

1894

The Rights and Remedies of Abutting Owners in Streets, with Special Reference to Elevated Railroads

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THESIS.

FOR

THE DEGREE OF MASTER OF LAWS .

ON.

THE RIGHTS AND REMEDIES OF ABUTTING
OWNERS IN STREETS, WITH SPECIAL
REFERENCE TO ELEVATED RAILROADS.

BY

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1894.

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During the past fifty years there has been introduced into our jurisprudence a new and independent line of cases, somewhat unique in character but vastly important in their results.

At first, when the population of the whole country was comparatively small and the territory occupied by cities correspondingly limited, the rights of abutting owners in streets was a question that attracted very little interest; but the unprecedented growth of large cities within the past few years has given rise to a condition of affairs to which eminent economists and legislators have given most earnest thought and study.

At an early day there was felt the need of proper facilities for carrying over the wide areas, the laboring, business and professional classes in the shortest possible time. The lack of these facilities brought a congested condition in the cities, the aspect of which was alarming.

The laboring classes found it impossible to have their homes in the suburbs as this would necessitate a daily walk

of three to five miles, consequently they crowded into tenement houses near the scene of their daily toil which soon became the hotbed of disease and pestilence. The great need was some method by which these classes could have homes in the suburbs and neighboring towns, and rapid communication with the heart of the city. In other words, the problem was to allow the city to spread out, but with such means of intercommunication between the centers of trade and the outlying districts, that the loss of time in going to and from these points, would be reduced to the minimum.

At first it was sought to alleviate this difficulty by means of horse railroads, the first one being chartered in this country in 1853, but as horses failed to furnish the desired expediency, the motive power was changed to electricity and cable.

This latter method proved to be amply sufficient to carry the traffic of the smaller cities but in such a large city as New York there was the greatest objections that there could not be permitted that rate of speed in propelling the cars, which was necessary to carry quickly and conveniently, the

immense traffic which already more than overtaxed the accommodations which these roads provided.

It was seen that the only way of bringing about the desired result was to build the railroad either above or below the bed of the street, the former method being finally adopted.

Before entering into a discussion of the rights and remedies of abutting owners in streets with relation to these railways, it may not prove unprofitable to review hastily the decisions in this state which consider their rights as respects steam railroads, as the reasoning in both classes of cases proceeds along the same lines.

As early as 1842, the question was considered with reference to steam roads in the case of *The Trustees of The Auburn & Rochester R.R.Co.*, 3 Hill 567, and the principle was there laid down, that the legislature had no power to authorize the construction of a railroad across a highway without providing for compensation to the owner of the land over which it passed. Chief Justice Nelson, who delivered the opinion of the court, held that the plaintiffs were not di-

vested of the fee of the land by the laying out of the highway, as was contested by the counsel for the defendants, under the laws of 1836, page 493, giving the company "the right to construct their road upon and across any highway, whenever it would be necessary" nor did the public thus acquire, in the opinion of the court, any greater interest therein than the right of way with the powers and privileges incident thereto. Subject to this easement, and to this only, the rights and interests of the owner of the fee remained unimpaired. The Court apprehended that the provisions of the section applied only to the public property and interest in the highway, and was not intended to authorize the company to appropriate to themselves any estate or interest remaining in the owner of the fee. In the case at bar the claim set up was an easement,-- not a right of passage to the public, but to the company, who had the exclusive privilege of using the track of the road in their own peculiar manner. The company were not the public, nor could they be regarded as standing in place of the public; they were a private company, an ideal individual, and entitled to no more

right than private individuals.

This case established the law with reference to steam roads, and was followed for some time by a number of important cases; but in 1854 a different doctrine was laid down by the case of Williams v. N.Y.C.R.R.Co., 18 Barb. 222, and others of that period, reversing the previous decisions.

The main ground of this ruling was the belief that railroads were simply improved highways, and for such improvement the company should not be required to pay compensation to the owners of the adjoining lands.

These conclusions, however, did not dispose of the constitutional questions involved; and it, moreover, soon became evident that the land-owners suffered a material detriment by reason of such construction. In country roads where railways might be regarded as improved highways, rendering distant parts more accessible and giving a stimulant to trade, the advantages of the system were immeasurable; but in the streets of large cities, on which blocks of residences stood, and over which other vehicles were accustomed to pass, the construction of a railway was found to be a great inconvenience,

if not an intolerable nuisance. It was not long, therefore, before the courts began to realize the error into which they had fallen, and accordingly reversed the intermediate decisions which then prevailed. The case of Williams v. N.Y.C.R. R.Co., on being carried to the court of Appeals, 18 N.Y., 97, was consequently reversed in 1857, and the former doctrine of compensation was re-established.

It was there held that the appropriation of a highway by a railroad company was an imposition of an additional burden upon, or a taking of the property of, the owner of the fee within the meaning of the constitutional provision which forbade such taking without compensation. Judge Selden who rendered the opinion of the court said, "If the only difference consisted in the introduction of a new motive power, it would not be material. But is there a difference between the common right of every man to use upon the road a conveyance of his own, and the right of a corporation to use its conveyance to the exclusion of all others,-- between the right of a man to travel in his own carriage without pay, and the right to travel in the car of a railroad on paying their price?"

It was virtually the same argument used by C.J. Nelson in the case in 3 Hill, but none the less applicable: the two uses the court argued, were impossible, if not wholly inconsistent with each other; so that taking the highway for a railroad, would nearly supersede the former use to which it had been lawfully appropriated.

The same doctrine was again laid down in *Wager v. The Troy Union R.R. Co.*, 25 N.Y. 526, decided in 1862, by Judge Smith. In this case the defendants claimed their right to construct their road by virtue of the provisions of the general railroad act of 1850: "That any corporation organized under said act might construct its roads across, along, or upon any stream of water, course, highway, etc., which the route of its road shall intersect or touch." "The acts of the legislature and those of the city of Troy," said the court, "were valid so far as the power of the legislature could extend." But the legislative grant to the defendants of the right to construct their railroads in the streets of Troy was a mere authority, and should be exercised without violating any private rights; or, if private rights were invaded, the

constitutional compensation should be made. The legislative grant was only sustainable upon that ground.

Since the decision of these cases the law has remained unchanged, and in most if not all of the states has been embodied in the form of statutes of various sorts, but of similar effect.

The question as to the rights of the owner of the soil over the street or highway on which it fronted was not, however, altogether put to rest by the establishment of this doctrine. It was again raised when the construction of horse roads was contemplated, and in the litigation, which was prosecuted in New York city with considerable vigor, and which involved the learning and ability of many of the eminent men of the Bar, received a most thorough sifting, if not a satisfactory solution.

In 1859, the question was perhaps first raised with reference to horse-railroads in the city of New Orleans, in the case of *M. Brown & Co. v. City of New Orleans*, 14 La. Ann. Rep., 842. And it was held in that case that the city of New Orleans had the right to sell the right of way in the streets

to private individuals, for a specified time, with the privilege of laying rails and running horse cars over them according to a tariff to be fixed by the common council, the defendants claimed that the common council was without authority in law to sell or lease the right of way, because the consent of the property owners was not first obtained therefor

Judge Cole, in delivering his opinion, held, "that such comment was not necessary; and said that if the city of New Orleans wished to expend the money necessary for the laying of rails throughout the city, for the purpose of permitting all who wished to run their cars thereupon, drawn by horses or mules, no one could complain as long as it did not prevent other modes of traversing the streets; for travelling in cars on rails was one mode of using the public streets, and there was no reason why it should be lawful to travel in a carriage upon the streets, and not lawful to travel in a car, upon rails fixed in the streets, but not so laid as to prevent the use of the streets by other modes of conveyance.

The fact was that in this particular case the street railway did not impede the right of way of others, that it

was of great benefit to the city, and that property-holders on the streets through which the road passed could not complain, because they still had the use of the streets. Whether the property-owners were here regarded as the owners of the fee to the middle of the street, and what rights (if any) they possessed thereon, do not appear from the statement of the case; and it would seem that these questions were not considered sufficiently important to have much bearing upon the decision, the main ground of which was founded upon the assumption that horse railroads were of great benefit to the public, and that property-owners were not much damaged by their construction.

The next case upon this question was Elliott v. The Fair Haven & Westville R.R.Co., 32 Conn. 579. This case came before the Conn. Supreme Court and was decided in 1860 upon the same reasoning as that found in the Louisiana case above cited.

In New York the leading case on this point is the Brooklyn Central & Jamaica R.R.Co. v. Brooklyn City R.R.Co., 33 Barb. 420, decided in 1861, and announcing substantially the same principle.

It was not until the following year that the important questions in these cases were taken up and discussed.

The case of *The People v. Kerr*, 37 Barb. 357, decided in 1862, was of exceeding interest; because it may be said to have been regarded as a test case which would settle the doctrine of compensation for the future, and because the most eminent members of the New York bar were engaged upon both sides.

By an act of the legislature passed April 17, 1860, the construction of a horse railroad in certain parts of New York city was authorized. An injunction was sought to restrain defendants from exercising the legislative authority, on the ground that the act was void as being repugnant to the constitutional prohibition against the taking of private property for public use without compensation. On the other hand, it was contended that in this case the fee of the streets and avenues of the corporation of the city of New York was held by it in trust for the people of the city of New York, under a previous act of the legislature of 1813.

Judge Sutherland, who delivered the leading opinion in

the case, adhered to the decisions rendered in the cases above cited on this point. ⁵It was also held to be immaterial whether the fee of the street was in the abutting lot-owners or in the corporation providing the privilege conferred on the grantees, of using the streets for the construction and operation of their railroad is consistent with the public use as highways for which the streets were so opened, dedicated or appropriated.

If a full grown elephant should be driven up Broadway in the middle of the day, such use of the street would no doubt be a nuisance, as those having horses in the street would soon discover. Who would suggest that the owners of the fee of the street could maintain trespass against his keeper on the ground that this was a new use of the street, or one not anticipated when the street was laid out or dedicated? Driving droves of cattle through the streets of the city might be a great nuisance, and the drovers might be liable for consequential damages for such use of the streets after an ordinance forbidding it; but could the owner of the soil of the streets maintain trespass for such forbidden use, on

the ground that such use of the streets was inconsistent with the purpose for which the streets were laid out? The question as to the fee of the streets of the city of New York certainly had too important a place given to it in the Kerr case.

What is this fee, and what is its value? It is nothing more than a mere legal skeleton fee in the ground or soil of the streets, divested of all private use and of all private possessory rights of or in the surface of the streets at least, by a complete devotion of the surface to public use.

It is not even a possibility of reverter like that which by the feudal law was left in the feoffor or grantor on every feoffment or grant in fee before the statute of Quia Emptores; and it is of no more value than such possibility of reverter would have been if diverted of all feudal services.

The case of *People v. Kerr* was affirmed by the Court of Appeals in 27 N.Y., 188, and has since been followed not only by the New York courts but also by the courts of other states. *Hobart v. The Milwaukee City R.R.Co.*, 27 Wis., 194, laid down the same rule where the fee of the street was in the adjacent owner.

OWNER.

And it may be said generally that with the exception of *Craig v. The Rochester & Brighton R.R.Co.*, 39 Barb. 494, and *Street Railway v. Cumminsville*, 14 Ohio St. 523, and in the absence of statutory provisions governing the subject, adjoining lot-owners have been generally held not entitled to compensation upon the construction of roads along public highways. And also that the case of *People v. Kerr* established the rule, although the fee of the streets was declared to be in the corporation of the city of New York in trust for the people of the state; but the cases which followed this ruling;-- *Henchman v. R.R.Co.*, 17 N.J.Lj.; *Hobart v. R.R.Co.* 37 Wis. 184; and *Attorney General v. R.R.Co.*, 125 Mass. 545, -- announced the doctrine where the fee of the streets was declared to be in the adjoining lot-owners subject to the public easement

Having considered the cases of street railways with reference to the adjoining owners, we now turn our attention to elevated railroads; and here we come in contact with a line of cases more intricate and of much more importance because of the vast interests usually involved therein.

In taking up this subject the first question naturally suggested is, whether or not the corporation in building these railroads is taking property within the meaning of Article I. Sec. 6, of the State Constitution.

The streets and highways of a state, are necessarily under its paramount control. The tenure by which the state of New York holds such lands, is based upon the Act, of 1779, by virtue of which all the rights, title, and interests, in the lands of the Colony of New York, and any authority thereover, which was then vested in the Kingdom of Great Britain, was declared to have vested in the state of New York.

The Supreme authority of the state, over the lands within its jurisdiction, is consonant with the idea of sovereignty

But, principles of democratic government, have limited this authority, when lands, or interests therein, are taken,

to a taking for public use; and by Article I. Sec. 6, of the State Constitution, private property cannot be thus taken without just compensation to the owner thereof. This authority to take private property for public use, upon just compensation made, may be delegated by the state, and this delegation may be either to corporations or to individuals, to be exercised under the same restrictions as are imposed upon the state.

This authority being in the state, the Legislature may direct, that the title which may be acquired, in streets opened under condemnations proceedings, shall be in fee; or that nothing more than a mere easement or right of way for ordinary purposes shall be acquired.

In this state, the abutting owner in some cities owns in fee to the center of the street and in such cases, the city has but a mere easement in the street. In others the fee of the street is in the municipal authorities, but in trust that the same shall be kept open for street purposes.

The city of New York belongs to this latter class of cases having acquired a title to the streets in fee by virtue of the Dongan Charter granted in 1686. And in 1793 the state

released to the municipality all its interests in the streets of the city, and vested in it title thereto. By the act of 1813 the state delegated to the city of New York, the power to open new streets by the exercise of the right of Eminent Domain.

In 1867, The West Side & Yonkers Patent Railroad Company incorporated under the General Railroad Act of 1851, was by Ch. 489, of the Laws of 1867 authorized to construct in New York City, an experimental line of elevated railway from Battery Park to the Harlem River. But the company being unable to go on and complete the road it was sold under foreclosure sale, to the New York Elevated Railroad Co., and was finally completed and approved by the Commissioners in 1875.

In Connection with a discussion of what are public uses, a description of the nature and effect of these structures is not out of place. The general plan of roads, as now built is as follows. Upon upright columns, placed at regular intervals on both sides of the street, slightly within the curbstone line, are supported traverse girders, which extend entirely across the street, upon these lateral girders are

laid, which, in turn, support the tracks upon which cars are propelled by steam power, at a high rate of speed, and at short intervals. The superstructure, extending across the whole travelled track of the street, at about ten feet from the houses adjoining, prevents the free passage of light and air to such premises. The frequent passage of trains produces a flickering character to the light admitted to those parts of the houses on line with the cars, and the gas, steam, and smoke also prevent the free passage of light and air; while the drippings of oil and water and the frequent columns to some extent obstruct access to the adjoining premises.

It was early decided that where the abutting owners held the fee of the street, the company was guilty of trespass in building its elevated road, and that such owners could maintain an action for damages, as for an injunction.

But where the fee is in the city, as in New York, a much more difficult question is presented. The city has not a mere easement but a fee and the only limitations upon the exercise of the authority so acquired is "that the streets so held shall be maintained as free and open streets as the other

streets of the city are and if right, ought to be." It is very evident, that the determination of what are such uses of the street, as will be permitted by the terms of this trust, lies within the sound discretion of the courts. They even have the power to declare a use to be inconsistent even though the legislature in the statute authorizing this use, has declared it to be a public one consistent with the trust.

The question of what are public uses cannot of course be settled for all times for as a country advances in civilization, wealth and prosperity, new and unforeseen cases arise which the courts from mere policy and necessity must continue to be public uses of the streets. This is illustrated by the courts having upheld the erection of telegraph poles, and the laying of sewers, watermains and finally, surface railroads.

The decisions of the Court of Appeals are uniform in holding that although surface railroads are only another mode of using the public street for public purposes, the erection of elevated railroads is a taking of property within the meaning of the Constitution and cannot be justified without

compensation being made to the abutting owners, whose property is taken.

The first Elevated Railroad case, involving the rights of abutting owners, was *Story v. N.Y.El.R.R.Co.*, 90 N.Y., 122, that case directly raised the question whether the railroad, as maintained and operated by the defendant, was a use consistent with the public uses for which the city streets were held. As this is a leading case, and one which has been followed in all other cases arising on the same question, a brief statement of the facts of the case will be given. The plaintiff, Story, held a lot on Front Street ultimately, by virtue of a grant from the city. The deed contained a covenant that the streets should "forever thereafter continue and be for the free and common passage of, and as perfect streets and ways for, the inhabitants of the city and all others passing and returning through or by the same in like manner as the other streets of the city now are, or lawfully ought to be". The trial court found, as a matter of fact, that the structure would to some extent obscure the light of the abutting premises; that the passing trains would also do

this, and give to the light a flickering character objectionable for business purposes, and to some extent impair the general usefulness of the plaintiff's premises; that the columns would interfere with the street as a thoroughfare, and that the fronts of the abutting buildings would be exposed to observation from passengers in the passing trains. It also found that these things would be of a constant and continuous character, tending to occasion incidental damages to the plaintiff's premises and to depreciate its value. The railroad company made defense upon the ground that its acts were authorized by the legislature, and therefore whatever injuries were occasioned to property were *damnum obsequia injuria*. The court held that the plaintiff having acquired an easement in the street although the fee remained in the city, thereby had the right to have the street kept open so that from it an access might be had to the lot, and light and air furnished across the open way,. So that it having been established as a fact that the elevated structure would interfere with this arrangement, the plaintiff had a right to recover damages to the extent of the injury suffered by

him. Tracy J. delivering a concurring opinion said: " Can the street be lawfully appropriated to such a structure without making compensation to the plaintiff for his easement therein? This is a question of power. If the legislature has power to authorize such a structure without compensation, its exercise cannot be regulated by the courts. If one road may be authorized to be constructed upon two series of iron columns placed in the street, another may be authorized to be supported upon brick columns, or upon brick arches spanning the entire street. Thus an open street would be converted into a covered way and so filled with columns as to be practically impossible for vehicles."

The Story case was soon followed by two others important cases, *Lahr v. Met. El. R.R. Co.*, 104 N.Y., 269, and *Kane v. N.Y. El. R.R. Co.*, 125 N.Y., 133, both laying down the same principles that were decided in that case.

So that be these decisions it has been settled that an abutting owner upon the streets in New York city whether his title to the adjacent premises has been acquired by grant from the city; or the streets have been opened under condemna-

tion proceedings, and he has been, or is liable to be accessed for the benefits thereby accruing to his property; or, where he owns lands abutting upon a street, opened before the state government was established, has easements in such streets of light, air and access. That such easements constitute property within the meaning of Article I. Sec. 6 of the State Constitution, and cannot be taken without just compensation to the owner. That an Elevated Railroad which impairs such easements without the consent of the owner, takes the property of the abutter unlawfully and he has a right of action against such company accordingly.

Having shown that the abutting owner has certain valuable rights in the streets, the next inquiry is in regard to his remedies in case these rights are invaded. This brings us to the second division of this subject namely, the remedies of abutting owners.

Since an invasion of these rights by the company is unlawful, and in the nature of a permanent trespass, the erection of their roads constitutes a private nuisance to the adjacent owners and gives him a right of action at law to

recover money damages for the injury sustained, and also, an action in Equity, to restrain the maintenance of the nuisance.

In Mahen v. N.Y.C.R.R.Co., 24 N.Y., 658, which was followed by Uline v. N.Y.C., 101 N.Y., 98, and Pond v. El. R.R.Co., 112 N.Y., 188, the true rule is laid down for determining the time for which damages may be obtained. It was there held that the abutter may obtain a judgment for damages, only up to the time of the commencement of the suit, and, if the nuisance is continued, the judgment is not a bar to subsequent suits by the party injured. For if this were allowed, the defendant in the first suit for damages, might bar the plaintiff in any future action, and thus obtain the title to the interest, which title in law, can only be secured by proceedings in invitum.

It was also held in Bischoff v. N.Y.El.R.R.Co., 138 N.Y. 257, that while the abutting owner has only the easement of light, air, and access as regards compensation for interference by railroads, yet in ascertaining past damages, the question of noise may enter as an element in the award.

The great majority of actions, however, are brought in

equity because a multiplicity of suits is thereby avoided.

The plaintiff for his complaint prays for relief by injunction, restraining the operation or construction of the road, or, in the alternative both fee and rental damages for the taking of his easements. This latter proposition is in accordance with the general rules of Equity which allow a court exercising equity powers, having once gained jurisdiction over such a case for the purpose of granting an equitable remedy, to give damages also. The judgment in such a case is that within a specified time, an injunction shall issue against the defendant unless he shall elect to pay the damages which the abutter has sustained; and, if he elects so to do, such damages shall not be paid, until the plaintiff shall execute to the defendant a conveyance of all his rights to the easements taken by the defendant. The complainant in such a case is governed by the equitable maxim "He who seeks equity must do equity".

The granting of this injunction by no means operates to prevent the running of defendants road but is in fact more in the nature of proceedings to condemn the abutter's property

rights in the street. In *Am. Bank Note Co. v. N.Y.El.R.R.Co.*, 129 NY., 252, it was said by Finch J. in his opinion, "There is no doubt in this case, and I think in any case, that the injunction of a court of Equity and its alternative damages, are to be deemed a substitute for the ordinary proceedings for condemnation, with the practical difference, only, that in the one case, the company is the moving party, and in the other, the owner."

In *Lynch v. Met.El.R.R.Co.*, 129 N.Y., 274, it was held that where an equity court assumes jurisdiction to restrain a continuous trespass, in order to prevent a multiplicity of suits, it may proceed to give full relief, both for the tortious act, and the resulting damages. But the court denied a motion to have the claim for past damages tried by jury holding that the right to a separate trial by jury of this issue was not within the perview of the constitutional guaranty.

It is often a difficult problem to determine a just measure of damages in this class of cases, for light, air and access, in themselves have no definite value, and the injury

done to the abutter, in impairing these easements, can only be ascertained by a reference to the effect of this injury upon the property to which the easements are appurtenant. An estimate of the loss, either total or partial, of the beneficial enjoyments of these rights can only be made by an inquiry as to the value of the premises before the easements were impaired, and their decrease in value since the taking. The above principle is laid down in the two important cases, Newman v. Met. El. R.R.Co., 118 N.Y. 618, and Bohm v. MET. EL.R. R.Co., 120 N.Y., 576.

In actions at law to recover past damages, it is for the jury to determine, under the circumstances, the actual amount of injury sustained; and where the land owner alleges the existence of the road as the cause of the decrease in the value of his property, and the company maintains that the decrease is due to other causes, it is for the jury to say to what the decrease is attributable.

But where the proceeding is in equity for an injunction the whole matter is for the determination of the court, including the measure of past damages; and in all cases the

finding of the trial court, whether by the court, by referee, or by jury, will not be disturbed, except where there is a plain case of error. The measure of damages is the same, whether the land owner has the fee of the street or a mere easement therein. The difference between the value of the property before the construction of the road and that at the time of the trial is ordinarily the best indication of the amount of damage to its fee value.

Quoting from *Bohm v. Nat. El. R. R. Co.*, " The question is, what in fact has been the actual market value decrease by the taking, or has the taking prevented an advancement in value greater than has actually occurred; and , if so, to what extent? The amount of such decrease in the value of the remaining land , or the amount of the difference between its actual market value and what it might have been worth if the railroad company had not taken the other property, is the amount of damage which the defendant should pay. If , on the contrary, there has been neither decrease in the market value caused by the railroad, nor any prevention of increase by the same course, how can it be truly said that the lot

owner has been injured to the extent of a farthing?

The absence of injury may have been the result of the general growth of the city, by reason of which the particular property has grown in value with the rest of the city. It is the fact not the cause, which is material. Where it appears that the property left has actually advanced in value, unless it can be shown, but for the act of the defendant in taking these easements, it would have grown still more in value, the fact is plain that it has not been damaged."

The plaintiff can in law but not in equity recover consequential damages on account of the smoke, cinders, gas, ashes, noise, and loss of privacy.

Limitations upon Actions by Abutting Owners.

The rule is the same in this line of cases as in most others, that the plaintiff in order that he may recover the damages to which he is rightfully entitled, must bring his action within a specified time.

If the railroad company gains title to his easements by prescription, his action is forever barred, and this title as decided in the Am. Bank Note Co. case, cited supra, can be obtained by the company. In order that the company may gain such a title, they must have continuous and adverse possession of the easements for a period of twenty years.

If the possession of the railroad company has not ripened into title, as long as the trespass is continued, and the ownership of the premises is in the abutter, he has a right of action. At law, an action for trespass on real property, not brought within six years after its commission and where such trespass has been a temporary and non-continuous one, would have been barred by the abutter's failure to bring the suit within the time limited. The legal remedy being lost, there would be no ground for maintaining a suit

in equity, for the jurisdiction of equity in such cases, is based upon the necessity of preventing the multiplicity of suits, and the fact that the legal remedy is inadequate. But the trespass being a continuous one, and each day a new cause of action arising, in law the abutter may elect to bring an action daily for such trespasses, or to wait until enough damages have accrued for such causes of action as are not barred, and unite all in one suit. The above conclusion was reached in *Galway v. Met. El. R.R.Co.*, 128 N.Y., 122, and it was further held that Section 388 of the Code of Civil Procedure, providing that "actions, the limitation of which is not therein specially prescribed, must be commenced within ten years" it did not apply to equity actions, brought to restrain the commission of trespasses by elevated railways upon the property rights of abutting owners.

In conclusion this discussion, in which it is hoped that the more important features of the rights and remedies of abutting owners have received a careful consideration they deserve, the position which the Court of Appeals has taken in determining those rights, is of considerable interest and

importance, as bearing upon the probable outcome of future litigation.

The Story case, the first case in which the rights of abutting owners were adjudicated, was decided by a divided court, nevertheless it laid down principles which have been recognized by all the cases since the rendering of that important decision. Since the decision of the Story case, the court, while in no manner detracting from the authority of that decision, has shown a constant inclination to restrain and limit that and subsequent decisions based upon it, within definite bounds. This is seen from the more stringent rules laid down by the later cases with reference to damages and the admissibility of evidence. The later cases while they admit that the easements of the abutters in the streets are property rights and protected by the state Constitution, also take into consideration the inestimable benefits derived by the public generally from the construction and operation of these railroads. And the present tendency of the Court of Appeals seems to be in favor of granting to the abutting owners all the relief to which they are justly entitled, without extending the principles already laid down.

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