

# HOUSE . . . . No. 1372

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## The Commonwealth of Massachusetts.

DEPARTMENT OF THE ATTORNEY-GENERAL,  
BOSTON, March 8, 1922.

HON. BENJAMIN LORING YOUNG, *Speaker of the House of Representatives.*

DEAR SIR:—As chairman of the House Committee on Rules you have transmitted to me the petition of W. I. Hennessey relative to the taking of certain interests in land in the city of Boston by the Boston Elevated Railway Company, with the accompanying bill, and have asked my opinion whether this bill, if enacted into law, would be constitutional. The bill is as follows:

“An Act relative to the taking of certain interests in land in the city of Boston by the Boston Elevated Railway Company.

*Be it enacted, etc., as follows:*

SECTION 1. Section five of chapter three hundred and eighty-six of the Acts of nineteen hundred and twenty-one is hereby amended by striking out in the twenty-fifth line thereof, the word ‘without’ and substituting therefor the word:— with,— so that said sentence in the twenty-fourth and twenty-fifth lines will read:— Such petitions shall be heard by the court with a jury.”

St. 1921, c. 386, section 5 of which the bill proposes to amend, is entitled “An Act authorizing the Boston Elevated Railway Company to take certain interests in land in the city of Boston”.

By section 1 the Boston Elevated Railway Company is

authorized and empowered to take by eminent domain for railway purposes certain rights and interests therein specified in and to a certain parcel of land in the city of Boston on Hyde Park Avenue and Walk Hill Street, containing about 4,404 square feet, said rights and interests being an easement to locate, construct, maintain and operate an elevated railway, and the right to construct, maintain and operate surface car tracks, sewer and drain connections and retaining walls in, upon and across the premises described.

Sections 3 and 5 of said act are as follows:

“If said company and said city, or any person having any right or interest in said property which is injured by such taking, are unable to agree as to the damages sustained by the city or any such person on account of such taking, such damages may be determined by a jury in the superior court for the county of Suffolk, on the petition therefor of said city or of said person filed in the clerk's office of said court within one year after such taking, and judgment shall be entered upon the determination of such jury, with interest from the date of taking, and costs shall be taxed and execution issued in favor of the prevailing party as in civil cases.

SECTION 5. The owners, lessees, mortgagees and other persons having an estate in lands abutting on Walk Hill street or Hyde Park avenue opposite a tract of land bounded by Washington street, Walk Hill street, Hyde Park Avenue, Toll Gate way and land of the Old Colony Railroad Company which the Boston Elevated Railway Company has heretofore acquired or may hereafter acquire, shall be entitled to reasonable compensation from the Boston Elevated Railway Company for any diminution in the fair market value of their said property suffered by them by reason of the use of said tract of land for an elevated railway, terminal, repair shop or other railway purposes, and the construction of an elevated railway connecting said terminal with the elevated railway system of the Boston Elevated Railway Company under plans heretofore approved by the department of public utilities which said company is hereby authorized to construct. Any such person may at any time within three years after the beginning of use of any part of said land for any of said purposes, file in the clerk's office of the superior court for the county of Suffolk, a petition setting forth his claim against the corporation. He shall give said corporation fourteen days' notice of the filing of such petition and an answer thereto shall be filed by the corporation within thirty days from the return day of such notice. Such petition shall be heard by the court without a jury. Judgment shall be entered upon the finding together with interest from the date of the filing of the petition and

execution shall issue as in other civil cases. The provisions of chapter seventy-nine of the General Laws relative to cases where damages are claimed to estates in which two or more persons have different, separate or several interests shall apply to all such proceedings. Such taking shall constitute a covenant and agreement by the company with said owners, lessees, mortgagees and other persons that they shall be entitled to recover such compensation in the manner hereinabove provided.

You do not state what action, if any, has been taken by the Boston Elevated Railway Company under this act; but I understand that the taking has been made and that construction of a terminal on the tract of land described in section 5 has been begun.

There can be no doubt that in this State where land or an easement in land is taken by eminent domain, any interference with light, air and prospect caused by such taking and resulting in damage to the property interfered with is a proper element of damage for which compensation may be awarded. *McKeon v. New England Railroad*, 199 Mass. 292, 295; *Opinion of the Justices*, 208 Mass. 603, 605; *Story v. New York El. R. Co.*, 90 N. Y. 112; *Lahr v. Metropolitan El. Ry. Co.*, 104 N. Y. 268.

I assume that where a taking by eminent domain is authorized by statute, with a provision fixing the method by which the damages of those entitled thereto shall be determined, the Legislature may subsequently, even after the taking has been made, change that method by an amendment. See *Danforth v. Groton Water Co.*, 178 Mass. 472; 20 C. J. 878.

But in St. 1921, c. 386, it is section 3 and not section 5 which provides for the determination of all damages caused by the taking. The right to light, air and prospect is a right in the property taken, interference with which will entitle the owner of abutting land to compensation under section 3. *McKeon v. New England Railroad*, *supra*; *Opinion of the Justices*, *supra*. Section 5 gives a further right to persons not entitled to compensation under section 3. The right given by section 5 is not to compensation for damages caused by the taking. It is a right given to all those having an estate in lands abutting on the tract of land described in

section 5, of which I am informed the premises taken is a small part, to recover reasonable compensation "for any diminution in the fair market value of their said property suffered by them by reason of the use of said tract of land for an elevated railway, terminal, repair shop or other railway purposes, and the construction of an elevated railway connecting said terminal with the elevated railway system of the Boston Elevated Railway Company". The obligation to pay this compensation *in the manner provided* became valid and binding on the company, when the taking was made, by virtue of the provision of the last clause in section 5 that "such taking shall constitute a covenant and agreement by the company with said owners, lessees, mortgagees and other persons that they shall be entitled to recover such compensation in the manner hereinabove provided". The proposed amendment changes the manner in which compensation is to be recovered. Hence the company cannot be bound by its agreement to pay compensation determined as provided by the amendment.

But there is a further question to be considered whether, aside from the operation of the last clause of section 5, the obligation created by section 5 was within the constitutional power of the General Court to create. The Legislature cannot create an obligation of one person to another without his consent. *Hampshire County v. Franklin County*, 16 Mass. 76; *Medford v. Learned*, 16 Mass. 216; *Camp v. Rogers*, 44 Conn. 291; *New York, etc., R. Co. v. Van Horn*, 57 N. Y. 473. But it can impose conditions on which a particular use of property will be authorized. *Commonwealth v. Parks*, 155 Mass. 531; *Kilgour v. Gratto*, 224 Mass. 78; *Transportation Co. v. Chicago*, 99 U. S. 635, 640. The obligation imposed by section 5 not only was a condition sanctioned by this principle, but was a condition of the taking, which the company could have declined. Clearly, therefore, the obligation was valid.

Where an obligation or liability exists, the Legislature can change the remedy by which it is to be enforced. *Commonwealth v. Cochituate Bank*, 3 Allen 72; *National Surety Co. v. Arch. Dec. Co.*, 226 U. S. 276; *Henley v. Myers*, 215 U. S.

373. The proposed amendment is a mere change of remedy. The General Court has not agreed that the amount of compensation is to be determined in the manner provided by section 5. It is within its power to change the method of determination. I am therefore of opinion that the bill, if enacted into law, would be constitutional.

Very truly yours,

J. WESTON ALLEN,  
*Attorney General.*

