CONSEQUENTIAL DAMAGES IN EMINENT DOMAIN IN PENNSYLVANIA.*

CONSTRUCTION OF A SEWER IN A STREET.

The construction of a sewer in a street or road is not an exercise of the power of eminent domain, as there is no taking of private property. Such construction is, however, well within the scope of the public use of a highway.[146] The damage if any caused to abutting property in this case was not the subject of redress before the Constitution of 1874 in the absence of statutory provision.[147]

A municipal corporation constructing a sewer is, however, a corporation exercising the power of eminent domain, but is not exercising the power of eminent domain by the construction in question. Such a corporation is clearly liable under the constitution for "property taken, injured or destroyed by the construction or enlargement" of a sewer, which is well within the definition of "works, highway or improvements."[148] The remedy was formerly by action of trespass. The cases are as follows:

In *Butchers' Ice & Coal Co.* v. *Philadelphia,*[149] the plaintiff recovered damages in an action of trespass for obstruction of his wharf by reason of a sewer constructed by the City of Philadelphia under ordinance passed after 1874. The sewer was

*Continued from the December issue, 65 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 145.

[146] Wood v. McGrath, 150 Pa. 451 (1892); Carpenter v. Lancaster, 250 Pa. 541 (1915). Where the sewer is constructed outside of the limits of a highway across private property, as is sometimes the case, there is obviously a taking and to that extent an exercise of the power of eminent domain.

[147] Malone v. City, 2 Penny. 370 (1882).

[148] Township authorities may construct sewers and assess the cost of construction under the provisions of the Act of Feb. 23, 1905, P. L. 22. In Anderson v. Lower Merion Township, 217 Pa. 369 (1907), a bill in equity by property owners to restrain the collection of sewer assessments against their properties was dismissed.

[149] 156 Pa. 54 (1893).

constructed entirely on the land of the city, which land had not been acquired under the power of eminent domain. The mouth of the sewer opened into a dock alongside of plaintiff's wharf and the discharge from the sewer filled up the dock and interfered with access to his property. It was held that the city was clearly liable under Art. 16, Sec. 8, even though there was no question of negligence. The injury, it will be noted, might have been avoided by the extension of the sewer beyond the plaintiff's wharf line.[150]

In *Ladd* v. *Philadelphia,*[151] there was an action of trespass to recover damages for injuries to a dwelling house caused by the construction of a sewer.[152] The plaintiff was allowed to recover damages which were the direct and proximate result of the construction of the sewer, irrespective of negligence. It was argued in this case that the city was not liable because there was no exercise of eminent domain in building the sewer, and that therefore Art. 16, Sec. 8, did not apply. The argument was not even noticed in the opinion of the court, although it must be confessed it has great force. The liability in such a case is now provided for by the Act of May 16, 1891.[153]

[150] This case overrules decisions to the contrary prior to the Constitution of 1874. See Malone v. City, 2 Penny. 370 (1882).

[151] 171 Pa. 485 (1895).

[152] There was an agreement of counsel in this case as to form of action. Without this agreement it probably should have been brought under the Act of May 16, 1891, P. L. 75, which was in force at that time.

[153] P. L. 75. This act provides that viewers shall be appointed who shall assess damages and benefits and the cost of the sewer and also provides a method of collecting the cost by a lien on the property. The remedy of the property owner is exclusively under this statute unless there is a deviation from the line described by the ordinance authorizing the construction of the sewer, in which case, if the property owner petitions for viewers he waives the tort and is entitled only to compensation. Garland Chain Co. v. Rankin Boro., 226 Pa. 389 (1910). The property owner is entitled to the judgment of the viewers as to damages, benefits and the cost of the sewer. Wheeler Ave. Sewer, 214 Pa. 504 (1906). As the Act of June 15, 1871, P. L. 391. Sec. 1, prohibiting the assessment of damages against owners of property adjoining or in the vicinity of the land, appropriated for public use, except in the case of roads, streets or highways, is not repealed by the Act of May 16, 1891, P. L. 75, the viewers appointed to assess damages for property taken for a sewer cannot assess benefits generally without regard to the cost of the sewer and exceptions to such a report will be sustained. Mill Creek Sewer, 196 Pa. 183 (1900). No property can be assessed for a sewer except property abutting on the street in which the sewer is constructed. Whitman v. Reading, 169 Pa. 375 (1895); Park

In *Chatham Street,*[154] proceedings were instituted under the Act of May 16, 1891,[155] to assess damages and benefits for injuries to property resulting from the construction of a sewer in Chatham Street. The question involved in the case is as to the measure of damages, and the court said that they were to be assessed as of the date of the completion of the sewer. Therefore no damages were recoverable in the proceedings for neglect of a duty after the completion of the improvement. The city argued in this case that the Act of May 16, 1891,[156] was intended for and applied only to cases of exercise of the power of eminent domain, and where the city rendered itself liable outside of eminent domain, the remedy should be by trespass unless some other statutory remedy was provided.[157] The argument did not prevail. The court said the damages were such as were the direct, immediate and necessary consequences of the construction of the sewer. It is to be noticed that this argument is very much the same as that urged when it was first sought to invoke the application of the provisions of Art. 16, Sec. 8, to the case of the construction of a sewer independently of any act of assembly.[158]

The construction of a sewer is an executive function conferred upon the local government by the legislature and not subject to judicial review. Therefore, in the absence of negli-

Ave. Sewers, 169 Pa. 433 (1895); Colwin Boro. v. Tarbottom, 19 Pa. Super. Ct. 414 (1899). There is no recovery for the cost of reconstruction. City of Erie v. Russell, 148 Pa. 384 (1892); West Third St. Sewer, 187 Pa. 565 (1898). The exemption in the charter of a cemetery company may be set up against a municipal lien for sewer construction unless the exemption is clearly repealed. Uniondale Cemetery Co.'s Case, 227 Pa. 1 (1910). We have noted only a few of the decisions under this statute for the purpose of more clearly defining the main subject of discussion.

[154] 16 Pa. Super. Ct. 103 (1901).

[155] P. L. 75.

[156] P. L. 75.

[157] Citing, Stork v. Phila., 195 Pa. 101 (1900).

[158] Fyfe v. Turtle Creek Borough, 22 Pa. Super. Ct. 292 (1903) where the construction of the sewer deprived the owner abutting on the street of lateral support. The court held that the effect of the provision of Article 16, Section 8, of the Constitution was to change the common law rule as to lateral support in a case of this kind and impose a liability for damages for the removal thereof. The same rule was laid down as to the measure of damages as in Chatham Street, 16 Pa. Super. Ct. 103 (1901).

gence, the city is not liable because the sewer is insufficient in capacity to carry off surface water. The leading case on this point is *Baer* v. *City of Allentown*,[159] where an abutting owner brought trespass against the city under Art. 16, Sec. 8, to recover damages caused by water backing up on the street in front of his premises caused by a sewer (which was constructed by the city) being insufficient to carry it off. Reeder, P. J., in the court below, said (affirmed on appeal), "In order to be entitled to recover under the constitutional provision referred to, there must be an actual and immediate depreciation in the value of the property following immediately upon the construction complained of as to constitute a material injury to the value of the property." The plaintiff did not complain that the construction of the sewer depreciated the value of his property, but that the city officials were guilty of an error of judgment, resulting in the construction of an inadequate sewer by reason of which the water was dammed back on plaintiff's property.[160]

The distinction between these cases is not apparent. If property is damaged by flood from an inadequate sewer, there is no right of recovery. If it is damaged by water flowing from the sewer, the property owner can recover.

McCollum, J., in *Butchers' Ice & Coal Co.* v. *Philadelphia*,[161] distinguished the cases as follows:

"In the former the claims for damages were founded on the alleged inadequacy of the sewers to carry off the surplus water during heavy showers, and in the latter the claim rests on the undisputed fact that access to the plaintiff's wharf was obstructed by deposits of foul matter discharged through the sewer."

It is beside the case to say that in one case the plaintiff claims depreciation in value and in the other claims damages caused by an error of judgment. In each case there is an error of judgment, and in each case depreciation. The true distinction

[159] 148 Pa. 80 (1892).

[160] This principle has been repeatedly affirmed since: Carr v. Northern Liberties, 35 Pa. 324 (1860); Sullivan v. Pittsburgh, 5 Pa. Super. Ct. (1897); Collins v. Philadelphia, 93 Pa. 272 (1880); Fair v. Philadelphia, 88 Pa. 309 (1879); Bealafeld v. Boro. of Verona, 188 Pa. 627 (1898). It is perhaps surprising that so many cases have arisen on a point of law so clearly ruled. It is probable, however, that in most of these cases the plaintiff tried to prove negligence and failed.

[161] 156 Pa. 54 (1893) at 58.

is, perhaps, to be found by applying the exact words of the constitution which confers a remedy for damages caused by the construction or enlargement of the works. When the sewer is inadequate, the damage results from the operation and is, therefore, not within the words of the constitution. The sewer after it is constructed is too small to carry off the water, its operation is inadequate. In the other case, the sewer makes a deposit immediately after it is constructed, which deposit results immediately from the construction of the sewer and not from the operation.

The provisions of the constitution, however, apparently do not apply to a case where the work is done in the exercise of the police power. In *Betham* v. *Philadelphia*,[162] a suit was brought against the city for damages caused by the negligent construction of a sluice and dike. The court held that the city was not under any statutory duty or power to build the sluice except in so far as it could do so in the exercise of its general police power. The power to construct the dikes in the case in question had been vested in a private corporation by the Commonwealth by an act of assembly, which the court said the Commonwealth had passed in the exercise of its police power. The city could not do what it did except in the exercise of the same power.

The same rule of law applies between a city and property owner on the outskirts of a city as applies between two individual owners of land. The city in its position as an owner of the city boundaries is entitled to the natural, profitable and usual use of its land and is not liable to such property owner for damages caused by an increased flow of surface water over, or on to, his property arising merely from changes in the character of the surface caused by the opening of streets, building of houses, *etc.*, in the ordinary and regular course of the expansion of the city.[163]

[162] 196 Pa. 302 (1910).

[163] Strauss v. Allentown, 215 Pa. 96 (1906). See obscure case of Frederick v. Lansdale Borough. 156 Pa. 613 (1893), where the increased flowage appears to have resulted directly from the opening of a street and the right of the property owner to recover was sustained.

In the case of negligence, the public authorities are liable in an action of trespass.[164]

A riparian owner may claim damages from the city for the polluting of a stream by discharging contents of a sewer into it, in which case the proper remedy is trespass.[165] But the city is not liable for alleged contamination of a well from the sewage in the stream, because the connection between the discharge into the stream and the contamination of the well is too remote.[166]

THE LAYING OUT OF A STREET WITHOUT OPENING.

It frequently happens that public authorities will place a street or road upon a public plan and then some interval of time will elapse between the laying out and the opening.[167] In many of these cases, the property owner will be injured and his property depreciated in value by the presence of the unopened street over his land. This injury is intensified by the statutory provisions which prevent the owner from recovering damages for the removal of buildings erected on the ground covered by the proposed street after it has been duly laid out.[168] It seems perfectly clear, although there is no express decision, that before the Constitution of 1874, the damages in such case

[164] Negligence in failure to repair a sewer causing escape of sewage on plaintiff's property. Betterly v. Scranton, 208 Pa. 370 (1904); Ansley v. Scranton, 218 Pa. 113 (1907), question here as to plaintiff's contributory negligence. Negligence in allowing obstructions to remain in sewer causing overflow: defence that overflow was caused by an extraordinary storm. Boehm v. Bethlehem Boro., 4 Pa. Super. Ct. 385 (1897). Negligent construction of water pipe resulting in escape of water on plaintiff's property. Borough, however, not liable for negligence of an independent contractor. Gunther v. Boro. of Yorkville, 3 Pa. Super. Ct. 403 (1897). Negligent construction of sewer inadequate to drain water shed resulting in overflowing plaintiff's premises. Gift v. Reading, 3 Pa. Super. Ct. 359 (1897).

[165] Carpenter v. Lancaster, 212 Pa. 581 (1905). No reference to Constitution of 1874.

[166] Wharton v. Bradford City, 209 Pa. 319 (1904).

[167] In the case of South 12th Street, 217 Pa. 302 (1907), forty years elapsed between the laying out and the opening.

[168] Act of Dec. 27, 1871, P. L. (1872) 1890, applying to City of Philadelphia, and Act of May 16, 1891, P. L. 75, Sec. 12, of general application throughout the state. The constitutionality of the Act of 1871 was affirmed in the case of Harrison's Est., 250 Pa. 129 (1915), s. c. 23 D. R. 605.

could not be recovered before the street was opened except under the provisions of an act of assembly.[169]

The question whether Article 16, Sec. 8, of the Constitution confers a right to recover damages for the mere laying out has never been squarely decided.

In *Bush* v. *McKeesport*,[170] a property owner in the city of McKeesport petitioned for the appointment of viewers under the Act of May 16, 1891,[171] to assess damages caused by a street laid out over his property but not opened. The city filed an answer setting out that the Act of 1891 made no provision for the recovery of damages for the mere laying out of a street. The court below entirely overlooked the issue raised by this answer and dismissed the petition on the ground that the mere laying out of the street on the city plan did not, under the law, constitute such taking or injury as gave the court the power to assess damages therefor. The Supreme Court, on appeal, affirmed in a short and unsatisfactory *per curiam* opinion, on the ground that the property of the petitioner had not been taken or injured within the meaning of the provision of Art. 16, Sec. 8, of Constitution of 1874.[172] This is a curious de-

[169] There are several cases referred to in this connection which do not exactly decide what they are commonly supposed to do, and to which some attention should be given. In the District of the City of Pittsburgh, 2 W. & S. 320 (1841), the legislature had, by special act of assembly, directed certain land adjoining the City of Pittsburgh, to be surveyed as a city district, and provided a method of laying out streets, *etc.* Certain of the inhabitants objected to the map made in pursuance of the act on the ground that the act of assembly was unconstitutional. It is to be noted that this was a mere objection to the laying out of the street, and not an attempt to recover damages for the same. The Supreme Court held, in an opinion by Kennedy, J., that the Constitution conferred the right to take property, that the laying out of the streets was not a taking, and that the act provided a method of assessing damages when the streets were actually opened. In Forbes St., 70 Pa. 125 (1871), proceedings were taken to assess damages for a street opened which had been laid out under the act of assembly considered in the case of the District of the City of Pittsburgh. The Supreme Court sent the case back for further proceedings, saying, *inter alia*, that where an act of assembly so provides, the owner of property through which a street is opened, is not entitled to recover damages for removal of buildings erected in the bed of the street after it was laid out. As both these cases arose before the Constitution of 1874 and under a special act of assembly, they are not in point.

[170] 166 Pa. 57 (1895).

[171] P. L. 75.

[172] This case was obviously hastily decided. The first section of the

cision. Even if the constitutional provision did not extend to such an injury, the legislature would undoubtedly have power to impose liability by act of assembly, and the question was squarely raised by the answer of the city whether such liability was imposed by the Act of 1891.[172a] This the court entirely overlooked. If the liability had been imposed by the act of assembly in question, then any reference to the constitutional provision was entirely out of place. If the act of assembly did not impose a liability for damages caused by such injury, then any reference to the provisions of the constitution was in like manner, out of place, because in the absence of statutory provision the remedy of the property owner injured is by an act of trespass, and the question whether the constitutional provision would extend to such a case would not be before the court for decision until such an action in trespass was brought.

Strangely enough, the *dictum* of this case was accepted by the profession, and no attempt was ever made squarely to raise the question by bringing an action of trespass. The injustice which frequently resulted to the property owner, particularly in connection with the Parkway in Philadelphia, attracted attention, and the legislature attempted to confer a remedy against cities, counties, boroughs and townships, by the Act of May 28, 1913.[173]

act authorizes municipalities to lay out, open, *etc.*, a street and confers a right to recover damages therefor. It is difficult to see how more appropriate language could be used to describe the injury inflicted by the plotting of the street without opening.

[172a] P. L. 75.

[173] P. L. 368. The text of the act is as follows:

Section 1. Be is enacted, *etc.*, That the right to damages against cities, counties, boroughs, or townships, within this Commonwealth, is hereby given to all owners or tenants of lands, property, or material abutting on, or through which pass, roads, streets, lanes, or alleys, injured by the laying out, opening, widening, vacating, extending or grading of said roads, streets, lanes or alleys, or the changing of grades or lines thereof, by said cities, counties, boroughs or townships; the construction and the vacating by said cities, counties, boroughs or townships of bridges, and the piers, abutments, approaches, embankments, slopes, or causeways therefor, or leading thereto; and the construction of sewers by said cities, counties, boroughs, or townships in, over, upon, along, or through said lands, property, or material.

Section 2. That all juries of view appointed, or which shall hereafter be appointed, under existing laws, for assessing damages or benefits for

No reported case has been found of an attempt to take advantage of this act. The language is involved and obscure. By the first section, the right to damages is apparently conferred on the owners of the property through which passed a road, *etc.*, injured by the laying out, *etc.*, of said road. Does the word "injured" refer to the road or to the owner of the property? If a road must pass through the property before the property owner is one of those contemplated by the act, how can he ever recover for the laying out of the road? What the legislature probably meant to say was something like this: Whenever any road or alley is laid out, opened or widened, *etc.*, by any city, county, borough or township within the Commonwealth, any owner or tenant of land and property, *etc.*, abutting on said road, *etc.*, shall have a right to recover from any of said cities, *etc.*, damages caused by such laying out, opening, *etc.*

The second section of the act is also ambiguous. As it is only a jury of view appointed under existing laws, who are authorized and directed to assess the damages provided for in section one, no damages can be recovered for the mere laying out, except where there is already an act authorizing such a recovery. If this is so, the statute does not add anything to the existing law. Probably the most that can be said for the act is that it directs any jury of view appointed to assess dam-

taking, using, occupying or injuring lands, property, or material, are hereby directed, and it shall be their duty, to assess the damages provided for in section one of this act, if any, against said cities, counties, boroughs, or townships, as the case may be, and the benefits, if any, in connection therewith, and make report thereof as under existing laws.

Section 3. That the right of appeal to the proper court of common pleas from said report, and the right of trial by jury in said court of common pleas, and the right to file exceptions to said report, are hereby given to any party or parties not satisfied with said report, in accordance with proceedings under existing laws.

Section 4. That after disposal of exceptions, or verdict and final judgment, any interested party or parties may have an appeal to the Superior Court or Supreme Court, as in any other cases.

Section 5. That the provisions of this act shall apply to all existing and future proceedings.

Section 6. That all acts, or parts of acts, inconsistent herewith, are hereby repealed.

Confer, also, Act of June 7, 1915, P. L. 398, providing that an ordinance to open a park or parkway in cities of the first-class shall be considered an actual appropriation of the land within a certain time after its passage.

ages for the opening of a street, also to assess damages which had been previously incurred by the mere laying out without an opening.

In *Philadelphia Parkway*,[174] an owner of property situate within the lines of the Parkway as laid out by the city of Philadelphia petitioned the Court of Quarter Sessions for appointment of viewers to assess damages caused to his property.[175] The Parkway had not yet been actually opened nor had, apparently, any ordinance been passed authorizing the opening over the property of the petitioner. The court below quashed the petition, and, on appeal, the Supreme Court reversed. The city of Philadelphia is authorized to exercise the power of eminent domain for the purpose of opening the Parkway by the Act of June 8, 1907,[176] which provides that damages shall be assessed as provided in the Act of June 8, 1895.[177] By this act the proceedings are in the Common Pleas. The Supreme Court decided [178] that this act did not repeal the previous legislation applying to the city of Philadelphia relating to the assessment of damages for the opening of streets, and vesting jurisdiction in the Court of Quarter Sessions. The property owner may therefore proceed either in the Common Pleas under the Act of June 8, 1895,[179] or in the Quarter Sessions.

[174] 250 Pa. 257 (1915), reversing 24 D. R. 184 (1915), where the court dismissed the petition on the authority of *In re* South 12th St., 217 Pa. 362. In this case the street had been on the city plan for forty years before the opening, after which proceedings to assess damages were instituted, in which it was held, (1) that the damages were to be assessed with reference to the market value of the land at the time of the opening, and not at the time of the laying out, which latter was not a taking; (2) that no account is to be taken of the circumstance that under the statutes no compensation can be recovered for buildings erected on the bed of the proposed street after the same had been plotted.

[175] The petitioner relied expressly on the Act of May 16, 1891, P. L. 75, which, however, did not authorize the proceedings because (a) it confers jurisdiction only on the Common Pleas; (b) it does not apply to cases of street openings in Philadelphia. *In re* Orthodox Street, 29 W. N. C. 411 (1892). This does not appear in the report but is set out in the petition on file.

[176] P. L. 466.

[177] P. L. 188.

[178] *In re* Opening of Parkway, 249 Pa. 367 (1915).

[179] P. L. 188.

The statutes in force relating to the opening of streets by proceedings in the Quarter Sessions in Philadelphia, all clearly provide that damages shall be assessed only where the street is open or an ordinance to open is passed, and the acts have been uniformly so construed.[180] The court overlooked these statutes;

[180] (1) The Act of June 13,, 1836, P. L. 556, as supplemented and amended by the Act of March 16, 1866, P. L. 224, which is the general road law of the state, provides (in Sec. 7) that the owner of the land through which the road is opened may within one year from the opening, petition for damages. The one-year limitation was abrogated by Art. 3, Sec. 21, of the Constitution of 1874. Grape St., 103 Pa. 121 (1883). The rest of the provision, however, that the petition may not be presented until the road is open, is still in force, as it was before the Constitution of 1874. Grugan v. Phila., 158 Pa. 337 (1893). The street was opened in 1889, and it was contended, *inter alia*, on behalf of the city, that the petitioner in 1892 was barred by the statute of limitations because more than six years had elapsed since the proceedings to lay out, in 1877. The contention was overruled. See remarks of Sergeant, J., in Jarden v. Railroad Company, 3 Whart. 502 at 509 (1838), where he said that from the time of the laying out of the street until the opening, the owner is left in the exclusive use and accupancy of the land, and the public is not bound to pay for it until actually occupied. Furthermore, the location of the road may be changed and the land would then never be taken away from the owner and the public might thus be required to pay for something which it might never use.

(2) The local Act of April 21, 1855, P. L. 624, which provides that councils may, by ordinance, order the opening of a street on the city plan upon three months' notice, whereupon the owner whose ground will be taken by such street may petition the Court of Quarter Sessions for viewers to assess the damages which may be sustained by the opening. This act, also, clearly confines the damages to be assessed under it to damages caused by the opening of the street. In Phila. v. Dickson, 38 Pa. 247 (1861), an ordinance to open had been passed, the damages had been assessed by the viewers under the Act of 1855, and the property owner brought an action of debt against the city to recover this amount. It was held that the city could not escape liability on the ground that the street had never been actually opened. In 39th St., 10 W. N. C. 384 (1881), a report of viewers was held defective, which, *inter alia*, failed to set out that the street had been opened or was about to be opened.

(3) The Act of April 1, 1864, P. L. 206, authorizes the jury of view appointed to assess damages when any street in the City of Philadelphia is ordered to be opened according to law also to make inquiry as to the advantages.

(4) The Act of May 6, 1887, P. L. 87, is unconstitutional except Sections 1 and 2, which do not affect the question. Ruan Street, 132 Pa. 257 (1890). In Volkmar Street, 124 Pa. 320 (1889), there was a petition in 1888 by a property owner for the assessment of damages sustained by the opening of a street. The court below dismissed the proceeding on the ground that the claim of the property owner was barred by the statute of limitations, not having been filed within six years from the date of the order. The Supreme Court affirmed on the ground that there was no act of opening the street, consequently no right accrued, and there was no occasion to appoint viewers. The case arose under a special act of March 6, 1820, 7 Sm. L. 265, which in fact provided that no street shall be opened until the owner of the ground shall be compensated, and is, therefore, not

indeed the learned judge who wrote the opinion does not seem to have been aware that there were any statutes involved at all. No possible ground upon which to support the decision can be found. Even if it might be regarded as overruling *Bush* v. *McKeesport*,[181] as to the construction of the Act of May 16, 1891,[182] the grounds of decision are no more valid, because the Act of 1891, as we have pointed out,[183] does not apply in Philadelphia, and the proceedings in the case were in the Quarter Sessions and not in the Common Pleas.

The Supreme Court, however, in an opinion by Mr. Justice Elkin, drew a distinction between the plotting of a street across suburban or unimproved land, and across improved land in a city. The learned judge said that in the former case the doctrine of the cases denying the owner the right to recover damages for a mere laying out was founded on equitable consideration and a wise public policy; on the contrary the cases were decided on express statutory provisions.

Mr. Justice Elkin also said, that in the case of a laying out of a street through urban property, particularly in the case of the Parkway, different considerations were involved; that it was clear that the property of the petitioner was injured by the laying out, and that the constitution conferred a remedy. The learned judge then undertook to base the right to recover in the proceedings before the court on the ground that, under certain circumstances, the right to recover might accrue even where there was no ordinance to open, or no actual opening. The right

in point when considering proceedings under a general act. Williams, J., at 327, said: "Whether the owner might give notice of his intention to abandon the land covered by the plotted street to the city and proceed to have his damages ascertained and paid, is not now before us and we express no opinion about it." Whittaker v. Phoenixville Boro., 141 Pa. 327 (1891), turned on the Act of April 22, 1856, P. L. 525, relating to boroughs. The remarks of Green, J., therefore, as follows: "We decided that the right of action to have damages assessed to the owner did not commence until the opening of the street or the doing of some unequivocal act by the city, which indicated that the possession of the owner was about to be disturbed," are to be confined to the act before the court.

[181] 166 Pa. 57 (1895).

[182] P. L. 75.

[183] See note 175 *ante*.

might accrue under the constitution, but it could not accrue under any statute relating to proceedings in the Quarter Sessions of Philadelphia County to recover damages for the opening of streets.[184] While, in this case, the conclusion reached was probably the correct result, had the proceedings been in the Common Pleas, under a proper act of assembly, the reasoning is most unfortunate. Statutes do have a binding force although there is a tendency, in the press of business, to shirk the labor of examination when they are conflicting or obscure.[185]

There is an unfortunate result of this decision, which is producing grave injustice to the taxpayer, because of the Act of June 1, 1915.[186] The lower courts of Philadelphia County have accepted the decision as authority for the proposition that the ordinary laying out is a taking, and, in consequence, under this act of assembly the property owner receives income from his property, and, at the same time draws interest on the damages from the public treasury. The taxpayer is now hit as hard as the property owner was before.

The laying out of a street is clearly not a taking but may inflict damages, and the property owner would probably be entitled to such damages under the constitution entirely apart from and irrespective of the damages which he might afterwards recover when the actual taking occurs.

[184] See note 180 *ante.*

[185] This case overrules the case of *In re* the Widening of Venango Street, 9 D. R. 651 (1900), where a land owner, part of whose property was within the lines of the street as widened on the city plan but not actually opened, petitioned for the appointment of viewers. The City of Philadelphia answered that there was no taking and the petition was dismissed, without a discussion of the statutes, the court saying that the Act of December 27, 1871, P. L. (1872) 1390, applying to the City of Philadelphia, and, in effect, depriving property owners of a right to recover damages for the removal of buildings erected on the bed of the street after the laying out, was not a taking of the land. The owner here built his improvements on the line of the street and in fact abandoned the bed to the city. The court, however, held that he was not compellable to abandon his lot. The voluntary abandonment was not sufficient.

[186] P. L. 685. This act provides that damages caused by a taking, injury or destruction of private property shall bear interest from the date of such taking, injury or destruction.

Time of Accrual of Action.

The constitution provides that compensation must be made or secured. It seems, therefore, that the compensation is payable before the injury is inflicted, and that the right of action accrues at the same time; consequently, the property owner may sue as soon as the work is actually undertaken at the point where the injury is done.[187]

In case of injury by construction of sewer, the damages are to be assessed as of the time of the completion of the sewer.[188] In the case of a change of grade, the right of action against the borough under the Act of May 24, 1878,[189] accrues when the work is done on the ground.[190]

Where, however, the construction of the works of the corporation is considered as a taking, and consequently the damages are to be assessed in statutory proceedings, the rule is otherwise. Here the title is divested only by the filing of the bond. Up to that time an action of trespass will lie for the damages done. The damages are to be assessed as of the time of the transfer of the title, to wit, the filing of the bond, and in such cases, where the works are constructed prior to the filing of the bond, the then owners have their remedy in an action of trespass, the damages in which are not to be considered in the subsequent statutory proceedings.[191]

So also in case of proceedings under the Act of May 16, 1891,[192] the owner of the abutting property at the time the physical change is made, is entitled to damages and it is imma-

[187] O'Brien v. Railroad Co., 119 Pa. 184 (1888), action of trespass. The abutting owner died after work commenced, and it was held the right of action was in his executors. Railroad Co. v. Ziemer, 124 Pa. 560 (1889), the heir and not the executor entitled to sue although route located and staked before death of plaintiff's ancestor, who died before work was actually begun.

[188] Chatham St., 16 Pa. Super. Ct. 103 (1901).

[189] P. L. 129.

[190] Jones v. Borough of Bangor, 144 Pa. 638 (1892).

[191] Shevalier v. Telegraph Co., 22 Pa. Super. Ct. 506 (1903).

[192] P. L. 75.

terial that the fourth section of the same act authorizes the appointment of viewers before or at any time after the taking or injuring.[193]

Security for Consequential Damages

The constitutional provision specifies that the damages shall be secured or paid for property injured or destroyed, and this clause seems to apply as well to the injuries as to the taking. The question then arises,—how far the property owner may have security entered for property which is about to be injured. The same rule applies here as in the case of eminent domain, that is, that a public corporation, a municipality, or the state need not give security as the power of taxation is adequate security.[194]

Since the damages are in a measure consequential and sometimes impossible of calculation until after the work is done, it is extremely difficult to settle properly the question of damages. In one class of cases, that is, of corporations in streets of cities and boroughs, it seems to be clear that the only remedy the abutting owner has is by trespass for damages, and that he is not entitled to security for damages, yet the constitution seems clearly so to provide in such a case.

Negligence.

It remains only to point out that the liability for negligence is entirely unaffected by the principles we have just discussed and that such liability existed as well before the Constitution of 1874 as since. It has always been clear that damages

[193] *In re* Thirteenth Street, 38 Pa. Super. Ct. 265 (1909). In this case there was a petition for viewers presented under the act by an owner who subsequently parted with title before the work commenced. The owner at the time the work commenced was held entitled to damages.

[194] In Delaware County's App., 110 Pa. 159 (1888), an injunction against the county commissioners was refused. The court said that the power of taxation had been held sufficient in cases of taking and was clearly so in cases of consequential damages. The rule was otherwise before the Constitution of 1874. Spangler's App., 64 Pa. 387 (1870); *Confer*, Faust v. Railroad Company, 3 Phila. 164 (1858), s. c. 25 L. I. 221, where the injunction was refused.

for negligence cannot be recovered in statutory proceedings.[195] It is frequently necessary, therefore, to distinguish the liability for negligence from the liability for consequential damages. The distinction appears to be as follows. Where the damage cannot be averted by the exercise of due care, then it is the direct and unavoidable consequence of the doing of the act and the subject of redress under the heading of consequential damages. Where, however, the damage can be avoided by the exercise of due care, then it is not the inevitable result of the doing of the act, but the result of the manner of doing it, and is the subject of redress on the ground of negligence. This distinction is illustrated by the case of *Stork* v. *Philadelphia,*[196] where the plaintiff claimed in statutory proceedings for damages to his house caused by an excavation for a subway, which excavation removed the lateral support of an adjoining lot. It was held that the plaintiff could not recover as the injury resulted, according to his own witnesses, from the manner of doing the work and his remedy, therefore, was by an action of trespass for negligence.

Summary.

For convenience, the principal headings of the discussion may be summarized as follows:

Damages to Property Taken.

(*a*) Where the whole tract is taken, the measure of damages is the market value at the time of taking, and the law is unaffected by the provisions of the Constitution of 1874.

(*b*) Where part is taken, the tract is considered as a whole, and the damages to the part not taken, although strictly consequential, are recoverable both for construction and operation, without negligence, under the measure of damages, which is the difference between the market value of the whole tract before

[195] Bridge Co. v. Coal & Nav. Co., 4 Rawle 9, 1832 (*semble*); Denniston v. Phila. Co., 161 Pa. 41 (1874), s. c. 1 Pa. Super. Ct. 559 (1896); Stork v. Philadelphia, 195 Pa. 101 (1900); Line v. Railroad Company, 218 Pa. 604 (1907) *semble.*

[196] 195 Pa. 101 (1900).

and the market value of the whole tract after the taking. The Constitution 1874 had no effect on this case.[197]

DAMAGES TO PROPERTY IN VICINITY CAUSED BY OPERATION.

Where the damages to the property in the vicinty are caused by the operation of the works on the land taken, the law probably was, prior to the Constitution of 1874,[198] that the adjoining owner could not recover in the absence of negligence.. In a number of cases since 1874, the adjoining owner has failed to recover, although the exact grounds of decision are not clear,[199] and in two recent cases the court seemed to lay down the rule that there could be a recovery in the absence of negligence.[200] It is apprehended that the true principle involved is this: the power of eminent domain conferred by the legislature makes the operation lawful and eliminates any aspect of a nuisance at common law in the absence of negligence.[201] This rule is not changed by Article 16, Section 8, of the Constitution of 1874, which imposes only a liability for damages caused by construction and enlargement and omits any reference to operation.

The doctrine recently introduced by the Supreme Court, that there can be a recovery in the absence of negligence, seems unsound and unsupported by reason or authority.[202]

[197] Watson v. Railroad Co., 37 Pa. 469 (1861); Gilmore v. Railroad Co., 104 Pa. 275 (1883); Railroad Co. v. Hummel, 27 Pa. 99 (1856), and many other cases.

[198] No case on this point has been found.

[199] Action of trespass on the case: Railroad Company v. Lippincott, 116 Pa. 472 (1887); Railroad Company v. Marchant, 119 Pa. 541 (1888); Dooner v. Railroad Company, 142 Pa. 36 (1891); Wunderlich v. Railroad Company, 223 Pa. 114 (1909); Himmell v. Railroad Company, 175 Pa. 537 (1896); Gilles v. Railroad Company, 226 Pa. 31 (1909); Ridgway v. Railroad Company, 244 Pa. 282.

[200] Stokes v. Railroad Company, 214 Pa. 415 (1906); Ganster v. Electric Light Co., 214 Pa. 628 (1906).

[201] The power of eminent domain confers a right to locate anywhere irrespective of the neighborhood, and that right would be impaired, if not defeated, by permitting the adjoining owners to insist on their rights at common law.

[202] Where, however, there is no power of eminent domain, the corporation is liable for maintaining a nuisance. Trespass: Pottstown Gas Co. v. Murphy, 39 Pa. 258 (1861); Rogers v. Phila. Traction Co., 182 Pa. 473 (1897); Hauck v. Pipe Line Co., 153 Pa. 366 (1893); Ganster v. Electric Light Co., 214 Pa. 628 (1906). Bill in equity: Stewart's App., 56 Pa. 413 (1867).

Damages to Land in Vicinity Caused by Construction and Enlargement.

Where the damage to the land in the vicinity is caused by the construction of the works on the land taken, the adjoining owner could not recover prior to 1874, in the absence of negligence.[203] Since 1874 he may recover for damages caused by construction and enlargement,[204] under Article 16, Section 8, of the Constitution of 1874,[205] irrespective of negligence, and since no statute has been passed, the remedy is solely by an action of trespass.

Public River Cases.

The commonwealth owns the bed and waters of a public or navigable river between low-water marks, and the riparian owner has no title therein; consequently, anything done on the river under grant from the commonwealth is a lawful act, and, prior to the Constitution of 1874, neither the riparian owner [206] nor a navigator [207] in the river could recover damages caused by anything done in the river under grant [208] from the commonwealth, unless the liability was expressly imposed by act of the legislature,[209] or there was negligence.

[203] Railroad Company v. Young, 33 Pa. 175 (1859); Canal Co. v. Mulliner, 68 Pa. 357 (1871).

[204] Fredericks v. Canal Co., 148 Pa. 317 (1892); Crum v. Railroad Company, 226 Pa. 151 (1910).

[205] No case as to enlargement has been found.

[206] Zimmerman v. Union Canal Co., 1 W. & S. 346 (1841), statutory proceedings; Shrunk v. Navigation Co., 14 S. & R. 71 (1826), statutory proceedings; Tinicum Fishing Co. v. Carter, 61 Pa. 21 (1869), 61 Pa. 35 (1870), 77 Pa. 310 (1873), 90 Pa. 85 (1879), actions on the case; Commonwealth v. Fisher, 1 P. & W. 462 (1830). See remarks of Thayer, P. J., in Patent v. The Railroad Co., 14 W. N. C. 545, at 547 (1884); McKeen v. Canal Co., 49 Pa. 424 (1865), action on the case; Malone v. City, 2 Pa. 370 (1882). Monongahela Navigation Co. v. Coons, 6 W. & S. 101 (1843), action on the case.

[207] Monongahela Bridge Co. v. Kr[illegible] 46 Pa. 112 (1863); Clarke v. Birmingham-Pittsburgh Bridge Co., 41 [illegible] 47 (1861). See, however, remarks of Thayer, P. J., in Patent v. The [illegible]oad Company, 14 W. N. C. 545, at 547 (1884).

[208] Hughes v. Heiser, 1 Binney 463 (1898).

[209] Dugan v. Bridge Co., 27 Pa. 303 (1856); Bacon v. Arthur, 4 Watts 437 (1835).

The Supreme Court, however, placed the failure of the riparian owner to recover in these cases upon the supposed fact that the damage was consequential, and therefore there was no taking, and, in many cases, supposed that the commonwealth was exercising the power of eminent domain in granting the use of the public river.

Since the Constitution of 1874, a corporation, operating under grant from the commonwealth on a public river, having the power of eminent domain, would be clearly liable for damage to riparian property injured. No case has arisen, however, exactly involving the point,[210] and since no statute has been passed, the remedy is by an action of trespass. In these cases if the corporation is merely given the right to operate on or occupy the river, and there is no grant of the power of eminent domain, Article 16, Section 8, would not apply. There is no authority, however, for this proposition.

Damages to Abutting and Non-Abutting Owners by Disturbance of a Public Highway.

Change of Grade.

There was no right of recovery before the Constitution of 1874, in the absence of statutory provision, for damages caused by a change of grade [211] or by a private corporation.[212] A change of grade is a construction or enlargement of the works of a city, borough or township, and frequently occurs in the construction or enlargement of the works of a private corporation having the power of eminent domain. Article 16, Section 8, of the Constitution of 1874, therefore, applies and confers a right to recover damages. The remedy in the absence of statute is by an action of trespass.[213]

Where a statute has been passed, the remedy thereon is ex-

[210] Railroad Company v. Jones, 111 Pa. 204 (1885); Butcher's Coal Co. v. Phila., 156 Pa. 54 (1893); Walnut Street Bridge, Philadelphia's App., 191 Pa. 153 (1899); Freeland v. Railroad Company, 197 Pa. 529 (1901).

[211] Green v. Borough of Reading, 9 Watts 382 (1842); O'Conner v. Pittsburgh, 18 Pa. 187 (1851); *In re* Ridge Street, 29 Pa. 391 (1857).

[212] Henry v. Bridge Co., 8 W. & S. 85 (1844).

[213] Plan 166, 143 Pa. 414 (1891); Groff v. Phila., 150 Pa. 594 (1892); Hobson v. Phila., 150 Pa. 595 (1892).

clusive and trespass will not lie.[214] The remedy is now exclusively conferred by the following statutes: Boroughs Act of May 24, 1878,[215] Cities Act of May 16, 1891,[216] Townships Act of May 28, 1913.[217] The non-abutting owner may recover if the injury is proximate, immediate and substantial.[218] A number of cases have arisen of change of grade of streets consequent upon the abolition of railroad grade crossings.[219]

Corporations in Highways.

Railroads are liable under the Act of February 19, 1849,[220] to make compensation to an abutting owner for any damage caused by an excavation or embankment in any street or alley in a city or borough made in the construction of the road,[221] and the same statute[222] provides that the railroad may occupy the whole of a country road upon constructing a new one in its stead.[223]

[214] Borough of Beltzhoover v. Gollings, 101 Pa. 293 (1882); White v. Borough of McKeesport, 101 Pa. 394 (1882); McKee v. Pittsburgh, 7 Pa. Super. Ct. 397 (1898). In Philadelphia, where the change occurred prior to 1874, the remedy was exclusively under the Consolidation Act of 1854. Schuler v. Philadelphia, 22 W. N. C. 161 (1888). See Philadelphia v. Wright, 100 Pa. 235 (1882).

[215] P. L. 129.

[216] P. L. 75.

[217] P. L. 368. Townships were formerly exempt from liability because they did not have the power of eminent domain. Wagner v. Salzburg Twp., 132 Pa. 636 (1892); Shoe v. Township, 31 Pa. Super. Ct. 137 (1896).

[218] Recovery: Mellor v. City, 160 Pa. 614 (1894); Chatham Street, 191 Pa. 604 (1899); Robbins v. Scranton, 217 Pa. 577 (1907); Walsh v. City of Scranton, 23 Pa. Super. Ct. 276 (1903); Haggerty v. Scranton, 23 Pa. Super. Ct. 279 (1903). *Cf.* O'Brien v. Railroad Company, 119 Pa. 184 (1888), *semble;* change of grade of street by railroad company in constructing its road.

No recovery: Ogontz Ave., 225 Pa. 126 (1909); Tucker Street, Plumb's App., 166 Pa. 336 (1895); Pittsburgh's Pet., Wilson and Snyder, *etc.*, Co.'s App., 247 Pa. 384 (1915).

[219] Tucker Street, Plumb's App., 166 Pa. 235 (1895); Phila., *etc.*, Iron Works v. Phila., 253 Pa. 60 (1916), affirming 24 D. R. 864 (1915); Keeling v. Railroad Company, 205 Pa. 31 (1903).

[220] P. L. 79, Sec. 10.

[221] Railroad Co. v. Rose, 74 Pa. 362 (1873); Railroad Company v. McChesney, 85 Pa. 522 (1878); Railroad v. Rhoadarmer, 107 Pa. 214 (1884); Duke v. Railroad Company, 129 Pa. 422 (1889); Seipel v. Railroad Company, 129 Pa. 425 (1889).

[222] Sec. 13.

[223] Sugar Creek Township v. Railroad Company, 242 Pa. 573 (1914).

Where the railroad merely occupied the street with its tracks, under authority of law, it was held that the company was not liable in damages to the abutting owner in the absence of negligence on the ground that there was no additional servitude.[224]

The Constitution of 1874, Article 16, Section 8, clearly gives the abutting owner a right to recover damages caused by the construction or enlargement of the works in the street irrespective of his ownership of the fee underlying the street, and as no statute has been passed, the remedy is by an action of trespass.[225] Although this principle was uniformly applied, the unfortunate notion that the abutting owner must have the underlying fee of the street in order to recover, has been adopted by the Supreme Court.[226] The adoption of this principle, which now seems to be the law, is contrary to all the previous authorities, and, if carried to its logical conclusion, will nullify the constitution by denying the right to recover to an abutting owner who does not own the fee to the bed of the street, and, at the same time, has his right of access interfered with. It does not clearly appear why such a useless principle should be adopted.

In the case of corporations other than railroads, a distinction has been drawn between a rural and an urban servitude, without, however, assigning, any clear reason for the distinction.[227] In the case of a country road, which is a rural servi-

[224] Phila. & Trenton R. R. Co., 6 Whart. 25 (1840), statutory proceedings; Mercur v. Railroad Company, 36 Pa. 99 (1859); Faust v. Railroad Company, 3 Phila. 164 (1858), s. c. 25 L. I. 221, bill of abutting owner for an injunction dismissed. Snyder v. Railroad Co., 55 Pa. 340 (1867), statutory proceedings; Struthers v. Railroad Company, 87 Pa. 282 (1874), trespass on the case.

[225] Railroad Company v. Patent, 17 W. N. C. 198 (1885); Railroad Company v. Duncan, 111 Pa. 352 (1886); Railroad Company v. Walsh, 124 Pa. 544 (1889); Railroad Company v. Ziemar, 124 Pa. 560 (1889); Railroad Company v. McCutcheon, 18 W. N. C. 527 (1886); Quigley v. Railroad Company, 121 Pa. 35 (1888).

[226] Jones v. Railroad Company, 151 Pa. 30 (1892); Willock v. Railroad Company, 222 Pa. 590 (1909); Christy v. Railroad Company, 249 Pa. 245 (1915), s. c. 23 D. R. 682 (1914), 24 D. R. 240 (1915).

[227] Nothing has been found in the books except the remarks of Mr. Justice Dean in Dempster v. United Traction Co., 205 Pa. 70, at 78 (1903); see also remarks of Rice, P. J., in Shinzel v. Telephone Co., 31 Pa. Super. Ct. 221, at 231 (1906), and of Green, J., in Wood v. McGrath, 150 Pa. 451, at 455, *et seq.* (1892).

tude, the construction of the works of a corporation is considered an additional burden on the underlying fee, and the abutting owner is entitled to recover in statutory proceedings in eminent domain,[228] although permanent damages have been recovered in an action of trespass.[229]

No case has been found of an enlargement of the works. In these cases an abutting owner is entitled to an injunction when the construction has been begun without his consent or the filing of a bond.[230]

In the case of an urban servitude, which is a street in a city or borough, the works of the corporation do not impose an additional servitude, and the abutting owner is entitled to bring an action of trespass and recover damages for any interference with his access caused by construction and enlargement under the provisions of the constitution.[231] An injunction will not lie to restrain construction.[232]

In one case, however, where the court conceded the lawful right of a telephone company to occupy the street, an injunction was issued specifically controlling the location of a pole in front of plaintiff's lot in order to prevent irreparable injury to the lot and the imposition of undue and unnecessary burdens thereon.[233]

The construction of a sewer in a street or road is not an exercise of the power of eminent domain, and prior to the Constitution of 1874 the abutting owner had no right to recover damages. The case is well within the wording of Article 16,

[228] Tannehill v. Phila. Co., 2 Pa. Super. Ct. 150 (1896); Shevalier v. Telegraph Co., 22 Pa. Super. Ct. 506 (1903); Shuster v. Telegraph Co. 34 Pa. Super. Ct. 513 (1907); Radnor Co. v. Electric Light Co., 208 Pa. 460 (1904).

[229] Hankey v Phila. Co., 5 Pa. Super. Ct. 148 (1897); Zanzinger v. Electric Light Co., 6 D. R. 577 (1897). As to right of recovery against a turnpike company, see Wenger v. Rohrer, 3 Pa. Super. Ct. 596 (1897).

[230] Dempster v. Traction Co., 205 Pa. 70 (1903).

[231] Starr v. Traction Co., 193 Pa. 536 (1899); Socket v. Norristown Traction Co., 62 Pa. Super. Ct. 542 (1916).

[232] Lockhart v. Rwy. Co., 139 Pa. 419 (1891); Rafferty v. Traction Co., 147 Pa. 579 (1892); Dutton v. Railway Co., 1 Mont. Co. 4 (1885); Cooke v. Telegraph Co., 21 Pa. Super. Ct. 43 (1902); Faust v. Railroad Company, 3 Phila. 164 (1858), 25 L. I. 221.

[233] Bartholomew v. Telephone Co., 29 Pa. C. C. R. 390 (1904).

Section 8, and the remedy is now exclusive under the Act of May 16, 1891.[234] The city is not liable, in the absence of negligence, if the sewer is inadequate to carry off the water.[235]

The laying out of a street without an opening did not confer a right to recover damages prior to the Constitution of 1874, in the absence of statutory provision.[236] No case has arisen of an action of trespass to determine whether the right to recover damages is conferred by Article 16, Section 8, of the Constitution of 1874. The Act of May 16, 1891 [237] seems clearly to confer the right. The Supreme Court, however, in an ill-considered decision upon proceedings brought under this act,[238] overlooked its provisions and said, by way of *dictum*, that there was no taking conferring a right to recover by Article 16, Section 8. This *dictum* was accepted by the profession and no attempt was made to raise the question by bringing an action of trespass. The legislature attempted to confer a remedy by the obscure and clumsily worded Act of May 28, 1913,[239] which probably adds to the existing law only by directing juries of view in street-opening cases to assess damages, if any are previously incurred, by the mere laying out without an opening.

The Supreme Court, in a case of proceedings in the Quarter Sessions of Philadelphia County to recover damages for the laying out of the Philadelphia Parkway without an opening, decided that the petitioner was entitled to have a jury of view appointed to assess damages, overlooking the express provision of the statutes in force relating to proceedings in the Quarter Sessions, which statutes were not even referred to in the opinion.[240] The petition in the case relied on the Act of May 16,

[234] P. L. 75. For the cases arising under the act, see note 53, *ante*.

[235] Baer v. City of Allentown, 148 Pa. 80 (1892); Carr v. Northern Liberties, 35 Pa. 324 (1860); Sullivan v. Pittsburgh, 5 Pa. Super. Ct. 357 (1897); Collins v. Philadelphia 93 Pa. 272 (1880); Fair v. Philadelphia, 88 Pa 309 (1870); Bealafeld v. Borough of Verona, 188 Pa. 627 (1898). For cases of negligence, see note 164, *ante*.

[236] District of City of Pittsburgh, 2 W. & S. 320 (1841); Forbes Street, 70 Pa. 125 (1871), *semble*.

[237] P. L. 75.

[238] Bush v. McKeesport, 166 Pa. 57 (1895).

[239] P. L. 368, for text see note 172, *ante*.

[240] Phila. Parkway, 250 Pa. 257 (1915), reversing 24 D. R. 184 (1915).

1891,[241] which was not applicable.[242] The decision cannot be sustained on any possible ground, although the result reached would be sound if the proceedings had been in the Common Pleas under the Act of May 16, 1891,[243] or the Act of June 8, 1895.[244] The distinction drawn in the case of laying out a street over unimproved ground and over improved ground is not justified by any act of assembly or by the language of Article 16, Section 8, of the Constitution of 1874.

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Philadelphia.

[241] P. L. 75.
[242] See note 175, *ante*.
[243] P. L. 75.
[244] P. L. 188.