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Constitutional Right to Compensation for Injuries to Property in Opening or Grading Roads in Pennsylvania

As is suggested by the title, we purpose to examine merely the constitutional right to compensation for injuries to property in opening or grading roads and will discuss the statutory law giving such a right only as it is involved incidentally in the constitutional question. We shall confine the article to the right to compensation for so-called "consequential injuries" so far as it is practicable to so limit it. A dictum in a recent case¹ said, "**** damages for consequential injuries cannot be recovered by a property owner under the present Constitution, unless the legislature gave that right and imposed such liability on the municipality; ****but unless the legislature, by statute, so provides, the owner is without remedy". The general aim of this article is to examine the Constitution and cases decided thereunder to determine the justification for that statement and to determine to what extent it may be regarded as the present law.

Prior to our present Constitution, the courts of Pennsylvania held uniformly that there was no constitutional right in a property owner to be compensated for land taken from him in the construction of new roads or streets. If improved land were so taken, the owner was entitled, at least after 1700,² to compensation for the improvements

¹Westmoreland C. & C. Co. v. P. S. C., 294 Pa. 451 (1928); 144 Atl. 407.

²Act of Nov. 27, 1700; 2 Statutes at Large of Penn'a, Chapter LV, p. 68, which read, "Sec. 2. Provided, That no such road shall be carried through any man's improved lands but where there is a necessity for the same; and where that appears, the respective courts shall appoint six indifferent men to view and adjudge the value of so much of such improved lands as shall be taken up for the use aforesaid, and the value thereof shall be paid to the owner of the said land out of the respective county stock".

taken but not for the soil itself.³ It seems to have been taken for granted that the right to such compensation was a matter of legislative grace, there being nothing in the Constitution at that time to require that such be given.⁴ To reach the conclusion that it was necessary to compensate merely for the value of the improvements, required a rather liberal emasculation of the words of the statute to conform to a supposed intention of the legislature.

The reason given for the holding that there was no necessity of compensating the owner for land taken for public roads or streets was one peculiar to Pennsylvania. It had been the original intention of William Penn to lay out all the streets in the cities and towns and the great roads and highways from town to town on lands owned by Penn and not until that was done to grant lands to individuals, thereby obviating the taking of lands from private owners for streets and roads. This was found practicable in one great city (within the original limits of Philadelphia) and accordingly was done. It was found impracticable, however, to thus lay out the great roads and highways from place to place and the streets in other towns, since at that time no other cities or towns were planned definitely. Hence Penn abandoned this scheme of laying out roads and streets only on land owned by himself. To make it unnecessary to compensate private owners when land was taken later for public roads and streets, each grantee was compensated for such later taking at the time of the original grant by the addition of six per cent to each grant for which no payment was made by the grantee. Consequently when land was taken later for roads and streets no compensation was required, compensation already having been made. It mattered not that more than six per cent of a man's land was taken for roads or streets,

³Feree v. Meily et al., 3 Yeates 153 (1801); M'Clenachan v. Curwin, 3 Yeates 362, s. c. 6 Binney 509 (1802). It will be noted that the statute said "the value of so much of such improved lands", etc.

⁴See, however, Plank Road v. Thomas, 20 Pa. 91 (1852) where it is said that the right to compensation for improvements destroyed is a constitutional right.

since it also might have been much less or none at all. The cases are legion which make reference to this reason for there being no constitutional right to compensation in such cases. One of the best discussions of this peculiar system is *M'Clenachan v. Curwin*.⁵ This historical reason is doubtless the underlying thought prompting the dictum quoted in the first paragraph of this article.

The constitutional provisions in regard to land taken by eminent domain were held to be inapplicable to land taken for roads and streets. The Constitution of 1776⁶ said nothing about compensation. "**** no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives." The Constitution of 1790⁷ read, "Nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being made." The amendment of 1838⁸ said, "The legislature shall not invest any corporate body or individual with the privilege of taking private property for public use, without requiring such corporation or individual to make compensation to the owners of said property, or give adequate security therefor, before such property shall be taken." This amendment was evidently aimed to insure prepayment or presecuring of compensation where necessary and added no new right of compensation.

Under these constitutional provisions the Supreme Court repeatedly held that where land was taken for roads or streets, compensation was a matter of purely statutory origin and not of constitutional right. When land was so taken the State was exercising merely the express or implied reservation in every grant from the Commonwealth or predecessors that as much land as might be necessary could be taken for such purposes. This was true both where the land was taken by the state itself or by a municipal corpor-

⁵3 Yeates 362 (1802); also found in 6 Binney 509, opinion by Shippen, C. J.

⁶Chapter 1, section 8.

⁷Article IX, section 10.

⁸Article VII, section 4.

ation. A few of the cases applying or stating the general rule are given in the footnote.⁹

While this rule was and still is theoretically and constitutionally correct, where unchanged by constitutional enactment, the practical injustice to subsequent grantees from the original grantees, who purchase land ignoring this reservation in favor of the State and who do not secure compensation from their grantors, never became acute. The legislature early granted a statutory right to compensation, not only for improvements, but for the land itself, whether improved or unimproved.¹⁰ This has been the usual situation ever since and the constitutional right to compensation for land actually and physically taken has been in question but infrequently.

Several of the early cases seem to hold that the right to compensation in such cases is a constitutional one. *Pittsburgh v. Scott*¹¹ said, "Unless the Act provided a reasonable and adequate remedy for persons aggrieved, it is unconstitutional and void, it being contrary to the letter and spirit of the constitution." Such expressions can be ignored as being mere dicta, and as being opposed to the very

⁹*Comm. v. Fisher*, 1 Penrose & Watts 462 (1840); *Phila. & Trenton R. Co.*, 6 Wharton 25 (1840); *Yost's Report*, 17 Pa. 524 (1851); *Plank Road v. Thomas*, 20 Pa. 91 (1852); *Workman v. Mifflin*, 30 Pa. 362 (1858); and *Lycoming G. & W. Co. v. Moyer*, 99 Pa. 615 (1882).

¹⁰Act of April 6, 1802, 17 Statutes at Large of Penn'a, Chapter MMCCXCVIII, p. 151, section 14, p. 160, "And be it further enacted by the authority aforesaid, That if a public road or highway shall be carried through any land whereby the owner shall receive damage, the person who sustains such damage, may within one year, but not afterwards, make a representation, by petition, of the damage he has sustained, to the court of quarter sessions, and the said court shall appoint six disinterested men to view and adjudge the amount of the damage (if any) sustained, and the said amount shall be paid, after being approved by the court, by the treasurers of the respective counties out of the county stock. Provided always, that it shall be the duty of the viewers, in assessing damages, to take into consideration the advantages derived from such road passing through the land of the complainant".

¹¹1 Pa. 309 (1845). See also *Sharrett's Road*, 8 Pa. 89 (1848); *Keene v. Boro. of Bristol*, 26 Pa. 46 (1856).

great weight of authority, both earlier and later.

Since there was no constitutional right, prior to 1874, to compensation for land *taken* for highways, roads and streets, there certainly was no such right at that time to compensation for land merely injured. This would be true whether such injury accompanied an actual taking or where no land was taken. If direct damages were a matter of grace and not of right, surely the right to compensation for indirect or consequential damages could rise no higher. If the reservation in each grant included the taking of land it must also include the indirect injury to land not taken. The cases, without exception, held that the only possible right to recover compensation for consequential damages rested on statutes and not on the constitution.¹² The court in these cases seems to imply that there is a constitutional right where land is taken but hold that the infliction of consequential injuries is not a *taking* within the meaning of the constitution. The court also held invariably that such injuries were not within the meaning of statutes imposing the duty of paying for land *taken*. The injustice and harshness of this ruling in the case of consequential injuries did become acute because the legislature had not and did not provide any general statutory remedy for such situations. The famous case of *O'Connor v. Pittsburgh*¹³ excellently illustrates the then existing conditions. There the grade of a city street had been lowered considerably by the city of Pittsburgh, leaving a church "high and dry". The court could find no remedy provided by statute; held that such injury was not a taking within the constitutional protection and in addition suggested that the immunity enjoyed by the sovereign and its agents from being sued without consent forbade recovery. The court suggested that a

¹²*Green v. Boro. of Reading*, 9 Watts 382 (1840) (change of grade); *Phila. & Trenton-R. Co.*, 6 Wharton 25 (1840); *Monongahela Nav. Co. v. Coons*, 6 W. & S. 101 (1843); *Henry v. P. & A. B. Co.*, 8 W. & S. 85 (1844) (change of grade); *O'Connor v. Pittsburgh*, 18 Pa. 187 (1851) (change of grade); and *Yealy v. Fink*, 43 Pa. 212 (1862).

¹³18 Pa. 187 (1851), opinion by Gibson, C. J.

general statutory remedy should be provided by the legislature. This suggestion was not adopted, however.

At this time, then, there was no constitutional right to compensation for land taken or injured in the construction or improvement of roads or streets against either the state or municipal corporations.

With this situation in mind¹⁴ the constitutional convention inserted in the Constitution ratified in 1873, Article XVI, Section 8. It reads, "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction ****." It is applicable clearly to municipal corporations taking, injuring or destroying property in constructing or enlarging highways. The insertion of the word "highways" must have been intended to change the existing law or the term is meaningless. But it is by its terms applicable only to such municipal corporations as are "invested with the privilege of taking private property for public use." If it be not invested with such privilege, no compensation need be paid by it for in such a case either the taking or injuring is by virtue of some superior authority which must be regarded as doing the taking or injuring or else the taking or injuring is a wrongful one for which the ordinary remedies of the law would be available. It is also clear that the provision was not intended to make any change in the rights of owners of private property as against the State. The Convention and People are presumed to have known the existing law that there was no constitutional right as against the State; to have known that the general provision inserted in Article I,

¹⁴See explicit statements to that effect in *Pa. R. Co. v. Lippincott*, 116 Pa. 472 (1887); *Pa. R. Co. v. Marchant*, 119 Pa. 541 (1888); *Pa. R. Co. v. Miller*, 132 U. S. 75 (1889); *O'Brien v. Phila.*, 150 Pa. 589 (1892); *Mellor v. Phila.*, 160 Pa. 614 (1894); *Ladd v. Phila.*, 171 Pa. 485 (1895) and *Stork v. Phila.*, 195 Pa. 101 (1900).

Section 10¹⁵ was but a repetition of the meaning of the provision in the Constitution of 1790¹⁶ with some slight change in wording; that this earlier provision created no right against the State in road cases; and in leaving out the State from Article XVI, Section 8, must have intended to permit the law to remain as it was.

The cases decided in the several decades next succeeding the adoption of the new Constitution were unanimous in holding that this provision in the Constitution was intended to and did create in property owners a constitutional right to compensation against municipal corporations not only for property taken in constructing or improving roads and streets but also for property injured or destroyed. While it was admitted that the legislature might regulate this right, it never was suggested that the right was dependent upon legislative action for its existence. In fact, prior to any legislative remedy for enforcement of the right, the courts permitted enforcement by actions of trespass on the case. In view of some recent statements by the courts, we shall examine some of these cases more in detail.

In *City of Reading v. Althouse*¹⁷ the court said, "That section provides for the making of compensation, not only for the taking of private property for public use, as was the case theretofore, but also for its injury or destruction. Previous cases, that an action for consequential damages against a corporation possessed of the right of eminent domain, cannot be sustained, are now of no value, for the new constitution has introduced a different rule."

*Boro. of New Brighton v. U. P. Church*¹⁸ involved the change of grade of a street by a borough. It was held, "This section (Const. Art. XVI, sec. 8) thus gives compensation for property injured in the construction and en-

¹⁵"nor shall private property be taken or applied to public use without authority of law, and without just compensation being first made or secured".

¹⁶Article IX, section 10.

¹⁷93 Pa. 400 (1880).

¹⁸96 Pa. 331 (1880).

largement of highways. The Act of 1878, P. L. 129 gives effect to the Constitution and defines the liabilities of boroughs".

In speaking of this constitutional provision the court in *Pusey v. City of Allegheny*¹⁹ said, "This is an advance upon the limitations of the right of eminent domain, as found in the bill of rights both of the present constitution and that of 1838. It makes municipal corporations liable for what are ordinarily called consequential damages. This being now the supreme law of the land, it must govern and it is idle to recur to decisions and legislation, the authority of which, as to all present and future cases, is, by this provision, annulled. * * * * The constitution in positive terms requires compensation to be made, not only for private property that a corporation may appropriate to its own use, but also for such as it may injure or destroy".

*County of Chester v. Brower*²⁰ held that where the abutments or approaches to a county bridge interfered with access to houses, that even though there was no taking of property, there was an injury to property and since no legislative remedy for the constitutional right had been provided, an action on the case would lie against the county which built the bridge.

In *Appeal of the County of Delaware*²¹ it was said, "The right to compensation for what are usually called consequential injuries, that is to say, where property is injured without being actually taken, is given by section 8 of Article XVI of the Constitution. * * * * We have therefore held that inasmuch as the legislature has provided no remedy for the assessment of such damages, an action on the case will lie to enforce the right conferred by the constitution. * * * * The only difference between the late constitution and the present one is, that in the former, compensation was given only for property taken; in the latter, compensation is given for property taken, injured or destroyed".

¹⁹98 Pa. 522 (1881).

²⁰117 Pa. 647 (1888).

²¹119 Pa. 159 (1888).

*Schuler v. Phila.*²² said that this provision made the right for consequential damages, which in Philadelphia had been statutory under the Act of 1854, P. L. 37, into a constitutional right.

One of the strongest cases affirming the constitutional right is *Parkeburg Borough Streets*.²³ It was there said, "But if there was ever any doubt as to the liability of municipal corporations in such cases (laying out of streets by borough authorities), the 8th section of the 16th article of the constitution must certainly settle the question. This section provides: '*Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction*'. If this does not impose payment of the damages for property taken, in the construction of highways, upon the municipality taking it, it would be difficult to suggest language which would be adequate for that purpose". The court was speaking of taking land but taking and injuring are indistinguishable under this provision. The court was careful to distinguish those cases where roads are opened through or into a borough by the action of the Court of Quarter Sessions and says that there the land is taken not by the municipality but by the State and that there would be no liability on the municipality.

In *Snyder v. City of Lancaster*²⁴ a street was opened by the city. It took most of the adjoining house but none of that of the plaintiff. It was claimed, in seeking damages, that the taking of the adjoining house would injure that of the plaintiff by requiring rebuilding of the outside wall. The Supreme Court said, "It is testified that the plaintiff's house will have no gable end when the Worth house is taken down. If such is the case the plaintiff's house will certainly be injured by the removal of the Worth house, and as this

²²22 W. N. C. 161 (1888)—a Supreme Court case.

²³124 Pa. 511 (1889).

²⁴20 W. N. C. 184 (1891)—a Supreme Court case.

removal is a necessary part of the opening of Filbert Street, we cannot avoid the conclusion that the opening of the street is, or will be, the direct cause of the injury to the plaintiff's house. This being so, the case comes within the operation of section 8, Article XVI, of the Constitution of 1874 * * * *".

In *Jones v. Boro. of Bangor*²⁵ it was held that a prior dedication of the street did not preclude a securing of damages for a later change of grade by the borough.

The court held, in *O'Brien v. Phila.*,²⁶ where damages were sought for change of grade of a street by the city, "If any regard is to be had for the constitutional mandate that 'municipal and other corporations * * * * shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements', we are at a loss to see how the learned judge could do otherwise than decide the reserved question as he did (permitting recovery). Nobody conversant with the history of the constitutional provision above quoted can entertain any doubt that it was intended to provide, *inter alia*, for that class of cases of which *O'Connor v. Pittsburgh*, 18 Pa. 187, is a conspicuous example. It has uniformly been so regarded from the date of its adoption to the present time. * * * * To hold that it was *damnum absque injuria* would defeat one of the objects of the constitutional mandate in question and virtually overrule several well considered cases". The plaintiff recovered damages.

Another important case is *Mellor v. Phila.*²⁷ Here a grade crossing was abolished by order of the city council and the grade of the street lowered to such an extent that it practically prevented all ingress and egress by vehicles to the properties in question from this changed street. These properties did not abut on the lowered street but on one that entered the lowered street at a right angle to the latter. The plaintiff sought damages and the defendant

²⁵144 Pa. 638 (1892).

²⁶150 Pa. 589 (1892).

²⁷160 Pa. 614 (1894).

claimed that the constitutional provision was inapplicable because the properties did not abut on the streets the grade of which had been changed. The court said, "This (defendant's contention) would indeed be a very narrow and unreasonable construction of the words of the constitution, especially in view of the history and object of the constitutional provision. It was intended to provide against the great injustice that was continually resulting from the ruling of the court in *O'Connor v. Pittsburgh*, 18 Pa. 187, that 'the constitutional provision for the case of private property taken for public use extends not to the case of property injured or destroyed'. In doing this the people of the Commonwealth recognized, in a practical way, the justice of compensating private property owners, not only for property taken, but also for property injured or destroyed by municipal and other corporations and individuals, of the specified class, by the construction and enlargement of their works, highways or improvements". The court held that there was nothing to limit the right to property fronting or abutting on the particular work, highway or improvement. The injury must be proximate and immediate and substantial. Damages were allowed. No statute was mentioned in the case but the right of recovery was based entirely on the constitution.

In *Stork v. Phila.*²⁸ it was held that the injury meant to be provided for under this provision was such a one as was unavoidable in the accomplishment of the object of the work. "For such injury there was no redress under the former constitution and it was to remedy this defect that the present constitution added property 'injured or destroyed' to property 'taken' compensation for which had always been secured".

*Lafean v. York County*²⁹ involved the erection of a county bridge which interfered with the access and light and air of an abutting owner from whom no property was taken. The court said, "Prior to the adoption of the Con-

²⁸195 Pa. 101 (1900).

²⁹20 Pa. Super. Ct. 573 (1902).

stitution of 1874, a person injured in the manner complained of by the plaintiff was without remedy. But section 8, Article XVI of that instrument gave the right to recover damages for such an injury, and until the legislature provided a remedy for the enforcement of the right, a person thus injured was entitled to maintain a common law action, which prior to the Procedure Act of 1887, would have been an action on the case and since that act was an action of trespass. This was decided in *Chester County v. Brower*, 117 Pa. 647, a case which, so far as the nature of the injury is concerned, is parallel with the present case in every essential particular". Recovery was permitted.

*Cooper v. Scranton*³⁰ said, "The constitution gave the plaintiff a right to compensation; the remedy has been regulated by statutes".

Numerous other cases which either concede that there is a constitutional right to damages for consequential injuries or in which such is a necessary implication, are cited in the footnote.³¹

³⁰21 Pa. Super. Ct. 17 (1902).

³¹Boro. of N. Brighton v. Piersol, 107 Pa. 280 (1884); P. J. R. Co. v. McCutcheon, 18 W. N. C. 527 (1886); Pa. R. Co. v. Duncan, 111 Pa. 352 (1886); P. & R. Co. v. Patent, 17 W. N. C. 198 (1886); Pa. R. Co. v. Lippincott, 116 Pa. 472 (1887); N. C. Ry. Co. v. Holland, 117 Pa. 613 (1888); Pa. R. Co. v. Marchant, 119 Pa. 541 (1888); Pa. R. Co. v. Miller, 132 U. S. 75 (1889); Pa. R. Co. v. Walsh, 124 Pa. 544 (1889); Pa. R. Co. v. Ziemer, 124 Pa. 560 (1889); Chambers v. S. Chester Boro., 140 Pa. 510 (1891); Bear v. Allentown, 148 Pa. 80 (1892); Fredericks v. Canal Co., 148 Pa. 317 (1892); Groff v. Phila., 150 Pa. 594 (1892); Hobson v. Phila., 150 Pa. 595 (1892); Tucker Street, 166 Pa. 336 (1895); Ladd v. Phila., 171 Pa. 485 (1895); Walnut St. Bridge, 191 Pa. 153 (1899); Chatham Street, 191 Pa. 604 (1899); Fyfe v. Turtle Creek Boro., 22 Pa. Super. Ct. 292 (1903); Sedgley Ave., 217 Pa. 313 (1907); Robbins v. Scranton, 217 Pa. 577 (1907); Ogontz Ave., 225 Pa. 126 (1909)—pointing out difference in holdings in railroad cases; Spring Brook W. S. Co. v. Pa. C. Co., 54 Pa. Super. Ct. 380 (1913); Nichols v. Wellsboro, 57 Pa. Super. Ct. 306 (1914); Iron City Auto Co. v. Pittsburgh, 253 Pa. 478 (1916); Jackman v. Rosenbaum Co., 263 Pa. 158 (1919); Shobert v. Bloomsburg, 74 Pa. Super. Ct. 246 (1920); Spang & Co. v. Comm., 281 Pa. 414 (1924); Phila. v. Comm., 284 Pa. 225 (1925); and Oakdale Boro. v. Allegheny County, 91 Pa. Super. Ct. 100 (1927).

There are cases deciding that no constitutional right exists to such compensation as against some municipal corporations either because they are not "invested with the privilege of taking private property for public use" or that in the particular case, though so invested, the State was responsible for the taking or injury and not the municipal corporation. The constitutional provision necessarily implies that the right to compensation exists only where the municipal corporation does the taking or injuring and where the acts are done by the State with the municipality being a mere paymaster of all or part of the cost, no such right exists. There being no constitutional liability in the State there can be none in the paymaster unless such liability is imposed on the latter by legislative enactment. But the implied argument in a later case that since no municipal corporation can exist or act in anything without prior legislative action, every taking or injuring is therefore by the State carries this logical deduction to an illogical absurdity, completely ignoring the intent and wording of the constitutional provision in question.

In *Twp. of East Union v. Comrey*³² a road was opened under a special act of Assembly with the costs imposed on the townships affected thereby. The court rightfully held that the taking was by the State and that compensation was a matter of grace and not of constitutional right.

It was decided in *Lamoreux v. Luzerne County*³³ "It is true a county is recognized as a municipal corporation under the Constitution of 1874 and subsequent legislation, and in some cases it may take private property for public use. This road, however, was not taken by the county. The proceedings for taking the land for this road, were not instituted by the county nor under its authority. The county has no ownership in the road, nor control over it. It is a public road or highway of the Commonwealth, which the township in which it is located is bound to keep in repair. The township and not the county is liable for damages caused by

³²100 Pa. 362 (1882).

³³116 Pa. 195 (1887).

a neglect to keep it in proper repair. It follows in this case, the facts do not come within any act authorizing the plaintiff to appeal". The case is a direct admission that where a road is opened by the Court of Quarter Sessions in townships, the fact that the county pays for the land taken does not bring it within the constitutional provision.

*Wagner v. Salzburg Twp.*³⁴ involved a change of grade made by township supervisors in laying out a public road. The court held that the constitutional provision was inapplicable. The court said, "But we do not think a township is such a corporation invested with the power of taking private property for public use as is within the purview of this constitutional provision. The township does not take land for a highway. It does not lay out the road. The law imposes on it the duty of opening the road, and keeping it in repair, for the benefit of the travelling public; but the duties of the township do not begin until the road has been laid out by proceedings in the Court of Quarter Sessions. The right to sue cannot be rested, therefore, on the Constitution". The court is giving two reasons for the absence of a constitutional right: (1) the township is not a corporation invested with the privilege of taking land for public use; (2) even though it were such, here the act of taking and injuring is that of the State and not of the township. In such a case the right to compensation is purely statutory and there being no statute giving the right, no recovery could be had. The decision is correct, but is not authority for the statement that the right to consequential damages against all municipal corporations is purely statutory.

In *Shoe v. Nether Providence Twp.*,³⁵ a case involving damages resulting from a change of grade made by the township supervisors, it was decided that the township was not within the meaning of the constitutional provision and that townships are liable only to the same extent that they were before the constitution, unless some statute extends their liability. The case is a mere iteration of the *Wagner* case and adds nothing to it.

³⁴132 Pa. 636 (1890).

³⁵3 Pa. Super. Ct. 137 (1896).

*Howell v. Morrisville*³⁶ after discussing the previous cases, held, "It must therefore be accepted as settled law, that the vacation of a highway or street is not an injury to the abutting landowners within the provisions of the Constitution requiring compensation, and in the absence of special legislative provision for damages none can be recovered". The case holds that there is no injury in the constitutional sense, which is of questionable soundness, but in no manner decides that where there is such an injury, the right to compensation is of statutory origin merely.³⁷

*Snively v. Washington Twp.*³⁸ has been quoted for the rule that consequential damages are purely of statutory grant and not of constitutional right. The case, however, deals solely with acts of township supervisors and decides that townships are not liable, under the constitution, for consequential damages in road cases. The case does not mention the present Constitution and is certainly no authority for a general rule that the present Constitution gives no right to compensation for consequential injuries against proper municipal corporations.

The first of the recent cases involving consequential injuries by change of grade was *Jamison v. Cumberland County*.³⁹ The change of grade was made by the State Highway Department in a township road and the county was required to pay the damages assessed but the statute gave no right to compensation for injuries where no land was actually taken in making the improvement. The grade was raised to such an extent as to do substantial injury to the abutting owner who brought an action of trespass to recover therefor against the county. Recovery was denied, the court deciding that the constitutional provision was inapplicable under the existing facts. It was said, "Any taking of, or injury to, property authorized by the Acts of 1905 and 1907, involves an exercise of the right of eminent

³⁶212 Pa. 349 (1905).

³⁷See also *Saeger v. Comm.*, 258 Pa. 239 (1917) for the same result where the vacation is by the Commonwealth.

³⁸218 Pa. 249 (1907).

³⁹48 Pa. Super. Ct. 32 (1911); s. c. 234 Pa. 621 (1912).

domain by the state in its sovereign capacity, acting through one of its executive departments. The statute conferred upon counties no privilege to take private property in connection with the improvement of a township road, nor did it give a county any control over or right in such road before, during or after the completion of the improvement. * * * * The statute, as amended, does allow compensation for property actually taken in improving a road under its provisions, by the state highway department, but that, as is shown by the authorities above cited, was a matter of grace and not of constitutional right. The fact that the statute made the county the paymaster, in the first instance, for property thus taken, did not make the county a corporation 'invested with the privilege of taking property for public use' within the meaning and spirit of the constitutional provision, nor did it vest parties whose property was not actually taken with the constitutional right to demand consequential damages for injuries alleged to have resulted from change of grade. * * * * The County of Cumberland was not invested with the right to take private property for public use in making the improvement in question; the road was not and did not become a work, highway or improvement of the county or over which the county had control, and the constitutional provision in question has no application". The case, by dictum, says that the constitutional provision does apply in the case of the erection of county bridges. The Supreme Court, on appeal to it, said in addition to other things, "The State directly, not the County or township exercises the power of eminent domain, and injuries suffered by property owners are attributable to the State and not to the County". The case therefore decides that where the acts causing the injury are undertaken by the State Highway Department, the county is not causing the injury and there is no constitutional right to compensation under the provision in re municipal corporations and none against the State. This case later is cited as setting the whole matter at rest that the right to compensation against municipal corporations is a matter of legislative grant. The case nowhere suggests that the pre-

vious cases in which the right to compensation was said to be a constitutional one were either incorrect or were decided solely on statutes. It does decide that the Constitution is inapplicable since there was no injury by a municipal corporation invested with the privilege of taking property for public use but was an injury by the State, and that in such a case the right to compensation is a matter of grace and grace alone.

In *Burdsall v. Lansdowne Boro.*⁴⁰ it was said, "Municipal corporations are liable to be called upon to make compensation for injury to property resulting from interference with or change of the natural flow of waters as a consequence of their public works" (here change of grade of a street).

*Allison v. Bigelow, S. H. Comm.*⁴¹ involved a change of grade of a state highway by the Highway Commission in which some land was actually taken. This brought the case within the Act of May 31, 1911, P. L. 468 giving compensation for consequential injuries where land was actually taken.

In *State Highway Route No. 72*⁴² the liability of the Commonwealth for damages occasioned by the change of grade of a state highway was considered. The court refused recovery stating that the rule was well settled that there was no constitutional right to compensation against the State either for land taken or injured in the construction or improvement of public roads. It was correctly decided that Article XVI, section 8 had no application to the Commonwealth engaged in the improvement of public highways. Article I, section 10 was held to be inapplicable to the State in taking or injuring lands in road construction, referring again to the six per cent allowance as the reason therefore. Hence the only right had to be found in the statutes and none had been given where the horizontal lines of the road had not been changed.

In *Herrington's Petition*⁴³ the situation involved a change

⁴⁰68 Pa. Super. Ct. 215 (1917).

⁴¹68 Pa. Super. Ct. 219 (1917).

⁴²265 Pa. 369 (1919); s. c. 71 Pa. Super. Ct. 85 (1919).

⁴³266 Pa. 88 (1920).

of grade in the roads of a township of the first class. The court held that while the preliminary procedure for a change of grade was before the township commissioners, the Court of Quarter Sessions had a revisory control upon exceptions under the Act of June 7, 1901, P. L. 510, section 1, which eliminated the township as an agency having the power to exercise eminent domain, and substituted therefor the judiciary. It was said, "Although townships of the first class may be said to have a qualified power of eminent domain, they do not have the exclusive power to take land for highways, and such right as they do possess is not coequal with the power as it is enjoyed by municipalities recognized by the constitutional provision. * * * * The term 'municipality' as used in the Constitution does not include all government agencies having authority to take or injure private property for use as a public highway but such only as are municipalities with local and subordinate powers of self-government through their own legislation, and to which the features of police power appertain as an incident of government. It does not include quasi-corporations such as a township. When the latter is given authority, or a qualified authority, to take land for a highway, the enabling act must provide for compensation, with a remedy to recover it". The case is an explicit admission that there is a constitutional right to compensation for consequential injuries in road cases against some municipal corporations but holds that a township of the first class is not such a municipal corporation.

*Donnelly v. P. S. C.*⁴⁴ decides that the vacation of a street does no injury in the constitutional sense and hence recovery for such must be based on a statute. It is a reaffirmation of *Howell v. Morrisville*⁴⁵ except that the statutes permitted recovery.⁴⁶

*Wagner v. Bucks County*⁴⁷ holds that there is no con-

⁴⁴268 Pa. 345 (1920).

⁴⁵212 Pa. 349 (1905).

⁴⁶*Hedrick v. Harrisburg*, 278 Pa. 274 (1923) also decides that statutes permitted recovery for the vacation of a street.

⁴⁷82 Pa. Super. Ct. 448 (1924).

stitutional right to compensation for injury due to change of grade in a state highway when caused by the state authorities.

*Emaus Boro. v. S. Trust Co.*⁴⁸ decides that the Constitution gives a right to damages where land is taken by a borough for opening or widening a street.

*Ligionier Boro. v. Deeds*⁴⁹ holds that there is no liability on the borough for property taken, injured or destroyed in the paving of a borough street, part of a state highway, where the improvement was made by the state authorities.

*Lenhart v. Wright*⁵⁰ deals with the acts of the State in reconstructing a state highway and holds that compensation in such a case is a matter of statutory grant merely.

*Falkner v. Winfield Twp.*⁵¹ dealt with changes in a road made by the State Highway Department, the road being in a township of the second class. It decided that there was no liability on the township for consequential injuries.

In *Fetherolf's Petition*⁵² a remedy against the borough is suggested where land was taken by the State Highway Department with the consent of the borough, for the change of a borough street, authority to do such being lacking in the Highway Department. There the usual situation would be reversed, the state authorities being merely the agents of the borough in making the change, there being no independent right in the Department to make the change.

In *Blainesburg—West Brownsville Road*⁵³ the borough and county had entered into an agreement for the rebuilding of a borough street. A change of grade was made injuring the plaintiff's property. It was held that there was no right to recover against the county as no statute imposed such liability and the county had no power of eminent domain to change the grade of a borough street. The borough was improperly brought into the proceedings and

⁴⁸6 D. & C. 395 (1924).

⁴⁹7 D. & C. 598 (1925).

⁵⁰286 Pa. 351 (1926).

⁵¹12 D. & C. 23 (1928).

⁵²84 Pa. Super. Ct. 514 (1925).

⁵³293 Pa. 173 (1928).

hence its liability was not adjudicated. The erroneous and unfounded statement appears in the case, "Damages for change of grade are consequential injuries and they cannot be recovered against a municipality unless the right to do so is given by statute". If the statement be limited to the facts involved, it is correct, i. e., no remedy can be had, unless given by statute, against a county in rebuilding a borough street by agreement with the borough, since the county in such a case is not a "municipal corporation invested with the privilege of taking private property for public use". As against the borough in such a case, no statute would be necessary for recovery as shown by the cases heretofore discussed.

One of the most important of recent cases is *Hoffer v. Reading Co.*⁵⁴ This case concerned the elimination of a grade crossing over a railroad by order of the Public Service Commission. Upon application of the State Highway Commission a grade crossing over the tracks of the Reading Co. was ordered abolished. This was done by constructing a passage under the railroad. In approaching the underground passage, the road officials reduced the grade of the highway, not, however, altering the existing center or side lines. There was a gradual lowering to eight feet along the property of the plaintiff making entrance into his property difficult except at the upper end. The plaintiff was allowed compensation and the P. S. C. ordered the railroad to pay all consequential damages occasioned by the change. The actual grading and building of the road was done by the State Highway Department.

The court said, in part, "It is clear that the change of grade of a public road does not furnish the basis for the recovery of damages against a municipal corporation by an abutting owner, whose property was 'injured' by the elevation or depression of its bed unless liability for the loss sustained is expressly fixed by some act of assembly". It has been shown by the cases discussed above that the principle here enunciated is too broad entirely and unless limited to

⁵⁴287 Pa. 120 (1926).

particular municipal corporations and particular cases against municipal corporations is incorrect and unjustified by the language of the Constitution, the history of litigation before the adoption of the Constitution and the cases decided under the Constitution. All the cases cited by the court have been discussed by us except *Spang & Co. v. Comm.*⁵⁵ The Supreme Court cites this case as holding that where damage results from change of grade, no recovery can be had against the Commonwealth unless imposed by statute. That case holds, however, that no injury was shown and hence cannot be authority for what the rule might have been had there been an injury.

Applying and limiting the general rule set out in the *Hoffer* case to the facts of that case, the rule is correct. The injury was caused in a proceeding instituted by and actually carried out by the State Highway Department. In such a case there is no constitutional right to compensation although the injury be one that if done by a borough or city would create a constitutional right to compensation.

The court also decided, and such was justified by the previous decisions, that the railroad was not liable under the Constitution for consequential injury resulting from the lifting or lowering of its tracks on the right-of-way which it had acquired, although the alteration of a roadway crossing was involved, where it did not take land or alter lines beyond this right-of-way.⁵⁶

The defendant railroad insisted that, there being no constitutional right to damages as against it, damages could only be assessed against it by virtue of statutory imposition. It argued that the P. S. C. Act of July 26, 1913, P. L. 1374, Article V, section 12 as amended by July 17, 1917, P. L. 1025⁵⁷ gave the P. S. C. no power to assess a public service

⁵⁵281 Pa. 414 (1924).

⁵⁶Limits of space forbid the discussion of the railroad cases under Article XVI, section 8. But see *Ogontz Avenue*, 225 Pa. 126 (1909) where the distinction between the railroad cases and the municipal corporation cases is suggested to be without substantial basis.

⁵⁷It reads, "The Commission shall also have power . . . to order any crossing . . . at grade . . . to be . . . abolished, according to

corporation for consequential injuries, arising from a change of grade beyond the lines of its own property, occasioned by the alteration of a highway, so that it might pass through a subway. The Supreme Court sustained this argument holding that the Act imposed no such liability. The court held that the Act was authority to assess damages allowed by the Constitution or legislative enactments and did not create new liability. It was said that the Act contemplated existing rights to compensation under some statute and merely determined how this should be apportioned, no new liability being imposed for change of grade. Recovery was denied.

The case seems to be correctly decided as far as the constitutional question is concerned. The proceeding having been initiated and the change made by the State Highway Department, there was no constitutional right to compensation for consequential injuries suffered. Again the fact that other corporations are made the paymasters should not change the essential nature of the rights under the Constitution.

The latest important case on the grade elimination question is *Westmoreland C. & C. Co. v. P. S. C.*⁵⁸ An avenue in the city of New Castle crossed the river over a county bridge. The street crossed the tracks of several railroads at grade on either side of the river. The bridge was destroyed by a flood and the County petitioned the P. S. C. for an order abolishing the grade crossings. The Commission made the State, County, City and railroad and railway companies parties to the proceeding. The Commis-

plans . . . and reasonable terms and conditions to be prescribed, by the Commission The compensation for damages which the owners of adjacent property, taken, injured or destroyed, may sustain . . . shall be . . . paid . . . by the public service companies or municipal corporations concerned The Commission shall have the right to recover for . . . the Commonwealth . . . as debts . . . from the public service . . . companies, or municipal corporations, in such amounts or proportions against each as may be determined by the Commission, . . . the amount of the damages or compensation awarded to the owners of adjacent property by the Commission".

⁵⁸294 Pa. 451 (1928); 144 Atl. 407.

sion ordered the crossings abolished and substituted therefor a bridge above grade. The bridge in spanning the river and railroads was of such an elevation that when the city street was reached, it was necessary to build approaches or abutments to meet it. A solid concrete wall occupied most of the street and extended along the lands of the plaintiff company. At one end of its property the wall was 6½ feet high and at the other 17 feet high. An award of damages was made to the plaintiff, no part of whose property was taken and whose claim was for consequential damages only. The railroad company appealed the award alleging non-liability for such consequential damages and relied on the *Hoffer* case.

As far as the consequential injuries suffered are concerned, the case is indistinguishable from the *Hoffer* case. There the injury was beyond the right-of-way of the railroad. It was in the present case. There the injury was injury to access by lowering the grade. In the instant case the injury was to access by raising the grade. Here, however, the work in no way involved the State Highway Department but only the municipal and public service corporations.⁵⁹

In its discussion the court speaks of *Chester County v. Brower*, 117 Pa. 647, and *Delaware County's Appeal*, 119 Pa. 159. It says of these cases, "We there stated that a county was a municipality within Article XVI, liable for consequential injuries to property injured by change of grade, though the State had not provided a remedy. These cases were in opposition to repeated expressions of the court as to the effect of similar constitutional provisions. Since then, these decisions have been modified, if not set aside. We have returned to our former policy of placing the right to damages within the grant of the sovereign, and the rule is now well settled that damages for consequential injuries can not be recovered by a property owner under the present Constitution, unless the legislature gave that right and im-

⁵⁹s. c. 293 Pa. 326 (1928) at p. 329—another appeal, decision being handed down the same day.

posed such liability on the municipality; * * * * but unless the legislature, by statute so provides, the owner is without remedy. The question was put at rest in *Jamison v. Cumberland County*, 48 Pa. Superior Ct. 33, affirmed in 234 Pa. 621, where our former decisions were before the court. In discussing the earlier cases, it was there stated that, when counties erect bridges pursuant to statutory authority, and, under such laws property is taken, the constitutional provision requires them to make compensation for property taken, injured or destroyed. The effect of that decision was to reduce *Chester County v. Brower*, *supra*, and *Delaware County's Appeal*, *supra*, to the recovery of damages under a statute".

Most of the above quotation seems unjustifiable. There never had been, prior to 1874, any "similar constitutional provisions" in Pennsylvania and the Court points to none. Hence these two cases could not be "in opposition to repeated expressions of the court as to the effect of similar constitutional provisions". Article XVI, section 8 cannot be said to be similar in language or meaning to the amendment of 1838, which is the only provision it remotely resembles. As has been shown by the discussed cases, there is but dicta of recent origin, to the effect that the right to compensation for consequential injuries against municipal corporations is statutory only. It cannot be seen how the two cases have been modified or set aside. The *Jamison* case certainly did not have that effect. It decided merely that where the acts were those of the State Highway Department, the constitutional provision was inapplicable. The *Chester County* case was approved in the *Jamison* case but distinguished in that the former involved a corporation invested with the privilege of eminent domain which it had exercised. After the *Jamison* case, as before, in proper cases, there is a constitutional right to consequential damages against municipal corporations. It will be noted that all the statements in the *Westmoreland* case as to the right to damages in the absence of statutory grant are dicta merely. The court found statutes imposing liability and

hence was not called upon nor was it necessary to decide the rights of the litigants in the absence of statutes.

The court decided that liability had been imposed by statutes on the city and the county. Unless the fact that the P. S. C. ordered the bridge to be built is sufficient to make the whole proceeding an exercise of the state's sovereign power in building roads and bridges, the right to compensation as against the city and the county would have been a constitutional one under Article XVI, section 8. Nothing not dicta in the previous cases would seem to take them out of the constitutional provision. The case was treated by the court as a county bridge case. In deciding the constitutional question, it should be treated as an eminent domain proceeding by the party which instituted the proceeding and which would have the authority to build the road or bridge if grade crossing eliminations were not involved.

Part of the damages for the consequential damages suffered were assessed against the railroad company. The holding of the *Hoffer* case was repeated that it required a statute to impose such liability on the railroad and that the P. S. C. Act did not impose such liability. In some mysterious way in the instant case the opposite result to that reached in the *Hoffer* case was reached without pointing out a statute imposing the liability. It can be only the P. S. C. Act as no other possible one is mentioned. Although citing the *Hoffer* case with apparent approval, it must be reversed impliedly by the imposition of liability. As said before, the cases seem indistinguishable as far as injury and liability of the railroad are concerned. Since the opposite result is reached, however, the conclusion seems irresistible that the *Hoffer* case is not now the law.

Before concluding we wish to call attention to the recent case of *Penn Builders, Inc. v. Blair County*.⁶⁰ In this case there was brought before the Supreme Court for the first time, the recent practice of the State Highway Department of plotting roads of greater width than is oc-

⁶⁰302 Pa. 300 (1931), opinion by the late Justice Sadler.

cupied presently. The purpose is to prevent use of this additional strip for building purposes and thus reduce the amount of damages that will be due when the width is actually occupied. In the instant case the official plotting was of one hundred feet but thirty-three feet only was occupied. The plaintiff claimed compensation for one hundred feet. The constitutional question was peremptorily dismissed by saying, "Without statutory provision, no claim could have been made by the landowner for the loss sustained * * *". The taking being by the State, this conclusion is consistent with the previous cases heretofore discussed by us. Article XVI, section 8 clearly is inapplicable.

The court reiterated the well established rule in Pennsylvania that for a mere plotting of a road to be built in the future, no compensation need be paid until actual occupancy. It was held, however, that this rule was inapplicable since entry on part of the plotted width was sufficient to make payment necessary for the whole width. But since the award of damages had not been confirmed, the court kindly suggested that it was not too late to alter the certified plan. It was suggested that the plan be changed of record to include but 33 feet, the amount actually occupied. Thereafter, without present liability, plots might be certified to cover the additional strips on each side. Thus 100 feet would be plotted while present payment would be confined to 33 feet. The effect of such plotting would be to prevent future compensation for buildings erected within the plotted width. Since the actual present taking of all would not constitutionally require payment by the State, this less arbitrary method must also be constitutional.

We conclude that the decided cases in Pennsylvania applying Article XVI, section 8 in road opening, widening or grade changing cases, ignoring any unsupported dicta, establish: (1) That there is no constitutional right to damages for consequential injuries where the State is responsible for the injuries inflicted; (2) That there is such a constitutional right where the injury is caused by a municipal corporation with local and subordinate powers of self-

government through their own legislation, and to which the features of police power appertain as an incident of government, acting under its own legislative power.⁶¹ We appreciate the fact that this discussion is incomplete, leaving many questions untouched. Lack of space prevents such further discussion at this time.

Carlisle, Penn'a.

HAROLD S. IRWIN

⁶¹Adopting the qualification in the well considered case of *Herrington's Petition*, 266 Pa. 88 (1920)—which the recent dicta fail to notice, even though a very recent case.