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THE RELATIONS OF RAILWAYS AND HIGHWAYS—
STREET RAILWAYS.

I. THE RIGHTS OF RAILWAYS AS TO THE LAND OWNERS. HOW FAR THEY MAY DEMAND COMPENSATION WHEN RAILWAYS OCCUPY THE HIGHWAYS.

1. Some of the earlier American cases allowed such compensation.
2. A railway was for a long time regarded as only an "improved highway;" and no additional compensation given to the land owner.
3. That doctrine abandoned. Now held that the railway is an additional servitude and the owner of the soil entitled to additional compensation.
4. This was always the English rule. One cannot there tunnel the highway without additional compensation to the owner of the soil.

II. THE LAW HAS BEEN HELD DIFFERENTLY IN REGARD TO STREETS IN THE CITIES.

1. As to street railways, not operated by steam, it has been held the landowner is not entitled to additional compensation for any use they may make of the streets or highways, either in city or country.
2. Railway companies generally held to require only the consent of the municipal authority for locating in the street. Rule questioned in some cases.
3. There is difficulty in saying what is the true principle.

III. DECISIONS AND INTIMATIONS IN REGARD TO THE ULTIMATE RIGHTS AND DUTIES OF STREET RAILWAYS.

1. Such railways need not pay any compensation to land owners.
2. They are never to be regarded as a nuisance or purpresture.
3. There has been manifested great public interest in the establishment of street railways.

4. It may fairly be calculated that some abatement of the enthusiasm may occur hereafter.
5. It is therefore the policy, as well as the duty of the proprietors of such interests, to cultivate kindly relations, both with the public and the municipal authorities.

IV. THE RELATIVE RIGHTS AND DUTIES OF THE PROPRIETORS OF STREET RAILWAYS AND THE MUNICIPAL AUTHORITIES, IN REGARD TO THE MAINTENANCE OF THE SECURITY OF THE HIGHWAYS FOR PUBLIC TRAVEL.

1. The municipal authorities have all the powers and duties of the municipalities themselves.
2. The primary responsibility for the safe condition of highways rests upon the municipalities.
3. The railways are directly responsible to persons injured by their negligence.
4. And the towns are not responsible when they have no right to interfere, or where the maintenance of the highway rests solely upon the railways, as is sometimes the case in regard to steam railways.
5. And where towns are made responsible for the default of railways, they are entitled to demand indemnity of the railways, and this extends to costs and expenses.
6. And where the injury did not accrue for more than six years after the default of the company, they were still held liable to indemnify the town.
7. But the railway is not responsible unless in default, either in laying or maintaining their track.
8. A condition in the location of a street railway that it shall be completed in a given time, will not render void the location, upon non-performance, unless judicially declared.
9. The reserved power of vacating the location by the municipal authorities, is only limited by good faith and reasonable discretion.
10. It is both the interest and duty of street railways to cultivate in themselves a sense of dependence upon the good will of the municipal authorities, and of consequent forbearance towards all other modes of public travel.
11. This is the only condition upon which the grant of such large privileges, for such long terms, could possibly be endured.
12. The indispensable necessity of some summary tribunal, in every State, where such railways exist, for the speedy determination of questions arising in regard to the relative rights and duties of the railways, the towns, and the traveller.

We have selected this familiar subject for the present article, partly because it was familiar. What is familiar, and of daily use and occurrence, stands some fair chance for being made useful to our readers and patrons, if otherwise valuable and important, while one which is abstruse and recondite, and of rare occurrence, is far less likely to prove so. And the profession have no time and

little disposition to listen to disquisitions, the chief purpose of which is, either to educate the author or to exhibit his skill in dialectics, or in law. The relation of highways to railways, and the rights growing out of these relations, has, first and last, led to more litigation than almost any other subject connected with the LAW OF RAILWAYS.

I. We have here to consider the rights of railways in regard to the land owners, or whether the owner of the fee of land, which has already been taken for the use of a public highway, is entitled to additional compensation when a railway is constructed over the same land. The decisions upon this point have been exceedingly conflicting. While it has always seemed to us extremely clear, as matter of principle, that in such case the railway is an additional servitude upon the land, and therefore justly entitles the owner of the fee to additional compensation; the current of authority, especially in this country, at one time certainly, seemed to be setting, almost without obstruction or protest, entirely in the opposite direction.

1. Some of the earlier cases did, indeed, require additional compensation to the land owner in such cases. The *Trustees of the Presbyterian Society in Waterloo vs. The Auburn and Rochester Railway*, 3 Hill (N. Y.) R. 567; *Fletcher vs. Auburn and Syracuse Railway*, 25 Wendell R. 462; other cases of that date took a similar view: Redfield on Railw. 176, and Notes.

2. But it was very soon discovered by some courts, as they supposed, that a railway was only an *improved highway*, and this was thought to deprive the land owner of all claim for additional compensation. The course of argument, by which this result was reached, was very natural and plausible. It was well settled that the land owner was not entitled to additional compensation in consequence of any alterations, which the municipal authorities might elect to make in the construction of the highway, as such, whatever detriment he might sustain thereby. This was one of the contingencies, coming fairly within the contemplation of the purpose for which the right of way was originally taken. And even

when the change in the highway was of a character which could not have been reasonably anticipated, either on account of some unexpected change in the necessities of travel, or because the public authority might be regarded as having acted capriciously in the particular matter, it was nevertheless among the exigencies of possible advancement, or of official discretion, or the want of it, to which every loyal man is bound to submit, and which he ought to prepare himself to do with grace, and without additional compensation. This question has been repeatedly decided by the English courts. *Governor & Co. of Plate Manufacturers vs. Meredith*, 4 T. R. 724; *Sutton vs. Clark*, 6 Taunt. 29; *Boulton vs. Crowther*, 2 B. & C. 703; *King vs. Payham*, 8 B. & C. 355. Similar principles have been adopted in this country: *Henry vs. The Pittsburg and Allegheny Bridge Co.*, 8 W. & Serg. R. 85. In other cases cited in *Hatch vs. Vermont Central Railway Co.*, 25 Vt. R. 49, and note. It seemed very natural hence to conclude, that the legislature might convert a highway into a railway, since that was only a different mode of intercommunication: *Williams vs. N. Y. Central R.*, 18 Barb. R. 222, 246.

3. But the argument has finally been proved unsound. A railway is indeed an improved highway, but it is more. And the land was originally taken for no such purpose. The use is vastly more onerous and detrimental to the owner of the fee, which may fairly be presumed to belong to the land adjoining. And there is not the same probability of abandonment, as in the case of an ordinary highway. The case of *Williams vs. New York Central Railway*, *supra*, was accordingly reversed in the Court of Appeals, 16 New York Court of Appeals R. 97, and upon a full review of all the cases, English and American, it was fully determined, that both upon principle and authority, the land owner *is entitled* to additional compensation for the new burden upon his soil. The same rule is now adopted by the following cases: *Imlay vs. The Union Branch Railway*, 26 Conn. R. 249; *Gardiner vs. Boston and Worcester Railway*, 9 Cush. R. 1.; *Springfield vs. Connecticut River Railway*, 4 Cush. R. 63; *Tate vs. Ohio and Mississippi Railway*, 7 Ind. R. 479; *Protzman vs. Indianapolis and*

Cincinnati Railway, 9 Ind. R. 467; *Evansville & C. Railway vs. Dick*, 9 Ind. R. 433. Many other American cases will be found in Redfield on Railw. § 16 and Notes.

4. The doctrine of the English courts is elaborately discussed in the late case of *The Marquis of Salisbury vs. The Great Northern Railw. Co.*, 5 Jur. N. T. 70, S. C., 5 C. B. (N. S.) 174. The court here say: "The soil of a public highway is presumably vested in the owner of the adjacent land *ad medium filum via.*" They further say there is nothing in the General Turnpike Acts to alter this presumption, or to vest the soil of that description of roads in the trustees of the roads. *Davidson vs. Gill*, 1 East R. 69. And in *Ramsden vs. The Manchester South Junction & Atl. Railway*, 1 Exch. R. 723, it was expressly determined that a railway company has no right to tunnel even under a highway, without making previous compensation to the land owner. See also *Thompson vs. East Somerset Railway*, 29 Law Times, 7. So that we think it safe to affirm that notwithstanding the large number of American cases in the opposite direction, the tide is so completely turned, that it will not relapse.

II. The law has been held somewhat different in regard to the streets of cities, and whether the attempted distinction between such streets and common highways will ultimately prevail, it is, perhaps, not time to determine with confidence.

1. In regard to street railways, not operated by steam power, the decisions have been uniform, we believe, that the land owners are not entitled to any additional compensation: *Brooklyn Central and Jamaica Railway vs. Brooklyn City Railway*, 33 Barb. R. 420. And the same rule was applied where a common highway was converted into a turnpike road, and an incorporated company allowed to take toll on the same: *Wright vs. Carter*, 3 Dutcher R. 76. But in *Williams vs. The Natural Bridge Plank Road Company*, 21 Mo. R. 580, it was decided that the grant of such a road along a highway did not preclude the claim of the owner of the soil for compensation for the additional purchase. This case is not, however, in consonance with the general course of decision upon the subject, at the present time.

2. It seems generally to have been considered that the municipal authorities of a city, or large town, have such an exclusive control over the streets, that a railway company duly chartered by the legislature for the purpose of constructing a railway, extending within the limits of such town or city, will require no other warrant for the construction of their road, except that of the consent of the municipal authorities, as to the particular location; and that the adjoining land owners, or abutters, have no such interest in the land covered by streets, as will entitle them to compensation. This was so decided at an early day, soon after railways began to be constructed in the country: *Philadelphia and Trenton Railway*, 6 Wharton R. 25; *Lexington and Ohio Railway vs. Applegate*, 8 Dana R. 289; *Hamilton vs. New York and Harlem Railway*, 9 Paige, 171; *Hentz vs. Long Island Railway*, 13 Barb. 646; *Chapman vs. Albany and Schenectady Railway*, 10 Barb. 360; *Redfield on Railways*, 162, and cases cited, § 76, pl. 6, n. 6. But even this doctrine seems to have been somewhat questioned in the case of *Nicholson vs. New York and New Haven Railway*, 22 Conn. R. 74, where it was held that the company, in laying their road through the City of New Haven, in which they found it necessary to carry one of the streets over the railway, upon a bridge with large embankments at both ends, the plaintiff owning the land abutting, and no compensation being offered him, became liable to the plaintiff in an action of trespass for any appreciable incidental damages occasioned thereby to him. It was also here held, that the company having proceeded, under the authority of the legislature, were *primâ facie* not liable as trespassers, but that when they caused any appreciable damage to the land owners along the line of the street they occupied by their road, they were liable in this form of action.

The court in this last case, Hinman, J., assume the distinct ground, that the railway, by laying their track upon the plaintiff's land, which was before only subject to the servitude of the highway or street, would become liable for "such entry" upon the land. "In all such cases," said the learned judge, "the subjecting the plaintiff's property to an additional servitude, is an

infringement of his right to it, and is, therefore, an injury and damage to him. It would be a taking of the property of the plaintiff, without first making compensation," thus treating the fee of the land covered by the street as still being in the adjoining owner.

3. From what we have said, it will be apparent the cases are not as yet entirely harmonious, in regard to the use of the streets of our large towns and cities, for the bed of steam railway tracks; and it is not easy now to determine precisely where the true principle must eventually bring the courts. There does not seem to be any such difference between the streets of a city and large towns like New Haven, which is also, in fact, a city, as to justify any different rule, as applicable to the two cases. And the same may be said of the imperceptible shades by which the streets of cities and towns grow into mere country highways, as they recede in that direction. It would be difficult upon any of the highways leading into our cities to determine the precise point at which a steam railway would cease to be liable to make compensation to the adjoining land owners for occupying the highway by their track.

III. If we were to conjecture the final result of the cases upon this subject, we should say:

1. That street railways are so nearly the same thing as the ordinary use of a highway, that no additional compensation will ever be required to be paid to the owners of the soil, from the mere fact of occupying the street in that way, whether it be in the city or country. The motive power is the same, the noise and dust not increased, and the only appreciable difference consists in bringing the travel to a defined line. This is not attended with any inconvenience to the land owner. The grade of the street is not required to be changed, and the same is true where these lines of travel are carried along the line of highways in the country, as is now the case for long distances in the vicinity of some of the large towns. We cannot therefore conjecture any sufficient ground for subjecting the proprietors of such street railways to the burden of making additional compensation to the land owners; unless from the future use of steam power upon street railways, they should cause a similar annoyance

to that which is now caused by steam railways. And in that case, and in every instance where such street railways cause special damages to the adjoining land owners, the redress should be left to the statutory remedy given in most of the states, for consequential injury caused by railway companies. We cannot suppose that there can be any difference as to the rights of the owners of the soil, whether the railway is operated by a corporation or a natural person, or that it is, of necessity, mainly a monopoly. The fact that ordinary travellers are not allowed to conform their carriages to the tracks of the company, so as thereby to convert it to their own use, can make no essential difference with the owners of the soil: *Brooklyn Central Railway vs. Brooklyn City Railway*, 32 Barb. R. 358. This cannot be done even by consent of the municipal authority: *Ib.*

2. It has been repeatedly decided that a street railway, which is erected under a grant from the legislature, and with the concurrence of the municipal authorities, is not to be regarded as a nuisance or purpresture: *Milhau vs. Sharp*, 15 Barb. R. 193; *Plant vs. Long Island Railway*, 10 Id. 26; *Chapman vs. Albany and Schenectady Railway*, Id. 360; *Adams vs. S. and W. Railway*, 11 Id. 414; *Hodgkinson vs. Long Island Railway*, 4 Edw. Ch. R. 411. Some of the cases, in deciding that a street railway is not a nuisance of such a character, that it will be enjoined at the suit of the adjoining land owners, place stress upon the fact, that the railway is so constructed and used as not to obstruct or impair the public right of way: *Hamilton vs. New York and Harlem Railway*, 9 Paige R. 171; *Drake vs. Hudson River Railway*, 7 Barb. R. 508. See also Willard's Eq. Ju. 402, 406.

3. We think it may be fairly regarded as evidence of very surprising interest in the public feeling, in having street railways maintained, and of condescension towards them, on the part of the public generally, that no more remonstrance has yet been made in regard to the kind and degree of obstruction which they unavoidably do produce in the public streets in cities, and especially in the greatest thoroughfares, where they are most used, and would, by consequence, be most likely to be built, if the municipal autho-

rities will allow it. In some portions of the City of New York, we think, and probably in other cities, the street railways are excluded from the most crowded thoroughfares, and confined to streets where they may be operated in lines parallel to the main thoroughfares, and thus afford substantially the same accommodation to public travel, with less serious embarrassment to the other modes of travel. But this is not the usual course in the cities, so far as we have observed. More commonly the tracks of these street railways are allowed to be laid precisely where there is the most of other travel, and where, by consequence, they must inevitably cause a most uncomfortable amount of embarrassment, often, to others. And in some thronged streets, not wide in themselves, the street railways are allowed to lay double tracks, which, by the frequent passing and repassing of cars, almost wholly obstruct, at times, the free passage of teams and carriages, for periods of greater or less duration.

4. It has, therefore, always seemed probable to us, that at no remote period, after the feverish gratification consequent upon having such a luxurious and inexpensive mode of street travel, so generally introduced into the principal streets of our large cities, shall have so far subsided as to allow of what has been very appropriately called "the sober second thought of the people," to find expression, there will not be the same enthusiastic concurrence in the necessity of having such a monopoly of transportation in so uncomfortable a mode, so far as other travel is concerned, so generally maintained. It has seemed amazing to us, that no more clamor against so serious an obstruction of the thoroughfares in the larger cities, has hitherto been heard. We should, of course, rejoice to see the continuance of the same quiet acquiescence in the partial evils caused by these street railways, for more universal good. But we scarcely dare expect it.

5. We think it fair, therefore, to admonish the proprietors of such interests, to be prepared for a serious reaction, in regard to them, in the public mind, and not to count too confidently upon the continuance of this unbroken, unclouded sunshine of public favor.

We know many able jurists and wise statesmen, somewhat of the

old school, be sure, who regard them with no favor; and if not prepared to denounce them as altogether unmitigated evils, yet feel that they are by no means exempt from the charge of themselves causing serious public grievance, if not even deserving of a more offensive name. We are certainly not disposed to sound any note of alarm against so important a public interest. What we have said has been altogether by way of friendly caution, and to induce, if possible, reasonable circumspection on the part of such companies to maintain the most entire submission to, and patient endurance of, those little inconveniences which will be liable always to occur in the streets, feeling that they are already sufficiently protected from any intentional obstruction and embarrassment, both by the statutes of the states and the decisions of the courts.

IV. We deem it proper, also, to give some brief outlines of the relative rights and duties of the street railway companies and the municipal authorities of the town or city through which they pass, in regard to the maintenance of the public highways in safe condition for public travel.

1. The selectmen of the several towns, and the mayor and aldermen of the cities, have all the powers and duties of the towns and cities which they represent, and are bound to maintain the rights and duties of their respective superiors, and to vindicate the public rights committed to their care and control: *City of Boston vs. Boston and Prov. Railw. Co.*, 6 Cush. R. 424.

2. The primary responsibility in regard to the safe condition of highways and streets, so far as the public is concerned, rests upon the towns and cities, notwithstanding their insecurity may have been caused by the negligence or misconduct of the railway company; and which might be at the time exercising a legal right in an improper manner, and in regard to which the municipalities had no direct control over them: *Currier vs. Lowell*, 16 Pick. R. 170; *Willard vs. Newbury*, 22 Vt. R. 458; *Batty vs. Duxbury*, 24 Vt. R. 155; *Buffalo vs. Holloway*, 14 Barb. R. 101.

3. It is not intended to intimate here that the railway companies, who are first in fault, are not also liable to the persons injured by such default on their part. There can be no question they are

liable to an action, directly, by the party injured. This has been often decided by the English courts: *Drew vs. New Riv. Co.*, 6 Car. & P. 754; *Manley vs. The St. Helen's Canal and Railw. Co.* 2 Hurst. & Norm. 840.

4. And in regard to those defects in highways where the municipal authorities could not interfere to remedy them, without an unauthorized interference with the track of the railway company, the towns are not liable at all for any injury which may occur in consequence, the companies being alone responsible: *Davis vs. Leominster*, 1 Allen, 182; *Jones vs. Waltham*, 4 Cush. R. 299. Nor are the towns responsible where the injury is occasioned by an illegal act of the railway company. The party affected will have to look exclusively to the company in such cases, unless the act of the company had before rendered the highway unsafe, and this had become known to the town: *Vinel vs. Dorchester*, 7 Gray R. 421. So, also, when a railway company, by occupying the highway, finds it needful to erect and maintain a bridge for the accommodation of the highway, the towns are not held responsible for any defects in such bridge: *Sawyer vs. Northfield*, 7 Cush. R. 490; see, also, Redfield on Railways, 391, *et seq.*, § 171. But in such case the towns may compel the railway companies to keep such bridge in repair, by writ of mandamus, and may recover of them any expenses incurred by keeping them in repair: *State vs. Gorham*, 37 Maine R. 451.

5. And in all cases where towns or cities are made responsible to persons suffering injury in consequence of defects in the streets or highways, through the fault of railway companies primarily, such railway companies are liable to indemnify the towns or city, for all damages or costs thereby suffered: *Lowell vs. Boston and Lowell Railw.*, 23 Pick. R. 24; *Newbury vs. Conn. and Pass. Railw. Co.*, 26 Vt. 751, 752. And in such cases costs will include counsel fees and other necessary expenses: *Duxbury vs. Vt. Central Railw. Co.*, 26 Vt. R. 751, 752, 753; *Hayden vs. Cabot*, 17 Mass. R. 169, where Parker, C. J., says: "If the surety pays voluntarily, he shall be reimbursed; if he is compelled by suit to pay, he shall also be indemnified for his costs and expenses."

6. And even where the injury did not accrue for more than six years after the unlawful act or neglect of the company, it was held that they were still responsible to the town to indemnify them; and that it would not exonerate the company guilty of the neglect, that they had subsequently leased their road to another company, who were operating it at the time the injury occurred. *Hamden vs. N. H. & Northampton Co. and N. Y. & N. H. Railway Co.*, 27 Conn. R. 158.

7. But when the railway company have a right to lay their rails in the streets of a city or town, they are not responsible for any injury resulting therefrom to others, unless they were in fault, either in laying them down or keeping them safe. In such case the injury is considered accidental. *Mazetti vs. N. Y. & Harlem Railway Co.*, 3 E. D. Smith R. 98.

8. And where a street railway company were authorized to construct their line and operate their road through the streets of a city, and the municipal authorities have assented to the location of the company's road upon a given route on certain conditions, one of which was, that it be completed in a given period, it was held that the municipal authorities had no power to vacate the location for failure of the company to complete their road in the time prescribed; that such condition was not to be regarded as precedent, but subsequent, and that nothing short of a judicial determination would operate to divest the interests of the company. *Brooklyn Central Railway vs. Brooklyn City Railway*, 32 Barb. R. 358.

9. But in those charters of street railways, where there is reserved to the municipal authorities a power of vacating the location of street railways, in their discretion they may undoubtedly exercise such power, upon the ground that the original location was injudiciously made, the track being placed in the middle of the street, when it should, for the accommodation of the public travel, have been placed upon the margin of the street, or vice versa. We say this upon the ground that such a reservation evidently looks mainly to the placing such street railways under the absolute control of the municipal authorities; and that such a control, to be of any practical benefit to the public, as a defence against the assumption of

unjust interference, on the part of street railway companies with the other public travel, must be absolute and unlimited, except by the conditions of good faith and reasonable discretion. One great purpose of such a reserved power is to enable the municipal authorities to correct mistakes in former action by the result of enlarged experience; and the companies must be content to enjoy such liberal privileges upon the tenure of such uncertain conditions, even.

10. It seems to be an indispensable pre-requisite to allowing the location of horse power railways along the streets and highways, that they should be held to very strict accountability to the public authorities; for unless this is done, there will arise, in all probability, such frequent collision between the rights and interests of the general public and this railway monopoly of a portion of the public street or highway, as speedily to beget inconceivable feuds and conflicts, quite inconsistent with that quiet good order which is indispensable to comfort, or tolerable success in threading the numerous thoroughfares of our populous cities. And the very apprehension on the part of the companies, or their employees, that they had acquired interests or rights entirely independent of the public control, would be liable to beget a spirit of positiveness and want of accommodation which, if not the source of annoyance and discomfort to themselves, could hardly fail to become so to others. The only practicable mode of maintaining the proper spirit of yielding accommodation in these street railways, and their employees, will be found to consist in their cultivating in themselves the feeling that they are allowed such large indulgence in the exclusive use of the public street, from year to year, purely by the favor of the public, and not as matter of vested right. They should not allow themselves to feel that they have acquired anything more than a temporary indulgence, since no public functionary has any power to give them anything like a permanent easement in the public street for carrying forward such a monopoly of travel throughout the indefinite future. If they had, or could acquire any such easement, it would constitute an additional servitude upon the soil, and entitle the owner of the fee to additional compensation.

11. And in saying the companies and their employees should cultivate such a feeling of dependence upon public favor, and the concession of the public authorities, we mean, of course, that street railways cannot be admitted on any other condition without becoming an intolerable grievance, not to say nuisance. It is, therefore, for their best interest to put themselves in the proper spirit for perpetual duration, and studiously to cultivate and to maintain such a spirit; and if they should, in any spirit of defiance and mistaken zeal for supposed exclusive privileges, which have no existence except in their own misapprehensions, come to seriously disturb the public comfort and convenience along the crowded streets and thoroughfares of our cities, it would unquestionably become the duty of the municipal authorities, by bringing their unfounded pretensions to some judicial determination, to teach them the proper spirit of forbearance and reserve towards other modes of travel having equal rights with their own in every portion of the street, so far as their necessities might demand. These questions are readily disposed of in courts of equity, and in applications for mandamus and other similar orders.

12. We have occupied so much space already upon this subject, that we can only refer at present to one more topic, which seems to us of the greatest consequence, both to the proprietors of street railways and to the public interests liable to be affected by them. We mean the creation in every state where such companies exist, and the same may be true, in a degree, of steam railways, of a public tribunal (commissioners, or a court of inquiry) for the summary determination of all questions of conflicting claims between railway companies and the municipal authority, in regard either to the use of the streets or highways, the repairs of those portions near the line of the railway track, any obstructions caused by the railway to other travel, or any obstructions caused by other travel to the operations of the railway, or obstructions caused by the repairs or reconstruction of the highway, either to the bed of the railway or its operation, or any similar questions arising between the railways and the municipal authorities. Such a board, always in session, and of easy access, would be of infinite advantage to these