 29 Atl. 184; Cincinnati etc. Elec. St. Ry. v. Cincinnati etc. R. R. Co., 21 Ohio C. C. 391; Cleveland etc. Ry. Co. v. Urbana etc. Ry. Co., 5 Ohio C. C. (N. S.) 583; Buffalo etc. R. R. Co. v. Du Bois Traction Pass. R. R. Co., 149 Pa. St. 1, 24 Atl. 179; North Penn. R. R. Co. v. Inland Traction Co., 205 Pa. St. 579, 55 Atl. 774; Delaware etc. R. R. Co. v. Wilkes-Barre & W. S. R. R. Co., 1 Pa. Dist. Ct. 627; Du Bois Traction Pass R. R. Co. v. Buffalo etc. R. R. Co., 10 Pa. Co. Ct. 401; Pennsylvania R. R. Co. v. Inland Traction Co., 25 Pa. Super. Ct. 115; Atchison etc. Ry. Co. v. General Elec. Ry. Co., 112 Fed. 689, 50 C. C. A. 424; East St. Louis Ry. Co. v. Louisville etc. R. R. Co., 149 Fed. 159, 79 C. C. A. 107. *And see* Highland Ave. etc. R. R. Co. v. Birmingham Union R. R. Co., 93 Ala. 505, 9 So. 568; Birmingham Traction Co. v. Birmingham R. R. & Elec. Co., 119 Ala. 129, 24 So. 368; Atchison St. R. R. Co. v. Mo. Pac. R. R. Co., 31 Kan. 660; Kansas City etc. R. R. Co. v. St. Joseph Terminal R. R. Co., 97 Mo. 457, 10 S. W. 826; Chicago etc. R. R. Co. v. Beatrice Rapid Transit & P. Co., 47 Neb. 741, 66 N. W. 830; Buffalo etc. R. R. Co. v. New York etc. R. R. Co., 72 Hun 587, 25 N. Y.

cial railroad.⁸² Of course the street railroad company must construct the crossing at its own expense and with as little injury to the other company as possible.⁸³ Where a grade crossing of a steam railroad and street railroad is abolished by raising the tracks of the former, the work must be so done as to give sufficient head room for the cars of the street railroad company.⁸⁴ The crossing of steam railroads by street railroads is frequently regulated by statute.⁸⁵

§ 181 (121d). Railroads in streets.—Miscellaneous cases. The abutting owner has no easement in the street for backing up teams to the sidewalk for the purpose of loading and unloading freight, and the interference with such use of the street by laying a railroad therein affords no ground for an injunction or suit for damages.⁸⁶ When streets are dedicated by plat and the right is reserved to use them for railroad pur-

Supp. 265; Chicago etc. R. R. Co. v. General Elec. R. R. Co., 79 Ill. App. 569; Consolidated Traction Co. v. South Orange etc. R. R. Co., 56 N. J. Eq. 569, 40 Atl. 15. One street railroad company may cross the tracks of another without compensation. Birmingham Ry. & Elec. Co. v. Birmingham Traction Co., 122 Ala. 349, 25 So. 192.

⁸²South East etc. Ry. Co. v. Evansville etc. Elec. Ry. Co., 169 Ind. 339, 82 N. E. 765; Cleveland etc. Ry. Co. v. Feight, 41 Ind. App. 416. In Louisville etc. R. R. Co. v. N. O. Terminal Co., 120 La. 978, 45 So. 962, it was held that a steam railroad laid along a street is subject to the right of another steam railroad to cross its tracks and that the expense of constructing the crossing should be divided between the companies.

⁸³Ibid. Central Pass Ry. Co. v. Philadelphia etc. R. R. Co., 95 Md. 428, 52 Atl. 752; Briden v. New York etc. R. R. Co., 27 R. I. 569, 65 Atl. 315. In the former case the steam road filed a bill to enjoin the street railroad from crossing, until it agreed to construct the crossing

and keep it in repair at its own expense. Pending the suit the crossing was, by agreement, put in by the street railroad company. On the final hearing the defendant was enjoined from using the crossing until it entered into an agreement with the plaintiff to keep the crossing in repair in accordance with the requirements of the plaintiff's engineers and this decree was affirmed. In the Rhode Island case, where the highway was carried over the steam road by a bridge, it was held that the street railroad must strengthen the bridge at its own expense.

⁸⁴Chicago General R. R. Co. v. Chicago etc. R. R. Co., 181 Ill. 605.

⁸⁵See Jackson etc. Traction Co. v. Comrs. of Railroads, 128 Mich. 164, 87 N. W. 133; Trenton St. Ry. Co. v. United N. J. R. R. & C. Co., 60 N. J. Eq. 500, 46 Atl. 763; Geneva etc. Ry. Co. v. New York Cent. etc. R. R. Co., 163 N. Y. 228, 57 N. E. 498.

⁸⁶Hobart v. Milwaukee City R. R. Co., 27 Wis. 194, 9 Am. Rep. 461; Louisville Bagging Mfg. Co. v. Central Pass. R. R. Co., 95 Ky. 50, 23 S. W. 592; Taylor v. Bay City St. R. R. Co., 101 Mich. 140, 59 N. W. 447.

poses, the reservation confers no greater right than an ordinary grant.⁸⁷ Where land is dedicated for a street, with a railroad thereon, the dedication is subject to the right of the railroad company.⁸⁸ Where lots are conveyed to a railroad company to be used for railroad purposes, it does not carry the right to use the street to the center line thereof for such purposes, to the damage of other property of the grantor.⁸⁹ The fact that a street has been mapped out through plaintiff's land does not give a railroad company any right to occupy it without compensation.⁹⁰ Where a boulevard was laid out under a special act of the legislature, with a provision that no railway or tramway should be constructed thereon without compensation to the owner of the fee, the same as though no highway existed, it was held the legislature could not abrogate this condition by authorizing a railroad without compensation.⁹¹ Where a railroad was built on the property of the company, adjoining a street or alley, and the filling encroached slightly thereon, it was held the owner opposite had no right of action.⁹² An abutment or arch in a street for the use of a railroad, and authorized by municipal authority, is not a nuisance, which can be prevented or abated.⁹³ A telephone company may compel a railroad company subsequently occupying the street with trolley wires, to put up guard wires where it crosses the telephone line, the duty being enjoined by ordinance.⁹⁴ A consent of abutters to lay tracks in a street does not authorize any encroachment on their property, though the street is too narrow to accommodate the tracks.⁹⁵ An abutter can recover nothing for gate fixtures, erected on his fee pursuant to municipal authority or direction.⁹⁶ One railroad com-

⁸⁷Ottawa etc. R. R. Co. v. Larson, 40 Kan. 301, 19 Pac. 661, 2 L.R.A. 59.

⁸⁸City of Denver v. Denver etc. R. R. Co., 17 Col. 583, 31 Pac. 338.

⁸⁹Lamm v. Chicago etc. R. R. Co., 45 Minn. 71, 47 N. W. 455, 10 L.R.A. 268.

⁹⁰Quigley v. Penn. S. V. R. R. Co., 121 Pa. St. 35, 15 Atl. 478, S. C. 4 Mont. Co. L. Rep. 179.

⁹¹Matter of Southern Boulevard R. R. Co., 58 Hun 497, 38 N. Y. St. 550, 12 N. Y. Supp. 466; appeal from same dismissed, 128 N. Y. 93.

⁹²Rinard v. Burlington & W. R.

R. Co., 66 Ia. 440; Morris v. Wisconsin Midland R. R. Co., 82 Wis. 541, 52 N. W. 758.

⁹³Chicago & N. W. R. R. Co. v. Elgin, 91 Ill. 251; Gates v. Kansas City etc. R. R. Co., 111 Mo. 28, 19 S. W. 957.

⁹⁴State v. Janesville St. R. R. Co., 87 Wis. 72, 57 N. W. 970, 41 Am. St. Rep. 23.

⁹⁵Curtin v. Rochester R. R. Co., 78 Hun 555, 29 N. Y. Supp. 521.

⁹⁶Trustees First Cong. Church v. Milwaukee etc. R. R. Co., 77 Wis. 158, 45 N. W. 1086.

pany may be prevented by injunction from wrongfully interfering with another company in laying its tracks in a street.⁹⁷ A city cannot authorize the construction of a railroad on a private street.⁹⁸ A city may impose reasonable regulations upon a railroad company as to the manner of laying its tracks, though its authority is derived directly from the legislature.⁹⁹ A railroad company, owning abutting property, is entitled to the same remedies as any other abutter.¹ Where a railroad had built an overhead crossing, it was held that a street railroad company could not use it without compensation.² Where two main tracks and three or four side tracks had been laid in a street one hundred feet wide under due authority and had been in use eighteen years, it was held the city could not compel the removal of the tracks when they did not appear to be an unreasonable use of the street.³

IV. OTHER USES OF STREETS.

§ 182 (126). What are legitimate street uses generally. In regard to the uses which the public authorities can make, or authorize to be made, of the land acquired for streets, the general rule is that streets are laid out primarily to accommodate the public in traveling from place to place, and for use in the transportation of goods and property, and that the right attaches to do whatever is necessary or proper to facilitate such travel and transportation in the usual and ordinary modes. "The primary law of the highway is motion, and whatever vehicles are used, or whatever method of transmission of intelligence is adopted, the vehicle must move and the intelligence be transmitted by some moving body, which must pass along the highway, either on or over or perhaps under it; but it cannot permanently appropriate any part of it."⁴ But, while the pur-

⁹⁷Chicago General R. R. Co. v. West Chicago St. R. R. Co., 63 Ill. App. 464; Central Crosstown R. R. Co. v. Met. St. R. R. Co., 16 App. Div. N. Y. 229.

⁹⁸Talbot v. Richmond etc. R. R. Co., 31 Gratt. 685.

⁹⁹Harrisburg City Pass. R. R. Co. v. Harrisburg, 7 Pa. Co. Ct. 584; Same v. Same, 7 Pa. Co. Ct. 593.

¹Pennsylvania S. V. R. R. Co. v.

Reading Paper Mills, 149 Pa. St. 18, 24 Atl. 205.

²Carolina Central R. R. Co. v. Wilmington St. R. R. Co., 120 N. C. 520; Pennsylvania R. R. Co. v. Greensburg etc. R. R. Co., 176 Pa. St. 559, 35 Atl. 122, 36 L.R.A. 839.

³Colorado Springs v. Colorado etc. Ry. Co., 38 Colo. 107, 89 Pac. 820.

⁴Eels v. American Tel. & Tel. Co., 143 N. Y. 133, 38 N. E. 202, 25 L.R.A.

pose of streets is primarily for public travel and transportation, yet in populous districts it has been the immemorial custom to employ them for other purposes of a public nature which, though having little or no connection with the use or improvement of

640, 10 Am. R. R. & Corp. Rep. 69. In *Western Union Tel. Co. v. Williams*, 86 Va. 696, 11 S.E. 106, 19 Am. St. Rep. 908, 2 Am. R. R. & Corp. Rep. 258, the court says: "The right of the commonwealth is to use by going along over. This is the extent of the right. If the right was granted to the defendant to go over simply to carry its messages, then the right granted was in existence before the grant, and the right to go over is not only not disputed, but distinctly admitted. This is the servitude over the land fixed upon it by law and the whole extent of it. If anything more is taken, it is an additional servitude, and is a taking of the property within the meaning of the constitution." See also *Donovan v. Allert*, 11 N. D. 289, 91 N. W. 441, 95 Am. St. Rep. 720, 58 L.R.A. 775; *Cincinnati Inclined Plane R. R. Co. v. City & Suburban Tel. Ass'n*, 48 Ohio St. 390, 27 N. E. 890, 12 L.R.A. 534, 4 Am. R. R. & Corp. Rep. 533; *Dailey v. State*, 51 Ohio St. 348, 37 N. E. 710, 24 L.R.A. 724, 10 Am. R. R. & Corp. Rep. 687. On the other hand, the Supreme Court of Minnesota in a recent case has declared in favor of a more enlarged conception of the purpose of highways. It says: "It seems to us that a limitation of the public easement in highways to travel and the transportation of persons and property in movable vehicles is too narrow. In our judgment, public highways, whether urban or rural, are designed as avenues of communication; and, if the original conception of a highway was limited to travel and transportation of property in movable vehicles, it was because

these were the only modes of communication then known; that as civilization advanced, and new and improved methods of communication and transportation were developed, these are all in aid of and within the general purpose for which highways are designed. Whether it be travel, the transportation of persons and property, or the transmission of intelligence, and whether accomplished by old methods or by new ones, they are all included within the public 'highway easement,' and impose no additional servitude on the land, provided they do not inconsistent with the reasonably safe and practical use of the highway in other and usual and necessary modes, and provided they do not unreasonably impair the special easements of abutting owners in the street for purposes of access, light, and air. It is impracticable, as well as dangerous, to attempt to lay down, except in this general form, any rule or test of universal application as to what is or what is not a legitimate 'street or highway use.' Courts have often attempted to do so, but have always been compelled by the logic of events to shift their ground. The only safe way is to keep in mind the general purpose of highways, and adopt a gradual process of inclusion and exclusion as cases arise. * * * It is said that 'the primary law of the street is motion.' It is true motion is the law of the street, in the sense that the person or thing to be transmitted or transported must move; but it is not true in the sense that the medium or agency by or through which it is conveyed or transmitted must move. Pipes laid

the street as a highway, are not inconsistent with such use.⁵ Out of this usage has grown up a rule that streets in cities and villages may be used for various incidental purposes, such as sewer, gas and water pipes. The best general statement of this rule, which we have met with, is found in the case of *In re City of Yonkers*,⁶ and is as follows: "It is part of the purpose in view when land is taken or dedicated for use as a public street in a city, that it shall be used not only for the purpose of mere passage and repassage, but for all such incidental purposes, including the building of sewers therein, as may be necessary, appropriate and usual for the proper enjoyment of such street."⁷ But these generalizations are of but little practical value. As to every new use proposed the question will arise as to whether it is an exercise of the right of passage or is such a purpose as is "necessary, appropriate and usual" for the "proper enjoyment" of the street.⁸

for the transmission of water, gas, and steam are immovable. So are the tracks of street railways, also the poles and wires of the trolley system. And it can make no difference in principle whether the immovable structure is on, under, or above the surface of the ground, for the rights of the owner of the fee are the same in either case. Subject only to the public easement for highway purposes, he remains the owner of the land upward and downward indefinitely. If the transmission of intelligence by telegraph or telephone is not included in the public easement in a highway, it would be equally an invasion of his rights of property, even if the wires were placed underground. If an immovable structure in a highway constitutes an additional servitude, it is not merely because it is immovable, but because it unreasonably interferes with the general use of the street by the public, or because it unreasonably impairs the special easements of abutting owners." *Cater v. N. W. Tel. Exch. Co.*, 60 Minn. 539, 63 N. W. 111, 51 Am. St. Rep. 543, 28 L.R.A. 310. Similar views are expressed in the

following: *Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 65 Am. St. Rep. 358, 40 L.R.A. 370; *Taylor v. Portsmouth etc. St. R. R. Co.*, 91 Me. 193, 39 Atl. 560, 64 Am. St. Rep. 216; *Cumberland Tel. & Tel. Co. v. Avritt*, 120 Ky. 34, 85 S. W. 204; *Frazier v. East Tenn. Tel. Co.*, 115 Tenn. 416, 90 S. W. 620, 112 Am. St. Rep. 856, 3 L.R.A. (N.S.) 323.

⁵"No structure upon the street can be authorized which is inconsistent with the continued use of the same as an open public street." *Story v. New York El. R. R. Co.*, 90 N. Y. 177, 43 Am. Rep. 146. To the same effect *Jaynes v. Omaha St. R. R. Co.*, 53 Neb. 631, 74 N. W. 67, 39 L.R.A. 751.

⁶117 N. Y. 564, 573, 23 N. E. 661.

⁷*See also McDevitt v. People's Nat. Gas. Co.*, 160 Pa. St. 367, 28 Atl. 948; *Van Brunt v. Town of Flatbush*, 59 Hun 192, 37 N. Y. St. 200, 13 N. Y. Supp. 545.

⁸*In Halsey v. Rapid Transit St. R. R. Co.*, 47 N. J. Eq. 380, 20 Atl. 859, it is said: "Any use of a street which is limited to an exercise of the right of passage, and which is confined to a mere use of the public easement,

In Massachusetts it is held that the public easement in a street "includes every kind of travel and communication for the movement of transportation of persons or property which is reasonable and proper in the use of the public street. It includes the use of all kinds of vehicles which can be introduced with a reasonable regard for the safety and convenience of the public, and every reasonable means of transportation, transmission and movement beneath the surface of the ground as well as upon or above it."⁹

The easement of the public is not limited to the particular methods of use in vogue when the easement was acquired, but includes improved methods which the progress of society finds necessary or convenient, and which do not subvert the use of the street by the public in the ordinary way.¹⁰ The new use must not be inconsistent with the common and ordinary modes of using the street. "If the use complained of is such that the public and common right of passage of persons and things cannot be enjoyed without substantial impairment on account of the *manner* of such use, then it is inconsistent with the public

whether it be by old methods or new, and which does not in any substantial degree destroy the street as a means of free passage, common to all the people, is a legitimate use, and within the purposes for which the public acquired the land."

⁹New England Tel. & Tel. Co. v. Boston Terminal Co., 182 Mass. 397, 65 N. E. 835. In Sears v. Crocker, 184 Mass. 586, 588, 69 N. E. 327, 100 Am. St. Rep. 577, it is said: "Our system, which leaves to the landowner the use of a street above or below or on the surface, so far as he can use it without interference with the rights of the public, is just and right, but the public rights in these lands are plainly paramount, and they include, as they ought to include, the power to appropriate the streets above or below the surface as well as upon it, in any way that is not unreasonable, in reference either to the acts of all who have occasion to travel or to the

effect upon the property of abutters." See also White v. Blanchard Bros. Granite Co., 178 Mass. 363, 59 N. E. 1025; Eustis v. Milton St. Ry. Co., 183 Mass. 586, 67 N. E. 663; Cheney v. Boston Consolidated Gas Co., 198 Mass. 356.

¹⁰Cumberland Tel. & Tel. Co. v. Avritt, 120 Ky. 34, 85 S. W. 204: "The dedication of a street must be presumed to have been made, not for such purposes and uses only as were known to the landowner and plotter at the time of such dedication, but for all public purposes, present and prospective, consistent with its character as a public highway, and not actually detrimental to the abutting real estate." Mordhurst v. Ft. Wayne etc. Traction Co., 163 Ind. 268, 280, 71 N. E. 642, 106 Am. St. Rep. 222, 66 L.R.A. 105. See also Kinsey v. Union Traction Co., 169 Ind. 563, 81 N. E. 922.

and common right, and not a proper and lawful use of the easement of the street.”¹¹

§ 183 (127). Sewers and drains. Drainage is necessary for the proper construction and maintenance of highways, both in city and country. The manner in which this drainage can be best secured is solely a question for the proper authorities. In the country, an open drain may suffice, but in the city, where the whole surface of the street is needed for travel, a covered sewer is required. As the proper drainage of house-lots and cellars, and the prompt removal of the liquid refuse from dwellings, are necessary to the public health, and therefore matters of public concern, the public may provide the means for such drainage and removal and construct public sewers in the streets for that purpose.¹² But a sewer, constructed through the streets

¹¹Newell v. Minneapolis etc. R. R. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303.

¹²Cone v. Hartford, 28 Conn. 363, 372; Leeds v. Richmond, 102 Ind. 372; McMahon v. Council Bluffs, 12 Ia. 268; Boston v. Richardson, 13 Allen 146, 159; Chelsea Dye-House and Laundry Co. v. Commonwealth, 164 Mass. 350, 41 N. E. 649; Lincoln v. Commonwealth, 164 Mass. 1, 41 N. E. 112; Cabot v. Kingman, 166 Mass. 403, 44 N. E. 344, 33 L.R.A. 45; Warren v. Grand Haven, 30 Mich. 24; White v. Yazoo City, 27 Miss. 357; Glasby v. Morris, 18 N. J. Eq. 72; Traphagen v. Jersey City, 29 N. J. Eq. 206; Stoudinger v. Newark, 28 N. J. Eq. 187; S. C. on appeal, 28 N. J. Eq. 446; In re City of Yonkers, 117 N. Y. 564, 23 N. E. 661; Kelsey v. King, 32 Barb. 410; Allison v. Cincinnati, 2 Cinn. Super. Ct. 462; Cincinnati v. Penny, 21 Ohio St. 499, 8 Am. Rep. 73; Elster v. Springfield, 49 Ohio St. 82, 34 N. E. 274; Lockart v. Craig St. R. R. Co., 139 Pa. St. 419, 21 Atl. 26.

In Cone v. Hartford, the court says: “There cannot be a doubt that, in the laying out and establishment of a highway, the right of repairing

and maintaining, as well as of originally constructing it, is embraced, and therefore, when damages are assessed to a person for laying out and constructing a road upon his land, those damages include compensation as well for the repairing of such road as its original construction. Such reparation embraces and extends to the making of such gutters, drains and sewers as are necessary and proper in order to preserve the highway in good condition for the purposes for which it was made. And, for these purposes, we have no doubt that it is as competent to construct drains and sewers below, as it is upon the surface of the ground. On ordinary country roads the gutters upon their sides are usually deemed sufficient to carry off the water and filth upon them. In populous places, however, where they accumulate in greater quantities, or where it may be necessary for the public to use, for passing and other proper purposes, every part of the highway, it is frequently requisite to make the drains of the highway beneath its surface, and the safety as well as the commodiousness of the public travel, and the health-

of a town, which is not for use of the town or the abutting owners, but solely to carry the sewerage of an adjoining town to the sea, is an additional servitude upon the street and cannot be built without compensation to the owners of the fee.¹³ So of a sewer upon a country road to carry the sewerage of a city to a stream.¹⁴ The making of a drain or open ditch on the side of a street, if for the amelioration of the street, is a proper use of the street, for which the abutting owner has no legal ground of complaint.¹⁵ But the public authorities cannot authorize a private drain to be laid in a street over the fee of others.¹⁶

§ 184 (128). Water pipes. Water is a prime necessity, and in densely populated districts cannot be obtained from the soil without danger to health. A supply of pure water, therefore, becomes a matter of public concern, and its distribution by public authority by means of pipes laid in the public streets is an ancient and universal custom. Such a supply is not only a requisite to the public health, but for the public safety as well, in order to afford the means of extinguishing fires and preventing conflagrations, and may even be connected with the use of the street for travel, when used for sprinkling. Such a use of urban streets is proper and legitimate.¹⁷ But to lay pipes in a country highway for the purpose of conducting water to a

fulness of the people in its vicinity may also require it. It is no objection, therefore, to a sewer in a highway, that it is made beneath the surface of the ground, if the circumstances render it proper so to construct it."

¹³Van Brunt v. Town of Flatbush, 128 N. Y. 50, 27 N. E. 973, reversing S. C. 59 Hun 192, 37 N. Y. St. 200, 13 N. Y. Supp. 545. Compare Cummins v. City of Seymour, 79 Ind. 491.

¹⁴Whitney v. Toledo, 8 Ohio C. C. (N.S.) 577.

¹⁵Cummins v. Seymour, 79 Ind. 491, 41 Am. Rep. 618; McMahon v. Council Bluffs, 12 Ia. 268; Wilson v. Duncan, 74 Ia. 491, 38 N. W. Rep. 371; Randall v. Christiansen, 76 Ia. 169, 40 N. W. 703; Highway Comrs. v. Ely, 54 Mich. 173; White v. Yazoo City, 27 Miss. 357.

¹⁶Murray v. Gibson, 21 Ill. App.

488. But the contrary is held in Wood v. McGrath, 150 Pa. St. 451, 24 Atl. 682, 16 L.R.A. 715. *And see* Smith v. Simmons, 103 Pa. St. 32, 49 Am. Rep. 119; Susquehanna Depot v. Simmons, 112 Pa. St. 384, 5 Atl. 434, 56 Am. Rep. 317; Glasby v. Morris, 18 N. J. Eq. 72; Conrad v. Smith, 32 Mich. 429.

¹⁷Bishop v. North Adams Fire Dist., 167 Mass. 364, 45 N. E. 925; Crooke v. Flatbush Water Works Co., 29 Hun 245; Same v. Same, 27 Hun 72; Witcher v. Holland W. W. Co., 66 Hun 619, 20 N. Y. Supp. 560; same *affirmed* without opinion, 142 N. Y. 626; Village of Pelham Manor v. New Rochelle Water Co., 143 N. Y., 532, 38 N. E. 711; Provost v. New Chester Water Co., 162 Pa. St. 275, 29 Atl. 914; Smith v. Goldsboro, 121 N. C. 350, 28 S. E. 479.

town would be an additional burden for which the owner of the fee would be entitled to compensation.¹⁸ Where a water pipe was laid underneath the sidewalk, so as to prevent the abutter building stairs to his basement, it was held he could recover no compensation.¹⁹

§ 185 (129). Gas pipes. Gas is not, like water, a necessity in the sense of being absolutely indispensable, but it has become a practical necessity in all urban communities. The right to lay pipes in the streets of cities and villages for the distribution of gas has never been questioned, but has often, indirectly, received judicial sanction.²⁰ But a country highway cannot be used for the purpose of conveying natural gas to a distant city.²¹ This is an additional burden, for which compensation must be made. It is otherwise when those living along the road where the pipe is laid are to receive gas for light and heat.²² And in Massachusetts it is held that gas mains may be laid through a city street for the purpose of conveying gas to another municipality without compensation to the owner of the fee in the street.²³ A city is not entitled to compensation for

¹⁸Baltimore County W. & Elec. Co. v. Dubruvil, 105 Md. 424, 66 Atl. 439. See ante, § 183, note 13; post, § 135, note, 21.

¹⁹Provost v. New Chester Water Co., 162 Pa. St. 275, 29 Atl. 914.

²⁰Story v. New York El. R. R. Co., 90 N. Y. at p. 161, 43 Am. Rep. 146; West v. Bancroft, 32 Vt. p. 371; Tompkins v. Hodgson, 2 Hun 146; People v. Bowen, 30 Barb. 24; Smith v. Central Dist. Tel. Co., 2 Ohio C. C. 259, 263; Boston v. Richards, 13 Allen 146, 160; Pierce v. Drew, 136 Mass. 75, 81, 49 Am. Rep. 7; Cheney v. Boston Consol. Gas Co., 198 Mass. 356; McDevitt v. People's Natural Gas Co., 160 Pa. St. 367, 28 Atl. 948. See Mallory v. City of Bradford, 1 Pa. Dist. Ct. 670; King v. Philadelphia Co., 154 Pa. St. 160, 26 Atl. 308, 35 Am. St. Rep. 817, 21 L.R.A. 141; Levis v. Newton, 75 Fed. 884.

²¹Kineaid v. Indianapolis Nat. Gas Co., 124 Ind. 577, 24 N. E. 1066, 19 Am. St. Rep. 113, 8 L.R.A. 602, 3 Am. Em. D.—22.

R. R. & Corp. Rep. 1; Board of Comrs. v. Indianapolis Nat. Gas Co., 134 Ind. 209, 33 N. E. 972; Windfall Nat. Gas Co. v. Terwilliger, 152 Ind. 364, 53 N. E. 284; Consumers' Gas Trust Co. v. Huntsinger, 14 Ind. App. 156, 39 N. E. 423, 42 N. E. 640; Huffman v. State, 21 Ind. App. 449, 52 N. E. 713; Ward v. Triple State Nat. Gas & Oil Co., 115 Ky. 723, 74 S. W. 709; Bloomfield etc. Gas Light Co. v. Calkins, 62 N. Y. 386; S. C. 1 Thomp. etc. 541, 549; Calkins v. Bloomfield etc. Gas Light Co., 1 N. Y. Supn. 541; Sterling's Appeal, 111 Pa. St. 35. But where the fee of the highway is in the public, the abutter is not entitled to compensation. Ward v. Triple State Nat. Gas & Oil Co., 115 Ky. 723, 74 S. W. 709.

²²Hardman v. Cabot, 60 W. Va. 664, 55 S. E. 756, 7 L.R.A.(N.S.) 506.

²³Cheney v. Boston Consolidated Gas Co., 198 Mass. 356.

the laying of gas pipes in its streets by authority of the legislature,²⁴ but it may prevent such use of its streets without authority.²⁵ It has been held that one gas company has no standing in court to contest the right of a rival company to occupy a street, so long as its property and rights are not interfered with.²⁶

§ 186 (130). Steam, electricity, etc. Within the principle of the foregoing cases would be the laying of pipes in streets, for the purpose of conducting and distributing gas or steam for heating, or the laying of subterranean cables or wires for supplying electricity, either for lighting or other general use.²⁷

§ 187 (131). Telegraph and telephone lines. The lines of a telegraph or telephone company are on the same footing as the steam railroad. They form no part of the equipment of a public highway, but are entirely foreign to its use. Where the fee of the street is in the abutting owner, he is clearly entitled to compensation for the additional burden placed upon his land.²⁸ When the fee is in the public, the abutting owner

²⁴La Harpe v. Elm Tp. Gas etc. Co., 69 Kan. 97, 76 Pac. 448; People v. Bowen, 30 Barb. 24.

²⁵Citizens' Gas etc. Co. v. Elwood, 114 Ind. 332. So such use of the streets may be prevented by indictment. Queen v. Longton Gas Co., 2 El. & El. 651, 105 E. C. L. R. 650.

²⁶Coffeyville M. & Gas Co. v. Citizens' Nat. Gas Co., 55 Kan. 179, 40 Pac. 326. *But see* People's Gas Light Co. v. Jersey City Gas Light Co., 46 N. J. L. 297.

²⁷Carli v. Railroad Co., 28 Minn. at p. 376, 41 Am. Rep. 290; Berks & Dauphin Turnpike Road v. Lebanon Steam Co., 5 Pa. Co. Ct. 354; Empire City Subway Co. v. Broadway & S. A. R. R. Co., 87 Hun 279, 33 N. Y. Supp. 1055. *But see post.* § 188.

Where the legislature grants the right to a company to place and maintain its electric wires underground subject to the regulations of the municipality, the latter may require the grantee to take the wires

of other companies in its conduits or the city may provide the conduits for all the wires. State v. Towers, 71 Conn. 657, 42 Atl. 1083.

²⁸Board of Trade Tel. Co. v. Barnett, 107 Ill. 507, 47 Am. Rep. 453; Postal Tel. Cable Co. v. Eaton, 170 Ill. 520, 49 N. E. 365, 62 Am. St. Rep. 390, 39 L.R.A. 722; Burrell v. Am. Tel. & Tel. Co., 224 Ill. 266, 79 N. E. 705, 8 L.R.A. (N.S.) 1091; De Kalb Co. Telephone Co. v. Dutton, 228 Ill. 178, 81 N. E. 838, 10 L.R.A. (N.S.) 1057; American Tel. & Tel. Co. v. Jones, 78 Ill. App. 372; Union Elec. Tel. & Tel. Co. v. Applequest, 104 Ill. App. 517; Chesapeake & P. Tel. Co. v. Mackenzie, 74 Md. 36, 21 Atl. 690. 28 Am. St. Rep. 219; Md. Tel. & Tel. Co. v. Ruth, 106 Md. 644, 68 Atl. 358; Stowers v. Postal Tel. Cable Co., 68 Miss. 559, 9 So. 356, 24 Am. St. Rep. 290, 12 L.R.A. 864; Bronson v. Albion Telephone Co., 67 Neb. 111, 93 N. W. 201, 60 L.R.A. 426; Nicoll v. New York etc. Co., 62 N. J. L. 733, 42 Atl.

583, 72 Am. St. Rep. 666; S. C. 62 N. J. L. 156, 40 Atl. 627; *Eels v. Am. Tel. & Tel. Co.*, 143 N. Y. 133, 38 N. E. 202, 25 L.R.A. 640, 10 Am. R. R. & Corp. Rep. 69; *Jemison v. Bell Telephone Co.*, 186 N. Y. 493, 79 N. E. 728; *Osborne v. Auburn Telephone Co.*, 189 N. Y. 393, 82 N. Y. S. 428, reversing S. C. 111 App. Div. 702; *Bashfield v. Empire State Tel. Co.*, 71 Hun 532, 24 N. Y. Supp. 1006; *Comisky v. Postal Tel. Cable Co.*, 41 N. Y. App. Div. 245; *Gray v. York State Telephone Co.*, 92 App. Div. 89, 86 N. Y. S. 771; *Powers v. State Line Telephone Co.*, 116 App. Div. 737, 102 N. Y. S. 34; *Gray v. York State Telephone Co.*, 41 Misc. 109, 83 N. Y. S. 920; *Hudson Riv. Telephone Co. v. Forrestal*, 56 Misc. 133; *Donovan v. Allert*, 11 N. D. 289, 91 N. W. 441, 95 Am. St. Rep. 720, 58 L.R.A. 775; *Dusenbury v. Mutual Union Tel. Co.*, 11 Abb. New Cases, 440; *Metropolitan Telephone & Telegraph Co. v. Colwell Lead Co.*, 50 N. Y. Supr. Ct. 488; *Tiffany v. United States Illuminating Co.*, 51 N. Y. Supr. Ct. 280; S. C. 67 How. Pr. 73; *Wade v. Carolina Tel. & Tel. Co.*, 147 N. C. 219; *Cosgriff v. Tri-State Telephone Co.*, 15 N. D. 210, 107 N. W. 525; *Dailey v. State*, 51 Ohio St. 348, 37 N. E. 710, 24 L.R.A. 724; *Smith v. Central District P. & Tel. Co.*, 2 Ohio C. C. 259; *Tanninan v. City & Suburban Tel. Ass.*, 1 Ohio N. P. (N.S.) 81; *Mantell v. Bueyrus Telephone Co.*, 20 Ohio C. C. 345; *Western Union Tel. Co. v. Williams*, 86 Va. 696, 11 S. E. 106, 2 Am. R. R. & Corp. Rep. 258, 19 Am. St. Rep. 908; *Kreuger v. Wis. Telephone Co.*, 106 Wis. 96, 81 N. W. 1041, 50 L.R.A. 298; *Pacific Postal Tel. Cable Co. v. Irvine*, 49 Fed. 113; *Kester v. Western Union Tel. Co.*, 108 Fed. 926. The following New York cases hold a telephone line to be a proper use of a city or village street but are overruled by later decisions of the Court

of Appeals cited above: *Johnson v. New York etc. Tel. & Tel. Co.*, 76 App. Div. 564, 78 N. Y. S. 598; *Gannett v. Independent Telephone Co.*, 55 Misc. 555, 106 N. Y. S. 3. In *Eels v. Am. Tel. & Tel. Co.*, 143 N. Y. 133, 38 N. E. 210, 25 L.R.A. 640, 10 Am. R. R. & Corp. Rep. 69, the court says: "We think neither the State nor its corporation can appropriate any portion of the public highway permanently to its own special, continuous and exclusive use by setting up poles therein, although the purpose to which they are to be applied is to string wires thereon, and thus to transmit messages for all the public at a reasonable compensation. It may be at once admitted that the purpose is a public one, although for the private gain of a corporation; but the constitution provides that private property shall not be taken for public use without compensation to the owner. Where land is dedicated or taken for a public highway, the question is, what are the uses implied in such dedication or taking? Primarily there can be no doubt that the use is for passage over the highway. The title to the fee of the highway generally remains in the adjoining owner, and he retains the ownership of the land, subject only to the public easement. If this easement do not include the right of a telegraph company to permanently appropriate any portion of the highway, however small it may be, to its own special, continuous and exclusive use, then the defendant herein has no defense to the plaintiff's claim. Although the purpose of a public highway is for the passage of the public, it may be conceded that the land forming such highway was not taken for the purpose of enabling the public to pass over it only in the then known vehicles, or for using it in the then known methods for the conveyance

may recover for any interference with his rights in the street.²⁹ It is held to make no difference that the city fire alarm and po-

of property or the transmission of intelligence. Still the primary law of the highway is motion, and whatever vehicles are used, or whatever method of transmission of intelligence is adopted, the vehicle must move and the intelligence be transmitted by some moving body, which must pass along the highway, either on or over or perhaps under it; but it cannot permanently appropriate any part of it. * * * We cannot agree that this permanent appropriation and exclusive possession of a small portion of the highway can properly be regarded as any newly discovered method of exercising the old public easement, for the very reason that this so-called 'new method' is a permanent, continuous and exclusive use and possession of some part of the public highway itself, and, therefore, cannot be simply a new method of exercising such old public easement. It is a totally distinct and different kind of use from any heretofore known. It is not a mere difference in the kind of vehicle, or in their number or capacity, or in the manner, method or means of locomotion. All these might be varied, increased as to number, capacity or form, altered as to means or rapidity of locomotion, or transformed in their nature and character, and still the use of the highway might be substantially the same—a highway for passage and motion of some sort. Here, however, in the use of the highway by the defendant is the fact of permanent and exclusive appropriation and possession, a fact which is, as it seems to us, wholly at war with that of the legitimate public easement in a highway."

In *Willis v. Erie T. & T. Co.*, 37 Minn. 347, the court was equally

divided and the judgment of the lower court in favor of the abutting owner was affirmed, no opinion being given. In New Jersey an act passed March 11, 1880, Supp. to Rev. Stat. p. 1022, requires compensation to be made when telegraph or telephone poles are set in a street. The following cases have arisen under the statute involving its validity and the method of procedure under it: *Turnpike Co. v. News Co.*, 43 N. J. L. 381; *Broome v. N. Y. & N. J. Tel. Co.*, 49 N. J. L. 624; *Winter v. N. Y. & N. J. Tel. Co.*, 51 N. J. Eq. 83. In *Roake v. Am. Telephone & Telegraph Co.*, 41 N. J. Eq. 35, the chancellor refused a preliminary injunction on a bill filed to prevent the stringing of wires in front of the plaintiff's premises on the ground that his right was doubtful. In *Broome v. N. Y. & N. J. Tel. Co.*, 42 N. J. Eq. 141, a mandatory injunction was granted to compel the removal of poles set in the highway in front of plaintiff's premises, the fee of the street being in him, and the erection of other poles was prohibited. In *Howell v. Western Union Tel. Co.*, 4 Mackey, 424 (1886), an injunction to prevent the erection of telegraph poles in front of the plaintiff's property was denied on the ground that plaintiff would suffer no irreparable injury and that the remedy at law was adequate. The main question was not discussed.

²⁹*In Chesapeake etc. Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 690, the right to compensation was sustained irrespective of the fee of the street. On this point the court says: "If the fee be in the city, or in some third person, then—First, what are the rights, in a case like this, of the owner of a lot abutting on the street?

lie wires are attached to the same poles.³⁰ It is evident that poles and wires may be so placed as not to afford the slightest impediment to the access of light and air or to ingress and egress. In such case, the fee being in the public, there is no taking, because there is no damage.³¹ Whether there is or is not damage is a question of fact, and, if damage can be shown, the remedy is clear upon the authority of cases discussed in previous sections of this chapter. There is a strong dissent from these views, several of the courts holding that a telegraph or telephone line is a legitimate street use, and may be placed in a street without compensation to the abutting owner, whether he owns the fee or not.³² As will be seen by reference to the notes, the courts of last resort are about equally divided on the

and, secondly, how are those rights affected by the provisions of the Code relied on in the pleas? There is some diversity of opinion in the decided cases upon the first of these questions, but all agree in going at least this far—and we are not required to go any further in deciding this appeal—that where the fee or legal title has passed from the original proprietor, as in cases where the land has been acquired for streets by the exercise of the right of eminent domain, the adjoining owner cannot maintain an action for injuries to the soil or ejectment, but he nevertheless has a remedy for any special injury to his rights by the unauthorized acts of others. Hence, if an appropriation of a street by a person or body corporate, even under legislative and municipal sanction, unreasonably abridges the right of adjacent lot-owners to use the street as a means of ingress and egress, or otherwise, they are thereby deprived of a right without compensation; and an action will lie against the person or corporation guilty of usurping such unreasonable and exclusive use for the recovery of such immediate and direct damages as the abutter may sustain."

³⁰DeKalb County Telephone Co. v.

Dutton, 228 Ill. 178, 81 N. E. 838, 10 L.R.A. (N.S.) 1057.

³¹Holleran v. Bell Telephone Co., 64 App. Div. 41, 71 N. Y. S. 685; S. C. affirmed 177 N. Y. 573, 69 N. E. 1122; Gay v. Mutual Union Tel. Co., 12 Mo. App. 485; Forsyth v. Baltimore & Ohio Tel. Co., 12 Mo. App. 494; Hays v. Columbia Telephone Co., 21 Ohio C. C. 480.

³²Hobbs v. Long Distance Tel. & Tel. Co., 147 Ala. 393, 41 So. 1003, 7 L.R.A. (N.S.) 87; Magee v. Overshiner, 150 Ind. 127, 49 N. E. 951, 65 Am. St. Rep. 358, 40 L.R.A. 370; Coburn v. New Telephone Co., 156 Ind. 90, 59 N. E. 324, 52 L.R.A. 671; McCann v. Johnson County Tel. Co., 69 Kan. 210, 76 Pac. 870, 66 L.R.A. 171; Cumberland Tel. & Tel. Co. v. Avritt, 120 Ky. 34, 85 S. W. 204; Irwin v. Great Southern Telephone Co., 37 La. An. 63; Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7; People v. Eaton, 100 Mich. 208, 59 N. W. 145, 24 L.R.A. 721; Cater v. Northwestern Tel. Exch. Co., 60 Minn. 539, 63 N. W. 111, 51 Am. St. Rep. 543, 28 L.R.A. 310; (*Compare* Willis v. Erie Tel. & Tel. Co., 37 Minn. 347, 34 N.W. 337.) Julia Building Ass'n v. Bell Tel. Co., 88 Mo. 258, 57 Am. Rep. 398; City of St. Louis v. Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2

question. The text writers generally favor the right to compensation.³³ Under constitutions giving compensation for property damaged or injured for public use, there may be a re-

L.R.A. 278; *Gay v. Mutual Union Tel. Co.*, 12 Mo. App. 485; *Forsythe v. Baltimore & O. Tel. Co.*, 12 Mo. App. 494; *Hershfield v. Rocky Mt. Bell Co.*, 12 Mont. 102, 29 Pac. 883; *Shinzel v. Bell Telephone Co.*, 31 Pa. Supr. Ct. 221; *Kirby v. Citizens' Telephone Co.*, 17 S. D. 362, 97 N. W. 3; *Frasier v. East Tenn. Telephone Co.*, 115 Tenn. 416, 90 S. W. 620, 112 Am. St. Rep. 856, 3 L.R.A. (N.S.) 323; *Maxwell v. Central D. & P. Tel. Co.*, 51 W. Va. 121, 41 S. E. 125; *Lowther v. Bridgeman*, 57 W. Va. 306, 50 S. E. 410; *Southern Bell Tel. & Tel. Co. v. Nalley*, 165 Fed. 263. These cases all go upon substantially the same ground which is thus stated in *Pierce v. Drew*, 136 Mass. 75, 81: "When the land was taken for a highway that which was taken was not merely the privilege of traveling over it in the then known vehicles, or of using it in the then known methods, for either the conveyance of property or the transmission of intelligence. * * * The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy and the mail-coach. It is a newly discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out." These views are most ably and convincingly answered in the dissenting opinion in the same case. To say that a telegraph or telephone line is a legitimate street use

because it accomplishes some of the objects for which the street is established, lays down a principle which justifies the use of a street for the commercial railroad, the elevated railroad or even for a canal. There is absolutely no analogy between ordinary travel and the telegraph or telephone, and it is even more foreign to street uses proper than the commercial railroad. In *East Tenn. Telephone Co. v. Russellville*, 106 Ky. 667, 51 S. W. 308, 21 Ky. L. R. 305, is a *dictum* to the effect that a telephone line is an additional burden.

³³ See *Dill. Munic. Corp.* § 698a; *Elliott, Roads and Streets*, pp. 533-536; *Keasbey on Electric Wires*, pp. 82-84. We also refer to the following cases as having some bearing on the subject: *Southern Bell Tel. & Tel. Co. v. Francis*, 109 Ala. 224, 19 So. 1, 55 Am. St. Rep. 930, 31 L.R.A. 193; *Bradley v. Southern New Eng. Tel. Co.*, 66 Conn. 559, 34 Atl. 499, 32 L.R.A. 280; *Chicago Telephone Co. v. N. W. Telephone Co.*, 199 Ill. 324, 65 N. E. 329; *Chamberlain v. Ia. Tel. Co.*, 119 Ia. 619, 93 N. W. 596; *East Tenn. Tel. Co. v. Anderson Co. Tel. Co.*, 115 Ky. 488, 74 S. W. 218; *Postal Tel. Cable Co. v. Baltimore*, 79 Md. 502, 29 Atl. 819, 24 L.R.A. 161; *Mieh. Telephone Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L.R.A. 87; *Mich. Telephone Co. v. Benton Harbor*, 121 Mich. 512, 80 N. W. 386, 47 L.R.A. 104; *Duluth v. Duluth Telephone Co.*, 84 Min. 486, 87 N. W. 1127; *State v. Red Lodge*, 30 Mont. 338, 76 Pac. 758; *State v. Red Lodge*, 33 Mont. 345, 83 Pac. 642; *Neb. Telephone Co. v. Western Independent L. D. T. Co.*, 68 Neb. 772, 95 N. W. 18; *State v.*

covery for any damage to abutting property by reason of a telegraph or telephone line in the street.³⁴

Telephone wires placed in a conduit under the surface of a street and intended to supply telephone service to residents on the street, would seem to come within the principle of the decisions as to gas and water pipes in streets, and, therefore, to be such a use of the street as could be made without compensation to the abutting owner.³⁵

§ 188 (131a). Electric wires for lighting and other purposes. It seems beyond question from the authorities that, under the general power to improve streets and render them more convenient and safe for travel, the public authorities may provide for lighting them at night. If this is so, it can hardly be that such authorities are limited to any particular kind or system of lighting. It follows that poles and wires may be placed in the street for the purpose of lighting them by means of electricity. Such a use is directly connected with and incident to the public right of passage. The abutting owner would have no ground of complaint, in the absence of any abuse of the right

Bayonne, 59 N. J. L. 101, 34 Atl. 1080; Hudson Riv. Tel. Co. v. Water-vliet T. & R. R. Co., 135 N. Y. 393, 32 N. E. 148, 6 Am. R. R. & Corp. Rep. 619, 31 Am. St. Rep. 838, 17 L.R.A. 674; Weeks v. N. Y. & N. J. Telephone Co., 86 App. Div. 257, 83 N. Y. S. 678; Cincinnati Inclined Plane R. R. Co. v. City & Suburban Tel. Ass'n 48 Ohio St. 390, 27 N. E. Rep. 890, 4 Am. R. R. & Corp. Rep. 533, 12 L.R.A. 534; Worth v. Postal Tel. Cable Co., 7 Ohio C. C. 290; Burns v. Columbus Citizens' Telephone Co., 10 Ohio C. C. (N.S.) 307; New Castle City v. Central D. & P. Tel. Co., 207 Pa. St. 371, 56 Atl. 931; Wirth v. Postal Tel. Cable Co., 7 Ohio C. C. 290; York Tel. Co. v. Kersey, 5 Pa. Dist. Ct. 366; Russ v. Pennsylvania Tel. Co., 15 Pa. Co. Ct. 226; Memphis Tel. Co. v. Hun, 16 Lea, 456; Rugg v. Commercial Union Tel. Co., 66 Vt. 208, 28 Atl. 1036; Western Union Tel. Co. v. Bullard, 67 Vt. 272, 31 Atl. 286; State v. Sheboygan, 111 Wis. 23, 86

N. W. 657; St. Louis v. Western Union Tel. Co., 149 U. S. 465, 13 S. C. 990; Southern Bell Tel. & Tel. Co. v. Richmond, 103 Fed. 33, 44 C. C. A. 147; Morristown v. East Tenn. Telephone Co., 115 Fed. 304, 53 C. C. A. 132. The case of American Tel. & Tel. Co. v. Pearce, 71 Md. 535, 18 Atl. 910, 1 Am. R. R. & Corp. Rep. 73, decides that a telegraph or telephone line on a railroad right of way for general commercial use, is an additional burden on the soil for which the owner is entitled to compensation.

³⁴Shinzel v. Bell Telephone Co., 31 Pa. Super. Ct. 221; Maxwell v. Central D. & P. Tel. Co., 51 W. Va. 121, 41 S. E. 125; *post*, § 352.

³⁵Coburn v. New Telephone Co., 156 Ind. 90, 59 N. E. 324, 52 L.R.A. 671; Castle v. Bell Telephone Co., 49 App. Div. 437, 63 N. Y. S. 482; Burns v. Columbus Citizens Telephone Co., 10 Ohio C. C. (N. S.) 307.

to so use the street.³⁶ The lighting of private premises, however, has no connection whatever with the use of a street for public passage, and the placing of poles and wires or other appliances in the street for that purpose cannot, therefore, be justified as a street use. It would follow that poles and wires, to be used exclusively for private lighting, cannot be placed in a public street without compensation to the abutting owner for any damage sustained.³⁷ In regard to poles and wires to be used for both public and private lighting, the logical position would seem to be that the abutting owner would be entitled to a remedy to the extent of the unlawful use.³⁸ It may be doubted, however, whether these distinctions are practicable, and it is probable that the use of streets for electric light wires will be sustained, without regard to whether they are for public or private lighting, but that the abutting owner will have a remedy for any unnecessary injury to his rights, as by obstructing his doorway with a pole.³⁹ In Massachusetts poles and wires for

³⁶Loeber v. Butte General Electric Co., 16 Mont. 1, 39 Pac. 912, 11 Am. R. R. & Corp. Rep. 260, 50 Am. St. Rep. 468; French v. Robb, 67 N. J. L. 260, 51 Atl. 509, 91 Am. St. Rep. 433, 57 L.R.A. 956; Palmer v. Larchmont Elec. Co., 158 N. Y. 231, 52 N. E. 1092, 43 L.R.A. 672.

³⁷See Carpenter v. Capital Elec. Co., 178 Ill. 29, 52 N. E. 973, 69 Am. St. Rep. 286, 43 L.R.A. 645; French v. Robb, 67 N. J. L. 260, 51 Atl. 509, 91 Am. St. Rep. 433, 57 L.R.A. 956; Callen v. Columbus Edison Elec. Lt. Co., 66 Ohio St. 166, 64 N. E. 141, 58 L.R.A. 782.

³⁸It was so held in French v. Robb, 67 N. J. L. 260, 51 Atl. 509, 91 Am. St. Rep. 433, 57 L.R.A. 956. So in Gurnsey v. Northern Cal. Power Co., 7 Cal. App. 534.

³⁹Lines of poles and wires for public and private lighting are held to be a proper street use in Illinois and Mississippi. McWethey v. Aurora Elec. Lt. & P. Co., 202 Ill. 218, 67 N. E. 9, *affirming* Aurora Elec. Lt. & P. Co. v. McWethey, 104 Ill. App. 479; Gulf Coast Ice & Mfg. Co. v.

Bowers, 80 Miss. 570, 32 So. 113; Hazelhurst v. Mayes, 84 Miss. 7, 36 So. 33, 64 L.R.A. 805. In Tuttle v. Brush Electric Illuminating Co., 50 N. Y. Super. Ct. 464 (1883), the suit was to prevent the erection of electric light poles in the street in front of plaintiff's property, and to compel the removal of those already erected. The fee of the street was in the public for street uses. The poles were to be used for street lighting and for private lighting. Ingraham, J., denied the relief, holding that such poles for the purpose of lighting the street were proper, but doubting whether poles could be erected for the purpose of lighting private premises. In the same year, Maxwell, J., of the court of common pleas of Ohio, enjoined the erection of electric light poles in the street, though the plaintiff did not have the fee. McLean v. Brush Electric Light Co., 9 Cinn. Law Bull. 65 (1883). In People ex rel. Manus v. Thompson, 65 How. Pr. 407 (1883). Haight, J., held that poles and wires for street light-

electric lighting are, by statute, placed upon the same footing as poles and wires for the telegraph and telephone. Compensation must be made to abutting owners for any injury to their property caused thereby, but not for any injury to the fee of the street.⁴⁰ At the present time it is common to use the streets for wires for fire alarm purposes, and to aid in the police serv-

ing were a proper use of a street. The decision in the case was affirmed without passing upon this question. 32 Hun 93. In *Tiffany v. U. S. Illuminating Co.*, 51 N Y. Super. Ct. 280; 67 How. Pr. 73 (1885), the New York superior court, general term, affirmed a decree enjoining the erection of electric light poles in front of plaintiff's property. The court says: "Its business is to furnish light to the city corporation for the public lighting of the streets, and to private individuals to light private houses. The former may involve a public and ordinary use of the street; the latter would involve a use of the street for private purposes. On the plaintiff showing that the defendant, a private corporation, is about to obstruct the street with poles, etc., it would appear *prima facie*, that it was without authority to do so. The defendant, to absolve itself from responsibility, must show the authority. Its evidence on this point is most general and does not show that every part of its proposed work is necessary or highly convenient for both the public and the private use. It is entirely consistent with the testimony, that the particular pole and wire that would be in front of the plaintiff's house, would not be necessary to the public use." In *Johnson v. Thompson-Houston Electric Co.*, 54 Hun 469, 7 N. Y. Supp. 716 (1889), it was held at general term that an abutting owner could not compel

the removal from in front of his premises of an electric light pole, from which a street lamp was to be suspended, and which was to be used both for lighting the streets and private premises. It was doubted whether a street could be used for poles and wires for private lighting, and intimated that the plaintiff might have such use enjoined until compensation was made. *Consumers' Gas & El. Light Co. v. Congress Spring Co.*, 69 Hun 133, 39 N. Y. St. 703, 15 N. Y. Supp. 624 and *Berlew v. Electric Illuminating Co.*, 1 Pa. Co. Ct. 651 (1886) support the view that light wires are a legitimate street use. So does *Loeber v. Butte General Electric Co.* 16 Mont. 1, 39 Pac. 912, 50 Am. St. Rep. 468, 11 Am. R. R. & Corp. Rep. 260, wherein it was held that the plaintiff could not enjoin the erection of a light pole in an alley, in the rear of his premises, the fee of which was in the public. See also *Electric Construction Co. v. Hefferman*, 12 N. Y. Supp. 336. In *Haverford Electric Light Co. v. Hart*, 13 Pa. Co. Ct. 369, 1 Pa. Dist. Ct. 571, electric light poles were held to be an additional burden on a country highway. Also in *Palmer v. Larchmont Electric Co.*, 6 App. Div. 12, 39 N. Y. Supp. 522. The erection of a light pole in front of the plaintiff's premises, without authority was enjoined in *Malone v. Waukesha Elec. Lt. Co.* 120 Wis. 485, 98 N. W. 247.

⁴⁰See *Suburban Light & Power Co. v. Board of Aldermen*, 153 Mass.

ice.⁴¹ Electricity is also distributed to some extent by means of wires in streets to be converted into mechanical power. It is not too much to expect that at no distant day its use for this purpose will greatly increase, and also that it will become practicable for heating purposes. It is manifest, however, that while all these applications of electricity subserve a public purpose in aid of which the power of eminent domain may be invoked, none of them are connected with or in aid of the public right of passage in a street, and are not properly street uses.⁴² Although the process of putting electric wires under the surface of streets, for the various purposes for which they are used, has been going on for a number of years, no question appears to have been made by abutting owners as to the right to use the streets in that way.⁴³

§ 189 (132). Markets. A public market is entirely foreign to the legitimate uses of a public highway, and when a part of the highway is devoted to such use by legislative authority, the abutting owner is entitled to compensation, whether the fee is in him or in the public.⁴⁴ But, where fifty feet in the middle of a street was condemned for market purposes, the abutting owners cannot enjoin its use for that purpose on account of the

200, 26 N. E. 447; Pub Stats. Mass. c. 109; Acts, 1883, c. 221; Acts, 1889, c. 398.

⁴¹In *Callen v. Columbus Edison Elec. Lt. Co.*, 66 Ohio St. 166, 64 N. E. 141, 58 L.R.A. 782, it is doubted whether such wires are a proper street use. See *De Kalb County Telephone Co. v. Dutton*, 228 Ill. 178, 81 N. E. 838, 10 L.R.A.(N.S.) 1057.

⁴²See *Edison Elec. Ill. Co. v. Hooper*, 85 Md. 110, 36 Atl. 113; *Smith v. Goldboro*, 121 N. C. 350, 28 S. E. 479; *Young v. York Haven Elec. T. Co.*, 15 Pa. Dist. Ct. 843.

⁴³In *State v. Murphy* (Mo.), 34 S. W. 51, it was held that the privilege of constructing electrical subways in the streets of a city could not be granted to a private company, whose object was to lease the same for gain, though they were expected to be leased for public uses.

We refer to the following cases growing out of electric light wires in streets, but which did not involve any controversy with abutting owners. *Crowder v. Town of Sullivan*, 128 Ind. 486, 28 N. E. 94, 13 L.R.A. 647; *City of Newport v. Newport Light Co.*, 89 Ky. 454, 12 S. W. 1040, 1 Am. R. R. & Corp. Rep. 397; *State v. Murphy*, 130 Mo. 10, 31 S. W. 594, 12 Am. R. R. & Corp. Rep. 370, 31 L.R.A. 798; *Nebraska Tel. Co. v. York Gas & El. Light Co.*, 27 Neb. 284, 43 N. W. 126; *Grand Rapids E. L. & P. Co. v. Grand Rapids E. L. & G. Co.*, 33 Fed. 659.

⁴⁴*State v. Mobile*, 5 Porter (Ala.) 279; *Lutterloh v. Cedar Keys*, 15 Fla. 306; *Schopp v. St. Louis*, 117 Mo. 131, 22 S. W. 898, 8 Am. R. R. & Corp. Rep. 391, 20 L.R.A. 783; *State v. Lavanac*, 34 N. J. L. 201, 205; *Herriek v. Cleveland*, 7 Ohio C. C. 470. In *State v. Lavanac*, 34

concourse of teams in front of their property thereby occasioned.⁴⁵

§ 190 (132a). Destruction of or injury to shade trees in streets. Where the public owns the fee of the street, the abutting owner has no proprietary right in the soil or minerals, or in the herbage or trees growing thereon. The public authorities may, therefore, cut or remove the trees in their discretion, and the abutter has no remedy, though his property may be damaged thereby.⁴⁶ In New York it is held that the abutter, though he does not own the fee of the street, has an interest in shade trees in the nature of an easement, which is on the same basis as the easements of light and air, and that this interest is sufficient to enable him to maintain an action for their destruction by a wrongdoer.⁴⁷ But when the abutter owns the fee of the street, he owns the trees thereon, subject to the public easement.⁴⁸ The rights of the public in such case are thus stated in a recent Wisconsin case: "The right of the public to use the street for the purposes of travel extends to the portions set apart or used for sidewalks, as well as to the way for car-

N. J. L. 201, the court says: "I think the true rule is that land taken by the public for a particular use cannot be applied, under such a sequestration, to any other use, to the detriment of the land owner. This is the only rule which will adequately protect the constitutional right of the citizen. To permit land taken for one purpose, and for which the landowner has been compensated, to be applied to another and additional purpose, for which he has received no compensation, would be a mere evasion of the spirit of the fundamental law of the State. Land taken and applied for the ordinary purposes of a street would often be an improvement of the adjacent property; an appropriation of it to the uses of a market would, perhaps, as often be destructive of one-half of the value of such property." In *Philadelphia v. Slocum*, 14 Phil. 141, it was held that where land was dedicated for a street with a proviso

that a certain space in the center should be used for market purposes, the city might abandon the market and improve the whole as a street.

⁴⁵*Henkel v. Detroit*, 49 Mich. 249, 13 N. W. 611, 43 Am. Rep. 464. *And see Miller v. Webster City*, 94 Ia. 162, 62 N. W. 648, 11 Am. R. R. & Corp. Rep. 346. Where a city authorized the use of a street for market purposes by allowing wagons to stand against the curb for purposes of traffic, whereby a nuisance resulted, it was held that the abutting fee owner could enjoin. *Richmond v. Smith*, 148 Ind. 294.

⁴⁶*City of Atlanta v. Holliday*, 96 Ga. 546, 23 S. E. 509.

⁴⁷*Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 73 N. E. 1108, 106 Am. St. Rep. 549, 70 L.R.A. 761, affirming S. C. 90 App. Div. 386, 85 N. Y. S. 478; *Lane v. Lamke*, 53 App. Div. 395, 65 N. Y. S. 1090.

⁴⁸*Post*, § 853; *Lancaster v. Richardson*, 4 Lans. 136.

riages, wagons, etc., and, in short, to the entire width of the street upon which the land of the lot-owner abuts. As against the lot-owner, the city as trustee of the public use, has an undoubted right, whenever its authorities see fit, to open and fit for use and travel the street over which the public easement extends, to its entire width, and whether it will so open and improve it, or whether it should be so opened or improved, is a matter of discretion, to be determined by the public authorities to whom the charge and control of the public interests in and over such easements is committed. With this discretion of the authorities, courts cannot ordinarily interfere upon the complaint of a lot-owner, so long as the easement continues to exist; and no mere non-user, however long continued, will operate as an abandonment of the public right, even though, until needed for a public use, the authorities should treat the street as the property of the owner of the lot. The public authorities, representing its interests, will not be thereby estopped from removing obstructions therefrom, and opening and fitting it for public use to its entire width.⁴⁹ The public use is the dominant interest, and the public authorities are the exclusive judges when and to what extent the street shall be improved. Courts can interfere only in case of fraud or oppression, constituting manifest abuse of discretion."⁵⁰ Undoubtedly the proper public authorities may cause the removal of shade trees in a street where they constitute an obstruction to travel or when necessary for the improvement of the street without liability to the owner of the fee.⁵¹ But, as intimated in the Wisconsin case above quoted, the courts will interfere to prevent or redress the wrong to the owner of the fee by the removal of trees, when the authorities abuse the discretion vested in them. And it is an abuse of discretion to remove valuable shade trees when

⁴⁹Citing *State v. Leaver*, 62 Wis. 387, 22 N. W. 576; *Reilly v. City of Racine*, 51 Wis. 526, 8 N. W. 417; *Childs v. Nelson*, 69 Wis. 125, 33 N. W. 587.

⁵⁰*Chase v. City of Oskosh*, 81 Wis. 313, 51 N. W. 560, 6 Am. R. R. & Corp. Rep. 1, 29 Am. St. Rep. 898, 15 L.R.A. 553. This case is quoted and approved in *Tate v. City of Greensborough*, 114 N. C. 392, 19 S. E. 767, 24 L.R.A. 671.

⁵¹*Ibid*; *Vanderhurst v. Tholeke*, 113 Cal. 147, 45 Pac. 266; *Castlebury v. Atlanta*, 74 Ga. 164; *Patterson v. Vail*, 43 Ia. 142; *Cartwright v. Liberty Telephone Co.*, 205 Mo. 126, 103 S. W. 982, 12 L.R.A. (N.S.) 1125; *Colston v. St. Joseph*, 106 Mo. App. 714, 80 S. W. 590; *Sherman v. Butcher*, 72 N. J. L. 53, 60 Atl. 336.

there is no reasonable necessity therefor.⁵² In Massachusetts shade trees are protected by statute, and can only be removed upon complaint to the proper authorities and a determination by them that the public necessity so requires, of which proceeding the owner is entitled to notice with an opportunity to be heard.⁵³ And in Michigan a city was held liable for removing shade trees without notice to the abutting owner and giving him an opportunity to transplant them, and this in the absence of any statute on the subject.⁵⁴ A statute of New Hampshire provided for designating and marking ornamental and shade trees in the public highways and for their care and preservation and for the acquisition of title thereto by purchase or condemnation and also forbade the injury or destruction of trees so marked and designated under a penalty. In a suit for the penalty against an abutting owner for cutting down such a tree, the court held the statute unconstitutional, as amounting to a taking of the abutter's property without compensation.⁵⁵

Whether trees may be mutilated or removed to make room for electric wires or railroads or other such uses, will depend upon the view taken as to whether these are legitimate street uses. If they are held to be so, then they stand upon the same footing as ordinary street improvements.⁵⁶ If not, then they cannot be placed in the street at all without compensation to the abutter,

⁵²City of Atlanta v. Holliday, 96 Ga. 546, 23 S. E. 509; City of Mt. Carmel v. Bell, 52 Ill. App. 427; City of Mt. Carmel v. Shaw, 52 Ill. App. 429; Bills v. Belknap, 36 Ia. 583; Everett v. Council Bluffs, 46 Ia. 66; Chisman v. Deck, 84 Ia. 344, 51 N. W. 55; Frostburg v. Wineland, 98 Md. 239, 56 Atl. 811, 103 Am. St. Rep. 399, 64 L.R.A. 627; Stretch v. Cassopolis, 125 Mich. 167, 84 N. W. 51, 84 Am. St. Rep. 567, 51 L.R.A. 345; Cross v. Morristown, 18 N. J. Eq. 305, 313; Tainter v. Morristown, 19 N. J. Eq. 46; State v. Mayor etc. of Vineland, 56 N. J. L. 474, 28 Atl. 1039, 23 L.R.A. 685; Western Union Tel. Co. v. Smith, 64 Ohio St. 106, 59 N. E. 890.

⁵³White v. Godfrey, 97 Mass. 472; Bliss v. Ball, 99 Mass. 597; Chase v.

City of Lowell, 149 Mass. 85, 21 N. E. 233.

⁵⁴Stretch v. Cassopolis, 125 Mich. 167, 84 N. W. 51, 84 Am. St. Rep. 567, 51 L.R.A. 345; Miller v. Ypsilanti etc. Ry. Co., 125 Mich. 171, 84 N. W. 49, 84 Am. St. Rep. 569, 51 L.R.A. 955.

⁵⁵Bigelow v. Whitecomb, 72 N. H. 473, 57 Atl. 680, 65 L.R.A. 676.

⁵⁶Southern Bell Tel. & Tel. Co. v. Francis, 109 Ala. 224, 19 So. 1, 55 Am. St. Rep. 930, 31 L.R.A. 193; Huntting v. Hartford St. Ry. Co., 73 Conn. 179, 46 Atl. 824; Miller v. Ypsilanti etc. Ry. Co., 125 Mich. 171, 84 N. W. 49, 84 Am. St. Rep. 569, 51 L.R.A. 955; McAntire v. Joplin Tel. Co., 75 Mo. App. 535; Dodd v. Consolidated Traction Co., 57 N. J. L. 482, 31 Atl. 980. In the Michi-

and this compensation would include any injury to his trees. For any unauthorized or unnecessary interference with shade trees for any of these purposes, the abutter, owning the fee, may recover damages.⁵⁷ There is no necessity, in the legal sense, for cutting or trimming trees, merely because it is more convenient or less expensive.⁵⁸ If interference with trees can reasonably be avoided, the companies are bound to let them alone.

§ 191 (132b). Interfering with access by obstructing street at a distance from the plaintiff's property. Whether a plaintiff can recover damages when the street upon which he abuts is closed or obstructed at a point not in front of his property, is one of the vexed questions of the law. According to the better view, as it seems to the writer, the private right of access is the right, not only to go from one's property to the street and from the street to the property, but also to use the street in either direction as an outlet to the general system of highways.⁵⁹ This right extends at least to the next intersecting street.⁶⁰ Consequently if the street upon which the plaintiff abuts is wrongfully closed or obstructed in either direction, at a point between the plaintiff's property and the next

gan case it was held that though a street railway company had a right to remove trees, a removal of them without notice to the owner would render the company liable.

⁵⁷Hoyt v. Southern New Eng. Tel. Co., 60 Conn. 385, 22 Atl. 957; Bradley v. Southern New Eng. Tel. Co., 66 Conn. 559, 34 Atl. 499, 32 L.R.A. 280; Rockford Gas etc. Co. v. Ernst, 68 Ill. App. 300; Tisso v. Great So. Tel. & Tel. Co., 39 La. An. 996, 3 So. 261, 4 Am. St. Rep. 248; Wyant v. Central Telephone Co., 123 Mich. 51, 81 N. W. 928, 81 Am. St. Rep. 155, 47 L.R.A. 497; Hazelhurst v. Mayes, 84 Miss. 7, 36 So. 33, 64 L.R.A. 805; Cartwright v. Liberty Telephone Co., 205 Mo. 126, 103 S. W. 982, 12 L.R.A.(N.S.) 1125; State v. Graeme, 130 Mo. App. 138; McCruden v. Rochester R. R. Co., 5 Misc. 59, 25 N. Y. Supp. 114; Western Union Tel. Co. v. Smith, 64 Ohio St. 106,

59 N. E. 890; Marshall v. Am. Tel. & Tel. Co., 16 Pa. Super. Ct. 615; Memphis Tel. Co. v. Hun, 16 Lea 456; O'Connor v. Nova Scotia Tel. Co., 22 Duvall 276; *And see* Cumberland Tel. & Tel. Co. v. Cassedy, 78 Miss. 666, 29 So. 762; Osborne v. Auburn Telephone Co., 111 App. Div. 702, 97 N. Y. S. 874. In Darling v. Newport Elec. Lt. Co., 74 N. H. 515, it was held that an electric company had no right to trim trees which grew upon private ground and projected into the street, without an assessment of damages.

⁵⁸Van Sielen v. Jamaica Elec. Lt. Co., 45 App. Div. 1, 61 N. Y. S. 210; S. C. *affirmed* 168 N. Y. 650, 61 N. E. 1135; Brown v. Asheville Elec. Co., 138 N. C. 533, 51 S. E. 62, 107 Am. St. Rep. 554, 69 L.R.A. 631.

⁵⁹*Ante*, § 123; *post*, § 193.

⁶⁰*Ibid.*

intersecting street, this right is violated and an action accrues.⁶¹ So where the plaintiff's property was on a *cul de sac* and his outlet was blocked or obstructed.⁶² If such closure or obstruction is lawfully made for a public purpose, there is a taking or damaging of the plaintiff's property for which compensation may be had under the constitution.⁶³ If the obstruction is more remote from the plaintiff's property it is generally held that there can be no recovery.⁶⁴

⁶¹Cushing-Wetmore Co. v. Gray, 152 Cal. 118, 92 Pac. 70; Harvey v. Ga. Southern etc. R. R. Co., 90 Ga. 66, 15 S. E. 783; Brunswick etc. R. R. Co. v. Hardy, 112 Ga. 604, 37 S. E. 888, 52 L.R.A. 396; Southern Cotton Oil Co. v. Bull, 116 Ga. 776, 43 S. E. 52; Savannah etc. Ry. Co. v. Gill, 118 Ga. 737, 45 S. E. 623; Winnetka v. Clifford, 201 Ill. 475, 66 N. E. 384; O'Brien v. Central Iron etc. Co., 158 Ind. 218, 63 N. E. 302, 92 Am. St. Rep. 305, 57 L.R.A. 508; Pennsylvania R. R. Co. v. Stanley, 10 Ind. App. 421, 37 N. E. 288, 38 N. E. 421; Park v. C. & S. W. R. R. Co., 43 Ia. 636; Dairy v. Iowa Cent. Ry. Co., 113 Ia. 716, 84 N. W. 688; Young v. Rothrock, 121 Ia. 588, 96 N. W. 1105; Leavenworth etc. R. R. Co. v. Curtan, 51 Kan. 432, 33 Pac. 297; Atchison etc. Ry. Co. v. Armstrong, 71 Kan. 366, 80 Pac. 928, 114 Am. St. Rep. 474, 1 L.R.A.(N.S.) 113; Dyche v. Weichselbaum, 9 Kan. App. 360, 58 Pac. 126; Richardson v. Davis, 91 Md. 390, 46 Atl. 964; Kaje v. Chicago etc. R. R. Co., 57 Minn. 422, 59 N. W. 493; Fitzer v. St. Paul City Ry. Co., 105 Minn. 221, 117 N. W. 434; Glaessner v. Anheuser-Busch Brewing Co., 100 Mo. 508, 13 S. W. 707, 2 Am. R. R. & Corp. Rep. 420; Autenreith v. St. Louis etc. R. R. Co., 36 Mo. App. 254; Dries v. St. Joseph, 98 Mo. App. 611, 73 S. W. 723; Ellis v. St. Louis etc. R. R. Co., 131 Mo. App. 395; Morris & C. Dredging Co. v. Jersey City, 64 N. J. L.

587, 46 Atl. 609; Perrine v. Penn. R. R. Co., 72 N. J. L. 398, 61 Atl. 87; Buckholz v. New York etc. R. R. Co., 148 N. Y. 640, 43 N. E. 76; Ackerman v. True, 56 App. Div. 54, 66 N. Y. S. 6; Gillender v. New York, 127 App. Div. 612; Tise v. Whataker-Harvey Co., 144 N. C. 507, 57 S. E. 210; Madden v. Penn. Ry. Co., 21 Ohio C. C. 73; Johnston v. Old Colony R. R. Co., 18 R. I. 642, 29 Atl. 594; Richardson v. Lone Star Salt Co., 20 Tex. Civ. App. 486, *post*, §§ 202, 203.

Contra: San Jose Ranch Co. v. Brooks, 74 Cal. 463, 16 Pac. 250; Newton v. New York, etc. R. R. Co., 72 Conn. 420, 44 Atl. 813; Stufflebeam v. Montgomery, 3 Ida. 20, 26 Pac. 125; Jacksonville etc. Ry. Co. v. Thompson, 34 Fla. 346, 16 So. 282, 26 L.R.A. 410; O'Connor v. St. Louis etc. R. R. Co., 56 Ia. 735; Harrington v. Ia. Cent. Ry. Co., 126 Ia. 388, 102 N. W. 139; Grey v. Greenville etc. Ry. Co., 59 N. J. Eq. 372, 46 Atl. 638. *See* Guttery v. Glenn, 201 Ill. 275, 66 N. E. 305; Davenport v. Dedham, 178 Mass. 382, 59 N. E. 1029; Davenport v. Hyde Park, 178 Mass. 385, 59 N. E. 1030.

⁶²Brakken v. Minneapolis etc. Ry. Co., 29 Minn. 41, 11 N. W. 124; S. C. 31 Minn. 45, 16 N. W. 459; 32 Minn. 425, 21 N. W. 414; Hayes v. Chicago etc. Ry. Co., 46 Minn. 349, 49 N. W. 61.

⁶³*See post*, §§ 202–207, 354.

⁶⁴Ibid; Shaubert v. St. Paul etc. R. R. Co., 21 Minn. 502; Rochette v.

§ 192 (121e). Damage to railroads, water pipes, gas pipes, etc., by the grading and improvement of streets. The power to grade and change the grade of streets and otherwise improve them in aid of the right of passage is continuing and inalienable.⁶⁵ A grant of the right to lay down and operate a railroad in a street,⁶⁶ or to lay water or gas pipes therein⁶⁷ is subject to the paramount right of the public to grade and improve the street. It follows that the grantees of such privileges cannot recover for any damage to their property resulting from such improvements, when the same are executed with due care and skill. Accordingly, when the grade of a street is lowered and water or gas pipes are exposed or brought too near the surface, there is no remedy against the city either to prevent the change or recover damages therefor, but the company must lower its pipes at its own expense.⁶⁷ So where the grade was raised and the pipes were buried too deep.⁶⁸ A gas company may be compelled to remove its pipes to make way for a municipal water main.⁶⁹ A railroad company cannot prevent a change of grade, but may be compelled to change the grade of its tracks to conform to a new grade of the street.⁷⁰ But this power of

Chicago etc. Ry. Co., 32 Minn. 201, 20 N. W. 140; Barnum v. Minn. Transfer Ry. Co., 33 Minn. 365, 23 N. W. 538; Kakkie v. St. Paul etc. Ry. Co., 44 Minn. 438, 46 N. W. 912.

⁶⁵Roanoke Gas Co. v. City of Roanoke, 88 Va. 810, 14 S. E. 665, 6 Am. R. R. & Corp. Rep. 88; *Ante* § 145.

⁶⁶Ridge Ave. Pass. R. R. Co. v. Philadelphia, 10 Phil. 37; Chicago, B. & Q. R. R. Co. v. City of Quincy, 136 Ill. 563, 27 N. E. 192, 29 Am. St. Rep. 334; Ridge Ave. Pass. R. R. Co. v. Philadelphia, 181 Pa. St. 592, 37 Atl. 910.

⁶⁷Rockland Water Co. v. City of Rockland, 83 Me. 267, 22 Atl. 166; Natick Gas Lt. Co. v. Natick, 175 Mass. 246, 56 N. E. 292; Stillwater Water Co. v. City of Stillwater, 50 Minn. 498, 52 N. W. 893; National W. W. Co. v. City of Kansas, 20 Mo. App. 237; In matter of Deering, 93 N. Y. 361; Columbus Gas Light &

Coke Co. v. City of Columbus, 50 Ohio St. 65, 33 N. E. 292, 7 Am. R. R. & Corp. Rep. 472, 40 Am. St. Rep. 648, 19 L.R.A. 510; Seranton Gas & W. Co. v. Seranton City, 214 Pa. St. 586, 64 Atl. 84; Pittsburg v. Consolidated Gas Co., 34 Pa. Super. Ct. 374; Roanoke Gas Co. v. City of Roanoke, 88 Va. 810, 14 S. E. 665, 6 Am. R. R. & Corp. Rep. 88; Southwark Water Co. v. District Board, L. R. (1898) 2 Ch. 603.

⁶⁸Jamaica Pond Aqueduct Co. v. Brookline, 121 Mass. 5.

⁶⁹Pittsburg v. Consolidated Gas Co., 34 Pa. Super. Ct. 374.

⁷⁰Hampton v. Chicago etc. Ry. Co., 125 Ill. App. 412; McHale v. Easton & B. Transit Co., 169 Pa. St. 416, 32 Atl. Rep. 461; City of Detroit v. Ft. Wayne etc. R. R. Co., 90 Mich. 646, 51 N. W. Rep. 688, 6 Am. R. R. & Corp. Rep. 188. But a contractor, paving a street, has no right unnecessarily to obstruct

changing the grade of streets cannot be so exercised as to destroy the franchise of a railroad company lawfully authorized to occupy a street. A railroad was authorized to be built upon a street along the shore of Puget Sound, in Seattle, and to connect with the wharves along its route. The railroad and surrounding property were destroyed by fire. Thereupon the city raised the grade of intersecting streets so as to render it impossible for the railroad to be reconstructed without cutting through the embankments made by such changes of grade. In a suit by the city to enjoin such cutting, the bill was dismissed on the ground that the city's power to grade the streets must be so exercised as not to destroy the company's franchise.⁷¹ Where a railroad crossed a street under an ordinance which required it to build a bridge so as to allow use of the full width of the street, and the city subsequently widened the street, it was held that the railroad company was entitled to compensation for having to reconstruct

the operation of street cars, and may be prevented from so doing. Milwaukee St. R. R. Co. v. Adlam, 85 Wis. 142, 55 N. W. Rep. 181, 8 Am. R. R. & Corp. Rep. 320.

⁷¹City of Seattle v. Columbia & P. S. R. R. Co., 6 Wash. 379, 33 Pac. Rep. 1048. The court says: "Under such a state of facts, we think the well-settled rule of law is that the city's right to graduate its streets or alter the grades thereof is not an absolute one, to be exercised at its option, regardless of its effect upon others, but it is a power which must be reasonably exercised with reference to the rights of parties interested. It cannot be exercised to the extent of working the destruction of such a franchise previously granted. This would amount to an unauthorized taking of property, and none of the cases cited by appellant, in our opinion, support such contention, as none of them go to the extent of holding that the city may so alter and change the grades of its streets as to work a destruction of a valuable property under such circumstances, but the

right to change the grades of streets is sustained upon the ground that the same may be done consistently with the preservation of rights previously acquired by others. * * * The property of railroad companies is as much within the protection of the law as that of any other company or of any individual. Railroads are recognized as essential to the welfare and prosperity of the people, and, because of their capacity for usefulness to the whole people, railroad companies are invested with large powers of a public nature. The laws of the state also provide for the organization of cities, and large powers are granted to them relating to the control and regulation of matters within the municipal limits; but, where a broad interpretation of such powers clashes with acquired property rights, as in this instance, such reasonable construction should be given them as shall not have the effect of destroying or even materially injuring such rights. The city must so use its powers as to enable the respondents to have a reasonable

the bridge.⁷² Where a railroad crosses a street by a bridge and is allowed to occupy a part of the street with piers, it may be compelled to remove them without compensation when the traffic on the street requires it.⁷³ Where a statute provided that any person damaged by altering a street should be entitled to compensation, it was held to apply to a water company whose pipes were exposed by a change of grade.⁷⁴

§ 193 (121f). Damage to railroads, water and gas pipes by the construction of sewers. The construction of sewers differs from the grading of streets which was considered in the last section, in that the grading of a street ordinarily extends to the entire surface, while a sewer occupies but a small portion of the width. If the construction of a sewer necessarily interferes with water or gas pipes or a railroad, and causes damage thereto, there is no remedy and no taking, because the respective franchises are subject to the right of the city to construct sewers.⁷⁵ But it may be doubted whether a city has an absolute discretion to locate a sewer where it pleases, regardless of the consequences to those having franchises in the street. Thus it has been held that the location of a sewer in the center of a street, on the line of a railroad, will be enjoined, when it can just as well be laid elsewhere in the street.⁷⁶ Where a street was laid out over a railroad right of way without making the railroad a party, it was held that it could recover any ex-

use and enjoyment of theirs and not so as to render it impossible or even very difficult for the respondents to reconstruct and operate their railroads."

⁷²Kansas City v. Kansas City Belt R. R. Co., 102 Mo. 633, 14 S. W. 808, 3 Am. R. R. & Corp. Rep. 522, 10 L.R.A. 851.

⁷³Delaware etc. R. R. Co. v. Buffalo, 158 N. Y. 266, 53 N. E. 44; Delaware etc. R. R. Co. v. Buffalo, 158 N. Y. 478, 53 N. E. 533.

⁷⁴Paris Mountain Water Co. v. Greenville, 53 S. C. 82, 30 S. E. 699.

⁷⁵Railway Co. v. Louisville, 8 Bush 415; New Orleans Gas Lt. Co. v. Drainage Commission, 111 La. 838, 35 So. 929; S. C. *affirmed*, 197 U. S. 453, 25 S. C. 471; Brunswick Gas Light Co. v. Brunswick, 92 Me. 493,

43 Atl. 104; Kirby v. Citizens' R. Co., 48 Md. 168, 30 Am. Rep. 455; Kansas City etc. R. R. Co. v. Morley, 45 Mo. App. 304; Portsmouth Gas Light Co. v. Shanahan, 65 N. H. 233, 19 Atl. 1002; Brooklyn El. R. R. Co. v. Brooklyn, 2 App. Div. 98, 37 N. Y. Supp. 560; Elster v. City of Springfield, 49 Ohio St. 82, 30 N. E. 274; Bryn Mawr Water Co. v. Lower Marion Tp., 15 Pa. Co. Ct. 527; San Antonio v. San Antonio St. R. R. Co., 15 Tex. Civ. App. 1.

⁷⁶Des Moines City R. Co. v. City of Des Moines, 90 Ia. 770, 58 N. W. 770, 26 L.R.A. 767; Scranton G. & W. Co. v. Scranton, 11 Pa. Dist. Ct. 671; Clapp v. City of Spokane, 53 Fed. 515; *Contra*, Spokane St. R. R. Co. v. City of Spokane, 5 Wash. 634, 32 Pac. 456.

pense incurred in consequence of a sewer being built across its tracks on such street.⁷⁷

§ 194 (133). Miscellaneous uses. A well or cistern may be constructed in a street for the purpose of obtaining water to be used in sprinkling the streets or extinguishing fires or convenience of the public, provided this can be done without damage to the abutting owner or destruction of the public use.⁷⁸ The sprinkling of streets is one mode of making their use more convenient, and the public may use the street for such appliances for that purpose as are reasonable under the circumstances. But a city may not erect a water tank in the street for use in sprinkling and such use may be enjoined by the abutting owner.⁷⁹ But the plea that a structure is for use in the amelioration of the streets will not justify the serious obstruction of a street by the indirect means of such amelioration, as by the erection of pumping works in a street,⁸⁰ or a mill for sawing lumber or crushing stone for a pavement. Nor can a street be occupied by a stand pipe⁸¹ or used for boring wells⁸² to obtain a public water supply. The erection of a pound for the confinement of stray animals, or of a jail or lock-up upon a public street, is a misappropriation which may be enjoined

⁷⁷Baltimore v. Cowen, 88 Md. 447, 41 Atl. 900.

⁷⁸West v. Bancroft, 32 Vt. 367; Barter v. Commonwealth, 3 Penn. & Watts, 253; Savage v. Salem, 23 Or. 381, 31 Pac. 832, 37 Am. St. Rep. 688, 7 Am. R. R. & Corp. Rep. 428. In Dubuque v. Malony, 9 Ia. 450, the city had constructed a brick cistern in the street for similar purposes, and the defendant, in digging for the foundation of his building, removed the support of the soil so that it burst and was destroyed. The city sued for damages, and a recovery was denied on the ground that such use of the street, the fee being in the abutting owners, was not justified.

⁷⁹Davis v. Appleton, 109 Wis. 580, 85 N. W. 515.

⁸⁰City of Morrison v. Hinkson, 87 Ill. 587, 29 Am. Rep. 77.

⁸¹Barrows v. City of Sycamore,

150 Ill. 588, 37 N. E. 1096, 41 Am. St. Rep. 400, 10 Am. R. R. & Corp. Rep. 62, *reversing* S. C. 49 Ill. App. 590. In a suit by an abutting owner to recover damages because of such a stand pipe a declaration which alleged that the plaintiff's property was damaged by reason of the apprehension that the stand pipe would fall or be blown upon the plaintiff's property or that it might burst and flood it; and which stated no ground for such apprehension, was held to state no cause of action. Doyle v. Sycamore, 193 Ill. 501, 61 N. E. 1117.

⁸²Odneal v. City of Sherman, 77 Tex. 182, 14 S. W. Rep. 31. In Lostutter v. City of Aurora, 126 Ind. 436, 26 N. E. 184, 12 L.R.A. 259, it was held that a city could maintain a well and pump in a street without subjecting the soil to an additional servitude.

by the abutting owner,⁸³ or for which trespass will lie.⁸⁴ The erection of ornamental or memorial statuary at proper places in public streets is sanctioned by long and universal usage, and may be regarded as a legitimate use of the same.⁸⁵ A municipality may authorize the use of a street for a street fair when travel and access are not materially interfered with thereby.⁸⁶ The erection of lamps for street lighting, of hydrants, fire plugs, drinking fountains and watering troughs, all fall within the principles heretofore laid down as to the appropriate use of streets. Weighing scales cannot be placed in a street over the objection of an abutter who has the fee.⁸⁷ A canal for any purpose would seem to be a perversion of the street, and, therefore, a use which could not be authorized without compensation.⁸⁸ But drains for the improvement of a highway are proper though they interfere with access.⁸⁹ A street cannot be used for warehouse.⁹⁰ a band stand,⁹¹ electric light plant⁹² or other building.⁹³ A city was held not liable to an abutting owner for obstructing access to his premises by wagons by means of a platform and step for the use of pedestrians.⁹⁴ An elevated footway over a street a hundred feet from plaintiff's premises was held to be no obstruction to his light and air, and so to afford him no cause of action.⁹⁵ When the abutter owns the fee, it has been held that a city cannot authorize the use of the

⁸³Lutterloh v. Town of Cedar Keys, 15 Fla. 306.

⁸⁴Winchester v. Capron, 63 N. H. 605, 56 Am. Rep. 554.

⁸⁵Thompson v. Hodgson, 2 Hun 146.

⁸⁶State v. Stoner, 39 Ind. App. 104, 79 N. E. 399.

⁸⁷Cline v. Cornwall, 21 Grant Ch. 129. But where a city had power to provide for weighing hay, coal, etc., it was held that it could grant to an individual the right to place scales in the street in front of his premises and that, after such grant had been acted upon it could not be revoked. Town of Spencer v. Andrew, 82 Ia. 14, 47 N. W. 1007, 12 L.R.A. 115.

⁸⁸City of Fresno v. Fresno Canal & Irr. Co., 98 Cal. 179, 32 Pac. 943; Walley v. Platte & D. Ditch Co., 15

Colo. 579, 26 Pac. 129; Tucker v. Inhabitants of Russell, 14 Pick. 279; Taylor v. Chicago etc. R. R. Co., 83 Wis. 636, 53 N. W. 853.

⁸⁹Dean v. Millard, 151 Mich. 582, 115 N. W. 739.

⁹⁰Packet Co. v. Sorrels, 50 Ark. 466; Bingham v. Doane, 9 Ohio 165; Attorney General v. Tarr, 148 Mass. 309, 19 N. E. 358, 2 L.R.A. 87.

⁹¹Richmond v. Smith, 101 Va. 161, 43 S. E. 345.

⁹²McIlhenny v. Trenton, 148 Mich. 381, 111 N. W. 1083, 118 Am. St. Rep. 583, 10 L.R.A.(N.S.) 623.

⁹³Pettit v. Grand Junction, 119 Ia. 352, 93 N. W. 381.

⁹⁴Hobson v. City of Philadelphia, 155 Pa. St. 131, 25 Atl. 1046.

⁹⁵Ottendorf v. Agnew, 13 Daly, 16; Knox v. New York, 55 Barb. 404.

street for a hack stand.⁹⁶ Where the fee is in the abutting owner, he is entitled to the herbage growing thereon, and a law or ordinance allowing it to be depastured by the public is void.⁹⁷ As to the taking of a highway for a turnpike or ferry landing, the reader is referred to a subsequent section.⁹⁸ No action will lie on account of changes in the relative width of roadway and sidewalk.⁹⁹ Nor because the curb is placed nearer the lot line on one side than on the other.¹ Nor because a portion of the street is set apart for a bicycle path² or speedway.³ Under legislative authority the control of a city street may be turned over to park commissioners and traffic teams excluded therefrom, but it is intimated that if abutters are damaged thereby they would have a remedy.⁴ When railroad tracks are elevated to avoid a grade crossing, the railroad company may be permitted to occupy a part of the street for the supports of its bridge.⁵ The legislature may authorize the use of space under the stairs of an elevated railroad for news stands and booths, when such use does not interfere with the travel on the street.⁶ So the space under a

⁹⁶ McCaffrey v. Smith, 41 Hun 117. See Odell v. Bretney, 62 App. Div. 595, 71 N. Y. S. 449.

⁹⁷ Woodruff v. Neal, 28 Conn. 165; Cole v. Drew, 44 Vt. 49. *Contra*: Hardenburk v. Lockwood, 25 Barb. 9. Where such a law was in force when the highway was laid out, it was held that compensation was made in view of such statute, and that the act was valid as to such highway. Griffin v. Martin, 7 Barb. 297.

⁹⁸ Post, §§ 219, 220.

⁹⁹ Munson v. Mallory, 36 Conn. 165, 4 Am. Rep. 52; O'Neil v. Armstrong, 17 Phil. 273; and see Carter v. Chicago, 57 Ill. 283; Chicago v. Wright, 69 Ill. 318; Topliff v. Chicago, 196 Ill. 215, 36 N. E. 692; Commonwealth v. Borough of Beaver, 171 Pa. St. 542, 33 Atl. 112.

¹ McGrew v. Kansas City, 64 Kan. 61, 67 Pac. 438; McGrew v. Kansas City, 69 Kan. 606, 77 Pac. 698. So where a street was so improved as to leave a space for grass and sidewalk on one side and only for side-

walk on the other, it was held a person on the latter side could not recover damages. English v. Danville, 170 Ill. 131, S. C. 69 Ill. App. 288. But where the sidewalk was removed and the curb placed on the street line it was held the abutter was entitled to damages. Narchold v. Westport, 71 Mo. App. 508.

² Ryan v. Preston, 59 App. Div. 97, 69 N. Y. S. 100; O'Donnell v. Preston, 74 App. Div. 86, 77 N. Y. S. 305; Ryan v. Preston, 32 Misc. 92, 66 N. Y. S. 162.

³ Seovel v. Detroit, 146 Mich. 93, 109 N. W. 20.

⁴ Kreigh v. Chicago, 86 Ill. 407; People v. Walsh, 96 Ill. 232, 36 Am. Rep. 135; Cicero Lumber Co. v. Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L.R.A. 696; and see Simon v. Northrop, 27 Ore. 488, 40 Pac. 560, 30 L.R.A. 171.

⁵ Summerfield v. Chicago, 197 Ill. 270, 64 N. E. 490.

⁶ People v. Keating, 168 N. Y. 390, 61 N. E. 637, reversing S. C. 62 App. Div. 348, 71 N. Y. S. 97.

bridge or viaduct which is incapable of use as a street, may be leased for any purpose which does not interfere with the use of the bridge.⁷ Where the abutter owned the fee and the city laid a flagstone sidewalk, it was held that it became a part of the realty and the city was held liable for removing it because the abutter refused to pay for it.⁸ There is no liability for the necessary interference with access during the construction of authorized public works in a street.⁹

§ 195. The franchise to use streets and its incidents. This subject has been considered with respect to railways in a former section.¹⁰ The legislature has paramount authority over streets and highways and municipalities can only exercise such control thereover as has been granted to them by that body.¹¹ Consequently a municipal corporation cannot grant the right to use its streets for any purpose unless it has been authorized to do so by the legislature.¹² Powers granted to municipal corporations over streets may be resumed at the pleasure of the legislature,¹³ which may itself grant the use of streets in cities without their consent.¹⁴ As a general rule no

⁷Ricard Boiler & Engine Co. v. Toledo, 6 Ohio C. C. (N. S.) 501.

⁸Platt v. Oneonta, 88 App. Div. 192, 84 N. Y. S. 699; S. C. affirmed without opinion, 183 N. Y. 516, 76 N. E. 1106.

⁹Lefkowitz v. Chicago, 238 Ill. 23.

¹⁰Ante, § 169.

¹¹Chamberlain v. Ia. Telephone Co., 119 Ia. 619, 93 N. W. 596; La Harpe v. Elm Tp. Gas etc. Co., 69 Kan. 97, 76 Pac. 448; New England Tel. & Tel. Co. v. Boston Terminal Co., 182 Mass. 397, 65 N. E. 835; United R. R. & C. Co. v. Jersey City, 71 N. J. L. 80, 58 Atl. 71; Fries v. New York etc. R. R. Co., 169 N. Y. 270, 62 N. E. 358, reversing S. C. 57 App. Div. 577, 68 N. Y. S. 670; Muhlenker v. New York etc. R. R. Co., 173 N. Y. 549, 66 N. E. 558; 2 Dill. Munic. Corp. §§ 680, 683.

¹²Ibid.; Domestic Tel. Co. v. Newark, 49 N. J. L. 344; Beekman v. Flint ave. R. R. Co., 153 N. Y. 144, 47 N. E. 277; Potter v. Collis, 156

N. Y. 16, 50 N. E. 413; Phoenix v. Gannon, 123 App. Div. 93, 108 N. Y. S. 255; State v. Monroe, 40 Wash. 545, 82 Pac. 888.

¹³"The legislature, representing the state, has paramount authority over its public ways, including the streets in cities as well as the country roads, and the legislature can at any time resume the power previously granted to municipal subdivisions of the state." United R. R. & C. Co. v. Jersey City, 71 N. J. L. 80, 81, 58 Atl. 71.

¹⁴La Harpe v. Elm Tp. Gas etc. Co., 69 Kan. 97, 76 Pac. 448; Milbridge etc. Elec. R. R. Co., appellants, 96 Me. 110, 51 Atl. 818; Cheney v. Boston Consolidated Gas Co., 198 Mass. 356; Rochester etc. Water Co. v. Rochester, 176 N. Y. 36, 68 N. E. 117, affirming S. C. 84 App. Div. 71, 82 N. Y. S. 455; Economic P. & C. Co. v. Buffalo, 59 Misc. 571; State v. Sheboygan, 111 Wis. 23, 86 N. W. 657.

person or corporation can occupy a street or highway for any structure such as a railway, water main, gas main, electric wires or conduits, without a grant from the legislature, either directly or through a municipal corporation to which the power has been delegated.¹⁵ And any such structure or appliance placed in the street without such authority is a public nuisance and any abutting owner whose easements in the street are impaired thereby may have his action for damages or abatement of the nuisance.¹⁶ But it has been held in Kansas that a natural gas company could lay its pipes in the public highways without any permission from the legislature or local authorities, the same being for the transportation of a commodity and within the public easement.¹⁷ When a grant to use the streets for a public purpose has been made and accepted, there is a binding contract which cannot be revoked or impaired without compensation.¹⁸ Structures and appliances placed in the street under a valid franchise are the private property of the grantee and are protected by the Constitution, the same as other private

¹⁵East Tenn. Telephone Co. v. Anderson Co. Telephone Co., 115 Ky. 488, 74 S. W. 218; Twin Village Water Co. v. Damariscotta Gas Lt. Co., 98 Me. 325, 56 Atl. 1112; Pur nell v. McLane, 98 Md. 559, 56 Atl. 830; Baltimore Co. W. & Elec. Co. v. Baltimore Co., 105 Md. 154, 66 Atl. 34; Southern Bell Tel. & Tel. Co. v. Mobile, 162 Fed. 523.

¹⁶Neb. Telephone Co. v. Western Independent L. D. T. Co., 68 Neb. 772, 95 N. W. 18; *ante*, 172.

¹⁷State v. Kansas Natural Gas Co., 71 Kan. 503, 80 Pac. 962, 114 Am. St. Rep. 507. The suit was by the attorney general to oust the company from such use of the public ways. The court says: "The contention of the state is that the use which the gas company is making of the highway is exceptional, and may be exercised only under a franchise from the state, mediately or immediately. We think this is an overstatement of the proposition. The use is not exceptional. The transportation of commodities on the

highways is one of the uses for which it has always been maintained. The means, however, used by the gas company in the transportation of gas are exceptional. A demand for this method has not heretofore existed in this state; but shall this fact alone deprive the defendant of the use of the highway for a usual and proper purpose, unless such use necessarily obstruct, seriously inconvenience or endanger public travel? * * * The public highway is maintained for the transportation of the commodities of the country, and the means employed for such purpose need only be such as not to interfere with public travel to the extent hereinbefore stated. It is not shown that such privilege has been abused by the defendant in this case, nor is it claimed that the use by the gas company has or will inconvenience or obstruct public travel. Judgment for the plaintiff is therefore denied." p. 510.

¹⁸People v. Central Union Tel. Co., 192 Ill. 307, 61 N. E. 428, 85 Am.

property.¹⁹ Such structures and appliances are held subject to the right of the public authorities to change or improve the street as the public interests require.²⁰ And also, it is held, subject to the right of the public authorities to discontinue or vacate the street, in which case the right to use the land ceases and the owner of such structures and appliances must remove them at his own expense.²¹ In the case last referred to certain streets in Boston were discontinued and taken for a terminal station. The plaintiff, an electrical company, had conduits in these streets for its wires. The company removed its wires but the conduits could not be removed without destroying them. It was held that the company could not recover for its loss, either by petition under the statute, as for property taken, or in tort.²²

St. Rep. 338; Chicago Telephone Co. v. N. W. Telephone Co., 199 Ill. 324, 65 N. E. 329; Kalamazoo v. Kalamazoo H. L. & P. Co., 124 Mich. 74, 82 N. W. 811; N. W. Telephone Exch. Co. v. Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L.R.A. 175; Duluth v. Duluth Telephone Co., 84 Minn. 486, 87 N. W. 1127; Rochester etc. Water Co. v. Rochester, 176 N. Y. 36, 68 N. E. 117, *affirming* S. C. 84 App. Div. 71, 82 N. Y. S. 455; Southern Kan. Ry. Co. v. Oklahoma City, 12 Okl. 82, 69 Pac. 1050; Mead v. Portland, 45 Ore. 1, 76 Pac. 347; Wheeling etc. R. R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499, 4 L.R.A. (N.S.) 321; Morristown v. East Tenn. Tel. Co., 115 Fed. 304, 53 C. C. A. 132.

¹⁹Montgomery Lt. & W. P. Co. v. Citizens' Lt. H. & P. Co., 142 Ala. 462, 38 So. 1026; Missouri-Edison Elec. Co. v. Weber, 102 Mo. App. 95.

²⁰Ante, §§ 192, 193.

²¹New England Tel. & Tel. Co. v. Boston Terminal Co., 182 Mass. 397, 65 N. E. 835.

²²New England Tel. & Tel. Co. v. Boston Terminal Co., 182 Mass. 397, 65 N. E. 835; Boston Electric Lt. Co. v. Boston Terminal Co., 184 Mass. 563, 69 N. E. 346. In the former

case, which was a petition under the statute, the court says: "All the statutes and ordinances upon which the petitioners rely as a justification for their action in constructing conduits in the public streets and as giving them rights of property there, are merely provisions for the regulation of the different public rights in the streets. None of them purports to convey private rights of property. Most of them expressly state the limitations upon the authority given, and make the petitioners subject to possible future proceedings terminating or modifying their rights. But where there is no such express provision the result is the same; their rights in connection with the rights of the public are subject to reasonable regulation, or even to termination at any time, if the supreme authority acting in the public interest shall so determine. It follows that they have no rights of property in the street, and their structures that were built therein were personal property which they had a right to remove, and which could not be subject for the assessment of damages under statutes of this kind." p. 400.

Grants of franchises by municipal corporations must be made in accordance with the power conferred²³ and where a city was empowered to grant franchises by ordinance, a grant by resolution was held to be ineffective.²⁴ Such grants are subject to the police power and to regulation in the interests of the public.²⁵ Grantees of franchises may be compelled to change the location of structures in the street as the public needs require and without compensation for the trouble and expense.²⁶ A municipality cannot grant an exclusive franchise without express legislative authority²⁷ and a mere grant gives no exclusive right.²⁸ A general grant to a gas company to lay its pipes in any and all streets of a city, was held valid.²⁹ When no duration is fixed for such grants they are held not to be in perpetuity but during the existence of the municipality making the grant and when such municipality ceases to exist the grant terminates.³⁰ A statute giving telegraph and telephone companies the right to construct their lines upon the public roads or highways of the State has generally been held to include the streets

²³Phoenix v. Gannon, 123 App. Div. 93, 108 N. Y. S. 255; and see London Mills v. White, 208 Ill. 289, 70 N. E. 313; Lowther v. Bridgeman, 57 W. Va. 306, 50 S. E. 410; Hardman v. Cabot, 60 W. Va. 664, 55 S. E. 756, 7 L.R.A.(N.S.) 506.

²⁴Morristown v. East Tenn. Telephone Co., 115 Fed. 304, 53 C. C. A. 132.

²⁵State v. St. Paul City Ry. Co., 78 Minn. 331, 81 N. W. 200; Carthage v. Garner, 209 Mo. 688, 108 S. W. 521; Economic P. & C. Co. v. Buffalo, 59 Misc. 571; New Castle City v. Central D. & P. Tel. Co., 207 Pa. St. 371, 56 Atl. 931.

²⁶Merced Falls Gas & Elec. Co. v. Turner, 2 Cal. App. 720, 84 Pac. 239; Atlantic etc. Ry. Co. v. Cordele, 125 Ga. 373, 54 S. E. 155; Atlantic etc. Ry. Co. v. Cordele, 128 Ga. 293, 57 S. E. 493; Crocker v. Boston Elec. Lt. Co., 180 Mass. 516, 62 N. E. 978; Carthage v. Central N. Y. Tel. & Tel. Co., 185 N. Y. 448, 78 N. E. 165, 113 Am. St. Rep. 932, reversing 110 App. Div. 625; People

v. Ellison, 188 N. Y. 523, 81 N. E. 447, affirming 115 App. Div. 254, 101 N. Y. S. 35; Am. Tel. & Tel. Co. v. Millcreek, 195 Pa. St. 643, 46 Atl. 140; Am. Tel. & Tel. Co. v. Harbor Creek Tp., 23 Pa. Super. Ct. 437; Charlottesville v. Southern Ry. Co. 97 Va. 428, 34 S. E. 98; Washington etc. Ry. Co. v. Alexandria, 98 Va. 344, 36 S. E. 385; Ganz v. Ohio Postal Tel. Cable Co., 140 Fed. 692, 72 C. C. A. 186.

²⁷Oklahoma v. Oklahoma Gas & Elec. Co., 13 Okl. 454, 74 Pac. 98; Clarksburg Elec. Lt. Co. v. Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L.R.A. 142; Hutchinson W. L. & P. Co. v. Hutchinson, 144 Fed. 256.

²⁸Columbus v. Columbus Gas Co., 76 Ohio St. 309, 81 N. E. 440.

²⁹Kalamazoo v. Kalamazoo H. L. & P. Co., 124 Mich. 74, 82 N. W. 811; Meyers v. Hudson Co. Elec. Co., 63 N. J. L. 573, 44 Atl. 713.

³⁰People v. Chicago Telephone Co., 220 Ill. 238, 77 N. E. 245; Venner v. Chicago City Ry. Co., 236 Ill. 349, 86 N. E. 266.

of cities and villages.³¹ All such grants are strictly construed in favor of the public.³²

V.—DAMAGES FROM THE VACATION, DISCONTINUANCE AND CLOSING OF STREETS AND HIGHWAYS.

§ 196. The power to vacate streets and highways. The legislature has plenary authority over the public streets and highways and may itself vacate and discontinue them, as it may deem best for the public good, or it may delegate the power to do so to municipal corporations and local authorities, subject, in either case, to such limitations as the constitution may impose.³³ In one of the cases cited the supreme court of California says: "That the legislature possesses competent power to vacate a street in a city; that the legislature may delegate or commit such power to the municipal authorities of the city; that its exercise by the municipal authorities is dependent upon the will and subject to the control of the legislature; and that after such power has been committed to the municipal authorities, the legislature may revoke it in part as well as in whole, or, without an express revocation, may itself exercise it in any particular instance, are propositions about which there can be

³¹Chamberlain v. Ia. Telephone Co., 119 Ia. 619, 93 N. W. 596; N. W. Telephone Exch. Co. v. Minneapolis, 81 Minn. 140, 86 N. W. 69; Duluth v. Duluth Telephone Co., 84 Minn. 486, 87 N. W. 1127; State v. Red Lodge, 30 Mont. 338, 76 Pac. 758; State v. Red Lodge, 33 Mont. 345, 83 Pac. 642; Point Pleasant Elec. Lt. & P. Co. v. Bayhead, 62 N. J. Eq. 296, 49 Atl. 1108; State v. Sheboygan, 111 Wis. 23, 86 N. W. 657; Abbott v. Duluth, 104 Fed. 833.

³²Chicago Terminal Transfer R. R. Co. v. Chicago, 203 Ill. 576, 68 N. E. 99; *ante*, § 169. A grant without limitation as to time was held good for the life of the company in Wyandotte Elec. Lt. Co. v. Wyandotte, 124 Mich. 43, 82 N. W. 821, but was held revocable at any time as to future exercises of the power in Boise City etc. Water Co. v. Boise

City, 123 Fed. 232, 59 C. C. A. 236. One legislature cannot bind future ones by enacting that no street railway franchise shall be granted on certain streets. Commonwealth v. Broad St. Ry. Co., 219 Pa. St. 11, 67 Atl. 958. As to annexing conditions to grant by city see Mich. Tel. Co. v. St. Joseph, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L.R.A. 87; Mich. Tel. Co. v. Benton Harbor, 121 Mich. 512, 80 N. W. 386, 47 L.R.A. 104; Keystone State Tel. & Tel. Co. v. Ridley Park, 28 Pa. Super. Ct. 635; Southern Bell Tel. & Tel. Co. v. Richmond, 103 Fed. 33, 44 C. C. A. 147.

³³Polack v. S. F. Orphan Asylum, 48 Cal. 490; San Francisco v. Burr, 108 Cal. 460; Whitsett v. Union Depot & R. R. Co., 10 Colo. 243, 15 Pac. 339; Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312,

no controversy in this State.”³⁴ Doubtless there would be no question about the correctness of these propositions in any State, unless there were constitutional provisions in the way. The power to vacate and close public streets is as necessary for the public good as the power to establish them, in order that the public may be relieved from the expense of maintaining useless streets and highways and from liability for their non-repair or defective condition, and in order also that, though the ways are not useless, the space occupied by them may be devoted to more pressing public needs, or that improvements for the public safety and welfare may be carried out.³⁵ It of course follows from what has already been said that a municipal corporation or local body cannot vacate or discontinue a street or highway unless authorized to do so by the legislature and then only in the manner and to the extent that the law provides.³⁶

§ 197. Right to compensation for the vacation or closing of streets. General principles. When a street is vacated or closed by statutory authority, the right of any person damaged thereby to compensation depends upon the constitution or upon some statute making provision therefor. In many of the States there are statutes which provide for compensation in such cases.³⁷ If there is no statute giving compensa-

104 Am. St. Rep. 156; Smith v. Macon, 129 Ga. 227, 58 S. E. 713; Meyer v. Teutopolis, 131 Ill. 552, 23 N. E. 651; Haynes v. Thomas, 7 Ind. 38; McLachlan v. Gray, 105 Ia. 259, 74 N. W. 773; Leavenworth v. Douglass, 59 Kan. 416, 53 Pac. 123; State v. Board of Park Comrs., 100 Minn. 150, 110 N. W. 1121, 9 L.R.A.(N.S.) 1045; Coster v. Albany, 43 N. Y. 399; Fearing v. Irwin, 55 N. Y. 486; Beatty v. Kinnear Mfg. Co., 21 Ohio C. C. 384; McGee's Appeal, 114 Pa. St. 470, 8 Atl. 237; Ponischiil v. Hoquiam Sash & Door Co., 41 Wash. 303, 83 Pac. 316; Armstrong v. County Court, 54 W. Va. 503, 46 S. E. 131.

³⁴Polack v. S. F. Orphan Asylum, 48 Cal. 490, 492.

³⁵Levee District v. Farmer, 101 Cal. 178, 35 Pac. 569, 23 L.R.A. 388; Coffey County v. Venard, 10 Kan.

95; State v. Sneedeker, 30 N. J. L. 80. Most of the cases hereafter cited in this chapter are authority for this point.

³⁶Macintosh v. Nome, 1 Alaska, 492; Texarkana v. Leach, 66 Ark. 40, 48 S. W. 807, 74 Am. St. Rep. 68; Cromwell v. Brown, 50 Conn. 470; Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312, 104 Am. St. Rep. 156; Coker v. Atlanta etc. Ry. Co., 123 Ga. 483, 51 S. E. 481; Louisville v. Bannon, 99 Ky. 74, 35 S. W. 120; Miller v. Corinna, 42 Minn. 391, 44 N. W. 127; Coleman v. Holden, 88 Miss. 798, 41 So. 374; Leighton v. Concord etc. R. R. Co., 72 N. H. 224, 55 Atl. 938.

³⁷See East St. Louis v. O'Flynn, 119 Ill. 200, 10 N. E. 395, 59 Am. Rep. 795; Parker v. Catholic Bishop, 146 Ill. 158, 34 N. E. 473, *affirming* S. C. 41 Ill. App. 74; Butterworth

tion, then the right must be derived from the constitution, if at all. Some constitutions provide only for compensation when property is *taken* for public use, while others provide also for compensation when property is *damaged* or *injured* for public use.³⁸ The statutes which provide for compensation are usually general in their terms and the same in phrase and legal effect as the constitutional provisions last referred to. The right to compensation therefor, when property is claimed to be injured by the vacation or closing of a street, will depend upon whether the injury complained of is a *taking* within the constitution or whether it is *damage* or *injury* within the meaning of the constitutional and statutory provisions referred to. There is a *taking* if any private right appurtenant to the property in question is destroyed or interfered with, otherwise not.³⁹ Such destruction or injury to private rights would also be *damage* or *injury* within the meaning of those words as used in constitutions and statutes.⁴⁰ But they include something more and are generally held to embrace damages that are special and peculiar to the plaintiff or which would be actionable but for the statutory authority.⁴¹ If a street is closed or obstructed without statutory authority the act is a public nuisance. The right of any particular person to recover for injury to his property by such a nuisance will depend upon whether his damage is special and peculiar within the meaning of the law.

It is thus manifest that the principal questions which arise in connection with the vacation and closing of streets and upon which the right to relief depends, are what private "rights" exist

v. Bartlett, 50 Ind. 537; Cook v. Quick, 127 Ind. 477, 26 N. E. 1007; Brady v. Shinkle, 40 Ia. 576; Hicks v. Ward, 69 Me. 436; Smith v. Boston, 7 Cush. 254; Nichols v. Richmond, 162 Mass. 170, 38 N. E. 501; Kimball v. Homan, 74 Mich. 699, 42 N. W. 167; Buhl v. Fort St. Union Depot Co., 98 Mich. 596, 57 N. W. 829, 23 L.R.A. 392, 9 Am. R. R. & Corp. Rep. 173; In re Big Hollow Road, 111 Mo. 326, 19 S. W. 947; Heinrich v. St. Louis, 125 Mo. 424, 28 S. W. 626, 46 Am. St. Rep. 490; Lindsay v. Omaha, 30 Neb. 512, 46 N. W. 627, 27 Am. St. Rep. 415;

Petition of Concord, 50 N. H. 530; Matter of New York, 28 App. Div. 143; Matter of Morris Ave., 56 App. Div. 122, 67 N. Y. S. 603; Matter of Vanderbilt Ave., 95 App. Div. 533, 88 N. Y. S. 769; Blackwell etc. Ry. Co. v. Gist, 18 Okl. 516, 90 Pac. 889; In re Melon St., 182 Pa. St. 397, 38 Atl. 482, 28 L.R.A. 275; Ruscomb St., 30 Pa. Super. Ct. 476; Attorney General v. Sherry, 20 R. I. 43, 37 Atl. 43.

³⁸Ante, §§ 15-61.

³⁹Ante, § 65.

⁴⁰Post, § 362.

⁴¹Post, §§ 363, 364.

in the street and what constitutes special damage. These questions will be next considered.

§ 198. Private rights in streets and highways. This subject has already been considered in the earlier sections of this chapter,⁴² but more with reference to the rights of an abutting owner in the street in front of his property or immediately adjacent thereto. Some further considerations seem necessary with special reference to the subject in hand and to the rights of such owners in the street beyond their lot lines and in neighboring streets upon which they do not abut. Highways and streets may be established in three ways: by dedication; by prescription; and by condemnation. The most common form of dedication is that by plat. The effect of platting a tract of ground and of selling lots with reference to such plat, is thus stated by the editor of Smith's Leading Cases in a passage often quoted: "If the owner of land lays out and establishes a town, and makes and exhibits a plan of the town, with various plats of spare ground, such as streets, alleys, quays, etc., and sells the lots with clear reference to that plan, the purchasers of lots acquire, as appurtenant to their lots, every easement, privilege and advantage which the plan represents as belonging to them as a part of the town, or to their owners as citizens of the town. And the right thus passing to the purchaser is not the mere right that such purchaser may use these streets, or other public places, according to their appropriate purposes, but a right vesting in the purchasers, that all persons whatever, as their occasion may require or invite, may so use them; in other words, the sale and conveyance of lots in the town, and according to its plan, imply a grant or covenant to the purchasers, that the streets and other public places, indicated as such upon the plan, shall be forever open to the use of the public, free from all claims or interference of the proprietor inconsistent with such use."⁴³ The correctness of this statement is attested by many cases which have laid down the law in similar language.⁴⁴ According to some authorities each purchaser under the plat acquires

⁴² *Ante*, §§ 120 *et seq.*

⁴³ *Smith's Leading Cases*, 7th Am. Ed. p. 154, citing *Rowan v. Portland*, 8 B. Mon. 232, 237; *Bowling Green v. Hobson*, 3 B. Mon. 478, 481; *Huber v. Gazley*, 18 Ohio 18; *Dummer v. Jersey City*, Spencer, 86,

106; *Wickliffe v. Lexington*, 11 B. Mon. 163. The passage is quoted and approved in *Zearing v. Raber*, 74 Ill. 409, 411, 412 and *Earl v. Chicago*, 136 Ill. 277, 285, 286.

⁴⁴ *Chambers v. Talladega Real Est. & L. Ass.*, 126 Ala. 296, 28 So. 636;

the right to have all the streets and alleys laid down on the plat kept open and to that extent has a private right in each and all of the streets and alleys on the subdivision.⁴⁵ But the prevailing rule is that the purchaser of a lot according to a plat acquires an easement only in such streets and alleys laid down on the plat as are necessary for the reasonable and convenient enjoyment of the lot conveyed.⁴⁶ This rule fixes no precise

McLean v. Llewellyn Iron Works, 2 Cal. App. 346, 83 Pac. 1082, 1085; Eisendrath v. Chicago, 192 Ill. 320, 61 N. E. 419; Thompson v. Maloney, 199 Ill. 276, 65 N. E. 236, 93 Am. St. Rep. 133; Russell v. Lincoln, 200 Ill. 511, 65 N. E. 1088; Russell v. Chicago etc. Elec. Ry. Co., 205 Ill. 155, 68 N. E. 727; Indianapolis v. Cross, 7 Ind. 9; Rowan v. Portland, 8 B. Mon. 232; Winter v. Payne, 33 Fla. 470, 15 So. 211; Porter v. Carpenter, 32 Fla. 14, 21 So. 788; Price v. Stratton, 45 Fla. 535, 33 So. 644; Horton v. Williams, 99 Mich. 423, 58 N. W. 369; Longworth v. Sedorie, 165 Mo. 221, 65 S. W. 260; Taylor v. Hopper, 62 N. Y. 649; Olean v. Steyner, 135 N. Y. 341, 32 N. E. 9; Lord v. Atkins, 138 N. Y. 184, 33 N. E. 1035; Matter of Adams, 141 N. Y. 297, 36 N. E. 318; Kerrigan v. Backus, 69 App. Div. 329, 74 N. Y. S. 906; Collins v. Buffalo Furnace Co., 73 App. Div. 22, 76 N. Y. S. 420; Smith v. Smith, 120 App. Div. 278, 104 N. Y. S. 1106; Moose v. Carson, 104 N. C. 431, 10 S. E. 689; Ermentrout v. Stitzel, 170 Pa. St. 540, 33 Atl. 109; Fereday v. Mankedick, 172 Pa. St. 535, 34 Atl. 46; Quicksall v. Philadelphia, 177 Pa. St. 301, 35 Atl. 609; Higgins v. Sharon, 5 Pa. Supr. Ct. 92; Commonwealth v. Shoemaker, 14 Pa. Supr. Ct. 194, 202; Witman v. Smeltzer, 16 Pa. Supr. 285; Smith v. Union S. & S. Co., 17 Pa. Supr. Ct. 444; Corsicana v. Zorn, 97 Tex. 317, 78 S. W. 924; McFarland v. Lendekugel, 107 Wis. 474, 83 N. W. 757. See

Barr v. Oskaloosa, 45 Ia. 275; Kimball v. Kenosha, 4 Wis. 321.

⁴⁵Indianapolis v. Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Hall v. Breyfogle, 162 Ind. 494, 70 N. E. 883; Collins v. Asheville Land Co., 128 N. C. 563, 39 S. E. 21, 83 Am. St. Rep. 720; Cook v. Totten, 49 W. Va. 177, 38 S. E. 491, 87 Am. St. Rep. 792. And see South Western State Normal School's Case, 213 Pa. St. 244, 62 Atl. 908.

⁴⁶Roberts v. Mathews, 137 Ala. 523, 34 So. 624, 97 Am. St. Rep. 56; Field v. Barling, 149 Ill. 556, 37 N. E. 850, 41 Am. St. Rep. 311, 10 Am. R. R. & Corp. Rep. 707; Highbarger v. Milford, 71 Kan. 331, 80 Pac. 633; Rodgers v. Parker, 9 Gray. 445; Fox v. Union Sugar Co., 109 Mass. 292; Regan v. Boston Gas Lt. Co., 137 Mass. 37; Pearson v. Allen, 151 Mass. 79, 23 N. E. 731, 21 Am. St. Rep. 426; Diamond Match Co. v. Ontonagon, 72 Mich. 249, 40 N. W. 448; Horton v. Williams, 99 Mich. 423, 58 N. W. 369; Dodge v. Pennsylvania R. R. Co., 43 N. J. Eq. 351; S. C. affirmed on opinion below, 45 N. J. Eq. 366; Taylor v. Hopper, 62 N. Y. 649; Kerrigan v. Backus, 69 App. Div. 329, 74 N. Y. S. 906; Madden v. Pennsylvania R. R. Co., 21 Ohio C. C. 73; Ermentrout v. Stitzel, 170 Pa. St. 540, 33 Atl. 109; Fereday v. Mankedick, 172 Pa. St. 535, 34 Atl. 46; Garvey v. Harbison-Walker Refractories Co., 213 Pa. St. 177, 62 Atl. 778; Johnston v. Old Colony R. R. Co., 18 R. I. 642, 29 Atl. 549, 49 Am. St. Rep. 800; State v. Hamilton,

limit to the private rights acquired but the reasonable application of the rule would include such streets and parts of streets as give value to the lot and the loss of which would render the lot less valuable to use or sell. The grant, according to well recognized principles, should be construed in favor of the purchaser and he should be held to acquire all that is fairly necessary for the enjoyment of the property conveyed. Some cases hold that the purchaser acquires the right to have the street on which his property abuts kept open to the next connecting street in each direction and no farther.⁴⁷

Where two or more owning adjoining tracts in severalty united in platting the same, it was held that a purchaser from one acquired no right in the streets laid down on the plat, except such parts of the streets as were on the land of his grantor.⁴⁸ But it would seem that by uniting in the plat the proprietors agreed to represent and treat the plat as a unit and that a purchaser from any one should get the same rights in the streets as though all belonged to one person. If this result could not be worked out on the basis of a grant it might on that of estoppel. When the owner of a tract plats his property and makes the streets continuous with those in an older and adjoining plat, the purchaser of a lot in the former is held to get no private right to the streets in the latter.⁴⁹

A street may be dedicated by grants of land describing it as a boundary and in such case there is an implied covenant that

109 Tenn. 276, 70 S. W. 619. In the last case it is said that the true rule is laid down in Jones on Easements, § 347, as follows: "When land is sold by reference to a plan upon which several streets and avenues are laid out, the grantee does not necessarily acquire an easement in all such streets or ways. He acquires an easement in the street or way upon which his lot is situated, and in such other streets or ways as are necessary or convenient to enable him to reach a highway. He acquires no easement in a street or way which his land does not touch, and which does not lead to a highway; and he is not entitled to an injunction or other remedy by rea-

son of an obstruction to such street or way."

⁴⁷Hawley v. Baltimore, 33 Md. 270; Baltimore v. Frick, 82 Md. 77; Canton Co. v. Baltimore, 106 Md. 69; Glasgow v. St. Louis, 107 Mo. 198, 17 S. W. 743, 5 Am. R. R. & Corp. Rep. 192; Matter of Twenty Ninth St., 1 Hill 189; Reis v. New York, 188 N. Y. 58, 80 N. E. 573, affirming S. C. 113 App. Div. 464, 99 N. Y. S. 291.

⁴⁸Patterson v. Duluth, 21 Minn. 493.

⁴⁹Kimball v. Homan, 74 Mich. 699, 42 N. W. 167. And see Shauburt v. St. Paul etc. R. R. Co., 21 Minn. 502. But the principle of estoppel might apply here in some cases.

there is such a way, that, so far as the grantor is concerned it shall be continued, that the grantee, his heirs and assigns, shall have the benefit of it and that the grantee is entitled as purchaser to have the space of ground left open forever as a street, and to the right of using the way for every purpose that may be usual and reasonable for the accommodation of the granted premises.⁵⁰ Manifestly the grantee in such a case would get the same right as in case of platted streets. So when land is conveyed as bounded on a public highway of which the grantor owns the fee and though the fee of the highway is excluded from the grant.⁵¹ But if the grantor does not own the fee of the highway his deed of land bounded thereon is held to convey no private rights therein.⁵² Where one dedicates a highway wholly on his own land but contiguous to the land of another, the latter acquires no private right in the way.⁵³ But if the highway was accepted and the latter should improve his property with reference to the highway or should sell to a third party, a right to have the way kept open might arise by estoppel.

Just what private rights abutters have in streets and highways established by prescription or condemnation, it is somewhat difficult to determine. But it would seem that both the public and those claiming the fee should be estopped from denying the existence of a private right of access and of light and air, as to those who have purchased or improved abutting property on the faith of the advantages afforded by the street or highway and that this private right of access should be held to include an outlet in both directions to the general system of

⁵⁰Teasley v. Stanton, 136 Ala. 641, 33 So. 823, 96 Am. St. Rep. 88; Haynes v. Thomas, 7 Ind. 38; Louisville etc. R. R. Co. v. Hennin, 14 Ky. L. R. 526; Witson v. Gutman, 79 Md. 405, 29 Atl. 608, 24 L.R.A. 403; Parker v. Smith, 17 Mass. 413; Parker v. Framingham, 8 Met. 260; White v. Tide Water Oil Co., 50 N. J. Eq. 1, 25 Atl. 199; White's Bank v. Nichols, 64 N. Y. 65; Matter of Opening Eleventh Ave., 81 N. Y. 436; Davis v. Morris, 132 N. C. 435, 43 S. E. 950; In re Melon St., 182 Pa. St. 397, 38 Atl. 482, 28 L.R.A. 275; Clymer v. Roberts, 220 Pa. St. 162, 69 Atl. 548. Compare Mercer v.

Pittsburg etc. R. R. Co., 36 Pa. St. 99.

⁵¹Holloway v. Southmayd, 139 N. Y. 390, 34 N. E. 1047; Holloway v. Delano, 64 Hun 27; Holloway v. Delano, 64 Hun 34. See Dodge v. Penn. R. R. Co., 43 N. J. Eq. 351; S. C. affirmed, 45 N. J. Eq. 366; Wheeler v. Clark, 58 N. Y. 267.

⁵²Wheeler v. Clark, 58 N. Y. 267; Kings County Fire Ins. Co. v. Stevens, 101 N. Y. 411, 5 N. E. 353.

⁵³Attorney General v. Sherry, 20 R. I. 43, 37 Atl. 344. But see Oliver Schlemmer Co. v. Steinman & M. Furn. Co., 2 Ohio N. P. (N.S.) 293; S. C. affirmed, 7 Ohio C. C. (N.S.) 468.

streets. Many cases hold that these private rights exist in favor of every abutting owner, without considering how the street was established or how such owner obtained title to his property. "Every owner of ground on any street in Lexington," says the supreme court of Kentucky, "has a right, as inviolable as it is indisputable, to the common and unobstructed use of the contiguous highway, so far as it may be necessary for affording him certain incidental easements and services, and a convenient outlet to other streets. And of this right the legislature cannot deprive him, without his consent, or a just compensation in money. The extent of this appurtenant right, dependent upon circumstance, may not, in a particular case, be easily definable with mathematical precision. As far as it exists, however, it partakes of the character of private property, and is therefore protected by the fundamental law as property. But it cannot, as to each proprietor of ground, be coextensive with all the streets and alleys of the city. As a private right, it must, like that of vicinage, be limited by its own nature and end—that is chiefly by the necessity of convenient access to, and outlet from, the ground of each proprietor."⁵⁴

Where a street is opened or extended by condemnation and abutting property is specially assessed for benefits on account of the improvement, it would seem just that the payment of such assessment should secure to the property the advantages

⁵⁴Transylvania University v. Lexington, 3 B. Mon. 25, 38 Am. Dec. 173. "The owners of lots bordering upon a public street have an easement of way in the street, in addition to the use of it in common with the people generally. This additional right of way is private property, within the protection of the law, as much as if it were corporeal property, and cannot be taken for public use without just compensation." Anderson v. Turbeville, 6 Coldw. 150. *To same effect:* Smith v. McDowell, 148 Ill. 51, 35 N. E. 141; Field v. Barling, 149 Ill. 556, 37 N. E. 850, 10 Am. R. R. & Corp. Rep. 707; World's Columbian Exposition v. Brennan, 51 Ill. App. 128; Rensselaer v. Leopold, 106 Ind. 29; O'Brien

Em. D.—24.

v. Central I. & S. Co., 158 Ind. 218, 63 N. E. 302, 92 Am. St. Rep. 305, 57 L.R.A. 508; Long v. Wilson, 119 Ia. 267, 93 N. W. 282, 97 Am. St. Rep. 315, 60 L.R.A. 720; Hiller v. Railroad Co., 28 Kan. p. 628; Lexington etc. R. R. Co. v. Applegate, 8 Dana 289, 33 Am. Dec. 497; Gargan v. Louisville etc. R. R. Co., 89 Ky. 212, 12 S. W. 259; Bannin v. Rohmeiser, 90 Ky. 48, 13 S. W. 444; Plumer v. Johnston, 63 Mich. 165, 29 N. W. 687; Diamond Match Co. v. Ontonagon, 72 Mich. 249, 40 N. W. 448; Pearsall v. Board of Supervisors, 74 Mich. 558, 42 N. W. 77; Heinrich v. City of St. Louis, 125 Mo. 424, 28 S. W. 626; Strader v. Cincinnati, 1 Handy, 446; *Ante*, §§ 120, 121.

paid for, which are none other than the easements of access, light and air. Some of the authorities so hold⁵⁵ but others take a different view.⁵⁶

§ 199. What is special damage from the obstruction of a street. When a specific statute gives compensation for property damaged by the vacation or discontinuance of a street or highway or other public work or a constitution in general terms guarantees compensation for property damaged or injured for public use, the rule, almost universally applied, is "that those damages can be recovered which could have been recovered at common law, had the acts which caused them been done without statutory authority."⁵⁷ Some courts hold that the words in question mean more but we believe that none hold that they mean less.⁵⁸ When a street or highway is closed or obstructed without statutory authority a public nuisance is created, and actionable damage depends upon the question of special or peculiar injury resulting from the nuisance. One line of cases holds that if the obstruction is not in front of the plaintiff's property and does not cut off his access, so that he can still get from his property to the general system of streets and highways, then he does not suffer any special or peculiar damage, though access in one direction may be cut off or interfered with and though his property, by reason of the obstruction, is rendered less valuable to use or to sell.⁵⁹ The reasoning is

⁵⁵Wormser v. Brown, 72 Hun 93, 25 N. Y. S. 553; Oliver Schlemmer Co. v. Steinman & M. Furn. Co., 2 Ohio N. P. (N.S.) 293.

⁵⁶Chicago v. Union Building Ass., 102 Ill. 379, 397, 398, 40 Am. Rep. 598; Dantzer v. Indianapolis Union Ry. Co., 141 Ind. 604, 39 N. E. 223, 50 Am. St. Rep. 343, 34 L.R.A. 769, 11 Am. R. R. & Corp. Rep. 249; Kean v. Elizabeth, 54 N. J. L. 462, 24 Atl. 495; S. C. affirmed 55 N. J. L. 337, 26 Atl. 939. See quotation from latter case in note 34, § 121.

⁵⁷Stanwood v. Malden, 157 Mass. 17, 31 N. E. 702, 16 L.R.A. 591; Coster v. Albany, 43 N. Y. 399.

⁵⁸See post, § 365.

⁵⁹Guttery v. Glenn, 201 Ill. 275, 66 N. E. 305; Proprietors of Locks

and Canals v. Nashua etc. R. R. Co., 10 Cush. 385; Willard v. Cambridge, 3 Allen, 574; Stanwood v. Malden, 157 Mass. 17, 31 N. E. 702, 16 L.R.A. 591; Shaw v. Boston etc. R. R. Co., 159 Mass. 597, 35 N. E. 92; Davenport v. Dedham, 178 Mass. 382, 59 N. E. 1029; Davenport v. Hyde Park, 178 Mass. 385, 59 N. E. 1030; Robinson v. Brown, 182 Mass. 266, 65 N. E. 377; Hyde v. Fall River, 197 Mass. 4; Shawburt v. St. Paul etc. R. R. Co., 21 Minn. 502; Rochette v. Chicago etc. R. R. Co., 32 Minn. 201, 20 N. W. 140; Barnum v. Minn. Transfer Ry. Co., 33 Minn. 365, 23 Minn. 538; Lakkie v. St. Paul etc. Ry. Co., 44 Minn. 438, 46 N. W. 912; Enders v. Friday, 78 Neb. 510; Gray v. Greenville etc. Ry. Co. 59 N. J.

that the diminution in value of the property is due to the fact that the owner or occupier of the property and those who desire to reach or do business with him suffer delay and inconvenience in consequence of the obstruction, that such delay and inconvenience are not actionable and therefore the damage to the property which results because of such delay and inconvenience is not actionable.⁶⁰ On the other hand, another line of cases holds

Eq. 372, 46 Atl. 638; *Coster v. Albany*, 43 N. Y. 399.

The subject of special damages is also much discussed in the following cases which relate to the vacation of streets and highways; *Whitsett v. Union Depot & R. R. Co.*, 10 Colo. 243, 15 Pac. 339; *Newton v. New York etc. R. R. Co.*, 72 Conn. 420, 44 Atl. 813; *Chicago v. Union Bldg. Ass.*, 102 Ill. 379, 40 Am. Rep. 598; *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795; *Dantzer v. Indianapolis Union Ry. Co.*, 141 Ind. 604, 39 N. E. 223, 50 Am. St. Rep. 343, 34 L.R.A. 769, 11 Am. R. R. & Corp. Rep. 249; *Smith v. Boston*, 7 Cush. 254; *Castle v. Berkshire*, 11 Gray 26; *Davis v. County Comrs.*, 153 Mass. 218, 26 N. E. 848, 11 L.R.A. 750; *Hammond v. County Comrs.*, 154 Mass. 509, 28 N. E. 902; *Nichols v. Richmond*, 162 Mass. 170, 38 N. E. 501; *Buhl v. Fort St. Union Depot Co.*, 98 Mich. 596, 57 N. W. 829, 23 L.R.A. 392; *Bailey v. Culver*, 84 Mo. 531, *affirming* 12 Mo. App. 175; *Glasgow v. St. Louis*, 107 Mo. 198, 17 S. W. 743, 3 Am. R. R. & Corp. Rep. 192; *Cram v. Laconia*, 71 N. H. 41, 51 Atl. 635, 57 L.R.A. 282; *Kean v. Elizabeth*, 54 N. J. L. 462, 24 Atl. 495; *S. C. affirmed*, 55 N. J. L. 337, 26 Atl. 939; *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 62 N. E. 341, 87 Am. St. Rep. 600, *reversing S. C. sub. nom. Beatty v. Kinnear Mfg. Co.* 21 Ohio C. C. 384; *Ponischil v. Hoquiam S. & D. Co.*, 41 Wash. 303, 83 Pac. 316; *Mottman v. Olympia*, 45 Wash. 361, 88 Pac.

579; *Montreal v. Drummond*, L. R. 1 H. L. 384.

⁶⁰Ibid. See especially *Proprietors of Locks and Canals v. Nashua etc. R. R. Co.*, 10 Cush. 385; *Stanwood v. Malden*, 157 Mass. 17, 31 N. E. 702, 16 L.R.A. 591; *Cram v. Laconia*, 71 N. H. 41, 51 Atl. 635, 57 L.R.A. 282. In the case first cited the court says: "Why is the market value of an estate, thus situated diminished? Is it not because whenever a purchaser in seeking a home, or a lot to build one on, he perceives at a glance that in passing from his home to the places he will have most occasion to frequent, he must encounter the inconveniences of an intervening railroad, such as passing over an embankment, danger of detention by trains, exposure of children to accident, and the like, considerations which render the houses less eligible and attractive? Such a view applies itself to the tastes, motives and inducements of purchasers. Now the inconveniences of crossing a railroad track, elevated or depressed, or at grade, the possible detention by trains, the noise and smoke and frightening of horses, the danger to persons, especially to children, are those which the whole community suffer alike, in a greater or less degree; but it cannot be contended that every member of such community, or even those so situated as to feel them in a greater degree than others, can maintain a claim against the company for damages on this account. Is then the apprehension of

that if the wrongful closing or obstruction of a street impairs access to property whereby it is diminished in value, the owner suffers a special damage for which he may recover.⁶¹ So if property is depreciated in value by a structure in the street

these inconveniences, which might tend to alarm purchasers, and deter or discourage them from buying, a more tenable ground to support a claim for damages? We think not. They are common to the whole community, to be borne by the public in consideration of the greater public good to be acquired." Proprietors of Locks & Canals v. Nashua etc. R. R. Co., 10 *Cush.* 385.

⁶¹Cabell v. Williams, 127 Ala. 320, 28 *So.* 405; Birmingham Ry. L. & P. Co. v. Moran, 151 Ala. 187, 44 *So.* 152; Davis v. Epstein, 77 Ark. 221, 92 *S. W.* 19; Harvey v. Ga. Southern etc. R. R. Co., 90 Ga. 66, 15 *S. E.* 783; Southern Cotton Oil Co. v. Bull, 116 Ga. 776, 43 *S. E.* 52; Savannah etc. Ry. Co. v. Gill, 118 Ga. 737, 45 *S. E.* 623; Chicago v. Puleyn, 129 Ill. App. 179; Danville etc. R. R. Co. v. Tidrick, 137 Ill. App. 553; Martin v. Marks, 154 Ind. 549, 57 *N. E.* 249; O'Brien v. Central I. & S. Co., 158 Ind. 218, 63 *N. E.* 308, 92 Am. St. Rep. 305, 57 L.R.A. 508; Pennsylvania Co. v. Stanley, 10 Ind. App. 421, 37 *N. E.* 288, 38 *N. E.* 421; Park v. C. & S. W. R. R. Co., 43 Ia. 636; Dairy v. Ia. Cent. Ry. Co., 113 Ia. 716, 84 *N. W.* 688; Young v. Rothrock, 121 Ia. 588, 96 *N. W.* 1105; Dyche v. Weichselbaum, 9 Kan. App. 360, 58 *Pac.* 126; Richardson v. Davis, 91 Md. 390, 46 *Atl.* 964; Brauer v. Baltimore Refrigerating etc. Co., 99 Md. 367, 58 *Atl.* 21, 105 Am. St. Rep. 304, 66 L.R.A. 403; Brakken v. Minneapolis etc. Ry. Co., 29 Minn. 41, 11 *N. W.* 124; S. & 31 Minn. 45, 16 *N. W.* 459 and 32 Minn. 425, 21 *N. W.* 414; Hayes v. Chicago etc. Ry. Co., 46 Minn. 349, 49 *N. W.*

61; Aldrich v. Wetmore, 52 Minn. 164, 53 *N. W.* 1072; Fitzer v. St. Paul City Ry. Co., 105 Minn. 221, 117 *N. W.* 434; Glaessner v. Anheuser-Busch Brewing Co., 100 Mo. 508, 13 *S. W.* 707, 2 Am. R. R. & Corp. Rep. 420; Autenrieth v. St. Louis etc. R. R. Co., 36 Mo. App. 254; Dries v. St. Joseph, 98 Mo. App. 611, 73 *S. W.* 723; Ellis v. St. Louis etc. R. R. Co., 131 Mo. App. 395; Morris etc. Dredging Co. v. Jersey City, 64 N. J. L. 587, 46 *Atl.* 609; Buchholz v. New York etc. R. R. Co., 148 N. Y. 640, 43 *N. E.* 76; Gillender v. New York, 127 App. Div. 612; Tise v. Whataker-Harvey Co., 144 N. C. 507, 57 *S. E.* 210; Mellor v. Philadelphia, 160 Pa. St. 614, 28 *Atl.* 991; Robbins v. Scranton, 217 Pa. St. 577, 66 *Atl.* 977; Richardson v. Lone Star Salt Co., 20 Tex. Civ. App. 486, 49 *S. W.* 647; Tilley v. Mitchell & Davis Co., 121 Wis. 1, 98 *N. W.* 969, 105 Am. St. Rep. 1007; Milwaukee Boiler Co. v. Wadham, O. & G. Co., 126 Wis. 32, 105 *N. W.* 312; McCarthy v. Met. Board of Works, L. R. 7 C. P. 508; S. C. affirmed, L. R. 8 C. P. 191 and L. R. 7 Eng. & I. App. 243; Caledonia Ry. Co. v. Walker's Trustees, L. R. 7 App. Cas. 259; McQuade v. The King, 7 Can. Exch. 318; Macarthur v. The King, 8 Can. Exch. 245; Cook v. Bath, L. R. 6 Eq. Cas. 177.

See also the following cases which arose out of the vacation, or attempted, vacation of streets; Texarkana v. Leach, 66 Ark. 40, 48 *S. W.* 807, 74 Am. St. Rep. 68; Coker v. Atlanta etc. Ry. Co., 123 Ga. 483, 51 *S. E.* 481; Chicago v. Bureky, 158 Ill. 103, 42 *N. E.* 178, 49 Am. St. Rep.

which obstructs the light, air or view to and from the property.⁶² In case of an obstruction which interferes with access to property, the effect upon the property is quite distinct from the delay and inconvenience which the owner suffers in consequence of being unable to use the street. The latter is common to the public while the former is not. The right to use the public streets and to have them kept open as a means of access to property has a special and peculiar value to the owner of the property, which is entirely distinct from his right to use the streets as one of the public, and this special and peculiar interest extends to so much of the streets and system of streets as are necessary to afford convenient access to the property and as give value thereto and when a street is closed or obstructed so near the property as to affect its value there is an impairment of this special and peculiar right or interest and a special and peculiar injury results.

The matter is well put by the supreme court of Iowa in a case which arose out of the following facts: A railroad company crossed the street near the plaintiff's property upon an embankment which blocked the street at that point. The plain-

142, 29 L.R.A. 568; Chicago v. Webb, 102 Ill. App. 232; Chrisman v. Omaha etc. Ry. & B. Co., 125 Ia. 133, 100 N. W. 63; Leavenworth etc. Ry. Co. v. Curlan, 51 Kan. 432, 33 Pac. 297; Hayden v. Stewart, 71 Kan. 11, 80 Pac. 43; Gargan v. Louisville etc. Ry. Co., 89 Ky. 212, 12 S. W. 259, 6 L.R.A. 340; Bannon v. Rohmeiser, 90 Ky. 48, 13 S. W. 444, 29 Am. St. Rep. 355; Van Witsen v. Gutman, 79 Md. 405, 29 Atl. 608, 24 L.R.A. 403; Horton v. Williams, 99 Mich. 423, 58 N. W. 369; Dean v. Ann Arbor R. R. Co., 137 Mich. 459, 100 N. W. 773; Vanderburgh v. Minneapolis, 98 Minn. 329, 108 N. W. 480, 6 L.R.A.(N.S.) 741; Foust v. Penn. R. R. Co., 212 Pa. St. 213, 61 Atl. 829; Walsh v. Scranton, 23 Pa. Supr. 276; Haggerty v. Scranton, 23 Pa. Supr. 279; Chicago v. Baker, 86 Fed. 753, 30 C. C. A. 364; Chicago v. Baker, 98 Fed. 830, 39 C. C. A. 318; *Ante*, §§ 174, 191, *post*, § 354.

⁶²First Nat. Bank v. Tyson, 133 Ala. 459, 32 So. 144, 91 Am. St. Rep. 46, 59 L.R.A. 399; S. C. 144 Ala. 457, 39 So. 560; Field v. Barning, 149 Ill. 556, 37 N. E. 850, 41 Am. St. Rep. 311, 10 Am. R. R. & Corp. Rep. 707; People v. Harris, 203 Ill. 272, 67 N. E. 785, 96 Am. St. Rep. 304; Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 86 Am. St. Rep. 441, 52 L.R.A. 409; Bischof v. Merchants' Nat. Bank, 75 Neb. 838, 106 N. W. 996, 5 L.R.A.(N.S.) 486; Beecher v. Newark, 64 N. J. L. 475, 46 Atl. 166; S. C. *affirmed* 65 N. J. L. 307, 47 Atl. 466; Ackerman v. True, 175 N. Y. 353, 67 N. E. 629; Ackerman v. True, 56 App. Div. 54, 66 N. Y. S. 6; McMillan v. Klaw & Erlanger Constr. Co., 107 App. Div. 407, 95 N. Y. S. 365; Tilley v. Mitchell & Lewis Co., 121 Wis. 1, 98 N. W. 939, 105 Am. St. Rep. 1007. See Sauttee v. Utica City Nat. Bank, 45 Misc. 15, 90 N. Y. S 838.

tiff's property was lessened in value and his business damaged. In a suit against the railroad for the damages sustained the court affirmed a judgment for the plaintiff and, after discussing the question of special damage from a public nuisance, proceeded as follows: "That the obstruction of a highway, whereby the property of an individual is rendered less valuable as a place of business, affords a ground of action for damage is clearly within the principles above stated, we cannot doubt. The right to the enjoyment of property is an individual right, which in no manner pertains to the public; it is held distinct and separate from the rights possessed on account of the individual being a member of society. He travels the highway in exercise of the rights he possesses in common with the public. If deprived of that right he could not maintain an action. Therefore he could base no claim for damages on the ground of being deprived of the use of the highway by an obstruction. But if the highway gives value to his property by affording access thereto by himself and others, he is deprived of an individual right to the enjoyment of property in its most useful condition by a nuisance which obstructs travel upon it. This illustration serves to point out the distinctions between such injuries resulting from a nuisance for which an action will lie, and those that are not actionable."⁶³

⁶³Park v. C. & S. W. R. R. Co., 43 Ia. 636, 639. *And see* especially Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072; *In re Melon St.*, 182 Pa. St. 397, 38 Atl. 482, 28 L.R.A. 275; Tilley v. Mitchell & Lewis Co., 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007. In the latter case the city narrowed a 60 foot street to a 20 foot street by vacating strips on each side, at the instance of the defendant company which owned the property on both sides and which was also given permission to connect its buildings by a bridge across the unvacated part of the street. In a suit by property owners in the next and remoter blocks to restrain the obstruction of the street by building on the vacated strip, or by erecting the connecting bridge, the court held that they suffered a spec-

ial damage and were entitled to maintain the suit. The court says: "As before indicated, a person whose lot abuts upon the particular piece of street which is unlawfully closed or obstructed is universally held to be specially and peculiarly injured, though he may have other access to his lot; but many of the cases draw an arbitrary line at this point, and maintain that when the plaintiff's lot fronts upon another part of the street no such injury is shown. Certainly the distinction is illogical. The man whose lot fronts upon the next block may be fully as deeply injured in the decreased value, rentability and desirability of his lot as the man whose lot fronts on the block which is closed. One may suffer as great damage in his estate as the other. True there may be many

§ 200. Vacating or closing street in front of property. When a street or alley is vacated and closed in front of property there is a taking of the appurtenant easements and the owner is entitled to compensation.⁶⁴ In one of the cases cited it is said: "It may be of no importance to the general public whether a particular street is vacated or not. It is important to the individual owner of abutting property that he shall be able to get to and from his residence or business, and that the public shall have the means of getting there for social or business purposes. In such a case access to thoroughfares connecting his

such individual owners, but that cannot affect individual rights. There may be twenty or there may be fifty of them, but if each has suffered great damage to his estate by the unlawful closing of a street, why shall not each have his action. Neither twenty men nor fifty men constitute the general public. The general public is composed of the great mass of individuals who own no property in the vicinity and who may wish to pass over the street or not, and who, if they do, simply suffer the trifling inconvenience of being obliged to make a circuitous trip. The man who owns a lot in the next block, and whose lot has lost a great part of its value by reason of the closing of the street, manifestly suffers some injury different in its nature from the mere inconvenience suffered by the general public. There are at least two plaintiffs in the present case who own lots fronting on Eighth street—one in the next block to the east, and the other two blocks to the west of the block attempted to be vacated. The complaint alleges distinctly that the property of each will be greatly depreciated in value by the proposed vacation and occupation of the street. We hold this to be a sufficient allegation of special and peculiar injury to entitle them to maintain an action of this kind, and we do not

find it necessary to go further or critically examine the rights of the remaining plaintiffs." pp. 7, 8.

⁶⁴Bigelow v. Ballerino, 111 Cal. 559, 44 Pac. 307; Pennsylvania Co. v. Bond, 202 Ill. 95, 66 N. E. 941; Chicago v. Webb, 102 Ill. App. 232; Long v. Wilson, 119 Ia. 267, 93 N. W. 282, 97 Am. St. Rep. 315, 60 L.R.A. 720; Ridgeway v. Osceola, (Ia.) 117 N. W. 974; Louisville etc. R. R. Co. v. Hannen, 14 Ky. L. R. 526; Pearsall v. Eaton County, 71 Mich. 438, 39 N. W. 578; Pearsall v. Eaton County, 74 Mich. 558, 42 N. W. 77, 4 L.R.A. 193; Wendt v. Board of Supervisors, 87 Minn. 403, 92 N. W. 404; Laurel v. Rowell, 84 Miss. 435, 36 So. 543; Heinrich v. St. Louis, 125 Mo. 424, 28 S. W. 626, 46 Am. St. Rep. 490; Lindsay v. Omaha, 30 Neb. 512, 46 N. W. 627, 27 Am. St. Rep. 415; Grinnell v. Portage Co. Comrs., 6 Ohio C. C. (N.S.) 180; Oliver Schlemmer Co. v. Steinman-M. Furn. Co. 2 Ohio N. P. (N.S.) 293; S. C. *affirmed*, 7 Ohio C. C. (N.S.) 468; Pence v. Bryant, 54 W. Va. 263, 46 S. E. 275; Johnston v. Lonstorf, 128 Wis. 17, 107 N. W. 459. See Holloway v. Southmayd, 139 N. Y. 390, 34 N. E. 1047; Holloway v. Delano, 64 Hun 27; Same v. Same, 64 Hun 34; Pettibone v. Hamilton, 40 Wis. 402; James v. Darlington, 71 Wis. 173.

property with other parts of the town or city has a peculiar value to him; apart from that shared in by citizens generally, and his right to the street as a means of enjoying the free and convenient use of his property has a value quite as certainly as the property itself. If this special right is of value,—and it is of value if it increases the worth of his abutting premises,—then it is property, regardless of the extent of such value. Surely no argument is required to demonstrate that the deprivation of the use of property is to that extent the destruction of its value. Under the allegations of the petition, then, shutting off the approach to the plaintiff's homestead was the taking of his property.”⁶⁵ It is no answer that the plaintiff may still use his own half of the street or alley for the purposes of access.⁶⁶ As already shown the right of access extends to the full width of the street.⁶⁷ So one is entitled to compensation who has a private right of way terminating on the vacated part, as the right of way is rendered useless.⁶⁸ Where land was platted so that the only access to certain lots was over a space marked “Public Square,” and the city vacated a part of this square so as to destroy access to the lots, the owners were held entitled to compensation.⁶⁹

Contrary decisions have been made in Pennsylvania⁷⁰ and Iowa.⁷¹ In the Iowa case referred to, the plaintiff owned two lots upon Kossuth street, in Oskaloosa. The lots and street were platted by one White. The fee of the street was in the public, the reversion in White. The plaintiff's lots were improved, at an expense of several thousand dollars, with dwellings occupied by tenants. The Central Railroad Company procured a quitclaim from White, of Kossuth street, secured from the City Council an ordinance vacating the street, and then proceeded to cut down the grade six feet and fill it with railroad tracks constructed and used in such manner as to prevent access to the plaintiff's premises and preclude all travel on the street

⁶⁵Long v. Wilson, 119 Ia. 267, 269, 93 N. W. 282, 97 Am. St. Rep. 315, 60 L.R.A. 720.

⁶⁶Heinrich v. St. Louis, 125 Mo. 424, 28 S. W. 626, 46 Am. St. Rep. 490.

⁶⁷Ante, §§ 120, 201.

⁶⁸Webster v. Lowell, 142 Mass. 324, 8 N. E. 54; Munn v. Boston, 183

Mass. 421, 67 N. E. 312; People v. Highway Comrs., 35 Mich. 15.

⁶⁹Borghart v. Cedar Rapids, 126 Ia. 313, 101 N. W. 1120, 68 L.R.A. 306.

⁷⁰Paul v. Carver, 24 Pa. St. 207, 64 Am. Dec. 649.

⁷¹Barr v. Oskaloosa, 45 Ia. 275.

by the plaintiff or the public. The value of plaintiff's property was almost wholly destroyed. In a suit against the city and railroad company the plaintiff set up the foregoing facts, the defendants demurred, and the demurrer was sustained. It was held that, on vacation of the street, the title vested in the railroad company under its deed from White, that plaintiff ceased to have any rights in the soil of the street, and could no more complain of the building of the railroad upon it than he could if it had been built on an adjacent lot. But, according to the great weight of authority, any interest which White had in the street was burdened with private easements in favor of the plaintiff⁷² and even if the city was held to take an absolute fee,⁷³ it yet in effect invited the public to buy and improve property on the street and should have been held estopped to deny to the plaintiff the right to those easements which were indispensable to the enjoyment of the property. The case has been much cited but has been virtually overruled by the later Iowa cases cited in this section.⁷⁴

§ 201. Narrowing street in front. It has often been laid down as the law that one who buys property on a street has a right to have the street kept open to its full width.⁷⁵ It would follow that a street could not be narrowed without compensation to the abutting owner. But the authorities are not uniform. Property was platted with a street along a river. The legislature vacated all of the street but fifty feet adjacent to the abutting lots. The act was held void and an owner of one of the lots was held entitled to recover damages against one

⁷²*Ante*, §§ 120, 198.

⁷³This seems to be the law in Iowa. See *Dempsey v. Burlington*, 66 Ia. 387, 24 N. W. 508; *Lake City v. Fulkerson*, 122 Ia. 569, 98 N. W. 376; *Harrington v. Ia. Central Ry. Co.*, 126 Ia. 388, 102 N. W. 139.

⁷⁴See especially *Ridgeway v. Osceola*, (Ia.) 117 N. W. 974. See also the following cases on the subject of his section: *Levee District v. Farmer*, 101 Cal. 178, 35 Pac. 569, 23 L.R.A. 388; *Marrietta Chair Co. v. Henderson*, 121 Ga. 399, 49 S. E. 312, 104 Am. St. Rep. 156; *Fesser v. Achenbach*, 29 Ill. App. 373; *Ellsworth v. Chickasaw County*, 40 Ia.

'571; *Cole v. Shannon*, 1 J. J. Marsh. 218; *Campbell Turnpike Co. v. Dye*, 18 B. Mon. 761; *Stanwood v. Malden*, 157 Mass. 17, 31 N. E. 702, 16 L.R.A. 591; *Nichols v. Richmond*, 162 Mass. 170, 38 N. E. 501; *Nicholson v. Stockett, Walker*, Miss. 67; *Leighton v. Concord etc. R. R. Co.*, 72 N. H. 224, 55 Atl. 938; *Kakeldy v. Columbia etc. R. R. Co.*, 37 Wash. 675, 80 Pac. 205.

⁷⁵*Haynes v. Thomas*, 7 Ind. 38; *White v. Tidewater Oil Co.*, 50 N. J. Eq. 1, 25 Atl. 199; *Moose v. Carson*, 104 N. C. 431, 10 S. E. 689; *Madden v. Penn. R. R. Co.*, 21 Ohio C. C. 73; *Ante*, § 123.

building on the vacated part in front of his lot.⁷⁶ Other cases are to the same effect.⁷⁷ But where the north thirty-one feet of street was vacated it was held in California that the property on the opposite side of the street was neither taken nor damaged within the constitution and that its owners had no standing to contest the proceeding.⁷⁸ In an Iowa case a city proposed to vacate twelve feet off the east side of a street fifty-three and one half feet wide and give the same to the adjacent owners on condition that they would give a like amount off the rear of their lots to widen another street. It was held that those on the opposite side of the street would suffer no actionable damage and could not prevent the consummation of the scheme.^{78a} Where a city was laid out pursuant to act of Congress which reserved a space along a river for public highways and other public uses, it was held that part of the space next the river could be devoted to railroad purposes and that abutting owners could not prevent it.⁷⁹ Where damages are given by statute when a street is vacated or discontinued, the statute is held to apply to the narrowing of a street, in favor of those abutting on the narrowed part.⁸⁰ It is held that one three blocks away from the narrowed part may not enjoin, though his property is depreciated.⁸¹

§ 202. Vacating or closing street so as to cut off access to property in one direction. Whether one may recover compensation when the street in front of his property is closed or vacated between his property and the next connecting street on one side, so as to cut off access in that direction, while leaving access in front and in the other direction unimpaired, is one

⁷⁶Haynes v. Thomas, 7 Ind. 38.

⁷⁷Hyde v. Fall River, 197 Mass. 4; Stehr v. Mason City etc. Ry. Co., 77 Neb. 641, 110 N. W. 701; Lawrence v. New York, 2 Barb. 577; People v. Commissioners of Highways, 53 Barb. 70; Egerer v. New York Cent. etc. R. R. Co., 130 N. Y. 108, 29 N. E. 95, 14 L.R.A. 381, 5 Am. R. R. & Corp. Rep. 245; Moose v. Carson, 104 N. C. 431, 10 S. E. 689.

⁷⁸Brown v. San Francisco, 124 Cal. 274, 57 Pac. 82. See also Mt. Carmel v. Shaw, 155 Ill. 37, 39 N. E. 584, 46 Am. St. Rep. 311, 27 L.R.A. 580, reversing S. C. 52 Ill. App. 429; and Mt. Carmel v. Bell, 52 Ill. App.

427, where a 99-foot street was narrowed by vacating 2 feet on each side. And see Patton v. Rome, 124 Ga. 525, 52 S. E. 742.

^{78a}Williams v. Cary, 73 Ia. 194, 34 N. W. 813.

⁷⁹Burlington Gas Lt. Co. v. Burlington etc. R. R. Co., 91 Ia. 470, 59 N. W. 292; S. C. affirmed 165 U. S. 370.

⁸⁰Rensselaer v. Leopold, 106 Ind. 29; Morris v. Philadelphia, 199 Pa. St. 357, 49 Atl. 70.

⁸¹Cummings Realty & Inv. Co. v. Deere & Co., 208 Mo. 66, 106 S. W. 496, 14 L.R.A.(N.S.) 822.

of the vexed questions of the law. A leading case on the question is that of *Smith v. Boston*,⁸² decided by the supreme court of Massachusetts. The street on which the plaintiff abutted was vacated near to but not in front of his property. He had access in the other direction. The case was a petition for damages under the statute, which was as follows:—"If damage shall be sustained by any person in their property, by the laying out altering or discontinuing any highway, the commissioners shall estimate the amount of damage, sustained by such persons, and, in their return, shall state the share of each separately." "In estimating the damages sustained by any person in his property, by the laying out, altering or discontinuing of any highway, the jury shall take into consideration *all the damage done to the complainant, whether by taking his property, or by injuring it in any manner*: and they shall also allow by way of set-off, the benefit, if any, to the property of the complainant, by reason of such laying out, alteration or discontinuance."⁸³ The language of the statute could hardly be more comprehensive but the court held that the plaintiff did not sustain damage within the meaning of the statute, though his property was depreciated in value by the discontinuance of the street. The basis of the decision is that the statute contemplated actionable damage and that the plaintiff's damage would not have been actionable, if the street had been closed without legal authority. "The inconvenience of the petitioner is experienced by him," says the court, "in common with all the rest of the members of the community. He may feel it more, in consequence of the proximity of his lots and buildings; still it is a damage of like kind, and not in its nature peculiar or specific."⁸⁴ This case has been approved and followed in many subsequent cases in the same court involving similar facts⁸⁵ and has exerted a marked influence upon the law of the country. It is now the settled doctrine in Massachusetts that property is not

⁸²7 CUSH. 254.

⁸³Rev. Stats. Mass. 1836, c. 24. §§ 11, 35.

⁸⁴Smith v. Boston, 7 CUSH. 254.

⁸⁵Proprietors of Locks & Canals v. Nashua etc. R. R. Co., 10 CUSH. 385; Castle v. Berkshire, 11 Gray 26; Hartshorn v. South Reading, 3 Allen, 501; Willard v. Cambridge, 3 Allen 574; Davis v. County Comrs.,

153 Mass. 218, 26 N. E. 848, 11 L.R.A. 750; Hammond v. County Comrs., 154 Mass. 509, 28 N. E. 902; Stanwood v. Malden, 157 Mass. 17, 31 N. E. 702, 16 L.R.A. 591; Nichols v. Richmond, 162 Mass. 170, 38 N. E. 501; Putnam v. Boston etc. R. R. Co., 182 Mass. 351, 65 N. E. 790; Hyde v. Fall River, 189 Mass. 439, 75 N. E. 953, 2 L.R.A.(N.S.) 269.

damaged within the statute by the vacation of a street or highway, unless it abuts upon the part of the street vacated or is cut off altogether from the general system of highways. The doctrine is admitted to be harsh in some cases but is adhered to as affording a definite and practical rule and on the ground of *stare decisis* and the acquiescence of the legislature.⁸⁶ Many other courts follow the Massachusetts doctrine and hold that, when access to property is cut off in one direction by the vacation or closing of the street upon which it abuts but may be had in the other direction, the property is not taken or damaged within the meaning of constitutions or statutes giving compensation.⁸⁷

On the other hand there are many cases which hold a contrary doctrine. A statute of Pennsylvania, local to Philadelphia, gave compensation in general terms for damage to property by the vacating of roads and streets in that city.⁸⁸

⁸⁶“Although the doctrine may sometimes be rather harsh in its application to special cases, there are sound reasons on which it rests. The chief of these reasons are, that to hold otherwise would be to encourage many trivial suits; that it would discourage public improvements if a whole neighborhood were to be allowed to recover damages for such injuries to their estates and that the loss is of a kind which purchasers of land must be held to have contemplated as liable to occur, and to have made allowance for in the price which they paid.” *Davis v. County Comrs.*, 153 Mass. 218, 224, 225, 26 N. E. 848, 11 L.R.A. 750.

“None of the considerations which have been urged seem to us to warrant our overruling a construction of a statute which has been settled for forty years, seemingly to the satisfaction of the legislature, and which has been followed elsewhere by courts of the highest respectability.” *Stanwood v. Malden*, 157 Mass. 17, 31 N. E. 702, 16 L.R.A. 591.

⁸⁷*Newton v. New York etc. R. R. Co.*, 72 Conn. 420, 44 Atl. 813; *Ells*

worth v. *Chicasaw County*, 40 Ia. 571; *Brady v. Shinkle* 40 Ia. 576; *Dempsey v. Burlington*, 66 Ia. 387, 24 N. W. 508; *Harrington v. Ia. Cent. Ry. Co.*, 126 Ia. 388, 102 N. W. 139; *Bailey v. Culver*, 84 Mo. 531, *affirming S. C.* 12 Mo. App. 531; *Cram v. Laconia*, 71 N. H. 41, 51 Atl. 635, 57 L.R.A. 282; *Herbert v. Penn. R. R. Co.*, 43 N. J. Eq. 21; *Coster v. Albany*, 43 N. Y. 399; *Wheeler v. Clark*, 58 N. Y. 267; *Kings Co. Fire Ins. Co. v. Stevens*, 101 N. Y. 411, 5 N. E. 353; *Buchholz v. New York etc. R. R. Co.*, 148 N. Y. 640, 43 N. E. 76; *Buchholz v. New York etc. R. R. Co.*, 71 App. Div. 452, 75 N. Y. S. 824; *S. C. affirmed*, 177 N. Y. 550, 69 N. E. 1121; *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 62 N. E. 341, 87 Am. St. Rep. 600, *reversing S. C.* 21 Ohio C. C. 384; *Serutefield v. Choctaw etc. R. R. Co.*, 18 Okl. 308, 88 Pac. 1048, 9 L.R.A.(N.S.) 496; *Ponisichil v. Hoquiam S. & D. Co.*, 41 Wash. 303, 83 Pac. 316; *Montreal v. Drummond*, L. R. 1 H. L. 384.

⁸⁸The statute was as follows: “That it shall be the duty of juries

In a case under the statute, the plaintiff owned property on Melon street in the block between 9th and 10th streets. A part of Melon street was closed next to 9th street, leaving the plaintiff upon a *cul de sac*. He was cut off from 9th street but the street in front of his property was undisturbed and he had access to the general system of streets, *via* 10th street as before. His property was depreciated and it was held that he was entitled to recover. The court says: "Where the part of a street in front of a property is vacated the owner's right to compensation is conceded, but the right is denied unless there is an actual vacation and closing of the part of the street on which the property abuts. It is evident, however, that without the impairment of the owner's outlet in one direction his property may be rendered entirely worthless by a change in the physical condition of a street. To draw the line between owners who may and owners who may not recover, at the point where the deprivation of access is total, is to draw it arbitrarily. The abutting owner's special right in a street as a means of access to his property is not limited to the part of the street on which his property abuts. Such a limitation of his right would deny him compensation if all of the street except that part immediately in front of his property were vacated. His right is the right of access in any direction which the street permits. As affecting this right no distinction can be drawn between a partial and a total deprivation of access; the impairment of the right is a legal injury differing in degree only from its total destruction. If the street is vacated on both sides of his property so as to cut him off from other streets, his means of access is as effectually destroyed as if the entire street were vacated. If the street is vacated on one side only and his property is left at the end of a *cul de sac*, if the street is decreased in width so as to be impassable to vehicles; or if one means of access is taken away by the closing of a back street or alley, his injury may be less, but the difference is one of degree only. In either case he has sustained a loss by the destruction of an important element in the market value of his property, and he has

selected to assess damages for the opening, widening or vacating of roads or streets, within said city, to ascertain and report to the court: first, what damages the parties claiming the same are entitled to;

second, to ascertain and apportion the same among and against such owners of land as shall be benefited by such opening, widening or vacating any such road or street"—P. L. 1858, p. 385.

been injured in a legal sense."⁸⁹ This view is also supported by many decisions in Pennsylvania and other states involving similar facts.⁹⁰ In Illinois where the plaintiff's property abutted upon an alley which was vacated and closed at one end but a new alley at right angles was opened to a connecting alley, so that the plaintiff could use the alley in front of his property as before but would have to go further to reach certain points, it was held that the plaintiff's property, though depreciated, was not taken or damaged for public use.⁹¹ But where the plaintiff's property was on the corner of Sixty-first and State streets in Chicago and Sixty-first street was vacated just beyond the line of his property, it was held that the plaintiff could recover for the depreciation of his property.⁹² This and other

⁸⁹In re Melon St., 182 Pa. St. 397, 403, 404, 38 Atl. 482, 28 L.R.A. 275, reversing S. C. 1 Pa. Super. Ct. 63.

⁹⁰O'Brien v. Central I. & S. Co., 158 Ind. 218, 63 N. E. 302, 92 Am. St. Rep. 305, 57 L.R.A. 508; Pennsylvania Co. v. Stanley, 10 Ind. App. 421, 37 N. E. 288, 38 N. E. 421; Leavenworth etc. Ry. Co. v. Curlan, 51 Kan. 432, 33 Pac. 297; Hayden v. Stewart, 71 Kan. 11, 80 Pac. 43; Highbarger v. Milford, 71 Kan. 331, 80 Pac. 633; Louisville etc. R. R. Co. v. Finly, 86 Ky. 294, 5 S. W. 753; Gargan v. Louisville etc. Ry. Co., 89 Ky. 212, 12 S. W. 259, 6 L.R.A. 340; Martin v. Louisville, 97 Ky. 30, 29 S. W. 864; Bannon v. Rohrmeier, 90 Ky. 48, 13 S. W. 444, 29 Am. St. Rep. 355; Louisville v. Bannon, 99 Ky. 74, 35 S. W. 120; Van Witsen v. Gutman, 79 Md. 405, 29 Atl. 608, 24 L.R.A. 403; Goss v. Highway Commissioner, 63 Mich. 608, 30 N. W. 197; Horton v. Williams, 99 Mich. 423, 58 N. W. 369; Dean v. Ann Arbor R. R. Co., 137 Mich. 459, 100 N. W. 773; Kaje v. Chicago etc. Ry. Co. 57 Minn. 422, 59 N. W. 493; Vanderburgh v. Minneapolis, 98 Minn. 329, 108 N. W. 480, 6 L.R.A.(N.S.) 741; Dries v. St. Joseph, 98 Mo. App. 611, 73

S. W. 723; Mellor v. Philadelphia, 160 Pa. St. 614, 28 Atl. 991; Foust v. Pa. R. R. Co., 212 Pa. St. 213, 61 Atl. 829; Robbins v. Scranton, 217 Pa. St. 577, 66 Atl. 977; Walsh v. Scranton, 23 Pa. Super. Ct. 276; Haggerty v. Scranton, 23 Pa. Super. Ct. 279; Ruscomb St., 33 Pa. Super. Ct. 148; S. C. 30 Pa. Super. Ct. 476; Black v. Pittsburg etc. St. Ry. Co., 34 Pa. Super. 416; Johnston v. Old Colony R. R. Co., 18 R. I. 642, 29 Atl. 594, 49 Am. St. Rep. 800; Tilley v. Mitchell & L. Co., 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007; Chicago v. Baker, 86 Fed. 753, 30 C. C. A. 364; Chicago v. Baker, 98 Fed. 830, 39 C. C. A. 318; Mason City etc. R. R. Co. v. Wolf, 148 Fed. 961, 78 C. C. A. 589; McQuade v. The King, 7 Can. Exch. 318; Macarthur v. The King, 8 Can. Exch. 245; Cook v. Bath, L. R. 6 Eq. Cas. 177.

⁹¹Parker v. Catholic Bishop, 146 Ill. 158, 34 N. E. 473, affirming S. C. 41 Ill. App. 74.

⁹²Chicago v. Bureky, 158 Ill. 103, 42 N. E. 178, 49 Am. St. Rep. 142, 29 L.R.A. 568, affirming S. C. under title of Lake v. Bureky, 57 Ill. App. 547.

cases place Illinois in line with the courts which hold that there may be a recovery when access to property is cut off in one direction by the vacation or closing of a street.⁹³ This seems to the writer to be the correct view and is in accordance with previous conclusions as to rights of abutting owners and special damage.⁹⁴

§ 203. When the vacated part is beyond the next cross street from the plaintiff's property. The cases already considered are where the vacation is in front of the plaintiff's property or in the same block, so that his access is cut off entirely or in one direction. The case now to be considered is where the vacation is in the next or some remoter block and the plaintiff has left access in both directions to the system of streets. To reach certain points in the direction of the vacation the plaintiff must make a detour and this fact and the diversion of travel and the loss of a thoroughfare depreciate the value of his property. The decisions are nearly unanimous to the effect that in such case the plaintiff's property is not taken or damaged and that he cannot prevent the closing of the street or recover damages therefor.⁹⁵ While this conclusion may be correct so

⁹³Rigney v. Chicago, 102 Ill. 64; Winnetka v. Clifford, 201 Ill. 475, 66 N. E. 384; Chicago v. Puleyn, 129 Ill. App. 179; Danville etc. R. R. Co. v. Tidrick, 137 Ill. App. 553.

⁹⁴See *ante*, §§ 197, 199. When a street is *wrongfully* closed or obstructed so as to cut off access to property in one direction there is special damage and a right of recovery. Birmingham Ry. L. & P. Co. v. Moran, 151 Ala. 187, 44 So. 152; Texarkana v. Leach, 66 Ark. 40, 48 S. W. 807, 74 Am. St. Rep. 68; Park v. C. & S. W. R. R. Co., 43 Ia. 636; Dairy v. Ia. Cent. Ry. Co., 113 Ia. 716, 84 N. W. 688; Vandeburgh v. Minneapolis, 93 Minn. 81, 100 N. W. 668; Glaessner v. Anheuser-Busch Brew. Co., 100 Mo. 508, 13 S. W. 707, 2 Am. R. R. & Corp. Rep. 420; Longworth v. Sedevie, 165 Mo. 221, 65 S. W. 260: And see Commissioners of Highways v. Quinn, 136 Ill. 604, 27 N. E. 186;

Taylor v. Commissioners of Highways, 88 Ill. 526; Whitman v. Comrs. of Highways, 96 Ill. 292; Petition of Concord, 50 N. H. 530; Buchholz v. New York etc. R. R. Co., 148 N. Y. 640, 43 N. E. 76; Buchholz v. New York etc. R. R. Co., 71 App. Div. 452, 75 N. Y. S. 824; S. C. affirmed, 177 N. Y. 550, 69 N. E. 1121.

Dennis v. Mobile etc. Ry. Co., 137 Ala. 649, 35 So. 30, 97 Am. St. Rep. 69; Little Rock etc. R. R. Co. v. Newman, 73 Ark. 1, 83 S. W. 653, 108 Am. St. Rep. 17; Polack v. S. F. Orphan Asylum, 48 Cal. 490; Symons v. San Francisco, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453; Whitsell v. Union Depot & R. R. Co., 10 Colo. 243, 15 Pac. 339; Chicago Union Bldg. Ass., 102 Ill. 379, 40 Am. Rep. 598; East St. Louis v. O'Flynn, 119 Ill. 200, 59 Am. Rep. 795; Guttery v. Glenn, 201 Ill. 275, 66 N. E. 305: Dantzer v. Indian-

far as the question of a *taking* is concerned, its correctness may be questioned when, by virtue of the constitution or a statute, compensation is given for property damaged or injured.⁹⁶

§ 204. When the property is cut off entirely, though street is left intact in front. By the vacation or closing of

apolis Union Ry. Co., 141 Ind. 604, 39 N. E. 223, 50 Am. St. Rep. 343, 34 L.R.A. 769, 11 Am. R. R. & Corp. Rep. 249; Hall v. Lebanon, 31 Ind. App. 265, 67 N. E. 703; Gray v. Iowa Land Co., 26 Ia. 387; McLachlan v. Gray, 105 Ia. 259, 74 N. W. 773; Hiller v. Atchison etc. R. R. Co., 28 Kan. 625; Arnold v. Weiker, 55 Kan. 510, 40 Pac. 901; Leavenworth v. Douglass, 59 Kan. 416, 53 Pac. 123; Cole v. Shannon, 1 J. J. Marsh. 218; Pearson v. Allen, 151 Mass. 79, 23 N. E. 731, 21 Am. St. Rep. 426; Putnam v. Boston etc. R. R. Co., 182 Mass. 351, 65 N. E. 790; People v. Ingham Co., 20 Mich. 95; Kimball v. Homan, 74 Mich. 699, 42 N. W. 167; Buhl v. Fort St. Union Depot Co., 98 Mich. 596, 57 N. W. 829, 23 L.R.A. 392, 9 Am. R. R. & Corp. Rep. 173; Baudistel v. Jackson, 110 Mich. 357, 68 N. W. 292; Bandistel v. Mich. Cent. R. R. Co., 113 Mich. 687, 71 N. W. 1114; Beutel v. West Bay City Sugar Co., 132 Mich. 587, 94 N. W. 202; Glasgow v. St. Louis, 107 Mo. 198, 17 S. W. 743, 3 Am. R. R. & Corp. Rep. 192; Knapp, Stout & Co. v. St. Louis, 153 Mo. 560, 55 S. W. 104; Knapp, Stout & Co. v. St. Louis, 156 Mo. 343, 56 S. W. 1102; Cummings Realty & Inv. Co. v. Deere & Co., 208 Mo. 66, 106 S. W. 496, 14 L.R.A. (N. S.) 822; Dodge v. Penn. R. R. Co., 43 N. J. Eq. 351; S. C. affirmed, 45 N. J. Eq. 366; Kean v. Elizabeth, 54 N. J. L. 462, 24 Atl. 495; S. C. affirmed, 55 N. J. L. 337, 26 Atl. 939; Fearing v. Irwin, 55 N. Y. 486; Matter of Grade Crossing Comrs., 166 N. Y. 69, 59 N. E. 706; Reis v.

New York, 188 N. Y. 58, 80 N. E. 573, affirming S. C. 113 App. Div. 464, 99 N. Y. S. 291; McGee's Appeal, 114 Pa. St. 470, 8 Atl. 237; Cherry v. Rock Hill, 48 S. C. 553, 26 S. E. 798; State v. Taylor, 107 Tenn. 455, 64 S. W. 766; Smith v. St. Paul etc. Ry. Co., 39 Wash. 355, 81 Pac. 840, 109 Am. St. Rep. 889, 70 L.R.A. 1018; Mottman v. Olympia, 45 Wash. 361, 88 Pac. 579; Kimball v. Kenosha, 4 Wis. 321; Tilley v. Mitchell & Lewis Co., 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007.

The following, though not cases of vacation, are to the same effect: Davenport v. Dedham, 178 Mass. 382, 59 N. E. 1029; Davenport v. Hyde Park, 178 Mass. 385, 59 N. E. 1030; Patterson v. Duluth, 21 Minn. 493; Rochette v. Chicago etc. Ry. Co., 32 Minn. 201, 20 N. W. 140; Lakkie v. St. Paul etc. Ry. Co., 44 Minn. 438, 46 N. W. 912; Shaubut v. St. Paul etc. R. R. Co., 21 Minn. 502; Barnum v. Minn. Transfer Ry. Co., 33 Minn. 365, 23 N. W. 538; Schuster v. Lemond, 27 Minn. 253, 6 N. W. 802; State v. Barton, 36 Minn. 145, 30 N. W. 454; State v. Holman, 40 Minn. 369, 41 N. W. 1073; Gray v. Greenville etc. Ry. Co., 59 N. J. Eq. 372, 46 Atl. 638; In re C. N. O. & S. P. Ry. Co., 19 Ohio C. C. 308.

⁹⁶See *post*, §§ 353, 354, 363. Coker v. Atlanta etc. Ry. Co., 123 Ga. 483, 51 S. E. 481; Glasgow v. St. Louis, 87 Mo. 678, affirming 15 Mo. App. 112; Madden v. Penn. Ry. Co., 21 Ohio C. C. 73.

part of a street, property may be cut off altogether from access to the general system of streets, though the street in front of the property remains open as before. It is pretty generally held that in such case the owner of the property so isolated is entitled to compensation, either under the constitution or statute.⁹⁷ The Massachusetts court, which enforces a very strict rule of liability as against the property owner, in cases of the vacation, closing or obstruction of streets, says: "Ordinarily on discontinuance of a street, only those persons whose property abuts on the part discontinued, suffer special and peculiar damages. Commonly such persons are the only ones whose property is cut off from access to the world outside. If this access is only made less convenient by the necessity of using some other part of the highway, instead of the part discontinued, their inconvenience in that particular is of the same kind as that of the public generally. But if their access to their property to the general system of public highways of the city or town is cut off altogether the case is different. It has repeatedly been recognized that in such a case they may suffer special and peculiar damages. * * * It never has been held that one whose access to a general system of public streets in a city or town is entirely cut off, suffers only the same kind of damage by the discontinuance of a street as one of the public who is merely obliged to travel further through public streets to reach his destination."⁹⁸

⁹⁷ Butterworth v. Bartlett, 50 Ind. 537; Cook v. Quick, 127 Ind. 477, 26 N. E. 1007; MacGinnitie v. Silvers, 167 Ind. 321, 78 N. E. 1013; Putnam v. Boston etc. R. R. Co., 182 Mass. 351, 65 N. E. 790; Plummer v. Johnston, 63 Mich. 165, 29 N. W. 687; McQuigg v. Cullins, 56 Ohio St. 649, 47 N. E. 595; Strader v. Cincinnati, 1 Handy 446; Mellor v. Philadelphia, 160 Pa. St. 614, 28 Atl. 991; Smith v. Mitchell, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858.

To the same effect, though not cases of vacation: Brakken v. Minneapolis etc. Ry. Co., 29 Minn. 41, 11 N. W. 124; Brakken v. Minneapolis etc. Ry. Co., 31 Minn. 45, 16 N. W. 459; Brakken v. Minneapolis

etc. Ry. Co., 32 Minn. 425, 21 N. W. 414; Hayes v. Chicago etc. Ry. Co., 46 Minn. 349, 49 N. W. 61; Autenrieth v. St. Louis etc. R. R. Co., 36 Mo. App. 254.

The contrary is held in the following cases where country roads were discontinued or closed. Atwood v. Partree, 56 Conn. 80; Campbell Turnpike Co. v. Dye, 18 B. Mon. 761.

⁹⁸ Putnam v. Boston etc. R. R. Co., 182 Mass. 351, 354, 65 N. E. 790. Where a street was wrongfully obstructed by private parties so as to cut off the plaintiff's outlet to the system of streets, the damage was held to be actionable. Cushing-Wetmore Co. v. Gray, 152 Cal. 118, 92 Pac. 70. After speaking of the

§ 205. Vacation and discontinuance of country highways. Some authorities make a distinction between country highways and city streets as respects the rights of abutting owners.⁹⁹ But we believe the true rule to be that the legal rights of the abutter are the same, when the mode of establishment is the same. The question has already been sufficiently discussed.¹ A number of cases hold that where a highway is discontinued which affords the only outlet to one's farm, or the only practicable outlet, he is entitled to compensation.² Perhaps an equal number hold the contrary and that the damage in such cases is neither the taking nor damaging of property for public use.³ But where the plaintiff does not abut upon the vacated part of the highway and is not cut off from access to a public highway, it is generally held that he cannot recover, though he may have to go further to reach certain points and this may affect the

right of access, the court says: "This right of property is as much invaded by obstructions which have the effect of absolutely preventing access to the premises along the street as it is by obstructions preventing access from the premises to the street immediately in front of the land. As to the latter, it is thoroughly established that the obstruction constitutes a private as well as a public nuisance. The attempted distinction between the two cases appears to us to be too technical to afford a sufficient basis for a rule granting the relief in the one case and denying it in the other."

⁹⁹"The distinction is this: Ordinary highways, or what are termed county roads, are created by law for the public, and the land or its use taken from the owner in the first place by paying him its value; or there may be some times such a dedication by the individual owner and an acceptance of the county court, as will create this easement without compensation. The streets of a town or city are acquired by grant with the implied right of ingress and egress to the abutting lot own-

er, the grantor, or the party making the dedication, saying to the owners of lots, this right of ingress and egress you shall have. But not so with an ordinary public road. The state creates the easement for the entire public; its use is that of the public, one citizen having as much right to this use as another, and when its abandonment or non-use is deemed necessary for the public good, the county court may discontinue it altogether." *Bradbury v. Walton*, 94 Ky. 163, 167, 21 S. W. 869.

¹*Ante*, § 120.

²*Butterworth v. Bartlett*, 50 Ind. 537; *Cook v. Quick*, 127 Ind. 477, 26 N. E. 1007; *People v. Highway Commissioners*, 35 Mich. 15; *Pearsall v. Eaton County*, 71 Mich. 438, 39 N. W. 578; *Pearsall v. Eaton County*, 74 Mich. 558, 42 N. W. 77, 4 L.R.A. 193; *Wendt v. Board of Supervisors*, 87 Minn. 403, 92 N. W. 404; *McQuigg v. Cullins*, 56 Ohio St. 649, 47 N. E. 595; *Grinnell v. Portage Co. Comrs.*, 6 Ohio C. C. (N. S.) 180.

³*Levee District v. Farmer*, 101 Cal. 178, 35 Pac. 569, 23 L.R.A. 388;

value of his farm.⁴ But where a highway was discontinued which afforded the only access to the plaintiff's farm and a new one laid out which afforded access but which was very inconvenient and impracticable, it was held that the new road was no reasonable substitute for the old, that the plaintiff was entitled to compensation and that, as the statute provided for none, the closure of the old road should be enjoined.⁵

§ 206. When damage by the vacation or closing of streets and highways amounts to a taking. It is manifest that when a street or highway is vacated there is no physical interference with the possession of property. On the other hand property is thereby relieved of a public burden, and it would at first blush seem that property is restored instead of taken. But assuming that the vacation or discontinuance of a street or highway amounts to its closure, the act of vacation destroys such private rights of passage and of light and air as may exist in the vacated street. To the extent that such private rights are interfered with or destroyed there is a taking of property within the constitution.⁶ The nature and extent of these private rights have already been discussed.⁷ They differ in different states and with the manner in which the street is established. Nearly all the authorities agree that there are such rights and that their impairment or destruction for public use is a taking of property within the constitution. According to the better reason and the weight of authority, there is a taking when the street or highway upon which property abuts is vacated and closed in front of the property or when by the vacation and closure property is cut off from access to the general system of streets and highways, though the street in front remains intact.⁸ Where by the vacation and closure of a

Ellsworth v. Chicasaw County, 40 Ia. 571; *Grove v. Allen*, 92 Ia. 519, 61 N. W. 175; *Coffey County v. Venard*, 10 Kan. 95; *Campbell Turnpike Co. v. Dye*, 18 B. Mon. 761; *Bradbury v. Walton*, 94 Ky. 163, 21 S. W. 869.

⁴*Brady v. Shinkle*, 40 Ia. 576; *McLachlan v. Gray*, 105 Ia. 259, 74 N. W. 773; *Cole v. Shannon*, 1 J. J. Marsh. 218; *People v. Ingham Co.*, 20 Mich. 95; *Hamman v. County Comrs.* 154 Mass. 509, 28 N. E. 902.

⁵*McQuigg v. Cullins*, 56 Ohio St. 649, 47 N. E. 595. *See also* the following which relate to the discontinuance of country highways: *Fesser v. Achenbach*, 29 Ill. App. 373; *Goss v. Highway Comrs.*, 63 Mich. 608, 30 N. W. 197; *Petition of Concord*, 50 N. H. 530; *People v. Comrs. of Highways*, 53 Barb. 70.

⁶*Ante*, § 65.

⁷*Ante*, §§ 120-124, 197.

⁸*Ifaynes v. Thomas*, 7 Ind. 38; *Butterworth v. Bartlett*, 50 Ind.

street access to property is cut off in one direction but remains unimpaired in the other, the majority of courts hold there is no taking and no constitutional right to compensation.⁹ As

537; *Rensselaer v. Leopold*, 106 Ind. 29; *McGinnitie v. Silvers*, 167 Ind. 321, 78 N. E. 1013; *Long v. Wilson*, 119 Ia. 267, 93 N. W. 282, 97 Am. St. Rep. 315, 60 L.R.A. 720; *Borghart v. Cedar Rapids*, 126 Ia. 313, 101 N. W. 1120, 68 L.R.A. 306; *Leavenworth etc. Ry. Co. v. Curlan*, 51 Kan. 432, 33 Pac. 297; *Lexington etc. R. R. Co. v. Applegate*, 8 Dana, Ky. 289, 33 Am. Dec. 497; *Transylvania University v. Lexington*, 3 B. Mon. 25, 38 Am. Dec. 173; *Louisville etc. R. R. Co. v. Hemen*, 14 Ky. L. R. 526; *People v. Highway Comr.*, 35 Mich 15; *Plumer v. Johnston*, 63 Mich. 165, 29 N. W. 687; *Pearsall v. Eaton Co.*, 71 Mich. 438, 39 N. W. 578; *Pearsall v. Eaton Co.* 74 Mich. 558, 42 N. W. 77, 4 L.R.A. 193; *Kaje v. Chicago etc. Ry. Co.*, 57 Minn. 422, 59 N. W. 493; *Vanderburg v. Minneapolis*, 98 Minn. 329, 108 N. W. 480, 6 L.R.A.(N.S.) 741; *Laurel v. Rowell*, 84 Miss. 435, 36 So. 543; *Leighton v. Concord etc. R. R. Co.*, 72 N. H. 224, 55 Atl. 938; *Holloway v. Southmayd*, 139 N. Y. 390, 34 N. E. 1047; *Holloway v. Delano*, 64 Hun 27; *Holloway v. Delano*, 64 Ilun 34; *Lawrence v. New York*, 2 Barb. 577; *Moose v. Carson*, 104 N. C. 431, 10 S. E. 689; *McQuigg v. Cullins*, 56 Ohio St. 649, 47 N. E. 595; *Strader v. Cincinnati, Handy*, 446; *Madden v. Pennsylvania R. R. Co.*, 21 Ohio C. C. 73; *Grinnell v. Portage Co. Comrs.*, 6 Ohio C. C. (N. S.) 180; *Anderson v. Turbeville*, 6 Coldw. 150; *Johnston v. Lonstorf*, 128 Wis. 17, 107 N. W. 459.

The contrary is held in *Barr v. Oskaloosa*, 45 Ia. 275, as respects the vacation and closing of a city street. So in the following which

relate to country roads: *Levee District v. Farmer*, 101 Cal. 178, 35 Pac. 569, 23 L.R.A. 388; *Atwood v. Partree*, 56 Conn. 80; *Ellsworth v. Chicasaw Co.*, 40 Ia. 571; *Brady v. Shinkle*, 40 Ia. 576; *Grove v. Allen*, 92 Ia. 519, 61 N. W. 175; *McLachlan v. Gray*, 105 Ia. 259, 74 N. W. 773; *Coffey Co. v. Venard*, 10 Kan. 95; *Campbell etc. Turnpike Co. v. Dye*, 18 B. Mon. 761.

⁹*Newton v. New York etc. R. R. Co.*, 72 Conn. 420, 44 Atl. 813; *Danziger v. Indianapolis Union Ry. Co.*, 141 Ind. 604, 39 N. E. 223, 50 Am. St. Rep. 343, 34 L.R.A. 769, 11 Am. R. R. & Corp. Rep. 249; *Dempsey v. Burlington*, 66 Ia. 387, 24 N. W. 508; *Harrington v. Ia. Cent. Ry. Co.*, 126 Ia. 388, 102 N. W. 139; *Hammond v. County Comrs.*, 154 Mass. 509, 28 N. E. 902; *People v. Ingham Co.*, 20 Mich. 95; *Kimball v. Homan*, 74 Mich. 699, 42 N. W. 167; *Buhl v. Fort St. Union Depot Co.*, 98 Mich. 596, 57 N. W. 829, 23 L.R.A. 392, 9 Am. & Corp. Rep. 173; *Bailey v. Culver*, 84 Mo. 531, *affirming* S. C. 12 Mo. App. 531; *Cram v. Laconia*, 71 N. H. 41, 51 Atl. 635, 57 L.R.A. 282; *Coster v. Albany*, 43 N. Y. 399; *Fearing v. Irwin*, 55 N. Y. 486; *Wheeler v. Clark*, 58 N. Y. 267; *Kings Co. Fire Ins. Co. v. Stevens*, 101 N. Y. 411, 5 N. E. 353; *Buehlholz v. New York etc. R. R. Co.*, 71 App. Div. 452, 75 N. Y. S. 824; *S. C. affirmed*, 177 N. Y. 550, 69 N. E. 1121; *Matter of Grade Crossing Comrs.* 166 N. Y. 69, 59 N. E. 706; *Reis v. New York*, 188 N. Y. 58, 80 N. E. 573, *affirming* 113 App. Div. 464, 99 N. Y. S. 291; *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 62 N. W. 341, 87 Am. St.

the courts which hold this doctrine concede that to cut one off altogether from access is a taking, it follows that the right of access is a floating right, a right of access in one direction or the other, until it is cut off in one direction, when it becomes a fixed and absolute right in the other. This seems a very unreasonable position and is contrary to all the decisions in controversies between private parties touching the rights of lot owners in platted and dedicated streets.¹⁰ The more reasonable rule is that the owner of a lot on a street in a city or town has a private right of access in both directions which extends as far, at least, as the next connecting highway.¹¹ "While we do not think," says the court in one case "that when one purchases a parcel of ground bounded by a laid out and dedicated street, in a given platted parcel of land, he thereby becomes vested for all time with the right to travel over and along all of the streets and alleys of such platted parcel of ground, or even all of the streets that it would be convenient for him to use we do think that he obtains the right to the use of such streets as are reasonably necessary for the enjoyment of the land so purchased by him. These streets are ordinarily such as bound the block in which his land is situated, or such as furnish access to his property from either direction."¹² It follows that when access is cut off in one direction or partially by the vacating or closing of a street, there is a taking of the private right of access in that direction and that there is a right to compensation for the damage thereby inflicted upon the property.¹³

When the vacated part is beyond the next connecting highway from the plaintiff's property, so that he has access in both directions, there it is held by all the authorities that there is no

Rep. 600, reversing S. C. Beatty v. Kinnear Mfg. Co., 21 Ohio C. C. 384; Scrutchiefield v. Choctaw etc. R. R. Co., 18 Okl. 308, 88 Pac. 1048, 9 L.R.A.(N.S.) 496; Gerhard v. Seekonk River Bridge Comrs., 15 R. I. 334; Cherry v. Rock Hill, 48 S. C. 553, 26 S. E. 798.

¹⁰See ante, §§ 121-123, 197.

¹¹Ibid.

¹²Highbarger v. Milford, 71 Kan. 331, 340, 80 Pac. 633.

¹³Ridgeway v. Osceola (Ia.) 117 N. W. 974; Highbarger v. Milford,

71 Kan. 331, 80 Pac. 633; Louisville etc. R. R. Co. v. Finley, 86 Ky. 294, 53 S. W. 753; Gargan v. Louisville etc. Ry. Co., 89 Ky. 212, 12 S. W. 259, 6 L.R.A. 340; Bannon v. Rohmeier, 90 Ky. 48, 13 S. W. 444, 29 Am. St. Rep. 355; Louisville v. Bannon, 99 Ky. 74, 35 S. W. 120; Van Witten v. Gutman, 79 Md. 405, 29 Atl. 608, 24 L.R.A. 403; Horton v. Williams, 99 Mich. 423, 58 N. W. 339; Tilley v. Mitchell & Lewis Co., 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007.

taking of the plaintiff's property, though the closing of the street at the point in question, renders his property less valuable.¹⁴

§ 207. When depreciation of value from the vacation and closing of streets amounts to damage or injury within constitutions and statutes. When access to property is cut off entirely by the vacation and closing of a street in front of the property or elsewhere, there is no question but what it is damaged or injured within constitution and statutes giving compensation for property damaged or injured by the vacation and discontinuance of streets and highways.¹⁵ So where a private right of way is cut off or obstructed, by the vacation and

¹⁴Polaek v. S. F. Orphan Asylum, 48 Cal. 490; East St. Louis v. O' Flynn, 119 Ill. 200, 59 Am. Rep. 795; Hall v. Lebanon, 31 Ind. App. 265, 67 N. E. 703; Gray v. Ia. Land Co., 26 Ia. 387; Williams v. Cary, 73 Ia. 194, 34 N. W. 813; Hiller v. Atchison etc. Ry. Co., 28 Kan. 625; Arnold v. Weiker, 55 Kan. 510, 40 Pac. 901; Leavenworth v. Douglass, 59 Kan. 416, 53 Pac. 123; Cole v. Shannon, 1 J. J. Marsh 218; Bandistel v. Jackson, 110 Mich. 357, 68 N. W. 292; Beutel v. West Bay City Sugar Co., 132 Mich. 587, 94 N. W. 202; Dean v. Ann Arbor R. R. Co., 137 Mich. 459, 100 N. W. 773; Herbert v. Penn. R. R. Co., 43 N. J. Eq. 21; Dodge v. Penn. R. R. Co., 43 N. J. Eq. 351; S. C. affirmed, 45 N. J. Eq. 366; Kean v. Elizabeth, 54 N. J. L. 462, 24 Atl. 495; S. C. affirmed, 55 N. J. L. 337, 26 Atl. 939; In re Cincinnati etc. Ry. Co. 19 Ohio C. C. 308; State v. Taylor, 107 Tenn. 455, 64 S. W. 766.

¹⁵Bigelow v. Ballerino, 111 Cal. 559, 44 Pac. 307; Butterworth v. Bartlett, 50 Ind. 537; Cook v. Quick, 127 Ind. 477, 26 N. E. 1007; Putnam v. Boston etc. R. R. Co., 182 Mass. 351, 65 N. E. 790; Wendt v. Board of Supervisors, 87 Minn. 403, 92 N. W. 404; Smith v. Mitchell, 21

Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858. The contrary is held with respect to a country highway in Levee District v. Farmer, 101 Cal. 178, 35 Pac. 569, 23 L.R.A. 388, wherein the court says: "The creation of highways by use, or under the statute, creates an easement for the benefit of the public for such time only as the public necessities and convenience may require, and creates no covenant or obligation in favor of an abutter that it shall always exist; but, on the contrary, the statutes, while providing for the establishment and maintenance of highways, also provide for vacating the same, and abutters must be held to have acquired and improved their property in view of that fact, and hence no one can acquire a legal interest in it other than that which is common to all, and this common interest the authority relied upon by appellant concedes does not entitle an abutter to damages upon the vacation of the road. The public use ceases upon such vacation; and any injury to appellant consequent upon such ending of the use cannot be held to be a taking or damaging for a public use." pp. 186, 187. See also Fesser v. Achenbach, 29 Ill. App. 373.

closing of the street with which it connects.¹⁶ So in the case of corner lots, if one of the streets is vacated.¹⁷ So if a street is narrowed.¹⁸ It seems equally clear to the writer that property is damaged within the meaning of the law when access thereto is cut off in one direction, but the authorities are conflicting.¹⁹ Where the vacated part of the street is still more remote from the property in question, as when it is in the next block, or farther, or beyond the next intersecting street, it is generally held that there is no damage or injury within the legal

¹⁶ Webster v. Lowell, 142 Mass. 324, § N. E. 54; Munn v. Boston, 183 Mass. 421, 67 N. E. 312; People v. Highway Commissioner, 35 Mich. 15.

¹⁷ Ridgeway v. Osceola (Ia.) 117 N. W. 974; Heinrich v. St. Louis, 125 Mo. 424, 28 S. W. 626, 46 Am. St. Rep. 490.

¹⁸ Hyde v. Fall River, 197 Mass. 4; Stehr v. Mason City etc. Ry. Co., 77 Neb. 641, 110 N. W. 701; *ante*, § 201. But in California where a street one hundred feet wide was narrowed by the vacation of the north thirty one feet, it was held that the property on the opposite side of the street was not damaged within the constitution. Brown v. San Francisco, 124 Cal. 274, 57 Pac. 82.

¹⁹ In favor of right to compensation; Chicago v. Burkey, 158 Ill. 103, 42 N. E. 178, 49 Am. St. Rep. 142, 29 L.R.A. 568, *affirming* Lake v. Bureky, 57 Ill. App. 547; Winnetka v. Clifford, 201 Ill. 475, 66 N. E. 384; Chicago v. Webb, 102 Ill. App. 232; Gargan v. Louisville etc. Ry. Co., 89 Ky. 212, 12 S. W. 259, 6 L.R.A. 340; Bannon v. Rohmeier, 90 Ky. 48, 13 S. W. 444, 29 Am. St. Rep. 355; Louisville v. Bannon, 99 Ky. 74, 35 S. W. 120; Vanderburgh v. Minneapolis, 98 Minn. 329, 108 N. W. 480, 6 L.R.A.(N.S.) 741; Mellor v. Philadelphia, 160 Pa. St. 614, 28 Atl. 991; *In re Melon St.*,

182 Pa. St. 397, 38 Atl. 482, 28 L.R.A. 275; Foust v. Penn. R. R. Co., 212 Pa. St. 213, 61 Atl. 829; Robbins v. Scranton, 217 Pa. St. 577, 66 Atl. 977; Black v. Pittsburgh etc. St. Ry. Co., 34 Pa. Super. Ct. 416; Johnston v. Old Colony R. R. Co., 18 R. I. 642, 29 Atl. 594, 49 Atl. 800; Tilley v. Mitchell & Lewis Co., 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007; Chicago v. Baker, 86 Fed. 753, 30 C. C. A. 364; Chicago v. Baker, 98 Fed. 830, 39 C. C. A. 318; Mason City etc. R. R. Co. v. Wolf, 148 Fed. 961, 78 C. C. A. 589; McQuade v. The King, 7 Can. Exch. 318; Macarthur v. The King, 8 Can. Exch. 245; Cook v. Bath, L. R. 6 Eq. Cas. 177. Where a new way was opened so as to afford access in the same direction as that cut off by the vacation, it was held there could be no recovery, though the new way was less convenient: Parker v. Catholic Bishop, 146 Ill. 158, 34 N. E. 473, *affirming* 41 Ill. App. 74; Howell v. Morrisville, 212 Pa. St. 349, 61 Atl. 932.

Contra: Smith v. Boston, 7 Cush. 254; Castle v. Berkshire, 11 Gray, 26; Hartshorn v. South Reading, 3 Allen 501; Davis v. County Comrs., 153 Mass. 218, 26 N. E. 848, 11 L.R.A. 750; Nichols v. Richmond, 162 Mass. 170, 38 N. E. 501; Hyde v. Fall River, 189 Mass. 439, 75 N. E. 953, 2 L.R.A.(N.S.) 269; Buhl v. Fort St. Union Depot Co., 98

meaning of those terms.²⁰ Where a short street which terminated opposite the plaintiff's property, was vacated and closed, it was held that the property was damaged within the constitution, if it was thereby depreciated in value.²¹

We have endeavored to show elsewhere, that if property is lessened in value by an interference under statutory authority with a right, public or private, which the owner is entitled to make use of in connection with such property, then he is entitled to recover for such loss in value under constitutions and statutes giving compensation for property damaged or injured for public use.²² Under this rule, if property is diminished in value by the vacation and closing of a street, whether at a point near or remote he is entitled to compensation under the constitutions and statutes referred to.

The rule usually applied in interpreting these constitutional and statutory provisions is "that those damages can be recovered which could have been recovered at common law, had the acts

Mich. 596, 57 N. W. 829, 23 L.R.A. 392; 9 Am. R. R. & Corp. Rep. 173; Glasgow v. St. Louis, 107 Mo. 198, 17 S. W. 743, 3 Am. R. R. Corp. Rep. 192; Cram v. Laconia, 71 N. H. 41, 51 Atl. 635, 57 L.R.A. 282; Smith v. St. Paul etc. Ry. Co., 39 Wash. 355, 81 Pac. 840, 109 Am. St. Rep. 889, 70 L.R.A. 1018; Ponischil v. Hoquiam Sash & Door Co., 41 Wash. 303, 83 Pac. 316; Mottman v. Olympia, 45 Wash. 361, 88 Pac. 579; Montreal v. Drummond, L. R. 1 H. L. 384. See Rodgers v. Parker, 9 Gray, 445, where the statute provided that "the right of way of any lot owner should not be impaired" by the vacation, and it was held not to enlarge the right to compensation. Kinnear Mfg. Co. v. Beatty, 65 Ohio St. 264, 62 N. E. 341, 87 Am. St. Rep. 600, reversing Beatty v. Kinnear Mfg. Co., 21 Ohio C. C. 384.

²⁰Dennis v. Mobile etc. Ry. Co., 137 Ala. 649, 35 So. 30, 97 Am. St. Rep. 69; Little Rock etc. R. R. Co. v. Newman, 73 Ark. 1, 83 S. W. 653, 108 Am. St. Rep. 653; Symons v.

San Francisco, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453; Whitsett v. Union Depot & R. R. Co., 10 Colo. 243, 15 Pac. 339; Chicago v. Union Bldg. Ass., 102 Ill. 379, 40 Am. Rep. 598; East St. Louis v. O'Flynn, 119 Ill. 200, 59 Am. Rep. 795; Pearson v. Allen, 151 Mass. 79, 23 N. E. 731, 21 Am. St. Rep. 426; Stanwood v. Malden, 157 Mass. 17, 31 N. E. 702, 16 L.R.A. 591; Knapp, Stout & Co. v. St. Louis, 153 Mo. 560, 55 S. W. 104; Same v. Same, 156 Mo. 343, 56 S. W. 1102; Cummings Realty & Imp. Co. v. Deere & Co., 208 Mo. 66, 106 S. W. 496, 14 L.R.A.(N.S.) 822; McGees Appeal, 114 Pa. St. 470, 8 Atl. 237; Lawrence v. Philadelphia, 154 Pa. St. 20, 25 Atl. 1079; Rockafeller v. Northern Central Ry. Co., 212 Pa. St. 485, 61 Atl. 960; Ruscomb Street, 30 Pa. Super. Ct. 476, S. C. 33 Pa. Super. Ct. 148.

²¹Coker v. Atlanta etc. Ry. Co., 123 Ga. 483, 51 S. E. 481. Directly the contrary is held in Stanwood v. Malden, 157 Mass. 17, 31 N. E. 702, 16 L.R.A. 591.

²²Post, § 363.

which caused them been done without authority of statute.”²³ This brings us to the question of special damages from a public nuisance, for if a street is closed or obstructed without authority of law the act is a public nuisance. We have already endeavored to show that if property is so situated that it is depreciated in value by such public nuisance, the owner suffers a special damage, though in his attempt to travel the street he suffers only the same kind of inconvenience as the general public.²⁴ Accordingly, if property is depreciated in value by the vacation and closing of a street or highway, the owner is entitled to recover therefor under constitutions giving compensation for property damaged or injured for public use, or under statutes giving compensation for property damaged by the vacation or discontinuance of streets and highways.

§ 208. Pennsylvania decisions as to taking and damaging by the vacation of streets. The decisions in Pennsylvania are somewhat peculiar and require special mention. It was held in an early case, where a street was vacated by an act of the legislature, that there was no taking of the property of abutting owners and that they had no remedy.²⁵ In 1874 the constitution of the State was amended by adding the following with reference to the eminent domain power: “Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways or improve-

²³Stanwood v. Malden, 157 Mass. 17, 31 N. E. 702, 16 L.R.A. 591.

²⁴Ante, § 199.

²⁵Paul v. Carver, 24 Pa. St. 207, 64 Am. Dec. 649. The court says: “Surrendering the right of way over a public road to the owners of the soil, is *not* taking private property for public use, and the proprietors of other land incidentally injured by the discontinuance of the road are not entitled to compensation. A private road is private property, and an act of assembly to close it up without paying for it, would be depriving the owner of his property. But a public road belongs to nobody but the State; and when the government sees proper

to vacate it, the consequential loss if there be any, must be borne by those who suffer it, just as they bear what might result from a refusal to make it in the first place. It is true that there is much property in the commonwealth whose principal value would be taken away by closing the avenues which lead to it; and we are warned that if we do not declare it unconstitutional, an act may be passed to vacate Chestnut street. If the possible abuse of power were sufficient to prove that the legislature cannot have it, then it would also prove that it does not exist at all; and this would bring us to the absurd conclusion that there is no authority

ments, which compensation shall be paid or secured before such taking, injury or destruction.”²⁶ Since the adoption of this amendment it has been repeatedly held that the vacation of a street was not a taking, injury or destruction of property within the provision, and that there could be no recovery in the absence of a statute giving compensation in such cases.²⁷ “Vacating a street takes no property from anyone. * * * There is no constitutional right to damages even on the ground of injury under the present constitution.”²⁸ A statute exists applicable to Philadelphia, giving compensation for the vacation of streets, and cases under this statute have already been cited.²⁹

§ 209. Purpose and motive of the vacation. In Iowa the fee of streets in cities and towns is in the municipality and it has been repeatedly held that the municipality may vacate a street and devote the land to any use it pleases, whether public or private, and that abutters whose access is destroyed or impaired have no remedy. It has been so held where a street was vacated and turned over to a railroad company for its depot or

anywhere in the State to vacate a useless road and substitute a better one in its place. Every function of government may be injudiciously exercised, but still we must trust it with somebody. That of vacating roads is as necessary as any other; and while we cannot promise that everybody's interests will be taken care of, we have faith enough in our system to believe that no atrocious wrong will be done.” pp. 211, 212.

²⁶Ante, § 49.

²⁷McGee's Appeal, 114 Pa. St. 470, 8 Atl. 237; Lawrence v. Philadelphia, 154 Pa. St. 20, 25 Atl. 1079; Wetherill v. Penn. R. R. Co., 195 Pa. St. 156, 45 Atl. 658; Carpenter v. Pennsylvania R. R. Co., 195 Pa. St. 160, 45 Atl. 685; Daughters of Am. Rev. v. Schenley, 204 Pa. St. 572, 54 Atl. 366; Howell v. Morrisville, 212 Pa. St. 349, 61 Atl. 932; Rockafeller v. Northern Central Ry. Co., 212 Pa. St. 485, 61 Atl. 960; Noeton v. Penn. R. R. Co., 32 Pa. Supr. Ct. 555.

²⁸Wetherill v. Penn. R. R. Co., 195

Pa. St. 156, 45 Atl. 658. And in the late case of Howell v. Morrisville, 212 Pa. St. 349, 61 Atl. 932, the Court says: “It must therefore be accepted as settled law, that the vacation of a highway or street is not an injury to abutting landowners within the provisions of the constitution requiring compensation, and in the absence of special legislative provision for damages, none can be recovered.” p. 352.

See the following: Foust v. Penn. R. R. Co., 212 Pa. St. 213, 61 Atl. 829; Robbins v. Scranton, 217 Pa. St. 577, 66 Atl. 977; Walsh v. Scranton, 23 Pa. Supr. Ct. 276; Haggerty v. Scranton, 23 Pa. Supr. Ct. 279; Carroll v. Asbury, 28 Pa. Supr. Ct. 354; Black v. Pittsburg etc. St. Ry. Co., 34 Pa. Supr. Ct. 416.

²⁹Mellor v. Philadelphia, 160 Pa. St. 614, 28 Atl. 991; In re Melon St., 182 Pa. St. 397, 38 Atl. 482, 28 L.R.A. 275, reversing 1 Pa. Supr. Ct. 63; Rusecomb St., 30 Pa. Supr. Ct. 476; S. C. 33 Pa. Supr. Ct. 148.

tracks.³⁰ So where a street was vacated and given over to the adjacent owner to be built upon or otherwise employed for his private use.³¹ In the cases cited the vacation was directly attacked on the ground that it was for a private purpose. In some of the cases it is intimated that equity will interfere to prevent an abuse of the power.³²

The general rule is that the power to vacate streets and highways is a power to be exercised from considerations of public policy and for the purpose of promoting the public welfare and not for the benefit of private individuals and corporations.³³ "A city cannot barter away streets and alleys, nor can it do indirectly, by invoking its power of vacating ways what it cannot do directly. Streets and alleys are not to be vacated at the instance of individuals interested only in the acquisition of the vacated property, and the exercise of legislative discretion in such matters must, at least upon the face of the record, be free from affirmative evidence that such discretion was invoked for individual gain, and its exercise influenced by an offer to divide the property acquired."³⁴ Accordingly when it appears upon the face of the proceedings, as from the petition or ordinance, or from some contract or arrangement between the parties, that the object of the vacation is to promote private interests it will be declared void at the suit of parties affected.³⁵ But the mere fact that upon vacation the bed of the street reverts to private parties and is put to private uses, does not

³⁰Barr v. Oskaloosa, 45 Ia. 275; Spitzer v. Runyan, 113 Ia. 619, 85 N. W. 782; Harrington v. Ia. Cent. Ry. Co., 126 Ia. 388, 102 N. W. 139.

³¹Marshalltown v. Forney, 61 Ia. 578, 16 N. W. 740; Dempsey v. Burlington, 66 Ia. 387, 24 N. W. 508; Williams v. Carey, 73 Ia. 194, 34 N. W. 813. On vacation the city gets an absolute title to the property. Lake City v. Fulkerson, 122 Ia. 569, 98 N. W. 376.

³²Williams v. Carey, 73 Ia. 194, 197, 34 N. W. 813; McLachlan v. Gray, 105 Ia. 259, 74 N. W. 773.

³³Weage v. Chicago etc. R. R. Co., 227 Ill. 421, 81 N. E. 424, 11 L.R.A. (N.S.) 589; Glasgow v. St. Louis, 107 Mo. 198, 17 S. W. 743, 3 Am. R. R. &

Corp. Rep. 192; Laurel v. Rowell, 84 Miss. 435, 36 So. 543; Pence v. Bryant, 54 W. Va. 263, 46 S. E. 275; cases cited in the following notes.

³⁴Horton v. Williams, 99 Mich. 423, 430, 58 N. W. 369.

³⁵Smith v. McDowell, 148 Ill. 51, 35 N. E. 141, 22 L.R.A. 393; DeLand v. Dixon Power & Lt. Co., 225 Ill. 212, 80 N. E. 25; Louisville v. Bannon, 99 Ky. 74, 35 S. W. 120; Van Witsen v. Gutman, 79 Md. 405, 29 Atl. 608, 24 L.R.A. 403; Horton v. Williams, 99 Mich. 423, 58 N. W. 369; People v. Comrs. of Highways, 53 Barb. 70; Ashland v. C. & N. W. Ry. Co., 105 Wis. 398, 80 N. W. 1101; Ashland v. No. Pac. Ry. Co., 119 Wis. 204, 96 N. W. 688.

show that the power of vacation was exercised for a private and not for a public purpose.³⁶ Such reversion is, in most cases, a necessary incident of the vacation and if that fact vitiated the proceeding the power to vacate would be nugatory. The motives of a common council or local legislative body in vacating a street or highway are not the subject of judicial inquiry³⁷ and, unless it appears on the face of the proceedings or from some record or writing in connection with the matter, that the purpose was to benefit private parties, the vacation will be sustained.³⁸

³⁶Meyer v. Teutopolis, 131 Ill. 552, 23 N. E. 651; Parker v. Catholic Bishop, 146 Ill. 158, 34 N. E. 473, affirming S. C. 41 Ill. App. 74; People v. Wieboldt, 233 Ill. 572, 84 N. E. 646; Rensselaer v. Leopold, 106 Ind. 29; Ponischil v. Hoquiam Sash & D. Co., 41 Wash. 303, 83 Pac. 316; Tilley v. Mitchell & Lewis Co., 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007.

³⁷Meyer v. Teutopolis, 131 Ill. 552, 556, 23 N. E. 651; Amboy v. Ill. Cent. R. R. Co., 236 Ill. 236, 86 N. E. 238; Rensselaer v. Leopold, 106 Ind. 29; Glasgow v. St. Louis, 107 Mo. 198, 17 S. W. 743, 3 Am. R. R. & Corp. Rep. 192; Bellevue v. Bellevue Imp. Co., 65 Neb. 52, 90 N. W. 1002; Endres v. Friday, 78 Neb. 510; Tilley v. Mitchell & Lewis Co., 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007; 1 Dill. Munie. Corp. § 311.

³⁸Ibid. The question arose in State v. City of Elizabeth, 54 N. J. L. 462, 24 Atl. 495, and the court disposed of it as follows: "Nor do I find any substance in the point that the vacation was made to subserve a private interest. It is true that the proceedings for vacation were taken immediately after a petition for such vacation had been presented by the trustees of the Trumbull estate. The vacated portion of the street had been laid over the Trumbull lands. There appears to have been an opportunity to sell a tract of said land to a company which would locate ex-

tensive works upon it, and so increase the prosperity of that portion of the city. The required piece of land could not have been obtained without a vacation of this part of York street. This was probably the principal inducement to the action of the common council. But the motives which induce municipal proceedings of this kind are always of a mixed character. Regard for private interests are necessarily intertwined with public interests. The size of lots for building purposes is a proper factor to be taken into consideration in the vacation of, as well as in the laying out or altering, streets. If the motive of a common council in exercising the power conferred upon it by the legislature can ever be questioned is doubtful. If the courts can enter into the motives of the municipal legislature in respect to acts of this kind in any case, it must be one in which the public interests have been glaringly sacrificed to subserve private ends. Nothing of this sort appears in this case. The vacated portion of the street runs through salt meadows, and crosses an unbridged creek, and there is not a house or building along the line of it. Between the property of the prosecutrix and the vacated part of the street, York street is crossed by Schiller street, which is open and built upon. Under all the circumstances, the action of the common

In one of the cases cited the defendant company owned the blocks on opposite sides of the street in question, which was 60 feet wide. On petition of the defendant the city vacated the north 25 feet and south 15 feet of this street through the block and also authorized the defendant to connect its premises by a bridge across that part of the street not vacated. The defendant had a manufacturing plant and proposed to occupy with its buildings the vacated strips and connect them by a bridge over the street, as provided in the ordinance. Property owners in the vicinity filed a bill to enjoin such use of the vacated or unvacated parts of the street, averring among other things that the street was not vacated in the public interest but solely for the benefit of the defendant company. The ordinance recited that the vacation was made because the parts vacated were of no public utility and because the public interests required it. No fraud or corruption was charged. The statute provided for compensation to those damaged by the vacation. On demurrer to the bill it was held that it showed no ground for equitable relief so far as the vacation was concerned and on the question of the vacation being void because for a private purpose, the court says: "The sole claim is that the council have vacated a part of a street for a private use when it was needed by the public. This means that the motives of the councilmen were wrong and their judgment unsound. We think the courts will not entertain an inquiry into the truth of these charges. * * * It was within the power of the council to vacate the street, when in its judgment the public interest required such action, and even though the council may have been wrong in its judgment, or may have mistaken a private interest for a public one, our conclusion is that the courts cannot arrest the operation of the ordinance for these reasons, and hence that no cause of action is stated in the first count of the complaint."³⁹ It is not uncommon for a party, owning property on both sides of a street or alley, to procure the vacation of the part of the street or alley, which separates his property, so as to make the property continuous and to occupy the whole with a building or plant.

council is not properly the subject of a suspicion of being influenced by any considerations other than to conserve the best interests of the city." This case was affirmed in 55 N. J. L. 337, 26 Atl. 939. See also ante, §§ 138,

178; Amboy v. Ill. Central R. R. Co., 236 Ill. 236, 86 N. E. 238.

³⁹Tilley v. Mitchell & Lewis Co., 121 Wis. 1, 12, 13, 98 N. W. 969, 105 Am. St. Rep. 1007.

But where nothing more appears than that the vacation has been made on the request of the party benefited, it has been sustained.⁴⁰

The abolition of grade crossings,⁴¹ the construction or improvement of railroad depots and terminals,⁴² and the re-ar-

⁴⁰Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312, 104 Am. St. Rep. 156; Chicago v. Union Bld. Ass'n, 102 Ill. 379, 40 Am. Rep. 598; Parker v. Catholic Bishop, 146 Ill. 158, 34 N. E. 473, *affirming* 41 Ill. App. 74; People v. Friend, 233 Ill. 572, 84 N. E. 646; Marshalltown v. Faney, 61 Ia. 578, 16 N. W. 740; Bailey v. Culver, 84 Mo. 531, *affirming* 12 Mo. App. 531; Glasgow v. St. Louis, 107 Mo. 198, 17 S. W. 743, 3 Am. R. R. & Corp. Rep. 192; Knapp, Stout & Co. v. St. Louis, 156 Mo. 343, 56 S. W. 1102; Kinnear Mfg. Co. v. Beatty, 65 Ohio St. 264, 62 N. E. 341, 87 Am. St. Rep. 600, *reversing* S. C. Beatty v. Kinnear Mfg. Co., 21 Ohio C. C. 384; Ponischil v. Hoquiam S. & D. Co., 41 Wash. 303, 83 Pac. 316; Tilley v. Mitchell & Lewis Co., 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007. In Knapp, Stout & Co. v. St. Louis, 153 Mo. 560, 55 S. W. 104, it is held that an ordinance vacating a street may be annulled for fraud and corruption but that an averment that the ordinance was not passed for any public purpose but solely to give a private corporation the use of the property, did not show fraud.

Where a consideration was paid, the vacation was held void, as for a private purpose. Louisville v. Bannon, 99 Ky. 74, 35 S. W. 120; Horton v. Williams, 99 Mich. 423, 58 N. W. 369. So where the same purpose was evident from recitals in the proceedings. Smith v. McDonald, 148 Ill. 51, 35 N. E. 141, 22 L.R.A. 393; DeLand v. Dixon P. & L. Co., 225 Ill. 212, 80 N. E. 25; Van Witsen v. Gut-

man, 79 Md. 405, 29 Pac. 608, 24 L.R.A. 403.

⁴¹Newton v. New York etc. R. R. Co., 72 Conn. 420, 44 Atl. 813; Chicago v. Burcky, 158 Ill. 103, 42 N. E. 178, 49 Am. St. Rep. 142, 29 L.R.A. 568, *affirming* S. C. *sub nom.* Town of Lake v. Burcky, 57 Ill. App. 547; People v. Atchison etc. Ry. Co., 217 Ill. 594, 75 N. E. 573; Spitzer v. Runyan, 113 Ia. 619, 85 N. W. 782; Davis v. County Comrs., 153 Mass. 218, 26 N. E. 848, 11 L.R.A. 750; Nichols v. Richmond, 162 Mass. 170, 38 N. E. 501; Dodge v. Penn. R. R. Co., 43 N. J. Eq. 351; S. C. *affirmed*, 45 N. J. Eq. 366; Dean v. Ann Arbor etc. R. R. Co., 137 Mich. 459, 100 N. W. 773; Buchholz v. New York etc. R. R. Co., 71 App. Div. 452, 75 N. Y. S. 824; S. C. *affirmed*, 177 N. Y. 550, 69 N. E. 1121; Matter of Grade Crossing Comrs., 166 N. Y. 69, 59 N. E. 706; Foust v. Penn. R. R. Co., 212 Pa. St. 213, 61 Atl. 829; Chicago v. Baker, 98 Fed. 830, 39 C. C. A. 318.

⁴²Dennis v. Mobile etc. Ry. Co., 137 Ala. 649, 35 So. 30, 97 Am. St. Rep. 69; Whitsett v. Union Depot & R. R. Co., 10 Colo. 243, 15 Pac. 339; East St. Louis v. O'Flynn, 119 Ill. 200, 59 Am. Rep. 795; Amboy v. Ill. Cent. R. R. Co., 236 Ill. 236, 86 N. E. 238; Dantzer v. Indianapolis Union Ry. Co., 141 Ind. 604, 39 N. E. 223, 50 Am. St. Rep. 343, 34 L.R.A. 769, 11 Am. R. R. & Corp. Rep. 249; Leavenworth etc. Ry. Co. v. Curlan, 51 Kan. 432, 33 Pac. 297; Leavenworth v. Douglass, 59 Kan. 416, 53 Pac. 123; Spetzer v. Runyan, 113 Ia. 619, 85 N. W. 782; Buhl v. Fort St. Union

angement of streets to secure a more regular and harmonious system, are public purposes for which the power of vacation may properly be exercised.⁴³ So where the vacation is for public or *quasi* public buildings or grounds.⁴⁴

§ 210. Exercise and construction of the statutory authority. Power to lay off, open, widen, straighten, establish and improve streets does not confer power to vacate them.⁴⁵ So of a power "to open, lay out, widen, straighten or otherwise change" streets and alleys.⁴⁶ But the latter provision was held sufficient to narrow a street for a short distance by vacating a strip, so as to make the street of uniform width.⁴⁷ And generally the power to vacate streets has been held to authorize the narrowing of a street by vacating a part longitudinally.⁴⁸ Under a statute which provides that any *alley* or *highway* which has become useless may be vacated, a part of a *street* which has become useless may be vacated.⁴⁹ A statute provided that a road which had been laid out and "opened in part," could be vacated; held that the statute would apply if 84 feet had been opened and made fit for travel.⁵⁰ The statutory authority must

Depot Co., 98 Mich. 596, 57 N. W. 829, 23 L.R.A. 392, 9 Am. R. R. & Corp. Rep. 173; Kaje v. Chicago etc. Ry. Co., 57 Minn. 422, 59 N. W. 493; Vanderburgh v. Minneapolis, 93 Minn. 81, 100 N. W. 668; Vanderburgh v. Minneapolis, 98 Minn. 329, 108 N. W. 480, 6 L.R.A.(N.S.) 741. *And see* Coker v. Atlanta etc. Ry. Co., 123 Ga. 483, 51 S. E. 489; Kakeldy v. Columbia R. R. Co., 37 Wash. 675, 80 Pac. 205; Columbus v. Union Pac. R. R. Co., 137 Fed. 869, 70 C. C. A. 207. In Wisconsin it has been held that a city had no power to vacate a street and turn it over to a railroad company in consideration of improvements to be made on other streets by the company. Ashland v. C. & N. W. Ry. Co., 105 Wis. 398, 80 N. W. 1101; Ashland v. No. Pac. Ry. Co., 119 Wis. 204, 96 N. W. 688.

⁴³Lindsay v. Omaha, 30 Neb. 512, 46 N. W. 627, 27 Am. St. Rep. 415; Matter of New York, 28 App. Div. 143.

⁴⁴For a college or school. Meyer v. Teutopolis, 131 Ill. 552, 23 N. E. 651; Cherry v. Rock Hill, 48 S. C. 553, 26 S. E. 798. For a hospital or asylum. Polack v. S. F. Orphan Asylum, 48 Cal. 490; Reis v. New York, 188 N. Y. 58, 80 N. E. 573, *affirming* 113 App. Div. 464, 99 N. Y. S. 291. For a State Capitol. Mottman v. Olympia, 45 Wash. 361, 88 Pac. 579.

⁴⁵Texarkana v. Leach, 66 Ark. 40, 48 S. W. 807, 74 Am. St. Rep. 68.

⁴⁶Coker v. Atlanta etc. Ry. Co., 123 Ga. 483, 51 S. E. 481.

⁴⁷Patton v. Rowe, 124 Ga. 525, 52 S. E. 742.

⁴⁸Brown v. San Francisco, 124 Cal. 274, 57 Pac. 82; Mt. Carmel v. Shaw, 155 Ill. 37, 39 N. E. 584, 46 Am. St. Rep. 311, 27 L.R.A. 580, reversing S. C. 52 Ill. App. 429.

⁴⁹In re Swanson street, 163 Pa. St. 323, 30 Atl. Rep. 207.

⁵⁰Union Township Road, 10 Pa. Co. Ct. 433.

be substantially complied with as to petition, notice and procedure generally, or the attempted vacation will be ineffectual.⁵¹ Where a statute provided that a city should not vacate a street "when objected to by property owners adjacent thereto" or by those having a direct or substantial interest therein," it was held that one just outside of the city limits, at whose land the street terminated, was not within the statute, and consequently could not defeat the vacation by objecting.⁵² But where it was proposed to narrow a street by vacating a strip on one side, it

⁵¹Greist v. Amrhyn, 80 Conn. 280; People v. Atchison etc. Ry. Co., 217 Ill. 594, 75 N. E. 573; Small v. Binford, 41 Ind. App. 440; Hayes v. Tyler, 85 Ia. 126, 52 N. W. 116; Devoe v. Smeltser, 86 Ia. 385, 53 N. W. 287; Harris v. Board of Supervisors, 88 Ia. 219, 55 N. W. 324; Mills v. Board of Comrs., 50 Kan. 635, 32 Pac. 361; Martin v. City of Louisville, 97 Ky. 30, 29 S. W. 864; Big Sandy Ry. Co. v. Boyd County, 125 Ky. 345; Goss v. Highway Commissioner, 63 Mich. 608, 30 N. W. 197; Price v. Stagray, 68 Mich. 17, 35 N. W. 815; Pearsall v. Eaton Co., 71 Mich. 438, 39 N. W. 578; Pearsall v. Eaton Co., 74 Mich. 558, 42 N. W. 77, 4 L.R.A. 193; Kimball v. Homan, 74 Mich. 699, 42 N. W. 167; Davis v. Board of Supervisors, 89 Mich. 295, 50 N. W. 862; Curry v. Rosell, 99 Mich. 524, 58 N. W. 472; Hatt v. Napoleon, 144 Mich. 266, 107 N. W. 1058; Miller v. Corinna, 42 Minn. 391, 44 N. W. 127; Nicholson v. Stockett, Walker, Miss., 67; In re Big Hollow Road, 111 Mo. 326, 19 S. W. 947; Letherman v. Hauser, 77 Neb. 731, 110 N. W. 745; DeForest v. Wheeler, 7 Ohio St. 286; Latimer v. Tillamook County, 22 Or. 291, 29 Pac. 734; Road in Ross Township, 36 Pa. St. 87; Chartier's Township Road, 48 Pa. St. 314; Vacation of Henry Street, 123 Pa. St. 346, 16 Atl. 785; In re Vacation of Union Street, 140 Pa. St. 525, 21 Atl. 406;

In re Vacation of Public Road, 160 Pa. St. 104, 28 Atl. 649; In re Swanson St., 163 Pa. St. 323, 30 Atl. 207; Matter of Vacation of Certain Streets, 17 Phil. 660; Union Township Road, 10 Pa. Co. Ct. 433; Yates v. West Grafton, 33 W. Va. 507, 11 S. E. 8; Pettibone v. Hamilton, 40 Wis. 402; James v. City of Darlington, 71 Wis. 173, 36 N. W. 834; Schroeder v. Klipp, 120 Wis. 245, 97 N. W. 909; Johnston v. Lonstorf, 128 Wis. 17, 107 N. W. 459; Morris v. Edwards, 132 Wis. 91, 112 N. W. 248.

As to who are parties "interested" in case of a vacation, or who are entitled to notice or to object or appeal see Commissioners of Highways v. Quinn, 136 Ill. 604, 27 N. E. 186; Brandenburg v. Hittel (Ind.) 37 N. E. 329; Linning v. Barnett, 134 Ind. 332, 33 N. E. 1098; Arnold v. Weiker, 55 Kan. 510, 40 Pac. 901; Bradbury v. Walton, 94 Ky. 163, 12 S. W. 869; Roxedale v. Seip, 32 La. Ann. 435; Kimball v. Homan, 74 Mich. 699, 42 N. W. 167; Baudistel v. Mich. Cent. R. R. Co., 113 Mich. 687, 71 N. W. 1114; Schuster v. Lemond, 27 Minn. 253, 6 N. W. 802; State v. Barton, 36 Minn. 145, 30 N. W. 454; State v. Hohman, 40 Minn. 369, 41 N. W. 1073; State v. Sneiderer, 30 N. J. L. 80; Gay v. West Streets, 7 Pa. Co. Ct. 217; Yates v. Grafton, 33 W. Va. 507.

⁵²House v. Greensburg, 93 Ind. 533.

was held that abutters on the opposite side were adjacent within the statute.⁵³ Where a statute forbade the closing of public roads without the consent of the contiguous property owners, it was held to mean those who abutted on the part closed.⁵⁴ Under some statutes a road may be discontinued before it has been actually opened.⁵⁵ But where county commissioners had duly ordered a road opened, it was held that they could not at a subsequent session reconsider their vote, and so in effect vacate the road, without complying with the statute in that regard.⁵⁶ An alteration of a highway is held to work a discontinuance of such parts of the old way as are not included in the new location.⁵⁷ It has been held that a highway could not be discontinued during the pleasure of the authorities, reserving the right to open it again without paying any damages,⁵⁸ also that a city could not vacate a street for twenty years, during which it was to be put to private use.⁵⁹ In an Illinois case it appeared that a certain railroad company had occupied certain streets with its tracks under due authority for twenty years or more. The city passed an ordinance requiring the company to elevate its tracks in order to abolish grade crossings and providing that the streets so far as occupied by the tracks and embankment should be discontinued and vacated. Thereupon the persons entitled to the reversion in the streets filed a bill to prevent the occupation of their property without compensation. The court held, construing the entire ordinance, that its effect was to give to the railroad company the exclusive use of the streets so far as necessary to accomplish the elevation and not to vacate the streets so as to cause a reversion of the bed of the streets.⁶⁰

⁵³Lowe v. Lawrenceburg Roller Mills Co., 161 Ind. 495, 69 N. E. 148. *But see* Rensselaer v. Leopold, 106 Ind. 29.

⁵⁴Roxedale v. Seip, 32 La. Ann. 435.

⁵⁵Millett v. County Comrs., 80 Me. 427, 15 Atl. Rep. 24; Seuter v. Pugh, 9 Gratt. 260. *But see* Webb v. Town of Rocky Hill, 21 Conn. 468.

⁵⁶Mills v. Neosho County, 50 Kan. 635, 32 Pac. 361.

⁵⁷City and County of San Francisco v. Burr, 108 Cal. 460, 41 Pac. 482; Commonwealth v. Boston & A. R. R. Co., 150 Mass. 174, 22 N. E. 913; Leighton v. Concord etc. R. R.

Em. D.—26.

Co., 72 N. H. 224, 55 Atl. 938; Road in Manheim Tp., 12 Pa. Super. Ct. 279.

⁵⁸Cheshire Turnpike v. Stevens, 10 N. H. 133.

⁵⁹Glasgow v. St. Louis, 87 Mo. 678, affirming S. C. 15 Mo. App. 112.

⁶⁰Weage v. Chicago etc. R. R. Co., 227 Ill. 421, 81 N. E. 424, 11 L.R.A. (N.S.) 589. The court says that when elevation becomes necessary for the public safety and convenience "we are of opinion the city council has the right to authorize the use by the railroad company of such portions of its streets as may be necessary for

Where the vacation of a street was procured by a county for the purpose of erecting public buildings thereon, whereby a drain belonging to a city was destroyed, it was held the city was entitled to compensation.⁶¹

§ 211. Effect of vacation on private rights in street. As we have seen streets and highways cannot be discontinued except by the legislature or by its authority.⁶² Sometimes the statute authorizing the vacation or discontinuance of streets and highways provides for compensation for property damaged thereby, and sometimes it is silent on the subject. In the former case, it would seem that the intent of the statute was to provide for extinguishing private rights and for closing the street and that damages should be assessed on this basis. Most of the cases apparently proceed upon this theory.⁶³ The contrary has

that purpose, and that such use of the streets is not a diversion of them to an unauthorized or unlawful purpose. In this case the defendant in error had been given a perpetual easement in the street for its tracks and the operation of its trains thereon. The city council had not the power to take this right from it, but it did have authority to require it to elevate its tracks. In the judgment of the council such elevation made necessary the occupation of portions of the street its entire width by the embankment and structure upon which the tracks were to be laid. Defendant in error's tracks would, when elevated, still be in the street, and its right to continue to use the street was not terminated by the adoption of the ordinance. It would still lawfully occupy and use the street as a street. The necessity for the defendant in error occupying the whole or part of the street for the purpose of complying with the ordinance necessitated the exclusion of the general public therefrom. This was the purpose and effect of the ordinance. The exclusion of the public from the use of the street and the continuation of its use by the defendant in error did not have

the effect of causing a reversion to the dedicators, as would have been the case had the street been vacated for the purpose of abandoning its use entirely as a street. * * * By the passage of the track elevation ordinance, therefore, the city did not divest defendant in error of the right to use and occupy the streets, and there was no reversion to the dedicators, their heirs, devisees and grantees." pp. 427, 430.

As to construction of statutes relating to vacation of street, *see also* Madison Road, 37 Pa. St. 417; Henry Street Vacation, 123 Pa. St. 346, 16 Atl. 785; Union Street Vacation, 140 Pa. St. 525, 21 Atl. 406; Palo Alto Road, 160 Pa. St. 104, 28 Atl. 649.

⁶¹Cincinnati v. Hamilton County, 1 Disney 5.

⁶²*Ante* § 196.

⁶³Winetka v. Clifford, 201 Ill. 475, 66 N. E. 384; Butterworth v. Bartlett, 50 Ind. 537; Rensselaer v. Leopold, 106 Ind. 29; Cook v. Quick, 127 Ind. 477, 26 N. E. 1007; Webster v. Lowell, 142 Mass. 324, 8 N. E. 54; Stanwood v. Malden, 157 Mass. 17, 31 N. E. 702, 16 L.R.A. 591; Putnam v. Boston etc. R. R. Co., 182 Mass. 351, 65 N. E. 790; Munn v.

been held in New York. The legislature passed an act to alter the map or plan of certain portions of New York city. The act provided that commissioners should make a new plan for such portions of the city and should lay out and survey streets, avenues and public places and should make and file maps of the same, that all streets, avenues and roads not shown on the maps should, from and after the time of making and filing the same "cease to be or remain public streets, avenues, roads, squares or public places," and that "all damages to any land or to any building or other structure thereon" by reason of the closing of such streets should be ascertained and paid in a manner specified. It was held that the damages here provided for related only to the extinguishment of the public easement and that the private rights of abutting owners were not affected by the discontinuance of the street and the assessment and payment of damages as provided in the statute.⁶⁴

Boston, 183 Mass. 421, 67 N. E. 312; Cram v. Laconia, 71 N. H. 41, 51 Atl. 635, 57 L.R.A. 282; Matter of New York, 28 App. Div. 143; Matter of Vanderbilt Ave., 95 App. Div. 533, 88 N. Y. S. 769; Matter of Vanderbilt Ave., 119 App. Div. 882, 104 N. Y. S. 1133; In re Melon St., 182 Pa. St. 397, 38 Atl. 482, 28 L.R.A. 275; Rusecomb Street, 30 Pa. Supr. Ct. 476; S. C. 33 Pa. Supr. Ct. 148.

⁶⁴Holloway v. Southmayd, 139 N. Y. 390, 34 N. E. 1047; S. C. Holloway v. Delano, 64 Hun 27; 64 Hun 34. What is said by the Court of Appeals on this subject is as follows: "The appellant further contends that these special easements, if acquired by the abutting owner, were lawfully extinguished and condemned, as the results of the proceedings had under the act of 1867, providing for the closing of the Bloomingdale road. In that he is mistaken. The purpose and the effect of that act, it is plain from its language, were to discontinue the road as a public highway and, in so doing, to extinguish the public easement. The legislature was not concerned with

private easements and rights in land covered by the public highway. Its action left these private easements as they were; the public had no interest in their destruction. The award of damages was to compensate property owners who could prove they had been injured by the discontinuance of a public highway. It is obvious that the presence of a public highway in front of one's premises, by reason of the many public and general advantages it offers, confers a distinct value upon them and that its proposed discontinuance may result in a diminished value to the owner. The *situs* of a parcel of land enters into its value. If upon a public and prominent thoroughfare, it has a value which it would not possess if the thoroughfare were closed or changed. How great the loss in value is, or if any is in fact sustained, may turn upon a consideration of the circumstances surrounding the proposed alteration; but the legislature, in providing for awards of damages, looks at the general fact of a change being made, which may affect injuriously land-

When the statute does not provide for compensation, the effect of a vacation would seem to be to extinguish the public right or easement and to leave private rights unaffected. The private rights of abutters, so far as they are recognized by law as private property, are distinct from the public right and independent of it.⁶⁵ This being the case, it follows that the abandonment of the public right, under a statute making no provision for compensation, leaves the private rights as before.⁶⁶ Speaking of a dedicated street, the court in one case says: "The public might reject or accept, or having accepted might renounce, the public right involved in the transaction, but the action of the public could not change the private right of the parties created by their own contract, as between themselves and those claiming under them."⁶⁷ According to this view, the abutting owner may have his suit for injunction or damages against anyone interfering with his private rights, as by closing or obstructing the vacated street, and the fact of vacation would be no defense.⁶⁸

owners and authorizes compensation in such cases." 139 N. Y. 410.

⁶⁵Haynes v. Thomas, 7 Ind. 38; Rensselaer v. Leopold, 106 Ind. 29; Long v. Wilson, 119 Ia. 267, 93 N. W. 282, 97 Am. St. Rep. 315, 60 L.R.A. 720; Borghart v. Cedar Rapids, 126 Ia. 313, 101 N. W. 1120, 68 L.R.A. 306; Highbarger v. Milford, 71 Kan. 331, 80 Pac. 633; Louisville etc. R. R. Co. v. Hennen, 14 Ky. L. R. 526; Holloway v. Southmayd, 139 N. Y. 390, 34 N. E. 1047; Smith v. Smith, 120 App. Div. 278, 104 N. Y. S. 1106; McQuigg v. Cullins, 56 Ohio St. 649, 47 N. E. 595; Madden v. Penn. R. R. Co., 21 Ohio C. C. 73; Strader v. Cincinnati, Handy 446; In re Melon St., 182 Pa. St. 397, 38 Atl. 482, 28 L.R.A. 275; Carroll v. Asbury, 28 Pa. Supr. Ct. 354; Black v. Pittsburgh etc. St. Ry. Co., 34 Pa. Supr. Ct. 416; Johnston v. Old Colony R. R. Co., 18 R. I. 642, 29 Atl. 594, 49 Am. St. Rep. 800; State v. Taylor, 107 Tenn. 455, 64 S. W. 766; Cook v. Totten, 49 W. Va. 177, 38 S. E. 491, 87 Am. St. Rep. 792.

⁶⁶Ibid. Horton v. Williams, 99

Mich. 423, 58 N. W. 369; Heilscher v. Minneapolis, 46 Minn. 529, 49 N. W. 287, 5 Am. R. R. & Corp. Rep. 115; Johnson v. Cox, 42 Misc. 301, 86 N. Y. S. 601; Oliver Schlemmer Co. v. Steinman & M. Furn. Co., 2 Ohio N. P. (N.S.) 293; S. C. affirmed, 7 Ohio C. C. (N.S.) 468; State v. Taylor, 107 Tenn. 455, 64 S. W. 766.

⁶⁷Carroll v. Asbury, 28 Pa. Supr. Ct. 354, 360.

⁶⁸Haynes v. Thomas, 7 Ind. 38; Long v. Wilson, 119 Ia. 267, 93 N. W. 282, 97 Am. St. Rep. 315, 60 L.R.A. 720; Chrisman v. Omaha etc. Ry. & B. Co., 125 Ia. 133, 100 N. W. 63; Borghart v. Cedar Rapids, 126 Ia. 313, 101 N. W. 1120, 68 L.R.A. 306; Hayden v. Stewart, 71 Kan. 11, 80 Pac. 43; Louisville etc. R. R. Co. v. Hennen, 14 Ky. L. R. 526; Heilscher v. Minneapolis, 46 Minn. 529, 49 N. W. 287, 5 Am. R. R. & Corp. Rep. 115; Longworth v. Sedevice, 165 Mo. 221, 65 S. W. 260; Holloway v. Southmayd, 139 N. Y. 390, 34 N. E. 1047; Holloway v. Delano, 64 Hun 27; Holloway v. Delano, 64 Hun 34; Johnson v. Cox, 42 Misc. 301, 86 N.

Where a highway was discontinued which afforded the only practical access to the plaintiff's farm, the court enjoined the owner of the fee from closing up the vacated part and in doing so said: "The effect of the judgment of the trustees ordering the road vacated, is to relieve the public of any duty to keep it in repair, but it does not authorize the trustees, or anybody else, to close the road up, or obstruct it, and thus deprive Cullins of the right to travel it."⁶⁹ But some cases proceed upon the theory that the effect of the vacation is to authorize the closure of the street by those to whom the title reverts, that so far as this would destroy or interfere with private rights there is a taking of private property and that, if the statute makes no provision for compensation, it is void and of no effect.⁷⁰ Thus the supreme court of California holds that "the vacation of a highway, when duly and legally effected, involves something more than a mere constructive closing which would leave the street still a street, but no longer subject to municipal control. It involves a physical closing as well, which entitles the owner of the soil once occupied by the highway to take full and complete possession of their land."⁷¹

§ 212. Remedies. When the proceedings to vacate or discontinue a street or highway are void for want of statutory authority, or because the conditions prescribed have not been complied with, or because taken for a private purpose, or for any other reason, equity will enjoin the closure or obstruction of the street at the suit of one who would be specially damaged thereby.⁷² If the act provides for compensation and the proceed-

Y. S. 601; *McQuigg v. Cullins*, 56 Ohio St. 649, 47 N. E. 595; *Strader v. Cincinnati*, Handy 446; *Madden v. Penn. R. R. Co.*, 21 Ohio C. C. 73; *Beatty v. Kinnear Mfg. Co.*, 21 Ohio C. C. 384; *Oliver Schlemmer Co. v. Steinman & M. Furn. Co.*, 2 Ohio N. P. (N.S.) 293; *S. C. affirmed*, 7 Ohio C. C. (N.S.) 468; *Carroll v. Asbury*, 28 Pa. Supr. Ct. 354; *Black v. Pittsburgh etc. St. Ry. Co.*, 34 Pa. Supr. Ct. 416; *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858; *Johnston v. Lonstorf*, 128 Wis. 17, 107 N. W. 459.

⁶⁹*McQuigg v. Cullins*, 56 Ohio St. 649, 47 N. E. 595.

⁷⁰*Bannon v. Rohmeier*, 90 Ky. 48, 13 S. W. 444, 29 Am. St. Rep. 355; *Pearsall v. Eaton Co.*, 71 Mich. 438, 39 N. W. 578; *Pearsall v. Eaton Co.*, 74 Mich. 558, 42 N. W. 77, 4 L.R.A. 193. See *Leighton v. Concord etc. R. R. Co.*, 72 N. H. 224, 55 Atl. 938; *Grinnell v. Portage Co. Comrs.*, 6 Ohio C. C. (N.S.) 180.

⁷¹*Bigelow v. Ballerino*, 111 Cal. 559, 565, 44 Pac. 307.

⁷²*Texarkana v. Leach*, 66 Ark. 40, 48 S. W. 807, 74 Am. St. Rep. 68; *Coker v. Atlanta, etc. Ry. Co.*, 123 Ga. 483, 51 S. E. 481; *DeLand v. Dixon P. & L. Co.*, 225 Ill. 212, 80 N. E. 125; *Louisville v. Bannon*, 99 Ky.

ings are regular, injunction will not lie.⁷³ And where the constitution requires compensation for property damaged or injured for public use, it is held that one damaged by the vacation of a street has an adequate remedy at law in an action for damages and that an injunction will not be granted.⁷⁴ In some jurisdictions the order or ordinance declaring the vacation may be reviewed by writ of certiorari.⁷⁵

74, 35 S. W. 120; *Van Witsen v. Gutman*, 79 Md. 405, 29 Atl. 608, 24 L.R.A. 403; *Horton v. Williams*, 99 Mich. 423, 58 N. W. 369; *Laurel v. Rowell*, 84 Miss. 435, 36 So. 543; *Coleman v. Holden*, 88 Miss. 798, 41 So. 374; *Glasgow v. St. Louis*, 87 Mo. 678, *affirming* S. C. 15 Mo. App. 112; *Letherman v. Hauser*, 77 Neb. 731, 110 N. W. 745; *Lawrence v. New York*, 2 Barb. 577; *Pence v. Bryant*, 54 W. Va. 263, 46 S. E. 275; *Pettibone v. Hamilton*, 40 Wis. 402; *James v. Darlington*, 71 Wis. 173. See *Ashland v. C. & N. W. Ry. Co.*, 105 Wis. 398, 80 N. W. 1101; *Ashland v. No. Pac. Ry. Co.*, 119 Wis. 204, 96 N. W. 688. Where plaintiff has acquiesced for twenty years in the vacation, he has waived any invalidity. *Morris etc. R. R. Co. v. Prudden*, 20 N. J. Eq. 530, *reversing* S. C. entitled, *Attorney General v. Morris etc. R. R. Co.*, 19 N. J. Eq. 386; *Yates v. West Grafton*, 33 W. Va. 507.

⁷³*Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. E. 473, *affirming* S. C. 41 Ill. App. 74; *Lindsay v. Omaha*, 30 Neb. 512, 46 N. W. 627, 27 Am. St. Rep. 415; *Morris v. Philadelphia*, 199 Pa. St. 357, 49 Atl. 70; *Tilley v. Mitchell & Lewis Co.*, 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007.

⁷⁴*Dennis v. Mobile etc. Ry. Co.*, 137 Ala. 649, 35 So. 30, 97 Am. St. Rep. 69; *Ridgeway v. Osceola*, (Ia.) 117 N. W. 974; *Vanderburg v. Minneapolis*, 98 Minn. 329, 108 N. W. 480, 6 L.R.A.(N.S.) 741; *Vanderburgh v. Minneapolis*, 93 Minn. 81, 100 N. W. 668. See *Marietta Chair Co. v. Henderson*, 121 Ga. 399, 49 S. E. 312, 104 Am. St. Rep. 156; *Kakeldy v. Columbia etc. R. R. Co.*, 37 Wash. 675, 80 Pac. 205. *Contra*: *Bigelow v. Ballerino*, 111 Cal. 559, 44 Pac. 307.

⁷⁵*Brown v. San Francisco*, 124 Cal. 274, 57 Pac. 82; *McLachlan v. Gray*, 105 Ia. 259, 74 N. W. 773; *People v. Ingham Co.*, 20 Mich. 95; *Goss v. Highway Commissioner*, 63 Mich. 608, 30 N. W. 197; *Kimball v. Homan*, 74 Mich. 699, 42 N. W. 167; *Baudistel v. Jackson*, 110 Mich. 357, 68 N. W. 292; *Spitzer v. Runyan*, 113 Ia. 619, 85 N. W. 782; *Kean v. Elizabeth*, 54 N. J. L. 462, 24 Atl. 495; S. C. *affirmed*, 55 N. J. L. 337, 26 Atl. 939. For other remedies see *Atwood v. Partree*, 56 Conn. 80; *People v. Atchison etc. Ry. Co.*, 217 Ill. 594, 75 N. E. 573; *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, 22 L.R.A. 393; *People v. Wieboldt*, 233 Ill. 572, 84 N. E. 646; *Rodgers v. Parker*, 9 Gray 445.

CHAPTER VI.

OTHER CASES OF TAKING.

§ 213 (135). Impairing franchises. A franchise may be defined as a privilege or authority vested in certain persons by grant of the sovereign, to exercise powers or to do and perform acts which without such grant they could not do or perform.¹ The right to construct, maintain and operate a toll-bridge, ferry, turnpike, railroad, canal and the like is a franchise, which must emanate directly or indirectly from the sovereign power.² The property in connection with which the franchise is made available, and the franchise itself, are of course, subject to the power of eminent domain like all other property.³ When a part of the property or the whole property and franchise are taken for public use there is no doubt as to the nature of

¹Tuckahoe Canal Co. v. Tuckahoe etc. R. R. Co., 11 Leigh (Va.) 42, 36 Am. Dec. 374; Wilmington Water Power Co. v. Evans, 166 Ill. 548, 46 N. E. 1083.

²Dyer v. Tuscaloosa Bridge Co., 2 Porter (Ala.) 296, 27 Am. Dec. 655; Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co., 17 Conn. 63, 42 Am. Dec. 716; Binghamton Bridge, 3 Wall. 51, 81; Chicago City R. R. Co. v. People, 73 Ill. 541; Lytle v. Breckenridge, 3 J. J. Marsh. 663; McRoberts v. Washburne, 10 Minn. 23; New York v. Starin, 106 N. Y. 1.

³La Fayette Plank Road Co. v. New Albany & Salem R. R. Co., 13 Ind. 90; Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co., 17 Conn. 40, 454, 42 Am. Dec. 716; State v. Noyes, 47 Me. 189; White River Turnpike Co. v. Vermont Central R. R. Co., 21 Vt. 590; Brainard v. Missisquoi R. R. Co., 48 Vt. 107; West

River Bridge Co. v. Dix, 6 How. 507, 543; Powell v. Sammon, 31 Ala. 552; Ft. Wayne L. & I. Co. v. Maumee Avenue Gravel R. R. Co., 132 Ind. 80, 30 N. E. 880, 15 L.R.A. 651; McRoberts v. Washburne, 10 Minn. 23; New York v. Starin, 106 N. Y. 1; In re City of Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L.R.A. 270. The legislature may repeal the charter of a corporation, where the right to do so is reserved, and may authorize a new company to take any of the property of the old upon making compensation. Greenwood v. Freight Co., 105 U. S. 13. The expiration of a franchise to construct and operate a railroad in a street, gives the municipality no right to appropriate or grant the track and its equipment without compensation. Cleveland Elec. Ry. Co. v. Cleveland etc. Ry. Co., 204 U. S. 116, 27 S. C. 202.

the act or the right to compensation.⁴ But toll-bridges, ferries, turnpikes, railroads and the like are often very seriously injured by the construction of competing lines which draw away patronage and impair the value of the franchise. The question arises under what circumstances, if at all, the owners of the franchise so impaired may claim compensation, as a matter of constitutional right.

§ 214 (136). When the franchise is not exclusive. The grant of a franchise may be exclusive, or the grant may be silent in that respect. A toll-bridge or ferry is often granted with a provision that no other bridge or ferry shall be erected within a certain distance above or below the one granted, and this exclusiveness may be limited or unlimited in its duration. So a railroad, turnpike, canal or other means of travel or communication may be granted between two points with a proviso excluding any similar grant. As all grants by the sovereign are construed in favor of the sovereign, the grant of a franchise will not be deemed exclusive unless so expressed.⁵ Where the grant

⁴Matter of Flatbush Avenue, 1 Barb. 286; Seneca Road Co. v. Auburn & Rochester R. R. Co., 5 Hill 170; Boston Water Power Co. v. Boston & W. R. R. Co., 23 Pick. 360; Matter of Hamilton Avenue, 14 Barb. 405; Chicago General R. R. Co. v. Chicago City R. R. Co., 62 Ill. App. 502. *See post*, § 214, note 8.

⁵Montgomery Lt. & W. P. Co. v. Citizens' Lt. H. & P. Co., 142 Ala. 462, 38 So. 1026; Phoenix Water Co. v. Phoenix, 9 Ariz. 430, 84 Pac. 1095; Green v. Ivey, 45 Fla. 338, 33 So. 711; Town of Goleonda v. Field, 108 Ill. 419; Crowder v. Town of Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L.R.A. 647; City of Rushville v. Rushville Nat. Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L.R.A. 321; People's Elec. L. & P. Co. v. Capital Gas & Elec. Lt. Co., 116 Ky. 76, 75 S. W. 280; North Baltimore Pass. R. R. Co. v. Baltimore, 75 Md. 247, 23 Atl. 470; Revere Water Co. v. Winthrop, 192 Mass. 455, 78 N. E. 497; Lake v. Va. & Truckee R. R. Co., 7 Nev. 294; Power

v. Village of Athens, 99 N. Y. 592; S. C. 26 Hun 282; Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 22 N. E. 381; *In re City of Brooklyn*, 143 N. Y. 596, 38 N. E. 983, *affirming* S. C. 73 Hun 499, 26 N. Y. Supp. 198; Skaneateles W. W. Co. v. Skaneateles, 161 N. Y. 154, 55 N. E. 562, 46 L.R.A. 687; Columbus v. Columbus Gas. Co., 76 Ohio St. 309, 81 N. E. 440; Johnson v. Crow, 87 Pa. St. 184; Titusville Elec. Lt. & P. Co. v. Titusville, 196 Pa. St. 3, 46 Atl. 195; Boyertown Water Co. v. Boyertown, 200 Pa. St. 394, 50 Atl. 189; Hastings Water Co. v. Hastings, 216 Pa. St. 178, 65 Atl. 403; Newport News etc. Ry. & Elec. Co. v. Hampton Roads Ry. & Elec. Co., 102 Va. 795, 47 S. E. 839; North Springwater Co. v. Tacoma, 21 Wash. 517, 58 Pac. 773, 47 L.R.A. 214; Wood v. Seattle, 23 Wash. 1, 62 Pac. 135, 52 L.R.A. 369; State v. Taylor, 36 Wash. 607, 79 Pac. 286; Clarksburg Elec. Lt. Co. v. Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L.R.A. 142; Sistersville Ferry Co. v. Russell, 52 W. Va. 356, 43 S. E.

is not by its terms exclusive, the legislature or municipality is not precluded from granting a similar franchise or erecting a rival way or structure, the result of which may be to greatly impair or even totally destroy the value of the former grant, and such damage is not a taking of the former franchise which entitles its owner to compensation. This principle was settled in the leading case of *Charles River Bridge v. Warren Bridge*,⁶ and has been confirmed by numerous decisions.⁷ Of course, if any prop-

107, 59 L.R.A. 513; *Janesville Bridge Co. v. Stoughton*, 1 Pinney, 667; *Mills v. St. Clair County*, 8 How. 569; *Thompson-Houston Electric Co. v. City of Newton*, 42 Fed. 723; *Helena v. Helena W. W. Co.*, 122 Fed. 1, 58 C. C. A. 381; *Tillamook Water Co. v. Tillamook City*, 150 Fed. 117, 80 C. C. A. 71; *Franklin Trust Co. v. Peninsular Pure Water Co.*, 161 Fed. 855, 89 C. C. A. 49.

⁶7 Pick. 233, *affirmed* in 11 Pet. 420.

⁷*Dyer v. Tuscaloosa Bridge Co.*, 2 Porter (Ala.) 296; *Phoenix Water Co. v. Phoenix*, 9 Ariz. 430, 84 Pac. 1095; *Bartram v. Central Turnpike Co.*, 25 Cal. 283; *Salem v. Hamburg Turnpike Co. v. Town of Lyme*, 18 Conn. 451; *Green v. Ivey*, 45 Fla. 335, 33 So. 711; *General Elec. R. R. Co. v. Chicago City R. R. Co.*, 66 Ill. App. 362; *East St. Louis Connecting Ry. Co. v. East St. Louis Union Ry. Co.*, 108 Ill. 265; *Bush v. Peru Bridge Co.*, 3 Ind. 21; *LaFayette Plank Road Co. v. New Albany & Salem R. R. Co.*, 13 Ind. 90; *Piatt v. Covington & Cincinnati Bridge Co.*, 8 Bush. 31; *Phelps v. Parish of Morehouse*, 12 La. An. 649; *Day v. Stetson*, 8 Me. 365; *State v. Noyes*, 47 Me. 189; *Washington & Balt. Turnpike Road v. Balt. & Ohio R. R. Co.*, 10 G. & J. 392; *Balt. & Havre de Grace Turnpike Co. v. Union R. R. Co.*, 35 Md. 224; *Revere Water Co. v. Winthrop*, 192 Mass. 455, 78 N. E. 497; *Long v. City of Duluth*, 49 Minn. 280, 51 N. W. 913, 32 Am. St. Rep.

547; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Syracuse Water Co. v. City of Syracuse*, 116 N. Y. 167, 22 N. E. 381; *Skaneateles W. W. Co. v. Skaneateles*, 161 N. Y. 154, 55 N. E. 562, 46 L.R.A. 687; *Oswego Falls Bridge Co. v. Fish*, 1 Barb. Ch. 547; *Empire City Subway Co. v. Broadway etc. R. R. Co.*, 87 Hun 279, 33 N. Y. Supp. 1055; *State ex rel. v. City of Hamilton*, 47 Ohio St. 52, 23 N. E. Rep. 935, 2 Am. R. R. & Corp. Rep. 60; *Bridgewater Ferry Co. v. Sharon Bridge Co.*, 145 Pa. St. 404, 22 Atl. 1039; *Boyertown Water Co. v. Boyertown*, 200 Pa. St. 394, 50 Atl. 189; *Hastings Water Co. v. Hastings*, 216 Pa. St. 178, 65 Atl. 403; *Hydes Ferry Turnpike Co. v. Davidson County*, 91 Tenn. 291, 18 S. W. Rep. 626; *City of Houston v. Houston City R. R. Co.*, 83 Tex. 548, 19 S. W. 127, 6 Am. R. R. & Corp. Rep. 106; *Sommerville v. Wimbush*, 7 Gratt. 205; *Newport News etc. Ry. & Elec. Co. v. Hampton Roads Ry. & Elec. Co.*, 102 Va. 795, 47 S. E. 839; *North Springs Water Co. v. Tacoma*, 21 Wash. 517, 58 Pac. 773, 47 L.R.A. 214; *Wood v. Seattle*, 23 Wash. 1, 62 Pac. 135, 52 L.R.A. 369; *State v. Taylor*, 36 Wash. 607, 79 Pac. 286; *Clarksburg Elec. Lt. Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994, 50 L.R.A. 142; *Janesville Bridge Co. v. Stoughton*, 1 Pinney 667; *Hamilton G. & C. Co. v. City of Hamilton*, 146 U. S. 258, 13 S. C. Rep. 90, 7 Am. R. R. & Corp. Rep. 76; *Skaneateles W. W. Co. v. Skaneateles*, 184 U. S. 354, 22 S. C.

erty is taken, compensation must be made.⁸ The grant of a franchise and its acceptance by acting upon it or otherwise, creates a contract and the franchise cannot be recalled or revoked.⁹

§ 215 (137). When the franchise is exclusive. There is no doubt as to the power of the legislature to grant, or to authorize the granting, of exclusive privileges and franchises, when the same is not forbidden by the constitution.¹⁰ But municipal corporations cannot grant exclusive franchises unless

400; Helena W. W. Co. v. Helena, 195 U. S. 383, 25 S. C. 40; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 26 S. C. 224; Thompson-Houston El. Co. v. City of Newton, 42 Fed. 723; Kansas etc. R. R. Co. v. Payne, 49 Fed. 114, 1 C. C. A. 183; Helena v. Helena W. W. Co., 122 Fed. 1, 58 C. C. A. 381; Meridian v. Farmer's L. & T. Co., 143 Fed. 67, 74 C. C. A. 221; Tillamook Water Co. v. Tillamook City, 150 Fed. 117, 80 C. C. A. 71. In Fort Plain Bridge Co. v. Smith, 30 N. Y. 44, the plaintiff had a toll bridge across the Mohawk River, and defendant erected a free bridge within forty-nine feet of it, the effect of which was totally to destroy the value of the plaintiff's franchise. It was held that the plaintiff was without remedy.

It makes no difference that the State itself is largely interested in the management and profits of the new enterprise. Illinois & Mich. Canal Co. v. Chieago etc. R. R. Co., 14 Ill. 314; Matter of Hamilton, 14 Barb. 405; Brooklyn City etc. R. R. Co. v. Coney Island etc. R. R. Co., 35 Barb. 364; New York & Harlem R. R. Co. v. Forty-second Street R. R. Co., 50 Barb. 285; *affirmed* same, p. 309; S. C. 26 How. Pr. 68; White River Turnpike Co. v. Vermont Central R. R. Co., 21 Vt. 590; Tuckahoe Canal Co. v. Tuckahoe etc. R. R. Co., 11 Leigh 42; Turnpike Co. v. State, 3 Wall. 210.

Contra: Hall v. Ragsdale, 4 Stew

& Porter, 252; Newburg Turnpike Co. v. Miller, 5 Johns. Ch. 101; Franklin & Columbia Turnpike Co. v. County Court, 8 Humph. 342. *And see* Hudson etc. Del. Canal Co. v. N. Y. & Erie R. R. Co., 9 Paige 323; Bennett Water Co. v. Millvale, 200 Pa. St. 613, 50 Atl. 155.

⁸La Fayette Plank R. Co. v. New Albany & Salem R. R. Co., 13 Ind. 90; Baltimore etc. Co. v. Union R. R. Co., 35 Md. 224; Matter of Flatbush Avenue, 1 Barb. 286; Seneca Road Co. v. Auburn & Rochester R. R. Co., 5 Hill 170; Pittsburg & Lake Erie R. R. Co. v. Jones, 111 Pa. St. 204; Moses v. Sanford, 11 Lea 731.

⁹People v. Central Union Tel. Co., 192 Ill. 307, 61 N. E. 428, 85 Am. St. Rep. 338; Chicago Telephone Co. v. N. W. Telephone Co., 199 Ill. 324, 65 N. E. 329; Kalamazoo v. Kalamazoo H. L. & P. Co., 124 Mich. 74, 82 N. W. 811; Columbus v. Columbus Gas Co., 76 Ohio St. 309, 81 N. E. 440; *ante*, § 195; *post*, § 215, note, 18.

¹⁰Livingston v. Van Ingen, 9 Johns. 507, 573; Muney Elec. L. H. & P. Co. v. People's Elec. L. H. & P. Co., 218 Pa. St. 636, 67 Atl. 956; Slaughter House Cases, 16 Wall. 66; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; New Orleans Water Works Co. v. Rivers, 115 U. S. 674; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683; St. Tammany Water Works v. New Orleans Water Works, 120 U. S. 64; Note to Ford v. Chicago Milk Shippers'

expressly authorized so to do.¹¹ Grants will be construed in favor of the public and against the exclusive right.¹² A statute forbidding a county court from granting the right to operate a ferry within half a mile of an existing ferry, does not prevent the legislature from authorizing a ferry within the prohibited limits.¹³

When the grant of a franchise is exclusive, this is but a circumstance which increases its value without changing its essential character. It is still property, and subject to the power of eminent domain.¹⁴ The power to take a franchise for public use will be discussed in a subsequent chapter.¹⁵ The question now is, what impairment of its value or interference with its exercise or enjoyment will amount to a taking. In so far as it

Assn., 11 Am. R. R. & Corp. Rep. 433, 448.

Where the constitution prohibits the granting of exclusive rights, privileges and immunities an exclusive ferry privilege cannot be granted. *Carroll v. Campbell*, 110 Mo. 557, 19 S. W. 809. The granting of an exclusive ferry franchise is not a taking of the property of those on the banks of the stream above or below. *Murray v. Mefee*, 20 Ark. 561. In *State v. Tower*, 84 Me. 444, 24 Atl. 898, it was held that the State could grant an exclusive privilege of fishing within the waters of the State whether tidal or otherwise.

¹¹*Montgomery Gas Light Co. v. City Council*, 87 Ala. 245, 6 So. 113; *Citizens' Gas etc. Co. v. Elwood*, 114 Ind. 332; *Crowder v. Town of Sullivan*, 128 Ind. 486, 28 N. E. 94; *City of Newport v. Newport Light Co.*, 84 Ky. 166; *Long v. City of Duluth*, 49 Minn. 280, 51 N. W. 913, 32 Am. St. Rep. 547; *St. Louis Gas Light Co. v. St. Louis Gas, Fuel & Power Co.*, 16 Mo. App. 52; *State v. Cincinnati Gas Co.*, 18 Ohio St. 262; *Oklahoma Ter. v. Oklahoma Gas & Elec. Co.*, 13 Okl. 454, 74 Pac. 98; *Meadville Nat. Gas Co. v. Meadville Fuel Gas Co.*, 1 Pa. Co. Ct. 448; *Jackson*

County H. R. R. Co. v. Inter-State Rapid Transit Ry. Co., 24 Fed. Rep. 306; *Grand Rapids E. L. & P. Co. v. Grand Rapids E. L. & G. Co.*, 33 Fed. Rep. 659; *Hutchinson W. L. & P. Co. v. Hutchinson*, 144 Fed. 256; 11 Am. R. R. & Corp. Rep., p. 463, and cases cited.

¹²*Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 26 S. C. 224.

¹³*Williams v. Wingo*, 177 U. S. 601, 20 S. C. 793; *Fanning v. Greゴoire*, 16 How. 524. The existence of two ferries within a mile may be good ground for refusing a license to a third between the two. *Sistersville Ferry Co. v. Russell*, 52 W. Va. 356, 43 S. E. 107, 59 L.R.A. 513.

¹⁴*Post*, §§ 438, 439; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Salem & Hamburg Turnpike Co. v. Lyme*, 18 Conn. 451; *Piscataqua Bridge Co. v. N. H. Bridge Co.*, 7 N. H. 35; *La Fayette Plank Road Co. v. New Albany & Salem R. R. Co.*, 13 Ind. 90; *Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co.*, 2 Gray 1; *Boston Water Power Co. v. Boston & W. R. R. Co.*, 23 Pick. 360; *Philadelphia & Gray's Ferry Passenger Ry. Co.'s Appeal*, 102 Pa. St. 123.

¹⁵*Post*, §§ 438, 439.

is exclusive, it will be protected by the law. The exclusive right is property, which cannot be interfered with, except for public use and upon just compensation made.¹⁶ The exercise of a rival franchise within the express terms of the grant is a taking, and may be enjoined unless compensation is provided.¹⁷ An act granting a franchise is a contract between the grantee and the State, and any subsequent act impairing its obligation is void.¹⁸ If the original grant is not exclusive, but is made exclusive by a subsequent act without any consideration, such subsequent act is not binding upon the State and may be disregarded.¹⁹ It is otherwise if there is a consideration for such subsequent act.²⁰ An exclusive franchise or privilege in a matter of public concern can be created only by the sovereign power. It cannot be secured by contract with individuals or corporations. Thus the grant by a railroad company of the exclusive right of maintaining a telegraph line along its right of way,²¹ or the grant by an individual of the exclusive right

¹⁶Piscataqua Bridge Co. v. N. H. Bridge Co., 7 N. H. 35.

Gas L. Co. v. Town of Lake, 130 Ill. 42, 22 N. E. 616.

¹⁷Ga. Northern Ry. Co. v. Tifton etc. Ry. Co., 109 Ga. 762, 35 S. E. 104; People's Elec. Lt. & P. Co. v. Capital Gas & Elec. Lt. Co., 116 Ky. 76, 75 S. W. 280; Hatten v. Furman, 123 Ky. 844; Peru v. Barrett, 100 Me. 213, 60 Atl. 968, 109 Am. St. Rep. 494, 70 L.R.A. 567; Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co., 2 Gray 1; St. Louis R. R. Co. v. N. W. St. Louis Ry. Co., 69 Mo. 65; Piscataqua Bridge Co. v. N. H. Bridge Co., 7 N. H. 35; Power v. Village of Athens, 99 N. Y. 592; S. C. 26 Hun 282; Muncey Elec. Lt. H. & P. Co. v. People's Elec. Lt. H. & P. Co., 218 Pa. St. 636, 67 Atl. 956; Turnpike Co. v. Davidson Co., 106 Tenn. 258, 61 S. W. 68; Binghamton Bridge, 3 Wall. 51; Vicksburg v. Vicksburg W. W. Co., 202 U. S. 453, 26 S. C. 660, and cases cited in following section.

¹⁸Johnson v. Crow, 87 Pa. St. 184; Wheeling Bridge Co. v. Wheeling & B. Bridge Co., 34 W. Va. 155, 11 S. E. 1009, *affirmed*, 138 U. S. 287, 11 S. C. 301.

¹⁹East Hartford v. Hartford Bridge Co., 17 Conn. 79, S. C. 16 Conn. 149, 10 How. 511.

²⁰Western Union Tel. Co. v. Am. Union Tel. Co., 65 Ga. 160, 38 Am. Rep. 781; Baltimore & Ohio Tel. Co. v. Western Union Tel. Co., 24 Fed. 319; Western Union Tel. Co. v. Burlington etc. R. R. Co., 3 McCrary 130, 11 Fed. 1; Western Union Tel. Co. v. Am. Tel. Co., 9 Biss. 72; Western Union Tel. Co. v. B. & O. Tel. Co., 19 Fed. 660; Western Union Tel. Co. v. B. & O. Tel. Co., 23 Fed. 12; Pacific Postal Tel. Cable Co. v. Western Union Tel. Co., 50 Fed. 493; Mercantile Trust Co. v. Atlantic & P. R. R. Co., 63 Fed. 910. *Contra*: Western Union Tel. Co. v. A. & P. Tel. Co., 7 Biss. 367; Canadian Pac. R. R. Co. v. Western Union Tel. Co., 17 Can. Sup. Ct. 151; and see Western Union Tel.

²¹Dartmouth College v. Woodward, 4 Wheat. 625; Binghamton Bridge, 3 Wall. 51; Powell v. Sammon, 31 Ala. 552; Chicago Municipal

of constructing pipe lines over his land for the transportation of oil is void as against public policy.²²

§ 216 (138). What is an interference with an exclusive franchise? Bridges and ferries. The grant of the right to maintain a toll-bridge with a provision that no other bridge or ferry shall be allowed for a certain distance above or below the same, is not violated by the erection of a railroad bridge within the specified limits which is used exclusively for the passage of trains as a part of the general line of the road.²³ In such case there is no taking and no right to compensation. But such grant is, of course, violated by the erection of a bridge for ordinary travel.²⁴ An exclusive franchise to maintain a ferry will be protected from infringement, and a rival bridge or ferry can only be established by an exercise of the eminent domain power.²⁵ The grant of an exclusive privilege being in derogation of common right and tending to create monopolies, should receive a strict construction.²⁶ The grant of "the exclusive right and

Co. v. Chicago & P. R. R. Co., 86 Ill. 246, 29 Am. Rep. 28.

²²West Virginia Transportation Co. v. Ohio River Pipe Line Co., 22 W. Va. 600.

²³Mohawk Bridge Co. v. Utica & Schenectady R. R. Co., 6 Paige 554; Thompson v. New York & Harlem R. R. Co., 3 Sandf. Ch. 625; McRae v. Wilmington R. R. Co., 2 Jones Law, 186; McLeod v. Savannah, Albany & Gulf R. R. Co., 25 Ga. 445; Bridge Co. v. Hoboken Land & Improvement Co., 13 N. J. Eq. 81, *affirmed* in Court of Errors and Appeals; Same, p. 503, *affirmed* in Supreme Court of United States, 1 Wall. 116; Lake v. Virginia & Truckee R. R. Co., 7 Nev. 294.

Contra: Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co., 17 Conn. 40, 42 Am. Rep. 716.

²⁴Piscataqua Bridge Co. v. New Hampshire Bridge, 7 N. H. 35; Binghamton Bridge, 3 Wall. 51; Horrell v. Ellsworth, 17 Ala. 576; Nixon v. Tallahassee Bridge Co., 47 Ala. 652; Kansas etc. R. R. Co. v. Payne, 49 Fed. 114, 1 C. C. A. 183. *And see*

Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210; Townsend v. Blewett, 5 How. (Miss.) 503.

²⁵Blanchard v. Abraham, 115 La. 989, 40 So. 379; Peru v. Barrett, 100 Me. 213, 60 Atl. 968, 109 Am. St. Rep. 494, 70 L.R.A. 567; McRoberts v. Washburn, 10 Minn. 23; New York v. Starin, 106 N. Y. 1; Riverton Ferry Co. v. McKeesport & D. Bridge Co., 1 Pa. Supr. Ct. 587. *And see* Lindsay v. Lindly, 20 Ark. 573; Haynes v. Wells, 26 Ark. 464; Gales v. Anderson, 13 Ill. 413; Patterson v. Wollmann, 5 N. D. 608, 67 N. W. 1040, 33 L.R.A. 536.

²⁶Shorter v. Smith, 9 Ga. 517; Savannah v. Vernon Shell Road Co., 88 Ga. 342, 14 S. E. 610; Long v. City of Duluth, 49 Minn. 280, 51 N. W. 913, 32 Am. St. Rep. 547; New York v. Starin, 106 N. Y. 1; State v. City of Hamilton, 47 Ohio St. 52, 23 N. E. Rep. 935, 2 Am. R. R. & Corp. Rep. 60, 67; Emerson v. Commonwealth, 108 Pa. St. 111; Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435; Sistersville Ferry Co. v. Russell, 52 W. Va. 356, 43 S. E. 107, 59 L.R.A. 513;

privilege of building and maintaining a bridge across the Kansas River at the city of Lawrence for the period of twenty-one years," was held not to be violated by the establishment of a ferry at the same place.²⁷ The converse of this proposition is denied in two cases in which it is held that the exclusive right of maintaining a ferry within certain limits is violated by the erection of a toll-bridge within those limits.²⁸ A licensed bridge or ferry, though having no exclusive right, will be protected from competition by an unlicensed bridge or ferry.²⁹

§ 217 (139). Same: Other franchises. While, in the absence of any exclusive right, the construction of free public roads, the effect of which may be to diminish tolls, is not actionable,³⁰ yet the construction of such roads for the express purpose of enabling the traveling public to avoid toll-gates is an act of bad faith and will be enjoined.³¹ The operation of a steam railroad alongside a turnpike is held not to be an unwarrantable interference with the franchise of the turnpike company.³² A United States mail contractor cannot use a toll road without paying toll, nor could the government itself.³³ The extension of the limits of a city, so as to embrace a toll road, does not deprive the company of the right to take tolls, and such right can only be taken by virtue of the eminent domain power.³⁴

Where a railroad is authorized between two places with a provision that no other road shall be authorized between the same

Stein v. Bienville Water Supply Co.,
34 Fed. 145.

²⁷Parrott v. Lawrence, 2 Dill. 332; *see also* Bush v. Penn Bridge Co., 3 Ind. 21; *and sec*, in support of the general proposition, Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210.

²⁸Gates v. McDaniel, 2 Stew. 211; 19 Am. Dec. 49; and Mason v. Harper's Ferry Bridge Co., 17 W. Va. 396; *see also* Queen v. Cambrian Ry. Co., 40 L. J. Q. B. 169.

²⁹Green v. Ivey, 45 Fla. 338, 33 So. 711; Blackwood v. Tanner, 112 Ky. 672, 66 S. W. 500; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884; Catawba Toll Bridge Co. v. Flowers, 110 N. C. 381, 14 S. E. 918.

³⁰Derry Tp. Road, 30 Pa. Supr. Ct. 538.

³¹Hall v. Rugsdale, 4 Stew. & Porter, 252; Franklin & Columbia Turnpike Co. v. County Court of Maury, 8 Humph. 342; Hydes Ferry Turnpike Co. v. Davidson County, 91 Tenn. 291, 18 S. W. 626; Turnpike Co. v. Davidson, 106 Tenn. 258, 61 S. W. 68.

³²Bordentown etc. Turnpike Co. v. Camden & Amboy R. R. Co., 17 N. J. L. 314.

³³Dickey v. Maysville Road Co., 7 Dana, 113.

³⁴Ft. Wayne L. & I. Co. v. Manmee Ave. Gravel Road Co., 132 Ind. 80, 30 N. E. 880, 15 L.R.A. 651; *and see* Highland Park v. Detroit etc. Road Co., 95 Mich. 489, 55 N. W. 382.

places for thirty years, the formation of a continuous line between the two places by an arrangement between three distinct companies is a violation which will be enjoined.³⁵ The exclusive right of constructing a railroad is not violated by the construction of a horse railway within the specified limits.³⁶ The exclusive privilege of transporting passengers between certain points is not interfered with by a road for merchandise only.³⁷ A dummy railroad upon a street was held to be an interference with the exclusive privilege of operating a horse railroad on the same street.³⁸ But such exclusive privilege is not violated by the construction of another horse railroad on the same street for a short distance only, merely as a connecting link.³⁹ The city of Des Moines granted to the Des Moines Street R. R. Co. the exclusive right for thirty years to use all the streets of the city for street cars, to be operated by animal power only, with a provision that "the said city of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company." It was held that a grant of the right to use the streets for electric cars was no infringement of the first grant.⁴⁰ A competing omnibus line will not be allowed to use the track of a horse railroad company;⁴¹ and, although a horse railroad company has no

³⁵Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co., 2 Gray 1.

³⁶Louisville & P. R. R. Co. v. Louisville City Ry. Co., 2 Duvall 175.

³⁷Richmond etc. R. R. Co. v. Louisa R. R. Co., 13 How. 71.

³⁸Denver & S. Ry. Co. v. Denver City Ry. Co., 2 Col. 673.

³⁹Street Railway Co. of Grand Rapids v. West Side Street Railway Co., 48 Mich. 433.

⁴⁰Teachout v. Des Moines Broad Gauge St. R. R. Co., 75 Ia. 722, 38 N. W. Rep. 145. The court says: "It may well be questioned whether the city had any power to contract that no other means of public travel should be allowed upon the streets of the city except by cars drawn by horses for the period of thirty years. If so, the establishment of hack-lines or omnibus-lines, or other means of

public conveyance, would impair the revenue of the Narrow-Gauge Company, and thus impair its rights under this ordinance. Its right is to operate a horse railroad. It is entitled to the exclusive right to do so, and to use all improvements that may be made thereto; but to nothing more. The city cannot impair that right; but it does not follow that it may not authorize other means of street travel. It did not undertake to confer upon the company the right to carry all the passengers who might desire to travel by public conveyance upon the streets; and it did not, by the ordinance, contract that new and improved and undiscovered methods of travel might not be adopted as the public wants might demand."

⁴¹Citizens' Coach Co. v. Camden H. R. R. Co., 33 N. J. Eq. 267, 36 Am.

exclusive right in a street, a new company will not be allowed to lay down its tracks so that one rail of the new track will be between the two rails of the old track, without compensation.⁴²

It does not seem to have been customary to grant exclusive rights to canal companies. At least no cases appear in the reports based upon such a right. A competing railroad impairing the franchise of a canal is not a taking,⁴³ but it has been intimated that a railroad within a few feet of a canal might produce actionable injury, if, by frightening the horses, or otherwise, it materially injured the rights and property of the company.⁴⁴

An exclusive right to furnish gas or water to a city or village, or to use the streets for that purpose, will be protected by injunction.⁴⁵ But an exclusive privilege of lighting with gas is not infringed by the grant of a privilege to light with electricity in the same territory.⁴⁶ An exclusive franchise "to supply heat to the public from gas within the city of Pittsburgh," was held not to preclude a franchise to supply heat to the same public from natural gas brought from without the city.⁴⁷ So an exclusive right to supply a city with water from "Three Mile Creek" is not interfered with by a grant to supply water derived from other sources.⁴⁸ Where the exclusive right of furnishing water within a certain borough was granted by statute to a private company, the construction and operation of works by the borough itself was held to be no infringement of the grant.⁴⁹ But it has

Rep. 542, affirming S. C. 31 N. J. Eq. 525. In *Camden Horse R. R. Co. v. Citizens' Coach Co.*, 28 N. J. Eq. 145, which is the same case, a preliminary injunction was granted, but was set aside in *Citizens' Coach Co. v. Camden H. R. R. Co.*, 29 N. J. Eq. 299, on grounds not affecting the merits of the case.

⁴²*Hamilton etc. Traction Co. v. Hamilton etc. Elec. Traction Co.*, 69 Ohio St. 402, 69 N. E. 991; *Union Passenger Ry. Co. v. Continental Ry. Co.*, 11 Phil. 321; *Fidelity Trust etc. Co. v. Mobile St. R. R. Co.*, 53 Fed. 687.

⁴³*Illinois & Michigan Canal Co. v. C. & R. I. R. R. Co.*, 14 Ill. 314; *Tuckahoe Canal Co. v. Tuckahoe etc. R. R. Co.*, 11 Leigh 42, 36 Am. Rep. 374.

⁴⁴*Hudson & Delaware Canal Co. v. N. Y. & Erie R. R. Co.*, 9 Paige 323.

⁴⁵*Metropolitan Gas Co. v. Hyde Park*, 27 Ill. App. 361; *City of Newport v. Newport Light Co.*, 84 Ky. 166; *White v. Meadville*, 177 Pa. St. 643, 35 Atl. 695, 34 L.R.A. 567; *Vicksburg v. Vicksburg W. W. Co.*, 202 U. S. 453, 26 S. C. 660. *And see Citizens' Water Co. v. Bridgeport Hydraulic Co.*, 55 Conn. 1.

⁴⁶*Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435.

⁴⁷*Emerson v. Commonwealth*, 108 Pa. St. 111.

⁴⁸*Stein v. Bienville Water Supply Co.*, 24 Fed. 145.

⁴⁹*Lehigh Water Co.'s Appeal*, 102 Pa. St. 515.

been held in the same State that, where a city had power to construct municipal waterworks and also to contract with a private corporation for a water supply, it could not do both and that, after contracting for a supply it could not establish municipal works during the period of the contract.⁵⁰ A city made a contract with a private company to supply water within the city for thirty years and stipulated not to grant to any other person or corporation, any contract or privilege to furnish water within the city during such period. It was held that the contract was to be construed in favor of the public and, as there was no stipulation against municipal works, the city could establish them within the thirty years.⁵¹

The forfeiture of a franchise is not a taking of property within the constitution.⁵² Under the right reserved to amend the charter of a plank-road company, the legislature cannot require it to remove its gates within a populous city so as to throw open to the free use of the public two and a half miles of its road.⁵³ This would be to deprive the company of its property without due process of law.

§ 218 (139a). Electrical franchises and electrical interference. A telegraph or telephone line upon a street may be damaged by the construction and operation of an electric railway on the same street. Such damage may arise, both from induction and conduction. Some courts have held that the grant to a telegraph or telephone company is subject to the use of the street for all legitimate street purposes, that the electric railway is such in purpose, and, therefore, that the telegraph or telephone company has no remedy for damage caused by the railroad company, unless it is due to negligence.⁵⁴ In Tennes-

⁵⁰White v. Meadville, 177 Pa. St. 643, 35 Atl. 695, *overruling* Howard's Appeal, 162 Pa. St. 374, 29 Atl. 641, and Fingal v. Millvale, 162 Pa. St. 393, 29 Atl. 644; Bennett Water Co. v. Millvale, 200 Pa. St. 613, 50 Atl. 155; S. C. 202 Pa. St. 616, 51 Atl. 1098.

⁵¹Knoxville Water Co. v. Knoxville, 200 U. S. 22, 26 S. C. 224.

⁵²State Bank v. State, I Blackf. 267, 12 Am. Dec. 234.

⁵³Detroit v. Detroit & Howell Plank Road Co., 43 Mich. 140.

⁵⁴Cincinnati Inclined Plane R. R. Co. v. City & Suburban Tel. Assn., 48 Ohio St. 390, 27 N. E. 890, 12 L.R.A. 534, 4 Am. R. R. & Corp. Rep. 533; Hudson Riv. Tel. Co. v. Watervliet T. & R. R. Co., 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838, 17 L.R.A. 674, 6 Am. R. R. & Corp. Rep. 619, *reversing* 61 Hun 140; Cumberland Tel. & Tel. Co. v. United Electric R. R. Co., 42 Fed. 272, 12 L.R.A. 544; National Tel. Co. v. Baker, L. R. (1893) 2 Ch. D. 186.

see it has been held that if the railroad company places its poles and wires so as to interfere with those of the telephone company, the former will be liable for damage occasioned; also that injury to the telephone company by conduction or the escape of electricity through the ground to the telephone wires, both companies using the ground as a return circuit, was such a damage as amounted to a taking of the telephone company's property, for which compensation must be made; but that the injury by induction, being one which inevitably resulted from the exercise of its right by the railroad company, was one which must be borne or obviated by the telephone company.⁵⁵ In Missouri, where telegraph and telephone lines are held to be legitimate street uses, a light company was restrained from placing its wires within eight feet of the wires of a telegraph company.⁵⁶ An electric railroad will be prevented by injunction from any unnecessary interference with a telephone company.⁵⁷ The grant to an electrical company to use the streets for poles and wires confers no exclusive right and the like privilege may be granted to others.⁵⁸ The first company will be protected from any unnecessary or unreasonable interference and no further.⁵⁹ "As between two corporations exercising similar franchises upon the same street, priority, though it does not create monopoly, carries superiority of rights, and equity will adjust conflicting interests, as far as possible, controlling them, so that each company may exercise

⁵⁵Cumberland Tel. & Tel. Co. v. United Electric R. R. Co., 93 Tenn. 492, 29 S. W. 104, 27 L.R.A. 236, 10 Am. R. R. & Corp. Rep. 549. *See also* Central Pa. Tel. & Supply Co. v. Wilkes-Barre etc. R. R. Co., 11 Pa. Co. Ct. 417.

⁵⁶Western Union Tel. Co. v. Electric Light Co., 46 Mo. App. 120. *See also* Nebraska Tel. Co. v. York Gas etc. Co., 27 Neb. 284, 43 N. W. 126; Paris Elec. L. & R. R. Co. v. S. W. Tel. & Tel. Co. (Tex. Civ. App.), 27 S. W. 902; Western Union Tel. Co. v. Los Angeles Elec. Co., 76 Fed. 178.

⁵⁷Birmingham Traction Co. v. Southern Bell Tel. & Tel. Co., 119 Ala. 144, 24 So. 731.

⁵⁸Am. Tel. & Tel. Co. v. Morgan County Tel. Co., 138 Ala. 597, 36 So.

178, 100 Am. St. Rep. 53; Newport News etc. Ry. & Elec. Co. v. Hampton Roads Ry. & Elec. Co., 102 Va. 795, 47 S. E. 839.

⁵⁹Montgomery Lt. & W. P. Co. v. Citizens' L. H. & P. Co., 142 Ala. 462, 38 So. 1026; Chicago Telephone Co. v. N. W. Telephone Co., 199 Ill. 324, 65 N. E. 329; N. W. Telephone Exch. Co. v. Twin City Telephone Co., 89 Minn. 495, 95 N. W. 460; Western Union Tel. Co. v. Elec. Lt. & P. Co., 178 N. Y. 325, 70 N. E. 863, *reversing* S. C. 81 App. Div. 655; Cumberland Tel. & Tel. Co. v. Louisville Home Tel. Co., 110 Fed. 593; *Same v. Same*, 110 Fed. 596. *See* East Tenn. Telephone Co. v. Anderson Telephone Co., 115 Ky. 488, 74 S. W. 218.

its own franchise as fully as is compatible with the necessary rights of another.”⁶⁰ A company lawfully using the street may prevent interference by a second company having no lawful right to use the street.⁶¹

§ 219 (140). Change of use, or an additional use. We have already discussed this subject, in some of its aspects, in the chapter upon streets and highways.⁶² We have there shown that land taken for a street could not be devoted to any additional use, distinct from its use as a highway, without compensation to the abutting owner for any interference with his rights. It may be laid down as a general proposition that, where an easement only is taken, the land will revert to the owner of the fee when it ceases to be used for the particular purpose for which it was taken.⁶³ The soil cannot be devoted to a different use, whether more or less onerous, without a new condemnation and compensation paid.⁶⁴ When a fee simple estate is taken for public use, it may be either absolute or qualified. If absolute, then no individual has any interest in the land or its use, and it may be devoted to any purpose in the discretion of the legislature, or even sold to private parties.⁶⁵ A qualified fee is one which is held in trust, as it were, for some particular public use or uses, the execution of which affects the value or enjoyment of particular property. In such case the owners of the property so affected have a right to the faithful execution of the trust, in the nature of an easement in the property so held in trust, and the legislature cannot divert it to a different use without compensation to the owners of the property affected. Thus lands taken for an asylum, jail or school-house are usually held by a fee simple absolute, while lands acquired for streets and public grounds, though held in fee, are nevertheless held in trust for the use specified. The nature of this trust, where the land is held for street purposes, and the rights or easements of abutting owners therein have been considered in the last chapter.⁶⁶ As a general rule, land dedicated for a public park or square, may not be

⁶⁰N. W. Telephone Exch. Co. v. Twin City Telephone Co., 89 Minn. 495, 95 N. W. 460.

⁶¹MERCHANTS P. & D. Tel. Co. v. Citizens Telephone Co., 123 Ky. 90, 93 S. W. 642.

⁶²*Ante*, chap. v.

⁶³*Post*, §§ 861, 862.

⁶⁴See cases cited in following notes, also *ante*, §§ 149–193; and State v. Laverack, 34 N. J. L. 201; Jackson v. Big Sandy etc. R. R. Co., 63 W. Va. 18.

⁶⁵*Post*, § 858.

⁶⁶*Ante*, §§ 120–124.

diverted to other uses, such as a jail,⁶⁷ court-house or public office building,⁶⁸ or otherwise,⁶⁹ and those having property adjacent to such square or public ground, have a right in the nature of an easement that the trust attached to such public grounds shall be faithfully executed.⁷⁰ Public parks may be used for buildings in aid of the purpose for which they are established, such as museums, art galleries, casinos and the like.⁷¹ Also for free

⁶⁷Flaten v. City of Moorhead, 51 Minn. 518, 53 N. W. 807, 19 L.R.A. 195; Corporations of Sequin v. Ireland, 57 Tex. 183.

⁶⁸McIntyre v. El Paso County, 15 Colo. App. 78, 61 Pac. 237; Princeville v. Auten, 77 Ill. 325; Rowzee v. Pierce, 75 Miss. 846, 65 Am. St. Rep. 625, 40 L.R.A. 402; Fessler v. Union, 67 N. J. Eq. 14, 56 Atl. 272; Foster v. City of Buffalo, 64 How. Pr. 127. In Pennsylvania it is held that the great square of a county town may be used for a court-house, but when a new court-house has been built the old one cannot be retained and rented in part for private purposes and used in part for a treasurer's office. Commonwealth v. Bowman, 3 Pa. St. 202.

⁶⁹Douglass v. Montgomery, 118 Ala. 599, 24 So. 745, 43 L.R.A. 376; Gordon Co. v. Calhoun, 128 Ga. 781, 58 S. E. 360; Riverside v. MacLain, 210 Ill. 308, 71 N. E. 408, 102 Am. St. Rep. 164, 66 L.R.A. 288; Ocean City Land Co. v. Ocean City, 73 N. J. L. 493, 63 Atl. 1112; Clereq v. Gallipolis, 7 Ohio, pt. 1, 217; Morrow v. Highland Grove Traction Co., 219 Pa. St. 619, 69 Atl. 41; Sturner v. County Court, 42 W. Va. 724, 36 L.R.A. 300; Gilman v. City of Milwaukee, 55 Wis. 328; United States v. Illinois Central R. R. Co., 2 Biss. 174; Davenport v. Buffington, 97 Fed. 234, 38 C. C. A. 453, 46 L.R.A. 377; Murray v. Allegheny, 136 Fed. 57, 69 C. C. A. 65; Attorney General v. Sunderland, L. R. 2 Ch. Div. 634. And see State Historical Assn. v. Lincoln, 14 Neb. 336.

⁷⁰Riverside v. MacLain, 210 Ill. 308, 71 N. E. 408, 102 Am. St. Rep. 164, 66 L.R.A. 288; Fessler v. Union, 67 N. J. Eq. 14, 56 Atl. 272; Ocean City Land Co. v. Ocean City, 73 N. J. L. 493, 63 Atl. 1112; Foster v. Buffalo, 64 How. Pr. 127; Conrad v. West End Hotel & Land Co., 126 N. C. 776, 36 S. E. 282; Morrow v. Highland Grove Traction Co., 219 Pa. St. 619, 69 Atl. 41. But see Anderson v. Rochester etc. R. R. Co., 9 How Pr. 553; Clark v. City of Providence, 16 R. I. 337, 15 Atl. Rep. 763; Mowry v. City of Providence, 16 R. I. 422, 16 Atl. Rep. 511. In the latter cases the city of Providence was authorized by the legislature to discontinue a public park and sell the lands at pleasure. It was held that owners of land in the vicinity could not enjoin the carrying into effect of the act. In Manson v. South Bound R. R. Co., 64 S. C. 120, 41 S. E. 838, it was held that one who did not abut on a public park had no interest to maintain a bill to enjoin its use as a railway station. But some cases hold a resident and taxpayer may have a bill to enjoin a diversion in such cases. McIntyre v. El Paso County, 15 Colo. App. 78, 61 Pac. 237; Davenport v. Buffington, 97 Fed. 234, 38 C. C. A. 453, 46 L.R.A. 377.

⁷¹Public parks have come to be recognized as not only the natural place for walks and drives, afoot, awheel or with horse and carriage, for boating, skating and other outdoor athletics, but also as the appropriate and most effective location for

public libraries,⁷² monuments and statuary.⁷³ Land conveyed to a town for a market cannot be used for a court-house,⁷⁴ and land dedicated for a court-house cannot be used for other purposes.⁷⁵ Railroads may be laid in public parks, for the purpose of facilitating the enjoyment and use of the park.⁷⁶ As

monuments and statues, either to historic heroes or to pure art, fountains, flower displays, botanical and zoological gardens, museums of nature and art, galleries of paintings and sculpture, music stands and music halls, and all other agencies of aesthetic enjoyment of eye and ear." Laird v. Pittsburgh, 205 Pa. St. 1, 6, 54 Atl. 324, 61 L.R.A. 332. Also Ross v. Long Branch, 73 N. J. L. 292, 63 Atl. 609.

⁷²Spires v. Los Angeles, 150 Cal. 64, 87 Pac. 1026; Laird v. Pittsburgh, 205 Pa. St. 1, 54 Atl. 324, 61 L.R.A. 332; Attorney General v. Sunderland, L. R. 2 Ch. Div. 634. In the Pennsylvania case the city of Pittsburgh sought to condemn property for an addition to Schenley park. The Carnegie Free Library, containing a library, museum and music hall, occupied a site in the park. A part of the addition was to be used for an enlargement of the library. It was held that such a library was a proper use of the park and that the condemnation could be made. The court says: "The Free Library Building as already said contains an art gallery, museum and music hall besides a free library. The latter is as much devoted to the public recreation as the other parts. It affords a place of resort and entertainment for the public at large in rainy and inclement weather, and at all times for those who prefer quiet study to sightseeing or more active amusement. It may be conceded as argued by appellants that a library in itself is not an integral part of a park, and were the taking here complained of a tak-

ing directly and solely for a library site, a different question would be presented. But a library occupying only a very small fraction of the park area, not interfering at all substantially with its open air and free space, does not differ in legal effect from the museums, picture galleries, music stands and other incidental means of promoting the entertainment and pleasure of the people. Should the city, therefore, decide to devote the land now in controversy to the enlargement of the free library building it could not be fairly said to be a use outside of what is legitimately implied in the authority to take for a public park." pp. 6, 7.

⁷³Parsons v. Van Wyck, 56 App. Div. 329, 67 N. Y. S. 1054.

⁷⁴Attorney General v. Goderich, 5 Grant (U. C.) 402.

⁷⁵Lamar County v. Clements, 49 Tex. 348. Where land was dedicated for a court-house and standing room for wagons, etc., it was held that the city could not lay it out into grass plats, walks, etc. Board of Supervisors v. City of Winchester, 84 Va. 467, 4 S. E. 844.

⁷⁶People v. Park etc. R. R. Co., 76 Cal. 156; Philadelphia v. Commissioners of Fairmount Park, 16 Pa. Co. Ct. 625; Philadelphia v. McManes, 175 Pa. St. 28, 34 Atl. 331. Where a city had only an easement in lands held for park purposes, a railroad through the park was held an additional burden for which the fee owner was entitled to compensation. Newton v. Manufacturers Ry. Co., 115 Fed. 781, 53 C. C. A. 599.

to what use may be made of land along a river or water front dedicated to public use, there is considerable doubt under the authorities.⁷⁷ A city condemned a strip of land for laying water pipes. It was held that a telephone line thereon, connecting the pumping station with the central fire station and for the exclusive use of the city, was an additional burden.⁷⁸

§ 220 (141). Change of use: Instances. The different kinds of toll-roads are public highways, in the same sense, and to the same extent, as ordinary roads. The only difference is as to the manner of maintaining them.⁷⁹ Consequently, when a turnpike is laid out over a common highway,⁸⁰ or when a turnpike is made a common highway, to be maintained at the public expense,⁸¹ the owner of the fee is entitled to no compensation. There has, in fact, been no change of use, nor any addition

⁷⁷Platt v. Chicago etc. R. R. Co., 74 Ia. 127, 37 N. W. 107; McNeil v. Hicks, 34 La. An. 1090; Attorney General v. Tarr, 148 Mass. 309, 19 N. E. 358, 2 L.R.A. 87; In re Mayor etc. of New York, 135 N. Y. 253, 31 N. E. 1043; Louisville etc. R. R. Co. v. Cincinnati, 76 Ohio St. 481, 81 N. E. 893; Portland & Willamette Valley R. R. Co. v. Portland, 14 Or. 188; Memphis v. Wright, 6 Yerg. 497; Williams v. Chicago etc. R. R. Co., 110 Tenn. 442, 75 S. W. 1026; Union Ry. Co. v. Chieasaw Cooperage Co., 116 Tenn. 594, 95 S. W. 171; Burlington Gas Light Co. v. Burlington etc. R. R. Co., 165 U. S. 370, 17 S. C. 359; Illinois etc. R. & C. Co. v. St. Louis, 2 Dill. 70.

⁷⁸Spokane v. Colby, 16 Wash. 610.

⁷⁹State v. Maine, 27 Conn. 641, 71 Am. Dec. 89, and cases cited in the following notes.

⁸⁰Turner v. Rising Sun etc. Turnpike Co., 71 Ind. 547; Stratton v. Elliott, 83 Ind. 425; Danville etc. Road Co. v. Campbell, 87 Ind. 57; Palmer v. Logansport etc. Gravel R. Co., 108 Ind. 137; Douglass v. Boonsborough Turnpike Co., 22 Md. 219, 85 Am. Dec. 647; Morgan v. Monmouth Plank Road Co., 26 N. J. L. 99; Wright v. Carter, 27 N. J. L. 76; Walker v. Caywood, 31 N. Y. 51;

Benedict v. Goit, 3 Barb. 459; Chagrin Falls & Cleveland Plank Road Co. v. Cane, 2 Ohio St. 419; Nolensville v. Baker, 4 Humph. 315; Panton Turnpike Co. v. Bishop, 11 Vt. 198. *But see*, as involving a contrary doctrine, Williams v. Natural Bridge Plank Road, 21 Mo. 580, and Cape Girardeau etc. Road Co. v. Renfroe, 58 Mo. 265, 274. Where a public road is taken by a turnpike company the erection of a toll-house on the road is an additional burden. Wright v. Carter, 27 N. J. L. 76, and remarks on this case in State v. Laverack, 34 N. J. L. at p. 207. Same point as to toll-house, Stratton v. Elliott, 83 Ind. 425; Danville etc. Road Co. v. Campbell, 87 Ind. 57; Perkins v. Moorestown etc. Turnpike Co., 48 N. J. Eq. 499, 22 Atl. 180.

⁸¹State v. Maine, 27 Conn. 641, 71 Am. Dec. 89; Murray v. Commissioners of Berkshire, 12 Met. 455; Hingham & Quincy Bridge Co. v. County of Norfolk, 6 Allen 353; Pierce v. Somersworth, 10 N. H. 369; Barclay v. Lebanon, 11 N. H. 19; Heath v. Barman, 49 Barb. 496; Heath v. Barmore, 50 N. Y. 302; Pittsburgh etc. R. R. Co. v. Commonwealth, 104 Pa. St. 583.

tional burden cast upon the land. Where a highway is taken by a turnpike company, the company has the same right to repair and improve it, by changing the grade or otherwise, that the public had, and will not be liable for consequential damages resulting therefrom.⁸² Nor in such case is the town entitled to compensation for the expense of making the road in the first instance.⁸³ It is generally held that a ferry landing upon a highway is an additional burden for which the owner of the fee is entitled to compensation.⁸⁴ Nor can a ferry landing be established upon a turnpike without compensation to the owner of the franchise.⁸⁵ Where by agreement between an electric power company and a trolley company a new line of poles, higher and with longer arms, and carrying the wires of both companies, was to be substituted in a street for the poles and wires of the trolley company, it was held that the new line would impose an additional burden on the fee and that the owner could enjoin the proposed construction until the right was acquired in the manner provided by law.⁸⁶ Land taken for a turnpike cannot be transferred to a railroad company without compensation to the owner of the fee.⁸⁷ But a turnpike may be condemned for a railroad when authorized by the legislature, and in such case the owner of the fee is only entitled to compensation for the additional burden upon his soil, if any.⁸⁸ It has been held that a street railroad may be laid over a toll-bridge, under such terms as will protect the rights of the bridge company and the traveling public, without compensation to the bridge company.⁸⁹ A rail-

⁸²Benedict v. Goit, 3 Barb. 459; Douglass v. Boonesborough Turnpike Co., 22 Md. 219, 85 Am. Dec. 64; *but see* Williams v. Natural Bridge Turnpike Co., 21 Mo. 580.

⁸³Town of Barnet v. Passumpsic Turnpike Co., 15 Vt. 757; *see also* Monmouth County v. Red Bank etc. Turnpike Co., 18 N. J. Eq. 91; Waterbury River Turnpike Co. v. Litchfield, 26 Conn. 209. Upon the repeal of a turnpike charter the pike does not become a public highway, which the public are bound to keep in repair. State v. New Boston, 11 N. H. 407.

⁸⁴Prosser v. Wappello, 18 Ia. 327; Prosser v. Davis, 18 Ia. 367; Pipkin

v. Wynns, 2 Dev. (N.C.) 402; Chambers v. Farry, 1 Yeates 167; Chess v. Manown, 3 Watts 219.

⁸⁵Lexington etc. Turnpike Co. v. McMurtry, 3 B. Mon. 516. *Contra:* Clarke v. White, 5 Bush 353.

⁸⁶Young v. York Haven Elec. Transmission Co., 15 Pa. Dist. Ct. 843.

⁸⁷Mahon v. New York Central R. R. Co., 24 N. Y. 658; Ellicottville etc. Plank Road Co. v. Buffalo etc. R. R. Co., 20 Barb. 644.

⁸⁸Brainard v. Missisquoi R. R. Co., 48 Vt. 107; Mifflin v. Railroad Company, 16 Pa. St. 182.

⁸⁹Pittsburgh etc. Pass. R. R. Co. v. Point Bridge Co., 165 Pa. St. 37,

road on a canal bank is an additional use.⁹⁰ Where a railroad company is authorized to condemn a canal, it has been held that the land does not revert to the owner of the fee, but the public easement is transferred to the railroad company, and the owner of the fee is only entitled to such damages as are occasioned by the new use.⁹¹ But, if the public easement is voluntarily abandoned, the soil reverts to the owner of the fee. This right of reversion is property, of which the owner cannot be deprived without compensation. Accordingly, where a railroad company has an easement only, and transfers its right of way to a municipal corporation for a street, pursuant to an authority given by the legislature, and takes up and removes its track, the land reverts to the owner of the fee, and he can maintain ejectment therefor.⁹² So where an easement is taken for a canal which is abandoned and the right of way transferred to a railroad company.⁹³ Land which is subject to a ferry landing may be used for a bridge without further compensation.⁹⁴ Property abutting on an alley cannot be said to be damaged by taking the alley for a street, as the street affords the same privileges as the alley.⁹⁵ A third-class road, on which the owner of the fee is allowed to maintain gates, cannot be changed to a second-class road, on which gates are not allowed without further compensation.⁹⁶ Nor can a private road be made a public way

30 Atl. 511, 26 L.R.A. 323. *And see* County of Floyd v. Rowe Street R. R. Co., 77 Ga. 614. *Contra:* New York etc. R. R. Co. v. Fair Haven etc. R. R. Co., 70 Conn. 610.

⁹⁰La Fayette, Muncie & B. R. R. Co. v. Murdock, 68 Ind. 137; Vought v. Columbus etc. R. R. Co., 58 Ohio St. 123.

⁹¹Hatch v. Cincinnati & Indiana R. R. Co., 18 Ohio St. 92; Chase v. Sutton Manufacturing Co., 4 Cush. 152. *But see* note 93.

⁹²Heard v. Brooklyn, 60 N. Y. 242; Strong v. Same, 68 N. Y. 1. *Compare* cases cited in last note.

⁹³Pittsburgh & Lake Erie R. R. Co. v. Bruce, 102 Pa. St. 23. In Taylor v. Chicago etc. R. R. Co., 83 Wis.

636, 53 N. W. 853, it is said that even if a canal company has a fee in its right of way, it cannot transfer the same to a railroad company, so as to authorize its use for railroad purposes, without compensation to those to whom the land would revert. *And see* Whitney v. State of New York, 96 N. Y. 240.

⁹⁴Hudson v. Cuero Land & Emigration Co., 47 Tex. 56, 26 Am. Rep. 289.

⁹⁵Fagan v. Chicago, 84 Ill. 227.

⁹⁶Bounds v. Kirven, 63 Tex. 159; Woodbridge v. Eastland Co., 70 Tex. 680, 8 S. W. Rep. 503; Parker County v. Jackson, 5 Tex. Civ. App. 36, 23 S. W. 924.

without consent or compensation.⁹⁷ Where an irrigation canal is enlarged and causes new damage an action will lie.⁹⁸

§ 221 (141a). New burdens on railroad right of way. A line of telegraph or telephone on a railroad right of way is an additional burden, for which compensation must be made to the owner of the fee,⁹⁹ unless the line is constructed for the use of the railroad company in the operation of its road and dispatch of its business.¹ A railroad company may, from time to time, construct as many tracks and sidetracks on its right of way as it deems necessary for the transaction of its business.² But where a right of way is acquired for main line only, sidetracks cannot be laid thereon without additional compensation.³ Nor can a railroad company grant a part of its right of way to the use of another company as against the owner of the fee.⁴ But it has been held that one railroad company may grant the joint use of its tracks to another company, without imposing any additional burden on the land or entitling the owner to compensation.⁵ Where a right of way was condemned through a

⁹⁷Indianapolis v. Kingsbury, 101 Ind. 200, 51 Am. Rep. 749. *But see* Clayton v. County Court, 58 W. Va. 253, 52 S. E. 103, 2 L.R.A. (N.S.) 598.

⁹⁸Clear Creek Land & Ditch Co. v. Kilkenny, 5 Wyo. 38.

⁹⁹American Tel. & Tel. Co. v. Smith, 71 Md. 535, 18 Atl. 910, 1 Am. R. R. & Corp. Rep. 73; Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868; Hodges v. Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572; Pittock v. Central Dist. & Print. Tel. Co., 31 Pa. Supr. Ct. 589. *And see* Atlantic & P. Tel. Co. v. Chicago etc. R. R. Co., 6 Biss. 158; Mercantile Trust Co. v. Atlantic & P. R. R. Co., 63 Fed. 513.

¹Western Union Tel. Co. v. Rich, 19 Kan. 517. In this case it was held that a telegraph was indispensable for the safe and proper operation of a railroad, and that it made no difference that the telegraph was being constructed by a distinct company and for the joint use of the two corporations.

²East Tenn. V. & G. R. R. Co. v. Telford's Exrs., 89 Tenn. 293, 14 S. W. 776, 3 Am. R. R. & Corp. Rep. 364; Borough of Pottsville v. People's R. R. Co., 148 Pa. St. 175, 23 Atl. 900; White v. Chicago etc. R. R. Co., 122 Ind. 317, 23 N. E. 782, 7 L.R.A. 257, 2 Am. R. R. & Corp. Rep. 138.

³Donnithorpe v. Fremont etc. R. R. Co., 30 Neb. 142, 46 N. W. Rep. 240, 3 Am. R. R. & Corp. Rep. 172.

⁴Ft. Worth etc. R. R. Co. v. Jennings, 76 Tex. 373, 13 S. W. 270, 8 L.R.A. 180, 2 Am. R. R. & Corp. Rep. 121; Blakely v. Chicago etc. R. R. Co., 34 Neb. 284, 51 N. W. 767, 6 Am. R. R. & Corp. Rep. 262; Platt v. Pennsylvania R. R. Co., 43 Ohio St. 228; Pennsylvania Co. v. Platt, 47 Ohio St. 336, 25 N. E. 1028.

⁵Miller v. Green Bay etc. R. R. Co., 59 Minn. 169, 60 N. W. 1006, 11 Am. R. R. & Corp. Rep. 246, 26 L.R.A. 443. And this is especially true where the statute in force at the time of condemnation provides for a joint use upon making compensation to the first company. Stevens v. St. Louis

tract of land abutting on a river, and the railroad company was afterwards authorized to build a bridge, with approaches, both for railroad and highway traffic, it was held that the latter use was an additional burden on the soil, entitling the owner to compensation.⁶ The substitution of electricity for steam as a motive power imposes no additional burden on the right of way.⁷ The rights of the railroad company in its right of way, generally, are treated in another connection.⁸

§ 222 (141b). Joint use of tracks. It has never been intimated that one commercial railroad could acquire the right to use the tracks of another such railroad, except by agreement or an exercise of the eminent domain power. And no such right can be condemned without express legislative authority.⁹ But it has been claimed that the legislature may provide for the joint use of street car tracks under the police power.¹⁰ This is undoubtedly a mistaken view. For any damage or inconvenience resulting from a legitimate exercise of the police power, no compensation can be had.¹¹ The tracks and franchises of a street railroad company are private property, and are protected by the constitution, the same as any other property.¹² It necessarily follows that to authorize one company to use the tracks of another, is to take the property of the latter, and this cannot be

Merchants Bridge T. Ry. Co., 152 Mo. 212, 53 S. W. 1066.

⁶Payne v. Kansas etc. R. R. Co., 46 Fed. 546; Kansas etc. R. R. Co. v. Payne, 49 Fed. 114, 1 C. C. A. 183; Kansas etc. R. R. Co. v. Le Flora, 49 Fed. 119, 1 C. C. A. 192.

⁷Howley v. Central Valley R. R. Co., 213 Pa. St. 36, 62 Atl. 109.

⁸Post, §§ 845-850.

⁹Minneapolis & St. Louis R. R. Co. v. Minneapolis & W. R. R. Co., 61 Minn. 502, 63 N. W. 1035. *And see* State v. Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225.

¹⁰Booth Street Ry. Law, §§ 110, 115; Covington St. R. R. Co. v. Covington & Cinn. St. R. R. Co. (Ky.), 19 Am. L. Reg. (N.S.) 765; Canal & C. St. R. R. Co., v. Crescent City R. R. Co., 41 La. An. 561, 6 So. 849; Pacific R. R. Co. v. Wade, 91 Cal. 449, 27 Pac. 768; Union Depot

R. R. Co. v. Southern R. R. Co., 105 Mo. 562, 16 S. W. 920, 4 Am. R. R. & Corp. Rep. 622.

¹¹Post, § 243.

¹²Town of Arcata v. Arcata & M. R. R. Co., 92 Cal. 639, 28 Pac. 676; Citizens' Horse R. R. Co. v. City of Belleville, 47 Ill. App. 388; City of Belleville v. Citizens' Horse R. R. Co., 152 Ill. 171, 38 N. E. 584, 26 L.R.A. 681; Chicago General R. R. Co. v. Chicago City R. R. Co., 10 Nat. Corp. Rep. 651; Covington St. R. R. Co. v. Covington & Cinn. St. R. R. Co. (Ky.), 19 Am. Law Reg. (N.S.) 265; S. C., 1 Ky. Law Rep. 341; Canal & C. R. Co. v. Orleans R. R. Co., 44 La. An. 54, 10 So. 389; People v. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684, 2 L.R.A. 255; Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co., 32 Barb. 358; Kinsman St. R. R. Co. v. Broadway & N. St. R. R. Co., 36 Ohio

done without compensation.¹³ In many cases the right is reserved when the original grant is made, to permit other companies to use the tracks, on specified terms and conditions.¹⁴ In Pennsylvania it is held that a joint use of street car tracks cannot be authorized, as it is taking the property of one corporation to be devoted to the same public use by another corporation.¹⁵ In case of a corporation organized to provide depot and terminal facilities to railroads in Jacksonville, it was held by the supreme court of Florida, that it could be compelled to furnish

St. 239; Toledo Consolidated St. R. R. Co. v. Toledo Electric St. R. R. Co., 50 Ohio St. 603, 36 N. E. 312; S. C. 6 Ohio C. C. 362; Jersey City & Hoboken Horse R. R. Co. v. Jersey City & Bergen R. R. Co., 21 N. J. Eq. 550; S. C. 20 N. J. Eq. 61; Camden Horse R. R. Co. v. Citizens' Coach Co., 28 N. J. Eq. 145; S. C. 29 N. J. Eq. 299, 31 N. J. Eq. 525, 33 N. J. Eq. 267; Union Pass R. R. Co. v. Continental R. R. Co., 11 Phila. 321; City of Houston v. Houston City St. R. R. Co., 83 Tex. 548, 19 S. W. 127, 6 Am. R. R. & Corp. Rep. 106. Compare Lake Roland El. R. R. Co. v. City of Baltimore, 77 Md. 352, 26 Atl. 510, 20 L.R.A. 126, 7 Am. R. R. & Corp. Rep. 619; Pacific R. R. Co. v. Wade, 91 Cal. 449, 27 Pac. 768, 25 Am. St. Rep. 201.

¹³Covington St. R. R. Co. v. Covington & Cinn. St. R. R. Co. (Ky.), 19 Am. L. Reg. (N.S.) 765; Louisville City R. R. Co. v. Central Pass. R. R. Co., 87 Ky. 223, 8 S. W. 329; Canal & C. St. R. R. Co. v. Crescent City R. R. Co., 41 La. An. 561, 6 So. 849; Canal & C. R. R. Co. v. Orleans R. R. Co., 44 La. An. 54, 10 So. 389; Canal & C. R. R. Co. v. St. Charles St. R. R. Co., 44 La. An. 1069, 11 So. 702; Canal & C. R. R. Co. v. Crescent City R. R. Co., 44 La. An. 485, 10 So. 888; New Orleans & C. R. R. Co. v. Canal & C. R. R. Co., 47 La. An. 1476, 17 So. 834, 12 Am. R. R. & Corp. Rep. 590; Crescent City R. R. Co. v. New

Orleans etc. R. R. Co., 48 La. An. 856, 19 So. 868; Pennsylvania R. R. Co. v. Baltimore & O. R. R. Co., 63 Md. 263; North Baltimore Pass. R. R. Co. v. North Ave. R. R. Co., 75 Md. 233, 23 Atl. 466; Jersey City & Hoboken Horse R. R. Co. v. Jersey City & Bergen R. R. Co., 21 N. J. Eq. 550; S. C. 20 N. J. Eq. 61; Sixth Ave. R. R. Co. v. Kerr, 72 N. Y. 330; Sixth Ave. R. R. Co. v. Kerr, 45 Barb. 138; Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co., 32 Barb. 358; Kinsman St. R. R. Co. v. Broadway & N. St. R. R. Co., 36 Ohio St. 239; Toledo Consol. St. R. R. Co. v. Toledo Electric St. R. R. Co., 50 Ohio St. 603, 36 N. E. 312; S. C. 6 Ohio C. C. 362; Union Pass. R. R. Co. v. Continental R. R. Co., 11 Phila. 321; 2 Dill. Mun. Corp. § 727.

¹⁴Grand Ave. R. R. Co. v. Lindell R. R. Co., 148 Mo. 637; Grand Ave. R. R. Co. v. Citizens' R. R. Co., 148 Mo. 665. The subject of the joint use of tracks will be found treated in its various phases in note to Grand Ave. R. R. Co. v. People's R. R. Co., 12 Am. R. R. & Corp. Rep. 594, 603.

¹⁵Philadelphia etc. St. Ry. Co.'s Petition, 203 Pa. St. 354, 53 Atl. 191; Commonwealth v. Uwehlau St. Ry. Co., 203 Pa. St. 608, 53 Atl. 513. So one company cannot be authorized to straddle the tracks of another. Commonwealth v. Bond, 214 Pa. St. 307, 63 Atl. 741, 112 Am. St. Rep. 745.

ish its facilities to a particular railroad upon a compensation fixed by the railroad commissioners, and that this was an exercise of the police power and not of the eminent domain, and that the compensation need not be fixed by twelve men as required by the constitution in case of an appropriation to public use.¹⁶

§ 223 (142). Interfering with an easement. We have already seen that to interfere with or destroy any right appurtenant to property is a taking within the constitution.¹⁷ We have heretofore treated only of those natural rights appurtenant to land which may be interfered with by works upon adjacent land. But one may have annexed to his land easements in the land of others, derived by grant or prescription. Such easements cannot be destroyed or impaired by public works without compensation.¹⁸ This principle is well illustrated by the case of *Arnold v. Hudson River R. R. Co.*¹⁹ Arnold was the owner of a factory, with the right to take water from a pond at some distance from his factory and convey it thereto, over the land of another, in a race way or trunk, either over or under the ground. For this purpose Arnold had built and had in use a trunk some six feet above the ground. The defendant, having acquired title to a portion of the intervening lands, took down the trunk, laid it beneath the ground and its tracks, and then raised the water by means of a penstock into the old trunk. Arnold permitted this to be done on the assurance of the company's agent that it would make the watercourse as good as formerly, and also keep the same in repair. The water power was impaired, and the expense of repairs was increased. It was held that the easement was property within the constitution, and that the plaintiff was entitled to compensation. The prin-

¹⁶*State v. Jacksonville Terminal Co.*, 41 Fla. 377, 27 So. 225.

¹⁷*Ante*, § 65.

¹⁸*Strickler v. Colorado Springs*, 16 Col. 61, 26 Pac. 313, 25 Am. St. Rep. 245; *Spencer v. New York etc. R. R. Co.*, 62 Conn. 242, 25 Atl. 350; *Indianapolis & Cumberland Gravel Road Co. v. Belt Ry. Co.*, 110 Ind. 5; *De Lander v. Baltimore Co.*, 94 Md. 1, 50 Atl. 427; *Munn v. Boston*, 183 Mass. 421, 67 N. E. 312; *Levi v. Worcester Consol. St. Ry. Co.*, 193 Mass. 116, 78 N. E. 853; *Hyman v.*

Ann Arbor R. R. Co., 141 Mich. 84, 104 N. W. 375; *Detroit Leather Specialty Co. v. Mich. Cent. R. R. Co.*, 149 Mich. 588, 113 N. W. 14; *Willey v. Norfolk Southern Ry. Co.*, 96 N. C. 408; *Neff v. Penn. R. R. Co.*, 202 Pa. St. 371, 51 Atl. 1038; *Alexandria etc. R. R. Co. v. Faunce*, 31 Gratt 761. See *Kingsland v. New York*, 110 N. Y. 569, 18 N. E. Rep. 435.

¹⁹55 N. Y. 661. See also, for comments on same case, *Story v. N. Y. Elevated R. R. Co.*, 90 N. Y., p. 149, 43 Am. Rep. 146. .

ciple of this case will apply to all easements.²⁰ One who has a mere parol license to hunt and fish over lands has no such interest as entitles him to compensation for interference by a railroad company.²¹

§ 224. Restrictive covenants. When one conveys a tract of land upon condition that it shall not be used in a certain way and this condition is imposed for the benefit of the remaining lands of the grantor, the latter has an interest in the tract conveyed in the nature of an easement and may prevent a violation of the condition.²² And where the owner of a tract conveys different portions to different grantors and imposes the same restriction upon the use in each conveyance, not only does the grantor have an interest in each part conveyed, appurtenant to the part not conveyed, but each purchaser acquires a similar interest in all the other tracts so conveyed and may enforce the restriction as to such tracts.²³ When property subject to a restrictive covenant is taken for public use, the owner of the property for whose benefit the restriction is imposed, is entitled to compensation. Thus where the owners of lots covenant that certain portions of the lots shall not be built upon or occupied

²⁰So of rights appurtenant, as the right obtained from a city to extend a pier into navigable water. *Matter of New York*, 193 N. Y. 503, reversing 121 App. Div. 702. See, in this connection, *Boston Gas Light Co. v. Old Colony & Newport Ry. Co.*, 14 Allen 444; *McSweeney v. Commonwealth*, 185 Mass. 371, 70 N. E. 429.

²¹*Bird v. Great Eastern Ry. Co.*, 34 L. J. C. P. 366.

²²*Trustees of Columbia College v. Lynch*, 70 N. Y. 440; *Same v. Thatcher*, 87 N. Y. 311; *Hodge v. Sloan*, 107 N. Y. 244; *Rowland v. Miller*, 139 N. Y. 93, 34 N. E. 765, 22 L.R.A. 182; *Meigs v. Milligan*, 177 Pa. St. 66, 35 Atl. 600.

²³In *Evans v. Foss*, 194 Mass. 513, 80 N. E. 587, 9 L.R.A.(N.S.) 1039, which was a bill to enforce a restrictive covenant against carrying on any business offensive to the occupants of dwelling houses, the court says: "It is a familiar principle of law, which

has been applied in many cases, that when one makes deeds of different portions of a tract of land, each containing the same restriction upon the lot conveyed, which is imposed as a part of a general plan for the benefit of the several lots, such restriction not only imposes a liability upon the grantee of each lot as between him and the grantor, but it gives him a right in the nature of an easement, which will be enforced in equity against the grantee of one of the other lots, although there is no direct, contractual relation between the two. Through the common character of the deeds the grantees are given an interest in a contractual stipulation which is made for their common benefit." p. 515. To same effect: *Simpson v. Mikkelsen*, 196 Ill. 575, 63 N. E. 1036; *Tobey v. Moore*, 130 Mass. 448; *Jeffries v. Jeffries*, 117 Mass. 184; *Sanborn v. Rice*, 129 Mass. 387; *Jackson v. Stevenson*, 156 Mass. 496.

with buildings above a certain height, each acquires an easement of light, air and prospect in the lots of the other covenantors, and when some are taken for a court-house free of any easements, the owners of the others are entitled to compensation.²⁴ In another case a man owning a tract of land opened a street through it and laid out the part on one side for a private park or recreation ground and on the other into building lots. These lots were sold to divers parties subject to a covenant not to erect or permit to be erected thereon any erection or building of any kind nearer to the street than a certain building line and not to erect any buildings on the land conveyed other than dwelling houses fronting on the street of a specified value. A railroad company took the lots and built an embankment thereon for its tracks which encroached on the building line. It was held that the grantor was entitled to compensation for the destruction of the restrictive covenants and a very substantial judgment was affirmed.²⁵ In case of land platted and sold for summer residences on the seashore, the deeds contained restrictive covenants which forbade the use of the property for many objectionable trades and businesses specified by name or for any other noxious, dangerous or offensive trade or business whatever. In a proceeding by the United States to condemn a part of the lots for the public defense, it was held that the covenants related to private uses and would not be infringed by the use proposed.²⁶ In the same case, some squares or grounds dedicated as public parks were taken, and it was held that lot owners who had a right to insist upon the preservation of the parks, were entitled to compensation.²⁷

§ 225 (143). Possessory rights in public lands. One having the mere naked possession of public lands is not entitled to compensation when the same are taken for public use.²⁸ The fact that such a person has a right to pre-empt or intends

²⁴Ladd v. Boston, 151 Mass. 585, 24 N. E. 558, 21 Am. St. Rep. 585.

²⁵Long Eaton Recreation Grounds Co. v. Midland Ry. Co. (1902) K. B. 574. "There is in this case a negative easement adding to the monetary value of the estate. Why that should not be the subject of compensation it is difficult to conceive." Mathew L. J., p. 585.

²⁶United States v. Certain Lands,

112 Fed. 622; Wharton v. United States, 153 Fed. 876, 83 C. C. A. 58.

²⁷See 11 Cyc. 1051.

²⁸Allard v. Loban, 3 Martin, La. N. S. 293; Doran v. Central Pacific R. R. Co., 24 Cal. 245; Hobart v. Ford,

⁶Nev. 77; Rosa v. Missouri, Kansas & Texas Ry. Co., 18 Kan. 124. *Contra*: Cal. Northern R. R. Co. v. Gould, 21 Cal. 254.

to do so, is immaterial, unless he has actually taken steps, by entry and payment, to secure his right.²⁹ If the right of way through public lands is granted to a railroad company, one subsequently acquiring title thereto takes subject to such right of way.³⁰ But it has been held that one having growing crops upon public lands is entitled to compensation for injury thereto.³¹

§ 226 (144). Mapping Territory into streets and blocks for future improvements. It has been a common practice in the older cities for the legislature to authorize the public authorities to make a map of vacant lands, indicating the location of streets, alleys and public grounds for future improvement, and to provide that when the streets are opened they shall be opened as designated on the map, and that no improvements shall be placed upon the parts designated as streets or public grounds. It is evident that, if such an act is valid, the owner would be deprived or at least greatly restricted in the enjoyment of one of the most valuable rights of property, without any compensation, viz.: the right of user. Consequently, so much of such an act as restricts the right to make improvements is void, and when such streets are opened the owners of property taken are entitled to compensation precisely the same as though the streets had not been previously designated.³² The mere making of such a map or plat does not affect any right of property, and

²⁹Western Pacific R. R. Co. v. Kerr, 41 Cal. 489; Hamilton v. Spokane etc. R. R. Co., 2 Idaho 898, 28 Pac. 408. See Denver etc. R. R. Co. v. Wilson, 28 Colo. 6, 62 Pac. 843; Union Pac. R. R. Co. v. Harris, 76 Kan. 255, 91 Pac. 68; Jamestown etc. R. R. Co. v. Jones, 7 N. D. 619, 76 N. W. 227; Slaight v. Mo. Pac. Ry. Co., 39 Wash. 576, 81 Pac. 1062.

³⁰Davis v. East Tenn. & Ga. R. R. Co., 1 Snead 94.

³¹Gillan v. Hutchinson, 16 Cal. 153; Rosa v. Missouri, Kansas & Texas Ry. Co., 18 Kan. 124.

³²Terrill v. Town of Bloomfield (Ky.), 21 S. W. 1041; Moale v. Baltimore, 5 Md. 314, 61 Am. Dec. 276; Stewart v. Baltimore, 7 Md. 500; Baltimore v. St. Agnes' Hospital, 48 Md.

419; Baltimore v. Hook, 62 Md. 371; State v. Carragan, 36 N. J. L. 52; Forster v. Scott, 136 N. Y. 577, 32 N. E. 976, 18 L.R.A. 543, *affirming* S. C. 60 N. Y. Supr. 313; In re 44th St., 7 Pa. Co. Ct., 69; Warren v. Bunnell, 11 Vt. 600; Paine Lumber Co. v. City of Oshkosh, 86 Wis. 397, 56 N. W. 1088; and see Beidler's Appeal, 1 Monaghan (Pa. Supm. Ct.) 336; German-American Real Est. Co. v. Meyers, 32 App. Div. N. Y. 41.

Such an act was held valid in New York on the ground that it was passed before there was any limitation in the constitution of that State upon the power of eminent domain, and compensation for improvements placed within the lines of a proposed street was denied, although the street

is not a taking.³³ Nor does the filing of such a map under such a statute constitute any incumbrance upon the land designated as a street, and a vendee cannot successfully object to the title on that ground.³⁴ If the owner conveys with reference to such map or plat, he thereby adopts the same and dedicates for public use so much of his land as is thereon designated for streets and public places,³⁵ and when they are afterwards opened for use is entitled only to nominal damages.³⁶ The failure of a city to open streets which have been projected does not render it liable to one who has built on the supposition that that would be done.³⁷

was not actually laid out until seventeen years after the map was made. Matter of Furman Street, 17 Wend. 649. This case was followed in Pennsylvania without noticing the ground on which it rested. Forbes Street, 70 Pa. St. 125; *see also* District of City of Pittsburgh, 2 W. & S. 320; In re Sedgeley Avenue, 88 Pa. St. 509; Matter of Snyder Avenue, 14 Phil. 346; Matter of 127th Street, 56 How. Pr. 60.

³³District of Columbia v. Armes, 8 App. Cas. D. C. 393; State v. Seymour, 35 N. J. L. 47; New York Central etc. R. R. Co. v. Haffen, 90 Hun 260, 35 N. Y. Supp. 806; Singer v. New York, 47 App. Div. 42, 62 N. Y. S. 347; S. C. *affirmed*, 165 N. Y. 658, 59 N. E. 1130; District of City of Pittsburgh, 2 W. & S. 320; Burch v. City of McKeesport, 166 Pa. St. 57, 30 Atl. 1023; South Twelfth Street, 217 Pa. St. 362, 66 Atl. 568. *But see* State v. Hudson County Ave. Coms., 37 N. J. L. 12.

³⁴Forster v. Scott, 136 N. Y. 577, 32 N. E. 976, 18 L.R.A. 543, *affirming* S. C. 60 N. Y. Supr. Ct. 313; Singer v. New York, 47 App. Div. 42, 62 N. Y. S. 347; S. C. *affirmed*, 165 N. Y. 658, 59 N. E. 1130. In the opinion of the Court of Appeals in the former case it is said: "Whenever a law deprives the owner of the beneficial use and free enjoyment of his property,

or imposes restraints upon such use and enjoyment that materially affect its value, without legal process or compensation, it deprives him of his property, within the meaning of the constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that may be desirable or valuable in the title or possession. It is not necessary, in order to render a statute obnoxious, to the restraints of the constitution, that it must, in terms or in effect, authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner. * * * As the plaintiff in the case at bar was virtually deprived of the right to build upon his lot by the statute in question, and as this circumstance obviously impaired its value, and interfered with his power of disposition, it was to that extent void as to him, and created no incumbrance upon it."

³⁵Clark v. City of Elizabeth, 37 N. J. L. 120; Matter of Furman Street, 17 Wend. 649.

³⁶See cases in last note and *post*, § 743; and *see* Morris Canal Co. v. Jersey City, 12 N. J. Eq. 252; Same on appeal, p. 547.

³⁷Collins v. Savannah, 77 Ga. 745.

§ 227 (144a). Establishing building lines. The attempt by statute or ordinance to establish building lines on a street, whereby the abutting owners are prohibited from placing any building within a specified distance of the street line, is similar to the practice noticed in the last section. Such a law deprives the owner of the lawful use of his property, and amounts to a taking thereof within the meaning of the constitution, and, consequently, can only be carried out by making provision for the compensation of the owner.³⁸ In commenting upon such an ordinance, the supreme court of Missouri, in the case cited, says: "The day before the ordinance went into operation defendant had the unquestionable right to build at will on his lot. The day afterwards he was as effectually prevented from building on the forty feet strip, except under the peril of punishment, as if the city had built a wall around it, and this, too, without any form of notice, any species of judicial inquiry, or any tender of compensation. If this is not a 'taking' by mere arbitrary edict, it is difficult to express in words the meaning which should characterize the act of the city."

§ 228 (145). Justifiable entries. One of the constituent rights of property in land is the right of exclusion, that is, the right to exclude others from its possession and enjoyment. This right, however, is not absolute, but is subject to certain overruling necessities. Thus an entry upon land will be justified, not only without consent of the owner, but even against his positive prohibition, if necessary to escape bodily harm or secure property which is found there without the privity or fault of its owner. If a highway is impassable, one may go round the obstruction on private property.³⁹ All such entries, however, are limited by the necessities of the case and must be made with the least possible injury, and continued for only a reasonable time.⁴⁰ A somewhat similar necessity justifies an entry on private property for the purpose of making preliminary surveys.

See also Funke v. City of St. Louis, 122 Mo. 132, 26 S. W. 1034.

³⁸City of St. Louis v. Hill, 116 Mo. 527, 22 S. W. 861, 8 Am. R. R. & Corp. Rep. 422; People v. Calder, 89 App. Div. 503, 85 N. Y. S. 1015; Hawkins v. Pittsburg, 220 Pa. St. 7, 69 Atl. 283. *See* Byrnes v. Riverton, 64 N. J. L. 210, 44 Atl. 857.

Em. D.—28.

³⁹Morey v. Fitzgerald, 56 Vt. 487, 56 Am. Rep. 538; Campbell v. Race, 7 Cush. 408, 54 Am. Dec. 728; 2 Bl. Com. 37; Ball v. Herbert, 3 T. R. 253; Ruch v. New Orleans, 43 La. An. 275, 9 So. 473.

⁴⁰Orr v. Quimby, 54 N. H. 590.

Unless this was allowable it would be almost impossible to construct a public work, such as a railway or canal. It has accordingly been held that an entry for preliminary surveys is not a taking, but may be justified on the ground of necessity.⁴¹ Such an entry has been held not to be a taking for which compensation must be first made.⁴² If possession be continued an unreasonable time, or any unnecessary damage is done, the persons making or authorizing the entry become trespassers *ab initio*.⁴³ The possession gained by such entry cannot be continued for the purpose of construction,⁴⁴ or the prosecution of experimental works.⁴⁵ And so, on the same ground, and subject to the same limitations, an entry upon private property is justifiable for the purpose of measuring or establishing public boundaries,⁴⁶ or for making coast surveys by the general government.⁴⁷ But this right does not justify the inflicting of substantial and permanent damage. And where an act provided for the survey and marking of the boundary between two counties and the state engineer, in pursuance of the act, entered upon a large estate and cut a path through the forest from five to twenty-five feet wide and more than three miles long, to be used as a base line in determining the boundary, it was held that the damage was such as could not be inflicted without compensation and as the act made no provision therefor, the engineer and his assistants were held liable in trespass.⁴⁸ It has been held in Pennsylvania that the temporary occupation of private property adjacent to a railroad by shanties, stables, shops, etc., during the construction of the road, was justifiable without compensation.⁴⁹ In the opinion of the court, the question is treated as one of

⁴¹Cushman v. Smith, 34 Me. 247; Cal. 528; Cushman v. Smith, 34 Me. 247.
Orr v. Quimby, 54 N. H. 590, 596;
Polly v. Saratoga etc. R. R. Co., 9 Barb. 449; Bonaparte v. Camden & Amboy R. R. Co., Bald. 205, 225;
Stuart v. Baltimore, 7 Md. 500, 516;
State v. Seymour, 35 N. J. L. 47, 53;
Walther v. Warner, 25 Mo. 277.

⁴²State v. Simons, 145 Ala. 95, 40 So. 662.

⁴³See last note; also Bellingham Bay R. & N. Co. v. Loose, 2 Wash. 500, 27 Pac. 174.

⁴⁴Davis v. San Lorenzo R. R. Co., 47 Cal. 517; California & Pacific R. R. Co. v. Central Pacific R. R. Co., 47

Cal. 528; Cushman v. Smith, 34 Me. 247.
⁴⁵Morris & Essex R. R. Co. v. Hudson Tunnel R. R. Co., 25 N. J. Eq. 384, 388.

⁴⁶Winslow v. Gifford, 6 Cush. 327; Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719, reversing S. C. 105 App. Div. 229, 93 N. Y. S. 1016.

⁴⁷Orr v. Quimby, 54 N. H. 590, 596.

⁴⁸Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719, reversing S. C. 105 App. Div. 229, 93 N. Y. S. 1016.

⁴⁹Landerbrun v. Duffy, 2 Pa. St. 398.

statutory construction merely. It seems to us that such an intrusion is prohibited by the constitution.⁵⁰

§ 229 (146). Injuries by blasting. It is a common practice in the construction of a railroad or other public work to resort to blasting, in consequence of which fragments of rock are frequently projected beyond the limits of the company's land. Casting rock upon a man's land is a violation of his right of exclusion. All the authorities agree that there must be compensation for such damages. But some cases hold that such compensation is included in the original award, and that a separate action therefor will not lie.⁵¹ Other cases hold the contrary doctrine, which seems to us the better rule.⁵² One from whom no land has been taken, and who consequently has received no award of compensation, would be entitled to recover for such damages within the principle of either class of cases.⁵³ Débris

⁵⁰St. Peter v. Denison, 58 N. Y. 416, 17 Am. Rep. 258.

⁵¹Sabin v. Vermont Central R. R. Co., 25 Vt. 363; Dodge v. County Commissioners of Essex, 3 Met. 380; Brown v. Providence, Warren & Bristol R. R. Co., 5 Gray 35; Whitehouse v. Androscoggin R. R. Co., 52 Me. 208; *see also* Tibbetts v. Knox & Lincoln R. R. Co., 62 Me. 437; Eaton v. E. & N. A. Ry. Co., 59 Me. 520, 8 Am. Rep. 430. In Blackwell v. Lynchburg & D. R. R. Co., 111 N. C. 151, 16 S. E. 12, 32 Am. St. Rep. 786, which was a suit for injury to plaintiff by a rock projected 200 yards from the place of the blast, the court says: "Excavating by blasting is one of the approved methods of constructing a railway, and the prudent use of such an agency in removing hard material is always deemed to have been in contemplation when the damage was assessed for the right of way, as a necessary incident to the privilege. But when damage is done to the land of the owner, adjacent to that within the condemned boundary, if it results from managing or handling explosive material carelessly or unskillfully, or from the unnecessary

use of such as is so powerful that the injury might be expected to follow as a natural or probable consequence, the corporation is answerable in a new action. * * * We do not think that the privilege of throwing stones through the air 200 or more yards, and beyond the right of way, so as to endanger the lives of the owners of adjacent land and of the members of their families, when engaged in their domestic duties in and around their dwelling house, passes with the right of way, as a necessary incident to the easement." The same observations would apply in case of injury to property.

⁵²Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 284; S. C. 3 Barb. 42; Tremain v. Same, 2 N. Y. 163; St. Peter v. Denison, 58 N. Y. 416, 17 Am. Rep. 258; Carman v. Indiana R. R. Co., 4 Ohio St. 399. As to the liability of the company for such damages where the work is done by a contractor, compare last case holding that it is, and last two cases of last note holding that it is not.

⁵³FitzSimons & Connell Co. v. Braun, 199 Ill. 390, 65 N. E. 249, 59 L.R.A. 421; Chicago v. Murdock, 212

thus cast upon adjoining land must be removed in a reasonable time, even though there is no liability for the original intrusion.⁵⁴ In a recent New York case, brought for injuries to the plaintiff's house caused by jarring and concussion, resulting from blasting on the right of way of defendant, through and near the plaintiff's lot, the court of appeals adjudicated the following propositions: 1. The powers granted to said road corporations are construed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to private rights, and under the same responsibility as though the acts done in the execution of such powers were done by an individual. 2. The test of the permissible use of one's own land is not whether the use causes damage to his neighbor, but the inquiry is, was the use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy. 3. A railroad company which, having to do blasting on its own land in order to lay its tracks, exercises due care in doing it, and uses charges of no greater force than are necessary for the purpose, is not liable for injury to adjoining property arising merely from the incidental jarring. 4. If the damage in such case results from the failure of the railroad company to use due care, it will be liable.⁵⁵ The question as to whether injuries

Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221; Dodge v. County Commissioners of Essex, 3 Met. 380; Carman v. Indiana R. R. Co., 4 Ohio St. 399; Gossett v. Southern Ry. Co., 115 Tenn. 376, 89 S. W. 737, 112 Am. St. Rep. 846, 1 L.R.A.(N.S.) 97; Farnandis v. Great Northern Ry. Co., 41 Wash. 486, 84 Pac. 18, 111 Am. St. Rep. 922, 5 L.R.A.(N.S.) 1086.

⁵⁴Sabin v. Vermont Central R. R. Co., 25 Vt. 363; St. Peter v. Denison, 58 N. Y. 416, 17 Am. Rep. 258.

⁵⁵Booth v. Rome etc. R. R. Co., 140 N. Y. 267, 35 N. E. 592, 9 Am. R. R. & Corp. Rep. 92, 37 Am. St. Rep. 552, 24 L.R.A. 105. To same effect: Holland Hoare Co. v. Baird, 169 N. Y. 136, 62 N. E. 149, reversing S. C. 49 App. Div. 180, 63 N. Y. S.

73. According to these authorities the question resolves itself into an inquiry as to what is a reasonable use of one's own land. Undoubtedly every owner of land may make a reasonable use of his land. So every owner of land has a right not to be injured in its use or enjoyment by an unreasonable use of adjoining land. These mutual rights and obligations are elaborately discussed in Thompson v. Androscoggin River Improvement Co., 54 N. H. 545, and Eaton v. Railroad Co., 51 N. H. 504, 12 Am. Rep. 147. What is a reasonable or unreasonable use of one's land is largely a question of fact. Any use may be declared reasonable when, though it may in some cases injuriously affect adjoining property, the right to make

from blasting should be included in the estimate of damages will be considered hereafter.⁵⁶

§ 230 (147). Injury to business. All damages which result from the proper construction, use and operation of public works, where no right of property is taken or interfered with, are not a taking and are not actionable.⁵⁷ So, too, are all such loss and inconvenience as result from temporarily obstructing the use of public highways by land or water in consequence of the construction of improvements therein by the public authorities.⁵⁸ This results from the fact that the use of such highways in connection with private property is subordinate to the right of the public to make such improvements. For damage to business carried on in whole or in part upon property taken, the reader is referred to the chapter on damages.⁵⁹

§ 231 (148). Highways laid out adjacent to but not taking one's land. Where a highway is laid out alongside of a person's land, but without taking any of it, it is held that he is not entitled to compensation, although the duty of maintaining the whole fence on his front is cast upon him, when before that he was only obliged to maintain half.⁶⁰ All the authorities are one way upon this question, but their correctness is questionable. Where by law the burden of maintaining a divi-

such use would tend to the "highest enjoyment of land by the entire community of proprietors." See *Thompson v. Androscoggin River Improvement Co.*, 54 N. H. 545. This is not materially different from the test laid down in the New York case. Now it may be seriously doubted whether the right to use explosives in excavating upon one's land in such manner as to shake down or greatly impair buildings on adjoining property, is one which, on the whole, will conduce to the highest enjoyment of land by the entire community. In other words, it would seem more to the advantage of the whole community that one who desired to excavate rock on his land should be required to do so in such manner as not to materially injure adjoining property.

⁵⁶Post, § 828; and see *Matter of Thompson*, 43 Hun 416.

⁵⁷*Hooker v. New Haven & Northampton Co.*, 15 Conn. 312, 319; *Bailey v. Boston etc. R. R. Co.*, 182 Mass. 537, 66 N. E. 203.

⁵⁸*Adair v. Atlanta*, 124 Ga. 288, 52 S. E. 739; *Brooks v. Boston*, 19 Pick. 174; *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100; *Plant v. Long Island R. R. Co.*, 10 Barb. 26; *Linton Pharmacy v. McDonald*, 48 Misc. 125, 96 N. Y. S. 675; *Acker v. Knoxville*, 117 Tenn. 224, 96 S. W. 973; *Northern Transportation Co. v. Chicago*, 99 U. S. 635; S. C. 7 Biss. 45.

⁵⁹Post, § 727.

⁶⁰*Hoag v. Switzer*, 61 Ill. 294; *People v. Supervisors of Oneida County*, 19 Wend. 102; *Kennett's Petition*, 24 N. H. 139.

sion fence is cast equally upon adjoining proprietors, there are mutual rights and obligations attached to the respective estates. Each has a right to compel the other to contribute his proportion. This right is appurtenant to the estate, for it passes with it. Likewise the obligation. When the adjoining estate is taken for a highway, this right is taken with it, and compensation to the extent of the loss should be made. A city bought a lot adjacent to plaintiff's and laid it out as a street. The plaintiff sued for damages on account of being deprived of privacy and rendered liable for assessments for the improvement of the new street. It was held that plaintiff's property was neither taken nor damaged, within the meaning of the constitution.⁶¹

§ 232 (149). Interfering with the right of exclusion. Any invasion of property, except in case of necessity as heretofore explained, either upon, above or below the surface, and whether temporary or permanent, is a taking: as by constructing a ditch through it,⁶² passing under it by a tunnel,⁶³ laying gas, water or sewer pipes in the soil,⁶⁴ or extending structures over it, as a bridge or telephone wire.⁶⁵ Even a temporary occupation, as for an annual training,⁶⁶ or a road during sleighing time,⁶⁷ can only be made pursuant to law, for a public use and upon compensation made.⁶⁸ Nor can public authorities interfere with the control or use of a private way, except upon mak-

⁶¹Peel v. City of Atlanta, 85 Ga. 138, 11 S. E. 582, 2 Am. R. R. & Corp. Rep. 413. *See also* Funke v. City of St. Louis, 122 Mo. 132, 26 S. W. 1034; Wells v. Harris, 137 Mo. 512.

⁶²Reeves v. Treasurer of Wood County, 8 Ohio St. 333; Watson v. Trustee, 21 Ohio St. 667; People v. Haines, 49 N. Y. 587; Plummer v. Sturtevant, 32 Me. 325. A statute in force since before the Revolution, permitting the surveyors of highways to enter upon land adjoining the way, for the purpose of constructing drains, but providing for no compensation, was held void in Ward v. Peek, 49 N. J. L. 42.

⁶³Sparrow v. Oxford, Worcester & Wolverhampton Ry. Co., 2 DeG. McN. & G. 94; Farmer v. Waterloo & City R. R. Co., L. R. (1895) 1 Ch. D. 527.

⁶⁴Smith v. Atlanta, 92 Ga. 119, 17 S. E. Rep. 981; Noon v. Scranton City, 7 Pa. Co. Ct. 123.

⁶⁵Metropolitan W. S. El. R. R. Co. v. Springer, 171 Ill. 170, 49 N. E. 416; Butler v. Frontier Telephone Co., 186 N. Y. 486, 79 N. E. 716, 116 Am. St. Rep. 563, 11 L.R.A. (N.S.) 920, *affirming* S. C. 109 App. Div. 217, 95 N. Y. S. 684; Bass v. Met. W. S. El. R. R. Co., 82 Fed. 857, 27 C. C. A. 147. *And see* Western Union Tel. Co. v. Moyle, 51 Kan. 185, 32 Pac. 895; Drainage Comrs. v. Knox, 237 Ill. 148.

⁶⁶Brigham v. Edmonds, 7 Gray 359.

⁶⁷Holcomb v. Moore, 4 Allen 529; Holden v. Cole, 1 Pa. St. 303.

⁶⁸*See* Markham v. Brown, 37 Ga. 277.

ing compensation.⁶⁹ An encroachment upon abutting property in filling a street or building a railroad embankment, or by means of earth thrown out from an excavation, is actionable and if authorized by law would be a taking.⁷⁰ And where a city built a wall along a school lot, which was pressed out by the filling so as to overhang the adjoining lot, it was held an actionable nuisance.⁷¹ Where coal underlying the surface, is owned separately from the surface, it will be protected from intrusion the same as other property.⁷² The legislature cannot authorize the use of private property for a ferry landing without compensation.⁷³ A statute of Montana provided that in case of a suit concerning the title to mining claims or for damages thereto the court might by order allow either party to inspect, survey and measure, the underground workings of the mine for purposes pertaining to the litigation. It was held that the statute was valid and that an entry under it was not a taking or damaging of property within the constitution.⁷⁴

§ 233 (150). Easement of levee in Louisiana. Riparian property upon the Mississippi, in the State of Louisiana, is subject to the easement of levee, that is, the right of the State to use so much as may be necessary for the construction of proper levees and to repair or re-locate the same from time to time as

⁶⁹Morse v. Stocker, 1 Allen, 150.

⁷⁰Ante, § 140; Wichita & W. R. R.

Co. v. Fechheimer, 49 Kan. 643, 31 Pac. 127; Schneider v. Brown, 142 Mich. 45, 105 N. W. 13; Tegeler v. Kansas City, 95 Mo. App. 162, 68 S. W. 953; Pinnix v. Lake Drummond etc. Canal Co., 132 N. C. 124, 43 S. E. 578; Cherry v. Lake Drummond etc. Canal Co., 140 N. C. 422, 53 S. E. 138, 111 Am. St. Rep. 850; Davis v. Silverton, 47 Ore. 171, 82 Pac. 16; Bigham v. Pitts Construction Co., 29 Pa. Supr. Ct. 86; O'Donnell v. White, 23 R. I. 318, 50 Atl. 333; Sims v. Ohio Riv. etc. Ry. Co., 56 S. C. 30, 33 S. E. 746; Bunker v. Hudson, 122 Wis. 43, 99 N. W. 448; McCullough v. Campbellsport, 123 Wis. 334, 101 N. W. 709; Williams v. Hudson, 130 Wis. 297, 110 N. W. 239.

⁷¹Miles v. City of Worcester, 154 Mass. 511, 28 N. E. 676.

⁷²Penn Gas Coal Co. v. Versailles Fuel Gas. Co., 131 Pa. St. 522, 19 Atl. 933; Robbins v. Guffy, 20 Phila. 400.

⁷³Blake v. McCarthy, 56 Miss. 654.

⁷⁴State v. District Court, 28 Mont. 528, 73 Pac. 230. Says the Court: "Every citizen has the right to the exclusive enjoyment of his property, without interruption or evasion; yet this general rule of right must, under the circumstances of the case, yield to the higher right of public necessity, that equal justice may be administered upon conflicting rights of different citizens. Every citizen holds his property subject to this burden, and when the necessity arises his private right must give way to this higher law." p. 545.

the public exigencies may require.⁷⁵ And this is true though the title to the property is derived from the United States and belongs to a citizen of another state.⁷⁶ This servitude was attached to the land at the time of its original grant.⁷⁷ But the land only is so subject, and if buildings are destroyed in constructing a levee, the owner is entitled to compensation.⁷⁸ Nor does the servitude extend to the case where the necessity for the levee is created by some collateral or distinct improvement, such as the closing of a bayou.⁷⁹ This servitude is peculiar to the law of Louisiana.⁸⁰ Where a city instituted proceedings to condemn property for use for levee purposes which proceeded to judgment, it was held that it could not recede from the judgment and construct the levee without compensation by virtue of the servitude.⁸¹

§ 234 (151). Interfering with the right of support. Every owner of land has a right to the lateral support of his soil in its natural condition, and no person is entitled to so excavate upon his own land as to deprive the soil of his neighbor of its natural support and thereby cause it to slide into the excavation.⁸² This right extends only to the soil, and not to

⁷⁵Mithoff v. Town of Carrollton, 12 La. An. 185; Bass v. State, 34 La. An. 494; Ruch v. City of New Orleans, 43 La. An. 275, 9 So. 473; Peart v. Meeker, 45 La. An. 421, 12 So. 490; Hart v. Board of Levee Comrs., 54 Fed. 559.

⁷⁶Eldridge v. Trezevant, 160 U. S. 452, 16 S. C. 345.

⁷⁷Mithoff v. Town of Carrollton, 12 La. An. 185.

⁷⁸Cash v. Whitworth, 13 La. An. 401; Mithoff v. Carrollton, 12 La. An. 185; *contra*; Dubose v. Levee Comrs., 11 La. An. 165; Hanson v. La Fayette, 18 La. 295.

⁷⁹Cash v. Whitworth, 13 La. An. 401. *But see* Egan v. Hart, 45 La. An. 1358, 14 So. 244.

⁸⁰See Richardson v. Levee Comrs., 58 Miss. 539, 9 So. 351.

⁸¹In re City of New Orleans, 20 La. An. 394.

⁸²Stimmel v. Brown, 7 Houst. 219, 30 Atl. 996; Guest v. Reynolds, 69

Ill. 478, 18 Am. Rep. 570; Moellering v. Evans, 121 Ind. 195, 22 N. E. 989, 6 L.R.A. 449; Clemens v. Speed, 93 Ky. 284, 19 S. W. 660, 19 L.R.A. 240; Boothby v. Androscoggin R. R. Co., 51 Me. 318; Baltimore etc. R. R. Co. v. Reaney, 42 Md. 117; Thurston v. Hancock, 12 Mass. 220, 7 Am. Dec. 57; Gilmore v. Driscoll, 122 Mass. 199, 201, 23 Am. Rep. 312; Gildersleeve v. Hammond, 109 Mich. 431, 67 N. W. 519, 33 L.R.A. 46; Nichols v. City of Duluth, 40 Minn. 389, 42 N. W. 84, 12 Am. St. Rep. 743; McCullough v. St. Paul etc. R. R. Co., 52 Minn. 12, 53 N. W. 802, 47 Am. St. Rep. 630; Charless v. Rankin, 22 Mo. 566; McGuire v. Grant, 25 N. J. L. 356; Lasala v. Holbrook, 4 Paige 169, 25 Am. Dec. 524; Farrand v. Marshall, 19 Barb. 380; Mosier v. Ore. Nav. Co., 39 Ore. 256, 64 Pac. 453, 87 Am. St. Rep. 652; Novotney v. Danforth, 9 S. D. 301, 68 N. W. 749; Beard v. Murphy, 37 Vt. 99;

improvements placed upon it which increase the weight.⁸³ If, in the execution of public works under authority of law, excavations are made and the soil of an individual gives way in consequence of being deprived of its lateral support, there is a taking to the extent of such deprivation, and the individual is entitled to compensation for the resulting damage. The right of lateral support is a part of his property in the land, as much so as his right of user, or of exclusion. When he is deprived of it his property is taken just as much as if his property was invaded.⁸⁴ "The right of a landowner to have his property protected against an excavation which will cause it to subside is a part of his property in the land, alike in nature and importance to the right of user and exclusion, and the deprivation of the right is a taking of property as much as an actual appropriation of the soil."⁸⁵ Notwithstanding the clear justice and logic of this position, there is, perhaps, as much authority against it as for it. It has been held that, where a railroad company excavated upon its own land, so that the plaintiff's soil slid into the excavation, the plaintiff was entitled to recover damages.⁸⁶ The contrary doctrine has been held in precisely

Stearns' Exrs. v. City of Richmond, 88 Va. 992, 14 S. E. 847, 6 Am. R. R. & Corp. Rep. 247; Damkoehler v. Milwaukee, 124 Wis. 144, 101 N. W. 706; Washburn on Easements, pp. 514-516; Wood on Nuisances, § 172, and cases cited below. In Gilmore v. Driscoll, the court (Gray, C. J.,) says: "Every owner of land is entitled, as against his neighbor, to have the earth stand and the water flow in its natural condition. * * * In the case of land, which is fixed in its place, each owner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor; and, if the neighbor digs upon or improves his own land so as to injure this right, he may maintain an action against him, without proof of negligence."

⁸³Lasala v. Holbrook, 4 Paige 169; City of Quincy v. Jones, 76 Ill. 231; Wood on Nuisances, § 175; Moeller-

ing v. Evans, 121 Ind. 195, 22 N. E. 989, 6 L.R.A. 449.

⁸⁴Quoted and followed in Mosier v. Ore. Nav. Co., 39 Ore. 256, 64 Pac. 453, 87 Am. St. Rep. 652.

⁸⁵Damkoehler v. Milwaukee, 124 Wis. 144, 151, 101 N. W. 706.

⁸⁶Dickinson v. Pere Marquette R. R. Co., 148 Mich. 461, 111 N. W. 1078; Kopp v. Northern Pac. R. R. Co., 41 Minn. 310, 43 N. W. 73; McCullough v. St. Paul etc. R. R. Co., 52 Minn. 12, 53 N. W. 802; Church of Holy Communion v. Paterson etc. R. R. Co., 66 N. J. L. 218, 49 Atl. 1030, 55 L.R.A. 81, reversing S. C. 63 N. J. L. 470, 43 Atl. 696; S. C. on second appeal, 68 N. J. L. 399, 53 Atl. 1079; Ludlow v. Hudson River R. R. Co., 6 Lans. 128; Ruppert v. West Side Belt R. R. Co., 25 Pa. Supr. Ct. 613; Richardson v. Vermont Central R. R. Co., 25 Vt. 465, 60 Am. Dec. 459; and see New Orleans, Baton Rouge etc. R. R. Co. v. Brown, 64 Miss. 479.

similar cases in Maine and Kentucky.⁸⁷ In both these cases the railroad companies obtained title by deed, in the usual form. In Maine a recovery was denied, on the ground that the act of the legislature was an authority and license to the company to construct the road in the manner it did, and, as it had not been guilty of negligence, no action would lie. The court says: "It is a principle of the common law that a man must not dig so near the land of another as thereby to withdraw the natural support of the soil, and render it liable to break away and slide down of its own weight; but this principle does not apply to excavations made in pursuance of a license; and a license from the legislature, if within its constitutional limits, affords as ample protection as a license from the injured party." The right of support was thus conceded to exist. This right was property, and the legislature could not license a railroad company to take away the plaintiff's property without an equivalent as required by the constitution. Such a license was not "within its constitutional limits." In the Kentucky case a recovery was denied, on the ground that the plaintiff sold the right of way to the company for use as a right of way, and it must be presumed that he estimated and obtained the damages which would result from such use. But the grant of land even to be excavated for materials does not authorize the grantee to deprive the adjoining land of the grantor of its support.⁸⁸ The grant of land for a railroad or other public use is simply a grant of the land, as land, and it is still subject to the same obligations in respect to adjacent or neighboring land as if granted to a private individual for private use.⁸⁹

Where the grade of a street is cut down and the soil of the abutting owner slides into the street, he is entitled to recover.⁹⁰

⁸⁷Boothby v. Androscoggin & Kennebec R. R. Co., 51 Me. 318; Hortsman v. Covington & Lexington R. R. Co., 18 B. Mon. 218. Compare City of New Westminster v. Brighouse, 20 Duvall 520, where a city was held liable for taking away the support of plaintiff's soil in lowering the grade of a street.

⁸⁸Ryckman v. Gillis, 6 Lans. 79; Ludlow v. Hudson River R. R. Co., 6 Lans. 128.

⁸⁹Post, §§ 820, 824.

⁹⁰Aurora v. Fox, 78 Ind. 1; Dyer v. St. Paul, 27 Minn. 457; Armstrong v. St. Paul, 30 Minn. 299; Nichols v. Duluth, 40 Minn. 389, 42 N. W. 84; Moore v. Albany, 98 N. Y. 396; Columbus v. Willard, 7 Ohio C. C. 113; Keating v. Cincinnati, 38 Ohio St. 141; Stearns Exrs. v. City of Richmond, 88 Va. 992, 14 S. E. 847, 6 Am. R. R. & Corp. Rep. 247; Damkoehler v. Milwaukee, 124 Wis. 144, 101 N. W. 706; Dahlman v. Milwaukee, 131 Wis. 427, 110 N. W. 479,

But this question, so far as it relates to streets, is discussed elsewhere.⁹¹ Where a city excavated in the bed of a river, to form a basin for the settling of sewerage, and thus deprived plaintiff's land of its support, it was held liable.⁹² So where the city in digging a sewer removes quicksand by pumping and damages the abutting property by depriving it of support.⁹³ Some cases hold that a city is not liable for damage to property by subsidence or otherwise, resulting from the digging of a sewer in a street, in the absence of negligence, misconduct or want of skill on the part of its servants or agents.⁹⁴ Where a telephone company, in setting a pole, interfered with the lateral support of the plaintiff's building, it was held liable for the damages.⁹⁵ So when the subsidence is caused by the excavation of a tunnel in the street or near the property.⁹⁶ In case of interfering with the right of support, the action accrues when the damage results, and not when the excavation is made.⁹⁷

§ 235 (151a). Consequential injuries to property by the operation of a railroad: Noise, smoke, cinders, jarring, vibrations, etc. When part of a tract of land is taken for a railroad just compensation includes damage to the remainder by reason of the use of the part taken for railroad purposes.⁹⁸ When such compensation has been paid the railroad company acquires the right to operate its road in the usual way without any further liability to the owner of such remainder for damage or inconvenience resulting therefrom. But railroads are frequently constructed adjacent, or in close proximity, to land no part of which has been taken. Such land may be damaged and depreciated by the proximity of the railroad, and by the noise,

111 N. W. 675; *City of New Westminister v. Brighouse*, 20 Duvall 520. *Contra*: *Talcott Bros. v. Des Moines*, 134 Ia. 113, 109 N. W. 311, 120 Am. St. Rep. 419. *And see* cases cited *ante*, § 139.

⁹¹ *Ante*, § 139.

⁹² *Pomroy v. Granger*, 18 R. I. 624, 29 Atl. 690.

⁹³ *Cabot v. Kingman*, 166 Mass. 403, 44 N. E. 344, 33 L.R.A. 45.

⁹⁴ *Uppington v. New York*, 165 N. Y. 222, 59 N. E. 91, 53 L.R.A. 550; *Fyfe v. Turtle Creek*, 22 Pa. Supr. Ct., 292. In *Gerst v. St. Louis*, 185 Mo. 191, 84 S. W. 34, 105 Am. St.

Rep. 580, the city was held liable in such case on the ground of negligence.

⁹⁵ *Cumberland Tel. & Tel. Co. v. Foster*, 117 Ky. 389, 78 S. W. 150.

⁹⁶ *FitzSimmons & Connell Co. v. Braun*, 199 Ill. 390, 65 N. E. 249, 59 L.R.A. 421; *Chicago v. Rust*, 117 Ill. App. 427; *Farnandis v. Great No. Ry. Co.*, 41 Wash. 486, 84 Pac. 18, 111 Am. St. Rep. 922, 5 L.R.A. (N.S.) 1086.

⁹⁷ *Ludlow v. Hudson River R. R. Co.*, 6 Lans. 128.

⁹⁸ *Post*, § 686.

smoke, cinders, jarring, vibrations and other annoyances arising from the operation of the road. According to the general principles heretofore enunciated, if such damages would be actionable but for the statutory authority, then they amount to a taking, for which compensation must be made.⁹⁹ But the authorities are not harmonious upon this point. In a suit brought to recover for damage to the plaintiff's property, no part of which had been taken, caused by the noise, smoke, cinders, vibrations, etc., resulting from the use of railroad tracks on adjacent property, the supreme court of Minnesota denied a recovery and state their reasons, as follows: "Railroads are a public necessity. They are always constructed and operated under authority of law. They bring to the public great benefits; to some persons more, to other persons less. The operating them in the most skillful and careful manner causes to the public necessary inconveniences, such as noise, smoke, cinders, vibrations of the ground, interference with travel at the crossings of roads and streets, and the like. One person may suffer more from these than another. For instance, one whose premises lie within a hundred feet of the railroad will feel the inconveniences in a greater degree than one whose premises are at the distance of a thousand feet; and one who has to pass many times a day along a street crossed by a railroad suffers more inconvenience from it than one who seldom has occasion to pass. But the difference is only in degree, not in kind. Such inconveniences are common to the public at large. If each person had a right of action because of such inconveniences, it would go far to render the operating of railroads practically impossible."¹ The question has recently received very elaborate consideration in New Jersey. The railroad was in the rear of plaintiff's lot upon elevated tracks. The complaint was for nuisance in the use of the tracks, resulting from noise, smoke, smells, etc., caused by switching, making and unmaking trains, leaving cars standing in the vicinity loaded with stock and the like. The company pleaded its statutory authority, and alleged that its road was operated with no unnecessary in-

⁹⁹*Ante*, § 65.

¹Carroll v. Wis. Cent. R. R. Co., 40 Minn. 168, 41 N. W. 661. *See also* the following cases in the same court: Adams v. Chicago etc. R. R. Co., 39 Minn. 286, 39 N. W. 629, 12 Am. St.

Rep. 644, 1 L.R.A. 493; Cameron v. Chicago etc. R. R. Co., 42 Minn. 75, 43 N. W. 785; Kaje v. Chicago etc. R. R. Co., 57 Minn. 422, 59 N. W. 493.

jury to the plaintiff. The plea was held good on demurrer.² It was conceded that the acts complained of amounted to an actionable nuisance but for the statutory authority, but it was held that the legislature had plenary control over the subject of "incidental" or "consequential" damages, though the same might amount to half the value of the property. The reasoning of the court cannot be better answered than by an opinion of the same court in a prior case, in which the court by Dixon, J., says: "An act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive

²Beseman v. Pennsylvania R. R. Co., 50 N. J. L. 235, 13 Atl. 164. The judgment of the supreme court was affirmed by the court of errors and appeals on the opinion of the former court, so that the opinion has the sanction of both courts. 52 N. J. L. 221, 20 Atl. 169 (1890). We quote from the opinion as follows: "It is a radical error to regard these corporations as simply private. They have a public as well as a private aspect, and it is on this account that the immunity in question belongs to them. * * * These roads, in view of their effect upon social and commercial interests, are of vastly more importance than are most of the public highways, and it is on account of this transcendent usefulness that they, to a large extent, have been and must be regarded as public agencies. Looking at them in this light, it is but following the ordinary path to declare that they are not responsible for those incidental damages that result from the proper exercise of their functions. This is the settled rule. The legislature may authorize the altering the grade of a city street; such act may occasion immense loss to the owners of abutting property, and such loss is *damnum absque injuria*, the reason being that the improvement is a matter of public concern, and that each individual mem-

ber of the community, while he is entitled to its benefits, must submit to its burthens. The attitude of a railroad company, so far as relates to the application of legal principles, is not dissimilar. They run their trains by legislative authority for the public benefit, and on that account, in doing such acts, they are so far forth the representatives of the body of the people. The defendant alleges that it has kept entirely within the limits of its chartered rights in running its trains, and that the plaintiff has suffered no damage except such as is necessarily incident to such transactions, and it seems to me that if this be true this action cannot be maintained." (pp. 240, 241.) * * * "Nor have I found any serious constitutional difficulty with reference to this question. It has not been unobserved that it is said that as the legislature cannot authorize, by force of the constitution of the State, property to be taken for public use without compensation, it follows that it cannot legalize an injury to such property. The argument is that to injure property for the public benefit to the extent say, of one-half of its value, is, in substance, to take for that purpose a moiety of it. But this line of reasoning excludes altogether, as it appears to me, the legislative control over the subject. As

persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners. This principle rests upon the express terms of the constitution. In declaring that private property shall not be tak-

already remarked, if the right of action cannot be taken from the land-owner when the injury to his property is equal to one-half its value, neither can this be done when it is damaged to the extent of one-twentieth part of its value, or in any other actionable degree. To hold otherwise would be not only illogical but impracticable, for who would be able to say to what degree the damage must go in order to give the right of action. In my opinion the legislative power covers the entire field of incidental injuries. In the case cited from the English reports it was held that the burning of a haystack by the engine of an unchartered company was a loss that could be redressed by action, without respect to the question whether the fire had been kept with proper care or not; and yet the court declared, as has always been judicially declared in this State, that if such engine had been used under legislative authority such loss would have been remediless. This, it is evident, was maintaining a legislative right to deprive a person of a right of action due to him at common law for an injury resulting in the entire destruction of his property, and this is the legal principle that has practically been enforced in this State from the existence of its first railroad up to the present hour. And it is the entire doctrine that must be abrogated if we say that by force of the constitution the legislature cannot exempt these companies from responsibility for those things that are the necessary concomitants of the use of the road. When property has been incidentally injured, no

matter to what extent, as an unavoidable result of a public improvement, such loss has always been deemed remediless, and it has never been supposed that the property so injured was taken, in the constitutional sense, for the public use. All the public improvements in the State have been built and are now resting on this foundation. For my part, therefore, I find no embarrassment in disposing of the present subject, for I have put railroads in the category of public agents, and have regarded them as possessed of all the immunities, in the particular in question, belonging to such an office; for to me it does not appear to be consistent with reason to declare that these exemptions may be bestowed upon an inconsiderable turnpike company but cannot be given in favor of these great highways connecting distant countries and extending over a continent." pp. 244-246. In the prior cases of Pennsylvania R. R. Co. v. Angel, 41 N. J. Eq. 316, and Pennsylvania R. R. Co. v. Thompson, 45 N. J. Eq. 870, 14 Atl. 897, 19 Atl. 622, both decided by the court of errors and appeals, similar injuries were held to be actionable, but the tracks in these cases were in a public street and the use complained of was held to be in excess of the authority granted to the railroad company. Beideman v. Atlantic City R. R. Co., 19 Atl. (N. J. Ch.) 731 is similar to the Beseman Case, and is decided in accordance therewith. Compare Costigan v. Pennsylvania R. R. Co., 54 N. J. L. 233, 23 Atl. 810; Hennessey v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374.

en without recompense, that instrument secures to owners, not only the possession of property, but also those rights which render possession valuable. Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied with comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is a taking of his property in the constitutional sense; of course, mere statutory authority will not avail for such an interference with private property.³ But the authorities generally are in accord with the later New Jersey cases.⁴ In a Maryland case the rear of the plaintiff's property abutted upon an open cut connecting two tunnels. The operation of trains drew the smoke and soot from the tunnels to the cut whence they were cast upon the plaintiff's property. Complaint was also made of the noise and vibration. The acts were held to amount to a taking of the plaintiff's property and he was held entitled to recover irrespective of negligence.⁵

In the case of railroads in streets there is a difference of opinion, whether damages should be allowed for the annoyances

³Pennsylvania R. R. Co. v. Angel, 41 N. J. Eq. 316, 329, 7 Atl. 432, 56 Am. St. Rep. 1 (Court of Errors and Appeals).

⁴Decker v. Evansville Suburban etc. R. R. Co., 133 Ind. 493, 33 N. E. 349; Densmore v. Central Ia. R. R. Co., 72 Ia. 182; Atchison etc. Ry. Co. v. Armstrong, 71 Kan. 366, 80 Pac. 978, 114 Am. St. Rep. 474, 1 L.R.A. (N.S.) 113; Werges v. St. Louis etc. R. R. Co., 35 La. An. 641; Davis v. Baltimore etc. R. R. Co., 102 Md. 371, 62 Atl. 572; Emigrant Mission Committee v. Brooklyn R. R. Co., 165 N. Y. 604, 58 N. E. 756, affirming S. C. 20 App. Div. 596, 47 N. Y. S. 344; Thompson v. Seaboard Air Line Ry. Co., 142 N. C. 318, 55 S. E. 205; Cincinnati Connecting Belt R. R. Co. v. Burski, 4 Ohio C. C. (N.S.) 98. In Decker v. Evansville Suburban R. R.

Co., 133 Ind. 493, 33 N. E. 349, the court says: "Injuries which result from the careful construction and operation of a railroad on the land of another are common to all those whose lands are in close proximity to such road, and for such injuries there can be no recovery, in the absence of a statute entitling the owner to maintain such action." Lincoln v. Commonwealth, 164 Mass. 368, 41 N. E. Rep. 489 and Essex v. Local Board for Acton, L. R. 14 H. L. 153 (S. C. 14 Q. B. D. 753, 17 Q. B. D. 447), though not relating to railroads, are important in the general discussion of the points involved.

⁵Baltimore Belt R. R. Co. v. Sattler, 100 Md. 306, 59 Atl. 654; S. C. 102 Md. 595, 64 Atl. 507; Baltimore Belt R. R. Co. v. Sattler, 105 Md. 264, 65 Atl. 752.

occasioned by noise, smoke and vibrations.⁶ In the New York elevated railroad cases it is held that such damages may be recovered where the occupation of the railroad company is wrongful, but cannot be considered in estimating the just compensation to be paid for the permanent interference with the abutter's easements.⁷

Such damages may be recovered under constitutions or statutes which give compensation for property damaged or injured for public use, whether the railroad is on a public street or its private property.⁸

⁶The following cases favor the allowance of such damages: South Carolina R. R. Co. v. Steiner, 44 Ga. 546; Wilson v. Des Moines etc. R. R. Co., 67 Ia. 509; Mix v. LaFayette etc. R. R. Co., 67 Ill. 319; Elizabethtown etc. R. R. Co. v. Combs, 10 Bush. 382; Fulton v. Short Route R. Trans. Co., 85 Ky. 640, 4 S. W. 332, 7 Am. St. Rep. 619; Louisville & N. R. R. Co. v. Orr, 91 Ky. 109, 15 S. W. Rep. 8; Maysville & B. S. R. Co. v. Ingram, (Ky.) 30 S. W. 8. *Contra:* Werges v. St. Louis etc. R. R. Co., 35 La. An. 641; Adams v. Chicago etc. R. R. Co., 39 Minn. 286, 39 N. W. 629, 12 Am. St. Rep. 644, 1 L.R.A. 493; Randle v. Pacific R. R. Co., 65 Mo. 325; Parrott v. Cincinnati etc. R. R. Co., 10 Ohio St. 624. *And see post*, §§ 735, 736.

⁷American Bank Note Co. v. New York El. R. R. Co. 129 N. Y. 252, 29 N. E. 302, 5 Am. R. R. & Corp. Rep. 583; Messenger v. Manhattan R. R. Co., 129 N. Y. 502, 29 N. E. 955; Bischoff v. New York El. R. R. Co., 138 N. Y. 257, 33 N. E. 1073; Sperb v. Metropolitan El. R. R. Co., 137 N. Y. 155, 32 N. E. 1050, 20 L.R.A. 752, 7 Am. R. R. & Corp. Rep. 554; Sperb v. Metropolitan El. R. R. Co., 61 Hun 539, 41 N. Y. St. 155, 16 N. Y. Supp. 392; Sloan v. New York El. R. R. Co., 63 Hun 300, 44 N. Y. St. 583, 17 N. Y. Supp. 769; Jordan v. Metropolitan El. R. R. Co., 60 N. Y. Supp. 385; Golden v. Metropoli-

tan El. R. R. Co., 1 Misc. 142, 20 N. Y. Supp. 630; Purdy v. Manhattan R. R. Co., 3 Misc. 50, 22 N. Y. Supp. 943; Diehl v. Metropolitan El. R. R. Co., 11 Misc. 14, 31 N. Y. Supp. 839.

⁸Lake Erie & W. R. R. Co. v. Scott, 132 Ill. 429, 24 N. E. 78, 8 L.R.A. 330; Chicago etc. R. R. Co. v. Darke, 148 Ill. 226, 35 N. E. 750, 9 Am. R. R. & Corp. Rep. 73; Chicago etc. R. R. Co. v. Leah, 152 Ill. 249, 38 N. E. 556; Ill. Cent. R. R. Co. v. Trustees of Schools, 212 Ill. 406, 72 N. E. 39; Wis. Cent. R. R. Co. v. Wieczorek, 51 Ill. App. 498; Met. West Side El. R. R. Co. v. Goll, 100 Ill. App. 323; Davenport etc. R. R. Co. v. Sinnet, 111 Ill. App. 75; Ill. Cent. R. R. Co. v. Trustees of Schools, 128 Ill. App. 111; Ball v. Marysville etc. R. R. Co., 102 Ky. 486, 43 S. W. 731, 80 Am. St. Rep. 362; Willis v. Ky. & Ind. Bridge Co., 104 Ky. 186, 46 S. W. 488; Covington etc. R. R. & Bridge Co. v. Kleymeier, 105 Ky. 609, 49 S. W. 484; Louisville etc. R. R. Co. v. Geikel, 9 Ky. L. R. 813; Louisville Southern R. R. Co. v. Cogar, 15 Ky. L. R. 444; Louisville Southern R. R. Co. v. Hooe, 18 Ky. L. R. 521, 35 S. W. 266, 38 S. W. 131; Baker v. Boston El. Ry. Co., 183 Mass. 178, 66 N. E. 711; Chicago K. & N. R. R. Co. v. Hazels, 26 Neb. 364, 42 N. W. 93; Omaha etc. R. R. Co. v. Janecek, 30 Neb. 276, 46 N. W. 478, 27 Am. St. Rep. 399, 3 Am. R. R. &

The maintaining and use of coal chutes or bins for coaling engines, in the immediate vicinity of plaintiff's property, has been held to be an actionable nuisance in Illinois, New York, North Carolina and Texas,⁹ but the contrary in Iowa.¹⁰ The maintenance of stock yards by a railroad company near the plaintiff has been held an actionable nuisance in Iowa and Missouri.¹¹ In Wisconsin it is held that, if they are properly located and properly managed, there can be no recovery for the annoyances caused thereby.¹² If by reason of neglect and

Corp. Rep. 268; Omaha etc. R. R. Co. v. Moschel, 38 Neb. 281, 56 N. W. 875; Gainsville etc. R. R. Co. v. Hall, 78 Tex. 16, 14 S. W. 259, 9 L.R.A. 298, 3 Am. R. R. & Corp. Rep. 251; Ft. Worth etc. R. R. Co. v. Downie, 82 Tex. 383, 17 S. W. Rep. 620; Gulf etc. R. R. Co. v. Necco (Tex.) 15 S. W. Rep. 1102; Stockdale v. Rio Grande Western Ry. Co., 28 Utah, 201, 77 Pac. 849; Smith v. St. Paul etc. Ry. Co., 39 Wash. 355, 81 Pac. 840, 109 Am. St. Rep. 889, 70 L.R.A. 1018; *post*, § 357.

The contrary is held in Georgia and Pennsylvania. Austin v. Augusta Terminal Ry. Co., 108 Ga. 671, 34 S. E. 852, 47 L.R.A. 755; Pennsylvania R. R. Co. v. Lippincott, 116 Pa. St. 472, 9 Atl. 871; Pennsylvania R. R. Co. v. Marchant, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. Rep. 659; Dooner v. Pennsylvania R. R. Co., 142 Pa. St. 36, 21 Atl. 755; Jones v. Erie & W. R. R. Co., 151 Pa. St. 30, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L.R.A. 758; Pennsylvania Co. for Insurance v. Pennsylvania S. V. R. R. Co., 151 Pa. St. 334, 25 Atl. 107.

⁹Wiley v. Elwood, 134 Ill. 281, 25 N. E. 570; Spring v. Delaware etc. R. R. Co., 88 Hun 385, 34 N. Y. Supp. 810; Thomason v. Seaboard Air Line R. R. Co., 142 N. C. 300, 55 S. E. 198; Daniel v. Ft. Worth etc. Ry. Co., 96 Tex. 327, 72 S. W. 578. So of a turntable. Garvey v. Long Island R. R. Co., 9 App. Div. 254, 41 N. Y. Supp. 397; Garvey v. Long Em. D.—29.

Island R. R. Co., 159 N. Y. 323, 54 N. E. 57, 70 Am. St. Rep. 550. See Cleveland etc. R. R. Co. v. Patterson, 67 Ill. App. 351.

¹⁰Dunsmore v. Central Ia. R. R. Co., 72 Ia. 182.

¹¹Shirley v. Cedar Rapids etc. R. R. Co., 74 Ia. 169, 37 N. W. 133; Bielman v. Chicago etc. R. R. Co., 50 Mo. App. 152. And see Pittsburgh etc. Ry. Co. v. Crothersville, 159 Ind. 330, 64 N. E. 914.

¹²Dolan v. Chicago etc. Ry. Co., 118 Wis. 362, 95 N. W. 385. The court says: "The railway company must use all reasonable diligence in the location of its yards, to avoid injury to others, and must manage them with approved methods, using all reasonable skill to prevent their becoming a nuisance. It cannot unnecessarily or unreasonably locate its yards in close proximity to dwellings or business houses, to their injury, without incurring liability. It must, doubtless, in order to perform its duty, place the yard in a reasonably practicable and convenient location in the vicinity of its station, for the reception and shipping of cattle, but it must at the same time place them where they will do the least possible injury to others. If these requirements be fulfilled, and if the yards be operated without negligence, and with that skill and diligence to avoid noise and noxious smells therefrom which the importance of their duty demands, there can be no liability."

mismanagement the yards become a nuisance, the company will, of course, be liable.¹³ Where a railroad company located its engine house and repair shops close to a church, it was held a recovery could be had for the annoyances and damage caused by the noise, smoke, cinders, etc.¹⁴ But where a railroad station and terminal was located across the street from a church, with tracks crossing the street near the church, it was held that there could be no recovery for the nuisance caused by the noise, smoke, smells and the like, which emanated therefrom.¹⁵ On general principles, when railroad appurtenances such as a round house, switch yards, repair shop or terminal plant cause a nuisance to neighboring property by reason of noise, smoke, cinders, vibrations, etc., there may be a recovery.¹⁶ But there are authorities to the contrary.¹⁷

In England there can be no recovery for such damages, unless allowed by statute, because there is no higher law than an enactment of the legislature.¹⁸ But an act of Parliament, which authorizes what would otherwise be a nuisance, without providing for compensation to those injured, is declared by the courts to be harsh legislation.¹⁹

ity, even though injury may result to others. Such injury, like many others, is simply one of the penalties we have to pay for the conveniences of modern methods of transportation." pp. 365, 366.

And see London etc. R. R. Co. v. Truman, L. R. 11 H. L. 45.

¹³*Anderson v. Burlington etc. Ry. Co., 82 Minn. 293, 84 N. W. 145, 1021; Anderson v. Chicago etc. Ry. Co., 85 Minn. 337, 88 N. W. 1001.*

¹⁴*Baltimore & P. R. R. Co. v. Fifth Baptist Church, 108 U. S. 317; Baltimore & P. R. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 11 S. C. 185. To same effect: Chicago Gt. Western Ry. Co. v. First M. E. Church, 102 Fed. 85, 42 C. C. A. 178, 50 L.R.A. 488. In Porterfield v. Bond, 38 Fed. Rep. 391, the plaintiff recovered for damages caused by vibrations produced by trains running past his premises at a prohibited speed.*

¹⁵*Taylor v. Seaboard Air Line R. R. Co., 145 N. C. 400, 59 S. E. 129.*

¹⁶*Kuhn v. Ill. Cent. R. R. Co., 111 Ill. App. 323; Louisville etc. Terminal Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L.R.A. 188; Louisville etc. Terminal Co. v. Lellyett, 114 Tenn. 368, 85 S. W. 881, 1 L.R.A.(N.S.) 49; Rainey v. Red River etc. Ry. Co., 99 Tex. 276, 89 S. W. 768, 90 S. W. 1096; St. Louis etc. Ry. Co. v. Shaw, 99 Tex. 559, 92 S. W. 30; Texas etc. Ry. Co. v. Edrington, 100 Tex. 496, 101 S. W. 441, 9 L.R.A.(N.S.) 988.*

¹⁷*Ga. R. R. & Banking Co. v. Mad-dox, 116 Ga. 64, 42 S. E. 315; Friedman v. New York etc. R. R. Co., 89 App. Div. 38, 85 N. Y. S. 404; S. C. affirmed, 180 N. Y. 550, 73 N. E. 1123; Ross v. Cincinnati etc. Ry. Co., 5 Ohio C. C. (N.S.) 565.*

¹⁸*See ante, § 103.*

¹⁹"I do not think there can be any doubt that if on the true construction of a statute it appears to be the intention of the legislature that powers should be exercised, the proper exercise of which may occa-

§ 236 (152). Polluting the atmosphere. The owner of land has a right that the air which comes upon his premises shall come in its natural condition, free from artificial impurities.²⁰ This right has its correlative obligation, which is that one must not use his own premises in such a manner as to discharge into the atmosphere of his neighbor dust, smoke, noxious gases or other foreign matter which substantially affect its wholesomeness.²¹ This right is very fully treated by Mr. Wood in his work on Nuisances, and a reference thereto will suffice.²² The right to pure air is property, and to interfere with the right for public use is to take property.²³ "There can be no question

sion a nuisance to the owners of neighboring land, and that this should be free from liability to an action for damages, or an injunction to prevent the continued proper exercise of these powers, effect must be given to the intention of the legislature. No doubt when compensation is not given to those interested in the neighboring land, this is, as against them, harsh legislation." Blackburne, J. in London etc. R. R. Co. v. Truman, L. R. 11 H. L. 45, 60. See also Essex v. Local Board for Acton, L. R. 14 H. L. 153; S. C. 14 Q. B. D. 753, 17 Q. B. D. 447; Rex v. Pease, 4 B. & A. 30, 24 E. C. L. R. 24; Attorney General v. Metropolitan R. R. Co., L. R. (1894) 1 Q. B. D. 384.

²⁰State v. Luce, 9 Houst. 396; Ponder v. Quitman Ginnery, 122 Ga. 29, 49 S. E. 746; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L.R.A. 737; Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18, 25 N. E. 246, 9 L.R.A. 711, 3 Am. R. R. & Corp. Rep. 318; Wood on Nuisance, §§ 469, 494.

²¹Ibid.

²²Wood on Nuisances, Chapters 13 and 14.

²³Baltimore & Potomac R. R. Co. v. Fifth Baptist Church, 108 U. S. 317; Pennsylvania R. R. Co. v. Angel, 41 N. J. Eq. 316; Cogswell v. New

York, New Haven & Hartford R. R. Co., 103 N. Y. 10, 57 Am. Rep. 701; Abendroth v. Manhattan El. Ry. Co., 19 Abb. N. C. 247; Caro v. Same, 46 N. Y. Supr. Ct. 138. But see Briesen v. Long Island R. R. Co., 31 Hun 112. In Cogswell v. New York etc. R. R. Co. the court intimated pretty clearly that it would hold it a taking to fill the atmosphere of one's premises with smoke, soot, gases, etc., if called upon to do so, but decide the case on other grounds. In Pennsylvania R. R. Co. v. Angel the court says: "But, secondly, an act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit, as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners. This principle rests upon the express terms of the constitution. In declaring that private property shall not be taken without recompense, that instrument secures to owners, not only the possession of property, but also those rights which render possession valuable. Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it can

that the erection of gas works, or the setting up of any other noxious trade in the vicinity of my premises that emits noxious odors, which are sent over my lands in quantity and volume, sufficient to essentially interfere with the use of that air for the ordinary purposes of breath and life, so as to constitute a legal nuisance, is such a taking of my property as the legislature may not permit without compensation. What possible distinction can there be between the actual taking of my property, or a part of it, and occupying it for the erection of a railroad track or a gas house and invading it by an agency that operates as an actual abridgment of its beneficial use and possibly a complete and practical ouster? There certainly can be none. By the erection of such works a burden is imposed upon my property; the property itself is actually invaded by an invisible, yet a pernicious, agency, that seriously impairs its use and enjoyment, as well as its value. The impregnation of the atmosphere with noxious mixtures that pass over my land is an invasion of a natural right, a right incident to the land itself, and essential to its beneficial enjoyment. My right to pure air is the same as my right to pure water; it is an incident of the land, annexed to and a part of it, and it is as sacred as my right to the land itself. Therefore, I apprehend that the legislature has no power to shield one from liability for all the consequences of the exercise of an occupation that produces such results any more than it has to authorize the flooding of my lands or the permanent diversion of a stream.”²⁴ Legislative authority to carry on a business does not authorize it to be carried on in such a manner or at such a place that it will be a nuisance to neighboring property.²⁵ An act which authorized a particular business at a particular place which necessarily defiled the air so as to

not be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private domain. This is the taking of his property in a constitutional sense. Of course, mere statutory authority will not avail for such an interference with private property.” p. 329.

²⁴Wood on Nuisances, 1st Ed. § 755.

²⁵N. W. Fertilizer Co. v. Hyde Park, 70 Ill. 634; S. C. affirmed, 97 U. S. 659; Churchill v. Burlington Water Co., 94 Ia. 89, 62 N. W. 646; Payne v. Wayland, 131 Ia. 659, 109 Ia. 203; Baltimore v. Fairfield Imp. Co., 87 Md. 352, 39 Atl. 1081, 67 Am. St. Rep. 344, 40 L.R.A. 494; Bacon v. Boston, 154 Mass. 100, 28 N. E. 9; Matthews v. Stillwater G. & E. L. Co., 63 Minn. 493, 65 N. W. 947;

create a nuisance would be void unless it was for public use, and, if for public use, such as manufacturing gas for a city, would be subject to the constitutional limitation of making compensation.²⁶ Where a city discharges sewerage into a pond or stream or otherwise, so as to create a nuisance, it will be liable.²⁷ So a garbage dump,²⁸ a garbage crematory,²⁹ or sewerage disposal plant,³⁰ or a sewerage farm³¹ may be a nuisance and, if so, will be enjoined. So where a railroad company so constructs

King v. Vicksburg Ry. & Lt. Co., 88 Miss. 456, 42 So. 204, 117 Am. St. Rep. 749, 6 L.R.A. (N.S.) 1036; Board of Health v. Lederer, 52 N. J. L. 675, 29 Atl. 444; Bohan v. Port Jervis Gas Lt. Co., 122 N. Y. 18, 25 N. E. 246, 9 L.R.A. 711; Louisville etc. Terminal Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L.R.A. 188; Rainey v. Red River etc. Ry. Co., 99 Tex. 276, 89 S. W. 768, 90 S. W. 1096; Townsend v. Norfolk Ry. & Lt. Co., 105 Va. 22, 52 S. E. 970, 115 Am. St. Rep. 842, 4 L.R.A. (N.S.) 87.

²⁶Wood on Nuisances, § 750; King v. Vicksburg Ry. & Lt. Co., 88 Miss. 456, 42 So. 204, 117 Am. St. Rep. 749, 6 L.R.A. (N.S.) 1036; Rainey v. Red River etc. Ry. Co., 99 Tex. 276, 89 S. W. 768, 90 S. W. 1096. And generally where, in the construction and operation of public works, a nuisance is created, an action will lie. Central R. R. Co. v. English, 73 Ga. 366; Quinn v. Chicago B. & Q. R. R. Co., 63 Ia. 510; Gould v. Rochester, 105 N. Y. 46; Morgan v. Binghamton, 32 Hun 602; Suffolk v. Parker, 79 Va. 660.

²⁷Lind v. City of San Luis Obispo, 109 Cal. 340, 42 Pac. 437; Platt Bros. & Co. v. Waterbury, 72 Conn. 531, 45 Atl. 154, 77 Am. St. Rep. 335, 48 L.R.A. 691; Waterbury v. Platt Bros. & Co., 75 Conn. 387, 53 Atl. 958, 96 Am. St. Rep. 229; Waterbury v. Platt Bros. & Co., 76 Conn. 435, 56 Atl. 856; Augusta v. Marks, 124 Ga. 365, 52 S. E. 539; Dierks v. Comrs. of Highways, 142 Ill. 197, 31

N. E. 496; City of Jacksonville v. Doan, 145 Ill. 23, 33 N. E. 878; City of Champaign v. Forrester, 29 Ill. App. 117; City of Jacksonville v. Doan, 48 Ill. App. 247; Loughran v. Des Moines, 72 Ia. 382; Randolph v. Bloomfield, 77 Ia. 50, 41 N. W. 562, 14 Am. St. Rep. 268; Middlesex Co. v. City of Lowell, 149 Mass. 509, 21 N. E. 872; Bacon v. Boston, 154 Mass. 100, 28 N. E. 9; Edmundson v. City of Moberly, 98 Mo. 523, 11 S. W. 990; Pierce v. Gibson Co., 107 Tenn. 224, 64 S. W. 33, 89 Am. St. Rep. 946, 55 L.R.A. 477; Winchell v. Waukesha, 110 Wis. 101, 85 N. W. 668, 84 Am. St. Rep. 902. And see Seufferle v. Macfarland, 28 App. Cas. D. C. 94; Bloomington v. Costello, 65 Ill. App. 407; Robb v. Village of La Grange, 57 Ill. App. 386; Barrett v. Mt. Greenwood Cem. Assn., 57 Ill. App. 401; Titus v. City of Boston, 161 Mass. 209, 36 N. E. 793; Lincoln v. Commonwealth, 164 Mass. 368, 41 N. E. 489; Owens v. Lancaster, 182 Pa. St. 257, 37 Atl. 858; Essex v. Local Board for Acton, L. R. 14 H. L. 153; S. C. 14 Q. B. D. 753, 17 Q. B. D. 447.

²⁸Shreck v. Coeur D'Alene, 12 Ida. 708, 87 Pac. 1001; Stephenville v. Brown, 29 Tex. Civ. App. 384, 68 S. W. 833.

²⁹Kobbe v. New Brighton, 23 App. Div. 243.

³⁰Gerow v. Liberty, 106 App. Div. 357, 94 N. Y. S. 949.

³¹Scrivner v. Paris, 26 Tex. Civ. App. 196, 62 S. W. 1075.

its road as to create a stagnant pool, which becomes a nuisance to adjacent property.³² Where a city used land of its own for crushing stone and injured the plaintiff by the dust sent into his atmosphere and deposited upon his land, it was held liable.³³ But where a city acquired land across the street from the plaintiff and built thereon an embankment and bridge from which dust and dirt were projected upon the plaintiff's lot, the city was held not liable, the court treating the question as one of statutory construction only.³⁴ But this case has been overruled.³⁵ Where a water, light or power plant creates a nuisance by reason of gas, smoke, cinders, etc., an action will lie.³⁶ And if the same is authorized by law for a public purpose the damage is a taking.³⁷ A town having power to establish a cemetery may not locate it where it would be a nuisance.³⁸ A hospital or pest house may be enjoined as a nuisance,³⁹ but the erection of

³²Louisville & N. R. R. Co. v. Finley, 86 Ky. 294, 5 S. W. 753; Atlanta & F. R. R. Co. v. Kimberly, 87 Ga. 161, 13 S. E. 277; Lockett v. Ft. Worth & R. G. R. R. Co., 78 Tex. 211, 14 S. W. 564.

³³Waldron v. Haverhill, 143 Mass. 582. *See* Chicago-Virden Coal Co. v. Wilson, 67 Ill. App. 443.

³⁴Rand v. City of Boston, 164 Mass. 354, 41 N. E. 484. *See* Sadlier v. New York, 104 App. Div. 82, 93 N. Y. S. 579; S. C. *affirmed*, 185 N. Y. 408, 78 N. E. 272; Sadlier v. New York, 40 Misc. 78, 81 N. Y. S. 308.

³⁵Hyde v. Fall River, 189 Mass. 439; McKean v. New England R. R. Co., 199 Mass. 292, 295.

³⁶J Hyde Park T. H. Light Co. v. Porter, 167 Ill. 276, 47 N. E. 206; S. C. 64 Ill. App. 152; Chicago North Shore St. Ry. Co. v. Payne, 192 Ill. 239, 61 N. E. 467; Churchill v. Burlington Water Co., 94 Ia. 69, 62 N. W. 646; Matthews v. Stillwater G. & E. L. Co., 63 Minn. 493, 65 N. W. 947; King v. Vicksburg Ry. & Lt. Co., 88 Miss. 456, 42 So. 204, 117 Am. St. Rep. 749, 6 L.R.A.(N.S.) 1036; Gauster v. Met. Elec. Co., 214 Pa. St. 628, 64 Atl. 91.

Edison Elec. Ill. Co., 172 N. Y. 1, 64 N. E. 745; Pritchard v. Edison Elec. Ill. Co., 179 N. Y. 364, 72 N. E. 243, *affirming* S. C. 92 App. Div. 178, 87 N. Y. S. 225; Miller v. Edison Elec. Ill. Co., 184 N. Y. 17, 76 N. E. 734, 3 L.R.A.(N.S.) 1060, *reversing* S. C. 97 App. Div. 638; Bly v. Edison Elec. Ill. Co., 111 App. Div. 170, 97 N. Y. S. 592; S. C. *affirmed* 188 N. Y. 82, 81 N. E. 1160; Gauster v. Met. Elec. Co., 214 Pa. St. 628, 64 Atl. 91; Greenville v. Allard (Tex. Civ. App.) 27 S. W. 292; Townsend v. Norfolk Ry. & Lt. Co., 105 Va. 22, 52 S. E. 970, 115 Am. St. Rep. 842, 4 L.R.A.(N.S.) 87.

³⁷*Ibid.* *See especially* King v. Vicksburg Ry. & Lt. Co., 88 Miss. 456, 42 So. 204, 117 Am. St. Rep. 749, 6 L.R.A.(N.S.) 1036; Gauster v. Met. Elec. Co., 214 Pa. St. 628, 64 Atl. 91.

³⁸Payne v. Wayland, 131 Ia. 659, 109 N. W. 203. *And see* Elliott v. Ferguson, 37 Tex. Civ. App. 40.

³⁹Deaconess Home & Hospital v. Bontjes, 207 Ill. 553, 69 N. E. 748, 64 L.R.A. 215; Cherry v. Williams, 147 N. C. 452.

one will not be enjoined, as it cannot be told in advance whether it will be a nuisance or not.⁴⁰ Likewise an open sewer,⁴¹ or noxious mill dam⁴² may be abated as nuisances.⁴³

§ 237 (152a). Where the public use of land produces a physical or structural injury to adjacent land. Disturbance of the soil by pressure, vibration, flooding or percolation. In *Hennessey v. Carmony*,⁴⁴ the vice-chancellor says: "Upon reason and authority I think there is a clear distinction between that class of nuisances which affect air and light merely, by way of noises and disagreeable gases, and obstruction of light, and those which directly affect the land itself, or structures upon it." But it may be doubted whether there is any good ground, either in legal principles or physical science, for such a distinction. A land owner's right in the space above the surface are quite as important and valuable as his rights in or below the surface, or in structures upon the land. In order to be secure in the enjoyment of his property he needs the same protection for the one sort of rights as for the other. What valid distinction can be made between discharging smoke or noxious gases into the atmosphere, which find their way into the air of the adjoining lot and cause a nuisance, and the discharge of water or noxious liquids which flow upon adjoining property or percolate through its soil so as to create a nuisance upon the land?⁴⁵ The operation of machinery may communicate vibra-

⁴⁰*Manning v. Bruce*, 186 Mass. 282, 71 N. E. 537. *And see Arnold v. Stanford*, 113 Ky. 852, 69 S. W. 726; *Barry v. Smith*, 191 Mass. 78, 77 N. E. 1099, 5 L.R.A.(N.S.) 1028; *Lorain v. Rolling*, 3 Ohio C. C. (N.S.) 660.

⁴¹*Rand Lumber Co. v. Burlington*, 122 Ia. 203, 97 N. W. 1096.

⁴²*Richard v. Dougherty*, 133 Ala. 569, 31 So. 934.

⁴³As to nuisance of fertilizing plant *see Swift v. Broyles*, 115 Ga. 885, 42 S. E. 277, 58 L.R.A. 390; *N. W. Fertilizing Co. v. Hyde Park*, 70 Ill. 634; *S. C. affirmed*, 97 U. S. 659; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L.R.A. 737; *Susquehanna Fertilizer Co. v. Spangler*, 86 Md. 562, 39 Atl. 270, 63 Am. St. Rep. 533.

⁴⁴50 N. J. Eq. 616, 25 Atl. 374. *And see Costigan v. Pennsylvania R. R. Co.*, 54 N. J. L. 233, 23 Atl. 810.

⁴⁵In *Hauck v. Tide Water Pipe Line Co.*, 153 Pa. St. 366, 26 Atl. 644, 34 Am. St. Rep. 710, 20 L.R.A. 642, which was a suit for damages caused by oil which had escaped from the pipes of the defendant and percolated through the soil to the plaintiff's springs, the court says: "The appellant attempted to distinguish this case from *Robb v. Carnegie*, by the fact that in the latter case the smoke and gases from the works were carried by the wind, and lodged upon the plaintiff's land; while in the latter case the escaping oil merely percolated through the soil until it reached plaintiff's springs. The essential difference between being

tions to the air which make life a burden to those in the neighborhood by reason of the noise so produced, and at the same time may communicate vibrations to the land, which crack the walls and shake down the plaster of the houses in which they live. How can a distinction be made between the two, when both kinds of injury go to the extent of materially impairing the use and enjoyment of the property?

Where a railroad company builds an embankment on its own land, which, owing to the yielding nature of the subsoil, settles, and, by lateral pressure, causes an upheaval of the adjacent land, it will be liable for the damage.⁴⁶ Where a city erected a pumping station, upon a lot adjoining plaintiff's, which damaged his property by noise and vibrations, it was held the city was liable, not on the ground of a taking, but on the ground that the legislative authority did not authorize the works where they would be a nuisance, and, therefore, that the city should have selected a different location or acquired more land.⁴⁷ A recovery has been allowed for vibrations caused by an electric light plant.⁴⁸ Where a railroad company builds a fence upon its own land to protect its tracks from snow, it is not liable for an accumulation of snow on the adjoining land caused by the same fence.⁴⁹ Injuries to land by flooding it with water, by interfering with the flow of water, or by the percolation of noxious substances, have been considered in a former chapter.⁵⁰

carried through the air and percolating through the soil has not been made to appear. We regard it as a distinction without a difference."

⁴⁶Herbert v. Pennsylvania R. R. R. Co., 43 N. J. Eq. 21, 10 Atl. 872; Costigan v. Pennsylvania R. R. Co., 54 N. J. L. 233, 23 Atl. 810; Roush-lange v. Chicago & A. R. R. Co., 115 Ind. 103, 17 N. E. 198.

⁴⁷Morton v. New York, 140 N. Y. 207, 35 N. E. 490, 22 L.R.A. 241, affirming 65 Hun 32, 47 N. Y. St. 64, 19 N. Y. Supp. 603. But temporary annoyances of the same kind, while building a tunnel, were held to be *damnum absque injuria*, in Lester v. New York, 79 Hun 479, 29 N. Y. Supp. 1000, though they were continued for nearly three years. *But see* Fitz Simmons & Connell Co. v.

Braun, 199 Ill. 390, 65 N. E. 249, 59 L.R.A. 421; Chicago v. Murdock, 212 Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221; Gossett v. Southern Ry. Co., 115 Tenn. 376, 89 S. W. 737, 112 Am. St. Rep. 846, 1 L.R.A.(N.S.) 97; Farnandis v. Gt. Northern Ry. Co., 41 Wash. 486, 84 Pac. 18, 111 Am. St. Rep. 922, 5 L.R.A.(N.S.) 1086.

⁴⁸Shelfer v. City of London Electric Lighting Co., L. R. (1895), 1 Ch. D. 287.

⁴⁹Carron v. Western R. R. Co., 8 Gray 423.

⁵⁰See chap. iv; also Athens Mfg. Co. v. Rucker, 80 Ga. 292; Stone v. Augusta, 46 Me. 127; Bacon v. Boston, 154 Mass. 100, 28 N. E. Rep. 9; Rise v. City of Flint, 67 Mich. 401, 34 N. W. Rep. 719; Mundy v. New York etc. R. R. Co., 75 Hun 479, 27 N. Y.

§ 238 (152b). If the use of property for public purposes produces a nuisance, those injured are entitled to compensation. This proposition is sustained by many of the cases cited in the preceding sections. It is immaterial whether the particular use of the property in question is authorized by the legislature or not. The right not to be injured by a nuisance on adjoining land cannot be taken without compensation. This seems to us the only logical conclusion.⁵¹ The Massachusetts court has held that "the legislature may authorize small nuisances without compensation, but not great ones."⁵² But where is the line to be drawn? The courts of New Jersey, perceiving this difficulty, have held that it cannot be drawn anywhere, and have hence concluded that the legislature can authorize all nuisances, both great and small.⁵³ But it is certainly more logical, more just and more in keeping with the trend of modern decisions to hold that no right of property can be taken, destroyed or materially impaired, without compensation. Numerous decisions, cited in this and the last three chapters, support this conclusion, and it is unnecessary to repeat them. In a suit to recover for the nuisance of noise, smoke, cinders, etc., caused by a railroad company, the court says: "In legal effect, the nuisance resulting from the use made of these structures by the defendant constitutes a partial taking of the plaintiff's property, for which compensation must be made. If two private citizens own adjacent lots, one cannot establish and maintain on his own lot a nuisance which has the effect of depriving his neighbor of any beneficial use of his lot without making compensation for the injury; and no more can a private corporation erect and maintain a nuisance on its own premises, or in a public street, which has the effect to deprive an adjacent or abutting owner of the beneficial use of his property, without making compensa-

Supp. 469; Hauck v. Tide Water Pipe Line Co., 153 Pa. St. 366, 26 Atl. 644, 34 Am. St. Rep. 710, 20 L.R.A. 642; Riddle's Exrs. v. Delaware County, 156 Pa. St. 643, 27 Atl. Rep. 569; High Bridge Lumber Co. v. United States, 69 Fed. Rep. 320, 16 C. C. A. 460; Broadbent v. Imperial Gas Co., 7 De G. McN. & G. 436; Imperial Gas Co. v. Broadbent, 7 H. L. Cas. 600.

⁵¹Ante, §§ 65 et seq., 235-237.

⁵²Bacon v. Boston, 154 Mass. 100,

102, 28 N. E. 9. And see Davis v. Sawyer, 133 Mass. 239; Commonwealth v. Parks, 155 Mass. 531, 532, 30 N. E. 174; Murtha v. Lovewell, 166 Mass. 391, 44 N. E. 347; Levin v. Goodwin, 191 Mass. 341, 77 N. E. 718, 114 Am. St. Rep. 616.

⁵³Beseman v. Pennsylvania R. R. Co., 50 N. J. L. 235, 13 Atl. Rep. 164. See statement and quotations from the case, ante, § 235, note 2.

tion for the injury. There is no such thing as a natural person or a private corporation having a 'lawful right' to invade the premises of an abutting owner, and appropriate his property; and there is no difference in principle between an actual physical invasion of one's property and the creation and maintenance of a nuisance which has the effect to deprive him of its beneficial use."⁵⁴

§ 239 (153). Miscellaneous decisions as to what constitutes a taking. A leasehold interest in public property derived from the State cannot be taken without compensation.⁵⁵ A right to recover for flowage is a valuable right of property, within the protection of the constitution.⁵⁶ But one has no such vested right in an award of damages for property taken for public use as will prevent the legislature from authorizing a court to set it aside for good cause shown.⁵⁷ The unauthorized use of a patented machine by the government is not a taking, but a mere infringement of a patent right.⁵⁸ Fixing the maximum of fees to be allowed an attorney for defending a pauper charged with crime, does not violate the constitution as to the taking of private property for public use.⁵⁹ One who furnishes books to a State under a contract for less than they are worth, has no claim against the State for the difference on the ground that his property has been taken for public use.⁶⁰

An act authorizing the sale of lands held in joint tenancy, tenancy in common and coparcenary,⁶¹ or the real estate of minors,⁶² is not invalid. Where land is held in trust or for life with remainder over, it has been held that the legislature may authorize the sale of the land and the application of the proceeds according to the rights of the parties.⁶³ A law giving an occupying claimant the option of purchasing the land or selling the improvements, after judgment against him in ejectment, was

⁵⁴Chicago Gt. Western Ry. Co. v. First M. E. Church, 102 Fed. 85, 91, 42 C. C. A. 178, 50 L.R.A. 488.

⁵⁵McCauley v. Waller, 12 Cal. 500; Same v. Brooks, 16 Cal. 11.

⁵⁶Neponset Meadow Co. v. Tileson, 133 Mass. 189.

⁵⁷Matter of Widening Broadway, 61 Barb. 483.

⁵⁸Pitcher v. United States, 1 Ct. of Cl. 7.

⁵⁹Samuels v. County of Dubuque, 13 Ia. 536.

⁶⁰Shoals v. State, 2 Chand. Wis. 182.

⁶¹Richardson v. Munson, 23 Conn. 94.

⁶²Rice v. Parkman, 16 Mass. 326.

⁶³Norris v. Clymer, 2 Pa. St. 277; Sohier v. Mass. General Hospital, 3 Cush. 483, 496; Lindsay v. Hubbard, 44 Conn. 109.

held invalid as a taking.⁶⁴ So of a law authorizing a court to confirm and make valid a deed previously executed by a married woman, which was not properly acknowledged.⁶⁵ The legislature has no power to authorize the sale of private property, for other than public uses, without the consent of the owner, except in cases of necessity, arising from the infancy, insanity, or other incompetency of those in whose behalf it acts.⁶⁶ An act compelling the city of Boston to transfer a cemetery to a private corporation was held invalid.⁶⁷ The property of a private eleemosynary institution cannot be taken away from it by the legislature.⁶⁸ An act that, when a town is divided, part of the property of the old town shall belong to the new, does not violate the constitution.⁶⁹ An act allowing the building of a party wall partly on the adjoining land of another is not a taking.⁷⁰ The legislature may provide that the lien of a special assessment shall take precedence of a prior mortgage.⁷¹ Where vessels, being suspected of being about to sail on a marauding expedition, are detained in accordance with the provisions of a statute, there is no taking within the constitution.⁷² The discontinuance of a railroad is not a taking of the property of those who are damaged thereby.⁷³ So where the laying out of a new highway diverts travel from past the plaintiff's property and renders it less valuable.⁷⁴ An act establishing the Torrens system of land transfers was held to be invalid for the reason, among others, that its operation would take private property for private use and with-

⁶⁴McCoy v. Grandy, 3 Ohio St. 463.

⁶⁵Pearce's Heirs v. Patton, 7 B. Mon. 162, 167.

⁶⁶Powers v. Bergen, 6 N. Y. 358.

⁶⁷Proprietors of Mt. Hope Cemetery v. City of Boston, 158 Mass. 509, 33 N. E. 695. *See also* People v. Porter, 26 Hun 622; Board of Regents v. Painter, 102 Mo. 464, 14 S. W. 938; Webb v. New York, 64 How. Pr. 10.

⁶⁸Board of Education v. Bakewell, 122 Ill. 339.

⁶⁹Bristol v. New Chester, 3 N. H. 533.

⁷⁰Hunt v. Arnbruster, 17 N. J. Eq. 208.

⁷¹Murphy v. Beard, 138 Ind. 560, 39 N. E. 33.

⁷²Graham v. United States, 2 Ct. of Claims, 327. Where the Government had possession of a vessel under a charter party, which gave an option to purchase at an appraised value, and during such possession the vessel is destroyed by the Government, it is to be deemed a taking under the contract and not under the eminent domain power. Bogert v. United States, 2 Ct. of Claims, 159.

⁷³Kinealy v. St. Louis etc. R. R. Co., 69 Mo. 658.

⁷⁴Huff v. Donehoo, 109 Ga. 638, 34 S. E. 1035.

out compensation.⁷⁵ The lessee of a stall in a city market was held to have no such estate therein as would enable him to maintain trespass against a railroad company taking possession under the power of eminent domain.⁷⁶ The legislature authorized a dam across the outlet of a creek in which the tide ebbed and flowed. The dam was built and maintained by the owners of meadows thereby reclaimed from overflow. After being maintained for nearly a hundred years, the legislature declared the creek navigable and ordered the removal of the dam. It was held that the dam was private property and could not be taken without compensation.⁷⁷ Drawing down a mill dam in order to repair a highway or bridge is not a taking.⁷⁸ A statute giving double damages for loss by reason of negligent fires is not unconstitutional, as taking the property of one person for the benefit of another without compensation.⁷⁹ Imposing a fine upon a corporation in obedience to a state law for a refusal to produce books and papers in a judicial proceeding, is neither a taking of property for public use without compensation or a taking without due process of law.⁸⁰ When, in case of emergency, property is seized temporarily for use as a pest house⁸¹ or for a military camp,⁸² the owner is entitled to compensation. Preventing a turnpike company from taking tolls after its franchise has expired is not a taking of property for public use.⁸³ Excepting certain parts of a county from the operation of a general stock law is not a taking as to such parts, though the effect is to turn them into a common pasture.⁸⁴ But requiring the owners of such parts to fence the same is a taking for private use and forbidden by the constitution.⁸⁵ An act providing that unsubdivided tracts of land might, for the purpose of spreading assess-

⁷⁵State v. Guilbert, 56 Ohio St. 575. *But see* People v. Crissman, 41 Colo. 450; People v. Simon, 176 Ill. 165, 52 N. E. 910.

⁷⁶Strickland v. Pennsylvania R. R. Co., 154 Pa. St. 348, 26 Atl. 431.

⁷⁷Glover v. Powell, 10 N. J. Eq. 211.

⁷⁸East Montpelier v. Wheelock, 70 Vt. 391, 41 Atl. 432; Aitken v. Wells River, 70 Vt. 309, 40 Atl. 829, 67 Am. St. Rep. 672, 41 L.R.A. 566.

⁷⁹Allen v. Bainbridge, 145 Mich. 366, 108 N. W. 732.

⁸⁰Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 28 S. C. 178.

⁸¹Brown v. Pierce County, 28 Wash. 345, 68 Pac. 872.

⁸²Chicago v. Chicago League Ball Club, 97 Ill. App. 637.

⁸³State v. Scott County Road Co., 207 Mo. 54, 105 S. W. 752.

⁸⁴Goodale v. Sowell, 62 S. C. 516, 40 S. E. 970.

⁸⁵*Ibid.*

ments for house drains and water service pipes, be divided into lots of twenty-five feet frontage each, was held void as depriving the owner of dominion over his land and thereby taking it *pro tanto* without due process of law.⁸⁶

§ 240 (154). Damages from negligence. Damages resulting from negligence are always actionable. Consequently a recovery may be had for all damages which result from the negligent or improper construction or operation of public works.⁸⁷ Such damages are, of course, not a taking, and are not included in the award of compensation.⁸⁸

§ 241. Public property not within the constitutional provision. An act of Illinois provided for the organization of drainage districts and the construction by the district of ditches, drains and levees, and authorized the drainage commissioners to remove any bridge, culvert or embankment, if found necessary in their judgment, and required the proper corporate authorities to reconstruct or replace the same at their own expense. In case of a district organized under the act, the commissioners found it necessary to enlarge a creek and, in order to do so, removed a county bridge over the same. The counties owning the bridge sued for damages and the court held that the bridge was public property and not within the protection of the constitution, that the acts of the defendants were within the authority of the statute and that they were not liable.⁸⁹ In a proceeding by the United States to condemn a portion of the town of Nahant

⁸⁶Chicago v. Wells, 236 Ill. 129.

⁸⁷Terre Haute & Indiana R. R. Co. v. McKinley, 33 Ind. 274; Blood v. Nashua & Lowell R. R. Co., 2 Gray 137, 61 Am. Dec. 444; Estabrooks v. Peterborough & Shirley R. R. Co., 12 Cush. 224; Bungenstock v. Nishnabotna Dr. Dist., 163 Mo. 198, 64 S. W. 149; Johnson v. Atlantic & St. Lawrence R. R. Co., 35 N. H. 569; Delaware etc. Canal Co. v. Lee, 22 N. J. L. 243; Bellinger v. New York Central R. R. Co., 23 N. Y. 42; Robinson v. New York & Erie R. R. Co., 27 Barb. 512; Waterman v. Connecticut etc. R. R. Co., 30 Vt. 610.

⁸⁸Cases in last note. Post, §§ 714, 829; Board of Comrs. v. State, 147 Ind. 476.

⁸⁹Heffner v. Cass and Morgan

Counties, 193 Ill. 439, 62 N. E. 201, 58 L.R.A. 353. The court says: "We are unable to see that this constitutional provision relates in any way to the question in controversy. The bridge in question in this case was not private property, but belonged to the public. In no legal sense can it be said that roads and bridges in counties are private property. Counties are but political subdivisions of the State, and are subject to the full control of the State acting through the legislature by general law, and the property they hold is not private but public property. * * * Such being the law, it is clear that the constitutional provision involved has no application to this case, and that the legislature has full power to

for defensive purposes, including all roads, ways and avenues included within the description and all buildings and structures thereon, the town made a claim for compensation for the streets, street improvements, water pipes and sewers taken and for damage to the water and sewerage systems by the taking. The State of Massachusetts had given its consent to the appropriation. It was assumed that the State might have taken all of this property without compensation to the town but it was held that its consent to the taking did not have the effect to transfer this right to the federal government and that the town was entitled to compensation for all the items claimed, except the soil of the streets.⁹⁰

§ 242 (155). Taking under the guise of taxation. We have already distinguished the eminent domain power from that of taxation.⁹¹ Many attempts have been made to invalidate a tax on the ground that it was a violation of the constitutional provision prohibiting the taking of private property for public use without just compensation. But, with a few exceptions, it has generally been held that this limitation has no application to the taxing power. The limitations upon that power are to be found in the nature of the power itself, and in other provisions of the constitution having express reference to taxation.⁹² Accordingly it has been held that a water tax,⁹³ a tax to pay bounties to soldiers,⁹⁴ or a tax in aid of a railroad or similar public works,⁹⁵ or upon the franchises or business of a corporation,⁹⁶ is

authorize another public corporation to remove a public bridge over a stream which runs across a public highway without compensation, although such bridge may have been constructed by the county." pp. 448, 449.

⁹⁰Nahant v. United States, 136 Fed. 273, 70 C. C. A. 641, 69 L.R.A. 723; United States v. Nahant, 153 Fed. 520, 82 C. C. A. 470. See ante, § 175.

⁹¹Ante, § 4.

⁹²Cooley on Taxation, chap. 3.

⁹³Allen v. Drew, 44 Vt. 174.

⁹⁴State v. Demarest, 32 N. J. L. 528; Booth v. Woodbury, 32 Conn. 118. Such a tax held invalid as being for a private purpose. Opinion of Justices, 186 Mass. 603, 72 N. E. 95;

Opinion of Justices, 190 Mass. 611, 77 N. E. 820.

⁹⁵Gibbons v. Mobile & Great Northern R. R. Co., 36 Ala. 410; Stein v. Mobile, 24 Ala. 591; President & Comrs. of Revenue v. State, 45 Ala. 399; Aurora v. West, 9 Ind. 74; Stewart v. Supervisors of Polk County, 30 Ia. 9, 1 Am. Rep. 238; Clarke v. Rochester, 24 Barb. 446; Grant v. Courter, 24 Barb. 232; Gibson v. Mason, 5 Nev. 283, 303; C. W. etc. R. R. Co. v. Clinton County, 1 Ohio St. 101-2; Norris v. City of Waco, 57 Tex. 635; Gilman v. Sheboygan, 2 Black 510; Pine Grove v. Talcott, 19 Wall. 666; County of Mobile v. Kimball, 102 U. S. 691.

⁹⁶Horn Silver Min. Co. v. New

not a taking of private property under the eminent domain power. The only instances in which a proposed tax has been held to be a taking, and so within the limitations imposed upon the exercise of the power of eminent domain by the legislature, are special assessments for local improvements and the taxation of farming lands for municipal purposes.⁹⁷

The question as to special assessments has been discussed in a former chapter.⁹⁸ It has been held in many cases that a special assessment upon property for a local improvement in excess of the benefits accruing to the property therefrom, is as to such excess a taking of property for public use without compensation.⁹⁹ The supreme court of Nebraska says that "it is elementary constitutional law that the only foundation for a local assessment lies in the special benefits conferred by the improvement, and that a local assessment beyond the special benefits conferred is a taking of private property for public use without compensation."¹ On the other hand the Supreme Court of the United States has recently sustained a statute of Missouri which required the whole cost of a local improvement to be assessed upon the abutting property according to frontage and which made no provision for determining the question of benefits.² And many other cases in the same and other courts have held the same view.³ Where part of a lot or tract is taken for opening

York, 143 U. S. 305, 12 S. C. 403. A tax on telegraph poles in streets, is valid. *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 S. C. 485, 7 Am. R. R. & Corp. Rep. 589; *St. Louis v. Western Union Tel. Co.*, 149 U. S. 465, 13 S. C. 990; *Postal Tel. Cable Co. v. Baltimore*, 79 Md. 502, 29 Atl. 819, 24 L.R.A. 161. See *Hedges v. Western Union Tel. Co.*, 72 Miss. 910, 18 So. 84, 29 L.R.A. 770.

⁹⁷See, as to license tax, *Livingston v. Paducah*, 80 Ky. 656.

⁹⁸*Ante*, § 5.

⁹⁹*Adams v. Shelbyville*, 154 Ind. 467, 57 N. E. 114, 77 Am. St. Rep. 484, 49 L.R.A. 797; *Louisville v. Bitser*, 115 Ky. 359, 73 S. W. 1115; *Weed v. Boston*, 172 Mass. 28, 51 N. E. 204, 42 L.R.A. 642; *Sears v. Street*

Commissioners, 173 Mass. 350, 53 N. E. 138; *Dexter v. Boston*, 176 Mass. 247, 57 N. E. 379, 79 Am. St. Rep. 306; *Lorden v. Coffey*, 178 Mass. 489, 60 N. E. 124; *Edwards v. Bruorton*, 184 Mass. 529, 69 N. E. 328; *State v. Pilsbury*, 82 Minn. 359, 85 N. W. 175; *Cain v. Omaha*, 42 Neb. 120, 60 N. W. 368; *King v. Portland*, 38 Ore. 402, 63 Pac. 2, 55 L.R.A. 812; *Hutchinson v. Storrie*, 92 Tex. 685, 51 S. W. 848, 45 L.R.A. 289; *Lathrop v. Racine*, 119 Wis. 461, 97 N. W. 192.

¹*Cain v. Omaha*, 42 Neb. 120, 60 N. W. 368.

²*French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 21 S. C. 625.

³*Montgomery v. Moore*, 140 Ala. 638, 37 So. 291; *Barfield v. Gleason*, 111 Ky. 491, 63 S. W. 964; *Voight v. Detroit*, 123 Mich. 547, 82 N. W. 253;

or widening a street, it has been held that the cost of the part taken cannot be assessed upon the part remaining to an amount exceeding the special benefits to such part by the opening or widening of the street.⁴ And where the constitution forbids the consideration of benefits in case of property taken for public use, no part of the cost of the property taken can be assessed back upon the part not taken.⁵ A sale of property to pay a special assessment or any other tax is not a taking.⁶

Goodrich v. Detroit, 123 Mich. 559, 82 N. W. 255; Cass Farm Co. v. Detroit, 124 Mich. 433, 83 N. W. 108; Wilzinski v. Greenville, 85 Miss. 393, 37 So. 807; Edwards House Co. v. Jackson, 91 Miss. 429, 45 So. 14; Prior v. Buchler etc. Co., 170 Mo. 439, 71 S. W. 205; McMillan v. Butte, 30 Mont. 220, 76 Pac. 203; People v. Pitt, 169 N. Y. 521, 62 N. E. 662, 58 L.R.A. 372, *affirming* S. C. 64 App. Div. 316, 72 N. Y. S. 191; Webster v. Fargo, 9 N. D. 208, 82 N. W. 732, 56 L.R.A. 156; Harrisburg v. McPherran, 200 Pa. St. 343, 49 Atl. 988; Wight v. Davidson, 181 U. S. 371, 21 S. C. 616; Tonawanda v. Lyon, 181 U. S. 389, 21 S. C. 609; Webster v. Fargo, 181 U. S. 394, 21 S. C. 645; Cass Farm Co. v. Detroit, 181 U. S. 396, 21 S. C. 644; Detroit v. Parker, 181 U. S. 399, 21 S. C. 645; Wormley v. District of Columbia, 181 U. S. 402, 21 S. C. 609; Shumate v. Heman, 181 U. S. 402, 21 S. C. 645; Schaeffer v. Werling, 188 U. S. 516, 23 S. C. 449; Hibben v. Smith, 191 U. S. 310, 24 S. C. 88; Cleveland etc. Ry. Co. v. Porter, 210 U. S. 177, 28 S. C. 647. *And see* Harton v. Avondale, 147 Ala. 458, 41 So. 934; Coffman v. St. Francis Dr. Dist., 83 Ark. 54, 103 S. W. 179; State v. Robert P. Lewis Co., 72 Minn. 87, 75 N. W. 108, 42 L.R.A. 639; Sperry v. Flygare, 80 Minn. 325, 83 N. W. 177, 81 Am. St. Rep. 261, 49 L.R.A. 757; State v. Robert P. Lewis Co., 82 Minn. 390, 85 N. W. 207, 86 N. W. 611, 53 L.R.A.

421; State v. Macalester College, 87 Minn. 165, 91 N. W. 484.

⁴Davidson v. Wight, 16 App. Cases D. C. 371; Cain v. Omaha, 42 Neb. 120, 60 N. W. 368; Hutchinson v. Storrie, 92 Tex. 685, 51 S. W. 848, 45 L.R.A. 289; Norwood v. Baker, 172 U. S. 269; Martin v. District of Columbia, 205 U. S. 135, 27 S. C. 440. "The courts will not permit municipalities to evade the provision of the constitution that the property of no person shall be taken or damaged for public use without just compensation by paying the compensation, and then, under the guise of taxation, taking it back from the person entitled." Cain v. Omaha, 42 Neb. 120, 60 N. W. 368. But in City of Covington v. Worthington, 88 Ky. 206, 10 S. W. 790, 11 S. W. 1038, a street was extended through the plaintiff's property, and he was assessed for benefits more than the amount of his damages, and the assessment was sustained. *And see* Turner v. City of Detroit, 104 Mich. 326, 62 N. W. 405. A statute authorizing a personal judgment for special assessments was held invalid as permitting a taking without compensation. Raleigh v. Peace, 110 N. C. 32, 14 S. E. 521, 17 L.R.A. 330.

⁵Cincinnati etc. Ry. Co. v. Cincinnati, 62 Ohio St. 465, 57 N. E. 229, 49 L.R.A. 566; Dayton v. Bauman, 66 Ohio St. 379, 64 N. E. 433.

⁶Williams v. Cammack, 27 Miss. 209.

It has been held in Kentucky that lands used simply for agricultural purposes cannot be annexed to a city and subjected to the payment of municipal taxes, for the reason that such a tax is an attempt to take private property for public use without just compensation, and is therefore void.⁷ These decisions have been followed in Iowa⁸ and in an early case in Nebraska,⁹ which latter case however was subsequently overruled.¹⁰ The principle has been extended to a railroad bridge within the limits of a city but separated from the built-up part by a mile of farming lands.¹¹ An act authorizing a city to tax farming land outside of its limits, which was so situated as not to be benefited by the expenditure of the tax, was held void as an attempt to take property for public use without compensation.¹²

⁷Cheaney v. Hooser, 9 B. Mon. 330, 344; Covington v. Southgate, 15 B. Mon. 491; Sharp v. Dunavan, 17 B. Mon. 223; Malthers v. Shields, 2 Met. (Ky.) 553. In Arbegust v. City of Louisville, 2 Bush 271, 275, 276, it is said: "When in the judgment of the legislature the interest of a suburban population demands local regulations, and the peace, tranquility, and order of the public indicates that such is necessary, we cannot doubt its constitutional power to so enact, nor question its power to tax for such purposes the real as well as the personal estate of the people, nor the large as well as the small lots included therein; for it is more consonant with the entire genius, equality, and justice of our constitution and laws, that each should bear the burdens of that government which protects his person and property according to the worth of his estate, than to discriminate against the small in favor of the large property-holders. But whatever may be said of the intrinsic justice of such measures, there is no power in the courts to control this when the taxing power is conferred in good faith to uphold local government, and give police regulations to the population, and not merely to embrace taxable prop-

Em. D.—20.

erty for revenue purposes in order to lighten the burdens of others. And these are the principles heretofore announced and adhered to by this court through a train of decisions including the cases of Cheaney v. Hooser, 9 B. M. 330; Sharp's Ex'r v. Dunaven, 17 B. M. 223; Maltus v. Shields, 2 Met. 553, and Southgate v. Covington, 15 B. M. 291. It is sometimes difficult to determine from the facts whether local government to a population or taxation for revenue purposes be the real incentive to the enactment; but when this is clearly manifested, then the proper application of the principle is not embarrassing." See also Board of Trustees v. Gill, 94 Ky. 138, 21 S. W. 579.

⁸Morford v. Unger, 8 Ia. 82; Langworthy v. Dubuque, 13 Ia. 86; Same v. Same, 16 Ia. 271; Fulton v. Davenport, 17 Ia. 404; Buell v. Ball, 20 Ia. 282; O'Hare v. Dubuque, 22 Ia. 144; Deiman v. Ft. Madison, 30 Ia. 542; Taylor v. Waverly, 94 Ia. 661, 63 N. W. 347.

⁹Bradshaw v. Omaha, 1 Neb. 16.

¹⁰Turner v. Althaus, 6 Neb. 54.

¹¹Arnd v. Union Pac. R. R. Co., 120 Fed. 912, 57 C. C. A. 184.

¹²Territory of Utah v. Daniels, 6 Utah 288, 22 Pac. 159.

In Wisconsin it has been held that farming lands cannot be annexed to a village for the sole purpose of increasing its taxable property, and that the act of annexation itself was void.¹³ The current of authority, however, as well as the reason of the matter, is clearly the other way.¹⁴ Municipal corporations, their existence, extent, and powers, are entirely within the control of the legislature, unless restrained by other provisions of the constitution than that relating to eminent domain. The legislature may divide or consolidate them, expand or contract their limits as it sees fit. These propositions are almost elementary and substantially undisputed. For the courts to say what lands within a municipal corporation may be taxed for municipal purposes, and what not, is clearly judicial legislation and involves insuperable difficulties. These are well pointed out by the supreme court of Nebraska in *Turner v. Athaus*,¹⁵ from which we quote as follows: "The rule contended for is, that the theory of compensation to the owner of property within the corporate limits of a city by way of protection or benefit, derived from the city government, applies to property used and occupied for city purposes, and is co-extensive, only, with that line or point where it ceases to operate beneficially to the proprietor in a municipal point of view. Who is the arbiter to define this line—and where is it to be exactly found? If the judiciary is to act as such arbiter, then it seems clear that it must do one of two things, either to pronounce the act unconstitutional —(as in *Smith v. Sherry*,)¹⁶ and upon such decision, as already shown, the tax district will be destroyed—or it must, by legislative action, amend and change the law, and classify the property within the city limits, so as to subject part thereof to taxation, and exempt the other part from taxation, and this must be done by piecemeal as each case shall arise. But in the adjudication of cases which must constantly arise under the rule contended for, it seems impossible to discover any test, or criterion, by which uniformity and certainty of decisions may be obtained. The opinions of men are so diversified and

¹³*Smith v. Sherry*, 50 Wis. 210.

6 Neb. 54; *Kelley v. Pittsburgh*, 85

¹⁴*Stiltz v. Indianapolis*, 55 Ind. 515; *Logansport v. Seybold*, 59 Ind. 225; *Giboney v. Cape Girardeau*, 58 Mo. 141; *Groff v. Frederick City*, 44 Md. 67; *Martin v. Dix*, 52 Miss. 53.

Pa. St. 170; *Appeal of Hewitt*, 88 Pa. St. 55; *Noris v. City of Waco*, 57 Tex. 635; *Forsythe v. City of Hammond*, 68 Fed. 774.

24 Am. Rep. 661; *Turner v. Althaus*,

¹⁵6 Neb. 54, 74.

¹⁶50 Wis. 210.

varied, that what to one mind may seem clearly right and proper, to another may clearly appear to be wrong and unjust. By one court lands may be adjudged subject to taxation, and by another the same lands, or lands similarly situated, may be adjudged exempt from taxation. Which would be right? Who can decide the question? It therefore seems difficult to escape the conclusion that the decision of each case, as it shall arise, must depend upon the caprice of the arbiter who determines it, for he cannot resolve the question upon any principle of legal science. Hence the exercise of judicial power in apportioning the taxes of a district affords no security against the abuse of the taxing power; but on the contrary, it may be fraught with more danger, and result in greater injustice, than a uniform system of taxation established by legislative enactment."

An act providing for fencing a large tract of land and levying a tax to build and maintain the fences, was held void as being for a private purpose and as a taking of private property, without compensation.¹⁷

§ 243 (156). Taking under the guise of the police power. Regulating the use of property, the construction, repair and height of buildings and the like. Fire limits. While the theoretical distinction between the police power and the power of eminent domain is clear and definite, it is not always easy to distinguish them in their practical application. That is sometimes attempted under the police power which can only be accomplished by an exercise of eminent domain. We shall not go at length into this question, but advert briefly to some of the cases in which the question has been made. All property is subject to the police power of the State¹⁸ and, under this power, uses of property which are detrimental to the public health, safety, morals and welfare, may be regulated and restrained.¹⁹

¹⁷Hancock Stock & Fence Law Co. v. Adams, 87 Ky. 417, 9 S. W. 246; Fort v. Goodwin, 36 S. C. 445, 15 S. E. 723. *And see* Cypress Pond Dr. Co. v. Hooper, 2 Met. (Ky.) 350.

¹⁸In re Kelso, 147 Cal. 609, 82 Pac. 241, 109 Am. St. Rep. 178, 2 L.R.A. (N.S.) 796; Chicago v. Jackson, 196 Ill. 496, 63 N. E. 1013; Commonwealth v. Alger, 7 Cush. 53; State v. St. Paul City Ry. Co., 78 Minn. 331,

81 N. W. 200; Westport v. Mulholland, 159 Mo. 86, 60 S. W. 77, 53 L.R.A. 442; Tenement House Dept. v. Moeschen, 179 N. Y. 325, 72 N. E. 231, 103 Am. St. Rep. 910, 70 L.R.A. 704.

¹⁹*Ibid.* Greenburg v. Western Turf Ass., 140 Cal. 357, 73 Pac. 1050; Same v. Same, 148 Cal. 126, 82 Pac. 684; New Orleans v. Murat, 119 La. 1093, 44 So. 898; Belmont v. New

Fire limits may be established and the manner of building regulated with a view to preventing the spread of fires.²⁰ The erection or repairing of wooden buildings in cities may be prohibited, and such a regulation is not a taking of a partially destroyed building.²¹

The height of buildings may be limited, as very high buildings increase the danger to persons and property in case of fire and may affect the public health by shutting out light, air and sunshine.²² An act of Massachusetts limiting the height of buildings in the business district of Boston to one hundred and twenty-five feet and in the residence district to eighty feet and providing for fixing the boundaries of the district by a commission was held valid as an exercise of the police power.²³ Statutes of Massachusetts limiting the height of buildings around Copley Square in Boston and about the State House, made provision for compensation.²⁴

An act prohibiting the use of any building not "now" used for that purpose, for slaughtering, rendering and the like, is

Eng. Brick Co., 190 Mass. 442, 77 N. E. 504; St. Louis v. Galt, 179 Mo. 8, 77 S. W. 876, 63 L.R.A. 778; Western Turf Ass. v. Greenburg, 204 U. S. 359, 27 S. C. 384; Halter v. Nebraska, 205 U. S. 34, 27 S. C. 419; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 27 S. C. 412.

²⁰Canepa v. Birmingham, 92 Ala. 358, 7 So. 180; Ex parte Fisher, 72 Cal. 125; Wadleigh v. Gilman, 12 Me. 403, 28 Am. Dec. 188; Salem v. Maynes, 123 Mass. 372; Brady v. Northwestern Insurance Co., 11 Mich. 425; Hubbard v. Medford, 20 Or. 315, 25 Pac. Rep. 640; Knoxville v. Bird, 12 Lea 121, 47 Am. Rep. 326; Roanoke v. Bolling, 101 Va. 182, 43 S. E. 343; City of Olympia v. Mann, 1 Wash. 389, 25 Pac. 337, 12 L.R.A. 150; Wheeler v. Aberdeen, 45 Wash. 63, 87 Pac. 1061.

²¹First Nat'l Bank v. Sarlls, 129 Ind. 201, 28 N. E. 434, 5 Am. R. R. & Corp. Rep. 77, 28 Am. St. Rep. 185, 23 L.R.A. 807; Brady v. Northwestern Insurance Co., 11 Mich. 425;

State v. Johnson, 114 N. C. 846, 19 S. E. 599; Klinger v. Bickal, 117 Pa. St. 326, 11 Atl. 555.

²²Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77, 47 L.R.A. 314; Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 118 Am. St. Rep. 523; Am. Unitarian Ass. v. Commonwealth, 193 Mass. 470, 79 N. E. 878; People v. D'Oench, 111 N. Y. 359, 18 N. E. 862.

²³Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 118 Am. St. Rep. 523. This case *affirmed* by Supreme Court of United States May 17, 1909.

²⁴Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77, 47 L.R.A. 314; Parker v. Commonwealth, 178 Mass. 199, 59 N. E. 634; Attorney General v. Williams, 178 Mass. 330, 59 N. E. 812; Cole v. Boston, 181 Mass. 374, 63 N. E. 1061; Williams v. Boston, 190 Mass. 541, 77 N. E. 509; Am. Unitarian Ass. v. Commonwealth, 193 Mass. 470, 79 N. E. 878.

not unconstitutional as interfering with private property without compensation.²⁵ The use of property in certain localities for carrying on unwholesome or objectionable manufactures or business, may be prohibited.²⁶ And an act prohibiting the use of property for certain purposes or the carrying on of a business injurious to the public health or public morals, though authorized by the legislature and though it may destroy and greatly impair the value of property, is neither a taking for public use under the power of eminent domain, nor a violation of a contract.²⁷ But such regulations must be reasonable in view of the rights of property as well as the public welfare. In the month of August the city of Los Angeles passed an ordinance fixing the limits within which gas works might be erected and carried on. The plaintiff bought property within this district, obtained a permit for the erection of gas works thereon and in September commenced the works. In November of the same year the city amended the ordinance so as to exclude the plaintiff's property from the district and thereby made it a penal offense for the plaintiff to proceed and operate his works. The Supreme Court of the United States, reversing the supreme court of California, held that the amendment was not a proper police regulation and amounted to a taking of the plaintiff's property without due process of law.²⁸ An ordinance making it a misdemeanor to

²⁵Watertown v. Mayo, 109 Mass. 315, 12 L.R.A. 694.

²⁶Ex parte Lacey, 108 Cal. 326, 41 Pac. 411, 49 Am. St. Rep. 93, 38 L.R.A. 640; Green v. Savannah, 6 Ga. 1; Waters Pierce Oil Co. v. New Iberia, 47 La. An. 863, 17 So. 343; City of Newark v. Watson, 56 N. J. L. 667, 29 Atl. 487, 24 L.R.A. 843; State v. Pendergrass, 106 N. C. 664, 10 S. E. 1002; City of Austin v. Austin City Cem. Ass'n, 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114, 11 Am. R. R. & Corp. Rep. 265.

²⁷Northwestern Fertilizing Co. v. Hyde Park, 70 Ill. 634, *affirmed*, 97 U. S. 659; Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, same case below, 4 Wood 96; Boyd v. Alabama, 94 U. S. 645; Beer Co. v. Massachusetts, 97 U. S. 25; Stone v. Mississippi, 101 U. S. 814; Spring v.

Park, 89 Md. 406. In Lake View v. Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71, three of the seven judges dissenting, it was held that the Cemetery Company, having been authorized by charter to acquire five hundred acres of land in Lake View, to be used for cemetery purposes, could not be deprived of the privileges of using a portion of the land so acquired for cemetery purposes, without compensation. *See also* New Orleans Water Works Co. v. St. Tammany Water Works Co., 4 Wood 134.

²⁸Dobbins v. Los Angeles, 195 U. S. 223, 25 S. C. 18, *reversing* S. C. 139 Cal. 179, 72 Pac. 970, 96 Am. St. Rep. 95; Daly v. Elton, 195 U. S. 242, 25 S. C. 22, *reversing* S. C. Sub Nom. In re Daly, 139 Cal. 216, 72 Pac. 1097.

maintain gas works in a sparsely settled district was held unreasonable and void.²⁹ An act of New York making it unlawful to carry on or continue in the borough of Brooklyn the business of rendering garbage was held to be unconstitutional as to the plaintiff's plant, situated upon an island and not a nuisance or detrimental to health and representing an investment of half a million.³⁰

The legislature may regulate the construction and use of wharves and piers and prescribe dock lines,³¹ but cannot declare a dock which has been rightly and properly built, a nuisance, and abate it without compensation, because it projects beyond a dock line afterwards established.³² An act prohibiting the taking of sand or gravel from a sea beach was held valid as a proper regulation of the use of private property for the preservation of Boston harbor, and a person violating the act was found guilty though he owned the fee of the land whence he took the sand.³³ But an act prohibiting a railroad company from opening an embankment, which protected the shore from the waves and tide, was held an unlawful restriction upon the use of property.³⁴

A statute prohibiting natural gas to be sent through pipes at a greater pressure than 300 pounds to the square inch was held to be a valid police regulation and not a taking.³⁵ A statute to prevent the waste of natural gas or oil from wells is a valid police regulation and not a taking of property without compensation.³⁶

The construction and use of billboards upon private property may be regulated so far as necessary to provide for the

²⁹In re Smith, 143 Cal. 368, 77 Pac. 180.

³⁰N. Y. Sanitary Utilization Co. v. Dept. of Health, 61 App. Div. 106, 70 N. Y. S. 510. For other regulations held invalid as a taking or unlawful interference with private property see George v. Chester, 59 Misc. 553; Heaton v. Chester, 59 Misc. 558; Malone v. Williams, 118 Tenn. 390; State v. Redmond, 134 Wis. 89, 114 N. W. 137. In the last case the upper berth law of Wisconsin was held invalid as a taking of private property for private use.

³¹State v. Sargent, 45 Conn. 358; Commonwealth v. Alger, 7 Cush. 53; Roosevelt v. Godard, 52 Barb. 533.

³²Chicago v. Laflin, 49 Ill. 172; Yates v. Milwaukee, 10 Wall. 497; Ryan v. Brown, 18 Mich. 196, 100 Am. Dec. 154.

³³Commonwealth v. Tewksbury, 11 Met. 55.

³⁴Koch v. Delaware etc. R. R. Co., 53 N. J. L. 256, 21 Atl. 284.

³⁵Jamieson v. Ind. Nat. Gas & Oil Co., 128 Ind. 555, 28 N. E. 76, 12 L.R.A. 652.

³⁶State v. Ohio Oil Co., 150 Ind.

public safety and welfare and various regulations of this sort have been sustained.³⁷ But an ordinance forbidding the erection of signs or billboards upon private property without regard to any danger to the public was held void as an attempt to take private property without compensation.³⁸ So of an act or regulation forbidding the use of private property in the vicinity of parks and boulevards for such purposes.³⁹ So of an ordinance of Passaic forbidding the erection of billboards more than eight feet high, or within ten feet of the street line or without a permit from the building inspector.⁴⁰ But a very similar ordinance was held valid in New York.⁴¹ A game law of New York forbidding the possession of game during the closed season under a penalty, was held valid even as applied to game brought from without the State.⁴²

Fishing with a net or seine may be prohibited, even in private waters.⁴³ An ordinance limiting the amount of land any person or family may cultivate within a city is not void as a

21, 49 N. E. 809; Ohio Oil Co. v. State, 150 Ind. 694, 49 N. E. 1107; Ohio Oil Co. v. State, 150 Ind. 698, 50 N. E. 1124; Given v. State, 160 Ind. 552, 66 N. E. 750; Commonwealth v. Trent, 117 Ky. 35, 77 S. W. 390; Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 S. C. 576; Same v. Same, 177 U. S. 212, 20 S. C. 585; Same v. Same, 177 U. S. 213, 20 S. C. 585. A similar statute to prevent the waste of water from artesian wells was held void in Wisconsin. Huber v. Merkel, 117 Wis. 355, 94 N. W. 354, 62 L.R.A. 589. *See contra*, Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811.

³⁷Chicago v. The Gunning System, 214 Ill. 628, 73 N. E. 1035, 70 L.R.A. 230; Rochester v. West, 164 N. Y. 510, 58 N. E. 673, 79 Am. St. Rep. 659, 53 L.R.A. 548, *affirming* S. C. 29 App. Div. 125, 51 N. Y. S. 482; Gunning System v. Buffalo, 75 App. Div. 31, 77 N. Y. S. 987; In re Wilshire, 103 Fed. 620; Whitmier & F. Co. v. Buffalo, 118 Fed. 773. *And see* Gunning System v. Buffalo, 62 App. Div. 497, 71 N. Y. S. 155.

³⁸Bill Posting Sign Co. v. Atlantic City, 71 N. J. L. 72, 58 Atl. 342.

³⁹Commonwealth v. Boston Advertising Co., 188 Mass. 348, 74 N. E. 601, 108 Am. St. Rep. 494, 69 L.R.A. 817; People v. Green, 85 App. Div. 400, 83 N. Y. S. 460.

⁴⁰Passaic v. Paterson Bill Posting Co., 72 N. J. L. 285, 62 Atl. 267, 111 Am. St. Rep. 676, *reversing* S. C. 71 N. J. L. 75, 58 Atl. 343. *And see* Crawford v. Topeka, 53 Kan. 756.

⁴¹Rochester v. West, 164 N. Y. 510, 58 N. E. 673, 79 Am. St. Rep. 659, 53 L.R.A. 548, *affirming* S. C. 29 App. Div. 125, 51 N. Y. S. 482.

⁴²New York v. Hesterberg, 211 U. S. 31, *affirming* People v. Hesterberg, 184 N. Y. 126, 76 N. E. 1032.

⁴³People v. Bridges, 142 Ill. 30, 31 N. E. 115, 16 L.R.A. 684; Commonwealth v. Follett, 164 Mass. 477, 41 N. E. 676; Ex parte Fritz, 86 Miss. 210, 38 So. 722, 109 Am. St. Rep. 700; State v. Theriault, 70 Vt. 617, 41 Atl. 1030, 67 Am. St. Rep. 695.

taking.⁴⁴ Nor an ordinance imposing a penalty for permitting water to run upon a street or alley from any well or spring.⁴⁵ The legislature may prohibit a use of property which violates a duty that the owner owes to his neighbor or the State, and hence may prohibit the owner of lands, delinquent for taxes, from peeling bark or cutting timber thereon.⁴⁶ Where a city gave the plaintiff the exclusive right of boating and fishing on its reservoir in part consideration of lands conveyed for its water works, such use cannot be prohibited without compensation.⁴⁷ Private property cannot be seized and occupied as a smallpox hospital under the police power.⁴⁸ An act which restricts one in the use of his property in a particular manner in order that another may use his in that manner to greater advantage is void.⁴⁹ An act excepting certain tracts of land from the operation of a law giving the right to distrain and impound trespassing cattle, thus leaving such tracts to be trespassed upon without redress, was held to deprive the owners of such tracts of their property without due process of law.⁵⁰ Pursuant to a grant from a city, a railroad company laid down side tracks in a street and used them for seventeen years for loading and unloading cars. The city then passed an ordinance forbidding such use of the streets. It was held that the grant was a franchise and irrevocable; that the effect of the ordinance was to destroy it, and that its enforcement should be enjoined.⁵¹ An act compelling railroad companies to permit the erection and operation of elevators on their right of way at a nominal rental, was held void, as a taking without compensation.⁵² A law mak-

⁴⁴Town of Summerville v. Pressley, 33 S. C. 56, 11 S. E. 545, 8 L.R.A. 854, 3 Am. R. R. & Corp. Rep. 101. "This power to restrain a private injurious use of property is very different from the right of eminent domain."

⁴⁵Staggs v. City of Martinsville, 140 Ind. 476, 39 N. E. 241.

⁴⁶Prentice v. Weston, 111 N. Y. 460, 18 N. E. 720.

⁴⁷Dunham v. New Britain, 55 Conn. 378. See Proprietors of Mills v. Commonwealth 164 Mass. 227, 41 N. E. 280.

⁴⁸Markham v. Brown, 37 Ga. 277.

⁴⁹Commonwealth v. Bacon, 13 Bush (Ky.) 210, 26 Am. Rep. 189. The act prohibited any one within three hundred yards of a fair ground from furnishing feed and shelter for horses.

⁵⁰Smith v. Bivens, 56 Fed. 352.

⁵¹Port of Mobile v. Louisville etc. R. R. Co., 84 Ala. 115.

⁵²Missouri Pac. R. R. Co. v. Nebraska, 164 U. S. 403, 17 S. C. 130, reversing S. C. 29 Neb. 550; Chicago etc. R. R. Co. v. State, 50 Neb. 399; State v. Chicago etc. R. R. Co., 36 Minn. 402.

ing it a misdemeanor to build or maintain a fence extending more than three miles in the same general direction, without providing a gateway of a specified kind, was held to violate the eminent domain provision of the constitution.⁵³ The following regulations were held not to be a taking in the respective cases cited: Forbidding the taking of ice from Des Moines river in Des Moines;⁵⁴ forbidding use of national flag for advertising;⁵⁵ forbidding the interment of dead bodies within, or the further use of a cemetery within, the city limits;⁵⁶ forbidding the taking of oysters under a certain size;⁵⁷ making it a penal offense to permit noxious weeds to grow upon land;⁵⁸ making it a penal offense to pollute the waters of a stream, spring or pond.⁵⁹ An ordinance forbidding the sale of milk in bottles unless the capacity of the bottle is indicated thereon, is not a taking of bottles which do not conform to the ordinance.⁶⁰

An ordinance of New Orleans prescribing limits outside of which no woman of lewd character should dwell was held not to deprive those within the district of any property right.⁶¹ A statute of New Hampshire, which provided for designating and marking ornamental and shade trees in the public highways and for their care and preservation and which forbade their injury or destruction under a penalty, was held void as taking the property of the abutting owner without compensation.⁶² The grant to a person of the exclusive right of disposing of the

⁵³Dilworth v. State (Tex. Civ. App.), 36 S. W. 274. S. 587, 20 S. C. 788, *affirming* S. C. 51 La. An. 93.

⁵⁴Board of Park Comrs. v. Diamond Ice Co., 130 Ia. 603, 105 N. W. 203, 3 L.R.A.(N.S.) 1103.

⁵⁵Halter v. State, 74 Neb. 757, 105 N. W. 298.

⁵⁶Odd Fellows Cem. Ass. v. San Francisco, 140 Cal. 226, 73 Pac. 987; Laurel Hill Cemetery v. San Francisco, 152 Cal. 464.

⁵⁷Windsor v. State, 103 Md. 611, 64 Atl. 288.

⁵⁸St. Louis v. Galt, 179 Mo. 8, 77 S. W. 876, 63 L.R.A. 778.

⁵⁹Commonwealth v. Emmers, 221 Pa. St. 298.

⁶⁰Chicago v. Bowman Dairy Co., 234 Ill. 294, 84 N. E. 913; 123 Am. St. Rep. 100.

⁶¹L'Hote v. New Orleans, 177 U.

⁶²Bigelow v. Whitcomb, 72 N. H. 473, 57 Atl. 680, 65 L.R.A. 676. The court says: "An effective prohibition against one's use and enjoyment of his property in a usual and otherwise appropriate manner deprives him of his property, as much as its actual taking or asportation against his will." p. 479. A requirement that buildings to be erected should conform in general character and appearance with the buildings previously erected in the same locality, would be an unwarranted interference with the rights of property. Bostock v. Sams, 95 Md. 400, 52 Atl. 1130, 93 Am. St. Rep. 394, 59 L.R.A. 282.

garbage of a city and an ordinance forbidding any garbage to be placed or deposited elsewhere than at the works of such person, are not void as taking the property of householders in the garbage without compensation.⁶³

The senate of Maine propounded to the justices of the supreme court of that State the question whether a law to regulate or restrict the cutting of trees, upon wild or uncultivated land by the owner thereof, without making compensation to such owner would be valid, and the justices answered the question in the affirmative. The justices were of opinion that the word *taken* in the constitution should be construed strictly as against the police power of the State and say: "There are two reasons of great weight for applying this strict construction of the constitutional provision to property in land: (1) Such property is not the result of productive labor, but is derived solely from the State itself, the original owner; (2) the amount of land being incapable of increase, if the owners of large tracts can waste them at will without State restriction, the State and its people may be helplessly impoverished and one great purpose of government defeated.

"Regarding the question submitted, in the light of the doctrine above stated (being that of Maine and Massachusetts at least), we do not think the proposed legislation would operate to 'take' private property within the inhibition of the constitution. While it might restrict the owner of wild and uncultivated lands in the use of them, might delay his taking some of the product, might defer his anticipated profits, and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product, and increase untouched, and without diminution of title, estate or quantity. He would still have large measure of control and large opportunity to realize values. He might suffer delay but not deprivation. While the use might be restricted, it would not be appropriated or 'taken'"⁶⁴

§ 244 (156a). Legislative regulation and control of railroads and other corporations. Imposing new liabilities. Corporations may be made liable for consequential damages to

⁶³Cal. Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 26 S. C. 100; Gardner v. Michigan, 199 U. S. 325, 26 S. C. 106; State v. Robb, 100 Me. 180, 60 Atl. 874.

⁶⁴Opinion of the Justices, 103 Me. 506, 69 Atl. 627.

property by works or improvements thereafter constructed, though they had previously been exempt from such liability.⁶⁵ Railroad companies may be made liable for wrongfully causing the death of persons.⁶⁶ They may be made absolutely liable for fires communicated by their locomotives,⁶⁷ and may be compelled to fence their tracks, construct cattle guards, etc., and made liable for all injuries to stock resulting from a failure to comply with such regulations.⁶⁸ Statutes imposing a liability in such cases of double the value of the stock killed,⁶⁹ or making the company liable for attorney's fees in suits brought for such injuries, have been sustained.⁷⁰ But a statute making railroad companies absolutely liable for stock killed or injured, irrespective of negligence, is void, as depriving them of their property without due process of law.⁷¹ Requiring railroad companies to contribute toward the expense of a State railroad commission, is not a taking of their property contrary to law.⁷² Railroad companies may be compelled to keep a flag-

⁶⁵Pennsylvania R. R. Co. v. Miller, 132 U. S. 75, 10 S. C. 34.

⁶⁶Boston etc. R. R. Co. v. State, 32 N. H. 215; Southwestern R. R. Co. v. Paulk, 24 Ga. 356; Coosa Riv. Steamboat Co. v. Barclay, 30 Ala. 130; Brown v. Buffalo etc. R. R. Co., 22 N. Y. 191; Commonwealth v. Boston etc. R. R. Co., 134 Mass. 211.

⁶⁷McCandless v. Richmond & D. R. R. Co., 38 S. C. 103, 18 S. E. 429, 18 L.R.A. 440, 7 Am. R. R. & Corp. Rep. 366; Lipfeld v. Charlotte etc. R. R. Co., 41 S. C. 285, 19 S. E. 497; Regan v. New York etc. R. R. Co., 60 Conn. 124, 22 Atl. 503, 25 Am. St. Rep. 306; Martin v. New York etc. R. R. Co., 62 N. Y. 331, 25 Atl. 239.

⁶⁸Minneapolis etc. R. R. Co. v. Emmons, 149 U. S. 364, 13 S. C. 870, 7 Am. R. R. & Corp. Rep. 755; S. C. 40 Minn. 133, 42 N. W. 789; Nelson v. Minneapolis etc. R. R. Co., 40 Minn. 131, 42 N. W. 788.

⁶⁹Little Rock etc. R. R. Co. v. Payne, 33 Ark. 816, 34 Am. Rep. 55; Cairo etc. R. R. Co. v. People, 92 Ill.

97, 34 Am. Rep. 112; Treadway v. Railroad Co., 43 Ia. 527; Barnett v. Railroad Co., 68 Mo. 56; Cummings v. Railroad Co., 70 Mo. 570; Spearman v. Railroad Co., 71 Mo. 434; Humes v. Railroad Co., 82 Mo. 221; Humes v. Mo. Pac. R. R. Co., 115 U. S. 512.

⁷⁰Railroad Co. v. Duggan, 109 Ill. 537; Perkins v. St. Louis etc. R. R. Co., 103 Mo. 54, 15 S. W. 320, 11 L.R.A. 426. *And see* Cameron v. Chicago etc. R. R. Co., 63 Minn. 384, 31 L.R.A. 553, 65 N. W. 652.

⁷¹Birmingham Mineral R. R. Co. v. Parsons, 100 Ala. 662, 13 So. 602; Wadsworth v. Union Pac. R. R. Co., 18 Colo. 600, 33 Pac. 515, 8 Am. R. R. & Corp. Rep. 127; Denver etc. R. R. Co. v. Outcalt, 2 Colo. App. 395, 31 Pac. 176; Denver etc. R. R. Co. v. Davidson, 2 Colo. App. 443, 31 Pac. 181.

⁷²Charlotte etc. R. R. Co. v. Gibbs, 142 U. S. 386, 12 S. C. 255, 5 Am. R. R. & Corp. Rep. 575; S. C. 27 S. C. 385, 4 S. E. 49.

man at crossings,⁷³ and street railroad companies to have a driver and conductor on each car,⁷⁴ to water their tracks,⁷⁵ and to so construct cars as to protect motormen from the weather.⁷⁶ Railroads and corporations may be subjected to many other restrictions and requirements in the conduct of their business and use of their property, without infringing their rights of property.⁷⁷ Municipal corporations may be made liable for property destroyed by mobs.⁷⁸ A statute of Massachusetts required railroad companies to sell 1,000-mile passenger tickets for twenty dollars and made such tickets good for passage on any railroad in the State; required each company to redeem the tickets issued by it on presentation, and to accept for passage tickets issued by other companies. It was held to be unconstitutional, among other reasons, because by compelling one company to accept the tickets issued by other companies, its property was taken for public use without any adequate provision for compensation.⁷⁹

§ 245 (156b). Regulating or prohibiting businesses, occupations, contracts, and the like. It has been held that the right to contract and the right to labor are property,⁸⁰ and, in this view, the right to carry on any kind of business or engage

⁷³State v. Cozzens, 42 La. An. 1069, 8 So. 268; Toledo etc. R. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Lake Shore etc. R. R. Co. v. Cincinnati, 30 Ohio St. 604.

⁷⁴South Covington etc. R. R. Co. v. Berry, 93 Ky. 43, 18 S. W. 1026, 40 Am. St. Rep. 161, 15 L.R.A. 604; Trenton Horse R. R. Co. v. City of Trenton, 53 N. J. L. 132, 20 Atl. 1076.

⁷⁵City etc. R. R. Co. v. Savannah, 77 Ga. 731.

⁷⁶State v. Nelson, 52 Ohio St. 88, 39 N. E. 22, 26 L.R.A. 317; State v. Smith, 58 Minn. 35, 59 N. W. 545, 25 L.R.A. 759.

⁷⁷State v. New Haven etc. R. R. Co., 43 Conn. 351; City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107, 39 N. E. 433, 49 Am. St. Rep. 183, 27 L.R.A. 514; Boston etc. R. R. Co. v. Western R. R. Co., 14 Gray 253; Lexington etc. R. R. Co. v. Fitchburg R. R. Co., 14 Gray 266;

City of Grand Rapids v. Grand Rapids Hydraulic Co., 66 Mich. 606, 33 N. W. 749; State v. Murphy, 130 Mo. 10, 31 S. W. 594, 12 Am. R. R. & Corp. Rep. 370, 31 L.R.A. 798; New York v. 23d St. R. R. Co., 113 N. Y. 311, 21 N. E. 60; McCoy v. Cincinnati etc. R. R. Co., 13 Fed. 3.

⁷⁸Folsom v. City of New Orleans, 28 La. An. 936; Darlington v. New York, 31 N. Y. 164, 88 Am. Dec. 248; Matter of Pennsylvania Hall, 5 Pa. St. 204; County of Allegheny v. Gibson, 90 Pa. St. 397, 35 Am. Rep. 670; Louisiana v. New Orleans, 109 U. S. 285.

⁷⁹Attorney General v. Boston & A. R. R. Co., 160 Mass. 62, 35 N. E. 252, 9 Am. R. R. & Corp. Rep. 569, 22 L.R.A. 112.

⁸⁰"Labor is property, and the laborer has the same right to sell his labor, and to contract with reference thereto, as has any other property."

in any occupation, is property.⁸¹ Many laws prohibiting or restricting the right to contract, or labor, or carry on business, have been held void, because they deprived the citizen of his property without due process of law. But whatever deprives a citizen of his property without due process of law necessarily takes his property, either for public or private use, without compensation, and such laws are, therefore, also obnoxious to the eminent domain provision of the constitution. "The legislature can no more destroy a business by statute, without providing for compensation, than it can authorize a corporation to take a piece of real estate for public use, except upon compensation."⁸² Under the police power such prohibitions and restrictions may be placed upon the right to contract and to labor, as the public welfare demands. Thus the manufacture and sale of intoxicating liquors may be prohibited altogether, though the result of such prohibition may be to render buildings, machinery and fixtures used for that purpose, of little or no value.⁸³

owner. * * * The right to acquire, possess and protect property includes the right to make reasonable contracts, and when an owner is deprived of one of the attributes of property, like the right to make contracts, he is deprived of his property within the meaning of the constitution." *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 46 Am. St. Rep. 315, 29 L.R.A. 79. *And see Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62, 37 Am. St. Rep. 206, 22 L.R.A. 340; *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285, 25 Am. St. Rep. 863, 6 L.R.A. 621.

⁸¹"A calling, business or profession, chosen and followed, is property." *State v. Chapman*, 69 N. J. L. 464, 466, 55 Atl. 94.

⁸²*Ibid.*

⁸³*People v. Hawley*, 3 Mich. 330, 342. In this case the court says: "In the exercise of its police power a State has full power to prohibit, under penalties, the exercise of any trade or employment which is found to be hazardous or injurious to its citizens and destructive of the best

interests of society, without providing compensation to those upon whom the prohibition operates." *Mugler v. Kansas*, 123 U. S. 623. The latter is the decision sustaining the prohibitory amendment to the constitution of Kansas and the legislation passed to carry it into effect. The nature of the decision is so well known that no extended comment upon it is necessary. We quote the following extract from the opinion as particularly in point in this connection: "As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot in any sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his

So the manufacture and sale of oleomargarine and other imitations of butter may be prohibited, and the effect of such a statute is not to take property without compensation within the eminent domain limitation.⁸⁴ A law prohibiting any but corporations to carry on a banking business,⁸⁵ or an insurance busi-

property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner. It is true, that, when the defendants in these cases purchased or erected

their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone v. Mississippi*, above cited, the supervision of the public health and the public morals is a governmental power, ‘continuing in its nature,’ and ‘to be dealt with as the special exigencies of the moment may require;’ and that, ‘for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.’ So in *Beer Co. v. Massachusetts*, 97 U. S. 32: If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer.’” pp. 668-670. See also *Kidd v. Pearson*, 128 U. S. 1, 9 S. C. 6; *Foster v. Kansas*, 112 U. S. 201, 206; *People v. McGann*, 34 Hun 358; *Ingram v. State*, 39 Ala. 247; *Dorman v. State*, 24 Ala. 216; *State v. City Council of Aiken*, 42 S. C. 222, 20 S. E. 221, *overruling McCullough v. State*, 41 S. C. 220, 19 S. E. 458.

⁸⁴ *Powell v. Pennsylvania*, 127 U. S. 678, 8 S. C. 992, 1257; *Plumley v. Massachusetts*, 155 U. S. 461, 15 S. C. 154. *But see People v. Marx*, 99 N. Y. 376.

⁸⁵ *State ex rel. Goodsell v. Woodmanse*, 1 N. D. 246, 46 N. W. 970, 11 L.R.A. 420. *But the contrary is held*

ness,⁸⁶ has been sustained. And generally the reasonable regulation of a business or profession is not a taking of property for public use without compensation.⁸⁷ An ordinance of the city of New Orleans requiring vendors of milk to furnish gratuitously, on application of sanitary inspectors, samples of milk, not exceeding one-half pint, for inspection and analysis, was held not to take property for public use without compensation.⁸⁸ On the other hand laws prohibiting the payment of wages in orders, scrip or evidences of indebtedness, not redeemable in lawful money,⁸⁹ or the employment of females in any factory or workshop for more than eight hours in any one day,⁹⁰ or prohibiting the manufacture of cigars in tenement houses,⁹¹ or forbidding the offering of gifts as an inducement to make purchases,⁹² and many similar laws have been held invalid, as an

in *State v. Seougal*, 3 S. D. 55, 51 N. W. 858, 40 Am. St. Rep. 603, 25 L.R.A. 250, 6 Am. R. R. & Corp. Rep. 165.

⁸⁶*Commonwealth v. Vrooman*, 164 Pa. St. 306, 30 Atl. 217, 10 Am. R. R. & Corp. Rep. 519, 44 Am. St. Rep. 756, 15 L.R.A. 477.

⁸⁷*State v. Richereek*, 167 Ind. 217, 77 N. E. 1085, 119 Am. St. Rep. 491, 5 L.R.A.(N.S.) 874; *State v. Chapman*, 69 N. J. L. 464, 55 Atl. 94. Pure food laws upheld: *Crossman v. Lurman*, 171 N. Y. 329, 63 N. E. 1097, 98 Am. St. Rep. 599, affirming S. C. 57 App. Div. 393, 68 N. Y. S. 311; *People v. Rierecker*, 169 N. Y. 53, 61 N. E. 990, 88 Am. St. Rep. 534, 57 L.R.A. 178, affirming S. C. 58 App. Div. 391, 68 N. Y. S. 1067; *State v. Capital City Dairy Co.*, 62 Ohio St. 350, 57 N. E. 62, 57 L.R.A. 181; *Commonwealth v. Kevin*, 202 Pa. St. 23, 51 Atl. 594, 90 Am. St. Rep. 613.

⁸⁸*State v. Dupaqueir*, 46 La. An. 577, 15 So. 502, 26 L.R.A. 162. An ordinance of same city prohibiting the sale of lottery tickets held valid. *State v. Dobard*, 45 La. An. 1412, 14 So. 253.

⁸⁹*Leep v. St. Louis etc. R. R. Co.*, 58 Ark. 407, 25 S. W. 76, 23 L.R.A.

264, 9 Am. R. R. & Corp. Rep. 185; *Ramsey v. People*, 142 Ill. 380, 32 N. E. 364, 17 L.R.A. 853; *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62, 37 Am. St. Rep. 206, 22 L.R.A. 340; *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L.R.A. 789; *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354; *State v. Fire Creek C. & C. Co.*, 33 W. Va. 188, 10 S. E. 288, 25 Am. St. Rep. 891; *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285, 25 Am. St. Rep. 863, 6 L.R.A. 621.

⁹⁰*Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 46 Am. St. Rep. 315, 29 L.R.A. 79.

⁹¹*In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

⁹²*Montgomery v. Kelly*, 142 Ala. 552, 38 So. 67, 110 Am. St. Rep. 43, 70 L.R.A. 209; *Hewin v. Atlanta*, 121 Ga. 723, 49 S. E. 765, 67 L.R.A. 795; *Long v. State*, 74 Md. 565, 22 Atl. 4, 28 Am. St. Rep. 268; *Commonwealth v. Sisson*, 178 Mass. 578, 60 N. E. 385; *State v. Ramseyer*, 73 N. H. 31, 50 Atl. 958; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 854; *State v. Dalton*, 22 R. I. 77, 46 Atl. 234, 84 Am. St. Rep. 818, 48 L.R.A. 775; *Young v. Commonwealth*, 101 Va. 853, 45 S. E. 327. In

unconstitutional interference with the liberty and property rights of the citizen.

§ 246 (156c). Regulating rates and charges. The existence of a right or power in the State to regulate or fix the charges which may be lawfully demanded for certain services or commodities, is evidenced by an almost immemorial exercise of such right in England and America and is established in this country by a long line of decisions by the Supreme Court of the United States, beginning with *Munn v. Illinois*,⁹³ in 1876, and coming down to the present time. The right to exercise this power in the case of common carriers,⁹⁴ telegraph and tele-

People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 854, the court says: "Under an exercise of the police power the enactment must have reference to the comfort, the safety or the welfare of society, and it must not be in conflict with the constitution. The law will not allow the rights of property to be invaded under the guise of a police regulation for the protection of health, when it is manifest such is not the object and purpose of the regulation. (*See Austin v. Murray*, 16 Pick. 121; *Com. v. Alger*, 7 Cush. 53, 84, cited with approval in *Matter of Jacobs*, 98 N. Y. 98.) As is also said in the last case, it is generally for the legislature to determine what laws and regulations are needed to protect the public health and serve the public health and safety, and if measures are calculated, intended, convenient or appropriate to accomplish such ends, the exercise of its discretion is not the subject of judicial review. But these measures must have some relations to these ends. Courts must be able to see, upon a perusal of the enactment, that there is some fair, just and reasonable connection between it and the ends above mentioned; unless such relation exists the enactment cannot be upheld as an exercise of the police power."

⁹³94 U. S. 113.

⁹⁴*Munn v. Illinois*, 94 U. S. 113; *Chicago etc. R. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago etc. R. R. Co.*, 94 U. S. 164; *Chicago etc. R. R. Co. v. Ackley*, 94 U. S. 179; *Ruggles v. Illinois*, 108 U. S. 526; *Stone v. Farmers L. & T. Co.*, 116 U. S. 307; *Stone v. Illinois Central R. R. Co.*, 116 U. S. 347; *Stone v. New Orleans etc. R. R. Co.*, 116 U. S. 352; *Wabash etc. R. R. Co. v. Illinois*, 118 U. S. 557; *Dow v. Beidelman*, 125 U. S. 680; *Georgia R. & B. Co. v. Smith*, 128 U. S. 174; *Chicago etc. R. R. Co. v. Minnesota*, 134 U. S. 418, 10 S. C. 462, 702, 2 Am. R. R. & Corp. Rep. 564; *Minneapolis Eastern R. R. Co. v. Minnesota*, 134 U. S. 467, 10 S. C. 473; *Chicago & G. T. R. R. Co. v. Wellman*, 143 U. S. 339, 12 S. C. 408, 5 Am. R. R. & Corp. Rep. 638; *St. Louis etc. R. R. Co. v. Gill*, 156 U. S. 649, 15 S. C. 484, 11 Am. R. R. & Corp. Rep. 709; *Norfolk & W. R. R. Co. v. Pendleton*, 156 U. S. 667, 15 S. C. 413; *Chicago etc. Ry. Co. v. Tompkins*, 176 U. S. 167, 20 S. C. 336; *Atlantic Coast Line R. R. Co. v. Florida*, 203 U. S. 256, 27 S. C. 108; *Same v. Same*, 203 U. S. 261, 27 S. C. 109; *Ill. Cent. R. R. Co. v. Interstate Com. Com.*, 206 U. S. 441, 27 S. C. 700; *Prentis v. Atlantic Coast Line R. R. Co.*, 211 U. S. 210; *Railroad Commissioners v. Pensacola & A. R. R. Co.*, 24 Fla. 417; *Storrs v.*

phone companies,⁹⁵ water, gas, light and irrigation companies,⁹⁶ hackmen, draymen, turnpikes, bridges, ferries,⁹⁷ public millers and all persons or corporations exercising any franchise or privilege emanating from the government, may be regarded as settled beyond question. The right to regulate the charges of grain elevators is also well settled, although those engaged in the business do not hold any franchise or privilege from the

Pensacola & A. R. R. Co., 29 Fla. 617, 11 So. 226; State v. Atlantic Coast Air Line, 48 Fla. 114, 37 So. 652; Same v. Same, 48 Fla. 146, 37 So. 657; State v. Seaboard Air Line R. R. Co., 48 Fla. 150, 37 So. 658; Southern Ry. Co. v. Atlantic Stove Works, 128 Ga. 207, 57 S. E. 427; Hill v. Wadley Southern Ry. Co., 128 Ga. 705, 57 S. E. 795; Chicago B. & Q. R. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L.R.A. 141, 10 Am. R. R. & Corp. Rep. 234; Board of R. R. Comrs. v. Symms Grocer Co., 53 Kan. 207, 35 Pac. 217, 9 Am. R. R. & Corp. Rep. 676; Wellman v. Chicago & G. T. R. R. Co., 83 Mich. 592, 3 Am. R. R. & Corp. Rep. 703; Corporation Commission v. Seaboard Air Line R. R. Co., 127 N. C. 283, 37 S. E. 266; Norfolk & W. R. R. Co. v. Pendleton, 88 Va. 350, 13 S. E. 709.

⁹⁵Hockett v. State, 105 Ind. 250, 55 Am. Rep. 201; Central Union Tel. Co. v. State, 118 Ind. 194; Central Union Tel. Co. v. State, 123 Ind. 113, 24 N. E. 215, 2 Am. R. R. & Corp. Rep. 406; Chesapeake etc. Tel. Co. v. B. & O. Tel. Co., 66 Md. 399; State v. Mo. etc. Telephone Co., 189 Mo. 83, 88 S. W. 41; Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 265.

⁹⁶Spring Valley W. W. Co. v. City and County of San Francisco, 82 Cal. 286, 22 Pac. 910, 1 Am. R. R. & Corp. Rep. 96, 16 Am. St. Rep. 116, 6 L.R.A. 756; Deninger v. Recorder's Court, 145 Cal. 629, 79 Pac. 360; Deninger v. Recorder's Court, 145 Cal. 638, 79 Pac. 364; Freeport Water Co. v. Freeport, 186 Ill. 179,

57 N. E. 862; Chicago v. Rogers Park Water Co., 214 Ill. 212, 73 N. E. 375; Chicago v. Rogers Park Water Co., 116 Ill. App. 200; City of Rushville v. Rushville Nat. Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L.R.A. 321; Westfield Gas & M. Co. v. Mendenhall, 142 Ind. 538, 41 N. E. 1033; Cedar Rapids Water Co. v. Cedar Rapids, 118 Ia. 234, 91 N. W. 1081; In re Pryor, 55 Kan. 724, 41 Pac. 958, 29 L.R.A. 398; State v. LaClede Gas & L. Co., 102 Mo. 472, 14 S. W. 974; Aqua Pura Co. v. Las Vegas, 10 N. M. 6, 60 Pac. 208, 50 L.R.A. 224; Saratoga Springs v. Saratoga G., E. L. & P. Co., 191 N. Y. 123, 83 N. E. 693, 18 L.R.A. (N.S.) 713; Spring Valley W. W. v. Schottler, 110 U. S. 347; Freeport Water Co. v. Freeport, 180 U. S. 587, 21 S. C. 493; Stanislaus Co. v. San Joaquin etc. Irr. Co., 192 U. S. 201, 24 S. C. 241; Vicksburg v. Vicksburg Water Co., 206 U. S. 496, 27 S. C. 762; Boise City Irr. & L. Co. v. Clark, 131 Fed. 415, 65 C. C. A. 399.

⁹⁷Covington & L. Turnpike R. R. Co. v. Sandford (Ky.), 20 S. W. 1031; Commonwealth v. Covington & Cinn. Bridge Co. (Ky.), 21 S. W. 1042, 7 Am. R. R. & Corp. Rep. 638; S. C. on appeal, 154 U. S. 204, 14 S. C. 1087, 10 Am. R. R. & Corp. Rep. 399. A municipal corporation may not regulate rates unless authorized by statute. Richmond v. Richmond Nat. Gas Co., 168 Ind. 82, 79 N. E. 1031; State v. Mo. etc. Telephone Co., 189 Mo. 83, 88 S. W. 41.

"Every corporation or person

State.⁹⁸ So of stockyards.⁹⁹ The general rule has been laid down that whenever a property or business is "affected with a public interest" or "devoted to a public use," it is subject to public regulation.¹ "Many kinds of business," says the supreme court of Kansas, "carried on without special franchises or privileges are treated as public in character, and have therefore been subjected to legislative regulation and control. The nature and extent of the business, the fact that it closely touches a great many people, and that it may afford opportunities for imposition and oppression, as in cases of monopoly and the like, are circumstances affecting property with a public interest."²

The right to regulate rates and charges may be precluded by contract, either in the form of charter provision or otherwise,³ and the States cannot regulate the charges for interstate commerce.⁴ It was formerly understood that the power of the

who, by reason of privileges received from the State, such as the right to use the highways, or the right to exercise the power of eminent domain, is in the business of supplying the general public with any commodity or service necessary or convenient for the general comfort and welfare is subject to the dominion and supervision of public authority, so far as may be necessary to prevent such business from being carried on unjustly or oppressively by the imposition of excessive charges for such commodity or services. This dominion is exercised for the general good, and it is one form of what is known as the police power." Denninger v. Recorder's Court, 145 Cal. 638, 79 Pac. 364.

⁹⁸Munn v. Illinois, 94 U. S. 113, S. C. 69 Ill. 80; Budd v. New York, 143 U. S. 517, 12 S. C. Rep. 468, 5 Am. R. R. & Corp. Rep. 610; S. C. 117 N. Y. 1; Brass v. North Dakota, 153 U. S. 391, 14 S. C. Rep. 857, 10 Am. R. R. & Corp. Rep. 380.

⁹⁹Ratcliff v. Wichita Union Stock Yards Co., 74 Kan. 1, 86 Pac. 150, 118 Am. St. Rep. 298, 6 L.R.A. (N.S.) 834.

¹Munn. v. Illinois, 94 U. S. 113. And see Cooley Const. Lim. p. 739; Tiedeman on Police Power, p. 233; People v. Budd, 117 N. Y. 1, 27-29.

²Ratcliff v. Wichita Union Stock Yards Co., 74 Kan. 1, 6, 86 Pac. 150, 118 Am. St. Rep. 298, 6 L.R.A. (N.S.) 834.

³Ruggles v. Illinois, 108 U. S. 526; Stone v. Farmer L. & T. Co., 116 U. S. 307; Stone v. Illinois Central R. R. Co., 116 U. S. 347; Dow v. Beidleman, 125 U. S. 680; Georgia R. & B. Co. v. Smith, 128 U. S. 174; Norfolk & W. R. R. Co. v. Pendleton, 156 U. S. 667, 15 S. C. Rep. 413; Cleveland v. Cleveland City Ry. Co., 194 U. S. 517, 24 S. C. 756; Cleveland v. Cleveland Elec. Ry. Co., 194 U. S. 538, 24 S. C. 764; Vicksburg v. Vicksburg W. W. Co., 206 U. S. 496, 27 S. C. 762; In re Prior, 55 Kan. 724, 41 Pac. 958, 29 L.R.A. 398; State v. Laclede Gas Co., 102 Mo. 472, 14 S. W. 974.

⁴Wabash etc. R. R. Co. v. Illinois, 118 U. S. 577; Covington & Cinn. Bridge Co. v. Kentucky, 154 U. S. 204, 14 S. C. Rep. 1087, 10 Am. R. R. & Corp. Rep. 399; Gulf etc. R. R. Co. v. Heffley, 158 U. S. 98, 15 S. C. Rep. 802.

legislature to fix rates and charges was absolute,⁵ but that idea is now exploded. If such was the case, it is manifest that it would be within the power of the legislature to greatly impair or even destroy the value of property by fixing rates that were unreasonably low. To fix rates which are unreasonably low for any property or business, affected with a public interest, is to take property for public use without compensation, as well as to deprive of property without due process of law.⁶ The power, therefore, is limited to the fixing of reasonable rates and the reasonableness of rates established may be inquired into by the courts.⁷ An act requiring street railroads to carry pupils in the public schools to and from school at half rates was held

⁵Chicago etc. R. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 10 Am. R. R. & Corp. Rep. 234, 41 Am. St. Rep. 278, 24 L.R.A. 141; Covington etc. T. Co. v. Sandford (Ky.), 20 S. W. 1031; Wellman v. Chicago & G. T. R. R. Co., 83 Mich. 592, 3 Am. R. R. & Corp. Rep. 703; Munn v. Illinois, 94 U. S. 113.

⁶San Diego Water Co. v. San Diego, 118 Cal. 556, 62 Am. St. Rep. 261, 38 L.R.A. 460; Pensacola & A. R. R. Co. v. State, 25 Fla. 310; Commonwealth v. Covington & Cinn. Bridge Co. (Ky.), 21 S. W. 1042, 7 Am. R. R. & Corp. Rep. 638; St. Louis etc. R. R. Co. v. Gill, 156 U. S. 649, 15 S. C. 484, 11 Am. R. R. & Corp. Rep. 709; Covington etc. Road Co. v. Sandford, 164 U. S. 578, 17 S. C. 198; Smythe v. Ames, 169 U. S. 466; Prentis v. Atlantic Coast Line R. R. Co., 211 U. S. 210.

⁷Chicago etc. R. R. Co. v. Minnesota, 134 U. S. 418, 10 S. C. Rep. 462, 702, 2 Am. R. R. & Corp. Rep. 564; Minneapolis Eastern R. R. Co. v. Minnesota, 134 U. S. 467, 10 S. C. Rep. 473; Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 14 S. C. Rep. 1047, 9 Am. R. R. & Corp. Rep. 641; Reagan v. Mercantile Trust Co., 154 U. S. 413, 14 S. C. Rep. 1060; Reagan v. Mercantile Trust Co., 154 U. S.

418, 14 S. C. Rep. 1062; Reagan v. Farmers' L. & T. Co., 154 U. S. 420, 14 S. C. Rep. 1062; St. Louis etc. R. R. Co. v. Gill, 156 U. S. 649, 15 S. C. Rep. 484, 11 Am. R. R. & Corp. Rep. 709; Chicago etc. Ry. Co. v. Tompkins, 176 U. S. 167, 20 S. C. 336; Missouri Pac. R. R. Co. v. Smith, 60 Ark. 221, 29 S. W. 752; Chicago v. Rogers Park Water Co., 214 Ill. 212, 73 N. E. 375, *affirming* S. C. 116 Ill. App. 200; State v. Sioux City etc. R. R. Co., 46 Neb. 682, 65 N. W. 766, 31 L.R.A. 47; Logan Nat. Gas & Fuel Co. v. Chillicothe, 65 Ohio St. 186, 62 N. E. 122; Penn. R. Co. v. Philadelphia Co., 220 Pa. St. 100, 68 Atl. 676; Commonwealth v. Atlantic Coast Line Ry. Co., 106 Va. 61, 55 S. E. 572, 117 Am. St. Rep. 983, 7 L.R.A.(N.S.) 1086; Mercantile Trust Co. v. Texas & P. R. R. Co., 51 Fed. 529; Ames v. Union Pac. R. R. Co., 64 Fed. 165. Rates fixed by the legislature or by legislative commission are deemed to be *prima facie* just and reasonable. Southern Ry. Co. v. Atlanta Stove Works, 128 Ga. 207, 57 S. E. 429; Hill v. Wadley Southern Ry. Co., 128 Ga. 705, 57 S. E. 795; Atlantic Coast Line R. R. Co. v. Florida, 203 U. S. 256, 27 S. C. 108; Seaboard Air Line Ry. Co. v. Florida, 203 U. S. 261, 27 S. C. 109.

valid as a police regulation in the interest of education.⁸ Requiring railroad companies to sell mileage tickets at reduced rates is held to be a taking of property without due process of law.⁹ But such a statute was held valid in New York as to corporations thereafter organized and as applied to business within the State.¹⁰

§ 247 (156d). Taking, injuring or destroying property in the abatement of nuisances, or when made, kept, or used in violation of law. “To destroy property because it is a public nuisance is not to appropriate it to public use, but to prevent any use of it by the owner, and to put an end to its existence, because it could not be used consistently with the maxim, *sic utere tuo ut alienum non laedas.*”¹¹ Any nuisance may be abated, such as a pig sty,¹² a stagnant pool,¹³ or a mill pond which has become befouled by sewerage or otherwise,¹⁴ without compensation for the property destroyed or interfered with.¹⁵ Low, wet grounds in populous localities may be filled up at the expense of the owners for the purpose of preserving the public health.¹⁶ But land upon which there is no nuisance

⁸Commonwealth v. Interstate Consolidated St. Ry. Co., 187 Mass. 436, 73 N. E. 530.

⁹Beardsley v. New York etc. R. R. Co., 162 N. Y. 230, 56 N. E. 488; Lake Shore etc. R. R. Co. v. Smith, 173 U. S. 684, 19 S. C. 565.

¹⁰Purdy v. Erie R. R. Co., 162 N. Y. 42, 56 N. E. 508, 48 L.R.A. 669.

¹¹Dunbar v. City Council of Augusta, 90 Ga. 390, 17 S. E. 907.

¹²St. Louis v. Stern, 3 Mo. App. 48.

¹³Baker v. Boston, 12 Pick. 184, 22 Am. Dec. 421.

¹⁴New Castle City v. Raney, 6 Pa. Co. Ct. 87; Americus v. Mitchell, 79 Ga. 807; People v. Board of Health, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522; Jeremy Imp. Co. v. Commonwealth, 106 Va. 482, 56 S. E. 224. But under authority to abate nuisances a city cannot fill up a slip which has become foul by reason of its own failure to prevent the casting of filth and refuse therein, and when it can be cleaned out at small

expense. Babcock v. Buffalo, 56 N. Y. 268. And when the statute points out the manner of abatement, it must be strictly pursued or a liability will be incurred. Frank v. Atlanta, 72 Ga. 428.

¹⁵See generally Attorney General v. Hunter, 1 Dev. Eq. 12; Eason v. Perkins, 2 Dev. Eq. 38; Denver v. Mullen, 7 Col. 345. But only the nuisance can be abated. Railroad tracks cannot be torn up because they are used in a way to create a nuisance. Chicago v. Union Stock Yards etc. Co., 164 Ill. 224, 45 N. E. 430, 35 L.R.A. 281.

¹⁶Kirkland v. State, 72 Ark. 171, 78 S. W. 770; Bush v. Dubuque, 69 Ia. 233; Leavitt v. Cambridge, 120 Mass. 157; Farnsworth v. Boston, 126 Mass. 1; Bancroft v. Cambridge, 126 Mass. 438; Welch v. Boston, 126 Mass. 442; Patrick v. Omaha, 1 Neb. (Unof.) 250, 95 N. W. 477; City of Charleston v. Werner, 38 S. C. 488, 17 S. E. 33, 8 Am. R. R. & Corp. Rep. 73, 37 Am. St. Rep. 776; Charleston

belonging to one proprietor cannot be occupied with drains or other works for the purpose of abating a nuisance on the lands of others, unless compensation is made.¹⁷ Intoxicating liquors kept or made in violation of law may be destroyed.¹⁸ So of gambling instruments.¹⁹ Bread made under weight in violation of law may be forfeited;²⁰ cattle taken damage feasant may be impounded and sold after reasonable notice.²¹ So a building which is in such condition as to endanger life and property may be declared a nuisance and destroyed without compensation.²² So of a building²³ or clothing, bedding, etc., infected with smallpox.²⁴ Likewise a building erected in violation of a valid fire ordinance.²⁵ Damaged grain,²⁶ diseased animals,²⁷ milk kept for sale and below the standard prescribed by law,²⁸ food unfit for human consumption,²⁹ and fish nets used

v. Werner, 46 S. C. 323, 24 S. E. 207; Sweet v. Rechel, 37 Fed. 323.

¹⁷Matter of Chessbrough, 78 N. Y. 232; S. C. 17 Hun 561; Cavanaugh v. Boston, 139 Mass. 426.

¹⁸Beer Co. v. Massachusetts, 97 U. S. 25; State v. Snow, 3 R. I. 64; ex parte Keeler, 45 S. C. 537, 23 S. E. 865, 55 Am. St. Rep. 785, 31 L.R.A. 678. *But see* Wynehamer v. People, 13 N. Y. 378; Scott v. Donald, 165 U. S. 58, 17 S. C. 265. On the evacuation of Richmond by the confederates the city council ordered the destruction of certain liquor and pledged the city to pay for the same. In a suit to recover its value it was held that it was taken under the police power and not under the power of eminent domain and that there could be no recovery. Wallace v. Richmond, 94 Va. 204.

¹⁹Garland Novelty Co. v. State, 71 Ark. 138, 71 S. W. 257; Furth v. State, 72 Ark. 161, 78 S. W. 759; Frost v. People, 193 Ill. 635, 61 N. E. 1054, 86 Am. St. Rep. 352; Board of Police Commissioners v. Wagner, 93 Md. 182, 48 Atl. 455, 86 Am. St. Rep. 423, 52 L.R.A. 775.

²⁰Guillotte v. New Orleans, 12 La. An. 432; In re Nasmith, 2 Ontario 192.

²¹Dillard v. Webb, 55 Ala. 468.

²²Harvey v. Dewoody, 18 Ark. 252, 52 Am. Rep. 173; Theilan v. Porter, 14 Lea 622; Raymond v. Fish, 51 Conn. 80.

²³Singo v. Joliet, 237 Ill. 300, 86 N. E. 663.

²⁴Perry v. Oregon, 139 Ill. App. 606.

²⁵Hine v. New Haven, 40 Conn. 478; King v. Davenport, 98 Ill. 305, 38 Am. Rep. 89; City of Brooklyn v. Franz, 87 Hun 54, 33 N. Y. Supp. 869. As to destroying obstructions in streets as nuisances, *see* State v. Jersey City, 34 N. J. L. 31; Hoey v. Gilroy, 129 N. Y. 132, 29 N. E. 85; Gas Light Co. v. Hart, 40 La. An. 474, 4 So. 215.

²⁶Dunbar v. City Council of Augusta, 90 Ga. 390, 17 S. E. 907.

²⁷Livingston v. Ellis Co., 30 Tex. Civ. App. 19, 68 S. W. 723; Lowe v. Conroy, 120 Wis. 151, 97 N. W. 942, 102 Am. St. Rep. 983, 66 L.R.A. 907.

²⁸Deems v. Baltimore, 80 Md. 164, 30 Atl. 648, 45 Am. St. Rep. 339, 26 L.R.A. 541.

²⁹North Am. Cold Storage Co. v. Chicago, 211 U. S. 306.

in violation of law,³⁰ may be summarily destroyed and such destruction is not a taking for public use, requiring compensation to be made.³¹

In all such cases the owner may have a hearing on the question of whether his property was within the condemnation of the law by bringing a suit against the officers who have seized and destroyed it and in such a suit the defendants must prove the existence of the facts necessary to justify their action.³²

§ 248 (156e). Compelling railroads and others to make alterations and construct works for the purpose of promoting the public safety, convenience and welfare. Where the charter of a water-power company is subject to amendment, alteration or repeal at the pleasure of the legislature, it may be compelled to construct a fishway in its dam without compensation.³³ And some authorities hold that a dam is erected subject to the right of the legislature to require the construction of a fishway, without compensation, whether there is any reservation covering the matter in the charter or statute or not;³⁴ other cases hold that such a requirement cannot be enforced without compensation, in the absence of such a reservation.³⁵ A railroad company may be compelled to erect such structures and submit to such regulations as are necessary for the safety of the public or security of property, and according-

³⁰Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878, 16 Am. St. Rep. 813, 7 L.R.A. 134; S. C. *affirmed*, 152 U. S. 133; State v. French, 71 Ohio St. 186, 73 N. E. 216, 104 Am. St. Rep. 770. The nature and limits of the police power are much discussed in the case first cited. Bittenhaus v. Johnston, 92 Wis. 477, 66 N. W. 805, 32 L.R.A. 380. Compare Colon v. Lisk, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609.

³¹As to killing of animals by officers of humane society, see King v. Hayes, 80 Me. 206, 13 Atl. Rep. 882; Sahr v. Scholle, 89 Illn. 42, 35 N. Y. 97; Munn v. Corbin, 8 Colo. App. 113, 44 Pac. 783.

³²Sings v. Joliet, 237 Ill. 300, 86 N. E. 663; North Am. Cold Storage Co. v. Chicago, 211 U. S. 306.

³³Commissioners of Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446, 6 Am. Rep. 247; Holyoke Co. v. Lyman, 15 Wall. 500; see also S. P. Commonwealth v. Eastern R. R. Co., 103 Mass. 254, 4 Am. Rep. 555.

³⁴Parker v. People, 111 Ill. 581; State v. Beardsley, 108 Ia. 396, 79 N. W. 138; West Point W. P. & L. I. Co. v. State, 49 Neb. 218, 66 N. W. 6.

³⁵State v. Glen, 7 Jones, L. 321; Cornelius v. Glen, ibid. 512; People v. Platt, 17 Johns. 195; Woolever v. Stewart, 36 Ohio St. 146, 38 Am. Rep. 569; Commonwealth v. Pennsylvania Canal Co., 66 Pa. St. 41, 5 Am. Rep. 320.

ly may be required to disuse steam upon city streets,³⁶ to construct and maintain cattle-guards and fences,³⁷ to widen and repair bridges over its road,³⁸ to reconstruct on a different plan a bridge by which it crosses a street, so as to remove obstructions from the street,³⁹ to enlarge a bridge over a stream to accommodate the increased flow of water caused by the discharge of drainage ditches into the stream,⁴⁰ to remove dangerous grade crossings,⁴¹ to construct and maintain stations at the intersec-

³⁶North Chicago City Ry. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788; Railroad Co. v. Richmond, 96 U. S. 521.

³⁷Birmingham Mineral R. R. Co. v. Parsons, 100 Ala. 662, 13 So. 602; Ohio etc. R. R. Co. v. Russell, 115 Ill. 52; Emmons v. Minneapolis & St. Louis Ry. Co., 35 Minn. 503; Kansas City etc. R. R. Co. v. Spencer, 72 Miss. 491, 17 So. 168; Yazoo etc. R. R. Co. v. Harrington, 85 Miss. 366, 37 So. 1016; Nelson v. Vermont & Canada R. R. Co., 26 Vt. 717; Thorp v. Rutland & Burlington R. R. Co., 27 Vt. 140; Missouri Pacific Ry. Co. v. Humes, 115 U. S. 512; Minneapolis & St. L. R. R. Co. v. Emmons, 149 U. S. 364, 13 S. C. 870, 7 Am. R. R. & Corp. Rep. 755.

³⁸English v. New Haven & Northampton Co., 32 Conn. 240; Charlottesville v. Southern Ry. Co., 97 Va. 428, 34 S. E. 98; Chicago etc. R. R. Co. v. Nebraska 170 U. S. 57. *But see* Kansas City v. Kansas City Belt R. R. Co., 102 Mo. 633, 14 S. W. 808, 3 Am. R. R. & Corp. Rep. 522, 10 L.R.A. 851.

³⁹Delaware etc. R. R. Co. v. Buffalo, 158 N. Y. 266, 53 N. E. Rep. 44; Delaware etc. R. R. Co. v. Buffalo, 158 N. Y. 478, 53 N. E. Rep. 533.

⁴⁰Chicago etc. Ry. Co. v. People, 212 Ill. 103, 72 N. E. 219; S. C. affirmed. 200 U. S. 561, 26 S. C. 341.

⁴¹People v. Union Pac. R. R. Co., 20 Col. 186, 37 Pac. 610; Suffield v. Northampton Co., 53 Conn. 367;

Woodruff v. Catlin, 54 Conn. 277; Railroad Co. v. Waterbury, 55 Conn. 19; Town of Westbrook's Appeal, 57 Conn. 96, 17 Atl. 368; Town of Fairfield's Appeal, 57 Conn. 167, 17 Atl. 764; New York etc. R. R. Co.'s Appeal, 58 Conn. 532, 20 Atl. 670; Woodruff v. New York etc. R. R. Co., 59 Conn. 63, 20 Atl. 17; Doolittle v. Selectmen of Branford, 59 Conn. 402, 22 Atl. 336; New York etc. R. R. Co. v. Waterbury, 60 Conn. 1, 22 Atl. 439; New York & N. E. R. R. Co. v. Town of Bristol, 62 Conn. 527, 26 Atl. 122; Cullen v. New York etc. R. R. Co., 66 Conn. 211, 33 Atl. 910; Mooney v. Clark, 69 Conn. 241; Argentine v. Atchison etc. R. R. Co., 55 Kan. 730, 41 Pac. 946, 30 L.R.A. 255; Veazie v. Mayo, 45 Me. 560; State v. Noyes, 47 Me. 189; In re Selectmen of Norwood, 161 Mass. 259, 37 N. E. 199; In re Old Colony R. R. Co., 163 Mass. 356, 40 N. E. 198; State v. Minneapolis etc. R. R. Co., 39 Minn. 219, 39 N. W. 153; State v. St. Paul etc. R. R. Co., 38 Minn. 246; State v. St. Paul etc. R. R. Co., 35 Minn. 131, 59 Am. Rep. 313; Chicago etc. R. R. Co. v. State, 47 Neb. 550, 66 N. W. 624; State v. City of Camden, 53 N. J. L. 322, 21 Atl. 565; Harriman v. Southern Ry. Co., 111 Tenn. 538, 82 S. W. 213; New York & N. E. R. R. Co. v. Town of Bristol, 151 U. S. 556, 9 Am. R. R. & Corp. Rep. 593. A city cannot compel the elevation of tracks to abolish grade crossings without legislative author-

tions with other roads,⁴² to unite in the construction of union stations and to make such changes in the location of tracks as may be necessary to accomplish the purpose,⁴³ to maintain bulletin boards at stations, showing whether trains are on time or not,⁴⁴ to provide separate and equal accommodations for the white and colored races,⁴⁵ and in these and like cases there is simply an exercise of the police power and not a taking of property for public use under the power of eminent domain.⁴⁶ So a railroad company having constructed a tunnel under a navigable river, may be compelled to lower the tunnel at its own expense, when the necessities of navigation require it.⁴⁷ But a statute of South Carolina requiring railroad companies to construct spur tracks to manufacturing plants and industrial enterprises with-

ity. *State v. Indianapolis Union Ry. Co.*, 160 Ind. 45, 66 N. E. 163, 60 L.R.A. 831.

⁴²*State v. Wabash etc. R. R. Co.*, 83 Mo. 144; *San Antonio etc. R. R. Co. v. State*, 79 Tex. 264, 14 S. W. Rep. 1063; *State v. Kansas City etc. R. R. Co.*, 32 Fed. Rep. 722. A railroad company may be compelled to erect stations at such places as the public convenience and necessity reasonably require. *Minneapolis etc. R. R. Co. v. Minnesota*, 193 U. S. 53, 24 S. C. 396; *Dolan v. New York etc. R. R. Co.*, 175 N. Y. 367, 67 N. E. 612.

⁴³*Dewey v. Atlantic Coast Line R. R. Co.*, 142 N. C. 392, 55 S. E. 292.

⁴⁴*State v. Indiana etc. R. R. Co.*, 133 Ind. 69, 32 N. E. 817, 18 L.R.A. 502; *State v. Pennsylvania Co.*, 133 Ind. 700, 32 N. E. 822; *Pennsylvania Co. v. State*, 142 Ind. 428, 41 N. E. 937, 12 Am. R. R. & Corp. Rep. 581;

⁴⁵*Louisville etc. R. R. Co. v. Mississippi*, 133 U. S. 587, 1 Am. R. R. & Corp. Rep. 724; *Ex parte Plessy*, 45 La. Ann. 80, 11 So. 948, 7 Am. R. R. & Corp. Rep. 383, 18 L.R.A. 639.

⁴⁶Where a railroad crosses a street it may be compelled to change its grade to conform to a change in the grade of the street. *Cleveland v. Augusta*, 102 Ga. 233; *Houston etc. R. R. Co. v. Dallas*, 98 Tex. 396, 84 S.

W. 648. The following are additional illustrations: *Metropolitan R. R. Co. v. Macfarland*, 20 App. Cas. D. C. 421; *People v. Detroit United Ry. Co.*, 134 Mich. 682, 97 N. W. 36, 104 Am. St. Rep. 626, 63 L.R.A. 746; *Corporation Commission v. Atlantic Coast Line R. R. Co.*, 137 N. C. 1, 49 S. E. 191, 115 Am. St. Rep. 636; *Same v. Same*, 139 N. C. 126, 51 S. E. 793; *Corporation Commission v. Seaboard Air Line R. R. Co.*, 140 N. C. 239, 52 S. E. 941; *Atlantic Coast Line R. R. Co. v. N. C. Corporation Commission*, 206 U. S. 1, 27 S. C. 585.

⁴⁷*People v. West Chicago St. R. R. Co.*, 115 Ill. 172, 3 N. E. 439; *West Chicago St. R. R. Co. v. People*, 214 Ill. 9, 73 N. E. 393; S. C. *affirmed*, 201 U. S. 506, 26 S. C. 518. So a bridge company may be compelled to make changes to facilitate navigation, where the bridge in its present condition is an obstruction, though it was no obstruction when built, and such is not a taking. *Union Bridge Co. v. United States*, 204 U. S. 364, 27 S. C. 367. See *State v. Ashtabula Co. Comrs.*, 7 Ohio C. C. (N.S.) 469; S. C. 8 Ohio C. C. (N.S.) 169; *United States v. Parkersburg Branch R. R. Co.*, 143 Fed. 224, 74 C. C. A. 354; *United States v. Union Bridge Co.*, 143 Fed. 377.

in half a mile of the main track, the expense to be borne by the applicant in the first instance and refunded by the company out of freights received, was held void as taking property for a private use.⁴⁸ But a similar statute was enforced in North Carolina.⁴⁹ So a statute was held invalid which required railroad companies to construct and keep in repair ditches on their right of way for the benefit of contiguous land.⁵⁰ So of a statute which provided for laying drains across rights of way and required the company to make and maintain the necessary openings without compensation.⁵¹ A statute requiring railroad companies to provide and maintain, light and keep clean, separate water closets or privies for men and women, at every station where they receive or discharge passengers, under penalty of one hundred dollars a week for a failure to comply, was held to be arbitrary and oppressive and to deprive of property without due process of law.⁵² Owners of electric wires in streets of cities may be compelled to put them underground,⁵³ and owners of tenement houses may be required to provide a supply

⁴⁸Mays v. Seaboard Air Line Ry. Co., 75 S. C. 455, 56 N. E. 30.

⁴⁹Corporation Commission v. Seaboard Air Line R. R. Co., 140 N. C. 239, 52 S. E. 941.

⁵⁰Chicago etc. R. R. Co. v. Keith, 67 Ohio St. 279, 65 N. E. 1020, 60 L.R.A. 525.

⁵¹Chicago etc. Ry. Co. v. Chappell, 124 Mich. 72, 82 N. W. 800.

⁵²Missouri etc. Ry. Co. v. State, 100 Tex. 420, 100 S. W. 766; Ft. Worth etc. Ry. Co. v. State, 100 Tex. 425, 100 S. W. 768; Missouri etc. Ry. Co. v. State, 100 Tex. 426, 100 S. W. 768; Southern Kansas Ry. Co. v. State, 100 Tex. 437, 100 S. W. 1197. Where a company got its right of way under a statute which made no provision for private crossings, it cannot be compelled to construct them at its own expense. Owazarzak v. Gulf etc. Ry. Co., 31 Tex. Civ. App. 229, 71 S. W. 793.

⁵³American Rapid Tel. Co. v. Hess, 125 N. Y. 641, 26 N. E. 919, 4 Am. R. R. & Corp. Rep. 199, 13 L.R.A.

454; People v. Ellison, 188 N. Y. 523, 81 N. E. 447, *affirming* S. C. 115 App. Div. 254, 101 N. Y. S. 55; Western Union Tel. Co. v. New York, 38 Fed. 552, 3 L.R.A. 449. But a municipal corporation cannot compel such change without express legislative authority. Carthage v. Central N. Y. Tel. & Tel. Co., 185 N. Y. 448, 78 N. E. 165, *reversing* S. C. 110 App. Div. 625. Where the city of Minneapolis ordered the wires of a telephone company to be put underground in the business part of the city covering nearly a square mile and later ordered them underground in the larger part of the city and it appeared that the poles and wires were not an obstruction or menace in the territory covered by the second order and that compliance would involve a ruinous expense, the second order was held arbitrary and unreasonable. N. W. Telephone Exch. Co. v. Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L.R.A. 175.

of water on each floor,⁵⁴ and to replace school sinks and privy vaults with individual water closets, though compliance may cost ten or twenty per cent of the value of the property.⁵⁵

Some cases hold that a railroad company cannot be compelled to construct a highway across its track, even though the power to modify or repeal its charter is reserved.⁵⁶ Other cases hold that it may be done when the power to repeal, alter or amend the charter is reserved.⁵⁷ A recent case in Maine sustained, as a valid police regulation, a statute which made it the duty of a railroad company, when a new highway was laid out over its tracks, to construct and maintain the crossing.⁵⁸ And this is the prevailing doctrine.⁵⁹ Public service corporations, occupy-

⁵⁴Health Department v. Trinity Church, 145 N. Y. 32, 39 N. E. 833.

⁵⁵Tenement House Dept. v. Moeschen, 89 App. Div. 526, 85 N. Y. S. 704; Same v. Same, 90 App. Div. 603, 85 N. Y. S. 1148; Same cases affirmed, 179 N. Y. 325, 72 N. E. 231, 103 Am. St. Rep. 910, 70 L.R.A. 704; last east affirmed, Moeschen v. Tenement House Dept., 203 U. S. 583, 27 S. C. 781.

⁵⁶Illinois Central R. R. Co. v. Bloomington, 76 Ill. 447; People v. Lake Shore & Mich. Southern Ry. Co., 52 Mich. 277; Kansas City v. Kansas City Belt Ry. Co., 187 Mo. 146, 86 S. W. 190; Miller v. New York & Erie R. R. Co., 21 Barb. 513.

⁵⁷Albany Northern Ry. Co. v. Brownell, 24 N. Y. 345; Boston & Albany R. R. Co. v. Greenbush, 52 N. Y. 510; Portland & Rochester R. R. Co. v. Deering, 78 Me. 61.

⁵⁸The court says: "Corporations derive their existence from the State, and hence are subject to the State even more completely than individuals. Corporations created for public purposes and invested with large powers, as railroad corporations are, can properly be required to do any reasonable thing and to assume permanently any reasonable duty, which shall promise greater security from the dangers attendant

upon the exercise of their powers. There must needs be a highway. The crossing at the railroad must be kept in repair. To permit any divided authority or responsibility as to the crossing would be dangerous. The railroad company would loudly remonstrate if the municipality were given the power to manage the crossing. The company needs the entire control for its own protection as well as that of its passengers. By operating its road it occasions the danger. It is not unreasonable that the railroad company should provide against the danger so occasioned. Such a requirement does not seem to be an 'alteration, amendment or repeal' of the charter of the Boston and Maine Railroad Company. The company exercises all the powers and privileges it had before the enactment of the statute requiring this duty of maintaining crossings. The statute simply requires more care and greater security in such exercise. However the statute may affect the company or its charter, we think the company is subject to it." Railroad Co. v. County Comrs., 79 Me. 386, 395.

⁵⁹Hughes v. Arkansas etc. R. R. Co., 74 Ark. 194, 85 S. W. 773; State v. St. Paul etc. Ry. Co., 98 Minn. 380, 108 N. W. 261; State v. Mo. Pac. Ry. Co., 98 Minn. 429, 108 N. W. 269; Ill.

ing the public streets, may be compelled to change the location of their tracks, poles, pipes, conduits or other works, or to reconstruct the same, when necessary for the public health, safety, convenience or welfare, and such requirement is not a taking of property for public use without compensation.⁶⁰

But a corporation cannot be deprived of its essential rights without compensation. Thus, a bridge company cannot be compelled to construct a draw,⁶¹ or a turnpike company to remove or open its gates.⁶² A statute providing that, where a railroad was laid adjacent to or upon a highway, unobstructed residence crossings should be provided and maintained by the railroad, if so ordered by the railroad commissioners, was held to take the property of the company without compensation and to be void.⁶³

§ 249 (156f). Taking under the guise of the police power. Conclusions. As a result of the decisions cited in

Cent. R. R. Co. v. Copiah Co., 81 Miss. 685, 33 So. 502; Ill. Cent. R. R. Co. v. Swalm, 83 Miss. 631, 36 So. 147; Mo. Pac. R. R. Co. v. Cass County, 76 Neb. 396, 107 N. W. 773; Yonkers v. New York Cent. etc. R. R. Co., 165 N. Y. 142, 58 N. E. 877; Clarendon v. Rutland R. R. Co., 75 Vt. 6, 52 Atl. 1057. See Cincinnati etc. Ry. Co. v. Troy, 68 Ohio St. 510, 67 N. E. 1051.

⁶⁰Merced Falls Gas & Elec. Co. v. Turner, 2 Cal. App. 720, 84 Pac. 239; Macon Consolidated St. R. R. Co. v. Macon, 112 Ga. 782, 38 S. E. 60; Atlantic etc. Ry. Co. v. Cordele, 125 Ga. 373, 54 S. E. 155; S. C. 128 Ga. 293, 57 S. E. 493; Crocker v. Boston Elec. Lt. Co., 180 Mass. 516, 62 N. E. 978; People v. Geneva etc. Traction Co., 112 App. Div. 581, 98 N. Y. S. 719; S. C. affirmed 186 N. Y. 516, 78 N. E. 1109; Am. Tel. & Tel. Co. v. Millereek, 195 Pa. St. 643, 46 Atl. 140; New Castle City v. Central D. & P. Tel. Co., 207 Pa. St. 371, 56 Atl. 931; Am. Tel. & Tel. Co. v. Harbor Creek, 23 Pa. Supr. Ct. 437; Pittsburg v. Consolidated Gas Co., 34 Pa. Supr. Ct. 374; Pawcatuck

Valley St. Ry. Co. v. Westerly, 22 R. I. 307, 47 Atl. 691; Washington etc. Ry. Co. v. Alexandria, 98 Va. 344, 36 S. E. 385; Ganz v. Ohio Postal Tel. Cable Co., 140 Fed. 692, 72 C. C. A. 186. A street railroad company may be compelled to pave between its tracks, when the right to alter, amend or repeal its charter is reserved. Fair Haven etc. R. R. Co. v. New Haven, 203 U. S. 379, 27 S. C. 74.

⁶¹Washington Bridge Co. v. State, 18 Conn. 53. To same effect: Denver v. Denver Cable City R. R. Co., 22 Col. 565, 45 Pac. 439. *But see* United States v. Monongahela Bridge Co., 160 Fed. 712.

⁶²Turnpike Co. v. Davidson Co., 3 Tenn. Ch. 396; Powell v. Sammons, 31 Ala. 552; *and see* City of Philadelphia v. Scott, 9 Phil. 171, 81 Pa. St. 80; City of Schenectady v. Furman, 145 N. Y. 482, 40 N. E. 221, 45 Am. St. Rep. 624.

⁶³People v. Detroit etc. R. R. Co., 79 Mich. 471, 44 N. W. 934, 2 Am. R. R. & Corp. Rep. 215, 7 L.R.A. 717.

the foregoing sections and the principles upon which they depend, we think the following conclusions may be deduced: The use of property may be regulated as the public welfare demands. A public nuisance may be abated and private property interfered with or destroyed for that purpose. The conduct of any business detrimental to the public interests may be prohibited. Property made or kept in violation of law may be destroyed. Railroad corporations, and others invested with the power of eminent domain, because their business is of public utility, may be subjected to such regulations in regard to their charges and the conduct of their business as the legislature deem wise and proper for the general good. They may be compelled to adopt such appliances and execute such additions or changes in their works or property and take such precautions as are necessary to the public safety. Beyond this, private property cannot be interfered with under the police power, but resort must be had to the power of eminent domain and compensation made.⁶⁴

The Supreme Court of the United States, which is the final arbiter upon these questions says: "The validity of a police

⁶⁴Coyne v. Memphis, 118 Tenn. 651, 102 S. W. 355; Askam v. King County, 9 Wash. 1, 36 Pac. 1097.

An act prohibiting the manufacture of cigars or tobacco in a certain class of tenement houses in cities of over five hundred thousand population, of which there was only one in the State, was held invalid in *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; S. C. 33 Hun 374. Ordinances compelling abutting owners to clean the snow and ice from their sidewalks and to keep them in repair were held invalid in Illinois. *Gridley v. Bloomington*, 88 Ill. 554, 30 Am. Rep. 566; *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640; *Chicago v. Crosby*, 111 Ill. 538. But the contrary has been held in other States. *In re Goddard*, 16 Pick. 504; *Union R. R. Co. v. Cambridge*, 11 Allen 287; *Kirby v. Boylston Market Assn.* 14 Gray 252, 74 Am. Dec. 682; *Village of Carthage v. Frederick*, 122 N. Y. 268, 3 Am. R. R. & Corp. Rep. 538, 19 Am. St. Rep. 490, 10 L.R.A.

178; *St. Louis v. Conn. Mut. Life Ins. Co.*, 107 Mo. 92, 18 S. W. 145, 28 Am. St. Rep. 402; *Commonwealth v. Cutter*, 156 Mass. 52, 29 N. E. 1146. In some of these cases it was contended, that the effect of such regulations was to take private property for public use without compensation. See also, as illustrating the text, *Philadelphia etc. R. R. Co. v. Philadelphia*. 47 Pa. St. 325; *Albany v. Watervliet etc. R. R. Co.*, 45 Hun 442; *Clark v. Syracuse*, 13 Barb. 32; *Philadelphia v. Scott*, 81 Pa. St. 80, 22 Am. Rep. 738.

The legislature cannot bargain away its police power, at least so far as the public health and the public morals are concerned. *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746; and see *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Co. v. Rivers*, 115 U. S. 674; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683.

regulation, whether established directly by the State or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose. Private property cannot be taken for public use under a police regulation relating strictly to the public health, the public morals or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare. * * * The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If in the execution of any power, no matter what it is, the government, federal or State, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner. If the means employed have no real, substantial relation to the public objects which government may legally accomplish, if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action.”⁶⁵

⁶⁵Chicago etc. Ry. Co. v. Drainage S. C. 341, *affirming* S. C. 212 Ill. 103,
Comrs., 200 U. S. 561, 592, 593, 26 72 N. E. 219.

CHAPTER VII.

MEANING OF THE WORDS "PUBLIC USE."

§ 250 (157). Taking for private use unauthorized. Only a few of the State constitutions in terms prohibit the taking of private property for private use.¹ All courts, however, agree in holding that this cannot be done.² Different courts find different reasons for this conclusion, some putting it on the ground of an implied prohibition in the eminent domain provi-

¹See provisions in the constitutions of Alabama, Colorado, Georgia, Louisiana and Missouri, *ante*, §§ 16, 19, 23, 30, 37.

²Sadler v. Langham, 34 Ala. 311; Mountain Park Terminal Ry. Co. v. Field, 76 Ark. 239, 88 S. W. 897; Gillan v. Hutchinson, 16 Cal. 153; Lorenz v. Jacob, 63 Cal. 73; Nickey v. Stearns Ranchos Co., 126 Cal. 150, 58 Pac. 459; Hart v. Tresise, 36 Colo. 146, 84 Pac. 685, 4 L.R.A.(N.S.) 872; Prior v. Swartz, 62 Conn. 132, 25 Atl. 398, 36 Am. St. Rep. 333, 18 L.R.A. 668; Hand Gold Mining Co. v. Parker, 59 Ga. 419, 421; Nesbitt v. Trumbo, 39 Ill. 110, 89 Am. Dec. 290; Board of Education v. Bakewell, 122 Ill. 339; Great Western Nat. G. & O. Co. v. Hawkins, 30 Ind. App. 557, 66 N. E. 765; Bankhead v. Brown, 25 Ia. 540; Fleming v. Hull, 73 Ia. 598, 35 N. W. 673; Sisson v. Board of Supervisors, 128 Ia. 442, 104 N. W. 454, 70 L.R.A. 440; Harding v. Funk, 8 Kan. 315, 323; Clark v. Board of County Comrs., 69 Kan. 542, 77 Pac. 284, 66 L.R.A. 965; Robinson v. Swope, 12 Bush 21, 27; Pearce's Heirs v. Patton, 7 B. Mon. 162; Cypress Pond Dr. Co. v. Hooper, 2 Met. Ky. 350; Hancock Stock & Fence Land Co. v. Adams, 87 Ky. 417, 9 S. W.

246; Pickerill v. Louisville, 125 Ky. 213, 100 S. W. 873; Bradley v. Pharr, 45 La. An. 426, 12 So. 618, 19 L.R.A. 647; Williams v. Judge of Eighteenth Judicial Dist., 45 La. An. 1295, 14 So. 57; Bangor R. R. Co. v. McComb, 60 Me. 290; Ulmer v. Lime Rock R. R. Co., 98 Me. 579, 57 Atl. 1001, 66 L.R.A. 387; Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 109 Am. St. Rep. 526, 70 L.R.A. 472; Hepburn's Case, 3 Bland (Md.) 95; Hoye v. Swan's Lessee, 5 Md. 237, 244; New Central Coal Co. v. George's Creek Coal & Iron Co., 37 Md. 537; Van Witsen v. Gutman, 79 Md. 405, 29 Atl. 608, 24 L.R.A. 403; Arnsperger v. Crawford, 101 Md. 247, 61 Atl. 413, 70 L.R.A. 479; Cary Library v. Bliss, 151 Mass. 364, 25 N. E. 92; Turner v. Nye, 154 Mass. 579, 28 N. E. 1048, 14 L.R.A. 487; Woodward v. Central Vt. Ry. Co. 180 Mass. 599, 62 N. E. 1051; Toledo etc. R. R. Co. v. East Saginaw etc. R. R. Co., 72 Mich. 206, 40 N. W. 436; Board of Health v. Van Hoesen, 87 Mich. 533, 49 N. W. 894; Berrien Springs W. P. Co. v. Berrien Circ. Judge, 133 Mich. 48, 94 N. W. 379, 103 Am. St. Rep. 438; State v. Polk Co. Comrs., 87 Minn. 325, 92 N. W. 216, 60 L.R.A. 161; Minn. Canal & Power Co. v. Koochiching Co., 97

sion of the constitution,³ some on the ground that it would be contrary to the provision that no person shall be deprived of

Minn. 429, 107 N. W. 405, 5 L.R.A. (N.S.) 638; *Brown v. Beatty*, 34 Miss. 227, 240, 69 Am. Dec. 389; *Dickey v. Tennison*, 27 Mo. 373; *Helena Power Transmission Co. v. Spratt*, 35 Mont. 108, 88 Pac. 773, 8 L.R.A.(N.S.) 567; *Jenal v. Green Island Dr. Co.*, 12 Neb. 163; *Forney v. Fremont etc. R. R. Co.*, 23 Neb. 465, 36 N. W. 806; *Welton v. Dickson*, 38 Neb. 767, 57 N. W. 555, 41 Am. St. Rep. 771, 22 L.R.A. 496; *Chicago etc. R. R. Co. v. State*, 50 Neb. 399; *Dayton Mining Co. v. Seawell*, 11 Nev. 394, 399; *Concord R. R. Co. v. Greeley*, 17 N. H. 47; *Rockingham Co. L. & P. Co. v. Hobbs*, 72 N. H. 531, 58 Atl. 46, 66 L.R.A. 581; *Seudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 726; *Matter of Albany Street*, 11 Wend. 151; *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 9, 59; *Matter of John & Cherry Streets*, 19 Wend. 659; *Taylor v. Porter*, 4 Hill 140, 40 Am. Dec. 274; *Embry v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; S. C. 2 Sandf. 89; *Matter of Eureka Basin Warehouse and Manuf. Co.*, 96 N. Y. 42; *Matter of Niagara Falls & Whirlpool R. R. Co.*, 108 N. Y. 375, 15 N. E. 429; *Matter of Split Rock Cable R. R. Co.*, 128 N. Y. 408, 28 N. E. 506; S. C. 58 Hun 351, 34 N. Y. St. 169, 12 N. Y. Supp. 116; *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 345, 28 N. E. 358, 14 L.R.A. 481; *Pocantico W. W. Co. v. Bird*, 130 N. Y. 249, 29 N. E. 246; *Matter of Tuthill*, 163 N. Y. 133, 57 N. E. 303, 79 Am. St. Rep. 574, 49 L.R.A. 781; *Harrison v. Thompson*, 9 Barb. 350; *Bennett v. Boyle*, 40 Barb. 551; *Beckman v. Railroad Co.*, 3 Paige, 73; *Wormser v. Brown*, 72 Hun 93, 25 N. Y. Supp. 553; *Carey v. Dewey*, 127 App. Div. 478; *Kenedy v. Erwin, Busbee L.* 387; *State v. Lyle*, 100 N. C. 497, 6 S. E. 379; *McQuillen v. Hatton*, 42 Ohio St. 202; *Lake Erie etc. R. R. Co. v. Hancock Co.*, 63 Ohio St. 23, 57 N. E. 1009; *Witham v. Osburn*, 4 Ore. 318, 18 Am. Rep. 287; *Dalles Lumbering Co. v. Urquhart*, 16 Ore. 67, 19 Pac. 78; *Grande Ronde Elec. Co. v. Drake*, 46 Ore. 243, 78 Pac. 1031; *McCaudless' Appeal*, 70 Pa. St. 210; *Waddell's Appeal*, 84 Pa. St. 90; *City of Wilkes-Barre v. Wyoming Historical & Geological Soc.* 134 Pa. St. 616, 19 Atl. 809; *Peify v. Mountain Water Supply Co.*, 214 Pa. St. 340, 63 Atl. 751; *Dunn v. Charleston, Harper (S.C.)* 189; *Fort v. Goodwin*, 36 S. C. 445, 15 S. E. 723; *Boyd v. Winnsboro Granite Co.*, 66 S. C. 433, 45 S. E. 10; *Clack v. White*, 2 Swan, 540; *Nash v. Clark*, 27 Utah, 158, 75 Pac. 371, 101 Am. St. Rep. 953, 1 L.R.A.(N.S.) 208; *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398; *Fallsburg P. & Mfg. Co. v. Alexander*, 101 Va. 98, 43 S. E. 194, 99 Am. St. Rep. 855, 61 L.R.A. 129; *Varner v. Martin*, 21 W. Va. 534; *Valley City Salt Co. v. Brown*, 7 W. Va. 191; *Pittsburgh etc. R. R. Co. v. Benwood Iron Works*, 31 W. Va. 71, 8 S. E. 453; *Osborn v. Hart*, 24 Wis. 89, 1 Am. Rep. 161; *Wisconsin Water Co. v. Winans*, 85 Wis. 26, 54 N. W. 1003, 39 Am. St. Rep. 813, 20 L.R.A. 662; *In re Theresa Dr. Dist.*, 90 Wis. 301, 63 N. W. 288; *Huber v. Merkel*, 117 Wis. 355, 94 N. W. 354, 98 Am. St. Rep. 933, 62 L.R.A. 589; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 12 S. C. 173. Taking the land of one for the private use of another, was held an abuse of power by a municipal corporation, in *Pills v. Boswell*, 8 Ontario 680.

³See last note, and especially the following cases: *Bankhead v. Brown*, 25 Ia. 540; *Robinson v.*

his property except by the law of the land;⁴ others, on the ground that it would be subversive of the fundamental principles of free government,⁵ or contrary to the spirit of the constitution.⁶ The conclusion is undoubtedly a correct one and is too well settled by authority to necessitate any inquiry into the true grounds upon which it rests. "It is conceded on all hands," says Judge Cooley, "that the legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit."⁷

Swope, 12 Bush 21, 27; Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 109 Am. St. Rep. 526, 70 L.R.A. 472; Arnsperger v. Crawford, 101 Md. 247, 61 Atl. 413, 70 L.R.A. 497; Talbut v. Hudson, 16 Gray 417; Minn. Canal & P. Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405, 5 L.R.A.(N.S.) 638; Welton v. Dickson, 38 Neb. 767, 57 N. W. 559; Concord R. R. Co. v. Greeley, 17 N. H. 47, 54; Rockingham Co. L. & P. Co., 72 N. H. 531, 58 Atl. 46, 66 L.R.A. 581; Matter of Albany Street, 11 Wend. 151; Bloodgood v. Mohawk & Hudson R. R. Co., 18 Wend. 9, 59; Matter of Tuthill, 163 N. Y. 133, 57 N. E. 303, 79 Am. St. Rep. 574, 49 L.R.A. 781; State v. Lyle, 100 N. C. 497, 6 S. E. 379; Dalles Lumbering Co. v. Urquhart, 16 Ore. 67, 19 Pac. 78; Grande Ronde Elec. Co. v. Drake, 46 Ore. 243, 78 Pac. 1031; Sedgwick on Const. Law, p. 447 (2d ed.).

⁴Nesbitt v. Trumbo, 39 Ill. 110; Taylor v. Porter, 4 Hill 140, 40 Am. Dec. 274; Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325.

⁵Concord R. R. Co. v. Greeley, 17 N. H. 47, 56; Hepburn's Case, 13 Bland (Md.) 95; Bloodgood v. Mohawk & Hudson R. R. Co., 18 Wend. 9, 56.

⁶Matter of Peter Townsend, 39 N. Y. 171, 182. In Concord v. Greeley, 17 N. H. 47, 55, the court says: "We

have no doubt that a law providing merely that the property of A should be taken from him and given to B, either with or without consideration, would be repugnant to the constitution. Not, indeed, to the letter of any particular clause contained in it, but to its spirit and design, which, throughout the whole, discountenance the idea that the property of the citizen is held by any such uncertain tenure as the arbitrary discretion of the legislature in a matter of mere private right, unconnected with any considerations of public utility. Such a law would not be so much in repugnance to the constitution as it would be to the principles which hold human society together; which, while they recognize the power of the legislature to be supreme, do not admit it to be arbitrary." See also Welton v. Dickson, 38 Neb. 767, 57 N. W. 559.

⁷Cooley Const. Lim. (6th ed.) p. 651. "The right of eminent domain, however, does not permit the sovereign power to take the property of one citizen and transfer it to another even for full compensation." Forney v. Fremont etc. R. R. Co., 23 Neb. 465, 468, 36 N. W. 806. So also Gillan v. Hutchinson, 16 Cal. 153; Board of Education v. Bakewell, 122 Ill. 339; Cary Library v. Bliss, 151 Mass. 364, 25 N. E. 92; Board of Health v. Van Hoesen, 87 Mich. 533,

§ 251 (158). The question of public use a judicial one. It is manifest that the legislature, in providing for the condemnation of private property, must determine in the first instance whether the use for which it is proposed to make the condemnation is a public one. But this determination is not final. All the courts, we believe, concur in holding that, whether a particular use is public or not, within the meaning of the constitution, is a question for the judiciary.⁸ Some *dicta* have

49 N. W. 894. In *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, 63, the Chancellor says: "There is no prohibition in the constitution of this State, or in any of the State constitutions, that I know of, against taking private property for private use. But the power is nowhere granted to the legislature. The constitution vests in the senate and general assembly the legislative or law-making power. They can make laws, the rules prescribed to govern our civil conduct. They are not sovereign in all things; the executive and judicial power is not vested in them. Taking the property of one man and giving it to another is not making a law, or rule of action; it is not legislation, it is simply robbery. This power was not necessary or useful to be given to the legislature for any of the purposes for which the government was instituted; and it was not given. It is the principle of all free governments, that no right of the citizen should be surrendered to the sovereign, that is not necessary for the purposes of government. This maxim pervades all republican governments as well as monarchies; for the tyranny of a majority, or of corrupt representatives, is just as oppressive, and far more odious, than that of a monarch. This is the aim of all our constitutional restrictions. The first declaration in the bill of rights, that forms the first article of our State constitution, affirms that one of the unalienable rights of every

man is that of acquiring, possessing, and protecting property; and the last declaration therein says that such enumeration of rights shall not be construed to deny others retained by the people. This shows that the right of private property was made sacred by the constitution, to be invaded by no one, not even the legislative power, except where such control was expressly given by that instrument. Again, the sixteenth declaration of the bill of rights, which declares that private property shall not be taken for public use without just compensation; and the ninth provision of the seventh section of the fourth article of the constitution, the article defining and restricting legislative power, which declares that individuals and private corporations shall not be authorized to take private property for public use without compensation first made to the owners: both show, by inevitable implication, that it was not intended to confer on the legislature the power of taking private property for private use at all."

⁸*Sadler v. Langham*, 34 Ala. 311; *Sanford v. Tucson*, 8 Ariz. 247, 71 Pac. 247; *Mountain Park Terminal Ry. Co. v. Field*, 76 Ark. 239, 88 S. W. 897; *Stockton & Visalia R. R. Co. v. Stockton*, 41 Cal. 147; *Consolidated Channel Co. v. Central Pacific R. R. Co.*, 51 Cal. 269; *San Mateo County v. Coburn*, 130 Cal. 631, 63 Pac. 78; *Laguna Dr. Dist. v. Charles Martin Co.*, 144 Cal. 209, 77 Pac. 933; *Madera*

been understood as announcing the doctrine that it was competent for the legislature not only to decide upon the necessity and expediency of an exercise of the power of eminent domain, but also to determine absolutely what uses are public within the meaning of the constitution. We think it more likely that these *dicta* have been misapprehended than that any judge ever intended to announce such a doctrine, and the *dicta* usually

Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27; Tanner v. Treasury T. M. & R. Co., 35 Colo. 593, 83 Pac. 464, 4 L.R.A.(N.S.) 106; New York etc. R. R. Co. v. Long, 69 Conn. 424; Young v. Harrison, 6 Ga. 130; Parkham v. Justices etc., 9 Ga. 341; Loughbridge v. Harris, 42 Ga. 501; Bridwell v. Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, 10 L.R.A. (N.S.) 909; Logan v. Stogdale, 123 Ind. 372, 24 N. E. 135, 8 L.R.A. 58; Mull v. Indianapolis etc. Traction Co., 169 Ind. 214, 81 N. E. 657; Great Western Nat. G. & O. Co. v. Hawkins, 30 Ind. App. 557, 66 N. E. 765; Bankhead v. Brown, 25 Ia. 540; Lake Keon Nav. etc. Co. v. Klein, 63 Kan. 484, 65 Pac. 684; Williams v. Judge of Eighteenth Judicial District, 45 La. An. 1295, 14 So. 57; Kennebec Water Dist. v. Waterville, 96 Me. 234, 52 Atl. 774; Uhmer v. Lime Rock R. R. Co., 98 Me. 579, 57 Atl. 1001, 66 L.R.A. 387; Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 109 Am. St. Rep. 526, 70 L.R.A. 472; New Central Coal Co. v. George's Creek Coal & Iron Co., 37 Md. 537; Van Witsen v. Gutzman, 79 Md. 405, 29 Atl. 608, 24 L.R.A. 403; Arnsperger v. Crawford, 101 Md. 247, 61 Atl. 413, 70 L.R.A. 497; Talbot v. Hudson, 16 Gray, 417; In re St. Paul & Northern Pacific Ry. Co., 34 Minn. 227; Minn. Canal & P. Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405, 5 L.R.A.(N.S.) 638; Dickey v. Teunison, 27 Mo. 373; County Court of St. Louis County v. Griswold, 58 Mo. 175, 194-196; Savannah v. Hancock, 91 Mo. 54; City of Cape Girardeau v. Houck, 129 Mo. 607, 31 S. W. 933; St. Louis v. Brown, 155 Mo. 545, 56 S. W. 298; Welton v. Dickson, 38 Neb. 767, 57 N. W. 559, 41 Am. St. Rep. 771, 22 L.R.A. 496; Dayton Mining Co. v. Seawell, 11 Nev. 394, 399; Concord R. R. Co. v. Greeley, 17 N. H. 47; Rockingham Co. L. & P. Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L.R.A. 581; Seudder v. Trenton Delaware Falls Co., 1 N. J. Eq. 694, 726; Coster v. Tide Water Co., 18 N. J. Eq. 54; Albright v. Sussex Co. Lake & Park Co., 68 N. J. L. 523, 53 Atl. 612; Matter of Deansville Cemetery Association, 66 N. Y. 569, 23 Am. Rep. 86; Matter of Niagara Falls v. Whirlpool R. R. Co., 108 N. Y. 375, 15 N. E. 429; Pocantico W. W. Co. v. Bird, 130 N. Y. 249, 29 N. E. 246; In re City of Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L.R.A. 270; Martin v. Burns, 155 N. Y. 23, 49 N. E. 246; Harris v. Thompson, 9 Barb. 350; McQuillen v. Hatton, 42 Ohio St. 202; Bridal Veil Lumbering Co. v. Johnson, 30 Ore. 205, 46 Pac. 790, 60 Am. St. Rep. 818, 34 L.R.A. 368; Apex Transportation Co. v. Garbade, 32 Ore. 582, 54 Pac. 367, 882; Fanning v. Gilliland, 37 Ore. 369, 61 Pac. 636, 67 Pac. 209, 82 Am. St. Rep. 758; Grande Ronde Elec. Co. v. Drake, 46 Ore. 243, 78 Pac. 1031; Pittsburgh v. Scott, 1 Pa. St. 309, 314; In re R. I. Suburban Ry. Co., 22 R. I. 455, 48 Atl. 590; In re R. I. Suburban Ry. Co., 22 R. I. 457, 48 Atl. 591, 52 L.R.A. 879; Anderson v. Turbeville, 6 Coldw. 150; Ryan v. Terminal Co., 102 Tenn. 111, 50 S. W.

referred to do not necessitate any such construction.⁹ While the legislature cannot make a use public by declaring it so,¹⁰ yet its declaration will be respected by the courts, unless it is palpably without reasonable foundation.¹¹ And the use will be scrutinized less closely when the property is vested in the State or some public agency, than when it is vested in a private corporation.¹²

§ 252 (159). State of the authorities as to the meaning of the words, "public use." It is easily determined, as has been shown in the two preceding sections, that private property can be taken only for public use, and that what is a public use is a question for the courts. When, however, we come to seek for the principles upon which the question of public use is to be determined, or to define the words, "public use," in the light of judicial decisions, we find ourselves utterly at sea. "No question has ever been submitted to the courts," says one authority, "upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words, 'public use,' as found in the different State con-

744, 45 L.R.A. 303; *Borden v. Trespalacios R. & I. Co.*, 98 Tex. 494, 86 S. W. 11, 107 Am. St. Rep. 640; *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398; *Varner v. Martin*, 21 W. Va. 534, 550; *Pittsburgh R. R. Co. v. Benwood Iron Works*, 31 W. Va. 71, 8 S. E. 453; *Hench v. Pritt*, 62 W. Va. 270, 57 S. E. 808; *Wisconsin Water Co. v. Winans*, 85 Wis. 26, 54 N. W. 1003, 39 Am. St. Rep. 813, 20 L.R.A. 662; *Priewe v. Wis. S. L. & I. Co.*, 93 Wis. 534, 67 N. W. 918, 33 L.R.A. 645; *Shoemaker v. United States*, 147 U. S. 282, 13 S. C. 361; *Walker v. Shasta Power Co.*, 160 Fed. 856, 87 C. C. A. 660.

⁹See *Sadler v. Langham*, 34 Ala. 311, 326.

¹⁰*San Mateo County v. Coburn*, 130 Cal. 631, 63 Pac. 78; *Tanner v. Treasury Tunnel M. & R. Co.*, 35 Colo. 593, 83 Pac. 464, 4 L.R.A. (N.S.) 106; *New York etc. R. R. Co. v. Offield*, 77 Conn. 417, 59 Atl.

510; *Logan v. Stogdale*, 123 Ind. 372, 24 N. E. 135, 8 L.R.A. 33; *Great Western Nat. G. & O. Co. v. Hawkins*, 30 Ind. App. 557, 66 N. E. 765; *Minn. Canal & P. Co. v. Koochiching Co.*, 97 Minn. 429, 107 N. W. 405, 5 L.R.A.(N.S.) 638; *Jacobs v. Clearview Water Supply Co.*, 220 Pa. St. 388, 69 Atl. 870; *In re R. I. Suburban Ry. Co.*, 22 R. I. 455, 48 Atl. 590.

¹¹*San Mateo County v. Coburn*, 130 Cal. 631, 63 Pac. 78; *Sisson v. Board of Supervisors*, 128 Ia. 442, 104 N. W. 454, 70 L.R.A. 440; *Ulmer v. Lime Rock R. R. Co.*, 98 Me. 579, 57 Atl. 1001, 66 L.R.A. 387; *Welton v. Dickson*, 38 Neb. 767, 57 N. W. 559; *United States v. Gettysburg Electric R. R. Co.*, 160 U.S. 688, 16 S. C. 427.

¹²*United States v. Gettysburg Electric R. R. Co.*, 160 U. S. 688, 16 S. C. 427; *Walker v. Shasta Power Co.*, 160 Fed. 856, 87 C. C. A. 660.

stitutions regulating the right of eminent domain."¹³ A perusal of the cases cited in this chapter will verify this statement. Courts have generally avoided, and wisely so, the enunciation of general principles or the giving of general definitions, which might prove stumbling blocks in subsequent cases or work mischief in their practical application. It is the duty of courts simply to apply the law to the case in hand. But every decision necessarily proceeds upon the basis of certain general principles, which, whether expressed or not, are capable of being discovered and applied to future cases. In a treatise of this sort, it is proper to seek out the general principles which underlie the decision of specific cases, as to what constitutes a public use, and so expound the law as to afford a guide in its application to new cases and conditions as they arise. Before proceeding to inquire as to the proper construction and meaning of the words public use, it will be well to divest the subject of certain outlying considerations which are sometimes supposed to affect the question, but in reality do not.

§ 253 (160). The question of public use not affected by the agency employed. As we shall see hereafter, it is competent for the legislature to delegate to individuals or corporations the right to take private property for public use.¹⁴ In determining whether the use in such case is public or not, it is an immaterial consideration that the control of the property is vested in private persons who are actuated solely by motives of private gain,¹⁵ or that private benefits will incidentally

¹³Dayton Mining Co. v. Seawell, 11 Nev. 394, 400; *see also* Cooley Const. Lim. p. *532. In Farnsworth v. Lime Rock R. R. Co., 83 Me. 440, 22 Atl. 373, it is said: "There must be enterprises occupying such middle ground on this question, so near to the boundary line between public use and private use that it may be difficult to say on which side of the line the facts would place them. There must be instances at either extreme, and all the way between extremes."

¹⁴Post, § 374.

¹⁵Brown v. Beatty, 34 Miss. 227, 240, 69 Am. Dec. 389; Spratt v. Helena Power Transmission Co., 37

Mont. 60, 94 Pac. 631; Bloodgood v. Mohawk etc. R. R. Co., 18 Wend. 9, 21, 83; Ryan v. Terminal Co., 102 Tenn. 111, 50 S. W. 744, 45 L.R.A. 303; Salt Co. v. Brown, 7 W. Va. 191, 197. In 18 Wend. p. 21, Senator Edwards says: "Does the fact that the power to construct the road is given to a company alter the nature of the grant? Surely not. It is entirely immaterial who constructs the road, or who defrays the expense of the construction. The object for which it is constructed must determine the nature of the grant, whether for public or private use." p. 21. *Also* Concord R. R. Co. v. Greeley, 17 N. H. 47, 60; Matter

accrue from the condemnation.¹⁶ Railroads, canals, turnpikes and ferries are familiar instances of such appropriation, and the principle is of universal application. "The inquiry must necessarily be, what are the objects to be accomplished? not, who are the instruments for attaining them?"¹⁷

§ 254 (161). **Nor by the fact that the use or benefit is local or limited.** It is not necessary that the entire community, or any considerable portion of it, should directly participate in the benefits to be derived from the property taken.¹⁸ "The public use required, need not be the use or benefit of the whole public or State, or any large portion of it. It may be for the inhabitants of a small or restricted locality; but the use and benefit must be in common, not to particular individuals or estates."¹⁹ A school-house site for a district of a dozen families

of Townsend, 39 N. Y. 171; Bellona Company Case, 3 Bland Chy. 442; Cottrill v. Myrick, 12 Me. 222; Pocantico W. W. Co. v. Bird, 130 N. Y. 249, 29 N. E. 246; Lancey v. King County, 15 Wash. 9, 45 Pac. 645, 34 L.R.A. 817.

¹⁶Sisson v. Board of Supervisors, 128 Ia. 442, 104 N. W. 454, 70 L.R.A. 440; Minn. Canal & P. Co. v. Kooochching Co., 97 Minn. 429, 107 N. W. 405, 5 L.R.A.(N.S.) 638.

¹⁷Willyard v. Hamilton, 7 Ohio, pt. 2, 111, 30 Am. Dec. 195.

¹⁸Aldridge v. T. C. & D. R. R. Co., 2 Stew. & Por. 199, 23 Am. Dec. 297; Gilmer v. Lime Point, 18 Cal. 229; Laguna Dr. Dist. v. Charles Martin Co., 144 Cal. 209, 77 Pac. 933; Kramer v. Los Angeles, 147 Cal. 668, 82 Pac. 334; Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27; Bridwell v. Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, 10 L.R.A.(N.S.) 909; Cleveland etc. Ry. Co. v. Polecat Dr. Dist., 213 Ill. 83, 72 N. E. 684; O'Reilly v. Kankakee Valley Draining Co., 32 Ind. 169; Riche v. Bar Harbor Water Co. (Me.) 28 Alb. L. J. 498; Ulmer v. Lime Rock R. R. Co., 98 Me. 579, 57 Atl. 1001, 66 L.R.A. 387; Brown v. Gerald, 100

Me. 351, 61 Atl. 785, 109 Am. St. Rep. 526, 70 L.R.A. 472; Talbot v. Hudson, 16 Gray 417, 425; Lien v. Norman County, 80 Minn. 58, 82 N. W. 1094; Rockingham Co. L. & P. Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L.R.A. 581; Coster v. Tide Water Mill Co., 18 N. J. Eq. 54; Albright v. Sussex Co. Lake & Park Commission, 68 N. J. L. 523, 53 Atl. 612; Martin v. Burns, 155 N. Y. 23; Bloomfield etc. Natural Gas Light Co. v. Richardson, 63 Barb. 437, 448; Hartwell v. Armstrong, 19 Barb. 166; Jacobs v. Clearview Water Supply Co., 220 Pa. St. 388, 69 Atl. 870; Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779; Skagit County v. McLean, 20 Wash. 92, 54 Pac. 781; State v. Superior Court, 47 Wash. 397, 92 Pac. 269.

¹⁹Coster v. Tide Water Co., 18 N. J. Eq. 54, 68. Similar views are expressed in Ross v. Davis, 97 Ind. 79, and McQuillen v. Hatton, 42 Ohio St. 202. "The term implies 'the use of the many,' or 'by the public,' but it may be limited to the inhabitants of a small or restricted locality, but the use must be common and not for a particular individual." Pocantico W. W. Co. v. Bird, 130 N. Y. 249-259, 29 N. E. 246.

is as undeniably for public use as the ground for a State-house.²⁰ If the use is open to all upon equal terms who are so situated as to be able to enjoy the privilege, it is immaterial how few actually avail themselves of the right.²¹ The amount of benefit to be derived from a particular improvement or system of improvements is a consideration which addresses itself to the legislature, and not to the courts.

§ 255 (162). Nor by the necessity or lack of necessity for the condemnation. Some courts have held that, in order to uphold an exercise of the power of eminent domain, a necessity must exist for its exercise, in order to accomplish the purpose sought, and that this question of necessity is in some way an element in determining whether the taking is for public use.²² Thus it is argued that a hotel or theater is not a public use within the meaning of the constitution, because the public can be accommodated in those respects without resorting to the power of eminent domain.²³ Nearly all the cases, how-

²⁰In a case where the question was whether the taking for a district school was for a public use, the court says: "Every public use is, to some extent, local, and benefits a particular section more than others. Railroads and canals, the most extensive of our public works, do so in some degree. Burying grounds, aqueducts, mills, and many highways are as purely local as this, and no person can derive benefit from them except by becoming a resident in their vicinity. In the same way this may be for the benefit of any citizen. But the use in the present case has a more enlarged and liberal view. It is a benefit and advantage to the whole country, that all the children should be educated, and thus, any means of educating the children in any district, benefit the whole. To accomplish this great object of educating the whole, it becomes necessary that a great number of schools should be supported to make them accessible to all; but the principle remains the same, as if all the children of the State could attend a sin-

gle school; they are all but separate means to accomplish the same great and general benefit." *Williams v. School District*, 33 Vt. 271, 279; *Township Board v. Hackman*, 48 Mo. 243, 245.

²¹*State v. Superior Court*, 48 Wash. 277, 93 Pac. 423; *post*, § 312.

²²*Ryerson v. Brown*, 35 Mich. 333, 24 Am. Rep. 564; *Jordan v. Woodward*, 40 Me. 317, 323; *Dayton Mining Co. v. Seawell*, 11 Nev. 394; *Salt Co. v. Brown*, 7 W. Va. 191, 199; *Varner v. Martin*, 21 W. Va. 534, 556. In the last case the court says, the use "must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience;" also, that it "must be impossible, or very difficult at least, to secure the same public uses and purposes in any other way than by authorizing the condemnation of private property." *And see Stearns v. Barre*, 73 Vt. 281, 50 Atl. 1086, 87 Am. St. Rep. 721, 58 L.R.A. 240.

²³*Dayton Mining Co. v. Seawell*, 11 Nev. 394.

ever, hold that the question of necessity is distinct from the question of public use, and that the former question is exclusively for the legislature.²⁴ The necessity, expediency or propriety of exercising the power of eminent domain, and the extent and manner of its exercise, are questions of general public policy and belong to the legislative department of the government. They have nothing to do with the question of what constitutes a public use.

§ 256 (163). The words “public use” a limitation. Many courts seem to treat the question of *What is a public use?* as though the question was *For what purposes may the power of eminent domain be properly exercised?* This is a serious error. The power of eminent domain, as we have before shown, is the power of a sovereign State to appropriate private property to particular uses for the purpose of promoting the general welfare.²⁵ This power was originally in the people, in their sovereign capacity, and was by them delegated to the legislature in the general grant of legislative power. In the absence of any restrictions, the legislature could take private property for any purpose calculated to promote the general good. By the provision in question, the people said to the legislature, in effect, You shall not exercise this power except for public use. To give these words any effect, they must be construed as limiting the power to which they relate, that is, as limiting the purposes for which private property may be appropriated. As the power is by its nature limited to such purposes as promote the general

²⁴San Mateo County v. Coburn, 130 Cal. 631, 63 Pac. 78; Tanner v. Treasury Tunnel M. & R. Co., 35 Colo. 593, 83 Pac. 464, 4 L.R.A. (N.S.) 106; Savannah etc. Ry. Co. v. Postal Tel. Cable Co., 115 Ga. 554, 42 S. E. 1; Chicago etc. Ry. Co. v. Morrison, 195 Ill. 271, 63 N. E. 96; Water Works Co. v. Burkhardt, 41 Ind. 364, 370; Speck v. Kenoyer, 164 Ind. 431, 73 N. E. 896; Mull v. Indianapolis etc. Traction Co., 169 Ind. 214, 81 N. E. 657; Challiss v. A. T. & S. F. Ry. Co., 16 Kan. 117, 126; Lake Keon Nav. etc. Co. v. Klein, 63 Kan. 484, 65 Pac. 684; Kennebec Water Dist. v. Waterville, 96 Me. 234, 52 Atl. 774; Brown v. Gerald, 100 Me. 351,

61 Atl. 785, 109 Am. St. Rep. 526, 70 L.R.A. 472; St. Louis v. Brown, 155 Mo. 545, 56 S. W. 298; Southern Ill. & Mo. B. Co. v. Stone, 174 Mo. 1, 73 S. W. 453, 63 L.R.A. 301; Albright v. Sussex Co. Lake & Park Commission, 68 N. J. L. 523, 53 Atl. 612; Buffalo & New York R. R. Co. v. Brainard, 9 N. Y. 100, 109; People v. Smith, 21 N. Y. 595; Bloomfield etc. Natural Gas Light Co. v. Richardson, 63 Barb. 437; Anderson v. Turbeville, 6 Coldw. 150, 160; Ryan v. Terminal Co., 102 Tenn. 111, 50 S. W. 744, 45 L.R.A. 303; Cooley Const. Lim. *538; *post*, § 369.

²⁵Ante, § 1.

welfare, it is evident that the words public use, if they are to be construed as a limitation, cannot be equivalent to the general welfare or public good. They must receive a more restricted definition.

§ 257 (164). Statement of doctrines. The different views which have been taken of the words "public use" resolve themselves into two classes: one holding that there must be a use or right of use on the part of the public or some limited portion of it, the other holding that they are equivalent to public benefit, utility or advantage. Some of the many definitions of the words public use are here given. "The words 'public use' mean public utility, advantage or what is productive of public benefit."²⁶ "If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose."²⁷ "By the public use is meant for the use of many, or where the public is interested."²⁸ "Whatever is beneficially employed for the community is of public use and a distinction cannot be tolerated."²⁹ Similar definitions, making the words equivalent to public benefit or advantage, are numerous.³⁰ On the other hand, numerous cases hold that to constitute a public use the

²⁶Olmstead v. Camp, 33 Conn. 532, 89 Am. Dec. 221.

²⁷Chancellor Walworth in Beekman v. Saratoga & Schenectady R. R. Co., 3 Paige 45, 73.

²⁸Seely v. Sebastian, 4 Oregon 25.

²⁹Aldridge v. T. C. & D. R. R. Co., 2 Stew. & Por. 199, 23 Am. Dec. 297.

³⁰Todd v. Austin, 34 Conn. 78; Hand Gold Min. Co. v. Parker, 59 Ga. 419; Potlatch Lumber Co. v. Peterson, 12 Ida. 769, 88 Pac. 426, 118 Am. St. Rep. 233; Tuttle v. Moore, 3 Ind. Ter. 712, 64 S. W. 585; Bellona Company's Case, 3 Bland Ch. 442; Talbot v. Hudson, 16 Gray 417; Pittsburgh v. Scott, 1 Pa. St. 309, 314; Nash v. Clark, 27 Utah 158, 75 Pac. 371, 101 Am. St. Rep. 953, 1 L.R.A.(N.S.) 208; S. C. affirmed, 198 U. S. 361, 25 S. C. 676;

Highland Boy Gold Min. Co. v. Strickley, 28 Utah 215, 78 Pac. 296, 107 Am. St. Rep. 711, 1 L.R.A.(N.S.) 976; S. C. affirmed, Strickley v. Highland Boy Gold Min. Co., 200 U. S. 527, 26 S. C. 301. As illustrating this broad view of the subject, the supreme court of Idaho says: "It is enough if the taking tends to enlarge the resources, increase the industrial energies and promote the productive power of any considerable part of the inhabitants of a section of the State, or leads to the growth of towns and the creation of new channels for the employment of private capital and labor, as such results indirectly contribute to the general prosperity of the whole community." Potlatch Lumber Co. v. Peterson, 12 Ida. 769, 88 Pac. 426, 118 Am. St. Rep. 233.

property must be taken into the direct control of the public or of public agencies, or the public must have the right to use in some way the property appropriated.³¹

§ 258 (165). Proper construction of the words "public use." It is, of course, impossible to reconcile these different views, and the question is, which one is correct. "The meaning of the words cannot be ascertained by reading the constitution. No attempt is there made to define them. Nor is there any clause in that instrument, which, by its bearing upon them, teaches us the precise meaning which they were intended to have. We must, therefore, look elsewhere for a true con-

³¹Sholl v. German Coal Co., 118 Ill. 427; Arnsperger v. Crawford, 101 Md. 247, 61 Atl. 413, 70 L.R.A. 497; Jenal v. Green Island Dr. Co., 12 Neb. 163; Matter of Eureka Basin Warehouse & Mfg. Co., 96 N. Y. 42; Jacobs v. Clearview Water Supply Co., 220 Pa. St. 388, 69 Atl. 870; Memphis Freight Co. v. Memphis, 6 Coldw. 419; Healey Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681, 99 Am. St. Rep. 964, 63 L.R.A. 820; State v. White River Power Co., 39 Wash. 648, 82 Pac. 150, 2 L.R.A. (N.S.) 842; Varner v. Martin, 21 W. Va. 534; Hench v. Pritt, 62 W. Va. 270, 57 S. E. 808; and cases cited in next section. In Vance v. Martin, 21 W. Va. 534, 552, 556, the court divided cases of appropriation into two classes, as follows: First, Where "the property condemned is under the direct control and use of the government, or public officers of the government, or what is almost the same thing in the direct use and occupation of the public at large, though under the control of private persons or corporations." Second, Where "it is in the direct use and occupation of private persons or of a corporation, and the general public has only an indirect and qualified use of the property condemned, or perhaps no use properly of any kind of the property condemned, but simply derives

from its use by and for a private person or corporation, some indirect advantage, as by the promotion of the general prosperity of the community." As to cases of the first class, the court concludes there is no question as to the public use. In regard to the second class, the court proceeds as follows: "I think we can show from the decisions, that a person or corporation claiming to belong to this second class, and to have legislative authority to condemn lands, must first show that he or they are possessed of each and all of these three qualifications: First, the general public must have a definite and fixed use of the property to be condemned, a use independent of the will of the private person or private corporation in whom the title of the property when condemned will be vested; a public use which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the legislature; second, this public use must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience; third, it must be impossible, or very difficult at least, to secure the same public uses and purposes in any other way than by authorizing the condemnation of pri-

struction.”³² If we look to our dictionaries, we find the same confusion as in the decisions. Thus, “use” is defined as, first, “the act of employing anything or the state of being employed for any purpose; application, employment, service;” second, “the quality that makes a thing proper for a purpose; benefit, utility, advantage.”³³ To constitute a public use according to the first of these definitions, it is necessary that the public should in some way use or be entitled to use or enjoy the property taken. According to the second definition, it would be a public use if the property taken was so employed as to enure in any way to the public benefit or advantage.

If we go back a century and place ourselves in the situation of those who framed the constitutions of the original States, we shall find that the principal purposes, if not the only purposes, for which private property was appropriated were for ways and mills. The mills were mostly saw-mills and grist-mills, and were accustomed, and in most cases obliged, to saw and grind for toll for whomsoever applied.³⁴ They were for public use, in the stricter sense of the phrase. There was nothing in the practice of the States at the time the earlier constitutions were adopted to require that the words *public use* should have the meaning of public benefit or advantage.

The use of a thing is strictly and properly the employment or application of the thing in some manner.³⁵ The public use of anything is the employment or application of the thing by the public. Public use means the same as use by the public, and

vate property. If any one of these essentials is wanting, the courts will declare the act of the legislature authorizing such condemnation of private property to be unconstitutional, because it would amount to taking private property for private and not for public uses.” See also Salt Co. v. Brown, 7 W. Va. 191, 139. Public use and public benefit are not the same. Wis. River Imp. Co. v. Pier (Wis.), 118 N. W. 857.

³²Concord R. R. Co. v. Greeley, 17 N. H. 47, 60.

³³See Worcester, Webster and other lexicographers, all of whom give and illustrate these different uses of the word.

³⁴Post, § 275.

³⁵Such is the first meaning given by all lexicographers, and the one required by the etymology of the word. It is from the Latin *utor*, which means “to use, make use of, avail one’s self of, employ, apply, enjoy, etc.” Of course constitutional law cannot be turned into a question of etymology, but, in questions of this sort, which necessarily turn upon nice distinctions, and where there is no definite clue to guide us, it is proper to look at the original and controlling definition of the words employed.

this it seems to us is the construction the words should receive in the constitutional provision in question.³⁶ The reasons which incline us to this view are: First, That it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; third, it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application.³⁷

³⁶"The test whether a use is public or not is whether a public trust is imposed upon the property, whether the public has a legal right to the use, which cannot be gainsaid, or denied, or withdrawn at the pleasure of the owner." Farmers' Market Co. v. Philadelphia R. R. Co., 10 Pa. Co. Ct. 25. "What is a public use is incapable of exact definition. The expressions public interest and public use are not synonymous. The establishment of furnaces, mills and manufactures, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote, in a general sense, the public welfare. But they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings." Matter of Niagara Falls & Whirlpool R. R. Co., 138 N. Y. 375, 15 N. E. 429. *And see* Matter of Split Rock Cable R. R. Co., 128 N. Y. 408, 28 N. E. 506; Pocantico W. W. Co. v. Bird, 130 N. Y. 249, 29 N. E. 246; Board of Health v. Van Hoe-sen, 87 Mich. 533, 49 N. W. 894; Fork Ridge Baptist Cem. Assn. v. Redd, 33 W. Va. 262, 10 S. E. 405. In the last case it is held, that where the property condemned will come under the control of a private corporation or individuals, to constitute a public use, it must appear: "(1) The use which the public is to have of the

property must be fixed and definite; the general public must have a right to a certain definite use of the private property, on terms and for charges fixed by law; and the owner of the property must be compelled by law to permit the general public to enjoy it. (2) This use of the property by the public must be a substantially beneficial one, which is obviously needful for the public, and which it could not do without, except by suffering great loss or inconvenience. (3) The necessity for condemnation must be obvious. It must obviously appear from the location of the property, or from the character of the use to which it is to be put, that the public could not, without great difficulty, obtain the use of this or other land, which would answer the same general purpose, unless it be condemned; and in such case the courts will judge of the necessity for condemnation."

³⁷These views are strongly supported by the following authorities, in many of which the text is quoted and approved: Cleveland etc. Ry. Co. v. Polecat Dr. Dist., 213 Ill. 83, 72 N. E. 684; Great Western Nat. G. & O. Co. v. Hawkins, 30 Ind. App. 557, 66 N. E. 765; Sisson v. Board of Supervisors, 128 Ia. 442, 104 N. W. 454, 70 L.R.A. 440; Ulmer v. Lime Rock R. R. Co., 98 Me. 579, 57 Atl.

If the constitution means that private property can be taken only for use *by* the public, it affords a definite guide to both the legislature and the courts. Though the property is vested in private individuals or corporations, the public retain certain definite rights to its use or enjoyment, and to that extent it remains under the control of the legislature. If no such rights are secured to the public, then the property is not taken for public use and the act of appropriation is void. This interpretation will cover every case of appropriation that has been deemed lawful by any court, except a few in relation to mills, mines and drainage. If exceptional circumstances require exceptional legislation in those respects in any State, it is very easy to provide for it specially in the constitution, as has been done in several States.

On the other hand, if the constitution means that private property may be taken for any purpose of public benefit and utility, what limit is there to the power of the legislature? This view places the whole matter ultimately in the hands of the judiciary, as though the constitution read that private property may be taken for such purposes as the Supreme Court deem of public benefit or advantage. The public welfare is committed generally to the keeping of the legislature. It is a numerous body, coming directly from the people and supposed to be acquainted with their condition and needs. All questions of general public wel-

1001, 66 L.R.A. 387; Arnsperger v. Crawford, 101 Md. 247, 61 Atl. 413, 70 L.R.A. 497; Berrien Springs Water Power Co. v. Berrien Circ. Judge, 133 Mich. 48, 94 N. W. 379, 103 Am. St. Rep. 438; Minn. Canal & Power Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405, 5 L.R.A. (N.S.) 638; Rockingham Co. L. & P. Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L.R.A. 581; Matter of Tuthill, 163 N. Y. 133, 57 N. E. 303, 79 Am. St. Rep. 574, 49 L.R.A. 781, reversing S. C. 36 App. Div. 49; Cozard v. Kanawha Hardwood Co., 139 N. C. 283, 51 S. E. 932, 111 Am. St. Rep. 779, 1 L.R.A. (N.S.) 969; Jacobs v. Clearview Water Supply Co., 220 Pa. St. 388, 69 Atl. 870; In re R. I. Suburban Ry. Co., 22 R. I. 457, 48 Atl. 591, 52

L.R.A. 879; Ryan v. Terminal Co., 102 Tenn. 111, 50 S. W. 744, 45 L.R.A. 303; Borden v. Trespalacio R. & I. Co., 98 Tex. 494, 86 S. W. 11, 107 Am. St. Rep. 640; Avery v. Vt. Elec. Co., 75 Vt. 235, 54 Atl. 179, 98 Am. St. Rep. 818, 59 L.R.A. 817; Fallsburg P. & M. Co. v. Alexander, 101 Va. 98, 43 S. E. 194, 99 Am. St. Rep. 855, 61 L.R.A. 129; Dice v. Sherman, 107 Va. 424, 59 S. E. 808; Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681, 99 Am. St. Rep. 964, 63 L.R.A. 820; State v. White River Power Co., 39 Wash. 648, 82 Pac. 150, 2 L.R.A. (N.S.) 842; State v. Superior Court, 42 Wash. 660, 85 Pac. 666, 5 L.R.A. (N.S.) 672; Shasta Power Co. v. Walker, 149 Fed. 568.

fare and advantage fall appropriately within the province of the legislature. They have opportunities for judging correctly, ways and means of information which the courts do not and cannot have. It cannot be presumed that the people ever intended to commit such a question to the courts. Whether the public will have the use of property taken under a particular statute is a question which may be readily determined from an inspection of the statute, but whether a particular improvement will be of public utility is a question of opinion merely, about which men may differ, and which cannot be referred to any definite criterion. "The moment the mode of use is disregarded, and we permit ourselves to be governed by speculations upon the benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat without any certain principles to guide us."³⁸ Says the supreme court of Maryland: "There will be found two different views of the meaning of these words which have been taken by the courts; one, there must be a use, or right of use *by* the public, or some limited portion of the public; the other that they are equivalent to *public utility* or *advantage*. If the former is the correct view, the legislature and the courts have a definite, fixed guide for their action. If the latter is to prevail, the enactment of laws upon this subject will reflect the passing popular feeling, and their construction will reflect the various temperaments of the judges, who are thus left free to indulge their own views of public utility or advantage. We cannot hesitate to range this court with those which hold the former to be the true view."³⁹ And the supreme court of Texas says: "We are not inclined to accept that liberal definition of the phrase 'public use' adopted by some authorities, which makes

³⁸Tracy, Senator, in *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 9, 60. Also, in the same opinion, p. 65: "Can the constitutional expression, public use, be made synonymous with public improvement, or general convenience or advantage, without involving consequences inconsistent with the reasonable security of private property; much more with that security which the constitution guarantees? If an incidental benefit, resulting to the

public from the mode in which individuals in pursuit of their own interests use their property, will constitute a public use of it, within the intentions of the constitution, it will be found very difficult to set limits to the power of appropriating private property." *And see Howard Mills Co. v. Schwartz L. & C. Co.*, 77 Kan. 599, 99 Pac. 559.

³⁹*Arnsperger v. Crawford*, 101 Md. 247, 253. 61 Atl. 413, 70 L.R.A. 497.

it mean no more than the public welfare or good, and under which almost any kind of extensive business which promotes the prosperity and comfort of the country might be aided by the power of eminent domain. With the court of appeals and counsel for plaintiffs and those authorities which they follow, we agree that property is taken for public use as intended by the constitution only when there results to the public some definite right or use in the business or undertaking to which the property is devoted. And we further agree that this public right or use should result from the law itself and not be dependent entirely upon the will of the donee of the power.”⁴⁰

⁴⁰Borden v. Trespalacios R. & Y. Co., 98 Tex. 494, 509, 86 S. W. 11, 107 Am. St. Rep. 640. The question is very elaborately considered in Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681, 99 Am. St. Rep. 964, 63 L.R.A. 820, from which we quote as follows: “It seems to us, however, that this is the announcement of a dangerous doctrine, tending to encroach upon private rights which the constitution has attempted to safeguard, and to render such rights as uncertain and varying as are the interests of different localities and opinions of different judges on different branches of business. Under such a rule an act might be construed to be legal one year, because a certain business was found to be profitable to the community at large, and the next year held void because the business was not a paying one. The constitution is the fundamental law. Its enactments, whether they constitute grants or limitations, are presumed to be stable, and uniform, and to constitute a check on the more mutable sentiment and actions of members of different legislatures. And it seems to us that the result of such a construction would be a virtual removal of any constitutional inhibition on legislative power in this respect, leaving the legislative will as free and untrammeled as in those states

where the legislatures are permitted to act in consonance with the inherent power of sovereignty, and no constitutional enactments have intervened. It was no doubt for the purpose of preventing enthusiastic legislation, practically destroying this limitation, that the question of public use was especially submitted to the courts, who are, and should be, ever watchful in maintaining inviolate the constitutional rights of the citizen.

“It cannot be that, within the meaning of the constitution, the distinction between public policy and public use is to be obliterated. It might be of unquestionable public policy, and for the best interests of the State, to allow condemnation of lands in every instance where it would result in aiding prosperous business enterprises which would give employment to labor, stimulate trade, increase property values, and thereby increase the revenues of the State, even if the enterprise was purely private; for such is the relation, under our form of government, between public and private prosperity that one cannot be enjoyed to any appreciable extent without favorably influencing the other. But it is evident that this was not the kind of public use that was in the minds of the framers of the constitu-

It has sometimes been said that the construction of the words public use which we have preferred would afford less security to private property than the one we have rejected. Thus, one court says: "If public occupation and enjoyment of the object for which land is to be condemned furnishes the only and true test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theaters. Why not? A hotel is used by the public as much as a railroad. The public have the same right, upon payment of a fixed compensation, to seek rest and refreshment at a public inn as they have to travel upon a railroad." ⁴¹ But certainly a hotel is also for the public benefit and advantage as well as a railroad, and is as much within one construction of the words public use as the other. But why may not the legislature provide for acquiring by condemnation a site for a hotel or theater to which the public shall have the right to resort, and which shall be subject to public regulation in its management and charges? Is not this a mere question of expediency and public policy? And is not our opinion upon this question the outgrowth of the state of society in which we live and the usages and practices to which we are accustomed? In ancient times vast sums of money were expended in the construction and maintenance of

tion; and it seems to us that the logic of those courts which have sustained appellants contention is justified solely on grounds of public policy.

"It seems scarcely necessary to particularize to show to what extent this doctrine might practically be carried. Under such liberal construction, the brewer could successfully demand condemnation of neighbors' land for the purpose of erection of a brewery, because, forsooth, many citizens of the State are profitably engaged in the cultivation of hops. Condemnation would be in order for grist mills, and for factories for manufacturing the cereals of the State, because there is a large agricultural interest to be sustained. Tanneries, woolen factories, oil refineries, distilleries, packing houses,

and machine shops of almost every conceivable kind, would be entitled to some consideration for the same reasons; thereby actually destroying any distinctions between public and private use, for the principle in one instance is the same as in the other; the difference is only in degree." pp. 504-506. And after reviewing authorities, the court concludes thus: "But from a consideration of all the authorities and from our own views on construction, we are of opinion that the use under consideration must be either a use by the public, or by some agency which is *quasi* public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the State." p. 509.

⁴¹ Dayton Mining Co. v. Seawell, 11 Nev. 394, 411.

public theaters, which were regarded as among the most important of public institutions. A proposal to condemn a site for a theater would not have sounded strange, so far as the purpose goes, in the ears of Pericles or Cicero.⁴²

There is no constitutional limitation to the effect that the power of eminent domain shall not be exercised unless it would be otherwise impossible or difficult to accomplish the purpose sought. There are *dicta* to this effect, but no decisions that we are aware of.

Some discretion must be left to the legislature. It is not to be presumed that they are wholly destitute of integrity or judgment. The people have left it for them to determine for what public uses private property may be condemned. If they abuse their trust, the responsibility is not upon the courts, nor the remedy in them. For further verification of the views here expressed we must refer to the subsequent sections of this chapter and the cases therein cited.

§ 259 (166). Highways: Questions of public use, as affected by their character, purpose or other circumstances. Perhaps no better example of a public use can be given than that of the ordinary highway, where the easement or right of way vests in the public for the common and equal use of all.⁴³ Private property taken for a highway is taken for public use, though the way terminates on ground used for a church and cemetery and be laid out wholly to afford access to such ground,⁴⁴ or though it accommodates but a single family,⁴⁵ or though it

⁴²In a recent case it is said: "The uses which should be deemed public in reference to the right of the legislature to compel an individual to part with his property for a compensation, and to authorize or direct taxation to pay for it, are being enlarged and extended with the progress of the people in education and refinement." Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77.

⁴³San Mateo County v. Coburn, 130 Cal. 631, 63 Pac. 78; Miller v. Colonial Forestry Co., 73 Conn. 500, 503, 48 Atl. 98; Speck v. Kenoyer, 164 Ind. 431, 73 N. E. 896; State v.

Superior Court, 29 Wash. 1, 69 Pac. 366; State v. Superior Court, 47 Wash. 11, 91 Pac. 241. A highway is a public use, though of special interest to local property owners. Wheelwright v. Boston, 188 Mass. 521, 74 N. E. 937. Footways and alleys are within the definition of highways. Boston & Albany R. R. Co. v. Boston, 140 Mass. 87; Savannah v. Hancock, 91 Mo. 54.

⁴⁴West Pikeland Road, 63 Pa. St. 471; Kissinger v. Hanselman, 33 Ind. 80; Cemetery Assn. v. Meninger, 14 Kan. 312.

⁴⁵Roberts v. Williams, 15 Ark. 43; Johnson v. Supervisors of Clayton

be a mere *cul de sac*,⁴⁶ or though it be laid out in one town solely for the benefit of lands and persons belonging in another town or another State,⁴⁷ or though its purpose be to afford access to a farm, lumber yard, or mine.⁴⁸ So a highway may be laid out terminating at a State line,⁴⁹ or town line,⁵⁰ or river,⁵¹ or to connect with a highway to be laid out in an adjoining county.⁵² A highway may be laid out to form an approach to a bridge, built by a corporation created by Congress.⁵⁴ But a road which does not connect with or intersect any public road is not a highway and cannot be laid out as such.⁵⁵ It is immaterial what the object of travel on the road may be, whether pleasure or business. The proper authorities may lay out roads to accom-

Co., 61 Ia. 89; Pagels v. Oaks, 64 Ia. 198; Drake v. Clay, Sneed., Ky. 139 (*but see Fletcher's Heirs v. Fugate*, 3 J. J. Marsh, Ky. 631); Fanning v. Gilleland, 37 Ore. 369, 61 Pac. 636, 67 Pac. 209, 82 Am. St. Rep. 758; Paine v. Leicester, 22 Vt. 44; Lewis v. Washington, 5 Gratt. 265. *Contra:* Knowles' Petition, 22 N. H. 361; Underwood v. Bailey, 59 N. H. 480. In Richards v. Wolf, 82 Ia. 358, 47 N. W. 1044, 31 Am. St. Rep. 501, it was held that a highway could not be laid out which would be practically for the convenience of one person, whose land abutted on another highway. The prior cases above cited from the same State were distinguished. *See Matter of Whites-town*, 24 N. Y. Misc. 150.

⁴⁶Sheaff v. People, 87 Ill. 189; Masters v. McHolland, 12 Kan. 17; Cemetery Assn. v. Meninger, 14 Kan. 312; Fields v. Colby, 102 Mich. 450, 60 N. W. 1048; People v. Van Alstyne, 3 Keyes 35; State v. Superior Court, 42 Wash. 521, 85 Pac. 256; Schatz v. Pfeil, 56 Wis. 429; Johnston v. Lonstrot, 128 Wis. 17, 107 N. W. 459. *But see Holdane v. Village of Cold Spring*, 23 Barb. 103; Holdane v. Cold Spring, 21 N. Y. 474; Greene v. O'Connor, 18 R. I. 56, 25 Atl. 692, 19 L.R.A. 262; Mabler v. Brumder, 92 Wis. 477, 66 N. W. 502, Em. D.—33.

31 L.R.A. 695; *Matter of Burdick*, 27 N. Y. Misc. 298.

⁴⁷Gilman v. Westfield, 47 Vt. 20; Crosby v. Hanover, 36 N. H. 404.

⁴⁸Morrison v. Thistle Coal Co., 119 Ia. 705, 94 N. W. 507; Masters v. McHolland, 12 Kan. 17; State v. Bishop, 39 N. J. L. 226; Robinson v. Winch, 66 Vt. 110, 28 Atl. 884. *See Matter of Lawton*, 24 N. Y. Misc. 426.

⁴⁹Rice v. Rindge, 53 N. H. 530.

⁵⁰Goodwin v. Wethersfield, 43 Conn. 437.

Watson v. Town Council of South Kingstown, 5 R. I. 562; Moore v. Ange, 125 Ind. 562, 25 N. E. 816.

⁵²Peckham v. Town of Lebanon, 39 Conn. 231. If the statute requires a highway to lead to some public point or place, a highway terminating at a railroad is bad. *Road in Upper Darby*, 2 Pa. Co. Ct. 366.

⁵⁴Luxton v. North Riv. Bridge Co., 153 U. S. 525.

⁵⁵State v. Price, 21 Md. 448; Snow v. Town of Sandgate, 66 Vt. 461, 29 Atl. 673; Wallman v. R. Connor Co., 115 Wis. 617, 92 N. W. 374. "To be public, it must not only be nominally open for use by the public, but it must be so located that the public can get on to it at some point." Last case, p. 620.

modate all lawful travel. It has accordingly been held that highways may be laid out for the purpose of affording access to points which command a fine view or are resorted to for pleasure.⁵⁶ So the public nature of the use is not affected by the fact that the expense is defrayed in whole or in part by private contribution,⁵⁷ but it has been held that a road which is not of public utility cannot be laid out merely because private parties are willing to defray the expense.⁵⁸ Land taken for a ditch to drain and improve a highway is taken for a public use.⁵⁹ In the absence of special statutory or constitutional provisions it is for the proper public authorities to determine whether a particular highway is necessary and proper, and with this question the courts have nothing to do. A highway is a public use, but the need of it is a question of expediency.⁶⁰ Taking property to widen a street or highway is for a public use as much as the original establishment of a highway.⁶¹ And a street may be widened for

⁵⁶Higginson v. Nahant, 11 Allen, 530; Petition of Mount Washington Road Co., 35 N. H. 134.

⁵⁷Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 234; Townsend v. Hoyle, 20 Conn. 1; Chicago etc. R. R. Co. v. Naperville, 169 Ill. 25, 48 N. E. 335; Butts v. Geary County, 7 Kan. App. 302; Inhabitants of Vassellborough, 19 Me. 338; Coombs v. County Comrs., 68 Me. 484; Parks v. Boston, 8 Pick. 218, 19 Am. Dec. 322; Cope-land v. Packard, 16 Pick. 217; Blake v. County Comrs., 114 Mass. 583; Atkinson v. Newton, 169 Mass. 242, 47 N. E. 1029; Seafield v. Bohne, 169 Mo. 537, 69 S. W. 1051; Smith v. Conway, 17 N. H. 586, 592; Kelley v. Kennard, 60 N. H. 1; State v. Justice, 24 N. J. L. 413; State v. City of Orange, 54 N. J. L. 111, 22 Atl. 1004, 14 L.R.A. 62; State v. New Brunswick, 58 N. J. L. 225, 33 Atl. 477; Commissioners of Canal Fund v. Perry, 5 Ohio, 58; State v. Collins, 6 Ohio, 126; Dwiggins v. Denver, 24 Ohio St. 629; Bern v. Penn Tp. Road, 2 Monaghan (Pa.) 105; Patchen v. Doolittle, 3 Vt. 457; State v. Geneva, 107 Wis. 1, 82 N. W. 550.

⁵⁸Blackman v. Halves, 72 Ind. 515; Dudley v. Cilley, 5 N. H. 558; Hampton v. Poland, 50 N. J. L. 367, 13 Atl. 174; Commonwealth v. Sawin, 2 Pick. 547; Frederick Street, 12 Pa. Co. Ct. 577; East Whiteland Tp. Road, 30 Pa. Supr. Ct. 211; State v. Ryan, 127 Wis. 599, 106 N. W. 1093. In the latter case an order establishing a road was held void, where it appeared that before entering the order the commissioners took a bond from a private individual conditioned that he would construct the road at his own expense, though two of the three commissioners were in favor of laying out the road before the bond was given and testified that they were not influenced by it.

⁵⁹Smeaton v. Martin, 57 Wis. 364.

⁶⁰Post, § 369. San Mateo County v. Coburn, 130 Cal. 631, 63 Pac. 78; Opp v. Timmons, 149 Ind. 236, 48 Ind. 1038; Speck v. Kenoyer, 164 Ind. 431, 73 N. E. 896; New Orleans v. Steinhardt, 52 La. An. 1043, 27 So. 586.

⁶¹Mendocino County v. Peters, 2 Cal. App. 24, 82 Pac. 1122.

the purpose of securing land for ornamental purposes and for light and air.⁶²

§ 260 (167). Private roads. Laws have existed, and, perhaps, do still exist in most of the States for the laying out of what are usually called private roads, but which are also called in some States, township, neighborhood or pent roads. These statutes have in some cases been held valid, and in others invalid. There is, however, but little, if any, real conflict of authority, as appears when the cases are examined and compared. The key to their reconciliation is to be found in the fact that the phrase *private roads* or *private ways* is used in different States and different statutes to designate roads of entirely different character. Where the road, though laid out on the application and paid for and kept in repair by a particular individual who is especially accommodated thereby, is, in fact, a public road and for the use of all who may desire to use it, then it is regarded as accomplishing a public purpose for which land may be condemned.⁶³ But when the road, after being laid out, becomes the property of the applicant, from which he may lawfully ex-

⁶²Matter of Clinton Ave., 57 App. Div. 166, 68 N. Y. S. 193; S. C. affirmed, 167 N. Y. 624, 69 N. E. 1108.

⁶³Roberts v. Williams, 15 Ark. 43; Pippin v. May, 78 Ark. 18, 93 S. W. 64; Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 577; Butte Co. v. Boydston, 64 Cal. 110; Monterey County v. Cushing, 83 Cal. 507, 23 Pa. 700; Los Angeles County v. Reyes (Cal.), 32 Pac. 233; Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915; Mariposa County v. Knowles, 146 Cal. 1, 79 Pac. 525; Hickman's Case, 4 Harr. (Del.) 580; Brewer v. Bowman, 9 Ga. 37; Latah County v. Peterson, 2 Idaho, 1118, 29 Pac. 1089, 16 L.R.A. 81; Latah County v. Hasfurther, 12 Ida. 797, 88 Pac. 433; Johnson County v. Minnear, 72 Kan. 326, 83 Pac. 828; Denham v. County Comrs. of Bristol, 108 Mass. 202; Davis v. Smith, 130 Mass. 113; Downing v. Coreoran, 112 Mo. App. 645, 87 S. W. 114; Metcalf v. Bingham, 3 N. H. 459; Clark v. Boston etc. R. R. Co., 24 N. H. 118; Proe-

tor v. Andover, 42 N. H. 348; Perrine v. Farr, 22 N. J. L. 356; Cook v. Vickers, 141 N. C. 101, 53 S. E. 740; Shaver v. Starrett, 4 Ohio St. 494; Ferris v. Bramble, 5 Ohio St. 109; County of Douglas v. Clark, 15 Ore. 3, 16 Pac. 420; Wolcott v. Whitecomb, 40 Vt. 40; Whitingham v. Bowen, 22 Vt. 317; Brock v. Barnett, 57 Vt. 172. The text is sustained in Towns v. Klamath County, 33 Or. 225, 53 Pac. 604, in which the court says: "If by a fair construction and operation of the statutes, the road, when laid out, is in fact a public road, for the use of all who may desire to use it, the law is not liable to the charge of unconstitutionality, and is valid, though the road may be laid out on the application of, paid for and kept in repair by the petitioner, and primarily designed for his benefit; but if such road is to become a mere private way, and not open to the public, the law sanctioning it is void," p. 232. See also Sullivan v. Kline, 33 Ore. 260, 54 Pac. 154.

clude the public, then the use is strictly private, and the law authorizing the condemnation of property therefor is void.⁶⁴ In many cases, it will be found, the constitutional question is not raised or considered.⁶⁵

Whether a private way is the exclusive property of the applicant or is open to public use must be determined from the statute. If the statute provides that it shall be for public use,⁶⁶ or for the exclusive use of the applicant, that settles the question.⁶⁷ If any part of the expense may be imposed upon the public, that circumstance would indicate that it was intended to be for the use of the public.⁶⁸ Where the statute provides that the applicant shall pay the cost of the road and that it shall

⁶⁴Sadler v. Langham, 34 Ala. 311; Nesbitt v. Trumbo, 39 Ill. 110, 89 Am. Dec. 290; Crear v. Crossly, 40 Ill. 175; Wild v. Deig, 43 Ind. 455, 13 Am. Rep. 399; Stewart v. Hartman, 46 Ind. 331; Logan v. Stogdale, 123 Ind. 372, 24 N. E. 135, 8 L.R.A. 58; Bankhead v. Brown, 25 Ia. 540; Clark v. Board of Comrs., 69 Kan. 542, 77 Pac. 284, 66 L.R.A. 965; Dent v. Smith, 76 Kan. 381, 92 Pac. 307; Shake v. Frazer, 94 Ky. 143, 21 S. W. 583; Dickey v. Tennison, 27 Mo. 373; Welton v. Dickson, 38 Neb. 767, 57 N. W. 559, 41 Am. St. Rep. 771, 22 L.R.A. 496; Taylor v. Porter, 4 Hill 140, 40 Am. Dec. 274; Mohawk etc. R. R. Co. v. Arteher, 6 Paige 83; Burgwyn v. Lockhart, Winston Law, 269; Plimmons v. Frisby, *ibid.* 201; Witham v. Osburn, 4 Ore. 318, 18 Am. Rep. 287; Beaudrot v. Murphy, 53 S. C. 118, 30 S. E. 825; Rice v. Alley, 1 Snead 51; Clack v. White, 2 Swan 540; Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681, 99 Am. St. Rep. 964, 63 L.R.A. 820; Varner v. Martin, 21 W. Va. 534; Osborn v. Hart, 24 Wis. 89, 1 Am. Rep. 161; Wallman v. R. Connor Co., 115 Wis. 617, 92 N. W. 374.

⁶⁵Leach v. Day, 27 Cal. 643; Reynolds v. Reynolds, 15 Conn. 83; Bradford v. Cole, 8 Fla. 263; Ryker v. McElroy, 28 Ind. 179; McCauley v.

Dunlap, 4 B. Mon. 57; Rout v. Mountjoy, 3 B. Mon. 300; Jones' Heirs v. Barclay, 2 J. J. Marsh 73; Littlejohn v. Cox, 15 La. An. 67; Perry v. Webb, 21 La. An. 247; North Berwick v. Commissioners of York, 25 Me. 69; Lyon v. Hamor, 73 Me. 56; Owings v. Worthington, 10 G. & J. 283; Hall v. Pettit, 88 Mich. 158, 50 N. W. 117; Singleton v. Commissioners, 2 Nott. & McC. 526; Warlick v. Lowman, 103 N. C. 122, 9 S. E. 458; Burwell v. Snead, 104 N. C. 118, 10 S. E. 152; Warlick v. Lowman, 104 N. C. 403, 10 S. E. 474; Road Case, 4 Yates 514.

⁶⁶Loveland v. Town of Berlin, 27 Vt. 713.

⁶⁷Wild v. Deig, 43 Ind. 455, 13 Am. Rep. 399. But in Logan v. Stogdale, 123 Ind. 372, 24 N. E. 135, 8 L.R.A. 58, an act, which authorized the laying out of "branch highways" on the petition of any freeholder who had no outlet to a highway, was held void, though the roads provided for were declared to be highways.

⁶⁸Denham v. County Commissioners, 108 Mass. 202. Here the statute authorized the laying out of "private ways for the use of one or more of the inhabitants," but the applicant was only to pay such part of the cost as the commissioners should deem reasonable, and the residue, if any, was to

be for the use of himself, his heirs or assigns, it will be deemed to intend that the road shall be private property, and the act will be void.⁶⁹ So where the statute provided that the applicant should pay the damages assessed and the cost of laying out the road and that thereupon "such road shall be considered as the private way of such person, who shall keep open and repair the same at his own expense."⁷⁰ Where the act provides that the road shall be laid out on the application of the individual or individuals to be benefited, who are to pay the expense of its establishment and maintenance, and gives no other indication of intent, it is generally held to provide for a strictly private road, and to be void.⁷¹ The supreme court of Iowa assigns the following reasons for this conclusion:

"First. The statute denominates them 'private roads,' and is entitled, 'an act to provide for establishing private roads.' If the roads established thereunder were not intended to be private, and different from ordinary and public roads, there was no necessity for the act.

"Second. Such road may be established on the petition of the applicant alone; and he must pay the costs and damages occasioned thereby, and perform such other conditions as to fences, etc., as the board may prescribe.

"Third. The public are not bound to work or keep such roads in repair, and this is a very satisfactory test as to whether a road is public or private.

"Fourth. We see no reason, when such a road is established, why the person at whose instance this was done, might not lock the gates opening into it, or fence it up, or otherwise debar the public to any rights thereto."⁷²

On the other hand, such roads have been held public on the ground that it was the duty of the court so to construe the act, if possible, as to make it valid,⁷³ and this even in case of an act

be paid by the town. In the particular case the applicant paid the whole cost, but it was held a public way.

⁶⁹Nesbitt v. Trumbo, 39 Ill. 110, 89 Am. Dec. 290; Taylor v. Porter, 4 Hill 140, 40 Am. Dec. 274; Varner v. Martin, 21 W. Va. 534; Osborn v. Hart, 24 Wis. 89, 1 Am. Rep. 161.

⁷⁰Arnsperger v. Crawford, 101 Md. 247, 61 Atl. 413, 70 L.R.A. 497.

⁷¹Sadler v. Langham, 34 Ala. 311;

Wild v. Deig, 43 Ind. 455, 13 Am. Rep. 399 (*overruling* Kissinger v. Hansleman, 33 Ind. 80); Stewart v. Hartman, 46 Ind. 331; Bankhead v. Brown, 25 Ia. 540; Dickey v. Tennison, 27 Mo. 373; Witham v. Osburn. ⁴Ore. 318.

⁷²Bankhead v. Brown, 25 Ia. 540, 547.

⁷³Roberts v. Williams, 15 Ark. 43.

which provided that the roads should "be, to all intents and purposes, private roads for the use of the parties interested."⁷⁴ Though the cost and repair of the road are cast upon the applicant, yet, if the repairs are subject to the supervision and control of public officers, it will be deemed a public road.⁷⁵

⁷⁴Sherman v. Buick, 32 Cal. 241, 251. In this case the court, referring to the legislature, says: "By distinguishing or classifying roads or highways by the words 'public' and 'private,' and providing different modes for their establishment and support, and declaring that the latter class 'shall be, to all intents and purposes, private roads for the use of parties interested,' they give color to the idea that, in their judgment, they have the power to create and are creating a road for private use, and to make and are making it the private property of certain persons to the exclusion of all others. If we look solely at their language without regard to the true nature of the only power which they possessed in the premises, an impression that the property of the owner of the land is taken for private use is created, for there is an apparent, if not an express, appropriation of it to the use of certain parties to the exclusion of all others. But it is well understood that the language of the legislature is to be read in all cases by the light of the constitution, with the spirit of which it is always presumed to be consistent. In construing it, it is the duty of the courts to look to the true object and to trace out the true results, and not to be guided by those which the legislature has mistakenly assumed or declared; and if they be found to be consistent with the constitution, or within the acknowledged power of the legislature, to uphold the act as to its legitimate results and to discard all else. Thus, if the legislature provides for the laying

out and establishing of a certain class of roads or highways which from any cause, whether for the purposes of classification or otherwise, is denominated 'private,' or as being for the especial benefit of certain individuals upon whom the burden of cost and repair is cast, instead of the public at large, it by no means follows that such roads become the private property or estate of the individuals designated, even if the legislature has so provided in express terms; for where roads are laid out, whether mainly for the accommodation of particular neighborhoods or individuals or not, it must be understood as having been provided for the use of every one who may have occasion to travel it, and hence as being public. In other words, the legislature has no power to lay out and establish 'private roads,' in the sense that they are to be the private property of particular individuals, or that they are what are denominated 'private ways' at common law; and hence, so far as they undertake to do so, their action is simply null and void; but the road so laid out and established becomes a way over which all may lawfully pass who have occasion, and therefore public; and the language employed by the legislature, so far as it relates to the legal character of the road—as public or private—must be understood as being used for the purpose of distinguishing it from all other roads, or, in general terms, for the purposes of classification."

⁷⁵Hickman's Case, 4 Harr. (Del.) 580, and Statutes of Delaware.

In Kentucky a statute has existed since 1820 providing for the establishment of private passways over the land of others, when necessary to enable a citizen "to attend courts, elections, a meeting-house, a mill, a warehouse, ferry, *to pass from one tract of land to another owned by him*, or railroad depot most convenient to his residence."⁷⁶ The validity of this statute passed unchallenged for many years,⁷⁷ but was finally passed upon in *Robinson v. Swope*.⁷⁸ It seems to have been conceded that all such passways were private property. The court, in view of the long acquiescence in the enforcement of the statute and the manifest utility of such ways and of the statute being in force when the present constitution was adopted, sustains the act, except the clause in italics, which, being a recent introduction and not of public utility, was held void. The same view is implied in Georgia⁷⁹ and perhaps also in Connecticut,⁸⁰ though in neither State has the point been decided. In Pennsylvania statutes have existed for the establishment of private roads since 1735.⁸¹ They may be laid out from "dwellings and plantations to a highway or place of necessary public resort, or to any private way leading to a highway."⁸² The roads here provided for are spoken of as *quasi* public,⁸³ and have been sustained as a valid exercise of the power of eminent domain.⁸⁴ It

⁷⁶Statutes of Ky. 1883, p. 770.

⁷⁷Jones' Heirs v. Barclay, 2 J. J. Marsh 73; McCauley v. Dunlap, 4 B. Mon. 57; Rout v. Mountjoy, 3 B. Mon. 300; Troutman v. Barnes, 4 Met. (Ky.) 337.

⁷⁸12 Bush. 21. "We have no hesitation in holding," says the court, "that the general assembly may, in the exercise of the right of eminent domain, authorize the establishment of private passways over the lands of others when it is necessary to enable any inhabitant of the State to attend courts, elections, or mills, or to reach an established public highway." p. 25. It is to be observed, however, that the point decided in this case was that such a way could not be laid out to pass from one tract of a man's land to another, and that, consequently, the remainder of the opinion is *dictum*. *Shake v. Fraser*,

94 Ky. 143, 21 S. W. 583, is a similar case. *And see Vice v. Eden*, 113 Ky. 255, 68 S. W. 125, as to when a necessity is shown within the statute.

⁷⁹Brewer v. Bowman, 9 Ga. 37. The law was held void because it did not provide for compensation.

⁸⁰Reynolds v. Reynolds, 15 Conn. 83. The court here expressly declines to consider the question because not properly raised.

⁸¹Waddell's Appeal, 84 Pa. St. at p. 92.

⁸²Purdon's Statutes, p. 646. Act 13, June, 1836.

⁸³Waddell's Appeal, 84 Pa. St. 90, 94.

⁸⁴Pocopson Road, 16 Pa. St. 15; *also*, Stuber's Road, 28 Pa. St. 199; Sandy Lick Creek Road, 51 Pa. St. 94; Keeling's Road, 59 Pa. St. 358; Dickinson Tp. Road, 23 Pa. Supr. Ct. 34.

has been held under other statutes in that State that a right of way for mere private use cannot be condemned.⁸⁵

It has never, we think, been decided in any case that private property could be condemned for a private road for the exclusive use of the applicant, and we know of no principle upon which such a proceeding can be justified. It is undoubtedly within the power of the legislature to lay out public ways to connect private premises with a public way or place of public resort.⁸⁶ It is a question for the legislature whether the public welfare will be promoted by such an appropriation.

It has been held that where one has a way of necessity over the land of another at common law, it is competent for the legislature to prescribe how this shall be established, and that such a law would not divest private property for private use, but only regulate the exercise of an existing private right.⁸⁷ The owner of land taken for a private road may waive the unconstitutionality of the act and recover the damages awarded.⁸⁸ In some States the laying out of private ways is expressly sanctioned by the constitution,⁸⁹ or the constitution is construed as giving such authority.⁹⁰ A constitutional provision authorizing

⁸⁵ McCandless' Appeal, 70 Pa. St. 210; Waddell's Appeal, 84 Pa. St. 90.

⁸⁶ Bankhead v. Brown, 25 Ia. 540, 554; Witham v. Osburn, 4 Ore. 318, 18 Am. Rep. 287; Wild v. Deig, 43 Ind. 455, 13 Am. Rep. 399; and see Lewis v. Washington, 5 Gratt 265.

⁸⁷ Snyder v. Warford, 11 Mo. 513, 49 Am. Dec. 94; Lawrence, J., in Crear v. Crossly, 40 Ill. 175.

⁸⁸ Post, § 260. One who has petitioned for a private road and used it, will be estopped from denying the validity of the proceedings when sued for the damages awarded. Fernald v. Palmer, 83 Me. 244, 22 Atl. 467. Those who have accepted the damages for the laying out of private roads will be estopped from questioning their validity. Arnsperger v. Crawford, 101 Md. 247, 61 Atl. 413, 70 L.R.A. 497.

⁸⁹ Michigan constitution, art. 18, sec. 14; Scheh v. Detroit, 45 Mich. 626; Ayres v. Richards, 38 Mich.

214; South Carolina constitution, art. 1, sec. 23; State v. Stockhouse, 14 S. C. 417. Alabama, art. 1, sec. 5; Steele v. County Comrs., 83 Ala. 304. Colorado, art. 2, sec. 14. Georgia, art. 1, secs. 17, 20; Norman-dale Lumber Co. v. Knight, 89 Ga. 111, 14 S. E. Rep. 882. Missouri, art. 2, sec. 20; Belk v. Hamilton, 130 Mo. 292, 32 S. W. Rep. 656. Montana, art. 3, sec. 15; State v. District Court, 14 Mont. 476, 37 Pac. Rep. 7. Washington, art. 1, sec. 16; Long v. Billings, 7 Wash. 267, 34 Pac. Rep. 936. New York, art. 1, sec. 7; and see Illinois, art. 4, sec. 30.

⁹⁰ Art. 1, sec. 14 of the constitution of Idaho provides as follows: "The necessary use of lands for reservoirs or storage basins, for the purposes of irrigation, or for rights of way for the construction of canals, ditches, flumes, or pipes, * * * or any other use necessary to the complete development of the material resources of

the taking of lands for private ways of necessity, is not self-executing, and such ways cannot be laid out without statutory authority.⁹¹ When private ways are permitted by the constitution when certain conditions exist, these conditions must be affirmatively shown in order to justify the exercise of the power.⁹² Where the constitution sanctions the establishment of "private ways of necessity," or "in cases of necessity,"⁹³ one cannot be laid out simply because it will be more convenient or less expensive for the applicant, than one on his own land.⁹⁴ To create such a necessity as is contemplated, it is probable that the applicant's land would have to be surrounded by the land of others.⁹⁵ The statutory power to lay out private roads of any

the State, * * * is hereby declared to be a public use." This was held to authorize the laying out of private roads. *Latah County v. Peterson*, 2 Idaho 1118, 29 Pac. 1089, 16 L.R.A. 81. "The necessity for such private roads is apparent when it is stated that it would be impossible to improve very many valuable tracts of land in this State which are not reached by public highways, unless this power existed. Such roads are therefore necessary to the complete development of the material resources of the State."

⁹¹*Long v. Billings*, 7 Wash. 267, 34 Pac. 936.

⁹²*Normandale Lumber Co. v. Knight*, 89 Ga. 111, 14 S. E. 882; *Latah County v. Peterson*, 2 Idaho 1118, 29 Pac. 1089, 16 L.R.A. 81; *Belk v. Hamilton*, 130 Mo. 292, 32 S. W. 656; *State v. District Judge*, 14 Mont. 476, 37 Pac. 7; *Long v. Billings*, 7 Wash. 267, 34 Pac. 939.

⁹³*See* constitutional provisions of Colorado, Georgia, Missouri and Washington above cited, note 89.

⁹⁴*Normandale Lumber Co. v. Knight*, 89 Ga. 111, 14 S. E. 882; *Chattanooga etc. R. R. Co. v. Philpot*, 112 Ga. 153, 37 S. E. 181; *Charleston etc. Ry. Co. v. Fleming*, 119 Ga. 995, 47 S. E. 541; *Jones v.*

Venable, 120 Ga. 1, 47 S. E. 549; *Gaines v. Lunsford*, 120 Ga. 370, 47 S. E. 967, 102 Am. St. Rep. 109; *Neal v. Neal*, 122 Ga. 804, 50 S. E. 929. *Compare Pippin v. May*, 78 Ark. 18, 93 S. W. 64. *See Vice v. Eden*, 113 Ky. 255, 68 S. W. 125; *Chandler v. Reading*, 129 Mo. App. 63. A law authorizing the taking of property for private use "must be closely scrutinized, strictly construed and sparingly enforced." *Chattanooga etc. R. R. Co. v. Philpot*, 112 Ga. 153, 154, 37 S. E. 181.

⁹⁵*Belk v. Hamilton*, 130 Mo. 292, 32 S. W. 656. In *Chattanooga etc. R. R. Co. v. Philpot*, 112 Ga. 153, 37 S. E. 181, the court says: "The word 'necessity' as used in the constitution is to be given its most restricted meaning. So construing it, a case of necessity authorizing the laying out of a private way would not arise unless it was shown that the way sought to be laid out was indispensable to the use or enjoyment of the farm or place of residence, as the case might be. If there is a way by which the applicant can lawfully reach his farm or place of residence, a case of necessity does not exist within the meaning of the constitution."

description must be strictly complied with and all the conditions precedent must be shown to exist.⁹⁶

§ 261 (168). Toll roads, bridges and ferries. Property taken for toll roads, toll bridges and ferries is taken for public use.⁹⁷ They are public highways which every member of the public is entitled to use, and do not differ in any essential particular from the common highway opened and maintained at the expense of the public.⁹⁸

§ 262 (169). Canals. Canals to be used as highways by water are a public use.⁹⁹ But more water cannot be taken than is necessary for navigation, for the purpose of selling it to private individuals for power or other use.¹ But so long as

⁹⁶Charleston etc. Ry. Co. v. Fleming, 119 Ga. 995, 47 S. E. 541; Breaux v. Bienvenue, 51 La. An. 687, 25 So. 321; Hall v. Pettit, 88 Mich. 158, 50 N. W. 117; Warlick v. Lowman, 103 N. C. 122, 9 S. E. 458; Burwell v. Sneed, 104 N. C. 118, 10 S. E. 152; Warlick v. Lowman, 104 N. C. 403, 10 S. E. 474; *In re Road in Brenchnock Tp.*, 2 Woodward's Dees. (Pa.) 437.

⁹⁷Arnold v. Covington & Cincinnati Bridge Co., 1 Duval 372; Young v. Buckingham, 5 Ohio 485; Plecker v. Rhodes, 30 Gratt. 795. A horse ferry is a public use. Day v. Stetson, 8 Me. 365; Young v. McKenzie, 3 Ga. 31. So of land taken for an approach to a public ferry. Drake v. Clay, Sneed, 139. Or a bridge. Luxton v. North Riv. Bridge Co., 153 U. S. 525.

⁹⁸"A road constructed and supported by a turnpike corporation differs in no essential characteristic from a common highway, established and supported by a town, a borough, or a city. Their origin and objects are identical. Both emanate from the same supreme power, acting through the legislature, the courts, or other depositaries of authority designated by the laws. Both are called into existence, and supported,

to subserve, in exactly the same way, the public necessities and convenience and both alike are intended to endure for an indefinite period, and so long as that convenience requires or that necessity exists. The funds for making and repairing them, indeed, are drawn from different sources and in different modes—the one, from travelers by a toll—the other, from the community by a tax; and the turnpike company is permitted to take, for the benefit of its stockholders, the contingent profits in compensation for the contingent losses of the enterprise; but still the public interest in the road and the burden upon the land are essentially the same in both." State v. Maine, 27 Conn. 641, 646, 71 Am. Dec. 89.

⁹⁹Matter of Peter Townsend, 39 N. Y. 171; Willyard v. Hamilton, 7 Ohio (pt. 2) 111, 30 Am. Dec. 195; Dalles Lumbering Co. v. Urquhart, 16 Ore. 67, 19 Pac. 78; Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 12 S. C. 173; Chesapeake etc. Canal Co. v. Key, 3 Cranch, C. C. 599.

¹Cooper v. Williams, 5 Ohio, 391. 24 Am. Dec. 299; Buckingham v. Smith, 10 Ohio 288; Varick v. Smith, 5 Paige, 137.

the State acts in good faith and with a bona fide intent of promoting the main purpose in view, it may dispose of any surplus water or water power, incidentally taken or created, for private uses and appropriate the proceeds of such disposition.² Where the water of a stream was taken for a canal and the supply of a mill cut off, it was held that a raceway could not be made through private property from the canal to the mill in order to supply it with water, the mill-owner having agreed to accept the same in lieu of damages for interfering with the stream. This would be taking one man's property to make compensation to another.³

²Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 12 S. C. 173. Here the State constructed a dam for the bona fide purpose of furnishing water to a public canal and it was held that it was entitled to the water power incidentally created and could dispose of it to private parties. The court says: "The true distinction seems to be between cases where the dam is erected for the express or apparent purpose of obtaining a water power to lease to private individuals, or where in building a dam for a public improvement, a wholly unnecessary excess of water is created, and cases where the surplus is a mere incident to the public improvement and a reasonable provision for securing an adequate supply of water at all times for such improvement. No claim is made in this case that the water power was created for the purpose of selling or leasing it, or that the dam was erected to a greater height than was reasonably necessary to create a depth of water sufficient for the purposes of navigation at all seasons of the year. So long as the dam was erected for the bona fide purpose of furnishing an adequate supply of water for the canal and was not a colorable device for creating a water power, the agents of the State are entitled to great latitude of discre-

tion in regard to the height of the dam and the head of the water to be created; and while the surplus in this case may be unnecessarily large, there does not seem to have been any bad faith or abuse of discretion on the part of those charged with the construction of the improvement. Courts should not scan too jealously their conduct in this connection if there be no reason to doubt that they were animated solely by a desire to promote the public interests, nor can they undertake to measure with nicety the exact amount of water required for the purposes of the public improvement. Under the circumstances of this case we think it within the power of the State to retain within its immediate control such surplus as might incidentally be created by the erection of the dam." The court cites the following cases as supporting its conclusions: Cooper v. Williams, 4 Ohio 253; Buckingham v. Smith, 10 Ohio 288; Little Miami Elevator Co. v. Cincinnati, 30 Ohio St. 629, 643; Hubbard v. City of Toledo, 21 Ohio St. 379; Fox v. Cincinnati, 104 U. S. 783; Spaulding v. Lowell, 23 Pick. 71, 80; French v. Inhabitants of Quincy, 3 Allen 9; Attorney General v. Eau Claire, 37 Wis. 400; State v. Eau Claire, 40 Wis. 533.

³McArthur v. Kelley, 5 Ohio 139.

§ 263 (170). Railroads, their connections and appurtenances. When railroads were first introduced, some question was made as to their being a public use, but it has long been settled that they are.⁴ A railroad company may be authorized to condemn land for all appurtenances necessary to the convenient and proper operation of the road, such as depots,⁵ freight houses,⁶ yard room,⁷ side tracks,⁸ gravel pits,⁹ water supply,¹⁰ and the like.¹¹ An electric railway may condemn land for a

⁴Aldridge v. T. C. & D. R. R. Co., 2 Stew. & Por. 199, 23 Am. Dec. 297; Davis v. Same, 4 Ibid. 421; Cairo & Fulton R. R. Co., v. Turner, 31 Ark. 494; San Francisco A. & S. R. R. Co. v. Caldwell, 31 Cal. 367; Moran v. Ross, 79 Cal. 159, 21 Pac. 547; Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co., 17 Conn. 40, 42 Am. Dec. 716; Whiteman v. W. & S. R. R. Co., 2 Harr. (Del.) 514; O'Hara v. Lexington & Ohio R. R. Co., 1 Dana (Ky.) 232; Lexington & Ohio R. R. Co. v. Applegate, 8 Dana 289, 33 Am. Dec. 497; Shreveport & A. R. R. Co. v. Hollingsworth, 42 La. An. 729, 7 So. 693; The Bellona Company Case, 3 Bland, Chy. 442; Boston Water Power Co. v. Boston & Worcester R. R. Co., 23 Pick. 360; Swan v. Davidson County Comrs., 18 Minn. 482; Brown v. Beatty, 34 Miss. 227, 69 Am. Dec. 389; Concord Railroad Co. v. Greeley, 17 N. H. 47; Beekman v. Saratoga & Schenectady R. R. Co., 3 Paige 45; Bloodgood v. Mohawk & Hudson R. R. Co., 14 Wend. 51; Same v. Same, 18 Wend. 9; Buffalo & New York R. R. Co. v. Brainard, 9 N. Y. 100; Seacomb v. Milwaukee etc. R. R. Co., 49 How. Pr. 75; Louisville etc. R. R. Co. v. Chappell, Rice, L. 383; Buffalo, Bayou etc. R. R. Co. v. Ferris, 26 Tex. 588; Tait v. Matthews, 33 Tex. 112; Bonaparte v. Camden & Amboy R. R. Co., 1 Baldwin, U. S. 205; Baltimore & Ohio R. R. Co. v. Van Ness, 4 Cranch 595; Cherokee Nation v. Southern Kansas R. R. Co., 33 Fed.

900. See People v. Salem, 20 Mich. 452.

⁵State v. Railroad Comrs., 56 Conn. 308; Small v. Georgia etc. R. R. Co., 87 Ga. 602, 13 S. E. 694; Ewing v. Ala. & V. R. R. Co., 68 Miss. 551, 9 So. 295; Hannibal & St. Joe R. R. Co. v. Muder, 49 Mo. 165; Matter of New York Central etc. R. R. Co., 59 Hun 7; Geizy v. C. W. & Z. R. R. Co., 4 Ohio St. 308.

⁶Central Pac. Ry. Co. v. Feldman, 152 Cal. 303, 92 Pac. 849; In Matter of New York etc. R. R. Co. v. Kip, 46 N. Y. 546; Matter of New York Central etc. R. R. Co., 77 N. Y. 248; New York Central etc. R. R. Co. v. Metropolitan Gas Light Co., 5 Hun 201. Right to take for warehouse question. Cumberland Valley R. R. Co. v. McLanahan, 59 Pa. St. 23.

⁷Eldridge v. Smith, 34 Vt. 484; Rensselaer & S. R. R. Co. v. Davis, 43 N. Y. 137.

⁸St. Louis etc. R. R. Co. v. Petty, 57 Ark. 359, 21 S. W. 884, 20 L.R.A. 434.

⁹Hopkins v. Florida Cent. etc. R. R. Co., 97 Ga. 107, 25 S. E. 452; Saginaw etc. R. R. Co. v. Bordner, 108 Mich. 236, 66 N. W. 62.

¹⁰Dillon v. Kansas City etc. R. R. Co., 67 Kan. 687, 74 Pac. 251.

¹¹The question is extensively considered in Milwaukee etc. R. R. Co. v. Milwaukee, 34 Wis. 271. A statute exempted from taxation the property of a railroad necessarily used in operating its road. The exemption was held to be co-extensive with the right

power house and car barn,¹² and for a transmission line from its power house to its railway.¹³ But in Rhode Island such a purpose is held not to be a public use within the constitution.¹⁴ But property cannot be taken for things not necessary to the operation of the road or which do not require a particular location with reference to the right of way, such as tenement houses for employees,¹⁵ and shops for manufacturing new rolling stock.¹⁶ It has been held that property may be condemned for

of the company to take by condemnation. It was held indirectly that the company could not condemn for grain elevators nor for a building used chiefly for a hotel, though incidentally for a station.

¹²Eddleman v. Union Co. Traction & P. Co., 217 Ill. 409, 75 N. E. 510; Metropolitan St. Ry. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860.

¹³Mull v. Indianapolis etc. Traction Co., 169 Ind. 214, 81 N. E. 657.

¹⁴In re R. I. Suburban Ry. Co., 22 R. I. 455, 48 Atl. 590; In re R. I. Suburban Ry. Co., 22 R. I. 457, 48 Atl. 591, 52 L.R.A. 879. In the latter case, the court says: "A common carrier serves both the public and itself. It has its public and private functions. The public part is the exercise of its franchise for the accommodation of the parties; the private part is its incidental business, with which the public is not concerned, and which the company manages for its own interests. The company carries passengers over its road as a public duty; but the generation of power to propel cars is the private business of the company. Whatever is necessary for the exercise of the franchise is for the benefit of the public; but that which pertains simply to means of supply is the private business of the company." pp. 459, 460.

¹⁵Eldridge v. Smith, 34 Vt. 484; Rensselaer & S. R. R. Co. v. Davis, 43 N. Y. 137; State v. Commissioners of Mansfield, 23 N. J. L. 510.

¹⁶Eldridge v. Smith, 34 Vt. 484, 493; Matter of New York etc. R. R. Co. v. Kip, 46 N. Y. 546, 552; West River Bridge Co. v. Dix, 6 How. 507, 546. In the first case the court says: "Is an establishment for the manufacture of railroad cars a legitimate railroad purpose, so that the company would have a right to take land for it against the will of the owner? The defendants say, that as the company must necessarily have cars in order to carry on their business, therefore they must have the right to manufacture them, and have works for that purpose. But this argument proves too much. Railroads must have iron, in great quantities, for their track and other purposes. Does this authorize them to take ore beds and lands for forges and foundries, and manufacture their own iron? They must have wood, sleepers, and timber for depots, and large quantities of lumber of various kinds. Does this authorize them to take timbered lands, and sites for mills, against the will of the owners? They must have glass, nails, paint, and many other things. Can they by compulsory measures provide themselves the means to manufacture them all? We think it very clear they cannot. If the company must manufacture their own cars or go without, then, doubtless, their manufacture would be regarded as a necessity of the railroad, but the manufacture of cars and engines is a distinct branch of mechanical industry,

repair shops and that this would be a public use.¹⁷ These differ, undoubtedly, from shops for the manufacture of new cars, or engines, since the former are indispensable to every railroad, while the latter are not. New rolling stock can be purchased of those who make a business of its manufacture. But facilities for the repair of such stock do not usually exist within any practicable distance, and unless the companies could have such facilities conveniently located, they might be hampered in their service and the public greatly incommoded. A railroad company may condemn land for a track to a public warehouse or elevator,¹⁸ or to connect with a wharf or pier,¹⁹ or for the purpose

carried on wholly independent of any connection with railroads, and is a branch of business in which railroads do not usually engage at all; and in this case it seems to have been quickly demonstrated, that it was better to rely on supplying themselves with cars by purchase from those whose legitimate business it was to make them.

"Although railroad companies must have engines and cars, iron, lumber, wood and many other things in large quantities, in order to build and operate their roads, it is supposed they can supply themselves as private persons do, by purchase in the ordinary way, and they are not created or designed to be independent of all other branches of industry and business in the country, but to be additional aids to their successful development. The company must have shops for the repair of cars and engines, as they are so often needed, and as they cannot well be moved for repairs, nor can facilities be found for repairs in the country generally, but the company were already supplied with all necessary accommodations for repairs. We are of opinion that an establishment for the manufacture of cars is not a legitimate railroad necessity, so that the company could properly condemn land on which to erect one."

¹⁷For "depot, engine house and repair shops," Hannibal & St. Joe R. R. Co. v. Muder, 49 Mo. 165; for "turn-outs, depots, engine houses, shops and turn-tables," C. B. & Q. R. R. Co. v. Wilson, 17 Ill. 123; for a "paint shop, and lumber and timber sheds," Low v. Galena & Chicago Union R. R. Co., 18 Ill. 324. In the Illinois cases the constitutional question of public use was not raised. The only question was whether the purposes specified were within the statute. Nor does it appear that the constitutional question was actually raised in the Missouri case. After referring to the cases from Illinois and Vermont the court says: "All these adjudications proceed upon the assumption that the appropriation of land, for the purpose stated in the plaintiff's petition, is an appropriation of private property to a public use." p. 166. See also Eldridge v. Smith, 34 Vt. 484, and quotation in last note.

¹⁸Fisher v. C. & S. R. R. Co., 104 Ill. 323; Chicago Dock & Canal Co. v. Garrity, 115 Ill. 155. A city may grant permit to lay a track in a street to a private elevator. Clarke v. Blackmar, 47 N. Y. 150.

¹⁹Rensselaer & S. R. R. Co. v. Davis, 43 N. Y. 137.

of diverting a stream in order to avoid a bridge, where the public safety will thereby be promoted.²⁰ "Whatever is essential and indispensable to the construction, maintenance or running of the road, is allowed to be taken."²¹ The question of public use does not depend upon the length of the road²² and a company organized to build a connecting link between two other roads which are separated by a river, is for a public use and may exercise the right of eminent domain.²³ A railroad built from Denver east to the State line to coal mines of the company, and equipped and operated in the usual way for the transportation of freight and passengers, was held a public use.²⁴ That a road is limited to the transportation of freight does not make it for private use.²⁵ A belt road around a city, organized for general commercial purposes but designed chiefly to transfer loaded and empty cars from one road to another, is a public use.²⁶ A company was organized to provide terminal facilities for railroads, and could be compelled to furnish such facilities upon terms fixed by the railroad commissioner in case of disagreement, and which was authorized and, on certain conditions, could be compelled to construct tracks and operate suburban trains, was held to be for a public purpose and such a company as could be vested with the power of eminent domain.²⁷ And generally the construction of union stations and terminals by a corporation organized for that purpose, is a public use for which property may be condemned.²⁸ It is no objection that a railroad is built especially for the accommodation of certain mines or industrial plants, so long as it is in law a public highway and prepared to

²⁰Reusch v. C. B. & Q. R. R. Co., 57 Ia. 687.

²¹New York etc. R. R. Co. v. Gunnison, 1 Hun 496, 497.

²²Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27; Bridwell v. Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, 10 L.R.A.(N.S.) 909; Caretta Ry. Co. v. Va. — Pocahontas Coal Co., 62 W. Va. 185, 57 S. E. 401.

²³Niemeyer v. Little Rock Junction R. R. Co., 43 Ark. 111; Philadelphia etc. Ferry Co. v. Inter City Link R. R. Co., 73 N. J. L. 86, 62 Atl. 184.

²⁴Colorado Eastern R. R. Co. v.

Union Pac. R. R. Co., 41 Fed. 293. *And see* Denver R. Land & Coal Co. v. Union Pac. R. R. Co., 34 Fed. 386.

²⁵Brown v. Chicago etc. R. R. Co., 137 Mo. 529, 38 S. W. 1099.

²⁶Collier v. Union Ry. Co., 113 Tenn. 96, 83 S. W. 155.

²⁷Fort St. Union Depot Co. v. Morton, 83 Mich. 265, 47 N. W. 228, 3 Am. R. R. & Corp. Rep. 438.

²⁸Bridwell v. Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, 10 L.R.A.(N.S.) 909; Riley v. Charleston Union Station Co., 71 S. C. 457, 51 S. E. 485, 110 Am. St. Rep. 579; Ryan v. Terminal Co., 102 Tenn. 111, 50 S. W. 744, 45 L.R.A. 303.

carry for all who desire its service.²⁹ But a railroad used exclusively for transporting coal or freight for its stockholders and which has no depots, freight houses, or facilities for doing a public business, is a private enterprise.³⁰ But such railroads are authorized by the constitution in South Carolina.³¹ A railroad in the gorge of the Niagara river, from the falls to the "whirlpool," which could not be reached without passing over the State reservation or private property, along which no habitations could be built and on which no freight could be carried, and which could only be used for conveying sightseers along the river during the summer months, was held not to be such a road as was contemplated by the general statutes of New York, and not a public use, for which the power of eminent domain could be exercised.³² Similar views are expressed by the supreme court of Virginia in a proceeding by an electric railway company to condemn land for a park and terminal near the great falls of the Potomac river. The court says that "to gratify the senses of the pleasure seeker and thereby incidentally to increase revenues is without the domain of a public use for which private property may be taken under the power of eminent domain."³³ But the real point of the decision was that the proposed condemnation was not authorized by the statute, under which the proceedings were had. A statute of Pennsylvania permitting one street railway company to condemn the joint use of the tracks of another company for not exceeding twenty-five hundred feet when necessary "either to construct a circuit upon its road or to connect with the road of any passen-

²⁹Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27; Kansas etc. Ry. Co. v. N. W. Coal & M. Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L.R.A. 936; Butte etc. R. R. Co. v. Montana U. R. R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L.R.A. 298; State v. Superior Court, 42 Wash. 675, 85 Pac. 669; Caretta Ry. Co. v. Va. Pocahontas Coal Co., 62 W. Va. 185, 57 S. E. 401. *And see* next section.

³⁰State v. Railway Co., 40 Ohio St. 504; Weidenfeld v. Sugar Run R. R. Co., 48 Fed. 615.

³¹Ex parte Bacot, 36 S. C. 125, 15 S. E. 204, 16 L.R.A. 586.

³²Matter of Niagara Falls & Whirlpool R. R. Co., 108 N. Y. 375, 15 N. E. 429; Matter of Niagara Falls & Whirlpool R. R. Co., 121 N. Y. 319, 24 N. E. 452; *and see* Matter of Split Rock Cable Road Co., 128 N. Y. 408, 28 N. E. 506. *Compare ante* § 259; *post*, § 271.

³³Great Falls Power Co. v. Great Falls etc. R. R. Co., 104 Va. 416, 52 S. E. 172.

ger railway already in existence," was held void as not being for a public use, the only effect of the condemnation being "to transfer the property of one private corporation to a new one, for the same public use, both being transporters of passengers for profit."³⁴

The consolidation of connecting railroads and the establishment of through lines is a public purpose for which the power of eminent domain may be exercised and the shares of dissenting stockholders may be condemned to effect such consolidation.³⁵

Where, under a general railroad law, a road is built for private use, its operation may be enjoined at the suit of an individual,³⁶ or the franchise annulled at the suit of the people.³⁷

§ 264 (171). Lateral and branch railroads, switch and spur tracks to private property. Certain decisions in Pennsylvania have sometimes been understood as laying down the

³⁴Philadelphia etc. St. Ry. Co.'s Petition, 203 Pa. St. 354, 53 Atl. 191.

³⁵New York etc. R. R. Co. v. Offield, 77 Conn. 417, 59 Atl. 510; Same v. Same, 78 Conn. 1, 60 Atl. 740; Black v. Delaware etc. Canal Co., 24 N. J. Eq. 455; Spence v. Seaboard Air Line Ry. Co., 137 N. C. 107, 49 S. E. 96. In the New Jersey case which is a decision by the court of errors and appeals it is said: "There can be no doubt that a railroad company may be empowered to extend their road beyond the point to which it was built under the original grant, if proper compensation is provided for stockholders who may resist it, and I can see no difference in principle, whether the original company, in order to secure a through route under one management, is authorized to take the lands of individuals, or to take the property which individuals have in the stock of an existing road. In the first case, for the purpose of establishing the through route, one kind of private property, to wit, the lands of individuals, is taken by the corporation: in the second case, another

kind of property, to wit, the shares of stock of individuals in an existing company, is authorized to be condemned. In the latter instance, the use is as clearly a public use as in the former, and when the legislature declares that it may be done it is no more necessary to declare in the grant that the public necessity requires it, than it is essential, in order to validate a railroad charter, that there should be an express announcement by the legislature that it is in aid of public uses." Black v. Delaware etc. Canal Co., 24 N. J. Eq. 455, 470.

³⁶A road between the mines and mill of a company, McCaudless' Appeal, 70 Pa. St. 210; *see also* Edgewood R. R. Co.'s Appeal, 79 Pa. St. 257; Weidenfeld v. Sugar Run R. R. Co., 48 Fed. 615.

³⁷A road to transport coal from the company's mine a distance of about five miles. People v. Pittsburgh R. R. Co., 53 Cal. 694. So of a road used and equipped only for transporting coal from the private mines of the company's stockholders. State v. Railway Co., 40 Ohio St. 504.

doctrine that private property could be taken for a lateral railroad connecting a mine or mill with a railroad, canal or navigable stream, though the lateral road was for the private use of the owner of the mine or mill.³⁸ The supreme court of that State seems to have so understood itself at an early date,³⁹ but afterwards discovered its mistake.⁴⁰ An act of 1832 provided that the owners of any land, mills, quarries, coal mines, lime-kilns or other real estate might condemn lands for a railroad to any railroad, canal or navigable stream not exceeding a distance of three miles. Section seven of the act provided that any person could use the road for the transportation of freight on the payment of a certain specified compensation.⁴¹ This statute has remained in force until the present time. These lateral roads, therefore, are for public use, and the cases referred to form no exception to the general current of authority.⁴² Similar roads are sanctioned in Maryland, where, though constructed for the particular advantage of individuals, they are also open to the public as occasion requires.⁴³ The legislature of Missouri, by special charter, authorized a company to construct a railroad from its coal lands to the Missouri river, but provided that it should be a public carrier of passengers and freight. It was rightly held to be for public use.⁴⁴ A general statute of West Virginia authorizes the condemnation of a right of way under or over the surface from any timber, coal or mineral lands for the purpose of development or of conveying the product of such lands to market, provided the court, to which application is made, "is of the opinion that the purpose for which the property is to be taken is of public utility."⁴⁵ In a case arising under the statute the court held that the words public

³⁸Harvey v. Thomas, 10 Watts 63; Harvey v. Lloyd, 3 Pa. 331; Shoenerberger v. Mulholland, 8 Pa. 134; Hays v. Risher, 32 Pa. 169; Brown v. Corey, 43 Pa. 495.

³⁹Harvey v. Thomas, 10 Watts 63.

⁴⁰Hays v. Risher, 32 Pa. St. 169.

⁴¹Purdon's Statutes, p. 492; see also Boyd v. Negley, 40 Pa. St. 377.

⁴²See also Schofield v. Penn. S. V. R. R. Co., 12 Pa. Co. Ct. 122; Pittsburgh etc. R. R. Co. v. Pittsburgh etc. R. R. Co., 159 Pa. St. 331, 28 Atl. 155; Rudolph v. Penn. S. V. R. R.

Co., 166 Pa. St. 430, 31 Atl. 131; Rochester etc. C. & I. Co. v. Berwind-White Min. Co., 24 Pa. Co. Ct. 104.

⁴³New Central Coal Co. v. Georges Creek Coal and Iron Co., 37 Md. 537; N. Y. Mining Co. v. Midland Mining Co., 99 Md. 506, 58 Atl. 217.

⁴⁴Dietrich v. Murdock, 42 Mo. 279. To same effect: Kansas etc. Ry. Co. v. N. W. Coal & Min. Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L.R.A. 936.

⁴⁵Rev. Stats. c. 171, §§ 50, 51.

utility, in the statute, meant the same as public use in the constitution, and that, in the particular case, the purpose did not appear to be a public one, but do not pass generally upon the statute.⁴⁶ In a later case a similar statute was held void as providing for the condemnation of land for a railway for private use.⁴⁷ A statute of Iowa permits the owner or lessee of lands having coal, stone or mineral thereon to condemn land for a "public way" to any highway or railroad, such owner or lessee to pay all damages and to construct and maintain the road. After the way was established a railroad could be laid thereon. The act made no provision for the expenditure of public moneys thereon, and did not in any way define the rights of the public therein. The Supreme Court of that State held that the statute intended that the way should be for the use of the public, and so sustained the act. The court says: "We ought not to declare any act of the legislature void, if a construction can fairly be put upon it under which it can be sustained. In the title, as well as in the body of the act, the ways for the establishment of which it provides are described as public ways, and the legislature must be presumed to have intended that they should be public ways, in the ordinary sense in which that term is used; that is, that the public should have the right to use, occupy and enjoy them as ways or roads. It is not material that the rights and privileges of the public with reference to them are not specially defined in the act, for the rights and privileges of the people generally with reference to public highways are defined in the general statutes on the subject. Neither is it material that no special provision is made in the act for the improvement of such ways, or for putting them in condition for public use at public cost. The authority for making such improvements could probably be found in the general statutes which govern the subject, if there should be occasion for its exercise. And we think that it makes no difference that the mine-owner may be the only member of the public who may have occasion to use the way after it has been established. The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way.

⁴⁶Salt Co v. Brown, 7 W. Va. 191.
Compare Pittsburgh etc. R. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453.

⁴⁷Hench v. Pritt, 62 W. Va. 270, 57 S. E. 808; Scott Lumber Co. v. Wolford, 62 W. Va. 555, 59 S. E. 516.

although the number who have occasion to exercise the right is very small.”⁴⁸ A similar statute of New Jersey has been sustained by the courts of that State, though it differs from the Iowa statute, in that it expressly requires the road to carry freight for any one who has occasion to use it.⁴⁹ The laying out of an underground railroad under this statute, about two-thirds of a mile long from a coal mine to a railroad, was sustained.

In Illinois it has been held that a railroad company cannot condemn land for a spur about three-quarters of a mile to a brick-yard, and that such a road was neither authorized by the statute nor the constitution.⁵⁰ Also that a railroad from a coal mine to a railroad was not a public purpose for which land could be taken.⁵¹ But we believe that it is now the established law of Illinois that a switch or spur track from a railroad to a business plant is to be regarded as part of the railroad system and a public use, even though paid for by private parties, and that the right of way for such tracks may be granted in the public streets or property condemned therefor.⁵² There is a sharp conflict of authority as to whether switch and spur tracks to private property are a public use for which property may be condemned. They seem a proper mode of making the facilities of the railroad available and, if open to all who are so situated as to be able to use them, upon equal terms, there is no sound reason why they

⁴⁸Phillips v. Watson, 63 Ia. 28, 18 N. W. 659. *Also* Morrison v. Thistle Coal Co., 119 Ia. 705, 94 N. W. 507.

⁴⁹DeCamp v. Hibernia Underground R. R. Co., 47 N. J. L. 43, affirmed by the Court of Errors, 47 N. J. L. 518.

⁵⁰Chicago & Eastern Ill. R. R. Co. v. Wiltse, 116 Ill. 449, 6 N. E. 49.

⁵¹Sholl v. German Coal Co., 118 Ill. 427, 10 N. E. 199. In this case the petition was by the coal company. *See also* Koelle v. Knecht, 99 Ill. 396.

⁵²Truesdale v. Peoria Grape Sugar Co., 101 Ill. 561: Mills v. Parlin, 106 Ill. 60: South Chicago R. R. Co. v. Dix, 109 Ill. 237; Chicago Dock & Canal Co. v. Garrity, 115 Ill. 155, 3 N. E. 448; McGann v. People, 194

III. 526, 62 N. E. 94; People v. Blocki, 203 Ill. 363, 67 N. E. 809. In *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448, the court says: “But we have held that there may be a grant to private individuals of the right to lay tracks in the street connecting with public railway tracks previously laid, and extending to the manufacturing establishments of those laying the tracks; but in such cases the tracks so laid become, in legal contemplation, to all intents and effects, tracks of the railway with which they are connected, and open to the public use and subject to the public control in all respects as other railway tracks open to public use. We have not regarded the circumstances that they were laid with

should not be regarded as a public use.⁵³ The very fact that condemnation is necessary in order to establish them, shows that they are capable of being used by more than one. Of course switch and spur tracks owned and constructed by private parties for their exclusive use, are not a public use, and statutes allowing condemnation for such tracks transcend the constitution.⁵⁴ Railroads connecting mines, mills, etc., with lines of trans-

private funds, and that they terminated opposite or within convenient contiguity of a private manufacturing establishment, as materially affecting them, and giving a private character to their use. All termini of tracks and switches are more or less beneficial to private parties, but the public character of the use of the tracks is never affected by this. If they are open to the public use indiscriminately, and under the public control to the extent that railroad tracks generally are, they are tracks for public use. It may be, in such cases, that it is expected, or even that it is intended, that such tracks will be used almost entirely by the manufacturing establishment, yet if there is no exclusion of an equal right of use by others, and this singleness of use is simply the result of location and convenience of access, it cannot affect the question." p. 167.

⁵³Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27; Hurd v. Atchison etc. Ry. Co., 73 Kan. 83, 84 Pac. 553; Kansas City etc. Ry. Co. v. La. Western R. R. Co., 116 La. 178, 40 So. 627, 5 L.R.A. 512; Farnsworth v. Lime Rock R. R. Co., 83 Me. 440, 22 Atl. 373; Ulmer v. Lime Rock R. R. Co., 98 Me. 579, 57 Atl. 1001, 66 L.R.A. 387; Toledo etc. R. R. Co. v. East Saginaw etc. R. R. Co., 72 Mich. 206, 40 N. W. 436; Kettle River R. R. Co. v. Eastern R. R. Co., 41 Minn. 461, 43 N. W. 469, 6 L.R.A. 111; Minneapolis etc. R. R. Co. v. Nicolin, 76 Minn. 302, 79 N. W. 304; Liedel v. Mo. Pac. Ry. Co., 89

Minn. 284, 94 N. W. 877; Robey v. State, 76 Neb. 450; Clarke v. Blackmar etc. R. R. Co., 47 N. Y. 150; Corporation Commission v. Seaboard Air Line R. R. Co., 140 N. C. 239, 52 S. E. 941; State v. Toledo Ry. & T. Co., 1 Ohio C. C. (N.S.) 513; Wolford v. Fisher, 48 Ore. 479, 84 Pac. 850, 87 Pac. 530, 7 L.R.A. (N.S.) 991; Stockdale v. Rio Grande Western Ry. Co., 28 Utah 101, 77 Pac. 849; Zireh v. Southern Ry. Co., 102 Va. 17, 45 S. E. 802, 102 Am. St. Rep. 805; State v. Superior Court, 42 Wash. 675, 85 Pac. 609; Chicago etc. Ry. Co. v. Morehouse, 112 Wis. 1, 87 N. W. 849, 88 Am. St. Rep. 918, 56 L.R.A. 240. *Contra:* Green v. Portland, 32 Me. 431; Pere Marquette R. R. Co. v. U. S. Gypsum Co., (Mich.), 117 N. W. 733; Gustafson v. Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L.R.A. 565; Glaessner v. Anheuser-Busch Brewing Assn., 100 Mo. 508, 13 S. W. 707, 2 Am. R. R. & Corp. Rep. 420; Appeal of Hartman Steel Co., 129 Pa. St. 551, 18 Atl. 553; Kyle v. Texas & N. O. R. R. Co., 3 Tex. Civ. App. p. 518, § 436; Pittsburg etc. R. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453. See State v. Superior Court, 46 Wash. 516, 90 Pac. 663; Richards v. Ferguson Implement Co., 125 Mo. App. 428, 102 S. W. 606; Salem R. R. Co. v. Alderman & Sons Co., 78 S. C. 1.

⁵⁴Leigh v. Garysburg Mfg. Co., 132 N. C. 167, 43 S. E. 632; Cozard v. Kanawha Hardware Co., 139 N. C. 283, 51 S. E. 932, 111 Am. St. Rep. 779, 1 L.R.A. (N.S.) 969.

portation are sometimes authorized by the constitution.⁵⁵ A constitutional provision permitting the condemnation of property for private ways of necessity, includes a way for a private railroad of necessity.⁵⁶

There appears to be no reason why lateral roads should not be constructed, if they are required to serve the public, as occasion requires. The system of so-called private and lateral roads appears to have had its fullest development in Pennsylvania, and a summary of the legislation and decisions on that subject will be found in the case of Waddell's Appeal.⁵⁷

§ 265 (172). Other means of transportation and communication: the telegraph and telephone, petroleum tubes, elevated tramways, etc. A telegraph or telephone line designed for the service of the public and subject to regulation by the legislature is a public use for which property may be taken.⁵⁸ The same is true of lines of tubing for the conveyance of petroleum, the same being for general use and subject to public regulation.⁵⁹ And so, generally, any means of conveying passengers or goods, or of transmitting intelligence, which is at the service of the public generally, would be a public use for which property might be condemned.⁶⁰ A statute of New York authorized the formation of companies to construct elevated tramways for carrying material in buckets and conferred upon

⁵⁵Ex parte Bacot, 36 S. C. 125, 15 S. E. 204, 16 L.R.A. 586. *And see* People v. District Court, 11 Colo. 147.

⁵⁶Garbutt Lumber Co. v. Ga. etc. Ry. Co., 111 Ga. 714, 36 S. E. 942; Jones v. Venable, 120 Ga. 1, 47 S. E. 549.

⁵⁷84 Pa. St. 90. See generally, in addition to cases cited in this section, St. Lonis etc. R. R. Co. v. Petty, 57 Ark. 359, 21 S. W. 884. 20 L.R.A. 434; Butte etc. R. R. Co. v. Montana U. R. R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L.R.A. 298; State v. Railway Co., 40 Ohio St. 504; Weidenfeld v. Sugar Run R. R. Co., 48 Fed. 615; Denver etc. R. R. Co. v. Union Pac. R. R. Co., 34 Fed. 386; Colorado Eastern R. R. Co. v. Union Pac. R. R. Co., 41 Fed. 293.

⁵⁸New Orleans etc. R. R. Co. v. Southern & Atlantic Tel. Co., 53 Ala. 211; Mobile etc. R. R. Co. v. Postal Tel. Cable Co., 120 Ala. 21; Union Pac. R. R. Co. v. Colo. Postal Tel. Cable Co., 30 Colo. 163, 69 Pac. 564, 97 Am. St. Rep. 106; Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7; State v. St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L.R.A. 113; Am. Tel. & Tel. Co. v. St. Louis etc. Ry. Co., 202 Mo. 653, 101 S. W. 576; Turnpike Co. v. American etc. News Co., 43 N. J. L. 381; Postal Tel. Cable Co. v. Ore. Short Line R. R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

⁵⁹West Va. Trans. Co. v. Volcanic Coal & Oil Co., 5 W. Va. 382.

⁶⁰Concord R. R. Co. v. Greeley, 17 N. H. 47, 61.

them the power of eminent domain. The stockholders of the Solvay Process Company organized a corporation under this act and constructed a road four miles long, between the works of said company and Onondaga lake. There was no public access to its termini and all its capacity was required by the Solvay Process Company. In a proceeding to condemn additional land for terminal facilities, it was held not to be for a public use.⁶¹ A statute of Oregon authorized any company organized to transport timber, lumber or cordwood to construct railroad skidways, tramways, chutes and flumes, and to condemn land therefor and declared that the work should "be deemed to be for the public benefit," and that the owners should "afford to all persons equal facilities in the use thereof for the purposes to which they are adapted upon payment or tender of reasonable compensation, for such use." On a petition to condemn for a skidway under this statute it appeared that the petitioner was organized in the interest of a lumbering company, that the termini of the way were on the land of this company, and that there was no access to the way except over private property. It was held to be for private use.⁶²

§ 266 (172a). **Public grain elevators.** An act of Minnesota providing for the erection of public grain warehouses and grain elevators on or near the right of way of railways and authorizing the condemnation of sites therefor, was held valid on the ground that the taking was for a public use.⁶³

§ 267 (173). **Urban improvements: sewers, water, gas and light.** The condemnation of property for public sewers and drains,⁶⁴ or works for the disposition of sewerage,⁶⁵ for

⁶¹Matter of Split Rock Cable R. R. Co., 128 N. Y. 408, 28 N. E. 506. The court says that "a possible limited use by a few, and not then as a right but by way of permission or favor, is not sufficient to authorize the taking of private property against the will of the owner."

⁶²Apex Transportation Co. v. Garbade, 32 Ore. 582, 52 Pac. 573, 54 Pac. 367, 882.

⁶³Stewart v. Great Northern R. R. Co., 65 Minn. 515, 68 N. W. 208.

⁶⁴McDaniel v. City of Columbus, 91 Ga. 462, 17 S. E. 1011; Huntington v. Amiss, 167 Ind. 375, 79 N. E. 199; Hildreth v. Lowell, 11 Gray 345; Horton v. Andrus, 191 N. Y. 231.

⁶⁵Kingman et. al., Petitioners, 151 Mass. 566, 27 N. E. 778.

supplying a city or town with water,⁶⁶ or gas,⁶⁷ or light,⁶⁸ is so manifestly for public use that it has been seldom questioned and never denied. So supplying a city and its inhabitants with natural gas is a public use.⁶⁹

§ 268. Electricity for light, heat and power and works for generating and transmitting same. The furnishing of electricity to the public for light, heat or power, that is to such members of the public within a given territory as may desire the current for any or all of such purposes, is a public use for which the power of eminent domain may be exercised.⁷⁰ "The knowl-

⁶⁶Burden v. Stein, 27 Ala. 104, 116, 62 Am. Dec. 758; Cummings v. Peters, 56 Cal. 593; St. Helena Water Co. v. Forbes, 62 Cal. 182, 45 Am. Rep. 659; Riche v. Bar Harbor Water Co., 75 Me. 91; Kane v. Mayor etc. of Baltimore, 15 Md. 240; Reddall v. Bryan, 14 Md. 444, 74 Am. Dec. 550; Wayland v. County Commissioners, 4 Gray 500; Lombard v. Stearns, 4 Cush. 60; Thorn v. Sweeney, 12 Nev. 251; Olmstead v. Proprietors of the Morris Aqueduct Co., 46 N. J. L. 495, affirmed by Court of Errors, 47 N. J. L. 311; Pocantico Water Works Co. v. Bird, 130 N. Y. 249, 29 N. E. 246; Stamford Water Co. v. Stanley, 39 Hun 424; Matter of New Rochelle Water Co., 46 Hun 525; Witcher v. Holland W. W. Co., 66 Hun 619, 20 N. Y. St. 560; Rome v. Whitestown W. W. Co., 113 App. Div. 547, 100 N. Y. S. 357; S. C. affirmed 187 N. Y. 542, 80 N. E. 1106; State v. Eau Claire, 40 Wis. 533.

⁶⁷La Harpe v. Elm Tp. Gas etc. Co., 69 Kan. 97, 76 Pac. 448; Bloomfield etc. Natural Gas Light Co. v. Richardson, 63 Barb. 437.

⁶⁸Matter of E. Canada Creek Elec. L. & P. Co., 49 Misc. 565, 99 N. Y. S. 109.

⁶⁹State v. Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L.R.A. 729.

⁷⁰Jones v. North Ga. Elec. Co., 125 Ga. 618, 54 S. E. 85, 6 L.R.A.(N.S.) 122; Hollister v. State, 9 Ida. 8, 71

Pac. 541; Hollister v. Clark, 9 Ida. 672, 77 Pac. 1132; Minn. Canal & Power Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405, 5 L.R.A. (N.S.) 638; Minn. Canal & Power Co. v. Pratt, 101 Minn. 197, 112 N. W. 395, 11 L.R.A.(N.S.) 105; Helena Power Transmission Co. v. Spratt, 35 Mont. 108, 88 Pac. 773, 8 L.R.A.(N.S.) 567; Spratt v. Helena Power Transmission Co., 37 Mont. 60, 94 Pac. 631; Rockingham Co. L. & P. Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L.R.A. 581; Matter of Niagara L. & O. Power Co., 111 App. Div. 686, 97 N. Y. S. 853; Brown v. Weaver Power Co., 140 N. C. 333, 52 S. E. 954; Little Miami L. H. & P. Co. v. White, 5 Ohio N. P. (N.S.) 201; McMeekin v. Central Carolina Power Co., 80 S. C. 512; State v. Centralia etc. Ry. & P. Co., 42 Wash. 632, 85 Pac. 344; State v. Olympia L. & P. Co., 46 Wash. 511, 90 Pac. 656; Wis. Riv. Imp. Co. v. Pier (Wis.), 118 N. W. 857; Shasta Power Co. v. Walker, 149 Fed. 568; Walker v. Shasta Power Co., 160 Fed. 856, 87 C. C. A. 660, 19 L.R.A.(N.S.) 725.

And see Stoy v. Indiana Hydraulic Power Co., 166 Ind. 316, 76 N. E. 1057; Grande Ronde Elec. Co. v. Drake, 46 Ore. 243, 78 Pac. 1031; Avery v. Vt. Elec. Co., 75 Vt. 235, 54 Atl. 179, 98 Am. St. Rep. 818, 59 L.R.A. 817; Fallsburg P. & M. Co. v. Alexander, 101 Va. 98, 43 S. E. 194,

edge recently acquired concerning electricity has made it possible to divide power into any desired portions and to freely transmit the same to almost any point for use. This has created a demand for power which, though not so universal as the demand for water, is nevertheless of a public character. Like water, electricity exists in nature in some form or state, and becomes useful as an agency of man's industry only when collected and controlled. It requires a large capital to collect, store and distribute it for general use. The cost depends largely upon the location of the power plant. A water power or a location upon tide water reduces the cost materially. It may happen that the business cannot be inaugurated without the aid of the power of eminent domain for the acquisition of necessary land or rights in land. All these considerations tend to show that the use of land for collecting, storing, and distributing electricity, for the purposes of supplying power and heat to all who may desire it, is a public use, similar in character to the use of land for collecting, storing and distributing water for public needs—a use that is so manifestly public 'that it has seldom been questioned and never denied.' "⁷¹

And where the object to be accomplished is the production and distribution of electricity to the public for any of the purposes mentioned, property and property rights may be condemned for whatever purpose is necessary to accomplish such object. Consequently land and water rights may be condemned for dams, reservoirs, canals and flumes for the creation and utilization of water power to be used in generating the electric current and for works for such generation.⁷² Also for works and rights of way for transforming, transmitting and distributing the current.⁷³

99 Am. St. Rep. 855, 61 L.R.A. 129; State v. White River Power Co., 39 Wash. 648, 82 Pac. 150, 2 L.R.A. (N.S.) 842; State v. Superior Court, 42 Wash. 660, 85 Pac. 666, 5 L.R.A. (N.S.) 672; State v. Tolt P. & T. Co., 50 Wash. 13, 96 Pac. 519.

The contrary is held in an elaborate opinion in Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 109 Am. St. Rep. 526, 70 L.R.A. 472.

⁷¹Rockingham Co. L. & P. Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L.R.A. 581.

⁷²Jones v. North Ga. Elec. Co., 125

Ga. 618, 54 S. E. 85, 6 L.R.A.(N.S.) 122; Hollister v. State, 9 Ida. 8, 71 Pac. 541; Hollister v. State, 9 Ida. 672, 77 Pac. 1132; Helena Power Transmission Co. v. Spratt, 35 Mont. 108, 88 Pac. 773, 8 L.R.A.(N.S.) 567; Brown v. Weaver Power Co., 140 N. C. 333, 52 S. E. 954; State v. Centralia etc. Ry. & P. Co., 42 Wash. 632, 85 Pac. 394; State v. Olympia L. & P. Co., 46 Wash. 511, 90 Pac. 656; Shasta Power Co. v. Walker, 149 Fed. 568.

⁷³Rockingham Co. L. & P. Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66

§ 269. The supply and distribution of water for power purposes. The supply and distribution of water for power for commercial and manufacturing purposes, would seem to be on the same basis as the production and supply of electricity for the same purpose. A statute of Pennsylvania authorized the exercise of the eminent domain power for "the supply, storage or transportation of water and water power for commercial and manufacturing purposes." The statute was upheld as providing for a public use.⁷⁴ A Minnesota corporation was organized, among other things, to create a water power and to supply water power *from the wheels*. It was held that water power from the wheels must be used at the wheels and, from the nature of the case, could only be supplied to a few consumers, and therefore would not be a public use.⁷⁵ Furnishing water to manufacturing companies for use in boilers was held to be a private use in Washington.⁷⁶

§ 270 (174). Public buildings: schools, markets, hospitals, etc. Property taken for public buildings of all kinds, such as city halls,⁷⁷ court houses,⁷⁸ jails, public schools,⁷⁹ mar-

L.R.A. 581; Matter of Niagara L. & O. Power Co., 111 App. Div. 686, 97 N. Y. S. 853.

⁷⁴Jacobs v. Clearview Water Supply Co., 220 Pa. St. 388, 69 Atl. 870. The court says: "It is conceded that the supply of water to the public for domestic purposes is a public use, but it is denied that the supply of water for commercial and manufacturing purposes is a public use. The distinction is more apparent than real. It rests on a very narrow edge. It is based on the theory that a large number of individual citizens living in the community where the respondent company transacts its business will not engage in commercial and manufacturing enterprises, and therefore will not participate in the use of water and water power for such purposes. An enterprise does not lose the character of a public use because that use may be limited by circumstances to a comparatively small part of the public." p. 394.

To same effect: Wis. Riv. Imp. Co. v. Pier (Wis.), 118 N. W. 857.

⁷⁵Minn. Canal & Power Co. v. Koochiching County, 97 Minn. 429, 107 N. W. 405. 5 L.R.A.(N.S.) 638. The case was really disposed of upon other grounds. See also Smith v. Barre Water Co., 73 Vt. 310, 50 Atl. 1055; State v. White Riv. Power Co., 39 Wash. 648, 82 Pac. 150, 2 L.R.A. (N.S.) 842; Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 109 Am. St. Rep. 526, 70 L.R.A. 472.

⁷⁶State v. Superior Court, (Wash.), 99 Pac. 3.

⁷⁷Cincinnati etc. R. R. Co. v. Village of Belle Centre, 48 Ohio St. 273, 27 N. E. 464.

⁷⁸Jockheek v. Board of Comrs., 53 Kan. 780, 37 Pac. 621.

⁷⁹Chamberlain v. Morgan, 68 Pa. St. 168; Williams v. School District, 33 Vt. 271; Long v. Fuller, 68 Pa. St. 170; Township Board v. Hackman, 48 Mo. 243; Rittenhouse v. Creasy, 2 Luzerne Leg. Rep. (Pa.) 241.

kets,⁸⁰ almshouses,⁸¹ and the like, is taken for public use. This right has been questioned in some decisions, but never denied in any decided case.⁸² So a postoffice and custom house⁸³ and other public works for the general government are a public use for which the State's power of eminent domain may be exercised.⁸⁴

§ 271 (175). Public parks and pleasure drives.—Aesthetic purposes. Pleasure and recreation are not only essential to health, but tend to the improvement of character. No better instance of a public use can be given than that of a public square or park in the midst of, or convenient to, a dense population. Private property may be taken for the purpose of securing such means of recreation and health.⁸⁵ A park is a public use, though not located in a city or town, but only in the vicinity of it.⁸⁶ Land may be taken on each side of a highway to be kept open for court yards and ornament.⁸⁷ Highways may be laid out for the purpose of affording access to a position which commands a fine view or for accommodating pleasure driving.⁸⁸ The

⁸⁰Matter of Application of Cooper, 28 Hun 515. *But see* Twelfth St. Market Co. v. Philadelphia etc. R. R. Co., 142 Pa. St. 580, 21 Atl. 989.

⁸¹Hayward v. Mayor etc. of New York, 8 Barb. 486.

⁸²Justice Woodbury in West River Bridge Co. v. Dix, 6 How. p. 546, says: "Who ever heard of laws to condemn private property for public use, for a marine hospital or State prison? So a custom-house is a public use for the general government, and a court-house or jail for a State. But it would be difficult to find precedent or argument to justify taking private property, without consent to erect them on, though appropriate for the purpose. No necessity seems to exist, which is sufficient to justify so strong a measure. A particular locality as to a few rods in respect to their site is usually of no consequence." For comments on this language *sec* 33 Vt. 278, 279.

⁸³Burt v. Merchants' Ins. Co., 106 Mass. 356, 8 Am. Rep. 339.

⁸⁴*See post*, § 309.

⁸⁵United States v. Cooper, 9 Mackey 104; County Court v. Griswold, 58 Mo. 175; Owners of Ground v. Mayor etc. of Albany, 15 Wend. 374. Brooklyn Park Co. v. Armstrong, 45 N. Y. 234; Matter of Commissioners for Central Park, 63 Barb. 282; Laird v. Pittsburg, 205 Pa. St. 1, 54 Atl. 324, 61 L.R.A. 332; Shoemaker v. United States, 147 U. S. 282, 13 S. C. Rep. 361. *See also* the following cases which impliedly sustain the same proposition: Cook v. South Park Comrs., 61 Ill. 115; Winn v. Board of Park Comrs. (Ky.) 14 S. W. Rep. 421; Holt v. Somerville, 127 Mass. 408; Foster v. Boston Park Comrs., 131 Mass. 225; S. C. 133 Mass. 321; Kerr v. South Park Comrs., 117 U. S. 379.

⁸⁶County Court v. Griswold, 58 Mo. 175.

⁸⁷Matter of Bushwick Avenue, 48 Barb. 9; Matter of Clinton Ave., 57 App. Div. 166, 68 N. Y. S. 196; S. C. affirmed, 167 N. Y. 624, 60 N. E. 1108.

⁸⁸Higginson v. Nahant, 11 Allen

taking of a large tract in the Adirondacks for a State park was held to be for a public use.⁸⁹ An act of New Jersey "to acquire rights of fishing common to all in fresh water lakes in certain counties, to acquire lands adjoining thereto for public use and enjoyment therewith, and to regulate the same," was held void because the right of fishing could not be taken without taking the water or lake itself and because the object of the act was not a public use within the constitution.⁹⁰

Whether aesthetic purposes are a public use for the promotion of which property may be taken has been made a question.⁹¹ An act limiting the height of buildings around a public square and providing compensation to the owners of property affected was sustained in Massachusetts.⁹² And it has been implied by the same court that the right to use property for display advertising by means of bill boards, posters and the like might be taken on making compensation.⁹³

530; Mount Washington Road Co., 35 N. H. 134; *see* Bryan v. Branford, 50 Conn. 246; Woodstock v. Gallup, 28 Vt. 587; Great Falls Power Co. v. Great Falls etc. R. R. Co., 104 Va. 416, 52 S. E. 172; *ante*, § 259.

⁸⁹People v. Adirondack R. R. Co., 160 N. Y. 225, *reversing* S. C. 39 App. Div. 34.

⁹⁰The act was sustained by the Supreme Court. Albright v. Sussex County Lake and Park Commission, 68 N. J. L. 523, 53 Atl. 612. On appeal this decision was reversed by the court of errors and appeals. Albright v. Sussex County Lake & Park Commission, 71 N. J. L. 303, 57 Atl. 398, 108 Am. St. Rep. 749, 69 L.R.A. 768. And on rehearing the act was held void *in toto*. Albright v. Sussex County Lake & Park Commission, 71 N. J. L. 309, 59 Atl. 146, 69 L.R.A. 768. The court says: "But not only does the constitution require that the property taken shall be for the public; it is necessary that it should be for *use*. The chief purpose in the enjoyment of the property must be utility. But it cannot

be doubted that the main object of the present statute is to furnish a means of amusement or sport to the few persons who have the inclination and leisure for such pastime. The public utility to be subserved by such indulgence is imperceptible.

* * * We have found no instance of the exercise of the power in order to afford a means of pastime capable of being enjoyed by only a few persons." Albright v. Sussex Co. Lake & Park Commission, 71 N. J. L. 303, 306, 307, 57 Atl. 398, 108 Am. St. Rep. 749, 69 L.R.A. 768.

⁹¹See cases cited in last note; also Farist Steel Co. v. Bridgeport, 60 Conn. 278; Bostock v. Same, 95 Md. 400, 52 Atl. 1130, 93 Am. St. Rep. 394, 59 L.R.A. 282; Passaic v. Paterson Bill Posting Co., 72 N. J. L. 285, 62 Atl. 267, 111 Am. St. Rep. 676; Great Falls Power Co. v. Great Falls etc. R. R. Co., 104 Va. 416, 52 S. E. 172.

⁹²Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77. See *ante*, § 243.

⁹³Commonwealth v. Boston Advertising Co., 188 Mass. 348, 74 N.

§ 272 (175a). Converting spots of historic interest into public grounds: battle fields. Acts of Congress provided for the condemnation of land "for the purpose of preserving the lines of battle at Gettysburg, Pa., and for properly marking with tablets the positions occupied by the various commands of the armies of the Potomac and of Northern Virginia on that field, and for the opening and improving avenues along the positions occupied by troops upon those lines, and for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, division, corps and other organizations, with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets, each bearing a brief historical legend, compiled without praise and without censure." This was held to be within the powers vested in Congress and a public use for which the power of eminent domain could be exercised.⁹⁴

E. 601, 108 Am. St. Rep. 494, 69 L.R.A. 817. *See ante*, § 243.

⁹⁴United States v. Gettysburg Electric R. R. Co., 160 U. S. 638, 16 S. C. 427, reversing S. C. 67 Fed. 809. The court says: "The end to be attained, by this proposed use, as provided for by the act of Congress, is legitimate, and lies within the scope of the constitution. The battle of Gettysburg was one of the great battles of the world. The numbers contained in the opposing armies were great; the sacrifice of life was dreadful; while the bravery, and, indeed, heroism, displayed by both the contending forces, rank with the highest exhibition of those qualities ever made by man. The importance of the issue involved in the contest of which this great battle was a part cannot be overestimated. The existence of the government itself, and the perpetuity of our institutions, depended upon the result. Valuable lessons in the art of war can now be learned from an examination of this great battlefield, in connection with the history of the events which there

took place. Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of Congress, or even take possession of the field of battle, in the name and for the benefit of all the citizens of the country, for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted congress by the constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great re-

§ 273 (176). Cemeteries. Public places of sepulture are undoubtedly a public use, and the power of eminent domain may be exercised for this purpose, when the cemetery is to be under the control of public authorities, or when the right of sepulture is public and general.⁹⁵ But cemetery associations cannot condemn land for burial purposes, to be vested in the association and lot-holders as their private property, and in which the pub-

public of modern times is forcibly impressed upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States through its representatives in congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition. Such action on the part of congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made. The greater the love of the citizen for the institutions of his country, the greater is the dependence properly to be placed upon him for their defense in time of necessity, and it is to such men that the country must look for its safety. The institutions of our country, which were saved at this enormous expenditure of life and property, ought to and will be regarded with proportionate affection. Here upon this battlefield is one of the proofs of that expenditure, and the sacrifices are rendered more obvious and more easily appreciated when such a battlefield is preserved by the government at the public expense. The right to take land for cemeteries for the burial of the deceased soldiers of the country rests on the same footing, and is connected with, and springs from, the same powers of the constitution. It seems very clear that the government has

the right to bury its own soldiers, and to see to it that their graves shall not remain unknown or unhonored. No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred. It is needless to enlarge upon the subject, and the determination is arrived at without hesitation that the use intended, as set forth in the petition in this proceeding, is of that public nature which comes within the constitutional power of congress to provide for by the condemnation of land." *See United States v. Tract of Land*, 70 Fed. 940.

⁹⁵ *Edwards v. Stonington Cemetery Association*, 20 Conn. 466; *Evergreen Cemetery Association v. New Haven*, 43 Conn. 234, 241; *Westfield Cem. Assn. v. Danielson*, 62 Conn. 319, 26 Atl. 345; *Starr Burying Ground Ass. v. North Lane Cem. Ass.*, 77 Conn. 53, 58 Atl. 467; *Forneman v. Mt. Pleasant Cem. Assn.*, 135 Ind. 344, 35 N. E. 271; *Baleh v. County Comrs. of Essex*, 103 Mass. 106; *Tracy v. Bittle*, 213 Mo. 302, 112 S. W. 45; *Standards Corners Rural Cem. Assn. v. Brandes*, 35 N. Y. Supp. 1015; *Matter of Lyons Cem. Ass.*, 93 App. Div. 19, 86 N. Y. S.

lic have no rights.⁹⁶ It is no objection that the privilege must be paid for, nor that the price varies according to location, nor that the price operates as a practical exclusion of a portion of the public.⁹⁷

§ 274 (177). Improvement of navigation. As we have already seen, all navigable streams are public highways by water, and the public not only have a right to traverse them, but to improve them for that purpose, and private property may be condemned in order to effect such improvements.⁹⁸ Any occupation or interference with private property for the purpose of improving navigation, as by the construction of canals or dams is for public use.⁹⁹ A boom to facilitate the running, storing and handling of logs is an improvement of such highway and a public use.¹ Land may be taken on the banks of navigable streams for public landing places, including yard room for storing and handling freight.² The establishment of harbor lines and improvement of harbors fall in the same category.³ A company was chartered by the legislature of Tennessee for the purpose of

⁹⁶ 60; Memphis State Line R. R. Co. v. Forest Hill Cem. Co., 116 Tenn. 400, 94 S. W. 69; Edgecumbe v. Burlington, 46 Vt. 218; United States v. Gettysburg Electric R. R. Co., 160 U. S. 688, 16 S. C. 427.

⁹⁷ Evergreen Cemetery Association v. Beecher, 53 Conn. 551, 5 Atl. 353; Board of Health v. Van Hoesen, 87 Mich. 533, 49 N. W. 894; Matter of Deansville Cemetery Association, 66 N. Y. 569, 23 Am. Rep. 86; Fork Ridge Baptist Cem. Assn. v. Redd, 33 W. Va. 262, 10 S. E. 405.

⁹⁸ Evergreen Cemetery Association v. Beecher, 53 Conn. 551, 5 Atl. 353. The court says: "Corporations take land by right of eminent domain primarily for the benefit of the public, incidentally for the benefit of themselves. As a rule men are not allowed to ride in cars, or pass along turnpikes, or cross toll bridges, or have grain ground at the mill, without making compensation. One man asks and pays for a single seat in a car; another for a special train; all have rights; each pays in propor-

tion to his use; and some are excluded because of their inability to pay for any use; nevertheless it remains a public use as long as all persons have the same measure of right for the same measure of money." p. 553.

⁹⁹ Matter of Petition of United States, 96 N. Y. 227; S. C. 67 How. Pr. 121.

Hazen v. Essex Co., 12 Cush. 475; Calking v. Baldwin, 4 Wend. 667, 21 Am. Dec. 168.

Cotton v. Miss. & Rum River Boom Co., 22 Minn. 372; Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670; Patterson v. Boom Co., 3 Dill. 465; S. C. affirmed, 98 U. S. 403.

Pearson v. Johnson, 54 Miss. 259; Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 10 Mo. App. 401; Pittsburgh v. Scott, 1 Pa. St. 309.

Farist Steel Co. v. City of Bridgeport, 60 Conn. 278, 22 Atl. 561; Moore v. Sanford, 151 Mass. 285, 24 N. E. 323, 7 L.R.A. 151

constructing sheds, railroads, engines and other equipments to be used in loading and unloading freight on or from steamboats and other craft touching at Memphis. This was held not to be a public use which would authorize the condemnation of private property. The ground of this decision was that it was a public convenience, merely, and not a necessity, and that it was not subject to public regulation in its charges and services.⁴ Converting a private stream into a highway for floating logs and timber is a public use for which land or riparian rights may be condemned.⁵

§ 275 (178). Water mills and water power. Prior to the Revolution, and, consequently, long before the courts of this country were called upon to adjudicate upon the question of public use, it had been the practice to permit the erection of dams for water power and to provide for a statutory adjustment of the damages to property overflowed.⁶ After the Revolution and the adoption of State constitutions containing the eminent domain provision in question, this practice continued, no question being made for some time as to the constitutionality of such proceedings.⁷ When at last the question was raised as to the public use of these mills, the practice had been so long acquiesced in and encouraged and so much capital had become invested in such enterprises, that the courts were hardly in a condition to give the question a fair consideration. Courts are not, and perhaps ought not to be, free from the influence of the circumstances which surround a case and the consequences which may flow

⁴Memphis Freight Co. v. Memphis, 4 Cold. 419.

⁵Potlatch Lumber Co. v. Peterson, 12 Ida. 769, 88 Pac. 426, 118 Am. St. Rep. 233; Martin v. Burns, 155 N. Y. 23, 49 N. E. 246; Brewster v. J. & J. Rogers Co., 169 N. Y. 73, 62 N. E. 164, 58 L.R.A. 495, *affirming* S. C. 42 App. Div. 343, 59 N. Y. S. 32; State v. Superior Court, 47 Wash. 397, 92 Pac. 269.

⁶Acts of 8 Anne, 1714, and 13 Anne, 1719, in Colony of Massachusetts Bay, Ancient Charters, pp. 388, 404; and see remarks of court in Boston & Roxbury Mill. Corp. v. Newman. 12 Pick. 467-9, and Murdock v. Stickney, 8 Cush. 113, 117.

In Great Falls Manf. Co. v. Fernald, 47 N. H. 444, 459, such acts are said to have been in force in that State since 1718.

⁷Stowell v. Flagg, 11 Mass. 364, 1814; Cogswell v. Essex Mill Corp., 6 Pick. 94, 1827; Wolcott v. Woolen Manf. Co., 5 Pick. 292, 1824; Fiske v. Framingham Manf. Co., 12 Pick. 67, 1831; French v. Braintree Manf. Co., 23 Pick. 216, 1839; Crenshaw v. Slate River Co., 6 Rand. Va. 245, 1828; Bibb v. Mountjoy, 2 Bibb 1, 1810; Afee v. Kennedy, 1 Litt. 92, 1822; Smith v. Connelly's Heirs, 1 T. B. Mon. 58, 1824; Shackleford v. Coffee, 4 J. J. Marsh 40, 1830.

from a particular decision. Most of the mills which existed in these early years were grist-mills and saw-mills, accustomed to grind and saw for the public, and dependent upon the custom of the public for their success and profit. In most States they were regulated by law and compelled to serve the public for a stipulated toll and in regular order.⁸

⁸We have not access to all the old statutes of the different States enacted prior to the time when the constitutionality of the mill acts was called in question, but give below sufficient to sustain the text.

Alabama. All mills were declared to be for public use, and were required to be commenced within one and completed within three years after leave granted. Grist mills were required to grind according to turn and well and sufficiently all grain brought thereto and for a toll fixed by the county court where located. Acts of 1811 and 1812. The act of 1812 authorized the erection of grist-mills, saw-mills, cotton gins or other useful water works. Tomlin's Digest, Laws of Ala., pp. 623-626.

Connecticut. The first act authorizing flowage by dams appears to have been passed in 1864. Acts of 1864, p. 40. There had existed, however, since 1796 a statute regulating the tolls and duties of millers. Acts and Laws, 1796.

Delaware. As far back as 1752 an act was passed for regulating the tolls of millers, and from time to time during the remainder of the century acts were passed compelling millers to grind for the public, to keep their mills in repair, and otherwise regulating them. Laws of Del. 1829, pp. 402, 403. Laws of Del. 1797, *passim*.

Georgia had a similar act passed in 1786. Prince's Digest of Laws of Ga. p. 339.

Kentucky. In 1797 an act was
Em. D.—35.

passed for the erection of water grist-mills. Applicants were obliged to commence their mill in one year and complete it in three years and keep it in repair under a penalty. Millers were required to grind well and sufficiently the grain brought to their mills in due time as the same was brought. In 1810 the provisions of this act were extended to "any kind of water works." Littell & Swigert Digest of Laws of Ky., 1822, pp. 935-939.

Maryland. Acts of 1704 and 1816 regulate tolls for grinding. Dorsey's Statutes, vol. 1, pp. 3 and 640. No act for a statutory assessment of damages appears to have existed up to 1840.

Massachusetts. The first act for a statutory assessment of damages from flowage was passed in 1714. Ancient Charters, p. 404. The preamble refers to mills as "serviceable for the public good and benefit of the town, or considerable neighborhood in or near to which they have been erected." Which indicates that saw-mills and grist-mills for public use were in mind. The act, however, provides for "any water-mill or mills." Other early acts regulate the tolls and duties of millers. Act of 1635, Ancient Charters, p. 157; also pp. 388, 469. The act of 1796 was a revision of the statutes on this subject. Perpetual Laws, vol. 2, p. 344. The act applies to "any water mill." The preamble recites as follows: "Whereas the erection and support of mills to accommodate the inhabitants of the several parts of

§ 276 (179). The same: Leading cases. The question as to the constitutionality of these mill acts appears to have been made almost simultaneously in two different States, Massachu-

the State ought not to be discouraged by many doubts and disputes," etc. This shows that the legislature had in mind public mills. The act also regulates the tolls and prescribes the duties of millers. There were afterwards many additions and amendments to this act and also many special acts passed for the erection of particular mills or water power.

New Hampshire. In 1718 an act was passed authorizing the erection of water mills and providing a statutory remedy for flowage. The act regulates the toll of millers. The act is given in full, together with a summary of legislation on the subject, in 44 N. H. 448-450.

New Jersey. An act of 1696 prescribes the tolls of millers. Leaming & Spicer's Grants etc. of N. J. 547. Similar regulations were continued in force until the present century. Nixon's Digest of Laws, p. 547; Rev. Stat. 1821, p. 446. I find no laws for the erection of mills or the assessment of damages to lands.

North Carolina. An act of 1777 allows the erection of water grist-mills only, and provides for an assessment of damages caused by flowage. All millers are required to grind "according to turn," and "well and sufficiently," for a prescribed toll. After the right has been acquired, the applicant must commence his works within a year and complete them within three years. This act continued in force at least until 1821. Rev. Stat. 1821, vol. 1, p. 345.

Pennsylvania. Mill acts do not appear to have existed in this State in early times. An act of 1803 permits the erection of dams in all but specified streams, but the persons erecting such dams are not to "in-

fringe on or injure the rights or privileges of the owner or possessor of any private property on said stream." Purdon's Statutes, p. 592.

Rhode Island. An act of 1726 regulates the tolls of millers. Rev. Stat. 1822, p. 376. An act of 1734 provides for the erection of "water mills" and an assessment of damages from flowage. Same, p. 374.

South Carolina. In 1712 an act was passed offering a benefit to the one who should first erect and put in successful operation a wind or water saw-mill, or a wind or water grist-mill. Statutes at Large, vol. 2, p. 388. In 1744 an act was passed which prohibited the erection or maintenance of dams which flooded the lands of others and provided for their abatement. *Ibid.* vol. 3, p. 609. This act, at first passed for three years only, was revived and made perpetual in 1783. *Ibid.* vol. 4, p. 540. In 1785 an act was passed regulating tolls taken by millers. *Ibid.* vol. 4, p. 652.

Vermont. An act of 1797 regulates the tolls and duties of millers. Rev. Laws, 1797, p. 407. No flowage laws existed until a recent date.

Virginia. Various acts were passed from 1645 to 1666 regulating the charges and duties of millers. Henning's Stat. at Large, vol. 1, pp. 301, 348, 485; vol. 2, p. 242. In 1667 an act was passed allowing the owner on one side of a stream to condemn an acre of land on the opposite side for the purpose of erecting a mill "for the grinding of corn." *Ibid.* vol. 2, p. 260. In 1745 the first act was passed allowing an assessment of damages for flowage. *Ibid.* vol. 5, p. 360. This act applied generally to water mills. In 1748 these various

etts and New Jersey.⁹ In *Boston & Roxbury Mill Corporation v. Newman*, the plaintiff was authorized to construct a system of dams and works for the purpose of operating grist-mills, iron manufactories and other mills by means of tide water. The act was held valid principally on the ground that the establishment of such mills would be a great public benefit. The acts of the Colony and State in reference to mills were referred to as showing the light in which the legislature and the people had regarded such works. The court says: "We should be at a loss to imagine any undertaking of an individual or association of persons with a view to private emolument, in which the public had a more certain and direct interest and benefit." "Take the grist-mill established in this city, as an example. Is it of no benefit to have the corn ground near to the inhabitants, rather than at a distance? 'But you cannot compel the miller to grind your corn for the toll, as you may the proprietors of the turnpike to let you travel over the road for a toll.' If there be not an actual, there is a moral necessity imposed upon the owner of the mill, to accommodate the public to the extent of his power. Who ever heard of a refusal? And in regard to the manufacturing establishments, is it nothing to the public that great numbers of citizens have the means of employment brought to their homes?"¹⁰

In *Scudder v. Trenton Del. Falls Co.*¹¹ the decision was by the Chancellor only. He says: "May we not, in considering what shall be deemed a public use and benefit, look at the objects, the purposes, and the results of the undertaking? The water power about to be created, will be sufficient for the erection of seventy mills, and factories, and other works dependent on such power. It will be located at the seat of government, at the head of tide water, and in a flourishing and populous district of country. It will be no experiment in a country like ours; and, judging from the results in other places, we may make a sufficiently accurate calculation as to the result here. Take the town of Paterson as an example. The water power there is in the hands of individuals—a company like this. They are under

acts were revised and continued in force at least until after the adoption of the first constitution. *Ibid.* vol. 6, p. 55.

⁹*Boston & Roxbury Mill Corp. v. Newman*, 12 Pick. 467, 476, 1832;

Scudder v. Trenton Del. Falls Co., 1 N. J. Eq. 694, 1832.

¹⁰*Boston & Roxbury Mill Corp. v. Newman*, 12 Pick. 467.

¹¹1 N. J. Eq. 694, 728.

no obligation to lease or sell any mills or privileges to the public; and yet see the result of a few years' operation. Paterson is now the manufacturing emporium of the State, with a population of eight thousand souls. It has increased the value of property in all that district of country; opened a market for the produce of the soil, and given a stimulus to industry of every kind. May we not hope that a similar benefit may be experienced here? * * * The ever varying condition of society is constantly presenting new objects of public importance and utility; and what shall be considered a public use or benefit may depend somewhat on the situation and wants of the community for the time being. The great principle remains: There must be a public use or benefit; that is undisputable. But what that shall consist of, or how extensive it shall be to authorize an appropriation of private property, is not easily reducible to general rule. Looking at this case in all its bearings, and believing as I do that great benefit will result to the community from the contemplated improvement, I am not satisfied to declare the act of incorporation, or that part of it which is now in question, void and unconstitutional." The act was accordingly sustained.

In the same year a case was decided in Tennessee which intimates that to take land for a saw-mill or paper-mill or any kind of mill except a public grist-mill would not be a taking for a public use.¹² The decision in the case was that, under an act which related solely to grist-mills, an application for a grist-mill, saw-mill and paper-mill could not be granted. These early cases were not very carefully considered, but they were sufficient to establish the law of the States where they were made, and to exert an important influence upon the law of sister States.

§ 277 (180). The same: Law in the different States at the present time. The taking of land for water-power for running any kind of mills or machinery is held to be for public use upon principle in Connecticut,¹³ Indiana,¹⁴ Massachusetts,¹⁵

¹²Harding v. Goodlet, 3 Yerg. Tenn. 41 (1832), 24 Am. Dec. 546.

¹³Olmstead v. Camp, 33 Conn. 532, 551, 89 Am. Dec. 221; Todd v. Austin, 34 Conn. 78, 90; Oecum Co. v. Sprague Manf. Co., 35 Conn. 496. In Olmsted v. Camp the court says: "It would be difficult to conceive a greater public benefit than garnering up the waste waters of innumerable

streams and rivers and ponds and lakes, and compelling them with a gigantic energy to turn machinery and drive mills, and thereby build up cities and villages, and extend the business, the wealth, the population and the prosperity of the State." In Todd v. Austin this proposition is laid down: "The legislature may lawfully grant rights of easement to

New Hampshire,¹⁶ and New Jersey;¹⁷ and also by the Supreme Court of the United States in a case which went up from New Hampshire.¹⁸ The constitutionality of acts for this purpose has been seriously questioned, but nevertheless upheld either on the ground of authority or long and general acquiescence and usage in Iowa,¹⁹ Kansas,²⁰ Maine,²¹ Minnesota,²² Nebraska,²³ and

individuals or corporations to enable them to erect and operate structures, if the resul^t of their operation is the production of an article or thing intended to be furnished or sold to the public for a beneficial use, and to supply their reasonable wants."

¹⁴Hankins v. Lawrence, 8 Blackf. 266; Kepley v. Taylor, 1 Blackf. 492. See Great Western Nat. Gas & Oil Co. v. Hawkins, 30 Ind. App. 557, 66 N. E. 765.

¹⁵Boston & Roxbury Mill Corp. v. Newman, 12 Pick. 467; Hazen v. Essex Co., 12 Cush. 475; Murdock v. Stickney, 8 Cush. 113; Otis Co. v. Ludlow Mfg. Co., 186 Mass. 89, 70 N. E. 1009. In Murdock v. Stickney, 8 Cush. 113, the court doubt whether the mill acts could be sustained if the question was a new one, but say it is too late to question them after being in full operation for a century and a half. In this case also the court take the position that the mill acts are not an exercise of the power of eminent domain at all, but the argument is too obscure to be condensed. An interesting commentary upon the mill acts, in which the position taken in 8 Cush. is elaborated, will be found in Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39. A statement of this case will be found in § 279, *post*. In Turner v. Nye, 154 Mass. 579, 28 N. E. 1048, 14 L.R.A. 487, doubt is again expressed whether the mill acts could be sustained as new legislation. See opinion of the court, p. 582.

¹⁶Great Falls Manf. Co. v. Fernald, 47 N. H. 444; Amoskeag Manf.

Co. v. Head, 56 N. H. 386; Ash v. Cummings, 50 N. H. 591; Amoskeag Manf. Co. v. Worcester, 60 N. H. 522; Amoskeag Manf. Co. v. Goodale, 62 N. H. 66. In Rockingham Co. Lt. & P. Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L.R.A. 581, it is said that the mill cases of New Hampshire are *sui generis* and that they "cannot be regarded as declaring that 'public use' in the bill of rights is synonymous with public benefit, public advantage, or any use that is for the benefit and welfare of the State."

¹⁷Scudder v. Trenton Del. Falls Co., 1 N. J. Eq. 694.

¹⁸Head v. Amoskeag Manf. Co., 113 U. S. 9.

¹⁹Burnham v. Thompson, 35 Ia. 421; Gamnell v. Potter, 6 Ia. 548. In Fleming v. Hall, 73 Ia. 598, 35 N. W. 673, doubt is expressed whether, if the question was now (1887) to come up for the first time the mill acts would not be held unconstitutional.

²⁰Venard v. Cross, 8 Kan. 248; Harding v. Funk, 8 Kan. 315, 323. In the former case it is argued that, when the constitution was adopted, mill acts had been in operation in other States, and if the people had intended to stop the practice they would have said so in express terms. One judge dissents on principle, but acquiesces in the decision for the reason above stated. It is doubtful whether these cases sustain anything more than public grist-mills. In Harding v. Funk the court says: "The fact, however, is that the mills provided for under our statute are

Wisconsin.²⁴ On the other hand, such acts have been held to be unconstitutional as authorizing the taking of private property for private use, except in case of public mills, in the States of Ala-

neither absolutely private mills nor absolutely public mills, but they partake of the character of both. They might perhaps properly be called *quasi* public mills. It is not necessary for us to say what would be our decision upon this question if the same was a new question in this country. But it is not a new question. It has been long and well settled by legislative, executive, and judicial construction, practice, and usage; and we are not now at liberty to depart from such construction, practice, and usage." See also Rev. Stat. 1860, chaps. 65 and 66.

²¹Jordan v. Woodward, 40 Me. 317, 323. "The mill act, as it has existed in this State, pushes the power of eminent domain to the verge of constitutional inhibition." "Strictly speaking, private property can only be said to have been taken for public use when it has been so appropriated that the public have certain well-defined rights to that use secured, as the right to use the public highway, the turnpike, the public ferry, the railroad, and the like. But when it is so appropriated that the public have no rights to its use secured, it is difficult to perceive how such an appropriation can be denominated a public use." Also in Ingram v. Me. Water Co., 98 Me. 566, 57 Atl. 893.

²²Miller v. Troost, 14 Minn. 365, 369. "Had not similar laws, in States having constitutional restraints similar to ours, been uniformly sustained by the courts, we should hesitate long before upholding this one. The decisions, however, are so numerous, and by courts of so great authority, that we are con-

strained to hold the law to be constitutional." In Coates v. Campbell, 37 Minn. 498, 35 N. W. Rep. 366, an act authorizing a city to issue bonds to aid in the construction of a dam for improving a private water power was held to be void, because the object was not a public purpose for which taxes could be levied.

²³Travers v. Merrick County, 14 Neb. 327.

²⁴Newcomb v. Smith, 1 Chandler, 71, 1849. In this case two of the five judges dissent in an elaborate opinion. In Thien v. Voegtländer, 3 Wis. 461, the decision in Newcomb v. Smith is impliedly questioned, while in Pratt v. Brown, 3 Wis. 603, the minority opinion is commended, but the court do not deem it necessary to reconsider the question, because the act in question had in the meantime been repealed. Other acts were sustained in Babb v. Mackey, 10 Wis. 371; Fisher v. Horicon Iron & Manf. Co., 10 Wis. 351, though in the latter case the court distinctly says that they would hold the mill act unconstitutional, but for the large investments which had been made upon the faith in the decision in Newcomb v. Smith. In Attorney General v. Eau Claire, 37 Wis. 400, 436, the court says: "This court, as now organized, has, in submission to the rule *stare decisis*, reluctantly, against its own views, followed Newcomb v. Smith, 1 Chand. 71, in upholding the mill-dam act." See also Bowers v. Bears, 12 Wis. 213, 221; McCord v. Sylvester, 32 Wis. 451; Allaby v. Milwaukee Elec. Service Co., 135 Wis. 345, 116 N. W. 4.

bama,²⁵ Georgia,²⁶ Illinois,²⁷ Michigan,²⁸ New York,²⁹ Vermont,³⁰ Virginia,³¹ and West Virginia.³² A recent case in Kansas would seem to place that State in the class last referred to. A statute permitted the condemnation of land for "milling and other manufacturing corporations using power." It was held that a steam-mill grinding flour and feed for the market could not exercise the power and that the application of the statute must be limited to corporations serving the public directly such as public grist-mills.³³

§ 278 (181). The same: Review of the decisions. Saw-mills and grist-mills, carding and fulling-mills, cotton gins and other mills, which are regulated by law and obliged to serve the public, are undoubtedly a public use.³⁴ But, as respects all other kinds of mills, although they may be a public benefit, they are not a public use within the meaning of the

²⁵Sadler v. Langham, 34 Ala. 311; Bottoms v. Brewer, 54 Ala. 288. In the former case it is said that long acquiescence in such acts is no reason for sustaining them. By the code in force in 1891 the power of eminent domain may be exercised for the establishment of a dam "for any water grist-mill, saw-mill, gin, or factory, to be operated for the public." In a proceeding under the statute it is held a fatal defect if the petition fails to show that the proposed mill is to be operated for the public. McCulley v. Cunningham, 96 Ala. 583, 11 So. 694.

²⁶Loughbridge v. Harris, 42 Ga. 501. Here it is denied that even grist-mills are a public use.

²⁷Gaylord v. Sanitary District, 204 Ill. 576, 68 N. E. 522, 98 Am. St. Rep. 235, 63 L.R.A. 582.

²⁸Ryerson v. Brown, 35 Mich. 333, 24 Am. Rep. 564; *overruling* Hartwell's Petition, 2 *Nisi Pruis* Rep. 97, 1871. In this case (Ryerson v. Brown), Judge Cooley, in an elaborate opinion, reviews the authorities and discusses the principles applicable to the question under consideration.

²⁹See *dictum* in Hay v. Cohoes Co., 3 Barb. 42.

³⁰Tyler v. Beacher, 44 Vt. 648, 8 Am. Rep. 398; Avery v. Vt. Elec. Co., 75 Vt. 235, 54 Atl. 179, 98 Am. St. Rep. 818, 59 L.R.A. 817. The following is also an instructive and well-considered case. *In re Barre Water Co.*, 62 Vt. 27, 20 Atl. Rep. 109, 3 Am. R. R. & Corp. Rep. 136.

³¹Dice v. Sherman, 107 Va. 424, 59 S. E. 388.

³²Varner v. Martin, 21 W. Va. 534. This case contains an elaborate opinion which discusses the question, but the decision is not directly in point. In Oregon land may be condemned for a flume to convey water to lumber mills. Maffet v. Quine, 93 Fed. Rep. 347.

³³Howard Mills Co. v. Schwartz L. & C. Co., 77 Kan. 599, 95 Pac. 559. And see S. W. Mo. Lt. Co. v. Schenrich, 174 Mo. 235, 73 S. W. 496.

³⁴Sadler v. Langham, 34 Ala. 311; McCulley v. Cunningham 96 Ala. 583, 11 So. 694; State v. Edwards, 86 Me. 102, 29 Atl. 947, 41 Am. St. Rep. 528, 25 L.R.A. 504; Harding v. Goodlett, 3 Yerg. 41, 24 Am. Dec. 546; Varner v. Martin, 21 W. Va. 534.

constitution. No one of the public has any right in these mills. No one of the public can require any service at their hands. They are as absolutely private property and for private use as a steam-mill or a business block.³⁵ In the original States it is almost certain that, at the time of the adoption of the first constitutions—that is, from 1777 to 1800—the power of eminent domain had never been exercised for the establishment of any mills except such as were public, either by law or practice. These acts were prompted by the great and urgent necessity which existed in the early history of the country for mills for grinding grain and sawing logs. It was undoubtedly the understanding of the legislature and people that the mill acts had reference to mills of this character. The fact, therefore, that no reference is made to mills or mill acts in the early constitutions cannot be construed into a recognition of all kinds of water mills as a public use.

It must be confessed, however, that many courts which have been called upon to pass upon the validity of these acts for the first time have labored under peculiar difficulties. The question has not generally arisen in any State until a large amount of capital had become invested upon the assumption of their validity. To have declared them unconstitutional, it was supposed, would have been to jeopardize these investments, and bring loss and ruin to many citizens. The legislatures and people of the newer States were justified in accepting the construction given by the courts of the older States to a constitutional provision which the newer States had adopted from the older ones. These decisions were the best attainable information. The first case holding the acts in question unconstitutional was not decided until 1859, and then no legislature had reason to suspect their invalidity.³⁶ When the question first arose in Massachusetts in 1832,³⁷ the court of that State had very plausible grounds for sustaining the act in question, on the ground of a contemporaneous construction by the legislature and of long acquiescence on the part of the people and legal profession.³⁸ The New Jersey court, which passed upon the question at the same time,³⁹ had similar grounds to go upon, and, besides, was free from any embarrassment occasioned by the constitution, since the constitu-

³⁵Cole v. La Grange, 113 U. S. 1.

³⁸Cooley Const. Lim. pp. 67-72;

³⁶Sadler v. Langham, 34 Ala. 311.

³⁹Sedgwick Con. Law. pp. 412, 413.

³⁷Boston & Roxbury Mill Corp. v. Newman, 12 Pick. 467, 1832.

³⁹Scudder v. Trenton Del. Falls Co., 1 N. J. Eq. 694, 1832.

tion of that State contained no provision as to taking private property for public use until 1844. When the question next arose in Indiana, in 1846,⁴⁰ the court was sustained in its views, not only by contemporaneous construction and long acquiescence, but also by the authority of the decisions in Massachusetts and New Jersey. The next case, which arose in Wisconsin in 1849,⁴¹ presented still stronger inducements to sustain the act. The act there in question was taken largely from the statutes of Massachusetts. The constitutional provision in question had been transplanted from the older States, where it had not only received a practical construction by the legislatures in favor of the mill acts, but had also been construed by the courts in favor of such acts. Moreover, the act in question was in force when the constitution was adopted. Every State which has since been called upon to adjudicate upon this question has labored under similar embarrassments.

But, while these considerations may explain, they do not justify, the decisions which have been made. The doctrine of contemporary construction or long acquiescence will not justify upholding a statute which is plainly repugnant to the constitution.⁴² Especially is this true where no material embarrassment will result from an adverse decision. Stress has been laid in many cases upon the fact that a large amount of capital had become invested under the mill acts which would be endangered or swept away if these acts were declared invalid. But this we think is a mistake. Those whose property had been condemned for mills had received the damages awarded and would be estopped from questioning the validity of the proceedings by which it was acquired.⁴³ This principle would have relieved and still relieves the question of most of its embarrassment. The prosperity of the State would not have been affected by such a decision, for it is not probable that in this age of steam and enterprise there would have been one less mill in consequence.⁴⁴

⁴⁰Hankings v. Lawrence, 8 Blackf. 266. In the previous case of Kepler v. Taylor, 1 Blackf. 492, the question was not made, though the acts are expressly sanctioned by the court.

⁴¹Newcomb v. Smith, 1 Chand. 71, 1849.

⁴²Story on Const. § 407; Cooley, Const. Lim. 70, 71; 1 Lewis' Suth. Statutory Construction, § 82.

⁴³Post, § 871.

⁴⁴In Fleming v. Hull, 73 Ia. 598, 35 N. W. Rep. 673, it is said: "But if such statutes were enacted now for the first time, it is possible, if not probable, that they could not be sustained".

§ 279 (182). Massachusetts doctrine that the mill acts do not fall under the eminent domain power. A doctrine has grown up in Massachusetts that the mill acts are not an exercise of the power of eminent domain at all, but are referable to the same power, and to be classed with the same acts, that regulate the duties of adjoining proprietors to each other in regard to division fences and party walls, and the enjoyment and partition of joint estates.⁴⁵ This doctrine has also lately found its way into the Supreme Court of the United States, through a judge from Massachusetts.⁴⁶ The doctrine is very fully elaborated in *Lowell v. Boston*,⁴⁷ from which we make the following quotation:

"The mill acts, so called, are often referred to as authorizing the exercise of the right of eminent domain by private parties for their exclusive private benefit. And the language of the court, used arguendo, has been sometimes such as to imply that the growth and prosperity of manufacturing and other industrial enterprises were of such importance to the public welfare,

⁴⁵ *Fiske v. Framingham Manf. Co.*, 12 Pick. 68, 70-72; *Williams v. Nelson*, 23 Pick. 141, 143; *French v. Braintree Manf. Co.*, 23 Pick. 216, 218-221; *Cary v. Daniels*, 8 Met. 466, 476, 477, 41 Am. Dec. 532; *Murdock v. Stickney*, 8 CUSH. 113, 116; *Bates v. Weymouth Iron Co.*, 8 CUSH. 548, 552, 553; *Gould v. Boston Dock Co.*, 13 Gray, 442, 450; *Storm v. Manchaug Co.*, 13 Allen 10; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Turner v. Nye*, 154 Mass. 579, 28 N. E. 1048, 14 L.R.A. 487; *Otis Co. v. Ludlow Mfg. Co.*, 186 Mass. 89, 70 N. E. 1009.

⁴⁶ *Head v. Amoskeag Manf. Co.*, 113 U. S. 9, opinion by Gray, J. In *Pumpelly v. Green Bay Co.*, 13 Wall. 166, the United States Court holds that flooding property by means of a dam is a taking. In *Head v. Amoskeag Manf. Co.*, *ante*, the same court holds that property may be flooded by a dam in order to create a water power to operate the mill of a private manufacturing corporation. In Cole

v. La Grange, in the same volume, page 1, it holds that neither the power of eminent domain nor of taxation can be exercised for the purpose of aiding a private manufacturing company. We do not see how these three decisions can stand together. If a flooding is taking, then land can only be flooded for a public use. If land may be flooded to afford water power for a mill, then it follows that a mill is a public use. But if a mill is a public use for which the power of eminent domain may be exercised, why is it not a public use for which the power of taxation may be exercised? The only reconciliation that can be made of these cases is to limit the opinion in *Head v. Amoskeag Manf. Co.* to the particular point decided, viz.: that the mill acts of New Hampshire were due process of law in that State at the time the Fourteenth Amendment was adopted.

⁴⁷ 111 Mass. 454, 464, 15 Am. Rep. 39.

as to justify the exercise of the right of eminent domain in their behalf, as a public use.⁴⁸

"That mills for the sawing of lumber for purposes of building, grinding grain for food, and the manufacture of material for clothing, may be of such necessity to a community, especially in the early settlement of a country, as to make their establishment a provision for a public service, we do not question. It is doubtless within the power of the legislature to declare the existence of a public exigency for the establishment of a mill, for which the right of eminent domain may properly be exercised; as in the case of the Boston & Roxbury Mill Corporation, and the Salem Milldam Corporation. What may be the limits of legislative power in that direction, and whether there are any limits except in the sound discretion of the legislature, it is needless now to inquire. We are satisfied that the mill acts are not founded upon that power, and do not authorize its exercise.

"The advantages to be derived from a running stream by the several riparian proprietors, are of natural right. Each one may make use of its waters, as they flow through his lands, in a reasonable manner, for such purposes as they are adapted to serve. In order that each may have his opportunity in turn, each is entitled to have the water allowed to flow to and from his land as it has been accustomed to flow, with only such modification as results from such reasonable use. Hence, all proprietors upon a stream, from its source to its mouth, have, in a certain sense, a common interest in it, and a common right to the enjoyment of all its capacities. Among those capacities no one is more important than that of the force of the current to supply power for the operation of mills. To make that force practicably serviceable requires a considerable head and fall at the point where it is to be applied; often more than can be gained within the limits of one proprietor. The use of the stream in this mode has always been regarded as a reasonable use, notwithstanding the effect of the dam, by which the head is created, to retard the water in its flow to the proprietor below, and to set it back and thus diminish or destroy the force of the current above. One who thus appropriates the force of the current is in the enjoyment of a common right, in which he is protected, although he may thereby prevent a like use subsequently by the

⁴⁸Citing Boston & Roxbury Mill v. Essex Co., 12 Cush. 475, 478; Talbot v. Hudson, 16 Gray, 417, 426.

proprietor above.⁴⁹ But this protection extends no farther than to justify the appropriation of a part of that quality of the stream which, until so appropriated, is common to all. It does not justify any, even the least, injury to land outside the channel. Without some law to control, the mill-owner would be exposed, not merely to the liability to make just compensation for injuries thus occasioned, but to harassing suits for damages and to abatement of his dam as causing a nuisance. This liability and the inevitable controversies growing out of conflicting rights in the stream itself, tending to defeat all advantageous use of its power, led to the adoption of laws regulating and protecting the beneficial use of streams for mill purposes. The St. of 1795, c. 74, is introduced by the recital: ‘Whereas the erection and support of mills, to accommodate the inhabitants of the several parts of the State, ought not to be discouraged by many doubts and disputes, and some special provisions are found necessary relative to flowing adjacent lands and mills held by several proprietors.’ But there is no public service secured through the mill acts, except so far as it may result incidentally, and as the inducements of private interest may lead mill-owners to devote their mills to purposes favorable to the public accommodation. The same rights and protection are secured to all who may be possessed of sites for mills, whatever the purpose for which their mills may be designed, and however useless for all purposes of public accommodation or advantage. There is no discrimination in this respect, and no provision to secure any public service that may be supposed to have been contemplated. Further than this, each proprietor is allowed to avail himself of the rights secured by the mill acts, in his own mode and for his own purposes, at his own discretion, without the intervention of any public officer or other tribunal or board, to whom such a governmental function as the exercise of the right of eminent domain is ordinarily entrusted, when not under the special direction of the legislature itself.

“A consideration, still more conclusive to this point, is, that in fact no private property, or right in the nature of property, is taken by force of the mill acts, either for public or private use. They authorize the maintenance of a dam to raise a head of water, although its effect will be to overflow the land of an-

⁴⁹Citing Hatch v. Dwight. 17 Met. 466; Gould v. Boston Duck Co., Mass. 289, 296; Cary v. Daniels. 8 13 Gray 442.

other proprietor. This right of flowage is sometimes inaccurately called an easement.⁵⁰ But it is not so. It confers no right in the land upon the mill-owner, and takes none from the land-owner.⁵¹ In *Murdock v. Stickney*,⁵² Chief Justice Shaw remarks, in reference to the mill acts: ‘The principle on which this law is founded is not, as has sometimes been supposed, the right of eminent domain, the sovereign right of taking private property for public use. It is not in any proper sense a taking of the property of an owner of the land flowed, nor is any compensation awarded by the public.’ In *Bates v. Weymouth Iron Co.*,⁵³ he says: ‘It is a provision by law, for regulating the rights of proprietors, on one and the same stream, from its rise to its outlet, in a manner best calculated, on the whole, to promote and secure their common rights in it.’ Similar declarations are made in *Fiske v. Framingham Manuf. Co.*,⁵⁴ and *Williams v. Nelson*.⁵⁵ ‘This regulation of the rights of riparian proprietors, both in respect to the stream and to their adjacent lands, liable to be affected by its use, involves no other governmental power than that ‘to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances,’ as the general court ‘shall adjudge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same.’’ Const. of Mass. c. 1. § 1, art. iv.

“All individual rights of property are held subject to this power, which alone can adjust their manifold relations and conflicting tendencies. The absolute right of the individual must yield to and be modified by corresponding rights in other individuals in the community. The resulting general good of all, or the public welfare, is the foundation upon which the power rests, and in behalf of which it is exercised; whether by restricting the use of private property in a manner prejudicial to the public,⁵⁶ or by imposing burdens upon it for the protection or convenience in part of the public;⁵⁷ or by modifying rights of individuals,

⁵⁰Citing *Hunt v. Whitney*, 4 Met. 603; *Talbot v. Hudson*, 16 Gray 417, 422, 426.

⁵¹Citing *Murdock v. Stickney*, 8 Cush. 113; *Storm v. Manchaug Co.*, 18 Allen 10.

⁵²8 Cush. 113.

⁵³8 Cush. 548, 553.

⁵⁴12 Pick. 68.

⁵⁵23 Pick. 141.

⁵⁶Citing *Commonwealth v. Alger*, 7 Cush. 53.

⁵⁷Citing *Goddard, Petitioner*, 16 Pick. 504; *Baker v. Boston*, 12 Pick. 184, 193; *Salem v. Eastern R. R. Co.*, 98 Mass. 431.

in respect of their mutual relations, in order to secure their more advantageous enjoyment by each." The court then alludes to various other statutes, such as those relating to property held by joint tenants and tenants in common, to the drainage of meadows, and the like, and then concludes as follows: "We find in these statutes no exercise of the right of eminent domain, or of the governmental power of taxation."

§ 280 (183). **The mill acts fall under the eminent domain power.** There can be no question, it seems to us, but that the flooding of land by a mill-dam is a taking. It interferes with the right to have the water of the stream flow off in its accustomed manner, and excludes the owner from the use and enjoyment of so much of the land as is covered by water, and may greatly deteriorate that which is not flooded. This has been expressly held to be a taking by the Supreme Court of the United States,⁶⁰ and by almost every court in the Union.⁶¹ It is the appropriation of private property to a particular use, and this can only be done under the eminent domain power.⁶² It follows, therefore, that it can only be done for a public use, and upon just compensation being made. Consequently, the only possible basis upon which the mill acts can stand is that mills are a public use within the meaning of the constitution. This can only be true of that class of mills which are obliged to serve the public, and, unless the acts are limited to such mills, they cannot be sustained. The Massachusetts court escapes this conclusion by maintaining that the flooding of lands by a mill-dam is not a taking. "A consideration, still more conclusive to this point, is, that in fact no private property, or right in the nature of property, is taken by force of the mill acts, either for public or private use. They authorize the maintenance of a dam to raise a head of water, although its effect will be to overflow the land of another proprietor. This right of flowage is sometimes inaccurately called an easement. But it is not so. It confers no right in the land upon the mill owner and takes none from the land owner."⁶³ The Massachusetts doctrine rests upon

⁶⁰Pumpelly v. Green Bay Co., 13 Wall. 166.

⁶¹Ante, § 80.

⁶²The Supreme Court of Maine, which sustains such acts, says: "The principle upon which these laws are founded is the right of eminent do-

main, the sovereign right of taking private property for public use." Ingram v. Me. Water Co., 98 Me. 566, 57 Atl. 893.

⁶³Lowell v. Boston, 111 Mass. 466, 15 Am. Rep. 39. In Boston Mfg. Co. v. Burgin, 114 Mass. 340, 341, 343.

this position, and we think we have shown that the position is untenable.⁶⁴ The prohibition of the constitution applies to the legislative power in all its branches, and prevents private property from being appropriated to a particular use, unless that use is by or for the public.

We have treated this question thus at length, not because we think that the mill acts in themselves are an evil, but because we believe that they cannot be justified upon principle without virtually expunging the words public use from the constitu-

the position of the court is further defined as follows: "Such exercise of the right of flowage is not the enjoyment of an easement in the land flowed. It is not adverse to the title or possession of the owner; and being permitted by law, and not actionable except by complaint for compensation, it will not ripen into title by lapse of time. When the right has become absolute by the payment of gross damages, or by exercise of the right without compensation for more than twenty years, it is commonly called an easement. But it is an easement in respect of the use of the stream only, and not an interest in or right over the land flowed. Williams v. Nelson, 23 Pick. 141; Murdock v. Stickney, 8 Cush. 113; Storm v. Manchaug Co., 13 Allen 10. The right to maintain the dam and to keep up the head of water is given to all mill-owners by statute. The flowage of adjacent lands is incidental, and compensation is made according to the degree of injury. But the right to occupy the surface of the land with water of the pond is not taken, and the landowner may exclude it if he sees fit to do so. And when the right of the millowner becomes absolute by paying gross damages or by prescription, it is only a right to keep up the dam without rendering compensation for such incidental injury." See also Turner v. Nye, 154 Mass. 579, 28 N. E. 1048, 14 L.R.A. 487, where the same idea is repeated.

In Wood v. Kelley, 30 Me. 47, the right of flowage is spoken of as an easement.

⁶⁴Field, C. J., in a dissenting opinion, in Turner v. Nye, 154 Mass. 579, 28 N. E. 1048, 14 L.R.A. 487, says: "Notwithstanding what has been said in some of our decisions, overflowing a person's land without his consent is a taking of property while the overflow continues, and is a tort which would be enjoined unless the statutes authorized it. The mill acts were originally sustained on the ground that the erection of water mills was for the public benefit, and this was strictly true of grist-mills and saw-mills, if the public had the right to have their grain ground and their logs sawed at the mills. The acts, however, extended to mills of all kinds, in most of which the interests of the public were less direct; still, the erection of water mills, when water was the only available source of power, was always of public concern, sufficient to justify the damming of streams, if compensation were paid to the persons whose lands were overflowed. Mill acts were in force long before the adoption of the constitution, and it could not properly be held that it was the intention of that instrument to render them void. But the damming of the waters of a running stream, so that the lands of the upper proprietor are overflowed, is something more than the reasonable use of the water,

tion.⁶⁵ The principle of these decisions may be used to justify the invasion of private rights for any purpose which the legislature or the courts for the time being may happen to consider of public utility. The courts should enforce the constitution as it is, and leave the people, if they deem mill acts essential to the prosperity of the State, to provide for them by an amendment to the constitution.⁶⁶

§ 281 (183a). Promoting fish culture, cranberry culture and the like. In Massachusetts a statute which authorized a person to erect a dam and flood the lands of others, subject to the duty of making compensation as under the mill acts, for the purpose of cultivating fish for his own personal use, pleasure or profit, was held valid, on the same ground as the mill acts.⁶⁷ The statute is held not to be an exercise of the power of eminent domain, but of the power to make laws for the good and welfare of the commonwealth, and for the government and ordering thereof and of the subjects of the same, and the opinion is expressed that the flooding is not a taking, since the owner whose land is flowed may bank out the water. A similar statute exists, permitting the erection of dams in aid of the cultivation of cranberries. The constitutionality of the latter act has not been challenged or directly passed upon, but its validity has been assumed in numerous cases.⁶⁸ A statute declaring

which every proprietor is entitled to make, as it runs through his land, without paying any compensation to the upper or lower proprietors. It has never been supposed that the mill acts would be sustained if they contained no provision for compensation to the persons whose lands were flowed."

⁶⁵The supreme court of Vermont, in Avery v. Vt. Elec. Co., 75 Vt. 235, 54 Atl. 179, 98 Am. St. Rep. 818, 59 L.R.A. 817, repudiates the Massachusetts doctrine that the mill acts fall under the police power and that the flooding of land pursuant thereto is not a taking and says: "We think Mr. Lewis is right in saying that appropriations of this character cannot be sustained without virtually expunging the words 'public use' from the constitution." p. 243.

⁶⁶The constitution of Colorado

provides "that private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches, on or across the lands of others, for agriculture, mining, milling, domestic or sanitary purposes." Sec. 14, Art. 2. This was held to authorize condemnation of land for a ditch to carry water to operate an electric light plant. Lamborn v. Bell, 18 Col. 346, 32 Pac. 989, 7 Am. R. R. & Corp. Rep. 747.

⁶⁷Turner v. Nye, 154 Mass. 579, 28 N. E. 1048, 14 L.R.A. 487.

⁶⁸Bearse v. Perry, 117 Mass. 211; Hinckley v. Nickerson, 117 Mass. 213; Blackwell v. Phinney, 126 Mass. 458; Howes v. Grush, 131 Mass. 207; Turner v. Nye, 154 Mass. 579, 28 N. E. 1048, 14 L.R.A. 487.

that it should not be actionable to cross uncultivated private lands to fish in public waters, provided no damage was done, was held void as authorizing the taking of private property for private use.⁶⁹

§ 282 (184). Development of mines. The tendency of those decisions which sustain the mill acts, is illustrated by some cases now to be noticed. The legislature of Nevada passed an act in which it was declared that "the production and reduction of ores are of vital necessity to the people of this State; are pursuits in which all are interested and from which all derive a benefit; so the mining, milling, smelting or other reduction of ores are hereby declared to be for the public use and the right of eminent domain may be exercised therefor." In *Daton Mining Co. v. Sewell*,⁷⁰ the question was whether the company could condemn a strip of land, "in order to transport the wood, lumber, timbers and other materials to enable it to conduct and carry on its business of mining." The strip of land after being condemned, would be the private property of the mining company. The court, after reviewing the mill cases at length, says: "In the light of these authorities, nearly all of which were decided prior to the adoption of our State constitution, I think it would be an unwarranted assumption on our part to declare that the framers of the constitution did not intend to give to the term 'public use' the meaning of public utility, benefit and advantage, as construed in the decisions we have quoted. The reasons in favor of sustaining the act under consideration are certainly as strong as any that have been given in support of the mill-dam or flowage acts, as well as some of the other objects heretofore mentioned. Mining is the greatest of the industrial pursuits of this State. All other interests are subservient to it. Our mountains are almost barren of timber, and our valley lands could never be made profitable for agricultural purposes except for the fact of a home market having been created by the mining developments in different sections of the State. The mining and milling interests give employment to many men, and the benefits derived from this business are distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills. The mines are fixed by the

⁶⁹*New England Trout & Salmon Club v. Mather*, 68 Vt. 338, 35 Atl. 323, 33 L.R.A. 569.

⁷⁰11 Nev. 394, 408, 1876.

laws of nature, and are often found in places almost inaccessible. For the purpose of successfully conducting and carrying on the business of ‘mining, milling, smelting or other reduction of ores,’ it is necessary to erect hoisting works, to build mills, to construct smelting furnaces, to secure ample grounds for dumping waste rock and earth; and a road to and from the mines is always indispensable. The sites necessary for these purposes are oftentimes confined to certain fixed localities. Now, it so happens, or, at least, is liable to happen, that individuals, by securing title to the barren lands adjacent to the mines, mills or works, have it within their power, by unreasonably refusing to part with their lands for a just and fair compensation, which capital is always willing to give without litigation, to greatly embarrass, if not entirely defeat, the business of mining in such locations. In my opinion, the mineral wealth of this State ought not to be left undeveloped for the want of any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining. Nature has denied to this State many of the advantages which other States possess; but by way of compensation to her citizens, has placed at their doors the richest and most extensive silver deposits ever yet discovered. The present prosperity of the State is entirely due to the mining developments already made, and the entire people of the State are directly interested in having the future developments unobstructed by the obstinate action of any individual or individuals.” The act was of course sustained, and, conceding the mill acts to be valid, the conclusions of the court are sound. The decision was approved in a subsequent case in which it was held that land might be condemned for a shaft.⁷¹ So it has been held in Georgia that land could be condemned for a ditch to conduct water for hydraulic mining.⁷² And yet it was held in Georgia, only six years before, that even grist-mills under public regulation were not a public use.⁷³ No reference,

⁷¹Overman Silver Mining Co. v. Coreoran, 15 Nev. 147, 1880; and see Douglass v. Byrnes, 59 Fed. 29, 31.

⁷²Hand Gold Mining Co. v. Parker, 59 Ga. 419, 423, 1877. The court says: “The right of eminent domain may be exercised by the general assembly in this State, when it is for the public good, either through the

officers of the State, or through the medium of corporate bodies, or by means of individual enterprise.” Adding to the wealth of the State by the production of gold was held to be a sufficient public good.

⁷³Loughbridge v. Harris, 42 Ga. 501, 1871.

however, was made to this or any other case. A statute of Utah authorizing the power of eminent domain to be exercised for "roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines," was held valid and the condemnation under it of a right of way for an aerial tramway two miles long, from the plaintiff's mine to a railroad, for the transportation of ore, was sustained as a public use.⁷⁴ A similar statute was upheld in Alaska.⁷⁵

On the other hand the validity of such laws has been denied in California,⁷⁶ Pennsylvania,⁷⁷ and Washington,⁷⁸ and virtually so in West Virginia.⁷⁹ This is undoubtedly the correct view. In the California case it was sought to condemn land for a bedrock flume to carry dirt and gravel from mining claims and for a place of deposit for the tailings and refuse from the mines. The court says: "The proposed flume is to be constructed solely for the purpose of advantageously and profitably washing and mining plaintiff's mining ground. It is not even pretended that any person other than the plaintiff will derive any benefit whatever from the structure when completed. No public use can possibly be subserved by it. It is a private enterprise to be conducted solely for the personal profit of the plaintiff, and in which the community at large have no concern. It is clear that this case does not come within the meaning of that clause of the constitution which permits the taking of private property for public use after just compensation made." This language is of general application.⁸⁰

The taking of private property for the development of mines may be authorized by the constitution, and this has been done

⁷⁴Highland Boy Gold Min. Co. v. Strickley, 28 Utah 215, 78 Pac. 296, 107 Am. St. Rep. 711, 1 L.R.A. 976; S. C. affirmed, Strickley v. Highland Boy Gold Min. Co., 200 U. S. 527, 26 S. C. 301. *See post*, § 315.

⁷⁵Miocene Ditch Co. v. Jacobson, 146 Fed. 680, 77 C. C. A. 106.

⁷⁶Consolidated Channell Co. v. Central Pacific R. R. Co., 51 Cal. 269, 1876; *see also* Gillan v. Hutchinson, 16 Cal. 153.

⁷⁷Waddell's Appeal, 84 Pa. St. 90; Edgwood R. R. Co.'s Appeal, 79 Pa. St. 257.

⁷⁸State v. Superior Court, 33 Wash. 542, 74 Pac. 686.

⁷⁹Valley City Salt Co. v. Brown, 7 W. Va. 191.

⁸⁰A law exists in Iowa allowing the condemnation of property for the purpose of draining mines. But, as to whether it is valid in that respect, it has not been decided. *See* Ahern v. Dubuque Lead & Level Mining Co., 48 Ia. 140. *And see* generally Butte etc. R. R. Co. v. Montana U. R. R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L.R.A. 298.

in Colorado and other States.⁸¹ The development of the mineral resources of a State is a public benefit for which the power of eminent domain may be exercised, when the restriction imposed by the words *public use* is removed.⁸²

§ 283 (185). Drains, ditches, levees, etc., for improving wet and overflowed land. Statutes for the improvement and reclamation of low, wet and overflowed lands by means of drains and levees have been common in the United States for at least a century. These statutes have been made to apply to a great variety of circumstances and differ greatly in their phraseology, purpose and details. There has been much litigation growing out of these statutes, in which their validity has not been questioned, and in which, therefore, their validity has been tacitly assumed. There have also been quite a number of cases in which these statutes have been assailed as unconstitutional. They have generally been upheld, but their validity has been put upon different grounds by different courts, some holding that they are referable to the power of eminent domain and subject to the constitutional limitations on that power,⁸³ others holding that they are an exercise of the police power, or of the still more general power to make all such laws as the legislature shall deem for the good of the State, and hence are not subject to the limitations as to public use and just compensation.⁸⁴

⁸¹Ante, § 18, 22a, 35a, 52a. Downing v. More, 12 Colo. 316, 20 Pac. 766; Lamborn v. Bell, 18 Colo. 346, 32 Pac. 989, 7 Am. R. R. & Corp. Rep. 747; Denver Power & Irr. Co. v. Denver etc. R. R. Co., 30 Colo. 204, 69 Pac. 658, 60 L.R.A. 383; Tanner v. Treasury Tunnel Min. & Reduction Co., 35 Colo. 593, 83 Pac. 464, 4 L.R.A. (N.S.) 106; Helena etc. Reduction Co. v. Lynch, 25 Mont. 497, 65 Pac. 919; Ballie v. Larson, 138 Fed. 177.

⁸²See ante, § 1; post, § 315.

⁸³Nickey v. Starns Ranchos Co., 126 Cal. 150, 58 Pac. 459; Laguna Dr. Dist. v. Martin Co., 144 Cal. 209, 77 Pac. 933; Fleming v. Hull, 73 Ia. 598, 35 N. W. 673; People v. Supervisors, 26 Mich. 22; Kinnie v. Barr, 68 Mich. 625, 36 N. W. 1097; Attorney Gen-

eral v. McClellan, 146 Mich. 45, 109 N. W. 27; Jenal v. Green Island Draining Co., 12 Neb. 163; Draining along Pequest River, 41 N. J. L. 175; Same, 39 N. J. L. 433; People v. Nearing, 27 N. Y. 306; Matter of Ryers, 72 N. Y. 1, 28 Am. Rep. 88; Matter of Tuthill, 163 N. Y. 133, 57 N. E. 303, 79 Am. St. Rep. 574, 49 L.R.A. 781; Hartwell v. Armstrong, 19 Barb. 166; Burk v. Ayers, 19 Hun 17; Sessions v. Krunkilton, 20 Ohio St. 349; Seely v. Sebastian, 4 Ore. 25; Askam v. King County, 9 Wash. 1, 36 Pac. 1097; Hayward v. Snohomish County, 11 Wash. 429, 39 Pac. 652.

⁸⁴Hagar v. Supervisors, 47 Cal. 222; O'Reiley v. Kankakee Valley Draining Co., 32 Ind. 169; Zigler v. Menges, 121 Ind. 99, 22 N. E. 782, 16

§ 284 (186). Decisions referring such improvements to the police power, or power to legislate for the general welfare. The leading case on this subject is that of *Coster v. Tide Water Co.*⁸⁵ The court says: "But there is another branch of legislative power that may be appealed to, as authorizing the taking of the lands required for the works to drain these meadows. It is the power of the government to prescribe public regulations for the better and more economical management of the property of persons whose property adjoins, or which, from some other reason, can be better managed and improved by some joint operation, such as the power of regulating the building of party walls; making and maintaining partition fences and ditches; constructing ditches and sewers for the drainage of uplands or marshes, which can more advantageously be drained by a common sewer or ditch. This is a well-known legislative power, recognized and treated by all jurisconsults and writers upon law through the civilized world; a branch of legislative power exercised by this State before and since the Revolution, and before and since the adoption of the present constitution, and repeatedly recognized by our courts. The legislature has power to regulate these subjects, either by general law, or by particular laws for certain localities or particular and defined tracts of land. When the constitution vested the legislative power in the Senate and general assembly, it conferred the power to make these public regulations as a well understood part of the legislative power." This case is relied upon in all subsequent cases which refer the drainage and levee-acts to the police power, or power to legislate for the general welfare.⁸⁶ The position is stated by Wells, J., in *Lowell v. Boston*,⁸⁷ as follows, referring to the acts for the improvement of meadows: "The action taken therein relates to that in which all have a common interest, or in reference to which all are affected by a

Am. St. Rep. 357; *Lowell v. Boston*, 111 Mass. 454, 468, 15 Am. Rep. 39; *Lien v. Norman Co.*, 80 Minn. 58, 82 N. W. 1094; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *State v. Blake*, 36 N. J. L. 442; *Pool v. Trexler*, 76 N. C. 297; *Winslow v. Winslow*, 95 N. C. 24; *Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637; *State v. Stewart*, 74 Wis. 620, 43 N. W. 947; *State v. McNay*, 90 Wis. 104, 62 N. W. 917;

Wurtz v. Hoagland, 114 U. S. 606; *Shelley v. St. Charles Co.*, 17 Fed. 909. Compare *In re Theresa Dr. Dist.*, 90 Wis. 301, 63 N. W. 288.

⁸⁵18 N. J. Eq. 54, 68, 1866.

⁸⁶See *O'Reiley v. Kankakee Drain-ing Co.*, 32 Ind. 169; *Zigler v. Menges*, 121 Ind. 99, 22 N. E. 782, 16 Am. St. Rep. 357; *Pool v. Trexler*, 76 N. C. 297; *Donnelly v. Decker*, 58 Wis. 461.

⁸⁷111 Mass. 454, 15 Am. Rep. 39.

common necessity. That common necessity is met, and that common interest secured, by subjecting the individual rights to such modifications as the commissioners may judge to be most practicable to secure the best advantage of all. The natural conflict of rights which would arise if each were left to insist on his own, regardless of consequences to others, is avoided by the intervention of this common agent, by whom they are adjusted with due regard for the interests of all as well as of each." The acts in question are likened by Wells, J., to the mill acts, acts in relation to the repair of houses and mills owned by tenants in common, acts for the partition of joint estates, for the regulation of wharves, etc.⁸⁸ The question is elaborately considered in the recent case of *Donnelly v. Decker*,⁸⁹ but no new or different arguments or principles are therein referred to. The general proposition is that, when several estates are affected detrimentally by some common cause which cannot be removed except by some common improvement, then the legislature may direct such improvement to be made at the common expense, under its general power to legislate for the public welfare. If the cases referred to are examined, it will be seen that this general conclusion is inferred from the assumed validity of laws relating to adjoining proprietors and joint estates. But none of these laws attempt to appropriate a man's property to a particular use against his will, and therefore do not support the conclusion which is sought to be derived from them.⁹⁰

⁸⁸111 Mass. p. 468.

⁸⁹58 Wis. 461 (1883), 46 Am. Rep. 637.

⁹⁰When the authorities are carefully examined, it appears that the view that the drainage acts are referable to the police power, or general welfare power, has very little support. In *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, the decision is by the Chancellor only, but though this view is casually approved by the Court of Errors and Appeals in *State v. Blake*, 36 N. J. L. 442, it is clearly disapproved in *Matter of Drainage along Pequest River*, 41 N. J. L. 175, where such acts are sustained on the ground of their having been in existence when the constitution was

adopted and having been acquiesced in ever since. What is said in *Lowell v. Boston*, 111 Mass. 454, is *dictum* only. *O'Reiley v. Kankakee Valley Draining Co.*, 32 Ind. 169, is based wholly upon *Coster v. Tide Water Co.*, *ante*, and subsequent cases in the same State, by implication at least, sanction the view that such works fall under the power of eminent domain. *Ross v. Davis*, 97 Ind. 79; *Neff v. Reed*, 98 Ind. 341; *Lipes v. Hand*, 104 Ind. 503; *Heick v. Voight*, 110 Ind. 279. But in a more recent case it is said: "Our own cases, already cited, refer the authority to direct the drainage of wet lands to the police power of the State, and in so far as the drainage

§ 285 (187). These improvements referable to the eminent domain power. All the statutes in question provide for constructing drains or levees across the lands of those who are unwilling to have them. Private property is thus devoted to a particular use, permanent in its nature, against the will of its owner. The rights of exclusion, of user and of disposition are interfered with or entirely destroyed. The question is, whether this can be done without an exercise of the power of eminent domain. It is not a question of advantage or disadvantage to the owner, but of constitutional right. The police power, so far as it relates to property, is a power to regulate its use, and is negative or inhibitory in its character. A man

does promote the health, comfort and convenience of the public it is by virtue of this great power that the authority is exercised." *Zigler v. Menges*, 121 Ind. 99, 22 N. E. 782. In *Lien v. Norman County*, 80 Minn. 58, 82 N. W. 1094, drainage laws are viewed as an exercise of the police power, but in subsequent cases in the same State they are clearly recognized as involving an exercise of the eminent domain power. *State v. Polk County Comrs.*, 87 Minn. 325, 92 N. W. 216, 60 L.R.A. 161; *Miller v. Jensen*, 102 Minn. 391, 113 N. W. 914; *State v. Board of Suprs.*, 102 Minn. 442, 114 N. W. 244, 120 Am. St. Rep. 640. *Pool v. Trexler*, 76 N. C. 297, is an extreme case and entitled to little respect as an authority outside of North Carolina, as is evident from the following, which contains all that is said by way of argument on the point: "These two powers, 'eminent domain,' and 'police regulations,' are distinct, and yet they are frequently confounded. By the one, the property of A is given to B. By the other, the property of A is left in him, but is made subservient to the general welfare. 'Cart-ways,' Bat. Rev. Ch. 104, § 38, furnishes an analogy. Under the power to make 'police regulations,' the land of A is made subservient to the land of B for the purposes of a road.

After some contestation the question of the power of the General Assembly was yielded. So in our case the power of the General Assembly to make the land of A subservient to the land of B for the purpose of drainage must alone be yielded upon the authorities and upon the reason of the thing." This case is followed in *Winslow v. Winslow*, 95 N. C. 24. The case of *Wurts v. Hoagland*, 114 U. S. 606, went up from New Jersey and simply follows the New Jersey law, the point of the decision being that the drainage laws of that State, as interpreted and applied by the courts, did not result in depriving the citizen of his property without due process of law, or in depriving him of the equal protection of the laws. In *Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637; *State v. Stewart*, 74 Wis. 620, 43 N. W. 947, and *State v. McNay*, 90 Wis. 104, 62 N. W. 917, the drainage laws in question were upheld as an exercise of the police power, while in the case of *In re Theresa Dr. Dist.*, 90 Wis. 301, 63 N. W. 288, the drainage law there involved was held invalid as authorizing the taking of property for a use which was not public. A more particular statement of these cases will be found in the notes to § 304, *post*.

cannot be compelled, under the police power, to devote his property to any particular use, however advantageous to himself or beneficial to the public; but he may be compelled to refrain from any use which is detrimental to the public.⁹¹ This is the beginning and the end of the police power over private property. No instance can be cited, outside of the mill and drainage acts, (which are in controversy), in which the owner of private property has been compelled to devote it, or submit to its devotion, to a particular use, by virtue of the police power, or of any other power except that of eminent domain.⁹²

Again, if the acts in question are not under the power of eminent domain, then there is no obligation to make compensation for the property appropriated for ditches or levees,⁹³ and one proprietor might be compelled to contribute both land and money for an improvement which is no benefit to him. A tract of land which requires drainage may be so situated that it can only be drained by a ditch through another tract which does not require it and would not be benefited by it.⁹⁴ In such case certainly the drain could only be made under the power of eminent domain.⁹⁵ And, in any case, the land occupied by drains or

⁹¹See *ante*, § 243 *et seq.*

⁹²Cooley, Const. Lim. chap. 16; Dillon, Munic. Corp. §§ 93 *et seq.*; Sedgwick Const. Law, pp. 435-441.

⁹³Sedgwick Con. Law, 499-502; State v. Blake, 36 N. J. L. 442, 447; Mugler v. Kansas, 123 U. S. 623. In nearly all the cases it is assumed that compensation must be made, but in Donnelly v. Decker, 58 Wis. 461, 46 Am. Rep. 637, the contrary doctrine is distinctly held. But the case of *In re Theresa Drainage Dist.*, 90 Wis. 301, 63 N. W. 288 (1895), distinctly holds "that to dig ditches or drains across the lands of private owners, under an apparent legislative authority, is a taking of the lands," and such taking can only be made for a public use and upon the payment of just compensation. *Compare* State ex rel. v. Stewart, 74 Wis. 620, 43 N. W. 947; State v. McNay, 90 Wis. 104, 62 N. W. 917.

⁹⁴People v. Nearing, 27 N. Y. 306;

Askam v. King County, 9 Wash. 1, 36 Pac. Rep. 1097.

⁹⁵In Askam v. King County, 9 Wash. 1, 36 Pac. Rep. 1097, it is intimated that this might be done under the police power. The court, after having determined that the drainage act in question could not be sustained as an exercise of the eminent domain power, proceed to say: "The act in question cannot be sustained on this ground. Can it be as an exercise of the police power of the State? We think not; for while it is undoubtedly true that in extreme emergencies the rights of private parties, as to property, must yield to the requirements of the public, yet to authorize such interference, the emergency must be such as to make the action necessary. The law under consideration was not, in our opinion, enacted for the purpose of authorizing private rights to be interfered with without compensation, because

ditches is devoted to a particular use, and this, as we have shown in discussing the mill acts, cannot be done under any branch of the legislative power, except the use be public and compensation be made.⁹⁶ In other words, it can only be done by invoking the eminent domain power.⁹⁷

§ 286 (188). The question of public use. The promotion of the public health is undoubtedly a public use within the meaning of the constitution, and private property may be taken for the construction of drains, levees or other works in order to accomplish this object.⁹⁸ In New York it is held that drains

necessary for the protection of the public. It is true that there are some things in the act which indicate that the interests of the public were to be considered in the determination of the question as to whether or not the improvement was necessary, but there nowhere appears any intention to declare that the public interests are such that it is necessary that private rights should be set aside in order that they may be protected. Even if we concede that the requirements of the law are such that the board of county commissioners must decide that the swamps to be drained are a nuisance, before they will proceed in the matter, yet the intention does not appear in the act to declare the nuisance to be of such imminent danger to the public welfare as to require private property of others than those maintaining the nuisance to be taken without compensation. Under the provisions of the act, the land of private parties situated at some distance from the swamps and low lands to be drained may be taken; and to sustain such taking under the police power of the State would require such a clear declaration on the part of the legislature of its intent to take such property for that purpose without compensation, as to make such intention certain. The act in question does not make this intention so apparent, if

apparent at all." But we apprehend that if the legislature had distinctly declared their intention, that the lands of A might be taken without compensation for a drain to abate a nuisance solely on the lands of B, the court would have held it invalid as to A.

⁹⁶ *Ante*, § 280.

⁹⁷ See cases cited *ante*, § 283.

⁹⁸ "That the promotion and preservation of the public health is a public purpose, cannot be doubted. The legislation of the State in creating boards of health in cities, villages and towns, and vesting in them great, if not extreme and arbitrary powers, show this. There is scarcely any one object which has been the subject of more enactments than this, or as to which more power is given to officials over the citizen and his property, and by more summary proceedings." *Matter of Ryers*, 72 N. Y. 1, 28 Am. Rep. 88. See also *Zigler v. Menges*, 121 Ind. 99, 22 N. E. 782, 16 Am. St. Rep. 357; *Hull v. Baird*, 73 Ia. 528, 35 N. W. 613; *Sisson v. Board of Suprs.*, 128 Ia. 442, 104 N. W. 454, 70 L.R.A. 440; *Duke v. O'Bryan*, 100 Ky. 710, 39 S. W. 444, 824; *New Orleans Drainage Co.*, 11 La. An. 338; *Dingley v. Boston*, 100 Mass. 544; *Bancroft v. Cambridge*, 126 Mass. 438; *Kinnie v. Bare*, 68 Mich. 625, 36 N. W. 672; *Lake Erie etc. R. R. Co. v. Comrs.*, 63 Ohio St. 23, 57 N. E. 1009;

can only be constructed for this purpose.⁹⁹ As wet lands are undoubtedly unhealthful, it is evident that the public health may be made the real or ostensible ground of nearly all the drainage laws which have ever been passed. It is never an objection to an exercise of the power of eminent domain that it is instigated by private persons whose private interests will thereby be promoted. So a drain which will in fact promote the public health is none the less a public use because it is sought by particular individuals whose estates will be thereby improved. Most drainage laws, however, are not conditioned upon the public health. Some of these laws permit any one or more persons to construct a drain across the land of others without any consideration of the public health or public welfare.¹ Such statutes clearly permit the taking of private property for private use, and are void.²

Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779; Skagit Co. v. McLean, 20 Wash. 92, 54 Pac. 781; State v. Stewart, 74 Wis. 620, 43 N. W. 947; In re Theresa Drainage Dist., 90 Wis. 301, 63 N. W. 288.

⁹⁹Matter of Ryers, 72 N. Y. 1, 28 Am. Rep. 88. So by statute in Michigan. 1 Howell's Stat. 1882, p. 474; Kinnie v. Base, 68 Mich. 625, 36 N. W. Rep. 672. *And see* Hull v. Baird, 73 Ia. 528, 35 N. W. Rep. 613; Hulbert v. Harris, 3 App. Div. 30, 37 N. Y. Supp. 1056. But the constitution has since been changed to permit condemnation for drains for agricultural purposes. *Ante*, § 43; Matter of Tuthill, 36 App. Div. N. Y. 492; S. C. *reversed* and the constitutional amendment held to be in conflict with the federal constitution, which forbids a State to deprive one of his property without due process of law. Matter of Tuthill, 163 N. Y. 133, 57 N. E. 303, 79 Am. St. Rep. 574, 49 L.R.A. 781; Reeves v. Wood County, 8 Ohio St. 333; Smith v. Atlantic etc. R. R. Co., 25 Ohio St. 91.

ity, in French v. White, 24 Conn. 170. So a law of New York passed in 1895. 1 Laws of N. Y. 1895, p. 227, C. 384.

²Nickey v. Stearns Ranchos Co., 126 Cal. 150, 58 Pac. 459; Fleming v. Hull, 73 Ia. 598, 35 N. W. 673; Cypress Pond Dr. Co. v. Hooper, 2 Met. (Ky.) 350; State v. Board of Supervisors, 102 Minn. 442, 114 N. W. 244, 120 Am. St. Rep. 640; Jenal v. Green Island Dr. Co., 12 Neb. 163; Matter of Tuthill, 163 N. Y. 133, 57 N. E. 303, 79 Am. St. Rep. 574, 49 L.R.A. 781; Reeves v. Wood County, 8 Ohio St. 333; Smith v. Atlantic etc. R. R. Co., 25 Ohio St. 91.

A statute of Nebraska permitted any three or more persons, being owners of lands wet or liable to be overflowed, to form a corporation for constructing drains or levees for the reclamation of their lands. This act was held void in Jenal v. Green Island Draining Co., 12 Neb. 163, 167. The court says: "There is no conditions upon which their right to locate a ditch depend, except that they are owners of wet and overflowed land. A ditch may be located and opened across the land of individual owners merely to subserve private interests." A similar law conferring like author-

¹An act of Connecticut passed in 1853, R. S. 1854, p. 786, permitted any owner of land to drain across the land of others. This was construed, but no question made as to its valid-

On the other hand a drain through a large tract of wet or swampy land belonging to numerous proprietors, into which all can drain whose lands incline towards it, would seem to be a public use, although the only object accomplished is the drainage and improvement of private property. As has been already observed, a public use does not necessarily mean for the use of the entire community, but for the use of all within a given locality.³ Thus a drain for the use of all within a certain district is as much for public use as a school-house for the use of a particular school district. The school-house is for the use of those who have children of school age residing within the school district. The drain is for those who have land needing drainage within the drainage district. The public outside of the school district have no right in the school-house whatever, though all share indirectly in the benefits which result from the schooling there provided. So of the drainage district. The improvement of the land in a particular locality is a benefit to the whole State. The instances of a supply of water or gas for a city or village afford similar analogies. The difference between such a ditch which is kept open and public for the use of a particular district and land taken for a mill or mill-dam is obvious. Unless the mill is for public use, as heretofore explained, the mill and dam become the private property of the person or corporation making the condemnation, as absolutely and exclusively as if it had been acquired by private purchase. Therefore, it seems to us, that a law which provides for the drainage of a given district by means of drains which are for the common use of all the lands within the district, is valid as effectuating a public

ity upon any five or more was upheld in *Anderson v. The Kerns Draining Co.*, 14 Ind. 199. See also *Norfleet v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787; *Pool v. Trexler*, 76 N. C. 297. In the latter case it is said that such drains may be made to drain the property of one man or a single acre of ground. In Oregon an act which enabled any person whose land required draining to open a ditch over the land of others was upheld as being for a public use. *Seely v. Sebastian*, 4 Ore. 25. An almost precisely similar statute of Iowa was held invalid, as authorizing a taking

for private use. *Fleming v. Hull*, 73 Ia. 598, 35 N. W. Rep. 673. So in Indiana. *Gifford Drainage Dist. v. Shroer*, 145 Ind. 572, 44 N. E. Rep. 636.

"The public use or benefit need not extend to the whole public, or any large portion of it, within the jurisdiction of the legislature. It may be limited to the inhabitants of a small locality, but the benefit must be in common, not to particular persons or estates." *O'Reily v. Kankakee Valley Draining Co.*, 32 Ind. 169, 185; *ante*, § 254.

use within the meaning of the constitution. But a law which enables one or more proprietors to construct a drain across the lands of others for the benefit of their particular estates, is void as authorizing a taking for a private purpose. A law such as we have indicated would be valid, might be special, designating the particular district to be drained, or general, providing for the organization of drainage districts of a *quasi* public character.⁴

As we have before intimated, the legislation on this subject presents almost every conceivable variety of method. And the decisions present almost as much variety of reasoning and conclusion on the subject as the laws present in form. In the succeeding sections we have given a review of the decisions of each State, with such reference to the laws passed upon as will make them intelligible. The diversified and multifarious views expressed in these decisions and the antagonistic conclusions reached are some evidence, at least, that the courts have not found the true philosophy of the drainage question or the true criterion by which to test particular laws. Whether we have suggested them here, we leave the reader to judge.

§ 287 (189). Drains, etc.—Decisions of California. An act incorporated a certain defined district as the Washington Drainage District of Yolo County, created a board of trustees and other officers, and provided for a tax on the district for works to be constructed under the supervision of the board. The object of the act was to secure the drainage of the district and prevent its overflow by the Sacramento river.⁵ This act was held valid. The court says: "We think the power of the legislature to compel local improvements, which, in its judgment, will promote the health of the people, and advance the public good, is unquestionable."⁶ An act of 1880⁷ providing for a division of the whole State into drainage districts, and for an elaborate system of improvements, was declared void on other grounds than those under discussion.⁸ An act of 1881 "to provide a system of drainage for agricultural, swamp and overflowed lands," enacted that when "two or more owners shall petition

⁴This section quoted and approved in Laguna Dr. Dist. v. Martin Co., 144 Cal. 209, 77 Pac. 933.

⁵Acts 1867-8, p. 466.

⁶Hagar v. Supervisors of Yolo Co., 47 Cal. 222, 233.

⁷Stats. 1880, p. 123.

⁸People v. Parks, 58 Cal. 624. And see Brandenstein v. Hoke, 101 Cal. 131, 35 Pac. 562.

the board of supervisors for a ditch, drain or other water course," the supervisors should appoint a day for a hearing on the petition and give notice thereof and that "if the supervisors shall find that the construction of the ditch would be conducive to the general welfare of the land owners so petitioning" the work should be done, land condemned therefor and the cost assessed upon the property benefited. The act was held void as authorizing a taking for a private purpose.⁹ An act of 1885 that on the petition of the owners of two-thirds of any body of land susceptible of one mode of drainage, the same could be organized into a district for the purpose of effecting such drainage. The act required no finding that the drainage was for the public health or welfare. It was held that such drainage was a public purpose for which the power of eminent domain could be exercised, and condemnation by a district embracing only one hundred and sixty acres was sustained. The court says: "It is to the interest of every State, and hence conducive to the public good, that all its land should be utilized and made productive, and this end attained in any particular locality or localities is a benefit to the entire State. A moment's thought will suggest that whatever tends to increase the area of cultivable land materially adds to the productive capacity of the State, increases her resources, induces settlement, promotes her industrial energies, and enlarges her revenue. And whether legislation operates to facilitate the draining of land so as to adapt it to cultivation, or to irrigate it so as to promote its productivity, the same principle applies, and the end to be attained is the same, public prosperity and welfare. And not only is drainage legislation supported as being, from a material point of view, conducive to the public good, but it is equally sustained as being within the exercise of the police power of the State—in the interest of the public health. Ponds, marshes and low, swampy places are generally recognized as a menace to the public health of the neighborhood in which they exist as generating malaria, and, hence, it is matter of public interest that they should be abated and removed."¹⁰

⁹Nickey v. Stearns Ranchos Co., 126 Cal. 150, 58 Pac. 459.

¹⁰Laguna Dr. Dist. v. Charles Martin Co., 144 Cal. 208, 214, 215, 77 Pac. 933. In regard to the size of the district, the court says: "Neither can

it be said because the area of overflowed land embraced in the district amounts to a fraction less than one hundred and sixty acres that the object of the district in this proceeding is not effectuating a public use with-

§ 288 (189a). **Same.** Illinois. Drainage laws are authorized by a special provision of the constitution.¹¹ Laws for the organization of drainage districts and the construction of drains for the use of all within the district are held to be for a public use.¹²

§ 289 (190). **Same.** Indiana. In this State drainage acts are upheld, both under the eminent domain and police powers.¹³ But it must appear in each case that the proposed work will be of public utility. "The drainage of a man's farm, simply to render it more valuable to the owner, would not be a work of public utility, in the constitutional sense of the term; and a corporation, organized and acting for such a purpose, would no more be acting in a public undertaking, than would a company organized and acting for the clearing up of men's farms and putting them in a better state of cultivation than the proprietors were willing to do, though the public and adjoining proprietors might be, in a substantial degree, benefited by the operation."¹⁴ Under the statute now in force it must appear that the proposed drain will improve the public health, benefit

in the meaning of the constitution. The area of a drainage district is not a matter from which, of itself, it can be determined whether the district corporation is exercising the right of eminent domain for the private advantage of the owners within its territory, rather than as a public agency exercising it for a public use. It is apparent from the act that it contemplates by its provisions a subdivision of the State into districts, so that the lands which, by reason of natural conditions, are capable of one common system of drainage shall be embraced in one district; but of course, in the nature of things, these districts could not be expected to be all of the same area; in organizing these districts there would have to be taken into consideration the area of overflowed land as it existed, be it great or small, which was capable of drainage under one practical common system, and under the terms of the act it is made the duty of the board

of supervisors in providing for the organization of the district, with a view to have all the land capable of one mode of drainage included therein, to see that no land is excepted from said district which should properly be included therein, and to exclude all land improperly included, so that the area of the land overflowed could not affect the question of public use in providing for its drainage." p. 218.

¹¹Const. 1870, Art. 4, § 31; *ante*, § 25; *Blake v. People*, 109 Ill. 504; *Chronic v. Pugh*, 136 Ill. 539, 27 N. E. 415.

¹²*Cleveland etc. Ry. Co. v. Polecat Dr. Dist.*, 213 Ill. 83, 72 N. E. 684. *And see Heffner v. Cass & Morgan Counties*, 193 Ill. 439, 62 N. E. 201, 58 L.R.A. 353.

¹³*Anderson v. Kerns Draining Co.*, 14 Ind. 199; *O'Reiley v. Kankakee Valley Draining Co.*, 32 Ind. 169.

¹⁴14 Ind. p. 202. Approved in *Tillman v. Kircher*, 64 Ind. 104.

a public highway in the county, or street of a town or city, or be of public utility. The constitutionality of this statute is no longer regarded as an open question.¹⁵ A statute of 1893, authorizing the formation of drainage districts and the construction of drains without any requirement that they should be for the benefit of the public health or of public utility, was held to be invalid.¹⁶

§ 290 (191). Same. Iowa. Drainage for the "public health, convenience or welfare" is held constitutional.¹⁷ A law will be so construed, if possible, as to be valid and, therefore, as permitting drainage only for the public health or for the public convenience and utility.¹⁸ But a statute which enabled any person, who should desire to do so, to construct a tile or other underground drain through the lands of another, was held void as authorizing a taking for private use.¹⁹

§ 291. Same. Kansas. An act authorizing drainage for the public health, convenience and welfare was sustained.²⁰

§ 292 (191a). Same. Kentucky. The inhabitants of a certain wet district, comprising about 14,000 acres, were incorporated for the purpose of providing drainage for the same. Six persons were named as trustees and vested with the necessary powers, and authorized to levy a tax upon the lands up to the limit of 25 cents per acre per year for ten years. It was held that the act was to accomplish a private purpose and was void.²¹ But drainage for the public health is recognized as a public use.²²

§ 293 (191b). Same. Michigan. It is held that under

¹⁵Ross v. Davis, 97 Ind. 79; Wishmier v. State, 97 Ind. 160; Neff v. Reed, 98 Ind. 341; Anderson v. Baker, 98 Ind. 587; Lipes v. Hand, 104 Ind. 503; Heick v. Voight, 110 Ind. 279; Zigler v. Menges, 121 Ind. 99, 22 N. E. 782, 16 Am. St. Rep. 357; Poundstone v. Baldwin, 145 Ind. 139, 44 N. E. 191; Huntington v. Amiss, 167 Ind. 375, 79 N. E. 199.

¹⁶Gifford Drainage Dist. v. Shroer, 145 Ind. 572, 44 N. E. 636.

¹⁷Hatch v. Pottawattamie Co., 43 Ia. 442; Patterson v. Baumer, 43 Ia. 477; Sisson v. Board of Supervisors, 128 Ia. 442, 104 N. W. 454, 70 L.R.A.

440. Hull v. Baird, 73 Ia. 528, 35 N. W. 613, tends to support the proposition that drainage is a public use only when necessary for the public health.

¹⁸Sisson v. Board of Supervisors, 128 Ia. 442, 104 N. W. 454, 70 L.R.A. 440.

¹⁹Fleming v. Hull, 73 Ia. 598, 35 N. W. 673.

²⁰Griffith v. Pence, 9 Kan. App. 253, 59 Pac. 677.

²¹Cypress Pond Dr. Co. v. Hooper, 2 Met. Ky. 350.

²²Duke v. O'Bryan, 100 Ky. 710.

the constitution, as well as under the statutes, land cannot be taken for drains except to promote the public health.²³

§ 294. Same. Minnesota. An act of 1887 provided that on petition of property owners the county commissioners of a county could establish a ditch when found to be conducive to the public health, convenience or welfare, or when of public benefit or utility.²⁴ The ditch was constructed by the county commissioners and kept in repair out of the public funds by the officers of the township in which the ditch or any part thereof was located. The act was held valid as providing for a public object.²⁵ This act was repealed and a new one substituted in 1901, which was very similar in its scope, except that it required no finding that the ditch would be conducive to the public health, convenience or welfare. The act was construed as authorizing ditches only when a public object would be promoted and, as so construed, was sustained.²⁶ The act was again revised in 1905²⁷ and the establishment of the ditch was made conditional upon its being a public benefit or for the promotion of the public health. The act was again held valid.²⁸ In all these cases the drain provided for was a public drain, made and kept in repair by the public authorities and for the common benefit of the lands through which it was constructed.

In 1907 the legislature passed an act which permitted the construction of a drain across the lands of others when any person or persons are owners of any swamp, marsh or wet land "which on account of its condition may endanger the public health, or the drainage of which will result in the reclamation of otherwise waste lands," or "where the construction of such ditch or drain is of benefit or advantage to adjoining owner or owners."²⁹ This act was held void as permitting one man to drain across the lands of another.³⁰

²³Kinnie v. Bare, 68 Mich. 625, 36 N. W. 672; Attorney General v. McClear, 146 Mich. 45, 109 N. W. 27; 1 Howell's Statutes, 1882, p. 474; Const. Art. 14, § 9.

²⁴C. 97, Laws of 1887.

²⁵Lien v. Norman County, 80 Minn. 58, 82 N. W. 1094.

²⁶State v. Polk Co. Comrs., 87 Minn. 325, 92 N. W. 216, 60 L.R.A. 161; McMillan v. Board of Co. Comrs., 92 Minn. 16, 100 N. W. 384.

²⁷C. 230, Laws of 1905.

²⁸Miller v. Jensen, 102 Minn. 391, 113 N. W. 914.

²⁹C. 191, Laws of 1907.

³⁰State v. Board of Supervisors, 102 Minn. 442, 114 N. W. 244, 120 Am. St. Rep. 640.

See also the following cases relating to drainage laws: Curran v. Sibley County, 56 Minn. 432, 57 N. W. 1070; Curran v. Sibley County, 47 Minn. 313, 50 N. W. 237; Witty v.

§ 295. Same. Missouri. The constitution of this State permits a taking for drains and ditches across the lands of others.³¹ Drainage laws have existed since 1877 which permit the organization of drainage districts of not less than six hundred and forty acres in area and the construction of drains by such districts. The law is of course held valid.³² Another law provides that one or more persons may secure a drain across the lands of others for agricultural or sanitary purposes and this too was held valid.³³

§ 296 (192). Same. Nebraska. An act empowering any three or more persons, being owners of wet or overflowed land, to form a corporation for the construction of drains or levees over the land of others, was held void as authorizing a taking for private use. But laws permitting drainage for the public health, convenience and welfare are sustained.³⁴

§ 297 (193). Same. New Jersey. An act for the reclamation of tidewater marshes was passed in 1788, and with various amendments has remained in force to the present time. So also an act for the drainage of swamp or meadow lands.³⁵ In *Coster v. Tide Water Co.*³⁶ acts of this character were referred to the police power. In the Court of Errors it was held that the construction of dikes, etc., to prevent the overflow of large districts of country, was a public use for which property might be taken. But the drainage of meadows was referred to the police power.³⁷ A special act for the drainage of lands on the upper Passaic was held valid in *State v. Blake*,³⁸ and again in the same case in a later volume,³⁹ where it was referred to the police power.⁴⁰ In 1871 an act was passed for the drainage of wet lands where the owners of a major part of the land to be affected so desired.⁴¹ In *Matter of Application for Drainage*,⁴²

Board of County Comrs., 76 Minn. 286, 79 N. W. 112; *Dressen v. Co. Comrs.*, 76 Minn. 290, 79 N. W. 113; *Clapp v. Minn. Grass Twine Co.*, 81 Minn. 511, 84 N. W. 344.

³¹*Ante*. § 37.

³²*Mound City Land & Stock Co. v. Miller*, 170 Mo. 240, 70 S. W. 721, 94 Am. St. Rep. 727, 60 L.R.A. 190.

³³*Lile v. Gibson*, 91 Mo. App. 480; R. S. 1899, §§ 6951-6974.

³⁴*Jenal v. Green Island Dr. Co.*, 12 Neb. 163; *Dakota County v. Cheney*, 22 Neb. 437, 35 N. W. 211; *Darst v. Em. D.*—37.

Griffin, 31 Neb. 668, 48 N. W. 819; *Dodge County v. Acom*, 61 Neb. 376, 85 N. W. 292.

³⁵Vol. 1 R. S. 1877, p. 641.

³⁶18 N. J. Eq. 54.

³⁷*Tide Water Co. v. Coster*, 18 N. J. Eq. 518, 531, 1866.

³⁸35 N. J. L. 208, 1871.

³⁹36 N. J. L. 442, 447, 1872.

⁴⁰A similar case: *O'Neill v. Hoboken*, 72 N. J. L. 67, 60 Atl. 50.

⁴¹Pub. Laws, 1871, p. 25.

⁴²35 N. J. L. 497, 1872.

this act was held valid and referred to the eminent domain power. Also in *Matter of Commissioners etc. on Pequest River*.⁴³ On an appeal of the latter case to the Court of Errors and Appeals,⁴⁴ the decision of the Supreme Court was affirmed, but the view that the act could be sustained as an exercise of the eminent domain power was questioned, and its validity rested upon the antiquity of such statutes and long acquiescence in them.⁴⁵ But, while drainage acts are thus upheld in this State, the power cannot be exercised for the profit of a private corporation not interested in the lands to be affected.⁴⁶

The act of 1871 above referred to came before the Supreme Court of the United States, on appeal from the court of last resort of New Jersey, and it was held that the act did not deprive an owner of his property without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.⁴⁷

§ 298 (194). *Same. New York.* Drainage works can only be executed for the public health, the promotion of which is a public use.⁴⁸ In the earlier cases wherein drainage laws were sustained, it appeared that the public health would be promoted, although that was not made a condition to the exercise of the powers granted.⁴⁹ In 1894 the constitution of this State was

⁴³39 N. J. L. 433, 1877.

⁴⁴41 N. J. L. 175, 1879.

⁴⁵See the same case again in 42 N. J. L. 553, 1880.

⁴⁶State v. Driggs, 45 N. J. L. 91. See also *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, 518.

⁴⁷*Wurts v. Hoagland*, 114 U. S. 606. After reviewing the New Jersey cases, the court says: "This review of the cases clearly shows that general laws for the drainage of large tracts of swamps and low lands, upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (without reference to the power of taking private property for the public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public

health), as a just and constitutional exercise of the power of the legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense. The case comes within the principle upon which this court upheld the validity of general mill acts in *Head v. Amoskeag Manufacturing Co.*, 113 U. S. 9." See *ante*, § 279.

⁴⁸*Matter of Ryers*, 72 N. Y. 1, 28 Am. Rep. 88, 1878; *Burk v. Ayers*, 19 Hun 17.

⁴⁹*Hartwell v. Armstrong*, 19 Barb. 166, 1854; *People v. Nearing*, 27 N.

amended so as to permit the legislature to pass general laws authorizing the owners or occupants of agricultural land to drain them across the lands of others.⁵⁰

In pursuance of this amendment the legislature in 1895 passed an act "in relation to the drainage of agricultural lands," whereby a person owning agricultural lands might procure their drainage or protection from overflow by means of a drain or dyke on the lands of another.⁵¹ The proceedings were instituted by a petition to the supreme court and the drain or dyke was to be constructed and kept in repair by a board of commissioners who assessed the cost upon the property benefited. The act was held invalid on the ground that the constitutional amendment did not authorize a law under which the compensation and damages could be assessed upon the property benefited.⁵² A still more important question was mooted in the case, Gray, J., holding that the constitutional amendment itself was void, as authorizing the taking of property for a private use in violation of the Fourteenth Amendment to the federal Constitution. Parker and Haight, JJ., were of a contrary opinion. The other judges did not express themselves upon this question. We shall recur to the subject in a later section.⁵³

§ 299 (195). Same. North Carolina. Drainage for the benefit of private estates is sustained, first as a public use under the eminent domain power, in *Norfleet v. Cromwell*,⁵⁴ and afterwards under the police power, in *Pool v. Trexler*,⁵⁵ and *Winslow v. Winslow*.⁵⁶

§ 300. Same. North Dakota. A drainage law providing for the construction and maintenance of drains "whenever the same shall be conducive to the public health, convenience or welfare," and which drains are constructed, owned and kept in repair by the counties in which they are situated and established, is upheld as constitutional.⁵⁷

Y. 306, 1863; *People v. Jefferson Co.* Ct., 55 N. Y. 604; *Matter of Draining Certain Swamp Lands*, 5 Hun 116; *Woodruff v. Fisher*, 17 Barb. 224; *see ante*, § 286.

⁵⁰*See ante*, § 43.

⁵¹Laws of 1895, p. 27, c. 384.

⁵²*Matter of Tuthill*, 163 N. Y. 133, 57 N. E. 303, 79 Am. St. Rep. 574, 49 L.R.A. 781.

⁵³*Post*, § 315.

⁵⁴70 N. C. 634, 16 Am. Rep. 787.

⁵⁵576 N. C. 297.

⁵⁶95 N. C. 24. *See also Williamson v. Canal Company*, 78 N. C. 156; *Porter v. Armstrong*, 129 N. C. 101, 39 S. E. 799; *Porter v. Armstrong*, 134 N. C. 447, 46 S. E. 997; *Porter v. Armstrong*, 139 N. C. 179, 51 S. E. 926.

⁵⁷*Redmond v. Chacey*, 7 N. D. 231,

⁷³ N. W. 1081; *Erickson v. Cass*

§ 301 (196). Same. Ohio. An act which authorized the construction of drains on the application of one or more persons, without any consideration of the public welfare, was held void; but it was held that drains, levees, etc., might be constructed when necessary for the "public health, convenience or welfare."⁵⁸ Thereupon, in 1859,⁵⁹ an act was passed authorizing County Commissioners, on petition of one or more owners, to establish ditches, drains, etc., when the same are "demanded by or will be conducive to the public health, convenience or welfare." This act was held valid in *Thompson v. Treasurer of Wood County*;⁶⁰ also, a similar act⁶¹ passed in 1862.⁶²

The Revised Statutes of 1886, § 4511, provide that the trustees of a township may establish a ditch whenever, in their opinion, the same will be conducive to the public health, convenience or welfare. It was held that under this statute a ditch could not be established, the only effect of which would be to render the lands of two proprietors more productive.⁶³ "The prosperity of each individual conduces, in a certain sense, to the public welfare, but this fact is not a sufficient reason for taking other private property to increase the prosperity of individual men. The draining of marshes and ponds may be for the promotion of the public health and so become a public object; but the draining of farms to render them more productive, is not such an object." The "public health, convenience or welfare" to be promoted have reference to the locality of the ditch. The finding that a ditch, five miles long and extending into two counties, "will be conducive to the public health, convenience and welfare of the neighborhood, is a finding that the community generally in the vicinity are benefited, and not merely the lands of the petitioner and others. It is a finding that it is for the public welfare as distinguished from a mere private advantage."⁶⁴ A ditch to drain public roads or public school grounds

County, 11 N. D. 494, 92 N. W. 841; *Turnquist v. Cass County*, 11 N. D. 514, 92 N. W. 852. See *Martin v. Tyler*, 4 N. D. 270, 60 N. W. 392; *State v. Fisk*, 15 N. D. 219, 107 N. W. 191; *Alstad v. Sim*, 15 N. D. 629, 109 N. W. 66; *Sim v. Rosholt*, 16 N. D. 77, 112 N. W. 50.

⁵⁸*Reeves v. Treasurer of Wood Co.*, 8 Ohio St. 333, 1858.

⁵⁹Laws of 1859, p. 58.

⁶⁰11 Ohio St. 678.

⁶¹Laws of 1862, p. 93.

⁶²*Sessions v. Crunkelton*, 20 Ohio St. 349.

⁶³*McQuillen v. Hatton*, 42 Ohio St. 202.

⁶⁴*Chesbrough v. Commissioners*, 37 Ohio St. 508, 516; *Lake Erie etc. R. R. Co. v. Hancock Co.*, 63 Ohio St.

is a public use.⁶⁵ But an act which authorized the construction of levees whenever, in the opinion of the probate judge, they would be conducive to the health, convenience or welfare of any number of citizens of his county, or were necessary for the protection of the land of such citizens, was held invalid, as permitting the taking of private property for private use.⁶⁶

§ 302 (197). **Same. Oregon.** An act under which any person might secure the construction of a ditch over the land of others was held valid, as promoting a public use, in *Seely v. Sebastian*.⁶⁷

§ 303 (197a). **Same. Washington.** A drainage law which provided for the construction of drains and ditches, dikes and levees, but made no provision for compensation to those whose lands were taken or damaged, unless the owners appeared and claimed compensation, was held to be void, as being in violation of the constitution, which requires compensation to be first made for property taken or damaged for public use.⁶⁸ The question of public use was not discussed. Thereupon the legislature passed an act to cure the defect in the former law and provided for the recondemnation of the necessary land, where ditches had been constructed in whole or in part, under the old law.⁶⁹ This law was held valid and it was also held that the construction of ditches for the drainage of land otherwise useless for agricultural purposes is a public use, for which private property may be taken.⁷⁰

§ 304 (198). **Same. Wisconsin.** A statute that any six or more freeholders, residing in any town and desiring to have any ditch or drain laid out for draining any marsh, swamp or overflowed lands, or any existing ditch enlarged, might make application therefor to the supervisors of the town, who were required to lay out the same, "if, in their judgment such ditch, drain or enlargement is demanded or will conduce to the public health

23, 57 N. E. 1009; *Northern Ohio R. R. Co. v. Hancock Co.*, 63 Ohio St. 32, 57 N. E. 1023.

⁶⁵*Lake Erie etc. R. R. Co. v. Hancock Co.*, 63 Ohio St. 23, 57 N. E. 1009.

⁶⁶*Smith v. Atlantic & Great Western R. R. Co.*, 25 Ohio St. 91, 1874.

⁶⁷4 Ore. 25.

⁶⁸*Askam v. King County*, 9 Wash. 1, 36 Pac. 1097; *Skagit County v.*

Stiles, 10 Wash. 388, 39 Pac. 116; *Hayward v. Snohomish County*, 11 Wash. 429, 39 Pac. 652. The act in question uses the drainage law of 1890. *Laws of 1889-1890*, ch. 21, p. 652.

⁶⁹*Laws of 1895*, ch. 89, p. 142.

⁷⁰*Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779; *Skagit County v. McLean*, 20 Wash. 92, 54 Pac. 781.

or welfare," was held valid as an exercise of the police power.⁷¹ A special act relating to Dane county was also upheld, which permitted the construction of drains and other works for the reclamation of wet lands, upon the application of twenty-five or more owners of such lands, provided that commissioners, after a hearing of parties interested, should be of the opinion "that the public health or welfare will be thereby promoted."⁷² On the other hand a law of 1891 that "whenever a majority of the owners of lands within a district proposed to be organized, who shall have arrived at lawful age, and who shall represent one-third in area of the lands to be reclaimed or benefited, or whenever the adult owners of more than one-half of such lands desire to construct a drain or drains, ditch or ditches, levee or levees, or other work across the lands of others for agricultural, sanitary or mining purposes, or to maintain and keep in repair any such drain," etc., they may apply to the circuit court of the proper county, and if the court finds "that the proposed drain or drains, ditch or ditches, levee or levees, or other works, is or are necessary, or will be useful for the drainage of the lands proposed to be drained thereby, for agricultural, sanitary or mining purposes," the court shall appoint three competent persons as commissioners to lay out and construct the proposed works, was held to be invalid as authorizing the taking of private property for private use.⁷³ It is settled by the later decisions

⁷¹Donnelly v. Decker, 58 Wis. 461, 46 Am. Rep. 637; State v. McNay, 90 Wis. 104, 62 N. W. 917. In the first of these cases, p. 466, it is said: "It is obvious, at first blush, that this law cannot be sustained as providing for a work for the public use."

⁷²State v. Stewart, 74 Wis. 620, 43 N. W. 947.

⁷³In re Theresa Drainage Dist., 90 Wis. 301, 63 N. W. 288 (May 15, 1895). The court says: "There is in the entire statute no expression or intimation that it was any part of the consideration upon which the improvement should be authorized that it should be either necessary or desirable to promote any public interest, convenience, or welfare. No doubt, such an improvement may be

useful to some, or perhaps many, private owners of land, by way of increasing the usefulness and value of their lands. But that is merely a private advantage. It interests the public only indirectly and remotely, in the same way and sense in which the public interest is advanced by the thrift and prosperity of individual citizens. Donnelly v. Decker, *supra*. Some home or homes might be made more cheerful and more healthful. But one man's property cannot be taken to make another man's home more cheerful or healthful. It is only when it will make the homes of the public more healthful that any man's property can be taken for 'sanitary purposes.' But it is urged that the term 'sanitary purposes' comprehends and imports the

that drains to promote the public health and welfare are a public use for which private property may be taken and that, when the construction of a drain requires the taking of property, it involves an exercise of the eminent domain power.⁷⁴

§ 305 (199). Same. Other States. The foregoing embrace all of the decisions which have come to our notice in which drainage laws have been assailed as not being a legitimate exercise of the eminent domain power. Some miscellaneous cases in which they are attacked on other grounds are given in the note.⁷⁵

§ 306 (200). Levees, dikes, etc. Dikes and levees to

idea of the public health. If so, it might save this statute. Webster defines the word ‘sanitary’ as ‘pertaining to or designed to secure sanity or health.’ The Century Dictionary defines it as ‘pertaining to health or hygiene, or the preservation of health.’ It will be seen that the word is of purely abstract meaning. It is utterly devoid of any suggestion of numbers or of public or private relation. It imports neither. For such purpose it is strictly neutral and impartial. Without some qualifying word, it is inoperative to designate the purpose as a public one, or as in the interest of the public health. It is, no doubt, for the legislature to specify the use and purpose for which it authorizes private property to be appropriated. It should be expressed clearly; for it cannot be enlarged by a doubtful construction, nor be presumed to be larger than the purpose which is expressed. *Dill. Mun. Corp.* (4th Ed.) § 603. This is not a question of the construction of ambiguous words or terms. But it is an entire failure to express in any form that the taking of property for which it provides is to be for a public use. So it must be held that it does not provide for a taking for a public use. It could not lawfully provide for a taking for any other than a public use. It cannot support proceedings

for the condemnation of lands as for a public use. It is entirely invalid.”

We do not see how these different cases can be reconciled. In the last case it is held to be settled law “that to dig ditches or drains across the lands of private owners, under an apparent legislative authority, is a taking of the lands.” It does not make any difference what the purpose of the ditch or drain is. To occupy a man’s land with a ditch or drain is to take his land. Consequently such a ditch or drain can only be constructed for a public purpose. In *Donnelly v. Decker*, 58 Wis. 461, it is held that a ditch or drain to promote the public health or welfare is not a public purpose. Hence it follows by the logic of the latest decision that the case of *Donnelly v. Decker* upheld the taking of private property for a private purpose, and it would seem to be overruled by implication. But the latest decision does not attempt, in express terms, to overrule, explain or distinguish the prior cases.

⁷⁴*Rude v. St. Marie*, 121 Wis. 634, 99 N. W. 460.

⁷⁵*Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276; *New Orleans Drainage Co.*, 11 La. An. 338; *Cypress Pond Draining Co. v. Hooper*, 2 Met. (Ky.) 350; *Shelley v. St. Charles Co.*, 17 Fed. 909.

prevent the overflow of extensive districts of country by streams or tide-waters are a public use.⁷⁶ They are a direct and immediate benefit to all the land affected by them, and may be necessary for the preservation of life and property. Both the powers of taxation and of eminent domain may be exercised for this purpose.⁷⁷ If the public health will be promoted by such improvements, the case is clear.⁷⁸ If the public ways or other public means of travel, transportation or communication will be improved or secured from interruption and damage, the case is equally clear.⁷⁹ The only doubt arises, when the only object and effect of such works is the improvement of private property.

⁷⁶Missouri etc. Ry. Co., v. Camborn, 66 Kan. 365, 71 Pac. 809, *affirming* S. C. 10 Kan. App. 581, 63 Pac. 605; Ham v. Levee Comrs., 83 Miss. 534, 35 So. 943; Egyptian Levee Co. v. Hardin, 27 Mo. 495, 72 Am. Dec. 276; Tide Water Co. v. Coster, 18 N. J. Eq. 518, 523; Matter of Drainage along Pequest River, 41 N. J. L. 175, 178; Norfleet v. Cromwell, 70 N. C. 634, 639; Hansen v. Hammer, 15 Wash. 315, 46 Pac. 332.

⁷⁷In Coster v. Tide Water Co., 18 N. J. Eq. 54, and 518, the act passed upon created a corporation for the reclamation and protection of the tide-water marshes about Newark Bay by means of dikes, drains and other works. Of this act the Court of Errors and Appeal say: "That the legislative authority is competent to effect the end provided for in this act, I can entertain no doubt. The purpose contemplated is to reclaim and bring into use a tract of land covering about one-fourth of the county of Hudson and several thousand acres in the county of Union. This large district is now comparatively useless. In its present condition it impairs very materially the benefits which naturally belong to the adjacency of the territory of the State to its navigable waters. It is difficult, from the great expense of such works, to build roads across it,

and consequently it has heretofore interposed a barrier to anything like easy access, except by means of railroads, from one town to another situated upon its borders. To remove these evils and to make this vast region fit for habitation and use seems to me plainly within the legitimate province of legislation; and, to effect such ends, I see no reason to doubt that both the prerogatives of taxation and eminent domain may be resorted to. From the earliest times, the history of the legislation of this State exhibits many examples of the exercise of both these powers for purposes not dissimilar, and by these means, without question, many improvements have been effected. The principle is similar to that which validates the transfer, by legislative authority, of private property to private corporations for the construction of railroads and canals, or the construction of sewers and streets, and the imposition of the expense upon the lands benefited." p. 520. See also Cooley on Taxation, p. 427; Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L.R.A. 725.

⁷⁸See *post*, § 307; *ante*, § 286.

⁷⁹Coster v. Tide Water Co., 18 N. J. Eq. 54; Tide Water Co. v. Coster, 18 N. J. Eq. 518.

In such case the same principles would seem to apply as in case of drains and ditches for the reclamation of wet lands, or the irrigation of arid lands.⁸⁰

There is also another view by which the works in question can be sustained. Every natural stream is public, in the sense of being for the common use and benefit of the proprietors of all the lands drained by it or subject to its influence, and any improvement of it by dikes or otherwise for the benefit of such lands is a public purpose, as being for the common use and benefit of all such lands as are affected by the improvements. Therefore, the construction of a levee which shall confine the waters of a stream to its channel and prevent the overflow of the adjacent country is a public use for which property may be taken or taxes levied. And similar considerations apply to tide-waters. The shores of the sea are public for all purposes, and may be improved, not only for the purposes of navigation, but also to prevent erosion or submersion of the adjacent land. According to this view, dikes and levees to prevent the overflow of streams or tide-waters are a public use *per se*, and it rests absolutely with the legislature to determine when the power of eminent domain shall be exercised for that purpose, and what the extent of benefit must be to justify a resort to that power.⁸¹ The courts may always protect the individual from the perversion of laws authorizing the appropriation of private

⁸⁰See *ante*, § 286; *post*, § 308.

⁸¹We do not understand how the taking for a certain definite purpose can be a public use or not, according to the result of an investigation of the circumstances of each proposed exercise of the power for that purpose. A purpose for which property may be taken must be held to be a public use or not, according to the nature and character of the purpose itself. As to whether the power of eminent domain shall be exercised for a purpose in its nature public, and the time, manner and extent of its exercise, in the absence of special constitutional provisions, are exclusively legislative questions. A contrary view is expressed in a drainage case in 35 N. J. L., p. 505. In Smith

v. Atlantic & Great Western R. R. Co., 25 Ohio St. 91, an act which authorized the erection of a levee whenever, in the opinion of the probate judge, it will be conducive to the health, convenience or welfare of any number of citizens of his county, or is necessary for the protection of the land of such citizens or any of them from overflow, was held invalid as authorizing the taking of property for private use. It seems to us this law might be upheld, on the ground that the erection of a levee to confine the waters of a stream within their natural channel is a public use. An act which is in fact for the promotion of a public use may be upheld, though the legislature has declared a use which is not public.

property for public use. Levee acts have almost uniformly been upheld by the courts, though they have more frequently been called in question under the power of taxation than under that of eminent domain.⁸² In Louisiana, lands on the banks of the Mississippi are subjected to a levee servitude, by virtue of which the same may be occupied for that purpose without compensation.⁸³ In Missouri levee acts have been referred to the police power.⁸⁴

§ 307 (201). The public health and safety. Abolishing grade crossings. Nothing is more vital to the welfare of the State than the public health, and works calculated to promote the public health, by removing the causes of disease or affording to populous communities a supply of pure air, pure water or means of necessary recreation, are a public use.⁸⁵ We have already had occasion to refer to this subject in connection with public parks⁸⁶ and drainage.⁸⁷ Drains may be constructed or dams destroyed⁸⁸ in order to relieve low grounds of their excessive moisture and render them more salubrious. Low grounds in the neighborhood of populous districts may be filled to abate a nuisance, and the power of eminent domain exercised for this purpose.⁸⁹ So to promote the public safety grade crossings of railroads may be abolished and this is a public purpose for which property may be taken or public money appropriated.⁹⁰

§ 308 (202). Irrigation. The construction of canals, conduits and other works to convey or store water for irrigation in localities where the rainfall is insufficient or too uncertain for agricultural purposes, and which are for the use of all those capable of being supplied by them upon terms which may

⁸²Upheld under power of eminent domain: Tide Water Co. v. Coster, 18 N. J. Eq. 518. Upheld under taxing power: McGhee v. Mathis, 21 Ark. 40; Williams v. Cammack, 27 Miss. 209; Alcorn v. Hamer, 38 Miss. 652; Daily v. Swope, 47 Miss. 367; Egyptian Levee Co. v. Hardin, 27 Mo. 495, 72 Am. Dec. 276; Boro v. Phillips, 4 Dill. 216; Cooley on Taxation, p. 427; Gould on Waters, § 247.

⁸³See ante, § 233.

⁸⁴Morrison v. Morey, 146 Mo. 543, 48 S. W. 629.

⁸⁵Matter of Ryers, 72 N. Y. 1, 28 Am. Rep. 88.

⁸⁶Ante, § 271.

⁸⁷Ante, § 286.

⁸⁸Woodruff v. Fisher, 17 Barb. 224; Talbot v. Hudson, 16 Gray 417; Miller v. Craig, 11 N. J. Eq. 175.

⁸⁹Dingley v. Boston, 100 Mass. 544; Bancroft v. Cambridge, 126 Mass. 438; Sweet v. Rechel, 159 U. S. 380, 16 S. C. 43; Ante, § 247.

⁹⁰Summerfield v. Chicago, 197 Ill. 270, 64 N. E. 490; Millard v. Roberts, 202 U. S. 429, 26 S. C. 674. For numerous cases arising out of the abolition of grade crossings see ante, § 248.

be regulated by law, would seem to be a public use within the meaning of the constitution.⁹¹ A statute of Utah which permitted one person to condemn a right of way for an irrigating ditch for the purpose only of irrigating his own land was upheld as providing for a public use by the supreme court of Utah.⁹² And this decision was affirmed by the Supreme Court of the United States, which held that in the particular case, the defendant was not deprived of his property without due process of law.⁹³ Several of the State constitutions provide especially for the condemnation of property for irrigation purposes.⁹⁴ These would be valid under the decision last cited, though they permitted one man to condemn for his private use.

⁹¹Oury v. Goodwin, 3 Ariz. 255, 36 Pac. 376, 4 Am. R. R. & Corp. Rep. 81; Cummings v. Peters, 56 Cal. 593; Lux v. Haggin, 69 Cal. 255; Irrigation District v. Williams, 76 Cal. 360, 18 Pac. 379; Irrigation v. De Lappe, 79 Cal. 351, 21 Pac. 825; In re Madera Irrigation Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L.R.A. 755, 5 Am. R. R. & Corp. Rep. 288; Aliso Water Co. v. Baker, 95 Cal. 268, 30 Pac. 537; Lindsay Irrigation Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802; Ortiz v. Hansen, 35 Colo. 100, 83 Pac. 964; Witterding v. Green, 4 Ida. 473, 45 Pac. 134; Lake Keon Nav. Co. v. Klein, 63 Kan. 484, 65 Pac. 684; Salazar v. Smart, 12 Mont. 395, 30 Pac. 676; Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. 757; Helena Power Trans. Co. v. Spratt, 35 Mont. 108, 88 Pac. 773, 8 L.R.A.(N.S.) 567; Cummings v. Hyatt, 54 Neb. 35, 74 N. W. 411; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 108 Am. St. Rep. 647, 60 L.R.A. 889; Albuquerque L. & I. Co. v. Gutierrez, 10 N. M. 177, 61 Pac. 357; Umatilla Irr. Co. v. Barnhart, 22 Or. 389, 30 Pac. 37; Miles v. Benton Tp., 11 S. D. 450, 78 N. W. 1004; McGee Irr. Ditch Co. v. Hudson, 85 Tex. 587, 22 S. W. 967; Borden v. Trespalacios R. & I. Co., 98 Tex. 494, 86 S. W. 11, 107 Am. St. Rep. 640; Prescott Irrigation Co. v. Flathers, 20 Wash. 454,

55 Pac. 635; Nash v. Clark, 27 Utah 158, 75 Pac. 371, 101 Am. St. Rep. 953, 1 L.R.A.(N.S.) 208; S. C. *affirmed*, Clark v. Nash, 198 U. S. 361, 25 S. C. 676. The question is very elaborately argued by the Supreme Court of Arizona in the case first cited. The California act of 1887, which has been upheld in the California cases above cited, is declared to be unconstitutional by Ross, Circuit Judge, as authorizing the taking of property for private use, in Bradley v. Fallbrook Irr. Dist., 68 Fed. Rep. 948. But this decision has been reversed in an elaborate opinion by the Supreme Court of the United States. Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 S. C. Rep. 56. The taking of private property for irrigation works is provided for by a special constitutional provision in Colorado. *Ante*, § 19. *And see* Sand Creek Lateral Irr. Co. v. Davis, 17 Col. 326, 29 Pac. Rep. 742; San Luis Land etc. Co. v. Kenilworth Canal Co., 3 Col. App. 244, 32 Pac. Rep. 860.

⁹²Nash v. Clark 27 Utah 158, 75 Pac. 371, 101 Am. St. Rep. 953, 1 L.R.A.(N.S.) 208.

⁹³Clark v. Nash, 198 U. S. 361, 25 S. C. 676.

⁹⁴*See* § 19, Colorado; § 24, Idaho; § 38, Montana; § 47, Oklahoma; § 58, Washington; § 61, Wyoming.

§ 309 (203). Taking for the United States. Property taken for the use of the general government is taken for a public purpose, for which the State may exercise its power of eminent domain. Thus it has been held that the United States may, through the machinery of the States, take private property for a postoffice,⁹⁵ for a fort,⁹⁶ for naval purposes,⁹⁷ for works to supply the national capital with water,⁹⁸ or for the purpose of prosecuting the coast survey.⁹⁹ This power has been denied in Michigan.¹ It seems to us, however, that property taken for the use of the national government, being for the use of all the people of all the States, is certainly for the use of the people of that State where it is located, who would be likely to be especially interested in the improvement to be made.

§ 310. Taking for use in foreign State. The public use for which property may be taken is a public use within the State from which the power is derived. "It seems to be an admitted fact generally, that the power inheres in a State for domestic uses only, to be exercised for the benefit of its own people, and cannot be extended merely to promote the public uses of a foreign State.² In the case cited it was held that a Georgia corporation, engaged in supplying water to two cities in Alabama and to one city in Georgia, could condemn land in Alabama for the purpose of preserving the purity of its water supply. "While a State," says the court, "will take care to use this power for the benefit of its own people, it will not refuse to exercise it for such purpose, because the inhabitants of a neighboring State may incidentally partake of the fruits of its exercise. Such a refusal would violate the principles of a just

⁹⁵Burt v. Merchants' Insurance Co., 106 Mass. 356, 8 Am. Rep. 339.

⁹⁶In re League Island, 1 Brews. Pa. 524; Gilmer v. Lime Point, 18 Cal. 229.

⁹⁷Branch v. Lewerenz, 75 Conn. 319, 53 Atl. 658.

⁹⁸Reddell v. Ryan, 14 Md. 444, 74 Am. Dec. 550.

⁹⁹Orr v. Quimby, 54 N. H. 590.

¹Trombley v. Humphrey, 23 Mich. 471, 476. The court says: "In the first place there can be no necessity for the exercise of this right by the States for this purpose, for the au-

thority of the nation is ample for the supply of its own needs in this regard under all circumstances. In the second place, the eminent domain in any sovereignty exists only for its own purposes; and to furnish machinery to the general government under, and by means of which, it is to appropriate lands for national objects, is not among the ends contemplated in the creation of the State government."

²Columbus W. W. Co. v. Long, 121 Ala. 245, 25 So. 702.

public policy, and the neighborly comity which should exist between States.”³

§ 311 (204). Taking all of a tract when only a part is required. Statutes for widening or opening streets sometimes provide that, where part of a lot is required, the whole may be taken and the part not required sold for the benefit of the improvement. Such statutes are not void, but they cannot be enforced against the will of the owner, as the part not needed for the street would be taken for private use.⁴ But the owner may consent to the taking, and thereby a valid title will be acquired by the city.⁵ The taking of the compensation awarded amounts to such consent, and the owner cannot afterwards reclaim the property.⁶ If the law simply provides that the owner may require the city to take the whole, it is not objectionable, since it is inoperative without the owner’s consent.⁷

§ 312 (205). Miscellaneous cases: Settling private controversies. The legislature of Kentucky passed an act creating a corporation with power to fence a tract of some fifteen hundred acres of land which was subject to annual floods carrying off the fences. The cost was to be made a tax upon the several owners, according to acreage. The law was held invalid as not being for a public purpose.⁸ A New York corporation was formed under the general law for the purpose of acquiring certain swamp, marsh and other lands in the County of Kings, which were particularly described in the certificate of incorporation, and to excavate, construct and maintain one or more basins, docks, wharves and piers, and to erect thereon suitable warehouses, mills, furnaces, foundries, factories, shops and such other buildings as might be necessary and proper for docking, loading and unloading vessels, for the storage of goods and for

³Ibid.

⁴Matter of Albany Street, 11 Wend. 149, 25 Am. Dec. 618; Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; S. C. 2 Sandf. 98; Matter of John and Cherry Streets, 19 Wend. 659; Bennett v. Boyle, 40 Barb. 551; Dunn v. City Council of Charleston, Harper (11 S. C.) 189; Gregg v. Baltimore, 56 Md. 256.

⁵Ibid.

⁶Sherman v. Kane, 46 N. Y. Supr. Ct. 310; Embury v. Conner, 3 N. Y.

511, 53 Am. Dec. 325, overruling same case in 2 Sandf. 89.

⁷Mayor etc. of Baltimore v. Clunet, 23 Md. 449, 464; Boulat v. Municipality No. 1, 5 La. An. 363.

⁸Scuffletown Fence Co. v. McAllister, 12 Bush. (Ky.) 312. The following are similar cases: Hancock Stock & Fence Law Co. v. Adams, 87 Ky. 417, 9 S. W. 246; Fort v. Goodwin, 36 S. C. 445, 15 S. E. 723; Goodale v. Sowell, 62 S. C. 516, 40 S. E. 970.

carrying on generally the business of a dock, warehousing and manufacturing company, and in any and every other proper and suitable way promoting and increasing the facilities for commerce, manufactures and business generally. A special act, afterwards passed, authorized the company to condemn any of the lands specified which it could not acquire by agreement, and provided that the basin of the company should at all times be open to public use for all vessels that might apply therefor, but left by far the greater part of the works under the absolute control of the company. The Court of Appeals held that the object was not a public use. "We cannot regard such a project as a public purpose or use which justifies the delegation to this company of the right of eminent domain. The enterprise is, in substance, a private one, and the pretense that it is for a public purpose is merely colorable and illusory. The taking of private property for private purposes cannot be authorized even by legislative act, and the fact that the use to which the property is intended to be put, or the structure intended to be built thereon, will tend incidentally to benefit the public by affording additional accommodations for business, commerce or manufactures, is not sufficient to bring the case within the operation of the right of eminent domain, so long as the structures are to remain under private ownership and control, and no right to their use or to direct their management is conferred upon the public."⁹ To take the property of one and transfer it to another in order to settle a private controversy concerning title to the property, is not a taking for public use, however numerous the controversies or however extensive the property in question.¹⁰ In 1869 an act was passed in Pennsylvania to provide for the extinction of irredeemable ground rents upon payment, by the owners of the land out of which they issued, of damages or compensation to be ascertained as provided in the act. This was held invalid as authorizing the taking of private property for private use.¹¹ It has been held that, under the eminent domain power, congress may provide for the extinguishment of Indian titles to land and for the sale and transfer of such land to private parties.¹² An

⁹Matter of Application of E. B. W. & M. Co., 96 N. Y. 42, 48.

¹⁰Van Horne's Lessee v. Dorrance, 2 Dall. 304; Lessee of Pickering v. Rutty, 1 S. & R. 511. These are cases growing out of laws for settling disputes between Connecticut and Penn-

sylvania claimants to property in the latter State. *See also* Hoye v. Swan's Lessee, 5 Md. 237.

¹¹Palairat's Appeal, 67 Pa. St. 479.

¹²Tuttle v. Moore, 3 Ind. Ter. 712, 64 S. W. 585.

act authorizing a court to confirm and make valid a deed previously executed by a married woman, which was not properly acknowledged, was held invalid as an attempt to take private property for a private purpose.¹³ Public bath houses¹⁴ and poor farms¹⁵ are public uses, for which, doubtless, private property could be condemned. Land may be taken to procure gravel for the repair of streets.¹⁶ Where an act provides for a general scheme for laying out, changing and discontinuing streets for the improvement of a particular locality and provides for acquiring the fee of discontinued streets to be held for private use, it is not obnoxious to the objection that it authorizes a taking for private use.¹⁷ An act of Colorado providing "that the public shall have the right to fish in any stream of this State, stocked at public expense, subject to actions in trespass for any damage done property along the bank of any such streams," was held invalid as an attempt to take private property for private use.¹⁸

§ 313. To constitute a public use the public must have a legal right to the use or service for which the property is taken. Where property is taken by private corporations or individuals, it must not only appear that the purpose of the taking is a public use, but also that the public have a right to that use independent of the will of the condemning party.¹⁹

¹³Pearce's Heirs v. Patton, 7 B. Mon. 162, 167.

¹⁴Poillon v. Brooklyn, 101 N. Y. 132.

¹⁵Tyrone Tp. School District's Appeal, 1 Monaghan (Pa. Supm. Ct.) 20.

¹⁶Sommerville v. Waltham, 170 Mass. 160.

¹⁷Matter of Mayor etc. of New York. 157 N. Y. 409, 52 N. E. 1126, affirming 28 App. Div. 143.

¹⁸Hartman v. Tresise, 36 Colo. 146, 84 Pac. 685, 4 L.R.A.(N.S.) 872.

¹⁹Lake Keon Nav. etc. Co. v. Klein, 63 Kan. 484, 65 Pac. 684, 93 Am. St. Rep. 299; Howard Mills Co. v. Schwartz L. & C. Co., 77 Kan. 599, 95 Pac. 559; Berrien Springs W. P. Co. v. Berrien Circ. Judge, 133 Mich. 48, 94 N. W. 379, 103 Am. St. Rep. 438; Rockingham Co. L. & P. Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L.R.A.

581; Jacobs v. Clearview Water Supply Co., 220 Pa. St. 388, 69 Atl. 870; Memphis Freight Co. v. Memphis, 4 Coldw. 419; Ryan v. Terminal Co., 102 Tenn. 111, 50 S. W. 744, 45 L.R.A. 303; Borden v. Trespalacios R. & I. Co., 98 Tex. 494, 86 S. W. 11, 107 Am. St. Rep. 640; Avery v. Vermont Elec. Co., 75 Vt. 235, 54 Atl. 179, 98 Am. St. Rep. 818, 59 L.R.A. 817; Fallsburg P. & M. Co. v. Alexander, 101 Va. 98, 43 S. E. 194, 99 Am. St. Rep. 855, 61 L.R.A. 129; State v. White River Power Co., 39 Wash. 648, 82 Pac. 150, 2 L.R.A.(N.S.) 842; State v. Superior Court, 42 Wash. 660, 85 Pac. 666, 5 L.R.A.(N.S.) 672; State v. Tolt P. & T. Co., 50 Wash. 13, 96 Pac. 519; Caretta Ry. Co. v. Va. Pocahontas Coal Co., 62 W. Va. 185, 57 S. E. 401; Hench v. Pritt, 62 W. Va. 270, 57 S. E. 808; Scott Lumber Co. v. Wolford, 62 W.

"The service proposed," says the court in one case, "must be such as every individual member of the community, similarly situated, shall have the right to demand and receive upon like conditions as any other member, whether the corporation would accede to the bidding or not. The community might be large or small, or the service might be limited to a few, or extended to many; but within the compass of the proposed service every individual similarly situated should be entitled to it as of right upon like conditions; otherwise it is hardly conceivable how such an institution could be considered a public service corporation. If it may serve whom it pleases and deny whom it pleases, although those it accommodates may be a part of the general public, the service becomes of private consequence merely, and the real public is ignored. So that, unless all may, under like and similar conditions and circumstances, demand and receive as of right, it is not a public, but a private service."²⁰ Thus where a corporation was authorized to create water power or electricity for its own use or the use of others, it was held that it could not condemn, as it was optional with the company whether it would serve itself or the public.²¹ But where the authority is general, to provide and furnish a power or service, and the power of eminent domain is conferred, there is an implied obligation to serve the public on demand and impartially and the use is held to be a public use.²² "The delegation of the power of eminent domain to a corporation is not always accompanied with an express imposition of the obligation to serve the public reasonably and equitably. A corporation by the acceptance and exercise of the power impliedly undertakes such service respecting the subject for which the power is exercised."²³

Va. 555, 59 S. E. 516; Wis. Riv. Imp. Co. v. Pier (Wis.) 118 N. W. 857; Shasta Power Co. v. Walker, 149 Fed. 568.

²⁰Shasta Power Co. v. Walker, 149 Fed. 568, 572.

²¹Berrien Springs Water Power Co. v. Berrien Circ. Judge. 133 Mich. 48, 94 N. W. 379, 103 Am. St. Rep. 438; Fallsburg P. & M. Co. v. Alexander, 101 Va. 98, 43 S. E. 194, 99 Am. St. Rep. 855, 61 L.R.A. 129.

²²Lake Koen Nav. etc. Co. v. Klein, 63 Kan. 484, 65 Pac. 684; Rocking-

ham Co. L. & P. Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L.R.A. 581; Kansas etc. Ry. Co. v. N. W. Coal & Min. Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L.R.A. 936; Helena Power Transmission Co. v. Spratt, 35 Mont. 108, 88 Pac. 773, 8 L.R.A. (N.S.) 567; Borden v. Trespalacios R. & I. Co., 98 Tex. 494, 86 S. W. 11, 107 Am. St. Rep. 640.

²³Rockingham Co. L. & P. Co. v. Hobbs, 72 N. H. 531, 537, 58 Atl. 46, 66 L.R.A. 581.

§ 314 (206). Combination of public and private use in the same act or proceeding. An act which authorized the erection of a dam across a navigable river by a city, either for the purpose of water works for the city or for the purpose of leasing the water for private use was held void.²⁴ So, in a State where the only kind of mills regarded as a public use are public grist-mills, a statute which authorized the condemnation of property for the erection of a mill or other machinery was held void.²⁵ In this case the court says: "We have, then, the case of a statute, which, in the employment of a generic phrase, without expressing the different species included in that genus, attempts, by words not separable, to confer a general authority, a part of the patent object of which are within, and others without, the pale of constitutional power. In such case, we have no discretion but to pronounce the entire clause unconstitutional." A company was chartered to construct and operate plants and water power and "to manufacture and generate water power, electrical and other power, light or heat, and utilize and transmit and distribute such power, light or heat to any place or places *for its own use* or for the use of other individuals or corporations," and, in aid of such purposes, was given the power of eminent domain. It was held that the company could not condemn for the purposes of its charter.²⁶ So where a statute conferred the power of eminent domain upon corporations organized to create, *use*, lease and sell water power.²⁷

But other cases hold that, when a statute authorizes the condemnation of property for various purposes, some of which are public and some private, the authority will be good and may be exercised for such of the purposes specified as are in fact public.²⁸ So a corporation organized for both public and private

²⁴Attorney General v. Eau Claire, 37 Wis. 400. After this decision the act was amended so as to make the water-works compulsory and permit the leasing of only surplus water, and was then sustained. State v. Eau Claire, 40 Wis. 533.

²⁵Sadler v. Langham, 34 Ala. 311, 333.

²⁶Fallsburg P. & M. Co. v. Alexander, 101 Va. 98, 43 S. E. 194, 99 Am. St. Rep. 855, 61 L.R.A. 129.

²⁷Berrien Springs W. P. Co. v. Em. D.—38.

Berrien Circ. Judge, 133 Mich. 48, 94 N. W. 379, 103 Am. St. Rep. 438. *And see Hercules Water Co. v. Fernandez*, 5 Cal. App. 726; *La. Nav. & Fisheries Co. v. Doullut*, 114 La. 906, 38 So. 613.

²⁸Lake Keon etc. Co. v. Klein, 63 Kan. 484, 65 Pac. 684, 93 Am. St. Rep. 299; *Brown v. Gerald*, 100 Me. 351, 61 Atl. 785, 109 Am. St. Rep. 526, 70 L.R.A. 472; *Minn. Canal & Power Co. v. Koochiching Co.*, 97 Minn. 429, 107 N. W. 405, 5 L.R.A. 638; *In re R. I.*

purposes may condemn property in aid of the purposes which are public.²⁹ And this is in accordance with a general rule, which has been thus stated by the supreme court of New Hampshire: "The rule of construction universally adopted is that when a statute may constitutionally operate upon certain persons, or in certain cases, and was not evidently intended to conflict with the constitution, it is not to be held unconstitutional merely because there may be persons to whom, or cases in which, it cannot constitutionally apply; but it is to be held constitutional and to be construed not to apply to the latter persons or cases, on the ground that courts are bound to presume that the legislature did not intend to violate the constitution."³⁰ According to this rule the power of eminent domain may be exercised for such purposes as are a public use, while the other purposes must be accomplished, if at all, without the aid of that power. Thus where a corporation was authorized to condemn property for "its corporate purposes," it was held to mean only such purposes as were a public use.³¹ And in proceedings under such a statute the petition should clearly show that the property sought is to be devoted to a purpose, which is not only within the statutory powers, but also a public use within the constitution.³² If the petition is general to condemn for the use of the corporation or for the purposes of the charter or

Suburban Ry. Co., 22 R. I. 455, 48 Atl. 590; *In re R. I. Suburban Ry. Co.* 22 R. I. 457, 48 Atl. 591, 52 L.R.A. 879; *State v. Centralia etc. Ry. & P. Co.*, 42 Wash. 632, 85 Pac. 344; *State v. Olympic L. & P. Co.*, 46 Wash. 511, 90 Pac. 656. *And see Thom v. Ga. Mfg. & Public Service Co.*, 128 Ga. 187, 57 S. E. 75.

²⁹*Walker v. Shasta Power Co.*, 160 Fed. 856, 87 C. C. A. 660, 19 L.R.A. (N.S.) 725.

³⁰*Opinion of the Justices*, 41 N. H. 555. To same effect: *State v. Smiley*, 65 Kan. 240, 69 Pac. 199; *Grimes v. Eddy*, 126 Mo. 168, 28 S. W. 756, 47 Am. St. Rep. 653, 26 L.R.A. 638; *State v. McGowan*, 138 Mo. 187, 39 S. W. 771; *Citizens' Nat. Bank v. Graham*, 147 Mo. 250, 48 S. W. 910; *Northrup v. Hoyt*, 31 Ore. 524, 49 Pac. 754; *State v. Mines*, 38 W. Va. 125, 18 S. E. 470; *State v.*

Fackler, 91 Wis. 418, 64 N. W. 1029; *Freight Tax Case*, 15 Wall. 232; *Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377; *Railroad Co. v. Shutte*, 103 U. S. 118, 26 L. ed. 327; *Supervisors v. Stanley*, 105 U. S. 305, 313, 314, 26 L. ed. 1044; *United States v. Central Pac. R. R. Co.*, 118 U. S. 235, 6 S. C. 1038, 30 L. ed. 173; *McCullough v. Virginia*, 172 U. S. 102, 19 S. C. 134, 43 L. ed. 382; *1 Lewis' Sutherland Stat. Constr.* §§ 298-300.

³¹*In re R. I. Suburban Ry. Co.*, 22 R. I. 455, 48 Atl. 590; *In re R. I. Suburban Ry. Co.*, 22 R. I. 457, 48 Atl. 591, 52 L.R.A. 879.

³²*State v. Centralia etc. Ry. & P. Co.*, 42 Wash. 632, 85 Pac. 344; *State v. Superior Court*, 42 Wash. 660, 85 Pac. 666. 5 L.R.A. (N.S.) 672; *State v. Olympia L. & P. Co.*, 46 Wash. 511, 90 Pac. 656.

organization, the proceeding should be dismissed.³³ So an application under an act to condemn property for purposes, part of which are within, and part not within, the act, will be bad *in toto*.³⁴

§ 315 (206a). Taking for other than a public purpose violates the Fourteenth Amendment of the federal constitution. The fourteenth amendment forbids any State to deprive a person of his property without due process of law. To take property for other than a public purpose, either under the guise of taxation or of eminent domain, is to violate this provision.³⁵ Hence the purpose of the taking may present a federal question, though arising under State laws. But in thus applying the federal Constitution the broadest possible construction should be given to the eminent domain power. The words "public use" import a limitation upon the eminent domain power with respect to the purposes for which it may be exercised.³⁶ The States are not compelled to retain this limitation. In its absence, the power may be exercised for any purpose which promotes the general welfare of the State.³⁷ This would include many cases where the property taken is devoted to strictly private uses, as in the case of private roads, mills, drains and the like. Instead of doing away with the usual limitation on the subject, special provisions may be adopted permitting the condemnation of property for particular purposes, as has been done in many States with reference to private roads, drainage, irrigation and the development of mines. These special provisions are in the nature of exceptions to the general provision, which limits the taking to a public use. The legislature of a State may not take, or authorize the taking of private property, except for public use, but the State itself, the people in their collective

³³*Ibid.*

³⁴Thus, under an act for the erection of grist-mills, an order of the court condemning land for a grist-mill, saw-mill and paper-mill is void. *Harding v. Goodlet*, 3 Yerg. 41, 24 Am. Dec. 546. To same effect, *Gaylord v. Sanitary District*, 204 Ill. 576, 68 N. E. 522, 98 Am. St. Rep. 235, 63 L.R.A. 582. *And see McCulley v. Cunningham*, 96 Ala. 583, 11 So. Rep. 694; *In re Barre Water Co.*, 62 Vt. 27, 20 Atl. Rep. 109, 3 Am. R.

R. & Corp. Rep. 136; *Smith v. Barre Water Co.*, 73 Vt. 310, 50 Atl. 1055.

³⁵*Loan Association v. Topeka*, 20 Wall. 655; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 S. C. 56; *Clark v. Nash*, 198 U. S. 361, 25 S. C. 676; *Strickley v. Highland Boy Gold Min. Co.*, 200 U. S. 527, 26 S. C. 301; *Matter of Tuthill*, 163 N. Y. 133, 57 N. E. 303, 79 Am. St. Rep. 574, 49 L.R.A. 781.

³⁶*Ante*, § 256.

³⁷*Ante*, § 1.

capacity, may take, or authorize the taking, of private property for any purpose of public utility or public welfare. We have endeavored to show that public use means a use by the public, a use in which the public participates as of right.³⁸ The words *public utility* or *public welfare* have a broader meaning. The policy of permitting private property to be taken for a particular purpose may promote the public welfare, though the purpose may not be a public use, as we have defined it. Just what purposes the public welfare will include, will depend upon the ideas and needs and practices of the time. They will vary from age to age. What is said by Mr. Judson in reference to the public purpose in taxation, will apply equally to the power of eminent domain. "The public purpose which will warrant the exercise of the taxing power is that which is sustained by the prevailing and controlling public opinion of the time; not the public opinion in the popular sense, which is conclusively reflected in the expression of the legislative will, but the trained and thoughtful judicial opinion. The public opinion of one age or generation, however, as reflected in judicial opinions concerning the proper scope of governmental activity, or as to what are the public purposes of taxation, is not the public opinion of another age or of another generation."³⁹

At the present time there are at least three things which are deemed to promote the public welfare in such way and in such sense as to justify the exercise of the power of eminent domain, though the property taken is not devoted to the use of the public but becomes the private property of the petitioner, as truly and completely as if he had purchased it by private contract. These three things are, (1) the reclamation of wet and arid lands,⁴⁰ (2) the development and utilization of the mineral resources of the land,⁴¹ and (3) the development and utilization of water power.⁴² Wherever the local conditions are such that these improvements affect, in a material degree, the general prosperity and welfare of the State, there they become matters

³⁸*Ante*, § 258.

³⁹Judson on Taxation, § 46.

⁴⁰Wurts v. Hoagland, 114 U. S. 606; Clark v. Nash, 198 U. S. 361, 25 S. C. 676, *affirming* Nash v. Clark, 27 Utah 158, 75 Pac. 371, 101 Am. St. Rep. 953, 1 L.R.A.(N.S.) 208.

⁴¹Strickley v. Highland Boy Gold

Min. Co., 200 U. S. 527, 26 S. C. 301, *affirming* Highland Boy Gold Min. Co. v. Strickley, 28 Utah, 215, 78 Pac. 296, 107 Am. St. Rep. 711, 1 L.R.A.(N.S.) 976.

⁴²Head v. Amoskeag Mfg. Co., 113 U. S. 9.

of such public concern as justifies the exercise of the eminent domain power to make them possible. The reclamation of a single farm or tract of land cannot be a matter of public concern. But a policy which makes it possible to reclaim all wet and arid tracts is a matter of public concern, provided there is enough such land in the State, so that its reclamation will affect appreciably the public welfare. To carry out this policy, it must be possible for a single owner to reclaim his land by works upon the land of others and therefore the power of eminent domain may be exercised for such purpose. The same reasoning holds good with respect to mines and water power. It follows that the States may provide for the improvements mentioned by constitutional amendment and that such amendments and the taking of private property in pursuance thereof will not violate the fourteenth amendment of the federal constitution.

These views are fully sustained by decisions of the Supreme Court of the United States, whose interpretation of the fourteenth amendment is final. A statute of Utah which permitted a single proprietor to condemn a right of way for an irrigating ditch across the lands of others was sustained as a valid exercise of the eminent domain power.⁴³ The principle of this case

⁴³Clark v. Nash, 198 U. S. 361, 25 S. C. 676, affirming Nash v. Clark, 27 Utah 158, 75 Pac. 371, 101 Am. St. Rep. 953, 1 L.R.A.(N.S.) 208. The federal court, in course of its opinion, says: "Whether a statute of a State permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and, therefore, a valid enactment, may depend upon a number of considerations relating to the situation of the State and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. Where the use is asserted to be public, and the right of the individual to condemn for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the State, where the right of condemna-

tion is asserted under a State statute, we are always, where it can fairly be done, strongly inclined to hold with the State courts, when they uphold a State statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious and acknowledged in the State, and the State courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them. They understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the

would cover reclamations by drains or dykes.⁴⁴ In another case from Utah the same court sustained a statute of Utah which permitted the owner of a mine to condemn a right of way across the land of others for an aërial line of transportation. The court says: "In the opinion of the legislature and the supreme court of Utah the public welfare of that State demands that aërial lines between the mines upon its mountain sides

State, which in all probability would flow from a denial of its validity. These are matters which may properly be held to have a material bearing upon the question whether the individual use proposed might not in fact be a public one. It is not alone the fact that the land is arid and that it will bear crops if irrigated, or that the water is necessary for the purpose of working a mine, that is material; other facts might exist which are also material, such as the particular manner in which the irrigation is carried on or proposed, or how the mining is to be done in a particular place where water is needed for that purpose. The general situation and amount of the arid land, or of the mines themselves, might also be material, and what proportion of the water each owner should be entitled to; also the extent of the population living in the surrounding country, and whether each owner of land or mines could be, in fact, furnished with the necessary water in any other way than by the condemnation in his own behalf, and not by a company, for his use and that of others. * * * But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already

stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained. Other landowners adjoining the defendant in error, if any there are, might share in the use of the water by themselves taking the same proceedings to obtain it, and we do not think it necessary, in order to hold the use to be a public one, that all should join in the same proceedings or that a company should be formed to obtain the water which the individual landowner might then obtain his portion of from the company by paying the agreed price, or the price fixed by law." pp. 367-370.

⁴⁴See *Matter of Tuthill*, 163 N. Y. 133, 57 N. E. 303, 79 Am. St. Rep. 574, 49 L.R.A. 781. Under the amendment to the constitution of New York of 1894 in relation to drainage (*ante*, § 43) an act was passed whereby one person could drain his lands or protect them from overflow by works upon the lands of others and could exercise the power of eminent domain for such works. Gray, J., was of opinion that such a law violated the 14th Amendment but Parker, C. J., and Haight, J., were of a contrary opinion. The question was not decided, as the law was held invalid upon other grounds.

and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong.”⁴⁵

⁴⁵Strickley v. Highland Boy Gold Min. Co., 200 U. S. 527, 26 S. C. 301, *affirming* Highland Boy Gold Min. Co. v. Strickley, 28 Utah 215, 78 Pac. 296, 107 Am. St. Rep. 711, 1 L.R.A. (N.S.) 976.

CHAPTER VIII.

MEANING OF THE WORDS "DAMAGED," "INJURED," AND "INJURIOUSLY AFFECTED."

I. IN STATUTES.

§ 316 (206b). Statutes giving damages for change of grade: Connecticut. These statutes vary so much that we shall notice the decisions of each State separately.

A statute of Connecticut provides that "when the owner of land adjoining a public highway, or of any interest in such land, shall sustain special damage or receive special benefit to his property by reason of any change in the grade of such highway by the town, city or borough in which such highway be situated, such town, city or borough shall be liable to pay to him the amount of such special damage, and shall be entitled to receive from him the amount or value of such special benefits, to be ascertained in the manner provided for ascertaining damages and benefits occasioned by laying out or altering highways therein."¹ It is held that the "special damage" to be allowed under this statute "differs in no essential respect from the damage that would be appraised for injury to adjoining land, if the alteration were an original layout, causing a similar injury. Such damage includes the diminution in the market value of the land caused by the alteration, to be determined by considering everything by which that value is legitimately affected."² The statute applies to improvements under the "Good Roads Act," though the same are supervised by the State, which also bears part of the expense.³ The destruction of a sidewalk or shade trees may be taken into consideration.⁴ Also the cost of a re-

¹R. S. 1888, § 2703; R. S. 1902, § 2051.

²Platt v. Town of Milford, 66 Conn. 320, 34 Atl. 82; Cook v. Ansonia, 66 Conn. 413, 34 Atl. 183; Holley v. Town of Torrington, 63 Conn. 426, 433, 28 Atl. 613; Shelton

Co. v. Birmingham, 62 Conn. 456, 26 Atl. 348; S. C. 61 Conn. 518, 24 Atl. 978.

³Griswold v. Guilford, 75 Conn. 192, 52 Atl. 742.

⁴Shelton Co. v. Birmingham, 62 Conn. 456, 26 Atl. 348; Holley v.

taining wall and the regrading of the lot.⁵ If a change is made without complying with the statute an action at law will lie for the damage.⁶ A change of grade of the sidewalk or from the natural grade of the street is within the statute.⁷ The action accrues when the change is made, not when it is ordered.⁸ But a private action cannot be brought until the city has been guilty of unreasonable delay to have the damages assessed or refused to do so.⁹ The rights of the parties are held to be governed by the law in force when the change is finally ordered. Thus when a change of grade was ordered while a statute like the one quoted was in force but was not executed until after the repeal of the statute, it was held that the abutter was entitled to compensation.¹⁰

§ 317 (207). The same: Indiana. A statute of Indiana provides that, "when the city authorities have once established the grade of any street or alley in the city, such grade shall not be changed until the damages occasioned by such change shall have been assessed and tendered to the parties injured or affected by such change, and such damages shall be collected by the city from the party or parties making such change of grade in the manner provided for the collections of street improvements."¹¹ The statute applies only to cities, not to incorporated towns.¹² If the city fails to have the damages assessed and paid as required by the statute, a common law action will lie.¹³ But no action lies to recover nominal damages.¹⁴ An established grade within the statute is a grade established in pursuance of some ordinance or order of the common council, involving some general plan of improvement or grading of a

Town of Torrington, 63 Conn. 426, 28 Atl. 613; Cook v. City of Ansonia, 66 Conn. 413, 34 Atl. 183.

⁵Pickles v. Ansonia, 76 Conn. 278, 56 Atl. 552.

⁶Healey v. New Haven, 49 Conn. 394; Holley v. Town of Torrington, 63 Conn. 426, 28 Atl. 613; Cook v. City of Ansonia, 66 Conn. 413, 34 Atl. 183.

⁷McGar v. Bristol, 71 Conn. 652, 42 Atl. 1000; Pickles v. Ansonia, 76 Conn. 278, 56 Atl. 552.

⁸Pickles v. Ansonia, 76 Conn. 278, 56 Atl. 552.

⁹Gilpin v. Ansonia, 68 Conn. 72, 35 Atl. 777.

¹⁰Healey v. New Haven, 49 Conn. 394.

¹¹R. S. 1881, § 3073.

¹²Baker v. Town of Shoals, 6 Ind. App. 319, 33 N. E. 664.

¹³La Fayette v. Wortman, 107 Ind. 404; La Fayette v. Nagle, 113 Ind. 425.

¹⁴Burkham v. Ohio & M. R. R. Co., 122 Ind. 344, 23 N. E. 799.

street or some specific portion thereof.¹⁵ Accordingly no damages can be recovered when the change is from a natural grade merely.¹⁶ Where the city engineer and committee on streets agreed with the plaintiff on a grade to which he adapted his building, and afterwards the council fixed a lower grade, this was held not to be a change within the statute.¹⁷ A change of grade of the sidewalk or part of the street is within the statute.¹⁸ Where the town of Wabash established the grade of a street with reference to which the plaintiff built, and afterwards the town became a city, and then changed the grade so established, it was held the city was not liable, because it had not established the prior grade.¹⁹

§ 318 (208). The same: Iowa. A statute provided that, where a grade had been established and improvements made according to the grade so established, and the grade was changed so as to injure or diminish the value of such property, the city making the change should pay to the owner or owners of said property the amount of such damage.²⁰ It is held that "property is improved according to the established grade, within the meaning of the statute, whenever it is so improved that it can be comfortably and conveniently used for the purpose to which it is devoted while the street upon which it abuts is maintained at that grade."²¹ Where the improvements are made before the grade is established,²² or after it is established but according to the natural surface and not according to the established grade,²³ there can be no recovery for bringing the surface to

¹⁵Mattingly v. Plymouth, 100 Ind. 545; City of Anderson v. Bain, 120 Ind. 254, 22 N. E. 323; City of Valparaiso v. Adams, 123 Ind. 250, 24 N. E. 107; City of Huntington v. Griffith, 142 Ind. 280, 41 N. E. 8, 589.

¹⁶Ibid.; Keehn v. McGillicuddy, 15 Ind. App. 580, 44 N. E. 554.

¹⁷Mattingly v. Plymouth, 100 Ind. 545.

¹⁸Kokomo v. Mahan, 100 Ind. 242.

¹⁹Wabash v. Alber, 88 Ind. 428. To same effect City of Huntington v. Griffith, 142 Ind. 280, 41 N. E. 8, 589. Compare Nolte v. City of Cincinnati, 3 Ohio C. C. 503.

²⁰Code of 1873, § 469; Code of 1897, § 785.

²¹Conklin v. Keokuk, 73 Ia. 343. "We think it quite clear that the improvement of a lot 'according to the grade' of the adjacent street does not require that the foundations of buildings erected thereon shall be exactly at grade, or at any invariable elevation above or below it." Stevens v. Cedar Rapids, 128 Ia. 227, 103 N. W. 363.

²²Wilbur v. Ft. Dodge, 120 Ia. 555, 95 N. W. 186.

²³Farmer v. Cedar Rapids, 116 Ia. 322, 89 N. W. 1105; Reilly v. Ft. Dodge, 118 Ia. 633, 92 N. W. 887.

the established grade. Under the statute the damage to both land and buildings may be recovered.²⁴ If, however, the property is worth more after the change than before, it has not been damaged, although expense will have to be incurred to adjust it to the new grade.²⁵ The measure of damages is the difference in value before and after the improvement.²⁶ Where a new pavement was put down, and the surface at the curb was a few inches lower than the old pavement, but the curb and center of the street remained the same, it was held not to be a change of grade within the statute.²⁷ Putting macadam on a street, though it elevates the surface, is not a change of grade.²⁸ One who has filled in and graded his lot preparatory to building upon it, may recover, though no building has been erected.²⁹

An established grade is one adopted by ordinance or resolution of the council.³⁰ The fact that a city has worked or improved a street at a particular grade does not make it an established grade within the statute.³¹ The action accrues when the change is actually made, and when any part of the work is done in front of the property.³² The fact that the plaintiff changes his improvements to conform to the new grade before the work is done does not bar his action.³³ The remedy given by the statute is exclusive.³⁴ The act does not apply to changes which were ordered before the law took effect, but which were not

²⁴Dalzell v. Davenport, 12 Ia. 437; Hempstead v. Des Moines, 52 Ia. 303, 3 N. W. 123. It is immaterial that the change is back to the natural surface. Ressegien v. Sioux City, 94 Ia. 543, 63 N. W. 184, 28 L.R.A. 389.

²⁵Hempstead v. Des Moines, 52 Ia. 303, 3 N. W. 123.

²⁶Stewart v. Council Bluffs, 84 Ia. 61, 50 N. W. 219; McCash v. Burlington, 72 Ia. 26, 33 N. W. 346; Richardson v. Webster City, 111 Ia. 427, 82 N. W. 920; Millard v. Webster City, 113 Ia. 220, 84 N. W. 1044.

²⁷Coates v. Dubuque, 68 Ia. 550, 27 N. W. 750.

²⁸Warren v. Henry, 31 Ia. 31.

²⁹Chase v. Sioux City, 86 Ia. 603, 53 N. W. 333; to same effect, Season-good v. Cincinnati, 5 Ohio C. C. 225.

³⁰Morton v. Burlington, 106 Ia. 50; Farmer v. Cedar Rapids, 116 Ia. 322, 89 N. W. 1105.

³¹Kepple v. Keokuk, 61 Ia. 653, 17 N. W. 140.

³²Hempstead v. Des Moines, 63 Ia. 36, 18 N. W. 676. In this case an established grade was lowered six feet, and the city first lowered the roadway and the plaintiff recovered damages for that, and afterwards the sidewalks were lowered and the plaintiff brought another suit; it was held that the former suit was a bar. *But see* Buser v. Cedar Rapids, 115 Ia. 683, 87 N. W. 404; Foley v. Cedar Rapids, 133 Ia. 64, 110 N. W. 158.

³³York v. Cedar Rapids, 130 Ia. 453, 103 N. W. 790.

³⁴Cole v. Muscatine, 14 Ia. 296.

executed until afterward.³⁵ Where the grade of a street was changed, which necessitated changes on intersecting streets, it was held a recovery could be had for damages to property on the latter streets, by reason of such incidental change, though no change was formally ordered.³⁶

§ 319 (208a). Same: Kansas. An established grade cannot be changed until the damage to property owners, which may be caused thereby, has been assessed and paid or deposited, and a particular mode of assessment is provided for.³⁷ Under this statute there is no liability when a change is made from a natural to an established grade.³⁸ Where the notice served on the plaintiff showed that the grade would be raised two or three inches in front of his property, which would be no damage, but the change actually ordered and made was a lowering of eighteen inches, it was held the city was liable in a common law action.³⁹ The measure of damages is the difference in market value before and after the change.⁴⁰

§ 320 (208b). Same: Maine. A recent statute provides that, "when a way or street is raised or lowered by a surveyor or person authorized, to the injury of an owner of land adjoining, he may apply in writing to the municipal officers, and they shall view such way or street and assess the damages, if any have been occasioned thereby."⁴¹ The measure of damages is the diminution of market value caused by the change, and if there is no diminution there can be no recovery.⁴²

§ 321 (209). The same: Massachusetts. The statute provides that, "where an owner of land adjoining a highway sustains damage in his property by reason of any raising or lowering or other act done for the purpose of repairing such way, he shall have compensation therefor."⁴³ Under this statute the abut-

³⁵Cotes v. Davenport, 9 Ia. 227.

³⁶Conklin v. City of Keokuk, 73 Ia. 343, 35 N. W. 444.

³⁷Laws 1881, c. 37, § 18; Gen. Stat. 1889, par. 562; Parker v. City of Atchison, 46 Kan. 14, 26 Pac. 435; Leavenworth v. Duffy, 10 Kan. App. 124, 62 Pac. 433.

³⁸Interstate Consol. R. T. R. R. Co. v. Early, 46 Kan. 197, 26 Pac. 422.

³⁹City of Topeka v. Sells, 48 Kan. 520, 29 Pac. 604.

⁴⁰Parker v. City of Atchison, 46 Kan. 14, 26 Pac. 435, 5 L.R.A. 775; City of Topeka v. Martineau, 42 Kan. 387, 22 Pac. 419.

⁴¹Stat. 1887, chap. 97. See Hurley v. South Thomaston, 101 Me. 538, 64 Atl. 1050.

⁴²Chase v. City of Portland, 86 Me. 367, 29 Atl. 1104.

⁴³There appear to be different statutes on the subject and a statement and history of the same will be found in the following cases: Sisson v.

ting owner is entitled to recover for any damages to his property by reason of the proper execution of any such improvement.⁴⁴ The word "damage" is not confined to injuries for which an action lay at common law, as between individuals, but covers all damages flowing from the change, such as interfering with access, or the flow of surface water.⁴⁵ Where a street is laid out, the compensation awarded includes such damages as may be occasioned by the construction of the street as proposed in the order of laying out,⁴⁶ but, where a street was laid out in 1861, and a grade established but the street was not built at such grade, and the city by repairs and otherwise recognized the existing grade, and in 1877 the street was made to conform to the grade so originally established, it was held to be a change of grade within the statute.⁴⁷ If no grade is established when the street is laid out, the establishing of a grade afterwards and bringing the street to such grade is a change within the statute.⁴⁸ The statute has been held to apply to a case where, by removing dirt from in front of premises for the purpose of repairing elsewhere, access thereto was interfered with.⁴⁹ An agreement not to claim compensation for land taken for a highway, does not preclude the owner from recovering damages for a change of grade made after the highway has been established.⁵⁰ Where both the street and abutting land fall away from natural causes, the street may be raised to the established grade without incurring liability.⁵¹ If property abuts on two streets both of which are improved, the damages by the improvement of each street must be kept distinct.⁵² The statute only applies to property abutting on the street where the change is made.⁵³ The action accrues when the work is done, and not when the change is or-

New Bedford, 137 Mass. 255; Sullivan v. Fall River, 144 Mass. 579; Albro v. Fall River, 175 Mass. 590, 56 N. E. 894.

⁴⁴ Flagg v. Worcester, 13 Gray 601.

⁴⁵ Woodbury v. Beverly, 153 Mass. 245, 26 N. E. 851.

⁴⁶ Ryan v. Boston, 118 Mass. 248; Geraghty v. Boston, 120 Mass. 416; Murphy v. Boston, *Ibid.* 419; Brady v. Fall River, 121 Mass. 262.

⁴⁷ Cambridge v. County Commissioners, 125 Mass. 529.

⁴⁸ Snow v. Provincetown, 109 Mass. 123; Lane v. Boston, 125 Mass. 519.

⁴⁹ Burr v. Leichester, 121 Mass. 241.

⁵⁰ Fernald v. Boston, 12 Cush. 574.

⁵¹ Garrity v. Boston, 161 Mass. 530, 37 N. E. 672.

⁵² Bemis v. Springfield, 122 Mass. 110.

⁵³ Wilbur v. Taunton, 123 Mass. 522.

dered.⁵⁴ A change of grade made by a street railroad company under statutory authority is not within the statutes above referred to and no compensation can be had for damages occasioned by such change of grade.⁵⁵

§ 322. The same: Michigan. The general act of 1895 for the incorporation of villages, which reincorporated all villages then existing under the act, provided that the grades of streets could be established and changed by the council and that "whenever the grade of any street or sidewalk shall have been heretofore or shall hereafter be established, and improvements shall thereafter be made by the owner or occupant of the adjacent property in conformity to such grade, such grade shall not be changed without compensation to the owner for all damages to such property resulting therefrom." It is held that a grade cannot be established within the meaning of the statute by user but only by formal action of the council in accordance with the statute.⁵⁶ Consent to the change estops the abutter from claiming damages.⁵⁷

§ 323 (210). The same: Minnesota. The charter of St. Paul provides that, if a grade once established is changed, "all damages, costs and charges arising therefrom shall be paid by the city to the owner of any lot or parcel of land or tenement which may be affected or injured in consequence of the alteration of such grade." The act prescribed no remedy and a common law action was held proper. It was also held in the same case that the right of action accrued when the change was finally ordered by the proper tribunal, and that an owner need not delay his action until the change was actually made, and that a recovery could be had for all the damages which would be occasioned by the change.⁵⁸ Subsequently acts were passed providing a remedy and making it exclusive, but they were held not to

⁵⁴ *Brown v. Lowell*, 8 Met. 172. See generally: *Dana v. Boston*, 176 Mass. 97, 57 N. E. 325; *Garvey v. Revere*, 187 Mass. 545, 73 N. E. 664; *Galeano v. Boston*, 195 Mass. 64, 80 N. E. 579.

⁵⁵ *Purinton v. Somerset*, 174 Mass. 556, 55 N. E. 461; *Vigeant v. Marlborough*, 175 Mass. 459, 56 N. E. 709; *Underwood v. Worcester*, 177 Mass. 173, 58 N. E. 589; *Hewett v. Canton*, 182 Mass. 220, 65 N. E. 42;

Laroe v. Northampton St. Ry. Co., 189 Mass. 254, 75 N. E. 255; *Hyde v. Boston etc. St. Ry. Co.*, 194 Mass. 80, 80 N. E. 517.

⁵⁶ *Cummings v. Dixon*, 139 Mich. 269, 102 N. W. 751.

⁵⁷ *Wheat v. Van Line*, 149 Mich. 314, 112 N. W. 933.

⁵⁸ *McCarthy v. St. Paul*, 22 Minn. 527. It seems to us the decision is wrong as to the time when the cause of action arises in such a case. A

apply to a change made before their passage.⁵⁹ A viaduct over a railroad which took all the travel along the street was held to be a change of grade within the statute.⁶⁰

§ 324 (211). The same: Missouri. The charter of the city of St. Louis contains the following provision: "The city shall be liable for damages sustained by any owner of real estate upon which permanent buildings shall have been erected by any change of grade of any street upon which such real estate shall front." Under this provision the city was held liable for damages by a causeway in the middle of the street, thirty-two feet wide, though a space nine feet wide between the causeway and the sidewalk was left on each side of the street at the old grade.⁶¹ So the city was held liable where the grade of a street was ordered to be raised, but was not in fact raised to the full height ordered.⁶² The charter of the city of St. Joseph provided for damages to abutting owners, in case of a change of grade which had been previously fixed or established. It was held that a grade might be fixed or established by improving a street at its natural grade without any ordinance in terms fixing the grade.⁶³ Compensation is now secured by the constitution.⁶⁴

§ 325. The same: New Hampshire. A statute giving damages for a change of grade was first passed in 1848.⁶⁵ As amended in 1867 it required compensation to be made "if in

change of grade on paper does not injure any one. After a change has been ordered it might be reconsidered before execution. In the meantime an owner might have obtained judgment. *See post*, § 970.

⁵⁹Taylor v. St. Paul, 25 Minn. 129.

⁶⁰Wilkin v. St. Paul, 33 Minn. 181. For a statute held not to impose such liability, *see* Willis v. City of Winona, 59 Minn. 27, 60 N. W. 814.

⁶¹Stickford v. St. Louis, 7 Mo. App. 217; *affirmed*, 75 Mo. 309. The city contended that the charter only embraced a change of grade over the whole width of the street. On this point the court says: "Such an interpretation would substitute the shadow for the substance. It would

allow the city to evade responsibility for every change of grade by leaving a few feet, or even a few inches, untouched along the lateral boundaries of the street. * * * The change of grade contemplated by the charter provision is manifestly any such alteration as will raise or lower the principal current of travel or transportation." To same effect, Dyer v. St. Louis, 11 Mo. App. 590. *See also* Mitchell v. St. Louis, 14 Mo. App. 600.

⁶²Schumacher v. St. Louis, 3 Mo. App. 297.

⁶³Gibson v. Zimmerman, 27 Mo. App. 90.

⁶⁴Post, § 361; *ante*, § 37.

⁶⁵Laws of 1848, c. 725, § 1.

repairing a highway by authority of the town the grade is raised or lowered, or a ditch made at the side thereof, whereby damages is occasioned to any estate adjoining.”⁶⁶ A change of grade of the sidewalk or from a natural grade is within the statutes.⁶⁷ The action accrues when the change is made and the right to recover is in the owner at the time and does not pass by a subsequent deed of the property.⁶⁸ The assessment should cover all damages, past, present, and prospective.⁶⁹

§ 326 (212). The same: New Jersey. Under a statute giving damages for a change of grade, it was held that, where a street is widened and then the grade of the street subsequently changed, the damages occasioned by reducing the new part to the grade of the old must be presumed to have been included in the award for the original taking.⁷⁰ Where the statute allows damages only to improved property, an award for property not improved will be void.⁷¹ The owner may recover not only for all structural damage to his buildings but also for loss of rentals during such time as the buildings are necessarily rendered untenantable by making the change of grade and adjusting the buildings to the new grade.⁷² Securing a modification of the order for a change does not bar the recovery of damages for the change actually made.⁷³ Mandamus will lie to compel the city authorities to make an award.⁷⁴ One to whom damages have been awarded for a change of grade cannot be assessed for benefits for the same improvement. The first adjudication, that the premises are damaged by the change, concludes both parties while it stands.⁷⁵ A statute making it lawful for a municipality to give compensation for a change of grade was held to be obligatory.⁷⁶

§ 327 (213). The same: New York. Acts giving

⁶⁶R. S. 1867, c. 76, § 20; Hinckley v. Franklin, 69 N. H. 614, 45 Atl. 643.

⁶⁷*Ibid.*

⁶⁸Hodgman v. Concord, 69 N. H. 349, 41 Atl. 287.

⁶⁹Sawyer v. Keene, 47 N. H. 173.

⁷⁰Van Riper v. Essex Road Board, 38 N. J. L. 23. The statute was passed in 1858. See R. S. p. 1009, § 70; Vorrath v. Hoboken, 49 N. J. L. 285.

⁷¹State v. Sayer, 41 N. J. L. 158.

⁷²Newark v. Weeks, 71 N. J. L. 448, 59 Atl. 901.

⁷³Klaus v. Jersey City, 69 N. J. L. 127, 54 Atl. 220.

⁷⁴*Ibid.*

⁷⁵Davis v. City of Newark, 54 N. J. L. 595, 25 Atl. 336.

⁷⁶Clark v. Elizabeth, 61 N. J. L. 565, 40 Atl. 616, 737. See generally: Manufacturers' Land & Imp. Co. v. Camden, 71 N. J. L. 490, 59 Atl. 1; Same v. Same, 73 N. J. L. 263, 63 Atl. 5.

damages for a change of grade in the streets of New York City have existed since 1852.⁷⁷ A general act of 1883, applicable to incorporated villages, gives compensation for damages by a change of grade.⁷⁸ There have probably been many special acts on the subject.⁷⁹ There appears to have been very little litigation under these acts which has found its way into the reports. It is held that the remedy provided by the statute is exclusive and that an ordinary suit will not lie.⁸⁰ Also that the statutory provisions as to remedy must be strictly complied with.⁸¹

The right to damages accrues when the work is done, and not when the change is ordered.⁸² The gradual removal of a bank of earth between the traveled roadway and the street line, is not a change of grade.⁸³ Nor is the mere leveling the surface of a street to produce a uniform grade.⁸⁴ Where the statute gives damages to the owners of buildings fronting on the street, it excludes the allowance of damages to the land.⁸⁵ The fact that one has deeded the land for the street, does not preclude him from claiming damages for a change of grade afterward made.⁸⁶ But where one deeded land for a street to a village which was liable for damages for a change of grade and the village was made a city which was not liable for such change, and the grade of the street was changed by the city, it was held the grantor obtained no vested right to the remedy and that he could not

⁷⁷Laws of 1852, c. 52, pp. 46-47; Laws of 1867, vol. 2, c. 697, pp. 1748-1750; Laws of 1872, vol. 2, c. 729, p. 1726.

⁷⁸Laws of 1883, c. 113; Whitmore v. Village of Tarrytown, 137 N. Y. 409, 33 N. E. 489.

⁷⁹See People v. Fitch, 147 N. Y. 355, 41 N. E. 695; People v. Gilon, 121 N. Y. 551, 24 N. E. 944; People v. Gilon, 76 Hun 346, 27 N. Y. Supp. 704.

⁸⁰Heiser v. New York, 104 N. Y. 68, *affirming* 29 Hun 446; Melenbacker v. Salamanca, 188 N. Y. 370, 80 N. E. 1090, *affirming* 116 App. Div. 691; Smith v. White Plains, 67 Hun 81, 22 N. Y. Supp. 450; Matter of Ehksam, 37 N. Y. App. Div. 272; Hoy v. Salamanca, 57 Misc. 81.

⁸¹Comesky v. Suffern, 179 N. Y. 393, 72 N. E. 320. *reversing* 83 App. Em. D.—39.

Div. 137, 81 N. Y. S. 1049; Melenbacker v. Salamanca, 188 N. Y. 370, 80 N. E. 1090, *affirming* 116 App. Div. 691.

⁸²People v. Zoll, 97 N. Y. 203; Nugent v. New York, 58 Misc. 453.

⁸³Whitmore v. Tarrytown, 137 N. Y. 409, 33 N. E. 489.

⁸⁴Farrington v. Mt. Vernon, 166 N. Y. 233, 59 N. E. 826, *affirming* 51 App. Div. 250, 64 N. Y. S. 863; Comesky v. Suffern, 179 N. Y. 393, 72 N. E. 320, *reversing* S. C. 83 App. Div. 137, 81 N. Y. S. 1049; Bissell v. Larchmont, 57 App. Div. 61, 67 N. Y. S. 692; Stenson v. Mt. Vernon, 104 App. Div. 17, 93 N. Y. S. 309.

⁸⁵People v. Gilon, 76 Hun 346, 27 N. Y. Supp. 704.

⁸⁶Bartlett v. Tarrytown, 52 Hun 380, 24 N. Y. St. 272, 5 N. Y. Supp. 240.

recover.⁸⁷ A change of grade made by a railroad company by permission of the village is within the statute.⁸⁸ So is a change from a natural grade, which has not been established except by user.⁸⁹ There is no vested right in the remedy and it may be taken away by repeal of the statute.⁹⁰ A statute giving compensation to the owners of real estate claimed to be damaged was held not to embrace a tenant for years.⁹¹ A viaduct over a railroad was held to be a change of grade.⁹² One who builds after the grade is established cannot have damages for bringing the street to the grade so established.⁹³ When the statute requires the claim for damages to be presented "within sixty days after such change of grade is effected," it means sixty days from the completion of the work.⁹⁴ A municipal corporation may be made liable for changes of grade previously made.⁹⁵ A statute that "in any town in which a highway has been or hereafter shall be repaired, graded and macadamized, etc., the owner or owners of the land adjacent to the said highway shall be entitled to recover from the town the damages resulting from any change of grade," was held to be retroactive and to apply to changes made before the act was passed.⁹⁶ After the grade of a street had been changed an act was passed authorizing the board of revision "in its discretion to ascertain and determine the damage" to certain property thereby and to award compensation to the owners thereof. The making of an award was held to be purely discretionary.⁹⁷

⁸⁷Lawton v. New Rochelle, 123 App. Div. 832.

⁸⁸Matter of Stack, 50 Hun 385, 21 N. Y. St. 953, 3 N. Y. Supp. 231.

⁸⁹Folmsbee v. Amsterdam, 142 N. Y. 118, 36 N. E. 821, *affirming* S. C. 66 Ilun 214; Bartlett v. Tarrytown, 55 Hun 492, 30 N. Y. St. 341, 8 N. Y. Supp. 739; Matter of Greer, 39 N. Y. App. Div. 22; Stenson v. Mt. Vernon, 104 App. Div. 17, 93 N. Y. S. 309.

⁹⁰Smith v. White Plains, 67 Hun 81, 22 N. Y. Supp. 450.

⁹¹Matter of Ehksam, 37 App. Div. N. Y. 272.

⁹²Matter of Grade Crossing Comrs., 154 N. Y. 550.

⁹³Matter of E. 187 St., 78 App.

Div. 355, 79 N. Y. S. 1031; People v. Muh, 101 App. Div. 423, 92 N. Y. S. 22; S. C. *affirmed*, 183 N. Y. 540, 76 N. E. 1105.

⁹⁴Phipps v. North Pelham, 61 App. Div. 442, 70 N. Y. S. 630.

⁹⁵Matter of Anderson, 178 N. Y. 416, 70 N. E. 921, *reversing* S. C. 91 App. Div. 563; Matter of Borup, 182 N. Y. 222, 74 N. E. 838, 108 Am. St. Rep. 798, *affirming* S. C. 102 App. Div. 262, 92 N. Y. S. 624.

⁹⁶Matter of Anderson, 178 N. Y. 416, 70 N. E. 921, *reversing* S. C. 91 App. Div. 563.

⁹⁷People v. Phillips, 88 App. Div. 560, 85 N. Y. S. 200. See generally: Torge v. Salamanca, 176 N. Y. 324, 68 N. E. 626, *reversing* 86 App. Div.

The Greater New York charter provides as follows: "After the taking effect of this act there shall be no liability to abutting owners for originally establishing a grade; nor any liability for changing a grade once established by lawful authority, except where the owner of the abutting property has subsequently to such establishment of grade built upon or otherwise improved the property in conformity with such established grade and such grade is changed after such buildings or improvements have been made. * * * A grade shall be deemed established by lawful authority within the meaning of this section where it was originally adopted by the action of the public authorities, or where the street or avenue has been used by the public as of right for twenty years and been improved by the public authorities at the expense of the public or the abutting owners."⁹⁸ We believe no decisions of general interest have been rendered on this provision.⁹⁹

§ 328 The same: Ohio. A statute provides for an assessment of damages when an owner of a lot, or of land, bounding or abutting upon a proposed improvement, claims that he will sustain damages by reason of the improvement.¹ Where an owner has graded his lot to correspond to an established grade, he may recover damages for a change of grade.² Where the traveled way was some feet below the margins and the grade was changed and the street cut down to the new grade for the whole width, it was held an abutter could not recover for cutting down the margins to the old grade.³

§ 329 (214). The same: Pennsylvania. An act of 1854 in relation to Philadelphia provided "that in any alteration that may be made of the regulation of any portion of the

211, 86 N. Y. S. 672; Matter of Rogers Place, 65 App. Div. 1, 72 N. Y. S. 459; Matter of Trinity Ave., 81 App. Div. 215, 80 N. Y. S. 732; Matter of Briggs Ave., 84 App. Div. 312, 82 N. Y. S. 575; Matter of Summit Ave., 84 App. Div. 455, 82 N. Y. S. 1027; Matter of Tiffany St., 84 App. Div. 525, 82 N. Y. S. 852; People v. Leonard, 87 App. Div. 269, 84 N. Y. S. 341; Matter of Borup, 89 App. Div. 183, 85 N. Y. S. 828; Matter of Anderson, 91 App. Div. 563, 87 N. Y. S. 24; S. C. reversed, 178 N. Y. 416, 70 N. E. 921.

⁹⁸§ 951 Greater New York Charter as amended by c. 466, Laws of 1901.

⁹⁹See Triest v. New York, 193 N. Y. 525, reversing 126 App. Div. 934; Mayer v. New York, 193 N. Y. 535, affirming 127 App. Div. 926.

¹R. S. 1886, § 2315; R. S. 1890, § 2315.

²Seasongood v. Cincinnati. 5 Ohio C. C. 225.

³Cincinnati v. Roth, 20 Ohio C. C. 317.

city, in conformity with the provisions of this section, whereby damages may ensue to private property, compensation shall be made for such damages, to be ascertained and paid by law as in case of damages for opening streets." This act only applies to the change of an established grade.⁴ The right to damages is held to accrue when the new grade has been duly established and confirmed according to law. The owner is not required to wait until the work is completed.⁵ Where a statute provided that when the grade of a street was changed, thereby causing damage to the owner or owners of property abutting thereon, compensation should be made to such owners, it was held that one might have compensation whose property abutted on the street, though it did not abut upon the part where the change was made.⁶

§ 330 (215). The same: Rhode Island. A statute gave compensation to abutting owners for damages "by any change in the grade of a highway." Where a grade was recognized by the city as the grade of the street, and was afterwards changed, it was held that the abutting owner was entitled to damages, though the first grade had never been formally established by the board of aldermen.⁷ But a subsequent case holds that the statute only applies to a change from an established grade.⁸ One having a leasehold interest as tenant from year to year is such an owner.⁹ Any claim for such damages was required to be presented to the board of aldermen within forty days after the change was completed; it was held that after the forty days the aldermen had no jurisdiction to allow it.¹⁰

§ 331. The same: South Carolina. By its charter the city of Greenville had power "to lay out, adopt, alter, widen, and open" streets, roads and ways and the charter provided that "any person damaged by the closing or from the altering of any such street, road or way, shall be duly compensated therefor by the

⁴In re Ridge Ave., 99 Pa. St. 469; Philadelphia v. Wright, 100 Pa. St. 235; Matter of Change of Grade of Germantown Ave., 15 Phila. 413; In re Levering St., 14 Phila. 349; In re Germantown Ave., 14 Phila. 351; In re Plan 166, 143 Pa. St. 414, 22 Atl. 669.

⁵Matter of Change of Grade of 5th and 6th streets, 12 Phila. 587; Campbell v. Philadelphia, 108 Pa. St. 300.

⁶Lewis v. Homestead, 194 Pa. St. 199, 45 Atl. 123.

⁷Aldrich v. Providence, 12 R. I. 241.

⁸Gardner v. Town Council of Johnstown, 16 R. I. 94, 12 Atl. 888; O'Donnell v. White, 24 R. I. 483, 53 Atl. 633.

⁹Gilligan v. Providence, 11 R. I. 258.

¹⁰Anness v. Providence, 13 R. I. 17.

city council." A change of grade is held to be an *altering* within the charter for which compensation must be made.¹¹ The statute is held to cover damages to the pipes of a water company.¹² The measure of damages to abutting property is the difference before and after the change.¹³ The statutory remedy is exclusive.¹⁴

§ 332 (216). The same: Tennessee. A statute provided that, when the owner of a lot desired to build, he might apply to the city authorities and have the grade of the street fixed, and if, after the building was constructed, the grade was changed, he should have compensation for any damages. The grade of a street was established in 1866, and plaintiff raised his building to correspond. Two years later the grade was changed. It was held that plaintiff could recover under the statute.¹⁵ It is held that the statute should be liberally construed, and that a grade may be established without an ordinance. If the city council directs it engineer to fix grades, and he does so, such grades are established within the statute.¹⁶ A general act was passed in 1891, giving compensation for any damage to property by reason of any change in the natural or established grade of any street or highway or of other acts done for the repair or improvement of such ways.¹⁷ Where a city permitted the grade of a street to be cut down by those who desired the earth, it was held liable, though there was no formal order for the change.¹⁸ The meas-

¹¹Paris Mt. Water Co. v. Greenville, 53 S. C. 82, 30 S. E. 699; Mauldin v. Greenville, 53 S. C. 285, 31 S. E. 252; Garraux v. Greenville, 53 S. C. 575, 31 S. E. 597; Greenville v. Mauldin, 64 S. C. 438, 42 S. E. 200; Mauldin v. Greenville, 64 S. C. 444, 42 S. E. 202.

¹²Paris Mt. Water Co. v. Greenville, 53 S. C. 82, 30 S. E. 699.

¹³Mauldin v. Greenville, 64 S. C. 444, 42 S. E. 202.

¹⁴Garraux v. Greenville, 53 S. C. 575, 31 S. E. 597. *And see* Kendall v. Columbia, 74 S. C. 530, 54 S. E. 777; Greenville v. Earle, 80 S. C. 321.

¹⁵Mayor of Nashville v. Nichol, 3 Bax. 338. The court says: "We think, however, it is the duty of the court to give a liberal construction to statutes in favor of the right of a

citizen to be reimbursed for damages done to his property by city authorities, occasioned by works for the advantage of the general public. The citizen whose property is thus injured, ought not to be required to bear the entire burden, the benefits of which he shares perhaps very slightly, in common with other inhabitants of the city, the improvements frequently being of no personal advantage to him, whatever."

¹⁶Chattanooga v. Geiler, 13 Lea, 611.

¹⁷Acts of 1891, c. 31, p. 67. Same amended in 1893, acts of 1893, c. 41, p. 53; Shannon's Code, § 1988.

¹⁸Knoxville v. Harth, 105 Tenn. 436, 58 S. W. 650, 80 Am. St. Rep. 901.

ure of damages is the difference in value of the property before and after the change.¹⁹

§ 333. The same: Vermont. An act of 1884 gave damages when a highway was raised or lowered more than three feet in front of any dwelling house or other building.²⁰ The damages recoverable are such as result from the excess of raising or lowering over three feet.²¹

§ 334 (216a). Same: Washington. A general statute prohibits a change of grade so as to necessitate the raising or lowering of buildings, without prepayment of the damages.²² It is held to apply only to a change from a grade, either formally adopted by ordinance or resolution, or by the actual improvement of the street.²³

§ 335 (217). The same: Wisconsin. The charter of Milwaukee required the city to establish the grade of all streets, and contained this provision: "When the established grade shall be thereafter altered, all damages, costs and charges arising therefrom shall be paid by the city to the owner of any lot or parcel of land or tenement which may be affected in consequence of the alteration of such grade." Under this statute it was held that it was no defence to an action for damages by the changing of an established grade, that the city had not established the grade of all its streets;²⁴ that the doing of the work by the plaintiff in front of his premises pursuant to an order of the council was no bar to his recovery;²⁵ that the signing of a petition for a change of grade different from the one ordered was no bar;²⁶ nor the signing of a petition to complete the work already begun.²⁷ The building of a causeway forty feet wide in the middle of a street was held to be a change within the statute, though twenty feet was left on each side at the old grade.²⁸ The measure of damages is the depreciation in the value of the property caused by the change, and in arriving at this it is proper to consider the cost of adjusting the property to the new grade, the cost of making the change in the street which is a charge

¹⁹Acker v. Knoxville, 117 Tenn. 224, 96 S. W. 973.

²⁴Goodrich v. Milwaukee, 24 Wis. 422.

²⁰Vt. Stats. 1894, §§ 3357-3361.

²⁵Pearce v. Milwaukee, 18 Wis.

²¹Fairbanks v. Rockingham, 75 Vt. 221, 54 Atl. 186; S. C. 73 Vt. 124, 50 Atl. 802.

²⁶Luscombe v. Milwaukee, 36 Wis. 511.

²²Gen. Stat., § 759.

²⁷Herzer v. Milwaukee, 39 Wis.

²³Sargent v. City of Tacoma, 10 Wash. 212, 38 Pac. 1048.

²⁸Dove v. Milwaukee, 42 Wis. 108.

upon the lot, the damage to trees if any, and also any benefit which will accrue to the property by the change.²⁹ The right of action accrues when the work is done, and not when the order is passed, and suit must be brought by the owner at the former time.³⁰ A law providing that the grade of certain streets could be changed without making compensation, or, in effect suspending the operation of the charter as to such streets, was held void as depriving the property owners affected of the equal protection of the laws.³¹ Other municipal charters have given damages for a change of grade. Where a charter was repealed after an ordinance was passed for a change of grade, but before the ordinance became effective by publication, it was held to defeat the claim for compensation.³² Where the statute required an assessment of damages before the work was done, a change without complying is unlawful and an action will lie. And the plaintiff is not estopped because he made no objection to the doing of the work.³³ Paving a street, whereby it is made slightly higher in the middle is not a change of grade.³⁴ A statute gave compensation in case a municipality should close up, use or obstruct a highway so as materially to interfere with its usefulness as such, to the injury or damage of abutting owners. It was held not to apply to a change of grade.³⁵

§ 336 (218a). When the statute refers merely to a change of grade must it be from a previously established grade? Such statutes are remedial and should be liberally construed and, therefore, should be held to apply to a change from a natural grade, where the street has been used at such grade.³⁶ This is in accordance with the rule adopted in con-

²⁹French v. Milwaukee, 49 Wis. 584; Church v. Same, 34 Wis. 66; Stadler v. Same, 34 Wis. 98; Church v. Same, 31 Wis. 512; Stowell v. Same, 31 Wis. 523; Tyson v. Same, 50 Wis. 78.

³⁰Tyson v. Milwaukee, 50 Wis. 78; *contra*: McCarthy v. St. Paul, 22 Minn. 527.

³¹Anderson v. Milwaukee, 82 Wis. 279, 52 N. W. 95.

³²Smith v. Eau Claire, 78 Wis. 487, 47 N. W. 830.

³³Jorgenson v. Superior, 111 Wis. 561, 87 N. W. 565; Friedrich v. Milwaukee, 114 Wis. 304, 90 N. W. 174.

See State v. Superior, 108 Wis. 16, 83 N. W. 1100.

³⁴Sanderson v. Herman, 108 Wis. 662, 84 N. W. 890, 85 N. W. 141.

³⁵Smith v. Eau Claire, 78 Wis. 487, 47 N. W. 830.

³⁶Bartlett v. Tarrytown, 55 Hun 492, 30 N. Y. St. 341, 8 N. Y. Supp. 739; Aldrich v. Providence, 12 R. I. 241. *And see* Cambridge v. County Comrs., 125 Mass. 529; Snow v. Provincetown, 109 Mass. 123; Lane v. Boston, 125 Mass. 519; Matter of Greer, 39 App. Div. N. Y. 22; Blair v. Charleston, 43 W. Va. 62, 64 Am. St. Rep. 837, 35 L.R.A. 852.

struing constitutions giving compensation for property damaged or injured by public improvements.³⁷ Some courts hold that the statute refers only to a grade established by actual improvement of the street or one formally adopted by ordinance or resolution.³⁸

§ 337 (218b). What constitutes an established grade. Many statutes in express terms limit the remedy for a change of grade to a change from a previously established grade. The authorities differ as to what constitutes an established grade within the meaning of such statutes. Some hold that the grade must have been established by some express action of the municipal authorities adopting or fixing the grade.³⁹ Others hold that a grade may be established by implication, or by improving the street at its natural grade or otherwise.⁴⁰

§ 338 (218c). What constitutes a change of grade. Macadamizing or paving a street, whereby the surface is slightly raised, is not a change of grade.⁴¹ So merely leveling the surface to make it uniform.⁴² Raising or lowering a part of the

³⁷Eachus v. Los Angeles Consol. El. R. R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; City of Bloomington v. Pollock, 141 Ill. 346, 31 N. E. 146; Sheey v. Kansas City Cable R. R. Co., 94 Mo. 574, 7 S. W. 579; Smith v. Kansas City etc. R. R. Co., 98 Mo. 20, 11 S. W. 259; Davis v. Mo. Pac. R. R. Co., 119 Mo. 180, 24 S. W. 777, 41 Am. St. Rep. 648, 9 Am. R. R. & Corp. Rep. 117; Smith v. City of St. Joseph, 122 Mo. 643, 27 S. W. 344; Dale v. City of St. Joseph, 59 Mo. App. 566; Norristown's Appeal, 3 Walker (Pa. Supm. Ct.) 146; City of Ft. Worth v. Howard, 3 Tex. Civ. App. 537, 22 S. W. 1059.

³⁸Gardiner v. Town Council of Johnston, 16 R. I. 94, 12 Atl. 888; O'Donnell v. White, 24 R. I. 483, 53 Atl. 633; Sargent v. City of Tacoma, 10 Wash. 212, 38 Pae. 1048.

³⁹Mattingly v. Plymouth, 100 Ind. 545; City of Anderson v. Bain, 120 Ind. 254, 22 N. E. 323; City of Valparaiso v. Adams, 123 Ind. 250, 24 N. E. 107; City of Huntington v.

Griffith, 142 Ind. 280, 41 N. E. 8, 589; Kepple v. Keokuk, 61 Ia. 653; Farmer v. Cedar Rapids, 116 Ia. 322, 89 N. W. 1105.

⁴⁰Gibson v. Zimmerman, 27 Mo. App. 90; Folmsbee v. Amsterdam, 142 N. Y. 118, 36 N. E. 821; Stenson v. Mt. Vernon, 104 App. Div. 17, 93 N. Y. S. 309; Cincinnati v. Roth, 20 Ohio C. C. 317; Chattanooga v. Geiler, 13 Lea, 611; *see also* cases cited in last section and Smith v. Board of Comrs., 50 Ohio St. 628, 35 N. E. 796; Neubert v. City of Toledo, 9 Ohio C. C. 462; Matter of Grade Crossing Comrs., 154 N. Y. 550.

⁴¹Warren v. Henry, 31 Ia. 31; Coates v. Iowa, 68 Ia. 550; Bogard v. O'Brien (Ky.), 20 S. W. 1097; Zearfoss v. Lansdale, 1 Mont. Co. L. R. R. 157; Sanderson v. Herman, 108 Wis. 662, 84 N. W. 890, 85 N. W. 141.

⁴²Farrington v. Mt. Vernon, 166 N. Y. 233, 59 N. E. 826, *affirming* S. C. 51 App. Div. 250, 64 N. Y. S. 863; Comesky v. Suffern, 179 N. Y. 393, 72 N. E. 320, *reversing* S. C. 83 App. Div. 137, 81 N. Y. S. 1049; Bissell v.

street,⁴³ building a causeway in the middle,⁴⁴ or a viaduct over it,⁴⁵ have been held to be changes of grade. Filling a street which has settled, so as to compensate for the settling, is not a change of grade.⁴⁶ Where a bank ten feet wide was left between the traveled way and the lot lines, its gradual removal by the city and others, wanting to use the earth, was held not to be a change of grade.⁴⁷ It is immaterial that the change is made by a railroad, with the approval of the municipal authorities.⁴⁸ Where the grade of two parallel adjacent streets is changed, the grade of an intersecting street between the two is not thereby changed by implication to correspond.⁴⁹

§ 339 (218d). The right and remedy are wholly dependent upon the statute. There being no constitutional right to compensation for a change of grade, the whole matter is in the control of the legislature, which may give compensation to such extent and under such circumstances and conditions as it sees fit.⁵⁰ If a right to compensation is created and no remedy provided a common law action will lie.⁵¹ So if the initiative is cast upon the municipality and it fails to have the damages assessed,⁵² or otherwise fails to comply with the law in making the change.⁵³ If the statute provides a remedy, that is exclusive.⁵⁴ A repeal of the statute takes away the remedy.⁵⁵

Larchmont, 57 App. Div. 61, 67 N. Y. S. 692; Stenson v. Mt. Vernon, 104 App. Div. 17, 93 N. Y. S. 309.

⁴³Kokomo v. Mahan, 100 Ind. 242. So where the sidewalk is lowered; McGar v. Bristol, 71 Conn. 652, 48 Atl. 1000; Hinckley v. Franklin, 69 N. H. 614, 45 Atl. 643.

⁴⁴Stickford v. St. Louis, 7 Mo. App. 217; *affirming*, 75 Mo. 309; Dove v. Milwaukee, 42 Wis. 108.

⁴⁵Wi'kin v. St. Paul, 33 Minn. 181. *See ante*, § 138.

⁴⁶Garrity v. City of Boston, 161 Mass. 530, 37 N. E. 672.

⁴⁷Whitmore v. Tarrytown, 137 N. Y. 409, 33 N. E. 489.

⁴⁸Interstate Consol. T. R. R. Co. v. Early, 46 Kan. 197, 26 Pac. 422; Matter of Stack, 50 Hun 385, 3 N. Y. Supp. 231.

⁴⁹Morton v. Burlington, 106 Ia. 50, 75 N. W. 662.

⁵⁰Matter of Beale St., 39 Cal. 495.

⁵¹McCarthy v. St. Paul, 22 Minn. 527; Taylor v. St. Paul, 25 Minn. 129.

⁵²Lafayette v. Wortman, 107 Ind. 404; Jorgenson v. Superior, 111 Wis. 561, 87 N. W. 565; Friedrich v. Milwaukee, 114 Wis. 304, 90 N. W. 174.

⁵³Holley v. Torrington, 63 Conn. 426, 28 Atl. 613; Cook v. Ansonia, 66 Conn. 413, 34 Atl. 183; City of Topeka v. Sells, 48 Kan. 520, 29 Pac. 604; Lafayette v. Nagle, 113 Ind. 425.

⁵⁴Cole v. Muscatine, 14 Ia. 296; Reilly v. Ft. Dodge, 118 Ia. 633, 92 N. W. 887; Golding v. Attleborough, 172 Mass. 223, 51 N. E. 1076; Abel v. Minneapolis, 68 Minn. 89; Heiser v. New York, 104 N. Y. 68, *affirming* 29 Hun 446; Melenbacker v. Salamanca, 188 N. Y. 370, 80 N. E. 1090, *affirming* 116 App. Div. 691; Hoy v. Sala-

§ 340 (218e). When the action accrues. The language of the statute may determine when the action accrues, but, in the absence of anything express in the statute, the better rule is that it accrues when the work is done,⁵⁶ though some courts have held that it accrues when the change is ordered.⁵⁷

§ 341 (218f). Whether the statute applies to changes ordered before but made after it takes effect. It has been held that such a statute did not apply to a change of grade ordered before the statute took effect but which was not executed until afterwards.⁵⁸ But the contrary would seem to be the better rule, and the one in harmony with the prevailing rule as to when the action accrues.⁵⁹

§ 342 (218g). Elements and measure of damages. Where compensation is given generally for damages to abutting property by a change of grade, the measure of damages is the diminution in value, caused by the change.⁶⁰ If the property is not lessened in value there can be no recovery, though expense will have to be incurred in adjusting the property to the new

mance, 57 Misc. 81; Anness v. Providence, 13 R. I. 17; Garraux v. Greenville, 53 S. C. 575, 31 S. E. 597; Kendall v. Columbia, 74 S. C. 539, 54 S. E. 777.

⁵⁵Smith v. White Plains, 67 Hun 81, 22 N. Y. Supp. 450; Smith v. Eau Claire, 78 Wis. 487, 47 N. W. 830.

⁵⁶Pickels v. Ansonia, 76 Conn. 278, 56 Atl. 552; Hempstead v. Des Moines, 63 Ia. 36; Brown v. Lowell, 8 Met. 172; Hodgman v. Concord, 69 N. H. 349, 41 Atl. 287; People v. Zoll, 97 N. Y. 203; Phipps v. North Pelham, 61 App. Div. 442, 70 N. Y. S. 630; O'Brien v. Penn. S. V. R. R. Co., 119 Pa. St. 184, 13 Atl. 74; Ogden v. City of Philadelphia, 143 Pa. St. 430, 22 Atl. 694; Jones v. Bangor, 144 Pa. St. 638, 23 Atl. 252; North Chester v. Eckfeldt, 1 Monaghan (Pa. Supn. Ct.), 732; Tyson v. Milwaukee, 50 Wis. 78.

⁵⁷McCarthy v. St. Paul, 22 Minn. 527; Matter of Change of Grade of 5th and 6th sts., 12 Phila. 587; Ker-

shaw v. Philadelphia, 20 Phila. 318; Campbell v. Philadelphia, 108 Pa. St. 300. See generally *post* § 970.

⁵⁸Cotes v. Davenport, 9 Ia. 227.

⁵⁹City of Bloomington v. Pollock, 141 Ill. 346, 31 N. E. 146; S. C. 38 Ill. App. 133; and see cases cited in last section.

⁶⁰Platt v. Town of Milford, 66 Conn. 320, 34 Atl. 82; McCosh v. Burlington, 72 Ia. 26; Stewart v. Council Bluffs, 84 Ia. 61, 50 N. W. 219; Richardson v. Webster City, 111 Ia. 427, 82 N. W. 920; Millard v. Webster City, 113 Ia. 220, 84 N. W. 1044; Parker v. City of Atchison, 46 Kan. 14, 26 Pac. 435; Chase v. City of Portland, 86 Me. 367, 29 Atl. 1104; Woodbury v. Beverly, 153 Mass. 245, 26 N. E. 851; Dale v. City of St. Joseph, 59 Mo. App. 566; Mauldin v. Greenville, 64 S. C. 444, 42 S. E. 202; Acker v. Knoxville, 117 Tenn. 224, 96 S. W. 973; Fairbanks v. Rockingham, 75 Vt. 221, 54 Atl. 186; French v. Milwaukee, 49 Wis. 584.

grade.⁶¹ There can be no recovery of nominal damages.⁶² Interference with access, the cost of adjusting the property to the new grade, injury from surface water, and whatever affects the value of the property may be taken into consideration.⁶³ The statute may limit the right of compensation to improved property,⁶⁴ or to the buildings alone.⁶⁵

§ 343 (218h). Estoppel to claim damages. The fact that an abutter has dedicated or conveyed land for the street, or released any claim for damages in consequence of its establishment, does not estop him from claiming compensation for a change of grade.⁶⁶ Nor is the plaintiff estopped by the fact that he has done the work in front of his property in compliance with an order of the council,⁶⁷ nor by the fact that he has requested the completion of a change already begun.⁶⁸ Where a person builds to the natural grade after a different grade has been established, he cannot recover for damages caused by bringing the street to the established grade.⁶⁹ Where an abutter built on a ridge to the natural grade and the grade of the street was afterwards lowered, it was held he was not estopped

⁶¹Hempstead v. Des Moines, 52 Ia. 303.

⁶²Burkham v. Ohio & M. R. R. Co., 122 Ind. 344, 23 N. E. 799.

⁶³Shelton Co. v. Birmingham, 62 Conn. 456, 26 Atl. 348; Holley v. Torrington, 63 Conn. 426, 28 Atl. 613; Cook v. City of Ansonia, 66 Conn. 413, 34 Atl. 183; Pickles v. Ansonia, 76 Conn. 278, 56 Atl. 552; City of Topeka v. Martineau, 42 Kan. 387, 22 Pac. 419, 5 L.R.A. 775; Chase v. City of Portland, 86 Me. 367, 29 Atl. 1104; Woodbury v. Beverly, 153 Mass. 245, 26 N. E. 851; Newark v. Weeks, 71 N. J. L. 448, 59 Atl. 901; Mauldin v. Greenville, 64 S. C. 444, 42 S. E. 202; Church v. Milwaukee, 34 Wis. 66; Stadler v. Ibid., 34 Wis. 98; Church v. Ibid., 31 Wis. 512; Stowell v. Ibid., 31 Wis. 523; French v. Ibid., 49 Wis. 584; Tyson v. Ibid., 50 Wis. 78; *post* § 737.

⁶⁴Conklin v. City of Keokuk, 73 Ia. 343, 35 N. W. 444; Chase v. Sioux City, 86 Ia. 603, 53 N. W. 333.

⁶⁵People v. Gilon, 76 Hun 346, 27 N. Y. Supp. 704.

⁶⁶Fernald v. Boston, 12 Cush. 574; Bartlett v. Tarrytown, 52 Hun 380, 24 N. Y. St. 272, 5 N. Y. Supp. 240.

⁶⁷Pearce v. Milwaukee, 18 Wis. 428.

⁶⁸Herser v. Milwaukee, 39 Wis. 108; Hickman v. City of Kansas, 120 Mo. 110, 25 S. W. 225; Klaus v. Jersey City, 69 N. J. L. 127, 54 Atl. 220: *and see* Luscombe v. Milwaukee, 36 Wis. 511. But where the property owner, after an ordinance for a change of grade had been passed, petitioned for the making of the improvement, he was held to be estopped. Preston v. Cedar Rapids, 95 Ia. 71, 63 N. W. 577. *And see* generally: York v. Cedar Rapids, 130 Ia. 453, 103 N. W. 790; Wheat v. Van Tine, 149 Mich. 314, 112 N. W. 933; Jorgensen v. Superior, 111 Wis. 561, 87 N. W. 565.

⁶⁹Omaha v. Williams, 52 Neb. 40.

to recover damages on the ground that he should have foreseen that a change would be necessary.⁷⁰

§ 344 (219). Statutes giving damages for railroads in streets. The code of Iowa, § 464, empowers cities to grant or forbid the laying of railroad tracks in streets, "but no railway track can thus be located and laid down until after the injury to the property abutting on the street, alley or public places upon which such railroad is proposed to be located has been ascertained and compensated" in the manner provided by law. This was held to apply as to any tracks laid after its passage, and that a recovery was not limited merely to damages from change of grade.⁷¹ It was held not to apply to a horse railway,⁷² nor to a railroad crossing a street.⁷³ But if the crossing is diagonal, so that any part of the track or embankment is opposite the plaintiff's lot,⁷⁴ or if the crossing is above or below grade, necessitating an approach in front of plaintiff's property,⁷⁵ there may be a recovery. No right can be acquired until the compensation has been ascertained and paid and a company laying down and using a track without making compensation, and its successors in title, are trespassers.⁷⁶

Where permission to lay a railroad in a street was granted upon condition of paying all damages to private property, it was held that only actionable damages were intended.⁷⁷ But where the condition was that the railroad company should pay all damages that might accrue to the property owners on the street by reason of the construction of the road, it was held that

⁷⁰McGar v. Bristol, 71 Conn. 652, 42 Atl. 1000.

⁷¹Drady v. D. M. & Ft. D. R. R. Co., 57 Ia. 393, 10 N. W. 754; Merchants' Union Barb Wire Co. v. Chicago, B. & Q. R. R. Co., 70 Ia. 105, 28 N. W. 494.

⁷²Sears v. Marshalltown Street Ry. Co., 65 Ia. 742, 23 N. W. 150.

⁷³Morgan v. Des Moines & St. Louis Ry. Co., 64 Ia. 589, 21 N. W. 96, 52 L.R.A. 462. *But see* New Castle & Franklin R. R. Co. v. McChesney, 85 Pa. St. 522.

⁷⁴Enos v. Chicago etc. R. R. Co., 78 Ia. 28, 42 N. W. 575; Gates v. Chicago etc. R. R. Co., 82 Ia. 518, 48 N. W. 1040. *And see* Wead v. St.

Johnsbury etc. R. R. Co. 64 Vt. 52, 24 Atl. 361.

⁷⁵Nicks v. Chicago etc. R. R. Co., 84 Ia. 27, 50 N. W. 222; Hitchcock v. Chicago etc. R. R. Co., 88 Ia. 242, 55 N. W. 337; Middleton v. Mason City etc. R. R. Co. 127 Ia. 433, 103 N. W. 364.

⁷⁶Harbach v. Des Moines etc. R. R. Co., 80 Ia. 593, 44 N. W. 348, 1 Am. R. R. & Corp. Rep. 449, 11 L.R.A. 113.

⁷⁷Sargeant v. Ohio & Mississippi R. R. Co., 1 Handy, Ohio, 52; Henderson Belt R. R. Co. v. Dechamp, 95 Ky. 219, 24 S. W. 605; Same v. Same, 14 Ky. L. R. 44.

a recovery could be had, not only for the depreciation in value of the property, but also for interruption and damage to business during the progress of the work.⁷⁸ Where a statute provides that when tracks are laid upon a public street, the company shall be responsible for injuries done by such location to private property lying upon or near the street, one whose property is situated a few feet beyond the terminus of the road is entitled to recover.⁷⁹ Under the provision of a street railway company's charter that "whenever any estate abutting on a street or highway upon or over which the rails of said corporation shall be laid shall be injured thereby the said corporation shall be liable to pay the owner or owners thereof the damages thereby occasioned to said estate," damages can be recovered for injuries resulting from the laying of the rails only as distinguished from those resulting from the using of them as laid.⁸⁰ But unless limited by the statute the measure of damages is the depreciation in value caused by the construction and use of the tracks.⁸¹ Abutters on both sides of the street may recover though the railroad is laid wholly on one side.⁸² A statute giving compensation for damage caused by electric lines for the transmission of intelligence and in case of electric light and electric power lines and passed before electric railways were in common use, was held not to apply to the latter.⁸³ A statute of Massachusetts in relation to elevated railroads in the streets of Boston gave compensation to abutting owners "who are damaged by reason of the location, construction, maintenance and operation of said lines of railway." The word "damage" "is held to include only damage that is direct and proximate, as distinguished from

⁷⁸St. Louis etc. R. R. Co. v. Capps, 67 Ill. 607; S. C. 72 Ill. 188; Same v. Haller, 82 Ill. 208.

⁷⁹Lake Roland El. R. R. Co. v. Webster, 81 Md. 529, 32 Atl. 186. "The right to redress depends upon the question whether damage was done, and not on the proximity or distance of the operative cause of the injury." Under a similar statute property 300 feet away was held to be "near to" the street occupied. Wheeling etc. R. R. Co. v. Laughlin, 15 Ohio C. C. 1.

⁸⁰Vose v. Newport St. R. R. Co., 17 R. I. 134, 20 Atl. 267.

⁸¹Nicks v. Chicago etc. R. R. Co., 84 Ia. 27, 50 N. W. 222; Boyne City etc. R. R. Co. v. Anderson, 146 Mich. 328, 109 N. W. 429, 117 Am. St. Rep. 642, 8 L.R.A.(N.S.) 306; Railway Co. v. Gardner, 45 Ohio St. 309, 13 N. E. 69; *post*, § 735.

⁸²Kuhl v. Chicago & N. W. R. R. Co., 101 Wis. 42, 77 N. W. 155; Lenz v. Chicago etc. R. R. Co., 111 Wis. 198, 86 N. W. 607.

⁸³McDermott v. Warren etc. R. R. Co., 172 Mass. 197, 51 N. E. 972.

that which is remote and consequential, and to include only that which is special and peculiar to the petitioner and to those similarly situated, as distinguished from that which is common, affecting generally persons and property in the vicinity.”⁸⁴ The statute applies alike to those who own the fee and to those who own a less estate. An act of Missouri required street railroad companies to have determined in advance, in the mode pointed out in the statute, the damages that would be done by the building and operation of such railroads to the real and personal property on the line of the road, and section 3 of the act was as follows: “Damages in this act is hereby defined to be the depreciation in the value of the property that may result from the construction and operation of the proposed railway.” Notwithstanding the very clear and specific directions of the statute the supreme court held that a street surface railroad was a legitimate street use and that, though the abutting property was depreciated in value thereby, the property was not taken or damaged within the meaning of the constitution or statute.⁸⁵

§ 345 (220). Statutes giving damages in other cases. The charter of a railroad company required it “to pay all damages that may arise to any person or persons.” This was held to embrace damages of every description, incidental and consequential, as well as direct, and to apply to those no part of whose land was taken as well as to those over whose land the road was laid.⁸⁶ Injury to a building by excavating on the adjoining lot, whereby the foundations were weakened,⁸⁷ also by raising the grade of the street in front, whereby access was impeded and

⁸⁴Baker v. Boston El. Ry. Co., 183 Mass. 178, 66 N. E. 711.

⁸⁵Ruckert v. Grand Ave. Ry. Co., 163 Mo. 260, 63 S. W. 814; Nagel v. Lindell Ry. Co., 167 Mo. 89, 66 S. W. 1090.

The following cases arose under such statutes, but involve questions that will be considered elsewhere: O'Brien v. Baltimore Belt R. R. Co., 74 Md. 363, 22 Atl. 141; Onset St. R. R. Co. v. County Comrs., 154 Mass. 395, 28 N. E. 286; Grand Rapids & Indiana R. R. Co. v. Heisel, 47 Mich. 393; Taylor v. Bay City St. R. R. Co., 80 Mich. 77, 45 N. W. 335;

Strickford v. Boston etc. R. R. Co., 73 N. H. 1, 59 Atl. 367; Pittsburg, Va. etc. R. R. Co. v. Rose, 74 Pa. St. 362; Wead v. St. Johnsbury etc. R. R. Co., 64 Vt. 52, 24 Atl. 361; Hodges v. Seaboard etc. R. R. Co., 88 Va. 653, 14 S. E. 380; Richmond Traction Co. v. Murphy, 98 Va. 104, 34 S. E. 982; Trustees v. Milwaukee etc. R. R. Co., 77 Wis. 158, 45 N. W. 1086; Grafton v. Baltimore & Ohio R. R. Co., 21 Fed. 309.

⁸⁶Bradley v. New York & New Haven R. R. Co., 21 Conn. 294.

⁸⁷Same.

water turned on the property,⁸⁸ were held to be within the statute. The charter of a gas and water company required it to make compensation for "any injury done to private property." The court interpreted this as follows: "'Private property' necessarily includes everything that can be held or owned by private persons and 'injury' any and every damage to which it can or may be subjected."⁸⁹

A statute of Massachusetts provided as follows: "Every railroad corporation shall be liable to pay all damages that shall be occasioned by laying out and making and maintaining their road, or by taking any land or materials as provided in the preceding section."⁹⁰ The following cases of damage have been held to be within the statute: The draining of plaintiff's well by a deep cut,⁹¹ injury to plaintiff's building by blasting,⁹² and injury by raising the grade of the street in front of plaintiff's property.⁹³ An important case arose out of the following facts: Plaintiff owned premises in Lowell abutting on Western avenue. A railroad company crossed the avenue near the plaintiff's premises, and between them and the center of the city. The track was several feet above the grade of the street, and on either side suitable approaches were made. The result of this was to cause numerous detentions to plaintiff, to impair the convenience of the road, and to depreciate the value of plaintiff's property. No part of the plaintiff's property was taken. The court held that the plaintiff was not entitled to damages.⁹⁴ It is difficult to reconcile this case with an earlier one in the same court. A corporation was authorized to erect dams on a stream, by a statute which provided that any person "sustaining any damage to his land" by reason thereof might obtain compensation. The plaintiff had a soap and candle mill on the stream. The dam

⁸⁸Same; and *Nicholson v. New York & New Haven R. R. Co.*, 22 Conn. 74; *Burritt v. New Haven*, 42 Conn. 174.

⁸⁹*Lycoming Gas & Water Co. v. Moyer*, 99 Pa. St. 615.

⁹⁰R. S. 1836, c. 39, § 56; R. S. 1882, c. 112, § 95.

⁹¹*Parker v. Boston & Maine R. R. Co.*, 3 CUSH. 107, 50 AM. DEC. 709. *To the same effect are Trowbridge v. Brookline*, 144 Mass. 139, and *Bickford v. Hyde Park*, 173 Mass. 552, 73

Am. St. Rep. 320, where a well was drained by a cut for a sewer, and the statute as to damage was similar. See also *McNamara v. Commonwealth*, 184 Mass. 304, 68 N. E. 332.

⁹²*Dodge v. Commissioners of Essex*, 3 Met. 380.

⁹³*Gardiner v. Boston & Worcester R. R. Co.*, 9 CUSH. 1.

⁹⁴*Proprietor of Locks and Canals v. Nashua & Lowell R. R. Co.*, 10 CUSH. 385.

cut off his water communication with Boston, whereby transportation was rendered more expensive. It was held that he could recover.⁹⁵ In the former case there was an interference with a highway by land, in the latter an interference with a highway by water. In both cases the interference caused a depreciation of the plaintiff's property. In neither case was any part of the plaintiff's property taken.

Under a statute which provided for the payment of "all damages that shall be sustained by any persons in their property * * * by the construction of any aqueducts, etc., for the purpose of the act," it was held that an injury by transporting materials over land was embraced by the act and the remedy provided by the act was exclusive.⁹⁶ But a statute giving damages for property taken or affected by a public work does not cover damages by negligence or unskillfulness.⁹⁷ An act which provides that the mayor and aldermen of a city shall have power to ascertain any damage done to property by a certain improvement, and to provide for payment of the same, imposes an imperative duty and vests a right of action in the owner of property so injured, whether the city makes such provision or not.⁹⁸ In Pennsylvania it has been held that an act requiring compensation for any injury or damage to private property by particular works includes all damages, consequential and remote.⁹⁹

⁹⁵Boston & Roxbury Mill Corporation v. Gardner, 2 Pick. 33.

⁹⁶Tower v. Boston, 10 Cush. 235.

⁹⁷Bailey v. Mayor etc. of New York, 3 Hill, 531.

⁹⁸Gregg v. Mayor etc. of Baltimore, 56 Md. 256.

⁹⁹Buckwalter v. Black Rock Bridge Co., 38 Pa. St. 281; Watson v. Pittsburgh & Connellsburg R. R. Co., 37 Pa. St. 469; Mifflin v. Railroad Co., 16 Pa. St. 182; *see also* Coster v. Albany, 52 Barb. 276. In the following case it was held that legal injury only is intended; Shrunk v. Schuylkill Navigation Co., 14 S. & R. 71. Where a canal was transferred by the State to a private company, who agreed to pay "any and all claims for damages or other demands against the commonwealth," the company was held bound to pay only such

claims as the commonwealth would have been held liable for, and hence was held not liable for consequential damages. Delaware Division Canal Co. v. McKeen, 52 Pa. St. 117. Where a company was authorized to improve a stream and required to file a bond "sufficient to indemnify all persons holding property on said stream for any loss by reason of said improvement," this was held not to enlarge the company's liability so as to make it responsible for consequential damages. Woodward v. Webb, 65 Pa. St. 254. But where a gas company gave a voluntary bond to pay the plaintiff "all damages of whatsoever nature or kind" that he might sustain by constructing or repairing pipe lines across certain described property, the language was held to cover consequential damages.

Under an act which provides for an assessment of damages sustained by reason of any excavation or embankment made in the construction of a railroad, proceedings cannot be had to assess damages for an additional track in a street.¹ Under an act giving compensation "to all parties interested for all damages by them sustained by reason of the exercise of such powers," it was held that damage to goods could be recovered.² Where a canal was abandoned and granted to a city by the State upon condition that the city should "be liable for all damages which might accrue from the vacation of said canal," it was held the city would only be liable for such damages as would have been a legal claim against the State.³ A statute authorizing a company to take land and material, for improving the navigation of a river, "being accountable to the owners thereof for all damages, if any," does not make the company liable for consequential damages, as by changing the current so as to wash away the plaintiff's banks.⁴ Statutes giving damages for telephone poles and fixtures in a street,⁵ for a public urinal in a street,⁶ and for the vacation of a highway,⁷ are cited in the margin. A navigation company was made liable for consequential damages to property situated on either side of its improvements. This was held to refer to contiguous property and not to property situated some ways below a dam and injured thereby.⁸ A statute of Massachusetts authorized the State Board of Agriculture to take measures for the extermination of the gypsy moth, and to enter upon lands for that purpose, and provided that "the owner of any land so entered upon, who should suffer damage by such entry and acts done thereon," by the board, might recover therefor from the city or town in which the land was situated. This was held not to extend to personal property on the land, such

Pennsylvania Nat. Gas Co. v. Cook, 123 Pa. St. 170, 16 Atl. 762. *And see* as in line with the text; Commonwealth v. Snyder, 2 Watts 418; Boston Belting Co. v. City of Boston, 152 Mass. 307, 25 N. E. 613.

¹Cumberland Valley R. R. Co. v. Rhoadarmer, 107 Pa. St. 214.

²Knock v. Metropolitan Railway Co., 4 L. R. C. P. 131; 38 L. J. C. P. 78. *To same effect;* Jabb v. The Hull Dock Co., 9 A. & E. N. S. 443, 58 E. C. L. R. 441.

Em. D.—40.

³Hubbard v. City of Toledo, 21 Ohio St. 379. *To same effect,* Coster v. Albany, 43 N. Y. 399.

⁴Brooks v. Cedar Brook etc. Imp. Co., 82 Me. 17, 19 Atl. 87, 17 Am. St. Rep. 459, 7 L.R.A. 460.

⁵Chesapeake & P. Tel. Co. v. Mackenzie, 74 Md. 36, 21 Atl. 690.

⁶Badger v. Boston, 130 Mass. 170.

⁷Brandenburg v. Hittel (Ind.) 37 N. E. Rep. 329.

⁸Ihmsen v. Monongahela Nav. Co., 32 Pa. St. 153.

as cord wood, and that there could be no recovery under the statute for its destruction.⁹ Another act of the same State to provide for a metropolitan water supply, provided for taking the business part of the town of West Boylston and contained a provision as follows: "In case any individual or firm owning on April 1, 1895, an established business on land in the town of West Boylston, whether the same shall be taken or not under this act, or the heirs or personal representatives of such individual or firm, shall deem that such business is decreased in value by the carrying out of this act, whether by loss of custom or otherwise, and is unable to agree with said board as to the amount of damages to be paid for such injury, such damages shall be determined and paid in the manner hereinbefore provided." It was held that though such damages were not recoverable under the constitution, there was nothing to prevent the legislature from providing for such compensation,¹⁰ and various cases construing the act as to what constituted an established business and as to the elements and measure of damages are referred to in the margin.¹¹ Where an act gave compensation for "all damages sustained by any person or corporation by the taking of land or any right therein under this act," it was held that one, no part of whose land was taken, could not recover for the temporary flooding of his land during the construction of the works.¹² A statute of New York to provide for an additional water supply for the city of New York gives compensation not only for the injury or destruction of an established business but also to employees of six months' standing in any such business or upon land taken who are thrown out of employment.¹³

Statutes giving compensation in general terms for property damaged or injured are similar, in effect, to the constitutional

⁹Globe Fire Ins. Co. v. Lexington, 173 Mass. 6.

¹⁰Earle v. Commonwealth, 180 Mass. 579, 63 N. E. 10, 91 Am. St. Rep. 326, 57 L.R.A. 292.

¹¹*Ibid.*; Gavin v. Commonwealth, 182 Mass. 190, 65 N. E. 37; Sawyer v. Commonwealth, 182 Mass. 245, 65 N. E. 52, 59 L.R.A. 726; Fairbanks v. Commonwealth, 183 Mass. 373, 67 N. E. 335; Sawyer v. Commonwealth, 185 Mass. 356, 70 N. E. 438; Allen v.

Commonwealth, 188 Mass. 59, 74 N. E. 287, 69 L.R.A. 599; Whiting v. Commonwealth, 196 Mass. 468, 82 N. E. 670.

¹²McSweeney v. Commonwealth, 185 Mass. 371, 70 N. E. 429. See also Whitney v. Commonwealth, 190 Mass. 531, 77 N. E. 516.

¹³See Laws of New York, 1905, c. 724, § 42 as amended by § 9, c. 315 Laws of 1906; Matter of Simmons, 58 Misc. 581, 109 N. Y. S. 1036.

provisions considered in the subsequent sections of this chapter and decisions thereunder are grouped with those construing such constitutional provisions, under the appropriate headings. Where there are different statutes of this sort in the same State, giving compensation for property damaged by different sorts of public works or improvements, they should be regarded as resting upon the same reasons and should be so construed, if possible, as to be uniform in their operation and in the results which they accomplish.¹⁴

II.—IN CONSTITUTIONS.

§ 346 (221). Constitutional provisions. When the people of Illinois revised their constitution in 1870, they introduced an important change into the provision respecting the power of eminent domain. The provision reads as follows: "Private property shall not be taken *or damaged* for public use without just compensation."¹⁵ Nearly every other State which has revised its constitution since 1870 has followed the example set by Illinois by adding the word *damaged*, or its equivalent, to the provision in question.¹⁶ Prior to 1870, as appears from the preceding sections, statutes had been passed in many of the

¹⁴ Sheldon v. Boston ete. R. R. Co., 172 Mass. 180, 182, 51 N. E. 1078; Hyde v. Fall River, 189 Mass. 439, 75 N. E. 953, 2 L.R.A.(N.S.) 269.

¹⁵ Art. II, § 13.

¹⁶ "Taken or damaged." Illinois, art. ii, § 13, 1870; West Virginia, art. iii, § 9, 1872; Missouri, art. i, § 20, 1875; Nebraska, art. 1, § 21, 1875; Colorado, art. ii, § 14, 1876; California, art. i, § 14, 1879; Louisiana, art. 150, 1879; Mississippi, art. iii, § 17, 1890; Montana, art. iii, § 14, 1889; North Dakota, art. i, § 4, 1889; Oklahoma, § 32, 1907; South Dakota, art. vi, § 13, 1889; Utah, art. i, § 22, 1895; Virginia, art. i, § 6, 1902; Washington, art. i, § 16; Wyoming, art. i, § 32. "Taken, injured or destroyed." Kentucky, § 242, 1891. "Taken, appropriated or damaged." Arkansas, art. ii, § 22, 1874. "Taken, damaged or destroyed." Texas, art.

i, § 17, 1876. "Taken, destroyed or damaged." Minnesota art. i, § 13, as amended in 1896. In the new constitution of Pennsylvania, adopted in 1874, a provision was inserted as follows: "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." Art. i, § 8. The new constitutions of Alabama adopted in 1875 and 1901 contain the same provision. Art. xiii, § 7. In both States the general provision as to taking remains. The exceptions are Florida, Idaho, New York, North Carolina and South Carolina.

States giving compensation for property damaged or injured in particular cases or for particular public uses. These statutes related mostly to the change of street grades. In England, since 1845, compensation has been allowed by act of Parliament for property "injuriously affected" by the construction of public works.¹⁷ The proper meaning of the words damaged or injured in these late constitutions is now to be considered.

§ 347 (222). The terms "damaged," "injured" and "injuriously affected" are synonymous. The legal profession are familiar with a distinction between damage and injury. *Damnum absque injuria* has been the answer to many a lawsuit, which, being interpreted, means that there may be damage or loss without any violation of legal right. In common usage, however, these words are practically synonymous. Webster defines damage as "any hurt, injury or harm to one's estate;" and injury he defines as "any wrong or damage done to a man's person, rights, reputation or goods." The people of Pennsylvania, when they said that private property should not be *injured* for public use without compensation, undoubtedly understood and intended the same thing as the people of Illinois, who said that it should not be *damaged* for public use without compensation. The evil to be remedied was the same in both States. In England the word *damaged*, in a statute providing compensation for land damaged, was held equivalent to the words *injuriously affected* and given the same construction.¹⁸ Likewise the words *all damages*, in a similar statute.¹⁹ So also the word *injured*.²⁰ The word *injured*, in a New Jersey statute, was construed by the courts of that State to mean the same as the words *injuriously affected*, in the English statute.²¹ So of the word *damaged* in the constitution of Colorado.²² The Supreme Court of Georgia, referring to the words *damaged*, *injured* and

¹⁷Land Clauses Consolidation Act, § 68.

¹⁸Hall v. Mayor of Bristol, L. R. 2 C. P. 322; *see also* Ripley v. Great Northern Ry. Co., L. R. 10 Ch. App. 435.

¹⁹East & West India Docks etc. Co. v. Gattke, 3 McN. & G. 155; New River Co. v. Johnson, 2 E. & E. 435; S. C. 105 E. C. L. R. 434.

²⁰Rickett's Case, 2 Eng. & Irish App. 193.

²¹Columbia Delaware Bridge Co. v. Geisse, 35 N. J. L. 558.

²²Town of Longmont v. Parker, 14 Colo. 386, 23 Pac. 443, 20 Am. St. Rep. 277, 2 Am. R. R. & Corp. Rep. 91. "In those cases the words are 'injuriously affected,' which are certainly in meaning and intention the same as the word 'damaged' in our constitution."

injuriously affected, says: "All these terms are believed to be equivalent in meaning and extent." ²³ And the Supreme Court of Washington, speaking of these words in recent constitutions, says that, though the constitutions differ slightly in phraseology, "their substance is exactly the same." ²⁴ And so of other courts.²⁵

§ 348 (223). Damages from change of grade. All damage resulting to abutting property by reason of lowering or raising the street in front of it, is within the constitutional provisions in question, and compensation must be made therefor.²⁶

²³Peel v. Atlanta, 85 Ga. 138, 11 S. E. 582, 2 Am. R. R. & Corp. Rep. 413.

²⁴Brown v. City of Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. Rep. 214, 7 Am. R. R. & Corp. Rep. 64.

²⁵Tidewater Ry. Co. v. Shartzner, 107 Va. 562, 59 S. E. 407.

²⁶Montgomery v. Townsend, 80 Ala. 489; S. C. 84 Ala. 478, 4 So. 780; Winter v. City Council, 83 Ala. 589; City Council of Montgomery v. Maddox, 89 Ala. 181, 7 So. 433, 2 Am. R. R. & Corp. Rep. 426; Town of Avondale v. McFarland, 101 Ala. 381, 13 So. 504; Montgomery v. Lemle, 121 Ala. 609, 25 So. 919; New Decatur v. Scharfenberg, 147 Ala. 367, 41 So. 1025, 119 Am. St. Rep. 81; Reardon v. San Francisco, 66 Cal. 492, 56 Am. Rep. 109; De Long v. Warren (Cal.) 36 Pac. 1009; Eachus v. Los Angeles Consol. El. R. R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; Bancroft v. San Diego, 120 Cal. 432; Eachus v. Los Angeles, 130 Cal. 492, 62 Pac. 829; Smith v. Los Angeles, 136 Cal. 156, 68 Pac. 595; Atlanta v. Green, 67 Ga. 386; Moore v. Atlanta, 70 Ga. 611; Castlebury v. Atlanta, 74 Ga. 164; Atlanta v. Wood, 78 Ga. 276; Atkinson v. Atlanta, 81 Ga. 625, 7 S. E. 692; Smith v. Floyd County, 85 Ga. 422, 11 S. E. 850; City Council of Augusta v. Schrameck, 96 Ga. 426, 23 S. E. 400; Barfield v. Macon Co., 109 Ga. 386, 34 S. E. 593; Roughton v. Atlanta, 113 Ga. 948, 39 S. E. 316;

Ficken v. Atlanta, 114 Ga. 970, 41 S. E. 58; Columbus v. McDaniel, 117 Ga. 823, 45 S. E. 59; East Rome v. Lloyd, 124 Ga. 852, 53 S. E. 103; Atlantic etc. Ry. Co. v. McKnight, 125 Ga. 328, 54 S. E. 148; Macon v. Daly, 2 Ga. App. 355, 58 S. E. 540; Pekin v. Brereton, 67 Ill. 477; Bloomington v. Brokaw, 77 Ill. 194; Pekin v. Winkel, 77 Ill. 56; Elgin v. Eaton, 83 Ill. 535, 25 Am. Rep. 412; S. C. 2 Ill. App. 90; Springer v. City of Chicago, 135 Ill. 552, 26 N. E. 514, 12 L.R.A. 609, 4 Am. R. R. & Corp. Rep. 52; Tinker v. City of Rockford, 137 Ill. 123, 27 N. E. 74; Tinker v. City of Rockford (Ill.) 28 N. E. 573; Hohman v. City of Chicago, 140 Ill. 226, 29 N. E. 671; City of Bloomington v. Pollack, 141 Ill. 346, 31 N. E. 146; City of Joliet v. Blower, 155 Ill. 414, 40 N. E. 619; Schroeder v. Joliet, 189 Ill. 48, 59 N. E. 550, 52 L.R.A. 634; Chicago v. Jackson, 196 Ill. 496, 63 N. E. 1013; Chicago v. Lonergan, 196 Ill. 518, 63 N. E. 1018; Grant Park v. Trah, 218 Ill. 516, 75 N. E. 1040; City of Elgin v. McCullum, 30 Ill. App. 416; Osgood v. Chicago, 44 Ill. App. 532; City of Springfield v. Griffith, 46 Ill. App. 246; City of Savanna v. Loop, 47 Ill. App. 214; City of Joliet v. Blower, 49 Ill. App. 464; Hermann v. City of East St. Louis, 58 Ill. App. 166; Hopkins v. City of Ottawa, 59 Ill. App. 288; North Alton v. Dorsett, 59 Ill. App. 612; East St. Louis v.

It is immaterial whether the whole surface of the street is raised or lowered or only a part of it, as where a causeway is built in

Murphy, 89 Ill. App. 22; Danville v. Schultz, 99 Ill. App. 287; Barrington v. Meyer, 103 Ill. App. 124; Wheeler v. Bloomington, 105 Ill. App. 97; Grant Park v. Trah, 115 Ill. App. 291; Charleston v. Newman, 130 Ill. App. 6; Henderson v. McClain, 102 Ky. 402, 43 S. W. 700, 39 L.R.A. 349; Layman v. Beeler, 113 Ky. 221, 67 S. W. 995; Hay v. Lexington, 114 Ky. 665, 71 S. W. 867; Ludlow v. Dweller, 20 Ky. L. R. 894, 47 S. W. 881; Louisville v. Hegan, 20 Ky. L. R. 1532, 49 S. W. 532; Mt. Sterling v. Jephson, 21 Ky. L. R. 1028, 53 S. W. 1046; Covington v. Taffee, 24 Ky. L. R. 373, 68 S. W. 629; Manning v. Shreveport, 119 La. 1044, 44 So. 882; Dickerman v. Duluth, 88 Minn. 288, 92 N. W. 1119; Salden v. Little Falls, 102 Minn. 358, 113 N. W. 884, 120 Am. St. Rep. 635, 13 L.R.A.(N.S.) 790; Vicksburg v. Herman, 72 Miss. 211, 16 So. 434; Rainey v. Hinds County, 78 Miss. 308, 28 So. 875; Yazoo etc. R. R. Co. v. Lefoldt, 87 Miss. 317, 39 So. 459; Werth v. Springfield, 78 Mo. 107; Householder v. City of Kansas City, 83 Mo. 488; Davis v. Mo. Pac. R. R. Co., 119 Mo. 180, 24 S. W. 77, 41 Am. St. Rep. 648, 9 Am. R. R. & Corp. Rep. 117; Hickman v. City of Kansas, 120 Mo. 110, 25 S. W. 225; Speneer v. Met. St. R. R. Co., 120 Mo. 154, 23 S. W. 126, 22 L.R.A. 668; Clinkingbeard v. City of St. Joseph, 122 Mo. 641, 27 S. W. 521; Smith v. City of St. Joseph, 122 Mo. 643, 27 S. W. 344; Smith v. City of Kansas City, 128 Mo. 23, 30 S. W. 314; Farrar v. Midland Elec. Ry. Co., 162 Mo. 469, 63 S. W. 115; Imber v. City of Springfield, 30 Mo. App. 669; Carson v. City of Springfield, 53 Mo. App. 289; Walker v. Sedalia, 74 Mo. App. 70; Hampton v. Kansas City, 74 Mo. App. 129; Restesky v. Delmar Ave. etc. R. R. Co., 106 Mo. App. 382, 85 S. W. 665; Less v. Butte, 28 Mont. 27, 72 Pac. 140, 98 Am. St. Rep. 545, 61 L.R.A. 601; Schaller v. City of Omaha, 23 Neb. 325, 36 N. W. 533; City of Omaha v. Kramer, 25 Neb. 492, 41 N. W. 295, 13 Am. St. Rep. 504; City of Omaha v. Schaller, 26 Neb. 522, 42 N. W. 721; Hammond v. City of Harvard, 31 Neb. 635, 48 N. W. 462; Lowe v. Omaha, 33 Neb. 587, 50 N. W. 760; Fremont etc. R. R. Co. v. Setright, 34 Neb. 253, 51 N. W. 833; Svanson v. City of Omaha, 38 Neb. 550, 57 N. W. 289; Dayton v. City of Lincoln, 39 Neb. 74, 57 N. W. 754; Harvard v. Crouch, 47 Neb. 133, 66 N. W. 276; Douglas County v. Taylor, 50 Neb. 535; Omaha L. & T. Co. v. Douglas County, 62 Neb. 1, 86 N. W. 936; New Brighton v. United Presbyterian Church, 96 Pa. St. 331; Pusey v. Allegheny, 98 Pa. St. 522; New Brighton v. Peirsol, 107 Pa. St. 280; O'Brien v. Penn. S. V. R. R. Co., 119 Pa. St. 184, 13 Atl. 74; Ogden v. City of Philadelphia, 143 Pa. St. 430, 22 Atl. 694; O'Brien v. City of Philadelphia, 150 Pa. St. 589, 24 Atl. 1047, 30 Am. St. Rep. 832; Lawrence v. Philadelphia, 154 Pa. St. 20, 25 Atl. 1079; Mellor v. City of Philadelphia, 160 Pa. St. 614, 28 Atl. 991; Brady v. Wilkes-Barre, 161 Pa. St. 246, 28 Atl. 1085; City of Philadelphia v. Rudderow, 166 Pa. St. 241, 31 Atl. 53; Lewis v. Borough of Darby, 166 Pa. St. 613, 31 Atl. 335; Seaman v. Borough of Washington, 172 Pa. St. 467, 33 Atl. 756; In re Chatham St., 191 Pa. St. 604, 43 Atl. 365; Kelenke v. West Homestead, 216 Pa. St. 476, 65 Atl. 1079; Bond v. Philadelphia, 218 Pa. St. 475, 67 Atl. 805; Norristown's Appeal, 3 Walker's Pa. Supm. Ct. 146;

the middle,²⁷ or an embankment on one side,²⁸ or the sidewalk only is raised or lowered.²⁹ When a roadway forty feet wide was graded down by a turnpike company in the middle of a highway sixty feet wide, and thirty years after the public authorities graded down the sides of the street to correspond, it was held to be a change of grade.³⁰ Where a street is opened and graded in one proceeding, compensation should be assessed both for the taking and the grading.³¹ But where a change is made from the natural grade after a street is opened, compen-

In re Levering Street, 14 Phil. 349; In re Germantown Ave., 14 Phil. 351; Lloyd v. Philadelphia, 17 Phil. 202; Wilkesbarre Paper Mfg. Co. v. Wilkesbarre, 5 Luzerne Leg. Reg. Rep. 333; Cooper v. Scranton City, 21 Pa. Supr. Ct. 17; Seale v. Lead, 10 S. D. 312, 39 L.R.A. 345; Texarkana v. Talbot, 7 Tex. Civ. App. 202, 26 S. W. 451; San Antonio v. Mullaly, 11 Tex. Civ. App. 596, 33 S. W. 256; City of Ft. Worth v. Howard, 3 Tex. Civ. App. 537, 22 S. W. 1059; Kimball v. Salt Lake City, 32 Utah 253, 90 Pac. 395; Hempstead v. Salt Lake City, 32 Utah 261, 90 Pac. 397; Swift v. Newport News, 105 Va. 108, 52 S. E. 821, 3 L.R.A.(N.S.) 404; Brown v. City of Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. Rep. 214, 7 Am. R. R. & Corp. Rep. 64; Swope v. Seattle, 35 Wash. 69, 76 Pac. 517; Compton v. Seattle, 38 Wash. 514, 80 Pac. 757; Hart v. Seattle, 42 Wash. 113, 84 Pac. 640; Fletcher v. Seattle, 43 Wash. 627, 86 Pac. 1046, 88 Pac. 843; Johnson v. Parkersburg, 16 W. Va. 402, 37 Am. Rep. 779; Hutchinson v. Parkersburg, 25 W. Va. 226; Blair v. Charleston, 43 W. Va. 62, 64 Am. St. Rep. 837, 35 L.R.A. 852; Barnes v. Grafton, 61 W. Va. 408, 56 S. E. 608; Crowe v. Charlestown, 62 W. Va. 91; Chicago v. Taylor, 125 U. S. 161; McElroy v. Kansas City, 21 Fed. 257; Lehigh Valley Coal Co. v. Chicago, 26 Fed. 415; Blanchard v. City of Kansas, 5 McCrary 217; Queen v. Vestry of St. Luke's etc., L.

R. 6 Q. B. 572; S. C. 7 L. R. Q. B. 148; Queen v. The Wallasey Local Board of Health, L. R. 4 Q. B. 351; Queen v. Eastern Counties Ry. Co., 2 A. & E. N. S. 347; S. C. 42 E. C. L. R. 706; Adams v. Toronto, 12 Ontario, 243; Yeomans v. Wellington, 4 U. C. App. 301; Pratt v. City of Stratford, 16 U. C. App. 5; Moore v. Great Southern etc. R. R. Co., 10 Irish C. L. R. 46; Tuohy v. Same, 10 Irish, C. L. R. 98.

²⁷Eachus v. Los Angeles Consolidated Electric R. R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; Rainey v. Hinds County, 78 Miss. 308, 28 So. 875; Chouteau v. St. Louis, 8 Mo. App. 48; *see also* the following cases under statutes, but involving the same principle: Stickford v. St. Louis, 7 Mo. App. 217; *affirmed* in 75 Mo. 309; Dore v. Milwaukee, 42 Wis. 108.

²⁸Shawneetown v. Mason, 82 Ill. 337, 25 Am. Rep. 321.

²⁹City Council of Montgomery v. Maddox, 89 Ala. 181, 7 So. 433, 2 Am. R. R. & Corp. Rep. 426; Grant Park v. Trah, 218 Ill. 516, 75 N. E. 1040, *affirming* S. C. 115 Ill. App. 291. *And see* cases cited in next section.

³⁰Harp v. Glenolden, 28 Pa. Supr. Ct. 116. *See* Thompson v. Macon City, 106 Mo. App. 84, 80 S. W. 1.

³¹Pusey v. Allegheny, 98 Pa. St. 522; Sedgeley Ave., 217 Pa. St. 313, 66 Atl. 546.

sation must be made for the change.³² The contrary is held in

³² *Eachus v. Los Angeles Consol. El. R. R. Co.*, 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; *City of Bloomington v. Pollack*, 141 Ill. 346, 31 N. E. 146; *City of Elgin v. Eaton*, 83 Ill. 535, 25 Am. Rep. 412; *Manning v. Shreveport*, 119 La. 1044, 44 So. 882; *Sallden v. Little Falls*, 102 Minn. 358, 113 N. W. 884, 120 Am. St. Rep. 635, 13 L.R.A. (N.S.) 790; *Davis v. Missouri Pac. R. R. Co.*, 119 Mo. 180, 24 S. W. 777, 41 Am. St. Rep. 648, 9 Am. R. R. & Corp. Rep. 117; *Hickman v. City of Kansas*, 120 Mo. 110, 25 S. W. 225; *Smith v. St. Joseph*, 122 Mo. 643, 27 S. W. 344; *Less v. Butte*, 28 Mont. 27, 72 Pac. 140, 98 Am. St. Rep. 545, 61 L.R.A. 601; *New Brighton v. United Presbyterian Church*, 96 Pa. St. 331; *Hendrick's Appeal*, 103 Pa. St. 358; *Jones v. Bangor*, 144 Pa. St. 638, 23 Atl. 252; *O'Brien v. City of Philadelphia*, 150 Pa. St. 589, 24 Atl. 1047, 30 Am. St. Rep. 832; *Winner v. Graner*, 173 Pa. St. 43, 33 Atl. 698; *Klenke v. West Homestead*, 216 Pa. St. 476, 65 Atl. 1079; *Norristown's Appeal*, 3 Walker's Pa. Supm. Ct. 146; *Wilkesbarre Paper Mfg. Co. v. Wilkesbarre*, 5 Luzerne Legal Reg. Rep. 333; *City of Ft. Worth v. Howard*, 3 Tex. Civ. App. 537, 22 S. W. 1059; *Fletcher v. Seattle*, 43 Wash. 627, 86 Pac. 1046, 88 Pac. 843. In the first case cited the court says: "The same rule is applicable when a street is for the first time reduced to an established grade as when a change in the grade has been made after the street has once been brought to such grade. The suggestion that, when the owner dedicates his land for a street, it is with the understanding and consent on his part, binding also upon his grantees, that it will be subsequently fitted for use by grading, applies with as much force to any subsequent

change in the established grade as to the first establishment of a grade. The power of the city to determine the grade is not exhausted with its first exercise, and the dedication by the owner must be deemed to have been made with a knowledge of this principle as much as with a consent to the establishment of any grade. The purchaser of a city lot fronting upon a street takes it subject to a right in the public to make the street available for the enjoyment of the easement therein for which the street was originally dedicated; but we are not aware that it has ever been held, where the foregoing constitutional provision prevailed, that the public had a right to establish any grade it might choose, irrespective of the damage such owner might sustain. This right to establish a grade in the street is attended with the corresponding obligation imposed by the constitution to make compensation for any damage to the private property which may be caused by the public in its exercise of the right. It may be conceded that the dedication of a street carries with it the right to make such a reasonable grade as will adapt it for use, for in such a case the grading of the street would have the effect to increase rather than to diminish the value of the lots adjacent thereto by making them accessible to the public; but, if the municipality deems it desirable to establish such a grade as will cause a damage rather than a benefit to the lots, the owner is entitled to compensation for the amount of this damage. The establishment of the grade is for the benefit of the public rather than of the adjacent owner, and if, in establishing such grade, the owner suffers damage, his property has been damaged 'for public use.'"

Colorado.³³ One who buys property on a street after a grade has been established should improve with reference to the established grade and not with reference to the natural grade. And where, in such a case, the purchaser improved with reference to the natural grade, and the city afterwards cut down the street three feet to the established grade, it was held that no recovery could be had.³⁴ And generally if improvements are put upon property after a grade has been established, no damages can be recovered for injury to such improvements by bringing the street to the grade so established.³⁵ The constitution does not apply to a change of grade made prior to its adoption,³⁶ but it is no bar to a recovery that the change was ordered or the grade established prior to the adoption of the constitution, if the actual change was not made until afterwards.³⁷ Nor that the improve-

³³Leiper v. Denver, 36 Colo. 110, 85 Pac. 849, 118 Am. St. Rep. 101, 7 L.R.A.(N.S.) 108. The court says: "We are now constrained to hold that for reasonable, and carefully made, changes of the grade of a public street from the natural surface to a legally established grade in the first instance, a municipality is not liable to the abutting lot owner for consequential damages to his property." p. 113.

³⁴Denver v. Vernia, 8 Colo. 399.

³⁵Manning v. Shreveport, 119 La. 1044, 44 So. 882; Davis v. Mo. Pac. R. R. Co., 119 Mo. 180, 24 S. W. 777, 41 Am. St. Rep. 648, 9 Am. R. R. & Corp. Rep. 117; Clinkingbeard v. St. Joseph, 122 Mo. 641, 27 S. W. 521; Axford v. Philadelphia, 19 Phila. 483; Blair v. Charleston, 43 W. Va. 62, 64 Am. St. Rep. 837, 35 L.R.A. 852. Compare Nolte v. Cincinnati, 3 Ohio C. C. 503. In this case it was held, that if the work of bringing a street to an established grade was not done in a reasonable time, property owners might consider the grade abandoned, and improve their property with reference to the existing grade, and recover damages to such improvements if the change was

afterwards made. The court says: "To say that, in a large city, where property is of so great value, and taxes high, the city can by a mere paper ordinance, fix a grade which may require heavy cuts and fills to be made, and keep back any improvement according to the grade for a great many years, and prevent the abutting proprietor from making any improvements on his property except according to such grade, and which improvement may be entirely inaccessible until the grade is made, and which the city may never carry out, seems to us as sacrificing the interests of property holders in a manner the spirit of our law does not warrant." p. 507.

³⁶Folkenson v. Easton Borough, 116 Pa. St. 523.

³⁷Eachus v. Los Angeles Consol. El. R. R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; City of Bloomington v. Pollack, 141 Ill. 346, 31 N. E. 146; Ogden v. City of Philadelphia, 143 Pa. St. 430, 22 Atl. 694; Swift v. Newport News, 105 Va. 108, 52 S. E. 821, 3 L.R.A.(N.S.) 404. Compare Chicago v. Rumsey, 87 Ill. 348; In re Plan 166, 143 Pa. St. 414, 22 Atl. 669.

ments were made before the constitution was changed.³⁸ The right to compensation accrues when the change of grade is actually made and is governed by the law in force at that time.³⁹ If a change of grade is made without the authority of the city, it will not be liable for damages resulting therefrom,⁴⁰ but a grade not legally established may be ratified and adopted so as to bind the city.⁴¹ When a city ordered a change of grade of a railroad, necessitating a change of grade in the streets crossing it, the latter change is authorized as much as if specified in the order.⁴² The fact that a change of grade was made by a city to enable it to construct a system of sewers calculated to abate a nuisance, does not affect the right to compensation.⁴³ Where a change of grade damaged lots on an intersecting street by preventing the flow of surface water therefrom, it was held that the owner could recover.⁴⁴ And so generally when property is damaged by interfering with surface water.⁴⁵ If the change is made by a railroad company, with or without authority, the company is liable.⁴⁶ A deed, or dedication of land for a street is no bar to recovery.⁴⁷ Where a sidewalk was built by special assessment and the grade changed in doing so, it was held that the assessment was no bar to a recovery of damages for the change of grade.⁴⁸ But if one requests the change to be made, he is estopped to claim damages because of the change.⁴⁹

³⁸Dickerman v. Duluth, 88 Minn. 288, 92 N. W. 1119; Kimball v. Salt Lake City, 32 Utah 253, 90 Pac. 395.

³⁹East Rome v. Lloyd, 124 Ga. 852, 53 S. E. 103; Devlin v. Philadelphia, 206 Pa. St. 518, 56 Atl. 21; *ante*, § 338.

⁴⁰Bibb County v. Reese, 115 Ga. 346, 41 S. E. 636; Werth v. Springfield, 22 Mo. App. 12; Gardner v. St. Joseph, 96 Mo. App. 657, 71 S. W. 63. *And see* Vaile v. City of Independence, 116 Mo. 333, 22 S. W. Rep. 695; Huckensteine v. City of Allegheny, 165 Pa. St. 367, 30 Atl. Rep. 982.

⁴¹Bibb County v. Reese, 115 Ga. 346, 41 S. E. 636; Imler v. City of Springfield, 30 Mo. App. 669.

⁴²Lewis v. Homestead, 194 Pa. St. 199, 45 Atl. 123.

⁴³City of Philadelphia v. Rudde-row, 166 Pa. St. 241, 31 Atl. 53.

⁴⁴In re Chatham Street, 191 Pa. St. 604, 43 Atl. 365.

⁴⁵Barfield v. Macon County, 109 Ga. 386, 34 S. E. 596; Hay v. Lexington, 114 Ky. 665, 71 S. W. 867; Mt. Sterling v. Jephson, 21 Ky. L. R. 1028, 53 S. W. 1046.

⁴⁶Atlantic etc. Ry. Co. v. McKnight, 125 Ga. 328, 54 S. E. 148; Yazoo etc. R. R. Co. v. Lefoldt, 87 Miss. 317, 39 So. 459; Farrar v. Midland Elec. Ry. Co., 162 Mo. 469, 63 S. W. 115.

⁴⁷Houston v. Bartels, 36 Tex. Civ. App. 498, 82 S. W. 323; Fletcher v. Seattle, 43 Wash. 627, 86 Pac. 1048, 88 Pac. 843.

⁴⁸Grant Park v. Trah, 218 Ill. 516, 75 N. E. 1040, *affirming* S. C. 115 Ill. App. 291.

⁴⁹New Decatur v. Schafenberg, 147 Ala. 367, 41 So. 1025, 119 Am. St. Rep. 81.

§ 349 (223a). Viaducts, tunnels, causeways, bridge approaches and the like in streets. The construction of viaducts, bridges and tunnels and approaches thereto, for the purpose of carrying streets over or under railroad tracks, streams or other obstructions, though often of great public utility, is frequently attended with great damage to property abutting on such improvements. All such damage is within the constitution and may be recovered.⁵⁰ Such improvements stand upon the same footing as a change of grade.⁵¹ So a recovery may be had where the grade of a street is raised for the purpose of forming a levee,⁵² or where an approach to a bridge is built therein which affects the abutting property by impeding access and by the dust, noise and jarring caused by traffic on the same.⁵³

§ 350 (224). Decisions in Alabama and Pennsylvania.

⁵⁰City of Pueblo v. Strait, 20 Colo. 13, 36 Pac. 790, 47 Am. St. Rep. 273, 24 L.R.A. 392; Smith v. Floyd County, 85 Ga. 422, 11 S. E. 850; Bentley v. Atlanta, 92 Ga. 623, 18 S. E. 1013; Pause v. Atlanta, 98 Ga. 92, 58 Am. St. Rep. 290; Stack v. East St. Louis, 85 Ill. 377, 28 Am. Rep. 619; Springer v. City of Chicago, 135 Ill. 552, 26 N. E. 514, 12 L.R.A. 609, 4 Am. R. R. & Corp. Rep. 52; Tinker v. City of Rockford, 137 Ill. 123, 27 N. E. 74; Tinker v. City of Rockford (Ill.), 28 N. E. 573; Hohman v. City of Chicago, 140 Ill. 226, 29 N. E. 671; Hermann v. City of East St. Louis, 58 Ill. App. 166; Chicago v. McShane, 102 Ill. App. 239; Chicago v. Anglum, 104 Ill. App. 188; Star & Crescent Milling Co. v. Sanitary District, 120 Ill. App. 555; Louisville etc. R. R. Co. v. Cumnock, 25 Ky. L. R. 1330, 77 S. W. 933; Spencer v. Metropolitan St. R. R. Co., 120 Mo. 154, 23 S. W. 126, 22 L.R.A. 668; City of Omaha v. Kramer, 25 Neb. 492, 41 N. W. 295, 13 Am. St. Rep. 504; Fremont etc. R. R. Co. v. Setright, 34 Neb. 253, 51 N. W. 833; County of Chester v. Brower, 117 Pa. St. 647, 12 Atl. 577; Brower v. County of Chester, 1 Pa. Co. Ct. I; Beaver v. City of Harrisburg, 156 Pa.

St. 547, 27 Atl. 4; Case v. Pennsylvania Co., 159 Pa. St. 273, 28 Atl. 161; Lafean v. York County, 20 Pa. Supr. Ct. 573; Coyne v. Memphis, 118 Tenn. 651, 102 S. W. 355; Burton Lumber Co. v. Houston, 45 Tex. Civ. App. 363; Chicago v. Taylor, 125 U. S. 161; Chicago v. Le Moyne, 119 Fed. 662, 56 C. C. A. 278. *And see* Eachus v. Los Angeles Consol. El. R. R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; Shano v. Bridge Co., 189 Pa. St. 245, 42 Atl. 128, 69 Am. St. Rep. 808; In re Walnut St. Bridge, 191 Pa. St. 153, 43 Atl. 88; Cobb v. Warren St. Ry. Co., 218 Pa. St. 366, 67 Atl. 654. In Chicago v. Rumsey, 87 Ill. 348, suit was brought for damages to property abutting on the open approach to a tunnel under the Chicago river. A recovery was denied because the ordinance was passed, the contracts let and the work commenced before the new constitution took effect. *And see* South v. East London Ry. Co., 42 L. J. 477.

⁵¹See *ante*, § 138.

⁵²Shawneetown v. Mason, 82 Ill. 337, 25 Am. Rep. 321; Beckett v. Midland Ry. Co., 1 L. R. C. P. 241; S. C. 3 L. R. C. P. 82.

⁵³Stack v. East St. Louis, 85 Ill. 377.

What constitutes a construction or enlargement of works, highways or improvements. These States have a limited extension of the right to damages, requiring municipal and other corporations and individuals invested with the power of eminent domain to make compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements.⁵⁴ In Pennsylvania the question as to what constitutes a construction or enlargement of a street or highway does not appear to have been discussed. Suits for damages arising from a change of grade, whether from a natural grade or an established grade have uniformly been upheld,⁵⁵ and a liberal construction of the constitution has been favored.⁵⁶ The purport of the decisions is that any change of grade is within the provision in question. A different view was at first taken in Alabama but has since been repudiated. In *City Council of Montgomery v. Townsend*,⁵⁷ it was held that it was not every change of grade that could be considered a "construction" or "enlargement" of a street or highway, but only such as could not have been reasonably and fairly foreseen at the time of the original establishment of the street or highway.⁵⁸ In *City Council of Montgomery v. Maddox*,⁵⁹ Somer-

⁵⁴*Ante*, §§ 16, 49.

⁵⁵*New Brighton v. United Presbyterian Church*, 96 Pa. St. 331; *Pusey v. Allegheny*, 98 Pa. St. 522; *Hendrick's Appeal*, 103 Pa. St. 358; *New Brighton v. Piersol*, 107 Pa. St. 280; *O'Brien v. Penn. S. V. R. R. Co.*, 119 Pa. St. 184, 13 Atl. 74; *Ogden v. City of Philadelphia*, 143 Pa. St. 430, 22 Atl. 694; *O'Brien v. City of Philadelphia*, 150 Pa. St. 589, 24 Atl. 1047; *Mellor v. City of Philadelphia*, 160 Pa. St. 614, 28 Atl. 991; *Brady v. Wilkesbarre*, 161 Pa. St. 246, 28 Atl. 1085; *City of Philadelphia v. Rudde-row*, 166 Pa. St. 241, 31 Atl. 53; *Lewis v. Borough of Darby*, 166 Pa. St. 613, 31 Atl. 335; *Seaman v. Washington*, 172 Pa. St. 467, 33 Atl. 756; *In re Chatham*, 191 Pa. St. 604, 43 Atl. 365; *Klenke v. West Homestead*, 216 Pa. St. 476, 65 Atl. 1079; *Bond v. Philadelphia*, 218 Pa. St. 475, 67 Atl. 805; *Norristown's Appeal*, 3 Walker's Pa. Supn. Ct. 146;

In re Levering St., 14 Phil. 349; *Lloyd v. Philadelphia*, 17 Phil. 202; *Wilkesbarre Paper Mfg. Co. v. Wilkesbarre*, 5 Luzerne Leg. Reg. Rep. 333.

⁵⁶*New Brighton v. United Presbyterian Church*, 96 Pa. St. 331; *County of Chester v. Brower*, 117 Pa. St. 647, 12 Atl. 577.

⁵⁷80 Ala. 489, 2 So. Rep. 155; 84 Ala. 478, 4 So. 780

⁵⁸*In City Council of Montgomery v. Townsend*, 84 Ala. 478, 482, 4 So. Rep. 780, it is said: "'A material change, operating injuriously 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,

ville, J., in delivering the opinion of the court, expressed himself as follows: "I have no difficulty, for myself, in reaching the conclusion that, under the provisions of our present constitution, if the contiguous proprietor of a house and lot is injured, in the sense of being damaged, by the grading of a street, in the mode exhibited by the evidence in this case, and this grading is done by the authority of the municipality, and by reason of this improvement the pecuniary value of the property is diminished, the owner is entitled to be compensated for the damages he has sustained. This rule has the advantage of being plain in meaning, and of easy application in practice. It harmonizes, moreover, in policy with that distinguishing feature of modern republican constitutions which has in view the protection of private rights and personal liberty, against the unjust oppression and encroachments of governmental power; and the measure of damages in such cases will be the decrease in the

which casts upon the property owner an additional burden, entitling him to compensation.' It is not every change operating an increase of convenience which falls within this rule. Changes generally have for their object increase of convenience. This power may be exercised completely at one time, or, on several occasions, as circumstances may suggest; and it authorizes the municipality to so alter the grade or surface of the streets, as to make them useful, convenient and safe for travel and transportation, as the same may be likely to be in request generally, or on the particular street. To come within the clause of the constitution we are discussing, the change, alteration or improvement must go beyond this. It must be the result of a contingency not likely to be foreseen, or anticipated, or must be an increasing convenience above the ordinary standard of 'useful, convenient and safe,' or, must be made for ornamentation or for the purpose of improving the general appearance of the street. We have thus attempted to define, as well as

we can, the two classes of street alteration or improvement. The power to make such as fall within the one class, is conclusively presumed to have been conferred by the act of dedication, or by the judgment of condemnation. In fact, it is so generally conferred, that it may almost be said to be inherent in municipal organization. For the proper exercise of this power, the attingent property holder, though injured, is without redress. For injury suffered from the other, he is entitled to compensation under the new provision of our constitution of 1875. But whether the case falls within the one class or the other, must depend on so many phases and shadings of fact, that it can rarely, if ever, become a question of law. Larger license must be allowed in a city than in a village, in a commercial center and crowded thoroughfare, than in an obscure off-street. Hence, it is a mixed question of law and fact, to be pronounced on by a jury under proper instructions."

5^o89 Ala. 181, 7 So. 433, 2 Am. R. R. & Corp. Rep. 426.

actual value of the property occasioned by the improvement thus made for the public benefit. Unless this construction be given the constitution, it will fail, in my opinion, to afford that just indemnity for the wrongs of the citizens which was intended to be accomplished by its framers; which was, I repeat, to require the public to bear the burden of municipal improvements of this nature made for the public benefit, and not to crush the private citizen by imposing upon him alone the entire damage which may have been caused to his property. Such an improvement seems to me to be a ‘construction or enlargement’ of a highway, within the meaning of the clause under consideration. And I do not see that any dedication of a street, however long ago it may have been made, could operate to withdraw the case from the operation of the law, in force at the time the improvement is made, which declares, in effect, that the municipality shall indemnify the citizen for any injury or damage to his property resulting from such improvement, equally with any injury or damage done him by the actual taking of such property. It can make no difference in the justice of the case if one’s property is reduced to one-half its original value by an actual taking, or by indirectly covering up his premises with earth piled up at his doorstep in leveling a street or in digging down a sidewalk so as to render a ladder necessary for access to the place of his abode or his business.” But the judges were equally divided on the question of adopting the views of Justice Somerville or adhering to the views expressed in Townsend’s case. In the more recent case of *Town of Avondale v. McFarland*,⁶⁰ the majority of the court adopted the opinion of Justice Somerville in Maddox’s case, and Townsend’s case was overruled in so far as it conflicted with that opinion.

A county has been held to be a municipal corporation within the meaning of the constitution.⁶¹

§ 351 (225). Damages by railroads in streets. Where a railroad is laid down in a public street or alley, the abutting property is damaged within the meaning of the constitution, to the extent of the depreciation caused by the construction and operation of the road.⁶² In Pennsylvania, where the consti-

⁶⁰101 Ala. 381, 13 So. 504.

Delaware County’s Appeal, 119 Pa.

⁶¹Brower v. County of Chester, 1 Pa. Co. Ct. 1; County of Chester v.

St. 159, 13 Atl. 62.

Brower, 117 Pa. St. 647, 12 Atl. 577;

⁶²Columbus & W. R. R. Co. v. Withrow, 82 Ala. 190; Alabama M.

R. R. Co. v. Coskey, 92 Ala. 254, 9 So. 202; Highland Ave. & B. R. R. Co. v. Matthews, 99 Ala. 24, 10 So. 267; Birmingham Ry. Lt. & P. Co. v. Oden, 146 Ala. 495, 41 So. 129; Hot Springs R. R. Co. v. Williamson, 45 Ark. 429; Little Rock etc. Ry. Co. v. Greer, 77 Ark. 387, 96 S. W. 129; Mullin v. So. Pac. R. R. Co., 83 Cal. 240, 23 Pac. 264; Eachus v. Los Angeles Consol. El. R. R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; Montgomery v. Santa Ana & W. R. R. Co., 104 Cal. 186, 37 Pac. 786, 10 Am. R. R. & Corp. Rep. 25, 43 Am. St. Rep. 89, 25 L.R.A. 654; St. Clair v. San Francisco etc. Ry. Co., 142 Cal. 647, 76 Pac. 485; Smith v. Southern Pac. R. R. Co., 146 Cal. 164, 79 Pac. 868, 106 Am. St. Rep. 17; Reynolds v. Presidio etc. R. R. Co., 1 Cal. App. 229, 81 Pac. 1118; Denver v. Boyer, 7 Colo. 113, 2 Pac. 6; Denver etc. R. R. Co. v. Schmitt, 11 Colo. 56; Denver etc. R. R. Co. v. Bourne, 11 Colo. 59; Denver etc. R. R. Co. v. Domke, 11 Colo. 247; Union Pac. R. R. Co. v. Foley, 19 Colo. 280, 35 Pac. 542; Union Pac. R. R. Co. v. Benson, 19 Colo. 285, 35 Pac. 544; Colorado Mid. R. R. Co. v. Trevarthen, 1 Colo. App. 152, 27 Pac. 1012; Denver etc. R. R. Co. v. Coates, 1 Colo. App. 336, 28 Pac. 1129; Campbell v. Metropolitan St. R. R. Co., 82 Ga. 320, 9 S. E. 1078; Fouche v. Rome St. R. R. Co., 84 Ga. 233, 10 S. E. 1046, 1 Am. R. R. & Corp. Rep. 188; Ivey v. Georgia etc. R. R. Co., 84 Ga. 536, 11 S. E. 128; Georgia etc. R. R. Co. v. Ray, 84 Ga. 376, 11 S. E. 352; Brunswick & W. R. R. Co. v. Waycross, 88 Ga. 68, 13 S. E. 835; Harvey v. Georgia So. etc. R. R. Co., 90 Ga. 66, 15 S. E. 783; Streyer v. Georgia etc. R. R. Co., 90 Ga. 56, 15 S. E. 637; Powell v. Macon etc. R. R. Co., 92 Ga. 209, 17 S. E. 1027; Atlantic etc. Ry. Co. v. McKnight, 125 Ga. 328, 54 S. E. 148; Atlanta etc. R. R. Co. v. Atlanta etc. R. R. Co., 125 Ga. 529, 54 S. E. 736;

Mix v. La Fayette etc. R. R. Co., 67 Ill. 319; Stone v. Fairbury etc. R. R. Co., 68 Ill. 394, 18 Am. Rep. 556; Chicago & Pacific R. R. Co. v. Francis, 70 Ill. 238; Stetson v. Chicago & Evanston R. R. Co., 75 Ill. 74; Patterson v. Chicago, D. & V. R. R. Co., 75 Ill. 588; Chicago, M. & St. Paul Ry. Co. v. Hall, 90 Ill. 42; S. C. 8 Ill. App. 621; Pittsburgh, Ft. Wayne & Chicago R. R. Co. v. Reide, 101 Ill. 157; Chicago & Western I. R. R. Co. v. Ayers, 106 Ill. 511; Chicago etc. R. R. Co. v. McAuley, 121 Ill. 160; Penn Mut. Life Ins. Co. v. Heiss, 141 Ill. 35, 31 N. E. 138, 6 Am. R. R. & Corp. Rep. 407; Chicago etc. R. R. Co. v. Wedel, 144 Ill. 9, 32 N. E. 547; Davenport etc. Terminal Co. v. Johnson, 188 Ill. 472, 59 N. E. 497; Ill. Cent. R. R. Co. v. Turner, 194 Ill. 575, 62 N. E. 798, *affirming* S. C. 97 Ill. App. 219; Aldis v. Union El. R. R. Co., 203 Ill. 567, 68 N. E. 95; Spalding v. Macomb etc. Ry. Co., 225 Ill. 585, 80 N. E. 327; Chicago & Western Indiana R. R. Co. v. Berg, 10 Ill. App. 607; Same v. George, *Id.* 646; Same v. Phillips, *Id.* 648; Chicago & Eastern Ill. R. R. Co. v. Loeb, 8 Ill. App. 627; Maltman v. Chicago etc. R. R. Co., 41 Ill. App. 229; McCarty v. Chicago etc. R. R. Co., 34 Ill. App. 273; Chicago etc. R. R. Co. v. Leach, 41 Ill. App. 584; Atchison etc. R. R. Co. v. Platt, 53 Ill. App. 263; Lake St. El. R. R. Co. v. Brooks, 90 Ill. App. 173; Ill. Cent. R. R. Co. v. Schmidgall, 91 Ill. App. 23; Ill. Cent. R. R. Co. v. Kreeble, 95 Ill. App. 185; Griveau v. South Chicago City Ry. Co., 130 Ill. App. 519; Ball v. Maysville etc. R. R. Co., 102 Ky. 486, 43 S. W. 731, 80 Am. St. Rep. 362; Willis v. Ky. & Ind. Bridge Co., 104 Ky. 186, 46 S. W. 488; Louisville So. R. R. Co. v. Cogar, 15 Ky. L. R. 444; Louisville So. R. R. Co. v. Hooe, 18 Ky. L. R. 521, 35 S. W. 266, 38 S. W. 131; Chesapeake etc. Ry. Co. v. Rice, 20 Ky. L. R. 1930, 90

tution only gives compensation for property injured by the "construction or enlargement" of works or improvements,⁶³ it is held that compensation may be had for damages by the construction of railroads in streets, though not for damages caused by their operation, as by smoke, noise, cinders, etc.⁶⁴ But in

S. W. 541; Koch v. Ky. & Ind. Bridge Co., 26 Ky. L. R. 216, 80 S. W. 1133; Hepting v. New Orleans Pac. R. R. Co., 36 La. An. 898; Griffin v. Shreveport etc. R. R. Co., 41 La. An. 808, 6 So. 624; McMahan v. St. Louis etc. R. R. Co., 41 La. An. 827, 6 So. 640; Helmer v. Colo. Southern etc. R. R. Co. (La.), 47 So. 443; Alabama & V. R. R. Co. v. Bloom, 71 Miss. 247, 15 So. Rep. 72; Gottschalk v. C. & B. & Q. R. R. Co., 14 Neb. 550; Omaha etc. R. R. Co. v. Rogers, 16 Neb. 117; Omaha Belt R. R. Co. v. McDermott, 25 Neb. 717, 41 N. W. Rep. 648; Omaha etc. R. R. Co. v. Janecek, 30 Neb. 276, 46 N. W. 478, 27 Am. St. Rep. 399; Nebraska etc. R. R. Co. v. Scott, 31 Neb. 571, 48 N. W. 390; Chicago etc. R. R. Co. v. O'Conner, 42 Neb. 90, 60 N. W. 326; Jaynes v. Omaha St. R. R. Co., 53 Neb. 631, 74 N. W. 67, 39 L.R.A. 751; Galveston etc. R. R. Co. v. Eddins, 60 Tex. 656; Same v. Bock, 63 Tex. 245; Same v. Fuller, 63 Tex. 467; Texas etc. R. R. Co. v. Goldberg, 68 Tex. 685; Lyles v. Texas etc. R. R. Co., 73 Tex. 95; Morrow v. St. Louis etc. R. R. Co., 81 Tex. 405, 17 S. W. 44; Williams v. Galveston etc. R. R. Co., 1 Tex. App. Civil Cas. 131; Galveston etc. Ry. Co. v. Graves, *Ibid.*, 301; Belt Line St. Ry. Co. v. Crabtree, 2 Tex. App. Civil Cas. p. 579; Aycock v. San Antonio Brewing Co., 26 Tex. Civ. App. 341, 63 S. W. 953; Rische v. Texas Trans. Co., 27 Tex. Civ. App. 33, 66 S. W. 324; Schier v. Cane Belt Ry. Co., 45 Tex. Civ. App. 295; Stockdale v. Rio Grande Western Ry. Co., 28 Utah 201, 77 Pac. 849; Kaufman v. Tacoma etc. R. R. Co., 11 Wash. 632, 40 Pac.

637; Seattle Transfer Co. v. Seattle, 27 Wash. 520, 68 Pac. 90; Lund v. Idaho etc. R. R. Co., 50 Wash. 574, 97 Pac. 665; Arbens v. Wheeling & H. R. R. Co., 33 W. Va. 1, 10 S. E. 14, 5 L.R.A. 371; Fox v. Baltimore & O. R. R. Co., 34 W. Va. 466, 12 S. E. 757; Stewart v. Ohio Riv. R. R. Co., 38 W. Va. 438, 18 S. E. 604; Guinn v. Ohio Riv. R. R. Co., 46 W. Va. 151, 33 S. E. 87, 76 Am. St. Rep. 806; Hart v. Piedmont etc. R. R. Co., 52 W. Va. 396, 44 S. E. 155; Pennsylvania R. R. Co. v. Miller, 132 U. S. 75, 10 S. C. Rep. 34, 1 Am. R. R. & Corp. Rep. 15; Hot Springs R. R. Co. v. Williamson, 136 U. S. 121, 10 S. C. Rep. 955; Osborne v. Mo. Pac. R. R. Co., 147 U. S. 248, 13 S. C. Rep. 299; Mollandin v. Union Pacific R. R. Co., 4 McCrary, 290, 14 Fed. Rep. 394; Frankle v. Jackson, 30 Fed. Rep. 398; Osborne v. Mo. Pac. R. R. Co., 35 Fed. Rep. 84; Jackson v. Chicago etc. R. R. Co., 41 Fed. Rep. 656; Beckett v. Midland Ry. Co., 1 L. R. C. P. 241, affirmed, 3 L. R. C. P. 82; Queen v. Eastern Counties Ry. Co., 2 A. & E. N. S. 347, 42 E. C. L. R. 706; Harrocks v. Met. R. R. Co., 4 B. & S. 357, 116 E. C. L. R. 314.

⁶³See *ante*, § 49.

⁶⁴Duncan v. Pennsylvania R. R. Co., 94 Pa. St. 435; S. C. 13 Phil. 68; Pennsylvania R. R. Co.'s Appeal, 115 Pa. St. 514; Pennsylvania R. R. Co. v. Lippincott, 116 Pa. St. 472, 9 Atl. 871; Pennsylvania R. R. Co. v. Merchant, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. Rep. 659; Pennsylvania S. V. R. R. Co. v. Ziemer, 124 Pa. St. 560, 17 Atl. 187; Baltimore & C. V. R. R. Extension Co. v. Duke, 129 Pa.

Pennsylvania S. V. R. Co. v. Walsh,⁶⁵ where a railroad was laid close to plaintiff's curb line, the court seems to hold that the interference with access by the passage of trains may be taken into account. In Missouri it is held that a railroad, laid so as to conform to the grade of the street, is not a taking or damaging of the abutting property within the meaning of the constitution, though such property is depreciated thereby.⁶⁶ But if the railroad is laid otherwise than upon the grade of the street,

St. 422, 18 Atl. 566; Cass v. Pennsylvania Co., 159 Pa. St. 273, 28 Atl. 161; Ryan v. Penn. S. V. R. R. Co., 2 Mont. Co. L. R. 31; Quigley v. Penn. S. V. R. R. Co., 2 Mont. Co. L. R. 109; O'Brien v. Penn. S. V. R. R. Co., 4 Mont. Co. L. R. 57. In Beek v. Erie Terminal R. R. Co., 11 Pa. Co. Ct. 363, it was held that abutters on the north side of a street were not entitled to damages for a railroad on the south half of the street, if they still had convenient access to their property. Compare Shano v. Bridge Co., 189 Pa. St. 245, 42 Atl. 128, 69 Am. St. Rep. 808.

⁶⁵124 Pa. St. 544, 17 Atl. 186; S. C. 5 Mont. Co. L. R. 57. The court says: "It was urged, however, that the mere laying down of the tracks in front of the plaintiff's property was not, of itself, an injury; that it was a benefit, in view of the fact that the street had been greatly improved by having been repaved with Belgian blocks in a superior manner; and the injury was the sole result of the use and operation of the road. This is plausible, but unsound. Where the question is the obstruction of access to property by the building of a railroad, it is impossible to separate the construction from the operation of the road. Such a doctrine would be a misapplication of the rule laid down in Railroad Co. v. Marchant, *supra*. It would be an unsavory technicality to hold that a railroad laid down by the curb in front of a man's door, with trains constantly passing

and repassing, did not interfere with his access to his house, and was not an injury caused by the construction of the road. No authority for such a proposition can be found in anything this court has ever said."

⁶⁶Henry Gauss & Sons Mfg. Co. v. St. Louis etc. R. R. Co., 113 Mo. 308, 20 S. W. 658, 18 L.R.A. 339, 7 Am. R. R. & Corp. Rep. 235. This case is commented on somewhat in Osborne v. Mo. Pac. R. R. Co., 147 U. S. 248, 13 S. C. 299, in a way that warrants the inference that the latter court regarded the former decision as erroneous. The subject of railroads in streets is elaborately considered in De Geofroy v. Merchants' Bridge Terminal Ry. Co., 179 Mo. 698, 79 S. W. 386, 101 Am. St. Rep. 524, 64 L.R.A. 959. wherein the court, sitting in bank, says: "That the power of a city or other municipal corporation in Missouri to authorize the construction of railroads in the public streets is 'a modified right, a right hedged about with many qualifications,' that it does not include the right to grant a railroad the exclusive use of the surface of a street even when laid at grade. Neither can the municipal authority grant the power to a railroad company of such use of a street as will destroy or unreasonably interfere with the right of an abutting property holder of access to or egress from his property or deprive him of his easement of light and air from the street. The street on which a railroad is constructed on the grade

the abutter is entitled to compensation.⁶⁷ The same rule applies to street railways as to commercial railways, for the question does not depend upon what is a legitimate street use, but on whether the abutting property is damaged for public use.⁶⁸ But a distinction seems to be made in Pennsylvania and this may be justified by the peculiar provisions of the constitution of that State.⁶⁹ It is immaterial whether the fee of the street is in the public or in the adjoining owner.⁷⁰ So a recovery may be

cannot be used for side tracks, the storing of cars, for water tanks or like structures," p. 715. See Ruckert v. Grand Ave. Ry. Co., 163 Mo. 260, 63 S. W. 814; Nagel v. Lindell Ry. Co., 167 Mo. 89, 66 S. W. 1090.

⁶⁷Sheehy v. Kansas City Cable R. R. Co., 94 Mo. 574, 7 S. W. 579, 4 Am. St. Rep. 396; Smith v. Kansas City etc. R. R. Co., 98 Mo. 20, 11 S. W. 259; Gates v. Kansas City etc. R. R. Co., 111 Mo. 28, 19 S. W. 957; Brady v. Kansas City Cable R. R. Co., 111 Mo. 329, 19 S. W. 953; Spenceer v. Metropolitan St. R. R. Co., 120 Mo. 154, 23 S. W. Rep. 126, 22 L.R.A. 668; De Geofroy v. Merchants Bridge Terminal Ry. Co., 179 Mo. 698, 79 S. W. 386, 101 Am. St. Rep. 524, 64 L.R.A. 959; Spenceer v. Met. St. R. R. Co., 58 Mo. App. 513.

⁶⁸Birmingham Ry. L. & P. Co. v. Oden, 146 Ala. 495, 41 So. 129; Montgomery v. Santa Ana etc. Co., 104 Cal. 186, 37 Pac. 786, 43 Am. St. Rep. 89, 25 L.R.A. 654; Reynolds v. Presidio etc. R. R. Co., 1 Cal. App. 229, 81 Pac. 1118; Campbell v. Metropolitan St. R. R. Co., 82 Ga. 320, 9 S. E. 1078; Fouche v. Rome St. R. R. Co., 84 Ga. 233, 10 S. E. 726, 1 Am. R. R. & Corp. Rep. 188; Aldis v. Union El. R. R. Co., 203 Ill. 567, 68 N. E. 95; Sheehy v. Kansas City Cable R. R. Co., 94 Mo. 574, 7 S. W. 579, 4 Am. St. Rep. 396; Brady v. Kansas City Cable R. R. Co., 111 Mo. 329, 19 S. W. 953; Spenceer v. Met. St. R. R. Co., 58 Mo. App. 513; Hot Springs R. R. Co. v. Williamson, 136

U. S. 121, 10 S. C. 955. *But see* San Antonio Rapid Transit St. Ry. Co. v. Limburger, 88 Tex. 79, 30 S. W. 533, 53 Am. St. Rep. 730; Ruckert v. Grand Ave. Ry. Co., 163 Mo. 260, 63 S. W. 814; Nagel v. Lindell Ry. Co., 167 Mo. 89, 66 S. W. 1090.

⁶⁹Lockart v. Craig St. R. R. Co., 139 Pa. St. 419, 21 Atl. 26; S. C. 8 Pa. Co. Ct. 470; Rafferty v. Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. Rep. 763, 6 Am. R. R. & Corp. Rep. 287; Lockart v. Craig St. R. R. Co., 8 Pa. Co. Ct. 470; Commonwealth v. West Chester, 9 Pa. Co. Ct. 542; Heilman v. Lebanon & A. R. R. Co., 10 Pa. Co. Ct. 241; Dilly v. Wilkesbarre Pass. R. R. Co., 12 Pa. Co. Ct. 270; Township of Mahaney v. Beaver Meadow etc. R. R. Co., 13 Pa. Co. Ct. 344; Perry v. Wilkesbarre etc. Pass. R. R. Co., 4 Luzerne Leg. Reg. Rep. 519. But where a street railway was laid under an ordinance which made it liable for all damages to abutting property, it was held liable for the diminution in the value of the property. May v. Carbondale Traction Co., 167 Pa. St. 343, 31 Atl. Rep. 667. The constitution of Pennsylvania limits the liability for property injured but not taken to corporations and individuals "invested with the privilege of taking private property for public use." *Ante*, § 49. Street railway corporations are not usually vested with such power.

⁷⁰Denver v. Bayer, 7 Colo. 113; Gottschalk v. C. B. & Q. R. R. Co., 14 Neb. 550; Stewart v. Ohio Riv. R. R.

had for damages caused by laying an additional track in a street,⁷¹ or by moving a track nearer the plaintiff's property.⁷²

§ 352 (226). Damages by other uses of streets. Damages resulting to abutting property by any improvement or use of streets for public purposes are undoubtedly within the constitution. Where a city erected a tank and steam engine in front of plaintiff's property, for the purpose of supplying water to its citizens, which caused smoke and cinders to be thrown upon his property and depreciated its value, it was held that he could recover.⁷³ So where the city placed a standpipe in the street near plaintiff's property.⁷⁴ If abutting property is injured by the construction of sewers or drains in the street,⁷⁵ or by ditches or canals for conveying water,⁷⁶ a recovery may be had. In Missouri the erection of telephone poles in a street is held not to come within the constitutional provision as to damage.⁷⁷ But we think this is clearly an error.⁷⁸ Where an abutter has built an area to afford light to his basement, under a revocable license from the city, the city may fill up the area and cut off the light, and the abutter will have no claim, as for property damaged, injured, or destroyed within the constitution.⁷⁹ In Pennsylvania it has been intimated but not decided

Co., 38 W. Va. 438, 18 S. E. 604; *ante*, § 128.

Ill. 588, 37 N. E. 1096, 10 Am. R. R. & Corp. Rep. 62, 41 Am. St. Rep. 400.

⁷¹Denver etc. R. R. Co. v. Domke, 11 Colo. 247; Denver etc. R. R. Co. v. Costes, 1 Colo. App. 336, 28 Pac. Rep. 1129; Pittsburgh etc. R. R. Co. v. Reich, 101 Ill. 157; Hogan v. Chicago etc. R. R. Co., 208 Ill. 161, 69 N. E. 853; McCarty v. C. B. & Q. R. R. Co., 34 Ill. App. 273; Maltman v. Chicago etc. R. R. Co., 41 Ill. App. 229; Chicago etc. R. R. Co. v. O'Connor, 42 Neb. 90, 60 N. W. 326; Northern Central R. R. Co. v. Holland, 117 Pa. St. 613, 12 Atl. 575; Dilley v. Wilkesbarre Pass. R. R. Co., 12 Pa. Co. Ct. 270.

⁷²Gerst v. St. Louis, 185 Mo. 191, 84 S. W. 34, 105 Am. St. Rep. 580; City of Plattsmouth v. Boeck, 32 Neb. 297, 49 N. W. 167; Ladd v. City of Philadelphia, 171 Pa. St. 485, 33 Atl. 62; Chatham Street, 16 Pa. Supr. Ct. 103; Johnson v. St. Louis, 137 Fed. 439; Stanton v. Metropolitan Board of Works, 26 L. J. Ch. 300.

⁷³Town of Longmont v. Parker, 14 Colo. 386, 23 Pac. Rep. 443, 20 Am. St. Rep. 277, 2 Am. R. R. & Corp Rep. 91; Walley v. Platte & D. Ditch Co., 15 Colo. 579, 26 Pac. 129.

⁷⁴Julia Building Association v. Bell Telephone Co., 88 Mo. 258, 57 Am. Rep. 398.

⁷⁵See *ante*, § 187; Maxwell v. Central D. & P. Tel. Co., 51 W. Va. 121, 41 S. E. 125.

⁷⁶Winter v. City Council, 83 Ala. 589.

⁷⁷Morrison v. Hinkson, 87 Ill. 587, 29 Am. Rep. 77.

⁷⁸Barrows v. City of Sycamore, 150

that an abutter may have his action at law for any damages sustained by the laying of a gas main underneath the sidewalk adjacent to his property.⁸⁰

§ 353 (226a). Damages by the vacation of streets.

This subject has been fully considered in a former chapter, both as to when such damages are a taking and when damage or injury within constitutions and statutes,⁸¹ though not with reference to the effect of the constitutional provisions now under consideration. But the authorities hold that an abutter is not entitled, by virtue of these provisions, to recover damages occasioned by the vacation of a street, or part of a street, if his property does not abut upon the part vacated, and he is not deprived of an outlet from his property.⁸² Property which abuts on the vacated part or is deprived of an outlet is damaged within the constitution.⁸³

§ 354 (227). Impeding access to premises by interfering with public ways not in front of same. We have already seen that if, by any authorized use or improvement of the street in front of property, access thereto is impeded or it is otherwise depreciated in value, the property is damaged and a recovery may be had. But it frequently happens that a public improvement on a street or public way affects the value of property which does not abut upon the improvement, and the question is whether in such case the property is damaged or injuriously affected. This question has received careful consideration both in England and the United States.

In the case of *McCarthy v. Metropolitan Board of Works*,⁸⁴ the plaintiff, McCarthy, resided and carried on business as a dealer in lime, brick, sand, ballast and other building materials on premises near a dock, known as Whitefriars' Dock, which was a public dock on the Thames. The dock was separated from plaintiff's premises by a public street twenty feet wide and the

⁸⁰*McDevitt v. People's Nat. Gas Co.*, 160 Pa. St. 367, 28 Atl. 948.

⁸¹*Ante*, §§ 197-208.

⁸²*Glasgow v. City of St. Louis*, 107 Mo. 198, 17 S. W. 743, 5 Am. R. R. & Corp. Rep. 192; *Bailey v. Culver*, 84 Mo. 531; *Parker v. Catholic Bishop of Chicago*, 146 Ill. 158, 34 N. E. 478; *In re Vacation of Howard Street*, 142 Pa. St. 601, 21 Atl. 974; *Hare v. Rice*, 142 Pa. St. 608, 21 Atl. 976; In

re *Melon St.*, 1 Pa. Supr. 63. *Compare Town of Lake v. Burky*, 57 Ill. App. 547. *But see §§ 200-208.*

⁸³*Bigelow v. Balerino*, 111 Cal. 559, 44 Pac. 307.

⁸⁴L. R. 7 C. P. 508; *affirmed* in Exch. Chamber. L. R. 8 C. P. 191 (5 Moak's Rep. 256); *affirmed* in House of Lords, L. R. 7 Eng. & Irish App. 243 (10 Moak's Rep. 1).

distance from this street to the river along the dock was 352 feet. The dock was largely used by the plaintiff in the way of his business, but he had no right or easement in the dock other than as one of the public, nor was there appurtenant or otherwise belonging to his premises any other right or privilege in or to the dock. By reason of its proximity to the plaintiff's premises, and the access thereby afforded to and from the Thames, the premises were rendered more valuable to sell or occupy with reference to the uses to which any owner might put them. In the execution of the works authorized by the Thames embankment acts, a solid embankment was carried along the foreshore of the Thames, thus permanently stopping up and destroying Whitefriars' Dock. By reason thereof access along the dock from the plaintiff's premises to and from the Thames was prevented, and his premises were permanently damaged and diminished in value. The plaintiff recovered judgment in the Court of Common Pleas, which held that his premises were injuriously affected, and this decision was affirmed by the Exchequer Chamber and House of Lords. Many elaborate opinions were delivered in which the grounds of the decision were fully considered and all prior decisions touching the questions in issue were reviewed. We shall refer to the principles of this case further on. The McCarthy case was fully approved by the House of Lords in Caledonia Ry. Co. v. Walker's Trustees,⁸⁵ which involved a similar state of facts. There are many other English cases which go upon the same ground.⁸⁶

In Rigney v. Chicago,⁸⁷ it appeared that Rigney owned an improved lot on Kinzie street, which street was intersected at

⁸⁵ Appeal Cas. 259.

⁸⁶ Chamberlain v. The West End of London etc. Ry. Co., 2 Best & Smith, 605, 110 E. C. L. R. 604, 31 L. J. Q. 13, 201; *affirmed* same, 617; Glover v. North Staffordshire Ry. Co., 20 L. J. N. S. Q. B. 376; Wood v. Stourbridge Ry. Co., 16 Q. B. N. S. 222; 111 E. C. L. R. 221; Cameron v. Charing Cross Ry., 16 C. B. N. S. 430; 111 E. C. L. R. 430; 33 L. J. C. P. 313; Senior v. Metropolitan Ry. Co., 2 H. & C. (Ech.) 258; Wadham v. North-eastern Ry. Co., 14 L. R. Q. B. 747; Ford v. Metropolitan R. R. Co., L. R. 17 Q. B. D. 12. But, where the ob-

struction is temporary only, being occasioned by the construction of the works, the premises are not injuriously affected within the meaning of the Lands Clauses Act, and compensation must be sought under a different provision. Rickett v. Metropol. Ry. Co., 5 Best & Smith, 149, 117 E. C. L. R. 149, *affirmed* L. R. 2 House of Lords, 175. See the case of the Caledonian Railway Co. v. Ogilvy, 2 Macq. Sc. App. 229; Regina v. Met. Board of Works, 4 L. R. Q. B. 358.

⁸⁷ Rigney v. Chicago, 102 Ill. 64.

right angles by Halsted street, at a point 220 feet west of Rigney's property. The city built a viaduct on Halsted street over Kinzie street, so as entirely to prevent access to Halsted street from Kinzie except by stairs. The evidence showed that Halsted street was an important thoroughfare, upon which horse car lines were operated, affording communication with all parts of the city. No change whatever was made in Kinzie street in front of Rigney's property or elsewhere, but, as a result of the construction of the viaduct, and cutting off access to Halsted street along Kinzie street, Rigney's property was depreciated one-fourth or more. The supreme court of Illinois held that Rigney's property was damaged within the meaning of the constitution.⁸⁸ These cases settle the doctrine that an obstruction or interference with a public street or way need not necessarily be in front of or contiguous to the property claimed to be affected thereby, in order to authorize a recovery. It is sufficient if it is such an obstruction or interference as produces a diminution in the value of the property, as distinguished from mere personal inconvenience to the owner.⁸⁹

The conclusions thus stated in the first edition have been verified by numerous decisions since rendered, and, we believe, without any material dissent, except in the case of Missouri, as shown below. If a street or public way communicating with the plaintiff's premises is obstructed elsewhere than in front of the plaintiff's property, as by a viaduct or bridge, or approach thereto, or by a railroad crossing a street in a cut or on an embankment, or otherwise, and the result of such obstruction is to render such property less valuable either to sell or to use, then the property is damaged, and compensation may be recovered to the extent of the depreciation.⁹⁰

⁸⁸A somewhat similar case is found in *East St. Louis v. Lockhead*, 7 Ill. App. 83; also *East St. Louis v. O'Flynn*, 19 Ill. App. 64.

⁸⁹*Caledonian Ry. Co. v. Walker's Trustees*, 7 Appeal Cas. 259.

⁹⁰*Texarkana v. Leads*, 66 Ark. 40, 48 S. W. 807, 74 Am. St. Rep. 68; *Ft. Collins etc. Ry. Co. v. France*, 41 Colo. 512, 92 Pac. 953; *Harvey v. Georgia Southern etc. R. R. Co.*, 90 Ga. 66, 15 S. E. 783; *Burky v. Town of Lake*, 30 Ill. App. 23; *Chicago v.*

Pulcyn, 129 Ill. App. 179; *Danville etc. R. R. Co. v. Tedrick*, 137 Ill. App. 553; *Republican Valley R. R. Co. v. Fellons*, 16 Neb. 169; *Atchison etc. R. R. Co. v. Boener*, 34 Neb. 240, 51 N. W. 842, 33 Am. St. Rep. 637; *S. C. affirmed*, 45 Neb. 453, 63 N. W. 787; *Chicago etc. R. R. Co. v. O'Neill*, 58 Neb. 239, 78 N. W. 521; *O'Brien v. Pennsylvania S. V. R. R. Co.*, 119 Pa. St. 184, 13 Atl. 74; *Mellor v. City of Philadelphia*, 160 Pa. St. 614, 28 Atl. 991; *In re Melon Street*, 182 Pa. St.

397, 38 Atl. 482, 28 L.R.A. 275; Foust v. Pa. R. R. Co., 212 Pa. St. 213, 61 Atl. 829; Robbins v. Scranton, 217 Pa. St. 577, 66 Atl. 977; Walsh v. Scranton, 23 Pa. Supr. Ct. 276; Haggerty v. Scranton, 23 Pa. Supr. St. 279; Harvey v. G. C. & S. F. R. R. Co., 3 Tex. Ct. of App. 336, §§ 278-280; Brown v. City of Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. Rep. 214, 7 Am. R. R. & Corp. Rep. 64; Mason City etc. R. R. Co. v. Wolf, 148 Fed. 961, 78 C. C. A. 589 (Neb. Case); McQuade v. The King, 7 Can. Exch. 318; Macarthur v. The King, 8 Can. Exch. 245; *ante*, §§ 189, 198-208. Compare the following cases which are more or less opposed to the text: Gilbert v. Greeley etc. R. R. Co., 13 Colo. 501, 22 Pac. 814; Union Pac. R. R. Co. v. Foley, 19 Colo. 280, 35 Pac. 542; Union Pac. R. R. Co. v. Benson, 19 Colo. 285, 35 Pac. 544; Jacksonville etc. Ry. Co. v. Thompson, 34 Fla. 346, 16 So. 282, 26 L.R.A. 410; Davenport v. Dedham, 178 Mass. 382, 59 N. E. 1029; Davenport v. Hyde Park, 178 Mass. 385, 59 N. E. 1030; Putnam v. Boston etc. R. R. Co., 182 Mass. 351, 65 N. E. 790; Detroit v. C. H. Little Co., 146 Mich. 373, 109 N. W. 671; S. C. 141 Mich. 637, 104 N. W. 1108; Matter of Grade Crossing Comrs., 166 N. Y. 69, 59 N. E. 706; McGee's Appeal, 114 Pa. St. 470, 8 Atl. 237; Lawrence v. City of Philadelphia, 154 Pa. St. 20, 25 Atl. 1079; Howell v. Morrisville, 212 Pa. St. 349, 61 Atl. 932; Santry v. Pennsylvania S. V. R. R. Co., 4 Mont. Co. L. R. 144; Enochs v. Philadelphia, 2 Pa. Dist. Ct. 83; Smith v. St. Paul etc. Ry. Co., 39 Wash. 355, 81 Pac. 840, 109 Am. St. Rep. 889, 70 L.R.A. 1018; Ponischil v. Hoquiam S. & D. Co., 41 Wash. 303, 83 Pac. 316; Mottman v. Olympia, 45 Wash. 361, 88 Pac. 579.

In Mellor v. City of Philadelphia, 160 Pa. St. 614, 28 Atl. 991, the plaintiff's property was on the north side of Trenton avenue. The property on

the south side of Trenton avenue was occupied by railroad tracks, running parallel to the avenue. To avoid grade crossings the side streets adjacent to the plaintiff were lowered so as to go under the tracks and, as we understand it, under Trenton avenue also. Access from Trenton avenue to the side streets, except for pedestrians, was rendered impossible. Trenton avenue upon which the plaintiff's property abutted remained unchanged, but access to the nearest side streets was cut off. In holding that the plaintiff's property was injured, within the meaning of the constitution, the court says: "Defendant's contention was that this provision is inapplicable to any of the cases under consideration, because neither of the properties front or abut on either of the streets the grade of which was changed. This would, indeed, be a very narrow and unreasonable construction of the words above quoted, especially in view of the history and object of the constitutional provision. It was intended to provide against the great injustice that was continually resulting from the ruling of this court in O'Connor v. Pittsburgh, 18 Pa. St. 189, that 'the constitutional provision for the case of private property taken for public use extends not to the case of property injured or destroyed.' In connection with this statement of the controlling principle in that case, Mr. Chief Justice Gibson suggested that the omission might be supplied by ordinary legislation, but no such legislative action was ever taken. It was not until the adoption of our present constitution, nearly a quarter of a century thereafter, that an appropriate remedy was provided in the form of the section above quoted. In doing this, the people of the commonwealth recognized, in a practical way, the justice of compensating private property

A recent case in Missouri is apparently in conflict with these views. The plaintiff's premises were situated upon High street, which was crossed by a railroad two blocks or more away. The crossing was of such a character as completely to obstruct the street at that point. Two streets intersected High street, at right angles, between the plaintiff's premises and the crossing. The jury found that the plaintiff's premises were damaged or depreciated to the amount of two thousand dollars, and he recovered judgment for that sum. The Supreme Court reversed the case, holding that the plaintiff's damages were the same in kind as those suffered by the public generally, and that for such damages no recovery could be had, even under the word damaged in the new constitution.⁹¹ This case was approved and followed in two similar cases, decided a year or so later.⁹² In

owners, not only for property taken, but also for property injured or destroyed by municipal and other corporations and individuals of the specified class, by the construction and enlargement of their works, highways, or improvements. There is nothing in the phraseology of the section that can be even tortured into a limitation of its provisions to property fronting or abutting on the particular work, highway, or improvement by the construction or enlargement of which said property was injured or destroyed. The section in question cannot be thus narrowly construed without reading into it words which are not in it, and were never intended to be there. It was contended on behalf of the city that, inasmuch as the properties of the several plaintiffs do not front on Orthodox street, they 'are not entitled to any damages; that, because Trenton avenue has not been changed, the plaintiffs, no matter how much they may have been injured, are not entitled to damages for the alteration of the side street;' and points for charge substantially to that effect were submitted. The learned trial judge very properly refused to thus narrowly and unreason-

ably construe the constitution. He rightly conceded, however, 'that where the street which undergoes an alteration is not sufficiently near to the property of a citizen as to make the injury approximate and immediate and substantial, he would have no right to claim damages for change of grade of such a street;' and, in connection therewith, he appropriately added: 'In case of properties situated as these properties are, and so affected by the change of grade that their ingress and egress to and from their houses is virtually injured,—partly destroyed,—and where the injury is so obvious that it admits of comparatively easy calculation as to the extent of the diminution of the value of the property, I cannot doubt that such a case is covered by the constitution.'

⁹¹Rude v. St. Louis, 93 Mo. 408, 6 S. W. 257.

⁹²Fairchild v. City of St. Louis, 97 Mo. 85, 11 S. W. 60; Canman v. City of St. Louis, 97 Mo. 92, 11 S. W. 60. To same effect Gates v. Kansas City etc. R. R. Co., 111 Mo. 28, 19 S. W. 957. *And see* Burde v. St. Joseph, 130 Mo. App. 453, 110 S. W. 27.

these cases the street on which the plaintiffs abutted was obstructed by a railroad crossing below grade and the street was closed at that point. In one case the plaintiff's property was 350 feet from the obstruction, and in the other 125 feet. If the plaintiff's premises were depreciated in value by reason of the obstruction complained of, then, it seems to us, both the premise and conclusion of the court are wrong. When property is so situated with respect to a public way that its permanent obstruction depreciates its market value, then the owner of the property suffers a special and peculiar damage by reason of such obstruction, different from that of the public generally.⁹³ It is tacitly conceded by the Missouri court, and is unquestionably the law, that, if the plaintiff's damages were special and peculiar, then he had a right of action under the constitutional provision in question. The right to damages cannot be reduced to a question of distance, but depends upon the fact of the market value of the premises being actually depreciated by reason of the obstruction or improvement. The supreme court of Missouri seems to have come to the same conclusion as to what is a special or peculiar damage in a subsequent case and to thus have cut away the ground upon which the decisions above referred to were based. A switch track was laid across the street on which plaintiff abutted, connecting with a brewery. The court found that the track was laid for a private use, that the permission to use the street was therefore void and the track a public nuisance. The plaintiff's property was 75 feet from the crossing but the evidence showed that its value would be depreciated by the obstruction. This was held to be such a special injury as entitled the plaintiff to an injunction. No reference is made to the cases above cited.⁹⁴

⁹³Ante, §§ 174, 191, 199. Where property is so situated with respect to any kind of a public nuisance that it is permanently depreciated in value if the nuisance is regarded as permanent, or the value of its use is lessened if it is regarded as temporary, then the owner of the property suffers a special and peculiar damage, different from that of the public generally, for which a private action will lie. Stetson v. Faxon, 19 Pick. 147; Francis v. Schoellkoff, 53 N. Y. 152; Givens v. Van Studdiford, 4

Mo. App. 498; Wesson v. Washburn Iron Co., 13 Allen 95; Blane v. Khimpke, 29 Cal. 156; Frink v. Lawrence, 20 Conn. 117, 50 Am. Dec. 274; Brown v. Watrous, 47 Me. 161; Ottawa Gas Light Co. v. Graham, 28 Ill. 73, 81 Am. Dec. 263; Illinois Central R. R. Co. v. Grabil, 50 Ill. 242; Attorney General v. Lonsdale, 7 L. R. Eq. Cas. 390. See also opinions in the McCarthy case, ante.

⁹⁴Glaessner v. Anheuser-Busch Brewing Ass., 100 Mo. 508, 13 S. W. 707, 2 Am. R. R. & Corp. Rep. 420.

The contention that such an interpretation of the constitution will give rise to an indefinite number of claims, is one which has been often made, but is without merit. The constitution guarantees compensation for property damaged or injured for public use. The right to compensation is coextensive with the damage or injury, both in space and in amount. This point was fully considered in the McCarthy case, and in reference to it Justice Bramwell says: "If it is to be asked where the line is to be drawn, I answer not by distance in point of measurement. Premises might be injuriously affected by the stopping of a landing place ten miles away, if there was no other within twenty of the premises affected. The line is to be drawn by ascertaining whether the premises are actually or potentially affected for present or other purposes, or the man, whether it is only the person who happens to be using them. It is said this might give the right to make an immense number of claims. Suppose it did. Suppose there were one thousand claims of £1,000 each. If they are well founded, £1,000,000 of property is destroyed, and why is not that part of the cost of the improvement; and, if taken into account as such, why should not the loser of it receive it?"⁹⁵ And the supreme court of Wisconsin, in an action for wrongfully obstructing a street, says: "True, there may be many such individual owners, but that cannot affect individual rights. There may be twenty or there may be fifty of them, but if each has suffered great damage to his estate by the unlawful closing of a street, why shall not each have his action? Neither twenty men nor fifty men constitute

The court says: "The city having no rightful authority to enact the ordinance, the switch tracks constructed thereunder on the public highway would be a public nuisance; and, in order for the plaintiff to maintain this injunction, he must show some special injury over and above the general injury to the general public. Some of the evidence offered by the defendant is that the construction of the switch will not decrease the value of the plaintiff's property. On the other hand, it is alleged and shown that plaintiff's property is within seventy-five feet of the proposed crossing, and the weight of the evi-

dence is that these proposed crossings will have the effect to divert travel to streets west of the brewery, and thereby decrease the value of the plaintiff's property, and take away some of the trade which he at this time enjoys. The evidence satisfied the trial court, and it satisfies us, that plaintiff will suffer an injury which entitles him to maintain this suit."

⁹⁵ McCarthy v. Metropolitan Board of Works, L. R. 8 C. P. 191, 210. In the House of Lords Lord Penzance gives expression to similar views as follows:

"It was asked, in argument, where

the general public. The general public is composed of the great mass of individuals who own no property in the vicinity and who may wish to pass over the street or not, and who, if they do, simply suffer the trifling inconvenience of being obliged to make a circuitous trip.”⁹⁶

§ 355 (228). Competing ferries, bridges, etc. It has been held, by the supreme court of West Virginia, that where a statute prohibited another ferry within half a mile of one already established, the statute would include a toll-bridge as well as a ferry, and that the diminution in value of the ferry by reason of the establishment of a toll-bridge within the prohibited distance was a damage and not a taking within the constitution.⁹⁷ So the English courts have held a similar injury to be an injurious affecting.⁹⁸ And where a railroad was built along a stream, so as to interfere with a ferry, it was held that the proprietor was entitled to compensation.⁹⁹

§ 356 (229). Interference with water rights. In Duke of Buccleuch v. Metropolitan Board of Works,¹ the plaintiff's property consisted of a leasehold interest in a mansion house

are the claims to compensation to stop, if the rule is so applied? The answer, I think is, that in each case the right to compensation will accrue whenever it can be established to the satisfaction of the jury or arbitrator that a special value attaches to the premises in question by reason of their proximity to, or relative position with, the highways obstructed, and that this special value has been permanently destroyed or abridged by the obstruction. If this limit be thought to be a wide one, and the number of claimants under it likely to be numerous, that is only the misfortune of the undertaking, for the limit does not exceed the range of the injury. On the other hand, all claim for compensation will vanish as, receding from the highway, the case comes into question of lands of which (though their owners may have used the highway and found convenience in so doing) it cannot be predicated and proved that the value of the

lands depends on the position relatively to the highway which they occupy.” Metropolitan Board of Works v. McCarthy, L. R. 7, Eng. & I. App. 243, 214.

⁹⁶Tilley v. Mitchell & Lewis Co., 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007. To same effect: Park v. C. & S. W. R. R. Co., 43 Ia. 636; In re Melon St., 182 Pa. St. 397, 38 Atl. 482, 28 L.R.A. 275; Tidewater Ry. Co. v. Shartzner, 107 Va. 562, 59 S. E. 407, 17 L.R.A.(N.S.) 1053.

⁹⁷Mason v. Harper's Ferry Bridge Co., 17 W. Va. 396. According to the views of the author, such an interference with an exclusive right is a taking. *See ante*, §§ 215, 216.

⁹⁸See Hopkins v. The Great Western Railway Co., L. R. 2 Q. B. D. 224; Queen v. Cambria Railway Co., L. R. 6 Q. B. 422.

⁹⁹Cooling v. Great Northern R. R. Co., 19 L. J. Q. B. 25.

¹ 15 L. R. Ex. 221, *affirmed*, 5 L. R. Eng. & Irish App. 418.

and grounds abutting on the Thames River. He not only had free access to the river, but the grounds were secluded and quiet by reason of the river frontage and thereby rendered more valuable to sell or occupy. The defendant constructed an embankment along the river frontage which was to serve as a public highway. The result of this was to cut off access to the river and to destroy the quiet and seclusion of the premises. It was held that the plaintiff was entitled to recover the full amount of the depreciation of his premises.² Where a railroad was constructed along the shore of the sea below high-water mark, thus interfering with one's access to the sea, his property was held to be injuriously affected.³ So an interference with access to a dock on a stream by a bridge is within the constitutional provision as to damage.⁴ Damage which results to a lower proprietor by changes in the flow of a stream in consequence of the removal of shoals is not actionable.⁵ The right to recover for diverting the waters of a stream to the damage of a lower proprietor was referred to this provision of the constitution in *Reading v. Althouse*,⁶ though we think such a diversion is clearly a taking, as shown in a previous chapter.⁷ Under the English acts it is held that compensation in such cases must be had under the clause giving damages for land injuriously affected.⁸

²Compare *Regina v. Metropolitan Board of Works*, L. R. 4 Q. B. 358; 38 L. J. Q. B. 201.

³*Queen v. Rynd*, 16 I. C. L. R. 29; *Bell v. Hull etc.* R. R. Co., 6 M. & W. 699; but see *Falls v. Belfast etc.* R. R. Co., 12 I. C. L. R. 233.

⁴*Chicago etc. R. R. Co. v. Stein*, 75 Ill. 41; *Chicago & Alton R. R. Co. v. Maher*, 91 Ill. 312. It has been held in Pennsylvania that an interference with the feeders of an artificial stream which had flowed for over a century was to be regarded as an injury rather than a taking under their present constitution. *City of Reading v. Althouse*, 93 Pa. St. 400. In *Payne v. English*, 79 Cal. 540, 21 Pac. 952, plaintiff had piers and slips abutting on an arm of the bay of San Francisco, two hundred feet

wide, and known as Channel street. The defendants, the State harbor commissioners, proposed to erect a wharf in Channel street in front of plaintiff's property, thirty feet wide and thus cut off his access to the bay. On a bill to enjoin, the opinion was expressed that this would not be a taking or damaging of the plaintiff's property within the constitution, but the decision itself was based on a question of title.

⁵*Rhodes v. Airedale Drainage Comrs.*, L. R. 1 C. P. Div. 402; S. C. Same, p. 380.

⁶93 Pa. St. 400; *Lycoming Gas & W. Co. v. Moyer*, 99 Pa. St. 615.

⁷*Ante*, § 74.

⁸*Bush v. Trowbridge Water Co.*, 44 L. J. Ch. 645; S. C. L. R. 10 Ch. App. 459.

We have considered at length in a former chapter the right to recover for damage to land by interfering with riparian rights appurtenant thereto, or by flooding it permanently or temporarily by works for public use, or by injuriously affecting it in any way through the agency of water, and we should say that any such damage, which is not held to be a taking, would clearly be a damage or injury within the constitution. Causing surface water to flow upon land where it is not accustomed to flow, or obstructing its flow so as to cause a submergence or saturation, by grading and improving streets,⁹ or the building of railroads,¹⁰ or other works for public use,¹¹ have been held to be remediable under this provision. So of a bridge, dam or other works which interfere with the flow of a stream so as to flood the land above or wash away the land below.¹² Damage by the pollution of a stream with sewage or otherwise, if not held to be a taking, is clearly a damage or injury within the constitution.¹³ But where a railroad constructed its road along the banks of a stream upon a sandy soil, it was held not liable for injury to a mill pond by sand washed into the stream from the railroad land and embankment.¹⁴

§ 357 (230). Damages from the operation of a railroad or its appurtenances on the private property of the company. Noise, smoke, vibrations, etc. The operation of a railroad, the switching of cars to and fro, the use of coal bins, stock yards, etc., may be a serious annoyance to the occupiers of adjacent property, by reason of the noise, smoke, cinders, vibrations, smells, etc. The use and value of property may be greatly impaired thereby. The question whether such an impairment of property constitutes an independent cause of action is quite distinct from the question whether such annoyances may

⁹Town of Avondale v. McFarland, 101 Ala. 381, 13 So. 504; Atlanta v. Wood, 78 Ga. 276; Atchison v. Atlanta, 81 Ga. 625, 7 S. E. 692; Carson v. City of Springfield, 53 Mo. App. 289; In re Chatham Street, 191 Pa. St. 604, 43 Atl. 365.

¹⁰Ante, §§ 78-81, 112.

¹¹Mayor etc. of Albany v. Sikes, 94 Ga. 30, 20 S. E. 257, 26 L.R.A. 653; Ware v. Regents Canal Co., 3 De G. & J. 212.

¹²Tyler v. Tehama County, 109

Cal. 618, 42 Pac. 240; Bradbury v. Vandalia Levee & Dr. Dist., 236 Ill. 36; Delaware County's Appeal, 119 Pa. St. 159, 13 Atl. 62; Fredericks v. Pennsylvania Canal Co., 148 Pa. St. 317, 23 Atl. 1067.

¹³Joplin Consol. Min. Co. v. City of Joplin, 124 Mo. 129, 27 S. W. 406; Smith v. Sedalia, 152 Mo. 283, 53 S. W. 907, 48 L.R.A. 711; S. C. 182 Mo. 1, 81 S. W. 165.

¹⁴Trinity etc. R. R. Co. v. Meadows, 73 Tex. 32, 11 S. W. 145.

be taken into consideration when part of a tract is taken, or when a railroad is laid in a street or highway. In the latter case the annoyances referred to are mere incidents to what is in law the main grievance.¹⁵ But in the former case they constitute the principal and only cause of complaint. Whether the impairment caused by such annoyances constitutes a taking we have already considered.¹⁶ But whether a taking or not, it would seem that such an impairment of property was a damage or injury within the purview of recent constitutions. Where the use and operation of a railroad or switch yards on the private property of the company adjacent to, or in the near vicinity of the plaintiff's property, or across the street from him, depreciates the value of his property by reason of the noise, smoke, vibration, etc., his property is damaged within the constitution and he is entitled to compensation.¹⁷ So where the damage re-

¹⁵See *post*, §§ 739-741.

¹⁶Ante, § 235.

17Stone v. Fairbury, Pontiac & North Western Ry. Co., 68 Ill. 394, 18 Am. Rep. 556; Chicago etc. R. R. Co. v. Leah, 152 Ill. 249, 38 N. E. 556; Chicago etc. R. R. Co. v. Drake, 148 Ill. 226, 35 N. E. 750, 9 Am. R. R. & Corp. Rep. 73; Ill. Cent. R. R. Co. v. Trustees of Schools, 212 Ill. 406, 7² N. E. 39; Chicago etc. R. R. Co. v. Coggswell, 44 Ill. App. 388; Wisconsin Cent. R. R. Co. v. Wieczorek, 51 Ill. App. 498; Met. West Side El. R. R. Co. v. Goll, 100 Ill. App. 323; Davenport etc. Ry. Co. v. Sinnet, 111 Ill. App. 75; Ill. Cent. R. R. Co. v. Trustees of Schools, 128 Ill. App. 111; Willis v. Ky. & Ind. Bridge Co., 104 Ky. 186, 46 S. W. 488; Covington etc. R. R. & Bridge Co. v. Kleymeyer, 105 Ky. 609, 49 S. W. 484; Chicago etc. R. R. Co. v. Hazels, 26 Neb. 364, 42 N. W. 93; Omaha etc. R. R. Co. v. Janecek, 30 Neb. 276, 46 N. W. 478, 3 Am. R. R. & Corp. Rep. 268; Omaha etc. R. R. Co. v. Moschel, 38 Neb. 281, 56 N. W. 875; Gulf etc. R. R. Co. v. Necco (Tex.) 15 S. W. Rep. 1102, 18 S. W. 564; Gainesville etc. R. R. Co. v. Hall, 78 Tex. 69, 14

S. W. 259, 9 L.R.A. 298, 3 Am. R. R. & Corp. Rep. 251; Ft. Worth etc. R. R. Co. v. Downie, 82 Tex. 383, 17 S. W. 620; Houston etc. R. R. Co. v. Davis, 45 Tex. Civ. App. 212; Novich v. Trinity etc. Ry. Co., 45 Tex. Civ. App. 664; Stockdale v. Rio Grande Western Ry. Co., 28 Utah 201, 77 Pac. 849; Tidewater Ry. Co. v. Shartzer, 107 Va. 562, 59 S. E. 407, 17 L.R.A.(N.S.) 1053; Smith v. St. Paul etc. Ry. Co., 39 Wash. 355, 81 Pac. 840, 109 Am. St. Rep. 889, 70 L.R.A. 1018; Mason City etc. R. R. Co. v. Wolf, 148 Fed. 961, 78 C. C. A. 589. See Morrison v. Hinkson, 87 Ill. 587, 29 Am. Rep. 77. Compare Atchison etc. R. R. Co. v. Lenz, 35 Ill. App. 330; Hammersmith etc. R. R. Co. v. Brand, L. R. 4 Eng. & Ir. App. 171. An elevated railroad crossed the street on which the plaintiff's property abutted, 31 feet north of his property. He brought suit for damages to his property by the noise, vibration, obstruction of view and of light. The plaintiff does not appear to have made out a case of nuisance or obstruction of light and the court found that there was no interference with any right, public or private, and, therefore, no right to

sults from the use of coal bins, water tanks, round houses and the like, similarly situated with reference to the plaintiff's property.¹⁸ Where a railroad was laid alongside a highway opposite the plaintiff's farm and impaired the value of the farm by rendering access thereto with teams and stock more dangerous, he was held entitled to recover compensation.¹⁹

A different view is taken of the constitution of Pennsylvania by the supreme court of that State. Railroad companies in that State are required to make compensation for property taken, injured or destroyed by the construction or enlargement of their works, and this compensation is required to be paid in advance.²⁰ It is held that one, no part of whose property has been taken, cannot recover for the damages resulting from the lawful and proper operation of a railroad adjacent to or in the near vicinity of his property.²¹ Also that the word injured in

recover. *Aldrich v. Met. W. S. El. R. R. Co.*, 195 Ill. 456, 63 N. E. 155, 57 L.R.A. 237.

¹⁸*Wiley v. Elwood*, 134 Ill. 281, 25 N. E. 570; *Kuhn v. Ill. Cent. R. R. Co.*, 111 Ill. App. 323; *Bramlette v. Louisville etc. R. R. Co.*, 113 Ky. 300, 68 S. W. 145; *Omaha etc. R. R. Co. v. Janecek*, 30 Neb. 276, 46 N. W. 478, 3 Am. R. R. & Corp. Rep. 268; *Chicago etc. R. R. Co. v. O'Connor*, 42 Neb. 90, 60 N. W. 326; *Louisville & N. Terminal Co. v. Jacobs*, 109 Tenn. 727, 72 S. W. 954, 61 L.R.A. 188; *Same v. Lellyett*, 114 Tenn. 368, 85 S. W. 881, 1 L.R.A.(N.S.) 49; *Ft. Worth etc. R. R. Co. v. Downie*, 82 Tex. 383, 17 S. W. 620; *Daniel v. Ft. Worth etc. Ry. Co.*, 96 Tex. 327, 72 S. W. 578; *Rainey v. Red River etc. Ry. Co.*, 99 Tex. 276, 89 S. W. 768, 90 S. W. 1096, 122 Am. St. Rep. 622, 3 L.R.A.(N.S.) 590; *St. Louis etc. Ry. Co. v. Shaw*, 99 Tex. 559, 92 S. W. 30, 122 Am. St. Rep. 663, 6 L.R.A.(N.S.) 245; *Texas etc. Ry. Co. v. Edrington*, 100 Tex. 496, 101 S. W. 441, 9 L.R.A.(N.S.) 988. So of the power house of an electric railway. *Chicago North Shore St. Ry. Co. v. Payne*, 192 Ill. 239, 61 N.

E. 467; *King v. Vicksburg Ry. & Lt. Co.*, 88 Miss. 456, 42 So. 204, 117 Am. St. Rep. 749, 6 L.R.A.(N.S.) 1036. But the construction of a freight house and railroad yards across the street from the plaintiff cannot be enjoined because the locality is a residence neighborhood. *Walther v. Chicago etc. R. R. Co.*, 215 Ill. 456, 74 N. E. 461.

¹⁹*Lake Erie & W. R. R. Co. v. Scott*, 132 Ill. 429, 24 N. E. 78, 8 L.R.A. 330, S. C. 32 Ill. App. 292. It has been held in Illinois that lots adjacent to a railroad, no parts of which were taken, were damaged to the extent of "the depreciation in market value of the same by reason of the construction and maintenance of the road." *Eberhart v. Chicago etc. R. R. Co.*, 70 Ill. 347.

²⁰See ante, § 49.

²¹*Pennsylvania R. R. Co. v. Lipincott*, 116 Pa. St. 472; *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. Rep. 659; *Dooner v. Pennsylvania R. R. Co.*, 142 Pa. St. 36, 21 Atl. 755; *Pennsylvania Company for Insurance v. Pennsylvania S. V. R. R. Co.*, 151 Pa. St. 334, 25 Atl. 107.

the constitution embraces only such wrongs as would be actionable but for the statutory authority, and such as are occasioned by the construction and enlargement of works and improvements, as distinguished from their use or operation.²²

The supreme court of Georgia takes a similar view, although the constitution of that State provides in general terms that private property shall not be taken or damaged for public purposes without just compensation first paid.²³ A plaintiff sued for damages to his property by reason of railroad tracks and yards near his property. A common law nuisance was clearly shown by reason of the noise, smoke, cinders, vibrations, etc., in the operation of the yards; also that the property in question was materially depreciated in value. A majority of the court held that there could be no recovery, and elaborate opinions were given on both sides of the question.²⁴

A recovery may be had for damage caused by dust and dirt drifting upon one's premises from a bridge or embankment.²⁵ Damage arising from the fact that premises can be overlooked from a railroad embankment, or by persons traveling over the same in coaches, have been held not to be within the English act;²⁶ also damages caused by vibrations made by passing trains.²⁷

§ 358 (231). Miscellaneous cases. Obstructing the access of light to premises is a damage for which a recovery may be had.²⁸ Plaintiffs had a rifle range, and, for the purpose of

²²See especially Pennsylvania R. R. Co. v. Marchant, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. Rep. 659. This case was affirmed in the Supreme Court of the United States, but the latter court only considered whether the constitution of Pennsylvania, as construed by the Supreme Court of that State, operated to deprive the plaintiff of his property without due process of law, or of the equal protection of the laws. *Marchant v. Pennsylvania R. R. Co.*, 153 U. S. 380, 14 S. C. 894.

²³*Ante*, § 23.

²⁴*Austin v. Augusta Terminal Co.*, 108 Ga. 671, 34 S. E. 852, 47 L.R.A. 755. Also *Georgia R. R. & B. Co. v. Maddox*, 116 Ga. 64, 42 S. E. 315.

²⁵*Stack v. City of East St. Louis*. 85 Ill. 377, 28 Am. Rep. 619; *Chicago etc. R. R. Co. v. Coggswell*, 44 Ill. App. 388; *Shano v. Bridge Co.*, 189 Pa. St. 245, 42 Atl. 128; *Turner v. Sheffield & Rotherham R. R. Co.*, 10 M. & W. 425; *East and West India Docks and Birmingham Junction Ry. Co. v. Gattke*, 20 L. J. N. S. Ch. 217.

²⁶*In re Penny*, 7 Ellis & B. 660; 90 E. C. L. R. 658; 26 L. J. Q. B. N. S. 225; *Shano v. Bridge Co.*, 189 Pa. St. 245, 42 Atl. 128, 69 Am. St. Rep. 808.

²⁷*Brand v. Hammersmith City Ry. Co.*, L. R. 1 Q. B. 130; *S. C. (Exch. Cham.) L. R. 2 Q. B. 223*; *S. C. (House of Lords) L. R. 4 Eng. & Irish App.* 171.

²⁸*Eagle v. Charing Cross Ry. Co.*,

maintaining it, had an interest in three fields in a straight line. On one field was the range. The plaintiffs had a verbal arrangement with the owner of the next field, revocable on notice, by which they paid him forty-nine pounds a year liquidated damages. The third field was leased to the plaintiffs. A road was constructed through the middle field, which rendered the range useless for the purpose for which plaintiffs held it. It was held that the interest of plaintiffs in the first and third fields was injuriously affected.²⁹ The construction of street railway tracks across the tracks of a commercial railroad, which intersect the street, is not a taking or damaging of the property of the commercial road.³⁰ Where a railroad purchased the rear end of plaintiff's lot and went under the surface in a tunnel, constructing a ventilating shaft therein, which was afterwards enlarged so as to increase the annoyance to plaintiff by smoke, gases, etc., it was held the plaintiff had no cause of action for such increased discomfort.³¹ Where plaintiff's property was diminished in value by the construction of a jail or fire-engine house adjacent thereto, it was held that his property was not damaged within the meaning of the constitution.³² In an Illinois case the plaintiff brought a suit for damages to his property by reason of a small-pox hospital erected and maintained by the defendant city on the opposite side of the street from the plaintiff's property. The court held that the depreciation of the plaintiff's property was not *damage* within the constitution and that he could not recover. "We can see no difference in

2 L. R. C. 638; *Turner v. Sheffield & Rotherham R. R. Co.*, 10 M. & W. 425; *London etc. R. R. Co. v. Trustees of Gower Walk School*, L. R. 24 Q. B. D. 40, 326. *See also Barrows v. City of Sycamore*, 150 Ill. 588, 37 N. E. 1096, 41 Am. St. Rep. 400, 10 Am. R. R. & Corp. Rep. 62.

²⁹*Holt v. The Gas Light & Coke Co.*, 7 L. R. Q. B. 728.

³⁰*Chicago etc. R. R. Co. v. West Chicago St. R. R. Co.*, 156 Ill. 270, 40 N. E. 1008, 12 Am. R. R. & Corp. Rep. 522; *Pittsburgh etc. R. R. Co. v. West Chicago St. R. R. Co.*, 54 Ill. App. 273; *Chicago etc. Terminal R. R. Co. v. Whiting etc. R. R. Co.*, 139 Ind. 297, 38 N. E. 604, 47 Am. St. Rep.

Em. D.—42.

264, 26 L.R.A. 337, 11 Am. R. R. & Corp. Rep. 507; *New York etc. R. R. Co. v. Bridgeport Traction Co.*, 65 Conn. 410, 32 Atl. 953, 29 L.R.A. 367; *Kansas City etc. R. R. Co. v. St. Joseph Terminal R. R. Co.*, 97 Mo. 457, 10 S. W. 826.

³¹*Attorney General v. Metropolitan R. R. Co.*, L. R. (1894) 1 Q. B. D. 384.

³²*Bacon v. Walker*, 77 Ga. 336; *Long v. Elberton*, 109 Ga. 28, 34 S. E. 333, 77 Am. St. Rep. 363, 46 L.R.A. 428; *Van de Vere v. Kansas City*, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396, 5 Am. R. R. & Corp. Rep. 196. *And see* the following sections.

principle," says the court, "between the right of a city to establish and maintain a small-pox hospital and to erect and use jails, fire engine houses, calaboozes and the like."³³ A contrary conclusion has been reached in Kentucky, where the constitution requires compensation for property taken, injured or destroyed. A small-pox hospital was erected on a twenty acre tract adjoining the plaintiff's farm of three hundred and twenty-five acres. The hospital was 750 feet from the plaintiff's line and half a mile from his residence. The plaintiff was held entitled to recover the depreciation in value of his farm by reason of the pest house.³⁴ Depreciation to abutting property caused by raising the grade of a railroad on its private right of way is not damage within the constitution.³⁵ So when the plaintiff's property is injured by the laying out of a new highway, which diverts travel from past his premises.³⁶ Loss by depreciation in property pending proceedings to condemn it, which proceedings were unreasonably delayed and finally abandoned, was held to be damage within the constitution.³⁷

§ 359 (232). The words in question were intended to enlarge the right to compensation. There can be no doubt but what the words in question were intended to enlarge the right to compensation. Any other construction would render the words nugatory. They are "an extension of the common provision for the protection of private property."³⁸ "The words, injured or destroyed, were not used in vain and without meaning. It was intended that they should have effect, and unless they operate to impose a liability not previously existing,

³³Frazer v. Chicago, 186 Ill. 480, 57 N. E. 1055, 78 Am. St. Rep. 296, 51 L.R.A. 306.

³⁴Padueah v. Allen, 111 Ky. 361, 63 S. W. 981, 98 Am. St. Rep. 42. The court says: "We therefore conclude that where a city or other municipality erects and maintains a public institution, which, by reason of its nature, endangers the lives or health of the occupants of adjacent premises, as by subjecting them to contagious or infectious diseases, it is not only a nuisance, but it is such an invasion of the property rights of such adjacent holder as amounts both to an injuring and a taking of

property." p. 367. *See also* Arnold v. Stanford, 113 Ky. 852, 69 S. W. 726. A general hospital was enjoined as a nuisance in Deaconess Home & Hospital v. Bontjes, 207 Ill. 553, 69 N. E. 748, 64 L.R.A. 215.

³⁵Kotz v. Ill. Cent. R. R. Co., 188 Ill. 578, 59 N. E. 240; Osburn v. Chicago, 105 Ill. App. 217.

³⁶Huff v. Donehoo, 109 Ga. 608, 34 S. E. 1035; Elbert Co. v. Swift, 2 Ga. App. 47, 58 S. E. 396.

³⁷Winkleman v. Chicago, 213 Ill. 360, 72 N. E. 1036.

³⁸Transportation Co. v. Chicago, 99 U. S. p. 642.

they are without operation." ⁴⁰ The Supreme Court of the United States, referring to the constitution of Illinois, says: "The use of the word 'damaged' in the clause providing for compensation to the owners of private property, appropriated to public use, could have been used with no other intention than that expressed by the State court. Such a change in the organic

⁴⁰City Council of Montgomery v. Townsend, 80 Ala. 489, 492. To the same effect are the following cases: City Council of Montgomery v. Mad-dox, 89 Ala. 181, 7 So. 433, 2 Am. R. R. & Corp. Rep. 426; Hot Springs R. R. Co. v. Williamson, 45 Ark. 429; Reardon v. San Francisco, 66 Cal. 492, 56 Am. Rep. 109; Denver v. Bayer, 7 Col. 113; City of Buffalo v. Strait, 20 Col. 13, 36 Pac. 790; Campbell v. Metropolitan St. R. R. Co., 82 Ga. 320, 9 S. E. 1078; Rigney v. Chicago, 102 Ill. 64; Henderson v. Mc-Clain, 102 Ky. 402, 43 S. W. 700, 39 L.R.A. 349; City of Vicksburg v. Herman, 72 Miss. 211, 16 So. 434; Van de Vere v. Kansas City, 107 Mo. 83, 17 S. W. 695, 5 Am. R. R. & Corp. Rep. 196; Gottschalk v. Chicago, Burlington & Quincy R. R. Co., 14 Neb. 550; Omaha & Republican Valley R. R. Co. v. Struden, 22 Neb. 343; Schaller v. City of Omaha, 23 Neb. 325, 36 N. W. 533; City of Omaha v. Kramer, 25 Neb. 492, 41 N. W. 295, 13 Am. St. Rep. 504; Scace v. Wayne County, 72 Neb. 162, 100 N. W. 149; County of Chester v. Brower, 117 Pa. St. 647, 12 Atl. 577; Searle v. Lead, 10 S. D. 312, 73 N. W. 101, 39 L.R.A. 345; Gainsville etc. R. R. Co. v. Hall, 78 Tex. 169, 14 S. W. 259, 3 Am. R. R. & Corp. Rep. 251, 9 L.R.A. 298; Tide-water Ry. Co. v. Shartzer, 107 Va. 562, 59 S. E. 407, 17 L.R.A. (N.S.) 1053; Brown v. City of Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 7 Am. R. R. & Corp. Rep. 64; Smith v. St. Paul etc. Ry. Co., 39 Wash. 355, 81 Pac. 840, 109 Am. St. Rep. 889, 70 L.R.A. 1018; Johnson v. Parkersburg, 16 W. Va. 402, 37 Am.

Rep. 779. In Galveston etc. R. R. Co. v. Fuller, 63 Tex. 467, the Supreme Court of Texas says: "This language is broader than that used in the former constitutions of this State, and was doubtless intended to meet all cases in which, even in the proper prosecution of a public work or purpose, the right or property of any person, in a pecuniary way, may be injuriously affected by reason of the thing being made thereby less valuable, or its use by the owner restricted by the public use to which it is wholly or partially applied, without compensation having been first made to the owner. It is also not improbable that it was intended, by the language found in the present constitution, to meet and correct

"is which had sometimes been thought to result to the property-owner from a narrow and technical meaning sometimes put by the courts upon the word 'taken' used in the former constitutions of this State and in the constitutions of the most of the other States. The word 'property,' as used in the section of the constitution referred to, is doubtless used in its legal sense, and means not only the thing owned, but also every right which accompanies ownership and its incidents. Thus considered, under the rules established by the great weight of judicial decisions, and opinions of elementary writers eminent for their learning, the facts of this case amount to a taking of private property for a public use." p. 469. * * * "The word 'damaged' is evidently used in the sense

law of the State was not meaningless. But it would be meaningless if it should be adjudged that the constitution of 1870 gave no additional or greater security to private property sought to be appropriated to public use than was guaranteed by the former constitution.”⁴¹

§ 360 (232a). **The words in question should be liberally construed.** The provisions of the constitution requiring compensation to be made for property taken, injured or damaged for public use, are intended for the protection of private rights. They are remedial in character. They should, therefore, be liberally construed in favor of the individual whose property is affected, and the authorities so hold.⁴² “The language of the constitution is to be construed liberally so as to carry out and not defeat the purpose for which it was adopted.”⁴³

§ 361 (233). **They include any physical injury to property not held to be a taking.** In the chapters on What Con-

in which the word ‘injured’ is ordinarily understood. By damage is meant ‘every loss or diminution of what is a man’s own, occasioned by the fault of another,’ whether this results directly to the thing owned, or be but an interference with the right which the owner has to the legal and proper use of his own. If by the construction of a railway or other public work an injury peculiar to a given property be inflicted upon it, or its owner be deprived of its legal and proper use, or of any right therein or thereto; that is, if an injury, not suffered by that particular property or right only in common with other property or rights in the same community or section, by reason of the general fact that the public works exist, be inflicted, then such property may be said to be damaged.” p. 470. *Compare Stanwood v. Malden*, 157 Mass. 17, 31 N. E. 702, 16 L.R.A. 591.

⁴¹*Chicago v. Taylor*, 125 U. S. 161, 8 S. C. 820. Section quoted and approved in *Tidewater Ry. Co. v. Shartzer*, 107 Va. 562, 59 S. E. 407, 17 L.R.A.(N.S.) 1053.

⁴²*City of Pueblo v. Strait*, 20 Colo.

13, 36 Pac. 790, 47 Am. St. Rep. 273, 24 L.R.A. 392; *Allen v. Commonwealth*, 188 Mass. 59, 74 N. E. 287, 69 L.R.A. 599; *Schaller v. City of Omaha*, 23 Neb. 325, 36 N. W. 533; *City of Omaha v. Kramer*, 25 Neb. 492, 41 N. W. 295, 13 Am. St. Rep. 504; *Matter of Grade Crossing Commissioners*, 59 App. Div. 498, 69 N. Y. S. 52; *S. C. affirmed*, 168 N. Y. 659; *Paris Mt. Water Co. v. Greenville*, 53 S. C. 82, 30 S. E. 699; *Tidewater Ry. Co. v. Shartzer*, 107 Va. 562, 59 S. E. 407, 17 L.R.A. (N.S.) 1053. In *Boyd v. United States*, 116 U. S. 616, 635, it is said that “constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.”

⁴³*County of Chester v. Brower*, 117 Pa. St. 647, 12 Atl. 577.

stitutes a Taking, we have endeavored to show that any physical injury to property is a taking, but all the decisions do not bear out this conclusion.⁴⁴ In States which hold that there is any kind of physical injury which is not a taking, the words in question would clearly cover such physical injury. Thus any invasion of one's premises by water or gases, or by casting upon them smoke or cinders, or affecting them by vibrations, if not held to be a taking, would certainly be a damage or injury within the constitutional provisions now under consideration.⁴⁵ In order that smoke, cinders, gases, vibrations, etc., should amount to a taking, they must constitute a common law nuisance.⁴⁶ But the invasion of property by any of these agencies, in a degree to materially affect its value, is a damage or injury, though not a nuisance.⁴⁷ Probably mere noise would not give a right of recovery unless it amounted to a nuisance,⁴⁸ nor vibrations, unless they produced a physical injury.⁴⁹

§ 362 (234). Also any interference with private rights not held to be a taking. We have also endeavored to show that any interference with any private right appurtenant to property, such as the right of support, the right to pure air, etc., was a taking for which compensation must be made under our constitutions as they existed prior to 1870.⁵⁰ Many courts,

⁴⁴See *ante*, §§ 62-68; chapters iii., iv., v., vi.

⁴⁵Ante, §§ 356 *et seq.*; Ill. Cent. R. R. Co. v. Trustees of Schools, 212 Ill. 406, 72 N. E. 39; Davenport etc. Ry. Co. v. Sinnet, 111 Ill. App. 75; Kuhn v. Ill. Cent. R. R. Co., 111 Ill. App. 323; Henderson v. McClain, 102 Ky. 402, 43 S. W. 700, 39 L.R.A. 349; Willis v. Ky. & Ind. Bridge Co., 104 Ky. 186, 46 S. W. 488; Covington etc. R. R. & Bridge Co. v. Kleymeyer, 105 Ky. 609, 49 S. W. 484; King v. Vicksburg Ry. & Lt. Co., 88 Miss. 456, 42 So. 204, 117 Am. St. Rep. 749, 6 L.R.A.(N.S.) 1036; Louisville etc. Terminal Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L.R.A. 188; Louisville etc. Terminal Co. v. Lellyett, 114 Tenn. 368, 85 S. W. 881, 1 L.R.A.(N.S.) 49; Gossett v. So. Ry. Co., 115 Tenn. 376, 89 S. W. 737, 112 Am. St. Rep. 846, 1 L.R.A.(N.S.) 97;

Daniel v. Ft. Worth etc. Ry. Co., 96 Tex. 327, 72 S. W. 578; St. Louis etc. Ry. Co. v. Shaw, 99 Tex. 559, 92 S. W. 30, 122 Am. St. Rep. 663, 6 L.R.A. (N.S.) 245; Texas etc. Ry. Co. v. Edrington, 100 Tex. 496, 101 S. W. 441, 9 L.R.A. (N.S.) 988; Stockdale v. Rio Grande Western Ry. Co., 28 Utah 201, 77 Pac. 849; Tidewater Ry. Co. v. Shartzer, 107 Va. 562, 59 S. E. 407, 17 L.R.A.(N.S.) 1053; Smith v. St. Paul etc. Ry. Co., 39 Wash. 355, 81 Pac. 840, 109 Am. St. Rep. 889, 70 L.R.A. 1018.

⁴⁶Ante, §§ 235-238.

⁴⁷See cases already cited in this section. *Also ante*, § 357.

⁴⁸Gossett v. Southern Ry. Co., 115 Tenn. 376, 89 S. W. 737, 112 Am. St. Rep. 846, 1 L.R.A.(N.S.) 97.

⁴⁹Ill. Cent. R. R. Co. v. Trustees of Schools, 212 Ill. 406, 72 N. E. 39.

⁵⁰Ante, §§ 234-238.

however, have held otherwise. We think it clear that, where such interference is held not to be a taking, it must be held to be a damage or injury. So far, we think, no question can arise as to the interpretation of the words under consideration.

§ 363 (235). And, generally, any damage to property arising from an interference with a right, public or private, which does not amount to a taking. After forty years of litigation in England over the proper construction of the words, *injuriously affected*, we think it may now be regarded as settled, that they include any damage to property produced by an interference with a right, either public or private, which the owner or occupier is entitled to make use of in connection with the property, and the loss or impairment of which renders the property less valuable.⁵¹ In McCarthy's Case the Lord Chancellor says: "My Lords, in his very able argument at your Lordship's bar, Mr. Thesinger stated what he would rely upon as a definition of the right to compensation, and, having considered this case very fully, I myself should not be disposed to find fault with any part of that definition, although definitions are always matters of very considerable difficulty. Mr. Thesinger stated that the test which he would submit as one which he thought would explain and reconcile the various cases upon this subject, was this, that where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value."⁵²

Substantially the same test is adopted by the supreme court of Illinois in interpreting the word "damaged" in the constitution of that State. "In all cases," says the court, "to warrant a recovery, it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which

⁵¹The doctrine is settled and the cases reviewed in McCarthy v. Metropolitan Board of Works, L. R. 7 Eng. & Irish App. 243, and Caledonian Railway v. Walker's Trustees, L. R. 7 App. Cas. 259.

⁵²Metropolitan Board of Works v. McCarthy, 7 E. & I. App. Cas. 243, 253.

gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally.”⁵³ In a more recent case the same court has held the disturbance of the right need not necessarily be a “direct physical disturbance” in order to bring the case within the constitution. A railroad was constructed alongside a highway and the farm opposite was diminished in value because access thereto over the highway was rendered dangerous and inconvenient by the operation of the road. It was held that the farm was damaged within the meaning of the constitution.⁵⁴

⁵³Rigney v. Chicago, 102 Ill. 64, 81. This language is quoted and approved as a proper interpretation of the Illinois constitution by the Supreme Court of the United States in the case of Chicago v. Taylor, 125 U. S. 161. *And see Aldrich v. Met. West Side El. R. R. Co.*, 195 Ill. 456, 63 N. E. 155, 57 L.R.A. 237; *Ill. Cent. R. R. Co. v Trustees of Schools*, 212 Ill. 406, 72 N. E. 39; *Chicago etc. R. R. Co. v. Coggswell*, 44 Ill. App. 88; *Met. West Side El. R. R. Co. v. Goll*, 109 Ill. App. 323.

⁵⁴Lake Erie & W. R. R. Co. v. Scott, 132 Ill. 429, 24 N. E. 78, 8 L.R.A. 330. After referring to the Rigney case, above cited, the court says: “We are inclined to think that there is no good reason for distinguishing between an injury arising from an interference with appellee's right to the advantages the highway gave his farm, caused by a physical obstruction placed therein, as in the foregoing case, and where the same kind of an injury is produced by the operation of trains beside it. In either case the advantages given the farm by the highway have to some extent been destroyed, and the land lessened in value. If it be conceded that the result of operating the road has in fact injured appellee's farm in a way not common to the public, and thereby made it

less valuable, it would seem to follow as a necessary consequence that it has been damaged for public use. Such operation, being lawful, and confined to the right of way, does not release appellant from liability; for it would clearly be liable for damages caused by an unlawful act, and, as we understand the constitutional provision that private property shall not be taken nor damaged for public use without just compensation, it means to cover cases where damages are caused by acts that are legal, and entirely within the power of the corporation performing them, but in the doing of which, for the use and benefit of the public, private property is damaged. It follows, therefore, that appellant's proposition that ‘a corporation is not liable unless an individual doing the same thing on his private property would be,’ as applied to this case is not sound. An individual cannot legally take or damage private property for public use, but a railroad company can lawfully do either, if in so doing it makes compensation.” This is from the opinion of the appellate court, adopted and approved by the Supreme Court. The leaving of abutting property in a condition, or the use of it in a way to endanger travel on the adjacent street, is un-

In speaking of the word damaged in the constitution of Nebraska, the supreme court of that State says: "It was to grant relief in cases where there was no direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection with his estate, by reason of which he sustains special injury in respect to such property in excess of that sustained by the public at large."⁵⁵ Similar conclusions have been reached in other States.⁵⁶ The test here proposed is

doubtedly a public nuisance. Elliott, Roads and Streets, p. 542 *et seq.* The operation of a railroad on private property adjacent to a street or highway, without authority of law, in such a manner as to frighten horses and endanger travel, would, therefore, be to maintain a public nuisance. If the use of the property on the opposite side of the street was thereby interfered with so as to diminish its rental or salable value, the owner would suffer a special damage, and would be entitled to maintain a private action. Consequently, it would follow that when the same damage results from a railroad authorized by law, the owner would have a remedy under the constitution, and the case is no exception to the general rule.

⁵⁵Gottschalk v. Chicago, Burlington & Quincy R. R. Co., 14 Neb. 550, 560; Omaha Belt R. R. Co. v. McDermott, 25 Neb. 717, 41 N. W. 648; Stehr v. Mason City etc. Ry. Co., 77 Neb. 641, 110 N. W. 701. *But compare* City of Omaha v. Kramer, 25 Neb. 492, 41 N. W. 295, 13 Am. St. Rep. 504; Chicago etc. R. R. Co. v. Hazels, 26 Neb. 364, 42 N. W. 93; Schaller v. City of Omaha, 23 Neb. 325, 36 N. W. 533. *See* next section.

⁵⁶Eachus v. Los Angeles Consol. El. R. R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; City of Pueblo v. Strait, 20 Colo. 13, 36 Pac. 790; Peel v. Atlanta, 85 Ga. 138, 11 S. E. 582, 2 Am. R. R. & Corp. Rep. 413; Campbell v. Metropolitan St.

R. R. Co., 82 Ga. 320, 9 S. E. 1078; Bramlette v. Louisville etc. R. R. Co., 113 Ky. 300, 68 S. W. 145; Ludlow v. Detwiller, 20 Ky. L. R. 894, 47 S. W. 881; City of Vicksburg v. Herman, 72 Miss. 211, 16 So. 434; King v. Vicksburg Ry. & Lt. Co., 88 Miss. 456, 42 So. 204, 117 Am. St. Rep. 749, 6 L.R.A.(N.S.) 1036; Van de Vere v. Kansas City, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396, 5 Am. R. R. & Corp. Rep. 196; Pennsylvania R. R. Co. v. Marchant, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. Rep. 659; Pennsylvania S. V. R. R. Co. v. Walsh, 124 Pa. St. 544, 17 Atl. 186; Foust v. Pa. R. R. Co., 212 Pa. St. 213, 61 Atl. 829; Trinity & S. R. R. Co. v. Meadows, 73 Tex. 32, 11 S. W. 145; Gainsville etc. R. R. Co. v. Hall, 78 Tex. 169, 14 S. W. 259, 9 L.R.A. 298, 3 Am. R. R. & Corp. Rep. 251; Ft. Worth etc. R. R. Co. v. Downie, 82 Tex. 383, 17 S. W. 620; Brown v. City of Seattle, 5 Wash. 35. 31 Pac. 313, 32 Pac. Rep. 214, 7 Am. R. R. & Corp. Rep. 64; Mason City etc. R. R. Co. v. Wolf, 148 Fed. 961, 78 C. C. A. 589. In the last case, which is under the constitution of Nebraska, the court says: "The right of recovery under the State constitution is not limited to those cases in which the property of a private owner is actually invaded or appropriated by a railroad company. It extends to cases where the value of the property is depreciated by the disturbance of some right, either public or private, which the owner en-

one which can be readily applied in all cases, which gives ample scope to the words in question, and which affords full protection to the owners of private property, without casting any unnecessary burden upon those engaged in works of a public nature.

§ 364 (235a). When claim based on an interference with a public right, the plaintiff's damages must be special and peculiar. According to the rule laid down in the last section the owner of property may recover, as for a damage or injury, under the constitution, though the only actual injury or wrongful act complained of consists of an obstruction or interference with a right which he enjoys in common with the public. In such case, it is the universal rule that the plaintiff must show an injury or damage which is special and peculiar to himself; as distinguished from that suffered by the public at large.⁵⁷ But diminution in value of the property, resulting from the interference, is a special and peculiar injury within the rule.⁵⁸

§ 365 (235b). Different views regarding the proper construction of the word "damaged" or "injured." In endeavoring to give a general interpretation to the words damaged or injured, as used in recent constitutions, courts have usually adopted one or the other of the following views: 1. That the words embrace only what are known as actionable damages, that is, such damages as would form the basis of an action at common

joys in connection therewith. It matters not whether the disturbance proceeds from works and operations upon public highways, or from those upon grounds acquired and owned by the company itself; and in the latter case the method of acquisition, whether by purchase or by the exercise of the power of eminent domain, is immaterial. The right of recovery includes damage to the property from noise, smoke, cinders, and vibrations of the ground, and the obstruction or impairment of the right of the owner to make use of public highways in the vicinity. The measure of the recovery is the difference between the market value of the property before the construction and operation of the railroad and its market value afterwards." p. 967.

⁵⁷Brown v. Board of Supervisors,

124 Cal. 274, 57 Pac. 82; Town of Longmont v. Parker, 14 Colo. 386, 23 Pac. 443, 20 Am. St. Rep. 277, 2 Am. R. R. & Corp. Rep. 91; Fairchild v. City of St. Louis, 97 Mo. 85, 11 S. W. 60; Carman v. City of St. Louis, 97 Mo. 92, 11 S. W. 60; Glaessner v. Anheuser-Busch Brewing Ass., 100 Mo. 508, 13 S. W. 707, 2 Am. R. R. & Corp. Rep. 420; Van de Vere v. Kansas City, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396, 5 Am. R. R. & Corp. Rep. 196; Gates v. Kansas City etc. R. R. Co., 111 Mo. 28, 19 S. W. Rep. 957; Pennsylvania R. R. Co. v. Marchant, 119 Pa. St. 541, 13 Atl. 690; Pennsylvania S. V. R. R. Co. v. Walsh, 124 Pa. St. 544, 17 Atl. 186; Trinity etc. R. R. Co. v. Meadows, 73 Tex. 32, 11 S. W. 145.

⁵⁸Ante, § 199; post, § 951.

law, but for the statutory authority.⁵⁹ 2. That they embrace only damages caused by some physical injury to the property, or by an interference with some private right appurtenant to the property, or of some public right, which the owner is entitled to make use of in connection with the property.⁶⁰ 3. That

⁵⁹Brown v. San Francisco, 124 Cal. 274, 57 Pac. 82; Town of Longmont v. Parker, 14 Colo. 386, 23 Pac. 443, 28 Am. St. Rep. 396, 2 Am. R. R. & Corp. Rep. 91; Peel v. Atlanta, 85 Ga. 138, 11 S. E. 582, 2 Am. R. R. & Corp. Rep. 413; Campbell v. Metropolitan St. R. R. Co., 82 Ga. 320, 9 S. E. 1078; Austin v. Augusta Terminal Ry. Co., 108 Ga. 671, 34 S. E. 852, 47 L.R.A. 755; Ga. R. R. & B. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315; Baker v. Boston El. Ry. Co., 183 Mass. 178, 66 N. E. 711; Coster v. Albany, 43 N. Y. 399; Pennsylvania R. R. Co. v. Marchant, 119 Pa. St. 541, 13 Atl. 690; Pennsylvania S. V. R. R. Co. v. Walsh, 124 Pa. St. 544, 17 Atl. 186; Trinity & S. R. R. Co. v. Meadows, 73 Tex. 32, 11 S. W. 145; Gainsville etc. R. R. Co. v. Hall, 78 Tex. 169, 14 S. W. 259, 3 Am. R. R. & Corp. Rep. 251; Haney v. G. C. & S. F. R. R. Co., 3 Tex. Ct. of App. p. 336, §§ 278-280; Smith v. St. Paul etc. Ry. Co., 39 Wash. 355, 81 Pac. 840, 109 Am. St. Rep. 889, 70 L.R.A. 1018. *And see* Henderson Belt R. R. Co. v. Dechamp, 95 Ky. 219, 24 S. W. 605; McMahon v. St. Louis etc. R. R. Co., 41 La. An. 827, 6 So. 640. In the case of Peel v. Atlanta, 85 Ga. 138, 11 S. E. 582, 2 Am. R. R. & Corp. Rep. 413, it is said: "The effect of such provisions is not to authorize compensation in all cases where property may be injured by public works, but only where the enjoyment of some right of the plaintiff in reference to his property is interfered with, and the property thereby rendered less valuable. The test is, would the injury, if caused by a private person

without authority of statute, give the plaintiff a cause of action against such person? If so, then he is entitled to compensation notwithstanding the statute which legalizes the damaging work. The constitutional or statutory provision simply prevents the defendant from shielding himself under legislative authority against liability for damages consequent upon the work. Hence, if no part of the plaintiff's land is taken, and no other right of his is disturbed, he cannot have compensation." And in Trinity etc. R. R. Co. v. Meadows, 73 Tex. 32, 11 S. W. 145, the court says: "We do not understand that it was intended to give an action against those constructing public works, for acts which if done by persons in pursuit of a private enterprise would not have been actionable. * * * If a corporation do an act which it acquires a right to do by virtue of its franchise granted for public use, and if a person having no franchise could not have done the act lawfully, and the property of another is directly damaged, then we understand that the constitutional provision requires that notwithstanding the franchise the corporation shall be liable." On the subject of actionable damage *see* Stanwood v. Madden, 157 Mass. 17, 31 N. E. 702, 16 L.R.A. 591; Nichols v. Richmond, 162 Mass. 170, 38 N. E. 501.

⁶⁰Van de Vere v. Kansas City, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396, 5 Am. R. R. & Corp. Rep. 196. "Whether the plaintiff must now, in all cases, where claiming that his property has been 'damaged' for pub-

they cover any loss or injury which may properly be taken into consideration, in estimating damages to the balance of a tract when part is taken.⁶¹ 4. That they embrace any depreciation caused by the construction and operation of works for public use, no matter how occasioned.⁶² The third and fourth of these rules of construction doubtless amount to the same thing, that property is damaged whenever it is depreciated in value by the construction or operation of works for public use. The first rule is doubtless too restricted, since in some cases and in some jurisdictions, it would exclude compensation for injuries, which were

lic use, show that the injury is one for which he might have maintained an action if the act had not been done by authority of law, we need not say in this case. What we do say is this: that he must show that the property itself, or some right or easement connected therewith, is directly affected, and that it is specially affected." See also cases cited in last section and Gates v. Kansas City etc. R. R. Co., 111 Mo. 28, 19 S. W. 957.

⁶¹Brewer, J., in Omaha Horse R. R. Co. v. Cable Tramway Co., 32 Fed. 727, in speaking of the construction of the word "damaged," says: "It is futile to attempt a general answer, or to lay down a rule to determine all cases. One proposition may be affirmed. Whenever a proposed public use causes to property, no part of which is taken, an injury of such a character as, if it accrued when a portion of the property was taken, would be a proper element of damages to the part not taken, there is a damage within the scope and protection of this constitutional provision, entitling the owner to compensation." As to what damages may thus be taken into consideration see *post*, § 748.

⁶²In *City of Omaha v. Kramer*, 25 Neb. 492, 41 N. W. 295, 13 Am. St. Rep. 504, the court says that "the words, 'or damaged,' in section 21, art. 1, of the constitution, include all

actual damages, resulting from the exercise of the right of eminent domain, which diminish the market value of private property. * * * The fact that damages are consequential will not preclude a recovery if the construction and operation of the public improvement is the cause of the injury, and it is not necessary that the damages be caused by trespass, or an actual physical invasion of the owner's real estate. The test is, excluding general benefits, is the property in fact damaged? If so, the owner is entitled to compensation. It is not within the scope of the authority of the law-making department of the government to take the property of A. and give it to B., even if B. has the right to condemn property for public use. This being so, it is equally beyond the power of such department to confer the right on B. to damage or destroy the property of A. without making compensation therefor. The right of the legislature to authorize the taking of private property for public use is based on the condition that an equivalent in value be paid to the owner. If the property is diminished in actual value by reason of a public improvement, it is to the extent of the diminution taken for public use, as much as if it was directly appropriated. The cases differ in regard to the mode of appropriation only. In the

intended to be indemnified.⁶³ The matter is further considered in the following section.

§ 366 (236). Damages not embraced by the words in question. It is evident that the rule of interpretation laid down in section 365 will not embrace every species of loss or depreciation to property which is due directly to public improvements. Unless property is physically affected or the owner is disturbed in the enjoyment of some right which he is entitled to make use of in connection with his property, he cannot recover. If the loss or depreciation arises from the mere proximity of the work or improvement, as from its unsightly nature or its incongruity with the uses to which the neighboring property is put, there can be no recovery. There are no decided cases to which we can refer on this point, but we can easily illustrate our meaning. Suppose the public authorities purchase or condemn a lot in a fashionable residence locality and erect and maintain a jail thereon, and suppose the direct effect is to depreciate the surrounding property twenty-five to fifty per cent. Is the property so depreciated damaged, injured, or injuriously affected within the meaning of the provisions in question? We answer in the negative, because the owners have not been disturbed, either in the enjoyment of their estates, or of any right connected with their estates. Their property and rights remain as before. The same effect might be produced if an individual should establish on the same lot a boarding-house, a school or a factory. It seems to us the true rule is that, unless the depreciation is due to the disturbance of some right, no recovery can be had. In any other case the loss is the same as is often sustained by one proprietor by the lawful use of adjacent or neighboring property, and is *damnum absque injuria*.

one case, all the property is taken, while in the other it is taken only to the extent that it is diminished in value; and in either case the owner is entitled to be compensated for his loss." The case of Pennsylvania R. R. Co. v. Marchant, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. Rep. 659, is referred to and disapproved. The Kramer case is approved in Chicago etc. R. R. Co. v. Hazels, 26 Neb. 364, 42 N. W. Rep. 93. But in neither of these cases was it decided that a

mere diminution in value would sustain a recovery. In the Kramer case the street in front of plaintiff was occupied by a viaduct. In the Hazels case the street on which plaintiff abutted was obstructed and closed a block west of his property. Compare Woodbury v. Beverly, 153 Mass. 245, 26 N. E. 851.

⁶³See Woodbury v. Beverly, 153 Mass. 245, 26 N. E. 851; Tidewater Ry. Co. v. Shartzner, 107 Va. 562, 59 S. E. 407, 17 L.R.A.(N.S.) 1053.

The foregoing remains as written in the first edition, but the conclusions stated have been verified by recent decisions. In speaking generally of the constitutional provisions in question, the supreme court of California says: "The constitution does not, however, authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable, by reason of the public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent render the property less desirable, and even less salable; but this is not an injury to the property itself, so much as an influence affecting its use for certain purposes. But whenever the enjoyment by the plaintiff of some right in reference to his property is interfered with, and thereby the property itself is made intrinsically less valuable, he has suffered a damage for which he is entitled to compensation."⁶⁴

Although the opinion has been expressed in some cases that there could be a recovery for mere depreciation caused by a public improvement or the use of public works,⁶⁵ yet a recovery has not been allowed in any case, unless there was some physical injury to the plaintiff's property, as by noise, smoke, gases, vibrations or otherwise, an interference with the street in front of his property, or with some right appurtenant thereto, or which he was entitled to make use of in connection with his property. On the other hand, several cases have held that mere depreciation, caused by the proximity of a public improvement, afforded no ground for redress. Thus it has been held that the erection of a fire-engine house⁶⁶ or jail⁶⁷ on a lot adjoining plaintiff's afforded no cause of action, though his property was depreciated

⁶⁴Eachus v. Los Angeles Consol. El. R. R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149. Mo. 83, 17 S. W. 695, 5 Am. R. R. & Corp. Rep. 196, 28 Am. St. Rep. 396.

⁶⁵See cases cited in last section, note 62.

⁶⁶Van de Vere v. Kansas City, 107

Mo. 83, 17 S. W. 695, 5 Am. R. R. & Corp. Rep. 196, 28 Am. St. Rep. 396; Bacon v. Walker, 77 Ga. 336; Long v. Elberton, 109 Ga. 28, 34 S. E. 333, 77 Am. St. Rep. 363, 46 L.R.A. 428.

thereby. So where the plaintiff's property was depreciated by the laying out of a new road which diverted travel from past his premises.⁶⁸ The principle of these decisions would cover the case of a school-house, court-house, market or other public building, erected upon adjacent property. In almost every city there are localities in which the erection and use of such a building would depreciate the surrounding property. In such case there is no invasion or physical injury of the property affected, nor an interference with any right, public or private, connected therewith. The only ground of complaint is, that one owner, by a perfectly legitimate use of his property, has depreciated the value of the adjoining property. The same result might have happened by the establishment of a store or factory. Every owner takes the chance of having the value of his property enhanced or diminished by the use made of surrounding property, and the character of the improvements put upon it. He has no cause of complaint on account of the nature of such uses or improvements, unless they amount in law to a nuisance.⁶⁹ The grievances which lead to the insertion of the words "damaged" or "injured" in recent constitutions, did not consist in the fact that such damages as have just been referred to went without redress, but in the fact that, under the restricted interpretation put upon the word "taken," private property might be subjected to physical injuries, and valuable rights appurtenant thereto or connected therewith, might be impaired or destroyed for public use without compensation.⁷⁰ These words were not inserted for the purpose of preventing the public from doing what every private individual may do without liability to his neighbor. They were not intended to confer a right of action for a use of property by the public, which a private individual might make without legislative authority.⁷¹

⁶⁸Huff v. Donehoo, 109 Ga. 638, 34 S. E. 1035; Elbert County v. Swift, 2 Ga. App. 47, 58 S. E. 396.

⁶⁹In Peel v. Atlanta, 85 Ga. 138, 11 S. E. 582, 2 Am. R. R. & Corp. Rep. 413, the city bought a lot next to plaintiff and laid it out as a street. It was held the plaintiff's property was not damaged. *And see* Trinity etc. R. R. Co. v. Meadows, 73 Tex. 32, 11 S. W. 145.

⁷⁰City Council of Montgomery v.

Maddox, 89 Ala. 181, 7 So. 433, 2 Am. R. R. & Corp. Rep. 426; City of Vicksburg v. Herman, 72 Miss. 211, 16 So. 434; Van de Vere v. Kansas City, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396, 5 Am. R. R. & Corp. Rep. 196; Trinity & S. R. R. Co. v. Meadows, 73 Tex. 32, 11 S. W. 145; Brown v. City of Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. Rep. 214, 7 Am. R. R. & Corp. Rep. 64.

⁷¹See Aldrich v. Met. West Side

El. R. R. Co., 195 Ill. 456, 63 N. E. 155, 57 L.R.A. 237; Smith v. St. Paul etc. Ry. Co., 39 Wash. 355, 81 Pac. 840, 109 Am. St. Rep. 889, 70 L.R.A. 1018.

The leading cases in the United States on the construction of the words in question are here given: City Council of Montgomery v. Townsend, 80 Ala. 489; Hot Springs R. R. Co. v. Williamson, 45 Ark. 429; Reardon v. San Francisco, 66 Cal. 492, 56 Am. Rep. 109; Eachus v. Los Angeles Consol. El. R. R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; Denver v. Bayer, 7 Colo. 113; City of Pueblo v. Strait, 20 Colo. 13, 36 Pac. 790, 47 Am. St. Rep. 273, 24 L.R.A. 392; Atlanta v. Green, 67 Ga. 386; Campbell v. Metropolitan St. R. R. Co., 82 Ga. 320, 9 S. E. 1078; Rigney v. Chicago, 102 Ill. 64; Chicago & Western Indiana R. R. Co. v. Ayres, 106 Ill. 511; Lake Erie & W. R. R. Co. v. Scott, 132 Ill. 429, 24 N. E. 78, 8 L.R.A. 330; Wiley v. Elwood, 134 Ill. 281, 25 N. E. 570; Chicago

etc. R. R. Co. v. Drake, 148 Ill. 226, 35 N. E. 750, 9 Am. R. R. & Corp. Rep. 73; Gottschalk v. Chicago, Burlington & Quincy R. R. Co., 14 Neb. 550; Omaha etc. R. R. Co. v. Janecek, 30 Neb. 276, 46 N. W. 478, 27 Am. St. Rep. 399, 3 Am. R. R. & Corp. Rep. 268; Pennsylvania R. R. Co. v. Merchant, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. Rep. 659; Mellor v. City of Philadelphia, 160 Pa. St. 614, 28 Atl. 991; Galveston etc. R. R. Co. v. Fuller, 63 Tex. 467; Gainesville etc. R. R. Co. v. Hall, 78 Tex. 169, 14 S. W. 259, 9 L.R.A. 298, 3 Am. R. R. & Corp. Rep. 251; Johnson v. Parkersburg, 16 W. Va. 402. The leading cases in England are McCarthy v. Metropolitan Board of Works, 7 Eng. & I. App. 243; Caledonian Railway v. Walker's Trustees, 7 App. Cas. 259. Damages by reason of negligence in the construction of works are, of course, not included. Edmundson v. Pittsburgh etc. R. R. Co., 111 Pa. St. 316.

CHAPTER IX.

THE STATUTORY AUTHORITY.

§ 367 (237). **Power of the legislature generally.** The power of eminent domain, being an incident of sovereignty, is inherent in the federal government and in the several States, by virtue of their sovereignty.¹ It does not exist in any subordinate political division or public corporation unless granted by the sovereign power. Consequently it does not exist in any territorial government unless it has been expressly granted by congress.² This power, with all its incidents, is vested in the legislatures of the several States by the general grant of legislative powers contained in the constitution. From this it follows, *first*, that the power can only be exercised by virtue of a legislative enactment; ³ second, that the time, manner and oc-

¹Fulton v. Town of Dover, 8 Hous-ton (Del.), 78; S. C. 6 Del. Ch. 1; Jones v. No. Ga. Elec. Co., 125 Ga. 618, 54 S. C. 85, 6 L.R.A. (N.S.) 122; Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. 1062, 15 L.R.A. 505; Lafayette etc. Ry. Co. v. But-ner, 162 Ind. 460, 70 N. E. 529; Sisson v. Board of Supervisors, 128 Ia. 442, 104 N. W. 454, 70 L.R.A. 440; Peo-ple v. Fisher, 190 N. Y. 468, 83 N. E. 482; Darlington v. United States, 82 Pa. St. 382; Spring City Gas Light Co. v. Pennsylvania S. V. R. R. Co., 167 Pa. St. 6, 31 Atl. 368; Winona etc. R. R. Co. v. Watertown, 4 S. D. 323, 56 N. W. 1077; Painter v. St. Clair, 98 Va. 85, 34 S. E. 989; Balti-more & Ohio R. R. Co. v. P. W. & Ky. R. R. Co., 17 W. Va. 812, 841; Kohl v. United States, 91 U. S. 367; United States v. Fox, 94 U. S. 315, 320; Jones v. Walker, 2 Paine C. C. 688. *Ante*, §§ 1-3.

²Newcomb v. Smith, 1 Chand. Wis.

71; Pratt v. Brown, 3 Wis. 603; Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 255; Sanford v. Tucson, 8 Ariz. 247, 71 Pac. 247.

³In re Pet. of Alston, 1 Penn. Del. 359; Parham v. Decatur County, 9 Ga. 341; Tyson v. Rogers, 33 Ga. 473; Sholl v. German Coal Co., 118 Ill. 427; Leeds v. Richmond, 102 Ind. 372; Richland School Tp. v. Over-meyer, 164 Ind. 382, 73 N. E. 811; Lake Keon Nav. etc. Co. v. Klein, 63 Kan. 484, 65 Pac. 684, 93 Am. St. Rep. 299; Bethum v. Turner, 1 Me. 111, 10 Am. Dec. 36; Schmidt v. Dens-more, 42 Mo. 225; Helena Power Transmission Co. v. Spratt, 35 Mont. 108, 88 Pac. 773, 8 L.R.A. (N.S.) 567; Claremont Ry. & Lt. Co. v. Putney, 73 N. H. 431, 62 Atl. 727; Matter of Niagara Falls & W. R. R. Co., 108 N. Y. 375, 15 N. E. 429; Matter of Poughkeepsie Bridge Co., 108 N. Y. 483, 15 N. E. 601; Matter of Union Elevated R. R. Co., 113 N. Y. 275, 21

casion of its exercise are wholly in the control and discretion of the legislature, except as restrained by the constitution.⁴ "It lies in its discretion to determine to what extent, on what occasions, and under what circumstances this power shall be exercised."⁵

N. E. 81; Bridal Veil Lumber Co. v. Johnson, 30 Ore. 205, 46 Pac. 790, 60 Am. St. Rep. 818, 34 L.R.A. 368; Jacobs v. Clearview Water Supply Co., 220 Pa. St. 388, 69 Atl. 870; Wallace v. Richmond, 94 Va. 204; Painter v. St. Clair, 98 Va. 85, 34 S. E. 989; City of Tacoma v. State, 4 Wash. 64, 29 Pac. 847; Long v. Billings, 7 Wash. 267, 34 Pac. 936; St. Louis etc. R. R. Co. v. Thomas, 34 Fed. 774; United States v. Rauers, 70 Fed. 748.

In matter of Poughkeepsie Bridge Co., 108 N. Y. 483, 490, it is said: "The power of eminent domain which resides in the State as an attribute of sovereignty, is nevertheless dormant until called into exercise by an act of the legislature. Until a statute authorizes an exercise of the power, it is latent and potential merely, and not active or efficient, and the State can neither exercise the prerogative, nor can it delegate its exercise, except through the medium of legislation. Therefore it is that whenever an attempt is made either by the officers of the State or by a corporation organized for a public purpose to take private property under the power of eminent domain, the officers or body claiming the right must be able to point to a statute conferring it. In the absence of statutory authority private property cannot be invaded by this power, however strong may be the reasons for the appropriation."

⁴Consumers' Gas Trust Co. v. Harness, 131 Ind. 446, 29 N. E. 1062, 15 L.R.A. 505; Lafayette etc. Ry. Co. v. Butner, 162 Ind. 460, 70 N. E. 529;

Em. D.—43.

Richland School Tp. v. Overmeyer, 164 Ind. 382, 73 N. E. 811; Central Branch U. P. R. R. Co. v. Atchison, T. & S. F. R. R. Co., 28 Kan. 453; Van Witsen v. Gutman, 79 Md. 405, 29 Atl. 608, 24 L.R.A. 403; Swan v. Williams et al., 2 Mich. 427; Fairchild v. St. Paul, 46 Minn. 540, 49 N. W. 325; State v. Engleman, 106 Mo. 628, 17 S. W. 759; Simpson v. Kansas City, 111 Mo. 237, 20 S. W. 38; Seacomb v. Milwaukee etc. R. R. Co., 49 How. Pr. 75; Bachler's Appeal, 90 Pa. St. 207; Winona etc. R. R. Co. v. Watertown, 4 S. D. 323, 56 N. W. 1077; Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670; Secombe v. Railroad Co., 23 Wall. 108; St. Louis R. R. Co. v. Thomas, 34 Fed. Rep. 774. In Swan v. Williams, 2 Mich. 427, the court says: "It rests in the wisdom of the legislature to determine when, and in what manner, the public necessities require its exercise, and with the reasonableness of the exercise of that discretion courts will not interfere." Wilkin v. First Div. of St. Paul & Pacific R. R. Co., 16 Minn. 271; Weir v. St. Paul, Stillwater & Taylor's Falls R. R. Co., 18 Minn. 155; Roanoke City v. Berkowitz, 80 Va. 616; *post*, § 369.

⁵Van Witsen v. Gutman, 79 Md. 405, 29 Atl. 608. In Richland School Tp. v. Overmeyer, 164 Ind. 382, 73 N. E. 811, the court says: "The right to appropriate private property to public use lies dormant in the State until legislative action is had, pointing out the occasions, the modes, conditions and agencies for its appropriation," p. 385.

§ 368 (237). People's charters. The constitution of Missouri permits cities of over one hundred thousand population to frame their own charters. Provisions for the exercise of the eminent domain power contained in such charters are valid, the power emanating directly from the people, instead of through the legislature.⁶ The same ruling has been made in Minnesota.⁷ When it is said, as in the last section, that the exercise of the power must originate with the legislature, the statement is made in view of the usual conditions in which all legislative power is vested in that body. The sovereign powers reside in the people as the ultimate source and they may delegate their exercise directly to municipalities. And a constitutional provision authorizing cities to frame their own charters, authorizes the adoption of such provisions for the exercise of the eminent domain power as are necessary to enable them to construct and carry on such local improvements as the local needs require.⁸ In the case referred to there was an enabling act passed by the legislature in pursuance of the constitutional provision, and it was held that this might be treated as an implied authority from the legislature to insert in the charter the necessary eminent domain provisions.

§ 369 (238). The necessity or expediency of exercising the power is exclusively for the legislature. Whether the power of eminent domain shall be put in motion for any particular public purpose, and whether the exigencies of the occasion and the public welfare require or justify its exercise, are questions which rest entirely with the legislature.⁹ "When the

⁶Kansas City v. Marsh Oil Co., 140 Mo. 458, 41 S. W. 943.

⁷State v. District Court, 87 Minn. 146, 91 N. W. 300.

⁸Ibid.

⁹Aldridge v. Tuscarawas, Courtland & Decatur R. R. Co., 2 Stew. & Por. 199, 23 Am. Dec. 297; Sadler v. Langham, 34 Ala. 311; New & Old Decatur Belt etc. R. R. Co. v. Karcher, 112 Ala. 676, 21 So. 825; Gilmer v. Lime Point, 18 Cal. 229; Sherman v. Brick, 32 Cal. 241, 91 Am. Dec. 577; Lent v. Tillson, 72 Cal. 404; Moran v. Ross, 79 Cal. 159, 21 Pac. 547; Wulzen v. Board of Supervrs., 101 Cal. 15, 35 Pac. 353, 40 Am. St. Rep. 17; San Mateo

County v. Coburn, 130 Cal. 631, 63 Pac. 78; Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127; Ortiz v. Hansen, 35 Colo. 100, 83 Pac. 964; Tanner v. Treasury Min. & Reduction Co., 35 Colo. 593, 83 Pac. 464, 4 L.R.A.(N.S.) 106; Waterbury v. Platt Bros. & Co., 76 Conn. 435, 56 Atl. 856; White-man's Executrix v. Wilmington & Susquehanna R. R. Co., 2 Harr. (Del.) 514; Parham v. Justices etc. of Decatur County, 9 Ga. 341; Thomas v. Milledgeville R. R. Co., 99 Ga. 714, 27 S. E. 756; Thom v. Ga. Mfg. etc. Co., 128 Ga. 127, 57 S. E. 75; Chicago, Rock Island & Pacific R. R. Co. v. Town of Lake, 71 Ill. 333;

Chicago & A. R. R. Co. v. Pontiac, 169 Ill. 155, 48 N. E. 485; Baughman v. Heinzelman, 180 Ill. 251, 54 N. E. 313; Pittsburg etc. Ry. Co. v. Sanitary District, 218 Ill. 286, 75 N. E. 892; Gillette v. Aurora Ry. Co., 228 Ill. 261, 81 N. E. 1005; Water Works Co. v. Burkhart, 41 Ind. 364; Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. 1062, 15 L.R.A. 505; Mull v. Indianapolis etc. Trac-tion Co., 169 Ind. 214, 81 N. E. 657; Bankhead v. Brown, 25 Ia. 540; Cherokee v. The S. C. & I. F. Town Lot & Land Co., 52 Ia. 279; Bennett v. Marion, 106 Ia. 628, 76 N. W. 844; Sisson v. Board of Supervisors, 128 Ind. 442, 104 N. W. 454, 70 L.R.A. 440; Challiss v. Atchison, T. & S. F. R. R. Co., 16 Kan. 117, 126; Lake Keon Nav. etc. Co. v. Klein, 63 Kan. 484, 65 Pac. 684, 93 Am. St. Rep. 299; Moseley v. York Shore Water Co., 94 Me. 83, 46 Atl. 809; Kennebec Water District v. Waterville, 96 Me. 234, 52 Atl. 774; Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 109 Am. St. Rep. 526, 70 L.R.A. 472; Talbot v. Hudson, 16 Gray, 417, 424; Haverhill Bridge Props. v. County Comrs. of Essex, 103 Mass. 120, 4 Am. Rep. 518; Holt v. Somerville, 127 Mass. 408; Appleton v. Newton, 178 Mass. 276, 59 N. E. 648; Swan v. Williams, 2 Mich. 427; State Park Comrs. v. Henry, 38 Minn. 266, 36 N. W. 874; State v. Rapp, 39 Minn. 65, 38 N. W. 926; Fairchild v. St. Paul, 46 Minn. 540, 49 N. W. 325; Stewart v. Great Northern R. R. Co., 65 Minn. 515, 68 N. W. 208; Minneapolis etc. R. R. Co. v. Hartland, 85 Minn. 76, 88 N. W. 423; Dickey v. Tennison, 27 Mo. 373; Simpson v. Kansas City, 111 Mo. 237, 20 S. W. 38; City of Cape Girardeau v. Houck, 129 Mo. 607, 31 S. W. 933; Southern Ill. & Mo. Bridge Co. v. Stone, 174 Mo. 1, 73 S. W. 453, 63 L.R.A. 301; Welton v. Dickson, 38 Neb. 767, 57 N. W. 559, 41 Am. St. Rep. 771, 22 L.R.A. 496; Paxton etc. Irr. Canal & L. Co. v. Farmers' etc. Irr. & L. Co., 45 Neb. 884, 64 N. W. 343, 29 L.R.A. 853; Howard v. Board of Supervisors, 54 Neb. 443, 74 N. W. 953; Coster v. Tide Water Co., 18 N. J. Eq. 54 and 518; State v. City of Orange, 54 N. J. L. 111, 22 Atl. 1004, 14 L.R.A. 62; Buffalo & New York R. R. Co. v. Brainard, 9 N. Y. 100; People v. Smith, 21 N. Y. 595; Matter of William A. Fowler, 53 N. Y. 60; Matter of Niagara Falls & W. R. R. Co., 108 N. Y. 375, 15 N. E. Rep. 429; Matter of Poughkeepsie Bridge Co., 108 N. Y. 483, 15 N. E. Rep. 601; People v. Adirondack R. R. Co., 160 N. Y. 225; People v. Fisher, 190 N. Y. 468, 83 N. E. 482; Beekman v. Saratoga & Schenectady R. R. Co., 3 Paige, 45; Harris v. Thompson, 9 Barb. 350; Matter of Deansville Cemetery Ass., 5 Hun 482; Call v. Wilkesboro, 115 N. C. 337, 20 S. E. 468; Dalles Lumbering Co. v. Urquhart, 16 Ore. 67, 19 Pac. 78; Bridal Veil Lumbering Co. v. Johnson, 30 Ore. 205, 46 Pac. 790, 60 Am. St. Rep. 818; 34 L.R.A. 368; Apex Transportation Co. v. Garbade, 32 Ore. 582; Winona etc. R. R. Co. v. Watertown, 4 S. D. 323, 56 N. W. 1077; Anderson v. Turbeville, 6 Coldw. 150; Ryan v. Terminal Co., 102 Tenn. 111, 50 S. W. 744, 45 L.R.A. 303; Tyler v. Beacher, 44 Vt. 648, 8 Am. Rep. 398; Roanoke City v. Berkowitz, 80 Va. 616; Tait's Executor v. Central Lunatic Asylum, 84 Va. 271, 4 S. E. 697; Painter v. St. Clair, 98 Va. 85, 34 S. E. 989; Baltimore & Ohio R. R. Co. v. Pittsburg, Wheeling & Ky. R. R. Co., 17 W. Va. 812; Smeaton v. Martin, 57 Wis. 364; State v. Stewart, 74 Wis. 620, 43 N. W. 947; Wisconsin Water Co. v. Winans, 85 Wis. 26, 54 N. W. 1003, 39 Am. St. Rep. 813, 20 L.R.A. 662; St. Louis etc. R. R. Co. v. Thomas, 34 Fed. 774.

use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance.”¹⁰ “The general principle is now well settled that when the uses are in fact public, the necessity or expediency of taking private property for such uses by the exercise of the power of eminent domain, the instrumentalities to be used and the extent to which such right shall be delegated are questions appertaining to the political and legislative branches of the government.”¹¹

The question of necessity is sometimes confounded with that of public use,¹² and it has sometimes been maintained that the exercise of the power of eminent domain must be founded on a public necessity.¹³ But we know of no case in which it has been

“It is not indispensable that the legislature shall determine that any given enterprise is necessary or proper, before putting in operation the power of eminent domain. This power is primarily an absolute one, and theoretically exists in this absolute form in the ultimate source of authority in every organized society. In the constituted government of this State, the right of exercising it has been confided to the legislature, restricted by only two conditions: one, that compensation shall be made to the owner of the property taken; the other, that the use for which property may be taken shall be a public use. In other respects it is without limit. Whether the purpose to be subserved be necessary or wise, is for the legislature alone.” Ct. of Errors and Appeals in National Docks R. R. Co. v. Central R. R. Co., 32 N. J. Eq. 755, 763.

¹⁰Boom Co. v. Patterson, 98 U. S. 403, 406. Similar language will be found in the following cases: Geisy v. Cincinnati, Wilmington & Zanesville R. R. Co., 4 Ohio St. 308; County Court v. Griswold, 58 Mo. 175; Chicago & Eastern Ill. R. R. Co. v. Wiltse, 116 Ill. 449; Towns v. Klamath County, 33 Ore. 225, 233; and in many of the cases cited in the last note.

¹¹Matter of Niagara Falls & Whirlpool R. R. Co., 108 N. Y. 375, 383, 15 N. E. 429.

¹²Ante, § 255.

¹³Cary Library v. Bliss, 151 Mass. 364, 25 N. E. 92. In this case money had been given to a town for a public library to be managed and controlled by a board of trustees consisting of the selectmen, the school committee and settled ministers of the place. The legislature afterwards created a corporation, to be managed and controlled by a different body, and directed the transfer of the property to this corporation. The act also provided for the acquisition of the property by the new corporation under the power of eminent domain. After the transfer the property was to be used in the same manner and for the same purposes as before. The court appears to hold that so much of the act as provided for the acquisition of the property under the eminent domain power, was invalid, because the proposed taking was not founded on a public necessity. “Property can be taken in this way only in the exercise of the paramount right of the government, founded on a public necessity. * * * The question arises, whether taking property from one party, who holds it for a public use, by another, to hold it in

adjudicated that an appropriation of private property for a recognized public use, or an authority to make such appropriation, was void because, in the opinion of the court, there was no necessity for an exercise of the eminent domain power.¹⁴

§ 370 (239). When the power of eminent domain has been delegated, the propriety of its exercise rests with the grantee. When authority to take property for public use has been conferred by the legislature, it rests with the grantee to determine whether it shall be exercised, and when and to what extent it shall be exercised,¹⁵ provided, of course, that the power

the same manner for precisely the same public use, can be authorized under the constitution. Can such a taking be founded on a public necessity? * * * In every case it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity. If it is of that nature, it is for the legislature to say whether in a particular case the necessity exists. We are of opinion, that the proceeding authorized by the statute was in its nature merely a transfer of property from one party to another, and not an appropriation of property to public use, nor a taking which was, or which could be found by the legislature to be, a matter of public necessity." The true ground and reason of this decision would seem to be that an act which merely accomplishes the transfer of property from one owner to another, does not subserve any public purpose and is not, therefore, a public use.

¹⁴"The authority to determine in any case whether it is necessary or expedient to permit the exercise of the power of eminent domain, when not prohibited by the constitution, rests with the legislative department of the State; and the propriety of taking private property for public use is not a judicial question, but one of political sovereignty, and a hearing upon the facts of such propriety or

necessity is not required." Richland School Tp. v. Overmeyer, 164 Ind. 382, 385, 386, 73 N. E. 811. *Compare Stearns v. Barre*, 73 Vt. 281, 50 Atl. 1086, 87 Am. St. Rep. 721, 58 L.R.A. 240.

¹⁵St. Louis etc. R. R. Co. v. Fayetteville, 75 Ark. 532, 87 S. W. 1174; United States v. Baltimore etc. R. R. Co., 27 App. Cas. D. C. 105; Chicago & Eastern Ill. R. R. Co. v. Wiltse, 116 Ill. 449, 454, 6 N. E. 49; O'Hare v. Chicago etc. R. R. Co., 139 Ill. 151, 28 N. E. 953; Schuster v. Sanitary District, 177 Ill. 626, 52 N. E. 855; Bass v. City of Ft. Wayne, 121 Ind. 389, 23 N. E. 259, 1 Am. R. R. & Corp. Rep. 173; Richland School Tp. v. Overmeyer, 164 Ind. 382, 73 N. E. 811; Williams v. Cary, 73 Ia. 194, 34 N. W. 813; Barrett v. Kemp, 91 Ia. 296, 59 N. W. 76; Cotton v. Mississippi & Rum River Boom Co., 22 Minn. 372; Am. Tel. & Tel. Co. v. St. Louis etc. Ry. Co., 202 Mo. 656, 101 S. W. 576; Matter of Union El. R. R. Co., 113 N. Y. 275, 21 N. E. 81; Pennsylvania R. R. Co. v. Diehm, 128 Pa. St. 509, 18 Atl. 522; Heine v. Columbia etc R. R. Co., 16 Pa. Dist. Ct. 840; Memphis etc. R. R. Co. v. Union Ry. Co., 116 Tenn. 500, 95 S. W. 1019; Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670; United States v. Certain Lands, 145 Fed. 654.

is not exceeded or abused. These questions are political in their nature, and not judicial. Thus, whether a particular road, street or alley shall be laid out,¹⁶ or an existing street widened,¹⁷ or any similar improvement made,¹⁸ in the absence of any special statutory provisions, rests entirely with the local authorities vested with power in the premises.¹⁹ The courts cannot inquire into the motives which actuate the authorities or enter into the propriety of making the particular improvements.²⁰ The same may be said of individuals and corporations vested

¹⁶Commission's Court of Lowndes Co. v. Bowic, 34 Ala. 461; St. Louis etc. R. R. Co. v. Fayetteville, 75 Ark. 532, 87 S. W. 1174; City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224; Symons v. San Francisco, (Cal.) 42 Pac. 913; Santa Ana v. Brunner, 132 Cal. 234, 64 Pac. 287; Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127; Harwinton v. Catlin, 19 Conn. 520; Borough of Stonington v. States, 31 Conn. 213; Poulan v. Atlantic Coast Line R. R. Co., 123 Ga. 605, 51 S. E. 657; Dunlap v. Mount Sterling, 14 Ill. 251; Curry v. Mount Sterling, 15 Ill. 320; Chicago etc. R. R. Co. v. Pontiac, 169 Ill. 155, 48 N. E. 485; English v. Danville, 170 Ill. 131, 48 N. E. 328; Lawliss v. Reese, 4 Bibb 309; Baldwin v. Bangor, 36 Me. 518; Methodist Church v. Baltimore, 6 Md. 391, 48 Am. Dec. 540; Knoblauch v. Minneapolis, 56 Minn. 321, 57 N. W. 928; City of Kansas v. Baird, 98 Mo. 215, 11 S. W. 242, 562; State v. Engleman, 106 Mo. 628, 17 S. W. 759; State v. Bishop, 39 N. J. L. 226; Matter of Folts Street, 18 App. Div. N. Y. 568; Fanning v. Gilliland, 37 Ore. 369, 61 Pac. 636, 67 Pac. 209, 82 Am. St. Rep. 758; West River Bridge Co. v. Dix, 16 Vt. 446; Gallup v. Woodstock, 29 Vt. 347.

¹⁷Dunham v. Hyde Park, 75 Ill. 371; Gilbert v. New Haven, 39 Conn. 467; New Orleans v. Steinhardt, 52 La. Ann. 1043, 27 So. 586.

¹⁸Kelsey v. King, 32 Barb. 410;

Stout v. Freeholders, 25 N. J. L. 202; Iron R. R. Co. v. Ironton, 19 Ohio St. 299; Wulzen v. Board of Suprvs., 101 Cal. 15, 35 Pac. 353, 40 Am. St. Rep. 17; Lynch v. Forbes, 161 Mass. 302, 37 N. E. 437; Sample v. Carroll, 132 Ind. 496, 32 N. E. 220, 42 Am. St. Rep. 402.

¹⁹Cases apparently holding a contrary doctrine are, White's Case, 2 Overton, 109; Leecoul v. Police Jury, 20 La. An. 308.

²⁰Dunham v. Hyde Park, 75 Ill. 371; Richland School Tp. v. Overmeyer, 164 Ind. 382, 73 N. E. 811. In the latter case the statute provided that whenever in the opinion of the township trustee it shall be considered necessary to purchase any real estate upon which to build a school house, he might proceed to acquire the same by condemnation. The case was a proceeding of this sort and the court says: "The General Assembly of Indiana has delegated to school corporations the power of eminent domain, and to the township trustee the authority to determine the necessity for its exercise. In acquiring land for a school-house, and for other purposes connected therewith, no right to a hearing as to the necessity or expediency of the appropriation has been reserved to the landowner, either in the constitution or laws of the State. The discretion conferred upon the township trustee under these statutes is broad, comprehensive and absolute,

with the power of eminent domain and acting from considerations of private emolument, so far as relates to the necessity or propriety of exercising the power or of taking the particular property.²¹ But an abuse of the discretion and authority conferred by eminent domain statutes, may be prevented or redressed by the courts.²² Sometimes the constitution or statute requires the question of necessity to be determined as a judicial question.²³

§ 371 (240). The authority to condemn must be expressly given or necessarily implied. The exercise of the power being against common right, it cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication.²⁴ When the right to exercise the power can only be made out by argument and

and the court cannot control its exercise in a proceeding of this kind; nor can the court substitute its judgment, or the judgment of the jury, for that of the officer designated by law, as to the expediency or necessity of making the proposed appropriation of land."

²¹Gates v. Boston etc. R. R. Co., 53 Conn. 333; O'Hare v. Chicago etc. R. R. Co., 139 Ill. 151, 28 N. E. 923; St. Paul v. Nickl, 42 Minn. 262, 44 N. W. 59; Matter of Union Elevated R. R. Co., 113 N. Y. 275, 21 N. E. 81; Norton v. Wallkill etc. R. R. Co., 42 How. Pr. 228; Pennsylvania R. R. Co. v. Diehm, 128 Pa. St. 509, 18 Atl. 522; Colorado Eastern R. R. Co. v. Union Pac. R. R. Co., 41 Fed. 293; Douglass v. Byrnes, 59 Fed. 29.

²²Williams v. Carey, 73 Ia. 194, 34 N. W. 813; Ham. v. Levee Comrs., 83 Miss. 534, 35 So. 943; Pennsylvania R. R. Co. v. Diehm, 128 Pa. St. 509, 18 Atl. 522. *And see ante* § 314.

²³See post, § 598.

²⁴McCarthy v. So. Pac. Co., 148 Cal. 211, 82 Pac. 615; Butler v. Thomasville, 74 Ga. 570; Oconee Elec. Lt. & P. Co. v. Carter, 111 Ga. 106, 36 S. E. 457; Ga. R. R. & B. Co. v. Union Point, 119 Ga. 809, 47 S. E. 183; Stowe v. Newborn, 127 Ga. 421,

56 S. E. 516; Phillips v. Scales Mound, 195 Ill. 353, 63 N. E. 180; Gillette v. Aurora Rys. Co., 228 Ill. 261, 81 N. E. 1005; Allen v. Jones, 47 Ind. 438; Gano v. Minneapolis etc. R. R. Co., 114 Ia. 713, 87 N. W. 714, 89 Am. St. Rep. 393, 55 L.R.A. 263; Perry v. Wilson, 7 Mass. 393; Schmidt v. Densmore, 42 Mo. 225; S. W. Mo. Lt. Co. v. Scheurich, 174 Mo. 235, 73 S. W. 496; Claremont Ry. & Lt. Co. v. Putney, 73 N. H. 431, 62 Atl. 727; Erie R. R. Co. v. Steward, 170 N. Y. 172, 63 N. E. 118; Manhattan Ry. Co. v. Astor, 126 App. Div. 907; Miami Coal Co. v. Wighton, 19 Ohio St. 560; State ex rel. v. Salem Water Co., 5 Ohio C. C. 58; Pennsylvania R. R. Co.'s Appeal, 93 Pa. St. 150; Woods v. Greensboro Nat. Gas Co., 204 Pa. St. 606, 54 Atl. 470; Penn. Telephone Co. v. Hoover, 209 Pa. St. 555, 58 Atl. 922, affirming S. C. 24 Pa. Supr. Ct. 96; Snee v. West Side Belt R. R. Co., 210 Pa. St. 480, 60 Atl. 94; Pfoutz v. Penn. Telephone Co., 24 Pa. Supr. Ct. 105; Middle Creek Elec. Co. v. Hughes, 34 Pa. Co. Ct. 270; City of Tacoma v. State, 4 Wash. 64, 29 Pac. 847; Western Union Tel. Co. v. Pa. R. R. Co., 195 U. S. 540, 25 S. C. 133; Same v. Same, 195 U. S. 594, 25 S. C. 150;

inference, it does not exist.²⁵ "There must be no effort to prove the existence of such high corporate right, else it is in doubt; and, if so, the State has not granted it."²⁶ If the act is silent on the subject, and the powers given by it can be exercised without resort to condemnation, it is presumed that the legislature intended that the necessary property should be acquired by contract.²⁷ Thus the authority to construct and maintain booms,²⁸ or bridges,²⁹ does not carry with it the right to condemn property. If the act makes no provision for compensation, it is presumed that the legislature did not intend that the power of eminent domain should be exercised.³⁰ A city had power to construct and regulate sewers, drains and cisterns, also to provide on what terms real estate in such city might be drained by means of surface or under drains over and across other real estate therein. It was held that neither provision gave power to condemn.³¹ A statute in relation to Detroit gave power to open, extend, widen or straighten streets or alleys. A subsequent provision as to compensation omitted the case of widening. It was held that the power to widen could not be exercised by condemnation.³² Statutory authority to lay out and establish streets, alleys and avenues, was held not to confer the power to condemn land for such purposes.³³ In this case there was no

United States v. Rauers, 70 Fed. Rep. 748. "In favor of such right there can be no implication unless it arises from a necessity so absolute that, without it, the grant itself will be defeated. It must, also, be a necessity which arises from the very nature of things, over which the corporation has no control; it must not be a necessity created by the company itself for its own convenience or for the sake of economy." *Pennsylvania R. R. Co.'s Appeal*, 93 Pa. St. 150, 159.

²⁵*Penn. Telephone Co. v. Hoover*, 209 Pa. St. 555, 58 Atl. 922.

²⁶*Ibid.*

²⁷*Chamberlain v. Elizabethport Steam Cordage Co.*, 41 N. J. Eq. 43; *Leeds v. Richmond*, 102 Ind. 372.

²⁸*Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, 323; *Perry v. Wilson*, 7 Mass. 393; *The Stevens*

Point Boom Co. v. Reilly, 44 Wis. 295.

²⁹*Thatcher v. The Dartmouth Bridge Co.*, 18 Pick. 501; *Payne v. Kansas & A. R. R. Co.*, 46 Fed. Rep. 546. But where power was given to construct a bridge coupled with a provision for the ascertainment of damages for property taken therefor, the right to condemn was held to be necessarily implied. *Linton v. Sharpsburg Bridge Co.*, 1 Grant's Cases, 414.

³⁰*Chamberlain v. Elizabethport Steam Cordage Co.*, 41 N. J. Eq. 43; *Chaffee's Appeal*, 56 Mich. 244; *In re Manderson*, 51 Fed. 501, 2 C.C.A. 490; *In re Montgomery*, 48 Fed. 896.

³¹*Allen v. Jones*, 47 Ind. 438; *see also Leeds v. Richmond*, 102 Ind. 372.

³²*Chaffee's Appeal*, 56 Mich. 244.

³³*Ga. R. R. & B. Co. v. Union Point*, 119 Ga. 809, 47 S. E. 183; *City*

general law to which the city in question could resort, and it attempted to provide by ordinance a mode of condemnation. But where a county board of supervisors was empowered to build and keep in repair county buildings and to provide suitable rooms for the use of the county, it was held that this was sufficient authority to condemn land for a court house.³⁴ In another case, where commissioners were empowered to select a site for a city hall, either certain lands owned by the city or any other lands, and to cause a city hall to be erected thereon, it was held by the Court of Appeals of New York, that, in case land not owned by the city had been selected, there would have been no power to condemn, and, if the commissioners could not have agreed with the owner, they could have proceeded no further in the matter.³⁵ As a rule, a municipal corporation cannot condemn property beyond its limits, unless authority to do so is expressly given.³⁶

The rule that the power to condemn is not to be implied, is further illustrated in subsequent sections which treat of the construction of statutes giving authority to condemn.³⁷ No general rule can be laid down as to when the right to condemn will be implied or inferred, and when not. Such implication will more readily be made in favor of public corporations exercising powers solely for the public use and benefit than in favor of private individuals or corporations organized for pecuniary profit.³⁸

§ 372 Same: Illustrations. A statute provided that when the property and franchises of a corporation were sold at judicial sale, the purchasers should become the owners of the corporate rights, liberties, privileges and franchises of such corporation and should constitute a new corporation, entitled to all such rights, liberties, franchises and privileges. It was held that if the old corporation had the power of eminent domain, the new one would also.³⁹ Where a company was organized to supply electricity for light, heat and power and was authorized to use

of Tacoma v. State, 4 Wash. 64, 29 Pac. 847; Georgia R. R. & B. Co. v. Decatur, 129 Ga. 502, 59 S. E. 217.

³⁴Supervisors of Culpepper County v. Gorrell, 20 Gratt. 484.

³⁵People ex rel. Hayden v. City of Rochester, 50 N. Y. 525.

³⁶Houghton v. Huron Copper Co., 57 Mich. 547; Drain Commissioners v. Baxter, 57 Mich. 127. See also

Warner v. Town of Gunnison, 2 Colo. App. 430, 31 Pac. 238, where, however, the power was held to have been conferred.

³⁷Post, §§ 378-402.

³⁸Quoted and approved in Leitzsey v. Columbia Water Power Co., 47 S. C. 464, 34 L.R.A. 215.

³⁹Brinkerhoff v. Newark etc. Traction Co., 66 N. J. L. 478, 49 Atl. 812.

any public street, lane, alley or highway for its distributing works, it was held power to condemn the necessary easement in the street was implied.⁴⁰ Where a corporation is organized for a public purpose and it is authorized to take and to purchase necessary lands and the statute contains provisions as to making compensation, the intent to confer the power of eminent domain is shown.⁴¹ The telegraph includes the telephone and laws conferring the power of eminent domain for the construction of lines of telegraph are held to apply to companies for the construction of telephone lines.⁴² The contrary is held in Mississippi where they have been kept distinct in legislation.⁴³ The act of congress declaring all railroads to be post roads and providing "that any telegraph company now organized, or which may hereafter be organized under the laws of any State in the Union, shall have the right to construct, maintain and operate lines of telegraph * * * over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of congress," does not confer upon telegraph companies the power to condemn the right to place their lines upon railroad rights of way.⁴⁴

⁴⁰Brown v. Radnor Tp. Elec. Lt. Co., 208 Pa. St. 453, 57 Atl. 904; Radnor Tp. Elec. Lt. Co.'s Petition, 208 Pa. St. 460, 57 Atl. 1135; Radnor Tp. Elec. Lt. Co. v. Brown, 208 Pa. St. 461, 57 Atl. 1135.

⁴¹Rockingham County L. & P. Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L.R.A. 581.

⁴²Chesapeake etc. Tel. Co. v. B. & O. Tel. Co., 66 Md. 399; N. W. Telephone Exch. Co. v. Chicago etc. Ry. Co., 76 Minn. 334, 79 N. W. 315; Same v. Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69; People's Tel. & Tel. Co. v. Berks etc. Turnpike Road Co., 23 Pa. Co. Ct. 401; Pa. Telephone Co. v. Hoover, 27 Pa. Co. Ct. 61; San Antonio etc. Ry. Co. v. S. W. Tel. & Tel. Co., 93 Tex. 313, 55 S. W. 117, 77 Am. St. Rep. 884, 49 L.R.A. 459; Gulf etc. R. R. Co. v. S. W. Tel. & Tel. Co., 18 Tex. Civ. App. 500, 45 S. W. 151; Same v. Same, 25 Tex. Civ. App. 488, 61 S. W.

406; Wis. Telephone Co. v. Oshkosh, 62 Wis. 32, 21 N. W. 828; Roberts v. Wis. Telephone Co., 77 Wis. 589, 46 N. W. 800; State v. Sheboygan, 111 Wis. 23, 86 N. W. 657; Cumberland Telephone Co. v. United Elec. Co., 17 Fed. 825.

⁴³Alabama etc. Ry. Co. v. Cumberland Tel. & Tel. Co., 88 Miss. 438, 41 So. 258.

⁴⁴Western Union Tel. Co. v. Pa. R. R. Co., 195 U. S. 540, 25 S. C. 133; Western Union Tel. Co. v. Pa. R. R. Co., 195 U. S. 594, 25 S. C. 150; N. W. Telephone Exch. Co. v. Chicago etc. Ry. Co., 76 Minn. 334, 79 N. W. 315.

The following additional cases are referred to on the question of what language is sufficient to confer the power of eminent domain; Enfield Toll Bridge Co. v. Hartford etc. R. R. Co., 17 Conn. 454; S. C. 17 Conn. 40, 42 Am. Dec. 716; Hartshorn v. Ill. Val. Traction Co., 210 Ill. 609, 71 N. E. 612; Helm v. Grayville, 224 Ill.

§ 373 (241). How the authority may be given. This is purely a matter of legislative discretion, unless limited by the constitution. The authority may be given by a special act to a particular person or corporation, or by a general act or general incorporation laws.⁴⁵ Municipal corporations may be authorized to make certain improvements, or compelled to do so, in the discretion of the legislature.⁴⁶

§ 374 (242). To whom authority may be given. Foreign corporations. Strictly speaking, the legislature cannot delegate the power of eminent domain.⁴⁷ It cannot divest itself of sovereign powers. But, in exercising the power, it can select such agencies as it pleases, and confer upon them the right to take private property subject only to the limitations contained in the constitution.⁴⁸ Accordingly it has been held that the

274, 79 N. E. 689; Smith v. Claussen Park Dv. & L. District, 229 Ill. 155, 82 N. E. 278; David Bradley Mfg. Co. v. Chicago etc. Traction Co., 229 Ill. 170, 82 N. E. 210; Mercer County v. Wolff, 237 Ill. 74; Shreveport Traction Co. v. Kansas City etc. Ry. Co., 119 La. 759, 44 So. 457; Claremont Ry. & Lt. Co. v. Putney, 73 N. H. 431, 62 Atl. 727; State v. Newark, 54 N. J. L. 62, 23 Atl. 129; Wendel v. Board of Education (N. J. L.), 70 Atl. 152; State v. City of Newark, 54 N. J. L. 62, 23 Atl. 129; Commissioners v. Judges of Queens County, 17 Wend. 9; Matter of Rochester Electric R. R. Co., 57 Hun 56, 10 N. Y. Supp. 379; Adee v. Nassau Elec. R. R. Co., 72 App. Div. 404, 76 N. Y. S. 589; S. C. *affirmed*, 177 N. Y. 548, 69 N. E. 1120; Schenectady Ry. Co. v. Peek, 88 App. Div. 201, 84 N. Y. S. 759; State v. Salem Water Co., 5 Ohio C. C. 58; Rahn Tp. v. Tamaque etc. R. R. Co., 4 Pa. Dist. Ct. 29; City of Springville v. Fullmer, 7 Utah 450, 27 Pac. 577.

⁴⁵De Witt v. Duncan, 46 Cal. 342; Moran v. Ross, 79 Cal. 159, 21 Pac. 547; Chestates Pyrites Co. v. Cavers Creek Gold Min. Co., 119 Ga. 354, 46 S. E. 422, 100 Am. St. Rep.

174; Weir v. St. Paul, Stillwater & Taylor's Falls R. R. Co., 18 Minn. 155; Central R. R. Co. v. Penn. R. R. Co., 31 N. J. Eq. 475; National Docks R. R. Co. v. Central R. R. Co., 32 N. J. Eq. 755; Buffalo & New York R. R. Co. v. Brainard, 9 N. Y. 100.

⁴⁶Matter of Sixth St., 11 Philadelphia 414.

⁴⁷Sholl v. German Coal Co., 118 Ill. 427; Brewster v. Hough, 10 N. H. 138. Nor can a municipal corporation bind itself by an agreement not to exercise the power of eminent domain with which it is vested. Matter of Opening First St., 66 Mich. 42, 33 N. W. 15.

⁴⁸Yost's Report, 17 Pa. St. 424; Matter of Deansville Cem. Ass. 5 Hun 482; State v. Rapp, 39 Minn. 65, 38 N. W. 926; Wisconsin Water Co. v. Winans, 85 Wis. 26, 54 N. W. 1003, 39 Am. St. Rep. 813, 20 L.R.A. 662. In State v. Rapp, 39 Minn. 65, 38 N. W. 926, the court says: "The manner of the exercise of this right is, except as to compensation, unrestricted by the constitution, and addresses itself to the legislature as a question of policy, propriety, or fitness, rather than of power. They are

right may be conferred upon corporations, public⁴⁹ or private,⁵⁰ upon individuals,⁵¹ upon foreign corporations,⁵² or a consoli-

under no obligation to submit the question to a judicial tribunal, but may determine it themselves, or delegate it to a municipal corporation, to a commission, or to any other body or tribunal they see fit.”

⁴⁹State v. Rapp, 39 Minn. 65, 38 N. W. 926; Winona etc. R. R. Co. v. City of Watertown, 4 S. D. 323, 56 N. W. 1077; Matter of Thompson, 57 Hun 419, 10 N. Y. Supp. 705; Spring City Gas Light Co. v. Pennsylvania S. V. R. R. Co., 167 Pa. St. 6, 31 Atl. 368.

⁵⁰Denver Power & Irr. Co. v. Denver & R. G. R. R. Co., 30 Colo. 204, 69 Pac. 568, 60 L.R.A. 383; New York etc. R. R. Co. v. Long, 69 Conn. 424; Mims v. Macon & Western R. R. Co., 3 Ga. 333; Hand Gold Mining Co. v. Parker, 59 Ga. 419; Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 109 Am. St. Rep. 526, 70 L.R.A. 472; Tide Water Canal Co. v. Archer, 9 Gill & J. (Md.) 479; Fort St. Union Depot Co. v. Morton, 83 Mich. 265, 47 N. W. Rep. 228, 3 Am. R. R. & Corp. Rep. 438; Concord R. R. Co. v. Greeley, 17 N. H. 47; Ash v. Cummings, 50 N. H. 591; Bloodgood v. Mohawk & Hudson R. R. Co., 18 Wend. 9; Buffalo City R. R. Co. v. Brainard, 9 N. Y. 100; Matter of Union El. R. R. Co., 113 N. Y. 275, 21 N. E. 81; L. C. & C. R. R. Co. v. Chappell, Rice (S. C.) 383; Boom Co. v. Patterson, 98 U. S. 403. In Matter of Union El. R. R. Co., 113 N. Y. 275, 21 N. E. 81, it is said: “Much has been said upon this subject of the exercise of the right of eminent domain by private corporations, and it is not necessary to dwell upon it here at any length. The right resides in the State at any time to resume the possession of private property for public use, upon just compensation being

made. What it can thus do directly, it may, in the furtherance of a public purpose, delegate the right to do to a corporation, which has been created to subserve some supposed public convenience or necessity, and thus becomes invested with a *quasi* public character.” *Compare* People v. Salem, 20 Mich. 452.

⁵¹Moran v. Ross, 79 Cal. 159, 21 Pac. 547; Pocantico Water Works Co. v. Bird, 130 N. Y. 249, 29 N. E. 246; Matter of Petition of Kerr, 42 Barb. 119; also cases in last note. *Compare* Finney v. Sommerville, 80 Pa. St. 59.

⁵²Columbus W. W. Co. v. Long, 121 Ala. 245, 25 So. 702; Russell v. St. Louis S. W. Ry. Co., 71 Ark. 451, 75 S. W. 725; Dodge v. Council Bluffs, 57 Ia. 500; Abbott v. New York etc. R. R. Co., 145 Mass. 450; Gray v. St. Louis & San Francisco Ry. Co., 81 Mo. 126; St. Louis etc. R. R. Co. v. Lewsight, 113 Mo. 660, 21 S. W. 210; Southern Ill. & Mo. Bridge Co. v. Stone, 174 Mo. 1, 73 S. W. 453, 63 L.R.A. 301; S. C. *affirmed sub. nom.* Stone v. So. Ill. & Mo. Bridge Co., 206 U. S. 267, 27 S. C. 605; Helena Power Transmission Co. v. Spratt, 35 Mont. 108, 88 Pac. 773, 8 L.R.A. (N.S.) 567; Matter of Peter Townsend, 39 N. Y. 171; New York etc. R. R. Co. v. Welsh, 143 N. Y. 411, 38 N. E. 378, 42 Am. St. Rep. 734; Morris Canal & Banking Co. v. Townsend, 24 Barb. 658; New York & Erie R. R. Co. v. Young, 33 Pa. St. 175; Gulf etc. Ry. Co. v. S. W. Tel. & Tel. Co., 25 Tex. Civ. App. 488, 61 S. W. 406; Miocene Ditch Co. v. Lyng, 138 Fed. 544, 70 C. C. A. 458. In Iowa it was held that, though a foreign corporation did not have power to condemn land in that State, a domestic company, organized at the instance of

dated company composed in part of a foreign corporation,⁵³ and upon the federal government.⁵⁴ Such has been the common practice since the Revolution, and the right to do so has never been a matter of serious question; and it may be regarded as settled law that, in the absence of special constitutional restriction, it is solely for the legislature to judge what persons, corporations or other agencies may properly be clothed with this power.⁵⁵

The general grant of the power of eminent domain to all corporations of a certain class or organized for certain purposes, is held not to include foreign corporation.⁵⁶ This is in accordance with the rule of strict construction universally applied to such statutes,⁵⁷ and also in accordance with the rule that statutes are presumed to refer and apply only to persons and things within the State enacting them.⁵⁸ Where a statute provided for the issuing of permits to foreign corporations to do business in the State upon certain conditions and enacted that "such corporations, on obtaining such permits, shall have and enjoy all of the privileges conferred by the laws of this State on corporations organized under the laws of this State," it was held that a foreign telephone company, upon complying with the statute, would have the same right to condemn property as a domestic

a foreign company, could condemn land for the purpose of leasing it to such foreign corporation. *Lower v. Chicago & Quincy R. R. Co.*, 59 Ia. 563.

⁵³*Toledo, A. A. & G. Ry. Co. v. Dunlap*, 47 Mich. 456; *Trester v. Missouri Pac. R. R. Co.*, 33 Neb. 171, 49 N. W. 1110.

⁵⁴*Burt v. Merchants' Ins. Co.*, 106 Mass. 356, 8 Am. Rep. 339; *Gilmer v. Lime Point*, 18 Cal. 229.

⁵⁵*Ash v. Cummings*, 50 N. H. 591; and cases cited in note 48.

⁵⁶*Chestates Pyrites Co. v. Cavenanders Creek Gold Min. Co.*, 119 Ga. 354, 46 S. E. 422, 100 Am. St. Rep. 174; *Helena Power Transmission Co. v. Spratt*, 35 Mont. 108, 88 Pac. 773, 8 L.R.A.(N.S.) 567; *Central Union Telephone Co. v. Columbus Grove*, 8 Ohio C. C. (N.S.) 81; *Duke v. Postal Tel. Cable Co.*, 71 S. C. 95, 50 S. E. 675; *Evansville etc. Traction Co. v.*

Henderson Bridge Co., 141 Fed. 51, 72 C. C. A. 539; *Baldwin v. Postal Tel. Cable Co.*, 78 S. C. 419; *Barnett v. Postal Tel. Cable Co.*, 79 S. C. 462. But a statute giving to telegraph and telephone companies the right to construct their lines across and along streets, highways, railroads, canals, turnpikes, etc., was held to include foreign companies. *Cumberland Tel. & Tel. Co. v. Yazoo etc. R. R. Co.*, 90 Miss. 686, 44 So. 166; *State v. Red Lodge*, 30 Mont. 338, 76 Pac. 758. An Iowa statute conferred power upon "railroad corporations organized under the laws of this State;" held, necessarily, a denial of the right to foreign corporations. *Holbert v. St. Louis, K. C. & N. R. R. Co.*, 45 Ia. 23.

⁵⁷*Post*, § 388.

⁵⁸*2 Lewis' Sutherland Stat. Constr.* §§ 513, 514.

corporation.⁵⁹ A constitutional provision of Montana that foreign corporations should not enjoy within the State any greater rights or privileges than domestic corporations of similar character was held not to confer by implication the same rights and privileges, but to be a mere limitation upon the power of the legislature.⁶⁰ The right in question, in the case referred to, was that of eminent domain. A statute of Missouri provided that on complying with certain conditions foreign corporations "shall be subject to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the laws of this State, and *shall have no other or greater powers.*" The clause in italics was held to mean that they should have the same powers as domestic corporations and that the words were effective to confer such powers, and an Illinois corporation was held entitled to condemn property in Missouri, even though it did not have power to do so in its own State.⁶¹

Some State constitutions prohibit the exercise of the power by foreign corporations.⁶² A proceeding by a foreign corporation as lessee of a domestic corporation, was held within the prohibition by the Nebraska supreme court.⁶³ Proceedings instituted in violation of the provision should be dismissed whenever the fact appears.⁶⁴ A prohibition that a foreign corporation may not "condemn or appropriate" lands, was held not to prevent its acquiring property by agreement.⁶⁵ And where land has been acquired by violation of such a provision, one who has accepted the compensation awarded, is estopped from questioning the company's title,⁶⁶ and the title has been held to be good against all except the State.⁶⁷ It has been argued that the prohibition would apply to a corporation created by congress,⁶⁸ and

⁵⁹San Antonio etc. Ry. Co. v. S. W. Tel. & Tel. Co., 93 Tex. 313, 55 S. W. 117, 77 Am. St. Rep. 884, 49 L.R.A. 459. See Evansville etc. Traction Co. v. Henderson Bridge Co., 141 Fed. 51, 72 C. C. A. 539; Miocene Ditch Co. v. Lyng, 138 Fed. 544, 70 C. C. A. 458.

⁶⁰Helena Power Transmission Co. v. Spratt, 35 Mont. 108, 88 Pac. 773, 8 L.R.A.(N.S.) 567.

⁶¹Southern Ill. & Mo. Bridge Co. v. Stone, 174 Mo. 1, 73 S. W. 453, 63 L.R.A. 301; S. C. 194 Mo. 175, 92 S. W. 475.

⁶²*Ante*, §§ 17, 39.

⁶³State v. Scott, 22 Neb. 628. *And see* Koenig v. C. B. & Q. R. R. Co., 27 Neb. 699, 43 N. W. 423.

⁶⁴Trester v. Missouri Pac. R. R. Co., 23 Neb. 242, 36 N. W. 502.

⁶⁵St. Louis etc. R. R. Co. v. Foltz, 52 Fed. 627.

⁶⁶*Ibid.*

⁶⁷Myers v. McGavock, 39 Neb. 843, 58 N. W. 522, 42 Am. St. Rep. 627.

⁶⁸*Ibid.*

this would doubtless be true if it had no express authority to condemn. But congress may create a corporation with power to condemn property in a State, for a purpose within its constitutional powers, as in aid of interstate commerce, despite any prohibition, contained in the constitution or laws of the State.⁶⁹

§ 375 (242a). Direct appropriation by the legislature. It is competent for the legislature to appropriate property directly, by an act duly passed, instead of conferring authority to do so, and this has occasionally been done.⁷⁰

§ 376 (243). Delegation and transfer of authority by grantees of the legislature: Contractors and agents: Receivers. When authority to take property by virtue of the power of eminent domain is conferred by the legislature, it becomes a personal trust, and cannot be delegated or transferred, except by legislative sanction.⁷¹ Purchasers under a mortgage,⁷² grant-

⁶⁹California v. Central Pac. R. R. Co., 127 U. S. 1, 39; Mining Co. v. Pennsylvania, 125 U. S. 181, 186, 8 S. C. 737; Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, 12; 6 Am. R. R. & Corp. Rep. 607 *et seq.*

⁷⁰Mims v. Macon & Western R. R. Co., 3 Ga. (3 Kelly) 333; Gillette v. Aurora Rys. Co., 228 Ill. 261, 81 N. E. 1005; State v. Spencer, 53 Kan. 655, 37 Pac. 174; Hingham & Quincy Bridge & Turnpike Co. v. County of Norfolk, 6 Allen 353; Matter of Union Ferry Co., 98 N. Y. 139; Matter of Application of Mayor etc. of New York, 99 N. Y. 569 (*affirming* 34 Hun 441); Genet v. Brooklyn, 99 N. Y. 296; McCormack v. City of Brooklyn, 108 N. Y. 49, 14 N. E. 808; Mott v. Eno, 181 N. Y. 346, 74 N. E. 229, *reversing* 97 App. Div. 580, 90 N. Y. S. 608; Matter of Department of Public Works, 53 Hun 280, 25 N. Y. St. 9, 6 N. Y. Supp. 750; State v. Collis, 20 App. Div. N. Y. 341; Matter of Riverside Parks, 59 App. Div. 603, 69 N. Y. S. 742; S. C. *affirmed*, 167 N. Y. 627, 60 N. E. 1116; Delap v. City of Brooklyn, 3 Misc. 22, 22 N. Y. Supp. 179; Smedley v. Erwin, 51 Pa. St. 445; In re Towanda Bridge Co., 91 Pa. St. 216; Township of Mahoney v. Comry, 103

Pa. St. 362; Painter v. St. Clair, 98 Va. 85, 34 S. E. 989; Baltimore & Ohio R. R. Co. v. B. W. & Ky. R. R. Co., 17 W. Va. 812, 841; State v. Hogue, 71 Wis. 384, 36 N. W. 860; Boom Co. v. Patterson, 98 U. S. 403; United States v. Harris, 1 Sumner 21.

⁷¹Harris v. Inhabitants of Marblehead, 10 Gray 40; Stewart's Appeal, 56 Pa. St. 413; Lyon v. Jerome, 26 Wend. 485, *reversing* S. C. in 15 Wend. 569. "This is an exceedingly delicate and important power, and only exists in the State by virtue of her right of eminent domain as sovereign. In expressly granting this power, a confidence in the grantee of the power, as to its exercise, is implied. It cannot, therefore, be delegated. It must be exercised by the grantee in person, and not by proxy or substitute. The commissioner can act by others. He must judge himself. He only can decide upon the necessity or expediency in any case of appropriating private property to public use; but he may employ his subordinate officers or agents to carry such decision into effect. Lyon v. Jerome, 26 Wend. 485, 498.

⁷²Atkinson v. Marietta R. R. Co., 15 Ohio St. 21.

ees⁷³ or lessees⁷⁴ of the property and franchises of a corporation authorized to condemn property for public use, cannot, by virtue of such purchase, grant or lease, exercise such power. Being a personal trust, the power must be exercised by the grantee in person,⁷⁵ and, in case of corporations, by the governing body of the corporation, which ordinarily is the board of directors.⁷⁶ From these principles it follows that, where corporations, or others who are empowered to take materials for the construction of works, employ contractors who engage to furnish their own materials, the power of eminent domain does not pass to the contractors by virtue of the contract, but they must provide their materials as best they can.⁷⁷ A city, hav-

⁷³Mahoney v. Spring Valley Water Works, 52 Cal. 159; Abbott v. New York & N. E. R. R. Co., 145 Mass. 450. In the last of these cases the court reviews a number of acts from which an intent that the power to condemn should pass with the property and franchises of a railroad was inferred.

⁷⁴Null v. Indianapolis etc. Traction Co., 169 Ind. 214, 81 N. E. 657; Worcester v. Norwich & Worcester R. R. Co., 109 Mass. 103; Lewis v. Germantown etc. R. R. Co., 16 Phila. 608; Barker v. Hartman Steel Co., 6 Pa. Co. Ct. 183; Hespenheide's Appeal, 4 Penny. 71; Western Union Tel. Co. v. Pa. R. R. Co., 195 U. S. 594, 25 S. C. 150.

⁷⁵Lyon v. Jerome, 26 Wend. 485.

⁷⁶Eastern R. R. Co. v. Boston & Maine R. R. Co., 111 Mass. 125, 130, 15 Am. Rep. 13.

⁷⁷Schmidt v. Densmore, 42 Mo. 225; Lyon v. Jerome, 26 Wend. 485; St. Peter v. Dennison, 58 N. Y. 416, 17 Am. Rep. 258. A contrary doctrine is maintained in Illinois. Hinde v. Wabash Navigation Co., 15 Ill. 72; Lesher v. The Wabash Navigation Co., 14 Ill. 85, 56 Am. Dec. 494. In this case, however, there appears to have been a resolution of the canal commissioners authorizing the appropriation, but the court disregarded it

in their decision. In Vermont Central R. R. Co. v. Baxter, 22 Vt. 365, it was held that one who contracted to build a section of road and to furnish all materials, necessarily took the company's power to appropriate them *in invitum*, and that the company was liable directly to the owner therefor. The statute in that case provided that, where a railroad company had by its engineers, agents or servants taken any materials from contiguous lands for use in the construction of its road, and had failed to have the damages therefor assessed within two years, the owner might have his common law remedy therefor. (§ 30, C. 26 Compiled Stats. 1850). The court held that the contractors were agents or servants within the statue. Bliss v. Hosmer, 15 Ohio, 44, may also seem at first blush to be opposed to the text. That was trespass against the contractor on a canal for taking materials, and judgment was given for the defendant. The statute provided that the commissioners and any agent, superintendent and engineer employed by them might enter on private property and take materials. The contract provided that the contractors should furnish their own materials, but, if they could not obtain them at a fair price, the com-

ing power to condemn property for water works, cannot, by a contract with a water company which has no such power, confer upon the latter the power of condemnation.⁷⁸ The receiver of a corporation invested with the power may exercise it, when authorized to do so by the court.⁷⁹

§ 377 (244). A lease of the property and franchises of a corporation does not destroy its right to condemn.⁸⁰ This is true though the term of the lease is for the entire life of the corporation.⁸¹ The lease is but a mode of enabling the corporation to discharge its duties to the public, and the necessities of further condemnations would be the same, whether the duties which the corporation owes to the public are discharged by the corporation directly, or by its lessee.⁸² It has been held that the lessee may prosecute proceedings in the name of the lessor.⁸³

missioners or their engineer would give an order for appropriating them. An order was, in fact, given by the engineer to take the materials in question. In this case, therefore, the statute expressly authorized any agent or engineer of the commissioners to enter and take materials, which differs materially from the case of *Lyon v. Jerome*, *ante*. Such a contract, however, does not prevent the corporation or principal from appropriating materials by condemnation for the benefit of the contractor. *Ten Broeck v. Sherrill*, 71 N. Y. 276.

⁷⁸*State v. Salem Water Co.*, 5 Ohio C. C. 58.

⁷⁹*Morrison v. Forman*, 177 Ill. 427, 53 N. E. 73, in which the court says: "A court of equity having in charge the property of a railroad company is authorized to do any act within the corporate power the performance of which is necessary to preserve the property of the company for the benefit of the company and its creditors. If, when property comes into the hands of the court, the corporation is engaged in some proper and legitimate undertaking the completion whereof is essential to the successful

maintenance and operation of the road and to the preservation of the property, the court may proceed to complete the undertaking, and if required will transfer to and clothe its receiver with such power and authority as the corporation possessed to institute the appropriate legal proceedings to condemn any real estate which ought to be acquired in order to finish and make useful and available that which the corporation was engaged in constructing when the court displaced it in the possession of its property." p. 430.

⁸⁰*Beckman v. Lincoln etc. R. R. Co.*, 79 Neb. 89; *Matter of New York, Lackawanna & Western Ry. Co.*, 35 Hun 220, *affirmed* in 99 N. Y. 12; *Snyder v. Baltimore etc. R. R. Co.*, 210 Pa. St. 500, 60 Atl. 151.

⁸¹*Matter of New York etc. Ry. Co.*, 99 N. Y. 12.

⁸²*Kip v. New York & Harlem R. R. Co.*, 67 N. Y. 227; *Deitrichs v. Lincoln & Northwestern R. R. Co.*, 13 Neb. 361; *Chicago & Western Indiana R. R. Co. v. Illinois Central R. R. Co.*, 113 Ill. 156.

⁸³*Glaser v. Glenwood R. R. Co.*, 208 Pa. St. 328, 57 Atl. 713.

But the lessee may not condemn property for itself under cover of proceedings in the name of the lessor and under the powers conferred upon the latter.⁸⁴ And in the case referred to it was held to be a question of fact whether such an attempt was being made.

§ 378 (245). The manner of proceeding may be changed at the pleasure of the legislature. It is no part of the contract between the State and a corporation vested with the power of eminent domain, that the mode of condemning property shall remain unchanged.⁸⁵ Consequently the tribunal to assess damages may be changed,⁸⁶ jurisdiction may be transferred from one court to another⁸⁷ and a right of appeal may be granted where none existed before.⁸⁸ These and like matters relate to the remedy which, according to well settled principles, may be changed without impairing existing contracts, provided no substantial right secured by the contract is impaired. The substantial right in the case under consideration is the right to take private property by compulsory proceedings.⁸⁹ It follows that laws changing the procedure apply to pending proceedings, unless a contrary intent is expressed.⁹⁰

⁸⁴Beckman v. Lincoln etc. R. R. Co., 79 Neb. 89.

⁸⁵Springfield etc. R. R. Co. v. Hall, 67 Ill. 99; Cowan v. Penobscott R. R. Co., 44 Me. 140; Long's Appeal, 87 Pa. St. 114; McCrea v. Port Royal R. R. Co., 3 S. C. 381, 16 Am. Rep. 729; Mississippi R. R. Co. v. McDonald, 12 Heisk. 54; Balt. & Susquehanna R. R. Co. v. Nesbit, 10 How. 395; Bohlman v. Green Bay & Minn. Ry. Co., 40 Wis. 157.

⁸⁶Chesapeake & Ohio R. R. Co. v. Patton, 9 W. Va. 648.

⁸⁷United Railroad & Canal Co. v. Weldon, 47 N. J. L. 59.

⁸⁸Farnum's Petition, 51 N. H. 376; Long's Appeal, 87 Pa. St. 114.

⁸⁹McCrea v. Port Royal R. R. Co., 3 S. C. 381, 16 Am. Rep. 729.

⁹⁰Chicago etc. R. R. Co. v. Guthrie, 192 Ill. 579, 61 N. E. 658; Heinl v. Terre Haute, 161 Ind. 44, 66 N. E. 450; Ross v. Board of Supervisors, 128 Ia. 427, 104 N. W. 506, 1 L.R.A.

(N.S.) 431; Paterson etc. Traction Co. v. De Gray, 70 N. J. L. 59, 56 Atl. 250; Van Emburgh v. Paterson etc. Traction Co., 70 N. J. L. 668, 59 Atl. 461; Matter of Ludlow Street, 172 N. Y. 542, 65 N. E. 494, *affirming* S. C. 59 App. Div. 180, 68 N. Y. S. 1046; Matter of Commissioner of Pub. Works, 111 App. Div. 285, 97 N. Y. S. 503; S. C. *affirmed*, 185 N. Y. 391, 78 N. E. 146; Wheeling etc. R. R. Co. v. Toledo etc. R. R. Co., 72 Ohio St. 368, 74 N. E. 209, 106 Am. St. Rep. 622; Texas Midland R. R. Co. v. S. W. Tel. & Tel. Co., 24 Tex. Civ. App. 198, 58 S. W. 152; Gulf etc. Ry. Co. v. S. W. Tel. & Tel. Co., 25 Tex. Civ. App. 488, 61 S. W. 406; Chelan County v. Navarre, 38 Wash. 684, 80 Pac. 845. See post, § 380. Where a party claims that a law passed pending proceedings applies and the court orders accordingly and the proceedings are so conducted, he cannot object afterwards that the law was not applic-

§ 379 (246). The right to impose additional liabilities. The charter of a corporation being a contract, the right secured by it cannot be impaired by subsequent legislation. A statute imposing upon such corporations a liability for consequential damages to property by reason of works already executed, where no such liability existed before, has accordingly been held to be unconstitutional and void.⁹¹ If the right to repeal, alter or amend such charter is reserved, a liability for consequential damages as to the future may undoubtedly be imposed.⁹² Whatever may be the limitation of the right so reserved, it is certain that, under it, the legislature has the right to make any reasonable amendments regulating the mode in which the franchise granted shall be used and enjoyed, and to impose any reasonable duties and obligations upon the corporation. To make the corporation liable for consequential damages to private property as to any future works by it constructed, or any future exercise by it of the power of eminent domain, would certainly be reasonable, for it is but just that such a corporation should make good to an individual any loss sustained by him in respect of his property by reason of the exercise of the corporate powers. Where the right to occupy the streets of a city is granted to a railroad corporation by the municipality, such right is subject to any conditions which may be imposed by general law prior to its exercise. Where the right to lay a double track in a street was granted to a corporation, and after one track was laid a law was passed requiring compensation to be made to abutting owners for damages occasioned by laying railroads in streets, it was held the second track could not be laid without making compensation as required by the act.⁹³

Whether such corporations can be subjected to additional

able. *Columbia Heights Realty Co. v. Macfarland*, 31 App. Cas. D. C. 112.

⁹¹*Bailey v. Philadelphia, Wilmington & Balt. R. R. Co.*, 4 Harr. (Del.) 389, 44 Am. Dec. 593; *Towle v. Eastern R. R. Co.*, 18 N. H. 547, 47 Am. Dec. 153; *Monongahela Navigation Co. v. Coon*, 6 Pa. St. 379, 47 Am. Dec. 474.

⁹²*Monongahela Nav. Co. v. Blair*, 20 P. St. 71; *Northern Central R. R. Co. v. Holland*, 117 Pa. St. 613, 12

Atl. 575; *Pierce on Railways*, p. 456; *Parker v. Metropolitan Ry. Co.*, 109 Mass. 506; *Shields v. Ohio*, 95 U. S. 319, 324; *Worcester v. Norwich & Worcester R. R. Co.*, 109 Mass. 103; *Portland & Oxford Central R. R. Co. v. Grand Trunk Ry. Co.*, 46 Me. 69.

⁹³*Drady v. Des Moines & Ft. D. R. R. Co.*, 57 Ia. 393; *S. P. Mulholland v. D. M. & W. R. R. Co.*, 60 Ia. 740; To same effect, *Taylor v. Bay City St. R. R. Co.*, 80 Mich. 77, 45 N. W. 335.

liabilities as to future exercises of the power of eminent domain or future improvements of property already condemned, when no right to alter, repeal or amend their charter is reserved, is a question of great importance, because upon its solution depends the efficacy, as to such corporations, of the constitutional and statutory provisions giving compensation for property damaged or injured, as well as for property taken. In Pennsylvania it is held that such liability can be imposed without impairing the obligation of the charter.⁹⁴ The reasoning of the court is as follows: "The Constitution of the United States undoubtedly precludes a State from impairing the obligation of a charter even through an amendment of its organic law; but this restriction has never been held to forbid such remedial legislation as may be requisite to give effect to antecedent rights, or provide a remedy for injuries that previously went unredressed. A child was entitled to support from its father at common law, but he could not recover damages for the frustration of this right through the parent's death from injuries occasioned by the negligence of an individual or body corporate. The act which now affords a remedy for such deprivations, and under which damages are constantly assessed and judgments rendered, is of recent origin, and was passed since the creation of the Pennsylvania Railroad Company, and yet it has never, that I am aware of, been contended that it was invalid as to pre-existing corporations or impaired their chartered privileges. In like manner the citizen has a natural right to compensation, for the consequences of acts done for the public benefit that are injurious to his estate or person, and a statute which affords a remedy cannot justly be assailed as unconstitutional. Such an argument would obviously be fallacious if advanced on behalf of an individual, and the principle is the same when the defendant is a corporation. A power conferred by a charter cannot be abrogated without impairing the obligation of the contract; but the legislature does not, in making such a grant, contract that persons who are injuriously affected by the exercise of the power are not entitled to indemnity, nor that it will not provide a means for rendering their demand effectual. This may be tested by supposing the incorporation of a railway company in a State

⁹⁴ *Duncan v. Pennsylvania Railroad Co.*, 94 Pa. St. 435, 443. See also *Patent v. Philadelphia etc. R. R. Co.*, 17 Phil. 291, affirmed by Su-

preme Court, 43 Legal. Intel. 79; *Northern Central R. R. Co. v. Holland*, 117 Pa. St. 613, 12 Atl. 575.

where, as was long the case in Rhode Island, there is no constitutional restraint on the right of eminent domain, and the subsequent enactment of a law providing that land should not be taken for the use of the road without payment. Would any one contend that such a statute impaired vested rights, or was within the prohibition of the Constitution of the United States? If the question must be answered in the negative, the legislature might obviously proceed to give a remedy for property injured or destroyed." This ruling has since been approved by the Supreme Court of the United States.⁹⁵ But a statute imposing additional liability will not apply in case of works previously constructed.⁹⁶

§ 380 (247). Effect of the repeal, amendment or expiration of statutes. The lapse of the time within which the compulsory powers conferred by a statute can be exercised puts an end to any further proceedings, as well as to the right to condemn.⁹⁷ Where the act imposes no limit, none can be imposed by construction.⁹⁸ Whether compulsory powers have expired or have otherwise been lost by delay or neglect, often becomes a question of difficulty. Where a railroad company was

⁹⁵ Pennsylvania R. R. Co. v. Miller, 132 U. S. 75, 10 S. C. Rep. 34, 1 Am. R. R. & Corp. Rep. 15; affirming S. C. Pennsylvania R. R. Co. v. Duncan, 111 Pa. St. 352, 5 Atl. Rep. 742. The court says: "Although it may have been the law in respect to the defendant, prior to the constitution of 1873, that under its charter, and the statutes in regard to it, it was not liable for such consequential damages, yet there was no contract in that charter, or in any statute in regard to the defendant, prior to the constitution of 1873, that it should always be exempt from such liability, or that the State, by a new constitutional provision, or the legislature, should not have power to impose such liability upon it in cases which should arise after the exercise of such power. But the defendant took its original charter subject to the general law of the State, and to such changes as might be made in such general law, and sub-

ject to future constitutional provisions or future general legislation, since there was no prior contract with the defendant, exempting it from liability to such future general legislation in respect of the subject matter involved."

⁹⁶ Lampley v. Atlantic Coast Line R. R. Co., 71 S. C. 156, 50 S. E. 773.

⁹⁷ New York etc. R. R. Co. v. Boston etc. R. R. Co., 36 Conn. 196; Hartford etc. R. R. Co. v. Montague, 72 Conn. 687, 45 Atl. 961; Hartford etc. R. R. Co. v. Wagner, 73 Conn. 506, 48 Atl. 218; In re Hartford etc. R. R. Co., 74 Conn. 662, 51 Atl. 943; Peavey v. Calais R. R. Co., 30 Me. 498; Atlantic & Pacific R. R. Co. v. St. Louis, 66 Mo. 228; Morris & Essex R. R. Co. v. Central R. R. Co., 31 N. J. L. 205; State v. Bergen Neck R. R. Co., 53 N. J. L. 108, 20 Atl. 762.

⁹⁸ Thicknesse v. Lancaster Canal Co., 4 M. & W. 471.

required to commence its road and expend ten per cent of its capital in five years and complete its road in a certain other period and in default of so doing the statute provided its corporate existence and powers should cease, and the company had done neither, it was held that the statute executed itself, that no proceedings or forfeiture were necessary, and that consequently it could not condemn after the periods specified had elapsed.⁹⁹ The same effect was given to a forfeiture clause, the words of which were, "This act and all the powers, rights and franchises herein and hereby granted shall be deemed forfeited and terminated."¹ On the other hand a provision in the charter of a bridge corporation that the bridge should be commenced within two years, "or this act and all rights and privileges granted hereby shall be null and void," was held not to be self-executing, and the corporation was permitted to condemn after the two years had expired.² Upon the expiration or repeal of a statute

⁹⁹Matter of Brooklyn etc. R. R. Co., 72 N. Y. 245, S. C. 55 How. Pr. 14.

¹Brooklyn Steam Transit Co. v. City of Brooklyn, 78 N. Y. 524.

²New York & L. I. Bridge Co. v. Smith, 148 N. Y. 540, 42 N. E. 1088. After referring to the cases above cited the court says: "It requires, however, strong and unmistakable language, such as each of the cases referred to presents, to authorize the court to hold that it was the intention of the legislature to dispense with judicial proceedings on the intervention of the attorney general. In the case at bar the words of forfeiture are, 'All rights and privileges granted hereby shall be null and void.' It cannot be said that the words 'shall be null and void' disclose the legislative intent to make this clause self-executing. The words 'null and void,' as used in this connection, clearly mean voidable. The word 'void' is often used in an unlimited sense, implying an act of no effect, a nullity *ab initio*. *Inskeep v. Lecony*, 1 N. J. Law, 112. In the case at bar it was not so employed, but

rather in its more limited meaning. We think these words mean no more than if the legislature had said, in case of default, the corporation 'shall be dissolved.' The attorney general was authorized to treat the charter of the bridge company as voidable, and by appropriate legal proceedings to have terminated its corporate existence. The Supreme Court of the United States, in passing upon the meaning of the words 'void and of no effect,' uses this language: 'But these words are often used in statutes and legal documents * * * in the sense of 'voidable' merely,—that is, capable of being avoided,—and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances.' *Ewell v. Daggs*, 108 U. S. 148, 2 Sup. Ct. 408." Where an act provided for extending a street and directed the corporation counsel to commence proceedings therefor within three months, it was held the power was not lost by a neglect to proceed within the time limited. *Stevenson v. Mayor etc. of*

all inchoate proceedings founded thereon fall to the ground,³ unless there is a saving clause in the repealing act.⁴ A saving clause in the repeal of a drainage law that the repeal should not affect any pending proceeding in which a ditch has been ordered established, was held not to save a proceeding pending on appeal from county commissioners, as the appeal had the effect to vacate the order establishing the ditch.⁵ The repeal of an act does not affect the substantial rights of the parties acquired under it.⁶

The effect of a change or amendment of a statute pending

New York, 3 N. Y. Supr. 133. A provision in a railroad charter that, if the road is not commenced and completed within a specified time, the company should forfeit all rights acquired under the act, can only be taken advantage of by the State. A failure to comply is no defense to condemnation proceedings. *Matter of Brooklyn El. R. R. Co.*, 125 N. Y. 434, 26 N. E. 474.

³*Cohen v. Gray*, 70 Cal. 85; *County of Menard v. Kincaid*, 71 Ill. 587; *Taylor v. Strayer*, 167 Ind. 23, 78 N. E. 236, 119 Am. St. Rep. 469; *Clemans v. Hatch*, 168 Ind. 291, 78 N. E. 1065; *Williams v. County Comrs. of Lincoln County*, 35 Me. 345; *State v. Passaic*, 36 N. J. L. 382; *Commonwealth v. Beatty*, 1 Watts 382; *Hampton v. Commonwealth*, 19 Pa. St. 329; *Boyer's Petition*, 15 Pa. Co. Ct. 531; *Hatfield Township Road*, 4 Yeates 392; *Terry v. McClung*, 104 Va. 599, 52 S. E. 355; *Stephens v. Marshall*, 3 Chand. Wis. 222; *Pratt v. Brown*, 3 Wis. 603; *French v. Owen*, 5 Wis. 112; *Brocklebank v. Whitehaven Junction Ry. Co.*, 15 Sim. 632. *Contra: Burrows v. Vandevier*, 3 Ohio 383. Where an act approved March 31, 1866, required a road to be laid on or before March 1, 1866, it was held to be directory as to time. *People ex rel. etc. v. Board of Supervisors*, 33 Cal. 487.

⁴*Downs v. Town of Huntington*, 35 Conn. 588; *County of Menard v. Kincaid*, 71 Ill. 587; *McClarren v. Jefferson School*, 169 Ind. 140, 82 N. E. 73, 13 L.R.A.(N.S.) 417; *Champlain v. McCrea*, 165 N. Y. 264, 59 N. E. 83. *And see* generally as to saving clauses and saving statutes, 1 Lewis' Suth. Stat. Constr. § 287; 2 *Ibid.* §§ 351–355. Under the English Acts, where a company has given an owner notice that it will require his lands, it may go on and complete the purchase after the expiration of its compulsory powers. *Salisbury v. Great Northern R. R. Co.*, 17 Q. B. 840, 21 L. J. Q. B. 185, 16 Jur. 740; *and see Birmingham R. R. Co. v. Queen*, 15 Q. B. 647, 20 L. J. Q. B. 304; *Ystalyfera Iron Co. v. Neath R. R. Co.*, 17 L. R. Eq. 142, 43 L. J. Ch. 476, 29 L. T. N. S. 662; *Rangely v. Midland R. R. Co.*, 37 L. J. Ch. 313, 3 L. R. Ch. 306.

⁵*Taylor v. Strayer*, 167 Ind. 23, 78 N. E. 236, 119 Am. St. Rep. 469.

⁶*Duluth v. Duluth Telephone Co.*, 84 Minn. 486, 87 N. W. 1127; *Dow v. Electric Co.*, 68 N. H. 59, 31 Atl. 22; *S. C., sub nom., Electric Co. v. Dow*, 166 U. S. 489, 17 S. C. 645; *Geneva etc. Ry. Co. v. N. Y. Cent. etc. R. R. Co.*, 163 N. Y. 228, 57 N. E. 498; *Rochester etc. Water Co. v. Rochester*, 176 N. Y. 36, 68 N. E. 117, *affirming S. C. 84 App. Div. 71, 82 N. Y. S. 450. See generally, 1 Lewis' Suth. Stat. Constr. §§ 282–285.*

proceedings under it must depend largely upon the circumstances of the particular case. If the right to condemn or the jurisdiction of the particular court or tribunal before which the proceedings are pending is taken away, the proceedings must necessarily fall to the ground; but if there is simply a change in the mode of procedure, then they may be continued under the new statute.⁷ Where an amendatory act provides an unconstitutional method of assessing damages, the amendment is void and the original act remains in force, and proceedings had in accordance therewith are valid.⁸ The charter of Sing Sing, passed in 1859, provided that the proceedings to lay out, open and widen streets should be according to the provisions of the Revised Statutes in regard to laying out highways. In 1880 the charter was revised and the same provision re-enacted; it was held to mean the Revised Statutes as they were in 1859, and not as they had been amended by an act of 1875.⁹ An act of 1835 provided a mode of assessing damages. An act of 1838 provided a different mode. An act of 1842 abolishing

⁷Emerson v. Western Union R. R. Co., 75 Ill. 176; Hyslop v. Finch, 99 Ill. 171; Chicago etc. R. R. Co. v. Guthrie, 192 Ill. 579, 61 N. E. 658; Heinl v. Terre Haute, 161 Ind. 44, 66 N. E. 450; Ross v. Board of Supervisors, 128 Ia. 427, 104 N. W. 506, 1 L.R.A.(N.S.) 431; Treacy v. Elizabethtown etc. R. R. Co., 85 Ky. 270, 3 S. W. 168; S. C. 80 Ky. 266; Van Emburgh v. Paterson etc. Traction Co., 70 N. J. L. 668, 59 Atl. 461; Matter of Ludlow Street, 172 N. Y. 542, 65 N. E. 494, *affirming* S. C. 59 App. Div. 180, 69 N. Y. S. 1046; Matter of Commissioner of Public Works, 111 App. Div. 285, 97 N. Y. S. 503; S. C. *affirmed*, 185 N. Y. 391, 78 N. E. 146; Wheeling etc. R. R. Co. v. Toledo etc. R. R. Co., 72 Ohio St. 368, 74 N. E. 209, 106 Am. St. Rep. 622; Fenelon's Petition, 7 Pa. St. 173; Uwchlan Township Road, 30 Pa. St. 156; Hickory Tree Road, 43 Pa. St. 139; Tex. Midland R. R. Co. v. S. W. Tel. & Tel. Co., 24 Tex. Civ. App. 198, 58 S. W. 152; Gulf etc. Ry. Co. v. S. W.

Tel. & Tel. Co., 25 Tex. Civ. App. 488, 61 S. W. 406; Chelan County v. Navarre, 38 Wash. 684, 80 Pac. 845; Bohlman v. Green Bay & Minnesota Ry. Co., 40 Wis. 157. In New Hampshire it is held that pending proceedings are not affected by a statute relating to procedure only. Colony v. Dublin, 32 N. H. 432; Boston & Maine R. R. Co. v. Cilley, 44 N. H. 578; Wentworth v. Farmington, 48 N. H. 207; Matter of New York, 34 N. Y. App. Div. 468. An act may be passed and expressly made applicable to pending proceedings. Bridgeport v. Hubbell, 5 Conn. 237; City and County of San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720; Ross v. Board of Supervisors, 128 Ia. 427, 104 N. W. 506, 1 L.R.A.(N.S.) 431.

⁸Campbell v. Detroit, 14 Mich. 276; Shepardson v. Milwaukee & Beloit R. R. Co., 6 Wis. 605.

⁹Matter of Altering etc. Main Street, 98 N. Y. 454, *affirming* S. C. 30 Hun 424.

the board created by the act of 1838 was held equivalent to a repeal of a repealing act, and the act of 1835 was held to be restored.¹⁰ A repeal of an act under which damages have been assessed, after the right thereto has vested, does not affect the rights of the parties.¹¹ Generally the procedure should be according to the law in force at the time.¹² Proceedings under an act which has been repealed or has ceased to operate are void and of no effect.¹³

§ 381 (248). General and special laws: Repeal by implication. As a rule, a general law does not repeal a prior special law merely because it embraces the same subject matter.¹⁴ An intent to repeal the special law must be manifested either by express words, or by language extending the operation of the general law to all cases embraced by it, or there must be some inconsistency or absurdity in the two standing together. Accordingly a general law in regard to the assessment of damages or other procedure in condemnation proceedings will not supersede the provisions of special charters on the subject,¹⁵ unless expressly made applicable to all cases for condemnation,¹⁶ or plainly intended as a revision of all prior laws, general and special, upon the subject.¹⁷

¹⁰Directors of Poor v. Railroad Co., 7 W. & S. 236.

¹¹People v. Supervisors of Westchester, 4 Barb. 64; People v. Common Council of Buffalo, 140 N. Y. 300, 35 N. E. 485; People v. Common Council, 2 Misc. 7, 21 N. Y. Supp. 601.

¹²McCrea v. Champlain, 35 App. Div. N. Y. 89.

¹³Byrne v. Drain, 127 Cal. 663, 60 Pac. 433; Baird v. Monroe, 150 Cal. 560, 89 Pac. 352; State v. Tenny, 58 S. C. 215, 36 S. E. 555.

¹⁴1 Lewis' Suth. Stat. Constr. §§ 274, 275; Shrader v. Lancaster, 170 Pa. St. 136, 32 Atl. 587.

¹⁵Tenn. Coal, Iron & R. R. Co. v. Birmingham So. Ry. Co., 128 Ala. 526, 29 So. 455; North Missouri R. R. Co. v. Gott, 25 Mo. 540; State v. Clarke, 25 N. J. L. 54; State v. Trenton, 36 N. J. L. 198; Hudson River R. R. Co. v. Outwater, 3 Sand. 689; Norfolk & Southern R. R. Co. v. Ely,

95 N. C. 77; Dallas County v. Plowman, 99 Tex. 509, 91 S. W. 221.

¹⁶Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197; Paterson etc. Traction Co. v. De Gray, 70 N. J. L. 59, 56 Atl. 250; Van Emburgh v. Paterson etc. Traction Co., 70 N. J. L. 668, 59 Atl. 461; Marlor v. Philadelphia etc. R. R. Co., 166 Pa. St. 524, 31 Atl. 255; McCrea v. Port Royal R. R. Co., 3 S. C. 381, 16 Am. Rep. 729. But in Gardner v. Ga. R. R. & B. Co., 117 Ga. 522, 43 S. C. 863, a general law for the condemnation of private property, which provided that "all corporations or persons authorized to take or damage private property for public purposes shall proceed as herein set forth," was held not to affect the procedure under a special railroad charter.

¹⁷Organ v. Memphis etc. R. R. Co., 51 Ark. 235, 11 S. W. 96; Treacy v. Elizabethtown etc. R. R. Co., 85

§ 382 (248). Two acts conferring same power. There may be two complete acts in reference to the same subject matter, such as the construction of gravel roads, the acquisition of parks, etc., though having inconsistent provisions, under either of which proceedings may be had, if the legislature expressly declares in the second that it was not their intention to repeal any former act on the subject.¹⁸ So a corporation may have the option of proceeding under its special charter or under the general law.¹⁹ In cases where there are two statutes available the proceedings should be wholly under one.²⁰

§ 383 (249). Effect of a change in the form of municipal government. Municipalities frequently put off one form of government for another, whereby radical changes are made in the form of government. Towns and villages become cities. One law of incorporation is exchanged for another. The laws under which such changes are made frequently do, and always ought, to make provisions for all pending suits and

Ky. 270, 3 S. W. 168; S. C. 80 Ky. 266; Knight v. Aroostook Riv. R. R. Co., 67 Me. 291; Hunt v. Card, 94 Me. 386, 47 Atl. 921; State v. Jersey City, 54 N. J. L. 49, 22 Atl. 1052; Lehigh Val. R. R. Co. v. Phillipsburg, 73 N. J. L. 138, 62 Atl. 194; Moore v. Superior & St. Croix R. R. Co., 34 Wis. 173.

¹⁸Los Angeles v. Leaves, 119 Cal. 164, 51 Pac. 34; Oakland v. Thompson, 151 Cal. 572, 91 Pac. 387; Robinson v. Ripley, 111 Ind. 112; Driscoll v. Taunton, 160 Mass. 486, 36 N. E. 495; Detroit v. Daly, 68 Mich. 503; Trowbridge v. Detroit, 99 Mich. 443, 58 N. W. 368; Shroder v. Lancaster, 170 Pa. St. 136, 32 Atl. 587.

¹⁹McMahon v. Cincinnati & Chicago Short Line R. R. Co., 5 Ind. 413; Cascades R. R. Co. v. Sohns, 1 Wash. Ter. N. S. 558. *And see* generally where there are different statutes which may apply: City and County of San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720; Crow v. Judy, 139 Ind. 562, 38 N. E. 415; In re City of Cedar Rapids, 85 Ia. 39, 51 N. W. 1142; Arnold v. Council Bluffs, 85

Iowa 441, 52 N. W. 347; Knight v. Aroostook Riv. R. R. Co., 67 Me. 291; Howes v. Belfast, 72 Me. 46; Kearney Tp. v. Ballantine, 54 N. J. L. 194, 23 Atl. Rep. 821; State v. West Hoboken, 54 N. J. L. 508, 24 Atl. Rep. 477; New York etc. R. R. Co. v. Welsh, 143 N. Y. 411, 38 N. E. 378, 42 Am. St. Rep. 734; City of Syracuse v. Stacey, 86 Hun 441, 33 N. Y. Supp. 929; Durham & N. R. R. Co. v. Richmond & D. R. R. Co., 106 N. C. 16, 10 S. E. 1041; Gwinner v. Lehigh R. R. Co., 55 Pa. St. 126; Appeal of Borough of Hanover, 150 Pa. St. 202, 24 Atl. 669; Appeal of Huntington etc. R. R. Co., 149 Pa. St. 133, 24 Atl. 189; In re Public Alley, 160 Pa. St. 89, 28 Atl. 506; Seaman v. Borough of Washington, 172 Pa. St. 467, 33 Atl. 756; In re Sewer St., 20 Phil. 367; West Whiteland Road, 4 Pa. Co. Ct. 511; Chestnut St., 8 Pa. Co. Ct. 55; Sewickley Borough v. Jennings, 12 Pa. Co. Ct. 75; Tuttle v. Knox County, 89 Tenn. 157, 14 S. W. 486.

²⁰Verona v. Railroad Co., 187 Pa. St. 358, 41 Atl. 276.

proceedings and all accrued rights and liabilities in such a way as to prevent confusion or loss. But sometimes this is not done, and the question arises, what would be the effect of such a change upon pending proceedings for condemnation? It would be difficult to lay down any general rule for such cases, but the following decisions may be noticed: County Commissioners acquired jurisdiction to lay out a town way in the town of Lawrence, in July, 1852. The way was finally located and established April 12, 1853. On March 29, 1853, the town became a city, by accepting a charter granted by the legislature. By this charter jurisdiction of the subject matter was taken away from the county commissioners as to the incorporated territory. The charter continued the town officers until the organization of the city government, which did not take place till April 18, 1853. The lay-out was held valid.²¹ In another case the Scheme and Charter for the city and county of St. Louis was adopted on August 22, 1876, and by its terms was to be operative in sixty days thereafter. A controversy arose over its adoption, which was not determined until March 5, 1877, and until then it was unknown whether it was adopted or not. On November 26, 1876, proceedings were begun for opening a street, pursuant to ordinances passed in January and July, 1876. These proceedings were finally completed, by the confirmation of the commissioner's report, on March 26, 1877. The proceedings were begun and carried on according to the old charter. The new charter provided that all ordinances for the opening of any street upon which proceedings should not be begun when the charter went into operation should stand repealed. In theory the new charter was in operation from and after October 22, 1876. But the proceedings were sustained on what was called the *de facto* principle.²² A statute of California provided that the board of water commissioners of a township should establish a ditch upon receiving a petition from a majority of the persons in a township liable to work on water ditches. Such petition was presented to the commissioners of San José township and, pending proceedings under it, Azusa township was set off from San José. The commissioners of Azusa township, in which the proposed ditch would be, filed a supplemental petition and continued the proceedings.

²¹Durant v. Lawrence, 1 Allen 125.

²²St. Louis v. Stoddard, 15 Mo. App. 173.

This was held to be erroneous, and it was further held that new proceedings would have to be begun, based upon a petition by the required number of persons residing in the new township.²³

§ 384 (250). Conflict of jurisdiction between different authorities having power in the same territory. Where a city or borough is vested with power to lay out and improve streets, the authorities of a town or county embracing such city or borough are precluded from exercising the same power within the same territory.²⁴ Of course it is otherwise if the city or borough has no authority in the premises.²⁵ So it is held that under a general drainage act a ditch cannot be established wholly within a city which has full power to make sewers and drains for any purpose for which they are needed.²⁶ This seems the reasonable rule. To hold otherwise might bring about very disagreeable and disastrous conflicts of jurisdiction and authority. Some courts have held, however, that in such cases the jurisdiction is concurrent.²⁷ In many cases town

²³Dalton v. Water Commissioners, 49 Cal. 222; *see also*, on the same subject, Minhinnah v. Haines, 29 N. J. L. 388; Road in Sterrett Tp., 123 Pa. St. 231, 16 Atl. 777; Shaaber v. City of Reading, 133 Pa. St. 643, 19 Atl. 419.

²⁴Shields v. Highway Comrs., 158 Ill. 214, 41 N. E. 985; Gascho v. Sohl, 155 Ind. 417, 58 N. E. 547; Gallagher v. Head, 72 Ia. 173; State v. Clarke, 25 N. J. L. 54; State v. Trenton, 36 N. J. L. 198; Cherry v. Board of Comrs., 52 N. J. L. 544, 20 Atl. 970, *affirming* S. C. 51 N. J. L. 417, 18 Atl. 299; *In re Piscataway & B. Tps.* 54 N. J. L. 539, 24 Atl. 759; Freeman v. Price, 63 N. J. L. 151, 43 Atl. 432; Atlantic Coast Line Elec. R. R. Co. v. Griffin, 64 N. J. L. 513, 46 Atl. 1062; Salsbury v. Gaskin, 66 N. J. L. 111, 48 Atl. 531; Pleasant Hill v. Commissioners, 71 Ohio St. 133, 72 N. E. 896; Easton Road Case, 3 Rawle, 195; Somerset etc. Road, 74 Pa. St. 61; South Chester Road, 80 Pa. St. 370; Cowan's Case, 1 Overton 310; Street in Donnington, 3 Pa. Co. Ct. 455; Road in Huntington, 11 Pa. Co.

Ct. 119; Norwood v. Gonzales County, 79 Tex. 218, 14 S. W. Rep. 1057. *And see In re Twenty-eighth St.*, 15 Phil. 350.

²⁵Washington v. Fisher, 43 N. J. L. 377; State v. Troth, 34 N. J. L. 377; Road in Mercer, 14 S. & R. 447; Matter of Callowhill St., 32 Pa. St. 361.

²⁶Anderson v. Endientt, 101 Ind. 539.

²⁷Norwich v. Story, 25 Conn. 44; Bennington v. Smith, 29 Vt. 254; Windham v. Cumberland County Commissioners, 26 Me. 406. In such case the authorities first instituting proceedings will be entitled to proceed. Monroe v. Danbury, 24 Conn. 199; Powers v. City Council of Springfield, 116 Mass. 84. Special cases: The charter of Newark, approved March 11, 1857, gave to the city council the power to lay out and open streets. By act of March 20, 1857, exclusive power over the subject was conferred upon commissioners to be appointed by the council; held a repeal of the former act as to the power in question. State

or county authorities have authority to lay out town or county roads, while the city or village authorities have exclusive jurisdiction of purely local streets.²⁸ The authorities of the larger jurisdiction may lay out a way wholly within the smaller when it is of the character over which they have jurisdiction.²⁹ In Massachusetts it is held that the selectmen of a town may lay out a highway wholly within their town, but extending to the town limits and there connecting with other roads so as to form a continuous inter-town thoroughfare, though the county commissioners alone have jurisdiction to establish inter-town ways.³⁰ But the contrary is held in New Hampshire.³¹

§ 385 (251). Statutes have no extra-territorial effect. It is a general rule that statutes have no extra-territorial effect.³² It follows that one State cannot authorize the condemnation of property in another State,³³ also, that it cannot authorize works which will produce actionable damages in another

v. Newark, 28 N. J. L. 491. The city of New Orleans was divided into municipalities; held that one municipality could not open a street, the center line of which was the dividing line between it and another municipality, under a statute formerly applicable to the whole city. Municipality No. 1 v. Young, 5 La. An. 362. *And see* People v. Lake County, 33 Cal. 487; Sparling v. Dwenger, 60 Ind. 72.

²⁸State v. County Comrs., 23 Fla. 632; Harkness v. Waldo County Comrs., 26 Me. 353; Herman v. County Comrs., 39 Me. 583; City of Deering v. County Comrs., 87 Me. 151, 32 Atl. 797; Cragie v. Mellen, 6 Mass. 7; Monterey v. County Comrs., 7 Cush. 394; People v. Highway Comr., 15 Mich. 347; Wells v. McLaughlin, 17 Ohio 97; Palo Alto Road View, 13 Pa. Co. Ct. 537; Kelly v. Danby, 46 Vt. 504.

²⁹In the following cases it was held that county commissioners could, under a proper petition, lay out a way wholly within a town or village: Harkness v. Waldo County

Comrs., 26 Me. 353; Herman v. County Comrs., 39 Me. 583; Wells v. McLaughlin, 17 Ohio 97; Kelly v. Danby, 46 Vt. 504. Under a petition for a way in two towns, a way cannot be laid out wholly in one of the towns: Hopkinton v. Winship, 35 N. H. 209; Petition of Newport, 39 N. H. 67.

³⁰Monterey v. County Comrs., 7 Cush. 394.

³¹Griffin's Petition, 27 N. H. 343. *And see* Biddeford v. County Comrs., 78 Me. 105.

³²Lewis' Suth. Stat. Constr., § 13.

³³Southern Ill. & Mo. Bridge Co. v. Stone, 174 Mo. 1, 73 S. W. 453, 63 L.R.A. 301; Crosby v. Hanover, 36 N. H. 404; Saunders v. Bluefield W. W. & Imp. Co., 58 Fed. 133; St. Louis etc. R. R. Co. v. S. W. Tel. & Tel. Co., 121 Fed. 276, 58 C. C. A. 198; Evansville Traction Co. v. Henderson Bridge Co., 134 Fed. 973. In Crosby v. Hanover, 36 N. H. 404, the attempt was to condemn a bridge across the Connecticut River, one end of which was in Vermont.

State,³⁴ or in territory within a State, jurisdiction over which has been ceded to the United States.³⁵ Where a mill erected in Massachusetts flowed lands in New Hampshire, it was held that damages could not be assessed in New Hampshire under the statutes of the latter State in relation to mills.³⁶ And, generally, the mill acts of one State do not apply to mills erected out of the State, though flowing lands in the former State.³⁷ But where a mill or other works in one State produces damage in another State, a common law action can be maintained in the State where the works are situated.³⁸

The city of Worcester, Massachusetts, took the waters of Tatnuck Brook for public use, as a water supply for said city. The brook was a tributary of the Blackstone River, and the diversion of the waters of the brook diminished the supply of water coming to mills on the Blackstone River situated in Rhode Island. In *Manville Company v. Worcester*,³⁹ the plaintiff, having a mill in the latter State, was allowed to maintain an action of tort in Massachusetts for damages caused by the diversion. In *Banigan v. Worcester*⁴⁰ it appeared that several suits were begun in the superior court of Worcester county, Massachusetts, under the statutes of the latter State, by the owners of mill property situated on the Blaekstone River in Rhode Island, for a statutory assessment of damages by reason of the diversion of Tatnuck Brook. These cases were removed to the Federal court, and it was held by Carpenter, J., that the suits were removable, and that the petitions were well brought under the statute.⁴¹

§ 386 (252). When a naked or defective authority to condemn may be exercised according to previous statutes,

³⁴*Farnum v. Blackstone Canal Co.*, 1 Sumner 46; *Holyoke Water Power Co. v. Connecticut River Co.*, 22 Blatch. 131.

³⁵*United States v. Ames*, 1 W. & M. 76.

³⁶*Salisbury Mills v. Forsaith*, 57 N. H. 124. To the same effect, *Wooster v. Great Falls Manf. Co.*, 39 Me. 246.

³⁷*Ibid.*

³⁸*Wooster v. Great Falls Manf. Co.*, 39 Me. 246; *Mannville Co. v. Worcester*, 138 Mass. 89.

³⁹138 Mass. 89.

⁴⁰30 Fed. 392.

⁴¹This view is also supported by *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394, where it was held that one who owned lands situated partly in Massachusetts and partly in New Hampshire, which were injured by the diversion of a stream in Massachusetts to supply a village, must seek his remedy under the statute for his lands in both States, and that an action of tort would not lie.

and when not. The provision of the constitution that compensation must be made for property taken for public use is absolute and imperative. When the legislature authorizes the taking of private property it must make provision for ascertaining and paying compensation. But such provision need not be made in each particular act conferring authority. Where authority to condemn is conferred by an act which is silent as to compensation, it sometimes becomes a nice question whether the provisions of prior statutes can be invoked to help it out. Where an additional authority to condemn property is conferred upon a company it may be exercised according to the provisions of prior statutes applicable to the company.⁴² Where power to lay out streets and alleys is conferred by special act upon a particular borough, or is contained in a special charter, the municipality may proceed according to the provisions of the general law in regard to highways.⁴³ The same is true also where the legislature direct or authorize the proper authorities to lay out a particular street or highway.⁴⁴ In a case which arose in Virginia it appeared that the government of county affairs was vested in the county court which was authorized to condemn property when necessary for the use of the county. By a subsequent statute the management of the county affairs was vested in a board of supervisors, whose duty it was among other things, to provide suitable buildings for the use of the county. It was held that the authority to condemn property for county buildings was necessarily implied, and that compensation could be assessed according to the prior statute, which in terms applied only to the county court.⁴⁵ A corporation was created by special charter, with power to buy, maintain or manage any works, public or private, which may tend, or be designed, to improve, increase, facilitate or develop, trade, travel, transportation of freight, live stock, passengers or any other traffic by land or water in the United States. It was authorized "to enter upon and occupy the lands of individuals or companies, on making payment therefor or giving security

⁴²Railroad Co. v. State, 9 Bax. 522; Heady v. Vevay etc. Turnpike Co., 52 Ind. 117.

⁴³Barnes v. Springfield, 4 Allen 488; Sharett's Road, 8 Pa. St. 89.

⁴⁴Smedley v. Erwin, 51 Pa. St. 445; City of Belfast, Appellants, 53

Me. 431; Warner v. Hennepin County, 9 Minn. 139; Hamlin v. New Bedford, 143 Mass. 192.

⁴⁵Supervisors of Culpepper v. Gorrell, 20 Gratt. 484. Compare § 371 and cases there cited.

according to law." No mode of procedure was pointed out, and it would appear that there was no general eminent domain statute. It was held that the company could proceed to condemn under the law applicable to the particular kind of works it proposed to construct; that is, it could use the railroad law, if it proposed to construct a railroad, the natural gas law, if it proposed to transport natural gas, and so on.⁴⁶ General eminent domain statutes are now common, which provide a complete mode of procedure for the condemnation of property and ascertaining the compensation. When such statutes are in force a naked power to condemn may be exercised under the general law.⁴⁷ And where in case of drainage laws, the mode provided for ascertaining the compensation was held to be invalid, it was held that resort could be had to the general law to effect the condemnation.⁴⁸

A Kentucky statute as to parks in cities of the first class, authorized the condemnation of property, provided what the petition should contain in certain cases and made full provision for the payment of the compensation, but contained a provision as to procedure which was found to be nugatory. It was held that the condemnation might be made by petition to any court of competent jurisdiction and the proceedings conducted according to the course of the common law.⁴⁹

⁴⁶Carothers v. Philadelphia Co., 118 Pa. St. 468, 12 Atl. 314.

⁴⁷Poulan v. Atlantic Coast Line R. R. Co., 123 Ga. 605, 51 S. E. 657; Stowe v. Newborn, 127 Ga. 421, 56 S. E. 516; Mercer County v. Wolff, 237 Ill. 74; Orange County v. Ellsworth, 98 App. Div. 275, 90 N. Y. S. 576.

⁴⁸Cleveland etc. Ry. Co. v. Polecat Dr. Dist., 213 Ill. 83, 72 N. E. 684; Smith v. Claussen Park D. & L. Dist., 229 Ill. 155, 82 N. E. 278.

⁴⁹Board of Park Comrs. v. Du Pont, 110 Ky. 743, 62 S. W. 891. The court says: "We are of the opinion that the legislature intended, upon the filing of the petition for the condemnation of private property for park purposes, the procedure should be according to the course of the

common law; that the circuit court of Jefferson county, being a court of original and general jurisdiction, has jurisdiction of the proceeding. The court can permit the jury to hear such evidence as may be offered as to the necessity of condemning property, and as to its value, and have the jury view the property sought to be condemned, and instruct it as to the method of ascertaining and fixing the value of the property taken, and as to the damages for taking same, if any results. It would be within the power of the court to fix the day upon which the money should be paid to the owner of the property taken, and to adjudge that, upon the board's failure to pay it at that time, the proceedings were to be void, or to be regarded as being abandoned. It

A chapter of the general statutes of Minnesota, relating to *roads, cartways and bridges*, contained complete provisions for the laying out of town roads by town supervisors. It contained a section as to town line roads as follows: "Whenever the supervisors of any town receive a petition praying for the location of a new road, or the altering or discontinuing of an old one, on the line between two towns, such road shall be laid out, altered, or discontinued by two or more of the supervisors of each of said towns, either on such line or as near thereto as the convenience of the ground will admit; and they may so vary the same either to one side or the other of such line as they think proper." The statute contained no other provision as to procedure in case of such roads and there was no provision as to how the damages were to be paid or apportioned, or how a record was to be made for each town. It was held that the procedure as to town roads should be applied with appropriate and necessary changes, that the papers should be kept and record made by the town in which the petition was filed and a copy filed in the other town, and that the damages should be apportioned by the supervisors of the two towns acting jointly.⁵⁰

seems to us that the court would have complete jurisdiction to protect the rights of all parties concerned."
p. 754.

⁵⁰Hurst v. Martinsburg, 80 Minn. 40, 82 N. W. 1099. As such cases are rare, we quote from the opinion as follows: "The several provisions of the chapter, so far as applicable to the subject in hand, are not as full and complete as well-considered and carefully prepared statutes might be made, but omissions as to the mode and manner of conducting the proceedings thereby authorized may be supplied by intendment, and do not affect the constitutionality of the law as a whole. Other sections of this statute provide for laying out town roads by town supervisors, for notice to all interested parties, and for damages and compensation for land taken. And, unless the section under consideration is to be stricken

from the statutes, and held entirely meaningless, such other provisions must be referred to, and applied to proceedings to lay out a town-line road under it. They may be resorted to and applied without much difficulty, and the legislature evidently so intended. The supervisors receiving the petition for such town-line road must take the active charge and conduct of the proceedings, but in the matter of determining whether the road shall be laid out, and in assessing damages, they can act only in conjunction with the supervisors of the adjoining town. The records may be kept in the town in which the proceedings are commenced, and duplicates filed in the adjoining town; and the matter of the division of the damages to be paid, between the towns, must be left to the judgment and discretion of both boards. The notices required to be given, in the case of

§ 387 (253). The authority must be strictly pursued. This is a proposition so universally conceded and so often reiterated by the courts that it requires no discussion, and we shall simply refer to some of the principal cases illustrating the doctrine.⁵¹ "As private property can be taken for public uses,

an ordinary town road must be served in the same manner in this proceeding. Three copies should be posted in each town.

"Statutes must be so construed as to give effect to every section and part, and, when any doubts arise as to the constitutionality thereof, such doubts must be resolved in favor of the law. That the legislature intended that the section of the statute under consideration should have some force and effect is too evident to be for a moment doubted. And that it was further intended that the other sections on the subject of laying out town roads generally should be resorted to and applied to this section and proceedings under it, we have no doubt. We so construe and interpret it." pp. 42, 43.

Compare. with last two cases Chaffer's Appeal, 56 Mich. 244, and Wautauga Water Co. v. Scott, 111 Tenn. 321, 76 S. W. 888.

⁵¹Mobile etc. R. R. Co. v. Ala. Mid. R. R. Co., 87 Ala. 501, 6 So. 404; New & Old Decatur Belt etc. R. R. Co. v. Karcher, 112 Ala. 676, 21 So. 825; Roberts v. Williams, 15 Ark. 43; Bensley v. Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575; Curran v. Shattuck, 24 Cal. 427; Lincoln v. Colusa, 28 Cal. 662; Damrell v. Board of Supervisors etc. 40 Cal. 154; Shepherd v. Turner, 129 Cal. 530, 62 Pac. 106; Colo. Fuel & Iron Co. v. Four Mile Ry. Co., 29 Colo. 90, 66 Pac. 902; Keefer v. Bridgeport, 68 Conn. 401, 36 Atl. 801; Brown v. Macfarland, 19 App. Cas. D. C. 525; Fla. Cent. etc. R. R. Co. v. Bear, 43 Fla. 319, 31 So. 287; Young v. McKenzie,

3 Ga. 31; Justices etc. v. Plank Road Co., 9 Ga. 475; Hyslop v. Finch, 99 Ill. 171; Chicago & Alton R. R. Co. v. Smith, 78 Ill. 96; Reid v. Ohio Miss. R. R. Co., 126 Ill. 48, 17 N. E. 807; Phillips v. Seales Mound, 195 Ill. 353, 63 N. E. 180; Funderburk v. Spengler, 234 Ill. 574, 85 N. E. 193; Finke v. Zeigemiller, 77 Ia. 253, 42 N. W. 183; Gano v. Minneapolis etc. R. R. Co., 114 Ia. 713, 87 N. W. 714, 89 Am. St. Rep. 393, 55 L.R.A. 263; New Orleans v. Sohr, 16 La. An. 393; Mayor etc. of Jefferson v. Delachaise, 22 La. An. 26; Calder v. Police Jury, 44 La. An. 173, 10 So. 726; Pingree v. Co. Comrs., 30 Me. 351; Hubbard v. Great Falls Mfg. Co., 80 Me. 39, 12 Atl. 878; Harris v. Inhabitants of Marblehead, 10 Gray 40; Wamesit Power Co. v. Allen, 120 Mass. 352; Derby v. Framingham etc. R. R. Co., 119 Mass. 516; Kroop v. Forman, 31 Mich. 144; Detroit Sharpshooters' Association v. Highway Commissioners, 34 Mich. 36; Toledo, Ann Arbor & Northern Mich. R. R. Co. v. Munson, 57 Mich. 42; Stockett v. Nicholson, Walker, Miss. 75; St. Louis v. Franks, 78 Mo. 41; Chicago etc. R. R. Co. v. Young, 96 Mo. 39, 8 S. W. 776; Orrick School Dist. v. Dorton, 125 Mo. 439, 28 S. W. 765; Nishnabotna Dr. Dist. v. Campbell, 154 Mo. 151, 55 S. W. 276; Williams v. Kirby, 169 Mo. 622, 70 S. W. 140; In re Grading Bledsoe Hill, 200 Mo. 630, 98 S. W. 631; State v. Tarrelly, 36 Mo. App. 282; Taylor v. Todd, 48 Mo. App. 550; Spurgeon v. Bartlett, 56 Mo. App. 349; Rousey v. Wood, 57 Mo. App. 650; Glass v. Basin Min. etc. Co., 22 Mon. 151, 55 Pac. 1047;

against the consent of the owner only in such cases, and by such proceedings, as may be specially provided by law, and as these proceedings are not according to the common law, and are in derogation of private right, and as they wholly depend on statute regulation in this State, any one using this extraordinary and harsh power must comply with all the provisions of the statute.”⁵² A strict compliance with the statute does not necessarily mean a literal and exact compliance.⁵³ A substantial compliance will suffice.⁵⁴ As to what is a substantial compli-

Helena v. Rogan, 26 Mont. 452, 68 Pae. 798; S. C. 27 Mont. 135, 69 Pae. 709; Nelson v. Harlan County, 2 Neb. (Unof.) 537, 89 N. W. 458; State v. Van Geison, 15 N. J. L. 339; Griscom v. Gilmore, same, p. 475; State v. Jersey City, 25 N. J. L. 309; State v. Town of Bergen, 33 N. J. L. 72; State v. Jersey City, 54 N. J. L. 49, 22 Atl. 1052; State v. Hernsley, 59 N. J. L. 149; State v. Larabee, 59 N. J. L. 259; Hampton v. Clinton Water etc. Co., 65 N. J. L. 158, 46 Atl. 650; Whittingham v. Hopkins, 70 N. J. L. 322, 57 Atl. 402; Manda v. Orange, 75 N. J. L. 251; Leyba v. Armijo, 11 N. M. 437, 68 Pac. 939; Newell v. Wheeler, 48 N. Y. 486; Miller v. Brown, 56 N. Y. 383; Schneider v. Rochester, 160 N. Y. 165; reversing 33 App. Div. 458; Matter of Schreiber, 53 How. Pr. 359; Harbeek v. Toledo, 11 Ohio St. 219; Grant v. Hyde Park, 67 Ohio St. 166, 65 N. E. 891; Woodruff v. Douglass Co., 17 Ore. 314, 21 Pae. 49; Grande Ronde Elec. Co. v. Drake, 46 Ore. 243, 78 Pac. 1031; Killbuck Private Road, 77 Pa. St. 39; Appeal of Borough of Curwensville, 129 Pa. St. 74; Harbaugh's Road, 8 Pa. Co. Ct. 671; Painter's Lateral R. R. Co., 198 Pa. St. 461, 48 Atl. 299; Bell v. Ohio etc. R. R. Co., 1 Grant 105; McCotter v. New Shoreham, 21 R. I. 43, 41 Atl. 572; Town of Wayne v. Caldwell, 1 S. D. 483, 47 N. W. 547, 36 Am. St. Rep. 750; Lewis v. St. Paul etc. R. R. Co., 5 S. D. 148, 58 N. W. 580; Gulf etc. R. R.

Co. v. Poindexter, 70 Tex. 98, 7 S. W. 316; Galveston Wharf Co. v. Gulf etc. R. R. Co., 72 Tex. 454, 10 S. W. 537; Gulf, H. & S. A. R. R. Co. v. Mud Creek, I. A. & M. Co., 1 Tex. App. Civil Cas. p. 169; Post v. Rutland R. R. Co., 80 Vt. 551, 69 Atl. 156; Painter v. St. Clair, 98 Va. 85, 34 S. E. 989; Adams v. Clarksburg, 23 W. Va. 203; Fork Ridge Baptist Cem. Ass. v. Redd, 33 W. Va. 262, 10 S. E. 405; Charleston & S. S. Bridge Co. v. Comstock, 36 W. Va. 263, 15 S. E. 69; Bohlman v. Green Bay & Minn. Ry. Co., 40 Wis. 157; Fraser v. Mulany, 129 Wis. 377, 109 N. W. 139; Herron v. Improvem't Comrs., L. R. (1892) A. C. 498. “The form by which private property may be taken for public purposes having been prescribed, it must be strictly pursued, or the attempt will be ineffectual and the proceedings void, and all persons acting under the color of them will be trespassers.” Stewart v. Wallis, 30 Barb. 344.

⁵²Fork Ridge Baptist Cem. Ass. v. Redd, 33 W. Va. 262. 10 S. E. 405.

⁵³Darrow v. Chicago etc. R. R. Co., 169 Ind. 99.

⁵⁴Darrow v. Chicago etc. R. R. Co., 169 Ind. 99, 81 N. E. 1081; Nickerson v. Lynch, 135 Mo. 471, 37 S. W. 128; Jones v. Zink, 65 Mo. App. 409; Dodge County v. Acorn, 61 Neb. 376, 85 N. W. 292; Charleston etc. S. S. Bridge Co. v. Comstock, 36 W. Va. 263, 15 S. E. 69.

ance will be considered in future chapters relating to procedure and the validity of the proceedings when collaterally attacked. Courts cannot dispense with the forms and conditions prescribed by law, on the notion that they are not essential. The very fact that they are prescribed makes them matters of substance.⁵⁵ When the matter is in doubt the general rule applies in favor of the property owner and against the party attempting to enforce the statute.

§ 388 (254). The authority to condemn will be strictly construed. All grants of power by the government are to be strictly construed, and this is especially true with respect to the power of eminent domain, which is more harsh and peremptory in its exercise and operation than any other.⁵⁶ "An

⁵⁵ Hawkins v. Pittsburgh, 220 Pa. St. 7, 69 Atl. 283. "Every condition prescribed in the grant must be complied with, and the proceedings must be conducted in the manner and with the formalities prescribed in the grant of power. Formalities and modes of procedure prescribed are of the essence of the grant, which the courts cannot disregard on a conception that they are not essential." State v. Jersey City, 54 N. J. L. 49, 22 Atl. Rep. 1052.

⁵⁶ Reynolds v. Spears, 1 Stew. 34; Martin v. Rushton, 42 Ala. 289; Mobile etc. R. R. Co. v. Ala. Mid. R. R. Co., 87 Ala. 501; Ortiz v. Hansen, 35 Colo. 100, 83 Pac. 964; Waterbury v. Platt Bros. & Co., 75 Conn. 387, 53 Atl. 958, 96 Am. St. Rep. 229; Florida Cent. etc. R. R. Co. v. Bear, 43 Fla. 319, 31 So. 287; Alabama Great Southern R. R. Co. v. Gilbert, 71 Ga. 591; Hopkins v. Fla. Cent. etc. R. R. Co., 97 Ga. 107, 25 S. E. 452; Oconee Elec. Lt. & P. Co. v. Carter, 111 Ga. 106, 36 S. E. 457; Chestates Pyrites Co. v. Cavenders Creek Gold Min. Co., 119 Ga. 354, 46 S. E. 422, 100 Am. St. Rep. 174; Chicago & Eastern Illinois R. R. Co. v. Wiltse, 116 Ill. 449, 6 N. E. 49; Harvey v. Aurora etc. R. R. Co., 174 Ill. 295, 51 N. E. 163; Phillips v. Seales Mound, 195 Ill. 353,

63 N. E. 180; Funderburk v. Spangler, 234 Ill. 574, 85 N. E. 193; Chicago etc. Ry. Co. v. Chicago Mechanics Inst., 239 Ill. 197; Eward v. Lawrenceburgh etc. R. R. Co., 7 Ind. 711; Atchison etc. Ry. Co. v. Kansas City etc. Ry. Co., 67 Kan. 569, 70 Pac. 939, 73 Pae. 899; Board of Park Comrs. v. Du Pont, 110 Ky. 743, 62 S. W. 891; Breaux v. Bienvenu, 51 La. An. 687, 25 So. 321; Spofford v. B. & B. R. R. Co., 66 Me. 26; Binney's Case, 2 Bland. Ch. (Md.) 99; City of Detroit v. Wabash etc. R. R. Co., 63 Mich. 712, 30 N. W. 321; Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 82 Mo. 121; Kansas City Interurban Ry. Co. v. Davis, 197 Mo. 669, 95 S. W. 881, 114 Am. St. Rep. 790; Cox v. Tifton, 18 Mo. App. 450; Chandler v. Reading, 129 Mo. App. 63; Claremont Ry. & Lt. Co. v. Putney, 73 N. H. 431, 62 Atl. 727; Simpson v. South Staffordshire Water Works Co., 34 L. J. Eq. 380; Jersey City v. Central R. R. Co., 40 N. J. Eq. 417; Watson v. The Acquacknonck Water Co., 36 N. J. L. 195; Beck v. United N. J. R. R. Co., 39 N. J. L. 45; Central R. R. Co. v. Hudson Terminal Co., 46 N. J. L. 289; Hampton v. Clinton Water etc. Co., 65 N. J. L. 158, 46 Atl. 650; Metlar v. Middlesex County etc. Traction

act of this sort," says Bland, J., "deserves no favor; to construe it liberally would be sinning against the rights of property."⁵⁷ But, as in other cases, such a construction will, if possible, be given to an act as will carry into effect the chief and manifest

Co., 72 N. J. L. 524, 63 Atl. 497, *reversing S. C. sub nom. Middlesex etc. Traction Co. v. Metlar*, 70 N. J. L. 98, 56 Atl. 142; *Mauda v. Orange*, 75 N. J. L. 251; *Belknap v. Belknap*, 2 Johns. Ch. 463, 7 Am. Dec. 548; *New York etc. R. R. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385; *Matter of Poughkeepsie Bridge Co.*, 108 N. Y. 483, 15 N. E. 601; *Matter of Union El. R. R. Co.*, 113 N. Y. 275, 21 N. E. 81; *Erie R. R. Co. v. Steward*, 170 N. Y. 172, 63 N. E. 118, *affirming S. C. 61 App. Div. 480*, 70 N. Y. S. 698; *Lea v. Johnson*, 9 Iredell Law, 15; *Carolina etc. Ry. Co. v. Pennearden L. & M. Co.*, 132 N. C. 644, 44 S. E. 358; *Miami Coal Co. v. Wigton*, 19 Ohio St. 560; *City of Cincinnati v. Sherike*, 47 Ohio St. 217, 25 N. E. 169; *Cleveland etc. Ry. Co. v. South, 78 Ohio St. 10*; *Central Union Telephone Co. v. Columbus Grove*, 8 Ohio C. C. (N.S.) 81; *Packer v. Sunbury etc. R. R. Co.*, 19 Pa. St. 211; *Pittsburgh & Lake Erie R. R. Co. v. Brace*, 102 Pa. St. 23; *Woods v. Greensboro Nat. Gas Co.*, 204 Pa. St. 606, 54 Atl. 470; *Pa. Telephone Co. v. Hoover*, 209 Pa. St. 555, 58 Atl. 922; *Snee v. West Side Belt R. R. Co.*, 210 Pa. St. 480, 60 Atl. 94; *Lazarus v. Morris*, 212 Pa. St. 128, 61 Atl. 815; *Pa. Telephone Co. v. Hoover*, 24 Pa. Supr. Ct. 96; *Pfoutz v. Pa. Telephone Co.*, 24 Pa. Supr. Ct. 105; *S. W. State Normal School*, 26 Pa. Supr. Ct. 99; *Warren Academy of Sciences*, 29 Pa. Co. Ct. 30; *Woolard v. Nashville*, 108 Tenn. 353, 67 S. W. 801; *O'Neal v. City of Sherman*, 77 Tex. 182, 14 S. W. 31; *Charlottesville v. Maury*, 93 Va. 383, 31 S. E. 520; *Painter v. St. Clair*, 98 Va. 85, 34 S. E. 989; *Norfolk etc. Ry.*

Co. v. Lynchburg Cotton Mills Co., 106 Va. 376, 56 S. E. 146; *Seattle v. Fidelity Trust Co.*, 22 Wash. 154, 60 Pac. 133; *State v. Superior Court*, 36 Wash. 381, 78 Pac. 1011; *Mills v. St. Clair County*, 8 How. 569; *City of Madison v. Daley*, 58 Fed. 751; *West v. Parkdale*, 8 Ontario 59; *Lamb v. North London R. R. Co.*, 4 L. R. Ch. 522, 21 L. T. N. S. 98; *Gray v. Liverpool & Bury Ry. Co.*, 9 Veav. 391.

"In construing statutes which are claimed to authorize the exercise of the power of eminent domain, a strict rather than a liberal construction is the rule. Such statutes assume to call into active operation a power which, however essential to the existence of the government, is in derogation of the ordinary rights of private ownership and of the control which an owner usually has of his property. The rule of strict construction of condemnation statutes is especially applicable to delegations of the power by the legislature to private corporations. The motive of the promoters of such corporations is usually private gain, although their creation may subserve a public purpose. When such corporations claim to exercise this delegated power, the rule of strict construction accords with the ordinary rule that delegations of public powers to individuals or private corporations are to be strictly construed in behalf of the public, and by the other principle that private rights are not to be divested except by the clear warrant of law." *Matter of Poughkeepsie Bridge Co.*, 108 N. Y. 483, 490, 491.

⁵⁷ *Binney's Case*, 2 Bland. Ch. 99.

purpose for which it was passed,⁵⁸ and such as will give effect to all its words.⁵⁹ It will be so construed as to support its validity rather than otherwise.⁶⁰ "Statutes granting these powers are not to be construed so literally, or so strictly as to defeat the evident purpose of the legislature. They are to receive a reasonably strict and guarded construction, and the powers granted will extend no further than expressly stated, or than is necessary to accomplish the general scope and purpose of the grant. If there remains a doubt as to the extent of the power, after all reasonable intenders in its favor, the doubt should be solved adversely to the claim of power."⁶¹

§ 389 (254a). Provisions as to compensation and remedy and in favor of the property owner should be liberally construed. This is a familiar rule, but a few cases in which it is enunciated are referred to.⁶²

§ 390 (255). Construction of statutes as to location. In determining whether statutes confer the right to exercise the

⁵⁸The Bellona Company Case, 3 Bland. Ch. 442; Canandaigua v. Benedict, 24 App. Div. N. Y. 348; Nunnamaker v. Columbia W. R. R. Co., 47 S. C. 485, 25 S. E. 751, 58 Am. St. Rep. 905, 34 L.R.A. 222; Pnyallup v. Lacey, 43 Wash. 110, 86 Pac. 215; Dyer v. Baltimore, 140 Fed. 880.

⁵⁹Beck v. United N. J. R. R. Co., 39 N. J. L. 45. Such statutes should be given a consistent and reasonable construction and such as will give effect to all the words, if possible. McLeod v. So. Deerfield Water Supply Dist., 193 Mass. 6, 78 N. E. 764.

⁶⁰Commissioners' Court v. Street, 116 Ala. 28, 22 So. 629; Howard Mills Co. v. Schwartz L. & C. Co., 77 Kan. 599, 95 Pac. 559; State v. Polk County Comrs., 87 Minn. 325, 92 N. W. 216, 60 L.R.A. 161; St. Joseph v. Zimmerman, 142 Mo. 155; St. Louis v. Brown, 155 Mo. 545, 56 S. W. 298; Shively v. Lankford, 174 Mo. 535, 74 S. W. 835; Grossman v. Patton, 186 Mo. 661, 85 S. W. 548; Morris v. Washington County, 72 Neb. 174, 100 N. W. 144; Littleton v. Berlin Mills

Co., 73 N. H. 1, 58 Atl. 877; Town of Keysport v. Cherry, 51 N. J. L. 417, 18 Atl. 299; State Water Supply Commission v. Curtis, 192 N. Y. 319, *affirming* 125 App. Div. 117; Browning v. Collis, 21 N. Y. Misc. 155; Carroll v. Griffith, 117 Tenn. 500, 97 S. W. 66; Pittsburgh v. Scott, 1 Pa. St. 309; In re Barre Water Co., 62 Vt. 27, 20 Atl. 109, 3 Am. R. R. & Corp. Rep. 136; Western Union Tel. Co. v. Williams, 86 Va. 696, 11 S. E. 106, 2 Am. R. R. & Corp. Rep. 258, 19 Am. St. Rep. 908.

⁶¹New York etc. R. R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385.

⁶²Torrington v. Messenger, 74 Conn. 321, 50 Atl. 873; Dyer v. Belfast, 88 Me. 140, 33 Atl. 790; Matter of Grade Crossing Comrs., 59 App. Div. 498, 69 N. Y. S. 52; S. C. *affirmed*, 168 N. Y. 659, 61 N. E. 1129; Schuylkill Nav. Co. v. Loose, 19 Pa. St. 15; Nashville v. Nichol, 3 Bax. 338; Lenz v. Chicago etc. Ry. Co., 111 Wis. 198, 86 N. W. 607; *ante*, § 360; West v. Parkdale, 8 Ont. 59.

power of eminent domain, the rules of strict construction are to be applied. But when the power has undoubtedly been conferred by a statute, then, in so far as it attempts to define the location or route, it is to receive a reasonable rather than a strict construction. It is against common right that a person or corporation should have the power, but, having the power, it is for the general good that they should not be hampered or embarrassed by a narrow and technical interpretation of it.⁶³ Power to construct a railroad "to the place of shipping lumber" on a tide-water river authorizes an extension of the tracks over flats and tide-water to a point where lumber may be conveniently shipped.⁶⁴ Authority to build a railroad terminating at some suitable point on another railroad "between Metser's ford and Wager's ford on the river Schuylkill," was held not to authorize a connection with the Schuylkill canal and the maintenance of a canal basin as an appurtenance.⁶⁵ Where the route of a railroad was described in a statute in part as running through the towns A, B, C, D, etc., it was held that the order named was not imperative.⁶⁶ A railroad had power to appropriate contiguous lands, not exceeding five acres, for warehouse purposes. It was held it could only take lands immediately adjoining its right of way.⁶⁷ A company was authorized to condemn lands "adjoining their road as constructed on their right of way as located." It was held not to authorize the taking of lands adjoining a side or spur track.⁶⁸ A company was authorized to occupy a certain street and to take ground near or convenient to said street for depot purposes. It purchased grounds so that it had to cross another street in order to reach them. It was held it had no power to cross such street, but should have selected lands adjacent to the street occupied.⁶⁹ Authority to build an elevated railroad on a street, does not authorize any part of a

⁶³Pierce on Railroads, p. 258; Petersburg Sch. Dist. v. Peterson, 14 N. D. 344, 103 N. W. 756, 940; Chesapeake & Ohio Canal Co. v. Key, 3 Cranch. C. C. 599.

⁶⁴Peavey v. Calais R. R. Co., 30 Me. 498. A power to construct a railroad from a mine to the most convenient and suitable railroad depot within three miles, was held not to authorize a road merely connecting with a railroad where there was no

depot. Karnes v. Drake, 103 Ky. 134, 44 S. W. 444.

⁶⁵Plymouth R. R. Co. v. Colwell, 39 Pa. St. 337, 80 Am. Dec. 526.

⁶⁶Commonwealth v. Fitchburg R. R. Co., 8 Cush. 240.

⁶⁷Bird v. W. & M. R. R. Co., 8 Rich. Eq. S. C. 46.

⁶⁸Akers v. United New Jersey R. R. Co., 43 N. J. L. 110.

⁶⁹Pennsylvania R. R. Co.'s Appeal, 93 Pa. St. 150.

depot or stairs on a cross street.⁷⁰ The location of a railroad partly in another State will not, for that reason, be held invalid by the courts of the State to which the corporation belongs.⁷¹ An act provided that a railroad might be constructed "to some suitable point in Orange street, or some street north of said street, or south of Market street, in the city of Newark;" held that the act related, not to the route, but to the termination of the road, and that the company was not precluded from locating upon or along Market street.⁷² A statute required that where a new railroad was to be built between two points where "a railroad is now constructed," it should be located ten miles at least from the old road, was held not to prevent a new road within less than ten miles of a road in process of construction.⁷³ A railroad company was empowered to manufacture iron and steel from ore obtained on its own lands; held it could not locate its road and station over an iron mine for the purpose of obtaining the mine, and not in good faith for the purposes of its road.⁷⁴ A railroad charter provided that "nothing in this act contained shall authorize said corporation to make a location of their track within any city without the consent of the common council of such city." This was held to apply not only to main track but also to appurtenances, such as depots, engine houses, and the like and to mean the territory of the city as it existed when the location was made and not when the charter was passed.⁷⁵

Where an avenue was directed to be laid out in a direct line between two points and the act also provided that it should not be laid through any buildings, yards or orchards, without the consent of the owner, it was held that deviations might be made to avoid buildings.⁷⁶ Authority to lay out a highway on

⁷⁰Mattlage v. New York El. R. R. Co., 67 How. Pr. 232, 14 Daly 1.

⁷¹Piedmont & Cumberland Ry. Co. v. Speelman, 67 Md. 260; *and see* Matter of New York L. & W. R. R. Co., 88 N. Y. 279.

⁷²McFarland v. Orange etc. R. R. Co., 13 N. J. Eq. 17.

⁷³Macon & A. R. R. Co. v. Macon & D. R. R. Co., 86 Ga. 83, 13 S. E. 157.

⁷⁴Jenkins v. Central Ontario R. R. Co., 4 Ont. 593.

⁷⁵Ill. Cent. R. R. Co. v. Chicago, 176 U. S. 646, 20 S. C. 509, *affirming* S. C. 173 Ill. 471, 50 N. E. 1104.

⁷⁶Charles Street Avenue Co. v. Merryman, 10 Md. 536. The following cases illustrate the same principle: State v. Wilton R. R. Co., 19 N. H. 521; Fall River Iron Works Co. v. Old Colony & Fall River R. R. Co., 5 Allen 221; Heath v. Des Moines & St. Louis Ry. Co., 61 Ia. 11; Clark v. Blackmar, 47 N. Y. 150. Under a general railroad law a road may be built which is wholly within one city. National Docks R. R. Co. v. Central R. R. Co., 32 N. J. Eq. 755.

a line between two towns does not authorize a highway wholly within one town, but bounded on one side by the division line.⁷⁷ On the other hand, the fact that the statute provides that, in case of a road on the line between two towns, the proceedings shall be before the commissioners of both towns, does not prevent the commissioners of one town, having jurisdiction to lay out roads in their own town, from laying out a road along the division line, but wholly in their town.⁷⁸ Under authority to lay out a road upon and along the division line between two counties, it was held that the center of the road must coincide with the division line and that where a creek formed the line a lay-out was impossible.⁷⁹ Under authority to lay out highways from "town to town and from place to place," a highway may be laid out wholly within a town.⁸⁰

A statute provided that land might be taken for a cemetery, when "land necessary therefor cannot be obtained in any suitable place at a reasonable price by contract with the owner." It was held that by "any suitable place" the legislature meant nothing less than the most suitable place, or a place as suitable as any other, or as suitable as the town could afford to pay for.⁸¹

A drainage statute provided for the appointment of an engineer to survey and locate the ditch petitioned for, and authorized him to shorten or extend the ditch from the outlet named in the petition far enough to reasonably effectuate the purpose for which it was intended. This was held not to authorize the extension of a ditch four miles long, seven miles beyond the outlet named in the petition.⁸²

As a general rule statutes conferring the power of eminent domain upon corporations and individuals vest a large discretion in the grantees as to the location of their lines and works, and the courts cannot interfere with the exercise of this discretion unless there is bad faith or an excess of authority.⁸³

⁷⁷Matter of the Town of Bridport,
24 Vt. 176.

⁷⁸Mack v. Commissioners of Highways, 41 Ill. 378.

⁷⁹Roaring Creek Road, 11 Pa. St. 356.

⁸⁰New Vineyard v. Somerset, 15 Me. 21.

⁸¹Crowell v. Londonderry, 63 N. H. 42.

⁸²Lager v. Sibley County, 100 Minn. 85, 110 N. W. 355.

⁸³Union Pacific R. R. Co. v. Colo. Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; Sample v. Carroll, 132 Ind. 496, 32 N. E. 220; Bass v. City of Ft. Wayne, 121 Ind. 389, 23 N. E. 259, 1 Am. R. R. & Corp. Rep. 173; New York etc. R. R. Co. v. Daily, 57 Misc. 311; Petersburg Sch. Dist. v. Peter-

§ 391 (256). Construction of statutes as to the purpose for which the power may be exercised: Railroads. A railroad company had a general power to condemn property for the purposes of its incorporation. It was licensed by the city of Buffalo to lay its track along a street and across a canal slip, provided it built and maintained a swing-bridge over the slip. It was held that it could condemn land in order to obtain room in which to swing the bridge.⁸⁴ So if it becomes the duty of a railroad company to carry a highway over or under its road, it may condemn the land necessary therefor.⁸⁵ Under authority to construct a "railway and works," land may be taken for a station.⁸⁶ So under a general authority to condemn land for a railroad, or for its corporate purposes, a railroad company may condemn land for its necessary appurtenances, such as depots, freight houses, terminal yards, switch and spur tracks and the like.⁸⁷ A statute provided that a company owning a completed

son, 14 N. D. 344, 103 N. W. 756, 940; Gano v. Bristol etc. R. R. Co., 196 Pa. St. 442, 46 Atl. 372; Price v. Pa. R. R. Co., 209 Pa. St. 81, 58 Atl. 137; Heine v. Columbia etc. R. R. Co., 16 Pa. Dist. Ct. 840; Tenn. Cent. R.R. Co. v. Campbell, 109 Tenn. 655, 73 S. W. 112; Samish Riv. Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670; Douglass v. Byrnes, 59 Fed. 29; Colorado Eastern R. R. Co. v. Union Pac. R. R. Co., 41 Fed. 293; Oregon Short Line R. R. Co. v. Postal Tel. Cable Co., 111 Fed. 842, 49 C. C. A. 663; London etc. R. R. Co. v. Truman, L. R. 11 H. L. 45. Compare Morton v. Mayor etc. of New York, 140 N. Y. 207, 35 N. E. 490, 22 L.R.A. 241; Lowell v. Washington County R. R. Co., 90 Me. 80, 37 Atl. 869.

⁸⁴Matter of New York, Lackawanna & Western R. R. Co., 33 Hun 148.

⁸⁵State v. St. Paul etc. Ry. Co., 35 Minn. 131.

⁸⁶Cother v. Midland Ry. Co., 2 Phillips, 469.

⁸⁷Central Pac. Ry. Co. v. Feld-

man, 152 Cal. 303, 92 Pac. 849; State v. Railroad Comrs., 56 Conn. 308; Gardner v. Ga. R. R. & B. Co., 117 Ga. 522, 43 S. E. 863; Kansas City etc. Ry. Co. v. La. Western R. R. Co., 116 La. 178, 40 So. 627, 5 L.R.A.(N.S.) 512; Ewing v. Alabama & Va. R. R. Co., 68 Miss. 551, 9 So. 295; New York etc. R. R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385; In re Long Island R. R. Co., 143 N. Y. 67, 37 N. E. 636; Nashville & Chattanooga R. R. Co. v. Cowardine, 11 Humph. 348. In State v. Railroad Comrs., 56 Conn. 308, 313, the court says: "Depots for passengers and freight are essential parts of railroads. A railroad is incomplete without them. It is doubtless true that in speaking of the several parts of a railroad we distinguish between the main tracks, sidetracks or turnouts, and depots; but when we speak of a railroad from one place to another, we use the word in a comprehensive sense as embracing all these, and mean by it, so far as real estate is concerned, all the land and buildings owned by

railroad could condemn land "for necessary additional depot grounds" on getting the approval of the railroad commissioners. It was held that the right was not limited to the enlargement of existing depot grounds, but that land might be condemned for a new station.⁸⁸ Under authority to a company to take land necessary for its works, it can only take land to be occupied by its works, and cannot condemn land merely to get earth or materials for construction.⁸⁹ Power to lay a double track means on the same right of way.⁹⁰ A railroad company cannot condemn for widening a street upon which it is proposed to lay its track.⁹¹ It has been held that a lessee company may condemn for the purpose of enlarging the right of way of its lessor.⁹² A railroad company may not condemn for a dam across a navigable stream for the purpose of obtaining water for locomotives.⁹³ But where authority is given to condemn for water stations, the company may condemn for a dam and flowage, though the water will set back twelve hundred feet.⁹⁴ Where a railroad company was chartered to construct a road from one specified place to another, it was held that it could not condemn land to construct a road for part of the distance.⁹⁵ A railroad crossed a bend in the river. It had authority to take what was necessary for the construction and operation of its road. It was held it could condemn land for a new channel so as to avoid two bridges and also take the riparian rights on the old channel.⁹⁶ But in Pennsyl-

the corporation and necessary or convenient for the transaction of its business." See *Taussig v. St. Louis Val. Transfer Ry. Co.*, 133 Fed. 220, 66 C. C. A. 274.

⁸⁸*Jager v. Dey*, 80 Ia. 23, 45 N. W. 391.

⁸⁹*Eversfield v. Mid-Sussex Ry. Co.*, 3 DeG. & J. 286; *Bentinek v. Norfolk Estuary Co.*, 8 DeG. McN. & G. 714; see also *Parsons v. Howe*, 41 Me. 218; *New York etc. R. R. Co. v. Gunnison*, 1 Hun 496; S. C. 3 N. Y. Supm. Ct. Rep. 632.

⁹⁰*People v. New York & Harlem R. R. Co.*, 45 Barb. 73.

⁹¹*Chicago etc. R. R. Co. v. Galt*, 133 Ill. 657, 23 N. E. 425, 24 N. E. Rep. 674, 1 Am. R. R. & Corp. Rep. 365.

⁹²*Hespenheide's Appeal*, 4 Penny. 71.

⁹³*Gulf etc. R. R. Co. v. Tacquard*, 3 Tex. Ct. of App. p. 179, § 142.

⁹⁴*Smithko v. Pittsburgh etc. R. R. Co.*, 5 Pa. Dist. Ct. 543.

⁹⁵*Kansas City Interurban Ry. Co. v. Davis*, 197 Mo. 669, 95 S. W. 881, 114 Am. St. Rep. 790.

⁹⁶*Bigelow v. Draper*, 6 N. D. 152. *State v. District Court*, 34 Mont. 535, 88 Pac. 44, 115 Am. St. Rep. 540 is a similar case but the company had express authority to divert the stream when necessary. Compare *Cleveland etc. Ry. Co. v. South, 78 Ohio St. 10*, 84 N. E. 418.

vania, where the right of way was limited to sixty feet, except for embankments, cuttings, sidings, turnouts, depots and stations, it was held the company could not take an extra width in order to make a new channel for a stream and save two bridges.⁹⁷ Unless otherwise provided in the act, a company may be organized under a general railroad law to construct a railroad wholly within a city, or across a river, and may condemn property therefor.⁹⁸ A railroad a mile long and underground was held within the authority.⁹⁹ So one three miles long and mostly in one city.¹ In one case the authority was to construct, maintain and operate a railroad "between the points named in the articles of incorporation, commencing at or within, and extending to or into, any city, village, town or place named as a terminus of its road." It was held to justify a road wholly within one city.² Under authority to construct a railway from one place to another, a belt road may be built around a city.³ Railroad corporations were required to specify in their certificate of incorporation the names of the places of the *termini* of the

⁹⁷Snee v. West Side Belt R. R. Co., 210 Pa. St. 480, 60 Atl. 94. The statute also gave authority to enter upon all land upon which the railroad and appurtenances may be located, "or which may be necessary or convenient for the erection of the same, or for any purpose necessary or useful in the construction, maintenance or repair of said railroad and therein and thereon to dig, excavate and embank, make, grade and lay down and construct the same." It was claimed that this justified a taking for the proposed new channel but the court held otherwise. So in Philadelphia etc. R. R. Co.'s Petition, 32 Pa. Co. Ct. 337. Where a railroad right of way was limited to a width of sixty feet "except in the neighborhood of deep cuttings or high embankments," an embankment three to five feet high was held not to justify the taking of a greater width. Curtis v. Columbus etc. R. R. Co., 16 Pa. Dist. Ct. 1017.

⁹⁸Niemeyer v. Little Rock Junction R. R. Co., 43 Ark. 111; Wiggins Ferry Co. v. East St. Louis etc. R. R. Co., 107 Ill. 450; National Docks etc. R. R. Co. v. United N. J. R. R. Co., 53 N. J. L. 217, 21 Atl. 570; Cincinnati International R. R. Co. v. Murray, 10 Ohio N. P. (N.S.) 301.

⁹⁹Sparks v. Philadelphia etc. R. R. Co., 212 Pa. St. 105, 61 Atl. 881.

¹Bridwell v. Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, 10 L.R.A.(N.S.) 909.

²State v. Union Terminal R. R. Co., 72 Ohio St. 455, 74 N. E. 642. Almost identical words were given the same effect in Long Branch Comrs. v. West End R. R. Co., 29 N. J. Eq. 566, approved in National Docks Ry. Co. v. Central R. R. Co., 32 N. J. Eq. 755.

³State v. Martin, 51 Kan. 462, 33 Pac. 9; Collier v. Union Ry. Co., 113 Tenn. 96, 83 S. W. 155. *But see* Gillette v. Aurora Ry. Co., 228 Ill. 261, 81 N. E. 1005.

road, and the county or counties, city or cities through which it should pass, and were authorized to construct a railroad "between the points named in the certificate, commencing at or within and extending to or into any town, city or village named as the place of *termini* of such road." It was held that the *termini* of the road need not be within any city, village or town.⁴

A traction act authorized railroad companies formed thereunder to condemn not exceeding sixty feet in width, "either as an extension of the line of an existing railway, or a new line." The word *extension* was held to refer to longitudinal extension and not lateral extension, and that a company could not condemn to widen an existing right of way.⁵

§ 392 (256a). Same: Branch and lateral railroads. An act conferring authority upon a railroad to construct branches from its main line, means the main line as it existed at the time the act was passed.⁶ The charter of a railroad company gave it power to construct "branches or lateral roads in any direction whatsoever in connection with the said railroad, not exceeding ten miles each in length." It was held that it could construct a branch running in the same general direction as the main line and connecting with another railroad.⁷ It has been held no objection that the branch is twice as long as the main line.⁸ The power to build laterals or branches implies the power to condemn for that purpose.⁹ A railroad, authorized to construct a specified main line and branches, cannot construct the branch and abandon the main line.¹⁰ Under a power to "con-

⁴Union R. R. Co. v. Canton R. R. Co., 105 Md. 12, 65 Atl. 409.

⁵Metlar v. Middlesex etc. Traction Co., 72 N. J. L. 524, 63 Atl. 497, *reversing* S. C. *sub. nom.* Middlesex etc. Traction Co. v. Metlar, 70 N. J. L. 98, 56 Atl. 142.

⁶City of Philadelphia v. Philadelphia etc. R. R. Co., 19 Phil. 507. To same effect: People's Pass. R. R. Co. v. Market St. Pass. R. R. Co., 8 Pa. Co. Ct. 273.

⁷Blanton v. Richmond etc. R. R. Co., 86 Va. 618, 10 S. E. 925. And see Nehall v. Galena etc. R. R. Co., 14 Ill. 273; Baltimore etc. R. R. Co. v. Waters, 105 Md. 396, 66 Atl. 685.

⁸Volmer v. Schuylkill Riv. E. S. R. R. Co., 18 Phil. 248.

⁹Nehall v. Galena etc. R. R. Co., 14 Ill. 273.

¹⁰Goelet v. Met. Transit Co., 48 Hun 520, 15 N. Y. St. 936, 1 N. Y. Supp. 74. See further on the power to take for branch or lateral roads: Arrington v. Savannah & W. R. R. Co., 95 Ala. 434, 11 So. 7; Graff v. Evergreen R. R. Co., 2 Pa. Co. Ct. 502; Schofield v. Pennsylvania S. V. R. R. Co., 12 Pa. Co. Ct. 122; Wheeling Bridge etc. Co. v. Camden Consol. Oil Co., 35 W. Va. 205, 13 S. E. 369.

struct, maintain and operate branches within the limits of any county *through* which said road may pass," it was held that a road wholly within a city could avail of the statute and that the privilege was not confined to roads passing through a county.¹¹ Power to construct switches, turnouts or branches does not justify a cut-off around a city between two points on the main line and designed to take part of the through traffic.¹²

§ 393 (256b). Same: Street and elevated railroads. The General Railroad Law of Illinois provides for the organization of corporations "for the purpose of constructing and operating any railroad" in the State. The Chicago and Southside Rapid Transit Company was organized under the act for the declared purpose of constructing a "railroad" between certain *termini* in the city of Chicago. Its real purpose was to construct an elevated railroad. The supreme court of Illinois held that such a purpose was within the act and that such a road could be built under the company's charter, and that land could be condemned therefor.¹³ But it is held that a system of street

¹¹Gray v. Greenville etc. Ry. Co., 59 N. J. Eq. 372, 46 Atl. 638.

¹²Erie R. R. Co. v. Steward, 170 N. Y. 172, 63 N. E. 118, *affirming* 61 App. Div. 480, 70 N. Y. S. 698; Norfolk etc. Ry. Co. v. Lynchburg Cotton Mills Co., 106 Va. 376, 56 S. E. 146. *Compare* Baltimore etc. R. R. Co. v. Waters, 105 Md. 396, 66 Atl. 685.

¹³Lieberman v. Chicago & S. S. R. T. R. Co., 141 Ill. 140, 30 N. E. 544. The court says: "We are able to perceive no reason why the word 'railroad,' as here used, should not be construed to apply to elevated railroads as well as to any others. While most railroads, for obvious reasons, are so constructed as to make their grade conform as nearly as practicable to that of the earth's surface, yet it is a fact, with which every one is familiar, that they are sometimes constructed wholly beneath the surface, and sometimes upon an elevation above the surface. It is also a matter of common knowl-

edge that an ordinary surface railroad may and often does, in different parts of its line, run through tunnels excavated beneath the surface, or upon structures so built as to elevate it above the surface. But it has never been supposed that, whether they run beneath or above the surface, they are any the less entitled to the name of 'railroads.' Nor does the fact that a railroad is wholly underground or wholly raised above the surface make it any the less a railroad. The term 'railroad,' as used in the act of 1872, is clearly broad enough to include an elevated railroad; and we think the legislature clearly intended to use the word in a sense sufficiently broad and general to include railroads of that character. The same word, when used in the petitioner's articles of incorporation, must be deemed to be used in a sense equally general. The petitioner, then, by its incorporation, became authorized to construct a railroad between the designated points;

railroads cannot be constructed under this law.¹⁴ It is held in Pennsylvania that an elevated street passenger railroad company could not be organized nor such a railroad constructed under the General Railroad Law of that State.¹⁵ But there had been one course of legislation for ordinary steam railroads, and another for street passenger railroads, and the two systems had been kept quite distinct. Moreover the General Railroad Law expressly provided that the provisions of the act should "not be construed so as to authorize the formation of street passenger railway companies to construct passenger railways in any city or borough of this commonwealth." A similar conclusion has been reached by the New York courts in construing the General Railroad Law of that State.¹⁶ In the first case cited, which was a proceeding for condemnation, it was held that the General Railroad Law did not confer power to construct an elevated railroad through the city of New York, in the form of a two-story viaduct, having a height of seventy-five feet, and crossing the streets upon steel bridges sixty feet above the surface. Following this decision it was held in the other case that the same law did not authorize the construction of an ordinary elevated railroad along the streets of a city, and, of course, the company could not have condemned the easements of abutting owners for the purpose of its organization. But a company organized under the general railroad act may make a connection with an elevated railroad.¹⁷ The general railroad laws of New York and Missouri have been held to authorize the formation of corporations to construct and operate horse and street railroads.¹⁸ Statutes authorizing the condemnation of property for railroad purposes have been held not to apply to street railroads.¹⁹ But a general

and the authority thus obtained included, *ex vi termini*, that of constructing an elevated railroad."

¹⁴Gillette v. Aurora Rys. Co., 228 Ill. 261, 81 N. E. 1005.

¹⁵Potts v. Quaker City El. R. R. Co., 161 Pa. St. 396, 29 Atl. 108; S. C. 12 Pa. Co. Ct. 593; Commonwealth v. Northeastern R. R. Co., 161 Pa. St. 409, 29 Atl. 112.

¹⁶People's Rapid Transit Co. v. Dash, 125 N. Y. 93, 26 N. E. 25; Schafer v. Brooklyn & L. I. R. R. Co., 124 N. Y. 630, 26 N. E. 311.

¹⁷Beekman v. Brooklyn & B. R. R. Co., 89 Hun 84, 35 N. Y. Supp. 84.

¹⁸In re Washington St. & C. R. R. Co., 115 N. Y. 442, 22 N. E. 356; St. Louis R. R. Co. v. Northwestern R. R. Co., 2 Mo. App. 69.

¹⁹Thompson-Houston Electric Co. v. Simon, 20 Ore. 60, 25 Pac. 147, 23 Am. St. Rep. 86, 10 L.R.A. 251, 3 Am. R. R. & Corp. Rep. 393; Rahn Tp. v. Tamaqua & L. St. R. R. Co., 4 Pa. Dist. Ct. 29.

statute of Louisiana conferring the power of eminent domain upon any corporation constituted under the laws of that State for the construction of railroads, was held to include street and electric railroads.²⁰ A general law conferred upon street railroad companies power to take and hold such land as might be necessary for the purpose of installing and maintaining power plants. This was held only to authorize the condemnation of land for the site of a plant and not to authorize the taking of water and water power to operate the plant.²¹ Where a street railroad company was empowered to condemn private property when necessary for the construction, maintenance or operation of its road, it was held that the company could not deviate from the highway except to avoid obstructions or difficulties, which could not reasonably be otherwise overcome.²² The question of necessity is one of fact to be found in each case and the right to condemn depends upon this fact. Municipal authorities cannot prevent condemnation in a proper case by refusing consent to a location on private property,²³ nor authorize condemnation in an improper case by giving such consent.²⁴

²⁰Shreveport Traction Co. v. Kansas City etc. Ry. Co., 119 La. 759, 44 So. 457. *And see* Birmingham Union R. R. Co. v. Elyton Land Co., 114 Ala. 70; South & North Ala. R. R. Co. v. Highland Av. etc. R. R. Co., 119 Ala. 105, 24 So. 114; Matter of South Beach R. R. Co., 119 N. Y. 141, 23 N. E. 486, *affirming* 53 Hun 131, 25 N. Y. St. 328, 6 N. Y. Supp. 172; Matter of Rochester Electric R. R. Co., 57 Hun 56, 10 N. Y. S. 379.

²¹Claremont Ry. & Lt. Co. v. Putney, 73 N. H. 431, 62 Atl. 727. *See* In re R. I. Suburban Ry. Co., 22 R. I. 455, 48 Atl. 590; In re R. I. Suburban Ry. Co., 22 R. I. 457, 48 Atl. 591, 52 L.R.A. 879.

²²Harvey v. Aurora etc. R. R. Co., 174 Ill. 295, 51 N. E. 163. The court says: "If, in the construction of the road in the highway, difficulties or obstructions were encountered which rendered it impracticable to construct the road in the highway, a necessity might arise, within the

meaning of the law, which would authorize the company to leave the highway and go upon private property until the difficulty encountered was overcome, when a return could be made to the highway; or if sufficient land could not be had in the street for sidetracks, turnouts, or stations, and the same were necessary for a successful operation of the road, under the statute the company would have the right to resort to private property." S. C. Aurora etc. R. R. Co. v. Harvey, 178 Ill. 477, 53 N. E. 331; Harvey v. Aurora etc. Ry. Co. 186 Ill. 286, 57 N. E. 857. Same point: Hartshorn v. Ill. Val. Traction Co., 210 Ill. 609, 71 N. E. 612.

²³Harvey v. Aurora etc. Ry. Co., 186 Ill. 283, 57 N. E. 857.

²⁴Dewey v. Chicago etc. Elec. Ry. Co., 184 Ill. 426, 56 N. E. 804. A street railway may construct its line upon private property acquired by purchase or consent. Farnum v.

§ 394 (256c). Same: Roads and streets. Statutes giving authority to lay out private roads are very strictly construed and confined to the particular cases specified in the statute.²⁵ But authority to lay out a private road to the nearest highway does not mean that it must be laid out on the shortest line to the highway.²⁶ Authority to lay out private roads from dwellings and plantations to a public highway, does not authorize one from a coal bank or coal mine.²⁷ Authority to lay out highways and townways includes a public footway.²⁸ A statute permitting roads for private and public use to be laid out "from one dwelling or plantation of an individual to any public road, or from one public road to another, or from a lot of land to a public road, or from a lot of land to a public waterway," was held not to authorize a road connecting several lots of land with a public road.²⁹ Power to regulate and improve streets does not confer authority to open streets.³⁰ But power to a city to condemn for its public corporate purposes includes streets and alleys.³¹ Authority to lay out and vacate public roads, and to open or extend any street, lane or alley, was held not to authorize the widening of a twenty-foot alley to a fifty-foot street.³² Authority to widen and straighten a street is not authority to extend it.³³ Authority to survey a highway that has become uncertain does not justify the taking of land not included in the street.³⁴ Under power to alter streets the width may be diminished,³⁵ but an entirely new road cannot be laid out between the *termini* of the old one.³⁶ Power to lay out and alter roads is power to lay out a new road and discontinue

Haverhill etc. St. Ry. Co., 178 Mass. 300, 59 N. E. 755.

²⁵Killbuck Private Road, 77 Pa. St. 39; Klicker v. Guilbaud, 47 N. J. L. 277; Commissioners of Bibb County v. Harris, 71 Ga. 250; Lyon v. Hamor, 73 Me. 56.

²⁶State v. Stockhouse, 14 S. C. 417.

²⁷Calhoun's Road, 8 Pa. Co. Ct. 222; Palmer's Private Road, 16 Pa. Co. Ct. 340.

²⁸Boston & A. R. R. Co. v. Boston, 140 Mass. 87.

²⁹Funderburk v. Spengler, 234 Ill. 574, 85 N. E. 193.

Em. D.—46.

³⁰Knowles v. Muscatine, 20 Ia. 248.

³¹State v. Superior Court, 44 Wash. 476, 87 Pac. 521.

³²In re Liberty Alley, 8 Pa. St. 381.

³³Widening of Thirty-fourth St., 10 Phila. 197.

³⁴Beckwith v. Beckwith, 22 Ohio St. 180. *But see* Culver v. Fair Haven, 67 Vt. 163, 31 Atl. 143.

³⁵Heiple v. Clackamas County, 20 Ore. 147, 25 Pac. 291. *And see* Williams v. Carey, 73 Ia. 194, 34 N. W. 813.

³⁶Gloucester v. County Comrs., 3 Met. 375.

an old one for which the new is a substitute.³⁷ Under a general power to lay out highways it was held that a town had power to divert one channel of a stream into the other channel so as to avoid two bridges.³⁸ A statute for the laying out of public roads was held to contemplate one of sufficient width and grade to accommodate vehicles and not to justify the establishment of a bridle path for horse-back travel only.³⁹

§ 395 (256d). Same: Statutes relating to the taking of materials for the repair of roads and bridges. It is common to provide by statute that the proper officers may enter upon private property and take timber and materials for the repair of roads and bridges, the compensation to be afterwards adjusted. Where the constitution does not require prepayment for property taken, and adequate provision is made whereby the owner may obtain compensation, such statutes are valid.⁴⁰ Authority to enter upon unimproved lands and take materials for repairing highways and bridges does not authorize the taking of timbers which the owner has prepared for his own use,⁴¹ nor justify an entry upon improved lands.⁴² Such an authority must be construed as giving a reasonable discretion to the officer charged with its execution. He is not confined to the land immediately adjacent to the place where the material is used, but he may not take the material at will anywhere in his jurisdiction.⁴³

§ 396 (256e). Same: Drains, levees, irrigation. Under authority to construct ditches from a highway to a natural water-course, one cannot be made to a pond.⁴⁴ Power to drain the low or swamp lands of one man across the lands of another does not authorize a drain onto the lands of another, unless it connects with some pond or water-course so as to produce no harm.⁴⁵ Where ditches were allowed to be established which would be of benefit to any highway or street of any town or city, the turnpike of an incorporated company was held to be

³⁷Millcreek Road, 29 Pa. St. 195.

³⁸Anthony v. Adams, 1 Met. 284.

³⁹Terry v. McClung, 104 Va. 599, 52 S. E. 355.

⁴⁰McOske v. Burrell, 55 Ind. 425. And see Lindell v. Hannibal etc. R. R. Co., 25 Mo. 550; Palmer v. State, Wright, (Ohio), 364; Branson v. Gee, 25 Ore. 462, 36 Pac. 527; Cherry v.

Matthews, 25 Ore. 484, 36 Pac. 529,

24 L.R.A. 355; Cherry v. Lane County, 25 Ore. 487, 36 Pac. 531.

⁴¹Goodman v. Bradley, 2 Wis. 257.

⁴²Jackson v. Rankin, 67 Wis. 285.

⁴³Collins v. Creely, 8 Jones L. 333.

⁴⁴McLaughlin v. Sandusky, 17 Neb. 110.

⁴⁵Sherman v. Tobey, 3 Allen 7.

within the act.⁴⁶ A statute for draining lands, provided for the construction of levees, if necessary to accomplish the drainage sought. Held not to authorize a levee sixty miles long not connected with any drain or ditch.⁴⁷ A statute, for the purpose of drainage, permitted the straightening, etc., of the channel of a water-course. Held not to authorize such straightening as a principal object, when the drainage was a mere incident.⁴⁸

§ 397 (256e). Same: Dams, water and water power. Under authority to erect a dam and reservoir for the use of a corporation and of mills below, the corporation may maintain a dam and sell part of the power to the lower mills.⁴⁹ Power to build a dam for working a water mill, does not authorize a dam to raise water for floating logs to a steam mill.⁵⁰ Authority to condemn for a mill does not authorize a taking for a tail race.⁵¹ An existing corporation was authorized to take the waters of certain specified ponds and to "construct, lay down and maintain, any dam or dams, pipes, fountains, or reservoirs whatsoever, upon or over any land whatsoever." The only provision for compensation was to persons suffering damage "by the taking the water aforesaid." It was held it could only take the waters mentioned and that it could not condemn land for a dam or for flooding.⁵² An act in regard to the construction of waterworks gave power "to lay down all such pipes and conduits for water" as should be necessary and proper to carry into effect the act. It was held that land might be taken for an open conduit to convey water from a pond to a pumping station.⁵³ A company was empowered to furnish the town of B with water for the extinguishment of fires and "for domestic, sanitary and other purposes." Held the words "other purposes," must be construed to mean other like purposes, that is, such as were a public use, and that water could not be taken for the purpose of furnishing mechanical power.⁵⁴ Where a water company has a sufficient

⁴⁶Neff v. Reed, 98 Ind. 341.

⁵³Cheyney v. Atlantic City W. W.

⁴⁷Updike v. Wright, 81 Ill. 49.

Co., 55 N. J. L. 235, 26 Atl. 95. And

⁴⁸Scruggs v. Reese, 128 Ind. 399,

see Rialto Irr. Dist. v. Brandon, 103

27 N. E. 748.

Cal. 384, 37 Pae. 484.

⁴⁹Amoskeag Mfg. Co. v. Worcester,
60 N. H. 522.

⁵⁴In re Barre Water Co., 62 Vt.

⁵⁰Dixon v. Eaton, 68 Me. 542.

27, 20 Atl. 109, 3 Am. R. R. & Corp.

⁵¹Coulter v. Hunter, 4 Rand. 58,

Rep. 136; Smith v. Barre Water Co.,

15 Am. Dec. 726.

73 Vt. 310, 50 Atl. 1055.

⁵²Pickman v. Peabody, 145 Mass.
480, 14 N. E. 751.

supply of water for the inhabitants of the place named in its charter, it cannot condemn an additional supply to furnish customers outside of that territory.⁵⁵ Power to condemn the water of certain springs includes the power to condemn riparian rights in the flow of the springs.⁵⁶ The Missouri statute as to mills and mill dams is held, in view of its history, to refer to grist-mills only and not to authorize condemnation for water power to generate electricity, though for public use.⁵⁷

* § 398 (256e). Same: Telegraphs and telephones.—

Electric companies. Power to condemn for a telegraph line includes a telephone line.⁵⁸ Authority to construct telephone lines "along and parallel to any railroad in the State" was held to authorize the construction of a line *on* the right of way and to condemn for that purpose.⁵⁹ Where telegraph and telephone companies had power to condemn property "for the purpose of constructing new lines," it was held that a new route for an old line was a "new line" within the statute.⁶⁰

§ 399 (256e). Same: Municipal purposes. A general act entitled "An Act to empower cities to acquire land for public use by condemnation," and which authorize them to condemn land "for any lawful public use or purpose," applies only to such public uses as the city is otherwise empowered to promote.⁶¹ Under a power to construct a system of sewage disposal, a city cannot condemn the right to discharge a sewer upon a tract of land, leaving the owner to dispose of it as he can.⁶² So under a similar power to condemn for a sewerage system, it was held a city could not condemn the right to pollute a stream with sewerage, temporarily, as for a period of five years.⁶³ Under au-

⁵⁵Detwiler v. Citizens Water Co., 25 Pa. Co. Ct. 481.

160, 71 S. W. 270, 60 L.R.A. 145.

See ante, § 371.

⁵⁶Wautauga Water Co. v. Scott, 111 Tenn. 321, 76 S. W. 888.

⁵⁹S. W. Telephone Co. v. Kansas City etc. Ry. Co., 109 La. 892, 33 So. 910.

⁵⁷S. W. Mo. Lt. Co. v. Scheurich, 174 Mo. 235, 73 S. W. 496; Scheurich v. S. W. Mo. Lt. Co., 109 Mo. App. 406, 84 S. W. 1003. *See* Howard Mills Co. v. Schwartz L. & C. Co., 77 Kan. 599, 95 Pac. 559.

⁶⁰Cumberland Tel. & Tel. Co. v. Yazoo etc. R. R. Co., 90 Miss. 686, 44 So. 166.

⁵⁸Gulf etc. R. R. Co. v. S. W. Tel. & Tel. Co., 18 Tex. Civ. App. 500, 45 S. W. 151; Gulf etc. Ry. Co. v. S. W. Tel. & Tel. Co., 25 Tex. Civ. App. 488, 61 S. W. 406; Ft. Worth etc. Ry. Co. v. S. W. Tel. & Tel. Co., 96 Tex.

⁶¹State v. City of Newark, 54 N. J. L. 62, 23 Atl. 129. *And see* In re Thompson, 86 Hun 405, 33 N. Y. Supp. 467.

⁶²Colby v. La Grange, 65 Fed. Rep. 554.

⁶³Waterbury v. Platt Bros. & Co., 75 Conn. 387, 53 Atl. 958, 96 Am. St.

thority to "acquire, to open and to lay out public grounds or squares, streets, alleys and highways," land cannot be condemned for a city prison.⁶⁴ Power to condemn "for public wharves, docks, slips, basins and landings on navigable waters and for the improvement of water-courses," was held not to authorize the taking of land to enlarge a harbor.⁶⁵ Authority "to build, or acquire by purchase, lease or gift, and to maintain ferries and bridges, and the appurtenances thereto" authorizes condemnation for a ferry landing and approaches.⁶⁶ A city had power "to improve rivers and streams flowing through such city or adjoining the same; to widen, straighten and deepen the channel thereof and remove obstructions therefrom." Under this power a city on one side of a stream was held to have power to condemn land on the other side of the stream in order to straighten and improve it.⁶⁷ A municipality may be authorized to condemn property beyond its limits.⁶⁸

§ 400 (256e). Same. Miscellaneous. A statute provided for the condemnation of land "to construct a canal or a railroad or a turnpike, graded, macadamized or plank road or bridge or a work of public utility." It was held not to authorize condemnation for a ferry.⁶⁹

A statute authorizing the formation of corporations to improve the navigation of any river does not authorize an incorporation to improve a stream not navigable for any purpose in a state of nature.⁷⁰ Under authority to take materials "necessary for the prosecution of the improvements intended by this act and to make all such canals," etc., it was held that materials could be taken for repairs as well as for construction.⁷¹ Authority to condemn land for a cemetery does not permit the tak-

Rep. 229. Other suits arising out of the same matter: *Platt Bros. & Co. v. Waterbury*, 72 Conn. 531, 45 Atl. 154, 77 Am. St. Rep. 335, 48 L.R.A. 691; *Waterbury v. Platt Bros. & Co.*, 76 Conn. 435, 56 Atl. 856.

⁶⁴*East St. Louis v. St. John*, 47 Ill. 463.

⁶⁵*South Haven v. Probate Judge*, 140 Mich. 117, 103 N. W. 521.

⁶⁶*Helm v. Graybill*, 224 Ill. 274, 79 N. E. 689. Under power to establish and construct gas works, held a city could purchase Natural Gas

works. *Indianapolis v. Consumers' Gas Trust Co.*, 144 Fed. 640, 75 C. C. A. 442, reversing *S. C. sub nom. Quimby v. Consumers' Gas Trust Co.*, 144 Fed. 362.

⁶⁷*Puyalluy v. Lacey*, 43 Wash. 110, 86 Pac. 215.

⁶⁸*State v. Superior Court*, 35 Wash. 303, 77 Pac. 382.

⁶⁹*Sandford v. Martin*, 31 Ia. 67.

⁷⁰*East Branch etc. Imp. Co. v. Lumber Co.*, 69 Mich. 207, 37 N. W. Rep. 192.

⁷¹*Bates v. Cooper*, 5 Ohio 115.

ing of land for a road to a cemetery.⁷² Power to regulate public landings does not give power to lay out new landings.⁷³ Under authority to condemn sites for school-houses, not exceeding one acre, a district may condemn to enlarge a lot to a size not exceeding the limit fixed.⁷⁴ A gas company authorized to condemn land "for the laying of pipe lines for the transportation and distribution of natural gas," cannot condemn a right of way for pipe lines and also for a telegraph or telephone line to be used only in the operation of such pipe lines.⁷⁵ A law specifying particular purposes for which land may be condemned, by implication, excludes other purposes.⁷⁶

§ 401 (257). Meaning of the words "to," "from," "at" or "near" a place, in statutes describing termini and location. These words must receive a reasonable construction, and in such statutes have uniformly been held to be inclusive.⁷⁷ Authority to construct a road *to* or *from* a place is confined to the

⁷²Fore v. Hoke, 48 Mo. App. 254.

⁷³Commissioners v. Judges, 17 Wend. 9; Pearsall v. Post, 20 Wend. 111.

⁷⁴Springboro School Dist., 21 Pa. Co. Ct. 23.

⁷⁵Woods v. Greensboro Nat. Gas. Co., 204 Pa. St. 606, 54 Atl. 470.

⁷⁶City of Detroit v. Wabash etc. R. R. Co., 63 Mich. 712, 30 N. W. 321; City of Syracuse v. Benedict, 86 Hun 343, 33 N. Y. Supp. 944; In re Thompson, 86 Hun 405, 33 N. Y. Supp. 467. *And see* many of the cases cited in the preceding sections. *And see generally:* Oconee Elec. Lt. & P. Co. v. Carter, 111 Ga. 106, 36 S. E. 457; Potlatch Lumber Co. v. Peterson, 12 Ida. 769, 88 Pac. 426, 118 Am. St. Rep. 233.

⁷⁷*To:* Central of Ga. Ry. Co. v. Union Springs etc. Ry. Co., 144 Ala. 639, 39 So. 473, 2 L.R.A.(N.S.) 144; In re Kenan, 109 Ga. 819, 35 S. E. 312; Moses v. Pittsburgh etc. R. R. Co., 21 Ill. 516; Indianapolis etc. R. R. Co. v. Hartley, 67 Ill. 439; Farmer's Turnpike v. Coventry, 10 Johns. 389; Rio Grande R. R. Co. v. Brownsville, 45 Tex. 88.

From: Central of Ga. Ry. Co. v. Union Springs etc. Ry. Co., 144 Ala. 639, 39 So. 473, 2 L.R.A.(N.S.) 144; Hazelhurst v. Freeman, 52 Ga. 244; Chicago & Northwestern Ry. Co. v. Chicago & Evanston R. R. Co., 112 Ill. 589; McCartney v. Chicago & Evanston R. R. Co., 112 Ill. 611; St. Louis etc. R. R. Co. v. Hannibal Union Depot Co., 125 Mo. 82, 28 S. W. 483; Western Pennsylvania R. R. Co.'s Appeal, 99 Pa. St. 155; Tennessee & Alabama R. R. Co. v. Adams, 3 Head 596; In re Bronson, 1 Ontario 415. *See* Brock v. Dore, 166 Mass. 161, 44 N. E. Rep. 142.

At or near: Mason v. Brooklyn City & Newton R. R. Co., 35 Barb. 373; Mohawk Bridge Co. v. Utica & Schenectady R. R. Co., 6 Paige 554; State v. Hudson Tunnel R. R. Co., 38 N. J. L. 548; Central R. R. Co. v. Pennsylvania R. R. Co., 31 N. J. Eq. 475; Griffin v. House, 18 Johns. 397; Purifoy v. Richmond & D. R. R. Co., 108 N. C. 100, 12 S. E. Rep. 741.

Generally: Pierce on Railroads, p. 258. The only case holding a contrary doctrine is North Eastern R. R. Co. v. Payne, 8 Rich. S. C. 177,

territory then within the corporate limits, and does not authorize an extension into new territory afterwards added.⁷⁸ A statute fixing a terminus of a railroad at or near a place was held to be satisfied in one case by a location 2,475 feet from the place,⁷⁹ and in another by a location a mile and half away.⁸⁰ Authority to construct a railroad "on the most practicable route from the town of Spartanburg, passing *near* the village of Union, to connect" with a specified railroad, was held to mean that the road should be so located as to be convenient and useful to the inhabitants of Union and that the road could be built *through* the village and land condemned therefor.⁸¹ A statute fixing the eastern terminus of the Union Pacific Railroad at a point "on the western boundary of Iowa" was held to be satisfied by a point on the east shore of the Mississippi River.⁸²

§ 402 (258). **Change of location.** In nearly all statutes conferring the power of eminent domain, some discretion is left with those who are vested with the power, in respect to the designation of the property to be taken. Formerly, when public works were constructed mostly under special laws and charters, it was common to specify with more or less particularity the *termini* and route of any proposed railroad, canal or other public way. In the present day it is more common to provide by general laws for all works of this character under which both the route and *termini* are left to the determination of those who choose to avail themselves of the statute. In such cases the articles of incorporation take the place, somewhat, of the former special charters, and, in so far as they designate the location, route or *termini* of the proposed work, would probably receive a similar construction.⁸³ In either case there remains a dis-

which holds that authority to construct a road "from Charleston" would not permit the company to enter the city.

⁷⁸Commonwealth v. Erie & North East R. R. Co., 27 Pa. St. 339, 67 Am. Dec. 471; Pontchartrain R. R. Co. v La Fayette & Pontchartrain R. R. Co., 10 La. Ann. 741; Chope v. Detroit & Howell Plank Road Co., 37 Mich. 195, 26 Am. Rep. 512.

⁷⁹Fall River Iron Works Co. v. Old Colony & Fall River R. R. Co., 5 Allen 221.

⁸⁰Parke's Appeal, 64 Pa. St. 137.

⁸¹Hill v. Southern Ry. Co., 67 S. C. 548, 46 S. E. 486.

⁸²Union Pacific R. R. Co. v. Hall, 91 U. S. 343.

⁸³Under authority to file amended articles of incorporation to correct any defect or informality in the original, it was held that a change could not be made in the location and *termini* of the road. Matter of Riverhead etc. R. R. Co., 36 N. Y. App. Div. 514.

cretion to be exercised in the actual location of the road according to the general route and *termini* specified in the charter or articles of incorporation. When the choice or discretion which is thus given has been exercised, the power is exhausted, and the location cannot be changed, in the absence of a statutory provision permitting such changes to be made.⁸⁴ "The general rule is," says the court in one case, "that where the *termini* and general route of a railroad are prescribed by the charter, leaving the determination of details to the discretion of the corporation, the power of the company to fix the location of the road is exhausted after such discretion has been exercised, and it cannot relocate its road without statutory authority to do so, and being without power to relocate its road the company is without power to condemn a right of way for a line which it cannot lawfully locate."⁸⁵ But this principle is not to be applied too rigidly. A general or material change of location cannot be made. But minor changes can be made, which experience or change of circumstances have demonstrated to be necessary or desirable. The growth of a town in a certain direction may make a former location of a depot very inconvenient. A railroad may be destroyed by a mountain slide or a washout in such a way that reconstruction would be impracticable or impossible. In such cases it

⁸⁴State v. New Haven etc. Co., 45 Conn. 331; Leverett v. Middle Georgia etc. R. R. Co., 96 Ga. 385, 24 S. E. 154; Brown v. Atlantic etc. Ry. Co., 126 Ga. 248, 55 S. E. 24; Atlantic etc. Ry. Co. v. Kirkland, 129 Ga. 552; Cairo etc. Ry. Co. v. Woodyard, 226 Ill. 331, 80 N. E. 882; Lusby v. Kansas City etc. R. R. Co., 73 Miss. 360, 19 So. 239, 36 L.R.A. 510; Morris & Essex R. R. Co. v. Central R. R. Co., 31 N. J. L. 205; Matter of Poughkeepsie Bridge Co., 108 N. Y. 483, 15 N. E. 601; Erie R. R. Co. v. Steward, 170 N. Y. 172, 63 N. E. 118, *affirming* S. C. 61 App. Div. 480, 70 N. Y. S. 698; Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co., 32 Barb. 358; Mason v. Brooklyn City & Newton R. R. Co., 35 Barb. 373; People v. New York & Harlem R. R. Co., 45 Barb. 73; Hudson & Delaware Canal Co. v. New York &

Erie R. R. Co., 9 Paige 323; McMurtie v. Stewart, 21 Pa. St. 322; Morrow v. Commonwealth, 48 Pa. St. 305; McKay v. Pa. Water Co., 6 Pa. Dist. Ct. 364; Lehigh Valley Coal Co. v. U. S. Pipe Line Co., 7 Luzerne Leg. Reg. Rep. 77; In re Providence & W. R. R. Co., 17 R. I. 324, 21 Atl. Rep. 965; Pierce on Railroads, p. 254. *Contra:* Ex parte South Carolina R. R. Co., 2 Rich. L. S. C. 434. See Washington etc. R. R. Co. v. Coeur D'Alene R. & N. Co., 60 Fed. 981, 9 C. C. A. 303; Kirkland v. Atlantic etc. Ry. Co., 126 Ga. 246, 55 S. E. 23; Doubet v. Independent District, 135 Ia. 95. A city cannot relocate an alley in the absence of special authority. Hawkins v. Pittsburg, 220 Pa. St. 7, 69 Atl. 283.

⁸⁵Cairo etc. Ry. Co. v. Woodyard, 226 Ill. 331, 80 N. E. 882.

seems to us a change of location may be made so as to obviate the inconvenience in the one case or the difficulty in the other. And so are the authorities. Where the location of a lock-house on a canal proves inconvenient or unsuitable, a new location can be made.⁸⁶ In another case two railroads intersected at G and crossed the Y river, not far from that place, on independent bridges. These were burnt during the war. After the war, both roads being much crippled financially, they united in building one bridge on the line of one of the roads, and the other condemned a short intersecting line in order to avail itself of the new bridge. It was held that it might lawfully do so.⁸⁷ And the location of a depot or station within a city or town may be changed and land condemned for the new location.⁸⁸

Where the statute gave the right to railroad corporations to make a change of location, whenever a better and cheaper route could be had, or whenever any obstacle occurred, either by way of difficulty of construction or inability to procure right of way at a reasonable cost, it was held that the privilege must be exercised before completion.⁸⁹ Where a railroad is permitted to deviate not exceeding one mile from the route laid down in its maps and plans, it may not extend its road a mile.⁹⁰ The charter of a horse railroad company authorized it to use a certain street, and provided that, in order to avoid an obstruction on that street, it might use such portions of any of the adjacent streets as might be necessary. It was held that, after the obstruction was removed, it could lay its track on the first-named street.⁹¹ Where

⁸⁶Ligat v. Commonwealth, 19 Pa. St. 456. In this case the court says: "If a lot of ground, on which a lock-house has been erected, should be deemed no longer suitable or convenient for its appropriate uses, the canal commissioners have power to take possession of other ground for the purpose of erecting a new lock-house. Their power is not exhausted by the first appropriation. Errors of location, in matters of that kind, which are but incidents to the main work, may be corrected without special application to the legislature."

⁸⁷Mississippi & Tennessee R. R. Co. v. Devaney, 42 Miss. 555.

⁸⁸Chicago etc. R. R. Co. v. People,

222 Ill. 396, 78 N. E. 784; Chicago etc. Ry. Co. v. Chieago Mechanics Inst., 239 Ill. 197.

⁸⁹Moorehead v. Little Miami R. R. Co., 17 Ohio, 340; Little Miami R. R. Co. v. Naylor, 2 Ohio St. 235, 59 Am. Dec. 667; Atkinson v. Marietta & Cincinnati R. R. Co., 15 Ohio St. 21.

⁹⁰Murphy v. Kingston etc. R. R. Co., 11 Ontario 582, *reversing* S. C. 11 Ontario 302. The following cases construe statutes permitting a change of location: Boston etc. R. R. Co. v. Midland R. R. Co., 1 Gray 340; Hewitt v. St. Paul etc. R. R. Co., 35 Minn. 226.

⁹¹Phila. & Gray's Ferry Passenger Ry. Co.'s Appeal, 102 Pa. St. 123. In

the power to change the location of a railroad was expressly given by statute, it was held it could be exercised after a partial construction of the road.⁹² A statute provided that "every railroad corporation, except elevated railway corporations, may, by a vote of two thirds of its directors, alter or change the route of its road or its *termini*, or locate such route or any part thereof, or its *termini*, in a county adjoining any county named in its certificate of incorporation, if it shall appear to them that the line can be improved thereby." It was held that under this statute the *terminus* could only be changed to an adjoining county for the purpose of improving the existing line by affording greater conveniences or facilities in operating that line, and not for the purpose of getting new business.⁹³

§ 403 (259). Successive appropriations. In the absence of any restriction or limitation, the power to take private property may be exercised by the grantee from time to time as necessity requires. If this were not so, it would be necessary to anticipate all future needs at the outset. The company condemning would thus not only have to take and pay for property in advance, but it might be saddled with property which it could never use at all. On the other hand, either from taking too narrow a view of the future or from the growth of business beyond any reasonable anticipation, it might in a few years find itself unable properly to discharge its duties to the public.⁹⁴ Accord-

Brown v. Atlantic etc. Ry. Co., 126 Ga. 248, 55 S. E. 24, it was held, construing a statute as to change of location, that the change could not be made after the road was constructed.

⁹²Eel River & Eureka R. R. Co. v. Field, 67 Cal. 429; Cape Girardeau etc. Road Co. v. Dennis, 67 Mo. 438.

⁹³Matter of Greenville etc. Ry. Co., 172 N. Y. 462, 65 N. E. 278, affirming S. C. 75 App. Div. 220, 78 N. Y. S. 24.

⁹⁴Hamilton v. Annapolis & Elk Ridge R. R. Co., 1 Md. 553; S. C. 1 Md. Ch. 107; In re Providence & W. R. R. Co., 17 R. I. 324, 21 Atl. 965. In Gardner v. Ga. R. R. & B. Co., 117 Ga. 522, 43 S. E. 863, the court says: "If it should be held that a general power to condemn is exhausted in its

first exercise, every railroad company, if financially able so to do, would be likely, in order to provide for the future, to take more land than it needed, and this would have a tendency to work a greater hardship upon property owners than if only so much land was taken as would meet the needs of the railroad company, with the right to make additional condemnations to meet subsequent necessities. As has already been said, it would be well nigh impossible for a railroad company to determine, at its inception, how much land it would need at the end of a successful career of say twenty years; but even if that could be done with precision, and it were financially able to acquire the land, to require it to

ingly a railroad company, after having located and completed its road, may, as the expansion of its business requires, and within the limitations imposed by statute, if any, take additional land for right of way,⁹⁵ terminal facilities,⁹⁶ depot accommodations,⁹⁷ side tracks,⁹⁸ branches,⁹⁹ shops,¹ or for any other purpose for which its compulsory powers may be exercised.² A company to supply a city with water may make successive appropriations of land or water, as the population and demands for water increase.³ So in regard to a power to take lands in order

condemn land in advance of its needs would be oppressive and subversive of its rights." pp. 532, 533.

⁹⁵Cooper v. Anniston etc. R. R. Co., 85 Ala. 106; Chicago & Western Ind. R. R. Co. v. Illinois Central R. R. Co., 113 Ill. 156; Chicago etc. Elec. R. R. Co. v. Chicago etc. Ry. Co., 211 Ill. 352, 71 N. E. 1017; Prather v. Jeffersonville etc. R. R. Co., 52 Ind. 16; Peck v. New Albany & Chicago R. R. Co., 101 Ind. 366; Matter of South Brooklyn R. & T. Co., 50 Hun 405, 18 N. Y. St. 51, 2 N. Y. Supp. 613; Matter of New York Central etc. R. R. Co., 67 Barb. 426.

⁹⁶Gardner v. Ga. R. R. & B. Co., 117 Ga. 522, 43 S. E. 863; Central Branch U. P. R. R. Co. v. Atchison, Topeka & Santa Fe R. R. Co., 26 Kan. 669.

⁹⁷Deitrichs v. Lincoln & North Western R. R. Co., 13 Neb. 361.

⁹⁸St. Louis etc. R. R. Co. v. Petty, 57 Ark. 359, 21 S. W. 884, 20 L.R.A. 434; State Board v. People, 229 Ill. 430, 82 N. E. 324; Hurd v. Atchison etc. Ry. Co., 73 Kan. 83, 84 Pac. 553; Ewing v. Ala. & Va. R. R. Co., 68 Miss. 551, 9 So. 295; Philadelphia, Wilmington & Balt. R. R. Co. v. Williams, 54 Pa. St. 103; Toledo & W. R. R. Co. v. Daniels, 16 Ohio St. 390. In the last case it is said: "Prima facie power to do any act is power to do it in such manner and at such time as is usual, convenient and reasonable,—in such way as prudent men manage their own concerns."

⁹⁹Pittsburgh, V. & C. R. R. Co. v. Pittsburgh, C. & S. L. R. R. Co., 159 Pa. St. 331, 28 Atl. Rep. 155.

¹Chicago, Burlington & Quincy R. R. Co. v. Wilson, 17 Ill. 123.

²Fisher v. Chicago & Springfield R. R. Co., 104 Ill. 323; Brown v. Philadelphia, W. & B. R. R. Co., 58 Md. 539; Cincinnati v. Cincinnati So. Ry. Co., 1 Ohio N. P. (N.S.) 361; Virginia & Truckee R. R. Co. v. Lovejoy, 8 Nev. 100; Simpson v. Lancaster & Carlisle Ry. Co., 15 Sim. 580; Stamps v. Birmingham & Stone Valley Ry. Co., 2 Phillips 673. A power to widen a railroad right of way in order to accommodate traffic and secure the safety of persons and property is not exhausted by one exercise. Sutton v. Pa. R. R. Co., 211 Pa. St. 554, 60 Atl. 1090; Sutton v. Pa. R. R. Co., 13 Pa. Dist. Ct. 474. In Hopkins v. Philadelphia etc. R. R. Co., 94 Md. 257, 51 Atl. 404 and Dolfield v. Western Md. R. R. Co., 107 Md. 584, the section is quoted to this point and its doctrine pronounced sound and salutary.

³Thom v. Ga. Mfg. etc. Co., 128 Ga. 187, 57 S. E. 75; Johnson v. Utica Water Works Co., 67 Barb. 415; Water Commissioners v. Lawrence, 3 Edw. Ch. 552; Edgewood Water Co. v. Troy Water Co., 7 Pa. Co. Ct. 476; Kellar v. Riverton Consolidated Water Co., 34 Pa. Supr. Ct. 301.

to secure materials for an aqueduct.⁴ A street or other railroad company, authorized to lay two tracks upon a street, or one or more tracks, may lay one at one time and one at another.⁵ So a power to a street railroad company to construct, use and operate all necessary and convenient turnouts, side tracks, etc., is not limited to those necessary when the road is first constructed.⁶ A special act authorized the connection of two railroads by tracks on the streets of a city upon consent of the people given, and such consent was given and the tracks constructed. It was held that the power was exhausted and that an additional track could not be laid thirty years after, though a fresh consent was obtained.⁷ Where a railroad sixty-six feet wide is purchased by another company which had power to condemn a hundred feet in width, it was held the latter company, after operating the road for several years, might widen to a hundred feet.⁸ Where park commissioners have power to connect any public park with any part of any incorporated city by taking any street or streets leading to such park, the power is not exhausted by taking one street.⁹ The power to establish harbor lines, like the power to establish the grade of streets,¹⁰ is a continuing power, and new lines may be established which operate to discontinue old ones.¹¹ Where a railroad company is authorized to condemn not exceeding one hundred feet for right of way, it cannot acquire a right of way by purchase and then condemn an additional hundred feet.¹²

§ 404 (260). Where the provisions of one statute are adopted by another, or extended to another jurisdiction. This is frequently done in statutes relating to eminent domain, and sometimes leads to great confusion and perplexity. The courts will, if possible, in such cases effectuate the intention of

⁴Matter of Water Commissioners, 3 Edwards Ch. 552.

⁵Workman v. So. Pac. R. R. Co., 129 Cal. 536, 62 Pac. 185; Ranson v. Citizens R. R. Co., 104 Mo. 375, 16 S. W. 416; Varwig v. Cleveland etc. R. R. Co., 6 Ohio C. C. 439; People's Passenger Ry. Co. v. Baldwin, 14 Phila. 231; Dunmore v. Scranton Ry. Co., 34 Pa. Supr. Ct. 294.

⁶Detroit Citizens' St. Ry. Co. v. Board of Public Works, 126 Mich. 554, 85 N. W. 1072.

⁷Savannah & W. R. R. Co. v. Woodruff, 86 Ga. 94, 13 S. E. 156.

⁸Childs v. Central R. R. Co. of N. J., 33 N. J. L. 323.

⁹West Chicago Park Comrs. v. McMullen, 134 Ill. 170, 25 N. E. 676, 10 L.R.A. 215.

¹⁰Ante, § 145.

¹¹Farist Steel Co. v. Bridgeport, 60 Conn. 278, 22 Atl. 561.

¹²Crandall v. Des Moines etc. R. R. Co., 103 Ia. 684.

the legislature.¹³ Certain commissioners were authorized to remove all dams on a stream and to execute other works for the benefit of health and drainage. The act provided that the damages should be assessed "in the same manner" as in laying out highways. This was held to mean that similar proceedings should be had, so far as applicable to the subject-matter, and that much was left to implication in the manner of adapting the proceedings to the subject-matter.¹⁴ A statute in reference to assessing betterments in Boston was made applicable to the city of Charlestown. In Boston the authority was vested in the board of aldermen, which also had general authority to lay out streets. In applying the act to Charlestown it was held that the authority did not vest in its board of aldermen, but in the body which had jurisdiction in laying out and improving streets, viz.: the city council.¹⁵ A statute relating to the laying out of highways and town ways by county commissioners was made applicable to the laying out of streets by the city council of cities. It was held that a provision that the county commissioners should, if requested, view the premises, did not require that the city council should view the premises, but that a view by a committee would suffice.¹⁶ Where an act provided that in case of land taken for

¹³It would take too much space to state each case so as to show clearly the points decided. The following are in point: Board of Directors v. Redditt, 79 Ark. 154, 95 S. W. 482; Atlantic Coast Line R. R. Co. v. Postal Tel. Cable Co., 120 Ga. 268, 48 S. E. 15; Taylor v. Pettijohn, 24 Ill. 312; Terre Haute v. Evansville etc. R. R. Co., 149 Ind. 174, 46 N. E. 77, 37 L.R.A. 189; Postal Tel. Cable Co. v. Chicago etc. Ry. Co., 30 Ind. App. 654, 66 N. E. 919; Moseley v. York Shore Water Co., 94 Me. 83, 46 Atl. 809; Kennebeck Water Dist. v. Waterville, 96 Me. 234, 52 Atl. 774; Boston El. R. R. Co. v. Presho, 174 Mass. 99, 54 N. E. 348; Danforth v. Groton Water Co., 176 Mass. 118, 57 N. E. 351; Sawyer v. Met. Water Board, 178 Mass. 267, 59 N. E. 658; Appleton v. Newton, 178 Mass. 276, 59 N. E. 648; McSweeney v. Commonwealth, 185 Mass. 371, 70 N. E.

429; Craig v. Supervisors, 10 Wend. 585; Matter of Riverside Park, 95 App. Div. 552, 89 N. Y. S. 6; Road York Water Co., 24 Pa. St. 397; Memphis v. Hastings, 113 Tenn. 142, 86 S. W. 609, 69 L.R.A. 750; Leinz v. Chicago etc. Ry. Co., 111 Wis. 198, 86 N. W. 607; Broadbent v. Imperial Gas Light Co., 7 De G. M. & G. 436, 3 Jur. N. S. 221, 26 L. J. Ch. 276; Ferrar v. Comrs., 4 L. R. Exch. 227, 38 L. J. Exch. 102, 21 L. T. N. S. 295, 17 W. R. 709; Daugey v. London, 38 L. J. C. P. 298, 17 W. R. 1106, 20 L. T. N. S. 921.

¹⁴Phillips v. County Commissioners, 122 Mass. 258.

¹⁵Lockwood v. Charlestown, 114 Mass. 416. For a similar case see Day v. Board of Aldermen of Springfield, 102 Mass. 310.

¹⁶Taintor v. Cambridge, 192 Mass. 522, 78 N. E. 545.

parks the proceedings should be the same as in case of street openings, it was held to mean that the proceedings in park cases should conform to the law applicable to streets as it exists from time to time when park proceedings are begun.¹⁷ An act to enable cities to build sewers and to acquire lands for that purpose required that the proceedings therefor should conform to the proceedings *now* provided by law for the acquiring of land for the opening of streets in such cities. It was held that in proceedings by a city to acquire land for a sewer, it must conform to the special provisions in its charter for acquiring land for a street, whatever they may be.¹⁸ If the act adopted or referred to provides for an appeal or review, an appeal or review may be had.¹⁹ Where a telegraph company was authorized to condemn and to proceed as provided in a specified chapter relating to railroads, it was held that the chapter was adopted as then existing and not as afterwards amended.²⁰ References to sections of other statutes by a wrong number will be corrected, when the intent can be clearly made out, otherwise not.²¹

§ 405 (261). Validity and effect of statutes legalizing defective proceedings. The legislature may legalize irregular or defective proceedings which it might have authorized in the form in which they have been taken.²² If the defect is one of power, it can be supplied by a subsequent act.²³ In all cases,

¹⁷In re Vernon Park, 163 Pa. St. 70, 29 Atl. 972.

¹⁸State v. City of Jersey City, 54 N. J. L. 49, 22 Atl. 1052.

¹⁹Austin v. Belleville etc. R. R. Co., 19 Ill. 310; C. Street, 118 Pa. St. 171, 12 Atl. 345; In re Vernon Park, 163 Pa. St. 70, 29 Atl. 972.

²⁰Postal Tel. Cable Co. v. Southern R. R. Co., 98 Fed. 190.

²¹Williamson v. Houser, 169 Ind. 397, 82 N. E. 771; Board of Park Comrs. v. Du Pont, 110 Ky. 743, 62 S. W. 891; 2 Lewis' Suth. Stat. Constr. § 410. *And see generally* on the subject of the section 2 Lewis' Suth. Stat. Constr. §§ 405-413.

²²Bennett v. Fisher, 26 Ia. 497; Richman v. Board of Supervisors, 77 Ia. 513, 42 N. W. 422; Clinton v. Walliker, 98 Ia. 655, 68 N. W. 431;

O'Brien v. Commissioners of Baltimore County, 51 Md. 15; Pitkin v. Springfield, 112 Mass. 509; Spaulding v. Nourse, 143 Mass. 490; State v. Bruggerman, 31 Minn. 493; State v. Newark, 27 N. J. L. 185; State v. Union, 33 N. J. L. 350; State v. Bergen, 34 N. J. L. 438; State v. Passaic, 36 N. J. L. 382; State v. Passaic, 37 N. J. L. 65; People ex rel. etc. v. McDonald, 69 N. Y. 362; Board of Water Comrs. v. Dwight, 101 N. Y. 9; Burgett v. Norris, 25 Ohio St. 308; Mattingly v. District of Columbia, 97 U. S. 687; Burns v. Multnomah, 8 Sawyer 543. *Contra*, Seibert v. Linton, 5 W. Va. 57.

²³Spaulding v. Nourse, 143 Mass. 490; Himmelman v. Hoadley, 44 Cal. 213; Hoadley v. San Francisco, 50 Cal. 265.

however, intervening rights must not be impaired.²⁴ It is no objection to such an act that it is passed while an appeal or *certiorari* is pending to review the proceedings.²⁵ Where a ditch had been constructed under an unconstitutional law, it was held that the right of way might be recondemned and the assessment of damages and benefits relieved under a valid law.²⁶ But the legislature cannot legalize what it could not authorize in the first instance and so cannot legalize the laying out of a highway without compensation.²⁷

§ 406 (261a). The legislature cannot surrender or preclude itself from the exercise of the eminent domain power. If this were not so it would be possible for one legislature to block and render forever impossible the most needed and valuable public improvements. A legislature could grant a right of way across the State and make a binding stipulation that it should never be crossed by any other line of transportation or communication. And if the eminent domain power could thus be bargained away, so could the police power and power of taxation. The State might thus soon cease to be sovereign, and corporations and franchise-holders become the dominant power. The result of this process of reasoning is that the sovereign powers of the State cannot be bargained away, restrained, surrendered or extinguished by the action of the legislature.²⁸ If there is any exception to this rule it applies to the power of taxation only, which may be surrendered or commuted, as to particular persons or property, for a valuable consideration received by the State.²⁹ But even this exception has not been established without emphatic protest. Judge Cooley sums up his

²⁴Mattingly v. District of Columbia, 97 U. S. 687; Schumaker v. Toberman, 56 Cal. 508; Holliday v. City of Atlanta, 96 Ga. 377, 23 S. E. Rep. 406; Board of Comrs. v. Fahlor, 132 Ind. 426, 31 N. E. 1112.

²⁵State v. Newark, 27 N. J. L. 185; State v. Union, 33 N. J. L. 350.

²⁶Curran v. Sibley County, 56 Minn. 432, 57 N. W. 1070; Curran v. Sibley County, 47 Minn. 313, 50 N. W. 237; Lewis County v. McGeorge, 47 Wash. 414, 92 Pac. 268. *And see* Sudberry v. Graves, 83 Ark. 344, 103 S. W. 728.

²⁷Hutch v. Barnes, 124 Ia. 251, 99

N. W. 1072; Heacock v. Sullivan, 70 Kan. 750, 79 Pac. 659.

See further on the subject of curative statutes the following: Spencer v. Merchant, 100 N. Y. 585; S. C. affirmed, Spencer v. Merchant, 125 U. S. 345; People v. Stillings, 75 App. Div. 569, 75 N. Y. S. 333; People v. Stillings, 76 App. Div. 143, 78 N. Y. S. 942; Whitlock v. Hawkins, 105 Va. 242, 53 S. E. 401; 2 Lewis' Suth. Stat. Constr. §§ 675-677.

²⁸Cooley Const. Lim. 6th Ed. pp. 337-342.

²⁹Cooley Const. Lim. 6th Ed. pp. 148, 337, 338.

discussion of this subject as follows: "It would seem, therefore, to be the prevailing opinion, and one based upon sound reason, that the State cannot barter away, or in any manner abridge or weaken, any of those essential powers which are inherent in all governments, and the existence of which in full vigor is important to the wellbeing of organized society; and that any contracts to that end are void upon general principles, and cannot be saved from invalidity by the provision of the national constitution now under consideration. If the tax cases are to be regarded as an exception to this statement, the exception is perhaps to be considered a nominal rather than a real one, since taxation is for the purpose of providing the State a revenue, and the State laws which have been enforced as laws in these cases have been supposed to be based upon a consideration by which the State receives the benefit which would have accrued from an exercise of the relinquished power in the ordinary mode."³⁰ The authorities are quite conclusive to the effect that the police power cannot be surrendered or restricted.³¹ And we believe that the authorities are equally emphatic with respect to the eminent domain power.³² An agreement or stipulation, either by the State or a municipal corporation, that the power of eminent domain shall not be exercised in a particular manner or in respect to certain property, is null and void.³³ The granting of an exclusive privilege or franchise is neither in form or substance an agreement that the power of eminent domain shall not be exer-

³⁰Cooley Const. Lim. 6th Ed. pp. 341, 342.

³¹New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; New Orleans Water Works Co. v. Rivers, 115 U. S. 674; Louisville Gas. Co. v. Citizens' Gas Co., 115 U. S. 683; St. Tammany Water Works v. New Orleans Water Works, 120 U. S. 64; Butchers Union Co. v. Crescent City Co., 111 U. S. 746; Beer Co. v. Massachusetts, 97 U. S. 25; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Stone v. Mississippi, 101 U. S. 814.

³²Hyde Park v. Cemetery Ass., 119 Ill. 141, 7 N. E. 627; Brimmer v. Boston, 102 Mass. 19; Matter of Opening First Street, 66 Mich. 42, 33 N. W. 15; Brewster v. Hough, 10 N. H.

138; People v. Adirondack R. R. Co., 160 N. Y. 225, 238, 54 N. E. 689; In re Twenty-second Street, 102 Pa. St. 108; S. C. 15 Phil. 409; Lock Haven Bridge Co. v. Clinton County, 157 Pa. St. 379, 27 Atl. 726; Commonwealth v. Broad St. Ry. Co., 219 Pa. St. 11, 67 Atl. 958.

³³*Ibid.* A contract between a city and a railroad company that no street should be opened over its property was held void. Matter of Opening First Street, 66 Mich. 42, 33 N. W. 15. *And see also*, Leggett v. Detroit, 137 Mich. 247, 100 N. W. 566; In re Southern Boulevard R. R. Co., 146 N. Y. 352, 40 N. E. 1000; S. C. 143 N. Y. 258, 38 N. E. 276.

cised to take or interfere with such franchise or privilege. The exclusive feature is inserted in order to induce priyate parties to invest their capital in an enterprise which might otherwise be rendered valueless without redress by the making of similar grants to others. The legislature thereby simply creates a valuable right or property, but this property remains subjeet to the eminent domain power, like any other property.³⁴ A provision in a charter that the property of the company shall not be taken for certain public uses, is void as a contract, and amounts simply to the expression of a legislative intent that, for the time being, the power of eminent domain shall not be so exercised.³⁵ The legislature having full power to grant or withhold the exercise of the right of eminent domain, it is competent for it to provide that streets shall not be laid through cemeteries or railroad grounds, but it is also competent to reverse this policy at any time.

§ 407. Agreements not to condemn. Whether a priyate corporation invested with the power of eminent domain, in order to enable it to accomplish a public purpose, may bind itself not to condemn specified property, or more than a specified amount may be doubted. Such a covenant would seem to be against public policy, as it might prevent improvements which the public interests demand. And it has been so adjudicated.³⁶ It has been held that such a covenant does not run with the land so as to bind the successors of the covenantor acquiring the railroad by foreclosure.³⁷ Also that a court of equity would not enforce the covenant but leave the parties to their remedy at law.³⁸

§ 408 (261b). Exercise of the power by Congress. Congress, as the national legislature, may exercise the power of eminent domain, for the promotion of any purpose within its constitutional powers, and subject to the limitation contained in the federal constitution.³⁹ As the local legislature of the Dis-

³⁴*Ante*, § 215; *post*, §§ 438, 439.

³⁵*Hyde Park v. Cemetery Ass.*, 119 Ill. 141, 7 N. E. 627; *In re Twenty-second St.*, 102 Pa. St. 108, 15 Phil. 409.

³⁶*Chicago etc. R. R. Co. v. Ill. Cent. R. R. Co.*, 113 Ill. 156; *South Chicago City R. R. Co. v. Calumet etc. St. R. R. Co.*, 70 Ill. App. 254; *Cornwall v. Louisville etc. R. R. Co.*, 87 Ky. 72, 7 S. W. 553.

Em. D.—47.

³⁷*Morris etc. R. R. Co. v. Hoboken etc. R. R. Co.*, 68 N. J. Eq. 328, 59 Atl. 332.

³⁸*Ibid.*

³⁹*Luxton v. North Riv. Bridge Co.*, 153 U. S. 525; *Nahant v. United States*, 136 Fed. 273, 70 C. C. A. 641, 69 L.R.A. 723.

trict of Columbia, it may exercise the power for any municipal or legitimate public use.⁴⁰ In taking property in the States, it may provide a procedure of its own, or adopt or make use of that provided by the States.⁴¹

§ 409 (261c). Constitutionality of eminent domain statutes generally. Statutes which provide for an exercise of the eminent domain power must not only comply with the eminent domain provisions of the constitution, but with those provisions which relate to the manner and form of legislation or which otherwise limit the power of the legislature. The statute, either by itself or in connection with other legislation, must provide for compensation.⁴² The taking must be for a public use⁴³ and that use must be defined in the act.⁴⁴ The statute must not be obnoxious to the constitutional provisions as to local and special legislation,⁴⁵ nor to the provision that a person shall not be deprived of his property without due process of law,⁴⁶ nor to any other limitations.⁴⁷ It must conform to the provi-

⁴⁰Shoemaker v. United States, 147 U. S. 282, 13 S. C. 361; United States v. Cooper, 9 Mackey 104.

⁴¹Jones v. United States, 48 Wis. 385; *In re Secretary of the Treasury*, 45 Fed. 396, 11 L.R.A. 275.

⁴²Post, § 673. Brunswick & W. R. R. Co. v. City of Waycross, 94 Ga. 102, 21 S. E. 145; Garbutt Lumber Co. v. Georgia etc. Ry. Co., 111 Ga. 714, 36 S. E. 942; Commonwealth v. Boston Advertising Co., 188 Mass. 348, 74 N. E. 601, 108 Am. St. Rep. 494, 69 L.R.A. 817; Morris v. Washington County, 72 Neb. 174, 100 N. W. 144; Littleton v. Berlin Mills Co., 73 N. H. 11, 58 Atl. 877; Cherry v. Board of Comrs., 52 N. J. L. 544, 20 Atl. 970; Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719, reversing S. C. 105 App. Div. 229, 93 N. Y. S. 1016; *In re Widening of Burnish St.*, 140 Pa. St. 531, 21 Atl. 500; Tuttle v. Justice of Knox County, 89 Tenn. 157, 14 S. W. 486; Wautauga Water Co. v. Scott, 111 Tenn. 321, 76 S. W. 888; Western Union Tel. Co. v. Williams, 86 Va. 696, 11 S. E. 106, 2 Am.

R. R. & Corp. Rep. 258, 19 Am. St. Rep. 908.

⁴³See chap 7. State v. City of Orange, 54 N. J. L. 111, 22 Atl. 1004, 14 L.R.A. 62.

⁴⁴*In re Theresa Drainage Dist.*, 90 Wis. 301, 63 N. W. 288.

⁴⁵City of Pasadena v. Stinson, 91 Cal. 238, 27 Pac. 604; Commissioners of Parks and Boulevards v. Moesta, 91 Mich. 149, 51 N. W. 903; New York & L. I. Bridge Co. v. Smith, 148 N. Y. 540, 42 N. E. 1088; Swikehard v. Michels, 8 Mis. 568, 29 N. Y. Supp. 777; Matter of Lexington Ave., 29 Hun 303, 63 How. Pr. 462; State v. Cowles, 64 Ohio St. 162, 59 N. E. 895; Appeal of Wilbert, 137 Pa. St. 494, 21 Atl. 74; Wagner v. Milwaukee County, 112 Wis. 601, 88 N. W. 577.

⁴⁶Post, §§ 564-569. Smith v. Cochrane, 9 Wash. 85, 37 Pac. Rep. 311, 494.

⁴⁷Memphis etc. R. R. Co. v. Birmingham etc. R. R. Co., 96 Ala. 571, 11 So. 642, 18 L.R.A. 166; New York etc. R. R. Co. v. Offield, 77 Conn. 417, 59 Atl. 510; People v. Township

sion as to the title of acts⁴⁸ and to all other provisions as to the manner of passing laws.⁴⁹ A title which indicates the purpose of the act to be that of creating municipal corporations or of conferring additional powers thereon, is sufficient to cover provisions conferring the right of eminent domain for municipal public uses.⁵⁰ An act requiring questions of necessity or public utility to be determined by a court, was held not to be void as imposing legislative duties on the court.⁵¹ And where an act of the legislature confirmed the report of commissioners appointed by a court to devise and report a plan for the abolition of certain grade crossings and provided for carrying out the plan it was held not void as a usurpation of judicial functions by the legislature, since the legislature might in the first instance

Board. 25 Mich. 153; Mt. Clemens v. Macomb Circ. Judge, 119 Mich. 293, 77 N. W. 936; Attorney General v. Pingree, 120 Mich. 550, 79 N. W. 814, 46 L.R.A. 407; Tyson v. Washington County, 78 Neb. 211, 110 N. W. 634; State v. Commissioners, 54 Ohio St. 333, 43 N. E. 587; Dallas County v. Plowman, 99 Tex. 509, 91 S. W. 221; Senor v. Board of Comrs., 13 Wash. 48, 42 Pac. Rep. 552; State v. Froehlich, 115 Wis. 32, 91 N. W. 115, 95 Am. St. Rep. 894, 58 L.R.A. 757.

⁴⁸Poulan v. Atlantic Coast Line R. R. Co., 123 Ga. 605, 51 S. E. 657; Mull v. Indianapolis etc. Traction Co., 169 Ind. 214, 81 N. E. 657; Sisson v. Board of Supervisors, 128 Ia. 442, 104 N. W. 454, 70 L.R.A. 440; Enterprise v. Smith, 62 Kan. 815, 62 Pac. 324; Lien v. Norman County, 80 Minn. 58, 82 N. W. 1094; Shively v. Lankford, 174 Mo. 535, 74 S. W. 835; Coward v. North Plainfield, 63 N. J. L. 61, 42 Atl. 805; Slocum v. Neptune, 68 N. J. L. 595, 53 Atl. 301; Van Cleve v. Passaic Val. Sewerage Comrs., 71 N. J. L. 183, 58 Atl. 571; Seaside Realty & Imp. Co. v. Atlantic City, 74 N. J. L. 178, 64 Atl. 1081; Sweet v. City of Syracuse, 128 N. Y. 680, 27 N. E. 1081; Matter of Clinton Ave., 57 App. Div. 166, 68

N. Y. S. 196; S. C. affirmed, 167 N. Y. 624, 60 N. E. 1108; Nicholson Borough, 27 Pa. Supr. Ct. 570; Marysville Water Co. v. West Fairview etc. St. Ry. Co., 13 Pa. Dist. Ct. 365; Ryan v. Terminal Co., 102 Tenn. 111, 50 S. W. 744, 45 L.R.A. 303; Franklin Turnpike Co. v. Long Distance Tel. & Tel. Co., 118 Tenn. 88; Adams v. San Angelo Water Works Co., 86 Tex. 486, 25 S. W. 605; Borden v. Trespalacios R. & I. Co., 98 Tex. 494, 86 S. W. 11, 107 Am. St. Rep. 640; State v. Superior Court, 28 Wash. 317, 68 Pac. 957, 92 Am. St. Rep. 831; Weed v. Goodwin, 36 Wash. 31, 78 Pac. 36.

⁴⁹Spratt v. Helena Power Transmission Co., 37 Mont. 60, 94 Pac. 631; Niagara Co. I. & W. S. Co. v. College Heights Land Co., 111 App. Div. 170, 98 N. Y. S. 4; Memphis etc. R. R. Co. v. Union Ry. Co., 116 Tenn. 500, 95 S. W. 1019; State v. Superior Court, 44 Wash. 476, 87 Pac. 521.

⁵⁰Coward v. North Plainfield. 63 N. J. L. 61, 42 Atl. 805.

⁵¹McGee v. Hennepin County, 84 Minn. 472, 88 N. W. 6; State v. Crosby, 92 Minn. 176, 99 N. W. 636. See Tyson v. Washington County, 78 Neb. 211, 110 N. W. 634.

have decided upon the plan and provided for its accomplishment.⁵²

§ 410. Parties availing of statute cannot object to its validity. As the legislature may grant or withhold the privilege of exercising the eminent domain power, it may annex such conditions to the exercise of the privilege as it sees fit, provided the same do not conflict with the constitution.⁵³ This question was very elaborately considered in the Iowa case cited. The statute as to the taking of property by railroad companies provided that "the corporation shall pay all the costs of the assessment made by the commissioners and those occasioned by the appeal, including reasonable attorneys' fees to be taxed by the court, unless on the trial thereof the same or a less amount of damages is awarded than was allowed by the commissioners." The court held the proposition above stated and also that the provision as to attorneys' fees was not class legislation because made applicable to railroad companies only, and not to all persons and corporations exercising the power of eminent domain.⁵⁴

It was further held in the same case that a corporation availing itself of the privilege granted, was estopped to deny the validity of the conditions imposed. And this is the general rule.⁵⁵ In the case cited from New Hampshire the statute required the condemnor to pay the value of the property as fixed by the committee or jury and fifty per centum additional. In

⁵² Providence etc. Steamboat Co. v. Fall River, 183 Mass. 535, 67 N. E. 647.

⁵³Gano v. Minneapolis etc. R. R. Co., 114 Ia. 713, 87 N. W. 714, 89 Am. St. Rep. 393, 55 L.R.A. 263; Dow v. Electric Co., 68 N. H. 59, 31 Atl. 22; Cincinnati etc. Traction Co. v. Felix, 5 Ohio C. C. (N.S.) 270; Wiler v. Logan Nat. Gas & Fuel Co., 6 Ohio C. C. (N.S.) 206; S. C. affirmed without opinion, 72 Ohio St. 628, 76 N. E. 1128.

⁵⁴Gano v. Minneapolis etc. R. R. Co., 114 Ia. 713, 87 N. W. 714, 89 Am. St. Rep. 393, 55 L.R.A. 263. *And see* Chicago etc. R. R. Co. v. Guthrie, 192 Ill. 579, 61 N. E. 658.

⁵⁵New York etc. R. R. Co. v. Wheeler, 72 Conn. 481, 45 Atl. 14; Gano v. Minneapolis etc. R. R. Co.,

114 Ia. 713, 87 N. W. 714, 89 Am. St. Rep. 393, 55 L.R.A. 263; Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N. E. 533; Gloucester Water Supply Co. v. Gloucester, 179 Mass. 365, 60 N. E. 977; Am. Unitarian Asso. v. Commonwealth, 193 Mass. 470, 79 N. E. 878; People v. Calder, 153 Mich. 724; Dow v. Elec. Co., 68 N. H. 59, 31 Atl. 22; S. C. Elec. Co. v. Dow, 166 U. S. 489, 17 S. C. 645; Wiler v. Logan Nat. Gas & Fuel Co., 6 Ohio C. C. (N.S.) 206; S. C. affirmed, 72 Ohio St. 628, 76 N. E. 1128; Atlantic Coast Line R. R. Co. v. South Bound R. R. Co., 57 S. C. 317, 35 S. E. 553; Newburyport Water Co. v. Newburyport, 193 U. S. 561, 24 S. C. 553.

holding that one who had availed of the statute to acquire the right of flowage could not object to the validity of the condition the court says: "When a legislative grant of authority to exercise the power of eminent domain contains a condition that the grantee shall pay more than the value of the property taken under the power, the grantee accepting the grant and exercising the power cannot question the constitutionality of the condition. The defendants were authorized to flow the plaintiff's land upon the condition, among others, that they pay the damages thereby done to him and fifty per cent in addition. The statute is permissive. It confers a privilege which the defendants were at liberty to exercise or not as they saw fit. But they cannot take and enjoy the benefit without performing the condition on which it is given. By their exercise of the power conferred, flowing the plaintiff's land and applying for an assessment of the damages, they are precluded from denying the validity of the condition. The question of its constitutionality under either the federal or State constitution is not open to them."⁵⁶

⁵⁶Dow v. Electric Co., 68 N. H. 59, 31 Atl. 22. This case was prac- tically *affirmed* in Electric Co. v. Dow, 166 U. S. 489, 17 S. C. 645.

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