THE

AMERICAN LAW REGISTER.

JANUARY, 1888.

AN INTERESTING QUESTION IN EMINENT DOMAIN UNDER CONSTITUTIONAL LAW.

THERE has not been delivered, by the Supreme Court of Pennsylvania—probably for a very long time—so important a decision as the one in the case of *Pennsylvania Rd.* v. *Lippincott*, 19 W. N. C. 513, wherein the court held that, "A railroad company constructing and operating an elevated road upon property owned by it in fee simple, fronting on one side of a street, is not liable under the new Constitution,[1] or otherwise, for depreciation in value of property fronting upon the opposite side of the street, in consequence of noise, disturbance, smoke, sparks, vapor, necessarily resulting from the operation of the road as a steam railway, where no part of said last-mentioned property or any right of way or other appurtenance belonging thereunto has been taken or used in the erection or construction of the road."

Public roads, turnpikes, plank-roads, streets, canals, railroads, and bridges are public highways, if the owners thereof have been invested with the privilege of eminent domain and in Pennsylvania it follows from *McClenachan* v. *Curwin*,[2] owing to

[1] The new Constitution (1874), Art. 16, § 8, provides that: "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."

[2] 3 Yeates 362, 371.

Penn's concessions, that public roads could be authorized by the legislature to cut through the cultivated fields of our farmer ancestors without any obligation for damages; so navigation companies on our navigable rivers—they being public highways—could equally be authorized to destroy the water-power of mills without making any remuneration for what might prove absolute ruin to the owners, and later on, when railroads were introduced—they also being public highways—the streets of our towns and cities were liable to be invaded by these railroads at the will of the legislature, without one cent of compensation to the adjoining property owners. Any compensation which the legislature chose to grant, was of grace and *not* of right, hence the people were forced to rely upon the justice of a legislature sometimes too complacent in so far as regards the corporations. It is only fair to add, however, that few special charters were granted to these quasi-public corporations, wherein compensation was not allowed for the taking of private property.

Under the amended Constitution of 1838, it was decided that compensation should be made only for land actually *taken*. When this provision was introduced, improved roads, turnpikes, plank-roads, and canals were the public highways, and under these conditions it will be readily seen that the Constitution, by providing compensation for land actually taken, would afford an adequate remedy. It was evidently felt that little or no harm could be done, save where property was actually appropriated, and it was therefore thought that this construction of the constitutional check on the legislature would give to the people all the relief to which they were entitled. During the next eleven years—1838 to 1849—however, railroads had come into extensive use, and it was realized that the Constitution of 1838 did not grant adequate relief; it was found that railway trains rushing over a man's land might cause a permanent injury to and a corresponding depreciation in the value of his whole property, hence the General Railroad Act of 1849 remedied this omission by providing compensation not only for the lands taken, but where *any* land was taken, then compensation also for the injury to the remaining land. Again it was found—when these general laws were tested in the courts—that they operated inequitably, thus:

under these laws, if ever so small a piece of one's ("A") land were *taken*, he not only recovered compensation for this, but also damages to his remaining land, but his less fortunate neighbor ("B")—less fortunate because the company had not taken a little piece of his land—had no redress; as to him the injury was *damnum absque injuria*, his land may have been equally near the railroad, his measure of damages would have been computed as was "A's," had only a little piece of his land been taken. Yet "A" recovered for this injury to his land *not* taken, because some of it, perhaps a small corner of it, had been taken, whilst as to "B," who experienced the same depreciation in value from the same causes, the injury was *damnum absque injuria*, because a little piece of his land, no matter how small, had not been taken. This was one of the faults of these General Railroad Laws, which the provision of the new Constitution was intended to remedy.

Let us compare this new Constitution with the amended Constitution of 1838. The phraseology of the two is so very different it is apparent that the former instrument contemplated a very much wider extension of the right of recovery. In the Constitution of 1838 it was an inhibition upon the legislative power to grant eminent domain, *i. e.*, "*the legislature shall not invest, etc., etc.*" In the Constitution of 1874 a very different object was in view; it was not, primarily, an inhibition upon the legislative power to grant eminent domain, this the people did not intend to interfere with, but it was:—

"*Municipal and other corporations and individuals invested with the privilege of taking private property for public use, etc., etc.,*" that is, this clause is used to designate a certain class of corporations invested with eminent domain. Who are invested with eminent domain? Why, railroads, canals, etc., etc.; these are liable to produce a distinct and particular injury peculiar to themselves, and it was against these distinct and peculiar injuries that the Constitution was intended to provide a remedy. Then follows the remedial clause, "shall make just compensation for property *taken*, injured, or destroyed, etc., etc." This is very different from authorizing the exercise of eminent domain, under certain qualifications; on the contrary it only indicates a certain class as being subject to a certain law; it is not, corpora-

tion shall not be invested with the privilege, etc., etc., as in the Constitution of 1838, but it is, corporations invested—note the past tense—with the privilege, etc., etc., shall be subjected to certain obligations, whether the injury they cause is the direct result of their acquisition under eminent domain or not. In other words, corporations possessing the right of eminent domain can enforce it; it is, therefore, really immaterial whether they acquire the property under the exercise of this right or purchase it outright at private sale,[1] for in any such sale the controlling factor must be their right under eminent domain. Thus I think it is clear that the expression, "*invested with the right,*" etc., etc., is intended as designating a class subject to the remaining terms of the clause, that is, these corporations shall make compensation for property taken, property injured, or property destroyed.

We have tried in the previous pages to present the growth of what may be called the public highway laws. Hitherto I have referred, in a general way only, however, to the various decisions under these laws, but I now propose to consider them in detail, to show what has been held an injury of that character for which compensation should be granted, and to compare these decisions with that in *Pennsylvania Railroad Company* v. *Lippincott,* 19 W. N. C. 513, wherein damages were not allowed, to see if these decisions are logical and consistent. Before doing so, however, it would be well to state that the words "direct," "immediate," "consequential," and "remote" are used in connection with this subject of damages under the new Constitution in a loose way, which robs them of their true meaning. It seems to me that the injury is direct, immediate, and consequential, without regard to property being taken or not—whether a *legal* injury will depend upon the common law or the statutes, or the Constitution; an injury is speculative, where it has no practical existence, but arises from a mere possibility—an imaginative fear and an injury is too remote, where it results from the company simply carrying on its business, as

[1] Of course, one who has sold his property to a railroad has no further claim for damages to that property; but what I mean is, no matter how they acquire their property, either under eminent domain or at private sale, they are liable for legal injury to other property.

loss of trade to stage-coach companies, or of custom to inns, by reason of the introduction of a railway. The true point in any given case is, the plaintiff must have suffered a special legal damage, and it is immaterial whether it is immediate or consequential.[1] The injury may be said to be *consequential* in the sense that it is the result of the corporate action, but if it is one for which a legal remedy is provided, then it is a direct, immediate legal wrong; but if the injury is a mere speculative, possible one, if it does not exist, but is a mere phantom of the mind, or if too remote, it cannot be considered.

Again, the legal maxim, "*damnum absque injuria*," is often misunderstood. Upon this point, Mr. Justice STEPHENS said:[2] "The maxim that there is no wrong without a remedy does not mean, as it is sometimes supposed, that there is a legal remedy for every moral or political wrong. If this were its meaning, it would be manifestly untrue. There is no legal remedy for the breach of a solemn promise not under seal, and made without consideration, etc., etc. The maxim means only that legal wrong and legal remedy are correlative terms, and it would be more intelligibly and correctly stated, if it were reversed so as to stand, where there is no legal remedy, there is no legal wrong." This is the true meaning; *damnum absque injuria* has nothing to do with whether the injury is under the common law, a statute, or a constitutional provision, the injury may be saved from being *damnum absque injuria* as well by a statute or a constitutional provision as by the common law; legal wrong and legal remedy are correlative terms; thus the common law has provided no legal remedy for the breach of a promise not under seal and without consideration, hence there is no legal wrong; but if a statute or constitutional provision were passed establishing a legal remedy, then the breach of such a promise would be a legal wrong, that is, a damage where there is no *legal remedy* is "*damnum absque injuria*,"[3] but the moment a legal remedy is provided, it ceases to be *damnum absque injuria* and becomes a *legal* wrong for those within the legal remedy.

[1] *Hughes* v. *Heister*, 1 Binn. 462.
[2] *Bradlaugh* v. *Gossett*, 12 Q. B. D. 271, 285.
[3] *Shrunk* v. *Schuylkill Nav. Co.*, 14 S. & R. 71, 83.

Considering our Pennsylvania decisions upon this question of damages, this principle must be borne in mind for example, under the General Railroad Law of 1849, where any portion of a man's land was *taken*, the injury to the remaining land was *not* "*damnum absque injuria*," because the statute provided a remedy for such injury, but where no land was taken a similar injury to a neighbor *was damnum absque injuria*, because the statute *only* provided a remedy where one's land was taken; hence the intention of the Constitution of 1874 was to provide a legal remedy where no portion of one's land had been taken—to prevent that being *damnum absque injuria*, which, under the earlier statute of 1849, had been so.

Accepting Mr. Justice STEPHENS' definition of the maxim as correct, the theory that the word "*injured*" in the Constitution means a *legal* wrong in the sense that the word *legal* means the common law only, is not sound; for the words *remedy* and *wrong* are correlative terms, and instead of the legal wrong existing without the remedy, it is the existence of the legal remedy that creates the legal wrong. Now, the Constitution, by providing the remedy, establishes the legal wrong, "*when any man's property is injured*, compensation shall be made."

It has been stated that: "There is a wide distinction between the legal meanings of the words 'damaged' and 'injured,' the one signifying *any* loss of value to property, the other signifying a loss for which an action lies. This distinction is pointed nowhere more forcibly than in the familiar phrase, '*damnum absque injuria.*'" The above, whilst correct, is not fairly stated. It would seem to imply a fallacy; it makes it appear that the word "injured" in the Constitution was meant to refer to a loss for which there was no recovery; this is absurd; the word is used, of course, simply to establish a remedy for those who can avail themselves of it. The maxim means, and cannot mean anything more than this—where there is no legal remedy there is no legal wrong; *damnum absque injuria*—damaged without injury!! Why? Because the common law, a statute or a constitutional provision has not provided a legal remedy, that is to say (1), an injury is only a legal wrong when a legal remedy is provided, and (2), in order that one can avail one's self of the legal remedy, one's right of property must have been invaded

or the special class of injury must have been specially brought within the remedy. The Supreme Court of Pennsylvania has correctly interpreted this maxim, as exemplified in the following cases, wherein it will be seen that the court held that the legislature had intended to provide compensation for injuries only, which would have been remedied at common law, but by examining these cases and in this examination I wish to emphasize strongly the fact that the words of the court should be carefully considered, in connection with (*a*) the words of the statute creating the liability, and (*b*), with the claim of the plaintiff under the statute. Looking at the cases in this light, it will be appreciated that what the court meant was that the plaintiffs in each case had no rights at all, therefore, the remedy was not applicable to them; that they claimed damages for an injury to something to which they had no right, and to which they would not have had a right had the company's works never been constructed. Thus, in *Shrunk* v. *Schuylkill Nav. Company*, 14 S. & R. 71, 83, an injury to a right of fishery, but court replied, you never had a right of fishery, therefore, no common-law wrong; in *Lehigh Bridge Co.* v. *Lehigh Coal and Nav. Company*, 4 Rawle 9, 23, injury to a pier by reason of a flood, but court replied, the flood was the act of God, therefore, no common-law wrong; in *Watson* v. *Pittsburgh, etc., Rd. Company*, 1 Wright 469, in estimating injury plaintiff wished to consider what the lands *would be* worth at some future time, court replied, this is wholly fanciful. The plaintiff also wanted to prove *simply* the depreciation in value of the property, *without* confining witnesses to the direct and necessary consequences of the occupation; but the court replied, this was going too far, for the jury could thus take into the estimate *any* consequences, no matter how remote, and this, moreover, was the duty of the court, to decide if any given claim for damages was within the law. In *Sunbury, etc., Rd.* v. *Hummell*, 3 Casey 99, an injury arising from the risk of fire from a locomotive, court replied, purely speculative, hence no injury at common law; and in *Pittsburgh, etc., Rd.* v. *Jones*, 1 Amer. 204, an injury to a ferry franchise by diversion of business by reason of the railroad tracks crossing the street at which the ferry-boats landed; but court replied, ferry franchise gave no right to land, hence no

injury at common law. Thus in the above cases, by considering the plaintiffs' claims, it will be readily seen that they demanded compensation for injury to things to which they had no right. These cases do *not* hold, had the plaintiffs possessed a right to the things themselves, that an injury to them would not have entitled one to compensation; but, on the contrary, they only hold, having no right to the things in question, of course they could suffer no common-law wrong, and this is the sense in which the expression common-law wrong is used; it is important to note that the cases are not intended to, and, as an actual fact, do not attempt to decide what injuries are common-law wrongs.

But in the following cases, as the legal remedy applied to the plaintiff's claims, the injury was a legal wrong and not *damnum absque injuria;* thus in *Commonwealth* v. *Snyder*,[1] charter provided compensation for interference in any way with any person's rights of property; Snyder claimed damages because the canal company, by erecting a dam across the creek, forced the water back into Back Creek, and from this latter upon his paper-mill, so that he could not use the same for six weeks; the court replied, the legal remedy was applicable to Snyder, hence the injury was a legal wrong. It was *not damnum absque injuria,* because Plum Creek being non-navigable, he had a right of property in it. So in *Barclay Rd. and Coal Co.* v. *Ingham*,[2] Ingham claimed damages as owner of a mill-dam on a non-navigable stream for destruction of the water-power by the erection of an embankment in said stream; court replied, the legal remedy was applicable to Ingham, hence the injury was a legal wrong; it was not *damnum absque injuria,* because the stream being non-navigable, he had a right of property in it. Again, in *Dugan* v. *Bridge Co.*,[3] charter provided not to impair or ob-

[1] 2 Watts 418.

[2] 12 Casey 200.

[3] 3 Casey 303. This case may be considered as the converse of *Shrunk* v. *Schuylkill Navigation Co.;* in neither case did plaintiffs have any absolute right of property; in *Shrunk's case* the claim was denied because the remedy did not provide for compensation for destruction of fishery, whilst in *Dugan's case* the remedy was provided for compensation for impairment or obstruction of navigation, although, the river being a navigable one and therefore a public highway, the legislature could have given the right to obstruct; in the former case there was no recovery, whilst in the latter there was, yet in neither case was there any absolute right of property injured.

struct navigation; plaintiff claimed damages for obstructing his right of passage on the river as a public highway; court replied, the legal remedy was applicable to Dugan, hence the injury was a legal wrong; that the legislature could have parted with the power not to obstruct, but they had not done so, hence company was liable for obstructing.

I have cited these two types of cases at length, because it has seemed to me they illustrate the true meaning of the maxim *damnum absque injuria*, that is to say: (1) An injury is only a legal wrong when a legal remedy is provided, and (2) in order that one can avail one's self of the legal remedy, one's right of property must have been invaded, or the injury for which one claims compensation must have been brought especially within the remedy. There are, of course, a large class of injuries which the constitutional provisions were not intended to embrace, and this type of injury is well illustrated in the following cases, thus, in *Pittsburgh, etc., Rd.* v. *Jones*,[1] loss of business to a ferry company, occurring by reason of the railroad tracks crossing the street at which the ferry-boat landed, the latter having no right to land under the ferry franchise, was clearly not an injury contemplated by the Constitution; so also in *Edmundson* v. *Pittsburgh, etc., Rd.*,[2] carelessness and negligence are not *necessary* results in constructing a railroad; again, in *Searle* v. *Lackawanna, etc., Rd.*,[3] the increased inconvenience and expense there would be in the future working of mines now unopened, but when they should be opened, should not be considered, nor should it be considered as an injury, in estimating the damages, what the property would have been worth at some future time, as was urged in *Watson* v. *Pittsburgh, etc., Rd.*,[4] nor the risk of accidental fire, as in *Sunbury & Erie Rd.* v. *Hummell*;[5] again, as in *Lehigh Bridge Co.* v. *Lehigh Coal and Nav. Co.*,[6] and in *Pittsburgh., etc., Rd.* v. *Gilleland*,[7] where the injury is the result of the act of God, there should be no recovery under the constitutional provision. In other words, there is no relief where the injury is purely speculative, *i. e.*, that which may in the future

[1] 1 Amer. 204.
[2] 1 Amer. 316.
[3] 9 Casey 571.
[4] 1 Wright 469.
[5] 3 Casey 99.
[6] 4 Rawle 9, 23.
[7] 6 Smith 445.

take place, or where there are no rights invaded, or where the injury is common to all persons alike, or where it arises simply from the company doing that which they are authorized to do, independently of committing a nuisance, as loss of trade; thus a railroad may, by carrying freight and passengers, destroy the trade of canal and stage-coach companies, and of innkeepers along the route; these would not be considered injuries for which the Constitution had provided a remedy. This type of injury is nowhere better explained than in *Shrunk* v. *Schuylkill Nav. Co.*,[1] by Chief Justice TILGHMAN, wherein, in examining the act before him, he says: "The next observation that arises is that all injuries mentioned in the act are those which are done to property immediately, such as inundation of land, the swelling of the water into tail-races of mills, the taking away of earth, stone, or other material, or the carrying of a canal or lock through a man's land. These are palpable and direct, so there can be no dispute about the injury. Compensation shall be made for all damage arising from immediate injury to property, but not for any damage where there is no legal injury, which is called *damnum absque injruia.*"

Now the explanation of these words is this: the learned chief justice examines the act to find out what injuries are meant, and he finds any injury by a dam being erected, such as inundation, injury to tail-races of mills, etc., and he correctly concludes that the injury in the act must mean an immediate injury to property, but he does not attempt to define what is an immediate injury to property, he simply finds that the injury complained of was not. The remainder of the opinion deals with the principle, what injuries are too remote to be entitled to compensation? But first it should be stated that the principle is clearly announced by the counsel for the defendant in the following words: "The plaintiff had no right to the fish or the water, and with equal propriety might any one maintain an action who, by the erection of the dam, is deprived of the opportunity of catching a shad above the falls." It will be seen that the chief justice follows this principle for establishing too remote damages, for he says: "There would be no end to damages

[1] 14 S. & R. 71, 83; see also *Proprs. of Locks & Canals* v. *Nashua & Lowell Rd.*, 10 Cush. 385, per SHAW, C. J.

for injuries, considered in the most extensive sense of the word. For not only may the owners of land contiguous to the river complain of injury by the obstruction to the ascent of the fish, but also all other persons living in towns or lands near the river. All these persons feel the loss of fish. All persons accustomed to fish with an angle or a hoop net may truly say they are injured. There are other kinds of injuries too, sustained particularly by owners of lands on the river between Fairmount and the lower Falls; all these persons have lost the benefit of navigation free from toll in batteaux, flats, which was very useful, as it served to carry produce to market and to bring up manure for their lands. Yet it has not been contended that for such injuries compensation is to be made. Suppose the health of the country to be injured by the evaporation from the dams, is compensation to be made for this, the greatest of all injuries? I presume not. Where, then, are we to stop, or what is to be the boundary if we go beyond the limit I have mentioned? I confess I should be at a loss to fix any one. * * * * * The plaintiff *had no property either in the fish or the river*, and he was bound to know the law by which the river remained *public property*, and of course all emoluments from fisheries were precarious." Here the learned chief justice states the principle that there is no recovery where the injury is common to all alike, nor where the right of action is merely personal and not incident to the ownership of the property—these injuries are all too remote—but, on the contrary, that there should be a recovery if the injury is incident to the ownership, if the property is subjected to a perpetual servitude—then the owner's interest in it is *injured*; this is the key-stone to the true principle: *if the property is subjected, by reason of the works to a perpetual servitude, then to the extent of that servitude, is the owner's interest in the property injured.* It has been held in England[1] that noise, smoke, soot, etc., are such servitudes, and that vibrations from passing trains are also such servitudes.[2] Now, if this be so, the question remains, are they such servitudes as the law intends to be compensated? In England this ques-

[1] *Turner* v. *The Sheffield & Rotherman Ry. Co.*, 10 M. & W. 425.

[2] *Hammersmith & City Railway Co.* v. *Brand*, L. R., 4 Eng. & Irs. App. 171. It was not doubted that this was an injury, but it was held there was no recovery under the construction of the statute on another point.

tion came up[1] in the construction of the Land Clauses Consolidation Act and the Railway Clauses Consolidation Act,[2] wherein it was held *injuries inflicted by the construction* meant simply by the *actual* construction, and not by the use as a way-going concern; so, of course, there was no compensation for the vibrations, although

[1] *Hammersmith & City Ry. Co.* v. *Brand*, L. R., 4 Eng. & Irs. App. Cas., 171.

[2] There is one very important thought in connection with the meaning placed upon the word "construction" by the judges in this English case [*Hammersmith, etc., Ry. Co.* v. *Brand, supra*], which could not apply in Pennsylvania; in fact, the point I mean, not existing with us, however, is the one which probably led the English court to hold that the word "construction" meant *the actual* construction, and our courts to hold that the same word meant a way-going concern, thus; in England, Parliament is sovereign [that Parliament is sovereign is made clear in that delightful book, "The Law of the Constitution," by Professor A. V. Dicey; wherein he says (p. 64) "Parliamentary sovereignty is, therefore, an undoubted legal fact. It is complete both on its positive and on its negative side. Parliament can legally legislate on any topic whatever which in the judgment of Parliament is a fit subject for legislation. There is no power which, under the Constitution, can come into rivalry with the legislative sovereignty of Parliament"], hence, Parliament being sovereign, all the judges held, first, that Parliament did that which they had the sovereign power to do, to wit: by authorizing the railway to be constructed and used, they did, by this very act, legalize the nuisance of working the railway; hence it can very readily be seen the effect that this parliamentary sovereignty would have upon the minds of the judges in seeking for a meaning of the word "*construction*," occurring in the very act which legalized the running of trains. It would be almost a solecism, where the words "use" and "construction" are almost indiscriminately used, and where the word "construction," as it appears in the act [see Railway Clauses Consolidation Act, §§ 6, 16], seems to be used in connection with the actual construction of the road, to hold that it meant to apply to the running of trains, the nuisance of which Parliament had the sovereign power to legalize. Lord CAIRNS dissented, taking the broader ground that the word "construction" means a way-going concern, and with him were three out of the remaining eight judges; but I wish to show how the minds of the majority could have been influenced by the principle of parliamentary sovereignty. With us in Pennsylvania, however, the legislature is not sovereign, in so far as it is controlled by the Constitution; hence it cannot legalize any nuisance which the Constitution has not given it the power to legalize; so that the factor which was present to the minds of the English judges in deciding upon the meaning of the word "construction" in an English parliamentary sovereign act, was absolutely absent, and correctly so, from the minds of the members of our Supreme Court, where they had to deal with the same word in our Constitution. They decided the word had a broader meaning than that of a mere actual construction, but meant construction as a way-going concern. That is, our Constitution gave no power to our legislature to legalize any nuisance, but was a check on any such power. The Constitution, standing over the legislature with the sword of Damocles,

the court conceded that the property was subjected to an injurious servitude. Lord CAIRNS dissented from this construction and adopted the broader, more catholic view—injuriously affected by the construction—*as a way-going concern.* Our constitutional provision is somewhat similar to the English statute, and the Pennsylvania Supreme Court has, I think correctly, taken a position similar to that of Lord CAIRNS, that the word "construction" means *the way-going concern.* Of course, this does not mean that the railroad is always liable for damages arising *from the use,* this contention would be absurd, but what it does mean is this: upon paying damages arising from the construction of the road as a way-going concern, and thus having subjected the property to a perpetual servitude, and having paid for this right of servitude, of course it can use it. Had the word "*use*" been resorted to in the Constitution, it would probably have been contended that the road would have been continually liable for these damages, whereas by the use of the word "construction" in the sense of a way-going concern, it follows that whenever a road subjects a property to a perpetual servitude, and pays for the injury resulting from that servitude, it receives in return a perpetual right to charge that property with the said servitude, and, of course, is never again liable for the said use. That the Pennsylvania Supreme Court has held that the word "construction" is used in the sense of a way-going concern, I think is beyond doubt.[1]

says: You can create railroads, you can authorize them to run anywhere, you can authorize them to exercise their powers, but subject to compensation for the injuries they cause. Railroads had, previously to the new Constitution, been liable where land was taken for the injury as a way-going concern, and the people in the Constitution used the word "construction" in that sense.

[1] In *Lycoming Gas Water Co.* v. *Moyer,* 3 Out. 615, if in the "*construction*" of its works any injury should be done to private property, compensation should be made. Moyer claimed damages, because the company tapped a small run, in order to procure *water for its works,* thereby diminishing the flow of water into his race. That is, the water was taken from the race for the company's use as *way-going concern,* yet the charter provided compensation for injury in the "*construction;*" still the court held that Moyer should recover—"*construction*" meant the way-going concern. To the same effect is *City of Reading* v. *Althouse,* 12 Norris 400, under the new Constitution. In *Western Penn. Rd.* v. *Hill,* 6 Smith 460, Hill claimed damages for decrease of the business of the mill, by reason of the danger of driving horses near it, and the danger to persons going to and from the mill. The court said: the direct and

There is another legal principle which requires explanation. "Every man has the right to the natural use and enjoyment of his own property, and if, whilst lawfully in such use and enjoyment, without negligence or malice on his part an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*, for the rightful use of one's land may cause damage to another without any legal wrong." This principle is expressed in the maxim, "*sic utere tuo, ut alienum non lædus*," of which it has been said, the maxim "is no help to decision, as it cannot be applied till the decision is made."

This is very true, but there is an underlying principle illustrating what the courts have considered "the natural use and enjoyment of one's own property." Our own Supreme Court has clearly shown this distinction in the following cases: In *Penn. Coal Co.* v. *Sanderson*, 18 W. N. C. 181, the plaintiff claimed damages for the pollution of a stream running through his land by the "pumpings" out of a mine on the company's work, the said "pumpings" being the necessary result of the natural use and development of the coal property. The court held, in effect, as the property was coal property, the natural use of it was to develop it, and that the removal of the water from the workings of a coal mine was essential to the business of coal mining, as also was its discharge into the natural water courses. In *Pottstown Gas Co.* v. *Murphy*, 3 Wright 257, the plaintiff below claimed damages because the gas from the company's works percolated into his well. The company urged not

immediate results of the "*construction*" of a road over land taken, if injurious, gives title to compensation, and as the court sustained Hill's claim, they must have used the word "*construction*" in the sense of a way-going concern, for that was the only way in which Hill claimed damages. To the same effect is *Hornstein* v. *Atlantic, etc., Rd.*, 1 Smith 87. In *Wilmington, etc., Rd.* v. *Stauffer*, 10 Smith 374, Stauffer claimed damages for the loss of use of his barn, which by reason of its proximity to the railroad, was rendered unsafe to use as a barn from the danger of fire. The court sustained this claim, thus holding the railroad as a way-going concern.

In the above, I have cited a few cases under the new Constitution—where the words used are "*in the construction of their works, etc., etc.,*" and a few cases under the General Railroad Act of 1849—where the words used in providing for damages (see Purdon, p. 1219, § 35), are: "*in consequence of the making or opening of said railroad, etc., etc.,*" so it is clear beyond question, that the Supreme Court have interpreted the words "*making or opening*" and "*construction,*" as meaning a way-going concern.

liable, because authorized by the legislature to carry on this business, that is, to use their own property for the purpose for which they had been incorporated, but the court held they were liable for damages.

Now what is the difference between these two types of cases? Neither was possessed of eminent domain, so the question was clearly, what is the proper use of one's property? One was liable in damages for the use he made of his property, whilst the other was not. The coal company's use of its land was the absolute, proper, and legitimate use of it, it was the only profitable and economic use to which the land could be placed, and the bringing the water to the surface of the mine and allowing it to find the natural water-courses was a necessity of the making a proper use of the land, hence the doctrine, *sic utere tuo, ut alienum non lædas*, was complied with; in the case of the gas company it was not a clear legitimate use of the land; the percolating of the gas was not the outgrowth of the use, but it was something which the gas company produced on the land, and, therefore, for the gas company to place their works in such a position as to injure a neighbor was their own deliberate act and was not the absolute economic legitimate use of their own land as land, hence liable. Again, in a late English case in the House of Lords, *Hammersmith, etc., Ry. Co.* v. *Brand*, L. R., 4 Eng. & Irish App. 195, it was shown that a railway in a city was not a natural use of land. Mr. Justice BLACKBURN, saying: "I think it is agreed *on all hands* that if a person not authorized by act of parliament,[1] so to do, erected a railway or any other private road on his own land, and then worked it by running locomotives and trains or any other species of carriages upon it, so that the vibrations and noise were to such an extent as really to be annoying a neighbor, that injury would be a nuisance."

What is a nuisance? It is subjecting another's property "to a servitude whereby the owner's interest in the same is injuriously affected. It is the continuous doing of something which interferes with another's health or comfort in the occupation of his property, such as carrying on a noisy or offensive trade. It is not necessary to constitute private nuisance that the acts or state

[1] We have previously shown that parliament is sovereign and can legalize a nuisance.

of things complained of should be noxious in the sense of being injurious to health. It is enough that there is a natural interference with the ordinary comfort and convenience of life—the physical comfort of human existence—by an ordinary and reasonable standard." Pollock on Torts 330 *et seq.* Smoke, unaccompanied with noise or noxious vapors; noise alone; offensive vapor alone, although not injurious to health, may severally constitute a nuisance to the owner of an adjoining or *neighboring* property.[1] I have placed the word "neighboring" in italics because it is very important to note that nuisance upon principle and authority, cannot be confined to an *adjoining* property alone. From the very definition of the word it will be seen that it extends to all who suffer from it, "it is the continuous doing of something which interferes with another's health or comfort in the occupation of his property." Now if the same thing which is a nuisance to an adjoining owner is established to have interfered with the health and comfort of another (but not an adjoining owner), in the occupation of his property, upon what principle is one to recover and the other not? There is none!! The true principle is—a nuisance is a nuisance to all who experience it, without any question of *adjoining* or *neighboring* owner. Of course, an *adjoining* owner may suffer a nuisance which does not affect a *neighboring* owner, but this is a question of fact, not of principle.

There is another important question in proving an actionable nuisance, and that is the *appropriateness* of the place for the work carried on. Upon this point, JESSEL, M. R.,[2] said he followed Mr. Justice MELLOR, in *St. Helens' Smelting Co.* v. *Tipping*, 11 House of Lords Cas. 642, where the latter held, an actionable nuisance was the producing sensible discomfort to one person. Then he went on to say that in an action for nuisance to property arising from noxious vapors, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. The jury ought to consider all the circumstances, including *locality*, and that with respect to this, it was clear that in counties where great works had been erected and carried on, persons must not stand on their

[1] *Crump* v. *Lambert*, L. R., 3 Eq. 412, per ROMILLY, M. R.

[2] *Salvin* v. *North Brancepeth Coal Co.*, L. R., 9 Ch. App. 705.

extreme rights and bring actions in respect of *every matter of annoyance*, for if so, the business of the whole county would be seriously interfered with. Lord CRANWORTH said, upon the question of appropriateness of place,[1] "I remember trying an action for an injury from smoke, in the town of Shields. It was proven that smoke did come and interfere with the plaintiff, but I said, you must look at it not with a view to the question whether, abstractedly that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields, because if it only added in an infinitesimal degree to the quantity of smoke, I held that the state of the town rendered it altogether impossible to call that an actionable nuisance." This is the same principle which lead the court below in *McCaffrey's App.*,[2] to refuse the injunction to stop the works.

But independent of the fact of a person going to a nuisance or of a nuisance previously existing—as smoke in Shields—where the smoke only added to the nuisance in an infinitesimal degree, there yet remains a well-defined principle, which governs the question. As was said by Lord SELLBORNE, L. C.,[3] "Many houses have stables attached to them, but a man who turns the whole ground floor of a London house into a stable, or otherwise keeps a stable so near a neighbor's living rooms that the inhabitants are disturbed all night, does so at his own risk; in making out a case of nuisance of this character, there are always two things to be considered—the right of the plaintiff and the right of the defendant. If either party turns his house, or any part of it to unusual purposes, in such manner as to produce a substantial injury to his neighbor, it appears to me that that is not, according to principle or authority, a reasonable use of his own property, and his neighbor showing substantial injury, is entitled to protection."

A most important point in this question of appropriateness of place, is this—to whom should this question be left? In the case I have lately referred to[4] Mr. Justice MELLOR put the following question to the jury—was the place appropriate? Although

[1] *St. Helen's Smelting Co.* v. *Tipping*, 11 House of Lords 652.
[2] 15 W. N. C. 12.
[3] *Ball* v. *Ray*, 8 L. R., Ch. App. 469.
[4] *St. Helen's Smelting Co.* v. *Tipping*, *supra*.

the correctness of this was most vehemently assailed, yet it was the unanimous opinion of the House of Lords that the question was correctly put.

Is a city an appropriate place in which to run locomotives and trains of cars 1,440 movements per day, with the accompanying noise, soot, smoke, cinders, etc., etc.? I should think the question hardly admitted of doubt. It has been decided in recent cases in England in the negative, as already stated. Besides, if there is a doubt, the question should be left *to the jury.*

A railroad authorized by the legislature to run into the heart of a city, although creating a nuisance, could not be restrained from carrying out that which the legislature has willed it to carry out, for it would be a *reductio ad absurdum* to permit an individual to prevent that being done which the legislature intended to be done at all events.[1] As the nuisance cannot be restrained damages are recoverable unless the legislature is sovereign to legalize the nuisance;[2] in England parliament is sovereign in all things; in Pennsylvania the legislature on this particular point is subordinate to the Constitution.

Briefly summarizing my conclusions, I find as follows, viz.:

(1). By the amended Constitution of 1838 it was provided that compensation should be made for land actually taken; at that time, however, public highways were ordinary roads—railroads not yet having come into use—hence it was felt that the Constitution, by providing compensation for land actually taken, was affording an adequate remedy.

(2). But later on, between the years 1838 and 1849, railroads appeared, and it was soon found by the decisions of the courts that the Constitution of 1838 had not provided adequate relief, hence the General Railroad Act of 1849.

(3). When these general laws were tested in the courts they also were found wanting. They did much toward remedying the evil, it is true, but they did not go far enough; recovery under

[1] *Hammersmith, etc., Rd.* v. *Brand, supra,* per Lord CAIRNS, L. C.

[2] All that is said upon this subject in Wood's Railway Law, §§ 212 and 213, must proceed from the English cases cited, where parliament is sovereign to legalize a nuisance, or from cases in States where the legislature is sovereign upon this point, not being controlled therein by a constitutional provision. It is positively inapplicable to Pennsylvania, where the legislature is so controlled.

these laws was granted for land taken; this, however, was obligatory under the Constitution of 1838; and also damages for injury to the remaining land where any land had been taken. But where *no land* was taken there was no recovery for any damage. This was thoroughly inequitable; these corporations for the public good could be authorized to construct their roads wherever seemed advisable to their corporators, and being for the public good, even though they produced a nuisance, they could not be restrained from carrying out their purposes, and under the laws they were not liable for damages, even if an acknowledged nuisance, unless they had taken *land;* to remedy this lack of equality provisions further extending the remedy were incorporated in the new Constitution of 1874.

(4). The phraseology of the new Constitution is peculiar. It is not, like the amended Constitution of 1838, *corporations shall not be invested* with eminent domain, but, *corporations invested with* eminent domain, that is, it designates, as subject to the remedy, the class of corporations which are invested with eminent domain. Who are so invested? Why, those who accomplish a public benefit—railroads, canals, etc., etc.—these are liable to produce a distinct and particular injury, peculiar to themselves, and it was against these distinct and peculiar injuries that the Constitution was intended to provide a remedy; then follows the remedial clause, shall make compensation for property taken, injured, or destroyed.

(5). The maxim, *damnum absque injuria,* does not mean that an injury, in order to be a legal injury, must be one within the common law; it only means that legal wrong and legal remedy are correlative terms; it would be more correctly stated, where there is no legal remedy, there is no legal wrong; it has nothing to do with whether the injury is under the common law, the injury may be saved from being *damnum absque injuria* as well by a statute or a constitutional provision as by the common law.

(6). In all the cases in our Supreme Court, upon the question of damages, the court used the maxim *damnum absque injuria,* to show that the plaintiffs were *not* within the remedy. There is no intention, not even the suspicion of one, to decide what are common-law wrongs. A common-law wrong may still be *damnum absque injuria* unless there is a remedy for the plaintiff; instance,

a quasi public corporation[1] be exempted from all damages by a sovereign legislature.

(7). There are, of course, a large class of injuries for which there should be no recovery under the constitutional provision, thus:

(a) Loss of business (1) where the railroad has invaded no right of property; or (2) where the loss of custom results merely from the railroad carrying on its business, as loss to turnpikes and canals, to taverns or public houses left in obscurity, to stage-coach proprietors and companies, to owners of dwelling-houses, manufactories, wharves, and all other real estate in towns and villages for which the line of travel has been diverted. (b) Carelessness and negligence have their own remedies, and are not within the constitutional provision. (c) Purely speculative injuries cannot be considered. (d) Or injuries resulting from the act of God. (e) Or where the injury is common to all alike, this, of course, being too remote.

(8). But the true principle is, where the property is subjected to a perpetual servitude, the owner's interest in the property to the extent of the servitude is injured; in other words, where there is an injury to property, the direct result of the company's operations, the property is legally injured, save as qualified by the next proposition, to wit: what is the natural use and enjoyment of land, or, in other words, what is an actionable nuisance?

(9). The underlying principle is, where a neighbor's property is subjected to a servitude which is not *appropriate to the place* where it occurs, and which is not the natural use of the land, it is a legal nuisance.

(10). Appropriateness of place would be illustrated by smoke in a large manufacturing place like Pittsburgh—in Pennsylvania, or Shields—in England, or again, by the publishing business in *McCaffrey's App.*, in Philadelphia, in so far as restraining it by an injunction.

(11). Is a steam railway and 1,440 movements in the heart of a city, in an appropriate place? Mr. Justice BLACKBURN, in a very recent case in the House of Lords said, in effect, it is agreed *upon all hands* that it is not. Again, in another case, in which Mr. Justice MELLOR, in the court below—nuisance from smoke from smelting-works—put to the jury the question: Is

[1] *Pittsburgh, etc., R. R. Co.* v. *Jones, supra.*

the place appropriate? It was unanimously held in the House of Lords, that the question was properly put to the jury, and it was for them to decide, and not for the court—the appropriateness of the place.

(12). A nuisance, *per se*, on principle, is never confined to an adjoining property, but extends to all who establish substantial injury. Upon what principle could noise, smoke, soot, burning cinders, dust, dirt, odors, and offensive vapors, be confined to an adjoining property, when one in the neighborhood establishes the fact that he has experienced the same substantial injury?

(13). A nuisance created by the legislature—a railroad running into a city—must continue to exist for the public good, hence cannot be restrained by an injunction, for it would be a *reductio ad absurdum* to permit an individual to prevent that being done, which the legislature intended to be done at all events.

(14). Hence, as the nuisance cannot be restrained, damages are recoverable, *unless* the legislature was *sovereign*, to legalize the nuisance.

(15). In England, parliament is sovereign in all things; with us in Pennsylvania, the legislature on this particular point is subordinate to the Constitution. The legislature can permit the nuisance to be done at all events, but the Constitution says: subject to the payment of damages.

(16). Noise, smoke, soot, dirt, gases, etc., and the shifting of 1,440 trains per day in a city, near residences, is clearly a nuisance, for it is clearly not an appropriate place for the same.[1]

(17). And, finally, the place not being appropriate and substantial injury being established, then upon principle and universal authority, the question whether one is an adjoining or neighboring owner should be unheard of, and it would follow that recovery should be granted.

For these reasons, it seems that the late decision in *Pennsylvania R.l.* v. *Lippincott*, was an error. This decision is contrary to all rules of construction. I do not mean, being a remedial

[1] In this case, there can be no doubt that the place was not appropriate, but had there been a doubt, or in any case where there is a doubt, the question of appropriateness should be left to the jury. This principle was abundantly sustained in a hotly-contested case in the House of Lords. Note 2, p. 16.

statute, it should be favorably construed—let it be strictly construed, I accept this; but there still remains the well-known rule—of such universal application as to have become axiomatic—that the words of a Constitution should be taken in their common-sense, every day meaning. It has been said, in effect, from our Supreme Bench, we care not what the members of the Constitutional Convention took the words of the Constitution to mean, but the question is: What do we take them to mean? But it must be remembered that the axiomatic principle is, that the words of a Constitution, voted upon by the people, shall be construed to have been used by them in their ordinary sense. But we even waive this also, yet the decision still remains unsound; because when property is subjected to a servitude, the owner's interest in it, to the extent of that servitude, is injured, and if the servitude is of the character of a *nuisance*, whether a legal injury will depend upon *the appropriateness of place*. If there is any doubt upon this point, the question of *appropriateness* should be left to the jury,[1] and finally, the place being inappropriate, the nuisance existing, then there is no principle or authority upon which the nuisance can be confined to an *adjoining* owner, when the fact is established that a *neighboring* owner has experienced the same servitude.

In conclusion, I wish to disclaim any intention of attempting to decide, from a legal point of view, whether a steam railway coming into the heart of a city is a nuisance, or not. I only insist that this depends upon the *appropriateness of place and of time*, which questions should be left to the jury.

R. Mason Lisle.

Philadelphia, October, 1887.

[1] There could hardly be much doubt that a steam railway running into the heart of a city, with its noise, dust, dirt, soot, cinders, etc., and 1,440 movements per day, was not in an appropriate place. It has been so conceded in the late English cases, already referred to. But if there were a doubt, the point should be left to the jury. So long as trial by jury is willed by the people, let them do the work belonging to them. In a common-law action questions of fact clearly belong to the jury and they ought to decide them. In the case of an injunction to restrain, a different principle is applicable: *McCaffrey's App.*, 15 W. N. C. 12.