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The Rights and Remedies of Abutting Owners in Streets in the City of New York over Which Elevated Railroads Have Been Constructed Prior to 1890

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T H E S I S

for

The Degree of Bachelor of Laws

on

The Rights and Remedies of Abutting Owners in Streets in The City of New York Over Which Elevated Railroads Have Been Constructed Prior To 1890.

by

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Divisions of Subject.

Table of Cases Cited. Page

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The enormous growth of large cities within the last fifty years has given rise to a condition of affairs to which economists and legislators have given most earnest thought and study.

The natural tendency of the suburban and farming classes in this, as in other countries, has been toward the city. At first, when the population of the whole country was small and the territory occupied by cities correspondingly limited, this influx from without was not felt; but, as population increased and city areas necessarily became greater, there was urgent 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 conjested condition in the cities, the aspect of which was alarming.

The laboring classes crowded into tenement houses

near the scene of their daily toil which soon became breeding centers 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, ingoing to and from these points, would be reduced to the minimum.

Horse railroads failed to bring about this result, and these, soon followed by other surface roads, the motive power of which was supplied by electricity or by cable, were scarcely more successful. The great objection to such surface roads being that in the thoroughfares of a populous city, 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. The sub-ways and elevated roads of London, seem to suggest the solution, and, in 1867, The West Side and Yonkers Patent Railroad Company, incorporated under the General Railroad Act of 1850, was by Chapter 489 of the Laws of 1867,

authorized to construct in New York City, an experimental line of elevated railroad to extend from Battery Park, a half mile northerly along Greenwich St., towards the Harlem river.

This structure was to consist of a single track, upon which, cars were to be run in contrary directions upon opposites sides of the street, "which track shall not exceed five feet in width between the center of the rails, and shall be supported by a series of iron columns, eighteen inches in diameter at the pavement, which columns shall be placed at intervals of not less than twenty feet along the curb-stone line, between the sidewalk and the carriage-way, and attached at their upper extremities to the track aforesaid, so that the center of the track shall be perpendicular to the center of the columns, and, at a distance of not less than fourteen feet above the surface of the pavement". The cars were to be propelled by cables attached to stationary engines, which were to be concealed beyond or beneath the surface of the street.

The further conditions binding the company were that the experimental line was to be constructed within one year, and, if approved by the Commissioners appointed

under the provisions of the Act, it should complete its road to the Harlem river within five years. The taking of any private property, for the purposes of such road, was declared to be for public use, and the operation of such railway, was declared to be consistent with the uses for which the municipal authorities held the same.

By Laws of 1868, Chapter 855, the company was given six months additional time in which to complete the experimental road, and was authorized to experiment with any other form of motive power, and adopt that form which should be approved by the commissioners. The company was unable to go on and complete the road, and was sold under foreclosure sale, with all its rights, privileges and franchises, to the New York Elevated Railroad Co., incorporated under the Act of 1850 and the supplementary and amendatory Acts thereto.

This failure to comply with the conditions of its charter, by the West Side and Yonkers Co., and thereby to incur the forfeiture of all its rights, was not taken advantage of by the State, which, on the contrary, by Act of 1875, Chapter 595, confirmed the New York R. R. Co. "in the possession of the rights, privileges and franchises" of the defunct West Side and Yonkers Co., and

authorized it to construct and complete one tract of the experimental road, over the route designated for the former road, and permitted it to use any form of motive power, that the Commissioners, appointed under the former Act of 1867, should approve.

The experimental line was duly completed, steam was chosen as the motive power, the road was approved by the Commissioners and extended over the route contemplated. In the same year the so-called Rapid Transit Act was passed (Laws of 1875, Chapter 606) by virtue of the provisions of which other elevated railroads were built and operated. In the General Railroad Act of 1850, and the various Acts supplementary thereto, as also in the Rapid Transit Act of 1875, provision had been made for the condemning of lands, and interests in lands, by proper proceedings in invitum. These provisions, at that time, however, were not supposed to relate to any other estate than a corporeal one, and no right in the streets was assumed to be in the abutting owners.

The rapid growth of the railroads, and the damage to adjacent property thereby, received judicial notice in the highest court, for the first time, "In The Matter of The N. Y. El. R. R. Co", 70 N. Y. 327. This company,

taking advantage of the provisions of the Rapid Transit Act, attempted to extend its route, but, not being able to gain the consent of the property owners along the proposed route of extension, under an order of the Supreme Court, Commissioners were appointed who decided that the road should be extended over one of the proposed routes. An appeal from this order was taken to the Court of Appeals upon various grounds, principal among which were these; that the Rapid Transit Act, under which Commissioners had been appointed, delegated legislative powers to such Commissioners; that the Act was not a General Law within Art. 3, #18 of the State Constitution; that it was void as it granted exclusive privileges to this company. These various grounds of appeal were held untenable, as also, the ground of most importance in this connection, "that the various Acts by virtue of which the N. Y. El. R. R. Co. was incorporated, did not provide for compensation being made to owners for property taken".

Although at this time, elaborate arguments were submitted as to the rights of abutting owners in the streets, the court declined to pass upon them, saying, "This claim appears to rest upon the assumption, that the abutting owners have property rights in the streets,

of which they are to be deprived, and for which they are entitled to compensation under the Constitution. This it will not be necessary to determine as provision is made for compensation". The question of the rights of an abutter on such streets was thus, for a time, left an open one.

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 Art. 1, #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 is most

frequently seen in the authority given municipalities, in their charters or by statute, to open streets and highways. Furthermore, this power may be delegated to private persons, 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 condemnation proceedings, shall be in fee; or, that nothing more than a mere easement, or right-of-way, for ordinary purposes shall be acquired.

This, then, is the situation in the cities of this State. In some, the abutter owns in fee to the center of the street, and the city, in such cases, 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.

This is the case in the City of New York, whose title to the streets in fee, dates back to the Dongan Charter, granted in 1686, by virtue of which, title to the then streets, was vested in the municipality, "For the public use and service, of the Mayor, Aldermen and Commonalty, of the said city, and of the inhabitants of Manhattan's Island, and travelers therein". After

the War of the Revolution, and the Act of 1779, before referred to, the State, in 1793, released to the municipality, all its interests in the streets of the city, and vested in it title thereto.

By the Act of 1813, (2 R.L. 49) the State delegated to the City of New York, the power to open new streets by the exercise of the right of eminent domain, and vested the title to streets so opened and those thereafter to be opened, in the said City; in trust, however, that the same should be kept open as public streets, "in like manner as the other streets of the said City, are, and of right, ought to be". It is, therefore, by virtue of these Laws, that the title to the streets of the said city, is vested in fee in the municipal authorities, but in trust, that they shall be kept open and free for public uses.

Public Uses.

In connection with a discussion of what are public uses, attention must be given to the nature and effect of the structures which have been erected by the Elevated Railroad Companies of New York, prior to the year 1890. The experimental road, as described supra, was but a precursor of what was to come. The general plan of the roads as now built is as follows. Upon upright columns, placed at regular intervals on both sides of the street, and slightly within the curbstone line, are supported transverse 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 traveled track of the street, at about ten feet from the houses adjoining, hinders, necessarily, the free passage of light and air to such premises. The trains, passing rapidlyand frequently, give a flickering character to the light admitted to those parts of the houses on a line with the cars, and the smoke, gas and steam, also abridge 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

premises adjoining.

What, then, is the position in which such a structure stands to the public uses for which the City's streets are held. When, as in the first class of tenures cited, the fee of the street is in the abutting owner, and the City has but a mere easement in such street, the question is not a difficult one. It was early settled in such cases, that the use of such a street was to be restricted to a general right of passage in the public. Such as would be usual in an ordinary street; as, the passage of pedestrians and ordinary vehicles. But no new, or additional burden, could be imposed upon the abutting owner.

On this theory a surface railroad acting under municipal authority, which had laid its tracks over such streets, without having condemned the owner's interest therein, was held a trespasser; and that an injunction would lie against it prohibiting the maintenance of it as a nuisance. Craig v. Rochester City and Brighton R.R. Co., 39 N.Y. 407. The construction of such a road and its operation, being held to impose an additional burden upon the abutter, a fortiori, if the use is one like that of the Elevated Railroads which is much more inconsistent with the ordinary uses to which such a

street might lawfully be put, would it be an invasion of the rights of the abutting owner. So, where an Elevated Railroad is constructed over streets, the fee of which is in the abutting owners, such railroad company commits a trespass, as against such abutting owners, and an action for damages, or for an injunction, will lie accordingly.

But a much more difficult question is presented, when the city, as in New York, owns the fee of the streets, though in trust for street purposes. The question of what are, and what are not, street purposes consistent within this trust, is a very nice one. There is no doubt that where the city has a mere easement in the street, that, according to the well settled principles governing such an interest, no new burden can be imposed upon the servient tenement, without a condemnation of the owner's interest for the further uses desired. But here, we have a different situation, not an easement in the city merely, but a fee, and the only limitation upon the exercise of the authority so acquired "that the streets so held shall be maintained as free and open streets as the other streets of the city are, and of 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 discretion of the courts. They may determine that a use is inconsistent, even though the Legislature in the statute authorizing this use, has declared it to be a public one consistent with the trust.

Advances in civilization, in wealth and prosperity, must, and have, influenced the courts in this determination. This idea was boldly maintained, in one of the early surface railroad cases, where one of the judges, in discussing what were public uses, in substance said; that it was impossible to limit within any definition what were public uses; that they must change as circumstances changed; and, that a hundred years from that time, there would, no doubt, be uses permitted by the courts, of which they, then, could know nothing. And so, in confirmation of this theory, courts have upheld the laying of sewers, gas and water mains; so lamp-posts and telegraph-poles along the street, have been held no infringement of the rights of abutting owners. The temporary obstruction of streets for the purpose of repairing them, though it obstructs access to the premises adjoining, is readily seen to conform to the public use, in that the obstruction is but temporary to the end that the public may have safer

ways.

The laying of surface railroad tracks, and the maintenance of such roads, early met with great opposition. It was claimed that not only were they a source of great discomfort and damage, but that they took the rights which the abutters had in the adjacent streets, their easement of access; and they did not constitute a public use within the trust. This trust, however, is a public one, held not alone for the people of the City of New York, but for the inhabitants of the whole state; and, such being the case, the Legislature may authorize the construction and maintenance of such railroads, for in the construction or operation of such railroads, no right, either of the abutter, or the public, has been unlawfully taken. Though consequentially, the abutter may be damaged, the street is still an open one, and it has not lost its open and public character, by reason of the fact that vehicles of a different character, than those ordinarily used, are allowed to traverse the streets upon fixed tracks, which conform to the general course of the street. As quoted in Story v. N.Y. El. R.R. Co. 90 N.Y. 122, there is still "a way between two houses - a street", and the operation of a street surface railroad has been declared

to be consistent with the public uses of a street. These, then, are some of the principal uses to which a street, held under such a tenure, may be put, and these uses have been maintained by the courts, from time to time.

Is an Elevated Railroad constructed and operated over the streets of the City of New York, such a public use as is consistent with the trust upon which title to them is held?

In the original statute, authorizing the building of the experimental road, Laws of 1867, Chapter 489, such experimental railway in the streets was declared to be a public use, consistent with the uses for which the Mayor held the same. In People v. Kerr, 27 N.Y. 188, the court held that the trust, upon which the municipal authorities, under the Act of 1813, held the streets in New York City, was publici juris, and the power of regulating and governing such uses was vested in the Legislature as representative of the whole people. Following out the logic of this case to its natural conclusion, it would seem that the declaration by the Legislature that this was a public use, would have been sufficient, but, what was said in People v. Kerr, is evidently to be confined to the facts as they existed

in that case, and the subsequent rulings of the Court of Appeals, go to show that the inherent power of determining what is a public use in such streets is vested in the courts. In the light of these decisions, the answer to the question must be in the negative. The construction and maintenance of an Elevated Railroad is not a public use within the terms of the trust, and, as we have shown it to a greater or less extent, hinders and impedes the passage of light and air, and obstructs access to abutting premises, it is a taking of property within the meaning of Art. 1, #6, of the State Constitution, and cannot be justified without due compensation being made to the abutting owners, whose property is so taken.

These conclusions are based upon the reasoning and legal principles applied in four celebrated cases, in which the rights of the abutting owners upon streets in which Elevated Railroads were constructed, were thoroughly adjudicated. The reasoning by which such a use by the railroad company is determined to be a use inconsistent with the public uses of the streets of New York, and the development of that reasoning, by virtue of which such an entry upon the streets was declared a taking of property within the provisions of the Consti-

tution will be next considered.

The maintenance of a street must, of necessity, so far as the abutters thereon are concerned, be for three principal reasons:

1st. That through and over the streets there shall be free passage of light to the abutting premises.

2nd. That such premises shall receive an unhindered and unpolluted supply of air.

3rd. That access to them shall be unobstructed. If the street be closed in such a manner, as to materially impede the passage of light and air, and obstruct access to the adjacent property, such property, of necessity, will be rendered less valuable according to the degree of the impairment of these natural concomitants to the benificial enjoyment of such property.

Though as has been frequently declared, the English doctrine of ancient lights and prospect, constituted no part of the law of the Colonies, and is not recognized in this State, yet, there has always been recognized in this country, an easement of light, air and access, which, in proper cases, has been enforced by the State courts. And this is true whether the easement has been created by express grant, or by dedication implying such a grant. In Myers v. Gemmell, 10 Barb. 543, it was said

that, in a case where a building occupied four sides of a lot, with a central court through which light and air were furnished to the tenants of such building, the owner may be well presumed to have dedicated the open space for the benefit of all the tenants. And in 64 N.Y. 432 a lessee of a store which store received light and air from a yard adjoining was held to have an easement in such yard; that such easement went as an appurtenance to the property, and the lessee when leasing the property from the owner of the yard and store, relied upon the yard remaining open for the purpose of furnishing light and air to his premises. On this ground, though the lessee had leased the store only, a subsequent purchaser, of the land constituting the yard, from the lessor, was restrained from building thereon, and from thus destroying the easement of the lessee.

The principles governing the decisions in these cases, were recognized when the first Elevated Railroad case, involving the rights of abutters, came before the Court of Appeals. That case, Story v. The N.Y. El. R. R. Co., 90 N.Y. 122, 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. Story, the plaintiff, was

vested with title to premises on Front St. in New York City, over which the N.Y. El. R.R. Co., proposed to operate an Elevated Railroad. His title to the premises in question came through various mesne conveyances from the original owner who had bought the lands from the city. Previous to such sale the lands, which were under water, had been surveyed and laid out on a map as abutting on certain streets therein designated. A covenant in the grantee's deed required him to erect and construct the said streets and further declared that said streets "shall forever thereafter continue and be for the free and common passage, and as public streets and ways, for the inhabitants, and all others, in like manner as the other streets of the said city, are, and of right, ought to be". The grantee constructed the streets, and, as before stated, the plaintiff having come into possession of a part of a premises so conveyed, abutting upon one of the streets so constructed, brought suit against the defendant to restrain him from constructing and operating the proposed Elevated Railroad.

A question was here raised as to whether or not the plaintiff owned the fee of the street, under the conveyance made to his grantor, but, in deciding the case, it was held immaterial to the decision whether the fee

were in the city or in the abutting owner. In either case the conveyance to the original grantee of the premises was a dedication to him of the right to have the street maintained as an open and unobstructed way for the benefit of his adjoining premises. As to the nature of these rights it was said, "Generally it may be said it is to have the street kept open so that from it access may be had to the lot, and light and air furnished across the open way. The street occupies the surface, and to its uses the rights of the adjacent owners are subordinate but above the surface there can be no unlawful obstruction to the access of light and air to the detriment of abutting owners. To hold otherwise would be to allow the city to derogate from its own grant, and violate the arrangement, on the faith of which the lot was purchased. This, in effect, was an agreement that, if the grantee would buy the lot, he might have the use of the light and air over the open space designated as a street".

It was further held that such easements in the street being in the abutter, in taking them by the erection of its road, the defendant would take plaintiff's property as much as if he took the tenement itself. And this upon the authority of Arnold v. Hudson R.R. Co.

55 N.Y. 661. Here Arnold, the plaintiff, was the owner of a mill, and also, of the right to take water from a pond at a distance from his lands under an agreement so to do, the water was conveyed by means of a trunk, over the lands of one Innes, to the mill. The railroad company having acquired part of Innes' lands, for the purpose of constructing its railroad, without the consent of the plaintiff, removed the trunk and placed it under ground, laying the track over it, by reason of which change the water power of the plaintiff was materially impaired to his damage. It was held that the taking of the plaintiff's easement was a taking of property within the Constitutional prohibition.

Proceeding upon the analogy of this case, the court said, "We have indeed a different element and a different medium, by which the right of use was made available, but the principle is the same. Whether light crosses the open space unrestrained, or water is conveyed by mechanical contrivance over it, can make no difference. The right of unobstructed passage is alone in question in each case".

The decision in the Story case did not, however, settle discussion upon this much mooted subject. Although it held that an easement was in the abutting owner

it was maintained that this decision should be limited to the facts of that case. But this position was plainly untenable, and, in the Lahr case, 104 N.Y. 268, which followed, the court affirmed the decision in the Story case, and decided, that where the street had been opened under proceedings in invitum, the trust relation which the city assumed to the adjacent property owners under the Act of 1813, was not different from that assumed by it in the deed by which Story claimed title to his premises. Further, that even though no land of the abutting owner had been taken for the bed of the street, as he was a party to the proceedings, and liable to be assessed for the benefits accruing to his property by reason of the opening of the street, such benefit could not be taken from him without compensation.

These benefits are taken into consideration by the Commissioners in estimating the amount to be assessed upon the abutting owners, in raising the funds necessary to open the street. And where the abutter is so assessed, as a compensation for the additional benefits secured to him "if in the next instant, they may be legislated away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legalized robbery than any form of acquiring property".

Two other important cases, the Abendrath case, 122 N.Y. 11, which was decided in the 2nd Division, and the Kane case, 123 N.Y. 164, decided in the 1st Division of the Court of Appeals, effectually put at rest all questions as to whether an abutting owner in streets in New York City has property rights in such streets. In both these cases, which went up upon substantially similar facts, an interesting question was raised, as to whether the Civil Law was brought over to this country by the Dutch, in whose regime, Pearl St. in New York City was laid out. By the Civil Law no easement whatever was recognized in the abutting owners on streets, but an absolute fee was in the government, so that a street might be entirely closed without compensation being made to adjacent owners. The plaintiffs, Abendrath and Kane, owned property on Pearl St. extending to the street line only, and it was claimed that since Pearl St. was opened during the Dutch occupation of Manhattan Island, the Civil Law applied as against them, however different the rule might be as to the other streets. This doctrine was not sustained. By the Common Law an abutter's easement was recognized in streets and highways and the court refused to go into any historical discussion, however interesting, as it

held the rule too well settled to be shaken. That there existed an analogy between the principles governing the dedication of land for a street by a private person, and a dedication for the same purpose, by a municipal corporation. And, as the state, by statute, had dedicated the streets in the City of New York as and for public streets, upon acceptance of the dedication by the abutting property owners, that dedication became irrevocable.

By these decisions it has been settled that an abutting owner upon 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 condemnation 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 Art. 1, #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 a company accordingly.

The Abutters' Remedies.

An easement of light, air and access, being in such an abutting owner, the erection of an Elevated Railroad upon such a street, although under Legislative and Municipal authority, is, as has been said before unlawful, if compensation for the taking of such easements is not made to the owner thereof. This being the case, the maintenance of the railroad constitutes an invasion upon the rights of the owner, in the nature of a trespass and, as it is permanent in its character, a private nuisance to the adjacent owners. Upon this theory, the abutter has a right of action at Law for injuries sustained, and also, an action in Equity, to restrain the maintenance of the nuisance. And first, as to the action at Law.

Remedy at Law.

The structure being a trespass in its creation and operation, the abutting owner has a right of action each day accruing for the damages which he sustains thereby. Lahr v. El. R.R. Co. and, as the structure is not a lawful one, the owner may recover not only damages to his easements of light, air and access, but other and consequential injuries as damages sustained by the noise, consequent upon the running of

trains. His right to damages, and the amount thereof is calculated from the institution of the nuisance to the date of bringing the action. For all such time as he has not recovered damages, he may have them by bringing his action. But, in this action, he cannot recover both past and future damages, on the ground that the injury is permanent. His remedy in such a case is in Equity. In the Lahr case, a different rule was applied, but it was so applied, for the reason that the parties had agreed in the trial court upon the measure of damages, and not because the apellate court intended to lay down any such rule.

The rule laid down in surface railroad cases, as in the Uline case, 101 N.Y. 98, is the proper one, in determining the time for which damages may be obtained. It is 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, that 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 further action, and thus obtain the title to the interest, which title, in Law, can only be secured by proceedings in invitum."

This principle was affirmed in the case of Pond v. El. R.R. Co., 112 N.Y. 188, where the plaintiff had brought his action at Law for damages simply, claiming prospective as well as past damages, on the ground that the injury was permanent and irremediable.

Remedy in Equity.

But the suitor may choose to bring his action in Equity, claiming that the trespass is permanent in its nature and that action is brought to avoid a multiplicity of suits. The majority of suits are so brought, the complainant praying 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 conforms to the general rules of Equity which permit 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 a conveyance to the defendant, of all his rights to the esasements taken by the defendant,

Thus the complainant seeking Equity is compelled "to do Equity". The intention of the suitor in such a case, is not that by the injunction which issues, the defendant shall discontinue operating his road or cease from building the structure, as it might seem theoretically. In practice, the Elevate Railroad Company still operates its road. Cars are regularly run and no thought is entertained by the parties that any other effect shall be given to the judgement. In reality, therefore, this action in Equity partakes of the nature of proceedings to condemn the abutter's property rights in the street, and this was in fact held in American Bank Note Company v. N.Y. El. R.R. Co., 29 N. E. Rep. 302, where Finch J. said, "There is no doubt in this case, and I think in any case, that the injunstion of a court of Equity and its alternative damages, are to be deemed a substitute for the ordinary proccedings for condemnation, with the practical difference, only, that in the one case, the company is the moving party, and in the other, the owner".

Before leaving this examination of the Equity Jurisdiction, brief notice must be given to a question, which, though it be of procedure merely, and, therefore, foreign to so limited a discussion as can be given in

this Thesis, is yet of great importance; since, though this construction is given to the judgment of a Court of Equity in these cases, the equitable theory of the action and judgment, is still maintained. An attempt was made in the case of Lynch v. Met. El. R.R. Co., 29 N. E . 315, under Section 970 of the Code of Civil Procedure, to obtain a framing of issues as to past damages to be tried by a jury, in Equity suits brought by the abutter. But it was there held that the defendant had no constitutional right to a jury trial, as was claimed, under Art. 1, #2 of the State Constitution. That, though the claim for past damages could have been adjudicated at Law, the plaintiff had not brought his suit in that jurisdiction, but his cause of action was the restraining "of the continuance of Acts which were constantly injuring him, and would to all appearances, constantly in the future continue to injure him". That was a form of relief demandable and cognizable, only, on the Equity side of the court. The Court of Equity having gained jurisdiction over the cause specially, could retain it for general purposes, and decree past damages. And that such a jurisdiction, without jury trial, had been exercised before the clause in the Constitution had been enacted, and was, therefore, no

violation of the Constitutional guaranty.

The decision in this case led to an amendment of that section, Laws of 1891, Chapter 209, by which, in an action controlled by that provision, where one or more questions arose on the pleadings as to the value of property, or as to the damages to which a party might be entitled, upon notice, such party might apply to the court for an order, directing the framing and submission of such issues to a jury, whose findings should be conclusive in the action, unless the verdict was set aside or a new trial ordered. Under the amended section, it was again attempted in Shepard v. Man. El. R.R. Co., 30 N.E. Rep. 187, to secure a jury trial as to past damages, But the court reaffirmed the doctrine of Lynch v. Met. El. R.R. Co., and held it no error on the part of the trial court in refusing to grant such an order. That the section could not govern such an Equity case and, that the granting of such an order, rested in the sole discretion of the court sitting in Equity. This amendment was subsequently repealed by the Legislature in the session of 1892.

The Measure of Damages.

The effect of the judgment both at Law and in Equity, being compensation in damages for the taking of the plaintiff's easements; what is the measure of damages by which this compensation may be ascertained? The easement taken is an incorporeal heridatament, appurtenant to the estate of the owner, a right to light, air and access. Its value cannot be ascertained, as could the value of the tenement itself to which it is appurtenant, by the market value of the property taken. 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 b e made by an inquiry as to the value of the premises before the easements were impaired, and their decrease in value since the taking. Bohm v. Met. El. R.R. Co., 29 N. E. Rep. 802. Newman v. Met. El. R.R. Co., 118 N.Y. 618.

The measure of damages is the value of the property without the railroad and with it.

If the property has suffered a loss of value by reason

of the construction of the railroad, then the abutter is damaged. If he has suffered no damage, as measured by this standard, then he is entitled to mere nominal damages for the unlawful taking of his easement.

Although the Acts, under which these companies came into existence, provided, that in determining the compensation to be made to owners whose property should be taken, no allowance or deduction should be made on account of any real, or supposed, benefit which the party in interest might derive from the proposed railroad, these benefits may be taken into consideration, in determining the damages which an abutter has sustained by the taking of his easement. Newman v. Met. El. R.R. Co., This is true though the benefits be special to the abutting owner, or shared in by all the owners on the street. This is so held, on the ground, that these provisions in the statutes regulating the compensation to be paid to owners whose property should be taken, were intended to relate only to the taking of land, which must be paid for at its full market value. That, though recognized as a species of property, by judicial decision, the easements acquired value in Law only as they benefited the abutting property, and not as property valuable in themselves. So the taking of such

easements is a consequential injury to the premises to which they are appurtenant and as such, and in estimating the extent of such injury, proof of benefits accruing to the owners by the construction of the road can be taken. In the Newman case it was held that where the rental value of a part of plaintiff's premises was diminished by the construction of the railroad, and, on the otherhand, the first floor, used as a store, was increased in value, by the business brought it from the establishing of a station at that point, such increase in value might be set off against a damage to the other parts of the premises. And, in the Bohm case, the general rise in the value of property consequent upon the erection of the company's road, which was established by uncontradicted evidence, was held a good ground for proving that the plaintiff had not been injured. So on proof that the Elevated Railroad had impaired to a certain extent the easements of the abutter by reason of which the value of his property was diminished, but, it being shown that the premises had been reduced in value from the movement of business up town, and away from that street, it was held that both these facts might be taken into consideration in determining the damage inflicted by the railroad company.

That from the general loss occasioned by the movement up town, should be taken the loss chargeable to the company, and for that loss the company was liable..

This ruling, which would seem to involve the courts in a calculation based merely upon opinion, was upheld on the ground that the defendant at Law, was a wrong-doer, and as such, had no standing in court to interpose the defense that damages, under such a ruling, "could not be ascertained with definiteness and precision". Drcker v. Man. El. R.R. Co., 106 N. Y. 156.

Again quoting from Bohm v. Met. El. R.R. Co., "The question is, what in fact has been the actual result upon the land remaining? Has its actual market value been decreased 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 cause, 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 particulae 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".

Rule at Law.

In considering this question of the measure of damages, a distinction is to be made between the rules applying at Law and in Equity, where damages are claimed for incidental injuries not impairing the abutter's easements. In an action at Law, the abutter may recover damages for any injury to his easements of light, air and access. So the smoke, gases and cinders, from the locomotives by which the cars are propelled, have been held to impair his easement of air; the structure and the cars running at short intervals, his easement of light; and the water and oil and,"possibly the frequent columns, his right of access". Drucker v. Man. El. R.R. Co. But further, in such an action for

past damages the abutter may recover for any consequential injuries caused by the maintenance of the railroad; for the company's entry upon the street and its taking of the abutter's easements, was a wrongful act, a trespass. This is a principle well settled, and one applied in the surface railroad cases, when such a trespass has been committed. Therefore, as has been before stated, the abutter may recover for injuries his property sustains from the noise of passing trains. Kane v. El. R.R. Co., 125 N.Y. 164.

Rule in Equity.

But in Equity the rule is not the same. The theory that the judgment in Equity that an injunction shall issue or alternative damages be paid, is in the nature of and a substitute for, proceedings in invitum, is here further elaborated. Equity follows the Law, since reference must be made to the legal practice in condemning lands. In such proceedings consequential injuries are not allowed to affect the amount of damages to be paid for the land taken. These easements of light, air and access, which have been declared property by the Story case, would, in the case of an ordinary surface railroad, have been mere incidents to the property of the abutter, and any lessening of his enjoyment of the

same, would have been a consequential injury for which no compensation could have been claimed, but the Story case makes these privileges, when existing above the surface of the streets, property rights, and, therefore, any injury to them, as such, is a taking of private property within the meaning of the Constitutional prohibition. However, these, and these only, were declared to be property rights in that case, and many other incidents remain which might be injured by the Elevated Railroads. As to such, the rules of Law must apply, and for injuries to such incidental benefits, no damages may be recovered in Equity.

It is only then, for injuries which impair these, his judicially declared property rights, that the abutter may recover damages in Equity. American Bank Note Company v. N. Y. El. R.R. Co.

Some interesting and important decisions, relating to testimony admissable, in determining the damage which an abutter has received, have been recently decided by the Court of Appeals. But, as they relate more particularly to a discussion of evidence receivable, they can receive but brief discu ssion here. The measure of damages remains the same, though the manner of ascertaining that damage, by the testimony given at the

trial, has received careful limitation. These decisions have, in the main, been upon the admission of expert testimony, and decide that such testimony is admissable to determine the present worth of the premises damaged, both as to their fee and rental value, and also, as to their value before the appurtenant easements were taken by the railroad. But testimony which permits the expert to usurp the functions of the court or jury, as, where the expert testifies that, in his judgment, the property has, or has not been damaged by the maintenance of the railroad, is not admissable, and is a good ground for reversing a judgment. As said before, the expert, in such a case, undertakes to do what the court or jury are to do, viz: to decide whether the abutter's premises have been injured by the trespass of the railroad, and, if so, what are the damages to which he is entitled. Roberts v. N. Y. El. R.R. Co., 28 N. E. Rep. 486.

Who Are Abutting Owners.

Having considered the easements which may be injured by the operation of Elevated Railroads, and the remedies which the abutter may have for the injury to these easements; who are the abutting owners entitled to exercise these remedies?

The use of the term trespass, in describing the entry of the railroad company, is apt to be misleading, in that a trespass, as known at the common law, would be presumed to be intended. This, technically, is not the case and the term is used rather to denote an invasion of the rights of the abutter. In this view of the case, one who owns in fee, the premises abutting on a street occupied by an Elevated Railroad, is an abutting owner with all the rights which have been enumerated in this discussion, even though, after the construction of the railroad, such owner has leased his premises to another. Kernochan v. N. Y. El. R.R. Co. 128 N. Y. 559 For the road, having been constructed before this lease was made, the premises had been deprived of these appurtenant easements, and went into the hands of the lessee in such impaired condition and the rent agreed upon between the parties must, of necessity have been fixed with reference to the then condition

of the property. The owner has not, by the lease transferred his right of action, which is each day accruing. The injury, for that reason, is not to the lessee who took possession with knowledge of the depreciated value of the property, but to the freehold, the fee, as held by the lessor, and he may have his remedy at Law, or in Equity.

If, however, the owner had demised the premises, previous to the entry of the railroad, though not directly adjudicated, it would seem to follow logically, that the owner would have no action for damages accruing during the continuance of the tenancy, for the lessee took the property with its easements unimpaired and such entry has been a direct damage to his interest therein.

The executor or trustee of a decedent abutting owner, is invested with such decedent's rights of action for damages accruing, up to the time of such decedent's death and they may bring such suits for the benefit of the beneficiaries. But the heirs or devisees, upon title vested in them may sue for all injuries to the easements of their estate so vesting, from the time of the death of the decedent. 14 N.Y. Supp. 952.

An abutter who has purchased premises from another during whose holding the railroad made its entry, takes

all the rights of action which his grantor had at the time of the sale, even though he purchases at a depreciated value, consequent upon the taking of the appurtenant easements by the railroad company. As the grantor has parted with all his interest in the land, he has nothing upon which to sustain a claim for the depreciated market value of the premises, at the time of sale. And, as on the other hand, the grantee took the premises with all the easements appurtenant to them, he received the absolute right to enjoy light, air and access impaired. Though they had been impaired by the operation of the railroad during the holding of his grantor, such a taking was a wrong for which the grantor might have had redress each day of its continuance. However, though this wrong was continuous in its nature, in the eyes of the Law it is not considered a permanent one, as between grantor and grantee, and the grantor, in conveying the premises, could not reserve either the rights of action or the easements. Pappenheim v. Met. El. R. R. Co., 128 N. Y. ~~518.~~ 436

It has been further held that under Section 1665, of the Code of Civil Procedure, by virtue of which, "a person seized of an estate in remainder, or reversion, may maintain an action, founded upon an injury done

to the inheritance, notwithstanding an intervening estate for life, or for years", that, as the taking of the appurtenant easements, is an injury to the inheritance, the remainderman or reversioner might have his action for such a taking and injury. 8 N. Y. Supp. 536.

Limitations Upon Abutters' Actions.

As has been frequently said, the injury to the abutter is a continuous one for which damages are accruing daily. What, if any, are the limitations upon the bringing of his action?

The first bar to an action would be where, by his laches, the railroad company has gained title to his easements by presciption, and this title as decided in the American Bank Note Company case, cited supra, can be obtained by the company. To gain such a title, the possession of the easements must have been continuous and adverse to the abutter's title for a period of twenty years. The use must be the same during that period. A use for one purpose being maintained by the company for a less period, and upon that a use of another and different character for the remainder of the time, will not be such a consecutive and continuous use as will pass the title as against the abutter.

In American Bank Note Company v. El. R.R. Co. where the first use was that maintained for a few years by the West Sideand Yonkers Co. in the experimental road which it built, the defendant, attempted to maintain that this, with the different burden imposed upon the plaintiff's property, when the N. Y. El. R.R. Co. enlarged and rebuilt the structure and used a different motive power, could be combined to make up the full term of adverse possession, This claim, however, was not sustained.

But, 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 upon 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 period 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 a 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 have not outlawed, and unite all in one suit.

This, the continuous nature of the trespass, and the inconvenience and delay, consequent upon a multiplicity of suits, which will be caused the abutter in obtaining compensation for his injuries at Law, is the ground upon which courts of Equity, in Elevated Railroad suits take possession of the subject matter, and award full and adequate relief. In Galway v. Met. El. R.R. Co., 28 N. E. Rep. 480, this conclusion was reached, and it was 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" did not apply to Equity actions, brought to restrain the commission of trespasses by Elevated Railroads upon the property rights of abutting owners.

In concluding this discussion, in which it is hoped that the salient features of the rights and remedies of the abutting owners, have received the careful consideration they deserve, the position which the Court of Appeals has taken in determining those rights, is of considerable interest, as bearing upon the probable outcome of future litigation.

The Story case, the first in which the abutters' rights were adjudicated, was decided by a divided court, and the present Chief Justice, wrote a masterly dissenting opinion. But the court was of necessity, controlled, thereafter, by the principles applied in that case, and, the natural outcome was the decisions in the Lahr, Abendrath, and Kane cases, for, in those cases, the main questions in issue were those referring to the property rights of the plaintiffs.

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 the subsequent decisions based upon it, within definite bounds. And, while upholding in every case, the theory that the abutters' interests in the streets constituted property, the rule of damages adopted and the rules as to evidence admissable, are,

for all practical purposes, limitations upon the effect of the Story decision.

In the Bohm case, which represents the latest expression of opinion of the court of last resort, upon the question of the nature of the abutters' property interests in light, air and access, the decision is based upon reasoning, which would seem to show that that court is taking judicial notice of the nature of the service which the Elevated Railroad Companies, in New York, are rendering to that city.
That a man may have property rights in a street, and, that these may be taken by a railroad company without any thing else than nominal damages being awarded to him theoretically, seems anomalous. But, taking into consideration the fact that these rights were,at first, merely consequential rights, which, by the Story case, were raised to the dignity of property interests, it can be readily seen why no "abstract" method of reasoning would be permitted in determining their value.

There can be but little doubt that the Court of Appeals has gone as far, in deciding in favor of the abutting owners, as it intends to go. And, there can be scarcely less doubt, that, in reaching the conclusions it has, it has been influenced, not so much by

the strictly theoretical aspect of the situation, as, by the magnitude of the interests involved, not alone as represented by the interests of property owners, but also by the great outlay and expenditure, which has been made by the companies, in affording, or attempting to afford, means of rapid transit over the vast area of the metropolis.