THE ELECTRIC STREET RAILWAY COMPANY, OF CLARKSVILLE, TENN.

-:-VERSUS-:-

R. B. M O S E L E E Y.

JUDGMNT IN FAVOR OF DEFENDANT IN ERROR.

DANIEL & DANIEL, ATTORNEYS FOR PLAINTIFF IN ERROR,

LEECH & SAVAGE, ATTORNEYS FOR DEFENDANT IN ERROR.

HONORABLE A. H. MUNFORD, TRIAL JUDGE.

Filed December 3rd 1898.

-:- I N D E X -:-

STATE OF TENNESSEE-MONTGOMERY COUNTY.

Be it remembered that at a regular term of the Circuit Court begun and held for said County on the 1st Monday in May, 1898; it being the time fixed by law for holding the said Court for said County; when the Hon. A. H. Munford, Judge &c, being present and presiding the following proceedings were had and entered of record, to-wit:

Respite.

The entry on the minutes on May 10th 1898, is as follows:

R. D. Moseley)
(
-vs.-) Damages.
(
Electric St. Tailway Co.)

Came the parties by attys., and thereupon came a jury of good and lawful men, citizens of Montgomery County, to-wit:

J. D. Neblett, J. H. Mason, Jesse Ford, Charles Riggins, J. A. McCool, D. F. Bryant, Henry Suiter, B. J. Corbin, D. M. Smith, John Baggett, J. S. Lowe and Frank Polk, who being duly elected, tried and sworn, well and truly to try the issue joined in this cause, took their seats in the jury box; and it appearing to the Court that there is not time to finish the trial of this cause, to-day by consent of all the parties, the further trial thereof is continued until to-morrow morning at 9 o'clock.

And the jurors were permitted to disburse until that hour, under proper instructions from the Court.

VERDICT.

The entry on the minutes on May 11th 1898, is as follows:

R. D. Moseley,)
(
-VS-) Damages.
(
Electric St. Railway Co.)

Came again the parties by attys., and again came the jury heretofore empannelled and sworn in this cause; and said jurors upon their oaths do say they find in favor of plaintiff, and assess his damages as the sum of $120; wherefore it is considered by the Court, that the plaintiff recover of the defendant the said sum of $12 0, and the costs in this behalf expended, for which execution may issue.

MOTION FOR NEW TRIAL

The entry on the minutes on May 23rd 1898, is as follows:

R. D. Moseley)
(
-VS-) Damages.
(
Electric St. Railway Co.)

Comes the defendant by its attys., and moves the Court to grant a new trial in this cause upon the following grounds:

1st. The verdict of the jury was contrary to the weight of the evidence.

2nd. There was no evidence to support the verdict of the jury.

3rd. The Court erroneously charged as follows:

"The way in which to determine such damages is to

take the value of the property prior to the interference with the ingress and egress to and from the property to see how much, if any, it is diminished thereby," and, also charged the jury, "you are not to allow the plaintiff to recover for the depreciation;" this is directly contradictory. The latter charge was erroneous, misleading and ambiguous.

4th. The Court refused to charge the jury as requested by the defendants as follows:

No. 2.

"The mere fact that the track of defendant Company is located on a narrow street infront of, or on the side of plaintiff's property would not of itself constitute an element for damage, for which plaintiff could recover, if the tracks are properly constructed, unless they materially injure plaintiff's ingress and egress to said property.

Refused because in substance embraced in charge.

A. H. Munford, Judge.

-3-

If it appears that plaintiff's Edwin Moseley, et-als, have only a remainder interest in said property, with no present right of use for occupation they cannot recover.

Refused because this is a permanent injury to property, and all joined in suit.

A. H. Munford, Judge.

-4-

If plaintiff, R. D. Moseley, has only a life interest in said property he could in no event recover any injury to his fee.

3

Refused.

A. H. Munford, Judge.

-5-

If the jury shall find that the line of defendants road is built in centre of street, and so built by the direction of the city authorities, and leaving on either side space for the usual passing of vehicles, and is so constructed as not to seriously or materially interfere with plaintiff's access to his property, then there can be no recovery.

Refused because in substance already charged.

A. H. Munford, Judge.

-6-

The fact that people walk on the sidealk or street to the corner of 10th and Madison Sts. to get on the car, and there wait for the cars to get on, would be no element of damages for which plaintiff can recover.

Refused because in substance already charged.

A. H. Munford, Judg

-7-

The Court is asked to charge that the plaintiff as an abutting lot owner is entitled to a free and unmolested use for purposes of egress and ingress to and from his lot, and that the impairment of the use for such purposes, if shown by the evidence, would be the element of damages in this case, plaintiff's private property in the street is his right of egress and ingress, he has no further right or interest in the street which is not to be equally enjoyed by each and every member of the community, and the

public generally.

Refused except as appears in my charge.

A. H. Munford, Judge.

-5-

The verdict is contrary to the law as charged by the Court.

-6-

The charge of the Court as a whole on the subject of the measure of damages is confusing and misleading.

Which said motion the Court doth overrule.

Defendant then moved the Court in arrest of judgment, which said motion the Court doth, also, overrule.

Defendant then excepted to all of the action of the Court in this cause, and tendered its bill of exceptions, which is signed by the Court, and ordered to be made a part of the record.

Defendant then prayed an appeal to the next term of the Supreme Court at Nashville, Tennessee, and having given bond, as required by law, the said appeal is granted.

APPEAL BOND.

The appeal bond in this cause is as follows:

We, The Electric Street Railway Company, principal, and W. M. Daniel and T. J. Bailey, sureties, acknowledge ourselves indebted to R. D. Moseley, and others, in the sum of $250, to be void on condition that the said Electric Street Railway Company shall subcessfuly prosecute an appeal in the nature of a write of error to the next term of the Sup[illegible] Court at Nashville, by it prayed from a judg-

ment rendered against it in favor of the said R. D. Moseley in the Circuit Court of Montgomery County, on the 11th day of May 1898 for the sum of $120, damages and costs of suit, or incase of failure to do so, pay and satisfy said debt, damages and costs, and perform and satisfy the judgment of the Supreme Court in the premises.

Electric Street Railway Co.,

by W. M. Daniel, Atty.

Wm. M. Daniel and T. J. Bailey,

Sureties.

BILL OF COSTS.

...mise is as foll...

-:- R. D. Moseley,
-vs-
Electric Railway of Clarksville, Tenn. -:-

-:- Costs due F. D. Daniel, former Clerk of the Circuit Court, for Montgomery County, Tenn. -:-

Writ--.75---Bond prosecution--.50---dock--.30	1.55
Filing dec.--.25---demurrer--.25---B. C.--.50	1.00
Order on demurrer--.25 (sustaining same)	.25
Order appeal--.25---Order bill of exceptions--.25	.50
Motion & judgt. costs--.25---Appeal bond--.50	.75
Jury--.10---Filing plea--.25---Judgt.--.75	1.10
Motion new trial--.25---Motion arrest judgt--.25	.50
Decree (1300 words)--1.30---Order appeal--.25	1.55
Appeal bond--.50---50 spas.--5.00	5.50
5 Continunaces--1.25---Seal--.50---Certif--.25	2.00
Filing bonds--.50---10 probates--.50	1.00
Transcript of record @ 40 cts. per page	

-:- State of Tennessee - Montgomery County -:-
Personally appeared before me, C. W. Staton Clerk of the Circuit Court for the said State ar... F. D. Daniel, who made oath that he was Clerk of the Circ... for said State and County, when the above case was tried ... August, ed to the Supreme Court for said State; that the above co... costs due him as said Clerk, is a tr... from the records in said case.

Sworn to and subscribed before...

E/43
21
88
21

R. D. Moseley

The Elect -vs-

The Electric Street Railway Company

Leech and Savage, Attys. for plaintiff in error.

Burney and Bailey, and Daniel and Daniel, Attys. for Defendant in error.

Filed Dec 4/97
Jas. Turner
Clk

-:- INDEX -:-

----- STATE OF TENNESSEE MONTGOMERY -----

Be it remembered that at a regular term of the Circuit Court, begun and held for the said County on the 6th day of September, 1897; it being the first Monady in September, 1897, and it, also, being the time fixed by law for the holding the said Court for the said County; when, the Honorable A. H. Munford, Judge, &c., being present, and presiding, the following proceedings were had, and entered of record, towit:-

-:- PROSECUTION BOND -:-

The prosecution bond entered into by the plaintiff in this cause is as follows towit:-

"KNOW ALL MEN BY THESE PRESENTS, That we, R. D. Mosely, Principal, and H. N. Leech, Surety, are jointly and severally held and firmly bound unto the Electric Street Railway Company of Clarksville Tennessee, in the penal sum of Two Hundred and fifty Dollars, to be void on condition that the said R. D. Moseley doth with effect prosecute an action for damages which he is about to commence in the Circuit Court for Montgomery County, against the said Railway Company or pay all such costs and damages as may at any time be adjudged against the said R. D. Mosley, for failure so to do.

Witness our hands and seals, this the 18th day of August, 1896.

R. D. Mosely (L.S.)

H. N. Leech (L.S.)

-:- SUMMONS -:-

The summons in this cause is as follows, towit:-

"State of Tennessee, Montgomery County.

To the Sheriff of Montgomery County, Greeting:-

You are hereby commanded to summon the Electric Street Railway Company of Clarksville Tennessee, if to be found in your County, to appear before the Judge of our Circuit Court, to be held for the County of Montgomery, at the Court House in the town of Clarksville, on the first Monday in September next, then and there to answer J. H. Gerhart and wife, Lizzie Gerhart, Lena Ragsdale, Edwin and Corinne Moseley, and R. D. Moseley, in an action to his damage Twenty Four Hundred Dollars ($2400.00).

Herein fail not and have you then ad there this writ.

Witness: Font D. Daniel, Clerk of our said Court, at office the first Monday in May, 1896.

F. D. Daniel, Clerk."

Endorsed:- "Issued 18th day of August, 1896. F. D. Daniel, Clerk."

-:- SHERIFF'S RETURN -:-

The Sheriff's return on the said summons is as follows:-

"Came to hand when issued and executed by reading the within to N. L. Carney, President of the Electric Street Railway Company of Clarksville Tennessee.

This August-18-1896.

M. McFall, D. Shff. "

-:- DECLARATION -:-

The declaration filed by the plaintiffs in this cause is as follows:-

R. D. Moseley et al. #
#
vs # Circuit Court Sept.Term -1897.
#
Elec. St. Ry. Co. of # Declaration.
#
Clarksville, Tenn. # Plaintiffs R. D.,Edwin, and Corinne Mosely, J. H. Gerhart and wife, Lizzie, and Lena Ragsdale, sue the defendant, Electric Street Railway Company of Clarksville, Tennessee, and say:-

On Oct.21, 1874, B.O. Keesee deeded to Bettie G. Moselye, as the deed reads, - " a certain tract or parcel of land bounded as follows, viz: North by the brick-yard property known as the Bradley & Dick brick-yard, on the East by the Leigh property now owned by Geo. Snaden, and by Mrs. Wisdom's property, on the West by Montgomery Street, and on the South by Madison Street and the Clarksville and Port Royal Tunrpike Company; contains five acres more or less, lying in Disrtict No.12, in Montgomery County, Tennessee." Montgomery is now Tenth Street, and the portion of the pike mentioned in the said description has been within the City Limits of the City of Clarksville since they were enlarged by Statute passed in 1891; but the city has never assumed any responsibility or control as to such part of the pike, & it has been, & is now, maintained as a part of the pike over which the Clarksville and Port Royal Turnpike Company collects tolls under its charter of incorperation; plaintiffs own said property by inheritance from said grantee, and to the center of said streets and said pike by virtue of said deed, also; just before the suit was filed, the defendant, under its charter of incorperation obtained under the statute, laid on said streets and pike on the portions thereof in which plaintiffs own the fee, lines of railing,

3

& was then, and has been ever since, operating electric street cars thereon within ten feet of the sidewalks and pavements along said property on said streets and pike, the cars when running being from one to two feet nearer. The line on the pike and beyond the corporate limits was laid not for any convenience to the public outside said City, but for carrying people to and from a park outside the City, and owned by certain individuals. This placing of tracks and use of same as averred, the fact the rails on defendant's said lines come above the surface, & the location of plaintiffs' property on the corner of said two streets materially damage & interefere with the right of ingress and egress belonging to plaintiffs as the owners of said property, and its use and value to said property; & this right and use in reference to this property of plaintiffs suffers a damage not suffered by abutters in general on the street sides, from the fact defendant uses sid corner to keep cars in waiting for the making of connections; by reason of the construction of said tracks and their use as averred the market value of plaintiff's property has been very much damaged;

Wherefore plaintiffs sue the defendant in damages for twenty four hundred dollars. (2400)

Pltfs ask a jury to try this case.

Leech & Savage, Attys.,&c. "

Endorsed:- "Filed September 25, 1897. F. D. Daniel, Clerk"

-:- DEMURRER -:-

The demurrer to the declaration of the plaintiff, filed in this cause, is as follows:-

"R. D. Moseley, et als.,
-vs-
The Electric Street Railway
Company of Clarksville, Tenn.

The defendant comes and demurs to the declaration filed in this cause, and for cause of demurrer says

First:- The plaintiffs set out no cause of action in their declaration, and hence they should not be allowed to proceed further with their suit.

Second:- The tracks of the defendant company are laid, as averred in the declaration, along public streets of the City of Clarksville, and the operation by the defendant of its lines of railway thereupon is not an additional servitude, and the plaintiffs cannot recover.

Third:- The facts, as averred in plaintiffs' declaration, that the tracks of the defendant road are with in ten feet of their sidewalk; that the rails are above the surface of the street; and that the cars are kept in waiting for the purpose of making connections, furnishes no ground of action in this suit.

The defendant asks the judgment of the Court whether it shall be further required to defend.

Daniel & Daniel,

Burney & Bailey,

Attys. "

Endorsed:- "Filed September 25, 1897. F. D. Daniel, Clerk

-:- CONTINUANCE -:-

The entry on the Minutes on September 24th, 1897, is as follows, towit:-

R. D. Moseley # Damages.
#
-vs- #
#
Electric Street Railway Co. # Came the parties by attorneys, and by consent ofparties, this cause is set fir trial on Saturday, September 25, 1897.

-:- ACTION ON DEMURRER AND APPEAL -:-

The entry on the Minutes on September, 25th is as follows, towit:-

R. D. Moseley # Damages.
#
-vs- #
#
Electric Street Railway Co.# Came the parties by attorneys and defendant by attorneys filed its demurrer to the declaration heretofore filed in this cause, when after due consideration the Court is of opinion that said demurrer should be sustained.

Wherefore it is considered by the Court that defendant recover of the plaintiff and on motion againstbhim, of H. N. Leech, surety on plaintiffs' prosecution bond, the costs in this behalf expended, for which execution may issue.

Plaintiff then excepted to all the action of the Court in this cause, and tendered his bill of exceptions which is signed by the Court and ordered to be made a part of the record.

Plaintiffs then prayed an appeal to the next term of the Supreme Court of Tennessee, at Nashville, Tennessee, and having given bond s required by law, the said appeal is granted.

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-:- APPEAL BOND -:-

The appeal bond entered into by the plaintiffs in this cause, is as follows:-

"We, R. D. Mosely and others, plaintiffs, principals, and Leech & Savage, Sureties, acknowledge ourselves indebtd to The Electric Street Railway Company, of Clarksville, Tennessee, in the sum of Two Hundred and Fifty Dollars, to be void on condition that the said R. D. Moseley and others shall successfully prosecute an appeal in the nature of a writ of error to the next term of the Supreme Court of Tennessee, at Nashville, by them prayed from a judgment rendered against them, dismissing their suit in favor of the said Electric Street Railway Company of Clarksville, Tennessee, in the Circuit Court of Montgomery County, on the 25th day of September, 1897, and also for costs of suit, or in case of failure to do so, pay and satisfy said debt and damages and costs, and perform and satisfy the judgment of the Supreme Court in the premises.

R. D. Moseley and others,
pltfs.
by H. N. Leech, Atty.
Leech & Savage, Sec'ty.

-:- BILL OF COSTS -:-

The Bill of Costs in this said cause is as follows, towit:-

State and County taxes		5.00
F. D. Daniel Clerk:		
Summons--.75---dock--.30---B. C.--.50	1.55	
Judgment--.75---Dec--.25---Demurrer--.25	1.25	
Motion and judgt costs--.25---Seal--.50	.75	
1 continuance--.25---Record--(3600)--3.60	3.85	7.40

Marable McFall Sheriff:

Serving writ:	1.00
Total	13.40

-:- State of Tennessee - Montgomery County -:-

I, F. D. Daniel Clerk of the Circuit for the said County, certify the foregoing to be a true copy of the record and bill of costs in the above styled case, as the same appears of record in my office.

Witness my hand and the seal of the Circuit Court for the said County, this the 20th. day of November 1897.

F D Daniel Clerk.

---- IN THE SUPREME COURT OF STATE OF TENNESSEE ----

----o----

---Appeal in Error by Plaintiffs from action of Court in---

---- sustaining demurrer to declaration in case of ----

R. D. MOSELEY ET AL.,

-vs-

THE ELECT. ST. RY. COMPANY, OF CLARKSVILLE, TENN.

Filed Dec 13/97
Jas Summers
clk

-----o----

From Circuit Court of Montgomery County.

-----o-----

Brief of the Attorneys for Appellees.

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Filed, , 1897.

_____, Clerk Sup. Ct.

-----o-----

R. D. MOSELEY ET AL.,

-vs-

THE ELECT. ST. RY. CO., OF CLARKSVILLE, TENN.

-----o-----

Brief of Appellees.

-----o-----

That the building of a Street Railway on a public street, creates no additional burden or servitude on the fee, is settled law in Tennessee.

9 Pickle, page 503.

3 Pickle, page 626.

Appellants' counsel however, do not insisit upon any different conclusion - but admit in their brief, that so far as the streets in side the old city limits are concerned, there is no right to recover in this action. Saying, " As to all that portion of the lot on the street within the old corporate limits, this principle applies to this case."

But he, argues, "It cannot be said that the condemnation or donation for pike purposes, in its compensation covers the compensation now claimed by way of damage to that portion of the lot not within the old city limits. "

The distinction sought to be made is somewhat difficult to be perceived.

The doctrine applicable to the streets in a town, has been held applicable as to streets or thoroughfares outside of the town limits and immediately adjacent to the town, especially where it is an extension of the street.

In Hiss vs Street Railroad Co., 52 Maryland

242, - reported in 36 Am. Rep., 371, - is an authority upon this question.

That was a case where the street railroad company, proposed to build their line along a street or way, adjacent to the city, and outside the city limits. The abutting owners on the way had laid out the way for public use, and they claimed it to be a private way; and claimed there was no right to locate thereon the road; and undertook to enjoin the construction thereof.

In that case the authority cited by counsel for appellant in his brief, from Cooley on Const. Limitations ; was cited and relied on, - but the Court said, - "This distinction, if supported by authority, upon which we do not pass, cannot and ought not to apply in this case; for although the way is not technically, within the city limits, its location in such near proximity thereto, as an entering way into the city, and exit therefrom, and in fact as an extension of one of the streeets, it must and ought . . . to be, regarded as subject to the same burden , in the way of use, which would legitimately fall on the street, of which it is at the place in question only an extension. It is so near the city proper, and used in such way by the city people and others; that when it was formerly dedicated many years ago, it was then called Decker St., &c. "

Here however, that part of the way along the front of plaintiffs' property after passing the old corporate line, is a turnpike operated and controlled by a turnpike company, and has been for a number of years a thoroughfare entering in to the town.

It is held "When property has been taken for a pub-

lic use, and full compensation been made for the fee or a perpetual easement, its subsequent appropriation to another public use, certainly if of a like kind, does not require further compensation."

Pierce on Railroads, 233.

Here that part of the way along the front part of plaintiffs' propertyy, after passing the old corporate line, is a turnpike operated and controlled by a turnpike company, and has bee n for a number of years.

In Perricord's case, 34 Maryland, 479, and cited in the case of Hiss vs Railroad Company, above cited, the Court in passing upon the rights of the Catonville Passenger Railroad under its contract with the turnpike company, says, "The use so granted does not (in the language of the Court in 14 Ohio St., 523), exclude or seriously interfere with the original modes in which the highway was used; but simply adds another in furtherance of the same general object."

The Court in the case of Hiss vs Baltimore Railway Co., above, say, "The effort to distinguish the case there discussed from Peddicord's case, is vain. It is true that in that case the railroad company derived their powers by contract from the turnpike company, who had secured the ease ment by legislative aid through purchase or condemnation Still it was only an easement, as a highway, for the ordinary and usual uses of a turnpike, which the turnpike company had obtained, and if the turnpike company had the right, under its charter, to authprize the railway company to lay such a track along its line or road, and such use by the railway company did not add a new servitude upon the road as against the adjacent proprietor, surely the public have acquired in Decker

Street, or Maryland Ave., a right of as high grade as the said turnpike company secured. If that be so, then the legislature representing the public may grant this right of improved use of the highway."

We insist therefore, that appellants would have no right of recovery, even if any part of the railway line, located on the pike, was without the city limits.

But as matter of fact, and as alleged by the declaration, five years before the location of this street car line all of the pike or highway, bounding or abutting upon plaintiffs' property, was in the city; and was one of its streets or thoroughfares.

We insist that the fact that the pike company, in order to keep their line of required length, has declined to abandon this part, and keeps it up, does not change the matter. It is inside the city, and is part of one of its streets; it has full control of it, and is liable to the public for its being kept up and in repair. It has a right to use or authorize it to be used for all legitimate street purposes; such as building gas and water mains or building tracks for running street cars.

The fact that cars stop at this corner and transfer is not, an extraordinary, unusual, or illegitimate use of its tracks by the company, or one that plaintiffs can complain about; indeed in this there is nothing which can be called even an annoyance to him. And in the transferring at this corner, the railway company is in the rightful use of its tracks

As to whether plaintiffs have any title to the

fee in the street or the pike, or any right different from that of all other citizens as an easement, we submit:-

The declaration describes the property as follows:- "It is bounded on the West by Montgomery Street, and on the South by Madison Street, and the Clarksville and Russellville Turnpike Company;" and alleges that by virtue of these boundaries in the deed, that it is meant that he goes to the middle of the street and the turnpike road.

In Railroad vs Bingham, 3 Pickle 526, it is said, "A correct interpretation of the deed under which Mrs. Bingham holds her property, must confine her to the side of the street and excl udes the fee of the highway al together. No part of her freehold having been taken or occupied by the railroad, her damages must be limited to such injuries as she can show herself to have sustained as the owner of a mere easement in the street in front of her premises. What injury has she sustained by the use made of this street, for which she is entitled to recover damages? The railroad is not a trespasser upon this street. The tracks now upon the street are there under license and authority from the city government."

In same authority is used the language, "While the general rule is that a deed which merely calls for a highway or street carries title to the center thereof. This rule is analogy to the doctrine that a grant calling for a stream not navogable carries title to the middle or thread of the stream But where, from the language of the grant, it appears that the bank of the stream is intended to be the boundary, the title will be confined within the intended limits. So if, from the terms used, it appears that the intent was to convey only

to the street, such intent will be given effect. Such a conveyance as the one under which Mrs Bingham holds, calling for the side of the street, has been frequently construed as not carrying the fee to the center of the highway or street." And authorities there cited.

Does not the language equally apply here?

But if it should be held not to apply to the street, does it not apply to the turnpike company? The boundary is not the turnpike, but the turnpike company; its property; and surely, if so, plaintiffs' line must end where the property of the other begins.

However this may be, the principles heretofore set out, and authorities relied on, are controlling and conclusive.

We insist that the demurrer was properly sustained and the decision of the Circuit Judge should be affirmed.

Respectfully submitted,

Bunny & Bailey,

Durrett & Durrett

Attys. for Appellees.

A D Moseley
vs
Electric St. Ry

In this cause the judgment heretofore entered is so amended so as to show on what ground the judgment of the lower Court was reversed, which is as follows;

The plaintiff in his declaration [redacted] alleges among other things, towit; "This placing of tracks and use of same as averred, the fact the rails on defendant's said lines come above the surface, and the location of plaintiff's property on the corner of said two streets, materially damages and interfere with the rights of ingress and egress belonging to plaintiff as the owner of said property, & its use and value to said property."

It is therefore ordered by the Court that the judgment heretofore entered be so amended as herein indicated & that this order be certified with the proceedings to the

~~County Election~~

Circuit Court of Montgomery County.

R. D. MOSELEY,

-vs-

ELEC. ST. R. R. CO.

OF CLARKSVILLE, TENNESSEE.

Filed dec 13/97
Jas Tunney
clk

BRIEF AND ASSIGNMENTS OF ERROR

BY APPELLANT - THE PLAINTIFF.

The case stands on demurrer. The declaration states as briefly as can be the facts upon which the suit is based - pg. 3-4. The demurrer is on pg. 5.

ASSIGNMENT OF ERROR.

The demurrer should have been overruled by the Court.

ARGUMENT.

The plaintiff certainly has the right to recover damages occasioned that portion of the property outside of the original city limits, and fronting on the pike. When property is once donated or condemned for street purposes in law compensation is made for all future uses for street purposes. This is the ground upon which damage is denied to lot owners along the street for the additional inconvenience and injury occasioned by the laying down and operation of street railways in the street. As to all that portion of the lot on the street within the old corporate limits this principle applies to this case, but it cannot be said that the condemnation or donation for pike purposes in its compensation covers the compensation now claimed by way of damage to that portion of the lot not within the old

city limits. The fact that the city has the ordinary control a city possesses over all its streets with reference to this portion of the pike nowwithin the city limits has nothing to do with the question we have. Unless the original donation or condemnation consideration paid for this new kind of damage the position we insist on is manifestly correct. That it did not cover such damage is too clear for argument. Judge Cooley in his 6 Ed. Const. Limts. pg. 683-4 - in treating of this question of damages, in putting down and operating street railways - says :--- "Perhaps the true distinction in these cases is not to be found in the motive power of the railway, or in the question whether the fee simple or a mere easement was taken in the original appropriation, but depends upon the question whether the railway constitutes a thoroughfare, or, on the other hand, is a mere local convenience. When land is taken or dedicated for a town street, it is unquestionably appropriated for all the ordinary purposes of a town street; not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use for carriages which run upon grooved tracks; and the preparation of important streets in large cities for their use is not only a frequent necessity, which must be supposedto have been contemplated, but it is almost as much a matter of course as the grading and paving. The appropriation of a country highway for the purposes of a railway, on the other hand, is neither useful nor often important; and it cannot with any justice be regarded as within the contemplation of the parties when the highway is first established. And if this is so, it is clear that the owner cannot be considered as compensated for the new use at the time of the original appropriation." The "new use" of that portion of the lot appropriated to the pike was not paid for. The making of a pike and the appropriation of property for that purpose

cannot with any show of reason be said to contemplate a street railway use of the same property. The language of this Court on pg. 505 in the case of Tel.& Telph. Co. vs. Elec. Ry. Co. 9 Pkl. -, is in accord with the view of Judge Cooley. It is thus - "we do not hold, and must not be understood as holding that the Elec. Ry. Co. may, without making compensation accompany such ordinary use of the streets with such extraordinary incidence as impose new or additional burdens upon properties outside the street that were not, and could not have been, contemplated and compensated for in the original taking." This quotation adheres to the principle that a new use must be paid for because it is not covered by the original "taking" consideration.

The declaration alleges the track is within ten feet - not saying exactly how near -, and that in point of fact the plaintiff suffers an injury from the standing of cars on the corner - the corner being made a kind of a depot -, not suffered by other lot owners along the street where the lines of railway run; and alleges as a fact that the right of ingress and egress to plaintiffs property is materially interfered with. The Harmon and Bingham cases - 3 Pkl. pgs. 522 and 614 - both hold that if the damage suffered by a lot owner is not that which is suffered by all the lot owners along the street a recovery can be had for it; that if the ingress and egress be materially interfered with by the street railway and its operation it is a damage for which recovery can be had. These facts are distinctly stated in the declration. We think the demurrer conceding these facts cannot be sustained.

Respectfully submitted,

Leach & Savage,

Attys for Appellant