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STREET RAILWAYS
THEIR RIGHTS TO AND LIABILITIES FOR USE OF STREETS

THESIS

PRESENTED FOR THE DEGREE OF BACHELOR OF LAWS

-BY-

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CORNELL UNIVERSITY --- SCHOOL OF LAW

1895
I.

DEFINITION -- HOW MUCH DOES STREET RAILWAY INCLUDE?

In order to define what is meant by street railway as it pertains to this subject it is first necessary to inquire what is meant by a street. This might be dismissed summarily by saying it is a public road or way in a city, town or village. (Elliot on Roads and Streets, 12) If this were adopted the question would immediately suggest itself are street and highway convertible terms. It requires no amount of reason to arrive at the conclusion that though all streets are highways, still all highways are not necessarily streets. (24 Am. & Eng. Encyclo. Law, p. 2) Even having arrived at this we are still unable to define accurately and distinguishingly the respective terms. We are obliged to thumb the yellow leaves and faded pages of the legacies of our Roman and Teutonic ancestors as they have been handed down, and commented upon by our more immediate forefathers in the numerous volumes of legal literature, which by their perseverance and adaptability to the study of jurisprudence the English bench and bar have resurrected from the musty ruins of the past.

The reader will not of course expect an historical dis-
ussion of what these terms have meant in the different ages of progress and invention from the time when Semiramis made her subjects in Nineveh neighbors to those of Susa or Persepolis by means of those lasting thoroughfares that have stood incorrigible to the ever nagging hand of time; nor will it be my purpose to treat of those ways, the building of which would have made the Roman famous did he never think of law, literature nor theology. It is enough to borrow from their descended stores such appellations and conceptions as other nations have become possessed, and by them delivered to their migrating children to diffuse and establish throughout the New World to which they fled, here to found and build up a new political and social system with such modifications as were consonant with their utilitarian and democratic ideas, tempered by the adversities of a trackless, boundless forest before them; hidden beneath whose boughs was the treacherous and murderous savage, and behind them rolled the broad expansive waste of the Atlantic. With such surroundings it is but reasonable that those first settlers should appropriate whatever was useful of the laws and improvements they but lately left behind them. They built their roads as their fathers had built them, and designated them according to the old uses; and at the present time in the State of Louisiana the law governing roads and ways is still quite similar to the old Roman.
(Code of Louisiana, SS.700-703)
Bacon said in his day there were three kinds of ways, *(1) A footway called in Latin, iter; (2) A pack and prime-way which is both a horse and footway called in Latin actus; (3) A cartway called in Latin via or aditus, which contains the other two as well as a cartway, and is called in Latin via Regia if it be common to all men and communis strata if it belong only to some town or private person." (Bacon's Abr., Highways) It is with this last class that we will have to deal and this disposes of them as far as pertains to use in the early treatises, but as regards the element of possession Justinian divided all property into res communes, as the sea and air which cannot be appropriated by any particular individuals; res publicae, things which belong to the state, as the state lands (ager publicus) navigable rivers, roads, etc.; res universitatis, things which belong to aggregate bodies as corporations; res privatae, things which belong to individuals; res nullius, things which no one could own, as wild animals, etc. (Sander's Inst. of Justinian, 36.) Savigny adopts much the same division with the further remark that all res publicae and communes are incapable of being possessed. (Savigny on Possession (Perry's ed.) 85) Domat also includes highways in his classification of things public, the use of which is common to all particular persons, but adds that it is the sovereign that regulates the use of them. (1 Domat's Civil Law, (Cush. ed. 1850) 150 art. 116.) From these classifications it is seen we must
draw our modern street and highway from the via regia and communis strata of Bacon, and the res publicae, res universitatis and res privatae of Justinian, and endeavor to distinguish so far as is deemed necessary for a proper consideration of the subject at hand. These definitions would indeed seem vague to us did we not look at them with a modern city and rural district before our eyes; but aside from this all of them convey the idea of their being used for public purposes by the public indiscriminately, with the slight variation owing to the dignity conferred upon the one by its use and appellation—via regia. This term evidently included urban and rural roads, or as we now designate them streets and highways.

Since we have learned at the outset that all streets are highways and that all highways are not necessarily streets, then highways must be a general term of which street is a division, and since we seldom find the term used outside of towns and cities it must by common consent be confined to them. However, as we progress in this consideration we will learn that as regards its connection with railways it will often be found an important and difficult question to determine whether a thoroughfare is a road or a street, and whether the track laid thereon is a street railway or an ordinary railroad.

If now we conclude that a street is a public way in a city or town we might at first infer that a street railway
was a railway erected in a street. This would be incorrect, for we find nearly all our great cities approached through their streets and avenues by the great commercial, and trunk lines of the continent, while, clearly no one would think of classifying the Pennsylvania, or the New York Central Railroads with street railways. To distinguish these it might be suggested that the latter carry only passengers within city limits, while the former carry freight and passengers beyond the city limits.¹ This seems to be the ground upon which the majority of the courts draw the distinction, but it is still a mooted question in many of the states in the construction of statutes in which the term "railroad" is found.²

If this is not the means by which we are to distinguish them then we must look to something else, and the next would naturally be the motive power. Steam is now used as a tractor in both railways and railroads; and even in the city has superseded the horse and cable car, which so lately superseded the old-fashioned stage coach and omnibus, that for so many centuries served the purposes of travel. The first railroad was nothing but an improved stage coach and to the old nomenclature we still cling, even though inventions and the prog-

¹ Thompson-Houston Co. v. Simon, 20 Ore. 67.
ress of arts and sciences have greatly affected the meaning of the words. "Road" is now used to mean a "railroad," but until the thing was made or seen even the most fertile imagination of a century ago could not have pictured it from the use of the word. So we call the enclosure in which passengers travel on a railroad a "coach"; but it is more like a house than a coach, and is less like a coach than are several other vehicles which are rarely if ever called coaches.

In the rapid strides of progress and invention it is but natural that people should still retain the old notion that a street railway was one operated by horses or some other similar motor. Electricity and the cable were accepted willingly as an improvement; but the bustle of the steam is still repugnant as not being a use of the street within the contemplation of the people at the time the street was laid out, and therefore not a proper use of the street. Out of the contention has grown the endless litigation which will be treated in the remainder of this work. We find under the law of Illinois and act which gives cities councils authority to license "hackmen, omnibus drivers and all others pursuing like occupations" embraces street cars; (Allerton v. City of Chicago, 9 Bis. (U.S.) 552) while again in Pennsylvania it was held that an act fixing rates for tolls for "every carriage, wagon or other wheeled vehicle of whatever description" did not include street cars; (Monongahela Bridge Co. v. Ry. Co. 28 A. & E. Ry. Cas. 30) and again in New York the provisions of 1 N. Y. R.S. 695, entitled "Of the law of the road and the
regulation of public stages" are not applicable to street railways. (Whitaker v. Eighth Ave. Ry. Co. 51 N.Y. 295).

Again we find in Pennsylvania another apparent conflict when the Supreme Court of that State decides that sec. 4, art. 17 of the Constitution, providing that "no railroad, canal or other corporation shall consolidate with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning a parallel or competing line" is not applicable to street railway companies. (Gyger v. Ry. Co. 139 Pa. St. 96). And in Ry. Co. v. City of Pittsburgh (104 Pa. St. 522; 17 A. & E. Ry. Co. 43) the court held that the real estate of a street passenger railway is within the meaning and spirit of an act making the real estate of "railroads" liable to taxation.

From these two cases arose the Potts case (161 Pa. St. 402) owing to the doubt, into which the court had driven them, whether they should incorporate their elevated railroad under the general railroad law, or under the street railway law. They chose the former and the court said "the appellant is not a street passenger railroad company and cannot acquire the rights and franchises of such company without incorporation under our street railroad laws". The Northeastern Elevated Railway Company believed they could operate their road if incorporated under the street railway laws, but what the court apparently decided in the Potts case, they again speaking through the same Justice Williams in Com. v. N. E. Elev. Ry. Co. (161 Pa. St. 411) held that, "even if it had been incorporated as a street passenger railroad it could not have
acquired thereby the right to build an elevated street railroad, for there is no provision in our street railroad laws that authorize such a structure, or that contemplate any other than surface lines."

From these litigations in one state alone it is obvious that the task is not easily met with in distinguishing the one from the other. The last case seems to add one distinguishing feature to street railways in that State, and that is, it must be a surface road, or in other words built upon the highway. 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 he chose to elect. They were not used by one person in any way which was not open to all. The railroad does not fall within the scope of such uses. (Lewis Em. Domain s' II) It requires a permanent structure in the street, the use of which is private and exclusive.

Street railways are in a general sense, highways, but they are not, in a strict sense, public ways, since their owners possess a private proprietary right in the franchise, and such railways are operated for private gain not primarily for the public benefit. (Elliott Roads & Streets, 560). A railroad is for the use of the universal public in the transportation of all persons, baggage and other freight; (20 Ore. 67) while the New York Courts after some debate have arrived at the conclusion that the difference between a steam and a
horse railway is one of degree; (Hare Const. Law, p.366.)
the degree they do not give nor do text writers offer to help
them out. The Supreme Court of Oregon defines a street rail-
way to be a railroad "dedicated to the more limited use
of the local public for the more transient transportation
of persons only and within limits of a city". (20 Ore.67.)
Were the learned justice not so particular to limit it to
roads within a city his definition would be quite applicable
even to the more densely populated Eastern portion of the
Union, but in the coal fields of the Lackawanna, and Wyoming
Valleys of Pennsylvania we find an electric passenger rail-
way system stretching over territory fully fifty miles in
length and from five to ten miles wide, operated in the streets
and highways through and between the towns located therein,
and engaged solely in carrying local passengers to and from
the intermediate points along the lines; and no one would
question for a moment but this is a street railway.

We must conclude then 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; that the difference consists
in their use, and not in the motive power; (Williams vs.Rail-
way Co., 41 Fed.Rep.556.) and that street railway now means
cable, electric, horse and sometimes steam.
II.

RIGHT TO OCCUPY STREETS AND HIGHWAYS.

Power of Legislature to Grant:----

It is now such a well established rule of law in this country as to be no longer open to debate that the legislature has absolute control over the streets; and may, where no private interests are involved or invaded, close a highway and relinquish altogether its use by the public, or it may regulate such use, or restrict it to particular vehicles, or to the use of a particular motive power. (People v. Kerr, 27 N.Y., 188 (1863)) It may change one kind of a public use into another so long as the property continues to be devoted to a public use. (Carli v. Stillwater Ry. Co. & Transfer Co., 26 Minn. 373; 3 A. & E. Ry. Cas. 228) The highway is the property of the people, not of a particular 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. (Phil. v. Trenton Ry. Co. 6 Whart. (Pa.) 25.)

This power of disposition is even extended to cases where the fee of the streets is in the municipal corporation. Whether the corporation be the owner of the fee of the street in trust for the public, or whether it be merely the trustees of the streets and highways as such, irrespective of
any title to the soil, it has the power to authorize their appropriation to all such uses as are conducive to the public good, and do not interfere with the complete and unrestricted use as highways; and in doing so is not obliged to confine itself to such uses as have already been permitted. (Milhau v. Sharp 15 Barb. 206 (1853).)

In New York where by law when a public street is laid out or dedicated, the fee in the soil becomes vested in the city, it has been held that the legislature might authorize the construction of a horse railway in a street and that neither the city nor the owners of lots were entitled to compensation. The city was not entitled, because, though it held the fee, it held it in trust for the use of all the people of the state and not as corporate or municipal property; and the land having been originally acquired under the right of eminent domain, and the trust being publici juris it was under the unqualified control of the legislature and any appropriation of it to public use by legislative authority could not be regarded as an appropriation of the private property of the city. (Cooley Const. Lim. 6th Ed. pp. 678-9, and authorities cited thereunder.) It is indispensable to the validity of a direct legislative grant that in every instance the use should be public, for highways are held in trust for the public purposes and no other. (Elliott, Roads & Streets p. 565.) Roads and streets are never held for permanent private purposes. (Smith v. City of Leavenworth 15 Kan. 61) In grant-
ing a right to use a highway for a street railway the legislature makes that lawful which but for the grant, would be unlawful, for no citizen has a right to use a highway in any other than the usual modes, except where the legislature authorizes him to do so.(Angel on Highways, 3. 33)

But there is conflict in the decided cases upon the question of the power of the legislature to grant an exclusive right to a street railway to occupy and use a street. This is the consequence of the fallacy that has misled so many of our courts. They seem to have been carried away with the idea that a railroad is but an improved highway. It is no more an improved highway than is a canal and no one would question for a moment the justice or propriety of a street being given up to a canal. Lewis(Em.Dom.s.111) says: "to hold that a 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 the highway."

His remark is consonant with sound reason and discretion; and since it is settled with but few exceptions (Jersey City v.do.20 N.J.Eq. 61(1869).) that the power to control the streets is in the legislature and that this power may be directly exercised or may be delegated to a municipality it would be anticipating the work of the next part of this article to discuss the rights of a monopoly on the streets;
for it would lead to the necessity of defining where the rights of the public end and those of the abutting owners begin before disposing of the

**Power of Municipality to Grant:**

If the power of the legislature to regulate the control of streets is conceded to be supreme and absolute it must follow as a necessary conclusion, that the power of the municipality is that of agent, if it has any power at all. That it has a certain interest in the care and management of its own streets, aside from that of the convenience of travel no one will dispute. How far this control extends or how far it should extend is the question to be answered here.

It is the usual and ordinary method for a legislature to leave to the municipality the acceptance and ratification of the rights delegated by the legislature in their charter to the railway corporation, by some act or ordinance in accordance with the usual methods of performing the functions of city government. How far and to what extent this acceptance or rejection may be modified is generally stated to depend on the charter of the municipality. (Dillon, Mun. Corp. s. 658; 4th ed.)

The Supreme Court of North Carolina (Asheville v. Ry. Co. 19 S.E. 697) held that the charter of a street railway company, granting to it certain powers and privileges, and "such other privileges as may be granted by the municipal authorities" gives the city no new power, but merely authorizes it to exercise such power as it has under its charter for the further-
ance of the objects of the railway. This seems to be the recognized opinion of the courts of this country and it has been asserted that the consent of a city to construct a railway without express legislative authority would be of no avail as a justification of occupying city streets. (Potts Case, 161 Pa. St. 396 (1894).)

Since the municipality cannot authorize the erection of railways in its streets and is an agent of the legislature, if it authorizes such functions at all it must be an agent to the extent of performing such legislative functions as are expressly granted to it by the legislature. That it has the right to exercise the police power is too well settled by the line of decision following the Slaughter House Case (16 Wall. 36). Upon this right which has been thus preserved to it the municipality has often imposed conditions upon the railway companies which must be complied with and which the courts will interpose to enforce. (City of Alleghany v. Ry. Co. 159 Pa. St. 411.) No one would venture to assert under omne majus in se continet minus that all conditions would be enforced. The city council might impose conditions in contravention to all law and the established precedents, or against the fundamental principle of the purity of the administration of public affairs for the public benefit. Such conditions clearly would be an abuse of, or transcend the discretion given them, and I have no hesitancy in saying would be declared void and of no force or effect by any court to whom they
appealed for aid.

The rule then seems to be that when a regulation is prescribed by the legislature itself, the courts can do no more than ascertain whether or not any constitutional provision is violated, and if they find that no constitutional right has been invaded, the statute must be upheld. Where the regulation is prescribed by a municipal corporation the field of judicial duty is much larger, for the courts must ascertain whether there is a constitutional statute authorizing the act of the municipality, whether the act is within the scope of the statute, and is performed in the mode prescribed and whether the regulation is a reasonable one. To this extent the municipality has power to regulate the use and occupancy of its streets so that there are few instances in which the company has such right.

Though there have been numerous instances where the railway company have sought to enforce their rights to occupy the streets of a city without consent of the city as, where under legislative authority to construct a railroad through a city, the courts have in all cases respected the wishes and authority of the municipality to regulate the control and the use of its own streets and given it the right to say what streets shall be so used, or if any. To say that the railway company has such a right from the general grant and charter given it by the legislature would be giving to the railway corporation an unlimited power of discretion and selec-
In the language of Justice Miller of the United States Supreme Court in Edmunds v. Baltimore &c. Ry. Co. (114 U.S. 456) "the assertion of the existence of such a right is, to say the least somewhat novel. It is not known to any member of this Court that any railroad company, whether its cars are propelled by steam or horse power, has ever claimed to use the streets of an incorporated city or any part of them without express authority from some legislative body, or the authorities of the city government. It would be a strange grant of power which, authorizing a railroad company to enter or even pass through a city, should leave to the company the selection, not only of its route into or through the city, but even the streets and highways over which its tracks should be laid, subject only to its own sense of its own convenience and that of the people of the city."

From the language of the learned Justice this seems to be the first case of this kind before the United States Supreme Court; but on a little investigation numerous cases will be found which have arisen in other jurisdictions, though almost unanimously in accordance with the opinion of the United States Supreme Court. (23 Am. & Eng. Ency. Law p. 1098 and notes).
III.

RIGHTS OF OWNERS OF ABUTTING PROPERTY TO COMPENSATION.

General Doctrine :----

In all cases whether the fee of the street is in the public or in the adjoining owner the abutting property owner has attached to his property the easements of light, air and access -- both ingress and egress. (Story Case, 90 N.Y. 122). These rights are property and to impair or destroy them is a taking. (Lewis Em. Dom. 3. 123.) Conceding for the present that there has been a taking of property by interfering with these easements, it follows that there has been a loss or, we must inquire can there be a loss without such taking.

In considering the loss has been occasioned to adjoining owners by laying of railroads in streets; and whether such a loss constitutes a taking we should inquire, first, whether a railroad is one of the ordinary and legitimate uses for which highways and streets are established; second, the right to compensation when the fee is in the adjoining owner, and, third, the right to compensation when the fee is in the public. The answer to the first question has been disposed of and has been answered in the negative modified to the extent dependent upon the character of the highway.

This then leads to the inquiry is there any difference whether the fee of the street is in the public or in the
abutting owner. The weight of authority seems to be now that there is no distinction between the rights of abutting owners who own the fee of the street and those who do not. The earlier line of cases gave damages to the owner of the fee to the street but refused it where the fee was in the public. This doctrine has been generally changed and the cases in support of the change are too numerous to need citation.

**Doctrine in New York:**

In this State the law is peculiar and the right to recover is still based upon the nature and extent of the title of the abutting property owner together with the nature of the new use of the street. If the new use of the street is a horse car line and the abutter owns the fee to the middle of the street the courts hold it to be a trespass; (Craig v. Rochester &c. Ry. Co. 39 N.Y. 40) but if a horse car line is built in a street in which the abutter has only an easement in the street -- he only owning fee to the exterior line of the street, the courts hold there is no trespass. (People v. Kerr, 27 N.Y. 168; Mahady v. Bushwick Ry. Co. 91 N.Y. 148.) Andrews Ch. J. in deciding the last case cited says; "The Story Case left untouched the decision in People v. Kerr that a horse railroad constructed under legislative authority on the surface of a city street, the fee of which was in the city, was not an unlawful interference with the rights of abutting owners, but was
a street use consistent with their rights therein." The rule is the same if instead of a horse car line a steam surface line should be erected. (Williams v. N.Y. Cent. R.R. 16 N. Y. 97, and Fobes v. R. W. & O. R. R. Co. 121 N.Y. 505).

But there is a decided difference in the elevated railway cases. In these it makes no difference whether the abutter owns the fee or an easement in the street, he is still entitled to compensation. This was established in the Story Case (90 N. Y. 122), but in this case Story derived title to his lot from the city with a covenant in the deed that the street "shall forever thereafter continue and be for the free and common passage, and as public streets and ways for the inhabitants and all others in like manner as the other streets of the same city now are or lawfully ought to be". Aside from this express covenant the case is quite similar to the ordinary cases. This point the Court dismissed by saying it was an easement appurtenant to his property and therefore property.

The trial Court found that the defendants intended to construct a road upon a series of columns, about fifteen inches square, fourteen feet high, placed five inches inside the edge of the sidewalk and carrying girders from thirty-three to thirty-nine inches deep, for the supporting of cross ties for three sets of rails for a steam railroad. The cars intended for this road, would when placed thereon,
have bodies eleven feet above the tracks, in running would project two feet over the sidewalk on either side of the street, and would reach within nine feet of the plaintiff's building. The defendant intended to run his trains as often as once in three minutes, and at a rate of speed as high as eighteen miles an hour. On appeal a divided court -- four to three -- found that the injunction prohibiting the continuance of the road, which was asked for should be issued; but not until the defendant has had reasonable time after the decision to acquire the plaintiff's property by agreement, or by proceedings to condemn the same.

Four years later (1887) after the complexion of the Court had been changed, the question was again taken to the Court of Appeals in the Lahr Case (104 N.Y. 270), hoping to have the questions decided in the Story Case re-examined. But Ruger Ch. J. in delivering the opinion of the Court says; "The doctrine of the Story Case, although pronounced by a divided Court, must be considered as stare decisis upon all questions involved therein, and as establishing the law, as well for this Court as for the people of the State, whenever similar questions may be litigated. x x x We hold that 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 pur-
poses 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 to be laid 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 and 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 streets for the benefit of 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 (Art. 1 §. 6), and requires compensation to be made therefor before it can lawfully be taken from its owner, for public use."

This case was decided without a dissenting opinion. Thus it will be seen that so far as elevated railroads are concerned the question is definitely settled at least in New York.
In Other Jurisdictions:

It is now well settled by the great weight of authority that, where the fee of the street is in the abutting owner, he may recover for the additional burden caused by a railroad laid in the street.¹

But where the fee is in the public and the abutter has only an easement in the street there is still a difference of opinion as to his right of compensation. Since the rights of access, air and light are property it is difficult to vindicate the opinion of some courts that the abutter is not entitled to compensation for any interference with, or infringement of these rights. They attempt to justify their position by stating that the construction and operation of a horse railway on the public streets of a city, by authority from the city government, is not such a new or additional burden imposed upon the land as would entitle the owner of the fee to compensation therefor (Texas &c. Co. v. Rosedale, 64 Tex. 80 (1885) reviewing previous cases) and that a change of motor power does not increase the servitude or impose an additional burden to the one already on the street. (Patterson Ry. Co. v. Grundy, 51 N.J.Eq. 213 (1893).) On horse railroads the Court observes: "The words 'horse railroad track or tracks' used in the ordinance

¹Dillon Mun. Corp. 4th Ed. S. 703 and notes in which is contained an admirable collection of cases; and in notes to Lewis Em. Dom. S. 115 will be found a collection of the different statutory provisions throughout the different states and cases which have arisen thereunder.
must be taken as descriptive of the railroad to be constructed and not of the motive power to be used. Railways in the streets of cities, laid to conform with the grade of the streets, and properly known as street surface railroads, had by common usage been designated as horse railroads from the fact that they were for a long time operated exclusively by horses being attached thereto, and horse railroads and street surface railroads have come to be convertible terms."

The Supreme Court of Pennsylvania (Lockart v. Craig St. Ry. Co. 139 Pa. St. 419) in recognizing the right of the legislature and city authorities to authorize the building of railways upon the streets of cities says: "The necessary and proper apparatus for moving them must be allowed to follow as an incident, unless there is something illegal in its construction or use". Whether it would consider the erection of poles and wires in the street in front of property such an impairment of access as to be illegal in its construction, is yet to be determined.

The law is well settled that wherever these rights of light, air, and access are either destroyed or diminished, the abutter is entitled to compensation, but whether there has been such an interference is in all cases a question still left to the jury to decide.
IV.

MEASURE OF DAMAGES.

Generally:----

The measure of damages depends upon the nature of the new use of the street, and the extent of the abutter's title. If he owns to the middle of the street then clearly he has an action for trespass.

But if he owns to the exterior line of the street then his action is for the impairment of the plaintiff's easement. What constitutes such impairment is well stated in an opinion by Pinch J. in Drucker v. The Manhattan Ry. Co. (106 N. Y. 164) "Smoke and gases, ashes and cinders affect and impair the easement of air. The structure itself and the passage of cars lessen the easement of light. The drippings of oil and water and possibly the frequent columns interfere with the convenience of access. These are elements of damage even though the necessary concomitants of the construction and operation of the road, and not the product of negligence, for they abridge the land owner's easement, and to that extent, at least are subjects for redress in an action for damages". This is but another way of stating the fourth proposition of the Story Case as it was approved in the Lahr Case: "That the erection of an elevated railroad, the use of which is intended to be permanent, in a public street, and upon which cars are propelled
by steam engines, generating gas, steam and smoke, and distributing in the air cinders, dust, ashes and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement and its appropriation by the railroad corporation, and rendering it liable to the abutters for damages occasioned by such taking."

Again in the Newman Case (Newman v. M.E.Ry. Co. 118 N.Y. 618) the rule was laid down, and approved in Bohm Case (129 N.Y. 576) that the increase of value resulting from the growth of public improvements, the construction of railroads and improved means of transit accrues to the public benefit generally, and the general depreciation of property consequent upon such improvements belongs to the property owner and the railroad company are not entitled to the consideration of that element in the ascertainment of the compensation it must pay to the abutting proprietor. But the special and peculiar damages which property receives from the construction and operation of the road, and the location of the stations are elements which enter largely into the inquiry whether there is an injury or not, and the jury must consider them and give them due weight in their verdict.

From this it will be seen that the rule is pretty settled in New York as to the elements that constitute damages in case the user is that of an elevated railway, with the possible exception of the loss of privacy. This is still
an open question though it has been recognized as far as it related to depreciation in rental value in Messenger v. Railway Company (129 N.Y. 522) as also in the same case was the effect of noise on rental value. Such damages as noise and vibration can only be considered in an action to determine past damages and cannot be taken into consideration in estimating prospective damages in a proceeding for an injunction. (Am. Bnk. Note Co. v. N.Y.E. Ry. Co. 129 N.Y.252).

**Surface Roads:**

Even the courts of New York have refused to apply the same rules to surface roads that they do in estimating damages in elevated railroad cases. They hold that such are "merely incidental or consequential injuries for which the abutter cannot recover," since the public use is authorized by law and not *malum in se* and merely affects him by proximity and not by adjacency. But then the rights of access, light and air constitute the principal values of such property and it must be presumed that when lots are sold the grantees purchase them with a view to the advantage and benefits which attach to them because of these easements. If he does the grantee acquires a right to the street in front of the premises as a means of access. (Dooly Block v. Rapid Transit Co. 9 Utah 31.)

It is a well recognized principle, that where a thing not *malum in se* is authorized to be done by a valid act of the legislature, and it is performed with due care and skill
in strict conformity with the provisions of the act, its performance cannot, by common law be made the ground of an action however much they may be injured by it. (Penny v. S.E. Ry. Co. 7 E. & B. 660; City of Glasgow Ry. Co. v. Hunter, L.R. 2 Sc. & D. 78). There are certain injuries which are necessarily incident to the ownership of property in towns or cities which directly impair the value of private property, for which the law does not, and never has afforded any relief. For instance, the building of a jail, police station or the like will generally cause a direct depreciation in the value of neighboring property, yet that is clearly a case of damnum absque injuria.

In all cases to warrant a recovery it must appear that there has been some direct physical disturbance of the right, either public or private, which the plaintiff enjoys in connection with his property and which 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. But in determining whether there has been a direct physical disturbance a cursory review of the cases cited herein will show that two propositions have been directly passed upon and laid down: First, that a railway in a city is not per se a nuisance or a purpresture; and, Second, that the city corporation has the power and right to authorize the use of streets for that purpose. And also that the word "damage"
as ordinarily used in statutes has been given a very broad meaning and embraced more than physical invasions of property. It is not restricted to cases where the owner is entitled to recover as for a tort at common law. (Reardon et al v. City of San Francisco, 66 Cal. 501.) The language is intended to cover 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. (G.C.& S. F. Ry. Co. v. Fuller, 63 Tex. 470).

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