

ELEVATED RAILROAD LAND-DAMAGE LITIGATION.

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The litigation which has been in progress for the past sixteen years between the various elevated railroad companies now merged in, or leased by, the Manhattan Railway Company, and the owners of real estate abutting upon the streets and avenues of New York City through which the lines of such railroads run, is probably, quantitatively speaking, the greatest which the world has ever witnessed.

Some idea of its magnitude can be had when one is informed that more than two thousand cases are constantly pending, and that it costs the defendant companies upward of a quarter of a million annually to carry on the litigation, entirely aside from judgments, costs and allowances paid, or voluntary settlements entered into by them.

Therefore, as the ingenuity of lawyers is apt to be in proportion to the magnitude of the interests involved, there is much that is instructive to be evolved from a *resumé* of the progress of this litigation.

The question of the liability of the elevated railroad companies to pay to the owners of abutting property damages for any depreciation in the value of their premises caused by the construction, maintenance and operation of the elevated roads, was first squarely presented to the court of last resort of the State of New York in the now famous Story case on June 7, 1882, and decided by a majority of one on October 17, 1882.¹ The plaintiff was represented by John E. Parsons, Esq., and the Hon. William M. Evarts, while attorneys for other property owners were heard in person or by briefs. The argument for the defense was by Hon. David Dudley Field, the brevity of whose citations seemed to indi-

¹ Story *v.* N. Y. E. R. R. Co., 90 N. Y. 122.

cate that he deemed the hope of his opponents for a reversal of the decisions of the special and general terms of the Court of Common Pleas, from which the appeal had been taken, as highly chimerical.

It was contended on the part of the plaintiff that the occupation and use of the street in front of his premises was a taking of his property for public use and that, under the terms of the Constitution, he was entitled to compensation.

For the defense the claim was, that having been duly authorized by both the State and city governments to proceed with the erection, maintenance and operation of their road, and no part of the lands or buildings of the plaintiff having been appropriated, they had taken no private property ; that they occupied the same position as a street railway.

The decision of this case by a majority of one, and a careful reading of the opinions both of those who concurred and those who dissented, brings into clear relief that great division of juridical minds, of which the counterpart exists in the philosophical world, between those who apply a principle deduced from a certain state of facts, ever thereafter, with no eye to aught else, and those who examine the facts of each case to see if they were originally taken into consideration in the evolution of that principle, or are sufficiently divergent therefrom to require a new principle to be promulgated.

The minority held that, because lamp-posts or telegraph posts or hydrants or horse-car tracks could be erected or laid down by authority of the city and State without compensation to abutting owners, so could an elevated railroad be built without such compensation ; that whatever rights the plaintiff had, as abutting owner upon the street in question, was subject to any use thereof authorized by the State and city governments, short of absolutely closing the street.

The majority, however, in an able opinion by Danforth J. carefully and clearly demonstrated that the elevated railroads were entirely distinguished from surface roads, as useless for general street purposes and foreign thereto, and as inconsistent with any ordinary travel or passage over its tracks. They said, "Whether a particular structure authorized by the legislature is consistent or inconsistent with the uses of the street as a street must be largely a question of fact depending upon the nature and character of the structure authorized."

They pronounced the claim made by the defense that, "the legislature may, in its discretion, appropriate the public streets of

our cities to the use of railroad corporations, and this without reference to the form of their structure, or the extent of the injury wrought upon property abutting thereon," as, "a startling proposition, and one well calculated to fill the owners of such property with alarm." They added, "It cannot be that the vast property abutting on the streets of our great cities is held by so feeble a tenure."

That this decision was one justified in law and fact, no one can deny in view of the large judgments since secured by property owners against these roads. It is a matter of congratulation that there was a majority of even one in the Court of Appeals who could see that there was as much difference between permitting the laying of horse-car tracks without compensation to abutting owners, and the granting of a like privilege to an elevated railroad, as there is between an unintentional push in a crowd and an assault with an axe. As the quantitative element enters so largely into all the relations of the physical world; as work and leisure, as abstinence and indulgence, are each proper and conducive to health if carried to a certain point, no matter how hard it may be to draw the line; as medicine in certain quantities becomes poison in other quantities; as motion merges into rest at some indeterminate point;—so in the world of jurisprudence must the line be drawn between those acts which are, and those which are not, infringements of individual right. A certain difference of degree becomes practically one of kind.

The decision of this case brought upon the elevated railroad companies an avalanche of cases; and it was doubtless with the intention of making one almost superhuman effort to stem the flood which they saw coming, that they carried to the Court of Appeals and argued on October 27, 1886, the case of *George Lahr v. The Metropolitan Elevated Railway Company* (104 N. Y. 268). Seldom does one see such an array of counsel as appeared on the argument of this case. For the company appeared Hon. David Dudley Field, Julien T. Davies, and Edward S. Rapallo. The plaintiff was represented by Inglis Stuart, while other property owners were heard through John E. Parsons, Joseph H. Choate, Edward B. Whitney, Roger Foster, and many others.

The decision was handed down about three months later, February 1, 1887, and was a complete reassertion of the principles laid down in the *Story* case; and declared them to be as follows:

"*First*—That an elevated railroad, in the streets of a city, operated by steam-power and constructed as to form, equipments and dimensions like that described in the *Story* case, is a perversion of the use of the street from the

purpose originally designed for it, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation for the injury inflicted upon the property of abutting owners.

"*Second*—That abutters upon a public street, claiming title to their premises by grant from the municipal authorities, which contains a covenant that a street to be laid out in front of such property, shall forever thereafter continue for the free and common passage of, and as public streets and ways for the inhabitants of said city, and all others passing and returning through or by the same, in like manner as the other streets of the same city now are or lawfully ought to be, acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of property situated thereon.

"*Third*—That the ownership of such easement is an interest in real estate, constituting property within the meaning of that term as used in the Constitution of the State, and requires compensation to be made therefor before it can lawfully be taken from its owner for public use.

"*Fourth*—That the erection of an elevated railroad, the use of which is intended to be permanent, in a public street, and upon which cars are propelled by steam-engines, generating gas, steam and smoke, and distributing in the air cinders, dust, ashes and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement, and its appropriation by the railroad corporation, rendering it liable to the abutters for the damages occasioned by such taking."

The general principles of the extent of the liability of the companies being established, the first move on their part was to seek to limit the scope of the evidence which could be introduced on the part of the property owners, and to claim that the damages, being incapable of accurate estimation, should be nominal. These questions were presented to the court of last resort in the case of *Ephraim Drucker v. Manhattan Railway Company et al.*, decided June 7, 1887,² where it was determined that evidence tending to show, "that since the building of the elevated road the trade and business of the street had fallen off, and the current of custom had largely lessened in volume and changed in character," was competent; and that the claim of nominal damages for lack of precise proof had "no force in the mouth of the wrong-doer when all reasonable data had been furnished for consideration."

Following this case came several during 1888 and 1889, which tended to settle the proper mode of procedure in the actions brought against the companies; limiting the recovery in actions at law to the damages already sustained, and requiring the property owner who desired compensation for future damages to bring

² 106 N. Y. 157.

a suit in equity, praying for an injunction, and the granting of an alternative thereto by the payment of which the railroad company secured title to the easements which it occupied and of course the right to occupy and use the same forever. Other cases were as to parties, and established the principle that, as to the remedy by injunction, all parties to be affected by the decree should be brought in.

The next decision which marks a distinct era in this litigation is the Newman case, decided on March 4, 1890.³ This case was carried up to secure an interpretation of the application to these cases of that portion of the railroad law which provided that, in determining the amount of compensation to be made to parties owning or interested in property acquired for the construction and operation of railways, there should not be made "any allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railroad." Here the companies won their first great victory. After saying that, where a part only of land is taken, a fair and adequate compensation is to be paid for all injury to the residue, beside the value, if any, of the land taken, it proceeds to say, referring to the case at issue:

"The easement is the property taken by the railroad company. But in estimating its value it is impossible to consider it as a piece of property, separate and distinct from the land to which it is appurtenant, and the right of the property owner to compensation is measured, not by the value of the easement in the street separate from his abutting property, but by the damages which the abutting property sustains as a result or consequence of the loss of the easement. It follows that in making an award to a party situated as the plaintiff was with reference to the defendant's railroad there would be no compensation for property taken beyond a nominal sum, and that his right to recover would rest chiefly upon proof of consequential damages."

Further on:

"The increase of value resulting from the growth of public improvements, the construction of railroads and improved means of transit accrues to the public benefit generally, and the general appreciation of property consequent upon such improvements belongs to the property owner, and the railroad company are not entitled to the consideration of that element in the ascertainment of the compensation it must pay to the abutting proprietor. But the special and peculiar advantages which property receives from the construction and operation of the road, and the location of the stations are elements which enter largely into the inquiry whether there is injury or not, and the jury must consider them and give to them due weight in their verdict."

³ 118 N. Y. 618.

This case was followed by the Powers case⁴ in which the claim of property owners to exemplary damages, on the ground of failure of the defendant to institute condemnation proceedings after the decision of the Story case, was disallowed.

While this was, perhaps, a proper decision in view of the fact that but two years had elapsed between the decision of the Story case and the commencement of the action before the court, there would now be quite a serious question as to whether such a ruling would be in accordance with law or justice. Not only have the elevated railroad companies declined to accept with good grace the decisions in the Story and Lahr cases, but they have resorted to every legal expedient to delay and hinder claimants from a settlement of their claims by litigation. If no ground for the awarding of exemplary damages now exists, then the doctrine of exemplary damages is extinct in the State of New York.

The success of the defense was continued by the decision of the Tallman case.⁵ The property in this case consisted of three city lots abutting upon a street through which the elevated railroad ran, and was occupied in part by a carpenter shop and in part as a lumber yard. The plaintiff was allowed to show that he could have built, and at one time contemplated building, dwelling houses thereon; that they would have cost a certain sum; that they would have probably rented for a certain sum with the road in front of them and a much larger sum without the road there. The judgment in favor of the plaintiff was reversed, the court holding that, while he could use his property as he chose and recover the damages actually sustained, he could not recover what was merely speculative and problematical. That this was a sound and practical decision, no one can doubt. As they said, "Any other rule would open upon the trial in every case like this an inquiry into all the possible uses to which the abutting owner might put his premises; and damages, instead of being awarded upon any certain or probable basis, would rest mainly upon conjecture and speculation."

The following case was probably, next to the Story case, the most important which, up to the date of its decision, Oct. 7, 1890, had been passed upon by the Court of Appeals. It is known as the Abendroth case⁶ and its decision probably involved between three and six millions of dollars.

⁴ 120 N. Y. 178.

⁵ 121 N. Y. 119.

⁶ 122 N. Y. 1.

The claim was here set up by the defendant, that the Island of Manhattan was, within the law of nations, so discovered, settled, subjugated or possessed by the United Provinces as to impress upon it and its inhabitants the law of that country and the general rule of the civil law, that the title to the soil of highways and the beds of public streets is in the government. If this claim were sustained, they deduced therefrom the result that all streets,—of which the one in the case was an instance,—which existed at the time of the relinquishment of all claim to Manhattan Island by the United Provinces, were the sole property of the public, and the owner of abutting property had no right therein except subject to the control of the government ; and the elevated railroad being built with the full sanction of the latter, the former could be ignored. In other words, that the owners of abutting property had no easements in the street and therefore could have sustained no deprivation of property for which they were entitled to compensation.

The court in *banc*, however, in rendering its decision in favor of the plaintiff, smashed this beautiful crystal palace in which lay the hope of avoiding the payment of damages on some two or three miles of the narrowest and most badly damaged streets in the city, by holding that, “the owner of a lot on a public street, whether it extends to the center or only to the side of the street, has incorporeal private rights therein which are incident to his property, which may be so impaired as to entitle him to damages.”

The next move was to set up the statute of limitations, and acquiescence or estoppel. In the Galway case, decided Oct. 6, 1891,⁷ it was claimed that, as ten years had elapsed since the building of the road, the action was barred by the statute of limitations as applied to equity actions ; and further, that the plaintiff by using the road as a passenger had become estopped from any claim for equitable relief. It was held, however, that it was a case of continuous trespass and that “no lapse of time, or inaction merely on the part of the plaintiff, * * * unless it has continued for the length of time necessary to effect a change of title in the property claimed to have been injured, is sufficient to defeat the right of the owner to damages.”

This was followed on the thirteenth of the same month by the loss of another hope upon which the defense put considerable reliance.

⁷ 40 N. Y. St. Rep. 145.

The plaintiff in this, as in many other cases, had bought the abutting property in question after the road was built, and at a reduced figure on account thereof. The defendant therefore claimed that he had no right to damages. The Court said, however, (*Pappenheim v. M. E. R. Co.*, 40 N. Y. St. Rep. 445) "The vendee has purchased and the vendor has sold to him in fee simple absolute the premises fronting the street, to which premises are attached, as property passing to him by the conveyance, the easements of light, air and access which the defendants have already interfered with and trespassed upon by the erection and operation of the road," and "as these easements passed to the vendee and became her property, as much so as the land itself, how is it that the railroad company has become possessed of the right to appropriate such easements, or any portion of them without payment to her?"

About a week later, however, a decision was rendered (*Roberts v. N. Y. E. R. R. Co.*, 40 N. Y. St. Rep. 454) which was a substantial triumph for the defendants in these cases. It had been customary in the trial of these causes for the plaintiff to produce real estate experts who were asked what in their opinion was the damage to the property of the plaintiff by reason of the construction and operation of the road of the defendants, and,—to put the same question in another way,—to ask him what is the present value of the premises, and what would it be but for the existence of the road in front of the premises. This case was carried to the Court of Appeals to secure a ruling as to the propriety of these questions, claiming that any answers must be purely speculative, and embrace the very question for the court to decide. The plaintiff claimed, however, that it was the best evidence available; but, although supported by two members of the court in an instructive and able dissenting opinion, the claims of the defense prevailed.

It is hard to estimate the exact effect of this decision, but that it was of great benefit to the elevated railroads no one can doubt. The principal virtue of the decision, however, is the way in which experts and their testimony were handled without gloves. Certainly every word of scathing criticism upon them and their methods was deserved, as anyone who has noted the absolute inconsistency of expert testimony in cases of late, must allow. They have become as much counsel as the attorneys themselves.

The next case decided (*Kernochan v. N. Y. E. R. R.*, 41 N. Y. St. Rep. 110) was an attempt on the part of the defense to secure a ruling that the decision of the *Pappenheim* case above

cited required, as a logical necessity, that if the property had been leased by the owner since the building of the road the cause of action had passed with the possession to the lessee. They received an adverse decision, however, although the reasoning thereof is inclined to be a little cloudy.

In the case of *The American Bank Note Company* (41 N. Y. St. Rep. 531) the first claim of a right by prescription was set up, a one-track road having been built in front of the premises in 1867. The court refused to recognize this as a valid defense, holding that the right as now claimed was not identical with the original user; and also basing their decision partly on the fact that the defendants had begun condemnation proceedings in 1888, thereby admitting title in the plaintiffs to the easements occupied.

This case was also a noted one for deciding that the element of noise was not to be taken into consideration in estimating the damages, as it did not interfere with the easements of light, air or access.

Aside from the various decisions as to matters of practice, some of which were very important but of little interest to attorneys outside of the State, the only other important decisions are those which have extended the doctrine of the *Newman* case above mentioned, so that at present property owners in the upper part of the city, where the value of property has largely increased since the building of elevated railroads, can recover nothing unless they can show that their values have not increased in proportion to those on other streets and avenues in the same neighborhood, and that this failure is due to the construction and operation of the elevated railroads.

A general review of the decisions which have been handed down by the court of last resort, in connection with this litigation, convinces a fair-minded man that for the most part justice has been done. It would have been a grievous wrong if any property owner in any of the narrow down-town streets had failed of recovery on account of any technical defense, and it would have been an equal wrong if the elevated railroad companies had been mulcted in large amounts for damages to properties which but for the building of the roads would not have been worth more than one-fifth of their present value. It would appear, on the whole, that the defendants in these cases have bettered their position in the course of the progress of the litigation; but that they will do so much further is to be doubted. The vast number of cases blocking the calendars of all the courts is of course a temptation to judges to dispose of them in a summary manner, but whether

to the injury of the plaintiffs or defendants it is hard to predict. There is, however, no doubt in any well informed man's mind as to who should be made to pay the penalty, if any, for the congestion. It has been the policy of the defendants to use every possible means which the law allows to delay and hinder litigation, with a view to discouraging the enforcement of claims or secure their settlement at nominal figures. Probably there has been nothing which more clearly demonstrates the evil of *ex-parte* extensions of time to take the various steps in litigation—an evil which exists nowhere outside of New York State that I am aware of—than the history of this legal warfare. This, if anything, will open the eyes of the bar to the absurdity of granting extensions *ex-parte* and then throwing upon the party who has asked no concessions the burden of getting out an order to show cause why the extension should not be vacated, all of which takes time and gives the delinquent the very advantage he seeks.

No doubt, as to all parcels of property upon which no suits shall have been begun by 1897-99, or twenty years from the constructing of the roads in their present form, they will have a right by prescription; but with the present diligence displayed by attorneys making a specialty of this litigation in searching out all such owners and informing them of their rights, there is little danger that any property owner will remain without redress.

The amount of the judgments secured by property owners must be nearer twenty millions than ten; and the companies must have already paid nearly five millions as a part of these judgments or in voluntary settlements.

The litigation has tended to become concentrated in the hands of a few lawyers and some of them have made vast sums therefrom. Both the prosecution and defense of these cases has been very uneven in point of ability displayed. Some of the attorneys for property owners have shown great ability in the management of their cases and have secured enormous amounts in the way of judgments, while others have secured small awards or settled at ridiculous figures. The defense has been conducted with equal unevenness, a necessary consequence of the conduct thereof by so many different men. There has been some very meritorious work done, especially by some of the younger members of the office which has the matter in charge.

That a litigation involving so large an amount and conducted by so many attorneys should be absolutely free from corrupt practices, is perhaps hardly to be expected. Possibly dark secrets will be some day revealed by the enterprising press.