terms of the inherent moment of the particular offense.[41] Modern development in the classification of statutory offenses should take place by the adjustment of penalties according to what may be a changing criterion of expedience and rather than by ignoring past experience, and substituting in its stead individual opinions of morality. The moral sense of the community will be more adequately reflected in the general adaptation of a classification than in sporadic and isolated personal judgments on particular crimes.

THE ELEVATED RAILWAY CONDEMNATION CASE—ANOTHER ANAYSIS OF THE PROPERTY INTERESTS INVOLVED

IN two previous Comments in this volume,[1] there have been discussions of a recent New York case involving rights to compensation on the dismantling of a part of the elevated railway system in New York City. When this system was built, the courts held that the railway company must make compensation to abutting owners for interference with light, air, and access. Now, upon dismantling the elevated structure, that interference ceases; and the railway company claims a right to compensation for the retaking of the easements of light, air, and access, retransferred, so it contends, to the abutting owners. The trial court sustained the claim and made an allowance of $750,000.[2] The Appellate Division also sustained the claim, but allowed only $200,000.[3]

The writers of both the previous Comments criticize these decisions, being in disagreement, however, as to the character of the property interests and the amount to be allowed as compensation. Both make valuable contributions to an understanding of the problem. With many of the matters there discussed, the present Comment does not deal; but an additional and somewhat different analysis of the property interests that are involved will be attempted. If this analysis is sound, the railway company has no right to compensation for anything that is retransferred to the abutting owners.

Unquestionably the railway company has property that is now being taken for the public benefit. The question is to determine

[41] See PALEY, SUMMARY CONVICTIONS (9th Ed. 1926) 5; Frankfurter and Corcoran, *op. cit. supra* note 15, at 926.

[1] 40 YALE L. J. 779, 1074.

[2] In re Forty-Second St. Spur of Manhat. Ry. Co., 126 Misc. 879, 216 N. Y. Supp. 2 (Sup. Ct. 1926).

[3] In re Elevated Railroad Structures, 229 App. Div. 617, 243 N. Y. Supp. 665 (1st Dep't 1930).

just what is this property for which compensation is to be made. The theory of the railway company and of the court seems to be that, when the railway was first built, the railway company acquired certain easements of light, air, and access from the abutting owners, paying the assessed value thereof; that these easements are now being taken from the railway company and retransferred to the abutting owners; and that the railway company is entitled to compensation at their present reasonable valuation.

What are these easements of light, air, and access that were originally "taken" from the abutting owners? No concept in our law, as used in specific cases is in greater need of exact and detailed analysis than the concept of "property." Without such analysis, the policies that are involved and the requirements of the public welfare cannot be determined. Analysis does not determine what sound policy requires, but it is a necessary prerequisite to its determination. This is shown by the struggles and differences of the courts and commentators in the present case. Easements are only one sort of property; and they must yield to analysis.

Prior to the building of the elevated railway, the owners of the abutting lots had easements of light, air, and access. This means only that those owners had rights against all other persons (rights *in rem*) that they should not interfere unreasonably with the passage of light and air to the lots in question or with the opportunity of convenient access and approach. An "easement" is not a physical *res;* like all other property, it consists of human relations recognized by the courts. In the present instance, the easements of the abutting owners were manifold rights against innumerable people, putting upon those people the correlative duties of forbearance and correspondingly limiting their legal privileges—their freedom of action.

It seems to be the established law that these easements of light, air, and access—these manifold rights against others—are appurtenant to particular parcels of land. They are for the protection of the use and enjoyment of that land and of no other land whatever; they cannot be sold or transferred apart from that land; they cannot be held "in gross." Therefore, it appears that by the original condemnation proceedings, the railway company did not acquire and could not acquire these easements. This is because they did not acquire the particular lots for the sole benefit of which the easements existed.[4]

[4] The trial court recognized that these latter easements "cannot be owned separate and distinct from the ownership of the land to which they are appurtenant"; but it failed to recognize that herein lay the key to the problem of the railway company's right to compensation. Instead, it confused the problem by continuing to talk in terms of easements that did not exist.

By the condemnation process, however, the railway company did acquire, as against each abutting owner, the privilege of interfering with his light, air, and access, so far as the maintenance of the railway required; and as against the railway company, the abutting owner lost his right against such interference. Not only was this not a transfer of the easements to the railway company, it was not even their entire destruction. The lot owners still had their easements of light, air, and access, as against everybody except the railway company; and it was the continued existence of those easements that gave to the lots the greatest part of their continuing market value. Who would pay much for a lot if there is danger that all of the light and air will be shut off and all access, even that of the borrowing mole, will be denied? The easements of the lot owners remained their property exactly as before the condemnation, except that one important constituent element—namely, the right that the railway company should not interfere unnecessarily with light, air, and access—was extinguished.

There never was any "transfer" of property from the abutting owners to the elevated railway company when the railway was built; nor is there now any such "transfer" of property from the elevated railway company to the abutting owners when the railway is being dismantled. When the railway was built, the railway company acquired much new property and the abutters lost some of their property; but the property acquired was not that which was lost. The State was creating and the State was taking away. In the railway company it created a "franchise," including privileges of using the streets and of carrying for hire, and rights *in rem* against all persons that they should not interfere with the exercise of these privileges. From the abutting owners, it took away their previously existing rights against certain types of interference by the railway company with light, air, and access. The abutters never had the property (called the "franchise") or any part thereof, created by the State in the railway company; the railway company never acquired the property (called the "easements of light, air, and access"), one part of which was taken by the State from the abutters.

In the case of a "transfer" of property, the transferee is substituted for the transferor. The latter's rights, privileges, powers, and immunities *in rem* pass to the transferee. So also do some of the transferor's duties and liabilities—for example, the duty of keeping the premises in safe condition and the liability to taxation; the analysis of ownership (or property) shows that it is not in all respects advantageous to the owner. In the case of such a simple piece of property as a *chose in action*—for example, a contract right—its transfer by assignment extinguishes the right of the assignor against the debtor and

creates a similar right in the assignee against the debtor. In the case of the more complex property in a chattel or in land, its transfer extinguishes the transferor's privileges of user, his rights against interference by others, his powers of conveyance, his duties of keeping in safe condition, his liability to taxation, and the other constituent relations of which property is composed; and it creates exactly similar ones in the transferee.

When the railway was built, there was no such transfer as this; there was a taking by eminent domain from the abutting owners, destroying their previous right against interfence—by the railway company. There was a creation of valuable property in the railway company, justifying an assessment for the benefits conferred by the community. But the value of the property of the abutters taken and extinguished by the community was not the same as the value of the property newly created in the railway company by the community. The requirement that the railway company should pay the abutting owners for the destroyed part of their easements was merely a part of the method of assessing the railway company for the benefits that it received from the State; it was not a payment of the price of property transferred by the abutting owners to the railway company.

Now the public is again "taking" property, in the sense of destroying it, except that this time it is destroying the property of the railway company instead of the abutters. Again, new property is being created in the abutters (it is the formerly destroyed portion of the easement),[5] although there is no "transfer" from the railway company. In so far as the abutters are now the special beneficiaries of the destruction of the railway company's property, it is just to assess the benefits against them (just as we do the benefits from paving an adjacent street), and to use such assessment in compensating the railway company for its loss. This is exactly what was done originally when the railway was built.

It never was just to assess the railway company more than it was benefited, or to pay to the abutters more than they were injured. In fact, the railway company received property that may have been worth much more than the amount of the injury to the abutters. If the railway company is required to pay the

[5] It is probably safe to assume, as the trial court did, that upon dismantling the railway the privilege of the company to occupy the street is totally destroyed, and the right of the abutting owners that the company shall not interfere with light, air, and access is recreated. If this is true, the abutting owners' easements of light, air, and access are restored to their original perfection by the recreation of the one constituent right that had been destroyed. If this is not true, there is much less benefit to the abutting owners and much less reason for assessing them for benefits conferred.

full value of what it got, the amount by which it exceeds the injury to the abutters should go to the community that created that property, not to the abutters who transferred none of it.

So now, it is not just to assess the abutters more than they are benefited by the new creation of property in them, or to pay to the railway company more than it is injured by the destruction of its property. If the abutters are required to pay the full value of what they get, the amount, so far as it exceeds the railway company's injury, should go to the community that again creates the property, not to the railway company that transfers none of it.

Originally, it was proper to require the railway company to pay for the injury suffered by the abutters, because the injury was a necessary result of giving the railway company the rights and privileges that it asked (that is, its newly created property); also for the reason that the community had to pay for the injury to the abutters and it might well be distributed on the large numbers of users of the railway company who were especially benefited by the sacrifice.

Now, it may be proper to require the abutters to pay for the injury suffered by the railway company, but not for the same reasons. The abutters may or may not be "asking" for the dismantling of the railway; in either case they do not obtain, as did the railway company, new and effective means of distributing the cost upon the community or the benefited members thereof. The community is destroying the property of the railway company and the community should pay the full amount of the injury. To raise the money necessary for this, it is customary and reasonable for the community to assess those who are special beneficiaries of the process. Among these are unquestionably the abutters. They may properly be assessed by the community to the extent that their benefits are in excess of the benefits acquired by other members of the community. Part or all of this assessment may be appropriated in payment of what the community owes to the railway company; but the amount of that debt is determined solely by the value of the railway company's property that is destroyed and has no relation whatever to the value of the special benefit conferred upon the abutting owners. How much the State should charge against the abutting owners for their special benefit and what part thereof should go to the railway company is for the State to determine, not for the railway company to demand. As against the abutting owners themselves, the railway company has no claim whatever.[6]

[6] This Comment deals only with easements extinguished and with rights and privileges gained by the process of condemnation for public purposes. No doubt, the railway company could have obtained a greater property interest by private purchase and conveyance. Thus, it might buy an

The depreciation in value of the railway company's franchise, or of the privilege of interference with light, air, and access that formed a constituent part of its total property, is a matter for consideration in the condemnation proceeding. So also is the appreciation in value of the abutting owner's right against interference that is being restored to him, in the process of assessing his benefits. It is obvious that the value of the privilege may have depreciated while the value of the right has appreciated. The value of the privilege depends on the operation of the trains; the value of the right depends on the uses of the land. If the company's franchise, including the privilege of interference, had appreciated in value, while the land values of the abutting owners, including their easements, had depreciated, the city might have had to pay a large amount to the railway company, while collecting only a small assessment from the abutting owners. If in such case the city must bear the loss, in the converse case the city should reap the profit.

In cases of a taking by eminent domain, Mr. Justice Holmes says that the question is, "What has the owner lost, not, What has the taker gained?"[7] This is clearly demonstrated to be correct when it appears that what the owner loses is different both in kind and in value from that which the taker gains. When the State or one of its agencies destroys property for a public purpose, there may be circumstances under which no compensation at all will be made under our existing law; but in the cases where compensation is due, it is measured by the value of the property destroyed, not by the amount by which somebody else may profit from the destruction.

On the other hand, in cases where the State is assessing a property owner for special benefits conferred upon him, the statement of Mr. Justice Holmes does not apply. The question now is, What has the recipient gained, not, What has somebody else lost?

In many eminent domain proceedings, no doubt the two problems exist together and both questions ought to be answered. Very likely, confusion exists for failure to differentiate them, the

abutting lot outright, with its appurtenant easements of light, air, and access. On any subsequent condemnation of this abutting lot by the city, the value of the easements, as well as of the lot without them, would have to be paid. With some of the abutting owners, the railway company had dealt privately and had obtained from them voluntary deeds of conveyance. It is believed, however, that these deeds of conveyance by the abutting owners, not involving the physical land itself, should generally be construed as conveying and creating only that interest that was required for railway purposes. This would be identical with the interest that would be created by the condemnation proceedings.

[7] See Boston Chamber of Commerce v. Boston, 217 U. S. 189, 195, 30 Sup. Ct. 459, 460 (1910); *cf.* Comment (1931) 40 YALE L. J., at 783.

supposition being that the two questions are identical and that the loss of one party is the other's gain. In the case of dismantling the elevated railway, the two questions are not identical and the railway company's loss is not at all the same as the abutting owners' gain.

The result reached by this analysis is that although the railway company is entitled to compensation by the city for all of its property that is taken from it by the city, whether taken for destruction or for enjoyment by a transferee, this does not include any easements of light, air, and access to the lots of abutting owners. No part of any such easements ever formed any part of the railway company's property. It includes the property in the elevated structure as a physical *res*, including easements of light, air, and access to this elevated structure. It includes the "franchise" (a term as greatly in need of analysis as is the term easement, for it, too, is not a physical *res*, but consists of legal relations between men); forming a part of this are the legal privileges (*in rem*) of erection, maintenance, and user. One of these privileges is the privilege as against each abutting owner—a privilege that was obtained by condemnation process, and costing (with respect to all the abutting owners) some $200,000. Without these privileges the "franchise" would have been incomplete and ineffective; and there is no good reason for separating them from the other privileges and rights of which the franchise is composed.

After the court has valued the elevated structure and the franchise, there is no other property left to be valued. To value anything further is to give double compensation for the same thing or to give compensation for something that the company never owned.[8]

If the city so desires, no doubt it is possible to make abutting owners parties to the condemnation proceeding and to assess them for the benefits that they will derive from the new public improvement. This is a problem of assessment for benefits, not a problem of compensation for property taken for a public purpose.

A. L. C.

[8] The analysis here made is not identical in form with that made by the City of New York in the existing litigation; but it reaches the same result, so far as concerns the right of the railway company to compensation for the taking of its property. As against the railway company, the city did not need to deal with its power to assess the abutting owners for benefits received from the recreation of their former right.