Michigan Law Review

Volume 6 | Issue 8

1908

The Corporation in the Street

Charles C. Dibble

THE CORPORATION IN THE STREET

A. THE CORPORATION AND THE ABUTTING LAND OWNER

THE modern street is not a simple roadway, but a complicated three-story structure in the use of which the general public, the city government, the abutting property owner and the licensed corporation are interested. Not often are streets so limited in capacity as the one in Frankfort, Kentucky, which was so narrow that the passage of a railroad train would have all but filled it, a condition which led the court to enjoin the construction of a track, though duly authorized.[1] Generally there is room for all, and the use of the streets has been granted with the greatest liberality. The occupants, being numerous, have interfered with each other more or less. It is the purpose of this paper to define the rights and duties of the various co-owners and co-tenants toward each other and toward third persons.

A highway may come into existence by prescription, by dedication, and by condemnation. A highway by prescription[2] is always an easement[3] of the extent indicated by the user (which is usually held to include a reasonable amount of land beside the track actually traveled[4]). A highway by condemnation or dedication is such as the decree or grant describes it, with a presumption in favor of an easement.

An owner may grant whatever estate he sees fit, and may annex conditions and limitations, provided they are not inconsistent with the dedication and will not defeat its operation. Such limited grants are unusual and present no difficulties: and it is with the normal dedication or condemnation, in which the grant, of fee or easement, is in general terms, that the law concerns itself.

The usual estate of the county or township in a country road is an easement; in a city more often the fee is taken. But no matter how absolute the title of the municipality, a street can never be de-

---

[1] Commonwealth v. City of Frankfort, 92 Ky. 149.

[2] For the nature of a highway by prescription and the requisites for its existence see: State v. K. C. St. J. & C. B. R. R. Co., 45 Ia. 139; Elliott, Roads and Streets, Chap. VI.

[3] I. B. & W. R. R. Co. v. Hartley, 67 Ill. 439. An easement is presumed to pass, since this is the title which at common law and by common law dedication the state possesses; City of Dubuque v. Maloney, 9 Ia. 450; Banks v. Ogden, 2 Wall. 57.

[4] Elliott, Roads and Streets, p. 186; Sprague v. Waite, 34 Mass. 309; Lawrence v. Mt. Vernon, 35 Me. 100; Upper v. Lowell, 7 Wash. 460. Some courts restrict it to the path actually traveled: Scheiner v. Price, 65 Mich. 638; Morse v. Ranno, 32 Vt. 600, Epler v. Ninan, 5 Ind. 459.

voted to a private use, either wholly or in part.[5] As the old saying goes. "Once a highway, always a highway." The municipality holds the land, or the easement, in trust for the public as a highway, and may not divert it, even though expressly authorized by the legislature to do so.[6]

Indeed, no use, either public or private, save as a street, will be permitted; since the land is held in trust, not for any public purpose, but for street purposes. Not that the street must be reserved exclusively for travel; there are many other customary street uses, such as wires belonging to the city or public service corporations.[7] water-pipes, and tracks for street railways and steam railroads.[8] These will be permitted, provided they do not entirely obstruct the street to ordinary traffic.[9]. But it has been held that a stand-pipe, part of a municipal water-works system, although undoubtedly a public use, is not a legitimate street use; and its erection in the street will be enjoined, although the fee of the street is in the city, and even though the tower leaves ample room for traffic.[10]

---

[5] Abbott, Mun. Corp. II, 1937; Elliott, Roads and Streets, 698; Bates v. Holbrook, 171 N. Y. 460; Kimball v. City of Kenosha, 4 Wis. 321; Reighart v. Flynn, 189 Pa. 355; Glasgow v. City of St. Louis, 87 Mo. 678; City of Morrison v. Hinkson. 87 Ill. 587; Stetson v. Faxson, 19 Pick. 147; Galloso v. City of Sikeston, 101 S. W. 715; McHarge v. Newcomer, (Tenn.) 100 S. W. 700. In White v. Blanchard Bros. Granite Co., 178 Mass. 363, a private track was allowed in the street for transporting defendant's granite, provided the cars should be hauled by animal power only. But this is against the weight of authority; see Hatfield v. Straus 189 N. Y. 208.

[6] The city of St. Louis was permitted by charter "To establish, open, vacate, * * * all wharves * * * to set aside or *lease portions of the unpaved wharf* for special purposes. * * * For any purpose tending to facilitate the trade of the city." Having taken complainant's land under this clause, the city attempted to lease a portion to defendant for a private landing place. This was enjoined. The court said, "It is conceded, and the authorities are all in accord on the subject, that, when private property is condemned or dedicated for one public use, it cannot be appropriated to another and different use. The city of St. Louis has no right to erect a permanent building on the property condemned, except for the use of the wharf so occupied, and of the building so erected for legitimate wharf purposes. The legislature of the state could not authorize any other use of the property of the city than that for which it was condemned." Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 82 Mo. 121. To the same effect are: Adams v. Ohio Falls Car Co., 131 Ind. 375; C. R. I. & P. R. R. Co. v. People, 222 Ill. 427; Chicago Cold Storage Warehouse Co. v. People, 127 Ill. App. 179.

[7] Consumers Gas & El. Light Co. v. Congress Spring Co., 61 Hun 133; Gulf Coast Ice Co. v. Bowers, 80 Miss. 570; Levis v. Newton, 75 Fed. 884; People ex rel. McManus v. Thompson, 65 How. Pr. 407; McWethy v. Aurora El. L. & P. Co., 202 Ill. 218, affg. 104 Ill. App. 479; St. Louis v. W. U. Tel. Co., 149 U. S. 465.

[8] Hyland v. Short Route Ry. Tr. Co., 11 S. W. 79 (Ky.); C. B. & Q. R. R. Co. v. City of Quincy, 136 Ill. 489; Drake v. Hudson River R. R. Co., 7 Barb. 508.

[9] Lockwood v. Wabash R. R. Co., 122 Mo. 86; Schulenburg & Boeckeler Lumber Co. v. St. Louis K. & N. R. R. Co., 129 Mo. 455; Commonwealth v. City of Frankfort, 92 Ky. 149; St. Ry. Co. of G. R. v. West Side St. Ry. Co., 48 Mich. 433; Detroit City Ry. v. Mills, 85 Mich. 634.

[10] "It is insisted on behalf of the city, that being the owner of the fee in the streets and having the absolute control of them, it had a right to build the stand-pipe in them, and that if injury resulted thereby to plaintiff's property, it is *damnum absque injuria*. The soundness of this position depends upon whether the placing of a structure like that described in the declaration in the streets of a city is consistent with the object for which streets are established and held by municipal authorities in trust for the public use. * * * The general rule long recognized by this court is that, having the fee and exclusive control over the streets, municipal authorities may appropriate them to any use not incompatible with the object for which they were established. In the application of the rule it has been held in the cases cited and others that a city council may lawfully authorize the laying of railroad tracks upon, and water, sewer, and gas pipes under, public streets, and that property owners could neither enjoin such use, nor recover

Those structures permitted to the street are such as are employed in the transmission or distribution of commodities of general benefit, which service can only be performed by lines of continuous conductors. For these conductors no other location is practicable, especially in cities, but the streets and alleys. Furthermore the conductors interfere relatively little with passage. Thus reason demands that they be given a place in the street, while other structures, as well placed elsewhere, be barred from it.

There are also certain uses of the street by private persons which are sometimes permissible. Chief among these are house-moving and building operations. In such cases it is held that if the operations are reasonably necessary and do not permanently or unreasonably obstruct the street, they are proper. The question is one of fact for the jury.[11]

Since the city holds the street in trust for public highway purposes, it follows that to restrain an attempted grant for a use not proper to a highway, not only an abutting owner,[12] but anyone specially injured,—as one who must pass through the street to reach his premises,[13]—or even the state on the relation of the attorney general,[14] may have injunction. Ejectment will lie for the owner of the fee.[15]

The rule that any purely *private* use of the street may be prohibited by the abutting land-owner is enforced by the courts unanimously. But in the case of an attempted use of the street by a municipal or public service corporation for a *public* purpose, the abutter's rights are the subject of great difference of opinion.

At the outset it should be understood that the corporation pos-

damages to property occasioned thereby. * * * It does not follow * * * that structures like the one described in the declaration can be built in them. Water and gas pipes, with hydrants, lamp posts and other appliances, are necessary for the distribution of water and light over the city, and the streets may be legitimately used for that purpose; but it would scarcely be contended that the water or gas works themselves could be lawfully built in a public street, as not being inconsistent with the public use." Barrows v. City of Sycamore, 150 Ill. 588. See also, Bates v. Holbrook, 171 N. Y. 460; McIllhinny v. Trenton (Mich.) 111 N. W. 1083.

[11] In Commonwealth v. Passmore, 1 Serg. & R. (Pa.) 217, the rule is stated, "Necessity justifies actions which would otherwise be nuisances; this necessity need not he absolute—it is enough if it be relative. No man has a right to throw wood or stones into the street at pleasure; but inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time." So with materials for building operations. This holding is approved in Dillon, Mun. Corp. sec. 730, and the cases there cited. The same rule applies to house-moving, Graves v. Shattuck, 35 N. H. 257. But without the proper municipal consent, the operation is a nuisance *per se,* Toronto St. Ry. Co. v. Dollery, 12 Ont. App. 679.

[12] Adams v. Ohio Falls Car Co., 131 Ind. 375; Belcher Sug. Ref. Co. v. St. L. Grain El. Co., 82 Mo. 121.

[13] McDonald v. Mayor &c. of Newark, 42 N. J. Eq. 136; Kimball v. City of Kenosha, 4 Wis. 321; Glasgow v. City of St. Louis, 87 Mo. 678.

[14] Commonwealth ex rel. Atty. Gen. et al. v. Kepner, 1 Pearson (Pa.) 182; Smith v. McDonald, States Atty., 148 Ill. 51.

[15] Peck v. Smith, 1 Conn. 103; Proprietors of Locks and Canals v. Nashua & L. R. R. Co., 104 Mass. 1.

sessing a franchise to operate in the street acquires no estate or interest in the land itself, but the mere right to the use of the highway or public easement,[16] a right co-existent only with the highway as such.[17] In its own equipment it has, of course, an unqualified property and a right to exclude others from its use.[18] But its tenure in the highway is virtually that of a licensee.

It has been held in the past by perhaps a majority of the courts that, under certain circumstances, a user of the highway by public service corporations, while not a private user in such a sense that it might be enjoined, was yet an additional burden on the fee. It was a user not included in the highway easement originally acquired by the municipality, and for it the owner of the fee was entitled to additional compensation. It should be emphasized that the theory necessarily applies only to those cases where the municipality in opening the street in question has acquired a mere easement therein, and not the fee. In considering the validity of this theory it is necessary first to determine exactly what uses it defines as additional servitudes.

The prime distinction met with is that between the highway easement involved in the city street and that in the country road. This distinction is stated by Judge Elliott[19] as follows: "The owner of the dominant estate in an urban servitude has very much more authority and much greater rights than the owner of the dominant estate in a suburban servitude. * * * It is doubtful whether of all servitudes there is another one so broad and comprehensive as that of the city in its streets. On the other hand, the easement of the public in a suburban road is not much greater than many merely private easements, if, indeed, it is as great." The right of the public is restricted to a mere right of passage, with the incidental right to keep the road in repair. Any other use of the road becomes, according to these authorities, an additional burden, for which compensation must be made to the owner of the fee by the corporation, public or quasi-public, attempting to use the road.[20]

[16] Hinchman v. Peterson Horse Ry. Co., 17 N. J. Eq. 75, 80; Camden H. R. Co. v. Cit. Coach Co., 31 N. J. Eq. 525, 532.

[17] Boston El. L. Co. v. Boston Term. Co., 184 Mass. 566.

[18] Except that the rails of a street railway line may be used by general traffic, insofar as such traffic does not obstruct the street cars, Hogan v. Eighth Ave. R. Co., 15 N. Y. 380; Camden H. R. Co. v. Cit. Coach Co., 31 N. J. Eq. 525.

[19] Roads and Streets, sec. 397.

[20] Elliott, Roads and Streets, Chap. XVIII. The following have been held to be additional burdens in a country highway: Pipes of a natural gas company, Sterling's Appeal, 111 Pa. 35; Bloomfield &c. Gas Co. v. Calkins, 62 N. Y. 386. Poles of an electric light company; Palmer v. Larchmont El. Co., 6 App. Div. (N. Y.) 12 (reversed, 158 N. Y. 231). Telephone pole, Chesapeake and Pot. Tel. Co. v. Mackenzie, 74 Md. 36. Interurban railway, Zehran v. Mil. El. R. & L. Co., 99 Wis. 83. See also cases under note 27. The distinction is clearly stated in Montgomery v. Santa Ana and Westminster Ry. Co., 104 Cal. 186.

Most, if not all, of the opinions that support this distinction are mere dicta,[21] or were given in cases where there were other reasons amply sufficient to support the decision.[22] Very many of the cases involved the rights of a telegraph or long distance telephone line, or a pipe line for natural gas to supply some distant locality.[23] These utilities, so far as concerned the rural communities through which they passed, might well be considered not public at all, since the local public could not use them. So it has been held in several instances that a pipe line for the benefit of a distant community is a burden on the fee even in a city street.[24]

As said the court in the case of *Witcher* v. *Holland Waterworks Company*[25] (in holding a waterworks pipe line for the distribution of water to a rural community not to be an additional burden), "This case is distinguished from the cases which hold that the appropriation of a rural highway for the conveying of water to another town or village, the inhabitants along the line of the pipes not being entitled to the use of the water, is imposing an additional burden; for that is taking one's property for the use of others, he having no right to the use thereof."

When we look for reasoning by which the two uses are distinguished we are usually met with silence. What there is to be said for the view was expressed by the Pennsylvania court as follows:[26] "The necessity for drainage; for a water supply; for gas for purposes of lighting; for natural, or fuel gas, for heat; for subways for telegraph and other wires; and for other urban necessities or conveniences, give the municipality a control over the subsurface that the township has not. Property in a city is no less sacred than property in the country. * * * But its situation may subject it to

[21] Compare, for example, Ches. & Pat. Tel. Co. v. Mackenzie, 74 Md. 361, with Hiss v. Balt. & H. P. R. Co., 52 Md. 253.

[22] As expressed in 1 Lewis on Eminent Domain, sec. 91c, "In one class of cases certain uses of a country road were held not to be within the purpose for which such roads are established, but the same courts have not held that the same uses of a city street were legitimate. In another class of cases certain uses of a city street are declared to be legitimate, * * * * * but this is quite different from holding that the same or similar uses of country roads would not be legitimate."

[23] Telegraph—Bd. of Trade Telg. Co. v. Barnett, 107 Ill. 507. Long distance telephone—Eels v. A. T. & T. Co., 143 N. Y. 133. Natural gas pipe-line—Bloomfield Gas Co. v. Calkins, 62 N. Y. 386; Sterling's Appeal, 111 Pa. 437; Stumpf's Appeal, 116 Pa. 33; Kincaid v. Ind. Nat. Gas Co., 124 Ind. 577. Sewer for neighboring city—Van Brunt v. Flat Bush, 128 N. Y. 50.

[24] Webb v. Ohio Gas Fuel Co., 9 Ohio S. & C. P. Dec. 662; Balt. etc. Co. v. Dubreuil, (Md.) 66 Atl. 439. On the same theory some courts have held an interurban railway to be an additional burden in the country, on the ground that it benefits outsiders primarily, Zehren v. Mil. El. R. & L. Co., 99 Wis. 83; Wilder v. A. D. & R. Co., 216 Ill. 493. But it has been held that such roads are, for the same reason, an additional burden on city streets, C. & N. W. R. Co. v. Mil. R. & K. El. R. Co., 95 Wis. 561; Abbott v. Mil. L. H. & T. Co., 126 Wis. 634. It would seem that the benefit to local inhabitants was sufficient to make such a road a proper street use. It ought not to be required that the benefits be local exclusively, see Akron etc. Co. v. Erie Ry. Co., 28 Ohio Cir. Ct. 36.

[25] 66 Hun 619.

[26] McDevitt v. Gas. Co., 160 Pa. 367.

a greater servitude in favor of the public in a large, compactly built city than would be imposed upon it in the open country." The distinction, then, is "necessity and convenience." But why should the convenience of the city-dweller be an object of greater solicitude than the convenience of the countryman? Or is the telephone, for example, a greater convenience to the townsman than to one living, perhaps, ten miles from town and half a mile from the nearest neighbor? There is a distinction in actual use, based upon the density of population and the needs of the inhabitants, but there is, and should be, none in legal rights.

It is universally held that, when unincorporated territory becomes incorporated into a city, the roads become city streets and the highway easement becomes impressed with all the burdens of a street;[27] and this without compensation to the owner.[28] Were the urban easement more extensive than the rural easement, this would be a clear violation of property rights.

As rural communities grew in wealth and population and more of the conveniences of city life were extended to them, the old rule was felt to be unworkable. So, in a case involving water pipes in a thickly populated rural community, the court, while admitting the existence of a distinction between rural and urban highways, held that this highway was, to all intents and purposes, urban.[29] To this conclusion the objection was raised that if the extent of the rural highway easement varied in accordance with the density of population, nearness to a city, and other factors, then it would be extremely difficult for the court to determine what was, in a given case, a proper use.[30]

---

[27] McGraw v. Stewart, 51 Kan. 185; Town of Palatine v. Krueger, 121 Ill. 72.

[28] Eels v. A. T. & T. Co., supra; Lewis on Eminent Domain sec. 91c; Huddleston v. City of Eugene, (Ore.) 55 Pac. 868; Palmer v. Larchmont El. Co., 158 N. Y. 231.

[29] Witcher v. Holland Waterworks Co., 66 Hun 619 (affd., 142 N. Y. 626). A water company that had not the right of eminent domain desired to use the roads of a rural community to distribute water to the inhabitants of the community. Injunction, which was sought on the ground that this was not within the highway easement, was denied. "Holland, though not incorporated, is a large and populous village. The inhabitants thereof have all the requirements and necessities for the use of pure and wholesome water that they would have were the village incorporated. The streets of a populous village or city are subject to greater burdens and to a greater variety of uses than a rural highway. The extent of an easement in a street is to be measured somewhat by the necessities of the public. * * * Assuming, then, that the supply of this water was for a public use, did the laying of pipes and the erection of the hydrant in front of plaintiff's premises constitute a taking of his property right in the soil and amount to an additional burden on the fee. There are many authorities holding that such use in an incorporated village does not impose an additional burden on the fee. The street in question must be held, we think, to be an urban street, and not an ordinary rural highway."

[30] In Zehren v. Mil. &c. Co., 99 Wis. 83, the court, while admitting the cogency of the argument in the Witcher case, reasons to the opposite conclusion as follows: "If a line be drawn in one case upon the facts in that case, dependent upon mere proximity, or upon the manner of use or the density of population, or the prospect of rapid settlement, or upon all these circumstances together, it cannot apply to any other case; and the question will always be one of doubt and embarrassment. * * * If the line be fixed at the limits of the corporation, it will at least have the great merit of certainty and be capable

The logic of this objection was unimpeachable. The New York court, in its next decision was brought fairly to the position that, the necessities of the community being best known to itself, the question of what is or is not a proper highway use is for the reasonable discretion of the local authorities. The province of the courts then becomes merely the prevention of abuse in discretion. This is exactly the doctrine in regard to urban servitudes. And the court, realizing this, announced unequivocally that urban and rural servitudes are identical.[31] This has been supported by most recent cases and text writers.[32]

Nothing of what has been said should be construed to mean that an abutting owner, either rural or urban, may be deprived of his easements in the highway without compensation. It is now well recognized that every piece of land facing a highway has appendant to it rights in the highway, in the nature of easements, and this irrespective of whether the highway be rural or urban, and of whether the fee be in the municipality or the abutting landowner. Of these rights the principal are: unimpeded access to the property, noninterference with light and air, and lateral support to the soil.[33]

As to being additional servitudes, highway uses may be divided into two classes: use by the municipal corporation and use by a public service corporation. As to the first class all authorities are agreed. For the furtherance of any governmental function the city may put the street to any permissible use without additional compensation;[34] public works are not an additional burden.

What public utilities under private ownership are additional bur-

---

of unerring application. Presumably the city limits include the entire urban area, and we feel under all the circumstances that it is the true and proper line." See also Palmer v. Larchmont El. Co., 6 App. Div. (N. Y.) 12, which, however was reversed, 158 N. Y. 231 see next note.

[31] Palmer v. Larchmont El. Co., 158 N. Y. 231. "The court below appears to have feared trouble with reference to the determination of the necessity for light [street lights] by the courts, and thought that each case would have to be determined on its own facts, and that the decision in each would vary with the varying minds and judgments of the courts and petit jurors, but we apprehend no difficulty in this regard. We think that question should be left to the determination of the parties specified by the statute. * * * Who can better determine the necessity for light in a highway than the inhabitants of the town through which it runs? * * * The authorities of this town having determined the necessity for the light and contracted with the defendant to furnish it, and the light being for a street purpose, we think no burden is placed upon the fee."

[32] Van Brunt v. Flat Bush, 128 N. Y. 50; Cater v. N. W. Tel. Ex. Co., 60 Minn. 539; Paine v. Calor Oil & G. Co., (Ky., 1907) 103 S. W. 309; Lewis, Em. Dom. sec. 126; Hiss v. Balt. & H. P. R. Co., 52 Md. 253.

[33] So in Nichols v. A. A. & Y. St. Ry. Co., 87 Mich. 361, an abutter was awarded damages for the construction of an interurban railway, not on the ground of "additional burden," but because the track, being on a different grade from the road, seriously interfered with his easement of access. This was one of the reasons for the decision in Zehren v. Mil. &c. Co., supra.

[34] Elliott, p. 410. No compensation for a sewer: Standinger v. City of Newark, 28 N. J. Eq. 446; Matter of Yonkers Sewer, 117 N. Y. 564; Cone v. Hartford, 28 Conn. 363. Nor for pipes of a municipal waterworks system: Bishop v. North Adams Fire District, 167 Mass. 364; Newburyport Water Co. v. Newburyport, 168 Mass. 541. Nor for a drinking fountain: Lostutter v. Aurora, 126 Ind. 436. Nor poles and wires for municipal lighting: Gulf Coast &c. Co. v. Bowers, 80 Miss. 570.

dens is a vexed question. It is settled that water[35] and gas[36] pipes are not, nor are surface street railways, whether operated by horse,[37] by cable[38] or by electric trolley.[39] As to steam dummy lines the courts differ.[40] Elevated railroads are held to damage abutting property owners; but in this case there is the additional consideration that the easements of light and air are cut off. It is probable that the latter is the controlling consideration, since damages have been awarded in cases where the fee in the streets was in the city.[41] Subways for travel have been held in a recent case not to be an additional burden.[42] As to commercial steam railways, though there is irreconcilable conflict, the great weight of recent authority is to the effect that such a use is an additional burden on the fee.[43]

As to telephone and telegraph lines the authorities are evenly divided. Some hold them to be foreign to the purpose for which the highway was taken, the passage of traffic, and hence an additional burden.[44] Others, however, regarding the highway to be,

[35] Provost v. Water Co., 162 Pa. 275; Lewis, Em. Dom. sec. 128; Jayne v. Cortland Waterworks Co., 95 N. Y. Supp. 227, reversing 86 N. Y. Supp. 571.

[36] McDevitt v. Gas Co., 160 Pa. 367; Lewis, Em. Dom. sec. 129.

[37] The authorities are too numerous to cite here; they are given in full in 1 Lewis, Em. Dom. §115c. New York alone holds such a railway to be an additional burden, Craig v. Rochester City R. R. Co., 39 N. Y. 404, and in the recent case of Peck v. Schenectady Ry. Co., 170 N. Y. 298, the court says that if it were an open question in that state, there would be much to sustain the contention that such a railway is not an additional burden.

[38] Rafferty v. Cent. T. Co., 147 Pa. 579; Harrison v. Mt. Auburn St. Ry. Co. (Ohio C. P.) 17 Wkly. L. Bul. 265.

[39] 1 Lewis, Em. Dom. §115f and cases there cited.

[40] Dummy line not an additional burden: Newell v. Minneapolis &c. Ry. Co., 35 Minn. 112; Briggs v. Lewiston & A. R. Co., 79 Me. 363; McQuaid v. Portland R. Co., 18 Ore. 237. Contra, St. Ry. Co. v. Doyle, 88 Tenn. 747.

[41] In the following cases, where the fee was in the abutter, the court awarded damages on the ground of additional burden, but said that it would have awarded damages had the fee been in the city, for injury to the easements of light, air and access: Story v. N. Y. El. R. Co., 90 N. Y. 122; Lehr v. M. E. R. Co., 104 N. Y. 268; Williams v. B. El. R. Co., 126 N. Y. 96. In the following cases, where the fee was in the city, damages were awarded for obstruction of the easements: Fifth Nat. Bk. v. N. Y. E. R. Co., 24 Fed. 114; Kane v. N. Y. E. R. Co., 125 N. Y. 164; Hughes v. M. E. R. Co., 130 N. Y. 14; Lawrence v. M. E. R. Co., 126 N. Y. 483; Aldis v. Union E. R. Co., 203 Ill. 567; De Geofroy v. M. B. T. R. Co., 179 Mo. 698. In Illinois such a road is an additional burden, West Side E. R. Co. v. Springer, 171 Ill. 170; which seemingly overrules Doane v. Lake St. E. R. Co., 165 Ill. 510, and Chicago O. B. v. Lake St. E. R. Co., 87 Ill. App. 594.

[42] Sears v. Crocker, 184 Mass. 586.

[43] See Lewis Em. Dom. §§111, 112, and 113, also the following: Atlanta & W. P. R. Co. v. A. B. & A. R. R. Co., 125 Ga. 529; Athens T. Co. v. A. F. & M. Wks., (Ga. 1907) 58 S. E. 891; Seaboard A. L. R. Co. v. South. Inv. Co. (Fla. 1907) 44 So. 351; Taber v. N. Y. P. & B. R. R. Co., 28 R. I. 269.

[44] "Although the purpose of a public highway is for the passage of the public, it may be conceded that the land forming such highway was not taken for the purpose of enabling the public to pass over it in the then known vehicles, or for using it in the then known methods for the conveyance of property or the transmission of intelligence. Still the primary law of the highway is motion, and whatever vehicles are used or whatever method of transmission of intelligence is adopted, the vehicle must move and the intelligence be transmitted by some moving body which must pass along the highway, either on, or over, or, perhaps, under it, but it cannot permanently appropriate any part of it. * * * we cannot agree that this permanent appropriation and exclusive possession of a small portion of the highway can properly be regarded as any newly discovered method of exercising the old public easement, for the very reason that this so-called new method is a permanent, continuous, and exclusive use and possession of some part of the public highway itself." Eels v. Am. Tel. & Telg. Co., 143 N. Y. 133. As to a distinction based upon permanence and exclusiveness of occupation, it need only be

not only a passage way, but also a channel for the transmission of intelligence, a use capable of expansion in proportion to the public necessity and the improvement of the means of travel and communication, have held these to be proper highway uses.[45] Telephone lines in underground conduits have been held not to be an additional burden, even in New York, where the overhead lines are held to be such.[46] The lines of an electric light or power company are not an additional burden where used to light the streets;[47] and the holding would probably be the same where they are used for both public and private lighting.[48] Lines used exclusively for private lighting have been held not to possess this immunity; but the question has

remarked that this test would exclude from the highway easement the electric trolley, with its poles, wires and track, and it would even bar water pipes, since their occupancy, although not pertaining to the surface, is also permanent and exclusive.

The position of the New York case, however, is supported by the following: P. P. T. & C. Co. v. Irvine, 49 Fed. 113; B. of T. T. Co. v. Barnett, 107 Ill. 507; Postal T. Co. v. Eaton, 170 Ill. 513; Burrall v. A. T. & T. Co., 224 Ill. 266; DeKalb C. T. Co. v. Dutton, 228 Ill. 178; C. & P. T. Co. v. Mackenzie, 74 Md. 36; Stowers v. P. T. Co., 68 Miss. 559; Nicoll v. N. Y. &c Co., 62 N. J. L. 733; Beachfield v. Empire &c. Co., 71 Hun 532; Osborn v. Auburn T. Co. (N. Y.) 82 N. E. 428, reversing 111 App. Div. 702; Donovan v. Allert, 11 N. D. 289; Cosgriff v. Tri-State Co., (N. D. 1906) 107 N. W. 525; Daily v. State, 51 Ohio St. 348; W. U. Teleg. Co. v. Williams, 86 Va. 696; Krueger v. Wis. T. Co., 106 Wis. 96; Joyce on Electric Law, § 321; Crosswell, Law of Electricity, §110; Elliott, Roads and Streets p. 533; Lewis Em. Dom. §131.

[45] The leading case is Pierce v. Drew, 136 Mass. 75, where the court says, "As every such [highway] grant has for its object the procurement of an easement for the public, the incidental powers granted must be so construed as most effectually to secure to the public the full enjoyment of such easement. It has never been doubted that, by authority of the legislature, highways might be used for gas or water pipes, intended for the convenience of the citizens, although the gas or water was conducted thereunder by companies formed for the purpose, or for sewers, whose object was not merely the incidental one of cleansing the streets, but also the drainage of private estates, the rights of which to enter therein are subject to public regulations. (Authorities).

"Nor can we perceive that these are to be treated as incidental uses, as suggested by the plaintiff, because the pipes are conducted under the surface of the traveled way, rather than above it. The rights of the owner of the fee must he the same in either case, and the use of the land under the way for sewers or gas pipes would effectually prevent his own use of it for cellarage or other purposes.

"When the land was taken for a highway, that which was taken was not merely the privilege of traveling over it in the then known vehicles, or for using it in the then known methods for either the conveyance of property or transmission of intelligence. * * * The use of the telegraph is certainly similar to, if not identical with the public use of transmitting information for which the highway was originally taken."

This opinion, which is in accordance with the contentions of the text as to the scope of the highway easement, is supported by the following: S. Bell. Tel. Co. v. Francis, 109 Ala. 224; Magee v. Overshiner, 150 Ind. 127; McCann v. Johnson C. Tel. Co., 69 Kan. 210; Cumberland T. & T. Co. v. Avritt, 120 Ky. 34; People v. Eaton, 100 Mich. 208; Cater v. N. W. Tel. Exch. Co., 60 Minn. 539; Julia Bldg. Ass. v. Bell T. Co., 88 Mo. 258; Hershfield v. Rocky M. B. T. Co., 12 Mont. 102; York Tel. Co. v. Kelsey, 5 Pa. Dist. Ct. 366; Kirby v. Cit. Tel. Co., 17 S. D. 362; Frazier v. E. Tenn. Tel. Co., 115 Tenn. 416 Maxwell v. C. D. & P. Co., 51 W. Va. 121; Lother v. Bridgeman, 57 W. Va. 306; 3 Cook on Corps* (4th ed.) § 933; Keasby on Electric Wires (ed. 1892) p. 82.

[46] Castle v. Bell Tel. Co., 49 App. Div. 437. The same rule is in force in Indiana, where, however, the overhead telephone is not an additional burden. Coburn v. New Tel. Co., 156 Ind. 90.

[47] Lewis, Em. Dom. §131a. While the question has never been directly passed upon, the assertion of the text is supported by much dictum, and by analogy from similar cases.

[48] Lewis, same citation, and cases there cited, none of which, however, is directly in point. Otherwise in New Jersey where it is held that the two purposes must be separated if possible, otherwise compensation must be made for the entire equipment. This decision was no doubt dependent on the statute, which required compensation to the abutter for electric wires for private lighting. Andreas v. G. & E. Co. of Bergen Co., 61 N. J. Eq. 69.

been passed upon only once.[49] The practicability of observing such a distinction may well be doubted.

It will have been perceived that the theory of additional servitudes is very unstable and hazy, involving as it does many highly artificial distinctions, every one of which has been frequently disregarded. The divergent holding as to rural and urban servitudes has already been discussed. The fundamental requisite for the additional servitude is that the abutter own the fee in the street; yet there are instances where abutters have had damages as for an "additional servitude," though not owning the fee.[50] By one line of authorities the congruity of the proposed use to the purpose of a highway has been made the test;[51] by others the extent to which the proposed use will cumber the street or annoy the abutter.[52] All these tests seem artificial and illogical, the last three no less than the first.

The ownership of the fee. True, in certain highways a right of way only is taken by the public; yet that right of way effectually excludes the owner of the fee from any present enjoyment. He may not fence it with his land, nor, safely, cultivate; he may not even pasture his cattle beside the track. To all practical intents he possesses a mere possibility of reverter. In what better case is he than one who has parted with the fee? For in that event the municipality gets but a qualified fee. It may purchase or condemn for a highway only; and any diversion of the land from a highway purpose the abutter may prevent by injunction. In the event of vacation the land reverts to the abutter,[53] just as if he had owned the fee. Why then should so shadowy a distinction be invoked to determine valuable rights. Furthermore, an observance of this distinction renders necessary in every case an investigation of the manner in which the street in question happened to be opened; and reserves to a certain class of abutters valuable rights of which no account was taken in adjusting their original compensation.[54]

---

[49] Callen v. Columbus E. L. Co., 66 Ohio St. 166.

[50] Callen v. Columbus E. E. L. Co., 66 Ohio St. 166; White v. N. N. C. R. Co., 113 N. C. 610.

[51] Compare Halsey v. Rapid T. St. R. Co., 47 N. J. Eq. 380, with Andreas v. G. & E. Co., 61 N. J. Eq. 380. Damages are awarded for wires used in private lighting and denied for those used in street lighting, thus leaving out of consideration the actual damages to the abutter, which would be identical in both cases.

[52] See the Eels case quoted above, note 44. In Joynes v. Omaha St. Ry. Co., 53 Neb. 631, this reasoning is carried to its logical conclusion, and a trolley line is held to be an additional burden, because with its poles, it constitutes a permanent occupation of the highway. No other supporter of the doctrine, however, is so logical.

[53] Stevens v. Shannon, 6 Ohio Cir. Ct. Rep. 142, affd., 51 Ohio St. 593; Callen v. C. E. E. L. Co., supra; Atchison &c. R. Co. v. Patch, 28 Kan. 470, Elliott (ed. 1890), p. 671.

[54] The distinction based on ownership of the fee was squarely involved in I. B. & W. R. Co. v. Hartley, 67 Ill. 439. This was an action of trespass by an abutter owning the fee against a railroad company which, with the proper permission from the city, had laid a track in the street. In a previous case, where the city owned the fee, the court had denied the abutter damages. That case was distinguished, and damages awarded this

Congruity to highway purpose. No principle of law is better established than that land acquired for a highway can be used for no other purpose; and, as above stated, the proper officers, or any individual aggrieved, may abate such use as a nuisance or prevent it by injunction. Yet the doctrine of additional servitudes, as invoked to permit the collection of damages, would appear to be: that there are certain uses, which, in the sense that they may not be abated as a nuisance, are not foreign to the highway use; but which are foreign to the highway use in the sense of being an additional burden on the "fee," and entitling the owner thereof to damages. The very statement is a *reductio ad absurdum;* the same use is made at once proper and improper to the highway.

Incumbrance of the street and annoyance to abutter. If any use seriously hinders other street uses then it is a matter of concern not only to the abutter but to the public at large, and it may, and should, be prevented altogether. If it interferes with the abutter's easements of light, air, access, etc., then he has his proper remedy. Why should he be allowed further damages, which he could not obtain from the owner of adjoining land for similar acts? For example, why should an electric railway in the street be liable to him otherwise than as though it were on its private right of way adjoining his land?[55]

---

plaintiff, in the following language: "It is claimed that it is immaterial whether the city owns the fee of the street or not; the municipal authorities have the supreme control over all streets, and can grant the right to lay a track on or across any street, and having done so in this instance, if ingress and egress are not materially affected, is *damnum absque injuria.* * * * * * A distinction has been taken, where the municipality granting the right to lay the track owns the fee in the streets, and where the fee remains in the abutting landowner, and it seems to us that it rests on sound principle and is supported by the highest authority." To the same effect are: Fobes v. R. W. & O. R. Co., 121 N. Y. 505; O'Connor v. St. Louis &c. R. Co., 56 Ia. 735; Iron Mt. R. Co. v. Bingham, 87 Tenn. 522; compare B. of T. T. Co. v. Barnett, 107 Ill. 507, with McWethy v. Aurora E. L. & P. Co., 202 Ill. 218.

The contrary view is well stated in Paquet v. Mt. Tabor St. Ry. Co., 18 Ore. 233. This was an action to enjoin a steam motor dummy line from constructing its road upon a street in the city of Portland and a country road, abutting upon both of which the plaintiff owned land with the fee to the center of the respective highways, until compensation should be made. The court, in denying the injunction, said, "The establishment of a public highway practically divests the owner of the fee to the land upon which it is laid out of the present beneficial interest of a private nature which he has therein. It leaves him nothing but a possibility of a reinvestment of his former interest in case the highway should be discontinued as such. This view, I am aware, is contrary to the ancient doctrine that the owner of the fee owned the land subject only to such public uses, and that he had a right of action when the use was diverted to a different purpose. Such a doctrine may have been applicable where the ownership was merely subject to a right of way over the land; but where, as in the modern cases, it is devoted exclusively to the purposes of a public thoroughfare, and the control thereof is committed to legally constituted authorities, charged with the duty of maintaining it for such purpose, the doctrine becomes a vague theory and should be laid away among the antiquities of the past age." So also McQuaid v. Portland &c. Ry. Co., 18 Ore. 237; Montgomery v. Santa Ana W. R. Co., 104 Cal. 186; Consumers G. & L. Co. v. Congress Spring Co., 61 Hun 133; Spencer v. P. P. & O. R. Co., 23 W. Va. 406; Keasbey on El. Wires, §§ 78-84, 91; Dillon, Mun. Corps, §§ 664a, 702-4, 723c; Barney v. City of Keokuk, 94 U. S. 324. So also, though used for a different purpose, are Lewis, Em. Dom. § 115; Joyce, Electric Law, § 298; Calen v. Columbus E. E. L. Co., supra.

[55] As says Keasbey (Electric Wires, 2d. ed. § 102), "It is certain that no distinction can permanently endure which makes a practical difference between two public streets

According to the views above stated the rights of public service corporations occupying the highways, and of property owners abutting thereon, may be summed up as follows:

1. The property of the public in the highway includes, beside the right of travel, also the right to permit, by the proper official action, the establishment therein of such public utilities as are reasonably necessary[56] for the comfort and convenience of the people of the community and do not interfere unreasonably with other proper uses of the same highway. Any other occupancy of the highway is a nuisance and unlawful.

2. A public service corporation lawfully occupying a highway is liable to abutters only for actual damage to their land or the easements in the street appurtenant thereto.

In these rules the doctrine of additional servitudes has no place. The growth of that doctrine is another instance of a hard case making bad law. The trouble arose over steam railroads. In the beginning resembling more closely the trolley lines than the steam railroads of the present day, they were welcomed to the streets. Eventually they became a hindrance, although changing only in the size, frequency, and speed of the trains. The courts desired to give the abutting property owner some redress in the numerous cases where he was seriously hindered in the ingress to his property, or was deprived of light and air. The doctrine of easements of access, etc. had not yet been developed. Accordingly the theory of additional servitudes was invented. At present the above named easements are universally recognized and furnish sufficient protection.[57] To award damages for further real or fancied injuries is not only illogical but practically unjust.

Take the case of an electric power company. If it plants a pole

with respect to the technical title to the soil. When men lay out land for streets they dedicate it for street uses, retaining all the privileges of adjacency; when they convey land to a city for a street or when the city condemns land for a street, the land is taken for the purposes of a street and for these only, and the individual retains the same rights of adjacency as before. * * * * * It could hardly be said, moreover, that the rule was settled if it should be found that, according to the rule, a landowner could object to the use of poles and wires for the telegraph, but not for the electric light, or to the use of a pole and wire for the ordinary telegraph, but not for the fire-alarm telegraph; or that poles with wires overhead trespass on the fee of the soil, while wires underground do not. * * * * * If gas pipes may be laid underground without compensation, there can be no objection to cables for furnishing electric light to private houses. And if this be so it would be hard to exclude the telegraph and telephone from the use of the same subways.

"A distinction is made between rural highways and city streets and it is suggested that the public uses for which the one is dedicated are different from those to which the other must be subject. The question resolves itself after all into the question of public necessity."

[56] "Reasonably necessary." This means not only is the utility itself reasonably necessary to the community; but, also, is it necessary that the apparatus in question occupy the street.

[57] A. & B. Ry. Co. v. McKnight, 125 Ga. 329; A. T. Co. v. A. F. & M. Wks. (Ga.), 58 S. E. 891; Barney v. Keokuk, 94 U. S. 324.

in the abutter's doorway all courts now give him an action for injury to his easement of access. If the pole is put in at some distance from his door the older line of decisions would give him damages if he owned the fee in the street and the wires which the pole supported carried an electric current to be used in street lighting, but would deny redress if he did not own the fee, or if, although he owned the fee, the wires were used in street lighting. If now the pole was set across the street (hence off his "fee"), there were no damages, however unsightly the pole might be. If again the pole were not in the street but in a neighbor's premises (although nearer to the house of our victim than the pole in the second case), then he is without redress. The rule contended for here would give him an action in the first case only.

Let us apply this rule to a railroad. If the proper authorities of the municipality deem it for the public good that a railroad be allowed to occupy a highway, and if in the opinion of the court it does not materially interfere with the other purposes of the highway, then the question of damages to the abutter should depend upon whether the road materially interferes with his easements above enumerated. If, on the other hand, it be found to interfere materially with the traffic in the street, then its erection or further operation should be enjoined. The same rule should apply to the trolley. It may be that *prima facie* a steam railway in the street interferes with the access to adjacent property and a trolley does not; but surely the presumption is rebuttable.[58] Telephones and telegraphs, being seldom an obstruction, ought to be permitted without compensation.

In the words of Mr. JUSTICE BRADLEY in the case of *Barney* v. *Keokuk*,[59] "On the general question as to the rights of the public in a city street, we cannot see any material difference in principle with regard to the extent of those rights, whether the fee is in the public or in the adjacent landowner, or in some third person. In either case the street is legally open and free for the public passage and for such other public uses as are necessary in a city, and do not pre-

[58] The theory of the writer is sustained by the Minnesota court in Newell v. Minneapolis L. & M. Ry. Co., 35 Minn. 112. "It is for the court to determine whether a manner of using a street complained of is or is not, all things considered, a substantial infringement upon the common right. We say, a substantial infringement, all things considered, because it is not every mere inconvenience or temporary hindrance to which one person, in using a street, may be subjected by the manner in which another uses it, which presents a case of inconsistency with the common public right. The inconsistency must be such that the common public use cannot, in its substantial integrity, co-exist with the use complained of. * * * * [If such inconsistency exists] then the latter cannot stand as a proper and lawful use of the street easement." So also Eustis v. Milton St. Ry. Co., 183 Mass. 586. In these cases, which were actions for damages by abutting landowners, the court states a rule identical with that involved in an action to oust the corporation from the street.

[59] 94 U. S. 324.

vent its use as a thoroughfare, such as the laying of water-pipes, gas-pipes and the like."

B. THE CORPORATIONS AS CO-TENANTS.

Not infrequently the laying of a new sewer, of water-mains, or gas pipes, or the track of an electric railway, will necessitate the disturbance or removal of existing lines belonging to other corporations. Questions then arise upon whom the burden of making the changes shall fall. May the interference be prevented by injunction, or, if not, may the prior occupant be reimbursed for its damages, present or prospective?

Apart from actual, physical interference, trouble often arises indirectly, as, for example, from misbehavior of electric currents, causing disturbance in other electric wires through induction and conduction, and causing electrolysis in iron pipes.[60] With regard to the parties concerned, such interference may arise between the municipality and some public service corporation, or between two such corporations.

As against such interference by a municipality acting in its *public capacity*, a public service corporation has but few rights. It takes its license to use the streets subject to their use by the city, not only for highway purposes, but as a location for sewers and other public utilities in furtherance of its governmental functions. Not only can the corporation not enjoin the city from interfering with its property, but it cannot even have damages.[61] The selection of a location for

[60] An electric current creates a magnetic field about its conductor, varying in extent and intensity with the amount of the current, and extending to a maximum distance of several feet from the conductor. If another conductor be placed parallel to the first and within this magnetic field, and if the current in the first be suddenly changed in intensity or direction, a momentary current will be produced in the second conductor by reason of the sudden alteration of the magnetic lines of force surrounding it. Through this "induction," as it is called, almost all heavy currents will create a continual disturbance in a wire near them. The current in the telephone being exceedingly weak, a telephone line might well be rendered useless by the proximity of such a wire. The difficulty may be obviated by using a metallic telephone circuit; the induction, then operating in opposite directions in the two wires, is neutralized. In the trolley system the current returns to the generator through the rails and the ground, causing two harmful results. If any telephone line within a considerable radius (in some cases half a mile) is using the ground for its return current, this diffused current from the trolley line will render it useless. For this the best remedy is a metallic telephone circuit. Secondly, iron pipes laid near the track will be used by the current as a return conductor, and will in time be disintegrated by electrolysis. This can be prevented by bonding the rails with copper wire. These troubles are spoken of in the cases as arising from "conduction."

[61] In the following cases damages were refused: 1. Water pipes of private corporation disturbed by (a) Sewers laid by the city, National Waterworks Co. v. City of Kansas, 28 Fed. 921; Rockland Water Co v. City of Rockland, 83 Me. 267; (b) a change in street grade, Jamaica Pond Co. v. Brookline, 121 Mass. 5; Water Comrs. of Jersey City v. City of Hudson, 13 N. J. Eq. 420; Nat. Waterworks Co. v. Kansas City, 20 Mo. App. 237; Bryn Mawr Water Co. v. Lower Meridon Tp., 15 Pa. Co. Ct. 527. 2. Street railway disturbed, (a) by laying sewers, San Antonio v. S. A. St. Ry. Co., 15 Tex. Civ. App. 1; Kirby v. Cit. Ry. Co., 48 Md. 168; Ry. Co. v. City of New York, 55 Barb. 298; North Pa. Ry. Co. v. Stone, 3 Phila. 421; (b) or by paving, C. B. & Q. Ry. Co. v. City of Quincy, 139 Ill. 355. 3. Steam pipes of heating plant disturbed by a change of grade, Chatfield v. Cincinnati, 7 Ohio Dec. 111. 4. Gas pipes disturbed,

the municipal improvements is an administrative act and will not be interfered with by the courts so long as the selection was reasonable and was not inspired by a malicious desire to injure the corporation.[62] The mere fact that another part of the street might have been used is not enough in itself to establish unreasonableness.[63] But it has been held that a city, having designated the location of a structure, could not order the location changed, when no new reason for the change had arisen and a change would entail great expense on the corporation.[64] As little injury as possible must be done; and the municipality is liable for negligence.[65]

When the apparatus in question is owned and operated by the municipality in its non-governmental capacity, a different question is presented. It is well settled that municipal water or electric plants which furnish service to private citizens are an exercise of the city's private and proprietary, and not its governmental, functions.[66] The city acting in this capacity is subject to the same liabilities in contract and tort as a private corporation.[67] It is believed, therefore, that in regard to its rights and duties in the event of interference with the apparatus of private corporations in the street, it has the status of a private corporation.[68]

Of much more frequent occurrence than disturbance by the city is interference between two private corporations. This is the cause of almost endless friction upon every street of the larger cities. What, then, are the rights of the previous occupant? May it prevent

(a) by a change of grade, Columbus G. & C. Co. v. City of Columbus. 50 Ohio St. 65; Roanoke Gas Co. v. Roanoke, 88 Va. 810; Matter of Petition of Deering, 93 N. Y. 361; (b) by laying sewer, Sedalia Gas Co. v. Mercer, 48 Mo. App. 644; Portsmouth Gas Co. v. Shanahan, 65 N. H. 233. 5. Wires of electric, or telephone, company disturbed by a change in the width of the street. Monongahela City v. Monongahela E. L. Co., 3 Pa. Dist. Rep. 63; American T. & T. Co. v. Millcreek Tp., 195 Pa. 643; Town of Mason v. R. R. Co., 51 W. Va. 183.

[62] Seattle v. Columbia P. S. R. Co., 6 Wash. 379; Clapp v. Spokane, 53 Fed. 515. The rule is stated by Judge Brewer (afterwards of the Federal supreme court) in the case of Nat. Waterworks Co. v. City of Kansas, 28 Fed. 921, an action to recover the cost of removing plaintiff's water-pipe, necessitated by the laying of defendant's sewer. "The plaintiff contends that by its contract with the city it was bound to lay its water-pipe in this street; and that it did lay it in the place and manner by the city directed, and thereby acquired such a vested property right in an undisturbed location and possession that any future trespass thereon or invasion thereof, like any other attack upon private property, would subject the city to an action for damages; while the contention of the city is that the matter of sewerage is one affecting the public health; that it could not if it would, and it did not, if it could, contract away the right to construct sewers in any part of the public streets it might deem necessary; and that the plaintiff took its contract rights to lay its pipes in the public streets subject to the paramount and inalienable right of the city to construct its sewers wherever therein, in its judgment, the public interests demanded. I think the contention of the city is correct." The court then states that the mere fact that there were other possible locations for the sewer is not sufficient to prove malice or unreasonableness. "The city is presumed to act without malice, to act reasonably, and as in its judgment the interests of the public demand."

[63] Spokane St. Ry. Co. v. Spokane, 5 Wash. 634; San Antonio v. S. A. St. Ry. Co., 15 Tex. Civ. App. 1.

[64] Des Moines City Ry. Co. v. Des Moines, 90 Ia. 770.

[65] N. C. Ry. Co. v. Baltimore, 46 Md. 425.

[66] Abbott, Mun. Corps. §888 and note 1019, and cases there cited.

[67] Abbott, § 892.

[68] Such is indicated in Sears v. Crocker, 184 Mass. 586.

the interference, or should it permit the interference and sue for damages, or is it wholly without remedy? There are, under certain circumstances, two possible remedies: injunction and an action for damages, with occasionally a third, mandamus.

The function of the injunction is two-fold, to restrain permanently the proposed interference, and to enforce the payment of damages by a temporary stay until an adjudication and satisfaction has been obtained under condemnation proceedings. It is a well recognized principle of the law of Eminent Domain that this remedy is open to prevent a threatened taking of private property for a public use without due compensation.[69] This use of the injunction, being a mere auxiliary to the action for damages, needs no separate treatment.

I.—INJUNCTION.

The permanent injunction may be invoked where the new corporation has not a valid franchise, or permit. It is then a mere trespasser.[70] So, also, if the proposed construction is absolutely inconsistent with the operation of existing apparatus and no amount of adaptation of the old or the new will make them compatible; then the proposed construction will be enjoined, so far as is necessary to protect the old. It is, for example, usually impossible to accommodate two lines of street railway in the same street; and where that has been attempted, even though under municipal sanction, the new railway has been enjoined.[71]

On the other hand, the situation often arises, where, with a slight alteration in the apparatus of the prior-existing corporation both utilities may be accommodated in the street. In that case no injunction will issue to prevent such inconvenience or interference to the first corporation. The interference, however, must be as small as possible. The situation was first presented by the proposed building of a trolley line in a street already occupied by a telephone system. It was shown that the telephone would be rendered completely useless by induction and conduction from the trolley. It was also shown that there was no successful method open to the trolley company to prevent these evils, but that a remedy lay within the power of the telephone company, by using a metallic circuit and other devices. So it was held in the case of *Cumberland T. & T. Co.* v. *United El. Ry. Co.*, 42 Fed. 273, and the decision has been univer-

[69] Lewis, Em. Dom. §§ 619, 631-34; Chicago & W. I. R. Co. v. Chicago St. L. & P. Co., 15 Ill. App. 587; High, Injunctions. §§ 578 *et seq.*

[70] Chi. Gen. El. Ry. Co. v. West Chi. St. Ry. Co., 66 Ill. App. 362. Contra, Phelps v. Lake St. El. R. Co., 60 Ill. App. 471; but the dissenting opinion is the better law.

[71] Ind. C. S. R. R. Co. v. Cit. St. Ry. Co., 127 Ind. 369; Commonwealth v. Bond, 214 Pa. 307; but see Chi. Gen. El. Ry. Co. v. W. C. St. Ry. Co., 63 Ill. App. 464.

sally followed, that no injunction would lie against the trolley line.[72] The alternative would have been, for the mere convenience of the telephone company, to prohibit the street in question to the trolley altogether. The question of damages was then raised; that will be discussed later.

In a third possible situation, the new utility will interfere more or less with that already in the street; but this interference may be obviated either by a change in the apparatus of the first occupant or an alteration in the plans of the newcomer. In determining upon which corporation the burden shall be thrown, the courts,—many of them,—strange to say, invoke the old dogma of additional servitudes, of proper and improper street uses.

"There is no question of prior equities involved," says the New York Court of Appeals in such a case.[73] "It is a matter of strict legal right. Neither priority of grant nor priority of occupation can avail either party. The plaintiff has a franchise which is entitled to protection, but the prime difficulty which it encounters grows out of its subordinate character. It has been given and accepted upon the express condition that it shall not obstruct or interfere with the enjoyment by the defendant of its franchises. The plaintiff is not using the streets for one of the purposes to which they have been dedicated as public highways, while the defendant is occupying them in such a manner as to expedite public travel and promote the public use to which they were originally devoted."

Hereupon has been reared a large and complicated hierarchy of uses graded according to the extent to which each subserves the supposed proper highway use. Most important stand street railways,

[72] In holding as stated in the text the court, per Brown, J., (afterwards of the Federal supreme court) said, "It is quite possible that the legal obligations of the parties may change with the progress of invention, and the duty of surmounting the difficulty be thrown on one party or the other, as a cheaper or more effectual remedy is discovered. For example, if it were shown that by the use of a certain device the defendants could control their return current in such a way as not to interfere with the use of complainant's instruments, the law might treat their failure to adopt such measures as negligence in the use of their franchise, and enjoin them, or hold them liable for all the damages sustained by complainant. If, upon the other hand, the difficulty can be better controlled by a device applicable to telephones, it might be incumbent upon the complainant to adopt it, leaving the courts to settle the further question, whether the expense of so doing is recoverable of the defendants * * * * If the existence of one was absolutely incompatible with the continued operation of the other, it might be incumbent upon us to make a choice between these two great benefactions." The same conclusion is reached, although with different reasoning, in Hudson R. Tel. Co. v. Watervliet Ry. Co., 135 N. Y. 393. The Cumberland case is supported by: Cincinnati &c. Ry. Co. v. City & S. Tel. Co., 48 Ohio St. 390; Cent. Un. Tel. Co. v. Akron St. Ry. Co. (Ohio Com. Pl.) 2 Am. Elec. Cas. 307; E. Tenn. Tel. Co. v. Chattanooga St. Ry. Co. (Tenn. Co. Ct.), 2 Am. El. Cas. 323; Rocky M. B. Tel. Co. v. Salt Lake City Ry. Co. (Utah Dist. Ct.), 3 Am. El. Cas. 350; Same v. Same. 3 Am. El. Cas. 359; Wis. Tel. Co. v. Eau Claire St. Ry. Co. (Wis. Super.), 3 Am. El. Cas. 383; E. Tenn. Tel. Co. v. Knoxville St. Ry. Co. (Tenn. Co. Ct.), 3 Am. El. Cas. 400; DuBois P. T. Ry. Co. v. Buffalo &c. Co., 149 Pa. 1.

[73] Hudson River Tel. Co. v. Watervliet T. & R. Co., 121 N. Y. 403, 135 N. Y. 393; this reference, 135 N. Y. 407.

which are considered a sort of specialized highway.[74] Next come electric wires employed in lighting the streets,[75] then telegraphs,[76] which owe their favored position to the federal post-roads act; below these are telephones, electric wires not used in street lighting, and steam railroads. With this line of reasoning it is impossible to concur. Admitting the validity of the theory of additional servitudes as between the abutter and the corporation, yet it is by its own profession only a rule to fix the payment of damages as between those parties. Why extend it to regulate the status of public utilities as to each other? As well regulate that status by the extent to which each interferes with the abutter's easement of access. Granted the telephone was a use not included in the original highway easement, yet it is now installed by authority of the city and leave of the landowner. With whom lies it to complain? Surely not with another corporation which occupies the street by the self-same authority. As a matter of practice, moreover, one public utility is of as great usefulness as another.

The better rule is that stated by the Pennsylvania court in a late case,[77] and extensively followed.[78] The plaintiff, an electric company for private illumination, was the prior occupant of the street. It sought to enjoin the defendant, which was under contract to light the streets, from stringing its wires in dangerous proximity to its own. The court below had held that the second company, on account of its public contract, had the right of way, and might only be enjoined from wanton or unnecessary interference with plaintiff.

[74] Hudson River Tel. Co. v. Watervliet Ry. Co.; Wis. Tel. Co. v. Eau Claire St. Ry. Co.; Cincinnati &c. Co. v. City & S. T. Co. (all supra).

[75] Terre Haute L. & P. Co. v. Cit. L. & P. Co. (Ind. Super. Ct.), 6 Am. El. Cas. 193. Tuttle v. Brush El. Co. (N. Y. Super.), 1 Am. El. Cas. 508.

[76] W. U. Tel. Co. v. Los Angeles El. Co., 76 Fed. 178.

[77] Edison El. L. & P. Co. v. Merchants & Mfgrs. El. L, H. & P. Co., 200 Pa. 209.

[78] In the case of Elizabethtown &c. Ry. Co. v. Ashland &c. Ry. Co., 96 Ky. 347, the court refused to enjoin an interurban road from crossing a steam road. To the argument that the former was an additional servitude the court answered, "Even if this use imposed an additional servitude on the lands of the turnpike company, it does not affect the right of appellants [complainants] to cross this highway or street, and they have nothing of which to complain." In W. U. Telg. Co. v. Guernsey & Scudder El. L. Co., 46 Mo. App. 120, the complainant, the first occupant of the street, sought to enjoin the light company from stringing high potential wires through and over its telegraph wires. The court, page 135, says that if plaintiff claimed by virtue of any supposed superiority of use, then the claim must be denied. "If, on the other hand, by such claim nothing further is sought to be asserted than the proposition that, the plaintiff being a prior licensee on the street, and as such in the exercise of legal rights and duties, its rights could not be substantially invaded by a subsequent licensee of the city, the claim is correct." The following cases support the same position: Birmingham Tr. Co. v. Sou. Bell. Tel. Co., 119 Ala. 144; N. Y. & L. B. R. R. Co. v. Atlantic Highlands &c. Ry. Co., 55 N. J. Eq. 522; D. L. & W. R. R. Co. v. Wilkesbarre &c. Ry. Co. (Pa. Com. Pl.), 4 Am. El. Cas. 237; New York N. H. & H. R. R. Co. v. Bridgeport Trac. Co., 65 Conn. 410, 432. In case of State ex rel. Wis. Tel. Co., v. Janesville St. Ry. Co., 87 Wis. 72, the defendant electric railway, on constructing its line under that of relator telephone company, already in operation, was compelled by mandamus to maintain guard wires. The same requirement as to guard wires is enforced against a trolley company by injunction in Cent. Pa. Tel. Co. v. Wilkesbarre Ry. Co., 11 Pa. Co. Ct. Rep. 417.

The supreme court said, "This principle is wholly inadmissible. As between two corporations exercising similar franchises upon the same street, priority carries superiority of right. Equity will adjust the conflicting interests as far as possible and control both, so that each company may exercise its own franchises as fully as is compatible with the necessary exercise of the other's. But if interference and limitation of one or the other are unavoidable, the latter must give way, and the fact that it is under contract with the city for work of a public nature does not alter its position, or give it any claim to preference."

Where the two uses are of the same nature the equitable rule above stated will, of course, be applied by all courts.[79]

II.—DAMAGES.

It was intimated by the court in the case of *Cumberland Tel. & Telg. Co.* v. *United El. Ry. Co.*[80] that, although injunction will be refused, where the threatened interference can be obviated by a comparatively inexpensive alteration in complainant's apparatus, yet that party might have an action to recover the expense of the alterations. The telephone company then made the necessary changes in its plant to avoid conduction, induction, and the danger of contact between its wires and those of the street railway, and brought an action to recoup itself. The court considering these various items separately, held as follows,[81] "Clearly upon the facts as found by the majority, the loss caused by conflict of poles and wires is imputable to defendant's fault or want of care. Having power to have avoided this conflict without injury to its plant, it was defendant's duty to do so. The conflict was the result of defendant's unnecessary act. On the other hand, the loss by induction cannot be imputed to any fault or negligence of defendant. Its plant was, as regards this

[79] In the following cases interference between wires by "interlacing," "overbuilding," or "underbuilding" was enjoined. In most of them the question of higher use was not involved, both wires being of the same nature. Consolidated Light Co. v. Light Co., 94 Ala. 372; N. W. Tel. Exch. Co. v. Twin Cities Tel. Co., 89 Minn. 495; Cumberland T. & T. Co. v. Louisville H. Tel. Co. (Ky.), 72 S. W. 4; W. U. Telg. Co. v. G. & S. El. Co., supra; Bell Tel. Co. v. Belleville El. Co., 12 Ont. 571; Paris El. Co. v. S. W. T. & T. Co. (Tex. Civ. App.), 5 Am. El. Cas. 262; Rutland El. Co. v. Marble City El. Co., 65 Vt. 377; Neh. Tel. Co. v. York El. Co., 27 Neb. 284; Edison E. L. Co. v. M. & M. El. Co., supra; Birmingham Trac. Co. v. So. Bell. T. & T. Co., supra; W. U. Telg. Co. v. Syracuse, 53 N. Y. Supp. 690. In the following cases injunction was refused on the ground that no material interference was shown, or that the interference was unavoidable: Chi. Tel. Co. v. N. W. Tel. Co., 100 Ill. App. 57, 199 Ill. 324; Louisville Home Tel. Co. v. Cumberland T. & T. Co., 111 Fed. 663; West Jersey R. Co. v. Ry. Co., 52 N. J. Eq. 31; Morris & Essex R. Co. v. Ry. Co. 51, N. J. Eq. 379; W. U. Telg. Co. v. Champlain El. Co., 1 Am. El. Cas. 822; Am. Tel. & Telg. Co. v. Morgan County Tel. Co., 138 Ala. 597. The courts seem agreed that interlacing will not be permitted; but differ as to overbuilding and underbuilding. They agree as to the theory, but differ as to what constitutes interference.

[80] Supra, note 72.

[81] Cumberland T. & T. Co. v. United El. Ry. Co., 93 Tenn. 492.

matter, properly conducted and operated. Defendant could not obviate induction without abandoning the streets where it occurred." Induction, the court continues, being remediable most easily by the telephone company, it must apply the remedy and cannot have reimbursement. So far the decision is in accord with the great weight of authority. As to conduction, however, the court, after quoting from Judge Brown's decision that this defect is most easily remediable by the telephone company, and the remedy must be applied by it, says, "This is correct as regards the application for an injunction, but if it is to be understood as holding that defendant would not be liable for the loss by conduction if plaintiff could apply the cheaper remedy, then we dissent from the view expressed. * * * The fact that plaintiff could apply the cheaper remedy would affect the amount of its recovery but not the fact of defendant's liability."[82] This last proposition is in conflict with the best considered cases.

In the case of *Consolidated Traction Company* v. *South Orange and Maplewood Traction Company*[83] the better rule is laid down, that for mere damages in the equipment of the prior occupant necessitated by the new occupancy no recovery may be had. Damages were sought by a street railway for a projected crossing by another, covering interruption of traffic while the crossing was being put in, and permanently increased cost of maintenance. The court says, "The right of one street railway to cross another street railway already constructed is the same legitimate use of the highway as the construction and operation of the original road, and the original right to construct and operate a road in the public streets is necessarily subject to all legitimate purposes of crossing. * * * If the complainant is to be compensated for the changes in its property to which it is subjected solely by the necessity of providing for legitimate public travel across its tracks, and can prevent such travel on the streets from crossing its tracks until compensation for the changes in its property and damages (whatever they may be) arising solely from the necessary provisions for such travel, then a situation arises in which it may perhaps be necessary to consider whether the

[82] The case is supported by E. Tenn. Tel. Co. v. Knoxville St. Ry. Co. (Tenn. Co. Ct.) 3 Am. El. Cas. 400, which was, of course, controlled by the case in the text, and by Omaha Horse Ry. Co. v. Cable Tramway Co., 32 Fed. 727. The same position is taken in Chicago & W. I. R. R. Co. v. St. Louis & P. R. R. Co., 15 Ill. App. 587: "It seems clear that the construction of another railroad across that of complainant, though built on the same grade, is a taking of complainant's property for public use, within the meaning of the constitution. It necessitates an interference with the track and roadbed of complainant's road, which does not come within the proper and ordinary use of the street as a highway, and which will necessarily, to some extent at least, impair the beneficial enjoyment of the complainant's easement." The court, it would seem, here fails to distinguish the right of a railroad in a street from its rights on a private way. In the latter case, no doubt, all the elements mentioned would have to be compensated for; but in a street the corporation takes its rights subject to other proper street uses.

[83] 56 N. J. Eq. 569.

structures which complainant has erected in the street have not now become such as interfere with and obstruct public travel at the point of crossing, and for such exclusive benefit of complainant that they go beyond its right of occupation of the street."[84]

To deny compensation for unavoidable interference between the new licensee and the old, however, is not to say that depredations, necessary or unnecessary, may be practiced upon the actual equipment of the latter with impunity. For injury to the physical property of a public service corporation occupying a street, a subsequent licensee, or the municipality itself, is liable in damages,[85] even though such injury be unavoidable; *a fortiori* where the injury was malicious, negligent, or unnecessary.[86]

If the new company is without proper municipal sanction, however, it is a mere trespasser; it will then be liable not only for direct injuries but for all consequential damages.[87]

An illustration of these principles is found in the "house-moving" cases. House-moving may be, as has been shown, if properly conducted, a legitimate street use.[88] Yet it is well established that, when the house-mover injures the wires or tracks of public service cor-

[84] Under the same set of facts the same decision is reached in Kansas &c. Ry. Co. v. St. Joseph &c. Co., 97 Mo. 457; So. Ry. Co. v. Atlanta R. & P. Co., 111 Ga. 679; and N. Y. N. H. & H. R. R. Co. v. Bridgeport Tr. Co., 65 Conn. 410. Under facts similar to the Cumberland Telephone case the Ohio court held that interference with telephone currents by conduction was not ground for damages against a street railway, Simmons v. Toledo, 8 Ohio Cir. Ct. 535, 561, affirmed without opinion, 51 Ohio St. 626. In Julia Bldg. Ass. v. Bell Tel. Co., 13 Mo. App. 47, 88 Mo. 258, damages were refused for interference with the use of a cellar under the street caused by the erection of a telephone pole which extended into it.

[85] Saginaw Un. St. Ry. Co. v. Mich. Cen. R. R. Co., 91 Mich. 657, was an action for damages caused by defendant's cutting plaintiff's trolley wire during the busiest hours of the day, thereby occasioning great loss of fares and injuring plaintiff's dynamo. Plaintiff had recently installed the wire, which defendant claimed was too low to permit the operation of its trains. The trial court charged, "That if the plaintiff neglected or refused to place its wires at a certain height over the defendant's tracks, so as to enable it to carry on its business in a proper way, the way it had a right to carry it on, the defendant would have a right to raise the wires to a proper height, or remove the wires from the right of way; but in doing this the defendant was required to choose such a time and under such circumstances as would do no damage to the property of the plaintiff." The supreme court, in sustaining this language said, "The removal of them was done at a time when it involved great loss to plaintiff and great danger to human life. Under the circumstances the defendant company was a trepasser *ab initio;* and liable for *all* damages. And in the case of Kankakee W. W. Co. v. Irwin, 56 Ill. App. 510, defendant was held liable for breaking a private sewer pipe in laying a water main, even though proceeding under proper authority and without negligence.

[86] To this rule there is apparently an exception in the case of wayside trees. In these the abutting landowner has a property that he may protect against trespassers, Phifer v. Cox, 21 Ohio St. 248; Winter v. Peterson, 24 N. J. L. 524; Wellman v. Dickey, 78 Minn. 29. Yet by the weight of authority he is not entitled to reimbursement if they are trimmed or removed to accommodate a new highway use, Seaman v. Washington, 172 Pa. 467; Dorman v. Jacksonville, 13 Fla. 538; Tate v. Greensboro, 114 N. C. 392; Chase v. City, 81 Wis. 313. But in Gaylord v. King, 142 Mass. 495, it is held that if they were planted under license from the city, damages may be collected. This would seem to be more just.

[87] Toronto St. Ry. Co. v. Dollery, 12 Ont. App. 679.

[88] Supra, Note 11.

porations, he is liable in damages.[89] To insure payment, injunction will lie, until a proper bond has been given.[90]

The foregoing considerations may be summarized in the following rules, which, it is believed, state the law, according to the best authorities, as to the relations between various public utilities occupying the street:

1. As between a municipal corporation, acting in furtherance of its governmental functions, and a private corporation, the only consideration in the location of the municipal works is their own efficiency. The municipality may choose that location most convenient to its purpose, regardless of inconvenience to the private corporation or interference with the operation of its plant. And in the absence of malice or oppression, the decision of the proper municipal officers as to the location of public works will not be reviewed by the courts.

2. As between private corporations, co-licensees of the municipality, the prevailing consideration is the accommodation of the greatest possible number of uses beneficial to the public and proper to the street. The second consideration is the commission of the least possible injury to the equipment of prior occupants. The resulting rule is that a new corporation will be enjoined from any material interference with equipment already in place, unless an avoidance of the interference would be inconsistent with the reasonably successful operation of the new utility.

3. For such unavoidable interference, not extending to actual injury to its physical property, the prior occupant of the street can obtain no damages, either by way of conpensation for increased cost of operation or reimbursement for alterations necessitated.

4. For injury to physical property rightfully in the street both the municipality and the private corporation are liable, even though, under the rules above stated, such injury may not be prevented by injunction.

The variety of public utilities is increasing every day. The telephone, yesterday a luxury of the city, is today in urban communities and many rural districts a necessity. The uses of the electric railway are widening. And for these utilities the highway is the recognized situs. The public, also, is assuming more and more control over these agencies and emphasizing their public character. On account, then, of the widening uses to which in practice the highway is devoted, and the increasing public control of public service cor-

[89] N. W. Tel. Co. v. Anderson, 12 N. D. 585; N. Y. & N. J. Tel. Co. v. Dexheimer, 11 N. J. Law Jour. 246, 14 Same 295; Mellville Trac. Co. v. Goodwin, 53 N. J. Eq. 448; Williams v. Cit. Ry. Co., 130 Ind. 71; Dickson v. Kewanee El. Co., 53 Ill. App. 379.

[90] N. W. Tel. Co. v. Anderson; Millville Trac. Co. v. Goodwin; Williams v. Cit. Ry. Co., supra.

porations, it ought to be squarely admitted that, if such corporations are proper street uses in any sense, they are such in every sense. The doctrine of "additional burdens" is, it is believed, passing from the law. In place of it is coming in, to govern the relations among these corporations, and between themselves and third persons, the equitable rule that the use of the street shall be as wide as may be, with compensation for property, tangible or intangible, actually taken. The corporation should make its bargain with the municipal authorities, paying them for its franchise, or license to the street, all that it is reasonably worth. It should then be free to construct its plant without unnecessary interference with existing public utilities or private persons, and without hindrance from them.

CHARLES L. DIBBLE,

CHICAGO.