

(2.) If the Telephone Department must in time adopt the metallic circuit, all tram companies who thereafter adopt electricity as a motive-power will get off scot free of the expense now sought to be imposed on this company because it is first in the field, in advance of the time when the Telegraph Department would have no ground for objections. Why should this company be saddled with an expense that other companies will not be asked to bear?

(3.) As the primary and paramount object of streets is travel and transportation, improvements facilitating that object ought to have first and paramount consideration. This is a view I strongly urge. As if in anticipation of this very question, the Appeal Court, in the *Cincinnati Inclined-plane Company v. City and Suburban Telegraph Association*, reported page 353, "*Crosby and Bell's Electric Railway*," used language which I venture to say applies absolutely.

"1. The dominant purpose for which streets in a municipality are dedicated and opened is to facilitate public travel and transportation, and in that view new and improved modes of conveyance by street-railways are by law authorised to be constructed, and a franchise granted to a telephone company of constructing and operating its lines along and upon such streets is subordinate to the rights of the public in the streets for the purpose of travel and transportation.

"2. The fact that a telephone company acquired and entered upon the exercise of a franchise to erect and maintain its telephone-poles and -wires upon the streets of a city prior to the operation of an electric-railway thereon, will not give the telephone company in the use of the streets a right paramount to the easement of the public to adopt and use the best and most approved mode of travelling thereon and if the operation of the street-railway by electricity as the motive-power tends to disturb the working of the telephone system, the remedy of the telephone company will be to readjust its methods to meet the conditions created by the introduction of electro-motive power upon the street-railway.

"3. Where a telephone company, under authority derived from the statute, places its poles and wires in the streets of a municipality, and in order to make a complete electric circuit for the transmission of telephonic messages uses the earth, or what is known as the 'ground-circuit,' for a return current of electricity, and where an electric street-railway afterwards constructed upon the same streets is operated with the 'single-trolley overhead system,' so-called, of which the ground-circuit is a constituent part, if the use of the ground-circuit in the operation of the street-railway interferes with telephone communication, the telephone company as against the street-railway will not have a vested interest and exclusive right in and to the use of the ground-circuit as a part of the telephone system. (Decided, Tuesday, 2nd June, 1891.)

"In *Taggart v. Street Railway Company*, 16 R.I., it was said by Durfee, C.J., that telephone-poles and -wires are not used to facilitate the use of the streets for travel and transportation whereas the poles and wires of the railway company are directly ancillary to the use of the streets as such, in that they communicate the power by which the street-cars are propelled.' As a general rule, an occupation of the streets, otherwise than for travel and transportation, is presumptively inferior and subservient to the dominant easement of the public for highway purposes, for, if not so, the primary object of their dedication or appropriation might be largely defeated. And the fact that permission is granted to occupy the streets or highways for a purpose other than travel does not confer a prior and paramount right to occupy them to the exclusion of their use for travel in a mode different from what obtained when such permission was given." [See Appendix E for full report of judgment.]

But it is said "The Electric Lines Act, 1884," gives the Telegraph Department a paramount right. I say in answer that that Act gives no right to the department to use the earth as a return circuit. It gives a right to maintain its posts and wires in streets, but not the right in question. Nor, I submit, had the local bodies power to surrender such a right, and thereby possibly for ever preclude themselves from using electricity as a street-motor. The trams were in operation in the streets years before the telephone. They were there with the Tram Act in existence enabling the company to obtain a variation of its Order in Council and substitute electricity at the time the telephones were constructed. With this latent power in the company with regard to its trams at the time the telephones were put up, who ought to stand in the way if the company now seeks to put forth that power?

The English law in the *Leeds Tramway* case, I submit, clearly shows this: that if the Order in Council were issued to the Tramway Company, and the Telephone Department then brought an action to restrain the Tramway Company from affecting the telephones, the Telephone Department would not succeed. That case clearly shows that, because the tramway company, which was one that used the single-wire system, did not choose to take precautions to safeguard the telephones which were there before it, it was not bound to do so so long as its own system was a good one and it was worked carefully and without negligence.

The American authorities that I have been able to find bear out the same view. The case on appeal of the *Cincinnati trams* decided in Ohio, and already cited, is particularly strong. And here I would point out that Dr. Lemon is wrong in assuming the judgment in error at page 353 of *Crosby and Bell's* book was overruled by the judgment of Taft, J., at page 358. The very opposite is the case. The judgment of Taft was that of the superior Court of the State. The judgment on Appeal I take to be the judgment of the Supreme Court of the United States.

I have searched for a report of the *Waterfleet Company* case, cited by Dr. Lemon, but cannot find it. It was decided in June, 1890, whereas the *Cincinnati* judgment was delivered in January, 1891.

I have, however, found another American case—one referred to in the *United States Digest* of 1890, at page 1951, as follows:—

"A telephone company cannot maintain a Bill to enjoin the operation of a subsequently constructed electric railway to prevent the disturbance of plaintiffs' business occasioned by the escape of electricity from defendants' rails, which is an incidental result of the operation of the